EXPERT WITNESS REPORT ON QUANTIFICATION OF DAMAGES FOR PERSONAL INJURY IN SCOTS LAW

By Robert Milligan KC

I am asked to comment on the following questions.

1. What are the various heads of loss that can be claimed in a personal injury case in Scotland and, broadly, how are they calculated?
2. Who can bring a claim in Scotland where a person has died as a result of personal injuries? What heads of loss can they claim and how are these damages calculated?
3. Please set out any differences you are aware of between the approach taken in Scotland to the quantification of damages and the approach taken in England and Wales.
4. How does the level of general damages as indicated by the Judicial Studies Board (sic) Guidelines in England and Wales compare with the assessment in Scotland by a court?

It should be noted that I am not qualified in the law of England and Wales.

QUESTION 1

What are the various heads of loss that can be claimed in a personal injury case in Scotland and, broadly, how are they calculated?

1. Subject to the exceptions set out below (particularly in relation to fatal claims), the heads of loss and the methods of calculation are the same in both jurisdictions. *Kemp & Kemp*, the *Judicial College Guidelines* and authorities from England and Wales are routinely used by practitioners and the courts alike in Scotland. This is particularly true of catastrophic injury claims, where there is a paucity of case law north of the border.

2. The two basic principles of assessment of pecuniary damage are (1) *restitutio in integrum* and (2) reasonableness.

3. The main principle is restitution. See for example *Cantwell v CICB* 2002 SC(HL) 1 per Lord Hope of Craighead at para [22]: "*The guiding principle... is that the compensation which the injured party receives by way of the sum of money as damages should as nearly as possible put him in the same position as he would have been in if he had not sustained the wrong for which he is to be compensated.*"

4. The principle of restitution is to put the pursuer (claimant) back into the same position, not a better one. Accordingly, the damages are only awarded for what is reasonably required. This is sometimes expressed as a duty on the pursuer to mitigate his loss. For a prosthetic limb, even the most expensive option falls far short of a real human limb and so there is little scope for arguing that the best option is unreasonably expensive (see *Donnelly v FAS Products* 2004 SCLR 678).

5. The onus is on the defenders (defendants) to show that the pursuer's actions are unreasonable. In *Graham v Richard Lawson Autologistics Ltd.* [2006] CSOH 89, Lord McEwen held as follows:

> "[42] I want to look now at the issue of mitigation of loss; I have already indicated my findings on the evidence and reasons for preferring the pursuer and Mr Keith. However, the matter is not solely one of fact. Whether there is in law any strict duty laid on a pursuer to mitigate his loss, in practice if he does not act reasonably he may not make full recovery from a defender in breach of duty. What is or is not reasonable has to be judged on the facts proved. In my view it is for the defenders to show that the actings were unreasonable.
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> [43] There are, however a number of other rules which are derived mainly from English cases and which I consider to be applicable in Scotland. They make eminent

commonsense. *Banco de Portugal* v *Waterlow & Sons Ltd* was a contract case but the principle stated by Lord McMillan at page 506 in my view applies equally in delict. The case involved an action of damages for breach of contract and negligence arising out of the printing of banknotes. A spectacular fraud by a Dutch criminal and others had been practised on the bank involving the printing of forged notes delivered to the dishonest parties in London. When discovered, it caused a run on the funds of the bank. The bank were criticised for honouring all of the forged notes between certain dates after the crime was discovered. Dealing with the civil consequences of this crime Lord McMillan said this:

> "Where the sufferer from a breach ... finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach ..... has occasioned the difficulty .... such criticism does not come well from those who have themselves created the emergency...."

[44] The rule has been much discussed in relation to medical treatment but has also been looked at in claims for loss of earnings when alternative employment has been sought. There are a number of differing cases discussed in Chapter 6 of *Kemp and Kemp (loc cit)*. The basic principle remains what could a pursuer reasonably do to mitigate his losses. It also has to be remembered that if the injuries are permanent they will always result in him being at a disadvantage on the job market whatever steps he takes. In a case where the plaintiff (aged 59) had declined to do a less attractive job, (*Melia* v *Key Terrain Ltd*), Sachs, L.J. said this in relation to mitigation of damages ".... a claimant .... is not to be unduly pressed at the instance of the tort-feaser ...". He went on to adopt Lord McMillan's test quoted *supra*. He added that a claimant is not normally called upon to change his way of life to one

which is distasteful to him in order to save the wrongdoer small sums of money in percentage figures. I propose to adopt and follow what was said in *Melia*. The pursuer has been badly injured at his employment with the defenders. No doubt in an ideal world, in a different area with a younger man a pursuer might have found more profitable work. That is not this case. The pursuer is older. It is a rural area and work is not plentiful. In these circumstances when weighed in the scales the pursuer has not been found wanting. He has not chosen willingly to "retire" as the defenders put it. His choice of work is in my view entirely reasonable. Accordingly on the mitigation point the defender's case not only fails on the facts but also in law."

