

Civil Law Reform Bill Consultation Paper

Chapter 2: Consultation on Damages Provisions

Introduction

In this chapter we consider the reforms proposed in Part 1 of the draft Bill. In general, this Part of the Bill reforms the legislation governing the right of persons in various categories of relationship to a person who has been killed as the result of another person's negligence to recover damages from that other person for their loss arising from the death. The changes add new categories of relationship to those already in the legislation, making it possible for a wider range of people to claim damages, including bereavement damages. Part 1 also makes provision regarding damages awarded for gratuitous care and provides for injured persons and dependants of a deceased person to have a personal obligation to account to providers of gratuitous care. Provision is also made regarding the use of the terms aggravated and exemplary damages and restitutionary awards.

The explanatory notes contain a clause by clause commentary on Part 1 of the draft Bill. The text of the relevant sections of the Fatal Accidents Act 1976 and other legislation amended by the Bill is set out at Annex G.

Background

The provisions in this Part 1 originate from a series of Law Commission reports published in the late 1990s: "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); and "Aggravated, Exemplary and Restitutionary Damages" (Law Com No 247). The proposals carry forward the reforms proposed by the Government in its response document to its consultation on The Law of Damages referred to in Chapter 1.

The Current Position

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 majority of the provisions in this Bill relate to the Fatal Accidents Act 1976. The main function of the 1976 Act is to govern the payment of compensation in the event of a death caused as a result of another person's wrongful act, neglect or default.

At present section 1 of the Fatal Accidents Act 1976 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 Fatal Accidents Act 1976 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. People who were dependent on the deceased but fall outside these categories are currently unable to bring a claim. Where the claimant was the spouse or civil partner of the deceased or had been in a financially

supportive cohabitation for two or more years, section 3 of the Fatal Accidents Act 1976 specifies when the prospect of the relationship ending should be taken into account.

Bereavement damages were introduced into statute law by the Administration of Justice Act 1982, which inserted section 1A into the Fatal Accidents Act 1976 following the recommendations in the Law Commission's 1973 report *Personal Injury Litigation – Assessment of Damages*. Prior to that, no damages were awarded for bereavement at common law. 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 caused by the death, and that bereavement damages 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. The current full award of bereavement damages is £11,800 in respect of causes of action arising on or after 1 January 2008. The Government has announced its intention to adjust this amount to the nearest £100 in line with inflation every three years.

The Bill also contains provisions in relation to gratuitous care in personal injury and fatal accidents cases. Currently claimants are generally entitled to recover damages for gratuitous care, but are required to hold the damages on trust for the carer. This can be cumbersome in practice.

The Bill also contains provisions regarding aggravated, restitutionary and exemplary damages in three statutes. 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 the availability of exemplary damages in civil proceedings should not be extended beyond the limited instances in which they are 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. It considers that 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 distinction between the civil and criminal law. Their extension into other areas is therefore undesirable. The Bill replaces the reference to exemplary damages in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 with a reference to aggravated damages.

Another problem at present is that some of the terms used to qualify references to damages in legislation may not be adequately clear. The Bill replaces the term "additional damages" in the Patents Act 1977 and the Copyright, Designs and Patents Act 1988 with a reference to aggravated damages and restitutionary awards. The term "additional damages" appears in no other statutes. The references to "additional damages" in the Patents Act 1977 and the Copyright, Designs and Patents Act 1988 are intended to cover all the aspects set out in Article 13.1 of EU Directive 2004/48/EC on the enforcement of intellectual property rights, including both damages and an account of profits. Both have been the subject of criticism for uncertainty.

The provision in the draft Bill does not take account of the different law of damages applicable in Scotland (the term 'aggravated damages' is not a familiar concept in Scots law). If introduced into Parliament a further provision defining the nature of aggravated damages in terms appropriate to Scots law would be necessary (both as

it applies to the 1951 Act and in intellectual property cases pursuant to the 2004 Directive). Any views on this would be welcome.

Ministry of Justice Consultation

The Ministry of Justice published a consultation document on 4 May 2007 to seek views on the issues raised by the Law Commission. The Commission's 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 in relation to aggravated, exemplary and restitutionary damages; and on various issues relating to the costs of care and accommodation and the treatment of benefits in assessing damages. The consultation paper considered and sought views on most of the recommendations made in these reports, taking into account subsequent developments.

This consultation closed on 27 July 2007 and we received a total of 103 responses. These were from a range of stakeholders who had a wide range of views as to the best way forward on the issues raised. The response paper was published on 1 July 2009 and set out the Government's position, including proposals for reform.

The Proposals for Reform

The Government decided to include, in the Bill, provisions to the following effect:

Dependency damages under the Fatal Accidents Act 1976

To add to the list of those eligible to claim as dependants under section 1(3) of the Fatal Accidents Act 1976 a residual category to enable any person who was being wholly or partly maintained by the deceased immediately before the death to bring a claim.

