



SCOTTISH LAW COMMISSION  
(Scot Law Com No 134)

# Report on The Effect of Death on Damages

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Law Commissions Act 1965

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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Scottish Law Commission  
**The Effect of Death on Damages**

To: The Right Honourable Ian Lang, MP,  
*Her Majesty's Secretary of State for Scotland*

We have the honour to submit our Report on The Effect of Death on Damages.

(Signed) C K DAVIDSON, *Chairman*  
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KENNETH F BARCLAY, *Secretary*  
27 January 1992

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1. Abbreviated in this report to "LC Report No 56 (1973)".

2. Abbreviated in this report to "the Faulks Report (1975)".

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1. Abbreviated in this report to "the Pearson Report (1978)".

2. Abbreviated in this report to "SLC Memorandum No 17 (1972)".

3. Abbreviated in this report to "SLC Report No 31 (1973)".

# Part I Introduction

## Our remit

1.1 This report examines certain limited questions concerning claims for damages in respect of personal injury and death. It follows on a discussion paper which we published in 1990,<sup>1</sup> in pursuance of a reference made on behalf of the Secretary of State for Scotland under section 3(1)(e) of the Law Commissions Act 1965:

“To consider the case for amending the law of damages in Scotland having regard to the possibility that there may be an incentive inherent in the present law for a defender to postpone making settlement or reaching proof until after the death of the pursuer in order to minimise the amount of any compensation to be paid.”<sup>2</sup>

The discussion paper was widely circulated and attracted helpful comments. We are grateful to those who submitted them.<sup>3</sup>

## The problem

1.2 Underlying the reference is a growing concern about the effects of the Damages (Scotland) Act 1976 on claims arising from terminal industrial disease. Public attention has focused on asbestos-induced disease.<sup>4</sup> The example of mesothelioma is instructive.<sup>5</sup> This particular disease may develop many years after harmful exposure to asbestos dust.<sup>6</sup> Diagnosis can be difficult and death tends to follow quickly after diagnosis.<sup>7</sup> Consequently, death may intervene before the victim can initiate a claim, or pursue a claim to its conclusion. And, as the legal rules operate at present, death in these circumstances can have the effect that the value of the claim is substantially diminished.<sup>8</sup> The victim's immediate family may therefore receive less than would have been payable if the victim had survived and succeeded in his or her claim. It is this possibility which is thought to constitute an incentive on occasion for the defender to prolong negotiations or legal proceedings.

1.3 In other words, there is a perception that the present state of the law can be exploited to the detriment of those pursuing claims in particularly distressing circumstances. That in itself may be ground for reform, whether or not there is actual exploitation. Equally, the rules may have to be changed if they produce capricious effects, albeit in extreme cases. More must be said on both counts. But first it is important to take note that we are not dealing with a problem which occurs only rarely or is confined to a few noxious diseases. Nor are we dealing with a problem which is temporary.

## Some statistics

1.4 Before publishing Discussion Paper No 89 we carried out a limited postal survey of selected legal firms (45) with substantial experience of handling personal injury claims.<sup>9</sup> Unfortunately, the response rate was low (33%). Nevertheless, the firms who did return our questionnaire provided much useful information.

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1. Discussion Paper No 89, *The effect of death on damages*, published on 16 November 1990 (subsequently referred to as “Discussion Paper No 89”).

2. In this report “pursuer” and “defender” designate not only the opposing parties in a legal action but also, where appropriate, a potential pursuer or potential defender. Similarly, “claimant” may include a potential claimant.

3. Appendix C contains a list of commentators.

4. See, for example, Scotland on Sunday, July 30 1989, *Rough justice for victims of asbestosis*; The Scotsman, Thursday 1 March 1990, *Insurers accused of delaying asbestos payments*; BBC Scotland, Focal Point, 1 March 1990, *Slow Death: Dead Slow Justice* (TV documentary).

5. Asbestos is a carcinogen, more pathogenic in some mineral forms than others. It can cause malignant mesotheliomas (tumours) to develop in the pleura and peritoneum. Typically, the victim has been exposed to asbestos dust containing high concentrations of airborne fibres. A recent American study estimates that 80% of diffuse malignant mesotheliomas occur in men exposed to asbestos in the workplace and sometimes in members of their families or in persons who live near mines: see B T Mossman and J B L Gee, *Asbestos-related diseases*, *New England Journal of Medicine* 1989; 320: 1721–1730. Other cancers may also be associated with exposure to asbestos, eg lung cancer and cancers of the gastrointestinal tract, larynx, kidney, pancreas, ovary and eye. However, it appears that the significance of many of the research findings concerning these cancers is still a matter of active debate.

6. The average latency period between first exposure and clinical diagnosis is 35 to 40 years, with most deaths occurring in persons over 60: see Mossman and Gee, *op cit*, p 1723.

7. Most of those afflicted survive for less than one year after diagnosis, although untreated persons have survived for as long as three years: see Mossman and Gee, *op cit*, p 1723.

8. We explain in Part II precisely how the rules can produce this result.

9. See Discussion Paper No 89, paras 1.4–1.5, pp 2–3. We also conducted in-depth interviews (5) with individual solicitors.

1.5 In the first instance we are concerned with claims in respect of death, more particularly where the victim dies after raising an action but before proceedings are completed. The firms returning our questionnaire reported 1,202 claims (resolved) in respect of death during the five-year period 1985-89. Some 70 deaths (6%) occurred after an action was raised but before proof.<sup>1</sup> Work-related accidents, other than those attributable to industrial disease, caused 54% of the 1,202 recorded deaths, road traffic accidents 29% and industrial disease 14%. The corresponding figures for deaths during legal proceedings are 3%, 11% and 74%. Table 1 in Appendix B contains more details.

1.6 The questionnaires also recorded 43 cases, then current, where there was a serious risk that the claimant might die before the claim could be resolved. Of these 30 (70%) involved industrial disease. At that time 19 (44%) of the 43 claims were already in court. This is comparable with what happens where claims are made in respect of death. The rate of settlement without court action seems to be lower for such claims (29% as against an estimated rate of 80% over all personal injury claims). Once an action is raised the situation changes. On the basis of our figures 82% of recorded actions in respect of death settled before proof compared with an estimated 90% over all personal injury actions.<sup>2</sup> Claims in respect of death do not seem to take significantly longer to resolve than other claims. This applies both to claims settled without court action and claims settled after an action is raised but before proof.

1.7 We must however urge caution when using the figures from our survey—for two reasons. First, they are based on a rather small sample, though it was fairly representative of the legal firms operating in the field.<sup>3</sup> Second, our questionnaire was not detailed enough to eliminate double counting. Firms seemed to act mainly for claimants (10 firms) or mainly for defenders (4 firms). Out-of-Edinburgh firms were in the majority (9 firms out of 15). It is quite possible, therefore, that 'claimants' firms' and 'defenders' firms', or out-of-Edinburgh firms and Edinburgh firms,<sup>4</sup> were reporting the same cases. The design of the questionnaire was such that these effects could not be isolated. To that extent it was flawed. But to have constructed and administered a more complex instrument would have taken too long and imposed an unrealistic burden on busy practitioners.

1.8 Despite the imperfections of our survey, the results are suggestive. Even if we halve the recorded total (1,202 claims), the evidence indicates that there could be more than 100 claims per year in respect of death.<sup>5</sup> Many of these are likely to involve instantaneous death, by which we mean death following more or less immediately on the injury causing it. Deaths occurring in road accidents or sudden catastrophes are obvious examples. It is difficult to know what proportion of claims might involve non-instantaneous death. But an overall figure of 6%, based on the findings from our survey, is not insignificant in relation to a possible rate of more than 100 claims per year. And our figures may well underestimate the real rate.

1.9 Certainly, reverting to industrial disease, we know that since 1980 there have been at least 50 deaths per year from occupationally related mesothelioma alone.<sup>6</sup> In 1988 there were just over 100 such deaths. In addition, over the same period there have been about 12 deaths per year from occupationally related asbestosis.<sup>7</sup> It is not known what proportion of these asbestos-induced deaths figured in claims for damages. A recent report estimates that since the early 1960s some 10,000 claims arising from asbestos-induced disease have reached the courts in the United Kingdom.<sup>8</sup> The industries involved, notably shipbuilding and the construction industry, were well represented in Scotland throughout the relevant period. It is therefore reasonable to assume that a significant proportion of those claims would have originated in Scotland, perhaps 10% on the basis of relative population size. On that basis a rate of more than 30 claims per year would not be implausible. No estimate is available for the proportion of claims involving death from asbestos-induced disease.

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1. Percentages in this and the following paragraph are stated in round figures.

2. The estimated rate of 90% is the rate for the Court of Session. We have used this on the assumption that the recorded actions in respect of death would have been raised there. In fact estimates varied from 75% to 95% (median = 90%), and we cannot be sure how accurate they are.

3. There were 4 firms each handling less than 100 claims; 5 firms handling between 100 and 500 claims; and 6 firms handling more than 500 claims, including 2 firms handling between 1,000 and 2,000 claims.

4. Edinburgh firms commonly act as agents for out-of-Edinburgh firms in litigation before the Court of Session.

5. The reported figures may have been distorted by recent mass disasters. For example, one firm in our survey was handling more than 150 claims arising from the explosion on the Piper Alpha oil platform in 1988.

6. See Table 2 in Appendix B.

7. Asbestosis, like mesothelioma, is typically due to workplace exposure to asbestos dust. It is characterised by interstitial pulmonary fibrosis (scarring of the lung tissue) and in severe cases may result in death: see Mossman and Gee, *op cit*, pp 1724-1728. Much recent research has been concerned with the possible causal role of asbestosis in the development of lung cancer. A major difficulty in such research is dissociating the relative contributions of exposure to asbestos, asbestosis and smoking. These issues have featured in Scottish cases and so far the courts have refused to accept exposure to asbestos as a cause of lung cancer in the absence of asbestosis: see *Main v McAndrew Wormald Ltd* 1988 SLT 141; *Vize v Scott Lithgow Ltd* 1991 GWD 9-549 (the deceased had been a light to moderate cigarette smoker).

Other forms of occupationally related lung disease are included in Table 2 in Appendix B for the purpose of comparison. These account for a further 30 or so deaths per year.

8. W Felstiner and R Dingwall, *Asbestos Litigation in the United Kingdom: An Interim Report* (Centre for Socio-Legal Studies, Wolfson College, Oxford, 1988), p 5.

## Some conclusions from the statistical evidence

1.10 What then can we conclude from the evidence regarding the incidence of claims which may be affected by the intervening death of the claimant? First, the incidence of such claims arising from industrial disease is relatively high, whether measured by frequency or as a proportion of all claims in respect of death. Second, it seems that there is also a small but significant incidence of claims arising from injury other than industrial disease. We regret that we are unable to provide more precise quantitative information. We did in fact pursue this specifically in our consultation, but without success.<sup>1</sup> Nevertheless, on the basis of the evidence available, we conclude that the problem is indeed quantitatively as well as qualitatively significant.

1.11 We should also emphasise that we do not see the problem as a temporary one. Certainly, the numbers of asbestos-related claims which are presently causing concern are likely to decline eventually. But most of the participants in our survey thought this was unlikely to happen before the turn of the century. We also expect that occupational and environmental hazards will continue to generate new causes of action of a similar sort.<sup>2</sup> And of course there is always likely to be a small core of familiar injuries, road traffic injuries for example, where the problem cannot be ignored. It is with these considerations in mind that we must assess the operation of the present rules and the opportunity they offer defenders to profit from delay.

## Delay

1.12 At the outset we should say that our survey produced no evidence that delay is more prevalent in claims where the defender has reason to anticipate the imminent death of the claimant. One of our main concerns when we circulated our questionnaire was to find out how far solicitors agreed with the premiss of our remit. We have made the point briefly that the intervening death of the claimant can reduce the total damages payable.<sup>3</sup> Our remit presupposes that this creates an incentive for the defender to postpone settlement or prolong legal proceedings where a claimant is likely to die. It is a serious matter to suggest that litigation might be deliberately manipulated to exploit the possibility of a claimant dying before the claim can be resolved. We therefore determined to make no such assumption without canvassing the views of experienced practitioners.

1.13 In our questionnaire we specifically asked:

“Do you agree:

‘that there may be an incentive in the present law for a defender to postpone making settlement or reaching proof until after the death of the pursuer in order to minimise the amount of any compensation to be paid?’

If so, why do you think this?”<sup>4</sup>

All but one of those who returned the questionnaire, or were interviewed, agreed that there might indeed be such an incentive. No firm claimed to have any evidence of tactical delay being used as a deliberate policy, although several criticised the practices of defenders in a general way. An equal number of firms, however, stated expressly that deliberate delay was unheard of in their experience. Problems of proof were said to be the principal cause of delay. The difficulty of negotiating settlements with multiple defenders was also mentioned. On the basis of our survey, therefore, we can only say that there may be at least an inducement to delay inherent in the present law. No evidence was submitted to us that the state of the law is being exploited. But that is not conclusive. The very possibility of exploitation may be sufficient reason for reform. And the case may be all the stronger if, as is said, delay is otherwise endemic in the processes in which personal injury claims are pursued.

1.14 Certainly it is a common perception that delay is unavoidable, given the ‘normal tactics’ adopted in the bargaining process in which settlements are negotiated. This is reported in a recent English study.<sup>5</sup> The study also brings out clearly that a degree of inevitable delay is built into the procedures of civil litigation.<sup>6</sup> Complex rules are in place to ensure that parties to a litigation have sufficient notice of the case against them and a proper opportunity to prepare and present

1. See Discussion Paper No 89, para 1.10, p 6. We also wrote directly to selected consultees.

2. For example, recent research in clinical occupational medicine has drawn attention to a number of suspected carcinogens which are widely used in certain industries and trades: see M R Cullen, M G Cherniack and L Rosenstock, Occupational medicine, *New England Journal of Medicine* 1990; 322: 675–683; Table 3 in Appendix B. The study also refers to investigations which have demonstrated an increased risk of certain cancers in identified populations, without revealing the causal factor(s). Examples include colorectal cancer in those who make the wood, plastic or metal models and patterns from which machines are designed; leukaemia and lymphoma in farmers; and glioblastoma multiforme in electrical workers. It also appears that numerous cancer clusters or epidemiological associations between cancers and occupational groups have been reported, though many remain unconfirmed. For further examples see M R Cullen, M G Cherniack and L Rosenstock, Occupational medicine, *New England Journal of Medicine* 1990; 322: 594–601.

3. Para 1.2.

4. See para 1.1.

5. H Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford University Press, 1987), pp 100–101.

6. H Genn, *op cit*, pp 101–106. Of course the study is based on research in England, but many of the points made about procedural rules are quite general.

their own. Evidential requirements are onerous. Information must be obtained, often from many sources, and collated for effective presentation. This is all necessary because by law the burden of proving fault and consequent damage rests on the claimant. The defender is therefore entitled to insist that the claimant proves every element in the claim.

1.15 The courts, too, have only a finite capacity. It is difficult to estimate how many personal injury claims might be under way at any given time. In the five-year period from 1986 to 1990 11,776 personal injury actions were raised in the Court of Session and the sheriff courts (ordinary causes).<sup>1</sup> At the end of 1990 4,343 such actions were pending. On the basis of the replies to our questionnaire it seems that about 80% of all claims may be settled without court action.<sup>2</sup> Assuming this figure is more or less accurate, we may have 20,000 to 22,000 claims currently being processed, with 10,000 to 12,000 new claims entering the system every year. Obviously these projections can only be approximate. But if anything the numbers are likely to be even larger than we suppose. Hence there is always a risk that too heavy demands may be made of the courts. When that happens, delay in processing claims cannot be avoided.

## Reforming court procedures

1.16 It is tempting to think that delays associated with litigation can be dealt with by streamlining court procedures. To some extent that is true. For example, expedited procedures for some reparation actions already exist in the Court of Session.<sup>3</sup> There are also recent indications that the Court itself will recognise the need to accelerate the ordinary procedures where special circumstances exist.<sup>4</sup> Perhaps extending such procedures and practices would solve the problem of delay, at least so far as delay was due to the operation of the courts. Indeed, some of our consultees suggested just that. One commentator proposed setting time limits reinforced by financial penalties.

1.17 We must recognise, however, that any form of expedited or accelerated procedure is necessarily subject to limitations. It may not be suitable for cases involving complicated facts which are difficult to prove or complex legal issues. And at least some of the cases which give rise to the problem we are concerned with fall into just these categories. Again, claims arising from asbestos-induced disease provide apt illustrations. For example, it may be difficult to establish a claimant's employment record, where that extends over many years and many employers.<sup>5</sup> There may be problems of causation and medical diagnosis.<sup>6</sup> Such issues are inevitably time-consuming and will often only be clarified finally in the intensive process of preparing for proof. Accordingly, we are inclined to think that the problem posed by our remit cannot be solved by procedural reform alone. That is not to criticise the existing special procedures, which may often provide a solution in particular cases. Nor is it to argue against refining and extending those procedures. Indeed, we would encourage that quite independently of the other reforms which we recommend.

