

SCOTTISH LAW COMMISSION

CONSULTATION PAPER

ON

THE LAW OF BANKRUPTCY:

**SOLATIUM FOR PERSONAL INJURY/
FUTURE WAGE LOSS**

February 1994

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SHOULD CLAIMS OR AWARDS
REPRESENTING SOLATIUM FOR
PERSONAL INJURY OR FUTURE
WAGE LOSS VEST FOR THE
BENEFIT OF CREDITORS?

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This Consultation Paper is intended to elicit comments and does not represent the final view of the Scottish Law Commission.

The Commission would be grateful if comments on this Consultation Paper were submitted by 30 June 1994. All correspondence should be addressed to:-

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Note: Should the Commission decide to make recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in respect of this Consultation Paper. Any requests from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Consultation Paper can be used in this way.

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TABLE OF CONTENTS

	Page	Paragraph
Introduction	1	1
The existing law	1	2
The issue	3	3
The moral dimension	3	4
Comparative law	8	5
England	8	5.1
Australia	9	5.3
South Africa	11	5.7
United States of America	12	5.9
France	12	5.10
The trustee in bankruptcy versus the executor	12	6
A case for reform?	19	7
The direction of reform?	21	8
<i>Timing of an award of damages</i>	21	8.2
<i>Solatium/future wage loss - what next?</i>	23	8.4
APPENDIX	25	
Excerpts from the Commission's Report on Bankruptcy and Related Aspects of Insolvency and Liquidation and The Effect of Death on Damages (1982) Scot Law Com No 68 and (1992) Scot Law Com No 134)		

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1. Introduction

1.1 During the course of our annual meeting with the Faculty of Advocates they suggested to us that consideration be given to the issue of whether, in the law of bankruptcy, claims or awards representing solatium for personal injury or future wage loss should continue to vest for the benefit of creditors. The equity of this principle had been queried by some members of Faculty.

1.2 To enable the Commission to consider the issue fully a background paper was completed. As a result of discussions focusing on the information contained in the background paper we decided to issue the present Consultation Paper to seek views on whether there is a case for reform and, if so, on the direction which that reform should take.

1.3 The Consultation Paper is being circulated to a restricted number of consultees and does not form part of our numbered series of consultative memoranda/discussion papers.

2. The existing law

2.1 While a permanent trustee can take over or instigate proceedings for any patrimonial loss which the bankrupt estate has suffered as a result of a wrong done to the debtor, including proceedings for the recovery of property or money due to the debtor, and also sue for damages for breach of any contract, subject

to appropriate consent being obtained, a permanent trustee cannot pursue an action for solatium for personal injuries¹ or probably for defamation² for such actions are considered to be personal to the debtor. The principle involved seems to be that as personal actions of the kind in question involve matters of great delicacy affecting the feelings and reputation of the debtor and his family, it should be left to the debtor's own discretion whether any such action should be raised. In other words, there may be circumstances which render it undesirable or detrimental to the debtor to make certain issues the subject of legal proceedings.

2.2 Once an action for solatium has been initiated by the debtor however, a trustee may continue such an action and recover any damages for the benefit of creditors.³ Should a debtor realise this and decide not to raise an action the trustee can do nothing to recover the damages. If the debtor chooses to pursue and is successful in any action for solatium, the damages recovered fall into the estate for the benefit of creditors.⁴

2.3 In the Commission's Report on Bankruptcy and Related Aspects of Insolvency and Liquidation⁵ no recommendation for any change in the existing

¹ *Muir's Tr v Braidwood* 1958 SC 169.

² *Bern's Executor v Montrose Asylum* (1893) 20 R 859 in which opinions were expressed that the reasons for excluding an executor from raising an action for injury to the person, feelings or reputation of the deceased applied equally in the case of a trustee in bankruptcy. See, eg, Lord M'Laren at p.863 and Lord Young at p.870.

³ *Thom v Bridges* (1857) 19 D 721; *Stewart v London, Midland and Scottish Railway Co* 1943 SC (HL) 19; *Watson v Thompson* 1990 SLT 374, 1991 SLT 683, 1992 SCLR 78.

⁴ *Jackson v M'Kechnie* (1875) 3 R 130.

⁵ (1982) Scot Law Com No 68. Paragraphs of the Report referred to in this Consultation Paper are reproduced in the Appendix hereto for ease of reference.

law on this matter was made.¹

3. **The issue**

3.1 Is it equitable that claims or awards representing solatium for personal injury or future wage loss (ie beyond the date of the debtor's discharge) vest for the benefit of creditors? Why should the debtor who has had the double misfortune of having an accident around the same time as his financial difficulties be penalised by the forfeiture of any such award to his creditors? Should such claims or awards be "ring fenced"?

3.2 The issue is a fundamental question of policy. In the recent case of *Watson v Thompson*², Lord Weir made the following comment:-

"It was suggested at one stage of counsel's submission that it was unconscionable that creditors should benefit out of the sufferings of a bankrupt, but I am afraid that in the harsh climate of insolvency law there is no room for the operation of considerations of this kind".³

Lord Weir's view thus enforces the position as set out in the existing law, but, as in all matters of policy, it is possible to advance an argument for a view to the contrary. The issue is extremely emotive and clearly has a moral dimension.

4. **The moral dimension**

4.1 It is clear that the legislature has always striven to maintain a just balance between the creditor on the one hand and the debtor on the other. That balance may shift one way or the other from time to time in accordance with social policy but that which remains constant is the principle that the debtor

¹ Supra, para 11.12.

² 1992 SCLR 78.

³ Supra at p.87.

should be required to settle his debts. Statute therefore provides that the whole of the debtor's estate should vest in the permanent trustee for the benefit of creditors¹. The debtor must also notify the permanent trustee of any additional property which he acquires after the date of sequestration and before the date of his discharge.² Furthermore, where the debtor learns, whether before or after the date of sequestration, that he may derive benefit from another estate, he must inform the permanent trustee or interim trustee of this fact and must also advise the person who is administering the other estate of his sequestration³.

4.2 The balance between creditor and debtor referred to in the foregoing paragraph is achieved by means of exempting certain property from distribution amongst creditors. The question of assets and exemptions is therefore of extreme importance in bankruptcy law since it relates directly both to the effective rehabilitation of the debtor and to the determination of the extent to which a person is to be regarded as having the resources to pay his debts. The more property is included in the categories of exempt property, the more the law qualifies the extent to which the debtor is to be considered able to pay his debts. The narrower the range of exemptions, the more the balance favours the creditor by increasing the extent of that ability to pay. As a rule, the debtor will obtain a release from his debts irrespective of the amount his creditors receive at the end of the day so that the exemption of property can be regarded as a problem of equity, a matter of social morality.

¹ Bankruptcy (Scotland) Act 1985, s.31(1) and (8).

² Bankruptcy (Scotland) Act 1985, s.32(7).

³ Bankruptcy (Scotland) Act 1985, s.15(8).

4.3 We have already examined¹ the existing law in relation to the vesting of claims or awards representing solatium for personal injury or future wage loss. The current statutory exemptions, or limitations on vesting, are to be found in section 33(1) of the Bankruptcy (Scotland) Act 1985. Property exempt from pouncing for the purpose of protecting the debtor and his family² and property held on trust by the debtor for any other person does not vest in the trustee. It is also provided that the debtor's earnings during the sequestration and income arising from any estate not vested in the trustee vest in the debtor³. However the permanent trustee may apply to the court for an order requiring payment to him of the debtor's income which is in excess of that which is required for suitable aliment for the debtor and his family, including any obligation to pay periodical allowance to a former spouse.⁴

4.4 To what extent does current society demand that a person be regarded as having the resources to pay his debts? Is it the case that the desired balance between creditor and debtor has shifted to such an extent that an amendment of the current law is desirable? It seems likely that views on this issue will cover a broad spectrum.

¹ Paras 2.1-2.2.

² ie the necessary clothing of the debtor and his family, necessary household furniture and plenishings and the debtor's tools of trade.

