SCOTTISH LAW COMMISSION

MEMORANDUM

on

Damages for Injuries Causing Death

Proposals

1. On 24th September, 1965, the Lord Advocate asked the Commission to consider:

> "The transmissibility of a right of action for personal injury in the event of the death of the injured person, with special reference to the right of the person's relatives to sue in respect of the death."

The Secretary of State for Scotland subsequently passed to the Commission for consideration a proposal, made by the Transport and General Workers' Union,

> "That legislation be introduced to nullify the case of Darling v. Gray and Sons (1892) 19 R. (H.L.) 31 so far as it affects claims for patrimonial loss by a widow and/or dependent child or children as individuals when the husband and/or father dies as a result of the injuries suffered or the disease contracted, subsequent to his raising of an action against the employers arising out of their alleged default."

It is understood that both proposals were made having regard to the decision in McCann's Executrix v. Wright's Insulations Ltd. [1]

[1] 1965 S.L.T. (Sh. Ct.) 19.

2. On 24th September, 1965, the Lord Advocate also asked us to consider:

"Whether collaterals of a deceased person should be entitled to sue for solatium and loss of support."

We deal first with -

I Transmissibility of Rights of Action

Darling v. Gray & Sons [1]

3. The facts in this case were these: a workman had raised an action against his employers for damages for personal injuries which he imputed to the defenders' fault. While this action was pending, the pursuer died and his mother, as his executrix, was sisted in his place. During the currency of this action, the mother raised a second action against the same defenders for solatium and damages for the death of her son, which she alleged to be due to the same injury. The House of Lords, affirming the judgment of the Second Division, [2] held that the second action was incompetent.

McCann's Executrix v. Wright's Insulations Ltd. [3]

4. In this case Hugh McCann had raised an action against his employers for pain and suffering and loss of wages, alleging that he had contracted asbestosis as a result of the conditions of his employment. McCann died during the progress of this action, and his executrix (his widow) was sisted as pursuer in his place. When, thereafter, the deceased's widow and daughter joined the proceedings as co-pursuers in their own right for damages for loss of support resulting from the death, the defenders pleaded that the

[1] (1892) 19 R. (H.L.) 31. More fully reported sub nom. Wood v. Gray & Sons [1892] A.C. 576.

[2] (1891) 18 R. 1164.

[3] supra.

action at their instance was incompetent. This plea was sustained by the Sheriff-Substitute and the widow and daughter appealed to the Sheriff. It was argued on their behalf that, since they had limited their claim to one for loss of support, Darling v. Gray & Sons was distinguishable. The Sheriff rejected this contention, and in the course of his opinion said: "In Darling, in my opinion, there is no hint of a possible distinction between claims for solatium, using the word in its narrow sense, and claims for damages. What was held to be incompetent in Darling was 'an action at the instance of relatives, where an action in respect of the same injuria has been raised by the deceased during his lifetime'."

The law considered

5. In Darling v. Gray & Sons it is not easy to identify the reasoning behind the conclusion that the following out of the injured person's own action after his death by his executors precludes the dependent relatives from taking action on their own behalf. It is true that there was some discussion of the brocard nemo debet bis vexari pro una et eadem causa, [1] and Lord Cameron [2] has said that the real ratio of the decision was that the court will not allow two actions to be brought and determined in respect of the same negligent act leading to the injury and death of the same person, the one at the instance of the person injured, and the other at the instance of dependants. This is undoubtedly a ground of decision which was adopted by Lord Field. [3] But this is merely to invite the further question - why should

[1] "A man ought not to be called upon to defend two actions, both arising from the same cause of action."

[2] In Bruce v. Alexander Stephen & Sons Ltd., 1957 S.L.T. 78.

[3] [1892] A.C. at page 582.

the court refuse to permit more than one action, when the pursuers sue different interests and present claims not only independent of one another but also founded upon different losses, though upon the same wrong? Today, it could not be disputed that there is a clear distinction between, on the one hand, the claim of an injured person for his patrimonial loss (including loss of wages), and solatium for his personal pain and suffering, and, on the other hand, following the injured person's death, the claim of his dependent relatives for their grief and suffering and for loss of future support and other patrimonial loss arising from the death. "The claim is clearly an independent claim in the sense that it is a claim by the relative for his or her own loss, i.e., the loss which he or she has suffered by the death, and not a claim for the loss, injury and damage which the deceased suffered from the wrong done to him."[1] "It is now accepted that the right of the relatives is an independent, and not a derivative or representative, right."[2]

6. In the course of his opinion in Darling Lord Watson observed, "The Court of Session, by a series of decisions which trench somewhat closely upon the province of the Legislature, has, subject to certain limitations, sustained actions at the instance of relatives of the deceased in their own rights, and not in a strictly representative capacity, against the parties whose negligence occasioned his death for the loss which they personally suffered through that event." After referring to the view of Lord President Inglis that "It is not desirable to extend this class of actions, unless they can be justified on some principle which has been already

[1] McKay v. Scottish Airways 1948 S.C. 254 per Lord Mackintosh at page 258.

