

SCOTTISH LAW COMMISSION
Discussion Paper No 116



Discussion Paper on Title to Sue for Non-Patrimonial Loss

October 2001

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NOTES

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

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Part 1 Introduction

Our Remit

1.1 In March 2001 we received the following reference¹ from the Deputy First Minister and Minister for Justice, Mr Jim Wallace, QC, MSP:

"To consider the provisions of the Damages (Scotland) Act 1976 that set out which relatives of a deceased person can claim non-patrimonial damages; and to make recommendations as to possible changes in the law".

1.2 We have undertaken to work on this as a short-term priority project and to submit our report to Scottish Ministers within 12 months.

1.3 As we shall explain,² it is our preliminary view that the basic scheme under the Damages (Scotland) Act 1976 in relation to damages for non-patrimonial loss should remain as it is. Accordingly, our discussion concentrates on possible amendments in respect of those persons who have title to sue for non-patrimonial loss.

Structure of the discussion paper

1.4 In Part 2 we outline the existing law and mention some of the cases that have drawn attention to possible deficiencies in the 1976 Act. Part 3 considers the current list of relatives who can claim damages for non-patrimonial loss and those relatives and others who might be added to the list. A summary of the questions for consultees is in Part 4. Appendix 1 contains a copy of the Appendices to our earlier Report on *The Law Relating to Damages for Injuries Causing Death*.³ Appendix 2 gives examples of awards for non-patrimonial loss. In Appendix 3 we discuss the position of homosexual cohabitants in relation to the European Convention on Human Rights. Appendix 4 gives an outline of the position in some other jurisdictions.

¹ Under section 3(1)(e) of the Law Commissions Act 1965 (c 22).

² See paras 3.1-3.5.

³ Scot Law Com No 31.

Part 2 The Existing Law

Introduction

2.1 In this Part we consider the existing provisions of the Damages (Scotland) Act 1976 relating to claims for damages for non-patrimonial loss. At present the relatives who are entitled to claim for non-patrimonial loss are a sub-set of the relatives who have title to sue for loss of support (patrimonial loss). We therefore begin with an outline of the provisions of the 1976 Act relating to patrimonial loss.

The Damages (Scotland) Act 1976 – relatives who can claim damages for patrimonial loss

2.2 Where a person dies in consequence of personal injuries sustained by him as a result of another's delictual conduct, the deceased's family may be entitled to claim damages under the Damages (Scotland) Act 1976. In order to sue, the pursuer must be a relative of the deceased within the meaning of Schedule 1, paragraph 1 to the Act¹

"(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 of the deceased;
- (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;
- (b) any person who was a parent or child of the deceased;
- (c) any person not falling within paragraph (b) above who was accepted by the deceased as a child of his family;
- (d) any person who was an ascendant or descendant (other than a parent or child) of the deceased;
- (e) any person who was, or was the issue of, a brother, sister, uncle or aunt of the deceased; and
- (f) any person who, having been a spouse of the deceased, had ceased to be so by virtue of a divorce;

but does not include any other person."

2.3 It is further provided² that:

"(2) In deducing any relationship for the purposes of the foregoing paragraph -

- (a) any relationship by affinity³ shall be treated as a relationship by consanguinity;⁴ any relationship of the half blood shall be treated as

¹ Damages (Scotland) Act 1976, (c 13) s 10(1).

² 1976 Act, Sch 1 para 2.

³ A relationship by affinity is one created through marriage. The law assumes that affinity survives the marriage that created it, even if the marriage ends by death or by divorce.

⁴ A relationship by consanguinity is a genetic or "blood" relationship.

a relationship of the whole blood; and the step-child of any person shall be treated as his child; and
(b) section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986⁵ shall apply; and any reference (however expressed) in this Act to a relative shall be construed accordingly."

The statutory concept of family is wide. However, the relative's claim is restricted to compensation for loss of financial support experienced as a consequence of the death of the deceased (patrimonial loss).⁶ Put another way, even although the pursuer is a relative within the Schedule, she will not obtain damages unless she was *in fact* being supported financially by the deceased (or would experience support in the future).⁷ If there is no patrimonial loss, the relative cannot recover. Thus, while the class of relative who can sue may appear wide, in practice it is restricted to those members of his family whom the deceased was in fact supporting financially before he died.

Relatives who can claim damages for non-patrimonial loss

2.4 In addition, a smaller group of relatives - the deceased's "immediate family" - is entitled to claim damages for non-patrimonial loss. Section 1(4) of the 1976 Act⁸ provides -

"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 the loss of 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."

The "immediate family" of the deceased consists of relatives who fall within sub-paragraphs (a), (aa), (b) or (c) of paragraph 1 of Schedule 1 to the 1976 Act,⁹ namely the deceased's spouse, heterosexual cohabitant, children and parents. While the court is not obliged to

⁵ Section 1(1) of the 1986 Act provides that the fact that a person's parents are not or have not been married to one another shall be disregarded in establishing the legal relationship between the person and any other person and that any such relationship shall have effect as if the parents were or had been married to one another.

⁶ 1976 Act, s 10(3). There is also a claim for reasonable expenses incurred by the pursuer in connection with the deceased's funeral.

⁷ For example, the deceased's posthumous child, ie a child who would have been alimented by the deceased had he lived. Similarly, a parent of the deceased who, while not being supported at the date of death, would have received financial support if the deceased had not died. Patrimonial loss must be established by evidence and is subject to the remoteness rules.

⁸ As amended by the Damages (Scotland) Act 1993 (c 5), s 1(1).

⁹ 1976 Act, s 10(2).

ascribe any part of an award to any of the heads of damage, the pursuer will fail unless the court is satisfied that the pursuer has suffered such loss(es). In theory at least, there is therefore no automatic right to damages for non-patrimonial loss. However, it is not a precondition to such a claim that the pursuer was being supported financially by the deceased.

Report on the Law Relating to Damages for Injuries Causing Death

2.5 The 1976 Act was enacted as a consequence of our Report on *The Law Relating to Damages for Injuries Causing Death*.¹⁰ In our Report we took the view that a claim for damages for non-patrimonial loss "should not be available to all persons who, in principle at least, would be entitled to sue for damages for patrimonial loss.... The intangible losses which we have described are suffered most acutely within the restricted family group of husband and wife, parent and child; outside that group the loss suffered by individuals in particular cases must be weighed against the need to discourage speculative claims for losses which are extremely difficult to quantify... We therefore propose that only a husband, wife, parent or child should be entitled to claim for loss of society [non-patrimonial loss] but that the award should be available to the same class of children who are entitled to claim damages for patrimonial loss".¹¹ This is confirmed by the Appendices to the Report.¹²

2.6 Appendix I to our Report made clear that the rules that (i) a relationship by affinity was to be treated as a relationship of consanguinity and (ii) a relationship of the half blood was to be treated as a relationship of the whole blood, were only intended to apply when determining the categories of relatives who could sue for patrimonial loss. Title to sue for loss of society (non-patrimonial loss) was deliberately restricted. In particular, relationships by affinity were not included: nor were collaterals.¹³

2.7 However, the provisions of the Appendices were not incorporated into the draft Bill annexed to our Report. For reasons discussed later, this led to relatives by affinity¹⁴ having title to sue for non-patrimonial loss.

*Quinn v Reed*¹⁵

2.8 Following the enactment of the 1976 Act, concern was raised about the provisions of the Act which permit certain immediate relatives of the deceased to sue for non-patrimonial loss. The relatives do not include brothers, sisters, grandparents and grandchildren. The courts commented on the provisions of the 1976 Act in *Quinn v Reed*. This case concerned an action for damages by the widower and several other relatives arising out of a road accident in which a woman was killed. The deceased's half-brother claimed for loss of society¹⁶ (non-

¹⁰ Scot Law Com No 31.

¹¹ *Ibid* para 109.

¹² These are reproduced in Appendix 1 of the current Discussion Paper.

¹³ I.e brothers and sisters.

¹⁴ Parents-in-law, daughters-in-law and sons-in-law.

¹⁵ 1981 SLT (Notes) 117.

¹⁶ The heads of loss in s 1(4) of the 1976 Act (see para 2.4 above), introduced by the Damages (Scotland) Act 1993 (c 5), s 1A, replaced the former "loss of society" award.

patrimonial loss). In dismissing the half-brother's claim, the Lord Ordinary (Grieve) issued an opinion:

"The reason why I am issuing a short opinion in this particular case is to draw attention to what seems to me to be an unfortunate omission in the Act of 1976. I have always understood that one of its purposes was to broaden the category of persons who could claim damages in respect of a relative's death. That purpose has to some extent been achieved by the provisions of section 1(3), which permits persons such as brothers and sisters to make a claim for loss of support following on the death of a brother or sister in circumstances covered by the provisions of section 1(1) of the Act. However, there must be many cases in which a brother and his sister live together, or without actually residing in the same house, live near each other, and to a very large extent are dependent on each other for society, and in circumstances where the loss of the other's society by death is far harder to bear than any loss of support would have been. The more common case is that of two sisters living together with their own means of support but each almost wholly dependent on each other for society. If one is killed in circumstances which would give rise to a claim for damages by a 'relative', and thus by, for instance, a son who had been resident in Australia for 20 years and had been out of touch with his mother during that time, the remaining sister could make no claim for loss of the society of her deceased sister, but technically the expatriate son could. Yet on any realistic view the sister was far more a member of the deceased's immediate family than the son.

It seems unrealistic to my mind that brothers and sisters could in certain circumstances claim for loss of support, but never in any circumstances for loss of society. If, as it appears is the case, awards made for loss of society include an element for grief and suffering the provisions of section 1(4) seem also to be unfair."

*Monteith v Cape Insulation*¹⁷

2.9 In *Monteith v Cape Insulation*, Mrs Monteith brought an action of damages against Cape Insulation in respect of the death of her husband. The deceased's mother-in-law claimed damages for non-patrimonial loss under section 1(4) of the 1976 Act. It was held that the provisions of the 1976 Act should be construed literally when determining the relatives who constituted the deceased's immediate family and that accordingly, the mother-in-law's claim was relevant. Lord Penrose explained:¹⁸

"The immediate family of a deceased person for the purposes of this Act are an artificially defined group which certainly excludes classes of individual who might normally have been expected to be within the immediate family in ordinary language. One's brothers and sisters would usually be so viewed at least before foris-filiation ... On the other hand, relationships by affinity may be less obvious candidates to be included in the 'immediate family' of a person. However, it is clear from sec 1(4) that 'immediate family' was to bear the meaning prescribed by sec 10(2) and no other. Section 10(2) clearly provides that one must find the members of the immediate family within the class of relatives. The immediate family is a sub-set of

¹⁷ 1998 SC 903.

