



House of Commons
Justice Committee

Draft Civil Law Reform Bill: pre-legislative scrutiny

Sixth Report of Session 2009–10

Volume II

Oral and written evidence

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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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Oral evidence

Taken before the Justice Committee on Tuesday 19 January 2010

Members present

Sir Alan Beith, in the Chair

Mrs Siân C James
Alun Michael

Dr Nick Palmer
Mrs Linda Riordan

Witnesses: **Mr Des Hudson**, Chief Executive of the Law Society, **Mr David Marshall**, the Law Society, **Mr Andrew Ritchie QC**, Personal Injury Bar Association and editor of Kemp and Kemp: The Quantum of Damages, **Mr Timothy Petts** and **Mr Tim Evans**, Bar Council, gave evidence.

Q1 Chairman: Good afternoon, gentlemen. It would be helpful for the record if we could go along the row and you identify yourselves.

Mr Hudson: I am Desmond Hudson, Chief Executive of the Law Society.

Mr Marshall: I am David Marshall, I am a partner in a private practice firm of solicitors and I am on the Civil Justice Committee of the Law Society.

Mr Ritchie: I am Andrew Ritchie QC; I am representing the Bar Council and Personal Injury Bar Association.

Mr Evans: Timothy Evans, barrister, Maitland Chambers, representing the Bar Council.

Mr Petts: Timothy Petts, barrister, also representing the Bar Council.

Chairman: Thank you very much. We are grateful to you for bringing us your evidence and anything you feel, after the session, that we ought to have picked up and have not from what was in your mind or you said, do not hesitate to get in touch with us afterwards. The purpose of this exercise is to look at the Draft Civil Law Reform Bill and to identify—not necessarily to resolve, but simply to identify—issues which could be better resolved by further consultation before a final Bill is produced and which the House itself may have views on and may want to come to conclusions about. Indeed, some of these issues I do not think we would presume to conclude on behalf of members in general; some of them are quite sensitive on almost emotive issues. We will start with damages under the Fatal Accident Act 1976. There are a number of questions that arise from that, one in particular that Dr Palmer wishes to pursue.

Q2 Dr Palmer: The Law Commission recommended a new category of claimant cover. I will give you the full quote, although you are probably familiar with it: “Any person 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”. The Draft Bill simply reads: “Any person who is being maintained by the deceased immediately before the death”. What is your view of this more restrictive reading?

Mr Ritchie: May I lead on that, Dr Palmer. 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 think that needs to be looked at bit more carefully and I suggest that Parliament considers the words “immediately before the accident” or “immediately before the death” and resolve that.

Q3 Dr Palmer: That is an interesting response; I think it is not quite what we had in mind but it is a valid point as well. Do you have a view on persons who had a reasonable expectation of being maintained at a time beginning after the death?

Mr Ritchie: These are persons who do not all into any of the other categories which pre-exist and those categories broadly are marriage, blood ties or stable relationship (co-hab relationship), so we are talking about people outside those categories.

Q4 Dr Palmer: It also excludes children and IVF embryos.

Mr Ritchie: Yes. 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.

Q5 Dr Palmer: Can you give us some examples of who you have in mind?

Mr Ritchie: I suppose it is the unborn child of the wife of the deceased.

Q6 Dr Palmer: We are advised that that is already covered. Any child *in utero* or following IVF would be covered by the existing list.

Mr Ritchie: Because of the blood ties.

Q7 Dr Palmer: Yes.

Mr Ritchie: So a child to be born would be covered under “child”.

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Q8 Dr Palmer: That is right, yes. The Ministry of Justice's argument, which we are seeking to probe, is that we are creating a vague category without really knowing who we mean and we will encourage all kinds of speculative claims, all of which will actually lose.

Mr Ritchie: These are claims by mates, mates who might have been supported (by "mates" I mean friends who might have been supported) who would come forward and say, "Well, we'd always agreed that in a couple of years' time we would live together as friends, go to football matches together and have a non co-habitee relationship", although they are living in the same house. That is the sort of category that one might imagine.

Mr Marshall: Or possibly younger people who are not blood children who live within the family, for example, and the deceased may well have maintained them but they were not naturally his children.

Q9 Chairman: Nephews and nieces, for example.

Mr Marshall: Yes, and other family members. It may be we would have to think about specific categories that would be of assistance to that.

Dr Palmer: Yes, because I think the current proposal would allow the people who were being maintained by the deceased; what we are looking for is whether there is a group we should worry about which was not being maintained but had a reasonable expectation of it.

Q10 Chairman: Another category the Law Commission had in mind that the Government has rejected is the court considering the facts of an engagement when assessing damages on the basis that if you got involved in that, it would lead to unnecessary intrusion into the bereaved's personal life. Do you agree or should the Law Commission's view have prevailed?

Mr Ritchie: On behalf of the Bar Council, I am reasonably comfortable ignoring the engagement because you already have the marriage ties, the blood ties—quite broad up and down—and the stable co-habiting relationship of two years. This category would be less than a stable co-habiting relationship for two years but with an engagement. What is the problem, because if you already have the new category you are introducing—which is maintained immediately before—then engagement does not add anything, does it?

Q11 Chairman: If you had been engaged to someone with the prospect of living with that person, are you saying they are covered by the maintenance prospect anyway?

Mr Ritchie: Yes.

Q12 Mrs James: The Government rejected the Law Commission proposal that the court could consider the fact of an engagement when assessing damages. Do you agree? Is this an inevitable aspect of our adversarial court system?

Mr Ritchie: I do not think the engagement adds anything to the category that is being suggested. I think the categories are sufficient and the new category is also sufficient. Shall we take the relationship where the future husband has a largish earning potential and the future wife is intending pretty soon to start a family and the future husband has not yet moved in with the future wife, despite the engagement, so there is no immediate support.

Q13 Chairman: They might take a traditional view of these matters.

Mr Ritchie: I am just taking an example. There are many others, but I take that one because it may be familiar with some around here.

Q14 Mrs James: They may consider it an unnecessary intrusion.

Mr Ritchie: This is a category where there is no immediate maintenance going on but because of the engagement there is a likelihood of maintenance in the future in those circumstances and the worry is whether that category is going to be excluded because they are not yet married. You can see some force in that. Where is the intrusion? What would be said is, "Here's my ring; here are a couple of relatives who know we were engaged. I have proven that we were engaged and hence there is a foreseeable dependency that was going to arise." The difficulty with that is Parliament under this Bill is also bringing in later in the Bill and exclusion based on that fact that there is a prospect of re-marriage or a fact of re-marriage or co-habiting with somebody else so you would have, in effect, investigations in between the death and the trial of whether this engaged person had started a new relationship and, if so, whether the damages would be removed as a result of starting a new relationship. I think that is where the intrusion would come. You would entitle them to damages due to engagement and then you take them away because they started a new relationship. It is a slightly bizarre position.

Mr Hudson: From the Law Society's perspective, we would endorse all of the points made. I think that last one is an interesting one because if there is any credibility in the argument of intrusion, it must be in those sorts of circumstances.

Q15 Chairman: The insurance company's lawyer would be trying to claim that this was spurious because, although there may have been an engagement, she has now got engaged to somebody else.

Mr Hudson: Precisely, and therefore the natural expectation one would have that the engagement would lead to a marriage and therefore financial dependency, et cetera, could be overturned. You could see that as being potentially a very hard fought argument and it clearly would involve sensitive private issues.

Mr Ritchie: There is more to be said on the later question in the sections about remarriage and co-habiting taking away damages.

Q16 Chairman: Would you like to say something about that now?

Mr Ritchie: Is it convenient to address that now?

Q17 Chairman: Yes.

Mr Ritchie: I have one further point on eligibility; may I just make that before we go to the next one, Chairman?

Mr Hudson: I too want to make a point on eligibility briefly.

Mr Ritchie: On eligibility—which was the first issue that has been raised—I am troubled by the cats’ home point because the word “person” has been used—“person being maintained”—and there is no definition of person. 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. You may wish to define “person” as a human being rather than the cats’ home or Amnesty International.

Q18 Chairman: That is presumably an unintended consequence that you foresee from the drafting.

Mr Ritchie: Exactly. You might say that you do intend for charities to be able to claim under this Act because they are dependent, but you might not. I think that should be thought about.

Q19 Mrs James: It is quite easy to insert that definition.

Mr Ritchie: Exactly, the definition of a person—two legs or whatever—rather than a cats’ home.

Q20 Chairman: Mr Hudson, did you wish to add something?

Mr Hudson: Yes, it is a related point to this question of claimants. One of the things the Law Society is concerned about—we have put this in evidence on other matters—is the risk of complication if we are adding another class of claimant to the existing definitions of claimants. One of the thoughts that we would be proposing that should be considered is that we wrap it up into one group which would be much simpler and more straightforward, so we just expand or extend the existing definition of “claimant” in this way rather than having two categories.

Q21 Dr Palmer: Before we move on, could I just ask is the concept of being engaged a well-defined legal concept? There might be some doubt: we talked about marriage, had we really got engaged?

Mr Ritchie: It is very tricky. How would you want to define it? How would you want to evidence it?

Q22 Dr Palmer: There might perhaps be more than one person who thought they were engaged to the person.

Mr Ritchie: Yes, you might be engaged to two people at one time and are they both going to claim. It is a tricky concept.

Mr Marshall: I am sure there is a lot of 19th century law but whether it is relevant today I am not sure.

Q23 Chairman: Some people have been married to two people at one time as well. Mr Ritchie, you were going to move on from there.

Mr Ritchie: Yes. The topic here is the effects of remarriage and this is dealt with in clause 2 of the Bill. The suggestion is that the court must take into account the fact that after the death the widow or widower has remarried or entered into a civil partnership. Personally I have no difficulty with those as matters that the court must take into account, but I do have considerable difficulty—as does the Bar Council—with the third which is that the widow or widower has entered into a relevant relationship and the relevant relationship is two years co-hab as husband and wife. This will lead to insurance companies thinking in this way and I suggest this will be driving bad behaviour. The insurance company will think: “Let’s hire a private investigator; let’s check out what the merry widow is doing. If we can prove she has cohabited for two years, we can bring this evidence and knock out 50, 60, 70 per cent of the dependency claim.” I think that would be a rather odious thing to be happening in fatal accident claims. Of course, it would increase the work of private investigators, but it would be an unpleasant way of litigation behaviour being driven by that particular clause and I would urge the Committee and Parliament to think about taking out the “relevant relationship” here.

Q24 Mrs James: The term “merry widow” is offensive.

Mr Ritchie: Yes, that is exactly part of it.

Q25 Mrs James: Who would decide what being “merry” is? Would being merry be having a pretty obvious affair? Spending half the money on taking a lover to Paris?

Mr Ritchie: Exactly. It is an odious thing to put into the law because it promotes exactly that sort of thinking from insurance companies, that they will investigate what they regard as somebody who has started up a new relationship, how long has it been going on for. They then produce the report to the judge to suggest that this person has fallen into a category and is not entitled to dependency damages because they have started a new relationship.

Q26 Chairman: The law has to step back and say that, although there is evidence to suggest that they would have got married or entered a civil partnership were it not for the expectation of damages, it is not in the public interest that we should be rummaging around trying to assess whether this might be the case.

Mr Ritchie: Exactly so, Chairman. One wants to avoid that sort of unseemly behaviour.

Q27 Chairman: Thank you for drawing that one to our attention. Do you have another one in this area?

Mr Marshall: We agree with that. Certainty is the important thing and you cannot really be certain about this category.

Q28 Chairman: There is a second point within this area.

Mr Marshall: It applies to 3(a) as well.

Mr Ritchie: Turning to within that area, the second point the Bar Council would like to make is that it is suggested not only that for an adult dependent widow or widower the fact of the re-marriage should reduce the damages but also that a child dependent should have his or her damages reduced by the fact of the re-marriage of the remaining spouse. Say, a high-earning mother is tortiously killed, the child dependent claims dependency but because the low-earning father has re-married the child dependent would have his or her damages reduced because the remaining spouse has remarried. We consider that is not the right way of dealing with damages for child dependents because we suggest the mother would want the damages that they are entitled to from that tortiously killed mother to care for them for the rest of their education, for the rest of their young life, rather than saying that should be taken away and transferred to the new partner of the remaining spouse. That is the thinking behind this clause: children dependents of a well-off, high-earning mother who is killed get reduced damages—in other words their dependency is taken away from the deceased loved one—as a result of their father remarrying.

Q29 Chairman: Is this irrespective of any resources that the father might acquire by the remarriage?

Mr Ritchie: If the father re-married somebody who was rich, the thinking is that new wife should be taking over the financial care of the children. Is that the right message you want to send across to the children who have a dependency claim for the mother that they loved who would have supported them and are then told by the courts, “Well, she may have supported you but you’re not getting the damages because your father’s new wife should be doing it”. I suggest that may not be what Parliament wants to achieve for child dependents. They should, I suggest, have the dependency on their deceased mother who they know would have cared for them.

Q30 Mrs James: I think the public find it very, very difficult to understand this fiscal dependency because obviously people tend to think emotionally and they talk about the loss of the mother and putting a price on that grief, or the loss of a spouse or a loved one, and I think the public find it very, very difficult that we cannot quantify that.

Mr Ritchie: Yes, but those that I have met in conference who are child claimants by the time they get to 12, 13 or 14 and understand they are recovering from the tort fees of the insurer the sums that their deceased mother or father would have provided to them as they were growing up by way of education, clothing and food, they do understand that is in effect the courts putting right what has been taken away from them. It would be odd then if the courts were to say, “You would have been entitled to that except your remaining parent has remarried so we won’t give it to you”.

Q31 Chairman: There is another complicated issue about what is referred to as “gratuitous care” provided by the defendant before the date of the trial which would be irrecoverable but it would allow the award of damages for the same care provided after the date of the trial. Given that insurers are likely to be paying the damages, is this not going to penalise deserving parties?

Mr Marshall: We do not understand why it does not apply to past care; it should be provided for the whole thing. It is the reversal of the case of *Hunt and Severs* and the fact that somebody is the wronged but is providing the care that should still be compensatable. I cannot understand why the past has been excluded.

Mr Ritchie: Can I give an example that may bring that to life?

Q32 Chairman: Yes, please do.

Mr Ritchie: Imagine there is a couple who have been married for 40 years; they are in their 70s and they are in a car together. The husband is driving and he falls asleep. As a result, there is a crash and his wife is very seriously injured. His responsibility is to care for his now injured wife and he does so. He is the tortfeasor but he cares for his now injured wife. It takes four years to get to court and at court what the court will say under this Bill is, “All the care that you have given to your wife over the last four years you cannot recover from the insurance company. All those hours that you’ve put in, you can’t recover. Your wife will live for one further year as a result of her brain injury and we will give you damages for caring for her for the next year.”

Q33 Chairman: If this case had come on two years earlier, he would only have had two years to pay for.

Mr Ritchie: Exactly. It is nonsense. The fact is that Parliament should be supporting families and their injured relatives; that should be encouraged, otherwise the taxpayer is going to have to pay and why should the taxpayer pay?

Q34 Chairman: I think we have covered quite a lot of the ground that we wanted to cover in that area, but there is a broader question about exemplary damages. Is the concept of exemplary damages important and is it sufficiently distinct in people’s minds from aggravated damages?

Mr Petts: The distinctions between the various aspects of the law of damages—the sort of standard compensatory damages, the aggravated damages and then the exemplary damages—are not always entirely clear. The standard position where someone has been injured in an accident or where someone has suffered a breach of contract is that they will get damages to compensate them to put them back in the position they should be. Then in two other circumstances they may be entitled to further damages, the first of those would be aggravated damages where the Law Commission says that the precise meaning and function was unclear but that the best view was that they were damages awarded as a tort as compensation for mental distress. In their response to the consultation paper the Government

phrased it quite neatly like this, that all aggravated damages are damages for mental distress but not all damages for mental distress are aggravated damages, giving the example of compensation for somebody's pain, suffering and loss of amenity which may include or be exclusively mental distress or compensation for a ruined holiday. That would be damages for mental distress but would not be aggravated damages. You then have the rare cases which have always been noted as anomalous or exemplary damages. The leading judgment in the 1960s by Lord Devlin said that they are anomalous because they confuse criminal and civil functions of the courts; they are money being paid over by punishment not as compensation and it is money as punishment being paid to an individual rather than to the state as would happen with a criminal fine. The categories for exemplary damages are quite limited; oppressive, arbitrary or unconstitutional actions by servants of government, people exercising governmental power (for example false imprisonment or malicious prosecutions where there is police misconduct), or a second example is wrongful conduct which has been calculated to make a profit in excess of compensation that was likely to be payable. An oft-given example there is illegal harassment of tenants. If you harass your tenants unlawfully and get them out of the house or the business so that you can re-let it to someone else but will not have to pay that much compensation, then in those circumstances exemplary damages can be paid to make sure the wrongdoer does not retain any of the benefits. The Law Commission recommended, back in 1997, some major reforms to the area. They said that nobody supported the present position and their consultees were more or less equally divided between abolition and extension; they fancied extension, the Government has decided to stick where we are, save with perhaps one tweak which is clause 9(1) of the Bill.

Q35 Chairman: Does that restrict exemplary damages?

Mr Petts: It removes the only clear category where exemplary damages is given by statute which is in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 with which I am sure the Committee is very familiar. It makes restrictions on enforcing money judgments against members of the Armed Forces without leave of the court. There are various exceptions such as county court judgments or orders for criminal cases or in some family and child maintenance cases. The situation would be this: if someone in the Armed Forces in the circumstances set out in the Act has a judgment enforced against them without the leave of the court, then the court can award exemplary damages rather than just damages by way of compensation. The Bar Council's view is that should remain. The proposal is to turn that from exemplary damages, ie punitive damages, to aggravated damages just to compensate for mental distress. It is easy to imagine situations where there is a profit element behind the enforcement of the judgment or the conduct towards

a member of the Armed Forces, and where punitive damages would have the appropriate deterrent effect as well.

Q36 Chairman: If I could stop you there. Presumably to the ordinary member of the public there is some purpose in all this if it actually leads either companies or individuals who make much bigger profit than the damages could possibly cost, it would be a disincentive to them to engage in such actions. In the case of state officers—you quoted that example earlier—potential for exemplary damages does at least mean, especially in those cases where it is unlikely that criminal prosecution will follow, that the abhorrence that people would have for the state misbehaving in this way is somehow expressed in the system.

Mr Petts: Yes, I gave the example before of police misconduct. Certainly there have been various cases over the years where the police have misbehaved quite severely in arresting, detaining and prosecuting people who should not have been brought before the courts at all, and then when the case eventually gets to court for compensation the victims are compensated for their lost earnings, for example, and for the time they have spent in prison, they are given aggravated damages for their mental distress and then on top of that they get the punitive damages to “teach the police a lesson”.

Q37 Chairman: That is exemplary damages.

Mr Petts: The Law Commission has said let us call them “punitive damages” and not “exemplary damages”. They are exemplary damages which have a punitive effect. The Law Commission said, “Let’s revisit the area”.

Mr Hudson: Does this not go to the very heart of the issue? Do we want the civil justice system to be dealing with punishment as opposed to restitution of loss? I think you made the point that the Commission was finely balanced. When we talk about the public understanding of these things it seems to me this is a rather complicated area of law. The debate that we have had here about what they should be called, are they punitive, are they exemplary, are we making an award for psychological damages that you suffer? 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, it seems to me.

Q38 Chairman: The Commission may have been split but it came down in favour of keeping exemplary damages in some form as a deterrent to wrong-doing and that was a valid aim of the civil justice system.

Mr Hudson: That is absolutely correct, although I think they made a number of points about how that should happen so that defendants should not be unreasonably prejudiced or unfairly prejudiced, that these would be damages awarded very exceptionally

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and very rarely and that the basis on which they were awarded need to be on a principle of rationality which would be assessed only by a judge and not a jury. They did come down in that way but they were probably, you might say, hedging around as to how that might be controlled because, it seems to me of this inherent difficulty: one should be in the criminal jurisdiction and one should be in the civil jurisdiction.

Q39 Dr Palmer: Given that most people are insured for third party liability and so on, is the deterrent effect of exemplary damages actually present to any very significant degree? Is this not, just testing the case, rather a tax on all insured people?

Mr Petts: I imagine it would depend on the facts of an individual insurance policy whether they chose to insure you against damages that you might have to pay either as a government or an agent of government for your oppressive, unreasonable and unconstitutional behaviour or for your profiteering behaviour.

Q40 Dr Palmer: You mean if you were a landlord and you habitually evicted people, then they might put up your insurance.

Mr Petts: It is difficult to imagine a landlord who would go out looking for insurance against having to pay punitive damages in case he turns out to be a habitual wrongful evictee of tenants.

Q41 Chairman: Sorry, I did not quite grasp what you were saying. Are you saying it is difficult to imagine a landlord being insured who is in the habit of trying to evict tenants, and there have of course been landlords like that?

Mr Petts: Yes. Whether a landlord could find a policy that would say, "We will also pay for exemplary damages that you are ordered to pay for your poor behaviour", I do not know if there are such policies on the market.

Q42 Chairman: I do not know. Do you want to say anything to us about copyright?

Mr Hudson: I imagine you are referring to the Patents Act and the rather anomalous position that we have there. It would seem to us it would be better to deal with that anomaly 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.

Mr Petts: 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. Again, I do not want to get too much into sidetracks but there are some concerns in the text books and in the court cases about whether the phrase "restitutionary damages" or phrases like that are, in fact,

appropriate. Whether it is a good idea for Parliament in two very limited areas to intervene it seems to the Bar Council questionable.

Q43 Chairman: Should we leave it to the courts?

Mr Petts: Yes, leave it to the courts. It is something that can be developed over time and, if necessary, looked at in a wider context rather than just three minor phrases in the entire area the Law Commission covered in 190-odd pages.

Q44 Chairman: There is mention in the Bill about interest rates and changes to the system; does it change it satisfactorily?

Mr Ritchie: Yes.

Q45 Chairman: You are happy with that.

Mr Ritchie: It just gives more power to the judges in the commercial field and other fields, if necessary, to make the interest compound and if they do not want to, they do not have to. It is a sensible tidying-up provision in the Bar Council's view.

Mr Hudson: I think we would go slightly further than that. I do not disagree with any of those points made on behalf of the Bar Council, but it seems to me implicit in what we have here we are still left with the need for a specific act to be taken to review the rate of interest. It has to be done annually rather than the unspecified period, but what about the opportunity to adopt a self-correcting mechanism? What if we were to say that the rate of interest will be a fixed premium over base rate? It would then be, if you like, self-correcting.

Q46 Chairman: Why do you think that is not being done?

Mr Hudson: I do not know is the frank answer. I cannot think of any reason why it should not be done frankly. As I say, I cannot see that that is any less onerous to all the various parties than the fact that we are now going to have the power to change and review annually.

Q47 Chairman: There are plenty of precedents for that, are there not?

Mr Hudson: Quite. If you think, for example, of the contract used for the buying and selling houses, that would include a similar clause to deal with compensating someone who is suffering because of a breach of contract by the other party. It is very widely used in commerce.

Q48 Chairman: Before I ask you if there are any other things which perhaps ought to be in the Bill, there is a curious question that has been suggested to us about intestacy which I think arises from something a judge said, the creation of a perverse incentive to murder somebody, which arises in the forfeiture rules when you get the death of a single parent under 18. Are you familiar with this problem?

Mr Hudson: Yes. I think there is a theoretical possibility that what is being said is correct. It seems to me for that theoretical possibility to have any degree of probability the murderer would have to have a very high level of knowledge about the rules

of intestacy and succession. It might be the likely future murderers are probably only barristers and solicitors. I think the probability of this, in our view, seems to be remote.

Mr Ritchie: Chairman, there was one further point on damages for bereavement. I perceive that the Committee has moved away from the Fatal Accidents Act; could I impose just for a second on that. There is a specific award for bereavement alongside dependency and in clause 5 of the Act the eligibility for the award for bereavement is broadened. Presently it is for spouses and parents, and the suggestion is to add eligibility for co-habs, two years, and also for children and we support that. However, we wanted to raise one point, if we may, about how the awards are given. The new provisions allocate a specific sum per child, so if there are two children, they will each get a specific sum, £5,800.

Q49 Chairman: Is that defined in the Bill as a sum of money?

Mr Ritchie: It says one half of the defined sum for bereavement. The defined sum for bereavement is £11,800 at the moment and so one half of that is somewhere near what I said—I have not got my calculator!—but the concern we have is that, although children will have a defined sum, however many they are, they will each get the same sum. That is good. Adults will not; they all have to share in the pot, so there will be an oddity here. If there are two adults (this is dealt with in the new clause 3(b); clause 5(vi) of the Bill) where there is a claim for damages under this section for the benefit of a person within subsection 2(a)—that is a spouse—and a claim for damages under this section for the benefit of a person within sub-section 2(a)(a)—that is a co-habitee—so spouse and co-habitee are left to divide it equally.

Q50 Chairman: What should the Act say?

Mr Ritchie: We suggest there should be a specified sum for each adult eligible claimant and a specified sum for each child eligible claimant, then you do not get unseemly squabbles over a pot of which people are getting a share. In the same way that the Act says that a child will get one half of the specified sum we would suggest that an adult—any eligible adult—should get a specified sum.

Mr Marshall: Apart from agreeing to that, I am also not quite sure why one half of the specified sum is for minor children. The Government has already limited this to minor children as opposed to all children.

Q51 Chairman: Under 18.

Mr Marshall: Yes, under 18, but they only get half the amount. 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.

Q52 Chairman: As opposed to?

Mr Marshall: The full amount as for a spouse, for example.

Q53 Chairman: Are we talking about a pot?

Mr Marshall: No.

Q54 Chairman: The court can award whatever damages the aggregation of several children's entitlement would amount to.

Mr Marshall: It can under these provisions; there is no limit for children but there is for adults.

Mr Ritchie: There is a pot under the present system. If we can dig into the principle, we suggest that the principle behind bereavement damages is that if there was a close tie of love and affection and, as a result, it is obvious there is going to be grief and bereavement from a tortious accident, then Parliament has put a sum of money on that. It can never be properly assessed on how high or how low grief is, but there is a stamped sum put on it and as a result we suggest that Parliament should put a stamped sum on every adult who suffers the bereavement within the eligible category and every child, rather than a squabble over a sum.

Q55 Chairman: There are all sorts of people who are not included, are there not, like step-parents?

Mr Ritchie: There are, yes. It is interesting that the gates of eligibility for the bereavement sum are really everyone who is in your house—your spouse or your children—whereas the gates of eligibility for dependency are everyone that the deceased has been supporting financially, so that can be people outside the house.

Q56 Chairman: There is a logic to that, is there not?

Mr Ritchie: There is a logic to it and you can see that what Parliament has said is that everyone in the house—children and spouses—will be so bereaved, they will get the stamped sum, but we will not allow it for those outside.

Q57 Chairman: Are there any other issues about the entitlement of children?

Mr Ritchie: The Bar Council also has an issue about the age limit of 18. I have in conference had a widow with two children, one of which is 17 and one of which is 19, and the father has died in a road traffic accident how can you say to the 17-year-old, "You will be getting the bereavement award for the death of your father caused tortiously", and to the 19-year-old, "You will not; Parliament has so decided". It is a rather odious way of doing it. The broader principle would be that children are assumed to grieve if their parents die and so they get a bereavement award. I would suggest that adult children whose parents die grieve as much, if not more—or less, depending on the circumstances—than a child under 18, so one wonders why there is an age cut-off. One assumes it is as a result of the parent/child relationship that the grief is generated by a tortious accident, but why is there not just an award stamped on that? The Bar Council's position was that it should 21 or 25 rather than 18 so that you do not have two children sitting in the conference room and you say to one, "You get an award", and to the other, "You don't".

Q58 Dr Palmer: Whatever level you set it at there will be a borderline.

Mr Ritchie: One wonders why there should be a cut-off if what we are doing is giving a statutory award for recognised grief for the death of a child or parent. You do not stop loving just because you are over 19, 21 or 25. The Bar Council's position is that it should be older than 18 and we suggest 21 or 25 as a compromise.

Mr Hudson: I think that last point is very persuasive. From the Law Society point of view, we agree on this. We do not see the point in setting an age; a child is a child whether a minor or an adult child as it were.

Q59 Dr Palmer: So if I am 70 and my 90 year old father dies I would still be entitled to a bereavement allowance.

Mr Ritchie: Yes. Love does not die at 18, nor does it die at 25.

Q60 Chairman: What we are talking about is not some sort of state benefit; we are talking about the person or body responsible for the accident providing compensation to those who have suffered in some way.

Mr Ritchie: It is a stamp for the break of the ties of love which leads to grief and bereavement. It is not going to be a large sum but it is not going to be a *de minimis* sum and so Parliament has decided it is somewhere around 5,000 to 10,000.

Q61 Chairman: Is there anything else significant that we ought to report to the House as requiring careful consideration in the clauses of the Bill that you feel we have not referred to?

Mr Evans: We have not mentioned distribution of estate yet. Just reverting to the points made earlier, there was the suggestion it is an incentive to murder. Looking at it in context, in the bad old days a felon, including a murderer, would forfeit all his property to the crown and, therefore, that would exclude the children from a right to inheritance. This is a point that was taken up by Sir Stephen Sedley in the *DWS* case. There is something to be said for the idea that where a forfeiture occurs the distribution of the forfeited property should be a matter for the state and would be dealt with by way of *bona vacantia* which is a traditional way of sorting out difficulties, not of this kind of course but in other circumstances where there is no right to inheritance at all in anybody but there are deserving close associates of the deceased.

