

SCOTTISH LAW COMMISSION

(SCOT. LAW COM. No. 31)

**REPORT ON THE LAW RELATING  
TO DAMAGES FOR INJURIES  
CAUSING DEATH**

*Laid before Parliament  
by the Lord Advocate  
pursuant to section 3(2)  
of the Law Commissions Act 1965*

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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# SCOTTISH LAW COMMISSION

TO THE RIGHT HONOURABLE NORMAN WYLIE, V.R.D., Q.C., M.P.  
*Her Majesty's Advocate*

In accordance with the provisions of section 3(1)(b) of the Law Commissions Act 1965, as amended<sup>1</sup>, we submitted on 14th May 1968 our Second Programme for the examination of several branches of the Law of Scotland with a view to reform. Item No. 10 of that Programme, which was published on 19th July 1968, requires us to proceed with an examination of the law relating to Damages arising from Personal Injuries and Death.

In pursuance of Item No. 10 we have examined the law relating to damages for injuries causing death and connected matters. We have the honour to submit our proposals for the reform of this branch of the law.

*19th July 1973*

J. O. M. HUNTER  
Chairman of the Scottish Law Commission

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<sup>1</sup>The Transfer of Functions (Secretary of State and Lord Advocate) Order 1972 (S.I. 1972/2002) removes the requirement to submit Reports to the Secretary of State for Scotland.

# REPORT ON THE LAW RELATING TO DAMAGES FOR INJURIES CAUSING DEATH

## CONTENTS

<i>Part</i>	<i>Paragraph</i>	<i>Page</i>
<b>I INTRODUCTION</b>	1-5	1
<b>II RELATIONSHIP BETWEEN CLAIMS BY AN INJURED PERSON AND HIS EXECUTORS</b>		3
(a) Introductory	6-7	3
(b) Claims for patrimonial loss	8-20	4
(i) A living person's claim for damages	11-18	5
(ii) The executors' claim for damages	19-20	8
(c) Claims for solatium	21-25	8
<b>III RELATIONSHIP BETWEEN CLAIMS BY AN INJURED PERSON AND HIS DEPENDANTS</b>		10
(a) Introductory—the nature of the dependants' claim	26	10
(b) The extent to which the dependants' claim is affected by the deceased's own actings	27-45	10
(i) Waiver of rights of action	27-32	10
(ii) Voluntary assumption of risk	33-35	12
(iii) Contributory negligence	36-38	13
(iv) Recovery of damages	39-43	14
(v) Prescription	44-45	15
<b>IV RELATIONSHIP BETWEEN CLAIMS BY THE EXECUTORS AND THE DE- PENDANTS</b>		15
(a) The admissibility of both claims — the rule in <i>Darling v. Gray &amp; Sons</i> reexamined	46-52	15
(b) The need to avoid a multiplicity of actions	53-62	17
<b>V CLASSES OF DEPENDANTS EN- TITLED TO CLAIM DAMAGES FOR PATRIMONIAL LOSS</b>		20
(a) Existing law	63-67	20
(b) The requirement of a reciprocal legal duty of support	68-72	22
(c) Extension of claim to other relatives	73-75	23
(d) Extension of claim to persons other than relatives	76-86	24

<i>Part</i>	<i>Paragraph</i>	<i>Page</i>
(i) The divorced spouse	77-78	24
(ii) Children unrelated to the deceased or to his spouse	79-81	25
(iii) "Unmarried spouses"	82-83	26
(iv) Employers and partners	84-86	27
 <b>VI ASSESSMENT OF THE DEPENDANTS' CLAIM FOR PATRIMONIAL LOSS</b>		 27
(a) Introductory	87	27
(b) Allowable deductions	88-101	28
(i) The claimant's earning capacity	88-89	28
(ii) The claimant's actual remarriage or prospects of remarriage	90-92	29
(iii) Inheritance and other benefits accruing to the dependants	93-101	29
 <b>VII CLASSES OF DEPENDANTS ENTITLED TO CLAIM DAMAGES FOR NON-PECUNIARY LOSS</b>	 102-113	 33
 <b>VIII THE ABOLITION OF ASSYTHMENT</b>	 114-115	 37
 <b>IX SUMMARY OF RECOMMENDATIONS</b>		 37

### **APPENDIX I**

The class of persons entitled to sue for patrimonial loss

### **APPENDIX II**

The class of persons to be entitled to sue for loss of society

### **APPENDIX III**

Draft Damages (Scotland) Bill, with Explanatory Notes

# SCOTTISH LAW COMMISSION

## REPORT ON THE LAW RELATING TO DAMAGES FOR INJURIES CAUSING DEATH

### PART I: INTRODUCTION

1. In Memoranda No. 5 and No. 17 we examined certain questions relating to the law of damages for injuries causing death. Our initial remit related to specific questions referred to us under s.3(1)(e) of the Law Commissions Act 1965, namely (1) whether relatives should have a right to sue for solatium and loss of support even when the deceased himself had initiated proceedings during his lifetime, and (2) whether the class of relatives entitled to sue for solatium and loss of support should be extended to include collaterals. We considered these questions in Memorandum No. 5 but, on studying them, we found that there were a number of related and wider questions which could not be omitted from consideration if the law were to be dealt with in an orderly fashion. While suggesting that the related questions were of less urgency, we thought it desirable to obtain the views of the profession and others concerned about them. In Memorandum No. 5, therefore, we stated what these related questions were, how the present law approached them, and how that law might be amended. In addition, after consultation, we included in our Second Programme, approved by the Secretary of State for Scotland and the Lord Advocate on 25th June 1968, an Item<sup>1</sup> designed to permit us to take an overall view of the problems raised by actions of damages for injuries causing death.

2. We were greatly assisted by the comments submitted upon the earlier Memorandum. One general observation made by those best qualified to judge was that, contrary to our preliminary view, it would be wrong to advocate interim amendments to the law to deal with the specific questions referred to us. While the application of the present law might occasion hardship, other anomalies leading to hardship of a different kind might well be introduced into the law if these specific questions were dealt with in isolation. We accepted this advice, and decided not to issue a Report, but to prepare a further Memorandum (No. 17), in which we considered these related and wider questions. This Memorandum, published on 10th April 1972, was widely circulated and attracted helpful comments. We are grateful to those who submitted them. Neither Memorandum, however, examined such matters as the method of payment of damages, the taxation of awards of damages, the use of actuarial principles in the assessment of damages, or the mode of trial. These questions, in our view, would best be dealt with in a wider context.

3. In our approach to the reform of this branch of the law<sup>2</sup> we have taken for granted the existence of a system of reparation for injuries and damage

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<sup>1</sup>(1968) Scot. Law Com. No. 8, Item No. 10.

<sup>2</sup>A general description of the law of Scotland so far as relevant to our inquiry is contained in Part II of Memorandum No. 17.

which is based on the idea that, when injuries or damage have been occasioned by the fault of the defender, it is right that he should pay compensation for those injuries or damage, reduced only in proportion to the deceased's own contributory negligence, if any. We are aware that, in a system of reparation based on a different principle, a different approach might be appropriate. We have assumed, however, that any re-appraisal of the fundamental basis of delictual liability would be outwith the scope of our remit. Indeed, while this Report was in preparation, the Government announced that a Royal Commission was to be set up under the chairmanship of Lord Pearson to consider this very problem<sup>3</sup>. We welcome this development and trust that, within the scope of damages for personal injuries causing death, this Report may prove of value to Parliament and to the Royal Commission.

4. In our review of this branch of the law we have sought to secure the following principal objectives:

- (a) that compensation should be recoverable by the deceased's executors for patrimonial loss suffered by the deceased in respect of the period up to his date of death;
- (b) that compensation should be recoverable by the deceased's dependants for patrimonial loss which they suffer subsequent to his date of death and in consequence of it;
- (c) that compensation should be recoverable for non-patrimonial loss, in particular loss of the deceased's society, by those persons within the family circle who have in fact sustained such loss, but not by others;
- (d) that there should be no duplication of damages, in the sense that compensation for substantially the same loss should not be recoverable both by the deceased's executors and by his dependants;
- (e) that, as far as practicable, the defender should not be exposed to the risk of a multiplicity of actions, or to the risk of an action emerging after the lapse of a long period of time<sup>4</sup>; as a general principle, an award should be fixed in the light of the circumstances known at the time when an action is disposed of, and it should not be possible to re-open a case merely because there has been a change in those circumstances which was not or could not have been foreseen at the time of the action;

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<sup>3</sup>The Royal Commission's terms of reference are:

"To consider to what extent, in what circumstances and by what means compensation should be payable in respect of death or personal injury (including antenatal injury) suffered by any person—

- (a) in the course of employment;
- (b) through the use of a motor-vehicle or other means of transport;
- (c) through the manufacture, supply or use of goods or services;
- (d) on premises belonging to or occupied by another; or
- (e) otherwise through the act or omission of another where compensation under the present law is recoverable only on proof of fault or under the rules of strict liability, all this having regard to the cost and other implications of the arrangements for the recovery of compensation, whether by way of compulsory insurance or otherwise."

<sup>4</sup>See *infra*, paras. 53-62.



- (f) that, as far as may be consistent with the above principles, the system of compensation should be a clear and simple one, conducive to the extrajudicial settlement of cases; and
- (g) that remedies for which there is no rational justification, or for which the rational justification has disappeared, should be removed from the law.

5. In framing our proposals we have had regard to these objectives, and from the comments we received we believe they would attract general acceptance. There will clearly be differences as to how these objectives can best be secured in particular areas, but there was widespread approval for the broad scheme which we outlined in Memorandum No. 17 and which, with minor modifications, we follow in this Report. We have sought to confine our proposals to claims by executors and dependants arising out of the death of an injured person. To give effect, however, to objective (d) above we found ourselves obliged to consider the injured person's own claim for damages for patrimonial loss in respect of the period between his post-accident expected date of death and his pre-accident expected date of death.

## **PART II: RELATIONSHIP BETWEEN CLAIMS BY AN INJURED PERSON AND HIS EXECUTORS**

### *(a) Introductory*

6. Under the law of Scotland, a right of action vested in a person is not necessarily extinguished by his death: when a person dies as a result of injuries caused by the delict, including the negligence, of another, sets of rights emerge in favour both of the deceased's executors and of his dependent relatives. It has been frequently stressed by the courts that the claims of the executors and the relatives are of a different kind, and depend on different principles<sup>1</sup>. It is a general condition of both claims that immediately before his death the injured person was entitled to bring an action in respect of the injuries, or would have been so entitled if he had survived.

7. The executors' rights are simply those which the deceased himself possessed by reason of the injury done to him, so far at least as the law allows of their transmission. A person who is injured in an accident may claim damages for any patrimonial loss which he has suffered. Patrimonial loss includes medical and other out-of-pocket expenses, loss of earnings to the date of the action, and loss of prospective earnings. There is no direct Scottish authority as to whether the loss of prospective earnings extends to the period of a man's pre-accident expectation of life or merely to the period of his post-accident expectation of life. While the latter period has been selected in England<sup>2</sup>, a different view has been taken in Australia<sup>3</sup>, where it was decided that an

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<sup>1</sup>*Davidson v. Sprengel* 1909 S.C. 566.

<sup>2</sup>*Oliver and Others v. Ashman and Another* [1962] 2 Q.B. 210; and its sequel, *Murray v. Shuter and Others* (1971) 115 S.J. 774; [1972] 1 Lloyd's Rep. 6, (C.A.).

<sup>3</sup>*Skelton v. Collins* (1966) 39 A.L.J.R. 480.

injured person had a right to compensation for loss of earnings for the whole period of his pre-accident expectation of life. Patrimonial loss can also include in appropriate circumstances other forms of economic loss, including loss of enjoyment of annuities and liferents. An injured person may also claim damages for losses of a non-pecuniary nature, namely solatium for physical pain and suffering, for loss of limbs and sense organs and their functional impairment, for disfigurement, and for nervous shock including, possibly, that occasioned by the realisation that expectation of life has been diminished<sup>4</sup>.

(b) *Claims for patrimonial loss*

8. The general rule of Scots law is that a right of action vested in a person is not extinguished by his death. Although this rule is qualified in relation to an injured person's claim for solatium, it applies without restriction to his claim for patrimonial loss. When, therefore, a person has been injured in an accident and subsequently dies, his executors may, if the deceased in his lifetime has instituted proceedings to recover damages for patrimonial loss, sist themselves as pursuers in those proceedings, or if he did not institute proceedings during his life, institute proceedings themselves to the same effect. The executors' rights in respect of patrimonial loss are simply those of the deceased himself, and include, therefore, the deceased's right to damages for medical and other out-of-pocket expenses, loss of earnings to the date of the action, and loss of prospective earnings. The loss must be a loss suffered by the deceased during his lifetime, and for this reason the deceased's funeral expenses are not competently included in the executors' claim for damages<sup>5</sup>.

9. It is a condition of the executors' right of action for patrimonial loss — as it is of their right of action for solatium and of the dependants' right of action for solatium — that immediately prior to his death the injured person was, or if he had survived would have been, entitled to bring an action. Where the injured person himself has no right to damages, whether by reason of an antecedent and valid exemption clause, acceptance of the risk, subsequent waiver of rights of action, settlement of the claim or actual recovery of damages, his executors have no right to sue.

10. We have no doubt that, with regard to patrimonial loss at least, the fundamental rules relating to the executors' rights of action are satisfactory as a matter of policy and are sufficiently clear to make their general restatement unnecessary. There are some aspects of the law, however, which require examination.

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<sup>4</sup>*McMaster v. Caledonian Railway Co.* (1885) 13 R. 252, per Lord President Inglis at p.254; *Balfour and Others v. William Beardmore and Co. Ltd.* 1956 S.L.T. 205, per Lord Strachan at p.215.

<sup>5</sup>*McEnaney v. Caledonian Railway Co.* 1913 2 S.L.T. 293; sequel to *Leigh's Executrix v. Caledonian Railway Co.* 1913 S.C. 838. Claims by the dependants in respect of funeral expenses are, however, admissible (*Tran v. Road Haulage Executive* 1952 S.L.T. (Notes) 58; *Drummond v. British Railways Board* 1965 S.L.T. (Notes) 82.). In England, executors are entitled to recover funeral expenses by virtue of s. 2 of the Law Reform (Miscellaneous Provisions) Act 1934 (c.41).

(i) *A living person's claim for damages*

11. If an injured person's settlement of a claim for damages or actual recovery of those damages is to bar—as it does under the existing law—any subsequent claim made after his death by his executors or his dependants, it is important to ensure that the settlement or award should be comprehensive and cover the injured person's loss of prospective earnings and other forms of economic loss, not merely in respect of the period of his post-accident expectation of life, but of his pre-accident expectation of life. Although we think it unlikely that the Scottish courts would follow the decision of the English Court of Appeal in *Oliver v. Ashman*<sup>6</sup>, we think it important that the law on this point should be clarified, because subsequent English decisions show that the application of its principle may lead to results which are not easy to justify<sup>7</sup>. It is true that the injured person may be recovering damages for losses, particularly loss of earnings, in respect of a period when he may himself be dead. But he has a moral obligation, which even his death does not dissolve, to provide for his dependants. If damages for patrimonial loss were competent only for the period of his post-accident expectation of life, there would be a grave risk of inadequate compensation to his family as a unit when, as a result of his injuries, his expectation of life is short. This seems anomalous since, if the injured person died without having recovered damages, his dependants would be entitled to recover damages based on their loss for the period of his pre-accident expectation of life. These results are unsatisfactory and are criticised by the Law Commission in their Report on *Personal Injury Litigation—Assessment of Damages*<sup>8</sup>. We conclude, therefore, that it should be expressly provided by statute that an injured person may recover damages for patrimonial loss in respect of his pre-accident expectation of life. One distinguished commentator, while accepting this, was concerned with the possibility that an injured person might be awarded damages on the basis of a life expectation which was of shorter duration than the actual duration of his life, with the implication that his executors should be entitled to recover the balance of patrimonial loss. Our own view is that, even where the presumed expectation of life is exceeded, there should be no occasion for reviewing the original award, which must necessarily be based upon reasonable assumptions.

12. In reaching this conclusion we considered, but rejected, two other possible solutions, both canvassed by the Law Commission. The first was that the rule in *Oliver v. Ashman* should be retained but that the relatives, notwithstanding the award of damages to the injured person during his lifetime, should be entitled to bring an action for damages for loss of support after his death<sup>9</sup>. The Law Commission itself rejected this solution on practical grounds. It would be necessary in actions of damages for patrimonial loss to record the period of expectation of life on which the damages were based, even in cases

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<sup>6</sup>[1962] 2 Q.B. 210; see *supra*, para. 7.

