



SCOTTISH LAW COMMISSION

DISCUSSION PAPER ON DAMAGES FOR WRONGFUL DEATH

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

December 2007

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 5,000 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 pursuers. APIL currently has 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

APIL welcomes the Scottish Law Commission's discussion paper on damages for wrongful death and broadly supports the proposals contained within it.

Our answers are based on a fundamental belief in the principles that pursuers should receive full and fair compensation, that defenders should pay once for actual patrimonial loss they cause and that society must acknowledge the suffering of family members of those persons who are wrongfully killed.

We believe the most significant proposal in the paper is to replace the relatives' rights to claim awards for loss of future support with an executor's right to claim for future patrimonial loss, and we support this in principle. We are, however, concerned that the proposed changes may result in families of people who are wrongfully killed being worse off, as a result of damages being made subject to inheritance tax, and urge the Commission to consider this issue carefully before recommending such a change. We also urge the Commission to ensure that provisions are in place so that dependent relatives do not suffer financial hardship as a result of the proposed changes.

We also support the proposal to widen the scope of the recent amendment to the Damages (Scotland) Act 1976, so that family members of people who die as a result of negligence can make their own, separate claim for non-patrimonial loss within a certain time limit, even when the victim has made a compensation claim whilst alive.

Overall, we believe that the discussion paper succinctly summarises the current law and relevant issues and makes proposals which will of be significant benefit to people whose relatives have been wrongfully killed.

For convenience, APIL has adopted the protocol of the consultation paper, referring to the deceased as masculine and the spouse as feminine.

- 1. Should a victim continue to receive damages for loss of expectation of life as part of an award of solatium only if he is aware or is likely to become aware that his life will end prematurely?**

Yes. A victim himself does not have a loss of expectation of life if he does not know that his life will end prematurely. It is better to compensate the people who suffer as a result of the deceased's loss of life, such as relatives, who feel the effects of the victim's death.

- 2. Should a victim continue to be able to claim future patrimonial loss for the periods between (i) the date of decree and the date when the victim is expected to die and (ii) from the date when the victim is expected to die and the notional date of death i.e. the lost period?**

Yes. The victim suffered the effect of the injuries and the compensation for this should go to the victim. In the first case, the victim is the person who feels the effect of the lost earnings, and should receive compensation for that loss. For the lost period, although the victim does not suffer from loss of earnings directly, the victim's family will be affected. The victim should be able to recover lost earnings for that period, which would enable him to provide for his family after his death. This is important, as it gives the victim peace of mind before his death.

- 3. For the purposes of the lost period only, (i) should income include income from third parties as well as the victim's earnings and (ii) should a deduction be made for the victim's reasonable living expenses?**

Yes, income for the lost period should take account of income from third parties and a deduction should be made for the deceased victim's reasonable living expenses. A defender should be liable for all actual financial losses suffered by the victim rather than being liable for some and not for others.

The source of a victim's future income is irrelevant when considering this principle: all that is relevant is that the income was curtailed and that the defender is liable for this. Deductions for living expenses should be made otherwise the lost income for which the victim is compensated will be artificially inflated.

4. (a) Should a claim under section 8 of the Administration of Justice Act 1982 continue to exclude the lost period?

Yes. A deceased person has no care costs to claim for. The expected date of death is the correct cut off point in terms of calculating when the victim's actual care costs will end.

(b) Should a claim under section 9 of the Administration of Justice Act 1982 include the lost period?

Yes. The actual cost of services does not change because a victim, who used to render the services free of charge, dies. If a claim is made under section 9, this should therefore include the lost period, when the services previously rendered by the deceased victim and no longer provided by him continue to result in real expense.

5. (a) Should an executor be able to sue for the damages which the deceased could have recovered in respect of patrimonial loss sustained during the lost period?

In principle, we welcome this proposal although we have two specific areas of concern, namely inheritance tax and the position of dependent relatives who will not benefit from the deceased's estate.

We believe that the consultation paper sets out a thorough summary of the current highly complex situation and makes persuasive arguments in favour of this proposed change. In particular we believe that a person who suffers fatal injuries due to another person's negligence should be able to recover the future financial losses his injuries and death will result in and, if he dies before being able to do, his executor should be able to do so in his stead.

