



FOIL UPDATE

August 2009

Law on Damages – the Government responds

After two years of consideration the Government has responded to the consultation on the Law of Damages which closed in July 2007. This is a subject which attracted much interest – the Government received 103 responses – and predictably resulted in an expression of views on many issues split between claimant and defendant representatives.

The main response to the Government's proposals has been one of disappointment from the claimant community. Although the consultation ranged over 36 questions only limited reforms are now proposed (see box right). On a number of issues the Government has declined to impose statutory provisions, preferring to leave the resolution of difficult issues to the courts. On three issues (mesothelioma, private care and accommodation expenses), in spite of the time already taken in reviewing the submissions, the Government has indicated that further consideration will be required before proposals can be put forward.

On the issues on which legislation is proposed the Civil Law Reform Bill, announced as part of the legislative programme in May 2008, will be used as a vehicle to introduce primary legislation (although, of course, a General Election may intervene).

The Detail

Dependency under the FAA

The Government has decided to add a residual category of dependants to the Act to avoid hard cases, as detailed in the box above; a move supported by claimants in the submissions. There was some limited support for adding those who would have become dependant but for the death but the Government has rejected this approach. The Government will clarify in its legislation that children in utero and children already conceived by IVF qualify as children of the deceased.

Having explored the extent to which new relationships formed after the death should affect dependency claims the Government has decided that the re-marriage of a claimant should be taken into account, as should a co-habitation of two years duration. Prospects of marriage or co-habitation should be ignored. With regard to eligible children, remarriage or co-habitation of the former spouse should only be taken into account if the judge thinks it appropriate to do so. Although at present under *Owen v*

The proposed reforms in brief:

- *Amendment of the FAA to allow claims for dependency by any person "wholly or partly maintained by the deceased immediately prior to the death".*
- *Remarriage/cohabitation of claimant to be taken into account under FAA; remarriage/cohabitation of former spouse to be taken into account but not be determinative with regard to dependant children claims.*
- *Prospective divorce/breakdown of co-habitation to be ignored under FAA unless parties were living apart at time of death or proceedings actually commenced.*
- *Extension of bereavement damages to co-habitees of two years standing; to children under 18 for the loss of a parent; and to unmarried fathers with parental responsibility for the loss of a child under 18.*
- *Concept of contrib. to be recognised in assessing bereavement damages.*
- *A change in the law relating to damages for gratuitous care to create a personal obligation on the claimant to account to the carer for money for past and future care, instead of the damages being held in trust for the carer as at present (under *Hunt v Severs*).*
- *Introduction of a change to allow damages to be awarded for future care provided by the defendant.*
- *FAA to be amended to allow damages to be awarded for services formerly provided to a dependant by the deceased and now gratuitously provided by another.*

Martin prospects of divorce are currently taken into account the Government has decided that they should be ignored unless proceedings for divorce, judicial separation or nullity have already been commenced, or unless the parties are not living together at the time of death. A claimant living apart from the deceased will be able to adduce evidence that the separation did not indicate estrangement. Prospects of breakdown of a co-habitation will also be ignored unless the couple had actually separated at the time of death. Sec 3(4) of the FAA will be repealed.

The consultation paper invited views on the extent to which difficulties arise for mesothelioma sufferers and their families with regard to any differences which arise in claims settled before or after death. Twenty-one responses were received on this issue which the Government is considering before taking forward discussions with key stakeholders.

Bereavement Damages

Almost all respondents considered that bereavement damages should continue to exist and the Government accepts that they should remain. Many respondents considered that the award was unsatisfactory and mis-understood and the Government will give more thought to explaining it to the public when the primary legislation is being drafted.

Consideration was given to adding several further categories to those entitled to bereavement damages including parents of children over 18, unmarried fathers, step-parents, children of the deceased, siblings, cohabitants, and fiancés and fiancées. Of those categories the Government has accepted that unmarried fathers (with parental responsibility under the Children Act 1989), co-habitees of two years standing, and children of the deceased under 18, should be added to the categories entitled under the Act. In an interesting social comment the Government believes that co-habitation demonstrates what an engagement does not: a commitment to the relationship. The response estimates the cost of the changes to insurers at £3m a year.