[2] Ibid. per Lord President Cooper at page 264.

established,"[1] Lord Watson continued:[2] "To my mind the only relevant question in the present case is, has the rule ever been carried so far as to recognise the competency of an action at the instance of relatives, where an action in respect of the same injuria has been raised by the deceased during his lifetime, and is still a depending litigation? Unless that question can be answered in the affirmative, the appellant's action is in my opinion incompetent." Lord Watson answered the question firmly in the negative, saying:[3] "There is not a single instance in which the Court has allowed two actions to be brought in respect of the same negligent act leading to the injury and death of one person."

7. Thus on one view the decision appears to be a purely negative one based on absence of precedent. Lord Watson, however, went further, and referred to an argument based on "the worn-out analogy of actions of assythment" - (an action available to dependants who had been injured through the criminal killing of a relative.) In Eisten v. North British Railway Co.[4], however, Lord Deas had expressly reserved consideration of whether a dependent sister could bring an assythment in a case where her brother had suffered culpable homicide at the hands of a negligent railway servant. In that case the question could not have arisen, because the fatal accident had taken place in England, but it hardly seems that Lord Watson's summary dismissal of what Lord Deas called a "difficult question," which he did "not wish to say anything to prejudice," was justifiable.

1 Eisten v. North British Railway (1870) 8 M. 980 at page 984.

2 Darling v. Gray & Sons, supra, at pages 31 and 32.

3 Ibid. at page 32.

4 (1870) 8 M. 980, at page 985.

8. Again, Lord Watson founded upon another observation by Lord President Inglis in Eisten[1] on the subject of claims by relicts and children upon the death of spouses or parents, that "As the existence of such claims in our common law is a peculiarity in our system, it is not desirable to extend this class of actions, unless they can be justified on some principle which has been already established." This observation is curious, in view firstly of the fact that Lord Campbell's Act[2] had introduced into England, just 24 years earlier, that very right to recover damages, and secondly of the existence of such an action at the time the opinion was delivered in many European countries. According to the argument of Sir Frederick Thesiger, in Blake v. Midland Railway Co.[3] in the course of claiming solatium for a widow in addition to patrimonial loss, "The kind of remedy here sought was given by the civil law, and is familiar in the law of Scotland, which country is in express terms excluded from the operation of the present Act by section 6, the Legislature apparently considered that, by this statute, the law of Scotland."[4] On this view it would seem arguable that, in limiting the dependant's right in the way they did

[1] at page 984.

[2] The Fatal Accidents Act, 1846.

[3] (1852) 18 Q.B. 93 at 99.

[4] The views of the promoter of The Fatal Accidents Act, 1846, may be worth recording. Arguing in the House of Lords in a Scottish Appeal, Sir John Campbell, A.G., as he then was, said: "In one important point the English and Scotch law differ from each other. By the English law, if a man's wife or son should be killed on the spot, he could have no action against the person whose negligence had caused the death. The English law allows no solatium in this respect. The Scotch law, however, says more sensibly, that in such a case a solatium shall be granted to the person injured in his happiness and circumstances by the death of his wife or child," Duncan v. Findlater (1839) 6 Cl. and Fin. 894 at 898/9.

in Darling's case, it was truly the House of Lords that was trenching "somewhat closely upon the province of the Legislature."