Gratuitous and Commercial care

6. Damages for paid professional care are paid on the same basis as in England and Wales.

7. In relation to gratuitous provision by family members, awards are made under section 8 (necessary services) and section 9 (personal services) of the Administration of Justice Act 1982. I am not sure if there is a direct counterpart to section 9 in English law. The following summary of the law in this area is taken from the Scottish Law Commission Discussion Paper on Damages for Personal Injury (23rd February 2022).

> **"Current law**
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> 2.1 Sections 8 and 9 of the Administration of Justice Act 1982 ("the 1982 Act") provide for claims in respect of "necessary" services rendered by a relative to an injured person, and "personal" services which the injured person is unable to render because of the injury. These sections implement some of the recommendations of our 1978 Report.[1] One particular issue to be discussed in this chapter is the restriction of claims to services rendered to or by a "relative" as defined in section 13(1).
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> *Section 8: necessary services*
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> 2.2 Section 8(1) provides that: "[w]here necessary services have been rendered to the injured person by a relative in consequence of the injuries in question, then, unless the relative has expressly agreed in the knowledge that an action for damages has been raised or is in contemplation that no payment should be made in respect of those services, the responsible person[2] shall be liable to pay to the

injured person by way of damages such sum as represents reasonable remuneration for those services and repayment of reasonable expenses incurred in connection therewith." Subsection (3) relates to future services.

2.3 The loss recoverable in terms of section 8 is, in fact, the loss sustained by the relative or relatives providing services.[3] However, this Commission, seeking to avoid a multiplicity of claims arising from one accident,[4] recommended that the injured person should be able to recover the relevant damages for services, and be under an obligation to account to the relative(s) for those damages.[5] The relative has no direct right of action against the responsible person.[6]

2.4 "Necessary" services are not defined in the 1982 Act but include services such as nursing care, help with bathing, housekeeping, shopping and emotional support.[7] As the law stands at present, where services have been rendered by someone other than a relative, damages are recoverable only if a contractual arrangement exists.[8]

[1] Scottish Law Commission, *Damages for Personal Injuries (Report on (1) Admissibility of Claims for Services and (2) Admissible Deductions)* (1978) Scot Law Com No 51, paras 33 and 44.

[2] The person whose act or omission gives rise to liability to pay damages to the injured person: 1982 Act, s 7.

Scot Law Com No 51, para 22.
Ibid, para 19.
Ibid, paras 29 and 33. This recommendation was implemented in the 1982 Act, s 8(2).

1982 Act, s 8(4).
McEwan and Paton, *Damages for Personal Injuries in Scotland* (2nd edn), para 12-02; White and Fletcher,

Delictual Damages (2000), p 19.
[8] For the background to these provisions of the 1982 Act, see J Blaikie, "Personal Injury Claims – Recovering the Cost of Services" (1992) 37 JLSS 62.

2.5 Depending upon the particular circumstances of the case, the value of a claim for necessary services can be substantial.

Section 9: personal services

2.6 Section 9 deals with circumstances where, owing to the injuries suffered, it is the injured person who can no longer provide personal services to a relative.[9] This loss is regarded as the loss sustained by the injured person.[10] While that approach may seem counter-intuitive, the underlying reasoning is explained in paragraph 38 of our 1978 Report,[11] as follows:

2.7

"38. ... It may be objected that it is not the injured person himself but his family who suffer the loss. We think, however, that this is an artificial way of looking at the matter. The injured person will normally have some earning capacity outside the family which he will have lost as a result of the accident. Within the family group, for practical reasons, a system of division of labour and pooling of income obtains in which, though in law the services are rendered gratuitously, they are in practice a species of counterpart for the benefits which that member receives as a member of the family group. If by reason of an accident a member of the family group loses the ability to offer the appropriate counterpart for the benefits he receives, he should be compensated for this loss. In this sense we are not advocating a departure from the principle of reasonable foresight as the test of liability for damages, since the system which we have described reflects the normal pattern of family relations in this country. The same test of reasonable foresight, however,

would seem to exclude the application of this principle outside the family group. The law cannot take into account unusual instances of gratuitous philanthropy. The Royal Commission, in endorsing this approach, said that

'the loss suffered by those not dependent on the plaintiff seems to us to be altogether more remote.'"[12]

"Personal services" are defined in section 9(3) as: " ... personal services –

1. (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,
2. (b) of a kind which, when rendered by a person other than a relative, would ordinarily be obtainable on payment, and
3. (c) which the injured person but for the injuries in question might have been expected to render gratuitously to a relative."