¹⁸ *Ibid* at 908.

the class of relatives. For the purposes of sec 10(2), therefore, one begins with a class which is ascertained on an application of the whole provisions of the schedule. A mother-in-law would be included in that wider class. What the Act requires is that one should identify within that class those members who fall within the four specific sub paragraphs of para 1 of the schedule. The subsection does not refer to para 2 of the schedule. But that is immaterial. In ascertaining the membership of the sub-set one is not concerned with identification of qualifying individuals *de novo* but with a process of selection within a class which has already been defined... This is the obvious and natural construction of the language used. There is no ambiguity".

2.10 As a matter of statutory construction, this approach cannot be faulted. Before a person can be a member of the deceased's immediate family, she must be a relative within the meaning of paragraph 1 of Schedule 1. In determining whether a person falls within paragraph 1, resort must be made to paragraph 2. All persons falling within paragraph 1, as a consequence of paragraph 2, can then constitute members of the deceased's immediate family if they fall within paragraph 1(a), (aa), (b) or (c). So for example, since under paragraph 2 relationships by affinity are to be treated as relationships of consanguinity, the deceased's mother-in-law and father-in-law fall within paragraph 1(b) and are therefore members of the deceased's "immediate family" for the purpose of a claim for non-patrimonial loss under section 1(4).

2.11 On the other hand, the deceased's brother or sister, half-brother or half-sister, brother-in-law and sister-in-law, while relatives for the purpose of paragraph 1, are *not* members of the deceased's immediate family because they do not fall within the categories set out in paragraph 1(a), (aa), (b) or (c).

2.12 The effect of the decision in *Monteith v Cape Insulation*,¹⁹ was to widen the extent of the deceased's immediate family beyond that originally envisaged in our Report on *The Law Relating to Damages for Injuries Causing Death*.²⁰ Arguably extending title to sue to parents-in-law goes too far, while excluding the deceased's brother and sister is too restrictive. It is clear from the two cases mentioned above that the provisions of the 1976 Act have not been without criticism. As a consequence we have been asked to consider the matter and make recommendations for possible changes in the law.

¹⁹ 1998 SC 903.

²⁰ Scot Law Com No 31.

Part 3 Who should be entitled to sue for non-patrimonial loss?

Introduction

3.1 Damages for non-patrimonial loss are an attempt to compensate for the grief arising from the death of a loved one. The approach taken in the 1976 Act has been to restrict title to sue for such losses to a small group of the deceased's relatives *viz* the deceased's immediate family. In turn, the deceased's immediate family is a sub-set of a statutory list of the deceased's relatives who have title to sue for patrimonial loss arising from the death. It is therefore clear that under the 1976 Act title to sue for non-patrimonial loss is inextricably linked with title to sue for loss of financial support. In allowing the deceased's relatives to sue in respect of losses incurred by them as a consequence of a delict sustained by a third party ie the deceased, the 1976 Act represents an important exception to the fundamental principle of Scots law that delictual liability does not lie in respect of losses indirectly sustained by the pursuer as a result of harm suffered by another person.

3.2 Thus Scots law generally denies liability in delict for the recovery of secondary economic loss. Secondary economic loss arises where the defender has caused physical harm to A and as a result B suffers economic loss.¹ The leading Scottish case is *Reavis v Clan Line Steamers Ltd.*² Mrs Reavis and her orchestra were involved in a collision at sea which was caused *inter alia* by the fault of the defender, the owner of the ship in which they were sailing. Some members of the orchestra were drowned and the orchestra had to be disbanded. Mrs Reavis claimed that the services of the players had been secured by contracts of employment and she sought damages from the defender for the loss of profit she had sustained as a result of the injuries and deaths of her employees. Her claim was rejected on the basis that her loss was too remote. While Mrs Reavis could recover direct economic loss incurred from *her own* injuries, she could not recover the secondary economic loss she had incurred from the injuries and deaths of other persons ie the employees who made up her orchestra.

3.3 Similarly, where a person (a secondary victim) suffers harm as a consequence of the injury or death of another (the primary victim), Scots law is generally reluctant to impose delictual liability.³ The reason for this is to prevent a defender facing potential indeterminate liability. Put another way, it is a question of remoteness of injury. For example, A is killed by B's negligence. As a consequence of A's death, non-patrimonial loss is sustained by C, A's wife, D and E, A's friends for 30 years and F, G and H, A's pupils. They are all secondary victims and *prima facie* have no title to sue B in delict. However, the 1976 Act constitutes an exception to these general principles and allows C, the deceased's wife, (a secondary victim) to sue not only for non-patrimonial loss but also for loss of support (secondary economic loss).

¹ This will most often arise when B has a contract with A which A can no longer fulfil causing economic loss to B. Secondary economic loss also arises when the defender has caused harm to A's property and as a result B suffers economic loss.

² 1925 SC 725.

³ *Bourhill v Young* 1942 SC (HL) 78; *Robertson v Turnbull* 1982 SC (HL) 1.

3.4 Accordingly, the 1976 Act allows a group of the deceased's relatives to sue for secondary economic loss (patrimonial loss) and a sub-set of that group (the deceased's "immediate family") to sue for non-patrimonial loss as well. Although members of the latter group have title to sue for loss of support, it is not a precondition of a claim for non-patrimonial loss that the claimant was being (or had been) maintained by the deceased. By restricting those who can sue for patrimonial loss and non-patrimonial loss to a list of the deceased's relatives, the 1976 Act clearly defines the scope of the exception to non-recovery of secondary economic loss and non-liability to secondary victims. It also reflects Scots common law which traditionally gave a limited class of the deceased's relatives the right to sue for loss of support and non-patrimonial loss (*solatium*).

3.5 In theory, title to sue for non-patrimonial loss is not, of course, dependent on entitlement to sue for loss of support. There could be two separate lists, *viz* a list of relatives who could sue for loss of support and a list of relatives who could sue for non-patrimonial loss. More radically, the notion that title to sue on both counts should be restricted to the deceased's relatives could be abandoned. At one extreme, there could be a simple rule that anyone who was being or had been supported by the deceased had title to sue for non-patrimonial loss. But this would exclude relatives, for example the deceased's parents, from suing for non-patrimonial loss if they had not in fact been maintained by the deceased. At the other end of the spectrum, there could be a system whereby anyone claiming interest could apply to the court to show how in the particular circumstances of the case he should be allowed to sue for non-patrimonial loss. However, it is thought that this is not an occasion for radical reform of the 1976 Act. We are satisfied that title to sue for patrimonial and non-patrimonial loss should remain restricted to a statutory list of relatives of the deceased. In particular, we would emphasise the degree of certainty this provides in respect of the defender's potential liability. Moreover, it also follows from the structure of the 1976 Act that any person who has title to sue for non-patrimonial loss will be able to claim damages for loss of support. Again, we are satisfied that it is not within our terms of reference to consider whether or not this outcome is always satisfactory.

The deceased's immediate family

3.6 At the time of our Report on *The Law Relating to Damages for Injuries Causing Death*⁴ we justified restricting title to sue for non-patrimonial loss to a narrower sub-set of the deceased's relatives for two reasons. First, we took the view that the intangible losses, which form the basis of the claim, will be felt most acutely by the deceased's nuclear family of husband and wife, parent and child. Second, we recognised that while more remote relatives could in fact suffer such losses, title to sue should nevertheless be restricted in order to prevent speculative claims.

3.7 The question arises whether we should continue to restrict title to sue to a sub-set of the deceased's relatives *viz* the deceased's immediate family. It could be argued that any relative who has title to sue for loss of support should also be able to sue for non-patrimonial loss. In theory, speculative claims would be avoided as the pursuer has to establish such loss. But in the majority of cases an award of damages for non-patrimonial loss is made as soon as the court is satisfied that the pursuer is a member of the deceased's

⁴ Scot Law Com No 31, para 109.

immediate family. Thus if the scope of the deceased's immediate family is extended to all relatives who have title to sue for loss of support, speculative claims are unlikely to be discouraged merely because the onus of proving such intangible losses lies on the pursuer. On the other hand, restricting title to sue for non-patrimonial loss to the deceased's immediate family means that cases can arise when a relative who has in fact suffered such loss is unable to claim simply because he is not a member of the group.

3.8 We do not make any proposal on this but invite comments on the following:-

1(a). Should title to sue for non-patrimonial loss continue to be restricted to a sub-set of persons (the deceased's immediate family) who have title to sue for loss of support? Or,

1(b). Should all relatives who have title to sue for loss of support have title to sue for non-patrimonial loss?

3.9 At the outset of this Part,⁵ damages for non-patrimonial loss were described as an attempt to compensate for the death of a loved one. In theory, no damages will be awarded unless non-patrimonial loss can be established and this can sometimes involve distressful - and distasteful - evidence.⁶ In the vast majority of cases, however, damages are awarded once the court is satisfied that the pursuer is in fact a member of the deceased's immediate family and evidence of the extent of the pursuer's grief is rarely required. The amounts awarded are small⁷ although there has been judicial acknowledgement that they have fallen out of step with the general level of awards of damages for personal injuries.⁸ The important point, however, is that compensation for non-patrimonial loss constitutes some recognition of the pain and anguish suffered by relatives on the death of a loved one.

3.10 If title to sue for non-patrimonial loss is to continue to be restricted to a group of relatives who constitute the deceased's immediate family,⁹ then consideration must be given to those persons who should be included in the group. There have been great changes in family structures in Scotland since the Damages (Scotland) Act was enacted in 1976. These include increasing diversity as a consequence of our multicultural society; the decline of marriage as the dominant legal regime for heterosexual couples; and the decriminalisation of homosexual relationships. It is clear that determining the membership of the deceased's immediate family so that it reflects the concepts of family in contemporary Scotland is primarily a matter of public policy and must ultimately be decided by the Scottish Parliament. Nevertheless the following discussion is offered as a contribution to inform the debate. In our discussion we shall consider

(i) relatives who are currently members of the deceased's immediate family;

(ii) relatives who are not members of the deceased's immediate family

⁵Above para 3.1.

⁶ See, for example, *Beggs v Motherwell Bridge Fabricators Ltd* 1998 SLT 1215 per the Lord Ordinary (Eassie) at 1223-24.

⁷ See Appendix 2.

⁸ *McManus' Executrix v Babcock Energy Ltd* 1999 SC 569.

⁹ If all relatives who have title to sue for patrimonial loss are given title to sue for non-patrimonial loss, then, of course, the concept of the deceased's immediate family will become redundant.

but who currently have title to sue for patrimonial loss;

- (iii) persons who are not currently regarded as the deceased's relatives and have no title to sue for patrimonial or non-patrimonial loss.

