



Scottish Law Commission  
*promoting law reform*

| (SCOT LAW COM No 213)

# Report on Damages for Wrongful Death

report





**Scottish Law Commission**  
*promoting law reform*

# Report on Damages for Wrongful Death

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965  
Laid before the Scottish Parliament by the Scottish Ministers

**September 2008**

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The Honourable Lord Drummond Young, *Chairman*  
Professor George L Gretton  
Patrick Layden, QC TD  
Professor Joseph M Thomson  
Colin J Tyre, QC.

The Chief Executive of the Commission is Malcolm McMillan. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

Tel: 0131 668 2131  
Fax: 0131 662 4900  
Email: [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk)

Or via our website at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk) – select "Contact"

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



# SCOTTISH LAW COMMISSION

*Report on a reference under section 3(1)(e) of the Law Commissions Act 1965*

## **Report on Damages for Wrongful Death**

To: Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Damages for Wrongful Death

(Signed)

JAMES DRUMMOND YOUNG, *Chairman*

GEORGE GRETTON

PATRICK LAYDEN

JOSEPH M THOMSON

COLIN TYRE

Malcolm McMillan, *Chief Executive*  
1 September 2008



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# Part 1 Introduction

## Reference from Scottish Ministers

1.1 This Report is in response to a reference from Scottish Ministers<sup>1</sup> in September 2006 inviting us –

"To consider the law relating to damages recoverable in respect of deaths caused by personal injury and the damages recoverable by relatives of an injured person; and to make appropriate recommendations for reform."

## Background to the reference

1.2 Around the time we received the reference, the Bill which became the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 was introduced in the Scottish Parliament.<sup>2</sup> Before the 2007 Act came into force, the Damages (Scotland) Act 1976 provided that claims by the relatives of a person who died as a consequence of sustaining a personal injury were extinguished if the injured person had settled his claim before he died.<sup>3</sup> The effect of this provision was that people who suffered from mesothelioma<sup>4</sup> had to decide whether to seek compensation while they were alive or leave the claim to be pursued after their death by their relatives. As relatives could often stand to receive larger awards of damages, many mesothelioma sufferers did not pursue their own claims so as to enable their relatives to obtain more generous compensation after their death.

1.3 The 2007 Act partially disapplies section 1(2) of the 1976 Act<sup>5</sup> where a person dies of mesothelioma. As a result, the deceased's immediate family can claim damages for non-patrimonial loss even where the deceased had obtained an award of damages or settled his claim before he died. Mesothelioma victims no longer have to decide whether or not to pursue their own claims for damages while alive as they can do so without affecting the separate right of their immediate family to claim damages for non-patrimonial loss after their death.

1.4 At the time the Bill for the 2007 Act was introduced, it became apparent that the provisions of the 1976 Act would merit review and for that reason Scottish Ministers invited us to examine this area of Scots law.

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<sup>1</sup> Under section 3(1)(e) of the Law Commissions Act 1965.

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

<sup>3</sup> Damages (Scotland) Act 1976, s 1(2).

<sup>4</sup> Mesothelioma is a cancer of the cells which make up the lining around the outside of the lungs and inside of the ribs or around the abdominal cavity. It arises predominantly in people who have been exposed to asbestos and does not usually develop until 30-40 years after such exposure. There is no cure for the disease and sufferers survive on average 15 months following diagnosis.

<sup>5</sup> The amendment to section 1(2) only applies in relation to the deceased's immediate family's claims under section 1(4) of the 1976 Act in respect of non-patrimonial loss.

## **The Discussion Paper**

1.5 In our Discussion Paper on Damages for Wrongful Death,<sup>6</sup> we outlined the background to the current law. We then set out a range of issues for reform and invited comments on the questions we raised. In particular, we sought consultees' views on whether a victim's executor should have increased rights to sue for damages, with a corresponding reduction in the rights of the victim's relatives. We asked whether the exception introduced by the 2007 Act should be reworked so that it would be non disease-specific instead of being limited to mesothelioma cases. We were also keen to obtain consultees' views on whether a victim's relatives should continue to claim damages for non-patrimonial loss in terms of section 1(4) of the 1976 Act, or if a tariff system would be preferable.

1.6 We are grateful to those consultees who submitted responses to our Discussion Paper. They are listed in Appendix D.

## **Structure of the Report and outline of the recommendations**

1.7 In Part 2 we outline the current provisions of the Damages (Scotland) Act 1976 and the Administration of Justice Act 1982 relating to damages for personal injuries resulting in death. It is clear from the responses to our Discussion Paper that there is no demand from consultees for a fundamental reform of the current law. However, one of the problems with the legislation is its accessibility. The 1976 Act in particular has been amended on numerous occasions and the Act does not have a logical and coherent structure. Another difficulty is that some provisions, concerning the right to damages in respect of personal services rendered to and by the victim, are contained in the 1982 Act. In Part 3, we recommend that the 1976 Act should be re-enacted with amendments in order to modernise and simplify the provisions. The main policy change relates to the rights of relatives to damages for patrimonial loss and in particular the calculation of loss of the deceased's support. We recommend that a fixed percentage deduction of 25% should be made from the deceased's net income to represent the amount that the deceased might reasonably have spent on his personal living expenses: the remaining 75% should be deemed to have been used to support his family. We also recommend that the relatives who are entitled to claim patrimonial loss should be restricted to those relatives ("the immediate family") who can currently claim damages for non-patrimonial loss. We recommend no changes as regards the right of relatives of a deceased person to claim damages for non-patrimonial loss when the deceased died of mesothelioma. A list of our recommendations is set out in Part 4.

1.8 Appendix A to the Report includes a draft Damages (Scotland) Bill, which if implemented, would give effect to our recommendations. We set out in Appendix B some worked examples of the calculation of loss of support in connection with our recommendations in respect of relatives' rights to damages for patrimonial loss. For ease of reference, Appendix C includes the current provisions of the Damages (Scotland) Act 1976 and Part 2 of the Administration of Justice Act 1982.

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<sup>6</sup> (Scot Law Com No 135), published August 2007.

## **Advisory group**

1.9 We have been assisted throughout the project by an advisory group of practitioners and academics.<sup>7</sup> The members of the group have provided helpful comments and practical advice. We are very grateful to them for their contribution to the project and in particular for the help they have given us with some further issues which emerged from consultation on the Discussion Paper, which are outlined in Part 3.

## **Legislative competence**

1.10 The recommendations in this Report relate to the Scots law of damages which is not a subject which is reserved to the United Kingdom Parliament in terms of Schedule 5 to the Scotland Act 1998. They are therefore within the legislative competence of the Scottish Parliament.

1.11 Another aspect of legislative competence of the Scottish Parliament is that an Act of the Parliament must be compatible with the European Convention on Human Rights and with European Community law. We consider that our recommendations, if implemented, would not give rise to a breach of the Convention or of European Community law.

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<sup>7</sup> The members of the Advisory Group were: Professor Douglas Brodie, University of Edinburgh, Laura Dunlop QC, Roderick Dunlop, Advocate, Gilles Graham, Solicitor, Maria Maguire QC, Professor Harvey McGregor QC and Thomas Marshall, Solicitor.

# Part 2            Outline of the current law

## Introduction

2.1     In this Part we outline the current law relating to damages for wrongful death and examine who is entitled to make a claim for damages.

2.2     When a person suffers injury or disease as a result of the actions or omissions of another, Scots law recognises the wrong by allowing reparation to be claimed from the wrongdoer. Reparation takes the form of damages, intended to compensate the injured person for the loss, injury and damage he has sustained. Where the person dies as a result of the injury or disease, the right to claim damages passes to his executor.<sup>1</sup> The victim's relatives may also have a separate claim for the loss of support and grief and distress that they have suffered because of the death. Awards of damages are compensatory in nature, not punitive: the aim is to put the victim – or his family – in the position in which he would have been had he not been injured, so far as money can achieve this.

2.3     The Damages (Scotland) Act 1976 regulates awards of damages in cases of wrongful death. Part 2 of the Administration of Justice Act 1982 relates to damages for personal injuries more generally and should be read in conjunction with the 1976 Act.

## The victim's claim

2.4     Where a claim for damages for personal injury is made, it is the practice to divide it into various heads of damages to assist in quantifying the claim. While this aids the court, it must be remembered that the various heads of damages do not constitute discrete claims: there is a single claim which is regarded as falling into several parts for the purpose of quantification.<sup>2</sup> When assessing damages, the court will consider both the patrimonial and non-patrimonial loss which the victim has suffered. Patrimonial loss consists of economic loss as a result of the personal injuries. Non-patrimonial loss takes account of the emotional distress, pain and suffering which the victim has experienced. Damages for non-patrimonial loss are known as *solatium*. A victim may claim for loss suffered up to the date of proof and also for future loss.

### *The victim's right to claim for patrimonial loss*

2.5     The victim's claim for damages for patrimonial losses up to the date of proof may include compensation for loss of earnings, the cost of reasonable medical expenses, the cost of necessary services rendered to the victim by a relative<sup>3</sup> and the costs arising from the victim's inability to render gratuitous services to his family.<sup>4</sup> As these losses will already have occurred they can be precisely quantified.

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<sup>1</sup> Damages (Scotland) Act 1976, s 2(1).

<sup>2</sup> *Irving v Hiddleston* 1998 SC 759.

<sup>3</sup> Administration of Justice Act 1982, s 8. See para 2.8 below.

<sup>4</sup> Administration of Justice Act 1982, s 9. See para 2.9 below.

2.6 At proof, the court will look forward and assess the amount of economic loss likely to be suffered in the future. This may include loss of future earnings, the cost of future maintenance, nursing and medical care, the cost of future necessary services rendered to the victim by a relative<sup>5</sup> and costs arising from the victim's inability to render gratuitous services to his family.<sup>6</sup> The projection that the court will make as to future patrimonial loss is a question of fact in each case, although conventions have developed to assist quantification. Of these, the method used to calculate the victim's loss of future earnings is the most important. First the court determines the victim's net annual earnings at the date of proof.<sup>7</sup> This figure is the multiplicand. A multiplier is then found by reference to the Ogden Tables,<sup>8</sup> which provide actuarial data for this purpose.<sup>9</sup> The product of the multiplier and multiplicand provides a lump sum which is intended to provide a fund in lieu of the victim's income until his death. At that point, both the capital sum awarded and the income from having invested it should be exhausted.

2.7 Section 9(2)(a) of the 1976 Act provides that, when quantifying future loss, the court will assume that the victim will live until the date when he would have been expected to die if he had not suffered the injuries. This date is known as the "notional date of death". This provision allows the victim to recover damages for the "lost period", which is the period between his expected date of death and his notional date of death. In assessing patrimonial loss during the lost period, the court may also have regard to income received from other sources<sup>10</sup> and it will make a deduction for the victim's reasonable living expenses.<sup>11</sup>

#### *The victim's right to claim for personal services under the Administration of Justice Act 1982*

2.8 Where a victim of personal injuries requires assistance from a relative in consequence of those injuries, he may sue for a sum representing reasonable remuneration for the necessary services which have been provided by that relative, together with any related expenses which were reasonably incurred.<sup>12</sup> The victim is obliged to account to the relative for any damages recovered under this provision.<sup>13</sup> The victim may also claim in respect of necessary services which will be rendered after the date of decree.<sup>14</sup> It is thought that damages for necessary services may only be recovered up to the victim's expected date of death and not to his notional date of death, as services cannot be rendered during the lost period.<sup>15</sup>

2.9 Where a victim of personal injuries provided personal services gratuitously to a relative and he is no longer able to do so as a result of those injuries, he may claim damages

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<sup>5</sup> Administration of Justice Act 1982, s 8.

<sup>6</sup> Administration of Justice Act 1982, s 9.

<sup>7</sup> This may be adjusted to take account of the victim's probable promotion or early retirement. The court may decide that it requires to use different multiplicands to reflect different stages in the remainder of the victim's life. The court will not, however, attempt to speculate on future rates of taxation or National Insurance contributions.

<sup>8</sup> Actuarial Tables for Use in Personal Injury and Fatal Accident Cases ("The Ogden Tables"). The 6<sup>th</sup> edition of the Tables provides detailed guidance on how the courts should assess awards of damages. The Tables and explanatory notes are published by the Government Actuary's Department and are available online at [http://www.gad.gov.uk/Documents/Ogden\\_Tables\\_6th\\_edition.pdf](http://www.gad.gov.uk/Documents/Ogden_Tables_6th_edition.pdf).

<sup>9</sup> The Ogden Tables are now the starting point in selecting a multiplier: *Wells v Wells* [1999] 1 AC 345; *McNulty v Marshalls Food Group Ltd* 1999 SC 195.

<sup>10</sup> Damages (Scotland) Act 1976, s 9(2)(b).

<sup>11</sup> Damages (Scotland) Act 1976, s 9(2)(c).

<sup>12</sup> Administration of Justice Act 1982, s 8(1).

<sup>13</sup> Administration of Justice Act 1982, s 8(2).

<sup>14</sup> Administration of Justice Act 1982, s 8(3).

<sup>15</sup> Discussion Paper para. 3.17.

in terms of section 9 of the 1982 Act.<sup>16</sup> This applies to services which the relative would otherwise ordinarily have to pay for.<sup>17</sup> The damages are intended to stand as payment for the provision of these services to the relative by someone other than the victim. Again, a claim under this section is based on the victim's expected date of actual death, meaning that there is no compensation for inability to provide personal services during the lost period.

### *The victim's right to claim for non-patrimonial loss*

2.10 Where a victim has sustained personal injuries, he may claim damages for the pain and suffering which he endures as a result of those injuries. This head of damages is known as *solatium*. In addition to damages for pain and suffering, the victim may include a claim for the distress and anxiety suffered due to the knowledge that his life expectancy has been reduced by the injuries.<sup>18</sup> The victim must, however, be aware, or be likely to become aware, of his shortened life expectancy in order to obtain damages.<sup>19</sup> For instance, a victim of a car crash who is left comatose and who subsequently dies without regaining consciousness has no claim for loss of expectation of life as he was not actually aware of his shortened life expectancy. On the other hand, a victim who is left paralysed but is aware of his impending death would receive damages to compensate for his distress and anxiety at knowing that his life expectancy was shortened. More generally, a victim must in fact experience pain and suffering before a claim for *solatium* can be made.<sup>20</sup>

2.11 In assessing non-patrimonial loss, a distinction is made between pain and suffering already experienced and pain and suffering which is likely to be experienced in the future. The reason for this distinction is that past loss can be quantified at proof whereas future loss involves a degree of speculation. The distinction is also important in that interest is awarded on *solatium* for pain and suffering in the past, but not for future pain and suffering.<sup>21</sup>

### **The executor's rights**

2.12 Where a victim dies as a consequence of his personal injuries, he may not have survived long enough to have been awarded damages or even to have raised a claim. In these cases, section 2 of the 1976 Act provides that the victim's right to claim damages in respect of his injuries transmits to his executor. The executor can continue an action raised by the victim,<sup>22</sup> or he can initiate an action on behalf of the victim's estate.<sup>23</sup> In either case the executor may claim for both patrimonial and non-patrimonial loss, but as we shall see,<sup>24</sup> this right is limited. An award of damages to the executor forms part of the victim's estate, which then falls to be distributed according to the law of succession. It is common for

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<sup>16</sup> Administration of Justice Act 1982, s 9(1) and (3).

<sup>17</sup> Administration of Justice Act 1982, s 9(3)(b). The definition of 'personal services' has been interpreted widely by the courts: see *Ingham v Russell (Transport) Ltd* 1991 SC 201.

<sup>18</sup> Damages (Scotland) Act 1976, s 9A.

<sup>19</sup> Damages (Scotland) Act 1976, s 9A(1)(b).

<sup>20</sup> However, in *Sellar's Curator Bonis v Glasgow Victoria and Leverndale Hospitals* 1973 SLT (Notes) 3 (where the victim was in a state of spastic quadriplegia and had no appreciation of her condition) the court awarded an award for *solatium* equivalent to an award made in a similar case where the victim had a full appreciation of his condition, Lord Leechman stating "I find little to choose between them". In *Steward v Greater Glasgow Health Board* 1976 SLT (Notes) 66, Lord Keith considered that the issue in regard to *solatium* was not one of subjective pain and suffering but objective loss of amenities, although he then went on to consider that as the victim had no appreciation of her cosmetic defect no damages were awarded for *solatium* on the basis of it.

<sup>21</sup> *Smith v Middleton* 1972 SC 30.

<sup>22</sup> Damages (Scotland) Act 1976, s 2A(1)(a).

<sup>23</sup> Damages (Scotland) Act 1976, s 2A(1)(b).

<sup>24</sup> See paras. 2.14 and 2.17 below.

damages obtained in this way to be distributed to the victim's relatives in the course of the distribution of his estate.

2.13 Section 4 of the 1976 Act provides that a claim by an executor is not affected by the existence of a claim by a relative and vice versa. As we see below, the deceased's relatives may also have title to sue for damages.<sup>25</sup> Whereas a living victim has the right to sue for both past and future loss, on his death title to sue is divided between his executor and his relatives. This is done to prevent double compensation. Section 4 ensures that the two actions arising from the same set of facts will not act to bar each other from proceeding.

#### *The executor's rights to claim for patrimonial loss*

2.14 An executor is entitled to claim on behalf of the victim's estate for the patrimonial loss sustained by the victim up to the date of his death. Unlike the victim, the executor cannot sue for future losses such as loss of earnings.<sup>26</sup> This is intended to prevent double compensation, as the deceased's relatives may make a separate claim for loss of support.

2.15 The right to claim damages for necessary services rendered by a relative to the victim before his death<sup>27</sup> also transmits to the victim's executor.<sup>28</sup> Where a victim was unable to provide a relative with personal services during the period after his injury and before his death, the victim's right to claim damages for that period transmits to his executor.