## The impact of delay

1.18 Our point is that delay of one sort or another probably cannot be wholly eliminated. There are too many potential causes of delay, and therefore an ever-present possibility of exploitation. We must also recognise that delay has a differential impact on the parties in dispute. The typical claimant, who would prefer to receive damages sooner rather than later, becomes increasingly vulnerable as time goes on. Accordingly, there is mounting pressure on the claimant to settle quickly, preferably without resort to litigation, which is widely regarded as most stressful for those not accustomed to it. The English study previously referred to concludes that the ordinary bargaining process generally favours defenders.<sup>7</sup> If that is so, the claimant whose life is seriously at risk must be the most vulnerable of all claimants.<sup>8</sup> He or she is aware of impending death and its effect on the value of the claim; is concerned about the future welfare of his or her family; and for these very reasons is poorly equipped to withstand the normal hurly-burly of bargaining, even without tactical manoeuvring by the defender. In such circumstances it is difficult to justify legal rules which add to the pressure on the claimant and invite exploitation.

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1. Figures provided by the Central Research Unit (Scottish Office).

2. Estimates ranged from 50% to 90% (median = 80%).

3. Rules of Court 188E-P. See R D Sutherland, *Optional Procedure in the Court of Session*, 1991 SLT (News) 17. This study reports that 1049 summonses were signeted under the optional procedure during 1989-90 (about 25% of all personal injury actions raised in the Court of Session). The study also claims that a straightforward action under the optional procedure takes approximately 6-9 months from the date of signeting to proof.

4. See *Law v Scottish Road Services*, Court of Session, 9 May 1991 (The Scotsman, Friday 10 May 1991). In that case the Court refused to allow delay in fixing a date for a full hearing. The pursuer was suffering from mesothelioma (diagnosed in February 1989). It was emphasised in argument that he had already survived much longer than the average victim of the disease; and that if he died before his claim was resolved, his family would be able to sue for damages but would recover significantly less.

5. *Glennie v Gillies* 1988 SLT 308; *Paterson v Henry Robb* 1989 SLT 585.

6. *Main v McAndrew Wormald Ltd* 1988 SLT 141; *Vize v Scott Lithgow Ltd* 1991 GWD 9-549.

7. H Genn, *op cit*, pp 104-106. It is recognised that legal aid or trade union funding for the claimant may somewhat redress the balance (pp 113-117).

8. That was certainly the view expressed to us by practitioners with a substantial experience of handling claims for those suffering from mesothelioma.

## Capricious effects of the present rules

1.19 In considering the effect of death on damages, we are primarily concerned with the case where death is attributable to the fault giving rise to the claim. But similar considerations apply where death intervenes naturally and is wholly unconnected with the circumstances of the claim. Although this is unlikely to be a frequent occurrence, our consultees did in fact report two recent cases. Again, the effect of intervening death is to reduce the damages payable.<sup>1</sup> Further, because the death has no causal connection with the injury, the deceased's family have no claims in their own right. Their claim depends on their right to inherit the deceased's estate and is restricted to recovering the pecuniary loss suffered by the deceased before death. This is a most capricious effect of the present rules and another argument for reform. One of our consultees makes the point tellingly:

"The principal reason for my interest was that I very recently had a case where a client of mine suffered a serious injury in a road traffic accident and then died of unconnected causes before the claim could be settled or had been brought into court. The reason it had not been brought into Court was that the negotiations were going well and there was no need to sue. By the time of my client's unfortunate death the [damages] had been more or less agreed and the delay related to the calculation of [pecuniary] loss. After the death the [pecuniary] loss claim was resolved and a payment of that at least was made to the widow."

## Structure of the report

1.20 In this part we have outlined the nature of the problem with which we are primarily concerned. We have also tried to place it in the wider context of personal injury litigation and out of court bargaining. In Part II we explain more precisely how the present rules create what we referred to as an inducement to delay.<sup>2</sup> In Part III we discuss the principles underlying the present rules and the policy which we think should guide reform. In Part IV we develop our specific recommendations for reform. These are summarised in Part V and Appendix A contains a draft Bill implementing them.

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1. See Part II.  
2. Para 1.13.

# Part II How the present rules operate

## Compensation for personal injury

2.1 Anyone who has suffered loss or injury as a result of another's wrongful conduct has by law a right to claim compensation (damages) from the wrongdoer. In this report we are concerned with personal injury, which includes disease and impairment of physical or mental condition.<sup>1</sup> For the present, we need not distinguish the different kinds of conduct which the law regards as wrongful.

## The injured person's claim while alive

2.2 Broadly, there are two main heads of damages. First, the injured person is entitled to compensation for patrimonial loss. In essence this is pecuniary loss and comprises such items as loss of past or future earnings, loss of employability,<sup>2</sup> and outlays and expenses, for example medical expenses.<sup>3</sup> In addition, statute provides for damages and expenses in respect of necessary services rendered to an injured person by a relative;<sup>4</sup> and for damages in respect of an injured person's inability to render personal services to a relative.<sup>5</sup>

2.3 The second main head of damages is called solatium, which is compensation for pain and suffering, loss of faculties and amenities or loss of expectation of life.<sup>6</sup> These forms of injury and loss are generally described as non-pecuniary loss in contrast with patrimonial loss, which is more naturally measured by money. Damages by way of solatium may be awarded for physical pain, loss of limbs or physical functions, disfigurement, disease, impairment of bodily powers or senses, wounded feelings and various sorts of psychological damage.<sup>7</sup>

## The effect of death on the injured person's claim

2.4 If the injured person dies before the claim is resolved, the right to claim damages is transmitted to his or her executor, but only in part. No claim can be made by the executor for patrimonial loss which is attributable to any period after the injured person's death. Further, the right to claim damages by way of solatium is completely extinguished. These provisions are contained in section 2 of the Damages (Scotland) Act 1976:

"(1) Subject to subsection (3) below there shall be transmitted to the executor of a deceased person the like rights to damages in respect of personal injuries sustained by the deceased as were vested in him immediately before his death; and for the purpose of enforcing any such right the executor shall be entitled to bring an action or, if an action for that purpose had been brought by the deceased before his death and had not been concluded before then, to be sisted as pursuer in that action.

(3) There shall not be transmitted to the executor of a deceased person any right to damages in respect of personal injuries sustained by the deceased and vested in the deceased as aforesaid, being a right to damages—

(a) by way of solatium;

(b) by way of compensation for patrimonial loss attributable to any period after the deceased's death,

and accordingly the executor shall not be entitled to bring an action, or to be sisted as pursuer in any action brought by the deceased before his death, for the purpose of enforcing any such right."

For the purpose of section 2 it is irrelevant whether the injured person's death was caused by the injury or was due to intervening natural causes unconnected with the injury.

1. See Damages (Scotland) Act 1976, s 10(1); also discussion in paras 4.31–4.32.

2. Loss of employability is sometimes treated under solatium (see para 2.3): *Rieley v Kingslaw Riding School* 1975 SC 28; *McNee v G R Stein and Co Ltd* 1981 SLT (Notes) 31.

3. Outlays and expenses are sometimes treated as a distinct head of damages. See, for example, D M Walker, *The Law of Delict in Scotland* (W Green & Son Ltd, 1981), pp 470–471.

4. Administration of Justice Act 1982, ss 8,13(1), as amended by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990, s 69.

5. Administration of Justice Act 1982, ss 9(1),(3), 13(1). In essence these are services otherwise obtainable on payment which the injured person might have been expected to render gratuitously to the relative but for the injury.

6. For the threefold classification see *Dalgleish v Glasgow Corporation* 1976 SC 32, 53.

7. See A Paton, *McEwan & Paton on Damages in Scotland* (W Green & Son Ltd, 1989), Case Notes, for recent awards of solatium for the infinite variety of conditions which attract such compensation.

## The claims of the injured person's relatives

2.5 Where the injured person dies as a result of the injury certain relatives may claim compensation for the loss they suffer through the death.<sup>1</sup> Again there are two heads of damages.

2.6 The first is damages for certain forms of patrimonial loss. Such damages comprise:

- (a) compensation for loss of support suffered since date of death, or likely to be suffered, as a result of the act or omission in question;
- (b) payment in respect of the reasonable expense incurred in connection with the deceased's funeral;
- (c) payment of a reasonable sum in respect of the loss of personal services (otherwise obtainable on payment) which the deceased might have been expected to render gratuitously but for the injury.<sup>2</sup>

2.7 The second head of damages covers non-patrimonial loss arising from deprivation of the deceased's society. Such an award is called a "loss of society award" and may be claimed by relatives who are members of the deceased's "immediate family":

"(4) If the relative is a member of the deceased's immediate family (within the meaning of section 10(2) of this Act) there shall be awarded . . . such sum of damages, if any, as the court thinks just by way of compensation for the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if he had not died; and a sum of damages such as is mentioned in this subsection shall be known as a 'loss of society award'."<sup>3</sup>

Under this head compensation has been given for grief caused by the death<sup>4</sup> and for distress in contemplating the suffering of the deceased before death.<sup>5</sup> These elements are comparable with the solatium which dependants could claim for grief and sorrow under the pre-1976 law.<sup>6</sup> But we doubt whether such compensation, in particular compensation for pre-death distress, can be justified on a strict reading of the 1976 Act. The loss of society award is compensation for lost non-patrimonial benefits which might have accrued to the claimant if the deceased had not died. In other words, the award looks to the future not the past.<sup>7</sup>

2.8 The relative's patrimonial and non-patrimonial claims are separate claims and are evaluated independently of each other.<sup>8</sup> It is expressly provided that the non-patrimonial claim is not transmitted to the executor, if the claimant dies.<sup>9</sup> By implication, the patrimonial claim is transmitted, so far as it relates to the period of survival after the death of the injured person.<sup>10</sup> Both these claims under section 1 of the Damages (Scotland) Act 1976 are quite distinct from any claim the executor of the injured person may have under section 2, as previously described.<sup>11</sup> This is expressly provided by section 4:

"4. A claim by the executor of a deceased person for damages under section 2 of this Act is not excluded by the making of a claim by a relative of the deceased for damages under section 1 of this Act; nor is a claim by a relative of a deceased person for damages under the said section 1 excluded by the making of a claim by the deceased's executor for damages under the said section 2."

## The problem posed in our remit

2.9 Our remit requires us to consider how a claim for damages is affected when a claimant dies before he or she can pursue the claim to its conclusion.<sup>12</sup> Our preliminary statement of the problem was that intervening death can have the effect of reducing the total damages recoverable from the defender. Now that we have described the general legal provision for damages, we can locate the difficulty more precisely. It is principally that the injured person's claim

1. For the list of qualifying relatives see Damages (Scotland) Act 1976, Sched 1, as amended by the Administration of Justice Act 1982, s 14(4) and the Law Reform (Parent and Child)(Scotland) Act 1986, Sched 1, para 15.

2. Damages (Scotland) Act 1976, s 1(3), Sched 1, Administration of Justice Act 1982, ss 9(2), (3), 13(1).

3. Damages (Scotland) Act 1976, s 1(4); see also s 10(2) and Sched 1, Administration of Justice Act 1982, s 14(4) and Law Reform (Parent and Child) (Scotland) Act 1986, Sched 1, para 15. The qualifying members of the deceased's "immediate family" are spouse, cohabitee, parent, child (including a stepchild and a child accepted by the deceased as a member of the family). Relationships by affinity are treated as relationships by consanguinity and relationships of the half blood as relationships of the whole blood.

4. *Dingwall v Walter Alexander & Sons (Midland) Ltd* 1982 SC (HL) 179.

5. *Donald v Strathclyde Passenger Executive* 1986 SLT 625.

6. See para 2.19.

7. See further paras 2.21-2.33.

8. Damages (Scotland) Act 1976, s 1(4).

9. Damages (Scotland) Act 1976, s 3(b).

10. Walker, *op cit*, pp 407-408.

11. Para 2.4. To say that the relative's claim is distinct from the executor's does not mean it is wholly independent of the deceased's claim: see para 2.20.

12. Paras 1.1-1.2.

for solatium is extinguished by death and cannot be taken up by an executor.<sup>1</sup> The immediate family, who would normally inherit the injured person's estate, are therefore deprived of any benefit they might otherwise have had from the non-patrimonial claim.

2.10 Of course, the deceased's claim for patrimonial loss to date of death is not lost.<sup>2</sup> And, where the death is attributable to the injury, new claims emerge which the deceased's relatives can pursue in their own right.<sup>3</sup> It might seem, therefore, that the deceased's immediate family is well provided for, at least in the more common case of wrongful death. Compensation for patrimonial loss before the deceased's death can be recovered by an executor for the benefit of those who inherit the estate; patrimonial loss thereafter can be compensated by an award for loss of support; and the claim for solatium will be replaced by a claim for loss of society.

2.11 Even so, the injured person's family is still likely to be worse off as a result of his or her untimely death. This is partly because of differences in the methods of calculating the elements of patrimonial loss.<sup>4</sup> Net prospective earnings which are lost count in full when calculating the living claimant's entitlement. Only the proportion which, on evidence of past practice, would have been used to support the family enters the calculation of loss of support.<sup>5</sup> But the main reason for the discrepancy is that loss of society awards tend to be rather less generous than awards of solatium for serious injury. It is therefore worth looking briefly at the relative levels of these awards, which may well have heightened the sense of lost entitlement (ie to solatium) when death intervenes.

## Levels of awards

2.12 Reported cases in the Court of Session record loss of society awards to a spouse, generally a widow, which range from £5,500 to £12,500.<sup>6</sup> The median is about £11,100, the mean about £10,200. Awards to children range from £600 to £10,500, with the median about £3,000 and the mean about £3,700.<sup>7</sup> Calculating total family settlements on the basis of these figures shows that such settlements typically lie in the range £5,000 to £20,000 (9 cases). Four settled under £10,000 (including one under £5,000) and two between £21,000 and £30,000. Four exceeded £30,000. The median is about £18,200, the mean about £19,000. The actual amounts largely reflect the age of the surviving spouse and the number and ages of the children, though other factors are also important. The largest family settlement recorded, for a widow and three children, was about £35,000.<sup>8</sup> Total family settlements reported by firms responding to our questionnaire are broadly in line with these figures, as we would expect. Of 1,099 recorded settlements 91 (8%) were under £5,000; 854 (78%) between £5,000 and £20,000 and 154 (14%) over £20,000.<sup>9</sup> Only four reached or exceeded £30,000. From our interviews with solicitors it seems that the current negotiating base is probably about £12,000 for a widow and about £6,000 for a child.<sup>10</sup> The point was frequently made to us that these levels were too low.

2.13 The range of injuries which attract solatium is obviously very wide.<sup>11</sup> In fact, the firms responding to our questionnaire typically estimated that most claims for solatium were settled for less than £5,000 (70%). Again, on the basis of estimates, only a relatively small proportion of payments seems to exceed £20,000 (10%). But, at the higher levels, payments in excess of £25,000 or £30,000 seem to be more common. The highest levels, £40,000 and above, are for the most part well beyond the levels reached by loss of society awards, even when totalled over a whole family.<sup>12</sup>

2.14 It is perhaps reasonable to assume that injuries which are serious enough eventually to cause death would attract payments of solatium at the higher levels, if the victim survived. This proposition can be illustrated by considering asbestos-induced disease. Recently reported awards by the English courts of general damages in respect of mesothelioma, or other asbestos-induced cancer, range from £28,800 to £49,000.<sup>13</sup> The median is about £35,600, the mean about £37,300. Corresponding awards in respect of asbestosis range more widely from £5,400 to £47,000, which reflects the variability of the condition.<sup>14</sup> The median is about £20,900, the mean about £23,700. In a Scottish case

1. See paras 2.3, 2.4.

2. See paras 2.2, 2.4.

3. See paras 2.5–2.8.

4. See A Paton, *op cit*, Chapter 5, Chapter 13, paras 13.05–13.08.

5. Percentages varying from 45% to 85% are recorded in A Paton, *op cit*, pp 90A, 90/1.

6. See A Paton, *op cit*, pp 86–90A. The figures are based on 16 awards. Amounts are adjusted to 1991 values (in round figures), on the basis of the Retail Prices Index (figures published in January each year ending with January 1991). Awards to widowers and parents appear to be lower.

7. The figures are based on 41 awards. Again, amounts are adjusted to 1991 values.

8. *Worf v Western SMT Co Ltd* 1987 SLT 317. The widow was 31 and the children 2, 5 and 7. The deceased was 32 when he died.

9. Amounts (unadjusted) are for settlements during the 5-year period 1985–89.

10. The actual amounts mentioned by solicitors were £10,000 and £5,000 respectively. These have been adjusted for inflation (to 1991 values).

11. See para 2.3.

12. Our questionnaire asked firms to report the highest recorded payments of solatium in their experience: 8 out of 14 recorded payments (57%) exceeded £40,000 (unadjusted).

13. The figures are based on 4 awards. Amounts are adjusted to 1991 values (in round figures). An award of general damages may include compensation for pain, suffering (including suffering caused by loss of expectation of life) and loss of amenities. It is broadly equivalent to an award for solatium in Scotland: see *Dalglish v Glasgow Corporation* 1976 SC 32, 51–53.

