

IMPACT ASSESSMENT

1. Introduction and Background

1.1

The purpose of the Fatal Accidents Act (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.

1.2

The Law Commission made a number of proposals for reform of the FAA. These proposals were considered in the Government's consultation paper and views were invited on whether the Government should accept each of these proposals. The Government's consultation response clearly sets out the Government's position on each of the proposals and explains why the option of taking forward all of the Law Commission proposals has not been taken forward.

1.3

The Government's consultation paper accepted some of the Law Commission's proposals, but indicated that it did not propose to implement the Commission's recommendations in full.

1.4

The consultation received a range of responses from the legal profession, insurers, the judiciary, academics, victims' organisations and other bodies, and from a number of individuals. This Impact Assessment covers three broad policy areas, as outlined below.

(a)

Claims for Financial Loss by Dependents of the Deceased Person

The FAA provides for a fixed list of persons to be entitled to claim damages for financial loss. The Law Commission proposed that this list is too restrictive and should be extended to include a 'residual' class of persons. This would comprise "any person who was being wholly or partly maintained by the deceased immediately before the death or who would, but for the death, have been so maintained at a time beginning after the death". The 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 Government's consultation paper indicated that it did not propose to implement this recommendation in full, as the extension of eligibility to people who would have been maintained at a time beginning after the death could encourage speculative claims that would be difficult to prove or disprove. It therefore proposed to limit the residual category to any person who was being wholly or partly maintained by the deceased immediately before the death. Following the consultation exercise, the Government intends to introduce legislation on the basis proposed in the consultation paper.

(b)

Bereavement Damages

A further major reform proposed by the Law Commission concerned 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 civil 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 cohabitants for not less than two years immediately prior to the death.

The Government's consultation paper indicated that it did not propose to extend bereavement damages to all the categories of claimant proposed by the Commission, as a finite limit must be placed on the sums awarded. The Government's position was that 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. In view of these considerations, the Government proposed to extend eligibility to claim bereavement damages to people who, although not married to the deceased, have lived with him or her as cohabitants for not less than two years immediately prior to the death; 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. Following the consultation exercise, the Government response intends to introduce legislation on the basis proposed in the consultation paper.

(c) Gratuitous Care

Gratuitous care is care provided for the claimant free of charge by relatives or other private parties. As a general rule, currently claimants are entitled to recover damages for gratuitous care that was being provided by the deceased prior to the death, but are required to hold the damages on trust for the carer (decision of the House of Lords in *Hunt v Severs*¹).

The Law Commission agreed that damages should be recoverable for gratuitous care for the benefit of the carer (including where the care is provided by the defendant), but considered that the trust approach in *Hunt v Severs* was not the best mechanism for achieving this. It recommended instead that the claimant should be under a personal obligation to account for the money to the carer. This would involve less formality and be simpler for the claimant. The Commission also recommended that the obligation should relate only to past care. Claimants should not be under a legal (as distinct from moral) duty to hand over any damages for future gratuitous care. This was principally on the basis that the future is uncertain and that different care arrangements might become appropriate. 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 services were provided gratuitously by another, an award of damages could be made to the provider of that care.

The Government's consultation paper agreed with the Law Commission's recommendations. In relation to the Commission's view that a personal obligation on the claimant to account for the money to the carer is preferable to the current approach of holding damages in trust, the paper indicated that, while assessing future need is inherently uncertain, a personal obligation to account to the carer should also apply to future gratuitous services actually provided.

¹ [1994] 2 AC 350

Scope of the Impact Assessment

Key proposals

In relation to dependency claims, to introduce a residual category eligible to claim limited to any person who was being wholly or partly maintained by the deceased immediately before the death.

In relation to bereavement damages, to extend eligibility to people who, although not married to the deceased, have lived with him or her as husband and wife (or if of the same sex in an equivalent relationship) for not less than two years immediately prior to the death; 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.

In relation to gratuitous care, to replace the current requirement for damages to be held on trust for the carer with a personal obligation on the claimant to account for the money to the carer (including in cases where future care is provided by the defendant), and to enable damages to be awarded in respect of services gratuitously provided to a dependant of the deceased.

Stakeholder groups and Organisations in the scope of the proposal

The following groups will be affected by 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, in particular, the NHS

Problem under consideration

At present, some categories of people who are dependent upon or in a close relationship with a person killed as the result of another person's negligence are unable to claim damages. For example, bereavement damages are currently only available to the deceased person's spouse or civil partner, or to the parents of an unmarried child under 18. The Government considers that the law needs

modernisation, and proposes to extend in certain respects the categories of people eligible to claim for bereavement damages and as dependants of the deceased.

