



# Damages (Scotland) Act 2011

2011 asp 7

**The Bill for this Act of the Scottish Parliament was passed by the Parliament on 3rd March 2011 and received Royal Assent on 7th April 2011**

An Act of the Scottish Parliament to make further provision as regards rights to damages in respect of personal injuries and death; and for connected purposes.

## **1 Damages to injured person whose expectation of life is diminished**

- (1) This section applies to an action for damages in respect of personal injuries suffered by a pursuer whose date of death is expected to be earlier than had the injuries not been suffered.
- (2) In assessing the amount of damages by way of solatium the court is, if the pursuer—
  - (a) was at any time,
  - (b) is, or
  - (c) is likely to become,aware of the reduced expectation of life, to have regard to the extent to which the pursuer, in consequence of that awareness, has suffered or is likely to suffer.
- (3) Subject to subsection (2), no damages by way of solatium are recoverable by the pursuer in respect of loss of expectation of life.
- (4) In making an award of damages by way of solatium, the court is not required to ascribe specifically any part of the award to loss of expectation of life.
- (5) In assessing the amount of any patrimonial loss in respect of the period after the date of decree the court is to assume that the pursuer will live until the date when death would have been expected had the injuries not been suffered (the “notional date of death”).
- (6) Such part of that amount as is attributable to the period between the expected date of death and the notional date of death (the “lost period”) is to be assessed as follows—
  - (a) the court is to estimate what (if anything) the pursuer would have earned during the lost period through the pursuer’s own labour or own gainful activity had the injuries not been suffered,
  - (b) the court may, if it thinks fit, add to the amount so estimated (whether or not that amount is nil) an amount equivalent to all or part of what it estimates the pursuer would have received by way of relevant benefits during the lost period had the injuries not been suffered, and

- (c) the court is then to deduct, from the total amount obtained by virtue of paragraphs (a) and (b), 25% of that amount (to represent what would have been the pursuer's living expenses during the lost period had the injuries not been suffered).
- (7) But, if satisfied that it is necessary to do so for the purpose of avoiding a manifestly and materially unfair result, the court may apply a different percentage to that specified in subsection (6)(c).
- (8) In paragraph (b) of subsection (6), "relevant benefits" means benefits in money or money's worth other than benefits—
  - (a) derived from the pursuer's own estate, or
  - (b) consisting of such earnings as are mentioned in paragraph (a) of that subsection.

## **2 Transmission of deceased's rights to executor**

- (1) There are transmissible to a deceased person's executor ("E") the like rights to damages, including a right to damages for non-patrimonial loss, in respect of injuries suffered by the deceased ("A") and vested in A immediately before A's death, being—
  - (a) personal injuries, or
  - (b) injuries which, though not personal injuries, are—
    - (i) injuries to name or reputation, or
    - (ii) injuries resulting from harassment actionable under section 8 of the Protection from Harassment Act 1997 (c.40).
- (2) The "like rights" mentioned in subsection (1) do not include any right to damages by way of compensation for patrimonial loss attributable to any period after the date of death; and in determining the amount of damages for non-patrimonial loss payable to E by virtue of this section, the only period to which the court is to have regard is that ending immediately before A's death.
- (3) In so far as a right to damages vested in A comprises a right to damages for non-patrimonial loss in respect of such injuries as are mentioned in sub-paragraph (i) of subsection (1)(b), that right is transmissible to E only if an action to enforce the right is brought by A and is not concluded before A's death.
- (4) For the purposes of subsection (3) an action is not to be taken to be concluded—
  - (a) while an appeal is competent, or
  - (b) before any appeal taken is disposed of.

## **3 Application of sections 4 to 6**

Sections 4 to 6 apply where a person ("A") dies in consequence of suffering personal injuries as the result of the act or omission of another person ("B") and the act or omission—

- (a) gives rise to liability to pay damages to A (or to A's executor), or
- (b) would have given rise to such liability but for A's death.

