Scottish Law Commission

DISCUSSION PAPER No. 89

THE EFFECT OF DEATH ON DAMAGES

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The Commission would be grateful if comments on this Discussion Paper were submitted by 28 February 1991. All correspondence should be addressed to:-

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NOTES

1. In writing a later Report on this subject with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper can be used in this way.

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LIST OF ABBREVIATIONS
(Excluding standard law reports)

Calcutt Report (1990)	Report of the Committee on Privacy and Related Matters. London, HMSO, 1990 (Cm 1102)
Ersk. Inst.	John Erskine of Carnock, An Institute of the Law of Scotland (ed Nicolson). Edinburgh, Bell & Bradfute, 1871.
Faulks Report (1975)	Report of the Committee on Defamation. London, HMSO, 1975 (Cmnd 5909).
Felstiner & Dingwall	W L F Felstiner and R Dingwall, Asbestos Litigation in the United Kingdom: An Interim Report. Oxford, Centre for Socio-Legal Studies, Wolfson College, Oxford, 1988.
Fleming	J G Fleming, The Law of Torts (7th ed) Sydney, The Law Book Company Ltd, 1987.

ILRR (UA), Report (1977)	Institute of Law Research and Reform, University of Alberta, Report No 24, Survival of Actions and Fatal Accidents Act Amendment. Edmonton, Alberta, Institute of Law Research and Reform, University of Alberta, 1977.
Kemp & Kemp	D A M Kemp, The Quantum of Damages in Personal Injury and Fatal Accident Claims (Volume 1). London, Sweet & Maxwell Ltd, 1975, 1990.
LC Report No 56	The Law Commission, Report on Personal Injury Litigation-Assessment of Damages, Law Com No 56. London, HMSO, 1973.
LC Working Paper No 41	The Law Commission, Published Working Paper No: 41, Personal Injury Litigation: Assessment of Damages. London, The Law Commission, 1971.
LCD, Consultation Paper (1990)	Lord Chancellor's Department, Damages For Bereavement: A Review of the Level. London, Lord Chancellor's Department, 1990.

LRCS, Report (1985)	Law Reform Commission of Saskatchewan, Proposals for a Survival of Actions Act. Saskatoon, Saskatchewan, Law Reform Commission of Saskatchewan, 1985.
McEwan & Paton	A Paton, McEwan & Paton on Damages in Scotland. Edinburgh, W Green & Son Ltd, 1989.
McGregor	H McGregor, The Law of Damages (McGregor on Damages) (15th ed). London, Sweet & Maxwell Ltd, 1988.
Pearson Report (1978)	Report of the Royal Commission on Civil Liability and Compensation for Personal Injury. London, HMSO, 1978 (Cmnd 7054).
SLC Memorandum No 5	Scottish Law Commission, Memorandum No: 5, Damages For Injuries Causing Death. Edinburgh, Scottish Law Commission, 1967.
SLC Memorandum No 17	Scottish Law Commission, Memorandum No: 17, Damages For Injuries Causing Death. Edinburgh, Scottish Law Commission, 1972.

SLC Report No 31	Scottish Law Commission, Report on the Law relating to Damages for Injuries Causing Death, Scot Law Com No 31. Edinburgh, HMSO, 1973.
Walker	D M Walker, The Law of Delict in Scotland (2nd ed, revd). Edinburgh, W Green & Son Ltd, 1981.
Winfield & Jolowicz	W V H Rogers, Winfield & Jolowicz on Tort (13th ed). London, Sweet & Maxwell Ltd, 1989.

PART I

INTRODUCTION

Our remit

1.1 On 14 September 1989 we received a reference on behalf of the Secretary of State for Scotland, under section 3(1)(e) of the Law Commissions Act 1965:

> "To consider the case for amending the law of damages in Scotland having regard to the possibility that there may be an incentive inherent in the present law for a defender to postpone making settlement or reaching proof until after the death of the pursuer in order to minimise the amount of any compensation to be paid."

The problem

1.2 Underlying the reference is a growing concern about the effects of the Damages (Scotland) Act 1976 on claims arising from terminal industrial disease, in particular asbestos-related disease. The terms of reference, however, are drawn more widely. We are invited to consider, quite generally, how claims for damages are affected when a claimant or potential claimant dies before he can pursue his claim to its conclusion. We are primarily concerned with delayed death which is attributable to the fault giving rise to the claim. But similar considerations apply where death intervenes naturally and is wholly unconnected with the circumstances of the claim.

1.3 We explain the consequences of delayed (or intervening) death in detail in Part II. Briefly, for the moment, it can have the effect of reducing the total damages recoverable from the defender. Public concern has been focused on this recently by a number of distressing examples of asbestos-related deaths reported in the media.[1] It has seemed unjustifiable to those investigating such cases that the family of a victim who dies may receive less than would have been payable if he had survived.

Survey of legal firms

1.4 As a first step we decided to gather some basic facts from selected legal firms with substantial experience of handling claims for personal injuries. We prepared a short questionnaire with the assistance of the Central Research Unit.[2] After piloting it in one of the target firms, we posted it to some 45 firms in Aberdeen, Edinburgh and Glasgow, chosen with the advice of the Law Society of Scotland. We also carried out interviews with 5 solicitors who have extensive reparation practices. Unfortunately, only 15 firms (33%) responded to the postal questionnaire. Nevertheless, those who did respond, and those who willingly gave time to be interviewed, provided us with a large amount of information which greatly assisted our deliberations. We draw on this as appropriate in what follows.

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[1]Recent media coverage includes Scotland on Sunday, July 30 1989, "Rough justice for victims of asbestosis"; The Scotsman, Thursday 1 March 1990, "Insurers accused of delaying asbestos payments"; BBC Scotland, Focal Point, 1 March 1990, "Slow Death: Dead Slow Justice" (TV documentary).

[2]The Unit is part of the Scottish Office.

1.5 The numbers of personal injury claims currently being processed by the firms responding to our questionnaire varied from less than 100 to more than 500. Generally, the firms were fairly evenly distributed across the range. One or two were handling between 1,000 and 2,000 claims. Most of the firms seem to act either mainly for claimants (10) or mainly for defenders (4).

Statistics of claims

1.6 It is difficult to estimate accurately how many personal injury claims might be under way at any given time. In the five years from 1984 to 1988 9,427 personal injury actions were raised in the Court of Session and the sheriff courts (ordinary causes).[1] At the end of 1988 3,376 such actions were pending. On the basis of the replies to our questionnaire it seems that about 80% of all claims may be settled without court action.[2] Assuming this figure is approximately accurate, we may have 15,000 to 20,000 claims currently being processed, with 9,000 to 10,000 new claims entering the system every year.

1.7 These projections can only be approximate, since they rest on estimates. Also, they do not take account of summary cause actions in the sheriff courts, or actions under the small claims procedure which, it seems, is increasingly used for personal injury claims. And of course some claims may be settled without the involvement of solicitors. The numbers are therefore likely to be even larger than we suppose. Whatever the

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[1]Figures taken from Civil Judicial Statistics returns.

[2]Estimates ranged from 50% to 90%.

defects of our statistics, we are clearly concerned with very large numbers of claims. Hence there is always a risk that too heavy demands may be made of the courts. When that happens delay in settling claims cannot be avoided. Nor can the possibility be excluded that the delay might be exploited.

Claims in respect of death

1.8 In the first instance, we are concerned with claims in respect of death, more particularly where the victims die after raising an action but before proceedings are completed.[1] The firms returning our questionnaire report 1,202 claims in respect of death during the five-year period 1985-89. Some 70 deaths (6%) occurred after an action was raised but before proof. Work-related accidents (other than those attributable to industrial disease) caused 53.5% of the 1,202 recorded deaths, road traffic accidents 29.0% and industrial disease 13.9%. The corresponding figures for deaths during legal proceedings are 2.9%, 11.4% and 74.3%. The table in the appendix contains more details.

1.9 The questionnaires also record 43 current cases where there is a serious risk that the claimant might die before his claim can be resolved. Of these 30 (70%) involve industrial disease. Already 19 (44%) of the 43 claims were in court. This is comparable with what happens where claims are made in respect of death. The rate of settlement without court action seems to be lower for death claims (29% as against an estimated rate of 80% over all claims). The corresponding rates of

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[1]But see para 1.2. There we point out that we must take account of the probably even rarer event of death which intervenes naturally and is unconnected with the circumstances of the claim.

settlement after an action is raised but before proof are closer. On the basis of our figures 82% of recorded actions in respect of death settled before proof compared with an estimated 90% over all actions.[1] Claims in respect of death do not seem to take significantly longer to resolve than other claims. This applies both to claims settled without court action and claims settled after an action is raised but before proof.

1.10 Again we must urge caution when using these statistics. Not only is our sample small but our questionnaire is not detailed enough to eliminate the possibility of double counting. As we have already mentioned, firms seem to act mainly for claimants or mainly for defenders.[2] We cannot tell how far 'claimants' firms' and 'defenders' firms', or out-of-Edinburgh firms and Edinburgh firms, are reporting the same cases. A more detailed survey would have taken too long and imposed an unrealistic burden on busy practitioners. We therefore rejected that course. Nevertheless, the results of our limited survey have helped us to appreciate the nature of the problem, which is clearly significant quantitatively as well as qualitatively. Even halving the recorded total, we are probably concerned with more than 100 deaths per year.[3] It is difficult to know what proportion of these might be deaths which are delayed or protracted, as opposed to

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[1]The overall rate of 90% is the rate for the Court of Session. We have used this on the assumption that the recorded actions in respect of death would have been raised there. In fact, the corresponding overall rate for the sheriff court is lower (75%).

[2]Para 1.5.

[3]See para 1.8. The figures may have been distorted by recent mass disasters.

instantaneous: our overall figure for 1985-89 was 6%.[1] Certainly, most deaths are likely to follow closely on the injuries causing them, for example death in a road accident. We hope, however, that this discussion paper will elicit more precise quantitative information from insurers, as well as trade unions and employers' associations.

An incentive to delay?

1.11 One of our main concerns when we circulated our questionnaire was to find out how far solicitors agreed with the premise of our remit. We have made the point briefly that delayed (or intervening) death can reduce the total damages payable in respect of a claim.[2] Our remit presupposes that this creates an incentive to postpone settlement where a claimant is likely to die. It is a serious matter to suggest that litigation might be deliberately manipulated to exploit the possibility of a claimant dying before his claim can be resolved. We therefore determined to make no such assumption without canvassing the views of experienced practitioners.

1.12 In our questionnaire we specifically asked:

> "Do you agree -
> 'that there may be an incentive in the present law for a defender to postpone making settlement or reaching proof until after the death of the pursuer in order to minimise the amount of any compensation to be paid?'
> If so, why do you think this?"[3]

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[1]Para 1.8.

[2]Para 1.3. We explain how in Part II.

[3]See para 1.1.

All but one of those who returned the questionnaire, or were interviewed, agreed that there might indeed be such an incentive. But no firm claimed to have any evidence of tactical delay being used as a deliberate policy, although several criticised the practices of defenders in a general way. An equal number of firms, however, stated expressly that deliberate delay was quite unheard of in their experience. Problems of proof were said to be the principal cause of delay. The difficulty of negotiating settlements with multiple defenders was also mentioned. On the basis of our survey, therefore, we can only say that there may be at least an inducement to delay inherent in the present law. We cannot say that there is hard evidence that the state of the law has been or is being exploited. Nevertheless, we think that it is sufficient to justify reform that there is even this possible inducement, which we now proceed to explain in more detail in Part II. In Part III we discuss the principles underlying the present rules and in Part IV our provisional proposals for reform. A summary of these proposals is contained in Part V.

PART II

THE PRESENT LAW AND ITS CONSEQUENCES WHEN A CLAIMANT DIES BEFORE HIS CLAIM IS RESOLVED

Compensation for personal injury

2.1 Anyone who has suffered loss or injury as a result of another's wrongful conduct has by law a right to claim compensation (damages) from the wrongdoer. In this discussion paper we are concerned with personal injury, which incudes disease and impairment of physical or mental condition.[1] For the present, we need not distinguish the different kinds of conduct which the law regards as wrongful.

The injured person's claim while alive

2.2 Broadly, there are two main heads of damages. First, the injured person is entitled to compensation for patrimonial loss. In essence this is pecuniary loss and comprises such items as loss of past or future earnings, loss of employability,[2] outlays and expenses, eg medical expenses.[3] In addition, statute provides for "reasonable remuneration" by way of damages for "necessary services" rendered to an injured person by a relative;[4] and for damages in respect of an injured

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[1]For a discussion of the meaning of the term "personal injuries", see paras 4.39-4.40.

[2]Loss of employability is sometimes treated under solatium (see para 2.3): *Rieley v Kingslaw Riding School* 1975 SC 28; *McNee v G R Stein and Co Ltd* 1981 SLT (Notes) 31.

[3]Outlays and expenses are sometimes treated as a distinct head of damages. See, for example, Walker, pp 470-1.

[4]Administration of Justice Act 1982, ss 8,13(1).

person's inability to render to a relative personal services which meet certain criteria.[1]

2.3 The second main head of damages is called solatium. This is compensation for pain and suffering, generally described as non-pecuniary loss in contrast with patrimonial loss, which is more naturally measured by money. Damages by way of solatium may be awarded for physical pain, loss of limbs or physical functions, disfigurement, disease, impairment of bodily powers or senses, wounded feelings and various sorts of mental damage.[2]

The effect of death on the injured person's claim

2.4 If the injured person dies before his claim is resolved, his right to claim damages is transmitted to his executor, but only in part. No claim can be made by the executor for patrimonial loss which is attributable to any period after the injured person's death. Further, the right to claim damages by way of solatium is completely extinguished. These provisions are contained in section 2 of the Damages (Scotland) Act 1976:

> "(1) Subject to subsection (3) below there shall be transmitted to the executor of a deceased person the like rights to damages in respect of personal injuries sustained by the deceased as were vested in him 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 action for that purpose had been brought by the

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[1]Administration of Justice Act 1982, ss 9(1),(3),13(1).