Q62 Chairman: That is an *ad hoc* decision by a court, is it?

Mr Evans: No, it is an *ad hoc* decision by an officer of the state, by the Ministry of Justice in fact who have a special department called the *Bona Vacantia* Department, a rarefied section.

Q63 Chairman: That is a corner of the Ministry of Justice we have not yet explored.

Mr Evans: If you are ever troubled to read the *DWS* case, which is the basis really of the forfeiture provisions which were in the Draft Bill, in that case

you will recall a son murdered the parents who both died intestate and because the son was still alive the children of the son could not inherit the property which the son would otherwise have inherited. The question then was who did in fact inherit it? The Court of Appeal was split 2:1. Sir Stephen Sedley came to the view on the basis of the Act as then drafted that it went *bona vacantia* and then the Government could sort out the mess. There is something to be said for that because that was the law until relatively recent times. I only put that in as a policy matter. What the Law Commission has done and what the general consensus of what ought to be done is to change the rules, so that where there is a forfeiture then you pretend that the offender died immediately before the death of the deceased.

Q64 Chairman: Therefore they cannot inherit.

Mr Evans: Therefore he cannot inherit. The forfeiture rules come in as a judge-made law and it is simply the rule that an offender cannot profit from his offence, at any rate in the case of a homicide. It extends much wider than merely inheriting under an estate, it includes also insurance. All that the law was concerned to do was to ensure that the offender did not profit from the offence, not to punish anyone else. Whether that is the right way of dealing with it is a policy matter, but assuming the right way of dealing with it is now to say that we can improve the position for those who would inherit—the children of the offender—by introducing this fiction that the offender died immediately before the victim of the murder. The trouble with that is that it is a rather myopic view of the circumstances of the case. It pretty much assumes that what we are dealing with is parents who were murdered by a child who himself or herself has grandchildren, but there is a variety of circumstances in which the situation might arise. You might well have the situation where one child of three murders the parents but has no children himself and is not married.

Q65 Chairman: One child out of three children.

Mr Evans: One out of three children murders the parents. He might even do so by way of some form of conspiracy.

Q66 Chairman: This is getting more and more like an Agatha Christie novel.

Mr Evans: There is an infinite variety. Of course we are dealing with a relatively rare situation.

Q67 Chairman: What are we trying to establish, that the law is being changed in such a way that the children of the offender no longer have an opportunity to inherit or the other way round?

Mr Evans: The other way round. What I am saying is that the way in which the draughtsman has approached it is to assume that what we are dealing with is a situation where the offender has children who would otherwise lose out. In fact, that is not necessarily going to be the situation and the particular words which cause a problem there come up twice, particularly in 15(3), the assumption in sub-paragraph two: "The Court (whether or not on

its own initiative) may appoint a public trustee or such other persons a public trustee may recommend, to hold during the infant's minority ---" I am so sorry, I have gone to the wrong place; above that in sub-section one: "This section applies where" (and then there is reference to the offender forfeiting) and "(b) as a result of section 46A(2), an infant who is a child or remoter descendant of the offender becomes entitled to an interest in the estate". 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.

Q68 Chairman: Would the general interest be better served if the law were not changed?

Mr Evans: I am in two views about that. On the whole I do not think it makes a great deal of difference. That is probably not fair; in the few cases where the situation has arisen where I have been personally involved they have involved an infant not taking an estate, which my own personal gut reaction was they should have taken. The last one I did was 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, as it happened. Of course because she did not die before the lady she had murdered the grand-daughter did not take and that was an unfortunate result. So maybe this is the right way of dealing with it, although the same result could equally well have been achieved if it had all gone over as *bona vacantia*. The other problem I have with the whole section is that the Bar Council does not like the introduction of the safeguards in 46(b) and 33(a) at all in any event. They are in an unnecessary restrictive form but assuming the restrictions are taken out—which they can easily be as a matter of drafting—they seem to the Bar Council to be completely unnecessary safeguards. They are only introduced to protect the interests of an infant and the infant is already protected under the provisions that exist in section 114(2) and section 116 of the Senior Courts Act which provide that where an infant has an interest in an estate then the grant of representation to the estate must go to two people, to a trust corporation unless there are special circumstances and also provide that where there are suitable circumstances the court may appoint anyone at all to be the personal representative of the deceased in place of the person who might otherwise have the title. A typical example would be where a husband murders a wife who has made a will in his favour. He would be the person entitled to probate but in those circumstances it is quite obvious that application would be made for some other person to be appointed as personal representative of the deceased in place of the offender.

Q69 Chairman: You are saying it is unnecessary.

Mr Evans: It is wholly unnecessary, plus it does so in a way which gives to the court a very wide hub to create trusts affecting the interests of the infant which are not already there and to do so in relation

to property wider than the extent of the infant's property because the trust which the court may specify are trusts relating to any property to which the infant's interest relates. Typically, if the infant gets half the house and the other half of the house belongs to the offender, we would end up with a situation whereby the court is entitled to expropriate property from the offender—or expropriate the legal title to it at any rate—and take control of the offender's property. It is certainly not explained in the notes to the Bill that there is actually an expropriatory power there in the court which is being introduced which I cannot see can properly be justified.

Mr Hudson: Chairman, you put to us a question about whether there were any general issues you might draw to the attention of colleagues in Committee. From the Law Society's point of view there is one in particular that we would ask you to consider doing precisely that. That is since the proposals in relation to distribution of estate will potentially have effect on 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—and we would intend to comment on this in our formal response to consultation—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. There is clearly some complexity which is why I think we need to respond to you outside this hearing through the written submissions, but we would need to think very carefully about doing anything that would inadvertently de-stabilise that bank of wills that the population has prepared and written. It strikes us that that is a very important point that needs to be borne in mind when the Bill passes through committee.

Q70 Chairman: Thank you for drawing that to our attention. Is there any area which this Bill ought to have covered which it has failed to cover?

Mr Ritchie: It could have popped in the pleural plaques problem.

Q71 Chairman: It is a next session Bill. It is a Draft Bill at this stage but if the Government has not sorted out the pleural plaques by then, it could do so in the next session. Is it an England and Wales Bill? There has been a court judgment on pleural plaques in Scotland in the last week or so.

Mr Ritchie: Yes, I think they have solved the problem up there.

Q72 Chairman: My personal hope is that problem is solved before this Bill even gets through, but if it is not I am sure amendments will be tabled to that effect.

Mr Ritchie: Thank you.

Chairman: Thank you very much indeed. If, afterwards, it occurs to you that there is something you wish you had mentioned to us, do not hesitate to get in touch at that stage. We are very grateful for your help and depth of knowledge in these matters.

Tuesday 26 January 2010

Members present

Sir Alan Beith, in the Chair

Alun Michael
Julie Morgan
Mrs Linda Riordan

Mr Andrew Turner
Dr Alan Whitehead

Witnesses: **Professor Hugh Beale**, Former Law Commissioner, Professor of Law, Warwick University; and **Professor Andrew Burrows**, Former Law Commissioner, Norton Rose Professor of Commercial Law, Oxford University, gave evidence.

Q73 Chairman: Welcome, Professor Beale and Professor Burrows. Both of you, as I understand it, were members of the Law Commission at relevant times when the bits you know most about were being considered, and we are very glad to have you because these are complex matters which do affect our constituents in very difficult circumstances, plainly if they happen to suffer a very serious accident, and involve sometimes quite intrusive issues about relationships. Therefore, we are very anxious to tease out some of these issues, not least so that when both Houses of Parliament come to look at the final legislation some of them can have been resolved and others will be well understood, because they are probably issues on which members want to take a view. The Law Commission recommended that the new category of claimant should cover “any person . . . 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”. The reading of the draft Bill is slightly different: “Any person . . . who was being maintained by the deceased immediately before the death.” What difference would that make?

Professor Burrows: Can I just explain, Chairman, that the idea of this particular provision was to stop the continual adding on to the list of those people. In other words, one had got to the point where we thought we should do this as a matter of principle. The idea is to try and cover all those who suffer dependency loss; that is the idea behind it. I think the difference in terms of “or who would have been maintained, but for the death” would produce some anomalies, because it is not quite the principled solution that we ourselves would have wanted. For example, it would not cover the situation where you have got a cohabitant who does not satisfy the two-year rule, so does not fall within the existing list, but who would, for example, have been going to give up their job to have a child and would then have been maintained by the deceased. That would not be covered by the present formulation but would have been covered by our formulation.

Q74 Chairman: Is that in a case where there was an established pregnancy—

Professor Burrows: It could well be.

Q75 Chairman: —or simply a hope for the future?

Professor Burrows: It would be a situation where you have got an established pregnancy. You would have to always establish, in this area of the law, that you

have suffered the loss—that is taken as read. The question is who is able to claim, and that would be one situation that would not be covered by the present drafting. It also would not cover the dependency loss of a child *en ventre de sa mère* who is not the deceased’s child but would have been supported by the deceased while he was in a marriage-like relationship with the parent. These are just two examples I have thought of. You are going to get anomalies on the margins if you do not quite follow the principled approach, and I think the principled approach is as we set it out.

Q76 Dr Whitehead: The Bar Council suggested to us some clarifications on the definition of the word “person”. They were concerned that that might be necessary in order to prevent bodies such as cats’ homes claiming that they were dependent. Is that something that needs clarity?

Professor Burrows: Yes, that is a correct criticism. It was never intended to include non-human persons as claimants, and there is a standard legal way of doing that. You use the word “individual” instead of “person”. That is the standard legal way of ensuring that one is talking about human claimants here and not bodies. The cats’ home point, in my view, should have been covered and I think it is very easy to do so.

Q77 Dr Whitehead: Another thing the Bar Council expressed concern to us about was the wording of the new category of people who could claim dependency damages concerned the idea of the person being dependent on the deceased immediately before the death. They pointed out that, of course, a number of such deaths arise when people have been in hospital for considerable periods before death and, therefore, maybe the definition should be changed to “before the accident”, or “before the relevant accident”, as opposed to the death itself, ie, the stay in hospital is associated with death but it is not the death itself.

Professor Burrows: Yes. I think that is likely to be covered if you went so far as to say, as we did, “or would have been maintained, but for the death”, but, I think, to be absolutely clear, you are talking about someone who is injured and is not realistically, on the scenario, ever going to satisfy the idea that they would have maintained the dependent but for the death. 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". It is a minor point, but I think that would be a correct amendment, in my view.

Q78 Julie Morgan: The Law Commission proposed that the court would consider the fact of an engagement when assessing damages, but the Government has rejected that view because it believed it would lead to unnecessary intrusion into the bereaved's personal life. Do you agree with what the Government is saying?

Professor Burrows: It comes in at various stages. There are actually two separate clauses that, I think, one needs to be looking at. In relation to the proposed clause (2), what one is there dealing with is the effect of remarriage of the dependant. The present law is in section 3(3) of the Fatal Accidents Act, which says that, basically, one has to ignore the remarriage of a widow, or the prospects of remarriage, when awarding damages to the widow, and that is principally what the new clause (2) is designed to reform. In relation to that, I think that the present clause is more or less satisfactory, but there is one major point that I think has been overlooked, unless I have misunderstood or missed something, and that is that a clause seems to have gone missing. There does not seem to be anything—and this would reflect the policy, I should say, that the Government has intended to put forward—about the prospects of remarriage being ignored by the court, which was part of the purpose. In other words, the clause that we had proposed, which was our draft clause (3A)(4), seems to have gone missing entirely. It was in the context of that clause that the engagement issue came up. What we were suggesting was that you ignore the prospects of remarriage unless you have got somebody who is already engaged, because then you have got some sort of objective evidence. I concede that that is perhaps a marginal point, but I think the important point is one has to have that clause in the Bill. It will not work properly without that clause. You are asking me a question about a missing clause actually, the engagement question, in relation to this issue. It also comes up later, I think, in relation to the question of bereavement damages. In terms of the loss of dependency damages, I do not think it is too significant, but I think you have to have this clause that tells the court you cannot take account of the prospects of remarriage, and that just is not there.

Q79 Julie Morgan: A financially supportive cohabitation of more than two years is defined as existing when, at the time when the action is brought, A lives with another person, B, as B's husband or wife or civil partner. Does this formulation mean insurance companies are likely to resort to private detectives or pursue very intrusive cross-examination?

Professor Burrows: This provision—I think we are talking about now clauses (3) and (4)—is dealing with the issue of the prospect that the relationship between the dependant and the deceased would have broken down, and the question is what one does about that particular issue. Our basic policy, which

the Government has accepted—it is very similar to our own—is that that should be ignored, because of intrusive enquiries, except where you have got some sort of clear objective evidence of the breakdown. That is what clauses (3) and (4) are designed to do. I do not think there is the problem of intrusion. That was the precise fear that one had, which is why one came out with proposals that, basically, you ignore all that, precisely for the sort of intrusion that one is concerned with, except where you have got some sufficiently clear, objective evidence that, for example, someone is petitioning for divorce, or petitioning for separation, or has actually separated.

Q80 Chairman: Does this situation arise if the case has dragged on for three years, perhaps on matters unconnected with this particular aspect, and cohabitation has developed in the latter two years of those three? Is that engaged by this clause or not?

Professor Burrows: You are back on clause (2) in a situation where you have a dependant who has now entered into another relationship, and the question is whether that should be taken into account. Can I check what the actual wording of that would be? Yes, in that situation you would take that into account, and one might say, why not? You have a clear indication that that relationship has now occurred and, of course, the important issue is not the relationship, it is the maintenance within the relationship. Otherwise one ends up with situations—the classic dilemma that we were looking at here—where somebody is widowed, she then remarries the billionaire and you have to ignore that. She is still entitled, under the law today, to exactly the same dependency loss. You are not allowed to take account of her remarriage to the billionaire.

Q81 Chairman: Conversely, if she builds up a relationship a year after the accident with someone who, although not a billionaire, might be capable of supporting her, the insurance company is going to start looking around and saying, "Are these people cohabiting, in which case we are not liable for damages."

Professor Burrows: I think that what has been laid down here is that there must have been a relationship for two years, and in relation to that it may well be correct that the insurance company would want to make that point, but a relationship together for two years seems to me a fairly objectively provable point. One already has that in the very list of cohabitants as it is.

Q82 Mr Turner: I am sorry to throw myself in a bit late to this, but if you have a man and a woman and the man lives at home and is ill, and so on, and the woman works, say, up here, and only goes down to her home about once a week, but what we do not know is that she has got somebody up here, do we assume that because there is no evidence it is not happening?

Professor Burrows: No, this goes back to normal standards of proof within the law. The general standard of proof in civil matters is on the balance of

probabilities, so one would be talking about proving those matters in the normal way, but this goes on, in any event, within the present law. One has to look at what the loss has been and what you might call, if I might put it in what might sound a rather crude way, the benefits financially of death. One should not ignore it if someone has now entered into a fully financially supportive relationship, one should not as a matter of principle ignore that, unless one thinks it is entering into encouraging intrusive enquiries, and I do not think this does do that.

Q83 Chairman: Does the Bill require further guidance for judges on assessing the impact of a new parental relationship on a child's dependency damages, given that the child has no right to legal support from the new partner?

Professor Burrows: I am not quite sure what is meant by that question. I do not think there would be any difficulty for the judges. In these sorts of issues the judges often have to make, under the existing law, decisions about what the child has lost in the light of all the evidence, and that will depend on who had parental obligations, and so on. I do not see anything in these provisions that would increase any difficulty on this over and above the present law.

Q84 Chairman: The difficulty arises, does it not, in a case where a child, perhaps a child entering the teenage years, is not comfortable with the new relationship and is not certain as to their position, has no particular legal protection in terms of parental support from the new partner and, at that very point, an insurance company is arguing in front of a judge that this new relationship relieves the damages obligation so far as that child is concerned. It is quite a worrying situation, is it not?

Professor Burrows: We have got a situation, as you are positing it, where the child is the child of the deceased, so they are within the list. The question then is what is going to be the effect of a new relationship of, let us say, the mother and the impact on the child?

Q85 Chairman: Yes.

Professor Burrows: That is already the present law. The Bar Council, I think, made the point that one might want to take out child dependants, but the present law is that the court takes all the facts into account except for this peculiar provision, section 3(3), whereby you are not allowed to take account in a widow's compensation her remarriage or prospects of remarriage. Everything else is open to the normal standard of proof and all the evidence. The idea that somehow child dependants should be taken out from these provisions: you would have to change a lot of the existing law to do that. It is already going on. The Bar Council, it seems to me, made a point that this would be prejudicing child dependants, but that is already the legal position and, I think, quite rightly so. The court has to look at all the evidence, and I do not see any reason why that sort of evidence should not be something for them to look at.

Q86 Chairman: Would you say that judges tend to have regard to the uncertain legal position of a child in those circumstances?

Professor Burrows: Yes.

Q87 Chairman: That is to say, uncertain as to how reliable future support is?

Professor Burrows: Absolutely.

Q88 Chairman: Or, indeed, future ability to live in the home with a new partnership?

Professor Burrows: Yes, they have to judge the probabilities of support. It is not just the relationship, it is the likelihoods of maintenance involved. This is something they have to weigh up all the time.

Mrs Riordan: The Government has adopted a much more restrictive approach than that recommended by the Law Commission. Does this stem from a different conception of the reason for bereavement damages, or is there another reason for it?

Q89 Chairman: I should have said that we are moving on to bereavement.

Professor Burrows: This is clause (5). It is true that these matters are very difficult. Everything is involving a balance between seeking to reflect an award for grief—and we are now talking about non financial loss; it is a bereavement damage sum; it is not the dependency loss—and not opening up too many claimants. That is the balancing act that one has to achieve here. The Government has not gone as far as we proposed. They have stopped with parents of deceased children under 18, and they have, similarly, only allowed children under 18 of those who are deceased. We ourselves would have gone considerably further. I think we thought the really controversial extension would be to siblings, brothers and sisters. We ultimately went that way in the light of what consultees told us, but I think we thought, at the very least, one ought to go to parents of deceased children, whatever the age of the child, and vice versa: we thought that children should be able to recover for the decease of their parents whatever their age. If you have got a deceased who is aged 30 we thought his 50-year-old parents should be entitled to bereavement damages. Similarly, if the deceased was aged 50, we thought that the 30-year-old child should be entitled to bereavement damages. We are, after all, talking about a wrongful death here.

Q90 Mrs Riordan: There are advantages and disadvantages of using an age threshold to limit the eligibility?

Professor Burrows: Yes. Clearly you have then got an issue about quantum. How much are you going to award? The merit of what the Government have decided is that you have got fairly standard sums. You would end up with nobody getting more than £5,900, although you may get several of them actually getting that if you have got multiple children. They would each get, as you can see, half the amount, £5,900. The proposal we put forward to stop too much being awarded was an overall cap,

which we fixed at three times the award. At the time it was £10,000, so the cap was £30,000, and then, however many claims you got would divide equally the £30,000, if you have got more than three. Up to three they would each have got the full amount of £10,000. Thereafter, you would give them an equal sum of £30,000. If you were minded to suggest extending the list to all parents and all children, I would suggest to you that that would be a perfectly sensible way of dealing with the quantum problem.

Q91 Mrs Riordan: It did seem rather unfair that if you had just gone 19 years old you would get nothing.

Professor Burrows: Absolutely. Whenever you draw these lines you are going to run into people who come along and say, “I am 18 and a day”, or, if you fix it at 25, again, obviously, anybody who is just over that would be cut out.

Q92 Mrs Riordan: Of course children of the deceased who are under 18, as you said, at the time of the death would be eligible for half the sum of the spouse or partner. It is sort of putting a lower price on the grief of minor children when compared to a spouse.

Professor Burrows: Exactly. If I might put it this way: an advantage of the proposal we had is that you would avoid that because everybody in one single wrongful death would all get the same amount. It might be that if you had six claimants all of them would be getting less than in another wrongful death where there were two claimants, but in relation to that one wrongful death each of those people you are compensating would be getting the same, and that seemed to us to be a good compromise.

Q93 Chairman: Why did it seem important to you to cap the liability of the insurance company rather than to meet the legitimate needs and demands of the categories of people you have just described?

Professor Burrows: I think this is always a balance in terms of how much do you really wish society to pay for these sorts of sums. They are, in a way, token sums, because they are trying to reflect the upset and grief, primarily, in relation to a wrongful death, but I think we were persuaded that to have very large sums being paid in relation to this was something that the insurers would legitimately feel was unacceptable.

Q94 Mrs Riordan: Step-parents are not eligible for bereavement damages in the draft Bill. What are the evidential issues with step-parents—I am a step-parent—that are just as involved with the step-children as birth parents? Is there a satisfactory test that could be applied so that they could become eligible, where appropriate?

Professor Burrows: We ourselves did not go as far as ultimately including step-parents. I think people use the term “step-parent” these days often to mean more than one category. There is one I would class as the strict category, where you are actually marrying the parent of the child, but there are also people who use the label step-parent in a situation where you have set up a relationship with the parent

of the child but without any marriage. You could say that there is an easy way of defining the first of those, and I do not think there would be any difficulty, the law has done it before, to include that strict definition of step-parent. The question then is whether one wants to do that without including the other category, and then, I think, that does open up slightly more difficult problems.

Chairman: Let us move on to have a look at gratuitous care following personal injury or fatal accidents. Dr Whitehead?

Q95 Dr Whitehead: I would like to ask questions about gratuitous care where it is provided by the defendant. Where it is provided by the defendant before the date of the trial, the draft Bill makes that gratuitous care irrecoverable but then does allow the award of damages for the same care if it is provided after the date of the trial. Given that it is extremely likely that the damages will be paid out by insurers rather than individuals, is that not likely to penalise potentially deserving parties?

Professor Burrows: Yes, it is. In my view this is completely contrary to what we ourselves proposed. I cannot understand what has actually happened in relation to this. Our proposal was that you should have no legal obligation in relation to future care because of the uncertainties of the future;—and we thought it very important to overrule the decision of *Hunt v Severs*, where no damages were awarded where the carer was the defendant, for precisely the reason you have given, and others, and that the overwhelming majority of our consultees supported it.

Q96 Chairman: Can you remind us of the case again?

Professor Burrows: *Hunt v Severs* was a case where the defendant was negligently driving a motorbike. His then girlfriend was on the bike and she ended up, as a result of his negligence, being rendered paraplegic. He then cared for her for a very considerable time and married her. No damages were awarded in respect of his care, as they would normally have been, because he was the defendant. The logic of the common law position is that you should not be awarded damages which one has to then in a sense be paying back to the same party, but our argument in the report was that you do have to override the logic, because that is the correct policy. It is not fair that somebody in that situation is deprived of damages. It has all sorts of unpleasant consequences and, as has just been said, these people are insured in any event. Our proposal was that you should award damages where the carer is the tortfeasor and, I have to say, I just do not understand clause 7(4) which completely reversed that. I do not understand 7(2)(b)—this business about imposing a legal obligation for the future which, I think, would produce problems. For example, if at trial the claimant is awarded, let us say, £10,000 for future care and the assumption would be that that is going to be carried out gratuitously, but then things change and, in fact, the care is carried out commercially so that the claimant spends the £10,000 on commercial care; according to this, they would still be bound to

legally pay the gratuitous carer the £10,000 that they are bound to pay across, and that cannot be right. In my view, they are putting the interests of the carer above the interests of the claimant. If I might put it this way, I would strongly urge you in relation to clause 7 to delete 7(2)(b) and to delete 7(4), and that would, more or less, achieve exactly what our proposal was, which the overwhelming majority of our consultees supported. I just do not know what has gone on with this clause, I am afraid.

Q97 Dr Whitehead: What about where someone turns out to be only minimally negligent, say, 10% or 15% negligence is determined? How might that affect a blanket ban on paying for gratuitous care by a defendant? Should there not be an element of discretion?

Professor Burrows: Exactly. If you keep this as it is, you run into that sort of precise problem. That was one of the reasons why we recommended the reversal of *Hunt v Severs*.

Q98 Dr Whitehead: You have mentioned the question of uncertainties about the future as far as future gratuitous care is concerned. The Government has not accepted the Law Commission's recommendation. I was going to ask you what are the pros and cons of that, but I suspect you have rather more cons than pros in your view?

Professor Burrows: Yes, I have to say, I do not understand what has happened in relation to this particular clause. As I say, it diametrically reverses our proposals, which were supported by an overwhelming majority of consultees.

Q99 Dr Whitehead: You do not see there is a line of argument which might support it?

Professor Burrows: No.

Q100 Dr Whitehead: That on balance it is not acceptable.

Professor Burrows: No, the Government has accepted the marginal point that one should only have a personal legal obligation rather than a trust operating in situations where a gratuitous carer is not the defendant, and that we agreed with—so it is a personal obligation to account in clause 7(2)—but the really important point of our reform was to reverse *Hunt v Severs* and to make the point about in the future not having a legal obligation, and both those crucial points have been reversed, for some reason, in this clause.

Chairman: We will explore that further. Can we turn now to aggravated damages, exemplary damages and additional damages.

Q101 Alun Michael: Are there difficulties in making a company eligible for aggravated damages when they are usually awarded for mental distress?

Professor Burrows: Yes, there are. As I understand it, that was part of the reason for clause 9(3). I have to say, this is the other clause where I have considerable misgivings about what is being proposed. As you may be aware, the Law Commission recommended that exemplary or punitive damages should be

retained, and we put forward a scheme, in essence, to rationalise the law in relation to that. We also said the phrase “aggravated damages”, where possible, should not be used because of the uncertainty about what exactly is meant by it. The general understanding of the law is aggravated damages are compensating for mental distress in a situation where the defendant has acted in a particularly reprehensible manner. It sort of merges this bad behaviour with mental distress, and that leads to the problem: can a company suffer mental distress? What has happened here is that the Government—and of course, it is entirely within their prerogative to do so—have rejected the idea of exemplary or punitive damages, and they have, therefore suggested, in 9(1), this clause to replace the only reference in the present statute book to “exemplary damages” by “aggravated damages”, and then they have also sought to deal with the unusual concept of additional damages in the Copyright Designs and Patents Act by substituting the word “additional damages” by “aggravated or such amount by way of restitution”. The difficulties with that are these. First of all, there are other provisions of the Copyright, Designs and Patents Act not mentioned here that have exactly the same reference to additional damages, so there is an omission in terms of the coverage. Section 191J(2) and 229(3) are in identical terms to section 97(2). If you are going to do this, you have obviously got to do it for the identical clauses. The problem about a company not being able to recover is here solved, but you would solve it in this isolated pocket. There are lots of examples in the law where aggravated damages are awarded, but you would just be solving this in the context of one area of aggravated damages.

Q102 Alun Michael: Can we unpick that a little bit? You say if you deal with it in one place, you have to deal with in others. What would be the consequences if you do not?

Professor Burrows: My personal view is that it would be better not to actually deal with this at all. I am sorry; I may have misunderstood your question.

Q103 Alun Michael: I understand that, but you said there are inconsistencies because if you apply it in one place you have to apply it in others. What are the consequences if you do not; in other words if you proceed on that course?

Professor Burrows: You carry on with aggravated damages not being available except to human persons, except for this one rather odd pocket where Parliament has suddenly said, “You can here.” I should also indicate that the main case that laid that down, which was a case called *Collins Stewart v Financial Times*, was not a copyright case, it was a libel case, and the judge there said you cannot have aggravated damages in favour of this particular claimant because it is a company. You would still leave that. You just, for some reason, have changed this within this one area of copyright law.

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Q104 Alun Michael: I have got the point that you do not like it. I am just trying to tease out the implications. If it did go ahead in this way, what would be the test for mental distress in relation to a company?

Professor Burrows: I think you would have to start thinking of the officers of the company actually experiencing that sort of distress. You could do that; there have been arguments, if I might put it this way, in general common law cases about whether this is a sensible restriction anyway. After all, a company is only a representation of individuals, so you take the leaders of the company and then think about their aggravation and upset, and so on, on behalf of the company.

Q105 Alun Michael: So you would personalise it rather than dealing with the institution?

Professor Burrows: I think that would be one way of conceptualising it, yes.

Q106 Alun Michael: Obviously there are arguments for widening and restricting the availability of exemplary damages?

Professor Burrows: Yes.

Q107 Alun Michael: What do you see as the argument in relation to this particular piece of legislation?

Professor Burrows: All it has done here is to simply remove one very minor example of exemplary damages, which is in this obscure section 13(2) of the Reserve and Auxiliary Forces Act. It is not an Act that, I think, many people will be familiar with. It is a situation where somebody is called up to serve in the Armed Forces and it tries to protect their civil interests while they are away, and there are restrictions about the sort of remedies that can be used in that situation. If you go ahead without the leave of the court, you will be contravening that particular Act, and it happens to say “and if you do, exemplary damages may be available”. It is the only example on the statute book, as opposed to the common law, where that phrase is used, so there is a sort of neatness, if you take the Government’s view, of getting rid of that. Of course you have got to take the Government view that it is a good idea to get rid of exemplary damages before you think that is a good idea. As I have already indicated, although I perfectly understand why the Government rejected our proposals, my personal view is exemplary damages should stay.

Q108 Alun Michael: Looking at the language, the substitution of “additional damages” with a provision for “aggravated damages and such amount by way of restitution”, does that clarify the awards of damages in breach of copyright cases or not?

Professor Burrows: I do not think it does. We have had this debate about what is meant by “additional damages”. “Aggravated damages”—you could say people will know what is now meant by that; whether it is really needed, I think, is another question. “. . . such amount by way of restitution”—

that can already be awarded in all copyright cases through a remedy called the account of profits, so I really do not know what that would be adding.