Relatives who are currently members of the deceased's immediate family

Any person who immediately before the deceased's death was the spouse of the deceased

3.11 Under the current law, a surviving spouse can sue for non-patrimonial loss.¹⁰ It is thought that a surviving spouse should continue to be entitled to sue for non-patrimonial loss. This is justified on the basis that a surviving spouse is most likely to suffer the type of losses referred to in section 1(4) of the 1976 Act. In other jurisdictions it is common for a surviving spouse to be entitled to claim for non-patrimonial loss.¹¹

3.12 We invite comments on the following-

- 2. Should a surviving spouse of the deceased continue to have title to sue for non-patrimonial loss?**

Any person, not being the spouse of the deceased, who was immediately before the deceased's death, living with the deceased as husband and wife

3.13 At present, a heterosexual cohabitant can sue for non-patrimonial loss.¹² The "unmarried spouse" was not included in the original list of relatives in Schedule 1. The reason given was that the legal status of the "unmarried spouse" was to be considered by the Commission in a comprehensive survey of family law.¹³ However, the Administration of Justice Act 1982 extended the meaning of the deceased's "immediate family" to include heterosexual cohabitants.¹⁴

3.14 It will be noticed that, unlike some other jurisdictions,¹⁵ there is no minimum period of cohabitation before a couple can qualify. Whether two people are living together as husband and wife is basically a question of fact; it will usually involve an element of stability. Unlike the law on marriage by cohabitation with habit and repute, the parties do not have to act as if they were married. They must, however, have been cohabiting immediately before the death.

3.15 Given the increasing number of couples choosing to live together without marrying, it is thought that a surviving cohabitant should continue to be entitled to sue for non-

¹⁰ 1976 Act, Sch 1, para 1(a).

¹¹ See Appendix 4.

¹² 1976 Act, Sch 1, para 1(aa).

¹³ Scot Law Com No 31, para 82.

¹⁴ 1982 Act, section 14(4). The 1982 Act introduced damages for injuries to a relative when the injuries did not result in death (sections 8 and 9). "Relative" for the purposes of the 1982 Act included heterosexual cohabitants (section 13). Schedule 1 to the 1976 Act was amended in the interests of consistency.

¹⁵ For example, in England the couple must have cohabited for at least two years. The cohabitation period is also two years in the Canadian provinces of Manitoba and Saskatchewan. In Ireland the couple must have cohabited for at least three years. See Appendix 4.

patrimonial damages. Again this view can be justified on the basis that, as in the case of the spouse of the deceased, the deceased's heterosexual cohabitant may well suffer grief as a consequence of the deceased's death.

3.16 We invite comments on the following-

3. **Should a person who immediately before the deceased's death, was the deceased's heterosexual cohabitant, continue to have title to sue for non-patrimonial loss?**

Any person who was a parent of the deceased

3.17 Under the current law a deceased's parent has title to sue for non-patrimonial loss.¹⁶ The deceased's biological mother and father are parents.¹⁷ Adoptive parents¹⁸ and step - parents¹⁹ are also included.

3.18 Under present law adoption terminates the legal relationship between the child and the biological mother. In recent years it has become easier for the adopted child and the biological mother to trace one another and thereby to have the opportunity to establish an emotional relationship. It is thought that the biological mother should be included in a revised statutory definition of "parent" in order to have a claim in such a case.

3.19 As we have seen "parent" has been held to include parent-in-law.²⁰ That was not our intention in the Report on *The Law Relating to Damages for Injuries Causing Death*.²¹ It could be argued that since the pursuer must establish that he has suffered relevant intangible losses, in practice successful cases will be rare. On the other hand, there is a tendency to make an award of damages merely because the pursuer is a member of the deceased's immediate family.

3.20 We invite comments on the following-

- 4(a). **Should parents of the deceased continue to have title to sue for non-patrimonial loss? If so,**
- 4(b). **Should "parent" include the biological mother of an adopted child?**
- 4(c). **Should "parent" continue to include parent-in-law for this purpose?**

Any person who was a child of the deceased

¹⁶ 1976 Act, Sch 1, para 1(b).

¹⁷ This includes a person deemed to be the mother or father of the child under the Human Fertilisation and Embryology Act 1990 (c 37), ss 27 and 28. Persons deemed not to be genetic parents under this legislation are excluded.

¹⁸ Adoption (Scotland) Act 1978 (c 28), s 39. Also included are persons who are parents by virtue of a parental order under the Human Fertilisation and Embryology Act 1990 (c 37), s 30.

¹⁹ 1976 Act, Sch 1, paras 1(b) and 2(a).

²⁰ *Monteith v Cape Insulation* 1998 SC 903.

²¹ Scot Law Com No 31.

3.21 At present a child of the deceased has title to sue for non-patrimonial loss.²² "Child" has an extended meaning and includes the deceased's biological child,²³ adopted child,²⁴ step-child²⁵ and a person accepted by the deceased as a child of the family.²⁶ It also includes the deceased's son-in-law or daughter-in-law,²⁷ contrary to our original proposals. "Child" also includes a child who was *in utero* at the time of the deceased's death and who was born alive posthumously.²⁸

3.22 For the reasons that we have given in our discussion of the definition of "parent", it is thought that the definition of "child" should perhaps include an adopted person whose biological mother was the deceased.

3.23 We invite comments on the following-

- 5(a). **Should a child of the deceased continue to have title to sue for non-patrimonial loss? If so,**
- 5(b). **Should "child" include an adopted person whose biological mother was the deceased?**
- 5(c). **Should "child" continue to include a son-in-law or daughter-in-law for this purpose?**

Relatives who are not members of the deceased's immediate family but who currently have title to sue for patrimonial loss

3.24 So far we have considered whether the relatives who are currently entitled to sue for non-patrimonial loss should continue to be able to do so. In the following paragraphs we consider the possible extension of the sub-set of relatives who constitute the deceased's "immediate family" to cover other relatives who are currently entitled to sue for patrimonial loss and who should possibly also have title to sue for non-patrimonial loss.

Any person who was an ascendant or descendant (other than a parent or child) of the deceased

3.25 Under the current law, relatives in this group are not members of the deceased's immediate family and consequently they have no title to sue for non-patrimonial loss.²⁹

3.26 The group is potentially very wide, particularly when it is remembered that relationships by affinity are included.³⁰ In practice, however, we are concerned with the

²² 1976 Act, para 1(b).

²³ Or person deemed to be the deceased's biological child.

²⁴ Or a child subject to a parental order in favour of the deceased under the Human Fertilisation and Embryology Act 1990, s 30.

²⁵ 1976 Act, Sch 1, paras 1(b) and 2(a).

²⁶ 1976 Act Sch 1, paras 1(b) and (c) and 2(a).

²⁷ *McAllister v Imperial Chemical Industries plc* 1997 SLT 351.

²⁸ *Cohen v Shaw* 1992 SLT 1022, OH.

²⁹ But they can sue for patrimonial loss under the 1976 Act, Sch 1, para 1(d).

deceased's grandparents or grandchildren. In contemporary Scotland strong affective relationships can exist between grandparent and grandchild. This can be seen, for example, when grandparents seek the right of contact with their grandchildren. Moreover, grandparents often take on the role of looking after grandchildren in their parents' absence, for example, when the parents are at work.

3.27 We invite comments on the following-

6(a). Should grandparents and grandchildren of the deceased have title to sue for non-patrimonial loss?

6(b). If so, should relationships by affinity be excluded for this purpose?

Any person who was, or was the issue of, a brother, sister, uncle or aunt of the deceased

3.28 At present, relatives in this group are not members of the deceased's immediate family and do not have title to sue for non-patrimonial loss.³¹

3.29 This has been the subject of criticism, particularly in relation to brothers and sisters. There is no doubt that deep affective relationships can exist between siblings, aunts, uncles, nieces and cousins. The group is potentially very wide, particularly when it is remembered that relationships by affinity are included. In its Report on *Claims for Wrongful Death*,³² however, the Law Commission recommended that a brother or sister of the deceased, including an adoptive brother or sister, should be entitled to claim bereavement damages.³³ In other jurisdictions, brothers and sisters are entitled to claim.³⁴

3.30 We invite comments on the following-

7(a). Should a person who was, or was the issue of, a brother, sister, uncle or aunt of the deceased have title to sue for non-patrimonial loss?

7(b). If so, should relationships by affinity be excluded for this purpose?

Any person who, having been a spouse of the deceased, had ceased to be so by virtue of a divorce

3.31 At present the deceased's former spouse is not a member of the deceased's immediate family and cannot sue for non-patrimonial loss.³⁵

3.32 Given that the former spouse's relationship with the deceased had irretrievably broken down before the death, it can be argued that a former spouse should not be included as a member of the deceased's immediate family. In particular, it should be remembered

³⁰ Relationships by affinity are treated as relationships by consanguinity and relationships of the half blood as relationships of the whole blood: 1976 Act, Sch 1, para 2(a).

³¹ But they can sue for patrimonial loss under the 1976 Act, Sch 1, para 1(e).

³² Law Com No 263, para 6.31(4).

³³ The Commission's Report has not yet been implemented.

³⁴ For example in Ireland, and the Canadian provinces of Manitoba and Ontario. See Appendix 4.

³⁵ But they can sue for patrimonial loss under the 1976 Act, Sch 1, para 1(f).

that under the Family Law (Scotland) Act 1985, on divorce, the surviving spouse should have obtained financial provision aimed at an economic "clean break" between the parties. However, we would welcome the views of consultees on this issue.

3.33 We therefore invite comments on the following-

8. **Should a former spouse of the deceased continue to be excluded from the list of members of the deceased's "immediate family who have title to sue for non-patrimonial loss"?**

Persons who are not currently regarded as the deceased's relatives and have no title to sue for patrimonial or non-patrimonial loss

3.34 In the following paragraphs we look at the possibility of extending title to sue for non-patrimonial loss to other people who at present do not have title to sue for either patrimonial or non-patrimonial loss. Because of the structure of the 1976 Act, a person who has title to sue for non-patrimonial loss would also be able to sue for loss of support.

Any person who was, immediately before the deceased's death, the deceased's homosexual cohabitant

3.35 Under the current law, a homosexual cohabitant has no title to sue for patrimonial or non-patrimonial loss.

3.36 There is no doubt that homosexual relationships are increasingly accepted as legitimate lifestyles. As a consequence, homosexual relationships are being recognised for important legal purposes. In particular, a deceased's homosexual cohabitant has been recognised by the House of Lords as a member of the deceased's family for the purpose of the Rent Acts.³⁶

3.37 Moreover, in *Salgueiro da Silva Mouta v Portugal*,³⁷ the European Court of Human Rights recognised that discrimination on the grounds of sexual orientation in respect of the enjoyment of the rights and freedoms enshrined in the European Convention on Human Rights could constitute a breach of Article 14 (prohibition of discrimination on any ground such as sex, race, colour, religion etc). Article 8 of the European Convention provides that "Everyone has the right to respect for his private and family life...". If the deceased's unmarried heterosexual cohabitant has title to sue under the 1976 Act and the deceased's homosexual cohabitant has not, it is arguable that this could constitute a violation of Article 8 read in conjunction with Article 14. The continued exclusion of the deceased's homosexual cohabitant from the list could be held to be a breach of the European Convention on Human Rights.³⁸

3.38 There remains the difficulty of defining the scope of the relationship. If the legal incidents of such a relationship were to be consistent with the current law on heterosexual cohabitants, it should be restricted to a person who was cohabiting with the deceased

³⁶ *Fitzpatrick v Sterling Housing Association* [1999] 4 All ER 705.

