Ministry of Justice

Civil Law Reform Bill Consultation

A response by the Association of Personal Injury Lawyers
February 2010

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

The aims of the Association of Personal Injury Lawyers are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Introduction

We welcome the opportunity to respond to this consultation, having responded to the Government's original consultation '*The Law on Damages'* in July 2007. Due to APIL's remit of campaigning on behalf of injured people, we will only be commenting on part one of the draft Bill.

There are some aspects of the draft Bill that we welcome. We are, however, extremely disappointed that some Law Commission recommendations have been ignored. In the foreword to the Bill, Bridget Prentice states that *'several of the reforms proposed derive from or implement recommendations of the Law Commission. I am very grateful to the Law Commission for its work in keeping the civil law up to date'*. Despite these comments, there are a number of recommendations that the Law Commission has made in recent years that are not addressed in this Bill. The fact that these recommendations have not been included is a failure to keep the law up to date, which will have a detrimental impact on injured people. We urge the Government to bring forward a further Bill to enable other Law Commission recommendations to be enacted in the very near future.

General comments

The most fundamental omission relates to the Law Commission's recommendations in relation to damages for non-pecuniary loss, which were not discussed in the Government's '*Law on Damages'* consultation in 2007. The fact that there is nothing in the draft Bill to address these recommendations represents a missed opportunity to make a much needed update to this area of law. The Court of Appeal failed to implement the recommendations in full and we had hoped that the Government would reflect on the Commission's view that the recommended increases should now be implemented through legislation, and bring forward measures in this Bill to do so.

In Law Commission report 257 – *Damages for Non- Pecuniary Loss*, published in 1999, it was recommended that damages for non-pecuniary loss should be increased by at least one and a half times (for damages above £3,000) and that, for damages valued between £2001 and £3000, that they should be subject to a series of tapered increases of less than one and half times. The Law Commission also stated:

"we recommend that, if the minimum increase recommended by us....is not achieved by the judiciary within a reasonable period (say three years from the date of publication of this report), it should be implemented by legislative enactment"[1].

By its decision in *Heil v Rankin* the Court of Appeal failed to implement the minimum recommendation. The Court did, however, acknowledge the following:

"the level of awards does involve questions of social policy...Parliament remains sovereign. It can still intervene after the Court has given its decision. The task would be a novel one for Parliament. However, Parliaments' intervention in this instance would not necessarily result in a loss of flexibility or interfere with the ability of the court to craft an award to the individual facts of a case, which is a virtue of the present system. The Commission has provided a draft Bill in their report in case it is necessary to legislate. The terms of the proposed Bill would avoid the undesirable consequence of lack of flexibility. If legislation based on the proposed Bill were to be passed, the legislation could also, by statutory provision, avoid the retrospective effect of an intervention by a court."[2]

Victims of negligence are poorly served by the failure here to review the Law Commission's own draft Bill, and we submit that this issue should be addressed without further delay.

[1] *Damages for Non-Pecuniary Loss*, LC 257, Part V Summary of Recommendations, paragraph 5.13
[2] Judgment, paragraph 41

Clause 1 – Extension of right of action

We welcome new subsection (h) in clause 1, which will give more people the right to make a claim when someone who is maintaining them is killed. We have concerns, however, about the current wording of new subsection (7), which gives a definition of 'maintenance', something that is not currently in the Fatal Accidents Act 1976.

We suggest amending new subsection (7) to read:

> *"(7) For the purposes of this Act, a person (A) is maintained by another person (B) if B, otherwise than for full valuable consideration, makes a substantial contribution in money or money's worth towards A.'*

We believe that the definition of 'maintained' in the current wording of subsection (7) could lead to satellite litigation as to what constitutes 'reasonable needs'. Our proposed amendment would remove reference to this and would, therefore, also reduce the risk of satellite litigation.

