



Response
By
The Forum of Scottish Claims Managers

To
Scottish Government Consultation Paper on the Civil Law of Damages:
Damages for Wrongful Death – July 2010

FSCM are pleased to be asked to contribute to the Consultation paper
and respond as follows:



Foreword

The Forum of Scottish Claims Managers (hereafter referred to as FSCM for short) are a collective of Insurance Companies who underwrite business in Scotland, Claims Handling agents who handle claims on behalf of Corporate Clients with a presence in Scotland and also, Local Authorities.

The membership of the Forum share common interests in areas such as Scottish Legislation and legal developments and as such, are delighted to be invited to participate in this Consultation.

Our membership number and represent the following organisations:

E-sure Halifax Sainsbury's Bank First Alternative UKI Insurance – (Peugeot, Citroen, Barclays, Nat-West, BMW Fleet, Vauxhall, Egg and Renault) Pearl NIG Nationwide Lloyds TSB AXA QBE Liverpool Victoria Generali Insurance St Paul's Travellers Ins Co PSV Claims Bureau Ltd NFU Mutual ACE European Group Ltd	Aviva Insurance RAC insurance Aviva Direct Ford Insure Chartis uk on behalf of New Hampshire Ins Landmark Insurance Co Allianz Royal & Sun Alliance More Than Direct Line Churchill Prudential Tesco Privilege Devitt Glasgow City Council North Lanarkshire council
--	--

Question 1

In your view, to represent what would have been spent on his/her personal living expenses in the lost period, in principal is it:

- a) Reasonable to introduce a standard fixed figure in all cases for the proportion to be deducted from a victim's income? Or
- b) Preferable to allow the courts to continue to decide the proportion on the merits of individual cases?

Response to Question 1

FSCM would favour a)

A standard fixed figure deduction, with the caveat that the surviving spouse's income and the established principles of 'pooled incomes' should not be ignored. (we shall expand on this aspect in later answers)

With our response to this question, we are clear that we are making a large concession from a defenders perspective and do so in the interest of narrowing the areas where dispute arise and therefore facilitating quicker compensation. The defenders are aware that they are foregoing any arguments on such deductions for living expenses in individual cases. FSCM recognise the paramount importance of speed and access to justice for the consumer and we agree that a fixed figure deduction would assist in this aim.

Question 1A

If such a fixed figure were introduced, do you agree that 25% is a reasonable level for the victim's living expenses?

Response to Question 1A

FSCM agree 25% is a reasonable level

In the interests of equity and fairness the one caveat we would use to qualify such an acceptance of the 25% deduction being reasonable is that we do consider the approach taken by the courts in Brown v Ferguson (i.e. pooled incomes) should remain and we shall make further comment on this when answering **Question 2E**.

Question 1B

Not Applicable

Question 1C

If such a fixed figure were introduced, in your view should it be as a “rebuttable presumption”, which could be set aside if due cause were shown?

Response to Question 1C

FSCM answer No

If a fixed deduction were to be introduced, it should be done with the stated aim of increasing speed and access to justice for the victim and their family. The creation of a ‘rebuttable presumption’ would create a polar opposite situation where both defenders and pursuers could use such a rule to delay or prolong the case.

This would not only add to the suffering of the victim and their family, but would create unnecessary increased legal costs on both defenders and pursuers costs as well as create unnecessary litigation which would only serve to place additional strain and cost burden on the judicial system itself.

We agree with the Scottish Law Commission in this regard who stated within their report that *“this figure should not be variable.... If this sum was open to variation, it would invite litigation thus defeating the object of reform”*.

Question 1D

If a “rebuttable presumption” were introduced, in your view what would require to be demonstrated for it to be set aside?

Please list possible criteria

Response to Question 1D

FSCM do not agree that a “rebuttable presumption” should exist if a fixed percentage deduction is introduced.

However, if a “rebuttable presumption” were to be introduced, there must be full and detailed disclosure of all financial records, evidence of lifestyle and true and accurate documentation to support levels of expenditure.

The documentation should seek to clearly demonstrate how much income was spent on the deceased themselves and how much was spent on the dependents or for the benefit of the dependents.

Additionally, precognitions or formal witness statements should form part of the disclosure to enable transparency in interpreting the financial documentation – it should not be the case that such evidence only comes out when a Proof takes place and cross examination happens.

Such detail and documentation should be available at the earliest practicable opportunity.

