brownejacobson

Consultation

The Law on Damages

CP 9/07

Response of Browne Jacobson LLP
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Contents

Introduction

Browne Jacobson LLP

Browne Jacobson is a leading firm of Solicitors in the Midlands, with offices in Nottingham, Birmingham and London. Among the firm's clients are a number of national insurers, loss adjusters, local authorities, charities, companies and the NHSLA. The firm covers a broad range of commercial sectors and legal specialties.

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Interest in the Consultation

Many of Browne Jacobson's clients instruct the firm to deal with claims on their behalf, either at a pre action stage or following issue of a claim in the courts. These claims cover a broad spread of Road Traffic Accidents, Employers' and Public Liability, disease, clinical negligence and fatal accident claims.

Browne Jacobson and its people have extensive experience in all areas covered by the consultation. In particular, the firm has experience of care issues of the type discussed in chapter 5. The firm is instructed by defendants to claims involving these issues and also acts for Local Authorities and NHS bodies.

The Response

This response is based upon the experience of lawyers at Browne Jacobson and upon feedback from a number of the firm's clients.

Summary

Our Approach to this Response

Certainty

The law of damages is at the core of civil law and is the primary means of its enforcement.

The consultation paper focuses primarily on damages arising in tort. However, principles of damages in one area of law can impact in other areas and can affect all remedies available through the courts.

Awards of damages are one of the key measures by which the performance of the courts is monitored and predicted. Insurers, public bodies, companies and individuals with an exposure to claims plan their business on the basis of the way courts will award damages for or against them. A decision as to whether to take up a claim or to defend it may be made with regard to the level of damages at stake.

As is noted within the consultation paper, the law of damages can also have effects beyond parties to a claim, as where the interface between damages and statutory care is considered.

It is therefore necessary to maintain the **highest possible degree of certainty** in the law. In most areas, the law of damages is settled and well understood and change in the law will therefore increase uncertainty.

We discuss at Chapter 5 the uncertainty currently surrounding the issue of availability of statutory care. This is one area in which we believe certainty will be increased by change and we set out our proposals in that regard below.

Positive Identifiable Benefits

Damages are at the heart of concerns over perceptions of a 'compensation culture'. Such perceptions centre around the idea that an individual can secure a 'windfall', for example, as a result of a trivial injury. The prospect of significant damages is also the incentive behind fraudulent or exaggerated claims.

The law in this area also affects the broader economy. Rising insurance premiums and risk averse behaviour are detrimental to economic growth. Damages awards in this country are among the highest in Europe and, indeed, the World. This cross border disparity has also given rise to concerns over 'forum shopping' whereby a claimant who might claim in more than one jurisdiction opts for the jurisdiction with the most favourable law.

With the above in mind, we endorse the government's view set out at page 9 of the consultation paper that **"change will only be appropriate where there are positive identifiable benefits".** Proposals for change must be weighed against the need for certainty. Where the availability of damages is to be extended, social and economic effects must be considered. Change should only be effected where this is necessary to address significant injustice.

Entitlement to Claim

A key principle of damages in tort is that a claimant should be put in the position he would have occupied but for the tort, insofar as this can be achieved by a monetary award. It follows that a person entitled to pursue a claim in tort should be compensated for actual losses incurred, but nothing more.

"*Where there's blame, there's a claim*" is not a legal principle. To amend the law to allow this would be to encourage a compensation culture. Those entitled to claim in tort are limited by common law principles such as foreseeability and proximity and also by statute, for example under the Fatal Accidents Act 1976 (FAA).

These limits on individuals able to bring a claim are not arbitrary. They are an important means of maintaining certainty, reducing satellite litigation and of ensuring that the finite resources of the court are directed at providing a remedy to those most affected by tortious acts. These considerations have informed our response to the consultation, in particular in relation to chapter 1.

Double Recovery

The principle that a claimant should recover losses incurred, but nothing more, is key to avoiding overcompensation. Overcompensation is likely to undermine confidence in administration of justice and to promote the perception, and perhaps development, of a compensation culture.

It is noted in the paper that awards for damages 'redistribute' the costs incurred as a result of a tortious act (p9). We agree that this should be the purpose of damages. However, that purpose is not achieved where double recovery is allowed to occur.

It is also stated at p 9 of the paper that "*damages are a way to ensure that a negligent person pays…*". It is recognised elsewhere in the paper that in fact most claims, in particular those of high value, are met by insurers or public bodies as opposed to the "*negligent person*".

This is particularly likely in relation to awards under the heads of damages considered in the paper. FAA, care and accommodation claims, for example, are most common where there is widespread or compulsory insurance (eg RTA claims) or in the context of clinical negligence claims involving the NHSLA.

In relation to RTA claims, where compulsory insurance is not in place the Motor Insurers' Bureau will generally satisfy a claim.

It is therefore not the case that the law of damages transfers loss from the injured party or taxpayer to the tortfeasor. Instead loss is largely transferred either to public bodies funded by the taxpayer or to insurers funded through premiums collected from the public at large. In either case, it is the general public who ultimately pays.

Double recovery therefore amounts to a windfall for an individual at the expense of the general public and it is in the public interest that this should be avoided wherever possible.

The courts should, in all cases, be permitted to examine full evidence as to the loss a claimant has incurred or will incur in the future. The courts should be permitted to examine the extent to which losses are reduced as a result of a claimant taking

advantage of income or services received otherwise than through damages. This will allow the courts to prevent double recovery and to protect the public interest.

We therefore agree that "*the courts must have as much flexibility as possible in considering whether damages can be awarded in a particular case*"**.**

Summary of Responses

Fatal Accidents

We do not agree that the categories of claimants entitled to make dependency claims should 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. 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.

Lost years claims should not survive for the benefit of a claimant's estate. This amounts to a windfall to the estate, in most cases at the expense of the general public (either as insurance policy holders or taxpayers).

Mesothelioma Claims

We propose an interim payment approach to address the specific requirements of mesothelioma claims. We have put forward an approach which avoids the need for significant change to the law. We consider this can be introduced through an appropriate Practice Direction to the Civil Procedure Rules.

Bereavement Damages

We agree many of the proposed changes to the law of bereavement damages. We consider, however, that in order to promote certainty total bereavement damages should be capped.

It should be made clear that bereavement damages include an award for loss of love and affection and for a normal grief reaction.

Psychiatric Illness

We agree no change is required.

Collateral Benefits

We consider the courts should always be permitted to consider collateral benefits where appropriate evidence is available. It is contrary to the administration of justice that a court should be required to turn a blind eye to double recovery.

Cost of Private Care

This is a complicated area and we have set out our detailed comments in the relevant section of this response.

In many personal injury claims to damages for care, claimants' care needs are such that they give rise to some state provision. However in the majority of cases, this falls within the responsibilities of Local Authority social services departments as opposed to NHS Primary Care Trusts. There is need for consistency and clarity in the primary legislation and regulations applicable to care provided from both sources. The treatment of this care in the assessment of damages should also be consistent.

With a view to achieving this we consider s 2(4) of the Law Reform (Personal Injuries) Act 1948 should be repealed.

We consider that the issue of most concern in this area is the prospect of double recovery. In many cases, this might be addressed by the court considering evidence as to the claimant's care needs and the statutory services available to meet them. This would involve no change in the law.

However, we recognise that in some cases a claimant's care or treatment provision will change over time or assessment of care far into the future will be difficult. In those cases, a capped indemnity or reverse indemnity allows damages to be assessed in a timely and cost effective manner, while minimising the risk of double recovery.

We consider that the government should endorse this approach through amendment of CPR 31 and the relevant Practice Direction to give further guidance on the subject. Amendments should include guidance as to considerations to be taken into account before awarding an indemnity and, in outline, the form of an appropriate indemnity.

Accommodation

We do not consider there is a need for change. We believe the current approach strikes a fair balance between claimant and defendant and prevents double recovery. Change will lead to significant uncertainty.

Aggravated, Exemplary and Restitutonary Damages

We set out our comments in the relevant section. While we do not oppose clarification of the law, this should not be at the expense of certainty and should not fetter the courts' ability to provide an effective system of remedies.

Intellectual Property Claims

We consider additional damages should be retained.

We advocate a fast track system for low value intellectual property claims, incorporating a tariff of damages to assist parties in assessing quantum.

Chapter 1 – Claims for Wrongful Death

Question 1a – Should a residual category be added to the list of those entitled to claim under the FAA?

No. It is considered that the current exhaustive list of those able to make a claim for dependency strikes an equitable balance between the parties. To supplement this list with a wider definition of those able to claim will cause difficulties to both claimants and defendants.