Allowing an executor to sue for future patrimonial loss would also address two of the current system's undesirable outcomes.

Firstly, if there are no dependants, there can be no loss of earnings claim after the victim's death. This could mean a potential windfall for the defender, whose liability would be limited to loss of earnings claims before death (which could be nil if the deceased victim was not working at the time of the accident, or died instantaneously) and claims for non-patrimonial loss. It can therefore be cheaper for the defender to kill rather than to injure a victim, which acts as a dis-incentive to those people with a duty of care for others to put health and safety measures in place to prevent negligent deaths. If the executor could make a claim for future patrimonial loss, defenders would have to pay significant compensation. Family members would be most likely to receive this due to the law of succession.

Secondly, where there are dependent relatives, their claim is calculated on the basis of what they have lost. A spouse who is working is considered to be less financially dependent than one who is not. The amount of compensation the spouse receives is therefore calculated differently according to her own circumstances, whereas logic dictates that the compensation should be calculated according to the deceased victim's circumstances.

We note that the paper highlights a concern that the proposed change in the law may result in increased compensation for the family of the deceased. This is a bad argument against making the proposed change. The defender should pay for the losses the negligence caused, including all future patrimonial loss. If the executor is able to recover compensation for the victim's lost future earnings (less a proportion for his living costs), the defender will be paying for the losses the negligence caused.

Despite APIL's support for this proposal in principle, we do have two important concerns about the impact the proposed change would have in practice. One of APIL's concerns about this proposal is that in rare circumstances some dependent relatives may be left without any compensation. We believe, however, that this issue can be addressed by the Commission and address this issue further in the answer to question 5c) below.

APIL's other concern is that inheritance tax may have the unwanted effect of reducing compensation for wrongful death in some cases. Whether inheritance tax is payable will depend on the financial and personal circumstances of the deceased victim. A married person will not have to pay inheritance tax on a spouse's estate, and a person with few assets may find that an award of damages does not take his estate past the point at which inheritance tax becomes payable. By way of example, though, the children of a divorced woman who will inherit their mother's estate, which is worth £300,000 (excluding damages), would have to pay inheritance tax on anything above this. If she was wrongfully killed and her estate sues for damages for her wrongful death, any damages received will be subject to a 40% deduction for inheritance tax. We believe that this would be an undesirable outcome and therefore urge the Commission to consider whether the current tax exemptions for damages for wrongful death should continue to apply to damages recovered even if they form part of the deceased's estate.

(b) If so, should a relative's right to recover damages for loss of support (patrimonial loss) be abolished?

Yes. If relatives were allowed to sue for loss of support in addition to the executor claiming for lost earnings, the defender would have to pay twice for the same loss. This would not be a fair outcome.

The law allows certain individuals (such as a surviving spouse or children) to benefit from an estate even where they are not named in a will and laws of succession provide for relatives in cases of intestacy. It is therefore highly likely that relatives who would otherwise be able to sue for loss of support will be provided for under a new system where the executors of an estate can make a claim for the deceased's loss of earnings.

(c) If so, where a relative would suffer serious financial hardship from the loss of the deceased's support, should he have the right to seek a capital sum payment from the deceased's executor to relieve him of such hardship?

Yes. Although provisions for distributing a person's estate after death seem comprehensive, there may be occasions where there are people who were financially dependent on the deceased, but not entitled to benefit from the estate by will, legal right or succession. The position of cohabitees is particularly difficult. Cohabitees can make a claim under the Family Law (Scotland) Act 2006, but only on intestacy. A cohabitee living with a married person who is yet to amend his will may therefore find herself financially dependant on her partner, yet not entitled to any financial support on his death. If that death was wrongful, she is currently entitled to make a claim for loss of support. The proposals for change would remove that right.

A cohabitee's position on intestacy is also uncertain, with the amounts they are likely to receive from an estate varying significantly because the present scheme for intestate succession distinguishes between heritable and moveable property. In addition, a cohabitee can not get more than a spouse would be entitled to, and if the deceased person did have a spouse, the spouse's interest would be deducted from the estate before the cohabitee's claim is considered.

