SLC CM17

SCOTTISH LAW COMMISSION

MEMORANDUM No. 17

DAMAGES FOR INJURIES CAUSING DEATH

10 APRIL 1972

This Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 30 June 1972. All correspondence should be addressed to:

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PART I

INTRODUCTION

1. In this Memorandum the Scottish Law Commission examines certain questions relating to damages for injuries causing death. Our initial remit related to certain specific questions referred to us under s. 3(1)(e) of the Law Commissions Act 1965, namely (1) whether relatives should not have a right to sue for solatium and loss of support even when the deceased himself had initiated proceedings during his lifetime, and (2) whether the class of relatives entitled to sue for solatium and loss of support should not be extended to include collaterals.

2. We considered these questions in our Memorandum No 5 but on studying them we found that there were a number of related questions which could not be omitted from consideration if the law were to be dealt with in an orderly fashion. While suggesting that the related questions were of less urgency, we thought it desirable to obtain the views of the profession and others concerned about them. We stated, therefore, in our Memorandum what these related questions were, how the law at present approached them, and considered possible amendments to the law. In addition, after consultation, we included in our Second Programme an item designed to permit us to take an overall view of the problems raised by actions of damages following injuries causing death.

3. We have been greatly assisted by the comments submitted upon Memorandum No 5. One general observation made by those best qualified to judge was that, contrary to our preliminary view, it would be wrong to advocate interim amendments to the law to redress the specific questions referred to our attention. We accept this criticism as well-founded. While the application of the present law to the questions referred to in the preceding paragraph may occasion hardship, if these questions were dealt with in isolation other anomalies conducing to hardship of a different kind might well be introduced into the law.

PART II

STRUCTURE OF THE PRESENT LAW

1. General

4. Under the present law of Scotland, when a person dies as a result of injuries caused by the delict, including the negligence of another, sets of rights emerge in favour both of the deceased's executors and of his dependent relatives which are different in character. It is a condition of such rights emerging that, immediately before the death of the injured person, the latter was, or if he had survived would have been, entitled to bring an action in respect of the injuries. When the injured person has himself waived his right to sue or has himself recovered damages or settled a claim for damages before his death[1], neither his executors nor his dependants will have any right of action in respect of the injury. Similarly, if the deceased's right of action has prescribed or is time-barred, the rights of action of his executors and of his dependants are excluded, a principle whose operation is preserved in s.6(1) of the Law Reform (Limitation of Actions etc) Act 1954.

5. The rights of action respectively of the deceased's executors and of his relatives are quite distinct in their nature. The executor's rights of action are simply those which the deceased himself possessed by reason of the injury

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[1]See Darling v Gray and Sons, (1892) 19 R (HL) 31, per Lord Watson at p 32.

done to him, so far at least as the law allows of their transmission. Those of the relatives are independent claims for the losses which they have suffered by reason of the wrong done to them. Although the precise rights of the relatives in the present state of the law may in fact depend upon the steps taken by the executors, the Court has frequently stressed that their respective claims are of a different kind, and depend on different principles[1].

2. Summary of rights of executors

6. An action may be brought by the executors to enforce those rights which the deceased himself possessed during his lifetime against the person at fault. During his lifetime, a person has a right, first, to damages for any patrimonial loss he suffered as a result of the accident. Under this head he may claim medical and other out-of-pocket expenses, loss of earnings to the date of the action and loss of prospective earnings. There is no direct Scottish authority as to whether the loss of prospective earnings extends to the period of a man's pre-accident expectation of life or merely to the period of his post-accident expectation of life; (the latter period has been selected in England[2], but a different view has been taken in Australia[3].)

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[1]Davidson v Sprengel, 1909 SC 566

[2]Oliver and Others v Ashman and Another, (1962) 2 QB 210; and its sequel, Murray v Shuter & Others, (1971) 115 SJ 774.

[3]Skelton v Collins, 1966 115 CLR 94.

The person injured has a right, second, to solatium for his physical pain and suffering, for his loss of limbs and sense organs, and their functional impairment, for disfigurement, and for nervous shock including, possibly, that occasioned by the realisation that his expectation of life has been diminished[1]. These are the injured person's own rights. After his death his executors may sist themselves as pursuers in any proceedings instituted by the deceased during his lifetime, whether these proceedings were instituted to recover patrimonial loss or solatium. If the deceased did not institute proceedings during his lifetime, his executors may bring an action to recover damages for the patrimonial loss suffered by the deceased, irrespective of whether or not the deceased himself intimated a claim to such damages[2]. But the loss must be a loss suffered by the deceased in respect of which he could have put forward a claim in his lifetime; on this ground a claim on the part of the executors for funeral expenses was disallowed[3].

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[1] McMaster v Caledonian Railway Co, (1885) 13 R 252, per Lord President Inglis at p 254; Balfour and Others v William Beardmore and Co Ltd, 1956 SLT 205, per Lord Strachan at p 215.

[2] Mein v McCall, (1844) 6 D 1112;

[3] McEnaney v Caledonian Railway Co, 1913, 2 SLT 293 sequel to Leigh's Executrix v Caledonian Railway Co, 1913 SC 838, which was overruled on another point in Smith v Stewart & Co, 1960 SC 329.

Moreover, there is authority for the view that the executors' claim for loss of earnings is limited to the period of the deceased's actual survivance[1]. The executors, however, cannot always insist on the deceased's claim for solatium. They may do so only if the injured person actually initiated proceedings to recover damages under this head during his lifetime[2]. The formal intimation of a claim on his behalf is insufficient[3].

3. Summary of rights of dependants

(a) Conditions of dependants' rights of action

7. The rights of the deceased's dependants are not directly derived from those of the deceased. They are of a different nature and are designed to compensate losses which they, rather than the deceased, suffered. One result of this is that the defender in an action by the deceased's dependants may plead in defence that the pursuer was sciens et volens. A father who claimed solatium in respect of the accidental death of his pupil child was successfully met with a plea that he had acquiesced in the defender's breach of duty by continuing to live with his family (including the child in question) in the property whose defects were alleged to have caused the accident[4].

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[1] Sommerville v National Coal Board, 1963 SC 666, especially Lord President Clyde at p 669 - see paragraph 26.

[2] Bern's Executor v Montrose Asylum, (1893) 20 R 859; Stewart v London, Midland and Scottish Railway Co, 1943 SC (HL) 19.

[3] Smith v Stewart & Co, 1960 SC 329 (Court of Seven Judges).

[4] Davidson v Sprengel, 1909 SC 566; see also Innes v Fife Coal Co Ltd, (1901) 3 F 335.

8. At the same time, as Lord Mackintosh has pointed out[1], "the relatives' right of action is not wholly and in every sense independent of the right of action in the deceased himself. Both rights depend upon the same wrong, and the fact that the deceased suffered an actionable wrong is the foundation and, in my opinion, the indispensable foundation of any right of action vesting in the relatives". Until the law was altered by the Law Reform (Contributory Negligence) Act 1945, the deceased's contributory negligence barred his own action and, in consequence, that of his relatives[2]. The principle that the contributory negligence of the deceased can be pled against a dependant was, however, preserved by section 1(4) of the Act of 1945, and it probably remains the law that if the deceased knowingly and voluntarily assumed the whole risk, the claims of his relatives would be barred[3]. It is certainly true that when the deceased has antecedently waived any claim for compensation in respect of personal injuries, his relatives have no right to damages and solatium for their loss[4], although there is English authority for the view that if the contract merely limits the amount recoverable (e.g. a ticket limiting liability for accidental injuries to £200) the action of the dependants would not be barred[5]. The

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[1] McKay v Scottish Airways, 1948 SC 254 at p 258.

[2] McNaughton v Caledonian Railway Co, (1858) 21 D 160

[3] See Steel v Glasgow Iron and Steel Co, 1944 SC 237, where this was a matter of assumption rather than of express decision.

[4] McKay v Scottish Airways Ltd, 1948 SC 254

[5] Nunan v Southern Railway Co, (1924) 1 KB 223; Grein v Imperial Airways Ltd, (1937) 1 KB 50.

acceptability of these rules is considered later in this paper.

9. It is, however, also important to notice that the dependants' right of action is excluded where the injured person has initiated an action for damages and solatium, which is insisted upon by his executors after his death. This rule was established by the House of Lords in the case of Darling v Gray and Sons[1], a case which we were especially requested to consider with a view to law reform. We do so in detail in this paper[2].

(b) Heads of claim in dependants' action

10. The dependants' rights of action may be summarised as follows:-

a. a right to repayment of outlays and expenses in connection with the deceased's death; but the cost of a tombstone or travelling expenses to attend a parent's funeral are not admitted[3];

b. a claim for compensation for "the loss of the natural support which the deceased afforded to the pursuer, or might in future have afforded"[4]; and

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[1] (1892) 19 R (HL) 31, more fully reported sub nom. Wood v Gray & Sons, (1892) AC 576.

[2] Paragraphs 46-56

[3] Tran v Road Haulage Executive, 1952 SLT (Notes) 58; Drummond v British Railways Board, 1965 SLT (Notes) 82.

[4] Quin v Greenock and Port-Glasgow Tramways Co, 1926 SC 544, per Lord President Clyde at p 547; Sagar v National Coal Board, 1955 SC 424.

c. a claim to what has been called "a solatium", in the case of the relatives a sum of money in acknowledgment of grief and sorrow occasioned to them by the deceased's death[1].

(c) Class of persons who may claim

11. Under the common law of Scotland the class of persons who may claim damages and solatium following a person's death are defined by the twin criteria of relationship and duty to support. Lord President Inglis declared: "And it is equally true that this claim may be maintained, although the party raising the action cannot qualify any direct pecuniary loss by the death of his relative. It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity"[2]. Lord President Inglis stressed the need for the simultaneous fulfilment of both these qualifications. Where neither qualification is fulfilled, as where a master sues for the loss caused to him by the death of a servant, no claim for damages and solatium is competent[3]. Where a legal relationship exists between the deceased and the pursuer, this will not suffice to found an action unless it was such as to found a duty to support.

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[1] Quin v Greenock and Port-Glasgow Tramways Co, 1926 SC 544, per Lord President Clyde at p 547; Sagar v National Coal Board, 1955 SC 424.

[2] Eisten v North British Railway Co, (1870) 8 M 980 at p 984.

[3] Reavis v Clan Line Steamers Ltd, 1925 SC 725.

12. Although the right to claim damages and solatium was conceded exceptionally to the husband of a deceased woman even at a time when a wife was under no legal duty to aliment her husband[1] - a right which still subsists - the common law rule was applied strictly to sisters who, on the death of their brother, had lost their sole means of support [2] and to children who, during the lifetime of their paternal grandfather, claimed damages and solatium following the death of their maternal grandfather who in fact supported them[3]. A rule, moreover, gradually developed which, in its final form, declared that a mother had no independent title to sue for damages and solatium for the death of a child while the father was alive[4].

13. Equally, the existence of a duty to support during the deceased's life is insufficient in the absence of a legal relationship between the deceased and the claimant. Under the common law, the father or mother of an illegitimate child

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[1] Dow v Brown & Co, (1844) 6 D 534. See also McKinlay v Glasgow Corporation, 1951 SC 495.

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

[3] Ewart v R & W Ferguson, 1932 SC 277.