Cost Benefit Analysis (CBA)

PRINCIPLES UNDERPINNING CBA

This IA identifies as far as possible both the monetised and non-monetised impacts of the introduction of extending the categories of people eligible to claim for bereavement damages and as dependants of the deceased, with the aim of understanding what the net social impact to society is likely to be from the policy. Cost benefit analysis places a strong emphasis on the monetisation of costs and benefits. However there are important aspects that cannot sensibly be monetised. These might be distributional impacts on certain groups of society or some institutional impacts, either positive or negative. CBA in this IA is therefore interpreted broadly, to include both monetised and non-monetised costs and benefits, with due weight given to those that are cannot be monetised.

An important consideration for any cost benefit analysis is the relevant scope of the assessment. The scope of this IA is defined to include the impacts that fall within England and Wales.

ECONOMIC RATIONALE

The conventional economic approach to Government intervention is based on efficiency or equity arguments. Government intervenes if there is a perceived failure in the way a market operates (“market failures”) or if it would like to correct existing institutional distortions (“government failures”). Government also intervenes for equity (fairness) reasons. Intervention in this case would be made primarily on equity grounds.

The proposals aim to make the law fairer with respect to damages. From an economic perspective, this is justified if the equity gains from doing so outweigh any costs that implementing the policy would create. In this instance, the administrative costs imposed on all parties appear to be minimal. There will be some distributional impacts (given one group gains at the expense of another), and there may be some costs generated by the policy given there may be an increase in the number of cases appearing before the courts. On the basis that the gains to society overall outweigh these identified costs, intervention is justified.

OPTIONS ANALYSIS

Base Case / Option 0

The base case would be for the Government not to legislate in this area. This would result in the categories of people able to claim for financial loss and for bereavement damages remaining unchanged and the current cumbersome procedures for the treatment of damages awarded for gratuitous care being retained.

The effect of this in relation to the categories of people eligible to claim for financial loss and bereavement damages would be that the current position which does not fully reflect the views and values of modern society would be maintained. This would leave open the possibility of unfairness, especially in relation to claims for financial loss, as it may leave people who were being wholly

maintained by the deceased prior to death unable to make a claim. In relation to gratuitous care it would maintain the current procedures for the treatment of damages awarded for gratuitous care, which can be cumbersome and difficult to operate in practice.

There are no costs or benefits associated with the base case: the net present value of the base case is zero.

Option 1

Description

This option is to take forward the Government's damages proposals as outlined in the consultation response document. This involves amending the FAA, with regards to dependency claims for financial loss and claims for bereavement damages, to produce a fairer and more modern system in relation to the availability and assessment of damages for fatal accidents caused by the wrongful act, neglect or default of another person. It also includes providing for injured persons and dependants of a deceased person to have a personal obligation to account to providers of gratuitous care.

(a) Dependency Claims for Financial Loss

The proposal will introduce a residual category eligible to claim limited to any person who was being wholly or partly maintained by the deceased immediately before the death.

(b) Bereavement Damages

The proposal will extend eligibility to people who, although not married to the deceased, have lived with him or her as husband and wife (or if of the same sex in an equivalent relationship) for not less than two years immediately prior to the death; 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.

(c) Gratuitous Care

The proposal will replace the current requirement for damages to be held on trust for the carer with a personal obligation on the claimant to account for the money to the carer (including in cases where future care is provided by the defendant), and to enable damages to be awarded in respect of services gratuitously provided to a dependant of the deceased. The policy will have no impact on the level of damages awarded per case.

Costs

(a) Dependency Claims for Financial Loss

The 2007 original consultation paper set out information received from the insurance industry on the impact of additional persons claiming for financial loss for dependency claims. The figures given at the time used were best estimates and as such have a high margin for error (25% in either direction).

It was estimated that the total cost of implementing the Law Commission's recommendation at the time would be £7.3million (made up of £6.8m for motor liability, £0.3m for employer's liability and £0.2m for public liability). The paper indicated that these figures would be reduced by the fact that the Government

had only accepted the Commission's recommendation in part, and applied a 50% reduction to the figures, on the basis that there would be much less potential for loosely framed and speculative claims.

Assuming these figures grow in line with the increases to bereavement damages over the period would result in an overall estimated cost of around **£3.8 million** per year. Responses to the consultation paper did not identify any further information to assist in developing this estimate further.

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 to cover any person who was being wholly or partly maintained by the deceased immediately before his or her death. Using the ratio of costs to the NHS and the insurance industry for bereavement damages (figures calculated below), the estimated costs to the NHS in relation to dependency claims is around **£1.8million**.

