

The Law on Damages

Consultation Paper

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The Law on Damages

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This information is also available on the DCA website at www.dca.gov.uk**

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Executive summary

Wrongful death & bereavement damages (chapters 1 and 2)

These chapters consider issues arising from the Law Commission's report *Claims for Wrongful Death*, and make recommendations for change to the Fatal Accidents Act 1976 (FAA). The main proposals are to extend the statutory list of claimants able to make a claim as dependants to include 'any person who was being wholly or partly maintained by the deceased immediately before the death'; to extend the list of claimants able to claim bereavement damages to include children of the deceased who were under 18 at the time of the death, and any person who had been living with the deceased as husband and wife (or in an equivalent same sex relationship) for at least two years immediately prior to the accident; and to provide for a fixed sum of £5000 in bereavement damages for each eligible child of the deceased under the age of 18.

Psychiatric illness (chapter 3)

The Law Commission recommended introducing statutory provisions in relation to claims for psychiatric illness. This chapter rejects that recommendation, and concludes that it is preferable to allow the courts to continue to develop the law on liability for psychiatric illness rather than attempt to impose a statutory solution.

Collateral benefits and gratuitous care (chapter 4)

This chapter discusses collateral benefits (payments or benefits in kind, other than the damages claimed, which a tort victim would not have received but for the tort). It puts forward a preferred approach which would treat collateral benefits in a way which would ensure that claimants get compensated once at the full expense of the tortfeasor, and seeks views on whether this approach should apply to a range of different collateral benefits. It also considers the Law Commission's recommendations on gratuitous care. It recommends that the approach taken by the House of Lords in *Hunt v Severs*¹, which held that claimants are entitled to recover damages for gratuitous care but must hold the damages on trust for the

¹ [1994] 2 AC 350

carer, should be replaced by a personal obligation to account for the money to the carer. It also recommends that this should apply to future gratuitous care provided by the defendant.

Cost of private care (chapter 5)

In June 2003 the Chief Medical Officer (CMO) produced a report, *Making Amends*² which recommended withdrawing scope for payment of private care costs in clinical negligence cases involving the NHS as defendant. This recommendation raises wider issues relating to damages for private care costs in other proceedings, which are discussed in this chapter. This chapter also discusses the interface between the public and private provision of care and accommodation services in the light of the case of *Sowden v Lodge*³.

Accommodation expenses (chapter 6)

This chapter discusses possible new methods to calculate accommodation expenses arising from the need to buy new accommodation or adapt existing accommodation because of the claimant's injury. It seeks views on two possible options: moving to a method whereby the defendant would pay the extra capital cost of the property at the time of trial, and in return receive a charge over the property for the amount paid, repayable on the claimant's death or when the accommodation was otherwise not needed by the claimant; or simply awarding the appropriate extra capital cost to the claimant.

Aggravated, exemplary & restitutionary damages (chapter 7)

This chapter reconsiders the Law Commission recommendations on aggravated and restitutionary damages in the light of case law which has clarified a number of issues since the Government's initial announcement in November 1999 to accept the recommendations. It concludes that no legislative change is necessary. It seeks views on a proposal to replace the term 'additional damages' with 'aggravated and restitutionary damages' in the Copyright Design and Patents Act 1988 and the Patents Act 1977, and confirms that the Government does not intend to extend the availability of exemplary damages in civil proceedings. It also seeks evidence in accordance with a recommendation of the Gowers Review of

² <http://www.dh.gov.uk/assetRoot/04/06/09/45/04060945.pdf>

³ [2004] EWCA Civ 1370

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Intellectual Property on how the system of damages works in relation to patents designs; trade marks and passing off; and copyright and related rights.

Costs and benefits (annexes A, B and C)

Partial Regulatory Impact Assessments (RIAs) on those areas involving potential costs to business, the insurance industry and the public sector are at Annexes A, B and C of the consultation paper. Information is sought to inform the full assessments.

Introduction

This paper sets out for consultation the issues highlighted in a series of reports published by the Law Commission in the late 1990s: *Claims for Wrongful Death; Liability for Psychiatric Illness; Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits; and Aggravated, Exemplary and Restitutionary Damages*.⁴ The consultation is aimed at parties involved in civil claims and their representatives in England and Wales.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The Consultation Criteria, which are set out on page 134, have been followed.

Partial Regulatory Impact Assessments on certain proposals are attached at Annexes A, B and C. These indicate that parties making and defending claims for personal injury, insurers, taxpayers and the NHS are likely to be particularly affected. The proposals are likely to involve additional costs or savings for businesses, charities or the voluntary sector, and for the public sector. Comments on these RIAs are particularly welcome.

Copies of the consultation paper are being sent to:

Action Against Medical Accidents

Alliance against IP Theft

Allianz Cornhill

AMICUS

Association of British Insurers

Association of District Judges

Association of Personal Injury Lawyers

AXA Insurance

⁴ http://www.lawcom.gov.uk/lc_reports.htm

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Bar Council Law Reform Committee

Berrymans Lace Mawer, Solicitors

British Copyright Council

British Medical Association

British Phonographic Industry

Churchill Insurance

Citizens Advice Bureaux

Confederation of British Industry

Civil Justice Council

Clinical Disputes Forum

Copyright Licensing Agency

Federation of Small Businesses

Forum of Insurance Lawyers

HM Council of Circuit Judges

Institute of Legal Executives

Irwin Mitchell, Solicitors

Law Society

Medical Defence Union

Medical Protection Society

Motor Accident Solicitors Society

Motor Insurance Bureau

Norwich Union

NHS Litigation Authority

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Ogden Working Party

Personal Injuries Bar Association

Royal and Sun Alliance Insurance Group PLC

Russell Jones & Walker, Solicitors

Thompsons, Solicitors

Trades Union Congress

Transport and General Workers' Union

UNISON

Which?

Zurich Insurance

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subjects covered in this paper.

Principles & background

Introduction

The Government is committed to tackling perceptions of a compensation culture and to improving the compensation system for valid claims. It is taking forward a wide-ranging programme of work to:

- stop a compensation culture from developing
- tackle perceptions that can lead to a disproportionate fear of litigation and risk averse behaviour
- find ways to discourage and resist bad claims and
- improve the system for those with a valid claim by providing fair compensation in a more timely, proportionate and cost-effective way.

This consultation paper relates to specific areas of the law on damages. It does not create any new rights, but focuses on providing a fairer and more coherent system in relation to valid claims.

The central purpose of a civil law award of damages is to compensate the claimant for the damage, loss or injury he or she has suffered as a result of another's acts or omissions, and to put the claimant in the same position as he or she would have been but for the injury, loss or damage, so far as this is possible. The scope in civil law to go beyond purely compensatory damages and to award 'punitive' or 'exemplary' damages is very limited. The Government's view is that this should remain the case, as the function of exemplary damages is more appropriate to the criminal law - the aim of the civil law should be to provide compensation for loss, not to punish the defendant.

The role of compensatory damages is an important one in enabling people to assert their rights against those causing harm and loss. Through this process tort law has a regulatory effect on people's behaviour, encouraging the general acceptance of principles such as the 'duty of reasonable care'. The law also places a duty on individuals to take reasonable care of their own safety, and reasonable steps to reduce the cost of any damage that others may cause them.

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Damages are a way to ensure that a negligent person pays the full costs generated by his or her unlawful act or omission, rather than forcing them to be met by the injured party or the taxpayer. Awards of damages do not in themselves cause costs, but simply redistribute the costs that have been generated by the negligence. For example, where an injured party is not adequately compensated to meet his or her needs, the shortfall may have to be met by recourse to State benefits and/or local authority funded care.

The damages awarded in personal injury cases can be separated into pecuniary and non-pecuniary losses. Pecuniary losses include all financial and material loss incurred. This is usually relatively straightforward to assess as the damages simply compensate for any loss that can actually be attributed to the wrong. Non-pecuniary losses include such things as pain, suffering, the value of a lost limb or physical scarring. These are not readily quantifiable and are therefore much more difficult to assess.

Setting the level of damages that is appropriate is a difficult issue. It has been argued that awards of damages are becoming too high, yet given rising prices, earnings, life expectancy and improved but more expensive treatments, it is not surprising that the value of claims is rising. This is not a reason for denying claimants the level of compensation that they need. However, it is important in considering the issues to balance the interests of claimants and those of defendants and their insurers, as in practice there are inevitably tensions between the levels of compensation payable and the affordability of insurance. The Government believes that the central principles which must continue to govern these considerations are that claimants with valid claims should receive fair compensation to meet their needs and that responsibility for this compensation should rest with the person who has caused the injury.

Because of the complexity of these issues and the fact that they are largely governed by the common law, the general principle which has been adopted in this paper is that legislation and procedural change will only be appropriate where there are positive identifiable benefits. It is the Government's view that the courts should have as much flexibility as possible in considering whether damages should be awarded in individual cases and if so, what the level of the award should be.

Background

During the 1990s the Law Commission (the Commission) published a series of reports contributing to a wide programme of reform on different aspects of the law

on damages. For example, its 1994 report on structured settlements led to the implementation by the Government of provisions to allow the courts to order damages for future pecuniary loss to be paid wholly or in part by way of periodical payments rather than a lump sum. This paper considers the following reports which were produced as part of the Commission's programme of work in this area.

Between 1998 and 1999 the Commission published three reports:

- *Claims for Wrongful Death* (Law Com No 263)
- *Liability for Psychiatric Illness* (Law Com No 249)
- *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* (Law Com No 262)

These reports made proposals for changes to the Fatal Accidents Act 1976; for the introduction of statutory provisions in relation to claims for psychiatric illness; and on various issues relating to the costs of care and accommodation and the treatment of benefits in assessing damages.

The paper considers and seeks views on most of the recommendations made in these reports. Areas not covered include:

- interest on pecuniary loss and bereavement damages, which will be dealt with at a later stage as part of a wider consideration of pre-judgment interest
- losses arising out of divorce, where the Government agrees with the Commission's view that there is no need for legislative change and
- points relating to Court of Protection fees, which are no longer an issue since the introduction by the Court of a fixed annual administration fee.

In addition, the paper considers certain aspects of a further report produced by the Commission: *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247)

In November 1999 the Government announced its acceptance of the recommendations on aggravated and restitutionary damages in the former report, but rejected the recommendations on exemplary damages. This paper looks again at the proposals on aggravated and restitutionary damages in the light of the time that has elapsed since the Government's announcement and the intervening case law.

Since publication of these reports, there have been a number of developments and changes that have affected the climate in which the Commission's recommendations must now be considered. These include the Government's response to the Better Regulation Task Force report *Better Routes to Redress*⁵; the introduction of provisions in the Courts Act 2003 to allow the courts to order periodical payments for future loss and care costs without the parties' consent; the CMO's report, *Making Amends*; and developments in case law. This paper takes all these developments into account.

⁵ <http://www.brc.gov.uk/downloads/pdf/betterroutes.pdf>

Chapter 1 - Claims for wrongful death

1. This chapter considers the recommendations in the Commission's report *Claims for Wrongful Death* relating to claims under the FAA for financial loss.

General

2. The main function of the FAA is to govern the payment of compensation, in the event of a death caused as a result of another person's wrongful act, for the pecuniary losses of those who are dependent on the deceased. This compensation is limited to benefits other than those that the claimant expected to receive as a result of a business relationship with the deceased. The Commission recommended no change to this position and the Government supports that view.
3. Other general recommendations made by the Commission were that:
 - there was no need for reform in relation to the right of action under section 1(1) of the FAA, under which a claim can only be made if the deceased would have had a claim against the tortfeasor
 - there was no need for legislation on issues relating to whether the deceased's death was too remote a consequence of the defendant's wrong and
 - contributory negligence of the deceased should continue to operate to reduce a dependant's damages. The Government agrees with all of these recommendations.
4. The Commission also recommended that the Ogden Working Party (which produces actuarial tables to assist in the calculation of lump sum damages) should consider and explain how the tables should be used or amended to produce accurate assessments of damages in FAA cases, and expressed preference for the approach that a multiplier which has been discounted for the early receipt of damages should only be used in the calculation of post-trial losses. Following this, the Ogden Working Party considered the relevant issues and produced revised tables in the light of the Commission's views.

List of eligible claimants

5. At present the FAA only allows certain categories of people to claim for financial loss as dependants. These comprise spouses; former spouses; opposite sex cohabitants who have lived together for at least two years immediately before the death; parents or other ascendants (including persons treated by the deceased as parents); children or other descendants (including children who were treated as children of the family in any marriage to which the deceased was a party); and brothers, sisters, uncles and aunts. The Civil Partnership Act 2004 amended the FAA to give civil partners the same rights as spouses and to allow other same sex cohabitants to claim on the same basis as opposite sex cohabitants. This change came into effect from 5 December 2005. People who were dependent on the deceased but fall outside these categories are unable to claim.
6. The Commission took the view that the exhaustive nature of this list denied a right of action to a number of classes of people who merited being able to claim. It considered a number of options for amendment of these provisions and concluded that a residual category should be added. This would include “any person who was being wholly or partly maintained by the deceased immediately before the death or who would, but for the death, have been so maintained at a time beginning after the death”. It believed that inclusion of this additional category of claimants would remove the anomaly that presently exists, whereby people who were actually dependent on the deceased cannot make a claim simply because they are not in the statutory list.
7. The first part of this residual category would allow anyone who can prove dependency immediately prior to the death to claim. This could include amongst others cohabitants of less than two years duration, stepchildren of cohabiting relationships, relatives and others supported by the deceased immediately prior to the death. The case of *Kotke v Saffarini*⁶ is an example of the injustice that can be caused by the current situation. In that case, the claimant was unable to obtain compensation for the death of her partner, despite the fact that the relationship had lasted some years and they had a child together. This was because she had not been living with the deceased in the same household for two years before his death. While many people could potentially fall within the proposed categories, in each case financial dependency would have to be proved, and thus unmeritorious claims would be

⁶ [2005] PIQR P26 (CA)

unlikely to succeed. The Government therefore proposes to accept this part of the recommendation.

8. The second part of the definition would enable any person who would, but for the death, have been wholly or partly maintained at a time beginning after the death to make a claim. It is difficult to identify what cases might arise under this provision, and most potential claims for future dependency will already fall within the existing list of eligible claimants. The Government's view is that this provision meets no significant need, is too open-ended and could encourage loosely framed and speculative claims which would be difficult to prove or disprove. The Government therefore does not propose to accept it.

Q1

- a) **Do you agree that a residual category should be added to the statutory list of those entitled to claim for financial loss?**
- b) **Do you agree that this residual category should be limited to any person who was being wholly or partly maintained by the deceased immediately before the death?**

Funeral expenses

9. The Commission did not consider that any statutory reform was needed in relation to the recovery of funeral expenses in FAA claims. From discussions with representatives of claimants' and defendants' interests it appears that no significant problems have arisen in this area. The Government therefore agrees that the determination of reasonable funeral expenses should be left to the courts to decide in individual cases. The Commission also considered that there should be no change to the current law to enable claims to be made for pecuniary losses resulting from the death other than funeral expenses (namely costs incurred in settling the deceased's estate; costs of grief counselling; losses incurred in looking after the deceased's dependants; medical expenses; and any other pecuniary expenses). The Government agrees with the Commission's view.

Remarriage and financially supportive cohabitation

10. Section 3(3) of the FAA provides that the fact or prospect of a widow's remarriage shall not be taken into account in the assessment of damages. This provision was originally introduced because of concerns that inquiries into remarriage prospects could be distasteful and distressing. The Commission took the view that this creates an exception to the general rule that damages under the FAA should be assessed so as to compensate as closely as possible for the loss suffered by the claimant as a result of the wrongful death. If a widow came to be in a financially supportive relationship with another person, the death of her spouse would not have the same ongoing financial impact as it would, had she remained single.
11. Clearly the same points could be made about a widower making a claim in respect of his wife's wrongful death. The Government therefore considers that widows and widowers should be treated the same for the purposes of section 3(3). In addition, as the Civil Partnership Act entitles registered partners to be treated in the same way as spouses, any change to section 3(3) should reflect that, as well as putting it beyond doubt that the provision applies to widowers.
12. The Commission proposed that unless a person is engaged to be married at the time of trial, the prospect that he or she will marry, remarry or enter into a financially supportive cohabitation with a new partner should not be taken into account when assessing any claim for damages under the FAA. Engagement would be evidenced by an agreement in writing or by the gift of an engagement ring, or a ceremony witnessed by one or more people. However, it took the view that the fact of remarriage or of financially supportive cohabitation should be taken into account wherever relevant.
13. It is likely that any enquiry into the future prospects of a widow or widower remarrying or entering into a civil partnership or financially supportive cohabitation would involve intrusive and potentially distasteful investigation at what is already a deeply distressing time. Any such enquiry would also be speculative in nature and the conclusions reached could easily be wrong. These difficulties would not necessarily be resolved in cases where it is alleged that the person has become engaged, as evidential disputes may well arise which necessitate further investigation. Discussions with representatives of both claimants' and defendants' interests have shown a general unwillingness to intrude into people's private lives in this way. The Government is therefore minded not to accept the Commission's

recommendation that the prospect of remarriage should be taken into account where a person is engaged to be married at the time of trial.

14. Similarly it may be difficult to determine whether a claimant has entered into a financially supportive cohabitation without carrying out speculative enquiries. However cohabitees of at least two years are being given increasing recognition as stable partners. In this paper the Government is recommending they be given the right to claim bereavement damages for the loss of their cohabiting partner, and there already exists the right for a cohabitee to claim financial loss as a dependant under the FAA. Therefore it may be argued that as cohabitees have many of the same benefits as spouses under the FAA, the fact that a person has been in a financially supportive cohabitation for at least two years following the death should be taken into account. However cohabitees are likely to have less financial protection than spouses.
15. The fact of remarriage or entry into a civil partnership can be clearly and simply established and could have a substantial effect on the claimant's financial position. It would also provide more certain financial protection than cohabitation in the event of the failure of the relationship. In practical terms inclusion of such a provision may simply lead to claimants delaying remarriage or entry into a civil partnership until after the date of trial. However on balance the Government believes that the fact of remarriage or entry into a civil partnership is an appropriate consideration for the court to take into account where relevant.

Q2

- a) **Do you agree that the fact of a person's remarriage or entry into a civil partnership should be taken into account when assessing a claim for damages under the FAA?**
- b) **Do you consider that the fact of a person's financially supportive cohabitation of at least two years following the death should be taken into account?**
- c) **Do you agree that the prospects of a person's remarriage, entry into a civil partnership or financially supportive cohabitation should not be taken into account in any circumstances (including where the person is engaged)? If not, in what circumstances would it be appropriate to do so?**

16. Currently a widow's remarriage or prospects of remarriage are only excluded from an assessment of damages to be awarded to her personally. However, in the assessment of damages for any eligible children they are taken into account. This is anomalous, as the same procedure would need to be followed in both cases. To create consistency and fairness it is therefore proposed that only the fact of a person's remarriage or entry into a civil partnership should be taken into account in these situations. Similar arguments arise in relation to those in financially supportive cohabitation.

Q3

- a) **Do you agree that the fact of a person's remarriage or entry into a civil partnership should be taken into account when assessing a claim for damages on the part of any eligible children?**
- b) **Do you consider that the fact of a person's financially supportive cohabitation of at least two years following the death should be taken into account when assessing a claim for damages on the part of any eligible children?**

Periodical payments

17. The Commission took the view that it would be inappropriate to deal with changing personal circumstances such as the remarriage of the claimant through variable periodical payments. It believed that this would undermine the general interest in finality of litigation, and was a much weaker reason for variable periodical payments than, for example, the uncertainty of the claimant's future medical condition.
18. In the light of responses to the consultation paper *Damages for Future Loss* provisions were introduced in sections 100 and 101 of the Courts Act 2003 giving the courts the power to order periodical payments for future loss and care costs in personal injury cases without the parties' consent. The courts would also have discretion to do this in FAA cases, although periodical payments are likely to be less relevant in this context. The legislation also contains a power for the Lord Chancellor to make an Order specifying circumstances in which a court may vary an order for periodical payments.

The first such Order⁷ provides for variation only where there has been significant deterioration or improvement in the claimant's physical or mental condition which can be foreseen at the time of the original court order and which is specifically provided for in that order. These provisions came into force on 1 April 2005.

19. The Government has adopted a cautious approach towards the introduction of the power to vary periodical payments. It recognises that the right balance must be struck between ensuring that claimants receive compensation which accurately reflects their needs and the desirability of finality. In particular, uncertain prospects of variability might impose disproportionate burdens on the NHS and insurers. Enabling variation of periodical payments in FAA cases would create inequality in the treatment of claimants who have received periodical payments rather than a lump sum award, as it would not be possible to recover part of a lump sum award in these circumstances. The Damages (Variation of Periodical Payments) Order 2005 therefore does not apply to FAA claims. The Government agrees with the Commission that it would not be appropriate to provide scope for variation of periodical payments awarded under the FAA in the event of remarriage, entry into a civil partnership or financially supportive cohabitation after the original order was made.

Divorce and breakdown of financially supportive cohabitation

20. Generally when assessing damages for the purpose of the FAA, any factor which affects or would have affected the value of benefits received by the claimant from the deceased should be taken into consideration. The prospect of divorce is currently considered to be a relevant factor and is taken into account when assessing damages, although it is of course the case that divorce will not necessarily mean that the provision of financial support by one party to the other will cease. In *Owen v Martin*⁸, the Court of Appeal held that the potential for divorce must be taken into account and inferred the prospect of divorce on the basis of the wife's past infidelity and the fact that she had remarried by the time of trial. This then operated to reduce the multiplier on her award to reflect the anticipated shorter period of dependency.
21. The Commission took the view that it is distasteful for a court to assess a claimant's prospects of divorce for the same reasons that it is distasteful to

⁷ The Damages (Variation of Periodical Payments) Order 2005 (SI 2005/841)

⁸ [1992] PIQR Q151

assess his or her prospects of remarriage. Such an assessment could similarly be based upon uncertainties and speculation which would be unfair and distressing. However, it acknowledged the need to avoid knowingly over-compensating the claimant where there was clear factual evidence that a particular couple were likely to divorce. In *D v Donald*⁹ the High Court applied a discount to the multiplier to account for the possibility of marriage breakdown based upon the deceased's extra-marital relationship which was ongoing at the time of his death. The judge expressed no difficulty with the principle that the prospect of divorce should be taken into account. However, in that case there was clear evidence of a serious long-term extra-marital relationship; in other cases there might be more speculation involved.

