

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

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.

Section 2: Transmission of deceased's rights to executor

21. **Section 2** re-enacts section 2 of the 1976 Act, with minor changes. It makes provision for the transmission of the deceased victim's right to sue to the victim's executor.
22. Subsection (1) restates section 2(1) of the 1976 Act. It provides that "the like rights" to damages (including damages for non-patrimonial loss or *solatium*) in respect of injuries that are vested in the deceased victim immediately before death transmit to the victim's executor.
23. For this purpose, "injuries" are defined as—
 - (a) personal injuries; and
 - (b) injuries which, although not personal, are (i) injuries to name or reputation and (ii) injuries resulting from harassment actionable under section 8 of the [Protection from Harassment Act 1997 \(c.40\)](#).
24. This restates the effect of section 2(1) of the 1976 Act but distinguishes between personal and non-personal injuries in view of the definition of "personal injuries" in section 14(1) of the Act, which excludes non-personal injuries.
25. Subsection (2) restates section 2(2) and (3) of the 1976 Act. It limits the extent to which the deceased's right to damages transmits to the executor. It does so by defining what is meant by "the like right" to damages so as to exclude any right to damages for patrimonial loss, or for non-patrimonial loss, in respect of any period after the date of the deceased's death. This is to avoid overcompensation where the deceased's relatives

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will have a claim for patrimonial loss in terms of section 4(3)(a), and to reflect the fact that the deceased's sufferings are taken to end with the deceased's death.

26. Subsection (3) restates section 2(4) of the 1976 Act. It makes provision for the special case where the deceased had a right to damages for non-patrimonial loss arising from defamation, verbal injury or other injury to reputation. It provides that the right to damages only transmits to the deceased's executor if the deceased had raised an action to enforce the right before death and the action had not been concluded by the date of the deceased's death. In other words, an executor may be sisted into a defamation action that has already been raised, but the executor cannot raise a new action in which damages are sought only for non-patrimonial loss. If the victim had sustained patrimonial loss as a result of the defamation, however, the executor will have title to sue by virtue of subsection (1).
27. Subsection (4) explains what is meant by an action being concluded in terms of subsection (3). This repeats the provision in section 2A(2) of the 1976 Act.

Section 3: Application of sections 4 to 6

28. **Section 3** re-enacts part of section 1(1) of the 1976 Act. It introduces the provisions dealing with the rights of the victim's relatives to damages. It provides that the rights of relatives contained in sections 4 to 6 apply where the victim ("A") died from personal injuries caused by the defender ("B"), so long as B would have been liable to pay damages to A if A had sued before A's death. In this way, the relatives' right to sue is dependent on B's liability to A.

Section 4: Sums of damages payable to relatives

29. **Section 4** re-enacts the rest of section 1(1) and section 1(2) and (3) of the 1976 Act. It makes provision about the damages that the defender may have to pay to the relatives of the victim in the case where section 3 applies, that is, in the case where the victim ("A") dies of personal injuries caused by the defender ("B") and B is liable to pay damages to A.
30. Subsections (1) and (2) restate the rest of section 1(1) and (2) of the 1976 Act. They provide that, in these circumstances, the defender B is liable to pay damages in terms of subsection (3) to relatives of the victim. Subsection (1) also establishes that members of the victim's immediate family have different rights to damages than other relatives. Subsection (5) defines "immediate family" for this purpose as a subset of the definition of "relative" contained in section 14(1). The right to damages is qualified by subsection (2) which provides that no liability to relatives will arise where the victim has discharged or excluded liability before the victim's death, or where liability is excluded by an enactment. The qualification is itself subject to an exception for mesothelioma cases, which are governed by section 5.
31. Subsection (3) specifies the damages that a defender B may be liable to pay to the deceased's relatives. B may be liable to pay damages under paragraphs (a) and (b) to immediate family members. B may be liable to pay damages only under paragraph (a) to other relatives.
32. Paragraph (a) of subsection (3) re-enacts section 1(3) of the 1976 Act. It deals with patrimonial loss and provides that a relative will only be able to recover damages for two heads of such loss—
 - (a) the loss of support that, as a result of B's act or omission, is, or is likely to be, suffered by that relative after A's death; and
 - (b) the reasonable expenses incurred by that relative in connection with A's funeral.