## **4 Sums of damages payable to relatives**

- (1) B is liable under this subsection to pay—

- (a) to any relative of A who is a member of A's immediate family, such sums of damages as are mentioned in paragraphs (a) and (b) of subsection (3),
  - (b) to any other relative of A, such sum of damages as is mentioned in paragraph (a) of that subsection.
- (2) But, except as provided for in section 5, no such liability arises if the liability to pay damages to A (or to A's executor) in respect of the act or omission—
- (a) is excluded or discharged, whether by antecedent agreement or otherwise, by A before A's death, or
  - (b) is excluded by virtue of an enactment.
- (3) The sums of damages are—
- (a) such sum as will compensate for any loss of support which as a result of the act or omission is sustained, or is likely to be sustained, by the relative after the date of A's death together with any reasonable expenses incurred by the relative in connection with A's funeral, and
  - (b) such sum, if any, as the court thinks just by way of compensation for all or any of the following—
    - (i) distress and anxiety endured by the relative in contemplation of the suffering of A before A's death,
    - (ii) grief and sorrow of the relative caused by A's death,
    - (iii) the loss of such non-patrimonial benefit as the relative might have been expected to derive from A's society and guidance if A had not died.
- (4) The court, in making an award under paragraph (b) of subsection (3) is not required to ascribe any part of the award specifically to any of the sub-paragraphs of that paragraph.
- (5) For the purpose of subsection (1)(a)—
- (a) a relative of A is a member of A's immediate family if the relative falls within any of paragraphs (a) to (d) of the definition of "relative" in section 14(1),
  - (b) paragraphs (a)(i) and (b) of section 14(2) are to be disregarded.

## **5 Discharge of liability to pay damages: exception for mesothelioma**

- (1) This section applies where—
- (a) the liability to pay damages to A (or to A's executor) is discharged, whether by antecedent agreement or otherwise, by A before A's death,
  - (b) the personal injury in consequence of which A died is mesothelioma, and
  - (c) the discharge and the death each occurred on or after 20th December 2006.
- (2) Liability arises under section 4(1) but is limited to the payment of such sum of damages as is mentioned in paragraph (b) of section 4(3).

## **6 Relative's loss of personal services**

- (1) A relative entitled to damages under paragraph (a) of section 4(3) is entitled to include, as a head of damages under that paragraph, a reasonable sum in respect of the loss to the relative of A's personal services as a result of the act or omission.

- (2) In subsection (1), “personal services” has the same meaning as in section 9(1) of the Administration of Justice Act 1982 (c.53) (damages in respect of inability of injured person to render such services).

## 7 Assessment of compensation for loss of support

- (1) Such part of an award under paragraph (a) of section 4(3) as consists of a sum in compensation for loss of support is to be assessed applying the following paragraphs—
- (a) the total amount to be available to support A’s relatives is an amount equivalent to 75% of A’s net income,
  - (b) in the case of any other relative than—
    - (i) a person described in paragraph (a) of the definition of “relative” in section 14(1), or
    - (ii) a dependent child,
 the relative is not to be awarded more in compensation for loss of support than the actual amount of that loss,
  - (c) if—
    - (i) no such other relative is awarded a sum in compensation for loss of support, the total amount mentioned in paragraph (a) is to be taken to be spent by A in supporting such of A’s relatives as are mentioned in sub-paragraphs (i) and (ii) of paragraph (b),
    - (ii) any such other relative is awarded a sum in compensation for loss of support, the total amount mentioned in paragraph (a) is, after deduction of the amount of the sum so awarded, to be taken to be spent by A in supporting such of A’s relatives as are mentioned in those sub-paragraphs, and
  - (d) any multiplier applied by the court—
    - (i) is to run from the date of the interlocutor awarding damages, and
    - (ii) is to apply only in respect of future loss of support.
- (2) But, if satisfied that it is necessary to do so for the purpose of avoiding a manifestly and materially unfair result, the court may apply a different percentage to that specified in subsection (1)(a).
- (3) In subsection (1)(b)(ii), “dependent child” means a child who as at the date of A’s death—
- (a) has not attained the age of 18 years, and
  - (b) is owed an obligation of aliment by A.