Q109 Alun Michael: This would not add anything?

Professor Burrows: I do not think so. Nobody knows what is meant by “additional damages”. It seems to me that one way forward is just to delete them. I do not think much would be lost. I am not an IP lawyer, I hasten to add, so I cannot speak generally. There may be IP lawyers around who think that they are serving a really useful purpose, whatever that might be.

Q110 Alun Michael: But you are not aware of a case having been made certainly such as would persuade you?

Professor Burrows: Correct.

Q111 Alun Michael: I do not want to stray into talking about unknown unknowns, but can you see any unintended consequences arising from this formulation?

Professor Burrows: I fear that if the business about making clear in this pocket of the law that aggravated damages are available even if the person claiming is a company, there could be unintended consequences, because the common law might then take the view that, indisputably, they cannot be awarded in other cases to companies, and that, I think, could be an issue that the common law might develop on.

Q112 Alun Michael: How big a risk is that? I am honestly not sure of the extent to which companies would make claims in those other areas of the law. Is that a general and serious issue?

Professor Burrows: As I say, this has arisen from a case in libel where clearly the judge, I think, thought that it should have been possible to award.

Q113 Alun Michael: So it would exclude that sort of case, you mean, if it is not explicit in the law?

Professor Burrows: There is always a danger, it seems to me, in reforming a very small pocket when you have got around it similar or identical issues, because you are not sure what the impact of that might be on those other areas. I have to say, I think this is ultimately not a major likely problem. The bigger problem for me is that I do not think this improves the law at the moment, because I do not think additional damages serve much purpose and I think to talk about aggravated damages is likely to cause more confusion.

Q114 Chairman: We have some time pressures because of votes that may happen this afternoon. I want to turn to inheritance, which may well incite Professor Beale’s involvement. It is a well-known rule that the killer cannot benefit from his or her crime, and the Law Commission proposed that this should be given effect in a rather different way to previously by creating a presumption that the killer died before he killed the person from whom he might inherit. I am slightly concerned as to whether there

are any other consequences of that. You have, as it were, in law killed off the person who is responsible for the killing. Is it possible to do that in a way which confines it merely to that inheritance and has no other effect?

Professor Beale: I think, Chairman, I would describe it slightly differently. What was proposed and what I think is actually in the Bill is that the effect should be the same as if the person had died—it is not exactly a presumption of death—and it does say “only for the purposes of this part”, so I think it is fairly clear that it would not have any effect outside this little bit of the Administration of Estates Act. Forgive me, I do not think it causes a risk of any damage elsewhere, no. It is simply that the rules would apply as if the killer had died immediately before the intestate.

Q115 Chairman: You recommended that the court should consult the Public Trustee. Is that because of the possibility that an arrangement might be set up, if the killer had perhaps undue influence, in which, although the child’s right to inheritance is created anew by this change, it might be contrived to the benefit of the person who killed?

Professor Beale: We were concerned that if the child were to inherit but because they are a child it goes into a trust for the child, the killer might have some influence on the way that the trust money was expended. Therefore, we suggested that the court should appoint the Public Trustee. The Government has changed the proposal slightly so that the court should consult the Public Trustee and the Public Trustee might well suggest somebody else be appointed. That seems an eminently sensible change, but essentially, Chairman, you have put your finger on it. 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 encouraging the trustee to take on responsibilities which otherwise the killer himself or herself would bear: maintenance responsibilities, for example, and so, yes.

Q116 Chairman: Would I be right in thinking that these provisions could arise even in some of those cases which might be loosely described in the press as “mercy killings”, where a conviction has taken place but the court has had a more sympathetic view of the circumstances in which it took place, but, nevertheless of course, all this happens, does it not? It is still the same consequence that the killer cannot benefit from the crime.

Professor Beale: It could indeed happen. It could be that the killing is a mercy killing. If it amounts to murder we have exactly the same situation. Of course, if there are reasons for reducing the judgment to one of manslaughter, then the court has discretion anyway, so the problem does not arise; it only arises in cases of murder.

Q117 Chairman: It only arises in a murder case.

Professor Beale: Yes.

Q118 Chairman: But without this change it will remain the case that the estate does not pass to the children. What does happen in those circumstances?

Professor Beale: It goes to the next class of relatives under the Administration of Estates Act 1925. In the case that actually happened, *Re DWS*, I believe it went to the parents’ sister’s estate, because actually the sister had already died anyway, which we thought was simply not what anybody would have intended or wanted. It is the policy of the law, as one can see in the remainder of the Act, to prefer the grandchildren to the collaterals, as it were, and we thought that, had the grandparents had the chance to express their wishes before they were unfortunately bumped off, they probably would have said, “Of course we want it to go to our grandchildren.” It seemed to us to be almost self-evident that we were reaching the wrong result, and virtually everybody we consulted agreed with us.

Q119 Chairman: Going back to one other point that arises in the damages area: interest. Could the Government not have sorted out, by reference to some obvious scale or something related to rates of interest elsewhere, a provision about interest rather than having a provision which could be varied by secondary legislation in the future?

Professor Beale: I am a little disappointed that, effectively, this is simply an enabling power and all the difficult decisions still remain. I accept that 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. I do understand that there is this major problem that the National Health Service, in particular, but also the Medical Defence Union and the Medical Protection Society would stand to lose quite significant sums of money, it would cost them a lot extra if compound interest were introduced in these long-running medical negligence cases—those are the cases where it would make a great deal of difference—and that, of course, would largely come out of the public purse, but that does not seem to me to be a good reason for delaying a decision on compound interest generally. 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

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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.

Q120 Chairman: But would it not, in any event, be better if the interest rate tracked something objective in the real world, like the bank rate?

Professor Beale: I think it would be much better, Chairman.

Q121 Chairman: Thank you very much indeed for your very clear evidence, which is really helpful to us as we struggle with some of the complex concepts here. If there is anything which you rather wish we had asked you or that you really wanted tell us, by all means drop us a line about it subsequently and we will take it into account.

Professor Beale: Thank you very much.

Professor Burrows: Thank you.

Chairman: Thank you very much indeed.

Tuesday 23 February 2010

Members present

Sir Alan Beith, in the Chair

Mr David Heath
Alun Michael
Julie Morgan

Mrs Linda Riordan
Dr Alan Whitehead

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

Chairman: Nick Starling from the Association of British Insurers, Dominic Clayden from Aviva and Muiris Lyons from the Association of Personal Injury Lawyers, welcome. We are glad to have you with us this afternoon. We have been looking at the Draft Civil Law Reform Bill and the pre-legislative scrutiny of it, and I will ask you in the latter part of our discussion whether there are points that we have not raised with you that you think are important, so do not worry about it, I will give you that opportunity, but in the meantime I will ask Dr Whitehead to begin.

Q122 Dr Whitehead: Could I ask you for your initial thoughts about the widening of the definition of entitlement to claim dependency damages under the 1976 Act? The new category of claimant for dependent damages following a fatal accident states that the claimant was being maintained by the deceased immediately before the death. Are there any particular difficulties that may arise from this revised definition?

Nick Starling: We think that the current list is too restrictive and we do have a situation where, because of the change in relationship structures in families and so forth, it needs to be brought up to date. We think that the categories of claimant that the Law Commission have highlighted are almost certainly the right ones. We also recognise that in the future there may need to be revisions because society is always changing, but we think that there should be a mechanism for allowing Parliament to do that so that, as society changes and categories of claimant change, that can change in the future.

Dominic Clayden: I wonder if it would be useful if I gave a bit of background as to why I am here. I am the Technical Claims Director at Aviva. We are the largest insurer in the UK, so we see an awful lot of fatal claims, sadly, and 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, and indeed for our staff, because they are not easy claims to deal with. The specific concern we would have about the proposed amendment 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. The other feature is that 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 permanency.

Muiris Lyons: Can I comment on that, if I may. APIL as an organisation represents the interests of those who are injured here.

Q123 Chairman: You people are normally at odds with each other, are you not?

Muiris Lyons: In the most cordial way, I hope. Our starting point is that this is about access to justice for those who are either injured or bereaved in these particular circumstances and the categories of dependency, we think, are too narrow, so we welcome the Law Commission's proposals to extend the categories of dependents, but we would urge you to go further than that. We look at the system in Scotland and think it is far more favourable for those who are injured or families that are bereaved because it has a wider category of those who qualify, those who are eligible. We would urge you to look at the Scottish system alongside the English system. It is more generous in terms of who is compensated under that, and our written response to you includes some information on that.

Q124 Chairman: Is that determined by residence or location of the incident?

Muiris Lyons: I think it is in respect of the jurisdiction in which the claim is brought, so, generally speaking, I imagine somebody injured in Scotland who brings a claim in Scotland will fall under the Scottish system. I must confess I am not an expert on Scottish law, but I do look rather enviously at the system they have in place for dealing with bereaved families where it is a more generous system, so that is the first point I would like to make.

Q125 Julie Morgan: When you talk about the wider category, could you just explain that a bit more, please?

Muiris Lyons: Yes. We adopt the Law Commission's proposals so far as they go, but in our submission you will see that we would welcome the Government revisiting the categories further. For example, we advocate that the parent of the deceased should be able to bring a claim, not just for children who are under 18. Somebody could be 21 and killed and the parents are unable to bring a claim. We say that just that difference in age is unfair and the loss of a child is the loss of a child. It is quite clear that you should

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not outlive your children and it is a tragic bereavement to anybody regardless of the age of the child, so we strongly advocate that it should be payable in respect of the death of any child. We also say in respect of the death of parents that it should be children under 18 or children living at home because again somebody living at home who may be 19 or 20 is going to be equally bereaved as somebody who is perhaps 17. Those sorts of arbitrary age cut-offs, we think, are quite unfair, particularly with the modern societal changes we see in terms of people living at home more. We also think siblings should be covered. At the moment it is a very difficult conversation to have when a family comes in to see you and you say to somebody that their brother has died and that is not recognised in the law. They do not get a bereavement award, no matter how close their relationship may have been. These are all areas that the Scottish system embraces and ours does not and so, if there is going to be reform, we suggest it is sensible to look at that as a starting point.

Q126 Dr Whitehead: Could I just pursue the question of dependency. There is a distinction between what the Law Commission recommended for the new category of claimant, which was “any person... 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”. The draft Bill, as alluded to, merely states “any person... who was being maintained by the deceased immediately before the death”. Who would be particularly disadvantaged by that change between the two definitions?

Muiris Lyons: I think the first point is that we lose the “wholly or partly” which was originally there and which has not made it through into the Bill and I think that is quite 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. We also suggest a slight revision to that clause of the Bill because we are slightly anxious that 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. They should not have to go one step further and establish that it is a reasonable dependency. 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 perhaps that godchild at university, and under this extended provision they would now be able to establish that dependency and make a claim.

Q127 Dr Whitehead: So that is the difference between “wholly or partly maintained” and “maintained”?

Muiris Lyons: I think “wholly or partly” is to avoid any doubt that it can be partial.

Q128 Dr Whitehead: But the draft Bill does not have that in?

Muiris Lyons: It does not have that in, and so I would suggest that the Law Commission recommendation should be adopted.

Q129 Dr Whitehead: When the Bar Council gave evidence to us, they suggested that there should be a definition of “person” put in so that it should exclude cats’ homes and dogs’ homes and homes for retired donkeys and various things that could claim dependency damages as a sort of corporate person. Do you think that would add clarity or do you think that is an unnecessary addition?

Muiris Lyons: We do not have a strong view on that particular point. Our organisation is all about injured people and their families, so any amendment on that would not affect them. Whether or not it adds clarity I am not sure, but I think it would be an interesting argument for a cats’ home to advance that they were dependent on somebody. If somebody wants to support a cats’ home, they can make a will of course and leave a legacy.

Q130 Dr Whitehead: But presumably, if someone was previously supporting a cats’ home on a regular basis—

Muiris Lyons: It seems the clarity should come from a will, leaving a legacy to the cats’ home, rather than court action to try and establish a dependency but, as I say, the Association does not have strong views on that point because it does not affect our approach.

Q131 Chairman: Does the industry?

Nick Starling: Yes, we have strong views. We think it is a very sensible suggestion by the Bar Council.

Q132 Alun Michael: Can I ask about the issue of assessment of dependency damages in relation to remarriage. The draft Bill provides that remarriage or new co-habitation of more than two years must be taken into account by the court when assessing damages for a surviving adult and may be taken into account when awarding damages for a bereaved child. Do you agree that that is the right emphasis and, if not, why not?

Dominic Clayden: For my part the subtle difference would be to change “may be taken into account” to “shall be taken into account”. “May” is something which has significantly more discretion sitting there. We believe the circumstances should be taken into account. It does not mean it is absolutely determinative of the outcome, but we believe it is right that, if a judge is directed to take that issue into account, he can.

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Q133 Alun Michael: Are you saying that “must” means that it has to affect the outcome, but that “shall” means it has to be considered but may not affect the outcome?

Dominic Clayden: Yes.

Q134 Alun Michael: Why should that be different in relation to a bereaved child and a surviving adult?

Dominic Clayden: The feature for us here is that, to a degree, this is entirely a question of policy. Ultimately, the further we expand the categories of payments then, of course, the greater the cost to society as a whole. 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 almost occurring. 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.

Muiris Lyons: It may not surprise you to know that we do not accept that. We see this very much as about core principles affecting society. It is not just about the impact on insurance premiums and we are great advocates, as I think most people are, for “the polluter pays” here. 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. The damages should be paid regardless of whether somebody is fortunate enough to be able to go on rebuilding their lives, and 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.

Q135 Alun Michael: There has been some debate about whether an engagement should be considered a sufficiently certain prospect of remarriage that the court should be required to take it into account. It sounds a bit dated in some ways. What is your view on that?

Nick Starling: We do not think it should be. As you say, it is dated. I do not think an engagement is a contractual obligation of any sort.

Muiris Lyons: We do not think it should apply in any event, so whether you have a test of evidence for it is not something we think is necessary.

Q136 Chairman: Can you repeat what you said?

Muiris Lyons: Let me take a classic example. I am going home tonight in my car, thinking how have I done today in front of this Committee, and somebody breaks through a red light and runs me over and I am killed. It could take several years for that claim to be resolved—liability issues, how much is the claim worth, what do I earn, all those sorts of issues. I would like my wife to feel that if she met somebody else who was going to provide a good home for her, a father for my children, she could not not move forward with her life because it might adversely affect the claim for my loss of earnings. It should not get wiped out simply because she is fortunate enough to meet somebody else, and so whether she is engaged to him or living with him or co-habiting with him or seeing him twice a week in the restaurant we think is completely irrelevant.

Dominic Clayden: I think we run the risk of duplication here. Our concern is making sure that the child is taken care of rather than the practical reality of whether someone is contributing to the financial needs of that child. The important bit is to make sure that there is that balance and we think it should be taken into account.

Muiris Lyons: We do not think it is right that the burden should pass from the person who caused it to somebody else. If that relationship were to break down two years later—there are all sorts of ramifications, so we just think it is not a very progressive move.

Q137 Julie Morgan: What about unmarried fathers with parental responsibility?

Muiris Lyons: We feel that if parental responsibility is granted and is being exercised that is the test. One of the things that the consultation paper makes clear is that as well as trying to keep things as clear as possible we should try to avoid intrusive investigations into people’s personal lives, and we think that is right. If somebody has parental responsibility then they should be entitled to make a claim.

Dominic Clayden: The reality is that the world has moved on and parental responsibility is a fact of life for a lot of relationships and a lot of children. We absolutely see that that is an acceptance of a responsibility and takes a defined step. It is not something people do lightly. You generally have to court or you have to sign for it. We are quite comfortable with that.

Q138 Chairman: Can we turn to gratuitous care? Why should claimants be accountable to people who have provided free care to them in respect of damages for future free care?

Muiris Lyons: In respect of future care I think there is agreement that it should not be a factor. I think this is in respect of past care and that is where the law bites. The example is a husband and wife are driving in a car, the husband negligently drives off the road, and the wife is severely injured. The husband then chooses to look after his wife. Normally, the wife would be able to make a claim for the gratuitous cost of the care, so if the mother comes round for six

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hours a week that can be recovered, but the way the law applies at the moment is that any care the husband would provide you cannot claim for because he is the tortfeasor, and *Hunt v Severs* says the tortfeasor cannot provide the care and then have to pay for it twice. We say that cannot be right. If somebody chooses to have the husband providing their care they should be entitled to make the same claim for gratuitous care as if it was the mother or the sister or the aunt. What they then do with the money—really, again, we say keep it simple: it is not about intrusive investigations as to who accounts to whom. The Law Commission have already said that. They have tried to modify the current system which sets up a trust and have said let us have a simple legal obligation, but we say making a legal obligation makes the situation even more complicated and it risks prying into what happens afterwards—“Have you accounted for this? Have you paid for that?” We just think it is simpler to say, “Don’t worry about what happens. You are entitled to claim it in the first instance”. It is a legitimate head of claim. It should be paid and thereafter it is a matter for the claimant and whoever provided the care to decide how best they want to deal with that.

Q139 Chairman: Aviva, I think, in the consultation said “. . . 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”. It still holds to that position?
Dominic Clayden: Yes. There is, if I might point out, a bit of a gap in Mr Lyons’ approach where the “polluter pays” principle is advanced, except where, of course, the polluter then goes on, it is proposed, to receive a payment for providing care. 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.

Q140 Chairman: Is this really the right principle to apply in motor insurance where, for example, a perhaps quite elderly husband is driving the car and the wife sustains very serious injury which necessitates a great deal of care? She does not really blame the husband for the fact that it happened. Perhaps his reactions were not as quick as they would have been when he was younger, but for her not to pursue the damages aspect and seek the insurance company’s assistance, effectively, in providing for her future care would be obviously foolish of them. They were insured to provide for such a situation. It is not a situation in which, as far as the wife is concerned, the husband is fundamentally at fault and therefore ought to be punished by the money not being available to him if he gives up his job to look after her.

Dominic Clayden: I think the reality is, of course, that hopefully in that scenario he would be benefiting from being in retirement if his reactions were that slow—

Q141 Chairman: Yes, that is right.

Dominic Clayden:—so it is not a loss of earnings. We are talking about the provision of gratuitous care. We do not object to the provision of care generally. That is something which we do every day of the week pay for. This is: should the tortfeasor be paid for providing gratuitous family care, making a cup of tea, generally being around to supervise? It is that kind of payment that we would be looking at and it would add a potentially significant additional cost because, sadly, the reality is statistically that the person who is at fault on a lot of occasions is closely related to the person who suffers an injury. We are here providing indemnity to the person who has committed the tort and we would be nervous and uncomfortable making a payment to that person as well, providing money to enable that person to provide the service.

Muiris Lyons: I think 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.

Q142 Chairman: Just more generally, what do you think the financial impact of the Bill on insurers will be and therefore presumably on policyholders?

Nick Starling: Very low, I think.

Dominic Clayden: The financial impact assessment suggests, from memory, about 50% of claims are made. My personal experience is that that has gone up. It is probably north of three-quarters of fatal accident claims are now made. That being said, I think the assessment made was, say, 12 million a year or 14 million—I cannot remember the precise amount. If you doubled that in the scheme of the amount of motor claims in a year, it is not a huge impact, the changes as currently proposed. I would stress that we endorse the vast majority of the proposal. We think it does need updating in this area.

Nick Starling: There is a principle here that 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 case 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.

Q143 Chairman: Are there any other issues which you particularly want to draw to our attention?

Muiris Lyons: I am happy to field that initially. Yes, in our response you will see that we say it is great that the Government is bringing forward these particular Law Commission recommendations, but actually we feel very strongly that it is a real missed opportunity to bring forward the rest of the Law Commission recommendations. In 1999 the Law Commission said that damages were too low for people who were injured or bereaved and something needed to be done about it and, if the courts did not act, the Government should. That was in 1999 and there has been very little change since then, so we would urge

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you as a Committee and the Government to look at those further outstanding Law Commission recommendations. We recognise that they cannot go into this Bill, but we would urge the next Government to look seriously at a further reform Bill that brings on the rest of the Law Commission recommendations.

Q144 Chairman: You might not agree with that.

Dominic Clayden: I suspect we may differ. There is one issue I would like to raise. It is the question of the proposal that the prospect of breakdown of a relationship should be disregarded unless there are divorce proceedings instituted. By coincidence, my wife was a divorce solicitor for 17 years, so I had a lot of kitchen conversations on the subject. The reality of the situation is that often the formal process of filing divorce proceedings is just a procedural one. People can be with lawyers, relationships have absolutely broken down, long before the actual formal, "Let's tick the box towards proceedings". You will often have the Courts Service involved in sorting out access arrangements for children. You will have the financial arrangements sorted out between lawyers and finally you will tick the box to say, "Let's go through the formal divorce". We think simply saying that you could exclude it until such time as divorce proceedings would fly in the face of the reality of what the position between two parties would be; the relationship or civil partnership would have broken down. We believe the courts should have discretion to look at the reality of what is going on there.

Q145 Chairman: But does that not put you in the position of being very intrusive, as Mr Lyons was saying earlier, the insurance company knocking on the door to check whether the relationship shows any signs of potentially breaking down?

Dominic Clayden: 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.

Q146 Chairman: But how do you know, as the insurer, that something is "going on", as you put it?

Dominic Clayden: 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. The vast majority of people who bring fatal accident claims are represented by solicitors. It is a request to the solicitor to say, "Look, have they started the process of divorce?" It is a yes or no through the solicitor rather than a process of knocking on doors and enquiring that way. You simply will ask the solicitor in the vast majority of cases and, frankly, most solicitors will answer the question.

Muiris Lyons: You have my point on it being very intrusive. 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. Again, if we are looking 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, so the fact that lawyers—

Q147 Chairman: You should be pleased!

Muiris Lyons: In fairness to him, family lawyers these days are all about mediation and counselling and trying to encourage constructive results, not just divorce, so I think just because lawyers have been consulted, 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.

Q148 Chairman: So we have got both sides of the case set down there.

Nick Starling: I can add another point, Chairman, and I assure you I do not know any divorce lawyers, so I am not going to make any disposition on that. You asked whether there are things in the Bill which we think should be there. Broadly speaking, apart from that point, no, but, in the spirit of the way Mr Lyons has said there is a missed opportunity to raise general damages, I think I would say that we have an overall concern in this area as the system becomes more streamlined, more efficient, cheaper and quicker for people to deal with. I think you will be aware from our previous appearances that that is our overall view and there is a lot to be done in this area. This Bill is welcome. I think it is doing a good job, it is clearing things up, but there is plenty more that could keep this Committee busy for some time in the future.

Chairman: Gentlemen, thank you very much indeed. We are very grateful.

Written evidence

Memorandum submitted by the Ministry of Justice

I am very sorry that I was unable to give evidence to the Justice Committee on 10 March, due to illness. I am, however, very grateful to the Committee for its scrutiny of the draft Bill and look forward to seeing a copy of its report. In the meantime, I am pleased to provide written replies to the technical questions raised by the Committee. As he promised, the Justice Secretary is himself replying separately to you to provide a fuller response to the question you asked him on 10 March concerning the time that it has taken to bring the damages provisions in the draft Civil Law Reform Bill before Parliament.

DEPENDENCY DAMAGES

1. *Why has the Ministry of Justice rejected the Law Commission's proposal that dependency damages should be available to persons who would have been maintained by the deceased but for his or her death?*

As we stated in our 2007 Consultation Paper, we believe that eligibility for dependency damages should not be extended to persons who were not maintained by the deceased immediately before the death, but who would, but for the death, have been maintained by the deceased at some time in the future. 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. We think that our approach is supported by the consensus of opinion as it was supported by the majority of those who replied to our 2007 consultation and only a small minority of those who commented on clause 1 of the draft Bill in reply to the 2009 consultation expressly supported the Law Commission's recommendation.

2. *Is there a case for giving the court a wider discretion in a case involving an adult so that the court could decide not to take the remarriage etc into account?*

We do not think so. It seems to us that the Bill strikes the right balance between opposing views. On one extreme, there are those, typically perhaps those who represent claimants, who argue that nothing that occurs after the event that caused the death should be taken into account. On the other end of the scale, there are those, typically perhaps insurers, who argue that everything that occurs after the event should be taken into account. And of course there are people arguing for points in between. The proposal in clause 2 of the draft Bill is intended to provide a clear set of provisions, fair to both parties and avoiding as far as possible the need for intrusive enquiries.

In our view, the fact of marriage or remarriage, entering a civil partnership or passing the second anniversary of a relevant cohabiting relationship as defined in clause 2 of the Bill are clear and material events in the claimant's life, which ought to be taken into account. It is of course for the court to decide how great the effect of this should be on the award of damages in any particular case. This approach was supported by the majority of those who commented on this subject in response to our 2007 and 2009 consultations.

The balance to be struck is different where the claimant is a child of the deceased. Here, following comments received on consultation in 2007 pointing out that any new partner of the deceased would not have the same obligation as a deceased parent to maintain a child, the draft Bill provides that where the claimant is 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.

BEREAVEMENT DAMAGES

3. *What is the Ministry of Justice's definition of the function of bereavement damages?*

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.

4. *The Law Commission recommended that the function of bereavement damages should be explained in the Explanatory Notes. Why isn't it? Is there another way that the function could be explained?*

In general terms, 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.

In 2007 consultees who commented on this recommendation of the Law Commission made various suggestions as to how the purpose of bereavement damages could be explained to the public. These included agreeing a standard explanation for solicitors to use with their clients; providing information in booklets or leaflets; and placing information on websites. We are grateful for all these suggestions. We would add that many consultees generally doubted that such an explanation would in any event make much difference.

We will continue to consider how the limited purpose of bereavement damages can best be explained. However, we consider that it must be recognised that any explanation is unlikely to prevent people in these tragic circumstances from feeling that the award is inadequate.

5. *What is the rationale/principle underlying the inclusion of the categories that have been included in the class of persons eligible to claim bereavement damages?*

Bereavement damages are currently available to the wife, husband or civil partner of the deceased; and where the deceased was a minor who was never married or a civil partner, his or her parents, if he or she was legitimate; and his or her mother, if he or she was illegitimate.

The intention is that bereavement damages should be available to those who are most likely to be closest to and most affected by the death of a loved one, whilst recognising the need to keep the award within finite limits. At the same time, we want the system to be as simple and straightforward to operate as possible and to avoid the need for intrusive enquiries into the closeness of the relationship or the extent of a person's grief. In addition, keeping classes of person finite and limited also ensures that the award is less likely to be diluted among what could in some situations be quite a significant number of claimants.

Of course, no one can predict where grief and loss will be most felt and the question of where to draw the line is a very difficult one, but, from time to time, as society changes, it is appropriate to reconsider whether the class of eligible persons is still appropriate. Clause 5 of the draft Bill is the result of such an exercise. Of course, we accept that there will be different views as to where the new boundaries should be drawn but we consider that the balance struck by clause 5 of the draft Bill is appropriate.

6. *What is the rationale for the limits within categories of persons that further restrict eligibility for bereavement damages?*

The draft Bill extends those eligible to claim bereavement damages to include:

- any person who had been living with the deceased as the deceased's husband or wife or civil partner for a period of at least two years ending with the date of the death (new subsection (2)(aa)); and
- any child of the deceased, who was under the age of 18 at the time of the death (new subsection (2)(ab)).
- a father with parental responsibility (within the meaning of the Children Act 1989) in relation to the death of an illegitimate child under 18 who was not married or in a civil partnership.

The same principles have been applied to setting limits on eligibility to claim within a broader category of persons as have been applied to defining the broader category itself as discussed in response to question 5. We think that the proposals in clause 5 of the draft Bill create a clear and straightforward system and strike a reasonable balance between all those affected.

7. *Why are bereavement damages not being extended to parents for the death of a child over 18? [ie parents will only be able to claim bereavement damages for the death of a child under the age of 18].*

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.

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.

18 years of age is the age of majority recognised by the law as the dividing line in a range of different circumstances and, given that an open ended class is not acceptable, we consider that restricting eligibility to claims in respect of children under the age of 18 is the most appropriate and practical limit.

The same arguments broadly apply to the provision proposed in clause 5 of the draft Bill restricting eligibility to claim bereavement damages in respect of the death of a parent to children under the age of 18 rather than to children generally.

8. *The Law Commission proposed that where two or more children qualified for bereavement damages each should have a full award subject to an overall cap.*

MoJ has proposed that each child should receive half the standard award without a cap. What is the rationale for that limit?

The Law Commission proposed that there should be a finite limit on the total amount of bereavement damages for which a defendant could be liable in an individual case. It suggested a figure of £30,000 (three times the then award). Within this cap the Commission proposed that every claimant would receive an equal share. Thus, in the case of a husband who was killed leaving a wife and five minor children, each would have received £5,000 (at the rate of award then applicable). If, say, all the deceased's children over the age of 18 or the deceased's siblings were also included the award would be reduced further. We considered that this 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.

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 co-habiting 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.

We accept that different views may reasonably be held, but consider that our approach strikes a fair balance between those opposed viewpoints.

For completeness, I should mention that we have increased the sum payable for bereavement damages from £10,000 to £11,800 in respect of causes of action arising on or after 1 January 2008. On this basis children would therefore each receive £5,900 under the draft Bill.

DAMAGES FOR GRATUITOUS CARE

9. *Why should claimants have to account to the carer in respect of damages awarded for future care?*

There seems to be a consensus that damages should be capable of being awarded for gratuitous care—at least where the carer is not the wrongdoer.