<sup>7</sup>In *Murray v. Shuter and Others* ((1971) 115 S.J. 774; [1972] 1 Lloyd's Rep. 6, (C.A.)) a young husband, who had a wife and two children dependent on him, received injuries which left him in a coma and with only a short expectation of life; and in *Smith v. Central Asbestos Co.* [1971] 3 W.L.R. 206 the injured persons had a very much reduced expectation of life as a result of contracting asbestosis.

<sup>8</sup>Law Com. No. 56 (1973), H.C. 373, paras. 55-91.

<sup>9</sup>Paras. 65-83.

which were settled. If this were not done, there would be a serious risk of duplication of damages. In the determination of that period, however, there would be a conflict between the interests of an injured person who desired to obtain personally and immediately as large a capital sum as possible, and the interests of his relatives. The interests of the latter could hardly be protected unless there were a system of judicial approval of settlements, which would be cumbersome and expensive. The system would also be open to the objection that defenders would be exposed to the risk of further actions, perhaps in the remote future. We agree with the Law Commission that these objections are conclusive.

13. A second solution canvassed by the Law Commission attempts to meet these objections by enabling dependants to participate in an injured person's own action and to receive compensation in that action for their probable future loss<sup>10</sup>. This solution, however, remains open to the objection that there may be a potential conflict of interest between the injured person and his relatives. This would complicate settlements. It would also be open to the objection that it would either entail payment to persons who would not necessarily be dependants at the injured person's date of death, or would require the interim administration of the capital sum awarded. Like the Law Commission, we think that this solution is impracticable.

14. We are confirmed, therefore, in our view that the damages should be recoverable directly by the injured person. Accordingly we **recommend** that it should be provided by statute that an injured person may recover damages for patrimonial loss in respect of the period between his post-accident expected date of death and his pre-accident expected date of death (the "lost period") (Recommendation 1).

15. In this context the term "patrimonial loss" should be interpreted in the widest possible sense. If, by reason of the acceleration of his death, the pursuer loses the enjoyment of a liferent or of other economic benefits deriving from a source other than his own estate, it may be appropriate that he should be compensated for the loss. There would seem, as the Law Commission observe<sup>11</sup>, no justification in principle for discrimination between deprivation of earning capacity and deprivation of the capacity otherwise to receive economic benefits. We refer to loss of economic benefits deriving from a source other than his own estate, since benefits from the injured person's own capital are in a different position. The acceleration of the injured person's death by itself neither increases nor reduces the pursuer's investment income which after his death (apart from the effect of estate duty) should continue to fall into his estate. We consider, therefore, that it should be made clear by statute that, in the calculation of an injured person's damages for patrimonial loss in respect of the "lost period", the court should be able to take into account not only the injured person's loss of earnings, but his loss of other economic benefits, howsoever arising, which would have accrued to him if he had lived from any source other than his own estate. The court's power should be discretionary rather than man-

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<sup>10</sup>Paras. 84-5.

<sup>11</sup>Para. 90.

datory, however, to ensure that there is no duplication of damages as between the injured person and his dependants.

16. A further problem is whether a deduction should be made from the award in respect of living expenses. In the case of *Skelton v. Collins*<sup>12</sup> the High Court of Australia decided that compensation for loss of earnings in the "lost period" should be based on the amount of such earnings less what the pursuer would have spent upon himself. The Law Commission consider this to be the appropriate method of computing the injured person's loss<sup>13</sup>. We are disposed to agree, because failure to deduct an appropriate sum for living expenses would lead to unrealistic awards, particularly to children and young persons, who would be compensated for losses which, in part at least, they did not suffer. A person cannot maintain his earnings without expenditure upon food, clothing and shelter, expenses which cease on death. We consider, therefore, that in calculating an injured person's damages for patrimonial loss during the "lost period", a deduction must be made for living expenses which are reasonable having regard to the financial and other circumstances of the pursuer, in so far as those expenses do not exceed the amount awarded for patrimonial loss during the period.

17. We **recommend**, accordingly, that it should be provided by statute that in calculating an injured person's damages for patrimonial loss during the "lost period",

- (1) The court may have regard not only to the injured person's loss of income which he would probably have earned during that period if he had been alive, but also to his loss of other benefits in money or in money's worth which he would probably have derived from sources other than his own estate (Recommendation 2); and
- (2) the court shall make a deduction for living expenses which the injured person might have been expected to incur during that period if he had been alive, and which are reasonable having regard to his financial and other circumstances, in so far as those expenses do not exceed the amount awarded for patrimonial loss during that period (Recommendation 3).

18. In the context of awards to a living pursuer there remains the problem of whether any deduction falls to be made in respect of other payments received by an injured person, such as proceeds of insurance policies, wages, gifts, pensions and state benefits. Whereas the common law position regarding proceeds of insurance policies, wages and gifts is reasonably clear, the courts have frequently experienced difficulty in deciding whether deductions should be made for pensions and certain state benefits. These are matters, however, which do not fall within the scope of this Report, and, unlike the problem of the period of an injured person's expectation of life, have no bearing on its main subject matter. We do not, therefore, propose to examine them here, although we intend to consider them in the context of a review of the law concerning damages to living pursuers.

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<sup>12</sup>(1966) 39 A.L.J.R. 480.

<sup>13</sup>Paras. 87-91.

(ii) *The executors' claim for damages*

19. While there is authority for the view that the executors' claim for patrimonial loss is limited to the loss attributable to the period up to the deceased's actual date of death<sup>14</sup>, we consider, in view of the preceding Recommendations, that this should be clarified by statute. We do so because the general principle is that executors take over the patrimonial rights competent to the deceased at the date of his death, and if the preceding Recommendations were implemented it might be assumed that the executors were entitled to claim damages for the deceased's patrimonial loss during the "lost years". This assumption would be incorrect, since the principle on which the preceding Recommendations are based is not that the deceased's legal personality is being extended fictitiously after his death, but rather that, during a man's life, he should be entitled to claim damages in respect of all the losses which arise in consequence of his injuries. After his death, however, it is the dependants who in practical terms suffer loss, and it seems right that they should be entitled to claim directly, rather than through the deceased's executors, because they suffer the loss directly. Both cannot claim, because otherwise there would be a danger of duplication between damages awarded to the executors in right of the deceased and those awarded to the dependants for loss of support during the "lost years". In Memorandum No. 17 we presented an argument to a similar effect which was accepted by all who submitted comments on it.

20. We recommend, therefore, that it should be declared that the right of the executors to recover damages in respect of the deceased's patrimonial loss should be limited to patrimonial loss attributable to the period up to the date of death (Recommendation 4).

(c) *Claims for solatium*

21. By way of exception to the general rule that a right of action vested in a person is not extinguished by his death, executors have no title to institute an action concluding for solatium in respect of the personal injuries suffered by the deceased. The existence of this exception was stated by the First Division in *Bern's Executor v. Montrose Asylum*<sup>15</sup> and affirmed by the House of Lords in *Stewart v. London, Midland and Scottish Railway Co.*<sup>16</sup>. The situation is otherwise, however, when the deceased has himself raised an action of damages in respect of these personal injuries. In that case the executors may continue and prosecute to a conclusion the deceased's action<sup>17</sup>. Their right to do so has sometimes been justified on the view that there is no room in such circumstances for suggesting that the deceased has waived his claim, or on the technical argument that by the judicial contract implied in litiscontestatio there arises a new ground of obligation<sup>18</sup>.

22. Although the existence of this exception to the rule in *Bern's Executor* was reaffirmed by the House of Lords in *Stewart v. London, Midland and*

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<sup>14</sup>*Sommerville v. National Coal Board* 1963 S.C. 666.

<sup>15</sup>(1893) 20 R. 859.

<sup>16</sup>1943 S.C. (H.L.) 19.

<sup>17</sup>Act of 1693, c. 24; *Neilson v. Rodger* (1853) 16 D. 325.

<sup>18</sup>See *Smith v. Stewart & Co.* 1961 S.C. 91; 1961 S.L.T. 67; *Cole-Hamilton v. Boyd* 1963 S.C. (H.L.) 1 per Lord Reid at p. 12; *sub nom. Purden's Curator Bonis v. Boyd* 1963 S.L.T. 157.

*Scottish Railway Co.*, its desirability may be questioned. If it is based on the view that liti-contestation transforms the character of the claim from one for solatium into one for pecuniary loss, it gives a formal rather than a rational explanation for the rule. If, on the other hand, it is based on the view that by raising the action the injured person has provided clear evidence of his having made up his mind to claim damages, then the doctrine should have been extended to allow proof of such intention by other means. But, although this extension was made in *Leigh's Executrix v. Caledonian Railway Co.*<sup>19</sup> that decision, having been questioned by the House of Lords<sup>20</sup>, was overruled by a Court of Seven Judges in *Smith v. Stewart & Co.*<sup>21</sup>.

23. However, as we explained in Memorandum No. 17, the deceased's intention to sue or not to sue seems relevant only if an affirmative answer is given to the logically prior question, namely, whether the right to solatium for personal injuries should *ever* transmit to executors. We are disposed to think not, primarily on the ground that it is artificial to allow compensation for a person's suffering after his death. Lord Justice-Clerk Hope, in a dissenting judgment, regarded this as "an utter contradiction in terms"<sup>22</sup>. Lord Young has remarked that "it is unreasonable and inexpedient that an action of damages for a personal wrong should be allowed after the death of the person wronged, and when there is no one in existence who has been damaged by it"<sup>23</sup>. Success in the action may benefit various persons, including legatees, persons with legal or prior rights in the deceased's estate, and creditors, but never the person upon whose suffering the claim is based. We think, like Lord Justice-Clerk Hope, that ". . . the stern fact of death from the injuries cuts down all legal subtleties about the transmission of rights of actions to executors, and that we shall run counter to common sense . . . if we entertain the right of the executors to carry on this action"<sup>24</sup>. We also think, like Lord Justice-Clerk Thomson, that "it would have made for simplicity and logic in this department of the law if the rule had been absolute, in the sense that the death of the sufferer extinguished the ground of action"<sup>25</sup>.

24. Although the majority of those who submitted comments supported our provisional conclusion, there were some adverse comments. We reject the technical argument that solatium becomes a debt to the deceased's estate. This argument begs the question which is whether such a debt should transmit. We reject, too, the argument that a defender should not escape the consequences of his act merely because the injured person has died: this argument is based upon a punitive approach to damages which seems entirely out of place. It was suggested to us that there might be a growing tendency to delay the settlement of claims by living pursuers if the right to solatium were extinguished on death. We doubt this because, in the normal case at least, there would be more substantial claims by the deceased's dependants. We have given careful con-

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<sup>19</sup>1913 S.C. 838.

<sup>20</sup>*Stewart v. London, Midland and Scottish Railway Co.*, *supra*.

<sup>21</sup>1960 S.C. 329.

<sup>22</sup>*Neilson v. Rodger* (1853) 16 D. 325 at p. 327.

<sup>23</sup>*Bern's Executor*, *supra*, per Lord Young at pp. 872-873.

<sup>24</sup>*Neilson v. Rodger*, *supra*, at p. 328.

<sup>25</sup>*Smith v. Stewart & Co.* 1960 S.C. 329 at p. 338.

sideration, too, to the argument that a distinction falls to be made between cases where the injured person's death was a consequence of the injury, when his personal solatium should become transformed into a claim for solatium on behalf of his dependants, and cases where his death arose from unconnected causes, including natural causes, when his personal claim to solatium should transmit. We reject this argument, even though solatium may form a substantial proportion of the award in cases of serious injury, because a new situation arises on death, howsoever occasioned, in which the person who suffered the loss can no longer be solaced or otherwise benefited by a monetary payment.

25. We recommend, therefore, that the right to recover solatium for personal injuries should cease on the death of the injured person and should not transmit to his executors, even when the injured person during his life has commenced an action incorporating a claim for solatium (Recommendation 5).

### PART III: RELATIONSHIP BETWEEN CLAIMS BY AN INJURED PERSON AND HIS DEPENDANTS

#### (a) *Introductory—The nature of the dependants' claim*

26. The rights of the deceased's dependants are not directly derived from those of the deceased: they are of a different nature, and are designed to compensate losses that they rather than the deceased suffer. On the other hand, the dependants' rights of action are not wholly independent of those of the deceased, because both rights arise from the same wrong and the existence of a right of action on the part of the deceased is the indispensable foundation of the dependant's right of action<sup>1</sup>. The elements of a dependant's claim are twofold. First, he has a claim for patrimonial loss. In this context the expression "patrimonial loss" is more restricted than in the case of the executors' claim, being limited to loss of support and reasonable outlays and expenses incurred in connection with the death. The amount of loss of support is assessed by reference to the amount of support which the dependant had been receiving from the deceased and might reasonably have been expected to receive in the future<sup>2</sup>. The second element of a dependant's claim is for solatium, and is considered in greater detail below<sup>3</sup>.

#### (b) *The extent to which the dependants' claim is affected by the deceased's own actings*

##### (i) *Waiver of rights of action*

27. It was decided in *McKay v. Scottish Airways* that if a deceased person has waived his rights of action, his dependants have no claim for damages

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<sup>1</sup>*McKay v. Scottish Airways* 1948 S.C. 254 per Lord Mackintosh at p. 258.

<sup>2</sup>*Quin v. Greenock and Port-Glasgow Tramways Co.* 1926 S.C. 544 per Lord President Clyde at p. 547. The Lord President did not refer specifically to the repayment of outlays and expenses in connection with the death, but it is accepted that such expenses can be recovered by the dependants (*Tran v. Road Haulage Executive* 1952 S.L.T. (Notes) 58; *Drummond v. British Railways Board* 1965 S.L.T. (Notes) 82), although not by the executors (*McEnaney v. Caledonian Railway Co.* 1913 2 S.L.T. 293; see para. 8 *supra*).

<sup>3</sup>*Infra*, paras. 102-113.



after his death. The basis for this rule is not that there has been any waiver of the dependants' rights of action, but rather that the existence of a right of action on the part of the deceased is an indispensable foundation of the dependants' right of action<sup>4</sup>. If a contract merely limits the amount recoverable, the position in Scots law is not clear, although there is English authority for the view that the action of the dependants is not barred, and indeed, that they are not affected by the contractual limitation of liability<sup>5</sup>.

28. In Memorandum No. 5 we stated that we were concerned about the position reached by *McKay*, but we preferred to defer consideration of the matter until the wider question of exemption clauses had been examined by the Law Commission and the Scottish Law Commission. This examination has not been concluded, but the preliminary view of the two Commissions was that in contracts for the supply of services there is a *prima facie* case for an outright ban on all clauses that purport to exclude totally liability for death or personal injury, but not for an outright ban on clauses which merely limit such liability<sup>6</sup>. These proposals proceed on the assumption that no general ban will apply to the latter class of clauses, although they might be banned in particular fields or subjected to a test of reasonableness. We invited views as to whether, if a contractual limitation of liability to the deceased was found to be reasonable in the circumstances, the dependants should be allowed to pursue their rights of action untrammelled by such limitation.

29. Some of those who submitted comments considered that the exemption clause should apply to the dependants, the basis for this view being that if a person chooses to accept certain risks, he must be deemed to do so in the knowledge that his dependants may suffer in consequence. It is certainly true that the average man does not necessarily consider every implication of a contract which he is entering into. But, as the dependants' claim springs from the same act of negligence as the deceased's own claim, it is only equitable that both claims should be subject to the same conditions, and this is the basis for the present law where the deceased has already recovered damages, or where there has been contributory negligence on his part, or where he has voluntarily assumed the risk. On the other hand, it is possible to take a different view of the contractual aspect: it is not legally possible for two parties to a contract to bargain away the rights of a third party who is a stranger to that contract, is not a beneficiary under it, and did not know of its existence. There is a real conflict here between the two principles which give rise to the dependants' claim.

30. In considering what recommendations are appropriate in this field, we think it desirable to seek a solution which may operate effectively whatever

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<sup>4</sup>*McKay v. Scottish Airways*, *supra*, per Lord Mackintosh at p. 258; *McNamara v. Laird Line and Clan Line Steamers, Ltd.*, reported as an appendix to *McKay v. Scottish Airways*, *supra*, at p. 265.

<sup>5</sup>*Nunan v. Southern Railway Co.* [1924] 1 K.B. 223; *Grein v. Imperial Airways Ltd* [1937] 1 K.B. 50.

<sup>6</sup>*The Exclusion of Liability for Negligence in the Sale of Goods and Exemption Clauses in Contracts of Services and other Contracts*: Law Commission Published Working Paper No. 39 and Scottish Law Commission Memorandum No. 15.

decisions are taken in relation to the effect of exemption clauses on the contracting parties themselves. It is thought that at least this much is clear: exemption clauses would not be held to be contractually binding upon dependants, who are strangers to the contract, and may even be unaware of its existence. The problem, therefore, is narrowed to the question whether an exemption clause which under the present or future law may directly affect the injured person should be conceded indirect operation to exclude claims competent, but for the contract, to his dependants.

