



Scottish Law Commission
promoting law reform

Discussion Paper on Damages for Wrongful Death

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The Commission would be grateful if comments on this Discussion Paper were submitted by 30 November 2007

Please ensure that, prior to submitting your comments, you read notes 1-3 on the facing page. Comments may be made on all or any of the matters raised in the paper. All non-electronic correspondence should be addressed to:

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¹ Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

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Part 1 Introduction

Terms of reference

1.1 In September 2006 we received the following reference from Scottish Ministers¹ -

"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 any appropriate recommendations for reform."

1.2 The reference is concerned with the law of damages in respect of death from personal injury under 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 The Discussion Paper, which is the first part of our work on the reference, invites views on a number of questions relating to reform of the 1976 Act as regards these claims.

Background to the reference

1.4 At the time we received the reference, the Scottish Executive introduced the Bill which became the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007.² Prior to the 2007 Act, the Damages (Scotland) Act 1976 provided that claims by the immediate family of a person who died as a result of personal injury were extinguished if the injured person settled his claim before he died.³ As a result of that provision, victims of mesothelioma⁴ had to decide whether to obtain compensation while they were still alive or leave the claim to be pursued after their death by their relatives who could stand to receive larger awards of damages. In these circumstances, many mesothelioma sufferers did not pursue their own claims in order that their relatives could obtain more generous compensation after their death.

1.5 The 2007 Act amended the Damages (Scotland) Act 1976 by disapplying section 1(2)⁵ where a person dies of mesothelioma. This means that the deceased's immediate family can claim damages for non-patrimonial loss even although the deceased had obtained an award of damages or settled his claim before he died. As a consequence, mesothelioma victims no longer have to make the stressful decision of whether or not to pursue their own claims while alive: now they can do so without affecting the separate right of their immediate family to claim damages for non-patrimonial loss after their death.

¹ Under section 3(1)(e) of the Law Commissions Act 1965.

² The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007, asp 18. The Act has retrospective effect in that it applies to any case where the victim recovers damages or obtains full settlement on or after 20 December 2006: see *Dow v West of Scotland Shipbuilding Co Ltd* [2007] CSOH 71.

³ Damages (Scotland) Act 1976, s 1(2).

⁴ Mesothelioma is a cancer of the cells which make up the lining around the outside of the lungs and inside of the ribs or around the abdominal cavity. It arises predominantly in people who have been exposed to asbestos and does not usually develop until 30-40 years after such exposure. There is no cure for the disease and sufferers survive on average 14 months following diagnosis.

⁵ The amendment to section 1(2) only applies in relation to the immediate relatives' claims under section 1(4) of the 1976 Act in respect of non-patrimonial loss.

1.6 Although the 2007 Act was intended to deal with a particular problem, it became apparent at the time the Bill was introduced that there were areas of the law of damages for wrongful death, in particular some of the provisions of the 1976 Act, which merited further examination. It was in this context that Scottish Ministers invited us to undertake our current review of this area of Scots law.

Advisory group

1.7 In the early stages of the project we established an advisory group of lawyers with expertise in this area, to assist us with the preparation of this Discussion Paper.⁶ Their comments on the issues which arise in practice have been invaluable to us and we thank them for taking the time to assist us with the project.

Structure of the Discussion Paper

1.8 The law of damages for personal injury has been considered by this Commission on previous occasions. The Damages (Scotland) Act 1976 implemented recommendations made by the Commission in 1973;⁷ the Damages (Scotland) Act 1993 implemented recommendations made in 1992.⁸ In Part 2 we outline the historical development of the 1976 Act in more detail with reference to this Commission's Reports and the changes brought about by subsequent legislation. In Part 3 we outline the issues relating to reform and invite comments on a number of questions which are summarised in Part 4. Appendix A contains the current provisions of the Damages (Scotland) Act 1976 while Appendix B sets out Part II of the Administration of Justice Act 1982. Appendix C provides examples of awards of damages for non-patrimonial loss. Appendix D outlines the provisions applying in other jurisdictions.

Legislative competence

1.9 The proposals outlined in this Discussion Paper relate to Scots private law and to matters which are within the legislative competence of the Scottish Parliament. None of the proposals would result in amendment to legislation which is reserved under Schedule 5 to the Scotland Act 1998.⁹

1.10 We consider that none of our proposals would give rise to any breach of the European Convention on Human Rights or of Community law.

⁶ The members of the group are: Professor Douglas Brodie, Laura Dunlop QC, Roderick Dunlop, Advocate, Graham Gilles, Solicitor, Maria Maguire, QC, Harvey McGregor, QC and Thomas Marshall, Solicitor.

⁷ Report on *The Law Relating to Damages for Injuries Causing Death* (Scot Law Com No 31, 1973).

⁸ Report on *The Effect of Death on Damages* (Scot Law Com No 134, 1992).

⁹ C 46.

Part 2 Background to the present law

Introduction

2.1 When A sustains personal injuries as a result of B's wrong, A is entitled to obtain reparation from B. Reparation takes the form of an award of damages to compensate A, so far as money can, for "the loss, injury and damage" he has sustained. It is now the practice to divide the claim into various heads of damages. While this is sensible and convenient, it is important to remember that these are not several discrete claims but a single claim which can be regarded as falling into several parts for the purpose of quantification.¹

2.2 The pain and suffering which A has sustained from his personal injuries constitute non-patrimonial loss. Compensation for such pain and suffering is known as *solatium*. In its assessment of *solatium*, the court takes into account not only the pain and suffering which A has already experienced but also the pain and suffering which he is likely to sustain in the future.² The reason for this distinction is that past loss can be established precisely while future loss includes a degree of speculation.³

2.3 A's patrimonial loss consists of the economic losses which derive from the personal injuries he has sustained. A distinction is drawn between losses incurred up until the date of the proof and losses which will be incurred in the future.

2.4 Damages for patrimonial loss up to the date of proof include compensation for the following: loss of earnings, the cost of reasonable medical expenses, the cost of necessary services rendered to the pursuer by a relative⁴ and the costs arising from the pursuer's inability to render gratuitous services to his family.⁵

2.5 Damages for future patrimonial loss include compensation for the following: loss of future earnings, cost of future maintenance, nursing and medical care, the cost of future necessary services rendered to the pursuer by a relative and the costs arising from the pursuer's inability to render future gratuitous services to his family.

2.6 It must always be remembered that the quantification of the losses sustained by a victim of personal injuries is an issue of fact. While particular conventions have developed to aid the assessment of the victim's losses, these are technically not rules of law although some at least appear to be treated as such. The most important of these is the convention used to calculate the pursuer's loss of future earnings. First the court determines the pursuer's net annual earnings at the date of the proof.⁶ The figure produced is known as the multiplicand. The second stage is to find a multiplier. The multiplier depends on the

¹ *Irving v Hiddleston* 1998 SC 759.

² Interest is awarded on the "past" *solatium*.

³ The distinction is also important in relation to interest on damages (See Report on *Interest on Debt and Damages* (Scot Law Com No 203, 2006), paras 4.3–4.6).

⁴ Administration of Justice Act 1982, s 8.

⁵ *Ibid*, s 9.

⁶ The courts do not attempt to speculate on future rates of taxation or NI contributions. Allowance can be made for the victim's probable promotion or early retirement.

pursuer's age and life expectancy and other matters such as the return he can expect on the investment of the damages. When the multiplicand is multiplied by the multiplier this should provide a lump sum which, when invested,⁷ should provide the pursuer with an equivalent income until his death. The Ogden Tables⁸ provide actuarial calculations of the lump sum which is required to provide the pursuer with such an income. An appropriate multiplier is therefore taken from the Tables though it may be reduced to take account of other contingencies, for example redundancy. A discount is also made because the damages constitute an acceleration of the income which the pursuer would have earned if he had not been injured. Where the injuries will eventually result in death, the court is enjoined to assume that A will live until the date he would have been expected to die if he had not sustained the injuries. This is known as the notional date of death. A therefore recovers damages for the loss of his earnings during the "lost years" ie the period between A's actual and notional date of death.⁹

2.7 But what if A dies from his personal injuries before he has settled his claim or obtained a decree for damages? Two possible rights to claim damages arise: the rights of A's executor and the rights of his relatives. In this Part of the Discussion Paper we outline the background to the current provisions of the Damages (Scotland) Act 1976¹⁰ as regards damages for wrongful death before turning in Part 3 to considering the issues for reform.

The common law

Assythment

2.8 The modern Scots law of delict is based on the general principle of an *ex lege* obligation to make reparation for loss sustained as a result of conduct of another which constitutes wrong. This was not always the case. In medieval times before the introduction of a centralised system for the prosecution of criminal offences, there was a close relationship between what would now be regarded as delictual actions and enforcement of the criminal law. There were several types of remedy which dealt with particular situations. One of these was the right of assythment which allowed the relatives of a person slain by the criminal act of another to obtain "assythment" from him. The action included not only payment to the relatives of what in more recent times would be described as damages for patrimonial loss and *solatium*, but also a sum for "pacifying of thair rancor."¹¹

2.9 Assythment died out with the introduction of a centralised prosecution system. Meanwhile the common law developed a principle by virtue of which the spouse, ascendants and descendants of a person who died as a result of another's *culpa* had the right to seek damages in delict. Unlike assythment, in the common law action there was no need to establish that the defender's wrongful conduct constituted a crime. Nevertheless in *McKendrick v Sinclair*¹² an attempt was made in the early 1970s to revive the action of assythment. In this case the sister and two brothers of the deceased were prevented from

⁷ On a reducible capital basis.

⁸ 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 Actuaries Department and are available online at http://www.gad.gov.uk/Publications/docs/Ogden_Tables_6th_edition.pdf.

⁹ Damages (Scotland) Act 1976, s 9. Section 9 is discussed in detail at paras 3.10-3.17 below.

¹⁰ See Appendix A.

¹¹ Balfour's *Practicks*, p 516.

¹² 1972 SC (HL) 25.

bringing an action in delict because at common law the brothers and sisters of a deceased person had no title to sue.¹³ They therefore claimed assythment where it was settled that the deceased's siblings could bring an action. However, the action failed because it could not be established that the defender's wrongful conduct was criminal and therefore the case did not fall within the recognised parameters of the remedy.¹⁴ Lord Simon of Glaisdale was prepared to dismiss the action on a more radical ground: that in spite of being a common law remedy assythment had fallen into desuetude and had become obsolescent. Assythment was finally abolished by the Damages (Scotland) Act 1976.¹⁵ This Act extended title to sue for patrimonial loss arising from the wrongful death of a relative to the deceased's brothers and sisters thus closing the gap revealed in *McKendrick*.

Rights of executor and relatives on the death of the injured person

2.10 Prior to the Damages (Scotland) Act 1976 where a person died from personal injuries, certain rights existed in favour of the deceased's executor and relatives. These rights were subject to the condition that immediately before death the injured person was entitled to bring an action in respect of the injuries.

2.11 The rights of action of the deceased's executor and relatives were quite distinct. The executor's rights to claim damages were simply those which the deceased had had at the time of his death which transmitted to his executor. By contrast, the rights of the relatives were independent claims in respect of the losses which they had suffered as a result of the wrong done to them when their relative died.¹⁶

The executor's rights at common law

2.12 Where the injured person had initiated an action of damages for patrimonial loss, the executor could continue it after his death: where no action had been initiated, the executor could commence an action for the patrimonial loss sustained by the deceased up to the date of his death.¹⁷ There was no right to claim damages for patrimonial loss in respect of the "lost years".

2.13 The position was different in relation to claims for *solatium*. Towards the end of the 19th century it was established that an executor could not initiate an action to recover *solatium* after the injured person had died.¹⁸ But where the victim had commenced a claim for *solatium* before his death, the executor could continue it after his death, whether with or without a claim in respect of damages for patrimonial loss.¹⁹

2.14 In *Dick v Burgh of Falkirk* Lord Kilbrandon summarised the position as follows –

¹³ *Eisten v North British Railway Co.* (1870) 8 M 980.

¹⁴ *McKendrick v Sinclair* 1972 SC (HL) 25 at 54 per Lord Reid and at 67 per Lord Kilbrandon.

¹⁵ 1976 Act, s 8, which implemented the recommendation of the Commission in its Report on *The Law Relating to Damages for Injuries Causing Death* (Scot Law Com No 31, 1973), p 40, recommendation 27.

¹⁶ In *Davidson v Sprengel* 1909 SC 566 the court stressed the different principles on which the rights of the executors and relatives depended.

¹⁷ *Darling v Gray & Sons* (1892) 19 R (HL) 31. Under the common law there was no right to claim damages in respect of future loss of earnings.

¹⁸ This followed from the decision in *Bern's Executor v Montrose Asylum* (1893) 20 R 859 which was affirmed by the House of Lords in *Stewart v London, Midland and Scottish Railway Co* 1943 SC (HL) 19.

¹⁹ *Neilson v Rodger* (1853) 16 D 325.

"the general rule, for which I need not cite authority, is that when a man dies, his right to bring an action in respect of solatium [compensation for suffering], as distinct from reparation [compensation for patrimonial loss], dies with him. That right of action so far resembles the Roman *actio injuriarum*, or action upon outrage to the personality, that, the personality ceasing to be, so also the right of action expires. The executor accordingly cannot institute an action for solatium...This is not so in reparation; the executor is entitled to institute an action in order that there may be restored to the estate administered by him the amount by which the negligence of the defender diminished it: *Smith v Stewart & Co Ltd* 1961 SC 91. In addition, if the deceased has in his life-time instituted an action concluding for solatium, his executor may carry it on after his death."²⁰

The relatives' rights at common law

2.15 The deceased's relatives had a right to claim damages for patrimonial loss. This was limited to loss of support and reasonable expenses and outlays incurred in connection with the deceased's death. The loss of support was quantified by reference to the amount of support which the relatives had been receiving from the deceased prior to his death and might have been expected to receive in the future.²¹

2.16 The deceased's relatives also had a right to claim damages by way of *solatium* in respect of the grief and suffering felt by them as a consequence of the death.²² Relatives could not claim *solatium* merely because of their relationship with the deceased; they had to establish that they had in fact suffered grief.²³

2.17 The relatives' claim was distinct from that of the deceased and could be pursued independently of the deceased's claim. The rights of relatives to claim damages did not derive directly from the deceased but were intended to compensate the relatives for the losses that *they, the relatives*, had sustained. But because they derived from the same wrong the relatives' rights were not wholly independent of those of the deceased; in particular the relatives had no right of action unless the deceased would have had a right of action against the defender if he had lived. As Lord Mackintosh explained in *McKay v Scottish Airways Ltd*²⁴ –

"...the relatives' right of action is not wholly and in every sense independent of the right of action in the deceased himself. Both rights depend upon the same wrong, and the fact that the deceased suffered an actionable wrong is the foundation and, in my opinion, the indispensable foundation of any right of action vesting in the relatives."

In the same case, Lord President Cooper commented –

"Upon the assumption that the conditions would have excluded a claim by the deceased, it remains to consider whether by necessary consequence they also exclude a claim by his relatives. The efforts of counsel were mainly directed to discovering a basis in principle for the established incidents of the right of certain relatives to recover solatium or patrimonial loss for the death of a person killed by the fault of a third party. This quest is a forlorn hope. Though dimly foreshadowed by

²⁰ *Dick v Burgh of Falkirk* 1976 SC (HL) 1 at 26.

²¹ *Drummond v British Railways Board* 1965 SLT (Notes) 82.

²² *Elliot v Glasgow Corporation* 1922 SC 146.

²³ *Rankin and Others v Waddell* 1949 SC 555.

²⁴ 1948 SC 254 at 258.

Stair, the right only clearly emerged in the beginning of the nineteenth century, and was then developed in a series of decisions which 'trench somewhat closely upon the province of the Legislature.'...

It is safer in my view to discard the theoretical approach and to accept the position that we have here to deal with rules of positive law which, as has more than once been observed, ought not to be further extended, and simply to deduce from the course of decisions (1) that the relatives can never recover unless the deceased, had he lived, could have done so; (2) that even if this condition is satisfied, defences not available against the deceased may still be available against the relatives; and (3) with particular reference to this case, that where the deceased has ab ante discharged or renounced his claim the relatives cannot recover."²⁵

2.18 Thus where the deceased had waived the right to sue the defender for damages if he sustained personal injuries, his relatives had no right to claim for patrimonial loss or *solatium* if he died from such injuries. The basis for this rule was not that the victim had waived his relatives' rights but rather that because their rights were dependent on the existence of the deceased's right of action, they did not arise on his death since, as a result of the waiver, he could not have sued the defender if he had lived. Similarly, where the deceased had settled his claim for damages before he died, his relatives could not seek damages after his death.²⁶ Until the law was altered by the Law Reform (Contributory Negligence) Act 1945 the deceased's contributory negligence barred his own action and, as a result that of his relatives.²⁷ After the 1945 Act came into force the relatives' damages could be reduced to reflect the deceased's contributory negligence.

2.19 Where the deceased had initiated a claim for patrimonial loss and *solatium* before his death and the executor continued the action, the relatives' lost their rights to sue. This rule was established by the House of Lords in *Darling v Gray & Sons*.²⁸ Its rationale was that unless the relatives' claims were excluded, there would be an overlap between the executor's claim and the claim of the relatives. In particular, if the relatives would inherit the damages obtained by the executor, there would be an element of double compensation if the relatives remained entitled to sue.

2.20 *Title to sue.* The class of relatives who were entitled to sue depended on two criteria: the relatives' relationship to the deceased and whether the deceased was under an obligation to aliment the relatives and did in fact support them. Both criteria had to be satisfied. Unless both criteria were satisfied, the relatives had no title to sue for patrimonial loss or *solatium*. The relatives who were entitled to claim damages for patrimonial loss and *solatium* were the deceased's husband or wife, child, father, mother and if an obligation of mutual support in case of need existed between them and the deceased at the date of death, the deceased's grandparents and grandchildren.

2.21 *Transmission of relatives' rights.* Where a relative of the deceased died after commencing an action for *solatium*, the claim transmitted to the relative's executor to

²⁵ 1948 SC 254 at 263-264.

²⁶ *McKay v Scottish Airways Ltd* 1948 SC 254.

²⁷ *McNaughton v Caledonian Railway Co* (1858) 21 D 160.

²⁸ *Darling v Gray & Sons* (1892) 19 R (HL) 31.

continue but if no action had been raised, the claim lapsed on the death of the deceased's relative.²⁹

Report on the Law Relating to Damages for Injuries Causing Death³⁰

2.22 During the 1960s the Scottish Law Commission was asked to examine specific questions relating to the law of damages for injuries causing death. In particular, the Commission was asked to consider the question of transmissibility of rights to claim damages on the death of an injured person and the rights of relatives to claim damages.

2.23 In undertaking the review the Commission sought to secure the following objectives –

- "(a) that compensation should be recoverable by the deceased's executors for patrimonial loss suffered by the deceased in respect of the period up to his date of death;
- (b) that compensation should be recoverable by the deceased's dependants for patrimonial loss which they suffer subsequent to his date of death and in consequence of it;
- (c) that compensation should be recoverable for non-patrimonial loss, in particular loss of the deceased's society, by those persons within the family circle who have in fact sustained such loss, but not by others;
- (d) that there should be no duplication of damages, in the sense that compensation for substantially the same loss should not be recoverable both by the deceased's executors and by his dependants;
- (e) that, as far as practicable, the defender should not be exposed to the risk of a multiplicity of actions, or to the risk of an action emerging after the lapse of a long period of time; as a general principle, an award should be fixed in the light of the circumstances known at the time when an action is disposed of, and it should not be possible to re-open a case merely because there has been a change in those circumstances which was not or could not have been foreseen at the time of the action;
- (f) that, as far as may be consistent with the above principles, the system of compensation should be a clear and simple one, conducive to the extrajudicial settlement of cases; and
- (g) that remedies for which there is no rational justification, or for which the rational justification has disappeared, should be removed from the law."³¹

2.24 Following criticism of the case of *Darling v Gray & Sons*,³² one of the primary aims was to separate clearly the claims of the deceased's executors and those of his dependent relatives (paras (a) to (d) above). In *Darling* a workman raised an action for damages in

²⁹ *Fraser v Livermore Brothers & Sheldon* (1900) 7 SLT 450.

³⁰ Scot Law Com No 31 (1973).

³¹ *Ibid*, p 2.

³² (1892) 19 R (HL) 31.

respect of personal injuries against his employers. While his action was pending the pursuer died. His mother, as executrix, was sisted in the action in his place. At the same time, the mother qua relative raised a separate action for *solatium* and damages for the death of her son. Her separate action qua relative was held to be incompetent because she had as executrix continued the action of damages which her son had instituted prior to his death. The decision in *Darling* was overruled by the House of Lords in 1976 in *Dick v Burgh of Falkirk*.³³ However, by this time the common law was being overtaken by the Damages (Scotland) Act 1976 which implemented this Commission's recommendation in its 1973 Report³⁴ that the rule in *Darling* should be abolished and that the continuation of the deceased's claim by the executor should not bar the relatives' claims. There would be no duplication of damages, however, because the Commission also recommended that the deceased's claim for *solatium* should not transmit to the executor and that the executor's claim for patrimonial loss should be limited to the losses incurred by the deceased before he died ie the executor could not claim damages for future loss of earnings during the "lost years".

The executor's rights

2.25 As we have noted above, in relation to the rights of the deceased's executor, this Commission recommended –

"...[T]hat the right of the executors to recover damages in respect of the deceased's patrimonial loss should be limited to patrimonial loss attributable to the period up to the date of death.

The right to recover *solatium* for personal injuries should cease on the death of the injured person and should not transmit to his executors, even when the injured person during his life has commenced an action incorporating a claim for *solatium*."³⁵

2.26 The Commission justified the recommendation that the right to *solatium* should not transmit to the executors on the ground that –

"...it is artificial to allow compensation for a person's suffering after his death."³⁶

Another factor was that a review of the comparative law³⁷ indicated that there was a tendency to deny the executor the right to recover damages for the deceased's pain and suffering.

The relatives' rights

2.27 As regards the relatives of the deceased, the Commission recommended –

"The recovery of damages by an injured person or his settlement of a claim to damages during his life should continue to exclude any right of action by his dependants after his death.