Under the present law claimants have to hold damages received in respect of the loss to another person (the carer) of providing gratuitous care to them in trust for the carer. This is a cumbersome approach. Both the Law Commission and the Government agreed that it should be simplified and that the claimant should instead be under an obligation to account to the carer for the money received. The Law Commission, however, considered that the duty to account should only apply to damages received in respect of past gratuitous care.

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.

10. *What is the rationale/justification for the distinction between the treatment of gratuitous care provided by the wrongdoer before and after the date of the award of damages?*

The present law does not allow the court to award damages to the claimant in respect of gratuitous care provided by the wrongdoer in any circumstances. As this is primarily likely to arise where the wrongdoer is a member of the family, it is clearly a controversial rule on which strongly held differing views are put forward.

Clauses 6 and 7 of the draft Bill allow the court to award damages in respect of future gratuitous care to be provided by the wrongdoer but not for gratuitous care which has already been provided by him or her before the date of the award of damages. A majority of the responses to the 2007 consultation supported this approach. However, the responses received in 2009 were more mixed.

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.

11. *The Committee notes that under the Bill the court cannot award damages to the claimant in respect of the gratuitous care provided by the wrongdoer to the claimant before the date of the award of damages. One concern appears to be that these damages (if payable) would be paid by the wrongdoer to the claimant, who would then be under an obligation to account to the wrongdoer for them. How is this argument affected by the practical reality that damages are almost invariably paid by an insurer?*

Clauses 6 and 7 of the draft Bill do not allow the court to award damages in respect of gratuitous care provided by the wrongdoer before the date of the award of damages. This follows the existing law. Certain responses to the 2007 consultation took the view that the implementation of the Law Commission's recommendation that damages should be payable for gratuitous care provided by the wrongdoer before the date of the award would appear inappropriate, as the money could simply be returned immediately to the wrongdoer under the duty to account. Others have argued that this circularity is more apparent than real because the money paid to the claimant comes from the wrongdoer's insurer rather than the wrongdoer.

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.

12. *There seems to be a tension between the notion that paying a wrongdoer damages is contrary to public policy and the view that paying such damages supports a public policy objective of encouraging the provision of care within the family. Where does MoJ stand on this? Is gratuitous care viewed as preferable to commercial care services? Does the law encourage carers and persons they are caring for to enter into commercial arrangements to circumvent restrictions on damages?*

Clearly, the overall object of awarding damages is to compensate the claimant not to benefit the wrongdoer.

However, the provisions in clauses 6 and 7 of the draft Bill allow damages to be paid to the claimant in respect of gratuitous care to be provided to him or her in the future by the wrongdoer and for the claimant to be under a duty to account to the wrongdoer for such damages when the care has been provided. We accept that it might therefore be argued that the wrongdoer is, albeit indirectly, benefiting from the award of damages. On the other hand, the existence of the duty to account could well encourage the provision of care in the future. Further, the wrongdoer may be a pillar of support for the victim and care for that victim, perhaps to a better standard— and certainly cheaper— than a commercial carer. Thus, as so often in civil law policy, a balance has to be struck between competing demands. In this case, we note that the Law Commission supported the payment of damages in respect of gratuitous care and consider that the balance struck by the Bill is appropriate. This position was adequately supported on consultation.

Whether commercial or gratuitous care is to be preferred in any individual case will depend upon its circumstances. It is not an issue on which a single general rule applies. What is needed is a pragmatic workable approach that strikes the right balance between victim and carer and society at large.

We are aware of suggestions that carers enter into contracts for the provision of care with persons who would otherwise provide gratuitous care to avoid the present prohibitions on claims for damages in respect of gratuitous care. We are, however, not aware of any widespread practice of this kind. Whether or not it is appropriate for persons in individual cases to enter commercial agreements is a matter for them to decide in the circumstances of the case. If such agreements are a sham, they may well be challenged and thereby result in extra costs and fail in any event. Under the draft Bill, damages will be recoverable for past and

future care provided by persons other than the wrongdoer and in respect of future care provided by the wrongdoer. The temptation to enter into sham agreements should therefore be greatly reduced. We do not consider that the possibility there may be such sham agreements undermines the case for maintaining a bar on damages for past gratuitous care by the wrongdoer.

INTEREST

13. *The Committee notes that the interest provisions are largely an enabling power allowing the Lord Chancellor to specify the pre- and post-judgment interest rates. Why hasn't a conclusion been reached on the use of the powers?*

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.

GENERAL

14. *Do you agree that it is for society, or Parliament acting on its behalf, to set parameters for who is eligible for what and how much in personal injury damages cases and for the insurance industry to price its products accordingly?*

The setting of levels of damages and the determination of the circumstance in which they should be awarded has largely been the role of the courts under the common law. We believe that it is important the courts should retain that role in order to do justice in individual cases and to develop the law to meet changing situations. Nonetheless, it is of course clearly for Parliament to legislate when the need arises.

In the main area covered by the damages related provisions in the draft Bill, that of damages for fatal accidents, a statute already exists. It is over 30 years old. It is important to ensure that it is amended where it is no longer clear or no longer reflects the needs of modern society.

Of course, there are inevitably a link between the levels of compensation payable and the affordability of insurance. So, once again, a balancing exercise is necessary because compensation should be adequate and insurance affordable. The Government believes that the central principles which must continue to govern these considerations are that claimants with valid claims should receive fair compensation to meet their needs and that responsibility for this compensation should rest with the person who has caused the injury and, through them, their insurer.

15. *What assessment was made of the impact of the different costs of the different possible solutions in relation to such damages?*

The impact assessments outlining the estimated costs and benefits of the reforms proposed in the draft Bill were published in the 2009 consultation paper. Those on damages had also previously been the subject of our consultation in 2007, and the views of those responding to that consultation were taken into account in producing the impact assessment accompanying the draft Bill. We will be considering the comments made on costs carefully in preparing the final impact assessment in relation to the draft Bill.

I hope that the Committee finds these answers helpful.

Bridget Prentice MP
Parliamentary Under-Secretary of State

March 2010

Supplementary memorandum submitted by the Ministry of Justice

In the course of my evidence to the Justice Select Committee regarding the draft Civil Law Reform Bill on 10 March you asked why it had taken until the last days of this current Government to bring into legislation, and then only draft legislation, the damages proposals in the draft Bill, which derive ultimately from recommendations made by the Law Commission in 1999. In my reply I promised to write to you with a fuller explanation.

The proposals to reform the law of damages now contained in the draft Bill derive from wide ranging work on the law of damages carried out by the Law Commission in the late 1990s. The Law Commission reports most relevant to the provisions in the draft Bill are:

- Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (LC262) 1999

— Claims for Wrongful Death (LC 263) 1999

However, at around the same time the Commission also published reports on:

— Liability for Psychiatric Illness (LC 249)

— Aggravated, Exemplary and Restitutionary Damages (LC 247)

These lengthy and detailed reports, which addressed complex legal policy issues, needed careful consideration, which had to be accommodated within the available resources and subject to the competing priorities of other work.

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. The new Parliamentary procedure in the House of Lords has already borne fruit in terms of implementation of Law Commission work in the Perpetuities and Accumulations Act 2009 and may lead to the enactment of the Third Parties (Rights against Insurers) Bill this session. The Law Commission Act 2009 has paved the way for a statutory protocol designed to increase collaborative working between the Law Commission and Whitehall and for Parliament to be more closely involved in scrutinising the Governments rate of implementation of Law Commission reports. We hope shortly to lay the protocol before Parliament. Hopefully, as a result of these reforms, slow progress of the kind that has afflicted the reform of the law of damages will become a thing of the past.

Since the publication of the response paper to the consultation matters have moved on more quickly and I am delighted that we have been able to lay the draft Bill before Parliament for pre-legislative scrutiny and to publish it for public consultation. This takes the preparation of the potential Bill one step further and we will consider the outcome of the pre-legislative scrutiny and the public consultation very carefully before deciding how to proceed with these important reforms.

March 2010

Memorandum submitted by Professor Hugh Beale QC, FBA

Thank you very much for arranging for me to give evidence during the Justice Committee's pre-legislative scrutiny of the Civil Law Reform Bill.

You suggested that I might want to send you any extra comments in writing. If it is not too late (my apologies—the last couple of weeks have been frantic), I would like to make one technical point on Interest, and a comment on the last-minute exclusion of Limitation from the Bill.

INTEREST

I welcome the inclusion of the provisions on interest. The replacement of section 35A and section 69 by a single provision (Clause 10) seems sensible, and so does the extension to post-judgment interest (Clause 11). The Law Commission did not study post-judgment interest because it was outside the terms of reference.

My only point is that I think there is a serious error in either the drafting or the instructions given to the drafter. The Bill appears not to cover the case in which proceedings are commenced and, before judgment, the debtor makes a part payment but judgment is given on the balance. The court presently has power to award interest on both sums; but it seems that under the Bill no interest can be awarded on the sum paid before judgement.

Suppose D owes C £1,000. C commences proceedings. D pays £600, as to which he recognises that there is no defence, but C has to obtain judgement for the remaining £400. Under Supreme Courts Act 1981, section 35A, the court may award interest on the whole sum. The section provides:

Subject to the rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and:

- (a) in the case of any sum paid before judgment, the date of payment; and
- (b) in the case of the sum for which judgment is given, the date of judgment.

The words underlined mean that the court can give interest on both the £400 for which it gave judgment and the £600 paid earlier.

Under the Bill, clause 10(2) allows the court only to award interest on sums for which it has given judgment. Clause 10(3) applies only if D paid the whole amount otherwise than in pursuance of a judgment. So it seems the court cannot award interest on the £400. I am sure this is simply a mistake.

LIMITATION

I am disappointed that at the last moment it was decided to omit the Law Commission's proposals on Limitation from the Bill. I very much hope that the Minister's statement (19 Nov 2009 : *Hansard* Column 13WS) that the reforms "will not now be taken forward" does not mean that recommendations, though previously accepted in principle, have now been rejected altogether.

Officials from the Ministry of Justice kindly saw me on 20 January 2010. They explained that the limitation proposals had been excluded partly because the courts have solved problems under the existing law and partly because they had carried out a "targeted consultation" as part of impact assessment, and had received largely negative responses.

The Ministry has kindly agreed to let me see the responses (except those that were confidential) and until then I cannot assess their validity. But my first reaction to what I was told about them is that several are based on misapprehensions as to how system would work. Moreover, there seems to have been little investigation of the positive benefits of scheme. It is true that the most glaring case of anomaly has been solved by courts. (This was that a claim for intentional harm, such as sexual abuse, appeared to be barred after six years, whereas a claim for negligence in allowing the abuse to take place, for example against an employer of the abuser who had failed to check the abuser's background before employing him, would be barred after a different and possibly longer period.) But many of the other problems with the law listed in the Law Commission's report remain.

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 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. I thought I should inform you of this.

Obviously it would help enormously if the Justice Committee were to indicate, even informally, that it too hopes that further study of the law of Limitation will be carried out. But of course I would quite understand if the Committee felt this would not be appropriate.

University of Warwick

5 February 2010

Memorandum submitted by Professor Andrew Burrows FBA, QC

I should preface my detailed comments on Part I of the Bill by saying how delighted I am that the Government is taking forward the work of the Law Commission, which naturally I regard as very important, in relation to Damages for Wrongful Death and Gratuitous Care.

Any detailed criticisms that I here offer of the drafting of the Bill should be taken in the light of my general support for the Bill. My comments are intended to help improve the Bill and to make it workable in practice.

1. *Those entitled to claim dependency loss (the list of dependants): clause 1*

(a) The history of this section is that, time and again, the list has had to be extended and at the Law Commission we felt, supported by our consultees, that the time had come to put the list on an entirely principled basis by adding a catch-all residual category of those who suffer a dependency loss. Those who are not included under the present law but would be correctly included under this reform are eg (see para 3.16 of the Law Commission's Report, *Claims for Wrongful Death* Law Com No 263):

- (i) a financially dependent friend and companion who lived with the deceased but not in a marriage-like relationship;
- (ii) a child who is not the deceased's child but was supported by the deceased while he or she was in a marriage-like relationship (but was not married or in a civil partnership) with the parent;
- (iii) certain distant relatives supported by the deceased (eg, a great-nephew supporting a great-aunt); and
- (iv) a cohabitant, who was not married to the deceased or a civil partner of the deceased, but who cannot satisfy the two year rule.

(b) The Law Commission's definition of the residual category was marginally wider than the Bill by including: "or who would, but for the death, have been so maintained at a time beginning after the death." That wider approach is in line with principle (after all, those who fall within the existing list can claim even though not yet suffering any dependency loss: eg an unborn child in a marriage or a wife who is about to give up work to have a family). I still think that that is the correct approach. 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 two-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, 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.

(c) The Bar Council has made a valid point about “immediately prior to the death” and have given the example of the person who is injured in hospital and was therefore not maintaining the claimant immediately prior to his death. This would normally be covered by the Law Commission’s wider wording “or who would have been maintained but for the death”. But even then there might conceivably be a gap: to be sure of filling it one would need to amend the wording to say something like: “or who would, but for the death *or the injury which led to the death*, have been so dependent.”

(d) The Bar Council has made a valid point that one would need to make clear, which the present Bill does not, that bodies such as a cats’ home, could not claim under this Bill. The intention was always that only humans could claim. This could be achieved by replacing the word “person” by “individual”.

2. *Effect of remarriage of dependant (or parent of dependent child): clause 2*

(a) The main purpose of this is to reform the present section 3(3) of the Fatal Accidents Act 1976 whereby in assessing a widow’s damages her remarriage, or prospects of remarriage, are to be ignored. The present law in section 3(3) can produce absurd overcompensation: so a widow is still able to claim full dependency loss unaffected by the fact that, since the death, she has remarried a multimillionaire. The aim of the reform should be to strike a balance between not overcompensating the widow (and others) while not encouraging intrusive enquiries.

(b) The reform as drafted in this Bill is more or less, but not quite, as the Law Commission envisaged. Subject to one major point, I personally think that it is satisfactory. The major point is that, unless I have overlooked something, a clause has gone missing because 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
- (b) entering into a relevant relationship.”

(The Law Commission then had an exception to that to deal with where the dependant has become engaged but that is no longer in play as the recommendations about engagement appear not to have been accepted by the Government).

(c) The two points made by the Bar Council about this clause (ie (i) taking into account two-year cohabitation will encourage intrusive enquiries and (ii) child dependants should not be caught by this) are in my view misconceived. They ignore the fact that on both those aspects that is already the present law and has not produced difficulties. In other words, in those respects the Bill, in the context of reforming section 3(3), would merely be clarifying what is already the present law.

3. *Prospect that the dependant’s marriage/relationship with the deceased would have broken up: clauses 3 and 4*

(a) Under the present law, section 3(4) of the Fatal Accidents Act 1976 is opaque (court should take into account that cohabitant if unmarried has no right to support) and the Law Commission therefore recommended its repeal and replacement. I am content with the Government’s policy here which was very similar, albeit not identical, to that of the Law Commission.

(b) But the drafting in the Bill does not achieve this as clearly as it could. The courts might get to the correct result by construing the Bill but the way in which the Bill is drafted is a tortuous way of putting into effect the policy. It should be drafted much more clearly. 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 respect of dependency claims of others, especially children of the marriage or relationship.

(c) For guidance as to how the Bill should be drafted to achieve the Government's policy, reference should be made to the Law Commission's draft Bill, appended to its Report No 263. With some tweaking what the Law Commission had as clauses 3A(1) and (2) should be the correct model for the drafting.

4. *Damages for bereavement: clause 5*

(a) At present those who can claim "bereavement damages" (a token sum for grief and other non-financial loss) are very limited. The list is limited to the spouse or civil partner of the deceased or the parents of an under-18 deceased child, if legitimate, and the mother alone if illegitimate, provided the child was unmarried and not in a civil partnership. The quantum is also limited: the defendant can only be liable for (the fixed sum which is at present) £11,800.

(b) The Government's policy is to extend the list to some extent which then requires one to deal with the quantum question. That policy constitutes a compromise between not extending the list too far—after all this is a token sum for a form of mental distress—and extending it sufficiently far that one does not create injustices and anomalies. Although the Law Commission would have gone further and had an approach of an overall cap (of £30,000), I can understand the Government's position. So this Bill would extend the right to bereavement damages to the deceased's cohabitee and deceased's children if under 18 (and unmarried and not in civil partnership). It would also extend the entitlement to both parents, whether the deceased child was legitimate or illegitimate, provided the child was under 18).

(c) As regards quantum, the Bill would mean that where there is more than one spouse or civil partner or cohabitee, the amount (at present £11,800) would be divided equally. Where both parents claim, it would be split equally (ie £5,900). As one could not have parents and spouses/partners all claiming (because the parents' claims are inapplicable where the deceased child was married or with a partner) the maximum amount awarded to these claimants is £11,800. Children of the deceased would have a fixed award of half ie, £5,900.

(d) The Law Commission would have extended the list further to include any parent (whether deceased was under 18 or not), any child of the deceased (whether child was under 18 or not) and, more controversially I think, any brother or sister of the deceased or a fiancé(e) (but not, eg, stepparents or persons treated as parents). On quantum the Law Commission recommended an overall pot of three times the award and if more than three claimants, the award would be split equally. So for any one death, each person entitled would get the same amount.

(e) My own view is that, while I can well understand the government not wanting to go as far as the Law Commission recommended, the list in the Bill is too narrow and should be extended to:

- (i) parents of the deceased whether under 18 or not; and
- (ii) children of the deceased whether under 18 or not.

So if the deceased was aged 30 I think his 50-year-old parents should be entitled to bereavement damages; and if the deceased was aged 50, I think his 30-year-old child should be entitled to bereavement damages. The present Bill would preclude such awards.

As regards quantum, I would then revert to the Law Commission's recommendation of an overall pot of three 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).

(f) The Law Commission recommended that the amount to be awarded for bereavement damages should be index-linked so as to keep it up-to-date. This recommendation has not been accepted in the Bill which continues to use the present technique of relying on occasional adjustment by Secretary of State. In my view, index-linking, because automatic, would be preferable.

5. *Damages for gratuitous care: clauses 7 and 8*

(a) I have serious misgivings about these clauses, which largely reverse the recommendations of the Law Commission in our Report No 262, *Damages for Personal Injury: Medical, Nursing and Other Expenses*. It is unclear to me what has happened to produce such odd clauses.

(b) First, the Bill has included a legal obligation (albeit, correctly, by means of a personal rather than a proprietary right) to pay across to the carer damages for the future as well as the past. As the Law Commission explained, this is not what is wanted because it 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.

(c) Secondly and bizarrely the Bill has clause 7(4) (and parallel provision in clause 8) that undermines the Law Commission's recommended reform of *Hunt v Severs* [1994] 2 AC 350 which at present precludes damages for gratuitous care where the carer is the tortfeasor. As explained by the Law Commission at paragraphs 3.67–3.76, and supported by an overwhelming majority of consultees, that decision should be reversed by legislation (ie 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 because the care is then not gratuitous. There is also the point that the damages are in reality to be paid by insurers.

(d) The simplest way to put that Bill right would be to delete 7(2)(b) and 7(4) and the analogous proposed provisions in clause 8 inserting into the Fatal Accidents Act the new section 3A2(b) and 3A2(4).

(e) There are two other sloppy aspects of the drafting that need correction. The first is that to stop, eg, the NHS or local authorities claiming under this provision, one needs to replace "person" by "individual" providing the services. Secondly, the meaning of services being provided gratuitously in clause 7(5)(c) is circular: one could probably deal with this by replacing "legally enforceable" by "contractual right".

6. *Aggravated damages and restitutionary awards: clause 9*

(a) This is the other clause about which I have serious misgivings. Leaving aside that it does not implement anything recommended by the Law Commission, this clause would make the present law worse not better.

(b) "Aggravated damages" are a type of damages that people find confusing. They are regarded as compensating for mental distress but in situations where the defendant's conduct has been particularly reprehensible. They therefore have overtones of punitive damages and yet are ultimately compensatory. The Law Commission in its Report, *Aggravated, Exemplary and Restitutionary Damages*, Report No 247 recommended at paragraph 2.42 that wherever possible the label "mental distress damages" should be used instead of the misleading phrase "aggravated damages".

To use this phrase in legislation is therefore a backward step.

(c) The Law Commission in line with the majority of its consultees favoured retaining exemplary (ie punitive) damages. Contrary to clause 9(1), there is nothing to be gained by abolishing the only statutory reference to exemplary damages in section 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.

(d) The idea of "additional damages" has long been a source of confusion in the law on intellectual property rights. But if one does not like to say that "additional damages" here means "exemplary" damages, additional damages should simply be abolished. Replacing them by "aggravated damages or restitution" would not improve the law because restitution can already be awarded through an account of profits as an alternative to damages; and aggravated damages are, for the reasons given above, confusing.

(e) There are identical provisions on "additional damages" that are not mentioned in clause 7: eg section 191J(2) and section 229(3) of the Copyright, Designs and Patents Act 1988. I presume that it is simply an oversight that these identical provisions have not been covered.

(f) The problem of aggravated damages not being awardable to a company, because a company cannot experience mental distress, is a general defect of aggravated damages throughout the many areas of the common law where such damages are available. It would be very odd and potentially dangerous for the development of the common law, if one were simply to reform that position in the narrow context of intellectual property rights as clauses 7(2) and (3) here do. Indeed the very case in which the issue was raised, *Collins Stewart Ltd v Financial Times Ltd* [2005] EWHC 262, was not an intellectual property case but a libel case so that this reform would leave a judge with exactly the same problem in a libel case as the judge faced in that case.

I should conclude by saying that the Law Commission gave a great deal of thought to the reforms they recommended. The Government is of course free to accept or amend or reject those recommendations. But in relation to clauses 7–9 of this Bill, the impression given is that the issues have not been thought through with the attention to detail required and do a disservice to the pain-staking work and extensive consultation carried out by the Law Commission (at public expense).

9 February 2010

Memorandum submitted by the Law Commission

I am writing in response to the call for evidence from the Justice Committee in relation to its examination of the draft Civil Law Reform Bill.

The Law Commission welcomes the publication of the draft Bill, which implements reforms discussed in four Law Commission reports, namely:

- The Forfeiture Rule and the Law of Succession (2005) Law Com No 295.

- Pre-Judgment Interest on Debts and Damages (2004) Law Com No 287.
- Claims for Wrongful Death (1999) Law Com No 263.
- Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262.

The Law Commission also welcomes the Government's recent support in taking forward work deriving from the Law Commission, such as the Perpetuities and Accumulations Act 2009, and the Bribery Bill and the Third Parties (Rights Against Insurers) Bill, both currently before Parliament.

It may be helpful to consider each of the four reports listed above in turn.

The Forfeiture Rule and the Law of Succession

This deals with a small but difficult problem which arose in the case of *Re DWS*.¹ A person killed both his parents, who died intestate. Rightly, the killer was not entitled to inherit, but the Court of Appeal found that the killer's son was similarly disinherited. The estate passed to more distant relatives.

In July 2003, the Department for Constitutional Affairs asked the Law Commission to consider the law in this area. There was widespread agreement that the current law was unfair and arbitrary. It was not based on public policy but arose from anomalies in the way the legislation was drafted.

We thought that the inheritance should pass as if the killer had died immediately before the intestate or testator. We are pleased that the Government has accepted our recommendations and has incorporated them in the draft Bill.

Pre-Judgment Interest on Debts and Damages

This report considered the amount of interest the courts should award on debts and damages in court proceedings. It looked at what the interest rate should be; how it should be set; when it should be departed from; and whether it should be simple or compound.

In practice, the most important issue is the rate itself. The issue of compound interest only becomes significant in the longest running cases (which in practice tend to be clinical negligence cases).

The current law gives the courts a wide discretion over pre-judgment interest. However, in practice, the courts follow the judgment interest rate, which was set at 8% in 1993. In 2003, the base rate was 3.75% and we thought that 8% was too high. Now that the base rate is 0.5%, it is clearly much too high, and grants a windfall to the successful claimant.

The issue is important because excessive court interest rates penalise some of the most vulnerable people in society. Research shows that most of those taken to court for debt "can't pay" rather than "won't pay". Families are already in serious financial difficulty, and cannot afford this further penalty.

We are pleased that the draft Bill includes statutory provisions to set a prescribed rate. We also welcome the Government's decision to enact similar provisions for post-judgment debts.

However, we are disappointed that the Government has still not reached a decision on the main policy issue, which is what the rate should be. In our report, we considered arguments that the rate should be 1%, 2% or 3% above base. We concluded that in general cases, a rate of 1% above base would be fair to compensate creditors for their loss. Today, this would have the effect of reducing the rate from 8% to 1.5%.

We do not think this is a particularly complex issue. We urge the Government to reach a concluded view on what a fair rate would be, and then act to protect the many thousands of vulnerable families passing through the courts each year.

The Damages Reports

The other two reports (Law Com Nos 262 and 263) were part of an extensive review of personal injury damages which the Law Commission carried out in the 1990s. We also published reports on Aggravated, Exemplary and Restitutionary Damages (1997 Law Com No 247); Liability for Psychiatric Illness (1999 Law Com No 249); and Damages for Non-Pecuniary Loss (1999 Law Com No 257).

There has been extensive delay in the consideration of these reports. In November 1999, the Government announced that it would undertake a comprehensive assessment of our recommendations. Unfortunately, the Department's consultation paper was not published until May 2007. The consultation period ended in July 2007 and the Department published a summary of responses in July 2009.

We welcome the December 2009 draft Bill and accompanying consultation paper (CP53/09) as an important contribution to the debate. However, the delay means that it has been difficult for the Law Commission to comment on some of the details of the draft Bill. All those involved in the original review have now left the Commission, circumstances have changed, case law has developed, and the consultation we conducted in the 1990s may no longer represent consultees' current views.

¹ [2001] Ch 568.

WRONGFUL DEATH

The main reforms set out in the draft Bill concern damages for wrongful death. These are of two sorts: dependency damages, where the claimant was financially dependent on the deceased; and bereavement damages, which grant a small, fixed sum for non-financial loss.

Extending those entitled to dependency damages

We are particularly pleased that the Government proposes to extend the list of those eligible to claim as dependants under section 1(3) of the Fatal Accidents Act 1976. The current list is too restrictive: for example, it leaves out cohabitants of less than two years; children who were not biologically related to the deceased but who were supported by them in a cohabiting relationship; and non-relatives who were nevertheless maintained by the deceased. We support clause 1, which permits any other person who was being maintained by the deceased before the death to claim for dependency damages.

The Law Commission recommended that claims should also be allowed from future dependants: that is from those who were not maintained at the time of death, but who would have become maintained had death not occurred. The Ministry of Justice has taken a different view, and has not included future dependants in the draft Bill. This exclusion will not affect many cases, and we understand the Ministry's objection that the category should not become too open-ended. However, we would hope that careful consideration is given as to whether this exclusion could do injustice in some difficult cases, for example, in disallowing the claim of a child in the womb in assisted fertilisation situations, who is not the deceased's biological child.

Effect of remarriage and prospects of divorce

We are pleased to see that the Government has largely adopted our recommendations on these issues.

However, there are some concerns about the way that clauses 2 and 3 have been drafted. For example, clause 2 repeals the provision in section 3(3) of the Fatal Accidents Act 1976 which prevents the court from taking into account a widow's prospects of remarriage. We think it would be helpful to clarify that the courts should not take such prospects into account.

Extending bereavement damages

Bereavement damages will always be controversial. By their nature, they award arbitrary sums to an arbitrary list of people. Strong arguments could be made that bereavement damages should be abolished, or that they should be substantially increased.

That said, we recommended that bereavement damages should be retained. They had become entrenched in law and in the public's sense of justice. We thought they were needed to compensate the bereaved person, as far as a standardised award of money can, for their grief, sorrow and the loss of care, guidance and society.

In 1999 we recommended that the then applicable sum of £7,500 should be increased to £10,000, and should be further increased in line with the Retail Price Index (RPI). We welcome the fact that the Government increased the amount to £10,000 in 2002, and again to £11,800 in 2007.

However, the Government appears to have rejected our recommendation to index-link. Instead, it is committed to updating the sum from time to time. Had our recommendation of £10,000 been implemented in September 1997 with an RPI link, the sum would now be £12,803.

Clause 5 of the draft Bill extends the list of those eligible for bereavement damages to children under 18; to cohabitants who have lived together for at least two years; and to unmarried fathers with parental responsibilities. We welcome these extensions. However, the list is substantially narrower than the extensions we recommended in 1999. Our list would, for example, have included parents who lost children aged over 18; adults who lost parents; and siblings.

We can understand that the issue of who should receive bereavement damages involves difficult judgements, and that views on this issue differ. However, we would hope that further thought could be given to the position of some of those on our original list, especially the parents of young adults, who may feel the bereavement acutely.

DAMAGES FOR GRATUITOUS CARE

The draft Bill also deals with an issue discussed in our report on Medical, Nursing and Other Expenses; Collateral Benefits (Law Com No 262), namely how claimants should be compensated for the gratuitous care they receive from family members and others.

A personal injury claimant is able to recover for the cost of their care. Where the care is provided gratuitously, the claimant can claim an equivalent value to be held on trust by them for the carer. This was part of the reasoning of the House of Lords in *Hunt v Severs*.²

In 1999, we thought there were difficulties with the trust mechanism. It created a proprietary right protected from insolvency for no clear reason and the obligations of a claimant trustee were not certain. Consultees described the trust mechanism as impractical and unworkable for future gratuitous services.

² [1994] 2 AC 350.

We recommended that damages should continue to be available from the tortfeasor for past and future gratuitous services. However, the issue raised more difficult questions about the rights of the carer as against the claimant. We thought that there should be a legal obligation on the claimant to account to the carer for past gratuitous services, but not for future services.

