



House of Commons  
Justice Committee

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# Draft Civil Law Reform Bill: pre-legislative scrutiny

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**Sixth Report of Session 2009–10**

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## The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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## Summary

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Having considered the awarding of damages under the Fatal Accidents Act 1976 we recommend a principled approach to the wording of the new category of claimant who can seek dependency damages from the negligent party following a fatal accident. It is for society or Parliament on society's behalf to decide the framework for setting the levels of damages and for insurers to compete to provide the lowest cost response to that framework. We also make a number of drafting recommendations to increase legal certainty and to ensure that the reforms implement Parliament's intentions. On the treatment of new relationships, and the breakup of the relationship between the claimant and the deceased, in an assessment of damages we recommend a clearer form of drafting to assist the courts in their decision-making. We criticise the Government's disproportionate focus on the level of individual awards in bereavement damages as misguided and make appropriate recommendations. The true function of such damages is a formal token or recognition of grief and loss. We also recommend a cap on the overall level of bereavement damages. We welcome the imposition of an obligation to account on a claimant who receives damages for gratuitous care before the date of trial but express reservations about a continuing obligation. We also recommend that the claimant be able to recover damage for gratuitous care provided by the negligent party before trial.

We query the need to repeal the statutory provision on exemplary damages and the substitution of "aggravated damages and such amount by way of restitution" in place of "additional damages" in cases of copyright infringement.

Having considered the proposed changes to the pre-judgment and post-judgment interest regimes, we express concerns that no decision appears to have been made on the new rate of interest to be levied nor the type of case to which compound interest may apply.

We welcome the changes to the Forfeiture Rule which will allow descendants to inherit following disqualification or disclaimer under a "deemed pre-deceased" rule. We also welcome the change of jurisdiction for appeals in disciplinary hearings for barristers.

Finally we urge Ministers to take action more promptly following Law Commission recommendations so that the valuable work done by this organisation does not become outdated prior to moves towards implementation.



# Introduction

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## Pre-legislative scrutiny

1. In its draft legislative programme, published in June 2009, the Government announced its intention to legislate in a number of areas of civil law. In November 2009, the Liaison Committee referred the draft Civil Law Reform Bill to us for pre-legislative scrutiny. We welcomed the opportunity to consider the bill having been critical of the quality of some Ministry of Justice legislation in the past, noting that poorly drafted legislation inevitably has unintended consequences.<sup>1</sup>

2. Pre-legislative scrutiny is a relatively recent development. Prior to 1997, although draft bills were sometimes published, they were not subject to an agreed process of scrutiny.

## Background to the bill

3. On 15 December 2009 the Ministry of Justice published the text of the bill<sup>2</sup> and opened a public consultation.<sup>3</sup> The consultation document described the content of the bill as follows:

The four principal parts of the Bill are independent of one another and derive from different sources. The reforms relating to the law of damages are ultimately derived from work carried out by the Law Commission and would give effect to the reforms announced by the Government in its response to the Consultation on the Law of Damages published on 1 July 2009...The reforms relating to the setting and calculation of interest on court judgments derive in part from the Law Commission's recommendations in its 2004 report *Pre-judgment Interest on Debts and Damages* (Law Com 287) which the Government accepted in part in September 2008. The reforms relating to the law of succession will give effect, with minor modifications, to the recommendations of the Law Commission in its 2005 report *The Forfeiture Rule and the Law of Succession* (Law Com No 295), which was accepted by the Government in 2006. The reforms relating to appeals do not derive from Law Commission proposals.<sup>4</sup>

4. The draft Civil Law Reform Bill contains four separate parts and includes, within those parts, unrelated provisions, albeit in the same area of law. We focused on the most controversial aspects of the bill and on where the proposed legislation differed from the Law Commission recommendations that had given rise to it. We therefore confined our scrutiny of Part 4, on barristers' disciplinary appeals, to inviting written evidence and limited our questioning on Part 3, which concerns the Forfeiture Rule which disbars killers from inheriting the from the estate of their victim. Our aims were to increase legal certainty

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1 Justice Committee, Fifth Report of Session 2007–08, *Towards Effective Sentencing*, HC 184, paras 20–21

2 Ministry of Justice, *Civil Law Reform Bill: A draft bill*, Cm 7773, December 2009

3 *Civil Law Reform Bill: Consultation*, Ministry of Justice, December 2009, CP53/09

4 CP53/09 p 8

so as to discourage prolonged, satellite<sup>5</sup> or speculative litigation and to draw attention to issues which we believe the Government should reconsider.

# 1 Damages under the Fatal Accidents Act

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## Our approach

5. An award of damages by the civil courts is usually intended to compensate the claimant for the damage, loss or injury he or she has suffered as a result of another's acts or omissions, aiming to put the claimant in the same position, as far as is possible, as he or she would have been but for the injury, loss or damage. The corollary of that rule is that claimants should not gain by the award. The courts' assessment of damages focuses on actual loss rather than punishing the negligent party, subject to occasional exceptions. Negligence claims are usually governed by the general rule "the polluter pays," in other words the person responsible for the wrong should be liable for putting it right, as far as possible. These two rules formed the basis for our scrutiny of the damages provisions in the draft bill. In this context Nick Starling, of the Association of British Insurers, voiced what we regard as an important principle:

we think it is for courts and society in general to decide levels of damages. You need to be aware of course that, even though in this [draft Bill] the costs are very low, they do inevitably feed through eventually into premiums, but it is society that decides what damages are payable. I think that is quite clear, and insurers price for that.<sup>6</sup>

**6. Damages in the civil courts are intended to compensate the victim of a wrong and, as far as possible, put right that wrong. Undercompensation of victims in personal injury and fatal accident cases is not only unjust but is likely to lead to the victim or the state paying for the consequences of the negligent party's act. We acknowledge that some of our recommendations may lead to a small increase in costs to insurers, although other of our recommendations will assist in preventing unjustified cost. It is for society or Parliament on society's behalf to decide the framework for setting the levels of damages and for insurers to compete to provide the lowest cost response to that framework. By increasing legal certainty our recommendations will allow parties to settle earlier, thereby reducing both court costs and the upset caused by prolonged legal proceedings in fatal accident cases.**

## The role of damages under the Fatal Accidents Act

7. Damages under the Fatal Accidents Act 1976 (the 1976 Act) are paid by the person or organisation who caused a death through negligence or another wrongful act(s) to specified dependents of the person who died. Because the individual who died would have had a claim for injury against the entity that killed him or her, that right to a claim is effectively 'inherited' by the specified dependents,<sup>7</sup> although the way damages are assessed

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5 Satellite litigation is ancillary litigation to the main issue.

6 Q 142

7 Fatal Accidents Act 1976, section 1(1)

differs. Lord Denning summed up the position as “...if [the deceased] had lived, i.e., only been injured and not died, and living would have been entitled to maintain an action and recover damages, then his widow and children can do so. They stand in his shoes in regard to *liability*, but not as to *damages*.”<sup>8</sup> The Law Commission consulted on changing the nature of the right of action for dependents but concluded it was unnecessary.<sup>9</sup>

8. Damages awarded under the 1976 Act constitute any “non-business benefits” the claimant had a “reasonable expectation” of receiving from the deceased. These can include financial contributions,<sup>10</sup> gratuitous services such as personal care or domestic work<sup>11</sup> and fringe benefits, for example, the loss of a company car. “Reasonable expectation” includes future benefits, for example, assistance with buying a house.<sup>12</sup> Claimants are required to prove their case “on the balance of probabilities,” the usual civil standard of proof.

### Extending the eligibility for dependency damages in Fatal Accident Act cases

9. Section 1(3) of the 1976 Act specifies exhaustively the people or categories of people who can bring a claim for dependency damages:

- (a) the wife or husband or former wife or husband of the deceased;
- (b) any person who—
  - (i) was living with the deceased in the same household immediately before the date of the death; and
  - (ii) had been living with the deceased in the same household for at least two years before that date; and
  - (iii) was living during the whole of that period as the husband or wife of the deceased;<sup>13</sup>
- (c) any parent or other ascendant of the deceased;
- (d) any person who was treated by the deceased as his parent;
- (e) any child or other descendant of the deceased;
- (f) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;

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8 *Gray v Barr* [1971] 2QB 554, 569 (as quoted in LC 263)

9 *Claims for Wrongful Death* (Law Commission No. 263), HC 803, para 3.5-3.6

10 *Grzelak v Harefield and Northwood Hospital Management Committee* (1968) 112 SJ 195

11 *Hay v Hughes* [1975] QB 790 concerned the loss of a mother’s services.

12 *Betney v Rowlands and Mallard* [1992] CLY para 1786

13 Section 1(3)(b) includes same sex cohabitants.

(g) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

10. In its 1999, report *Claims for Wrongful Death*,<sup>14</sup> the Law Commission recommended the extension of the right to claim damages beyond the above list. The Commission based its proposals on the potential for injustice to those who did not fall within the list, for example: a cohabitant who had been living with the deceased for less than two years; children supported by the deceased who were not birth, step or adopted children; distant relatives supported by the deceased (for example a great-aunt supported by a great-nephew); and, non-relatives who lived together but who do not enjoy a marriage-like relationship.<sup>15</sup> The extension of the list was almost unanimously supported by the respondents to the Law Commission's consultation on which the 1999 report was based.<sup>16</sup>

11. In its consultation the Commission considered adding specified persons to the fixed list in section 1(3) but rejected the idea as "lists too easily become outdated and need periodic review." The list in section 1(3) had already undergone a number of revisions since 1976 and changes in society and in science were likely to render any fixed list "outmoded".<sup>17</sup> The Commission therefore consulted on the merits of abolishing the list and replacing it with a general test or, alternatively, adding an additional, generally worded, category to the list. The Commission also sought views on the wording, if the second option was preferred, for adding a new class of claimant to the list.

12. In its final report, the Commission decided to reject its provisional view that the fixed list should be abolished and replaced by a generally worded test. Despite trying a number of formulations the Commission concluded that there was no generally worded test that would preserve the rights of those already on the list while broadening it sufficiently to include other meritorious claimants. Its report concluded that an additional general category was required to introduce the desired flexibility.

13. In formulating an additional category in the section 1(3) list the Commission considered the following alternative tests:

Any individual should be able to claim if he or she had a reasonable expectation of a non-business benefit from continuation of the deceased's life

Or

Any individual should be able to claim if he or she was, or but for the death would have been, dependent, wholly or partly, on the deceased.<sup>18</sup>

14. After consultation, the Commission rejected both tests. In its view a stand-alone category under the "non-business benefit" test was too wide-ranging because the loss of reasonably-expected non-business benefits was broader than the concept of dependency.

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14 Law Commission paper No. 263, November 1999, HC 807

15 *Claims for Wrongful Death*, para 3.16

16 *Claims for Wrongful Death: a consultation paper*, Law Commission consultation paper No. 148, 1997

17 The list underwent further revision in 2004 to include civil partners.

18 *Claims for Wrongful Death*, para 3.23

Buying a colleague a wedding present may form a reasonably expected non-business benefit, in an office where this is the usual practice, but it could not reasonably be argued that the gift in any way demonstrated a person's dependency on their workmates.

15. In considering the wording of the new category the Commission concluded that the formulation used in the Inheritance (Provision for Family and Dependents) Act 1975 (the 1975 Act) was preferable having being tested in the courts without producing any difficulties of interpretation. The 1975 Act defines those who can apply for a share of the deceased's estate as any person who "immediately before the death of the deceased was being maintained, either wholly or partly by the deceased".<sup>19</sup>

16. The Commission made the following recommendation:

the present list of those able to claim should be retained but there should be added to the list a generally worded class of claimant whereby any other individual who "was being wholly or partly maintained by the deceased immediately before the death or who would, but for the death, have been so maintained at a time beginning after the death" shall be able to bring an action under the Fatal Accidents Act 1976.<sup>20</sup>

17. The Commission also concluded that, while claimants under the new residual category would be required to evidence the fact of maintenance to have a cause of action, it would be unfair to create a two-tier system of damages. It therefore recommended that claimants falling into the new category should be able to claim damages in the same way as claimants covered by the current fixed list, in other words, for the loss of reasonably expected non-business benefits.<sup>21</sup>

18. In 2007, the Ministry of Justice, launched a public consultation, entitled *The Law on Damages*,<sup>22</sup> to consult on a number of changes to the law on damages, based in part on the Law Commission's proposals. The Department published a response to the consultation in July 2009.

### ***When should dependency begin?***

19. *The Law on Damages* provisionally accepted the first part of the Law Commission's recommendation; that a new category be added to the fixed list to cover those "wholly or partly maintained by the deceased immediately before the death". However, the Ministry of Justice proposed the rejection of the second part of the recommendation which would have included a person "who would, but for the death, have been so maintained at a time beginning after the death". The reasons given for that rejection were as follows:

It is difficult to identify what cases might arise under this provision, and most potential claims for future dependency will already fall within the existing list of eligible claimants. The Government's view is that this provision meets no significant

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19 Inheritance (Provision for Family and Dependents) Act 1975, section 1(1)(e)

20 *Claims for Wrongful Death*, para 3.46

21 *Ibid.*

22 *The Law on Damages*, Ministry of Justice, May 2007, CP9/07

need, is too open-ended and could encourage loosely framed and speculative claims which would be difficult to prove or disprove.<sup>23</sup>

20. The Ministry of Justice maintained this position, both in its response to the consultation<sup>24</sup> and in its written evidence to us:

We consider that to make such an extension would meet no significant need, be too open-ended and could encourage loosely framed and speculative claims which would be difficult to prove or disprove.

We acknowledge that the exclusion of this class could mean that some people who might potentially have been able to receive dependency damages under the Law Commission proposal would not be able to do so. However, on balance, we consider it fairest to make dependency damages available to all those who were actually dependent on the deceased while avoiding the possibility of speculative claims based on possible future dependency.<sup>25</sup>

21. Professor Andrew Burrows, Law Commissioner with responsibility for the Commercial and Common Law Team at the time of the 1999 report, criticised the Government's approach: "You are going to get anomalies in the margins if you do not quite follow the principled approach, and I think the principled approach is as we set it out." In written evidence Professor Burrows commented:

Although I understand that there may be a fear of uncertainty and speculative claims, I do not think that in reality those would be problems because the claimant would still have to satisfy the normal standard of proving that he or she would have been dependent on the deceased but for the death. The narrower wording of this Bill would leave certain anomalies. So, eg:

(i) It would not cover the dependency loss of a cohabitant who does not satisfy the 2-year rule and is not yet dependent on the deceased but was about to give up work at the time of the death to have their child.

(ii) It would not cover the dependency loss of a child *en ventre de sa mere* [an unborn child], who is not the deceased's child but who would have been supported by the deceased while he was in a marriage-like relationship with the parent.<sup>26</sup>

22. Andrew Ritchie QC, on behalf of the Bar Council, told us: "It seems to me that if the evidence that can be brought before the court is that such a person would, on the balance of probabilities, have been supported by the deceased, then there is no reason for Parliament to want to exclude such a person."<sup>27</sup> Her Majesty's Council of Circuit Judges

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23 CP9/07 para 8

24 *The Law on Damages*, Ministry of Justice, July 2009, CP(R)9/07 p 44

25 Ev 23

26 Ev 29

27 Q 4

said that the new provision should mirror that in the 1975 Act “in order to achieve consistency.”<sup>28</sup>

23. Dominic Clayden, Director of Technical Claims for Aviva, appearing before us on behalf of the Association of British Insurers, said:

one of the overarching messages we would like to send is to try and make the process as painless as possible for people who have to claim [in fatal accident cases], and indeed for our staff, because they are not easy claims to deal with. The specific concern we would have about the [Law Commission’s wording] is that it does not give certainty. If there is no definition, it would lead to quite significant enquiries being needed to be carried out by my claims staff to ascertain whether or not there is that dependency.<sup>29</sup>

**24. We agree with the Law Commission that the new category of claimant should include those whose dependency would have begun after the death. The claimant in such a case would be required to prove to the ordinary civil standard of proof that he or she would have been supported by the deceased; therefore we do not envisage that speculative or trivial claims will increase in number. In our view incorporating the broader definition gives effect to the intention behind the bill to allow a degree of flexibility which is required to keep pace with changes in familial relations in modern society.**

25. The Government’s response to *The Law on Damages* consultation noted that some consultees believed that the residual category should contain a qualifying period to weed out claims where the dependency had been of a very short duration. However, it concluded that such a period was unnecessary to discourage speculative claims as “in each case that arises actual financial dependency would have to be proved, and thus unmeritorious claims would be unlikely to succeed”<sup>30</sup>. Furthermore, the Ministry of Justice concluded that this would place potentially meritorious claimants in no better position than they were before.<sup>31</sup>

26. The Association of British Insurers reiterated the suggestion that dependents claiming under the new category should be required to show that they had been dependent on the deceased for a period of time. Dominic Clayden commented:

there is no real definition as to how long that dependency needs to have existed. It could be a day, et cetera, and certainly I feel and we feel that the two-year limit gives a good grounding and enables permanency and I see the need to broaden the categories. We believe the two-year dependency gives certainty and allows for that permanence.<sup>32</sup>

27. This position was supported by a number of respondents to the Ministry of Justice’s consultation, primarily insurers and law firms who act for insurers. Beachcroft LLP, a law

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28 Ev 53

29 Q 122

30 CP(R)9/07 p 44

31 *Ibid.*

32 Q 122

firm which usually represents clients from within the finance and insurance industry, was one such:

in theory it would be possible for a dependency claim to be made by someone who stated they had been maintained by the deceased albeit for example only for one month pre death, and yet anyone who had been co-habiting to have to establish a relationship for 2 years or more. We do consider that there is benefit in including the “catch all” provision but consider it would be appropriate to bring it in line with the remainder of [the 1976 Act] s.1(3) and apply a time period during which the maintenance had been provided.<sup>33</sup>

**28. We agree with the Government that the new category of claimant does not require a qualifying period to achieve legal clarity as all potential dependents will be required to evidence their claims. We would go further and conclude that the introduction of a qualifying period would exclude those whom this category is intended to benefit, for example a co-habitee who had lived with the deceased for less than two years. This would undermine the intention behind the creation of a new category, which is to introduce some flexibility and allow it to keep pace with changes in society.**

### ***Wording of the new category of dependent***

29. The wording of the new category of dependent has been criticised by witnesses and others. Our recommendations are aimed at ensuring the new category does not create large amounts of satellite litigation.