³³ 1976 SC (HL) 1.

³⁴ Scot Law Com No 31, para 51, pp 16-17.

³⁵ *Ibid*, recommendations 4 and 5, p 38.

³⁶ *Ibid*, para 23.

³⁷ Particularly that in Canada, Australia and New Zealand.

The dependants' rights of action for damages for patrimonial loss and solatium (or any award which may replace it) should not be affected by the existence of an action by the executors and vice versa.

The dependants' right to solatium should be replaced by a head of damages, entitled "loss of society", which is designed to acknowledge the non-pecuniary loss suffered by the husband, wife, parent or child of the deceased. The award should be available to the same class of children who are entitled to claim damages for patrimonial loss."³⁸

Damages (Scotland) Act 1976

2.28 With minor modifications, the recommendations of the Scottish Law Commission's 1973 Report were implemented by the Damages (Scotland) Act 1976.³⁹ This statute remains the foundation of the rules governing damages for wrongful death. In the early 1990s, however, concern was expressed about the operation of the 1976 Act. As a consequence, the Commission undertook a review and recommended⁴⁰ changes which were implemented by the Damages (Scotland) Act 1993.

The executor's rights

2.29 The principal criticism of the 1976 Act was that an injured person's claim for *solatium* was extinguished by death and could not be taken up by his executor even if the victim had instigated an action before he had died. The 1993 Act sought to remedy this situation. It changed the law by providing that a deceased's claim to *solatium* for the period prior to death should transmit to his executor for the benefit of the deceased's estate whether or not the victim had instigated proceedings before he died.⁴¹ The new provision made no change as regards transmissibility of claims for patrimonial loss.

2.30 By making the deceased's right to claim *solatium* transmissible to his executor, the amendment removed any incentive on the part of the defender to delay or prolong the proceedings in order to avoid paying damages by way of *solatium*. In that respect the new provision was similar to the pre-1976 Act rule. The difference was that transmissibility to the executor of the right to *solatium* did not depend on the deceased having commenced an action before his death.⁴² However, it was also provided⁴³ that a claim for *solatium* should be quantified by reference only to the period ending immediately before the deceased's death.

The relatives' rights

2.31 As we have seen,⁴⁴ at common law the deceased's relatives had a claim for damages for non-patrimonial loss. This was known as *solatium* and was intended to compensate the relatives' grief and suffering arising from the death. Section 1(4) of the Damages (Scotland) Act 1976 implemented this Commission's recommendation that the relatives' right to

³⁸ Scot Law Com No 31, recommendations 9, 11 and 25, pp 38 and 40.

³⁹ The provisions of the Act came into force on Royal Assent on 13 May 1976. The form of the Bill as introduced in the House of Lords, differed in a number of ways from the Bill annexed to the Commission's Report but the changes were "mainly of a presentational and drafting nature" (*Hansard*, HL, Vol 366, col 1579 (18 December 1975)).

⁴⁰ In its Report on *The Effect of Death on Damages* (Scot Law Com No 134, 1992).

⁴¹ Damages (Scotland) Act 1976, s 2 as substituted by the Damages (Scotland) Act 1993, s 3.

⁴² As was the case in *Neilson v Rodger* (1853) 16 D 325. See para 2.13 above.

⁴³ Damages (Scotland) Act 1976, s 2(2) as substituted by the Damages (Scotland) Act 1993.

⁴⁴ Para 2.16 above.

solatium "be replaced by a head of damages, entitled 'loss of society', which is designed to acknowledge the non-pecuniary loss suffered by the husband, wife, parent or child of the deceased..."⁴⁵ Accordingly section 1(4) as enacted provided that relatives should be awarded damages "by way of compensation for the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if he had not died." However, the courts found difficulty in determining the scope of this provision and in particular whether it was intended to include compensation for the relatives' grief and distress at the death.⁴⁶ To clarify the position the Damages (Scotland) Act 1993⁴⁷ replaced the original section 1(4) with a broader, more flexible provision which expressly stipulates that relatives are to receive damages for the distress and anxiety endured by them in witnessing the suffering of the deceased before he died, grief and sorrow caused by the death and loss of such non-patrimonial benefit as the relatives might have been expected to derive from the deceased's society and guidance. It was hoped that this reformulation of the award would act as an incentive to the courts and juries to make more generous awards.

Summary of the current provisions

2.32 In the following paragraphs we summarise the current provisions of the Damages (Scotland) Act 1976 taking into account the amendments made by the Family Law (Scotland) Act 2006⁴⁸ and the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007.⁴⁹ We also summarise those provisions of the Administration of Justice Act 1982 which make separate provision for damages for personal injury and which have to be read along with the provisions of the 1976 Act.⁵⁰

The executor's rights

2.33 Where a person dies as a consequence of personal injuries, his right to claim damages in respect of those injuries transmits to his executor.⁵¹ The executor can bring an action, or if the deceased had initiated an action before death, the executor can continue it on behalf of the deceased's estate.⁵² The executor can claim damages under two heads, namely for patrimonial loss (the deceased's loss of earnings) and *solatium*.

2.34 *The executor's rights to claim damages for patrimonial loss.* The executor can claim damages for the patrimonial losses sustained by the deceased which are attributable to the period up to the date of the deceased's death. The victim's claim for future loss of earnings does not transmit to the executor who cannot therefore claim damages for patrimonial losses in respect of the "lost years". This is intended to prevent the defender having to pay double compensation given that the deceased's relatives may have a claim for damages for loss of the deceased's support.

⁴⁵ Scot Law Com No 31, recommendation 25, p 40.

⁴⁶ See for example *Dingwall v Walter Alexander & Sons Ltd* 1980 SC 64; *Porter v Dickie* 1983 SLT 234; *Heap v West Highland Crofters & Farmers Ltd* 1985 SLT 191; *Morris v Drysdale* 1992 SLT 186.

⁴⁷ Section 1.

⁴⁸ Asp 2.

⁴⁹ Asp 18. The provisions of the 2007 Act came into force on 26 April 2007, but are retrospective in that they apply where mesothelioma sufferers had settled their claim or recovered damages on or after 20 December 2006.

⁵⁰ The current provisions of Part II of the 1982 Act are set out in Appendix B.

⁵¹ Damages (Scotland) Act 1976, s 2.

⁵² *Ibid*, s 2A.

2.35 *The executor's rights to claim solatium.* The deceased's right to claim damages by way of *solatium* for the pain and suffering arising from the injuries also transmits to the executor⁵³ but only in respect of the period up to the date of the deceased's death. In calculating the damages the court may take into account the extent to which the deceased suffered because he was aware that his life expectancy was reduced as a consequence of the injuries.⁵⁴

2.36 *Effect of an award of damages to the executor.* If the executor's claim is successful, the damages awarded becomes part of the deceased's executry estate and will be distributed according to the rules of testate succession if the deceased left a will, or the rules of intestate succession if there is no will.

2.37 Section 4 of the 1976 Act provides that the right of an executor to claim damages is not affected by the existence of an action by a relative and vice versa.

The relatives' rights

2.38 The relatives of the deceased have title to sue for damages in respect of the patrimonial and non-patrimonial losses they have sustained in consequence of the deceased's death from personal injuries. The relatives' rights are only enforceable if in respect of the personal injuries the defender would have been liable to pay damages to the deceased if he had lived.⁵⁵ If the defender would not have been liable to the deceased, he is not liable to his relatives: in this sense the relatives' rights to sue can be described as dependent. Thus for example, the relatives' claim will fail if the defender did not owe the deceased a duty of care, or his act or omission was not wrongful or the deceased had been *volens*. Similarly, the relatives' damages will be reduced on the ground of the deceased's contributory negligence. If the deceased's claim is time-barred because it has not commenced within three years,⁵⁶ the relatives' claim is also time-barred. It is expressly enacted in section 1(2) of the 1976 Act that a defender has no liability to the deceased's relatives "if the liability to the deceased or his executor in respect of the act or omission has been excluded or discharged...before his death...". This means that prima facie the relatives have no right to sue for patrimonial or non-patrimonial loss if the victim settled his claim against the defender or obtained a decree of damages before he died.

2.39 *The relatives' rights to claim damages for patrimonial loss.* Relatives of the deceased have a right to claim damages for patrimonial loss ie loss of the deceased's financial support.⁵⁷ This covers both loss of support up to the date of the deceased's death and future loss of support. The "relatives" also have the right to claim reasonable funeral expenses.⁵⁸ The term "relative" is defined in Schedule 1 to the 1976 Act. Following amendments by the Family Law (Scotland) Act 2006⁵⁹ which implemented recommendations made by this Commission,⁶⁰ paragraph 1 of Schedule 1 to the 1976 Act now provides that "relative" includes –

⁵³ Damages (Scotland) Act 1976, s 2.

⁵⁴ *Ibid*, s 2(3).

⁵⁵ *Ibid*, s 1(1).

⁵⁶ Prescription and Limitation (Scotland) Act 1973, s 17.

⁵⁷ Damages (Scotland) Act 1976, s 1(1) and (3).

⁵⁸ *Ibid*, s 1(3).

⁵⁹ Family Law (Scotland) Act 2006, s 35.

⁶⁰ In the Report on *Title to Sue for Non-Patrimonial Loss* (Scot Law Com No 187, 2002).

" (a) any person who immediately before the deceased's death was the spouse or civil partner of the deceased;

(aa) any person, not being the spouse or civil partner of the deceased, who was, immediately before the deceased's death, living with the deceased as husband or wife or in a relationship which had the characteristics of the relationship between civil partners;

(b) any person who was a parent or child of the deceased;

(c) any person not falling within sub-paragraph (b) above who was accepted by the deceased as a child of his family;

(ca) any person not falling within sub-paragraph (b) above who accepted the deceased as a child of the person's family;

(cb) any person who –

(i) was the brother or sister of the deceased; or

(ii) was brought up in the same household as the deceased and who was accepted as a child of the family in which the deceased was a child;

(cc) any person who was a grandparent or grandchild of the deceased;

(d) any person not falling within sub-paragraph (b) or (cc) above who was an ascendant or descendant of the deceased;

(e) any person not falling within sub-paragraph (cb)(i) above who was, or was the issue of, a brother, sister, uncle or aunt of the deceased;

(f) any person who, having been a spouse of the deceased, had ceased to be so by virtue of a divorce; and

(g) any person who, having been a civil partner of the deceased, had ceased to be so by virtue of the dissolution of the civil partnership.

but does not include any other person."⁶¹

For these purposes any relationship by affinity is treated as a relationship by consanguinity, half blood is treated as whole blood and the stepchild of any person is treated as his child.⁶²

2.40 *The relatives' rights to claim damages for non-patrimonial loss.* Some of the deceased's relatives, namely the "immediate family", are entitled to claim damages for non-patrimonial loss in addition to damages for their patrimonial losses. The "immediate family" is a sub-set of the relatives of the deceased as defined in Schedule 1 to the 1976 Act. Following amendments made by the Family Law (Scotland) Act 2006⁶³ the "immediate family" comprises those relatives listed in Schedule 1, paragraph 1(a) to (cc) above. Here however, relationships created only by affinity are excluded from being members of the deceased's immediate family.⁶⁴

2.41 Section 1(4) of the 1976 Act provides that damages for non-patrimonial loss are -

"by way of compensation for all or any of the following –

⁶¹ Damages (Scotland) Act 1976, Sch 1, para 1.

⁶² Ibid, Sch 1, para 2.

⁶³ Family Law (Scotland) Act 2006, s 35 inserting s 1(4A) and (4B) into the 1976 Act.

⁶⁴ On the complexity of the amendments introduced by the Family Law (Scotland) Act 2006, see Kenneth Norrie *"Rushed law and wrongful death"* Journal of the Law Society of Scotland, (April 2006), p 24.

(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."

2.41 *Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007.* As we have seen by section 1(2) of the 1976 Act relatives have no right to claim damages where the deceased settled his claim or was awarded damages prior to his death. As we mentioned in Part 1, this was criticised as being particularly harsh in cases involving mesothelioma. Until the 2007 Act, victims of the disease were faced with the dilemma of either pursuing their claim for damages while still alive or not pursuing their claim before their death so that their executors and relatives could claim greater awards following their death.

2.42 In order to address this dilemma, the 2007 Act amended the 1976 Act so as to disapply section 1(2) of the 1976 Act in so far as damages for non-patrimonial loss are concerned in cases where the victim's personal injury is mesothelioma. The effect of the amendment is to allow the "immediate family" of a person who has died from mesothelioma to claim damages for distress, grief and loss of society under section 1(4) of the 1976 Act after the deceased's death even although the deceased had obtained a decree for damages or reached a settlement before he died.

2.43 *Transmission of the relatives' rights to claim damages.* Section 1A of the 1976 Act⁶⁵ provides that the right of the relatives of a deceased to claim damages⁶⁶ transmits to the executor of the relative, if the relative dies before an award of damages is made. However, in determining the amount of damages payable to a relative's executor the court may only have regard to the period ending immediately before the relative's death.

Administration of Justice Act 1982 Act

2.44 *The injured person's rights.* Section 8 of the 1982 Act amended the common law to provide that where a person has sustained personal injuries, he can recover damages amounting to reasonable remuneration for necessary services, such as nursing care, provided or to be provided in the future to the injured person by a relative.⁶⁷

2.45 *The rights of relatives of an injured person.* Where an injured person has been providing personal services to a relative, section 9 of the Act gives the injured person the right to claim damages. The concept of "personal services" has been interpreted widely by the Inner House.⁶⁸ Any services must have been provided *in person* and gratuitously by the person before the injury was sustained.

2.46 *The relative's rights on the death of the injured person.* Section 9(2) of the 1982 Act provides that where an injured person dies as a result of the personal injuries, a relative who

⁶⁵ Inserted by the Damages (Scotland) Act 1993, s 3.

⁶⁶ Under section 1 of the Damages (Scotland) Act 1976.

⁶⁷ "Relative" is defined in s 13 of the Administration of Justice Act 1982. The list of relatives is similar to that in Schedule 1 to the Damages (Scotland) Act 1976. It now includes cohabitants living together in a relationship which has the characteristics of a civil partnership: Family Law (Scotland) Act 2006, s 30.

⁶⁸ *Ingham v John G Russell (Transport) Ltd* 1991 SC 201.

was receiving personal services from the person before the injury may claim a reasonable sum in respect of the loss of those services. However, before he or she can do so, the relative must have the right to claim damages for loss of the deceased's support under the 1976 Act.

Part 3 Damages and death: issues for reform

Introduction

3.1 When a person sustains fatal physical injuries, three situations can arise. First the victim may sue the defender and obtain a settlement or an award of damages before he dies from the injuries. This usually occurs when the physical injuries take the form of a disease. Second, the victim may institute proceedings against the defender and subsequently die before he obtains a settlement or an award of damages. Finally the victim may die before he has instituted proceedings.

3.2 As we have seen,¹ in the first situation, the victim will receive damages by way of *solatium* and damages for patrimonial loss. In calculating the loss of future earnings, the court is enjoined to assume that the pursuer will live until the date when he would have been expected to die if he had not sustained the injuries.² This is known as the notional date of death. He therefore recovers compensation for loss of earnings during the "lost years" ie the period between the victim's actual and notional date of death.

3.3 In the second situation, the victim's rights transmit to his executor. However, the executor can only recover *solatium* in respect of the deceased's pain and suffering before he died and damages for the patrimonial loss sustained by the deceased up until the date of his actual death.³ This means that the executor cannot recover compensation for the victim's loss of earnings during the lost years. But if the deceased has relatives, they are entitled to sue for loss of the deceased's financial support and their own non-patrimonial loss⁴ ie for their own grief and sorrow and loss of the deceased's society. Since the relatives are likely to be the deceased's heirs on intestacy or beneficiaries under his will, by restricting the executor's right to damages for losses incurred by the deceased before he died, double compensation of the relatives is avoided.

3.4 In the third case, the executor can institute⁵ proceedings but once again can only recover *solatium* in respect of the deceased's pain and suffering before he died and damages for the patrimonial loss sustained by the deceased up until the date of his actual death.⁶ Where the deceased has relatives, they are also entitled to sue for loss of the deceased's financial support and their own non-patrimonial loss,⁷ the restriction on the executor's right to damages again preventing double compensation.

3.5 It seems to us that it is sound policy that double compensation should be avoided. But in achieving that end the current law produces results which may seem anomalous to

¹ Para 2.2-2.6 above.

² Damages (Scotland) Act 1976, s 9(1).

³ *Ibid*, s 2. The executor is sisted as pursuer in the action: *ibid* s 2A(1)(b).

⁴ *Ibid*, s 1(3) and (4). Before the relatives have title to sue, the deceased must have died from the physical injuries and not some other cause for which the defender is not responsible.

⁵ *Ibid*, s 2A(1)(a).

⁶ *Ibid*, s 2.

⁷ *Ibid*, s 1(3) and (4). Before the relatives have title to sue, the deceased must have died from the physical injuries and not some other cause for which the defender is not responsible.

some. Consider the case where a young child is killed instantaneously in a car accident. Because the child was killed outright, the executor cannot recover damages by way of *solatium*: and as the child was not earning at the time of her death, the executor cannot recover damages for patrimonial loss. As no one was receiving financial support from the child the relatives' claims will be restricted to non-patrimonial loss: these damages are comparatively modest, for example £15,000 to £20,000 to each of the child's parents. Indeed, where a person is killed instantaneously and has no relatives, no damages are payable at all. But if the law were to allow an executor to obtain damages for future patrimonial loss in these cases ie if the executor could recover what the victim would have earned during the lost years, substantial damages would enure to the victim's estate to be distributed according to the law of succession. However if that were so, where the victim had relatives for whom he did provide financial support, their right to sue for patrimonial loss would have to be curtailed if double compensation was to be avoided.

3.6 If the executor could sue for the deceased's future patrimonial loss, this would increase the damages that are currently paid where the deceased has no dependent relatives: the damages would form part of the estate and be distributed according to the law of succession. This could mean that relatives who currently receive modest damages because they were not being supported by the deceased would receive a share of the increased damages if they were beneficiaries under the deceased's will or heirs on intestacy. On the other hand, relatives who were in fact being supported by the deceased might not be entitled to share in the estate under the law of succession and therefore would not be compensated for their loss. If the law is to ensure that dependent relatives are to obtain reparation for loss of the deceased's support, they must have an independent title to sue for patrimonial loss. But then the executor cannot also be allowed to obtain damages for the deceased's future patrimonial loss because this would result in double compensation where-as will often be the case - the dependent relatives are beneficiaries under the deceased's will or the heirs on intestacy.

3.7 Therefore there is clearly a tension between the rights of the deceased's executor and the rights of the deceased's relatives. In this Part we shall consider whether the existing law achieves a sensible balance between these interests. But even if it does and fundamental reform of the law is not necessary, difficulties have been experienced with some of the current rules. These problems are also discussed in this Part.

The victim's rights

[1] *Where the victim obtains a settlement or is awarded a decree for damages before he dies*

3.8 In this situation we are concerned with the case where a person sustains physical injuries which will result in his death but does not die until after he has obtained a settlement or has been awarded damages in his claim against the defender.

3.9 First, the victim is entitled to *solatium* for the pain and suffering arising from his injuries. Where the injuries have reduced the victim's expectation of life and the victim "is, was at any time or is likely to become, aware of that reduction"⁸ then, in addition, damages can be awarded by way of *solatium* for the distress to the victim caused by that knowledge.⁹

⁸ Damages (Scotland) Act 1976, s 9A(1)(b).

⁹ *Ibid*, s 9A(1).

If the victim does not know or is unlikely to become aware that he will die prematurely, no damages by way of *solatium* are recoverable for loss of expectation of life.¹⁰ Damages by way of *solatium* are only awarded when the victim in fact experiences pain and suffering from his injuries. If for example the victim is rendered unconscious by his injuries no award can be made for *solatium* if he does not regain consciousness and in fact experience pain.¹¹ It therefore appears to be consistent with principle that damages for loss of expectation of life should not be included as part of an award of *solatium* when the victim has not in fact suffered any distress on that account because he did not know and was not likely to become aware that he was going to die prematurely.¹² Consequently we ask -

1. Should a victim continue to receive damages for loss of expectation of life as part of an award of *solatium* only if he is aware or is likely to become aware that his life will end prematurely?

3.10 Second, as in any claim for damages for personal injuries, the victim is entitled to compensation for the patrimonial loss he has sustained up until the date of the proof. In relation to future patrimonial loss, section 9 of the Damages (Scotland) Act 1976 is applicable *viz* -

"9(1) This section applies to any action for damages in respect of personal injuries sustained by the pursuer where his expected date of death is earlier than it would have been if he had not sustained the injuries.

(2) In assessing, in any action to which this section applies, the amount of any patrimonial loss in respect of the period after the date of decree -

(a) it shall be assumed that the pursuer will live until the date when he would have been expected to die if he had not sustained the injuries (hereinafter referred to as the 'notional date of death');

(b) the court may have regard to any amount, whether or not it is an amount related to earnings by the pursuer's own labour or other gainful activity, which in its opinion the pursuer, if he had not sustained the injuries in question, would have received in the period up to his notional date of death by way of benefits in money or money's worth being benefits derived from sources other than the pursuer's own estate;

(c) the court shall have regard to any diminution of any such amount as aforesaid by virtue of expenses which in the opinion of the court the pursuer, if he had not sustained the injuries in question, would reasonably have incurred in the said period by way of living expenses."

3.11 It is clear that this provision applies to any claim for future patrimonial loss where the victim's personal injuries are going to be fatal. Section 9(2)(a) provides that in assessing the amount of future patrimonial loss, the court has to assume that the victim will live to the date when he would have been expected to die if he had not sustained the injuries - the notional date of death - rather than the date when, having regard to his state of health at the time of

¹⁰ Damages (Scotland) Act 1976, s 9A(2).

¹¹ *Lim v Camden Health Authority* [1980] AC 174.

