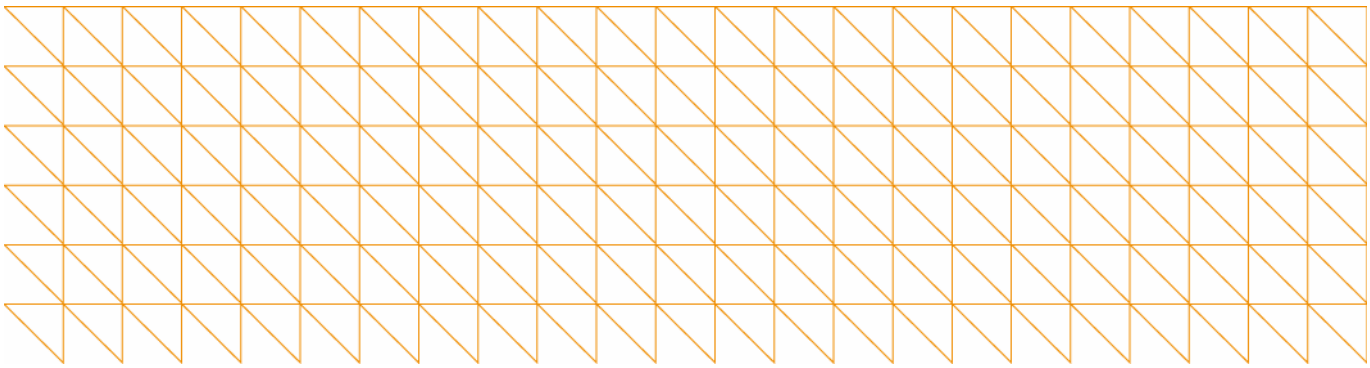
Ministry of JUSTICE

The Law on Damages

Response to consultation

CP(R) 9/07

1 July 2009



Ministry of JUSTICE

The Law on Damages

Response to consultation carried out by the Ministry of Justice.

This information is also available on the Ministry of Justice website: www.justice.gov.uk

Contents

Introduction	3
Background	4
Summary of responses	5
Responses to specific questions	10
Conclusion and next steps	44
The consultation criteria	71
Annex A – List of respondents	72

Introduction

This document is the post-consultation report for the consultation paper, 'The Law on Damages'.

It will cover:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting **Paul Norris** at the address below:

Civil Law and Justice Division
Ministry of Justice
4th Floor, 102 Petty France
London
SW1H 9AJ

Telephone: 0203 334 3220
Email: paul.norris@justice.gsi.gov.uk

This report is also available on the Ministry's website: www.justice.gov.uk

Background

The consultation paper ‘The Law on Damages’ was published on 4 May 2007. It invited comments on the issues highlighted in a series of reports published by the Law Commission in the late 1990s: ‘Claims for Wrongful Death’; ‘Liability for Psychiatric Illness’; ‘Damages for Personal Injury: Medical, Nursing and Other Expenses’; ‘Collateral Benefits’; and ‘Aggravated, Exemplary and Restitutionary Damages’.

These reports made proposals for changes to the Fatal Accidents Act 1976; for the introduction of statutory provisions in relation to claims for psychiatric illness and in relation to aggravated, exemplary and restitutionary damages; and on various issues relating to the costs of care and accommodation and the treatment of benefits in assessing damages. The consultation paper considered and sought views on most of the recommendations made in these reports, taking into account subsequent developments.

The consultation period closed on 27 July 2007 and this report summarises the responses, including how the consultation process has influenced the further development of the proposals consulted upon.

A list of respondents is at Annex A.

Summary of responses

1. A total of 103 responses to the consultation paper were received. Of these, the largest sector of respondents was the legal profession. This consisted of 34 responses from individual solicitors or solicitors' organisations (representing both claimant and defendant interests), seven individual members of the Bar or barristers' organisations, and a body representing legal executives.

2. 19 responses were received from the insurance industry, and four from defendant organisations. Two organisations representing the victims of road accidents, and two others representing victims of clinical negligence and victims of asbestos responded. Four responses were received from academics and academic bodies, and 8 bodies representing intellectual property rights holders responded to the proposals in that area. Two responses were received from the judiciary, two from trades unions, and two from organisations promoting the interests of business. In addition, responses were received from 10 individuals; a local authority; a police authority; a professional body for occupational therapists; an actuarial body; a forensic accountant; and a statutory non-departmental public body.

3. None of the responses answered every question. Some responses covered most aspects of the consultation paper, while others focused on particular chapters or issues.

4. In summary the responses were as follows:

   Chapter 1 – Claims for Wrongful Death

   - A majority of respondents supported adding a residual category to the statutory list of those entitled to claim for financial loss under the Fatal Accidents Act 1976 ("the FAA"). Of these, most agreed that this should be limited to any person who had been wholly or partly maintained by the deceased immediately before the death, but some considered that it should also be extended to specific additional categories of claimant or to those who would have been wholly or partly maintained at a time beginning after the death. Of those not agreeing to the proposal, similar numbers opposed the proposal completely, or suggested that eligibility should be subject to a qualifying period.

   - Almost three-quarters of respondents agreed that the *fact* of a person's re-marriage or entry into a civil partnership should be taken into account when assessing a claim for damages under the FAA. Approximately two-thirds also considered that the *fact* of a person's financially supportive cohabitation of at least two years following the death should also be taken into account. Most agreed that the *prospects* of a person's re-marriage or entry into a civil partnership or financially supportive cohabitation should not be taken into account (including where the person is engaged).

- A small majority of respondents considered that the *fact* of a person's re-marriage, entry into a civil partnership or financially supportive cohabitation of at least two years following the death should be taken into account when assessing a claim for damages on the part of any eligible children.
- A clear majority agreed that the courts should only take into account the *prospect* of divorce, dissolution or breakdown in the relationship between the deceased and his or her spouse or civil partner where one has petitioned for divorce, judicial separation or nullity, or where one has begun the process for dissolution of the civil partnership. Approximately two-thirds of responses opposed this where the couple are no longer living together at the time of death, but this was divided between those who thought that the prospect of breakdown should not be taken into account in these circumstances, and those who thought that it should be taken into account much more widely.
- A small majority agreed that section 3(4) of the FAA should be repealed and replaced by a provision to the effect that the prospect of breakdown of a relationship between the deceased and his or her partner should not be taken into account when assessing damages under the FAA.

Chapter 2 – Bereavement Damages

- Nearly all respondents considered that bereavement damages should continue to be available.
- A small majority considered that clarification of the purpose of bereavement damages in the explanatory notes accompanying any legislation might be helpful. A range of suggestions were made for other ways in which the purpose of bereavement damages could be explained to the public.
- In relation to the statutory list of those eligible to claim bereavement damages, the great majority of responses agreed that the list should be extended to include unmarried fathers with parental responsibility, and people who 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 prior to the fatal accident.
- Most responses also considered that stepparents who were living with and had caring responsibilities for a child under 18 should be eligible.
- A clear majority agreed that eligibility should not be extended to brothers and sisters of the deceased or to engaged couples.
- The proposals relating to the eligibility of parents and children received a more mixed response. A little over half agreed that a parent should only be able to claim bereavement damages for the loss of a child when the child is under 18 and unmarried. Several suggestions were made for alternative limits that could be drawn. Responses were similarly divided on the proposal that children of the deceased who are under 18 should be added to the list, but that eligibility should not be

extended to adult children of the deceased. Of those opposed, most did so on the basis that adult children should also be eligible, although a few considered that there should be no extension of eligibility to children at all.

- Almost three-quarters of respondents agreed that the award of bereavement damages should be available to the deceased's spouse, civil partner or cohabitant without dilution.
- A clear majority agreed that where a spouse or civil partner and a cohabitant are both eligible to claim, the award should be divided equally between the two, and that the award to the parents of an unmarried child should continue to be divided between them if appropriate.
- The question of whether an award to a stepparent should or should not be diluted was not specifically raised in the consultation paper, and some were concerned that there could be potential for multiple awards and for family conflict.
- Responses on whether an award of £5000 should be made to each eligible child under 18 on the death of a parent split into three main approximately equal groups. One supported the proposal; the second considered that each child should receive the full award of £10,000; and the third considered that a single full award of £10,000 should be divided between all eligible children
- Most respondents agreed that contributory negligence on the part of the claimant should reduce the award of bereavement damages

Chapter 3 – Psychiatric Illness

- No specific questions were asked on this chapter. A number of respondents commented on the Government's conclusion that it is preferable to allow the courts to continue to develop the law in this area, and these responses are summarised below after the responses on individual questions.

Chapter 4 – Collateral Benefits

- A small majority supported the proposal that the preferred outcome in principle when collateral benefits arise should be that the claimant should be compensated once and wherever practicable at the expense of the tortfeasor rather than the collateral benefit payer
- However, the majority of respondents did not agree that in general the best way of achieving this is to disregard the benefit in assessing damages, and to give the payer a right of recovery
- Approximately three-quarters of responses supported the proposal that in relation to damages for gratuitous care, the *Hunt v Severs* trust approach should be replaced by a personal obligation to account, and that this should apply to damages for future as well as past gratuitous care.

- A clear majority agreed that this should generally apply regardless of the identity of the tortfeasor, but that (as now) damages should not be awarded for past gratuitous care provided by the tortfeasor. Those opposed were divided between the view that no award should be made for gratuitous care provided by the tortfeasor and the view that both past and future care provided by the tortfeasor should be compensated.
- Approximately two-thirds of responses agreed that the FAA should be amended to allow damages to be awarded in respect of services gratuitously provided to a dependant of the deceased.
- The great majority of respondents agreed that no action was needed to amend the law in relation to charitable payments, and that the law on redundancy payments is best left to the courts to develop. Most respondents also agreed that no change was appropriate in the law relating to pensions.
- Approximately two-thirds of responses were opposed to the law being clarified to ensure that insurance payments are disregarded in the assessment of damages regardless of who paid the premiums. A similar proportion also opposed the need for any provision clarifying that contractual provisions for recovery are enforceable regardless of the nature of the insurance.
- More than two-thirds of responses considered that the law should not be changed so that sick pay is disregarded in the assessment of damages.