22. The Commission recommended that the prospect of divorce or breakdown in the relationship between the deceased and his or her spouse should not be taken into account when assessing damages for the purpose of any claim under the FAA unless the couple were no longer living together at the time of death, or one of the couple had petitioned for divorce, judicial separation or nullity. The Government proposes to accept this recommendation, and considers that the equivalent should apply to civil partners.

Q4

Do you agree that the courts should only take into account the prospect of divorce, dissolution or breakdown in the relationship between the deceased and his or her spouse or civil partner:

- a) where the couple are no longer living together at the time of the death**
- b) where one has petitioned for divorce, judicial separation or nullity**
- c) where one has begun the procedure for dissolution of the civil partnership?**

23. Section 3(4) of the FAA provides that the assessment of an award of damages to a claimant who cohabited with the deceased should take into account the fact that the claimant had no enforceable right to support from the deceased. The Commission took the view that the meaning and effect of this provision is unclear. It also considered that enquiry into the prospects of breakdown of a

⁹ [2001] PIQR Q5

cohabiting relationship would raise the same concerns over intrusiveness as enquiry into the prospects of divorce or remarriage.

24. It therefore recommended that section 3(4) should be repealed and replaced by a provision to the effect that the prospect of breakdown in the relationship between the deceased and his or her partner should not be taken into account when assessing damages under the FAA. Where cohabitants had already ceased to live together at the time of death, this fact would be taken into account by the court, although as is the case with a married relationship, this would not necessarily mean that the provision of financial support ceased. The Government proposes to accept this recommendation.

Q5

Do you agree that section 3(4) of the FAA should be repealed and replaced by a provision to the effect that the prospect of breakdown in the relationship between the deceased and his or her partner should not be taken into account when assessing damages under the FAA?

25. The recommendations made by the Commission regarding gratuitous care and collateral benefits in the context of FAA cases are discussed in chapter 4 below.

Claims for 'lost years'

26. 'Lost years' claims cover earnings that the claimant would have earned if his or her life span had not been reduced as a result of the injury suffered. The Commission rejected the view that such claims should survive to the deceased's estate, and thus that the FAA should not apply. This was on the grounds that if compensation for fatal accidents were only to be available through the deceased's estate (rather than directly to the dependants) the dependants' losses might not be fully compensated. In particular the Commission noted that this might happen where the potential claimant's losses were greater than his or her entitlement under the will, on intestacy or as a result of the application of the Inheritance (Provision for Family and Dependants) Act 1975. It therefore recommended that it should remain the law that the lost years claim should not survive for the benefit of the deceased's estate. The Government agrees with this recommendation.

Mesothelioma claims

27. The Government is currently taking forward work, led by the Department for Work and Pensions (DWP), to identify ways to improve the handling of claims in cases of mesothelioma. In the responses to a recent consultation by DWP, one issue identified was the difficulty experienced by claimants in deciding whether to pursue a claim to secure compensation before their death, or to postpone the claim to enable their dependants to bring a claim under the FAA.
28. This issue raises particular problems in mesothelioma cases because of the very short lifespan which almost always follows the development of mesothelioma, with many deaths occurring within a few months of diagnosis and most within 18 months. Responses to the DWP consultation have indicated that it is often the case that claims after death are greater in value than settlements concluded during the lifetime of the claimant. This is because of the ability of spouses to recover bereavement damages; the different approach taken to calculating loss of income; uncertainty regarding the ability to recover funeral expenses in a claim during life; and uncertainty regarding the treatment of gratuitous services provided by the claimant.
29. A number of options have been put forward in responses to the DWP consultation to address the difficulties which are perceived to exist in this area:
- a statutory amendment similar to that contained in the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill to provide that claims for damages by eligible relatives are not extinguished by a person with mesothelioma settling their own claim whilst still alive
 - amendment of the Civil Procedure Rules to allow a claimant with mesothelioma to make an application for an interim payment by way of the summary procedure under Part 8 of the Rules if they choose not to bring the claim to a full and final settlement during their lifetime. In this way the rights of others to pursue a claim of greater value after their death would be preserved
 - a special provision limited to mesothelioma claims to permit recovery of FAA damages in claims concluded in life
 - legislative removal of the different approaches to calculating damages for the 'lost years' in claims concluded during the lifetime of the terminally ill, as

compared with calculating damages for loss of dependency in claims pursued after death

30. The Government would welcome views on the extent to which difficulties arise in this area, and on the respective merits of these options and any alternative approaches that could be taken.

Summary of changes

31. If the recommendations in this chapter are accepted, the following changes to the law would be made:
 - a residual category would be added to those eligible to claim for financial loss under the FAA, comprising any person who was being wholly or partly maintained by the deceased immediately before the death
 - the fact of a person's remarriage, entry into a civil partnership, and possibly financially supportive cohabitation of at least two years following the death would be taken into account when assessing a claim for damages under the FAA, either by them or on behalf of any eligible children
 - the prospect of divorce, dissolution or breakdown in the relationship between the deceased and his or her spouse or civil partner would only be taken into account where the couple are no longer living together at the time of the death or where one has petitioned for divorce, judicial separation or nullity, or has begun the procedure for dissolution of the civil partnership
 - section 3(4) of the FAA would be repealed and replaced by a provision to the effect that the prospect of breakdown in a cohabiting relationship between the deceased and his or her partner would not be taken into account when assessing damages under the FAA

Chapter 2 - Bereavement damages

32. This chapter considers the recommendations of the Commission in the report *Claims for Wrongful Death* on bereavement damages.
33. Bereavement damages were introduced into statute law by the Administration of Justice Act 1982, which inserted section 1A into the FAA following the recommendations in the Commission's 1973 report *Personal Injury Litigation - Assessment of Damages*. Prior to that, no damages were awarded for bereavement at common law (although in recommending the introduction of bereavement damages the Commission envisaged their availability mitigating the abolition of the separate common law claim for loss of expectation of life).
34. When the introduction of bereavement damages was debated by Parliament, it was acknowledged by the then Lord Chancellor, Lord Hailsham, and others that it is impossible to quantify or provide adequate financial compensation for the grief felt at the loss of a loved one. It was accepted that bereavement damages could only constitute a token payment in acknowledgement of that grief, and that they should not be regarded as reflecting in any way the value of the deceased's life or as a punishment for the negligent person who caused the death. However, in practice, bereavement damages are almost inevitably regarded in this light by claimants. They can feel considerable dissatisfaction either because they do not fall within the categories of people entitled to claim, or because the amount of the award (currently £10,000) is perceived as derisory and an insult to the deceased and his or her family. In the circumstances of a bereavement, it would in all likelihood be impossible to provide for a sum that would not be considered derisory. This in itself may exacerbate the grief felt at the loss of a loved one.
35. In view of the controversy surrounding the function of bereavement damages, the Commission considered the option of abolition. It acknowledged the arguments against their continued existence for example that grief cannot be measured in monetary terms, it is an inevitable part of human life for all, and in compensation terms is subsidiary to compensation for pecuniary losses. Nevertheless, it concluded that bereavement damages were now entrenched in the law and served a valid purpose, and thus should continue to be available. The Government sees force in both sides of the argument, and would welcome the views of consultees.

Q6

Do you consider that bereavement damages should continue to be available?

36. The remainder of this chapter assumes that bereavement damages will continue to be available.
37. The Commission took the view that to support the ongoing role of bereavement damages and reduce misconceptions, it would assist to clarify their purpose. It discussed five possible purposes in the consultation paper preceding its report. These were:
- compensating relatives for their mental suffering (that is, their grief and sorrow, both immediate upon the deceased's death and continuing)
 - compensating relatives for the non-pecuniary benefits which they would have enjoyed (that is, the loss of care and guidance of the deceased, and/or the loss of society of the deceased)
 - providing practical help for the deceased's relatives
 - symbolising public recognition that the deceased's death was wrongful
 - punishing the tortfeasor who caused the wrongful death.
38. In its report, the Commission concluded that it is not appropriate for bereavement damages to fulfil the latter three purposes, and that they should solely be regarded as compensating the non-pecuniary losses of grief and sorrow and the loss of care, guidance and society of the deceased. It took the view that much of the controversy surrounding bereavement damages stems from the fact that their purpose is not clearly understood. Many people perceive the amount awarded as a reflection on the value of the deceased's life or as a punishment for the defendant, in which case it is understandable that the award is considered insufficient. The Commission recommended that clarification of their purpose should be made in the explanatory notes accompanying any legislation on the subject.
39. The Government believes that it is doubtful whether the clarification proposed by the Commission would have any practical effect on perceptions of the bereavement damages award. As Lord Hailsham indicated, it is impossible to provide adequate financial compensation for the grief felt at the loss of a loved

one, and thus whatever definition was provided would not prevent families feeling that the sum received was inadequate. The existence of a definition or statement of purpose could also fuel dissatisfaction among relatives who are not included in the statutory list, but who nonetheless feel grief at the loss of the deceased. However, it may be that a statement to define the purpose of bereavement damages as no more than a token payment in acknowledgement of the grief felt at the death of a loved one would be helpful.

Q7

- a) Do you think it would be appropriate to provide clarification in the explanatory notes accompanying any legislation that the purpose of bereavement damages is no more than a token payment in acknowledgement of grief?**
- b) Are there any other ways in which the purpose of bereavement damages could be explained to the public?**

Extending the statutory list of claimants

- 40. The Commission considered the question of who should be eligible to claim an award of bereavement damages. At present, section 1A(2) of the FAA sets out a statutory list of those who are able to claim. The existence of a fixed list inevitably results in some borderline cases where a deserving claimant is excluded from eligibility. In considering the current statutory list, it is important to ensure that it does not unreasonably discriminate against particular classes of claimant; such discrimination could constitute a breach of Article 14 of the European Convention on Human Rights. The Government considers that an exclusive list has the merit of providing certainty and avoids the need for claimants to prove their grief or the quality of the relationship they had with the deceased. To require claimants to prove such matters would be undesirable, as it may prolong litigation and cause further suffering to the grieving relative. The potential costs involved in investigation and prolonged litigation would also be disproportionate to the amount actually awarded as bereavement damages. The Government therefore agrees with the Commission that it is preferable to retain a statutory list of those entitled to claim bereavement damages.
- 41. The Commission took the view that the current statutory list is too restrictive. At present bereavement damages can only be recovered by the wife or husband of the deceased, the civil partner of the deceased or, where the

deceased was a minor who had never married, his parents (where he was legitimate) or his mother (where he was illegitimate). It appears that these provisions extend to adoptive parents, although the FAA does not make this explicit.

42. The Commission proposed that the denial of the right to claim to the father of an illegitimate child should be removed, and that the list should be extended to include the following. Each of these proposed new categories is considered in turn below:

- parents of children over the age of 18 (including adoptive parents)
- children of the deceased (including adoptive children)
- brothers and sisters of the deceased (including adoptive siblings)
- any person who immediately before the death was engaged to be married to the deceased and
- any person who had lived with the deceased as husband and wife (or in an equivalent same sex relationship) for not less than two years immediately prior to the death.

Parents of the deceased

43. The Government agrees with the Commission's recommendations that the term 'parent' should be defined to include adoptive parents. It also agrees that the current restriction denying unmarried fathers of children under 18 the right to claim should be removed. However, some unmarried fathers may have had little or no involvement with the child, and it is therefore proposed that the right to bereavement damages should extend only to unmarried fathers with parental responsibility under the terms of the Children Act 1989 (as amended).

44. At present a parent can only claim for bereavement damages if their child was a minor who had never married. The Commission proposed to extend the statutory list to allow a parent to recover for the loss of their child irrespective of whether that child was under or over the age of 18 at the time of death, and whether or not they had been married or were legitimate. This provision would also specifically include adoptive parents. However, the Commission took the view that to extend its scope further to stepparents and other situations where

the child has been treated as a child of the family would lead to undue complexity and the likelihood of inappropriate compensation.

45. Although the Commission did not consider that bereavement damages should be extended to stepparents, there will often be situations where a child is living with and being cared for by a stepparent rather than a birth parent. In these circumstances it could appear unfair to deny the stepparent bereavement damages as they may often have formed a close tie to the child over a period of years. The Government would therefore welcome views on whether stepparents who have caring responsibilities should be eligible for bereavement damages.
46. The current position can clearly result in unfortunate and distressing borderline cases, for example where parents are denied bereavement damages for a child who has only recently reached the age of 18, or is still living in the family home while completing further education. In most such cases the parents will have no claim in relation to financial loss, and thus will only be able to recover for funeral expenses. It has been argued that grief does not stop simply because a child reaches the age of majority or because they marry, and that grief can be greater because of the general expectation that children will outlive their parents.
47. On the other hand, it can be argued that to enable parents to claim regardless of the child's age or the circumstances of their relationship would represent an unjustified widening of the scope for claims. This could result, for example, in claims from parents whose children are advanced in years, have established separate lives and families, and may even have lost touch with them. This is particularly relevant in the light of the Commission's view that a finite limit should be placed on the total sum of bereavement damages available in a particular case (for discussion of this area see paragraphs 59 to 65 below), as it could result in the dilution of the award to other family members who are in fact closer to the deceased, such as their spouse and minor children. In addition, as noted above, the purpose of providing a list is to avoid the need for claimants to prove the existence of a close tie between them and the deceased. The wider the scope for potential claims is spread, the stronger becomes the need for evidence to support the claim, and so a blanket extension to parents of children of any age could undermine the simplicity and clarity of the current system.
48. That being the case, it would be difficult to fix the terms of any practical limit beyond the existing one of the age of majority which could be placed on

parents' entitlement to claim without its raising similar difficult borderline cases (for example, if eligibility is extended to parents whose children are still living with them there would still be cases where, say, the child had only moved out days before the fatal accident). Although difficult borderline cases inevitably arise under the current arrangements, they can do so whenever the age of majority is recognised by the law as the dividing line, as it is in a range of different circumstances. The Government considers that some limit on the ability of parents to claim bereavement damages for the death of a child is required, and that the current limit is the most appropriate and practical one.

Q8

- a) Do you agree that a parent should only be able to claim bereavement damages for the loss of their child where the child is under 18 and unmarried?**
- b) Do you agree that unmarried fathers with parental responsibility should be able to claim bereavement damages for the loss of a child under 18?**
- c) What is your view on whether stepparents who were living with and had caring responsibilities for a child under 18 should be able to claim bereavement damages?**

Children of the deceased

- 49. Similar considerations apply to the question of whether children should be able to claim for the loss of a parent. As the Commission indicates, it appears anomalous that a parent should be able to claim for their child's death, but not the other way round. It could be argued that in some cases children may be so young as to be incapable of suffering grief. However, in practical terms it would be very difficult to establish a minimum age from which a person could be taken to become sufficiently attached to those around them to mourn their death.
- 50. When the introduction of bereavement damages was debated in Parliament, Lord Hailsham stated that the rationale for not extending eligibility to children under the age of 18 was that they would already be likely to receive damages for financial loss and dependency and thus that the additional payment of bereavement damages would not be necessary. However, the view could be

taken that this approach does not compare like with like, as bereavement damages are not intended to compensate for financial loss.

51. As in the case of claims by parents, it is arguable that it would not be appropriate to allow children of any age to claim bereavement damages for the loss of a parent because this would widen considerably the scope for claims. It would also raise evidential issues in demonstrating that a close relationship existed, which would operate against the simplicity of the current system. The degree of closeness between adult children and their parents will vary, but it can no longer be assumed that a close relationship existed. It is also likely that an adult child will have established a separate life from his or her parents. The Government therefore considers that the list of those entitled to recover bereavement damages should only be extended to children of the deceased (including adoptive children) who are under the age of 18.

Q9

Do you agree that children of the deceased (including adoptive children) who are under 18 should be added to the statutory list, but that eligibility should not be extended to adult children of the deceased?

Brothers and Sisters

52. The Commission also recommended that the category of claimants should be extended to include brothers and sisters of the deceased, on the grounds that in many cases a sibling may feel as much grief as a parent or child. However, it acknowledged that this proposal carried a risk of inappropriate compensation, as for example it may be more likely that brothers and sisters will drift apart over time. Each case will of course be different, but as noted above there is a need to place broad practical limits on the ability to claim bereavement damages. The wider the categories of people able to claim, the stronger the need for a cap to be placed on the total amount that could be awarded. This could result in a dilution of the money available to those with a closer bond. The Government therefore does not accept this recommendation.

Q10

Do you agree that brothers and sisters of the deceased should not be eligible to recover bereavement damages?

Cohabitants

53. The Civil Partnership Act 2004 amended the FAA to allow civil partners to claim bereavement damages on the same basis as married couples.
54. The Commission took the view that the exclusion of cohabitants from the list of those eligible to claim bereavement damages was contrary to the premise that damages should be available to those closest to the deceased. However, it also acknowledged that to open up availability to all cohabitants would be likely to lead to inappropriate compensation. It therefore proposed that a qualifying period of two years' cohabitation immediately prior to the accident causing the deceased's death would be appropriate to establish the existence of a relationship of permanence and commitment. Other statutes use two years as a benchmark for defining a committed relationship and so it is felt that this is an appropriate limit. These provisions would also apply in the case of cohabitation by partners of the same sex who are not civil partners. The Government proposes to accept this recommendation.

Q11

Do you agree that the statutory list should be extended to include people who, although not married to the deceased, have lived with the deceased as husband and wife (or if of the same sex in an equivalent relationship) for not less than two years immediately prior to the accident?

Engaged couples

55. The Commission recommended that a person who was engaged to be married to the deceased at the time of the accident should be eligible to recover bereavement damages, provided they could produce evidence of the agreement to marry in writing or by the gift of an engagement ring, or by a ceremony witnessed by one or more people.
56. The Commission considered that it would be inconsistent to treat engaged couples in a different way to cohabiting couples, as many people do not

cohabit prior to marriage for religious or other reasons. It can clearly be argued that engaged couples should be entitled to claim on the basis that they are likely to have a close bond and would be deeply affected by the other's death. However, we have proposed that cohabiting couples must have lived together as husband and wife (or in an equivalent same sex relationship) for at least two years before they qualify. This two-year period demonstrates the couple's commitment to the relationship. The existence of an engagement alone does not automatically prove this, and there may be difficulties in establishing or disproving the existence of an engagement on the basis of the proposed evidential requirements.

57. In practical terms, it appears likely that either any purported evidence of an engagement would be accepted without further enquiry, and thus that some undeserving claims may succeed, or that potentially distressing and intrusive investigation would be needed to prove the validity of the claim. This would raise the possibility of satellite litigation where the facts are disputed, and could mean that the attendant costs of proceedings outweigh the benefits of the right to claim. On balance, the Government does not propose to extend bereavement damages to engaged couples.

Q12

Do you agree that engaged couples should not be added to the statutory list of those who can claim bereavement damages?

58. The Commission proposed that, as at present, there should be an irrebuttable presumption that people within the listed degrees of relationship for recovery of bereavement damages have been caused grief by the deceased's death. This would avoid distressing and distasteful enquiries and litigation about the extent of their grief and sorrow. This would clearly be appropriate as long as the statutory list is kept reasonably concise and its scope is not widened to include a broad range of instances where a close tie could less clearly be presumed.

Amount of bereavement damages award

59. The Commission made a number of proposals relating to the amount of the bereavement damages award. It recommended that the award should continue to be a fixed sum, to avoid the need for the court to enquire into the extent of the claimant's grief; that the sum should be increased to £10,000;

and that future increases in this figure should be made through linkage to the Retail Prices Index (RPI) rather than by way of the Lord Chancellor's power to vary the amount (contained in section 1A(5) of the FAA). It also took the view that it was appropriate to provide a finite limit on the total amount that should be available in an individual case, to protect defendants from liability for an excessive amount. It proposed that the figure should be set at £30,000.

60. The Government agrees that the award of bereavement damages should continue to be a fixed sum. In response to the Commission's recommendation, it increased the award to £10,000 in respect of claims which accrue on or after 1 April 2002¹⁰. The Government does not accept the recommendation that individual awards should be linked to the RPI at the time of the award as this would lead to complex calculations and increased costs. However, the Government intends to increase the award on a regular basis in line with RPI (rounded to the nearest £100). The first increase will be made later in 2007, and subsequent adjustments will be made every three years thereafter. This will ensure that the award is increased appropriately on a more regular and consistent basis and will assist insurers and the NHS in building the effect of future increases into their reserves and financial plans.
61. The Commission considered a number of options in relation to setting an overall ceiling for bereavement damages in individual cases. It proposed that all eligible claimants should be treated on an equal basis, and thus that the greater the number of claimants, the less each would receive. The Government is not convinced that this is the best approach, and is concerned that it could operate to dilute the award to those in what are generally regarded as the closest categories of relationship to the deceased.
62. For that reason, we believe that the existing award of £10,000 should be preserved for the spouse or, as the case may be, the civil partner or cohabitant of the deceased, and that any additional sum over and above that amount should be payable on the ground that this award should not be diluted. We also believe that it would be preferable for a fixed sum to be awarded to each of the other categories of claimant rather than impose a cap as proposed by the Commission, as this could result in claimants receiving different amounts purely because of the number of eligible claimants in a particular case.

¹⁰ SI No 644

63. We would therefore propose that, as now, the parents of an unmarried child under 18 should receive an award of £10,000, to be divided between them where both make a claim. It is also proposed that, where there are children of the deceased under the age of 18, a sum of £5,000 should be available to each eligible child.
64. A final situation which may arise is where a husband and wife had separated but not divorced, or where civil partners had separated but not dissolved the partnership, and the deceased spouse or registered partner had entered into a cohabiting relationship of over two years' duration with a new partner. In these circumstances we would propose that, by analogy with the position in relation to the parents of a child under 18, the sum of £10,000 should be divided between the two eligible claimants.
65. The Government believes that these proposals, together with the limited extension of the categories of people entitled to claim bereavement damages, strike an appropriate balance between making this award available to those in what are generally regarded as the closest categories of relationship to the deceased and ensuring that any expansion of compensation is proportionate and reasonable.