¹² While the unconscious victim cannot recover damages for pain and suffering it appears that damages can be recovered for "objective" loss of amenities and physical faculties: *Dalgleish v Glasgow Corporation* 1976 SC 32. Here the unconscious pursuer also obtained damages for loss of expectation of life: today she would not do so as a result of s 9A(2) of the 1976 Act. If damages for loss of amenity and physical faculties are characterised as part of an award of *solatium* it is arguable that it should not be available if the victim was unaware of such losses.

the action he is in fact expected to die - the expected date of actual death. Put another way, in determining an appropriate multiplier the court is ordained to proceed on the basis that the victim will live until the notional date of death and therefore no allowance can be made for the contingency that he might die sooner. So for example, if at the date of decree the victim's life expectancy is 5 years and the notional date of death is 10 years, then the multiplier is based on a life expectancy of 10 years. Using the Ogden Tables and applying a discount for accelerated payment this would give a multiplier of around 8.5. Section 9(2)(b) gives the court a discretion in assessing the victim's income to include not only the victim's earnings until the notional date of death but also any income he would enjoy from a third party, for example income from a trust. But by section 9(2)(c) the court must deduct from the victim's income the living expenses which the victim would have reasonably incurred if he had not been injured and had lived until the notional date of death. So if in our example the victim's only income was earnings of £30K a year and his reasonable expenses were £10K a year, the multiplicand is £20K and the multiplier is 8.5 giving damages for future patrimonial loss as £170K.

3.12 It will be noticed that if the victim's injuries had not been fatal, his life expectancy would still be 10 years. But in determining the multiplier in this kind of case the court is entitled to take into account the contingency that he might in fact die sooner. Assume this then gives a multiplier of 8. The victim's earnings are still 30K a year but as it is not a fatal injuries case no deduction is made for reasonable living expenses so the multiplicand is £30K and the multiplier is 8 giving damages for future patrimonial loss as £240K. Here, of course, the victim will have to use the damages to pay the expenses he incurs until he actually dies.

3.13 Why have reasonable living expenses to be deducted in fatal injury cases? In its 1973 Report¹³ this Commission argued¹⁴ that "...failure to deduct an appropriate sum for living expenses would lead to unrealistic awards, particularly to children and young persons, who would be compensated for losses which, in part at least, they did not suffer. A person cannot maintain his earnings without expenditure upon food, clothing and shelter, expenses which cease on death." We think that this point still carries force. But it is only appropriate for that proportion of the damages which represents the period between the expected date of the victim's actual death and his notional date of death - the so called "lost period" - when it is assumed that the victim will in fact have died. In respect of the lost period it is perfectly sensible to deduct the reasonable outlays which the victim would have incurred if he had lived. But it is totally inappropriate in respect of that proportion of the damages which represents the period from the date of the decree until the date of the victim's death which has been assumed for the purpose of quantification of damages: during this time it is assumed that the victim will be alive and require the damages to pay for his reasonable living expenses. Similarly it is perfectly sensible to take into account the victim's income from a third party in determining the multiplicand for the lost years when the income has been "lost" as it is assumed that he will be dead. But it makes no sense to do so for the period from the date of the decree until the date when the victim is expected to die during which it is probable that he will be alive and enjoying - and using - the income. And indeed in its 1973 Report and Bill,¹⁵ this Commission only made specific provisions¹⁶ for damages in

¹³ Report on *The Law Relating to Damages for Injuries Causing Death* (Scot Law Com No 31, 1973).

¹⁴ At para 16.

¹⁵ Scot Law Com No 31 (1973).

¹⁶ *Ibid*, paras 11-17 and draft Bill clause 4 and Schedule 2.

respect of future patrimonial loss during the lost years ie the period between the expected date of the victim's actual death and the notional date of death. Damages for future patrimonial loss for the period between the date of the proof and the expected date of the victim's actual death would be calculated as in non-fatal cases ie his continuing income from a third party would not be taken into account and no deduction would be made for the victim's living expenses.¹⁷

3.14 It can be argued that the current law can lead to hardship where the victim has relatives who are financially dependent on him. When the damages are paid, they become part of the victim's patrimony and he can spend the money as he chooses. But where the victim owes a relative an obligation of aliment, he must, of course, fulfil that obligation: for these purposes relatives are the victim's spouse, civil partner, children and any children accepted by the victim as a child of the family.¹⁸ When the victim dies, the balance of the damages will form part of his estate and will be distributed according to the law of succession.¹⁹ Again this could result in hardship to a relative who was financially dependent on the deceased and would have continued to be supported by him during the lost period, if the relative is not a beneficiary under the will or entitled to any of the estate under the rules of testate or intestate succession. However, when the victim dies testate, a surviving spouse or civil partner and children will be entitled to legal rights where they are not beneficiaries under the will. On intestacy, a surviving spouse or civil partner is entitled to prior rights²⁰ as well as legal rights and the deceased's children will be the heirs on intestacy. Further, the deceased's cohabitant is entitled to claim financial provision out of the deceased's net intestate estate.²¹ Therefore it is only dependent relatives to whom the deceased did not owe an obligation of aliment while alive and who will not succeed or be protected under the law of succession who are in fact at risk of hardship. To protect them it would be necessary to devise a scheme along the following lines. The victim could sue for patrimonial loss but the loss would be calculated on the basis of the expected date of actual death ie the lost period would not be included. But a dependent relative would have title to sue for the loss of support which he would have received during the lost period. Clearly such a scheme would complicate the law. Moreover, it might be also necessary to have an exception for victims who had no dependent relatives.

3.15 It seems to us that a person who has received personal injuries which are likely to result in death should be able to recover damages for the financial losses sustained by dying prematurely. In other words he should be able to recover for patrimonial losses not only up to the date when it is expected that he will actually die but also for the lost period. It is our preliminary view that given the law of aliment and succession, in the vast majority of cases financial hardship will not arise to dependent relatives by allowing a victim to sue for patrimonial losses based on the lost period. Where the dependent relative will not succeed

¹⁷ We have been informed that when negotiating settlements in practice section 9 is only applied to the lost period.

¹⁸ Family Law (Scotland) Act 1985, s 1.

¹⁹ For the purpose of this Part, it is assumed that the Scots domestic law of succession applies to all the property that constitutes the deceased's estate.

²⁰ Ie the right to the dwelling house (which was owned by the intestate) in which she was ordinarily resident at the date of death or £300K if the house is worth more than £300K: furniture and plenishings to the value of £24K: and £42K if the deceased is survived by issue or £75K if there is no issue: Succession (Scotland) Act 1964, s 8; The Prior Rights of Surviving Spouse (Scotland) Order 2005, SSI 2005/252. This will exhaust many estates. After satisfaction of prior rights, the surviving spouse or civil partner is entitled to legal rights.

²¹ Family Law (Scotland) Act 2006, s 29.

on intestacy, the victim can always provide for the relative in his will. Accordingly we do not see the need to depart radically from the current law.

3.16 It is therefore our preliminary view that the victim of personal injuries which will be fatal should continue to be able to sue for damages for financial losses incurred during the lost period. We also accept that in calculating such losses a deduction must be made in respect of the living expenses which he would reasonably have incurred provided it is confined to the lost period. For the reasons we have discussed, as currently drafted section 9 of the Damages (Scotland) Act 1976 does not implement that policy accurately and we think that it should be amended to do so. We ask -

2. **Should a victim continue to be able to claim future patrimonial loss for the periods between (i) the date of decree and the date when the victim is expected to die and (ii) from the date when the victim is expected to die and the notional date of death ie the lost period?**
3. **For the purposes of the lost period only, (i) should income include income from third parties as well as the victim's earnings and (ii) should a deduction be made for the victim's reasonable living expenses?**

3.17 Section 9 does not apply to the victim's claims under sections 8 and 9 of the Administration of Justice Act 1982. This means that any claim for future necessary services rendered by a relative will be based on the expected date of actual death: similarly, a claim for the inability to render personal services gratuitously to his relatives will also be based on that date. We do not think that a section 8 claim should include the lost period. The 1982 Act envisages that the victim will give the damages he has recovered under section 8 to the relative who has or is providing the services: given that no services can be provided to the deceased after he is dead, it is therefore intellectually incoherent that a section 8 claim can be made in respect of the lost period. But this is not the case with a section 9 claim. If he had not been injured the victim would have been able to provide personal services gratuitously to his family until the notional date of death. In these circumstances we ask –

4. **(a) Should a claim under section 8 of the Administration of Justice Act 1982 continue to exclude the lost period?**
(b) Should a claim under section 9 of the Administration of Justice Act 1982 include the lost period?

[2] Where the victim instigates proceedings, but dies from the personal injuries before he has obtained a settlement or been awarded a decree for damages

3.18 In this section we are concerned with the situation where the victim dies from the personal injuries before he has sued the defender for reparation. In these circumstances the right to sue transmits to his executor.²² The executor has the right to raise the action if the deceased had not done so before his death or, if an action had been raised by the deceased

²² Damages (Scotland) Act 1976, s 2(1).

before he died, the executor can continue the action on behalf of the deceased's estate.²³ However, there are two important limitations on the executor's rights.

3.19 First, as outlined in Part 2, while the deceased's right to damages by way of *solatium* transmits to the executor, in assessing damages the court can only have regard to the deceased's pain and suffering up until the date of his death.²⁴ This seems unexceptionable. On the assumption that a person's suffering ends when he dies,²⁵ *solatium* for future pain and distress would be intellectually incoherent. It must also be remembered that in assessing *solatium* the executor can recover for any distress experienced by the deceased if he had become aware that his expectation of life had been reduced.²⁶ That said, the courts have found difficulty in assessing damages for *solatium* when the deceased died shortly after he had been injured. In *Beggs v Motherwell Bridge Fabricators Ltd*²⁷ the Lord Ordinary (Eassie) doubted whether Parliament intended the court to carry out "...the difficult - and often distasteful - task of trying to assess the feelings of pain and apprehensions of mortality of someone so abruptly and severely injured as to be in the imminent and real danger of death within a period of minutes."²⁸ Here the deceased died minutes after he was injured and Lord Eassie awarded only £500 as *solatium*. In contrast, an award of £50K was made in *Wells v Hay*²⁹ where the deceased was trapped in a car for 40 minutes and suffered 60% full thickness burns to most of his body including his face. He was conscious until he was admitted to hospital an hour after the crash and died 16 days later having regained consciousness on at least one occasion. However such difficulties are inherent in all claims for *solatium* where the courts are being asked to compensate the victim's subjective pain and suffering: they are not restricted to cases where personal injuries have resulted in death.

3.20 Second, the deceased's right to damages under section 9 of the Damages (Scotland) Act 1976 for patrimonial loss incurred until the date of notional death ie during the lost period does *not* transmit to the executor. Put another way, the executor is only entitled to sue in respect of patrimonial loss sustained by the deceased up until the date of death. This is said to be necessary to prevent double compensation. As discussed below,³⁰ when the victim dies from his personal injuries the defender may have to meet claims for loss of support brought by the deceased's relatives. The relatives may also be the deceased's intestate heirs or beneficiaries under his will. If so, they would be the recipients of the damages which the executor obtained on behalf of the deceased's estate and would be doubly compensated if the executor could also sue for the deceased's patrimonial loss during the lost period. But while this is true in cases where the deceased has relatives who are financially dependent on him, the executor is still unable to sue for future patrimonial loss where the deceased has no dependent relatives or indeed no qualifying relatives at all.³¹ As a point of general principle it is difficult to see why in all cases the executor should not simply step into the

²³ Damages (Scotland) Act 1976, s 2A.

²⁴ *Ibid*, s 2(3).

²⁵ At least his temporal suffering apparently does!

²⁶ Damages (Scotland) Act 1976, s 9A.

²⁷ 1998 SLT 1215.

²⁸ *Ibid* at 1223-1224. Cf *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER 65. (No damages for fear of impending death if deceased had not sustained personal injuries before he died).

²⁹ 1999 Rep LR 44.

³⁰ Below paras 3.41-3.47.

³¹ Moreover when the deceased does not die from his personal injuries but from some other cause, the executor still cannot sue for future patrimonial loss even though the deceased's relatives have no claim as they only have title to sue when the deceased died *from his personal injuries*. But in these circumstances the defender will probably not be liable for future patrimonial loss since *ex hypothesi* the victim has died from a cause for which the defender was not responsible.

deceased's shoes and be able - like the deceased if he were alive - to sue for future patrimonial loss in respect of the lost period. If that were so, the damages would form part of the deceased's estate to be distributed according to his will or the rules of intestate succession. But where the deceased had relatives, they would have no title to sue for patrimonial loss as the deceased's estate would recover damages for the full amount of patrimonial loss which the deceased has sustained as a consequence of his personal injuries in exactly the same way as if the deceased had successfully sued the defender before he died.

3.21 There are, however, formidable arguments against such an apparently simple solution. First it can be argued that to do so involves the risk of under-compensating, if not altogether failing to compensate, some of the deceased's relatives who would have been entitled to considerable sums if damages continued to be based on loss of support. Consider the following examples:

- (i) H and W are married. H alimts their child C and W's child D from a previous relationship whom H has accepted as a child of the family. If H dies from personal injuries, under the current law W, C and D have title to sue for loss of H's support. If H's executor could sue for damages for future patrimonial loss, the damages would form part of H's estate. If H died intestate, W is entitled to her prior and legal rights. Where these do not exhaust the estate, C will inherit as the heir on intestacy and D will receive nothing. D, of course, retains his right to aliment from W and his father as well as his rights in relation to their estates when they die.
- (ii) H cohabits with A whom he supports. They have a child, B. H is still married to W. If H dies from personal injuries, under the current law A and B have title to sue for loss of H's support. W has also title to sue if she was being alimted by H. If H's executor could sue for damages for future patrimonial loss, the damages would form part of H's estate. If H died intestate, W is entitled to her prior and legal rights. Only after these have been satisfied, can A claim financial provision from H's net intestate estate under section 29 of the Family Law (Scotland) Act 2006: and only after A's claim has been satisfied will B inherit as heir on intestacy. B, of course, retains the right to be alimted by A as well as his rights in relation to her estate when she dies.

As these examples illustrate, the risk of under-compensation is real. However, the problems can be alleviated, if not necessarily removed. There are no difficulties if in the first example H had made a will under which D was a beneficiary or if in the second example H had divorced W or/and made a will under which A and B are beneficiaries. The practical problem is, of course, that over sixty per cent of Scots die intestate.³² On the other hand, in the vast majority of situations the rules of intestate succession will result in the deceased's surviving spouse or civil partner and children succeeding to the estate. Since these are persons to whom the deceased owed an obligation of aliment they are most likely to be the persons whom he was in fact supporting. But this would remain the case even when these relatives

³² *Wills and Awareness of Inheritance Rights in Scotland* (2006) (Scottish Consumer Council), also available online at: <http://www.scotconsumer.org.uk/publications/reports/reports06/rp10wrep.pdf>.

were no longer being supported by the deceased and would therefore receive no damages at all for patrimonial loss under the current system.³³

3.22 Secondly, it can be argued that if the executor could sue for future patrimonial loss, this could result in over-compensation for some, at least, of the deceased's relatives. For example, H and W have a child, C. C dies as a result of physical injuries when she is 5. Under the current law, H and W have no claim for patrimonial loss as they were not financially dependent on C ie since C did not support them,³⁴ they have not sustained any loss of support. They will, of course, be entitled to damages for non-patrimonial loss under section 1(4) of the Damages (Scotland) Act 1976:³⁵ depending on the circumstances this would be in the region of £20K-£30K each. But if C's executor could sue for C's loss of future earnings during the lost period, this would amount to substantially more than £60K even with a substantial discount for C's living expenses during that period.³⁶ The damages would form part of C's intestate estate. Under the rules of intestate succession, H and W as C's parents would succeed to her estate as her heirs on intestacy: (if C had siblings, half of her estate would be inherited by H and W and the other half would be shared between her brother(s) and/or sister(s)). Accordingly, H and W would receive by way of damages a sum that would be far greater than any sum they would have expected to receive from C as financial support had she lived.³⁷ This argument appears to be based on the assumption that the sole function of damages for patrimonial loss arising from a person's death is to compensate those whom the deceased was supporting. But it can also be maintained³⁸ that a person who has received fatal personal injuries should be able to recover damages for the financial losses sustained by dying prematurely; and that his executor should be able to sue for such damages if the victim dies before he has obtained a settlement or a decree for damages. Seen from this perspective, it is irrelevant that the deceased's beneficiaries or heirs on intestacy who will indirectly benefit from the damages were not and never had been financially dependent on the deceased.

3.23 Thirdly, if the executor could sue for future patrimonial loss, the full sum would enter the executry estate and could be liable to inheritance tax. A potential inheritance tax burden does not arise under the current law where relatives claim damages against the wrongdoer as individuals and the damages awarded enter directly into their private patrimonies. However at this stage we do not think that the potential tax liability should in itself be a decisive factor.

3.24 In spite of these arguments, we still think that there may be merit in the idea that the deceased's executor should be able to recover the full amount of the deceased's patrimonial loss including loss of earnings during the lost period. It is simple and it has a precedent in section 9 of the Damages (Scotland) Act 1976. Where the deceased was supporting a relative who has no rights of succession, it would be possible to devise a scheme under which the relative had a right to bring a claim against the deceased's executor if the relative

³³ Discussed below para 3.41.

³⁴ Children do not owe their parents an obligation of aliment even if they are adults and the parents have become indigent.

³⁵ Discussed below para 3.56 et seq.

³⁶ There would also be substantial discounting in respect of acceleration of C's future income. First, while in theory it might appear in the case of the death of a young man of 18 far greater damages would be recovered than in the case of a man of 38. In practice the difference will not be great because of this discounting.

³⁷ This is without taking the cynical point that C's death has reduced H and W's outgoings.

³⁸ Discussed above para 3.20.

was likely to experience serious financial hardship as a consequence of the loss of the deceased's support. The purpose of the claim would therefore be to relieve the relative of such hardship and we anticipate that in practice such claims would be rare. Any order would take the form of a capital sum payment. It should be emphasised that while the deceased's relatives would lose the right to sue for loss of support they would, of course, continue to be entitled to claim for non-patrimonial loss. Therefore we ask -

5. (a) **Should an executor be able to sue for the damages which the deceased could have recovered in respect of patrimonial loss sustained during the lost period?**
- (b) **If so, should a relative's right to recover damages for loss of support (patrimonial loss) be abolished?**
- (c) **If so, where a relative would suffer serious financial hardship from the loss of the deceased's support, should he have the right to seek a capital sum payment from the deceased's executor to relieve him of such hardship?**

[3] *Where the victim is killed instantaneously*

3.25 In this section, we consider the case where the victim A is killed outright as a consequence of B's wrong (and is therefore unable to instigate a claim for damages). In these circumstances A's executor has no title to sue for damages on behalf of A's estate. There is no claim for *solatium* as A died instantaneously and did not therefore endure any pain or suffering;³⁹ and because he died immediately, there is no past patrimonial loss. Nevertheless, A has died prematurely and has lost the opportunity of earning an income or having a pension during the lost period. But since an executor can only sue for damages in respect of past patrimonial loss, the current law does not countenance such a claim. The traditional argument for not doing so is that on his death A's dependent relatives have the right to sue for the loss of A's future financial support. If A's executor could also sue for future patrimonial loss there would be a danger of double compensation in that A's relatives are likely to be beneficiaries under his will or his heirs on intestacy and would therefore inherit the damages A's executor had obtained on behalf of A's estate. However we have questioned whether A's relatives should continue to be entitled to sue for patrimonial loss arising from his death.⁴⁰ If the executor could claim for future patrimonial loss and the relatives could not, then the damages the executor would obtain would simply form part of A's estate and be distributed with the rest of his property according to A's will or the rules of intestate succession.

3.26 A second reason often given why A's executor should not be able to sue for A's future patrimonial loss is that it would involve the court in hypothetical and highly speculative assumptions: A is dead and therefore his estate should not recover damages in relation to what he would have earned had he lived. But as we have seen⁴¹ when proceedings are taken by a person who has been fatally injured, by section 9(1) of the Damages (Scotland)

³⁹ The courts have refused to accept that an award of *solatium* can be made in respect of 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.

⁴⁰ Above, para 3.24.

⁴¹ Above, para 3.11.

Act 1976 the courts already engage in hypothetical assumptions and the Ogden tables⁴² have removed some of the speculation.

3.27 Further, by restricting the deceased's executor's title to sue in this way means that when A is killed outright as a consequence of B's wrong, B is not liable to make any reparation if there is no-one who qualifies as a relative of A under the Damages (Scotland) Act 1976.⁴³ In these circumstances, not only is it cheaper to kill than injure but there is no obligation to pay any damages at all. The wrongful death is not reparable. In our view it is difficult to continue to defend this position on the basis that because he was killed outright, the deceased has not sustained any harm. The harm sustained is the physical injuries which caused his death. Because he died instantaneously, it is true that he did not sustain pain and suffering in the normal sense: and this might remain sufficient reason to justify denying the deceased's executor a claim for *solatium*. But the victim has died prematurely and has lost the opportunity to acquire wealth during the lost period. To deny the executor the right to sue for future patrimonial loss where the deceased's patrimony has been diminished because of his premature death seems difficult to justify. If an executor could sue for future patrimonial loss ie the loss of the deceased's income during the lost period, the anomaly that a wrongdoer is not obliged to make reparation when his victim dies instantaneously without leaving dependent relatives would be closed.⁴⁴ Accordingly we seek comments on the following -

6. Should the executor of a deceased person who has been wrongfully killed outright continue to have no title to sue on behalf of the deceased's estate for future patrimonial loss?

The deceased's relatives' rights to damages

3.28 It has been argued that should an executor be able to sue for future loss, then the deceased's relatives' right to sue for patrimonial loss would have to be abolished to avoid double compensation. The relatives' right to sue for non-patrimonial loss could of course continue. However, in this section we explore the issues for reform in relation to the relatives' rights if the proposal that the executor could sue for future patrimonial loss is rejected.

[1] *The relatives' right to damages - a dependent claim*

3.29 In this section we shall consider the nature of the deceased's relatives' claims for reparation in respect of his death from personal injuries. Section 1(1) of the Damages (Scotland) Act 1976 provides -

"Where a person dies in consequence of personal injuries sustained by him⁴⁵ as a result of an act or omission... giving rise to liability to pay damages to the injured person or his executor, then,...the person liable to pay those damages (in this section referred to as 'the responsible person') shall also be liable to pay damages in

⁴² McEwan & Paton, *Damages for Personal Injuries in Scotland*, Actuarial Tables.