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33. Paragraph (b) of subsection (3) re-enacts section 1(4) of the 1976 Act. It deals with non-patrimonial loss and provides that a relative will only be able to recover damages for three heads of such loss—
- (a) distress and anxiety endured by the relative in contemplation of the suffering of A before A's death;
 - (b) grief and sorrow of the relative caused by A's death;
 - (c) 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.
34. Section 1(4) of the 1976 Act restricted damages under that subsection to a subset of the deceased's relatives known as the deceased's "immediate family". The Act maintains a distinction between the immediate family and other relatives for this purpose. The immediate family is defined as those close relatives falling into the categories set out in paragraphs (a) to (d) of the definition of "relative" in section 14(1). Only they may claim damages under section 4(3)(b) for non-patrimonial loss as well as loss of financial support. Other relatives who do not fall within the definition of immediate family but fall into the categories set out in paragraphs (e) to (h) of section 14(1) may only claim for loss of financial support.

Section 5: Discharge of liability to pay damages: exception for mesothelioma

35. Section 5 re-enacts subsections (2A) and (2B) of section 1 of the 1976 Act which were inserted by the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 ("the 2007 Act").
36. It forms an exception, in cases where a victim dies of mesothelioma, to the general principle laid down in section 4(2) that the defender B is not liable to pay damages to the deceased's (A's) relatives where A has discharged or excluded liability before A's death.
37. Subsection (1) contains three criteria which must be met for section 5 to apply.
38. Paragraph (a) provides that A must have discharged B's liability to A before death.
39. Paragraph (b) provides that the personal injury from which A dies must be mesothelioma.
40. Paragraph (c) provides that both the discharge and the death must have taken place on or after 20 December 2006. This was the date specified in the 2007 Act as the date from which the exception would apply.
41. Subsection (2) provides that, where the three criteria set out in subsection (1) are met, B will be liable in damages to A's relatives even though A had discharged the liability before A's death. However, B's liability is limited to damages for non-patrimonial loss; A's relatives may seek an award in terms of section 4(3)(b) but not damages for loss of support under section 4(3)(a).

Section 6: Relative's loss of personal services

42. Section 6 re-enacts section 9(2) of the Administration of Justice Act 1982 ("the 1982 Act"). It deals with the right of A's relatives to damages for loss of personal services that were provided by A before A's death.
43. Subsection (1) provides that a relative who is entitled to damages for loss of support may also include a claim for damages for loss of A's personal services.
44. Subsection (2) defines "personal services" in subsection (1) by reference to section 9(1) of the 1982 Act. This refers to personal services as the services mentioned in section 9(3) of the 1982 Act, being services—

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- (a) which were or might have been expected to have been rendered by the injured person before the occurrence of the act or omission giving rise to liability;
- (b) of a kind which, when rendered by a person other than a relative, would ordinarily be obtainable on payment; and
- (c) which the injured person but for the injuries in question might have been expected to render gratuitously to a relative.