A lack of definition of those able to claim will increase satellite litigation between the parties. Uncertainty as to those individuals able to make a claim will introduce further complex issues for claimants' representatives accepting instructions and defendants raising a Defence to investigate.

From a defendant's perspective the proposed definition has a propensity to open the floodgates to an extensive list of claimants not covered by the current legislation. This may enable some deserving claimants to bring a claim, however it would also allow the introduction of dependency claims for those claimants only able to show a very short period of dependency pre death, which may not be representative of the real prospects of a long term relationship.

Under the current law, assumptions as to the duration of a dependency form a starting point for calculating damages in FAA claims. In the case of married or civil partners and cohabitees of 2 years, it is presumed that the relationship will be lifelong. In the case of dependant children it will be until a normal age of independence.

In times of increased divorce and relationships of convenience, the appropriateness of these assumptions might be questioned and we make submissions below as to factors the court should be able to consider in this regard. However, the assumptions remain a reasonable starting point in relation to the existing categories of claimant, where there is a well established dependency in the past or a relationship formalised by marriage or civil partnership.

We note the consultation's general reluctance to encourage detailed investigations where these might intrude on claimant's privacy or may be distasteful. The assumptions above provide a means of avoiding such enquiries. However, if individuals who can demonstrate only a short period of dependency are permitted to claim then these assumptions cannot hold. Investigations will be necessary in all such cases in order to establish the likely duration of a dependency.

Further, the proposal will cause defendants difficulty in accurately reserving fatal claims. It will be difficult for a defendant to identify all those with a potential dependency. The law is required to provide certainty and we consider that this will not be the case without providing an exhaustive list.

It follows that to increase those able to claim would result in insurers needing to increase reserves to meet these claims. This would have a direct effect on premiums payable by policyholders. In the European market place insurers need to be competitive and this proposal will decrease insurers' ability to compete.

It is in the interests of the public to provide certainty to the parties in order that matters such as these can be dealt with accurately and expeditiously. The proposed residual category would be detrimental to these aims.

Question 1b – How should the residual category be defined?

For reasons set out in response to question 1a, we do not consider a residual category should be added.

Question 2a – Should the fact of remarriage be taken into account when assessing damages under the FAA?

Yes.

If re-marriage/entrance into a civil partnership can be established as fact then that should be considered when calculating damages and any dependency received in that new marriage taken into account.

If re-marriage were not considered then certain dependants will receive both damages through a dependency claim relating to a previous marriage and the financial benefits of re-marriage.

This would amount to double recovery on the part of the dependant (most commonly at the expense of the general public) and will promote perceptions of a compensation culture.

Question 2b – Should financially supportive cohabitation of 2 years be taken into account?

Yes. As with re-marriage if it is established that a dependant has entered into a new relationship of some 2 years then this should be considered in the calculation of damages. Again, this prevents the issue of double recovery by a claimant receiving a windfall payment.

We appreciate that for both claimants and defendants dealing with fatal accident claims this will be a sensitive issue. This is already reflected in the way in which defendants typically consider those claims. However, in order to promote equity between the parties it is just that a defendant be given the opportunity to consider all evidence available to form a view as to the proper value of any claim for dependency.

It would be unjust and inequitable to allow a claimant to use the fact of a financially supportive co-habitation to raise a dependency claim, but to deny a defendant the right to use the fact of a similar new relationship to quantify the true losses and so possibly reduce the claim.

In order to overcome any potentially insensitive request for information on the part of the defendant it is suggested that the claimant in each and every claim brought for dependency should disclose at an early stage a standard pack of information. This will enable the defendant to consider the issues surrounding the claim without causing a claimant to feel that they have been singled out or that their relationships are being

subjected to inappropriate scrutiny. It is suggested that this standard pack of information should incorporate the following:-

i) Marriage/Civil Partnership Certificate;

ii) Grant of Probate/Letters of Administration;

iii) Social services records;

iv) Employment records/occupational health notes of deceased or signed mandate;

v) Birth/Adoption Certificate of the dependant (if appropriate);

vi) Death Certificate;

vii) Deceased and dependant's GP notes or a signed form of authority to obtain them (to consider life expectancy of the deceased and dependant);

viii) Bank statements of dependant running from 3 years pre accident;

ix) Utility bills;

x) Preliminary Schedule of Special Damages with any documentary evidence in support.

Question 2c – Should the prospect of remarriage, entry into civil partnership or financially supportive cohabitation be disregarded?

No. To exclude consideration of the prospect of re-marriage or new partnerships completely would not be just to defendants.

It is not in the interests of justice or in the public interest that evidence of likely double recovery should be disregarded. As we have indicated in response to questions 2a and b this leads us to conclude that judges should be entitled to consider evidence of remarriage and partnerships of 2 years in assessing a dependency claim.

It is not difficult to envisage scenarios in which there may strong evidence as to the likelihood of future marriage or relationships. Indeed, such evidence may come out in the course of trial where, for example, a claimant talks of future plans. It would be contrary to the interests of justice to prevent a trial judge from considering such evidence.

It would then be the role of the trial judge to consider the evidence in the usual manner and to determine what will occur, on a balance of probabilities.

Defendants' ability to investigate these matters is not currently subject to abuse as all parties concerned appreciate the need for sensitivity. To withdraw that facility from defendants would not promote equity between the parties.

Question 3a – Should the fact of remarriage be taken into account when assessing a claim for damages on the part of eligible children?

Yes. Whilst we consider that there cannot be an assumption on the part of defendants that re-marriage would distinguish any dependency claim on the part of eligible children we consider that this prospect should not be excluded in its entirety.

If there is evidence offered by the claimant or obtained by the defendant to suggest that eligible children are being provided for by a new relationship then the dependency should be reduced to reflect this.

To ignore this possibility completely would put insurers at a disadvantage and would lead to double recovery. We consider that the judiciary should be trusted to make appropriate judgments on the evidence available.

Question 3b – Should financially supportive cohabitation of 2 years be taken into account when assessing a claim for damages on the part of eligible children?

Yes.

The same principles as set out in 3a above should apply in cases of financially supportive cohabitation.

Question 4 – Should the courts only take into account the prospect of divorce, dissolution or relationship breakdown where the couple no longer live together, one had petitioned for divorce or begun the procedure for dissolution?

The courts should take into account the prospect of relationship breakdown in all cases in order to avoid inconsistency.

The circumstances cited within the consultation paper (a to c under question 4) are clear examples of evidence of relationship breakdown that may justify a court in determining that a relationship had ended and that no damages for loss of dependency should be awarded.

However, it is not possible to anticipate all circumstances that may arise and an overly-prescriptive approach to amending the law will inevitably lead to injustice in some claims. In particular, there will be circumstances other than those listed which amount to clear evidence that a relationship breakdown was likely. These should not be excluded from consideration.

Use of a limited list will lead to unmeritorious claims and overcompensation.

The government position that the courts should be permitted to retain the broadest possible discretion should be applied here. The courts should be permitted to take into account all relevant circumstances in considering the prospect of relationship breakdown.

Question 5 – Should s 3(4) of the FAA be repealed and replaced by a provision that the prospect of relationship breakdown should not be taken into account when assessing damages under the FAA?

We consider that Section 3 (4) should be repealed but not replaced.

The prospect of breakdown in any relationship should be taken into account when calculating a dependency claim. If there are real prospects of a breakdown in a relationship then to ignore this evidence will lead to double recovery in many cases.

One solution to this and other issues raised within the consultation document would be for a new set of Ogden Tables to be produced, based on statistics relating to marriage, divorce and relationship breakdown etc.

Such tables would allow a statistical discount for the possibility of the relationship breaking down, taking into account statistics available for divorce/separation. The tables could also take into account prospects of remarriage or new relationships. This would remove the potential intrusion of enquiries in dependency claims while ensuring that compensation was calculated on a fair basis. Such an approach is analogous to the approach to contingencies for factors affecting employment under the 6th Edition Ogden Tables.

In the absence of such a tool, the assessment of the risk of breakdown in a relationship and quantification of damages will remain a matter for the trial judge.

Mesothelioma Claims

We propose the use of current procedural law to construct a process for the rapid recovery of damages by injured parties, without prejudice to possible dependency claims.

We consider our proposals can be effected by an appropriate Practice Direction, permitting rapid action to address concerns in this area.

We consider that introduction of an entirely new procedure should be avoided if possible. A new procedure is likely to increase the amount of satellite litigation surrounding claims, which will not promote the objective of timely payment of damages. Further, the number of future claims in this area is likely to be limited and so introduction of a new procedure for these claims should be avoided if appropriate processes can be put in place under the current law.