There may be other claims against uninsured defendants, but we have no evidence of their value or frequency. Such claims may fall to the public or private sector. If for indicative purposes, we assume that there are in the region of 500 successful claims per year, and that the ratio of costs to uninsured defendants and the insurance industry is broadly the same as for bereavement damages, the additional cost to uninsured defendants, such as public bodies, would be around **£0.6million**.

The total cost for dependency claims is therefore estimated to be around **£6.2 million** per year.

(b) Bereavement Damages

The proposal extends bereavement damages to children under the age of 18 for the death of a parent, and to cohabitants of two years duration at the date of death. The costs associated with these proposals will fall to the insurance industry and to the NHS. These costs are examined in turn below.

Extending the list of those eligible to claim (both as dependency claims for financial loss and for bereavement damages) could lead to additional cases going through the courts. This would lead to some additional costs for HMCS. It is difficult to estimate what this increase would be, but it is noted that the increase could potentially be significant.

The proposals are considered unlikely to have a significant effect on the behaviour of companies, the NHS and other Government bodies on the basis that the proposals only affect the scope of who is eligible to claim: they do not extend the scope of what gives rise to a claim. The current safeguards that are used to prevent fatal accidents should not require revision as a result of these proposals. While the level of damages awarded may increase, the volume of accidents is not assumed to change significantly.

Extending to Children under 18

To examine the cost of extending bereavement damages to children under 18 for the death of a parent, we have considered the following situations.

Costs to Insurers - Motor Liability

One major source of damage claims would be through road traffic accidents. The Department for Transport reports that in 2007 there were around 2500 adult fatalities in road accidents in England and Wales. Around 2500 adult fatalities would result in around 5,000 people losing a parent per year on the basis that the

average number of children a woman has in her lifetime if she lives until the end of her reproductive life is 1.90. However, given not all accidents will involve adults with children, this Impact Assessment assumes around 2500 children lose parents per year in road traffic accidents. ONS statistics suggest that around 20% of the UK population is under 18. Therefore, the number of incidents that could result in a claim as a result of this policy would be around 500 per year.

It is difficult to estimate the proportion of such incidents that would actually result in a successful claim. This Impact Assessment assumes that 50% of cases would result in a successful claim, which would be around 250 successful claims. At an average of £5,900 per child (as under the provisions each child is eligible for half of the full award of £11,800) this would result in additional costs to motor insurers of around **£1.5 million** per year. If insurers increased their premiums in response to this increase in their liability, then ultimately these costs may be passed on to those individuals holding insurance policies.

Costs to Insurers – Employer’s Liability

Bereavement damage claims could also result from incidents occurring at work. The Health and Safety Executive reports that in 2007-08 there were 192 fatalities in the work place in England and Wales, which would result in 365 children losing a parent. Using the same assumptions as set out above (that only 50% of deceased persons have children, that 20% of those children would be under 18 and eligible to claim, and that 50% of those eligible would make a successful claim) there would be 20 successful claims per year at £5,900 per child this would result in costs to employers’ insurers of around **£120,000** per year. If insurers increased their premiums in response to this increase in their liability, then ultimately these costs may be passed on to those companies holding insurance policies.

Costs to Insurers – Public Liability

The Health and Safety Executive found that in 2007-08 there were 65 fatal injuries to members of the public. It is not known how many of these cases ultimately gave rise to a public liability claim, nor what proportion were adults or children. Without this information it is not possible to assess the costs that may arise from implementing the proposed changes. However, using the assumptions set out above (that the average number of children is 1.90, that only 50% of deceased persons have children, that 20% of those children would be under 18 and eligible to claim, and that 50% of those eligible would make a successful claim), we assume that there could be three successful claims. At £5,900 per child the proposals would result in costs to public liability insurers of around **£18,000** per year. If insurers increased their premiums in response to this increase in their liability, then ultimately these costs may be passed on to those holding public liability insurance policies.

Costs to the National Health Service

The NHS could also face additional damage claims as a result of the proposals. NHS Local Health Authority figures show the number of adult fatalities has been around 1000 per year in recent years. This would mean 1900 children losing a parent. Based on the assumptions set out above (that only 50% of deceased persons have children, that 20% of those children would be under 18 and eligible to claim, and that 50% of those eligible would make a successful claim), at an

average damage award of £5,900 per child this would result in costs faced by the NHS of around **£0.6 million** per year.

Costs to Uninsured defendants

In addition to the costs identified above, uninsured defendants, such as public bodies may also face increased liabilities as a result of the proposals. It is difficult to assess the likely number of claims that will be made against these uninsured defendants, but for indicative purposes there could be in the region of 500 such successful claims per year. Based on the assumptions outlined above, at an average damages claim of £5,900, this would result in costs to uninsured defendants, such as public bodies, of around **£0.25 million** per year.

