

Response of Browne Jacobson LLP (Solicitors)

Civil Law Reform Bill - CP53/09

February 2010

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## Contents

|                                                                                      |    |
|--------------------------------------------------------------------------------------|----|
| Contents .....                                                                       | 2  |
| Introduction .....                                                                   | 3  |
| Browne Jacobson LLP .....                                                            | 3  |
| Interest in the Consultation .....                                                   | 3  |
| The Response .....                                                                   | 3  |
| Summary .....                                                                        | 4  |
| Response to Consultation Questions .....                                             | 5  |
| Damages .....                                                                        | 5  |
| Introduction .....                                                                   | 5  |
| Question 1 - Comment on the draft clauses of the Bill? .....                         | 5  |
| Question 2 - Comment on additional damages under Scots Law .....                     | 5  |
| Question 3 - Impact assessment on the proposed reforms .....                         | 5  |
| Interest .....                                                                       | 8  |
| Introduction .....                                                                   | 8  |
| Question 4 - Comments on the draft clauses on pre- and post-judgment interest? ..... | 11 |
| Question 5 - Impact assessment on the proposed reforms .....                         | 12 |
| Succession and Rights of Appeal .....                                                | 12 |

## Introduction

### Browne Jacobson LLP

Browne Jacobson LLP is a leading firm of solicitors in the Midlands, having offices in Nottingham, Birmingham and London. Among its clients the firm counts the NHSLA, a number of large national insurers, including NUFM and Chaucer; the MPS; the Motor Insurers Bureau, Local Authorities, charities and numerous businesses across a range of sectors. The firm deals with a substantial volume of litigation on behalf of these clients in all areas, including professional negligence, personal injury, employment and commercial dispute claims.

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### Interest in the consultation

Browne Jacobson LLP handles a wide variety of claims on behalf of its clients, the majority of which have the potential to be affected by the proposals in relation to interest. We have been able to use our own data and experience as well as feedback from our clients to prepare an assessment of the potential effect of the proposals pertaining to this issue. Our submission is based on this assessment.

We also deal with numerous claims relating to fatal accidents and took part in the Government consultation "The Law on Damages" dated July 2007 which related to this, and other issues.

### The response

This response deals with issues of interest and damages in relation to fatal accidents.

This response is based upon the experiences of lawyers at Browne Jacobson LLP, our claims data, and feedback from a number of the firm's clients.

## Summary

### Damages

We consider the proposed reforms relating to fatal accidents do not properly assess the impact on Defendants. The estimates of fatalities resulting in claims are too low and therefore fail to consider the costs of pursuing claims.

The proposed new categories of “dependants” are too widely framed encompassing a broad range of potential claimants which will significantly increase the number of claims. Each additional claim will result in costs for all parties involved. As the law will be subject to uncertainty it is anticipated that these claims will be funded by CFAs with success fees of 100% and costly ATE insurance premiums. We are concerned that the number of potential claims has been underestimated.

### Interest

In our view there is no positive identifiable benefit in removing the court’s discretion over the rate and period over which interest is paid. Taking away the court’s discretion would be a retrograde step, denying the Court the opportunity to consider the parties’ conduct when awarding interest and taking steps to reduce delay. The court’s right to withhold interest is an appropriate sanction to discourage delay.

If compound interest was to be introduced there is uncertainty over how compound interest will be calculated. In any event, it is probable that the calculation of compound interest will be difficult for both practitioners and the court causing an increase in the costs of civil litigation.

Nor is there any obvious reason why compound interest should be awarded. We submit that there is no “wrong to be righted”.

The proposals would result in a significant financial burden to defendants. We anticipate a substantial increase to the amount of interest that will be awarded, particularly in long running cases where the Claimant is a patient and the date of injury is many years before the date of payment. We anticipate a significant increase in damages awards over the entire portfolio of claims, if these measures are implemented.