³ Bankruptcy (Scotland) Act 1985, s.32(1). In their Report on Bankruptcy and Related Aspects of Insolvency and Liquidation, the Commission felt an exemption of future earnings to be justified on the basis that a bankrupt should have no disincentive to take up employment. (1982) Scot Law Com No 68, para 2.19.

⁴ Bankruptcy (Scotland) 1985, s.32(2) and (3).

4.5 At one end of the spectrum is the view that, as bankruptcy is a method of collective execution¹, to which is added a release of debts, it is only just and equitable that a debtor should not be in a position to withhold from his creditors assets of any substantial value. In the same way as Scots law does not countenance certain exemptions, eg, a "homestead"² exemption, it should not countenance the exemption of a potentially large sum of money which just happens to be in respect of solatium for personal injury or future wage loss. The causes which have entitled the debtor to a certain sum of money, so the argument goes, ought to have nothing to do with determining whether or not that sum of money should be applied for the benefit of his creditors. It is vital to the holders of this view that bankruptcy should not be seen as a "soft option".

4.6 At the other end of the spectrum is the view that the existing law on this issue is morally reprehensible. It is fundamentally unjust that sums in respect of solatium for personal injuries should be permitted to benefit creditors. Similarly, in the area of future wage loss (ie beyond the date of the debtor's discharge) it can be argued that as one object of bankruptcy is to give the debtor the capacity to earn in the future, if he is unable to work for some years due to injury, it is totally inequitable that he should be deprived of such compensation and thereby the wherewithal to support himself and his family. Such a view may be based on what can be termed simply a "gut reaction", a feeling that there are fundamental public policy objections to the existing situation. It is as simple as

¹ Cf *G & A Barnie v Stevenson* 1993 GWD 583 - while creditors saw sequestration as a useful means of obtaining satisfaction of a debt from the trustee in sequestration and not from the debtor, it did not follow that sequestration was to be regarded as a form of diligence.

² Some jurisdictions, eg the Federal Bankruptcy Act of the USA, permit an exemption of the debtor's family home.

that.¹ It was partly such a reaction which appears to have motivated the debtor to reclaim in the case of *Watson v Thompson*². One of his grounds of appeal is stated to be that "to permit a trustee in bankruptcy to appropriate to himself the injured bankrupt's claim for injury to his person as well as his claim for patrimonial loss is not consistent with equity nor the modern treatment of bankruptcy and bankrupts."³ There is therefore no need to turn one's mind to legal principles such as the principle of election and whether the fact that the debtor elects to pursue his claim should be regarded as removing the personal nature of the claim thereby opening the door to his creditors. It is considered to be only just and equitable that sums in respect of solatium for personal injuries and in respect of future wage loss should remain with the debtor. It might also be argued that future wage loss should be categorised as alimentary and therefore (in the same way as statutory redundancy payments⁴) regarded as income which vests in the debtor. However a trustee would then be able to seek a contribution order in terms of section 32(2) of the Bankruptcy (Scotland) Act 1985.

4.7 As noted above, in 1982 the Commission did not see fit to recommend any change in the law relating to the vesting of claims or awards representing

¹ In the same way, in their Report on The Effect of Death on Damages, ((1992) Scot Law Com No 134), the Commission, at para 3.13, found the fact that, under the then existing rules, actual suffering may go unacknowledged if the injured person died before the claim was resolved, difficult to justify on ordinary principles of justice. Paragraphs of the Report referred to in this Consultation Paper are reproduced in the Appendix hereto for ease of reference.

² 1992 SCLR 78.

³ *Supra* at p.80.

⁴ *McGrail* (unreported) discussed in the Accountant in Bankruptcy's Guidance Notes for Interim and Permanent Trustees, Part V, para 16. See Parliament House Book, pp.H533-534.

solatium for personal injury¹. In that Report, Commissioners concluded that "the precise scope of exemptions for bankrupts requires careful consideration"², and that "(f)rom the standpoint of social policy, perhaps the most important question is the extent to which the property and income of the bankrupt should be excluded from vesting in order that he may maintain himself and his family".³ The Commission also acknowledged that one danger of making exemptions too attractive was that debtors may be tempted to turn to sequestration to obtain a discharge from debts which they could reasonably pay. This was discussed in relation to the Federal Bankruptcy Act of the USA which provides *inter alia* for homestead⁴ and car exemptions. With this background in mind it may be instructive to examine briefly at this stage the approaches adopted by some other legal systems regarding the treatment of damages for personal injury in relation to bankruptcy.

5. Comparative law

5.1 England

Where a cause of action arises in respect of the bankrupt's personal injury, personal inconvenience or damage to reputation, the right of action remains with the bankrupt.⁵ Even if a bankrupt initiates such an action the trustee cannot

¹ Para 2.3; (1982) Scot Law Com No 68, para 11.12.

² (1982) Scot Law Com No 68, para 2.19.

³ (1982) Scot Law Com No 68, para 11.3.

⁴ In relation to a homestead exemption, the Commission has put forward the view that it is reasonable that a debtor should obtain rented accommodation rather than stay in a dwelling-house of considerable value, in effect at the expense of his creditors. (1980) Consultative Memorandum No 48. Second Memorandum on Diligence: Poidings and Warrant Sales, para 4.35.

⁵ Halsburys Laws of England, 4th ed, vol 3(2), para 424.

intervene in the action to obtain an order for payment of the damages to him¹. As a general rule, damages obtained by a bankrupt in any such action do not fall into the estate for the benefit of creditors. Where however the bankrupt uses his damages to invest in property, that property may be claimed by the trustee.² It is also possible that if the sum of damages awarded is more than is needed for the maintenance of the bankrupt and his family, the trustee could call upon the bankrupt to account to him for the surplus.³

5.2 Where two distinct causes of action arise from the same transaction, resulting in substantial damage to property and also personal injury, the trustee is entitled to the right of action for damage to the property, the bankrupt retaining his right to sue for personal injury;⁴ but where there is but one cause of action resulting in direct loss to property, to which the bankrupt's personal injury is merely incidental, the right of action cannot be split and passes to the trustee⁵ unless it gives rise to the possible award of aggravated damages to the bankrupt in which case the cause of action remains with him⁶.

5.3 Australia

In their General Insolvency Inquiry of 1987⁷ the Law Reform Commission of Australia acknowledged as an instance of policy relevant to exemptions in bankruptcy law the policy that compensation for personal injury should remain

¹ *Re Wilson ex p Vine* (1878) 8 Ch D 364, C.A.

² *Re Wilson, ex p Vine*, supra.

³ *Re Graydon, ex p Official Receiver* [1896] 1 QB 417.

⁴ Halsburys Laws of England, 4th ed, vol 3(2), para 425.

⁵ *Wenlock v Moloney* (1967) 111 Sol Jo 437, C.A.

⁶ Halsburys Laws of England, 4th ed, vol 3(2), para 425.

⁷ (1987) Law Reform Commission of Australia Discussion Paper No 32.

with the bankrupt¹. The personal action argument was again used.

5.4 In discussing whether existing categories were too wide an argument was put forward to the effect that the exemption for damages or compensation recovered by the bankrupt covered too broad a range of property in that damages may include an element attributable to loss of income part of which, it is arguable, would have been available to creditors. It was suggested that provision might be made for an application to the court for an order that that part of the damages attributable to loss of income be set aside for the benefit of creditors.²

5.5 In putting forward arguments against changing the existing policy, it was suggested, firstly, that problems would arise as often the court did not specify the proportion of damages relating to lost income and, secondly, that where the damages are compensation for total disability there may be public policy objections to attaching an amount of money which is paid to a person who is no longer able to work.³ The Law Reform Commission go on to say that "(t)hese objections may apply even where the disability is only partial."⁴

5.6 The Law Reform Commission felt that clear defects in the law would have to be shown before any change was contemplated and, accordingly, proposed that damages and compensation for personal injury and similar claims should remain exempt.⁵ Attention was also drawn to the tracing provisions⁶

¹ Supra p.215, para 567.

² Supra p.221, para 588.

³ Supra p.221, para 589.

⁴ Supra p.221, para 589.