#### *The executor's rights to claim for non-patrimonial loss*

2.16 The victim's executor may claim *solatium* for the pain and suffering that the victim endured up to the date of his death.<sup>29</sup> In assessing the executor's claim the court may have regard to the extent to which the victim suffered as a consequence of being aware that his life was going to end prematurely.<sup>30</sup>

2.17 Where a victim is killed instantaneously, the executor has no right to claim *solatium* as the victim would not have endured pain and suffering and would not have been aware that his expectation of life had been reduced by the injuries.<sup>31</sup> In cases of instantaneous death no patrimonial loss is sustained between the date of injury and the date of death. Accordingly, the executor will have no claim for damages. The victim's relatives will be the only people with title to sue. If the victim has no eligible relatives, it follows that no damages are payable in respect of his death.

### **The relatives' rights**

2.18 The victim's relatives have title to sue for damages in respect of the patrimonial and non-patrimonial loss which they sustain in consequence of the victim's death from personal injuries. This compensates them for their loss and it is not a transmission of the victim's

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<sup>25</sup> Paras 2.18 – 2.27.

<sup>26</sup> Damages (Scotland) Act 1976, s 2(2).

<sup>27</sup> Administration of Justice Act, s 8.

<sup>28</sup> Damages (Scotland) Act 1976, s 2(1).

<sup>29</sup> Damages (Scotland) Act 1976, s 2(3).

<sup>30</sup> Damages (Scotland) Act 1976, ss 9 and 9A.

<sup>31</sup> The courts have refused to accept that an award of *solatium* can be made in respect the deceased's fear of impending death in a fatal accident when he did not suffer personal injuries before he was killed: *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER 65.

rights to them. However, the relatives' rights are dependent in the sense that they are only enforceable if the responsible person would have been liable to pay damages to the victim had he lived.<sup>32</sup> Consequently, the general rule is that if before his death a victim excludes or discharges the responsible person's liability to pay damages, the relatives' rights will also be discharged.<sup>33</sup> Similarly, if the victim's claim is time-barred because it was not commenced within the triennium,<sup>34</sup> the relatives' claims will also be time-barred.

### *The relatives' rights to claim for patrimonial loss*

2.19 The victim's relatives have a right to claim damages for patrimonial loss arising from the loss of his financial support.<sup>35</sup> In order to make a claim for loss of support, it must be shown that, prior to his death, the victim was providing financial assistance to the relative.<sup>36</sup> This means that if, for example, the victim was a baby or young child, the parents' claims are restricted to an award for non-patrimonial loss as they were not being financially supported by the victim. Where the victim is a parent, his adult children are unable to sue for patrimonial loss unless the victim was still supporting them financially.

2.20 In calculating loss of support, it is generally for the relative to prove the actual loss sustained. However, where the pursuer is the deceased's spouse, civil partner or cohabitant, or his dependent children, the loss is calculated in accordance with a formula laid down by Lord Sutherland in *Brown v Ferguson*.<sup>37</sup> In either case, the Ogden Tables are then used to find an appropriate multiplier.<sup>38</sup> In addition to loss of support, the victim's relatives may also claim for the "reasonable funeral expenses" which they incur.<sup>39</sup>

2.21 For the purposes of determining who is entitled to claim patrimonial loss, the 1976 Act defines 'relative' widely.<sup>40</sup> A detailed list is provided in Schedule 1 to the 1976 Act.<sup>41</sup> Relatives by marriage are included,<sup>42</sup> as are former spouses and civil partners.<sup>43</sup> Relationships by affinity now also arise through civil partnership as well as through marriage.<sup>44</sup> However, as actual loss of support must be proved by all relatives except the deceased's spouse, civil partner or cohabitant and dependent children, the relatives who have title to sue will be limited to those who were in fact financially dependent on the deceased.

### *The relatives' rights to claim for personal services*

2.22 As noted above, a victim of personal injuries may claim compensation in respect of his inability to provide personal services to his relatives.<sup>45</sup> Where a victim dies as a result of

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<sup>32</sup> Damages (Scotland) Act 1976, s1(1).

<sup>33</sup> Damages (Scotland) Act 1976, s 1(2). ss. 1(2A) and (2B) provide an exception for mesothelioma sufferers. See paras 2.24 and 2.25 below.

<sup>34</sup> Prescription and Limitation (Scotland) Act 1973, s 17.

<sup>35</sup> Damages (Scotland) Act 1976, s 1(3).

<sup>36</sup> Title to sue is not restricted to those relatives to whom the victim owed an obligation of aliment: Damages (Scotland) Act 1976, s 1(6).

<sup>37</sup> 1990 SLT 274. For a fuller discussion of this rule, see paras. 3.39 – 3.44 below.

<sup>38</sup> *McNulty v Marshalls Food Group Ltd* 1999 SC 195.

<sup>39</sup> Damages (Scotland) Act 1976, s 1(3).

<sup>40</sup> Damages (Scotland) Act 1976, s 10(1) and Sch 1.

<sup>41</sup> See Appendix C.

<sup>42</sup> Damages (Scotland) Act 1976, Sch 1 para 2(a).

<sup>43</sup> Damages (Scotland) Act 1976, Sch 1 para 1(f) and (g).

<sup>44</sup> Civil Partnership Act 2004, ss 246 and 247 and Sch 21 (as amended by SSI 2005/568).

<sup>45</sup> Administration of Justice Act 1982, s 9(1).

these injuries, his relatives may include a claim for personal services as an additional head of damage under section 1(3) of the 1976 Act.<sup>46</sup> The claim is then determined in accordance with section 9 of the 1976 Act, allowing compensation for lost personal services up to the victim's notional date of death.<sup>47</sup>

### *The relatives' rights to claim for non-patrimonial loss*

2.23 The victim's relatives also have a right to sue for non-patrimonial loss suffered by them as a result of the victim's death. However, this only extends to relatives who are members of the deceased's 'immediate family'.<sup>48</sup> Section 10(2) of the 1976 Act defines the deceased's immediate family as including those relatives falling within paragraph 1(a) to (cc) of Schedule 1, namely (i) the deceased's spouse or civil partner; (ii) the deceased's opposite sex or same sex cohabitant; (iii) the deceased's parents or children; (iv) any person who was accepted by the deceased as a child of the family; (v) any person who accepted the deceased as a child of the family; (vi) any person who was the brother or sister of the deceased or was brought up in the same household as the deceased and was accepted as a child of the family in which the deceased was a child; (vii) any person who was a grandparent or grandchild of the deceased. Those who are related only by affinity are excluded.<sup>49</sup> The group of relatives who are entitled to claim non-patrimonial loss is therefore smaller than the group of relatives who can claim patrimonial loss.

2.24 An award of damages for non-patrimonial loss is currently known as a 'section 1(4) award' rather than *solatium*. It is intended to compensate the deceased's relatives for:

"(a) distress and anxiety endured by the relative in contemplation of the suffering of the deceased before his death;

(b) grief and sorrow of the relative caused by the deceased's death;

(c) the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died."<sup>50</sup>

2.25 In making a section 1(4) award, the court is not required to allocate damages to one or other of the above elements, although it may do so if it thinks fit. The award may encompass past and future loss. However, it is not necessarily the case that an older person will get a smaller award for future loss on the death of his or her spouse than a younger person, as the court may consider there to be enhanced grief from bereavement after a longer married life.<sup>51</sup> This illustrates the need to take into account all the facts and circumstances of the case when making a section 1(4) award.

### *Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007*

2.26 Section 1(2) of the 1976 Act precludes a claim by a relative where the victim settled his claim or was awarded damages prior to his death. This was considered to be particularly harsh in cases where the victim died from mesothelioma. Where persons are diagnosed

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<sup>46</sup> Administration of Justice Act 1982, s 9(2).

<sup>47</sup> Damages (Scotland) Act 1976, s 9(2)(a).

<sup>48</sup> Damages (Scotland) Act 1976, s 1(4).

<sup>49</sup> Damages (Scotland) Act 1976, s 1(4A) and (4B).

<sup>50</sup> Damages (Scotland) Act 1976, s 1(4).

<sup>51</sup> *Davidson v Upper Clyde Shipbuilders Ltd* 1990 SLT 329.

with mesothelioma their life expectancy is approximately 15 months. Before the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 was introduced, mesothelioma sufferers faced a difficult choice between pursuing their claims for damages while alive, or refraining to do so in order to allow their relatives to claim a higher award after their death.

2.27 In order to address this issue, the 2007 Act amended the 1976 Act by disapplying section 1(2) of the 1976 Act in relation to damages for non-patrimonial loss where the victim's personal injury is mesothelioma.<sup>52</sup> As a result, the victim's immediate family may also claim damages for distress, grief and loss of society under section 1(4) of the 1976 Act after the victim's death, even if the victim has already settled his claim.<sup>53</sup>

#### *Transmission of the relatives' rights to claim damages*

2.28 If a relative of the victim dies before obtaining an award of damages then that relative's claim will transmit to his executor under section 1A of the 1976 Act.<sup>54</sup> This includes damages for both patrimonial and non-patrimonial loss. However, in assessing the amount of damages to be awarded to the relative's estate, the court will have regard only to the period up to the date of the relative's death.

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<sup>52</sup> A relative's claim for patrimonial loss under section 1(3) of the 1976 Act will, however, continue to be barred by section 1(2).

<sup>53</sup> The victim and the relatives will be able to sue in one action, the relatives' claims being sisted until after the victim dies: see *Dow v West of Scotland Shipbreaking Co Ltd and Another* [2007] CSOH 71, unreported. See Rules of the Court of Session Rule 43.20.

<sup>54</sup> Inserted by the Damages (Scotland) Act 1993, s 3.

## Part 3            Recommendations for reform

### Introduction

3.1     Our Discussion Paper canvassed a wide range of options for the reform of the law of delict in respect of damages for wrongful death. After consultation, it has become clear that there is general satisfaction with the existing law and that there is little support for radical reform. However, as we shall see,<sup>1</sup> there are some areas where the current law no longer reflects the realities, in particular the economic realities, of contemporary family structures in Scotland. Here the law has become anachronistic and the majority of respondents agreed that reform of these areas was desirable. Moreover, it was also accepted that the Damages (Scotland) Act 1976 has become over-complex and, indeed, contains inaccuracies as a consequence of the numerous amendments made to it. Accordingly, our major recommendation is that the 1976 Act should be repealed and replaced by new legislation which will restate the current law with greater clarity and accuracy.

### The victim's rights

*Where the victim obtains a settlement or is awarded a decree of damages before he dies*

3.2     As we have seen in Part 2, the victim is entitled to damages, or *solatium*, for the pain and suffering arising from his physical injuries. Where the injuries have reduced the victim's expectation of life, and he "is, was at any time or is likely to become, aware of that reduction"<sup>2</sup> then in addition damages can be awarded by way of *solatium* for the distress to him caused by that knowledge.<sup>3</sup> If the victim does not know or is unlikely to become aware that he will die prematurely as a result of his injuries, no damages by way of *solatium* are recoverable for loss of expectation of life.<sup>4</sup> In the Discussion Paper<sup>5</sup> we took the view that this rule was consistent with principle and the majority of respondents agreed. Accordingly we recommend that:

- 1.     A victim should continue to receive damages for loss of expectation of life as part of an award of *solatium* only if he is, or was at any time, aware, or is likely to become aware that his life will end prematurely.**

(Draft Bill, section 1(1), (2) and (3))

3.3     Where the victim's injuries are going to be fatal, section 9(2)(a) of the 1976 Act provides that, in assessing the amount of future patrimonial loss, the court has to assume that the victim will live to the date when he would have been expected to die if he had not sustained the injuries - the notional date of death - rather than the date when, having regard to his state of health at the time of the action, he is in fact expected to die - the expected

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<sup>1</sup> See below paras 3.32-3.44; 3.52-3.57.

<sup>2</sup> Damages (Scotland) Act 1976, s 9A(1)(b).

<sup>3</sup> Damages (Scotland) Act 1976, s 9A(1).

<sup>4</sup> Damages (Scotland) Act 1976, s 9A(2).

<sup>5</sup> Discussion Paper paras 3.8-3.9.

date of actual death. In other words, in determining an appropriate multiplier the court is ordained to proceed on the basis that the victim will live until the notional date of death and no allowance is to be made for the contingency that he will in fact die sooner. Consequently, in a fatal injury case the victim recovers damages for future patrimonial loss not only for the period between the date of the action and the expected date of actual death, but also for the period between the expected date of actual death and the notional date of death. This latter period is commonly called the 'lost period'.

3.4 In the Discussion Paper<sup>6</sup> we considered that a person who has suffered personal injuries which are likely to result in death should be able to recover damages for the financial losses sustained by dying prematurely: consequently he should be able to recover for patrimonial loss not only up to the date when it is expected that he will actually die but also for the lost period. Respondents were unanimous that victims should continue to be able to do so. Many considered that this followed inevitably from the fundamental principle of the law of delict which is, insofar as money can do so, to restore the victim to the position in which he would have been if the wrong had not taken place. Further, the Association of Personal Injury Lawyers pointed out that while the victim does not directly sustain loss during the lost period, his financial dependents are indirectly affected. By being able to recover damages for patrimonial loss during the lost period, the victim can use the money to make financial provision for his family while he is still alive thereby securing peace of mind. Consequently we recommend that:

**2. A victim should continue to be able to claim damages for any patrimonial loss sustained between –**

**(i) the date of decree and the date when he is expected to die; and**

**(ii) the date when the victim is expected to die and the notional date of death, ie the lost period.**

(Draft Bill, section 1(5))

3.5 In assessing the victim's financial loss during the lost period, section 9(2)(b) of the 1976 Act provides that in addition to the victim's earnings the court may have regard to any amounts the victim would have received "by way of benefits in money or money's worth, being benefits derived from sources other than the pursuer's own estate". These include social security benefits and pensions. There was unanimous agreement among our consultees that such benefits should continue to be taken into account in assessing damages as they amount to losses which would not have been sustained if the victim had not died prematurely. In these circumstances we take the view that section 9(2)(b) should be re-enacted. Therefore we recommend that:

**3. For the purposes of the lost period patrimonial loss should continue to include the victim's earnings and any benefits in money or money's worth derived from sources other than the victim's own estate.**

(Draft Bill, section 1(6)(a) and (b))

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<sup>6</sup> Para 3.15.

3.6 When the victim's income during the lost period has been calculated, section 9(2)(c) of the 1976 Act provides that a deduction must then be made to account for the living expenses which in the opinion of the court the victim would have reasonably incurred during that period. In its 1973 Report<sup>7</sup> this Commission explained the reason for doing so:

"...failure to deduct an appropriate sum for living expenses would lead to unrealistic awards, particularly to children and young persons, who would be compensated for losses which, in part at least, they did not suffer. A person cannot maintain his earnings without expenditure upon food, clothing and shelter, expenses which cease on death."

3.7 In the Discussion Paper<sup>8</sup> we took the view that this point still has force. Damages for patrimonial loss during the lost period are intended to be compensatory only. A deduction has to be made for the victim's reasonable expenses as they would have been incurred by the victim during that period if he was not going to die prematurely: failure to do so would result in over-compensation.

3.8 All our respondents agreed that as a matter of principle a deduction for the victim's reasonable living expenses should continue to be made. One of our consultees, Thompsons Solicitors, raised the question of how the living expenses which the victim would have reasonably incurred during the lost period should be determined. There are no Scottish decisions on the point. In the English case of *Harris v Empress Motors Ltd*<sup>9</sup> the Court of Appeal considered that the victim's living expenses were the proportion of his net earnings which he would have spent to maintain himself at his standard of living. Living expenses did not include savings or sums spent exclusively for the maintenance of others but where there were shared living expenses, for example with his spouse or civil partner, a pro rata deduction should be made. It would follow from this approach that the more extravagant the victim, the greater the deduction for living expenses should be. Yet all the victim's voluntary expenditure cannot be taken into account as ultimately he is being compensated for loss of earnings, not loss of savings or investments. Moreover, deductions are only to be made for living expenses which the victim would have *reasonably* incurred: this means that the courts have to apply some objective standard.

3.9 However, the absence of any reported Scottish cases suggests that these difficulties may be more theoretical than real. We have been informed that in practice in settlement negotiations the victim's reasonable living expenses are agreed without too much difficulty. Nevertheless the assessment of a victim's actual living expenses could involve complex evidential issues and determining what constitutes reasonable expenses ultimately involves a value judgment: the scope for litigation therefore remains. In these circumstances we think that there should be a simple rule providing for a deduction for the victim's living expenses which falls within a band which would be considered reasonable. For the reasons we discuss in more detail below,<sup>10</sup> we consider that it is reasonable that a person should be taken to have spent 25% of his net annual income on his own living expenses. Accordingly we recommend that:

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<sup>7</sup> Report on *The Law Relating to Damages for Injuries Causing Death* (Scot Law Com No 31, 1973) at para 16.

<sup>8</sup> Para 3.13.

<sup>9</sup> [1984] 1 WLR 212.

<sup>10</sup> Paras 3.32 ff.

- 4. For the purposes of the lost period a deduction should continue to be made for the victim's reasonable living expenses: these should be taken to be 25% of the victim's net income during that period.**

(Draft Bill, section 1(6)(c))

3.10 In the Discussion Paper,<sup>11</sup> we pointed out that, read literally, section 9(2)(b) and (c) of the 1976 Act, which relate to the victim's income from third parties and deductions for reasonable living expenses, apply to any period after the date of decree and are not restricted to the lost period. This is clearly an error as the provisions make no sense while the victim is still in fact alive. During the period between the date of decree and the expected date of actual death, the victim will still be in receipt of the income from the third party and will require the damages to pay for his living expenses. The draft Bill makes clear that its equivalent provisions only apply in relation to the lost period.