Chapter 5 – Cost of Private Care

- Half of those responding opposed the repeal of section 2(4) of the Law Reform (Personal Injuries) Act 1948 in principle. The other half was divided approximately equally between those who supported repeal and those who considered that more research was needed before a view could be expressed.
- Almost two-thirds of responses agreed 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.

Chapter 6 – Accommodation Expenses

- Almost two-thirds of responses were opposed to the suggestion 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
- Three quarters of responses opposed the alternative approach of simply awarding the appropriate extra capital cost to the claimant without any *Roberts v Johnstone* calculation or provision for recovery.

- Many responses expressed the view that the *Roberts v Johnstone* method of calculation was the best available and should be retained. However, some felt strongly that this method was unsatisfactory, and a number of alternative approaches were proposed.

Chapter 7 – Aggravated, Exemplary and Restitutionary Damages

- A smaller number of responses was received to the issues raised in this chapter. Of these, the great majority agreed that the term "exemplary damages" in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 should be replaced by "aggravated damages".
- The great majority also agreed that legislation was not needed in relation to the law on restitutionary damages; to clarify the interface between aggravated damages and damages for mental distress; or to confirm that the purpose of aggravated damages is compensatory and not punitive.
- Only about a quarter of respondents replied to the proposal that the term "additional damages" in the Copyright, Design and Patents Act 1988 should be replaced by "aggravated and restitutionary damages". Of these, just under half agreed with the proposal. The other responses were divided between those who opposed the proposal on the basis that the change would not provide clarity in the law, and those who argued that the term should be extended to include exemplary damages.
- 17 responses were received to the request for views on how the system of damages works in relation to patents; designs; trade marks and passing off; and copyright and related rights, and put forward a range of different views.

Responses to specific questions

1. **a) Do you agree that a residual category should be added to the statutory list of those entitled to claim for financial loss?**

   b) Do you agree that this residual category should be limited to any person who was being wholly or partly maintained by the deceased immediately before the death?

   Many respondents answered these linked questions in a single response, and so the responses are set out together here. 38 responses were in favour of a residual category being added to the statutory list of those entitled to claim for financial loss. This group was made up primarily of solicitors representing claimants, but included a number of other respondents, including barristers and the judiciary. Of these, 24 agreed that the residual category should be limited as proposed, and 14 considered that it should be drawn more widely. Views expressed in support of the proposal included that dependants in the category proposed would be reasonably clearly ascertainable, and that extending more widely would produce many difficulties and could lead to more speculative claims.

   Of those that considered that the residual category should be wider, some considered that it should be extended to any person who would, but for the death, have been wholly or partly maintained by the deceased at a time beginning after the death (as proposed by the Law Commission), but others suggested particular types of claimant who should be eligible. These included children in utero, children conceived through IVF, prospective adoptions, engaged couples and elderly relatives. The suggestion was also made that the statutory list should be abandoned, so that anyone would be able to claim (subject to proving dependency).

   From the other perspective, 15 responses opposed the proposal outright, while 15 argued that a qualifying period should apply (ie that the claimant should have been supported by the deceased for a fixed period prior to the death). Several of these responses proposed a period of two years, while others proposed six months. These two groups were made up primarily of insurers and solicitors representing defendants.

   Those who were opposed to the proposal considered that having a residual category of this nature would require investigations to be carried out, and could encourage disputes, delay and additional cost. Concern was also expressed at how “wholly or partly maintained” would be defined and interpreted by the courts. Those proposing a qualifying period indicated that it would not be appropriate for cohabitants of very short duration to claim, and that having no qualifying period here for cohabitants was inconsistent with proposals elsewhere to have a two year qualifying period (eg in relation to bereavement damages and the existence of

financially supportive cohabitation). Other suggestions were for a new time limit for cohabitants rather than a residual category; a specific provision allowing the children of cohabitees to claim (subject to the two year qualifying period); for dependency to be proved as at the date of diagnosis in disease cases; and for the claimant to be required to prove that the dependency would have continued after the death.

2. a) Do you 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 FAA?

Almost three quarters of the 68 responses to this question agreed with the proposal. This included insurers, defendant representatives, barristers and the judiciary. Arguments expressed in support included that it would constitute double recovery for a dependant to receive both damages through the dependency claim relating to their previous marriage and the financial benefits of remarriage; that it is equitable to do so as damages are intended to be compensatory; and that this would follow from adding a residual category of claimant as proposed at question 1, as there is a balancing exercise to be achieved between the interests of claimants and those of defendants and insurers.

Opposition was expressed primarily by a number of claimant representatives, together with certain others, including two victims' organisations. The main arguments expressed against the proposal were that the obligation to support the deceased's dependant should not be transferred from the tortfeasor to the new partner; that it would be intrusive and would require the courts to scrutinise the new relationship; that it could be a disincentive to the claimant to remarry; or that it would only lead to remarriages being delayed until the proceedings had been completed. Two of those supporting the proposal recognised the latter possibility, but maintained their support.

b) Do you consider that the fact of a person's financially supportive cohabitation of at least two years following the death should be taken into account?

Approximately two-thirds of the 68 responses supported this proposal, with the breakdown largely reflecting that above. Views expressed by those supporting the proposal included that this would maintain consistency of approach, as cohabitants enjoy many of the same benefits as spouses under the FAA; and that it would reflect modern society, where people tend to live together longer in financially supportive relationships before getting married.

The main opposing arguments were again that the tortfeasor's liability should not be transferred to the dependant's new partner, and that the existence of a financially supportive cohabitation may not be clear and could lead to intrusive scrutiny which could affect the new relationship. One legal body which supported the proposal at Question 2(a) was opposed here on the grounds that uncertainty over the existence of a

financially supportive cohabitation would lead to litigation. In supporting the proposal, some insurers suggested that having a two-year qualifying period would lead to subterfuge, and that there should be consistency with the approach taken at Question 1, in that the two-year requirement should apply to both or neither.

c) Do you agree that the prospects of a person's remarriage, entry into a civil partnership or financially supportive cohabitation should not be taken into account in any circumstances (including where the person is engaged)? If not, in what circumstances would it be appropriate to do so?

38 responses agreed with the proposal, including claimant representatives, barristers, the judiciary, and a number of insurers. 8 insurers and defendant representatives indicated support subject to the person's engagement being taken into account. 21 responses opposed the proposal, made up primarily of insurers and defendant representatives.

Points made in support of the proposal included that taking these prospects into account would inevitably lead to embarrassing and intrusive surveillance and questioning of the bereaved party; and that notwithstanding the need for damages as far as possible to represent the loss suffered, taking into account the prospects of remarriage would be too speculative and intrusive. Points made by those opposing included that prospects of remarriage would differ according to the age of the claimant, and a rebuttable presumption of remarriage within five years up to the age of 50 would be appropriate; that enquiries in this area would not be unduly intrusive, as remarriage no longer carries any stigma, and many other sensitive enquiries have to be made (eg on life expectancy); and that claimants should be required to declare if they were contemplating remarriage, entry into a civil partnership or financially supportive cohabitation.

3. **a) Do you 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 on the part of any eligible children?**

39 respondents agreed with this proposal, with 29 either opposed or expressing reservations. The main support came from insurers, and defendant representatives and organisations, and the main opposition from claimant representatives. Views expressed by those supporting the proposal included that it would ensure that damages were assessed so as to compensate as accurately as possible the loss suffered; and that marriage arrangements and attitudes are now more fluid, and remarriage is not the stigma that was perceived at the time the FAA was introduced. A number of insurers argued that the fact of an engagement should also be taken into account.

The main argument raised by those opposing was that the children would have had no control over the decision to remarry or enter into a civil

partnership, might not get on with the parent's new partner, and could be put in a vulnerable position, and so should not suffer financially. Also, there was no guarantee that the new relationship would be stable, and it could be undermined by the additional financial responsibility. A judicial response considered that as the deceased would have had a statutory obligation to maintain their children which, short of adoption, any new partner would be unlikely to have, the factors proposed should only be taken into account as far as the judge thinks appropriate and should not be determinative.

b) Do you consider that the fact of a person's financially supportive cohabitation of at least two years following the death should be taken into account when assessing a claim for damages on the part of any eligible children?

In certain instances respondents expressed different views on this question to those they had given on the question above, but overall the same numbers were in agreement and in opposition. Views expressed by those supporting the proposal included that the dependency ought to be assessed as accurately as possible; and that it would be a logical result of cohabitation for that period giving a right to damages under the FAA.

Those opposed put forward similar arguments to those at question 3(a), with the additional point being made that in these circumstances there is no statutory obligation on the cohabitant to maintain the children of his or her new partner, and that a provision of this nature could only be taken into account and could not be determinative. The view was expressed that this lack of certainty could lead to litigation. It was also suggested that to achieve consistency with the proposal at question 1 there should be no two year qualifying period for the cohabitation.

4. Do you agree that the courts should only take into account the prospect of divorce, dissolution or breakdown in the relationship between the deceased and his or her spouse or civil partner:

a) where the couple are no longer living together at the time of the death

b) where one has petitioned for divorce, judicial separation or nullity

c) where one has begun the procedure for dissolution of the civil partnership?

In relation to question 4(a), approximately two-thirds of respondents were opposed to the prospects of breakdown being taken into account where the couple are no longer living together. Views expressed in support of the proposal (together with the proposals at question 4(b) and (c)) included that this would reduce a significant amount of uncertainty and subjectivity in the assessment of dependency. It was also suggested that the fact that a particular relationship had broken down or was in the process of doing so at the time of death should not be ignored where it affected the value of the dependency.

Opposition to the proposal at 4(a) came from two different perspectives: most insurers and defendant bodies considered that the prospects of breakdown should be taken into account in all situations, and the view was expressed that the whole history of the couple was relevant (although one response from a defendant organisation took the view that this would lead to gossip-based satellite litigation); most claimant bodies considered that enquiries of this nature were intrusive, and that situations could be caught where the couple were living apart for other reasons (for example because one was working away from home) or where the estrangement would only have been temporary. A solicitors' organisation also expressed the view that it would be safer to base any limitations on the existence of formal proceedings. Other suggestions included where the couple had been separated for either two or at least five years prior to the death; and that the situation at the date of the injury rather than the death should be used.