⁵ Supra p.221, para 590.

which applied to damages recovered by the bankrupt as indicating the legislature's intention to promote the exemption of such property.¹ In the Report² which followed Discussion Paper No 32, the Law Reform Commission confirmed their recommendation that damages and compensation for personal injury and similar claims should remain exempt.³

5.7 South Africa

Section 23(8) of the Insolvency Act 24 of 1936 deals with compensation or damages in respect of personal injury or defamation. The insolvent may for his own benefit recover any compensation for any loss or damage which he may have suffered, whether before or after the sequestration of his estate, by reason of any defamation or personal injury. This includes patrimonial as well as non-patrimonial loss and this produces certain anomalies. For example, a doctor who treated the insolvent before sequestration but who was not paid will only be a creditor of the estate, while the insolvent who is paid damages in respect of those injuries and medical expenses after sequestration is entitled to keep the same for his own benefit. This entitlement of the insolvent also produces the anomaly that an injured person who is paid all his damages prior to his sequestration loses everything.

5.8 The provisional view of the project committee of the South African Law Commission, which is currently investigating the law of insolvency, is that it should be provided that any compensation for personal injury should be paid to

⁶ ie provided a direct link can be shown between an asset and the damages award, that asset is exempt from the bankruptcy proceedings.

¹ (1987) Law Reform Commission of Australia Discussion Paper No 32, p.221, para 589.

² (1988) Law Reform Commission of Australia Report No 45, General Insolvency Inquiry.

³ Supra, vol 1, p.355, para 887.

the trustee who, after settling all accounts for accrued medical and hospital expenses relating to the injury, will pay the balance to the insolvent. This is to remove the anomaly concerning medical expenses referred to in para 5.7.

5.9 United States of America

Exempt property in the United States is determined either by the Federal system or by the State system supplemented by other Federal laws that grant exemptions. Under the present system of exemptions wide variations exist but it is possible for damages for personal injury to be exempt. The US has a philosophy of debtor's relief in bankruptcy and uses the exemption rules as an effective means of such relief.¹

5.10 France

The French Civil Code² provides that the creditors exercise all the rights and actions of the debtor except those which are purely personal, for example, tort actions concerning personal injury. However any damages obtained from such actions are included in the bankrupt estate.³ Belgian and Luxembourg law are similar.⁴

6. The trustee in bankruptcy versus the executor

6.1 We have examined the existing law⁵, the moral dimension⁶ and the

¹ International Insolvency and Bankruptcy, J H Dalhuisen (1986), p.2-76.

² CC 1166.

³ International Insolvency and Bankruptcy, J H Dalhuisen (1986), p.2-78.

⁴ Supra, p.3-342.

⁵ Paras 2.1-2.2.

⁶ Paras 4.1-4.7.

approaches adopted by some other legal systems¹. The consideration of another area of Scots law, namely the effect of death on damages, may stimulate thought further.

6.2 The Damages (Scotland) Act 1993 implemented the recommendations of the Commission's Report on The Effect of Death on Damages². The policy of the Act is one in favour of transmissibility in contrast to the previous principle whereby death extinguished the right to claim damages by way of solatium. Apart from claims arising from defamation or other verbal injury or injury to reputation, any right to damages by way of solatium vested in a claimant in consequence of personal injury now transmits unconditionally to his/her executor in the same way as the corresponding right to damages by way of compensation for patrimonial loss already transmits.³ The Commission's recommendation in favour of transmissibility was reached having given careful consideration to the personal elements of a claim for solatium⁴. It was recognised that "(i)t could well appear unjust to allow strangers or remote relatives or even creditors to recover a windfall from someone whom the deceased might have elected not to sue".⁵

¹ Paras 5.1-5.10.

² (1992) Scot Law Com No 134.

³ Damages (Scotland) Act 1976, ss.2(1) and 1A as substituted by Damages (Scotland) Act 1993, ss.3 and 2. See also (1992) Scot Law Com No 134, para 4.28. The Report also recommended that the relative's right to non-patrimonial damages should transmit unconditionally to an executor - see para 4.43.

⁴ The Commission recognised that there are counter-arguments about the personal nature of solatium but did not regard them as conclusive - see (1992) Scot Law Com No 134, paras 3.10-3.19 and 4.7.

⁵ *Supra*, para 4.8.

6.3 Claims arising from injuries to self-respect or reputation were regarded as forming a special case.¹ This was due partly to the "inherently personal" argument² (ie such claims are seen to be of a peculiarly personal nature) and partly due to the fact that it was not clear whether injuries resulting from defamation and like injuries were to be brought within the scope of "personal injuries" in the Damages (Scotland) Act 1976.³ The Act provides for conditional transmissibility here as an exception to the general rule. Any right to damages vested in a claimant in consequence of injury resulting from defamation or any other verbal injury or other injury to reputation now transmits to an executor, but any such right to damages other than for patrimonial loss so transmits only if the claimant had brought an action to enforce that right while alive.⁴

6.4 The Damages (Scotland) Act 1993 assimilates the law relating to the transmissibility of non-patrimonial claims arising from injuries to self-respect or reputation with the existing law on transmissibility of such claims in relation to bankruptcy. That is to say, it is only once an action for solatium has been initiated by the debtor that a trustee may continue such an action and recover any damages for the benefit of creditors. The unconditional transmissibility of any right to damages by way of solatium in consequence of personal injury⁵ (excepting injury to self-respect or reputation) goes even further than the

¹ Supra, para 4.29.

² Supra, para 4.30.

³ Supra, paras 4.31-4.32.

⁴ Damages (Scotland) Act 1976, s.2(4) as substituted by Damages (Scotland) Act 1993, s.3. See (1992) Scot Law Com No 134, para 4.35.

⁵ Damages (Scotland) Act 1976, s.2(1) as substituted by Damages (Scotland) Act 1993, s.3.

existing law relating to the trustee in bankruptcy which still requires initiation of the appropriate action by the debtor. Any move towards a change in policy enabling the debtor to keep such compensation to the exclusion of his creditors might therefore be seen as inconsistent with the Damages (Scotland) Act 1993.

6.5 Case law has highlighted the similarities and played down the distinctions between an executor and trustee in bankruptcy. The position of an executor in relation to claims for solatium for personal injury was set out in *Bern's Executor v Montrose Asylum*¹ and the case of *Muir's Trustee v Braidwood*² indicated that the position of a trustee in bankruptcy was analogous. As Lord Justice-Clerk Thomson said in *Muir's Trustee*:-

"An executor takes the whole executry estate for the benefit of those concerned; similarly the whole estate of the bankrupt is vested in the trustee for the benefit of those concerned. The principle is the same. The fundamental similarity of the two functions is clearly recognised in *Bern's Executor*. Patrimonial interests apart, there is at least as much reason for respecting the privacy of a living bankrupt as that of a man now dead."³

Further in the words of Lord Patrick:-

"Executor and trustee in bankruptcy alike take the *universitas* of the deceased's or the bankrupt's estate, as the case may be. This gives them a title to initiate an action for any patrimonial loss which that estate has suffered as the result of a wrong done to the deceased or the bankrupt, but it gives them no right to initiate an action for solatium, a right entirely personal to the injured party."⁴

¹ (1893) 20 R 859.

² 1958 SC 169.

³ *Supra* at p.176.

⁴ *Supra* at p.175.

These sentiments were echoed in *Watson v Thompson*.¹

6.6 Indeed, consistency was one argument put forward by the Commission in the Damages Report² in favour of transmissibility:-

"It seems anomalous that a claim for solatium should be assignable *inter vivos*, and transmissible to a trustee in bankruptcy, but not transmissible to an executor. Some justification can be offered for distinguishing between assignability and transmissibility as such on the view that solatium is inherently personal. Assignability has a cash value which the injured person can realise. Control of the claim remains with the injured person unless and until it is assigned. Transmissibility, on the other hand, may involve loss of control over the claim and cannot be so easily translated into money's worth. We are not satisfied that that is a sound argument. It does not provide a convincing reason for distinguishing between an executor and a trustee in bankruptcy so far as transmissibility is concerned."³

6.7 The rules in England and Wales were also looked at on the basis that any recommendations would invite direct comparison with them although it was accepted that the provision need not be identical in the two jurisdictions.⁴ Earlier restrictive rules in England and Wales have been progressively relaxed so that actions of damages for pain and suffering and loss of amenities now survive for the benefit of the deceased's estate.⁵ Such a contrast with the

¹ 1991 SLT 683. See Lord Murray at p.686 and Lord Weir at p.687.

