MINISTRY OF JUSTICE (MoJ)

Formerly the Department for Constitutional Affairs (DCA)

THE LAW ON DAMAGES

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

July 2007

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) 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 thank the following past presidents of the association who have contributed to discussions about this consultation: Colin Ettinger; Allan Gore QC; David Marshall.

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EXECUTIVE SUMMARY

- The opportunity to respond to this consultation paper is much welcomed by APIL. We have long been concerned that many Law Commission recommendations which would have benefited injured people over the years have not been implemented, and we are encouraged by the Government's review of most of these issues.

- The focus of the consultation must, however, be the principle of full and fair compensation for the claimant or bereaved families. We are disappointed and very concerned to see the reference in the paper to a need to balance the interests of claimants and defendants and their insurers. Seeking this kind of balance is not only unfair to claimants but could result in a departure from the 'polluter pays' principle and does not reflect current case law.

- It is regrettable that the Law Commission's recommendations in relation to damages for non-pecuniary loss are not discussed in the consultation. The Court of Appeal failed to implement the recommendations in full and we had hoped that the Government would consider the Commission's view that the recommended increases should now be implemented through legislation.

- We agree that the statutory list of those who are able to claim for financial loss under the Fatal Accidents Act should be extended. We also submit that the obligation to support the bereaved spouse or partner should not be passed from the defendant to a new spouse or partner.

- It is an anomaly that economic losses between the date of death and trial are reduced by the current discount rate yet, where the victim is alive, all losses from the date of the injury to trial are not subject to the discount. This should be addressed either by legislation or by Government affirmation and recognition of a calculation designed to address this issue in the sixth edition of the Ogden Tables.

- Recognition by the Government of the plight of mesothelioma sufferers and their families (for whom claims made after death are greater in value than settlements in life) are welcomed. It would be unfair, though, to apply the remedies suggested only to mesothelioma cases and not to other cases where death through negligence is inevitable and imminent.

- Bereavement damages must continue to be available: to withdraw them would be socially and morally repugnant. We believe much can be learned in this respect from Scottish law, which sets out eligibility for bereavement damages. The amount awarded is then decided through the court system. There is no reason why bereaved people in England and Wales should be treated differently from their counterparts in Scotland.

- We welcome the fact that liability for psychiatric illness is included in the paper, but note that no specific questions are asked of consultees. There is absolutely no evidence to support the contention that such a move would 'open the floodgates to claims' and we submit it is the Government's responsibility to initiate reform in this area to reflect the fact that psychiatric illness is as painful and debilitating as physical illness and should be compensated for accordingly.

- A redundancy payment is a reward to an employee for past service and should never be deducted from a payment of damages for loss of earnings.

- Section 2(4) Law Reform (Personal Injuries) Act 1948 should not be repealed. There is no evidence to support the suggestion that claimants whose compensation includes the cost of private healthcare go on to use NHS care and pocket the difference. Where the claim is against the NHS it would be inhumane to force a claimant to use the same NHS service which caused the injury. Furthermore, relying on NHS care, which cannot be guaranteed to be delivered quickly, can seriously impede successful early rehabilitation and return to work and normal life.

- We agree fundamentally that where there is a statutory duty on public bodies to provide care and accommodation services to the claimant, the central principle should be that the defendant should pay for the costs of care. When judges observe that it is not right for the public purse to meet the defendant's liabilities, the law is surely ripe for reform.

- If a claimant is so badly injured that he needs to purchase new accommodation or alter his current accommodation, the negligent party who caused the injury should simply provide the funds to allow the claimant to do this.

- We are extremely concerned about some of the assumptions made in the partial regulatory impact assessment annexed to the main consultation paper. This association is not (for example) equipped to answer question 38 about the analysis of costs to the insurance industry or, in question 39, comment on the analysis of costs to the NHS and we urge the Government to undertake independent investigation to examine these, and other, analyses.

- Similarly, there is no detail as to how the alleged costs of implementing Law Commission recommendations in relation to psychiatric illness as set out by the NHSLA and insurance industry in the RIA have been calculated. It is important that the evidential basis for these figures is transparent. There is also no assessment of the proportion by which overall damages payments would be increased by the change.

- There is no assessment of the savings to the state of tortfeasors being held accountable for this damage rather than the costs falling back on the state, in the form of medical treatment and benefits payments, and on employers for lost days of work. As argued earlier in this summary, the only costs which are relevant in this context are the damages themselves and the claimant's costs.

PRINCIPLES

1. APIL welcomes this consultation paper as an opportunity to address many iniquities in the current system for payment of damages which have been raised by the Law Commission over a number of years.

2. There is a fundamental concern, however, about the premise on which the paper is based.

3. We are surprised that the paper begins with a reference to the 'compensation culture', as the issue of damages must surely be distinct from any discussion about preventing a compensation culture from developing. As the paper[1] states:

> '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.'

4. References to a 'disproportionate fear of litigation' and provision of compensation in a 'proportionate and cost-effective way' are equally inappropriate in this context. The Government introduced the Compensation Act[2] precisely to deal with any 'disproportionate fear of litigation' and the Ministry of Justice's current consultation paper *Case Track Limits and the Claims Process for Personal Injury Claims* is designed to deal with proportionality and cost-effectiveness. Issues of proportionality do not apply to damages, which are calculated instead on the premise outlined in the section of the consultation paper quoted above.