[4] Whitehead v Blaik, (1893) 20 R 1045; Barrett v North British Railway Co, (1899) 1 F 1139; Aitken v Gourlay and McNab, (1903) 5 F 585; Laidlaw v National Coal Board, 1957 SC 49.

had no title to sue in respect of that child's death[1], nor had an illegitimate child a title to sue in respect of the death of its mother[2]. A divorced person has no right to sue in respect of the death of her former spouse, even when she holds a maintenance order[3]. Moreover, if any dependant dies after an action has been raised, his claim in respect of loss of support and solatium[4] passes to his executor, but the damages are restricted to the period during which the dependant survives the original deceased .

14. Statute law has now encroached upon the common law position. The Law Reform (Damages and Solatium) (Scotland) Act 1962 permits the mother to recover damages and solatium for the death of a child notwithstanding that the father is alive[5]. In consequence, each parent may table an independent claim for solatium and loss of support[6]. An illegitimate child was conceded a right to sue in respect of the death of either of his parents by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940[7]. The right of

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[1] Weir v Coltness Iron Co Ltd, (1889) 16 R 614 (mother) and Clarke v Carfin Coal Co, (1891) 18 R (HL) 63 (mother); McLean v Glasgow Corporation, 1933 SLT 396 (father).

[2] Clement v Bell & Sons Ltd, (1899) 1 F 924.

[3] Hemmens and Others v British Transport Commission, 1955 SLT (Notes) 48.

[4] Kelly v Glasgow Corporation, (1949 SC 496; 1951 SC(HL)15.)

[5] s.1(1). To remove doubts, it was declared at the same time that it should not bar the right of a child to recover damages and solatium in respect of the death of his mother that the father of the child was alive. s.1(2).

[6] Kelly v Edmund Nuttall Sons & Co Ltd, 1965 SLT 418.

[7] s.2(2).

the parent of an illegitimate child to recover was not conceded until 1962[1]. The 1940 Act also provided that, for the purposes of damages and solatium in respect of a person's death, an adopted child was to be deemed to be a child of his adopting parents and not of his natural parents[2]. The expression "adopted child", which formerly referred only to persons who had been adopted according to the laws of Scotland, England or Northern Ireland[3] now includes persons adopted by an "overseas adoption" (within the meaning of the Adoption Act 1968 s.4(3) read in conjunction with the Adoption Act 1958 s.58).

15. A different set of rules, in effect those of English law, formerly governed the liability of carriers to aircraft passengers but now, by virtue of s.11 of the Carriage by Air Act 1961, the ordinary rules of Scots law apply.

(d) Requirement of single action

16. When the relatives present claims for solatium and loss of support they must, save in exceptional circumstances, concur in a single action[4]. Where more than one relative has a title

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[1]Law Reform (Damages and Solatium) (Scotland) Act 1962, s.2.

[2]s.2(1).

[3]s.2(3).

[4]Darling v Gray and Sons, (1892) 19 R (HL) 31 at pp 32 and 33; MacLaren, Court of Session Practice, p 234.

to sue, an action by one of them is incompetent unless it is averred that the others refuse to concur or cannot be found or unless they are called as defenders for their interests[1]. If an entitled relative is aware that an action has been raised, but refrains from joining himself as a co-pursuer, he will be barred from raising subsequently an independent action[2]. The purpose of the rule is to prevent the defender from being harassed by a multiplicity of actions, and to bring before the Court all the claims at one time, so that they may be considered together as interrelated family claims[3]. The family nature of the claim is illustrated by Hewitt v West's Gas Improvement Co and Another[4], where the court held that though the award to a widow taken by itself was excessive, when the aggregate of the awards to the widow and the children, considered as a family claim, were taken together, they were not so excessive as to justify a new trial.

4. Limitations of actions affecting executors and dependants

17. The effect of the Law Reform (Limitation of Actions etc) Act 1954 s.6, as amended by the Limitation Act 1963 ss.8, 9 and 13 and the Law Reform (Miscellaneous Provisions) Act 1971 s.2, is to limit the time within which actions for damages

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1 Pollok v Workman, (1900) 2 F 354; Smith v Wilsons & Clyde Coal Co Ltd, (1893) 21 R 162.

2 Kinnaird v McLean, 1942 SC 448.

3 Kelly v Glasgow Corporation, 1951 SC (HL) 15 at p 20; Campbell v West of Scotland Shipbreaking Co, 1953 SC 173.

4 1955 SLT 207

or for solatium in respect of personal injuries may be brought. The period of this basic limitation is normally three years from the date of the act, neglect or default giving rise to the action or, where the act, neglect or default is a continuing one, from the date on which the act, neglect or default ceased.

18. This limitation, however, does not apply when the injured person lacked knowledge (actual or constructive) of "material" facts of a decisive character relating to the right of action, and in that case the period of limitation, again one of three years, commences when the relevant facts first came to the knowledge of the injured person. If the injured person has died in consequence of the injuries in question, these rules affect his executors and dependants in the sense that, although further extensions of the period of limitation are conceded to them, these extensions are available only if the injured person was himself, immediately before his death, entitled to bring an action in respect of the injuries. If he was so entitled, the action can be brought within three years of his death. Nor does the basic limitation apply when the "material" facts of a decisive character were at all relevant times outside the knowledge (actual or constructive) of the persons concerned[1] with the particular action. In that last situation the action can be brought within three years of the date when such knowledge is obtained. The special extensions of the period of limitation

[1] This phrase is intended as a compendious reference to the classes of persons specified more particularly in s.9(3) and (4) of the 1963 Act as amended.

referred to above formerly endured for one year only. Their extension to three years by the Law Reform (Miscellaneous Provisions) Act 1971 follows recommendations in our Report[1] on the Reform of the Law Relating to Prescription and Limitation of Actions.

5. The action of Assythment

19. By way of postscript to this description of the present law, we may allude to the ancient right of the relatives of a person slain by the criminal act of another to obtain an "assythment" from him. We do so because in the recent case of McKendrick and Others v Sinclair[2] the two brothers and a sister of a person who was killed, it was averred, by the defender's criminal conduct, attempted to revive the old action for an assythment. The rule in Eisten v North British Railway Co[3] barred them as collaterals from claiming solatium and loss of support in the usual way, but that rule was unknown in actions for an assythment.

20. The remedy of assythment bears traces of its archaic origins. In mediaeval times it contemplated not merely the payment to the relatives of what we would describe as damages and solatium, but a sum for the "pacifying of thair rancor"[4].

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[1] Scot. Law Com. No 15.

[2] 1971 SLT 19 and 234.

[3] (1870) 8 M 980.

[4] Balfour's Practicks, p 516.

If a person by his criminal conduct killed another the resentment of the deceased's relatives was held to be satisfied by the execution of the culprit and no assythment was due. If, to avoid the pains of the law, the culprit sought a Royal Respitt or remission[1], he found that the King required not only the payment of a composition to the Crown[2], but production of Letters of Slains by which the kin forgave the slayer and his kin and friends and remitted "all Rankour malice and haitrent of our hairtis and all deidlie feid had consavit or borne by us or any of us. And all action quarrell caus debait or questioun criminall or civill"[3]. The theory of the law at one time may have been that a remission was not granted where the felony was "fore-thought"[4] but it seems to have been given in practice even in such cases[5].

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[1]See W Fraser, Charters of the Family of Wemyss of Wemyss, No 92.

[2]For examples, see Wemyss of Wemyss, supra, Nos 91 and 114, and Registrum Secreti Sigilli Regum Scotorum, Vols I and II, passim.

[3]Juridical Review, vol xxxviii (1926) p 312. For other examples of Letters of Slains see W Fraser, Memorials of the Montgomeries of Eglinton, No 157, W Fraser, The Chiefs of Grant, vol III, nos 76 and 77, C Innes, The Family of Rose of Kilravock, p 183.

[4]David II, c50; James IV, c63.

[5]Mackenzie, The Laws and Customs of Scotland in Matters Criminal (Edinburgh, 1678), p 548.

21. Approached by the friends of the guilty person, the kin would insist on a Bond of Assythment[1], in which sureties were given for payment of damages and, possibly, for the performance of good works[2]. On receiving the Bond of Assythment, the relatives would grant Letters of Slains, and only then was the Royal Remission formally granted. In later practice, it was sufficient that the person seeking the remission should find caution to assyth the kin within forty days[3]. In these circumstances the relatives could summon the guilty person to the Lords of Council, who would remit to the judge ordinary, the Sheriff, to fix the amount of the assythment or composition[4].

22. In McKendrick, supra, the Lord Justice Clerk, Lord Walker and Lord Milligan held that the action was irrelevant and fell to be dismissed, since the pursuers did not aver that

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[1]For examples, see Antiquities of Aberdeen, (Spalding Club), Vol III, p 466; Protocol Book of John Foular (Scottish Record Society), Vol II, No 292.

[2]An instrument survives recording an offer on behalf of the person who killed the deceased to "pass the thre heid pilgrimages of Scotland and thar til gar do messis and suffragis for the soul. Secundlie houbeit we be sober in guidis we are contentit til paye the soume of tenne merkis of monie after the modificatioun and consideratioun of freindis" -- Antiquities of Aberdeen, Vol III, p 466. See also Protocol Book of John Foular, supra, Vol II, No 592.

[3]Act of 1593, cap. 178.

[4]Selected Cases from the Acta Dominorum Concilii et Sessionis, 1532 - 1533 (ed. by IH Shearer), Cases 60, 61 and 63. In one instance the parties agree to refer the nature and amount of the assythment to the arbitral decision of the Lords of Session, or any six or four of them -- W Fraser, Charters of the Melvilles of Melville, No 73.

the defender had received or would receive a remission. As Lord Walker put it: "But assythment in the sense of being a claim open to a wide circle (including collaterals) of the kinsmen of a person killed by criminal conduct is essentially the price paid for immunity from prosecution and punishment in the criminal court. Without such immunity no assythment can in my opinion be due"[1]. Lord Wheatley alone was prepared "to dismiss the action on a more radical ground, namely that this form of action which at the best has been obsolescent for nigh on 200 years is now dead"[2].

23. Since the other judges found it unnecessary to reach a concluded view on this matter, an action of assythment remains theoretically competent. We do not regard this state of affairs as being satisfactory. If the practical hardship disclosed in McKendrick were removed, as we later propose, by extending to collaterals and their issue the right to insist upon an ordinary claim for damages following injuries causing death, it is possible that the action of assythment would fall asleep for another 200 years. But it seems wrong to retain in the living body of the common law a shadowy right of an action whose basis - the compounding of a crime by payment to the relatives - is inconsistent with the current view that the criminal law operates *ad vindictam publicam* and whose detailed rules, as the court in McKendrick appreciated, are such that compliance with them is hardly

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[1] 1971 SLT 234 at p 242.

[2] *Idem*, p 239

likely to be possible in practice. "The time", as Lord Wheatley puts it, "has now come to end any uncertainty which may exist about its current existence, and to give it a decent burial"[1]. We agree, and recommend that actions for the recovery of an assythment should cease to be competent in any circumstances.

[1] 1971 SLT 234 at p 241.