30. As noted above, the proposed new category requires the claimant to have been dependent on the deceased “immediately before the death”.<sup>34</sup> Both the Bar Council and the National Health Service Litigation Authority believe this formulation would generate litigation. Andrew Ritchie QC, representing the Bar Council, told us:

We are troubled by the word “immediately” for this practical reason. If a man is injured in a road traffic accident and is in hospital for six months and, as a result, does not gain his usual income and hence is not supporting A, B or C, it is possible that the words “immediately before the death” could be interpreted in a way to exclude persons who would otherwise be dependent, were being maintained before the accident but not before the death...I suggest that Parliament considers the words “immediately before the accident”...<sup>35</sup>

31. The National Health Service Litigation Authority (NHSLA), in response to the Ministry of Justice’s consultation, agreed with Mr Ritchie and noted: “We anticipate significant legal argument as to whether or not a particular individual “was being maintained by the deceased immediately before the death”, and expect test cases in the courts on this point.” These concerns were, in part, the reason the NHSLA queried the Government’s impact assessment. The Ministry of Justice estimated that the cost to the NHS of all the new damages provisions would be £1.8 million. The NHSLA said:

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33 Ev 51

34 Draft Civil Law Reform Bill, clause 1(2)

35 Q 2

We find it difficult to assess the likely financial impact, because it is entirely speculative as to how many extra claims will be received and the likely size of such claims...The true cost to the NHS of this provision could well be in excess of £20m per annum, but we stress that this is no more than an educated guess, given the imponderables mentioned above.<sup>36</sup>

32. Professor Andrew Burrows commented: “I think, to make that absolutely clear, you would want some drafting change that said something like “or would, but for the death, or the injury which led to the death, have been so dependent”.”<sup>37</sup>

**33. It is highly desirable for all parties that the new category of claimant be clearly drafted to avoid uncertainty and satellite litigation. We recommend that the wording “immediately before the death” in clause 1(2) of the draft Civil Law Reform Bill be amended to read “immediately before the death or the accident that led to the death”.**

34. The Law Commission’s recommendation for the new category of dependent provided that the litigant had a claim if he or she was “wholly or partly maintained” by the deceased. Clause 1(2) of the draft Civil Law Reform Bill, however, simply reads “being maintained by” the deceased. In its response to *The Law on Damages* consultation, the Ministry of Justice noted some concerns about the Law Commission’s proposed wording:

Concern was also expressed at how “wholly or partly maintained” would be defined and interpreted by the courts. Those proposing a qualifying period indicated that it would not be appropriate for cohabitants of very short duration to claim, and that having no qualifying period here for cohabitants was inconsistent with proposals elsewhere to have a two year qualifying period (eg in relation to bereavement damages and the existence of financially supportive cohabitation).<sup>38</sup>

35. In the consultation document on the draft Civil Law Reform Bill the Ministry of Justice stated it had decided to include, in the bill, provisions to the following effect:

To add to the list of those eligible to claim as dependants under section 1(3) of the Fatal Accidents Act 1976 a residual category to enable any person who was being wholly or partly maintained by the deceased immediately before the death to bring a claim.<sup>39</sup>

It is unclear, therefore, why the bill does not make that provision.

36. Muiris Lyons, of the Association of Personal Injury Lawyers, told us that including “wholly or partly” was “a helpful clarification because it embraces the fact that there does not have to be a full dependency, a whole dependency; it can be a partial dependency.”<sup>40</sup>

**37. We recommend that clause 1(2) of the bill provides that a claimant may be “wholly or partly” maintained by the deceased. The new category of dependent is not intended**

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36 Ev 59

37 Q 77

38 CP(R)9/07 p 9

39 *Civil Law Reform Bill: Consultation*, Ministry of Justice, December 2009, CP53/09, p 12

40 Q 126

to apply only to those who were solely supported by the deceased. The courts, however, are required to interpret the new category as it is stated on the face of the bill. Failure to include “wholly or partly” could lead to a restrictive interpretation. Parliament has a responsibility to make its intentions clear.

### **Defining “dependence”**

38. The 1976 Act currently contains a fixed list of those eligible for dependency damages. The introduction of a new general category requires that “maintenance” under the 1976 Act be defined for the first time. The Law Commission recommended the following wording:

A person shall be treated as being wholly or partly maintained by another if that person “otherwise than for full valuable consideration, was making a substantial contribution in money or money’s worth towards his reasonable needs.”<sup>41</sup>

39. The wording was accepted by the Government and incorporated into clause 1 of the draft Civil Law Reform Bill.

40. Two substantive criticisms have been made of the definition of maintenance. Muiris Lyons criticised the requirement that the dependency form a “reasonable need” rather than a “need”:

...specifying that the dependency must meet a reasonable need could create satellite, unwanted litigation about what is a need, reasonable or not. It seems to us that, if someone can satisfy a judge on the evidence that they are a dependent, they should receive the appropriate payments...The example we give is the question of perhaps an uncle or a godparent who is paying towards the maintenance of somebody at university and they pay £400 towards their rent or something. We do not want to get involved in arguments about is that a reasonable dependency. It is a simple dependency. It is not necessarily a huge one, but it is something that is of very big significance to...that godchild...<sup>42</sup>

41. Irwin Mitchell, a solicitors’ firm which usually acts for claimants in personal injury cases, agreed: “We are concerned that the use of the expression ‘reasonable needs’ in the current wording may lead to satellite litigation. The definition of this may prove controversial.”<sup>43</sup>

**42. We have some sympathy with the view that, once a claimant has proved a “need” for maintenance and his or her dependence on the deceased, further obstacles to their claim are unnecessary. Nevertheless, on balance, we are satisfied that the requirement for a “need” to be “reasonable” should assist the court rather than complicate its deliberations. The courts are experienced in assessing whether a claim is reasonable and public policy requires that unreasonable claims should be discouraged. The inclusion of**

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41 *Claims for Wrongful Death*, para 3.46

42 Q 126

43 Ev 55

**a requirement that a need is “reasonable” will discourage speculative claims. We endorse the proposed drafting.**

43. Action Against Medical Accidents, a charity advising the victims of clinical negligence, noted:

[the bill] also defines a “person being maintained by another person” as being someone who “makes a substantial contribution in money or monies worth towards the claimant’s reasonable needs”. We firstly query what the definition of “monies worth” might be; specifically what services would count as monies worth in respect of this Act? We have seen a wide range of claims that include services provided by the deceased in the following format:

—As a carer to a grandchild.

—The provision of assistance in a business run from the family home.

—The provision of wrap around care before and after school where parents are separated but are both active in the care of their child.

—The provision of care by the parent of an adult child with mental health or long term disability conditions that indicate care or supervision needs.

Would the care provided in the above instances be quantifiable under the Act as “monies worth”? We would argue that further definition of monies worth needs to be made in this act to prevent the occurrence of satellite litigation as to what the meaning of “monies worth” might be.<sup>44</sup>

44. The Law Commission recommended that claimants under the new category of dependent be able to claim “non-business benefits” equivalent to those who could already claim under the Fatal Accidents Act. The Commission explicitly rejected applying a two-tier system of damages. **We agree that claimants under the new category for dependency damages should be able to claim for “non-business benefits” in the same way as other claimants under section 1(3) of the Fatal Accidents act 1976.**

### ***Should an organisation be able to claim dependency damages?***

45. The Bar Council expressed concern that the failure to define “person” in the new category of dependent meant “cats’ homes” or other organisations could claim dependency damages. Andrew Ritchie QC, on behalf of the Bar Council, told us: “I give money to Amnesty International each year so they are dependent on me to a certain extent. They are a legal person and they would be entitled to make a dependency claim under the new criteria as a legal person.”<sup>45</sup> Professor Andrew Burrows, a former Law Commissioner, agreed and told us: “The intention was always that only humans could claim. This could be

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44 AvMA, submission to the Ministry of Justice consultation on Draft Civil Law Reform Bill, [www.avma.org.uk](http://www.avma.org.uk)

45 Q 17

achieved by replacing the word ‘person’ by ‘individual’.”<sup>46</sup> Nick Starling, of the Association of British Insurers also expressed strong support for this clarification.<sup>47</sup>

**46. The bill is intended to benefit people not organisations. We recommend the Ministry of Justice replace “person” in clause 1(2) with “individual”, or include a definition of “person” in this context elsewhere in the bill.**

## Assessment of dependency damages

### Remarriage

47. Sections 2 to 4 of the draft bill amend section 3 of the Fatal Accidents Act 1976 which deals with the effect of remarriage and relationship breakdown on the entitlement to claim damages. Under section 3(3) of the 1976 Act, a widow’s “prospects” of remarriage can have no impact on the assessment of damages. This provision was to avoid the “distasteful and distressing” inquiries required of a bereaved woman if the court had to consider the likelihood of a new relationship in an assessment of damages and the essentially arbitrary nature of any such judgement.<sup>48</sup> This is something of an anomaly. A widower’s, or unmarried co-habitant’s, prospects of remarriage are taken into account in an assessment of damages and a widow’s remarriage is relevant to the assessment of damages for her child. In its consultation, *Claims for Wrongful Death*, the Law Commission described section 3(3) as forming a “large, and possibly unjustified, exception to the rule that damages under the Act should be assessed so as to compensate as accurately as possible the loss suffered by the claimant as a result of the wrongful death.”<sup>49</sup>

48. The Commission consulted on the following four options:

- (1) extending section 3(3) so the fact or prospect of remarriage is excluded from all relevant claims;
- (2) allowing the fact of a widow’s remarriage to be taken into account in an assessment of damages but excluding the prospects of remarriage;
- (3) allowing both the fact and prospect of remarriage to be taken into account; or
- (4) allowing the statistical probability of remarriage to be taken into account, although leaving it open to the widow to produce evidence rebutting such a probability.

49. Responses to the Commission’s consultation were mixed, although there was a large majority in favour of reforming the ambit of section 3(3). Option 1 was rejected primarily on the grounds that it simply widened the anomaly rather than ensuring accurate compensation of the claimant’s loss. Option 3 was apparently rejected due to the lack of legal certainty generated by assessing the “prospects” of remarriage, the potential for “dirt-

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46 Ev 30

47 Q 131

48 HL Deb 20 April 1971 col 541

49 Law Commission consultation paper No. 148, paras 3.57-3.60

digging” by defendants in an attempt to mitigate their liability, the potentially humiliating cross-examination of bereaved spouses and the difficulties implicit in a court determining the likelihood of remarriage consistently and fairly. The use of statistics in option 4 was heavily criticised by consultees as “inappropriate”, “inaccurate” and “insensitive” in this context. Respondents also commented that attempts to rebut or confirm the statistical probability were likely to lead to highly personal and intrusive cross-examination.<sup>50</sup>

50. Objections to the court being required to consider the fact of a remarriage but not the prospects of one centred on the likelihood that claimants would “tactically arrange” their personal lives by delaying a remarriage. The Commission noted this difficulty was an inevitable part of the exercise of trying to strike a balance between the need to assess damages as accurately as possible and the desire to avoid an assessment of the prospects of marriage.<sup>51</sup> The Commission produced the following recommendations:

(1) section 3(3) of the Fatal Accidents Act should be repealed. Unless a person is engaged to be married at the time of trial, the prospect that he or she will marry, remarry or enter into financially supportive cohabitation with a new partner should not be taken into account when assessing a claim for damages under the Fatal Accidents Act. The fact of remarriage and, as appears to be the present law, the fact of financially supportive cohabitation should be taken into account wherever relevant.

(2) as under the Family Law Act 1996, it should not be possible to establish an agreement to marry other than by evidence in writing of the existence of the agreement, by the gift of an engagement ring by one party to the agreement to the other in contemplation of their marriage, or by a ceremony entered into by the parties in the presence of one or more witnesses.<sup>52</sup>

51. In its consultation, *The Law on Damages*, the Ministry of Justice rejected the proposal by the Law Commission that the fact of a widow being engaged to be married was sufficiently certain to be taken into account in an assessment of damages. It concluded that the inclusion of engagements was likely to lead to evidential disputes similar to those that would arise if the court was required to assess the prospects of remarriage.<sup>53</sup>

52. Otherwise, the Government provisionally accepted the Law Commission’s recommendations, including the proposal that the fact of a financially supportive cohabitation of over two years should be considered in an assessment of damages. The consultation paper noted that the inclusion of such relationships could lead to intrusive inquiries by defendant representatives. It balanced this, however, against the increasing recognition given to cohabitants of more than two years. The Government’s proposals also extended the provision to widowers and civil partners.<sup>54</sup>

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50 *Claims for Wrongful Death* para 4.38

51 *Claims for Wrongful Death* para 4.47

52 *Claims for Wrongful Death* para 4.53

53 CP9/07 para 13

54 CP9/07 para 11

53. The Government's response to the consultation noted that submissions showed two different perspectives on the assessing of damages under the 1976 Act. From what may be deemed the "claimant perspective", it was argued that taking the fact, or prospect, of a new relationship into account would unfairly transfer the obligation to support the deceased's dependant from the tortfeasor<sup>55</sup> to the new partner. From the alternative, "defendant perspective", it was held that not to take into account a remarriage, or other relevant relationship, would amount to double recovery by the claimant and would depart from the principle that the purpose of damages is to compensate for loss.<sup>56</sup>

54. The Government's response concluded that basing assessments of damages on the fact of new relationships rather than prospects, including engagements, was the fairest approach for all parties and such relationships "should be" taken into account. Clause 2(2) of the draft bill, however, goes further in that it restricts the court's discretion in the assessment of damages by requiring the fact of any remarriage, a civil partnership or a co-habiting relationship of over two years to be taken into account. This apparently conflicts with the Government's view in *The Law on Damages* that: "the courts should have as much flexibility as possible in considering whether damages should be awarded in individual cases and if so, what the level of the award should be."<sup>57</sup>

55. The Bar Council expressed concerns that requiring the courts to take into account co-habiting relationships would lead to insurance companies using private detectives to inquire into the bereaved person's personal life and relying on gossip and rumours to conduct cross-examination in an effort to reduce liability.<sup>58</sup> The Chief Executive of the Law Society, Des Hudson, agreed and told us that the inclusion of co-habitants made certainty a problem.<sup>59</sup>

56. Professor Andrew Burrows disagreed:

The [submission] made by the Bar Council about this clause (i.e. (i) taking into account 2-year cohabitation will encourage intrusive enquiries...) [is] in my view misconceived. They ignore the fact...that [this] is already the present law and has not produced difficulties. In other words...the Bill, in the context of reforming s 3(3), would merely be clarifying what is already the present law.<sup>60</sup>

57. Beachcroft LLP agreed that the inclusion of co-habiting relationships made the assessment of damages uncertain. It submitted, therefore, that all relationships contracted since the death should be taken into account, including ones that do not involve co-habitation:

there should not be a requirement of co-habitation, relationships where the parties do not live together may be as stable, long term and relevant as those where they do. We consider the court should be required to take into account any relationship

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55 The tortfeasor is the negligent party.

56 CP9/07 p 45

57 CP9/07 p 9

58 Q 23

59 Q 27

60 Ev 30

which the claimant has entered in to. Having considered that relationship, the court may determine that it is not relevant and thus not consider it further, but it should not be precluded from doing so.<sup>61</sup>

58. Muiris Lyons, on behalf of the Association of personal Injury Lawyers, disagreed, He feared that claimants may feel unable to move forward in their personal lives because of the potential impact on their claims:

What you have got is a situation where somebody, through their negligence, has caused this loss, this bereavement, and created the need for the dependency. The fact that somebody 18 months or two years down the line may be trying to get over their grief and get on with their life and meets somebody else we do not think should be a factor affecting their need or dependency. It is all about the polluter paying here. If there is a need it should be met...we think it would be a great shame if people felt unable to move forward after such a tragedy because they were worried that any claim they might be bringing that could perhaps take two or three years to resolve could be adversely affected by them trying to move forward, so we say let the dice fall. If the insured causes the damage then he should pay for it and you should not take into account the fact that somebody may or has come along.<sup>62</sup>

59. We recognise that the approach to new relationships in an assessment of dependency damages is a very difficult area and fully appreciate the reaction of claimants, fortunate enough to find a new partner, when the damages they are awarded are reduced because of that relationship. Awards of dependency damages are, however, focused on compensating the claimant for actual financial loss and are not intended to punish the defendant or to put a price on the death of the deceased.