² (1992) Scot Law Com No 134.

³ *Supra*, para 3.18.

⁴ *Supra*, paras 3.29 and 3.37.

⁵ *Supra*, paras 3.33-3.34. Unlike actions for defamation which do not survive under the Law Reform (Miscellaneous Provisions) Act 1934.

Scottish provisions was a major factor in the demand for reform¹, although it is interesting to note that the rules applicable to England and Wales have been criticised on the basis that non-pecuniary losses are personal to the deceased and therefore have no proper entitlement to a place in the assessment of damages which come to his estate.² The English and Welsh rules on the effect of death on damages are to be contrasted with those jurisdictions' rules on transmissibility in relation to bankruptcy. We have already noted³ that even if a bankrupt initiates an action in respect of personal injury, personal inconvenience or damage to reputation, the trustee cannot intervene to obtain an order for payment of the damages to him, so that, as a general rule, damages obtained by a bankrupt in any such action do not vest for the benefit of creditors. England and Wales therefore appear to have accepted a lack of consistency between these two areas of law. In the area of transmissibility on bankruptcy, the contrast of the Scottish provisions as against the English and Welsh provisions does not seem to have produced a demand for reform in Scotland.

6.8 It was also noted that a wide variety of rules have been adopted in Canada, the trend being to curtail the executor's right to recover the deceased's non-pecuniary losses and this influenced the mid-1970s Scottish reforms.⁴ The variation in this area in the Canadian jurisdictions was seen as instructive in indicating that there was no obvious right answer to the question whether, or to

¹ *Supra*, para 3.33.

² McGregor, *The Law of Damages* pp.462-463, para 719.

³ Para 5.1.

⁴ (1992) *Scot Law Com No 134*, para 3.31.

what extent, the deceased's non-patrimonial claim should survive.¹

6.9 The question which falls to be considered is whether, in Scots law, a lack of consistency would prove so fundamental that it would preclude the possibility of reform. As we have noted above,² the Commission's recommendations, as implemented by the Damages (Scotland) Act 1993, overturn the previous law thereby enabling an executor to initiate an action for solatium for personal injury. In pursuing possible arguments flowing from such a change in the law it is submitted that one argument might be that the powers of a trustee in bankruptcy should be extended rather than curtailed. This is because the 1993 Act has done nothing to alter the nature of the office of executor (or of trustee in bankruptcy) so that, if it is accepted that the body of case-law³ equating the office of executor and trustee in bankruptcy holds good, it must be questioned why a trustee in bankruptcy should not also be given the power to initiate an action for solatium for personal injury.

6.10 On the other hand, as the Damages (Scotland) Act 1993 gives an executor rights which are wider than those of a trustee in bankruptcy, it is submitted that it could equally be argued that this recognises that there is room for distinguishing between the two situations so that a debtor should be permitted to keep any damages in respect of solatium for personal injuries. In the same way that potential injustice arising in relation to the effect of death on damages acted as a catalyst in relation to an amendment of the law, perhaps it can be argued that potential injustice arising in relation to the effect of

¹ *Supra*, para 3.31.

² Para 6.2.

³ *Bern's Executor v Montrose Asylum* (1893) 20 R 859; *Muir's Trustee v Braidwood* 1958 SC 169; *Watson v Thompson* 1991 SLT 683.

bankruptcy on damages justifies not only an amendment of the law but the adoption of an approach which differs from that introduced in relation to executors by the 1993 Act. Is there in fact room for protecting the privacy of a debtor more than that of a man now dead?¹ Perhaps transmissibility on death is easier to accept on the basis that those who will benefit are at least likely to be related in some way to the deceased claimant or nominated by him,² whereas in bankruptcy the fact that creditors may benefit from a personal tragedy is harder to rationalise.

6.11 We have already noted³ that the development of English and Welsh law has produced a distinction between transmissibility on bankruptcy and transmissibility on death. If a change in policy is considered, the question of whether, as in England and Wales, the trustee should be empowered to call upon the debtor to account to him for any surplus above that needed for the maintenance of the bankrupt and his family, would also have to be examined.⁴

7. A case for reform?

7.1 As stated above⁵ the Faculty has asked the Commission to consider this

¹ Cf the words of Lord Justice-Clerk Thomson in *Muir's Trustee v Braidwood* supra at p.176: "Patrimonial interests apart, there is at least as much reason for respecting the privacy of a living bankrupt as that of a man now dead."

² Cf (1992) Scot Law Com No 134 at para 4.8: "It could well appear unjust to allow strangers or remote relatives or even creditors to recover a windfall from someone whom the deceased might have elected not to sue."

³ Paras 5.1 and 6.7.

⁴ Cf Bankruptcy (Scotland) Act 1985, s.32(2). The permanent trustee may apply to the sheriff for an order requiring the debtor to hand over any income which is surplus to that required for the aliment of the debtor and the debtor's relevant obligations.

⁵ Para 1.1.

issue. The Commission has not received any indication from any other source that reform is desirable. The purpose of this Consultation Paper, therefore, is to ascertain whether those experienced in the field of bankruptcy law consider that there is a case for reform. Is the existing law in this area so unconscionable that it requires to be reformed? Or, while conceding that inequity may arise from time to time, do consultees consider that, in view of the increasing number of bankruptcies and the fact that the circumstances giving rise to inequity will arise only rarely, a case for reform has not been made out? Or, do consultees consider that the existing law is satisfactory?

7.2 The comparative material¹ which has been examined indicates that, in this controversial area, the adopted solutions vary. There cannot be said to be an obvious "right" answer to the question of policy under consideration.

7.3 We would, accordingly, welcome responses to the following questions:-

1. Is there a case for amending the law so that claims or awards representing solatium for personal injury or future wage loss no longer vest for the benefit of creditors? (If consultees wish to distinguish between the treatment of claims or awards representing solatium for personal injury and claims or awards representing future wage loss would they kindly make this clear?)

2. In English law (see paras 5.1 and 6.11) although, generally speaking, such damages do not fall into the estate for the benefit of creditors, where the bankrupt has used the damages to invest in property, that property may be claimed by the trustee. It is also possible that if the

¹ Paras 5.1-5.10.

sum of damages is more than is needed for the maintenance of the bankrupt and his family the bankrupt may be required to account to the trustee for the surplus. If the answer to question 1 is in the affirmative, is there any support for either or both of these principles?

3. If the answer to question 1 is in the negative, should future wage loss be categorised as alimentary and therefore regarded as income which vests in the debtor thereby permitting a trustee to seek a contribution order in terms of section 32(2) of the Bankruptcy (Scotland) Act 1985? (See para 4.6.)

4. If the answer to question 1 is in the negative, following on from the arguments set out in paragraph 6.9, is there any support for extending the powers of a trustee in bankruptcy to enable him to initiate an action for solatium for personal injury?

8. **The direction of reform?**

8.1 If a change in policy is considered to be desirable, one is immediately faced with the question of where the line should be drawn. Should the aim be to protect the debtor's physical and personal integrity without causing unnecessary hardship to creditors? If so, how is such an aim to be interpreted? If not, what should the aim be? The following two areas (discussed in paras 8.2 and 8.4) are put forward as examples which readily bring to the surface the question of where the line should be drawn:-

8.2 *Timing of an award of damages*

If a claim for solatium for personal injury is settled during the period of the bankruptcy we have already seen that such damages fall into the bankrupt estate

for the benefit of creditors.¹ Injuries sustained after the bankrupt's discharge do not come into the equation at all. For example, if the debtor suffers an accident after the date of his discharge he is free to retain any compensation received in respect of earnings or any award representing solatium for personal injury. If, however, a claim for solatium has been settled prior to the bankruptcy, the damages, in so far as not utilised by the bankrupt, will fall to the trustee.

8.3 We would welcome responses to the following questions:-

5. If it is considered desirable to exempt such claims or awards as narrated in question 1 above, should the exemption extend both to claims settled during the bankruptcy and to such monies received prior to bankruptcy?