31. We have found this question extremely difficult, but have finally concluded that an affirmative answer should be given. As Lord Mackintosh insisted in *McKay v. Scottish Airways*, "the relatives' right of action is not wholly and in every sense independent of the right of action in the deceased himself. Both rights depend on the same wrong . . ." <sup>7</sup>. It may be argued that this reasoning is conceptualistic, because negligence towards someone who is killed is at the same time negligence towards his dependants, whose existence may reasonably be assumed. But this argument fails to take account of the fact that, in many situations, only the parties to a contract can assess the risks and, if a person chooses to accept certain risks, he must be deemed to have considered the consequences to himself and to his dependants. He provides for them, and it is for him to decide how best to provide for them in the future, either by taking risks in the interest of immediate financial gain or by avoiding them in the interest of future security. We are not here in the domain of contractual liability: the question is rather whether it is reasonable and appropriate to impose a duty of reparation to the dependants of a person with whom they contracted to exclude or limit liability in the event of an accident. It might well be unreasonable and inappropriate in certain circumstances, particularly if the activity was dangerous. This argument applies to exemption clauses which exclude liability: it applies with still greater force to those which merely limit it. In such a case, the dependants' damages should be limited to the maximum sum provided for in the contract or to the proportion of the damages which are payable by the defender under the contract.

32. We **recommend**, therefore, that exemption clauses which validly exclude or limit liability to an injured person should have the effect after his death of excluding or limiting liability to his dependants (Recommendation 6).

(ii) *Voluntary assumption of risk*

33. If a person knowingly and voluntarily in full knowledge<sup>8</sup> of the risks involved persists in a particular course of action, the plea of *volenti non fit injuria* may be opposed to any claim for damages which he may present in consequence of injuries sustained in that course of action. It is probably the law that, where the deceased's own right of action would be barred, that of his dependants is also barred. This has been a matter of assumption, however, and not of express decision<sup>9</sup>.

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<sup>7</sup>1948 S.C. 254 at p. 258.

<sup>8</sup>Proof of actual knowledge of the risk is of the essence of the defence—*Stewart's Exix. v. Clyde Navigation Trustees* 1946 S.C. 317 per Lord President Normand at p. 326; *Flannigan v. British Dyewood Co. Ltd.* 1969 S.L.T. 223, per Lord Guthrie at p. 226.

<sup>9</sup>Cf. *Steel v. Glasgow Iron and Steel Co.* 1944 S.C. 237.

34. In Memorandum No. 17 we expressed a tentative preference for the view that the deceased's voluntary assumption of risk should bar both his executors' and his dependants' rights of action. The deceased foresaw that he might be injured by the defender's conduct and consciously assumed a real and not a hypothetical risk, of his own free will. Inequality of bargaining power, to which we referred when considering cases of antecedent waiver, does not exist in this context. This view met with unanimous approval.

35. We **recommend**, therefore, that the deceased's voluntary assumption of risk should continue to exclude any rights of action on the part of his executors or of his dependants (Recommendation 7).

(iii) *Contributory Negligence*

36. Since the Law Reform (Contributory Negligence) Act 1945, the deceased's contributory negligence does not bar altogether either the claims of his executors or those of his dependants, "but the damages or solatium recoverable shall be reduced to such extent as the court thinks just and equitable, having regard to the share of the said person in the responsibility for his death"<sup>10</sup>. The onus of establishing such contributory negligence is on the defender<sup>11</sup>.

37. Nearly all of those who submitted comments to us were content with the present rule. A possible alternative, suggested by Professor Glanville Williams<sup>12</sup>, is to separate the interests of the dependants and the deceased's estate—on the ground that the dependants should not suffer—and grant the defender a right of contribution against the estate alone and not against the dependants. This would benefit the dependants if the deceased has bequeathed his property to a stranger. South African law goes even further, and the dependants can recover in full despite the fact that if the deceased had been merely injured and not killed, his contributory negligence would have reduced his claim at common law<sup>13</sup>. Unless it is coupled with a right of contribution against the estate of the deceased, the South African rule strikes us as being unjust, because it cannot be reconciled with the acceptance of the principle of fault as the basis of liability. Nor do we accept Professor Glanville Williams' suggestion, because the whole basis of the dependants' claim is that they are not strangers in law, but are so closely associated with the deceased that a breach of duty to the deceased is at the same time a breach of duty to them also. Certainly, as one commentator put it, it would be most unfair to the defender if the dependants were entitled to recover damages in full in a situation where a court held that the defender was only 1% to blame for the accident. Moreover, if the deceased had lived, his damages, and therefore his ability to contribute to the dependants, would have been reduced by his contributory negligence. Most of those who submitted comments preferred the existing law, and we share this preference.

38. Accordingly, we **recommend** that in cases of concurrent fault the defender's liability to the deceased's executors and to his dependants should continue to

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<sup>10</sup>S. 1(4).

<sup>11</sup>*Hayden v. Glasgow Corporation* 1948 S.C. 143.

<sup>12</sup>*Joint Torts and Contributory Negligence* (London, 1951) p. 422.

<sup>13</sup>McKerron, *The Law of Delict* 7th edn. p. 149; Apportionment of Damages (Amendment) Act 1971.

be proportionate to the degree of fault shown by the deceased (Recommendation 8).

(iv) *Recovery of damages*

39. Where the injured person has himself recovered damages or settled a claim for damages before his death, neither his executors nor his dependants have any right of action in respect of the accident which caused the death.

40. In relation to the executors the existing law is not open to question. They stand in the deceased's own shoes and cannot recover what the deceased has already recovered. In relation to the dependants the result seemed less obvious, and we invited views as to whether the same rule should continue to apply to them. Their rights of action do not in principle derive from those of the deceased, and are designed to compensate their own loss rather than his<sup>14</sup>. It is therefore possible to argue that the fact that the deceased himself has recovered damages or settled his claim for damages should not bar the relatives' claim.

41. Our tentative view in Memorandum No. 17 was that the present law was satisfactory. Our principal reasons for this view were:

- (1) All the claims arise from the same act of negligence, and a balance must be struck between the interests of the dependants and the defender. A defender should not be exposed to successive claims, possibly over a long period of time, and he is entitled to be discharged from all future claims if the deceased has recovered damages or settled his claim.
- (2) It would be extremely difficult to exclude the possibility of duplication of certain elements of damages.
- (3) Recovery of damages by the deceased usually augments the estate available for distribution to his dependants, although this will not be so in every case.
- (4) If a person settles a claim he ought to be aware that his actions are likely to affect his relatives also.

42. Nearly all those who submitted comments agreed with our tentative view, though some who dissented rightly stressed that, for example, solatium to the deceased and solatium to the dependants are entirely different categories of claim. We maintain our previous view, however, both because a balance must be achieved between the interests of pursuers and of defenders, and because we do not think that a defender should be exposed to successive claims, perhaps separated by a long interval of time, during which the evidence may have been lost or have become unavailable.

43. We recommend, therefore, that the recovery of damages by an injured person or his settlement of a claim to damages during his life should continue to exclude any right of action by his dependants after his death (Recommendation 9).

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<sup>14</sup>*Davidson v. Sprengel* 1909 S.C. 566, per Lord President Dunedin at p. 570; *McKay v. Scottish Airways* 1948 S.C. 254, per Lord President Cooper at p. 264.

(v) *Prescription*

44. If the deceased's rights of action have prescribed or have become time-barred, those of his dependants are also excluded. The operation of this rule is preserved in s.6(1) of the Law Reform (Limitation of Actions, etc.) Act 1954.<sup>15</sup>

45. It is arguable that, since the claims of the deceased and his executors are founded on different bases from those of his dependants, the rule should apply only to the executors. The suggestion did not attract us, nor those who offered comments on the Memorandum, because it would open the way to the prosecution of stale claims. We do not, therefore, recommend any further amendments to the law of prescription in the context of this Report (Recommendation 10). We have, however, suggested a few minor amendments to the Limitation Acts in order to correct possible misinterpretations of the legislation, and these amendments received effect in the Prescription and Limitation (Scotland) Act 1973.<sup>16</sup>

#### PART IV: RELATIONSHIP BETWEEN CLAIMS BY THE EXECUTORS AND THE DEPENDANTS

(a) *The admissibility of both claims—the rule in Darling v. Gray & Sons re-examined*

46. When the deceased has initiated a claim for damages for patrimonial loss and solatium which is taken up by his executors, the dependants' right of action is excluded. This was decided in the case of *Darling v. Gray & Sons*<sup>1</sup>. A workman had raised an action against his employers for damages for personal injuries which he imputed to the defenders' fault. During the dependence of the action, the pursuer died and his mother, as his executrix, was sisted in his place. Subsequently, during the currency of this action, the mother raised a second action against the defenders in her own name for solatium for the death of her son and damages for loss of the support which he had given to her. The House of Lords, affirming the judgment of the Second Division, held that the second action was incompetent.

47. The precise *ratio* of this decision is not clear from the opinions, but it has been suggested in subsequent cases<sup>2</sup> that it is to be found either in the principle *nemo debet bis vexari pro una et eadem causa*, or in the circumstance that to admit such a right of action would entail an overlap between the executors' claim for solatium (competent when the deceased himself initiated the proceedings) and that of the dependants.

48. There is, we concede, a certain logic about the rule in *Darling*. In a state of law where the deceased's rights of action and those of his executors coincided, or were thought to coincide, it would seem anomalous to cut off the relatives'

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<sup>15</sup>c.36.

<sup>16</sup>c.52.

<sup>1</sup>(1892) 19 R. (H.L.) 31, more fully reported *sub nom. Wood v. Gray & Sons* [1892] A.C. 576.

<sup>2</sup>*Whitehead v. Blaik* (1893) 20 R. 1045, *per* Lord McLaren at p. 1049; *Mill v. Dundas* 1919 2 S.L.T. 65, *per* Lord Anderson at p. 67; *Bruce and Another v. Alexander Stephen & Sons Ltd.* 1957 S.L.T. 78 at p. 79; *Gray v. North British Steel Foundry Ltd.* 1969 S.C. 231, *per* Lord Hunter at p. 235.

rights of action when the deceased himself pursued his action to a conclusion but not to cut them off when his action was pursued to a conclusion by his executors. Some weight, too, in the present state of the law attaches to the argument relating to duplication of damages. It also seems undesirable, if it can be avoided, to require a defender to litigate more than one claim arising from a single actionable wrong.

49. In a number of recent cases attempts have been made, with some success, to narrow the effect of *Darling*. There is Outer House authority at least for the following propositions:

- (1) that the abandonment by the executors of their action permits the relatives to proceed with their action for solatium and loss of support<sup>3</sup>;
- (2) that the raising of an action by the relatives does not extinguish the right of the executors to sue for patrimonial loss to the estate of the deceased either concurrently with the relatives' action or subsequently to it<sup>4</sup>.

These decisions mitigate the effect of *Darling*, but the rule in that case still applies where the executors continue to insist in an action initiated by the deceased, and it has been held in the sheriff court that the rule applies even where the relatives in their action restrict their claim to one for loss of support<sup>5</sup>.

50. The rule in *Darling*, even as so modified, leads to anomalies and occasionally to real hardship. It seems anomalous that the rights of the relatives should depend on the priority of their action or upon the choice of the executors whether or not to insist in their right of action. The hardship which the rule may cause is illustrated in *Reid v. Lanarkshire Traction Co.*<sup>6</sup>. An employee was injured in a street accident and died from his injuries a fortnight later. Before his death he had brought an action for damages in respect of those injuries and, after his death, his widow *qua* executrix sisted herself as pursuer. The court held that she was entitled to recover only (1) the patrimonial loss occasioned to her husband's estate and (2) solatium in respect of his personal suffering. Since he had survived the accident for only a fortnight, the claim under the first head could be only two weeks' loss of wages. The amount of solatium was also small, because he had suffered pain for a relatively short period.

51. We proposed, therefore, in Memorandum No. 17 that the rule in *Darling* should be abolished. There was unanimous support for this provisional proposal, and we maintain it. By permitting the executors' action to continue rather than that of the dependants, the decision in *Darling* stressed the unimportant claim rather than the important one. When a man dies his interest in damages ceases, and the interest which then emerges and must be taken into account is that of his relatives to be compensated for the loss of the financial support afforded to them by the deceased, and the loss of the intangible benefits

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<sup>3</sup>*Bruce and Another v. Alexander Stephen & Sons Ltd.* 1957 S.L.T. 78.

<sup>4</sup>*McGhie v. British Transport Commission* 1964 S.L.T. 25; *Gray v. North British Steel Foundry Ltd.* 1969 S.C. 231.

<sup>5</sup>*McCann's Executrix v. Wright's Insulations Ltd.* 1965 S.L.T. (Sh. Ct.) 19.

<sup>6</sup>1934 S.C. 79.

which accrued from their association with him. This approach need not lead to a multiplicity of actions. We give considerable weight to the principle that the defender should not require to litigate more than once claims arising from a single actionable wrong, and we make proposals below to give effect to it<sup>7</sup>. This approach should not lead to duplication of damages if other Recommendations in this Report are accepted, namely that the deceased's claim for solatium should not transmit to the executors, and that the executors' right to insist in the deceased's claim should be limited to patrimonial loss attributable to the period up to his date of death.

52. We recommend, therefore, that the dependants' rights of action for damages for patrimonial loss and solatium (or any award which may replace it<sup>8</sup>) should not be affected by the existence of an action by the executors and *vice versa* (Recommendation 11).

(b) *The need to avoid a multiplicity of actions*

53. Where several relatives have a title to sue in respect of the same delictual act, they should, and normally do, conjoin in a single action. If a relative brings an action and other dependants are known, the court will order intimation to them to enable them to be sisted as pursuers within a limited period<sup>9</sup>. If the pursuer raises an action and states on record and undertakes to prove that the others entitled to claim have given up their claim, or refused to press them, or cannot be found, there is no objection to his going on with the action alone<sup>10</sup>. If the pursuer does not do so, or does not call the other parties as defenders for their interest, the action is held to be incompetent<sup>11</sup>. If the other relatives intimate that they do not desire to prosecute the claim or are called and do not appear, or are asked to concur and do not, they are excluded ever after<sup>12</sup>. In practice, then, the claims of the relatives are determined in a single action. Despite a dictum of Lord Watson's that "there is not a single instance in which the Court has allowed two actions to be brought in respect of the same negligent act leading to the injury and death of one person. . . . relatives . . . must bring one suit, and one only<sup>13</sup>," it is thought that there is no absolute rule to this effect: the practice derives simply from a desire not to expose the unsuccessful defender to the expense of more than one action<sup>14</sup>.

54. Equally, until recently at least, the law has assumed on the basis of *Darling v. Gray & Sons* that there will be no concurrent actions by executors and dependants. As we have seen, this is no longer the case<sup>15</sup>, and the risk of simultaneous actions would be enhanced by acceptance of the proposals made in this Report. No rule has as yet developed that, where the executors and

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<sup>7</sup>See paras. 53-62 *infra*.

<sup>8</sup>See paras. 102-113 *infra*.

<sup>9</sup>*Smith v. Wilsons and Clyde Coal Co. Ltd.* (1893) 21 R. 162.

<sup>10</sup>*Pollok v. Workman* (1900) 2 F. 354, per Lord Justice-Clerk Macdonald at p. 356.

<sup>11</sup>*ib.*, per Lord Moncrieff at p. 357.

<sup>12</sup>*ib.*, per Lord Justice-Clerk Macdonald at p. 356.

<sup>13</sup>In *Darling v. Gray & Sons* (1892) 19 R. (H.L.) 31 at pp. 32-33.

<sup>14</sup>*Slorach v. Kerr & Co.* 1921 S.C. 285 per Lord President Clyde at p. 287.

<sup>15</sup>See especially *McGhie v. British Transport Commission* 1964 S.L.T. 25; *Gray v. North British Steel Foundry Ltd.* 1969 S.C. 231, *supra*, para. 49.

dependants both raise actions founded upon the same injury to the deceased, they must concur in a single action. In Memorandum No. 17 we suggested that a rule should be introduced to this effect, mainly because we gave weight to the view taken in *Darling v. Gray & Sons* that a defender should not require to litigate more than once claims arising from a single actionable wrong. This proposal met with opposition, notably from the Law Society of Scotland and the Society of Writers to H.M. Signet. Among the reasons advanced against our proposal were that the executors' claim might be a straightforward one in comparison with that of the dependants, especially if the executors were henceforth to have no right to recover for solatium. In such a case the executors might be able to reach an extrajudicial settlement with the defender, whereas the dependants would be obliged to continue their action. There might be difficulty and delay in discovering how many dependants had a potential claim, and conceivably there might even be cases in which the whereabouts of a particular dependant were unknown. There might be conflicts of interest between the executors and the dependants, in which case the same counsel and solicitor would be unable to represent all the parties. The executors and the dependants might not agree as to which ground of fault they wished to aver. All these were factors which might make it impracticable for the various claims to be dealt with simultaneously.