**60. We strongly oppose the suggestion that all relationships, including those not involving co-habitation, be considered in an assessment of dependency damages. This would not only give rise to highly undesirable scrutiny of the bereaved's personal life: it may result in lengthy and expensive debate in court over the weight to be given to the quantifiable benefits of even the most casual relationship, for example, the occasional dinner.**

61. Professor Andrew Burrows criticised the drafting of clause 2(2):

...there is nothing to put into effect the Government's policy that the *prospects* of remarriage or being maintained by someone else are to be ignored by the courts. In other words, there is nothing equivalent to the Law Commission's draft clause 3A(4) which read as follows;

'In assessing the damages payable to a dependant under this Act, there shall not be taken into account the prospects of the dependant, or a person whose circumstances are relevant to the injury to the dependant—

(a) marrying or re-marrying or

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61 Ev 52

62 Q 134

(b) entering into a relevant relationship.<sup>63</sup>

**62. In the interests of legal certainty we recommend it is made clear on the face of the bill that the prospects of remarriage, a civil partnership or co-habiting relationship of over two years are not to be taken into account by a court when assessing dependency damages under the Fatal Accidents Act 1976.**

63. The Government's consultation also canvassed opinion on the proper weight to be given to the fact of a new parental relationship in the assessment of damages for children of the deceased. It proposed that "to create consistency and fairness" only the fact of a new relationship should be considered by the court. Responses to this proposal noted that the deceased would have had a statutory obligation to maintain their children, which would not apply to any new partner. The Ministry of Justice concluded "the fact of remarriage, entry into a civil partnership or entry into a financially supportive cohabitation should only be taken into account as far as the judge thinks it appropriate to do so, and should not be determinative."<sup>64</sup>

64. Andrew Ritchie QC, of the Bar Council, held the view that remarriage on the part of the surviving parent should not impact on the damages of a dependent child. Mr Ritchie told us that older children can find it difficult that their parent's new relationship, over which they have no control and from which they receive no financial protection in law (unless adopted by the new partner), impacts on the damages they receive.<sup>65</sup> Professor Andrew Burrows rejected these concerns on the grounds that the remarriage of the surviving parent or carer is already taken into account by the courts and has not produced difficulties.<sup>66</sup>

65. The Association of British Insurers proposed that the court's discretion on taking a new relationship into account when assessing a child's dependency damages be limited by substituting "shall" for "may". Dominic Clayden reasoned:

One has to be careful to avoid potentially quite unsavoury aspects of discussions around compensation, but the reality is that, if there is somebody else maintaining the child, you get an element of double compensation...The important element is: is the child being taken care of? That is the primary issue here, not, "Well, actually, this child comes with some sort of additional funding". We would like to see the primary concern across the piece being: is the child being taken care of? If somebody else is providing support, that should be taken into account from a social policy point of view.<sup>67</sup>

66. In evidence to us the Ministry of Justice noted:

Here, following comments received on consultation in 2007 pointing out that any new partner of the [surviving parent] would not have the same obligation as a deceased parent to maintain a child, the draft Bill provides that where the claimant is

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63 Ev 30

64 CP(R)9/07 p 13

65 Q 28

66 Ev 30

67 Q 134

a child of the deceased the court may take into account a remarriage and so on of a surviving parent (see clause 2(3)). This allows the court to take the new fact into account if it thinks it is right to do so in the circumstances of the case.<sup>68</sup>

67. We believe that the courts should have discretion to take account of a parent's new relationship when assessing a child's dependency damages as this will allow it to consider the realities of the child's financial loss. We reject the submission that the court's discretion in this regard be limited by ruling out consideration of new relationships or requiring them to be taken into account. Children have no control over parental relationships and there is no obligation on a new partner to support them, however, some will acquire a loving and supportive carer. The wider discretion allows for a common sense approach to ensure justice to the child and avoid the risk of overcompensation.

68. We note that the Ministry of Justice accepted concerns that the new partner of a surviving parent would have no legal obligation to support that child. We ask the Government to note that a co-habitee in a "relevant relationship" would also have no obligation to support his or her partner. In our view, the reasoning behind this clause is that a relevant new relationship of the surviving parent is simply less likely to impact upon the financial loss of the child than its parent and, in order to save court time and money, it is right that a judge be able to discount it at the outset, rather than go through a laborious process which ends in ascribing it nil weight. We do not expect the courts to shrink from assessing the impact of a new relationship at nil when assessing the damages of the surviving partner, although the situation may be an unlikely one, and, given the court has this discretion, we agree the judge should be required to consider it.

### **Engagements**

69. The Law Commission recommended engagements should be taken into account as the equivalent of a remarriage.<sup>69</sup> This was rejected by the Government.<sup>70</sup> **We agree with the Government that equating an engagement to a remarriage in an assessment for dependency damages should not form part of the bill, as society has moved on and the inclusion of engagements will almost certainly give rise to overly intrusive inquiries.**

### **Breakdown of relationship**

70. The likelihood that the relationship between the claimant and the deceased would have broken down at a later stage is taken into account by the courts when assessing damages.<sup>71</sup> This has been the subject of similar criticism as the prospects of remarriage in requiring intrusive and personal questions, and the lack of certainty implicit in a court assessing the health and longevity of a marriage or cohabiting relationship.

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68 Ev 23

69 *Claims for Wrongful Death*, para 6.31

70 CP9/07 para 13

71 *Owen v Martin* [1992] PIQR Q151

71. The Law Commission provisionally recommended that while “clear evidence” of divorce should be taken into account in an assessment of damages the statistical likelihood of divorce should not. It consulted on this recommendation.<sup>72</sup>

72. Many of the responses to the consultation reflected the submissions on assessing the prospects of remarriage. The vast majority viewed it as “thoroughly insensitive” to assess the bereaved person’s relationship with his or her late partner on the basis of statistical information. There was general agreement however that “clear evidence” of divorce should be a relevant factor for the courts.<sup>73</sup>

73. The Commission considered the definition of “clear evidence”. In doing so it explicitly rejected the findings in the Court of Appeal judgment in *Owen v Martin*. The deceased was the claimant’s second husband, her first marriage having ended on the grounds of her adultery. By the time of trial Mrs Owen had married a third time. The Court of Appeal held that Mrs Owen’s relationship with the deceased would also have ended in divorce and reduced the multiplier for the damages from 15 to 11 (essentially an assessment of the number of years the marriage would last). The Commission queried whether this approach was realistic and whether Mrs Owen had, in fact, simply suffered a reduction based on her earlier infidelity, with no evidence that her marriage to the deceased had been anything other than happy and stable. Unless there was evidence of a deterioration in a relationship, the Commission concluded, assessments by the court of the likelihood of divorce would be essentially arbitrary.<sup>74</sup> The Commission recommended:

the prospect of divorce or breakdown in the relationship between the deceased and his or her spouse should not be taken into account when assessing damages for the purposes of any claim under the Fatal Accidents Act unless the couple were no longer living together at the time of death, or one of the couple had petitioned for divorce, judicial separation or nullity.<sup>75</sup>

74. The Commission also considered the role of relationship breakdown in a claim by the co-habiting partner of the deceased. Section 3(4) of the 1976 Act requires the court to take into account the fact that the claimant had no enforceable right to financial support from the deceased. The Commission could not ascertain the reason for this provision, or the weight to be given to it. In considering the position of cohabitants in the light of its recommendation on divorce the Commission was unable to “identify any objective factor which might indicate the imminent prospect of separation in a relationship between cohabitants.”<sup>76</sup> It therefore recommended:

...that section 3(4) of the Fatal Accidents Act should be repealed, and replaced by a provision to effect that the prospect of breakdown in the relationship between the

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72 Law Commission consultation paper No. 148 para 3.67

73 *Claims for Wrongful Death*, para 4.58

74 Law commission consultation paper No. 148 para 3.69

75 *Claims for Wrongful Death*, para 4.66

76 *Claims for Wrongful Death*, para 4.70

deceased and his or her partner should not be taken into account when assessing damages under the Act.<sup>77</sup>

75. In its consultation, *The Law on Damages*, the Government proposed to accept both recommendations, with the proviso that the recommendation on divorce be extended to civil partnerships.<sup>78</sup>

76. The majority of the respondents to the Government consultation agreed with the requirement that a petition for divorce, judicial separation or nullity should be taken into account in an assessment of damages. Separation received less support, but the Government concluded that it would be open to the claimant to show that the couple were living apart for reasons unconnected with marital problems and that the recommendation should be enacted as it stood.<sup>79</sup> Irwin Mitchell disagreed with the Government's conclusion:

We do not agree that the Court should take into account the fact that the couple are no longer living together at the date of death as evidence that the marriage or partnership has irretrievably broken down. There are many reasons why a couple may not be living together, such as when one partner is working away from home for a significant length of time or when one partner is in hospital or in full-time care away from the home.<sup>80</sup>

77. We received evidence that a relationship may have broken down long before a couple begin divorce proceedings and therefore courts should be able to inquire into the state of the relationship in a claim for dependency damages by a spouse or partner. Dominic Clayden told us:

The issue for us in reality is: are solicitors involved? If someone has formally reached the point of having solicitors involved and there is the unfortunate ding-dong going on, that is not hugely intrusive. The parties are already at that point and you are simply getting involved in what was a difficult divorce in any event. The reverse is that you would be defying the reality of what has been going on and providing a financial support which would not have been there before.<sup>81</sup>

Mr Clayden rejected the suggestion that inquiries into such issues are inevitably intrusive: "Generally speaking, there is knowledge from your insured. It is a local community. It is not an intrusive question to simply ask the solicitor on the other side because it is something that is done by a request normally through the solicitor."<sup>82</sup> Muiris Lyons, disagreed:

I can see every time that a married couple are involved the question is being asked how strong is their relationship. I think it would be very intrusive...if we are looking

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77 *Claims for Wrongful Death*, para 4.71

78 CP9/07 para 22

79 CP(R)/07 p 13

80 Ev 56

81 Q 145

82 Q 146

at anecdotal evidence, one of my divorce partners is constantly bemoaning the fact that he gets instructed in divorces and then six months later the couple are back together again... the law for APIL should be about being clear and consistent and simple and whether a divorce petition has been applied for, whether a divorce petition has been granted. It is nice, it is clear, it is simple, it is consistent, and it avoids murky, unwanted intrusions into people's private lives.<sup>83</sup>

**78. On the principle that compensation should reimburse a claimant for actual losses but that public policy is not served by an intrusive assessment of the strength of a couple's relationship, we endorse the Ministry of Justice's approach to relationship breakdown in an assessment of dependency damages. Evidence of a reconciliation after an application for a divorce petition can be taken into account by the court. We note that separation between partners may be entirely due to external factors, but it will be open to the claimant to rebut the presumption that the partnership was in difficulty and we would expect the courts to take a practical and common sense approach to the evidence in such cases.**

79. Many respondents to the Law Commission's consultation noted that there was no objective way of assessing the strength of a cohabiting relationship except in cases where the couple had separated. The Government concluded that the intrusive nature of an assessment outweighed the benefits of accurate damages assessment. It also noted:

We do not consider that this can properly be interpreted as favouring cohabitation over marriage. In relation to perceptions of a discrepancy between this proposal and the absence of any qualifying period proposed for dependency claims by cohabitants being maintained by the deceased at the time of death, as noted above cohabitants are likely to have less financial protection than spouses. Whereas proof of dependency would be required to substantiate any dependency claim, the uncertainty regarding a cohabitant's financial position could lead to unfairness if the prospects of breakdown of the financially supportive cohabitation were taken into account.<sup>84</sup>

80. Professor Andrew Burrows criticised the drafting of this part of the bill:

...the way in which the Bill is drafted is a tortuous way of putting into effect the policy...The basic policy that the Bill is trying to effect is that, because of distressing enquiries, one should not take into account that a dependant's marriage/relationship might have broken up unless there is clear objective evidence of that by for example a petitioning for divorce or factual separation. But the drafting of the Bill is so difficult because:

(i) The drafting ought to start, but does not, by laying down the general position that the courts should not take into account the possibilities of marriage/relationship breakdown. There would then be the specified exceptions to that.

(ii) There is a serious omission in that the Bill does not apply the same approach (of ignoring prospects that marriage/relationship would have been broken down) in

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83 Qq 146–147

84 CP(R)/07 p 46

respect of dependency claims of others, especially children of the marriage or relationship.<sup>85</sup>

**81. Parliament has a duty to provide clear, consistent legislation for the courts to interpret and apply. The drafting of clauses 2 and 3 is not clear. The clauses should be redrafted to state the general rule that Parliament wants the courts to adopt as clearly as possible. We regard this to be that neither the prospects of a new relationship, nor of the breakdown of the relationship between the deceased and the deceased's partner, should be taken into account in the assessment of dependency damages. The clause should then state the limited exceptions to the rule.**

## Bereavement damages

82. Bereavement damages were introduced into statute law by the Administration of Justice Act 1982, which inserted section 1A into the Fatal Accident Act 1976 Act (the 1976 Act) following the recommendations in the Law Commission's 1973 report *Personal Injury Litigation Assessment of Damages*.<sup>86</sup> Bereavement damages form an exception to the usual rule that loss must be proved before damages are awarded. In this case the fact of the bereavement is sufficient for the sum to be awarded. Calling them damages, therefore, is a misnomer and other terms, such as bereavement award, have been used. The system of bereavement damages only applies in England and Wales.

83. Bereavement damages are a fixed sum, currently £11,800.<sup>87</sup> That sum has frequently been criticised by claimants as inappropriately small. In considering criticism of the level of the award the Law Commission found that confusion over the function of bereavement damages fuelled much of the negative commentary. The Commission concluded that the award was compensation for grief and sorrow and the loss of care, guidance and society provided by the deceased.<sup>88</sup> Bereavement damages acknowledge the value society places on life although, as Lord Hailsham noted when they were introduced, they can only ever be a token payment as it is clearly impossible to quantify or provide adequate financial compensation for the grief felt at the loss of a loved one. Equally bereavement damages were not, in the view of the Law Commission, intended to compensate financial loss, punish the defendant or symbolise that the deceased's death was wrongful. The Commission therefore recommended

That bereavement damages should continue to be available under the Fatal Accidents Act. However, the Explanatory Notes to our replacement clause on bereavement damages should clarify that the function of bereavement damages is to compensate, in so far as a standardised award of money can, grief, sorrow and the loss of the non-pecuniary benefits of the deceased's care, guidance and society.<sup>89</sup>

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85 Ev 30

86 Law Commission paper No. 56, HC 373

87 Damages are set by the Lord Chancellor under his powers contained in the Fatal Accidents Act 1976, section 1A

88 Law Commission consultation paper No. 148, para 3.138

89 *Claims for Wrongful Death*, para 6.7

84. Responses to the Ministry of Justice's 2007 *The Law on Damages* consultation were overwhelmingly in favour of retaining bereavement damages. The summary of the opinions both for and against abolition included:

that they are an important contribution towards the estate of a person killed as a result of another's negligence; that they reflect the wish of society to provide financial payment for the loss of something incalculable; that they are a pragmatic way of acknowledging loss; that they serve a useful social and emotional purpose even though they are token in nature and sometimes misunderstood in purpose; and that it would be socially and morally repugnant not to allow a payment. Many responses acknowledged that the nature of the award was unsatisfactory, but either took the view that it was entrenched in the law, or that it served some useful purpose as a token in acknowledgment of grief. Arguments in opposition were that the award should be replaced with an apology; that the only legitimate function of damages is compensation; and that the award is already covered by the ability of children to claim for loss of care and advice and spouses for loss of love and affection.<sup>90</sup>

85. The Government doubted, however, whether clarification of the function in the Explanatory Notes of the 1976 Act would prevent families feeling the sum was inadequate. In its summary of the responses to the damages consultation it noted:

A little over half the responses to this question indicated that it would be appropriate to provide clarification of the purpose of bereavement damages in the explanatory notes accompanying any legislation on the subject. Arguments put forward in support of clarification being provided included that it is important that bereaved people should not feel that the award is in any way equated with the loss that they have suffered; that any wording that helps to change the public perception of the award can only be a good thing; and that an explicit statement of what the award is for would help provide public recognition and acknowledgement that a wrong had occurred.

However, many responses both in favour of and against providing clarification felt that it would be likely to make little difference to people's perceptions about the award. A number of possible explanatory wordings were offered. Several responses considered that reference to a "token" payment should be avoided, and others thought that a different term to "bereavement damages" would be preferable. Suggested wordings included "bereavement award"; "an award in recognition of the mental anguish caused by the unnatural and untimely death of a loved one"; "an award to recognise anguish and suffering"; and "statutory award for tortious death". Some of those opposing the need for clarification considered that it was a matter for the claimant's solicitor to explain the purpose of the award. Others indicated that the best way to change people's perceptions would be to increase the award.