In relation to questions 4(b) and 4(c), approximately 60% of responses agreed that the prospect of breakdown should only be taken into account where one spouse had petitioned for divorce, judicial separation or nullity, or where one civil partner had begun the procedure for dissolution of the civil partnership. Support for this was expressed by a range of respondents including the judiciary, solicitors' and barristers' organisations, most claimant representatives and a number of insurers and defendant bodies. The view was expressed that as civil partnerships are on an equal footing with marriage for the purposes of the FAA, this would maintain consistency of approach.

Opposition came from two contrasting perspectives: many insurers and defendant representatives wanted no restriction imposed on the circumstances in which prospects could be taken into account, while a number of claimant representatives considered that they should not be taken into account in any circumstances. One claimant body supported the proposal with the exception of judicial separation, which it considered might be brief.

5. Do you agree that section 3(4) of the FAA 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 question dealt with the prospects of breakdown in a cohabiting relationship. 35 responses agreed with the proposal, while 32 were opposed. Two supported repeal of section 3(4) without replacement. Those in favour included claimant representatives, barristers, the judiciary and organisations representing victims. In agreeing with the proposal, a small number of responses indicated that it would be preferable also to take the prospect of imminent breakdown into account, but a barristers' organisation recognised that there was no objective factor which could be applied to this.

Arguments against the proposal included the view that it would mean cohabitants being in a better position than married people would be under the proposals at question 4, and that this would not be appropriate as cohabitants would not have the same expectation of a lasting relationship and were more likely in practice to separate. It was also suggested (by linking to question 1) that if dependency claims were to be allowed from cohabitants who were wholly or partly maintained at the time of the death, then it would be fair to allow the prospects of breakdown to be taken into account.

6. Do you consider that bereavement damages should continue to be available?

Nearly all those responding considered that bereavement damages should continue to be available, and only five responses indicated otherwise. Views expressed in support of their continuing availability included that they are an important contribution towards the estate of a person killed as a result of another's negligence; that they reflect the wish of society to provide financial payment for the loss of something incalculable; that they are a pragmatic way of acknowledging loss; that they serve a useful social and emotional purpose even though they are token in nature and sometimes misunderstood in purpose; and that it would be socially and morally repugnant not to allow a payment.

Many responses acknowledged that the nature of the award was unsatisfactory, but either took the view that it was entrenched in the law, or that it served some useful purpose as a token in acknowledgment of grief. Arguments in opposition were that the award should be replaced with an apology; that the only legitimate function of damages is compensation; and that the award is already covered by the ability of children to claim for loss of care and advice and spouses for loss of love and affection. Several responses indicated that these claims should be disallowed.

7. a) Do you think it would be appropriate to provide clarification in the explanatory notes accompanying any legislation that the purpose of bereavement damages is no more than a token payment in acknowledgement of grief?

b) Are there any other ways in which the purpose of bereavement damages could be explained to the public?

A little over half the responses to this question indicated that it would be appropriate to provide clarification of the purpose of bereavement damages in the explanatory notes accompanying any legislation on the subject. Arguments put forward in support of clarification being provided included that it is important that bereaved people should not feel that the award is in any way equated with the loss that they have suffered; that any wording that helps to change the public perception of the award can only be a good thing; and that an explicit statement of what the award is

for would help provide public recognition and acknowledgement that a wrong had occurred.

However, many responses both in favour of and against providing clarification felt that it would be likely to make little difference to people's perceptions about the award. A number of possible explanatory wordings were offered. Several responses considered that reference to a "token" payment should be avoided, and others thought that a different term to "bereavement damages" would be preferable. Suggested wordings included "bereavement award"; "an award in recognition of the mental anguish caused by the unnatural and untimely death of a loved one"; "an award to recognise anguish and suffering"; and "statutory award for tortious death". Some of those opposing the need for clarification considered that it was a matter for the claimant's solicitor to explain the purpose of the award. Others indicated that the best way to change people's perceptions would be to increase the award.

In relation to question 7(b), various additional or alternative approaches were suggested. These included agreeing a standard explanation for solicitors to use with their clients; providing information in booklets or leaflets to be available in a range of places; and placing information on appropriate websites.

8. a) Do you agree that a parent should only be able to claim bereavement damages for the loss of their child where the child is under 18 and unmarried?

A little over half of the responses agreed with the proposal, support coming primarily from insurers and defendant bodies. Arguments in support included that a cut-off point was necessary, and that when a minor attains majority was the most appropriate point; and that to increase the age limit beyond this would widen too far the scope for claims. It was also suggested that while there might be difficult borderline cases, there was no other real alternative to using the age of majority.

Those opposed were made up primarily of claimant representatives, barristers' and solicitors' organisations, and victims' organisations. A number of individuals who had suffered the loss of children over the age of 18 in accidents also opposed the proposal. Most of those opposed considered that parents should be able to claim for the loss of a child regardless of the child's age. However, several responses recognised the arguments in the consultation paper against extending eligibility in this way, and suggested that either 21 or 25 would be a more appropriate cut off point, as it would be more likely by that point that the child would no longer be at home or full-time education. Two defendant representatives indicated that a cut off point above 18 would be acceptable in some circumstances (in one case if there was no dependency claim, and in the other if there was no other claimant), and two insurers expressed support for 21 being the cut off point to reflect the increasing number of children remaining in education to this point and hence dependent on their parents. A number of claimant representatives also suggested that it

should be made clear that the parents of a still-born child would be eligible.

b) Do you agree that unmarried fathers with parental responsibility should be able to claim bereavement damages for the loss of a child under 18?

Nearly all responses agreed with this proposal, with only two insurers expressing complete opposition. Views in support included that there was no justification for discriminating against this group of people, and that it would reflect the increasing number of unmarried parents in society. Many responses indicated that there would be a need for a clear definition of parental responsibility, and many of these suggested that reference to the Children Act 1989 would be appropriate in this context.

Several insurers and a judicial response considered that an ongoing relationship of contact with the child should be required, and others took the view that formal parental responsibility was less important than the nature and quality of the relationship with the child. Another suggestion was that fathers who were paying maintenance for the child but had no contact should be included. A barristers' organisation also indicated that provision would be needed to cover the death of a newly born child, as there is currently no mechanism under the Children Act to make a prospective parental responsibility agreement.

c) What is your view on whether stepparents who were living with and had caring responsibilities for a child under 18 should be able to claim bereavement damages?

Approximately three-quarters considered that stepparents who were living with and had caring responsibilities for a child under 18 should be eligible. Views expressed in support of this position included that stepparents may often have formed very close bonds with a child over a period of years and it would be unfair to deny them bereavement damages; and that what is important is whether the person acts as a parent, not whether they are the birth or social parent. It was also suggested that proximity to the child should be the determining factor.

Those opposed were made up primarily of insurers and defendant organisations, but a barristers' organisation was also opposed on the basis that the categories of eligible claimant should be kept tightly drawn. Other opposing arguments were that a wide range of situations and relationships could arise involving stepparents and stepchildren, and closeness could not be assumed. Some suggested that eligibility should be limited to stepparents with formal parental responsibility, or to those who had adopted the child.

The main concerns expressed were about the potential for conflict with the natural parents and the question of whether stepparents would be entitled to an additional award or would have to split the award with the natural parents. It was pointed out that where two new families shared the

care of the child, this could mean up to four people being eligible. Possible ways suggested to avoid this were for the relevant natural parent not to be able to claim where a stepparent could do so; or for stepparents only to be able to claim if the natural parents were dead or did not make a claim for other reasons.

9. Do you agree that children of the deceased (including adoptive children) who are under 18 should be added to the statutory list, but that eligibility should not be extended to adult children of the deceased?

38 responses indicated support for this proposal, including the judiciary, insurers and defendant bodies. Some of these considered that it would be inconsistent not to reflect the grief and loss that a minor child suffers on the loss of a parent; and that a cut-off point of 18 would be appropriate. However, in indicating support several insurers expressed concern that children can currently claim for "special care and services", and that there could thus be some overlap and possible overcompensation. Some made their support contingent on removing scope for this type of claim.

29 responses opposed the proposal on the basis that eligibility should be more widely drawn. Most of these considered that all adult children should be eligible, although a number of other possible cut off points were suggested, including 21 or 25, or the point at which the child left home to marry or cohabit. Other suggestions were that evidence of ongoing contact could be required, and that the possibility of a claim in relation to an elderly parent could act as an incentive for proper care to be provided for them. Five responses opposed the extension of eligibility to children of any age. One argument advanced was that as most accidents involve young people, any children affected would be likely to be very young and wouldn't feel grief in the way that an older child might.

10. Do you agree that brothers and sisters of the deceased should not be eligible to recover bereavement damages?

Almost two-thirds of responses agreed that brothers and sisters of the deceased should not be eligible to recover bereavement damages. Those in favour of this position included insurers and defendant bodies, the judiciary and barristers' organisations. Those supporting the proposal gave a number of reasons, including that there needed to be practical limits on the ability to claim or the award would become too diluted and spread too thinly; that there are wide variations of relationships between siblings, with often little contact between adult siblings; that while it is reasonable to assume that the majority of parents and young children have close ties, this assumption would not hold for siblings; and that difficulties could arise in relation to half-siblings and step-siblings.

Those opposed included most of those representing claimants, victims' organisations, a trade union and several individuals who had suffered the loss of siblings. Most argued that siblings could be as close as other family members and that the Law Commission proposal should be

followed. A few suggestions were made for limiting the circumstances in which siblings could claim. For example, a judicial response, while accepting the proposal, suggested that an exception could be made where an adult sibling was acting as the de facto parent of a child; a victims' organisation suggested that eligibility could be limited to circumstances where there was no other claimant; one solicitor suggested that siblings living in the same household should be eligible; and another suggested the availability of bereavement damages should follow the approach in the intestacy rules.

11. Do you 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?

Nearly all the responses on this question agreed with the proposal. Arguments given in support of the proposal included that the exclusion of cohabitants runs contrary to the premise that damages should be awarded to those closest to the deceased; that this would remove inconsistencies with the existing availability to cohabitants of a dependency claim; and that it would reflect social changes in family structure. The view was also expressed by an insurer that the two year qualifying period, while somewhat arbitrary, would provide an important filter to ensure a level of permanence to the relationship.