## 8 Further provision as regards relative’s entitlement to damages

- (1) Subject to subsection (3), in assessing for the purposes of section 4 or 6 the amount of any loss of support sustained by a relative of A no account is to be taken of—
- (a) any patrimonial gain or advantage which has accrued or will or may accrue to the relative, by way of succession or settlement, from A or from any other person, or
  - (b) any insurance money, benefit, pension or gratuity which has been, or will or may be, paid as a result of A’s death.
- (2) In subsection (1)—

“benefit” means benefit under the Social Security Contributions and Benefits Act 1992 (c.4) or the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (c.7) and any payment by a friendly society or trade union for the relief or maintenance of a member’s dependants,  
“insurance money” includes a return of premiums, and  
“pension” includes a return of contributions and any payment of a lump sum in respect of a person’s employment.

- (3) Where A has been awarded a provisional award of damages under section 12(2) of the Administration of Justice Act 1982 (c.53), the making of that award does not prevent liability from arising under section 4(1); but in assessing for the purposes of section 4 or 6 the amount of any loss of support sustained by a relative the court is to take into account such part of the provisional award relating to future patrimonial loss as was intended to compensate A for a period beyond the date on which A died.
- (4) In order to establish loss of support for the purposes of section 4 or 6, it is not essential for a relative to show that A was, or might have become, subject to a duty in law to provide support for, or contribute to the support of, the relative; but if any such fact is established it may be taken into account in determining whether, and if so to what extent, A would (had A not died) have been likely to provide, or contribute to, such support.
- (5) Except as provided for in this Act or in any other enactment, no person is entitled by reason of relationship to damages in respect of the death of another person.
- (6) In subsection (5), “damages” includes damages by way of solatium.

## **9 Transmission of relative’s rights to executor**

- (1) This section applies where liability to pay damages to a relative (“R”) has arisen under section 4 or 6 but R dies.
- (2) If the right to damages is vested in R immediately before R’s death that right is transmissible to R’s executor (“E”); but in determining the amount of damages payable to E by virtue of this section, the only period to which the court is to have regard is the period ending immediately before R’s death.
- (3) In a case where—
  - (a) section 5 applies, and
  - (b) R died before 27th April 2007,any right of R to damages under that section is to be taken, for the purposes of subsection (2), to have vested in R on A’s death.

## **10 Enforcement by executor of rights transmitted under section 2 or 9**

- (1) Where a right is transmitted by virtue of section 2 or 9, the executor in question is entitled—
  - (a) to bring an action to enforce it, or
  - (b) if an action to enforce it was brought by the deceased but not concluded before the date of death, to be sisted as pursuer in that action.
- (2) For the purposes of subsection (1)(b) an action is not to be taken to be concluded—
  - (a) while an appeal is competent, or

- (b) before any appeal taken is disposed of.

### **11 Executor's claim not excluded by relative's claim etc.**

- (1) A claim made by virtue of this Act by a deceased's executor is not excluded by a claim so made by a relative of the deceased (or by such a relative's executor).
- (2) Nor is a claim so made by a such a relative (or by such a relative's executor) excluded by a claim so made by the deceased's executor.

### **12 Limitation of total amount of liability**

- (1) This section applies to an action directed against a defender ("B") in which, following the death of a person ("A") from personal injuries, damages are claimed—
  - (a) in respect of those injuries, by A's executor, or
  - (b) in respect of A's death, by any relative of A or by the executor of any relative of A.
- (2) If it is shown that the liability arising in relation to B from the personal injuries in question—
  - (a) had before A's death, by antecedent agreement or otherwise, been limited to damages of a specified or ascertainable amount, or
  - (b) is so limited by virtue of an enactment,
 nothing in this Act makes B liable to pay damages exceeding that amount.
- (3) Accordingly, where there are two or more pursuers, any damages to which they would (but for this section) respectively be entitled under this Act are, if necessary, to be reduced pro rata.
- (4) And where two or more actions are conjoined the conjoined actions are to be treated, for the purposes of this section, as if they were a single action.

