

**Scottish Parliament Justice Committee**

**Evidence on Damages (Scotland) Bill**



**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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1. We welcome the opportunity to submit this evidence to the Justice Committee, and the introduction of Bill Butler MSP's Bill. In order to ensure that the Justice Committee has APIL's views on the issues raised by the Bill, we have attached, as our evidence, our responses to Mr Butler's consultation and the Scottish Government, both of which have been submitted in the last year. We would also be happy to provide a spokesman to give oral evidence, if the committee feels that would be beneficial.
2. Our evidence is based on the fundamental belief that pursuers should receive full and fair compensation, that defenders should pay once for the actual patrimonial loss they cause and that society must acknowledge the suffering of family members of those who are wrongfully killed.

## **APIL evidence to Scottish Government – August 2010**

### **Introduction**

3. 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:

- reasonable to introduce a standard fixed figure in all cases for the proportion to be deducted from a victim's income? Or
  - preferable to allow the courts to continue to decide the proportion on the merits of individual cases
4. 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?

- 5. 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.

6. 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?**

7. 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?**

8. 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:

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

9. 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?

10. 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?

11. 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?**

12. 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?**

13. 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.
14. 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"?**

15. 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.

#### **APIL evidence to Bill Butler MSP – October 2009**

16. We are writing in response to your consultation paper on the proposed Damages (Scotland) Bill, which was published on 3 August 2009.
17. We welcome the opportunity to reply to this consultation, having already responded to the discussion paper which the Scottish Law Commission published in 2007. Our response to this consultation will, therefore, focus on the issues which were not covered by the original discussion paper.



18. In our submission to the Scottish Law Commission,(copy attached) we stated that we believed 'the discussion paper succinctly summarises the current law and makes proposals which will be of significant benefit to people whose relatives have been wrongfully killed'. We still believe that there is a case for the Damages (Scotland) Act 1976 to be amended, and broadly welcome both the final report and draft Bill produced by the Scottish Law Commission.
19. In response to questions two and three in the consultation paper, we agree that there should be set deductions 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.
20. A set deduction of 25 per cent will also save time in the process of calculating the award, as there will be reduced investigations into the finances of the deceased, and 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.
21. 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.

22. We agree that damages for non-patrimonial loss should not include damages in respect of any mental illness suffered. Close relatives of the deceased will, of course, experience emotions of extreme grief, and it is difficult to separate those feelings from a psychiatric disorder, brought on by the loss of their loved one. Where psychiatric disorders are taken into account, there are difficulties with recognition and definition of such disorders. Lawyers currently have to consider whether there might be a diagnosis of psychiatric illness, leading to bereaved relatives having to undergo psychiatric examination, which is the last thing they should endure in the circumstances. Taking psychiatric disorders into account also leads to some relatives receiving higher damages than others based on the severity of their psychiatric disorder, and we believe any “ranking of grief” on this basis is invidious.
23. We are not immediately aware of any additional costs associated with the proposed Bill, and have no further comments on the details of the consultation document, or the draft Bill.
24. The proposals are timely and proportionate and APIL expresses its strong support. This is one of a number of areas where the Scottish Law Commission has made proposals to bring the law of Scotland up to date and we wish the Bill a speedy progress through Parliament.