Only four responses opposed it outright, on the basis that cohabitation is not as formalised or permanent as marriage, and the same level of grief could not be assumed. Several claimant representatives argued that there should be no qualifying period, or that it should be reduced to one year. An insurer and a defendant representative took the view that in the case of terminal conditions, the qualifying period should run from the date of diagnosis not death. An insurer pointed out that taken together with Q1(b) this would mean that some cohabitants would be entitled to a dependency claim but not bereavement damages. However, another insurer saw a distinction in that dependency damages do not follow automatically from eligibility to claim in the way that bereavement damages do.

12. Do you agree that engaged couples should not be added to the statutory list of those who can claim bereavement damages?

Almost two-thirds of responses agreed with the proposal, and the breakdown of responses largely reflected that in relation to question 10 on siblings. A range of arguments were put forward in support of the proposal. Defendant representatives expressed the view that engagement does not automatically bring with it the certainty of marriage or permanence in the relationship; and that it is not a uniform notion across cultures, and could encourage litigation over what constitutes engagement and lead to inequitable or discriminatory outcomes. A claimant representative indicated that the role of engagement is no longer as common and as significant as it was, and that while in some cultures

there can be public recognition of an engagement, in others there may not and there could be problems in establishing the existence of an engagement where one party has died.

Of those opposing, some did so on the basis that engaged couples should not be treated any worse than cohabitants. Others considered that the evidential difficulties would not be as great as indicated in the consultation paper. However, a judicial response took the view that evidential problems would vary between different cultures and religions, and that rather than put one group at an advantage over another it was preferable to exclude all. One claimant representative agreed that the role of engagement was not as significant as in the past and varied between cultures, and that inclusion could cause uncertainty.

13. a) Do you agree that the current award of £10,000 should be available to the deceased's spouse, civil partner or cohabitant without dilution (subject to b), and that additional sums should be available to any other eligible claimants?

Almost three-quarters of responses to this question agreed with the proposal. These included most claimant representatives and some insurers and defendant representatives, together with barristers' organisations and some victims' groups. Views expressed by those supporting the proposal included that the award should be ring-fenced and available without dilution, and that the primary sum should be available to the person closest to the deceased.

Some claimant representatives opposed the proposal or did not express a direct view on the basis that the award should be higher. Other responses opposing the proposal considered that the award should be shared equally between all those eligible. An argument made in support of this view was that one eligible person's grief should not be regarded as greater than another's, and that this could cause conflict. A judicial response suggested that there should be an increased award divided equally between all those eligible.

A number of points were raised around the issue of uprating the award for inflation (which was not the subject of a question). The consultation paper indicated that the level of the award would be increased in line with the Retail Prices Index (rounded to the nearest £100) and that subsequent adjustments would be made every three years. The level of the award was subsequently increased to £11,800 in respect of causes of action arising on or after 1 January 2008. A number of claimant representatives supported annual uprates; a barrister suggested that the Average Earnings Index should be used rather than the RPI; and a solicitors' organisation called for an immediate uprate and annual review thereafter. From the other perspective, two insurers considered that the award should not be index-linked at all, as grief had no inflationary element, and a defendant representative indicated that the review period should only be every 5 years (or more).

b) Do you agree that where a spouse or civil partner and a cohabitant are both eligible to claim, the sum of £10,000 should be divided between the two?

Just under two-thirds of responses agreed with the proposal for the reasons set out in the consultation paper. Opposition primarily came from claimant representatives and victims' organisations. Views expressed included that the size of the award meant that there should not be any further dilution, and that this could upset those affected and cause disputes.

c) Do you agree that the sum of £10,000 should continue to be available to the parents of an unmarried child under 18, to be divided between them if appropriate?

Almost three-quarters of responses agreed with this proposal for the reasons set out in the consultation paper. Again, opposition primarily came from claimant representatives and victims' organisations. Most of these responses considered that both parents should receive the full award. Some who had supported the award being available to the parents of children over 18 in response to question 8(a) reiterated that view here.

d) Do you agree that an award of £5,000 should be made to each eligible child under 18 in respect of the death of a parent?

Responses to this question were split into three approximately equal groups. Support for the proposal was expressed primarily by some insurers and a barristers' organisation. Of these, two insurers and a defendant organisation indicated that this was subject to an overall cap of £30,000 being applied. However, another insurer took the view that it could not be right to reduce the award proportionally to the number of children affected.

A second group made up of the majority of insurers and defendant organisations opposed the proposal, and most of these argued for a single award of £10,000 to be divided between however many eligible children there were. Reference was made to the availability of a claim for loss of care and affection and to possible difficulties in establishing parentage.

The third group was predominantly made up of claimant representatives and victims' organisations, and opposed the proposal on the basis that more should be awarded. The most common suggestion was that each child should recieve £10,000, although some reiterated the need for a larger award. A judicial response preferred a larger overall award to be divided equally.

14. Do you agree that contributory negligence on the part of the claimant should reduce the award of bereavement damages?

Over 80% of responses agreed that contributory negligence on the part of the claimant should reduce the award of bereavement damages (although in several cases there may have been confusion as to whether the question related to contributory negligence by the claimant or by the deceased). Those supporting the proposal took the view that it would be consistent with the general approach to contributory negligence; that there was no justification for excluding this area from a principle which applied elsewhere in personal injury law; and that to order the payment of the full sum in these circumstances would be unjust.

Some claimant bodies agreed with the proposal subject to it excluding contributory negligence by a child under 14, which they indicated reflected current case law. The main argument used against the proposal was that taking contributory negligence into account goes against the nature of the bereavement damages award as a token for grief, as this would not be any less just because the deceased was partly responsible. Although this view was primarily put forward by claimant representatives and victims' organisations, two insurers and a defendant representative shared the concern that it might not be appropriate to dilute what was an arbitrary award.

15. a) Do you agree that the preferred outcome in principle when collateral benefits arise is that set out in paragraph 107?

A small majority (37) responses agreed that the preferred outcome in principle when collateral benefits arise should be that set out in the consultation paper (ie that the claimant should be compensated once, and wherever practicable at the expense of the tortfeasor rather than the collateral benefit payer). Support came primarily from claimant representatives, together with the judiciary, barristers, a trade union and a number of insurers (who accepted the proposition in principle but had concerns about the practical effects). Views expressed in support included that the tortfeasor should not benefit from the fact that the injured party is receiving benefits, nor should the payer of the benefit lose out because the payment is made as a result of the act of the tortfeasor. Some claimant representatives considered that if the claimant had made personal insurance provision he or she should not be penalised for that, and one indicated that there was no real problem in this area which required Government intervention. A barristers' organisation considered that this principle would fit with the objectives of the tort system, but that the current system was not as uncertain as the paper made out.

Of the 30 responses which were opposed, most insurers opposed the "tortfeasor pays" element, on the basis that it would remove the principle of deduction commonly applied under the common law, and would increase the chance of over-compensation and the cost of liability insurance. It was pointed out that in practice the insurer would pay rather than the tortfeasor, and the public would still meet the cost through

increased premiums. Some felt that the use of contractual repayment provisions was sufficient, and there was also concern about the scope for satellite litigation in relation to recovery. Other concerns were that it would mean insurers keeping their liabilities open, and that there could be an increase in uninsured driving because of higher premiums. A solicitors' organisation indicated that a fundamental change of this nature would need further consultation. A number of insurers and a barristers' organisation expressed the view that section 4 of the FAA (under which benefits accruing as a result of the death are disregarded) was in need of review.

b) Do you agree that, in general, the best way of achieving this is to disregard the benefit in assessing damages, and to give the payer a right of recovery?

Of those who supported the proposal at question 15(a), 23 agreed that the best way of achieving it would be to disregard the benefit in assessing damages and to give the payer a right of recovery. A barristers' organisation indicated that deduction and recovery needed to be addressed together and that this took the right approach. A judicial response agreed, but suggested that an efficient and inexpensive system of recovery like the Compensation Recovery Unit would be needed to avoid satellite litigation. Others emphasised the need to avoid any additional burden on claimants, and considered that a direct right of recovery between the payer and the tortfeasor would avoid this. However, a non-departmental public body preferred an obligation on the claimant to repay the collateral benefit payer.

40 responses, primarily from insurers and defendant bodies, disagreed that this was the best approach. Some considered that the area was best left to the courts. Concerns were expressed about how any recoupment power would fit with indemnity insurers' subrogation rights; how it would apply in cases involving contributory negligence; that because of the generic nature of settlements disputes could occur over exactly what had to be repaid; and at the potential for satellite litigation and for over-compensation if the collateral benefit payer did not exercise the power of recovery.

16. Do you agree that no action is required to amend the present law in relation to charitable payments?

Nearly all the responses agreed with this. Views expressed in support included that public policy and justice required the present position to remain, as it was not the tort which led to the charitable payment but the generosity of the person giving; and that the current position strikes a balance between individuals who want to make a voluntary contribution to an injured person, and whose contribution is disregarded, and a charitable donation by the tortfeasor at a time when it is needed most immediately after the accident. Of the three responses which were opposed, one considered that charitable payments should be taken into account, and two favoured a personal obligation for the claimant to account to the

charity, so that the defendant paid in full but the charity could recover its outlay.

17. a) Do you agree that the *Hunt v Severs* trust approach should be replaced by a personal obligation to account?

Approximately three quarters of responses supported this proposal, including nearly all claimant bodies, barristers and solicitors' organisations, the judiciary, and some insurers. One insurer indicated that a personal obligation would be more consistent with the need to account than a convoluted trust approach. A solicitors' organisation thought it was a sensible way of clarifying and simplifying a difficult area of the common law. A barristers' organisation thought it would be a more flexible and straightforward way of adapting to changes of carer without having to involve questions of beneficial ownership of trust monies. A claimants' organisation commented that the trust approach provides a distasteful financial incentive to the bereaved spouse to buy in care.

Those opposed were primarily made up of insurers and defendant bodies. These argued for a legal obligation rather than a personal obligation to make it more likely that the claimant actually would account to the carer. However, one defendant representative (which opposed any change) agreed with the Law Commission that a legal obligation would have the risk of compensating the carer at the expense of the claimant where future circumstances changed. They also thought that a personal obligation would remove a negotiating tool from defendants in cases where there was contributory negligence by the carer, where consideration of that issue could be avoided by agreeing that there should be no gratuitous care claim.