### **13 Amendment of section 9 of Administration of Justice Act 1982**

In section 9 of the Administration of Justice Act 1982 (c.53) (services to injured person's relative)—

- (a) after subsection (1) there is inserted—
  - “(1A) In assessing the amount of damages payable by virtue of subsection (1) above to an injured person whose date of death is expected to be earlier than had the injuries not been sustained, the court is to assume that the person will live until the date when death would have been expected had the injuries not been sustained.”,
- (b) subsection (2) is repealed,
- (c) in subsection (3), for the words “subsections (1) and (2)” there is substituted “subsection (1)”, and
- (d) in subsection (4), for the words “subsection (2) above” there is substituted “section 6(1) of the Damages (Scotland) Act 2011 (asp 7) (relative's loss of personal services)”.

## 14 Interpretation

- (1) In this Act, unless the context otherwise requires—
- “personal injuries” means—
    - (a) any disease, and
    - (b) any impairment of a person’s physical or mental condition, and
  - “relative”, in relation to a person who has died, means a person who—
    - (a) immediately before the death is the deceased’s spouse or civil partner or is living with the deceased as if married to, or in civil partnership with, the deceased,
    - (b) is a parent or child of the deceased, accepted the deceased as a child of the person’s family or was accepted by the deceased as a child of the deceased’s family,
    - (c) is the brother or sister of the deceased or was brought up in the same household as the deceased and accepted as a child of the family in which the deceased was a child,
    - (d) is a grandparent or grandchild of the deceased, accepted the deceased as a grandchild of the person or was accepted by the deceased as a grandchild of the deceased,
    - (e) is an ascendant or descendant of the deceased (other than a parent or grandparent or a child or grandchild of the deceased),
    - (f) is an uncle or aunt of the deceased,
    - (g) is a child or other issue of—
      - (i) a brother or sister of the deceased, or
      - (ii) an uncle or aunt of the deceased, or
    - (h) is a former spouse or civil partner of the deceased having become so by virtue of divorce or (as the case may be) dissolution of the partnership.
- (2) In deducing a relationship for the purposes of the definition of “relative” in subsection (1)—
- (a) any relationship—
    - (i) by affinity is to be treated as a relationship by consanguinity,
    - (ii) of the half blood is to be treated as a relationship of the whole blood,
  - (b) a stepchild of a person is to be treated as the person’s child.
- (3) In any enactment passed or made before this Act, unless the context otherwise requires, any reference to—
- (a) solatium in respect of the death of any person (however expressed), or
  - (b) a loss of society award,
- is to be construed as a reference to an award under paragraph (b) of section 4(3).

## 15 Minor and consequential amendments

Schedule 1 to this Act, which contains minor amendments and amendments consequential on the provisions of this Act, has effect.

## 16 Repeals

The enactments mentioned in schedule 2 to this Act are repealed to the extent mentioned in the second column of that schedule.

**17 Saving**

Nothing in this Act affects proceedings commenced before section 16 comes into force.

**18 Transitional provision etc.**

- (1) The Scottish Ministers may, by order made by statutory instrument, make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, this Act.
- (2) Subject to subsection (4), a statutory instrument containing an order under subsection (1) is subject to annulment in pursuance of a resolution of the Parliament.
- (3) An order under subsection (1) may make different provision for different cases or for different classes of case.
- (4) A statutory instrument containing an order under subsection (1) which adds to, replaces or omits any part of the text of an Act (including this Act) is not to be made unless a draft of the instrument has been—
  - (a) laid before, and
  - (b) approved by resolution of, the Parliament.

**19 Short title, Crown application and commencement**

- (1) This Act may be cited as the Damages (Scotland) Act 2011.
- (2) This Act binds the Crown.
- (3) The provisions of this Act, except section 18 and this section, come into force on such day as the Scottish Ministers may by order made by statutory instrument appoint.
- (4) An order under subsection (3) may include such transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient in connection with the commencement of this Act.