[1] Department for Constitutional Affairs consultation paper: The Law on Damages CP9/07, introduction, page 8
[2] Compensation Act 2006 C.29, Part 1, Section 1 'Deterrent Effect of Potential Liability'

5. This crucial paper must be based on the principle of both fair and full compensation to the victim of negligence. This does not mean, of course, that the claimant should receive a 'windfall' payment but a reimbursement of expenses which meet the claimant's reasonable needs and restores him to the same position he would have been in, but for the injury, as outlined above.

6. In pursuing the principle of fair and full compensation, it is, surely, a simple question of logic which dictates that the needs of the claimant must come first. The Government's concern about balancing 'the interests of claimants and those of defendants and their insurers' flies in the face of the principle of 'polluter pays' which governs our civil system.

7. It is settled law that in awarding damages, the financial consequences to the tortfeasor are not relevant. In *Heil v Rankin*[3] 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:

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

> "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".

8. Lord Hutton also confirmed this principle in *Wells v Wells* when he stated[4]:

> "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."

9. In *Parkinson v St James and Seacroft University Hospital NHS Trust*[5] 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

[4] [1999] 1 AC 345 at 405 (D-F)
[5] [2002] QB 266 at 284

> are regarded as so important that redress is given against both intentional and negligent interference with them."

10. 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.

11. In light of the context of these remarks, there is a real concern among APIL members that discussion about what is 'fair' to both sides will supersede discussion of what is 'full' compensation to the victim. And what can be considered 'fair' is, of course, highly subjective.

12. The association is equally disappointed by the Government's previous pronouncements that the Law Commission report 257 – *Damages for Non-Pecuniary Loss* is not a matter for the Government but a matter for the courts, and by the fact that the report is not included for discussion in this paper.

13. In that report, the Law Commission 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"[6].

14. The report was published eight years ago in 1999.

[6] *Damages for Non-Pecuniary Loss*, LC 257, Part V Summary of Recommendations, paragraph 5.13

15. 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."[7]

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

17. In addition, we submit that this consultation presents an opportunity to emphasise the need to prevent avoidable injury from happening in the first place. If providing full and fair compensation to injured people or the bereaved alerts defendants (such as employers) and their insurers to the fact that systematic safety improvements must be made to avoid the injuries which lead to payment of compensation, we welcome this.

[7] Judgment, paragraph 41

CHAPTER 1 - CLAIMS FOR WRONGFUL DEATH

Question 1 a)

18. We agree that a residual category should be added to the statutory list of those entitled to claim for financial loss. It is entirely appropriate that people who were actually dependent on the deceased should not suffer financial detriment simply because they are not on a statutory list.

Question 1 b)

19. We do not believe the residual category should be restricted just to any person who was being wholly or partly maintained by the deceased immediately before death. It should also be open to those who would have been partly or wholly maintained after the death. A typical situation in which an individual could be seriously disadvantaged if the restriction to before death is applied, is when a husband or partner dies during his wife or partner's pregnancy. Clearly, the child would have been maintained by the father, either wholly or partly, and so the suggested limitation would mean considerable hardship for the bereaved family. We appreciate and support the Government's concern to prevent unmeritorious claims from being brought, but, in the experience of our members, the courts have in the past, and can be relied upon in the future, to ensure this does not happen.

Question 2 a)

20. We do not 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 Fatal Accidents Act. The primary reason for this is that the obligation to support the bereaved spouse or civil partner would be passed from the tortfeasor to the new spouse or partner, which is iniquitous.

Question 2 b)

21. We do not consider that the fact of a person's financially supportive cohabitation of at least two years following the death should be taken into account, for the same reason outlined in our answer to 2 a).

Question 2 c)

22. We do agree that the prospects of remarriage, civil partnership or financially supportive cohabitation should not be taken into account in any circumstances for the reason outlined in our answer to question 2 a) above. In addition, if the prospects of remarriage, civil partnership or financially supportive cohabitation were to be taken into account, this would inevitably lead to embarrassing and intrusive surveillance and questioning of the bereaved party.

23. Before the introduction of the Fatal Accidents Act, judges were often obliged to assess visually if the bereaved party would be likely to remarry. Any return to such an undignified procedure must be avoided at all costs.

Questions 3 a) and 3 b)

24. We do not agree that remarriage, civil partnership or financially supportive cohabitation should be taken into account when assessing a claim for damages on the part of any eligible children. The current anomaly must be addressed by changing the position in relation to eligible children.

Questions 4 a) to c)

25. 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.

26. 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.

27. If, however, one partner has petitioned for divorce, nullity or dissolution of the partnership, then this can be taken into account. This should not, however, be an automatic bar to making a claim, but something which the court would have to take into account when determining the extent of dependency.

Question 5

28. We agree that s. 3(4) of the Fatal Accident Act 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. This suggestion was first made by the Law Commission in its consultation paper, number 263.

29. APIL would also like to draw attention to another anomaly found relating to FAA claims which should be reversed. The decision in *Cookson v Knowles* [1979] AC 556, held that in fatal accident cases economic loss damages should be divided into two parts: (a) pre-trial pecuniary loss damages (ie the total amounts lost between date of death and date of trial) and (b) pecuniary loss of the dependents from date of death with the multiplier as the probable length of the deceased's working life. The effect of this case is that in fatal claims, the multiplier is applied to the whole loss from the date of death: losses stemming from the death up to date of trial are discounted and the result is lower awards for economic loss in fatal claims. In contrast, where the victim is alive, all losses from the date of accident to trial are undiscounted, and the multiplier only applies to future losses. This means the economic loss awards are more accurate and fair.