⁴³ On persons who qualify as relatives for the purposes of the 1976 Act, see para 2.39 above.

⁴⁴ Cf American Survival Statutes. See Appendix D, p 64 below.

⁴⁵ When a child is born alive and dies from personal injuries sustained *in utero* the 1976 Act is still applicable and the child's relatives have title to sue: *Hamilton v Fife Health Board* 1993 SC 369.

accordance with this section to any relative of the deceased, being a relative within the meaning of Schedule 1 to this Act"⁴⁶

3.30 This means that a relative has title to sue if (i) the deceased has died from his personal injuries and (ii) in respect of the personal injuries, the responsible person would have been liable to pay damages to the deceased if he had lived. Conversely, it follows that if the responsible person would not have been liable to pay damages to the deceased if he had lived, a relative has no title to sue. In other words, a relative's title to sue is *dependent* on the responsible person being liable to pay damages to the deceased if he had brought an action before he died. It cannot be overemphasised that for the purpose of damages under the 1976 Act, the responsible person does *not* owe the deceased's relatives a duty of care distinct from and independent of the duty of care owed to the deceased.⁴⁷ The dependent nature of the relatives' claim is axiomatic to liability under the 1976 Act. Accordingly, a relative's claim will fail if the deceased's action against the responsible person would not have succeeded. So for example, the relative's claim will fail if the responsible person did not owe the deceased a duty of care or the responsible person's acts or omission had not been wrongful or the deceased had been *volens*. For this reason too, the relative's damages can be reduced on the ground of the deceased's contributory negligence.⁴⁸ If the deceased's claim would have been time-barred by section 17 of the Prescription and Limitation (Scotland) Act 1973,⁴⁹ a relative's claim is also barred.⁵⁰

3.31 As a general principle, Scots law does not allow a person to recover damages for economic loss sustained by him as a result of the death of or injury to a third party. Put another way, there is generally no liability in delict for causing secondary economic loss. For example if A is injured by B, A's employer cannot sue B for any loss he has sustained as a consequence of A being injured.⁵¹ Similarly, it is only in very exceptional circumstances that the law allows the - so called - secondary victim to recover damages for mental harm sustained by witnessing an incident where other persons were injured.⁵² The right to sue under the 1976 Act in respect of the death of a relative is therefore a striking exception to this principle. However, the dependent nature of the relative's claim reinforces the point that the deceased was the primary victim of the wrong and operates to keep a responsible person's potential liability within reasonable bounds. We are not convinced that there is any need to change this fundamental feature of the relative's right. Accordingly we ask -

⁴⁶ On the definition of "relatives" and Schedule 1 of the 1976 Act, see below para 3.68.

⁴⁷ *Robertson v Turnbull* 1982 SC (HL) 1 where Lord Fraser of Tullybelton at 10 described as "...contrary to principle and precedent" Lord Kilbrandon's obiter dictum in *Dick v Burgh of Falkirk* 1976 SC (HL) 1 that such a duty did exist. In *Robertson*, both Lord Wilberforce and Lord Keith also agreed that Lord Kilbrandon's dictum was both obiter and per incuriam.

⁴⁸ See for example, *Beggs v Motherwell Bridge Fabricators Ltd* 1998 SLT 1215.

⁴⁹ Subject to the court's discretion under section 19A to allow the claim after the limitation period has expired.

⁵⁰ *McLaren v Harland and Wolf Ltd* 1991 SLT 85.

⁵¹ *Reavis v Clan Line Steamers Ltd* 1925 SC 725. See also *Robertson v Turnbull* 1982 SC (HL) 1 where the House of Lords held that the defender did not owe a duty to his victim's spouse or relatives who had sustained economic loss by giving up their jobs in order to nurse the victim when he was injured. The common law has been overtaken by s 8 of the Administration of Justice Act 1982 which allows the *victim* to recover reasonable remuneration for a relative who has provided necessary services to him: in theory at least, the victim then transfers the money recovered to the relative.

⁵² *Bourhill v Young* 1942 SC (HL) 78; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

7. Should the right to sue on the death of a relative continue to be a dependent right in the sense that a relative cannot sue unless the responsible person would have been liable to the deceased if he had sought damages for personal injuries before he had died?

[2] *The relatives' right to damages - exclusion or discharge of liability to the deceased*

3.32 Consistent with the dependent nature of a relative's claim, section 1(2) of the Damages (Scotland) Act 1976 provides -

"(2) ...no liability shall arise under this section if the liability to the deceased or his executor in respect of the [responsible person's] act or omission has been excluded or discharged (whether by antecedent agreement or otherwise) by the deceased before his death, or is excluded by virtue of any enactment."

3.33 This subsection makes provision for several situations. First, it ensures that a relative's right is barred if the responsible person has excluded or limited liability in respect of the deceased's personal injuries as a consequence of a contractual exemption clause or non-contractual notice.⁵³ As a result of section 16 of the Unfair Contract Terms Act 1977, however, an exemption clause or a provision in a non-contractual notice which excludes or restricts liability for breach of duty arising in the course of any business or from the occupation of business premises is void if it purports to exclude or restrict liability in respect of death or personal injury. Where such a clause or provision is void so that it would not exclude or restrict the deceased's claim if he had lived, section 1(2) will not operate to exclude a relative's claim.

3.34 Second, where the deceased has successfully sued the defender before he dies, the award of damages discharges the defender's obligation to make reparation and section 1(2) operates to bar a relative's claim. Similarly, the relative's claim is barred if the deceased settled his claim against the responsible person before he died. We consider that this is the inevitable result of the dependent nature of the relative's claim.

3.35 The effect of section 1(2) has proved controversial in mesothelioma cases. Where persons are diagnosed as having mesothelioma their life expectancy is on average 15 months.⁵⁴ If they settled their claim during that period, section 1(2) operated to bar their relatives' claims. Because of the increase in the size of awards of damages to a deceased's relatives under section 1(4) of the 1976 Act,⁵⁵ this meant that if the victim settled before his death, the amount he would recover would often be less than the amount his family would recover if they sued after he had died. The victim was therefore placed in a dilemma. He could settle the case and obtain some financial security for the last months of his life but this would be at the expense of his family's claim. Or he could refuse to settle and forego compensation before he died thus enabling his family to recover a larger amount of damages after his death. The Scottish Parliament has responded to this problem by enacting the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007. This disapplies section 1(2) in respect of mesothelioma victims to the extent that their relatives remain entitled to sue for non-patrimonial loss⁵⁶ under section 1(4) of the 1976 Act even

⁵³ This was also the position at common law: *McKay v Scottish Airways Ltd* 1948 SC 254.

⁵⁴ Health and Safety Executive Statistics available online at <http://www.hse.gov.uk/statistics/causdis/meso.htm>.

⁵⁵ Discussed below para 3.56 et seq.

⁵⁶ Section 1(2) continues to bar a relative's claim for patrimonial loss.

though the victim has settled his claim or successfully sued the responsible person before he died.⁵⁷

3.36 We think that it remains sound policy that a responsible person should be able to settle a victim's claim before his death without having to face claims from the victim's relatives after he dies which could be many years later. There is, of course, no difficulty when death is instantaneous. When the victim's diagnosis is that he will not die until a substantial period of time has lapsed, it seems clear that any settlement should continue to relieve the defender from the relatives' claims. The hard case is when - as with mesothelioma - the victim usually dies within a relatively short period after diagnosis. Here the responsible person will not be faced with claims by relatives, years after the victim's claim has been settled. In such circumstances we agree that an exception to the general rule is justified. But while the difficulties raised by mesothelioma may appear to be unique, we think that if it is possible such an exception should not be disease-specific.⁵⁸

3.37 By section 17 of the Prescription and Limitation (Scotland) Act 1973, a victim of personal injuries must bring his claim for damages within three years from the date on which the injuries were sustained: if he fails to do so his claim is time-barred. Put another way, a victim's claim for damages for personal injuries is subject to a limitation period of three years.⁵⁹ If the victim's claim is time-barred, his relatives cannot bring any claims under the Damages (Scotland) Act 1976 should he later die from the personal injuries. We think that these limitation rules could be adapted to provide a solution to our problem which is not disease-specific. Section 1(2) of the Damages (Scotland) Act 1976 could be disapplied in all cases where the victim dies within a period of three years from the date when the limitation period under section 17 of the Prescription and Limitation (Scotland) Act 1973 begins to run against the victim in his own claim for damages. For example, A is diagnosed with a terminal illness caused by B. A settles his claim a year later. Assuming that the limitation period begins at the date of diagnosis, if A dies within two years of the settlement, section 1(2) is disapplied and his relatives can sue for non-patrimonial loss under section 1(4) in spite of the settlement: but if the victim survives for more than two years after the settlement ie for more than three years after the limitation period had begun to run against him, section 1(2) would apply and the relatives' claims under section 1(4) for non-patrimonial loss would be barred because of the settlement. This solution is not disease-specific. But given the short life expectancy of mesothelioma victims after diagnosis, under our suggested rule section 1(2) would always in fact be disapplied in mesothelioma cases. Accordingly we ask the following -

- 8. (a) Because of the dependent nature of the relative's claim, should it continue to be extinguished if before he died the deceased had discharged the responsible person's liability to him or his executor?**

⁵⁷ 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 Shipbuilding Co Ltd* [2007] CSOH 71.

⁵⁸ Although this is also true of the Compensation Act 2006 which provides that in cases of mesothelioma employers' liability is to remain joint and several.

⁵⁹ The period does not begin to run from the date when the injuries were sustained unless it was reasonably practicable for the pursuer to be aware of the following facts: (i) that the injuries were sufficiently serious to bring an action of damages (ii) that the injuries were caused by an act or omission and (iii) that the defender was responsible for the act or omission. Moreover by section 19A of the 1973 Act the court has discretion to allow the claim to proceed outwith the three year period if "it seems equitable to do so".

(b) If so, should there be an exception to the general rule allowing a relative's claim for non-patrimonial loss, if the deceased dies within three years of the beginning of the limitation period in respect of his claim against the responsible person whose liability he discharged during that period?

(c) Should the period be three years or should it be longer, for example five years?

3.38 One of the disturbing features of the mesothelioma cases is that the victim's own claim while he is alive would result in a smaller amount of compensation than would be received by his family in their claim for damages after he had died. There is no doubt that this was not the result intended when the 1976 legislation was first passed. In order to discover how this situation has developed, it is necessary to consider the nature of the relatives' rights. There are two aspects to a claim. First a relative can seek compensation for the patrimonial loss which she has incurred as a consequence of the death. Second, a group of relatives known as the deceased's immediate family are entitled to sue for non-patrimonial loss under section 1(4) of the 1976 Act. We shall consider each aspect in turn.

[3] *The relatives' right to damages - patrimonial loss*

3.39 Section 1(3) of the Damages (Scotland) Act 1976 provides -

"(3) The damages which the responsible person shall be liable to pay to a relative of a deceased under this section shall (subject to the provisions of this Act) be such as will compensate the relative for any loss of support suffered by him since the date of the deceased's death or likely to be suffered by him as a result of the act or omission in question, together with any reasonable expense incurred by him in connection with the deceased's funeral."

3.40 In addition, the relative is entitled to include as a head of damages under section 1(3) a reasonable sum in respect of the loss of the personal services which the deceased would have provided to her if he had lived.⁶⁰

3.41 The purpose of section 1(3) is primarily to compensate the relative for the loss of financial support which the deceased would have provided for the relative if he had not died from his personal injuries. Title to sue is not restricted to those relatives to whom the deceased owed an obligation of aliment⁶¹ viz spouse, civil partner, children and persons accepted by the deceased as a child of his family:⁶² but where the relative is an alimentary obligee, this will be taken into account by the court in determining whether the deceased had *in fact* supported the relative and would continue in the future to do so.⁶³ If the relative cannot establish that the deceased had provided him with financial support (or personal services) and would have continued to do so in the future, the relative is not entitled to any damages for patrimonial loss because the relative has not sustained any loss. Thus in the case of the death of a baby or a young child, the parents will not obtain any damages for patrimonial loss as the deceased did not provide them with financial support.

⁶⁰ Administration of Justice Act 1982, s 9(2).

⁶¹ Damages (Scotland) Act 1976, s 1(6).

⁶² Family Law (Scotland) Act 1985, s 1(1).

⁶³ Damages (Scotland) Act 1976, s 1(6).

3.42 How is loss of support established? Where the deceased was the sole earner, the court takes his net annual income and deducts a percentage, often 25 per cent, which is considered to be the amount that the deceased used for his own maintenance. The resulting balance is treated as the annual loss of support sustained by the deceased's family. This represents the family's dependency on the deceased. It forms the multiplicand. An appropriate multiplier is obtained by reference to the Ogden tables.⁶⁴ The damages thus recoverable are apportioned between the deceased's surviving partner and any dependent children.

3.43 In *Brown v Ferguson*⁶⁵ the Lord Ordinary (Sutherland) held that when the deceased and the surviving partner were both earning, their net incomes should be added together and a percentage usually 25 per cent deducted which represents the deceased's expenditure on himself. The multiplicand is the balance *minus* the partner's net income. For example, the deceased earned £50K net annually: his wife works part-time and earns £10K net annually. The couple's net incomes are added to give £60K. £15K ie 25% is deducted as the deceased's own maintenance. This leaves £45K from which is deducted the partner's net income of £10K to give £35K which represents the family's dependency on the deceased. This forms the multiplicand. After a suitable multiplier is found, using the Ogden tables, the damages are apportioned between the surviving partner and any dependent children.

3.44 But observe what happens when - as is increasingly the case - the deceased and his partner both work full time and earn comparable salaries. For example, the deceased earned £50K net annually: his wife works full time and earns £50K net annually. The couple's net incomes are added together to give £100K. £25K ie 25% is deducted as the deceased's own maintenance. This leaves £75K from which is deducted the partner's net income of £50K to give £25K which represents the family's dependency on the deceased and forms the multiplicand. If the deceased's partner earned more than him, the multiplicand is even smaller. For example: if the deceased's partner earned £100K net annually then the multiplicand would be only £12.5K ie $£150K - £37.5K = £112.5K - £100K = £12.5K$.

3.45 The approach taken in *Brown v Ferguson* has met with judicial criticism. In *Weir v Robertson Group (Construction) Ltd*⁶⁶ the Lord Ordinary (Glennie) pointed out that the formula assumed that where both spouses were earning the deceased spouse would spend more on himself than if he was the sole earner: yet often this might not in fact be true. He opined -⁶⁷

"I have to confess to having had some difficulty in understanding the justification for the approach in *Brown v Ferguson*, at least in the ordinary case. Take the case of the deceased having earned, net of tax and national insurance contributions, say, £20,000 per annum. The assumption underlying the 75/25 split, which is considered appropriate in a case where there are children of the family, is that the deceased will have spent, approximately, a quarter of his net earnings, ie about £5,000, on himself. That is, presumably, because that is the amount which he chose to spend on himself. One cannot assume, without more, that he only spent this amount because that was all that was available. In such circumstances, if one now assumes that the wife takes a job and earns £5,000, why should one assume that the deceased will spend more

⁶⁴ *McManus' Executrix v Babcock Energy Ltd* 1999 SC 569.

⁶⁵ 1990 SLT 274.

⁶⁶ [2006] CSOH 107.

⁶⁷ *Ibid* at paras 23 and 24.

on himself, or that any less of the deceased's net earnings would have been available to the family? Much will depend, it seems to me, on whether the deceased's spending on himself is limited by the amount available for the needs or lifestyle of the family. In a case where, within limits, he will spend as much on himself as is available, I can see some logic for saying that as the wife's income increases, and with it the money available to (and the lifestyle enjoyed by) the family, the amount spent by the deceased upon himself may rise. But I fail to see why that should be an assumption. It may be that evidence would be required to assess into which category a case falls. It seems to me likely that a case such as the present, where the wife earns only a fraction of the deceased's earnings, will fall into the category where one should simply ignore the wife's earnings.

However, I am conscious that this is not the approach that has been followed in Scotland and I do not think that I, as an Outer House judge, should depart from the line of decisions to which I have been referred. I therefore propose to take the pursuer's [deceased's wife's] income into account in the way described by Lord Sutherland in *Brown v Ferguson*."

3.46 It seems to us that if relatives retain title to sue for patrimonial loss, the current rules for calculating loss of support where both parties were earning can no longer be governed by the *Brown v Ferguson* formula.

3.47 Damages for a widow's loss of support after the deceased would have retired, have been assessed as half the likely pension and an appropriate multiplier.⁶⁸ In the case where the deceased had been supporting a parent or sibling, the actual value of that support to the relative constitutes the multiplicand.

3.48 It is important to re-emphasise that a relative's right to seek damages for patrimonial loss is restricted to compensation for loss of support and loss of services. This is graphically illustrated by the decision of the First Division of the Inner House in *Mackintosh and Mann v Morrice*.⁶⁹ H and W were killed in a car crash. Before they died, they had transferred large sums to their daughters, the pursuers in the action. This had been done to avoid the incidence of inheritance tax when H and W died. The evidence suggested that their health was such that it was probable that the couple would have lived for seven years after the disposal and that inheritance tax would not therefore have been payable on the monies transferred. The accident took place before the seven years had expired. In their action, the daughters claimed sums representing the inheritance tax which had been paid but which would not have been due if their parents had not died prematurely in the car crash. Their claim as relatives of the deceased failed because under section 1(3) of the 1976 Act such a claim was restricted to any loss of support sustained by them as a result of their parents' deaths. A sum representing the diminution in the value of their parents' estate which the pursuers inherited as residuary legatees could not be regarded as support provided to them by their parents while they were alive. Their claim as their parents' executrices failed on the ground that executors can only recover patrimonial losses sustained by deceased persons during their lifetimes:⁷⁰ and since there was no liability to pay inheritance tax until they died, the loss to the parents' estates was sustained after they had died and therefore did not transmit to their executrices.

⁶⁸ *Beggs v Motherwell Bridge Fabricators Ltd* 1998 SLT 1215.

⁶⁹ [2006] CSIH 43.

⁷⁰ See above para 3.20.

3.49 To summarise. A relative has the right to seek compensation for the loss of the deceased's support and loss of his personal services.⁷¹ Where the deceased has not provided such support, there can be no claim for patrimonial loss. This means that in the case of the death of a baby or young child, the parents' claim is restricted to an award under section 1(4).⁷² Conversely, where the victim is a parent, his adult children are unable to sue for patrimonial loss unless the deceased had still been supporting them financially before he died.

3.50 There are also difficulties in calculating the amount of support the relatives received. The formulae used are hardly sophisticated. There are fewer difficulties when the deceased was the only breadwinner and his wife or partner looked after the home and the children. Where both parties earn, however, the position can be very unsatisfactory, particularly where the survivor earns considerably more than the deceased. In these circumstances, the formula may produce a relatively small dependency⁷³ yet the survivor may be facing heavy obligations which she had only entered in anticipation that she and the deceased would continue to enjoy two incomes. While these methods of calculating loss of support are technically not rules of law, they appear to be treated as such. We think that if the relative is to continue to have title to sue for patrimonial loss then the current formulae will have to be abandoned. Instead evidence would have to be brought of the actual impact of the deceased's death on the financial position of the pursuer. Put another way, we think that perceiving a relative's patrimonial loss solely in terms of loss of the deceased's financial support has become anachronistic in an age when both parties earn to fulfil the financial obligations that they have undertaken in order to afford their lifestyle together. Given the interdependency of a modern family's finances, one party may undertake obligations, for example the payment of a large loan for the purchase of a house only because the other party pays other outgoings such as the purchase of a motor car or the cost of a holiday. Consequently the deceased's spouse or civil partner or cohabitant may well sustain substantial economic loss as a result of the death even though the survivor was not being supported by the deceased in the traditional sense because she was also earning a substantial income.

3.51 Many of these difficulties would be removed if the deceased's executor were able to sue for loss of future earnings during the lost period.⁷⁴ In the case of the death of a child, for example, the child's estate would receive a substantial sum which the parents would normally inherit. In the case of the two income family, the deceased's estate would generally recover more than the deceased's partner would in a claim for loss of support from the deceased. In addition, if the executor could sue for all losses to the estate arising from the wrongful death, such as a diminution in the value of the estate due to frustrated tax planning, the estate would receive damages for losses which are currently not reparable. On the assumption that the relatives' right to sue for patrimonial loss continues⁷⁵ -

⁷¹ For example cooking, cleaning and DIY.

⁷² Discussed below paras 3.56 et seq.

⁷³ As Lord Grieve observed in *Mitchell v Gartshore* 1976 SLT (Notes) 41 at 42 "the loss of jam on the family bread and butter does not give rise to what can currently be termed a claim for loss of support".

⁷⁴ Cf the position in America and in particular the states of Texas, Washington and Pennsylvania. See Appendix D, p 70 below.

⁷⁵ See above para 3.39 et seq.

9. Should the pursuer be able to recover damages for the patrimonial loss actually sustained by her as a consequence of the deceased's death and not simply the loss of the deceased's financial support?

3.52 In all these cases, the multiplier runs from the *date of death* not the date of the proof.⁷⁶ Consider the following example. A was killed when he was 55. The proof takes place 5 years later. The multiplier takes into account the possibility that the deceased might have died from another cause. If the relative receives damages for the full loss of support incurred over the previous five years, he would be marginally overcompensated as damages would have been awarded without taking into account that the deceased might have died during that period. In these circumstances, we are not convinced that there is any need to change the current rule. We therefore ask -

10. On the assumption that such claims are to be retained should the multiplier continue to run from the date of the deceased's death?