## SCHEDULE 1

(introduced by section 15)

### MINOR AND CONSEQUENTIAL AMENDMENTS

#### *Sheriff Courts (Scotland) Act 1907 (c.51)*

- 1 In Schedule 1 to the Sheriff Courts (Scotland) Act 1907 (ordinary court rules), in the definition of “relative” in rule 36.1(2), for the words “meaning assigned to it in Schedule 1 to the Damages (Scotland) Act 1976” there is substituted “same meaning as in the Damages (Scotland) Act 2011”.

#### *Prescription and Limitation (Scotland) Act 1973 (c.52)*

- 2 (1) In section 18 of the Prescription and Limitation (Scotland) Act 1973 (actions where death has resulted from personal injuries), in subsection (5), for the words “Schedule 1 to the Damages (Scotland) Act 1976” there is substituted “the Damages (Scotland) Act 2011”.
- (2) In section 22C of that Act (actions under the Consumer Protection Act 1987 where death has resulted from personal injuries), in subsection (6), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2011”.

#### *Administration of Justice Act 1982 (c.53)*

- 3 In section 13(1) of the Administration of Justice Act 1982 (supplementary), for the definition of “personal injuries” there is substituted—
- ““personal injuries” means—
- (a) any disease, and
  - (b) any impairment of a person’s physical or mental condition;”.

#### *Consumer Protection Act 1987 (c.43)*

- 4 (1) In section 1 of the Consumer Protection Act 1987 (purpose and construction of Part 1), in subsection (2), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2011”.
- (2) In section 6 of that Act (application of certain enactments etc.)—
- (a) in subsection (1)(c), for the words “section 1 of the Damages (Scotland) Act 1976” there is substituted “sections 3 to 6 of the Damages (Scotland) Act 2011”, and
  - (b) in subsection (2), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2011”.

#### *Coal Mining Subsidence Act 1991 (c.45)*

- 5 In section 32 of the Coal Mining Subsidence Act 1991 (compensation for death or disablement), in subsection (2)(c), for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2011”.

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*Status: This is the original version (as it was originally enacted).*

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*Merchant Shipping Act 1995 (c.21)*

- 6 In Part 2 of Schedule 7 to the Merchant Shipping Act 1995 (Convention on Limitation of Liability for Maritime Claims 1976), in paragraph 6, for the words “Damages (Scotland) Act 1976” there is substituted “Damages (Scotland) Act 2011”.

*Damages Act 1996 (c.48)*

- 7 In section 7 of the Damages Act 1996 (interpretation), in subsection (2), for the words “meaning given by section 10(1) of the Damages (Scotland) Act 1976” there is substituted “same meaning as in the Damages (Scotland) Act 2011”.

*Health and Social Care (Community Health and Standards) Act 2003 (c.43)*

- 8 In Schedule 10 to the Health and Social Care (Community Health and Standards) Act 2003 (recovery of NHS charges: exempted payments), in paragraph 7, for the words “section 1 of the Damages (Scotland) Act 1976 (c.13)” there is substituted “any of sections 4 to 6 of the Damages (Scotland) Act 2011 (asp 7)”.

*Companies Act 2006 (c.46)*

- 9 In section 1030 of the Companies Act 2006 (when application to the court may be made), in subsection (6)(b)(ii), for the words “Damages (Scotland) Act 1976 (c.13)” there is substituted “Damages (Scotland) Act 2011 (asp 7)”.

SCHEDULE 2

(introduced by section 16)

REPEALS

<i>Enactment</i>	<i>Extent of repeal</i>
Damages (Scotland) Act 1976 (c.13)	The whole Act.
Administration of Justice Act 1982 (c.53)	Section 14.
Law Reform (Parent and Child) (Scotland) Act 1986 (c.9)	In Schedule 1, paragraph 15.
Damages (Scotland) Act 1993 (c.5)	The whole Act.
Protection from Harassment Act 1997 (c.40)	Section 8(8).
Civil Partnership Act 2004 (c.33)	In Schedule 30, in the consequential amendments for Scotland, the entry relating to the Damages (Scotland) Act 1976.
Family Law (Scotland) Act 2006 (asp 2)	Section 35. In schedule 2, paragraph 2.
Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 (asp 18)	The whole Act.