

SCOTTISH LAW COMMISSION

DISCUSSION PAPER ON TITLE TO SUE FOR NON-PATRIMONIAL LOSS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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TITLE TO SUE FOR NON-PATRIMONIAL LOSS

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents around 5000 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. We currently have 106 members in Scotland who, in all likelihood, act for the majority of personal injury victims in the jurisdiction. The aims of the association are:
 - To promote full and prompt compensation for all types of personal injury;
 - To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
 - To promote health and safety;
 - To alert the public to dangers in society such as harmful products and dangerous drugs;
 - To provide a communication network exchanging views formally and informally.
2. APIL welcomes this opportunity to respond to the Scottish Law Commission's discussion paper on title to sue for non-patrimonial loss. In summary, we believe that an extended and non-exclusive list of persons entitled to claim damages for non-patrimonial loss should be introduced, to ensure that all those who, in fact, suffer non-patrimonial loss are treated fairly and equally.
3. Damages for non-patrimonial loss are awarded as an attempt to compensate for grief arising from the death of a loved one. In the interests of fairness and justice we believe that all those who do, in fact, suffer such grief, as defined in the Damages (Scotland) Act 1976, should be entitled to claim damages. Where two people are suffering from grief as a result of the death of a loved one, we believe it would be unfair if one of them was entitled to claim damages for non-patrimonial loss and the other was not, merely because the relevant relationship in the latter case was not included on the relevant

statutory list. In essence, those who suffer the same loss should be equally entitled to claim for the same compensation.

4. Having said that, we do recognise the advantages, as outlined in the discussion paper, of having a statutory list of all those entitled to claim for non-patrimonial loss. The current statutory list is, however, too restrictive. It can prevent those who had a close relationship with a deceased from claiming compensation for the grief caused and so should be extended.
5. We believe that the statutory list should continue to include the following:
 - The surviving spouse of the deceased;
 - A person who immediately before the deceased's death, was the deceased's heterosexual cohabitant;
 - The parents of the deceased;
 - The children of the deceased.
6. We agree with the Law Commission's view that 'parent' should be defined as any person who had parental responsibilities and rights in relation to the deceased, as increasingly, children are raised by people who are not married to either of their biological parents. We further believe that 'parent' should include a biological parent of an adopted child. We do not believe that the right should be restricted to a biological mother as appears to have been suggested. As noted by the Commission it has certainly become easier in recent years for an adopted child and biological mother to trace one another and thereby have the opportunity to establish an emotional relationship. An adopted child and biological father, however, may also trace one another and establish an emotional relationship and, for this reason, should not be excluded from the statutory list. For the same reasons, we believe the definition of 'child' within the statutory list should include an adopted person whose biological parent (and not just biological mother) was the deceased.

7. In addition, as parents-in-law may develop strong emotional relationships with their sons- and daughters-in-law, we believe that all should be included on the statutory list and be entitled to claim for any non-patrimonial loss.
8. To ensure that all those who may have had a close relationship with a deceased are entitled to claim for non-patrimonial loss, if it has been suffered, we believe that the statutory list should be extended to include the following:
 - The grandparents of the deceased;
 - The grandchildren of the deceased;
 - The siblings of the deceased;
 - Aunts and uncles of the deceased;
 - A former spouse of the deceased;
 - A person who immediately before the deceased's death was the deceased's homosexual cohabitant.
9. In relation to grandparents, grandchildren, aunts and uncles, we believe that relationships of affinity should be included. Whilst this may widen the potential group of persons entitled to claim for non-patrimonial loss, it must of course be remembered that those who have not, in fact, suffered non-patrimonial loss, as defined in s.1(4) Damages (Scotland) Act 1976, will not be entitled to damages for it.
10. Even if the statutory list is extended we are concerned that if it remains exclusive, some people, who had a close relationship with the deceased, would still not be able to claim damages for non-patrimonial loss because the relevant relationship does not feature in it. For example, a lifelong friend of the deceased, where there has been an exceptionally close relationship, may suffer as much distress, anxiety, grief and sorrow as the deceased's sister but would not be entitled to damages, as would the sister. To avoid unfairness in these circumstances we believe that where a cause is shown in exceptional circumstances, a person should be entitled to claim for non-patrimonial loss despite the absence of the relevant relationship from the statutory list.

11. In conclusion, in submitting that the statutory list of those entitled to claim damages for non-patrimonial loss should be extended, we are not seeking for damages to be awarded to those who are not entitled to those damages. As at present, those suffering from grief arising from the death of a loved one would still be required, if necessary, to prove non-patrimonial loss had, in fact, been suffered. All families operate in different ways and involve varying relationships between its members. An extended and non-exclusive list would merely allow justice to be done in all cases.