PART III

EVALUATION OF PRESENT LAW

1. General

24. Certain aspects of the present law have attracted comments and criticism. The more important comments concern the relationship to one another of the different species of claims or rights of action, in particular the effect of different courses of action taken by the deceased or by his executors upon the rights of dependent relatives. To these questions of inter-relationship of claims may be added questions relating to the duration of the executors' claim in respect of the deceased's loss of earnings, to the appropriateness of the executors' present right to follow out the deceased's own action for damages for pain and suffering, to the appropriateness of the dependants' right to solatium for grief, to the composition of the class of dependants who may claim damages and solatium, and to the method of calculating the amount of the dependants' patrimonial loss; including the question what benefits accruing to those relatives in consequence of the deceased's death should be taken into account in computing that loss. We propose to deal, first, with the rights of the executors, second, with questions relating to the inter-relationship of claims and, finally, with questions relating to the dependants' rights of action.

2. Rights of action of executors

(a) Damages for deceased's loss of earnings

25. The general rule of Scots law is that a cause of action vested in a person is not extinguished by his death. Although this rule is qualified in relation to claims for solatium for personal injuries[1], it applies without restriction to claims for patrimonial loss. When, therefore, a person has been injured in an accident and subsequently dies, his executors may, if the deceased in his lifetime instituted proceedings to recover damages for patrimonial loss, sist themselves as pursuers in those proceedings, or if he did not institute proceedings during his life, institute proceedings themselves to the same effect. The heads of damage include medical and other out-of-pocket expenses and damages for loss of earnings.

26. The executors in claiming loss of earnings are limited, it is thought, to the period up to the deceased's actual date of death. In Sommerville v National Coal Board[2] Lord President Clyde remarked: "In my opinion, a material element in the pursuer's claim is the loss of future earnings. The death of David Sommerville fixed the amount of that loss once and for all and cut off any prospect of loss of earnings after the date of death". In view, however, of the proposal contained later in this Memorandum, we

[1] Paragraphs 27-32.

[2] 1963 SC 666, at p 669.

consider that the law on this point should be made quite clear by statute. If the existence of an action for damages by the executors of a person deceased should not affect the rights of action of his dependants, it is important to ensure that there is no risk of duplication of damages as between executors and dependants. If compensation for loss of earnings during the period of the deceased's pre-accident expectation of working life were admissible, the executors would recover monies which in the deceased's lifetime would have been used to support his dependants and, apart from death duties, would be so used after his death. The dependants, if such compensation were admissible, would be in a position to claim loss of support from lost earnings in respect of which the executors may already have received compensation. We think that, as a matter of policy, priority should be given to the claim of the dependants over that of the deceased's estate, and, consequently, suggest that, for the avoidance of doubt, it should be enacted by statute that the right of the executors to recover damages for the deceased's loss of earnings should be limited to the period of his actual survivance.

(b) Deceased's own claim for solatium

27. By way of exception to the general rule that a cause of action vested in a person is not extinguished by his death, executors have no title to institute an action concluding for solatium in respect of the personal injuries suffered by the deceased. The existence of this exception was stated

by the First Division in Bern's Executor v Montrose Asylum[1] and affirmed by the House of Lords in Stewart v London, Midland and Scottish Railway Co[2]. Among the reasons[3] given to justify it have been the following:

> "It is unreasonable and inexpedient that an action of damages for a personal wrong should be allowed after the death of the person wronged, and when there is no one in existence who has been damaged by it"[4].

> "It is only reasonable and fitting that one who has been assaulted or slandered should be the sole judge whether it is proper to raise action therefor"[5].

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[1](1893) 20 R 859.

[2]1943 SC (HL) 19.

[3]It is at least doubtful whether these reasons are based on any single principle of law, and it is thought that the attempted application of rules derived from the actio injuriarum of Roman law to actions of reparation for personal injury and death must, with respect to high authorities who have suggested otherwise, be regarded as unsound except perhaps as an analogy. The "solatium" recoverable as redress for the affront of assault or slander is truly derived from the actio injuriarum, whereas "solatium" awarded in respect of pain or grief caused by injury or death probably had its origin in the lex Aquilia onto which Roman-Dutch lawyers grafted from customary law compensation for personal injury. (McKechnie - Introduction to Scottish Legal History (Vol 20 Stair Society) pp 276-277 cf Stewart v London, Midland and Scottish Railway Co supra per Lord Macmillan at p 39)

[4]Bern's Executor, supra, per Lord Young at pp 872-873.

[5]Idem, p 873.

"The raising of such an action puts the injured person's character in issue - a course which he himself might be unwilling to adopt"[1].

28. The situation in law is changed, however, when the deceased has in fact raised an action of damages in respect of these personal injuries. In that case the executors may continue and prosecute to a conclusion the deceased's action[2]. Their right to do so has sometimes been justified on the view that there is now no room for suggesting that the deceased has waived his claim or on the technical argument that by the judicial contract implied in litiscontestation there arises a new ground of obligation[3]. Whatever the merits of these justifications, the executors' right to sue rests securely upon the terms of the Act of 1693, c 24.

29. Although the existence of this exception to the rule in Bern's Executor was reaffirmed by the House of Lords in Stewart v London, Midland and Scottish Railway Co[4], its desirability may be questioned. If it is based on the view that litiscontestation transforms the character of the claim from one for damages into one for pecuniary loss, it gives

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[1] Muir's Trustee v Braidwood, 1958 SC 169, per Lord Walker at p 171. cf Auld v Shairp, (1874) 2 R 191, per Lord Ormidale at p 205.

[2] Neilson v Rodger, (1853) 16 D 325.

[3] See Smith v Stewart & Co, 1961 SC 91; 1961 SLT 67; Cole-Hamilton v Boyd, 1963 SC (HL) 1 per Lord Reid at p 12, sub nom Purden's Curator Bonis v Boyd, 1963 SLT 157.

[4] 1943 SC (HL) 19.

a formal rather than a rational explanation for the rule. If, on the other hand, it is based on the view that by raising the action the injured person has provided clear evidence of his having made up his mind to claim reparation, then the doctrine should have been extended to allow proof of such intention by other means. But, although this extension was made in Leigh's Executrix v Caledonian Railway Co[1] that decision, having been questioned by the House of Lords[2], was over-ruled by a Court of seven judges in Smith v Stewart & Co[3].

30. The deceased's intention to sue or not to sue, however, strikes us as being relevant only if an affirmative answer is given to the logically prior question, namely, whether the right to solatium for personal injuries should ever transmit to executors. We are disposed to think not, primarily on the ground that it is artificial to allow compensation for a person's suffering after that person's death. Lord Justice-Clerk Hope in a dissenting judgment regarded this as "an utter contradiction in terms"[4]. Success in the action may benefit various persons, including legatees, persons with legal or prior rights in the deceased's estate, and creditors, but never the person upon whose suffering the claim is based. We think, like Lord Justice-Clerk Hope, that: "... the stern fact of death from the injuries cuts down all legal subtleties about the transmission of rights of actions to

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[1] 1913 SC 838.

[2] Stewart v London, Midland and Scottish Railway Co, supra.

[3] 1960 SC 329.

[4] Neilson v Rodger (1853) 16 D 325 at p 327.

executors, and that we shall run counter to common sense .... if we entertain the right of the executors to carry on this action"[1]. We also think, like Lord Justice-Clerk Thomson, that: "It would have made for simplicity and logic in this department of the law if the rule had been absolute, in the sense that the death of the sufferer extinguished the ground of action"[2].

31. In reaching this view we are fortified by the present tendency in Commonwealth countries to deny, or at least curtail, the right of executors to recover damages for the deceased's pain and suffering or for his loss of expectation of life. In Canada, some of the provinces deny damages under both heads, and some only under the latter[3]. The Conference of Commissioners on Uniformity of Legislation in 1962 recommended the general extinction of damages under both heads in survival statutes. In Australia, this exclusion applies, except in Queensland, where such damages may be awarded, but are deducted from the damages recoverable by the surviving relatives in their own right - a position, that is to say, similar to that obtaining in England. In New Zealand, statute law provides that the executor has no right to recover "any damages for the pain or suffering (of the deceased) or for any bodily or mental harm suffered by him, or for the

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[1] Neilson v Rodger, supra, at p 328.

[2] Smith v Stewart & Co, 1960 SC 329 at p 338.

[3] For a very thorough description of the law of Canada relating to damages for personal injuries or death, see ERE Carter in 32 Canadian Bar Review (1954) pp 713-761.

curtailment of his expectation of life"[1]. The position in South Africa is similar to that in Scotland, and has attracted criticism[2].

32. We recommend, therefore, that where an injured person has died after suffering personal injuries, his right to recover solatium for those injuries should not transmit to his executors, even though the injured person has himself initiated an action incorporating a claim for solatium during his life.

3. Inter-relationship of claims

(a) Effect of recovery of damages by deceased upon dependants' claim

33. Where the injured person has himself recovered damages or settled a claim for damages before his death neither his executors nor his dependants have any right of action in respect of the accident which caused the death. In relation to the executors, this conclusion flows from the fact that they stand in the deceased's own shoes and cannot recover what the deceased has already recovered. In relation to the dependants the conclusion is less obvious. Their rights of action do not in principle derive from those of the deceased and are designed to compensate their own loss rather

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[1]Statutes Amendment Act 1937, s.17. See J L Robson, New Zealand: The Development of its Laws and Statutes, 2nd edn (London, 1967), p 435.

[2]See Article by P Q R Boberg, 1964 SALJ 194 and 346; 1965 SALJ 96, 247 and 324.

than his[1]. It would seem to follow, therefore, at least prima facie, that the fact that the deceased himself has recovered damages or has settled his claim for damages should not be a sufficient reason for barring the relatives' claim.

34. We have considered whether this apparently logical conclusion would justify a change in the law. We do not think so. One reason is the familiar argument that the award of damages to the deceased will in practice augment the estate available for distribution to his dependants. We do not lay too much stress upon this argument because such an award will not necessarily benefit the dependants. We lay more stress on the fact that, although in theory the death of the deceased is a new cause of action, the relatives' claim rests upon the same act of negligence and it seems important to maintain the principle that all claims arising from the same act of negligence towards the same person should be disposed of in one action. A balance must be achieved between the interests of the relatives and those against whom their claim is made. Defenders should not be exposed to successive claims, perhaps separated by a long interval of time, during which the evidence may have altered, arising from what in substance are the same facts. Moreover, if such claims were to be permitted, it would be extremely difficult to exclude the possibility of duplication of certain elements of damages. So long as most actions of this nature are decided by civil juries, who assess damages

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[1] Davidson v Sprengel, 1909 SC 566, per Lord President Dunedin at p 570; McKay v Scottish Airways, 1948 SC 254 per Lord President Cooper at p 264.

in a lump sum and do not state separately the respective elements making up the award, this difficulty would often be insuperable. Even if juries were required to state separately the different elements making up the total assessment, it would be impossible in many cases to reconstruct with any degree of confidence the factual and mathematical basis on which awards, say, for loss of earnings or prospective loss of earnings had been worked out.

(b) Effect of deceased's waiver of rights of action upon dependants' claim

35. In McKay v Scottish Airways[1] it was held that the fact that the deceased had waived his rights of action for personal injuries was fatal to any claim for solatium and damages by his dependants after his death. The basis of the decision was not any waiver of the dependants' rights of action, it was rather that the existence of a right of action on the part of the deceased was the indispensable foundation of the relatives' right of action[2]. Again, as we mentioned above, it has been decided in England[3] that, if the contract merely limited the amount recoverable (e.g. a ticket merely limiting liability for accidental injuries to

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[1] 1948 SC 254.