Q13

- 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?**
- 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?**
- 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?**
- 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?**
66. The Commission also proposed that claimants should, as now, be able to recover both damages for bereavement and damages for a recognised

psychiatric illness. This issue is not currently the subject of statute law, and the Government believes that it should be left to the courts to develop as appropriate.

67. In addition, the Commission recommended that, as is currently the case under section 1(1A) of the Law Reform (Miscellaneous Provisions) Act 1934, the action for bereavement damages should not survive for the benefit of the bereaved's estate. The Government accepts this recommendation.
68. The Commission also proposed that, as under the FAA, the contributory negligence of the deceased should continue to reduce the award of bereavement damages, and recommended that legislation should make clear that the contributory negligence of the bereaved claimant should also reduce that claimant's award. This appears fair, as it would be unjust for the defendant to be made liable to pay full damages to a person who is partly responsible for their loss, and the Government proposes to accept this.

Q14

Do you agree that contributory negligence on the part of the claimant should reduce the award of bereavement damages?

Summary of changes

69. If the recommendations in this chapter are accepted, the following changes to the law would be made:
- unmarried fathers with parental responsibility would be able to claim bereavement damages for the loss of a child under 18
 - people who had lived with the deceased as husband and wife (or if of the same sex in an equivalent relationship) for not less than two years immediately prior to the accident would be able to claim bereavement damages for the loss of their partner
 - children under 18 would be able to claim bereavement damages for the death of a parent
 - the current award of £10,000 would be available to the deceased's spouse, civil partner or cohabitant without dilution, although where a spouse or civil

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partner and a cohabitant are both eligible to claim the sum would be divided between them

- an award of £5000 would be made to each eligible child of the deceased under the age of 18
- these sums would be increased every three years in line with the retail prices index (rounded to the nearest £100)
- legislation would make clear that contributory negligence on the part of the claimant would reduce the amount of the award

Chapter 3 - Liability for psychiatric illness

70. This chapter considers the recommendations in the Commission's report *Liability for Psychiatric Illness*.
71. For over a century, English law has recognised a cause of action for nervous shock, or, as it is now more accurately called, psychiatric illness. This cause of action arises in cases involving a genuine and serious recognised psychiatric illness, and not merely extreme grief or upset. There is currently no statute law relating to liability for negligently inflicted psychiatric illness; the principles that make up the scope of the legal liability have evolved over time.
72. The basic factors which a claimant must establish are that the claimant must have suffered psychiatric injury in the form of a recognised psychiatric illness, and that damage to the claimant in the form of psychiatric injury must have been foreseeable by the defendant. In addition to these factors, Lord Griffiths in *White v Chief Constable of South Yorkshire*¹¹ indicated that possible categories of those who may establish liability are limited by a requirement for the necessary degree of proximity to the incident in question.
73. In the context of the latter requirement, the courts have classified claimants as either primary or secondary victims. Primary victims are those who are able to establish direct involvement in the incident, and, provided the other relevant conditions are met, general principles of negligence apply and the rules relating to liability are no different from those relating to physical injury. Secondary victims on the other hand are normally witnesses to an incident involving a primary victim. It is this area which is focused on by the Commission, and which raises most difficult issues. This chapter is therefore concerned with cases which involve secondary victims.
74. *Alcock v Chief Constable of South Yorkshire Police*¹² set out important principles relating to secondary victims which have been further developed in other cases, notably *White*. The House of Lords held that it was essential for the claimant to establish a duty owed by the defendant to him or her, and that this was dependent not only on the reasonable foreseeability of the damage

¹¹ [1999] 2 AC 455

¹² [1992] 1 AC 310

which had occurred, but also on the proximity or directness of the relationship between the claimant and the primary victim.

75. In the context of the latter, the House of Lords identified a number of factors which need to be demonstrated. These have essentially been followed in subsequent cases such as *White*. The relevant factors are that:
- there was a close tie of love and affection with the person killed, injured or imperilled (a close tie of love and affection is presumed in the case of a parent, child, spouse, and possibly fiancé(e) of the immediate victim, although this can be rebutted by evidence to the contrary. In the case of more distant relatives or friends, the claimant is required to prove that a close tie of love and affection existed) and
 - he or she was present at the accident or its immediate aftermath and
 - the psychiatric injury was caused by direct perception of the event or its immediate aftermath (for example by sight or hearing, or its equivalent), rather than, for example, hearing about it from a third person.
76. Additional considerations that may apply include whether the psychiatric illness was induced by shock and whether the psychiatric illness resulted from the death, injury or imperilment of the defendant him or herself.
77. The Commission's report was in part prompted by the widespread coverage given to certain high profile cases, in particular the disaster at Hillsborough football stadium to which *Alcock* and *White* relate. The report in general supported the development of this area through the common law. It rejected comprehensive codification of the law, but recommended legislative reform in certain core areas. This comprised recommendations that the requirements of closeness in time and space, direct perception of the accident, and inducement of the psychiatric illness by shock should no longer apply. Instead it proposed that legislation should establish a statutory duty of care. This would provide that the defendant would owe a duty to take reasonable care to avoid causing the claimant to suffer a recognisable psychiatric illness as a result of the death, injury or imperilment of another, if it was reasonably foreseeable that the defendant's act or omission might cause the claimant to suffer such an illness.
78. It proposed that, for this duty of care to apply, the requirement that the claimant should have a close tie of love and affection with the immediate victim

should be retained, and that there should be a statutory list of those who would be deemed to satisfy the test. This list would comprise a spouse; parent; child; brother or sister; and a cohabitant, defined as a person who lived with the immediate victim as man and wife (or in an equivalent same sex relationship) for at least two years immediately prior to the accident. Claimants outside these categories would be required to show that a close tie of love and affection existed. The requirement for such a tie could be satisfied either at the time of the defendant's act or omission or at the onset of the claimant's psychiatric illness.

79. The report recommended that the courts should be given the scope to decide not to impose the duty of care where satisfied that it would not be just and reasonable to do so because of any factor by virtue of which the defendant owed no duty of care to the immediate victim, or because the immediate victim voluntarily accepted the relevant risk. In addition, it included relevant circumstances where no duty of care should be imposed, namely:
- where the claimant voluntarily accepted the risk of suffering the illness
 - where the claimant excluded the duty or
 - where the claimant was involved in conduct that is illegal or contrary to public policy.
80. The Commission did not intend its proposals for new legislation to apply in any situation where the defendant's duty to the claimant is regulated by a statutory provision in place of the common law rules of the tort of negligence.
81. The Commission also proposed a similar duty of care where the defendant was the immediate victim, that is where the defendant causes his or her own death, injury or imperilment, either through negligence (e.g. a car accident through the fault of the defendant) or deliberately (e.g. attempted suicide) and the claimant suffers a recognisable psychiatric illness as a result. The Commission recommended that this duty of care, and the circumstances in which it could be held not to apply, should mirror the duty of care where the defendant is not the immediate victim. The courts would have the discretion not to impose the duty if satisfied that it would not be just and reasonable to do so because the defendant had chosen to cause his or her own death, injury or imperilment. There is no Court of Appeal authority on this point yet, but in

*Greatorex v Greatorex*¹³, Mr Justice Cazalet did not take the approach recommended by the Commission.

82. The Commission took the view that these proposals would provide a clear and coherent core regime to govern claims for psychiatric illness instead of what they perceived as the confusing and often arbitrary requirements of the current common law. Its report was, however, published at a time when some litigation relating to the Hillsborough tragedy was still unresolved. In particular *White* (concerning the ability of members of the police on duty at the tragedy to recover damages for psychiatric illness) was still before the courts. At that point, the Court of Appeal had held that members of the police involved in the events could potentially recover damages for psychiatric illness, whereas in *Alcock* the claims of relatives of the deceased had been rejected. The apparent injustice of this had provoked considerable adverse comment. In the event, the House of Lords overruled the Court of Appeal's decision in *White*, and held that the police could not recover damages either as rescuers or as employees.
83. Thus the climate in which the Commission made its recommendations has to some extent changed, although it is recognised that perceived difficulties still exist. This chapter therefore considers the issues in the light of these developments.
84. As the Commission indicated, the issue of liability for psychiatric illness provokes a range of strongly held opinions. These vary from the view that liability should be treated in exactly the same way as liability for physical injury, to the view that the possibility of recovery for psychiatric illness should be denied altogether.
85. In his judgment in *White*, Lord Steyn identified four reasons why he considered that it was proper for psychiatric illness to be distinguished from physical injury:
- the complexity of drawing a line between acute grief, for which compensation is not payable, and psychiatric harm, for which it is
 - the effect of an expansion of the availability of compensation, and the possible disincentive of litigation to the claimant's rehabilitation

¹³ [2000] 1 WLR 1970

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- the fact that relaxation would greatly increase the class of persons who can recover damages in tort and
 - the possible result that a burden of liability could be placed on defendants which was disproportionate to their tortious conduct, which for example might be a mere momentary lapse in concentration.
86. That judgment was made after the report by the Commission, but similar concerns, among others, were set out by the Commission as policy based arguments for justifying limiting factors. The Commission took the view that, in relation to concerns around the first of Lord Steyn's reasons, a distinction could not properly be made on grounds of complexity because equally difficult cases could arise involving physical injury. It did recognise that the law has drawn a line between ordinary grief and anxiety, for which damages are not normally payable, and a recognisable psychiatric illness, for which they may be. While there may be problems in proving causation or giving a prognosis in the case of physical injury, there is no such line between physical injury for which damages are recoverable and physical injury for which they are not. It could be said that the second and fourth of Lord Steyn's reasons could equally apply to cases of physical injury. However, the complexity surrounding identifying and demonstrating psychiatric illness may serve to make questions of rehabilitation and causation more difficult.
87. As the Commission recognised, the question of expanding the class of persons who can recover damages for psychiatric illness is clearly a significant one. There are inevitably limits to the number of people who may suffer physical injury in a particular incident; the number of people who may suffer psychiatric illness is not so restricted, and the complexities of such cases mean that there is a greater need for clear parameters to be set. The Commission's view was that restricting the ability to claim to people with a close tie of love and affection with the immediate victim would meet the need to impose a limit. However, that limit in itself would still have substantial implications for the numbers of people who would be eligible to claim, and would lead to a significant increase in insurance premiums. The RIA at Annex B gives an indication of the potential implications as estimated by the Association of British Insurers and the National Health Service Litigation Authority.
88. There could also be difficult issues arising from the proposal to deem that a close tie of love and affection exists in certain relationships (for example, whether a spouse who has been separated for several years or brothers and

sisters who have lost touch should be able to rely on a deemed tie). Although the current need to prove a tie of love and affection could be viewed as potentially distressing and intrusive, the current ability of the courts to apply a rebuttable presumption in the case of certain relationships avoids this in many instances. It also provides an element of flexibility to deal with particular circumstances.

89. It appears from subsequent case law that the courts are interpreting the requirements established in *Alcock* in a flexible and sensitive way. In addition, as the Commission acknowledges, medical knowledge and perspectives on psychiatric illness are still in the process of development, and it is important that the law should be able to develop flexibly and incrementally to take account of changes in diagnosis and interpretation. It is difficult at this stage to see how legislation could successfully assimilate the differing perspectives and arguments in this complex area into a simple and coherent system which would improve upon the current principles established by the courts, without running the risk of imposing rigid requirements which are not readily able to accommodate developments in medical knowledge and jurisprudence, and without opening the way to speculative and inappropriate claims.
90. One of the main criticisms of the present system is the requirement that the claimant's psychiatric illness is induced by shock. It has been called an anomalous restriction, and many feel it is there solely to limit the number of claims. However, the shock requirement does have a practical use in that it ensures that the causation test is met. Without shock the evidential complexities of the case increase and investigating it becomes more costly. It would be more difficult to establish whether the claimant's illness was directly caused by the act or omission in question, and not by some other intervening event, for example where psychiatric illness developed over an extended period of time after the long term care of an injured family member. Although this is a tragic situation, damages cannot be available for every misfortune that occurs.
91. Recent case law indicates that the courts are adopting a flexible approach to the shock requirement on the basis of the facts of each case, and will not always restrict claims where there is more than one event causing the psychiatric illness (although it is likely that a claim will only succeed if the appreciation of those events is sudden). For example, in *North Glamorgan*

*NHS Trust v Walters*¹⁴ the Court of Appeal, in dismissing the defendant's appeal, held that a 36-hour period could be classed as one horrifying event, and that the shock did not have to be confined to a frozen moment in time. It was held that the judge had been justified in concluding that the claimant's appreciation of events was sudden rather than gradual. The claimant had witnessed her child have a seizure, was then informed that the child was severely brain damaged and would have no quality of life, and was subsequently told that she should switch off the life support machine. The claimant was therefore entitled to her claim as a secondary victim.

92. Similarly, in *Galli-Atkinson v Seghal*¹⁵ the Court of Appeal allowed a claim where the claimant arrived about an hour afterwards at the scene of a traffic accident in which her daughter had been killed. She was told by a policeman that her daughter was dead, but did not see the body until some two hours later. The court agreed with *Walters* that the aftermath of an accident could be made up of a number of components, provided these retained sufficient proximity to the accident. However, in *White v Lidl*¹⁶ the court declined to extend this approach where the claimant was traumatised by the suicide of his wife six months after she had witnessed an accident. The court held that the duty of care owed by the defendant did not extend to the suicide, which was distinct in time and space from the accident, and that the claimant could not establish the necessary legal and factual proximity between the negligence which caused his wife's injury and his own illness resulting from her suicide.
93. For a viable and sustainable system, there need to be some limits drawn as to when a claim for compensation can be made. Without the shock requirement it would be difficult to separate cases of severe grief from cases where a psychiatric illness had resulted. As the Commission acknowledged, this could result in a situation where for every claim under the FAA there would be potential for at least one claim of liability for psychiatric illness. This could lead to an increase in speculative claims. A final point for consideration is that without the shock requirement, there would be no finality to the prospect of litigation for the negligent party, as there would always be the possibility of claims arising much later after the event.
94. We acknowledge the difficulties surrounding this area of the law. However, for all the reasons given above, and the development of case law since the

¹⁴ [2002] EWCA 1792

¹⁵ [2003] EWCA Civ 697

¹⁶ [2005] EWHC 871 (QBD)

Commission's report, the Government rejects its recommendations and considers it preferable to allow the courts to continue to develop the law on liability for psychiatric illness rather than attempt to impose a statutory solution.

95. The Commission's report also identified a range of issues surrounding its central recommendations which it considered would best be left to the courts to develop, including the ability of rescuers, employees, bystanders and involuntary participants to recover damages for psychiatric illness. It also proposed that the courts should continue to assume that the claimant is a person of reasonable fortitude when it is considering the reasonable foreseeability of him or her suffering psychiatric illness, and that there was no need for legislation to deal with liability for psychiatric illness suffered through stress at work. In the latter area, the decision of the House of Lords in *Barber v Somerset CC*¹⁷ and the principles of law as set out by the Court of Appeal in that case (reported as *Hatton v Sutherland*¹⁸) have helped to clarify the law. Subsequent decisions¹⁹ have shown that the courts have sufficient flexibility to develop the law further in the light of the facts of individual cases. The Government agrees that these are all areas which should be left to the courts to develop.
96. The Government would welcome any views that consultees wish to express on the issues discussed in this chapter.

Summary

97. No changes to the law are proposed in this chapter, as the Government considers it preferable to allow the courts to continue to develop the law in this area.

¹⁷ [2004] UKHL 13

¹⁸ [2002] 2 All ER 1

¹⁹ *Hiles v South Gloucestershire NHS Primary Care Trust* [2006] EWHC 3418 (QB), *Daw v Intel Corp (UK) Ltd* [2007] EWCA Civ 70

Chapter 4 - Collateral benefits

98. This chapter considers the situation where a claimant is potentially entitled to receive both damages and some form of 'collateral benefit'. A collateral benefit is a payment or benefit in kind (other than the tort damages being claimed) which the tort victim would not have received but for the tort. This can include sick pay; accident insurance; disability pensions; voluntary and charitable payments; benefits in kind such as gratuitous care by a friend or relative, local authority care and ancillary services or NHS treatment; statutory compensation schemes and social security benefits. Collateral benefits are discussed in section B of the Commission's report *Damages for personal injury: Medical, Nursing and Other Expenses; Collateral Benefits*.
99. In the case of *Parry v Cleaver*²⁰ Lord Reid made the following statement of principle about collateral benefits:
100. *Two questions can arise. First, what did the Plaintiff lose as a result of the accident? What are the sums which he would have received but for the accident but by reason of the accident he can no longer get? And secondly, what are the sums which he did in fact receive as a result of the accident but which he would not have received if there had been no accident? And then the question arises whether the latter sums must be deducted from the former in the assessment of damage...The common law has treated this matter as one depending on justice, reasonableness and public policy.*
101. Eighteen years later, Lord Bridge's speech in *Hussain v New Taplow Paper Mills Ltd*²¹ marked what the Law Commission described as a 'shift of emphasis'. Lord Bridge said:
102. *This dichotomy [Lord Reid's two questions], however, must not be allowed to obscure the rule that prima facie the only recoverable loss is the net loss. Financial gains accruing to the plaintiff which he would not have received but for the event which constituted the plaintiff's cause of action are prima facie to be taken into account in mitigation of losses which that event occasions to him.*

²⁰ [1970] AC 1

²¹ [1998] AC 514

103. This case established a contention that the principled starting point for considering collateral benefits is deduction. In other words, the tortfeasor's liability to pay damages should be reduced by the value of any other benefits due to the claimant as a result of the accident. In reality, there are as many exceptions to this rule as examples of it. Indeed, Lord Bridge recognised and sought to reconcile two of these - charitable and insurance payments - in his speech in *Hussain*. So the law is complex, inconsistent and uncertain. Expensive appellate rulings are often required.
104. The Commission considered six options for reform to increase consistency in the treatment of collateral benefits. The first four would have increased, to a greater or lesser extent, the categories of collateral benefit deducted in assessing damages. Sixty-two per cent of consultees favoured one or other of these options, but were divided between them. The fifth option moved in the opposite direction and proposed that all collateral benefits should be disregarded in assessing damages; 16 per cent of the Commission's consultees agreed. The final option, preferred by 22 per cent, was 'no change'. This was the option that the Commission, somewhat reluctantly, recommended, adding the hope that its report would assist the courts and the Government to give further consideration to reform.
105. A key assumption underlying the Commission's analysis was that the primary purpose of tort law is to provide compensation (and no more). This is what led it to prefer deduction options which would preclude double recovery, although it recognised that the disregard option had the benefits of simplicity, clarity and consistency. But the Commission's report dealt separately with the issues of deduction or disregard of collateral benefits, and the rights of collateral benefit payers to recover or recoup the benefit paid. In terms of public policy, these issues are inextricably linked and must be considered together in order to understand the overall outcome.
106. The Government agrees that the purpose of tort law is to compensate rather than punish, and that double recovery should be avoided. But it equally believes that tort law has a regulatory purpose. Potential tort liability creates an incentive to take appropriate care and thus should help to reduce the number of accidents and injuries and their associated costs. This incentive could be weakened to the extent that liability might be reduced by the contingency of a collateral benefit.
107. The Government considers, therefore, that in principle the most appropriate outcome when collateral benefits arise is one where the claimant is

compensated for his or her losses, but only once; and wherever practicable at the expense of the tortfeasor rather than a collateral benefit payer. In some cases, the difficulties involved may make it impracticable to achieve this, but the chapter discusses and seeks views on the issues involved to inform possible further consideration.

108. The preferred outcome can be achieved in, broadly, two ways. The collateral benefit could be deducted from the entitlement to damages, and the benefit provider given a right to recoup the expense from the tortfeasor. Or the collateral benefit could be disregarded in the assessment of damages; and, where damages are awarded, any obligation to make further collateral benefits in respect of that loss extinguished. Any benefits already paid would be made recoverable from the claimant (or in practice, the tortfeasor could pay the relevant damages direct to the collateral benefit payer). In general, we think the second route is to be preferred. It avoids any need for a separate claim and potential proceedings between the tortfeasor and collateral benefit payer, and it is more apt to deal with the situation where there is an on-going liability to pay a collateral benefit. The Government considers that adopting this approach wherever possible would make the law clearer, simpler, fairer and more consistent. It would also bring the law for personal injuries into line with the FAA, under which collateral benefits are disregarded.

109. We recognise, however, that it may not always be possible or appropriate to achieve the preferred outcome, for reasons of practicality or wider policy considerations. Relevant factors to consider include: whether the collateral benefits are paid voluntarily or under contractual or statutory obligation; whether they are in money or kind; whether they fall to be paid before or after damages are assessed; whether or not the benefit relates to a specific identifiable head of damages; and whether the tortfeasor is also the collateral benefit payer. Contributory negligence will be a further complicating factor in some cases.

Q15

- a) Do you agree that the preferred outcome in principle when collateral benefits arise is that set out in paragraph 107?**
- b) Do you agree that, in general, the best way of achieving this is to disregard the benefit in assessing damages, and to give the payer a right of recovery?**

110. The rest of this chapter considers each of the main categories of collateral benefit. It identifies whether the preferred outcome can be achieved under the current law; and if not whether it would be appropriate to change the law. For brevity, it does not consider all the detailed factors in paragraph 109 in every case. Instead it focuses on the general principles governing collateral benefits in these circumstances. If as a result of this consultation any reform is considered appropriate, further consideration will be given to the detail of how any provisions might operate.

Charity

111. Charitable payments are a voluntary collateral benefit and at present are disregarded in the assessment of damages. This rule was established in *Redpath v Belfast and County Down Railway*²² and then *Parry*. The treatment of charitable payments is only an issue where payments were made prior to a damages award. If a charitable benefactor chooses to make a payment when a damages award has already been made that is their choice.

112. Where there is a charitable payment by the tortfeasor the case law provides that such payments will generally be deducted in the assessment of damages, unless it can be shown that the payment was not on account of damages. For example, in *Williams v BOC Gases Ltd*²³ the Court of Appeal considered whether a payment to an employee described as “an advance against damages that may be awarded” fell to be deducted from damages or disregarded as a “benevolent payment”. It held that allowance (i.e. deduction) was *prima facie* to be made for benevolent gifts made by a tortfeasor against any compensation that it was subsequently ordered to pay. This achieves the desired outcome of single compensation.