We consider that the current law can be applied in such a way as to achieve the desired objectives. Use of existing procedural law has the additional advantage of allowing a new regime to be introduced rapidly. We believe our proposals would be best implemented by a new Practice Direction to the CPR.

We consider an interim payment would be the most effective and efficient way of dealing with the injured party's mesothelioma claim. The interim payment request should be contained within an issued Part 7 claim. The Claim Form will contain the request for the interim payment along with as much information as is possible regarding the potential dependency claim, including a list of dependants likely to make a claim.

If the claimant's application for an interim payment is successful and/or agreed by the defendant then a stay should be applied to proceedings, to be lifted by application to the court.

The application to have the stay lifted would be made when the dependency claim was to be pursued. In most cases the application would also seek permission to serve amended particulars of claim. The amended particulars would set out the full dependency claim, which would then progress in accordance with current procedure.

If our proposal is used we consider that the following must also be incorporated:-

i) Any interim payments (and interest) are offset against any future claim to avoid double recovery;

ii) A claim for lost years should not be available.

To amend the law so that mesothelioma claims brought in life do not extinguish subsequent dependency claims would create an unjustified anomaly. The procedure proposed above allows for a right of action by dependants to be maintained. It is not onerous to require the injured party, in bringing a claim, to specify that there may be a subsequent claim for dependency and to provide basic information about potential dependants as this information would be readily available.

The proposal to utilise Part 8 proceedings to permit a claimant to seek an interim remedy does not accord with the purpose of Part 8 (to allow proceedings where there is

no dispute of fact) as liability may be an issue when proceedings are commenced. It would also mean that a future dependency claim would require separate Part 7 proceedings, leading to increased costs.

To allow fatal accident claims to be brought when the injured individual is still alive is distasteful and could cause a terminally ill party undue anxiety and stress. It is also considered that to speculate on a party's date of death when performing calculations will increase uncertainty.

It is not appropriate to address concerns by allowing claims for lost years to be made. Lost years claims are anomalous and will often have no effect other than to provide a windfall to the estate of an injured party.

Chapter 2 - Bereavement Damages

Question 6 – Should bereavement damages continue to be available?

Yes.

We consider this head of claim should remain available to claimants but its purpose should be clarified.

The award should be available as payment to account for the unquantifiable and intangible claims of:-

i) Love and affection;
ii) A normal grief reaction to a loss.

Question 7a – Should clarification as to the purpose of bereavement damages be provided in the explanatory notes accompanying legislation?

Yes.

Whilst this is a matter for claimant's solicitors to explain to their client it may be useful to provide further guidance.

It should be made clear that the award incorporates a sum for unquantifiable factors including those referred to in the response to question 6, above.

Question 7b – Should the purpose of bereavement damages be explained to the public in any other way?

We do not believe that the law should be too prescriptive about this award and its intended use. The steps proposed above are adequate.

Question 8a – Should a parent only be able to claim bereavement damages in relation to a child under 18 and unmarried?

Yes.

We consider that there has to be a cut off point and that this is rightly when the minor attains majority.

We recognise the appropriateness of permitting parents to claim bereavement damages. However this entitlement cannot be open ended. We consider the current limit strikes a reasonable balance.

Question 8b – Should unmarried fathers with parental responsibility be able to recover bereavement damages for the loss of a child under 18?

Yes.

This should not extend to unmarried fathers without parental responsibility.

Question 8c – Should stepparents with caring responsibility for a child under 18 be able to claim bereavement damages?

Yes.

Whilst we accept that for defendants this would serve to increase the number of potential claims, we consider that this is equitable.

Question 9 – Should children of the deceased who are under 18 be able to claim bereavement damages?

Yes.

It is appropriate that minor children of the deceased should be able to recover bereavement damages. However, it is generally accepted that parents will pre-decease their children. We therefore agree that there should be a cut off point and it is appropriate that this is the age of majority.

Question 10 – Do you agree that brothers and sisters of the deceased should not be able to claim bereavement damages?

We agree that siblings should not be entitled to claim bereavement damages.

Whilst we accept that there is an argument for recovery on the part of siblings we consider there has to be a point where certain individuals are excluded from recovery. To widen the list of eligible claimants to include siblings would give rise to considerably more claimants and increased exposure for insurers and other compensators.

This would also lead to difficulties in defining the range of eligible claimants, given the potential to include half siblings and step siblings.

It is reasonable to assume that in the overwhelming majority of cases parents and their young children will have close ties and it is therefore reasonable to include them within the category. The same assumption cannot be made for siblings, step siblings and half siblings.

Question 11 – Do you agree that cohabiting partners for at least 2 years pre accident should be able to recover bereavement damages?

Yes.

Question 12 – Do you agree that engaged couples should not be added to the list of those entitled to recover bereavement damages?

Yes.

Engagement is not a uniform notion across cultures and is made an increasingly ill defined term in modern culture by the advent of parallel institutions such as 'commitment' (which can be signified by exchange of rings). Use of 'engagement' in this area could lead to inequitable or discriminatory results.

The definition of 'engagement' also lacks the certainty required in this area of law. Its use may encourage spurious claims.

Engaged couples who have been cohabiting continuously for at least 2 years prior to death will be able to make a claim if the proposal under question 11 is adopted.

Question 13 – Do you agree the proposed awards in relation to bereavement damages?

a) Do you agree that the current award of £10,000 should be available to the deceased's spouse, civil partner, or cohabitant without dilution (subject to b), and that additional sums should be available to any other eligible claimants?

No.

b) Do you agree that where a spouse or civil partner and a cohabitant are both eligible to claim, the sum of £10,000 should be divided between the two?

Yes. We believe that it remains appropriate for the award to be divided between them.

c) Do you agree that the sum of £10,000 should continue to be available to the parents of an unmarried child under 18, to be divided between them if appropriate?

Yes.

d) Do you agree that an award of £5,000 should be made to each eligible child under 18 in respect of the death of a parent?

No.

We consider that a sum of £10,000 should be available to be divided equally between all eligible children under the age of 18.

Further, as detailed in the response to 6 above we consider that this payment should reflect the loss of affection and a normal grief reaction. This allows for certainty in relation to a head of claim that is currently difficult to quantify.

Question 14 – Do you agree that contributory negligence of the claimant should reduce bereavement damages?

We consider that the bereavement award should be reduced to reflect contributory negligence on the part of either the deceased or the dependant.

This reduction should be cumulative where there is contributory negligence on the part of both the deceased and the dependant.

Chapter 3 – Liability for Psychiatric Illness

We endorse the approach taken by the courts in recent years to limit the extent of recovery for alleged psychiatric injury, and agree that no legislative reform is required.

Further to our submission in the previous chapter, to the extent that a claim for psychiatric injury constitutes an adjustment disorder or normal grief reaction to bereavement, such an injury is part of the normal response to bereavement, and is presumptively to be dealt with by way of the usual bereavement award.

Chapter 4 – Collateral Benefits

Question 15a – Do you agree that the most appropriate outcome is that "the claimant is compensated for his or her losses, but only once; and wherever practicable at the expense of the tortfeasor rather than a collateral benefit payer"?

We agree with the principle that the most appropriate outcome when collateral benefits arise is for the claimant to be compensated once and once only.

To achieve this and to avoid overcompensation, we believe that all collateral benefits received by the injured party should be taken into account when assessing recoverable damages.

The claimant should be compensated for actual loss at the expense of the tortfeasor.

In the majority of claims in which collateral benefits arise the tortfeasor will be backed by a policy of insurance or will be a publicly funded body. Insurers (and the MIB) and public bodies are reliant upon funds secured from the general public, either as policyholders or taxpayers, in order to meet claims.

Such claims therefore typically involve the transfer of funds from the general public to the claimant. Where claimants secure double recovery, this amounts to a windfall to an individual at the expense of the general public.

Double recovery and increasing insurance premiums also have the undesirable effect of making insurance less affordable. This may prevent small businesses and individuals from protecting their own interests through insurance. It may also increase the incidence of claims in which the tortfeasor cannot meet the claimant's damages, resulting in a deserving claimant being under-compensated.

A broader effect of double recovery, increased awards of damages and resulting increases in taxation and insurance premiums, is to render the economy less competitive and to promote forum shopping whereby a claimant who has the choice of bringing a claim in more than one jurisdiction selects the jurisdiction with the most generous remedies.

This being the case, double recovery should be prevented wherever possible.

The 'tortfeasor pays' approach is sound in principle, but it must be borne in mind that in the majority of cases it is the general public that ultimately meets the cost of claims.

To the extent that a claimant has suffered actual loss, the tortfeasor should be required to compensate, but there is a need to avoid double recovery in order to protect the interests of the general public.