[9] S 9 is entitled "Services to injured person's relative", and subsections (3) and (4) refer to services rendered to a relative.
[10] Scot Law Com No 51, para 38; *McGregor on Damages* (20th edn, 2018), paras 40-063 and 40-090-40-093; D Brodie, *Reparation: Liability for Delict,* Vol 1 A28-028.

[11] Scot Law Com No 51.
[12] Royal Commission on Civil Liability and Compensation for Personal Injury, Report, (HMSO 1978) Cmnd. 7054- I, ("The Pearson Report (1978)"), Vol one, para 356.

Such services may include child care, housework, gardening, shopping and home maintenance.[13]

Restriction to "relative"

2.8 For both section 8 and section 9, the extent of a claim for services is limited by whether the services were provided by a relative to the injured person or by that person to a relative.

9. 2.9 The term "relative" is defined in section 13(1) of the 1982 Act as amended: "'relative', in relation to the injured person, means —
(a) the spouse or divorced spouse;
(aa) the civil partner or former civil partner;

(b) any person, not being the spouse of the injured person, who was, at the time of the act or omission giving rise to liability in the responsible person, living with the injured person as husband or wife;

(ba) any person, not being the civil partner of the injured person, who was, at the time of the act or omission giving rise to liability in the responsible person, living with the injured person as the civil partner of the injured person;

(c) any ascendant or descendant;
(d) any brother, sister, uncle or aunt; or any issue of any such person;
(e) any person accepted by the injured person as a child of his family.
In deducing any relationship for the purposes of the foregoing definition —

(a) any relationship by affinity shall be treated as a relationship by consanguinity; any relationship of the half blood shall be treated as a relationship of the whole blood; and the stepchild of any person shall be treated as his child; and

(b) section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 shall apply; and any reference (however expressed) in this Part of this Act to a relative shall be construed accordingly."

10. 2.10 Section 13 of the 1982 Act also has to be read subject to the Marriage and Civil

Partnership (Scotland) Act 2014 ("the 2014 Act"), section 4. Section 4 states that references in legislation (within devolved competence) to people who are or were married should be read as referring to both different and same sex married couples;[14] to cohabitants should be read as including same sex cohabitants; [15] and to two persons of the same sex who are (or were) living together as if they are or were in a civil partnership (ie cohabitants) cease to have effect. [16] Therefore, the reference to people living together as if in a civil partnership in section 13(1)(ba) ceases to have effect by virtue of section 4(4) of the 2014 Act.

[13] McEwan and Paton, *Damages for Personal Injuries in Scotland* (2nd edn), para 12-05A; White and Fletcher, *Delictual Damages* (2000), p 22; Scot Law Com No 51, para 40.
[14] 2014 Act, s 4(1).
[15] *Ibid*, s 4(2) and (3).

[16] *Ibid*, s 4(4).

8. For modest levels of award the court will usually select a fairly random lump sum in the hundreds or low thousands of pounds. In serious cases, however, it is usual to have evidence from care experts (usually Occupational Therapists and/or registered Nurses) as to the care provided and the appropriate level of remuneration, under reference to National Joint Council for Local Government Service rates or minimum wage rates. These rates are discounted, usually by 20 or 25%, to allow for tax and national insurance (see McEwan and Paton at para 12.03: "*Current rates charged by nursing auxiliaries, carers, and home helps may assist in quantification, but discounts are made to reflect the absence of tax, national insurance and agency commission.*")

9. There is a paucity of reported cases in Scotland on significant awards for section 8 services. From my own experience of settling catastrophic injury claims in Scotland, both for pursuers and defenders, I am not aware of any appreciable difference between the method of assessment north and south of the border. The compromise figure is usually a midpoint between the estimates of the respective care experts. It is unusual in Scotland to have a jointly instructed care needs report.

10. In terms of section 9 services, there is often a degree of overlap. For example, the fact that the injured party is no longer able to do the gardening in a shared house could be expressed as a need for care by other family members (section 8), or a loss of the ability to help out (section 9). The main difference is that there is a duty on the pursuer to account to the family member for damages recovered under section 8 but not section 9.