14. The figures are based on 13 awards. Amounts are adjusted to 1991 values (in round figures).

in 1987, in the sheriff court, solatium of £18,900 was awarded to a pursuer for asbestosis where the resultant disability had been assessed at 10%.<sup>1</sup> More recently, in the Court of Session, it was said when awarding interim damages that “solatium [for asbestosis] on a conservative basis could lie between £15,000 and £20,000”.<sup>2</sup> Solicitors whom we interviewed and firms responding to our questionnaire anticipated payments of solatium around £30,000 for victims of mesothelioma who survived until their claims were settled. There was also general agreement that asbestosis might attract payments between £20,000 and £30,000, depending on its severity. Present levels of solatium for pleural plaques, £1,500–£3,000, were regarded as nominal.<sup>3</sup> The pleural plaques were thought to be important as evidence of exposure to asbestos dust and as indicating vulnerability to the graver conditions. Accordingly, there seems to be a move towards using these less serious conditions as a ground for claiming provisional damages under section 12 of the Administration of Justice Act 1982.

2.15 From the foregoing it is obvious that if a victim of mesothelioma, for example, dies before the claim is resolved, this has serious financial consequences for his or her family. The solatium, perhaps up to £30,000 is lost. Further, that loss is likely to be only partially offset by any ensuing claims for loss of society. These are unlikely to amount altogether to more than £20,000, unless perhaps the deceased’s family includes numerous young children, as well as a spouse. In fact, victims of asbestos-induced disease tend to be elderly and this may further reduce the payment(s) to be expected for loss of society.<sup>4</sup> In such cases, too, there might be minimal or even no compensation payable for loss of support. One solicitor, who is very experienced in these cases, told us that no client of his had ever received more than £15,000 for loss of society, and that payments of less than £10,000 were not uncommon. In other words, the intervening death of the claimant in the most unfavourable circumstances could lead to a significant saving for the defender as far as non-patrimonial damages are concerned. It is this possibility which is thought to constitute an incentive to delay in settling claims.

### **An historical explanation?**

2.16 In order to lay a foundation for our recommendations it is necessary to explain how the present situation came about. As so often, the reasons are largely historical. We must therefore briefly describe the provisions of the pre-1976 law, which were in fact replaced at the instigation of this Commission by the Damages (Scotland) Act 1976.<sup>5</sup> Thereafter we must look more closely at the new loss of society award,<sup>6</sup> the reasons for its introduction and its reception by the courts.

### **The rights of the deceased claimant’s executor under the pre-1976 law**

2.17 In the late 19th century it was established that an executor could not initiate an action merely to recover solatium for personal injury to the deceased.<sup>7</sup> This was in contrast with a claim based on patrimonial or pecuniary loss, whereby the deceased’s estate was diminished as a result of the injury. The executor was entitled to pursue such a claim, if necessary by legal action.<sup>8</sup> Further, where the deceased had already raised an action concluding for solatium, the executor was entitled to carry it on and recover solatium, whether with or without damages for patrimonial loss.<sup>9</sup> A similar exception was recognised, for a while, where a claim had been merely intimated to the alleged wrongdoer before the claimant’s death.<sup>10</sup> The deceased’s executor in these circumstances was entitled to take up the claim and to raise an action, if necessary. But a court of seven judges subsequently declined to recognise that exception.<sup>11</sup>

1. *Bateman v Newalls Insulation Co Ltd* 1987 SCLR 445 (amount adjusted to 1991 values in round figures).

2. *Hutton v Darlington Insulation Co Ltd* 1990 GWD 4–210. Adjusting the amounts for inflation (to 1991 values) gives a range of £16,300–£21,800.

3. In England recently reported awards of general damages for asbestos-induced pleural disease, with neither asbestosis nor mesothelioma, range widely from £1,700 to £30,400. The median is about £5,200, the mean about £10,300. These figures are based on 15 awards. Amounts are adjusted to 1991 values (in round figures).

Four types of benign pleural disorders are associated with asbestos, namely, pleural effusions, pleural plaques, pleural fibrosis (which is relatively rare) and rounded atelectasis: see Mossman and Gee, *op cit*, pp 1726–1727. Pleural plaques are currently the most common manifestation of exposure to asbestos. They occur as discrete nodular lesions on the pleura (or sometimes the pericardium) and generally do not affect lung function. It seems there is little evidence that pleural plaques on their own carry an increased risk of neoplasia or of the development of functionally significant asbestosis.

4. This was a point made to us by the solicitors we interviewed in the course of our survey: see para 1.2.

5. See Scottish Law Commission, Report on *The Law relating to Damages for Injuries Causing Death*, Scot Law Com No 31 (HMSO, 1973), which followed Memorandum No 5, *Damages for Injuries Causing Death* (Scottish Law Commission, 1967) and Memorandum No 17, *Damages for Injuries Causing Death* (Scottish Law Commission, 1972). The first and last of these documents are subsequently referred to as “SLC Report No 31 (1973)” and “SLC Memorandum No 17 (1972)”.

6. See paras 2.7, 2.21–2.33.

7. *Bern’s Executor v Montrose Asylum* (1893) 20 R 859, approved in *Stewart v London, Midland and Scottish Railway Co* 1943 SC (HL) 19. See also *Smith v Stewart & Co* 1960 SC 329.

8. *Auld v Shairp* (1874) 2 R 191, as explained in *Bern’s Executor v Montrose Asylum* (1893) 20 R 859, 863–865; *Smith v Stewart & Co* 1961 SC 91.

9. *Neilson v Rodger* (1853) 16 D 325. The principle is recognised in *Darling v Gray & Sons* (1892) 19 R (HL) 31 and *Bern’s Executor v Montrose Asylum* (1893) 20 R 859, 863. See also *Smith v Stewart & Co* 1960 SC 329.

10. *Leigh’s Executrix v Caledonian Railway Co* 1913 SC 838.

11. *Smith v Stewart & Co* 1960 SC 329.

2.18 These rules, as they stood immediately before the passing of the Damages (Scotland) Act 1976, are summarised in the last of the major cases dealing with the pre-1976 law:

“The general rule, for which I need not cite authority, is that when a man dies, his right to bring an action in respect of solatium [compensation for suffering], as distinct from reparation [compensation for patrimonial loss], dies with him. That right of action so far resembles the Roman *actio injuriarum*, or action upon outrage to the personality, that, the personality ceasing to be, so also the right of action expires. The executor accordingly cannot institute an action for solatium . . . This is not so in reparation; the executor is entitled to institute an action in order that there may be restored to the estate administered by him the amount by which the negligence of the defender diminished it: *Smith v Stewart & Co* 1961 S.C. 91. In addition, if the deceased has in his life-time instituted an action concluding for solatium, his executor may carry it on after his death—see *Stewart v London, Midland and Scottish Railway Co.* 1943 S.C. (H.L.) 19 per Viscount Simon L.C. at p 25.”<sup>1</sup>

### The relative's claim for non-patrimonial loss under the pre-1976 law

2.19 The loss of society award introduced by the Damages (Scotland) Act 1976 replaced an earlier form of non-patrimonial compensation, which was also called solatium. It was commonly described as a pecuniary acknowledgment of grief and suffering.<sup>2</sup> And the claimant was required to prove grief and the degree of suffering, which raised difficult questions and could have anomalous consequences.<sup>3</sup> It was no mere token payment, however. It could cover elements of loss of society in the post-1976 sense.<sup>4</sup> Account could also be taken of the laceration of the relative's feelings in contemplating the pain and suffering of the deceased before death supervened.<sup>5</sup> As with the deceased's claim for solatium, the non-patrimonial claim of an entitled relative who died after raising an action passed to his or her executor.<sup>6</sup> If no action had been commenced before the entitled relative's death, the claim lapsed.<sup>7</sup>

2.20 Finally, the relative's claim, whether for non-patrimonial or patrimonial loss, was held to rest on a distinct juridical foundation.<sup>8</sup> It could therefore be pursued independently of the deceased's claim. There was no duplication of damages, it was said, no overlap between the damages awarded to the deceased's executor and those awarded to the entitled relative.<sup>9</sup> But this is not to say that the relative's claim, any more than the executor's, was wholly independent of the deceased's claim.<sup>10</sup> Waiver or recovery of damages by the deceased excluded claims by the relatives and such claims might also be qualified by the deceased's contributory negligence (or excluded by a voluntary assumption of risk). Further, if the deceased's rights of action were time-barred, so were those of the relatives. These principles remain part of the present law.

### The loss of society award: Its nature and purpose

2.21 The new loss of society award was conceived as being rather different from the traditional concept of solatium for dependants.<sup>11</sup> It was to be made for reasons other than that of assuaging the grief and sorrow of the claimant. Its basis was to be much wider. It was consequently thought that awards would be more varied in their amounts than solatium for dependants under the pre-1976 law. The underlying assumption seems to have been that the wider basis would encourage more generous awards. This has not happened. Awards have settled in practice at the modest levels described above.<sup>12</sup> To that extent the expectations in 1973 have not been fulfilled. In fact, after allowing for inflation, current levels of compensation to relatives for non-patrimonial loss seem very little changed from pre-1976 levels. For example, awards quoted as typical in our memorandum in 1972 range from £1,250 to £1,500 for a widow and from £600 to £750 for a child: that is, after adjustment to 1991 values, from £10,100 to £12,100 and from £4,900 to £6,100

1. *Dick v Burgh of Falkirk* 1976 SC (HL) 1, 26.

2. *Elliot v Glasgow Corporation* 1922 SC 146, 148; *Smith v Comrie's Executrix* 1944 SC 499, 500.

3. *Rankin v Waddell* 1949 SC 555. See also *Brown v Macgregor* 26 Feb 1813 FC, *Elder v Croall* (1949) 11 D 1040, *Moorcroft v Alexander & Sons* 1946 SC 466.

4. *Kelly v Glasgow Corporation* 1949 SC 496, 501, discussed in *Donald v Strathclyde Passenger Transport Executive* 1986 SLT 625, 628. See paras 2.29–2.30.

5. *Black v North British Railway Co* 1908 SC 444, 453. See also *Smith v Comrie's Executrix* 1944 SC 499, 500; *McLeish v Fulton & Sons* 1955 SC 46, 48; *Nicolson v Cursiter* 1959 SC 350, 352.

6. *Kelly v Glasgow Corporation* 1951 SC (HL) 15. Contrast the loss of society award: see para 2.8.

7. *Fraser v Livermore Brothers* (1900) 7 SLT 450. In *Nevay v British Transport Commission* 1955 SLT (Notes) 27 mere intimation of the claim by the entitled relative before her death was held sufficient to prevent the claim lapsing. This decision, however, rested on *Leigh's Executrix v Caledonian Railway Co* 1913 SC 838 which was overruled by *Smith v Stewart & Co* 1960 SC 329. See para 2.17.

8. *Dick v Burgh of Falkirk* 1976 SC (HL) 1, 22–23, 25, overruling *Darling v Gray & sons* (1892) 19 R (HL) 31 which had been criticised in SLC Report No 31 (1973), paras 46–52, pp 15–17.

9. *Dick v Burgh of Falkirk* 1976 SC (HL) 1, 29.

10. See SLC Report No 31 (1973), paras 26–45, pp 10–15.

11. See SLC Report No 31 (1973), paras 105–112, pp 34–36, especially para 105, p 34, para 108, p 35 and para 111, p 36.

12. Para 2.12.

respectively.<sup>1</sup> We have noted that the current negotiating base is probably in the range £10,000–£12,000 for a widow and £5,000–£6,000 for a child.<sup>2</sup>

2.22 When a person is injured and dies his or her immediate family may be said to sustain non-patrimonial injury in three ways. First, where to their knowledge the injured person has undergone suffering before death, they experience distress and anxiety in contemplating that suffering. Second, they suffer grief and sorrow at the death. Third, they are deprived of the person's society and guidance in the future. But compensation for only one of these sources of injury to feelings is provided for in the Damages (Scotland) Act 1976, namely, deprivation of the deceased's society and guidance<sup>3</sup>. Solatium for grief and sorrow was of course awarded before the 1976 Act came into effect.<sup>4</sup> It was also said that in the assessment of solatium it was legitimate to consider—

“the laceration of the feelings of the widow and family in contemplating the pain and suffering to which the deceased was exposed before death actually supervened.”<sup>5</sup>

In our view this is clearly distinct from both grief and sorrow at the death and deprivation of the deceased's society in the future.

### The loss of society award: Its reception by the courts

2.23 Notwithstanding the terms of the 1976 Act, all three sources of injury to feelings have been taken into account in awards for loss of society.<sup>6</sup> And such awards are now the only competent awards for the immediate family's non-patrimonial loss. In certain cases the courts appear to have equated loss of society with solatium. But the extent to which there is now any judicial consensus on the matter is not altogether clear. Differing views have been expressed in the two cases in which section 1(4) of the 1976 Act has been considered by the Inner House, namely, *Dingwall v Walter Alexander & Sons (Midland) Ltd* 1982 SC (HL) 179 and *Donald v Strathclyde Passenger Transport Executive* 1986 SLT 625. We must therefore examine these decisions more closely.

### Dingwall v Walter Alexander & Sons (Midland) Ltd<sup>7</sup>

2.24 In *Dingwall* Lord Jauncey said in the Outer House:

“By abolishing awards of *solatium* the section clearly removes grief and sorrow as a factor to be considered. On the other hand, by substituting the alternative imponderables of the benefits flowing from society and guidance the section constitutes a new claim which differs in degree rather than in principle from the former claim for *solatium*. . . I conclude . . . that the use of the word ‘compensation’ in the subsection was not intended to effect an approach to loss of society awards different in principle to that which formerly prevailed in relation to *solatium*, albeit there may be some difference in degree and albeit younger children through the deprivation of a parent's society and guidance for a longer period than older children are likely to receive larger awards than their elder brothers and sisters.”<sup>8</sup>

Lord Jauncey found the defenders liable to the pursuers and awarded damages for, amongst other things, loss of society.

2.25 The defenders appealed on the question of liability and the pursuers took advantage of the appeal to present argument on the question of damages. The Second Division found for the defenders on the question of liability, but also discussed fully, albeit *obiter*, the pursuers' submissions on damages.<sup>9</sup> The majority (Lord Justice-Clerk Wheatley and Lord Kissen) thought that the loss of society awards should be increased by one-third. Lord Robertson, dissenting on this point, did not consider that the Lord Ordinary's figures for loss of society could be successfully challenged. The argument before the Court proceeded on the basis that both parties were agreed that solatium as such had been abolished and replaced by a loss of society award. The pursuers founded on the use of the word “compensation” in section 1(4) as contrasting with the traditional judicial concept of solatium attracting only an “acknowledgement payment”.<sup>10</sup> The defenders submitted that in recent years the concept of solatium had been judicially expanded to

1. SLC Memorandum No 17 (1972), para 94, p 70, citing cases reported between 1966 and 1970. In calculating the adjusted amounts 1968 has been taken as the base year for applying the multiplier. Amounts are stated in round figures.

2. Para 2.12.

3. Section 1(4).

4. See para 2.19.

5. *Black v North British Railway Co* 1908 SC 444, 453. See also *Smith v Comrie's Executrix* 1944 SC 499, 500; *McLeish v Fulton & Sons* 1955 SC 46, 48; *Nicolson v Cursiter* 1959 SC 350, 352.

6. See para 2.7.

7. 1982 SC (HL) 179. This was the first case in which section 1(4) of the 1976 Act was judicially interpreted: see p 191.

8. 1982 SC (HL) 179, 192–193.

9. The pursuers appealed unsuccessfully to the House of Lords, but no question was raised there about the quantum of damages: see 1982 SC (HL) 179, 243.

10. See para 2.19.

comprehend what had now become a loss of society award. Accordingly, awards of damages for solatium made before the passing of the 1976 Act would be a proper guideline for loss of society awards.<sup>1</sup>

2.26 Lord Justice-Clerk Wheatley expressed the opinion that with the abolition of solatium and the substitution of a loss of society award it must be presumed that something different was intended. He said:

“The old basis has been abolished and a new one has been introduced. That new basis seems to me to increase the considerations to be taken into account. Loss of society and guidance covers more aspects of family relationship than grief and sorrow, although grief and sorrow may be an inevitable consequence of the loss of society and guidance. Moreover, any limitation or restriction in the amount of the award to an acknowledgment or a token payment has been removed, and when compensation is substituted for such an award it means compensation in the normal use of the word. Accordingly, in my opinion, when a judge has to determine compensation for a loss of society award under the new legislation he must look at the relationship which existed between the parties involved, their respective ages, the circumstances in which they lived with respect to each other, and any other relevant factor, and from the weighing-up of these factors determine what in the exercise of his judgment an appropriate award of compensation should be for the loss of society and guidance and what that involves to the individual pursuer, once again keeping in mind the imponderables. On that approach, pre-Act awards can provide no necessary criteria.”<sup>2</sup>

2.27 Lord Kissen agreed that the loss of society awards should be increased by one-third. His reasons, however, were expressed rather differently:

“My view is that Parliament were simply re-stating the meaning of *solatium* by substituting for it other words in English which have a clearer meaning and are in line with what the Courts latterly considered *solatium* to include. On the other hand, in so re-stating it and using the word ‘compensation,’ I think that Parliament intended the Courts to exercise discretion in this matter on a more generous basis although it is not easy to calculate ‘compensation’ on such a matter. I would have awarded one-third more to each of the pursuers than the Lord Ordinary did if I had to award damages.”<sup>3</sup>

2.28 Lord Robertson, dissenting on this point, said:

“Although it is clear that Parliament intended to get rid of the old conception of *solatium*, and substitute therefor a more modern concept of loss of society, I am not convinced that the change in substance is material.”<sup>4</sup>

Later he said:

“. . . my conclusion is that the Act of 1976 has not in fact effected any alteration in the law in regard to this head of claim. I regard section 1(4) and (7) rather as simplifying the statement of the law as it has existed, by abolishing the word ‘*solatium*’ as a legal word not understood by laymen, and by simply translating it into the more common and easily understood language of section 1(4). So I am of opinion that the concept of grief and sorrow clearly contemplated in the old word ‘*solatium*’ is not excluded from an award for the loss of a deceased’s ‘society and guidance.’ So, too, I do not consider that the word ‘compensation’ in section 1(4) widens the scope of an award for loss of society, which was in any event embraced under the head of *solatium* before the Act. . . .