## Response to consultation questions

### Damages

#### Introduction

We have previously made submissions in relation to the proposed reform of this area of damages, in response to the 2007 Consultation "The Law on Damages". Our view remains that:

- The categories of claimants entitled to make dependency claims should not be extended. To do so would reduce certainty, promote the development of a compensation culture and increase the cost of claims.
- The current provisions provide a reasonable test to identify those most affected by fatal accidents and to compensate them.
- With regard to the factors to be taken into account in assessing dependency in a fatal accident claim, we consider the courts should be entitled to take all relevant evidence into account, including prospects of remarriage and new relationships. This allows double recovery to be prevented.
- We do not consider concerns in relation to distasteful enquiries justify the exclusion of evidence as to alternative sources of dependency secured by a claimant. Defendants are unlikely to undertake such enquiries lightly and the courts have the power to control evidence admitted in order to prevent inappropriate enquiries.

Our full response is available at <http://www.brownejacobson.com/pdf/Law%20on%20damages-1.pdf>

#### Question 1 - Comment on the draft clauses of the Bill?

We have no comment in relation to the drafting of this section of the Bill.

#### Question 2 - Comment on additional damages under Scots Law

We have no comment in respect of this proposal.

#### Question 3 - Impact assessment on the proposed reforms relating to fatal accidents

*We consider the impact assessment is likely to significantly underestimate the likely cost to all sectors, and is inaccurate in supposing that costs will be equal to benefits. We believe, based on the figures in the impact assessment, that a conservative estimate of the additional costs may be £25 million per annum.*

For the purpose of this response, we presume underlying ONS and industry data quoted in the assessment to be accurate.

We consider the assessment to be flawed in that:

- It fails to consider costs of pursuing claims
- The estimates of fatalities resulting in claims are too low

### Cost of claims

The proposals introduce new categories of individuals able to bring claims in relation to fatal accidents. Each additional claim will result in costs:

1. Incurred by claimant solicitors
2. To public bodies, businesses and individuals faced with claims- in the form of time, resource and money.
3. To insurers, and bodies such as NHSLA and MIB - in relation to their own costs and those of their legal advisors.
4. To the general public and businesses - as taxpayers funding public bodies and as buyers of insurance
5. To the court service which will see increased claims volumes.

The ratio of claimant costs to damages in personal injury and fatal accident cases is already a cause of widespread concern, averaging in the region of 90p costs for each £1 in damages in low value claims. We anticipate that claims under the proposed provisions will be funded by Conditional Fee Agreements, with policies of ATE insurance. As this new area of law will be subject to uncertainty, success fees will often be 100% and ATE insurance will be costly.

It is clear that the provisions in respect of dependency are widely framed and are capable of encompassing a broad range of individuals. The Law Commission identified as potential claimants under provisions of this type those cohabiting for short periods of time, children of friends, distant relatives and non-relatives in the same household. The effect of this will be to significantly increase overall claim numbers and to generate satellite litigation whilst the parameters of the provisions are clarified.

Similarly, each claim by an individual in relation to bereavement damages will generate additional cost.

### Claim volumes

For the purpose of the assessment, it has been supposed that only 50% of deaths where a remaining individual falls into one of the new categories of claimant will result in a claim. Our experience is that a much higher proportion of potential fatal accident claims are in fact pursued.

Litigation rates in this area are likely to be particularly high as a death will often result in contact with professionals (solicitors, undertakers, doctors etc) who will be aware of the potential for a claim, and may advise potential claimants to seek advice in this regard.

### Conclusion

We do not hold the data necessary to undertake a full assessment of the cost of the proposals ourselves. However, we do consider that the assessment is inaccurate in the following ways:

1. Costs associated with claims are not accounted for. These will:
  - a. Increase the overall cost of the measures
  - b. Not amount to a 'benefit' so that the cost of the proposals will significantly outweigh the benefits
2. The number of additional claims, and therefore cost, is underestimated.

We are confident that these factors will result in total costs at least twice as high as are set out within the assessment.