Question 15b – Do you agree that the best way to achieve this is to disregard collateral benefits in assessing damages, but to give the payer a right of recovery?

No.

The government's preferred outcome is best achieved by taking into account all forms of collateral benefit payments when assessing the amount of recoverable damages.

We take the view that if collateral benefit payments are disregarded when assessing recoverable damages the injured party is likely to be overcompensated at the expense of the tortfeasor and/or collateral benefit payer.

This is not solved by giving the collateral benefit payer a broad right of recovery which in our view will simply create additional satellite litigation and more appeals in the tribunal system.

As is noted in the consultation paper, collateral benefit payers are able to contract to recover benefits paid. This would result in a loss to the claimant so that damages would be recoverable in accordance with general principles of law.

We are conscious that as a subrogated claim, collateral benefits recoverable as a result of a contract would not sound in damages in claims against the MIB. This is a result of the MIB's position as a fund of last resort, compensating claimants where a compulsory motor insurance policy is not in place. It is a decision of policy which reflects MIB's purpose and does not undermine the points raised above.

If the law were modified so that collateral benefits were disregarded, then an exclusion to this principle would have to be introduced to maintain the MIB's position.

Question 16 – Do you agree that no change to the law in relation to charitable payments is required?

No. The law should be changed so that payments are taken into account when assessing recoverable damages.

We consider that the claimant should be compensated once and once only. The best way to achieve this is for charitable payments received by the claimant to be taken into account when assessing recoverable damages. To achieve that end the current law is in need of change.

This will promote consistency in the law relating to collateral benefits.

In making this recommendation we recognise the possible discomfort of taking into account charitable payments or services. However, the purpose of compensation is to make good the injured party's actual loss and not to penalise the tortfeasor. On those occasions where the injured party has received a charitable payment or services the injured party's actual loss is reduced.

It would remain open to the benefactor and injured party to provide for repayment upon recovery from the tortfeasor by contract, thereby giving rise to loss and to an entitlement to claim.

Question 17a – Do you agree that the *Hunt v Severs* approach should be replaced with a personal obligation to account?

We do not recognise any necessity to alter the *Hunt v Severs* 'trust' approach to gratuitous care.

We consider the concept of 'personal obligation' to be vague and one that is unlikely to make any real practical difference to the way payments of damages for gratuitous care are currently made (or not as the case may be) between injured parties and gratuitous care providers.

Question 17b – Should this apply to damages for future as well as past gratuitous care?

We do not recognise any necessity to extend either the *Hunt v Severs* trust approach or a personal obligation to recoverable damages for future gratuitous care.

Question 17c – Should that generally apply irrespective of the identity of the care provider, save that damages should not be awarded for past gratuitous care provided by the tortfeasor?

No. We do not recognise any necessity to extend either the *Hunt v Severs* trust approach or a personal obligation for gratuitous care provided by the tortfeasor.

We do not recognise any areas of difficulty or concern that necessitate a change in the law.

Question 17d – Do you agree that the FAA should be amended to allow damages to be awarded in respect of services gratuitously provided to a dependant of the deceased?

No. Such an amendment would introduce a new head of loss. The existing law already provides adequate compensation where a dependant is deprived of services as a result of a fatal accident.

The FAA currently provides for a dependant to recover for those services that would have been provided by the deceased had he or she lived. This gives adequate compensation.

We have no objection to the claimant accounting to a gratuitous care provider from the compensation received for care the deceased would have provided, via a *Hunt v Severs* approach.

Question 18 – Should the law in relation to insurance payments be clarified

a) so payments are excluded in assessment of damages, regardless of who pays the premiums?

No. Insurance premiums should be considered in all cases in order to prevent double recovery.

In principle we disagree with the government's proposal to disregard insurance payments to an injured party from the assessment of damages, irrespective of who purchased the insurance premium.

An injured party should be compensated once and once only. In cases where an injured party has the benefit of a payment made under an insurance policy and recovers damages from the tortfeasor, that injured party is paid twice for the loss and so overcompensated. As is noted above, in the majority of cases that overcompensation will be at the expense of the general public.

The purpose of damages is to compensate the injured party for actual losses rather than to penalise the tortfeasor.

b) so contractual provisions for recovery are enforceable regardless of the nature of the insurance?

Yes. This will permit insurers to protect their interests by securing recovery of funds, without the risk of double recovery.

We do recognise a need to clarify the law relating to the enforceability of contractual provisions for recovery regardless of the nature of insurance.

We recognise that in cases where there is a contractual obligation upon the injured party to repay an insurance payment, then such an obligation creates a loss for that injured party for which damages would be recoverable.

The apparent uncertainty in the enforceability of such clauses is not in the public interest and such uncertainty would create satellite litigation.

If you consider that the law should be clarified, do you agree that this should not apply to provisions requiring the insured person to pursue an action so that their insurer can recover payment?

In clarifying the law we recognise the importance for insurers to be able to seek recovery of payments from tortfeasors via an insured party. We recognise this is best achieved by a contractual right of subrogation rather than a contractual provision requiring the insured party to pursue an action.

Question 19 – Do you agree that no change is required in the law relating to pensions?

No. The law should be amended so that pension payments are considered when damages are assessed.

The current law treats pensions as analogous to insurance and so they are disregarded in assessing recoverable damages.

We do not accept that this approach achieves the government's preferred objective to see that claimants are compensated once and once only. In cases where a claimant receives a pension payment and recovers damages, that claimant is overcompensated. The purpose of compensation is to compensate actual loss.

We consider a change in law is needed for pensions to be taken into account when assessing recoverable damages.

Question 20a – Should sick pay be disregarded in the assessment of damages?

No. All sick pay should be taken into account when assessing recoverable damages.

A claimant should be compensated once and once only. In cases where the claimant receives sick pay and then recovers damages to include loss of earnings then that claimant is overcompensated.

We consider that the law should be changed so that all sick pay may be taken into account when assessing damages.

Question 20b – If you consider change is appropriate, should this apply only to sick pay above the statutory minimum?

No. Such a proposal would add unnecessary complexity and add to the risks of overcompensation.

Question 20c – Should there be an exception where the employer is also the tortfeasor?

No. In our view to have an exception in cases where the employer is also the tortfeasor would create an artificial distinction adding unnecessary complexity and increasing the risk of overcompensation.

Our preferred approach of allowing all sick pay to be considered in assessing damages removes the need for an exception of this type.

Question 21 – Is the law in relation to redundancy payments best left to the courts?

Yes.

Our view is that redundancy payments received by an injured party and which represent loss of earnings are collateral benefits that should be taken into account when assessing a claimant's recoverable losses.

We consider this to be appropriate to achieve the government's objective of ensuring that an injured party is compensated once and once only. For a claimant to receive both a redundancy payment reflecting lost earnings and a subsequent award of damages would amount to overcompensation.

If any element of a tribunal's award represented injured feelings then the trial judge should determine how far the redundancy payment should be disregarded when assessing recoverable loss.

Chapter 5 – Cost of Private Care

General Principles

The DCA consultation paper deals in most detail with s2(4) of Law Reform (Personal Injuries) Act 1948, which provides that the availability of state funded medical care should be disregarded in considering a claimant's entitlement to damages. We are pleased that this anomalous provision is subject to review, and welcome the prospect of appropriate reform. Nonetheless, we are conscious that this is only one part of the wider issue of the relationship between quantification of damages and state funded provision of care, whether medical or non-medical in nature. In reality, by far the greater part of damages awards in substantial cases is attributable to social and domestic care. We endeavour, in this submission, to take the issue as a whole.

The consultation paper asserts that the tortfeasor should pay. However, an equally fundamental principle is that in usual circumstances damages are compensatory rather than punitive, and so the tortfeasor should pay *only to the extent that there is a loss to make good*. Compensation is not awarded for a breach of duty absent causation of loss or injury.

The tortfeasor should pay only where its breach of duty has caused loss, and should pay only to the extent required to make that loss good, insofar as this can be done in monetary terms.

Equally, we should recognise the reality that compensation payments by "the tortfeasor" are almost invariably paid by a vicariously liable employer and/or an insurer, the MIB, or by a public sector body. Very rarely is compensation actually paid by a 'culpable' individual. Employers will usually rely on insurance and the MIB is funded by contributions from the insurance industry. Insurance companies will spread their losses across society through insurance premiums, and large public sector defendants, such as the NHS Litigation Authority or local government bodies, will achieve the same end even more directly through taxation.

The reality is that compensation payments, and especially those of sufficient quantum to involve substantial future care claims and issues of state funded or private provision, are overwhelmingly funded by the general public, whether directly or indirectly.

It is therefore of critical importance to the public to ensure that a claimant is not overcompensated by payment of damages for a loss that will not in fact be incurred.

