

# **DAMAGES (SCOTLAND) ACT 2011**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### ***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 Tables<sup>1</sup> to find an appropriate multiplier that it applies as 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).

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<sup>1</sup> 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](http://www.gad.gov.uk/Documents/Ogden_Tables_6th_edition.pdf)