By contrast, clause 7 of the draft Bill imposes an obligation on the claimant to account to the carer for any future services which were provided. In 1999, we thought that a legal obligation of this sort would be impracticable and uncertain. Much may change. A carer who at trial was willing to provide substantial care may find they are able to do less. Or the claimant's needs may increase. In either case, the claimant may need to seek commercial care for some or all of their needs. We pointed out that the damages may be insufficient to compensate both the carer and to pay other expenses. We commented that a legal obligation to remunerate the carer for future care "runs the unacceptable risk of compensating the carer at the expense of under-compensating the claimant".³

Under clause 7 it is not clear how far a claimant who has been awarded compensation for future care to be met on a gratuitous basis could use the money to meet unforeseen additional needs which were provided by a commercial carer. Nor is it clear how a dispute between claimant and carer under clause 7(2)(b) would proceed.

The other and particularly problematic aspect of *Hunt v Severs* was that damages were held to be irrecoverable where the carer was the defendant (as in that case). In line with the overwhelming majority of our consultees, we recommended the reversal of that rule. Unfortunately, the draft Bill would leave *Hunt v Severs* intact in respect of damages for past services by the defendant.

OTHER DAMAGES REPORTS

The Bill does not implement any of the recommendations we made in our report on Aggravated, Exemplary and Restitutionary Damages (1997 Law Com No 247), or in our report on Liability for Psychiatric Illness (1999 Law Com No 249). These reports have now been rejected.

Limitation of Actions

In 2008, the Government announced that the Civil Law Reform Bill would be likely to include proposals to reform the Limitation Act 1980. These proposals are not now, however, included in the draft Bill. On 19 November 2009, the Government announced, by Written Ministerial Statement, that consultations with stakeholders demonstrated insufficient benefits and potentially large-scale costs associated with the reform. The Government noted that the courts have now remedied some of the key difficulties, for example in relation to child abuse cases. We understand that objections were received from several different sectors. In particular, the Government considered that our reforms would place potentially large-scale costs on the debt/credit industry. The statement made clear that the recommendations in our 2001 report, Limitation of Actions (Law Com 270), have now been rejected. It is disappointing that it has taken the Government so long to come to this conclusion.

At present, a creditor has six years to enforce a debt from the time when the debtor either acknowledges a debt or makes part-payment under it. Under our recommendations, these six years would be reduced to three years. Thus, for example, under our proposal, if a bank wished to enforce a credit card debt, it must contact with the debtor within three years, and either obtain a written acknowledgement that the debt is owed or some payment towards the debt. There are many reasons why creditors may not wish to proceed to court, but we felt that creditors should strive to contact debtors every three years. They should not simply sit on debts. Instead, creditors should be given six years in which to establish contact.

We accept that if the time limit for pursuing a contract debt is to be retained at six years, it would be difficult to introduce a consistent, simplified regime in the way we had intended.

Rt Hon Lord Justice Munby
Chairman

January 2010

Response by the Law Reform Committee of the Bar Council of England and Wales to the Ministry of Justice consultation on the Civil Law Reform Bill

The Law Reform Committee of the Bar Council of England and Wales welcomes the opportunity to comment on the Civil Law Reform Bill 2010.

Question 1. Do you have any comments on the draft clauses of the Bill relating to the law of damages?

1. We deal with the proposed reforms clause by clause below.

³ Law Com No 262, para 3.59.

 FATAL ACCIDENTS DAMAGES
Clause 1—Extending the right of action under the FAA

2. Where someone's death is caused by negligence or breach of duty of another, only dependants of the deceased have a right of action against the wrongdoer under section 1 of the FAA. "Dependant" is given a statutory definition in section 1, and includes spouses and civil partners, cohabitants.⁴ Anyone not within section 1 cannot bring a claim, even if they were in fact financially dependent on the deceased.

3. Clause 1 proposes adding a "catch-all" to the list, so that any person receiving a substantial contribution in money or moneys worth towards his or her reasonable needs from the deceased immediately before death will be classified as a dependent.

4. We welcome this change. It is a sensible alteration to ensure that people who are in fact dependant on someone who has died are not left without a claim because of the wording of the statutory list. It has the effect that the two-year relationship requirement for cohabitants is removed, allowing the court to deal justly in individual cases with the facts of the case rather than be faced with an inflexible two year requirement as a threshold condition for recovering any damages.

5. We suggest that a definition of "person" is included. If it is not the "cats home" which the deceased supported would qualify.

Clause 2—Changing the effect of remarriage

6. Clause 2 proposes the following changes:

- (a) When assessing damages for a dependant, the court must take into account the fact of the dependant (re)marrying, entering a civil partnership or becoming a cohabitant;
- (b) When assessing damages for a dependant who is a child of the deceased, the court may take into account the fact that the surviving parent has (re)married, entered a civil partnership or become a cohabitant.

7. We agree with the first of these changes. It is appropriate that the court takes into account the fact of a new marriage/civil partnership/cohabitating relationship, without the court being barred from awarding any damages in such circumstances. The aim is to achieve appropriate compensation for dependants, and if the loss is reduced because such post-accident developments, then the courts ought to take this account in assessing the level of continuing loss to avoid over-compensation.

8. We did not agree with the original proposal to include children in this change to the law because the decision to remarry or cohabit is not one taken by the children and not one over which they exercise any control. We did not feel that it was right that the financial consequences of that decision should be visited on the children.

9. On the other hand we can see the force of the contention that if the children are being supported financially in the new relationship as well or better than they were by the deceased then to give them a claim to dependency may involve "double compensation".

10. In fact the proposal in the bill is that whilst the obligation upon a court to take into account a dependants (re)marriage/new civil partnership/new cohabitating relationship is mandatory a similar power to take such factors into account in the case of a child of the deceased is only discretionary. This discretion should be sufficient for the court to deal with cases fairly.

Clauses 3 and 4—the possibility of relationship breakdown

11. The first change in clause 3 allows the court to take into account the prospect of the deceased and his spouse/civil partner ceasing to be married/in a civil partnership, if either person had sought a court order to end the marriage or civil partnership, or if they were no longer living together immediately before the date of death. The second change in clause 3 is the court cannot take the prospect of the relationship of cohabitants ending.

12. At present, section 3(4) of the FAA provides that where a cohabitant claims damages as a dependant, the court must take into account "the fact that the dependant had no enforceable right to financial support by the deceased as a result of their living together". The practical effect of the measure was to reduce the damages to a cohabitant as compared to a spouse or civil partner in otherwise identical situations. Clause 4 proposes to repeal this provision

13. We agree with the changes made by both of these clauses. It is inappropriate to have courts assess the prospects of divorce etc in all cases unless steps to end the marriage or civil partnership had actually been taken, either by recourse to the courts or by ceasing to live together. Similarly, it is difficult to identify objective factors indicating imminent separation between cohabitants. There is clear potential for distress to be caused by such unpleasant enquiries, before and at trial.

⁴ A term we use for shorthand in this paper: section 1(3)(b) of the FAA refers to a person living in the same household as the deceased immediately before the death of date and for at least two years before that date, and living together as spouses or civil partners. Clause 6 of the Bill would reword this to "any person who has been living with the deceased as the deceased's husband or wife or civil partner for a period of at least two years ending with the date of death."

Clause 5—Damages for bereavement

14. At present, section 1A of the FAA limits a claim for damages for bereavement to the spouse or civil partner of the deceased, and the parents of a minor (someone under the age of 18) who was never married or in a civil partnership.

15. Clause 5 proposes to add to the list of those who can claim bereavement damages:

- (a) The cohabitant of the deceased;
- (b) The children of the deceased, if aged under 18 at the date of death.

16. The distinction between claims brought by parents of deceased legitimate and illegitimate children is removed, in favour of a reference to persons with parental responsibility for the deceased child.

17. We consider that these changes are good, but should go further in one small respect.

18. The addition of cohabitants reflects changes in society of the years, and the two-year co-residence qualification period ensures that transient partnerships are not included. We also think that it is appropriate to add children to the list of those who can claim. A reference to persons with parental responsibility is more appropriate way of addressing the issue than the current situation.

19. 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.

20. The proposed method of dividing the award in some situations where there is more than one eligible claimant seems sensible.

Clause 6—Definition of cohabitant

21. As noted earlier, clause 6 rewords the statutory definition of cohabitant to “any person who has been living with the deceased as the deceaseds husband or wife or civil partner for a period of at least two years ending with the date of death”. This simplification of the existing wording is unlikely to have major effects, but has the benefit of clarity.

DAMAGES FOR CARE

Clause 7—Damages for gratuitous services

At present, if an injured person is awarded damages for care and assistance gratuitously provided to them by someone else, the injured person has an obligation in the law of trusts to pay that money to the person providing the care.

22. Clause 7 proposes to replace the trust concept with an obligation on the injured person to account to the provider of the care. We support this change. It is best if injured persons do not become trustees by accident in this way. An obligation to account still protects the position of the provider of the care, to whom that part of the compensation payment is due, and avoids the need to resolve questions about beneficial ownership of the money particularly when (in cases of ongoing care) the carer changes.

23. Clause 7 would make a further change. At present, if (for example) a wife is injured in an accident that was her husbands fault, she cannot recover damages to reflect the care and assistance that her husband has provided, or will provide in the future. This is because he would be compensating her with money that she was under an obligation to repay to him, making the exercise circular. This position has been criticised in the past as failing to take account of the fact that in most cases, the compensation will come from the husbands insurers, not from the husband personally, and so there is not as much circularity in the movement of the money as might at first appear.

24. Under the proposed changes, the wife would be able to recover damages to reflect care to be provided in the future by her husband, but not for the care that he has provided up to the date of trial. We welcome this change, but still think that damages for the past care provided by the tortfeasor in such situations should be recoverable. In our view there is a risk with the approach adopted in the bill that claimants will structure their care arrangements in artificial ways to avoid the principle, either by entering contracts with the tortfeasor or seeking commercial carers rather than a more appropriate gratuitous carer. In the case of the former there is then a risk of the court being drawn into the question of whether such a contract is a sham.

25. We do not see a good reason in principle for distinguishing between past and future care in the way that clause 7 does.

Clause 8—Damages for gratuitous services under the FAA

26. Clause 8 provides that a court may treat as part of a dependants losses the gratuitous care that the deceased would have provided but for the death. It matches clause 7 by placing an obligation to account upon the dependant to persons providing the services, and by matching the distinction between irrecoverable past care provided to a dependant by a tortfeasor and recoverable future care.

27. We welcome this change, save for the same reservation about the inappropriate distinction between past and future care provided by a tortfeasor.

AGGRAVATED DAMAGES

Clause 9—Using the term “aggravated damages”

28. Clause 9 proposes to substitute the word “aggravated” for “exemplary” in the provisions of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 that enable a court to award exemplary damages where judgment is enforced without the courts permission.

29. We do not agree with this change. Firstly, it seems unnecessary to deal with the wording when it appears that the relevant sub-section has never been relied upon, let alone given rise to any problems of construction, since it was enacted. Secondly, it seems unnecessary to carry out a minor piece of “tidying-up” of statutory language relating to exemplary damages without a wider consideration of the position of exemplary damages.

30. Clause 9 also proposes to use the phrase “such aggravated damages and such amount by way of restitution” instead of “such additional damages” in the Patents Act 1977 (power to award additional damages for providing false information) and the Copyright, Designs and Patents Act 1988 (power to award additional damages for copyright infringement).

31. We do not agree with these changes either, as the changes seem unnecessary. “Aggravated damages” is frequently used in the context of damages for mental distress, and it seems inappropriate for the rather different statutory regimes under the 1977 and 1988 Acts.

Question 2: In particular, do you have any views on how the concept of additional damages pursuant to the 2004 Directive should be expressed in terms appropriate to Scots law?

32. Matters of Scots law are outside the scope of the Law Reform Committee.

Question 3: Do you agree with the impact assessment on the proposed reforms relating to the law of damages at Annex C?

33. We are not in a position to comment on the accuracy of the financial estimates contained in the impact assessment.

INTEREST

Q4: Comment on pre and post judgment interest changes.

34. Compound interest. There are differing views on compound interest. Claimants groups consider that compound interest is the right measure of compensation. Defendant groups consider that it is a step too far and merely increases already high compensation.

35. The interest rate: So long as the Lord Chancellor revises the interest rate properly in line with the average interests rate available to claimants and defendants for savings in the UK this should achieve fairness.

36. Discretion to refuse or reduce the rate: clause 10(8) retains the discretion for the court to penalise a Claimant for delaying a case unreasonably or for acting in some other unreasonable way. We support this discretion.

Q5: Impact assessment

37. No comment.

COMMENTS ON DRAFT CLAUSES 15—17 AND 23(3) OF THE BILL [PART 3—DISTRIBUTION OF ESTATES]

Clauses 15 and 16

1. These clauses make welcome amendments to the law on the impact on succession of a disclaimer or a forfeiture.

2. The nature of the amendment in each case is that succession to the disclaimed or forfeited property interest is now to be determined on the footing that the person disclaiming or forfeiting had died immediately before he would otherwise have acquired that property interest.

3. The impetus for these amendments has no doubt been in relation to forfeiture rather than disclaimer. The consequences of the forfeiture that was the subject of the decision in *Re DWS (deceased)* [2001] Ch 568 (CA) were unsettling. That was an intestacy case but the problem could arise just as easily where the victim died testate—as in “I leave my estate to X [the offender] but if he dies before me, then to his children”.

4. The way in which the problem on disclaimer and forfeiture has been solved at clauses 15(2) and 16(2) is straightforward and workable.

5. But we are less happy with the proposed new section 46B Administration of Estates Act 1925 and section 33B Wills Act 1837 introduced at clauses 15(3) and 16(3) of the draft Bill:

— infants are commonly beneficiaries under a will or an intestacy

- s. 114(2) of the Senior Courts 1981 already provides that, wherever a minority interest arises under a will or intestacy, administration of the estate should be granted either to a trust corporation with or without an individual, or to two individuals, unless it appears to the court to be expedient that there should be a sole administrator
- s. 116 of the Senior Courts Act 1981 already contains a wide, and well-known, power in the court to appoint, whenever by reason of any special circumstances it appears to the Court to be necessary or expedient to do so, any suitable person to be administrator of an estate instead of the person, or the persons, entitled under the ordinary rules
- so the safeguard in the proposed new sections already exists
- nor is it clear why the court should have power to interfere with the trusts applicable to the infants property
- further, the mischief which the proposed new sections are intended to address is the possibility that the offender, being a parent of the infant beneficiary, abuses that position by benefiting from the forfeited property; but the relevant infant might well not be a child of the offender; in an intestacy, it might be a younger sibling, or a cousin; under a will, it could be anyone; and there is no reason to assume that the possibility of abuse is confined to a parent-child relationship
- if a person forfeits, say, his share of a gift to the children of A, and there are three such children, the shares of the other two increase—those two might well be infants; but the safeguard would not apply to them because (a) they are not children of the offender and (b) they have not become entitled to a share in the estate or an interest under the will by reason of the forfeiture [although this particular point can easily be dealt with by adding in the expression “or greater interest”]
- the possibility of abuse where an infant takes a share in an estate is obvious; it may be heightened where an infant takes a share or greater share in an estate as a consequence of a forfeiture; but it is fanciful to suppose that the infant will be protected save on application by some third party, probably a family member; that application will be made in the context of an application for a grant of representation to the estate; and there already exists full power in the court to protect the infant if such protection is required (in particular where the offender is—as will commonly be the case—the sole person or one of the persons entitled under the ordinary rules to a grant of representation to the relevant estate)
- situations of real difficulty may arise where, for example, the forfeited asset is the former matrimonial home, in which the offender and the infant beneficiary or beneficiaries are living together—in a situation such as that, a provision such as draft clause 15(3)(7) may not be helpful.

6. On balance, we consider the proposed new sections 46A(2) and 33B to be unhelpful, and likely to lead to increased expense in the administration of estates in circumstances which are bound to be tragic but are otherwise unpredictable

7. We do not understand the reason for the delay (not less than three months from the date of enactment) in implementing Part 3. Subject to what we have said above in relation to the proposed new sections 46B and 33B, the reforms in clauses 15 and 16 are long overdue.

Clause 17:

8. This deals with an anomaly in the law of intestate succession where an unmarried infant survives his parent and (while still an unmarried infant) dies with issue.

9. We welcome this proposed amendment to the law. The amendment is simple and workable.

January 2010

Response by the Law Society to the Ministry of Justice consultation on the Civil Law Reform Bill

INTRODUCTION

The Law Society is the representative body for over 100,000 solicitors in England and Wales. It negotiates on behalf of the solicitors profession, lobbies regulators, Government and others. It also works closely with stakeholders to improve access to justice for consumers.

We welcome the opportunity to respond to this consultation. However, we must express our concern about the period of time allowed for this response to have been made which is shorter than the three month period generally recommended by the Cabinet Office.

GENERAL COMMENTS

Damages

In 2007 the Government published a consultation entitled “The Law of Damages”. The issues raised in that consultation had previously been highlighted in a series of Law Commission reports which were published in the late 1990s: Claims for Wrongful Death; Liability for Psychiatric Illness; Damages for Personal Injury; Medical Nursing and Other Expenses; Collateral Benefits; and Aggravated, Exemplary and Restitutionary Damages.

When the Commission published its report “Claims for Wrongful Death” it also published draft Bills proposing to amend the Fatal Accidents Act 1976 and to amend the law relating to damages in respect of gratuitous provision of services in personal injury cases.

The 2007 paper concerned possible changes to the substantive law on damages which would change the position for claimants and for those who pay damages. The questions raised were essentially those of public policy rather than legal practice. In responding to the 2007 consultation the Law Society expressed its regret that many of the recommendations made by the Law Commission in 1998 and 1999 appeared to have been acknowledged but not subsequently taken forward.

The Society also noted that no questions were asked in respect of the paper on Psychiatric Injury which the government had apparently put in the “too difficult” box. The consultation paper raised major issues of public policy regarding psychiatric injury which the courts had found very difficult to resolve. Without expressing any view on the policy issues at that stage, the Society questioned whether it was proper for government not to take the legislative opportunity to address them.

Over 10 years has now elapsed since the Law Commission published its reports in this area. The Government has now chosen to take forward possible changes to the law in respect of claims under the Fatal Accident Act 1976 (wrongful death and bereavement damages), damages for gratuitous care plus aggravated damages and restitutionary awards. However, it has still failed to address other important public policy issues which were raised by the Law Commission (eg liability for psychiatric illness and damages for personal injury) and the Society urges the Government to take this opportunity to do so now.

RESPONSE TO QUESTIONS

PART 1 DAMAGES

Question 1: Do you have any comments on the draft clauses of the Bill relating to the law of damages?

Clause 1—Extension of right of action

The provisions within the draft Bill reflect the provisions recommended by the Law Commission in its draft Fatal Accidents Bill (clause 2).

The Law Society welcomes the proposal to increase the statutory list of those who are entitled to claim for financial loss. However, as previously indicated in its response to The Law on Damages consultation in July 2007, the Society sees no reason why existing categories would need to remain. It is simpler to have one class of claimant (ie any person who was being wholly or partly maintained by the deceased immediately before death). Simplifying the legislation in this way by defining only one category of claimant will then leave it open for anyone who can establish that they have indeed been wholly or partly maintained by the deceased to make a claim.

The Society suggests that this clause should be redrafted to amend section 1(3) of the Fatal Accidents Act 1976 by inserting a whole new section as follows:

- (3) In this Act “dependant” means person who was being wholly or partly maintained by the deceased at the time of death.

*Clause 2—Assessment of damages: effect of remarriage etc.**Subsection 2*

The Law Commission recommended that the fact of remarriage etc. should be taken into account. The Society agrees that it is appropriate to update legislation so as to ensure there is as much certainty as possible about who can recover. The provisions within the draft Bill reflect the provisions recommended by the Law Commission in its draft Fatal Accidents Bill (clause 4 (3))

Subsection 3

The Law Commissions draft FAA Bill and the original consultation proposed that remarriage should be taken into account but the proposed provision actually gives discretion to the court which is acceptable. This is agreed on the principle of certainty (as above). Clause 3—Assessment of damages: possibility of relationship breakdown

Subsections 3 (c), (d), (e)

The Law Commission recommended that prospects of a relationship breakdown should only be taken into account where there is clear evidence to that effect (eg separation, petition for divorce/judicial separation/nullity). Its draft Bill also included living apart as one of conditions.

The Society argued in its consultation response that the prospect of breakdown in itself should not be a factor as the split in the relationship may only have been temporary and proposed that the qualifying factor should be that some formal proceedings had been commenced. The Law Society is pleased to note that its views appear to have been accepted in the drafting of this clause.

Clause 4—Assessment of damages; effect of lack of right to financial support

The previous provision in section 3 (4) of the FAA 1976 had been criticised for its lack of clarity and its intrusive nature and the Society agreed with this proposal in its response to The Law on Damages consultation in July 2007. The Society therefore welcomes this proposal to repeal section 3 (4).

Clause 5—Damages for bereavement

These proposals generally reflect the recommendations made by the Law Commission. However, the Commission recommended that each award should be £10,000 but that the defendants liability should not exceed £30,000 (it would be £35,700 today) for a single death.

The Law Society welcomes the extension of categories and acknowledges that the bereavement award has previously been increased from £10,000 to £11,900 which it had been advocating for some time.

Whilst the award for a child is proposed at 50% there is no limit on liability for the defendant. It could therefore be argued that there is no reason to reduce the award for a child. There should be provision within the Bill for the award to be increased annually in accordance with RPI and not every three years as currently.

Clause 6—Minor amendment

This clause replaces the existing section 1(3)(b) FAA 1976 by simplifying the wording but leaving the substance unchanged. The Society fully supports this change and the draft clause.

*Clause 7—Damages for gratuitous services**Subsections (1) and (2)*

These follow the recommendations of the Law Commission and the Law Society welcomes it as a sensible way of clarifying and simplifying a difficult area of common law.

Subsections (3) and (4)

The Law Commission stated in its 1998 report “Claims for Wrongful Death”—“We therefore recommend legislation which ensures that a defendants liability under the Fatal Accidents Act to pay damages to the claimant for gratuitously provided services is 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 such services”. However, no mention appears to have been made that no damages can be recovered for gratuitous services provided by the defendant before the date of the award. Neither was this referred to in the Commissions draft Bill. There was also no mention in the Commissions draft Bill on gratuitous services.

The Society does not consider that there is any justification for treating past and future losses differently. Such a differential may lead to conflicts of interest as claimants may feel impelled to rush a matter to trial to take advantage of the benefit of this situation but where other aspects of the claim are not ready to be finalised. The Law Commission did not propose this particular condition and there would appear to be no reasoning for it. Clause 7(4) should therefore be excluded from the Bill.

*Clause 8—Awards of damages under the Fatal Accidents Act 1976**Subsections (3) and (4)*

Clause 8(4) should be removed for the same reasons as set out in our comments on clauses 7(3) and 7(4) above.

*Clause 9 Power to award aggravated damages etc**Subsection (1)*

This supports the principle that the purpose of the civil law is to provide compensation and not to punish and that the function of exemplary damages is more appropriate to criminal law. However, the Law Commission, who preferred the phrase “punitive damages” considered that aggravated damages should remain as part of the civil law on the following conditions:

- exemplary damages should be an exceptional remedy, rarely-awarded and reserved for the most reprehensible examples of civil wrongdoing which would otherwise go unpunished by the law.

- their availability (and assessment) must be placed on a clear, principled basis (and be assessed by a judge and not a jury).
- although flexibility is necessary, unnecessary uncertainty as to the availability and assessment of the remedy must be avoided.
- defendants must not be unfairly prejudiced.
- the impact on the administration and funding of civil justice should not be adverse.

The Law Commission considered that there was a good deal of confusion surrounding the terms exemplary damages (which they considered to be punitive) and aggravated damages which (they felt were compensatory for mental distress). To avoid this confusion they recommended that statute should clarify that aggravated damages were compensatory and not punitive and that the term “compensation for mental distress” should replace the term aggravated damages. The current proposal in the draft Bill was agreed in the Society’s 2007 consultation response but there would appear to have been no move towards clarification of exemplary/aggravated damages as recommended by the Commission.

Subsections (2) and (3)

The term additional damages, which only appears in the Patents Act 1977 and the Copyright, Designs and Patents Act 1988 has been the subject of criticism for uncertainty. On the face of it this is a sensible and uncontroversial proposal. However, it would appear to be anomalous to have the availability of additional damages for flagrant breach of copyright and not for other types of Intellectual Property.

Question 2: In particular, do you have any views on how the concept of additional damages pursuant to the 2004 Directive should be expressed in terms appropriate to Scots law?

No comment

Question 3: Do you agree with the impact assessment on the proposed reforms relating to the law of damages at Annex C?

Yes—based upon the current proposals

PART 2 INTEREST

Question 4: Do you have any comments on the draft clauses of the Bill relating to the setting of pre—and post-judgment interest?

Clause 10 Power to award interest on judgment debts and damages

See below

Clause 11 Interest on judgment debt

See below

Clause 12 Rate of interest on debts and damages

See below

GENERAL COMMENTS ON CLAUSES 10—12

The Act will put the usual interest rules under one umbrella which is quite useful as they are contained in various statutes at present.

The circumstances in which the courts may award compound interest ought to be clearly stated because the current power to do so is limited. Given the huge volume of claims through the County Courts it is important that practitioners and judges there have a clear set of rules to follow. If there is too much discretion a new form of satellite litigation may develop along the lines seen over the past few years in relation to costs.

The power to change interest rates annually is useful but may cause difficulty if several different rates have to be applied over the relevant period of calculation. The Lord Chancellor appears to be given wide powers under clause 12 to determine what interest rate applies, and whether it is compound or simple. This causes the Law Society some concern, even though the Court has power under section 5 to disapply or vary the Lord Chancellors order. A better proposal may be to apply a fixed percentage (1% for example) above base rate.

There is no reference to the Late Payment of Commercial Debts (Interest) Act 1998 which is available in cases of supply of goods and services where both parties are acting in the course of a business. It is assumed that this remains intact—it ought to as it is a valuable weapon for the small suppliers against a larger but slow paying customer.

Question 5: Do you agree with the impact assessment on the proposed reforms relating to the setting of pre—and post-judgment interest at Annex D?i#

Yes—based upon the current proposals

PART 3 DISTRIBUTION OF ESTATES

Question 6: Do you have any comments on the draft clauses of the Bill in relation to the distribution of estates of deceased persons?

Clause 16—Disclaimer or forfeiture of a gift under a Will

The Law Society would like to highlight that the effects of the proposed amendments in relation to disclaimer of an interest under a Will are potentially complex and depend on the facts of each case and the drafting of the particular Will. The Society notes that it is the view of some practitioners that the change relating to disclaimers is not as necessary or desirable as it is for forfeiture cases. In practice, the Society understands that disclaimers are rarely undertaken without legal advice, and as such the person disclaiming is unlikely to find they have caused an unexpected result; and in many cases a deed of variation will be available as an alternative approach to achieve the desired result.

The Society would suggest that the drafting of new clause 16(2)(4) merits some further consideration. Clause 16(2)(4) of the Bill:

“[Clause 16(2)(2)] is subject to any provision in the will about how the devise or bequest is to take effect in circumstances including those where the intended beneficiary comes within subsection(1)(a) or (b)”.

Assuming the Bill is passed as drafted; avoiding the effect of the clause is likely to be achieved for professionally drafted Wills by excluding clause 16, just as section 33 of the Wills Act 1837 is currently sometimes excluded. However, with homemade Wills, non-professionally drafted Wills and Wills made pre-commencement, it will be necessary to construe the words of the Will in conjunction with the statute (when in force).

The Society believes that the test of there being a “provision in the Will about how the devise or bequest is to take effect in circumstances including [disclaimer or forfeiture]” sets the bar high. A testator is unlikely to contemplate specifically either disclaimer or forfeiture in the words of the Will, but the overall shape and terms of the Will may make it clear (particularly in the case where the Will was drafted before the commencement of the Act) that he did intend a default gift, and that it was not for the share of the disclaiming person to pass to his or her children as a matter of law.

By contrast, section 33 of the Wills Act 1837 is drafted to apply a test of “unless a contrary intention appears by the will”. The Law Society suggests that consideration be given as to whether clause 16(2)(4) should mirror section 33 of the Wills Act 1837 in this respect.

Clauses 15(3) and 16(3)—Safeguarding infants share

Clauses 15(3) and 16(3) give the court a discretionary power to intervene to appoint a third party to hold the share of a child's taking as a result of forfeiture by the child's parent. The Society notes that it is currently possible to apply to a court under section 116 of the Senior Courts Act 1981 to pass over an unsuitable personal representative and make a grant to someone else. However, the Society recognises that the proposed new provisions would give the court the initiative to appoint the Public Trustee, or such other person as the Public Trustee recommends, or make such further orders or directions as is necessary.

Clauses 15(3)(1)(b) and 16(3)(1)(b) refer to “an infant who is a child or remoter descendant of the offender” in relation to the safeguarding of the infants share. The Society is concerned that these clauses are limited to a child or remoter descendant, as there may be cases where court intervention is needed where those inheriting are not children or a remoter descendants of the killer. An example of this would be where X murders both parents and has two siblings under 18 who inherit. The Society suggests that these clauses apply wherever minors are taking (or taking more) as a result of the application of the forfeiture rule.

Commencement

The Law Society believes that the Bill should expressly state the commencement position of the proposed provisions. The Bill should make clear any effect the provisions will have on existing Wills, and what the implications are of making, after commencement, a codicil to a Will made before commencement of the proposed legislation. There should be no uncertainty as to how these amendments will impact on existing or future estates.