11. Case management is also a recoverable head of loss, subject to the usual requirement to show that the costs incurred were reasonable.

12. Similarly, medical treatment, therapies and medication, aids, equipment, mobility devices and exercise equipment, travel expenses, additional holiday costs etc are recoverable as a matter of principle, subject to the same requirement to show that the costs incurred were reasonable.

Interest on past losses

13. Interest is calculated on completed past losses at the judicial rate (currently 8%). Here the rate is governed by section 1(1) of the Interest on Damages (Scotland) Act 1958 (as amended), which provides as follows (my emphasis added):

> "Where a court pronounces an interlocutor decerning for payment by any person of a sum of money as damages, the interlocutor **may** include decree for payment by that person of interest, at such rate or rates as may be specified in the interlocutor, on the whole or any part of that sum for the whole or any part of the period between the date when the right of action arose and the date of the interlocutor."

14. Interest is applied to ongoing losses at half the judicial rate, starting from the date from which the loss starts to accrue. This may be a substantial time after the accident where, for

example, an injured pursuer receives full pay for 6 months after the accident, or a cost is not incurred for an item of equipment until several years after the accident.

15. The commentary in the Parliament House Book, volume 8, provides a helpful summary of the law in this area:

> "7.7 In actions of reparation for personal injuries or death, the position appears to be as follows: (1) *Pre-decree loss of earnings and loss of support.* Since the Interest on Damages (Scotland) Act 1958, s.1 (as amended by the Interest on Damages (Scotland) Act 1971, s.1), the practice has been to award interest at half the judicial rate (or half the average rate where the rate has changed over the period in question) from the date the loss began (date of accident) to the date the loss ceased or, if it did not, to the date of decree: see, e.g. *Smith v. Middleton, 1972 SC 30*; *McCuaig v. Redpath Dorman Long Ltd, 1972 S.L.T.(Notes) 42*; *Ward v. Tarmac Civil Engineering Ltd, 1972 S.L.T.(Notes) 52*; *Wilson v. Chief Constable, Lothian and Borders Police, 1989 S.L.T. 97* (an adjusted average of two rates)."

16. Although the approach is discretionary, it will be very unusual for the court to deviate from the norm. In *Sheridan v News Group Newspapers* referred to above, the Inner House reversed the decision of the Lord Ordinary in relation to his restriction of interest for the period when the action was sisted (stayed) pending an appeal. At paragraph [52] the court summarised the normal situation, at least where damages are assessed by a jury:

> "[52] Technically, the award of damages in personal injuries cases is inclusive of any interest in terms of sec 1(1A) of the 1958 Act, since the power on the court is to 'include' interest in the sum decerned for as damages (*Orr v Metcalfe*). The issue, which is provided to a jury, does not invite them to do the same. It is for the judge to add interest when the verdict is applied. The judge will include the interest which he has calculated and the total will be included in the decree upon which judicial interest will run *ex lege* (ie interest on interest). For this reason, if a pursuer wants interest

from a date earlier than the date of decree, he is advised (*MacDonald v Glasgow Corporation*) to divide up the claimed pre- and post-decree damages in his issue to enable the judge to apply interest at an appropriate rate (eg half the judicial rate on accumulating past losses). A pursuer has to recognise that, if he does this, he may open up greater scope for a new trial on the basis of errors in the quantification of component parts. A pursuer may thus elect not to do so, in which case the judge may not feel able to grant any interest prior to decree if he has no information on the apportionment of past and future losses (*cf Ross v British Railways Board*).

Future pecuniary losses

17. The key difference in Scotland is that the discount rate is set at -0.75%. This obviously leads to higher multipliers than in England and Wales. Standing the decision of the Inner House (Court of Appeal) in *Tortolano v Ogilvie Construction Ltd* 2013 SC 313, it is difficult to envisage any circumstances under which the court would apply a different rate. At that time the discount rate was 2.5% and the pursuer sought to argue that a lower discount rate should be used. The Inner House roundly rejected the pursuer's attempts.

18. However, in all other ways, the 8th Edition of the Ogden Tables is used in both jurisdictions in the same way. I understand that the law of England and Wales has recently changed in line with existing Scots law in relation to fatal claims. See further below. The Ogden Tables were first used in Scotland, before they were used in England. See *O'Brien's Curator Bonis v British Steel* 1991 SC 315.

19. Pension loss is a recoverable head of claim (e.g. *Mitchell v Glenrothes Development Corporation* 1991 SLT 284) and is invariably assessed by an actuary.