55. We have given careful consideration to these arguments, but we are not persuaded by them, largely because similar difficulties could arise where several dependants are involved in a single action to which the executors are not parties. There is nothing to prevent one dependant from settling an action extrajudicially, with the result that the action would proceed at the instance of the remaining dependants. Even if it is true that an action at the instance of the executors may in many cases be completed more quickly, we do not consider that this is sufficient justification for compelling a defender to litigate twice. Again, the dependants may themselves be in dispute as to the precise ground of fault which they wish to aver, but it is not suggested that they should be entitled to bring separate actions. To a large extent there is a community of interest among the various parties to an action—especially as, in the majority of cases, the dependants will themselves inherit the bulk of the deceased's estate—and in our view the law ought to recognise this. If it were competent to raise more than one action, there would be serious problems in cases where the total amount of damages fell to be reduced—as where there had been contributory negligence on the part of the deceased—or where the total amount of damages was restricted by agreement to a maximum figure. In such circumstances, the damages could not be apportioned in the first action until the second action was disposed of. Finally, if the remainder of our proposals are accepted, there will no longer be a real conflict between executors and dependants, either in regard to the distribution of the total sum awarded in respect of patrimonial loss—the executors' claim being limited to the period up to the date of death—or in relation to non-pecuniary loss, the whole of which will be awarded to the dependants.

56. We further suggested in Memorandum No. 17 that if either the executor or a dependant was aware that an action for damages had been initiated, but refrained from joining himself as a co-pursuer, he should be called as a defender



and be barred from subsequently raising an independent action. This suggestion received widespread support.

57. We have concluded, therefore, that the executors and the dependants should be required where practicable to concur in a single action; and we have formed the view that the general procedure should be laid down by statute and that the Court of Session should be empowered to regulate the details by rules of court. Our proposals are to some extent modelled on the existing rules which have emerged as a result of the decisions in the Court of Session to which we have already referred<sup>16</sup>.

58. We propose, first, that it should be the duty of any executor or dependant who wishes to raise an action to ascertain the identity of the other persons who have an interest, and to serve a notice upon them in a form and manner to be prescribed by rules of court. If the pursuer fails to serve a notice on any interested party of whose existence he is aware or could with reasonable diligence have become aware, it should be open to the court to dismiss the action if it thinks fit. We so **recommend** (Recommendation 12). We envisage that the abolition of the requirement that a potential claimant should have been owed a legal duty of support by the deceased may make it more difficult than hitherto for the claimant to ascertain with certainty who is entitled to sue, and hence it is important that the court's power to dismiss the action should be discretionary rather than mandatory.

59. Our second proposal is that any interested party should be entitled to apply to be sisted as a pursuer in an action which has already been raised, whether or not a notice has been served on him by the person who has raised the action. Any person who wishes to be sisted should be required to give notice to this effect to all other parties to the action before the commencement of the proof or jury trial. Once again, the precise details of this procedure should be regulated by rules of court. However, any power which the court has at present to sist any person as a pursuer should be retained—thus, for example, in appropriate circumstances the courts would be able to sist a pursuer in the process after the commencement of the proof or jury trial. Any interested person who fails to sist himself within the period specified should be barred subsequently from raising a separate action or—subject to the court's discretion—from sisting himself as a pursuer in the original action. We so **recommend** (Recommendation 13).

60. Our third proposal is that there should be an exception to the last Recommendation (even if this could lead to hardship to a defender) to take account of the case where an interested party cannot be found, and does not learn of the existence of the original action until it is too late. We consider that such a person should not be prevented from raising a separate action provided that he can satisfy the court that because of lack of knowledge or any other just reason he was unable to sist himself as a pursuer in the first action. We so **recommend** (Recommendation 14). We recognise that this Recommendation may cause hardship to defenders who have settled claims for damages on the

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<sup>16</sup>*Supra*, para. 53.

basis of ascertained dependency. But we think that claims of this class will be rare if our other Recommendations are implemented. The dependant would have to establish loss of future support, and a person who is out of touch with his family is unlikely to be able to prove such loss. He would also have to belong to a narrower class than hitherto if he wished to claim in respect of non-pecuniary loss. His rights, moreover, will be subjected to the operation of the ordinary rules relating to the limitation of actions. Though rare, claims of this class may arise and their satisfaction may cause hardship to defenders. It is necessary, however, to make a choice between the need to protect the interests of such a relative and those of the defender, and we can see no reason to exclude a genuine claim on the part of a relative who did not timeously learn of the existence of the original action.

61. Even if these Recommendations are implemented there may be occasions when two or more actions are pending, either in the same court or in different courts. This may happen if two or more actions are raised simultaneously by different claimants. There are already provisions for the conjoining of actions in the Court of Session and in the sheriff court, but if other aspects of procedure are to be regulated by statute we think that it would be preferable to include specific rules regarding the conjoining of actions in the same statute.

62. We therefore **recommend**, first, that if two or more actions are pending in different courts, any party to any of the actions should be able to apply to the Court of Session for an order that such of the actions as may be specified in the application shall be transferred to one of the other courts; and that the Court of Session may make such an order if it thinks fit; second, that if two or more actions are pending in the same court, that court may, if it thinks fit, either of its own accord or on the application of any party to any of the actions, order that the actions should be conjoined (Recommendation 15).

## **PART V: CLASSES OF DEPENDANTS ENTITLED TO CLAIM DAMAGES FOR PATRIMONIAL LOSS**

### *(a) Existing Law*

63. Under the common law of Scotland, the classes of persons who may claim damages for patrimonial loss and solatium following a person's death are defined by the twin criteria of relationship and duty to support. Where neither qualification is fulfilled, as where a master sues for the loss caused to him by the death of a servant, no claim in respect of patrimonial loss or solatium is competent<sup>1</sup>. Both qualifications must be fulfilled: where a legal relationship exists between the deceased and the pursuer, this will not suffice to found an action unless it was such as to found a duty to support. Although the right to claim damages for patrimonial loss and solatium was conceded exceptionally to the husband of a deceased woman even at a time when a wife was under no legal duty to aliment her husband<sup>2</sup>—a right which still subsists—the common

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<sup>1</sup>*Reavis v. Clan Line Steamers Ltd.* 1925 S.C. 725.

<sup>2</sup>*Dow v. Brown & Co.* (1844) 6 D. 534.

law rule was applied strictly to sisters who, on the death of their brother, had lost their sole means of support<sup>3</sup>, and to children who, during the lifetime of their paternal grandfather, claimed damages following the death of their maternal grandfather who in fact supported them<sup>4</sup>. A rule, moreover, gradually developed which in its final form declared that a mother had no independent title to sue in respect of the death of a child while the father was alive<sup>5</sup>.

64. Equally, the existence of a duty to support during the deceased's life is insufficient in the absence of a legal relationship between the deceased and the claimant. Under the common law, the father or mother of an illegitimate child had no title to sue in respect of that child's death<sup>6</sup>, nor had an illegitimate child a title to sue in respect of the death of its mother<sup>7</sup>. A divorced person has no right to sue in respect of the death of her former spouse, even when she holds a maintenance order<sup>8</sup>. Moreover, if any dependant dies after an action has been raised, his claim in respect of patrimonial loss and solatium<sup>9</sup> passes to his executor, but the damages are restricted to the period during which the dependant survives the original deceased.

65. Statute law has now encroached upon the common law position. The Law Reform (Damages and Solatium) (Scotland) Act 1962 permits the mother to recover damages (for patrimonial loss) and solatium for the death of a child even if the father is alive<sup>10</sup>. In consequence, each parent may table an independent claim<sup>11</sup>. An illegitimate child was conceded a right to sue in respect of the death of either of his parents by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940<sup>12</sup>. The right of the parent of an illegitimate child to recover was not conceded until 1962<sup>13</sup>. The 1940 Act also provided that, for the purposes of damages (for patrimonial loss) and solatium in respect of a person's death, an adopted child was to be deemed to be a child of his adopting parents and not of his natural parents<sup>14</sup>. The expression "adopted child", which formerly referred only to persons who had been adopted according to the laws of Scotland, England or Northern Ireland<sup>15</sup>, now includes persons adopted by an "overseas adoption"<sup>16</sup>.

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<sup>3</sup>*Eisten v. North British Railway Co.* (1870) 8 M. 980.

<sup>4</sup>*Ewart v. R. & W. Ferguson* 1932 S.C. 277.

<sup>5</sup>*Whitehead v. Blaik* (1893) 20 R. 1045; *Barrett v. North British Railway Co.* (1899) 1 F. 1139; *Aitken v. Gourlay and McNab* (1903) 5 F. 585; *Laidlaw v. National Coal Board* 1957 S.C. 49.

<sup>6</sup>*Weir v. Coltness Iron Co. Ltd.* (1889) 16 R. 614 (mother); *Clarke v. Carfin Coal Co.* (1891) 18 R. (H.L.) 63 (mother); *McLean v. Glasgow Corporation* 1933 S.L.T. 396 (father).

<sup>7</sup>*Clement v. Bell & Sons Ltd.* (1899) 1 F. 924.

<sup>8</sup>*Hemmens and Others v. British Transport Commission* 1955 S.L.T. (Notes) 48.

<sup>9</sup>*Kelly v. Glasgow Corporation* 1949 S.C. 496; 1951 S.C. (H.L.) 15.

<sup>10</sup>S. 1(1). To remove doubts, it was declared at the same time that the right of a child to recover damages (for patrimonial loss) and solatium in respect of the death of his mother should not be barred if the father of the child was alive (s. 1(2)).

<sup>11</sup>*Kelly v. Edmund Nuttall Sons & Co. Ltd.* 1965 S.L.T. 418.

<sup>12</sup>S. 2(2).

<sup>13</sup>Law Reform (Damages and Solatium) (Scotland) Act 1962, s. 2.

<sup>14</sup>S. 2(1).

<sup>15</sup>S. 2(3).

<sup>16</sup>Within the meaning of the Adoption Act 1968 s. 4(3) read in conjunction with the Adoption Act 1958 s. 58.

66. A different set of rules, in effect those of English law, formerly governed the liability of carriers in respect of aircraft passengers<sup>17</sup>, but now, by virtue of s. 11 of the Carriage by Air Act 1961, the ordinary rules of Scots law apply.

67. Thus the persons who may claim damages for patrimonial loss (and at present also solatium) following the death of another are those who stood to the deceased in the relationships of wife, husband, child, father, mother and, if an obligation of mutual support in case of need was immediately prestable between them at the date of death, grandparents and grandchildren. Relationship by adoption is assimilated to legitimate relationships; but illegitimate relationships are ignored except as between parent and child.

*(b) The requirement of a reciprocal legal duty of support*

68. The existence of a reciprocal legal duty of support became a definite condition of the relatives' action in Scots law as a result of *Eisten v. North British Railway Co.*<sup>18</sup>. The common law rule has two effects. It has the obvious effect of limiting the class of claimants, apart from the deceased's husband or wife, to his ascendants and descendants. It also has the less obvious effect that, even where the claimant stands to the deceased in a relationship where a reciprocal obligation to aliment in case of need may arise, the claimant will have no title to sue if that obligation was not immediately prestable at the date of death, for example if another relative was under an obligation to support the claimant which was prior to that of the deceased.

69. As a result of the rule some hard cases still arise today; for example:

- (i) A grandchild will have no title to sue for damages on the death of his maternal grandfather, who in fact supported him, if his paternal grandfather is still alive<sup>19</sup>;
- (ii) a grandchild will have no title to sue for damages on the death of his paternal grandfather, if his father is already dead and his mother, although alive, is also dependent upon the grandfather;
- (iii) a grandchild will have no title to sue for damages on the death of his maternal grandfather if both his parents are dead and his paternal grandfather, although alive, is indigent;
- (iv) a sister or a younger brother will have no title to sue for damages on the death of a brother who was in fact providing support.

We invited views as to whether the test of a reciprocal legal duty of support should now be discarded, and a substantial majority of those who commented on the Memorandum agreed that it should, on the ground that the test should be related to the fact of support, and the probability of its continuance, rather than to the existence of a legal duty.

70. We accordingly **recommend** that it should no longer be a condition of a dependant's claim for patrimonial loss that a reciprocal legal duty of support

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<sup>17</sup>Carriage by Air Act 1932 (c. 36), Schedule 2, as amended by the Fatal Accidents Act 1959 (c. 65), s. 1(5).

<sup>18</sup>(1870) 8 M. 980; see also *Greenhorn v. Addie* (1855) 17 D. 860 per Lords Curriehill and Deas at p. 869.

<sup>19</sup>*Ewart v. R. & W. Ferguson* 1932 S.C. 277.

existed between the claimant and the deceased at the latter's date of death (Recommendation 16).

71. In making this Recommendation we do not mean to suggest that, in calculating damages for patrimonial loss, the court should have no regard to the existence of a legal duty of support. It is of the essence of a dependant's claim in the present law that it is related not simply to present support but, as Lord President Clyde put the matter in *Quin v. Greenock and Port-Glasgow Tramways Co.*<sup>20</sup>, to "the loss of the natural support which the deceased . . . might in future have afforded". This was decided in *Sagar v. National Coal Board*<sup>21</sup>, where a father sought damages in respect of the accidental death of his son. Liability in respect of the loss of support actually given was admitted and the only question, answered by Lord Wheatley in the affirmative, was whether the father could claim in respect of his contingent right of support in the event of his being unable to work in the future because of illness or old age.

72. We recommend, therefore, that if our preceding Recommendation is accepted, the legislation implementing it should be so expressed that the courts, in assessing damages, should not be precluded from having regard to any legal duty of support owed, or contingently owed, to the claimant by the deceased (Recommendation 17).

(c) *Extension of claim to other relatives*

73. If it is accepted that it should no longer be a condition of a dependant's right of action for damages that the deceased owed the dependant a legal duty of support, it becomes relevant to consider whether the right of action should be extended to other persons who stand in an identifiable legal relationship to the deceased, particularly his collateral relatives. In England, where the class of relatives given rights under the Fatal Accidents Act 1846 was modelled on that of Scots law<sup>22</sup>, wide statutory extensions have been made. In so far as these relate to persons who would have no claim under Scots law, they include the deceased's brother, sister, uncle or aunt and the issue of any of them<sup>23</sup>. The Fatal Accidents Act 1959 also provided that, in determining the class of persons entitled to damages under the Fatal Accidents Acts, adopted children were to be deemed to be children of the adopting parent or parents, and of no other person<sup>24</sup>; relationship by affinity was deemed to be a relationship by consanguinity; and relationship of the half blood was to be treated in the same way as a relationship of the whole blood<sup>25</sup>. A stepchild of any person was to be treated as his child<sup>26</sup>, and an illegitimate person as the child of his mother and reputed father<sup>27</sup>.

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<sup>20</sup>1926 S.C. 544 at p. 547.

<sup>21</sup>1955 S.C. 424.

<sup>22</sup>See *Blake v. Midland Railway Co.* [1852] 18 Q.B. 93, argument of Sir Frederick Thesiger at p. 99; *Duncan v. Findlater* (1839) 6 Cl. & Fin. 894, argument of Sir John Campbell at pp. 898-9.

<sup>23</sup>Fatal Accidents Act 1959, s. 1(1), c.65.

<sup>24</sup>S. 1(2) (a) and s. 1(3); but the meaning of "adopted child" for this purpose has been extended by the Adoption Act 1964, ss. 1 and 2 and the Adoption Act 1968, s. 4(3).

<sup>25</sup>S. 1(2) (b).

<sup>26</sup>S. 1(2) (b).

<sup>27</sup>S. 1(2) (c).

74. In Memorandum No. 17 we had regard to the view of the Law Reform Committee for Scotland, which stated in 1960<sup>28</sup> that there was no evidence that the public interest required any extension of the class of relatives entitled to sue. We thought, however, that hardship might be occasioned in cases where, as in *Eisten v. North British Railway Co.*<sup>29</sup>, collateral relatives lose the person upon whom they rely for their support. It seemed clear, too, that this hardship prompted the recent attempts in *McKendrick and Others v. Sinclair*<sup>30</sup> to revive the old procedure of claiming an assythment. We therefore suggested that the class of persons entitled to damages should be extended to include those persons covered by the Fatal Accidents Act 1959. The comments which we received on this proposal were generally favourable, although some commentators were concerned that there might be a large increase in the number of claims. Having regard to the experience in England we doubt this: the real barrier to the pursuit of claims is the need to establish present and future, or simply future, dependence. Further consideration confirms us in our original view that the class of persons entitled to sue should be extended to collaterals.