...various additional or alternative approaches were suggested. These included agreeing a standard explanation for solicitors to use with their clients; providing

information in booklets or leaflets to be available in a range of places; and placing information on appropriate websites.<sup>91</sup>

86. In evidence to us the Ministry of Justice reiterated the above position, also noting:

the Explanatory Notes published with a Bill are intended to assist the reader in understanding the Bill, but they are not a tool for explaining wider policy issues. On this basis, in preparing the notes to the draft Bill, we took the view that including an explanation of the underlying function of bereavement damages would not be appropriate.<sup>92</sup>

The Government has not made any provision for explaining bereavement damages in the bill. It has undertaken to consider the matter further.<sup>93</sup>

**87. Confusion over bereavement damages undermines their purpose. We are pleased to learn the Ministry of Justice intend to consider how the limited purpose of bereavement damages can best be explained. It is our view that the Minister should provide a clear explanation of the function of bereavement damages to Parliament in the debate on this bill. That would provide an authoritative basis for the courts, and solicitors on which to advise a client who has questions about the role of bereavement damages. We urge the Law Society to ensure any such an explanation is brought to the attention of solicitors in the field of personal injury and fatal accidents.**

88. We also asked the Ministry of Justice for the Government's definition of bereavement damages. The Department replied:

Bereavement damages under the Fatal Accidents Act 1976 were introduced in 1982. The then Lord Chancellor, the late Lord Hailsham, said that it was impossible to quantify or provide adequate financial compensation for the grief felt at the loss of a loved one. As Parliament intended therefore bereavement damages constitute a token payment in acknowledgement of grief and are not intended to reflect the value of a life or to inflict a punishment for causing a death.<sup>94</sup>

**89. We agree with the Ministry of Justice's definition of bereavement damages as far as it goes but we believe it to be incomplete and, in respect of eligibility, unsatisfactory. We believe this is because the Government has ignored the carefully worded conclusion of the Law Commission that "the function of bereavement damages is to compensate, in so far as a standardised award of money can, grief, sorrow and the loss of the non-pecuniary benefits of the deceased's care, guidance and society." We recommend the Ministry reconsider its definition to bereavement damages, taking into account the approach of the Law Commission.**

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91 CP(R)/07 p 15

92 Ev 24

93 *Ibid.*

94 Ev 23

### ***Who should receive bereavement damages?***

90. The people currently eligible to claim bereavement damages are:

- the wife or husband of the deceased
- or, where the deceased was a minor who never married,  
his or her parents- if the child was legitimate; or  
the mother of an illegitimate child.

Where both (eligible) parents make a claim the sum is divided between them.<sup>95</sup>

91. The Law Commission considered abolishing the list and replacing it with a generally worded category. It rejected this view. Eligibility under a generally worded category would require the claimant to prove his or her bereavement in court which is likely to be a distressing and potentially protracted proceeding at a difficult time. It would also lead to undesirable uncertainty on the part of both defendant and claimant. A fixed list may confer eligibility on some undeserving claimants, for example a father who has no relationship with his child, leading to ‘overcompensation.’ However, this is preferable to the impact of such court proceedings on bereaved claimants.

92. The Commission therefore recommended that the model of an exhaustive statutory list for those entitled to claim bereavement damages should be retained.<sup>96</sup> The Government accepted this recommendation.<sup>97</sup>

93. Assuming the list was to be retained, the Commission considered in detail whether it should be extended. In considering reform of the list it found the following principles to be important: first, given that a person in the list will not have to prove bereavement, the list should be limited; second, the list should not be internally inconsistent and should treat like cases alike; and third, it is undesirable that the list be complex.<sup>98</sup>

94. The Commission made the following recommendation:

Bereavement damages should be recoverable by the following persons:

- (1) a spouse of the deceased;
- (2) a parent of the deceased, including adoptive parents;
- (3) a child of the deceased, including adoptive children;
- (4) a brother or sister of the deceased, including an adoptive brother or sister;
- (5) a person who was engaged to be married to the deceased, as established by evidence in writing of the existence of the agreement to marry, by the gift of an

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95 Fatal Accidents Act 1976, section 1A(2)

96 *Claims for Wrongful Death*, para 6.10

97 CP(R)9/07 para 40

98 *Claims for Wrongful Death*, para 6.15

engagement ring by one party to the other in contemplation of their marriage, or by a ceremony entered into before one or more witnesses (in accordance with the Family Law Act 1996);

(6) a person who, although not married to the deceased, had lived with the deceased as man and wife (or if of the same gender, in the equivalent relationship) for not less than two years immediately prior to the accident.<sup>99</sup>

95. The Commission concluded that the need for the list to be limited to reduce the possibility of inappropriate payments meant that ‘parent’ should not include ‘person treated by deceased as a parent’ and ‘child’ should not include ‘person treated by the deceased as a child’. Engaged couples were included because of the inconsistency of treating cohabitants of two years standing as spouses but not treating fiancé(e)s as spouses. The Commission noted that engaged couples may live apart for many reasons, including religious or cultural requirements or logistical ones (for example, family accommodation is only available to married members of the Armed Forces.) The Commission also recommended the abolition of any distinction between legitimate and illegitimate, married and unmarried and minor and over 18 year old children.<sup>100</sup>

96. The Ministry of Justice rejected the Law Commission’s recommendations. It extended eligibility to children under 18 who had lost a parent, the parents of children under 18 who were killed and the co-habitant of the deceased where the couple had lived together for more than two years.<sup>101</sup>

**97. We endorse the extension of eligibility for bereavement damages to co-habitees of more than two years. This is a long overdue reform. We note the Law Commission originally recommended this change in 1999. While any qualifying period is necessarily arbitrary, we believe the two year period, which is common in statute, is the most appropriate solution.**

### ***Eligibility of parents for bereavement damages***

98. The Government was unconvinced by the argument that parents should be awarded bereavement damages regardless of the age of the deceased child. Its consultation paper noted “it can be argued that to enable parents to claim regardless of the child’s age or the circumstances of their relationship would represent an unjustified widening of the scope for claims. This could result, for example, in claims from parents whose children are advanced in years, have established separate lives and families, and may even have lost touch with them.” The Ministry of Justice accepted, however, that this would create some difficult borderline cases, where the child was just over 18 or was still leaving at home but concluded that the age of majority was the most appropriate cut-off point.<sup>102</sup> The Government also rejected the conclusion that all birth and adopted parents should receive

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99 *Claims for Wrongful Death*, para 6.31

100 *Claims for Wrongful Death*, para 6.12

101 CP(R)9/07 p 61

102 CP(R)9/07 p 16

bereavement damages as potentially compensating inappropriate cases. It proposed extending eligibility to unmarried fathers only if they had parental responsibility.<sup>103</sup>

99. The Government consulted on adding stepparents with caring responsibility for the deceased child to the list.<sup>104</sup> It appears to have decided that the potential lack of clarity around such relationships means such an addition is too uncertain to take forward.

100. Roadpeace challenged the imposition of an age limit on eligibility for bereavement damages: “Many of our members are bereaved parents of young adult children. Some will never recover from the shock”.<sup>105</sup> The Association of Personal Injury Lawyers commented:

Society views it as an unnatural sequence of events for a parent to endure the loss of a child as, in the natural order of things, parents should pre-decease their children. This is, surely, only compounded in cases where a child has been killed through negligence. It is...both distasteful and impossible to argue that a child over 18 is any less of a loss than a younger child.<sup>106</sup>

101. The Association of British Insurers, however, supported the Ministry of Justice’s approach in broadening eligibility for bereavement damages selectively: “We agree that the statutory list of people eligible to claim bereavement damages is currently too restrictive, and should be extended to include: children under 18 (including adoptive children) for the death of a parent; cohabitants of at least two years’ duration for the death of a partner; unmarried fathers with parental responsibility for the death of a child under 18.”<sup>107</sup> Aviva expressed similar views.<sup>108</sup>

102. We asked the Ministry of Justice for a further explanation of the rejection of the Law Commission’s recommendation. The Department responded:

The death of a child before a parent is always a tragedy, and we accept that grief and loss cannot be neatly analysed by the age of majority. We also accept that restricting bereavement damages to children under the age of 18 is bound to be particularly difficult to accept where there are siblings killed whose ages straddle that boundary. However, an open ended extension allowing parents to claim bereavement damages for the death of any child, however old, would be a very significant extension of the present class and would increase the possibility that claimants would in fact not be particularly close to the deceased.

This would increase the need for intrusive enquiries into the closeness of the relationship, which we wish to avoid, and would undermine the simplicity and clarity of the present scheme.<sup>109</sup>

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103 CP(R)9/07 p 61

104 CP9/07 para 48

105 Ev 60

106 Ev 63

107 Ev 68

108 Ev 48

109 Ev 24

103. The Government has rejected the recommendation of the Law Commission that eligibility for bereavement damages should be extended to all parents who lose a child as the result of another's negligence because it would make too many parents eligible that were not close to their children, requiring Parliament to legislate to allow them to be cross-examined on their feelings of bereavement. We reject this view. The death of a child at any age is a tragedy for the parents. The function of bereavement damages is to acknowledge the grief and loss that arises from a death caused by another's negligence. In our view, it is better to "overcompensate" the very small number of parents who do not feel profound bereavement on the death of their child rather than deny the overwhelming majority who have strong and enduring ties to their children this formal recognition of their loss. We recommend that parents should be eligible for bereavement damages regardless of the age of the deceased child.

### *Eligibility of children for bereavement damages*

104. In its consultation paper the Ministry of Justice again posited the argument that allowing children of any age to make a claim following the death of a parent would lead to an "unacceptable" widening of eligible claimants. The paper continued "It would also raise evidential issues in demonstrating that a close relationship existed, which would operate against the simplicity of the current system. The degree of closeness between adult children and their parents will vary, but it can no longer be assumed that a close relationship existed." It is unclear what the Government meant by "evidential issues" in this context as a fundamental principle of bereavement damages is that the quality of the relationship is not a factor in the award.<sup>110</sup>

105. As noted above, parties who usually represent defendants supported the introduction of bereavement damages for children under the age of 18. The Bar Council, however, rejected the provision: "We consider that no 18 year limit should be attached. If this is retained then a 17 year old son who has lost his parents in a car crash will recover but his 18 year old sister will not. Love and bereavement do not disappear at 18." It suggested an alternative cut-off point of 21 or 25.<sup>111</sup> Des Hudson of the Law Society told us: "We do not see the point in setting an age; a child is a child whether a minor or an adult child..."<sup>112</sup>

106. The Ministry of Justice commented on alternative age restrictions:

We note that suggestions have been made to the effect that the cut off point should be at the age of 21 or 25. These would limit the scope of the extension, albeit to a lesser extent than a cut-off at the age of 18, but difficult borderline cases would still inevitably arise.<sup>113</sup>

107. **Close ties of love and affection do not cease or weaken when a child reaches 18, as witnessed by the large numbers of people who live with, and care for, their elderly parents. This is not a legal argument. The parent-child relationship is unique and is**

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110 CP9/07 para 51

111 Ev 37

112 Q 58

113 Ev 24

**usually characterised by lifelong support, love and guidance. We therefore recommend that Parliament should recognise the on-going importance of that relationship by extending eligibility for bereavement damages to all children who lose a parent in circumstances where another has negligently caused that death.**

108. The Law Commission recommended extending eligibility for bereavement damages to the siblings of the deceased. The Government rejected this proposal in its consultation paper as having too high a potential for “inappropriate compensation”. The consultation paper also expressed concerns that, if a cap was placed on the total amount of bereavement damages awarded as suggested by the Law Commission, the award could become overly “diluted.”<sup>114</sup> Almost two-thirds of the responses to the consultation did not agree eligibility should be extended, primarily for those reasons. Some of those in favour of such an extension made suggestions as to practical limits that could be placed on it “a judicial response, while accepting the proposal, suggested that an exception could be made where an adult sibling was acting as the de facto parent of a child; a victims’ organisation suggested that eligibility could be limited to circumstances where there was no other claimant; one solicitor suggested that siblings living in the same household should be eligible; and another suggested the availability of bereavement damages should follow the approach in the intestacy rules.”<sup>115</sup>

109. While noting he had felt “surprise” at the Law Commission’s recommendation on siblings, Sir Henry Brooke told us: “where there is no other candidate for bereavement damages, substantial injustice may be done if a sibling who is devastated by the deceased’s death (perhaps because they lived together, as unmarried siblings often do) has no claim under the Act, as the Government proposes.”<sup>116</sup>

**110. Losing a sibling is a painful and distressing experience. The function of bereavement damages is, however, to acknowledge the loss of those closest to the deceased. The pre-eminent need to avoid intrusive inquiries into the “level” or “quality” of bereavement felt by the deceased’s loved ones and the need for simple, straightforward rules on eligibility mean that we have, reluctantly, concluded that the unqualified exclusion of siblings from eligibility for bereavement damages is justified.**

### ***Should there be a limit on the sum total of bereavement damages?***

111. At present the defendant is liable for a single payment of £11,800 in bereavement damages. This is awarded to the spouse. If the deceased was under 18, and unmarried, the fixed sum is divided equally between the parents of a legitimate child or awarded to the mother, if the parents were unmarried. The Law Commission noted that, while it was important to limit the defendant’s liability, increasing the statutory list without increasing the award could lead to undercompensation, for example, where the deceased has a partner and five children.<sup>117</sup>

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114 CP9/07 para 52

115 CP9/07 p 19

116 Ev 70

117 *Claims for Wrongful Death* para 6.44

112. The Commission considered that a model of a single divisible award was not practicable if the list were to be extended. It proposed placing a ceiling on the defendants' liability of £30,000, at the time three times the fixed sum of £10,000. If there were three claimants then they would receive the full £10,000. Any more and the £30,000 would be divided equally between them. The equivalent ceiling today would be £35,400 (three times £11,800).<sup>118</sup>

113. The Government rejected the recommendation of a ceiling on the defendant's liability in its consultation.<sup>119</sup> Instead it proposed that the full amount of bereavement damages should be paid to the spouse or cohabitant of the deceased or the parent of a child under 18. Children of the deceased under 18 would be awarded half that sum. Around three-quarters of the responses to this question supported it on the grounds that those closest to the deceased should receive the most money and consistency. Arguments against included objections to placing differing values on people's grief.<sup>120</sup>

114. The insurance firm Aviva supported the awarding of half the fixed sum to the children of the deceased:

The principle behind an award to children as close relatives must be correct. Where there are several children the liability of the Defendant increases. However, it cannot be right that an award to a child is simply reduced proportionally to the number of his/her siblings. Although it can be shared a parent's award will not fall below £5,900 or 50% of the total award. The figure of £5,900 per child, therefore seems sensible.<sup>121</sup>

115. David Marshall of the Law Society disagreed: "Obviously bereavement damages are effectively a token but I cannot see any rationale why it is one half as opposed to the amount for a spouse."<sup>122</sup> Professor Andrew Burrows thought that all the claimants affected by the same death should be treated equally:

I would...revert to the Law Commission's recommendation of an overall pot of 3 times the award and, if there are more than three claimants, the pot would be split equally. The beauty of this is that, contrary to the present Bill, each person entitled would receive the same amount of bereavement damages in respect of the same death (although a different death, where there are fewer or more claimants, would produce different amounts).<sup>123</sup>

116. The Ministry of Justice explained its approach as follows:

We considered that [the Law Commission's] approach was capable of diluting the award too much and that the amount payable should not be so contingent on the number of eligible claimants.

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118 *Claims for Wrongful Death* para 6.54

119 CP9/07 para 62

120 CP9/07 p 20

121 Ev 48

122 Q 51

123 Ev 31

In general we take the view that the award to those in the closest categories of relationship to the deceased should not be diluted. However, it is currently the position that where two parents of the deceased are eligible the award is shared between them. In accordance with that approach we considered that it was appropriate to award half of the full award to each child of the deceased, regardless of the number of children involved.

We therefore proposed in 2007 that a surviving spouse, civil partner or qualifying cohabiting partner (see clause 5(2) of the draft Bill) should receive the full award (then £10,000) and the children half the award each (then £5,000).