Unless the commencement position of the Bill is spelled out practitioners may be left in a state of uncertainty—as is currently the case, for example, in relation to the Perpetuities and Accumulations Act 2009, where there has been much debate recently on this point.

If the policy is that the Bill is not to apply to Wills made before the statute comes into force then the Law Society suggests that, as a formulation for that proposition, the words in section 34 of the Wills Act 1837 should be used as a guide.

If it is to apply to all Wills whenever made consideration needs to be given to pre-commencement Wills which will have been drafted on the assumption that, in the event of disclaimer of forfeiture, the current law would apply. If this is the case, consideration should be given to the discussion regarding Clause 16 above, that it may assist in clarifying the intention of a Will if clause 16(2)(4) mirrors section 33 of the Wills Act 1837 to apply a test of “unless a contrary intention appears by the will” as opposed to proposed test “provision in the Will about how the devise or bequest is to take effect in circumstances”.

The Society supports the proposed commencement of Part 3 being subject to a minimum delay of three months from the date of Royal Assent. This delay will provide time for solicitors to come to terms with the proposed amendments, and allow people who may wish to execute codicils excluding or varying the provisions of the proposed statute to do so.

Question 7: Do you agree with the Impact Assessment on the proposed reforms relating to the law of succession at Annex E?

The Law Society agrees that as outlined in the impact assessment, solicitors will need to be informed and be familiar with the proposed amendments. There is also the likelihood that some testators may decide to amend their existing Wills to align with the Bill. However, if the commencement position of the amendments is made clear this will reduce any impact the amendments will have on solicitors and their clients.

PART 4 RIGHTS OF APPEAL

Question 8: Do you have any comments on the provisions of the draft Bill relating to rights of appeal?

No comment

Question 9: Do you agree with the impact assessment on the proposed reforms relating rights of appeal at Annex F?

No comment

February 2010

Response by Allen and Overy to the Ministry of Justice consultation paper on the Civil Law Reform Bill

We set out below our response to the proposals made in the Civil Law Reform Bill and to the questions posed in the accompanying Consultation Paper. We have limited our response to only those proposals relating to the award of interest on civil judgments, which are the subject of Chapter 3 of the Consultation. The other matters in the Consultation fall largely outside the areas of direct concern to our clients and so are not dealt with in this response. We are grateful for the opportunity to provide this feedback.

We are an international law firm, with clients primarily drawn from the banking, corporate and commercial sectors. We regularly act in disputes before the English High Court and therefore the proposals relating to the award of interest contained within the Consultation Paper are relevant to both our clients and to us as practitioners.

This response has been compiled with input from lawyers in our London office.

INTEREST

1. *Do you have any comments on the draft clauses of the Bill relating to the setting of pre—and post-judgment interest?*

As a general point, we note that with regard to many of the consultation proposals much of the relevant detail is omitted, being left to subsequent secondary legislation. It may be a truism, but the “devil is in the detail” and, without that detail, it can, on occasion, be difficult to respond fully to the proposals. For example, it is suggested that the rate of interest will be set by the Lord Chancellor and that the Lord Chancellor will prescribe the cases to which section 11 of the draft Bill will not apply. Without the detail of the rates to be used or the cases to which the changes may not apply, it is difficult to give constructive feedback on these proposals. We note that the relevant secondary legislation will be subject to consultation and an impact assessment. We would urge, however, that further consultation contains as many of the relevant details as feasible to make the consultation exercise as useful as possible.

PRE-JUDGMENT INTEREST

We favour the retention of the courts discretion in the award of pre-judgment interest, both as to the rate and the period for which it should be awarded. We support the proposal that there should be a default rate of interest set annually but with the court retaining the discretion to depart from it. We also believe that it should be in the discretion of the court to be able to award interest on a compound basis, if appropriate, as we believe that this better reflects commercial reality. We do not see the need to limit the discretion to award compound interest to amounts over £15,000.

We understand that the proposals will not affect cases where:

- (a) the interest payable is specified in a contract;
- (b) it is a statutory debt and the interest is specified by statute; or
- (c) debts where interest is not currently awarded.

We agree that this should remain the case. However, we support the suggestion made by the Law Commission that, in the case of the Late Payment of Commercial Debts (Interest) Act 1998, claimants should be allowed whichever is greater out of simple interest under the Act and compound pre-judgment interest.

POST-JUDGMENT INTEREST

In contrast to our views on pre-judgment interest, we believe that the rate of interest on judgment debts should remain a fixed rate. A fixed rate ensures certainty and transparency. We believe that such interest should be compensatory but with a moderate penal element to ensure swift settlement of judgment debts. We welcome the proposal to review the rate on an annual basis in order to better reflect the cost of borrowing and to ensure that creditors are properly compensated.

The Court of Appeal should have the power to vary the rate applicable to the period between judgment and the outcome of the appeal.

2. Do you agree with the impact assessment on the proposed reforms relating to the setting of pre—and post-judgment interest at Annex D?

We agree with the policy objectives and the intended effects, as set out in the impact assessment. However, as mentioned above, it is difficult to comment on the impact of the proposed reforms when so much of the detail is left to secondary legislation. It is not clear to us that the reforms, as set out in the current draft Bill, will improve on the current situation.

EUROPEAN PERSPECTIVE

As a final point, we would suggest that in making these proposed changes there is a careful consideration of the implications of pan-European practice. In this regard and in our experience, there can be practical problems involved in the transfer of judgments across Europe and, in particular, uncertainty regarding the interest rate applicable to money judgments transported between Member States courts. Member States have their own (often differing) national rules about interest rates applicable to judgments. In France, for example, an “automatic” interest rate applies once a money judgment is given (unless provided otherwise). Problems can arise because judgments may not mention these “automatic” interest rates (as they apply as of right). If a judgment creditor then seeks to get such a judgment recognised and enforced in another Member State, the courts of that Member State may not be aware of the relevant interest rate rule and applicable rate. That enforcing court may decline to apply the “automatic” rates of the court of the state of origin and may instead apply its own national interest rate and only do so from the date of the order of execution (ie several months after the initial judgment). This situation can give rise to unfairness and inconsistencies in approach across Europe, We have raised this issue with the Commission in the context of the review of the Brussels Regulation

http://ec.europa.eu/iustice_home/news/consulting_public/0002/contributions/civil_society_ngo_academics_ot_hers/alien_ovey_lip_en.pdf and note that the Rapporteur has recognised the difficulty in his report of 2 December 2009 <http://www.europarl.europa.eu/sides/aetDoc.do?PubRef=-//EP//NONSGML+COMPARH-PE-430.865+01+DOC+PDF+V0//EN&language=EN>. Accordingly, we would respectfully suggest that careful thought is given to how any changes might sit in the European context.

February 2010

Response by the Association of High Court Masters to the Ministry of Justice Consultation paper on the Civil Law Reform Bill

DAMAGES

Question 1. Do you have any comments on the draft clauses of the Bill relating to the law of damages?

Comments:

Dependancy Damages: We support the proposals for reform.

Damages for Bereavement: We support the proposals for reform.

Consideration should be given to adjusting the amount of the bereavement award annually so that the award keeps pace with inflation.

Damages for Gratuitous Services:

Serious consideration should be given as to whether a Court should be prohibited from awarding damages in respect of the gratuitous provision of services by the tortfeasor for any period before the date of the award. There is a strong argument that there should be no such prohibition because:

- (1) The tortfeasor who provides care will almost always be a family member and as a matter of public policy, they should not be discouraged from providing gratuitous care. If the care is provided commercially, it will almost invariably be at a significantly greater cost.
- (2) The prohibition may encourage the claimant and carer to attempt to circumvent the prohibition, which is undesirable. In *Kemp and Kemp, the Quantum of Damages*, volume 1, tab 13, paragraph 13–012, it is said,

“It might be possible for the claimant to avoid the consequences of this decision⁵ by entering into a contract with the tortfeasor for the provision of the services and a claimants solicitor should give advice to this effect at the earliest opportunity. It is perhaps unfortunate that the law requires such a device when the tortfeasor/carer is likely to have been injured and is therefore not going to be paying the damages personally.”

If it is considered that Section 7(4) of the Bill should be enacted, 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 claimants injury. Should the partial liability in respect of the claimants injury serve to extinguish the carers claim for gratuitous care or should it only reduce it in accordance with the extent of the carers liability? We suggest that it would be unjust if the partial liability in respect of the claimants injury extinguished the claim for gratuitous care. It would provide the tortfeasor who has not provided care with an unjust windfall.

Question 2. In particular, do you have any views on how the concept of additional damages pursuant to the 2004 Directive should be expressed in terms appropriate to Scots law?

Comments: We have no views.

Question 3. Do you agree with the impact assessment on the proposed reforms relating to the law of damages at Annex C?

Comments: We have no comments on the impact assessment.

INTEREST

Question 4. Do you have any comments on the draft clauses of the Bill relating to the setting of pre—and post-judgment interest?

Comments: We are concerned that the secondary legislation should not restrict the discretion of the judge as to whether to award interest.

Provision should be made for the interest rates to be reviewed on an annual basis so that the rates do not become (as they are at present) out of step with market rates.

Question 5. Do you agree with the impact assessment on the proposed reforms relating to the setting of pre—and post-judgment interest at Annex D?

Comments: We have no comments on the impact assessment.

SUCCESSION

Question 6. Do you have any comments on the draft clauses of the Bill in relation to the distribution of estates of deceased persons?

Comments: We support the proposals for reform.

Question 7. Do you agree with the Impact Assessment on the proposed reforms relating to the law of succession at Annex E?

Comments: We have no comment.

RIGHTS OF APPEAL

Question 8. Do you have any comments on the provisions of the draft Bill relating to rights of appeal?

Comments: We have no comment.

⁵ *Hunt v Severs* [1994] 2 AC 350.

Question 9. Do you agree with the impact assessment on the proposed reforms relating rights of appeal at Annex F?

Comments: We have no comment.

ABOUT YOU

Please use this section to tell us about yourself:

Full name	Master Richard Roberts
Job title or capacity in which you are responding (eg member of the public etc.)	Member of the Association of High Court Masters
Date	8 February 2010
Company name/organisation (if applicable):	Association of High Court Masters
Address	Royal Courts of Justice, Strand, London
Postcode	WC2A 2LL
If you would like us to acknowledge receipt of your response, please tick this box	Y (please tick box)
Address to which the acknowledgement should be sent, if different from above	By email

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Association of High Court Masters

The Association represents all five High Court branches ie the Chancery Masters, the Queens Bench Masters, the Bankruptcy (and Company) Registrars, the District Judges of the Principal Registry of the Family Division and the Senior Court Costs Judges.

February 2010

Response by Aviva to the Ministry of Justice consultation paper on the Civil Law Reform Bill

FOREWORD

Aviva are the UKs number one and the worlds fifth largest insurer, employing around 54,000 people across the world. Currently we have a 15% share of the UK insurance market, and in 2008 handled over 75,000 personal injury claims made against our policy holders, therefore we are a major user of the England and Wales Civil Litigation system.

Aviva has restricted its responses to the areas which it considers it is best placed to comment upon. In all its responses though, Aviva strives to get over a primary message that whilst we support the aim of the Bill to provide a fairer and modern civil law system, any changes should ensure fair outcomes whilst keeping damages at a proportionate level. Unless, the potential reforms are cost neutral overall, it will be appreciated that the compensator will need to increase premiums to cover any additional financial burden. The need to recoup additional cost will affect the NHS too.

Aviva supports the aim of the Bill and would be willing to be involved in further discussions and/or consultations that may assist in achieving a fair and modern compensation system.

Do you have any comments on the draft clauses of the Bill relating to the law of damages?

DEPENDENCY DAMAGES UNDER THE FATAL ACCIDENTS ACT 1976

Extending the statutory list of those entitled to claim for financial loss

1. We do not support the proposal to add to those eligible to claim as dependents under s 1(3) of the Fatal Accidents Act 1976 a residual category to enable anyone who was being wholly or partly maintained by the deceased immediately before the death to bring a claim.

2. We are concerned as to how the Courts would define and interpret the term “wholly or partly maintained”, and believe it could lead to some unjust decisions. Even where financial dependency has to be proved, such a broad approach could produce anomalies. For example it would be inappropriate for cohabitants of short duration to be able to bring a claim. A two year qualifying period whilst arbitrary does act as a filter and ensure some level of permanence to the relationship. To have no qualifying period is also inconsistent with the proposals elsewhere in the Bill, such as having a two year qualifying period in relation to bereavement damages and for existence of a financially supportive cohabitation when calculating dependency claims.

3. From a practical perspective, in our opinion adding a residual or “catch all” category to those eligible to bring a dependency claim will lead to delay whilst investigations are completed, incur additional costs and increase litigation due to disputes, at least until the courts have demonstrated how they will define and interpret the term “wholly or partly maintained”.

4. We would therefore propose a new subsection 1 3 (h) of the Fatal Accidents Act (FAA) 1976 of: “*any person who had been wholly or partly maintained by the deceased for a two year period immediately before the date of death*”

Claimants remarriage/civil partnership/cohabitation

5. We do support the proposal to amend section 3(3) of the Fatal Accidents Act 1976 to provide the fact (but not the prospect) of a persons remarriage, entry into a civil partnership, or financially supportive cohabitation of at least two years duration following the death must be taken into account when assessing a claim for damages under the Fatal Accident Act 1976 by that person.

6. Damages are intended to be compensatory and reflect as far as possible the loss arising from the Defendants negligence. Remarriage can substantially impact on a persons financial circumstances. Therefore it would not be equitable to allow a dependant to receive both damages through the dependency claim relating to their previous marriage and the financial benefits of remarriage. We also support the proposal that financially supportive cohabitation should also be taken into account as this reflects modern society where people tend to live together in a financially supportive relationship before or instead of marriage. Under the Bill it is proposed Cohabitants will enjoy the same benefits as spouses under the Fatal Accident Act, it is therefore correct that they should also be included in the amendment to section 3(3) in order to maintain consistency of approach.

7. However, we do foresee problems with the present drafting of s2 subsection 3. In the definition of “relevant relationship” it provides that “at the time when the action is brought A lives with another person B, as Bs husband or wife or civil partner.” At the time when the action is brought could be interpreted as at the time that the claim is first notified to the defendant or the time legal proceedings are commenced. For example

Accident Date 1/1/2010. Claim made by deceaseds dependant (X) in March 2010. X moves in with another person in June 2010. The Defendant will wish to wait for 2 years post June 2010 before settling the case—there is therefore an avoidable barrier to settlement.

Accident Date 1/1/2010. Y is seriously injured and remains in a persistent vegetative state. Claim made by Ys partner X in March 2010. X starts a new relationship in June 2010. Claim issued in January 2011. Y dies two years post accident.

8. This lack of clarity will result in increased litigation. We would suggest that it would be more appropriate to provide that “*at anytime after the deceaseds death, A is living with another person B as Bs husband or wife or civil partner, (b) A has so been living with B for at last two years and (c) A is maintained by B*”

Parents remarriage/entry into civil partnership/cohabitation may be taken into account when assessing a claim for damages from eligible children

9. We do not agree with the proposal that in relation to a claim on behalf of eligible children, the fact that the childs surviving parent had remarried or entered into a civil partnership or a financially supportive cohabitation of at least two years duration *may* be taken into account where the judge considers it appropriate to do so. In our opinion the remarriage/entry into civil partnership/financially supportive cohabitation of two years or more should *always* be taken into account when calculating childrens dependency claims, as this will ensure that the damages compensate as accurately as possible the loss suffered. In todays society marriage arrangements and attitudes are more fluid and there is certainly not the stigma attached to remarriage as was perceived when the Fatal Accident Act was introduced. Again we support the inclusion of cohabitation of at least two years, as a factor to be taken into account on equal terms as remarriage/entry into civil partnership.

10. If the proposal remains that the Court *may* take into account the surviving parents remarriage/entry into civil partnership/financially supportive cohabitation of at least two years, then in practice this is likely to be an area of dispute on every case and causing an increase in litigation with associated delay and extra costs incurred.

Breakdown of Marriage/Civil Partnership

11. We disagree that the prospects of breakdown in the relationship between the deceased and their spouse or civil partner should only be taken into account where one party has petitioned for divorce, judicial separation or nullity; or begun the procedure for dissolution of civil partnership; or is no longer living together. The court should be able take into account the full history of the relationship of the couple, for example, where the couple had had periods of separation and reconciliation in the past. This will provide the court with an informed perspective of the relationship and enable the court to take into consideration all material and relevant factors.

Breakdown of cohabiting relationship

12. We disagree that section 3(4) should be repealed. While it is desirable to treat cohabiters fairly under the FAA, the court should still be allowed to recognise that cohabitation does not have the same expectation of the relationship enduring as with marriage or civil partnership. All relevant research suggests that cohabiters are more likely to separate than a married couple or civil partnership and this must be taken into consideration. The Section 1 (b) definition of a cohabiter entitled to claim for dependency recognises that there must be some degree of permanency to the relationship. We also note that if Section 3 (4) is repealed, then cohabiters would be in a better position than married couples or civil partners, since it is proposed that the prospect of a breakdown in marriages or civil partnerships can be taken into account in certain circumstances (see 9 above). Moreover, in our experience, the courts have had no real difficulty in applying Section 3 (4) in practice.

DAMAGES FOR BEREAVEMENT UNDER THE FATAL ACCIDENTS ACT 1976

13. We agree that the statutory list of people eligible to claim bereavement damages should be extended to include; children under 18 (including adoptive children) for the death of a parent, cohabitants of at least two years durations for the death of a partner, unmarried fathers with parental responsibility for the death of a child under 18.

14. We agree that where a spouse and civil partner or cohabitant are both eligible to claim bereavement damages, the award should be divided equally between the two of them.

15. We agree that an award of £5,900 (or such future sum that represents half of the full award) should be made to each eligible child of the deceased under the age of 18. Bereavement damages are not “damages” in the sense that they are not aimed at compensating the claimant, or reflecting the value of the deceaseds life in any way. Neither are they a punishment of the negligent person who caused the death. Rather, bereavement damages are a token payment in acknowledgment of a persons grief. 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 parents award will not fall below £5,900 or 50% of the total award. The figure of £5,900 per child, therefore seems sensible.

Damages for Gratuitous Care

16. We agree that the current arrangements whereby the claimant holds in trust for the carer damages for gratuitous care should be replaced with a personal legal obligation to account to the carer for gratuitous services actually provided. The personal legal obligation should apply to future as well as past care, as there is no justification for a different approach and consistency should be maintained.

17. We agree that the personal legal obligation should apply regardless of carer, but as at present 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.

18. We do not agree with the proposal to amend s3 (1) of the Fatal Accidents Act 1976 to allow damages to be awarded for services gratuitously provided to a dependant of the deceased. The wide interpretation of s4 of the Fatal Accidents Act 1976 already allows damages to be awarded in such circumstances. In our opinion this is not a loss of benefits that the dependent reasonably expected to receive from the deceased and as such should not be recoverable under the Fatal Accidents Act 1976.

Do you have any views on the application of aggravated damages, for these purposes, in Scotland?

19. We have no comments in respect of the proposed amendments to the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, Patents Act 1977 and Copyright, Designs and Patent Act 1988.

Do you agree with the impact assessment on the proposed reforms relating to the law of damages at Annex C?

20. We have not undertaken a detailed analysis of the potential cost implications for Aviva. However, in the assessment it assumes bereavement damages are only claimed in 50% of cases. This is not our experience, and we believe damages are claimed in the majority of eligible cases. We anticipate that the proposals will lead to an increase in claims costs which will be passed on to our motor and liability policyholders.

Do you have any comments on the draft clauses of the Bill relating to the setting of pre—and post-judgment interest?

21. The current rate of pre-judgment interest was set by the Lord Chancellor in 1993 at 8%. This is significantly higher than investors receive on savings or current borrowing charges. A link to an external rate such as the Bank of England base rate to be reviewed on a regular basis would provide clarity and certainty. Until further information is provided on the mechanism for review and the rate to link the interest award, then it is not possible to comment on the impact of the proposal. We believe that this is a complicated area, which will require a further more detailed impact assessment and consultation before proposals are implemented. The aim of interest in personal injury claims is to be compensatory not penal. We do not consider compound interest could ever be justified in personal injury cases.

Do you agree with the impact assessment on the proposed reforms relating to the setting of pre—and post-judgment interest at Annex D?

22. See above.

Do you have any comments on the draft clauses of the Bill in relation to the distribution of estates of deceased persons?

23. No comment.

Do you agree with the Impact Assessment on the proposed reforms relating to the law of succession at Annex E?

24. No comment.

Do you have any comments on the provisions of the draft Bill relating to rights of appeal?

25. We have no comment on the provisions of the bill in respect of the reforms proposed for appeals in Barristers disciplinary hearings.

Do you agree with the impact assessment on the proposed reforms relating rights of appeal at Annex F?

26. No comment.

March 2010

**Response by the Bar Standards Board to the Ministry of Justice
Consultation paper on the Civil Law Reform Bill**

The Bar Standards Board (BSB) is grateful for the opportunity to respond to the Civil Law Reform Bill Consultation Paper. The BSBs function is to regulate the Bar of England and Wales and its responsibilities include, but are not limited to, handling complaints against barristers, taking disciplinary action where necessary and setting the education and training requirements for entry to the Bar.

The large majority of the provisions of the Bill relate to matters that fall outside the BSBs functions but we do have a significant interest in Part 4—“Rights of Appeal” given our responsibility for decisions regarding qualifications for entry to the Bar and our role in prosecuting disciplinary matters in front of Disciplinary Tribunals of the Council of the Inns of Court. The BSBs response is therefore limited to the questions set out under Chapter 5 of the consultation paper.

CHAPTER 5: RIGHTS OF APPEAL

Question 1: Do you have any comments on the provisions of the draft Bill relating to rights of appeal?

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 the purpose. We note that reference has not been made to appeals from the Inns Conduct Committee: technically these appeals still fall under the Visitors jurisdiction by virtue of the Bar Training Regulations 2009. However, amendments to the Regulations to remove this avenue of appeal are currently being considered.

Question 2: Do you agree with the impact assessment on the proposed reforms relating to the rights of appeal at Annex F?

The BSB agrees with the vast majority of the contents of impact assessment set out at Annex F particularly the rehearsal of the benefits that would flow from the proposed arrangements. However, in section 3—Cost Benefit Analysis, Option 1 Costs, it is stated that appellants are not required to pay a fee under the current arrangements. This is true in relation to student appeals but barristers appealing against disciplinary decisions are required to pay a fee of £250 to the Bar Council/Bar Standards Board. Therefore the proposed fee of £200 represents a small saving for barristers but it is unlikely that this will have an impact on the volume of appeals.

February 2010

**Response by Beachcroft LLP to the Ministry of Justice
Consultation paper on the Civil Law Reform Bill**

Beachcroft LLP is one of the largest national commercial law firms in the UK. With over 1,400 employees, it provides legal advice and litigation services from seven locations in the UK and also in Brussels. Beachcroft provides “trusted adviser” work for major national and international organisations, and delivers integrated legal services to clients in six main industry groups: health & public sector; real estate; financial services (including the insurance industry); technology, media & telecommunications; consumer goods & services; and industrial manufacturing and transport.

The specialist nature of the firms dispute resolution practice is reflected by the breadth of services offered to the financial services and insurance industry. Sixty of its Partners and over 300 of its lawyers advise the insurance industry on a daily basis, providing tailored solutions to a broad range of issues. Clients include the top ten composite insurers, specialist companies, leading re-insurers, Lloyds syndicates, professional associations and self-insureds. In the health care and commercial sector, the firms litigators handle a range of medical and clinical negligence, employers liability and public liability cases and a variety of other litigation on public sector law and patient care issues.

The questions set out in the consultation questionnaire are as follows:

1. Do you have any comments on the draft clauses of the Bill relating to the law of damages?
2. In particular do you have any views on how the concept of additional damages pursuant to the 2004 Directive should be expressed in terms appropriate to Scots law?
3. Do you agree with the impact assessment on the proposed reforms relating to the law of damages at Annex C?

Beachcroft is responding to the questions in this consultation as far as they relate to damages only.

Extending the category of claimants

1. DEPENDANTS

The proposed extension of the Fatal Accidents Act (FAA) to include any person who was being wholly or partly maintained at the time of death does create an opportunity for there to be litigation by a wider group of people and to create uncertainty. In reality, the numbers of individuals who fall in to this category would at first glance appear small. However it is inevitable that given an opportunity there will be an increase in the diversity of claims made.

The proposals do not include any minimum time period for which the maintenance need have occurred, hence 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 two 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 FAA s.1(3) and apply a time period during which the maintenance had been provided.

We consider it is appropriate that the contribution need not have been in moneys worth so that an individual who had been provided with substantial care could make a claim as a dependant. What amounts to a “substantial contribution” may of course become the subject of future litigation.

2. RELATIONSHIPS

We agree it is appropriate that the fact of a marriage, civil partnership or relevant relationship must be taken in to account. This remedies the previous inequitable situation whereby it could be argued that the remarriage of a widower could be considered but not that of a widow.

We note the change in terminology from “must” for the partner of the deceased to “may” in connection with the child of a deceased, we consider that the court must be required to take any relationship in to account in both situations.

With regard to the definition of a relevant relationship we consider that reference to “at the time when the action is brought” is ambiguous and the relationship should be capable of consideration at any time prior to settlement of the claim.

We do not consider it is appropriate to introduce a time period for relevant parties, but none for those who have entered into a legally binding relationship. Further 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 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.

3. RELATIONSHIP BREAKDOWN

We agree it is appropriate for consideration to be made of whether a relationship would have ended. We think the court should be free to take this into consideration in all circumstances and not just those prescribed. There may be evidence of a breakdown in a relationship which does not fulfil the proposed categories stated, for example where one party has raised the issue with a medical professional or sought relationship counselling. We also consider that it should be possible to raise the issue of a breakdown in a non-legally formalised relationship which is just as likely to come to an end as a marriage or a civil partnership. It is not appropriate to have two systems in place, one for legally formalised relationships and one for other relationships.

4. LACK OF FINANCIAL SUPPORT

We do not consider it is necessary to omit the current FAA s.3(4) and consider that the court should be able to take this issue into consideration where appropriate.

5. BEREAVEMENT ALLOWANCE

We consider that it is appropriate to end the ambiguity about the entitlement of co-habitees to claim a bereavement award.

We also agree that it is appropriate for children to make a similar claim. We are pleased to note that the category of claimants entitled to seek a bereavement allowance is not being extended further and that the sum claimed will remain a fixed sum, that a child will be entitled to half of that sum and that where there are claims by a former spouse and a current co-habitee or by both parents of a child under age 18 that the amount payable will be equally divided. We do not consider it is appropriate to extend the entitlement to a bereavement allowance any wider than these categories.

The Impact Assessment on the proposed reforms relating to the law of damages at Annex C

In connection with all of the above we note that the Impact Assessment bases the number of FAA claims on the number of motor accidents, accidents in the workplace and those covered by public liability insurance without any consideration of the claims made as a result of fatal long tail diseases. We accept that the majority of claims of this nature to date, taking mesothelioma for example, have been made by widows of the deceased who are able to make a claim under the FAA as currently drafted. As society changes and as the cohort of claimants who seek damages in these circumstances changes, the impact of the proposed reforms will be wider than as averred in the Impact Assessment. To that extent we consider that the Impact Assessment has undervalued the cost of the proposed changes for insurers. This increased cost will also, although in a reduced amount, impact upon the cost to the NHS which faces claims from relatives of former employees for damages for mesothelioma and other long tail fatal diseases for uninsured periods.

The recent publicised case of *Willmore v Knowlsey Metropolitan Borough Council* involved a 49 year old claimant who alleged she had been exposed to asbestos when a pupil at school. Given her age at death it would be perfectly feasible that she had children under age 18 who would become entitled to a bereavement allowance. Similarly it is possible to envisage the situation where an individual could with the proposed changes claim dependency where the deceased had been their main carer prior to their own death (where previously no such claim could have been made). It is clear that there will be additional costs from the proposed changes which have not been taken in to account in the Impact Assessment.

GRATUITOUS CARE

We agree that it is appropriate that where there is an award made for gratuitous care it should be acceptable that there be a personal obligation to account to the carer as opposed to placing those damages in trust.

AGGRAVATED AND EXEMPLARY DAMAGES

We agree that it is appropriate to limit the circumstances in which exemplary damages are payable and it is unfortunate that this terminology appears in a limited number of statutes. However 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.

CONTRIBUTORY NEGLIGENCE

We note that the proposals are now silent as to when the issue of contributory negligence should be taken in to account. We consider that provision should be made for this issue to avoid ambiguity and scope for satellite litigation.

February 2010

Response by the Civil Sub-Committee of the Council of Her Majesty's Circuit Judges to the Ministry of Justice consultation paper on the Civil Law Reform Bill

1. Our general comment about the Bill is that the method of amending legislation by amending individual sections and subsections in an existing statute is cumbersome and inconvenient. It would ease the task of lawyers, judges and members of the public wishing to understand legislation if, where a previous Act is undergoing extensive amendment (as the Fatal Accidents Act 1976 is on this occasion) the previous Act were to be repealed in its entirety and replaced by a new Act incorporating the amendment.

2. Alternatively, a simpler and less expensive alternative would be to reproduce in full any section of an Act which is amended in a schedule to the amending legislation with all amendments accurately incorporated.