9. The practical consequences of Darling's case may be illustrated by the case of Reid v. Lanarkshire Traction Co.[1] An employee was injured in a street collision and died from his injuries a fortnight afterwards. Before his death he had brought an action of damages in respect of his injuries and, after his death, his widow as executrix was sisted as pursuer. The Court held that she was entitled to recover only (1) the patrimonial loss occasioned to her husband's estate, and (2) solatium. Since he survived the accident for only a fortnight, the claim under the first head could be for only two weeks' loss of wages. The amount awarded under the head of solatium included a small sum referable to brief pain and suffering, by far the larger portion being in respect of "the additional handicap on his enjoyment of life due to the anticipation of earlier death."[2] The pleadings contained (in addition to the usual averments with regard to the injuries of the deceased and the pain he had suffered) a statement that the deceased was the sole means of support of his widow. The Court held that this averment was irrelevant. It was conceded by counsel for the pursuer that, on the authority of Darling's case, "the present action having been raised by the deceased, the pursuer was barred from bringing a second action to recover loss sustained by her as an individual."[3] He was therefore limited to the forlorn

[1] 1933 S.C. 416 and 1934 S.C. 79.

[2] per Lord Wark at page 82, approved and followed in Oliver v. Ashman [1962] 2 Q.B. 210, per Willmer L.J. at page 239.

[3] Reid v. Lanarkshire Traction Co. 1934 S.C. 79 at 82.

argument that she, as executrix, was entitled to damages for the shortening of the life of her constituent which must be at least as large as those which, on all heads, he could have claimed had he survived, since total loss of life is an even more grievous loss than incapacitation. This argument having been rejected, the consequence of the deceased's having instituted proceedings before his death was that the widow could recover nothing by way of damages for future loss of support and for solatium.

10. It is apparent that the rule in Darling v. Gray & Sons leads to arbitrary distinctions, and we submit that it was erroneous in law.[1] We are fortified in this view by the recent reluctance of the courts to extend its effects. In Bruce v. Alexander Stephen & Sons[2] the facts were that a claim had been intimated to the defenders by the deceased, but no action upon that claim was commenced during his life. Such an action was served on his behalf by his law agents three days after his death, in ignorance of that fact, but this action, and the deceased's claim, were formally waived or abandoned by his executors. On these facts Lord Cameron held that the dependent relatives' action for solatium and loss of support was not barred. He declared that he would not be prepared to extend the rule of Darling v. Gray and Sons to the case of a claim intimated but not pursued in proceedings which were pending before the death of the deceased. In McGhie v. British Transport Commission[3] Lord Kilbrandon held that an action by the deceased's relatives for loss of support and solatium was not defeated by a subsequent action for damages by the deceased's

[1] Cf. McKechnie, "Encyclopaedia of the Laws of Scotland," Volume XII, page 503.

[2] 1957 S.L.T. 78

[3] 1964 S.L.T. 25.

executrix-dative, in that capacity, for the patrimonial loss sustained by the deceased's estate prior to his death by reason of his loss of wages. It may be taken that, although the point was, for obvious reasons, not argued, the subsequent action by the executrix was incompetent. This case indicates that the rights of the relatives may be conditioned simply by the order in which the two actions are initiated, a position which can hardly be described as satisfactory.

Recommendations

11. We therefore recommend that the law be altered to the effect that it shall no longer be a bar to an action raised by a dependant claiming damages, whether by way of solatium or of patrimonial loss, for the death of a relative, that the deceased in his or her lifetime has raised an action which is insisted in by his or her executor claiming damages, under either head, for the injuries which caused the death, or that his or her executor has raised such an action after death. In order to deal with the converse case we would also recommend that, if the deceased has not raised an action while in life, and the dependants raise an action after his death, their action should not defeat a subsequent action by the executor. This is a situation which is not likely to arise often.

II Rights of Collaterals

Present Law

12. Since Greenhorn v. Addie[1] the Scottish courts have defined the class of persons who may claim solatium and patrimonial loss following the death of a relative by reference to the existence or absence of a reciprocal legal duty to aliment in case of necessity. Although a claim was conceded to the deceased's husband at a time when a wife had no duty to aliment her husband,[2] the rule was applied strictly to sisters who, on the death of their brother, lost their sole means of support[3] and to a mother on the death of her illegitimate child who contributed to her support.[4] A mother was held to have no claim to damages and solatium for the death of her child while the father was alive.[5] This particular rule has been abolished by statute[6] and illegitimate children[7] and adopted children[8] have now been conceded statutory rights to claim. Apart from

[1] (1855) 17 D. 860.

[2] Dow v. Brown & Co. (1844) 6 D. 534.

[3] Eisten v. North British Railway Co. (1870) 8 M. 980.

[4] Weir v. Coltness Iron Co. (1889) 16 R. 614; Clarke v. Carfin Coal Co. (1891) 18 R. (H.L.) 63.