30. The Law Commission suggest in its paper 263 that this should be reversed, (paragraph 7.14 LC 263). The Court of Appeal in *ATH and another v MS* [2002] 3 WLR 1179, [3 July 2002] TLR, found itself bound by the decision in *Cookson v Knowles* and so it is for Parliament to legislate on this issue.

31. In paper 263 the Law Commission suggested that:

> "the Ogden Working Party (which includes the Government Actuary) should consider, and explain more fully, how the existing actuarial Ogden tables should be used, or amended, to produce accurate assessments of damages in Fatal Accident Act cases (as opposed to personal injury cases). We would point out to that working party our preferred approach as set out in paragraphs 4.17 and 4.18 and, in particular, our view that a multiplier which has been discounted for the early receipt of the damages should only be used in the calculation of post-trial losses."

32. Since then, the publication of the sixth edition of the Ogden Tables has gone some way to resolve the issue: pages 22 of the sixth edition is the start of several pages which set out the calculation.[8] As an alternative to legislation to reverse the effect of *Cookson*, the methodology set out in the sixth edition of the Ogden Tables should be affirmed and recognised superseding the decision in *Cookson*.

33. *McGregor on Damages*, an authoritative text on this subject, approves of this suggestion:

> "The courts, of course, must first be persuaded, as it is thought that they should be, to adopt this scheme of calculation which is both more rational and much fairer to claimants. Do the decisions in the House of Lords in *Cookson v Knowles* and *Graham v Dodds* stand in the way? Both the Law Commission and the Ogden Working Party thought not, taking the view that the whole position has been radically changed by the House of Lords in *Wells v Wells* authoritatively laying down for the first time that the Ogden Tables should be the starting point for the assessment of damages for future pecuniary loss – as Lord Lloyd put it, it was 'a new approach'."[9]

[8] See paragraph 64 onwards of the Ogden Tables and subsequent worked examples.
[9] *McGregor on Damages*, 36-055.

34. The long-lasting text, *Kemp and Kemp*, provides an illustration of the absurdity of the current position in the case of *Corbett v Barking HA* [1991] 2QB 408. In this case, a dependant boy was two weeks old when his 29 year old mother died. The action did not come to trial until 11.5 years after the mother's death. The trial judge held that the boy would have been dependent on his mother until the age of 18 and that the multiplier to be adopted was 12 years from the date of the mother's death. Thus, for future loss, the judge only awarded six months' dependency, even though the boy was aged 11.5 at date of trial and would on the judge's finding, have been a dependent on his mother for another 6.5 years. The appeal increased the multiplier to 15, but even then, that only covered 3.5 of the remaining 6.5 years' dependency. [10]

Mesothelioma

35. APIL has been very closely involved with the work led by the Department for Work and Pensions to improve the system for mesothelioma sufferers and their families. It has certainly been a matter of great concern to us that, in certain cases, claims after death are greater in value than settlements concluded during the lifetime of the claimant.

36. Under paragraph 29, a number of options are set out to address the difficulties experienced, and we believe that each option would provide real relief to claimants. We do feel very strongly, however, that these options should not just be available for mesothelioma sufferers but in all cases where death due to negligence is inevitable, and imminent (subject to proof being provided by the claimant).

[10] *Kemp R.102*: February 2007, 29-058.

37. The first suggestion of introducing a statutory amendment similar to that contained in the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act would be welcomed, allowing as it would, the victim to obtain some comfort from his damages during life, and not depriving eligible relatives from claiming after his death. We would emphasise, however, that this should apply to bereavement damages only, to avoid any possibility of double recovery by relatives.

38. An amendment to the civil procedure rules to allow any personal injury claimant to make an application for an interim payment by way of the summary procedure under part 8 of the rules would be a welcome simplification of current convoluted procedures.

39. A special provision limited to eligible claimants to allow recovery of claims under the Fatal Accidents Act is a creative approach providing flexibility for victims in these circumstances and, as such, APIL supports the Government's goal. Such an initiative would, of course, involve changes to substantive law through primary legislation and this association would be happy to assist in any developmental work involved.

40. The legislative removal of the different approaches to calculating damages for the 'lost years' in claims concluded during the lifetime of the terminally ill would also be welcomed. We would stress again, however, that none of these options should be available only for mesothelioma victims but for all victims where death due to negligence is inevitable, and imminent.

CHAPTER 2 – BEREAVEMENT DAMAGES

Question 6

41. We do consider that bereavement damages should continue to be available. While it is self-evident that the level of pain and suffering following bereavement is different for all individuals and that loss of a loved one is a part of everyday life, it is important not to lose sight of the fact that, in the cases under discussion, a bereavement has occurred through the negligence of another party. The fact that a loved one has died needlessly can only increase the sense of pain and loss of the bereaved and should be compensated for by the tortfeasor. To suggest that a death should not receive a token acknowledgement is socially and morally repugnant and would not serve to enhance public confidence in the civil justice system.

Question 7

42. We do agree that it would be appropriate to include an explanation of the purpose of bereavement damages in the explanatory notes accompanying any legislation. At the present time, we can see no other way of explaining the purpose of bereavement damages to those affected and it is extremely important that people understand that the reason they will received a fixed figure in damages is because the law finds it impossible to put a value on an individual's life.