Damages: Questions 1–3

3. We suggest that section 3 subsection (1) and subsection (2) up to and including the word “insert-” are redundant and that subsection (3) of section 2 should continue after (3B) with (3C), (3D) and (3E) with the remaining sections being renumbered.

4. In section 1 of the Act we suggest that, in order to achieve consistency, the test of whether a person should be regarded as maintained by the deceased should mirror that in the Inheritance (Provision for Family and Dependents) Act 1975.

5. We consider it may be helpful (and that it is logical) to include in the part of the Bill dealing with damages for gratuitous care a provision enabling the court, if it sees fit, to make a direct award of damages to one or more carers despite their not being parties to the action.

6. We have no views on the application of aggravated damages in Scotland.

7. We have no comments on the impact assessment.

Interest: Questions 1 and 2

8. We consider the drafting of section 12 giving powers to bring in secondary legislation is far too widely drafted and substantially and undesirably restricts the discretion of judges to award or not to award interest. Secondary legislation should merely enable the rates of simple and compound interest to be fixed.

9. We have no comments on the impact assessment.

Distribution of Estates: Questions 1 and 2

10. We have no comments either on the draft bill or the impact assessment.

Rights of Appeal

11. We have no comments either on the draft bill or the impact assessment.

8 January 2010

Response by Clifford Chance to the Ministry of Justice consultation paper on the Civil Law Reform Bill

We write to comment on the provisions regarding interest in the draft Civil Law Reform Bill. We make no comments on the other provisions of the draft Bill as those other provisions relate to areas in which we do not practice on a regular basis.

In general terms, we consider that the courts should be given the power to award compound interest but we do not share the view that the current statutes dealing with interest are unduly complex or, in themselves, lead to inconsistencies. We are also unconvinced that the solutions offered by the draft Bill create a “simple and transparent” system, still less one that will be fair.

Pre-judgment interest

With regard to the provisions in the draft Bill regarding pre-judgment interest, we do not consider appropriate to give the courts discretion over

- whether to award interest,
- whether interest should cover the whole or only part of the sum awarded or paid, and
- whether interest should cover the whole or only part of the period from accrual of the cause of action to the date of judgment or payment

but then to deprive the court of discretion over

- the rate of interest, and
- whether the interest should be simple or compound

giving power over these latter issues to the Lord Chancellor instead.

Interest is, as the Impact Assessment comments (paragraph 19), intended to be compensatory, not penal. It can only be compensatory if the court is in a position to take into account the actual position of the parties and to consider all elements relevant to the calculation of interest. The rate of interest and basis upon which it is to be calculated do not differ in kind from the other aspects relevant to an assessment of interest. All matters relevant to interest should be determined within the judicial process, and not by administrative fiat.

Further, if the court has discretion over some matters relevant to the sum by way of interest that a party will receive but no discretion over others, in practice, the court will use those matters within its discretion to achieve the result that it considers just, even if doing so involves distorting the applicable principles. So, for example, if the court considered that the rate and basis of interest would, in all the circumstances, give a successful claimant too high a return and the court is not able to reduce the rate or change the basis, the court will, instead, not award interest on the whole sum or will reduce the period for which interest applies. This would, in our view, make the situation more arbitrary than it might be thought to be now.

To the extent that there is any justification (though we are not convinced that there is) in the Law Commissions criticism that the current position is uncertain, arbitrary and sets rates at an inappropriate level, the draft Bill does not, in our view, meet that criticism. Discretion can, in its nature, seem uncertain and arbitrary, but discretion necessarily remains a core aspect of the assessment of interest in the draft Bill. Those who regard the current system as uncertain and arbitrary will not regard the system put in place by the draft Bill any differently. Further, a rate of interest and basis of calculation set by the Lord Chancellor will not cure any perception in an individual case that the amount of interest payable is arbitrary or inappropriate and, indeed, might increase that perception. The parties will lack any ability even to argue that the rate of interest and basis of calculation are inappropriate, which they can at least do now. There is a risk that the parties will feel that they are victims of powers taken by a distant politician who can have no appreciation of what is just in their particular case.

Further, insofar as interest is set by the court at an inappropriate level, it is in the main through the (mis)use of the post-judgment rate. It is not unreasonable in itself for a court to apply the post-judgment rate before judgment as well as after judgment: that rate is officially sanctioned, and there is no obvious reason in many cases why the rate should differ before and after judgment. The problem is that the judgment rate has not been changed by the Lord Chancellor for almost 17 years, and therefore bears no (or a purely coincidental) relationship to real interest rates in the economy. It is not clear to us why the Lord Chancellor has not changed the rate for the last 17 years, but it does suggest that giving more power the Lord Chancellor is not the obvious solution.

In our view, only one straightforward reform to the current position on pre-judgment interest is necessary. The court should be given the discretion to award compound interest rather than only simple interest. Compound interest will, in most cases, more fully compensate the claimant for being out of its money than simple interest. As we have said, interest is properly a matter for judicial determination, and all aspects of interest should be left to the judge hearing the individual case.

It may be that in cases of, for example, default judgment, where there is no judicial determination of interest, the post-judgment rate should be used, but we do not consider that this justifies removing all judicial discretion over the rate and basis of calculation of interest.

In addition, we have the following comments on the relevant provisions of the draft Bill:

Clause 10(1): This follows section 35A of the Senior Courts Act 1981 in referring to “debt or damages”. There are many claims that do not fall within the description “debt or damages”, such as restitutionary claims or claims for equitable compensation (though the courts have extended the section to apply it to restitutionary claims, and there is an equitable power to award interest, even compound interest, in limited cases). We see no reason why the court should not have power to award interest on all money claims, and therefore favour amending clause 10(1) to read “... for the recovery of money, whether by way of debt, damages or otherwise.” This would also modernise the legislation and make it more readily comprehensible.

Clause 10(3): We assume that the intention of this clause is to reflect the current law that the court cannot award interest on any claim paid in full before the commencement of legal proceedings. If so, we agree, but we consider the clause to be ambiguous. It would be better if the clause read: “If the defendant pays the whole sum claimed to the claimant after the issue of proceedings but otherwise than in pursuance of a judgment, the court may order...”

Post-judgment interest

We consider that the post-judgment rate of interest and basis of calculation should be set by the court or, if it does not do so (eg for default judgments), there should be a default rate set or reviewed annually by the Lord Chancellor or by the Civil Procedure Rule Committee with the advice of HM Treasury. Any default rate should provide for compound interest.

If the court is to set the rate, it may (as may the Lord Chancellor in any event) need statutory guidance as to the basis upon which the rate should be set. Paragraph 9 of the Impact Assessment says that the rate should compensate creditors and encourage debtors to pay but without unfairly penalising debtors for late payment. We accept this as an approach, but there is a fine line between encouragement and punishment; the Late Payment of Commercial Debts (Interest) Act 1998 goes too in the direction of punishment in our view. We also consider that any judgment or order should specify the rate of interest and the basis of calculation so that the judgment debtor, on receiving a copy, will know exactly what it must pay.

We see no advantage in leaving it to the Lord Chancellor to determine rates of interest for particular categories of case and the basis of calculation in those categories. This will only add complexity to the system.

February 2010

Response by Irwin Mitchell to the Ministry of Justice consultation paper on the Civil Law Reform Bill

CLAUSE 1—EXTENSION OF RIGHT OF ACTION

We welcome the new extension in subsection (h) in clause 1, which will give more people the right to make a claim when someone who is maintaining them is killed. However, the current wording of new subsection (7) which gives a definition of maintenance is something which is not currently in the Fatal Accidents Act 1976. We suggest amending the new subsection to read:

“For the purpose of this Act the person (A) is maintained by another person (B) if B otherwise and for full valuable consideration makes a substantial contribution in money or monies worth towards A.”

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.

CLAUSE 2—ASSESSMENT OF DAMAGES (EFFECTIVE REMARRIAGE ETC.)

We propose that clause 2 of the draft bill is removed in order to ensure that the obligation for financially supporting the bereaved spouse or civil partner should continue to be placed on the tortfeasor, rather than pass the new spouse or partner. The principle that the “polluter pays” governs our civil justice system, and we would oppose anything that seeks to change that. It is just that the person who is negligent in causing the injury or death should pay the compensation.

We are also concerned that the parties may adjust their behaviour so as to avoid invoking this new clause, for example, defendants delaying in the hope that the claimant will find a new partner.

We do not accept that there is a need to have a two year period that has to be satisfied before a claimant can bring a claim under the Fatal Accidents Act 1976. This is referred to in a number of places within the consultation. We consider that every case should be judged on individual circumstances. Introducing the two year period leads to arbitrary results. We propose that subsection (b) in new clause 3 D should be omitted from the bill. 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.

The Government has stated in its response that it is opposed to intrusive investigation in some areas of this legislation. However, this clause could leave bereaved partners open to such investigation.

CLAUSE 5—DAMAGES FOR BEREAVEMENT

We note the proposed extension for people to recover damages for bereavement. However we do not consider that this extension goes far enough. We should suggest that the amendments of the current subsection should ensure that the following are covered:

- The parents of the deceased
- The child of the deceased who was aged under 18 at the date of death, or was living with the deceased at the time of death
- A sibling of the deceased
- A person who was engaged to the deceased at the time of death

We consider that parents should be entitled to claim bereavement damages regardless of the age of the child when the child dies. It seems to us that it is distasteful and impossible to argue that a child over the age of 18 is any less of a loss than a younger child.

Ties between siblings are close which is why we consider that they should be included as well.

We consider that engaged couples should be treated in the same way as cohabiting couples. If a couple were engaged that is likely to be inevitably proof enough that there is a closeness that justifies payment in these circumstances.

The loss of a parent will obviously be keenly felt by a child regardless of age and accordingly, it is justified for children to be included as well. Reference is also made to the damages (Scotland) at 1976 which includes an entitlement to bereavement in damages for relatives of the description referred to above.

CLAUSE 6—MINOR AMENDMENT

We are concerned that this amendment may have some implications. We do not consider for the reasons already stated that two people have to live together for two years before they can be designed as dependants. Clause 6 should be removed from the draft bill and that subsection (b) (ii) of clause 1 (3) in the Fatal Accidents Act 1976 should be repealed. This contains references to a two year period having the pass having to pass before someone is classed as a dependant.

IMPACT ASSESSMENT

We are unable to provide detailed comments on the specific figures included in the impact assessment. However it is a real concern that discussion of the potential cost to the defendant the impact assessment appears to be trying to achieve “fairness” to both sides. It is important that this does not supersede what is “full” compensation for up victims. It has of course been established for many many years that an injured person is entitled to compensation that puts them in the position they would have been had they not sustained any injuries.. There are many authorities that support this principle particular reference is made to the House of Lords decision in *Wells—v—Wells* in 1999. We sincerely hope that this important principle has been paramount in consideration of the various amendments to the legislation.

CLAUSE 7—DAMAGES FOR GRATUITOUS SERVICES

It is noted that a claimant can now recover damages for gratuitous services if those gratuitous services are provided by the defendant. However, it is unclear why as set out in clause 7 (4) that these damages cannot be recovered for the period prior to the date of the award. Such an approach seems arbitrary.

CLAUSE 8—AWARDS OF DAMAGES UNDER THE FATAL ACCIDENTS ACT 1976

This clause would allow the claimant to recover damages for gratuitous services provided by the defendant. Again, it is difficult to see why this only arises for damages after the award rather than before which seems arbitrary.

Comments on proposals in relation to Pre and Post Judgment Interest on claims for debt and damages (excluding PI)

Question 4. Do you have any comments on the draft clauses of the Bill relating to the setting of pre—and post-judgment interest?

Comments:

- a. In so far as the draft clauses mainly enable rates of interest, whether simple or compound to be prescribed by secondary legislation it is not possible to make much substantive comment. It will therefore be crucial that there is effective consultation in relation to any proposed secondary legislation.
- b. The prompt updating of any rates set for pre-judgment interest in particular would have to be provided for or the same objection noted in the impact assessment to the current setting of the prescribed judgment rate, that it is not kept up-to-date and may not always therefore be at an appropriate level, would arise. In theory the current position that the pre-judgment rate is in the courts discretion should enable rates appropriate at the time to be awarded.
- c. It is difficult to see any good reason for taking away in relation to pre-judgment interest (except in non-sterling cases) any residual discretion in the court to disallow or vary the specified interest rate or type (simple/compound) to enable justice to be done in individual cases, particularly when that discretion is given in relation to post-judgment interest in draft clause 11(5).

Clause 11(5) in effect gives the court more discretion in relation to post-judgment interest than it has now. Whilst it is true that section 17 of the Judgments Act 1838 states that rules of court may provide for the court to disallow all or part of the interest otherwise payable, the only such provisions in the CPR seem to be in relation to interest on costs in CPR 47.8 (3) and 47.14(5) (and CPR 40.8 also states that interest shall run from the date of judgment “unless the court orders otherwise”).

- d. The ability to recover compound interest in appropriate cases is a welcome proposal in principle.
- e. The proposed clauses, (as do section 35 of the Senior Courts Act 1981 and section 69 of the County Courts Act 1984), provide that there will be no power to award interest in respect of a debt or damages where interest already runs eg under statute or contractually.

“Another example” is mentioned at the end of paragraph 34 of the Explanatory Notes of interest payable under statute but the example does not appear.

If this excludes the award of interest where the Late Payment of Commercial Debts (Interest) Act 1998 applies, it would need to be ensured that there was equivalence and fairness between the differing regimes both as to rate and whether the interest be simple or compound.

- f. Clause 11 on post-judgment interest applies in relation to all judgment debts (High or county court) and subsection (2) says that any cases to which the section does not apply will be specified by order. So again it is not possible to make any definite comments in advance of a consultation on the details proposed in secondary legislation, save to suggest that this may be the opportunity to bring High and County court judgments and their enforcement into line and to review the County Courts (Interest on Judgment Debts) Order 1991.

There seems to be no sustainable reason why in the county court there should be no interest on judgments under £5,000, (unless there is contractual interest or statutory interest under the Late Payment of Commercial Debts (Interest) Act 1998), unless transferred to the High Court for enforcement, nor why if interest is payable it does not run when there are enforcement proceedings, unless they are unsuccessful (so that if the enforcement proceedings are partially successful, the remainder of the debt becomes interest free).

Question 5. Do you agree with the impact assessment on the proposed reforms relating to the setting of pre- and post-judgment interest at Annex D?

Comments:

- a. The comments given in answer to question 4 are repeated.
- b. It is not understood why or on what basis it is stated in paragraph 27 of the “Evidence Base”, referring to pre-judgment interest, that “...85% of all claims are under £5,000 (all these claims certainly would not fall into the affected claim pool.”

Provisions re Succession

The conclusions detailed below relate to the proposals on succession only (a copy of the proposals are attached). The conclusions were reached following a telephone conference between:

Louise Sykes—Contentious Probate—Alison Matthews—Compliance
Adam Draper—Contentious Probate—Gillian Coverley—Trust & Probate
Chris Walton—Contentious Probate—Lisa Shenton—Wills

Forfeiture

There is nothing in the proposal with which we disagree.

The current position has the effect of penalising a child for the act of his/her parent. In our view, it is appropriate that the Law on Forfeiture should be amended to remove the impact on the innocent child by treating the forfeiting parent as having immediately predeceased the deceased.

The only incidence we can foresee whereby the proposal may be subject to abuse/have a negative impact is in the incidence of a parent killing with a knowledge and/or intention that, although forfeiture would apply to them, their child would benefit. We do not expect that this situation would occur with any frequency.

Disclaimer

We neither fundamentally agree nor disagree with the proposal because whilst the issue can be resolved by a change in the law, equally the issue can simply be resolved by way of a Deed of Variation/gift.

Death during minority, leaving children

We agree with the proposal.

Impact assessment

We agree with the impact assessment.

March 2010

Response by the NHS Litigation Authority to the Ministry of Justice Consultation paper on the Civil Law Reform Bill

This is the response of the NHS Litigation Authority (NHSLA) to the above.

We have approached this response on the basis that the Government has made decisions following receipt of responses to the 2007 consultation paper on the Law of Damages, and therefore we concentrate as requested on the specific questions asked.

DEPENDENCY DAMAGES UNDER THE FATAL ACCIDENTS ACT 1976

1. *Do you have any comments on the draft clauses of the Bill relating to the law of damages?*

In our view, the phrase “no longer living together” in proposed clause (3D) (b) is ambiguous and could lead to satellite litigation. For example, is it intended that this wording should apply in a situation where the couple have separated, but continue to live in the same house albeit in different rooms and with minimal contact with each other? Alternatively, does it cover situations where the dependent and the deceased had their own separate households, but nonetheless lived as partners? It might be desirable to add the words “in the same household” at the end of this clause, which would (arguably) exclude the first of the two examples we have quoted, although we accept that the position in respect of the second example might remain subject to argument.

2. *Do you have any views on the application of aggravated damages, for these purposes, in Scotland?*

NHSLA does not cover NHS bodies in Scotland and therefore we express no view on this issue.

3. *Do you agree with the impact assessment on the proposed reforms relating to the Law of Damages at Annex C?*

We believe that the narrative on page 69, under the heading “Costs to the National Health Service”, is flawed. It suggests, for example, that there are around 1,000 adult fatalities per annum in the NHS. This is a massive under-estimate, and we assume that the figure of 1,000 relates to claims rather than fatalities in general. Even on that basis, however, we disagree with the suggested extra cost to the NHS of £0.6 million per annum. The calculation fails to take account of interest and, most particularly, the additional legal costs associated with such claims. There will undoubtedly be cases where this provision will result in claims being intimated in cases where no dependency claims would previously have been launched. Indeed, even for those cases where other claims (eg Bereavement Damages for those currently qualifying) would have been intimated, additional costs will be incurred by both sides in respect of the newly approved childrens bereavement claims. We therefore regard the figure of £0.6 million per annum as a serious under-estimate.

Likewise, the assessment on page 70 of the additional cost to the NHS of £1 million per annum of extending Bereavement Damages to co-habitants fails to take account of additional legal costs.

Similarly, on page 67, where it is estimated that the additional annual cost to the NHS of extending the basis for dependency claims is £1.8 million, we consider this to be a serious under-estimate. As with the other categories, it does not take account of legal costs. Additionally, we believe that there are likely to be substantially more claims under this heading, were the basis for such claims to be extended. 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. 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. 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.

INTEREST

1. *Do you have any comments on the draft clauses of the Bill relating to the setting of pre-and post-judgment interest?*

We find it difficult to comment on these provisions in detail, because so much will depend upon the decision of the Lord Chancellor as to the rate to be applied under section 12.

We do not consider it appropriate that the rate to be specified by the Lord Chancellor should be the only rate which a court may award in respect of pre-judgement interest. At present, courts have substantial discretion on this point, and generally apply that discretion equitably to reflect the conduct of the parties. We strongly urge that that discretion should remain. We acknowledge that section 10 (2) preserves discretion in relation to the period during which interest may be awarded, but we consider that there should also be discretion as to the rate.

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. We note that page 17 promises consultation in the event that there is a formal proposal to introduce compound interest generally, and NHSLA will be very willing to participate in that.

2. *Do you agree with the impact assessment on the proposed reforms relating to the setting of pre-and post-judgment interest at Annex D?*

Neither the draft Bill nor the impact assessment is entirely clear on this point, but both at least imply that there will in future be only one rate of interest in pre-judgment cases to cover both General Damages and Special Damages. If that is so, the impact assessment fails significantly to take account of this. At present, interest on General Damages is 2% per annum, which reflects the fact that (a) pain, suffering and loss of amenity do not all occur in their entirety on date of the accident or incident; and (b) that the amenity award is calculated at the date of settlement and not at the date of the accident. Accordingly, it is entirely fair and reasonable that interest on General Damages should be lower than that on Special Damages. We would strongly urge that position to continue.

Should the interest rate for General Damages be increased, the effects on the NHS would be significant. In brain-damaged baby cases, for example, General Damages are usually between £200,000 and £250,000.

Much will clearly depend upon the actual rate set by the Lord Chancellor, and therefore it is impossible at present to calculate the likely financial effect on the NHS. However, if it is proposed that interest on General Damages be increased to the level of that on Special Damages, and if the clock will start to run from the date of the accident or incident, then the cost to the NHS will be many millions of pounds per annum.

DISTRIBUTION OF ESTATES

We offer no comments here.

CHAPTER 5 RIGHTS OF APPEAL

We offer no comments here.

February 2010

Response by RoadPeace to the Ministry of Justice consultation paper on the Civil Law Reform Bill

DAMAGES

Question 1. Do you have any comments on the draft clauses of the Bill relating to the law of damages?

Comments: This Bill is intended to make the compensation system fairer but we believe some of the changes proposed will have the opposite effect.

Clause 2 should be deleted. It should not affect the damages claim if the bereaved are able to remarry. They were still suddenly and traumatically bereaved by the actions of another, a fate that no one would wish on another.

We also think that the requirement for a two year waiting period is fair. This will only delay efforts at recovery and may have devastating financial consequences for the bereaved.

Clause 5 is still too restrictive. As noted in previous responses, we strongly support removal of the age restrictions with bereavement damages. This has been a long standing concern of RoadPeace since Brigitte Chaudhry, RoadPeace founder, had her appeal for an inquest with a jury rejected by the European Court of Human Rights rejected on the basis that she could get civil redress, but her son was 26 when he was killed by a red light violator in 1990 and she did not qualify for bereavement damages. Many of our members are bereaved parents of young adult children. Some will never recover from the shock and will never work again. In addition to coping with the loss of their child, they face financial hardship as they cannot keep up mortgage payments and utility bills.

We believe that those eligible for bereavement damages should include: parents of the deceased; any child under the age of 18 at the date of death, or who was living with the deceased at the time of death; sibling of the deceased, any person who was engaged to the deceased at the time of death.

ABOUT YOU

Please use this section to tell us about yourself:

Full name	Amy Aeron-Thomas
Job title or capacity in which you are responding (eg member of the public etc.)	Executive Director
Date	9/2/10
Company name/organisation (if applicable):	RoadPeace
Address	245a Coldharbour Lane Brixton, London
Postcode	SW9 8RR
If you would like us to acknowledge receipt of your response, please tick this box	X (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

RoadPeace is the national charity for road crash victims, too many of whom do not qualify for bereavement damages.

February 2010

**Response by the Association of Personal Injury Lawyers to the Ministry of Justice's
Civil Law Reform Bill Consultation Paper**

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

The aims of the Association of Personal Injury Lawyers are:

- To promote full and just compensation for all types of personal injury.
- To promote and develop expertise in the practice of personal injury law.
- To promote wider redress for personal injury in the legal system.
- To campaign for improvements in personal injury law.
- To promote safety and alert the public to hazards wherever they arise.
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Muiris Lyons	APIL Vice President.
Stephen Lawson	APIL Secretary.
Allan Gore	APIL past President.
Karl Tonks	APIL Executive Committee Member.
Mark Turnbull	APIL Executive Committee Member.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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INTRODUCTION

We welcome the opportunity to respond to this consultation, having responded to the Government's original consultation "*The Law on Damages*" in July 2007. Due to APIL's remit of campaigning on behalf of injured people, we will only be commenting on part one of the draft Bill.

There are some aspects of the draft Bill that we welcome. We are, however, extremely disappointed that some Law Commission recommendations have been ignored. In the foreword to the Bill, Bridget Prentice states that "*several of the reforms proposed derive from or implement recommendations of the Law Commission. I am very grateful to the Law Commission for its work in keeping the civil law up to date*". Despite these comments, there are a number of recommendations that the Law Commission has made in recent years that are not addressed in this Bill. The fact that these recommendations have not been included is a failure to keep the law up to date, which will have a detrimental impact on injured people. We urge the Government to bring forward a further Bill to enable other Law Commission recommendations to be enacted in the very near future.

GENERAL COMMENTS

The most fundamental omission relates to the Law Commission's recommendations in relation to damages for non-pecuniary loss, which were not discussed in the Government's "*Law on Damages*" consultation in 2007. The fact that there is nothing in the draft Bill to address these recommendations represents a missed opportunity to make a much needed update to this area of law. The Court of Appeal failed to implement the recommendations in full and we had hoped that the Government would reflect on the Commission's view that the recommended increases should now be implemented through legislation, and bring forward measures in this Bill to do so.

In Law Commission report 257—*Damages for Non- Pecuniary Loss*, published in 1999, it was recommended that damages for non-pecuniary loss should be increased by at least one and a half times (for damages above £3,000) and that, for damages valued between £2,001 and £3,000, that they should be subject to a series of tapered increases of less than one and half times. The Law Commission also stated:

*“we recommend that, if the minimum increase recommended by us...is not achieved by the judiciary with in a reasonable period (say three years from the date of publication of this report), it should be implemented by legislative enactment”.*⁶

By its decision in *Heil v Rankin* the Court of Appeal failed to implement the minimum recommendation. The Court did, however, acknowledge the following:

*“the level of awards does involve questions of social policy...Parliament remains sovereign. It can still intervene after the Court has given its decision. The task would be a novel one for Parliament. However, Parliaments’ intervention in this instance would not necessarily result in a loss of flexibility or interfere with the ability of the court to craft an award to the individual facts of a case, which is a virtue of the present system. The Commission has provided a draft Bill in their report in case it is necessary to legislate. The terms of the proposed Bill would avoid the undesirable consequence of lack of flexibility. If legislation based on the proposed Bill were to be passed, the legislation could also, by statutory provision, avoid the retrospective effect of an intervention by a court.”*⁷

Victims of negligence are poorly served by the failure here to review the Law Commission’s own draft Bill, and we submit that this issue should be addressed without further delay.

CLAUSE 1—EXTENSION OF RIGHT OF ACTION

We welcome new subsection (h) in clause 1, which will give more people the right to make a claim when someone who is maintaining them is killed. We have concerns, however, about the current wording of new subsection (7), which gives a definition of “maintenance”, something that is not currently in the Fatal Accidents Act 1976.

We suggest amending new subsection (7) to read:

“(7) For the purposes of this Act, a person (A) is maintained by another person (B) if B, otherwise than for full valuable consideration, makes a substantial contribution in money or money’s worth towards A.”

We believe that the definition of “maintained” in the current wording of subsection (7) could lead to satellite litigation as to what constitutes “reasonable needs”. Our proposed amendment would remove reference to this and would, therefore, also reduce the risk of satellite litigation.

There is currently no mention of “reasonable needs” in subsections (a) to (g) of section 1 (3) in the Fatal Accidents Act. We consider that the law should treat all classes of claimants equally and that it is inequitable to require one group of claimants to satisfy a higher threshold. claimants under subsection (h) should be treated in the same way as claimants under subsections (a) to (g).

We are also concerned that the term “reasonable needs” could lead to some people becoming “second class” claimants, being maintained by the deceased at the time of death, but the support being given by the deceased not amounting to what could be considered as a “reasonable need”. A child who is attending university and receiving additional financial support from his uncle, for example, should be entitled to make a claim under the Fatal Accidents Act, as he will suffer financially due to the death.

Under the current wording of the Bill, however, such financial support may not be considered as a “reasonable need” and therefore he may not be able to bring a claim .

In the consultation paper the Government quite properly states that subsection (4) in clause 3 of the Fatal Accidents Act has been criticised for its “intrusive nature”, and is therefore to be repealed. It would therefore appear to be inconsistent for the Government to introduce a new subsection (7) here, which could lead to intrusive investigations regarding the financial arrangements of the deceased in order to establish who may have received financial assistance from him. We suggest the Government should avoid the need for intrusive investigations in this area.

CLAUSE 2—ASSESSMENT OF DAMAGES: EFFECT OF REMARRIAGE ETC

We recommend that clause 2 of the draft Bill should be removed, in order to ensure that the obligation for financially supporting the bereaved spouse or civil partner should continue to be placed on the tortfeasor, rather than passed to the new spouse or partner. The principle that the “polluter pays” governs our civil justice system, and we would oppose anything that seeks to change that. It is just and right that the person who is negligent in causing injury or death should pay the compensation.

We have consistently argued that the obligation to financially support the bereaved spouse or civil partner should remain with the tortfeasor, and not passed onto a new spouse or partner.

⁶ *Damages for Non-Pecuniary Loss*, LC 257, Part V Summary of Recommendations, paragraph 5.13.

⁷ Judgment, paragraph 41.

It is vitally important that the partner or spouse of someone killed through negligence is able to move on, and start rebuilding his or her life as quickly as possible. The fact that new subsection (3B) defines a relevant relationship as having lasted longer than two years could lead to defendants delaying proceedings, in the hope that the bereaved may have entered into a new relationship. The Government should not be proposing legislation that could prevent bereaved partners from moving on with their lives after the loss of a loved one.

The clause as currently worded may also lead to new partners not contributing to the maintenance of bereaved family members, so as not to invoke this clause.

We are opposed to any demand for a two year period to be satisfied before claimants are able to bring a claim under the Fatal Accidents Act, as referred to in several places within the consultation. We feel it is inappropriate to have arbitrary time frames imposed in these situations, and that every case should be judged on the individual circumstances. It is also inappropriate that references to a two year period are included in the draft Bill when they have not been included in the Government's 2007 consultation paper.

We believe that a spouse who met and married the deceased within a matter of months should not be in a better position than someone who has cohabited with the deceased for one year and 364 days prior to the death. There may also be cases where a partner has been demonstrated to be financially dependant on the deceased for a number of years, but had never lived with the deceased, for a variety of possible personal reasons. These people would also be in a worse position under clause two as currently worded.

When considering relationships for the purposes of benefit calculation, the state does not require a relationship to have lasted longer than two years. It is inconsistent, therefore, to insist on such a time limit being satisfied in this context.