Section 7: Assessment of compensation for loss of support

- 45. Section 7 is a change from the existing law. It makes detailed provision as to how a relative's claim under section 4(3)(a) for damages for loss of the deceased's ("A's") support is to be calculated.
- 46. Paragraph (a) of subsection (1) provides that the total amount available to support A's relatives is an amount equivalent to 75% of A's net income.
- 47. In the circumstances specified in subsection (1)(c) the resulting figure, arrived at after calculating 75% of the deceased's net income, will be applied by the court as the measure of the overall level of support that would have been provided by the deceased to the deceased's relatives. The court will, however, have discretion under subsection (2) 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.
- 48. Paragraph (b) of subsection (1) restates the general principle that a relative must prove the actual loss of support suffered and can only recover damages to that extent, unless the relative falls within certain excepted cases for which special provision is made. The excepted cases are A's spouse, civil partner or cohabitant and any dependent children that A may have had, for whom provision is made in paragraph (c). This paragraph gives effect in part to the Commission's recommendation 11(c).
- 49. Paragraph (c) of subsection (1) contains two exceptions to the general assessment of damages laid down in paragraph (b) that apply where A's spouse, civil partner, cohabitant or dependent child – the cases excepted from paragraph (b) – claim damages for loss of support.
- 50. Sub-paragraph (i) applies where it is only the relatives falling within those excepted cases who are claiming damages for loss of support. In this case, the court is to assume that A would have spent the whole amount of 75% of A's net annual income provided for in paragraph (a) to support those relatives. This amount of damages is to be awarded to these relatives on that basis regardless of the degree to which A actually supported them. It is for the court to apportion damages among the relatives, if there is more than one. This sub-paragraph gives effect in part to the Commission's recommendation 11(a).
- 51. Sub-paragraph (ii) applies where there are also relatives other than those falling within those excepted cases who are claiming loss of support. In this case, those other relatives have to prove the actual loss of support suffered. This sum is then deducted from the 75% of the deceased's net annual income provided for in paragraph (a) and the court is to assume that A would have spent the whole amount of the sum left over on those excepted cases. This sub-paragraph (ii) gives effect to the Commission's recommendation 11(d).
- 52. Paragraph (d) makes provision in respect of the multiplier that the court applies after the relative's loss of support has been calculated under paragraphs (a) to (c). At present, the court applies the Ogden Tables¹ to find an appropriate multiplier that it applies as

¹ Actuarial Tables for Use in Personal Injury and Fatal Accident Cases ("The Ogden Tables"). The Tables and explanatory notes are published by the Government Actuary's Department and are available online at http://www.gad.gov.uk/Documents/Ogden_Tables_6th_edition.pdf

from the date of death. However, paragraph (d) provides that any multiplier applied by the court is only to be applied in respect of future loss of support and should run from the date of the interlocutor awarding damages and not from the date of death. This paragraph gives effect to the Commission's recommendation 12.

53. Subsection (3) defines the term "dependent child" for the purposes of this section as meaning a child who, 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.
54. A may owe an obligation of aliment to a child who is 18 or older under section 1(5)(b) of the Family Law (Scotland) Act 1985, such as a child in higher education. Any such child may claim for loss of support but will not benefit from the special provisions that apply to a dependent child under this section and must accordingly prove actual loss of support in terms of paragraph (b) of subsection (1). This subsection gives effect to the Commission's recommendation 11(b).

Section 8: Further provision as regards relative's entitlement to damages

55. Section 8 re-enacts subsections (5) to (7) of section 1 of the 1976 Act.
56. Subsections (1) and (2) re-enact subsection (5) of the 1976 Act, subsection (3) re-enacts subsection (5A), subsection (4) re-enacts subsection (6) and subsections (5) and (6) re-enact subsection (7).
57. In subsection (5), there is a change in that reference is now made to "any other enactment" rather than to the named provisions in subsection (7) of the 1976 Act. The other changes are largely for drafting reasons.

Section 9: Transmission of relative's rights to executor

58. Section 9 re-enacts section 1A of the 1976 Act.
59. Subsection (1) provides that section 9 applies where a relative ("R") who has a right to damages under section 4 or 6 dies before that claim can be resolved.
60. Subsection (2) provides that any right to damages under section 4 or 6 that was vested in R immediately before R's death, will transmit to the relative's executor ("E"). However, the executor can only pursue the claim for damages up to R's date of death. Damages are not payable for future loss as R's death would have brought to an end the support that R received in any case. Similarly, the grief and suffering felt by R is taken to end with R's death.
61. Subsection (3) re-enacts section 1(4) of the 2007 Act. It makes special provision for transitional cases involving the relatives of mesothelioma sufferers. The 2007 Act came into force on 27 April 2007. However, the exception that it introduced (see commentary on section 5 above) was intended to apply where both the victim's discharge of liability and the victim's death occurred on or after 20 December 2006. As a result, the 2007 Act contained a transitional provision at section 1(4). Section 1(4) provides that, where R would have had rights to damages but died in the period between the victim's death and the coming into force of the Act, the rights in question were to be taken to have vested in R as at the victim's date of death. In this way, the rights would be deemed to have vested in R before R's death and accordingly they could transmit to R's executor. Subsection (3) re-enacts this provision because there could still be cases where such a deceased relative's executor had not yet raised an action for damages.