[2] See the opinion of the Lord Ordinary, (Lord Mackintosh) at p 258; and McNamara v Laird Line and Clan Line Steamers Ltd reported as an appendix to McKay v Scottish Airways, supra, at p 265.

[3] Nunan v Southern Railway Co, (1924) 1 KB 223; Grein v Imperial Airways Ltd (1937) 1 KB 50.

£500), the action of the dependants would not be barred and, indeed, that the relatives would not be affected by the contractual limitation of liability.

36. In Memorandum No 5 we stated that we were concerned by the position reached by McKay v Scottish Airways, but we thought it right to defer consideration of the matter until the whole question of exemption clauses had been examined jointly by the Law Commission and the Scottish Law Commission. This examination has not been concluded, but the preliminary view of the two Law Commissions set out in their provisional proposals, relating inter alia to exemption clauses in contracts for the supply of services[1], is that there is a prima facie case for an outright ban on all clauses that purport to exclude totally liability for death or personal injury, but not for an outright ban on clauses merely limiting such liability. These proposals proceed on the assumption that no general ban will apply to the latter class of clauses, though they might be banned in particular fields or subjected to a test of reasonableness. The net result of these proposals, if approved by the Commissions on reconsideration and given statutory sanction, would be to deprive the rule in McKay v Scottish Airways of practical effect.

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[1] Law Commission Published Working Paper No 39 and Scottish Law Commission Memorandum No 15.

37. If a contractual limitation of liability to the deceased was found to be reasonable in the circumstances, the question would remain whether the dependants should be allowed to pursue their rights of action untrammelled by such limitation. One view is that it is inequitable that it should, and that the law should provide for the scaling down of the damages which would otherwise be awarded to the executors on the one hand and the dependants on the other in the ratio of the specified limited sum to the aggregate damages otherwise recoverable. For the general reasons adduced in the following paragraph, we are not at present disposed to take this view ourselves, but our views on the matter are by no means concluded, and we invite comments.

38. If, however, legislative effect were not given to the proposals of the two Law Commissions relating to exemption clauses, the question would remain whether exemption clauses relating to personal injuries should be allowed, directly or indirectly, to discharge the claims of the injured person's dependants after his death. The argument for allowing them to do so takes as its point of departure the fact that, in certain situations, it can only be for the parties concerned to assess the risks: if a person chooses to accept certain risks, he must be deemed to do so in the knowledge that his dependants may suffer in consequence. He provides for them, and it is for him to decide how best to provide for them in the future, whether by taking risks in the interest of immediate financial gain or by avoiding them in the interest of future security.

39. Not all of us are convinced by this argument, which makes the assumption that the man-in-the-street enters upon recurrent and apparently unimportant transactions considering every implication of the contract, including the contingency of his own decease. Exemption clauses, however, are often contained in tickets and other "contracts of adhesion" where the individual is faced with the choice of accepting the contract or failing to obtain the desired article or service. In this situation the contingent needs of dependants are likely to be overlooked. For these reasons, we think that an antecedent waiver of rights of action or limitation of liability should not have the effect of barring or limiting the claims of an injured person's dependants. Once again, however, our views on this matter are by no means concluded, and we invite comments.

(c) Effect of deceased's contributory negligence upon the dependants' claim

40. s.1(4) of the Law Reform (Contributory Negligence) Act 1945 provides that: "Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, a claim by any dependant of the first mentioned person for damages or solatium in respect of that person's death shall not be defeated by reason of his fault, but the damages or solatium recoverable shall be reduced to such extent as the court thinks just and equitable having regard to the share of the said person

in the responsibility for his death". The onus of establishing such contributory negligence is, of course, on the defender[1].

41. This rule has been criticised as being based upon an erroneous identification of the deceased and his dependants. Glanville Williams has remarked: "What the Act should have done, it is submitted, was to provide that the dependants should not be identified with the deceased and should have a right of action irrespective of his contributory negligence but that the defendant should have the same right of contribution against the estate of the deceased as if the deceased owed a legal duty of care to his dependants not to contribute to his own death. Such a provision would place the deceased's share of responsibility where it belongs - upon his estate - and would benefit his dependants at the expense of a stranger to whom he has willed his property"[2]. In South African law the rule is that "any defence which strikes only at the deceased's personal right to sue, and not at the existence of the duty, cannot be set up against the dependants. Thus the dependants can recover in full despite the fact that the contributory negligence of the deceased would have been a bar at common law to any claim by the

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[1] Hayden v Glasgow Corporation, 1948 SC 143.

[2] Joint Torts and Contributory Negligence (London, 1951), p 422.

deceased himself, had he been merely injured and not killed"[1].

42. Unless it is coupled with a right of contribution against the estate of the deceased, the South African rule strikes us as being unjust and inconsistent with the acceptance of the principle of fault as the basis of liability in such actions. We are not persuaded that there should be no identification of the deceased and his relatives, that is, that they should for this purpose be treated as strangers in law. The whole basis of the claim of the dependants is that they are not strangers in law but are so closely associated with the deceased that a breach of duty to the deceased is at the same time a breach of duty to them. On this view it is arguable that the fault of the deceased is relevant in considering the defender's responsibility to his relatives. We are disposed to think, therefore, that in cases of concurrent fault the defender's responsibility, both to the deceased and to his relatives, should be proportioned to the degree of fault which the defender has exhibited and that there is no justification for amending the present law in this respect. We invite views, however, on this question.

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[1] McKerron, The Law of Delict, 7th edn, p. 149.

(d) Effect of volenti non fit injuria upon the dependants' claim

43. The approach suggested above to contributory negligence on the part of the deceased should lead, by parity of reasoning and in consonance with the present law, to the conclusion that where during his life a plea of volenti non fit injuria might have been successful in answer to an action at the instance of the deceased, his dependants should have no right of action. On the other hand, it is arguable that cases where the deceased knowingly and voluntarily himself assumed the risk should be assimilated to cases of antecedent waiver of rights of action since, in both cases, there is a consent to take the risk of injury or damage which will not give rise to a legal remedy.

44. Our tentative preference is for the analogy with cases of contributory negligence, because in cases where the plea of volenti non fit injuria is advanced, the deceased's consent is inferred from an indifference to his own safety which amounts to or verges upon carelessness[1]; moreover the deceased was aware of the defender's breach of the duty of care and consciously assumed a real and not a hypothetical risk in the full knowledge of its extent and nature[2];

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[1]To adapt the language of Lord Kilbrandon: if the deceased had been taking reasonable care for his own safety, he would not have exposed himself to dangers of which he was aware, so that his injuries are clearly partly a result of his own fault - McCaig v Langan, 1964 SLT 121 at p 12.

[2]Proof of actual knowledge of the risk is of the essence of the defence - Stewart's Executrix v Clyde Navigation Trustees, 1946 SC 317 per Lord President Normand at p 326; Flannigan v British Dyewood Co Ltd, 1969 SLT 223, per Lord Guthrie at p 226.

whereas in cases of antecedent waiver, the assumption of both parties was that there would be no carelessness. We invite views on the question whether the deceased's voluntary assumption of risk should bar his executors' and his dependants' rights of action.

(e) Effect of prescription of deceased's rights of action upon the dependants' claim

45. It is a familiar rule that, if the deceased's rights of action have prescribed or have become timebarred, those of his relatives and of his dependants are also excluded. The operation of this rule is preserved in s.6(1) of the Law Reform (Limitation of Actions, etc) Act 1954. It might be argued that, since the claims of the deceased and his executors are founded on different bases from those of his dependants, this rule should be changed to apply to the deceased's executors only. The suggestion does not attract us since it would open the way to the prosecution of stale claims, leaving the extent of possible future obligations uncertain. As we have seen, the circumstances in which the usual three-year period of limitation may be excluded in actions by executors and dependants have recently been amended by the Law Reform (Miscellaneous Provisions) Act 1971. No further amendments relevant to the subject-matter of this paper occur to us as being desirable.

(f) The rule in Darling v Gray & Sons

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

47. The precise ratio of this decision is not clear from the opinions, but it has been suggested in subsequent cases[2] that it is to be found either in the principle nemo debet bis vexari pro una et eadem causa or in the circumstance

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[1](1892) 19 R (HL) 31, more fully reported sub nom Wood v Gray & Sons, (1892) AC 576.

[2]Whitehead v Blaik, (1893) 20 R 1045 per Lord McLaren at p 1049; Mill v Dundas, 1919, 2 SLT 65, per Lord Anderson at p 67; Bruce and Another v Alexander Stephen & Sons Ltd, 1957 SLT 78 at p 79; Gray v North British Steel Foundry Ltd, 1969 SLT 273, per Lord Hunter at p 277.

that to admit such a right of action would entail an overlap between the executor's claim for solatium (competent when the deceased himself initiated the proceedings) and that of the dependants.

48. The principle in Darling v Gray & Sons has been applied even where the relatives restrict their claim to one for loss of support[1]. The practical consequences of the decision in Darling v Gray & Sons can be harsh, and of this Reid v Lanarkshire Traction Co[2] provides an illustration. An employee was injured in a street accident and died from his injuries a fortnight later. Before his death he had brought an action of damages in respect of those injuries and, after his death, his widow qua executrix sisted herself as pursuer. The Court held that she was entitled to recover only (1) the patrimonial loss occasioned to her husband's estate and (2) solatium in respect of his personal suffering. Since he had survived the accident for only a fortnight, the claim under the first head could be only two weeks' loss of wages. The amount of the solatium was also small, because he had suffered pain for a relatively short period. The Closed Record contained, in addition to the usual averments, a statement that the deceased was the sole means of support of his widow. The Court held that this averment could not be taken into account, as being contrary to established practice.

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[1] McCann's Executrix v Wright's Insulations Ltd, 1965 SLT (Sh Ct) 19.

[2] 1934 SC 79.

49. The hardship which can be occasioned by Darling v Gray & Sons requires us to examine closely the basis of the decision. The principle that the defender should not require to litigate more than once claims arising from a single actionable wrong is one to which we would give considerable weight; but effect may be given to it, as we propose later in this Memorandum[1], by requiring the executors and dependants to concur in a single action. The argument that there would be a danger of duplication of damages if the dependants' action were allowed to continue to run alongside that of the executors would be difficult to sustain, particularly if it became the practice to send such composite actions to proof instead of jury trial. It is true that if it were the law that the executors could recover damages for the deceased's loss of earnings for the whole of his normal life expectancy, the damages awarded to executors might overlap to some extent the damages awarded to relatives for loss of support from the date of death. If, however, as we assume the law now stands[2], and certainly as we propose it should be stated, the executors' claim for loss of earnings is limited to the period of the deceased's actual survivance, there will be no overlapping of this claim with that of the dependants for loss of support. In relation to their respective claims for solatium, the danger of overlap is still more remote since the executors' claim is in respect of pain and suffering experienced by the deceased and the dependants' claim in respect of grief which they have personally suffered. It is true, however, that

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[1]Paragraph 105.

[2]Paragraph 6 supra.

solatium recovered by the executors would normally go to augment the dependants' share of the estate and, conceivably, might be regarded as an ancillary solatium to those dependants; but the problem of overlapping awards of solatium would disappear entirely if, as we recommend,[1] the deceased's claim for solatium should not transmit to his executors.