Furthermore, if the deceased victim accepted a step-child as a child of the family, under the current rules of succession, the step-child would not be entitled to receive part of the victim's estate, but under the current rules for wrongful death, can make a claim for loss of support.

So although allowing executors to sue for lost earnings may benefit dependants in most cases, it is necessary to retain a provision so that those people who might otherwise lose out do not suffer as a result of the proposed changes.

If the court has discretion to order the deceased's estate to make a lump sum payment to dependants who would otherwise suffer financial hardship, this would strike a proper balance between allowing full recovery of financial losses from the defender, and proper provision for the deceased person's family and dependants.

6. Should the executor of a deceased person who has been wrongfully killed outright continue to have no title to sue on behalf of the deceased's estate for future patrimonial loss?

No. We believe that the executor should have title to sue for future patrimonial loss in cases of instantaneous loss, just as in cases where the victim was not killed outright. The arguments above in relation to the "lost period" are also relevant here.

Whilst we would obviously prefer this to be the position, we recognise the need for the law to be consistent in order for it to be fair. We therefore believe that the position with regard to future loss of earnings should be the same regardless of whether the victim's death was instantaneous or not. Whatever the Scottish Law Commission recommends in relation to question five above should therefore also be recommended in relation to question six.

7. Should the right to sue on the death of a relative continue to be a dependent right in the sense that a relative cannot sue unless the responsible person would have been liable to the deceased if he had sought damages for personal injuries before he had died?

Yes. In order for relatives or executors to claim for damages in relation to the death of a person, the person on whose suffering the claim is based must have suffered a legal wrong.

That wrong must not have already been redressed in a way recognised by the law as being in full and final satisfaction of all claims in relation to the wrongdoing.

To change the law to reflect otherwise would be a significant change in the longstanding principles which have underpinned the common law system in Scotland.

- 8. (a) Because of the dependent nature of the relative's claim, should it continue to be extinguished if before he died the deceased had discharged the responsible person's liability to him or his executor?**

Yes, save for the exception referred to below (which creates an independent right to sue).

- (b) If so, should there be an exception to the general rule allowing a relative's claim for non patrimonial loss, if the deceased dies within three years of the beginning of the limitation period in respect of his claim against the responsible person whose liability he discharged during that period?**

Yes. We believe that the above proposal, already implemented in a similar form for families of mesothelioma victims, would be for the benefit of families who have lost relatives as result of negligence.

Relatives' claims for loss of society are dependent only upon the liability element of the deceased victim's claim, i.e. if the defender was liable to the victim he is also liable to the victim's dependants upon the victim's death. Relatives' claims for solatium are for loss of society, grief and sorrow and anxiety and distress. This is quite distinct from the victim's own claim for solatium.

Allowing relatives to claim a non-patrimonial award after the loss of their loved one would therefore not lead to double recovery, even if the victim made a claim before his death.

In addition, the proposed reform would allow victims to see the benefit of compensation whilst alive, without being worried that this will mean their family will be less financially secure after their death.

(c) Should the period be three years or should it be longer, for example five years?

We have no objection to the proposed period of three years. The Scottish Law Commission is, however, aware of APIL's concerns about the way that limitation periods are interpreted by the courts, which are detailed in our June 2006 response to the Commission's consultation on limitation and prescribed claims.

9. Should the pursuer be able to recover damages for all the patrimonial loss actually sustained by her as a consequence of the deceased's death and not simply the loss of the deceased's financial support?

Yes, although this issue would only arise if dependent relatives continue to be able to sue for loss of support claims, rather than executors claiming loss of future earnings.

Loss of support claims are calculated using a formula which makes assumptions about the amount of support the deceased person provided for his dependants, based on the income of both.

A spouse of a deceased victim does, for example, receive more compensation for loss of support when not working. This is because the assumptions made include one that a deceased person whose spouse works spends more money on themselves, than one that doesn't.

Whilst such assumptions may have been broadly true at the time they were first made, we submit that they are now outdated. Rising living costs and significant liabilities (such as mortgage costs) mean that families often plan their expenditure based on two incomes.

If a dependant were able to recover damages for all the patrimonial loss actually sustained as a consequence of the deceased's death and not simply the loss of the deceased's financial support, it would be considerable fairer, and would better reflect the principle that people who suffer as a result of another's negligence are able to recover compensation for their actual losses.