[2]See McEwan & Paton, Case Notes, for recent awards of solatium for the infinite variety of conditions which attract such compensation; also Walker, p 465.

deceased before his death and had not been concluded before then, to be sisted as pursuer in that action.

(3) There shall not be transmitted to the executor of a deceased person any right to damages in respect of personal injuries sustained by the deceased and vested in the deceased as aforesaid, being a right to damages -

(a) by way of solatium;

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

and accordingly the executor shall not be entitled to bring an action, or to be sisted as pursuer in any action brought by the deceased before his death, for the purpose of enforcing any such right."

For the purpose of section 2 it is irrelevant whether the injured person's death was caused by his injury or was due to intervening natural causes unconnected with the injury.

The claims of the injured person's relatives

2.5 Where the injured person dies as a result of his injury, whether immediately or after some time, certain relatives may claim compensation for the loss they suffer through his death.[1] Again there are two heads of damages.

2.6 The first is damages for certain forms of patrimonial loss. Such damages comprise -

(a) compensation for loss of support suffered since date of death, or likely to be suffered, as a consequence of the death;

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[1]For the list of qualifying relatives see Damages (Scotland) Act 1976, Sched 1, as amended by the Administration of Justice Act 1982, s 14(4).

(b) payment in respect of the reasonable expense incurred in connection with the deceased's funeral;

(c) payment of a reasonable sum in respect of the loss of personal services obtainable on payment but which the deceased might otherwise have rendered gratuitously.[1]

2.7 The second head of damages covers non-patrimonial loss arising from deprivation of the deceased's society. Such an award is called a "loss of society award" and may be claimed by relatives who are members of the deceased's "immediate family":

> "1(4) If the relative is a member of the deceased's immediate family (within the meaning of section 10(2) of this Act) there shall be awarded ... such sum of damages, if any, as the court thinks just by way of compensation for the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if he had not died; and a sum of damages such as is mentioned in this subsection shall be known as a 'loss of society award'."[2]

Under this head compensation has been given for grief caused by the death and for distress in contemplating the suffering of the deceased before death.[3] These

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[1]Damages (Scotland) Act 1976, s 1(3), Sched 1, Administration of Justice Act 1982, s 9(2),(3),13(1).

[2]Damages (Scotland) Act 1976, s 1(4); see also s 10(2) and Sched 1 and Administration of Justice Act 1982, s 14(4). The qualifying members of the deceased's "immediate family" are spouse, cohabitee, parent, child (including a child accepted by the deceased as a member of the family).

[3]*Dingwall v Walter Alexander & Sons (Midland) Ltd* 1982 SC (HL) 179; *Donald v Strathclyde Passenger Executive* 1986 SLT 625.

elements are comparable with the solatium which dependants could claim for grief and sorrow under the pre-1976 law.[1] But we doubt whether such compensation, in particular compensation for pre-death distress, can be justified on a strict reading of the 1976 Act. The loss of society award is compensation for lost non-patrimonial benefits which might have accrued to the claimant if the deceased had not died. In other words, the award looks to the future not the past. We will return to this issue.[2]

2.8 The relative's patrimonial and non-patrimonial claims are separate claims and are evaluated independently of each other.[3] It is expressly provided that the non-patrimonial claim is not transmitted to an executor, if the claimant dies.[4] By implication, the patrimonial claim is transmitted, so far as it relates to the period of survival after the death of the injured person.[5] Both these claims under section 1 of the Damages (Scotland) Act 1976 are quite distinct from any claim the executor of the injured person may have under section 2, as previously described.[6] This is expressly

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[1]See para 2.20.

[2]Paras 3.3-3.13.

[3]Damages (Scotland) Act 1976, s 1(4).

[4]Damages (Scotland) Act 1976, s 3(b).

[5]Walker, pp 407-8.

[6]Para 2.4. To say that the relative's claim is distinct from the executor's does not mean it is wholly independent of the deceased's claim: see para 2.21.

provided by section 4:

> "4. A claim by the executor of a deceased person for damages under section 2 of this Act is not excluded by the making of a claim by a relative of the deceased for damages under section 1 of this Act; 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."

The problem posed in our remit

2.9 Our remit requires us to consider how claims for damages are affected when a (potential) claimant dies before he can pursue his claim to its conclusion.[1] Our preliminary statement of the problem was that delayed (or intervening) death can have the effect of reducing the total damages recoverable from the defender.[2] Now that we have described the general legal provision for damages, we can locate the difficulty more precisely. It is principally that the injured person's claim for solatium is extinguished by his death and cannot be taken up by his executor.[3] His immediate family, who would normally inherit his estate, are therefore deprived of any benefit they might otherwise have had from the non-patrimonial claim. This can seem very arbitrary, especially if the injured claimant dies just before legal proceedings are concluded, as has happened. It is also a situation which can be exploited by defenders, although we have no firm evidence that this

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[1]Paras 1.1-1.2.

[2]Para 1.3.

[3]Paras 2.3, 2.4.

is happening.[1] Plainly, however, it constitutes an inducement to delay settling some claims.

2.10 Of course, the deceased's claim for patrimonial loss to date of death is not lost.[2] And, where the death is attributable to the injury, new claims emerge which the deceased's relatives can pursue in their own right.[3] It might seem, therefore, that the deceased's immediate family is well provided for, at least in the more common case of wrongful death. Compensation for patrimonial loss before the deceased's death can be recovered by his executor for the benefit of those who inherit his estate; patrimonial loss thereafter can be compensated by an award for loss of support; and the claim for solatium will be replaced by a claim for loss of society.

2.11 Even so, the injured person's family is still likely to be worse off as a result of his untimely death. This is partly because of differences in the methods of calculating the elements of patrimonial loss.[4] Net prospective earnings which are lost count in full when calculating the living claimant's entitlement. Only the proportion which, on evidence of past practice, would have been used to support the family enters the calculation of loss of support.[5] But the main reason

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[1]See para 1.12.

[2]Paras 2.2, 2.4.

[3]Paras 2.5-2.8.

[4]See McEwan & Paton, Chapter 5, Chapter 13, paras 13.05-13.08.

[5]Percentages varying from 45% to 85% are recorded in McEwan & Paton, p 90.

for the discrepancy is that damages for loss of society tend to be rather less generous than awards of solatium for serious injury. It is therefore worth looking briefly at the relative levels of these awards, which may well have heightened the sense of lost entitlement (ie to solatium) when death intervenes. By 'relative' we do not intend a comparison with levels of damages elsewhere. That is a more general issue which our remit does not address. We will, however, be looking at other jurisdictions, notably England and Wales, where the right to claim compensation for pain and suffering is transmitted to the deceased claimant's executor.[1] Undoubtedly, the comparison with England and Wales is a major factor in the current dissatisfaction with the Scottish provision for solatium.

Payments for loss of society and solatium

2.12 Reported cases (13) in the Court of Session between 1979 and 1988 record loss of society awards to a spouse, generally a widow, which range from £4,600 to £12,300.[2] The average is about £8,400. Awards to children range from £400 to £8,400, with the average about £3,400. In one case decided in 1989 a widow whose husband had died of asbestos-related disease (mesothelioma) received £9,500 and an adult child

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[1]Paras 3.33-3.37.

[2]See McEwan & Paton, pp 86-90; also *Davidson v Upperclyde Shipbuilders Ltd* 1990 SLT 329, 331. Figures are adjusted to 1988 values (in round figures), on the basis of the Retail Prices Index (monthly figures to September 1988). Awards to widowers and parents appear to be lower.

£1,500.[1] More recently, in a similar case, a widow was awarded £10,000.[2] Calculating total family settlements on the basis of these figures shows that such settlements typically lie in the range £6,000 to £20,000 (11 cases). Five cases settled under £10,000 and three between £20,000 and £30,000. The actual amounts largely reflect the age of the surviving spouse and the number and ages of the children, though other factors are also significant. The largest family settlement recorded, for a widow and 5 children, was about £35,000.[3] Total family settlements reported to us by firms responding to our questionnaire seem to be in line with these figures, as we would expect. Of 1,099 recorded settlements 91 (8%) were under £5,000, 854 (78%) between £5,000 and £20,000 and 154 (14%) over £20,000.[4] Only 4 reached or exceeded £30,000. From our interviews with solicitors, it seems that the current negotiating base is probably about £10,000 for a widow and £5,000 for a (young) child. The point was frequently made to us that these levels were too low. It was also said that awards to parents for the death of a child were quite inadequate.

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[1]*Davidson v Upperclyde Shipbuilders Ltd* 1990 SLT 329. Quantum was disputed as regards the widow's claim. The child's claim was settled by agreement.

[2]*Howie v Upperclyde Shipbuilders Ltd* 1990 SCLR 381, 384. Lord Cameron of Lochbroom referred expressly to the evidence of "an exceptionally long and happy marriage", which he regarded as a special feature of the case.

[3]*Dingwall v Walter Alexander & Sons (Midland) Ltd* 1982 SC (HL) 179 (figures adjusted to 1988 values).

[4]Figures (unadjusted) are for 1985-89.

2.13 The range of injuries which attract solatium is obviously very wide.[1] In fact, the firms responding to our questionnaire typically estimated that most claims for solatium were settled for less than £5,000 (70%). Again on the basis of estimates, only a relatively small proportion of payments seems to exceed £20,000 (10%). But, at the higher levels, payments in excess of £25,000 or £30,000 seem to be more common. The highest levels, £40,000 and above, are for the most part well beyond the levels reached by loss of society awards, even when totalled over a whole family.[2]

2.14 It is perhaps reasonable to assume that injuries which are serious enough eventually to cause death would attract payments of solatium at the higher levels, if the victim survived. This proposition can be illustrated by considering asbestos-related disease, which first drew attention to the problem we are now considering.[3] Several asbestos-related conditions affecting the lungs are recognised. Mesothelioma is invariably fatal, and the problem of delay is acute as far as this condition is concerned. We are told that the average period of survival after diagnosis is about a year and that 80% of those afflicted die within 2 years and virtually all within 3 years. Asbestosis can also result in death, but it varies in its degree of severity. Pleural plaques are less serious, except that they may indicate a risk that the graver conditions will

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[1]See para 2.3.

[2]Our questionnaire asked firms to report the highest recorded payments of solatium in their experience: 8 out of 14 recorded payments (57%) exceeded £40,000 (unadjusted figures).

[3]See paras 1.2, 1.3.

develop. The question whether asbestos dust may cause lung cancer and gastro-intestinal cancer is still a matter of debate.[1]

2.15 In recently reported English cases payments of £20,000 and £32,000 were made for pain, suffering and loss of amenities, (broadly equivalent to solatium in Scotland) in respect of asbestosis; and payments of £24,800 and £28,000 in respect of mesothelioma.[2] In a Scottish case reported in 1987, in the sheriff court, solatium of £15,100 was awarded to a pursuer for asbestosis where the resultant disability had been assessed at 10%.[3] More recently, in the Court of Session, it was said when awarding interim damages that "solatium [for asbestosis] on a conservative basis could lie between £15,000 and £20,000".[4] Solicitors whom we interviewed and firms responding to our questionnaire anticipated payments of solatium around £30,000 for victims of mesothelioma who survived until their claims were settled. There was also general agreement that asbestosis might attract payments between £20,000 and £30,000, depending on its severity. Present levels of solatium for pleural plaques, £1,500-£3,000, were regarded as nominal. The pleural plaques were thought to be important as evidence of exposure to asbestos dust and, as mentioned, as indicating vulnerability to the graver conditions. Accordingly, there seems to be a

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[1]Felstiner & Dingwall, pp 5,8,17.

[2]See McEwan & Paton, p 500. Figures are again adjusted to 1988 values (in round figures).

[3]*Bateman v Newalls Insulation Co Ltd* 1987 SCLR 445 (amount adjusted to 1988 values).

[4]*Hutton v Darlington Insulation Company Limited* 1990 GWD 4-210.

move towards using these less serious conditions as a ground for claiming provisional damages under section 12 of the Administration of Justice Act 1982.

2.16 From the foregoing it is obvious that if a victim of mesothelioma, for example, dies before his claim is resolved, this has serious financial consequences for his family. The solatium, perhaps up to £30,000, is lost. Further, that loss is likely to be only partially offset by any ensuing claims for loss of society. These are unlikely to amount altogether to more than £20,000, unless perhaps the deceased's family includes numerous (young) children, as well as a spouse. In fact, victims of asbestos-related disease tend to be elderly and this may further reduce the payment(s) to be expected for loss of society.[1] In such cases, too, there might be minimal or even no compensation payable for loss of support. One solicitor, who is very experienced in these cases, told us that no client of his had ever received more than £15,000 for loss of society, and that payments of less than £10,000 were not uncommon. In other words, the intervening death of the claimant in the most unfavourable circumstances could lead to a significant saving for the defender as far as non-patrimonial damages are concerned. It is this possibility which constitutes the incentive to delay settling claims and which is now causing public concern.

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[1]In the cases cited in McEwan & Paton, pp 90, 500 the victims were all in their 50s and 60s. This was a point also made to us by the solicitors we interviewed in the course of our survey.

The pre-1976 rules

2.17 In Part III we discuss the principles and policy underlying the present rules and in Part IV set out our proposals for reform. At this point, however, we should note that these rules are largely the result of reforms introduced since the mid-1970s. In fact, we initiated this process in a report in 1973, which led to the Damages (Scotland) Act 1976.[1] We will have more to say in Part III about the policy underlying the changes made by that Act. Meantime, it may be useful to describe briefly how the pre-1976 law dealt with -

(a) the rights of the deceased claimant's executor; and

(b) the relative's claim for non-patrimonial loss.

The rights of the deceased claimant's executor under the pre-1976 law[2]

2.18 In the late 19th century it was established that an executor could not initiate an action merely to recover solatium for personal injury to the deceased whom he represented.[3] This was in contrast with a claim based on patrimonial or pecuniary loss, whereby the deceased's estate was diminished as a result of the injury. The executor was entitled to pursue such a

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[1]SLC Report No 31, which followed on SLC Memorandum No 17.