50. We consider, therefore, that the reasons given for the decision are unsatisfactory. We may add that it seems contrary to the basic policies which should inform this branch of the law. If the claim of the dependants is one which is available to them in their own right for a loss which they themselves, and not the injured person, have suffered, it seems appropriate that after the death of that person the dependants' claim should co-exist alongside the claim transmitted on his death to his executors. Moreover, by permitting the executors' action rather than that of the dependants to continue, the House of Lords stressed the unimportant claim rather than the important one. The executors' action is one in which the deceased's own action for damages for patrimonial loss and solatium is followed out; but his effective interest in such an action ceases with his death. In the words of Lord Reid, "Damages are awarded not to punish the wrongdoers but to compensate the person injured, and a dead man cannot be compensated"[2].

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[1]Paragraph 32 <u>supra</u>.

[2]<u>H West & Son Ltd</u> v <u>Shephard</u>, (1964) AC 326 at p 342.

Once a man has died his interest in damages ceases, and the interest which then emerges and does call for recompense is that of his relatives in the continuance of the financial support which he gave them and of the intangible benefits of association with him. If one of the two claims must fall, it should be that of the executors[1]. But we think that neither need fall completely.

51. For these reasons, we consider that the decision in Darling v Gray & Sons may have practical consequences which are harsh, arbitrary and unjust. Moreover, the decision cannot be easily reconciled with general principles in this branch of the law. We are fortified in this view by the recent tendency of the Courts to narrow its effect.

52. In Bruce and Another v Alexander Stephen & Sons Ltd[2] a claim for damages had been intimated by the deceased to the defenders during his life. An action was raised on his behalf by his solicitors, but they did this three days after his death in ignorance of that fact. This action and the deceased's claim were formally waived or abandoned by his executors. On these facts Lord Cameron had no difficulty in holding 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 & Sons to the case of a claim intimated but not pursued in

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[1]See Lord Reid, ibidem.

[2]1957 SLT 78.

proceedings which were pending before the death of the deceased.

53. In McGhie v British Transport Commission[1] Lord Kilbrandon held that, where the deceased has raised no action during his lifetime, an action by his relatives for loss of support and solatium is not defeated by a concurrent claim for damages in the same action by the deceased's executrix-dative for the patrimonial loss sustained by the deceased's estate prior to his death by reason of his loss of wages.

54. This decision was followed by Lord Hunter in Gray v North British Steel Foundry Ltd[2] and no attempt was made to challenge this view of the law when the case went to the Inner House on appeal. Lord Hunter also indicated that the decision in Darling v Gray & Sons did not support the proposition that "the raising of an action by a relative or relatives extinguishes any claim otherwise competent to the executor to sue for patrimonial loss to the estate of the deceased, including loss of wages sustained by the deceased during his lifetime"[3].

55. As a **result** of the Outer House decision in Bruce and Another v Alexander Stephen & Sons Ltd; it would appear that the practical difficulties occasioned to relatives by Darling v Gray & Sons in situations where the deceased has

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[1] 1964 SLT 25.

[2] 1969 SLT 273.

[3] Idem, at p 277.

initiated proceedings during his lifetime may in certain circumstances be resolved if the executor does not insist upon the deceased's action or abandons it. This last procedure, however, depends upon a coincidence of interest between executors and dependants which is accidental and may not always occur.

56. We recommend, therefore, that the dependants' right to sue for damages and solatium (or any award in lieu of solatium) following the death of an injured person should not be affected by the fact that the executors have sisted themselves as pursuers in an action raised by the injured person or have themselves initiated an action to recover damages on behalf of his estate. For similar reasons, we think that the existence of an action by the dependent relatives, or any of them, should not preclude the executors from initiating proceedings to recover damages on behalf of the deceased's estate. We recommend that, for the avoidance of doubt, this should be provided for explicitly by statute.

4. Questions relating to dependants' claim

(a) Classes of persons who may claim damages for loss of support

57. In consequence of the legislative changes described above[1], the persons who by Scots law may claim damages for loss of support (and at present also solatium) following the death of another are those who stood to the deceased in the relationships of wife, husband, child, father, mother

[1]Paragraphs 11-15.

and, if an obligation of mutual support in case of need was immediately prestable between them at the date of death, grandparents and grandchildren. Relationship by adoption is assimilated to natural relationship, but illegitimate relationships are ignored except as between parent and child.

58. In England, where the rights given to relatives under the Fatal Accidents Act 1846 (Lord Campbell's Act) were modelled on those of Scots law[1], those originally entitled included persons standing in the following relationships to the deceased:

(1) wife, husband, parent, child[2], and
(2) grandparents and grandchildren[3].

The class was extended by the Fatal Accidents Act 1959 to include:

(3) brother, sister, uncle or aunt,

and the issue of any of them[4].

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[1]See Blake v Midland Railway Co, (1852) 18 QB 93, argument of Sir Frederick Thesiger at p 99; Duncan v Findlater, (1839) 6 Cl & Fin 894, argument of Sir John Campbell at pp 898-9.

[2]Fatal Accidents Act 1846, s.2.

[3]Idem, s.5.

[4]Fatal Accidents Act 1959, s.1(1).

It was also provided by the 1959 Act that, in determining the members of those classes, adopted children were to be deemed to be children of the adopting parent or parents and of no other person[1]; relationship by affinity was to be deemed to be relationship by consanguinity; and relationship of the half-blood was to be treated in the same way as relationship of the whole blood[2]. A step-child of any person was to be treated as his child[2], and an illegitimate person as the child of his mother and reputed father[3].

59. The English rules differ from those of Scots law in several respects. There is no requirement that the deceased should have owed a legal duty to support the claimant, and the range of relatives specified is wider than the class of persons who may competently sue in Scotland. In particular, a right of action is conceded to collaterals. The relatives in England, however, are limited to a claim for damages for loss of support[4].

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[1] s.1(2)(a) and s.1(3); but the meaning of "adopted child" for this purpose has been extended by the Adoption Acts of 1964 and 1968.

[2] s.1(2)(b).

[3] s.1(2)(c).

[4] See Blake v Midland Railway Co, (1852) 18 QB 93; Davies v Powell Duffryn Associated Collieries Ltd 1942 AC 601, per Lord Wright at p 617.

60. In considering whether it would be desirable to extend the classes of persons who may competently sue for loss of support in Scotland, it seems relevant to ask at the outset whether Scots law should continue to apply, as it does at present, the same rules to identify those entitled to damages for loss of support as it applies to identify those entitled to solatium. We are persuaded that the two claims should be considered separately, since their bases are quite different. We confine ourselves at present to the question who should be entitled to claim damages for loss of support.

61. The existence of a reciprocal legal duty of support became a definite condition of the relatives' action in Scots law as a result of Eisten v North British Railway Co[1]. The rule has two effects. It has the obvious effect of limiting the class of claimants, apart from the deceased's husband or wife, to his ascendants and descendants. It has also the less obvious effect that, even where the claimant stands to the deceased in a relationship where a reciprocal obligation to aliment in case of need may arise, the claimant will have no title to sue if that obligation was not immediately prestable at the date of death, for example because another relative was under an obligation to support the claimant which was prior to that of the deceased. Under this rule a grandchild would have no title to sue for damages for loss of support on the death of his maternal grandfather if his paternal grandfather were still alive[2].

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[1](1870) 8 M 980. See also Greenhorn v Addie, (1855) 17 D 860 per Lords Curriehill and Deas at p 869.

[2]Ewart v R & W Ferguson, 1932 SC 277.

Equally, where the husband survived, a mother had no title to sue on the death of a son who was her sole means of support[1] until the law was altered by statute[2].

62. The common law in regard to title to sue may pay less attention to the relationship of the parties to one another than to the existence of a legal obligation to support which in the circumstances of the case may be of no practical value. The rigid application of the requirement of a reciprocal legal duty of support at the date of death may occasion hardship in cases such as these:-

(1) on the accidental death of a child's paternal grandfather who in fact supported it, where the child's father was already dead and its mother, though alive, was also dependent upon the grandfather; or

(2) on the accidental death of a child's maternal grandfather who in fact supported it, where the child's parents were both dead and the child's paternal grandfather, though alive, was indigent.

63. Accordingly, irrespective of whether or not legislative effect is given to our subsequent proposals to widen the

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[1] Whitehead v Blaik, (1893) 20 R 1045; Barrett v North British Railway Co, (1899) 1 F 1139; Aitken v Gourlay and McNab, (1903) 5 F 585; Laidlaw v National Coal Board 1957 SC 49.

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

class of relatives who may sue, we recommend that the requirement of a reciprocal legal duty of support between the claimant and the deceased at the date of death should now be discarded. If our proposal to replace the relatives' right to solatium in certain cases by an additional element of damages for loss of society is not accepted[1], we make the same recommendation with regard to the identification of the class of relatives to whom solatium may be awarded.

64. There was a general correspondence between the classes of persons with a title to sue for loss of support under English and Scots law respectively until the Fatal Accidents Act 1959 widely extended those classes in England by admitting collaterals and by requiring stepchildren to be treated as natural children, relations by affinity as if they were relations by consanguinity, and relations of the half-blood as if they were relations of the whole blood. In our Memorandum No 5 we suggested that the classes of dependants entitled to sue in Scotland for damages for future loss of support and other patrimonial loss should be enlarged to include the collaterals now so entitled by English law. Some of those who commented upon this suggestion did not favour such an extension[2] but many,

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[1]Paragraphs 100-103

[2]These included the late Professor G A Montgomery, Professor D M Walker, the Scottish Branch of the Confederation of British Industry, and the Society of Solicitors in the Supreme Courts.

including most of the professional societies[1], gave an affirmative answer, usually on the view that hardship occurred. Some of those who favoured the extension to collaterals stressed that it should be limited to those who were in fact in receipt of support[2], and the Glasgow Bar Association preferred to exclude the issue of collaterals.

65. We have carefully considered these observations and have considered also the view of the Law Reform Committee for Scotland[3] that "There is no evidence that the public interest requires any sweeping alteration or extension of the classes of relatives entitled to sue in respect of death"[4]. With respect, however, we think that real hardship may be occasioned in cases where, as in Eisten v North British Railway Co[5], collateral relatives lose the person upon whom they rely for their support. This hardship, it seems clear, prompted the recent attempts in McKendrick and Others v Sinclair[6], to revive the old procedure of claiming

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[1]The Faculty of Advocates, the Law Society of Scotland, the Society of Writers to HM Signet, the Royal Faculty of Procurators in Glasgow, the Society of Advocates in Aberdeen and the Faculty of Procurators and Solicitors in Dundee.

[2]The Society of Advocates in Aberdeen, the Faculty of Procurators and Solicitors in Dundee and the Counties of Cities Association.

[3]Tenth Report of the Law Reform Committee for Scotland, Cmnd 1103 (1960).

[4]Paragraph 21.

[5](1870) 8 M 980.

[6]1971 SLT 17 and 234.

an assythment. Lord Wheatley, in the course of his opinion in that case, remarked:[1] "There are undoubtedly cases, and this may well be one, where the death of, say, a brother may cause just as much loss of support, and possibly just as much grief as the death of say, a father. It might seem unfair that the sufferers in such circumstances should be without a legal remedy. If it is thought, as I think, that this can result in injustice, the remedy seems to me to lie in legislation whereby the limits imposed by Eisten can be broadened in the field of reparation. This would seem to me to be in conformity with the modern trend of legislation".