113. Otherwise, at present, a charitable benefactor has no direct claim to recover the payment in the event of a damages award. Although this does not fully accord with the preferred approach, the Government considers that it is reasonable that this should continue. If a person wishes to make a charitable payment which can be recovered where the recipient receives damages for the same loss, it would be open to them to contract to this effect.

²² [1947] NI 167

²³ [2000] WLR 33 1021

Q16

Do you agree that no action is required to amend the present law in relation to charitable payments?

Gratuitous care

114. Gratuitous care is care provided for the claimant free of charge by relatives or other private parties;²⁴ it is a voluntary collateral benefit in kind. However, the courts have created a distinction between this voluntary service and charitable payments. As a general rule, claimants are entitled to recover damages for gratuitous care, but hold the damages in trust for the carer (decision of the House of Lords in *Hunt v Severs*²⁵). This is directly analogous to the preferred approach of disregarding collateral benefits and giving the payer a right to recover.

115. The Commission agreed that damages should be recoverable for gratuitous care for the benefit of the carer, but considered that the trust approach in *Hunt v Severs* was not the best mechanism for achieving this. It recommended instead that the claimant should be under a personal obligation to account for the money to the carer. This would involve less formality and be simpler for the claimant. The onus would be on the carer to claim the money due. If the claimant died before the damages were exhausted, the remainder would go to the claimant's general estate, whereas with a trust the carer receives the outstanding money for care they will never provide. On the other hand, with a personal obligation the carer has no prior claim to any outstanding damages if the claimant becomes insolvent, even though they may be continuing to provide the care. On balance, the Government agrees that a personal obligation is preferable to a trust.

116. The Commission recommended that the obligation should relate only to past care. Claimants should not be under a legal (as distinct from moral) duty to hand over any damages for future gratuitous care. This was principally on the basis that the future is uncertain and that different care arrangements might become appropriate. This is a more powerful objection to the trust approach by which the damages ultimately belong to the carer from the outset. The personal obligation, on the other hand, could be to pay over damages awarded

²⁴ Free care provided by the NHS is considered separately as a statutory benefit in kind.

²⁵ [1994] 2 AC 350

for the gratuitous services only when and to the extent that those services were provided. This would fit well with an order for periodical payments in cases of significant future loss. The Government considers that assessing future needs is inherently uncertain and does not justify a departure from the general principle outlined in paragraph 107 in the particular case of future gratuitous services. Our view is that a personal obligation to account to the carer should also apply to future gratuitous services actually provided.

117. The Commission's draft Bill on this issue excluded gratuitous services provided in the course of a business, profession or vocation (for example by a charity worker). The Government sees no reason for this distinction. The claimant would receive a form of double compensation at the expense of (for example) a charity which could, no doubt, put the money to good alternative use.

118. The Commission discussed the effect of the decision in *Hunt v Severs* in respect of gratuitous services provided by the defendant. The current position is that damages are not awarded for gratuitous services provided by the tortfeasor (because they would only be held in trust and returned). The Government considers this to be the most straightforward solution where the tortfeasor has provided past gratuitous services. But damages should be awarded where future gratuitous services are to be provided, subject to the claimant's personal obligation to repay the caring tortfeasor when they actually are provided.

119. In its report, *Claims for Wrongful Death*, the Commission proposed that the FAA should be amended to make clear that, where a dependant had received services from the deceased and after the deceased's death those services were provided gratuitously by another, the dependant could be awarded damages, but would be required to account for them to the gratuitous service provider. This would bring the position into line with personal injury cases (given the recommendations above).

120. The Commission also drew attention to inconsistencies which it perceived in the Court of Appeal decision in *Daly v General Steam Navigation Co Ltd*²⁶ regarding the treatment of damages for past and future loss in respect of the loss of the claimant's ability to do work in the home. This held that damages were recoverable as a past pecuniary loss where the claimant had engaged

²⁶ [1981] 1 WLR 120

paid help or received unpaid help from someone who had had to forgo paid employment, but as a non-pecuniary loss where the claimant had attempted the work him or herself. However damages for future loss would be recoverable as a pecuniary loss regardless of whether the claimant would pay someone else to do the work or do the work as best he or she could. However the Commission took the view that in practice this decision was often distinguished, a point which the Court of Appeal has subsequently agreed with in *Lowe v Guise*²⁷. The Government agrees with the Commission's view that it is preferable for the common law to develop this area.

Q17

- a) Do you agree that the *Hunt v Severs* trust approach should be replaced by a personal obligation to account?**
- b) Do you agree that this should apply to damages for future as well as past gratuitous care?**
- c) Do you agree that this should generally apply regardless of the identity of the carer but that (as now) damages should not be awarded for past gratuitous care provided by the tortfeasor?**
- d) Do you agree that the FAA should be amended to allow damages to be awarded under the Act in respect of services gratuitously provided to a dependant of the deceased?**

Insurance

121. Payments under an insurance policy, for example accident or medical insurance, are examples of a contractual collateral benefit.

122. The current position (deriving from the case of *Bradburn v Great Western Railway Company*²⁸) is that insurance is disregarded in assessing damages. However, the effect of subsequent case law appears to imply that the rationale for this is that the claimant paid for the insurance with their own money and this foresight should not advantage the defendant. The law is therefore uncertain as to whether insurance is disregarded when the policy was bought

²⁷ [2002] QB 1369

²⁸ (1874) LR 10 Exch 1

for the claimant by someone else. Under the Government's preferred approach, that distinction is irrelevant, and insurance payments should be disregarded regardless of who paid the premiums.

123. To achieve the preferred approach, the insurer must also be able to recover or withhold payment in the event of damages being awarded. In principle, this could be achieved through appropriate provisions in the insurance contract. However, in the case of non-indemnity insurance such as personal accident insurance, there is some doubt as to whether such contractual provisions might be found champertous²⁹ and therefore void.

124. To overcome this possible difficulty, one option would be to clarify any uncertainty in the law by ensuring that any contractual right to recoupment would be enforceable regardless of the nature of the insurance. This would only affect the recovery of benefits actually covered by the damages award. However, there may be problems in disapplying champerty in these situations. For example, there may be many cases where an insured person does not wish to take action because their losses are compensated by payments under an insurance policy. Contractual provisions which required the insured person to pursue an action in order that their insurer could recover damages would put an inappropriate burden on the insured person and would increase litigation and associated costs. Any change to be made would also have to be considered in the context of the general law of contract. The Government would therefore welcome views on whether any clarification of the law in this area would be helpful.

Q18

What are your views on whether the law should be clarified to ensure that:

- a) insurance payments are disregarded in the assessment of damages regardless of who paid the premiums; and**
- b) contractual provisions for recovery are enforceable regardless of the nature of the insurance?**

²⁹ Champerty is the practice of participating in a legal action in order to share in the proceeds, by a person who is not a party to that legal action.

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?

Pensions

125. A disability pension may be paid where a person has been the victim of an accident that prevents them from continuing to work. Where that person also receives damages for loss of earnings, the disability pension becomes a collateral benefit. The same may not be true where a retirement pension is taken early in respect of the period up to the age when the claimant would have retired but for the accident. This is because under most final salary pension schemes, where there are provisions for a retirement pension to be received early, the pension is subject to actuarial reduction to allow for early receipt. That may mean that the person in receipt does not gain any advantage and there is no collateral benefit. Pension payments that become collateral benefits will usually be contractual. However the basic State pension could be relevant where the claimant had intended, but for the accident, to carry on working after normal retirement age and where damages are received for loss of earnings during that period.
126. The law treats pensions as analogous to insurance so they are disregarded in the assessment of damages. Although we are not aware if this happens in practice now, it would be possible for a pension provider to include provision in the scheme for additional/early pension payments to be recovered or withheld where these are triggered by an accident for which the claimant also recovers damages for loss of earnings. In other words, the preferred outcome can be achieved under the existing law, although in practice there is likely to remain a degree of double recovery.
127. The Commission's report also discussed the issue of damages for loss of pension rights. This arises where the claimant is unable to work and therefore cannot continue to make the contributions needed to earn a full pension. In calculating compensation under this head, the pension payments that have already been earned clearly have to be taken into account. But this deduction is an aspect of assessing the underlying quantum of damage, not an offset in respect of a collateral benefit.

Q19

Do you agree that no change is appropriate in the law relating to pensions?

Sick pay

128. A person who cannot work as a result of an accident may receive both sick pay and damages for loss of earnings for the period off work.

129. Sick pay is currently deducted from damages for loss of earnings. But sick pay may be funded under an insurance policy and (especially if the claimant never returns to work) is no different in substance from a disability pension. The Commission considered the different treatment of sick pay and disablement pensions to be the “most striking inconsistency” in the present law on collateral benefits. The law is also uncertain where an employer pays voluntary sick pay beyond that required by the employment contract: is that sick pay to be deducted from damages or a charitable payment to be disregarded?

130. Following the preferred approach, sick pay would be disregarded in the assessment of damages (requiring a change in the law), and employers would be able to recover sick pay payments. The Commission’s report states that employers’ contractual rights to repayment of sick pay are the most common example of third party recovery rights in practice. However, consideration would need to be given to whether recovery would be appropriate where the employer was also the tortfeasor, and whether any right of recovery should be limited to sick pay which exceeds the statutory minimum requirement.

Q20

- a) What are your views in principle on whether the law should be changed so that sick pay is disregarded in the assessment of damages?**
- b) If you consider that any change may be appropriate, should this apply only to sick pay above the statutory minimum?**
- c) Should there be an exception where the employer is also the tortfeasor?**

Redundancy payments

131. Redundancy payments are made when an employee has been dismissed because his or her job has ceased to exist. In the great majority of cases, therefore, redundancy payments are not collateral benefits because they do not result from an accident for which damages might be awarded.
132. The Commission report quotes with approval the dicta of Sir John Donaldson MR in *College v Bass Mitchell and Butlers Ltd*³⁰, but does not specifically discuss redundancy payments under its options for reform. However, it is difficult to see how, given the narrow definition of redundancy in section 139 of the Employment Rights Act 1996, a redundancy payment can be seen as a benefit collateral to a tort causing an injury. The provisions of the Disability Discrimination Act 1995 further underline the fact that a person may not be unfairly selected for redundancy on the ground that he or she has suffered an injury.
133. There may, however, be circumstances in which a person is unfairly selected for redundancy because he or she has been disabled as a result of a tortious injury. An Employment Tribunal could in that situation award compensation under various heads, including loss of earnings. In this situation, it is possible that compensation for lost earnings could be viewed as a collateral benefit. Awards of compensation in these circumstances may include a punitive element, particularly where the circumstances surrounding the dismissal give rise to a finding of unlawful discrimination.
134. The Government believes that in practice there is likely to be little, if any, risk of double compensation in this situation. In the majority of cases, dismissal by an employer of an employee injured by a tortious act will be a fair dismissal made on the grounds of capability, where no question of redundancy will arise. Any payments to the dismissed employee would be likely to take the form of sick pay or disability pension, which would be recoverable by the employer under other heads. More difficult issues would be raised where there had been an ex-gratia 'severance' payment, which could be seen as analogous to a charitable payment. However, the Government's view is that the preferred policy of single compensation at the expense of the tortfeasor is, in the vast majority of cases, likely to be achieved. There are particular difficulties surrounding this area, not least the tension between awards containing a

³⁰ [1998] 1 All ER 536

punitive element which may be made in some cases of unfair dismissal, and the compensation principle by which damages in personal injury cases are assessed. Therefore the courts are best placed to develop the law in this area.

Q21

Do you agree that the law on redundancy payments is best left to the courts?

State benefits

135. The issue discussed in this chapter may also arise where a person becomes entitled to benefits (whether money payments or free care services) provided by the State following an accident caused by another's negligence. There are three main categories:

- social security benefits, (either means-tested benefits for those with low income or non-means-tested benefits paid to the disabled or their carers)
- accommodation and care services provided by local authority social services departments to those in need and
- NHS care.

136. It is beyond the scope of this paper to propose reforms to the detailed statutory schemes that cover these areas. This section therefore simply describes the current position.

137. A further issue arises in respect of the latter two categories. Should a negligently injured person entitled to free care from the State be required to avail themselves of that service (in which case the issue discussed here is relevant), or should they be entitled to purchase equivalent care privately and claim damages for the ensuing loss? This issue is considered in the next chapter.

Social security benefits

138. Most social security benefits that are likely to be collateral to personal injury damages are subject to the statutory recoupment scheme established under

the Social Security (Recovery of Benefits) Act 1997. Section 17 provides that relevant benefits are disregarded in the assessment of damages. The list of benefits to be disregarded is contained in schedule 2, column 2 of the Act. By virtue of sections 1(1)(b) and 3, benefits paid to the claimant for a maximum of five years after the accident are then offset against any damages for the same type of pecuniary loss and paid directly by the tortfeasor to the DWP. Where it applies, this scheme achieves the preferred outcome of single compensation at the expense of the tortfeasor rather than, in this case, the taxpayer.

139. The 1997 Act does not apply to benefits that become payable to the deceased's dependent following a fatal accident³¹. It is also conceivable that, in exceptional circumstances, a benefit not included in schedule 2 could become payable in circumstances collateral to a damages claim. Benefits not covered by the 1997 Act scheme are dealt with under the common law. The case of *Hodgson v Trapp*³² suggests that both past and future benefits would be deducted from damages for the same loss. The result is single recovery for the relevant loss, but at the expense of the taxpayer and not the tortfeasor. Reversing the decision in *Hodgson v Trapp* without also extending the 1997 Act would, of course, simply lead to double recovery.

140. Furthermore, benefits covered by the 1997 Act are disregarded entirely, but recoupment only applies until the claim is finally settled or for five years, whichever is shorter. So there will also be double recovery if benefits that are attributable to losses for which damages are recovered continue to be paid after the recoupment period. This will mainly arise where an injured person can no longer work and receives damages for future loss of earnings. Since October 2006, in assessing entitlement for means-tested benefits such as Income Support, a lump sum payment made as a result of a personal injury is disregarded indefinitely if it is held on trust or can only be disposed of by order or direction of a court. A lump sum payment made as a result of a personal injury that does not fall into these categories can only be disregarded for 52 weeks. This change was made in order to help simplify the benefits regulations. The advantages of simplification were thought to outweigh the limited element of double recovery that arises.

³¹ Because FAA payments are prescribed under regulation 2(2)(a) of the Social Security (Recovery of Benefits) Regulations 1997 (1997/2205)

³² [1989] AC 807

Local authority social services

141. Local authorities are under a statutory duty to provide appropriate social services to persons in need. Authorities have considerable discretion as to when and how these services are provided. They can include the provision of residential accommodation or home visits to provide nursing or other care. There is no statutory recoupment scheme applying to the cost of these services.
142. The provision of accommodation and residential nursing care is means-tested, and may be provided subject to financial contributions by the recipient. A means test determining liability to contribute is defined in the National Assistance (Assessment of Resources) Regulations 1992 (NAA). These currently provide for income deriving from personal injury damages (whether in the form of periodical payments or income from a capital sum) to be disregarded when intended and used other than for normal living expenses; but otherwise the first £20 a week is disregarded and income above that taken into account. The effect is that damages agreed or awarded and actually used to fund care costs (other than those provided by the authority) are protected. But other damages, including significant damages for loss of earnings, are available to offset the local authority's costs in providing the injured person's accommodation, care and general upkeep. Similar rules applied to most means-tested social security benefits before the changes made in October 2006. The Department of Health is considering whether to introduce a similar simplification of the NAA. In relation to home visits, local authorities charge for non-residential care under discretionary powers, and draw up their own charging policies. To try to make charging more consistent nationally, in September 2003 the Department of Health issued statutory guidance to local authorities in *Fairer Charging Policies for Home Care and other Non-Residential Social Services*.
143. The law is unclear with regard to this type of collateral benefit, and the Commission did not consider it. It is possible that contributions in respect of local authority accommodation could be recoverable in damages, achieving the preferred outcome. It seems likely (in the absence of express provision to the contrary) that the cost of social services would not be treated as a loss or would be deducted from damages by analogy with *Hodgson v Trapp*, so that compensation would be at the expense of the authority not the tortfeasor.

NHS care

144. A statutory scheme exists to recoup some costs incurred by the NHS. Where a person receives NHS treatment or ambulance services as a result of a road traffic accident, a tortfeasor compensating that person is required to pay the NHS in respect of those services (Road Traffic (NHS Charges) Act 1999). The Health and Social Care (Community Health and Standards) Act 2003 extended the scope of the scheme to other types of injury. This came into force on 29 January 2007.

145. Where an injured person requires long-term medical treatment, they will generally be entitled to damages for the cost of private medical care. But damages will not be awarded where it is clear that the claimant will use the NHS – in other words, the collateral benefit of free NHS care is deducted. If the preferred approach were to be adopted here, damages for future care costs would be payable in all cases, and the NHS would be entitled to recover its costs (up to the amount of the damages) for any treatment it provided. Such a proposal would raise substantial practical and wider policy considerations. Similar issues arise where local authorities have a statutory duty to provide care and accommodation services. These issues are considered in more detail in chapter 5.

Summary

Type of Benefit	Current Approach	Preferred Approach
Charity	Generally disregarded in the assessment of damages, except where the tortfeasor makes the gift. No direct right to recover.	No change.
Gratuitous Care	Disregarded (i.e. damages can be awarded). Held in trust for carer.	Replace trust by personal obligation to account.
Pensions	Disregarded.	No change.
Sick Pay	Deducted from damages for loss of earnings.	Views sought.
Redundancy	Deducted from damages for loss of earnings.	No statutory change.

The Law on Damages

Social security Benefits	If in scope of statutory scheme, disregarded and recouped directly from tortfeasor. Otherwise deducted.	Any change should be by extending statutory scheme on case by case basis.
Local authority social services	Repayable to provider where contributions apply. Otherwise deducted.	Considered further in Chapter 5.
NHS care	Some costs recouped direct from tortfeasor. Otherwise deducted (i.e. damages not awarded) if no claim for private care costs.	Considered further in Chapter 5.

Chapter 5 - Cost of private care

146. Section 2(4) of the Law Reform (Personal Injuries) Act 1948 states that in an action for damages for personal injuries (including any such action arising out of a contract), there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the NHS or any of the corresponding facilities in Northern Ireland.

147. The effect of this is that a claimant is able to claim damages for the cost of private treatment without consideration being given to whether NHS treatment is available for the particular injury involved.

Background to section 2(4) of the Act

148. The law in relation to this issue developed over a number of years through several reports. One of the first was the Beveridge report³³. Although not making a formal recommendation, the report recognised the argument that a claimant should not be permitted to recover damages for special expenses beyond the treatment that was available through the Public Health Service.

149. But section 2(4) was introduced following the *Final Report of the Departmental Committee on Alternative Remedies in 1946* (The Monckton Report). Amongst the issues considered in the report was whether injured persons should be permitted to recover expenses as part of their damages, if the injured person privately procured services which were available free of charge from the State health services.

150. The report accepted that it would be unfair if a claimant chose private medical care and then could not recover the costs because a particular court did not consider that private services had advantages over the NHS services. Moreover, the report considered it invidious for a court to have to make a value judgement between the quality of care available under the NHS and the quality of private care.

³³ *Social Insurance and Allied Services* (1942)

151. It also considered the possibility of a defendant convincing the court that medical or other services were available free of charge to the claimant through a public service with which a reasonable person in the claimant's position ought to have been content, and concluded that "it would be the duty of the court to hold that the defendant was not liable for expenditure incurred by obtaining such services from other sources".
152. The report indicated that prior to 1946 there had been no known instance where a defendant had succeeded in arguing that comprehensive health services were available free of charge to a claimant (this was of course at a time when the NHS was in its infancy). However, it expressed the view that such an argument would be formidable if there was a comprehensive health service which ensured that everyone had the best opportunities or most up-to-date and allied services available.
153. Thirty years after section 2(4) was enacted, the Pearson report (1978) recommended that it should be repealed. The report suggested that private medical expenses should be recoverable in damages only if it was reasonable on medical grounds that the claimant should receive them. However, no action was taken to implement this recommendation.
154. In November 1999, the Commission published its report *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits*. The report assessed whether claimants should continue to be able to claim damages for the cost of private care where NHS treatment is available. The Commission noted that there is a perception that some claimants who claim damages for the cost of private care subsequently use NHS treatment, effectively charging the public sector twice where it is the defendant and driving up costs elsewhere by forcing private provision of services to duplicate publicly provided ones. The Commission however noted that empirical research³⁴ did not support this assertion.
155. The Commission concluded that "...in accordance with our provisional view and reinforced by the support of the vast majority of our consultees...section 2(4)...should not be repealed or reformed". Its reasons were that:
- there was little evidence to suggest that the current system is being abused
 - it was arbitrary to envisage a court comparing private and NHS services

³⁴ *Personal Injury Compensation: How Much is Enough?* (1994) Law Com No 225

- courts usually manage successfully to ascertain a claimant's real intention with regard to future medical treatment and numerous cases have borne this out
- the duty to mitigate did not require the claimant to choose NHS against private treatment simply because it was going to save the defendant money and
- private treatment might afford the claimant additional benefits which he/she could justify as inherently reasonable e.g. flexibility and convenience.

156. In 2003, the CMO published the report *Making Amends; A consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS*. The report recommended that the law should be changed to exempt clinical negligence cases arising from NHS treatment from the provisions of section 2(4). Instead, it proposed that the NHS as defendant should be obliged to put together a "comprehensive care package, promptly provided and efficiently delivered". This package would ordinarily be provided to successful claimants instead of financial compensation to meet private costs. The package would be tailored to the individual needs of the claimant and where appropriate would include a mixture of private, NHS, social services and local authority care. An appointed case manager would oversee the care package.

157. The CMO's proposals applied to clinical negligence cases involving the NHS only. However the Government considers that it would not be appropriate to change the law in relation to clinical negligence alone as it would create different provisions for personal injury claims depending on how and where the claimant had suffered the injury. Respondents to *Making Amends* were also concerned about the fairness of such a change.