Questions 8 a) to c)

43. We believe that anyone exercising parental responsibility under the Children Act 1989 should be entitled to claim bereavement damages for children aged under 18. Society views it as an unnatural sequence of events for a parent to witness loss of a child as, in the natural order of things, parents should pre-decease their children. 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.

44. We also believe that the statutory list should be extended to include parents of stillborn children. While parents in this situation can obtain damages through common law, this is not automatic. Case law is old and text books are unclear in this area and clarity would be welcomed.

Question 9

45. We agree that children of the deceased (including adoptive children) who are under 18 should be added to the statutory list, but we also believe that adult children should also be included. Feelings of pain and loss clearly do not cease once a child reaches the age of 18.

46. We do recognise, however, that it is reasonable to impose a limit on this and we suggest that it would be reasonable for children over the age of 18 to be excluded from the statutory list only once they have left the family home in order to start another family household either with a spouse or with a co-habiting partner.

47. While the loss will obviously still be keenly felt, the closeness of the relationship and nature of emotional dependency are different for a child over the age of 18 who may be temporarily living away from home at university, living alone, or living in the family home when a parent dies, compared with a child of the same age who has left home to marry or co-habit with a partner.

Question 10

48. We disagree with the proposal that brothers and sisters of the deceased should not be eligible to recover damages. Ties between siblings are very close and if one died due to negligence, the grief would be enormous.

Question 11

49. We 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.

Question 12

50. We agree entirely with the Law Commission 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.

51. It would be deeply iniquitous to discriminate against people who are committed to each other but who choose not to cohabit on religious or other grounds.

Questions 13 a) to d)

52. While we welcome the Government's recognition that the amount of the bereavement damages award should be uprated, we believe fundamentally that the current amount of £10,000 is too low. This arbitrary figure is no comfort at all to bereaved relatives who need to understand that the death of their loved one is taken seriously by society. We believe there should be a closer correlation between damages paid to the bereaved and damages paid for significant physical injury. It should not be cheaper to kill someone than to cause them serious injury.

53. The fact that the proposal to uprate the current payment of £10,000 every three years, partly to assist insurers and the NHS to build the effect of future increases into their reserves is also deeply unsatisfactory for the reasons outlined in the introduction to this response. If someone dies at the hands of a negligent party, then that party must be prepared for the consequences. An increase every three years is also illogical, and an uprate on an annual basis would be fairer to bereaved people.

54. All of those eligible should be entitled to a separate payment without having to share the payment as if it were a syndicate lottery win. The principle of bereavement damages should be the same irrespective of the size of the deceased's family.

55. In considering the answers to questions on bereavement damages, we submit that much can be learned 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.

56. Under the terms of the Act[11], 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

- 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

57. Clearly, the law in Scotland has no difficulty 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.

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

58. The category of fiancé is, however, omitted from the Scottish law and, as outlined earlier in this response, we agree entirely with the English Law Commission that it would be inconsistent to treat engaged couples in a different way from cohabiting couples.

59. We also submit that the Scottish system of awarding bereavement damages through the courts, 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 derisory sum currently presented to the bereaved in England and Wales. The Scottish 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.

Question 14

60. We do agree that contributory negligence on the part of the *deceased* (rather than the claimant, as stated in the question) should reduce the award of bereavement damages, with one exception. Current case law does not support the concept of contributory negligence for children under the age of 14. In view of this, and taking into consideration the extreme distress of bereaved parents of children of this age, we believe it would be inappropriate to enter into long liability arguments in cases relating to the death of a child under the age of 14 and submit that contributory negligence should not reduce the award of bereavement damages in these circumstances.

CHAPTER 3 – LIABILITY FOR PSYCHIATRIC ILLNESS

61. The association welcomes the fact that liability for psychiatric illness is included in the consultation paper but is disappointed by the Government's decision not to include any questions on this important issue. The law has developed since the Law Commission report but the association strongly believes that legislation is still needed to address the difficulties highlighted by Lord Steyn, for instance, in the case of White v Chief Constable of the South Yorkshire Police [1999] 1 All ER 1, who stated that 'the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify'. He went on to say:

> "In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform".

62. APIL agrees with this statement. The Law Commission published a draft bill alongside its report on liability for psychiatric illness and APIL contends that this bill should be enacted.

63. The arguments outlined in paragraph 85 of the consultation about complexity and the possibility of a burden of liability being placed on defendants for 'what might be a mere momentary lapse in concentration' are irrelevant here. If someone sufferes psychiatric injury through the negligence of another, he is entitled to compensation, regardless of administrative difficulties caused by complexity.

64. We suggest the points below should be included in any legislation.

Nervous shock

65. APIL contends that the nervous shock test is too restrictive. The requirement that the event itself must be 'shocking' in the sense of making a direct and immediate impact on the senses should be abandoned. The association favours the concept of a 'distressing event' (or series of events). Medical science increasingly shows that people can develop psychiatric illnesses as a result of events which took place over a considerable period of time. Child abuse is the obvious example. It cannot be right that a person who suffers psychiatric illness due to an extended series of events is denied damages whereas a person who suffers an illness due to one event, however shocking, is able to obtain damages. Such illnesses can also prove just as debilitating to the sufferer as physical injuries. This test is outdated, arbitrary and harsh, and needs to be changed. The Law Commission supported this view.

Close tie of love and affection

66. APIL regards the law in this area as too restrictive, particularly as applied to 'secondary victims'. At present, a secondary victim has to satisfy a number of 'control mechanisms' before he can claim. One of these is the requirement that the victim must have a 'close tie of love and affection' with the dead or injured person.