Question 1E

Do you have any other comments on the approach to calculating the amount to be deducted in representation of living expenses for the lost period?

Please provide any comments

Response to Question 1E

The view of FSCM is that a fixed deduction with no “rebuttable presumption” rule would create faster access to justice for the victim and their families.

If fixed percentage deductions could not be achieved or a “rebuttable presumption” rule was to come into effect, we would make the observation that the following evidence and documentation would in (in our view) be critical for disclosure so both defenders and pursuers could calculate the value of any claim:

- Open and full disclosure of all of the victim's financial records, bank and credit card statements over a meaningful period of time
- Precognitions, or formal witness statements from all proximate family members in support of the victim's (or defender's) regarding lifestyle and expenditure

Question 2

In your view, to represent the proportion of a victim's income which is to be taken as having been devoted to his relatives, in principal is it:

- a) Reasonable to introduce a standard fixed figure for all cases? Or
- b) Preferable to allow the courts to continue to decide the proportion on the merits of individual cases?

Response to Question 2

FSCM would favour a)

A standard fixed figure deduction, with the caveat that the surviving spouse's income and the established principles of 'pooled incomes' should not be ignored. (we shall expand on this aspect in later answers)

With our response to this question, we are clear that we are making a large concession from a defenders perspective and do so in the interest of narrowing the areas where dispute arise and therefore facilitating quicker compensation. The defenders are aware that they are foregoing any arguments on such deductions for living expenses in individual cases. FSCM recognise the paramount importance of speed and access to justice for the consumer and we agree that a fixed figure deduction would assist in this aim.

A fixed level of deduction could also alleviate arguments created around the complexities of modern family arrangements where dependants are situated within different households.

Cases such as the case of *Guilbert v Allianz Insurance plc* only serve to highlight the potential bones of contention where no fixed level of deduction exists – when discord arises between the parties on such issues, costly litigation, delays and ultimately, dissatisfaction are the inevitable consequence for both parties – be that dissatisfaction in the length of time taken to obtain compensation or dissatisfaction in the level of damages obtained.

Question 2A

If such a fixed figure were introduced, do you agree that 75% is a reasonable level for that proportion?

Response to Question 2A

FSCM agree 75% is a reasonable level

In the interests of equity and fairness the one caveat we would use to qualify such an acceptance of the 75% deduction being reasonable is that we do consider the approach taken by the courts in *Brown v Ferguson* (i.e. pooled incomes) should remain and we shall make further comment on this when answering **Question 2E**.

Question 2B

Not Applicable

Question 2C

If such a fixed figure were introduced, in your view should it be as a “rebuttable presumption”, which could be set aside if due cause were shown?

Response to Question 2C

FSCM answer No

If a fixed figure were to be introduced, it should be done with the stated aim of increasing speed and access to justice for the bereaved family. The creation of a ‘rebuttable presumption’ would create a polar opposite situation where both defenders and pursuers could use such a rule to delay or prolong the case.

This would not only add to the suffering of the bereaved family, but would create unnecessary increased legal costs on both defenders and pursuers costs as well as create unnecessary litigation which would only serve to place additional strain and cost burden on the judicial system itself.

We agree with the Scottish Law Commission in this regard who stated within their report that *“this figure should not be variable.... If this sum was open to variation, it would invite litigation thus defeating the object of reform”*.

Question 2D

If a “rebuttable presumption” were introduced, in your view what would require to be demonstrated for it to be set aside?

Please list possible criteria

Response to Question 2D

FSCM do not agree that a “rebuttable presumption” should exist if a fixed figure is introduced.

However, if a “rebuttable presumption” were to be introduced, there must be full and detailed disclosure of all financial records, evidence of lifestyle and true and accurate documentation to support levels of expenditure and the level of income retained by the deceased or spent for their own benefit.

The documentation should seek to clearly demonstrate how much income was spent on the deceased themselves and how much was spent on the dependents or for the benefit of the dependents.

Additionally, precognitions or formal witness statements should form part of the disclosure to enable transparency in interpreting the financial documentation – it should not be the case that such evidence only comes out when a Proof takes place and cross examination happens.

Such detail and documentation should be available at the earliest practicable opportunity.

Question 2E

Do you agree that in all cases the surviving partner’s income should be wholly ignored in calculating the damages award?