There is currently no mention of 'reasonable needs' in subsections (a) to (g) of section 1 (3) in the Fatal Accidents Act. We consider that the law should treat all classes of claimants equally and that it is inequitable to require one group of claimants to satisfy a higher threshold. Claimants under subsection (h) should be treated in the same way as claimants under subsections (a) to (g).

We are also concerned that the term 'reasonable needs' could lead to some people becoming 'second class' claimants, being maintained by the deceased at the time of death, but the support being given by the deceased not amounting to what could be considered as a 'reasonable need'. A child who is attending university and receiving additional financial support from his uncle, for example, should be entitled to make a claim under the Fatal Accidents Act, as he will suffer financially due to the death.

Under the current wording of the Bill, however, such financial support may not be considered as a 'reasonable need' and therefore he may not be able to bring a claim.

In the consultation paper the Government quite properly states that subsection (4) in clause 3 of the Fatal Accidents Act has been criticised for its 'intrusive nature', and is therefore to be repealed. It would therefore appear to be inconsistent for the Government to introduce a new subsection (7) here, which could lead to intrusive investigations regarding the financial arrangements of the deceased in order to establish who may have received financial assistance from him. We suggest the government should avoid the need for intrusive investigations in this area.

Clause 2 – Assessment of damages: effect of remarriage etc

We recommend that clause 2 of the draft Bill should be removed, in order to ensure that the obligation for financially supporting the bereaved spouse or civil partner should continue to be placed on the tortfeasor, rather than passed to the new spouse or partner. The principle that the 'polluter pays' governs our civil justice system, and we would oppose anything that seeks to change that. It is just and right that the person who is negligent in causing injury or death should pay the compensation.

We have consistently argued that the obligation to financially support the bereaved spouse or civil partner should remain with the tortfeasor, and not passed onto a new spouse or partner.

It is vitally important that the partner or spouse of someone killed through negligence is able to move on, and start rebuilding his or her life as quickly as possible. The fact that new subsection (3B) defines a relevant relationship as having lasted longer than two years could lead to defendants delaying proceedings, in the hope that the bereaved may have entered into a new relationship. The Government should not be

proposing legislation that could prevent bereaved partners from moving on with their lives after the loss of a loved one.

The clause as currently worded may also lead to new partners not contributing to the maintenance of bereaved family members, so as not to invoke this clause.

We are opposed to any demand for a two year period to be satisfied before claimants are able to bring a claim under the Fatal Accidents Act, as referred to in several places within the consultation. We feel it is inappropriate to have arbitrary time frames imposed in these situations, and that every case should be judged on the individual circumstances. It is also inappropriate that references to a two year period are included in the draft Bill when they have not been included in the Government's 2007 consultation paper.

We believe that a spouse who met and married the deceased within a matter of months should not be in a better position than someone who has cohabited with the deceased for one year and 364 days prior to the death. There may also be cases where a partner has been demonstrated to be financially dependant on the deceased for a number of years, but had never lived with the deceased, for a variety of possible personal reasons. These people would also be in a worse position under clause two as currently worded.

When considering relationships for the purposes of benefit calculation, the state does not require a relationship to have lasted longer than two years. It is inconsistent, therefore, to insist on such a time limit being satisfied in this context.

Clause 3 – Assessment of damages: possibility of relationship breakdown

We submit that subsection (b) of new clause 3D should be omitted from the Bill.

We do not agree that the courts should take into account the fact that the couple are no longer living together at the date of death as evidence that the marriage or partnership has irretrievably broken down. There are many reasons why a couple may not be living together, such as when one partner is working away from home for a significant length of time, or when one partner is in hospital or in full time care away from the home. There may also be cases where two people have lived together for some time, but have decided to continue their relationship, whilst not living together.