6. If such monies received prior to bankruptcy are to be exempt, should the exemption extend to them irrespective of the time lapse between the date of the award and the date of the bankruptcy?

7. If the answer to question 6 is in the negative, what timescale would consultees consider to be appropriate?

8. If such monies received prior to bankruptcy are to be exempt, should tracing provisions be introduced? In other words where, for example, a sum representing solatium for personal injury has been used to purchase an asset or assets should that asset or those assets be exempt from the bankruptcy proceedings provided that a direct link with the

¹ Para 2.2.

damages award can be shown? (See para 5.6.)

9. Would an extension of the exemptions applicable in bankruptcy law have to be considered in relation to any other area of law such as the law of diligence? (In their Report on Bankruptcy and Related Aspects of Insolvency and Liquidation the Commission stated "We recommend that the general exemptions from pouding designed to protect the debtor and his family should continue to apply in sequestrations: ... Any alterations to these exemptions made in the context of the reform of the law of diligence should apply also in sequestrations." (1982) Scot Law Com No 68, para 11.3.)

8.4 *Solatium/future wage loss - what next?*

If awards representing solatium for personal injury and future wage loss were to be exempt, should consideration be given to exempting other assets such as inheritances? Is it equitable that a settlement which a testator intended to be used for the personal benefit of X who is now bankrupt should instead be swallowed up by X's creditors? The policy relating to any non-vested contingent interest which the debtor may have is clearly set out in section 31(5) of the Bankruptcy (Scotland) Act 1985. Any such interest, for example a bequest to the survivor of the debtor and another named person, vests in the permanent trustee as if an assignation of that interest had been executed by the debtor and intimation thereof made at the date of sequestration. The effect is that where the contingency is purified after the debtor has been discharged, the interest will still vest in the trustee for the benefit of the creditors. Is this equitable? Similarly, how should family heirlooms, the proceeds of accident insurance policies and voluntary charitable payments be treated? Again the question of the timing of the receipt of such monies and the potential application of tracing provisions will apply.

8.5 We would be grateful for responses to the following questions:-

10. Whether or not consultees consider that awards representing solatium for personal injury and future wage loss should be exempt, should any other assets be exempt and, if so, which?

11. Should any exemption suggested in answer to question 10 extend both to such assets received during the bankruptcy and to such assets received prior to bankruptcy?

12. If such assets received prior to bankruptcy are to be exempt, should the exemption extend to them irrespective of the time lapse between the date of receipt and the date of the bankruptcy?

13. If the answer to question 12 is in the negative, what timescale would consultees consider appropriate?

14. If such assets received prior to bankruptcy are to be exempt, should tracing provisions be introduced?

15. Should the policy relating to non-vested contingent interests be amended and, if so, how?

16. If awards representing solatium for personal injury and future wage loss are to be exempt are there any other elements comprised in an award of damages for personal injury which should be exempt?

17. Have consultees anything to add?

Excerpts from the Commission's Report on Bankruptcy and Related Aspects of Insolvency and Liquidation ((1982) Scot Law Com No 68)

2.19 The present law adopts what might be thought to be a less humane approach to the question: What assets vest in the bankrupt's trustee? In principle, all the bankrupt's assets vest, other than those exempted from attachment for debt.²¹ In some systems a wide range of exemptions is admitted. In the United States, the Federal Bankruptcy Act excludes (up to certain values only) the bankrupt's home, his household goods and clothes, the articles he requires for the exercise of his trade or profession, and even a car.²² The attractiveness of these exemptions has been cited as the main reason why, in 1980, there was an 82% increase in personal bankruptcies, bringing the total to 381,000.²³ We conclude that the precise scope of exemptions for bankrupts requires careful consideration. There must be no temptation to debtors to have recourse to sequestration to obtain a discharge from debts which they could reasonably pay. We propose, therefore, only limited extensions to the class of assets which will not vest in the trustee. We have, however, thought it desirable to exclude from the vesting in the trustees the future earnings of the bankrupt.²⁴ This exclusion is justified on the ground that a bankrupt should have no disincentive to take up employment. Creditors, however, will be protected by a provision allowing the trustee to claim any income exceeding a suitable aliment for the debtor and his family.

11.3 From the standpoint of social policy, perhaps the most important question is the extent to which the property and income of the bankrupt should be excluded from vesting in order that he may maintain himself and his family. This question is closely connected with that of exemptions in diligence.

Section 97(1) of the 1913 Act provides that the bankrupt's moveable property vests in the trustee "so far as attachable for debt, or capable of voluntary alienation". The reference to voluntary alienation is inappropriate since certain goods and earnings are and should be excluded from sequestration because they are not attachable for debt. Yet they are capable of voluntary alienation.² While the phrase "attachable for debt" is appropriate as a general principle, it presents certain problems. Earnings, for example, attract two different types of exemption from diligence - the statutory limitation rule exempting half the balance over £4 of the weekly wage³ and the common law exemption fixed by the court in its discretion which may be a higher sum (known as the *beneficium competentiae*). While the former is invariably applied to arrestments in modern practice, it is the latter which is applied in sequestrations, in cases where the court determines under section 98(1) to what extent the bankrupt's earnings during sequestration should vest in the trustee.⁴ Again, the reference to "attachable for debt" does not take account of the fact that the exemptions from diligence do not apply to certain classes of privileged creditors.⁵ Moreover, while cash in the debtor's hands is generally thought not to be poindable in law and is not poinded in practice,⁶ it can be claimed by the trustee in a sequestration.⁷ In the light of these remarks, we think that the provisions vesting moveable property in the trustee should be amended and clarified. We recommend that the general exemptions from poinding designed to protect the debtor and his family should continue to apply in sequestrations: thus the necessary clothing of the bankrupt and his family, necessary household furniture and plenishings, and his tools of trade, should not vest in the trustee. Any alterations to these exemptions made in the context of the reform of the law of diligence should apply also in sequestrations.⁸ We also recommend that the bankrupt's earnings, and income arising from any estate not vested in the trustee, during the sequestration should not automatically vest in the trustee.

We later propose,⁹ however, that the trustee should be entitled to apply to the court for an order requiring payment to him of the bankrupt's income (from whatever source) in excess of what is required for a suitable aliment for the bankrupt and his family. This approach seems to reflect actual practice better than the existing law which somewhat artificially regards personal income arising during sequestration as in theory vested in the trustee though no vesting declarator has been made under section 98(1) of the 1913 Act¹⁰ and though, in the absence of such a declarator, the theory has no substantial practical consequence.

Rights and powers exercisable by the bankrupt

Actions for recovery of debt and damages

11.12 It is competent for the trustee to take over or to initiate actions for recovery of property or debts belonging or due to the bankrupt and actions of damages for breach of contract or in respect of certain delictual claims. The action may either be raised by the trustee initially or, if it has already been commenced by the bankrupt, be continued by the trustee by sisting himself in the action.²³ Where, however, the ground of action arises from injury to the person or to the feelings or reputation of the bankrupt, different considerations apply. The trustee has no right to institute proceedings for *solatium* for personal injuries suffered by the bankrupt,²⁴ and it is likely that the same result would follow where the ground of action is injury to the feelings or reputation of the bankrupt.²⁵ The general principle of the law is, therefore, to recognise that there are certain rights of action with which the bankrupt is so intimately connected that he, and he alone, should have the right to say whether or not proceedings should be instituted. But if he does choose to institute proceedings it would seem that his creditors can reach any sum received by him as damages.²⁶ We make no recommendation for any change in the law.

**Excerpts from the Commission's Report on The Effect of Death on Damages
((1992) Scot Law Com No 134)**

Is solatium inherently personal?

3.10 It is undoubtedly a primary presupposition underlying the scheme of the Damages (Scotland) Act 1976 that the right to claim solatium is inherently personal. In other words, solatium is intended to solace the injured person. In our report in 1973 the logically prior question was taken to be whether the right to solatium should ever transmit to executors. And that it should so transmit was rejected -

"primarily on the ground that it is artificial to allow compensation for a person's suffering after his death."²

This reflects a strong version of the view that the basis of allowing damages for pain and suffering is the alleviation of that pain and suffering. Once the victim is dead pain and suffering cannot be alleviated.