75. We **recommend**, therefore, that the class of persons entitled to claim for patrimonial loss should be extended to include those collaterals and other persons specified in s. 1 of the Fatal Accidents Act 1959 (Recommendation 18)<sup>31</sup>.

*(d) Extension of claim to persons other than relatives*

76. Some of those who commented upon our proposal in Memorandum No. 5 to extend the class of relatives favoured still wider extensions. This suggestion raises acutely the question whether, having regard to the interests of defenders, the law should extend its protection to persons not directly related to the deceased. Three possible extensions were considered in Memorandum No. 17:

*(i) The divorced spouse*

77. Under the present law a divorced wife has no title to sue for damages, even when she is receiving a periodical allowance<sup>32</sup>. The Law Society of Scotland proposed that a right to claim damages for patrimonial loss should be conceded to "the divorced spouse and any other person holding an alimentary decree against the deceased". This proposal presents a number of problems. We propose to confine the discussion to divorced spouses, because we believe that any other cases of persons holding alimentary decrees by virtue of relationship to the deceased will be covered by our other Recommendations. It was suggested that a periodical allowance is really equivalent to a payment under a contract, and that a claim of this nature should merely be regarded as a claim against the deceased's estate. We prefer to regard the basis of the claim of the divorced spouse as being that he or she formerly belonged to the injured person's family unit and has a subsisting or contingent right of support during the injured person's natural life, and that this life has been prematurely terminated by the fault

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<sup>28</sup>10th Report of the Law Reform Committee for Scotland, Cmnd. 1103 (1960).

<sup>29</sup>(1870) 8 M. 980.

<sup>30</sup>1971 S.L.T. 17 and 234; 1972 S.L.T. 110.

<sup>31</sup>For convenience, a synopsis of those persons presently entitled to sue for patrimonial loss, and of those persons who will be so entitled if this Recommendation is implemented, is contained in Appendix I.

<sup>32</sup>*Hemmens and Others v. British Transport Commission* 1955 S.L.T. (Notes) 48.

of the person against whom the claim is made. The contractual approach also has a practical disadvantage because of the application of s.26(1)(a) of the Succession (Scotland) Act 1964. In terms of this section, an executor is liable for the continuing payment of a periodical allowance, and indeed it is not possible for the courts to convert a periodical allowance into a capital sum: thus practical difficulties would arise if a divorced spouse's claim were to be treated as a debt against the estate. In our view, it is not an objection to the concession of such a claim that the deceased may also have been survived by a widow (or widower) or another surviving divorced wife (or husband). The concession of a right to a divorced spouse would only increase the burden upon defenders if the deceased had no other dependants: otherwise, it would merely serve to reduce the damages recoverable by the remaining dependants. We think that, having regard to the deceased's moral obligations to a divorced spouse, this is appropriate. In our view, too, it should be immaterial whether or not the divorced spouse had been awarded a periodical allowance. Like any other spouse, he or she should be entitled to sue for loss of a contingent right of support. The majority of those who offered comments favoured this extension, and a similar extension is advocated by the Law Commission in their Report<sup>33</sup>.

78. We **recommend**, therefore, that the class of persons entitled to claim for patrimonial loss should be extended to include a divorced spouse (Recommendation 19).

*(ii) Children unrelated to the deceased or to his spouse*

79. We have already illustrated why adopted children, illegitimate children and stepchildren of the deceased were excluded from the class of children entitled to claim. Of these, stepchildren are still barred. All such children were members of the deceased's family and were dependent on him for support. If our preceding proposals are implemented there will still be a small category of children dependent on the deceased who are debarred from claiming in respect of the death, and the question remains whether a right to recover damages should be conceded to them. Accordingly, in Memorandum No. 17 we considered the proposal of the Law Society of Scotland that children brought up in family by and dependent on the deceased, but not legally related to or legally adopted by him, should be entitled to damages, and a substantial majority of our commentators, in addition to the Law Society of Scotland, considered that they should be. We agree, and have sought to find a formula which, while admitting genuine claims, will discourage spurious claims and will exclude those children who have not become permanent members of the family.

80. In this matter we have reached a slightly different conclusion from the Law Commission. The Law Commission have recommended<sup>34</sup> the adoption of the same definition as is used in the current English divorce legislation for the purpose of determining whether a child qualifies for maintenance<sup>35</sup>. That legislation extends beyond children of both parties to a marriage, including illegitimate and adopted children, to those who have been treated by both

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<sup>33</sup>Law Com. No. 56 (1973), para. 259.

<sup>34</sup>Para. 257.

<sup>35</sup>Matrimonial Causes Act 1973, s. 52(1).

parties as a child of their family<sup>36</sup>. We are not wholly persuaded that the definition contained in the English legislation will restrict the claimants to those children whose membership of a family is permanent. It has been held that the word "treated" has an objective connotation and this may lead to consequences which are controversial<sup>37</sup>. In contrast, the existing Scottish maintenance legislation<sup>38</sup> empowers the Scottish courts to make orders in consistorial actions relating to the maintenance *inter alios* of a child of one of the parties who has been accepted as one of the family by the other party. The use of the word "accepted" in this section is subjective. In our view a more realistic solution in this context would be to concede a right of action to a child who has been accepted into the family by the deceased, but not if he has been accepted by the surviving spouse alone. A simple illustration of the different effects of the two formulae would be the case of a child who, for some time past, has been received into a family on a temporary basis in circumstances where his own parents were ill, abroad, or otherwise unable to care for him, it being understood that the child's own parents would resume responsibility for him at some future date. Clearly such a child will have been "treated" as a member of the family and, if such a formula is chosen, will be entitled to claim damages in respect of the period during which he remained with the deceased's family. This would entail a reduction in the amount of damages available to the other members of the deceased's family. If, instead, the "accepted" formula is selected, the child will not qualify for damages, because the deceased will have known that the arrangement was a temporary one, and thus he cannot be said to have accepted the child into his family. The concept of acceptance implies permanence, i.e. membership of the family until forisfiliation. There is a serious danger that the adoption of the "treated" formula will give rise to spurious claims, and it should be the policy of legislation to discourage such claims if at all possible.

81. We accordingly **recommend** that a child who is unrelated to the deceased or to his spouse, but who has been accepted by the deceased as a child of his family, should be included in the class of persons entitled to claim for patrimonial loss<sup>39</sup> (Recommendation 20).

(iii) "*Unmarried spouses*"

82. The preponderance of the advice which we received was against the inclusion of "unmarried spouses" in the category of persons entitled to damages. Many associations of this nature are temporary, and it would be difficult to define by legislation precisely when such an association is of a sufficiently stable character to be considered a *de facto* marriage. There would be a risk of unfounded claims to the prejudice of defenders. We concede that in some cases the "unmarried spouse" may have moral claims in relation to the deceased, but we feel that this matter ought not to be considered simply in the narrow context of claims for patrimonial loss occasioned by injuries causing death. If the law is to take account of the moral claims of "unmarried spouses" in

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<sup>36</sup>But it does not include children who have been boarded-out with the parties to a marriage by a local authority or a voluntary organisation.

<sup>37</sup>*W. (R.J.) v. W. (S.J.)* [1971] 3 All E.R. 303.

<sup>38</sup>S. 7(1) of the Matrimonial Proceedings (Children) Act 1958.

<sup>39</sup>And for non-pecuniary loss: see *infra*, paras. 102-113.



this context, it should do so also in other spheres, particularly that of succession<sup>40</sup>, and we would prefer to consider the matter in the wider context of our programme for the reform of family law.

83. We therefore recommend that the class of persons entitled to claim for patrimonial loss should not be extended to include “unmarried spouses”<sup>41</sup> (Recommendation 21).

(iv) *Employers and partners*

84. It has occasionally been suggested that the employers and partners of persons who have been killed by a wrongful act on the part of another should be entitled to claim damages for the economic loss which they have suffered in consequence of the death. Such claims have invariably been rejected by the Court of Session on the ground that the damage is too remote<sup>42</sup>.

85. There was little demand among those with whom we consulted for any change in the law. It was pointed out that the suggestion had very wide implications and would entail too many practical difficulties; and that in any case it was open to employers to insure against a risk of this nature. The most fundamental objection, however, is that this is not a subject which should be dealt with in isolation, because it would be anomalous if employers and partners could recover damages for loss sustained by reason of the death of an employee or associate, but not by reason merely of his injury.

86. We recommend, accordingly, that the right of employers and partners of a deceased person to claim damages for economic loss suffered by them in consequence of his death should be reconsidered against a wider background (Recommendation 22)<sup>43</sup>.

## PART VI: ASSESSMENT OF THE DEPENDANTS' CLAIM FOR PATRIMONIAL LOSS

(a) *Introductory*

87. The calculation of the amount of the relatives' claim for loss of support has raised a variety of difficult problems, notably those relating to itemisation of heads of damage, the use of actuarial evidence in calculating loss, and what deductions are admissible in calculating a claimant's loss. In Memorandum No. 17 we considered the relevance of actuarial principles but concluded that

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<sup>40</sup>At present there is a limited recognition of unmarried dependants in social security legislation—see *Halsbury's Laws of England*, 3rd ed., vol. 27, p. 750, para. 1350. Unmarried dependants, moreover, of persons in the armed forces have limited pension rights—*op. cit.*, vol. 39, p. 166, para. 161.

<sup>41</sup>A similar conclusion has been reached by the Law Commission (para. 258).

<sup>42</sup>*Reavis v. Clan Line Steamers Ltd.* 1925 S.C. 725; *Quin v. Greenock and Port-Glasgow Tramways Co.* 1926 S.C. 544; *Gibson and Others v. Glasgow Corporation* 1963 S.L.T. (Notes) 16.

<sup>43</sup>On this subject see the 11th Report of the Law Reform Committee, Cmnd. 2017 (1963) and the 11th Report of the Law Reform Committee for Scotland, Cmnd. 1997 (1963).

the subject required consideration against a wider background than that of an inquiry into damages for injuries causing death. This conclusion met with general acceptance. We maintain it, having particular regard to the possibility that the Royal Commission on civil liability and compensation for personal injuries and death, set up on 19th December 1972, may examine the use of actuarial evidence. The itemisation of heads of damage, we conclude, is also a matter which does not require consideration in the present context. We note that in *Macdonald v. Glasgow Corporation*<sup>1</sup> the First Division approved a new form of issue which contained separate headings for loss of earnings to date of trial, future loss of earnings, solatium to date of trial and future solatium. This will help to ensure that s. 1(1A) of the Interest on Damages (Scotland) Act 1971 can be applied to a jury's verdict. The question whether, and in what circumstances, the scope of patrimonial loss sustained by the dependants should be extended has not yet been investigated by the Commission. For example, a relative may incur losses as a result of giving up work in order to look after an injured person, or may incur expenses in visiting an injured person in hospital<sup>2</sup>. We prefer to consider this problem in conjunction with similar problems which arise in actions by a living pursuer, and which are outwith the scope of this Report.

(b) *Allowable deductions*

(i) *The claimant's earning capacity*

88. It is accepted as a basic principle that the measure of damages is the amount of support which the claimant was actually receiving from the deceased and was likely to receive in the future<sup>3</sup>. It is also accepted that if the amount of support required by one of the claimants is likely to be increased or diminished in the future, it is proper to take this into account in calculating the amount of the award. Thus, in Scotland, it has usually been considered appropriate to have regard to the fact that a young widow may take steps to obtain employment and so contribute to her own support. This, however, remains a matter of probability: the law does not impose a duty on a widow to seek employment. A different approach has, however, been recently adopted in an English case, when there was evidence that she had intended to return to work even if her husband had lived. It was held that a widow's earning capacity is inherent in herself and depends upon her own abilities. It might have been exercised even if her husband had lived, and was not a gain derived from her husband's death<sup>4</sup>. The court therefore declined to take her future earnings into account.

89. We do not favour this approach, because the object of the law is to compensate the claimant for what he or she has lost, neither more nor less. If the court ignores the likelihood that a widow will obtain employment, she may well be overcompensated. The fact that a widow has or has not been employed before her husband's death is relevant, but principally in the sense that it may assist the court in determining whether she is likely to be employed in the future

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<sup>1</sup>1973 S.L.T. 107.

<sup>2</sup>The Law Commission considered this subject in their Working Paper No. 41, paras. 191-207, and in Law Com. No. 56 (1973), paras. 154-158.

<sup>3</sup>*Cruikshank v. Shiels* 1951 S.C. 741 per Lord Patrick at p. 747.

<sup>4</sup>*Howitt v. Heads* [1972] 1 All E.R. 491.

and what her earning capacity is likely to be. A widow's earning capacity is distinct from her prospects of remarriage, which the courts are now required to disregard by virtue of s. 4 of the Law Reform (Miscellaneous Provisions) Act 1971, and in our opinion the courts are still entitled in appropriate circumstances to take her earning capacity into consideration<sup>5</sup>.

(ii) *The claimant's actual remarriage or prospects of remarriage*

90. Until recently it was regarded as appropriate to consider a widow's prospects of remarriage in the calculation of the quantum of her loss. Section 4 of the Law Reform (Miscellaneous Provisions) Act 1971 now precludes the courts from taking into account not merely the prospects of remarriage of a widow but the very fact of her remarriage. Most of those who commented upon this provision were highly critical of it. Its critics argued that, if the court is precluded from taking into account the remarriage of a widow or her prospects of remarriage, there is a risk of her being compensated for a loss which in the circumstances has not occurred or is unlikely to occur. Moreover, it seemed wrong that a young childless widow should in practice receive higher damages than an older woman with children who might have little prospect of remarriage.

91. A further criticism of s. 4 is that it is inconsistent in its application. It applies only to the assessment of damages payable to a widow and does not apply in respect of claims by children, a widower or a divorced spouse. In relation to the children's claims, the inquiries and cross-examination into the widow's prospects of marriage which the section was designed to avoid may still be required. The same applies to a claim by a divorced spouse. It also seems anomalous that, while such inquiries are precluded in the case of a widow, they are permissible in the case of a widower. In Memorandum No. 17 we drew attention to the anomalies which will arise in the case of claims by children and widowers, but those whom we consulted were so hostile to the principle of s. 4 that they were usually hostile to its extension. The Law Commission had a similar experience on consultation<sup>6</sup>.

92. In the light of these criticisms and the terms of the comments which we have received, we are not disposed to recommend that the rule embodied in s. 4 should be extended in any way<sup>7</sup>. While we appreciate that the rule has been introduced only recently we suggest that it should be reexamined by Parliament, particularly in regard to a widow's actual remarriage<sup>8</sup> (Recommendation 23). We are not aware that the particular problems which gave rise to this legislation were ever a feature of the Scottish forensic scene.

(iii) *Inheritance and other benefits accruing to the dependants*

93. In Memorandum No. 17 we posed the question whether pecuniary and other benefits accruing to the dependants as a result of the death should reduce

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<sup>5</sup>See also *infra*, paras. 90-92.

<sup>6</sup>Law Com. No. 56 (1973), para. 252.

<sup>7</sup>The Law Commission, however, recommend the extension of the rule contained in s. 4(1) to claims by widowers and children (paras. 251-2).

<sup>8</sup>The Law Commission conclude (para. 261): "reluctantly we find ourselves unable to make any proposal for the amendment of [s. 4(1)] which would obviate the gross over-compensation of some widows which results from the existing provision".

the amount of their claim for patrimonial loss. Authority is sparse in Scotland, but, as the approach of the English courts appears to have influenced practice in Scotland<sup>9</sup>, we shall first consider the English position.

94. Section 2 of the Fatal Accidents Act 1846 declared: "The jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought". It was held in *Pym v. Great Northern Railway Co.*<sup>10</sup> that the words "injury resulting from such death" meant the pecuniary loss resulting from the death, and the practice arose of deducting the inheritance which the family received from the compensation payable under the Acts. At first, even monies received under policies of insurance taken out by the deceased were taken into account, until s. 1 of the Fatal Accidents (Damages) Act 1908 excluded such monies. The principle of the 1908 Act was extended, first by the Law Reform (Personal Injuries) Act 1948, and later by the Fatal Accidents Act 1959, to exclude "any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death"<sup>11</sup>. The term "benefit", however, is statutorily defined to mean trade union and friendly society payments for the relief and maintenance of a member's dependants, and benefits under the National Insurance Acts. It does not include benefits by way of succession, and the English courts have continued to make a deduction in respect of such benefits, although not always the full amount. What is usually deducted is not the value of the inherited assets as such, but the value of the accelerated payment of assets which the dependants would probably have inherited eventually in the ordinary course of events<sup>12</sup>. In more recent cases, when the dependant has the use of the inherited assets as a member of the deceased's family, as where a widow inherits her husband's house, no deduction has been made<sup>13</sup>. Moreover, there is a tendency to recognise that where the deceased was a wealthy man and generous to his family during his life, it may be positively disadvantageous, owing to the incidence of estate duty, for his widow and surviving children to receive immediate payment of a share of his estate<sup>14</sup>.