It would also be quite wrong to view a separation, which could be extremely brief, as a 'trigger' for the breakdown of a relationship, when brief separations are far from uncommon in generally successful, long-term partnerships. This would also encourage unnecessary intrusion by defendants into the private lives of the deceased and their partners. The Government has stated in its response that it is opposed to intrusive investigation in some areas of this legislation, but could leave bereaved partners open to such investigations under this clause. This approach, of potentially leaving the personal arrangements of the deceased open to investigation is, therefore, at best, inconsistent.

Clause 4 – Assessment of damages: effect of lack of right to financial support

We agree that subsection 4 in section 3 of the Fatal Accidents Act should be repealed, a step first suggested by the Law Commission in its paper 263 in 1999. In our original submission to the Government we said that it should be 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'. We are pleased that the Government is seeking to repeal this subsection, but we are

disappointed that it has not been replaced by a new provision along the lines suggested above.

Clause 5 – Damages for bereavement

Although we recognise the Government has brought forward proposals to extend the list of people who are able to make a claim for bereavement damages under the Fatal Accidents Act, we believe the proposed extension does not go far enough. We therefore suggest that current subsection (2) (b) of clause 1A in the Fatal Accidents Act should be removed, and the following amendment to current subsection (ab), and three new subsections in clause 5 (2):

> '(ab) of a parent of the deceased'
> (ac) of a child of the deceased who was aged under 18 at the date of death, or was living with the deceased at the time of death
> (ad) of a sibling of the deceased
> (ae) of a person who was engaged to the deceased at the time of death'

We believe that parents should be entitled to claim bereavement damages regardless of the age of the child when the child dies. Society views it as an unnatural sequence of events for a parent to endure the loss of a child as, in the natural order of things, parents should pre-decease their children. This is, surely, only compounded in cases where a child has been killed through negligence. It is, surely, both distasteful and impossible to argue that a child over the age of 18 is any less of a loss than a younger child.

Ties between siblings are very close and if one were to die due to negligence, the grief would be enormous. It is right and just, therefore, that they should be compensated for their loss.

We agree entirely with the Law Commission's recommendation that it would be inconsistent to treat engaged couples in a different way from cohabiting couples. We believe it is highly unlikely that an engaged couple would not be able to provide evidence of the engagement in a variety of ways, including, for example, the wearing of a ring, witness statements, or evidence of an appointment with a registrar.
The loss of a parent will obviously be keenly felt by a child, regardless of age. The closeness of the relationship and nature of emotional dependency will, however, be much greater for children living with their parents at the time of death, compared to a child who lives away from home. It is right, therefore, that children living with their parents at the time of death should be entitled to make a claim.

When considering bereavement damages, we advocate learning from the Damages (Scotland) Act 1976, which has been effective in dealing with bereavement damages (or 'loss of society' in Scotland) for more than 30 years.

Under the terms of the Act[3], those relatives entitled to bereavement damages are:

- Any person who immediately before the deceased's death was the spouse or civil partner of the deceased or in a relationship which had the characteristics of the relationship between civil partners

- Any person, not being the spouse of the deceased, who was, immediately before the deceased's death, living with the deceased as husband or wife

- Any person who was a parent or child of the deceased

- Any person not a parent or child of the deceased who was accepted by the deceased as a child of his family

[3] Damages (Scotland) Act 1976, Schedule 1

- Any person not a parent or child of the deceased who accepted the deceased as a child of his family

- Any person who was the brother or sister of the deceased; or was brought up in the same household as the deceased and who was accepted as a child of the family in which the deceased was a child

- Any person who was a grandparent or grandchild of the deceased

Clearly, there is no difficulty here in recognising the closeness between parents, children of all ages, grandparents, siblings and other people living with the deceased as part of the family. And we submit that the law in England and Wales should offer the bereaved in this jurisdiction no less comfort than their Scottish counterparts.