158. This chapter therefore discusses the principles raised by section 2(4) in relation to all personal injury claims. In this broader context, a possible option could be for the defendant or his/her insurer to assemble the appropriate care package themselves or for the NHS to provide the package, funded by the defendant. As the CMO envisaged, the package could involve a mixture of care from different sources, including private care, where this would best meet the claimant's needs.

159. Where the NHS is defendant, and where it is providing a care package funded by the defendant, it is suggested that commissioning and managing the care

package should take place at national level. This would allow consistency of access even if a claimant moved to a different Primary Care Trust (PCT) area where different commissioning decisions have been made.

160. It is important that these issues are considered first and foremost in the context of the needs of the claimant and that those with primary caring responsibilities are able to retain a sense of control over the process and the care that is provided.

Repeal of section 2(4) of the Act

161. Some of the arguments that have been put forward for and against repeal are as follows:

Arguments for the repeal of section 2(4)

- If care packages that provide the required level of care could be provided in a way that was more cost-effective than current arrangements it would benefit the NHS and the taxpayer without causing any detriment to the claimant's care needs.
- The repeal of section 2(4) could enable the NHS to divert money to improving NHS services which would benefit both claimants and NHS patients generally.
- The possibility of the defendant or insurer providing a package of care shifts the burden of organising short and long-term care from the claimant onto the defendant. The claimant would no longer have to worry about managing and organising the resources awarded. It would however be important to ensure that this did not create feelings of a loss of control of the process on the part of the claimant or those closest to him or her. For that reason it is envisaged that if section 2(4) were repealed then the claimant (and where appropriate their family or carers) would be fully consulted on the care package and any changes to it.
- The package could be tailored to meet the individual's needs with regular reviews and would be able to combine a range of providers and treatments. It could be adapted to meet changing needs and to take advantage of better or new treatments, without concerns about the money running out.

The Law on Damages

- There are instances where treatment by the NHS may be preferable to private care, for example in treating children for serious illness and treating serious spinal conditions. In these and other cases, the defendant is paying for the cost of private care when NHS treatment of a comparable or better standard is available.
- There could be cost benefits which would benefit society generally. For example, where an insurer purchased a package of care from the NHS, the NHS would receive payment for the treatment or services it provides, which in turn could benefit other patients. The cost to insurers could often be lower than in providing private care, which would benefit other premium payers.
- Requiring the tortfeasor to fund all the care package would fit with the approach proposed in chapter 4 in relation to collateral benefits.
- The care package approach would also fit well with the greater use of periodical payments in awards for future loss and care costs.
- Even though the available evidence does not support concerns that claimants may use money provided for private care for other purposes, claimants may not always be in a position to get best value for money, the money may not necessarily be spent on the most appropriate treatment and may not reflect the actual costs involved.
- Concerns that the health service could not cope may be ill founded as it would not shoulder the entire burden of dealing with all personal injury cases, given the flexibility provided by packages that draw on private, NHS or local authority treatment or combinations of treatments where appropriate.
- In relation to NHS clinical negligence, the NHS defendant should be under an obligation to put right the damage caused. The NHS would also have to accept their responsibility for a patient who had suffered medical injury through clinically negligent NHS care, since they would be obliged to redress the injury.

Arguments against the repeal of section 2(4)

- Although it would receive funding for the care package from the tortfeasor, the NHS may not have the physical resources to cope with the increased workload involved, at least initially.
- Rehabilitation services available to the NHS are not always adequate to meet the need for either rapid or intensive or long-term support, although repeal of section 2(4) might make more resources available for rehabilitation.
- Local authorities, which in practice provide a substantial amount of the care involved in relation to personal injury claims, do not have the requisite resources to take on additional care responsibilities.
- If the defendant is to be responsible for organising and purchasing care packages, a coherent and clear definition of what constitutes a reasonable and acceptable standard of care may need to be established. There are concerns that defining what this entails would inadvertently lead to satellite litigation.
- Private care may allow claimants to choose hospitals in closer proximity to where they live. It can also allow access to services more quickly than the NHS can, which must take account of clinical need in reaching decisions on relative priorities. Private care can also allow for more flexible treatment options such as private rooms. Implementation of a package provided by the NHS could therefore restrict the claimant and those with caring responsibilities in exercising control and choice over how they receive care. It may also restrict their ability to move from one geographical area to another.
- It is unclear how changing care needs would be addressed, or what would happen if the care package breaks down or a dispute arises as to the quality of the care package. In the event of a care package being unsuitable, it would need to be decided whether the claimant would be required to accept further care packages put together by the defendant/insurer or the NHS or whether a stage would be reached where he or she could claim private care costs.
- Repeal of section 2(4) may lead to exclusions in private medical insurance policies in relation to private care for injuries arising from tortious acts,

because of concerns by private medical insurers that their outlay may not be recoverable from the tortfeasor. This concern could be offset by ensuring that any contractual right to recoupment is enforceable regardless of the nature of the insurance concerned, as suggested at paragraph 124 of chapter 4.

- The provision of care packages could create a two-tier system in the NHS with claimants in personal injury cases being given preferential treatment over other patients.
- There would be worries about the security of long-term care arrangements. There is no guarantee that care packages arranged now would remain viable several years ahead. Where the NHS is providing a care package, commissioning and managing the package at national level would enable a claimant to be satisfied that it would reliably provide care at an agreed level for what could be a significant amount of time.
- Repeal of section 2(4) could lead to uncertainty in the assessment of damages, and lead to more arguments and increased litigation over whether or not private medical care was reasonable for a particular claimant.
- In clinical negligence cases, claimants may not wish to have an ongoing relationship with the organisation which has injured them. It could be seen as invidious for a claimant injured as a result of negligence on the part of the NHS to be forced to depend on it for his or her future needs.

Other options

162. As an alternative to repeal, another option might be to amend section 2(4) to provide for the possibility of an order for private care being made in exceptional circumstances, for example where it was not possible to provide a package of care, or where a package had been provided but the arrangements had broken down. However, in the latter case it would be necessary to return to court for a further order. There may also be disagreement between the parties as to whether arrangements had actually broken down.

163. A further option would be for the current system to continue but for a requirement to be introduced for the defendant or insurer to pay the costs of care directly to the provider rather than to the claimant. This would ensure that only the actual costs of care were paid. This would provide greater certainty

that the claimant's care needs would continue to be met and avoid any difficulties that might arise relating to changes in the cost of the care provided or rates of inflation. It would benefit defendants and insurers where the actual payments required were less than would have been awarded, and claimants where they were more than anticipated.

Q22

Do you consider in principle that section 2(4) should be repealed? If so, how might a new system of care packages work? What difficulties would need to be addressed in developing such arrangements?

Q23

What benefits or drawbacks might there be for:

- a) claimants**
- b) defendants**
- c) the taxpayer?**

Q24

How could any new system ensure that claimants and their carers retain a sense of control over the care provided?

Q25

If section 2(4) is retained, is any action needed to avoid possible over-compensation and to ensure that damages for the cost of care are used appropriately? If so, would a requirement for the defendant to pay directly to the provider of care be appropriate?

The interface between the public and private provision of care and accommodation services

164. Many of the considerations set out above also apply where public bodies such as local authorities have a statutory duty or statutory obligation to the claimant to provide care and accommodation services.

165. The Government is grateful to the Civil Justice Council's Serious Injury Committee for the consideration that they have given to this issue, which is reflected in the following discussion.

166. In large value personal injury claims the interface between public and private provision of care and accommodation services has recently raised considerable difficulties. In short, the issue is whether the tortfeasor should bear all the reasonable costs of an injured claimant's future care and accommodation needs (as the law currently provides and for which insurers collect premiums), when in some cases one or more public authorities are under a statutory duty to assess the claimant's needs, and may, in some circumstances, also be under a statutory obligation to provide the claimant with services to meet those needs (sometimes being able to recover the costs of doing so from the claimant).

167. This issue was highlighted in the 2004 case of *Sowden v Lodge*³⁵, which concerned a claimant who had suffered severe brain damage in a road accident. The issue before the court was whether she should continue to be accommodated in sheltered accommodation provided by her local authority, or should receive damages to fund a private arrangement for accommodation and care in her own home. The court held that the test to be applied in deciding the issue was whether the care and accommodation chosen and claimed for by the claimant was reasonable. To reach a view on this, the approach was to compare what a claimant could reasonably require with what a local authority was likely to provide. If the second fell significantly short of the first, the tortfeasor would have to pay for the different regime (or pay any sum necessary to augment the local authority provision). The court indicated that there was no burden on the claimant to disprove that statutory provision would be adequate. This meant that the burden of establishing whether the claimant's future care needs could and would be met by a local authority free of charge fell to the defendant.

³⁵ [2004] EWCA Civ 1370

168. This approach has proved very difficult to apply in individual cases, and has resulted in conflicting case law. For example, in *Freeman v Lockett*³⁶ the court rejected the defendant's argument that damages should be reduced on the basis that the claimant would continue to receive funded public care. In *Redhead v Rawcliffe*³⁷, the court noted that there was no evidence regarding the current policy of the Authority and said that the effect of reducing the claimant's award to reflect the local authority's obligation to meet his needs for domiciliary care would be to transfer part of the liability of the tortfeasor onto the State, which it considered was unlikely to have been Parliament's intention. It therefore did not reduce the award for the claimant's future care to reflect the possibility that direct payments might continue to be paid to him by the local authority to meet the cost of care.

169. However, in *Crofton v NHSLA*³⁸ it was decided at first instance that the local authority should continue to pay £68,000 per annum for the claimant's care and that this amount should be offset against the claimant's annual care needs. This decision has recently been upheld by the Court of Appeal³⁹; but in its judgment the Court commented (while recognising that any change to the law was a matter for Parliament) that "It does not seem right, particularly where the care costs are very large, that they should be met from the public purse rather than borne by the tortfeasor. We can see no good policy reason why damages which are about to be awarded specifically for the provision of care to the claimant, needed only as a result of the tort, should be reduced, thereby shifting the burden from the tortfeasor to the public purse."

170. Various practical difficulties arise in this area. Evidence on the interface issue can take two to three days to hear at trial, which is expensive in court time. The parties also have to bear the not insignificant costs of investigating the possible State provision and whether it will meet the claimant's needs. This is compounded by the very different approaches taken by local authorities and PCTs towards the assessment of claimants' needs. Many take a considerable time to carry out an assessment, and some decline to do it at all if the claimant has received an interim payment from the tortfeasor. Others change their minds during the conduct of the case over whether they will seek recoupment of their outlay from the claimant if the claim succeeds (*Freeman v Lockett*) and there has also been one reported attempt by a local authority to recoup the

³⁶ [2006] EWHC 102 (QB)

³⁷ [2006] EWHC 2965 (QB)

³⁸ [2006] All ER (D) 104

³⁹ [2007] EWCA Civ 71

sums paid for care directly from the tortfeasor (*Islington LBC v University College London Hospital NHS Trust*)⁴⁰.

171. If claimants are fully or partly dependant on State care or provision, they live with the risk that changes in policy or funding will mean a reduction in, or even a withdrawal of, the provision, yet if this happens they cannot invite the court to reopen the damages award. Claimants also have no control over the quality of the State service provided, and even if they decide to 'top up' the State provision by using their damages to buy in additional services, they will face the problem of co-ordinating very different regimes provided by different agencies. Also changes may occur in what the local authority or PCT provides. Finally if claimants relocate to a different local authority or PCT area with different policies and funding criteria, or move abroad, again they may lose the provision with no possibility of reopening the damages award. For these reasons, most claimants consider that receiving damages from tortfeasors to buy the services they need gives them reasonable certainty that the funds will be sufficient to cater for their needs into the future. It also gives them control over the selection, quality and co-ordination of the services they are paying for.

172. From the other perspective, insurers are concerned about the increasing size of the awards made to claimants in very serious injury cases and about the rising cost of insurance premiums, which in turn affects premium payers. They consider that claimants should take advantage of State services when they are on offer, that the courts should assess whether those services are likely to be available into the future, and whether the claimant will continue to use them. Insurers are also concerned about the risk of 'double-funding' when the claimant's damages award covers the full cost of the services needed by the claimant, but in fact the claimant chooses to accept the services provided by the State, especially if these are not means-tested. Claimants, on the other hand, are concerned that if the law was changed to allow public bodies to take damages awards into account then public bodies providing traditionally non-means-tested benefits or services might seek to take part of the damages award into account on a 'like for like' basis.

173. In line with the policy set out in the chapter on collateral benefits, the Government believes that the tortfeasor should pay for the costs of care

⁴⁰ [2005] EWCA Civ 596

wherever possible. But those costs should be based on providing appropriate treatment in a cost-effective way.

Q26

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

Q27

How could the practical difficulties surrounding the assessment of what care is appropriate be resolved in a clear and cost-effective way that enables claimants and those close to them to retain a sense of control?

174. The Government will consult further on any proposals that are developed following this consultation. We would also be grateful for any information on the costs of the current system and on potential costs for any proposals discussed in this chapter or on any proposals you put forward in response to this chapter. This will inform the development of a RIA that will accompany any future consultation paper on these issues.

Chapter 6 – Accommodation expenses

175. This chapter considers the Commission's recommendations on accommodation expenses in its report *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits*.
176. The issue of accommodation expenses arises where a claimant either needs to purchase a new property because of the injury or requires the existing accommodation to be altered in some way to enable him or her to continue living at home. The cost of alterations (where these do not increase the value of the property) and any extra costs in connection with the purchase of the new accommodation are recoverable. However, problems arise over how damages should be calculated to avoid over-compensation or under-compensation where the alterations or the purchase of new accommodation results in an increase or decrease in the value of the claimant's property.
177. In relation to the purchase of new accommodation, in *George v Pinnock*⁴¹ it was held that the claimant was not entitled to a capital sum for this as she still had the capital in the form of the accommodation. Instead it was held that the claimant was entitled to be compensated for any annual loss of income from the capital expended on the new property, or notional outlay by way of annual mortgage interest, which would exceed what the cost of the accommodation would have been but for the accident.
178. In the leading case in this area, *Roberts v Johnstone*⁴², the Court of Appeal considered the rate that should be used in determining the amount of compensation a claimant should be awarded. It decided that this should be by reference to the rate of return on a risk-free investment and that at that point a rate of two per cent was appropriate. The House of Lords subsequently varied this rate to three per cent in *Thomas v Brighton Health Authority*⁴³ and indicated that changes from time to time in the discount rate should be reflected in the *Roberts v Johnstone* calculation.

⁴¹ [1973] 1 WLR 118

⁴² [1989] QB 878

⁴³ Reported with *Wells v Wells* [1999] 1 AC 345

179. There is conflicting case law about how increases in value should be dealt with where alterations are made to the claimant's property, or adaptations are made to a new property which is bought. *Roberts v Johnstone* suggests that the claimant may claim for the cost of the alterations but would have to give credit for the increase in market value. However *Willett v North Bedfordshire Health Authority*⁴⁴ indicates that the alterations may be considered to be part of the capital cost of the property and included in the calculation of the annual loss of income.
180. A major problem with the *Roberts v Johnstone* method is that claimants may not receive enough capital to purchase the new property at the outset. In some cases they may have capital of their own, but where a mortgage is used to pay for the shortfall the claimant will lose out because the discount rate will be lower than the mortgage interest rate. If claimants have to use damages awarded to them under other heads of claim that would leave them under-compensated in these areas.
181. In addition, the method adopted in *Roberts v Johnstone* involves the need to estimate life expectancy. The uncertainties surrounding calculations of life expectancy were a major factor in the Government's decision to introduce the power in the Courts Act 2003 for the court to order periodical payments. In accordance with that policy it would also be desirable to move away from the *Roberts v Johnstone* approach if possible to reduce further the circumstances in which artificial and uncertain estimates of life expectancy are needed.
182. The Commission considered and rejected a number of options for reform of the current method. One was the 'discounted cash flow' method, which would recognise the loss as an immediate capital loss, but would require credit to be given for the eventual capital 'windfall' to the claimant's estate. The capital loss exists because the claimant's money is tied up in the property and cannot be spent. The difficulty which the Commission identified with this method was that predictions need to be made about the future sale value of the property on the claimant's death and an accurate discount rate for that value would need to be established. Also the claimant may still not be awarded sufficient money to purchase the new accommodation, and so this method would be little better than the present one.

⁴⁴ [1993] PIQR Q166, Q173

183. Another possibility was to give the claimant sufficient money to purchase the new accommodation and to return the windfall to the defendant on the claimant's death. The Commission identified a number of ways that this could work: for example the defendant could have an equitable interest in the property, or they could buy it outright and give the claimant a life interest. However, the Commission considered that claimants might well have concerns about maintaining a relationship with the defendant, and would not want them to have any direct interest in the property that they live in.
184. Therefore, the Commission thought that a better solution might be for the property to vest in a trustee, who would hold it on trust for the claimant with a remainder to the defendant as beneficiary. However, it rejected this approach too, as there could be difficulties in ensuring that the claimant was free to move house, as the trustee could not be compelled by the beneficiary to sell the property unless the trustee's powers of sale had been delegated.
185. The main option identified by the Commission was for the defendant to pay the extra capital cost of purchasing the new property at the time of trial. In return he or she would receive a charge over the property for the amount paid, repayable on the claimant's death, or when the accommodation was otherwise not needed by the claimant. The proposal was complex and attempted to take account of a number of possible issues. In particular, where the claimant had already purchased the new property pre-trial with a mortgage, the claimant would be obliged to pay off that mortgage when the damages were awarded where this was necessary to preserve the security of the defendant's 'loan' of the damages.
186. The proposal also suggested that the defendant's charge would be capable of being transferred from one property to another, thus allowing the claimant to move house freely; that the claimant could redeem the charge over the house at any time, by paying back the money to the defendant, and that the defendant should have the power to require repayment on the claimant's death, or once the claimant no longer required the accommodation. However, where family members of the claimant remained in the house after the claimant's death, they would be able to delay the sale for up to one year, and the court would have an unfettered discretion further to delay the sale.
187. The Commission considered that the complexity of this scheme rendered it unworkable. It concluded that claimants would not choose such a scheme and that it would be wrong to impose it. However, in principle it could be seen as a fairer method than the existing one, particularly as it does not rely upon an

estimation of future house prices, or of the claimant's life expectancy. There is no possibility that the claimant may be under-compensated by not receiving enough capital for the initial purchase of the new accommodation. There would be no risk that claimants would have to use money awarded under other heads of damage to cover accommodation costs, and the defendant would not be unduly punished, as he or she would ultimately receive the money back, perhaps adjusted to reflect any changes in market value.

188. However, the Government also recognises that this would raise concerns about the potential short-term cost to defendants. The procedures for administering and redeeming charges could be cumbersome and cause significant legal expense, and could require files being kept open, often for a considerable length of time. It would not, however, be necessary for defendants to make a lump sum capital outlay as they could choose to fund the accommodation through a mortgage. In addition, the ability of the defendant to require repayment through, for example, sale of the property after the claimant's death could raise difficult issues. For example, defendants could come under criticism for requiring sale of the property where this was still occupied by members of the claimant's family.

189. If the approach were to be used, alterations to property could also be dealt with within it. If the alterations increased the value of the property the claimant could recover the cost of the adaptations, but the defendant would receive a charge for the increase in value. If there were a decrease in the value, damages could be awarded to cover this decrease, as the Commission suggested. However there is also the question of how to place a value on the alterations. It may be possible for a house survey to be used to determine the increase or decrease in value to the house consequent on the adaptations.

190. The Commission also considered and rejected the option of simply awarding the extra capital cost of the purchase or alterations to the claimant regardless of the possibility of over-compensating the claimant or creating a windfall to their estate. Although this approach could be criticised as unfair to defendants and likely to lead to over-compensation, this would be offset by the fact that it would remove the need for complex legal argument over the calculation of damages or administratively cumbersome methods of securing recovery of capital payments. Savings on the cost of these processes could arguably benefit both parties and offset the additional payment in damages that would be incurred by the defendant.

191. The RIA at Annex C seeks views on the possible costs and benefits of the options of giving the defendant a charge over the property or of awarding the extra capital cost to the claimant without any *Roberts v Johnstone* calculation or provision for recovery.

Q28

Do you consider that giving the defendant a charge over the property would be a possible alternative to the *Roberts v Johnstone* method in relation to the purchase of new accommodation and the cost of altering the claimant's existing property?

Q29

Alternatively, should the claimant simply be awarded the appropriate extra capital cost without any *Roberts v Johnstone* calculation or provision for recovery? If not, do you have any other suggestions for dealing with this issue, or do you consider that the current system should remain in place?

192. The Commission also considered the position where the money to finance the pre-trial purchase of the property had been provided gratuitously by a third party, for example the parents of the claimant. As consultees advised that this was seldom a problem in practice, it did not consider that any provision to require the claimant to hold these damages on trust or account to the third party for them was needed. It also considered that the current law made it sufficiently clear that the incidental costs associated with moving house are recoverable, and that there was no need to provide the courts with a power to determine the beneficial interests in the property at the time of trial. The Government agrees with all these recommendations.

Q30

Do you agree that no action is necessary in respect of these issues?

Chapter 7 - Aggravated, exemplary and restitutionary damages

193. This chapter considers the recommendations in the Commission's report *Aggravated, Exemplary and Restitutionary Damages*.

194. The Commission made a number of recommendations with the aim of clarifying the law on these issues. In November 1999, the Government announced its acceptance of the recommendations on aggravated and restitutionary damages, but indicated that it had decided not to take forward the Commission's proposals for legislation to extend the availability of exemplary damages (also known as punitive damages). Subsequent case law has clarified a number of issues in relation to aggravated and restitutionary damages, and we consider it appropriate to reconsider those recommendations in that light.

195. These three types of damage all have different aims. Aggravated damages aim to compensate the victim of a wrong for mental distress (or 'injury to feelings') in circumstances in which that injury has been caused or increased by the manner in which the defendant committed the wrong, or by the defendant's conduct subsequent to the wrong. Exemplary damages aim to punish the wrongdoer. Restitutionary damages aim to strip away some or all of the gains by a defendant arising from a civil wrong (restitutionary damages may perhaps better be described as restitutionary relief, but for the purposes of this paper the term used in the Commission report has been adopted).