I agree accordingly with the Lord Ordinary that section 1(4) does not affect an approach to loss of society awards different in principle to that which formerly prevailed in relation to *solatium*.<sup>5</sup>

## Donald v Strathclyde Passenger Transport Executive<sup>6</sup>

2.29 *Donald* was an appeal by the pursuers from the sheriff court on the question of the damages awarded to them as parents for the loss of society of their son. The pursuers’ counsel initially submitted that wider considerations entered into an award of damages for loss of society; and that such awards should therefore tend to be larger than pre-1976 awards of solatium made in similar circumstances.<sup>7</sup> Subsequently, counsel departed from this submission, although it could have been supported by reference to Lord Justice-Clerk Wheatley’s opinion in *Dingwall*.<sup>8</sup> Counsel’s final position appears to have been that awards for loss of society should not be less than awards of solatium would have been in similar circumstances. Counsel for the respondents argued that the compensation provided for loss of society under the 1976 Act was something less than an award of solatium would have provided. Grief and distress at the time of death could no longer form an element in an award of damages, solatium having been expressly abolished by section

1. The arguments are summarised in the opinions of all three judges: see 1982 SC (HL) 179, 207–208, 219–220, 230.

2. 1982 SC (HL) 179, 209.

3. 1982 SC (HL) 179, 220.

4. 1982 SC (HL) 179, 230.

5. 1982 SC (HL) 179, 231–232.

6. 1986 SLT 625.

7. The arguments are summarised in the opinion of the Court: see 1986 SLT 625, 627–628.

8. 1982 SC (HL) 179, 209: see quotation in para 2.26.

1(7). For these reasons an award in respect of loss of society should in most cases be smaller than an award of solatium would have been.

2.30 The Court said:

“In our opinion it would be very strange if Parliament, in enacting the Act of 1976, had intended to take away a head of damages in respect of the death of a child which a parent had previously enjoyed. Counsel’s references to *Kelly v Glasgow Corporation*<sup>1</sup> and the well known and oft quoted passage in the opinion of Lord Russell in that case at p. 501, as to what is comprehended by an award of solatium, and also the opinion of Lord Dunedin in the seven judge case of *Black v North British Railway Co*<sup>2</sup> . . . confirm our opinion that solatium has never been a mere token payment, that it always could take into account the loss of society of a parent or child, and the guidance given by the one to the other. In our opinion there is nothing in s. 1(4) of the Act of 1976 which requires the court to make a larger award or a smaller award in respect of loss of society than it would have made in respect of solatium. The award made must be such as to compensate the claimant, in so far as money can, for the loss of the relative in question. Counsel for the respondents retreated from his initial submission after a discussion of the cases of *Kelly* and *Black*, and said that it was good enough for him to submit that an award in respect of loss of society was not bound to be greater than an award of solatium in similar circumstances would have been. He was content to rest his submissions on that basis.

As counsel appeared to agree between them that awards of solatium could be looked at when trying to assess what a reasonable award for loss of society should be in this case, there is no need for us to consider in detail the provisions of s. 1(4) of the Act of 1976. Nor is it necessary to consider the opinion of the Lord Justice-Clerk in the case of *Dingwall*. In his opinion in that case his Lordship seemed to suggest that awards in respect of loss of society should be greater than awards in respect of solatium to the extent of one-third, because what he called ‘the new basis’ had increased the considerations to be taken into account. It has to be noted however that when his Lordship came to describe these considerations, there were none of them which would have been irrelevant in making an assessment for solatium (see the opinion of the Lord Justice-Clerk at [p 209]<sup>3</sup> of the report). It has to be remembered that these observations of the Lord Justice-Clerk were obiter, but they have been frequently referred to. An opportunity may yet be afforded for reconsidering them, but we are of opinion that this is not it.”<sup>4</sup>

### The loss of society award: Some conclusions

2.31 In view of the judicial opinions quoted, the present state of the law as to the content of a loss of society award is difficult to determine. Lord Justice-Clerk Wheatley in *Dingwall* was of the opinion that “the new basis” increased the considerations to be taken into account.<sup>5</sup> It seems clear that the First Division in *Donald* were not satisfied that that was so.<sup>6</sup> They were content to proceed on the basis of an agreement between counsel which, at least in effect, corresponded with Lord Robertson’s view in *Dingwall*.<sup>7</sup> The third view is that of Lord Kissen in *Dingwall*, that section 1(4) had restated the meaning of solatium in English but had intended the courts to make more generous awards than before.<sup>8</sup>

2.32 It appears to us that it is of the essence of a loss of society award, as defined in section 1(4) of the Damages (Scotland) Act 1976, that it should look to the future. Section 1(4) provides that it is to consist of damages—

“by way of compensation for the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased’s society and guidance if he had not died.”

Neither grief and sorrow nor, more particularly, pre-death distress and anxiety can easily be brought within that description. Certainly it was originally envisaged that a loss of society award would be given for reasons other than that of assuaging the grief and sorrow of the claimant.<sup>9</sup> Accordingly, including such elements of compensation within a loss of society award does not appear to us to have a secure juridical foundation. We also think it is probable that these elements have been undervalued when taken into account.

2.33 However that may be, the restrictive approach adopted by the courts has undoubtedly had serious consequences. The claims of the injured person for solatium and of the immediate family for loss of society, if the injured person dies, are generally not of comparable value.<sup>10</sup> This runs counter to the assumptions underlying the reforms in 1976.

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1. 1949 SC 496.

2. 1908 SC 444, 452–453.

3. The relevant passage is quoted in para 2.26.

4. 1986 SLT 625, 628.

5. 1982 SC (HL) 179, 209: see quotation in para 2.26.

6. 1986 SLT 625, 628: see quotation in para 2.30.

7. 1982 SC (HL) 179, 230, 231–232: see quotation in para 2.28.

8. 1982 SC (HL) 179, 220: see quotation in para 2.27.

9. See para. 2.21

10. See paras 2.12–2.15.

Indeed, precisely the problem we are now concerned with was then recognised, though perhaps not fully appreciated. The new form of award was thought to be sufficient in itself:

“It was suggested to us that there might be a growing tendency to delay the settlement of claims by living pursuers if the right to solatium were extinguished on death. We doubt this because, in the normal case at least, there would be more substantial claims by the deceased’s dependants.”<sup>1</sup>

With hindsight, we can now see that the problem is rather more complex.

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

# Part III Principles and Policy

## Preliminary

3.1 Our starting point is that reform is undoubtedly required to deal with the problem of the injured person who survives to initiate a claim but whose life is seriously at risk. It is clear, as we have tried to bring out in Part II, that the present law may provide a significant financial incentive to delay in such cases. There was widespread agreement about this both among those participating in our preliminary survey and among our commentators, though understandably rather less agreement about what precisely should be done. It is equally clear that the claims which concern us are more numerous than was anticipated in the mid-1970s and we cannot assume that they will diminish. As already noted,<sup>1</sup> we have no evidence of deliberate delay, but delay is endemic in both the formal and the informal processes whereby personal injury claims are pursued. The potential for exploitation is there. It is only sensible, therefore, to try to eliminate any financial incentive there may be within the legal rules themselves to exploit delay.

3.2 Accordingly, in this part we discuss the principles underlying the present rules and the policy which we think should guide reform. We consider in particular:

- (a) whether, for the purpose of reform, a distinction should be made between death due to the injury in question and death due to extraneous causes;<sup>2</sup>
- (b) what weight should be given to the view that solatium is inherently personal;<sup>3</sup>
- (c) what approach should be adopted to the relative's non-patrimonial award;<sup>4</sup>
- (d) whether allowing the deceased's claim for solatium to survive, while retaining a non-patrimonial award for relatives, would entail duplication of damages;<sup>5</sup>
- (e) how some other jurisdictions have dealt with the deceased's non-pecuniary (non-patrimonial) claims.<sup>6</sup>

In Part IV we develop detailed recommendations. As a first step, however, we must deal briefly with some suggestions for procedural remedies made to us by our consultees.

## Procedural remedies

3.3 When discussing delay in Part I we mentioned one of those suggestions, namely, that reform of court procedures was primarily what was required.<sup>7</sup> For the reasons given there we think that more radical reform is needed.<sup>8</sup> We would reiterate, however, that we see the continuing effort to improve court procedures as an important aspect of reform generally. We would therefore strongly encourage it. In our view, what can be achieved by such means in this area is best left to the judgment of the courts and the rule-making authorities.

3.4 Similarly, we are reluctant to recommend the introduction of *ad hoc* remedies for special categories of claims. For example, it was suggested to us that the courts should have power to apply penal interest to damages in order to discourage late settlement of asbestos-related claims. It was also suggested that specific provision should be made for the application of interest to damages from a date earlier than the date of the raising of an action. Apparently it is common practice among insurance companies to refuse to consider interest on damages except where legal proceedings are instituted. Again, the argument is that a discretionary enhancement of damages by way of interest may be an inducement to settle earlier.

3.5 We recognise that late settlement, and indeed litigation generally, is stressful for claimants, particularly claimants suffering from a painful and possibly terminal disease.<sup>9</sup> But such evidence as there is regarding the influence of liability

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1. See paras 1.12, 1.13.

2. Paras 3.6–3.9.

3. Paras 3.10–3.19.

4. Paras 3.20–3.25.

5. Paras 3.26–3.28.

6. Paras 3.29–3.37.

7. Para 1.16.

8. Para 1.17.

9. See para 1.18.

to pay interest tends to be anecdotal and rather less than conclusive.<sup>1</sup> There are also difficulties about what is in effect a punitive use of interest in complex cases, where it may not be easy to allocate responsibility for delay.<sup>2</sup> We therefore have reservations about such remedies and prefer to look for a more fundamental solution to the problem.

### **Should a distinction be made between death due to injury and death due to extraneous causes?**

3.6 Under our rules at present an injured person's claim for solatium is terminated by death howsoever caused. In other jurisdictions a distinction is made, or has been made in the past, between death which is caused by the injury in question and death due to extraneous causes.<sup>3</sup> The deceased's estate may then recover damages for the deceased's non-pecuniary loss in the latter case, though not the former.<sup>4</sup> There is a record of some support for a rule of this kind among those consulted before our report in 1973.<sup>5</sup> And one of our commentators favoured it in the recent consultation on Discussion Paper No 89.

3.7 We are not persuaded, although we accept that such a rule has a certain logic. When the injured person's death is a consequence of the injury, his or her claim for solatium is replaced by the non-patrimonial claims of the immediate family. But, as we pointed out in Part I, supervening death due to extraneous causes can have most capricious effects.<sup>6</sup> Some people regard it as unsatisfactory that the defender should benefit, perhaps substantially, from such a chance event.<sup>7</sup> Arguably, however, it is no less arbitrary that death in consequence of the injury should terminate a claim for solatium. It is somewhat surprising and apparently unjust that the amount recoverable by a family and payable by a wrongdoer should depend to such an extent on the precise date of death. And in both cases the death of the claimant means that past suffering goes unacknowledged.

3.8 It is in fact the element of randomness which many find offensive. Accordingly, we see no reason for adopting a rule which accords preference to claims on the basis of a distinction between one cause of death and another. And, certainly, where such a rule exists, it tends to be criticised. For example, the position in Australia has been described thus:

"From the outset, Australian legislation therefore excluded claims for the decedent's non-pecuniary losses. New South Wales, Victoria and the two territories do so only when the death was actually caused by the injury in question, but all others [ie Queensland, South Australia, Western Australia, Tasmania]—with more consistency—are of general application and also extend therefore to those, admittedly rarer, instances where death supervenes from some unconnected cause."<sup>8</sup> (emphasis added).

More shortly, the Law Reform Commission of Saskatchewan said in a recent report:

"The Commission is of the opinion that recovery by the estate should not depend on whether or not the deceased died from the injuries inflicted by the wrongdoer . . . it is an arid distinction that should not be retained."<sup>9</sup>

3.9 In rejecting the distinction we are merely following the precedent set in our report in 1973, although the rejection then was justified in a rather different way:

"We have given careful consideration, too, to the argument that a distinction falls to be made between cases where the injured person's death was a consequence of the injury, when his personal solatium should become transformed into a claim for solatium on behalf of his dependants, and cases where his death arose from unconnected causes, including natural causes, when his personal claim to solatium should transmit. We reject this argument, even though solatium may form a substantial proportion of the award in cases of serious injury, because a new situation arises on death, howsoever occasioned, in which the person who suffered the loss can no longer be solaced or otherwise benefited by a monetary payment."<sup>10</sup>

Here the principle is invoked that a claim for solatium is inherently personal. This is an important principle, which merits careful consideration.

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1. See, for example, H Genn, *op cit*, pp 101, 111–112.

2. Compare para 1.17.

3. For example, in Australia and Canada: see Discussion Paper No 89, paras 3.31, 3.32, pp 48–50.

4. The claim is quantified as vested in the deceased immediately before death.

5. See SLC Report No 31, para 24, pp 9–10; Discussion Paper No 89, para 3.27, p 46.

6. Para 1.19.

7. See paras 3.11–3.12. On the other side, we were told of a case where a very substantial settlement in respect of paraplegia was followed almost immediately by the claimant's death. The settlement took account of the burden of long-term care imposed on the claimant's family. There was no question of renegotiating the settlement.

8. J G Fleming, *The Law of Torts* (The Law Book Company Ltd, 1987), pp 640–641.

9. *Proposals for a Survival of Actions Act: Report to the Minister of Justice* (Law Reform Commission of Saskatchewan, 1985). The proposals were implemented in The Survival of Actions Act 1990 (Chapter S–66.1).

10. SLC Report No 31 (1973), para 24, pp 9–10.

## 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.”<sup>1</sup>

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 support prior to 1976. For example:

“The dissenting opinion of Lord Justice-Clerk Hope in *Neilson v Rodger*<sup>2</sup> and the leading opinion of Lord McLaren in *Bern’s Executor*<sup>3</sup> 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*<sup>4</sup> 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*<sup>5</sup>) 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.”<sup>6</sup>

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 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.”<sup>7</sup>

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,<sup>8</sup> or for distinguishing certain forms of action from others.<sup>9</sup> 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

1. 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.

2. (1853) 16 D 325.

3. (1893) 20 R 859.

4. (1893) 20 R 859.

5. (1893) 20 R 859.

6. *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.

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

8. See paras 4.23–4.24.

9. See para 4.30.

difficult to justify on ordinary principles of justice.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

3.15 Further, the pre-1976 rules, which provided for conditional transmissibility, were sometimes justified by invoking the formal doctrine of *litiscontestatio*, 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.<sup>4</sup> In the pure theory *litiscontestatio* 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.<sup>5</sup>

3.16 Under a looser interpretation the raising of an action was treated as *litiscontestatio*, thus justifying the rule that an executor might carry on an action for solatium instituted by the deceased.<sup>6</sup> 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-1976 law.<sup>7</sup> 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 *Dalglish 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,<sup>8</sup> 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.”<sup>9</sup>

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

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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.

4. John Erskine of Carnock, *An Institute of the Law of Scotland* (Bell & Bradfute, 1871), iv.1.69.

5. Erskine, *op cit*, iv.1.70.

6. *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.

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

8. 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.

9. 1976 SC 32, 54.

## 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. 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*,<sup>1</sup> 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.

## The relative's non-patrimonial award

3.20 Our starting point is that there should continue to be an award akin to the present loss of society award. And here we are not merely stating the obvious. Prior to our report in 1973 serious consideration was given to abolishing such awards and instead allowing the deceased's claim for solatium to survive.<sup>2</sup> That scheme was rejected, however, on the ground that the then dependant's claim for solatium was too well established to be discarded without substituting some alternative. And, if one of these rights had to go, as was assumed, it was thought better as a matter of principle to retain the dependant's right; for this would emphasise the continuing loss of the living rather than the past loss of the dead.