We also submit that the system of awarding bereavement damages through the courts, as happens in Scotland, is fairer to relatives. It is still accepted that any award made is simply a token, but the token offered is usually higher than the sum currently presented to the bereaved in England and Wales. This system relies on legal precedent and a proper examination of the closeness of the bereaved to the deceased, to ensure that any payments are fair, and we see no reason why this system cannot be introduced in this jurisdiction. Because the sums involved are still relatively low, cases are usually settled without going to court and so would not represent a major burden for the system.

Clause 6 – Minor amendment

We do not agree that this is a minor amendment. It is wrong, for the reasons stated above, for two people to have lived together for two years before they can be defined as a dependant.

We believe that clause 6 should be removed from the draft Bill, and that subsection (b) (ii) of clause 1 (3) in the Fatal Accidents Act should be repealed, as it contains references to a two year period having to pass before someone is classed as a dependant. We object to any reference to a two year period, for the reasons detailed above.

Clause 7 – Damages for gratuitous service
Clause 8 – Awards of damages under the Fatal Accidents Act 1976

Due to the similarities between clause 7 and 8, we will be commenting on the two clauses together. We submit that subsections (2), (4) and (5) of clause 7 in the draft Bill should removed, and the new clause 7 should read:

> (1) Subsection (2) applies if, on a claim for damages for personal injury, a court is considering awarding damages to the injured person in respect of a gratuitous provision of services to that person.
>
> (2) A court must not refuse to award damages in respect of a gratuitous provision of services merely because the person providing the services is the defendant.

In clause 8, we submit that subsections (2), (4), (5) and (6) should be omitted from the draft Bill. Clause 8 would, therefore, read:

> 1) The Fatal Accidents Act 1976 is amended as follows.
>
> (2) After section 3 insert—
>
> "3A Damages for gratuitous services provided by the deceased
>
> (1) Subsection (2) applies if, on a claim for damages for loss of dependency, a court awards damages to one or more dependants in respect of gratuitous provision of services to that person by the deceased.
>
> (2) In assessing the loss to a dependant of the deceased gratuitously providing services to the dependant which the deceased would have provided but for the death, the court must not refuse to award damages merely because the person providing the services is the defendant.

The Government's stated intentions were partial abolition of the rule in Hunt v Severs and the recognition of a personal obligation for the claimant receiver of compensation to account to the care provider. A less formal, simpler procedure than that currently imposed by *Hunt v Severs,* which requires funds to be held in a formal trust for the carer, was envisaged. This Draconian draft measure, however, goes much further than was ever suggested in the Government's consultation and attempts to implement the opposite of what was intended. Paragraph 14C of the Civil Law Reform Bill consultation paper states (our emphasis in bold):

"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…"*

This followed the Government's response to the *Law on Damages* consultation, which stated, in relation to gratuitous care, *'a legal obligation would be too rigid, and that a personal obligation would give greater flexibility.'* A statute which introduces a personal obligation to account into legislation, makes it a legal obligation.

The consultation paper echoes 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.

Our suggested amendment offers a partial reversion of *Hunt v Severs* which allows the claimant who has relied on gratuitous care in the past, even from the tortfeasor, to claim damages for that. This is then consistent with the current law that allows damages to be assessed at the full market rate (less discount for gratuitous care) of the cost of care in the future, because the claimant may not want to continue to rely on gratuitous care, especially where, for example, the carer has been the spouse. The claimant is entitled to choose that the care provider revert to a normal role as spouse or family member rather than to become a permanent carer.

If a legal obligation to account is created, the law then encourages defendants to continue to investigate the case after settlement or trial (to make sure that the claimant has accounted to the carer). This is an unwarranted intrusion by the

defendant into the private affairs of the claimant, after the claim has been concluded. Such an intrusion is inconsistent with the Government's approach in other areas of the draft Bill, as mentioned elsewhere in this response. It also imposes rigid requirements on the claimant, rather than leaving the account to the discretion of either or both the claimant and the carer (who for a variety of reasons may not want to enforce the personal obligation of the claimant).