The principal defect of the present system is that a claimant can recover damages with which to purchase care (including accommodation) and yet in addition secure provision of that care by public bodies, such as Primary Care Trusts or Local Authorities, which have statutory obligations to provide those services. **The basic problem is the potential for double recovery, overcompensating the claimant at the expense of the general public.**

In respect of NHS care, no financial contribution can be sought from the claimant because NHS care is free at the point of delivery, and this can lead to very clear double recovery. There are some means testing provisions as regards Local Authority care, but regulations and the common law have developed very complex arrangements to ring

fence some personal injury funds from being taken into account. These are inconsistent in application, and problematic in themselves.

We consider that there are four possible approaches to address this issue:-

1. Arrangements for direct funding by the defendant to the provider of the care as part of a damages award;

2. Means testing to ensure that a claimant does not receive state care free of charge in addition to receipt of damages for the cost of private provision;

3. Reducing recoverable damages to take account of state provision of care, ('*Sowden* investigations' – *Sowden v Lodge* [2004] EWCA Civ 1370); and

4. Use of indemnities / reverse indemnities.

We will deal with each in turn.

Direct Funding

This could involve payment from the defendant directly to a private care provider, or to the NHS or another public body.

This approach would be very problematic.

Direct funding of care packages would inevitably give rise to extensive satellite litigation. It would also undermine the certainty required by defendants as to the extent of their outlay if the charges made by the care provider varied according to their own assessment of needs from time to time. The care provider would have a financial incentive to recommend the greatest possible extent of care, and the introduction of any mechanism to redress this through appropriate checks and balances and independent scrutiny would simply add layers of bureaucracy, lead to dispute between the parties (and the care provider) and add to the overall costs of the claim.

We suspect that claimants may not always wholly welcome the imposition of an ongoing relationship between themselves and the defendant, which direct funding would require.

Even more profound objections would arise if the defendant's funding were to be paid to the NHS or another public body provider of care. It would be inequitable for patients within the NHS to be treated according to the mechanism of their injury, rather than their clinical need, with resources being made available to the patients injured by a tortfeasor, but denied to others with the same injuries, or to be prioritised differently.

Such an approach would inevitably create a 2 tier system of entitlement within the NHS and any other public body providing care, which we consider would be unwelcome and unpopular, and contrary to the underlying ethos of those bodies.

On a practical level, we do not see how any such sums could be ring fenced within the public bodies' finances, in order to be appropriately allocated solely against the care of the specific injured claimant.

If the defendant happened to be an NHS body, then direct funding to the NHS would be circular.

Means Testing

An approach based on means testing could operate in 2 ways:-

- as a tool in assessment of entitlement to state provision of care (ie a 'threshold test', in which a certain level of means would establish that no need arises for state provision of care); or

- as a tool for ensuring that public bodies can charge for the care provided, to ensure recovery of these costs from the compensation paid.

In theory, either approach would mean that the possibility of double recovery is minimised. Where damages have been paid, these funds would be taken into account to ensure that the claimant does not then receive free care in addition.

Such an approach would require a significant review and reform of the law, which would in itself be very welcome. There is inconsistency between the means testing provisions applicable to different parts of the legislation on statutory entitlement to state funded care, and these provisions in turn are inconsistently applied across the country.

However, we believe that any approach to issues of state provision of care will have greatest success if it is consistently adopted across both health and social care sectors.

Universal state funded provision of health care via the NHS, being free at the point of delivery, is a well established principle, wholly inconsistent with any means testing approach.

If use of means testing was to be extended throughout social care as a mechanism of avoiding double recovery, difficulties would be caused by inconsistency with the approach to provision of universal free health care. There would be an incentive for claimants to press for categorisation of their care needs as being health care rather than social care, in order to avoid the means testing rules. Conversely, there would be an incentive for the state providers to assess the claimant's needs as being social rather than health care, to allow refusal of access to such care free of charge. There would be more satellite litigation on these issues.

To the extent that means testing, including damages awards, would be intended to act as a 'threshold' question, going to the existence of a need for the services to be provided by the Local Authority, we doubt whether this can be satisfactorily reconciled with the principles of universal access and the welfare state.

We think that this is sufficient reason to reject this approach, but even if this principled objection could be overcome, there would also be a number of practical issues to address:-

- Would certain heads of loss within compensation awards be protected from means testing, for instance the general damages for pain suffering and loss of amenity?

- If so, how would the Local Authority establish the precise breakdown of any award, especially where settlement is agreed out of court (an adult with capacity would not need court approval), and in circumstances of confidentiality?

- In that situation, how would the courts and the Local Authorities overcome the incentive, unconscious or otherwise, for settlements to be agreed in such a way as to minimise those heads of loss that would expose the claimant to such means testing?

- Means testing for state provision of care is likely to be vulnerable to avoidance by financial planning and expert accountancy advice.

- If means testing is to be applied to charge a claimant for services provided by the Local Authority, double recovery would still occur to the extent that the charging rates applied by the Local Authority did not reflect the exact costings of commercial provision used to calculate the damages award.

- Any proposal to introduce more widespread means testing for state provision of care, to include damages awards, would be entirely contrary to the approach apparently favoured by the Department of Health in their recent consultation on means testing for provision of residential care (24 May 2007).

On balance, therefore, although this approach is superficially attractive, our view is that increased means testing, taking account of all or part of damages awards, is unlikely in itself to be an effective mechanism to minimise the possibility of double recovery.

Reducing Recoverable Damages by '*Sowden* Investigations'

This approach reflects the way in which parties to litigation deal with these issues under the existing legislation – investigation of the state funded care that is already being provided, or will be available as a matter of fact, seeking to deduct this from any damages award (per the Court of Appeal authorities of *Sowden* and *Crofton v NHSLA* [2007] EWCA Civ 71).

The overwhelming benefit of this approach is that it allows the parties to adduce evidence as to the issue of state provision of care as a matter of fact. Compensation would not be payable for losses that are not incurred. Any shortfall between the claimant's reasonable needs and the state provision can be made good by the defendant by way of a 'top up'.

There are cases where a claimant seeks to avoid issues of state provision of care altogether by asserting that he or she has no intention of availing him or herself of such services (see *Freeman v Lockett* [2006] EWHC 102 (QB)). We do not consider it feasible to establish a binding contract to disallow any entitlement to state care, in the interests of maintaining the ideals of universal access and equality of provision. We therefore submit that such an assertion by a claimant should not obviate the need for investigations by the defendant to establish the extent of state provision of care available to meet the claimant's reasonable needs, the reasonableness of any failure by the claimant to mitigate losses in this way, and the court's obligation to consider these issues and reach a finding on the true extent of losses caused by the tortfeasor which should be compensated.

However, we recognise that there are a number of difficulties with this approach.

The use of top ups will in many cases mean an ongoing relationship between the claimant and the defendant. We do not consider this to be as problematic in this context as would be the case if the defendant pays a private provider of care directly, as described above. Such cases will increasingly be settled by way of periodical payments, and so there will be an obligation on the claimant to provide evidence of life on an annual basis, and the defendant's files will need to stay open for this purpose in any event.

As regards public body defendants, especially the NHS, the reality is that there is a continuing relationship between the individual claimant and the state in its various manifestations in any event. The claimant will continue to use other services provided by the state, whether by the NHS or a Local Authority or otherwise. Our experience is that in many cases claimants choose to maintain ongoing therapeutic relationships with specific individual NHS clinicians, notwithstanding allegations of negligence made against them.

The greatest difficulty with this approach is that the law on entitlement to state provision of care is complex, inaccessible, and unclear. Mr Justice Munby described it as *"some of the worst, if not the worst, drafted and most confusing subordinate legislation it has ever been my misfortune to encounter"* (*Ryan v Liverpool Health Authority*, QBD, 10 September 2001).

Our experience is that frequently the other parties we are dealing with, whether claimant's solicitors, or state providers of care themselves, have an incomplete, or even an inaccurate understanding of the law. The inconsistency with which the law is applied between various public authorities poses particular problems. These difficulties are an understandable result of the lack of clarity found in the existing law.

Consolidation and clarification of the law pertaining to entitlement to state provision of social care in particular is essential. Greater consistency in dealing with these issues around the country would also be very helpful.

The complexity and therefore the costs of investigations into state provision of care will be reduced as parties become increasingly familiar with the issues, and the processes involved. Working relationships will evolve between investigating solicitors and the public bodies responsible for provision of care to facilitate and expedite such investigations, to the benefit of all involved. The very late introduction of these issues, anathema to constructive and pro-active litigation, will become less common. The courts will be assisted by the production of more comprehensive and apposite evidence, hopefully without the need to join the Local Authorities or other public bodies to proceedings, which we would not consider likely to reduce the cost or complexity of litigation.