3.21 It was accordingly part of the general policy in our report in 1973 to place less emphasis on past suffering. And it was consonant with such a policy that the new award should be strongly orientated towards future or continuing loss arising from deprivation of the deceased's society and guidance. However, as we tried to bring out in Part II, elements of past suffering have now been incorporated into the concept of "loss of society"—somewhat dubiously in our view.<sup>3</sup> At the very least, therefore, if we are to retain a non-patrimonial award for relatives, we must clarify the conditions under which it can be made.<sup>4</sup>

3.22 It is a separate question whether we should go further. It would be possible, for example, to enhance the loss of society award. We received many complaints from consultees that current awards are too low. Arguably, the emotional distress and grief which a person may suffer while and after a close relative dies are not given due weight by the courts. Nor is there sufficient recognition that there can be few injuries more serious as far as a family is concerned than the death of one of its members. And, of course, it is the discrepancy between loss of society awards and awards of solatium which creates the financial incentive to delay.<sup>5</sup> If loss of society awards were more generous that incentive might be reduced.

3.23 In fact, in Discussion Paper No 89 we did suggest that loss of society awards might be enhanced as an alternative to making solatium transmissible.<sup>6</sup> We also suggested how this might be done, for example by setting tariffs or minima.<sup>7</sup> Significantly, our suggestion was criticised on the basis that, realistically, enhancement could only be achieved through tariffs or minima, which the critic regarded as generally undesirable. We are inclined to agree, and we would be reluctant to recommend the introduction of such a scheme.<sup>8</sup>

3.24 Certainly our consultees rejected tariffs and minima conclusively, if not unanimously. They attached great importance to preserving the discretion of the courts when making awards of damages. This was thought to provide essential flexibility and sufficient certainty. There was no confidence that a system of tariffs could be devised which would both operate fairly and take account of the widely varying circumstances of individual families. We agree, though we do recognise that tariffs may have advantages. Systematic quantification is not easy when injury and loss cannot

1. 1976 SC 32. See para 3.17.

2. See Discussion Paper No 89, paras 4.11–4.12, pp 63–64.

3. See paras 2.21–2.33.

4. See paras 4.38–4.40.

5. See paras 2.9–2.15.

6. Discussion Paper No 89, para 4.32, p 78. The suggestion attracted a good deal of support from those who were inclined to accept the view that solatium is inherently personal. We also put forward the possibility of enhancing the loss of society award in conjunction with making solatium transmissible: see Discussion Paper No 89, paras 4.33–4.34, p 79. This received rather less support.

7. See Discussion Paper No 89, paras 4.25–4.29, pp 72–76.

8. See further paras 4.3–4.6.

be readily measured in money. We also accept that a tariff system could save close relatives of the deceased from the ordeal of giving evidence on the nature and degree of their suffering. Undeniably, there is something distasteful about conducting a judicial inquiry into the feelings of a grieving family. Nevertheless we are not persuaded that the advantages which tariffs may provide are sufficient to compensate for their defects.

3.25 Other reforms were also suggested by our consultees. For example, several proposed that the class of relatives who qualify for non-patrimonial awards should be extended. Various extensions were suggested, most commonly that siblings should be included within the class. We have considerable sympathy with these proposals. We are not however prepared to make recommendations at present. In our view such matters should be considered in a wider context than that of our current remit. Accordingly, we intend to give further thought in due course to the possibility of undertaking a more extensive review of the law of damages.

## Duplication of damages

3.26 As mentioned,<sup>1</sup> it was assumed prior to our report in 1973 that a choice must be made between allowing the deceased's claim for solatium to survive and retaining the relative's non-patrimonial award. We have commented on one aspect of the policy which guided that choice, namely, that compensation should be directed primarily to real continuing loss rather than past suffering. But another major concern was that duplication of damages or over-compensation should be avoided.<sup>2</sup> So a primary objective in our report in 1973 was to separate clearly the claims of a deceased's executors and those of his or her dependants.<sup>3</sup> The main reason for this was the much criticised case of *Darling v Gray & Sons*.<sup>4</sup> That case established that a dependant's right of action was excluded if the deceased's executor had taken up an action of damages for patrimonial loss and solatium instituted by the deceased. One of the reasons for the decision was that to admit the dependant's right of action in these circumstances would entail duplication of damages. In recommending the abolition of the rule in *Darling*, it was said:

"This approach should not lead to duplication of damages if other Recommendations in this Report are accepted, namely that the deceased's claim for solatium should not transmit to the executors, and that the executors' right to insist in the deceased's claim should be limited to patrimonial loss attributable to the period up to his date of death."<sup>5</sup>

In other words, the proposal that the right to claim solatium should terminate on death was linked to the aim of preventing duplication of damages.

3.27 A similar concern was manifest in some of the suggestions made by our consultees. For example, it was proposed that relatives should be allowed to elect between pursuing their own non-patrimonial claims and taking the benefit of the deceased's claim for solatium. Again, it was thought incompatible to allow the deceased's claim for solatium to survive and at the same time compensate a relative for distress caused by seeing the deceased suffer. In both cases the aim is to avoid over-compensation.

3.28 We entirely agree that it is a proper aim to prevent duplication of damages. But seeking to set off the deceased's claim against the relative's claim is misconceived.<sup>6</sup> The two claims are juridically quite distinct.<sup>7</sup> Allowing the deceased's claim for solatium to survive as part of his or her estate cannot involve duplication of damages just because a relative who receives compensation in his or her own right may also take the estate. This principle was clearly established in *Dick v Burgh of Falkirk*<sup>8</sup> which overruled *Darling v Gray & Sons*<sup>9</sup> a few months before the Damages (Scotland) Act 1976 came into force.

## Comparative law

3.29 In Discussion Paper No 89 we looked briefly at a number of other jurisdictions<sup>10</sup>. 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.

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1. Para 3.20.

2. See Discussion Paper No 89, para 4.13, pp 64-65.

3. See SLC Report No 31 (1973), para 4(a)-(d), p 2.

4. (1892) 19 R (HL) 31. See SLC Report No 31 (1973), paras 46-52, pp 15-17.

5. SLC Report No 31 (1973), para 51, p 17.

6. In fact in Discussion Paper No 89 (para 4.18, p 67) we asked directly whether there should be such a set-off and our commentators agreed unanimously that there should not.

7. See para 2.8.

8. 1976 SC (HL) 1, 22-23, 25, 29.

9. (1892) 19 R (HL) 31 See para 2.20.

10. 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.<sup>1</sup> 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).<sup>2</sup>

3.31 It is true that most of the provinces have by now adopted the Uniform Act in whole or in part.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

3.32 It is also clear from the Canadian example that considerable complications arise if different rules apply in respect of different heads of non-patrimonial damages. Equally, such distinctions cannot be consistently justified. Again, an observation of the Ontario Law Reform Commission is apposite. Discussing the argument that the non-pecuniary (non-patrimonial) claim is “personal to the deceased” (and therefore intended only for the deceased's own benefit), the Commission comments:

“. . . in Canada this argument has prevailed in all but one jurisdiction, insofar as loss of expectation of life is concerned, but (at least in terms of express statutory language) not universally in respect of claims for pain and suffering and loss of amenities: damages under the latter two heads remain recoverable in some jurisdictions despite the theoretical applicability of the ‘principal criticism’ just described.”<sup>6</sup>

We conclude that if a claim for solatium is allowed to survive, it should survive in respect of all elements of loss and injury, without distinction. That is, the claim would survive, if at all, as it might have been pursued by the deceased (but quantified as at the date of death).

## 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.<sup>7</sup> 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.<sup>8</sup> This enables recovery of damages for pain and suffering and loss of amenities to date of death, as well as for accrued pecuniary loss.<sup>9</sup> Under the 1976 Act a deceased's dependants may bring an action in respect of wrongful death.<sup>10</sup> The damages recoverable include compensation for loss of support and a fixed

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

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

3. 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.

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

5. Para 3.19.

6. *Op cit*, p 89.

7. See para 3.31.

8. S 1. Defamation is excluded.

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

10. S 1.

sum for “bereavement” which can be varied by ministerial order.<sup>1</sup> 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.

3.35 Historically, damages for pain and suffering and loss of amenities under the 1934 Act were set off against dependants’ claims under the 1976 Act and its predecessors.<sup>2</sup> This, however, no longer applies, since the 1976 Act was amended by the Administration of Justice Act 1982.<sup>3</sup> Actions for damages in respect of pain and suffering and loss of amenities now survive without qualification. A dependant taking the deceased’s estate may therefore have the full benefit of the deceased’s claim for damages under these heads, as well as benefits in his or her own right under the 1976 Act.<sup>4</sup> Interestingly, these rules have been criticised on the basis that non-pecuniary losses are personal to the deceased:

“If the estate has suffered loss by reason of the loss to the deceased being pecuniary, an action to recover such loss is proper, but if the loss is non-pecuniary, as it may for instance be in torts involving injury to reputation or to the person, the recovery of such a loss by the estate is more dubious. It is therefore not surprising that section 1 of the 1934 Act imposes certain limitations on recovery by the estate.<sup>5</sup> These limitations have . . . a somewhat erratic impact, and it is thought that the law would be both simplified and improved if the Act of 1934 were amended so as to allow all actions to survive for the benefit of the deceased’s estate but at the same time to limit the estate’s recovery in all cases to accrued items of a pecuniary nature, non-pecuniary losses of the deceased being personal to him and having no proper entitlement to a place in the assessment of damages which come to his estate.”<sup>6</sup>

3.36 Comparing the rules in England and Wales with the rules in the Canadian jurisdictions we are immediately impressed by the great divergence of views. Clearly, the proposition that death should necessarily terminate a claim for solatium in all circumstances is far from obvious. Further, the provision in England and Wales emphasises the relatively lower level of the provision in Scotland. Admittedly, the fixed sum for bereavement (£7,500) payable under the Fatal Accidents Act 1976 is restricted in scope and rather less generous than payments for loss of society in Scotland.<sup>7</sup> Accordingly, where death follows immediately on injury, and there is no question of the deceased having undergone pain and suffering, the Scottish provision may be more generous. But in the case of prolonged suffering before death, with which we are mainly concerned, the deceased’s family will normally be much better off under the English provision. It is therefore a serious question whether, or to what extent, we should now adopt the English rules as a model for reform in Scotland. Certainly, several of our commentators suggested just that, and it is clearly desirable that provision in the two jurisdictions should be comparable.

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.<sup>8</sup> 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.<sup>9</sup> And, as we mentioned,<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> Reform is therefore not simply a matter of adopting the English rules.

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

2. *Murray v Shuter* [1976] QB 972. See D A M Kemp, *The Quantum of Damages in Personal Injury and Fatal Accident Claims* (Sweet & Maxwell Ltd, 1975, 1990), Volume 1, para 22–006.

3. S 3, substituting a new s 4 in the Fatal Accidents Act 1976, which excludes taking account of, *inter alia*, damages under the 1934 Act.

4. *Ie* under ss 1A and 3 of the 1976 Act. See, for example, W V H Rogers, *op cit*, p 656.

5. In fact, the exclusion of defamation etc from the 1934 Act was not the result of a conscious policy that it was inappropriate for such actions to survive death. The legislators were simply avoiding controversial areas and dealing with the urgent issue of deaths in road accidents: see Rogers, *op cit*, p 719; Report of the Committee on Defamation (HMSO 1975, Cmnd 5909), paras 396–397, pp 109–110—subsequently referred to as “the Faulks Report (1975)”.

6. McGregor, *op cit*, para 719, pp 462–463.

7. See para 2.12.

8. Para 3.24.

9. See para 2.7.

10. Para 3.25.

11. 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.

12. See paras 4.29–4.35.

# Part IV Reform

## Preliminary

4.1 In this part we develop our specific recommendations for reform in light of the principles discussed in Part III. Our general policy is clear. It is not our purpose to carry out a comprehensive review of the Damages (Scotland) Act 1976. Our aim is limited to correcting a perceived defect in the present law. Otherwise we recommend change only where it seems necessary as part of a coherent solution to the problem posed in our remit.<sup>1</sup>

4.2 In our recommendations we try to ensure so far as possible that claimants in Scotland will not be disadvantaged in comparison with their counterparts in England and Wales. That seems to us to be a necessary objective in this area of the law.<sup>2</sup> It is no part of our policy, however, to try to equalise awards of damages in the two jurisdictions, even if that were possible. That is a more general issue which our remit does not address. We also recognise that, as far as the law of tort or delict is concerned, the two legal systems have very different historical starting points and have developed very differently. This limits the possibilities of assimilation by piecemeal reform.

## Can the problem be solved by enhancing the relative's non-patrimonial award?

4.3 We have accepted as a first principle that we must retain an award akin to the present loss of society award.<sup>3</sup> One solution to our problem, therefore, might be simply to enhance that award.<sup>4</sup> In this way the relatives' claims might substantially offset the loss of solatium when a claimant dies while pursuing the claim. We might thereby counter the incentive to delay settlement in at least some cases.

4.4 Such a solution may be thought to have several advantages. Arguably, it would entail minimal interference with the structure of the current legislation.<sup>5</sup> It would be entirely consistent with the principle that the deceased's claim and the surviving relatives' claims are juridically distinct.<sup>6</sup> Non-patrimonial awards to relatives would be designed to compensate their real and continuing suffering and not the past suffering of the deceased. In other words, relatives would be compensated for their own suffering and would not benefit from someone else's suffering. There might also be procedural advantages. Any dispute would most likely be confined to the relatives' claims, concerning which evidence would be readily available. The deceased's executor would be concerned only with the deceased's claim for patrimonial loss, which is generally amenable to objective assessment and therefore perhaps less likely to become the subject of prolonged dispute or litigation. Finally, as we have noted,<sup>7</sup> the solution of enhancing relatives' awards as an alternative to allowing claims for solatium to survive attracted significant support among our consultees. Those favouring the solution, though not a majority, included both legal academics and legal practitioners, perhaps most notably the Faculty of Advocates. The Law Society of Scotland was divided, a clear indication that the issues are controversial and tend to arouse strong reactions.

4.5 We are not convinced, however, that a solution along these lines would work. Certainly it would not be a complete answer to all the problems which might arise. Enhancing relatives' claims would not introduce any incentive to settle quickly, or reduce any incentive to delay settlement, where there were no appropriate claims. Nor would it assuage the sense of injustice where the claimant dies from extraneous causes and the immediate family consequently have no claims.<sup>8</sup> Most importantly, the success of the solution would depend on devising a mode of enhancement which would ensure that the courts made appropriate awards. We doubt if this can be done.

4.6 In Discussion Paper No 89 we suggested that the loss of society award might be reformulated to distinguish expressly elements of emotional suffering, including distress and anxiety caused by seeing the deceased suffer before

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1. See para 1.1.

2. See paras 3.33, 3.36–3.37.

3. See para 3.20.

4. See paras 3.22–3.23.

5. Damages (Scotland) Act 1976; Administration of Justice Act 1982, Part II.

6. See paras 2.8, 2.20, 3.28.

7. Para 3.23.

8. See paras 1.19, 3.7–3.8, 3.13.

death.<sup>1</sup> Our idea was that the longer the deceased's suffering had continued the greater would be the relatives' non-patrimonial claim. As a result of such a reformulation, depending on the amounts awarded, the relatives' non-patrimonial claims could equal or even exceed the solatium which would have been due to the deceased. But, so long as awards were discretionary, the effectiveness of the solution would depend greatly on how much the courts chose to award in respect of the several elements of suffering. The legislation would give the courts a means of dealing with the mischiefs of possible incentive to delay and under-valuation of relatives' non-patrimonial claims. It would be for the courts to apply it effectively. Doubts were expressed on this count both by solicitors participating in our preliminary survey and by our commentators. We share these doubts. Certainly, we could not compel enhancement merely by reformulating the award, though we could possibly reinforce the reformulation by introducing a tariff or a system of tariffs or minima.<sup>2</sup> As we mentioned, however, there was widespread resistance among our consultees to the introduction of any such scheme.<sup>3</sup> We therefore conclude that our problem cannot be solved effectively by seeking to enhance relatives' non-patrimonial awards.

### **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.<sup>4</sup> Indeed, the fact that there is such a distinction has featured prominently in the demand for reform in Scotland.<sup>5</sup> There are of course counter-arguments about the personal nature of solatium, but we do not regard them as conclusive.<sup>6</sup> Whether a right to claim solatium should be transmissible is a matter of policy on which a decision could be taken either way.<sup>7</sup> 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.<sup>8</sup> 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.

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.

4.9 We do not favour confining the benefit of transmissibility as suggested. It seems to us that if a claim for solatium is allowed to survive, it should survive for the benefit of the claimant's estate and those who take it, without qualification. We do accept, however, that defamation and injury to reputation generally may give rise to special considerations. Here the principle of election is particularly important and more must be said about that.<sup>9</sup> With that reservation, we think the correct starting point for reform is to allow the right to claim solatium in respect of personal injury to transmit to the claimant's executor.