[2]Para 2.4 describes the present law.

[3]*Bern's Executor v Montrose Asylum* (1893) 20 R 859, approved in *Stewart v London, Midland and Scottish Railway Co* 1943 SC (HL) 19. See also *Smith v Stewart & Co* 1960 SC 329.

claim, if necessary by legal action.[1] Further, where the deceased had raised an action during his lifetime concluding for solatium, his executor was entitled to carry it on and recover solatium, whether with or without damages for patrimonial loss.[2] A similar exception was recognised, for a while, where a claim had been merely intimated to the alleged wrongdoer before the claimant's death.[3] The deceased's executor in these circumstances was entitled to take up the claim and to raise an action, if necessary. But a court of seven judges subsequently declined to recognise that exception.[4]

2.19 These rules, as they stood immediately before the passing of the Damages (Scotland) Act 1976, are summarised in the last of the major cases dealing with the pre-1976 law:

> "The general rule, for which I need not cite authority, is that when a man dies, his right to bring an action in respect of solatium [compensation for suffering], as distinct from reparation [compensation for patrimonial loss], dies with him. That right of action so far resembles the Roman *actio injuriarum*, or action upon outrage to the personality, that, the personality ceasing to be, so also the right of action expires. The executor accordingly cannot

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[1]*Auld v Shairp* (1874) 2 R 191, as explained in *Bern's Executor v Montrose Asylum* (1893) 20 R 859, 863-865; *Smith v Stewart & Co* 1961 SC 91.

[2]*Neilson v Rodger* (1853) 16 D 325. The principle is recognised in *Darling v Gray & Sons* (1892) 19 R (HL) 31 and *Bern's Executor v Montrose Asylum* (1893) 20 R 859, 863. See also *Smith v Stewart & Co* 1960 SC 329.

[3]*Leigh's Executrix v Caledonian Railway Co* 1913 SC 838. See paras 3.20, 3.21.

[4]*Smith v Stewart & Co* 1960 SC 329.

institute an action for solatium ... This is not so in reparation; the executor is entitled to institute an action in order that there may be restored to the estate administered by him the amount by which the negligence of the defender diminished it: *Smith v. Stewart & Co.* 1961 S.C. 91. In addition, if the deceased has in his life-time instituted an action concluding for solatium, his executor may carry it on after his death - see *Stewart v. London, Midland and Scottish Railway Co.* 1943 S.C. (H.L.) 19 per Viscount Simon L.C. at p 25."[1]

The relative's claim for non-patrimonial loss under the pre-1976 law[2]

2.20 The loss of society award introduced by the Damages (Scotland) Act 1976 replaced an earlier form of non-patrimonial compensation, which was also called solatium. This was commonly described as a pecuniary acknowledgment of grief and suffering.[3] And it was necessary to prove grief and the degree of suffering, which raised difficult questions and could have anomalous consequences.[4] It was no mere token payment, however. It could cover elements of loss of society in the post-1976 sense.[5] Account could also be taken of the laceration of the relative's feelings in contemplating the pain and suffering of the deceased

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[1]*Dick v Burgh of Falkirk* 1976 SC (HL) 1, 26.

[2]Paras 2.5-2.8 describe the present law.

[3]*Elliot v Glasgow Corporation* 1922 SC 146, 148; *Smith v Comrie's Executrix* 1944 SC 499, 500.

[4]*Rankin and Others v Waddell* 1949 SC 555. See also *Brown v Macgregor and Others* 26 Feb 1813 FC, *Elder v Croall* (1849) 11 D 1040, *Moorcroft v Alexander & Sons* 1946 SC 466.

[5]*Kelly v Glasgow Corporation* 1949 SC 496, 501, discussed in *Donald v Strathclyde Passenger Transport Executive* 1986 SLT 625, 628. See paras 2.7, 3.11.

before death supervened.[1] As with the deceased's claim for solatium, the non-patrimonial claim of an entitled relative who died after raising an action passed to his executor.[2] If no action had been commenced before the entitled relative's death, the claim lapsed.[3]

2.21 Finally, the relative's claim, whether for non-patrimonial or patrimonial loss, was held to rest on a distinct juridical foundation.[4] It could therefore be pursued independently of the deceased's claim. There was no duplication of damages, it was said, no overlap between the damages awarded to the deceased's executor and those awarded to the entitled relative.[5] But this is not to say that the relative's claim, any more than the executor's, was wholly independent of the deceased's

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[1] *Black v North British Railway Co* 1908 SC 444, 453. See also *Smith v Comrie's Executrix* 1944 SC 499, 500; *McLeish v Fulton & Sons* 1955 SC 46, 48; *Nicolson v Cursiter* 1959 SC 350, 352.

[2] *Kelly v Glasgow Corporation* 1951 SC (HL) 15. Contrast the loss of society award: see para 2.8.

[3] *Fraser v Livermore Brothers* (1900) 7 SLT 450. In *Nevay v British Transport Commission* 1955 SLT (Notes) 27 mere intimation of the claim by the entitled relative before her death was held sufficient to prevent the claim lapsing. This decision, however, rested on *Leigh's Executrix v Caledonian Railway Co* 1913 SC 838 which was overruled by *Smith v Stewart & Co* 1960 SC 329. See para 2.18.

[4] *Dick v Burgh of Falkirk* 1976 SC (HL) 1, 22-23, 25, overruling *Darling v Gray & Sons* (1892) 19 R (HL) 31 which had been criticised in SLC Report No 31, paras 46-52, pp 15-17.

[5] *Dick v Burgh of Falkirk* 1976 SC (HL) 1, 29.

claim.[1] Waiver or recovery of damages by the deceased excluded claims by his dependants and such claims might also be qualified by the deceased's contributory negligence (or excluded by a voluntary assumption of risk). Further, if the deceased's rights of action were time-barred, so were those of his dependants. These principles remain part of the present law.

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[1]See SLC Report No 31, paras 26-45, pp 10-15; *Dick v Burgh of Falkirk* 1976 SC (HL) 1, 25.

PART III

THE REFORMS IN THE 1970s: PRINCIPLES AND POLICY

Damages (Scotland) Act 1976

3.1 Before proposing further reform, we should consider the principles and policy underlying the Damages (Scotland) Act 1976, particularly since the problem we are now concerned with was recognised by this Commission in 1973. It was not, however, given much weight:

> "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."[1]

3.2 The argument here is rather elliptical and it is not clear exactly what is meant. Probably the view was that the injured person's claim for solatium and his dependants' claims for loss of society, if he died, would generally be of comparable value. The new loss of society award was conceived as being rather different from the traditional concept of solatium for dependants.[2] It was to be made for reasons other than that of assuaging the grief and sorrow of the claimant. Its basis was to be much wider. It was consequently thought that awards would be more varied in their

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[1]SLC Report No 31, para 24, p 9.

[2]SLC Report No 31, paras 105-112, pp 34-36, especially para 105, p 34, para 108, p 35 and para 111, p 36.

amounts than solatium for dependants under the unreformed law. The underlying assumption seems to have been that the wider basis would encourage more generous awards. This has not happened. Awards have settled in practice at the modest levels described in Part II.[1] To that extent the expectations in 1973 have not been fulfilled. In fact, after allowing for inflation, current levels of compensation to dependants for non-patrimonial loss seem very little changed from pre-1976 levels. For example, awards quoted as typical in our memorandum in 1972 range from £1,250 to £1,500 for a widow and from £600 to £750 for a child: that is, after adjustment to 1988 values, from £8,400 to £10,100 and from £4,000 to £5,000 respectively.[2] In Part II we noted that the current negotiating base is probably about £10,000 for a widow and £5,000 for a (young) child.[3] How has the present situation come about? To answer this question we must look more closely at the way in which the courts have interpreted section 1(4) of the 1976 Act.

Loss of society

3.3 When a person is injured and dies his immediate family may be said to sustain non-patrimonial injury in three ways. First, where to their knowledge he has undergone suffering before death, they experience distress and anxiety in contemplating his suffering.

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[1]Para 2.12.

[2]SLC Memorandum No 17, para 94, p 70, citing cases reported between 1966 and 1970. The adjusted figures are calculated on the basis of the Retail Prices Index (monthly figures to September 1988). For simplicity, the base year for applying the multiplier has been taken as 1968.

[3]Para 2.12.

Second, they suffer grief and sorrow at his death. Third, they are deprived of his society and guidance in the future. But compensation for only one of these sources of injury to feelings is provided for in the Damages (Scotland) Act 1976, namely, deprivation of the deceased's society and guidance[1]. Solatium for grief and sorrow was of course awarded before the 1976 Act came into effect.[2] It was also said that in the assessment of solatium it was 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."[3]

In our view this is clearly distinct from both grief and sorrow at the death and deprivation of the deceased's society in the future.

3.4 Notwithstanding the terms of the 1976 Act, all three sources of injury to feelings have been taken into account in awards for loss of society.[4] And such awards are now the only competent awards for the immediate family's non-patrimonial loss. In certain cases the courts appear to have equated loss of society with solatium. But the extent to which there is now any judicial consensus on the matter is not altogether clear. Differing views have been expressed in the two

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[1]Section 1(4).

[2]See para 2.20.

[3]*Black v North British Railway Co* 1908 SC 444, 453. See also *Smith v Comrie's Executrix* 1944 SC 499, 500; *McLeish v Fulton & Sons* 1955 SC 46, 48; *Nicolson v Cursiter* 1959 SC 350, 352.

[4]See para 2.7.

cases in which section 1(4) of the 1976 Act has been considered by the Inner House. We must therefore examine these decisions more closely.

3.5 In *Dingwall v Walter Alexander & Sons (Midland) Ltd*,[1] Lord Jauncey said in the Outer House:

> "By abolishing awards of *solatium* the section clearly removes grief and sorrow as a factor to be considered. On the other hand, by substituting the alternative imponderables of the benefits flowing from society and guidance the section constitutes a new claim which differs in degree rather than in principle from the former claim for *solatium*. ... I conclude ... that the use of the word 'compensation' in the subsection was not intended to effect an approach to loss of society awards different in principle to that which formerly prevailed in relation to *solatium*, albeit there may be some difference in degree and albeit younger children through the deprivation of a parent's society and guidance for a longer period than older children are likely to receive larger awards than their elder brothers and sisters."

Lord Jauncey found the defenders liable to the pursuers and awarded damages for, amongst other things, loss of society.

3.6 The defenders appealed on the question of liability and the pursuers took advantage of the appeal to present argument on the question of damages. The Second Division found for the defenders on the question of liability, but also discussed fully, albeit *obiter*, the

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[1]1982 SC (HL) 179, 192-193. This was the first case in which section 1(4) of the 1976 Act was judicially interpreted: see p 191.

pursuers' submissions on damages.[1] The majority (Lord Justice Clerk Wheatley and Lord Kissen) thought that the loss of society awards should be increased by one-third. Lord Robertson, dissenting on this point, did not consider that the Lord Ordinary's figures for loss of society could be successfully challenged. The argument before the Court proceeded on the basis that both parties were agreed that solatium as such had been abolished and replaced by a loss of society award. The pursuers founded on the use of the word "compensation" in section 1(4) as contrasting with the traditional judicial concept of solatium attracting only an "acknowledgement payment".[2] The defenders submitted that in recent years the concept of solatium had been judicially expanded to comprehend what had now become a loss of society award. Accordingly, awards of damages for solatium made before the passing of the 1976 Act would be a proper guideline for loss of society awards.[3]

3.7 Lord Justice Clerk Wheatley expressed the opinion that with the abolition of solatium and the substitution of a loss of society award it must be presumed that something different was intended. He said:

> "The old basis has been abolished and a new one has been introduced. That new basis seems to me to increase the considerations to be taken into account. Loss of society and guidance covers more aspects of family relationship than grief and

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[1]The pursuers appealed unsuccessfully to the House of Lords, but no question was raised there about the quantum of damages: see 1982 SC (HL) 179, 243.

[2]See para 2.20.

[3]The arguments are summarised in the opinions of all three judges: see 1982 SC (HL) 179, 207-208, 219-220, 230.

> sorrow, although grief and sorrow may be an inevitable consequence of the loss of society and guidance. Moreover, any limitation or restriction in the amount of the award to an acknowledgment or a token payment has been removed, and when compensation is substituted for such an award it means compensation in the normal use of the word. Accordingly, in my opinion, when a judge has to determine compensation for a loss of society award under the new legislation he must look at the relationship which existed between the parties involved, their respective ages, the circumstances in which they lived with respect to each other, and any other relevant factor, and from the weighing-up of these factors determine what in the exercise of his judgment an appropriate award of compensation should be for the loss of society and guidance and what that involves to the individual pursuer, once again keeping in mind the imponderables. On that approach, pre-Act awards can provide no necessary criteria."[1]

3.8 Lord Kissen agreed that the loss of society awards should be increased by one-third. His reasons, however, were expressed rather differently:

> "My view is that Parliament were simply re-stating the meaning of *solatium* by substituting for it other words in English which have a clearer meaning and are in line with what the Courts latterly considered *solatium* to include. On the other hand, in so re-stating it and using the word 'compensation,' I think that Parliament intended the Courts to exercise discretion in this matter on a more generous basis although it is not easy to calculate 'compensation' on such a matter. I would have awarded one-third more to each of the pursuers than the Lord Ordinary did if I had to award damages."[2]

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[1]1982 SC (HL) 179, 209.

[2]1982 SC (HL) 179, 220.