There was a lack of consensus on this point among the consultees who replied to the 2007 consultation. Responses ranged from those who argued for a full award to be made to each eligible child and those who argued for a single award to be divided between however many children were eligible. The point did not, however, attract much comment from those who replied to the 2009 consultation.<sup>124</sup>

117. The Ministry of Justice's proposal that children be awarded half the fixed sum in bereavement damages received by the deceased partner or spouse seems to us to devalue the grief felt by a bereaved child. Bereavement damages are restricted to a fixed list of the people closest to the deceased and who will have suffered most by his or her death. Arbitrarily assigning a different value to that grief based on the claimant's relationship to the deceased is distasteful and goes against the principles on which bereavement damages are based. **We recommend that the bill adopt a 'cap' on bereavement damages of three times the full fixed sum to be shared equally between all eligible claimants. This means that all the claimants in the same case will receive the same amount of money. In our view unequal treatment of members of a family in relation to the same death is undesirable.**

118. **We believe concerns over the "dilution" of an award are misplaced. Bereavement damages are an acknowledgment of grief and loss. It is in the public interest that those who are bereaved receive that recognition. We believe the Government is focusing on the amount involved in bereavement damages at the expense of their function and that this misapprehension leads to a mistaken approach to eligibility for bereavement damages.**

119. **We note that our recommendations on bereavement damages will extend the liability of defendants. However, the Government must not lose sight of the fact that bereavement damages are only available for wrongful deaths, caused by another's negligence. The Government's current assessment of those "closest to the deceased" is illogical and suggests a rather negative view of the strength of family relationships for the overwhelming majority of people in England and Wales.**

120. Bereavement damages are set by the Lord Chancellor under section 1A(5) of the 1976 Act. The Law Commission recommended that the sum be linked to the Retail Prices Index to ensure it remained adequate. The Government rejected this proposal on the grounds it would lead to complex calculations. Instead, it gave a commitment to increase the fixed

sum in line with the Retail Prices Index every three years, having increased the fixed sum from £7,500 to £10,000 in 2002.<sup>125</sup> The Law Commission noted in its submission: “Had our recommendation of £10,000 been implemented in September 1997 with an RPI link, the sum would now be £12,803.”<sup>126</sup>

**121. We welcome the Government’s commitment to increase the fixed sum awarded as bereavement damages in line with the Retail Prices Index. However, we believe the update should occur on an annual basis. We see no reason why a person bereaved in the third year of the cycle should effectively be penalised because of the date of the death. An annual adjustment would be the fairest solution and not administratively burdensome.**

### Damages for gratuitous care provided following personal injury

122. A person injured by another’s negligence has a claim against the person or organisation who was responsible for the negligence for financial and other losses caused by the injury. Assessing the appropriate level of damages is not necessarily straightforward. The guiding principle of damages is that they compensate the injured party for what he or she has lost. But a claimant may have received “collateral benefits” as the result of the injury, for example, money from accident insurance, sick pay; accident insurance; disability pensions; voluntary and charitable payments; benefits in kind such as gratuitous (i.e. free) care from a friend or relative, local authority care and ancillary services or NHS treatment; statutory compensation schemes and social security benefits.

123. In assessing damages the courts have taken a specific approach to the provision of gratuitous care. Gratuitous care is care provided for the claimant free of charge by relatives or other private parties (not the NHS) and is therefore a “voluntary collateral benefit in kind.” The ‘loser’ is therefore the person providing the free personal care, not the injured party who benefits from the care.

124. In 1994, the House of Lords held that, while the claimant could recover damages for the gratuitous care given by another, he or she was then obliged to hold those funds in trust for the provider of that care.<sup>127</sup> The Law Commission considered the impact of this decision in 1999 in its report *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits*.<sup>128</sup> The Commission was unhappy with the trust mechanism, regarding it as over-complex (for example does the injured person, as trustee, have an obligation to invest the money and who receives the money if the victim dies?) The Commission did not accept that the trust approach was the only way to ensure the compensation reached the person entitled to it. However, the Commission was equally unimpressed by the suggestion that the carer be given a direct right to sue the negligent party believing this would further complicate litigation, potentially adding to its expense, as well as being unnecessary as long as the carer could be adequately compensated through the victim’s claim. After consultation the Commission recommended a “personal

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125 CP9/07 para 60

126 Ev 34

127 *Hunt v Severs* [1994] 2 AC 350

128 Law Commission paper No. 262, November 1999, HC 806

obligation” be placed on the claimant to account to the carer for the money paid in damages for gratuitous care before the date of trial.<sup>129</sup> This mechanism, the Commission concluded, would involve less formality and be simpler for the claimant while still protecting the rights of the carer. The onus would be on the carer to claim the money due. One of the reasons behind the Commission’s recommendation was that, with the imposition of a personal obligation, if the claimant died before the damages were exhausted, the remainder would go to his or her general estate, in contrast to the position with a trust where the carer would receive the outstanding money for care they will never provide.<sup>130</sup>

125. The Commission rejected the view that the claimant be legally bound to account for damages paid for future gratuitous care to the carer after the date of trial because of the potential for the claimant’s care requirements to change in unforeseeable ways.<sup>131</sup>

126. The Government agreed in *The Law on Damages* consultation paper that a personal obligation was preferable to a trust. This proposal was supported by the majority of respondents to the consultation who commented “a personal obligation would be more consistent with the need to account than a convoluted trust approach.”<sup>132</sup> However, the Government did not accept that the uncertainty of the future meant that claimants should not be required to account to whoever provides them with gratuitous personal care after the date of trial. Noting the “general rule” that “the most appropriate outcome when collateral benefits arise is one where the claimant is compensated for his or her losses, but only once; and wherever practicable at the expense of the tortfeasor rather than a collateral benefit payer”,<sup>133</sup> the consultation paper concluded: “The Government considers that assessing future needs is inherently uncertain and does not justify a departure from the general principle...in the particular case of future gratuitous services.”<sup>134</sup>

127. Professor Burrows did not accept the Government’s argument:

[the Government’s proposals] could leave the claimant undercompensated where unexpectedly he or she has had to incur some commercial costs of care. So, say, the claimant was awarded at trial damages of £10,000 for future care which is assumed to be gratuitous. There is then a change of circumstances so that the claimant incurs £10,000 of commercial care. According to the Bill the claimant would not be able to use the £10,000 to pay for the commercial care and would still have to compensate the gratuitous carer from the damages. As between undercompensating the claimant and undercompensating the gratuitous carer, it is obvious that it is not the claimant who should be undercompensated.<sup>135</sup>

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129 *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* para 3.62

130 *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* para 3.59

131 *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* para 3.59

132 CP9/07 para 115

133 CP9/07 para 107

134 CP9/07 para 116

135 Ev 31

128. Support for the Government’s proposal came from the Association for British Insurers:

We agree that the current requirement in case law for claimants to place such damages for gratuitous care in trust for the carer should be replaced by a personal legal obligation to account to the carer for gratuitous services actually provided. This should apply to damages for future as well as past care to maintain consistency.<sup>136</sup>

129. In its response to our questioning on gratuitous care the Government responded:

At present, we are not persuaded that damages for past and future should be distinguished in this way. In receiving money for future gratuitous care the recipient is receiving money for services that will be rendered by someone else. It seems to us to be reasonable that the provider of the services should be able to have the benefit of these payments when the services have been performed. This could, in a small way, encourage carers.

We do, however, acknowledge that there is some force in the arguments that have been made and will give further consideration to the exact nature of the obligation on the claimant to account to the carer.<sup>137</sup>

**130. We note the concerns over the imposition of a personal obligation to account for gratuitous care on the claimant in a personal injury case. However, such an obligation is preferable to the unwieldy “trust” system currently in place which we do not believe operates in the best interests of the claimant or carer. We therefore welcome this proposal.**

**131. The assessment at trial of the claimant’s future needs is inherently uncertain. We would be reluctant to see the imposition of a personal obligation to account that would fetter the injured party’s ability to obtain the most appropriate care. Although it would be regrettable for a carer to be undercompensated it is better that the burden fall on him or her rather than the claimant for whom the consequences of being unable to access necessary treatment could be highly damaging. We therefore find the argument that consistency is more important than ensuring the claimant is able to fund the most appropriate treatment unpersuasive. We welcome the Ministry of Justice’s undertaking to give further consideration to this proposal and urge Ministers to consider the imposition of a lifelong obligation carefully.**

132. The House of Lords in *Hunt v Severs* held that a claimant should not be able to claim damages for past gratuitous care when the person providing the care is the defendant as those damages would, essentially, be paid back to the defendant.<sup>138</sup> This decision has been heavily criticised. The Commission found that this rule has encouraged claimants to endeavour to evade the rule where the defendant had been providing gratuitous services, for example, by claimants and defendants entering into a “contract” the validity of which the court was then forced to assess. Alternatively, claimants were led to seek personal care

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136 Ev 68

137 Ev 25

138 [1994] 2 AC 350

from others, who may not be best suited to provide it, or from commercial suppliers at rates which would ultimately cost the defendant more.<sup>139</sup> The Commission felt this was an undesirable position, not least in public policy terms, and recommended the following:

There should be legislation reversing the decision in *Hunt v Severs* and laying down that the defendant's liability to pay damages to the claimant for nursing or other care should be unaffected by any liability of the claimant, on receipt of those damages, to pay them or a proportion of them back to the defendant as the person who has gratuitously provided (or will provide) such care.<sup>140</sup>

133. In its consultation paper the Government rejected the proposal that a defendant could be paid for providing past gratuitous care:

The current position is that damages are not awarded for gratuitous services provided by the tortfeasor (because they would only be held in trust and returned). The Government considers this to be the most straightforward solution where the tortfeasor has provided past gratuitous services. But damages should be awarded where future gratuitous services are to be provided, subject to the claimant's personal obligation to repay the caring tortfeasor when they actually are provided.<sup>141</sup>

134. The response to the consultation revealed around 60% of consultees agreed with the proposal, primarily insurers and defendant solicitors and some claimant representatives. Reasons appeared to be mixed. No consultee appears to have addressed the issue raised by the Law Commission that payments in court are almost inevitably by insurers, on behalf of the defendant, not by the defendant personally. In its response the Government concluded:

As certain responses pointed out, payment of past gratuitous care by the tortfeasor would also appear inappropriate, as the money would simply be returned to the tortfeasor. A number of suggestions were made as to particular circumstances in which the payment of past gratuitous care to the tortfeasor would be appropriate. However, it would be difficult to frame any legislative provision which would effectively differentiate between situations where awards for past gratuitous care to a tortfeasor might or might not be appropriate. In view of the fact that such claims are not currently possible, and in light of the general principle set out in the consultation paper that legislation and procedural change will only be appropriate where there are positive identifiable benefits, on balance the Government considers that damages should continue not to be awarded for past gratuitous care provided by the tortfeasor.<sup>142</sup>

135. The Government's position received support from defendant organisations. Aviva submitted that there were public policy reasons to support the proposal:

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139 *Damages for Personal Injury: Medical, Nursing and Other Expenses*, Law Commission Consultation paper No. 144, paras 3.59-3.68

140 *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* para 3.76

141 CP9/07 para 118

142 CP(R)9/07 p 53

...past gratuitous care damages should not be awarded where the care is provided by the tortfeasor. It would go against public policy to allow such an award, and there is no justification for excluding this area from a principle which is applied elsewhere in personal injury law.<sup>143</sup>

136. The Association of British Insurers commented in oral evidence: “Our concern is that as an insurer we provide an indemnity against the tortfeasor. We would then be paying our own policyholder to put right his own act of negligence and we are concerned about the broader principle that that would apply.”<sup>144</sup> The Association of Personal Injury Lawyers acknowledged the force of this argument but submitted that these constituted exceptional circumstances: “the legal principle on this is one that the tortfeasor should not benefit. There should not be a windfall to the tortfeasor as a result of their tort. The fact that you are negligent should not reward you and we would broadly endorse that, but we just do not think it is applicable in these circumstances.”<sup>145</sup>

137. This debate is complicated by the Government’s distinction between pre and post trial care. In its response to *The Law on Damages* consultation the Ministry of Justice concluded:

Unless the costs of gratuitous care can be claimed where the defendant is the carer, the claimant could consider it necessary in monetary terms to refuse future gratuitous care from the defendant in favour of another carer, even though the defendant is best placed to provide that care and the claimant would prefer the defendant to provide it.<sup>146</sup>

The draft bill therefore allows claimants to recover damages for future gratuitous care that has been provided by the defendant.<sup>147</sup>

138. David Marshall, of the Law Society, told us he simply could not understand the reason for this distinction.<sup>148</sup> Andrew Ritchie agreed calling the distinction a “nonsense”. He said that Parliament should be seeking to support injured people and their families; reducing damages in this way meant the NHS, or the state in other guises, would have to fill the gap. In such cases, the defendant can commonly be the victim’s spouse, partner, child or other person close to them particularly given these are the people most likely to drive one another.<sup>149</sup> Professor Andrew Burrows commented:

[*Hunt v Severs*] should be reversed by legislation (i.e. the logic of the common law should be overturned) because, for example, it discourages the appropriate person from caring and encourages the claimant to have commercial care; and it encourages sham legal contracts with gratuitous carers so that they can then claim damages

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143 Ev 49

144 Q139

145 Q141

146 CP(R)9/07 p 66

147 Draft Civil Law Reform Bill, clause 7(3)

148 Q 31

149 Q 33

because the care is then not gratuitous. There is also the point that the damages are in reality to be paid by insurers.<sup>150</sup>

139. The Association of High Court Masters did not support the Government proposals. If they were adopted, the Association pointed out a further complexity, consideration would have to be given to the position of defendant carers who were only partially responsible for the claimant's injury:

in order to avoid satellite litigation, consideration should be given to stating the application of the prohibition where the gratuitous carer is not the sole tortfeasor and is only partially responsible for the claimant's injury. Should the partial liability in respect of the claimant's injury serve to extinguish the carer's claim for gratuitous care or should it only reduce it in accordance with the extent of the carer's liability? We suggest that it would be unjust if the partial liability in respect of the claimant's injury extinguished the claim for gratuitous care. It would provide the tortfeasor who has not provided care with an unjust windfall.<sup>151</sup>

140. The Ministry of Justice told us:

The advantage of awarding damages for future care in respect of a wrongdoer is that it may enable the claimant to receive gratuitous care that would otherwise have to be procured at commercial rates, increasing costs and possibly inconvenience all round. A number of responses suggested circumstances in which the payment of damages for past gratuitous care by the wrongdoer might be appropriate but we consider that it would be very difficult to differentiate between the appropriate and inappropriate cases in legislation.

We therefore conclude that in light of these considerations and bearing in mind that such claims are not possible at present, the present rule should continue in relation to past gratuitous care only. Nonetheless, we recognise that this is a difficult issue and we greatly respect the concerns that have been expressed. We will be giving the problem further consideration.<sup>152</sup>

**141. We acknowledge the importance of the principle that the tortfeasor in a claim for negligence should not benefit from his or her negligent or wrongful act. However, we do not believe this is genuinely at stake in this issue. An award for gratuitous care is not a windfall for the person held liable for the injury but compensation for his or her losses resulting from the decision to provide gratuitous care to the victim. Parliament should encourage the provision of care by the most appropriate person regardless of whether he or she was found to have negligently caused the accident, for example when a husband's careless driving causes serious injuries to his wife. It is socially desirable and in the public interest that the most appropriate person cares for the injured party, for example a parent in the case of a child, thereby benefiting claimants, defendants and society as a whole. In our view, the Government's arguments in support of an award of**

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150 Ev 31

151 Ev 46

152 Ev 26

**damages for future gratuitous care are as valid for past gratuitous care. We welcome the Minister’s undertaking to us that she will give this proposal further consideration.**

142. We asked the Ministry of Justice whether the fact an insurance company is almost certain to be paying the damages impacts upon its argument that payments for past gratuitous care result in “circularity”, money being paid out by the defendant only for it to be returned. The Government responded:

We accept that in practice most awards of damages in relation to personal injury and fatal accident claims are paid out by an insurer, but the insurer is indemnifying the wrongdoer as a result of premiums paid. The fact that the monies are likely to be paid by an insurer does not therefore fundamentally alter the nature of the transactions. We will consider this issue further but are not convinced at present that the provisions in clauses 6 and 7 of the draft Bill are inappropriate.<sup>153</sup>

143. **We believe the Government’s view of an award of damages for gratuitous care is overly legalistic and fails to recognise the practical realities. It makes a fundamental difference to both victim and carer if an insurance company is responsible for paying damages rather than an individual defendant. In practical terms a defendant is highly unlikely to appeal an award of damages for past gratuitous care whereas an insurance company will seek to limit its liability. A defendant who provides gratuitous care may well be in the same household as the claimant who, while benefitting from the gratuitous care, will be impoverished by any loss of earnings the defendant has undergone. We urge the Government to take a realistic and practical approach to this issue.**

### **Damages for gratuitous care provided by the deceased in a dependency claim under the Fatal Accidents Act**

144. Section 3(1) of the 1976 Act states that dependency damages awarded following a fatal accident include “damages...may be awarded as are proportioned to the injury resulting from the death to the dependents respectively.” A difficulty therefore arises when the deceased provided gratuitous services to the dependent and, since the death, those have been provided, again gratuitously, by another person. This is because the loss is not the dependent’s but the new carer’s. In 1999, the Law Commission recommended that the claimant in a claim for dependency damages under the 1976 Act be able to recover the cost of gratuitous services that had been supplied by the deceased and were now supplied by another. To protect the carer, and ensure consistency with the recommended position under personal injury claims, the Commission proposed a personal obligation be imposed on the claimant to account for damages paid for gratuitous care that had already been supplied to the carer.<sup>154</sup>

145. The Government accepted the substance of the recommendation. However, it proposed that, as with the position in a personal injury case, the claimant should not be

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153 Ev 26

154 *Claims for Wrongful Death* para 5.53

able to recover damages for gratuitous care *before* the date of trial where that care had been provided by the defendant but only future care. It did not consult on this issue.<sup>155</sup>

146. The Association of British Insurers told us that:

Gratuitous services are not a benefit which the dependent could reasonably have expected to receive from the deceased, and therefore we do not agree that Section 3(1) of the Fatal Accidents Act should be amended to allow damages to be recoverable for services gratuitously provided by the deceased to a dependant, which after the death are gratuitously provided by another.<sup>156</sup>

147. The Bar Council, however, welcomed “this change, save for the same reservation about the inappropriate distinction between past and future care provided by a tortfeasor.”<sup>157</sup> Irwin Mitchell thought the distinction arbitrary: “it is difficult to see why [the defendant’s liability] only arises for damages after the award rather than before.”<sup>158</sup>

**148. We endorse the Ministry of Justice’s decision to allow claimants in a dependency damages claim under the Fatal Accidents Act 1976 to recover damages for gratuitous care that had been provided by the deceased. If gratuitous services were provided by the deceased before his or her death then it seems reasonable to expect that they would have continued.**

**149. We again reject the proposal that only future care be recoverable where the past care has been provided by the defendant. We acknowledge that a negligent party should not in general benefit from his or her wrongdoing but repeat that, not only is there no true benefit to the tortfeasor in these circumstances, but also that Parliament should do its utmost to encourage the provision of gratuitous services by the most suitable person.**

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155 CP(R)9/07 p 53

156 Ev 68

157 Ev 37

158 Ev 57

## 2 Exemplary, aggravated, additional and restitutionary damages

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150. Damages in civil courts are intended to compensate the claimant for financial and non-financial loss following a wrong with the intention that the victim be put in as good a position as he or she would have been if the wrongful act had not been committed. Exemplary damages, however, are an exception to this rule as they are intended to punish the defendant for the wrongful act and consequently an award will “overcompensate” the victim. Aggravated damages compensate the claimant for injury to feelings when his or her distress was exacerbated by the circumstances in which the injury was caused or by the conduct of the defendant after the wrongful act was committed.<sup>159</sup>

### Exemplary damages

151. Exemplary damages developed under the common law. A court can only award exemplary damages where the facts fall into one of the two “categories” of wrongful act where they are available, unless exemplary damages are provided for by statute.<sup>160</sup> The two categories are:

- oppressive, arbitrary or unconstitutional action by a public servant, or
- where the defendant’s wrongful conduct was calculated to make a profit which might well exceed the compensation payable to the claimant.<sup>161</sup>

The likelihood of an award of exemplary damages is further limited by the overriding discretion given to the court not to award them in any given case.

