

Scottish Government

**Consultation Paper on the Civil Law of Damages:
Damages for Wrongful Death**



A response by the Association of Personal Injury Lawyers

August 2010

The Association of Personal Injury Lawyers (APIL) was formed by pursuers' lawyers with a view to representing the interests of personal injury victims. APIL currently has around 4,500 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL currently has around 170 members in Scotland.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Introduction

We welcome this consultation from the Scottish Government, and are delighted that reports from the Scottish Law Commission are now being taken forward. This is, however, the third consultation on this issue within the last three years, and we hope that progress can now be made in terms of legislation. We were pleased, therefore, to see Bill Butler MSP introduce the Damages (Scotland) Bill into the Scottish Parliament in June, and urge the Scottish Government to give the Bill every chance of reaching the statute books.

Question 1

In your view, to represent what would have been spent on his/her personal living expenses in the lost period, in principle is it:

- a) reasonable to introduce a standard fixed figure in all cases for the proportion to be deducted from a victim's income? Or**
- b) preferable to allow the courts to continue to decide the proportion on the merits of individual cases**

We agree that a standard fixed figure should be deducted from an assessment of damages for living costs. A fixed deduction would spare bereaved families the current trauma of a deeply intrusive enquiry into the financial history of the deceased, and possibly other family members, at a time of severe emotional strain.

Question 1a

If such a fixed figure were introduced, do you agree that 25% is a reasonable level for victim's living expenses?

Yes. A set deduction of 25 per cent will save time in the process of calculating an award, as there will be reduced investigations into the finances of the deceased, and this in turn should provide the bereaved family with the compensation they need more quickly than is the case under the current arrangements. It will increase the predictability of awards and improve the prospects of settlement without litigation. There should also be an additional saving in lawyers' costs by removing the need for lengthy investigations into the financial arrangements of the deceased, and his family.

We also believe that a deduction of 25 per cent would better reflect the changing arrangements within households, where women are much more likely to be working than has been the case in the past.

Question 1c

If such a figure were to be introduced, in your view should it be as a "rebuttable presumption", which could be set aside if due cause were shown?

We do not support the proposal that a fixed figure should be a rebuttable presumption. If defendants, or insurers, are able to make enquiries into the personal financial arrangements of the deceased in an attempt to prove that it would not be appropriate to apply the fixed figure, then they are very likely to do so. This would leave bereaved families facing the kind of intrusive investigations which the introduction of a fixed deduction would eliminate. It may also be very difficult to prove that a figure other than the fixed amount is appropriate without a large volume of information, which would take time, and cost, to gather.

Question 1e

Do you have any other comments on the approach to calculating the amount to be deducted in representation of living expenses for the lost period?

No.

Question 2

In your view, to represent the proportion of the victim's income which is to be taken as having been devoted to his relatives, in principle is it:

- a) reasonable to introduce a standard fixed figure in all cases? Or**
- b) preferable to allow the courts to continue to decide the proportion on the merits of individual cases**

We agree that a set proportion of the victim's income should be taken as having been devoted to his relatives, for the reasons outlined in our response to question 1.

Question 2a

If such a fixed figure were introduced, do you agree that 75% is a reasonable level for that proportion?

Yes. It makes sense that if the deceased is spending 25 per cent of his income on himself, then the remainder will be spent on his family.

Question 2c

If such a figure were to be introduced, in your view should it be as a “rebuttable presumption”, which could be set aside if due cause were shown?

We do not support the proposal that a fixed figure should be a rebuttable presumption, for the reasons outlined in response to question 1c above.

Question 2e

Do you agree that in all cases the surviving partner’s income should be wholly ignored in calculating a damages award?

Yes. We believe that the tortfeasor has an obligation to provide full and fair compensation for his wrong, regardless of the financial circumstances of the surviving partner. It is a matter of fairness that compensation for a life must not take into account the financially position of the deceased’s family.

Question 3

Do you agree that, in respect of future loss only, a multiplier should run from the date of proof rather than the date of death?

We believe that a multiplier should run from the date of proof, rather than the date of death. This is because it is relatively easy to identify an accurate figure for past losses up to the date of proof, which can then be used in the multiplier. It is not right that a multiplier, which may include inaccurate figures, should be used for the period between death and proof, when an accurate figure for compensation can be reached.

If a multiplier were to run from the date of death, it could lead to bereaved families receiving an inaccurate amount of compensation for their loss.

Question 4

Do you agree with the SLC's recommendation that the category of person entitled to claim for patrimonial loss should be restricted only to those who are defined as part of the "immediate family"?

No. We can see no good reason for changing the current list of 'relatives' who are entitled to sue for patrimonial loss. If the father of a teenage girl dies, and her uncle steps in and agrees to support her through the remainder of her educational career, and is then wrongfully killed, the niece should be able to make a claim for patrimonial loss. It should be noted, also, that the number of occasions where these circumstances would arise is likely to be very small, so there would not be significant costs if the Scottish Law Commission's recommendation were introduced.