Exemplary damages

196. It remains the Government's view that the availability of exemplary damages in civil proceedings should not be extended beyond the limited instances in which they are currently available under the common law, namely in the case of oppressive, arbitrary or unconstitutional action by a public servant and where the tortfeasor's conduct was calculated to make a profit which might well exceed the compensation payable to the claimant. These categories were established in the case of *Rookes v Barnard*⁴⁵. In *Kuddus v Chief Constable*

⁴⁵ [1964] AC 1129

of *Leicestershire Constabulary*⁴⁶, the House of Lords disapplied the cause of action rule formulated in *AB v South West Water Services Ltd*⁴⁷ which had further restricted the availability of exemplary damages. The cause of action rule held that exemplary damages could only be granted if the cause of action was one for which exemplary damages would have been awarded prior to 1964 (i.e. before the case of *Rookes v Barnard*). However, the House of Lords decision did not create any new causes of action where exemplary damages can be claimed.

197. The decision in *Kuddus* opens up the possibility of claims for exemplary damages in a much wider range of cases involving the existing common law causes of action. A recent example of this is the Court of Appeal decision in *Borders (UK) Ltd and others v Commissioner of Police of the Metropolis and Another*⁴⁸. The key issue in this case was whether exemplary damages could cover quantified losses. However, in considering the issue, the Court of Appeal affirmed that exemplary damages were legitimately available wherever one of the categories established by *Rookes v Barnard* was fulfilled.

198. The Government accepts the decision in *Kuddus*, which represents a sensible change removing an arbitrary restriction on claims, but considers that there should be no further lessening through statute of the restrictions on the availability of exemplary damages. The purpose of the civil law on damages is to provide compensation for loss, and not to punish. The function of exemplary damages is more appropriate to the criminal law, and their availability in civil proceedings blurs the distinctions between the civil and criminal law. The Government does not intend any further statutory extension of their availability.

199. The one existing statute which allows an award of exemplary damages is the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951. That Act gives protection to people serving in the armed forces by providing that various civil judgments cannot be enforced against them without the permission of the court. Under section 13 of the Act, if someone acts without the court's permission and a claim is brought against them, the court may award exemplary damages. This provision is clearly anomalous, and it is proposed to replace the term 'exemplary damages' with 'aggravated damages' (which would accord with the view of the Act expressed by Lord Kilbrandon in *Broome*

⁴⁶ [2002] AC 122

⁴⁷ [1993] QB 507

⁴⁸ [2005] EWCA Civ 197

*v Cassell*⁴⁹). This would remove the anomaly and ensure that the provision of exemplary damages in civil proceedings is entirely a matter for the common law.

Q31

Do you agree that the term ‘exemplary damages’ in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 should be replaced by ‘aggravated damages’?

Restitutionary damages

200. Restitutionary damages are an exception to the principle of compensation for loss and provide an alternative method of assessing damages. In recent years, there has been an increasing view that restitutionary damages should be available to strip away gains made by the defendant as a result of the wrong committed. The general position taken in the Commission’s report was that the development of the law on restitution for torts and equitable wrongs should be left to the common law, as should the question of whether restitutionary damages should be available for breach of contract. The one area where the Commission recommended legislation was to make clear that in situations where exemplary damages were available, the less extreme remedy of restitution should also be available and determination of whether the defendant’s conduct warranted an award of restitutionary damages should be a matter for the judge and not a jury. However, these recommendations were contingent upon implementation of its other recommendations to expand the availability of exemplary damages, which the Government has rejected, and so we do not consider that legislation on the subject is appropriate.

201. The Commission also recommended that in the context of restitution for wrongs it would be appropriate for judges and practitioners to use the single term ‘restitutionary damages’ rather than ‘action for money had and received’ and ‘account of profits’. In *Attorney General v Blake*⁵⁰, Lord Nicholls preferred to say that the case was one of breach of contract and that the remedy that was called for was an account of profits, rather than treating it as a case of restitution for which the remedy was restitutionary damages. Furthermore, in

⁴⁹ [1972] AC 1027

⁵⁰ [2001] 1 AC 268

the recent case of *Experience Hendrix v PPX Enterprises*⁵¹ the Court of Appeal awarded restitutionary damages but refused an account of profits.

202. We share the Commission's view that the law on restitution for wrongs in general is best left to the courts, and do not believe that there is a need for legislation on any aspect of the law in this area.

Q32

Do you agree that there is no need for legislation in relation to the law on restitutionary damages?

Aggravated damages

203. The Commission's report stated that there was confusion over the purpose of aggravated damages, and in particular whether they could include some element of punishment. It endorsed the view taken by Lord Devlin in *Rookes v Barnard* that the function of aggravated damages is compensatory rather than punitive, and recommended that legislation should make it plain that aggravated damages must not be used to punish the defendant for his or her conduct.

204. The Commission's report did not cite any cases in which the courts had expressly described aggravated damages as punitive. Since the report was published there have been a number of court decisions which have explicitly confirmed that the nature of aggravated damages is compensatory and not punitive⁵². In *Kuddus*, Lord Nicholls distinguished between exemplary damages, which were punitive, and other damages, which were compensatory. The latter included damages for non-pecuniary loss such as mental distress arising from the circumstances in which the tort was committed, for example justified feelings of outrage at the defendant's conduct. Similarly in *Nottinghamshire Health Care National Health Service Trust v News Group Newspapers*⁵³, Mr Justice Pumfrey described aggravated damages as damages which, while awarded with a view to compensating the claimant for loss, had regard to the injury to his proper feelings of pride and dignity,

⁵¹ [2003] EWCA Civ 323

⁵² For example *Khodaparast v Shad* [2000] 1 All ER 545, *ICTS (UK) Ltd v Tchoula* [2000] ICR 1191 and *Richardson v Howie* [2004] EWCA Civ 1127

⁵³ [2002] RPC 49

humiliation, distress, insult or pain caused by the circumstances of the defendant's conduct.

205. While there may still be some element of doubt (see for example the High Court decision in *Shah v Gale*⁵⁴), on balance the Government believes that there is sufficient clarity in the law to obviate the need for any statutory definition clarifying that the purpose of aggravated damages is compensatory and not punitive.

Q33

Do you agree that legislation to confirm that the purpose of aggravated damages is compensatory and not punitive is unnecessary?

206. The Commission also took the view that the co-existence of two heads of claim, for mental distress and aggravated damages, was a source of confusion which it was desirable to avoid. It therefore recommended that aggravated damages should only be awarded to compensate a person for mental distress and that wherever possible the expression 'aggravated damages' should be avoided in favour of the phrase 'damages for mental distress'. It believed that this would clarify that aggravated damages were part of the law on damages for mental distress and would encourage the more coherent development of the law.

207. Although there may be some advantage in using the term 'damages for mental distress' this would not be a straightforward change to make, and legislation would not necessarily improve the situation. Aggravated damages are only part of the law on damages for mental distress: all aggravated damages are damages for mental distress, but not all damages for mental distress are aggravated damages. Thus it would not easily be possible to distinguish cases involving aggravated damages from other situations where damages for mental distress are awarded, such as compensation for pain and suffering in personal injury cases or contractual damages for a ruined holiday. In addition, in no case has the court expressed the view that the term 'aggravated damages' is misleading. On balance, we therefore take the view that it would not be appropriate to legislate on this point.

⁵⁴ [2005] EWHC 1087 (QB)

Q34

Do you agree that legislation is not needed to clarify the interface between aggravated damages and damages for mental distress?

Additional damages

208. 'Additional damages' are provided for under the Copyright, Design and Patents Act 1988. The Act enables the court, in an action for infringement of copyright, design right or performer's property rights, to award such additional damages as the justice of the case may require, having regard to all the circumstances and in particular to the flagrancy of the infringement and to any benefit accruing to the defendant by reason of it. The only other statutory provision enabling an award of additional damages is schedule A1 of the Patents Act 1977, which concerns the provision of false information relating to biotechnological innovations. There has been uncertainty as to how the term should be interpreted.

209. The Commission recommended that, in the context of its proposals to expand the availability of exemplary damages, the provisions of the 1988 Act concerning additional damages should be repealed. It expressed the view that the Act would then be likely to fall within the terms of its general proposal that exemplary damages should be available for statutory civil wrongs if the award would be consistent with the policy of the statute in question. As noted above, the Government has decided that there should be no statutory extension of exemplary damages in civil proceedings. In addition, recent case law on the 1988 Act suggests that the courts regard the award as one of aggravated and restitutionary damages rather than exemplary damages (we are unaware of any reported cases on the provisions in the 1977 Act).

210. The case of *Nottinghamshire Health Care* provides helpful clarification on the issue. In that case, Mr Justice Pumfrey considered whether it was appropriate to include an exemplary element in an award of additional damages under section 97(2) of the 1988 Act. He came to the conclusion that there was no reason why a purely punitive or exemplary award was appropriate, given that the Act established criminal offences in the case of knowing infringement, and given that the infringer might, in the case of concurrent copyright, be exposed to successive actions by the owners of the different copyrights each seeking punishment in respect of their interest. He did, however, hold that section 97(2) permitted an award of aggravated damages on a far wider basis than

was possible under the common law, and in particular allowed an element of restitution having regard to the benefit gained by the defendant.

211. The Government considers that the use of this anomalous term in the 1977 and 1988 Acts is not helpful and believes that it may assist in clarifying the law in this area if the Acts are amended. It would be consistent with the general policy to replace the term 'additional damages' with 'aggravated and restitutionary damages'. This would ensure that damages awarded under the 1977 and 1988 Acts could include, for example, restitutionary elements such as the recovery of profits from the tortfeasor as well as aggravated damages. In this context it might be appropriate to consider whether the remedies available should specifically allow the court to award both damages and an account of profit. Such changes would not affect the potential availability under the common law following *Kuddus* of exemplary damages in cases where the tortfeasor's conduct was calculated to make a profit which might well exceed the compensation payable to the claimant.

212. In the case of *Collins Stewart Ltd and another v Financial Times Ltd*⁵⁵ the Court of Appeal decided that aggravated damages were in principle not available to a corporate claimant because a company has no feelings to injure and cannot suffer distress. In view of the fact that most claims under the 1977 and 1988 Acts are likely to be brought by corporate claimants, in amending the Acts the Government would propose to clarify that aggravated and restitutionary damages under the Acts can be awarded to corporate claimants.

Q35

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

213. The Gowers Review of Intellectual Property, published on 6 December 2006, recommends that the Government considers the way in which the system of damages operates in the context of intellectual property (IP), and in particular that it should seek further evidence to ensure that an effective and dissuasive system of damages exists for civil IP cases and that it is operated effectively.

⁵⁵ [2005] EWHC 262 (QB)

214. The Government has considered the findings of the review and the responses submitted to its call for evidence. Respondents to the review suggested that damages should act as a disincentive to infringement and that the sums of damages awarded for infringement are inadequate. Some of the responses complained that additional damages are rarely awarded by the courts. But it appears that some claimants may believe that the risk of losing a case is too great when weighing up the costs and benefits of bringing an action, and consequently do not bring the case or settle out of court. It is therefore difficult to assess whether courts are refusing claims for additional damages, or whether the cases are reaching them in the first place. Another issue is whether in some cases the remedy may not be the real problem. For example, counterfeiters can be sued for considerable damages already, the real difficulty being catching them.

215. Some rights holders suggested that the current system of damages falls some way short of the 'effective, proportionate and dissuasive' civil remedies required by EU Directive 2004/48/EC on the enforcement of intellectual property rights. However, the evidence submitted to the Gowers Review preceded the making of the UK Regulations to implement the Directive⁵⁶, and therefore did not take account of the impact of those Regulations. We believe that the Regulations fully implement Article 13 of the Directive on damages.

Q36

What are your views on how the system of damages works in relation to:

- a) patents**
- b) designs**
- c) trade marks and passing off and**
- d) copyright and related rights?**

Summary of Changes

216. If the recommendations in this chapter are accepted, the following changes to the law would be made:

⁵⁶ The Intellectual Property (Enforcement etc.) Regulations 2006 (SI 2006 No.1028)

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- the term 'exemplary damages' would be replaced by 'aggravated damages' in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951
- the term 'additional damages' would be replaced by 'aggravated and restitutionary damages' in the Patents Act 1977 and the Copyright, Design and Patents Act 1988, and clarification would be provided that these damages would be available to corporate claimants

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

1. **a) Do you agree that a residual category should be added to the statutory list of those entitled to claim for financial loss?**

b) Do you agree that this residual category should be limited to any person who was being wholly or partly maintained by the deceased immediately before the death?

2. **a) Do you agree that the fact of a person's remarriage or entry into a civil partnership should be taken into account when assessing a claim for damages under the FAA?**

b) Do you consider that the fact of a person's financially supportive cohabitation of at least two years following the death should be taken into account?

c) Do you agree that the prospects of a person's remarriage, entry into a civil partnership or financially supportive cohabitation should not be taken into account in any circumstances (including where the person is engaged)? If not, in what circumstances would it be appropriate to do so?

3. **a) Do you agree that the fact of a person's remarriage or entry into a civil partnership should be taken into account when assessing a claim for damages on the part of any eligible children?**

b) Do you consider that the fact of a person's financially supportive cohabitation of at least two years following the death should be taken into account when assessing a claim for damages on the part of any eligible children?

4. Do you agree that the courts should only take into account the prospect of divorce, dissolution or breakdown in the relationship between the deceased and his or her spouse or civil partner:
 - a) where the couple are no longer living together at the time of the death
 - b) where one has petitioned for divorce, judicial separation or nullity
 - c) where one has begun the procedure for dissolution of the civil partnership?
5. Do you agree that section 3(4) of the FAA should be repealed and replaced by a provision to the effect that the prospect of breakdown in the relationship between the deceased and his or her partner should not be taken into account when assessing damages under the FAA?
6. Do you consider that bereavement damages should continue to be available?
7.
 - a) Do you think it would be appropriate to provide clarification in the explanatory notes accompanying any legislation that the purpose of bereavement damages is no more than a token payment in acknowledgement of grief?
 - b) Are there any other ways in which the purpose of bereavement damages could be explained to the public?
8.
 - a) Do you agree that a parent should only be able to claim bereavement damages for the loss of their child where the child is under 18 and unmarried?
 - b) Do you agree that unmarried fathers with parental responsibility should be able to claim bereavement damages for the loss of a child under 18?

- c) What is your view on whether stepparents who were living with and had caring responsibilities for a child under 18 should be able to claim bereavement damages?**
- 9. Do you agree that children of the deceased (including adoptive children) who are under 18 should be added to the statutory list, but that eligibility should not be extended to adult children of the deceased?**
- 10. Do you agree that brothers and sisters of the deceased should not be eligible to recover bereavement damages?**
- 11. Do you agree that the statutory list should be extended to include people who, although not married to the deceased, have lived with the deceased as husband and wife (or if of the same sex in an equivalent relationship) for not less than two years immediately prior to the accident?**
- 12. Do you agree that engaged couples should not be added to the statutory list of those who can claim bereavement damages?**
- 13. 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?**
- 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?**
- 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?**
- 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?**

14. Do you agree that contributory negligence on the part of the claimant should reduce the award of bereavement damages?
15. a) Do you agree that the preferred outcome in principle when collateral benefits arise is that set out in paragraph 107?
- b) Do you agree that, in general, the best way of achieving this is to disregard the benefit in assessing damages, and to give the payer a right of recovery?
16. Do you agree that no action is required to amend the present law in relation to charitable payments?
17. a) Do you agree that the *Hunt v Severs* trust approach should be replaced by a personal obligation to account?
- b) Do you agree that this should apply to damages for future as well as past gratuitous care?
- c) Do you agree that this should generally apply regardless of the identity of the carer but that (as now) damages should not be awarded for past gratuitous care provided by the tortfeasor?
- d) Do you agree that the FAA should be amended to allow damages to be awarded under the Act in respect of services gratuitously provided to a dependant of the deceased?
18. What are your views on whether the law should be clarified to ensure that:
- a) insurance payments are disregarded in the assessment of damages regardless of who paid the premiums; and
- b) contractual provisions for recovery are enforceable regardless of the nature of the insurance?

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?

- 19. Do you agree that no change is appropriate in the law relating to pensions?**

- 20. a) What are your views in principle on whether the law should be changed so that sick pay is disregarded in the assessment of damages**
 - b) If you consider that any change may be appropriate, should this apply only to sick pay above the statutory minimum?**

 - c) Should there be an exception where the employer is also the tortfeasor?**

- 21. Do you agree that the law on redundancy payments is best left to the courts?**

- 22. Do you consider in principle that section 2(4) should be repealed? If so, how might a new system of care packages work? What difficulties would need to be addressed in developing such arrangements?**

- 23. What benefits or drawbacks might there be for:**
 - a) claimants**

 - b) defendants**

 - c) the taxpayer**

- 24. How could any new system ensure that claimants and their carers retain a sense of control over the care provided?**

25. If section 2(4) is retained, is any action needed to avoid possible over-compensation and to ensure that damages for the cost of care are used appropriately? If so, would a requirement for the defendant to pay directly to the provider of care be appropriate?
26. Do you agree that where there is a statutory duty or statutory obligation on public bodies to provide care and accommodation services to the claimant, the central principle should be that the tortfeasor should pay for the costs of care?
27. How could the practical difficulties surrounding the assessment of what care is appropriate be resolved in a clear and cost-effective way that enables claimants and those close to them to retain a sense of control?
28. Do you consider that giving the defendant a charge over the property would be a possible alternative to the *Roberts v Johnstone* method in relation to the purchase of new accommodation and the cost of altering the claimant's existing property?
29. Alternatively, should the claimant simply be awarded the appropriate extra capital cost without any *Roberts v Johnstone* calculation or provision for recovery? If not, do you have any other suggestions for dealing with this issue, or do you consider that the current system should remain in place?
30. Do you agree that no action is necessary in respect of these issues?
31. Do you agree that the term 'exemplary damages' in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 should be replaced by 'aggravated damages'?
32. Do you agree that there is no need for legislation in relation to the law on restitutionary damages?
33. Do you agree that legislation to confirm that the purpose of aggravated damages is compensatory and not punitive is unnecessary?

34. Do you agree that legislation is not needed to clarify the interface between aggravated damages and damages for mental distress?
35. Do you agree that in the Copyright, Design and Patents Act 1988 and the Patents Act 1977 the term 'additional damages' should be replaced by 'aggravated and restitutionary damages'?
36. What are your views on how the system of damages works in relation to:
- a) patents;
 - b) designs
 - c) trade marks and passing off
 - d) copyright and related rights?
37. Do you agree that the assumption that bereavement damages will be claimed in 50 per cent of circumstances is accurate?
38. Do you agree with the analysis of costs to the insurance industry? In particular, in what proportion of motor accidents and employer's liability cases do you consider that bereavement damages claims are made? Are there any other costs and benefits to be considered?
39. Do you agree with the analysis of the costs to the NHS? Are there any other costs and benefits to be considered?
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?

41. Do you have any views or information on the likely cost to the NHS of the proposal to extend the list of claimants entitled to make a claim for financial loss under option 2?
42. Do you have any views on how the proposals outlined in this consultation paper should be monitored?
43. Do you have any views or information on the likely costs of implementing any of the proposals outlined in the costs section of the RIA? In particular:
- 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?
 - b) In how many cases does the claimant receive commercial or other care that would otherwise have been provided by the defendant?
 - c) In how many FAA cases was gratuitous care provided to a dependant by the deceased?
 - 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?
 - 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?
 - 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?
44. Do you have any views on how the proposals relating to accommodation expenses should be monitored?

Thank you for participating in this consultation exercise

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

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

How to respond

Please send your response by 27 July 2007 to:

Andrew Filis-Yelaghotis
Department for Constitutional Affairs
Legal Services Regulation and Redress Division
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54-60 Victoria Street
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Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.dca.gov.uk/index.htm>

Publication of response

A paper summarising the responses to this consultation will be published in October 2007. The response paper will be available online at <http://www.dca.gov.uk/index.htm>

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to

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information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Annex A - Wrongful death and bereavement damages partial Regulatory Impact Assessment

Title of proposal

This Regulatory Impact Assessment (RIA) considers recommendations made by the Law Commission (the Commission) to reform the Fatal Accidents Act 1976 (FAA), and the Government's own proposals.

Purpose and intended effect

Objectives

The Commission's proposals for reforming the FAA include extending the categories of claimants eligible to claim financial loss and bereavement damages. There are also proposals relating to the amount of bereavement damages and a number of other issues.

The proposals aim to modernise the existing legislation to reflect the views and values of modern society. The Commission stated that the review of the FAA was not motivated by dissatisfaction with the general scheme which it embodied, but was in response to calls for reform to a number of aspects of the law relating to claims under it. Those affected by the proposals will include both claimants and defendants. Defendants will commonly include insurers and the NHS.

Background

The purpose of the FAA is to provide compensation in case of a wrongful death for the financial losses of persons who were dependent on the deceased. It also enables the recovery of bereavement damages and reasonable funeral expenses.

The FAA provides for a fixed list of persons to be entitled to claim damages for financial loss. The Commission considered that this list is too restrictive and should include in addition, a 'residual' class of persons. This would comprise "any person who was being wholly or partly maintained by the deceased immediately

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before the death or who would, but for the death, have been so maintained at a time beginning after the death”.

The Commission gave examples of people who could potentially have been supported by the deceased - for example, those who had lived together as husband and wife for less than two years; same sex couples; stepchildren of cohabiting relationships; the children of friends; distant relatives and non-relatives who live in the same household.

The Commission also recommended that section 3(3) of the FAA, which concerns the position of widows, should be repealed. At present, a widow's remarriage or prospects of remarriage are not taken into account when assessing damages in respect of the death of her husband.

The Commission proposed instead that the fact of a dependant's remarriage or entry into a 'relevant relationship' (i.e. living together as husband and wife, or in an equivalent same sex relationship) should be taken into account, but that unless the person is engaged to be married at the time of trial their prospects of remarriage should not be taken into account.

The other major reform proposed by the Commission concerns bereavement damages. At present, only the deceased's spouse, civil partner, or, if the deceased was under eighteen and had never been married, the deceased's parents (including adoptive parents) can recover bereavement damages. The Civil Partnership Act 2004 amended the FAA to allow registered partners to claim bereavement damages on the same basis as spouses (from the date of implementation of the 2004 Act).