3.11 Section 9 of the 1976 Act does not expressly apply to the victim's claims under sections 8 and 9 of the Administration of Justice Act 1982. In the Discussion Paper,<sup>12</sup> we argued that a section 8 claim in respect of future necessary services rendered by a relative to the victim should not extend to the lost period when the victim will probably be dead. Consultees agreed with our arguments. However, there is no reason why a claim under section 9 of the 1982 Act in respect of the victim's inability to render personal services to a relative should not include the lost period: if he had not been injured the victim would have been able to provide personal services gratuitously to his family until the notional date of death. A large majority of our respondents agreed. Therefore we recommend that:

- 5. (a) A claim under section 8 of the Administration of Justice Act 1982 should continue to exclude the lost period.**
- (b) A claim under section 9(1) of the Administration of Justice Act 1982 should include damages in respect of the victim's inability to provide gratuitous personal services to his relatives during the lost period.**

(Draft Bill, section 13(a))

*Where the victim instigates proceedings but dies from the personal injuries before he has obtained a settlement or been awarded a decree of damages*

3.12 Under the current law, when a person dies as a result of personal injuries, his right to sue transmits to his executor.<sup>13</sup> The executor has the right to raise the action if the deceased had not done so before his death or, if the deceased raised an action before he died, the executor can continue the action on behalf of the deceased's estate.<sup>14</sup>

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<sup>11</sup> Para 3.11.

<sup>12</sup> Para 3.17.

<sup>13</sup> Damages (Scotland) Act 1976, s 2(1).

<sup>14</sup> Damages (Scotland) Act 1976, s 2A(1)(a) and (b).

3.13 This rule is subject to two limitations. First, while the victim's right to damages by way of *solatium* transmits to the executor, in assessing damages the court can only have regard to the deceased's pain and suffering up until the date of his death.<sup>15</sup> In the Discussion Paper,<sup>16</sup> we took the view that this rule was unexceptionable: on the assumption that the victim's pain ends when he dies, *solatium* for future suffering is intellectually incoherent. We therefore saw no need to change the rule.

3.14 Secondly, the deceased's right to damages under section 9 of the 1976 Act for patrimonial loss sustained until the notional date of death ie during the lost period, does not transmit to the executor. Put another way, the executor is only entitled to sue for the patrimonial loss sustained by the victim up until the date of death. Where, of course, the deceased has dependent relatives, they will have title to sue for loss of the victim's support.<sup>17</sup> But where the deceased had no dependent relatives, for example where the victim is a child, the executor still has no title to sue for future patrimonial loss with the result that the amount of recoverable damages is small. In the Discussion Paper we questioned this rule.<sup>18</sup> We asked why in all cases the executor should not simply step into the deceased's shoes and be able - like the deceased if he were alive - to sue for future patrimonial loss in respect of the lost period. If that were so, the damages would form part of the deceased's estate to be distributed according to his will or the rules of intestate succession and the victim's relatives would lose their title to sue for loss of the deceased's support.

3.15 On consultation, there was little support for such a radical change. At a theoretical level it was argued that while the deceased was clearly a victim of a wrong and had suffered harm, nevertheless he had not sustained any patrimonial loss after his death.<sup>19</sup> To allow the executor to sue for the deceased's future patrimonial loss would be to introduce an element of exemplary ie punitive damages into Scots law. Moreover, if damages could be recovered for patrimonial loss during the lost period, they would, of course, form part of the deceased's estate. Concern was expressed that under his will or the rules of intestate succession the victim's damages might be distributed to persons whom the deceased had not supported during his lifetime, while leaving relatives whom he had been supporting financially, for example the deceased's surviving cohabitant, without any redress. The only way to ensure that such cases of over or under-compensation could be avoided was to continue to allow relatives whom the deceased had in fact been supporting to sue for future patrimonial loss.

3.16 In addition, Susan O'Brien QC cogently argued that there were at least five serious practical difficulties with the suggestion. First, at present it is open for some relatives to settle their claims while others proceed to litigation with all its attendant risks. This would not be possible if only the deceased's executor had title to sue. The executor's duty is to ingather and distribute the deceased's estate as a whole. He will proceed with prudence and caution before embarking on litigation. This raises the prospect of executors being prepared to accept lower settlements than individual relatives might have obtained.

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<sup>15</sup> Damages (Scotland) Act 1976, s 2(3).

<sup>16</sup> Para 3.19.

<sup>17</sup> Discussed below paras 3.27 ff.

<sup>18</sup> Paras 3.20-24.

<sup>19</sup> By allowing the victim to recover damages for patrimonial loss in respect of the lost period when it is most likely that he will in fact be dead, it can be argued that it is section 9 of the Damages (Scotland) Act 1976 which amounts to a departure from principle. But this departure can then be defended on the grounds of expediency in that section 9 ensures that the victim's patrimony is in fact sufficient to support any dependent relatives after his death: see above para 3.3.

Secondly, there is consequently scope for increased conflicts of interest between the executor and the deceased's heirs or legatees. Where the deceased died intestate this could lead to family disputes about whether or not to settle between, for example, the deceased's surviving spouse or civil partner acting as executor dative and the deceased's children. Thirdly, the distribution of the estate could be delayed for a long time, particularly if there was an appeal: this would adversely affect the rights of beneficiaries who had no interest in the litigation. Fourthly, the expenses of an executry would rise if the executor had to run the litigation and it is questionable whether an executor could fund the case on a speculative basis. Finally, since the damages would form part of the deceased's estate, they would be subject to inheritance tax unless the tax legislation was altered.

3.17 We consider that there remains merit in the contention that the deceased's executor should be able to sue for the patrimonial loss which the deceased would have sustained during the lost period. The principle is simple and logical and would give the law an underlying coherence which it currently lacks. It would also remove the anomaly that where the victim dies instantaneously and has no dependent relatives, the defender's liability is merely to compensate the deceased's relatives, if any, who have experienced grief and suffering as a consequence of the death. If there are no relatives, the defender is not liable to pay any damages at all in respect of the wrongful death. Nevertheless we are persuaded that such a principle should not be introduced into Scots law. First, there is the danger that relatives whom the deceased had in fact been supporting may not be the deceased's beneficiaries or heirs on intestacy. This is particularly important where - as is increasingly the case - the deceased has been supporting a cohabitant. Under the current law, a cohabitant has no succession rights (though she could apply under section 29 of the Family Law (Scotland) Act 2006 for financial provision out of the deceased's estate if he died intestate<sup>20</sup>). Secondly, the practical difficulties outlined above, especially the potential conflicts of interest between the deceased's executor and the deceased's beneficiaries and heirs on intestacy, suggest that the deceased's dependent relatives should continue to have title to sue for loss of support in their own right. This would be independent of the deceased's executor's title to sue. In these circumstances the deceased's executor's title to sue for patrimonial loss has to be restricted to the loss sustained by the deceased up to the date of death if double compensation is to be avoided. Among our respondents, a large majority was prepared to accept that as a consequence a defender would not be liable to make reparation in the exceptional case where death was instantaneous and the deceased was not survived by any relatives who had title to sue. Therefore we recommend that:

- 6. (a) The executor's right to sue for patrimonial loss should continue to be restricted to the loss sustained by the deceased up until the date of death.**

(Draft Bill, section 2(1) and (2))

- (b) The deceased's dependent relatives should continue to have a right to sue for loss of the deceased's support.**

(Draft Bill section 3, 4(1) and (2)(a))

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<sup>20</sup> The difficulty with the claim under section 29 is that the amount the cohabitant receives is entirely a matter for the discretion of the court. An applicant cannot be awarded more than she would have inherited if she had been married to the deceased or had been the deceased's civil partner: see section 29(4).

## Relatives' rights

### *The relatives' right to damages - a dependent claim*

3.18 As outlined in Part 2, under the current law, a relative has title to sue if (i) the deceased has died from personal injuries and (ii) in respect of the personal injuries the defender would have been liable to pay damages to the deceased if he had lived.<sup>21</sup> A relative's title to sue is *dependent* on the defender being liable to pay damages to the deceased if he had brought an action before he died: the relative's claim will fail if the deceased's action against the defender would not have succeeded. Accordingly, the relative's claim will fail if, for example, the defender did not owe the deceased a duty of care or the defender's acts or omissions had not been wrongful or the deceased had been *volens* or the deceased's action would have been time-barred.<sup>22</sup> For the same reason, a relative's damages can be reduced on the ground of the deceased's contributory negligence.<sup>23</sup> On consultation, our respondents were almost unanimous that this should continue to be the law. Thus we recommend that:

7. **The right of a relative of the deceased to sue for damages should continue to be a dependent right in the sense that the relative cannot sue unless the defender would have been liable to the deceased if the deceased had claimed damages for personal injuries before his death.**

(Draft Bill, section 3)

### *The relatives' right to damages - exclusion or discharge of liability to the deceased*

3.19 Consistent with the dependent nature of the relative's right to sue, section 1(2) of the 1976 Act provides:

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

3.20 This subsection deals with three situations. First, it ensures that the relative's right is barred if the responsible person has excluded or limited liability in respect of the deceased's personal injuries as a consequence of a contractual exemption clause or non-contractual notice. However, the scope for excluding liability in this way is now very narrow. By section 16 of the Unfair Contracts Terms Act 1977 an exemption clause or a provision in a non-contractual notice which excludes or restricts liability for breach of duty arising in the course of business or from occupation of business premises is void if it purports to limit liability in respect of death or personal injury. Where the clause or non-contractual notice is void so

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<sup>21</sup> Damages (Scotland) Act 1976, section 1(1).

<sup>22</sup> *McLaren v Harland and Wolff Ltd* 1991 SLT 85. This is subject to the court's discretion under section 19A of the Prescription and Limitation (Scotland) Act 1973 to allow the claim after the limitation period has expired.

<sup>23</sup> See for example, *Beggs v Motherwell Bridge Fabricators Ltd* 1998 SLT 1215.

that it would not have excluded or restricted the deceased's claim had he lived, section 1(2) of the 1976 Act does not operate to exclude the relative's claim.

3.21 Secondly, where the victim of personal injuries has sued the defender before he dies, the award of damages discharges the responsible person's obligation to make reparation and section 1(2) of the 1976 Act operates to bar a relative's claim.

3.22 Thirdly, if before he died, the victim settled his claim against the responsible person, section 1(2) of the 1976 Act operates to bar a relative's claim. However, this aspect of section 1(2) became controversial in mesothelioma cases. When persons are diagnosed as having mesothelioma, their life expectancy is approximately 15 months. If they settled their action during that period, section 1(2) operated to bar their relatives' claims both for loss of support and non-patrimonial loss ie for their grief and suffering arising from the death under section 1(4) of the Damages (Scotland) Act 1976.<sup>24</sup> Because of the increase in the size of awards of damages to relatives under section 1(4), this meant that if the victim settled before his death, the amount he would recover would often be less than his family would recover if they sued for loss of support and non-patrimonial loss after his death. The victim was therefore placed in a dilemma. He could settle the case and achieve some financial security for the last months of his life but this would be at the expense of his family's claim, or he could refuse to settle and forego compensation before he died, thus enabling his family to recover a larger amount of damages after his death. The Scottish Parliament has responded to the problem by enacting the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007. The 2007 Act disapplies section 1(2) in respect of mesothelioma victims to the extent that their relatives remain entitled to sue for *non-patrimonial* loss under section 1(4) even though the victim has settled his claim or successfully sued the responsible person before he died.<sup>25</sup>

3.23 In the Discussion Paper we asked whether a relative's claim should continue to be extinguished if before he died the deceased had discharged the responsible person's liability to him or his executor.<sup>26</sup> The majority of respondents took the view that because the relative's right to sue is a dependent right, it must be extinguished if the responsible person's liability to the deceased was discharged during his lifetime. It remains sound policy that a responsible person should be able to settle a victim's claim before he dies without having to face claims from the victim's relatives after he dies which could - in theory at least - be many years later. We agree. Accordingly we recommend that:

8. **The right to sue on the death of a relative should continue to be extinguished if before he died the deceased had discharged the responsible person's liability to him or his executor.**

(Draft Bill, section 4(1))

3.24 While we support the general principle that the relatives' claim should be extinguished if the victim settles, we acknowledge that this can create an acute problem. Of course, no difficulty arises when death is instantaneous as the deceased will not have

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<sup>24</sup> On section 1(4) see below paras 3.47 ff.

<sup>25</sup> Damages (Scotland) Act 1976, ss 1(2A) and (2B). Section 1(2) continues to operate to bar the relatives' claims for loss of support.

<sup>26</sup> Discussion Paper, Question 8(a).

settled his claim. When the prognosis is that he will not die from the personal injuries until a substantial period of time has elapsed, it seems clear that any settlement should relieve the defender from the relatives' claim. It should also be noted that the longer the victim lives the more difficult it becomes for relatives to establish that he died from the personal injuries and not from another cause for which the defender was not responsible. The hard case is when - as with mesothelioma - the victim dies within a relatively short period after diagnosis. Here the defender will not be faced with claims by relatives years after the victim's claim has been settled, yet if the victim settles, he prejudices his family as they will lose their right to sue for non-patrimonial loss as well as loss of support. However, as mentioned above, the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 addresses this issue in the case of mesothelioma victims by providing an exception to the general rule whereby the victim's settlement does not extinguish the relatives' rights to sue for non-patrimonial loss.

3.25 In the Discussion Paper<sup>27</sup> we asked whether this exception could be made non-disease-specific. We suggested that section 1(2) of the 1976 Act could be disapplied and relatives would retain their right to sue for non-patrimonial loss if the deceased died within three years of the beginning of the limitation period<sup>28</sup> in respect of the victim's own claim against the defender. For example, A suffers an injury caused by B and the prognosis is terminal. On the assumption that the limitation period begins at the date of diagnosis, A must raise his claim within three years. A settles his claim a year later. If A dies from the personal injuries within the triennium, the relatives would retain their right to sue for non-patrimonial loss; if A dies from the personal injuries after the limitation period has expired, the relatives' right to sue would be extinguished by section 1(2).

3.26 This suggestion was met with a mixed response. One problem is that it is often very difficult to diagnose that a disease or other personal injury is in fact terminal until the victim's death occurs. A failure by a doctor to make an accurate diagnosis that the personal injuries were terminal might lead to claims of medical negligence by disappointed relatives. If the same rules in respect of limitation were to apply, claims by relatives could sometimes still be brought many years after the settlement. For example, if a child was injured, the limitation period would only begin when she was 16 and her parents could therefore bring a claim if she died within the next three years even though there might have been a settlement many years before. Finally, since the early death of the victim would operate as a windfall for the relatives, they might begin to hope that the victim would die before the limitation period expired. Surely such a result would be contrary to public policy?

3.27 By contrast with many other diseases, when mesothelioma is diagnosed the prognosis is certain and death will inevitably follow after a short period.<sup>29</sup> As the disease is caused by exposure to asbestos there appear to be no multiple causative factors: therefore the defender's liability can be established relatively easily. This makes mesothelioma cases highly exceptional. At present there do not appear to be any analogous conditions which would merit a similar exception or at least there is no apparent agitation by the public that further exceptions should be made.

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<sup>27</sup> Paras 3.36 and 3.37 and Questions 8(b) and (c).

<sup>28</sup> On limitation, see Prescription and Limitation (Scotland) Act 1973, ss 17, 18 and 19A.

<sup>29</sup> Though it is accepted that if after the diagnosis was made the victim died from an independent cause, for example in a traffic accident, the person responsible for the mesothelioma would not be liable to the relatives as the victim did not in fact die of the disease.

3.28 We are convinced that the special features of mesothelioma justify the retention of the exception to the operation of section 1(2) of the 1976 Act. It is not thought that there is at present a need to extend such an exception to other diseases or personal injuries. Even if it were simple to formulate, in our view a non disease-specific exception is not required. The special nature of mesothelioma cases has been recognised in other areas of the law of reparation.<sup>30</sup> Self-contained solutions to the difficult issues raised by mesothelioma cases will limit their impact on the general principles of the law of delict.

3.29 In addition, we discussed with the Advisory Group whether Scottish Ministers should be given a power to make orders applying the exception to other diseases. Members of the group were not enthusiastic. They took the view that, for the reasons discussed above,<sup>31</sup> mesothelioma was an exceptional illness and that accordingly there was no need for Scottish Ministers to have a power to extend the exception. For these reasons we recommend that:

- 9. Where a victim dies of mesothelioma, his relatives should retain title to sue for non-patrimonial loss although the victim has excluded or discharged liability before his death.**

(Draft Bill, section 5))

#### *The relatives' right to damages for patrimonial loss*

3.30 As a general principle, the Scots law of delict does not allow reparation for secondary economic loss. Thus if A has wrongfully caused physical harm to B and as a consequence C sustains pure economic loss, A is not liable in delict to pay damages to C. This will often arise when B has a contract with C, for example if B was in partnership with C or was C's employee.<sup>32</sup> However the 1976 Act makes an important exception to this principle of non-recoverability by allowing the relatives of a person who has died from personal injuries to recover at least some of the economic losses they have sustained as a result of the victim's death. Section 1(3) of the Damages (Scotland) Act 1976 provides:

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

3.31 In addition, a relative is entitled to include as a head of damages under section 1(3) a reasonable sum for the loss of the personal services which the deceased would have provided to her if he had lived.<sup>33</sup>

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<sup>30</sup> See for example, the Compensation Act 2006, s 3 (joint and several liability to apply in mesothelioma cases).

<sup>31</sup> Para 3.27.

<sup>32</sup> *Reavis v Clan Line Steamers Ltd* 1925 SC 725.

<sup>33</sup> Administration of Justice Act 1982, s 9(2).