10. On the assumption that such claims are to be retained should the multiplier continue to run from the date of the deceased's death?

On this issue, we commend and support the approach of the Ogden working party which recommends the use of split multipliers in fatal accident cases. To use only one multiplier from the date of the deceased's death could result in relatives being under-compensated. This is because the multiplier used in calculating future loss is discounted to take in to account factors which may occur in the future (i.e. early receipt and the possibility of the pursuer's death) but which have not in fact occurred by the time of the proof.

The multiplier should not therefore be discounted for these factors when calculating losses between the deceased's death and the date of the proof, but of course the factors will be relevant in the future and so the multiplier should continue to be subject to the appropriate discount for damages awarded from the date of proof onwards.

Section D of the 6th edition of the Ogden tables (available at http://www.gad.gov.uk/Documents/Ogden_Tables_6th_edition.pdf) deals with the application of tables to fatal accident cases and is relevant to this issue.

11. Should a claim for damages for the loss of a deceased's relative's personal services be subject to the same regime on deductions from damages as claims under the Damages (Scotland) Act 1976?

Yes, for the reasons stated in the consultation paper. We believe that this regime works well in practice.

12. Does the current system whereby the deceased's immediate family can seek damages under section 1(4) of the Damages (Scotland) Act 1976 for non-patrimonial loss operate satisfactorily?

Yes, we believe it operates satisfactorily. It is important to retain the court's discretion to decide the amount of damages that should be awarded for loss of society. Generally, awards have been fairly consistent since the case of *Shaher and others v. British Aerospace Flying College Limited* ScotCS 155 (29 May 2003), but it is important that the courts can retain a degree of flexibility in the making of such awards. Appendix C to the consultation paper shows wide variations that are made only in particular circumstances, such as a low award for loss of society to a widow, who only survived her husband by two days, and subtle differences in the awards made to the deceased's children depending on their ages and connections with their parents.

13. Should the deceased's immediate family's title to sue for non-patrimonial loss be abolished?

No. Whilst it is clear that a family can not be compensated for the loss of a loved one as a result of a wrongful act, the immediate family's entitlement to sue for non-patrimonial loss is an important acknowledgement that the death has had a significant effect on people's lives, and not just in the sense of financial loss.

To suggest that a wrongful death should not receive such a symbolic acknowledgement is socially and morally repugnant and would not serve to enhance public confidence in the civil justice system.

14. Should the deceased's immediate family's title to sue for non-patrimonial loss be abolished if the executor had title to sue for future patrimonial loss to the deceased's estate arising from his death?

No. Claims for patrimonial and non-patrimonial loss are separate claims. Non-patrimonial claims arise out of a person's relationship with the deceased, and as noted above are an important acknowledgement of the wrongful death suffered by a pursuers' close relative. Patrimonial claims are based on the deceased likely future earnings, which is an unrelated head of damage.

To link these two heads of damage would be to equate a person's worth with the amount of money which he would have earned if the wrong which caused his death had not occurred. In the case of a child, this would mean his likely earnings (less a significant proportion of this to account for the deceased's own cost of living) throughout his expected lifetime. This amount is likely to be higher for a child of a family where the parents went to university and who have high paying jobs, for example, than for a child whose parents have low paying jobs.

In effect, if a claim loss of earnings (even if this involves significant amounts of money) replaced claim for loss of society, the 'value' of a person's life would be calculated according to how much money the person earned. We think that this would be a very undesirable situation.

15. If a section 1(4) claim should continue should it be replaced by a conventional non-compensatory award?

A conventional non-compensatory award should not replace the current 1(4) claim. Whilst it is difficult to put a monetary figure on a claim for loss of society, the courts have been doing this for some time now and tend to make consistent awards, whilst still retaining discretion in case this is necessary.

A tariff would remove this discretion, which could be invaluable in some cases, whilst not bringing any increased benefits.

16. On the assumption that their right to claim damages for patrimonial loss is to be retained, should title to sue be restricted to the relatives (as defined in Schedule 1 to the 1976 Act) who now constitute the deceased's immediate family?

Yes. We believe that the schedule is sufficiently widely drafted to provide financial support for those supported by the deceased victim before his death.