Extending to cohabitants

To examine the cost of extending bereavement damages to cohabitants of not less than two years standing immediately before the death, we have considered the following situations.

Statistics from the 2007 General Household Survey show that around 27 per cent of the population were cohabiting in 2007, and of those, 53 per cent were unmarried. ONS figures (from the General Household Survey 2007) showing the *duration of past cohabitations which did not end in marriage* have been used to produce an estimate that approximately 60 per cent of cohabitants live together for two years or more. This information provides the basis for the estimated costs developed in this section.

Costs to Insurers - Motor Liability

Based on the assumptions above, and that 50% of incidents result in successful bereavement damages claims (a full award of bereavement damages is £11,800 per claimant) then approximately 220 of the 2,500 adult fatal accidents per year would be eligible to claim as cohabitants and 110 would result in a successful claim. At an average damage award of £11,800, this would result in costs to motor insurers of around **£1.3 million** per year. If insurers increased their premiums in response to this increase in their liability, then ultimately these costs may be passed on to those individuals holding insurance policies.

Costs to Insurers – Employer's Liability

The Health and Safety Executive reports that in 2007-08 there were 192 fatalities in the work place in England and Wales. Based on the assumptions set out above, the policy would result in costs to employers' insurers of around **£95,000** per year. If insurers increased their premiums in response to this increase in their liability, then ultimately these costs may be passed on to those businesses holding insurance policies.

Costs to Insurers – Public Liability

The Health and Safety Executive found that in 2007-08 there were 65 fatal injuries to members of the public. It is not known how many of these cases ultimately gave rise to a public liability claim, nor what proportion were adults or children. Without this information it is not possible to assess the costs that may arise from implementing the proposed changes. Based on the assumptions set out above, the policy would result in costs to public liability insurers of around

£55,000 per year. If insurers increased their premiums in response to this increase in their liability, then ultimately these costs may be passed on to those holding public liability insurance policies.

Costs to the National Health Service

NHS Local Health Authority figures show the number of adult fatalities is around 1000 per year. Under the policy, when 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. Based on the assumptions set out above, at an average damages claim of £11,800 this would result in cost to the NHS of around **£1 million** per year.

Costs to Uninsured defendants

In addition to the costs identified above, uninsured defendants, such as public bodies may also face increased liabilities as a result of the proposals. It is difficult to assess the likely number of claims that will be made against uninsured defendants, but for indicative purposes there could be in the region of 250 such successful claims per year. Based on the assumptions outlined above, at an average damages claim of £11,800, this would result in a cost to uninsured defendants, such as public bodies, of around **£0.25 million** per year.

Total

The total financial cost of the bereavement proposals is estimated to be around **£5.2 million** per year. These costs would be borne by insurers or by bodies holding insurance policies in the event that premiums rise in response to the proposals (£3.1 million), the NHS (£1.6 million) and uninsured defendants (£0.5 million).

As set out in the legal aid impact test, the proposals in total may have a significant impact on Legal Aid spending. A central estimate is that the proposals would result in an additional £500,000 per year in legal aid spending.

(c) Gratuitous Care

There may be some minor one-off adjustment costs for all parties associated with familiarisation with the new law.

Claimants will now have a personal obligation to account for any money paid to carers. The administration of this obligation may impose some one-off and ongoing costs on claimants. However, such costs are not expected to be significant.

Benefits

(a) Dependency Claims for Financial Loss

The proposed changes would ensure that all those actually dependant on the deceased at the time of death could claim. This would result in a fairer and much more certain system for awarding damages for financial loss. Such individuals are estimated to be around **£6.2 million** per year better off as a result of successful dependency claims for financial loss.

The proposed changes would also better reflect the views and values of modern society.

(b) Bereavement Damages

The proposed changes better reflect the values of modern society, particularly with regards to cohabitants. The proposal will create an updated version of the law that is considered fairer. This will generate welfare gains for society.

The proposed changes extend the population able to claim bereavement damages – any individuals who can now make a bereavement damages claim will benefit. Such individuals are estimated to be around **£5.2million** per year better off as a result of successful bereavement damages claims.

(c) Gratuitous Care

Carers and claimants will benefit from increased clarity in the law on certain aspects of gratuitous care provision as the proposals will clearly set out the responsibilities of the claimant to account to the carer. These changes are unlikely to have any impact on HMCS, in relation to the number of cases or court time. In addition, the law will preclude the need for the claimant to set up and maintain a trust.

Net Impact

The expected costs and benefits associated with this option are outlined above. It has not been possible to quantify all of the impacts, however, the benefits of this option are considered to outweigh the costs. Changing the law in the manner proposed would make the law fairer and is considered worthwhile.