

DAMAGES (SCOTLAND) ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 1: Damages to injured person whose expectation of life is diminished

7. **Section 1** re-enacts sections 9 and 9A of the 1976 Act but with certain amendments to give effect to recommendations 3 and 4 of the Commission's Report.
8. **Section 1** makes provision for damages to be payable to a victim of personal injuries whose expectation of life has been reduced as a result of the injuries suffered. It makes provision for the damages that such a victim can claim for—
 - (a) *solatium*, that is damages for pain and suffering, in so far as relating to the victim's awareness of the loss of expectation of life; and
 - (b) patrimonial loss, that is damages for the economic loss likely to be suffered by the victim, in so far as relating to the period between the expected date of death and the date when death would have been expected had the injuries not been suffered ("the notional date of death"). This period is known as the "lost period".
9. These damages are in addition to the damages that a victim is entitled to claim under the general principles of the common law of delict or under statute for *solatium*, that is damages for the pain and suffering that the victim endures as a result of the injuries, and for patrimonial loss that such a victim has suffered or is likely to suffer in the period up to the expected date of death.
10. Subsection (1) provides that persons may only claim damages in terms of the section if the person's date of death is expected to be earlier than it would have been if the injuries had not been suffered.
11. Subsections (2) to (4) re-enact section 9A of the 1976 Act in a slightly recast form. They are concerned with a victim's claim for *solatium*.
12. Subsections (2) and (3) make it clear that a victim will continue to receive damages for loss of expectation of life as part of an award of *solatium* only if the victim is, or was at any time, aware, or is likely to become aware that the victim's life expectancy has been reduced. As a result, where a victim of personal injuries is killed instantaneously, the victim's executor will continue not to be able to recover *solatium* on behalf of the estate.
13. Subsection (4) provides that, where a victim claims *solatium* for loss of expectation of life as part of a wider claim for *solatium*, the court does not require to ascribe any part of the damages by way of *solatium* to loss of expectation of life.
14. Subsections (5) to (7) re-enact, with certain amendments, section 9 of the 1976 Act. They are concerned with a victim's claim for patrimonial loss suffered as a result of the victim's injuries.
15. Subsection (5) re-enacts section 9(2)(a) of the 1976 Act. It provides that, when quantifying future loss, the court is to assume that the victim will live until the notional

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(asp 7) which received Royal Assent on 7 April 2011*

date of death. It ensures that a victim will continue to be able to claim damages for any patrimonial loss that the victim suffers, or is expected to suffer during the lost period.

16. Subsection (6) specifies how patrimonial loss during the lost period is to be assessed. This differs from the computation presently carried out under section 9(2)(b) and (c) of the 1976 Act because subsection (6) is only concerned with damages for patrimonial loss during the lost period and not, as at present, also for the period between the date of decree and the victim's expected date of death. This gives effect to recommendations 3 and 4 of the Commission's Report.
17. Paragraph (a) of subsection (6) provides that the court is to estimate what the victim's earnings would have been during the lost period.
18. Paragraph (b) of subsection (6) restates the court's discretion to take into account, for the purposes of assessing the victim's patrimonial loss during the lost period, any benefits in money or money's worth derived from sources other than the victim's own estate.
19. Paragraph (c) of subsection (6) makes provision for a deduction to continue to be made for the victim's reasonable living expenses from the aggregate amount under paragraphs (a) and (b) so as to arrive at the amount of the multiplicand that the court is to apply when awarding the damages that the victim can recover for patrimonial loss during the lost period. However, rather than as at present leaving it to the court to assess what deduction should be made, it provides that a fixed percentage of 25% should be deducted from that aggregate amount to represent what would have been the pursuer's living expenses during the lost period had the injuries not been suffered. This gives effect to recommendation 4 of the Commission's Report. The court will, however, have discretion under subsection (7) to depart from the fixed percentage in the limited circumstances in which it is necessary to do so in order to avoid a manifestly and materially unfair result.
20. Subsection (8) defines "relevant benefits" in paragraph (b) of subsection (6). It is based on the wording of section 9(2)(b) of the 1976 Act, but by placing this information in a separate subsection it seeks to increase the readability of subsection (6). The definition will include benefits that accrue to the victim from third parties.