3.53 From the relative's perspective, the law takes a very generous approach to the deduction of collateral benefits obtained by the relative as a consequence of the deceased's death. Section 1(5) of the Damages (Scotland) Act 1976 provides -

"(5)...in assessing for the purposes of this section the amount of any loss of support suffered by a relative of a deceased no account shall be taken of -

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

(b) any insurance money, benefit, pension or gratuity which has been, or will be or may be, paid as a result of the deceased's death;..."⁷⁷

3.54 In *Campbell v Gillespie*⁷⁸ for example, the court held that no account was to be taken of the pursuer's pension not only in respect of her claim for loss of support out of the deceased's future earnings but also out of his future pension. This provision reflects the common law position where, for example, proceeds from the deceased's life policies were not taken into account so that thrift would not be discouraged. However, where the deceased has been awarded provisional damages, such part of the award relating to future patrimonial loss as was intended to compensate the deceased for a period beyond the date on which he died, is to be taken into account in assessing the relative's loss of support.⁷⁹

3.55 We are not aware that sections 1(5) and (5A) have given cause for concern. However, it has been pointed out to us that section 10 of the Administration of Justice Act 1982 makes similar provisions in respect of claims for damages brought by a person who has sustained personal injuries. Section 10 is as follows -

⁷⁶ In an action for damages for personal injuries brought by the victim, the multiplier for loss of future earnings runs from the date of the proof.

⁷⁷ Section 1(5) goes on to provide that benefit means benefit under the Social Security Act 1975 or the Social Security (Northern Ireland) Act 1975 and any payment by a friendly society or trade union for the relief or maintenance: 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.

⁷⁸ 1996 SLT 503. See also *Bews v Scottish Hydro Electricity plc* 1992 SLT 749.

⁷⁹ Damages (Scotland) Act 1976, s 1(5A).

"Subject to any agreement to the contrary, in assessing the amount of damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount -

- (a) any contractual pension or benefit (including any payment by a friendly society or trade union);
- (b) any pension or retirement benefit payable from public funds other than any pension or benefit to which section 2(1) of the Law Reform (Personal Injuries) Act 1948 applies;
- (c) any benefit payable from public funds, in respect of any period after the date of the award of damages, designed to secure to the injured person or any relative of his a minimum level of subsistence;
- (d) any redundancy payment under the Employment Rights Act 1996, or any payment made in circumstances corresponding to those in which a right to a redundancy payment would have accrued if section 135 of that Act had applied;
- (e) any payment made to the injured person or to any relative of his by the injured person's employer following upon the injuries in question where the recipient is under an obligation to reimburse the employer in the event of damages being recovered in respect of those injuries;
- (f) subject to paragraph (iv) below, any payment of a benevolent character made to the injured person or to any relative of his by any person following upon the injuries in question;

but there shall be taken into account –

- (i) any remuneration or earnings from employment;
- (ii) any contribution-based jobseeker's allowance (payable under the Jobseekers Act 1995);
- (iii) any benefit referred to in paragraph (c) above payable in respect of any period prior to the date of the award of damages;
- (iv) any payment of a benevolent character made to the injured person or to any relative of his by the responsible person following on the injuries in question, where such a payment is made directly and not through a trust or other fund from which the injured person or his relatives have benefited or may benefit."

These deductions are relevant to claims under section 9(2) of the Administration of Justice Act 1982 in respect of loss to the pursuer of a deceased relative's personal services. In practice, for the purpose of deductions such a claim is treated as though it was subject to sections 1(5) and (5A) of the Damages (Scotland) Act 1976 rather than section 10. Since the substantive effect of the two sections is almost identical we think that it would be sensible if section 9(2) claims should expressly be made subject to the deduction regime provided in the 1976 Act. Accordingly we ask -

11. Should a claim for damages for the loss of a deceased relative's personal services be subject to the same regime on deductions from damages as claims under the Damages (Scotland) Act 1976?

[4] *The relatives' right to damages - non-patrimonial loss*

3.56 Section 1(4) of the Damages (Scotland) Act 1976 provides -

"(4) ... if the relative is a member of the deceased's immediate family...there shall be awarded, without prejudice to any claim under subsection (3) above, such sum of damages, if any, as the court thinks just by way of compensation for all or any of the following -

(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,

and the court in making an award under this subsection shall not be required to ascribe specifically any part of the award to any of paragraphs (a), (b) and (c) above."

3.57 The deceased's "immediate family" consists of the deceased's spouse or civil partner, the deceased's opposite sex or same sex cohabitant, a parent or child of the deceased, a person who had accepted the deceased as a child of his family or whom the deceased had accepted as a child of his family and any person who was a brother, sister, grandparent or grandchild of the deceased: brother and sister include persons who were brought up in the same household as and who were accepted as a child of the family in which the deceased was a child.⁸⁰ It should be pointed out that while being a member of the deceased's immediate family is a necessary condition for an award under section 1(4) it is not sufficient. The purpose of section 1(4) is to award damages to those members of the deceased's immediate family who have *in fact* suffered grief and sorrow as a result of the deceased's death. For example, siblings are members of the deceased's immediate family. It is thought that a section 1(4) award would be justified in the case of the deceased's sister with whom he had shared a house all his life: but it is our view that a section 1(4) award should not be made to his brother who had emigrated to Canada twenty years ago and with whom he had had little contact. Similarly, an award might be refused to an adult child who had ignored his mother for many years before she died but would be awarded to the woman whom the deceased had accepted as a child of her family and who had looked after the deceased before she died. That said, it is rare that a claim under section 1(4) is disputed on the ground that there was in fact no affective relationship between the pursuer and the deceased. In practice it is almost impossible to do so. This is because not only is it morally distasteful to make such arguments to the court but it is also extremely difficult for the defender to obtain the requisite evidence. There have been extreme situations where the point has been taken: for example, where a daughter sought section 1(4) damages in respect of the death of her father who had been convicted of sexually abusing her as a child.

⁸⁰ Damages (Scotland) Act 1976 ss 1(4), (4A), (4B), 10(2) and Schedule 1. For further discussion see below para 3.68 et seq.

It also appears that there is a certain degree of self restraint amongst relatives in instituting proceedings where they did not in fact have a close affective relationship with deceased.

3.58 Although the court is not obliged to ascribe specifically any part of the award to any of the paragraphs (a), (b) or (c) in section 1(4), it is recognised that the maximum level of awards is likely to contain all three elements.⁸¹ There can be no damages under (a) if in fact the deceased did not suffer because the death was instantaneous or he was unconscious during the period before he died.⁸² In relation to (b), its purpose is to provide damages for the relative's "grief and sorrow" caused by the deceased's death. It is submitted that these are the emotions ordinarily experienced as a consequence of the death of a loved one.⁸³ Accordingly, where the pursuer suffers a mental illness as a result of the death, that illness - and any derivative economic loss - is not reparable under section 1(4).⁸⁴ Instead the pursuer will have to establish that the defender owed her a duty of care - independent from that owed to the deceased - to prevent the pursuer sustaining mental harm: this would only occur if the pursuer was a primary victim of the defender's wrongful conduct or the *Alcock* criteria were established.⁸⁵ As to (c), here we are concerned with the loss of the intangible benefits of the deceased's society.

3.59 It will be obvious that section 1(4) awards are difficult - if not impossible - to quantify. It is not surprising that in these circumstances, while still purporting to use the language of compensation, the courts in effect have created tariffs in respect of particular relationships, for example parent and a deceased young child,⁸⁶ parent and deceased older child,⁸⁷ adult child and deceased parent⁸⁸ and young child and deceased parent etc. In *Cruickshank v Fairfield Rowan Ltd*⁸⁹ the Lord Ordinary (Brodie) confessed "...to some difficulty with the notion that it is possible to discern in the circumstances of one family, bonds of affection that are stronger or a degree of emotional investment in the future of a child that is more profound, than in the circumstances of another family, and so find the circumstances in the one case to be very special and in the other case not." In *Murray's Executrix v Greenock Dockyard*⁹⁰ Lord President Cullen maintained that the court should not make comparisons in the degree of love and affection between the spouses in one case as opposed to another.

3.60 The point is that the measure of damages under section 1(4) is prima facie an issue for a jury.⁹¹ Before section 1(4) was amended by the Damages (Scotland) Act 1993, the amounts awarded were relatively small. It was judicially recognised that these awards had fallen behind the general level of damages for personal injuries⁹² and juries began to make

⁸¹ *McLean v William Denny & Bros Ltd* 2004 SC 656.

⁸² *Ross v Pryde* 2004 Rep LR 129.

⁸³ *Ibid.*

⁸⁴ *Ibid.* Cf *Gillies v Lynch* 2003 SCLR 467 where the Lord Ordinary (Macfadyen) allowed evidence of the pursuer's psychiatric disorder to demonstrate the extent of her grief and sorrow.

⁸⁵ *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

⁸⁶ *Shaher v British Aerospace Flying College Ltd* 2003 SC 540.

⁸⁷ *Cruickshank v Fairfield Rowan Ltd* 2005 SLT 462.

⁸⁸ *Murray's Executrix v Greenock Dockyard Co Ltd* 2004 SLT 346.

⁸⁹ 2005 SLT 462 at 466, [2005] CSOH 1.

⁹⁰ 2004 SLT 346.

⁹¹ In an action for damages for personal injuries and damages in respect of death caused by personal injuries prima facie the pursuer is entitled to a jury trial. The jury determines not only whether the defender is liable but also the amount of damages which should be paid. It is open to the defender to argue that the case raises difficulties which makes it unsuitable for jury trial: if successful, there will be a proof before a judge. The awards of damages made by juries have traditionally been more generous than those made by judges.

⁹² *McManus' Executrix v Babcock Energy Ltd* 1999 SC 569; *Murray's Executrix v Greenock Dockyard* 2004 SLT 346.

substantially greater awards.⁹³ Taking account of jury awards, the judges in turn increased the amount of damages. In *Shaher v British Aerospace Flying College Ltd*⁹⁴ for example, the Lord Ordinary awarded £35K to each parent of a young man who had been killed: this was subsequently reduced by the Inner House to £20K to each parent. In *McLean v William Denny & Bros Ltd*⁹⁵ it was recognised that there was no coherent pattern in the awards made by juries and judges but that at the end of the day the amount of damages had to be "just". In that case, the Inner House held that in the absence of special circumstances a widow who had had a long and happy marriage with the deceased should be awarded damages in the region of £25K. In the course of his judgment Lord President Cullen observed -⁹⁶

"It may well be that as the years have passed, public expectations as to the value of claims has substantially increased. An increase in the standard of living may be relevant to this. So also may be public awareness of high figures for prices, earnings and other financial indicators. However, the extent to which this may affect the value attached to the loss of society of a deceased relative is a matter for speculation."

Nevertheless, the amounts awarded in *McLean* have been regarded as "pointers" to the size of awards under section 1(4).⁹⁷

3.61 What is clear is that awards under section 1(4) are no longer insignificant.⁹⁸ Even taking account of inflation, they are on average about 5 times higher than the traditional awards of *solatium* at common law. Yet at £20K-£35K for the death of a spouse and £10K-£20K for the death of a parent, they are still perceived as small⁹⁹ even though it should always be remembered that these awards are *additional* to a relative's claim for loss of the deceased's support.

[5] *Should we continue to have section 1(4) awards?*

3.62 In its *Memorandum on Damages for Injuries Causing Death*,¹⁰⁰ this Commission took the view¹⁰¹ that "[T]he idea that relatives should be permitted to claim money compensation for injury to their feelings arising out of the loss of a person near and dear to them is, we hope, repugnant to most people...". The Commission believed that reparation for grief and suffering should be replaced by reparation for loss of the deceased's society and the intangible benefits the deceased brought to his family. This became the legal basis for the original section 1(4) award. In turn, this provision proved to be unsatisfactory and was amended to make it clear that reparation for the pursuer's distress and anxiety when contemplating the deceased's suffering before he died and the pursuer's grief and sorrow arising from the death were to be included in a section 1(4) award. Yet how is such

⁹³ See for example *Wells v Hay* 1999 Rep LR 44 (£40K to single mother for 19 year old son).

⁹⁴ 2003 SC 540.

⁹⁵ 2004 SC 656.

⁹⁶ *Ibid* at 664.

⁹⁷ See for example *Ryan v Fairfield* 2004 Rep LR 138 per the Lord Ordinary (Drummond Young) at 141; (£28K to widow).

⁹⁸ See Appendix C, p 58 for some recent examples.

⁹⁹ "Even recently, the sums have been between £20,000 to £28,000 to a widow; from £5,000 to £10,000 to an adult child; and from £3,000 to £10,000 to an elderly parent who loses an adult son. That is really not a lot of money. Even the money for a widow does not match the average annual salary." Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill, Stage 1 debate, per Carolyn Leckie MSP, Official Report, col 31767 (1 February 2007).

¹⁰⁰ Memorandum No 5 (1968).

¹⁰¹ *Ibid* at 21.

reparation to be calculated? As we have seen,¹⁰² the courts have been understandably reluctant to engage in a detailed examination of the pursuer's relationship with the deceased and award less, if any, damages in those cases where the parties' relationship was not as close as might be expected in a "normal" family. Instead, while using the language of compensation the courts are in effect laying down tariffs for particular relationships. Inevitably, the sums awarded will be criticised as too low. This is particularly the case in relation to the death of a child or young person where a parent's section 1(4) award may be in the region of £10K-£15K and there is no award for patrimonial loss as the child was not supporting the parents.

3.63 There is no doubt that the current section 1(4) awards are problematic. It can be forcefully argued that they are an attempt to provide compensation for something that cannot be quantified *viz* the suffering caused by the wrongful death of a relative and the loss of their love and companionship. Such harm, it is argued, is irreparable. What price can be put on the death of a new born baby, a toddler, a spouse or civil partner, a mother or father or grandparent? To seek compensation in such cases is as futile as it is distasteful. Moreover, as the deceased is the primary victim, section 1(4) is anomalous in that it goes against the fundamental principle of non-recovery for secondary harm ie harm sustained by A as a consequence of wrongful harm to B. Thus if a child is seriously injured but does not die, her parents do not recover damages for their distress and anxiety: but the *child* will recover *solatium* for her pain and suffering and damages for patrimonial loss. What the law can do - albeit imperfectly - is provide reparation for patrimonial loss. If an executor could recover the full patrimonial loss sustained by the deceased's premature death - in particular income that would have been received during the lost period - then it can be argued that a section 1(4) claim is unnecessary. The damages obtained by the executor would become part of the deceased's estate and would be inherited either by the beneficiaries he has chosen in his will or his family under the rules of testate or intestate succession. Thus for example the parents of a young child who was wrongfully killed would receive through intestate succession the substantial damages that the executor would obtain for loss of the child's potential income. It would no longer be necessary for relatives to go through upsetting and potentially demeaning proceedings in order to establish that their relationship with the deceased was sufficiently close to obtain damages under section 1(4) which if the relationship was deeply affective are evidently inadequate and if the relationship was not truly affective are a distasteful windfall.

3.64 On the other hand, it can be argued that the right of the deceased's relatives to sue under section 1(4) for non-patrimonial loss has an important symbolic function. It recognises that a death arising from personal injuries is not merely a wrong against the deceased but also a wrong against those who have been closest to him. It is the family's sense of outrage that they have lost a loved one in this way that justifies the section 1(4) claims. There is little doubt that the public perceives section 1(4) in this way ie the damages are seen as marking the family's outrage that their relative has been wrongfully killed. If that is a legitimate rationale for the provision, the question then arises whether we should abandon the idea that such an award is compensation for non-patrimonial loss. If its function is largely symbolic, should it not take the form of a conventional non-compensatory award ie a tariff?¹⁰³ Thus for example if a parent died the defender could be ordered to pay a fixed sum to the deceased's

¹⁰² Above para 3.59.

¹⁰³ As has been developed by the courts in respect of wrongful conceptions; see *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309.

surviving spouse or civil partner or cohabitant and a fixed sum to be divided between his children. The amount of the fixed sums would be determined by Scottish Ministers and could be altered by them from time to time.¹⁰⁴

3.65 There are difficulties with a tariff system. Unless we were further to restrict those who make up the deceased's immediate family, it would be an onerous and difficult task to determine the appropriate tariffs for the different categories of relatives. There is also the danger that the level of awards may ossify even if they could be altered from time to time by Scottish Ministers. Finally, even if a tariff system were adopted it seems desirable that the court should retain some degree of discretion to reduce or, indeed, decline to make an award when the relationship between the pursuer and the deceased had been manifestly dysfunctional. Conversely, there should equally be discretion to increase the award where this was merited by the exceptional facts of the case; for example it seems unfair that the sibling of the deceased who had lived with him in the same household for many years should be awarded the same rigid tariff as the deceased's other siblings who had had no communications with him for many years. But if this last point is accepted, it undermines the whole rationale of a tariff system.

3.66 The arguments for the abolition of the right of the deceased's immediate family to sue for non-patrimonial loss have been rehearsed. In our opinion they carry weight. Nevertheless it is our preliminary view that the right retains an important symbolic function. For the reasons discussed above, we do not think that a tariff system should be introduced into Scots law. The difficulties arising from the idea that the function of section 1(4) is compensatory appear to be more theoretical than practical. The system seems to work reasonably well largely because relatives with title to sue do not do so if in fact they did not have an affective relationship with the deceased. In settling claims both sides negotiate on the basis of generally accepted benchmarks and litigation is avoided. In spite of the increases in awards over recent years, it is still argued that the benchmark is too low.¹⁰⁵ That said, the courts and juries seem much more aware of the public's perception of such awards and this may ensure that the amount of those awards do not ossify.

3.67 We have found these issues particularly difficult and seek views on the following -

- 12. Does the current system whereby the deceased's immediate family can seek damages under section 1(4) of the Damages (Scotland) Act 1976 for non-patrimonial loss operate satisfactorily?**
- 13. Should the deceased's immediate family's title to sue for non-patrimonial loss be abolished?**
- 14. Should the deceased's immediate family's title to sue for non-patrimonial loss be abolished if the executor had title to sue for future patrimonial loss to the deceased's estate arising from his death?**
- 15. If a section 1(4) claim should continue should it be replaced by a conventional non-compensatory award?**

¹⁰⁴ Cf the position in England, Canada and South Australia. See Appendix D, pp 61, 71 and 81 below.

¹⁰⁵ See for example the views expressed at footnote 99 above.

[6] *The relatives' right to damages - title to sue for patrimonial loss*

3.68 For the purpose of a claim for damages for loss of support, Schedule 1 to the Damages (Scotland) Act 1976 provides that the deceased's relatives include; (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) grandparent or grandchild of the deceased; (viii) the deceased's further ascendants and descendants; (ix) the deceased's uncle, aunt, niece, nephew and cousin; (xii) the deceased's former spouse or former civil partner. Any relationship by affinity is treated as a relationship of consanguinity; any relationship of the half blood is treated as a relationship of the whole blood; and the step child of any person is treated as his child.

3.69 However, for the purpose of a claim for non-patrimonial loss under section 1(4) the deceased's immediate family consists only of the deceased's relatives in categories (i) to (vii): here relationships of affinity are not treated as relationships of consanguinity and the stepchild of a person is not treated as his child.¹⁰⁶ This definition of immediate family was enacted by section 35 of the Family Law (Scotland) Act 2006.¹⁰⁷ But it seems to us that the definition of immediate family is now sufficiently wide to cover all those cases where a relative of the deceased is likely to sustain loss of support on his death. In particular, given the law on financial provision on divorce and dissolution of civil partnerships with its emphasis on a clean financial break, we do not see why the deceased's former spouse or civil partner should continue to have title to sue.

3.70 It might be argued that since the other relatives have only title to sue for patrimonial loss and the pursuer must establish loss of support, there is no need to refer in the legislation to the deceased's relatives at all: instead anyone whom the deceased had been supporting before he died should have title to sue for loss of support. The difficulty with this approach is that it could open claims where the pursuer's financial dependence arose from a business rather than a domestic relationship with the deceased.¹⁰⁸ We do not want to extend potential liability for secondary economic loss in this way.

3.71 It is therefore our preliminary view that only immediate relatives should have title to sue for patrimonial loss (ie loss of support).¹⁰⁹ Accordingly we ask -

16. On the assumption that their right to claim damages for patrimonial loss is to be retained, should title to sue be restricted to the relatives (as defined in Schedule 1 to the 1976 Act) who now constitute the deceased's immediate family?

¹⁰⁶ Damages (Scotland) Act 1976 s 1(4A) and (4B).

¹⁰⁷ Section 35 inserted a new section 1(4A) into the Damages (Scotland) Act 1976, which provides that "...no award of damages under subsection (4) above shall be made to a person related by affinity to the deceased." In connection with a possible ambiguity in that provision, see Kenneth Norrie, "*Rushed law and wrongful death*" *Journal of the Law Society of Scotland*, (April 2006), p 24.

¹⁰⁸ See for example, *Reavis v Clan Line Steamers Ltd* 1925 SC 725.

¹⁰⁹ Cf the position in France and Germany. See Appendix D, pp 75-78 below.

Part 4 List of questions for consultees

We would welcome views on the following questions.

1. Should a victim continue to receive damages for loss of expectation of life as part of an award of *solatium* only if he is aware or is likely to become aware that his life will end prematurely?

(Paragraph 3.9)

2. Should a victim continue to be able to claim future patrimonial loss for the periods between (i) the date of decree and the date when the victim is expected to die and (ii) from the date when the victim is expected to die and the notional date of death ie the lost period?

(Paragraph 3.16)

3. For the purposes of the lost period only, (i) should income include income from third parties as well as the victim's earnings and (ii) should a deduction be made for the victim's reasonable living expenses?

(Paragraph 3.16)

4. (a) Should a claim under section 8 of the Administration of Justice Act 1982 continue to exclude the lost period?

(b) Should a claim under section 9 of the Administration of Justice Act 1982 include the lost period?

(Paragraph 3.17)

5. (a) Should an executor be able to sue for the damages which the deceased could have recovered in respect of patrimonial loss sustained during the lost period?

(b) If so, should a relative's right to recover damages for loss of support (patrimonial loss) be abolished?

(c) If so, where a relative would suffer serious financial hardship from the loss of the deceased's support, should he have the right to seek a capital sum payment from the deceased's executor to relieve him of such hardship?

(Paragraph 3.24)

6. Should the executor of a deceased person who has been wrongfully killed outright continue to have no title to sue on behalf of the deceased's estate for future patrimonial loss?