3.32 It will be clear that the purpose of section 1(3) is primarily to compensate the relative for the loss of the financial support which the deceased would have provided for the relative if he had not died from the personal injuries. If the relative cannot establish that the deceased had provided financial support and would have continued to do so in the future, she is not entitled to any damages for patrimonial loss since she has not sustained any relevant loss. Thus, for example, parents cannot recover damages for patrimonial loss on the death of their child unless the child was in fact supporting them financially. For this reason too, daughters who were the residuary legatees of their parents' estate failed to recover the diminution in its value as a result of the payment of inheritance tax which would not have been due if the parents had not died prematurely in a car crash caused by the defender's negligence.<sup>34</sup>

3.33 In the Discussion Paper we asked<sup>35</sup> whether a relative should be able to recover damages for all the patrimonial loss actually sustained by her as a consequence of the victim's death and not simply for the loss of the deceased's financial support. Surprisingly, perhaps, almost half the respondents considered that the present law was satisfactory. While a substantial minority thought that a relative should obtain compensation for all the patrimonial loss actually sustained - and not simply loss of support - it was recognised that this could be very difficult to prove and would be costly in terms of court time and litigants' money. Moreover it could open up an even wider exception to the non-recovery of secondary economic loss principle, for example where the deceased was in business with his brother. Consultees also considered that the law should continue to compensate relatives only for losses sustained rather than missed gains,<sup>36</sup> and that claims for remote and speculative losses should continue to be discouraged.

3.34 In these circumstances, we do not think that we can simply recommend that a relative should be able to recover for all the economic losses actually sustained by her as a consequence of the victim's death. In practice it may be difficult to prove such losses without resort to litigation. Moreover abandoning the concept of loss of support could invite claims for remote and speculative losses. Accordingly we have taken the view that a relative should continue to obtain damages only for the patrimonial loss arising from the loss of the deceased's financial support.<sup>37</sup> We therefore recommend that:

- 10. A relative should continue to be able to recover damages only for the patrimonial loss sustained by her as a consequence of the loss of the deceased's financial support.**

(Draft Bill, section 4(2)(a))

3.35 Where a relative makes a claim under section 1(3) of the 1976 Act the onus is on the relative to prove the extent to which the deceased supported her. There can be difficulties in establishing the deceased's current and future income, particularly if the deceased had been self employed. It is also difficult to establish how much the deceased spent on himself as opposed to his dependants. Families simply do not keep detailed accounts of such

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<sup>34</sup> *Mackintosh v Morrice's Executors* 2007 SC 6; 2006 SLT 853.

<sup>35</sup> Question 9.

<sup>36</sup> *Mackintosh v Morrice's Executors* 2007 SC 6; 2006 SLT 853.

<sup>37</sup> This would continue to include as a head of damages a reasonable sum in respect of the loss to the relative of the deceased's personal services.

expenditure. As a consequence there is either litigation on such matters or relatives settle at artificially low levels because they cannot prove enough financial details. In an adversarial system, to some extent this is inevitable. But it seems particularly harsh where the claimant is the deceased's spouse, civil partner, cohabitant or dependent child. It would therefore be sensible to have a method of calculating loss of support which reduced the need for detailed personal financial evidence to a minimum.

3.36 While we did not propose an alternative method of ascertaining loss of support in our Discussion Paper, we have discussed this issue at length with our Advisory Group. As a result, we have come to the conclusion that there should be a rule that in every case a fixed percentage deduction should be made from the deceased's net income to represent the amount the deceased might reasonably have spent on his personal living expenses. We fully appreciate that since no regard would be made to the *actual* expenditure incurred by the deceased, the resulting figure might be too low for some people and too high for others. But the rule will have the virtue of simplicity and will save time and expense in litigation. In the absence of accurate figures on the proportion of their income that people actually spend on themselves,<sup>38</sup> we suggest that 25% falls within the range of what might be considered reasonable.<sup>39</sup> Consequently, in every case 75% of the deceased's net income is to be taken as available for the support of his relatives. This would therefore operate both as a floor and a ceiling on the amount of damages which can be awarded.

3.37 Where the deceased's spouse, civil partner, cohabitant or a dependent child claims damages, we have taken the view that the multiplicand used to quantify the damages for the loss of the deceased's support should be set at 75% of the deceased's net income. Apart from the situation where the deceased was also supporting another relative, this figure should not be variable. Put another way, it should be a rule of law that, in claims by the deceased's partner or dependent child, the deceased supported them to the extent of 75% of his net income. If this sum was open to variation, it would invite litigation thus defeating the object of the reform. For this purpose, a dependent child would be a person under the age of 18 to whom the deceased owed an obligation of aliment at the time of his death.<sup>40</sup>

3.38 In all other cases, the pursuer, for example a child of the deceased over the age of 18,<sup>41</sup> or a parent or sibling of the deceased, will continue to have to prove the amount of the actual financial support which he received, and was likely to receive in the future, from the deceased. But as a matter of law the multiplicand can never exceed 75% of the deceased's net income. Where a claim is brought by the deceased's spouse, civil partner, cohabitant or

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<sup>38</sup> This task is particularly difficult given that the deceased's expenditure may benefit others as well as himself, for example housing costs.

The Office for National Statistics publishes an annual report called 'Family Spending' which is drawn from the Expenditure and Food Survey. The most recent edition is for 2007 and is available online at [http://www.statistics.gov.uk/downloads/theme\\_social/Family\\_Spending\\_2006/FamilySpending2007\\_web.pdf](http://www.statistics.gov.uk/downloads/theme_social/Family_Spending_2006/FamilySpending2007_web.pdf).

This gives a breakdown of expenditure at a household level for a variety of types of household. However, this data relates to households as a whole and it is not possible to gauge individual expenditure from the report. For further information, see Chapter 3 of the report, and in particular Figures 3.4E to 3.11.

<sup>39</sup> In Appendix B, we have included worked examples (e) to (j) to illustrate the effect of using other percentage deductions.

<sup>40</sup> Under the Family Law (Scotland) Act 1985, sections 1(1) and (5), a parent's obligation to aliment his child or a child whom he has accepted as a child of the family ends when the child reaches the age of 18 unless the child is reasonably and appropriately undergoing instruction at an educational establishment, or training for employment or for a trade, profession or vocation when it can last until the child is 25.

<sup>41</sup> For example a child who is over the age of 18 and under 25 and at university, or an adult child who is physically or mentally impaired.

a dependent child *and* by another relative who has been supported by the deceased, the amount of support to that relative will have to be deducted from the 75% of the deceased's income which would otherwise have been the multiplicand used in the claim by the deceased's partner or dependent child.

3.39 Where the pursuer is the deceased's spouse, civil partner or cohabitant, loss of support for the pursuer and any dependent children is currently calculated by the application of a formula derived by Lord Sutherland in *Brown v Ferguson*.<sup>42</sup> This formula is now treated as a rule of law.<sup>43</sup> Under the *Brown v Ferguson* formula, the net incomes of the deceased and the pursuer are added together and 25% is deducted as representing the deceased's living expenses. The pursuer's net income is then subtracted to leave a sum for loss of dependency which, when multiplied by an appropriate multiplier, will give the total sum for that head of damages. Appendix B gives several worked examples of this rule as it applies to different scenarios.

3.40 The first example<sup>44</sup> illustrates the traditional concept of the family where the deceased was the main breadwinner and the surviving partner's primary role is looking after the home and children. The deceased had a net annual income of £20,000. The survivor has no independent income. Added together, the couple's joint net annual income at the date of the deceased's death was £20,000. 25%, ie £5,000, is deducted as representing the deceased's personal living expenses, leaving £15,000. The survivor's net income is then subtracted, and as it is nil the multiplicand is £15,000. After a suitable multiplier is found, using the Ogden Tables,<sup>45</sup> the damages are apportioned between the surviving partner and any dependent children.

3.41 Increasingly, however, both partners have an income and here the application of the *Brown v Ferguson* formula produces unsatisfactory results. In the second example,<sup>46</sup> the deceased again had a net annual income of £20,000. The survivor also has a net annual income of £20,000, giving a joint net income for the couple at the date of the deceased's death of £40,000. 25%, ie £10,000, is deducted as representing the deceased's personal living expenses. From the remaining £30,000, the survivor's net income of £20,000 is subtracted. The multiplicand is therefore £10,000 - one-third lower than in the first example.

3.42 If the survivor had a higher income than the deceased, the multiplicand is even smaller.<sup>47</sup> Eventually, where the survivor's income is three times greater than the deceased's, the formula will produce a multiplicand of zero and no damages for loss of support will be available to the survivor and any dependent children.<sup>48</sup>

3.43 The fundamental problem with applying the formula in the case of a two-income family is that the multiplicand obtained does not reflect the economic loss actually sustained by the survivor. As Susan O'Brien QC observed, "Today's reality is that most 'families'... have the couple's joint income assessed for the purpose of obtaining mortgages or loans.

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<sup>42</sup> 1990 SLT 274.

<sup>43</sup> *Weir v Robertson Group (Construction) Ltd* [2006] CSOH 107, unreported. Available at [www.scotcourts.gov.uk/opinions/2006CSOH107.html](http://www.scotcourts.gov.uk/opinions/2006CSOH107.html).

<sup>44</sup> Appendix B, example (a).

<sup>45</sup> Ogden Tables (6<sup>th</sup> edition, 2008).

Available online at [http://www.gad.gov.uk/Documents/Ogden\\_Tables\\_6th\\_edition.pdf](http://www.gad.gov.uk/Documents/Ogden_Tables_6th_edition.pdf).

<sup>46</sup> Appendix B, example (b).

<sup>47</sup> See Appendix B, example (c).

<sup>48</sup> See Appendix B, example (d).

This is by reference to the gross income, not the net, and the very roof over their heads will usually depend on a joint income at a given level in order to pay that mortgage. The true loss in wrongful death cases is in practice the inability to meet these joint commitments, along with car loans, school fees or whatever". This has confirmed the view we expressed in the Discussion Paper<sup>49</sup> that the *Brown v Ferguson* formula has become anachronistic. It fails to recognise that a surviving partner may sustain substantial economic loss as a result of the victim's death, even though the survivor was not being supported by the deceased in the traditional sense because she was also earning a substantial salary.

3.44 In these circumstances we think that the *Brown v Ferguson* formula should no longer be followed. Where the claimant is the deceased's spouse, civil partner or cohabitant, we think that the pursuer's income should be ignored when calculating the loss of the deceased's support. This should also be the case when the damages obtained are to be apportioned between the deceased's partner and any dependent children. Therefore we recommend that:

**11. (a) Where the pursuer is the deceased's spouse, civil partner, cohabitant or dependent child the deceased is to be taken as having used 75% of his net income to support his family and the pursuer's earnings are to be ignored;**

- (b) For these purposes a dependent child is a child of the deceased, or a child accepted by the deceased as a child of his family, who is under the age of 18 and to whom the deceased owed an obligation of aliment at the time of his death;
- (c) In all other cases, the pursuer must establish the amount of financial support he received from the deceased: this cannot exceed 75% of the deceased's net income;
- (d) Where the pursuers are the deceased's spouse, civil partner, cohabitant or dependent child, and also another relative whom the deceased was supporting, the amount of the latter's support must be deducted from the 75% of the deceased's net income which the deceased is to be taken to have used to support his partner and dependent children.

(Draft Bill, section 7)

3.45 We have been considering how the courts should find an appropriate multiplicand. Once this has been done, the court then applies a multiplier in order to calculate the damages. At present the multiplier runs from the date of death, not the date of the proof. In the Discussion Paper we took the view that there was no need to change this rule. Many of our respondents agreed. However, several consultees advocated that we should adopt the position recommended in the Ogden tables<sup>50</sup> under which the relative's loss is divided into past loss up to the date of proof and future loss from then to the date of notional death. The multiplier used in calculating future loss is discounted to take into account factors which may arise in the future (ie early receipt of the money and the possibility of the pursuer's death). Such discounting is inappropriate in relation to the calculation of the loss which the relative has in fact sustained between the date of death and the date of the proof. As Thompsons

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<sup>49</sup> Para 3.50.

<sup>50</sup> Ogden Tables (6<sup>th</sup> edition, 2008) Section D, paras 64-68.

Solicitors observed, "There should be a discount for futurity only for future loss". To calculate the multiplier from the date of death therefore results in under-compensation of the relative in respect of the loss actually incurred between the date of death and the proof.

3.46 We have been convinced by these arguments. There is no need for a multiplier for the period between the date of death and the date of proof: the relative has sustained a past loss which can be properly quantified. A multiplier should continue to be used to compensate the relative's future loss when the damages for that loss should continue to be subject to an appropriate discount. Accordingly we recommend that:

- 12. The relative's loss of support should be divided into past loss and future loss, and a single multiplier should run from the date of the interlocutor awarding damages in respect of future loss only.**

(Draft Bill, section 7(1)(e))

#### *The relatives' right to damages for non-patrimonial loss*

3.47 Section 1(4) of the 1976 Act provides that the deceased's immediate family can obtain "such sum of damages, if any, as the court thinks just by way of compensation for all or any of the following—

(a) distress and anxiety endured by the relative in contemplation of the suffering of the deceased before his death;

(b) grief and sorrow of the relative caused by the deceased's death;

(c) the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died,

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

3.48 In the Discussion Paper<sup>51</sup> we argued that section 1(4) awards are problematic in that they are an attempt to provide compensation for something that cannot be quantified, namely the suffering caused by the wrongful death of a relative and the loss of their love and companionship. Such harm is irreparable. But we also recognised that in causing the death the defender has committed a wrong not only against the deceased but also against those who were closest to him.<sup>52</sup> It is the family's sense of outrage that justifies the section 1(4) claim. A relative's right to sue in respect of non-patrimonial loss has therefore an important symbolic function.

3.49 An overwhelming majority of respondents thought that relatives should continue to be able to sue for non-patrimonial loss. While section 1(4) awards of damages can never fully compensate a grieving relative for the loss of a loved one, consultees argued that they marked the fact that grief and upset has been caused to the family as a result of the wrongful

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<sup>51</sup> Para 3.63.

<sup>52</sup> Ibid.

death. Moreover, a majority accepted that in general the current system worked well. While the courts have in effect laid down guidelines on the range of damages which should be paid, it was important that a court should be able to depart from them in exceptional cases. Yet there was sufficient certainty of what a court or jury would award that parties were able to settle. It was pointed out that courts and juries were aware of the public's perception of these awards so that the amounts awarded could be increased from time to time.

3.50 A minority of respondents argued strongly that section 1(4) awards should be replaced by a conventional non-compensatory award ie a tariff system. If the damages awarded under the current system were in effect conventional as opposed to compensatory, this should be acknowledged and it should be replaced by a genuine tariff system. Such a system would not only recognise that the relative had sustained a separate wrong when the victim died, but the payment would be made much sooner than under the present system as there would be no argument about the amount due in any particular case. The levels should be set by the Scottish Ministers and varied from time to time in order that they did not ossify.

3.51 While a tariff system has its attractions, we have decided that the current system should be retained. Under a tariff system, the deceased's relative would be entitled to the payment regardless of the quality of their relationship with the deceased. If the courts were to retain a discretion to depart from the level of the tariff to take into account exceptional cases, this would undermine the whole rationale for having a tariff system in the first place. Nor are we convinced that a tariff system would necessarily result in earlier settlements. While the quantum of damages for non-patrimonial loss would be set, there might be no admission of liability and such matters as contributory negligence or multiple defenders may still be outstanding.

3.52 The current system has the advantage that while a range of quasi-conventional awards operates which enables parties to settle without litigation, nevertheless the court has a discretion to depart from these when a particular case raises exceptional circumstances. In addition it appears to work satisfactorily and there is no great demand for radical reform. However, we think that the award should have a specific name. We are happy to adopt the suggestion made by William J Stewart of "grief and companionship award". In these circumstances we recommend that:

- 13. (a) The relatives of a deceased should continue to have title to sue for non-patrimonial loss;**

(Draft Bill, section 4(2)(b))

- (b) An award of damages for non-patrimonial loss should be called a "grief and companionship award".**

(Draft Bill, section 4(3)(a))

3.53 In the Discussion Paper we took the view<sup>53</sup> that the purpose of section 1(4)(b) of the Damages (Scotland) Act 1976 was to provide damages for the relative's "grief and sorrow" caused by the victim's death. It was submitted that these are the emotions ordinarily experienced as a consequence of the death of a loved one. Accordingly we maintained that

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<sup>53</sup> Para 3.58.

where a relative suffers a mental illness as a result of a death, that illness - and any derivative economic loss - is not reparable under section 1(4).<sup>54</sup> Instead the pursuer will have to establish that the defender owed her a duty of care - independent from that owed to the deceased - to prevent the pursuer sustaining mental harm: this would only arise if the pursuer was a primary victim of the defender's wrongful conduct or the *Alcock* criteria were satisfied.<sup>55</sup> We think that for the avoidance of doubt this point should be specifically addressed in our draft Bill. Therefore we recommend that:

**14. A grief and companionship award should not include damages in respect of a mental illness suffered by a relative as a consequence of the victim's death.**

(Draft Bill, section 4(3)(b) and (5))

*The relatives' right to damages - title to sue*

3.54 For the purpose of a claim for damages for loss of support, Schedule 1 to the Damages (Scotland) Act 1976 provides that the deceased's relatives include: (i) the deceased's spouse or civil partner; (ii) the deceased's opposite sex or same sex cohabitant; (iii) the deceased's parents and children; (iv) any person who was accepted by the deceased as a child of the family; (v) any person who accepted the deceased as a child of the family; (vi) any person who was the brother or sister of the deceased or was brought up in the same household as the deceased and was accepted as a child of the family in which the deceased was a child; (vii) any person who was a grandparent or grandchild of the deceased; (viii) the deceased's further ascendants and descendants; (ix) the deceased's uncle, aunt, niece, nephew and cousin; and (xii) the deceased's former spouse or former civil partner. Any relationship by affinity is treated as a relationship of consanguinity, any relationship of the half blood is treated as a relationship of the whole blood, and the stepchild of any person is treated as his child.