When the money claimed is for the cost of care, if the claimant were to be forced to hand the money to the carer in a lump sum, this could affect any means-tested benefits which the carer may have. This would be an unintended consequence of being forced to act in that way by this obligation to account.

If the claimant does not recover the full value of the claim, the carer may acknowledge that the award does not fully cover the claimant's needs. The carer may, therefore, not want to take the money, preferring it to be kept 'in the pot' for the benefit of the claimant. This selfless personal decision could not be adopted if a rigid requirement to account were to be introduced by statute.

While a statutory legal obligation may seem like a neat solution, we are concerned that intrusive enquiries could be made of the claimant, and of the receiver of the sums claimed (the carer). It is generally accepted that the defendant is never allowed to demand proof that any aspect of future loss is spent exactly how it was claimed, as people and circumstances change.

Impact assessment

We are unable to provide detailed comments on the specific figures included in the impact assessment. It is a real concern, however, that, by discussion of the potential cost to the defendant, the impact assessment appears to aim to be 'fair' to both sides. This must not supersede discussion of what is 'full' compensation to the victim, especially when what can be considered 'fair' is, of course, highly subjective.

In pursuing the principle of fair and full compensation, it is, surely, fairness and logic which dictates that the needs of the claimant must come first. Any concern about balancing the interests of claimants with the cost to defendants and their insurers flies in the face of the principle of 'polluter pays' which governs our civil system.

It is settled law that in awarding damages, the financial consequences to the tortfeasor are not relevant. In *Heil v Rankin*[4] Lord Woolf MR (as he then was) stated:

> "33. We are well aware that in making a decision in a particular case as to what the damage should be, the Court must not be influenced by the means of a particular Defendant. As Mr O'Brien submitted for the Defendants in making an award the Court is not concerned with whether the Claimant is a pauper or a millionaire. The award for the same injuries should be the same irrespective of the Defendant's means. This is clear from the authorities. In *Wells v Wells* [1998] 3 All ER 481 at 492, [1999] 1 AC 345 at 373 Lord Lloyd of Berwick, quoting from Lord Scarman in *Lim Poh Choo v Camden & Islington Area Health Authority* [1979] 2 All ER 910 at 917-918, [1980] AC 174 at 187 said:
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> "There is no room here for considering the consequences of a high award upon the wrongdoer or those who finance him. And, if there were room for any such consideration, upon what principle, or by what criterion, is the Judge to determine the extent to which he is to diminish upon this ground the compensation payable".

[4] [2000] 2 WLR 1173, [2000] 3 All ER 138

Lord Hutton also confirmed this principle in *Wells v Wells* when he stated[5]:

> "The consequence of the present judgments of this House will be a very substantial rise in the level of awards to Plaintiffs who, by reason of the negligence of others sustained very grave injuries requiring nursing care in future years and causing a loss of future earning capacity, and there will be resultant increases in insurance premiums. But under the present principles of law governing the assessment of damages which provides that injured persons should receive full compensation Plaintiffs are entitled to such increased awards."

In *Parkinson v St James and Seacroft University Hospital NHS Trust*[6] Hale LJ (as she then was) said:

> "[56] The right to bodily integrity is the first and most important of the interests protected by the law of tort, listed in *Clerk & Lindsell on Torts*, 18th ed (2000), para 1-25. "The fundamental principle, plain and incontestable, is that every person's body is inviolate": see *Collins v Wilcock* [1984] 1 WLR 1172, 1177. Included within that right are two others. One is the right to physical autonomy: to make one's own choices about what will happen to one's own body. Another is the right not to be subjected to bodily injury or harm. These interests are regarded as so important that redress is given against both intentional and negligent interference with them."

We see no reason to act against the principles outlined above by factoring into consideration any need to balance the interests of claimants and those of defendants and their insurers.

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[5] [1999] 1 AC 345 at 405 (D-F)
[6] [2002] QB 266 at 284