3.9 Lord Robertson, dissenting on this point, said:

> "Although it is clear that Parliament intended to get rid of the old conception of *solatium*, and substitute therefor a more modern concept of loss of society, I am not convinced that the change in substance is material."[1]

Later he said:

> "... my conclusion is that the Act of 1976 has not in fact effected any alteration in the law in regard to this head of claim. I regard section 1(4) and (7) rather as simplifying the statement of the law as it has existed, by abolishing the word '*solatium*' as a legal word not understood by laymen, and by simply translating it into the more common and easily understood language of section 1(4). So I am of opinion that the concept of grief and sorrow clearly contemplated in the old word '*solatium*' is not excluded from an award for the loss of a deceased's 'society and guidance.' So, too, I do not consider that the word 'compensation' in section 1(4) widens the scope of an award for loss of society, which was in any event embraced under the head of *solatium* before the Act. ...
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> "I agree accordingly with the Lord Ordinary that section 1(4) does not affect an approach to loss of society awards different in principle to that which formerly prevailed in relation to *solatium*."[2]

3.10 The second Inner House case in which section 1(4) was discussed is *Donald v Strathclyde Passenger Transport Executive*.[3] This was an appeal by the pursuers from the sheriff court on the question of the damages awarded to them as parents for the loss of society of their son. The pursuers' counsel initially

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[1] 1982 SC (HL) 179, 230.

[2] 1982 SC (HL) 179, 231-232.

[3] 1986 SLT 625.

submitted that wider considerations entered into an award of damages for loss of society; and that such awards should therefore tend to be larger than pre-1976 awards of solatium made in similar circumstances.[1] Subsequently, counsel departed from this submission, although it could have been supported by reference to Lord Justice Clerk Wheatley's opinion in *Dingwall*.[2] Counsel's final position appears to have been that awards for loss of society should not be less than awards of solatium would have been in similar circumstances. Counsel for the respondents argued that the compensation provided for loss of society under the 1976 Act was something less than an award of solatium would have provided. Grief and distress at the time of death could no longer form an element in an award of damages, solatium having been expressly abolished by section 1(7). For these reasons an award in respect of loss of society should in most cases be smaller than an award of solatium would have been.

3.11 The Court said:

> "In our opinion it would be very strange if Parliament, in enacting the Act of 1976, had intended to take away a head of damages in respect of the death of a child which a parent had previously enjoyed. Counsel's reference to *Kelly v. Glasgow Corporation*[3] and the well known and oft quoted passage in the opinion of Lord Russell in that case at p. 501, as to what is comprehended by an award of solatium, and also the opinion of Lord Dunedin in the seven judge case of *Black v. North*

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[1]The arguments are summarised in the opinion of the Court: see 1986 SLT 625, 627-628.

[2]1982 SC (HL) 179, 209: see quotation in para 3.7.

[3]1949 SC 496.

British Railway Co.[1] ... confirm our opinion that solatium has never been a mere token payment, that it always could take into account the loss of society of a parent or child, and the guidance given by the one to the other. In our opinion there is nothing in s. 1(4) of the Act of 1976 which requires the court to make a larger award or a smaller award in respect of loss of society than it would have made in respect of solatium. The award made must be such as to compensate the claimant, in so far as money can, for the loss of the relative in question. Counsel for the respondents retreated from his initial submission after a discussion of the cases of *Kelly* and *Black*, and said that it was good enough for him to submit that an award in respect of loss of society was not bound to be greater than an award of solatium in similar circumstances would have been. He was content to rest his submissions on that basis.

"As counsel appeared to agree between them that awards of solatium could be looked at when trying to assess what a reasonable award for loss of society should be in this case, there is no need for us to consider in detail the provisions of s.1(4) of the Act of 1976. Nor is it necessary to consider the opinion of the Lord Justice-Clerk in the case of *Dingwall*. In his opinion in that case his Lordship seemed to suggest that awards in respect of loss of society should be greater than awards in respect of solatium to the extent of one-third, because what he called 'the new basis' had increased the considerations to be taken into account. It has to be noted however that when his Lordship came to describe these considerations, there were none of them which would have been irrelevant in making an assessment for solatium (see the opinion of the Lord Justice-Clerk at [p 209][2] of the report). It has to be remembered that these observations of the Lord Justice-Clerk were obiter, but they have been frequently referred to. An opportunity may yet be afforded for reconsidering them, but we are of opinion that this is not it."[3]

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[1]1908 SC 444, 452-453.

[2]The relevant passage is quoted in para 3.7.

[3]1986 SLT 625, 628.

3.12 In view of the judicial opinions quoted, the present state of the law as to the content of a loss of society award is difficult to determine. Lord Justice Clerk Wheatley in *Dingwall* was of the opinion that "the new basis" increased the considerations to be taken into account.[1] It seems clear that the First Division in *Donald* were not satisfied that that was so.[2] They were content to proceed on the basis of an agreement between counsel which, at least in effect, corresponded with Lord Robertson's view in *Dingwall*.[3] The third view is that of Lord Kissen in *Dingwall*, that section 1(4) had restated the meaning of solatium in English but had intended the courts to make more generous awards than before.[4]

3.13 It appears to us that it is of the essence of a loss of society award, as defined in section 1(4), that it should look to the future. Section 1(4) provides that it is to consist of damages -

> "by way of compensation for the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if he had not died."

Neither grief and sorrow nor, more particularly, pre-death distress and anxiety can easily be brought within that description. Certainly our predecessors envisaged that a loss of society award would be given for reasons

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[1] 1982 SC (HL) 179, 209: see quotation in para 3.7.

[2] 1986 SLT 625, 628: see quotation in para 3.11.

[3] 1982 SC (HL) 179, 230, 231-232: see quotation in para 3.9.

[4] 1982 SC (HL) 179, 220: see quotation in para 3.8.

other than that of assuaging the grief and sorrow of the claimant.[1] Accordingly, including such elements of compensation within loss of society awards does not appear to us to have a secure juridical foundation. We also think it is probable that these elements have been undervalued when taken into account. We consider that they would be more likely to receive their due weight if expressly provided for. This may suggest a way of tackling the problem which concerns us, and we will return to that in Part IV.[2]

Other factors

3.14 The conception of the new loss of society award was not the only factor which influenced our predecessors' proposal that death should terminate the injured person's right to claim solatium. Certainly it was important, and we have examined its reception at length because we think the original intention may have been misconstrued by the courts. Our predecessors, however, were equally concerned with the question of the true nature of solatium. The view was strongly held in 1973, and not only by the then Commissioners, that solatium was inherently personal in nature. There were also thought to be well-founded objections to the usual justifications offered for the pre-1976 rules. More pragmatically, those who were consulted on the proposal supported it, with very few exceptions. And the arguments advanced by those dissenting seemed not to stand up under scrutiny. Last but not least, comparisons with corresponding rules in other jurisdictions influenced the final decision. It is

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[1]See para 3.2.

[2]Paras 4.24, 4.26.

worth taking time to examine these other factors more closely; for many of the arguments are still current which then determined the seemingly plausible range of options for reform. It is equally important to recognise where arguments may have been overtaken by later developments. In what follows we draw not only on our published documents but also on contemporaneous records and internal working papers.

The nature of solatium

3.15 In our report in 1973, the logically prior question was taken to be, whether the right to solatium should ever transmit to executors. This was denied -

> "primarily on the ground that it is artificial to allow compensation for a person's suffering after his death."[1]

This reflects a strong version of the view that the basis of allowing damages for pain and suffering is the alleviation of that pain and suffering. Once the victim is dead pain and suffering cannot be alleviated. This principle was certainly accepted by our predecessors in 1973. For example, it was invoked in the clearest terms to justify rejecting a suggestion that a distinction should be made between death due to injury and death from unconnected causes:

> "We have given careful consideration, 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

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[1]SLC Report No 31, para 23, p 9, citing opinions from *Neilson v Rodger* (1853) 16 D 325, 327, 328, *Bern's Executor v Montrose Asylum* (1893) 20 R 859, 872-873, *Smith v Stewart & Co* 1960 SC 329, 338.

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."[1]

In this view of solatium, the Commissioners had substantial support from those who were consulted in 1972.[2]

3.16 They were also able to refer to recent authoritative decisions containing strong statements of the inherently personal nature of a claim for solatium. For example, Lord Macmillan said in the House of Lords in 1943:

"The dissenting opinion of Lord Justice-Clerk Hope in *Neilson v. Rodger*[3] and the leading opinion of Lord M'Laren in *Bern's Executor*[4] adequately demonstrate how personal are the elements of any such claim. I prefer for myself to place the justification of the decision in *Bern's Executor*[5] on this broad principle of the inherently personal character alike of the injury and of the remedy. It is only a corollary of this principle to say that the election to sue or not to sue is with the injured person alone and cannot be made by anyone but himself. Where the accident has been

[1]SLC Report No 31, para 24, pp 9-10.

[2]In fact, the interviews we carried out as part of our preliminary survey for this discussion paper showed that the view still has support among solicitors.

[3](1853) 16 D 325.

[4](1893) 20 R 859.

[5](1893) 20 R 859.

instantaneously fatal or the injured person is insane (as in *Bern's Executor*[1]) there can be no question of election or waiver. The doctrine must have a wider basis. It follows that, in my view, it is quite inaccurate to describe, as some Judges have done, the wrong suffered by the deceased as constituting a debt due to him by the wrongdoer at the moment of the injury. The right of action is in no sense an asset of his patrimonial estate."[2]

3.17 Thus an earlier view was qualified. This held that a right to claim for damages and solatium vested *ipso iure* and *ipso facto* prior to any proceeding or decree for its constitution; that it was a moveable right which was assignable; and that it passed to personal representatives.[3] These are all characteristics of a patrimonial asset, and it has in fact been confirmed that a right to claim solatium can be assigned *inter vivos* like a debt.[4] It does not, however, transmit to a trustee in bankruptcy, who is treated for this purpose like an executor under the pre-1976 law.[5] At first sight, it may seem anomalous that a claim for solatium should be assignable but not transmissible. But the distinction can be justified on the view that solatium is purely personal. Assignability has a cash value which the injured person

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[1](1893) 20 R 859.

[2]*Stewart v London Midland and Scottish Railway Co* 1943 SC (HL) 19, 40; to the same effect, Lord President Clyde in *Smith v Stewart & Co* 1960 SC 329, 333.

[3]See Lord Wood, one of the majority judges, in *Neilson v Rodger* (1853) 16 D 325, 329 (Lord Justice Clerk Hope dissenting); also *Auld v Shairp* (1874) 2 R 191, 201-202.

[4]*Cole-Hamilton v Boyd* 1963 SC (HL) 1.

[5]*Muir's Trustee v Braidwood* 1958 SC 169; *Watson v Thompson* 1990 SLT 374.

can realise. Control of the claim remains with him unless and until he assigns it. Transmissibility, on the other hand, may involve loss of control over the claim and cannot be so easily translated into money's worth. There is therefore a respectable argument for saying that a claim for solatium should not be transmissible. Why should an executor or a trustee in bankruptcy be able to make a claim of such a personal nature for the benefit of heirs and creditors?

3.18 Such issues were also the subject of public debate in England and Wales in the early 1970s, and the Law Commission there took the opposite view. They recommended that a claim for damages for pain and suffering and loss of amenity should survive for the benefit of a deceased victim's estate like any pecuniary claim.[1] On this view no legal action by the victim while alive would be required. The argument was stated thus in a working paper in 1971:

> "The deceased may have suffered severe pain over a considerable period before death and may even, during that time, have spent some of the damages he was advised he would recover; and, during this period, relatives may have so acted in looking after him as to be not undeserving of the reward he may have intended to bestow upon them. We can see no reason why, in justice, a victim's death, perhaps wholly unconnected with the injury, should lead to his compensation being taken away."[2]

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[1]LC Report No 56, paras 101-103, 107, pp 27-29.

[2]LC Working Paper No 41, para 67, p 36, reiterated in LC Report No 56, para 101, p 27.

The subsequent report records that the proposal was criticised.[1] In fact, the main objection was that compensation paid after death could not benefit the person who had suffered loss; that it would benefit, at the expense of the tortfeasor, some relative or even creditor, who had suffered no loss. The Law Commission were unpersuaded. It is quite evident from our records that the Scottish Law Commissioners were fully conversant with the English debate; and that they discussed and explicitly rejected the English view when preparing their report in 1973.

Objections to the usual justifications for the pre-1976 rule

3.19 The pre-1976 rule, which allowed an executor to take up a claim for solatium provided an action had been raised by the deceased, was generally justified on two rather different grounds. Of these one was substantive, the other formal. Neither seemed satisfactory to our predecessors in 1973. With the failure of the traditional justifications, at least in the eyes of the then Commissioners, the case for retaining the rule was much weakened.

3.20 The substantive justification depended on a particular interpretation of *Bern's*[2] case and ultimately on the view that a claim for solatium is in some sense a patrimonial asset:

> "There is, therefore, the highest authority for holding that in our law the *actio injuriarum* is not so purely personal as to be intransmissible, and if the right, by reason of its being transmissible,

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[1]LC Report No 56, para 102, p 27.

[2]*Bern's Executor v Montrose Asylum* (1893) 20 R 859.

passes to executors, it must be equally capable of passing by the direct assignation of the injured person during his life. All that was decided in *Bern's*[1] case is that if a person who has sustained bodily injury through the fault of another dies without taking any step to vindicate a right to reparation, his executor cannot make a claim which during his life he abstained from making. This makes the title of a representative to sue depend upon the intention of the injured person himself to vindicate his right. But the institution of an action is not the only means of manifesting that intention. If the injured person assigns his right of action to one who has advanced the sum alleged to be payable by the wrongdoer, that is just as plain an assertion of his right to demand reparation as if he had brought an action in his own name."[2]

3.21 That principle was extended to include manifesting intention by merely intimating a claim.[3] But subsequently the view that election or waiver was the basis of the pre-1976 rule was questioned.[4] Finally it was rejected by a court of seven judges, among whom Lord Justice Clerk Thomson perhaps stated the grounds for rejection most succinctly:

"If the ground on which the exception is based is that by raising an action the deceased sufferer has provided evidence of his having made up his mind to seek reparation, it would be an easy step to the

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[1](1893) 20 R 859.

[2]*Traill & Sons v Actieselskabat Dalbeattie Ltd* (1904) 6 F 798, 806-807, citing Ersk. Inst. iii. 5,2 and, among other cases, *Neilson v Rodger* (1853) 16 D 325. See paras 3.16, 3.17.