Future accommodation costs

20. Prior to the decision in *Swift v Carpenter*, the Scottish courts followed the approach in *Roberts v Johnstone* (e.g. *Good v Lanarkshire Health Board* 2015 Rep LR 99). Although there are not yet any Scottish cases following *Swift v Carpenter*, it has been accepted by practitioners that the decision would be applied in Scotland. The position is well summarised by the recent *Discussion Paper on Damages for Personal Injury* from the Scottish Law Commission referred to above:

> "1.13 This decision does, however, leave some questions unanswered and some concerns unaddressed. For example, although this formula was suitable in quantifying the damages for the injured person in this particular case – where the life expectancy was over 40 years – application of this formula in a case where the injured person's life expectancy is shorter could result in a substantial shortfall of capital for purchasing the necessary accommodation. The court recognised this, stating:
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> "... this guidance should not be regarded as a straitjacket to be applied universally and rigidly. There may be cases where this guidance is inappropriate. However, for longer lives, during conditions of negative or low positive discount rates, and subject to particular circumstances, this guidance should be regarded as enduring". [11]
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> 1.14 We are aware that Scottish courts and those expert in personal injury claims are following the ruling in *Swift v Carpenter*. In light of these developments, we do not think it productive now to review the various options for quantifying accommodation claims more satisfactorily at a time of negative discount rates."

Investment advice

21. This is probably not a recoverable head of claim in Scotland. In *Good v Lanarkshire Health Board* 2015 Rep LR 99, Lord Uist held that investment costs were not recoverable. He referred to the case of *Page v Plymouth Hospitals NHS Trust* [2004] 3 All E.R. 367, which

has subsequently been cited with approval by the Court of Appeal in *Eagle v Chambers (No.2)*. The *ratio* was explained by Waller LJ in the following terms:

> "95 I have found Davis J's reasoning [in *Page*] extremely convincing. Part of that reasoning comes to this. A defendant must pay by way of compensation damages assessed on the basis that the return on the money will be by way of investment in gilts even though the practice is to gain a higher return by investing more broadly. To order the defendant to pay the costs of taking the advice so as to enable the investment to be made more broadly, so as to enable the claimant to recover more than that which he would have recovered if investments had been maintained in gilts, is to make the defendant lose both on the swings and the roundabouts, and to provide the claimant with a head of damage which flows from a decision as to how to invest and not from the accident. A claimant is entitled to use his money as he likes, but if he wishes to increase the sum awarded, and awarded on the most advantageous basis to the claimant, he must set off the fees charged against the gains made and not recover the fees from the defendant."

22. The logic of this position is unimpeachable where a pursuer is going to invest his damages in Index Linked Government Stocks since there is no need to obtain investment advice to do that. If a pursuer wants to get a better return then he is free to seek professional advice to achieve that but the defender should not be required to pay for that advice. The pursuer should pay for that out of the additional returns he receives on his investment.

23. *Good* was decided at a time when the discount rate was 2.5%. It is now -0.75%, in order to ensure that the pursuer does not need to seek extensive investment advice to obtain the necessary return.

24. In the case of *Tortolano v Ogilvie Construction* 2013 SC 313 the Inner House accepted that in practice the pursuer would not invest in ILGS. However, that did not mean that the fixed discount rate of 2.5% should not be applied in assessing damages. It was a simple question of statutory interpretation and that is the discount rate set by statute. The court was happy to accept that in order to achieve certainty and consistency, there may be an element of unfairness to one party or another at particular stages of the economic cycle. In *Page*, the court emphasized that the assumption was that the discount rate included an element for investment advice. There is a long line of Court of Appeal authority, referred to and followed in *Tortolano*, to the effect that the courts will not allow an indirect assault on the discount rate, which is set by Parliament. There would be a strong argument in Scotland that the lower discount rate precludes the recovery of investment costs for this very reason.

Provisional damages

25. Awards of provisional damages are governed by section 12 of the Administration of Justice Act 1982, which provides as follows:

> **"12.— Award of provisional damages for personal injuries: Scotland.**
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> (1) This section applies to an action for damages for personal injuries in which—
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> (a) there is proved or admitted to be a risk that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of the action, develop some serious disease or suffer some serious deterioration in his physical or mental condition; and
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> (b) the responsible person was, at the time of the act or omission giving rise to the cause of the action,
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> (i) a public authority or public corporation; or
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> (ii) insured or otherwise indemnified in respect of the claim.