On the level of bereavement damages the Government intends to proceed on the basis set out in the consultation: £11,800 to the deceased's spouse, civil partner or co-habitee without dilution; £11,800 to be shared between spouse and co-habitee if both are eligible; £11,800 to the parents of an unmarried child under 18, divided between them if appropriate; £5,900 to each eligible child under 18 for the loss of a parent. The sums will increase every three years in line with inflation as already set out.

A substantial majority of respondents indicated that contributory negligence should reduce the bereavement damages, although some thought that contrib. by those under 14 years of age should be ignored. The Government is minded to introduce a general provision allowing contrib. to be taken into account, which the courts could apply as appropriate in individual cases. More thought will be given to this when the legislation is drafted.

Liability for Psychiatric Illness

The consultation did not raise specific questions on this issue but asked for views and comments. Widely differing views were expressed. The arguments are complex and sensitive and the Government takes the view that it is preferable that the courts should have the flexibility to continue to develop the law rather than it attempting to impose a statutory solution.

Collateral benefits (sick pay, accident insurance, disability pensions, charitable payments, benefits in kind, state services and benefits)

The Government's preferred outcome on these issues, as set out in the consultation paper, is that claimants should be compensated once and wherever possible at the expense of the tortfeasor not the collateral benefit payer. It suggested that the best

way to achieve this was by disregarding the benefit in assessing damages and giving the payer a right of recovery. A small majority (mainly claimants) supported the preferred outcome but a significant number were opposed. Whilst the Government believes the preferred outcome is desirable in principle, in view of the concerns expressed no overarching general reform is planned in this area.

With regard to gratuitous care the Government intends to change the law to create a personal obligation on claimants to account to their carers for the damages received for both past and future care. This would change the principle in *Hunt v Severs* under which the damages are held in trust for the carer. The law regarding care provided by the tortfeasor will be changed: no damages will be payable for past care as at present but under the proposals damages will be recoverable for future care. The FAA will be amended to allow damages to be awarded to dependants for services formerly provided by the deceased and now provided gratuitously by another. This will bring fatal cases in line with personal injury cases.

The Government believes that no action is required on charitable payments, pensions and redundancy: its view is that the courts are best placed to resolve any difficulties these issues create. Insurers were opposed to a general disregard of insurance payments and, as a number of claimant responses indicated that the current principles (allowing disregard where the claimant pays the premium) are applied with little difficulty, the Government does not intend to legislate on the point. The majority of respondents opposed any change to the rules on disregarding sick pay and no legislation is proposed.

Private care

The possible repeal of Sec 2(4) the Law Reform (Personal Injuries) Act 1948 had been mooted but in the light of the wide range of views expressed in the submissions this issue will require further consideration by the Government. On the issue of public/private provision of care and accommodation, in view of the lack of consensus in the submissions the Government will give it further consideration.

Accommodation Expenses

The Government had sought views on possible alternatives to the principle in *Roberts v Johnstone*, in particular on two specific proposals to either give the defendant a charge on the purchased property or award extra capital costs. There was substantial opposition to both alternatives and the Government intends to ask the Civil Justice Council's Serious Injury Committee to review the issue and provide recommendations.

Aggravated, Exemplary and Restitutionary Damages

Apart from one small change (to change a reference to exemplary damages to aggravated damages in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951), the Government believes that these issues are best left to the courts.

The length of time it has taken the Government to respond and the reluctance to impose statutory reform in this area reveal the complexity of many of the issues covered by this consultation. Aside from the removal of some anomalies and out-dated principles this is not the wide-spread reform package that claimants were hoping for. It remains to be seen what the 'further consideration' of the most difficult issues will produce. At the very least the Government's response confirms the value of industry responses – it is clear in the response that the views put forward by the defendant lobby have had an effect on the debate, as reflected in the Government's thinking.

If you have any views on the proposals please contact Shirley Denyer at shirley.denyer@foil.org.uk

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