



Scottish Law Commission

promoting law reform

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BEFORE 1100 HOURS WEDNESDAY 1 AUGUST 2007
AT WHICH TIME A NEWS CONFERENCE WILL BE HELD

DISCUSSION PAPER ON DAMAGES FOR WRONGFUL DEATH

The Commission is seeking views on possible reform of the law relating to damages in cases where someone dies as a result of personal injuries. The Commission's Discussion Paper on Damages for Wrongful Death, which is published today, invites responses to a number of questions relating to reform.

Earlier this year, the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 changed the law in relation to claims for damages where a person dies of mesothelioma. As a result the deceased's immediate family can now claim damages for their non-patrimonial loss (ie their non-monetary loss, such as loss of support) even although the deceased had obtained damages or settled his claim before he died. Mesothelioma victims will no longer have to make the stressful decision of whether or not to pursue their own claims while alive: they can do so without affecting the separate right of their immediate family to claim damages for non-patrimonial loss after their death.

When the Mesothelioma Bill was being debated in the Scottish Parliament Scottish Ministers realised that some aspects of the law of damages for wrongful death merited further examination. The Commission was asked to undertake the review of the law and in particular the provisions of the Damages (Scotland) Act 1976.

Commenting on publication of the Discussion Paper, Professor Joe Thomson, the lead Commissioner on the project commented –

"This is the first time in thirty years that the opportunity has arisen to consider the options for a fair and principled system of compensation when a person dies from personal injuries."

The Commission invites comments on the Discussion Paper by **30 November 2007**. Following consultation the Commission will prepare a Report, including a draft Bill, which it aims to publish next year.

SUMMARY OF THE MAIN ISSUES FOR REFORM

Damages for Wrongful Death

When a person is injured as a result of the wrongful actions of another, the injured party is usually entitled to some form of compensation for loss suffered as a result of the injury, whether this loss is patrimonial (ie financial) or non-patrimonial (ie non-monetary loss, such as the loss of expectation of life). Where the injuries sustained prove fatal, three possibilities arise: first, the victim may raise proceedings and claim compensation from the responsible person before death; second, the victim may die before proceedings have been completed; and third, the victim may die before raising proceedings. Each possible scenario raises potential issues for reform and are dealt with in turn in the Discussion Paper.

Issues where the victim survives to complete a claim

Where the victim (or his or her representative) has raised a successful claim and has received compensation from the responsible person for the injuries before death, damages may currently be awarded for future patrimonial loss (what the victim would have earned in his or her lifetime, had the injuries not foreshortened it) between the date at which the victim is expected to die and the date on which the victim would have died but for the injuries. The Discussion Paper seeks views as to whether or not this should continue, and what income should be claimable.

Issues where the victim dies before proceedings have concluded

Where a victim instigates proceedings, but dies before they are concluded, his or her executor may continue the action to conclusion on behalf of the estate of the deceased. However, the executor may claim only for losses sustained by the deceased between injury and death – in other words, no claim for future patrimonial loss transmits to the executor. The reason for this is that the dependent relatives of the deceased have a separate claim against the responsible person for loss of support. It has been suggested that to allow both claims would amount to double compensation, essentially penalising the responsible person twice for the same wrong. This system results in the compensation for loss sustained by the victim becoming part of the deceased's estate. The damages awarded in the relatives' loss of support claim(s) are paid directly to the relatives who have suffered the loss.

However, the Discussion Paper seeks views on whether or not it would be appropriate to remove the relatives' action in favour of a single action in which the executor claims for both past loss incurred up to the date of death and future patrimonial loss with the result that the whole damages award would then become part of the deceased's estate. Where this would result in serious financial hardship on a relative of the deceased, the Discussion Paper seeks views as to whether such a relative should have the right to seek a payment from the deceased's executor to relieve such hardship.

Issues where the victim dies before raising a claim

Where a victim is killed instantaneously as a result of the wrongful act of another, or dies shortly thereafter, the executor has no title to sue for any patrimonial loss whatsoever. The only action lies in the hands of dependent relatives of the victim who can sue for loss of support. Again, the Discussion Paper seeks views as to whether or not the executor should

be able to step into the shoes of the deceased and sue for all losses for which the victim would have been able to claim for, had he or she survived to raise an action.

The deceased's relatives' rights to damages

The Discussion Paper seeks views on the reform of the relatives' right to claim damages, if the proposal that the executor could sue for future patrimonial loss is rejected.

Currently, to establish a claim for loss of support, it must be established that the responsible person would have been liable to pay compensation to the deceased had he or she survived to make a claim. The Discussion Paper asks whether this requirement should remain in place.

The relatives in a wrongful death case are entitled to claim only the loss of support they have sustained as a result of the death. It has been suggested that the damages awarded under this head do not accurately represent the losses which are actually occasioned when someone is wrongfully killed. The Discussion Paper seeks views on the damages a pursuer should be able to claim in such circumstances.

Section 1(4) awards

Awards under section 1(4) of the Damages (Scotland) Act 1976 are intended to compensate the immediate relatives of the deceased victim for the distress, grief and sorrow they feel as a result of the victim's death. Such awards are restricted to specified categories of relative.

These awards can be difficult to calculate, given that they involve an assessment of the level of grief a relative experiences consequent on their relationship with the deceased. Also, certain relatives who should perhaps be afforded a claim are discounted because their relationship to the deceased is not sufficiently close. Accordingly, the Discussion Paper seeks views on whether or not section 1(4) awards should be retained, and if so, what changes should be made to their operation in practice.

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 Drummond Young, a Court of Session judge. The other Commissioners are Professor George L Gretton, Professor Gerard Maher QC, Professor Joseph M Thomson and Colin J Tyre QC. The Chief Executive is Michael Lugton.

2. **A News Conference will be held on Wednesday 1 August 2007 at 11.00 hours** at the Commission's office, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131, Fax: 0131 662 4900, email: info@scotlawcom.gov.uk). Professor Joe Thomson, the lead Commissioner on the project will be available for interview. You are invited to be represented. Media copies of the paper will be available at the News Conference or can be collected from the Commission's office. The paper may also be viewed on our website at www.scotlawcom.gov.uk or purchased from TSO Scotland Bookshop.

3. Further information can be obtained by contacting Susan Sutherland, at the above address.