4.10 We accordingly recommend:

- 1. Subject to such qualifications as are contained in subsequent recommendations, any right to damages by way of solatium vested in a claimant in consequence of personal injury should transmit to his or her executor in the same manner as the corresponding right to damages by way of compensation for patrimonial loss transmits under the present law.**

(Clause 3)

Clause 3 of the draft Bill in Appendix A substitutes a new section 2 in the Damages (Scotland) Act 1976. Subsection

1. Discussion Paper No 89, para 4.24, p 71.

2. See para 3.23; Discussion Paper No 89, paras 4.25-4.29, pp 72-76.

3. See para 3.24.

4. See paras 3.33-3.37.

5. See paras 3.33, 3.36.

6. See paras 3.10-3.19.

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

8. See paras 3.26-3.28.

9. See paras 4.23-4.24, 4.30.

(1) implements recommendation 1 and re-enacts the current provision in respect of damages for patrimonial loss. Clause 4 inserts a new section 2A into the 1976 Act providing for enforcement by the executor of rights transmitted under section 2(1). In this respect section 2A merely re-enacts existing provisions in section 2(1) and (2) of the 1976 Act in their current form.

## Quantification of damages

4.11 Under our scheme what is transmitted to the deceased's executor is the right to damages vested in the deceased immediately before death. The damages payable to the executor must therefore be quantified by reference to the period ending immediately before the deceased's death. It is important to appreciate just what this means in relation to a claim for solatium. The claim which survives is not necessarily the full claim as it might have been pursued by the deceased. In the case of the living claimant part of the damages payable by way of solatium may well reflect future pain and suffering or future loss of faculties or amenities. And that part may well be much the larger part of the claim. We are proposing that, when a right to damages transmits, account is taken only of pain or suffering or loss of faculties or amenities endured before death. In other words, a claim for solatium is to be treated exactly as a claim for patrimonial loss is treated under the present law. This may seem so obvious as to be hardly worth saying. But it could have a very substantial effect on the value of a claim. Clearly, the shorter the period between injury and death, the smaller the claim for solatium is likely to be.

4.12 We recommend:

2. **When a right to damages by way of solatium transmits to an executor, the damages payable to the executor should be quantified by reference to the period ending immediately before the deceased's death.**

(Clause 3)

Recommendation 2 is implemented by section 2(3) substituted in the Damages (Scotland) Act 1976 by clause 3 in the draft Bill in Appendix A. Section 2(2) as so substituted re-enacts the current provision relating to damages for patrimonial loss in section 2(3)(b) of the 1976 Act.

## The elements of solatium

4.13 In Part II we described the threefold classification of damages by way of solatium as compensation for—

- (a) pain and suffering;
- (b) loss of faculties and amenities;
- (c) loss of expectation of life.<sup>1</sup>

These elements are analytically distinct in the sense that not every element need be present in every case. Thus, in *Dalgleish*<sup>2</sup> the injured child was comatose. An award of damages for pain and suffering would therefore have been inappropriate. The necessary awareness was lacking. In contrast, awareness is not a prerequisite of an award of damages for loss of faculties and amenities or loss of expectation of life.<sup>3</sup> It is not however the practice of the Scottish courts to allocate separate sums to these analytically distinct elements of solatium. The general view is that one sum is awarded for solatium:

“This view is reinforced by what was said in the unreported opinion of the First Division in the case of *Keith v Fraser and Others* where the Lord Ordinary had awarded separate sums in assessing solatium . . . it is stated that the court felt: ‘bound to say that in our opinion, the course the Lord Ordinary was persuaded by counsel to adopt in considering solatium cannot be justified in authority or practice. It involved, in effect, a division of what is truly an indivisible head of damages into several parts which are no more than representative of certain of the elements which should properly be considered together in the assessment of the claim for solatium. As a general rule we are in no doubt that solatium should be considered and assessed as a single entity . . .’”<sup>4</sup>

4.14 There is another ground on which the elements of solatium can be distinguished. Pain and suffering and loss of faculties and amenities are, or may be, continuing states. Loss of expectation of life, as opposed to awareness of that loss, is a once-and-for-all consequence of injury. In other words, a claim for pain and suffering or for loss of faculties and amenities may become more valuable the longer the effects of injury persist. A claim for loss of expectation of

1. See para 2.3; *Dalgleish v Glasgow Corporation* 1976 SC 32, 53.

2. 1976 SC 32.

3. *Reid v Lanarkshire Traction Co* 1934 SC 79, 84; *Dalgleish v Glasgow Corporation* 1976 SC 32, 54. Where there is awareness of loss of expectation of life some account may be taken of it as an aspect of pain and suffering: see the comment in the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (HMSO, 1978, Cmnd 7054), Volume 1, para 363, p 86 (subsequently referred to as “the Pearson Report (1978)”).

4. *Parke v Glasgow District Council* 1979 SLT 45, 47.

life is treated differently. Damages for such loss are said to be restricted to a conventional sum, though the practice of awarding a single sum for solatium makes it difficult to know what the conventional sum is.<sup>1</sup>

4.15 These distinctions have implications if a right to damages by way of solatium is allowed to transmit. The executor to whom the right transmits would have the task of proving the extent of the deceased's suffering in disputed cases. This may well be a difficult task on occasion in absence of evidence from the deceased. And the shorter the period of survival after injury the more difficult it is likely to be. In the extreme case of instantaneous or near-instantaneous death there are unlikely to be provable claims for pain and suffering or loss of faculties and amenities.<sup>2</sup> But could the executor pursue a claim for loss of expectation of life in these circumstances? One of our consultees argued strongly that this would indeed follow if a right to claim solatium was allowed to transmit without qualification. He clearly regarded any such consequence as unacceptable.

4.16 The point is well taken. There may be some justification for allowing a claim for lost life expectancy to survive as an element in a larger claim, which the court must assess on a substantive rather than a conventional basis. But it seems very artificial to allow the claim to survive in the case of instantaneous or near-instantaneous death, where it may be the only non-patrimonial claim which can be made by the deceased's executor. It is in just such circumstances that the court's way of assessing the claim is most likely to exacerbate rather than assuage the distress of the deceased's relatives. Conversely, the courts are likely to come under pressure to change the present basis of assessing the claim. How are they to respond? Arguably, the present law provides little guidance and our recommendations could make an already unsatisfactory situation worse. We therefore conclude that special provision is required for loss of expectation of life, if only to avoid confusion.

### Loss of expectation of life

4.17 It is worth noting that under the present law loss of expectation of life is taken into account when assessing the patrimonial loss of the living claimant. Section 9 of the Damages (Scotland) Act 1976 applies where a pursuer's "expected date of death is earlier than it would have been if he had not sustained the injuries". In that case the court can assume a normal lifespan when assessing patrimonial loss. The question now is: How should loss of expectation of life be treated in the case of a deceased claimant whose executor is pursuing a claim for solatium?

4.18 One possibility, perhaps the simplest option, would be not to allow a claim for solatium for loss of expectation of life to survive. The claim is insignificant in practice. While the basis of assessment remains conventional, such a claim is always likely to be swamped by the typically much larger claims for pain and suffering and loss of faculties and amenities. If there are no larger claims, as might well be the case where death is instantaneous or near-instantaneous, is there any merit in preserving the merely conventional claim? Here we can cite the Canadian example.<sup>3</sup> Among the various provinces, even where claims for non-pecuniary loss are allowed to survive, claims for loss of expectation of life tend to be excluded. But this solution seems altogether too arbitrary. We cannot consistently defend applying different rules in respect of different heads of non-patrimonial damages.<sup>4</sup>

4.19 In England and Wales loss of expectation of life has been abolished as a separate head of general (non-patrimonial) damages, on a recommendation of the Law Commission.<sup>5</sup> The court can however take into account any suffering caused by awareness of lost life expectancy when making an award for pain and suffering. Section 1(1) of the Administration of Justice Act 1982 provides:

"1(1) In an action under the law of England and Wales . . . for damages for personal injuries—

- (a) no damages shall be recoverable in respect of any loss of expectation of life caused to the injured person by the injuries; but
- (b) if the injured person's expectation of life has been reduced by the injuries, the court in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced."

1. *Dalgleish v Glasgow Corporation* 1976 SC 32, 53. In 1978 the Pearson Report (1978), Volume 1, para 366, p 87 commented:

"In Scotland, although there may be no conventional figure, awards for loss of expectation of life are in practice made at much the same level as in the rest of the United Kingdom, as part of damages for *solatium*."

Recently reported awards in England and Wales range from £1,100 to £4,800. The median is about £2,300, the mean about £2,500. These figures are based on 10 awards. Amounts are adjusted to 1991 values (in round figures).

2. Recommendation 2 requires that damages by way of solatium should be quantified by reference to the period ending immediately before death: see para 4.12. The death itself therefore cannot be treated as a loss of faculties and amenities.

3. See paras 3.30-3.32.

4. See para 3.32.

5. LC Report No 56 (1973), Recommendation 9, p 89. See also the Pearson Report (1978), Volume 1, Recommendation 6, p 372.

4.20 We are much attracted by this approach. It offers the possibility of a systematic treatment of solatium for loss of expectation of life without making an arbitrary distinction between the living claimant and the deceased claimant. It also means that the present conventional basis of assessment could be replaced by a flexible assessment, which could take individual circumstances more fully into account. In effect, loss of expectation of life would be compensated as an aspect of pain and suffering; that is, mental suffering caused by awareness of loss would be compensated.<sup>1</sup> Admittedly, adopting this approach would overturn the law as established in *Dalgleish v Glasgow Corporation*.<sup>2</sup> The comatose victim would no longer have a claim for loss of expectation of life, though the larger claim for loss of faculties and amenities would be unaffected.<sup>3</sup> We think that is an acceptable price to pay for putting the claim for loss of expectation of life on a more realistic basis.

4.21 We therefore recommend:

**3. Damages by way of solatium for loss of expectation of life should be recoverable only where the injured person is aware of the loss and suffers in consequence.**

(Clause 5)

Recommendation 3 is implemented by clause 5 of the draft Bill in Appendix A, which inserts a new section 9A into the Damages (Scotland) Act 1976. Section 9A(2) reflects the current practice whereby a single sum is awarded for solatium without allocation to specific elements of injury and loss.<sup>4</sup> That is, the court is not to be required to ascribe specifically any part of an award of solatium to loss of expectation of life. This provision is not however intended to prohibit a specific allocation where it seems appropriate to the court so to allocate.

### Conditions for transmissibility?

4.22 Given our recommendation that, in principle, a right to damages by way of solatium should transmit,<sup>5</sup> we must now consider whether it should transmit unconditionally or subject to conditions. We have already considered and rejected a suggestion made by some of our consultees that the benefit of the deceased's claim should be confined to the immediate family.<sup>6</sup> But other conditions may be apposite.

4.23 For example, under the pre-1976 rule it was a condition for transmissibility that the deceased should have raised an action while alive.<sup>7</sup> As we explained in Part III, justification for the rule rested on the view that solatium was inherently personal.<sup>8</sup> It was a corollary of this view that legal action was the prerogative of the injured person. It was for the injured person to elect to sue or not to sue. The same idea appears in association with the doctrine of liti-contestation, which was also used to justify the pre-1976 rule.<sup>9</sup> Raising an action was regarded as an unequivocal intimation to the alleged wrongdoer that the claim had not been waived:

“If the ground on which the exception is based is that by raising an action the deceased sufferer has provided evidence of his having made up his mind to seek reparation, it would be an easy step to the position that his election might be established by some other evidence, on the view that there is no reason in principle why, in seeking evidence of a concluded election, one should discriminate between raising an action and intimating that an action is to be raised. It is only a matter of degree.

If, on the other hand, there is some inherent virtue in a public and significant act, like the raising of an action, which distinguishes it in kind from the mere private and equivocal act of intimating an intention to the opposite party, then it is open to say that the Court in *Leigh's Executrix*<sup>10</sup> did more than just develop an existing principle. In my view, the raising of an action is different in kind from the intimation of an intention to do so. An action convenes the defender before a Court of law with certain inevitable consequences; short of some form of abandonment it is irrevocable. On the negative side, it shows that the ground of action has not been waived. Intimation of a claim has no such effect; it may be no more than a manoeuvre or a threat; it carries no consequences, it involves the intimator in no risks. It is not even conclusive on whether the sufferer has decided not to waive his ground of action. The defender need do nothing, indeed, he may never hear anything further.

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1. As may indeed happen on occasion under the present law: see para 4.13.

2. 1976 SC 32.

3. In fact the Pearson Report (1978) recommended that non-pecuniary damages should no longer be recoverable for permanent unconsciousness: see Volume 1, Recommendation 11, p 373.

4. See para 4.13.

5. Recommendation 1: see para 4.10.

6. Paras 4.8–4.9.

7. See para 2.17.

8. See paras 3.10–3.13, especially paras 3.11, 3.13.

9. See paras 3.15–3.16.

10. *Leigh's Executrix v Caledonian Railway Co* 1913 SC 838: see para 2.17.

Since the decision of the House of Lords in *Stewart*,<sup>1</sup> it must be taken that the rationale of the exception is the institution of an action, as such, and not that the raising of the action is evidence of an election to vindicate the ground of action.<sup>2</sup>

4.24 We are obviously not concerned to maintain this particular view of solatium. But we do recognise that there are personal elements in a claim for solatium and that the principle of election may be one such element of continuing importance. Certainly it suggests pertinent questions. For example, should an executor have an unfettered discretion to pursue a claim for solatium which the deceased did not pursue, and might never have pursued? It is easy to imagine circumstances where the deceased would have been unwilling to raise an action. Perhaps, therefore, special provision is needed to ensure that the deceased's intention to pursue a claim is properly attested before action is taken by an executor. Again, how far should an executor be liable to beneficiaries if he fails to investigate and follow up potential claims? Should an executor be protected by being required to pursue only those claims where the deceased's intention to sue has been appropriately manifested before death; or can we simply assume that a claim for solatium is no different from a claim for pecuniary loss? If no special provision is required for the latter, none may be required for the former.

4.25 These questions may point to a need for conditions qualifying transmissibility in the case of claims for solatium. On the other hand, imposing such conditions may itself cause further difficulties. If some act by the deceased while alive is to be a prerequisite of transmissibility, what happens if an injured person is incapacitated by the injury and unable to act? Would special provision be required for someone to act on his or her behalf; or would the ordinary law of curatory suffice?

4.26 We put these issues to consultation in Discussion Paper No 89.<sup>3</sup> The clear consensus among our commentators, with only a small minority dissenting, was that if a right to claim solatium was allowed to transmit, it should transmit unconditionally. As one commentator put it:

“... we do not consider it appropriate that a condition be attached that the deceased, while alive, either intimate a claim or raise an action. The reason for this is that in many of the most tragic cases, for example, cases of persons suffering from Mesothelioma . . . diagnosis of the cause of the illness is only made subsequent to death at post-mortem and in consequence no claim is anticipated until this diagnosis is made.”

4.27 Of course conditions could be imposed subject to yet further qualifications to cater for such eventualities. But this would entail a statutory scheme of some complexity. And, arguably, such a scheme would merely provide alternative and perhaps even more artificial cut-offs than the present law. More particularly, a condition that the deceased should have raised an action while alive seems more likely to provoke early litigation than to encourage settlement.<sup>4</sup> It seems to us, therefore, to be quite sufficient to rely on the established principles of prescription and limitation. We see no point in trying to devise an elaborate scheme of conditions for general application, when on the evidence of our consultation any such scheme would attract little support. We do however think that there may be an argument for imposing conditions in the case of claims arising from defamation or other verbal injury or other injury to reputation. We examine this special case separately.<sup>5</sup>

4.28 Accordingly, we recommend:

- 4. Subject to recommendation 5 (claims arising from defamation or other verbal injury or other injury to reputation),<sup>6</sup> 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)

## 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.<sup>7</sup> 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,

1. *Stewart v London Midland and Scottish Railway Co* 1943 SC (HL) 19: see para 3.16.

2. *Smith v Stewart & Co* 1960 SC 329, 339.

3. Paras 4.19–4.22, pp 67–70.

4. This was the condition most favoured by those few commentators who argued for imposing conditions.

5. See paras 4.29–4.35.

6. See para 4.35.

7. See Walker, *op cit*, Chapter 23.

actions for damages for wrongful arrest or imprisonment, or for certain abuses of legal process.<sup>1</sup> 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.

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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> The Committee consider this state of the law to be satisfactory and *do not recommend* any alteration.”<sup>8</sup>

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.”<sup>9</sup>

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).<sup>10</sup> 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.<sup>11</sup> So, the pre-1976 rules would still apply to such actions, as far as transmissibility is concerned.

4.33 We put these issues to consultees in Discussion Paper No 89, asking whether the same principle of transmissibility should apply to all claims for solatium or other non-patrimonial loss, whatever the ground of action; and if so, whether it should apply conditionally or unconditionally.<sup>12</sup> Unfortunately, only a minority of commentators addressed the

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

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

3. Compare para 4.24.

4. The Faulks Report (1975).

5. *Neilson v Rodger* (1853) 16 D 325.

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

7. *Smith v Stewart & Co* 1960 SC 329.

8. Paras 424-425, pp 116-117.

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

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

11. 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.”