Concern was also expressed about double recovery and the possible disincentive to carers, as it would leave their future recompense uncertain. Other concerns were the potential for disputes between claimant and carer, and that it would expose the carer to the risk of the claimant's insolvency. One respondent thought that there should be a requirement for any gratuitous care award to be notified to the carer. A number of responses on both sides considered that the proposal would not make a great deal of difference in practice.

b) Do you agree that this should apply to damages for future as well as past gratuitous care?

Again, about three quarters of responses supported this proposal, with the breakdown being largely the same as above. Views expressed in support included that there was no reason why the treatment of past and future claims should differ, and it was important to maintain consistency. A judicial response indicated that the obligation to account should only apply in so far as future care is actually provided. A barristers' organisation acknowledged that concerns could arise about the uncertainty of future arrangements, but considered that this was inherent in lump sum

compensation for future loss, and could be dealt with within the obligation to account.

Of those opposed, two responses expressed the view that future care should remain a matter for the claimant and that no fetters should be placed on their right to get what care they thought fit. From the other perspective, a defendant representative queried the practicalities of how the personal obligation would work, and whether it would be on settlement (in which case things could change) or ongoing (in which case how would the carer be paid). One insurer thought that the obligation should only apply to periodical payments which were actually provided.

c) Do you agree that this should generally apply regardless of the identity of the carer but that (as now) damages should not be awarded for past gratuitous care provided by the tortfeasor?

Approximately 60% of responses agreed with this proposal, including some insurers and defendant bodies and some claimant representatives. Of those opposed, some came from the perspective that past as well as future gratuitous care should be recoverable by the tortfeasor, while others took the view that the tortfeasor should be able to recover neither.

Of those supporting the proposal, a judicial response thought it a sensible and pragmatic solution. One insurer commented that it would recognise that the claimant and compensator may wish to reflect the value of voluntary gratuitous care in the settlement agreement. Some insurers supported the proposal on the basis that denying future gratuitous care to a caring tortfeasor would be likely to mean the claimant having to get commercial care at extra expense. However, others thought that no gratuitous care should be payable.

A claimant organisation agreed that payment of past gratuitous care was unnecessary and illogical, as the money paid by the tortfeasor would immediately be returned to him or her by the claimant. It also questioned the payment of future gratuitous care on the same basis, and considered that the only advantage would be that if gratuitous care was not then provided, the claimant would have sufficient money to fund alternative care. A barristers' organisation was concerned that if past gratuitous care was not recoverable, claimants might be advised at an early stage of the claim to enter into a contractual arrangement with the tortfeasor or get commercial care to get round the bar on recovery. A judicial response thought that provision should be made for exceptional cases (eg where a tortfeasor mother had wished to stay at home to care for the injured child rather than pay for commercial care). A non-departmental public body gave the same example, but thought that past gratuitous care should only be denied, not granted, in exceptional circumstances. This line was also supported by two claimant representatives and a victims' organisation.

d) Do you agree that the FAA should be amended to allow damages to be awarded under the Act in respect of services gratuitously provided to a dependant of the deceased?

Approximately two-thirds of the responses to this question agreed with the proposal, including most claimant bodies, barristers and solicitors' organisations and the judiciary. A barristers' organisation indicated that this would be consistent with the other proposed reforms and that there was no reason in principle why the fact that the claim arose from a fatal accident should mean that either the entitlement of the claimant to recover the damages or the obligation to account to the carer for those damages should be treated any differently.

Opposition was expressed primarily by most insurers and defendant bodies. Of these, several took the view that this was not a loss of benefit which the dependant could reasonably expect to receive, and reiterated the need for wide-ranging reform of section 4 of the FAA (see responses to Q15a). Others saw a risk of overcompensation, and thought that any such payment should be held on trust for the gratuitous care provider. It was also stated that the common law already allows damages for the loss of the services of the deceased, so any further provision would be unnecessary and could create satellite litigation.

Although claimant bodies generally supported the proposal, two indicated that they had experienced few or no problems in this area, and that no change was needed. A non-departmental public body indicated that a wide interpretation of section 4 of the FAA already allowed this award, but supported the proposal subject to revision of the Law Reform (Miscellaneous Provisions) Act 1934.

18. What are your views on whether the law should be clarified to ensure that:

a) insurance payments are disregarded in the assessment of damages regardless of who paid the premiums

Approximately two-thirds of responses were opposed to any clarification of the law to this effect. Defendant bodies and insurers were almost all opposed, and took the view that a general disregard could lead to double recovery and would be unfair where defendants had paid the insurance premiums. One response expressed strong opposition on the basis that all payments received by the claimant should be taken into account, and tortfeasors could be discouraged from taking out insurance if they were required to pay again. Several others indicated that disregard was only appropriate where the claimant had paid the premium, and that the courts applied that principle with little difficulty at present.

Most claimant bodies and the judiciary supported clarification. Arguments which were put forward included that insurance payments made by the prudent accident victim should be totally disregarded; and that the tortfeasor should not benefit from the claimant's foresight or where

premiums are paid as an emolument of employment. However, some claimant bodies did not support clarification on the basis that no significant problems were experienced with the current system. A number of responses made detailed suggestions as to the considerations that should apply and the circumstances in which payments should or should not be deducted. A non-departmental public body considered that this was an issue where the specialist views of the insurance industry were needed.

b) contractual provisions for recovery are enforceable regardless of the nature of the insurance?

If you consider that the law should be clarified, do you agree that this should not apply to provisions requiring the insured person to pursue an action so that their insurer can recover payment?

Responses to this question substantially reflected those to question 18(a), with almost two-thirds being opposed to any action. Of those in favour, most agreed that the insured person should not be required to pursue an action for this purpose. Many insurers were concerned that a provision of this nature would extend subrogation rights to non-indemnity insurers and would interfere with contractual rights and lead to greater uncertainty, litigation and costs (and hence higher premiums). A barristers' organisation considered that an approach which required or encouraged legal proceedings would be undesirable, but that providing a contractual right to withhold or recover payments (with no obligation on the insured person) would give greater certainty.

19. Do you agree that no change is appropriate in the law relating to pensions?

Most responses, including all claimant bodies, barristers and solicitors' organisations, and the judiciary agreed that no change was needed. Views expressed by those supporting the proposal included that any change would increase complexity, litigation and costs. While agreeing in general terms, several insurers commented that a claimant's disablement pension should be deducted from damages for loss of earnings to remove an inconsistency with the treatment of sick pay (which is deducted).

Other insurers and defendant representatives opposed the proposal on the basis that the existing law allows double recovery, and that this could be a disincentive to claimants to return to work, especially if they were near retirement. Several responses called for pension payments generally to be deducted other than in specific circumstances (eg where the claimant has paid himself or herself for an injury-related accelerated pension). A response from an actuarial body also supported deduction in relation to any pension which the claimant becomes immediately entitled to as a result of the tort.

A solicitors' organisation agreed that there was double recovery regarding early pension payments, but thought on balance that the law was clear and that any change could lead to confusion. A barristers' organisation commented that the power to prevent double recovery lay in the pension provider's hands, as schemes could provide for recovery or withholding of early pension payments where damages were received for loss of earnings, and that this was best left to the market place.

However, a solicitor advising on employment matters relating in particular to occupational pension schemes (who responded on this question alone) questioned whether this was possible, at least in relation to damages received after the pension had started, because of the terms of the Finance Act 2004 and the Pensions Act 1995. He considered that this uncertainty had led to a reduction in the automatic benefit cover given under pension schemes to employees, and that a change to clarify that deduction was possible would be beneficial. An actuarial body also queried how far early pension payments were usually contractual.

20. a) What are your views in principle on whether the law should be changed so that sick pay is disregarded in the assessment of damages

Over two-thirds of responses considered that the law in this area should not be changed. These included all insurers and defendant bodies, together with a number of claimant bodies. Insurers generally took the view that deduction of sick pay was consistent with the compensation principle, and that to disregard created the potential for double recovery. Claimant bodies supporting no change felt that the current use of contractual provisions for recoupment worked well and prudent employers already incorporated clauses of this nature. This view was shared by some insurers and defendant bodies. Several insurers referred back to their views on question 19 and indicated that any difference in treatment between disability pensions and sick pay should be resolved by the former being deductable rather than the latter being disregarded.

Responses supporting legislation came primarily from claimant lawyers, together with the judiciary, a trade union, and a barristers' organisation. The latter considered that a change in the law would be consistent with the preferred approach and would resolve any uncertainty in the treatment of contractual and voluntary sick pay, and that as sick pay was a reimbursement for lost wages there should be no distinction in how it was treated.

b) If you consider that any change may be appropriate, should this apply only to sick pay above the statutory minimum?

As most responses were opposed to any change, they did not engage directly with this question. Of the responses that did, the great majority opposed change being limited to sick pay above the statutory minimum.

c) Should there be an exception where the employer is also the tortfeasor?

Again, many responses did not engage with this question directly because of their response to question 19 (a). Of those that did, a small majority considered that there should be an exception where the employer is also the tortfeasor.

21. Do you agree that the law on redundancy payments is best left to the courts?

The great majority of responses supported the view that this area is best left to the courts, with only 7 responses disagreeing. Views expressed in support included that there were very few instances where a redundancy payment will be categorised as a collateral benefit, and it was sufficient for the courts to consider the issue on the limited occasions when it is necessary. The view of certain claimant bodies and a body representing legal executives was that it is unfair for any redundancy payment to be deducted from loss of earnings, and called for a statutory rule to stop this occurring. However, a number of defendant representatives and insurers considered that deduction where the tort had caused the redundancy was sensible. Other claimant bodies and a solicitors' organisation felt that the law was confused, and that legislation to prevent deduction was needed. However, a barristers' organisation took the view that the issue had moved on since any uncertainty created by past case law in this area, and that the definition of redundancy in the Employment Rights Act 1996 made it unlikely that double recovery could now arise in a true redundancy situation, and hence that this was best left to the courts.

22. Do you consider in principle that section 2(4) (of the Law Reform (Personal Injuries) Act 1948) should be repealed? If so, how might a new system of care packages work? What difficulties would need to be addressed in developing such arrangements?