67. APIL argues that the close ties of love and affection should be retained but this should be broadened. We favour a statutory list of relationships in which there is a rebuttable presumption of a close tie of love and affection, but this list should be widened to include the extended family, collegiate relationships within full-time education, and certain employment relationships, such as team workers. If the list has rebuttable presumption status, then it is open to the defendant to call evidence to challenge the tie.

Closeness of time and space

68. The requirement of closeness of time and space and of perception through one's unaided senses should also be abandoned. A secondary victim with close ties to the primary victim should not be denied the right to compensation simply because he was not present at the scene of the distressing event. This, again, can lead to arbitrary and unnecessarily harsh limits to who can claim.

Bystanders

69. The association submits that a 'bystander' (i.e. a person who physically witnesses, with his own unaided senses, the event and as a result suffers mental injury) should be entitled to claim damages. The normal rules of causation and injury are sufficient to qualify the position of bystander for liability purposes, as the further the bystander is from the event, the less likely he is to suffer injury.

General comments

70. The consultation paper is predicated on the belief that any change to the current law will lead to an increase in 'speculative and inappropriate claims'. APIL believes this to be unfounded. The extension of liability would not 'open the floodgates' to claims. Under normal tort principles, it will still be necessary for the claimant to show causation and injury which are sufficient to weed out unmeritorious claims. Perceptions of such a phenomenon have been influenced by mass disasters in the past. In practice these affect a comparatively small number of people as a proportion of those suffering personal injury overall. Most events, and therefore the numbers of potential secondary victims suffering from psychiatric illness, are on a much smaller scale. It is also doubtful that claims would be made in all cases as mental injury is not an inevitable consequence for eye witnesses.

71. It would, however, be inequitable for people who have suffered a recognised psychiatric illness to be denied the damages to which they are entitled due to an erroneous public policy aiming to prevent a mythical eventuality.

72. Lack of clarity in the case law can also affect cases of psychiatric illness in other ways. It is a disincentive, for example, for early rehabilitation to be made available to the injured person. This is clearly a missed opportunity to speed up the rate of recovery and allow the individual to return to normal life, and work, more quickly.

73. Uncertainty in the law also makes it very difficult to fund a case for psychiatric illness under a conditional fee agreement (CFA) and, where funding options are difficult and the risks are high, there is always a danger that an injured person may not be able to find a solicitor to deal with the claim at all, which represents an obvious barrier to access to justice. Clarification of the law could also lead to lower success fees, thereby reducing costs in these cases.

74. Furthermore, the Regulatory Impact Assessment makes clear that the Government has consulted the NHSLA and the ABI on the potential impact of any changes but we are disappointed to see there is no mention of any claimant organisations being consulted.

75. There is no detail as to how the alleged costs set out by the NHSLA and insurance industry in the RIA have been calculated. It is important that the evidential basis for these figures is transparent. There is also no assessment of the proportion by which overall damages payments would be increased by the change. There is no assessment of the savings to the state of tortfeasors being held accountable for this damage rather than the costs falling back on the state, in the form of medical treatment and benefits payments, and on employers for lost days of work.

76. The association argues that psychiatric illness has been regarded as being less serious than physical injury. Developments in medical science have proved that this is not the case: psychiatric illness can prove every bit as debilitating and it is unjust to taint such victims with any accusations of unmeritorious claims.

CHAPTER 4 – COLLATERAL BENEFITS

Question 15 a)

77. We welcome the Government's recognition in paragraph 106 that potential tort liability creates an incentive to take appropriate care. We do not agree, though, that fear of this incentive being weakened by the availability of a collateral benefit should lead to the principle as set out in paragraph 107 of the consultation paper. This principle does not take into account the issue of private personal provision and a claimant who has had the foresight to make private personal provision through payment of (for example) personal accident insurance, should not be penalised for doing so.

Question 15 b)

78. For the reason outlined above, we believe the payer should have no right of recovery against the claimant.

Question 16

79. We agree that there should be no change to the present law in relation to charitable payments.

Question 17 a)

80. We agree that the *Hunt v Severs* trust approach should be replaced by a personal obligation to account. It is distasteful that there is a financial incentive on a bereaved spouse to buy in care which can be recompensed, rather than provide it gratuitously, which cannot.

Question 17 b)

81. We agree that a personal obligation to account should apply to damages for future as well as past gratuitous care.

Question 17 c)

82. We agree that a personal obligation to account for damages for past gratuitous care, regardless of the identity of the carer, should apply generally except where the past gratuitous care is provided by the tortfeasor.

83. Payment of damages in these circumstances is an unnecessary and illogical transaction because the defendant will pay the money to the claimant, only for the claimant to immediately return it to the defendant.

84. We envisage that this is most likely to occur in domestic situations such as where a husband or wife has been injured after being a passenger in a car being driven negligently by the spouse.

85. Given the close tie of love and affection, and likely feelings of deep regret about the injury, it is natural that they would wish to provide gratuitous care and this should be encouraged. Our only concern would be that where the defendant is insured, he may conveniently avoid this rule by entering into a contractual agreement with the claimant for paid-for care, meaning that he receives money for care that would he would have otherwise provided gratuitously. As there is no clear solution to this problem, however, we suggest it is more a matter for the insurers to work out with defendants.

86. The rule is also helpful to defendants in that they save on the costs of care by providing the service themselves.

87. Finally, we would also question the payment of damages to defendants for future gratuitous care. This once again appears to be an unnecessary and illogical transaction because the money will be eventually repaid to the defendant. The only apparent advantage would be to the claimant where future gratuitous care is not actually provided, leaving him with sufficient funds to cover alternative care.