[5] Whitehead v. Blaik (1893) 20 R. 1045; Laidlaw v. National Coal Board 1957 S.C. 49.

[6] Law Reform (Damages and Solatium) (Scotland) Act, 1962, s. 1(1).

[7] Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, s. 2(2)

[8] We refer to the situation of adopted children in the subsequent part of this Memorandum.

these, the persons who may now claim include persons who stand to the deceased in the relationship of wife, husband, legitimate child, father, mother, and, if the intervening relatives are themselves dead, grandparents and grandchildren. Certain hard cases, however, remain, particularly where the death of a brother deprives a sister of her means of support or where the existence of a nearer relative liable in law to support a child negatives the existence of a legal duty to aliment as between the deceased and the child.[1] It may also be thought that another hard case is that of the divorced wife who, under the present law, has no title to sue for solatium or loss of support even when she holds a maintenance order.[2]

13. As we pointed out above, the object of Lord Campbell's Act was said to be to introduce into England the rule of the common law of Scotland; the limitation of relationship was accordingly substantially identical in both countries. This, however, is not the only instance of Scots law being introduced into England, where it receives the benefit of subsequent extension, while in Scotland the law remains in a backwater.[3] The only additions to the classes of beneficiary in Scotland have been the admission of the illegitimate child,[4] parent of an illegitimate child,[5] and the adopted child.[6] In England, however, apart from reforms

1 Ewart v. R. & W. Ferguson 1932 S.C. 277.

2 Hemmens and Others v. British Transport Commission 1955 S.L.T. (Notes) 48.

3 Cf. Legitimation per subsequens matrimonium. Scottish Law Commission Memorandum Cmnd. 3223, 1967.

4 Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, s. 2(2).

5 Law Reform (Damages and Solatium) (Scotland) Act, 1962 s. 2.

6 Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, s. 2(1).

similar to those just referred to, "the classes of dependants have been extended by section 1 of the Fatal Accidents Act, 1959, so as to include also any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased."[1] It is to observed, however, that solatium to bereaved relatives is not payable under English law; the dependants can therefore sue only for the loss of future support which they will sustain.

Recommendation

14. In the next part of this Memorandum we shall be making reference to the controversial question of solatium for bereavement. At this stage we do not recommend that any change be made in relation thereto one way or the other. We do, however, suggest that the classes of dependants entitled to sue for damages for future loss of support and other patrimonial loss arising from the death should be enlarged to include the collaterals now so entitled by English law. If this reform were instituted, the class entitled to sue for loss of support would be identifiable as confined to those persons who, from the closeness of family ties are, and might reasonably be expected to be, the beneficiaries of an obligation by a deceased to support, whether that obligation were enforceable at law or not. It is not recommended that the class of relatives entitled to sue for solatium in the sense of reparation for the grief occasioned by the death should be enlarged.

[1] Clerk and Lindsell on Torts, 12th Edition, paragraph 395.

III Related Questions

15. On studying the problems which were specifically referred to us, we found that there were a number of related questions which, while not of the same urgency as the two we have just dealt with, could not be omitted from consideration if the whole of this branch of the law were to be dealt with in an orderly fashion. We are very conscious of the force of the criticism which can justly be levelled at a method of redressing grievances in a piece-meal fashion, and in particular, at the unsatisfactory effect upon the form and content of the Statute Book if remedial clauses on unrelated topics are lumped together in a Miscellaneous Provisions Bill. But this way of going about things is sometimes inevitable. It would not be in the public interest to delay legislation upon Darling's case and the restriction exemplified by Eisten's case while the other cognate questions some of them both complicated and controversial, were studied and discussed. We propose to state what these questions are, how the law stands upon them, and some of the elements of the problems involved. This will enable the profession, and others concerned, to make a beginning on forming an opinion whether the law requires amendment, and, if so, in what sense.

Should an executor have a title to pursue a claim for solatium, including damages for the shortening of life, on behalf of his constituent?

16. The law now is that such claims cannot be raised by anyone representing the sufferer, such as an executor, or a trustee in bankruptcy. On the other hand, should the constituent in his lifetime have raised the action, the representative can competently carry it on on behalf of the estate under his charge.