[3]*Leigh's Executrix v Caledonian Railway Co* 1913 SC 838, founding strongly on *Traill & Sons v Actieselskabat Dalbeattie Ltd* (1904) 6 F 798.

[4]*Stewart v London, Midland and Scottish Railway Co* 1943 SC (HL) 19. See, for example, the opinion of Lord Macmillan quoted in para 3.16.

position that his election might be established by some other evidence, on the view that there is no reason in principle why, in seeking evidence of a concluded election, one should discriminate between raising an action and intimating that an action is to be raised. It is only a matter of degree.

If, on the other hand, there is some inherent virtue in a public and significant act, like the raising of an action, which distinguishes it in kind from the mere private and equivocal act of intimating an intention to the opposite party, then it is open to say that the Court in *Leigh's Executrix*[1] did more than just develop an existing principle. In my view, the raising of an action is different in kind from the intimation of an intention to do so. An action convenes the defender before a Court of law with certain inevitable consequences; short of some form of abandonment it is irrevocable. On the negative side, it shows that the ground of action has not been waived. Intimation of a claim has no such effect; it may be no more than a manoeuvre or a threat; it carries no consequences, it involves the intimator in no risks. It is not even conclusive on whether the sufferer has decided not to waive his ground of action. The defender need do nothing, indeed, he may never hear anything further.

Since the decision of the House of Lords in *Stewart*,[2] it must be taken that the rationale of the exception is the institution of an action, as such, and not that the raising of the action is evidence of an election to vindicate the ground of action."[3]

3.22 Our predecessors in 1973 saw clearly that if the deceased's intention was used to justify the rule, evidence of that intention could not be artificially restricted. They therefore concluded in light of the

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[1]1913 SC 838.

[2]1943 SC (HL) 19.

[3]*Smith v Stewart & Co* 1960 SC 329, 339.

authorities that the justification failed.[1] They did not, however, probe the reasoning in any great depth, since they regarded the question of the deceased's intention as secondary. The logically prior issue in their view was the nature of the right to solatium.[2]

3.23 The second commonly used justification for the pre-1976 rule invoked the legal doctrine of litiscontestation. This is a procedural doctrine which marks the solemnity of legal process once issue is joined; that is, after claim and defences are exhibited before the proper judge.[3] In the pure theory litiscontestation is regarded as a judicial quasi contract. The litigants agree, as it were, to submit their dispute to judicial determination. Thereby a new obligation is constituted. In other words, for the original claim there is substituted an obligation which, if the action is successful, becomes an obligation to satisfy the judgment. The effect of this is that a new quality is communicated to the action whereby it is perpetuated and made transmissible.[4]

3.24 Under a looser interpretation the raising of an action was treated as litiscontestation, thus justifying the rule that an executor might carry on an action for solatium instituted by the deceased.[5] It is

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[1]SLC Report No 31, para 22, p 9.

[2]SLC Report No 31, para 23, p 9. See para 3.15.

[3]Ersk. Inst. iv. 1,69.

[4]Ersk. Inst. iv. 1,70.

[5]*Stewart v London, Midland and Scottish Railway Co* 1943 SC (HL) 19, 41; *Smith v Stewart & Co* 1960 SC 329, 334; *Watson v Thompson* 1990 SLT 374, 377 (trustee in bankruptcy).

then a short step to the more pragmatic criterion adopted by Lord Justice Clerk Thomson, for example, in *Stewart v Smith & Co.*[1] Raising an action is regarded as significant because it is different in kind from the intimation of an intention to do so. That is a position which may be defensible without appealing to the excessively formal doctrine of litiscontestation. But our predecessors in 1973 did not explore that line of thought. It seems that the idea of treating the raising of an action as special was sufficiently discredited in their eyes by its dubious association with the more formal doctrine:

> "If it [ie the rule in *Bern's Executor*[2]] is based on the view that litiscontestation 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."[3]

The pre-1973 consultations

3.25 It is an important fact that the reforms in the mid-1970s were introduced with widespread support. The proposal that death should terminate an injured person's right to claim solatium was first put to consultation in a memorandum published in 1967.[4] The issue was publicly canvassed for the second time in 1972.[5] The response was almost wholly favourable to the Commission's proposal. Virtually no-one rejected it outright, though

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[1] 1960 SC 329, 339: see quotation in para 3.21.

[2] *Bern's Executor v Montrose Asylum* (1893) 20 R 859.

[3] SLC Report No 31, para 22, p 9.

[4] SLC Memorandum No 5.

[5] SLC Memorandum No 17.

some few qualifications were suggested to meet special circumstances, and one or two UK organisations proposed adopting the English model. The comments of the Faculty of Advocates in 1972 may be taken as representative. Their primary concern was not that any one particular solution should be adopted, but that the issue should be decided in a principled way. It seemed indefensible to them that the transmissibility of a claim for solatium should depend on the accident whether or not death intervened before an action could be raised. This attitude recurs in commentator after commentator, and it can readily be seen how the essential nature of solatium came to be the focus of the discussion.[1] It is hardly surprising, given the level of support, that our predecessors felt able to stand by their original proposal without arguing for it at length in their report in 1973.

3.26 The points made by those few who questioned the proposal were inevitably diminished by this general consensus. Their arguments accordingly seem *ad hoc* rather than principled. For example, a major trade union saw no inconsistency in allowing the injured person's claim for solatium to survive his death. Their main concern, however, seemed to be that the wrongdoer should not be relieved of consequences for which he would otherwise have been liable. This view is briskly rejected in the 1973 report:

> "We reject, too, the argument that a defender should not escape the consequences of his act merely because the injured person has died: this

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[1]See para 3.15.

argument is based upon a punitive approach to damages which seems entirely out of place."[1]

3.27 Another view sought to distinguish cases of intervening death by natural causes; that is, causes unconnected with the circumstances of the claim. A prominent legal organisation suggested that in such cases a claim for solatium might transmit to an executor. We have already referred to this view and the reasons for its rejection.[2] In fact, we also reject the distinction, which has been much criticised in other jurisdictions.[3] We would not, however, see this as necessarily committing us to our predecessors' view of solatium.[4]

3.28 The view that solatium is a debt due to the estate, which we have also touched upon,[5] was advocated by a widely representative commercial association. This too is summarily rejected in the 1973 report:

> "We reject the technical argument that solatium becomes a debt due to the deceased's estate. This argument begs the question which is whether such a debt should transmit."[6]

In fact, we ourselves have rather more sympathy with this view than our predecessors, since it seems that a

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[1]SLC Report No 31, para 24, p.9.

[2]Para 3.15.

[3]See paras 3.31, 3.32.

[4]See paras 4.5-4.7.

[5]Paras 3.16, 3.17.

[6]SLC Report No 31, para 24, p 9.

claim for solatium is not entirely without patrimonial attributes.[1]

3.29 Finally, another influential legal organisation gave some support to the view that intimating a claim before the death of a claimant should render it transmissible. As was said:

> "It appears to us somewhat unfortunate that a person who has, for example, entered into negotiations with an Insurance Company for settlement of his claim and dies before settlement is effected, his estate [sic] is penalised as against the man who is perhaps unsuccessful in negotiations with an Insurance Company and commences proceedings prior to his death. As the law stands at present the Executors are entitled to continue with such an Action.
>
> One reason given in the Memorandum ... is that if a deceased has raised an Action prior to his death then his intention to sue has been clearly demonstrated. It would appear to us however that if a deceased has intimated a claim without having actually raised an Action his intention has also been clearly demonstrated."

We have already indicated in another context why our predecessors attached no importance to the intimation of a claim.[2] We ourselves would be less certain about this, if we were inclined to recommend, for whatever reason, that a claim for solatium should be transmissible. If some condition for transmissibility were required, intimating a claim might well be an acceptable alternative to raising an action. We will return to this issue.[3]

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[1]See para 3.17.

[2]Para 3.22.

[3]Paras 4.19-4.22.

Comparative law

3.30 The final, and a major, factor in the Commission's decision in 1973 was the influence of comparative law. Comparisons were made with the corresponding rules in England and Wales and in a number of Commonwealth countries, notably Canada, Australia and New Zealand. The Commissioners detected a tendency in Commonwealth countries "to deny, or at least curtail, the right of the executors to recover damages for the deceased's pain and suffering."[1] This fortified them in their decision to propose that an injured person's right to claim solatium should terminate with his death. From internal papers it appears that a careful study was made of the position in English law in particular. Clearly, also, there was substantial criticism of the rules of that system as they then were, though this was not discussed in the published documents.[2] To that extent the reasoning in 1973 has been overtaken by later developments. The position in England and Wales is now substantially changed. Indeed, a number of those whom we interviewed as part of our survey for this discussion paper advocated the current English rules as a possible model for reform in Scotland. We must therefore give some attention to these rules. First, however, we should note briefly the current position in Canada and Australasia which figured so prominently in the Commission's studies in 1973.

Canada

3.31 In 1962 the Commissioners on Uniformity of Legislation in Canada proposed a Uniform Survival of

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[1]SLC Memorandum No 17, para 31, p 26.

[2]SLC Memorandum No 17 and SLC Report No 31.

Actions Act, which excluded recovery by a deceased's estate of damages for all non-pecuniary loss. Before then only British Columbia had wholly excluded such recovery.[1] A recent report by the Law Reform Commission of Saskatchewan gives an account of subsequent developments.[2] It appears that the Uniform Statute has been substantially adopted by New Brunswick, Newfoundland, Prince Edward Island and Alberta and in part by Nova Scotia. Manitoba has excluded recovery of damages by the deceased's estate in respect of loss of expectation of life. As a result of these developments recovery of the deceased's non-pecuniary loss is now fully permitted only by the North West Territories. In Saskatchewan, as the Law Reform Commission records, such recovery is only possible where death did not result from the injuries suffered by the deceased. The Commission proposes reforms in line with the majority of the Canadian provinces:

> "The Commission, however, is of the opinion that the cause of action in respect of intangible, non-pecuniary losses should not be inheritable. The damages for such losses are a substitute for the 'lost happiness' of the victim, and are intended for the victim alone. Once the victim has obtained such damages, he may do with them what he will. He may give them away; it is his choice. But until those damages are awarded him by judgment, no other person should be able to lay claim to them. Accordingly, the Commission proposes that damages for non-pecuniary loss not survive for the benefit of the estate."[3]

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[1]ILRR(UA), Report (1977), p 12.

[2]LRCS, Report (1985), p 11. See also ILRR(UA), Report (1977), pp 11-13.

[3]LRCS, Report (1985), p 12.

The proposal has not so far been implemented.

Australia and New Zealand

3.32 In New Zealand the executor's right to recover damages for pain and suffering undergone by the deceased has been excluded by statute since the mid-1930s.[1] The position in Australia is described in a current text:

> "From the outset, Australian legislation therefore excluded claims for the decedent's non-pecuniary losses. New South Wales, Victoria and the two territories [ie the Australian Capital Territory and the Northern Territory] do so only when the death was actually caused by the injury in question, but all others [ie Queensland, South Australia, Western Australia, Tasmania] - with more consistency - are of general application and also extend therefore to those, admittedly rarer, instances where death supervenes from some unconnected cause."[2]

England and Wales

3.33 The pre-reform rules in the Commonwealth jurisdictions mentioned were originally modelled on earlier English rules. Now, by a curious shift in the law reform process, the English rules have developed in a quite different direction. In the Commonwealth jurisdictions the tendency has been to curtail the executor's right to recover the deceased's non-pecuniary losses and, as mentioned, this clearly influenced the reforms in Scotland in the mid-1970s.[3] In England and Wales, however, earlier restrictive rules have been progressively relaxed. Actions of damages for pain and

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[1]SLC Memorandum No 17, para 31, pp 26-27.

[2]Fleming, pp 640-641.

[3]Para 3.30.

suffering and loss of amenities now survive to full effect for the benefit of the deceased's estate. This contrast with the provision for solatium in Scotland has attracted public attention and is a major factor in the demand for reform. The English rules therefore merit some further attention.

3.34 The claims in tort which may be pursued in England on behalf of a deceased's estate rest on the Law Reform (Miscellaneous Provisions) Act 1934. Those which may be pursued by his dependants in their own right rest on the Fatal Accidents Act 1976. Under the 1934 Act all causes of action which are vested in a deceased survive for the benefit of his estate.[1] This enables recovery of damages for pain and suffering and loss of amenities to date of death, as well as for accrued pecuniary loss.[2] Under the 1976 Act a deceased's dependants may bring an action in respect of wrongful death.[3] The damages recoverable include compensation for loss of support and a fixed sum for "bereavement".[4] The fixed sum is presently £3,500, but a recent consultation paper issued by the Lord Chancellor's Department canvasses the possibility of increasing this to £5,000 or £10,000.[5] It can only be claimed by a surviving spouse or by the parents of a deceased minor who was never married. Where the minor was legitimate the sum is divided

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[1]S 1. Defamation is excluded.

[2]McGregor, paras 1601-1613, pp 1018-1022.

[3]S 1.

[4]Ss 3 and 1A respectively. See Winfield & Jolowicz, pp 650-653.

[5]LCD, Consultation Paper (1990).

equally between the parents; otherwise it is paid to the mother alone.

3.35 The principle of the 1934 Act has been criticised in the past by English writers:

> "Winfield thought that it was consonant neither with abstract justice nor with the law of tort that a man's successors should profit by a wrong which in origin did them no harm and though there may be something to be said for allowing the survival of causes of action for torts which are unconnected with the death, the value of allowing an action in respect of the very acts which caused the death is doubtful."[1]

From internal papers it is clear that our predecessors were impressed by this criticism of the English rules, perhaps unduly so. But, interestingly, similar criticisms can still be found in the most recent texts, for example:

> "If the estate has suffered loss by reason of the loss to the deceased being pecuniary, an action to recover such loss is proper, but if the loss is non-pecuniary, as it may for instance be in torts involving injury to reputation or to the person, the recovery of such a loss by the estate is more dubious. It is therefore not surprising that section 1 of the 1934 Act imposes certain limitations on recovery by the estate.[2] These limitations have ... a somewhat erratic impact, and

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[1]Winfield & Jolowicz (10th ed, 1975), p 514, citing the 5th edition, 1950, p 204, the last by Winfield himself.