(2) In any case to which this section applies, the court may, on the application of the injured person, order—

(a) that the damages referred to in subsection (4)(a) below be awarded to the injured person; and

(b) that the injured person may apply for the further award of damages referred to in subsection (4)(b) below,

and the court may, if it considers it appropriate, order that an application under paragraph (b) above may be made only within a specified period.

(3) Where an injured person in respect of whom an award has been made under subsection (2)(a) above applies to the court for an award under subsection (2)(b) above, the court may award to the injured person the further damages referred to in subsection (4)(b) below.

(4) The damages referred to in subsections (2) and (3) above are—

(a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and

(b) further damages if he develops the disease or suffers the deterioration.

(5) Nothing in this section shall be construed—

(a) as affecting the exercise of any power relating to expenses including a power to make rules of court relating to expenses; or

(b) as prejudicing any duty of the court under any enactment or rule of law to reduce or limit the total damages which would have been recoverable apart from any such duty.

(6) The Secretary of State may, by order, provide that categories of defenders shall, for the purposes of paragraph (b) of subsection (1) above, become or cease to be

responsible persons, and may make such modifications of that paragraph as appear to him to be necessary for the purpose. And an order under this subsection shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

26. Applications for awards for further damages are governed by RCS 43.13. The explanatory note in Volume 8 of the Parliament House Book is as follows:

> "Section 12 of the Administration of Justice Act 1982
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> 43.13.8
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> Section 12 of the Administration of Justice Act 1982 provides for provisional damages for personal injuries to be awarded where there is proved or admitted to be a risk that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition. Rule 43.13 provides the procedure for applying for the further damages as a result of the order (for provisional damages and) for the right to apply for further damages under s. 12(2) of the 1982 Act .
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> A question has arisen in relation to further damages following a tender and acceptance which must be unqualified, clear and unambiguous. A minute of tender and acceptance, while binding between the parties, does not bind the court to award provisional damages: *Fraser v Kitsons Insulation Contractors Ltd, 2015 S.L.T. 753* (OH) (court ordered that pursuer might apply for further damages).
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> In *Talbot v Babcock International Ltd, 2014 S.L.T. 1077* (OH) 160, there was a tender for and acceptance of provisional damages (which could only be made if there was an admitted or proved risk of future damages). The pursuer, in moving for decree, sought to reserve the right to apply for further damages if the pursuer developed certain conditions. The defender sought to impose different limiting

conditions for such an application. It was held that there was no statutory right of the defender (or the pursuer) to impose conditions."

Periodical payments

27. Periodical payments orders (PPOs) are often used in Scotland to settle catastrophic injury claims, particularly in cases involving health boards. However, the court does not yet have the power to impose periodical payments. All parties must agree to their use. See section 2 of the Damages Act 1996.

28. Draft legislation to allow a court to impose a PPO has been the subject of consultation since 2017 but it is still not known when this will come into force.

QUESTION 2

Who can bring a claim in Scotland where a person has died as a result of personal injuries? What heads of loss can they claim and how are these damages calculated?

29. The law in relation to fatal claims is effectively codified in the Damages (Scotland) Act 2011. There is no room for any claim at common law (section 8(5)). There are significant differences from the law of England and Wales.
30. There are two categories of relative who can make a claim. The first category is the "immediate family" which includes spouses/partners, parents, children, siblings, grandchildren and grandparents. See sections 4(5)(a) and 14(1) of the 2011 Act.
31. This category can claim for loss of financial support; loss of services (see section 6 of the 2011 Act and section 9 of the Administration of Justice Act 1982 referred to in answer to question 1 above); and what used to be called "loss of society".

Non-pecuniary loss

32. This last is defined in section 4(3)(b) as

"(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."

33. Awards for "loss of society" range from about £150,000 to spouses/partners; up to £100,000 for the loss of a child; between £30,000 and £45,000 for the loss of a sibling; around £15,000 for the loss of a grandparent; and between £50,000 and £80,000 for the loss of a parent. Awards depend primarily on the age of the deceased and the closeness of the relationship. Further detail of specific awards can be provided if required.

34. From this it will be seen that not only is there a much wider range of relatives who can claim for non-pecuniary loss in a fatal claim in Scotland compared with England and Wales, the level of awards is also much higher.

Pecuniary loss

35. Section 7 of the 2011 Act deals with the method of 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 subparagraphs, 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."

36. In calculating loss of financial support for the category of "immediate family", there is a statutory assumption that the deceased would have spent 25% on their own support. This is subject to an exception where this would result in a "manifestly and materially unfair result" (section 7(2)) but in practice this exception is seldom pled and has never been applied in a reported case.