To amend section 3 (3) of the Fatal Accidents Act 1976 to provide that the fact (but not the prospect) of a person's remarriage, entry into a civil partnership, or financially supportive cohabitation of at least two years duration following the death must be taken into account when assessing a claim for damages under the Fatal Accidents Act 1976 by that person.

To provide that in relation to a claim on behalf of any eligible children, the fact that the child's surviving parent had remarried or entered into a civil partnership or a financially supportive cohabitation of at least two years duration may be taken into account where the judge considers it appropriate to do so.

To amend the Fatal Accidents Act 1976 to provide that 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 one of the couple has petitioned for divorce, judicial separation or nullity; where one of the couple has begun the procedure for dissolution of the civil partnership; or where the couple are no longer living together at the time of death.

To repeal section 3(4) of the Fatal Accidents Act 1976 and replace it with a provision to the effect that the prospect of breakdown in the cohabiting relationship between the deceased and his or her partner should not be taken into account when assessing damages under the Fatal Accidents Act 1976.

Damages for bereavement under the Fatal Accidents Act 1976

To amend the statutory list of people eligible to claim, as set out at section 1A(2) of the Fatal Accidents Act 1976, to include: children under 18 (including adoptive children) for the death of a parent; cohabitants of at least two years' duration for the death of a partner; unmarried fathers with parental responsibility for the death of a child under 18.

To provide that, where a spouse or civil partner and a cohabitant are both eligible to claim bereavement damages under section 1A(2) of the Fatal Accidents Act 1976, the sum is to be divided equally between them.

To enable an award of £5,900 (or such future sum as represents half of the full award) to be made to each eligible child of the deceased under the age of 18.

Damages for Gratuitous Care

To replace the current requirement in case law for claimants to place damages for gratuitous care in trust for the carer by a personal legal obligation to account to the carer for gratuitous services actually provided, and for this to apply to damages for future as well as past care.

To make clear that the personal legal obligation 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.

To amend section 3(1) of the Fatal Accidents Act 1976 to allow damages to be awarded for services gratuitously provided by the deceased to a dependant, which after the death are gratuitously provided by another and for the dependant to be under a personal obligation to account to the carer for any such gratuitous services as are actually provided.

Aggravated damages and Restitutionary awards

To replace the term "exemplary damages" with the term "aggravated damages" in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951.

To replace the term "additional damages" with a reference to aggravated and restitutionary awards in both the Patents Act 1977 and the Copyright, Designs and Patents Act 1988 and to make clear that aggravated damages in this context can be awarded to bodies corporate.

These three statutes apply to the whole of the United Kingdom. The amendments have the same territorial extent.

Impact assessment

An impact assessment relating to the damages provisions is at Annex C. We estimate that the proposals will result in the receipt by claimants of dependency and bereavement damages under the Fatal Accidents Act 1976 of about an additional £11.4 million per annum or thereabouts. This will largely be paid by insurers or their policyholders and, in the case of clinical negligence, the National Health Service

Litigation Authority and medical defence organisations. Uninsured defendants will have to bear any additional costs themselves. There would be no impact on the third sector or the environment. The main benefits identified are that the reforms would ensure that all those actually dependant on the deceased person at the time of death could bring a fatal accidents claim, and that bereavement damages would be available to those closest to the deceased. This would provide a fairer and more certain system which is in line with the values of modern society.

Questions

1. Do you have any comments on the draft clauses of the Bill relating to the law of damages?
2. Do you have any views on the application of aggravated damages, for these purposes, in Scotland?
3. Do you agree with the impact assessment on the proposed reforms relating to the law of damages at Annex C?

Chapter 3: Interest

Introduction

In this chapter we discuss the proposals in Part 2 of the draft Bill relating to the setting of pre- and post-judgment interest and the rate at which such interest is payable. Pre-judgment interest is the interest that may be awarded by the court in an order or judgment for payment of debt or damages in respect of the period from the time that the cause of action underlying the action arose to the date of the order or judgment or, if payment is made earlier, the date of the payment. Post-judgment interest (otherwise known as judgment debt interest) is the interest payable on a sum awarded by the court from the date of the award to the actual date of payment. The intention is to replace the existing statutory provisions, which are set out in various statutes and pieces of secondary legislation, with a single set of modern provisions setting out the courts' general powers in relation to interest (which are broadly unchanged) and to give the Lord Chancellor power to specify the rate of interest that will be payable. Different rates of interest may be specified for different cases and interest may be compound or simple.

The explanatory notes contain a clause by clause commentary on Part 2 of the draft Bill. Relevant extracts from the Judgments Act 1838, the Law Reform (Miscellaneous Provisions) Act 1934, the Administration of Justice Act 1970, the Senior Courts Act 1981 and the County Courts Act 1984 are set out at Annex G.

Background

Pre-judgment interest is in general a discretionary relief that may be awarded at such rate as the court thinks appropriate. In practice we understand that it is commonly levied at the same rate as post-judgment interest. Pre-judgment interest may be awarded in respect of the period from the accrual of the cause of action to the date of the judgment. Post-judgment interest (judgment debt interest) is payable on the sum of damages awarded or debt to be repaid from the date of the judgment to payment. The rate of post-judgment interest is prescribed by the Lord Chancellor. It is currently 8% (and has been so since 1993). Both pre- and post-judgment interest are simple, not compound. These general provisions apply to the High Court, County Court and

other courts of record. They do not apply where other legislation specifies the interest that is to be payable.