[2]In fact, the exclusion of defamation etc from the 1934 Act was not the result of a conscious policy that such actions should not survive death. The legislators were simply avoiding controversial areas and dealing with the urgent issue of deaths in road accidents: see Winfield & Jolowicz, p 719, Faulks Report (1975), paras 396-397, pp 109-110.

it is thought that the law would be both simplified and improved if the Act of 1934 were amended so as to allow all actions to survive for the benefit of the deceased's estate but at the same time to limit the estate's recovery in all cases to accrued items of a pecuniary nature, non-pecuniary losses of the deceased being personal to him and having no proper entitlement to a place in the assessment of damages which come to his estate."[1]

3.36 Another criticism which greatly influenced the thinking of our predecessors in 1973 was directed to the interrelations between the 1934 Act and the Fatal Accident Acts (subsequently consolidated in the 1976 Act). At that time damages for pain and suffering and loss of amenities under the 1934 Act were set off against dependants' claims under the Fatal Accident Acts.[2] The effects of this requirement were trenchantly criticised, again by Winfield:

"Moreover, in the great majority of cases the existence of a claim under the Act of 1934 benefits no-one, for any damages awarded to the estate which pass to the dependants are taken into account in assessing the damages under the Fatal Accidents Acts. Only if the deceased left no dependants, or if his residuary estate passes to a stranger, does the survival of his own cause of action have any practical effect. And yet the courts must go through the solemn farce of putting a value on such an incalculable thing as his lost expectation of life [a major element of non-pecuniary loss at the time of writing]. It would, perhaps, have been better to enlarge the rights of the dependants under the Fatal Accidents Acts so as to include general damages for the loss they have sustained,

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[1]McGregor, para 719, pp 462-463.

[2]*Murray v Shuter* [1976] QB 972. See Kemp & Kemp, Volume 1, para 22-006.

as distinct from loss of a purely financial character."[1]

This, however, no longer applies, since the 1976 Act was amended by the Administration of Justice Act 1982.[2] Actions for damages in respect of pain and suffering and loss of amenities now survive without qualification. A dependant taking the deceased's estate may therefore have the full benefit of the deceased's claim for damages under this head, as well as benefits in his own right under the 1976 Act.[3]

3.37 These changes emphasise the relatively lower level of the provision in Scotland. Admittedly, the fixed sum for bereavement (£3,500) payable under the Fatal Accidents Act 1976 is restricted in scope and less generous than payments for loss of society in Scotland.[4] Where death follows immediately on injury, therefore, and there is no question of the deceased having undergone pain and suffering, the Scottish provision may be more generous. But in the case of delayed or intervening death, with which we are mainly concerned, a deceased's family will normally be much better off under the English provision. It is therefore

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[1]Winfield & Jolowicz (10th ed, 1975), pp 514-515, reiterating Winfield's criticism in the 5th edition, 1950, pp 523-524.

[2]S3, substituting a new s 4 in the Fatal Accidents Act 1976, which excludes taking account of, *inter alia*, damages under the 1934 Act. There is now also provision for compensating dependants for their non-pecuniary loss: see para 3.34.

[3]See, for example, Winfield & Jolowicz, p 656.

[4]Of course, there are proposals to increase this sum: see para 3.34. For current levels of payments for loss of society, see para 2.12.

a serious question whether we should now reconsider the Scottish provision for solatium in light of the English developments since the mid-1970s.

PART IV

OPTIONS FOR REFORM

Introduction

4.1 Our starting point is that reform is almost certainly required to deal with the problem of the injured person who survives to initiate a claim but whose life is seriously at risk. It is clear, as we have tried to bring out in Part II, that the present law may provide a significant financial incentive to delay in such cases. Virtually all of those who participated in our preliminary survey agree. It is equally clear that the claims which concern us are more numerous than was anticipated in the mid 1970s and we do not see this as a temporary problem. Certainly, the numbers of asbestos-related claims which are presently causing concern are likely to decline eventually.[1] But we expect that occupational and environmental hazards will continue to generate new causes of action of a similar sort. Apart from that, there is always likely to be a small core of familiar injuries, road traffic injuries for example, where the problem of delayed death cannot be ignored.[2] In these circumstances we think it would be wrong to be too concerned about disputed allegations of deliberate delay. It is surely a sufficient reason for reform that there is always a risk of delay in the court system, because it is vulnerable to excessive

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[1]Most of the participants in our survey thought this was unlikely to happen before the turn of the century.

[2]See para 1.8.

demand.[1] The potential for exploitation is there. It is only sensible, therefore, to try to eliminate any financial incentive there may be within the system itself to exploit delay. Precisely what sort of reform is needed is less clear.

4.2 One possibility which may seem obvious is procedural reform. An expedited optional procedure for some reparation actions already exists in the Court of Session.[2] Perhaps some extension or modification of such a procedure would solve the problem. This approach, however, is problematic. Any expedited procedure is necessarily subject to limitations. It may not be suitable for cases involving complicated facts which are difficult to prove. And at least some of the cases which give rise to the problem we are concerned with fall into just that category.[3] We conclude, therefore, that the problem cannot be solved by procedural change alone, though no doubt the existing special procedures will sometimes provide a solution in particular cases.

4.3 Similarly, we are reluctant to recommend the introduction of *ad hoc* remedies for special categories of claims. For example, it was suggested to us in the course of our survey, that penal rates of interest should be applied to damages to discourage late settlement in asbestos-related claims. This would be at

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[1]See paras 1.6, 1.7.

[2]Rules of Court 188E-P.

[3]For example, see *Main v McAndrew Wormald Ltd* 1988 SLT 141, (lung cancer allegedly caused by exposure to asbestos dust); *Glennie v Gillies* 1988 SLT 308 (mesothelioma).

the discretion of the court. We recognise that late settlements, and indeed litigation generally, are stressful for claimants, particularly claimants suffering from a painful and possibly terminal disease. Nevertheless, we have reservations about such a remedy. As said in the preceding paragraph, the cases for which the remedy was suggested are quite often complex. There may be difficulties in establishing a claimant's employment record, where that extends over many years and many employers.[1] There may be problems of causation and medical diagnosis.[2] Such issues are inevitably time-consuming, and will often only be clarified finally in the intensive process of preparing for proof. Our view, therefore, is that we should look for a more fundamental solution to the problem. How then should we set about this?

A possible approach

4.4 Since we are not carrying out a general review of the Damages (Scotland) Act 1976 we must ensure, when proposing further reform, that we do not inadvertently undermine its structure. This is not to say that the principles underlying the Act are immune to change; only that none should be given up without due regard to the consequences. In Part III we discussed a range of factors which influenced the Commission's thinking in 1973. From that discussion, and the introduction to the 1973 report, we can identify a number of presuppositions which seem to have shaped the structure of the 1976 Act. We can then test these presuppositions against

[1]*Glennie v Gillies* 1988 SLT 308.

[2]*Main v McAndrew Wormald Ltd* 1988 SLT 141. See also Felstiner & Dingwall, pp 5,8,17.

subsequent developments and, with hindsight, ask whether they still remain valid.

Is solatium inherently personal?

4.5 It is undoubtedly a primary presupposition underlying the scheme of the 1976 Act that the right to claim solatium is inherently personal. In other words, solatium is intended to solace the injured person.[1] We appreciate the reasons for that view. There is, as has often been observed, something odd about the idea of compensating one person for another person's suffering. On the other hand, this view is not the only one that can be taken. We have already pointed to an earlier view which regarded a claim for solatium as a patrimonial asset, transmissible on death like a claim for debt.[2] There are considerable attractions in this view too. It is somewhat surprising and apparently unjust that the amount recoverable by a family and payable by a wrongdoer should depend to such an extent on the precise date of death. The question, as we see it, is not the inherent nature of solatium but whether or not, as a matter of policy, the right to claim ought to be transmissible to an executor.

4.6 Certainly, the rule now established in Scotland has also been adopted in numerous Commonwealth jurisdictions.[3] But it is notably not the rule in England and Wales.[4] It is therefore not obvious that death should necessarily terminate the right to claim

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[1]See paras 3.15, 3.16.

[2]Para 3.17.

[3]See paras 3.31, 3.32.

[4]See paras 3.33-3.36.

solatium in all circumstances. Nor was it obvious to the Faulks Committee reporting on defamation in 1975:

> "424 In relation to the transmission upon death of claims and of liability, Scots law has never distinguished between defamation and other delicts....
>
> 425 So far as the death of the victim of a delict is concerned, the position differs according to whether or not the victim during his lifetime has raised an action against the wrongdoer. If he has done so, his executors may have themselves sisted as pursuers in the action in place of the deceased, and may carry it on to the effect of recovering such damages, both for solatium and for pecuniary loss, as the deceased could have recovered had he survived.[1] If, on the other hand, the deceased died without having raised an action, his executors may competently sue the wrongdoer to recover damages for pecuniary loss suffered by the deceased.[2] But the executors are not entitled to recover damages by way of solatium for the deceased's pain and suffering or his injured feelings, even if the deceased had intimated a claim for such damages before his death.[3] The Committee consider this state of the law to be satisfactory and do not recommend any alteration."[4]

It is perhaps surprising that this was written after our report in 1973, and published just before the implementing legislation, and yet seems never to have received public attention. We will return to the question of defamation and other grounds of action involving injury to reputation or outrage to feelings.[5]

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[1]*Neilson v Rodger* (1853) 16 D 325.

[2]*Auld v Shairp* (1874) 2 R 191; *Smith v Stewart & Co* 1961 SC 91.

[3]*Smith v Stewart & Co* 1960 SC 329.

[4]Faulks Report (1975), paras 424-425, pp 116-117.

[5]Paras 4.39-4.42.

4.7 We are impressed by this divergence of views. Clearly the proposition that death should necessarily terminate a claim for solatium in all circumstances is not beyond question. Indeed, it is difficult to understand why it was accepted almost without question in Scotland in the 1970s. Certainly, there were weaknesses in the arguments used to justify the rule as it then stood.[1] And the English approach, which was the obvious alternative, had some rather unattractive features at the time, though these have now gone.[2] Even so, this hardly accounts for the manner in which the alternative approach was dismissed in the 1973 Report. It may be, therefore, that the initial view taken of solatium was reinforced by other presuppositions which also tended to discourage a more detailed assessment of alternatives.

Duplication of damages

4.8 For example, a primary objective in 1973 was to separate clearly the claims of a deceased's executors and those of his dependants.[3] The main reason for this concern was the much criticised case of *Darling v Gray & Sons*.[4] That case established that a dependant's right of action was excluded if the deceased's executor had taken up an action of damages for patrimonial loss and solatium instituted by the deceased. One of the reasons for the decision was that to admit the dependant's right

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[1]See paras 3.19-3.24.

[2]See paras 3.33, 3.34, 3.36.

[3]SLC Report No 31, para 4(a)-(d), p 2.

[4](1892) 19 R (HL) 31. See SLC Report No 31, paras 46-52, pp 15-17.

of action in these circumstances would entail duplication of damages. In recommending the abolition of the rule in *Darling's* case, the Commission commented:

> "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."[1]

In other words, the proposal that the right to claim solatium should terminate on death was linked to the aim of preventing duplication of damages. But the deceased's and the dependant's claims for non-patrimonial loss are quite distinct. Allowing the deceased's claim for solatium to survive as part of his estate cannot involve duplication of damages just because a dependant who receives compensation in his own right may also take the estate. In fact, this view has been confirmed by *Dick v Burgh of Falkirk*[2] which overruled *Darling's* case a few months before the 1976 Act came into force.

Presuppositions underlying the new loss of society award

4.9 The approach to solatium was also influenced by presuppositions which were made concerning the new loss of society award. First, as we have already mentioned, the Commission assumed in 1973 that claims for solatium and claims for loss of society would be of comparable

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[1]SLC Report No 31, para 51, p 17.

[2]1976 SC (HL) 1, 29.

value.[1] With that assumption, it is not too difficult to accept that claims for solatium should terminate on death. But subsequent developments, as we pointed out, have not fulfilled the original expectations.[2]

4.10 Second, the conception of the new award was strongly orientated towards future or continuing loss arising from deprivation of the deceased's society and guidance.[3] That is, the policy was to place less emphasis on past grief and suffering. It is consonant with this that a claim for solatium should not survive beyond death. To allow that would be to encourage looking to past suffering for which the victim could no longer be solaced. We ourselves are rather more impressed by the fact of suffering undergone not only by the deceased but also by his immediate family. There is also a point which was made to us by several of those who participated in our survey. The suffering of the claimant who has to cope with terminal disease or imminent death is often exacerbated by his anxiety to live long enough to maximise damages for the benefit of his family. An appropriate change to the law could at least alleviate suffering of that kind.

Some options rejected in 1973

4.11 Internal papers show, perhaps more clearly than our publications, how these various presuppositions influenced the way certain options were formulated and rejected in 1973. In fact, some consideration was given to the possibility that the deceased's claim for

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[1]Paras 3.1, 3.2.

[2]Paras 3.2, 3.13.

[3]See paras 2.7, 3.13.

solatium might be allowed to survive. Three variants were discussed.

4.12 First, an approach was considered which would have allowed the deceased's claim for solatium to transmit at the expense of the corresponding claim by his dependants. This was rejected on the ground that the dependant's claim was too well-established to be discarded without the substitution of some alternative. And, if one of the rights had to go, it was thought better as a matter of principle to retain the dependant's right; for this would "emphasise the continuing loss of the living rather than the past loss of the dead."

4.13 A second approach considered was allowing the deceased's claim for solatium to subsist cumulatively with the dependant's claim. This was rejected on the grounds -

(a) that where the deceased had no near relatives, or bequeathed his estate outwith his immediate family, distant relatives or complete strangers would take fortuitous benefit from the suffering of the deceased; and

(b) that where the estate passed to near relatives who also received compensation for non-patrimonial loss in their own right, there would be an element of over-compensation.