3.55 However, for the purpose of a claim for non-patrimonial loss under section 1(4) title to sue is restricted to the deceased's "immediate family".<sup>56</sup> The deceased's immediate family consists of the deceased's relatives in categories (i) to (vii): here relationships of affinity are not treated as relationships of consanguinity and the stepchild of a person is not treated as his child merely because he is married to the child's father or mother.<sup>57</sup>

3.56 In the Discussion Paper<sup>58</sup> we asked whether title to sue for patrimonial loss should now be restricted to those relatives who currently constitute the deceased's immediate family who can claim for non-patrimonial loss. Respondents were divided. Some argued that any person who was in fact supported by the deceased should have title to sue. The difficulty

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<sup>54</sup> Cf *Gillies v Lynch* 2002 SLT 1420; 2003 SCLR 467 where the Lord Ordinary (Macfadyen) allowed evidence of the pursuer's psychiatric disorder to demonstrate the extent of her grief and sorrow.

<sup>55</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. On the difficulties of obtaining reparation for psychiatric injuries and recommendations for reform see *Report on Damages for Psychiatric Injury* (Scot Law Com No 196).

<sup>56</sup> Damages (Scotland) Act 1976, s 10(2).

<sup>57</sup> Damages (Scotland) Act 1976, s 1(4A) and (4B). In most cases of step-children, the child and step-parent will qualify because the step-parent has accepted the child as a child of the family.

<sup>58</sup> Question 16.

with this approach is that it could open claims where the pursuer's financial dependence arose from a business rather than a domestic relationship with the deceased. We do not want to extend potential delictual liability for secondary economic loss in this way.<sup>59</sup> The current group of relatives defined in Schedule 1 to the 1976 Act is very wide, extending to uncles, aunts, nieces and cousins: it is further extended by the inclusion of "in-laws". The inclusion of the deceased's former spouse or civil partner now runs counter to the law on financial provision on divorce or dissolution with its emphasis on a financial clean break between the parties. Moreover, a majority of respondents accepted that in practice there are few claims for damages for patrimonial loss by relatives who are not members of the deceased's immediate family.

3.57 In these circumstances we have taken the view that title to sue for patrimonial loss should be restricted to those relatives who currently constitute the deceased's immediate family. In the context of contemporary family structures in Scotland,<sup>60</sup> they are the relatives who are most likely to have had an affective relationship with the deceased and who are most likely to have been in receipt of the victim's support at the time of his death. In short the current group of relatives with title to sue for patrimonial loss is too wide and has become anachronistic. Moreover the provisions in the 1976 Act are complicated and ambiguous.<sup>61</sup> Our recommendation will simplify the law. Therefore we recommend that:

- 15. The right to sue for patrimonial as well as non-patrimonial loss should be restricted to those relatives of the deceased who currently constitute the deceased's immediate family.**

(Draft Bill, section 14, definition of "relative")

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<sup>59</sup> See para 3.30 above.

<sup>60</sup> The current constitution of the deceased's immediate family is based on the recommendations of this Commission in our Report on *Title to Sue for Non-Patrimonial Loss* (Scot Law Com No 187, 2002). The amendments to the Damages (Scotland) Act 1976 to implement our recommendations were made by the Family Law (Scotland) Act 2006, s 35. The changes were not retrospective. However, because the 1976 Act has to be interpreted to be compatible with the European Convention on Human Rights, a man who had accepted the victim as a child of his family was held to have title to sue even though he had not married the victim's mother and technically was therefore not the child's step-father: *McGibbon v McAllister* 2008 SLT 459.

<sup>61</sup> See Kenneth Norrie *"Rushed law and wrongful death"* Journal of the Law Society of Scotland, (April 2006), p 24.

## Part 4 List of recommendations

1. A victim should continue to receive damages for loss of expectation of life as part of an award of *solatium* only if he is, or was at any time, aware, or is likely to become aware that his life will end prematurely.

(Paragraph 3.2; Draft Bill, section 1(1), (2) and (3))

2. A victim should continue to be able to claim damages for any patrimonial loss sustained between –

(i) the date of decree and the date when he is expected to die; and

(ii) the date when the victim is expected to die and the notional date of death, ie the lost period.

(Paragraph 3.4; Draft Bill, section 1(5))

3. For the purposes of the lost period patrimonial loss should continue to include the victim's earnings and any benefits in money or money's worth derived from sources other than the victim's own estate.

(Paragraph 3.5; Draft Bill, section 1(6)(a) and (b))

4. For the purposes of the lost period a deduction should continue to be made for the victim's reasonable living expenses: these should be taken to be 25% of the victim's net income during that period.

(Paragraph 3.9; Draft Bill, section 1(6)(c))

5. (a) A claim under section 8 of the Administration of Justice Act 1982 should continue to exclude the lost period.

(Paragraph 3.11; No amendment to section 8 of the 1982 Act))

(b) A claim under section 9(1) of the Administration of Justice Act 1982 should include damages in respect of the victim's inability to provide gratuitous personal services to his relatives during the lost period.

(Paragraph 3.11; Draft Bill, section 13(a))

6. (a) The executor's right to sue for patrimonial loss should continue to be restricted to the loss sustained by the deceased up until the date of death.

(Paragraph 3.17; Draft Bill, section 2(1) and (2))

(b) The deceased's dependent relatives should continue to have a right to sue for loss of the deceased's support.

(Paragraph 3.17; Draft Bill, sections 3, 4(1) and (2)(a))

7. The right of a relative of the deceased to sue for damages should continue to be a dependent right in the sense that the relative cannot sue unless the defender would have been liable to the deceased if the deceased had claimed damages for personal injuries before his death.

(Paragraph 3.18; Draft Bill, section 3)

8. The right to sue on the death of a relative should continue to be extinguished if before he died the deceased had discharged the responsible person's liability to him or his executor.

(Paragraph 3.23; Draft Bill, section 4(1))

9. Where a victim dies of mesothelioma, his relatives should retain title to sue for non-patrimonial loss although the victim has excluded or discharged liability before his death.

(Paragraph 3.29; Draft Bill, section 5)

10. A relative should continue to be able to recover damages only for the patrimonial loss sustained by her as a consequence of the loss of the deceased's financial support.

(Paragraph 3.34; Draft Bill, section 4(2)(a))

11. (a) Where the pursuer is the deceased's spouse, civil partner, cohabitant or dependent child the deceased is to be taken as having used 75% of his net income to support his family and the pursuer's earnings are to be ignored;

(b) For these purposes a dependent child is a child of the deceased, or a child accepted by the deceased as a child of his family, who is under the age of 18 and to whom the deceased owed an obligation of aliment at the time of his death;

(c) In all other cases, the pursuer must establish the amount of financial support he received from the deceased: this cannot exceed 75% of the deceased's net income;

(d) Where the pursuers are the deceased's spouse, civil partner, cohabitant or dependent child, and also another relative whom the deceased was supporting, the amount of the latter's support must be deducted from the 75% of the deceased's net income which the deceased is to be taken to have used to support his partner and dependent children.

(Paragraph 3.44; Draft Bill, section 7)

12. The relative's loss of support should be divided into past loss and future loss, and that a single multiplier should run from the date of the interlocutor awarding damages in respect of future loss only.

(Paragraph 3.46; Draft Bill, section 7(1)(e))

13. (a) The relatives of a deceased should continue to have title to sue for non-patrimonial loss;

(Paragraph 3.52; Draft Bill, section 4(2)(b))

- (b) An award of damages for non-patrimonial loss should be called a "grief and companionship award".

(Paragraph 3.52; Draft Bill, section 4(3)(a))

14. A grief and companionship award should not include damages in respect of a mental illness suffered by a relative as a consequence of the victim's death.

(Paragraph 3.53; Draft Bill, section 4(3)(b) and (5))

15. The right to sue for patrimonial as well as non-patrimonial loss should be restricted to those relatives of the deceased who currently constitute the deceased's immediate family.

(Paragraph 3.57; Draft Bill, section 14, definition of "relative")

# Appendix A

## Damages (Scotland) Bill 2008 [DRAFT]

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Section

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Schedule 1—Minor and Consequential Amendments

Schedule 2—Repeals

# Damages (Scotland) Bill 2008

[DRAFT]

An Act of the Scottish Parliament to make further provision as regards rights to damages in respect of personal injuries and death; and for connected purposes.

## **1 Damages to injured person whose expectation of life is diminished**

- (1) This section applies to an action for damages in respect of personal injuries suffered by a pursuer whose date of death is expected to be earlier than had the injuries not been suffered.
- (2) In assessing the amount of damages by way of *solatium* the court is, if the pursuer—
  - (a) was at any time,
  - (b) is, or
  - (c) is likely to become,aware of the reduced expectation of life, to have regard to the extent to which the pursuer, in consequence of that awareness, has suffered or is likely to suffer.
- (3) Subject to subsection (2), no damages by way of *solatium* are recoverable by the pursuer in respect of loss of expectation of life.
- (4) In making an award of damages by way of *solatium*, the court is not required to ascribe specifically any part of the award to loss of expectation of life.
- (5) In assessing the amount of any patrimonial loss in respect of the period after the date of decree the court is to assume that the pursuer will live until the date when death would have been expected had the injuries not been suffered (the “notional date of death”).
- (6) Such part of that amount as is attributable to the period between the expected date of death and the notional date of death (the “lost period”) is to be assessed as follows—
  - (a) the court is to estimate what (if anything) the pursuer would have earned during the lost period through the pursuer’s own labour or own gainful activity had the injuries not been suffered,
  - (b) the court may, if it thinks fit, add to the amount so estimated (whether or not that amount is nil) an amount equivalent to all or part of what it estimates the pursuer would have received by way of relevant benefits during the lost period had the injuries not been suffered, and
  - (c) the court is then to deduct, from the total amount obtained by virtue of paragraphs (a) and (b), 25% of that amount (to represent what would have been the pursuer’s living expenses during the lost period had the injuries not been suffered).

- (7) In paragraph (b) of subsection (6), “relevant benefits” means benefits in money or money’s worth other than benefits—
- (a) derived from the pursuer’s own estate, or
  - (b) consisting of such earnings as are mentioned in paragraph (a) of that subsection.

#### GENERAL NOTE

The overall purpose of the draft Bill is to repeal, and re-enact with certain amendments, the Damages (Scotland) Act 1976. The 1976 Act has been amended on numerous occasions and as a result its structure and clarity have suffered. The changes contained in the Bill are designed to modernise and simplify the law.

The draft Bill is structured differently from the 1976 Act. It deals first with the rights of the victim (section 1) and the extent to which those rights transmit to an executor (section 2), before moving on to deal with the rights of relatives (sections 3 to 8) and the extent to which those rights transmit to a relative's executor (section 9). Further provision is made in relation to rights transmitted to executors (section 10). The remaining provisions are of a general nature. This gives the draft Bill a clearer natural progression than the 1976 Act as amended.

#### NOTE

Section 1 makes provision for damages to be payable to a victim of personal injuries whose expectation of life has been reduced as a result of the injuries suffered. It permits a victim to claim *solatium* and damages for patrimonial loss.

Subsection (1) provides that persons may only claim damages in terms of the section if their date of death is expected to be earlier than it would have been if the injuries had not been suffered. Persons who have suffered personal injuries but whose expectation of life has not been diminished will continue to rely on the general principles of the law of delict.

Subsections (2) to (4) are concerned with a victim's claim for *solatium*. They re-enact section 9A of the 1976 Act in a slightly recast form, and in doing so implement recommendation 1. Subsections (2) and (3) make it clear that a victim is only entitled to *solatium* for loss of expectation of life where he was, is or is likely to become aware that his life expectancy has been reduced. As a result, where a victim of personal injuries is killed instantaneously his executor cannot recover *solatium* on behalf of the estate.

Subsection (4) provides that, where a victim claims *solatium* for loss of expectation of life as part of a wider claim for *solatium*, the court does not require to ascribe any part of the damages by way of *solatium* to loss of expectation of life.

Subsections (5) to (7) are concerned with a victim's claim for patrimonial loss arising from personal injuries. They re-enact, with certain amendments, section 9 of the 1976 Act.

Subsection (5) ensures that a victim's claim for patrimonial loss will take into account the period between his expected date of death and the date on which he would have been expected to die if he had not suffered the injuries. This period is referred to as the 'lost period'. Any damages received under subsection (5) are intended to restore the victim to the position in which he would have been had he not suffered the injuries. This subsection restates section 9(2)(a) of the 1976 Act, and it implements recommendation 2.

Subsection (6) specifies how patrimonial loss during the lost period is to be assessed. In order to implement recommendations 3 and 4, this differs from the computation presently carried out under section 9(2)(b) and (c) of the 1976 Act. In particular, subsection (6) is limited to damages for patrimonial loss *during the lost period*: under the 1976 Act a deduction was made in respect of reasonable living expenses against all damages for future patrimonial loss. In other words, a deduction was made for living expenses

in the period between the date of decree and the victim's expected date of death, despite the fact that he was still alive and actually incurring living expenses.

Paragraph (a) of subsection (6) provides that the court is to estimate what the victim's earnings during the lost period would have been. This provision, although an equivalent appeared in Schedule 1, paragraph 1 to the Commission's draft Bill annexed to the Report on the Law Relating to Damages for Injuries Causing Death (Scot Law Com No 31)), was omitted from the 1976 Act. Its inclusion is designed to make the basis of calculation clearer. Paragraph (b) restates the court's discretion to take into account benefits which do not derive from the victim's own estate. When added together, the victim's estimated earnings and benefits form his gross patrimonial loss during the lost period. This implements recommendation 3.

Paragraph (c) of subsection (6) goes on to provide that a deduction of 25% is to be made from the victim's gross patrimonial loss during the lost period. The purpose of this deduction is to represent the living expenses which the victim would have incurred had his life not been shortened by the injuries suffered. This provision implements recommendation 4. By deducting a fixed percentage, the Bill again departs from the practice under section 9(2)(c) of the 1976 Act, which provides that the court should take into account the victim's reasonable living expenses and reduce the sum for patrimonial loss accordingly. As noted above, section 9(2)(c) applies to damages from the date of decree forward. Paragraph (c) limits the deduction to damages for patrimonial loss during the lost period.

Subsection (7) defines "relevant benefits" in paragraph (b) of subsection (6). It draws on the wording of section 9(2)(b), but by placing this information in a separate subsection it seeks to increase the readability of subsection (6). The definition is intended to encompass benefits which accrue to the victim from third parties.

## **2 Transmission of deceased's rights to executor**

- (1) There are transmissible to a deceased person's executor ("E") the like rights to damages, including a right to damages for non-patrimonial loss, in respect of injuries suffered by the deceased ("A") and vested in A immediately before A's death, being —
  - (a) personal injuries, or
  - (b) injuries which, though not personal injuries, are—
    - (i) injuries to name or reputation, or
    - (ii) injuries resulting from harassment actionable under section 8 of the Protection from Harassment Act 1997 (c.40).
- (2) The "like rights" mentioned in subsection (1) do not include any right to damages by way of compensation for patrimonial loss attributable to any period after the date of death; and in determining the amount of damages for non-patrimonial loss payable to E by virtue of this section, the only period to which the court is to have regard is that ending immediately before A's death.
- (3) In so far as a right to damages vested in A comprises a right to damages for non-patrimonial loss in respect of such injuries as are mentioned in sub-paragraph (i) of subsection (1)(b), that right is transmissible to E only if an action to enforce the right is brought by A and is not concluded before A's death.
- (4) For the purposes of subsection (3) an action is not to be taken to be concluded—
  - (a) while an appeal is competent, or
  - (b) before any appeal taken is disposed of.

## NOTE

Section 2 makes provision in relation to the transmission of the deceased's right to sue to his executor. Under section 2 of the 1976 Act, when a person dies, his right to sue for damages in respect of personal injuries (as defined in section 10 of the 1976 Act) transmits to his executor. However, this is not unqualified: an executor has no right to seek *solatium* for future suffering, on the basis that the deceased's death has ended his suffering. Furthermore, the deceased's right to damages for patrimonial loss during the lost period does not transmit – instead, his dependent relatives may sue for loss of support. It is important to note, however, that the deceased does not require to die from personal injuries for his rights to transmit in terms of the section: where a deceased had suffered personal injuries and then died from an unconnected cause, his right to damages will still transmit.

In order to implement recommendation 6(a), section 2 of the draft Bill restates section 2 of the 1976 Act. In particular, subsection (1) provides that the rights to damages in respect of injuries which are vested in the deceased immediately before death are transmissible to his executor. As the draft Bill defines "personal injuries" differently to the 1976 Act, it has been necessary to insert section 2(1)(b) to make it clear that rights to damages in respect of injuries to reputation and arising from harassment will continue to transmit to the deceased's executor. Subsection (1) restates, with changes, subsection (1) in the 1976 Act.

Subsection (2) goes on to limit the extent of transmission by excluding the deceased's right to damages for patrimonial loss after the date of death and by stating that non-patrimonial loss may only be taken into account for the period ending immediately before the deceased's death. This is to avoid over-compensation where the deceased's relatives will have a claim for patrimonial loss in terms of section 4(2)(a), and to reflect the fact that the deceased's sufferings are taken (in law at least) to end with his death. Subsection (2) restates subsections (2) and (3) from the 1976 Act.

Subsection (3) restates section 2(4) of the 1976. It provides for the special case where the deceased had a right to damages for non-patrimonial loss arising from defamation, verbal injury or other injury to reputation. As injuries of these types are thought to be peculiarly personal to the victim, the right to damages may only transmit to his executor if the victim had raised an action to enforce the right before his death and the action had not been concluded by then. In other words, an executor may be sisted into a defamation action which has already been raised, but he cannot raise a new action in which he seeks damages only for non-patrimonial loss. If the victim had sustained patrimonial loss as a result of the defamation, however, his executor will have title to sue by virtue of subsection (1).

Subsection (4) explains what is meant by an action being concluded in subsection (3). Previously this was done by reference to section 2A(2) of the 1976 Act, but in the interests of clarity the opportunity has been taken to bring this rule together with the rest of the section.