³⁷ 2001 Fam LR 2.

³⁸ For fuller discussion see Appendix 3.

immediately before the date of his death.³⁹ In the Adults with Incapacity (Scotland) Act 2000, nearest relative includes a person of the same sex as the adult incapax who "is and has been ... living with the adult in a relationship which has the characteristics, other than that the persons are of the opposite sex, of the relationship between husband and wife".⁴⁰ In its Report on *Claims for Wrongful Death*,⁴¹ the Law Commission recommended that the deceased's homosexual cohabitant should be entitled to bereavement damages. Cohabitant is defined as "a person who, although not married to the deceased, had lived with the deceased as man and wife (or if of the same gender, in the equivalent relationship)".⁴² There is no reason to expect any greater difficulty in establishing the existence of a stable homosexual cohabitation than has been experienced in respect of the equivalent heterosexual relationship.

3.39 We invite comments on the following-

9. Should a person who immediately before the deceased's death, was the deceased's homosexual cohabitant, have title to sue for non-patrimonial loss?

Any person who, immediately before the deceased's death, had parental rights and responsibilities in relation to the deceased

3.40 Under the current law while a person accepted by the deceased as a child of the family is treated as the deceased's child, a person who has accepted the deceased as a child of the family is not treated as the deceased's parent. This appears an important lacuna given that increasingly children are brought up by persons who are not married to either of their biological parents or, indeed, may have no relationship at all with the biological parents. A solution would be to re-define "parent" for the purposes of the 1976 Act.

3.41 It could be argued that any person who had parental responsibilities and rights⁴³ in relation to the deceased should have title to sue as parent. This would always include the child's biological mother.⁴⁴ The child's biological father would also be included if he were married to the child's mother at the date of conception or any time thereafter.⁴⁵ If this has not happened a father only obtains responsibilities and rights by agreement with the mother⁴⁶ or by court order.⁴⁷ Similarly, a step-parent or other person who has accepted a child as a child of the family will not obtain parental responsibilities and rights except by court order.⁴⁸ However, if the concept of parental responsibilities for this purpose were to

³⁹ Like heterosexual cohabitants, it is not thought that there should be any minimum period of cohabitation: if a minimum period was required for homosexual cohabitants but not for heterosexual cohabitants this could be a violation of Article 8 in conjunction with Article 14.

⁴⁰ Adults with Incapacity (Scotland) Act 2000 (asp.4), s 87(2). Under para 2(1)(a)(ii) of Sch 3 to the Housing (Scotland) Act 2001, amongst those entitled to succeed to a Scottish secure tenancy on the death of the tenant is a person who had been living with the tenant in a homosexual relationship having the characteristics of a relationship between a husband and wife.

⁴¹ Law Com No 263, para 6.31.

⁴² *Ibid.*

⁴³ As defined in the Children (Scotland) Act 1995 (c 36), ss 1 and 2.

⁴⁴ *Ibid* s 3(1)(a).

⁴⁵ *Ibid* s 3(1)(b). Adoptive parents automatically have parental responsibilities and rights.

⁴⁶ *Ibid* s 4.

⁴⁷ *Ibid* s 11.

⁴⁸ *Ibid* s 11.

include an obligation to aliment the child, then any father⁴⁹ and any person who accepted the child as a child of the family would automatically qualify.⁵⁰ This solution has the advantage of not having complex definitions of "parent". It also relies on the concept of parental responsibilities and rights which is familiar in other areas of Scots family law.

3.42 We invite comments on the following-

- 10. Should a "parent" of the deceased be defined as any person who had parental responsibilities and rights in relation to the deceased? (Parental responsibilities for this purpose would include an obligation to aliment the deceased)**

The parent of any person who accepted the deceased as a child of the family (de facto grandparent)

3.43 At present the parents of a person who accepted the deceased as a child of the family (the *de facto* grandparent) have no title to sue for non-patrimonial or patrimonial loss. The relationship between the "grandparents" and the deceased child in this case can be close and it could be argued that such "grandparents" should be entitled to sue for non-patrimonial loss in recognition of the closeness of the relationship.

3.44 We invite comments on the following-

- 11. Should *de facto* grandparents have title to sue for non-patrimonial loss?**

Any child who has been accepted as a child of the family by a child of the deceased (de facto grandchild)

3.45 Under the current law a child who has been accepted as a child of the family by the child of the deceased (the *de facto* grandchild), has no title to sue for non-patrimonial or patrimonial loss. Again the relationship in this case can be close and it may be justifiable to allow *de facto* grandchildren to claim damages for non-patrimonial loss.

3.46 We invite comments on the following-

- 12. Should *de facto* grandchildren have title to sue for non-patrimonial loss?**

Any person who, immediately before the deceased's death, was engaged to be married to the deceased

3.47 Under the 1976 Act, the deceased's fiancé or fiancée has no title to sue for patrimonial or non-patrimonial loss. This accords with the general principle of Scots law that an

⁴⁹ Family Law (Scotland) Act 1985 (c 37), s 1(1)(b).

⁵⁰ *Ibid* s 1(1)(c). Local authority foster parents who accept a child as a child of the family do not owe an obligation to aliment the child. It is thought that foster parents should nevertheless be regarded as a parent for the purpose of the 1976 Act.

agreement to marry is of no legal significance.⁵¹

3.48 As we have seen, heterosexual cohabitants have title to sue under the 1976 Act.⁵² It could be argued that couples who choose not to cohabit during their engagement for religious, financial or other reasons should not be at a disadvantage on that account. In its Report on *Claims for Wrongful Death*,⁵³ the Law Commission recommended that a person who was engaged to be married to the deceased should be included in the list of persons entitled to bereavement damages.⁵⁴

3.49 The issue seems to centre on whether the benefits of extending title to sue to engaged couples justifies a departure from the general rule that engagement has no legal effect. We would welcome the views of consultees on this.

3.50 We invite comments on the following -

- 13. Should a person who at the time of death of the deceased, was engaged to be married to the deceased have title to sue for non-patrimonial loss?**

⁵¹ Law Reform (Husband and Wife) (Scotland) Act 1984 (c 15), s 1. Under this section an agreement to marry gives rise to no legal rights and obligations. This section abolished not only the claim for breach of promise to marry but also delictual claims arising from engagement. See, generally, Eric M. Clive, *Husband and Wife*, 4th edn, p 19.

⁵² See paras 3.13 – 3.16.

⁵³ Law Com No. 263, para 6.29.

⁵⁴ The position in England is slightly different from that in Scotland. While the action of breach of promise to marry has been abolished by the Law Reform (Miscellaneous Provisions) Act 1970 (c 33), s 1, the legal status of engagement remains.

Part 4 Summary of questions for consultees

We would welcome the views of consultees on the following questions.

- 1(a). **Should title to sue for non-patrimonial loss continue to be restricted to a sub-set of persons (the deceased's immediate family) who have title to sue for loss of support? Or**
- 1(b). **Should all relatives who have title to sue for loss of support have title to sue for non-patrimonial loss?**
(Para 3.8)
2. **Should a surviving spouse of the deceased continue to have title to sue for non-patrimonial loss?**
(Para 3.12)
3. **Should a person who immediately before the deceased's death, was the deceased's heterosexual cohabitant, continue to have title to sue for non-patrimonial loss?**
(Para 3.16)
- 4(a). **Should parents of the deceased continue to have title to sue for non-patrimonial loss? If so,**
- 4(b). **Should "parent" include the biological mother of an adopted child?**
- 4(c). **Should "parent" continue to include parent-in-law for this purpose?**
(Para 3.20)
- 5(a). **Should a child of the deceased continue to be have title to sue for non-patrimonial loss? If so,**
- 5(b). **Should "child" include an adopted person whose biological mother was the deceased?**
- 5(c). **Should "child" continue to include a son-in-law or daughter-in-law for this purpose?**
(Para 3.23)
- 6(a). **Should grandparents and grandchildren of the deceased have title to sue for non-patrimonial loss?**
- 6(b). **If so, should relationships by affinity be excluded for this purpose?**
(Para 3.27)
- 7(a). **Should a person who was, or was the issue of, a brother, sister, uncle or aunt of the deceased, have title to sue for non-patrimonial loss?**

- 7(b). If so, should relationships by affinity be excluded for this purpose?
(Para 3.30)
8. Should a former spouse of the deceased continue to be excluded from the list of members of the deceased's "immediate family" who have title to sue for non-patrimonial loss?
(Para 3.33)
9. Should a person who immediately before the deceased's death, was the deceased's homosexual cohabitant, have title to sue for non-patrimonial loss?
(Para 3.39)
10. Should a "parent" of the deceased be defined as any person who had parental responsibilities and rights in relation to the deceased? (Parental responsibilities for this purpose would include an obligation to aliment the deceased).
(Para 3.42)
11. Should *de facto* grandparents have title to sue for non-patrimonial loss?
(Para 3.44)
12. Should *de facto* grandchildren have title to sue for non-patrimonial loss?
(Para 3.46)
13. Should a person who at the time of death of the deceased, was engaged to be married to the deceased have title to sue for non-patrimonial loss?
(Para 3.50)

Appendix 1

Appendices to the Report on the Law Relating to Damages for Injuries Causing Death:¹

Appendix 1 The Class of Persons Entitled to Sue for Patrimonial Loss

1. *The present law* [pre 1976 Law]

Wife	
Husband	
Children	including: (a) adopted children (b) illegitimate children.
Other descendants, for example, grandchildren	only if the deceased had a legal duty to support them at the time of his death; but not in any circumstances the descendants of illegitimate children.
Parents	including: (a) adopting parents (b) parents of an illegitimate child.
Other ascendants	only if the deceased had a legal duty to support them at the time of his death; but not in any circumstances the ascendants of illegitimate children.

2. *The law if the Commission's recommendations are implemented*

Wife	including divorced wife.
Husband	including divorced husband.
Children	including: (a) adopted children (b) illegitimate children (c) stepchildren of either spouse (d) children unrelated to either spouse who have been accepted by the deceased as members of his family.
Other descendants for example, grandchildren	of all the above categories of children.
Parents	including: (a) adopting parents (b) parents of an illegitimate child.

¹ Scot Law Com No 31.

Other ascendants, of all the above categories of parents.
for example,
grandparents

Collaterals (brothers, sisters, uncles, aunts and their issue).