Section 10: Enforcement by executor of rights transmitted under section 2 or 9

62. **Section 10** re-enacts section 2A of the 1976 Act. It makes provision as to how an executor can enforce the rights that are transmitted on the death of a victim (by virtue of section 2) or on the death of a relative of the victim (by virtue of section 9).
63. Subsection (1) provides that an executor may raise an action to enforce the deceased's rights or, if the deceased had already raised an action that has not been concluded, may be sisted as pursuer.
64. Subsection (2) provides that an action is not to be taken as concluded for this purpose while an appeal is competent or before any appeal is disposed of.

Section 11: Executor's claim not excluded by relative's claim etc.

65. **Section 11** re-enacts section 4 of the 1976 Act but expresses it in a clearer way.

Section 12: Limitation of total amount of liability

66. **Section 12** re-enacts section 6 of the 1976 Act.
67. It deals with limitation of the defender's ("B's") liability in cases where the victim ("A") has died from personal injuries and A's executor seeks damages in respect of the injuries suffered by A or A's relative (or the executor of such a relative) seeks damages in respect of A's death.
68. Subsection (2) provides that, where A had agreed before A's death to limit the damages payable by the defender, or where there is a statutory limitation on such damages, nothing in the Act entitles the executor or relative to recover damages of more than the permitted amount.
69. Subsection (3) provides that, where there is a multiplicity of pursuers, any damages to which each would have been entitled by virtue of this Act will be reduced *pro rata* if required in order to bring the total sum of damages within the permitted amount.
70. Subsection (4) makes provision for conjoined actions.

Section 13: Amendment of section 9 of Administration of Justice Act 1982

71. **Section 13** amends section 9 of the Administration of Justice Act 1982 ("the 1982 Act").
72. Section 9(1) of the 1982 Act entitles the victim to claim damages in respect of the victim's inability to render personal services. Paragraph (a) inserts a new subsection (1A) in section 9 of the 1982 Act which provides that, in assessing damages under subsection (1) in cases where the victim's expectation of life has been reduced, the court is to assume that the victim would have lived until the victim's notional date of death had the injuries not been sustained. This provision makes it clear that damages under section 9 of the 1982 Act are payable in respect of the lost period. It is new and reflects section 1(5) of the Act. It gives effect to the Commission's recommendation 5(b).
73. Paragraphs (b) to (d) make amendments to section 9 of the 1982 Act in consequence of section 6 which re-enacts section 9(2) of the 1982 Act. Paragraph (b) repeals section 9(2); paragraph (c) deletes the reference to subsection (2) in subsection (3), and paragraph (d) amends subsection (4) by substituting, for the reference to subsection (2), a reference to section 6(1) of the Act.

Section 14: Interpretation

74. **Section 14** makes provision for interpreting the Act. It corresponds to section 10 of the 1976 Act in regard to the definition of "personal injuries" and sets out the categories of relatives who may claim non-patrimonial and patrimonial losses. As noted at paragraph

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34, the Act maintains a distinction between the deceased's immediate family and other relatives. The categories correspond to Schedule 1 of the 1976 Act with an addition to the immediate family of persons who accepted the deceased as a grandparent or were accepted by the deceased as grandchildren.

75. Subsection (1) defines what is meant by "personal injuries" and "relative" for the purposes of the Act.