152. Exemplary damages are controversial. Critics say that their punitive function does not belong in the civil courts and that matters of punishment and deterrence should be the concern of the criminal justice system. In 1997, the Law Commission examined the use issue and concluded that exemplary damages formed an effective deterrence against wrong-doing and that deterrence was a valid aim of the civil courts, separate from the role of the criminal justice system. Removing the profit of wrongdoing from the wrongdoer was, the Commission concluded, a particular deterrence. The Commission recommended the extension of exemplary damages for these reasons.<sup>162</sup>

153. In November 1999, the Government accepted other recommendations from the report but rejected the proposals on exemplary damages on the grounds that: “The purpose of the civil law on damages is to provide compensation for loss, and not to punish. The function of exemplary damages is more appropriate to the criminal law, and their availability in civil proceedings blurs the distinctions between the civil and criminal law.

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159 *Aggravated, Exemplary and Restitutionary Damages*, Law Commission paper No. 247

160 Cf *Merest v Harvey* (1814) 5 Taunt 442, 128 ER 761. quoted in *Aggravated, Exemplary and Restitutionary Damages*

161 *Rookes v Barnard* [1964] AC 1129

162 *Aggravated, Exemplary and Restitutionary Damages*, para 1.30

The Government does not intend any further statutory extension of their availability.”<sup>163</sup> Indeed, in *The Law on Damages* consultation, it proposed repealing the one provision in statute allowing exemplary damages, and replacing it with a power to award aggravated damages. Section 13(2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 provides that various civil judgments cannot be enforced against a member of the armed forces without the permission of a court. In a successful claim against someone who has acted without the court’s permission, exemplary damages may be awarded. The Government believes this provision has seldom “if ever” been used.<sup>164</sup>

154. *The Law on Damages* consultation did not receive many responses to this proposal. The only objections recorded were:

...that the concepts of exemplary and aggravated damages were fundamentally different and replacing one with the other would confuse rather than clarify and would mean anyone affected being worse off...just because no cases had arisen under the 1951 Act didn’t mean that they wouldn’t, and that legislation should not be amended just for the sake of tidiness....[and] that the existing common law categories for exemplary damages would not catch some competition law claims (eg for abuse of a dominant position) and should be extended.<sup>165</sup>

155. We asked witnesses whether the Government was confusing the different functions of exemplary and aggravated damages. Tim Petts, of the Bar Council, opposed the repeal primarily because exemplary damages have a deterrent effect because they allow for the removal of any profit made by the defendant from the wrongful act and members of the armed forces should not lose this protection. Ultimately, in his view, this reform was probably unnecessary.<sup>166</sup> Des Hudson of the Law Society told us: “There really is, I think, a very difficult issue of principle about whether this is a task we want to assign to the civil justice system as opposed to a criminal justice system, which is more about punishment. It is, therefore, a finely balanced argument and it is difficult to marshal the arguments pro or against with any degree of certainty...”<sup>167</sup>

156. Sir Henry Brooke commented: “It is clearly sensible to include the tidying-up provisions of Clause 9.”<sup>168</sup> Professor Andrew Burrows, however, expressed “serious misgivings” about this clause. Noting that aggravated damages and exemplary damages are distinct but frequently confused - the first being essentially compensatory with “overtones of punitive damages”, the second solely punitive- Professor Burrows observed: “there is nothing to be gained by abolishing the only statutory reference to exemplary damages in s. 13(2) of the Reserve and Auxiliary Forces (Protection of Civil) Interests Act 1951. That subsection is of little practical importance. Even worse would be to replace exemplary damages by aggravated damages for the reasons given above.”<sup>169</sup>

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163 CP9/07 para 198

164 CP9/07 para 199

165 CP(R)9/07 p 55

166 Q 35

167 Q 37

168 Ev 70

169 Ev 32

157. While supporting the limits on exemplary damages Beachcroft, a firm of solicitors, had reservations about the proposal:

we question whether it is appropriate to change the terminology to aggravated damages, which are already the subject of some confusion. For example it is rare for aggravated damages to be awarded in civil claims for injury and yet it is relatively usual that such awards are made in civil employment claims. Aggravated damages, save in employment claims, are awarded in a relatively limited set of circumstances and we consider that the inclusion of the terminology aggravated damages as opposed to exemplary damages may solve one problem but create another.<sup>170</sup>

**158. We see some force in the argument that amending legislation simply to ‘tidy it up’ is unwise and invites unintended consequences. We appreciate that in the Government’s view exemplary damages should be confined to the common law. However, Ministers should carry out a wider review on that issue before acting; replacing ‘exemplary’ with ‘aggravated’ damages in section 13(2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 simply confuses the different functions of these two awards.**

### Additional damages in copyright cases

159. Under the Patents Act 1971 and the Copyright, Designs and Patents Act 1988 claimants can receive “additional damages” in a successful claim for copyright infringement. A 2006 review of intellectual property law recommended that the system of damages in the area be reconsidered, in particular, whether the available awards constituted an effective deterrent.<sup>171</sup>

160. In its consultation on damages the Ministry of Justice noted the following:

The Government has considered the findings of the [Gowers] review and the responses submitted to its call for evidence. Respondents to the review suggested that damages should act as a disincentive to infringement and that the sums of damages awarded for infringement are inadequate. Some of the responses complained that additional damages are rarely awarded by the courts. But it appears that some claimants may believe that the risk of losing a case is too great when weighing up the costs and benefits of bringing an action, and consequently do not bring the case or settle out of court. It is therefore difficult to assess whether courts are refusing claims for additional damages, or whether the cases are reaching them in the first place. Another issue is whether in some cases the remedy may not be the real problem. For example, counterfeiters can be sued for considerable damages already, the real difficulty being catching them. Some rights holders suggested that the current system of damages falls some way short of the ‘effective, proportionate and dissuasive’ civil remedies required by EU Directive 2004/48/EC on the enforcement of intellectual property rights. However, the evidence submitted to the Gowers Review preceded the making of the UK Regulations to implement the Directive, and therefore did not

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170 Ev 53

171 *The Gowers Review of Intellectual Property* (December 2006)

take account of the impact of those Regulations. We believe that the Regulations fully implement Article 13 of the Directive on damages.<sup>172</sup>

161. The Government therefore proposed to replace the provision for “additional damages” with a provision for “aggravated damages and such amount by way of restitution.” The proposal was endorsed by “just under half” the consultees, the other half being divided between “those who opposed the proposal on the basis that the change would not provide clarity in the law, and those who argued that the term should be extended to include exemplary damages.”<sup>173</sup> Objections were also raised that “aggravated damages and such amount by way of restitution” was unclear and would not assist the court and the potential problems that may arise when a company sues for a type of damages that is available for “mental distress.”<sup>174</sup>

162. The Law Society thought this provision unnecessary: “It would seem to us it would be better to deal with that anomaly [in the relevant acts] rather than leave a particular approach for one classification of damages. It does not strike the Law Society as a matter of the greatest importance, to be frank.”<sup>175</sup>

163. The Bar Council agreed, adding that this anomaly had not caused any real difficulty:

From the Bar Council’s perspective it seems odd if you are looking to reform the area of aggravated exemplary damages to pick these aspects. In fact, it creates a further anomaly by making these the only two areas where the company can claim aggravated damages for mental distress. Our view is that the matter is best left alone as it stands as these provisions have not caused any real difficulty in interpretation with the courts so far. It is best left to further judicial development. ...Whether it is a good idea for Parliament in two very limited areas to intervene it seems to the Bar Council questionable.<sup>176</sup>

**164. We have not seen evidence that the “additional damages” provisions applicable to copyright infringement cases have caused any great difficulty in the courts. In these circumstances we recommend that Ministers consider whether it is necessary to introduce a change and whether substituting ‘aggravated damages and such amount by way of restitution’ is really an improvement. In any consideration of this clause the Government should bear in mind that aggravated damages are awarded for mental distress. Applying the formulation “aggravated damages” therefore seems inappropriate to cases of copyright infringement that are frequently brought by companies.**

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172 CP9/07 para 213

173 CP(R)9/07 p 9

174 CP(R)9/07 p 39

175 Q 42

176 *Ibid.*

### 3 Interest on pre-judgment and post-judgment debts

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165. Pre-judgment interest is awarded at the court’s discretion<sup>177</sup> on debts incurred between the injury or other cause of action and the date of judgment. It is simple interest and usually charged at 8%, the same rate as post-judgment interest, although this can be varied by the judge. Post-judgment interest is calculated on the total damages recovered or the debt repaid between the date of the judgment until the sum is paid.<sup>178</sup> It is also simple interest and is set by the Lord Chancellor.<sup>179</sup> These rules are subject to some exceptions, for example pre-judgment interest must be charged on damages in personal injury cases where the damages are over £200, unless exceptional circumstances apply. Consequently this part of the bill is particularly important to the NHS and the insurance industry.

166. In 2004, the Law Commission published a report on *Pre-judgment Interest on Debts and Damages*.<sup>180</sup> The report was written with the following “policy considerations” in mind: interest should not be seen as a penalty on debtors; interest should provide fair compensation for claimants, in other words, compensate them for what they had lost while they did not have access to their money; interest should be seen to be fair; and the law on interest should minimise the scope for disputes. The Commission noted that the fact pre-judgment interest was often charged at 8%, considerably above the bank base rate, provided some compensation for the fact the courts were unable to award compound interest but that was, nevertheless, “rough justice. The effect is to over-compensate claimants in most short-running cases, while undercompensating them in the longest cases.”<sup>181</sup> The Commission also noted that the time and effort involved in computing compound interest was disproportionate was less relevant in a computerised age.<sup>182</sup> The Commission’s two main recommendations were “each designed to enable the court to compensate claimants more accurately for being kept out of their money:

- there should be a specified rate set annually for pre-judgment interest at 1% above the Bank of England base rate, but the courts should retain a discretion to depart from it; and
- there should be power to award compound interest in appropriate circumstances, with a presumption in favour of it being awarded for sums of £15,000 or more.”<sup>183</sup>

167. In 2008 the Government produced the following response:

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177 Senior Courts Act 1981, section 35A; County Courts Act 1984, section 69; Law Reform (Miscellaneous Provisions) Act 1934, section 3

178 Judgments Act 1838, section 17

179 County Courts Act 1984 Act, section 74

180 Law Commission paper No. 287, February 2004, HC 295

181 *Pre-judgment Interest on Debts and Damages*, para 1.6

182 *Pre-judgment Interest on Debts and Damages*, para 6.8

183 *Pre-judgment Interest on Debts and Damages*, para 1.18

The Government agrees that the relevant legislation should be amended to give the Lord Chancellor power to prescribe a pre-judgment interest rate. This would provide greater certainty and rationality for the reasons given in the report. We also agree that it should be possible to set the rate by reference to the Bank of England base rate. This would ensure that the rate remained up-to-date without the need for frequent statutory instruments. (For the same reason, we think there is a case to amend section 17 of the Judgments Act 1838 so that the post-judgment rate can also be set by reference to the Bank rate.)

The Government understands the logic that led the Commission to recommend that it should be possible to award compound interest. We also note the decision of the House of Lords in the case of *Sempre Metals Limited v Her Majesty's Commissioners of Revenue and Customs* (2007) that compound interest is available in common law in appropriate cases as a restitutionary remedy. However, we do not think that the case has been made to introduce compound interest as the norm for the generality of larger cases as recommended in the report. This would be a major step that would require further consultation and a more detailed and quantified impact assessment than the Commission was able to provide. We also think that it would be necessary first to develop a readily accessible web-based programme to make the necessary calculations.

Given the arguments of principle, we think that the Lord Chancellor's order-making power should be cast widely enough to enable rates to be set on a compound basis in future. We think it should be for any such order, not rules of court, to prescribe the scope of compound interest (in terms of case value etc) and to deal with the issue of rests. But the Government has no plans to exercise the power to prescribe compound interest in the foreseeable future. This is because, especially given the recent case law, the issue does not command sufficient priority to justify the necessary work on impact assessment and IT development.<sup>184</sup>

168. In its consultation paper on the draft Civil Law Reform Bill the Ministry of Justice described the proposals in the draft bill as:

The intention is to replace the existing statutory provisions, which are set out in various statutes and pieces of secondary legislation, with a single set of modern provisions setting out the courts' general powers in relation to interest (which are broadly unchanged) and to give the Lord Chancellor power to specify the rate of interest that will be payable.<sup>185</sup>

169. The draft bill removes the court's discretion to set the rate of pre-judgment interest and but allows it to decide whether to charge interest at all, whether to charge it on the whole or part of the debt and for how long it should be applied (i.e. from the cause of action to the date of judgment or any part of that period.) When compound interest is introduced the Lord Chancellor will specify the cases to which it must apply. The Lord Chancellor's power will be "very flexible" and will be exercised by statutory instrument.

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184 The Government Response to the Law Commission Report: *Pre-judgment interest on debts and damages*, Ministry of Justice (September 2008), p 2

185 CP53/09 p 15

The Ministry of Justice described the draft bill as “develop[ing] the response to the Law Commission’s proposals.”<sup>186</sup>

170. The proposed changes were criticised for being essentially “enabling” powers. Professor Hugh Beale, the Law Commissioner with responsibility for the Commercial and Common Law Team at the time of the Law Commission’s report, told us:

there are two things which are left open. One is the rate and the other is the question of compound interest. I do accept that until you have made up your mind about compound interest, it is difficult to fix the rate because the way that things work at the moment is that the lack of compound interest is somewhat compensated for by the fact that the simple interest which is awarded is often over the going rate, very much so over the going rate at the moment, because it is often at 8% whereas the bank rate is 0.5%, and we were recommending, therefore, effectively a rate of 1.5%.

The two things go hand in hand, but I do not really understand why it has not been possible to make up their minds about both issues, both the compound interest point and, therefore, the rate of interest which should be awarded.<sup>187</sup>

171. Allen and Overy, a large international solicitors’ firm, commented that it was difficult to respond fully to the proposals as the rate and application of compound interest were to be determined by secondary legislation: “It may be a truism but the “devil is in the detail””.<sup>188</sup> Clifford Chance, another large international law firm, expressed the concern that courts may use the discretion they have over some aspects of awarding interest to exert control over areas in which they do not, possibly producing inconsistent and even arbitrary results.<sup>189</sup> The Association of High Court Masters also expressed concern that secondary legislation could restrict the discretion of a judge as to whether to award interest.<sup>190</sup>

172. Overall the Bar Council and the Law Society both welcomed the provisions. The Law Society suggested, however, that the power to set the rate of interest should be removed from the Lord Chancellor and set like a tracker mortgage rate at a specific amount over the base rate. This would be fairer to all parties as it would reflect prevailing economic circumstances rather the current situation where a 8% interest rate is levied, substantially above the Bank of England’s current interest rate.<sup>191</sup>

173. The Association of British Insurers rejected the proposal to create an enabling power for the introduction of compound interest:

Under present rules, interest awards are based on simple interest. This is because the aim of interest in personal injury cases is to be compensatory not penal. We note the Government thinks the case has not been made for introducing a provision for compound interest as suggested by the Law Commission. We do not consider

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186 CP53/09

187 Q 119

188 Ev 44

189 Ev 54

190 Ev 46

191 Q 45

compound interest could ever be justified in personal injury cases, and could add very significant sums to settlement of long-running cases; and no provision should therefore be made for compound interest to be awarded.<sup>192</sup>

174. The National Health Service Litigation Authority had similar concerns about the cost of introducing compound interest:

We remain very strongly opposed to the suggestion that compound interest should be awarded, as noted in our response to the consultation covering this point. We are relieved by the comment on page 17 that Government considers that “the case had not been made for such a general provision as favoured by the Commission”, but are concerned that the draft Bill leaves the door open to such an award if the Lord Chancellor so decides by Order. We believe that it is potentially dangerous to leave this option in the Bill, given that the Government itself has decided that the case for compound interest on a general basis has not been made out.