Question 17 d)

88. We believe there is no need to amend the FAA to allow damages to be awarded under the Act in respect of services gratuitously provided to a dependant of the deceased. In the experience of our members, there is no difficulty with the law in this respect.

Questions 18 a) and b)

89. We do not believe any clarification to the law is necessary in these respects.

Question 19

90. We agree that no change is appropriate in the law relating to pensions.

Questions 20 a) to c)

91. No change is required.

Question 21

92. A redundancy payment is, is intended to be, and is expressed to be a reward to an employee for past service and has therefore been earned by him by his past work, by definition, before the accident. It is not, therefore, fair to deduct a redundancy payment from damages for loss of earnings after the accident.

93. Such a deduction can happen through the courts, however, and we believe the Government should protect claimants by introducing a statutory rule to ensure that redundancy payments should never be deducted from damages.

94. For example, Kemp & Kemp Vol 1 para 27-034-035 says:

> "In *Wilson v National Coal Board* ([1981] S.L.T. 67.), a decision of the House of Lords, the claimant, a miner, was injured in an accident at work. He was kept on the work force, although unable to resume his duties, until the colliery closed about a year after his accident, whereupon he was dismissed for redundancy. But for his incapacity the claimant would not have been made redundant but would have accepted alternative employment at a neighbouring colliery, as did his workmates. The House of Lords held that it would be unjust and unreasonable to assess the damages on the basis that but for the accident the claimant would have remained in his employment and yet to refrain from taking into account a redundancy payment made because he was not going to continue because of his injuries. The redundancy payment was therefore deducted from the loss of earnings claim."

95. Although the House of Lords regarded as "exceptional" the circumstances in which a claimant's redundancy payment should be deducted from his damages, Lord Donaldson MR in *Colledge v Bass Mitchells Ltd* ([1988] 1 All ER 536, CA) appeared to have a different view. He said (at 540):

> "I would only add that, since their Lordships regarded Wilson's position as exceptional, it must be possible to construct a scenario in which the amount of a redundancy payment would not fall to be deducted. Nevertheless there is only one case in which I can foresee this, namely where the claimant would have been made redundant regardless of the accident."

CHAPTER 5 – COST OF PRIVATE CARE

Question 22

96. APIL does not believe that s.2 (4) of the Law Reform (Personal Injuries) Act 1948 should be repealed. As the Government's consultation paper states, there is no evidence to support concerns that claimants whose compensation includes the cost of private healthcare receive that healthcare free from the NHS.

97. There are important reasons why a claimant should be able to recover for private health care. Where the claim is against the NHS, claimants may not wish to obtain treatment from an NHS Trust which has already let them down – they may have no confidence in the treatment provided, and relationships with key NHS staff may have been damaged. In his report '*Making Amends: a consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS'* of June 2003, the Chief Medical Officer recognised that

> 'the effects of a serious adverse and unexpected outcome of care go beyond the impact of the physical injury itself. The psychological and social impact can include anxiety, depression, fear of future treatment, distribution to work and family life'.[12]

98. In addition, claimants may fear or know that the NHS will be unable to meet their needs. For example, the National Institute of Clinical Excellence (NICE) may refuse a treatment for a patient who desperately needs it. The patient will then have to pay for the treatment privately.

[12] Summary, page 9

Question 23

99. Repeal of section 2(4) is likely to have a significant negative impact on claimants, defendants, and the taxpayer.

100. Forcing a claimant into having to rely on the NHS, where treatment cannot be guaranteed to take place quickly, will have a serious impact on rehabilitation which needs to take place as soon as possible after the injury to achieve the optimum effect.

101. Obviously, the sooner a patient can return to work, the greater the benefit to the claimant and the greater the likelihood that any loss of earnings claim will decrease.

102. Even if waiting times for appointments at the NHS are substantially reduced in due course, it is considered highly unlikely that the early intervention needed to facilitate a speedy return to work will be available from the NHS alone.

103. Any delay in treatment will have an obvious negative impact on the claimant, add costs to the case and place a further burden on an already over-stretched NHS.

104. Furthermore, for those people whose return to work depends on dealing with the psychological effects of an incident, it is widely believed that cognitive behavioural therapy (CBT) is often the most effective treatment, and it is highly unlikely that the NHS could deliver the required elements of CBT to facilitate early return to work.

Question 24

105. Section 2(4) already offers claimants and their carers a sense of control over the care provided for several reasons. As outlined in our answer to question 22, the treatment a patient requires may not always be available through NHS treatment and this would inevitably be a cause of great anxiety to the claimant. In addition, a claimant may be able to plan his return to work earlier and with more reliability if he relies on private treatment, and this can have (as mentioned above) an impact on any loss of earnings claim.

106. If section 2(4) were to be repealed, it would be essential for the claimant to have the right to enforce the provision of any treatment offered through the NHS and to be able to return to the court at any time if the treatment is not provided as promised.

Question 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?)

107. The implicit suggestion in this question is that there may be a significant group of seriously injured claimants (in numerical or financial terms) who unnecessarily burden local NHS or social services budgets either by obtaining private care but then using NHS resources, or by squandering settlements.