66. It is not, in our view, a conclusive objection that collaterals owe each other no legal duty of support: the injury to the survivor is the same whether or not the deceased owed him such a legal duty. Nor do we think, having regard to experience in England, that an extension to collaterals of a right of action would lead to any startling increase in the number of claims[2]. An increase in the number of claims might possibly occur if this extended class of persons were to be entitled to claim solatium, but we do not so propose. A further barrier, moreover, to the proliferation of claims would usually exist in the need to

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[1]At p 240.

[2]It would be interesting to know, for example, whether the premiums on employers' liability policies or on motor vehicles policies are reduced when the risks covered by the policy are principally connected with Scotland.

establish positively actual loss of support.

67. We recommend, therefore, that unless the present requirement of a legal relationship between the parties is to be entirely abandoned, the class of relatives entitled to sue for damages for loss of support should be extended to include collaterals and the issue of collaterals. At the same time, partly because specific hardship may arise from the exclusion by Scots law of the persons after-mentioned and partly in the interest of harmonising the laws of England and Scotland on this matter, we recommend that the law be amended to require stepchildren to be treated as natural children, relations by affinity as if they were relations by consanguinity and relations of the half-blood as if they were relations of the full blood. Our intention is that the class of persons entitled to damages for loss of support should be identical in the two countries.

68. Some of those who commented upon our proposal to extend the class of relatives entitled to sue to include collaterals favoured still wider extensions. The Law Society of Scotland, for example, suggested that sympathetic consideration should be given to the inclusion of --

(a) the divorced spouse and any other person holding an alimentary decree against the deceased[1];

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[1]Under the present law of Scotland, a divorced wife has no title to sue for damages for loss of support or solatium even when she holds a maintenance order -- Hemmens and Others v British Transport Commission, 1955 SLT (Notes) 48.

(b) children brought up in family by and dependent on the deceased, but not legally related to or legally adopted by him; and

(c) the "unmarried wife".

69. While we have sympathy for the claimants in all these categories, the case for the inclusion of those in the first category is arguably the strongest. For example, a divorced spouse to whom the deceased has been paying a periodical allowance under a decree is clearly prejudiced to the extent that the accident prematurely deprived her or him of that right of support. We invite views whether persons in the first category should be entitled to damages for loss of support.

70. Persons in the second category also have a serious claim to consideration. In the Matrimonial Proceedings (Children) Act 1958, the legislature has seen fit to empower the courts to make orders in consistorial actions relating to the maintenance _inter alios_ of "the child of one party to the marriage (including an illegitimate or an adopted child) (who) has been accepted as one of the family by the other party"[1]. The Law Society of Scotland's proposal amounts to an extension of this principle. If this extension were acceptable, the court would clearly require to take into account, as it must under the 1958 Act, the liability of other persons to maintain the child. We pose the question whether it would be desirable to extend the

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[1] s.7(1)

class of persons entitled to damages for loss of support either to include all children brought up in family by the deceased and dependent upon him who are not otherwise entitled to such damages, or to include such children only when they are the children of the deceased's spouse.

71. We have more hesitation in regard to the inclusion of the third category, that of "unmarried wives". There are many practical problems, such as those of defining the category of persons affected; whether it should include "unmarried husbands"; and whether the rule should extend to the "unmarried spouse" when the deceased left a lawful wife or husband or indeed another "unmarried spouse". The courts, moreover, might legitimately ask for guidance as to how the probable duration of the relationship is to be estimated for the purpose of assessing an award.

72. The suggestion also raises acutely the main issue affecting all three categories, the question whether, having regard to the interests of defenders, the law should extend its protection to persons not directly related to the deceased. We invite views as to the inclusion of this category.

73. A still broader extension, however, was favoured by the Society of Writers to HM Signet, the Confederation of British Industry, and the British Insurance Law Association. This was to the effect that any person, whether or not related to the deceased, who was or who might become dependent

upon him in fact, should have a title to sue for damages for loss of support. The arguments against extending the right to claim damages for loss of support beyond the class of the deceased's relatives to persons generally include --

(a) the difficulty of countering averments and evidence of dependence in what would probably be a substantial number of cases;

(b) the risk that unfounded or dishonest claims might be presented for their nuisance value; and

(c) the difficulty of including in the instance or calling as defenders all persons with a potential right to sue.

For these reasons, we reject the proposal.

74. It has occasionally been suggested that the employers and partners of persons who have been killed by a wrongful act on the part of another should be entitled to claim damages for the economic loss which they have suffered in consequence of the death. The Court of Session has invariably rejected such claims on the ground that the damage is too remote[1]. The more general principle that an

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[1] Reavis v Clan Line Steamers Ltd, 1925 SC 725; Quin v Greenock and Port-Glasgow Tramways Co, 1926 SC 544; Gibson and Others v Glasgow Corporation, 1963 SLT (Notes) 16.

employer should be able to recover damages for loss which he has suffered in consequence of a wrong done to his employee by a third person was considered and rejected by the Law Reform Committee for Scotland[1]. We invite views on both these points.

(b) Determination of the quantum of the dependants' claim for loss of support

75. The calculation of the amount of the relatives' claim for loss of support has raised a variety of difficult problems. It is accepted, however, as a basic principle that the measure of damages is the amount of the support which the claimant was actually receiving from the deceased and was likely to receive in the future[2]. If the deceased's future earnings would have been greater than his earnings in the years before his death, the support which the relatives were likely to receive in the future is the crucial question[3]. If no support was actually being given a small award may be made in respect of the loss of contingent support, ie of the right of support in case of need[4]. The support in question is "natural support". Lord Mackintosh, in Daniell and Others v Aviemore Station Hotel Co Ltd[5] declined to admit to probation averments that the deceased's son, aged 43 and not stated to be in need of

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[1] 11th Report, Cmnd 1997 (1963).

[2] Cruikshank v Shiels, 1951 SC 741 at p 747.

[3] Gillan and Others v McGawn's Motors Ltd, 1970 SLT 250.

[4] Dickson v National Coal Board, 1957 SC 157; Sagar v National Coal Board, 1955 SC 424.

[5] 1951 SLT (Notes) 75.

support, was entitled for seven years or during their joint lives to a sum of £2,000 per annum payable under a deed of covenant.

76. It is also accepted that if the amount of support required by one of the claimants is likely to be diminished in the future, it is proper to take this into account in calculating the amount of the award. Thus it is relevant to have regard to the fact that a young widow may take, and ought reasonably to be expected to take, steps to obtain employment and so contribute to her own support[1].

77. On similar grounds it was, until recently, sometimes regarded as appropriate to consider a widow's prospects of remarriage[2]. S.4 of the Law Reform (Miscellaneous Provisions) Act 1971 now precludes the courts from taking into account either the remarriage of the widow or her prospects of remarriage. On the ground that in England a stepfather is now under a legal duty to maintain his step-children, the Law Commission suggest that in calculating awards to children the court might still be bound to take account of a widow's prospects of remarriage. This would mean that the inquiries and cross-examination that the 1971 Act was designed to avert might still be required. The Law Commission suggest legislation to prevent this anomaly[3]. While in Scotland a step-parent is still under

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[1] Donnelly v Glasgow Corporation, 1949 SLT 362.

[2] Donnelly v Glasgow Corporation, supra; O'Connor v Holst & Co and Others, 1969 SLT (Notes) 66; Gillan and Others v McGawn's Motors Ltd, 1970 SLT 250 at p 253.

[3] Published Working Paper No 41, paragraph 148.

no legal duty to aliment his or her step-child[1], the support derived in fact, or likely to be derived in fact, by a child in consequence of the remarriage of its mother might well be regarded as a relevant consideration. We invite views, therefore, as to whether the 1971 Act requires amendment to deal with this problem.[2]

78. The Law Commission also point out that when a wife dies in consequence of an accident, the husband may be entitled to damages in respect of the additional cost of paying a housekeeper to do the housekeeping, but that in assessing those damages account is taken of the husband's prospects of remarriage. They suggest, therefore, that the 1971 Act should be extended in its operation to cover the assessment of damages payable to a widower. On this point, the law of Scotland is thought to be similar to that of England[3] and we invite views as to whether effect should be given to the Law Commission's suggestion.

79. The precise manner in which the relatives' loss of support is to be calculated is not quite free from doubt, since no uniform method has been adopted by the Scottish courts. The matter, however, is discussed by Lord Robertson in Gillan and Others v McGawn's Motors Ltd,[4]

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[1] Macdonald v Macdonald, (1846) 8 D 830; Barry's Trs v Barry, (1888) 15 R 496.

[2] See also paragraph 80 *infra*.

[3] McBay v Hamlett, 1963 SLT 18; Williamson and Others v Spence, (1930) 46 Sh Ct Rep 31.

[4] 1970 SLT 250, at page 252.

where he says: "One method, which had a rough element of justice, was to take the gross figure of the deceased's estimated earnings and multiply it by three or four years as in Smith v Comrie's Executrix[1], (see also Riddell v Reid[2], Paterson v London, Midland and Scottish Railway Co[3].) In Walker on Damages, p 621 this is stated to be the normal method in Scotland. The total, after the multiplication, in this method included solatium as well as loss of support. More recently, however, at least in wage-earning cases, taking the gross figure earned before death, reduced to the amounts actually handed over for the family's upkeep, and then multiplied by a number of years, has been indicated as the proper method of calculating loss of support (Wason v British Transport Commission[4], Graham v Associated Electrical Industries and Others[5]."

80. The deceased in Gillan and Others v McGawn's Motors Ltd[6] was rapidly expanding a personal business, throwing much of his earnings back into it, and handing over little money to his family, who lived frugally. Lord Robertson in these circumstances assumed that most of the deceased's future

[1] 1944 SC 499.

[2] 1941 SC 277; 1942 SC (HL) 51.

[3] 1942 SC 156.

[4] 1960 SC 261.

[5] 1966 SLT (Notes) 27.

[6] 1970 SLT 250.

income would one way or another have accrued to the benefit of his family and calculated the pursuers' lost support simply by deducting from the deceased's disposable earnings a round figure in respect of his own support. He then went on to explain that the "multiplier" applied would vary with the circumstances; although in the case of a widow in her twenties a multiple of eight or ten might be appropriate in view of her prospects of remarriage[1]. In the case before him, where at the date of the accident the widow was aged 31, he took a multiple of 10, but referred to the English case of Roughead v Railway Executive[2] where a multiple of 15 had been selected. In the assessment, however, of damages payable to a widow in respect of the death of her husband in consequence of personal injuries, s.4 of the Law Reform (Miscellaneous Provisions) Act 1971 now precludes the court from taking into account the remarriage of the widow or her prospects of remarriage[3]. The 1971 Act has been criticised as being inconsistent with the principles adopted in assessing damages in other branches of the law, where circumstances likely to reduce the quantum of the loss in the future are regarded as relevant. It has been criticised also as leading to the anomaly that it benefits most the class of widow whose responsibilities are least, the young widow with no children[4]. There might be a

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[1]See also O'Connor v Holst & Co Ltd, 1969 SLT (Notes) 66.

[2](1949) 65 TLR 435.

[3]Paragraph 77 supra.