Approximately half of the responses to this question opposed the repeal of section 2(4) in principle. These responses came primarily from claimant representatives, together with the judiciary, solicitors and barristers' organisations, certain insurers, a victims' organisation, an individual and a trade union. Concerns which were expressed included that any new system would be extremely complex and likely to lead to greater uncertainty, disputes and litigation; that the NHS would not have the capacity to meet the extra demand; that statutory services are incapable of delivering flexible, tailored services to meet individual needs; that claimants and their carers would lose control of the process and should not be obliged to use NHS care, especially where this was home or community based; that it would be more time-consuming and costly for the courts; that it would risk shifting responsibility away from the tortfeasor to the NHS and the taxpayer; that it would be inappropriate in cases where the NHS was defendant, and there would not be the necessary relationship of trust to justify requiring NHS treatment rather than private care; that it could raise human rights concerns; and that there was no

evidence that claimants were currently using damages for private care for NHS treatment. Several responses considered that the principle in section 2(4) should be extended to all areas of care provision by the State.

Of the remaining responses, just over half supported repeal, while the remainder indicated that further research would be needed before it was possible to express a view. Those supporting repeal were made up primarily of insurers and defendant bodies, together with a local authority. Comments in support included that it would be consistent with tort principles and avoid the possibility of double recovery; that it was appropriate for NHS care to be used where appropriate; and that it would ensure that the claimant had to examine all the options and choose the most appropriate and cost-effective treatment. Concern was expressed that under the current system there was no certainty that care packages funded by the tortfeasor were subsequently put into place. Various suggestions were made relating to how a system of care packages could be made to work effectively.

Those identifying the need for further research pointed to the major implications of any new system for the insurance industry, businesses, claimants, local authorities and the NHS, and that any change would raise public policy issues on a much wider basis than just the principles of tort. One insurer expressed the view that a wide-ranging review would be needed which recognised that double recovery must be avoided; that assessment of an injured citizen's care needs should start from a baseline of statutory support regardless of whether there was a compensator; and that any top up by a compensator should take the form of service provision to assist in the rehabilitation process.

23. What benefits or drawbacks might there be for:

a) claimants

b) defendants

c) the taxpayer

A range of potential benefits and drawbacks of repealing section 2(4) and creating a new system of care packages were identified. In relation to claimants, the main benefit identified was greater certainty that their care needs would be met. Other possible benefits included continuing contact with the NHS in implementing and maintaining the package of care; that there would be no risk of the money running out; and that litigation could be resolved earlier and better rehabilitation provided. A number of responses considered that the new system would enable claimants to retain control and provide more flexibility and options than the current system. However, in contrast, many others considered that a new system would be more likely to take control away from claimants. Other possible drawbacks identified were that the NHS would be unable to provide all the care required; that the claimant could be unwillingly forced into an ongoing relationship with the tortfeasor; that rehabilitation through the NHS was likely to be inadequate and too slow; and that it would remove

flexibility for the claimant to use lump sum damages for unforeseen events or other purposes.

In relation to defendants, the main benefit identified was a potential reduction in the cost of funding care packages. Other possible benefits included greater flexibility in funding care; the removal of any risk of double recovery by the claimant; greater control over the care package; earlier resolution of litigation; and that reduced costs to the NHS as defendants could offset the additional resource demands of the care packages. However, other responses were concerned that the costs of administering the new system and the likelihood of satellite litigation would lead to more costs. Other drawbacks included ongoing liability and the need to control and fund adaptations to the care package; the possibility of ongoing disputes over what was appropriate; and the removal of the option of paying a lump sum, as the system would work best with the use of periodical payments.

In relation to the taxpayer, the main benefit identified was that the provision of more resources and the possibility of economies would make the NHS more efficient and cost-effective. However, in contrast the main drawback identified was that the requirement to manage care packages would overload the NHS and could lead to a two-tier system in which other users received less favourable treatment. Other possible benefits included the benefit to the public purse in avoiding double recovery; and the fact that the care packages would be funded by insurers or tortfeasors. Other possible drawbacks included the burden of additional cost involved, including increased litigation costs, the erosion of justice and fairness in the law; and that the upgrade and resources required would involve huge costs which would impact elsewhere in the system. There were mixed views on whether an increase or decrease in insurance premiums would be likely.

24. How could any new system ensure that claimants and their carers retain a sense of control over the care provided?

A range of different views were expressed on this question. A number of responses, primarily from those representing claimant interests, considered that this would be very difficult or even impossible to achieve, and could only be met by a system where the claimant had full control of the damages awarded. From the other perspective, a smaller number made up primarily of insurers and defendant representatives considered either that any new system would not affect the degree of control and influence that claimants already have, or that the existence of a transparent and reviewable process to decide what care was needed was more important than the claimant retaining a sense of control over its provision. It was also suggested that the provision of public care would enable the claimant to make an informed decision regarding future treatment and care needs and retain a sense of control, with private care still available where this was reasonable.

Various suggestions were made as to key elements which would be required in any new system for claimants and carers to retain a sense of control. These included a right to return to court to enforce the care package if it was not provided as promised; an appeals procedure where the claimant was dissatisfied with the way in which the care was being delivered (but not to extend to disputes over what the claimant's care needs actually were); an annual review involving the claimant, carers and GP; regular meetings and discussions between all those involved; the use of mediation in the event of disputes; provision of a case manager (funded by the compensator) to liaise with the NHS on the claimant's requirements; some form of independent monitoring; and provision for the claimant to express his or her preferences, to be taken into account in the care assessment.

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?

This question fell into two main parts. In relation to the first part 12 responses, primarily from those representing claimants, indicated that there was little or no evidence that claimants were unnecessarily burdening the NHS or squandering damages awarded to them for their care, and that it was more likely that under-compensation was occurring rather than over-compensation. A number referred to the 1994 research carried out in this area by the Law Commission in support of this view. One indicated that the cost of any over-compensation to defendants was likely to be negligible. A response from an individual indicated that the vast majority of claimants and families are completely honest, and that there are already resources and effective safeguards in place to determine, manage and control private provision, especially in the community, and to prevent over-compensation.

In contrast, 5 responses from insurers or defendant bodies considered that the Law Commission research was out of date and that there was a need for further detailed research on how care awards were used, as it was unfair to compensators and society more generally if awards for care were spent on other purposes. Two responses identified the need for research to devise an objective test which would fully compensate a claimant but avoid over-compensation.

In relation to whether there should be a requirement for the defendant to pay directly to the provider of care, 12 responses from insurers and defendant bodies considered that this would be appropriate, although a number indicated that this should be an option rather than a requirement as it might not be appropriate in all cases (for example where contributory negligence was involved). A number of others, while supportive in principle, felt that more detailed consideration was needed in view of possible difficulties. One insurer identified problems that could arise where there was a change of care provider or where additional care

needs arose unconnected to the original incident for which damages had been awarded.

Several responses from claimant representatives opposed direct payments and identified a number of other difficulties, including the need for an ongoing relationship between the claimant and the tortfeasor; likely substantial administrative costs to defendants; the removal of choice and control from the claimant; difficulties in policing the arrangements; possible conflicts of interest; and concerns about the ongoing solvency of defendants. However, one response considered that direct payments may be helpful as insurers could be more relaxed and generous if they knew that funds were used appropriately.

A number of alternative suggestions were put forward. A number of responses considered that the use of periodical payments would address any difficulties around over or under-compensation, and responses from a judicial group and a non-departmental public body suggested widening the power to vary periodical payments to cover care costs. A number of responses advocated the use of reverse indemnities under which the defendant pays the claimant an agreed figure for care and the claimant reimburses the defendant the money received from statutory services, and one considered that this should be provided for in legislation. Other responses suggested that there could be a requirement for the claimant to pay the NHS for the costs of treatment and return unused funds to the tortfeasor; or that a voucher system could be introduced under which the defendant would pay (within agreed limits) on production of vouchers from the claimant or case manager for money actually expended.

26. Do you agree 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?

Almost two-thirds of responses agreed with the principle set out in the question. Those supporting this view were made up primarily of claimant bodies, together with barristers' organisations, the judiciary, legal academics, an organisation representing victims of clinical negligence, an individual and a statutory non-departmental public body. Points made in support of this position included that long term social services provision is very uncertain and unreliable; it is unrealistic to expect judges to predict care and funding arrangements for potentially decades to come; and it is wrong that the tortfeasor can use the argument that statutory or collateral benefits are available to discount the amount of compensation to be paid.

A barristers' organisation indicated that the best approach would be for the tortfeasor to pay the costs of care and accommodation, and to allow the claimant's damages award to be taken into account by the local authority in conducting a means test in relation to the care and accommodation provision. A claimant representative pointed out that any amendment of the law should not prevent the claimant being able to access State services where a deterioration of their condition occurs

which is not related to the accident or where services need to be accessed because damages are not recovered on a 100% basis.

A number of insurers and defendant bodies agreed in principle, but considered that any provisions should be subject to a number of conditions, for example that claimants should only be entitled to seek wholly private provision for care and accommodation where they could establish that they would probably not have availed themselves of provision from the Local Authority or Primary Care Trust, or where that provision does not meet their reasonable needs. Several responses linked their answer to this question with that at Question 22, identifying the need for further research and for the issue to be considered in the context of a much wider review. A solicitors' organisation expressed the view that there was a complex legal framework in this area involving many issues of public policy, and that unless there was a full review of all the policy issues and interlinking legislation any further change was likely to lead to further confusion and litigation.

Those opposing the proposal in principle were made up of most insurers and defendant bodies. Arguments which were put forward included that it would be inconsistent with the principle that the claimant should only be compensated for his or her net loss, and with section 5 of the Administration of Justice Act 1982 (which requires maintenance at public expense to be taken into account in the assessment of damages for personal injuries); that public bodies should comply with their statutory duties; that claimants should take advantage of services provided by the State where available; and that the proposal would add further to the costs of liability insurance for both businesses and private individuals. Some responses placed emphasis on the need for rigorous controls to prevent double recovery. A number also pointed out that such an approach would be unsuitable in cases involving contributory negligence.

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?

A wide range of views were expressed in response to this question. Several responses from both claimant and defendant perspectives took the view that the assessment of care needs was already being done as well as it could be under the current system, and that no change was appropriate. A number of responses argued for the merits of using an independent expert assessor or tribunal appointed jointly by the parties to assess care needs. Others argued that the current adversarial system of each party commissioning their own expert evidence was preferable, with the court deciding the appropriate care package if this could not be agreed, and that this allowed claimants to retain a sense of control.