Response to Question 2E

FSCM strongly disagree with this proposal and regard this as the single most contentious issue within the Consultation paper which would breed a culture of inequality

To ignore the impact of the surviving partner’s income and to fail to consider the pooled income of the family unit would lead to gross overcompensation and be in breach of both the defenders and pursuers rights to fairness, equity and justice. The proposal would lead to large numbers of situations where the pursuer is being put in a better financial support position than they would have been but for the accident, thus going against the basic principles of reparation.

There would be many instances in the current economic climate where the pursuer is the main earner or earns as much as the deceased. One of the stated aims of the Consultation Paper is to reform in the face of the 'economic realities of modern family structures' and in our opinion, the practice of considering the pooled income of a family unit (and deducting the income of the Pursuer to arrive at the available loss of support pool) is one such cornerstone principle in considering modern family life and making sure our legislation is fit for purpose whilst providing true equality of arms and overall fairness for the consumer, the victim and their bereaved family.

To provide an example of the above in practice, here are 3 examples, showing **Example 1** with deceased as the main earner, **Example 2** with both spouses earning the same and the final **Example 3** with the Surviving Spouse as the main earner:

Example 1

Current Calculation		Proposed Calculation	
Deceased's Income:	£50,000.00	Deceased's Income:	£50,000.00
Surviving Spouse's Income:	£25,000.00	Surviving Spouse's Income:	
Family pool	£75,000.00		
Less 25% own keep	£56,250.00	Less 25% own keep	£37,500.00
Less surviving spouse income	£31,250.00		
Notional Multiplier of 20 applied		Notional Multiplier of 20 applied	
Total Dependency	£625,000.00	Total Dependency	£750,000.00

Conclusion

The proposed calculation results in a gross disparity of £125,000 additional compensation over what the courts presently regard as reasonable reparation.

Example 2

Current

Calculation

Deceased's
Income: £30,000.00
Surviving Spouse's Income: £30,000.00
Family pool £60,000.00

Less 25% own keep £45,000.00
Less surviving spouse income £15,000.00

Notional Multiplier of 20
applied
Total Dependency £300,000.00

Proposed Calculation

Deceased's
Income: £30,000.00

Less 25% own keep = £22,500.00

Notional Multiplier of 20
applied
Total Dependency £450,000.00

Conclusion

The proposed calculation results in a gross disparity of £150,000 additional compensation over what the courts presently regard as reasonable reparation.

Example 3

Current

Calculation

Deceased's
Income: £25,000.00
Surviving Spouse's Income: £50,000.00
Family pool £75,000.00

Less 25% own keep = £56,250.00
Less surviving spouse income £6,250.00

Notional Multiplier of 20
applied
Total Dependency £125,000.00

Proposed Calculation

Deceased's
Income: £25,000.00

Less 25% own keep = £18,750.00

Notional Multiplier of 20
applied
Total Dependency £375,000.00

Conclusion

The proposed calculation results in a gross disparity of £250,000 additional compensation over what the courts presently regard as reasonable reparation.



In effect, the recommendations, if enacted, would create a clear and gross over compensation well above the levels regarded as reasonable reparation by the courts – the sole cause of this gulf is the failure to take into account the earnings of the surviving spouse.

As you can clearly see from the examples, the proposed change in legislation does not make any change to a single income family, however, for double income families the disparities are clear and the greater the income level of that family, the greater the levels of disparity and inequality become.

Question 2F

If you answered no to question 2E, do you believe that in all cases some other fixed proportion or some fixed sum of the surviving partner's income should be ignored in calculating a damages award?

Response to Question 2F

FSCM answer No

We regard the pooled incomes model with the deduction of the surviving spouses income to be the only just and fair way to calculate the damages award. To create any unreal or fictional alteration to that family's financial position would be to create an inequality or unfair position which would stand against the defenders and pursuers human rights.

Question 2G

If the law were to specify that some or all of a surviving partner's income should be ignored, in your view should this be a "rebuttable presumption", which could be set aside if due course were shown?

Response to Question 2G

FSCM answer No

Exactly the same position as for a fixed deduction, a "rebuttable presumption" rule would create satellite litigation and lengthy legal argument and debate which would ultimately, lead to lengthy delays and dissatisfaction with the judicial process on both the part of pursuers and defenders.

Such legal debate would lead to significant legal cost burdens which would again, impact on both pursuers and defenders alike as well as create strain on the judicial system itself in terms of resource and funding.