Introduction of compound interest generally would be by far and away the most expensive consequence of this proposed enactment for defendants, and its impact on the NHS would be massive, particularly in large brain-damaged baby cases which frequently are not intimated for 10, 20 or even 30 years.<sup>193</sup>

175. Professor Hugh Beale commented:

I rather hope that these powers will be exercised in such a way that, if it is decided that the NHS, for example, cannot afford this extra, we calculated it at roughly 4.3% - I think it was £19 million - I would have thought that there could simply be an exemption for those kinds of claim for the time being, but compound interest seems to us to represent so much more an accurate measure of what it is that actually the creditor is losing that really there is no reason for not introducing it right away.<sup>194</sup>

We asked the Ministry of Justice why no decision had been taken on the application of compound interest or the rate. The Department responded:

The interest provisions in the draft Bill are indeed largely enabling provisions. They give the courts power to decide whether to award interest and the Lord Chancellor power to specify what the rate of interest should be. The Lord Chancellor’s power is intended to be flexible. These provisions provide a possible legal framework in which the policy set out in the Government’s 2008 response to the Law Commission’s recommendations in its 2004 report on Pre-judgment interest on Debt and Damages (HC 295) could be developed. The details of how the power to set interest rates will be exercised remain to be settled. The response to the 2009 consultation forms part of that process and we will consider carefully the comments received. Our intention is to consult widely before any decisions are taken as to how the powers will be used.<sup>195</sup>

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192 Ev 68

193 Ev 59

194 Q 119

195 Ev 27

176. We are surprised the Government has not made a decision on either the rate of pre-judgment interest or the type of case to which compound interest should be applied. We welcome, however, the Government's commitment to consult on the secondary legislation that will flow from this bill. If it is the prospect of claims against the National Health Service which is delaying a decision on interest, then other ways of dealing with this concern must be found.

## 4 Amending the Forfeiture Rule

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177. When a person dies without a valid will in England or Wales intestacy laws determine who will inherit his or her property.<sup>196</sup> Succession law is generally aimed at benefiting descendants in preference to other, more remote family members. The order prescribed in the Administration of Estates Act 1925 is therefore as follows: spouse; children (equally); parents (equally if both are alive); siblings; half siblings; grandparents (equally amongst those who survive the deceased); aunts and uncles, and, finally, half aunts and uncles. When no relatives survive the deceased the money goes to the Crown.

178. As lovers of crime novels will be aware, the common law Forfeiture Rule prevents a person convicted of an unlawful killing benefiting from the victim's death.<sup>197</sup> Murderers are always prevented from benefiting by their victims' deaths, but the court has discretion to disapply the Forfeiture Rule in cases of manslaughter or other forms of unlawful killing.<sup>198</sup> A child who has murdered her father, therefore, cannot inherit the father's estate. Her children, the victim's grandchildren, also cannot inherit because section 47 of the Administration of Estates Act 1925 and section 33 of the Wills Act 1837 require the death of the parent before the child can inherit from the grandparents. A similar process takes place when a person rejects (disclaims) an inheritance. If a father has rejected an inheritance from his mother that inheritance will go to the grandmother's parents, in the unlikely event they are still alive, or the grandmother's siblings. The grandchildren are effectively disinherited because they cannot inherit while their father is still alive.

179. The impact on a grandchild when his parent forfeits a grandparent's estate under the Forfeiture Rule was heavily criticised in *Re DWS (deceased)*.<sup>199</sup> A father murdered both his parents. Both grandparents died intestate. The Court of Appeal held that it had no power to treat the father, who was disqualified from inheriting by reason of his crime, 'deceased' which would have allowed the grandson to inherit. The estate went to the grandparents' other relatives. Following *DWS (deceased)* the Department of Constitutional Affairs referred the issue of the effect of the forfeiture rule on intestacy to the Law Commission. In the introduction to its 2005 report *The Forfeiture Rule and the Law of Succession* the Commission commented:

It is clearly right to exclude a murderer from inheriting, but it seems unfair to exclude the murderer's children as well. This outcome appears arbitrary: it is not

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<sup>196</sup> Administration of Estates Act 1925, sections 46 and 47

<sup>197</sup> Although a matter of common law a statement of the Forfeiture Rule can be found in the Forfeiture Act 1982, section 1

<sup>198</sup> Forfeiture Act 1982, section 2

<sup>199</sup> [2001] Ch 568 (CA)

based on public policy, but is a by-product of the way the intestacy legislation is drafted.<sup>200</sup>

180. The Law Commission made the following recommendations:

There should be a statutory rule that, where a person forfeits the right to inherit from an intestate through having killed that intestate, the rules of intestate succession, as laid down in sections 46 and 47 of the Administration of Estates Act 1925 (as amended), should be applied as if the killer had died immediately before the intestate.

Where a person forfeits under an intestacy through having killed the deceased, but as a result of the reforms property devolves on or is held for a minor descendant of the killer, the court should have the power to order that the property be held by the Public Trustee, who should administer it so as to avoid benefit to the killer.

Where a person forfeits a benefit under a will through having killed the testator, the will should be applied as if the killer had died immediately before the testator, unless the will contains a provision to the contrary.

Where a person forfeits a benefit under a will through having killed the deceased, but as a result of the reforms property devolves on or is held for a minor descendant of the killer, the court should have power to order that the property be held by the Public Trustee, who should administer it so as to avoid benefit to the killer.

Where a person disclaims an inheritance, either under a will or under the law of intestacy, the inheritance should devolve as if the person disclaiming had died immediately before the deceased.

Where a person loses a benefit under intestacy by dying unmarried and a minor, but leaves children or remoter issue, the property should devolve as if that person had died immediately before the deceased.<sup>201</sup>

The power to treat the killer as if he or she had died immediately before the victim is called the “deemed pre-deceased rule.”

181. The Government accepted the Law Commission’s recommendations in 2006.<sup>202</sup> The draft bill, however, slightly alters the Commission’s recommendation that the court appoint the Public Trustee when the beneficiary is a minor by requiring the court to consult the Public Trustee, who may then advise on a more suitable private trustee. Professor Hugh Beale endorsed this approach:

That seems an eminently sensible change...We were worried that somehow the killer might benefit indirectly or directly by, as it were, either being able to get hold of some of the trust money, perhaps by influencing the trustee or possibly by

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200 *The Forfeiture Rule and the Law of Succession* Law Commission paper No. 295, July 2005, Cm 6625

201 *The Forfeiture Rule and the Law of Succession*, paras 5.1- 5.6

202 CP53/09 p 18

encouraging the trustee to take on responsibilities which otherwise the killer himself or herself would bear: maintenance responsibilities [for example].<sup>203</sup>

182. Professor Beale emphasised that the “deemed predeceased rule” in the bill, whereby the killer was treated as if he or she had died immediately before the victim, was confined solely to intestacy law and would not otherwise effect the killer’s legal status.<sup>204</sup> He confirmed that the “deemed predeceased rule” would apply in cases of so-called mercy killings where the killer had been convicted of murder, the court having discretion not to apply the Rule in a case of manslaughter.<sup>205</sup> Timothy Evans of the Bar Council welcomed the introduction of the “deemed predeceased rule” with the following example:

[this case involved] a will giving to the offender all the old lady’s estate and if she should die before the old lady, then to that woman’s grand-daughter...Of course because [the killer] did not die before the lady she had murdered the grand-daughter did not take [the estate] and that was an unfortunate result.<sup>206</sup>

183. However, Mr Evans queried the drafting where it referred to a “child or remoter descendent of the offender”: “The assumption is made that the person we are trying to protect or help here is the child of the offender, but it may be some completely different infant; it may be a stepson, it may be a sister, it could be a whole range of people who are infants.”<sup>207</sup>

184. Des Hudson, of the Law Society, also expressed concerns about the drafting of the bill and the potential for unintended consequences on extant wills:

we need to be very, very careful to ensure that nothing is done or not done that might create doubt as to the validity of all the existing wills all over the country. It might well be sensible...to ensure that the face of the Bill makes it absolutely clear that nothing here is intended to revoke any existing wills made before the date of the Act coming into effect.<sup>208</sup>

**185. We welcome this clause as ending the current rule which penalises the children or other heirs of a killer who are themselves not only entirely innocent but are the people whom the deceased would probably have wanted to benefit from the estate in any event. We also welcome the proposal to ensure that minors who inherit under this provision have their inheritance protected.**

**186. We recommend the Government re-examine the drafting of clauses 15 to 17 in the light of the comments made by the Bar Council and the Law Society. We expect all minors to receive suitable protection under the bill. Equally, we share the Law Society’s concern that nothing be done to impair the validity of existing wills.**

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203 Q 115

204 Q 114

205 Q 116

206 Q 68

207 Q 67

208 Q 69

## 5 Barristers' disciplinary appeals

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187. Appeals in disciplinary hearings for barristers are currently heard by High Court judges sitting as Visitors to the Inns of the Court. Clause 18 of the draft bill transfers jurisdiction for such hearings to the High Court where they will be heard by judges sitting in their own right. This brings the procedure into line with that currently in place for solicitors.

188. The Bar Standards Board endorsed the proposal:

The BSB fully supports and welcomes the proposal to replace the existing appeal arrangements under the Visitors jurisdiction with a right of appeal to the High Court and we are satisfied that the terms of section 18 of the Bill are sufficient for this purpose.<sup>209</sup>

**189. We welcome the transfer of jurisdiction in appeals in disciplinary hearings for barristers from the Visitors to the Inns of Court to the High Court. This brings the disciplinary procedures into line with solicitors.**

## 6 Enacting Law Commission proposals

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190. Delay between the publishing of the Law Commission's reports and a substantive response from the Government has been a feature of many of the issues covered in this bill, the Commission made its recommendations on damages in 1999<sup>210</sup> and 1997,<sup>211</sup> on interest in 2004<sup>212</sup> and on the forfeiture rule in 2005.<sup>213</sup> The draft bill was published in [November?] 2009, six months before the last date a general election could be called. We asked witnesses whether there were issues they would have liked to have seen resolved within the Civil Law Reform Bill. Professor Hugh Beale expressed disappointment that the Law Commission's 2001 recommendations on the limitation periods that apply to causes of action was dropped from the bill in October 2009.<sup>214</sup> Professor Beale had reviewed many of the responses to the Ministry of Justice's consultation on the limitation period recommendations and believes that some of the objections within them are misconceived. While the courts have resolved some issues without legislation, civil claims for compensation in child sex abuse cases being the most obvious example, Professor Beale noted there were a number of outstanding issues.

I agree that further study is needed before the Law Commission's recommendations can be implemented both to consider the latest objections and to update the recommendations in the light of other recent developments in case law. I am now

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209 Ev 51

210 *Claims for Wrongful Death* (No.263); *Damages for Personal Injury: Non-pecuniary loss* (No. 257)

211 *Aggravated, Exemplary and Restitutionary Damages* (No. 247)

212 *Pre-judgment Interest on Debt and Damages* (No. 287)

213 *The Forfeiture Rule and the Law of Succession* (No. 295)

214 *Limitation of Actions*, Law Commission paper No. 270, July 2001, HC 23

discussing how this can be carried forward, given that the Law Commission may not be able to devote resources to it for the time being.<sup>215</sup>

191. As Professor Beale indicated, the difficulties with implementing the Law Commission's recommendations on limitations periods arise, at least in part, because case law has changed the legal position since the Law Commission made its recommendations in 2001. The Secretary of State for Justice, the Rt Hon Jack Straw, accepted that there had been delays in implementing Law Commission recommendations, specifically those on damages:

[The draft Civil Law Reform Bill]I has been in process since I have been [at the Ministry of Justice]. One of the difficulties...is that this is an important measure but there have always been other...demands on the legislative programme in the past which have meant that it has been squeezed out, because it is worthy—I actually think very important in terms of what it is doing—but it has not been seen as such a high priority. That is the honest truth about it...There has also been an extensive period of consultation. The original proposals, for example, in respect of damages following fatal accidents, which were in the Law Commission proposals, have themselves been refined since then. But if you are saying: “Does that take 11 years?” the answer to that is no.<sup>216</sup>

192. Following the evidence session, the Secretary of State wrote to set out the complexity of the legal issues involved but said: “Nonetheless, it has clearly taken an unreasonably long time to develop this policy. This is unsatisfactory and is one of the reasons why we have made such efforts to improve both the way that the Government works with the Law Commission to develop law reform and the way that Law Commission Bills are implemented.”<sup>217</sup>

193. Mr Straw assured us that work had been done over the last three years to address the delays in responding to Law Commission reports, including the introduction of an annual report on the progress of recommendations and “better use” of the fast track procedure for uncontroversial legislation.<sup>218</sup> Mr Straw continued: “The Law Commission have done a terrific job, and I am well aware of the fact that it is demoralising for them and their staff if they produce very good proposals which are then left on the shelf. We are trying to break through that.”<sup>219</sup>

**194. We endorse the Secretary of State for Justice's appreciation of the work of the Law Commission. We believe the delay in legislating on Law Commission recommendations is not only demoralising for that organisation but leads to a waste of limited resources because case law can change the legal context while recommendations await implementation requiring further consideration of the proposed changes. The last 10 years has seen a vast amount of criminal justice legislation introduced by the**

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215 Ev 29

216 Qq 91–92

217 Ev 28

218 Law Commission Act 2009

219 Q 93

**Government.** In contrast, civil law measures have sometimes being neglected, to the public detriment. We welcome the work done by Ministers to improve the response time to Law Commission reports but urge the Government to give prompt and appropriate consideration to enacting all Law Commission recommendations.

# Conclusions and recommendations

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## Damages under the Fatal Accidents Act

1. Damages in the civil courts are intended to compensate the victim of a wrong and, as far as possible, put right that wrong. Undercompensation of victims in personal injury and fatal accident cases is not only unjust but is likely to lead to the victim or the state paying for the consequences of the negligent party's act. We acknowledge that some of our recommendations may lead to a small increase in costs to insurers, although other of our recommendations will assist in preventing unjustified cost. It is for society or Parliament on society's behalf to decide the framework for setting the levels of damages and for insurers to compete to provide the lowest cost response to that framework. By increasing legal certainty our recommendations will allow parties to settle earlier, thereby reducing both court costs and the upset caused by prolonged legal proceedings in fatal accident cases. (Paragraph 6)
2. We agree with the Law Commission that the new category of claimant should include those whose dependency would have begun after the death. The claimant in such a case would be required to prove to the ordinary civil standard of proof that he or she would have been supported by the deceased; therefore we do not envisage that speculative or trivial claims will increase in number. In our view incorporating the broader definition gives effect to the intention behind the bill to allow a degree of flexibility which is required to keep pace with changes in familial relations in modern society. (Paragraph 24)
3. We agree with the Government that the new category of claimant does not require a qualifying period to achieve legal clarity as all potential dependents will be required to evidence their claims. We would go further and conclude that the introduction of a qualifying period would exclude those whom this category is intended to benefit, for example a co-habitee who had lived with the deceased for less than two years. This would undermine the intention behind the creation of a new category, which is to introduce some flexibility and allow it to keep pace with changes in society. (Paragraph 28)
4. It is highly desirable for all parties that the new category of claimant be clearly drafted to avoid uncertainty and satellite litigation. We recommend that the wording "immediately before the death" in clause 1(2) of the draft Civil Law Reform Bill be amended to read "immediately before the death or the accident that led to the death". (Paragraph 33)
5. We recommend that clause 1(2) of the bill provides that a claimant may be "wholly or partly" maintained by the deceased. The new category of dependent is not intended to apply only to those who were solely supported by the deceased. The courts, however, are required to interpret the new category as it is stated on the face of the bill. Failure to include "wholly or partly" could lead to a restrictive interpretation. Parliament has a responsibility to make its intentions clear. (Paragraph 37)