The Commission recommended that the statutory list should be extended to include children of the deceased (including adoptive children); a brother or sister of the deceased (including an adoptive brother or sister); a person who immediately before the death was engaged to be married to the deceased; and any person who had lived with the deceased as husband and wife (or in an equivalent same sex relationship) for not less than two years immediately prior to the death.

In addition, the Commission recommended that the award of bereavement damages should be uprated to £10,000 per claimant, with a maximum of £30,000 payable in respect of each deceased person, and that if the number of people receiving this award was more than three, then the £30,000 should be shared equally amongst them. The recommendation to increase the award to £10,000 has

been dealt with in a separate impact assessment, and has been implemented for cases where the cause of action accrued on or after 1 April 2002.

The Government's proposals

The Government's proposals would instead extend the availability of damages for financial loss to any person who was being wholly or partly maintained by the deceased immediately before the death, but not to those who would have been so maintained at a time beginning after the death. It proposes only to extend the list of those eligible to claim bereavement damages to include cohabitants who have lived together for at least two years and children under 18 in respect of the death of a parent.

The award of £10,000 would be preserved for the deceased's spouse or cohabitant (or for the parents of an unmarried child under 18). An additional sum of £5,000 would be available to each of the deceased's children under 18, and no maximum limit would be imposed. It is also proposed that the fact of a claimant's remarriage or entry into a civil partnership or a financially supportive cohabitation of at least two years following the death should be taken into account, but not the prospects of remarriage (even of an engaged person).

These changes would apply in respect of fatal accidents occurring on or after the date of implementation of the provisions.

Rationale for Government intervention

At present, many categories of people who are dependent upon or in a close relationship with a person wrongfully killed are unable to claim. For example, someone who has cohabited for less than two years cannot claim damages even though they were financially dependent on their deceased partner. Without any reform, these people would continue to go uncompensated.

The Commission's recommendations would enable many more people to make a claim than at present. They would also increase significantly the amount paid out in bereavement damages and, to a lesser extent, in claims for financial loss.

The Government does not propose to implement the Commission's recommendations in full. It does not propose to implement the proposal to extend the ability to claim for financial loss to those who would have been wholly or partly maintained by the deceased at a time after the death because this could

encourage speculative claims that would be difficult to prove or disprove. It also does not propose to extend bereavement damages to all the categories of claimant proposed by the Commission. This is because a finite limit must be placed on the sums awarded, and any increase in the categories of eligible claimants should not result in the dilution of the award to family members who are likely to be closest to the deceased, such as their spouse and minor children.

If the Government's proposals were taken forward more categories of people, who are close to the deceased, would be able to make a claim for financial loss or bereavement damages, than can at present. However, the increase in cost would be less than under the Commission's proposals.

Consultation

We consulted with a number of Government departments whose policy was affected by the recommendations, as well as the Association of British Insurers (ABI) to consider the impact on the insurance industry. The only Government department that considered that the recommendations would affect them was the Department of Health, and details were supplied by the National Health Service Litigation Authority (NHSLA). The responses we received focused primarily on the recommendations on bereavement damages as these were considered to have the most significant cost implications.

Options

The following options have been considered:

Option 1: accept all the Commission's recommendations as contained in the draft Bill attached to its report.

Option 2: extend the list of persons able to make a claim for financial loss and bereavement damages, and provisions on the amount of the bereavement damages award, only as far as is set out in the section on the Government's proposals above.

Option 3: make no change.

Costs and benefits

Sectors affected

The following groups have been identified with an interest in the proposals:

- Claimants - any individual who suffers the loss of a family member, or any other person on whom they were financially dependent, as a result of the wrongful act or omission of another person
- defendants - any individual or organisation subject to a claim for damages in such circumstances
- insurers - mainly general insurers and Medical Defence Organisations (MDOs)
- taxpayers
- public Sector NHS.

Equality impact

The proposals have been screened for impact on equalities. On the evidence available, we do not consider that any of the options impact differentially on individuals or groups within the population according to their ethnicity, religion, disability, age, gender or sexual orientation. Accordingly, it is our belief that no full equality impact assessment is required.

Benefits

Option 1: accept all the Commission's recommendations as contained in the draft Bill attached to its report

Option 1 would allow many more people to claim compensation for financial loss or to receive bereavement damages than at present. It would also raise the maximum level of bereavement damages to £30,000 in respect of each deceased person. The Commission believed that this would avoid under-compensating those grieved by the death of the deceased and ensure that all dependants and a range of relatives are able to claim compensation.

Option 2: accept in part the Commission's recommendations - extend the list of persons able to make a claim for financial loss and bereavement damages, and provisions on the amount of the bereavement damages award only as set out in the section on the Government's proposals above.

Option 2 would extend to a more limited extent the statutory lists of those able to receive compensation for financial loss or bereavement damages and the total amounts awarded. It would ensure that all those actually dependant on the deceased at the time of death could claim, and that bereavement damages were available to those closest to the deceased. It would avoid the possibility of speculative claims and recognise the need for a finite limit to be placed on bereavement damages awards.

The main social benefits are that the list of those able to claim bereavement damages and compensation for financial loss would be extended more widely. These changes would provide a fairer and more certain system, which is in line with the values of modern society.

Option 3: make no change

Option 3 would offer some economic benefit to defendants by saving them the additional costs arising under the other options. However, the Government does not believe that this outweighs the social benefits of the changes proposed under option 2.

Costs

Option 1

If option 1 were implemented, the number of compensation claims for financial loss would be likely to increase, reflecting the extension of the law to those dependants who are currently excluded from making a claim. In addition, under option 1 more people would be able to receive an award of bereavement damages than at present and the maximum total sum claimable would be increased.

The economic costs of accepting all of the Commission's recommendations would be met either directly by the organisation or individual that is responsible for a death or by their insurers. For those with insurance, the impact of any change is likely to be reflected in insurance premiums.

Option 2

As with option 1, the number of compensation claims for financial loss would be likely to increase, again reflecting the extension of the law to those dependants who are currently excluded from making a claim. This would be to a lesser extent than under option 1, reflecting the Government's proposals to implement the Commission's recommendations only in part. Under option 2 there would therefore be some additional cost, but less than would be the case under option 1.

As with option 1, the economic costs of accepting in part the Commission's recommendations would be met either directly by the organisation or individual that is responsible for a death or by their insurers. Again, for those with insurance the impact of any change is likely to be reflected in insurance premiums.

There may be a cost saving for defendants and insurers from the proposal that the fact of a dependant's remarriage, engagement or new cohabiting relationship should be taken into account in assessing damages. It has not been possible to quantify this, but it is likely to be very small.

Option 3

Option 3 would involve no economic cost, but would carry significant social disbenefits. A range of claimants would continue to be deprived of the opportunity to claim under the FAA for the loss of someone upon whom they were dependent or with whom they were in a close relationship.

Estimated costs using Option 2 as the model

Bereavement damages - motor liability

The Department for Transport reports that in 2005 there were 3201 fatalities in road accidents in England and Wales. Of these, 141 were children, and the remaining 3060 were adult. However, not all fatal accidents will involve a claim for bereavement damages: for example, not all accidents will involve negligence and not all adults who lose their lives will be cohabitants or will have children under 18. For the purposes of the RIA we have therefore assumed that bereavement damages will be claimed in 50 per cent of cases.

Q37

Do you agree that the assumption that bereavement damages will be claimed in 50 per cent of circumstances is accurate?

Extending to children

The average number of children a woman has in her lifetime is 1.80. Based on these figures 3060 adult fatalities would result in 5,508 people losing a parent per year, if all the adults who died had 1.80 children on average at the time of the accident. However, in practice this will not be the case, and in addition a proportion of accidents will involve single men with no children. On that basis, a more accurate figure may be half of this, i.e. 2754.

Under option 2 only children under 18 would be able to make a claim for loss of a parent. In 2005 the Office for National Statistics (ONS) estimated that the population was around 53.4 million and that 12,394,900 of these people were children under the age of 18. This means that approximately 23.21 per cent of people in England and Wales were under 18. Therefore, if 2754 people lose a parent, on average 639 would be under 18 and thus would potentially be able to make a claim. However, as noted above not all road fatalities will result in a claim. Applying the assumption that 50 per cent of the potential claimants (say 320) will claim for bereavement damages, at £5,000 per child this would cost **£1,600,000**.

Extending to cohabitants

Statistics from the 2004/2005 General Household Survey show that 25 per cent of the population were cohabiting, and of those 49 per cent were unmarried, therefore, on average 375 of the adult fatalities would have been cohabiting and unmarried.

From figures by the ONS showing *duration of past cohabitations which did not end in marriage by number of past cohabitations and sex*, taken from the 2004/2005 General Household Survey, we can estimate that approximately 62 per cent of cohabitants live together for two years or more. Therefore on average 232.50 (say 233) of the adult fatalities would have been cohabiting for two or more years.

On the assumption that 50 per cent of these (say 117) will claim bereavement damages, at £10,000 per cohabitant this would cost **£1,170,000**.

Bereavement Damages - Employer's Liability

The Health and Safety Executive reports that in 2005/2006 there were 175 fatalities in the work place in England and Wales. However, as is the case with motor accidents, not all fatalities will involve a claim for bereavement damages. If it is assumed again that 50 per cent of these accidents will involve a bereavement damages claim, the cost of extending the list under option 2 is calculated below.

Extending to children

The average number of children a woman has in their lifetime is 1.80 (see analysis above). Based on this figure, 175 fatalities would result in on average 315 children losing a parent per year. However, on the basis adopted for road traffic accidents, a more accurate figure is likely to be half of this, i.e. 158.

Under option 2, only children under 18 could make a claim for loss of a parent. As observed above, it is estimated that 23.21 per cent of the population of England and Wales is under 18. Therefore, of the 158 people losing a parent on average 36.67 (say 37) would potentially be able to make a claim for the loss of their parent. Applying the assumption that 50 per cent (say 19) will claim bereavement damages, at £5,000 per child this would cost **£95,000**.

Extending to cohabitants

As noted above, the General Household Survey suggests that 25 per cent of the population are cohabiting, and of those 49 per cent are unmarried. This means an estimated 21.44 of the fatalities in the work place would be cohabiting. Of those, 62 per cent would have been cohabiting for more than 2 years, therefore on average 13.29 (say 13) of the fatalities give rise to potential claims for bereavement damages. On the assumption that 50 per cent (say 7) will claim bereavement damages this would result in a cost of **£70,000**.

Bereavement Damages - Public Liability

The Health and Safety Executive found that in the year 2005/2006 there were 91 fatal injuries to members of the public⁵⁷. It is not known how many of these actually gave rise to a public liability claim, nor what proportion were adults or children.

⁵⁷ <http://www.hse.gov.uk/statistics/overall/fat10506.pdf>

Without this information we cannot do a full analysis of the costs that may arise from implementing the proposed changes. However, if it was assumed that all of these fatalities gave rise to public liability and the victims were all children under 18 or married adults, there would be no extra costs involved as parents and spouses may already bring a claim under the FAA.

Alternatively, if it is assumed that the victims are all adults, it is then possible to estimate the maximum costs involved as a result of extending the categories of claimants to children under 18 and cohabitants.

Extending to children

The average number of children a woman has in their lifetime is 1.80 (see analysis above). Based on this figure, 91 fatalities would result in on average 163.8 (say 164) children losing a parent per year. However, on the basis adopted for other types of accident, a more likely figure is likely to be half of this, i.e. 82.

Under option 2, only children under 18 could make a claim for loss of a parent. As observed above, it is estimated that 23.21 per cent of the population of England and Wales is under 18. Therefore, of the 82 people losing a parent on average 19.03 (say 19) would potentially be able to make a claim for the loss of their parent. Applying the assumption that 50 per cent (say 10) will claim bereavement damages, at £5,000 per child this would cost **£50,000**.

Extending to cohabitants

As noted above, the General Household Survey suggests that 25 per cent of the population are cohabiting, and of those 49 per cent are unmarried. This means an estimated 11.15 of the fatalities giving rise to public liability would be cohabiting. Of those, 62 per cent would have been cohabiting for more than two years, therefore on average 6.91 (say 7) of the fatalities give rise to potential claims for bereavement damages. On the assumption that 50 per cent (say 4) will claim bereavement damages this would result in a cost of **£40,000**.

Total

The estimated maximum impact on the insurance industry of extending the categories of claimant in bereavement damages cases in line with option 2 is:

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	£
Motor	2,770,000
Employer	165,000
Public	<u>90,000</u>
	3,025,000

Q38

Do you agree with the analysis of costs to the insurance industry? In particular, in what proportion of motor accidents and employer’s liability cases do you consider that bereavement damages claims are made? Are there any other costs and benefits to be considered?

Financial loss

In 2001 the ABI provided information relating to the impact of additional persons claiming for financial loss. The figures below were best estimates and as such have a high margin of error (25 per cent in either direction). They were estimated based on option 1, which is to implement the full range of the Commission’s recommendations.

This means that there would be some reduction for option 2, as that option does not propose to extend the residual list to those who would, but for the death, have been wholly or partly maintained at a time beginning after the death. We anticipate that the result of this would be a reduction of approximately 50 per cent, as there would be much less potential for loosely framed and speculative claims.

	TYPES OF LIABILITY						TOTAL	
	MOTOR		EMPLOYER’S		PUBLIC		1	2
Option	1	2	1	2	1	2		
Additional cost (£m)	6.8	3.4	0.3	0.15	0.2	0.1	7.3	3.65

National Health Service

Bereavement damages

From figures provided by the NHSLA it appears that there are approximately 630 fatal clinical negligence claims against the NHS per year, and the NHSLA estimate that two-thirds of these (i.e. 420) would involve a claim for bereavement damages. From this figure, we can estimate the increase in number of claims under the proposals in the consultation paper, and the associated costs:

	Children	Married People	Cohabitants (unmarried adults in a cohabiting relationship of at least 2 years)	Single Adults (unmarried or in a cohabiting relationship of less than 2 years)
Population in England	11,705,197	6,430,042	3,830,288	28,466,173

The 420 claims already being made can only have arisen from the death of a child or a married person, thus there are 420 fatalities of children and married people per year from clinical negligence (where liability can be established). This is 0.00232 per cent of the population of children and married people in England. Thus in relation to the whole population there is likely to be the following spread of fatalities arising from clinical negligence, assuming that each class of person is equally affected by the same proportion:

	Children	Married People	Cohabitants (adults in a cohabiting relationship of at least 2 years)	Single Adults (unmarried or in a cohabiting relationship of less than 2 years)
Average no. of fatalities	271.56	149.18	88.86	660.42

Extending to cohabitants

From the table above there would be an estimated 88.86 (say 89) fatalities arising from clinical negligence, where the deceased person was in a cohabiting relationship of at least two years. The partners of these people would now be entitled to make a bereavement damages claim. At £10,000 per claim this would cost **£890,000** per annum.

Extending to children

The average number of children a woman has in her lifetime is 1.80 (see analysis above). From the above table we see that the average number of adult fatalities is 898.46. Of the 898.46 fatalities there would be on average 1617.23 (say 1617) children losing a parent per year. However, on the basis adopted for other types of accident, a more accurate figure is likely to be half of this, i.e. 808.5 (say 809).

Under option 2, only children under 18 could make a claim for loss of a parent. As observed above, it is estimated that 23.21 per cent of the population is under 18. Therefore, of the 809 people losing a parent on average 187.76 (say 188) would potentially be able to make a claim for the loss of their parent. At £5,000 per child this would cost **£940,000**.

Therefore the estimated total cost to the NHS in England of extending the categories of claimant in bereavement damages cases under option 2 is approximately **£1,830,000** per annum.

Q39

Do you agree with the analysis of the costs to the NHS? Are there any other costs and benefits to be considered?

It is not possible to say what the effect of the proposals would be on Wales, as each NHS trust handles its own litigation and we have not been able to obtain details of the average number of claims made. The views of consultees on these potential costs would be welcomed, and on the potential costs in relation to clinical negligence claims involving private treatment.

Q40

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?

Financial Loss

As with the costs to the insurance industry, compensation claims for financial loss would increase to some extent due to the extension of the statutory list, whether under option 1 to encompass all dependants, or under option 2 to cover any person who was being wholly or partly maintained by the deceased immediately before his or her death. If the ratio of these costs to the NHS as compared to those falling to the insurance industry were to reflect the estimates for bereavement damages, an increase would result of approximately **£1,405,000**. However, the views of consultees on these potential costs would be welcomed.

Q41

Do you have any views or information on the likely cost to the NHS of the proposal to extend the list of claimants entitled to make a claim for financial loss under option 2?

Administrative burdens and compensatory simplification

The Commission's recommendations to amend the FAA were not intended to increase the burden of the requirements in the FAA either on individuals, organisations or others that may be subject to them; nor would they reduce or revoke the requirements of the FAA.

The recommendations to amend the FAA recognise that certain people are unfairly excluded from claiming damages for the loss of a loved one. The Government believes that the partial implementation of the Commission's recommendations to the extent proposed above will create a fair and socially beneficial system, without creating further administrative burdens or undue cost to the private or public sector.

Equity and fairness

We believe that the proposals under option 2 to widen the categories of claimants able to claim financial loss and bereavement damages following a wrongful death would represent a fair and balanced approach. They will enable compensation to be recovered for financial loss and bereavement damages by a range of claimants, but recognise the need for reasonable finite limits to be set on their availability. It is considered that the changes under option 1 would widen the categories of claimants too far, and would create a greater need to cap the overall cost of claims which could lead to the dilution of awards to those closest to the deceased.

Consultation with small business: the small firms impact test

Additional costs to small firms will be restricted to the presumed increase in insurance premiums. We will be discussing these issues further with small firms during the consultation period and will be actively encouraging them to participate in the consultation. The Small Business Service has been consulted and is content with this approach.

Competition assessment

The competition filter undertaken as part of the competition assessment suggests that there is unlikely to be a negative impact on competition. The market affected by these proposals is the insurance industry.

It is not anticipated that the proposals will have a significantly greater impact on different firms, and thus will not change the market structure. New firms entering the insurance market would not be affected differently from existing firms. The proposals should not prevent the insurance industry from providing services that they otherwise provide.

Legal aid impact assessment

According to the 2005/2006 Legal Services Commission report, 6937 bills were paid for cases where a funding certificate was issued for clinical negligence proceedings in England and Wales (legal aid is not available for other personal injury claims, except for proceedings arising out of allegations of the abuse of a child or vulnerable adult).

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Of these 6937 cases, 6181 reported an outcome; 3676 cases ended with no proceedings being issued; in 1916 cases, proceedings were issued but did not reach a final hearing, and 589 cases went to final hearing or appeal. This indicates that of the cases where proceedings are issued, 30.7 per cent of claims will result in a full hearing or appeal, and overall 90.5 per cent of cases do not reach a final hearing.

Where claimants bring a successful action, the costs of legal aid will be recouped from any award they receive through the statutory charge. The Legal Services Commission does not keep current data on this, but the last available data indicates that 55 per cent of gross costs are recovered.

In order to qualify for legal aid, applicants must, amongst other criteria, satisfy the cost-benefit test. The benefit element of a bereavement damages claim is a financial award fixed at £10,000, whilst the average cost of a clinical negligence case is £14,000, meaning that it is unlikely that legal aid would be awarded for a claim for bereavement damages which is not part of a dependency claim. However, the nature of the additional claimants (children and cohabitants) who would be able to claim under option 2 means that any claim for bereavement damages will almost certainly be accompanied by a claim for a dependency award, which is likely to be significantly higher and therefore satisfy the cost-benefit test.

From the figures on page 110 above, it is estimated that there will be an additional 277 claims for bereavement damages per annum (89 by cohabitants and 188 by children under 18 for the death of a parent). Figures indicate that approximately 50 per cent of households are eligible for legal aid, therefore the following calculations assume that half of these additional claims will be legally aided. All of these are likely to require initial Legal Help, which costs approximately £270; therefore an additional 139 claims would result in an extra cost to legal aid of **£37,530**. On the assumption that all 139 claims receive full representation, this would involve a cost of £1,946,000 (139 x £14,000). However, on the basis that 55 per cent of this cost would be recovered via the statutory charge the net cost would be **£938,700**.

Total

The estimated maximum impact on legal aid of extending the categories in bereavement damages and dependency claims in line with option 2 is therefore:

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Legal Help for claims	37,530
Cost of Representation	<u>938,700</u>
	£966,230

Enforcement, sanctions and monitoring

There are no enforcement measures or sanctions required.

We are considering what monitoring systems would best be put in place, and will include our plans in this area in the final RIA. Views from consultees on the systems that would be appropriate would be welcome.

Q42

Do you have any views on how the proposals outlined in this consultation paper should be monitored?

Summary and recommendation

The Commission proposed to extend the categories of claimant eligible to claim financial loss and bereavement damages and to increase the amount of bereavement damages. For the reasons set out above and in the consultation paper, the Government believes that option 2, of making changes only to the extent proposed in the consultation paper, represents a fair and balanced approach to these issues which should be taken forward. The estimated maximum costs of this option are summarised below.

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Proposal	Total Cost (£)		Total
	NHS	Insurance Industry	
Extending categories of claimants able to claim for financial loss	1,405,000	3,650,000	5,055,000
Extending categories of claimants able to claim bereavement damages	1,830,000	3,025,000	4,855,000

Annex B - Psychiatric illness partial Regulatory Impact Assessment

Title of proposal

This RIA considers recommendations made by the Commission in its report *Liability for Psychiatric Illness*. As indicated in the consultation paper, the Government does not propose to implement these recommendations for various reasons, including the associated costs. This impact assessment provides an estimate of the costs of accepting the Commission's recommendations.

Purpose and intended effect

Objectives

The Commission's recommendations for legislative reform were intended to assist those suffering from negligently inflicted psychiatric illness as a result of the death, injury or imperilment of a person with whom they had a close tie of love and affection in claiming compensation.

Background

The draft Bill attached to the Commission's report made legislative provisions for two new duties of care that would replace the common law duty of care where they overlap but would operate alongside it otherwise. The first was that there should be a duty of care to avoid causing the claimant to suffer a reasonably foreseeable recognisable psychiatric illness as a result of the death, injury or imperilment of another. The second duty of care would be to avoid causing a claimant to suffer a reasonably foreseeable recognisable psychiatric illness as a result of witnessing the defendant causing his or her own (rather than another person's) death, injury or imperilment.