## Interest

### Introduction

We are submitting a response primarily to the proposed amendments regarding the issue of pre-judgment interest in personal injury claims.

### Interest rates

The Civil Law Reform Bill proposes that there be one rate of interest in all damages and debt claims and that the Lord Chancellor be given the power to set the rate and type of interest, which he would set on an annual basis. It is also proposed that all interest should run from the date of action to the date of payment.

In personal injury claims the court currently retains a discretion as to what rate of interest is awarded and the period over which interest will be applied. In addition, interest is calculated on a simple, not compound basis. There is also a distinction between how interest is calculated in respect of general and special damages.

We submit that there is no positive identifiable benefit in removing the court's discretion over the rate and period over which interest is paid. This discretion enables the court to reduce or increase the interest claim having regard to the conduct of the parties, and all the circumstances of the claim.

Interest on general damages is currently paid from the date of service of the Claim Form until the date of payment of damages. The reason behind this is that the injurious effects of the accident are not necessarily sustained at the time of the accident and may in fact occur some time later (*Jefford v Gee* [1970] 2 QB.130). In addition, the rate of interest is set at 2% (*Birkett v Hayes* ([1982] 1.WL.R.816) on the basis that the value of general damages is usually assessed at the date of trial or payment by reference to levels of award for damages at the date of the trial not at the level current at the date of the accident. Accordingly, the award has already been automatically updated for inflation. On that basis, interest on damages for pain and suffering and loss of amenity should be at a lower rate than the special investment account rate, which is applied in respect of interest on special damages. If not there would be a duplication of interest.

With regard to special damages, representing a continuing loss from the date of action, interest is normally awarded at half the Special Investment Account rate over the full period from the date of injury because not all losses have been incurred over the whole period. Altering the rules to allow recovery of a single full rate over this whole period (from the date of incident) would lead to an inappropriate doubling of the interest recoverable.

We do not think that there has been an adequate assessment of the financial impact of these proposals on those who defend and pay for personal injury actions, notably insurance companies and public bodies including the NHS (ultimately all funded by the tax payer/insurance premium payer). We are concerned that the Government's proposal that a readily accessible web-based programme be made available, before deciding whether to implement such a change, to assess the impact of awarding compound interest, has not been implemented.

### **Compound interest**

We are concerned that if implemented there is no guidance as to how compound interest would be calculated, whether it would be compounded annually, monthly or daily. Furthermore, any compound interest calculation will be complex given that the rates are likely to vary year on year in accordance with the Bank of England base rate. In our view, this will introduce an unnecessarily complicated calculation and we see no positive identifiable benefit in introducing such a calculation into a scheme which has been proposed in order to simplify the system. We believe that the calculation of compound interest will be difficult for practitioners and the courts alike resulting in an increase to the costs of civil litigation.

### **Impact**

We are very concerned about the impact of utilising one single interest rate for both interest for pain and suffering and loss of amenity and past economic losses, and compounding it for the reasons set out above. We note that the average rate for the special account investment rate over time is about 11% and we anticipate that the average rate of interest utilising 1% over the Bank of England base rate will be around 12% over time. These proposals will represent a significant increase to the cost of personal injury litigation, particularly to insurance companies, public bodies and the NHS Litigation Authority resulting in a diversion of monies away from public services, patient care and an increase in insurance premiums.

### **Examples**

Our own calculations based on a portfolio of cases suggest that there will be a significant rise in the sums paid over a portfolio of claims. In a hypothetical cerebral palsy claim where the Claimant is 15 at the date of payment, on the award of general damages of £230,000 the award for interest would be £23,000 under current rules. If interest is set at a compound rate and from the date of injury we calculate the interest payment would rise to £79,549.72 (a 245% increase). In relation to past losses, assuming an award of £400,000, the interest award would currently be £206,000. Under the proposed regime the interest payment could rise to £1,023,590.93 (396% increase). (See Appendix A).