12. Paras 4.39-4.42, pp 82-85.

issues. Of those a bare majority accepted that the same principle of transmissibility should apply across the board. That majority, however, did include the Lord President, the Lord Justice-Clerk and Lord Clyde, the Sheriffs' Association and the Association of Personal Injury Lawyers. A few commentators who were in favour of a general principle of transmissibility suggested that conditions should be imposed, for example, that the deceased should have raised an action while alive. For those opposed to transmissibility in this context, such claims:

“are so inherently personal that they should not transmit”;

“[have] to be looked at in a very different light”;

“may partake of very different considerations”.

4.34 The recommendation in the Faulks Report (1975) was that the pre-1976 rules were satisfactory as far as defamation was concerned and should not be altered.<sup>1</sup> Indeed, it was also recommended that these rules should be adopted in England and Wales,<sup>2</sup> where actions for defamation do not survive under the Law Reform (Miscellaneous Provisions) Act 1934.<sup>3</sup> That possibility was considered recently, along with other options, in a consultation paper circulated by the Lord Chancellor's Department.<sup>4</sup> The Lord Chancellor has decided, however, to make no alteration in the present rules in England and Wales:

“The responses to the consultation paper on the death of a party to defamation proceedings have disclosed widely diverging views as to whether or not it would be fairer to allow proceedings to be started or continued in the absence of the party who has died, but the response has not persuaded me that the present rule ought to be changed.”<sup>5</sup>

The responses to Discussion Paper No 89 have similarly failed to produce any clear consensus. Our view is therefore that the pre-1976 rules in Scotland should be maintained (or reinstated) in respect of claims arising from defamation or any other verbal injury or other injury to reputation. In effect, we would allow conditional transmissibility in the case of such claims, as an exception to the general rule. We think this is justified because of the particular importance of the personal element in these claims.<sup>6</sup> And, of course, we also have the support of the Faulks Report (1975), at least with regard to defamation. Certainly, it is necessary to remove the present doubts regarding the rules for such claims.

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.

### **A corollary: The definition of “personal injuries”**

4.36 At present the Prescription and Limitation (Scotland) Act 1973, section 22(1), the Damages (Scotland) Act 1976, section 10(1) and the Administration of Justice Act 1982, section 13(1) all contain the same definition of “personal injuries”.<sup>7</sup> The 1973 Act includes special provision for defamation in section 18A, where that term is separately defined. In principle there is no reason why circumstances should not arise in the case of injury resulting from defamation, or any other verbal injury or other injury to reputation, where claims under the 1982 Act in respect of services might

1. See para 4.31.

2. Faulks Report (1975), para 423, p 116.

3. See paras 3.34, 3.35.

4. *Defamation: Death of a Party to Defamation Proceedings* (Lord Chancellor's Department, 1990).

5. Hansard, HL, Written Answers, 14 May 1991, col 66.

6. See paras 4.30, 4.33.

7. See para 4.32.

be relevant.<sup>1</sup> It is unclear whether the 1982 Act in fact envisages such claims under sections 8 and 9 as a result of defamation, etc. Accordingly, the definition of “personal injuries” which we propose in the 1976 Act may indirectly affect the interpretation of the 1982 Act. In other words, if the draft Bill in Appendix A becomes law, the 1982 Act may then be read as not applying in the case of injury resulting from defamation or any other verbal injury or other injury to reputation. We see no reason in principle why the extended definition should not also apply in the context of the 1982 Act.

4.37 We therefore recommend:

- 6. If the definition of “personal injuries” in section 10(1) of the Damages (Scotland) Act 1976 is amended, as we propose,<sup>2</sup> to refer to “injury resulting from defamation or any other verbal injury or other injury to reputation”, section 13(1) of the Administration of Justice Act 1982 should be similarly amended.**

(Schedule, paragraph 4)

### **The relative’s non-patrimonial award: Clarifying the present law**

4.38 In Part II we described the introduction of the present loss of society award and the uncertainties to which it is now subject.<sup>3</sup> In Part III we concluded that a relative’s non-patrimonial award should be retained and if not enhanced or extended at least clarified.<sup>4</sup> We also concluded that there should be no reduction in that award if a qualifying relative also benefited from the deceased’s claim for solatium.<sup>5</sup> Earlier in this part we considered and rejected enhancement of the present loss of society award as a means of solving the problem posed in our remit.<sup>6</sup> In the course of that discussion we mentioned the possibility of reformulating the award to distinguish expressly certain elements of emotional suffering.<sup>7</sup> We see just such a reformulation as the means whereby we can clarify the conditions under which a relative’s non-patrimonial award might be made. Our aim would be to distinguish expressly those elements of injury and loss which the courts have in fact compensated by a loss of society award. In this way we would provide a secure legislative foundation for the actual practice of the courts. Accordingly, we distinguish the following elements:

- (a) distress and anxiety due to the relative’s awareness of the deceased’s suffering before death;
- (b) grief and sorrow caused by the actual death;
- (c) deprivation of the deceased’s society and guidance in the longer term.<sup>8</sup>

4.39 A minor consequence of reformulating the award in this way is that it probably can no longer appropriately be called a “loss of society award”. More significantly, the very fact of reformulating it may operate as an incentive to the courts to make more generous awards. Although it is not part of our policy, we cannot exclude that possibility. We do not see this as an objection; for there is nothing at present to prevent the courts enhancing the loss of society award, other than the self-imposed policy of restraint which is now established in practice. Finally, we recognise that some may see our proposal as a retrograde step. We are apparently reinstating compensation for grief and sorrow as such, which runs counter to the intention of the reforms in the 1970s.<sup>9</sup> It seems better to us, however, to recognise what has now become established in the practice of the courts and to secure that practice with appropriate legislation. We can see no particular reason why some forms of emotional or mental suffering should be compensated and others not; or why any distinction in this respect should be made between awards of solatium and non-patrimonial awards to relatives.

4.40 We accordingly recommend:

- 7.(a) There should continue to be a non-patrimonial award for relatives of a deceased person in terms of section 1(4) of the Damages (Scotland) Act 1976; but that award should be reformulated to provide expressly for damages by way of compensation for all or any of the following:**
- (i) distress and anxiety endured by the relative in contemplation of the suffering of the deceased before death;**
  - (ii) grief and sorrow of the relative caused by the deceased’s death;**
  - (iii) the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased’s society and guidance if the deceased had not died.**

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1. See paras 2.2, 2.6.

2. See para 4.35.

3. Paras 2.21–2.33.

4. See paras 3.20–3.25, especially para 3.21.

5. See para 3.28 (also para 4.7). This of course is the position in England and Wales, which reinforces our conclusion: see para 3.35.

6. Paras 4.3–4.6.

7. Para 4.6.

8. See paras 2.7, 2.19, 2.22–2.23, 2.30; compare Discussion Paper No 89, para 4.32, p 78.

9. See para 2.21.

- (b) Where a relative qualifying for such an award also benefits from the deceased's claim for solatium, no deduction should be made from the award on that account.

(Clause 1)

Recommendation 7 is implemented by clause 1 of the draft Bill in Appendix A, which amends section 1(4) of the Damages (Scotland) Act 1976. Provision is also made to ensure that the courts need not make separate awards in respect of the several elements of compensatable injury and loss. This reflects the customary practice of the courts when making non-patrimonial awards.<sup>1</sup> It is not however intended to prohibit a specific allocation where it seems appropriate to the court so to allocate.

### The relative's non-patrimonial award: Transmissibility

4.41 If we allow a right to claim solatium to transmit, we are rejecting the view that a claim in respect of pain and suffering is so personal that only the victim can pursue it.<sup>2</sup> But this principle also underlies the rule that a relative's right to claim non-patrimonial damages does not transmit.<sup>3</sup> And that claim contains many of the elements which occur in a claim for solatium. Arguably, therefore, if the right to claim solatium transmits, so should the relative's right to claim non-patrimonial damages.<sup>4</sup> We note, however, that in England and Wales the corresponding right to claim the fixed sum for bereavement does not transmit, although a claim for general damages in respect of pain and suffering and loss of amenities does.<sup>5</sup>

4.42 We put these issues to our consultees in Discussion Paper No 89,<sup>6</sup> asking whether the relative's right to non-patrimonial damages should transmit in the same manner as a right to claim solatium; and if so, whether it should transmit conditionally or unconditionally. The conditions considered were those considered in relation to a claim for solatium, namely, that the deceased should have raised an action or intimated a claim while alive.<sup>7</sup> A bare majority of commentators addressed the issues. Of those a small majority was in favour of transmissibility. But a substantial majority of those who considered the question of conditions thought that there should be none. While no very clear consensus emerged, almost all commentators, whether favouring or rejecting transmissibility, accepted the analogy between the relative's non-patrimonial claim and a claim for solatium. As one commentator said:

"If, contrary to our views, it were to become law that a claim for Solatium survived the death of the party injured, it need not logically follow that a claim for Loss of Society should equally survive. However, we would take the view that . . . unless Loss of Society could fundamentally be distinguished in nature from Solatium, recognition of survival of the one type of claim entails survival of the other."

We agree and, since we take the view that a right to claim solatium should transmit, we think that the relative's right to claim non-patrimonial damages should likewise transmit.

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),<sup>8</sup> 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.<sup>9</sup> Provision is also made to ensure that damages are quantified by reference to the period ending immediately before the deceased relative's death.<sup>10</sup> Section 2A introduced into the 1976 Act by clause 4 provides for enforcement by the executor of any right transmitted under section 1A.

### Draft Bill: Transitional provisions

4.44 When legislation introduces changes which affect matters of succession, the normal principle is that the changes take effect only with regard to deaths occurring after the commencement of the legislation. We are now recommending

1. See para 4.13, and compare the provision in clause 5 of the draft Bill, for which see para 4.21.

2. See paras 3.10-3.19.

3. See para 2.8. In fact, the Pearson Report (1978), Volume 1, para 441, p 100 recommends that such a claim should not survive.

4. Under the pre-1976 law the same transmissibility rules applied to the injured person's claim for solatium, and the dependant's claim for solatium: see para 2.19.

5. Law Reform (Miscellaneous Provisions) Act 1934, ss 1, 1A, as amended by s 4 of the Administration of Justice Act 1982. The distinction appears to have originated in the Law Commission's report in 1973: see LC Report No 56 (1973), paras 172-180, pp 48-49 and contrast paras 101-102, 107, pp 27, 29.

6. Paras 4.36-4.38, pp 80-82.

7. See paras 4.22-4.27.

8. See para 4.40.

9. See para 2.8.

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

that an injured person's right to claim solatium should transmit to his or her executor;<sup>1</sup> and that the relative's right to claim non-patrimonial damages in respect of the death of an injured person should likewise transmit to the relative's executor.<sup>2</sup> In accordance with the usual principle such rights should transmit only where the death (whether of the injured person or the relative, respectively) occurs after the commencement of any legislation implementing our recommendations.

4.45 There is an additional point concerning the relative's claim. Where the relative dies after the commencement of any legislation implementing our recommendations, the right which transmits may be a right arising from the death of an injured person before that commencement. In that case it seems reasonable that the right which transmits should be the right as it vested in the relative on the death of the injured person. In other words, what transmits should be the vested right to a loss of society award, not a right to the reformulated award which we recommend.<sup>3</sup> The right to the reformulated award would only arise in respect of the death of an injured person after the commencement of any implementing legislation. In fact, this may be a somewhat academic point. Our reformulation is not intended to change the basis of the loss of society award, as it is now interpreted by the courts, but merely to clarify it and secure it legislatively.<sup>4</sup> We must recognise, however, that the courts' present practice may be challengeable,<sup>5</sup> and indeed may be successfully challenged before our recommendations are implemented. It is therefore necessary to make special provision for the case where the death giving rise to the relative's claim occurs before the commencement of any legislation implementing our recommendations.

4.46 Finally, we take the view that the new provision which we recommend for loss of expectation of life<sup>6</sup> should not affect proceedings started before the commencement of any implementing legislation. Again, this is the normal principle in such cases.

4.47 Gathering these various propositions together, we recommend:

**9.(a) Any right to damages which transmits in accordance with legislation implementing our recommendations:**

- (i) to the executor of an injured person, or
- (ii) to the executor of a relative of an injured person,

**should so transmit only where the death of the injured person or the relative, as the case may be, occurs after the commencement of the legislation.**

(Clause 6(1))

**(b) Where—**

- (i) an injured person dies before the commencement of any such legislation; and
- (ii) a relative of that injured person who would qualify under the present law for a non-patrimonial award dies after that commencement,

**any right under the present law to a non-patrimonial award vested in the relative immediately before death should transmit to the relative's executor.**

(Clause 6(1)(a),(b),(d); Clause 6(2))

**10. Any legislation implementing recommendation 3 (damages by way of solatium for loss of expectation of life)<sup>7</sup> should not affect proceedings started before the commencement of that legislation.**

(Clause 6(5))

Clause 6(2) of the draft Bill in Appendix A provides not only for vested rights to loss of society awards but also for corresponding rights vested in dependants before the commencement of the Damages (Scotland) Act 1976.<sup>8</sup> There is of course only a remote possibility of any such pre-1976 rights surviving, given the limitation provisions in the Prescription and Limitation (Scotland) Act 1973. Clause 6(2) also provides for the quantification of claims arising thereunder by reference to the period ending immediately before the death of the relative or dependant concerned.<sup>9</sup> Clause 6(3) provides for the enforcement by an executor of any right transmitted under clause 6(2).

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1. Recommendation 1: see para 4.10.

2. Recommendation 8: see para 4.43.

3. Recommendation 7(a): see para 4.40.

4. See para 4.39.

5. See paras 2.21–2.33.

6. Recommendation 3: see para 4.21.

7. See para 4.21.

8. See Damages (Scotland) Act 1976, s 3(a).

9. Compare paras 4.11–4.12, 4.43.

## **Draft Bill: Formal provisions**

4.48 Clauses 7 and 8 and the Schedule of the draft Bill in Appendix A provide for interpretation, minor and consequential amendments, repeals, short title, application to the Crown, commencement and extent. We comment on those provisions as necessary in the Explanatory Notes in Appendix A.

# Part V Summary of Recommendations

1. Subject to such qualifications as are contained in subsequent recommendations, any right to damages by way of solatium vested in a claimant<sup>1</sup> in consequence of personal injury should transmit to his executor in the same manner as the corresponding right to damages by way of compensation for patrimonial loss transmits under the present law.  
(Paragraph 4.10; Clause 3)
2. When a right to damages by way of solatium transmits to an executor, the damages payable to the executor should be quantified by reference to the period ending immediately before the deceased's death.  
(Paragraph 4.12; Clause 3)
3. Damages by way of solatium for loss of expectation of life should be recoverable only where the injured person is aware of the loss and suffers in consequence.  
(Paragraph 4.21; Clause 5)
4. Subject to recommendation 5 (claims arising from defamation or other verbal injury or other injury to reputation), 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.  
(Paragraph 4.28; Clause 3)
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.  
(Paragraph 4.35; Clause 3)
6. If the definition of "personal injuries" in section 10(1) of the Damages (Scotland) Act 1976 is amended, as we propose,<sup>2</sup> to refer to "injury resulting from defamation or any other verbal injury or other injury to reputation", section 13(1) of the Administration of Justice Act 1982 should be similarly amended.  
(Paragraph 4.37; Schedule, paragraph 4)
7. (a) There should continue to be a non-patrimonial award for relatives of a deceased person in terms of section 1(4) of the Damages (Scotland) Act 1976; but that award should be reformulated to provide expressly for damages by way of compensation for all or any of the following:
  - (i) distress and anxiety endured by the relative in contemplation of the suffering of the deceased before death;
  - (ii) grief and sorrow of the relative caused by the deceased's death;
  - (iii) the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died.(b) Where a relative qualifying for such an award also benefits from the deceased's claim for solatium, no deduction should be made from the award on that account.  
(Paragraph 4.40; Clause 1)
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), should transmit unconditionally to an executor.  
(Paragraph 4.43; Clause 2)
9. (a) Any right to damages which transmits in accordance with legislation implementing our recommendations—
  - (i) to the executor of an injured person, or
  - (ii) to the executor of a relative of an injured person,

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1. "Claimant" includes a potential claimant in this and the following recommendations.  
2. See para 4.35.

should so transmit only where the death of the injured person or the relative, as the case may be, occurs after the commencement of the legislation.

(Paragraph 4.47; Clause 6(1))

(b) Where—

- (i) an injured person dies before the commencement of any such legislation; and
- (ii) a relative of that injured person who would qualify under the present law for a non-patrimonial award dies after that commencement,

any right under the present law to a non-patrimonial award vested in the relative immediately before death should transmit to the relative's executor.

(Paragraph 4.47; Clause 6(1)(a),(b),(d); Clause 6(2))

10. Any legislation implementing recommendation 3 (damages by way of solatium for loss of expectation of life) should not affect proceedings started before the commencement of that legislation.