17. The reason for the first part of the rule has been assigned to the "broad principle of the inherently personal character alike of the injury and of the remedy. It is only a corollary of this principle to say that the election to sue or not to sue is with the injured person alone and cannot be made by anyone but himself."[1] The reason for the second part of the rule is that by going the length of actually commencing an action "the deceased had definitely committed himself, and therefore his estate, to a new situation, and, in so doing, had enabled his executor to proceed with the litigation after his death."[2]

18. One view is that it is wrong to permit the executors to follow out the deceased's own action for damages for personal injuries. The deceased's interest in obtaining reparation for personal suffering dies with him, and there seems to be no good reason why, because A. has suffered a painful injury, B. and C. should derive financial advantage from that circumstance.[3] The rule which permits transmission is inconsistent with the principles of a law of reparation which seeks only to compensate for loss.

19. The opposite view is that after the deceased has raised his action his claim against the defender, as yet unquantified, is a debt due to him and must therefore be constituted and ingathered by the executor as part of the duties of his office.

[1] Stewart v. L.M.S. Railway Co. 1943 S.C. (H.L.) 19 per Lord Macmillan at page 40.

[2] Smith v. Stewart & Co. 1960 S.C. 329 per Lord President Clyde at page 334.

[3] See the remarks of Danckwerts L.J. in Naylor v. West Yorkshire Electricity Board [1966] 3 All E.R. 327.

20. A practical objection to the present law is suggested by English experience following the Law Reform (Miscellaneous Provisions) Act, 1934. The Court, in assessing the relatives' claim for patrimonial loss under the Fatal Accidents Acts following the deceased's death, must take into account their financial gains as a result of the same event. The class of dependent relatives, however, usually overlaps the class of those who succeed to his estate and, in consequence, in the words of an English commentator, "damages under the Act of 1934 are no sooner awarded than they are taken away."[1] The same writer adds, "It is unrealistic that damages for personal injuries should be recovered by any person who has not sustained those injuries. It would have been better to enlarge the rights of the dependants under the Act of 1846 so as to include general damages for the personal loss they have sustained, as distinct from loss of a purely financial character."[2] In practice, therefore, the English courts often ignore the executor's claim as a mere arithmetical exercise and award the whole sum of damages to the relatives under the Fatal Accidents Acts.[3]

21. Similar problems would be likely to follow in Scotland unless, contrary to principle,[4] it were expressly provided that any sums recovered by the deceased's executors should not be taken into account in calculating the dependent relatives' claim for patrimonial loss. The suggestion has,

[1] Munkman, "Damages", 3rd edition page 141.

[2] Ibid., pages 141 and 142. A similar comment is made in Winfield on Tort, 7th edition, page 143.

[3] Hutchinson v. L.N.E. Railway Co. [1942] 1 K.B. 481; Winfield on Tort 7th edition, page 143; Salmond on Torts, 14th edition, page 756.

[4] See Davies v. Powell Duffryn Associated Collieries Ltd. [1942] A.C. 601; Smith v. Comrie's Executrix 1944 S.C. 499.

therefore, been made that it should be provided expressly that the deceased's own claim for solatium should die with him and that an action by a deceased's executors for patrimonial loss suffered by the deceased following an injury, whether or not in continuation of an action raised by the deceased, should not affect the rights of action otherwise competent to the dependent relatives.

22. Such a provision would have incidental advantages. It is one of the anomalies of the present law, highlighted in the case of Bern's Executor v. Montrose Asylum[1] that the executor's right to take proceedings for a solatium in respect of the personal injuries suffered by the deceased should depend upon whether or not the deceased has himself while in life initiated proceedings, and a quasi-contract of novation has thereby been entered into. The distinction is justifiable technically, but it is an artificial one in all cases and a singularly inappropriate one in cases where, either through his illness or his insanity, in his latter days the deceased was in no position either to initiate proceedings or to waive his claim. The distinction would disappear were it to be provided that the right to recover solatium should in all cases die with the injured man.

23. Another incidental advantage of a provision that the injured man's right to recover solatium should die with him would be its destruction of the basis of claims by executors for the deceased's loss of expectation of life. English experience has shown that the assessment of the monetary value of loss of a "reasonable expectation of life" has presented great difficulties, to which, in the cases following Rose v. Ford,[2] judges have frequently alluded. Lord Goddard

[1] (1893) 20 R. 859. This was, pace the observations of many eminent judges, an example, rare enough, of the true "actio injuriarum."