The difference is more pronounced in older, high value claims. In a hypothetical cerebral palsy claim where the Claimant is 25 at the date of settlement, the interest on general damages of £220,000 would rise from £30,800 to £110,133.32 (357% increase).

On assumed past losses of £600,000 the interest payment would increase from £610,680 (simple interest) to £3,007,621 (on a compound basis) (See Appendix B).

In a claim worth £50,000 if general damages were valued at £15,000, and past losses amounted to £25,000, interest on general damages would currently be £409.52. Under the proposed scheme we calculate that this would rise to £1,370.81 (2% compound interest from the date of accident on 31 March 2005 to the date of payment on 12 August 2009). Interest on special damages would increase from £6,554.79 (simple interest) to £7,499.04 (compound interest). This represents a 3.2% increase to the total damages payment. In the financial year 2008/2009 the NHSLA paid £807,115,000 in respect of clinical negligence claims alone. Based on our calculations we estimate an increase of at least 2.25% over the portfolio of claims. Accordingly, we would anticipate an additional liability of at least £18,160,087.

The impact of the proposals is not limited to high value or long running claims. We have analysed the effect of the proposals on two fast track claims, each valued at £15,000. These were selected randomly based purely on their overall value which sits at the middle of the fast track range.

They therefore represent typical fast track claims. Using compound interest running from the date of the incidents giving rise to the claim, we found increased in overall claim value of 2.4% and 4.6%.

We have extended our analysis to a portfolio of over 1,000 personal injury claims valued at up to £100,000. We found an overall increase in total claim value (inclusive of both interest and damages) of 11.2%. Our analysis demonstrates that the proposals would result in a significant financial burden to defendants including the NHS, local authorities, insurers, the motor insurers bureau and businesses.

The above examples are calculated on the basis of interest rates currently permitted by the courts, in what is clearly a very low current interest rate regime. When the economic climate returns to a more usual higher interest rate regime the interest payments will increase exponentially.

Question 4 - Comments on the draft clauses on pre- and post-judgment interest? (Paragraph 10 of the Bill)

*10(4) Whether interest under this section runs at the rate specified in, or determined in accordance with, an order under section 12(1)(b)(i)*

We are concerned that this clause would remove the court's discretion to set a single rate of interest, which for the reasons stated above we are opposed to.

*10(5) Whether interest under this section is to be simple interest or compound interest is to be determined in accordance with an order made under section 12*

This clause should not be included without a further assessment on the financial impact to Defendants. We refer to the Government's response to the Law Commission proposal to award compound interest in personal injury claims over £15,000 - *"we do not think the case has been made to introduce compound interest as the norm for the generality of larger cases as recommended in the report. This would be a major step that would require further consultation and a more detailed and quantified impact assessment than the Commission was able to provide. We also think that it would be necessary to develop a web based programme to make the necessary calculations."*

We are concerned that the impact of this legislation has not been fully considered and that defendants cannot at this stage properly quantify the additional amounts they would be required to pay if compound interest were to be allowed.

We would therefore welcome a web based programme to properly assess the impact before responding to this proposal further.

*10 (6) The relevant period is the period beginning with the date when the cause of action arose and ending -*

- (a) in the case of a sum for which judgment is given, with the date of the judgment, or
- (b) in the case of a sum paid before judgment or without judgment being given, with the date of the payment.

We are concerned about the impact of this clause on the award of interest on general damages. In particular, we are concerned that this will significantly increase the award of general damages in catastrophic injury claims where the Claimant is a minor or a patient under the Mental Health Act and where therefore

proceedings are issued many years after the event. In those circumstances the Defendant has no control over when proceedings are served. We are concerned that this clause if applied to general damages in personal injury claims would offer no incentive to Claimants to swiftly litigate their claim, and would over compensate the Claimant for inflationary elements. Whilst we accept that in certain cases the Court would be permitted not to award interest where there are "special reasons" we are concerned that the Court would only use this exception in a minority of cases.

