Damages (Scotland) Bill  

Written submission from the Scottish Government  

Introduction  
1. This memorandum has been prepared by the Scottish Government to assist consideration by the Justice Committee of the Damages (Scotland) Bill, which was introduced by Bill Butler MSP on 1 June 2010.

Background  
2. The aim of the Bill is to implement the recommendations made in the Scottish Law Commission’s (SLC) Report on Damages for Wrongful Death which was published in September 2008.

3. The origins of the report date back to what became the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007. It emerged in the run up to the passage of that legislation that aspects of the law on damages for wrongful death, in particular the provisions of the Damages (Scotland) Act 1976 (“the 1976 Act”), merited further examination. Therefore, a reference from Scottish Ministers in September 2006 invited the SLC:

“To consider the law relating to damages recoverable in respect of deaths caused by personal injury and the damages recoverable by relatives of an injured person; and to make appropriate recommendations for reform.”

The SLC subsequently published its Discussion Paper on Damages for Wrongful Death in August 2007 and the resulting 2008 report took account of the responses received.

4. The purpose of the Bill is to re-enact the Damages (Scotland) Act 1976 with amendments in order to modernise and simplify the provisions and to ensure relevant sections of the Administration of Justice Act 1982 are also appropriately amended. The SLC report states that from the responses to the discussion paper it is clear that there is no demand for a fundamental reform of the current law, but that there is a problem with the accessibility of the current legislation. The main proposed amendments to the existing legislation relate to the rights of relatives to damages for patrimonial loss. In particular the introduction of:

- a new method of calculating the damages payable to a victim's family;
- changes in relation to the calculation of damages by the courts by dividing the relative’s loss of support into past and future loss and running a single multiplier from the date of the interlocutor for future loss only; and
- limitations on the classes of relative who have a claim for damages as a result of a victim's death, so that the right to sue for patrimonial as well as non-patrimonial loss is restricted to the deceased’s “immediate family”.

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Consultation

5. Mr Butler originally lodged a draft proposal for implementing the SLC’s draft Bill, along with an explanation of why he considered consultation to be unnecessary, on 29 April 2009. In light of representations from some stakeholders, the Justice Committee resolved that it was not satisfied with the reasons given by Mr Butler for not consulting. Mr Butler subsequently issued a consultation paper with a closing date of 26 October 2009. The final proposal was consequently lodged on 13 January and a summary of responses to the consultation exercise was published on the Parliament’s website.

6. The paper posed 8 questions, 3 of which were general in nature and 5 of which were focused on specific changes recommended by the SLC:

- Victim’s damages for patrimonial loss: personal services under section 9 of the 1982 Act – Recommendation 5(b).
- Relatives’ title to sue for patrimonial loss – Recommendation 15.
- Relatives’ damages for non-patrimonial loss; exclusion of mental illness – Recommendation 14.

The consultation paper did not specifically address areas where the SLC had considered but ultimately recommended against reform.

7. The Member’s consultation exercise resulted in 14 formal responses being received. Respondents to the consultation consisted of 5 trade union bodies; 1 law firm; 3 insurance forums; 2 law commission/societies; the Faculty of Advocates and 2 individuals (a doctor and an advocate). The summary of these responses indicated that 9 (64%) respondents fully supported the proposals and 5 (36%) supported the proposals, subject to amendments. However, most of these responses found some level of concern with the scheme recommended by the SLC albeit, in some cases (principally in responses from the victims / pursuers side), those suggested concerns were not perceived as being fundamental. The summary highlighted the main areas of concern as:

- the disregard of the pursuer’s income;
- the set 25% and 75% allowance made for living expenses and dependency respectively;
- the division of a relative’s loss of support claim into past and future losses;
- the approach to multipliers;
- the terminology for awards for non-patrimonial loss;
- the exclusion of mental illness; and
- the potential financial implications of the recommendations.
8. In summing up the responses received Mr Butler indicated that “it was considered that the current Damages (Scotland) Act 1976 had served its purpose and the proposed new bill would function in a similar manner but would better reflect the current social and family structures in Scotland. In general most of the respondents supported the SLC’s view that radical reform is not required but that there were a small number of important areas where improvements could be made.”

9. In conclusion Mr Butler said “The responses to the consultation have provided a number of suggested amendments that the Member will consider and may use to refine policy before submitting a draft bill” However, the published Bill replicates the SLC’s draft Bill apart from the removal from Schedule 1 of a minor consequential amendment to section 651 of the Companies Act 1995 (c.6) as that section has now been repealed.

10. The Scottish Government would suggest that bodies with an interest in the Bill as it progresses include: the Association of British Insurers; the Scottish Claims Managers Forum; the Association of Personal Injury Lawyers; the Law Society of Scotland; the Forum of Insurance Lawyers; the Faculty of Advocates; the Lord President as head of the Scottish judiciary and the Scottish Court Service.

Financial Impact

11. The Financial Memorandum to the Bill indicates that the financial implications of the Bill, based on data provided by Thompsons Solicitors (who are said to be involved for pursuers in c.60% of relevant claims in Scotland), will be to increase the level of damages for loss of financial dependency or loss of future earnings by an average of 35% in wrongful death cases and in the region of 23% in lost year cases. These additional costs will fall, in the main, on insurers and UK Government Departments with responsibility for liabilities in cases arising through employment in former nationalised industries and, to a lesser extent, Scottish local authorities. Although the direct financial implications for the Scottish Government are estimated as negligible, the Financial Memorandum suggests that there may be a requirement of the Statement of Funding Policy (section 3.2.8) to meet the additional costs incurred by UK Government Departments.