3. *Other changes*

- i. While a legal duty of support is no longer to be an essential requirement, there must be proof of loss of present or future support.
- ii. Any relationship by affinity is to be treated as a relationship by consanguinity.
- iii. Any relationship of the half blood is to be treated as a relationship of the whole blood.

Appendix II The Class of Persons to be Entitled to Sue for Loss of Society

Wife

Husband

Children

including:

(a) adopted children

(b) illegitimate children

(c) stepchildren of either spouse

(d) children unrelated to either spouse who have been accepted by the deceased as members of his family.

But not their descendants, for example, grandchildren.

Parents

including:

(a) adopting parents

(b) parents of an illegitimate child.

But not their ascendants, for example, grandparents. "

Appendix 2

Examples of awards of damages for non-patrimonial loss

Case Citation	Awards for non – patrimonial loss
<i>Devlin v Strathclyde Regional Council</i> 1993 SLT 699	Mother of 14 year old son- £5,000 Stepfather- £5,000
<i>Kempton v British Railways Board</i> (unreported jury trial, 18 May 1993) ¹	Widow- £35,000 Child (aged 12)- £11,500 Child (aged 8)- £11,500
<i>Fisher v McKenzie</i> 1994 GWD 30-1823	Father- £13,000 Mother- £11,000
<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
<i>Campbell v Talbot</i> 1995 GWD 33-1702	Widow- £13,500 Child (aged 4)- £8,000 Child (aged 3)- £9,000
<i>Davies v McGuire</i> 1995 GWD 11-605 *	Parents of 13 year old- £7,500 each
<i>McManus 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
<i>Beggs v Motherwell Bridge Fabricators Ltd</i> 1998 SLT 1215	Widow- £14,388 Child (aged 14)- £4,000 Child (aged 13)- £4,000
<i>Muir v Grampian Health Board</i> 2000 GWD 12-442.	Widower- £15,000 Child (aged 6)- £8,000
<i>Young v McDowall</i> 2000 GWD 21-832.	Child (aged 21, living at home)- £5,000 Parents- £1,500
<i>Durie v Wyvern Structures Ltd</i> 2000 GWD 28-1102 *	Widow- £500 (only survived husband by two days) Child- £3,000
<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
<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
<i>Strang v Le Brusq</i> 2001 Rep LR 52 (jury award)	Parents of 21 year old son- £30,000 each
<i>McIntosh v Findlay</i> 2001 Rep LR 66 (jury award)	Posthumous child- £37,500

* 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.

¹ Discussed in McEwan & Paton, *Damages for Personal Injuries in Scotland* at 13/93-2. Another recent 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.

Appendix 3

The European Convention on Human Rights and the deceased's homosexual cohabitant

1. The continued exclusion of the deceased's homosexual cohabitant from the list of relatives entitled to claim for patrimonial and non-patrimonial loss could be held to constitute a violation of Article 8 of the European Convention on Human Rights read in conjunction with Article 14. The first paragraph of Article 8 provides:

"Everyone has the right to respect for his private and family life, his home and his correspondence."

2. Article 14 provides that:

"The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status..."

3. Article 14 does not provide an independent and free-standing protection against discrimination.¹ Rather, it is a complementary guarantee in relation to the rights and freedoms protected in Section I of the Convention which applies where the matter at issue falls within the ambit of one of the protected rights and freedoms.² However, Article 14 is autonomous in that even if there is no violation of the main Article, there may be a violation in conjunction with Article 14.³ The European Court of Human Rights considers Article 14 to be "an integral part of each of the Articles laying down rights and freedoms".⁴

4. If the exclusion of homosexual cohabitants from the list comes within the ambit of Article 8, then Article 14 applies. All things being equal, Article 8 does not give rise to entitlement to damages on the death of a spouse or cohabitant of either sex. However, once a state has chosen to allow actions by spouses and heterosexual cohabitants, it opens itself to the argument that failure to extend these rights to homosexual cohabitants constitutes a violation of the right to equal respect for private and family life under Article 8 in conjunction with Article 14.

5. So far, the Court has not held that a homosexual relationship can be classified as Article 8 "family life". In *S v UK*⁵ the Commission held that a lesbian relationship did not constitute "family life." However, this opinion was issued in 1986. The increasing social

¹ Protocol 12, signed by 27 of the member states of the Council of Europe on 4 November 2000, provides a general prohibition of discrimination. The Protocol will enter into force once it has been ratified by 10 states. So far there are no ratifications.

² See *Abdulaziz, Cabales & Balkandali v UK* A.94 (1985), para 71. See also van Dijk & van Hoof *Theory and Practice of the European Convention on Human Rights* pp 711-716.

³ *Belgian Linguistics Case* A.6 (1968) para 9.

⁴ *Belgian Linguistics*, para 9.

⁵ 47 DR 274. In this case it was held that although a lesbian relationship was not entitled to protection as "family life" under Article 8, it did come within the private life of both individuals.

acceptance of homosexual relationships might lead to a different result today, particularly given that the Court has shown increasing willingness to apply Article 8 to *de facto* family relationships.⁶ Respect for "private life" is also relevant. The fact that a person has no action for damages on the death of his homosexual cohabitant means that the character of his relationship and the pecuniary and non-pecuniary harm suffered by him as a result of its loss is not legally recognised. It is arguable that this non-recognition of his personal relationship comes within the ambit of his right to respect for his "private life."

6. It is therefore possible to argue that the situation of a person who cannot claim damages on the death of his homosexual cohabitant is within the ambit of the right to respect for private and family life under Article 8. If this is the case, then Article 14 comes into play. The principle of non-discrimination contained within Article 14 is violated where there is differential treatment of equal cases (the comparability test) without an "objective and reasonable justification" or if "there is no reasonable relationship of proportionality between the means employed and the aim to be realised" (the justification test).⁷

7. The comparability test⁸ involves determination of whether there has been differential treatment of analogous or relevantly similar cases linked to the purposes of the article in question.⁹ Under the current law there is clearly differential treatment of heterosexual and homosexual persons on the wrongful death of a cohabitant: the former can claim damages, the latter cannot. However, in order to satisfy the comparability test it must also be established that both groups are in analogous or relevantly similar situations, namely that the comparison between them is an appropriate one. The situation of homosexual and heterosexual cohabiting couples is arguably similar in that both are capable of forming long lasting relationships, often characterised by financial interdependence, and both groups therefore stand to suffer analogous losses on the wrongful death of a partner. There is authority for the proposition that a homosexual cohabitant is not appropriately compared to a heterosexual cohabitant but to a homosexual cohabitant of the opposite sex; in this case neither homosexual cohabitant is discriminated against on the grounds of sex as there is no differential treatment.¹⁰ The European Court of Human Rights is not constrained by an exhaustive list of grounds of discrimination and in *Salgueiro da Silva Mouta v Portugal*¹¹ held for the first time that where a difference in treatment is based on sexual orientation, this undoubtedly may constitute a breach of Article 14. This entails the approach that, for the purposes of establishing whether there has been discrimination on grounds of sexual orientation, a homosexual cohabitant is in a relevantly similar situation to a heterosexual cohabitant. The comparability test is therefore satisfied.

⁶ In *X,Y & Z v UK* Reports 1997 II, the Court held that the links between a woman's child and her cohabitant, who was a female to male transsexual, constituted "family life."

⁷ Eg *Belgian Linguistics*, para 10; *Abdulaziz, Cabales & Balkandali*, para 71.

⁸ The European Court of Human Rights has sometimes glossed over the comparability test or has considered it as part of the justification test, eg *Spadeo & Scalabrino v Italy* A.315-B (1995). See van Dijk & van Hoof *Theory and Practice of the European Convention on Human Rights*, pp722-729.

⁹ Eg *Sunday Times v UK* A.217 (1991), para 58; *Spadeo & Scalabrino v Italy* para 45.

¹⁰ This was the approach taken by the European Court of Justice in *Grant v South West Trains* [1998] 1 All ER (EC) 193 where sexual orientation discrimination was not recognised either as an independent ground of discrimination or as an aspect of sex discrimination. It was held in that case that the comparability test had not been satisfied as the appropriate comparator for a woman with a female partner was not a man with a female partner but a man with a male partner.

¹¹ 2001 Fam LR 2.

8. Where the comparability test is satisfied, the principle of equality of treatment will be violated if the justification test cannot be satisfied. A difference in treatment will be justified only if it is made in pursuit of a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.¹² The justification test attracts a wide margin of appreciation. The Court is generally willing to accept that states are acting in furtherance of a legitimate aim rather than in furtherance of "other and ill-intentioned designs".¹³

9. The general aim of the 1976 Act, to compensate the losses of the close relatives of a person who is wrongfully killed, is undoubtedly a legitimate one. There is no evidence to suggest that the original exclusion of homosexual cohabitants from the list of relatives was a policy decision. In our Report on *The Law Relating to Damages for Injuries Causing Death*¹⁴ and the Parliamentary debates leading to the 1976 and 1993 Acts the issue was not discussed.

¹² *Belgian Linguistics* para 10.

¹³ *National Union of Belgian Police v Belgium* A.19 (1975) para 48.

¹⁴ Scot Law Com No 31.

Appendix 4

Comparative Law

In preparing this Appendix we have drawn heavily on Appendix A to the Law Commission's Consultation Paper on *Claims for Wrongful Death*.¹⁵

1. England and Wales

1.1 The law relating to damages for wrongful death in England and Wales is contained in the Fatal Accidents Act 1976. This legislation implemented the recommendations of the Law Commission in their Report *Personal Injury Litigation - Assessment of Damage*.¹⁶ There was no claim for grief, loss of society and loss of guidance under the 1976 Act as originally enacted. However, section 1A, inserted by section 3 of the Administration of Justice Act 1982, provides that an action under the 1976 Act may include a claim for bereavement. The English bereavement claim differs in a number of respects from the equivalent claim under the Damages (Scotland) Act 1976. The action under section 1A of the Fatal Accidents Act 1976 can be brought for the benefit of a very narrow class of relatives; but those relatives who are entitled to claim are entitled to damages without proof of bereavement. There is, however, a fixed maximum statutory legacy which can be claimed by the relatives.

1.2 Section 1A(2) of the Fatal Accidents Act 1976 sets out the relatives for whose benefit an action for bereavement may be brought.¹⁷ A claim for bereavement damages may only be brought for the benefit of the deceased's spouse or where the deceased was a minor who had never married, for the benefit of his parents if he was legitimate or for his mother if he was illegitimate.¹⁸ Section 1A(3) provides that the maximum total which may be awarded under section 2A is £7,500.¹⁹ Where there is a claim for the benefit of both the parents of the deceased, the sum awarded is to be divided equally between them.²⁰

1.3 Bereavement need not be proven in order to obtain damages under section 1A. The Law Commission considered it highly undesirable that there should be any judicial investigation into the fact and extent of bereavement: for this reason, it recommended a presumption of bereavement where one of the family relationships set out in section 1A(2) was established and a fixed tariff of damages. This strong distaste for the leading of evidence on the extent of "psychic damage" was also an influencing factor in the Law

¹⁵ Law Com (1997) CP148.