### **3 Application of sections 4 to 6**

Sections 4 to 6 apply where a person ("A") dies in consequence of suffering personal injuries as the result of the act or omission of another person ("B") and the act or omission—

- (a) gives rise to liability to pay damages to A (or to A's executor), or
- (b) would have given rise to such liability but for A's death.

## NOTE

Section 3 implements recommendation 7. It introduces the provisions dealing with the rights of the victim's relatives to damages. It re-enacts in part section 1(1) of the 1976 Act. It provides that the rights of relatives contained in sections 4 to 6 apply where the victim ("A") died from personal injuries caused by

the defender ("B"), so long as B would have been liable to pay damages to A if A had sued before his death. In this way, the relatives' right to sue is dependent on B's liability to A.

#### **4 Sums of damages payable to relatives**

- (1) B is liable under this subsection to pay such sums of damages as are mentioned in subsection (2) to any relative of A; but except as provided for in section 5 no such liability arises if the liability to pay damages to A (or to A's executor) in respect of the act or omission—
  - (a) is excluded or discharged, whether by antecedent agreement or otherwise, by A before A's death, or
  - (b) is excluded by virtue of an enactment.
- (2) The sums of damages are—
  - (a) such sum as will compensate for any loss of support which as a result of the act or omission is sustained, or is likely to be sustained, by the relative after the date of A's death together with any reasonable expenses incurred by the relative in connection with A's funeral, and
  - (b) such sum, if any, as the court thinks just by way of compensation for all or any of the following—
    - (i) distress and anxiety endured by the relative in contemplation of the suffering of A before A's death,
    - (ii) grief and sorrow of the relative caused by A's death,
    - (iii) the loss of such non-patrimonial benefit as the relative might have been expected to derive from A's society and guidance if A had not died.
- (3) An award under paragraph (b) of subsection (2)—
  - (a) is to be known as a "grief and companionship award", and
  - (b) is not to be made in respect of mental disorder caused by A's death.
- (4) The court, in making an award under paragraph (b) of subsection (2) is not required to ascribe any part of the award specifically to any of the sub-paragraphs of that paragraph.
- (5) In subsection (3)(b), "mental disorder" has the meaning given by section 328 of the Mental Health (Care and Treatment)(Scotland) Act 2003 (asp 13).

#### **NOTE**

Where section 3 applies, section 4 makes provision in respect of the damages which the defender may have to pay to the relatives of the victim. The victim's relatives may seek damages for patrimonial loss in the form of loss of support, and may seek what is to be known as a "grief and companionship award" to reflect their non-patrimonial loss.

Subsection (1) restates the rest of subsections (1) and (2) of section 1 of the 1976 Act. Section 3 of the draft Bill has already established that the defender would have been liable to pay damages to the victim, and subsection (1) goes on to provide that the defender is therefore liable to pay damages in terms of subsection (2) to any relative of the victim. This is qualified by providing that no liability to relatives will arise where the victim has discharged or excluded liability before his death, or where liability is excluded by an enactment. In restating the current law, this provision implements recommendation 8. The qualification is itself subject to an exception for mesothelioma cases, which are governed by section 5.

Where section 5 applies, the general principle in subsection (1) of section 4 is overridden by the special provisions in section 5 in order to give effect to recommendation 9. For further details, see the note on section 5.

Subsection (2) specifies the damages which a defender may be liable to pay to the deceased's relatives. Paragraph (a) deals with patrimonial loss and paragraph (b) with non-patrimonial loss.

Paragraph (a) re-enacts section 1(3) of the 1976 Act. This implements recommendation 6(b) by providing that relatives will have title to sue for patrimonial loss. We consulted on the possibility of abolishing this right and permitting the deceased's executor to recover damages for future patrimonial loss as well as past loss, but this approach was rejected. It should be noted that paragraph (a) does not give the deceased's relatives an unfettered right to seek damages for patrimonial loss. The damages are confined to two heads: first, the loss of support suffered by that relative after the deceased's death, and, secondly, reasonable expenses incurred in connection with the deceased's funeral. In limiting the recoverable patrimonial loss in this way, the provision implements recommendation 10.

Paragraph (b) re-enacts section 1(4) of the 1976 Act. A significant change is that the 1976 Act restricted compensation under this subsection to a subset of the deceased's relatives known as the "deceased's immediate family". As the definition of relative used in the draft Bill corresponds to that subset, there is no longer any need to refer to the deceased's immediate family in this paragraph. Furthermore, as relatives by affinity are not entitled to damages of any sort under the terms of the draft Bill, there is no need to re-enact subsections (4A) and (4B) of section 1 of the 1976 Act. This simplifies the provision markedly. The elements for which the court may award compensation (sub-paragraphs (i) to (iii)) are unchanged in the draft Bill. It should be noted that the amount of compensation under paragraph (b) is at the discretion of the court. This paragraph implements recommendation 13(a).

Subsection (3) implements recommendation 13(b). It makes further provision in relation to awards under paragraph (b) of subsection (2). Paragraph (a) provides that such an award is to be known as a "grief and companionship award". At common law, the equivalent award was known as *solatium*. The 1976 Act as enacted provided that the statutory replacement would be known as a "loss of society award". When section 1(4) of the 1976 Act was amended by the Damages (Scotland) Act 1993, references to a loss of society award were removed, and in practice damages awarded under this section are simply known as a "section 1(4) award". The new name is more meaningful than referring to what would be the equivalent: a "section 4(2)(b) award."

Paragraph (b) of subsection (3) is intended to clarify what is meant by "grief and sorrow" in section 4(2)(b)(ii). Grief and sorrow, it is submitted, are emotions ordinarily experienced as a consequence of the death of a loved one. However, there is some authority (*Gillies v Lynch* 2002 SLT 1420) to suggest that, where a relative suffers mental illness as a result of the deceased's death, damages for that mental illness should be awarded as falling within the heading of grief and sorrow. The draft Bill contains express provision to the contrary for the avoidance of doubt: relatives who suffer mental illness in consequence of the deceased's death will, however, be able to rely on the general principles of delict if they can establish that the defender owed them a duty of care. This paragraph implements recommendation 14.

## **5 Discharge of liability to pay damages: exception for mesothelioma**

- (1) This section applies where—
  - (a) the liability to pay damages to A (or to A's executor) is discharged, whether by antecedent agreement or otherwise, by A before A's death,
  - (b) the personal injury in consequence of which A died is mesothelioma, and
  - (c) the discharge and the death each occurred on or after 20 December 2006.
- (2) Liability arises under section 4(1) but is limited to the payment of such sum of damages as is mentioned in paragraph (b) of section 4(2).

## NOTE

Section 5 forms an exception to the general principles of liability laid down in section 4(1) in cases where a victim dies of mesothelioma. In doing so, it re-enacts subsections (2A) and (2B) of section 1 of the 1976 Act which were inserted by the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007. It gives effect to recommendation 9.

Subsection (1) contains three criteria which must be met for section 5 to apply. Paragraph (a) states that the victim must have discharged the defender's liability to him before death. If the victim has not discharged liability, then his relatives have no need of the exception in section 5. They may rely on the general rule in section 4(1) and sue for both a grief and companionship award and loss of support, if appropriate. Paragraph (b) states that the personal injury from which the victim dies must be mesothelioma. The exception created by the 2007 Act was confined to mesothelioma sufferers on policy grounds and this approach has been followed. It should be noted that the victim's relatives cannot rely on the fact that the victim suffered from mesothelioma if he goes on to die from another cause. Finally, in terms of paragraph (c), both the discharge and the death must have taken place on or after 20 December 2006. This date was specified in the 2007 Act as the date from which the exception would apply (although the Act itself did not come into force until 27 April 2007).

Subsection (2) provides that, where the three criteria set out in subsection (1) are met, the defender will be liable in damages to the victim's relatives even though the victim had discharged the liability before his death. However, this liability is limited to damages for non-patrimonial loss: the victim's relatives may seek a grief and companionship award in terms of section 4(2)(b) but not damages for loss of support under section 4(2)(a).

## **6 Relative's loss of personal services**

- (1) A relative entitled to damages under paragraph (a) of section 4(2) is entitled to include, as a head of damages under that paragraph, a reasonable sum in respect of the loss to the relative of A's personal services as a result of the act or omission.
- (2) In subsection (1), "personal services" has the same meaning as in section 9(1) of the Administration of Justice Act 1982 (c.53) (damages in respect of inability of injured person to render such services).

## NOTE

Section 6 deals with the right of victims' relatives to damages for loss of personal services which were provided by the victim before his death. This is presently contained in section 9(2) of the Administration of Justice Act 1982, which is to be repealed by section 13(b) of the draft Bill in order that it may be re-enacted by section 6. In non-fatal cases, the injured person may seek damages under section 9(1) of the 1982 Act in respect of his inability to render personal services as defined in section 9(3). Where the injured person dies of his injuries, a relative who is entitled to damages for loss of support can include as a head of damages a sum in respect of loss of the personal services which the deceased would have rendered to him (section 9(2)). It is considered that this provision fits more logically with the provisions of the draft Bill than it does in the 1982 Act. Re-enacting the provision will bring all of the relatives' rights conveniently within the same piece of legislation.

Subsection (1) re-enacts section 9(2) of the 1982 Act, providing that a relative who is entitled to damages for loss of support may also include a claim for damages for loss of the victim's personal services.

Subsection (2) defines "personal services" in subsection (1) by reference to section 9(1) of the 1982 Act. This refers to personal services as the services mentioned in section 9(3) of the 1982 Act, being services:

- (a) which were or might have been expected to have been rendered by the injured person before the occurrence of the act or omission giving rise to liability,
- (b) of a kind which, when rendered by a person other than a relative, would ordinarily be obtainable on payment, and
- (c) which the injured person but for the injuries in question might have been expected to render gratuitously to a relative.

**7 Assessment of compensation for loss of support**

- (1) Such part of an award under paragraph (a) of section 4(2) as consists of a sum in compensation for loss of support is to be assessed applying the following paragraphs—
  - (a) the total amount to be available to support A’s relatives is an amount equivalent to 75% of A’s net annual income,
  - (b) a relative’s income is to be disregarded,
  - (c) in the case of any other relative than—
    - (i) a person described in paragraph (a) of the definition of “relative” in section 14(1), or
    - (ii) a dependent child,
 the relative is not to be awarded more in compensation for loss of support than the actual amount of that loss,
  - (d) if—
    - (i) no such other relative is awarded a sum in compensation for loss of support, the total amount mentioned in paragraph (a) is to be taken to be spent by A in supporting such of A’s relatives as are mentioned in sub-paragraphs (i) and (ii) of paragraph (c),
    - (ii) any such other relative is awarded a sum in compensation for loss of support the total amount mentioned in paragraph (a) is, after deduction of the amount of the sum so awarded, to be taken to be spent by A in supporting such of A’s relatives as are mentioned in those sub-paragraphs, and
  - (e) any multiplier applied by the court—
    - (i) is to run from the date of the interlocutor awarding damages, and
    - (ii) is to apply only in respect of future loss of support.
- (2) In subsection (1)(c)(ii), “dependent child” means a child who as at the date of A’s death—
  - (a) has not attained the age of 18 years, and
  - (b) is owed an obligation of aliment by A.

NOTE

Section 7 makes detailed provision for the calculation of damages for loss of support awarded under section 4(2)(a). At present, the general principle is that a relative who seeks damages for loss of support must quantify the loss and cannot recover more than that sum from the defender. However, a special rule laid down in *Brown v Ferguson* (1990 SLT 274) applies where the relative seeking damages is the

deceased's spouse, civil partner, cohabitant or dependent child. While retaining the general principle that a relative cannot recover damages in excess of the loss suffered, this section makes significant changes to the way damages are assessed, particularly for the classes of relative to whom *Brown v Ferguson* applies at present. These changes give effect to recommendation 11.

Paragraph (a) of subsection (1) provides that the total amount available to settle all claims for loss of support is 75% of the deceased's net annual income. In the Report, it is argued that a deceased should be deemed to spend 25% of his income on himself, leaving 75% as available for support to relatives. In accordance with the policy laid out in paragraphs 3.35 and 3.36 of the Report, the court has no discretion to vary this proportion in line with individual circumstances. This paragraph gives effect in part to recommendation 11(c).

Paragraph (b) of subsection (1) provides that the income of a relative claiming damages is to be disregarded when assessing the sum due. Although a relative's income is currently disregarded in most cases (as the relative has to prove the actual loss), it is taken into account where the pursuer is the deceased's spouse, civil partner or cohabitant by virtue of the rule in *Brown v Ferguson*. This paragraph will end that practice, and in so doing it partially implements recommendation 11(a).

Paragraph (c) of subsection (1) restates the general principle that a relative must prove the actual loss of support suffered and can only recover damages to that extent, unless the relative falls within certain classes for which special provision is made. This exception applies to the deceased's spouse, civil partner or cohabitant and to any dependent children the deceased may have had, for whom provision is made in subsection (4). This paragraph implements in part recommendation 11(c).

Paragraph (d) of subsection (1) contains two exceptions to the general assessment of damages laid down in subsection (3). It applies where the deceased's spouse, civil partner, cohabitant or dependent child (i.e. the persons mentioned in section 7(1)(c)(i) and (ii)) seeks damages for loss of support.

Sub-paragraph (i) is concerned with the situation where the only pursuers fall within those classes. For example, the deceased's widow and three dependent children may seek damages. In this case, the deceased is deemed to have spent the full 75% of his net annual income which was available for the support of his relatives on those four people. Damages are awarded to these persons on this basis regardless of the degree to which the deceased actually supported them. It is for the courts to apportion damages among the pursuers, if there are multiple pursuers. Sub-paragraph (i) gives effect in part to recommendation 11(a).

Sub-paragraph (ii) applies where the deceased, in addition to supporting his spouse, civil partner, cohabitant or dependent child, was supporting another relative. That relative has to prove the actual loss of support suffered. This sum is then deducted from the 75% of the deceased's net annual income provided for in paragraph (a) and the sum left over is deemed to have been spent by the deceased on his spouse, civil partner, cohabitant or dependent child. Sub-paragraph (ii) implements recommendation 11(d).

Paragraph (e) makes provision in respect of the multiplier which will apply to the multiplicand obtained through the application of paragraphs (a) to (d). At present, multipliers are selected and apply from the date of death. As multipliers are discounted for future eventualities, damages calculated in this way are artificially reduced. Losses in the period between the date of death and date of the interlocutor awarding damages can be quantified. Paragraph (e) states that multipliers are only to be applied in respect of future loss of support and they should run from the date of the interlocutor. This paragraph implements recommendation 12.

Subsection (2) defines the term "dependent child" for the purposes of this section. It should be noted that the deceased may owe an obligation of aliment at his date of death to a child who is 18 or older (see Family Law (Scotland) Act 1985 section 1(5)(b)). This would typically include children in higher education. While these children may claim for loss of support, they do not benefit from the special provisions which apply to a dependent child, and must accordingly prove actual loss of support in terms of paragraph (c) of subsection (1). This subsection implements recommendation 11(b).

## **8 Further provision as regards relative's entitlement to damages**

- (1) Subject to subsection (3), in assessing for the purposes of section 4 or 6 the amount of any loss of support sustained by a relative of A no account is to be taken of—
  - (a) any patrimonial gain or advantage which has accrued or will or may accrue to the relative, by way of succession or settlement, from A or from any other person, or
  - (b) any insurance money, benefit, pension or gratuity which has been, or will or may be, paid as a result of A's death.
- (2) In subsection (1)—

“benefit” means benefit under the Social Security Contributions and Benefits Act 1992 (c.4) or the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (c.7) and any payment by a friendly society or trade union for the relief or maintenance of a member's dependants,

“insurance money” includes a return of premiums, and

“pension” includes a return of contributions and any payment of a lump sum in respect of a person's employment.
- (3) Where A has been awarded a provisional award of damages under section 12(2) of the Administration of Justice Act 1982 (c.53), the making of that award does not prevent liability from arising under section 4(1); but in assessing for the purposes of section 4 or 6 the amount of any loss of support sustained by a relative the court is to take into account such part of the provisional award relating to future patrimonial loss as was intended to compensate A for a period beyond the date on which A died.
- (4) In order to establish loss of support for the purposes of section 4 or 6, it is not essential for a relative to show that A was, or might have become, subject to a duty in law to provide support for, or contribute to the support of, the relative; but if any such fact is established it may be taken into account in determining whether, and if so to what extent, A would (had A not died) have been likely to provide, or contribute to, such support.
- (5) Except as provided for in this Act or in any other enactment, no person is entitled by reason of relationship to damages in respect of the death of another person.
- (6) In subsection (5), “damages” includes damages by way of *solatium*.

### NOTE

Section 8 re-enacts subsections (5) to (7) of section 1 of the 1976 Act. Subsections (1) and (2) re-enact subsection (5) of the 1976 Act, subsection (3) re-enacts subsection (5A), subsection (4) re-enacts subsection (6) and subsections (5) and (6) re-enact subsection (7). In subsection (5), there is a change in that reference is now made to 'any other enactment' rather than to the named provisions in subsection (7) of the 1976 Act. The other changes are largely for drafting reasons.

## **9 Transmission of relative's rights to executor**

- (1) This section applies where liability to pay damages to a relative (“R”) has arisen under section 4 or 6 but R dies.

- (2) If the right to damages is vested in R immediately before R's death that right is transmissible to R's executor ("E"); but in determining the amount of damages payable to E by virtue of this section, the only period to which the court is to have regard is the period ending immediately before R's death.
- (3) In a case where—
  - (a) section 5 applies, and
  - (b) R died before 27th April 2007,any right of R to damages under that section is to be taken, for the purposes of subsection (2), to have vested in R on A's death.