Question 2H

If a “rebuttable presumption” were introduced, in your view what would require to be demonstrated for it to be set aside?

Please list possible criteria

Response to Question 2H

FSCM do not agree that a “rebuttable presumption” should exist in this regard.

Question 3

Do you agree that, in respect of future loss only, a multiplier should run from the date of proof rather than the date of death?

Response to Question 3

FSCM do not agree that multipliers should run from the date of proof rather than the date of death

The stated aim of the Consultation and the recommended reforms are to take away situations where over-complexity exist, simplify access to justice for the consumer / pursuer and to facilitate a quicker and easier method of agreeing appropriate compensation without the need to over burden the courts.

By dividing a relative’s loss of support claim into past and future losses the main overriding problem is what date can be taken as the present date?

The starting point for the Commission’s recommendation (Paragraph 6.3 on page 10 of the Consultation paper) is a Proof date. The losses sustained before the Proof date are the past losses and the losses sustained after the Proof date are the future losses.

This approach would be contradictory to facilitating any settlement without the intervention of the court because the approach is predicated on the actual Court Proof date being the pivot upon which the calculation is finely balanced.

Even if the defenders and pursuers do attempt to negotiate a settlement using the present date to calculate what is in the past and what is to be allowed to the future, such a calculation becomes more obsolete with every day which passes.

The approach taken in the case of *Dingwall v Walter Alexander & Sons* we believe is appropriate. The multiplier should be calculated from the date of death.

Furthermore, the multiplier starts from the date of death to avoid the removal of the risks relating to every day life that the deceased would have been exposed to had they survived i.e. they could have suffered ill health, accident or unemployment and this can only be properly calculated by using a multiplier from the date of death. To calculate from the date of settlement is to remove that risk and, again, over compensate the Pursuer.

It should not be forgotten that the value of the claim is calculated by reference to the Ogden Actuarial Tables, which are themselves, based upon the mortality rates prevalent in this country and take account of the normal vicissitudes of life and employment – if you create a fictional date upon which to calculate the multiplier, you are in essence choosing to ignore or overlook the mortality data upon which foundation the calculations are based – this then brings the whole basis of settlement into question.

Applying the multiplier from the date of death also fits with the aim of reducing needless litigation and not over burdening the judicial system with cases where negotiated settlement should be easily achievable.

Question 4

Do you agree with the SLC's recommendation that the category of person entitled to claim patrimonial loss should be restricted only to those who are defined as part of the "immediate family"

Response to Question 4

FSCM agree with the SLC's recommendation in this regard

Question 5

Do you have any comments in relation to other recommendations made in the SLC report, besides those addressed in chapters 3 and 4?

Response to Question 5

FSCM do not have any further comment to make in this regard

FSCM would simply like to draw attention to the fact that the indications are that the proposed reforms would be far from cost neutral and would as well as creating widespread dissatisfaction with the processes from both pursuers and defenders alike, there are far wider implications for the general body of consumers and small business.

If costs of compensation increased, there would be knock on increases to insurance premiums to consumers and business for example, this could potentially create problems with more uninsured drivers on the road as insurance becomes unaffordable for some or a 'nice to have' rather than the norm. This in turn could generate potentially social economic problems where more uninsured drivers on the roads mean more law and order offences are committed, using up valuable Police and Court resources to deal with same.

In the business arena, higher insurance premiums and any contraction in the supply of insurance in Scotland could lead to serious difficulties to the business community in that high risk trades (scaffolders, window cleaners etc) would have extreme difficulty in obtaining compulsory insurance cover (Employers Liability Insurance) at anything other than an exorbitant rate. This could lead to such businesses becoming unsustainable and causing unemployment issues.

Additional cost of compensation would also have a dramatic effect on Local Authorities as well as the NHS which create knock on effects of funding shortfalls and the question would therefore remain, who would actually pay for such deficits in funding?

Question 6

Do you agree that, in relation to claims by relatives, the recommended new approach does provide the greatest financial benefit to surviving partners who are comparatively high earners eg those with incomes significantly above average?

Response to Question 6

FSCM completely agree with this statement

Hopefully, from our answer at **Question 2E** you will see we regard this as a wholly unjust situation which would be unsustainable.

Question 7

Do you agree that the recommendations made in the SLC report would not have a significant impact on equality and diversity issues?

Response to Question 7

FSCM agree that there are no such impacts identified