37. The remaining 75% is split between the remaining relatives as the court sees fit. The majority is usually allocated to the surviving partner and allocation to children restricted to the age at which they are likely to leave full time education.

38. Future loss of financial support is calculated from the date of award and not the date of death (as it was previously).

More distant relatives

39. The second, wider category of relative who can make a claim includes aunts, uncles, cousins, great grandparents and great grandchildren. This category cannot claim for "loss of society" in terms of section 4(3)(b) of the 2011 Act.

40. Although this category of relative can also claim for loss of financial support, there is a requirement for them to prove actual loss. This award is deducted from the 75% of the deceased's net earnings.

41. Damages can also be claimed for reasonable funeral expenses (section 4(3)(a).

QUESTION 3

Please set out any differences you are aware of between the approach taken in Scotland to the quantification of damages and the approach taken in England and Wales.

42. As should be apparent from the answers to question 1, in non-fatal claims, the differences in quantification of damages between the two jurisdictions is largely terminological and procedural rather than substantive.

43. There are some differences in how interest is calculated.

44. There is a different statutory regime for compensation for gratuitous care for relatives. The Scottish Law Commission has recently proposed that the category of person who can be compensated should be expanded but there is not yet any draft legislation for that.

45. Periodical Payment Orders cannot be ordered without agreement from all parties.

46. Claims for loss of earnings during the "lost years" are calculated without reference to whether or not the pursuer has or is likely to have dependents.

47. In Scotland, awards can be assessed by civil juries as well as by judges sitting alone. It is common for fatal claims to be heard by juries and this has led to a significant increase in awards for "loss of society" in recent years. However, since the 5 judge case of *Hamilton v Ferguson Transport (Spean Bridge) Ltd* 2012 SC 486, which determined that juries should be given guidance as to levels of judicial awards, the incidence of civil juries generally has declined. The Covid 19 Pandemic has hastened that decline in all but fatal claims.

48. A much wider range of relatives can claim for non-pecuniary loss or "loss of society". This can extend to siblings, grand children and grand parents.

49. Awards for loss of society are much higher. The highest awards are usually made to spouses and partners of the deceased and can be as much as £150,000. Awards to parents for the loss of a young child can reach £100,000.

QUESTION 4

How does the level of general damages as indicated by the Judicial Studies Board (sic) Guidelines in England and Wales compare with the assessment in Scotland by a court?

50. In Scotland, the equivalent of general damages is the award for solatium. Solatium is the award for pain and suffering, loss of faculties and amenities; and loss of expectation of life (McEwan and Paton on *Damages for Personal Injuries in Scotland* at 10-01).

51. Solatium is slightly broader in scope than General Damages in English law. Thus, there is no separate award for loss of congenial employment in Scotland, as that is included within the award for solatium (*Stark v Lothian & Borders Fire Board* 1993 SLT 652). Similarly, there are no separate awards for aggravated damages in Scotland.

52. In practice, however, there is no significant difference in how solatium is assessed compared with general damages. The starting point is usually the Judicial College Guidelines, and cases from England and Wales can be (and often are) referred to. In *Allan v Scott* 1972 SC 59 the Inner House of the Court of Session held that there was no reason why Scottish awards should be lower than English and that English precedents in similar cases could and should be taken into account in determining the appropriate figure for solatium.

Assessment of interest on solatium:

a. The rate of interest

53. Interest on damages for solatium is governed by section 1A of the Interest on Damages (Scotland) Act 1958 (as amended) which provides as follows:

> "(1A) Where a court pronounces an interlocutor decerning for payment of a sum which consists of or includes damages or solatium in respect of personal injuries sustained by the pursuer or any other person, then (without prejudice to the exercise of the power conferred by subsection (1) of this section in relation to any part of that sum which does not represent such damages or solatium) the court shall exercise that

power so as to include in that sum interest on those damages and on that solatium or on such part of each as the court considers appropriate, unless the court is satisfied that there are reasons special to the case why no interest should be given in respect thereof."