¹⁶ (1973) Law Com No 56, paras 172-180.

¹⁷ In England and Wales, the deceased's relatives do not have title to bring an action in their own name. The executor or administrator of the deceased's estate must bring an action for their benefit.

¹⁸ The parents of an unmarried man who died less than one month after his 18th birthday as the result of an injury sustained while he was 17 were unable to claim bereavement damages in *Doleman v Deakin* (The Times 30 January 1990, noted in Kemp & Kemp, *The Quantum of Damages* vol 3 paras M5-018 and M5-102 and *Claims for Wrongful Death* Law Com No 263 para 2.70 at page 34.).

¹⁹ The Administration of Justice Act 1982 (c 53) provided for a fixed sum of £3,500 and s 1A(5) gave the Lord Chancellor the power to vary this sum by statutory instrument. The Lord Chancellor exercised this power in the Damages for Bereavement (Variation of Sum) (England and Wales) Order SI 1990/2575, increasing the award to £7,500 in respect of deaths occurring on or after 1 April 1991.

²⁰ S 1A(4). This is the only case in which there can be more than one claim for bereavement damages in respect of a single death under the 1976 Act.

Commission's recommendation that only a very narrow class of relatives should be able to claim bereavement damages.²¹

1.4 The Law Commission suggested the term "bereavement" to demonstrate that the claim extends beyond damages for grief and includes damages for other non-patrimonial losses, such as loss of guidance and society.²²

1.5 The Law Commission has recently reconsidered this area of the law and has produced recommendations for reform of the bereavement claim.²³ In the consultation paper they set out options to abolish the statutory list of relatives, to retain a list but to allow the courts discretion to grant bereavement damages to persons not on the list or to retain a fixed list but to extend the classes of relatives entitled to claim. In the Report, they settled on the third option. This option had proved popular with consultees and the Law Commission considered this to be an attractive option as it avoided the need to lead evidence of bereavement.

1.6 The Law Commission's suggested extended statutory list would include spouses, cohabitants, (whether of the opposite or the same sex), of at least two year's standing,²⁴ finance(e)s,²⁵ natural and adoptive parents and children and siblings. Where parents seek to claim in respect of the death of a child, they suggest that the age, legitimacy and marital status of the child should be irrelevant. Step-parents, children and siblings, half-siblings and persons who treated the deceased as a child of their family, or were treated as a child of the deceased's family are excluded from the proposed list. These relationships are excluded in order to avoid complexity, inconsistency and overcompensation. The Law Commission also recommended that there should be a fixed award of £10,000 for each eligible claimant and a ceiling of £30,000 on the defendant's total liability where the number of eligible claimants was greater than three. The £30,000 maximum award would be divided equally between them.

2. Ireland

2.1 In the Republic of Ireland the law relating to the recovery of damages in respect of wrongful death is governed by Part IV of the Civil Liability Act 1961.²⁶ The provisions of the Act are substantially similar to the English legislation, and the Irish case law draws heavily upon English decisions. To recover under the Act a claimant must prove the loss of financial dependency on the deceased, or the suffering of mental distress consequent upon the death of the deceased, and must also prove that he is a dependant within section 47(1), having a

²¹ Report on *Personal Injury Litigation- Assessment of Damages* (1973) Law Com No 56, paras 174 and 175.

²² Report on *Personal Injury Litigation- Assessment of Damages* (1973) Law Com No 56, para 173.

²³ *Claims for Wrongful Death* (1997) CP 148 and *Claims for Wrongful Death* (1999) Law Com No 263.

²⁴ The Law Commission considered providing for an exception to the 2 year rule where there was a child of the relationship but decided that the birth of a child could not be seen as an indication of the permanence or quality of the relationship. They came to the conclusion that although the 2 year period was an arbitrary limit, it was a necessary filter and should not be waived in any cases as this would inevitably involve judicial investigation into the quality of the relationship.

²⁵ In recognition of the fact that it could be difficult to establish whether a claimant had in fact been engaged to the deceased the Law Commission suggested the adoption of the evidential requirements for proof of an agreement to marry set out section 44 of the Family Law Act 1996 (c 27). Proof of engagement can be established by evidence in writing of an agreement to marry, by the gift of an engagement ring by one party to the other in contemplation of their marriage or by a ceremony entered into by the parties in the presence of one or more witnesses.

²⁶ As amended by the Civil Liability Amendment Act 1996. The 1961 Act replaced the Fatal Injuries Act 1956.

relationship with the deceased that falls within the range of close relationships prescribed in that section.

2.2 Section 49 (1)(a)(ii) of the 1961 Act provides for the recovery of an amount in respect of the "mental distress" suffered by the dependants as a result of the death. An award under this head can be made to a dependant whether or not he has suffered "injury resulting from the death" (patrimonial loss) within the meaning of section 49(1)(a)(i). Like English law there is a cap upon the total of any amounts awardable for mental distress. Originally this was £1,000. This was increased in 1981 to £7,500²⁷ and raised again in 1996 to £20,000.²⁸

2.3 Section 47(1)²⁹ of the 1961 Act defines "dependant" as a spouse, parent, grandparent, step-parent, child, grand-child, step-child, sibling, half-sibling of the deceased, a person whose marriage to the deceased has been dissolved by divorce or a person who had been cohabiting with the deceased until the deceased's death as husband and wife for a continuous period of not less than three years, and who has suffered injury or mental distress as a result of the death. All of these dependants are eligible to claim damages for both patrimonial loss and mental distress, apart from a former spouse who can claim for patrimonial loss only.³⁰ Prior to the passing of the Civil Liability Amendment Act 1996, cohabitants and former spouses had no claim.

2.4 In order to recover compensation under section 49(1)(a)(ii), a claimant must prove that he actually suffered some degree of mental distress as a result of the death, in addition to proving the requisite family relationship. There is some doubt as to the substance of this requirement. In *Cubbard v Rederij Viribus Unitis & Galway Stevedores Ltd*³¹ Lavery J took the view that section 49(1)(a)(ii) was not intended to provide compensation for every member of the deceased's family. He decided that there must be "some real intense feeling" over and above ordinary grief in order for a dependant to recover.³² However, this authority has not been followed subsequently. In *McCarthy v Walsh*³³ O'Dalaigh CJ considered that "a member of the family is far from being necessarily synonymous with a member of the family who suffers mental distress" but awarded damages to each of the seven siblings of the deceased, aged between 4 and 18. In *McDonagh v McDonagh*³⁴ Costello J awarded damages to the deceased's parents and 4 year old child but held that the second child of 18 months was too young to have suffered mental distress.

2.5 If the sum assessed as reasonable damages for mental distress exceeds the statutory maximum, then the maximum sum is divided among the dependants in proportion to their

²⁷ Courts Act 1981, s 28(1).

²⁸ Civil Liability Amendment Act 1996, s 2(1)(a). The new s 49(1A), inserted by s 2(1)(b) of the 1996 Act enables the amount to be varied by order.

²⁹ As substituted by the Civil Liability Amendment Act 1996, s 1(1).

³⁰ S 49A, inserted by the Civil Liability Amendment Act 1996, s 3(1).

³¹ [1965] 100 ILTR 40 (HC).

³² He awarded mental distress damages to each of the deceased's mother, sister and niece, who lived with the deceased in the family home, to the amount of £450. He awarded nothing to a brother of the deceased who also lived in the family home, and nothing to three other brothers and sisters who did not live with the deceased.

³³ [1965] 100 ITLR 40 (HC).

³⁴ [1992] IR 119 (HC).

shares in the original sum as assessed.³⁵ Damages should not be measured by reference to the imagined worst case, fixing damages for such a case at the statutory limit.³⁶

2.6 There exists no case under the 1961 Act in which any dependant has attempted to claim under section 49(1)(a)(i) damages for non-patrimonial injury for loss of society or in the case of a child's claim, the loss of parental education and training.

3. France

3.1 In France³⁷ an action for damages in respect of the wrongful death of a relative lies under the Civil Code if the death was caused by a private individual and under the *droit administratif* if it was caused by a public authority.³⁸

3.2 Actions under the Civil Code are brought under Chapter II, Articles 1382-1384. No special provision for wrongful death claims is made. The action is based on the general principles of delictual liability. As with other delictual claims under the Civil Code, the pursuer is not restricted as to the type of loss which he is entitled to claim. He can claim for patrimonial loss and also for *dommage moral* or non-patrimonial loss. *Domage moral* includes damages for grief, mental distress and nervous shock on the death of a relative or other person with whom the pursuer had a close relationship. There is no list of relatives.³⁹ The general rule applicable to all delictual claims under the Civil Code applies. The claimant must prove that he has suffered *préjudice*, namely a "direct, certain and legal" harm. This approach means that, as well as relatives typically able to claim in other jurisdictions, a number of persons outwith the conventional family group and unrelated to the deceased have been able to claim, including children to whom the deceased stood *in loco parentis*, a person who was engaged to be married to the deceased⁴⁰ and the deceased's mistress.⁴¹ In some areas the Civil Code is supplemented by legislation, for example where the death is caused in a road accident.⁴²

3.3 Where the death has been caused by the wrongful act of a public authority the Civil Code does not apply. However, the relatives then have a claim under the judge made *droit administratif*. In the past, the administrative courts had been unwilling to award damages for non-patrimonial loss. However in *Letisserand*⁴³ the Conseil d'État made an award to a

³⁵ This differs from the position in England where the maximum sum is divided equally amongst those eligible to claim.

³⁶ *McCarthy v Walsh* [1965] IR 246.

³⁷ See generally the *International Encyclopaedia of Comparative Law*, Vol XI, ch 9.

³⁸ However, in some areas, eg road accidents, the jurisdiction of the administrative courts has been transferred to the civil courts.

³⁹ The strong arguments in favour of retaining a list of relatives in Scots law see paras 3.1-3.4 do not apply in France. For example, French law has no principle preventing the recovery of damages for economic loss suffered as the result of another person's injury or death. Thus, for example Colmar 20 Apr. 1955, D 1956.733 note-Salvatier; in this case a football club successfully recovered damages for economic loss suffered by it on the death of its star player. However claims of this type are not usually successful. See generally Bell, Boyron & Whittaker, *Principles of French Law* (1998) pp. 393-395.

⁴⁰ Cass crim 5 Jan 1956, D.S 1956, 216.

⁴¹ Ch mixte 27 Feb 1970 *arrêt Dangeruex* D 1970.201. Until the decision of the *Cour de Cassation* in this case it had been thought that the deceased's mistress could not claim for *dommage moral* or for loss of support as the harm suffered by her was "illicit" and therefore did not meet the requirement of legality.