For both duties of care to apply, the Commission indicated that there must be a close tie of love and affection between the claimant and the immediate victim, either at the time of the defendant's act or omission or immediately before the onset of the claimant's illness. The draft Bill set out a list of those who should be

deemed to have had a close tie of love and affection. The list is wider than that currently applicable under the common law (parent, child, spouse and possibly fiancé(e)) and in addition includes siblings and cohabitants. Beyond these categories, it would be for the claimant to establish that they and the immediate victim had a close tie of love and affection at the time concerned.

The Commission recommended that both duties be owed regardless of the claimant's closeness in space and time to the accident or its aftermath, or the means by which the claimant learnt of it. Where the claimant was outside the area of reasonably foreseeable physical injury, the Commission considered that he or she should, as at common law, be under an obligation to show that any psychiatric illness was a reasonably foreseeable consequence of the defendant's conduct. The Commission considered that reasonable foreseeability of harm to the claimant is fundamental to all negligence claims, rather than just those for physical injury. The draft Bill also removed the restriction arising from previous case law that the psychiatric illness must be caused by a 'shock'.

For cases where the defendant was the immediate victim, the Commission considered cases where the injury or death of the defendant was caused either negligently (e.g. car accident through fault of defendant) or deliberately (e.g. suicide). They also considered dangerous activities that may cause harm or death to the defendant but not to others (e.g. extreme sports) and the effects of allowing claims for psychiatric illness in these circumstances. The Commission recommended that whilst the current barriers to claiming should be removed, courts should have the discretion not to impose a duty of care if satisfied that it would be unjust or unreasonable to do so because the defendant had chosen to cause their own death, injury or imperilment. Similarly, a duty of care would not be imposed where the court was satisfied that the claimant voluntarily accepted the risk of suffering the psychiatric illness or excluded the duty of care, or where it would be unjust or unreasonable because the claimant was involved in conduct that is illegal or contrary to public policy.

Rationale for Government not intervening

Increasing the list of those presumed to have a close tie of love and affection for the purpose of compensation for psychiatric illness is likely to increase significantly the number of claims both to the NHS and the insurance industry. Allowing claims to be made in cases where the defendant had chosen to cause their own death, injury or imperilment is also likely to increase the number of claims made.

If the Commission's recommendations are not taken forward by legislation then the common law in relation to psychiatric illness will continue to develop this area on a case by case basis. This may provide slightly less certainty for claimants and defendants than a statutory system, but on the other hand would enable the law to continue to develop in a more flexible way.

Consultation

We consulted with a number of Government departments whose policy was affected by the recommendations, as well as the Association of British Insurers (ABI) to consider the impact on the insurance industry. The only Government department that considered that the recommendations would affect them was the Department of Health, and details were supplied by the NHSLA.

Options

The following options have been considered:

Option 1: introduce legislation as recommended by the Commission to create new duties of care owed to a claimant with a close tie of love and affection. This legislation would also remove certain restrictions that are currently applicable (e.g. shock).

Option 2: make no change.

Costs and benefits

Sectors affected

The following groups have been identified with an interest in the proposals:

- claimants – any individual who may wish to bring a claim in relation to a psychiatric illness arising from the negligence of another person
- defendants – any individual or organisation subject to such a claim
- insurers – mainly general insurers and Medical Defence Organisations
- taxpayers

- public sector (NHS)

Equality impact

The proposals have been screened for impact on equalities. On the evidence available, we do not consider that any of the options impact differentially on individuals or groups within the population according to their ethnicity, religion, disability, age, gender or sexual orientation. Accordingly, it is our belief that no full equality impact assessment is required.

Benefits

Option 1: introduce legislation as recommended by the Commission to create new duties of care owed to a claimant with a close tie of love and affection, and to remove certain restrictions that are currently applicable (e.g. shock)

The main social benefit envisaged by the Commission was the introduction of a clear and coherent regime to govern claims for psychiatric illness instead of what it perceived as the confusing and often arbitrary requirements of the current common law. Its draft Bill was intended to provide greater certainty for claimants and allow a wider range of people with a close tie of love and affection to the immediate victim to claim damages. Claimants could also benefit from the imposition of a statutory duty of care in relation to psychiatric illness that is not restricted by reference to the claimant's closeness in time and space to the accident or its aftermath or the means by which the claimant learns of it. The Commission believed that this would remove any doubt that the claimant had a right to recovery based on reasonable foreseeability and their relationship with the immediate victim. It also intended that claimants would benefit from the abandonment of the requirement that, to be compensatable, the psychiatric illness must have been induced by a shock. This would potentially enable claims from claimants whose psychiatric illness only becomes apparent over a period of time.

Option 2: make no change

The Commission's proposals would have significant economic costs as set out below, and so the Government's decision not to accept these proposals would result in considerable economic benefit to defendants, the NHS and the taxpayer.

Costs

Option 1

National Health Service

The NHSLA has informed us that the NHS would be particularly susceptible to claims not induced by shock or proximity in space and time to the accident or its aftermath. Removing this restriction would allow, for example, close relatives of a patient in hospital following an incident of clinical negligence, who subsequently suffer a psychiatric illness, to claim for damages. Thus, instead of one patient claiming damages following an incident of clinical negligence, there could potentially be several claims over an extended period of time.

The NHSLA consider that these changes would increase the numbers of individuals able to recover damages by approximately 450 claims per year. It has provisionally estimated that the increased cost to the NHS in England alone could be £35m per annum, plus the need for increases in reserves of over £300m. As any additional money paid out in damages would result in reduced resources being available for other NHS expenditure, there could be very substantial disbenefits to patients and other NHS users generally.

Industry and the citizen

The ABI estimated in 2001 that the increased costs to the insurance industry of implementing the Commission's recommendations would be approximately £235m per annum. As the table below shows, the majority of these costs would fall to motor insurance. No costs are anticipated in respect of employers' liability, as the Commission did not recommend reform to the law as it applies to employees. There would also potentially be costs of around £468m if any change were to be made retrospective.

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	Motor	Employer's Liability	Public Liability	Total
Cost £m	200	-	35	235
Cost as % premiums	2.7	-	2.9	-
Retrospective cost £m	399	-	69	468

Option 2

Option 2 would involve no additional economic costs. The courts would continue to consider these claims on the basis of the current common law.

Administrative burdens and compensatory simplification

The Commission's recommendations under option 1 would create new statutory provisions building on and extending the existing common law, and would be likely to result in an increase in the number of claims for psychiatric illness. This could have the potential to increase administrative burdens for the public and private sector. However, for reasons stated elsewhere in the RIA the Government does not propose to accept these recommendations, and this issue therefore does not arise.

Equity and fairness

If the Commission's recommendations are not taken forward by legislation then the common law in relation to psychiatric illness will continue to develop this area on a case by case basis. Although this may provide slightly less certainty for claimants and defendants than a statutory system, it would enable the law to continue to develop in a more flexible and responsive way, and would represent a fair balance between the interests of claimants and defendants.

Consultation with small business: the small firms impact test

The Small Business Service has been consulted. Any additional costs of the Commission's proposals would be restricted to an increase in insurance premiums. However, the Government does not intend to take any action in this area, and so there will be no cost implications for small firms.

Competition assessment

The competition filter undertaken as part of the competition assessment suggests that if implemented, the Commission's proposals would be unlikely to have a negative impact on competition. The market affected by these proposals is the insurance industry.

It is not anticipated that the proposals would have a significantly greater impact on different firms, and thus would not change the market structure. New firms entering the insurance market would not be affected differently from existing firms. The proposals should not prevent the insurance industry from providing services that they otherwise provide.

Enforcement, sanctions and monitoring

There are no enforcement measures or sanctions required. As the Government does not intend to implement the Commission's recommendations there is no need for them to be monitored.

Summary and recommendation

The Commission's recommendations in this area have not been accepted for the reasons set out above and in the consultation paper.

Annex C - Accommodation expenses and gratuitous care partial Regulatory Impact Assessment

Title of proposal

This RIA considers recommendations made by the Commission in relation to gratuitous care provided to the claimant, and on calculating accommodation expenses incurred by the claimant. Chapter 4 of the consultation paper proposes the partial acceptance of the recommendations relating to gratuitous care, and chapter 6 seeks views on options for calculating accommodation expenses.

Purpose and intended effect

Gratuitous care

Objectives

The Commission believed that certain anomalies and inconsistencies had arisen in the law relating to gratuitous care as a result of the decision of the House of Lords in *Hunt v Severs*⁵⁸. Under *Hunt v Severs*, the claimant cannot recover damages for gratuitous services which the defendant has provided or will provide. The Commission proposed to reverse this decision so that damages could be recovered for gratuitous care provided by the defendant, both in personal injury cases and in cases under the FAA. The Government believes that this should only be the case in relation to future care provided by the defendant.

The Commission also proposed that, rather than damages being held in trust for the carer (as under *Hunt v Severs*) the claimant should simply be under a personal obligation to account for the money to the carer. It considered that this should only apply in relation to past gratuitous care, but the Government's view is that it should apply to both past and future gratuitous care.

The Commission also proposed to amend the FAA so that where a dependant received services from the deceased, and after the deceased's death those

⁵⁸ [1994] 2 AC 350

services were provided gratuitously by another, an award of damages could be made to the provider of that care.

Background

Gratuitous services were defined by the Commission as including, in particular, the provision of nursing care to the injured person; visiting the injured person in hospital; and carrying out household tasks that they would have performed themselves were it not for the injury. The above recommendations are considered in chapter 4 of the consultation paper.

Rationale for Government intervention

If the Commission's recommendation on gratuitous care provided by defendants in personal injury cases is not taken forward by legislation to the extent proposed by the Government then the decision of the House of Lords in *Hunt v Severs* would continue to apply. This would mean that where a defendant tortfeasor provides future gratuitous care the claimant could not claim the cost of those services. This may lead the claimant instead to obtain commercial services which could be claimed, but which are more costly and may not be as suitable as gratuitous care provided by the defendant. Gratuitous care is commonly awarded at two-thirds of the market rate for commercial care.

The same applies if the Commission's recommendation on claims for gratuitous care under the FAA is not taken forward by legislation, namely that dependants of the deceased person may use commercial services which are more costly, rather than accept the services of friends and family who may be better placed to help them.

The approach proposed in the consultation paper will ensure that in both cases claimants are under a personal obligation to account for these sums and so are not over-compensated by receiving both the gratuitous care and the compensation themselves.

Accommodation expenses

Objectives

The Commission discussed various methods for calculating accommodation expenses where a personal injury victim has to buy new property or adapt their own property to make it suitable for them following the accident, as alternatives to the current approach established by *Roberts v Johnstone*⁵⁹. It made no recommendations for change as it considered all these other methods to be too complicated and unworkable.

The Government is seeking further views on one of these methods, which could potentially be used to assess damages both where property needs to be purchased, and where adaptations need to be made, and on the option of simply awarding the extra capital cost to the claimant.

Background

As discussed in chapter 6, *Roberts v Johnstone* sets out the method presently used for assessing damages where a new property needs to be purchased. *Willett v North Bedfordshire Health Authority*⁶⁰ sets out an approach for assessing damages where alterations to the claimant's existing property are necessary (*Roberts* also sets out an approach to this, but the Commission take *Willett* to be the preferred approach).

Under the method being considered, the defendant would pay the extra capital cost of the property at the time of trial, and in return receive a charge over the property for the amount paid, repayable on the claimant's death, or when the accommodation was otherwise not needed by the claimant. Alterations to property could also be dealt with within this scheme. If the alterations increased the value of the property the claimant could recover the cost of the adaptations but the defendant would receive a charge over the property for the increase in value. Alternatively, the extra capital cost of the purchase or alterations could simply be awarded to the claimant.

⁵⁹ [1989] QB 878

⁶⁰ [1993] PIQR Q166

Rationale for Government intervention

The possible change to the method of assessing accommodation costs could result in a fairer system for claimants and defendants alike. Without legislation the *Roberts v Johnstone* method would continue to be used which, instead of awarding the capital cost of property, compensates the claimant for the loss of use of the capital he or she put into the property by giving them a rate of return on that money as if it had been invested. This system may result in under-compensation for the claimant. However, the possible new system could be difficult and costly for defendants to operate, and could raise difficult issues in relation to repayment following the claimant's death, where his or her family are still living in the property.

If the extra capital cost of the purchase or alterations were simply awarded to the claimant, this would create the likelihood of overcompensation, but could produce savings for both parties by removing the need for any complicated methods of calculating a rate of return or of recovering payments.

Consultation

We consulted with a number of Government departments whose policy was affected by the recommendations, as well as the ABI to consider the impact on the insurance industry. The only Government department that considered that the recommendations would affect them was the Department of Health, and details were supplied by the NHSLA.

Options

The following options have been considered:

Option 1: introduce legislation on these issues as set out above.

Option 2: make no change.

Costs and benefits

Sectors affected

The following groups have been identified with an interest in the proposals:

- claimants – any individual who may wish to bring a claim for personal injury arising from the negligence of another person
- defendants – any individual or organisation subject to such a claim
- insurers – mainly general insurers and Medical Defence Organisations
- taxpayers
- public sector (NHS)

Equality impact

The proposals have been screened for impact on equalities. On the evidence available, we do not consider that any of the options impact differentially on individuals or groups within the population according to their ethnicity, religion, disability, age, gender or sexual orientation. Accordingly, it is our belief that no full equality impact assessment is required.

Benefits

Gratuitous care

Option 1: introduce legislation as set out above

The Commission considered that the availability of gratuitous care damages generally was beneficial in acknowledging the role played by voluntary carers in society.

The social benefits of the proposal on gratuitous care under the FAA are that it allows claimants, who may feel more comfortable receiving care and assistance from their friends and family following the death of someone close to them, to do so without worrying that they cannot pay them for their services. The proposal also creates consistency in the treatment of gratuitous services for both fatal accident and personal injury cases.

In relation to the proposal on gratuitous care provided by the defendant, many consultees to the Commission's report considered that the decision in *Hunt v Severs* could lead to undesirable consequences for both claimants and defendants. The claimant could consider it necessary in monetary terms to refuse

future gratuitous care from the defendant in favour of another carer, even though the defendant is best placed to provide that care and the claimant would prefer the defendant to provide it.

The economic benefits of the proposals are that providing gratuitous care damages could reduce overall damages awards, as the costs of gratuitous care are likely to be significantly lower than if commercial care was to be purchased. If claimants cannot claim for gratuitous care to be provided by a defendant or which was formerly provided by the deceased, they are more likely to obtain commercial services, the cost of which can be claimed back. Commercial services are generally more expensive and may often not be as suitable for the claimant.

Option 2: make no change

Making no change might save some additional cost in the area of medical and nursing care, but the indications are that this is likely to be minimal, and the Government believes that it is outweighed by the social benefits set out above.

Accommodation expenses

Option 1: introduce legislation as set out above

Responses to the Commission's report expressed concern that the current approach to assessing accommodation costs in *Roberts v Johnstone* was unfair to claimants. One reason was that claimants frequently had to use the damages awarded under other heads to fund the purchase of property, which left them under-compensated in other areas. There were also fears that the rate used in *Roberts v Johnstone* to represent the amount a claimant would have earned had they invested their money (rather than on the purchase of property), is too low. There is a further concern that this method is only appropriate where a claimant can afford to buy a property outright. If a mortgage is needed the *Roberts v Johnstone* method is not appropriate as the rate of return is likely to be lower than the mortgage interest rate, and thus the claimant would be further under-compensated.

The possible new method of calculation could resolve these problems and ensure that the claimant was fully compensated, without the need for estimates of future property values. Defendants would have to make a greater initial capital outlay, but would then be entitled to recover the money when the accommodation was no

longer required by the claimant. Alternatively, simply awarding the extra capital costs to claimants would remove any uncertainty and ensure that claimants are not under-compensated. Defendants would have to pay the money without any prospect of recovering it, but would not have to incur the legal and administrative costs of calculation or recovery.

Option 2: make no change

Making no change would avoid any additional costs to defendants and their insurers that could arise from either of the possible approaches set out above. However, it would mean that the current system of calculating accommodation expenses, which is widely considered to be unsatisfactory, would continue.

Costs

Gratuitous care

Option 1

The ABI indicated that costs to the insurance industry would be limited to the area of medical and nursing care, on which it does not hold information.

The NHSLA indicated that they currently have no cases where the defendant provides gratuitous services and therefore the proposed changes in this area would have minimal impact.

Option 2

This would avoid the possible small additional cost which might arise from option 1, but would mean that it would continue to be difficult for claimants to claim gratuitous care in certain circumstances and could thus lead them to use commercial services instead. This could increase the overall level of damages awards.

Accommodation expenses

Option 1

Views have been sought from the NHSLA and ABI on the proposal for the defendant to pay the extra capital cost of new or replacement accommodation to the claimant but give the defendant a charge over the property. The NHSLA has indicated that this could result in significantly higher costs to the NHS in the short term in purchasing the new accommodation, and that administering charges for a considerable period of time over these properties would be cumbersome and involve significant legal expense. It indicated that it pays for new accommodation in roughly 250 claims per annum and for alterations to existing properties in roughly 350. The ABI have also informally expressed the view that the proposal could result in higher costs initially.

However, changing the method of assessing accommodation expenses could result in long-term cost savings to the defendant. Although the defendant would be required to pay a larger capital sum up-front to the claimant to aid them with the initial purchase of their accommodation, they would have a charge over the property for the amount paid. The charge would be repaid to the defendant once the property was sold after the claimant's death or when it was otherwise not needed, and the amount paid back to the defendant would reflect the new market price of the property. Given prevailing trends in house prices it is unlikely that the property would have decreased in value, and it could well have increased significantly. However, the NHSLA expressed concern about the difficulties and negative publicity that could arise in connection with securing repayment of the charge where the claimant's family are still living in the property.

Alternatively, simply awarding the extra capital cost to the claimant would increase the cost of the award to the defendant, but would remove the need for him or her to incur legal and administrative costs in association with calculation and recovery.

Option 2

Making no change would avoid the possible additional costs of either of these two approaches. However, it would mean that the possible risk of under-compensation for the claimant that could arise under the current system would continue.

Q43

Do you have any views or information on the likely costs of implementing any of the proposals outlined in the costs section of the RIA? In particular:

- 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?**
- b) In how many cases does the claimant receive commercial or other care that would otherwise have been provided by the defendant?**
- c) In how many FAA cases was gratuitous care provided to a dependant by the deceased?**
- 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?**
- 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?**
- 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?**

Administrative burdens and compensatory simplification

These proposals are not intended to increase the burden of the requirements of the law in this area either on individuals, organisations or others that may be subject to them. The proposals on gratuitous care would make it easier for claimants to claim gratuitous care rather than commercial care in certain circumstances, which would assist in creating a fair and socially beneficial system, without creating further administrative burdens or undue cost to the private or public sector.

The proposals on accommodation expenses seek views on whether certain options would represent a fairer and less administratively cumbersome method of calculating damages in this area than the current system. In the event of either approach being taken forward, the full RIA will assess the extent to which it adds to or reduces existing burdens and costs. Consultees' views would be welcomed on whether or not these proposals would add to or reduce burdens.

Equity and fairness

Legislation to enable claimants to recover the cost of future gratuitous care provided by the defendant will ensure that claimants are able to receive the most appropriate care available to them, and that those that provide care are properly compensated.

Changes to the FAA will similarly ensure that a person who had been dependent on the deceased to provide care or assistance, may now receive the most appropriate care or assistance available, and the carer will be properly compensated.

The possible change to the method of calculating accommodation costs would enable claimants to pay for the initial purchase of their new property, without having to use the money awarded under other heads of damage. It would also ensure that the defendant does not pay out any more than is necessary to ensure that the claimant is provided with appropriate accommodation, and could be able to recover sums paid out at a later stage, although there would be some administrative and legal costs involved.

The option of simply awarding the extra capital cost of new or adapted accommodation to the claimant would ensure that claimants are not under-compensated or have to use money awarded under other heads of damage. Although defendants would have to pay the money without any prospect of recovering it, they would not have to incur the legal and administrative costs associated with any system of calculation or recovery.

Consultation with small business: the small firms impact test

Any additional costs to small firms would be restricted to an increase in insurance premiums. We will be discussing these issues further with small firms during the consultation period and will be actively encouraging them to participate in the consultation. The Small Business Service has been consulted and is content with this approach.

Competition assessment

The competition filter undertaken as part of the competition assessment suggests that there is unlikely to be a negative impact on competition. The market affected by these proposals is the insurance industry.

It is not anticipated that the proposals will have a significantly greater impact on different firms, and thus will not change the market structure. New firms entering the insurance market would not be affected differently from existing firms. The proposals should not prevent the insurance industry from providing services that they would otherwise provide.

Enforcement, sanctions and monitoring

There are no enforcement measures or sanctions required. We are considering what monitoring systems it would be best to put in place, and will include our plans in this area in the final RIA. Views from consultees on the systems that would be appropriate would be welcome.

Q44

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

Summary and recommendation

The Commission proposed to reverse the decision in *Hunt v Severs* so that damages could be recovered for gratuitous care provided by the defendant, and so that rather than damages being held in trust for the carer, the claimant should be under a personal obligation to account for the past gratuitous care to the carer. The Government believes that the former should only be the case in relation to future care provided by the defendant, and that the latter should apply to both past and future gratuitous care. The Commission also proposed to amend the FAA to enable damages to be recovered for gratuitous care previously provided by the deceased. The Government proposes to accept this. Initial consultation indicates that the likely cost impact will be minimal.

The Commission also considered various new methods for calculating accommodation expenses as alternatives to the current approach established by *Roberts v Johnstone*, but made no recommendation. A possible alternative could be a method whereby the defendant would pay the extra capital cost of the property at the time of trial in return for a charge over the property. Views are sought on the principle of this proposal and the possible cost implications, and on the alternative of simply awarding the extra capital costs to the claimant.

The Consultation Criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact the Department for Constitutional Affairs Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at consultation@dca.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Laurence Fiddler
Consultation Co-ordinator
Department for Constitutional Affairs
5th Floor Selborne House
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If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper at page 96

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