6. We have some sympathy with the view that, once a claimant has proved a “need” for maintenance and his or her dependence on the deceased, further obstacles to their claim are unnecessary. Nevertheless, on balance, we are satisfied that the requirement for a “need” to be “reasonable” should assist the court rather than complicate its deliberations. The courts are experienced in assessing whether a claim is reasonable and public policy requires that unreasonable claims should be discouraged. The inclusion of a requirement that a need is “reasonable” will discourage speculative claims. We endorse the proposed drafting. (Paragraph 42)
7. We agree that claimants under the new category for dependency damages should be able to claim for “non-business benefits” in the same way as other claimants under section 1(3) of the Fatal Accidents act 1976. (Paragraph 44)
8. The bill is intended to benefit people not organisations. We recommend the Ministry of Justice replace “person” in clause 1(2) with “individual”, or include a definition of “person” in this context elsewhere in the bill. (Paragraph 46)
9. We recognise that the approach to new relationships in an assessment of dependency damages is a very difficult area and fully appreciate the reaction of claimants, fortunate enough to find a new partner, when the damages they are awarded are reduced because of that relationship. Awards of dependency damages are, however, focused on compensating the claimant for actual financial loss and are not intended to punish the defendant or to put a price on the death of the deceased. (Paragraph 59)
10. We strongly oppose the suggestion that all relationships, including those not involving co-habitation, be considered in an assessment of dependency damages. This would not only give rise to highly undesirable scrutiny of the bereaved’s personal life: it may result in lengthy and expensive debate in court over the weight to be given to the quantifiable benefits of even the most casual relationship, for example, the occasional dinner. (Paragraph 60)
11. In the interests of legal certainty we recommend it is made clear on the face of the bill that the prospects of remarriage, a civil partnership or co-habiting relationship of over two years are not to be taken into account by a court when assessing dependency damages under the Fatal Accidents Act 1976. (Paragraph 62)
12. We believe that the courts should have discretion to take account of a parent’s new relationship when assessing a child’s dependency damages as this will allow it to consider the realities of the child’s financial loss. We reject the submission that the court’s discretion in this regard be limited by ruling out consideration of new relationships or requiring them to be taken into account. Children have no control over parental relationships and there is no obligation on a new partner to support them, however, some will acquire a loving and supportive carer. The wider discretion allows for a common sense approach to ensure justice to the child and avoid the risk of overcompensation. (Paragraph 67)
13. We note that the Ministry of Justice accepted concerns that the new partner of a surviving parent would have no legal obligation to support that child. We ask the Government to note that a co-habitee in a “relevant relationship” would also have no

obligation to support his or her partner. In our view, the reasoning behind this clause is that a relevant new relationship of the surviving parent is simply less likely to impact upon the financial loss of the child than its parent and, in order to save court time and money, it is right that a judge be able to discount it at the outset, rather than go through a laborious process which ends in ascribing it nil weight. We do not expect the courts to shrink from assessing the impact of a new relationship at nil when assessing the damages of the surviving partner, although the situation may be an unlikely one, and, given the court has this discretion, we agree the judge should be required to consider it. (Paragraph 68)

14. We agree with the Government that equating an engagement to a remarriage in an assessment for dependency damages should not form part of the bill, as society has moved on and the inclusion of engagements will almost certainly give rise to overly intrusive inquiries. (Paragraph 69)
15. On the principle that compensation should reimburse a claimant for actual losses but that public policy is not served by an intrusive assessment of the strength of a couple's relationship, we endorse the Ministry of Justice's approach to relationship breakdown in an assessment of dependency damages. Evidence of a reconciliation after an application for a divorce petition can be taken into account by the court. We note that separation between partners may be entirely due to external factors, but it will be open to the claimant to rebut the presumption that the partnership was in difficulty and we would expect the courts to take a practical and common sense approach to the evidence in such cases. (Paragraph 78)
16. Parliament has a duty to provide clear, consistent legislation for the courts to interpret and apply. The drafting of clauses 2 and 3 is not clear. The clauses should be redrafted to state the general rule that Parliament wants the courts to adopt as clearly as possible. We regard this to be that neither the prospects of a new relationship, nor of the breakdown of the relationship between the deceased and the deceased's partner, should be taken into account in the assessment of dependency damages. The clause should then state the limited exceptions to the rule. (Paragraph 81)
17. Confusion over bereavement damages undermines their purpose. We are pleased to learn the Ministry of Justice intend to consider how the limited purpose of bereavement damages can best be explained. It is our view that the Minister should provide a clear explanation of the function of bereavement damages to Parliament in the debate on this bill. That would provide an authoritative basis for the courts, and solicitors on which to advise a client who has questions about the role of bereavement damages. We urge the Law Society to ensure any such an explanation is brought to the attention of solicitors in the field of personal injury and fatal accidents. (Paragraph 87)
18. We agree with the Ministry of Justice's definition of bereavement damages as far as it goes but we believe it to be incomplete and, in respect of eligibility, unsatisfactory. We believe this is because the Government has ignored the carefully worded conclusion of the Law Commission that "the function of bereavement damages is to compensate, in so far as a standardised award of money can, grief, sorrow and the loss of the non-pecuniary benefits of the deceased's care, guidance and society." We

recommend the Ministry reconsider its definition to bereavement damages, taking into account the approach of the Law Commission. (Paragraph 89)

19. We endorse the extension of eligibility for bereavement damages to co-habitees of more than two years. This is a long overdue reform. We note the Law Commission originally recommended this change in 1999. While any qualifying period is necessarily arbitrary, we believe the two year period, which is common in statute, is the most appropriate solution. (Paragraph 97)
20. The Government has rejected the recommendation of the Law Commission that eligibility for bereavement damages should be extended to all parents who lose a child as the result of another's negligence because it would make too many parents eligible that were not close to their children, requiring Parliament to legislate to allow them to be cross-examined on their feelings of bereavement. We reject this view. The death of a child at any age is a tragedy for the parents. The function of bereavement damages is to acknowledge the grief and loss that arises from a death caused by another's negligence. In our view, it is better to "overcompensate" the very small number of parents who do not feel profound bereavement on the death of their child rather than deny the overwhelming majority who have strong and enduring ties to their children this formal recognition of their loss. We recommend that parents should be eligible for bereavement damages regardless of the age of the deceased child. (Paragraph 103)
21. Close ties of love and affection do not cease or weaken when a child reaches 18, as witnessed by the large numbers of people who live with, and care for, their elderly parents. This is not a legal argument. The parent-child relationship is unique and is usually characterised by lifelong support, love and guidance. We therefore recommend that Parliament should recognise the on-going importance of that relationship by extending eligibility for bereavement damages to all children who lose a parent in circumstances where another has negligently caused that death (Paragraph 107)
22. Losing a sibling is a painful and distressing experience. The function of bereavement damages is, however, to acknowledge the loss of those closest to the deceased. The pre-eminent need to avoid intrusive inquiries into the "level" or "quality" of bereavement felt by the deceased's loved ones and the need for simple, straightforward rules on eligibility mean that we have, reluctantly, concluded that the unqualified exclusion of siblings from eligibility for bereavement damages is justified (Paragraph 110)
23. We recommend that the bill adopt a 'cap' on bereavement damages of three times the full fixed sum to be shared equally between all eligible claimants. This means that all the claimants in the same case will receive the same amount of money. In our view unequal treatment of members of a family in relation to the same death is undesirable. (Paragraph 117)
24. We believe concerns over the "dilution" of an award are misplaced. Bereavement damages are an acknowledgment of grief and loss. It is in the public interest that those who are bereaved receive that recognition. We believe the Government is

focusing on the amount involved in bereavement damages at the expense of their function and that this misapprehension leads to a mistaken approach to eligibility for bereavement damages. (Paragraph 118)

25. We note that our recommendations on bereavement damages will extend the liability of defendants. However, the Government must not lose sight of the fact that bereavement damages are only available for wrongful deaths, caused by another's negligence. The Government's current assessment of those "closest to the deceased" is illogical and suggests a rather negative view of the strength of family relationships for the overwhelming majority of people in England and Wales. (Paragraph 119)
26. We welcome the Government's commitment to increase the fixed sum awarded as bereavement damages in line with the Retail Prices Index. However, we believe the update should occur on an annual basis. We see no reason why a person bereaved in the third year of the cycle should effectively be penalised because of the date of the death. An annual adjustment would be the fairest solution and not administratively burdensome. (Paragraph 121)
27. We note the concerns over the imposition of a personal obligation to account for gratuitous care on the claimant in a personal injury case. However, such an obligation is preferable to the unwieldy "trust" system currently in place which we do not believe operates in the best interests of the claimant or carer. We therefore welcome this proposal. (Paragraph 130)
28. The assessment at trial of the claimant's future needs is inherently uncertain. We would be reluctant to see the imposition of a personal obligation to account that would fetter the injured party's ability to obtain the most appropriate care. Although it would be regrettable for a carer to be undercompensated it is better that the burden fall on him or her rather than the claimant for whom the consequences of being unable to access necessary treatment could be highly damaging. We therefore find the argument that consistency is more important than ensuring the claimant is able to fund the most appropriate treatment unpersuasive. We welcome the Ministry of Justice's undertaking to give further consideration to this proposal and urge Ministers to consider the imposition of a lifelong obligation carefully. (Paragraph 131)
29. We acknowledge the importance of the principle that the tortfeasor in a claim for negligence should not benefit from his or her negligent or wrongful act. However, we do not believe this is genuinely at stake in this issue. An award for gratuitous care is not a windfall for the person held liable for the injury but compensation for his or her losses resulting from the decision to provide gratuitous care to the victim. Parliament should encourage the provision of care by the most appropriate person regardless of whether he or she was found to have negligently caused the accident, for example when a husband's careless driving causes serious injuries to his wife. It is socially desirable and in the public interest that the most appropriate person cares for the injured party, for example a parent in the case of a child, thereby benefiting claimants, defendants and society as a whole. In our view, the Government's arguments in support of an award of damages for future gratuitous care are as valid

for past gratuitous care. We welcome the Minister's undertaking to us that she will give this proposal further consideration. (Paragraph 141)

30. We believe the Government's view of an award of damages for gratuitous care is overly legalistic and fails to recognise the practical realities. It makes a fundamental difference to both victim and carer if an insurance company is responsible for paying damages rather than an individual defendant. In practical terms a defendant is highly unlikely to appeal an award of damages for past gratuitous care whereas an insurance company will seek to limit its liability. A defendant who provides gratuitous care may well be in the same household as the claimant who, while benefitting from the gratuitous care, will be impoverished by any loss of earnings the defendant has undergone. We urge the Government to take a realistic and practical approach to this issue. (Paragraph 143)
31. We endorse the Ministry of Justice's decision to allow claimants in a dependency damages claim under the Fatal Accidents Act 1976 to recover damages for gratuitous care that had been provided by the deceased. If gratuitous services were provided by the deceased before his or her death then it seems reasonable to expect that they would have continued. (Paragraph 148)
32. We again reject the proposal that only future care be recoverable where the past care has been provided by the defendant. We acknowledge that a negligent party should not in general benefit from his or her wrongdoing but repeat that, not only is there no true benefit to the tortfeasor in these circumstances, but also that Parliament should do its utmost to encourage the provision of gratuitous services by the most suitable person. (Paragraph 149)

### **Exemplary, aggravated, additional and restitutionary damages**

33. We see some force in the argument that amending legislation simply to 'tidy it up' is unwise and invites unintended consequences. We appreciate that in the Government's view exemplary damages should be confined to the common law. However, Ministers should carry out a wider review on that issue before acting; replacing 'exemplary' with 'aggravated' damages in section 13(2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 simply confuses the different functions of these two awards. (Paragraph 158)
34. We have not seen evidence that the "additional damages" provisions applicable to copyright infringement cases have caused any great difficulty in the courts. In these circumstances we recommend that Ministers consider whether it is necessary to introduce a change and whether substituting 'aggravated damages and such amount by way of restitution' is really an improvement. In any consideration of this clause the Government should bear in mind that aggravated damages are awarded for mental distress. Applying the formulation "aggravated damages" therefore seems inappropriate to cases of copyright infringement that are frequently brought by companies. (Paragraph 164)

### Interest on pre-judgment and post-judgment debts

35. We are surprised the Government has not made a decision on either the rate of pre-judgment interest or the type of case to which compound interest should be applied. We welcome, however, the Government's commitment to consult on the secondary legislation that will flow from this bill. If it is the prospect of claims against the National Health Service which is delaying a decision on interest, then other ways of dealing with this concern must be found. (Paragraph 176)

### Amending the Forfeiture Rule

36. We welcome [the clause in the draft bill] as ending the current rule which penalises the children or other heirs of a killer who are themselves not only entirely innocent but are the people whom the deceased would probably have wanted to benefit from the estate in any event. We also welcome the proposal to ensure that minors who inherit under this provision have their inheritance protected (Paragraph 185)
37. We recommend the Government re-examine the drafting of clauses 15 to 17 in the light of the comments made by the Bar Council and the Law Society. We expect all minors to receive suitable protection under the bill. Equally, we share the Law Society's concern that nothing be done to impair the validity of existing wills (Paragraph 186)

### Barristers' disciplinary appeals

38. We welcome the transfer of jurisdiction in appeals in disciplinary hearings for barristers from the Visitors to the Inns of Court to the High Court. This brings the disciplinary procedures into line with solicitors. (Paragraph 189)

### Enacting Law Commission proposals

39. We endorse the Secretary of State for Justice's appreciation of the work of the Law Commission. We believe the delay in legislating on Law Commission recommendations is not only demoralising for that organisation but leads to a waste of limited resources because case law can change the legal context while recommendations await implementation requiring further consideration of the proposed changes. The last 10 years has seen a vast amount of criminal justice legislation introduced by the Government. In contrast, civil law measures have sometimes being neglected, to the public detriment. We welcome the work done by Ministers to improve the response time to Law Commission reports but urge the Government to give prompt and appropriate consideration to enacting all Law Commission recommendations. (Paragraph 194)

# Formal Minutes

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**Tuesday 23 March 2010**

Members present:

Sir Alan Beith, in the Chair

Mr David Heath

Rt Hon Alun Michael

Jessica Morden

Mr Andrew Turner

Dr Alan Whitehead

Draft Report (*Draft Civil Law Reform Bill: pre-legislative scrutiny*), proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 194 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Sixth Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

[The Committee adjourned

## Witnesses

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### Tuesday 19 January 2010

Page

**Des Hudson**, Chief Executive and **David Marshall**, Civil Justice Committee, Law Society, **Andrew Ritchie QC**, Personal Injury Bar Association, **Timothy Petts**, and **Tim Evans**, Bar Council

Ev 1

### Tuesday 26 January 2010

**Professor Hugh Beale**, Warwick University, and **Professor Andrew Burrows**, Oxford University

Ev 10

### Tuesday 23 February 2010

**Muiris Lyons**, Association of Personal Injury Lawyers, **Nick Starling**, Association of British Insurers, and **Dominic Clayden**, Director of Technical Claims, Aviva

Ev 18

## List of written evidence

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1	Ministry of Justice	Ev 23, 27
2	Professor Hugh Beale QC	Ev 28
3	Professor Andrew Burrows QC	Ev 29
4	Law Commission	Ev 32

### *Responses to the Civil Law Reform Bill Consultation Paper*

5	Law Reform Committee of the Bar Council of England and Wales	Ev 35
6	Law Society	Ev 39
7	Allen and Overy	Ev 44
8	Association of High Court Masters	Ev 45
9	Aviva	Ev 47
10	Bar Standards Board	Ev 50
11	Beachcroft LLP	Ev 51
12	Civil Sub-Committee of the Council of Her Majesty's Circuit Judges	Ev 53
13	Clifford Chance	Ev 54
14	Irwin Mitchell	Ev 55
15	NHS Litigation Authority	Ev 58
16	RoadPeace	Ev 60
17	Association of Personal Injury Lawyers	Ev 61
18	Association of British Insurers	Ev 66
19	Law Society of Scotland	Ev 69
20	Sir Henry Brooke	Ev 69

## Reports from the Justice Committee since Session 2008–09

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The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

### Session 2009–10

First Report	Cutting crime: the case for justice reinvestment	HC 94 ( <i>Cm 7819</i> )
Second Report	Work of the Committee in 2008-09	HC 233 ( <i>n/a</i> )
Third Report	Appointment of HM CPS Chief Inspector	HC 244
Fourth Report	Appointment of HM Chief Inspector of Prisons	HC354
Fifth Report	Constitutional processes of a general election	HC 396

### Session 2008–09

First Report	Crown Dependencies: evidence taken	HC 67 ( <i>HC 323</i> )
Second Report	Coroners and Justice Bill	HC 185 ( <i>HC 322</i> )
Third Report	The work of the Information Commissioner: appointment of a new Commissioner	HC 146 ( <i>HC 424</i> )
Fourth Report	Work of the Committee in 2007–08	HC 321 ( <i>n/a</i> )
Fifth Report	Devolution: a decade on	HC 529 ( <i>Cm 7687</i> )
Sixth Report	Sentencing guidelines and Parliament: building a bridge	HC 715 ( <i>Cm 7716</i> )
Seventh Report	Constitutional reform and renewal: Parliamentary Standards Bill	HC 791 ( <i>HC 1017</i> )
Eight Report	Family legal aid reform	HC 714 ( <i>HC 1018, and HC 161, Session 2009–10</i> )
Ninth Report	The Crown Prosecution Service: gatekeeper of the criminal justice system	HC 186 ( <i>HC 244, Session 2009–10</i> )
Tenth Report	Draft sentencing guideline: overarching principles—sentencing youths	HC 497 ( <i>n/a</i> )
Eleventh Report	Constitutional reform and renewal	HC 923 ( <i>HC 1017</i> )
Twelfth Report	Role of the prison officer	HC 361 ( <i>Cm 7783</i> )