Nonetheless, we accept that the delay to litigation and increased legal costs involved in undertaking '*Sowden* investigations' are rightly a matter of concern, albeit that they are more than justified by the paramount need to avoid the excess costs of double recovery being borne by the general public.

Indemnities / Reverse Indemnities

The final possibility, the use of indemnities / reverse indemnities, builds on the '*Sowden* investigations' approach.

Any uncertainty over the extent of future state provision can be addressed by an indemnity from the defendant to meet any such losses actually incurred, up to the level of the claimant's agreed reasonable needs. Alternatively, the defendant may agree to pay the costs of private provision, subject to a 'reverse indemnity' from the claimant that he or she shall obtain such state funded care as is available, and account to the defendant for any such sums, in order to avoid double recovery.

The court may well still be assisted by evidence as to the availability of state provision of care as a matter of fact, but strictly speaking the use of indemnities / reverse indemnities in this way obviates the requirement for such detailed investigations by the parties.

For this reason we strongly recommend the continued development of the use of indemnities / reverse indemnities as the best approach to address the problem of potential imposition of the excess costs of double recovery across society as a whole, while minimising the delays and additional legal costs involved in conducting the necessary '*Sowden* investigations'.

However, we do not consider that this solution is itself sufficient without a comprehensive review of the law to clarify the extent of entitlement to state provision of care (and the scope of such means testing as there is), and facilitate greater consistency in its application.

The use of indemnities and reverse indemnities should be formalised in this reform of the legislation, and promoted by guidance within the Civil Procedure Rules.

Conclusion

Damages in tort are compensatory rather than punitive, and the tortfeasor should only pay to the extent that there is in fact a loss to make good.

The costs of overcompensating a claimant are spread across society whether by taxation or insurance premiums.

The best mechanism to minimise the possibility of overcompensation is to take into account the extent to which state provision of care will in fact be available, either by ensuring the appropriate evidence is adduced before the court, or preferably by an agreement or order for an indemnity / reverse indemnity.

To encourage this approach and reduce legal costs, all parties would be greatly assisted by review and clarification of the primary and secondary legislation, regulations and guidance dealing with entitlement to state provision of care, and the provisions for means testing as presently in place.

Question 22 – Should s2(4) be repealed? If so, how might a new system work?

Yes, section 2(4) should be repealed.

The legislation is a product of its time, nearly 60 years ago, and in particular the nascent development of the National Health Service at that time.

It is no longer the case that comprehensive health care is unavailable unless provided privately, and in many circumstances the NHS provision is superior to anything available in the private sector. As the Monckton Report (1946) itself recognised, the existence of comprehensive state provision would present a formidable argument that the court should not close its eyes to the availability of such care, and the possibility at least that the claimant may avail him or herself of this. The Pearson Report (1978) recognised this, recommending that s2(4) should be repealed.

The Chief Medical Officer's Report "Making Amends" (2003) recommended that s2(4) should be repealed only as regards clinical negligence claims. This has not been pursued in the subsequent legalisation enacting other ideas from that report. It is understood that this is partly to avoid the inconsistency of establishing a different situation solely for clinical negligence, as opposed to any other mechanism of injury.

In our view it is equally anomalous that s2(4) should remain as an isolated example of disapplication of the general principles of tort. Where there is no injury suffered no damages should be payable. The reality is that where NHS medical treatment is available free of charge and will be used by the claimant then no loss is suffered in this respect, and it is anomalous that the parties and the courts should not be free to at least address their minds to this issue.

Though we recognise that there is limited research evidence of cases of double recovery, where a claimant is compensated for the costs of private provision of medical treatment, and then avails him or herself of NHS provision instead, we see no reason in principle why the law should unquestioningly permit such a possibility in this head of loss alone.

We do not, however, recommend the institution of NHS provided 'care packages' for claimants, in view of the need to avoid the development of a 2 tier NHS, with entitlement depending solely on the mechanism by which injury is suffered.

The question should be whether the NHS provision available to the claimant is sufficient to meet his or her reasonable needs, taking them as any other patient and regardless of any negligence claim. If so, there is the factual issue of whether the claimant will, on the balance of probabilities, take up these services, and if it is found that they will not, there is the question of whether this constitutes an unreasonable failure to mitigate loss.

Question 23 – What benefits might there be for claimants, defendants and the taxpayer?

There is no possible justification for allowing double recovery under a tort system premised on the compensatory principle, and the cost of such overcompensation is invariably borne by the general public. The overwhelming benefit of repeal of s2(4), and further pursuit of the '*Sowden*' approach to issues of state provision of social care,

including the use of indemnities / reverse indemnities, is that the possibility of double recovery is minimised.

Claimants may find that greater scrutiny of the resources available, whether private or NHS, results in a wider range of options and more favourable treatment or outcomes than would otherwise have been achieved.

Defendants will benefit by making fewer payments for the cost of private provision of health care when NHS care would in fact be available and preferable for the claimant. We consider that the benefit to the NHS, as a defendant of clinical negligence claims, would outweigh the increase in demands on NHS resources through more claimants taking advantage of NHS provision, particularly when the new mechanism for recovery of NHS charges following negligence claims is taken into account, subject to how well this works in practice.

The taxpayer will benefit from such reduced expenditure by public body defendants, and through reduced premiums from insurers of private sector defendants.

Question 24 – How could a new system ensure claimants and their carers retain control over care?

The approach we advocate would have no adverse effect on the claimant's control over their care. The critical issue is to avoid double recovery where state funded care will be provided, and so there is no loss, as a matter of fact. The claimant retains the right to choose whether or not to accept such state provision.

The relationship between the patient or service user and the state provider is increasingly coming to be seen in terms of a consumer based approach. With the introduction of 'choose and book', for example, a patient exercises control over the NHS health care he or she will receive to an extent that is comparable with that available in the private sector. The trend is in this direction, and it is reasonable to expect the provision of social care to follow, as it becomes ever more closely aligned with the model and systems of health care provision.

Question 25 – If s2(4) is retained, is action needed to avoid overcompensation and to ensure damages for the cost of care are used appropriately?

Avoidance of overcompensation is inherently incompatible with retention of s2(4).

Question 26 – Do you agree that where there is a statutory duty or obligation on public bodies to provide care and accommodation, the central principle should be that the tortfeasor should pay for the cost of care?

We agree that the tortfeasor should pay for losses caused as a result of its negligence, subject to the claimant's duty to mitigate loss in so far as this is reasonable (subject to recognition that the tortfeasor's liability is directly or indirectly met by the general public). Where no loss is suffered, as for instance when the claimant receives medical

treatment or social care free of cost, then any damages in this respect represents overcompensation at the expense of the general public, and betrays the fundamental compensatory principle which underlies the law of tort.

The availability and extent of state provision of care must be taken into account, whether by putting this evidence to the court to allow a determination of fact, or alternatively by the use and enforcement of indemnities / reverse indemnities.

Question 27 – How could the practical difficulties of assessing care needs be resolved?

At present many problems are caused by the inconsistency between the law as regards health care, as against social care, and residential care, as against domiciliary care. These inconsistencies and the lack of clarity in the law, result in inconsistent application of the law between different public bodies, and across different regions. It would help the parties greatly if these inconsistencies could be addressed and resolved.

The basic principles are simple. Where liability is established, it falls to the defendant to make good any losses caused. A claimant may lead evidence, from a care expert or otherwise, as to what care is appropriate, and the defendant may do likewise. The true extent of those reasonable care needs is a matter for the court. To the extent that the court finds as a matter of fact that those care needs are being reasonably met by existing state provision, or will be so, then there is no loss to compensate in this respect.

The availability and extent of state provision of care must be taken into account to avoid overcompensation at the expense of the general public (as taxpayers and through insurance premiums). This can be done by the parties putting appropriate evidence before the court to allow a determination of fact, or alternatively, saving time and legal costs, through use and enforcement of indemnities / reverse indemnities.

Chapter 6 – Accommodation Expenses

Question 28 – Do you consider that giving defendants a charge over property would be a possible alternative to *Roberts v Johnstone*?

We do not consider that this option will be attractive to either claimants or defendants.

Such a system will be unwieldy, costly and cumbersome to operate. Defendants will have to keep files open for many years and may have accounting problems when charges are redeemed many decades after payments were originally made. This may present some compensators with succession issues when the constitution of a company changes between the charge being granted and redeemed.

We suspect that both parties would prefer a 'clean break' once compensation has been agreed rather than any continuing relationship. Claimants are likely to prefer the freedom and flexibility to make their own decisions regarding their accommodation rather than having to involve the defendant.

