

1 November 2005

Mrs Anne Hampson
Justice Department – Civil Law Division
Scottish Executive
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Dear Mr Hampson

Title to sue for non-patrimonial loss: Proposed amendments to the Damages (Scotland) Act 1976

Many thanks for your recent letter regarding the above subject which was addressed to Annette Morris. I have, however, taken over from Annette as Policy Research Officer for the Association of Personal Injury Lawyers (APIL).

In your correspondence you mentioned that the Scottish Executive proposes to take forward the Scottish Law Commission's (SLC) recommendations for changes to the Damages (Scotland) Act 1976 via the current Family Law Bill. As you are aware APIL previously responded to the SLC's discussion paper on the issue in October 2001. APIL is therefore disappointed to note that its suggestion that the list of those people who can sue for non-patrimonial loss should be non-exclusive and allow anyone who suffers grief arising from the death of a loved one to be considered has not been adopted. We firmly believe that in the interests of fairness and justice that all those who do, in fact, suffer such grief as defined in the Act should be entitled to claim damages. It would be deeply inequitable if a person suffered distress, anxiety, sorrow and grief from the death of someone close to them, yet was not able to claim compensation due to the fact they did not have a specific prescribed relationship with the deceased. While there should be a statutory list of persons who are able to claim, this list should be non-exclusive and allow other grieving persons to be considered.

APIL is encouraged to note that the SLC has recommended the inclusion of siblings (brother and sister) and same-sex cohabitants in the statutory list, yet we are disappointed that it has failed to include the former spouse of the deceased, parents-in-law and relationships of affinity – such as grandparents, grandchildren, aunt and uncles. For example, an aunt or uncle of the

deceased may suffer as much distress and grief as the deceased's sister but under the current recommendations would not be entitled to damages. To avoid unfairness these categories should be included in the statutory list. APIL also feels that, in exceptional circumstances, if a person who has a close relationship with the deceased can show cause that they have suffered grief as defined in S.1 (4) of the Act, they should be able to sue for non-patrimonial loss regardless of their absence from the statutory list.

Finally, APIL is disappointed to note that the definition of 'parent' fails to include the biological parent of an adopted child. While under the current law adoption severs the legal relationship between child and biological parent, changes to the current social climate have meant that there are more 'open adoptions' and adopted children are more readily tracking down their natural parents. Both of these factors mean that there are often instances where strong emotional ties are developed between an adopted child and their biological parent. This fact should be reflected in the inclusion of biological parents (including adoption) within the statutory list.

In conclusion, APIL suggests that the primary consideration in deciding if a person can sue for non-patrimonial loss should reflect that fact that all families operate in different ways and involve varying relationships between its members.

If you require any further information, or there is anything else I can help you with, please do not hesitate to contact me.

Yours sincerely

Miles Burger
Policy Research Officer