108. Both suggestions are without foundation. The Law Commission, in its report, *Damages for personal injury: medical, nursing and other expenses; collateral benefits*, could only note that there was a concern among some commentators that some claimants who claim damages for the cost of private care may subsequently use NHS treatment. The report cited, *Lim Poh Choo v Camden & Islington HA* [1980] AC 174, 188, *per* Lord Scarman, although in this case, the appellant's argument that the award for loss of future earnings duplicated the cost of care was rejected and it was held that the capital sum assessed would compensate for both without any duplication. Also cited were: P Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed 1999) p 125; A Ogus, *The Law of Damages* (1973) p 175. It also referred consultees to read: *Letters to the Editor, The Times* 21 January 1999 and 3 February 1999 for evidence of more recent (albeit eight years old) debates which indicate the topical nature of s 2(4) of the Law Reform (Personal Injuries) Act 1948.

109. Ultimately the Commission did not find any empirical evidence to support the notion of over-compensation in this way, as noted in the consultation paper.[13]

110. Aside from the lack of evidence, it would be difficult for claimants to be over-compensated in reality. For permanent and serious injuries, the award of damages can be considerable, taking into account as they do future loss of earnings and future care costs, including, where deemed appropriate, the cost of privately buying medical care rather than using NHS services. The discount rate is a deduction made from the sum awarded for such future losses, on the basis that the successful claimant will invest the award, thereby increasing the value of the original sum. Such cases of serious injury result in claimants enduring higher levels of tax on investment income with the result that their net return is lower than for those claimants with

[13] Consultation paper paragraphs 154 and 155.

lower value awards. This could be compensated by using a lower discount rate but, to date, the Secretary of State has failed to lower the discount rate to reflect the fact that most claimants do not 'play' the stock market but invest instead in low risk funds which offer a predictable, but lower, return.

111. In addition, it has now been accepted in several recent cases that relying upon the use of the retail prices index (RPI) to calculate the escalation of costs of future losses, is inappropriate when it comes to calculating the cost of care. Such costs increase year on year in excess of the RPI. See the cases of *Flora v Wakom* [2006] EWCA Civ 1103, *Sarwar v Ali and the MIB* [2007] EWHC 274 and *Thompstone v Tameside & Glossop Acute Services NHS Trust* [2006] EWHC 2904. Bearing in mind that these cases all accept that care costs are more likely to run out rather than be an over-compensation of the claimant, there is evidence that under-compensation, rather than over-compensation is more likely to be the norm.

112. The suggestion that the defendant ought to pay directly to the provider of care is also a serious concern, as it would create a whole series of practical difficulties for the claimant.

113. What would happen, for example, if the claimant wishes to change carers? If the contract for care is not between the claimant and the carers (but between the paying defendant and the carer) this may be more difficult. From whom would the carer take instructions? The defendant who pays the bills or the claimant who receives the care? Conflict is almost inevitable. Even if there is a direct contract between claimant and carer, but payment is made direct, there will be issues of obtaining the agreement of the defendant to any changes, something which ought to be within the power of the claimant only.

114. Most claimants – and, indeed, many insurers – do not want to maintain contact for the rest of the claimant's life. Aside from issues of continuing solvency, which may affect the viability of future payments (a real source of worry to the claimant) the claimant may not wish to have any contact with the representative of the person who caused his current injuries and distress, once the claim is resolved.

Question 26

115. We agree fundamentally 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.

116. The judgment in *Crofton v NHS Litigation Authority*[14] exemplifies how the law as it currently stands disadvantages claimants, and costs social services departments dearly. The law on this matter is clearly ripe for reform when the judges at both instances have made observations suggesting it is not right for the public purse to meet the tortfeasor's liabilities, but that the law as it currently stands offers little alternative.

[14] [2006] All ER (D) 104

117. There are also serious implications for the claimant in such circumstances. Additional delays and legal challenges aside, this ruling creates a great deal of uncertainty about the future care arrangements for personal injury victims. In the case of *Sowden v Lodge*[15] a key issue was the question of whether the council was likely to fund care at the same level for the next 40 years. We believe it is completely unrealistic to expect judges adequately to predict care and funding arrangements for decades to come. It is, therefore, extremely difficult for claimant lawyers to secure adequate care for their clients on the basis of this ruling.

118. We would expect insurers to be concerned about the risk of 'double-funding'[16], but the fact is that social services' packages are very uncertain. The experience of our members shows that social services have very little to offer claimants and it is most unlikely that individuals will be in a position to rely on social services in order meet their needs and wants, in any event.

119. Insurers should also be comforted by the fact that, in very serious cases, such as where a clinically injured child is predicted to require treatment for many years, indemnities are often provided so that if the defendant's resources are no longer required, any money paid can be returned to the defendant.

[15] [2004] EWCA Civ 1370
[16] Consultation document, paragraph 172

Question 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?

120. APIL submits that there are no more *practical* difficulties surrounding the assessment of care than there are in relation to any other aspect of disputed evidence within the claim. As always, it is a matter of expert evidence which is then considered by the court if unresolved. In significant claims (in terms of complexity as well as value) this aspect forms a major part of the final value of the claim. It cannot be reduced to a mechanical process, nor should the burden of dealing with those issues be placed upon the State. If the practical 'hoops' currently created by the decisions in *Sowden v Lodge* (*Sowden v Lodge and Drury v Crookdale*, [2004] EWCA Civ 1370) and *Crofton* (*Crofton v NHS Litigation Authority* [2006] All ER (D) 104) through which claimants must struggle were removed, then claimants could be sure that they could instruct their own assessors to quantify the cost of care more easily.