Question 29 – Should the claimant be awarded any capital cost without any *Roberts v Johnstone* calculation or provision for recovery?

We consider that to award the extra capital sum is likely to lead to overcompensation in many cases.

In those cases that involve claims for accommodation there is usually a severe injury such that there are other heads of claim attracting significant damages awards. Conventionally these are used to fund the property purchase. This does not disadvantage a claimant because his damages are effectively invested in the property and will usually appreciate significantly over time.

The current system compensates for the true cost of setting funds aside to fund the purchase of accommodation. To provide damages equivalent to the capital cost of a property purchase amounts to double recovery.

The claimant enjoys the security and flexibility afforded by the unencumbered ownership of a substantial property.

We consider the present system, whilst not without disadvantage, provides a means of valuing the accommodation claim that treats both parties fairly. Significantly it ensures that the defendant only pays for the additional costs incurred as result of the negligence and also maintains the 'clean break' approach.

Question 30 – Do you agree that no action is necessary in relation to pre-trial gratuitous provision of funds to purchase a property by a third party, for example parents?

No action is necessary, for reasons set out above.

Chapter 7 – Aggravated, Exemplary and Restitutionary Damages

Question 31 – Do you agree that 'exemplary damages' in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 should be replaced with 'aggravated damages'?

Yes.

This would ensure consistency.

Question 32 – Do you agree there is no need for legislation in relation to restitutionary damages?

Yes.

We are not aware of any issues causing significant difficulties at present.

Question 33 – Is legislation to confirm the purpose of aggravated damages required?

No.

We consider that this issue is best left to the courts.

Question 34 – Is legislation required to clarify the interface between aggravated damages and damages for mental distress?

No.

We consider that this issue is best left to the courts.

Question 35 – Do you agree that in the Copyright, Designs and Patents Act 1988 and the Patents Act 1977, the term 'additional damages' should be replaced by 'aggravated and restitutionary damages' ?

No. This will not secure any positive identifiable benefit. It will not promote consistency or clarity of the law.

The proposed amendment is only likely to increase uncertainty in this area and result in satellite litigation. It may result in inadequate protection of intellectual property rights.

We note that the government intends to amend the law of damages only where this will result in a positive identifiable benefit. We do not agree that replacement of the term

'additional damages' with 'aggravated and restitutionary damages' will achieve any such benefit.

Those involved in intellectual property litigation (IP) are familiar with the term 'additional damages' and there is little uncertainty as to the ambit of this head of claim. The term is not, in itself, misleading or confusing.

Replacement of the term with a new definition appears to us to invite new satellite litigation in a relatively settled area of law. This is not desirable.

The government has identified the need to supplement the proposed amendment with provision for aggravated damages under the Acts to be recoverable by corporate clients, which is not in keeping with the general law. It appears that this would lead to two different definitions of aggravated damages. This will only promote confusion and undermine the objective of promoting consistency in the law of damages.

We agree that, at present, there is much common ground between the law of aggravated and restitutionary damages and the law of additional damages. However, as noted in the consultation paper, the law in relation to restitutionary damages in particular is a developing area and it cannot be guaranteed that developments will continue to fit with the needs of IP law.

IP rights are of particular importance in the commercial sphere. This is recognised in European Law. In order to ensure the law of this country continues to deliver appropriate protection in this field and remains compliant with European Law, we consider that additional damages should be maintained as a separate head of claim.

Question 36 – What are your views on how the system of damages works in relation to patents, designs, trade marks, passing off, copyright and related rights?

We consider that there is inadequate access to justice for individuals and small businesses pursuing IP claims of low value. We have addressed some procedural issues in this regard in response to the DCA consultation paper CP 8/07. A copy of our response can be found at Appendix 1.

A straightforward means of quantifying damages in such claims will also improve access to justice. This should be achieved by introduction of a tariff of damages, with a rebuttable presumption in favour of its figures.

We suggest that these two areas should be addressed in a separate exercise dealing with reform of the law relating to low value IP claims and we would welcome the opportunity to participate in that.

In many intellectual property claims the primary remedy sought is an injunction. Damages have the function of compensating the claimant for loss suffered and, indirectly, providing a disincentive to infringement.

We have made submissions above in relation to additional damages. These should remain available in order to ensure that damages fulfil their role as a disincentive to infringement of IP rights. We recognise the concerns referred to within the consultation paper that additional damages are not awarded in all cases where they are appropriate.

We agree that this may be a result of such claims not being pursued due to consideration of the costs and risks of doing so.

IP claims can be costly under the current system. Some of the expense of these claims results from detailed enquiries required to quantify damages. In IP claims the recovery of damages depends upon such loss being quantified in detail.

There is no significant general damages aspect to such claims, save perhaps for an element of the additional damages awards. As noted in the consultation paper, claimants will be reluctant to incur disproportionate expense in order to pursue these. In many cases, the success or failure of a claim is therefore dependant upon detailed evidential enquiries into loss.

A further challenge to claimants in IP claims is the limited case law or other guidance available in relation to damages. Following a liability hearing, the majority of IP claims will be settled and so a body of case law in this area has not developed and will not do so. It is therefore difficult for parties to determine whether it will be cost effective to bring or defend a claim before extensive and costly investigations take place. Where claims of limited value are involved, this will prevent many potential claimants from taking steps to protect their rights.

IP rights are among the most valuable and important of economic rights. In high value claims, it is appropriate that the question of damages is subject to close scrutiny, and the costs of this are proportionate.

However, we believe that the current system fails to protect lower value IP rights. For example, a small business may not seek to enforce a copyright because of the significant cost of litigation and because of uncertainty as to damages that might be recovered.

This leaves a significant gap in the protection afforded by IP law. It denies small businesses and individuals access to justice and stifles innovation.

Uncertainty in this area has also prevented the development of insurance products to protect IP rights. This is unsatisfactory given guidance of the Patents Office that rights should be protected by insurance. The European Patents Office has proposed that proof of insurance might be required before a European Patent can be registered. The reality is that insurance products for IP rights are simply not available, or are not available at a reasonable price.

This again has a disproportionate effect on small businesses and individuals who have most need of the protection offered by insurance and who would struggle most to afford high premiums.

The DCA recently consulted on case track limits and procedure for personal injury claims (CP 8/07). Within that paper, comments were sought as to measures that might make the handling of IP claims more straightforward and cost effective. In this firm's response it was proposed that a fast track procedure might be put in place for IP claims of low value, save for patent claims. This will address some of the costs issues referred to above.

However, in order to address uncertainty in relation to damages, we consider the procedure should include a tariff of damages. A presumption, rebuttable by evidence adduced by either party, should apply in favour of the figures on the tariff. If a party

elects to adduce evidence on quantum but fails to better the tariff figure, then they should be penalised in costs.

This approach would not only reduce costs of litigation, but would give parties a tool with which to assess the value of their claim and to make an informed decision on whether to pursue it. It would provide small businesses and individuals with IP claims of limited value access to justice but would also promote negotiated resolution of such disputes without recourse to legal advisors, by providing a common frame of reference for damages.

A tariff would also provide certainty, which would assist in the development of an insurance market in this area. While it would not extend to high value claims this would address the concern that the most vulnerable IP rights – those of small businesses and individuals - are not adequately protected.

We consider that a review of procedure in relation to low value IP claims should be undertaken and this should include consideration of a tariff system. We would welcome the opportunity to contribute to any such exercise.

Regulatory Impact Assessments

Question 37 – Do you agree the assumption that bereavement damages will be claimed in 50% of circumstances is accurate?

In relation to RTA claims, the figure is reasonable.

In relation to employer's liability and public liability claims, the figure is likely to be much higher. We would suggest:

- **Employer's liability: 90%**
- **Public liability: 75%**

We recognise that limited evidence is available on which to base these statistics. As solicitors, we only see those claims referred to us by clients and so we are not able to provide full statistics ourselves.

We note that separate discounts are applied to take into account statistics on cohabitation and parental responsibility. These should not be factored in to the initial discount under discussion here. That discount should be based on the likelihood of negligence and of a claim being brought.

In relation to motor claims, we have also adjusted the discount to take into account the demographic group from which accident victims are likely to come.

Motor Claims

The majority of serious or fatal road traffic accidents involve younger drivers. Such drivers are less likely than average to have children, but more likely to be cohabiting (as opposed to being married). A discount should take this into account and should also allow for claims where there is no fault save on the part of the deceased. The 50% proposed is a reasonable discount to apply for these factors.

Employer's Liability Claims

The strict liability and statutory duties applicable to employers impose higher standards of care than apply to motor claims and we therefore believe a figure above 50% is appropriate.