⁴² 5 July 1985 *Loi No 85-677* introduced strict objective liability upon the owner or driver of a vehicle for damage, including injury or death.

⁴³ CE 24 November 1961.

father to compensate for the mental anguish suffered by him as a result of his son's death in an accident involving a negligently driven public authority vehicle.

4. Canada

4.1 All Canadian provinces except Quebec have enacted wrongful death legislation. Differences exist between the statutes in the type of damages available and the qualifying claimants. In some provinces, pecuniary damages only are available for wrongful death.⁴⁴ Damages as compensation for grief are available only in Alberta and New Brunswick. Some Canadian jurisdictions permit recovery of damages for loss of care, guidance and companionship. This is sometimes treated as a sub-category of pecuniary loss and sometimes as non-pecuniary loss.

4.2 It appears to be normal practice for a child suing for the wrongful death of its parent to make a claim for damages for loss of care, education and training, or loss of care and guidance⁴⁵ even in those jurisdictions governed by statutes which restrict recovery to pecuniary losses. Those jurisdictions which permit recovery of damages for loss of care, guidance and companionship in situations other than in respect of a child's loss of its parent generally do so on the basis that they are compensating a non-pecuniary loss.

4.3 Damages for non-pecuniary loss can be obtained in Alberta,⁴⁶ New Brunswick,⁴⁷ Manitoba,⁴⁸ Nova Scotia⁴⁹ and Ontario.⁵⁰ Only in Alberta and New Brunswick do non-pecuniary damages include a sum to compensate for grief and in these two provinces a very narrow class of claimants are entitled to claim for non-patrimonial loss. In Manitoba, Nova Scotia and Ontario, the same claimants entitled to claim patrimonial damages can also claim for non-patrimonial loss.

⁴⁴ Newfoundland, Fatal Accidents Act, RSN 1990, c-F-6, 104-105; Northwest Territories, Fatal Accidents Act, RSNWT 1988, c F-3; Prince Edward Island, Fatal Accidents Act, RSPEI 1988, c F-5; Saskatchewan, The Fatal Accidents Act, RSS 1978, c F-11; Yukon, Fatal Accidents Act RSY 1986, c 64.

⁴⁵ See eg *Bechamp v Entem Estate* (1987) Sask R 99 104-105; *Smith v Cook* (1981) 125 DLR (3d) 457, 460. See also Alberta Law Reform Institute, Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the Fatal Accidents Act, Report for Discussion No 12 (June 1992) p.33.

⁴⁶ Fatal Accidents Act RSA 1980, section 8, as amended by the Fatal Accidents Amendment Act 1994. Eligible claimants can recover damages for grief and for loss of care, companionship and guidance.

⁴⁷ Fatal Accidents Act RSNB 1973 c F-7. Section 3(4) allows recovery of damages for loss of companionship and grief.

⁴⁸ Fatal Accidents Act CCSM 1987 c F-50. Section 3(4) permits the recovery of damages for loss of guidance, care and companionship. The courts have stressed that these damages compensate non-pecuniary loss eg in *Larney Estate v Friesen* (1986) 29 DLR (4th) 444 the Court of Appeal referred to an award under s 3(4) as "*solatium*" per O'Sullivan JA at p.449 and as "a compassionate allowance unrelated to pecuniary measurement" per Monnim CJM at p 447, quoting Hubard JA from *Rose v Belanger* (1985) 17 DLR (4th) 212, 219.

⁴⁹ Fatal Injuries Act RSNS 1989 c 163; s 5(2) provides that damages under s 5(1) includes damages for pecuniary and non-pecuniary loss, and without restricting the generality of this description, includes *inter alia* an amount to compensate for the loss of guidance, care and companionship which the person for whose benefit the action is brought might reasonably have expected to have obtained from the deceased. In *Campbell et al v Varanese* (1991) 102 NSR (2d) it was confirmed that grief and sorrow are not to be taken into account in making an award under s 5(1).

⁵⁰ Family Law Act RSO 1986 c F-3; s 61(2) (e) provides that an award made under s 61(1) may include damages for the loss of the deceased's guidance, care and companionship. In *Mason v Peters* (1983) 39 OR (2d) 27 it was held that s 61(2)(e) permits the recovery of damages for loss of guidance, care and companionship on a non-pecuniary basis. The court reasoned that if this were not the case, s 61(2)(e) would serve no purpose since pecuniary losses were already recoverable under s 61(1). In subsequent cases the Ontario courts have awarded separate sums for each of the three elements of care, guidance and companionship within section 61(2)(e), characterising loss of care as representing the replacement pecuniary value of household services such as cooking and housekeeping, and loss of companionship as an essentially non-pecuniary loss.

4.4 In all five provinces "parent" and "child" include grandparents and grandchildren and in all but Ontario also include step-parents and step-children. Alberta and Ontario are the only provinces not to make provision for persons who stood *in loco parentis* to a deceased child and for children to whom a deceased person stood *in loco parentis*. New Brunswick provides that adoptive relationships are to be treated as parent/child relationships and Alberta and New Brunswick specifically allow the father of an illegitimate child to claim as a parent.

4.5 In Alberta, section 8(2), as originally enacted, allowed the spouse or cohabitant⁵¹ (being a person of the opposite sex who had been living with the deceased for at least three years and had been held out to be the deceased's consort⁵²), the parents of a minor child or of a child aged between 18 and 26 and not cohabiting⁵³ and a minor child or a child aged between 18 and 26 and not cohabiting⁵⁴ to recover a fixed award of damages⁵⁵ for grief and loss of care, companionship and guidance. However, following the case *Lemke v Pottie*⁵⁶ the requirement that the deceased must have been under 26 at the time of death in order for his parents to be able to recover has been excised from the statute.⁵⁷ The requirement in section 8(2)(c) that the a child must have been under 26 at the time of his parent's death in order to claim damages for non-patrimonial loss still stands but would also appear to be challengable under article 15. It was recently confirmed in *Stace (Estate) v Larson*⁵⁸ that relatives (in this case siblings) not entitled to claim under section 8 cannot claim non-patrimonial loss under section 2.

4.6 In New Brunswick the action for damages for grief and loss of companionship under section 3(4) is restricted to the parents of a deceased child who was aged under 19 at the date of death or was aged over 19 and was dependant on one or more of the parents for support. Under section 3(5) any award is to be apportioned between the parents in proportion to the loss of companionship and grief suffered by each. In *Nightingale v Mazerall*⁵⁹ the New Brunswick Court of Appeal awarded separate sums for the loss of care, guidance and companionship on the one hand and grief on the other. It held that *quantum* is a matter for the court's discretion and was not of the opinion that the Act required it to award a substantial amount for grief. The court accepted that such an award can never truly compensate for the loss suffered and that it must be objective, promoting predictability and certainty. They awarded \$15,000 for loss of companionship of the 6 years old child, \$20,000 for loss of companionship of the nine months old child and \$15,000 damages for grief in respect of each child. The court was of the opinion that the parents had suffered no more grief for losing two children than one.

⁵¹ S 8(2)(a).

⁵² As defined in s 1(a1), inserted by the 1994 Act.

⁵³ S 8(2)(b).

⁵⁴ S 8(2)(c).

⁵⁵ The current awards are \$43,000 for a spouse, \$43,000 for a parent (to be divided if there is more than one) and \$27,000 to each child.

⁵⁶ 2000 ABQB 776.

⁵⁷ The court held that this requirement constituted a violation of article 15 (right to equality) of the Charter as it discriminated on grounds of age. It was held that the infringement could not be justified and the provision was therefore excised.

⁵⁸ 2000 ABQB 19.

⁵⁹ (1991) 87 DLR (4th) 158 (NBCA).

4.7 In Manitoba actions for loss of care, guidance and companionship can be brought under section 3(4) of the Fatal Accidents Act for the benefit of a spouse, including a common law spouse of at least 5 years who was substantially dependent on the deceased or of at least one year where there is a child of the relationship, a parent, a child or a sibling. The Court of Appeal has held that the courts must establish modest conventional awards and award them in all but the most unusual of cases.⁶⁰

4.8 In Nova Scotia non-pecuniary damages can be recovered by a parent, child or spouse.⁶¹ The father of an illegitimate child cannot recover as a parent. Damages are decided on a case by case basis and the courts are developing upper limits.⁶²

4.9 In Ontario damages can be recovered by a child, parent, siblings, spouse and same-sex partner.⁶³ "Spouse" includes an unmarried heterosexual partner who has cohabited with the deceased for at least three years up until the date of death, or who cohabited with the deceased in a relationship of some permanence if there was a natural or adoptive child of the relationship. The requirements for a homosexual partner are identical to those for a heterosexual cohabitant. The Ontario Court of Appeal has held in *Neilson v Kaufman*⁶⁴ that although damages under section 61(2)(e) are essentially non-pecuniary in character, there must be an actual loss of care, companionship and guidance. The mere fact of a relevant relationship between a claimant and the deceased would not, of itself, establish the right to compensation under the statute, and an inquiry into the nature of the lost relationship is needed in each case.⁶⁵

4.10 Only in Ontario can homosexual cohabitants recover non-patrimonial loss. The Alberta and Nova Scotia statutes expressly provide that only a cohabitant of the opposite sex from his partner may recover damages. The Manitoba statute provides for recovery by a "common law spouse". This could possibly be interpreted to exclude a homosexual cohabitant. However, following the decision of the Supreme Court in *M v H*⁶⁶ it seems that the exclusion of homosexual couples violates article 15(1) of the Canadian Charter of Rights and Freedoms and is therefore vulnerable to constitutional challenge.⁶⁷

⁶⁰ *Rose v Belanger* (1984) 17 DLR (4th) 212; *Lawrence v Good* (1985) 18 DLR (4th) 734.

⁶¹ "Spouse" is defined in section 13 as including a heterosexual cohabitant of at least one year's standing.

⁶² In *Morrell-Curry v Burke* (1990) 94 NSR (2d) 399 (NSSCAD) \$10,000 to a wife and \$2,500 to each parent were held to be appropriate sums. In *Campbell et al v Varanese* (1991) 102 NSR (2d) 104 (Nova Scotia Supreme Court Appeals Division) Chipman JA was unwilling to lay down guidelines for a conventional award for the death of a child, though this was not to suggest that such awards should not be kept within reasonable limits on a case-by-case basis. He awarded \$15,000 to one child (aged 8) and \$22,500 to the other (aged 3).

⁶³ The claim to damages under section 61 was extended to homosexual partners following the decision of the Supreme Court of Canada in *M v H* 1999 2 SCR 3. The Supreme Court in that case held that section 29 of the Family Law Act 1990, which conferred a right to alimony upon opposite sex cohabitants but not upon same-sex cohabitants, was in violation of article 15 of the Charter (right to equality).