Present Law: Pre-Judgment Interest

In relation to pre-judgment interest, the courts' general powers to award interest are set out in section 35A of the Senior Courts Act 1981 ("1981 Act"), and its county court equivalent, section 69 of the County Courts Act 1984 ("1984 Act"). Similar provisions apply in relation to other courts of record under section 3 of the Law Reform (Miscellaneous Provisions) Act 1934. These give the courts wide discretion about the rate of interest to be awarded, but interest must be simple rather than compound. These general provisions are subject to certain limitations. First, in respect of cases where judgment is given for damages for personal injury or death over £200, the court is obliged to award interest unless it is satisfied that there are special reasons to the contrary. Secondly, in the case of default judgments the Civil Procedure Rules 1998 ("CPR") provide that the rate of interest on default judgments may not exceed the rate of interest payable on judgment debts (see below). Thirdly, specific statutory interest regimes may apply: for example, the Taxes Management Act 1970 and the Late Payment of Commercial Debts (Interest) Act 1998.

Present Law: Post-Judgment Interest

In relation to post-judgment interest, the courts' general powers to award interest are set out in section 17 of the Judgments Act 1838 ("1838 Act"), which applies to the High Court, and its county court equivalent, section 74 of the 1984 Act.

Section 74 of the 1984 Act provides that the Lord Chancellor may by order (with the concurrence of the Treasury) provide for judgment debts and equivalent sums to carry interest at such rate and between such times as may be prescribed by order. The current rate is 8%. There are exceptions to this general rule. Interest is not, for example, payable where the judgment is given in proceedings to recover money due under agreements regulated by Consumer Credit Act 1974 or where the relevant judgment makes financial provision for a spouse or a child, on a order for the payment of less than £5,000 as a lump sum (whether or not payable by instalments). Nor is interest under this provision payable where the late payment of commercial debts regime applies.

History

In 2002, the Law Commission published a consultation paper on Compound Interest. There were 42 responses to this consultation paper from academics, government bodies and agencies, non-governmental bodies, lawyers, and businesses. Eighteen of the responses came from representative bodies (for example, the Consumer Credit Trade Association ("CCTA") and the Association of Personal Injury Lawyers ("APIL")). Respondents to that paper confirmed that there were inequities in the current law and encouraged reform. The Law Commission then considered the replies and published a final report and draft Bill on Pre-judgment Interest on Debts and Damages in 2004. The Commission considered that the law was uncertain, arbitrary and might result in inappropriate rates being charged in some cases. The Commission recommended that the law on pre-judgment interest should be changed.

The Commission's principal recommendations were that:

there should be a specified rate set annually at 1% above the Bank of England base rate, but that the courts should retain a discretion to depart from it; and

there should be power to award compound interest in appropriate circumstances, with a presumption in favour of it being awarded for sums of £15,000 or more. The Government responded to these recommendations in 2008. The Government agreed that the Lord Chancellor should prescribe the pre-judgment rate and that it should be possible to link the rate by reference to the Bank of England base rate. The Government also decided that this reform should also be extended to the post-judgment rate.

The Government agreed that it should be possible to award compound interest, but thought that the case had not been made for such a general provision as favoured by the Commission, noting that introducing compound interest for the generality of longer cases was a major step requiring further consultation and assessment of impact.

The proposals in the draft Bill develop the response to the Law Commission's proposals and would provide a legal framework within which the detailed provision of new legislation relation to pre- and post-judgment interest could be developed.

The proposals

The Bill will replace the present statutory provisions governing the award of pre- and post-judgment interest in the High Court, the county court and other courts of record with new provisions retaining the majority of the courts' powers but giving the Lord Chancellor a wide power to prescribe the rate of pre-judgment interest payable as well as the rate applicable to post-judgment interest. A significant change in the powers of the court would be that the rate specified by the Lord Chancellor for the type of case in question would be the only rate that the court could award if it chose to award pre-judgment interest. The Lord Chancellor's power will be very flexible and will be exercised by statutory instrument.

Impact assessment

An impact assessment relating to the pre and post-judgment interest provisions is at Annex D. As the provisions in the Bill provide only a legislative framework for the application and calculation of interest rates, the exact monetary costs arising from the Bill will depend on the rates that are set, which will be the subject of secondary legislation, which will itself be accompanied by an impact assessment and be the subject of consultation. There will be some minor one-off adjustment costs for all parties including HMCS. If the calculation of interest becomes more complicated this might impose some minor ongoing costs on all parties

Questions

1. Do you have any comments on the draft clauses of the Bill relating to the setting of pre- and post-judgment interest?
2. Do you agree with the impact assessment on the proposed reforms relating to the setting of pre- and post-judgment interest at Annex D?