[4]Alan Wharam, "The Widow's Claim", 1971 New Law Journal p 1064.

distinction in this respect between actual remarriage (and possibly engagement to remarry) on the one hand, and the mere prospect of remarriage on the other, because the latter might be considered too speculative an element to be taken into account, as well as causing social objections. We would welcome advice as to whether these views are widely shared within and outside the legal profession and, if so, whether remedial action is desirable.

81. It has been suggested from time to time that, in place of the use of the "multiplier", it would be better to use actuarial tables to calculate the amount of the relatives' pecuniary loss. The Law Commission, in its Working Paper No 27, suggested their use, primarily as a means of checking the assessment. The Commission have reverted to the problem in their Working Paper No 41, paragraph 176 and have suggested that: "In any action under the Fatal Accidents Acts or for damages for personal injuries where the plaintiff claims compensation in respect of a future annual loss or future annual payments or expenses (i.e. loss of dependency, loss of future earnings or loss of future expenses), the plaintiff shall be entitled to rely upon the evidence of actuaries and upon approved actuarial tables to an extent which the Court considers appropriate to the particular case and the Court shall pay such regard to such evidence and to such tables as it considers just in the circumstances of the particular case".

82. The Law Commission also suggested in Working Paper No 27 that the court or jury, in assessing damages, should be bound to assess separately the various heads of pecuniary loss, and to ensure that the sum of these amounts should be a non-reducible part of the total award. The Law Commission have returned to this problem in Working Paper No 41 and have suggested that their proposal should be the subject of legislation. While both these suggestions are relevant and important in the present context, they are arguably suggestions whose merits should be explored in the context of a system in which damages are still, in the ordinary case, determined by a jury, and generally against a wider background than that of a paper relating only to damages for injuries causing death. We propose, therefore, not to pursue these questions in the present Memorandum.

83. Another problem which is the subject of current debate is whether the defender may competently plead that pecuniary and other benefits accruing to the dependants as a result of the death should reduce the amount of their claim for patrimonial loss. Authority in this matter is sparse in Scotland, but since the approach of the English courts to this problem appears to have influenced practice in Scotland[1], it seems right to consider first the position in England.

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[1]See Smith v Comrie's Executrix, 1944 SC 499, per Lord Mackintosh at p 501.

84. The English courts, in calculating damages under the Fatal Accidents Act 1846, soon began to take inheritance into account. S.2 of that Act had declared: "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought". It was held in Pym v Great Northern Railway Co[1] that the words "injury resulting from the death" meant the pecuniary loss resulting from the death and the practice arose of deducting the inheritance which the family received from the compensation payable under the Acts. As Bramwell, B. said in Bradburn v Great Western Railway Co[2], "The damages were to be a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life. If, therefore, the person claiming damages was put by the death of his relative into possession of a large estate, there was no loss; he was a gainer by the event".

85. At first, even monies received under policies of insurance taken out by the deceased were taken into account. Parliament intervened in the Fatal Accidents (Damages) Act 1908, s.1 to exclude such monies and this principle was extended, first by the Law Reform (Personal Injuries) Act 1948, and later by the Fatal Accidents Act 1959, to exclude "any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the

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[1](1862) 2 B & S 759.

[2](1874) LR 10 Exch 1 at p 3.

death"[1]. The term "benefit", however, is statutorily defined to mean trade union and Friendly Society payments for the relief and maintenance of a member's dependants and benefits under the National Insurance Acts. It does not include benefits by way of succession, and the English courts have continued to make a deduction in respect of such benefits in calculating the pecuniary loss resulting from the death. Hodson, J. as he then was, remarked that "Where stocks and shares and comparable income-producing investments are concerned and the probable family interest is thereby accelerated, the deduction will normally be made in full. To take the extreme case where the whole family income is derived from the husband's investments, the widow who takes his whole estate on his death will have no claim under the Fatal Accidents Acts[2]."

86. But the full amount has not always been deducted. What is usually deducted is not the value of the inherited assets as such, but the value of the accelerated payment of assets which the dependants would probably have inherited eventually in the ordinary course of things[3]. In more recent cases, when the dependant has the use of the inherited assets as a member of the deceased's family,

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[1] s.2.

[2] Bishop v Cunard White Star Co Ltd, (1950) 2 All ER 22 at p 26.

[3] Grand Trunk Railway Company of Canada v Jennings, 1888, 13 AC 800; Roughead v Railway Executive, (1949) 65 TLR 435; Voller v Dairy Produce Packers Ltd, 1962 1 WLR 960.

as where a widow inherits her husband's house, no deduction has been made[1]. There is a disposition, moreover, to recognise that where the deceased was a wealthy man and generous to his family during his life it may be positively disadvantageous, owing to the incidence of estate duty, for his widow and surviving children to receive immediate payment of a share of his estate[2]. Lord Guest has said: "But pure arithmetic does not always in such cases lead to a just result where there are so many imponderables. The aim of assessing damages in a case such as the present is to estimate the loss of reasonable expectation of pecuniary benefit. This must in most cases be a matter of speculation and may be of conjecture"[3].

87. No provision was made for Scotland analogous to s.2 of the Fatal Accidents Act 1908, presumably because it had not been the practice of the Scottish courts to deduct the proceeds of policies of insurance when computing the amount of the dependants' loss[4]. Nor was any specific

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[1] Heatley v Steel Co of Wales Ltd, (1953) 1 WLR 405; Daniels v Jones, (1961) 3 All ER 24.

[2] Cf Daniels v Jones, (1961) 3 All ER 24 per Holroyd Pearce, LJ at p 28.

[3] Kassam v Kampala Aerated Water Co Ltd, (1965) 1 WLR 668 at p 672.

[4] See Glegg on Reparation, 3rd edn, p 114 and Smith v Comrie's Executrix, 1944 SC 499 per Lord Mackintosh at p 501.

provision made for Scotland analogous to s.2 of the Law Reform (Personal Injuries) Act 1948. Nevertheless, in Adams v James Spencer & Co[1] the Court of Session felt itself free to hold that a widow's pension under the National Insurance (Industrial Injuries) Act 1946 should be deducted in computing her claim for patrimonial loss[2]. This specific problem was dealt with by the Law Reform (Personal Injuries) (Amendment) Act 1953. The terms of that Act, however, are narrow. S.1 declares that: "In an action for damages in Scotland in respect of a person's death there shall not in assessing those damages be taken into account any right to benefit resulting from that person's death", and "benefit" is defined to mean merely benefit under the National Insurance Acts[3]. The wider provisions of the Fatal Accidents Act 1959 are not applied to Scotland.

88. It was not until 1944 that the Scottish courts had to consider whether estate inherited by the dependants in consequence of the deceased's death fell to be taken into account in assessing their damages for loss of support. Lord Mackintosh gave an affirmative answer to

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[1] 1951 SC 175.

[2] Cf Moorcraft v Alexander and Sons, 1946 SC 466; and Leadbetter v National Coal Board, 1952 SLT 179.

[3] Law Reform (Personal Injuries) Act 1948, s.2(6)(a).

the question in the case of Smith v Comrie's Executrix[1] where he declared: "On principle it seems to me that (an inheritance) must be taken into account, and that, where the claimant's need for support can be partially met by estate inherited from the deceased and formerly supporting relative, only a diminished award of damages for the loss of that relative's support can be given"[2]. This decision has been followed in practice[3], but there has been no adequate examination of the basis of this practice, nor guidance as to what proportion of the inheritance is to be taken into account.

89. The approach which a legal system adopts in relation to the calculation of a relative's claim for loss of support will naturally depend upon the basis of that claim. The initial approach of Scots law was to regard the relatives' claim as deriving from the fact that, by the fault of the defender, the aliment which the deceased afforded to them had terminated[4]. It followed on this view that the quantum of the claim could be determined by the extent of the legal duty to aliment and that where the relatives had derived benefits by inheritance

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[1] 1944 SC 499, 1945 SLT 108 sub nom Smith v Boyd and Another.

[2] 1944 SC at p 501.

[3] Webster and Others v Simpson's Motors and Others, 1967 SLT (Notes) 36; Gillan and Others v McGawn's Motors Ltd, 1970 SLT 250.

[4] Eisten v North British Railway Co, (1870) 8 M 980; Weir v Coltness Iron Co Ltd, (1889) 16 R 614; Clarke v Carfin Coal Co, (1891) 18 R (HL) 63.

or otherwise in consequence of the death, those benefits should be taken into account in calculating their loss.

90. This approach had been the dominant one in our system; but it was effectively rejected by the Second Division and by the House of Lords in Cruikshank v Shiels[1], where an averment that the widow was possessed of a substantial private fortune available for her support was held to be irrelevant. On this view a relative may claim damages for loss of support although he has resources of his own and is not in need of support: it suffices that such support was actually afforded by the deceased[2]. Today, arguably, the courts are moving towards the view that what is relevant is the relatives' loss of what they could have expected to receive from the deceased in the natural course of events. Their material loss is the loss of the family earnings provided by the deceased. This is a loss which they sustain whatever their personal income or the deceased's personal fortune. This principle is also recognised, though to a limited extent only, by such legislation as the Fatal Accidents Acts 1908 and 1959, the Law Reform (Personal Injuries) Act 1948 and the Law Reform (Personal Injuries)(Amendment) Act 1953.

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[1]1951 SC 741 and 1953 SC (HL) 1.

[2]Dickson v National Coal Board, 1957 SC 157.

91. Despite the views to the contrary expressed by some of those who commented upon our Memorandum No 5[1], after further consideration we believe that the time has come to carry this principle further and to make it clear that what the relatives receive by way of inheritance is to be ignored in assessing their claim for patrimonial loss. This approach would avoid the anomaly of the present law that the more strenuous the deceased's efforts were to provide by savings for his relatives, the less compensation his relatives may receive on his death. The Law Commission has reached a provisional conclusion in the same sense in its Working Paper No 41 in paragraph 152 which would obviate a very difficult and possibly insoluble problem of quantification.

(c) Relatives' claim for solatium

92. When a claim by dependent relatives is competent, Scots law concedes to them not merely damages for loss of support but also an award of solatium, or pecuniary acknowledgment of their grief and suffering[2]. A similar right was first conceded in actions of assythment where

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[1]The Society of Writers to HM Signet and the British Insurance Law Association. A different view is taken by the Law Society of Scotland, the Royal Faculty of Procurators in Glasgow, and by Professor D M Walker.

[2]Quin v Greenock and Port-Glasgow Tramways Co, 1926 SC 544; Elliot v Glasgow Corporation, 1922 SC 146.

a sum was given to the relatives for the "pacifying of thair rancor"[1]. In the modern action which took the place of assythment, solatium was explained to be a compensation for the relatives' grief rather than a buying-off of their vengeance. It is incompetent to take account of the greater anger of the relatives occasioned by the grossness of the negligence[2]. In assessing the award, however, it may be legitimate "to consider the laceration of the feelings of the widow and family in contemplating the pain and suffering to which the deceased was exposed before death actually supervened"[3].

93. The pursuer is not entitled to an award merely by virtue of his relationship with the deceased, however close: there must be proof of grief[4]. The fact , however, that financially a man is a burden rather than an asset to his family does not mean that they will feel no grief on his death[5]. Specific averments of injury to the pursuer's

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[1]Balfour's Practicks, p 516.

[2]Black v North British Railway Co, 1908 SC 444 at p 454.

[3]Black, supra, per Lord President Dunedin at p 453.