⁶⁴ (1986) 26 DLR (4th) 21.

⁶⁵ *Neilson v Kaufman* (1986) 26 DLR (4th) 21, 33: the court attempted to draw a distinction for these purposes between loss of care, guidance and companionship, on the one hand, and grief, on the other: in a hypothetical example, a brother who had not seen the deceased for 20 years, although they exchanged Christmas cards and infrequent telephone calls, would undoubtedly feel sorrow and grief at the death but there would be no actual loss of care, companionship and guidance.

⁶⁶ 1999 2 SCR 3.

⁶⁷ *M v H* was applied in the recent Alberta case *Johnson v Sand* 2001 ABQB 253 the Alberta Court of Queen's Bench held that the provisions of the Intestate Succession Act RSA 1980 c. 1-9, which provides *inter alia* that the estate of an intestate deceased reverts to the married spouse and children, violated the right to equality of the claimant, who had been the homosexual cohabitant of the deceased.

5. Australia

5.1 Each Australian state and territory has wrongful death legislation.⁶⁸ In Southern Australia and Northern Territory damages for *solatium* are available⁶⁹ and in the Northern Territory damages for loss of care and guidance where the deceased leaves an infant child⁷⁰ and for loss of *consortium* where he leaves a spouse⁷¹ are also available. In all states except Southern Australia and Northern Territory damages for pecuniary losses only can be recovered. However, the courts have tended to interpret pecuniary loss broadly, particularly where a child loses a parent, to include not only loss of a parent's services which can be replaced by the other parent, another family member or a domestic helper, but also for the loss of intangible benefits such as the deceased parent's care, encouragement and help.⁷² The Law Reform Commissions of Western Australia and South Australia have recommended that there should be legislative reform to take account of the loss of assistance and guidance involved in the loss of a parent.⁷³

5.2 The statutes vary in the classes of relatives who are entitled to recover. In Victoria, there is no list of relatives and any "dependant"⁷⁴ is entitled to recover. Parents and children can claim in all jurisdictions.⁷⁵ Persons to whom the deceased stood *in loco parentis* and persons who stood *in loco parentis* to the deceased can claim damages in a number of states and territories⁷⁶ and specific provision for adopted, illegitimate and posthumous children is also made in some cases.⁷⁷ Siblings, often defined to include half-siblings, can claim in all jurisdictions except Queensland. Spouses can claim in all states, as can opposite sex cohabitants, although there is some variation in the length of time which the claimant must have cohabited with the deceased in order to be entitled to damages.⁷⁸ In Western Australia, Northern Territory and Australian Capital Territory, divorced spouses are also entitled to claim.

⁶⁸ Wrongs Act 1958 (Vic) ss 16-22; Compensation to Relatives Act 1897 (NSW); Wrongs Act 1936 (SA), Part II; Supreme Court Act 1995 (Qld), Div 5, Fatal Accidents Act 1934 (Tas); Fatal Accidents Act 1959 (WA); Compensation (Fatal Injuries) Act 1974 (NT) Compensation (Fatal Injuries) Act 1968 (ACT).

⁶⁹ Wrongs Act 1936 (SA) ss 23A and 23B; Compensation (Fatal Injuries) Act (NT) s 10 (3)(f).

⁷⁰ S 10(3)(e)(ii).

⁷¹ S 10(3)(c).

⁷² *Fisher v Smithson* (1978) 17 SASR 223; *Hay v Hughes* [1975] QB 790 L; *Jacobs v Varley* (1976) 9 ALR 219, 234-5 per Murphy J.

⁷³ The South Australian Commission in its 56th Report Relating to the Fatal Accidents Provisions of the Wrongs Act 1936, pp 7-9 recommended that a child should have a statutory entitlement to damages for the loss of all pecuniary and non-pecuniary benefits which the child would have enjoyed if the parent, grandparent, step-parent or person *in loco parentis* had stayed alive. The Western Australian Commission in its Report on Fatal Accidents (19 December 1978) Project No 66, recommended that a "loss of guidance and assistance award" should be available to the parent, unmarried child or unmarried person to whom the deceased stood *in loco parentis* and spouse or *de facto* spouse of the deceased. However, they rejected the introduction of damages for grief.

⁷⁴ "Dependant" is defined as any person who would have been wholly or mainly dependant on the deceased but for the injury causing death, s 17(2).

⁷⁵ In all jurisdictions except South Australia "parents" and "children" include remoter ascendants and descendants and in Tasmania, Western Australia, Australian Capital Territory and Northern Territory provision is made for step-parents and children.

⁷⁶ New South Wales, Western Australia, Australian Capital Territory, Northern Territory.

⁷⁷ Queensland makes provision for posthumous children, Australian Capital Territory for posthumous and illegitimate children and Western Australia for illegitimate and adoptive relationships.

⁷⁸ Most states have a time limit of between one and three years. The Australian Capital Territory and the Northern Territory require only that the claimant was living with the deceased in a *bona fide* domestic relationship at the time of the deceased's death. In South Australia and Western Australia the time period requirement is dispensed with if there is a child of the relationship and in Tasmania the court has discretion to recognise a cohabitant as a *de facto* spouse notwithstanding the fact that the time requirement has not been met.

5.3 In the New South Wales statute "spouse" is defined as a husband, wife or a party to a *de facto* relationship within the Property (Relationships) Act 1984. Following extensive amendment, the definition of *de facto* relationship now extends to homosexual relationships.⁷⁹ It would seem that a dependant partner in Victoria could claim as a dependent even if of the same sex as the deceased. In all other states, a cohabitant must have been living with the deceased "as husband and wife" in order to recover damages, although only the Tasmanian statute expressly requires that the claimant must be of the opposite sex to the deceased. The Queensland Law Reform Commission recommended in its 1994 Report⁸⁰ that a "*de facto* relationship" should be capable of consisting in a relationship between two members of the same sex living as a married couple. However when the legislature introduced a provision enabling cohabitants to claim damages on the death of their partner, the provision extended only to persons "living as husband and wife."⁸¹

5.4 In South Australia and Northern Territory statutory provision is made for the recovery of damages for *solatium*. As in other common law jurisdictions, this head of damages is not recoverable at common law.⁸² In South Australia the list of persons entitled to claim damages for *solatium* is much narrower than those entitled to claim damages for patrimonial loss, being restricted to the parents, spouse or "putative spouse"⁸³ of the deceased.⁸⁴ The legislation provides that the maximum amount to be awarded for the death of a child is \$3,000, to be divided between the parents in such shares as the court directs and the maximum to be awarded for the death of a spouse is \$4,200. Where the deceased is survived by both a lawful spouse and a putative spouse both are entitled to claim *solatium* and the court is to apportion the award between them. The court has discretion to refuse to award *solatium* having regard to the conduct of the claimant in relation to the deceased, their relationship prior to the deceased's death or any other sufficient reason.⁸⁵ It is common for the courts to award the maximum amount in all cases⁸⁶ but awards are sometimes reduced where the court considers there is good reason to do so.⁸⁷

5.5 In the Northern Territory any person who is on the list of relatives for whose benefit an action under the statute may be brought⁸⁸ is entitled to claim damages for *solatium*⁸⁹ and

⁷⁹ S 4 of the 1984 Act, as amended by the Property (Relationships) Legislation Amendment Act 1999 now provides that a *de facto* relationship is a relationship between two adult persons who live together as a couple and are not related by family. S 4(2) provides that in determining whether two persons are in a *de facto* relationship, all of the circumstances of the case are to be taken into account including *inter alia* the duration of the relationship, the nature and extent of common residence and the degree of mutual commitment to a shared life.

⁸⁰ *De Facto Relationships: claims by surviving de facto partners under the Common Law Practice Act 1867 for damages for wrongful death* (November 1994) Report No 48, p.46

⁸¹ S 18(2).

⁸² *Public Trustee v Zoanetti* (1945) 70 CLR 266.

⁸³ "Putative spouse" is defined as a person cohabiting with the person in question as a *de facto* husband or wife, who has either (i) been cohabiting continuously with that person for a period of five years or (ii) has been cohabiting with that person to periods aggregating at least five of the past six years or (iii) who has had a child with that person.

⁸⁴ Ss 23a and 23b.

⁸⁵ S 23c(2)

⁸⁶ Eg *Groom v Starling* [1967] SASR 352 and *Hamlyn v Hann* [1967] SASR 387.

⁸⁷ In *Sloan v Kirby* (1979) 20 SASR 263 an award under s 23b was reduced to \$3,500 because the judge had misgivings about the stability of the relationship. In *Ratcliffe v Goodfellow* (1981) 95 LSJS 154 a s 23b award was reduced to \$2,000 where the couple had been separated for 11 years but had maintained a good relationship.

⁸⁸ S 4. This list includes a surviving spouse, a child, including a person to whom the deceased stood *in loco parentis*, a parent, including a person who stood *in loco parentis* to the deceased, a sibling or half-sibling, a former spouse, a person who was living in a traditional Aboriginal marriage relationship with the deceased and a person living with the deceased on a *bona fide* domestic basis.

⁸⁹ S 10(2)(f).

the award is not subject to an upper limit. However, grief must be proven in order for damages for *solatium* to be awarded.⁹⁰ Although the statute provides that remarriage or the prospects of remarriage shall not reduce damages, it was held in *Jones v Bleakly*⁹¹ that remarriage may limit the grief for which *solatium* damages are awarded and that it may therefore be appropriate to reduce damages to a surviving spouse who has remarried if there is a prospect of equal happiness in the new relationship. It has been held that damages for *solatium* are intended to provide compensation for loss of society as well as for grief endured at the time of and after the death.⁹² Damages for loss of guidance and care on the death of a parent or a person in *loco parentis* and for *consortium* on the death of a spouse⁹³ are also available under the Northern Territory statute. The courts have recognised that damages under these heads also involve an element of *solatium*.⁹⁴

⁹⁰ Therefore in *Cook v Cavenagh* (1981) 10 NTR 35 Muirhead J held that the four year old sister of a deceased child of six was too young to suffer from grief in respect of which *solatium* could be awarded.

⁹¹ (1981) 12 NTR 1.

⁹² *Rafferty v Barclay* [1942] SASR 147 (affirmed (1942) 66 CLR 669n) per Mayo J.

⁹³ It was held in *Australian Telecommunications Commission v Parsons* (1985) 59 ALR 535 (Federal Court of Australia) that the *solatium* and *consortium* provisions of the Compensation (Fatal Injuries) Act operate to extend recovery to a *de facto* spouse.

⁹⁴ In *Curator of Estates of Deceased Persons and Rozario v Fernandez* (1977) 16 ALR 445 (NT), Ward J recognised that there was a risk of overlapping in awarding damages for *solatium* under s 10(3)(f) and for loss of care and guidance under s 10(3)(e)(ii).