121. Being forced to consider the provision of local authority care creates uncertainty for the claimant and the calcuation of the claim: the privately paid system gives the claimant control of his own care, whereas if reliance is placed on the frequently reviewed, changed and cut level of local authority care available, all this certainty is lost. Claimants should always have control over their own care regime.

CHAPTER 6 – ACCOMMODATION EXPENSES

Question 28

122. We do not 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.

123. APIL submits that it is wrong that the claimant's property should partly belong to the tortfeasor for the rest of his life. He will undoubtedly wish to sever all ties with the tortfeasor as part of the process of getting his life back on track after the injury. There are also further implications for the claimant who may find himself unable to raise further lending secured against the property if there is already a charge on it. The reality is that claimants often need to do this because their damages become prematurely exhausted.

Question 29

124. We do believe the claimant should simply be awarded the appropriate extra capital cost without any *Roberts v Johnstone* calculation or provision for recovery.

125. The chances of this providing a windfall for the claimant, or the claimant's family, are, in reality, remote. Awarding the extra capital cost would allow a seriously injured claimant to obtain the best quality of life the tortfeasor's money can provide, and should be the recognisable consequence of negligence.

126. In the event of a claimant's death it is highly unlikely that the claimant's family would make a vast profit from selling a house which is likely to have been extensively adapted to suit one specific individual. The chances of the same adaptations suiting another individual are remote.

127. In the rare circumstance in which a claimant's family does benefit financially, this 'betterment' should, surely, not be taken away as the spouse's life will have been equally damaged by the claimant's injury. This view was expressed by the court in the case of *Iqbal v Whipps Cross University Hospital NHS Trust*[17], which found that it would not be just, in this case, to deprive the parents of the incidental benefit of living rent free when they were making so many sacrifices, most obviously the detriment to their quality of life, which would have to go uncompensated under the law of tort. The impact for a family of living in a house which has been adapted to become a quasi care home must be clearly borne in mind. Grab rails, ramps, hoists and other specialist equipment are likely to be used in all main living areas by the injured person, alongside the family.

128. We also have major objections to the current method under *Roberts v Johnstone.*

129. Firstly, as highlighted in the consultation paper, the *Roberts v Johnstone* method may leave the claimant with insufficient funds to purchase or adapt a property, forcing him to borrow from other heads of compensation such as non-pecuniary losses. This leaves him under-compensated in other areas until such a time that the property is sold, and it is possible that the property may never be sold during the claimant's lifetime.

[17] [2006] EWHC 3111 (QB)

130. The second problem with the current method is that it assumes that the value of the property will increase. It is accepted that this is generally the case, but market conditions have at times been adverse in the past. Additionally, appreciation may be reduced where the claimant has had to pay over the odds to secure the right type of property to accommodate his needs, although where the property has already been purchased, this fact is likely to be made known to the courts and taken into account when calculating the accommodation costs. The property value could also fall precisely because special adaptations to suit the claimant's needs have had to be made.

131. Additionally, APIL agrees with the Law Commission's observation that awarding the extra capital cost could be considered unfair to defendants, but it does avoid the legal costs associated with administering a charge over a property or performing the complex *Roberts v Johnstone* calculations, although it is recognised that the savings would depend on the value of the defendant's contribution to the property.

Question 30

132. We do not agree that no further action is necessary, based on our comments above.

CHAPTER 7 – AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES

Question 31

133. We do agree that the term 'exemplary damages' in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 should be replaced by 'aggravated damages'.

Question 32

134. We do not agree that there is no need for legislation in relation to the law on restitutionary damages.

135. In a written answer in November 1999[18], parliamentary secretary at the Lord Chancellor's Department (as he then was) David Lock, said:

> "I am pleased to be able to announce that the Government accept the recommendations on aggravated and restitutionary damages that the Law Commission made in '*Aggravated, Exemplary and Restitutionary Damages*' (Law Com rep no. 247). They will legislate when a suitable legislative opportunity arises…"

[18] HC c 502-3W 9 November 1999

136. As the consultation paper acknowledges, the Law Commission favoured no further legislation in relation to the law on restitutionary damages, with one exception: the Commission recommended that there should be legislation to ensure that, in situations where exemplary damages were available, restitutionary damages should also be available. The fact that the Government has rejected this because it is contingent upon expanding exemplary damages (with which the Government is not in favour) contradicts the written parliamentary answer, which we find hard to justify.

137. We do not accept the argument in the consultation paper that exemplary damages should not be extended. We accept that the purpose of civil damages is essentially compensatory rather than punitive and we agree that exemplary damages should be used sparingly, but we do believe that exemplary damages should be available where the defendant has acted maliciously, otherwise outrageously, with wanton disregard for safety or with reckless disregard for safety. This would provide a more powerful deterrent in cases where there is a continued and blatant failure to (for example) guard machinery.

Question 33

138. We do not agree that legislation is needed to confirm that the purpose of aggravated damages is compensatory and not punitive.

Question 34

139. We agree that legislation is not needed to clarify the interface between aggravated damages and damages for mental distress.

ANNEXES

Question 37

140. We believe that the assumption that bereavement damages will be claimed in 50 per cent of circumstances relating to motor liability should be confirmed with the Compensation Recovery Unit.

Questions 38 onwards

141. We do not have the information available to respond to these questions or comment on the analyses. We would point out, however, that, as argued in our introduction, the only costs which are relevant in this context are the damages themselves and the claimant's costs.