Over-compensation was seen as imposing that "double liability" on the defender which *Darling v Gray & Sons*[1] sought to avoid.

4.14 As a third possibility, the contemporary English approach was considered.[2] That is, the deceased's claim for solatium would survive, but damages thereby received would be set off against any damages paid to the recipient in his own right as an entitled relative. This was rejected because, where near relatives taking the deceased's estate had claims in their own right, the enquiry into the amount of solatium would become an unnecessary ritual. It was also noted that strangers or distant relatives might benefit fortuitously, where the estate did not pass to the deceased's immediate family.

4.15 The conclusion drawn from the consideration of these options was that the deceased's right to solatium should not transmit; and that a clear distinction should be made between the rights of executors and those of relatives. It was also thought that this offered procedural advantages. In many cases the amount of the deceased's patrimonial loss would not be in dispute, so controversy could be confined to questions concerning the relatives' claims. It would therefore seldom be necessary for executors to sist themselves as pursuers in actions to recover compensation for the deceased's patrimonial loss.

Our proposals: First option

4.16 What then are our proposals for reform? One option would be to allow a claim for solatium to survive

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[1](1892) 19 R (HL) 31.

[2]See also paras 3.18, 3.35, 3.36.

for the benefit of the deceased's estate. There are strong arguments for this option, which we are inclined to favour. It is the solution adopted in England and Wales and it may seem anomalous to maintain a distinction between the two jurisdictions in this respect.[1] Indeed, the fact that there is such a distinction has featured prominently in the demand for reform.[2] Counter-arguments about the personal nature of solatium are not necessarily conclusive.[3] Whether a claim for solatium should be transmissible is a matter of policy on which a decision could be taken either way. Nor do we see any element of over-compensation where dependants receiving compensation in their own right also take the deceased's estate and benefit from his claim for solatium.[4] In the mid-1970s it seemed arbitrary that a claim for solatium should survive merely because the claimant raised an action before he died. It could be said to be just as arbitrary that a claim should now fall merely because death intervenes before legal proceedings can be concluded. Perhaps it is easier to accept the latter, on the theoretical view that solatium is purely personal, when a disqualifying event seems unlikely. We now know that it is commoner than once seemed likely, and we cannot ignore that knowledge.

4.17 On the other hand, the view that the right to claim solatium ought to be personal to the injured party

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[1]See paras 3.33, 3.34, 3.36. But contrast Pearson Report (1978), Volume One, paras 442-444, p 100.

[2]See paras 2.11, 3.33.

[3]See paras 3.17, 4.5-4.7.

[4]See para 4.8.

cannot be rejected out of hand. It could well appear unjust to allow strangers or remote relatives to recover a windfall from someone whom the deceased himself would not have wished to sue.[1] There is perhaps something in the principle that one person should not, in general, be compensated for another person's suffering.

4.18 We invite views on the following proposals:

1. **Should a claim for solatium in respect of personal injuries[2] survive for the benefit of the deceased claimant's estate?**

2 **If it were provided that a claim for solatium in respect of personal injuries should survive for the benefit of a deceased claimant's estate, and the dependant who inherits any part of the estate also receives compensation in his own right, that compensation should be paid without deduction in respect of the benefit derived from the deceased's claim.**

Conditions for transmissibility?

4.19 If it is decided in principle that death should not terminate a claim for solatium, should there be any conditions for the transmissibility of the claim? For example, under the pre-1976 rule it was a condition for transmissibility that the deceased should have raised

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[1]See paras 3.18, 4.13, 4.14.

[2]For a discussion of the meaning of "personal injuries" see paras 4.39-4.40.

an action during his lifetime.[1] It was thought that raising an action somehow shifted the claim to a different level. Once the court was invoked, the claimant's control over the claim was qualified. Raising an action was also regarded as an unequivocal intimation to the alleged wrongdoer that the claim had not been waived. These are pragmatic considerations. Principle probably requires that there should be no conditions for transmissibility. Certainly, that would be consonant with the view that a claim for solatium is a patrimonial asset;[2] for it is implicit in any such view that the right to claim solatium vests by law in an injured person when injury is inflicted upon him. We are inclined to favour unrestricted transmissibility. But we also recognise that the question whether the right to claim should be transmissible is primarily one of policy.[3] Pragmatic considerations are therefore important. There could be practical problems to consider, if transmissibility were unrestricted.

4.20 For example, how would an executor be affected if the present rule were changed? Should an executor have an unfettered discretion to pursue a claim for solatium which the deceased did not pursue, and might not have pursued had he lived? It is easy to imagine circumstances where the deceased would have been unwilling to raise an action. Perhaps, therefore, special provision is needed to ensure that the deceased's intention to pursue a claim is properly attested before action is taken by his executor. Again,

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[1]See paras 2.18-2.19, 3.19-3.24.

[2]See paras 3.16-3.17, 4.5.

[3]See paras 4.5, 4.16.

how far should an executor be liable to beneficiaries if he fails to investigate and follow up potential claims? Should an executor be protected by requiring him to pursue only those claims where the deceased's intention to sue has been appropriately attested during his lifetime; or can we simply assume that a claim for solatium is no different from a claim for pecuniary loss. If no special provision is required for the latter, none may be required for the former, though a claim for solatium may be more problematic in practice. For example, it may be more difficult to quantify the claim, or to provide evidence of pain and suffering without the testimony of the deceased.

4.21 These problems may point to a need for conditions qualifying transmissibility in the case of claims for solatium. But, equally, imposing conditions may itself cause further difficulties. For example, assuming some act by the deceased during his lifetime was a prerequisite for transmissibility, what happens if an injured person is incapacitated by his injury and unable to act? Should we provide specially for a relative, say, to act on his behalf; or could this be left to the ordinary law of curatory; or is it better simply to have no conditions for transmissibility which require action by the victim? On balance, we prefer transmissibility without conditions.

4.22 We invite views on the following questions:

3. (a) If it were provided that a claim for solatium in respect of personal injuries should transmit to a deceased claimant's executor, should there be any conditions for the transmissibility of the claim?

(b) In particular, should it be a condition that the deceased, while alive, had raised an action in respect of the claim?

(c) Alternatively, should it be a condition that the deceased, while alive, had intimated the claim to the alleged wrongdoer?

Second option

4.23 A second possibility would be to preserve the principle that solatium is personal and does not transmit on death but to increase the claims of the immediate family. Such an increase appears to us to be justifiable on two grounds. First, it would ensure that in many cases the wrongdoer would have no incentive to delay settlement. Second, it would remove what appears to us to be a defect in the present law. As we tried to bring out in Part III, the deceased's immediate family may sustain certain injuries to feelings which seem to us not to be compensated appropriately in present practice.[1] Arguably, the emotional distress and grief which a person may suffer while and after a close relative dies are not given due weight by the courts. And there can be few injuries more serious as far as a family is concerned than the death of one of its members. Whether death follows immediately on injury or is delayed, the loss is final. Further, if we are correct in our interpretation of section 1(4) of the Damages (Scotland) Act 1976, even the present limited

[1]Paras 3.2, 3.3, 3.13.

recognition of distress and grief may rest on a precarious juridical foundation.[1]

4.24 Our second option for reform might therefore be achieved by reformulating the heads of non-patrimonial loss under which the members of a deceased's immediate family would be entitled to recover damages. These would be:

(a) loss of society as in section 1(4) of the 1976 Act;

(b) grief and sorrow at the deceased's death;

(c) where to their knowledge the deceased had undergone pain and suffering before death, distress and anxiety in contemplating his suffering.

Under head (c), the longer the deceased's suffering had continued, the greater would be the relatives' claim. As a result of such a reformulation, depending on the amounts awarded, the relatives' claims could equal or even exceed the solatium which would have been due to the deceased. This result would be more readily achieved if, consistently with section 1(4), the courts were to award "compensation" under each head of damages. That would involve a clear departure from the pre-1976 law, which commonly described such damages as an acknowledgement of injury to feelings, rather than as reparation or compensation.[2] Accordingly, while a substantial acknowledgement rather than a nominal award

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[1]See paras 3.3-3.13, especially paras 3.3, 3.13.

[2]See para 2.20.

was called for, there was a tendency to say that it should be confined within comparatively modest limits.[1] It is not entirely clear that the present law has eradicated the effects of that approach.[2]

4.25 Other methods of increasing the immediate relatives' claims could also be considered. The simplest would be to provide that a relative could recover in name of non-patrimonial loss only a fixed sum specified by statute. Here compare section 1A of the Fatal Accidents Act 1976, which provides a remedy of damages for "bereavement" in England and Wales.[3] The remedy is available only to the surviving spouse of the deceased, or to the parent(s) of a deceased minor who was never married. The damages are a fixed sum of £3,500, which is variable by statutory instrument and may soon be increased to £5,000 or £10,000.[4] Introducing a similar provision into Scots law might go some way to meet the objection that it is distasteful to conduct a judicial inquiry into the feelings of a grieving family. To some extent it would also harmonise the laws of Scotland and England as to the amount of damages for non-patrimonial loss which is recoverable in such cases. On the other hand, it would be undesirable to import the limitation of the remedy to those two classes of claimants, given the definition of the deceased's immediate family in the Damages (Scotland)

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[1]*Elliot v Glasgow Corporation* 1922 SC 146, 148; *Smith v Comrie's Executrix* 1944 SC 499, 500.

[2]See the arguments and judicial opinions discussed in paras 3.5-3.12.

[3]See para 3.34.

[4]LCD, Consultation Paper (1990): see para 3.34.

Act 1976.[1] And even the sum of £10,000 would appear to some people in Scotland to be unacceptably low.[2] For our part we do not favour a single tariff designed to compensate all non-patrimonial losses by the immediate family. Certainly, if such an option were to be pursued, considerable modification of the English provision would be required. For example, it would probably be necessary to devise a tariff which allocated different sums to different classes of claimant, perhaps placing children, if not others, in bands according to age. It would certainly be necessary, as regards quantum and qualification, to ensure that any such tariff was no less generous than the present provision in Scotland.

4.26 As an alternative to a single tariff, a system of separate tariffs could be introduced. The three elements of non-patrimonial loss - pre-death distress and anxiety, grief and sorrow at death, and loss of society[3] - could be specified and a tariff devised for each, or perhaps only certain of them. It may be that pre-death distress and anxiety would be the least suitable for the application of a tariff, since much would depend on variable but ascertainable factors: for example, the nature and duration of the deceased's suffering, or the extent to which the claimant was in his company. On the other hand, grief and sorrow at death and loss of society are very difficult to quantify. And it is not easy to justify variations in

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[1] S 10(2) and Sched 1: spouse, cohabitee, parent, child (including a child accepted by the deceased as a member of the family). See para 2.7.

[2] See para 2.12.

[3] See para 4.24.

awards under these heads to relatives of similar age who are identically related to the deceased. It is also unfortunate that a surviving relative, such as a widow, may have to give -

> "the usual general evidence indicative of the acuteness of the pain and grief which she has suffered and the gravity of the wound to her feelings."[1]

We believe that for many pursuers this is at best an embarrassment and at worst an ordeal. Tariffs for awards in respect of grief and sorrow at death and loss of society could resolve problems of quantification and eliminate the leading of evidence. Clearly, tariffs could not distinguish between insincere and unusually devoted relatives who might otherwise receive awards smaller or more substantial than the average. But such cases are perhaps less common than those in which tariffs might be expected to have the advantages mentioned. The tariffs could no doubt be linked to the age of the claimant and his or her legal relationship with the deceased.[2] However, while we recognise the possible advantages, we would be reluctant to recommend the introduction of such a system.

4.27 Our predecessors also rejected the option of a tariff of compensation for loss of society. Their grounds were that it would soon become out of date; and that if it attempted to deal with the many complex situations which might arise, it would be both arbitrary

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[1] *Kirkpatrick v Anderson* 1948 SC 251, 253.

[2] *Davidson v Upper Clyde Shipbuilders Ltd* 1990 SLT 329, 331-332.

and unwieldy.[1] We agree with the latter; the former, however, is relatively unproblematic. We envisage that if a tariff or tariffs were to be introduced, provision would be made for both index-linking and variation by statutory instrument. This would enable regular updating and, if appropriate, more radical review of the level or levels initially set. It is not so easy to deal with the criticism that a tariff is an arbitrary and unwieldy instrument in complex situations. As we have indicated, some stratification by relationship and age could be imposed. But this is crude at best. Accordingly, we have yet to be persuaded that the advantages which tariffs provide are sufficient to compensate for their obvious defects.

4.28 We recognise, however, that tariffs have seemed attractive to some. In 1988, for example, the Citizens' Compensation Bill was introduced into Parliament.[2] Amongst other things, the Bill proposed the establishment of a Compensation Advisory Board.[3] The function of the Board was to determine and adjust levels of compensation to which the courts would have regard. In other words, the Board would set and review tariffs on a continuing basis. In fact, after discussion with Government ministers, the promoters did not press these proposals and the relative clauses were rejected in

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[1]SLC Report No 31, para 111, p 36.

[2]Parliamentary Debates, House of Commons, Vol 144, col 456; Vol 148, cols 511-569 (second reading).

[3]Clauses 1-4 in the Bill as ordered to be printed on 21 December 1988.

Committee.[1] The Bill as so amended did not proceed beyond report stage in the Commons.[2]

4.29 We have mentioned this particular example partly because of its public significance, but partly also because the Bill proposed an amendment to section 1(4) of the Damages (Scotland) Act 1976, which is of some interest.[3] The amendment provided for a minimum sum of £10,000 for loss of society. This combination of fixed and variable elements appears to have been broadly acceptable to Scottish members. Clearly it constitutes yet another variant whereby our second option might be achieved. Again, however, we are not attracted by the proposal. It retains some of the basic features of a tariff which we have criticised. At the same time it lacks the advantages of a true tariff, since it will neither resolve problems of quantification nor eliminate the leading of evidence.