12. The Financial Memorandum estimates that per annum in Scotland there are around 100 wrongful death cases settled and in the order of 12 “lost years” cases concluded before the victim dies. This equates to estimated total additional costs of £3,882,108. It acknowledges that there is a degree of uncertainty in these estimates as settlement in individual cases can vary considerably depending on the age and earnings of the victim and that the number of wrongful deaths is also subject to variation from year to year.

13. It is envisaged that following implementation of the legislation cases will settle more quickly and fewer cases will be raised in court and, in turn,
there is potential for insurers to make financial savings in respect of legal costs and judicial expenses.

14. While the Scottish Court Service are content with the assertion in the Financial Memorandum that the proposed legislation will not increase costs to the Scottish courts, they are not persuaded that court resources would be freed up as a consequence of the legislation. In addition they believe that any reduction in the level of litigation will result in a commensurate reduction in fee income. Regarding legal aid the Scottish Government agrees with Mr Butler that there is unlikely to be any increased costs as a result of the Bill.

15. It should also be noted that during the Scottish Government’s recent discussions with stakeholders, some raised serious concerns in relation to the fixed deduction of 25% for the victim’s living expenses. Particular concern was also raised regarding the disregard of spouse’s income which it was considered could potentially put some pursuers in a far better financial position than they would have been but for the accident, contrary to the fundamental principle of the law of delict of (at least notionally) putting the pursuer in the position they would have been in had it not been for the accident. It was thought that the additional costs generated would subsequently be passed on to consumers and businesses by way of an increase in premiums and could perhaps make Scotland a less attractive place to do business.

Scottish Government’s Position

16. The Scottish Government fully shares the desire to ensure that victims and their relatives have appropriate rights and the ability to secure proper redress in respect of personal injury and wrongful death. Specifically, we agree with the SLC that the Damages (Scotland) Act 1976 should be repealed and replaced by a new Act which, with appropriate amendments, restates the law in a clearer and simpler form.

17. However, we are anxious to ensure that legislative proposals are appropriate and believe that concerns raised about some of the recommendations require further exploration. Areas of particular concern include:

- the 25% discount rate;
- disregarding the spouse’s income; and
- restricting those entitled to raise an action for damages to the list of those currently eligible to claim patrimonial loss under the Damages (Scotland) Act 1976.

18. Though the first two of those particular recommendations flowed from the SLC’s consideration of responses to its discussion paper, they were not actually subject to consultation by the SLC. Stakeholders therefore had no formal opportunity to comment on these potentially quite radical changes until the consultation exercise which was undertaken by Mr Butler.
19. The Scottish Government appreciated sight of the responses to Mr Butler’s consultation. As illustrated by the responses to that consultation, in which nearly all of the respondents expressed some reservations about the scheme recommended by the SLC, there appears to be a lack of consensus on some important features. These issues need to be worked through before we can be confident that any Bill is as effective, robust and durable as it needs to be.

20. The Scottish Government believe that further work is required, to focus attention on the key issues and secure a better understanding of the implications of the recommended changes.

21. It was with such considerations in mind that the Minister for Community Safety announced in December 2009 that the SLC Report on Damages for Wrongful Death would be amongst three SLC reports on aspects of damages for personal injury that would be covered in a programme of dialogue and formal consultation with stakeholders. In determining to progress this programme, the Scottish Government had also taken account of the fact that, without distinguishing between them as regards priority, the SLC had expressed the view in its 2008 Annual Report that “significant improvements could be made in the law of delict by implementation of our Reports on Damages for Wrongful Death (published in 2008), Prescription and Limitation (published in 2007) and Damages for Psychiatric Injury (published in 2004)”.

22. Against this background, Scottish Government officials have been undertaking dialogue with a range of external stakeholders in face-to-face meetings, to develop our appreciation of specific issues and concerns, and to inform the drafting of a consultation paper. Additionally, following an initial offer made by the Cabinet Secretary for Justice in April 2009 to meet in due course to discuss the issue, Mr Butler contacted Mr MacAskill’s office in January seeking a meeting to discuss his final proposal for a Bill. As the law on damages falls within his portfolio, the Minister for Community Safety subsequently met with Mr Butler on 4 February and again on 15 April to discuss the issue. The Minister also wrote to Mr Butler on two occasions sharing with him the Scottish Government’s developing internal notes.

23. It is now intended that the SLC’s Report on Damages for Wrongful Death will be the focus of a short formal consultation exercise over the summer, with a view to informing the refinement of policy and the Scottish Government’s approach to legislation in this area. Final decisions on the Government’s approach to legislation will be taken after consideration of responses to that exercise.

Conclusion

24. The Scottish Government supports the broad objectives of the Member’s Bill in principle. While we acknowledge the admirable work undertaken in this area, both by the SLC and by Mr Butler, the Scottish Government is nevertheless of the view that certain of the SLC’s key recommendations require further examination. Consequently, we will wish to
consider representations from stakeholders before deciding on the scope of any adjustments to the detail of the SLC’s draft scheme which we may in due course wish to propose to Parliament. However, the Scottish Government will endeavour to be as positive and constructive as possible throughout the Parliamentary process of this Bill.

Civil Law Division
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