#### NOTE

Section 9 re-enacts section 1A of the 1976 Act. As subsection (1) states, it makes provision for the situation where a relative who has a right to damages under section 4 or 6 dies before that claim can be resolved.

Subsection (2) provides that any right to damages under section 4 or 6 which was vested in the relative immediately before his death, will transmit to the relative's executor. However, the executor can only pursue the claim for damages up to the relative's date of death. Damages are not payable for future loss as the relative's death would have brought to an end the support which he received in any case. Similarly, the grief and suffering felt by the relative is taken to end with his own death.

Subsection (3) makes special provision for transitional cases involving the relatives of mesothelioma sufferers. The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 came into force on 27 April 2007. However, the exception which it introduced (see section 5 above) was intended to apply where the victim's discharge of liability and his death occurred on or after 20 December 2006. As a result, the 2007 Act contained a transitional provision at section 1(4). Where a relative would have had a right to damages but died in the period between the victim's death and the coming into force of the Act, section 1(4) provided that the rights in question were to be taken to have vested in the relative as at the victim's date of death. In this way, the rights would be deemed to have vested in the relative before his death and accordingly they could transmit to his executor. Subsection (3) re-enacts this provision, as the triennium (for the purposes of the Prescription and Limitation (Scotland) Act 1973) has not yet expired and there may be cases where a deceased relative's executor could raise an action.

#### **10 Enforcement by executor of rights transmitted under section 2 or 9**

- (1) Where a right is transmitted by virtue of section 2 or 9, the executor in question is entitled—
  - (a) to bring an action to enforce it, or
  - (b) if an action to enforce it was brought by the deceased but not concluded before the date of death, to be sisted as pursuer in that action.
- (2) For the purposes of subsection (1)(b) an action is not to be taken to be concluded—
  - (a) while an appeal is competent, or
  - (b) before any appeal taken is disposed of.

## NOTE

Section 10 re-enacts section 2A of the 1976 Act. It details the powers of an executor to enforce the rights which are transmitted on the death of a victim (by virtue of section 2) or a relative of the victim (by virtue of section 9). An executor may raise an action to enforce the deceased's right or, if the deceased had already raised an action, may be sisted as pursuer. Subsection (2) clarifies that an executor may also take or continue any appeal which would have been competent had the deceased taken it.

### **11 Executor's claim not excluded by relative's claim etc.**

- (1) A claim made by virtue of this Act by a deceased's executor is not excluded by a claim so made by a relative of the deceased (or by such a relative's executor).
- (2) Nor is a claim so made by a such a relative (or by such a relative's executor) excluded by a claim so made by the deceased's executor.

## NOTE

Section 11 in effect re-enacts section 4 of the 1976 Act.

### **12 Limitation of total amount of liability**

- (1) This section applies to an action directed against a defender ("B") in which, following the death of a person ("A") from personal injuries, damages are claimed—
  - (a) in respect of those injuries, by A's executor, or
  - (b) in respect of A's death, by any relative of A or by the executor of any relative of A.
- (2) If it is shown that the liability arising in relation to B from the personal injuries in question—
  - (a) had before A's death, by antecedent agreement or otherwise, been limited to damages of a specified or ascertainable amount, or
  - (b) is so limited by virtue of an enactment,nothing in this Act makes B liable to pay damages exceeding that amount.
- (3) Accordingly, where there are two or more pursuers, any damages to which they would (but for this section) respectively be entitled under this Act are, if necessary, to be reduced *pro rata*.
- (4) And where two or more actions are conjoined the conjoined actions are to be treated, for the purposes of this section, as if they were a single action.

## NOTE

Section 12 re-enacts section 6 of the 1976 Act. It deals with limitation of liability in cases where the victim's executor or a relative of the victim (or the executor of such a relative) seeks damages in respect of the injuries suffered by the victim or in respect of his death.

Subsection (2) provides that, where the victim had agreed before his death to limit the damages payable by the defender, or where there is a statutory limitation on the damages, the executor or relative may only recover damages up to the permitted amount. This subsection is intended to make the victim's agreement binding on his executor and on his relatives. This is justifiable in that the executor represents the victim's

estate and so stands to be bound by the victim's agreements, and in that a claim made by relatives is dependent upon the victim's right, and so should not go beyond what the victim himself agreed.

As the victim is effectively capable of binding all persons who have a claim after his death, subsection (3) provides that the damages payable where there is a multiplicity of pursuers will be reduced *pro rata* if required in order to bring the total sum of damages within the amount agreed by the victim.

Subsection (4) makes provision for conjoined actions.

### **13 Amendment of section 9 of Administration of Justice Act 1982**

In section 9 of the Administration of Justice Act 1982 (c.53) (services to injured person's relative)—

(a) after subsection (1) there is inserted—

“(1A) In assessing the amount of damages payable by virtue of subsection (1) above to an injured person whose date of death is expected to be earlier than had the injuries not been sustained, the court is to assume that the person will live until the date when death would have been expected had the injuries not been sustained.”,

(b) subsection (2) is repealed,

(c) in subsection (3), for the words “subsections (1) and (2)” there is substituted “subsection (1)”, and

(d) in subsection (4), for the words “subsection (2) above” there is substituted “section 6(1) of the Damages (Scotland) Act 2008 (asp 00) (relative's loss of personal services)”.

#### **NOTE**

Section 13 amends section 9 of the Administration of Justice Act 1982. While section 9 of the 1976 Act makes provision in relation to patrimonial loss during the lost period, it appears that it does not extend to the 1982 Act. Accordingly, neither the victim nor his relatives can claim damages in respect of his inability to provide services during the lost period.

Paragraph (a) inserts a new subsection (1A) in section 9 of the 1982 Act which alters this position: it provides that, in assessing damages under subsection (1) in cases where the victim's expectation of life has been reduced, the court is to assume that he would have lived until his notional date of death had the injuries not been sustained. This provision, which reflects section 1(5) of the draft Bill, makes it clear that damages under section 9 of the 1982 Act are payable in respect of the lost period. In doing so, it implements recommendation 5(b).

Paragraphs (b) to (d) make changes to section 9 of the 1982 Act to allow the relatives' right to damages for loss of personal services to be brought into the draft Bill (section 6 above). Paragraph (b) repeals section 9(2) of the 1982 Act, as it is re-enacted in section 6(1) of the draft Bill. In consequence, the reference to subsection (2) is removed from subsection (3) by paragraph (c). In order to preserve the effect of subsection (4), a reference to section 6(1) of the draft Bill is substituted by paragraph (d) for the reference to subsection (2).

### **14 Interpretation**

(1) In this Act, unless the context otherwise requires—

“personal injuries” means—

- (a) any disease, and
  - (b) any impairment of a person's physical or mental condition, and
- “relative”, in relation to a person who has died, means a person who—
- (a) immediately before the death is the deceased's spouse or civil partner or is living with the deceased as if married to, or in civil partnership with, the deceased,
  - (b) is a parent or child of the deceased, accepted the deceased as a child of the person's family or was accepted by the deceased as a child of the deceased's family,
  - (c) is the brother or sister of the deceased or was brought up in the same household as the deceased and accepted as a child of the family in which the deceased was a child, or
  - (d) is a grandparent or grandchild of the deceased.
- (2) In deducing a relationship for the purposes of paragraph (c) of the definition of “relative” in subsection (1), any relationship of the half blood is to be treated as a relationship of the whole blood.
  - (3) In any enactment passed or made before this Act, unless the context otherwise requires, any reference to a loss of society award is to be construed as a reference to a grief and companionship award.

NOTE

Section 14 makes provision for interpreting the Bill. It corresponds to section 10 of and Schedule 1 to the 1976 Act.

Subsection (1) defines "personal injuries" and "relative". The definition of "personal injuries" in the 1976 Act has been amended twice. Paragraph 3 of the Schedule to the Damages (Scotland) Act 1993 added the words "and injury resulting from defamation or any other verbal injury or other injury to reputation". Section 8(8) of the Protection from Harassment Act 1997 added the words "or injury resulting from harassment actionable under section 8 of the Protection from Harassment Act 1997".

In the draft Bill, these amendments have been removed and the definition has reverted, in essence, to the one contained in the 1976 Act as enacted. This approach has been taken in order to simplify and clarify the definition, and to add greater intellectual coherence to it. In the rare cases where injury to reputation or harassment causes impairment to a person's physical or mental condition, this will continue to be a personal injury and the victim will have a right to damages accordingly. Insofar as injury to reputation was concerned, however, the 1993 Act was chiefly concerned with transmissibility of rights to executors. This end has been achieved by different means in the draft Bill (see the note to section 2).

The definition of "relative" has changed significantly in the draft Bill. At present, there are two classes: relatives generally (as defined in Schedule 1 to the 1976 Act) and the deceased's immediate family (as defined in section 10(2) of the 1976 Act). The latter group is a subset of the former, and while any relative may seek damages for loss of support, only the deceased's immediate family may seek a "section 1(4) award" for non-patrimonial loss (see the note to section 4 of the draft Bill). This distinction is swept away in the draft Bill as a result of the new approach which has been taken.

In effect, "relative" in the draft Bill encompasses the group known as the deceased's immediate family in the 1976 Act. This implements recommendation 15. The definition is greatly simplified as a result, and it has been redrafted to reflect the wider changes in family law (for example, the status of cohabitants, the creation of the status of civil partner and the abolition of illegitimacy). As a consequence, there is no need

to re-enact the definition of the deceased person's immediate family contained in section 10(2) of the 1976 Act.

Section 10(3) of the 1976 Act provides that references to any other Act are to that Act as amended. It has not been re-enacted because there is no need to insert an express provision of this nature into individual Acts (see section 20(2) of the Interpretation Act 1978 and paragraph 15(2) of Schedule 1 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SSI 1999/1379)

## **15 Minor and consequential amendments**

Schedule 1 to this Act, which contains minor amendments and amendments consequential on the provisions of this Act, has effect.

## **16 Repeals**

The enactments mentioned in schedule 2 to this Act are repealed to the extent mentioned in the second column of that schedule.

## **17 Saving**

Nothing in this Act affects proceedings commenced before section 16 comes into force.

## **NOTE**

The 1976 Act is to be repealed by section 16 and schedule 2 on a day appointed by the Scottish Ministers. However, it may be the case that, on that day, there are ongoing proceedings which were commenced under the 1976 Act. Section 17 ensures that the 1976 Act will continue to apply to those actions. It should be noted, however, that the test is whether proceedings have been raised. If a victim suffers personal injuries before section 16 comes into force but does not raise proceedings until after that date, the new regime will apply to those proceedings.

## **18 Transitional provision etc.**

- (1) The Scottish Ministers may, by order made by statutory instrument, make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, this Act.
- (2) Subject to subsection (4), a statutory instrument containing an order under subsection (1) is subject to annulment in pursuance of a resolution of the Parliament.
- (3) An order under subsection (1) may make different provision for different cases or for different classes of case.
- (4) An order under subsection (1), if it includes provision amending or repealing an enactment contained in an Act, is not made unless a draft of the statutory instrument containing the order has been—
  - (a) laid before, and
  - (b) approved by resolution of, the Parliament.

**19 Short title, Crown application and commencement**

- (1) This Act may be cited as the Damages (Scotland) Act 2008.
- (2) This Act binds the Crown.
- (3) The provisions of this Act, except this section, come into force on such day as the Scottish Ministers may by order made by statutory instrument appoint.
- (4) Different days may be so appointed for different provisions and for different purposes.

SCHEDULE 1  
(introduced by section 15)

MINOR AND CONSEQUENTIAL AMENDMENTS

*Sheriff Courts (Scotland) Act 1907 (c.51)*

- 1 In Schedule 1 to the Sheriff Courts (Scotland) Act 1907 (c.51) (ordinary court rules), in the definition of “relative” in rule 36.1(2), for the words “meaning assigned to it in Schedule 1 to the Damages (Scotland) Act 1976” there is substituted “same meaning as in the Damages (Scotland) Act 2008”.

*Prescription and Limitation (Scotland) Act 1973 (c.52)*

- 2 (1) In section 18 of the Prescription and Limitation (Scotland) Act 1973 (actions where death has resulted from personal injuries), in subsection (5), for the words “Schedule 1 to the Damages (Scotland) Act 1976” there is substituted “the Damages (Scotland) Act 2008”.
- (2) In section 22C of that Act (actions under the Consumer Protection Act 1987 where death has resulted from personal injuries), in subsection (6), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2008”.

*Administration of Justice Act 1982 (c.53)*

- 3 (1) In section 10(b) of the Administration of Justice Act 1982 (assessment of damages for personal injuries), for the words “section 2(1) of the Law Reform (Personal Injuries) Act 1948” there is substituted “section 8 of the Social Security (Recovery of Benefits) Act 1997 (c.27)”.
- (2) In section 13(1) of that Act (supplementary), for the definition of “personal injuries” there is substituted—
- ““personal injuries” means—
- (a) any disease, and
- (b) any impairment of a person’s physical or mental condition;”.

*Companies Act 1985 (c.6)*

- 4 In section 651 of the Companies Act 1985 (power of court to declare dissolution of company void), in subsection (5)(b), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2008”.

*Consumer Protection Act 1987 (c.43)*

- 5 (1) In section 1 of the Consumer Protection Act 1987 (purpose and construction of Part 1), in subsection (2), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2008”.

- (2) In section 6 of that Act (application of certain enactments etc.)—
- (a) in subsection (1)(c), for the words “section 1 of the Damages (Scotland) Act 1976” there is substituted “sections 3 to 6 of the Damages (Scotland) Act 2008”, and
  - (b) in subsection (2), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2008”.

*Coal Mining Subsidence Act 1991 (c.45)*

- 6 In section 32 of the Coal Mining Subsidence Act 1991 (compensation for death or disablement), in subsection (2)(c), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2008”.

*Merchant Shipping Act 1995 (c.21)*

- 7 In Part 2 of Schedule 7 to the Merchant Shipping Act 1995 (Convention on Limitation of Liability for Maritime Claims 1976), in paragraph 6, for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2008”.

*Damages Act 1996 (c.48)*

- 8 In section 7 of the Damages Act 1996 (interpretation), in subsection (2), for the words “meaning given by section 10(1) of the Damages (Scotland) Act 1976” there is substituted “same meaning as in the Damages (Scotland) Act 2008”.

*Health and Social Care (Community Health and Standards) Act 2003 (c.43)*

- 9 In Schedule 10 to the Health and Social Care (Community Health and Standards) Act 2003 (recovery of NHS charges: exempted payments), in paragraph 7, for the words “section 1 of the Damages (Scotland) Act 1976 (c.13)” there is substituted “any of sections 4 to 6 of the Damages (Scotland) Act 2008 (asp 00)”.

*Companies Act 2006 (c.46)*

- 10 In section 1030 of the Companies Act 2006 (when application to the court may be made), in subsection (6)(b)(ii), for the words “Damages (Scotland) Act 1976 (c.13)” there is substituted “Damages (Scotland) Act 2008 (asp 00)”.

NOTE

Schedule 1 makes minor and consequential amendments to other enactments. In the majority of cases, this involves updating references to the 1976 Act. In paragraph 3(1), the opportunity has also been taken to update a reference in the Administration of Justice Act 1982 to the repealed Law Reform (Personal Injuries) Act 1948, and paragraph 3(2) is intended to ensure consistency between the definition of "personal injuries" under that Act and the new definition used in the draft Bill. In relation to paragraph 4, it should be noted that Schedule 16 to the Companies Act 2006 prospectively repeals section 651 of the Companies Act 1985.

SCHEDULE 2  
*(introduced by section 16)*

REPEALS

<i>Enactment</i>	<i>Extent of repeal</i>
Damages (Scotland) Act 1976 (c.13)	The whole Act.
Administration of Justice Act 1982 (c.53)	Section 14.
Law Reform (Parent and Child) (Scotland) Act 1986 (c.9)	In Schedule 1, paragraph 15.
Damages (Scotland) Act 1993 (c.5)	The whole Act.
Protection from Harassment Act 1997 (c.40)	Section 8(8).
Civil Partnership Act 2004 (c.33)	In Schedule 30, in the consequential amendments for Scotland, the entry relating to the Damages (Scotland) Act 1976.
Family Law (Scotland) Act 2006 (asp 2)	Section 35. In schedule 2, paragraph 2.
Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 (asp 18)	The whole Act.

# Appendix B

## Calculation of loss of support

1. In paragraphs 3.39 to 3.44 of the Report, we discuss the formula for calculation of loss of support laid down in *Brown v Ferguson*.<sup>1</sup> As we state in paragraph 3.41, the formula produces unsatisfactory results where both the deceased (D) and his surviving partner (S) had an income. The first four worked examples below illustrate this.
2. Throughout this Appendix, the deceased's net annual income has been taken to be £20,000.
3. Example (a) illustrates the scenario where the deceased was the sole breadwinner and the survivor had no independent income. Example (b) demonstrates the outcome where the deceased and the survivor had the same income. As will be seen in example (c), the multiplicand starts to diminish rapidly if the survivor had a higher income than the deceased. Example (d) illustrates the extreme case where the loss of dependency is calculated as being nil: this occurs when the survivor had an income at least three times greater than the deceased's.
4. The remaining examples, by contrast, illustrate the proposed new rule mentioned in paragraph 3.37: the survivor's income would be disregarded in calculating loss of support and a fixed percentage of the deceased's net income would be deducted to represent his reasonable living expenses. These examples show the effect of utilising different percentage deductions, from 0% (example (e)) to 50% (example (j)).
5. The effects of the current and the proposed rule are illustrated in Graph 1. It can be seen that the multiplicand will reduce at a steady rate as the survivor's net income increases (the *Brown v Ferguson* line). By contrast, the multiplicand remains constant regardless of the survivor's net income under the new rule. Graph 1 shows five lines which demonstrate the level of the multiplicand dependent on the percentage deduction made. Graph 2 demonstrates how the multiplicand will decrease as the percentage deduction increases.
6. It will be readily apparent from Graph 1 that the new rule is likely to result in an increased award of damages to the survivor, unless the percentage deduction is greater than 25%.