3.11 The view that solatium is inherently personal had substantial judicial

² SLC Report No 31 (1973), para 23, p 9, citing opinions from *Neilson v Rodger* (1853) 16 D 325, 327, 328, *Bern's Executor v Montrose Asylum* (1893) 20 R 859, 872-873, *Smith v Stewart & Co* 1960 SC 329, 338.

support prior to 1976. For example:

"The dissenting opinion of Lord Justice-Clerk Hope in *Neilson v Rodger*¹ and the leading opinion of Lord M'Laren in *Bern's Executor*² adequately demonstrate how personal are the elements of any such claim. I prefer for myself to place the justification of the decision in *Bern's Executor*³ on this broad principle of the inherently personal character alike of the injury and of the remedy. It is only a corollary of this principle to say that the election to sue or not to sue is with the injured person alone and cannot be made by anyone but himself. Where the accident has been instantaneously fatal or the injured person is insane (as in *Bern's Executor*⁴) there can be no question of election or waiver. The doctrine must have a wider basis. It follows that, in my view, it is quite inaccurate to describe, as some Judges have done, the wrong suffered by the deceased as constituting a debt due to him by the wrongdoer at the moment of the injury. The right of action is in no sense an asset of his patrimonial estate."⁵

And among legal practitioners generally it was very much the favoured view in the early 1970s, as the consultation preceding our report in 1973 showed. To a large extent that has now changed. Nevertheless, from our recent consultation it appears that there is still significant support for the view in the legal community, and indeed elsewhere. As one of our legal commentators said:

"... on principle Solatium should be seen as personal compensation for the pain and suffering of the injured party himself. Only he, therefore, should be entitled to claim it ... If there is one issue underlying the whole of the law of delict, it is surely that of compensating persons for losses they actually have sustained, rather than punishing wrongdoers. It is submitted that only the injured person himself sustains any 'loss' by virtue

¹ (1853) 16 D 325.

² (1893) 20 R 859.

³ (1893) 20 R 859.

⁴ (1893) 20 R 859.

⁵ *Stewart v London Midland and Scottish Railway Co* 1943 SC (HL) 19, 40 (Lord Macmillan); to the same effect, Lord President Clyde in *Smith v Stewart & Co* 1960 SC 329, 333.

of pain and suffering. If that appears to benefit the wrongdoer, and results in his being made to pay less than would otherwise have been the case - so be it. It is not 'punishment' of the wrongdoer which is in issue."

3.12 We appreciate the reasons for that view. Indeed, we entirely agree that compensation for the victim must take precedence over "punishment of the wrongdoer". In this respect we uphold what was said in our report in 1973:

"We reject, too, the argument that a defender should not escape the consequences of his act merely because the injured person has died: this argument is based upon a punitive approach to damages which seems entirely out of place."¹

3.13 We also agree that the principle of election is important. Legal action is primarily the prerogative of the injured person. It is in the first instance for him or her to elect to sue or not to sue. But of course that principle is already qualified in respect of patrimonial loss. If the injured person dies before initiating a claim, the executor may sue for damages for patrimonial loss incurred before death. We do not see the principle of election as conclusive, therefore, when considering whether a claim for solatium should be allowed to transmit. It may be a ground for attaching conditions to transmissibility;² or for distinguishing certain forms of action from others.³ But the fact remains that under the present rules actual suffering may go unacknowledged, if the injured person dies before the claim is resolved. We find that difficult to justify

¹ SLC Report No 31 (1973), para 24, p 9.

² See paras 4.23-4.24.

³ See para 4.30.

on ordinary principles of justice.¹ There is also a point which was made to us by several of those who participated in our survey. The suffering of the claimant who has to cope with terminal disease or imminent death is often exacerbated by anxiety to live long enough to maximise damages for the benefit of dependants. Allowing a claim for solatium to survive could at least alleviate suffering of that kind.

Is the right to claim solatium a patrimonial asset?

3.14 Our reservations about the personal view of solatium are not only due to its practical shortcomings. We also have theoretical doubts. Historically, the view is of relatively recent origin. The earlier view appears to have been that a right to claim for damages and solatium vested *ipso iure* and *ipso facto* prior to any proceeding or decree for its constitution; that it was a moveable right which was assignable; and that it passed to personal representatives.² These are all characteristics of a patrimonial asset, and it has in fact been confirmed that a right to claim solatium can be assigned *inter vivos* like a debt.³

¹ In a report in 1973 the Law Commission recommended that a claim for damages for pain and suffering and loss of amenity should survive for the benefit of a deceased victim's estate like any pecuniary claim. They stated among their reasons the following:

"The deceased may have suffered severe pain over a considerable period before death and may even, during that time, have spent some of the damages he was advised he would recover; and, during this period, relatives may have so acted in looking after him as to be not undeserving of the reward he may have intended to bestow upon them. We can see no reason why, in justice, a victim's death, perhaps wholly unconnected with the injury, should lead to his compensation being taken away."

See Report on *Personal Injury Litigation - Assessment of Damages* (Law Com No 56, HMSO, 1973), para 101, p 27 - subsequently referred to as "LC Report No 56 (1973)".

² See Lord Wood, one of the majority judges, in *Neilson v Rodger* (1853) 16 D 325, 329 (Lord Justice Clerk Hope dissenting); also *Auld v Shairp* (1874) 2 R 191, 201-202.

³ *Cole-Hamilton v Boyd* 1963 SC (HL) 1.

3.15 Further, the pre-1976 rules, which provided for conditional transmissibility, were sometimes justified by invoking the formal doctrine of litiscontestation, whereby a personal claim might be transformed into a patrimonial asset. This is a procedural doctrine which marks the solemnity of legal process once issue is joined; that is, after claim and defences are exhibited before the proper judge.¹ In the pure theory litiscontestation is regarded as a judicial quasi-contract. The litigants agree, as it were, to submit their dispute to judicial determination. Thereby a new obligation is constituted. In other words, for the original claim there is substituted an obligation which, if the action is successful, becomes an obligation to satisfy the judgment. The effect of this is that a new quality is communicated to the action whereby it is perpetuated and made transmissible.²

3.16 Under a looser interpretation the raising of an action was treated as litiscontestation, thus justifying the rule that an executor might carry on an action for solatium instituted by the deceased.³ By the raising of an action the claim was depersonalised, transformed by novation, translated into a money debt owing to the claimant's estate by due process of law. These elements are retained in the present law in relation to a trustee in bankruptcy, though not in relation to an executor. A bankrupt's right to claim solatium may transmit to the trustee, who for this purpose is treated like an executor under the pre-

¹ John Erskine of Carnock, *An Institute of the Law of Scotland* (Bell & Bradfute, 1871), iv.1,69.

² Erskine, *op cit*, iv.1,70.

³ *Stewart v London, Midland and Scottish Railway Co* 1943 SC (HL) 19, 41 (Lord Macmillan); *Smith v Stewart & Co* 1960 SC 329, 334. This justification was in fact criticised in our report in 1973 as giving "a formal rather than a rational explanation of the rule": see SLC Report No 31 (1973), para 22, p 9. That may be, but we are now inclined to think the formal analysis at least indicates that the personal view of solatium was always subject to qualification.

1976 law.¹ In other words, the right to claim solatium is at least in some circumstances treated as a patrimonial asset.

3.17 Aside from these technicalities, solatium was not always regarded prior to 1976 merely as solace for injury. Consider, for example, the case of *Dalgleish v Glasgow Corporation* 1976 SC 32, which was decided under the pre-1976 law. That case concerned a child who was rendered comatose by her injuries. The Lord Ordinary was prepared to contemplate an award of solatium in these circumstances,² though in fact he held that liability was not established. On reclaiming, by which time the child had died, the Inner House took the same view with regard to solatium, while also affirming that liability was not established. It was said:

"It is accepted that the fact that the victim may not derive any personal or financial benefit from the award is irrelevant."³

Such an approach seems at odds with the view that solatium is purely personal and only intended to solace the injured claimant.

Transmissibility: A question of policy?