[2] [1937] A.C. 826.

remarked that "damages awarded under this head have increased and are increasing and ought, as I think, to be diminished."[1] Finally, in Benham v. Gambling[2] the House of Lords directed that what had to be compensated was really the injured person's "loss of a measure of prospective happiness." This could not easily be measured in money, and a conventional sum of £200 was awarded. With changes in the value of money, the figure awarded today has been increased to £500.[3]

24. Of the decision in Benham v. Gambling it has been remarked: "It is obvious that it was only the principle of precedent which prevented the House from overruling Rose v. Ford. The policy laid down in that case was of an experimental nature, and the experiment failed, but the highest Court is prevented from doing what the Supreme Courts of most other countries could do in such a case: Admit the failure of the previous policy and overrule their previous decision. Instead of overruling it, they emasculated it."[4] The relatively small awards allowed by the courts in actions by executors for loss of a deceased's expectation of life point to their dissatisfaction with the basis of the claim. Lord Justice Salmon has suggested that the matter should be reconsidered "now that law reform is in the air."[5] If actions by executors for solatium due to the deceased were

[1] Mills v. Stanway Coaches Ltd. [1940] 2 K.B. 334 at pages 346-7.

[2] [1941] A.C. 157.

[3] Yorkshire Electricity Board v. Naylor [1967] 2 All E.R. 1; The Times, 16th March, 1967.

[4] 5 Modern Law Review (1941) page 97. Since that was said, the House of Lords has armed itself with more extensive powers.

[5] Naylor v. Yorkshire Electricity Board [1966] 3 All E.R. 327 at page 733. See also Solicitors' Journal, 18th November, 1966, page 859.

barred, these problems would not arise. If, however, they were not to be barred, it is for consideration whether there should be an express bar to the transmission of claims for loss of expectation of life, and indeed whether loss of expectation of life should continue to be a head of damages at all.

25. On the other hand, the position of the law of Scotland seems to be less obscure, and there is very little material in our reports to justify a recommendation that it be altered. This is probably because, in this country, the practice is not to regard diminution of the expectancy of life as a separate head of loss, but to allow juries to take the shortening of life into account as an "additional handicap on (the) enjoyment of life," in the words of Lord Wark quoted above,[1] so that the quantification of it becomes merged in the general fund of solatium, the calculation of which is necessarily made in a broad and general way.

The discharge of dependants' rights by contract entered into by deceased or by settlement of his claim

26. The first of these is the point raised in McKay v. Scottish Airways 1948 S.C. 254. The deceased was killed in an accident to an airliner. He had accepted as a condition of carriage that the defenders should be under no liability in respect of the carriage, and that he renounced for himself, his representatives and dependants, all claims for compensation for injury, fatal or otherwise, whether occasioned by the default of the carrier or otherwise. After criticising in strong terms the scope of the exemption clause, which may be important in view of what we say later on, Lord President Cooper, in giving the judgment of the Court, held that relatives can never recover unless the deceased, had he lived,

[1] paragraph 9.

could have done so; in that case, of course, a claim by the deceased would have been defeated by the exemption clause.

27. Similar principles may come in question where the deceased has (a) discharged, e.g., by compromise and release, his claim arising out of an accident to which he ultimately succumbed, or (b) rendered himself obnoxious to a plea of volenti non fit injuria[1] or contributory negligence, total or partial. In the course of our examination of the law relating to the relatives' rights of action following wrongful injuries causing death it became plain to us that these aspects of the existing rules may require reconsideration. While, as we have already stressed, the claims of the deceased and his dependants are founded upon the same wrongful or negligent action or omission, the rights of action arising from this act or omission in favour of the deceased and his relatives respectively are different, both as to their objects and as to the persons who are benefited. If it be conceded that after the death of the injured man the interests of the surviving dependants are paramount and thus the criterion in defining the relatives' right of action should be the existence of some original wrong-doing or default on the part of the defender under circumstances giving rise to liability in the first place rather than subsequent changes in the situation affecting the interest of the injured man while in life then it does not seem to be inevitable that the subsistence of a right of action, either partial or unimpaired, in the person of the deceased should be a necessary condition of the relatives' right of action, nor that the satisfaction of the deceased's claim should necessarily infer the satisfaction of that of the relatives. It may be necessary, therefore, to reconsider also the position

[1] voluntary assumption of risk.

of dependent relatives where the deceased has, during life, had favourable judgment upon his claim and subsequently dies of his injuries.