95. No provision was made for Scotland analogous to s. 2 of the Fatal Accidents Act 1908, presumably because it had not been the practice of the Scottish courts to deduct the proceeds of policies of insurance when computing the amount of the dependants' loss<sup>15</sup>. Nor was any specific provision made for Scotland analogous to s. 2(5) of the Law Reform (Personal Injuries) Act 1948. Nevertheless, in *Adams v. James Spencer & Co.*<sup>16</sup> the Court of Session felt itself

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<sup>9</sup>*Smith v. Comrie's Executrix* 1944 S.C. 499, per Lord Mackintosh at p. 501.

<sup>10</sup>(1862) 2 B. and S. 759. Cf. *Bradburn v. Great Western Railway Co.* (1874) L.R. 10 Exch. 1, per Bramwell, B. at p. 3.

<sup>11</sup>S. 2(1).

<sup>12</sup>*Grand Trunk Railway Company of Canada v. Jennings* [1888] 13 A.C. 800; *Roughead v. Railway Executive* [1949] 65 T.L.R. 435; *Voller v. Dairy Produce Packers Ltd.* [1962] 1 W.L.R. 960.

<sup>13</sup>*Heatley v. Steel Co. of Wales Ltd.* [1953] 1 W.L.R. 405; *Daniels v. Jones* [1961] 3 All E.R. 24.

<sup>14</sup>Cf. *Daniels v. Jones*, *supra*, per Holroyd Pearce, L.J. at p. 28.

<sup>15</sup>*Smith v. Comrie's Executrix* 1944 S.C. 499 per Lord Mackintosh at p. 501.

<sup>16</sup>1951 S.C. 175.

free to hold that a widow's pension under the National Insurance (Industrial Injuries) Act 1946 should be deducted in computing her claim for patrimonial loss<sup>17</sup>. This specific problem was dealt with by the Law Reform (Personal Injuries) (Amendment) Act 1953, the terms of which, however, are narrow<sup>18</sup>. The wider provisions of the Fatal Accidents Act 1959 are not applied to Scotland.

96. The initial approach of Scots law was to regard the relatives' claim as deriving from the fact that, by the fault of the defender, the aliment which the deceased afforded to them had terminated<sup>19</sup>. It followed on this view that the quantum of the claim could be determined by the extent of the legal duty to aliment, and that where the relatives had derived benefits by inheritance or otherwise in consequence of the death, those benefits should be taken into account in calculating their loss. It was on this basis that, when the matter first came before a Scottish court in 1944<sup>20</sup>, it was decided that inheritance must be taken into account and that only a diminished award of damages could be given. This decision has been followed in practice<sup>21</sup>, but there has been no adequate examination of the basis of this practice, nor guidance as to what proportion of the inheritance is to be taken into account. Indeed, in *Cruikshank v. Shiels*<sup>22</sup>, the House of Lords held that an averment that the widow was possessed of a substantial private fortune available for her support was irrelevant.

97. In Memorandum No. 17 we suggested that the law on this important matter should be clarified by an express statutory provision that, in assessing the amount of the dependants' damages, no account should be taken of what they may have received by way of inheritance from the deceased. We thought, and still think, that what is relevant is the dependants' loss of the family earnings provided by the deceased, a loss which they suffer whatever their personal income or the extent of the deceased's personal fortune. Almost all of those who submitted comments on the Memorandum shared the view which we expressed, and we are confirmed in it by a further examination of the question.

98. If the law is left unaltered there would be some inducement to seriously injured persons to arrange their affairs in such a way that their dependants would receive little or nothing from their estates. It seems anomalous, too, that account should be taken of benefits deriving from the deceased's direct investment in stocks and shares, whereas no account is to be taken of benefits deriving indirectly from the same source through insurance policies. Complex

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<sup>17</sup>Cf. *Moorcraft v. Alexander & Sons* 1946 S.C. 466; *Leadbetter v. National Coal Board* 1952 S.L.T. 179.

<sup>18</sup>S. 1 declares that: "In an action for damages in Scotland in respect of a person's death there shall not in assessing those damages be taken into account any right to benefit resulting from that person's death", and "benefit" is defined to mean merely benefit under the National Insurance Acts (Law Reform (Personal Injuries) Act 1948, s. 2(6) (a)).

<sup>19</sup>*Eisten v. North British Railway Co.* (1870) 8 M. 980; *Weir v. Coltness Iron Co. Ltd.* (1889) 16 R. 614; *Clarke v. Carfin Coal Co.* (1891) 18 R. (H.L.) 63.

<sup>20</sup>*Smith v. Comrie's Executrix* 1944 S.C. 499; 1945 S.L.T. 108 *sub nom.* *Smith v. Boyd and Another*.

<sup>21</sup>*Webster and Others v. Simpson's Motors and Others* 1967 S.L.T. (Notes) 36; *Gillan and Others v. McGawn's Motors Ltd.* 1970 S.L.T. 250.

<sup>22</sup>1951 S.C. 741; 1953 S.C. (H.L.) 1.

problems arise where the deceased's estate includes the proceeds of insurance policies. Such proceeds are not to be taken into account under the rules of our common law, yet their inclusion in the deceased's estate may materially affect the estate duty payable on the rest of the estate and, therefore, the net estate available to dependants. If the estate which the dependants receive by way of inheritance from the deceased were to be taken into account in calculating damages, the difficult question arises whether that estate should be calculated as if the insurance policies had not existed or should be calculated as if they had existed. In this case it might be argued that the estate duty should be apportioned rateably between the proceeds of the policies and the remainder of the estate, for the purpose of determining the net estate inherited by the dependants, leaving out of account the proceeds of the insurance policies. These complications point to the impracticability of distinguishing between the proceeds of insurance policies and other inherited benefits.

99. We consider, moreover, that the principle should be widened to include any benefits which the dependants may receive by way of succession or settlement (whether or not from the injured person's own estate) as a consequence of the death of the injured person. The fact that a relative benefits on the death of the injured person by the termination of a life interest enjoyed by that person or by the fact that an annuity commences on the death of the injured person should not affect his claim for damages for patrimonial loss<sup>23</sup>.

100. A subsidiary question is whether we should recommend legislation for Scotland analogous to s. 2(1) of the Fatal Accidents Act 1959. That subsection, as we have explained, provided that in a fatal accidents claim no deduction should be made in respect of insurance policies, benefits under the National Insurance Acts, pensions or gratuities<sup>24</sup>. We have already noted that it has not been the practice of the Scottish courts to deduct the proceeds of policies of insurance when computing the amount of the dependants' patrimonial loss, and that accordingly no provision was made for Scotland when English legislation was passed in 1908. There is a paucity of authority in Scotland as to whether or not pensions should be taken into account, although Lord Patrick did hold in *Moorcraft v. Alexander*<sup>25</sup>, a case involving the death of a soldier, that a soldier's widow's pension should be deducted. We do not believe that this is an area in which there can be any justification for differences between the laws of Scotland and England, and we think that the same arguments apply in the case of these deductions as apply in the case of inheritance. In the interests of uniformity, therefore, and in order to remove any ambiguities which may be thought to exist, we consider that legislation analogous to s. 2(1) of the Fatal Accidents Act 1959 should be introduced into Scots law.

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<sup>23</sup>The proposal of the Law Commission, in contrast, is that only benefits deriving from the deceased's estate should be excluded from the calculation of damages (paras. 255-6).

<sup>24</sup>The 1959 Act was not applied to Scotland, but it was applied to Scotland in the specialised context of the Carriage by Railway Act 1972, which ratified an international convention (described therein as the Additional Convention) concerning the carriage of passengers and their luggage. S. 3(2) provides that, for the purposes of an action brought in Scotland arising out of the Additional Convention, those benefits specified in s. 2(1) of the 1959 Act are not to be deducted. Cf. the provision in the Carriage by Air Act 1932 to which we referred in para. 66 *supra*.

<sup>25</sup>1946 S.C. 466.

101. We recommend, therefore, that it should be provided by statute that in assessing the amount of the dependants' damages for patrimonial loss, no account should be taken of what they receive in consequence of the death by way of succession or settlement (whether or not from the injured person's own estate), or in respect of any insurance money, pension, gratuity, benefit under the National Insurance Acts, or payments from a friendly society or trade union (Recommendation 24).

## PART VII: CLASSES OF DEPENDANTS ENTITLED TO CLAIM DAMAGES FOR NON-PECUNIARY LOSS

102. When a claim by dependent relatives is competent, Scots law concedes to them not merely damages for patrimonial loss, but also an award of solatium, or pecuniary acknowledgement of their grief and suffering<sup>1</sup>. A similar right was first conceded in actions of assythment where a sum was given to the relatives for the "pacifying of thair rancor"<sup>2</sup>. In the modern action which took the place of assythment, solatium was explained to be a compensation for the relatives' grief rather than a buying-off of their vengeance. It is incompetent to take account of the greater anger of the relatives occasioned by the grossness of the negligence<sup>3</sup>. In assessing the award, however, it may be legitimate "to consider the laceration of the feelings of the widow and family in contemplating the pain and suffering to which the deceased was exposed before death actually supervened"<sup>4</sup>. A similar award is given by many civilian systems, but not by the English common law. In England, under the Fatal Accidents Acts, damages are based on compensation for pecuniary loss<sup>5</sup>. The pursuer is not entitled to an award under Scots law merely by virtue of his relationship with the deceased, however close: there must be proof of grief<sup>6</sup>. The fact, however, that financially a man is a burden rather than an asset to his family does not mean that they will feel no grief on his death<sup>7</sup>. Specific averments of injury to the pursuer's physical or mental health are irrelevant and are not admitted to proof<sup>8</sup>. Since grief cannot be measured in financial terms, the sums awarded are necessarily conventional, and on the whole they have been small. In recent cases sums of £1250 to £1500 have been awarded to widows and £600 to £750 to children<sup>9</sup>. But widows who have remarried and young children may receive less<sup>10</sup>.

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<sup>1</sup>*Quin v. Greenock and Port-Glasgow Tramways Co.* 1926 S.C. 544; *Elliot v. Glasgow Corporation* 1922 S.C. 146.

<sup>2</sup>Balfour's Practicks, p. 516.

<sup>3</sup>*Black v. North British Railway Co.* 1908 S.C. 444 at p. 454.

<sup>4</sup>*Idem*, per Lord President Dunedin at p. 453.

<sup>5</sup>*Taff Vale Railway Co. v. Jenkins* [1913] A.C. 1 per Viscount Haldane, L.C. at p. 4.

<sup>6</sup>*Rankin and Others v. Waddell* 1949 S.C. 555.

<sup>7</sup>*Brown v. Macgregor and Others*, 26th February 1813 F.C.; *Elder v. Croall* (1849) 11 D. 1040.

<sup>8</sup>*Nicolson v. Cursiter* 1959 S.C. 350.

<sup>9</sup>*McNeil v. National Coal Board* 1966 S.L.T. (Notes) 4; *O'Connor v. Holst & Co. Ltd.* 1969 S.L.T. (Notes) 66; *Gray v. Allied Ironfounders Ltd.* 1969 S.L.T. (Notes) 95; *Gillan and Others v. McGawn's Motors Ltd.* 1970 S.L.T. 250.

<sup>10</sup>Cf. *Cowan v. Greig* 1969 S.L.T. (Notes) 34.

103. There has been criticism from time to time of the rights of spouses and relatives to sue for solatium, and the Law Reform Committee for Scotland were asked to consider whether any change in the law was desirable. The Committee dealt with this matter in their Tenth Report<sup>11</sup> as follows:

“The right to solatium is of long-standing in the law of Scotland and while unfounded claims are no doubt made from time to time there is no reason to think that this happens more frequently with regard to solatium than patrimonial loss. It has been suggested to us that unfounded claims for solatium in respect of the death of a relative are more difficult to refute before a jury than claims for patrimonial loss, but while this may be so we do not think the right to claim solatium should be withdrawn from the genuine claimants on this account. We would therefore not recommend any change in the law regulating the right to solatium”.

104. The Law Commission have recently reconsidered the English rule which denies any compensation to the widow, widower or other relatives for the grief occasioned by the death of the deceased<sup>12</sup>. After a review of legislation in the United States, South Australia and the Republic of Ireland admitting limited rights of action to relatives, the Commission concludes that in two cases, but in two cases only, damages for bereavement might appropriately be awarded. These cases are where parents lose an infant child or where a husband or wife loses his or her spouse. It proposes that fixed sums should be awarded, £1000 for the loss of a spouse and £1000 to a parent or parents for the loss of a child. Claims for such damages are not to survive to the estate of the relative.

105. We ourselves have been led to a different conclusion. Our examination of this subject has convinced us that an award similar to that which is at present given under the name of solatium might appropriately be given, but for reasons other than that of assuaging the grief and sorrow of the claimant. The present basis of the award, which depends on grief and sorrow and not on loss of society, leads to the anomaly that the very young or posthumous child, whose need is greatest, in principle should be awarded and in practice sometimes has been awarded little or nothing<sup>13</sup> in name of solatium. Yet awards of solatium have been made to young and to posthumous children and have been justified on the argument that they should receive “compensation for the bitter consciousness of the gravity of the bereavement which claimants of very tender years may be expected to experience as soon as they are old enough to appreciate it”<sup>14</sup>. Equally, if grief and suffering are the basis of an award of solatium there seems no reason why a substantial award should not be granted to the grown-up children of the deceased. The failure, however, of the jury in *Rankin and Others v. Waddell*<sup>15</sup> to make any award of solatium to three forisfamiliar sons and the small amounts awarded in other cases<sup>16</sup> suggest that there is some uneasiness about the basis of the award.

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<sup>11</sup>Cmnd. 1103 (1960), paragraph 27.

<sup>12</sup>Law Com. No. 56 (1973), paras. 160-80.

<sup>13</sup>See *Moorcraft v. Alexander & Sons* 1946 S.C. 466, per Lord Patrick at p. 468; *Walker, Law of Damages in Scotland*, pp. 639-641.

<sup>14</sup>*Kelly v. Glasgow Corporation* 1949 S.C. 496 per Lord President Cooper at p. 499.

<sup>15</sup>1949 S.C. 555.

<sup>16</sup>Cf. *Paterson v. London, Midland and Scottish Railway Co.* 1942 S.C. 156.



106. On the other hand, over and above the quantifiable loss of income which they sustain when a man is killed, we think that a wife and children suffer damage through the loss of his help as a member of the household and of his counsel and guidance as a husband and father. A similar situation arises when a wife is killed leaving a husband and a young family: even if she was not herself earning, her husband and family suffer considerable loss on her death, which is only partially quantifiable in financial terms. These are facts which ought to be acknowledged by the law.

107. In Memorandum No. 5 we suggested that the right to solatium conceded to the spouse and relatives might be replaced by a species of family award, which would take account of the intangible losses which we have just described, but on the basis of amounts fixed by a tariff. This proposal was not greeted with enthusiasm but attracted favourable comments, even from bodies which would have liked solatium to be entirely abolished. In consequence, we gave further thought to the matter in Memorandum No. 17, and in particular to the problems of specifying the persons to whom a claim should be open, of defining its basis in legislative terms, and of specifying how the award is to be quantified by the courts. As a result of the comments received on the second Memorandum we have reached the following conclusions.

108. We consider that the award should be described as "loss of society" and not as "solatium", partly because of the desirability of using a term which will be readily understood by the public at large, and partly because the nature of the award is rather different from the traditional concept of solatium. We fear that, if the term "solatium" is retained, emphasis will continue to be placed on pain and suffering, with the inevitable consequence that the anomalies which we have criticised will remain.

109. We proposed in Memorandum No. 17 that the claim should not be available to all persons who, in principle at least, would be entitled to sue for damages for patrimonial loss. This suggestion was criticised on the ground that the existence of different classes entitled to sue for patrimonial loss and solatium would lead to confusion—but we are not impressed with this objection, chiefly because of the intrinsically different nature of the types of claim. Simplicity is desirable, but not if it leads to the admissibility of inappropriate claims. 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. Most of the apparently hard cases will be dealt with by our proposal to define "child" as including children accepted by the deceased as members of his family. Some of those who submitted comments laid great stress on the need to discourage speculative claims but—short of abolishing claims for non-pecuniary loss altogether—we do not see how this can be achieved. The restriction of the class entitled to compensation will at least reduce the number of such claims. We therefore propose that only a husband, wife, parent or child should be entitled to claim for loss of society, but that the award should be available to the same class of children who are entitled to claim damages for patrimonial loss. It was further suggested

to us that only those members of the prescribed class who are actually living in family with the deceased should be entitled to claim. We would prefer, however, not to fetter the court's discretion, and we are content to observe that this is one of the factors which the court would consider, either when deciding whether to admit a claim, or when assessing the quantum of the award. In cases where one of the prescribed class of relatives has died before the hearing of the action, his executor should not be entitled to compensation of this kind<sup>17</sup>.