However, a response from an insurer indicated that the current approach which relies entirely on the experience of "care experts" should not remain given the size of care awards, and that it would be appropriate to review

the approaches taken in other jurisdictions and place the assessment of care needs on a more scientific footing. Other responses from insurers and defendant representatives referred to a significant gulf between state funded care and that proposed by the majority of experts providing reports on the provision of care; a lack of transparency or commercial pressure in the assessment process; and the need for agreed standards for care experts and the use of agreed scales for determining the cost of care. One response indicated that there was a massive disparity in the rates claimed, and that the care industry needed more rigorous regulation and standardisation.

A number of responses argued for the appointment of appropriately qualified case managers on behalf of claimants, and for regular reviews involving all parties (including the claimant's family, carers, GP, local health authority and - where periodical payments have been awarded - the insurer) with agreed action plans. A response from an academic body emphasised the need for the more systematic review of care needs assisted by a care manager through the variation of periodical payments either to increase or decrease the care package. However, a response from a claimant representative indicated that setting up a separate agency to assess the claimant's needs, particularly where the NHSLA was the tortfeasor, would be inappropriate and would remove control and fairness from the assessment process.

Several responses from claimant representatives, the judiciary, a barristers' organisation and a non-departmental public body considered that the best approach would be to extend the scope of section 2(4) of the Law Reform (Personal Injuries) Act 1948 to cover local authority care and accommodation as well as NHS treatment, so that cases could be costed on the basis of private provision without the need to consider arguments that the claimant should be reliant on the State. It was considered that this would ensure that claimants had control over their care regime. However, a number of responses reiterated the need for a full review of all the policy issues, and a response from a defendant representative indicated that the availability and extent of State care provision must be taken into account to avoid overcompensation at the taxpayer's expense.

Other suggestions included the need for stricter case management by the courts; requirements on local authorities to present and cost their care plans and provide statements on future funding; the need for universal and consistent PCT assessments providing geographical consistency; expanding the scope of direct payments to section 21 of the National Assistance Act; that Community Care Assessments should be mandatory for all seriously injured individuals prior to discharge from hospital; and that the adoption of a protocol involving an early focus on the resolution of liability and the use of the split trial facility where necessary could be advantageous.

28. Do you 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?

Almost two-thirds of responses to this question were opposed to this approach. This included most insurers and defendant bodies, a number of claimant bodies and an individual. Of those in favour, the majority indicated that this would only be a possibility if both parties agreed, or as a possible option in some circumstances alongside others. A judicial response considered that the idea of a charge "had real possibilities", while a non-departmental public body indicated that various practical issues would need to be resolved, but that a charge may be fairer than the *Roberts v Johnstone* method.

29. Alternatively, should the claimant simply be awarded the appropriate extra capital cost without any *Roberts v Johnstone* calculation or provision for recovery? If not, do you have any other suggestions for dealing with this issue, or do you consider that the current system should remain in place?

Three quarters of responses were opposed to this approach. Support came primarily from claimant bodies, together with a solicitors' organisation, a body representing legal executives and an individual. However, insurers, defendant bodies, the judiciary and barristers' organisations were opposed, mainly from the view that this would constitute over-compensation.

Many of the responses to these questions (primarily from insurers and defendant bodies) expressed the view that the *Roberts v Johnstone* method of calculation was the best available and should be retained. By contrast, a smaller number (primarily from a claimant perspective) felt strongly that *Roberts v Johnstone* was unsatisfactory and should be abandoned. A number of alternative approaches were suggested:

- A number of claimant representatives suggested an arrangement whereby the claimant took out a mortgage to top up the capital sum required for new accommodation or adaptations, to be paid by the defendant through periodical payments, together with the possibility of a charge in relation to any difference in the capital value of the property. A non-departmental public body also floated the mortgage idea, but indicated that there could be difficulties in sourcing mortgage providers and in reviewing periodical payments to cover changes in the interest rate.
- A forensic accountant suggested that the defendant should provide an interest free loan to the claimant, secured by a charge and repayable after death. A defendant representative also supported the idea of a loan
- Both a claimant and a defendant representative raised the possibility of a shared ownership arrangement (but recognised there could be problems with tying the claimant and defendant into an ongoing relationship)

- A solicitors' organisation suggested giving the full capital cost to the claimant with a notional percentage investment return to the defendant (as with other heads of damage) to leave the claimant with only the excess growth
- An individual proposed awarding the full capital cost in such a way as to give a dependent claimant complete future security of accommodation in the event that the financial position of his or her parents worsens or the parents' marriage fails; to allow the family easily to relocate when required; and to allow the adapted house to be restored as appropriate to make it suitable for sale on the open market
- An insurer suggested allowing defendants to provide goods and services to meet the claimant's needs (eg for building adaptations, aids and equipment). This was echoed by a barrister, who referred to a case where an insurer had arranged for a prefabricated ground floor lavatory to be provided and plumbed in.

30. Do you agree that no action is necessary in respect of these issues?

This question related to certain minor issues relating to accommodation expenses where the Law Commission had considered that no action was needed. Approximately two-thirds of the responses agreed that no action was appropriate, but a smaller number indicated strongly that action was needed. However, from the content of some of these responses, it appears that the lack of clarity in how the question was phrased may have led to some respondents interpreting it as meaning action in relation to *Roberts v Johnstone* and the issues raised in questions 28 and 29.

31. Do you agree that the term 'exemplary damages' in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 should be replaced by 'aggravated damages'?

Only just over a third of respondents answered this question. Of those that did, the great majority (36) agreed with the proposal. Views expressed in support of the proposal included that the anomalous provision in the 1951 Act should be removed and the ability to make exemplary damages awards should remain a common law remedy to be developed or restricted by case law.

The only opposition (in three responses) came from barristers and barristers' organisations. Of these, one barrister expressed the view that the concepts of exemplary and aggravated damages were fundamentally different and replacing one with the other would confuse rather than clarify and would mean anyone affected being worse off. Another indicated that just because no cases had arisen under the 1951 Act didn't mean that they wouldn't, and that legislation should not be amended just for the sake of tidiness. It was also argued that the existing common law categories for exemplary damages would not catch some competition law claims (eg for abuse of a dominant position) and should be extended.

Two defendant representatives and a police authority argued that exemplary damages should not be available in vicarious liability cases involving the police (ie where the chief constable is liable for the act of an officer), as this was a drain on resources and cost to the taxpayer. The police authority also considered that aggravated damages against the police should not be available. A claimant representative supported exemplary damages for bereaved families in FAA cases.

32. Do you agree that there is no need for legislation in relation to the law on restitutionary damages?

Nearly all the responses to this question agreed with the proposal for the reasons set out in the consultation paper, and only five respondents were opposed. Arguments in favour of the proposal put forward by barristers included that legislation is over-prescriptive and difficult to amend or repeal, and so development is best left to the courts; that damages cases are often very fact-dependent and may need a slightly different approach on a case by case basis; and that the courts can be trusted to develop the underlying principles and to deal with any problems with terminology.

Of those opposed, a claimants' organisation supported the Law Commission proposal that restitutionary damages should be available where exemplary damages were, and wanted exemplary damages to be available where the defendant had acted maliciously, outrageously or with wanton/reckless disregard for safety. A trade union body asked for the level of restitutionary damages to be reconsidered as the Law Commission had proposed, and another trade union wanted all three types of damages to be available whenever tortfeasors misbehave. A software provider indicated that restitutionary damages under the Copyright, Design and Patents Act 1988 ("the 1988 Act") should extend to costs saved by the defendant as well as profits made. While supporting the proposal, a barrister expressed concern that the increasing use of the term "restitutionary damages" by the courts might cause confusion.

33. Do you agree that legislation to confirm that the purpose of aggravated damages is compensatory and not punitive is unnecessary?

Nearly all the responses to this question agreed with the proposal. Views expressed in support included that the case law in this area is sufficiently clear, and that there is no misapprehension among practitioners.

Of the four responses which were opposed, a judicial response and a non-departmental public body agreed that the purpose of aggravated damages was compensatory, but thought it might help to confirm this in statute to avoid any lingering uncertainty, while a defendant solicitor thought that fixing it in statute might help restrict any expansion. From the claimant perspective, a solicitor called for a nominal sum of exemplary damages to be awarded in a range of cases.

34. Do you agree that legislation is not needed to clarify the interface between aggravated damages and damages for mental distress?

Nearly all responses supported this proposal. Views expressed in support included that the law in relation to mental distress and psychiatric injury is well established. A non-departmental public body considered that it would be difficult to draft legislation with sufficient precision to avoid arguments about whether a particular reaction was or was not within the boundaries identified by statute, and would be thus self-defeating.

One insurer and one defendant representative qualified their agreement by indicating that this applied as long as the courts used the terminology consistently. A software provider and a body representing those with intellectual property rights indicated that in intellectual property cases aggravated damages went beyond just mental distress to encompass moral rights. The former considered that this should be clarified in the 1988 Act, but the latter took the view that in the light of Article 13 of the Intellectual Property (Enforcement) Directive this wasn't necessary.

35. Do you agree that in the Copyright, Design and Patents Act 1988 and the Patents Act 1977 the term 'additional damages' should be replaced by 'aggravated and restitutionary damages'?

Only approximately a quarter of consultees responded to this question. Of these, responses fell into three categories: 11 were in agreement with the proposal, while 6 were opposed for reasons of clarity and 7 were opposed on the basis that exemplary damages are required.

Those in favour included a judicial body, a solicitors' organisation and a number of insurers and defendant representatives. The solicitors' organisation agreed that exemplary damages were not appropriate, and that the proposal would make the availability and amount of damages clearer to both parties and increase the chances of a fair settlement. It also considered that it would increase the confidence of rights holders in taking action. A solicitor acting for defendants indicated that the proposal would fit better with the concept of damages for "moral prejudice" in the Intellectual Property (Enforcement) Directive.

Those against the proposal on grounds of clarity included barristers and a barristers' organisation, and another judicial group. The latter considered that the proposal would probably reduce the amount awarded and that additional damages also had a dissuasive element. One barrister expressed dislike for the term "restitutionary damages" and thought that the change would be confusing and unnecessary. A defendant solicitor shared that view, considered that it could lead to more satellite litigation as it might not adequately protect intellectual property interests, and pointed to uncertainty over the availability of aggravated damages in corporate cases.