28. There is, however, a special reason why we do not recommend that the question of the antecedent discharge of an injured person's claim be investigated at the present time. The Law Commissions have set up a Working Party which is now examining the whole question of exemption clauses, with special reference to "standard form" contracts, of which that in McKay's case was a typical example.[1] It is not only Lord President Cooper who has looked at them askance. The Working Party has, up to the date of the drafting of this Memorandum, been concerned wholly with clauses in contracts of sale, but they will shortly be turning to contracts of service such as transportation. If conclusion relating to such contracts were to lead to legislative control of them, clearly this would affect the position of dependants along with that of contractors. We therefore consider that an examination of this question, which gives rise to extremely difficult legal as well as practical problems, be postponed.

Solatium for grief

29. The right of a solatium was conceded in actions of assythment where a sum was given to the relatives "for pacifying of their rancour." In the modern action which takes the place of assythment, solatium was explained to be a compensation for the relatives' grief rather than a buying-off of their vengeance. In assessing the award it is legitimate "to consider the laceration of the feelings of the widow and family in contemplating the pain and suffering to

[1] The law relating to carriage of passengers by air has altered a good deal since 1948. The principal purveyors of similar exemption clauses are now the shipping companies.

which the deceased was exposed before death actually supervened".[1] It is incompetent, however, to take account of the greater anger of the relatives occasioned by the grossness of the negligence.[2] On the whole the sums awarded have been small. It has been said, "solatium is not met by a nominal award . . . the sum awarded must be a substantial acknowledgment of . . . the pain and grief . . . which the defender's action has caused, but must be strictly confined within a moderate range".[3] In some systems, however, there is criticism of the notion that even grief and sorrow have their price. The law, it is said, has no devices to measure their intensity and reaches decisions which are almost necessarily arbitrary. This criticism is of considerable force. The idea that relatives should be permitted to claim money compensation for injury to their feelings arising out of the loss of a person near and dear to them is, we hope, repugnant to most people and seems to merit close examination. We have had under consideration a proposal that, in lieu of solatium as now understood, there should in certain circumstances be an award to compensate for loss, for example, of the companionship, influence, guidance and counsel of a young husband and father. On the other hand, it may be that the proposal indicates that in cases of certain character true patrimonial loss is at present being assessed on principles which result in inadequate awards. If that were so, solatium for grief could perhaps be dispensed with willingly

[1] Black v. North British Railway Co. 1908 S.C. 444, per Lord President Dunedin at page 453.

[2] Ibid. at page 454.

[3] Elliot v. Glasgow Corporation. 1922 S.C. 146, per Lord President Clyde at page 148.

if loss of future support were to be calculated on a more realistic basis. This, however, is a large question upon which we are not yet ready to express an opinion.

The inter-relationship of the damages recovered in the respective claims

30. If an executor were to be allowed to pursue a claim concurrently with surviving dependent relatives this would raise the question of how damages recovered in the respective actions are to be related in cases where the dependants also acquire by succession an interest in the estate of the deceased. This would be a common case. The problem has not hitherto been sharply in issue in Scots law but it has not been over-looked.[1] By some authorities it is treated as a question of "duplication of damages." Neither claim may competently contain any element appropriate to the other and the executor and the dependants sue in different interests. It may be questioned, however, whether the distinction between the interests of the estate and of the beneficiaries is, in this context, a real one, for any sum recovered by the executor will be of the nature of an inheritance to the dependants. There may even be cases where the damages recovered by the executor constitute virtually the whole inheritance. The question is, therefore, whether and, if so, to what extent an inheritance should be taken into account in assessment of dependants' damages.[2] This is a difficult problem and has wide implications. There is little reported judicial decision on the subject in Scots

[1] McGhie v. British Transport Commission 1964 S.L.T. 25 at 27 and as reported and discussed at a later stage in Russell v. British Railways Board 1965 S.L.T. 413

[2] Smith v. Comrie's Executrix supra: Webster v. Simpson's Motors 1967 S.L.T. (Notes) 36.

law but it has been widely discussed in other systems,[1] sometimes in the context of law reform,[2] and different solutions have been suggested. The present rules are governed partly by statute and partly by judicial decisions. To some extent these rules depend upon the nature of the several elements of the inheritance and the results are sometimes regarded as anomalous. The extent of any benefit the dependants may have enjoyed during the life of the deceased from the assets of the estate which constitutes the inheritance is also regarded by some authorities as an important consideration. The question is part of the wider problem of a claimant's obligation to mitigate his loss which has important implications for other aspects of the law of damages which go beyond the scope of our present enquiry. We have the question of the dependants' obligation to account for inheritance under consideration. We have touched upon the question of sums recovered by an executor in name of solatium.[3] This has always been regarded in Scots law as a personal claim and is currently explained as a reparation for the pain and suffering, in the widest connotation of these words, of the deceased during the period of his survivance. It may seem, therefore, something of a windfall to those who take in the succession and this may argue for the deduction of an award under this head to an executor from the damages recovered in the dependants' action. This is the solution adopted in some other systems. The question would not arise, of course, were the claim to fall with the