Taking away from the court the discretion as to the rates to apply for special damages awards where the loss has been continuing, would significantly over compensate the Claimant.

*10(8) In relation to a judgment given for damages for personal injury or death which exceed £200 ..... there were substituted "Unless there are special reasons to the contrary, the court must"*

For the reasons set out above we do not think that the court's discretion to award interest (whether by rate, method of calculation, or period), should be restricted. There is a real benefit to retaining the discretion with the trial Judge to enable him to have a sanction to penalise poor conduct or delay by the parties.

#### **Question 5 - Impact assessment on the proposed reforms**

We would welcome a readily accessible web-based programme in order that we may properly calculate the financial impact of these proposals.

#### **Succession and Rights of Appeal**

We make no submissions in relation to these sections of the consultation

## Appendix A

### Cerebral Palsy Claim Damages Paid at Age 15

Incident date 1993

Date of payment - 2008

Service of proceedings - 2003

General damages = £230,000

Interest on general damages under current regime = £23,000 (5 years at 2%)

Interest on general damages under new regime = £79,549.72 (15 years at 2% compounded)

Difference of £56,549

(245% increase)

Past losses = £400,000

Interest under current regime £400,000 x 51.5% = £206,000

5 years at 8% plus 3 years at 7% and 7 years at 6% (42%) = 51.5%

Interest on compound basis utilising same periods and rates as above

Year 1 - 5 (8%) = £281,596.85 (principal sum, £600,000.00)

Year 6-8 (7%) = £198,397.20 (principal sum, £881,596.85)

Year 9 - 15 (6%) = £540,785.80 (principal sum, £1,079,994.05)

Total = £1,023,590.93

Difference of £817,590.93

(396% increase)

## Appendix B

### Cerebral Palsy Claim Damages Paid at Age 25

Incident Date 1984

Proceedings Issued 2002

Payment of Damages 2009

General damages of £220,000.

Interest under current regime - 2% x 7 years = £30,800

Interest under proposed regime - 2% compounded x 25 years = £140,933.32

Difference of £110,133.32 (357% increase)

Past Losses of £600,000

Interest under current regime

- 1) 1984 - 1986 = 12% (2 years) = 24%
- 2) 1986 - 1987 = 11.5% (1 year) = 11.5%
- 3) 1987 = 11.56% (1 year) (aggregate rate) = 11.56%
- 4) 1988 = 10.91 (1 year) (aggregate rate) = 10.91%
- 5) 1989 = 13% (1 year) (aggregate rate) = 13%
- 6) 1991 - 1993 = 10.08% (2 years)(aggregate rate) = 20.16%
- 7) 1993 - 1999 = 8% (6 years) (aggregate rate) = 48%
- 8) 1999 - 2002 = 7% (3 years) (aggregate rate) = 21%
- 9) 2002 - 2009 = 6% (7 years) (aggregate rate) = 42%
- 10) 2009 = 1.5% (1 year) (aggregate rate) = 1.5%

Total = 203.57/2 = 101.78%

£600,000 x 101.78% = £610,680

Compound Interest (Utilising same periods and rates as above).

- 1) = £152,640 (principal sum, £600,000)
- 2) = £86,553.60 (principal sum, £752,640)
- 3) = £97,010.78 (principal sum, £839,193.60)
- 4) = £102,139.90 (principal sum, £936,204.38)
- 5) = £134,984.76 (principal sum, £1,038,344.28)
- 6) = £248,464.91 (principal sum, £1,173,329.04)
- 7) = £834,414.36 (principal sum, £1,421,793.95)
- 8) = £507,743.89 (principal sum, £2,256,208.31)
- 9) = £1,392,009.96 (principal sum, £2,763,952.20)
- 10) = £62,339.43 (principal sum, £4,155,962.16)

Total = £3,618,301.59

A difference of £3,007,621.59

(492% increase)