(Paragraph 3.27)

7. Should the right to sue on the death of a relative continue to be a dependent right in the sense that a relative cannot sue unless the responsible person would have been liable to the deceased if he had sought damages for personal injuries before he had died?

(Paragraph 3.31)

8. (a) Because of the dependent nature of the relative's claim, should it continue to be extinguished if before he died the deceased had discharged the responsible person's liability to him or his executor?

(b) If so, should there be an exception to the general rule allowing a relative's claim for non-patrimonial loss, if the deceased dies within three years of the beginning of the limitation period in respect of his claim against the responsible person whose liability he discharged during that period?

(c) Should the period be three years or should it be longer, for example five years?

(Paragraph 3.37)

9. Should the pursuer be able to recover damages for all the patrimonial loss actually sustained by her as a consequence of the deceased's death and not simply the loss of the deceased's financial support?

(Paragraph 3.51)

10. On the assumption that such claims are to be retained should the multiplier continue to run from the date of the deceased's death?

(Paragraph 3.52)

11. Should a claim for damages for the loss of a deceased relative's personal services be subject to the same regime on deductions from damages as claims under the Damages (Scotland) Act 1976?

(Paragraph 3.55)

12. Does the current system whereby the deceased's immediate family can seek damages under section 1(4) of the Damages (Scotland) Act 1976 for non-patrimonial loss operate satisfactorily?

(Paragraph 3.67)

13. Should the deceased's immediate family's title to sue for non-patrimonial loss be abolished?

(Paragraph 3.67)

14. Should the deceased's immediate family's title to sue for non-patrimonial loss be abolished if the executor had title to sue for future patrimonial loss to the deceased's estate arising from his death?

(Paragraph 3.67)

15. If a section 1(4) claim should continue should it be replaced by a conventional non-compensatory award?

(Paragraph 3.67)

16. On the assumption that their right to claim damages for patrimonial loss is to be retained, should title to sue be restricted to the relatives (as defined in Schedule 1 to the 1976 Act) who now constitute the deceased's immediate family?

(Paragraph 3.71)

Appendix A

Damages (Scotland) Act 1976¹

An Act to amend the law of Scotland relating to the damages recoverable in respect of deaths caused by personal injuries; to define the rights to damages in respect of personal injuries and death which are transmitted to an executor; to abolish rights to assythment; to make provision relating to the damages due to a pursuer for patrimonial loss caused by personal injuries whereby his expectation of life is diminished; and for purposes connected with the matters aforesaid.

[13th April 1976]

1. (1) Where a person dies in consequence of personal injuries sustained by him as a result of an act or omission of another person, being an act or omission giving rise to liability to pay damages to the injured person or his executor, then, subject to the following provisions of this Act, the person liable to pay those damages (in this section referred to as "the responsible person") shall also be liable to pay damages in accordance with this section to any relative of the deceased, being a relative within the meaning of Schedule 1 to this Act.

(2) Except as set out in subsection (2A) below, no liability shall arise under this section if the liability to the deceased or his executor in respect of the act or omission has been excluded or discharged (whether by antecedent agreement or otherwise) by the deceased before his death, or is excluded by virtue of any enactment.

(2A) Where subsection (2B) below applies –

- (a) liability arises under this section even though the liability to the deceased or the deceased's executor mentioned in subsection (2) above has been discharged as mentioned in that subsection; but
- (b) that liability is limited to the payment of such sum of damages as is awarded under subsection (4) below.

(2B) This subsection applies where –

- (a) the personal injury in consequence of which the deceased died is mesothelioma; and
- (b) the discharge of liability and the death each occurred on or after 20 December 2006 (and whether before, on or after the date on which section 1 of the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 (asp 18) came into force).

¹ This Appendix sets out the provisions of the Damages (Scotland) Act 1976 as amended to the date of publication of the Discussion Paper.

(3) The damages which the responsible person shall be liable to pay to a relative of a deceased under this section shall (subject to the provisions of this Act) be such as will compensate the relative for any loss of support suffered by him since the date of the deceased's death or likely to be suffered by him as a result of the act or omission in question, together with any reasonable expense incurred by him in connection with the deceased's funeral.

(4) Subject to subsection (4A), if the relative is a member of the deceased's immediate family (within the meaning of section 10(2) of this Act) there shall be awarded, without prejudice to any claim under subsection (3) above, such sum of damages, if any, as the court thinks just by way of compensation for all or any of the following -

- (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,

and the court in making an award under this subsection shall not be required to ascribe specifically any part of the award to any of paragraphs (a), (b) and (c) above.

(4A) Notwithstanding section 10(2) of, and Schedule 1 to, this Act, no award of damages under subsection (4) above shall be made to a person related by affinity to the deceased.

(4B) In subsection (4A), a "person related by affinity to the deceased" includes –

- (a) a stepchild, step-parent, stepbrother or stepsister of the deceased; and
- (b) any person who was an ascendant or descendant of any of the step-relatives mentioned in paragraph (a).

(5) Subject to subsection (5A) below, in assessing for the purposes of this section the amount of any loss of support suffered by a relative of a deceased no account shall be taken of -

- (a) any patrimonial gain or advantage which has accrued or will or may accrue to the relative from the deceased or from any other person by way of succession or settlement;
- (b) any insurance money, benefit, pension or gratuity which has been, or will be or may be, paid as a result of the deceased's death;

and in this subsection –

"benefit" means benefit under the Social Security Act 1975 or the Social Security (Northern Ireland) Act 1975, 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.

(5A) Where a deceased has been awarded a provisional award of damages under section 12(2) of the Administration of Justice Act 1982, the making of that award does not prevent liability from arising under this section but in assessing for the purposes of this section the amount of any loss of support suffered by a relative of the deceased the court shall take into account such part of the provisional award relating to future patrimonial loss as was intended to compensate the deceased for a period beyond the date on which he died.

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

(7) Except as provided in this section or in Part II of the Administration of Justice Act 1982 or under regulation 3 of the Railways (Convention on International Carriage by Rail) Regulations 2005 no person shall be entitled by reason of relationship to damages (including damages by way of solatium) in respect of the death of another person.

1A. Any right to damages under any provision of section 1 of this Act which is vested in the relative concerned immediately before his death shall be transmitted to the relative's executor; but, in determining the amount of damages payable to an executor by virtue of this section, the court shall have regard only to the period ending immediately before the relative's death.

2. (1) Subject to the following provisions of this section, there shall be transmitted to the executor of a deceased person the like rights to damages in respect of personal injuries (including a right to damages by way of solatium) sustained by the deceased as were vested in him immediately before his death.

(2) There shall not be transmitted to the executor under this section a right to damages by way of compensation for patrimonial loss attributable to any period after the deceased's death.

(3) In determining the amount of damages by way of solatium payable to an executor by virtue of this section, the court shall have regard only to the period ending immediately before the deceased's death.

(4) In so far as a right to damages vested in the deceased comprised a right to damages (other than for patrimonial loss) in respect of injury resulting from defamation or any other verbal injury or other injury to reputation sustained by the deceased, that right shall be transmitted to the deceased's executor only if an action to enforce that right had been brought by the deceased before his death and had not been concluded by them within the meaning of section 2A(2) of this Act.

2A. (1) for the purpose of enforcing any right transmitted to an executor under section 1A or 2 of this Act the executor shall be entitled –

- (a) to bring an action; or
 - (b) if an action for that purpose had been brought by the deceased but had not been concluded before his death, to be sisted as pursuer in that action.
- (2) For the purpose of subsection (1) above, an action shall not be taken to be concluded while any appeal is competent or before any appeal taken has been disposed of.

3.[repealed by the Damages (Scotland) Act 1993]

4. A claim by the executor of a deceased person for damages under section 2 of this Act is not excluded by the making of a claim by a relative of the deceased for damages under section 1 of this Act; or by a deceased relative's executor under section 1A of this Act; nor is a claim by a relative of a deceased person or by a deceased relative's executor for damages under the said section 1 or (as the case may be) the said section 1A excluded by the making of a claim by the deceased's executor for damages under the said section 2.

5.[repealed by the Administration of Justice Act 1982]

6. (1) Where in any action to which this section applies, so far as directed against any defender, it is shown that by antecedent agreement, compromise or otherwise, the liability arising in relation to that defender from the personal injuries in question had, before the deceased's death, been limited to damages of a specified or ascertainable amount, or where that liability is so limited by virtue of any enactment, nothing in this Act shall make the defender liable to pay damages exceeding that amount; and accordingly where in such an action there are two or more pursuers any damages to which they would respectively be entitled under this Act apart from the said limitation shall, if necessary, be reduced *pro rata*.

(2) Where two or more such actions are conjoined, the conjoined actions shall be treated for the purposes of this section as if they were a single action.

(3) This section applies to any action in which, following the death of any person from personal injuries, damages are claimed –

- (a) by the executor of the deceased, in respect of the injuries from which the deceased died;
- (b) in respect of the death of the deceased, by any relative of his or, if the relative has died, by the relative's executor.

7. In any Act passed before this Act, unless the context otherwise requires, any reference to solatium in respect of the death of any person (however expressed) shall be construed as a reference to a loss of society award within the meaning of section 1 of this Act; and any reference to a dependant of a deceased person, in relation to an action claiming damages in respect of the deceased person's death, shall be construed as including a reference to a relative of the deceased person within the meaning of this Act.

8. After the commencement of this Act no person shall in any circumstances have a right to assythment, and accordingly any action claiming that remedy shall (to the extent that it does so) be incompetent.

9. (1) This section applies to any action for damages in respect of personal injuries sustained by the pursuer where his expected date of death is earlier than it would have been if he had not sustained the injuries.

(2) In assessing, in any action to which this section applies, the amount of any patrimonial loss in respect of the period after the date of decree -

- (a) it shall be assumed that the pursuer will live until the date when he would have been expected to die if he had not sustained the injuries (hereinafter referred to as the "notional date of death");
- (b) the court may have regard to any amount, whether or not it is an amount related to earning by the pursuer's own labour or other gainful activity, which in its opinion the pursuer, if he had not sustained the injuries in question, would have received in the period up to his notional date of death by way of benefits in money or money's worth, being benefits derived from sources other than the pursuer's own estate;
- (c) the court shall have regard to any diminution of any such amount as aforesaid by virtue of expenses which in the opinion of the court the pursuer, if he had not sustained the inquiries in question, would reasonably have incurred in the said period by way of living expenses.

9A. (1) In assessing, in an action for damages in respect of personal injuries, the amount of damages by way of solatium, the court shall, if –

- (a) the injured person's expectation of life has been reduced by the injuries; and
- (b) the injured person is, was at any time or is likely to become, aware of that reduction,

have regard to the extent that, in consequence of that awareness, he has suffered or is likely to suffer.

(2) Subject to subsection (1) above, no damages by way of solatium shall be recoverable in respect of loss of expectation of life.

(3) The court in making an award of damages by way of solatium shall not be required to ascribe specifically any part of the award to loss of expectation of life.

10. (1) In this Act, unless the context otherwise requires –

.....[definition of "loss of society award" repealed by the Damages (Scotland) Act 1993]

"personal injuries" includes any disease or any impairment of a person's physical or mental condition and injury resulting from defamation or any other verbal injury or

other injury to reputation, or injury resulting from harassment actionable under section 8 of the Protection from Harassment Act 1997;

"relative", in relation to a deceased person, has the meaning assigned to it by Schedule 1 to this Act.

(2) References in this Act to a member of a deceased person's immediate family are references to any relative of his who falls within any of sub-paragraphs (a) to (cc) of paragraph 1 of Schedule 1 to this Act.

(3) References in this Act to any other Act are references to that Act as amended, extended or applied by any other enactment, including this Act.

11.[repealed by the Damages (Scotland) Act 1993]

12. (1) This Act may be cited as the Damages (Scotland) Act 1976.

(2) This Act binds the Crown.

(3)[repealed by the Damages (Scotland) Act 1993]

(4)[repealed by the Damages (Scotland) Act 1993]

(5) This Act extends to Scotland only.

SCHEDULE 1

Section 1

DEFINITION OF "RELATIVE"

1. In this Act "relative" in relation to a deceased person includes -

(a) any person who immediately before the deceased's death was the spouse or civil partner of the deceased;

(aa) any person, not being the spouse or civil partner of the deceased, who was, immediately before the deceased's death, living with the deceased as husband or wife or in a relationship which had the characteristics of the relationship between civil partners;

(b) any person who was a parent or child of the deceased;

(c) any person not falling within sub-paragraph (b) above who was accepted by the deceased as a child of his family;

(ca) any person not falling within sub-paragraph (b) above who accepted the deceased as a child of the person's family;

(cb) any person who –

- (i) was the brother or sister of the deceased; or
 - (ii) was brought up in the same household as the deceased and who was accepted as a child of the family in which the deceased was a child;
- (cc) any person who was a grandparent or grandchild of the deceased;
- (d) any person not falling within sub-paragraph (b) or (cc) above who was an ascendant or descendant of the deceased;
- (e) any person not falling within sub-paragraph (cb)(i) above who was, or was the issue of, a brother, sister, uncle or aunt of the deceased;
- (f) any person who, having been a spouse of the deceased, had ceased to be so by virtue of a divorce; and
- (g) any person who, having been a civil partner of the deceased, had ceased to be so by virtue of the dissolution of the civil partnership.

But does not include any other person.

2. In deducing any relationship for the purposes of the foregoing paragraph -

- (a) any relationship by affinity shall be treated as a relationship by consanguinity; any relationship of the half blood shall be treated as a relationship of the whole blood; and the stepchild of any person shall be treated as his child; and
- (b) section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 shall apply; and any reference (however expressed) in this Act to a relative shall be construed accordingly.

Appendix B

Administration of Justice Act 1982¹

PART II

DAMAGES FOR PERSONAL INJURIES ETC – SCOTLAND

7. Where a person (in this Part of this Act referred to as "the injured person") -

- (a) has sustained personal injuries, or
- (b) has died in consequence of personal injuries sustained,

as a result of an act or omission of another person giving rise to liability in any person (in this Part of this Act referred to as "the responsible person") to pay damages, the responsible person shall also be liable to pay damages in accordance with the provisions of sections 8 and 9 of this Act.

8. (1) Where necessary services have been rendered to the injured person by a relative in consequence of the injuries in question, then, unless the relative has expressly agreed in the knowledge that an action for damages has been raised or is in contemplation that no payment should be made in respect of those services, the responsible person shall be liable to pay to the injured person by way of damages such sum as represents reasonable remuneration for those services and repayment of reasonable expenses incurred in connection therewith.

(2) The injured person shall be under an obligation to account to the relative for any damages recovered from the responsible person under subsection (1) above.

(3) Where, at the date of an award of damages in favour of the injured person, it is likely that necessary services will, after that date, be rendered to him by a relative in consequence of the injuries in question, then, unless the relative has expressly agreed that no payment shall be made in respect of those services, the responsible person shall be liable to pay to the injured person by way of damages such sum as represents –

- (a) reasonable remuneration for those services; and
- (b) reasonable expenses which are likely to be incurred in connection therewith.

(4) The relative shall have no direct right of action in delict against the responsible person in respect of any services or expenses referred to in this section.

¹ This Appendix sets out the provisions of Part II of the Administration of Justice Act 1982 as amended to the date of publication of the Discussion Paper.

9. (1) The responsible person shall be liable to pay to the injured person a reasonable sum by way of damages in respect of the inability of the injured person to render the personal services referred to in subsection (3) below.

(2) Where the injured person has died, any relative of his entitled to damages in respect of loss of support under section 1(3) of the Damages (Scotland) Act 1976 shall be entitled to include as a head of damage under that section a reasonable sum in respect of the loss to him of the personal services mentioned in subsection (3) below.

(3) The personal services referred to in subsections (1) and (2) above are personal 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.

(4) Subject to subsection (2) above, the relative shall have no direct right of action in delict against the responsible person in respect of the personal services mentioned in subsection (3) above.

10. Subject to any agreement to the contrary, in assessing the amount of damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount –

(a) any contractual pension or benefit (including any payment by a friendly society or trade union);

(b) any pension or retirement benefit payable from public funds other than any pension or benefit to which section 2(1) of the Law Reform (Personal Injuries) Act 1948 applies;

(c) any benefit payable from public funds, in respect of any period after the date of the award of damages, designed to secure to the injured person or any relative of his a minimum level of subsistence;

(d) any redundancy payment under the Employment Rights Act 1996, or any payment made in circumstances corresponding to those in which a right to a redundancy payment would have accrued if section 135 of that Act had applied;

(e) any payment made to the injured person or to any relative of his by the injured person's employer following upon the injuries in question where the recipient is under an obligation to reimburse the employer in the event of damages being recovered in respect of those injuries;

- (f) subject to paragraph (iv) below, any payment of a benevolent character made to the injured person or to any relative of his by any person following upon the injuries in question;

but there shall be taken into account –

- (i) any remuneration or earnings from employment;
- (ii) any contribution-based jobseeker's allowance (payable under the Jobseekers Act 1995);
- (iii) any benefit referred to in paragraph (c) above payable in respect of any period prior to the date of the award of damages;
- (iv) any payment of a benevolent character made to the injured person or to any relative of his by the responsible person following on the injuries in question, where such a payment is made directly and not through a trust or other fund from which the injured person or his relatives have benefited or may benefit.

11. In an action for damages or personal injuries (including any such action arising out of a contract) any saving to the injured person which is attributable to his maintenance wholly or partly at public expense in

- (a) a hospital or other institution; or
- (b) accommodation provided by a care home service (as defined by section 2(3) of the Regulation of Care (Scotland) Act 2001 (asp 8).

shall be set off against any income lost by him as a result of the injuries.

- 12.** (1) This section applies to an action for damages for personal injuries in which -
- (a) there is proved or admitted to be a risk that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of the action, develop some serious disease or suffer some serious deterioration in his physical or mental condition; and
 - (b) the responsible person was, at the time of the act or omission giving rise to the cause of the action,
 - (i) a public authority or public corporation; or
 - (ii) insured or otherwise indemnified in respect of the claim.

(2) In any case to which this section applies, the court may, on the application of the injured person, order -

- (a) that the damages referred to in subsection (4)(a) below be awarded to the injured person; and

- (b) that the injured person may apply for the further award of damages referred to in subsection (4)(b) below,

and the court may, if it considers it appropriate, order that an application under paragraph (b) above may be made only within a specified period.

(3) Where an injured person in respect of whom an award has been made under subsection (2)(a) above applies to the court for an award under subsection (2)(b) above, the court may award to the injured person the further damages referred to in subsection (4)(b) below.

(4) The damages referred to in subsections (2) and (3) above are –

- (a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and
- (b) further damages if he develops the disease or suffers the deterioration.

(5) Nothing in this section shall be construed –

- (a) as affecting the exercise of any power relating to expenses including a power to make rules of court relating to expenses; or
- (b) as prejudicing any duty of the court under any enactment or rule of law to reduce or limit the total damages which would have been recoverable apart from any such duty.

(6) The Secretary of State may, by order, provide that categories of defenders shall, for the purposes of paragraph (b) of subsection (1) above, become or cease to be responsible persons, and may make such modifications of that paragraph as appear to him to be necessary for the purpose.

And an order under this subsection shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

13. (1) In this Part of this Act, unless the context otherwise requires -

"personal injuries" include any disease or any impairment of a person's physical or mental condition and injury resulting from defamation or any other verbal injury or other injury to reputation;

"relative", in relation to the injured person, means –

- (a) the spouse or divorced spouse;
- (aa) the civil partner or former civil partner;
- (b) any person, not being the spouse of the injured person, who was, at the time of the act or omission giving rise to liability in the responsible person, living with the injured person as husband or wife;

- (ba) any person, not being the civil partner of the injured person, who was, at the time of the act or omission giving rise to liability in the responsible person, living with the injured person as the civil partner of the injured person;
- (c) any ascendant or descendant;
- (d) any brother, sister, uncle or aunt; or any issue of any such person;
- (e) any person accepted by the injured person as a child of his family.

In deducing any relationship for the purposes of the foregoing definition –

- (a) any relationship by affinity shall be treated as a relationship by consanguinity; any relationship of the half blood shall be treated as a relationship of the whole blood; and the stepchild of any person shall be treated as his child; and
- (b) section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 shall apply; and any reference (however expressed) in this Part of this Act to a relative shall be construed accordingly.

(2) Any reference in this Part of this Act to a payment, benefit or pension shall be construed as a reference to any such payment, benefit or pension whether in cash or in kind.

(3) This part of this Act binds the Crown.

14. (1) Section 1(&) of the Damages (Scotland) Act 1976 is amended by inserting after the word "section" the words "or in Part II of the Administration of Justice Act 1982".

(2) Section 5 of that Act (provisions for the avoidance of multiplicity of auctions) is repealed, and –

- (a) in section 4 of that Act the words "but this section is without prejudice to section 5 of this Act" shall cease to have effect, and
- (b) in section 6 of that Act –
 - (i) in subsection (1) for the words "section 5 of this Act" there shall be substituted the words "this section", and
 - (ii) after subsection (2) there shall be inserted –

"(3) This section applies to any action in which, following the death of any person from personal injuries, damages are claimed –

- (a) by the executor of the deceased, in respect of the injuries from which the deceased died;
- (b) in respect of the death of the deceased, by any relative of his."

(3) Notwithstanding section 73(5) of this Act, where an action to which section 5 of that Act applies has been raised and has not, prior to the commencement of subsection

(2) above, been disposed of, the court shall not dismiss the action on the ground only that the pursuer has failed to serve notice of the action as required by subsection (6) of the said section 5.