[1] For a recent comparative study see Boberg, "Deductions from Gross Damages in Actions for Wrongful Death," Part V, (1965) 82 S.A.L.J. page 324.

[2] See, for example, report of debate in Standing Committee C, H.C. 18/2/1959 columns 13 et seq.

[3] paragraph 16.

death of the injured man.[1] The question of whether and, if so, to what extent, damages recovered by an executor in respect of patrimonial loss are properly to be applied in abatement of the relatives' damages is more complicated and in other systems has attracted varying solutions. One view is that the principles governing inheritance generally should apply. Here again, the nature of the constituent elements of the award may influence the question of deductibility.[2] We are aware that a solution may involve itemisation of awards of damages and that this raises a difficult problem in cases which are triable by jury.

Assessment of an executor's claim for patrimonial loss

31. The question of the inter-relationship of damages recovered by an executor and those recovered by surviving dependants in their own right might also be influenced by opinion as to the proper measure of an executor's recovery for patrimonial loss. One view is that an executor should be entitled to recover the measure of damages for past loss which the injured man would have been able to recover if he had survived. Thus, in the case of loss of earnings, the executor would be able to recover an amount equal to the gross wages lost during the period of the injured man's survivance subject to proper deductions, e.g., for income tax and National Insurance benefits. Financial loss to the injured man during his lifetime, however, is not necessarily loss to his estate. This raises the question of enrichment of the estate, and thus of the inheritance. Another view, in which the executor represents the estate and not the person of the deceased, is that an executor's recovery should be

[1] paragraph 21.

[2] See, for example, Mayne and McGregor, "Damages", 12th edition, paragraph 848.

limited to the amount by which the estate of the deceased, as it stands in the hands of the executor, has been diminished as a result of the delict, e.g., in the case of loss of earnings, an executor should be able to recover only that proportion which would have been saved and thus gone to swell the fund of the executry estate or an amount represented by debts incurred, as a result of his injury, by the injured man during the period of his survivance.[1] This also has implications for the treatment of collateral benefits such as the proceeds of accident insurance policies or voluntary charitable payments. This method of assessment might be thought to require an unduly high degree of accountability in mitigation of loss. The former method of assessment, however, amounts, on one view, to compensation of the executry estate for a loss it has never sustained and thus might lead to over-compensation of the dependants if there were no corresponding set-off against the damages recovered by them in their own right. It may be observed that in the existing state of the law an executor's recovery for patrimonial loss is not commensurate with that of his constituent for the executor cannot recover for prospective loss of earnings or earning capacity, or future outlays,[2] and this applies whether or not the action has been initiated by the deceased during life.[3] Thus the executor's action, even for pecuniary loss, is not in all respects the same as a patrimonial action raised by the deceased during life.

[1] McGhie v. British Transport Commission, 30th June, 1964, obiter, reported and discussed in Russell v. British Railways Board 1965 S.L.T. 413.

[2] Reid v. Lanarkshire Traction Co. supra; Oliver v. Ashman (1962) 2 Q.B. 210.

[3] Walker, "Damages," page 610.

Possible enlargement of class of person entitled to claim as dependants

32. At any earlier part of this Memorandum[1] we have made a recommendation as to widening the class of dependants entitled to sue for damages for future loss of support. We suggest that it might be for consideration whether this class should be further widened to include also a divorced spouse who was entitled to periodical maintenance from the deceased, whether under an extra-judicial agreement or by Court Order, but we make no recommendation at this stage.

Adopted children's claims

33. Claims by, or arising out of the death of adopted children are admitted in consequence of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940. By section 2(3) of that Act the expression "adopted child" means a person who has been adopted according to the laws of Scotland, England or Northern Ireland. It is for consideration whether this definition might be extended to cover children adopted under other systems of law. In this connection we refer to the Draft Convention on the International Adoption of Children prepared by the Special Commission of the Hague Conference on Private International Law.

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[1] paragraph 14.