(Paragraph 4.47; Clause 6(5))

# Appendix A

## **Damages (Scotland) Bill**

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### ARRANGEMENT OF CLAUSES

#### Clause

1. Rights of relatives of a deceased person.
2. Transmissibility to executor of rights of deceased relative.
3. Transmissibility to executor of deceased's right to solatium for his injuries.
4. Enforcement by executor of rights transmitted to him.
5. Solatium for loss of expectation of life.
6. Transitional provisions.
7. Interpretation, minor and consequential amendments and repeals.
8. Short title, application to Crown, commencement and extent.

#### SCHEDULE:—

##### CONSEQUENTIAL AMENDMENTS.

*Damages (Scotland) Bill*

DRAFT

OF A

**BILL**

TO

A.D. 1992.

Clarify and amend the law of Scotland concerning the right of certain relatives of a deceased person, and the right of executors, to claim damages in respect of the death of the deceased from personal injuries; to make provision regarding solatium for loss of expectation of life; and for connected purposes.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

*Damages (Scotland) Bill*

Rights of relatives of a deceased person.

1. In section 1(4) of the Damages (Scotland) Act 1976 (in this Act referred to as "the 1976 Act") for the words from "the loss" to the end there shall be substituted the words "all or any of the following—

- (a) distress and anxiety endured by the relative in contemplation of the suffering of the deceased before his death;
- (b) grief and sorrow of the relative caused by the deceased's death;
- (c) the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died;

and the court in making an award under this subsection shall not be required to ascribe specifically any part of the award to any of paragraphs (a), (b) and (c) above."

Transmissibility to executor of rights of deceased relative.

2. After section 1 of the 1976 Act there shall be inserted the following section—

"Transmissibility to executor of rights of deceased relative. 1A. Any right to damages under any provision of section 1 of this Act which is vested in the relative concerned immediately before his death shall be transmitted to the relative's executor; but, in determining the amount of damages payable to an executor by virtue of this section, the court shall have regard only to the period ending immediately before the relative's death."

Transmissibility to executor of deceased's right to solatium for his injuries.

3. For section 2 of the 1976 Act there shall be substituted the following section—

"Rights transmitted to executor in respect of deceased person's injuries. 2.—(1) Subject to the following provisions of this section, there shall be transmitted to the executor of a deceased person the like rights to damages in respect of personal injuries (including a right to damages by way of solatium) sustained by the deceased as were vested in him immediately before his death.

(2) There shall not be transmitted to the executor under this section a right to damages by way of compensation for patrimonial loss attributable to any period after the deceased's death.

(3) In determining the amount of damages by way of solatium payable to an executor by virtue of this section, the court shall have regard only to the period ending immediately before the deceased's death.

(4) In so far as a right to damages vested in the deceased comprised a right to damages (other than for patrimonial loss) in respect of injury resulting from defamation or any other verbal injury or other injury to reputation sustained by the deceased, that right shall be transmitted to the deceased's executor only if an action to enforce that right had been brought by the deceased before his death and had not been concluded by then within the meaning of section 2A(2) of this Act."

Enforcement by executor of rights transmitted to him.

4. After section 2 of the 1976 Act there shall be inserted the following section—

"Enforcement by executor of rights transmitted to him. 2A—(1) For the purpose of enforcing any right transmitted to an executor under section 1A or 2 of this Act, the executor shall be entitled to bring an action or, if an action for that purpose had been brought by the deceased before his death and had not been concluded by then, to be sisted as pursuer in that action.

(2) For the purpose of subsection (1) above, an action shall not be taken to be concluded while any appeal is competent or before any appeal timeously taken has been disposed of."

## EXPLANATORY NOTES

### *Clause 1*

Clause 1 amends section 1(4) of the Damages (Scotland) Act 1976. It implements recommendation 7(a): see paragraphs 4.38–4.40. The specified elements of injury and loss are those which are recognised by the courts when making a loss of society award under the present law. Provision is made to ensure that the courts are not required to make a separate award in respect of each distinct head of injury or loss which may be relevant in any particular case. But such a separate award could be made if that was thought appropriate. This reflects the general practice of the courts when making non-patrimonial awards under the present law: see paragraph 4.13 and compare clause 5.

No specific provision is required in respect of recommendation 7(b).

### *Clause 2*

Clause 2 inserts a new section 1A into the Damages (Scotland) Act 1976.

The *proposed section 1A* implements recommendation 8: see paragraphs 4.41–4.43. It also re-enacts the present law with regard to the transmissibility of the relative's right to damages for loss of support and funeral expenses under section 1(3) of the 1976 Act: see paragraph 2.8. When a right to damages transmits to an executor under the proposed section 1A, the claim is to be quantified by reference to the period ending immediately before the deceased relative's death.

### *Clause 3*

Clause 3 substitutes a new section 2 in the Damages (Scotland) Act 1976.

The *proposed section 2(1)* implements recommendations 1 and 4: see paragraphs 4.7–4.10, 4.22–4.28. It also re-enacts the present law with regard to the transmissibility of the right to damages for patrimonial loss. (For the special provision relating to injury resulting from defamation, or any other verbal injury or other injury to reputation, see the following note on the *proposed section 2(4)*).

The *proposed section 2(2)* re-enacts the current provision in section 2(3)(b) of the 1976 Act.

The *proposed section 2(3)* implements recommendation 2: see paragraphs 4.11–4.12.

The *proposed section 2(4)*, together with the *proposed section 2(1)* and the *Schedule, paragraph 3*, implements recommendation 5: see paragraphs 4.29–4.35. The effect of these provisions is that a right to damages for patrimonial loss in respect of injury resulting from defamation, or any other verbal injury or other injury to reputation, transmits unconditionally to the claimant's executor; and that the corresponding right to damages other than for patrimonial loss so transmits only if the deceased had brought an action before his death to enforce that right. When such rights to damages transmit to an executor, the claim is to be quantified by reference to the *proposed section 2(2) and (3)*, as the case may be.

### *Clause 4*

Clause 4 inserts a new section 2A in the Damages (Scotland) Act 1976.

The *proposed section 2A* is technical and in part re-enacts current provisions contained in section 2(1) and (2) of the 1976 Act. It provides for the enforcement of any right transmitted to an executor under the *proposed section 1A* of the 1976 Act or the *proposed section 2*: see notes on clauses 2 and 3.

*Damages (Scotland) Bill*

Solatium for loss of expectation of life.

5. After section 9 of the 1976 Act there shall be inserted the following section—  
“Solatium for loss of expectation of life. 9A—(1) In an action for damages in respect of personal injuries, no damages by way of solatium for loss of expectation of life caused to the injured person by the injuries shall be recoverable except to the extent that the court is satisfied—

- (a) that the injured person is aware that his expectation of life has been reduced by the injuries; and
- (b) that, in consequence thereof, he has suffered or is likely to suffer.

(2) The court in making an award of damages for solatium shall not be required to ascribe specifically any part of the award to loss of expectation of life.”.

Transitional provisions.

6.—(1) The following shall not have effect where the deceased concerned died before the commencement of this Act—

- (a) the amendment made to section 1(4) of the 1976 Act by section 1 of this Act;
- (b) section 1A of the 1976 Act;
- (c) section 2 of the 1976 Act (as substituted by section 3 of this Act); and
- (d) the repeal of section 3 of the 1976 Act.

(2) If—

- (a) a right to a loss of society award; or
- (b) a right to damages by way of solatium in respect of the death of a person under the law in force before 13th May 1976,

has vested in a person before the commencement of this Act and that person dies after such commencement, the right shall be transmitted to that person's executor; but, in determining the amount of an award payable to an executor by virtue of this subsection, the court shall have regard only to the period ending immediately before the person's death.

(3) Section 2A of the 1976 Act shall have effect in relation to a right transmitted under subsection (2) above as it has effect in relation to a right transmitted under section 1A or 2 of that Act.

(4) Subsection (2) above is without prejudice to Parts II and III of the Prescription and Limitation (Scotland) Act 1973.

(5) Section 9A of the 1976 Act shall not affect any proceedings commenced before this Act comes into operation.

Interpretation, minor and consequential amendments and repeals.

7.—(1) In any enactment passed or made before this Act, unless the context otherwise requires, any reference to a loss of society award shall be construed as a reference to an award under section 1(4) of the 1976 Act as amended by section 1 of this Act.

(2) The enactments mentioned in the Schedule to this Act shall have effect subject to the minor and consequential amendments respectively specified in that Schedule.

(3) The following provisions of the 1976 Act are hereby repealed—

Section 3;

In section 10(1) the definition of “loss of society award”;

Section 11;

Section 12(3) and (4);

Schedule 2.

Short title, application to Crown, commencement and extent.

8.—(1) This Act may be cited as the Damages (Scotland) Act 1992.

(2) This Act binds the Crown.

(3) This Act shall come into force at the end of the period of 2 months beginning with the day on which it is passed.

(4) This Act extends to Scotland only.

## EXPLANATORY NOTES

### *Clause 5*

Clause 5 inserts a new section 9A in the Damages (Scotland) Act 1976.

The *proposed section 9A(1)* implements recommendation 3: see paragraphs 4.13–4.21.

The *proposed section 9A(2)* provides that the court, when making an award of solatium, is not to be required to ascribe specifically any part of the award to loss of expectation of life. It would be possible, however, to make such an ascription if the court thought that was appropriate. The provision reflects the current practice of the courts whereby a single sum is awarded for solatium without allocation to specific needs of injury or loss: see paragraph 4.13; compare clause 1.

### *Clause 6*

Clause 6 contains transitional provisions.

#### *Subsections (1) and (2)*

Subsections (1) and (2) implement recommendation 9: see paragraphs 4.44–4.45, 4.47. The general intention is that the new transmissibility rules for non-patrimonial claims in the *proposed sections 1A and 2* of the Damages (Scotland) Act 1976 should only apply in relation to deaths after the commencement of this Act. Special provision is made for the case where the relative of an injured person who died before commencement has a vested right to claim a non-patrimonial award and dies after commencement. In that case it is the vested right to claim a non-patrimonial award under the present law which is to transmit. Provision is made for rights which may have vested before the commencement of the 1976 Act and not terminated under the Prescription and Limitation (Scotland) Act 1973. This is likely to be only a very remote possibility. When a right transmits to an executor under subsection (2), the claim is to be quantified by reference to the period ending immediately before the deceased relative's death.

#### *Subsection (3)*

Subsection (3) is technical. It applies the *proposed section 2A* of the Damages (Scotland) Act 1976 for the purpose of enforcing any right transmitted to an executor under subsection (2).

#### *Subsection (5)*

Subsection (5) implements recommendation 10: see paragraphs 4.46, 4.47.

### *Clause 7*

Clause 7 provides for interpretation, minor and consequential amendments and repeals.

#### *Subsection (3)*

Sections 11, 12(3) and (4) and Schedule 2 of the Damages (Scotland) Act 1976 are obsolete and can therefore be repealed.

**SCHEDULE**

**CONSEQUENTIAL AMENDMENTS**

*The Damages (Scotland) Act 1976 (c.13)*

1. In section 4 for the words from “nor is” to “said section 1” there shall be substituted the words “or by a deceased relative’s executor under section 1A of this Act; nor is a claim by a relative of a deceased person or by a deceased relative’s executor for damages under the said section 1 or (as the case may be) the said section 1A”.

2. At the end of section 6(3)(b) there shall be added the words “or, if the relative has died, by the relative’s executor”.

3. In section 10(1) at the end of the definition of “personal injuries” there shall be added the words “and injury resulting from defamation or any other verbal injury or other injury to reputation”.

*The Administration of Justice Act 1982 (c.53)*

4. In section 13(1) at the end of the definition of “personal injuries” there shall be added the words “and injury resulting from defamation or any other verbal injury or other injury to reputation”.

*The International Transport Conventions Act 1983 (c.14)*

5. In Schedule 1, in paragraph 1(2) for the words from “as defined in” to the end there shall be substituted the words “or for an award under section 1(4) of the Damages (Scotland) Act 1976 as amended by section 1 of the Damages (Scotland) Act 1992.”.

*The Criminal Justice Act 1988 (c.33)*

6. In section 111(4)(c) for the words from “for loss” to the end there shall be substituted the words “may be made to any person who is a member of the deceased’s immediate family (within the meaning of section 10(2) of the Damages (Scotland) Act 1976), being the kind of award described in section 1(4) of that Act; and”.

## EXPLANATORY NOTES

### *Schedule*

The Schedule contains a number of consequential amendments.

### *Paragraph 3*

Paragraph 3, together with the *proposed section 2(1) and (4)* of the Damages (Scotland) Act 1976, implements recommendation 5: see paragraphs 4.29–4.35; notes on clause 3.

### *Paragraph 4*

Paragraph 4 implements recommendation 6: see paragraphs 4.36–4.37.

# Appendix B

## TABLES

Table 1: Claims (resolved) in Scotland in respect of death 1985-89.

Cause of death	Claims		Deaths after action raised but before proof		
	Number	Percent	Number	Percent	Percent of Number of claims
Road traffic accident	333	29.0	8	11.4	2.4
Work-related accident	615	53.5	2	2.9	0.3
Medical accident	39	3.4	7	10.0	17.9
Industrial disease	160	13.9	52	74.3	32.5
Other	2	0.2	1	1.4	50.0
Totals	1,149(2)	100.0	70	100.0	6.1

### Notes

(1) Source: Scottish Law Commission (reproduced from Discussion Paper No 89, Appendix, p 90).

(2) A further 25 claims were allocated to road traffic accident and medical accident without any more precise enumeration and another 28 were unallocated.

Table 2: Deaths in Scotland due to occupationally related lung disease

	Asbestosis(3)	Mesothelioma(4)	Pneumococ- niosis(5)	Byssinosis	Farmer's lung and other occupational allergic alveolitis
1980	13	53	42	1	4
1981	18	55	34	0	1
1982	10	53	32	0	1
1983	13	50	21	0	1
1984	11	56	23	0	2
1985	21	50	30	0	2
1986	15	62	22	0	2
1987	12	93	20	0	0
1988	15	103	14	1	3
1989	10	70	21	0	2
Totals	138	645	259	2	18

### Notes

(1) Source: Health and Safety Executive.

(2) The data is derived from death certificates. For asbestosis and mesothelioma, the figure shown is the number of certificates mentioning the disease. For the other diseases the figure is the number of deaths coded to the disease as underlying cause.

(3) Without mesothelioma.

(4) Not all mesothelioma cases are related to occupational exposure to asbestos. The 'natural' rate for mesothelioma is believed to be about 2 per million per year, equivalent to approximately 100 deaths annually for GB.

(5) Other than asbestosis.

Table 3: Widely used suspected human carcinogens

Agent	Industries and trades	Suspected human sites
Beryllium	Beryllium processing, aircraft manufacturing, electronics, secondary smelting	Bronchus
Cadmium	Smelting, battery making, welding	Bronchus
Ethylene oxide	Hospitals, production of hospital supplies	Bone marrow
Formaldehyde	Plastic, textile, and chemical production; health care	Nasal sinus, bronchus
Synthetic mineral fibres (e.g., fibrous glass)	Manufacturing, insulation	Bronchus
Polychlorinated biphenyls	Electrical-equipment production and maintenance	Liver
Organochlorine pesticides (e.g., chlordane, dieldrin)	Pesticide manufacture and application, agriculture	Bone marrow
Silica	Casting, mining, refracting	Bronchus

Notes

(1) Source: M R Cullen, M G Cherniack and L Rosenstock, Occupational medicine, *New England Journal of Medicine* 1990; 322: 675-683 (679).

# Appendix C

## List of those who submitted written comments on Discussion Paper No. 89

M P Anderson, Simpson & Marwick, WS, Edinburgh  
Association of British Insurers  
Association of Personal Injury Lawyers  
Automobile Association  
P R Beaumont, M G A Christie, University of Aberdeen  
Borders Health Board  
British Insurance Law Association  
British Medical Association  
R E Brown, Ross Harper, Solicitors, Glasgow  
Professor A Busuttill, University of Edinburgh  
Clydeside Action on Asbestosis  
Court of Session judges  
B G Donald, J & A Hastie, SSC, Edinburgh  
Faculty of Advocates  
W L F Felstiner, American Bar Foundation  
G F Garrett, Allan McDougall & Co, SSC, Edinburgh  
Glasgow Bar Association  
Grampian Health Board  
I R Guild, Shepherd & Wedderburn, WS, Edinburgh  
Institute of Safety and Public Protection  
Law Society of Scotland  
Lothian Health Board  
N D MacLeod, QC, Sheriff Principal of Glasgow and Strathkelvin  
J E N Macmillan, MacRoberts, Solicitors, Glasgow  
C MacPherson, Glasgow  
J J Maguire, QC, Sheriff Principal of Tayside Central and Fife  
T C S Marr, Macnair, Clyde & Ralston, Solicitors, Paisley  
L G W Moodie, John Henderson & Sons, Solicitors, Lockerbie  
D Peters, Campbell, Riddell & Co, Solicitors, Glasgow  
J A R Roxburgh, Biggart Baillie & Gifford, WS, Glasgow  
D R C Sandison, Lawford Kidd & Co, WS Edinburgh  
Sheriffs' Association  
W J Stewart, University of Strathclyde  
D Stevenson, Robin Thompson & Partners, Solicitors, Edinburgh  
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