3.18 It seems anomalous that a claim for solatium should be assignable *inter vivos*, and transmissible to a trustee in bankruptcy, but not transmissible to an executor. Some justification can be offered for distinguishing between assignability and transmissibility as such on the view that solatium is inherently personal. Assignability has a cash value which the injured person can realise.

¹ *Muir's Trustee v Braidwood* 1958 SC 169; *Watson v Thompson* 1990 SLT 374, 1991 SLT 683.

² That is, solatium for loss of faculties and amenities and loss of expectation of life, neither of which required that the injured person should be aware of her loss: see further para 4.13.

³ 1976 SC 32, 54.

Control of the claim remains with the injured person unless and until it is assigned. Transmissibility, on the other hand, may involve loss of control over the claim and cannot be so easily translated into money's worth. We are not satisfied that that is a sound argument. It does not provide a convincing reason for distinguishing between an executor and a trustee in bankruptcy so far as transmissibility is concerned. Nor does it account for the approach adopted in *Dalgleish*,¹ where personal benefit to the injured person was considered irrelevant.

3.19 The fact is that a claim for solatium combines both personal and patrimonial elements. In some cases the personal elements predominate, in others the patrimonial elements. We therefore conclude that the question whether a right to claim solatium should be transmissible cannot be answered merely by analysing the nature of solatium. The question, as we see it, is whether or not or to what extent, as a matter of policy, the right should transmit.

Comparative law

3.29 In Discussion Paper No 89 we looked briefly at a number of other jurisdictions³. For our present purposes we can concentrate on Canada and England and Wales. The importance of the Canadian example is that it illustrates most aptly the wide variety of rules which have been or might be adopted. With regard to England and Wales, we recognise that any rules which we may propose will inevitably invite direct comparison with corresponding rules there.

¹ 1976 SC 32. See para 3.17.

³ Australia, Canada, England and Wales and New Zealand: see Discussion Paper No 89, paras 3.30-3.37, pp 48-55.

Canada

3.30 In 1963 the Commissioners on Uniformity of Legislation in Canada proposed a Uniform Survival of Actions Act, which excluded recovery by a deceased's estate of damages for all non-pecuniary loss.^④ Despite the Uniform Act it appears that no two Canadian jurisdictions have enacted precisely the same provisions. The Ontario Law Reform Commission comments in a recent report:

"Presumably reflecting the controversial nature of the issues involved, Canadian provisions respecting damages for non-pecuniary loss [ie in survival actions] vary from outright refusal to permit such an award ... to allowance of an award under some heads of non-pecuniary loss, although, except in the Yukon and the North-west Territories, not for loss of expectation of life." (emphasis added).¹

3.31 It is true that most of the provinces have by now adopted the Uniform Act in whole or in part.² And even at the time of our report in 1973 the decision that the deceased's right to claim solatium should terminate with his or her death was influenced by this trend in Canada.³ Nevertheless, the persistent variation in the Canadian jurisdictions is instructive. The issues are controversial, as the Ontario Law Reform Commission recognised, and the solutions vary. It therefore cannot be said that there is an obvious right answer to the question whether, or to what extent, the deceased's non-patrimonial claim should survive. It is a question of policy, as indeed we concluded when discussing the nature of solatium.⁴

^④ *Uniform Acts of the Uniform Law Conference of Canada* (Uniform Law Conference of Canada, 1978), p 45-1.

¹ Report on *Compensation for Personal Injuries and Death* (Ontario Government Bookstore, 1987), p 87.

² All claims for non-pecuniary (non-patrimonial) loss terminate with the death of the claimant in Alberta, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island and Saskatchewan.

³ SLC Memorandum No 17 (1972), para 31, p 26.

⁴ Para 3.19.

England and Wales

3.33 The pre-reform rules in the Canadian jurisdictions mentioned were originally modelled on earlier English rules. Now, by a curious shift in the law reform process, the English rules have developed in a quite different direction. In the Canadian jurisdictions the tendency has been to curtail the executor's right to recover the deceased's non-pecuniary losses and, as mentioned, this influenced the reforms in Scotland in the mid-1970s.^② In England and Wales, however, earlier restrictive rules have been progressively relaxed. Actions of damages for pain and suffering and loss of amenities now survive to full effect for the benefit of the deceased's estate. This contrast with the provision for solatium in Scotland has attracted public attention and is a major factor in the demand for reform. The English rules therefore merit close attention.

3.34 The claims in tort which may be pursued in England and Wales on behalf of a deceased's estate rest on the Law Reform (Miscellaneous Provisions) Act 1934. Those which may be pursued by dependants in their own right rest on the Fatal Accidents Act 1976. Under the 1934 Act all causes of action which are vested in a deceased survive for the benefit of the deceased's estate.¹ This enables recovery of damages for pain and suffering and loss of amenities to date of death, as well as for accrued pecuniary loss.² Under the 1976 Act a deceased's dependants may bring an action in respect of wrongful death.³ The damages recoverable include compensation for loss of support and a fixed sum for "bereavement" which can be varied by ministerial order.⁴ The fixed sum is presently £7,500. It can only be claimed by a surviving spouse or by the parents of a deceased minor who was never married.

^② See para 3.31.

¹ S 1. Defamation is excluded.

² H McGregor, *The Law of Damages* (Sweet & Maxwell Ltd, 1988), paras 1601-1613, pp 1018-1022.

³ S 1.

⁴ Ss 3 and 1A respectively. See W V H Rogers, *Winfield & Jolowicz on Tort* (Sweet & Maxwell Ltd, 1989), pp 650-653.

3.37 That, however, does not imply that the provision need be identical in the two jurisdictions. For example, we have mentioned the strong aversion in Scotland to the use of tariffs.² This would seem to rule out any provision like the fixed sum (£7,500) payable under the Fatal Accidents Act 1976 in respect of bereavement. It would be impossible to import that remedy with its limitation as regards the class of qualifying relatives, given the more liberal definition of the deceased's immediate family in the Damages (Scotland) Act 1976.³ And, as we mentioned,⁴ there is already pressure in Scotland to enlarge the class of qualifying relatives. Similarly, the sum of £7,500 would certainly appear to many in Scotland to be unacceptably low.¹ In a wider context, we also think that different rules may be required in respect of injury arising from defamation and other verbal injury or injury to reputation.² Reform is therefore not simply a matter of adopting the English rules.

² Para 3.24.

³ See para 2.7.

⁴ Para 3.25.

¹ See paras 2.12, 3.22. In fact the relative's non-patrimonial award in Scotland compares not too badly with corresponding awards in other European jurisdictions: see D McIntosh and M Holmes, *Personal Injury Awards in EC Countries* (Lloyds of London Press Ltd, 1990). For example, it seems that such awards are not available in Germany (ie West Germany before reunification) and the Netherlands and are quite low in Greece and Portugal. The provision in Belgium, France and Ireland seems to be broadly comparable with bereavement damages in England and Wales. In Luxembourg and in certain regions of Italy the provision is apparently more generous, ranging from about £16,000 per qualifying relative in Luxembourg to about £23,000 in Genoa and about £47,000 in Milan.

² See paras 4.29-4.35.

Solatium: Transmissibility

4.7 If the problem cannot be tackled effectively through the relative's non-patrimonial award, the only real alternative is to allow a right to claim solatium to transmit to the claimant's executor. That is not to say there are no independent grounds for adopting this solution. There are strong arguments in its favour. It is the solution favoured by a majority of our commentators, though not by an overwhelming majority. It is also the solution adopted in England and Wales and it may seem anomalous to maintain a distinction between the two jurisdictions in this respect.³ Indeed, the fact that there is such a distinction has featured prominently in the demand for reform in Scotland.⁴ There are of course counter-arguments about the personal nature of solatium, but we do not regard them as conclusive.¹ Whether a right to claim solatium should be transmissible is a matter of policy on which a decision could be taken either way.² Nor do we see any element of over-compensation where relatives receiving compensation in their own right also take the deceased's estate and benefit from the deceased's claim for solatium.³ In the mid-1970s it seemed arbitrary that a claim for solatium should survive merely because the claimant had raised an action. It could be said to be just as arbitrary that a claim should now fall merely because death intervenes before legal proceedings can be concluded. Perhaps it is easier to accept the latter, on the theoretical view that solatium is purely personal, when a disqualifying event seems unlikely. We now know that it is commoner than once seemed likely, and we cannot ignore that knowledge.