110. It will be observed that the draft clause designed to implement this proposal is in general terms. This will have the effect of leaving it to the courts to identify in each case the nature of the loss suffered. This must be so, because it will differ from case to case; although one fairly common example would be the loss suffered by a child when deprived of advantages which the court considers would probably have resulted from upbringing and early education by the parent of whose society the child has been deprived.

111. We also consider, on similar grounds, that it should be left to the courts to work out the appropriate compensation. It would be possible to devise a tariff of compensation, but it would soon become out of date, and if it attempted to deal with the many complex situations which might arise, it would be both arbitrary and unwieldy. We would imagine, however, that since what is being compensated is not grief and sorrow, the awards would in practice be more varied in their amounts than solatium awards are at present.

112. We therefore **recommend** that the dependants' right to solatium should be replaced by a head of damages, entitled "loss of society", which is designed to acknowledge the non-pecuniary loss suffered by the husband, wife, parent or child of the deceased. The award should be available to the same class of children who are entitled to claim damages for patrimonial loss (Recommendation 25)<sup>18</sup>.

113. If this Recommendation is accepted it would seem appropriate for the legislation following upon it to deal with the following subsidiary problem. If a person dies in consequence of personal injuries and if, as a result, the right to an award for loss of society vests in a member of his immediate family, should that right, on the death of the person in whom it is vested, transmit to his executors? We have already recommended that a claim to solatium for personal injuries should not transmit to the executors of the injured person, even when during his lifetime the injured person has commenced an action incorporating a claim for solatium<sup>19</sup>. The basis of this Recommendation is that the award of solatium in those circumstances cannot benefit the person who suffered the loss. Equally, the transmission of a claim for loss of society would not in fact benefit the person who suffered the loss. We **recommend**, therefore, that the right of a member of a deceased person's immediate family to a loss of society award should be personal to the claimant and should not

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<sup>17</sup>*Infra*, para. 113.

<sup>18</sup>For convenience, a synopsis of the proposed class of claimants is contained in Appendix II.

<sup>19</sup>*Supra*, paras. 21-25.

transmit to his executors, even when during his lifetime the claimant has initiated or joined in an action incorporating a conclusion for a loss of society award (Recommendation 26).

## PART VIII: THE ABOLITION OF ASSYTHMENT

114. In Memorandum No. 17 we briefly traced the history of assythment<sup>1</sup>, the ancient right of the relatives of a person slain by a criminal act to obtain redress from the person responsible. In the recent case of *McKendrick and Others v. Sinclair*<sup>2</sup>, the two brothers and a sister of a person who was killed, it was averred, by the defender's criminal conduct attempted to revive the old action. The rule in *Eisten v. North British Railway Co.*<sup>3</sup> barred them as collaterals from claiming solatium and patrimonial loss in the usual way, but that rule was unknown in actions for assythment. Their Lordships did not actually declare the action to be incompetent, because, in Lord Reid's words, "loss of a common law remedy by desuetude would I think be a novelty in our law and I see no advantage in introducing such a principle"<sup>4</sup>. However, if our proposals to extend the category of dependants entitled to sue are accepted, we do not imagine that there will ever again be circumstances in which dependants would find it necessary to have recourse to the ancient remedy.

115. We therefore **recommend** that it should be provided by statute that actions for the recovery of assythment should not be competent in any circumstances (Recommendation 27).

## PART IX: SUMMARY OF RECOMMENDATIONS

### RELATIONSHIP BETWEEN CLAIMS BY AN INJURED PERSON AND HIS EXECUTORS

1. It should be provided by statute that an injured person may recover damages for patrimonial loss in respect of the period between his post-accident expected date of death and his pre-accident expected date of death (the "lost period") (paragraphs 11-14).

2. It should be provided by statute that in calculating an injured person's damages for patrimonial loss during the "lost period", the court may have regard not only to the injured person's loss of income which he would probably have earned during that period if he had been alive, but also to his loss of other benefits in money or in money's worth which he would probably have derived from sources other than his own estate (paragraphs 15-17).

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<sup>1</sup>For a fuller account see article, *The End of Assythment*, (1973) S.L.T. (News) 1.

<sup>2</sup>1972 S.L.T. 110.

<sup>3</sup>(1870) 8 M. 980.

<sup>4</sup>At p. 113.

3. It should be provided by statute that in calculating an injured person's damages for patrimonial loss during the "lost period", the court shall make a deduction for living expenses which the injured person might have been expected to incur during that period if he had been alive, and which are reasonable having regard to his financial and other circumstances, in so far as those expenses do not exceed the amount awarded for patrimonial loss during that period (paragraphs 15-17).

4. It should be declared that the right of the executors to recover damages in respect of the deceased's patrimonial loss should be limited to patrimonial loss attributable to the period up to the date of death (paragraphs 19-20).

5. The right to recover solatium for personal injuries should cease on the death of the injured person and should not transmit to his executors, even when the injured person during his life has commenced an action incorporating a claim for solatium (paragraphs 21-25).

### **RELATIONSHIP BETWEEN CLAIMS BY AN INJURED PERSON AND HIS DEPENDANTS**

6. Exemption clauses which validly exclude or limit liability to an injured person should have the effect after his death of excluding or limiting liability to his dependants (paragraphs 27-32).

7. The deceased's voluntary assumption of risk should continue to exclude any rights of action on the part of his executors or of his dependants (paragraphs 33-35).

8. In cases of concurrent fault the defender's liability to the deceased's executors and to his dependants should continue to be proportionate to the degree of fault shown by the deceased (paragraphs 36-38).

9. The recovery of damages by an injured person or his settlement of a claim to damages during his life should continue to exclude any right of action by his dependants after his death (paragraphs 39-43).

10. There should be no further amendments to the law of prescription in the context of this Report (paragraphs 44-45).

### **RELATIONSHIP BETWEEN CLAIMS BY THE EXECUTORS AND THE DEPENDANTS**

11. The dependants' rights of action for damages for patrimonial loss and solatium (or any award which may replace it) should not be affected by the existence of an action by the executors and *vice versa* (paragraphs 46-52).

12. It should be the duty of any executor or dependant who wishes to raise an action to ascertain the identity of the other persons who have an interest, and to serve a notice upon them in a form and manner to be prescribed by rules of court. If the pursuer fails to serve a notice on any interested party of whose existence he is aware or could with reasonable diligence have become aware, it should be open to the court to dismiss the action if it thinks fit (paragraph 58).

13. Any interested party should be entitled to apply to be sisted as a pursuer in an action which has already been raised, whether or not a notice has been served on him by the person who has raised the action. Any person who wishes to be sisted should be required to give notice to this effect to all other parties to the action before the commencement of the proof or jury trial. The precise details of this procedure should be regulated by rules of court. Any power which the court has at present to sist any person as a pursuer should be retained. Any interested person who fails to sist himself within the period specified should be barred subsequently from raising a separate action or—subject to the court’s discretion—from sisting himself as a pursuer in the original action (paragraph 59).

14. Where an interested party cannot be found, and does not learn of the existence of the original action until it is too late, he should not be prevented from raising a separate action provided that he can satisfy the court that because of lack of knowledge or any other just reason he was unable to sist himself as a pursuer in the first action (paragraph 60).

15. (1) If two or more actions are pending in different courts, any party to any of the actions should be able to apply to the Court of Session for an order that such of the actions as may be specified in the application shall be transferred to one of the other courts; and the Court of Session may make such an order if it thinks fit;

(2) If two or more actions are pending in the same court, that court may, if it thinks fit, either of its own accord or on the application of any party to any of the actions, order that the actions should be conjoined (paragraphs 61-62).

#### **CLASSES OF DEPENDANTS ENTITLED TO CLAIM DAMAGES FOR PATRIMONIAL LOSS**

16, 17. It should no longer be a condition of a dependant’s claim for patrimonial loss that a reciprocal legal duty of support existed between the claimant and the deceased at the latter’s date of death (Recommendation 16); but the courts, in assessing damages, should not be precluded from having regard to any legal duty of support owed, or contingently owed, to the claimant by the deceased (Recommendation 17) (paragraphs 68-72).

18. The class of persons entitled to claim for patrimonial loss should be extended to include those collaterals and other persons specified in s. 1 of the Fatal Accidents Act 1959 (paragraphs 73-75).

19. The class of persons entitled to claim for patrimonial loss should be extended to include a divorced spouse (paragraphs 77-78).

20. A child who is unrelated to the deceased or to his spouse, but who has been accepted by the deceased as a child of his family, should be included in the class of persons entitled to claim for patrimonial loss (paragraphs 79-81).

21. The class of persons entitled to claim for patrimonial loss should not be extended to include “unmarried spouses” (paragraphs 82-83).

22. The right of employers and partners of a deceased person to claim damages for economic loss suffered by them in consequence of his death should be reconsidered against a wider background (paragraphs 84-86).

## **ASSESSMENT OF THE DEPENDANTS' CLAIM FOR PATRIMONIAL LOSS**

23. The rule embodied in s. 4 of the Law Reform (Miscellaneous Provisions) Act 1971 should not be extended in any way, and should be reexamined by Parliament, particularly in regard to a widow's actual remarriage (paragraphs 90-92).

24. It should be provided by statute that in assessing the amount of the dependants' damages for patrimonial loss, no account should be taken of what they receive in consequence of the death by way of succession or settlement (whether or not from the injured person's own estate), or in respect of any insurance money, pension, gratuity, benefit under the National Insurance Acts, or payments from a friendly society or trade union (paragraphs 93-101).

## **CLASSES OF DEPENDANTS ENTITLED TO CLAIM DAMAGES FOR NON-PECUNIARY LOSS**

25. The dependants' right to solatium should be replaced by a head of damages, entitled "loss of society", which is designed to acknowledge the non-pecuniary loss suffered by the husband, wife, parent or child of the deceased. The award should be available to the same class of children who are entitled to claim damages for patrimonial loss (paragraphs 102-112).

26. The right of a member of a deceased person's immediate family to a loss of society award should be personal to the claimant and should not transmit to his executors, even when during his lifetime the claimant has initiated or joined in an action incorporating a conclusion for a loss of society award (paragraph 113).

## **THE ABOLITION OF ASSYTHMENT**

27. It should be provided by statute that actions for the recovery of assythment should not be competent in any circumstances (paragraphs 114-115).

# APPENDICES

## APPENDIX I

### THE CLASS OF PERSONS ENTITLED TO SUE FOR PATRIMONIAL LOSS

#### 1. *The present law*

Wife	
Husband	
Children	including: (a) adopted children (b) illegitimate children.
Other descendants, <i>eg</i> 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, <i>eg</i> grandchildren	of all the above categories of children.
Parents	including: (a) adopting parents (b) parents of an illegitimate child.
Other ascendants, <i>eg</i> grandparents	of all the above categories of parents.
Collaterals	<i>ie</i> 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, *eg* grandchildren.

Parents

including:

- (a) adopting parents
- (b) parents of an illegitimate child.

But not their ascendants, *eg* grandparents.

DRAFT  
OF A  
**BILL**

TO

Amend the law of Scotland relating to the damages recoverable in respect of deaths caused by personal injuries; to define the rights of an injured person which are transmitted on his death to his executor in respect of personal injuries sustained by him; to make new provision for assessing the damages due to a pursuer for patrimonial loss caused by personal injuries sustained by him; to abolish rights to assythment; and for purposes connected with the matters aforesaid.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Rights of  
relatives of a  
deceased person.

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

## EXPLANATORY NOTES

### *Clause 1*

1. Clause 1 implements the Recommendations concerning the rights of the relatives of an injured person to recover damages for patrimonial loss and loss of society (in Parts III, V, VI and VII of the Report).

### *Subsection (1)*

2. As a preliminary to defining the rights of the relatives of a person who dies in consequence of personal injuries, subsection (1) provides that, under the Bill as under the common law, liability to the injured person or his executors is a precondition of liability to his relatives (see paragraph 26). The classes of relatives entitled to sue, whether for patrimonial loss or for loss of society, are defined in clauses 12(1) and (2) and Schedule 1. Reference is made to the executors of the injured person to preclude any argument that, because the act or omission instantaneously caused the death of the injured person, there was never any liability to him. The reference to an "act or omission" covers all the situations in which a person can be liable for injuries caused to another person, whether by fault, strict liability, or breach of statutory duty.

*Damages (Scotland) Bill*

(2) No liability shall arise under this section if the liability to the injured person or his executor has been excluded or discharged (whether by antecedent agreement or otherwise) by the injured person before his death, or is excluded by virtue of any enactment.

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

(4) If the relative is a member of the injured person's immediate family (as defined for the purposes of this Act) there shall be awarded in addition such further sum of damages, if any, as the court thinks just as compensation for the loss of such non-patrimonial benefit as the relative might have been expected to derive from the injured person's society and guidance if the injured person had not died; and in the following provisions of this Act the expression "loss of society award" means a further sum of damages such as is mentioned in this subsection.

(5) In assessing for the purposes of this section the amount of any loss of support suffered by a relative of an injured person, no account shall be taken of—

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

and in this subsection—

"benefit" means benefit under the National Insurance Act 1965 or the National Insurance (Industrial Injuries) Act 1965 or any corresponding enactment having effect in Northern Ireland, and any payment by a friendly society or trade union for the relief or maintenance of a member's dependants;

"insurance money" includes a return of premiums; and

"pension" includes a return of contributions and any payment of a lump sum in respect of a person's employment.

## EXPLANATORY NOTES

### *Subsection (2)*

3. Subsection (2) partly implements Recommendations 6 and implements Recommendations 7 and 9 of the Report. This subsection reinforces the principle stated in the previous subsection, again in conformity with the existing law, by making it clear that there is no liability to the injured person's relatives where the liability to the injured person himself or to his executors has been excluded or discharged. Liability can be excluded by the deceased's waiver of his rights of action, for example by an exclusion clause in a contract (see paragraphs 27-32), by his voluntary assumption of risk (see paragraphs 33-35), or by prescription (see paragraphs 44-45). Liability can be discharged by the injured person's recovery of damages or settlement of a claim before his death (see paragraphs 39-43). Limitation of liability, whether by prior agreement or by other means (for instance the operation of statute), is dealt with separately in clause 8.

### *Subsection (3)*

4. Subsection (3), in specifying those aspects of patrimonial loss which the relatives are entitled to claim (loss of support and reasonable funeral expenses) makes no change in the position at common law. Nor is there any change in the method of assessing the amount of the relatives' loss of support, which is calculated by reference to what they had been receiving from the deceased and might reasonably have been expected to receive in the future (see paragraph 26). For the effect of the removal of the requirement that there should be a legal duty of support, see subsection (6).

### *Subsection (4)*

5. Subsection (4) implements Recommendation 25 (see paragraphs 102-112). It replaces the common law award of solatium to the dependants in respect of their grief and suffering by an award in respect of their loss of the deceased's society and guidance. The term "solatium" is no longer used in respect of such an award, and is replaced by the expression "loss of society". The subsection restricts the class entitled to claim in respect of loss of society to husband, wife, parent and child, including all those children entitled to sue for patrimonial loss (see clause 12(2) and Schedule 1). The subsection does not seek to introduce a tariff, but instead entrusts the assessment of each loss of society award to the courts (see paragraph 111).

### *Subsection (5)*

6. Subsection (5) implements Recommendation 24 (see paragraphs 93-101). It ensures that the relatives' right to recover damages in respect of their loss of support should not be reduced as a result of the accelerated benefits which they receive as a result of the injured person's death. Paragraph (a) excludes benefits by way of succession or settlement (whether *inter vivos* or *mortis causa*) from all sources, and not merely from the injured person's estate. Paragraph (b) excludes insurance money and certain other benefits. It confirms the common law position regarding insurance policies and gratuities, and removes certain ambiguities regarding the treatment of pensions. It replaces the existing statutory provision regarding the treatment of National Insurance benefits (the Law Reform (Personal Injuries) Act 1948, s. 2(5A) and the Law Reform (Personal Injuries) (Amendment) Act 1953). As a result of these changes, the paragraph is in substantially the same terms as the corresponding English legislation (s.2(1) of the Fatal Accidents Act 1959). The definition of "benefit" has the same effect as the corresponding definition in s.2(1), and the definitions of "insurance money" and "pension" are in the same terms as those contained in s.2(1).

*Damages (Scotland) Bill*

(6) In order to establish loss of support for the purposes of this section it shall not be essential for a claimant to show that the injured person was, or might have become, subject to a duty in law to provide or contribute to the support of the claimant; but if any such fact is established it may be taken into account in assessing the probability that the injured person, if he had not died, would have provided or contributed to such support.