[4]Rankin and Others v Waddell, 1949 SC 555.

[5]Brown v Macgregor and Others, 26 Feb 1813 FC; Elder v Croall, (1849) 11 D 1040.

physical or mental health are irrelevant and are not admitted to proof[1].

94. 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"[2]. Since grief cannot be measured in financial terms the sums awarded are necessarily conventional, In recent cases sums of £1250 to £1500 have been awarded to widows and £600 to £750 to children[3]. But widows who have remarried and young children may receive less[4].

95. A similar award is given by many civilian systems, but not by the English common law. In England, under the Fatal Accidents Acts, "The basis is not what has been called solatium, that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss"[5].

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[1] Nicolson v Cursiter, 1959 SC 350.

[2] Elliot v Glasgow Corporation, 1922 SC 146, per Lord President Clyde at p 148. Cf Gibson v Kyle, 1933 SC 30.

[3] McNeil v National Coal Board, 1966 SLT (Notes) 4; O'Connor v Holst & Co Ltd, 1969 SLT (Notes) 66; Gray v Allied Ironfounders Ltd, 1969 SLT (Notes) 95; Gillan and Others v McGawn's Motors Ltd, 1970 SLT 250.

[4] Cf Cowan v Greig, 1969 SLT (Notes) 34.

[5] Taff Vale Railway Co v Jenkins, (1913) AC 1 per Viscount Haldane, LC at p 4.

96. There has been criticism from time to time of the rights of spouses and relatives to sue for solatium and the Law Reform Committee for Scotland were asked to consider whether any change in the law was desirable. The Committee dealt with this matter in their Tenth Report[1] as follows:-

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

97. We referred to the question again in our Memorandum No 5, and the comments which we received indicated that there is still a divergence of views on this question among the profession. The Law Society of Scotland, for example, said: "The view is strongly held in some quarters that solatium as an item of claim should be entirely abolished particularly in the cases of

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[1]Cmnd 1103 (1960), para 27.

parents suing on the death of a child". While a similar view was taken by other bodies including the Counties of Cities Association, the Confederation of British Industry, and the British Insurance Association, several bodies advocated its retention, including the Society of Writers to HM Signet, the National Union of Mineworkers and certain individual commentators. The Faculty of Advocates thought that such claims might be distasteful but suspected "that in many cases they serve a valuable social purpose in mitigating resentment, particularly where the claim for loss of support would have no substance (eg the loss by a husband of a wife)".

98. Further examination of this subject has convinced us that an award similar to that which is at present given under the name of solatium might appropriately be given, but for reasons other than that of assuaging the grief and sorrow of the claimant. The present basis of the award is not merely distasteful but leads to the anomaly that the very young or posthumous child whose need is greatest has sometimes been awarded little or nothing[1] in name of solatium. Yet, awards of solatium have been made to young and to posthumous children and justified on the somewhat artificial argument that they should receive "compensation for the bitter consciousness of the gravity of the bereavement which claimants of very tender years may be expected to experience as soon as

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[1]See Moorcraft v Alexander & Sons, 1946 SC 466, per Lord Patrick at p 468 and Walker, Law of Damages in Scotland, pp 639-641.

they are old enough to appreciate it"[1]. Equally, if grief and suffering are the basis of an award of solatium there seems no reason why a substantial award should not be granted to the grown-up children of the deceased. The failure, however, of the jury in Rankin and Others v Waddell[2] to make any award of solatium to three forisfamiliated sons and the small amounts awarded in other cases[3] suggest that there is some uneasiness about the basis of the award.

99. We do think, on the other hand, that over and above the quantifiable loss of income which they sustain when a man is killed, his wife and children suffer damage through the loss of his help as a member of the household and of his counsel and guidance as a husband and father. A similar situation arises when a wife is killed leaving a husband and a young family: even if she was not herself earning, her husband and family suffer considerable loss on her death, which is only partially quantifiable in financial terms. We consider that the law ought to acknowledge these facts of life. To the extent that, in practice, an award of solatium often does this, we would not favour its outright abolition.

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[1] Kelly v Glasgow Corporation, 1949 SC 496 per Lord President Cooper at p 499.

[2] 1949 SC 555.

[3] Cf Paterson v London, Midland and Scottish Railway Co, 1942 SC 156.

100. In our Memorandum No 5 we suggested that the right to solatium conceded to the spouse and relatives of the deceased might be replaced by a species of "family award"[1], which would take account of the intangible losses which we have just described[2]. This proposal attracted favourable, though not enthusiastic comments, and these even from bodies which would have liked solatium to be entirely abolished. In consequence, we have given further thought to the matter. It presents several problems; that of specifying the persons to whom a claim should be open; that of defining its basis in legislative terms; and that of specifying how the award is to be quantified by the courts.

101. We do not consider that it should be available to all persons who, in principle at least, would have a claim to damages for loss of support. The intangible losses which we have described are suffered most acutely within the restricted family group of husband and wife, parent and child: outside that group the loss suffered by individuals in particular cases must be weighed against the need to discourage speculative claims for losses which are extremely difficult to quantify. We suggest, therefore, that persons who stand to the deceased in the relation of husband, wife, parent or child, and only such

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[1]But not in the sense in which the term "family award" or "family claim" has often been used to describe an inter-related claim by a widow and her children; see, eg. Kelly v Glasgow Corporation, 1951 SC (HL) 15 *per* Lord Normand at p 20; Campbell v West of Scotland Shipbreaking Co, 1953 SC 173; Hewitt v West's Gas Improvement Co, 1955 SC 162 *per* Lord President Clyde at p 166; *supra*, paragraph 16.

[2]Paragraph 63, *supra*.

persons should be entitled to a "family award", although for this purpose the step-children, adopted children and illegitimate children of any person should be treated as if they were his or her natural children. In cases where one of these close relatives has died before the hearing of the action, that relative's executor should not be entitled to compensation of this kind.

102. We consider that the award should be described in terms such as "an acknowledgment of the non-pecuniary loss suffered by the claimant in consequence of the death of the deceased". This would leave it, in effect, to the courts to identify in particular cases the nature of the loss suffered. This must be so, because it will differ from case to case; although one fairly common example would be the loss suffered by a child when deprived of advantages which the court considers would probably have resulted from upbringing and early education by the parent of whose society the child has been deprived.

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

104. If the proposal which we have just made for the replacement of solatium by a "family award" is not accepted, we recommend, alternatively, that claims for solatium on the death of another should be restricted to the class of persons who, we suggested above, should be entitled to claim a "family award". We are conscious that this proposal would introduce into our law a distinction between the class of relatives who may claim solatium and loss of support, and the class of those who may claim for loss of support only. We accept that simplicity in the law is to be desired, but if the price of this simplicity is to allow claims which are inappropriate, we think that it should not be paid.

5. Desirability of single action

105. Under the present law, as we have explained[1], when dependants present claims for solatium and loss of support they must concur in a single action. There appears to be no rule that where the executors and dependants both raise actions of damages founded upon the same injury to the deceased, they must concur in a single action. The absence of this rule is possibly to be explained by the fact that concurrent actions by executors and dependants were

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[1]Paragraph 16 *supra*.

precluded by the rule in Darling v Gray & Sons. They are no longer always precluded[1] and legislative acceptance of our proposals would make concurrent actions by executors and dependants the rule rather than the exception. We suggest, for the protection of the defender and for the efficient determination of their respective rights, that the relatives and executors should be required to concur in a single action, and that if either the executor or a dependent relative is aware that an action for damages arising from injuries to the deceased has been initiated, but refrains from joining himself as a co-pursuer, he should be called as a defender and be barred from raising subsequently an independent action.

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[1] McGhie v British Transport Commission, 1964 SLT 25; Gray v North British Steel Foundry Ltd, 1969 SLT 273.

SUMMARY OF PROVISIONAL CONCLUSIONS AND OTHER MATTERS ON WHICH VIEWS ARE SOUGHT

1. For avoidance of doubt, it should be declared that the right of the executors of a person deceased to recover damages in respect of the deceased's loss of earnings should not extend beyond the period of the deceased's survivance.

2. A person's right to recover solatium for personal injuries should cease on his death and should not transmit to his executors.

3. No change should be made in the present rule whereby the recovery of damages by an injured person or his settlement of a claim to damages during his life excludes any right of action by his executors and dependants after his death.

4. Comments are invited on the question whether and in what circumstances exemption clauses agreed to before an accident by a person injured therein should have the effect of excluding or limiting liability to his dependants after his death.

5. There is a case for retaining the rule by which, in cases of concurrent fault, the defender's responsibility to the deceased's executors and to his relatives is proportioned to the degree of fault shown by the deceased.

6. There is also a case for retaining the rule by which a voluntary assumption of the risk on the part of the deceased bars the rights of action both of the deceased's executors and of his dependants.

7. The present statutory provisions governing the limitation of actions by the executors and dependants of a deceased person do not require amendment.

8. The dependants' rights of action for damages and solatium (or any award in lieu of solatium) should not be affected by the existence of an action by the executors and *vice versa*.

9. It should no longer be a condition of a dependant's right of action for damages for loss of support that a reciprocal legal duty of support existed between the claimant and the deceased at the latter's date of death.

10. The class of persons entitled to sue for loss of support should be extended to include those collaterals and other persons specified in s.1 of the Fatal Accidents Act 1959.

11. Comments are invited on the question whether the class of persons entitled to sue for loss of support should be further extended to include --

(a) a divorced spouse and any other person holding an alimentary decree against the deceased;

(b) children brought up in family by and dependent on the deceased who are not otherwise entitled to damages for loss of support, or such children only when they are the children of the deceased's spouse;

(c) "unmarried spouses".

12. The suggestions that actuarial principles should be used in the calculation of the dependants' pecuniary loss and that the heads of loss should be itemised require consideration against a wider background than that of an inquiry into damages for injuries causing death.

13. Comments are invited on the proposition that the employers or partners of persons who have been killed by a wrongful act on the part of another should be entitled to damages for any economic loss which they may have suffered in consequence of that death.

14. Views are invited on the question whether the principle embodied in the Law Reform (Miscellaneous Provisions) Act 1971, that the remarriage of a widow or her prospects of remarriage shall not be taken into account in assessing the damages payable to her, should be extended to apply to claims made by the children

of the deceased, and whether a similar principle should be applied to the claims of widowers.

15. It should be provided by statute that, in assessing the amount of the dependants' damages for loss of support, no account should be taken of what the claimants receive by way of inheritance from the deceased.

16. The relatives' right to solatium should be replaced by an additional element of damages acknowledging the non-pecuniary loss suffered by a person who was either the husband, wife, parent, or child of the deceased. For this purpose the step-children, adopted children and illegitimate children of any person should be treated as if they were his or her natural children.

17. Alternatively, if the preceding recommendation is not accepted, the right of action for solatium on the death of another should be restricted to the persons specified in that recommendation.

18. The executor (or executors) and the dependants of a deceased person should be required to concur in a single action in respect of patrimonial loss or solatium (or any element of damages replacing solatium).

19. If the executor or a dependant is aware that an action of damages arising from injuries to the deceased has been initiated, but refrains from joining himself as a co-pursuer, he should be called as a defender and

be barred from raising subsequently an independent action.

20. It should be declared by statute that actions for the recovery of an assythment should cease to be competent in any circumstances.

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