- (4) In section 10(2) of the said Act of 1976 (meaning of "deceased person's immediate family"), after the word "(a)" there shall be inserted the word "(aa)", and in paragraph 1 of Schedule 1 to that Act there shall be inserted after sub-paragraph (a) the following –

"(aa) any person, not being the spouse of the deceased, who was, immediately - before the deceased's death, living with the deceased as husband or wife;"

Appendix C

Awards of damages for non-patrimonial loss

Case Citation	Awards for non-patrimonial loss	Awards index linked to May 2007 ¹
<i>Devlin v Strathclyde Regional Council</i> 1993 SLT 699	Mother of 14 year old son: £5,000 Stepfather: £5,000	Mother: £7,564 Stepfather: £7,564
<i>Kempton v British Railways Board</i> (unreported jury trial, 18 May 1993) ²	Widow: £35,000 Child, aged 12: £11,500 Child, aged 8: £11,500	Widow: £51,148 Child, aged 12: £16,806 Child, aged 8: £16,806
<i>Fisher v McKenzie</i> 1994 GWD 30-1823	Father: £13,000 Mother: £11,000	Father: £18,615 Mother: £15,751
<i>Morrison v Forsyth</i> 1995 SLT 539 *	Widow (separated): £10,000 Child (aged 23, not at home): £2,000 Child (aged 21, not at home): £2,500 Child (aged 18, living with father): £4,000	Widow (separated): £14,250 Child (aged 23): £2,850 Child (aged 21): £3,563 Child (aged 18): £5,700
<i>Campbell v Talbot</i> 1995 GWD 33-1702	Widow: £13,500 Child (aged 4): £8,000 Child (aged 3): £9,000	Widow: £18,570 Child (aged 4): £11,005 Child (aged 3): £12,380
<i>Davies v McGuire</i> 1995 GWD 11-605 *	Parents of 13 year old: £7,500 each	Parents: £10,413 each

¹ Indexation based on monthly Retail Price Index levels as set out in the Office for National Statistics RP02 Table, available online at: http://www.statistics.gov.uk/downloads/theme_economy/RP02.pdf.

All awards shown as rounded to the nearest whole pound.

² Discussed in McEwan & Paton, *Damages for Personal Injuries in Scotland* at 13/93-2. Another jury case in which a very high award was made is *Wells v Hay* 1999 Rep LR (Quantum) 44; in that case a mother whose only son had died in hospital two weeks after an accident in which he was trapped in a car for 40 minutes was awarded £37,146.37. However a motion for new trial was granted and the parties settled out of court.

<i>Beggs v Motherwell Bridge Fabricators Ltd</i> 1998 SLT 1215	Widow: £14,388 Child (aged 14): £4,000 Child (aged 13): £4,000	Widow: £18,909 Child (aged 14): £5,257 Child (aged 13): £5,257
<i>McManus' Executrix v Babcock Energy Ltd</i> 1999 SC 569	Widow: £20,000 Child (aged 28, living at home): £5,000 Child (aged 27, not living at home): £5,000	Widow: £24,903 Child (aged 28): £6,226 Child (aged 27): £6,226
<i>Muir v Grampian Health Board</i> 2000 GWD 12-442.	Widower: £15,000 Child (aged 6): £8,000	Widower: £18,337 Child (aged 6): £9,796
<i>Young v McDowall</i> 2000 GWD 21-832.	Child (aged 21, living at home): £5,000 Parents: £1,500	Child (aged 21): £6,026 Parents: £1,808
<i>Durie v Wyvern Structures Ltd</i> 2000 GWD 28-1102 *	Widow: £500 (only survived husband by two days) Child: £3,000	Widow: £605 Child: £3,628
<i>Sargent v Secretary of State for Scotland</i> 2000 GWD 28-1089.	Widow: £15,000 Child (aged 21, not living at home): £2,000 Child (aged 20, living at home): £2,500 Child (aged 15, living at home): £4,000	Widow: £18,141 Child (aged 21): £2,418 Child (aged 20): £3,023 Child (aged 15): £4,837
<i>Cross v Highlands and Islands Enterprise</i> 2000 GWD 40-1506 *	Widow: £18,000 Child (aged 10): £10,000 Child (aged 8): £11,000 Father: £2,250	Widow: £20,793 Child (aged 10): £11,552 Child (aged 8): £12,707 Father: £2,599
<i>McIntosh v Findlay</i> 2001 Rep LR 66 (jury award)	Posthumous child: £37,500	Posthumous child: £45,193
<i>Strang v Le Brusq</i> 2001 Rep LR 52 (jury award)	Parents of 21 year old son: £30,000 each	Parents: £35,965 each

<i>Shaher v British Aerospace Flying College Ltd</i> 2003 SC 540	Parents of 19 year old son: £20,000 each	Parents: £22,722 each
<i>Murray's Executrix v Greenock Dockyard Co. Ltd.</i> 2004 SLT 1104	Widow: £28,000 Child (aged 32): £10,000	Widow: £31,091 Child: £11,104
<i>Cruickshank v Fairfield Rowan Ltd.</i> 2005 SLT 462	Mother of 54 year old man: £10,000	Mother: £10,916
<i>McTear's Executrix v Imperial Tobacco Ltd.</i> 2005 2 SC 1*	Widow: £25,000	Widow: £26,849
<i>Weir v Robertson Group (Construction) Ltd</i> [2006] CSOH 107	Widow: £35,000 Child (aged 12): £17,000 Child (aged 10): £17,000	Widow: £36,358 Child (aged 12): £17,659 Child (aged 10): £17,659

* In these cases no damages were actually awarded because the cases failed on liability. The damages mentioned are those damages which the judges said they would have awarded had liability been established.

Appendix D

Treatment of claims for damages in cases of wrongful death based on comparative research

England and Wales

McGregor on Damages (17th Edition, Sweet and Maxwell, 2003) para 36-005

"...every [action for damages for wrongful death] shall be for the benefit of the dependants, as defined, of the person whose death has been so caused... s.1A [of the Fatal Accidents Act 1976] ... gives further rights, being rights to recover for non-pecuniary loss, not to dependants as such but specifically to parents and children of the deceased. There is no action for nominal damages; if no recoverable damage is proved, the action fails."

Fatal Accidents Act 1976 (Section 1)

"1. Right of action for wrongful act causing death.

(1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

(2) Subject to section 1A(2) below, every such action shall be for the benefit of the dependants of the person ("the deceased") whose death has been so caused.

(3) In this Act "dependant" means--

- (a) the wife or husband or former wife or husband of the deceased;
- (aa) the civil partner or former civil partner of the deceased;
- (b) any person who—
 - (i) was living with the deceased in the same household immediately before the date of the death; and
 - (ii) had been living with the deceased in the same household for at least two years before that date; and
 - (iii) was living during the whole of that period as the husband or wife or civil partner of the deceased;
- (c) any parent or other ascendant of the deceased;
- (d) any person who was treated by the deceased as his parent;

- (e) any child or other descendant of the deceased;
- (f) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
- (fa) any person (not being a child of the deceased) who, in the case of any civil partnership in which the deceased was at any time a civil partner, was treated by the deceased as a child of the family in relation to that civil partnership;
- (g) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

(4) The reference to the former wife or husband of the deceased in subsection (3)(a) above includes a reference to a person whose marriage to the deceased has been annulled or declared void as well as a person whose marriage to the deceased has been dissolved.

(4A) The reference to the former civil partner of the deceased in subsection (3)(aa) above includes a reference to a person whose civil partnership with the deceased has been annulled as well as a person whose civil partnership with the deceased has been dissolved.

(5) In deducing any relationship for the purposes of subsection (3) above--

- (a) any relationship [by marriage or civil partnership] shall be treated as a relationship by consanguinity, any relationship of the half blood as a relationship of the whole blood, and the stepchild of any person as his child, and
- (b) an illegitimate person shall be treated as the legitimate child of his mother and reputed father.

(6) Any reference in this Act to injury includes any disease and any impairment of a person's physical or mental condition

1A. Bereavement

(1) An action under this Act may consist of or include a claim for damages for bereavement.

(2) A claim for damages for bereavement shall only be for the benefit—

- (a) of the wife or husband or civil partner of the deceased; and
- (b) where the deceased was a minor who was never married or a civil partner—
 - (i) of his parents, if he was legitimate; and
 - (ii) of his mother, if he was illegitimate.

(3) Subject to subsection (5) below, the sum to be awarded as damages under this section shall be £10,000.

(4) Where there is a claim for damages under this section for the benefit of both the parents of the deceased, the sum awarded shall be divided equally between them (subject to any deduction falling to be made in respect of costs not recovered from the defendant).

(5) The Lord Chancellor may by order made by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament, amend this section by varying the sum for the time being specified in subsection (3) above."

Executor's claim

4. In England and Wales, the executor handles the claims on behalf of the estate and the relatives of the deceased. The estate is entitled to recover for patrimonial and non-patrimonial losses occurring as a result of the injury which have been incurred before death. The categories of loss were restricted by section 1 of the Administration of Justice Act 1982 ("the 1982 Act") to: pain and suffering, loss of amenities; medical expenses; loss of earnings; loss of expectation of life and prospective earnings; although the latter two categories are of limited significance where death follows shortly after the injury is sustained. The executor may raise an independent action or continue one which has been brought by the deceased prior to death. The estate cannot claim for any future loss, such as lost future earnings.

Relatives' claim

5. The claims of the relatives in a case of wrongful death in England and Wales are brought by the executor of the deceased's estate. This is provided for in section 2 of the Fatal Accidents Act 1976 (as amended by section 3(1) of the 1982 Act). The executor raises one action in respect of all allowable claims and must detail the persons for whose benefit the action is brought. Individual dependants named in an action may, however, appeal on their own behalf where an award underestimates the amount which should be allocated to them.

6. The categories of person entitled to compensation for patrimonial loss arising from the death of a relative were expanded beyond the strict "dependants" category by section 3 of the 1982 Act. Claims for patrimonial loss are limited to those which are not pursued to conclusion by the deceased during his or her lifetime. If the deceased has successfully settled a claim with the tortfeasor before his death, any payment made for patrimonial loss sustained by the deceased is equated to the dependants' loss of support claim, and heads of damages covering patrimonial loss to dependants are therefore disallowed, ensuring that "double compensation" does not arise.

7. The spouse or civil partner of the deceased, as well as the parents of legitimate unmarried children under the age of majority are able to claim damages for bereavement under section 1A of the Fatal Accidents Act 1976.¹ The total amount which may be claimed is restricted to £10,000 and where the parents of a deceased child are claiming together, this

¹ Under this section, only the mother can make a claim on the death of an illegitimate child.

sum is divided equally between them. This claim is independent of any settlement reached by the deceased before his or her death.

The United States of America

8. American jurisdictions approach the question of damages for wrongful death in a variety of ways. The common law did not recognise the right of dependants to claim any sort of damages on the death of a relative and held that the right to compensation for personal injury died with the victim (or indeed the tortfeasor). However, various states have developed differing forms of statute which permit a variety of actions by the estate of the deceased and his or her dependants.

Victim's claim

9. American personal injury legislation is comparable to that of most other common law jurisdictions. The victim can sue for patrimonial losses occasioned as a result of the injury, including medical and other expenses; and lost wages, including the loss of future earnings if the victim is unable to return to work. He or she can also claim for non-patrimonial losses, but the heads of claim may vary depending on the state in which the claim is brought.

Claims surviving death

10. When someone has been killed as a result of the wrongful act of another, certain actions may survive beyond death. There is also normally a separate action which is created in favour of the dependants of the deceased to compensate them for the loss of support they have suffered as a result of the death. Both of these actions are governed by statute and there are three principal statutory forms which comprise the basis of the legislation across America. These are: survival statutes, wrongful death statutes and hybrid statutes.

Executor's claim

11. *Survival statutes* - Survival statutes provide for the continuation of any action the deceased would have had had he or she lived. The action is brought by the deceased's representative and is brought against the tortfeasor or his or her estate. The deceased's executor can claim for any loss the deceased would have been able to claim up to the date of death, including medical expenses, pain and suffering, loss of earnings, punitive damages (where claimable, and only against a living tortfeasor) and funeral expenses. If the victim has commenced an action prior to death, survival statutes normally provide for the estate to take this to conclusion.

12. Survival statutes do not generally allow claims by the estate for future losses. In Hawaii however, the statute expressly provides that lost future earnings may be claimed on behalf of the estate, subject to the deduction of any provision the deceased would have made for dependants:

"Hawaii Revised Statutes, Chapter 663

§663-4 Actions which survive death of wrongdoer or other person liable. All rights of action arising out of physical injury to the person or out of the death of a person as provided by section 663-3, shall survive, notwithstanding the death of the wrongdoer

or any other persons who may be liable for damages for such physical injury or death.

§ 663-8 Damages, future earnings. Together with other damages which may be recovered by law, the legal representative of the deceased person may recover where applicable under section 663-7 the future earnings of the decedent in excess of the probable cost of the decedent's own maintenance and the provision the decedent would have made for his or her actual or probable family and dependants during the period of time the decedent would have likely lived but for the accident."

Survival statutes do not address the claims of any of the victim's dependants.

Relatives' claim

13. *Wrongful death statutes* - The second category of legislation is the wrongful death statute. These statutes create a new action in favour of certain beneficiaries (usually legatees or legal dependants of the deceased) to compensate the deceased's family members for their patrimonial loss arising from the death of the victim. Wrongful death statutes create a new action which is brought either by the specified relatives themselves, or, more usually, by the executor on behalf of the relatives. Damages are paid directly to the relatives and do not form part of the deceased's estate.

14. There are two methods by which damages under wrongful death statutes are calculated. The majority of states measure damages in terms of loss of support to dependants. Calculations are based on the income the deceased would have contributed to the household had he or she survived uninjured. Accordingly, the dependants are required to show the loss which they have suffered as a result of the death. Federal statutes which create liability for deaths wrongfully caused also adopt this measure of damages.²

15. Using this measure, the dependants may claim for financial and non-monetary household contributions; services of economic value; benefits to which the deceased was entitled; and often certain non-patrimonial losses which have arisen from the death. For example:

"Florida Revised Statutes, Chapter 768

768.19 Right of action.--When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

768.20 Parties.--The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death. When a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate. The wrongdoer's personal representative shall be the defendant if the wrongdoer dies before or pending the action. ...

² E.g. Federal Employers Liability Act, 45 U.S.C. § 51 et seq (1908).

768.21 Damages.--All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

(1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.

(2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

(3) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury. For the purposes of this subsection, if both spouses die within 30 days of one another as a result of the same wrongful act or series of acts arising out of the same incident, each spouse is considered to have been predeceased by the other.

(4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors."

16. This measure of damages has caused problems when the deceased person was not earning or did not contribute financially to the running of the household – for example, where the deceased was a child or a homemaker. The general refusal of damages for mental anguish for the relatives of a deceased person may in such cases limit recovery to funeral expenses and lost services.

17. The alternative measure of damages under a wrongful death statute is to calculate the loss to the deceased's estate. The action under these statutes is brought by the executor or personal representative of the deceased. The damages are based on "the amount that the victim would have saved from earnings during a normal lifetime and thus what he would have left as an estate for heirs or legatees."³ The calculation involves determining the amount of money the deceased would have earned during his or her lifetime and then deducting funds which would have been used for his or her own living expenses. This method is used by every state which uses the "loss to estate" calculation, with the exception of Kentucky, which makes no deduction for the expenses the deceased would have incurred during his or her lifetime.⁴ The use of this method of calculation often addresses the problems inherent in cases where the deceased has not contributed to the household. Using this model, only the specified heirs and legatees of a deceased person may benefit from the action – dependants are not given their own action and there is no requirement to show a dependent relationship. For example –

³ Dobbs, *Law of Remedies*, 2nd edn, Vol II, 1992, p 434.

⁴ *Ibid.*

"Kentucky Revised Statutes, Chapter 411

411.130 Action for wrongful death - Personal representative to prosecute - Distribution of amount recovered.

(1) Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.

(2) The amount recovered, less funeral expenses and the cost of administration and costs of recovery including attorney fees, not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order:

(a) If the deceased leaves a widow or husband, and no children or their descendants, then the whole to the widow or husband.

(b) If the deceased leaves a widow and children or a husband and children, then one-half (1/2) to the widow or husband and the other one-half (1/2) to the children of the deceased.

(c) If the deceased leaves a child or children, but no widow or husband, then the whole to the child or children.

(d) If the deceased leaves no widow, husband or child, then the recovery shall pass to the mother and father of the deceased, one (1) moiety each, if both are living; if the mother is dead and the father is living, the whole thereof shall pass to the father; and if the father is dead and the mother living, the whole thereof shall go to the mother. In the event the deceased was an adopted person, "mother" and "father" shall mean the adoptive parents of the deceased.

(e) If the deceased leaves no widow, husband or child, and if both father and mother are dead, then the whole of the recovery shall become a part of the personal estate of the deceased, and after the payment of his debts the remainder, if any, shall pass to his kindred more remote than those above named, according to the law of descent and distribution."

18. *Hybrid statutes* - Some states, such as New Mexico and Tennessee, have created legislation which aims to cover both categories of claim in a single action.

"Tennessee Code § 20-5-106

(a) The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by the person's death but shall pass to the person's surviving spouse and, in case there is no surviving spouse, to the person's children or next of kin; or to the person's personal representative, for the benefit of the person's surviving spouse or next of kin; or to the person's natural parents or parent or next of kin if at the time of death decedent was in the custody of the natural parents or parent and had not been legally surrendered or abandoned by them pursuant to any court order removing such person from the custody of such parents or parent; otherwise to the person's legally adoptive parents or parent, or to the administrator for the use and benefit of the adoptive parents or parent; the funds recovered in either case to be free from the claims of creditors...

§ 20-5-107

(a) The action may be instituted by the personal representative of the deceased or by the surviving spouse in the surviving spouse's own name, or, if there is no surviving spouse, by the children of the deceased or by the next of kin...

§ 20-5-113

Where a person's death is caused by the wrongful act, fault, or omission of another, and suit is brought for damages, as provided for by §§ 20-5-106 and 20-5-107, the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received."

19. These statutes arise in states which did not historically adopt a separate wrongful death statute, but amended the survival action to allow recovery by survivors or dependants.⁵ The estate of the deceased is permitted to make a single claim based on the amount the deceased victim could have accumulated during his lifetime, had he or she not been killed. The award for lost earnings is measured in terms of loss suffered by both the deceased (of earnings from injury to death) and to the dependants (of support, from death onwards) and is calculated by a theoretical assessment of the future earning and saving potential of the victim.

State practice and allowable claims

20. "Almost all states appear to have both [wrongful] death and survival statutes in some form..."⁶ The use of both survival and wrongful death statutes by the majority of American jurisdictions gives rise to two separate actions following from a wrongful death. The estate continues the action under the survival statute which the deceased would have had for the loss he or she has sustained up to the date of death as a result of the injury. Most states allow claims for patrimonial and non-patrimonial loss up to the date of death, with only limited exceptions.⁷

21. Subject to the exception of Hawaii discussed above, survival statutes do not generally allow claims for future loss. This is due to the existence of the second action which arises from the wrongful death statutes. By providing compensation for loss of support to the relatives of the victim, it is thought that these statutes avoid double compensation and eliminate the need to claim lost future earnings where the deceased has not survived.

22. The dependants are given a separate cause of action under the wrongful death statute which is intended to compensate the loss of support they have sustained. In general, wrongful death statutes have not recognised claims by relatives for non-patrimonial loss, basing their position on the traditional view that intangible concepts such as loss of society cannot be ascribed a monetary value. However, as the perception of this bar on non-

⁵ Dobbs, *Law of Remedies*, 2nd edn, Vol II, 1992, p 436.

⁶ Ibid, p 423.

⁷ Arizona, for example, prohibits recovery for pain and suffering.

patrimonial loss began to change, the courts sought to develop methods of allowing relatives to make claims for such losses. The courts of several jurisdictions began to recognise claims for "services" provided to the household by children or retired persons. There also developed the concept of "consortium" claims which recognised that the loss of companionship, care, guidance and advice, society, and love and affection were all compensable losses.

23. Most states have now either enacted measures in their wrongful death statutes to allow claims for non-patrimonial losses or the principles have been developed in the courts. There is variation between jurisdictions as to what is claimable – certain states will countenance claims for loss of society but refuse to accept mental anguish claims, while others expressly allow both.⁸

A final example of state practice is Louisiana, which operates a civil code similar to those in Continental European jurisdictions. It provides:

"Louisiana Civil Code Art. 2315.1. Survival action

A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:

1. The surviving spouse and child or children of the deceased, or either the spouse or the child or children.
2. The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.
3. The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.
4. The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.

B. In addition, the right to recover all damages for injury to the deceased, his property or otherwise, caused by the offense or quasi offense, may be urged by the deceased's succession representative in the absence of any class of beneficiary set out in Paragraph A.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.

E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

⁸ Dobbs, *Law of Remedies* (2nd edn, Vol II, 1992) p 442.

Louisiana Civil code Art. 2315.2. Wrongful death action

A. If a person dies due to the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:

The surviving spouse and child or children of the deceased, or either the spouse or the child or children.

The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.

B. The right of action granted by this Article prescribes one year from the death of the deceased.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.

E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him."

It can be seen that this statute provides for the continuation of all actions available to the victim before death. Any of the relatives specified in Article 2315.2 may bring an action, but this right is subject to prescription and will expire one year after the date of death. There is no provision of a separate action for the relatives of the deceased.

Recent developments

24. Courts in Texas,⁹ Washington¹⁰ and Pennsylvania¹¹ have affirmed the ability of the estate to raise claims for future lost earnings, subject to appropriate deductions in respect of payments which would be made to dependants. This follows from the premise that the separate actions of the estate and the dependants do not overlap.¹²

25. The purpose of the survival statute is to place the deceased's estate in the position in which it would have been had the death not occurred. The primary purpose of the wrongful death statute is to compensate the dependants or relatives of the deceased for patrimonial losses they have incurred as a result of the death. If the dependants could expect to receive fifty per cent of the lifetime earnings of the deceased before death, it follows that they should receive an equivalent amount in compensation. The corollary of this premise is that the

⁹ *Hope v Seahorse Inc.*, 651 F.Supp. 976.

¹⁰ *Criscuola v Andrews* 507 P.2d 149.

¹¹ *Burkett v George* 118 Pa.Cmwlth. 543.

¹² Gunderson, *Personal Injury Damages under the Maryland Survival Statute: Advocating Damage Recovery for a Decedent's Future Lost Earnings* 29 U. Balt. L. Rev. 97 (1999-2000).

estate should receive the remaining fifty per cent or at least the balance of the remainder after taking into account the deceased's own living expenses.

