



Scottish Law Commission

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ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION

NOT FOR PUBLICATION OR BROADCAST

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TITLE TO SUE FOR NON-PATRIMONIAL LOSS

Today the Scottish Law Commission publishes its Report on Title to Sue for Non-Patrimonial Loss (Scot Law Com No 187).

Background

In March 2001 Scottish Ministers asked the Commission to consider the provisions of the Damages (Scotland) Act 1976 that set out which relatives of a deceased person can claim non-patrimonial damages.

Family structures found in contemporary Scotland differ greatly from those found in 1976. The exclusion of brothers and sisters and same-sex couples from those entitled to claim damages [for non-patrimonial loss] under the 1976 Act highlights this.

The present law

The Damages (Scotland) 1976 Act provides that where a person dies as a result of personal injuries caused by another person's delictual conduct, the deceased's family may be entitled to claim damages under the Act. The Act allows claims for damages under two heads:

- patrimonial loss (loss of financial support); and
- non-patrimonial loss (grief, distress, sorrow and other intangible losses).

Schedule 1 to the 1976 Act lists the deceased's "immediate family", who are entitled to sue for non-patrimonial loss. The deceased's immediate family is a sub-set of the deceased's "relatives", who are entitled to sue for patrimonial loss. Members of the immediate family are entitled to sue for patrimonial loss as well as non-patrimonial loss. But not all those relatives who are entitled to sue for patrimonial loss can sue for non-patrimonial loss.

At present the deceased's immediate family comprises:

- the spouse of the deceased;
- the opposite-sex cohabitant of the deceased;
- the parent of the deceased; and
- a child of the deceased.

Relationships by affinity (relationships by marriage, namely the deceased's mother and father-in-law, and brothers and sisters-in-law); and
Relationships of the half-blood (the deceased's half brother and sister).

The provisions of the 1976 Act have been criticised by the courts. In *Quinn v Reed* 1981 SLT (Notes) 117 the Lord Ordinary (Grieve) observed that it is unrealistic that brothers and sisters may not sue for non-patrimonial loss under the Act. In *Monteith v Cape Insulation* 1998 SC 903, because of the language of the Act, the court had to award non-patrimonial damages to the deceased's mother-in-law. It is clear from these cases that the 1976 Act can lead to potentially unjust results.

Consultation

The Commission published its Discussion Paper in October 2001, seeking comments on a number of questions relating to the reform of the 1976 Act. Responses were received from a variety of interested organisations and individuals. The Commission has taken the responses into account in preparing the report.

The Commission's recommendations

The Report recommends:

- The retention of the concept of the deceased's immediate family. We consider that it is important to retain the inherent structure of the 1976 Act. Consequently, any person whom we recommend should be included within the deceased's immediate family should also have title to sue for patrimonial loss, even if that person is not entitled to do so at present.
- The deceased's immediate family should consist of those relatives who are likely to have had a close tie of love and affection with the deceased in the context of contemporary family structures. There was overwhelming support from consultees on this issue.
- Appropriate weight should be given to relationships which can arise between persons who have lived and/or been brought up in the same household. So, for example, children who have been brought up in the same household together but who are not biological siblings would have title to sue for non-patrimonial damages, as well as brothers and sisters. We feel this reflects modern family structures.
- Relationships by affinity should be excluded. We take the view, supported by many of our consultees, that relatives by affinity are generally too remote from the deceased to suffer non-patrimonial loss.
- The deceased's immediate family should constitute the following persons:

Surviving spouse

surviving cohabitant (opposite-sex or same-sex)

parent (including biological parents, adoptive parents, parents by virtue of parental orders, persons who accepted the deceased as a child of the family)

child (including biological children, adoptive children, children by virtue of parental orders, persons who were accepted by the deceased as a child of the family)

brother and sister (including persons brought up in the same household and as children of the same family as the deceased)

grandparent and grandchild

The attached table shows the changes in relation to title to sue for non-patrimonial damages under the 1976 Act as a consequence of the Commission's recommendations.

NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Hon Lord Eassie. The other Commissioners are currently Mr Patrick S Hodge QC, Professor Gerard Maher, Professor Kenneth G C Reid and Professor Joseph M Thomson.

2. Further information can be obtained by contacting Professor Joe Thomson, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131, Fax: 0131 662 4900, e-mail: info@scotlawcom.gov.uk.)

3. The paper may be viewed on our website at www.scotlawcom.gov.uk or purchased from TSO Scotland Bookshops.

Damages (Scotland) Act 1976- Title to sue for non-patrimonial loss

"Relative" ¹	1976 Act - at present	1976 Act – as recommended by the SLC ²
Surviving spouse ³	Yes	Yes
Former spouse	No	No
Surviving opposite-sex cohabitant	Yes	Yes
Surviving same-sex cohabitant	No	Yes
Biological parent and child ⁴	Yes	Yes
Adoptive parent and child	Yes	Yes
Parent and child by virtue of a parental order	Yes	Yes
Step-parent and step-child	Yes	No
Any person who accepted the deceased as a child of his or her family	No	Yes
Any person who was accepted by the deceased as a child of his or her family	Yes	Yes
Parent-in-law and child-in-law	Yes	No
Other relations by affinity	No	No
Brother and sister	No	Yes
<i>De facto</i> brother and sister	No	Yes
Grandparent and grandchild	No	Yes
Further ascendant and descendant	No	No
<i>De facto</i> grandparent and grandchild	No	No
Uncle, aunt, niece, nephew and cousin	No	No

¹ Relationships of the half blood are included.

² See Appendix A draft Damages (Scotland) Bill 2002.

³ Including the surviving spouses to a valid polygamous marriage.

⁴ Including a parent and child by virtue of the Law Reform (Parent and Child) (Scotland) Act 1986, (c 9) s 1(1); but excluding a parent and child where the child has been adopted by another. See the Adoption (Scotland) Act 1978, (c 28) s 39.