CLAUSE 3—ASSESSMENT OF DAMAGES: POSSIBILITY OF RELATIONSHIP BREAKDOWN

We submit that subsection (b) of new clause 3D should be omitted from the Bill.

We do not agree that the courts 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. There may also be cases where two people have lived together for sometime, but have decided to continue their relationship, whilst not living together.

It would also be quite wrong to view a separation, which could be extremely brief, as a “trigger” for the breakdown of a relationship, when brief separations are far from uncommon in generally successful, long-term partnerships. This would also encourage unnecessary intrusion by defendants into the private lives of the deceased and their partners. The Government has stated in its response that it is opposed to intrusive investigation in some areas of this legislation, but could leave bereaved partners open to such investigations under this clause. This approach, of potentially leaving the personal arrangements of the deceased open to investigation is, therefore, at best, inconsistent.

CLAUSE 4—ASSESSMENT OF DAMAGES: EFFECT OF LACK OF RIGHT TO FINANCIAL SUPPORT

We agree that subsection 4 in section 3 of the Fatal Accidents Act should be repealed, a step first suggested by the Law Commission in its paper 263 in 1999. In our original submission to the Government we said that it should be replaced “by a provision to the effect that the prospect of breakdown in the relationship between the deceased and his or her partner should not be taken into account when assessing damages”. We are pleased that the Government is seeking to repeal this subsection, but we are disappointed that it has not been replaced by a new provision along the lines suggested above.

CLAUSE 5—DAMAGES FOR BEREAVEMENT

Although we recognise the Government has brought forward proposals to extend the list of people who are able to make a claim for bereavement damages under the Fatal Accidents Act, we believe the proposed extension does not go far enough. We therefore suggest that current subsection (2) (b) of clause 1A in the Fatal Accidents Act should be removed, and the following amendment to current subsection (ab), and three new subsections in clause 5 (2):

- “(ab) of a parent of the deceased;
- (ac) of a child of the deceased who was aged under 18 at the date of death, or was living with the deceased at the time of death;
- (ad) of a sibling of the deceased; and
- (ae) of a person who was engaged to the deceased at the time of death”.

We believe that parents should be entitled to claim bereavement damages regardless of the age of the child when the child dies. 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, surely, both distasteful and impossible to argue that a child over the age of 18 is any less of a loss than a younger child.

Ties between siblings are very close and if one were to die due to negligence, the grief would be enormous. It is right and just, therefore, that they should be compensated for their loss.

We agree entirely with the Law Commission's recommendation that it would be inconsistent to treat engaged couples in a different way from cohabiting couples. We believe it is highly unlikely that an engaged couple would not be able to provide evidence of the engagement in a variety of ways, including, for example, the wearing of a ring, witness statements, or evidence of an appointment with a registrar. The loss of a parent will obviously be keenly felt by a child, regardless of age. The closeness of the relationship and nature of emotional dependency will, however, be much greater for children living with their parents at the time of death, compared to a child who lives away from home. It is right, therefore, that children living with their parents at the time of death should be entitled to make a claim.

When considering bereavement damages, we advocate learning from the Damages (Scotland) Act 1976, which has been effective in dealing with bereavement damages (or "loss of society" in Scotland) for more than 30 years.

Under the terms of the Act,⁸ those relatives entitled to bereavement damages are:

- Any person who immediately before the deceased's death was the spouse or civil partner of the deceased or in a relationship which had the characteristics of the relationship between civil partners.
- Any person, not being the spouse of the deceased, who was, immediately before the deceased's death, living with the deceased as husband or wife.
- Any person who was a parent or child of the deceased.
- Any person not a parent or child of the deceased who was accepted by the deceased as a child of his family.
- Any person not a parent or child of the deceased who accepted the deceased as a child of his family.
- Any person who was the brother or sister of the deceased; or was brought up in the same household as the deceased and who was accepted as a child of the family in which the deceased was a child.
- Any person who was a grandparent or grandchild of the deceased.

Clearly, there is no difficulty here in recognising the closeness between parents, children of all ages, grandparents, siblings and other people living with the deceased as part of the family. And we submit that the law in England and Wales should offer the bereaved in this jurisdiction no less comfort than their Scottish counterparts.

We also submit that the system of awarding bereavement damages through the courts, as happens in Scotland, is fairer to relatives. It is still accepted that any award made is simply a token, but the token offered is usually higher than the sum currently presented to the bereaved in England and Wales. This system relies on legal precedent and a proper examination of the closeness of the bereaved to the deceased, to ensure that any payments are fair, and we see no reason why this system cannot be introduced in this jurisdiction. Because the sums involved are still relatively low, cases are usually settled without going to court and so would not represent a major burden for the system.

CLAUSE 6—MINOR AMENDMENT

We do not agree that this is a minor amendment. It is wrong, for the reasons stated above, for two people to have lived together for two years before they can be defined as a dependant.

We believe that clause 6 should be removed from the draft Bill, and that subsection (b) (ii) of clause 1 (3) in the Fatal Accidents Act should be repealed, as it contains references to a two year period having to pass before someone is classed as a dependant. We object to any reference to a two year period, for the reasons detailed above.

CLAUSE 7—DAMAGES FOR GRATUITOUS SERVICE

CLAUSE 8—AWARDS OF DAMAGES UNDER THE FATAL ACCIDENTS ACT 1976

Due to the similarities between clause 7 and 8, we will be commenting on the two clauses together. We submit that subsections (2), (4) and (5) of clause 7 in the draft Bill should be removed, and the new clause 7 should read:

- (1) Subsection (2) applies if, on a claim for damages for personal injury, a court is considering awarding damages to the injured person in respect of a gratuitous provision of services to that person.
- (2) A court must not refuse to award damages in respect of a gratuitous provision of services merely because the person providing the services is the defendant.

In clause 8, we submit that subsections (2), (4), (5) and (6) should be omitted from the draft Bill. Clause 8 would, therefore, read:

⁸ Damages (Scotland) Act 1976, Schedule 1.

(1) The Fatal Accidents Act 1976 is amended as follows.

(2) After section 3 insert—

“3A Damages for gratuitous services provided by the deceased

(1) Subsection (2) applies if, on a claim for damages for loss of dependency, a court awards damages to one or more dependants in respect of gratuitous provision of services to that person by the deceased.

(2) In assessing the loss to a dependant of the deceased gratuitously providing services to the dependant which the deceased would have provided but for the death, the court must not refuse to award damages merely because the person providing the services is the defendant.”

The Government’s stated intentions were partial abolition of the rule in *Hunt v Severs* and the recognition of a personal obligation for the claimant receiver of compensation to account to the care provider. A less formal, simpler procedure than that currently imposed by *Hunt v Severs*, which requires funds to be held in a formal trust for the carer, was envisaged. This Draconian draft measure, however, goes much further than was ever suggested in the Government’s consultation and attempts to implement the opposite of what was intended. Paragraph 14C of the Civil Law Reform Bill consultation paper states (our emphasis in bold):

*“The Law Commission agreed that damages should be recoverable for gratuitous care for the benefit of the carer (including where the care is provided by the defendant), but considered that the trust approach in Hunt v Severs was not the best mechanism for achieving this. It recommended instead that the claimant should be under a personal obligation to account for the money to the carer. **This would involve less formality and be simpler for the claimant.** The Commission also recommended that the obligation should relate only to past care. **Claimants should not be under a legal (as distinct from moral) duty to hand over any damages for future gratuitous care.** This was principally on the basis that the future is uncertain and that different care arrangements might become appropriate...”*

This followed the Government’s response to the Law on Damages consultation, which stated, in relation to gratuitous care, “a legal obligation would be too rigid, and that a personal obligation would give greater flexibility.” A statute which introduces a personal obligation to account into legislation, makes it a legal obligation.

The consultation paper echoes the Law Commission’s recommendations. In relation to the Commission’s view that a personal obligation on the claimant to account for the money to the carer is preferable to the current approach of holding damages in trust, the paper indicated that, while assessing future need is inherently uncertain, a personal obligation to account to the carer should also apply to future gratuitous services actually provided.

Our suggested amendment offers a partial reversion of *Hunt v Severs* which allows the claimant who has relied on gratuitous care in the past, even from the tortfeasor, to claim damages for that. This is then consistent with the current law that allows damages to be assessed at the full market rate (less discount for gratuitous care) of the cost of care in the future, because the claimant may not want to continue to rely on gratuitous care, especially where, for example, the carer has been the spouse. The claimant is entitled to choose that the care provider revert to a normal role as spouse or family member rather than to become a permanent carer.

If a legal obligation to account is created, the law then encourages defendants to continue to investigate the case after settlement or trial (to make sure that the claimant has accounted to the carer). This is an unwarranted intrusion by the defendant into the private affairs of the claimant, after the claim has been concluded. Such an intrusion is inconsistent with the Government’s approach in other areas of the draft Bill, as mentioned elsewhere in this response. It also imposes rigid requirements on the claimant, rather than leaving the account to the discretion of either or both the claimant and the carer (who for a variety of reasons may not want to enforce the personal obligation of the claimant).

When the money claimed is for the cost of care, if the claimant were to be forced to hand the money to the carer in a lump sum, this could affect any means-tested benefits which the carer may have. This would be an unintended consequence of being forced to act in that way by this obligation to account.

If the claimant does not recover the full value of the claim, the carer may acknowledge that the award does not fully cover the claimant’s needs. The carer may, therefore, not want to take the money, preferring it to be kept “in the pot” for the benefit of the claimant. This selfless personal decision could not be adopted if a rigid requirement to account were to be introduced by statute.

While a statutory legal obligation may seem like a neat solution, we are concerned that intrusive enquiries could be made of the claimant, and of the receiver of the sums claimed (the carer). It is generally accepted that the defendant is never allowed to demand proof that any aspect of future loss is spent exactly how it was claimed, as people and circumstances change.

Impact assessment

We are unable to provide detailed comments on the specific figures included in the impact assessment. It is a real concern, however, that, by discussion of the potential cost to the defendant, the impact assessment appears to aim to be “fair” to both sides. This must not supersede discussion of what is “full” compensation to the victim, especially when what can be considered “fair” is, of course, highly subjective.

In pursuing the principle of fair and full compensation, it is, surely, fairness and logic which dictates that the needs of the claimant must come first. Any concern about balancing the interests of claimants with the cost to defendants and their insurers flies in the face of the principle of “polluter pays” which governs our civil system.

It is settled law that in awarding damages, the financial consequences to the tortfeasor are not relevant. In *Heil v Rankin*⁹ Lord Woolf M R (as he then was) stated:

“33. We are well aware that in making a decision in a particular case as to what the damage should be, the Court must not be influenced by the means of a particular Defendant. As Mr O’Brien submitted for the Defendants in making an award the Court is not concerned with whether the claimant is a pauper or a millionaire. The award for the same injuries should be the same irrespective of the Defendant’s means. This is clear from the authorities. In *Wells v Wells* [1998] 3 All ER 481 at 492, [1999] 1 AC 345 at 373 Lord Lloyd of Berwick, quoting from Lord Scarman in *Lim Poh Choo v Camden & Islington Area Health Authority* [1979] 2 All ER 910 at 917–918, [1980] AC 174 at 187 said:

“There is no room here for considering the consequences of a high award upon the wrongdoer or those who finance him. And, if there were room for any such consideration, upon what principle, or by what criterion, is the Judge to determine the extent to which he is to diminish upon this ground the compensation payable”.

Lord Hutton also confirmed this principle in *Wells v Wells* when he stated:¹⁰

“The consequence of the present judgments of this House will be a very substantial rise in the level of awards to Plaintiffs who, by reason of the negligence of others sustained very grave injuries requiring nursing care in future years and causing a loss of future earning capacity, and there will be resultant increases in insurance premiums. But under the present principles of law governing the assessment of damages which provides that injured persons should receive full compensation Plaintiffs are entitled to such increased awards.”

In *Parkinson v St James and Seacroft University Hospital NHS Trust*¹¹ Hale LJ (as she then was) said:

“[56] The right to bodily integrity is the first and most important of the interests protected by the law of tort, listed in *Clerk & Lindell on Torts*, 18th ed (2000), para 1–25. ‘The fundamental principle, plain and incontestable, is that every person’s body is inviolate’: see *Collin v Wilcock* [1984] 1 WLR 1172, 1177. Included within that right are two others. One is the right to physical autonomy: to make one’s own choices about what will happen to one’s own body. Another is the right not to be subjected to bodily injury or harm. These interests are regarded as so important that redress is given against both intentional and negligent interference with them.”

We see no reason to act against the principles outlined above by factoring into consideration any need to balance the interests of claimants and those of defendants and their insurers.

February 2010

**Response by the Association of British Insurers to the Ministry of Justice’s
Civil Law Reform Bill Consultation Paper**

INTRODUCTION

1. The Association of British Insurers (ABI) is the voice of the insurance and investment industry. Its members constitute around 90% of the insurance market in the UK and 20% across the EU. They control assets equivalent to a quarter of the UK’s capital. They are the risk managers of the UK’s economy and society.

2. We support the aim of the draft Bill to provide a fairer and more modern civil law system. Our comments focus on changes to the law relating to damages in the Fatal Accidents Act 1976, as this is the area of reform which concerns our members directly. We agree the Act should be amended to reflect changing family structures in awarding damages. Our concern is to ensure that any changes result in fair outcomes while keeping damages at a proportionate level.

⁹ [2000] 2 WLR 1173, [2000] 3 All ER 13.8

¹⁰ [1999] 1 AC 345 at 405 (D-F).

¹¹ [2002] QB 266 at 284.

 QUESTIONS

Do you have any comments on the draft clauses of the Bill relating to the law of damages?

Dependency damages under the Fatal Accidents Act 1976

Eligibility to claim damages

3. The main purpose of the Fatal Accidents Act 1976 [the Act] is to provide compensation, in the event of a wrongful death, for the financial losses of people dependent on the deceased. Compensation is provided for the loss of any non-business benefit that the claimant could reasonably have expected to receive from the deceased, had the deceased continued to live. To recover damages under the Act currently, a person must fall into one of the categories listed in Section 1, which includes spouses, cohabitants, parents, children, grandchildren, siblings and aunts/uncles.

4. We agree that the current list is too restrictive, and, because of changing relationship structures, now precludes the provision of damages to some deserving claimants, such as children of qualifying cohabitants. The statutory list should therefore be extended to include the further specific categories of claimants highlighted by the Law Commission, such as children of qualifying cohabitants. This approach is consistent with that suggested for bereavement damages (see point 15 below).

5. We do not support Clause 1(2) of the Bill. We do not agree with the inclusion of a general category to the statutory list of dependants of “any person who was being wholly or partly maintained by the deceased immediately before the death”. Creating such a catch-all category has the potential to produce anomalies, and provide damages to claimants who would not have reasonably expected to receive benefits from the deceased, had the deceased continued to live. This is possible even though claimants under this new category will need to establish that they were being maintained by the deceased. For example, a cohabitee who had only just begun to be maintained prior to the death would not necessarily expect to receive benefits from the deceased because of the temporary nature of the relationship, but could nonetheless demonstrate their financial dependency in that short period. It would be better to continue to keep the current list of clearly defined categories under periodic review to ensure it reflects social structures.

6. In general, the qualifying period for cohabitation should remain as the two year period currently stated in Section 1(3)(b) of the Act. This ensures some level of permanence to the relationship, and qualifies the expectation of ongoing receipt of benefits after death.

Actual or predicted changes in the personal life of the claimant or deceased

7. As damages under the Act are intended to compensate the claimant for loss as a result of dependency on the deceased, any benefits alleviating this loss should be taken into account when awarding damages. For example, financial support provided by a new spouse or partner would alleviate the loss. Any actual change of this sort in the personal life of the claimant should be taken into account when assessing damages so as to compensate as accurately as possible the loss suffered as a result of the death.

8. We support Clause 2(3) of the Bill that amends Section 3(3) of the Act so that the fact of a person’s remarriage, entry into a civil partnership, or financially supportive cohabitation of at least two years following the death should be taken into account. We agree that establishing the *fact* of such a change in circumstance would not result in overly intrusive inquiries into the life of the claimant. We also agree that establishing the *prospect* of such a change would require intrusive inquiries, and therefore should not be taken into account.

9. Clause 2(3A) of the Bill should be amended so that a person’s remarriage, civil partnership, or financially supportive cohabitation *must* be taken in to account when assessing a claim for damages on behalf of any eligible children. It is highly likely that such a change in the circumstances of the parent would have an impact on the dependency loss of the child, and the court should therefore always take these circumstances into account. Judicial discretion should be exercised around the degree to which these factors should be taken into account, not whether they should be taken into account.

10. Equally, any factors which would have brought the relationship of dependency between the claimant and the deceased to an end should also be taken into account when assessing dependency damages.

11. On this basis, Clause 2(3C) of the Bill should be amended so that the court *must* take into account the prospect of the dependant’s marriage or civil partnership to the deceased being annulled or dissolved; and Clause 2(3D) of the Bill should be deleted. We disagree that the prospects of breakdown in the relationship between the deceased and their spouse or civil partner should *only* be taken into account where one party has petitioned for divorce, judicial separation or nullity; or begun the procedure for dissolution of civil partnership; or the parties are no longer living together. The court should be able take into account the full history of the relationship of the couple, for example, where the couple had had periods of separation and reconciliation in the past. Whereas assessing the future prospects of change in the claimant’s circumstances for mitigation of the loss might be unjustifiably intrusive (see 8 above), assessing the past prospects of the breakdown of the financially supportive relationship between the claimant and the deceased is material and directly relevant, and will provide the court with an informed perspective of the relationship to assess the appropriate level of damages.

12. We do not support Clause 4 of the Bill: we disagree that Section 3(4) of the Act should be repealed. While it is desirable to treat cohabittees fairly under the Act, the court should still be allowed to recognise that cohabitation does not have the same expectation of the relationship enduring as with marriage or civil partnership. The existing two year qualifying period required for a cohabitee to claim for dependency under Section 1(3)(b) recognises that there must be some degree of permanency to the relationship (see point 6 above).

Damages for bereavement under the FAA 1976

13. The Fatal Accidents Act allows for a token payment in acknowledgment of a person's grief. Although known as "damages" for bereavement, this sum is not intended to compensate the claimant for the loss of dependency on the deceased—this role is fulfilled by dependency damages.

14. We support Clause 5 of the Bill.

15. 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. This list should be kept under periodic review (see point 4 above).

16. We agree that where a spouse or civil partner and cohabitant are both eligible to claim bereavement damages, the full award should be divided equally between them.

17. We agree that an award of half of the full award should be made to each eligible child of the deceased under the age of 18.

Damages for Gratuitous Care

18. We support Clause 7 of the Bill.

19. As a general rule in common law, personal injury claimants are entitled to recover damages for the care or services provided to them without payment or other remuneration by friends and family. We recognise the vital role played by voluntary carers in society and that, in most cases, such gratuitous care is the most appropriate care regime for an injured person.

20. 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.

21. We agree that the personal legal obligation should generally apply regardless of the identity of the carer, even if that is the defendant. This recognises that the injured party and the compensator may wish to reflect the value of voluntary gratuitous care by the defendant in any settlement agreement. We agree that (as now) damages should not be awarded for past gratuitous care provided by the defendant.

22. We do not support Clause 8 of the Bill.

23. 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.

Do you have any views on the application of aggravated damages, for these purposes, in Scotland?

24. These provisions do not directly affect our members.

Do you agree with the impact assessment on the proposed reforms relating to the law of damages at Annex C?

25. The reforms are not likely to have significant cost implications for insurers.

Do you have any comments on the draft clauses of the Bill relating to the setting of pre—and post-judgment interest?

26. We do not support Clause 12(3) of the Bill, and related Clauses 10(5) and 11(4), providing that the Lord Chancellor may make an order permitting awards 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 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.

Do you agree with the impact assessment on the proposed reforms relating to the setting of pre—and post-judgment interest at Annex D?

27. The introduction of enabling provisions for compound interest would need a detailed impact assessment.

Do you have any comments on the draft clauses of the Bill in relation to the distribution of estates of deceased persons?

28. These provisions do not directly affect our members.

Do you agree with the Impact Assessment on the proposed reforms relating to the law of succession at Annex E?

29. These provisions do not directly affect our members.

Do you have any comments on the provisions of the draft Bill relating to rights of appeal?

30. These provisions do not directly affect our members.

Do you agree with the impact assessment on the proposed reforms relating rights of appeal at Annex F?

31. These provisions do not directly affect our members.

February 2010

**Response by The Law Society of Scotland to the Ministry of Justice's
Civil Law Reform Bill Consultation Paper**

The Law Society of Scotland has had the opportunity of considering this consultation however it does extend to Scotland only to a very limited extent, as identified in clauses 9 and 23.

The Society therefore responds to the question replicated below as follows:

Q: In particular, do you have any views on how the concept of additional damages pursuant to the 2004 Directive should be expressed in terms appropriate to Scots law?

A: As stated in the consultation paper, the concept of additional damages is not a familiar term in Scots law. However, a lump sum can be awarded to reflect a disadvantage. Therefore, we suggest it could be expressed as follows:

“The court may make such an award of damages as it thinks fit to reflect the disadvantage the injured party has suffered as a result of the infringement”.

If you have any questions, please do not hesitate to contact me.

10 February 2010

**Response by Sir Henry Brooke to the Ministry of Justice's
Civil Law Reform Bill Consultation Paper**

Before I respond, I would like to start by saying how much I deplore the fact that it has taken such an immensely long time for the Law Commission's recommendations on reforming the law of damages to come before Parliament in the form of a draft Bill. As a common lawyer who had had much practical experience of personal injuries law (unlike most Chairmen of the Commission) I remember Lord Mackay impressing on me how much importance he paid to the then current law reform project on damages when he persuaded me to become Chairman of the Commission in November 1992. Most of the proposals in this draft Bill were obvious candidates for reform at that time, over 17 years ago. I hope that at a time when Parliament is intent on burnishing its image and re-establishing its credibility with the public, it will take effective steps to ensure that comparable delays in enacting worthwhile measures of law reform never occur again.

To some extent we have all been here before. During my chairmanship (January 1993–December 1995) I was in close dialogue with Parliamentarians of all parties in both Houses, and we succeeded in seeing 13 Law Commission law reform proposals enacted in 14 months. Parliament then went back to its old ways, and I greatly welcome this opportunity for pre-legislative scrutiny as a harbinger of much better things in future. I remember getting myself invited in two successive years to a session with the Home Affairs Committee of the House of Commons, when I succeeded in persuading them, I think, that making the law fairer and more simple in mundane matters of significant importance to their constituents was every bit as important to their

constituents as many of the policy-driven legislative proposals which consume so much parliamentary time. I was able to demonstrate historically that Law Commission Bills, having been so expertly prepared, took up very little Parliamentary time at all.

I now respond to the Questionnaire.

Do you have any comments on the draft clauses of the Bill relating to the law of damages?

1. Fatal Accidents

I agree with the proposals in clauses 1–4 of the draft Bill. It is difficult to do complete justice in all cases involving cohabitants, but a line must be drawn somewhere, and I know no reason to alter the “two year” requirement, although this may do injustice in some cases where there is a loving, committed relationship of cohabitation lasting just less than two years and the surviving partner has no claim under the Act.

As to bereavement damages, it is high time the law was altered to give a claim to the surviving “two-year” cohabitant of the deceased. More than 80% of the respondents to the Law Commission’s consultation paper supported this change in the law, and great unhappiness and hardship have been caused unnecessarily because Parliament has not acted sooner on the Law Commission’s 1999 recommendation. In recent years such claimants have been driven to invoke Article 8 of the European Convention of Human Rights to establish their entitlement to bereavement damages, and arguments of this kind, to put right an obvious injustice in statute law, simply add to the costs of litigation every time the issue has to be argued. I had recent experience of such a case, where the young mother of the deceased’s child was outraged that the law did not permit her to recover any bereavement damages unless she tried to go by the Human Rights Act route.

I remember at the time being surprised by the Law Commission’s recommendation that siblings should recover bereavement damages in all cases (their award being equal to the awards to spouses etc and minor children), subject to an overall statutory inflation-adjustable cap of £30,000 on the total award. On the other hand, 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. I hope this point will be carefully scrutinised before the Bill becomes law.

2. Gratuitous Care

I agree with these proposals. The Law Commission received powerful submissions from “the vast majority of its respondents” to the effect that the House of Lords’ ruling in *Hunt v Severs*, however logical it may have been, should be reversed. Its report was published in November 1999, and it is scandalous that this injustice has been allowed to continue for a further 10 years before a correcting Bill is put before Parliament.

3. Aggravated damages etc

It is clearly sensible to include the tidying-up provisions of Clause 9. I regret the fact that the Government is not willing to take this opportunity to tidy up the law in relation to exemplary damages, which was a law reform project commenced in my time. Instead, a lot of litigants’ money will have to be spent before the Supreme Court at last has an opportunity to straighten out those parts of the decision in *Rookes v Barnard* which have rightly not been followed by the courts in comparable common law countries.

Do you agree with the impact assessment on the proposed reforms relating to the law of damages at Annex C?

No comment.

Do you have any comments on the draft clauses of the Bill relating to the setting of pre—and post-judgment interest?

Long experience in the courts makes me very suspicious of any provision which gives the Lord Chancellor an apparently unfettered power to specify interest rates at a time of his choosing. The rate of interest on judgment debts was fixed at 8% in 1993 and has not been altered since. The Law Commission was critical of this continued failure to take action in 2004 and interest rates have plunged further since then.

A similar story is told when one considers the fate of the arrangements for specifying the appropriate discount rate to be adopted for the accelerated receipt of future payments in personal injury cases. In my time the Law Commission recommended that instead of the point being expensively argued in every case, the Lord Chancellor, who was then head of the judiciary, should fix by order the appropriate discount rate from time to time. This was clearly a judicial act. His powers in this respect were retained by him at the time of the enactment of the Constitutional Reform Act 2005, so that what was intended to be a judicial act now became determined by the executive. It is universally accepted that with interest rates as low as they are now the discount rate of 2.5% is doing very significant hardship to grievously injured people (because their compensatory damages will all be used up a considerable time before their death) but the Lord Chancellor has taken no steps to correct this. Indeed, I am aware of a recent decision in the courts of Guernsey where a court, not governed by the Lord Chancellor’s order under the Damages Act, considered on the evidence (which included the evidence of the former Government Actuary) that a 1% discount rate was more appropriate, thereby substantially increasing the plaintiff’s damages for future care.

The Law Commission said in its report:

“3.25 There is a need to balance two objectives. On the one hand, the rate should reflect the commercial reality of borrowing and investing. On the other hand, litigants want a single clear rate, which they can discover easily and which does not change too often. It is important that the rate should be more flexible than the judgment rate (which has not changed for a decade). However, the rate should be less flexible than the bank rate itself, which changes at unpredictable times, so that parties and their representatives may not be alerted to what the current rate is.

3.26 This suggests a rate that changes on a set date each year. The rate should be clearly publicised on the Court Service website, on posters in court offices and in the legal press so that lawyers and litigants are aware of what it is.”

I do not know why the Government did not follow the Commission’s advice that the appropriate rate should be reset annually. I fear it may be driven by administrative convenience. I hope that Parliament will probe the Government’s reasons in this respect, because otherwise there is a strong likelihood that interest rates awarded by the courts will again get seriously out of kilter with interest rates in the world outside the courts.

Subject to this, I agree with the proposals in this part of the draft Bill.

In particular, do you have any views on how the concept of additional damages pursuant to the 2004 Directive should be expressed in terms appropriate to Scots law?

No comment.

Do you agree with the impact assessment on the proposed reforms relating to the setting of pre—and post-judgment interest at Annex D?

No comment.

Do you have any comments on the draft clauses of the Bill relating to the distribution of estates of deceased persons?

No.

Do you agree with the impact assessment on the proposed reforms relating to the law of succession at Annex C?

No comment.

Do you have any comments on the draft clauses of the Bill relating to rights of appeal?

I am a little uneasy about there being no recourse at all to the High Court if an Inn refuses a student admission to the Inn on grounds, for example of bad character. After all his/her whole future career will evolve around this decision, and there may be human rights implications if he/she is completely barred from access to a court. I sat as Visitor to one of the Inns nearly 20 years ago in a case where a man had had a serious criminal record when he was about 20 and served terms of detention and imprisonment. 20 years later he received glowing references from the law faculty of the reputable university at which he had been studying as a mature student, so much so that his professor was willing to travel 200 miles to London to give evidence at the hearing.

I directed the Inn to reconsider the case on the basis that the Consolidated Regulations then contained a blanket ban on admission to the Bar in such a case, not allowing for any discretion to be exercised, which I considered to be unlawful. In the event the Inn was willing to admit him and the Regulations were changed.

I certainly would not wish to see the High Court flooded with unmeritorious applications, but I do think there ought to be some opportunity for recourse to the High Court in a case which raises an important point of principle. If the avenue of appeal is to be comprehensively blocked at the level of the Qualifications

Committee of the Bar Standards Board, they may be seen to have a tendency to wish to uphold the letter of their regulations. Perhaps the Committee should have a right (which should be final) to grant permission to appeal to the High Court in an appropriate case.

Apart from this, the proposed changes are long overdue, and I support them.

Do you agree with the impact assessment on the proposed reforms relating to rights of appeal at Annex C?

No Comment.

ABOUT ME

My name is the Rt Hon Sir Henry Brooke. I am responding to this consultation paper as a retired Lord Justice of Appeal and a former Chairman of the Law Commission. My address is Fountain Court, Temple, London EC4Y 9DH. I would like you to acknowledge receipt of my response.

25 January 2010

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