54. The commentary in the Parliament House Book, volume 8, provides a helpful summary of the law in this area:

"7.7 In actions of reparation for personal injuries or death, the position appears to be as follows: …(2) *Pre-decree solatium or loss of society*. In the early years of the 1971 Act amendment to the 1958 Act, interest on past solatium was (because of the change in rates between the dates of accident and degree) an average rate: see *Smith*; *McCuaig*; *Ward*, above. Since then, though the rate remained at 11 per cent for eight years, the practice has been—(a) normally to adopt a similar rule to (1) above and award half the judicial rate; (b) where most solatium was before the proof, to award a higher rate than half; and (c) where all solatium was post solatium, to award the full rate. In considering what is fair, *J.M. v. Fife Council, 2009 S.C. 163 (First Div.)* sets out factors to be considered. In *Starkey v. National Coal Board, 1987 S.L.T. 103*, Lord Morison held that there was no logical justification for the practice of calculating interest without regard to changes in the rate during the relevant period; instead of awarding half the judicial rate he adjusted the rate to take account of an increase in the rate during the latter part of the relevant period: see also *Wilson*, above. The award and payment of interim damages may affect the award of interest: see *Redman v. McRae, 1991 S.L.T. 785*; *Jarvie v. Sharp, 1992 S.L.T. 350*.

…

(4) Interest on the total award (including pre-decree interest) is at the judicial rate in the rule. (5) *A selective and discriminating approach must be made* in relation to interest claimed under the 1958 Act: *Macrae*; *Smith*, above. The court may refuse to

award interest if there are special reasons: 1958 Act, s.1(1A). The reasons must be special to the case—e.g. undue delay or abuse of process; and see further, note 7.7.8."

55. Since 1st April 1993, the judicial rate of interest has been 8% (See Rules of the Court of Session 7.7 and section 9 of the Sheriff Courts (Scotland) Extracts Act 1892 and SI 75/948 and 93/796).

b. How interest is applied to ongoing losses

56. Interest is applied at half the judicial rate (i.e. 4%) on ongoing losses. See above.

c. The start date

57. The start date is the date on which the loss starts to accrue, which in this context is the date of the accident (*Smith v Middleton* 1972 SC 30).

d. The end date

58. This is the date on which the loss ends, which is usually the date of payment. See *Sheridan v News Group Newspapers* 2019 SC 203 at paragraphs [43]-[55].

59. The date of payment may be the date of an interim payment, particularly if it exceeds the past losses incurred by that date.

Apportionment between past and future solatium

60. Solatium is apportioned to past and future elements. Where the pursuer has completely recovered from the injury by the time of the proof (trial) or settlement date, all of the award is allocated to the past.

61. Where the loss is ongoing, the convention is that the starting point is usually about 50% allocated to the past. See McEwan and Paton at para 3.09, where the footnote explains this practice:

> "To reflect the fact that the pain and suffering did not occur all at once, but from day to day over a period of time. However, sometimes the rate of interest awarded is higher than half: see for example *Skakle v Downie, 1975 S.L.T. (Notes) 23*; *Banner's Tutor v Kennedy's Trs, 1978 S.L.T. (Notes) 83*. In each of these cases only a very small part of the solatium award related to the past. In one case, the rate of interest was reduced to one-quarter of the judicial rate to reflect considerable delay in bringing matters to court: *J v Fife Council, 2009 S.C. 163; 2009 S.L.T. 160* (abuse in a children's home)."

62. Section 1(A) is clearly mandatory, although in theory, the court can restrict the period over which interest is awarded. In practice, even where there has been fault or delay on the part of the pursuer, the more usual sanction is in expenses (costs). For example, in *Bhatia v Tribax* Ltd 1994 SLT 1201 the pursuers in a fatal claim took several years to produce information in relation to the loss of financial support claim. Furthermore, their evidence at proof was held to be unreliable and exaggerated. The defenders argued that interest should not run on the period during which they were unable to quantify the claim due to the pursuers' unreasonable conduct. The court allowed interest on the full period but restricted the award of expenses to 75%. Lord Cullen held at 1204 *In a case such as the present where the pursuers can claim the benefit of the provisions made in s 1 (1A) it seems to be equally plain that in the absence of any special circumstances inordinate delay in prosecuting the action should not result in the pursuer being deprived of interest on past loss of support and services. In the present case I am not satisfied that the defenders have demonstrated any such special circumstances. Accordingly I am satisfied that the pursuers are entitled to*

interest on their claims, subject to whatever may be the effect of the interim payments which have been made in this case.

63. The application of interest is dealt with differently in historic sex abuse cases where the solatium award is made at today's rate for an injury suffered decades earlier. There is then an element of double counting in the high judicial rate of interest. However, an element of interest is still awarded to reflect the fact that the defenders have had use of money that should have belonged to the pursuer at an earlier date.

Robert Milligan QC

Compass Chambers

Edinburgh

GRO-C

14th November 2022