³ See paras 3.33-3.37.

⁴ See paras 3.33, 3.36.

¹ See paras 3.10-3.19.

² See paras 3.19, 3.31. The Law Society of Scotland expressly agreed with this proposition.

³ See paras 3.26-3.28.

4.8 On the other hand, the personal elements of a claim for solatium cannot be wholly ignored. It could well appear unjust to allow strangers or remote relatives or even creditors to recover a windfall from someone whom the deceased might have elected not to sue. Indeed, several consultees who were generally in favour of transmissibility suggested that benefit should be confined to members of the deceased's immediate family. Doubts were also expressed about extending the principle of transmissibility to claims in respect of injury arising from defamation or other verbal injury or injury to reputation. Such claims were clearly regarded, at least by some commentators, as being of a peculiarly personal nature.

4.28 Accordingly, we recommend:

4. **Subject to recommendation 5 (claims arising from defamation or other verbal injury or other injury to reputation),² any right to damages by way of solatium vested in a claimant in consequence of personal injury should transmit unconditionally to his or her executor.**

(Clause 3)

² See para 4.35.

Defamation, etc

4.29 Claims arising from injuries to self-respect or reputation form a special case. So far in this report we have been primarily concerned with personal injuries in the sense of physical injuries (including disease) which could result in death. The injuries we are now concerned with are very unlikely to result in death. The most notable example is probably injury resulting from defamation, or related forms of verbal injury.³ The question whether the right to claim solatium should transmit in this context is confined in practical terms to the relatively rare case where death is due to extraneous causes. Injury to self-respect or reputation may be a component of other kinds of action, for example, actions for damages for wrongful arrest or imprisonment, or for certain abuses of legal process.¹ In such forms of action we can distinguish two kinds of non-patrimonial claim:

- (a) claims for solatium in respect of outrage to feelings (primarily feelings of self-respect or self-esteem); and
- (b) claims for injury to reputation as such.

That there is this distinction can be brought out by considering the element of publicity which may or may not be present. There can be no injury to reputation unless the act complained of is public in some sense. But an act may cause outrage to feelings whether or not it is public.

³ See Walker, *op cit*, Chapter 23.

¹ See Walker, *op cit*, Chapter 20, sections 1-3, Chapter 24.

4.30 These claims are special in two ways. First, in the words of one of our consultees, they may be thought of as very personal to the claimant. We can interpret this in terms of the principle of election by saying that the claimant may have very good reasons for electing not to sue.^② A damaged reputation may simply be further damaged by the publicity which may attach to litigation. For that reason, too, if a claimant dies, it may be particularly appropriate that an executor should not be allowed to pursue a claim unless the deceased's intention to do so is clearly attested.^③

4.31 Second, these claims are special because it is not altogether clear under the present law how they are affected by the death of the claimant. This can be illustrated most clearly in the case of defamation, which was the subject of a lengthy report in 1975.¹ The law as it then stood is summarised in that report:

"424 In relation to the transmission upon death of claims and of liability, Scots law has never distinguished between defamation and other delicts....

425 So far as the death of the victim of a delict is concerned, the position differs according to whether or not the victim during his lifetime has raised an action against the wrongdoer. If he has done so, his executors may have themselves sisted as pursuers in the action in place of the deceased, and may carry it on to the effect of recovering such damages, both for *solatium* and for pecuniary loss, as the deceased could have recovered had he survived.² If, on the other hand, the deceased died without having raised an action, his executors may competently sue the wrongdoer to recover damages for pecuniary loss suffered by the deceased.³ But the executors are not entitled to recover damages by way of *solatium* for the deceased's pain and suffering or his injured feelings, even if the deceased had intimated a claim for such damages before his death.⁴ The Committee consider this state of the law to be satisfactory and *do not recommend* any alteration.⁵

② For the principle of election see paras 3.11, 3.13, 4.23-4.24.

③ Compare para 4.24.

¹ The Faulks Report (1975).

² *Neilson v Rodger* (1853) 16 D 325.

³ *Auld v Shairp* (1874) 2 R 191; *Smith v Stewart & Co* 1961 SC 91.

⁴ *Smith v Stewart & Co* 1960 SC 329.

⁵ Paras 424-425. nn 116-117

It is not clear whether it was the intention with regard to defamation to change these rules in the Damages (Scotland) Act 1976; in other words, whether injuries resulting from defamation, and like injuries, were to be brought within the scope of the definition of "personal injuries" in the 1976 Act.

4.32 According to that definition -

" 'personal injuries' includes any disease or any impairment of a person's physical or mental condition."⁶

In Part II of the Prescription and Limitation (Scotland) Act 1973, which contains an identical definition in section 22(1), actions for defamation and actions in respect of personal injuries are treated separately. The provision for defamation in the 1973 Act was introduced to implement the recommendation in the Faulks Report (1975).¹ And it was assumed in that report that the term "personal injuries" as used in the 1973 Act did not include defamation. If this interpretation is correct, it would seem to follow that actions for defamation, and possibly other actions involving injury to reputation, are outwith the scope of the 1976 Act.² So, the pre-1976 rules would still apply to such actions, as far as transmissibility is concerned.

⁶ Damages (Scotland) Act 1976, s 10(1).

¹ Para 546, p 151. See s 18A, where defamation is separately defined, and the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985, s 12.

² But see *Barclay v Chief Constable, Northern Constabulary* 1986 SLT 562, 563 (an action for damages for wrongful arrest), where the Lord Ordinary said: "In my opinion personal injuries extend to injury to feelings such as is claimed in the present case. Even if they do not the pursuer has a very clear averment that his health suffered as a result of the upset. This is plainly a personal injury and is included in the pursuer's claim for damages."

4.35 We accordingly recommend:

- 5.(a) Any right to damages vested in a claimant in consequence of injury resulting from defamation or any other verbal injury or other injury to reputation should transmit to an executor.**
- (b) Any such right to damages other than for patrimonial loss should so transmit only if the claimant had brought an action to enforce that right while alive.**

(Clause 3; Schedule, paragraph 3)

Recommendation 5 is implemented by section 2(1) and (4) substituted in the Damages (Scotland) Act 1976 by clause 3 of the draft Bill in Appendix A; also by the Schedule, paragraph 3, which appropriately amends the definition of "personal injuries" in the 1976 Act. It should be noted that the right to damages in respect of patrimonial loss transmits unconditionally to the executor; also that damages are quantified in terms of section 2(2) and (3) by reference to the period ending immediately before the deceased's death. In section 2(4) the phrase "right to damages (other than for patrimonial loss)" is used so that damages for any non-patrimonial loss which perhaps cannot be regarded as solatium will nevertheless be so treated. For example, there is a view that damages for injury to reputation as such are non-patrimonial but not technically damages by way of solatium. Finally, if we bring injuries resulting from defamation, and like injuries, clearly within the scope of the 1976 Act, we must recognise that relatives' claims may also arise under section 1 in respect of death in consequence of such injuries. This, however, would seem to be only a very remote possibility.

4.43 We accordingly recommend:

8. **The relative's right to non-patrimonial damages under section 1(4) of the Damages (Scotland) Act 1976, modified as proposed in recommendation 7(a),¹ should transmit unconditionally to an executor.**

(Clause 2)

Recommendation 8 is implemented by clause 2 of the draft Bill in Appendix A, which introduces a new section 1A into the Damages (Scotland) Act 1976. Section 1A is drafted to include the relative's right to damages for patrimonial loss. In this respect it merely re-enacts the present law.² Provision is also made to ensure that damages are quantified by reference to the period ending immediately before the deceased relative's death.³ Section 2A introduced into the 1976 Act by clause 4 provides for enforcement by the executor of any right transmitted under section 1A.

¹ See para 4.40.

² See para 2.8.

³ Compare paras 4.11-4.12 which deal with the quantification of damages in the context of the right to claim solatium.