We are not aware of any statistics in relation to the age of employees killed at work but our experience is that claimants will be broadly spread across age groups. There is therefore no justification to apply a discount to allow for age specific likelihood of having children or of cohabiting.

On that basis, we propose a figure of 90%.

Public Liability Claims

We recognise the absence of detailed statistics in this area, and the broad range of accidents that may be covered by the HSE's figures for "fatal injuries to members of the public".

There is no evidence as to the spread of claims over different age groups, but we anticipate that the spread will be even. In the circumstances, taking into account claims where there is no negligence or which are not pursued for another reason, we propose a figure of 75%.

Question 38 – Do you agree the analysis of cost to the insurance industry?

We estimate the increase (including damages and costs) at £3,702,000.

On the figures proposed in response to question 37, and using the method of calculation adopted within the RIA we estimate additional damages at £3,202,000.

In addition, there will be extra legal costs incurred in dealing with claims. We do not have statistics that allow us to assess the overall impact in detail. We suggest allowing £1,000 per claim giving a figure of £500,000.

Question 39 – Do you agree the analysis of costs to the NHS?

We estimate the increase (including damages and costs) at £3,229,000

The analysis for cohabitants appears reasonable.

In relation to children, the number of claims made has been reduced by 50%. We do not believe this is appropriate. The starting figure of 898 children is calculated from the number of people who do currently claim, as opposed to those suffering fatal injuries. The figure is later reduced to take into account the number of children who would be under 18.

Excluding the 50% discount, we calculate an additional 375 claimants and £1,875,000 in damages is likely as a result of a change to eligibility for bereavement damages.

Using £1,000 per claim as a rough average figure, we estimate a figure of £464,000 in additional legal costs.

Question 40 – Do you have any figures on the number of claims or the likely cost of the proposals under option 2, in relation to the NHS in Wales and in relation to clinical negligence claims involving private treatment?

No.

Question 41 – Do you have views or information on the likely costs to the NHS of the extension of the claimant's entitlement to make a claim under option 2?

No.

Question 42 – Do you have any views on how the proposals outlined should be monitored?

We consider research should be undertaken into the economic effects of damages law.

The number of 'cross border' claims brought in this country should be monitored in order that the development of 'forum shopping' can be addressed.

Question 43 – Do you have any views or information on the likely costs of implementing the proposals outlined in the costs section of the RIA?

a) What is the average cost of a claim for gratuitous care, and how does this compare with the cost of care being provided commercially?

We do not hold statistics which distinguish between the two types of care.

Further, care claims range from a few hours of care provided over a couple of weeks to lifelong 24 hour regimes. The latter will typically involve greater proportions of commercial care.

Given the wide variety of care regimes which may be encountered, we consider that any indication of average care costs has little meaning.

b) In how many cases does the claimant receive commercial or other care that would otherwise have been provided by the defendant?

We would be concerned if we were aware that a claimant was securing commercial care simply in order to allow for recovery. We have no doubt that this happens in some cases, but cannot offer accurate statistics.

c) In how many FAA cases was gratuitous care provided to a dependant by the deceased?

We have no statistics as this will not always give rise to a claim.

d) In how many cases is it necessary for the claimant to purchase new accommodation because of his or her injuries? What is the average extra cost?

We do not hold this information.

e) In how many cases is it necessary for the claimant to make alterations to an existing property because of his or her injuries. What is the average extra cost?

We do not hold separate statistics in relation to such claims.

f) What legal costs are commonly incurred in connection with the *Roberts v Johnstone* **calculation? What would be the likely costs and savings of simply awarding the extra capital cost to the claimant?**

We have no figures. However, the *Roberts v Johnstone* calculation is not unduly complicated and in our experience does not give rise to significant costs.

Issues between the parties more commonly relate to the type and cost of accommodation and alterations required. These issues would only become more contentious if the extra capital cost were awarded, as opposed to the calculation under *Roberts v Johnstone*.

Question 44 – Do you have views on how the proposals relating to accommodation expenses should be monitored?

We do not consider there is need for change to the law in relation to accommodation.

Appendices

Appendix 1: Extract from submission in response to DCA Consultation 8/07 in relation to intellectual property claims procedure.

Question 6 – Measures that would make the handling of intellectual property claims more efficient and effective.

We consider that many lower value IP claims can be dealt with through a fast track procedure. Patents claims should be excluded from this.

Where liability has been agreed, we consider that a procedure for a pre-action application to a Patents County Court judge for assessment of damages might assist parties in resolving claims. We would welcome the opportunity to contribute to the development of such a procedure.

Intellectual Property (IP) claims can be dealt with in a timely and cost effective manner under the current procedure. The expertise of the Patents County Court is key to the rapid resolution of disputes in this area. The Court has been willing to be flexible in relation to where and when it sits, which assists in achieving cost effectiveness in this field. We believe, however, that there are areas in which further efficiencies can be achieved.

IP claims can involve remedies (whether in damages or other relief) of very substantial financial value. Further, IP law protects essential commercial interests and as such is an important foundation of the economy. Given these factors, it is appropriate that some IP claims should be subject to extensive and detailed scrutiny.

However, the range of IP claims also extends to rights of more limited financial value and importance. The Patents County Court has developed procedures which allow these cases to be dealt with in a proportionate manner. At present, those procedures are applied through directions given under the multi track (the default track for all IP claims) however we consider that such claims ought to be capable of resolution through a fast track procedure.

A fast track procedure should take into account the financial value of a claim, including the value of any injunctive relief sought. Such a procedure should not be applicable to claims involving patents, given the value and importance of the rights involved in such cases. We anticipate that a number of trademark cases will fall outside the fast track procedure for similar reasons.

We have considered whether a procedure such as that proposed in relation to personal injury claims for an application to a Judge for determination of quantum might be applied to IP claims. We believe that a system can be developed whereby the parties, at a pre action stage, having agreed liability and compiled quantum evidence could apply to the court for a determination of damages. However, the Judge should be a Patents Court Judge and attendance of the parties should be allowed. The proposed time limits under the procedure for personal injury claims cannot be applied to IP cases.

Question 7 – If the difficulty of dealing with intellectual property cases is not the court process, what are the difficulties and how could they be resolved?

The Patents County Court should be permitted to develop into a stand alone County Court. IP claims should be capable of being issued in that court directly.

To deal with this change and with the introduction of a fast track procedure, the Patents Court should be given the benefit of additional administrative resource, a court manager and Recorders with the experience to deal with IP claims.

In order to support a fast track process, the Patents County Court should be developed into a stand alone County Court and should receive additional resources.

At present, claims issued in the Patent County Court are administered by the Central London County Court, before being transferred to the Patents Court. This is not conducive to efficient resolution of claims and in particular would negate benefits offered by a fast track procedure. These claims should be capable of being issued in the Patents County Court.

We anticipate that the Court will require additional resource in order to deal with this. Further, the Court would benefit from independent administrative systems. This will allow IP claims to be dealt with in accordance with their particular requirements. We would suggest that a Court Manager should be appointed to the Patents County Court.

The court will also require additional judicial capacity in order to deal with claims rapidly and efficiently. We would suggest the appointment of Recorders to sit as deputies to HHJ Fysh QC. These Recorders should have appropriate IP or technology experience in order to allow them to deal with the issues raised by IP claims.

Question 8 - Would different measures be appropriate for different kinds of IP claim?

Yes. While many claims of limited value might be capable of a fast track procedure this should not extend to patents claims.

It may also be appropriate to exclude other claims, and in particular certain trademark claims, from such a procedure where the rights involved are of significant value or importance.

We have made submissions above in relation to a fast track procedure for IP claims. That should be subject to a financial limit. IP claims present a particular difficulty in this regard, as injunctive relief will often be of greater value to the parties than relief in the form of damages. IP claims can also have significance beyond the value of relief as they can sound in the wider commercial sphere.

While damages and injunctive relief can often be quantified, at least on a general basis, broader commercial importance of a decision is not so easily valued.

The significance of patents is such that claims relating to them should proceed on the multi track as a matter of course.

Trademarks occupy a middle ground, but the court should not be slow to allocate these to the multi track where the parties seek this. In relation to other IP claims, similar considerations may also arise. The courts are already empowered in a broad range of claims to depart from the default track where this is justified by particular facts or issues. The Patents Court has knowledge of the particular considerations applicable to IP claims and will be able to allocate appropriately, taking these into account.

Further Information

We would welcome the opportunity to participate in any further consultations or development work in the areas discussed in this paper. We are happy for our response and our contact details to be passed to relevant organisations.

If you have any queries arising from this response, please contact Sarah White.

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