26. Courts have held that allowing the estate to recover prospective earnings is consistent with the rule that all personal injury causes of action survive, including damages for loss of prospective earnings.¹³

27. The problem of double compensation is avoided in such cases because the provision the deceased would have made for dependants is taken into account. The court found that placing a limit on the recovery in a survival action allowing only the net accumulated earnings of the deceased prevented double recovery.¹⁴

Canada

Victim's claim

28. Every common law province in Canada has fatal accidents legislation which is broadly similar across the country.¹⁵ It provides that where A is injured as a result of B's wrong, A has an action against B. The victim is entitled to claim under a variety of heads. Medical expenses, earnings lost as a result of the injury, pain and suffering and loss of amenity are all typically available. The victim may claim for the loss of future earnings where an injury will prevent his or her return to work.

Executor's claim

29. The estate may raise its own action where A did not manage to commence one before death. If an action is commenced before death, the estate may take it to completion, but only in respect of losses incurred before the date of death. The claims raised by the estate are for the patrimonial and non-patrimonial losses which the deceased sustained up to the date of death only, no claim exists for loss of future earnings or other losses not yet incurred. In British Columbia, for example, the Estate Administration Act¹⁶ provides in section 59:

"(2) Subject to subsection (3), the executor or administrator of a deceased person may continue or bring and maintain an action for all loss or damage to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, including an action in the circumstances referred to in subsection (6).

(3) Recovery in an action under subsection (2) must not extend to the following:

(a) damages in respect of physical disfigurement or pain or suffering caused to the deceased;

(b) if death results from the injuries, damages for the death, or for the loss of expectation of life, unless the death occurred before February 12, 1942;

¹³ *Criscuola v Andrews* 507 P.2d 149, at p 151.

¹⁴ Gunderson, *Personal Injury Damages under the Maryland Survival Statute: Advocating Damage Recovery for a Decedent's Future Lost Earnings* 29 U. Balt. L. Rev. 97 (1999-2000) at p 124.

¹⁵ *Assessment of Damages under the Fatal Accidents Act for the loss of Guidance, Care and Companionship*; Manitoba Law Reform Commission, October 2000.

¹⁶ R.S.B.C. 1996, c. 122.

(c) damages in respect of expectancy of earnings after the death of the deceased that might have been sustained if the deceased had not died.

...

(6) If a person alleges that the person has suffered loss or damage by the fault of another and the person alleged to be at fault dies, the person wronged may

(a) continue against the executor or administrator of the deceased any action on that account pending against the deceased at the time of the deceased's death, or

(b) within the time otherwise limited for the action, bring an action for the loss or damage, naming as defendant in it

(i) the executor or administrator of the estate of the deceased, or

(ii) the deceased."

30. The executor may also raise a claim on behalf of the relatives of the deceased. In every claim so raised, the executor must provide a detailed breakdown of the relatives who are claiming, and on what basis the claims are made. These claims are discussed below.

Relatives' claim

31. Under Canadian law the executor in a case of wrongful death is permitted to bring an action on behalf of the family members of a deceased person if such an action was not commenced prior to death. Most provinces also allow the relatives to bring their own claims where there is no executor. Traditionally, the statutory provisions were silent on the matter of damages payable to relatives in a wrongful death action.

32. However, the provinces operating a common law system now take two distinct approaches to the nature of the damages to be awarded. It is uncontroversial that the executor can claim patrimonial losses to the estate on behalf of the family members, as well as continuing any action for non-patrimonial loss commenced by the deceased. There has been a division, however, in the treatment of non-patrimonial losses sustained by family members. Certain provinces (Ontario, Nova Scotia, Prince Edward Island, New Brunswick and Alberta) have made amendments to their legislative provisions to allow claims to be made by the relatives of the deceased in respect of non-patrimonial loss. These amendments identify certain categories of relative, usually close relatives, such as the spouse of the deceased and his or her children, who can claim damages for "loss of guidance, care and companionship" of the deceased. Certain provinces (for example, New Brunswick and Alberta) also make provision for a claim for the grief felt by the relatives as a result of the death. Those provinces which have adopted statutory rules provide monetary limits on the amount which may be claimed, resulting in relatively uniform awards in most cases.

33. In contrast, the remaining common law provinces (British Columbia, Saskatchewan, Northwest Territories, Yukon Territory and Newfoundland) rely on the unamended legislation which only provides for claims in respect of patrimonial loss. However, following the Supreme Court judgment in *The St. Lawrence & Ottawa Railway Company v Lett*,¹⁷ certain

¹⁷ (1885) 11 S.C.R. 422.

types of non-patrimonial loss, such as the loss of a mother's guidance and care, have been categorised as patrimonial in nature, allowing family members of the deceased to pursue claims for these types of loss as part of the overall patrimonial claim. This has led to a discrepancy in the level of awards in such cases; claimants whose non-patrimonial claims are decided under statutes containing monetary limits often receive less than those whose claims are subject to the *St. Lawrence* test.

34. Below are excerpts from two statutes illustrating the contrast between the different approaches. The first is from Alberta where the statute clearly sets out the categories of person entitled to raise an action, the non-patrimonial heads of damages which can be claimed, and also the statutory maxima of damages each entitled person can be awarded. The second comes from Newfoundland and represents the bare statutory regime compensating patrimonial loss only, subject to the decision in *The St. Lawrence* discussed above.

Alberta – Fatal Accidents Act (RSA 2000 cF - 8 s7) -

"Action for damages

2 When the death of a person has been caused by a wrongful act, neglect or default that would, if death had not ensued, have entitled the injured party to maintain an action and recover damages, in each case the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death of the party injured.

3(1) An action under this Act

(a) shall be for the benefit of the spouse, adult interdependent partner, parent, child, brother or sister of the person whose death has been so caused, and

(b) shall be brought by and in the name of the executor or administrator of the person deceased,

and in the action the court may give to the persons respectively for whose benefit the action has been brought those damages that the court considers appropriate to the injury resulting from the death.

(2) If there is no executor or administrator, or if the executor or administrator does not bring the action within one year after the death of the party injured, then the action may be brought by and in the name of all or any of the persons for whose benefit the action would have been, if it had been brought by or in the name of the executor or administrator.

Damages for bereavement

8(1) In this section,

(a) "child" means a son or daughter, whether legitimate or illegitimate;

(b) "parent" means a mother or father.

(2) If an action is brought under this Act, the court, without reference to any other damages that may be awarded and without evidence of damage, shall award damages for grief and loss of the guidance, care and companionship of the deceased person of

(a) Subject to subsections (3) and (4), \$75 000 to the spouse or adult interdependent partner of the deceased person,

(b) \$75 000 to the parent or parents of the deceased person if the deceased person, at the time of death,

(i) was a minor, or

(ii) was not a minor but was unmarried and had no adult interdependent partner,

to be divided equally if the action is brought for the benefit of both parents, and

(c) \$45 000 to each child of the deceased person who, at the time of the death of the deceased person,

(i) is a minor, or

(ii) is not a minor but is unmarried and has no adult interdependent partner.

(3) The court shall not award damages under subsection (2)(a) to the spouse or adult interdependent partner if the spouse or adult interdependent partner was living separate and apart from the deceased person at the time of death.

(4) Repealed 2002 cA-4.5 s 36."

Newfoundland and Labrador – Fatal Accidents Act 1995 (R.S.N.L. 1990, c. F-6) -

"An action maintainable

3. (1) Where the death of a person is caused by a wrongful act, neglect or default and the act, neglect or default would have entitled the party injured to maintain an action and recover damages, then the person who would have been liable if death had not ensued is liable to an action for damages, notwithstanding the death of the person injured.

(2) A criminal charge in relation to the death of a person referred to in subsection (1) does not bar an action for damages under subsection (1).

By whom action brought

4. An action under this Act is for the benefit of the wife, husband, parent and child of the person whose death is caused, and is brought by and in the name of the executor or administrator of the person deceased.

Damages

6(1) In an action brought under this Act the jury may award the damages that they think are proportional to the injury resulting from the death to the parties for whose benefit the action was brought, and the amount so recovered shall be divided among those parties, in the shares that the jury by their verdict finds and directs."

Québec, the sole province which operates a mixed legal system incorporating a civil code provides for liability arising out of wrongful acts as follows:

Québec Civil Code § 1457

"1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature."¹⁸

The Civil Code further provides that personal injury actions survive the death of the deceased in favour of the heirs only:

"625. The heirs are seised, by the death of the deceased or by the event which gives effect to the legacy, of the patrimony of the deceased, subject to the provisions on the liquidation of successions.

The heirs are not, unless by way of exception provided for in this Book, bound by the obligations of the deceased to a greater extent than the value of the property they receive, and they retain their right to demand payment of their claims from the succession.

The heirs are seised of the rights of action of the deceased against any person or that person's representatives, for breach of his personality rights.¹⁹

It can be seen, therefore, that the heirs of the deceased inherit any outstanding rights of action for personal injury which were viable prior to death. No separate action is created for dependants. Heirs under the Code include spouses and civil partners, followed by children, parents, brothers and sisters and other relatives according to the law of succession.²⁰

France

French Civil Code, Title IV – Of Undertakings formed without an Agreement, Chapter II – Of Intentional and Unintentional Wrongs

"Art. 1382

Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.

Art. 1383

Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence."²¹

Victim's claim

35. Article 1382 of the French civil code stipulates that the person who has caused the wrongful injury or death is bound to make reparation for the losses he has caused. The principle of *réparation intégrale* holds that the victim should be placed in the same position in which he found himself before the date of the injurious conduct. Obviously this cannot be achieved in fatal cases, but compensation is available under various heads including

¹⁸ Translation taken from CANLII, available online at <http://www.canlii.org/qc/laws/sta/ccq/20070516/whole.html>.

¹⁹ Ibid.

²⁰ Québec Civil Code, *Book III – Successions*, Chapters 1 and 2.

²¹ Translation taken from Legifrance available online at <http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=494>.

medical expenses, loss of earnings and pain and suffering, up to the date of death. Claims are transmissible by succession where the deceased has experienced patrimonial loss, or where he or she has commenced a claim for non-patrimonial loss prior to death. Where the deceased was killed instantly or very shortly after injury is sustained, no claim for non-patrimonial loss transmits to the relatives.

Executor's claim

36. An executor may administer claims on behalf of the estate, or on behalf of the relatives of the deceased, where a claim has survived death. A claim for patrimonial loss may be instigated by the estate where appropriate. The estate may not launch a claim for non-patrimonial loss independently – it can only carry on existing claims. The estate also has no claim for future patrimonial loss and cannot maintain any such claim past the date of death. Such claims are overtaken by loss of support claims on behalf of the dependants.

Relatives' claim

37. Liberal interpretation of article 1382 has allowed claims on behalf of the relatives of the deceased. "...article 1382, in requiring in absolute terms compensation on account of all acts of a person which cause injury to another, does not in any way limit... the nature of the link which, in the case of a death, binds the victim to the claimant who would sue for damages."²² The result is that a wide variety of persons may claim for damages: the action is not restricted to those who are dependent on the deceased. Anyone who can legitimately claim to have suffered as a result of the death can make a claim for damages, including claims for non-patrimonial loss.

38. If the victim successfully sues for loss of future earnings before death, this bars subsequent loss of support claims by dependants. Claims by relatives are also barred where the estate has successfully concluded an action commenced by the deceased under the 1898 Act on Work Accidents as a result of an injury sustained, or a disease contracted, in the course of employment.

Germany

Bürgerliches Gesetzbuch (BGB) – German Civil Code

"§ 823. A person who wilfully or negligently injures the life, body, health, freedom, property, or other right of another contrary to law is bound to compensate him for any damage arising therefrom.

The same obligation attaches to a person who infringes a statutory provision intended for the protection of others. If according to the purview of the statute infringement is possible even without fault, the duty to make compensation arises only if some fault may be imputed to the wrongdoer.

§ 844. In the case of causing death the person bound to make compensation must make good the funeral expenses to the person on whom the obligation of bearing such expenses lies.

²² Cass. crim 20th Feb. 1863, S. 1863.I.321.

If the deceased at the time of the injury stood in a relation to a third party by virtue of which he was or might become bound by law to furnish maintenance to him, and in consequence of the death such third party is deprived of the right to claim maintenance, the person bound to make compensation must compensate the third party by the payment of a money annuity, in so far as the deceased would have been bound to furnish maintenance during the presumable duration of his life... The obligation to make compensation arises even if at the time of the injury the third party was only [in utero]

§ 845. In the case of causing death, or of causing injury to body or health, or in the case of deprivations of liberty, if the injured party was bound by law to perform services in favour of a third party in his household or industry, the person bound to make compensation must compensate the third party for the loss of services by the payment of a money annuity.

§ 847. In the case of injury to body or health... the injured party may also demand an equitable compensation in money for the damage which is not a pecuniary loss."²³

Markesinis and Unberath, The German Law of Torts:

"[The action in a wrongful death case] is, in other words, the new action given by statute both in Anglo-American law... and the German code (§ 844 BGB) to the "dependants" of the deceased (primary) victim for their loss of dependency. (Reimbursement of funeral expenses (Beerdigungskosten) by whomsoever has legally incurred them is also available.) ... [The German Civil Code] also allows such a claim to be brought by the plaintiff's estate for the deceased's pain and suffering, suffered between accident and death. But, unlike other systems... German law gives no damages for solatium, bereavement, or other forms of pain and suffering to the deceased's dependants."²⁴

"According to § 844 II BGB only those persons to whom the deceased owed a statutory duty to provide support will be allowed to sue [for patrimonial loss]... This right of maintenance must exist at the time of the injury."²⁵

The victim's claim

39. The victim in a personal injury suit is entitled to sue for patrimonial loss occasioned up to the date of death. Therefore, medical expenses, lost wages and other forms of patrimonial loss may be claimed. The victim also has a claim for pain and suffering. The claim for pain and suffering incorporates factors such as loss of expectation of life and loss of earning capacity.

40. The victim may also claim for loss of future earnings where the ability to continue in or seek employment has been diminished as a result of the wrongful act.

The relatives'/executor's claim

41. Under German law, the heirs of a deceased person take over the management and administration of his or her estate. There is no executor unless one has been expressly appointed in a will; if an executor has been appointed, his or her duties will be confined to

²³ Translation taken from Markesinis and Unberath, *The German Law of Torts* (4th edn, 2002) pp 14-17.

²⁴ *Ibid*, p 44.

²⁵ *Ibid*, p 926.

administering the estate for a specified time, or effecting the last wishes of the testator.²⁶ On death, all rights and obligations of the deceased pass directly to the heirs.²⁷ As German law gives no damages for grief suffered by the dependants in an action, it follows that the estate may inherit an action which has been commenced by the deceased for patrimonial and non-patrimonial losses, but that the dependants themselves may only raise an action for patrimonial loss resulting from the death, and then only in the event that actual loss may be established.

42. Where the victim had concluded a claim for lost earnings and was in receipt of an annuity in respect of lost earnings, the dependants' claim only arises on the death of the victim. Where a lump sum payment had been made which now forms part of the deceased's estate, this is taken into account when establishing the actual patrimonial loss suffered by the dependants, ensuring that double compensation does not arise.²⁸

South Africa

43. In South Africa recovery of damages in a delictual action is governed by the common law. A claim for *solatium* for pain and suffering and other non-patrimonial loss is recognised as intended for the personal benefit of the victim.²⁹ Only the injured party can claim for any non-patrimonial losses and South African law does not permit non-patrimonial claims to transmit to dependants or to the estate, unless proceedings have already been commenced by the deceased.³⁰ South African law adheres strictly to the principle that only personal losses are claimable and therefore it precludes claims for bereavement, grief or loss of society on the part of the deceased's relatives.

Victim's claim

44. The injured party may raise a single action and claim under the following heads of damages: medical expenses already incurred and other existing patrimonial loss; prospective expenses and loss of earning capacity; pain and suffering, disfigurement, shock and loss of amenities. Once commenced, these claims can transmit to the estate of the injured party, should he or she die before conclusion of the action.

Executor's claim

45. As already indicated, the estate of the deceased may carry any claim for patrimonial or non-patrimonial loss which has been commenced prior to death to conclusion. The estate of the victim of an injury which has caused death has an independent claim for medical and hospital expenses,³¹ as well as funeral expenses.³² No independent claim exists in respect of any of the usual heads of damages and the estate cannot raise an independent action for any future loss which has arisen as a result of the death.³³ Claims for future loss raised by the deceased prior to death can be continued by the estate. To avoid double compensation

²⁶ Hayton, *European Succession Laws* (2nd edn, 2002) p 254.

²⁷ *Ibid*, p 244.

²⁸ Markesinis and Unberath, *The German Law of Torts* (4th edn, 2002) p 928-9.

²⁹ Joubert, *The Law of South Africa* (2nd edn, 2005, Vol 8) p.68.

³⁰ *Ibid*.

³¹ *Lockhat's Estate v North British & Mercantile Insurance Co. Ltd* 1959 (3) SA 295.

³² *Rondalia Assurance Corporation of South Africa Ltd. v Britz* 1976 (3) SA 243 (T).

³³ Joubert, *The Law of South Africa* (2nd edn, 2005, Vol 8) p 69.

in such cases, any subsequent claim by a dependant for loss of support will be reduced by the value of the future loss award allocated to the estate.

Relatives' claim

46. The right of dependants to recover patrimonial loss in cases of wrongful death was recognised in *Union Government v Warneke*, 1911 AD 657. In that case, it was established that a husband could claim damages for loss of support arising from the death of his wife. In *Amod v Multilateral Motor Vehicle Accidents Fund*,³⁴ it was held that a dependant's claim for loss of support as a result of the unlawful killing of another, being a claim for pure economic loss, will be valid if the deceased had a legally enforceable duty to support the dependant and if the right of the dependant to such support was worthy of protection by way of an action at the suit of the dependant against the wrongdoer.

47. The claim for loss of support accrues only to a dependant whom the deceased had a legal duty to support. Each dependant must establish a legal duty of support, as well as patrimonial loss occasioned as a result of the death.³⁵ If the deceased successfully sued for damages prior to death, the award now forming part of the estate will be taken into account in calculating the patrimonial loss occasioned. Claims by dependants are available solely for patrimonial loss.³⁶

Australia

General

48. Personal injury and wrongful death legislation in Australia is broadly similar across all the States and Territories, and tends to follow English law in content and structure. The victim of a wrong which results in bodily or psychiatric harm can claim for patrimonial and non-patrimonial loss resulting from the harm.

49. An example of the statutory regime is section 17 of the Queensland Supreme Court Act 1995, which provides -

"Whensoever the death of a person shall be caused by a wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to crime."

Victim's claim

50. In actions raised before the death of the victim, the claimable heads of damages are: loss of earning capacity/lost earnings (including a claim for "lost years"); medical expenses; loss of ability to perform gratuitous services; pain and suffering; loss of expectation of life; and loss of amenities.

³⁴ 1999 (4) SA 1319 (SCA).

³⁵ Joubert, *The Law of South Africa* (2nd edn, 2005, Vol 7) p 76.

³⁶ *Ibid.*

Executor's claim

51. The executor may raise an action for patrimonial loss on behalf of the estate of the deceased where this was not done prior to death. The estate cannot raise an independent action for non-patrimonial loss, but any existing action for either patrimonial or non-patrimonial loss can be continued. This could potentially result in the tortfeasor being liable to the estate for claims for future loss as well as for loss of support claims from the deceased's dependants. In order to prevent this, statutes providing for the survival of actions to the estate prohibit the transfer of future loss claims to the estate.³⁷ For example, section 66(2) of the Queensland Succession Act of 1981 provides -

"Where a cause of action survives pursuant to subsection (1) for the benefit of the estate of a deceased person, the damages recoverable in any action brought —

...

(d) where the death has been caused by the act or omission which gives rise to the cause of action—shall be calculated without reference to—

(i) loss or gain to the estate consequent upon the death save that a sum in respect of funeral expenses may be included; or

(ii) future probable earnings of the deceased had the deceased survived."

Relatives' claim

52. Every State and Territory in Australia makes statutory provision for an action enabling the relatives of a person wrongfully killed to recover the losses arising from the death.³⁸ The basis of a wrongful death claim by relatives of the deceased is -

"... for injuriously affecting the family of the deceased. It is not a claim which the deceased could have pursued in his own lifetime, because it is for damages suffered not by himself, but by his family after his death ... [and] the jury (or judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death."³⁹

53. The legislation generally follows the English model in allowing an independent claim for pecuniary loss suffered by the dependants of the deceased, but does not go as far as to authorise any claim for grief or suffering. Australian law has been less accepting of the notion of compensation for non-patrimonial loss accruing to the relatives of a deceased person.⁴⁰ However, in recognition of the fact that awards under the head of loss of expectation of life generally operate as a *de facto solatium* payment to the relatives of the deceased, the Northern Territory and South Australia have both enacted provisions enabling

³⁷ NSW Act, s.2(a)(ii); Survival of Causes of Action Act 1940 (SA), s.3(1)(a)(iv); Administration and Probate Act 1958 (Vic), s.29(2)(c)(ii); Law Reform (Miscellaneous Provisions) Act 1941 (WA), s.4(2)(e); Administration and Probate Amendment Act 1983 (Tas).

³⁸ Civil Law (Wrongs) Act 2002 (Australian Capital Territory); Compensation to Relatives Act 1897 (New South Wales); Compensation (Fatal Injuries) Act (Northern Territory); Supreme Court Act 1995 (Queensland); Wrongs Act 1936 (South Australia); Fatal Accidents Act 1934 (Tasmania); Wrongs Act 1958 (Victoria); Fatal Accidents Act 1959 (Western Australia).

³⁹ *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 611 per Lord Wright, referring to Bowen LJ in *The Vera Cruz (No 2)* (1884) 9 PD 96.

⁴⁰ *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383.

the relatives of a deceased person to claim for *solatium*. The South Australian statute places a defined limit on the amount which can be claimed. Although strict interpretation of the statutory provisions might indicate limitations on the claims which can be made for non-patrimonial loss, Australian courts have construed the legislation broadly and have allowed claims for such losses as a parent's care and encouragement.⁴¹

⁴¹ *Fisher v Smithson* (1978) 17 SASR 223.