(7) Except as provided in this section no person shall be entitled by reason of relationship to damages (including damages by way of solatium) in respect of the death of another person.

## EXPLANATORY NOTES

### *Subsection (6)*

7. Subsection (6) implements Recommendations 16 and 17. The common law rule that a dependant cannot claim in respect of patrimonial loss (or solatium) unless he was owed a legal duty of support by the deceased is discarded. The subsection provides that it is not a condition of the relative's claim that the injured person owed him a legal duty of support. However, it confers a right on the courts to take such a legal duty into account when claims for loss of support are being considered (see paragraphs 68-72).

*Damages (Scotland) Bill*

Rights  
transmitted  
to a deceased  
person's  
executor.

2.—(1) The following provisions shall have effect instead of the rules of law in force immediately before the commencement of this Act relating to the transmission to a deceased person's executor of any right of the deceased to damages in respect of personal injuries sustained by the deceased.

(2) Subject to subsection (4) below there shall be transmitted to the executor the like right to damages in respect of the injuries as was vested in the deceased immediately before his death; and for the purpose of enforcing any such right the executor shall be entitled to bring an action or, if an appropriate action in respect of the injuries had been brought by the deceased before his death and had not then been concluded, to be sisted as pursuer in that action.

(3) For the purpose of the foregoing subsection an action shall not be taken to be concluded while any appeal is competent or before any appeal timeously taken has been disposed of.

(4) Subsection (2) above shall not apply to any right the deceased may have had to damages—

(a) by way of solatium;

(b) by way of compensation for patrimonial loss attributable to any period after the deceased's death.



## EXPLANATORY NOTES

### *Clause 2*

1. Clause 2 implements Recommendations 4 and 5 (see paragraphs 19-25). It clarifies the law by providing that an injured person's claim for patrimonial loss transmits to his executors only insofar as it relates to the period up to his date of death. The term "patrimonial loss" is explained in paragraph 7 of the Report. This term is widely used in Scots law and is understood to include all items of loss in money or in money's worth which can be claimed in an action for personal injuries. Otherwise, the clause makes no alteration to the manner in which the rights of an injured person transmit to his executors. The executor is entitled to raise an action, or to continue an action which has been raised by the injured person during his lifetime. The conclusion of an action during the injured person's lifetime, however, and the other circumstances specified in clause 1, will exclude the executor's rights of action.

2. The combined effect of clauses 1 and 2 is that the executors are entitled to claim only in respect of patrimonial loss attributable to the period up to the date of death; the relatives are entitled to claim in respect of patrimonial loss attributable only to the period after the date of death, and they alone are entitled to claim in respect of loss of society. The result of these changes is that the various claims are now completely independent.

*Damages (Scotland) Bill*

Right to loss of society award not to be transmitted to executor.

3. Where a right to a loss of society award has accrued to a deceased person before his death the right shall not be transmitted to his executor.

Assessment of patrimonial loss in actions at instance of injured person.

4.—(1) This section applies to any action for damages in respect of personal injuries sustained by the pursuer where the pursuer's expected date of death (having regard to his actual state of health at the time of the action) is earlier than it would have been if he had not sustained the injuries; and in this section in relation to any pursuer—

- (a) references to the pursuer's notional expected date of death are references to the date when he would have been expected to die if he had not sustained the injuries; and
- (b) references to the lost period are references to the period between the pursuer's actual expected date of death and his notional expected date of death.

(2) For the purposes of assessing, in any action to which this section applies, the amount of any patrimonial loss likely to be suffered by the pursuer after the date of decree as a result of the injuries—

- (a) it shall be assumed that the pursuer will live until his notional expected date of death (and no longer); and
- (b) the amount of the said patrimonial loss attributable to the lost period shall be estimated in accordance with Schedule 2 to this Act.

Executor's claim not to be excluded by relatives' claim: and *vice versa*.

5. For avoidance of doubt it is hereby declared that a claim by the executor of a deceased person for damages under section 2 of this Act is not excluded by the making of a claim by a relative of the deceased for damages under section 1 of this Act; nor is a claim by a relative of a deceased person for damages under the said section 1 excluded by the making of a claim by the deceased's executor for damages under the said section 2; but this section is without prejudice to section 6 of this Act.

## EXPLANATORY NOTES

### *Clause 3*

Clause 3, which implements Recommendation 26, ensures that the rights of a relative to a loss of society award, in common with an injured person's right to solatium, should not transmit to his executors (see paragraph 113).

### *Clause 4*

Clause 4, when read in conjunction with Schedule 2, implements Recommendations 1, 2 and 3 (see paragraphs 11-17). Clause 4 provides that where, as a result of his injuries, a person's expectation of life has been diminished, his damages for patrimonial loss shall be calculated as if he were to survive until the date of his pre-accident expected date of death. The method of estimating the amount of his patrimonial loss attributable to the period between his post-accident expected date of death and his pre-accident expected date of death (the "lost period") is prescribed in Schedule 2. Under subsection (4) of clause 2 the injured person's right to compensation for patrimonial loss in respect of this period does not transmit to his executors.

### *Clause 5*

Clause 5 implements Recommendation 11 (paragraphs 46-52) by providing that the right of an executor to sue for damages is not affected by the existence of an action on the part of a relative, and *vice versa*.

*Damages (Scotland) Bill*

Provisions for avoidance of multiplicity of actions.

6.—(1) This section applies to any action in the Court of Session or a sheriff court in which, following the death of any person from personal injuries, damages are claimed—

(a) by the executor of the deceased, in respect of the relevant injuries;

(b) in respect of the death of the deceased, by any relative of his; and in this section, in relation to any such action,—

(i) “the relevant injuries” means the injuries from which the deceased died, and

(ii) references to a connected person are references to any person, not being a party to the action, who (apart from this section) would have a title, whether as the executor of the deceased or as a relative of his, to sue the same defender in another such action based on the relevant injuries.

(2) Where an action to which this section applies has been raised any connected person shall be entitled on application made in accordance with rules of court to be sisted as a pursuer in that action, and except as provided in subsection (5) below every connected person shall be barred from suing the same defender in another such action (whether in the same or any other court) based on the relevant injuries.

(3) Rules of court shall secure that an application for the purposes of subsection (2) above shall not be entertained unless notice of it has been given to all other parties to the action before the date on which the taking of evidence (whether before a judge and jury or before a judge sitting alone) is to begin.

(4) Nothing in subsection (2) above shall prevent a court from exercising any power it may have apart from this section to sist any person as a party to an action to which this section applies.

(5) Where an action to which this section applies has been raised nothing in subsection (2) above shall prevent a connected person from suing the same defender in another such action if in that other action he satisfies the court that by reason of lack of knowledge that the first-mentioned action had been raised or for any other just reason he was unable to make an application under the said subsection in that action.

## EXPLANATORY NOTES

### *Clauses 6 and 7*

Clauses 6 and 7 implement Recommendations 12, 13, 14 and 15 (see paragraphs 53-62). There is some authority for the view that, under the present law, claims should be pursued in a single action, but the sanction is primarily that expenses will not be awarded to a successful pursuer in a second or subsequent action (see paragraph 53). As the executors and the relatives can now claim concurrently in respect of their separate interests, clauses 6 and 7 introduce a procedure which will ensure that, as far as possible, the defender is not required to litigate more than once. Clause 6 accordingly lays down rules which will generally compel the executors and the relatives to concur in the same action; clause 7 makes provision for the conjoining of actions when two or more actions have been competently raised.

### *Clause 6*

#### *Subsection (1)*

1. Under the existing law actions in respect of personal injuries and in respect of death arising from personal injuries are already competent both in the Court of Session and in the sheriff court.

#### *Subsection (2)*

2. Subsection (2) permits any interested party to apply to the court to be sisted as a pursuer in an action which has already been raised, whether or not a notice has been served on him in accordance with subsection (6). It further imposes the sanction that failure to comply with the subsection is to bar subsequently that party's rights of action (see paragraph 59).

#### *Subsection (3)*

3. Subsection (3) requires such a party to give notice of his application under subsection (2) to all other parties to the action before the commencement of the proof or jury trial (see paragraph 59).

#### *Subsection (4)*

4. Subsection (4) retains any other powers which the court already has to sist any person as a pursuer. Thus, for example, the court would have a discretion to sist such a person as a pursuer after the commencement of the proof or jury trial (see paragraph 59).

#### *Subsection (5)*

5. Subsection (5) provides an exception to the procedure in order to protect the interests of a potential claimant who has a reasonable excuse for not sisting himself as a pursuer within the specified time (see paragraph 60).

*Damages (Scotland) Bill*

(6) Where an action to which this section applies has been raised it shall be the duty of the pursuer to serve, in such manner as may be prescribed, notice of the action in prescribed form on every connected person of whose existence and connection with the action the pursuer is aware or could with reasonable diligence have become aware; and if in any action it appears to the court that the pursuer has failed to implement the duty imposed on him by this subsection the court may, if it thinks fit, dismiss the action.

(7) Rules of court shall secure that any notice under the last foregoing subsection contains a statement of the effect of subsection (2) above.

## EXPLANATORY NOTES

### *Subsection (6)*

6. Subsection (6) imposes a duty on the first pursuer to ascertain the identity of the other persons who have an interest, and to serve a notice upon them in a form and manner to be prescribed by rules of court. The subsection also confers a discretion on the court to dismiss the action if the terms of the subsection are not complied with (see paragraph 58).

*Damages (Scotland) Bill*

Saving for enactments relating to contributory negligence and interest on damages.

9. Nothing in the foregoing provisions of this Act affects the operation of the Law Reform (Contributory Negligence) Act 1945 or the Interest on Damages (Scotland) Acts 1958 and 1971.

Amendment of references in other Acts.

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

Abolition of right to assythment.

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



## EXPLANATORY NOTES

### *Clause 9*

Clause 9, which in part implements Recommendation 8, is a general saving clause with regard to the Law Reform (Contributory Negligence) Act 1945 (see paragraphs 36-38), and the Interest on Damages (Scotland) Acts 1958 and 1971.

### *Clause 10*

Clause 10 ensures that all statutory references to solatium to dependants are replaced by references to a loss of society award, and that all statutory references to dependants include relatives within the meaning of this Bill.

### *Clause 11*

Clause 11, which implements Recommendation 27, provides that the right to assythment, which is virtually obsolete and which has been rendered unnecessary by the extension of the class of relatives entitled to sue to collaterals, is abolished (see Schedule 1 and paragraphs 114-115). The right is specifically abolished, as it is understood that a common law right cannot be lost by desuetude (see paragraph 114).

SCHEDULES

SCHEDULE 1

Section 1.

DEFINITION OF "RELATIVE"

1. In this Act "relative" in relation to a deceased person includes—
  - (a) any person who immediately before the deceased's death was the spouse of the deceased;
  - (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. In deducing any relationship for the purposes of the foregoing paragraph—

- (a) an adopted person shall be treated as the child of the person or persons by whom he was adopted and not as the child of any other person; and, subject thereto,
- (b) any relationship by affinity shall be treated as a relationship by consanguinity; any relationship of the half blood shall be treated as a relationship of the whole blood; and the step-child of any person shall be treated as his child; and
- (c) an illegitimate person shall be treated as the legitimate child of his mother and reputed father.

3. In this Schedule "adopted" means adopted in pursuance of an adoption order made under the Adoption Act 1958 or any previous enactment relating to the adoption of children or any corresponding enactment having effect in Northern Ireland, or in pursuance of an overseas adoption as defined by section 4(3) of the Adoption Act 1968.

## EXPLANATORY NOTES

### SCHEDULE 1

1. This Schedule sets out the categories of relatives entitled to sue for patrimonial loss and loss of society. Together with clauses 1 and 12 it implements Recommendations 18, 19 and 20.

2. The classes of relatives entitled to sue for patrimonial loss both under the present law and in terms of the Schedule are set out in Appendix I.

3. The existing class is extended to include:

Collaterals, *i.e.* brothers, sisters, uncles, aunts and their issue;

Stepchildren;

Persons unrelated to either spouse who have been accepted by the deceased as children of his family;

Divorced persons.

*Paragraph 1(c)* selects a subjective formula to define those children who are unrelated to the deceased or to his spouse but who are to be conceded a right to claim damages for patrimonial loss and loss of support (see paragraph 80).

4. The class is further widened by treating any relationship by affinity as a relationship by consanguinity, and any relationship of the half blood as a relationship of the whole blood. Finally, the composition of the class is affected by the removal of the requirement of a legal duty of support (see paragraphs 68-72).

5. The more limited class of relatives entitled to sue for the new award of loss of society is set out in Appendix II. Under the existing law, those relatives entitled to sue for patrimonial loss are also entitled to claim damages for solatium, subject to proof of grief and suffering (see paragraphs 102-112).

SCHEDULE 2

ESTIMATION OF PATRIMONIAL LOSS ATTRIBUTABLE TO LOST PERIOD

1. In estimating for the purposes of any action to which section 4 of this Act applies the amount of the pursuer's likely patrimonial loss attributable to the lost period (in this Schedule referred to as "the relevant loss") the court shall first estimate the amount which the pursuer would have earned during that period by his own labour or other gainful activity.

2. To the amount estimated under paragraph 1 above the court may, if it thinks fit, add an amount equal to the whole or any part of the amount (if any) which in its opinion the pursuer would have received during the lost period by way of benefits in money or money's worth, being benefits derived from sources other than the pursuer's own estate and not being benefits consisting of earnings falling under the said paragraph 1.

3. The court shall then estimate the amount (in this Schedule referred to as "the expenses") which in its opinion the pursuer would have incurred during the lost period for his living expenses, being expenses which in the court's opinion would be reasonable having regard to the financial and other circumstances which probably would have obtained, in relation to the pursuer, during that period.

4. From the amount estimated under paragraph 1 above, or, as the case may be, that amount together with the amount added thereto under paragraph 2 above, there shall be deducted an amount equal to the expenses; and the result (any negative quantity being disregarded) shall be taken to be the amount of the relevant loss.

5. In this Schedule the expression "lost period" has the same meaning as in section 4 of this Act.

## EXPLANATORY NOTES

### SCHEDULE 2

Schedule 2 relates to clause 4 and provides for the assessment of patrimonial loss attributable to the "lost period". It extends the injured person's claim for patrimonial loss to include the loss of earnings and other benefits which would have come to him if he had been alive during that period. By stipulating, however, for a deduction in respect of the estimated amount which the injured person would have spent on himself if he had been alive during the lost period, it restricts the injured person's claim to, or approximately to, the amount which would have been available for the support of his relatives during that period. The court is required in all cases to take account of the injured person's probable earnings during the lost period: it has merely a discretion to take into account other benefits, which in this context comprise only benefits from resources other than the pursuer's own earnings and estate. This discretion is designed to enable the court to ensure that the injured person and his relatives as a family unit should not receive compensation in respect of losses which they will not actually sustain.

*Damages (Scotland) Bill*

Section 13.

SCHEDULE 3

REPEALS

Chapter	Short Title	Extent of Repeal
3 & 4 Geo. 6. c. 42.	Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.	Section 2.
11 & 12 Geo.6. c. 41.	Law Reform (Personal Injuries) Act 1948.	Section 2(5A).
1 & 2 Eliz. 2. c. 7.	Law Reform (Personal Injuries) (Amendment) Act 1953.	The whole Act.
10 & 11 Eliz. 2. c. 42.	Law Reform (Damages and Solatium) (Scotland) Act 1962.	The whole Act.
1972 c. 33.	Carriage by Railway Act 1972.	Section 3(2).

## EXPLANATORY NOTES

### SCHEDULE 3

1. Schedule 3 repeals certain statutory enactments which are either replaced or superseded by the Bill.

2. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, s.2 which conferred rights to recover damages on adopted children, their adoptive parents, and illegitimate children is superseded by clauses 1 and 12 and Schedule 1.

3. The Law Reform (Personal Injuries) Act 1948, s.2(5A), and the Law Reform (Personal Injuries) (Amendment) Act 1953, provided that certain benefits should not be deducted from an award of damages to dependants; these provisions are replaced by the wider definition of "benefit" in clause 1(5).

4. The Law Reform (Damages and Solatium) (Scotland) Act 1962 conferred rights to recover damages on a mother in respect of the death of a child during the father's lifetime, and on a child in respect of the death of his mother during the father's lifetime. These provisions are superseded by the stipulation in clause 1(6) that a legal duty of support is no longer to be an essential requirement. The Act also conferred rights to recover damages on the parents of illegitimate children, and this provision is superseded by clauses 1 and 12 and Schedule 1.

5. The Carriage by Railway Act 1972, s.3(2), provided that for certain purposes connected with the Act those benefits specified in s.2(1) of the Fatal Accidents Act 1959 should not be deducted in an action in Scotland (see paragraph 100, footnote 24). The provisions of clause 1(5) (b) of the Bill render section 3(2) unnecessary.