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<sup>1</sup> 1990 SLT 274.

## Worked examples

The rule in *Brown v Ferguson* can be represented algebraically as follows:

Let:  $D$  = the deceased's annual net income  
 $S$  = the survivor's annual net income  
 $M$  = the multiplicand

$$M = \frac{3}{4}(D + S) - S$$

$$M = \frac{3}{4}D + \frac{3}{4}S - S$$

$$\underline{\underline{M = \frac{3}{4}D - \frac{1}{4}S}}$$

(a)  $D = \text{£}20,000$ ;  $S = \text{£}0$

$$M = \frac{3}{4}D - \frac{1}{4}S$$

$$M = \frac{3}{4}(20,000) - \frac{1}{4}(0)$$

$$M = 15,000 - 0$$

$$\underline{\underline{M = 15,000}}$$

(b)  $D = \text{£}20,000$ ;  $S = \text{£}20,000$

$$M = \frac{3}{4}D - \frac{1}{4}S$$

$$M = \frac{3}{4}(20,000) - \frac{1}{4}(20,000)$$

$$M = 15,000 - 5,000$$

$$\underline{\underline{M = 10,000}}$$

(c)  $D = \text{£}20,000$ ;  $S = \text{£}40,000$

$$M = \frac{3}{4}D - \frac{1}{4}S$$

$$M = \frac{3}{4}(20,000) - \frac{1}{4}(40,000)$$

$$M = 15,000 - 10,000$$

$$\underline{\underline{M = 5,000}}$$

(d)  $D = \text{£}20,000$ ;  $S = \text{£}60,000$

$$M = \frac{3}{4}D - \frac{1}{4}S$$

$$M = \frac{3}{4}(20,000) - \frac{1}{4}(60,000)$$

$$M = 15,000 - 15,000$$

$$\underline{\underline{M = 0}}$$

The proposed rule, whereby the survivor's income is disregarded, with deductions for the deceased's reasonable living expenses can be represented as follows:

(e) no deduction

$$M = D$$

$$\underline{\underline{M = 20,000}}$$

(f) 10% deduction

$$M = 90\% \times D$$

$$M = 0.9 \times 20,000$$

$$\underline{\underline{M = 18,000}}$$

(g) 15% deduction

$$M = 85\% \times D$$

$$M = 0.85 \times 20,000$$

$$\underline{\underline{M = 17,000}}$$

(h) 20% deduction

$$M = 80\% \times D$$

$$M = 0.8 \times 20,000$$

$$\underline{\underline{M = 16,000}}$$

(i) 25% deduction

$$M = 75\% \times D$$

$$M = 0.75 \times 20,000$$

$$\underline{\underline{M = 15,000}}$$

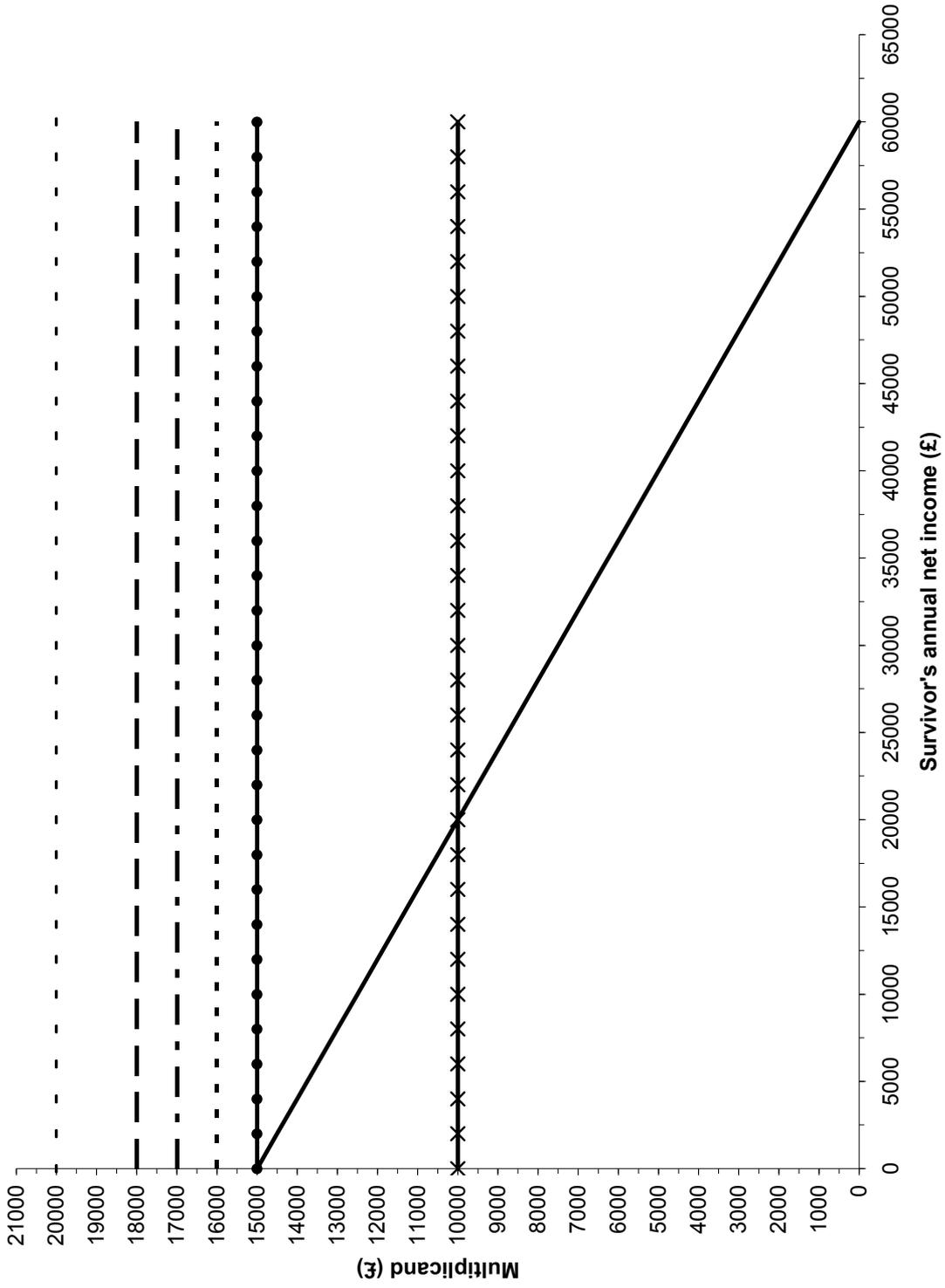
(j) 50% deduction

$$M = 50\% \times D$$

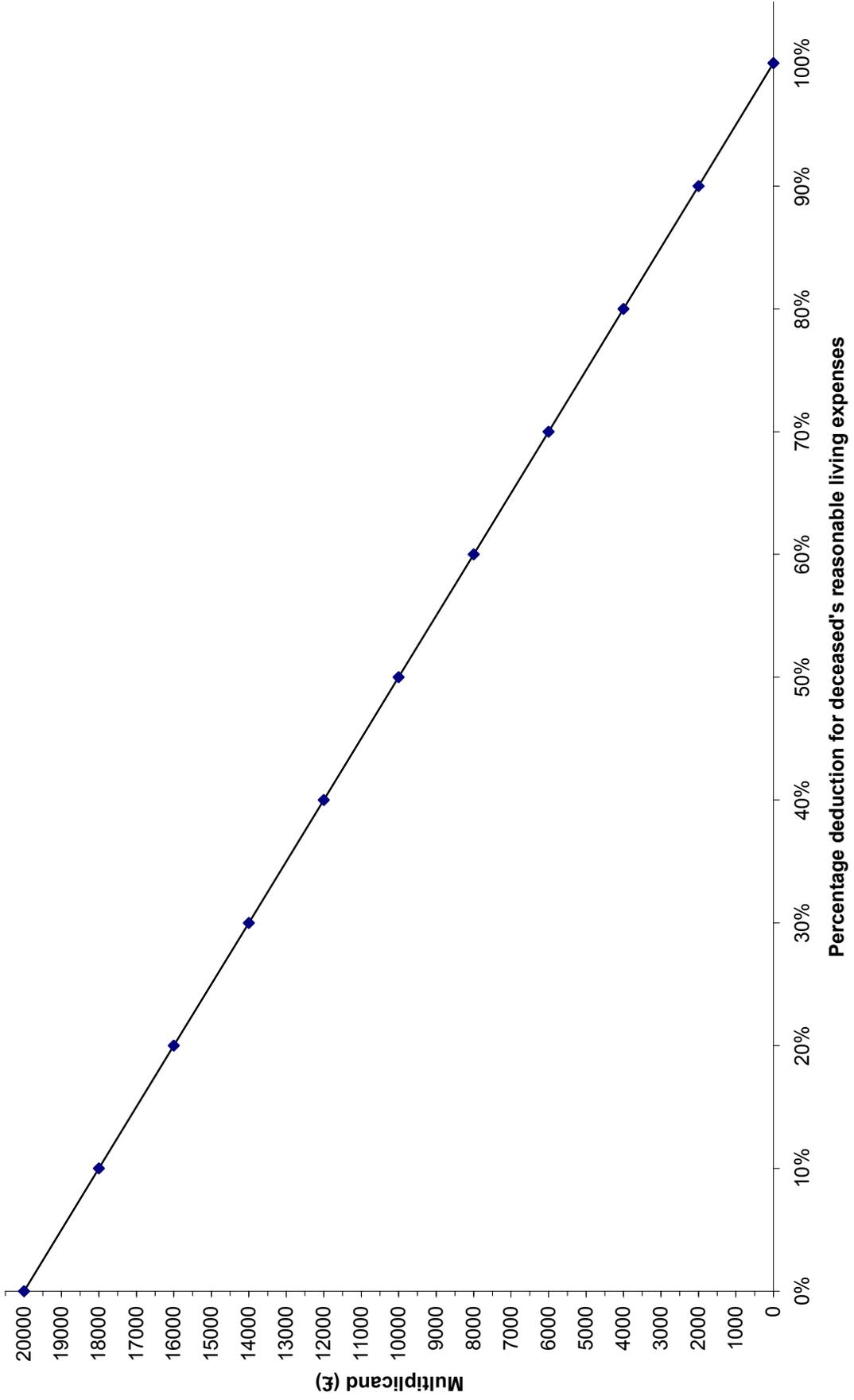
$$M = 0.5 \times 20,000$$

$$\underline{\underline{M = 10,000}}$$

**Graph 1**



**Graph 2**



# Appendix C

## Damages (Scotland) Act 1976<sup>1</sup>

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

[13<sup>th</sup> April 1976]

### **Rights of relatives of a deceased person.**

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

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

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

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

(2B) This subsection applies where –

- (a) the personal injury in consequence of which the deceased died is mesothelioma; and
- (b) the discharge of liability and the death each occurred on or after 20 December 2006 (and whether before, on or after the date on which section 1

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<sup>1</sup> This Appendix sets out the provisions of the Damages (Scotland) Act 1976 as amended to the date of publication of the Report.

of the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 (asp 18) came into force).

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

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

- (a) distress and anxiety endured by the relative in contemplation of the suffering of the deceased before his death;
- (b) grief and sorrow of the relative caused by the deceased's death;
- (c) the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died,

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

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

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

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

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

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

and in this subsection –

"benefit" means benefit under the Social Security Act 1975 or the Social Security (Northern Ireland) Act 1975, and any payment by a friendly society or trade union for the relief or maintenance of a member's dependants;

"insurance money" includes a return of premiums; and

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

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

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

(7) Except as provided in this section or in Part 2 of the Administration of Justice Act 1982 or under regulation 3 of the Railways (Convention on International Carriage by Rail) Regulations 2005 no person shall be entitled by reason of relationship to damages (including damages by way of *solatium*) in respect of the death of another person.

#### **Transmissibility to executor of rights of deceased relative.**

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

#### **Rights transmitted to executor in respect of deceased person's injuries.**

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

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

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

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

**Enforcement by executor of rights transmitted to him.**

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

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

**Certain rights arising on death of another not transmissible.**

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

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

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

**Provisions for avoidance of multiplicity of actions.**

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

**Limitation of total amount of liability.**

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

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

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

(a) by the executor of the deceased, in respect of the injuries from which the deceased died;

(b) in respect of the death of the deceased, by any relative of his or, if the relative has died, by the relative's executor.

#### **Amendment of references in other Acts.**

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

#### **Abolition of right of assythment.**

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

#### **Damages due to injured person for patrimonial loss caused by personal injuries whereby expectation of life is diminished.**

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

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

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

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

(c) the court shall have regard to any diminution of any such amount as aforesaid by virtue of expenses which in the opinion of the court the pursuer, if he had

not sustained the injuries in question, would reasonably have incurred in the said period by way of living expenses.

**Solatium for loss of expectation of life.**

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

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

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

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

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

**Interpretation.**

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

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

"personal injuries" includes any disease or any impairment of a person's physical or mental condition and injury resulting from defamation or any other verbal injury or other injury to reputation, or injury resulting from harassment actionable under section 8 of the Protection from Harassment Act 1997;

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

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

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

**Repeals.**

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

**Citation, application to Crown, commencement and extent.**

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

- (2) This Act binds the Crown.
- (3) .....[repealed by the Damages (Scotland) Act 1993]
- (4) .....[repealed by the Damages (Scotland) Act 1993]
- (5) This Act extends to Scotland only.

## SCHEDULE 1

### Section 1

#### DEFINITION OF "RELATIVE"

1. In this Act "relative" in relation to a deceased person includes -
  - (a) any person who immediately before the deceased's death was the spouse or civil partner of the deceased;
  - (aa) any person, not being the spouse or civil partner of the deceased, who was, immediately before the deceased's death, living with the deceased as husband or wife or in a relationship which had the characteristics of the relationship between civil partners;
  - (b) any person who was a parent or child of the deceased;
  - (c) any person not falling within sub-paragraph (b) above who was accepted by the deceased as a child of his family;
  - (ca) any person not falling within sub-paragraph (b) above who accepted the deceased as a child of the person's family;
  - (cb) any person who –
    - (i) was the brother or sister of the deceased; or
    - (ii) was brought up in the same household as the deceased and who was accepted as a child of the family in which the deceased was a child;
  - (cc) any person who was a grandparent or grandchild of the deceased;
  - (d) any person not falling within sub-paragraph (b) or (cc) above who was an ascendant or descendant of the deceased;
  - (e) any person not falling within sub-paragraph (cb)(i) above who was, or was the issue of, a brother, sister, uncle or aunt of the deceased;
  - (f) any person who, having been a spouse of the deceased, had ceased to be so by virtue of a divorce; and

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

but does not include any other person.

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

## SCHEDULE 2

Section 11

### REPEALS

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

# Administration of Justice Act 1982<sup>1</sup>

## PART 2

### DAMAGES FOR PERSONAL INJURIES ETC – SCOTLAND

#### Damages in respect of services.

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

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

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

#### Services rendered to injured person.

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

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

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

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

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

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<sup>1</sup> This Appendix sets out the provisions of Part 2 of the Administration of Justice Act 1982 as amended to the date of publication of the Report.

### **Services to injured person's relative.**

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

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

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

- (a) which were or might have been expected to have been rendered by the injured person before the occurrence of the act or omission giving rise to liability,
- (b) of a kind which, when rendered by a person other than a relative, would ordinarily be obtainable on payment, and
- (c) which the injured person but for the injuries in question might have been expected to render gratuitously to a relative.

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

### **Assessment of damages for personal injuries.**

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

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

under an obligation to reimburse the employer in the event of damages being recovered in respect of those injuries;

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

but there shall be taken into account –

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

**Maintenance at public expense to be taken into account in assessment of damages: Scotland.**

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

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

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

**Award of provisional damages for personal injuries: Scotland.**

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

(ii) insured or otherwise indemnified in respect of the claim.

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

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

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

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

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

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

(5) Nothing in this section shall be construed –

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

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

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

### **Supplementary.**

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

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

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

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

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

- (a) any relationship by affinity shall be treated as a relationship by consanguinity; any relationship of the half blood shall be treated as a relationship of the whole blood; and the stepchild of any person shall be treated as his child; and
  - (b) section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 shall apply; and any reference (however expressed) in this Part of this Act to a relative shall be construed accordingly.
- (2) Any reference in this Part of this Act to a payment, benefit or pension shall be construed as a reference to any such payment, benefit or pension whether in cash or in kind.
- (3) This part of this Act binds the Crown.

#### **Amendment and repeal of enactments.**

**14.** (1) Section 1(7) of the Damages (Scotland) Act 1976 is amended by inserting after the word "section" the words "or in Part 2 of the Administration of Justice Act 1982".

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

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

(ii) after subsection (2) there shall be inserted –

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

(a) by the executor of the deceased, in respect of the injuries from which the deceased died;

(b) in respect of the death of the deceased, by any relative of his."

(3) Notwithstanding section 73(5) of this Act, where an action to which section 5 of that Act applies has been raised and has not, prior to the commencement of subsection (2) above, been disposed of, the court shall not dismiss the action on the ground only that the pursuer has failed to serve notice of the action as required by subsection (6) of the said section 5.

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

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

# Appendix D

## List of consultees who submitted written comments on Discussion Paper No 135

Asbestos Action Tayside

Association of British Insurers (ABI)

Association of Personal Injury Lawyers (APIL)

Clydeside Action on Asbestos

Faculty of Advocates

Forum of Insurance Lawyers (Scotland) (FOIL)

Forum of Scottish Claims Managers

Law Society of Scotland

Lord President and the Judges of the Court of Session

Medical Defence Union (MDU)

Motor Insurers' Bureau (MIB)

Simpson & Marwick Solicitors

Susan O'Brien QC

Thompsons Solicitors

William J Stewart

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