4.30 The second option, however it might be achieved, may be thought to have several advantages. First, it would be entirely consistent with the principle that the deceased's claims and the surviving relatives' claims are juridically distinct.[4] Awards to relatives for non-patrimonial loss would be designed to compensate their real and continuing suffering rather than the past suffering of the deceased. Under the first option the

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[1]Parliamentary Debates, House of Commons, Standing Committee C, Wednesday 3 May 1989, cols 1-12.

[2]Parliamentary Debates, House of Commons, Vol 156, cols 637-649.

[3]Clause 7 in the Bill as ordered to be printed on 21 December 1988.

[4]See para 4.8.

deceased's transmissible claim for solatium might confer a windfall benefit on remote relatives or strangers.[1] But under the second option awards would be made to compensate pursuers for their own distress, and would not enable them to benefit from the distress of someone else. Second, in its most acceptable form where awards would continue to be variable, it would require the court to make a specific award for each element of non-patrimonial loss. Thus, any under-valuation of any element which may occur in current practice would be avoidable.[2] Third, in at least some cases where a claimant was suffering from a dust-related disease, the second option might significantly alleviate the mischief of the possible incentive to delay settlement.

4.31 On the other hand, it must be recognised that the second option would not necessarily be a complete answer to all the problems which might arise. First, assuming awards remain variable, its effectiveness would depend greatly on how much the courts chose to award in respect of each distinct element of non-patrimonial loss. The legislation would give the courts a means of dealing with the mischiefs of possible incentive to delay settlement of injured persons' claims and under-valuation of relatives' claims. But it would be for the courts to apply it effectively. Second, enhancing relatives' claims would not introduce any incentive to settle quickly, or reduce any possible incentive to delay settlement, where there were no relevant claims.

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[1]See para 4.17.

[2]To some extent a system of separate tariffs for distinct elements of non-patrimonial loss could be devised to achieve a similar result.

4.32 We invite views on the following questions:

4(1) As an alternative to making claims for solatium transmissible, should the non-patrimonial claims of the deceased's immediate family be enhanced?

(2) If so, should this be done -

(a) by reformulating the heads of non-patrimonial loss under which members of the deceased's immediate family would be entitled to claim damages as -

(i) loss of society;

(ii) grief and sorrow at the deceased's death; and

(iii) where to their knowledge the deceased had undergone pain and suffering before death, distress and anxiety in contemplating his pain and suffering; or

(b) by introducing a tariff for -

(i) all non-patrimonial loss; or

(ii) any of elements (i)-(iii) under 2(a) above, and if so, which; or

(c) **by some other means, for example by setting a minimum payment for loss of society?**

Third option

4.33 So far we have presented our first and second options as if they were mutually exclusive. We have expressed a preference for the first option, in the form of making claims for solatium transmissible without conditions. We have also discussed several variants of the second option of enhancing the claims of the deceased's immediate family. While no one of these greatly attracts us, we regard the variants which involve tariffs as the least satisfactory. As a final possibility we should consider combining the second option with the first. That might have its attractions, particularly if consultees were to favour restricting the transmissibility of claims for solatium. It is also arguable, quite independently of any question of enhancement, that the present law regulating loss of society should be restated, if only for clarification. Consultees are therefore invited to consider whether they would support combining the first and second options, with or without qualifications; and if with qualifications, to specify what qualifications they would wish.

4.34 We invite views on the following question:

5. **Should the second option of enhancing the claims of the deceased's immediate family (in any of its variants) be combined with the first option of making claims for solatium transmissible (with or without conditions); and if so, with what qualifications?**

Ancillary issues

4.35 We turn now to consider certain important implications of adopting the first option, whether alone or as part of the third option. If it is thought that a claim for solatium in respect of personal injuries should survive for the benefit of the deceased claimant's estate, there are two ancillary issues which must be addressed. The first is relatively straightforward and concerns the loss of society award. The second is perhaps more difficult and concerns the general scope of any new transmissibility rule.

Should claims for loss of society be transmissible?

4.36 If we make a claim for solatium transmissible, we are rejecting the principle that a claim in respect of pain and suffering is inherently personal, so that only the victim can pursue it. This principle applies more widely. It underlies the rule that a qualifying relative's claim for loss of society does not transmit to executors.[1] Such a claim contains many of the elements which occur in a claim for solatium. Arguably, therefore, if a claim for solatium were to transmit, so also should a claim for loss of society.[2] We note, however, that in England and Wales the corresponding claim for bereavement does not transmit, although a

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[1]See para 2.8. In this respect contrast the rule which applies to the dependant's claim for patrimonial loss. The Royal Commission on Civil Liability and Compensation for Personal Injury accepts that a claim for loss of society should not transmit: see Pearson Report (1978), para 441, p 100.

[2]Under the pre-1976 law the same transmissibility rules applied to the injured person's claim for solatium and the relative's claim for solatium: see para 2.20.

claim for damages in respect of pain and suffering and loss of amenities does.[1]

4.37 We invite views on the following proposal:

> 6. **If it were provided that a claim for solatium in respect of personal injuries should survive for the benefit of a deceased claimant's estate, a claim for loss of society should likewise survive on the death of an entitled relative.**

4.38 When considering whether a claim for solatium should survive for the benefit of the deceased claimant's estate, we discussed the possibility of introducing conditions for transmissibility.[2] Corresponding questions arise as regards the transmissibility of claims for loss of society. We accordingly invite views on the following questions:

> 7 (a) **If it were provided that a claim for loss of society should transmit to the executor of an entitled relative on death, should there be any conditions for the transmissibility of the claim?**
>
> (b) **In particular should it be a condition that the entitled relative, while alive,**

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[1]Law Reform (Miscellaneous provisions) Act 1934, s 1, as amended by s 4 of the Administration of Justice Act 1982. The distinction appears to have originated in the Law Commission's report in 1973: see LC Report No 56, paras 172-180, pp 48-49 and contrast paras 101-102, 107, pp 27, 29. See also para 3.18.

[2]See paras 4.19-4.22.

had raised an action in respect of the claim?

(c) Alternatively, should it be a condition that the entitled relative, while alive, had intimated the claim to the alleged wrongdoer?

Should claims for defamation, etc be transmissible?

4.39 Turning to the second issue, we revert to the problem of defamation.[1] Throughout this discussion paper we have been primarily concerned with physical injuries (including disease) which have resulted or which could result in death. We have not specifically considered claims for injury to reputation. The most notable example here is probably defamation, and related forms of verbal injury.[2] But injury to reputation may be a component of other kinds of action, for example actions for damages for wrongful apprehension, or imprisonment, or for certain abuses of legal process.[3] In such forms of action we can distinguish two kinds of non-patrimonial claim:

(a) claims for solatium in respect of outrage to feelings; and

(b) claims for injury to reputation as such.

That there is this distinction can be brought out by considering the element of publicity which may or may

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[1]See para 4.6.

[2]See Walker, Chapter 23.

[3]See Walker, Chapter 20, sections 1-3, Chapter 24.

not be present. There can be no injury to reputation unless the act complained of is public in some sense. But an act may cause outrage to feelings whether or not it is public.

4.40 In referring to the categories of physical injuries, we described them as personal injuries.[1] That is the term used in the Damages (Scotland) Act 1976, where it is defined as including any disease or any impairment of a person's physical or mental condition.[2] As so used, it appears not to include injury to reputation. Certainly, in Part II of the Prescription and Limitation (Scotland) Act 1973, which contains an identical definition, actions for defamation and actions in respect of personal injuries are treated separately. The provision for defamation in the 1973 Act was introduced to implement the recommendation of the Faulks Committee.[3] And the Committee assumed that the term "personal injuries" as used in the 1973 Act did not include defamation. If this interpretation is correct, it would seem to follow that actions for defamation, and possibly other actions involving injury to reputation, are outwith the scope of the 1976 Act.[4] So, the pre-

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[1]Para 2.1.

[2]S 10(1).

[3]Faulks Report (1975), para 546, p 151. See Law Reform (Miscellaneous Provisions)(Scotland) Act 1985, s 12.

[4]But see *Barclay v Chief Constable, Northern Constabulary* 1986 SLT 562, 563 (an action for damages for wrongful arrest), where the Lord Ordinary said: "In my opinion personal injuries extend to injury to feelings such as is claimed in the present case. Even if they do not the pursuer has a very clear averment that his health suffered as a result of the upset. This is plainly a personal injury and is included in the

1976 rules would still apply to such actions, as far as transmissibility is concerned. In other words, claims for non-patrimonial loss in respect of defamation, for example, would transmit to an executor, provided the deceased had raised an action during his lifetime.[1] At least that would be so if the Faulks Committee's account of the pre-1976 law is correct.[2] Either way, we should make it clear whether or not the principle of transmissibility embodied in the first option should apply to all claims for solatium or other non-patrimonial loss, whatever the ground of action.

4.41 We invite views on the following proposal:

8. If it were provided that a claim for solatium in respect of personal injuries (in the restricted sense) should transmit to a deceased claimant's executor, the same principle should apply to all claims for solatium or other non-patrimonial loss, whatever the ground of action.

4.42 As before, the question arises whether there should be conditions for transmissibility.[3] We accordingly invite views on the following questions:

9 (a) If it were provided that a claim for solatium or other non-patrimonial loss in

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pursuer's claim for damages." See also Calcutt Report (1990), Chapter 7, pp 25-31, especially para 7.6, p 26.

[1]See paras 2.18, 2.19.

[2]See para 4.6.

[3]See paras 4.19-4.22, 4.38.

respect of other than personal injuries (in the restricted sense) should transmit to a deceased claimant's executor, should there be any conditions for the transmissibility of the claim?

(b) In particular, should it be a condition that the deceased, while alive, had raised an action in respect of the claim?

(c) Alternatively, should it be a condition that the deceased, while alive, had intimated the claim to the alleged wrongdoer?

In posing these questions, we note that the Faulks Committee recommended no alteration in the Scottish rules of transmissibility as regards claims in respect of defamation.[1] On their account of the law, this would mean that such a claim would survive only where the defamed person had commenced legal action before he died. In this respect the Committee recommended that the law in England and Wales should be brought into line with the law of Scotland, as they understood it.[2]

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[1]See para 4.6.

[2]Faulks Report (1975), para 423, p 116.

PART V

SUMMARY OF PROPOSALS AND QUESTIONS FOR CONSIDERATION

First option

1. Should a claim for solatium in respect of personal injuries[1] survive for the benefit of the deceased claimant's estate?

(Para 4.18)

2. If it were provided that a claim for solatium in respect of personal injuries should survive for the benefit of a deceased claimant's estate, and the dependant who inherits any part of the estate also receives compensation in his own right, that compensation should be paid without deduction in respect of the benefit derived from the deceased's claim.

(Para 4.18)

Conditions for transmissibility

3. (a) If it were provided that a claim for solatium in respect of personal injuries should transmit to a deceased claimant's executor, should there be any conditions for the transmissibility of the claim?

   (b) In particular, should it be a condition that the deceased, while alive, had raised an action in respect of the claim?

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[1]See paras 4.39-4.40.

(c) Alternatively, should it be a condition that the deceased, while alive, had intimated the claim to the alleged wrongdoer?

(Para 4.22)

Second option

4. (1) As an alternative to making claims for solatium transmissible, should the non-patrimonial claims of the deceased's immediate family be enhanced?

(2) If so, should this be done -

(a) by reformulating the heads of non-patrimonial loss under which members of the deceased's immediate family would be entitled to claim damages as -

(i) loss of society;

(ii) grief and sorrow at the deceased's death; and

(iii) where to their knowledge the deceased had undergone pain and suffering before death, distress and anxiety in contemplating his pain and suffering; or

(b) by introducing a tariff for -

(i) all non-patrimonial loss; or

(ii) any of elements (i)-(iii) under 2(a) above, and if so, which; or

(c) by some other means, for example by setting a minimum payment for loss of society?

(Para 4.32)

Third option

5. Should the second option of enhancing the claims of the deceased's immediate family (in any of its variants) be combined with the first option of making claims for solatium transmissible (with or without conditions); and if so, with what qualifications?

(Para 4.34)

Claims for loss of society: Transmissibility

6. If it were provided that a claim for solatium in respect of personal injuries should survive for the benefit of a deceased claimant's estate, a claim for loss of society should likewise survive on the death of an entitled relative.

(Para 4.37)

7. (a) If it were provided that a claim for loss of society should transmit to the executor of an entitled relative on death, should there be any conditions for the transmissibility of the claim?

(b) In particular should it be a condition that the entitled relative, while alive, had raised an action in respect of the claim?

(c) Alternatively, should it be a condition that the entitled relative, while alive, had

intimated the claim to the alleged wrongdoer?

(Para 4.38)

Other claims for non-patrimonial loss: Transmissibility

8. If it were provided that a claim for solatium in respect of personal injuries (in the restricted sense) should transmit to a deceased claimant's executor, the same principle should apply to all claims for solatium or other non-patrimonial loss, whatever the ground of action.

(Para 4.41)

9. (a) If it were provided that a claim for solatium or other non-patrimonial loss in respect of other than personal injuries (in the restricted sense) should transmit to a deceased claimant's executor, should there be any conditions for the transmissibility of the claim?

(b) In particular, should it be a condition that the deceased, while alive, had raised an action in respect of the claim?

(c) Alternatively, should it be a condition that the deceased, while alive, had intimated the claim to the alleged wrongdoer?

(Para 4.42)

Appendix

Claims (resolved) in respect of death 1985-89

Cause of death	Claims		Deaths after action raised but before proof		
	No.	%	No.	%	% of No. of claims
Road traffic accident	333	29.0	8	11.4	2.4
Work-related accident	615	53.5	2	2.9	0.3
Medical accident	39	3.4	7	10.0	17.9
Industrial disease	160	13.9	52	74.3	32.5
Other	2	0.2	1	1.4	50.0
Totals	1149*	100.0	70	100.0	6.1

* A further 25 claims were allocated to road traffic accident and medical accident without any more precise enumeration and another 28 were unallocated.

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