Those representing intellectual property rights holders linked their answers here to their comments under question 36 and pressed for

exemplary damages to be available. One considered that the change proposed would be purely cosmetic and would not improve the level of awards. Another indicated that it was unclear how aggravated damages would apply, and that restitutionary damages were difficult to assess, as the infringer's profits could be far less that the rightsholder's loss (eg if CDs were copied and sold cheap). Another took the view that they were an unstable concept of uncertain extent and disputed validity, and wouldn't cover sums saved by the infringer.

36. What are your views on how the system of damages works in relation to:

a) patents;

b) designs

c) trade marks and passing off

d) copyright and related rights?

17 responses were received to the request for views on how the system of damages works in relation to these areas. Of these, 8 responses from bodies representing intellectual property rights holders identified a number of aspects of the current system which they considered were inadequate. These primarily related to the area of copyright and related rights, although certain responses also raised concerns in the area of trademarks and designs. No specific difficulties were identified in relation to patents. One response considered that liability for inadvertent patent infringements should be limited to reasonable licensing costs. Another indicated that exemplary, additional and statutory damages would not be appropriate in patent cases, as issues relating to validity and infringement were much more difficult to determine, involving technological assessments and business judgments in good faith which might turn out to be wrong.

In relation to the other areas on which views were sought, several responses indicated that the level of damages awarded for infringements was inadequate, and that exemplary damages should be available. It was argued that this was necessary to provide a sufficient deterrent to infringement, and that this was not inconsistent with the purpose of civil damages, as precedents already existed in other areas for the civil law to act in a regulatory role to control crime or anti-social conduct. Several responses drew attention to other countries in which higher levels of damages including exemplary damages were available. A number of responses expressed the view that the function of exemplary damages was not punitive, but focused on making an example of the infringer to deter him and others from future illegal conduct. Concern was expressed that the courts were reluctant to award additional damages, and that in any event, these were inadequate as case law had indicated that they were simply an uplift to compensatory damages. A number of responses argued that aggravated damages should be available more widely than at present.

An area of concern which several responses identified was that frequently copies of software applications were used for which a licence had not been obtained, but that when a breach of this nature was discovered, it was possible to acquire the necessary licences post-infringement with no penalty. In these situations, it could be claimed that the rights holder had suffered no loss, and that there was thus no need for damages to be awarded. This meant that infringers knew that the worst consequence of their failing to get a licence would only be the need to acquire one later on if they were caught.

A number of responses identified a need for “pre-established” damages to be available, which would enable the court to award an appropriate amount within a set range dependent on the extent of the infringement. Models used in other countries were referred to, which provide for infringers to pay at least the full retail price of a legitimate licence and possibly some multiple of that price.

Several responses maintained that changes to the law were necessary to fulfil the requirement in the World Trade Organisation’s TRIPs agreement to provide enforcement procedures which permit effective action against intellectual property infringements, including remedies which constitute a deterrent to further infringements. A number also considered that EU Directive 2004/48/EC on the enforcement of intellectual property rights, while offering some assistance, did not go far enough. Concern was also expressed that there were currently no criminal sanctions available in relation to design right infringements.

In addition to the responses from those representing intellectual property rights holders, a number of other responses raised concerns about the current system. A claimant representative favoured exemplary damages in extreme cases and indicated that additional damages were rarely awarded, and that as they were discretionary it was difficult to factor them into settlement negotiations. A defendant representative indicated that claims were often not pursued because of the cost and uncertainty involved, and that this could deny small businesses and individuals access to justice and stifles innovation. Another indicated that there were a number of circumstances where damages based on traditional principles would not deliver effective, proportionate or dissuasive enforcement, and supported a wide discretion for the court to award additional damages without importing a punitive element. An organisation representing employers indicated that many small businesses did not pursue legal action because of the cost involved, and expressed concern that small businesses that inadvertently breach IP rights could be subject to disproportionate penalties.

From the other perspective, several responses did not support changes to the system in this area. A solicitors organisation indicated that the EU Directive would ensure consistency in awards for different types of IP rights, that the current system in the light of the Directive was effective, proportionate and dissuasive, and that purely punitive damages should not be introduced. A judicial response indicated that awards in England

and Wales were generally higher than corresponding awards elsewhere in Europe, and that the balance should not tip further in favour of rights holders. It considered it desirable to consider additional damages for all IP infringements and for misuse of confidential information, subject to clear safeguards, but not in cases where there was a genuine dispute as to the subsistence of the right or its infringement.

Liability for Psychiatric Illness

Chapter 3 of the consultation paper indicated that the Government considered it preferable to allow the courts to continue to develop the law in relation to liability for psychiatric illness. It did not ask any specific questions, but indicated that the Government would welcome any views that consultees wished to express.

29 responses were received on the issues discussed in this chapter. Of these, 12 supported the Government's position. These primarily came from a number of insurers and defendant bodies, although one barristers' organisation and a police authority also agreed that it was preferable for the courts to continue to develop the law in this area. Arguments in support of this position included that the climate in which the Law Commission's recommendation had been made had since changed, and that the courts had been developing and applying the law in a sensitive and flexible way, taking into account advances in medical knowledge. Concern was expressed that legislation along the lines proposed by the Commission would lead to a considerable expansion in claims which would increase insurance premiums, fuel perceptions of a compensation culture and could lead to further confusion and evidential difficulties.

In relation to particular aspects of the Commission's recommendations, a number of responses considered that the requirement that the psychiatric illness must have been caused by a shock was being interpreted flexibly by the courts, and that removing it would create more complex issues of causation relating to whether the psychiatric illness had been caused by the tortfeasor or by an intervening cause. It was considered that this would considerably increase medical and legal costs and would raise difficulties in distinguishing between a psychiatric illness and other forms of grief or longer term reaction. It was also suggested that a statutory list of those eligible to claim on the basis of a close tie of love and affection could result in the inclusion of people who had long lost touch with the deceased.

One response, while agreeing the Government's position generally, considered that the area of stress-related psychiatric claims did merit attention because of conflicting case law in relation to reasonable foreseeability between the civil courts and employment tribunals.

17 responses were received which disagreed with the Government's position. These came primarily from claimant representatives and victims' organisations, but also included a trade union, barristers' and solicitors' organisations, an individual, and a judicial response. Arguments in

support of this position included that the current law was too restrictive and was still confusing and uncertain, and that fears that codification would lead to a flood of claims were unfounded. The majority of these responses considered that the law in this area was unfair, and was preventing many people with a seriously debilitating illness from being able to claim. A smaller number focused their concerns around the lack of clarity and coherence in the law and the need to clarify the extent to which (if at all) public policy concerns should apply to limit eligibility to claim. A number questioned the costings in the impact assessment on this issue, and indicated that savings to the NHS could arise to offset any increase in costs as some costs would then be met by the tortfeasor.

In relation to particular aspects of the Commission's recommendations, several responses indicated that the "shock" requirement should be removed as it was arbitrary and unreasonable: a psychiatric illness could develop over a period of time or a series of events and where this occurred as a result of the tortfeasor's actions there should be a right to claim damages. Support was also expressed for broadening the categories of people able to claim on the basis of a close tie of love and affection; removal of the requirement for proximity in time and space; allowing claims by bystanders and rescuers; the introduction of a statutory duty of care; and for psychiatric illness to be treated in the same way as physical injury. One response drew particular attention to the position of secondary victims such as relatives and carers who suffer a psychiatric illness as a result of the ongoing impact of a serious physical injury to a loved one, and considered that claims should be possible in these situations, subject to expert evidence to establish a causative link.

Conclusion and next steps

This section sets out the Government's conclusions in the light of the consultation responses and the next steps that it intends to take. As indicated in the consultation paper, a number of the proposed changes to the law will require primary legislation. In its draft legislative programme published in May 2008, the Government indicated its intention to introduce a Civil Law Reform Bill, which will include, among other things, provisions on aspects of the law of damages arising from this consultation.

Chapter 1 – Claims for Wrongful Death

List of eligible claimants

The consultation paper proposed that a residual category should be added to the statutory list of those entitled to claim for financial loss, but that this should be limited to any person who was being wholly or partly maintained by the deceased immediately before the death. It remains the Government's view that this is the fairest approach to take, and would ensure that all those actually dependent on the deceased could claim while avoiding the possibility of speculative claims based on possible future dependency.

We recognise that it would be unfair to exclude children in utero or children already conceived though IVF treatment prior to the death from being able to claim. The Law Commission indicated in its report that under the current law, an unborn child conceived before the death and born alive would already qualify as a child of the deceased within the existing statutory list. However, to avoid any doubt, we would propose to clarify this in the context of any legislation which is introduced.

Concerns were expressed that introducing the residual category would enable claims to be brought where the dependency (in particular of a cohabitant) has been of a very short duration. However, a two year qualifying period as suggested by some responses would put cohabitants in no better position than under the current law, and would not prevent unjust outcomes in circumstances such as that in *Kotke v Saffarini* (as set out in the consultation paper). A shorter qualifying period such as six months would be less disadvantageous, but on balance the Government believes that this would not be appropriate. As the consultation paper pointed out, in each case that arises actual financial dependency would have to be proved, and thus unmeritorious claims would be unlikely to succeed. The fact that dependency has to be proved distinguishes this situation from the proposed two year qualifying period for a cohabitant to receive bereavement damages, as the latter is an automatic award to those in the eligible categories.

Remarriage and financially supportive cohabitation

The consultation paper proposed that the fact, but not the prospects, of a person's remarriage or entry into a civil partnership should be taken into account when assessing a claim for damages under the FAA by the claimant or on behalf of any eligible children. It also sought views on whether the fact, but not the prospects, of entry into a financially supportive cohabitation of at least two years' duration following the death should be taken into account in both these types of claim.

The responses to the questions in this area showed two fundamentally differing perspectives on the availability and function of damages under the FAA. From one perspective it was held that taking the fact or prospect of a new relationship into account would unfairly transfer the obligation to support the deceased's dependant from the tortfeasor to the new partner, while from the other perspective it was held that not to do so would amount to double recovery by the claimant and would depart from the principle that the purpose of damages is to compensate for loss.

The Government recognises that both these competing arguments carry some weight. The proposals in the consultation paper were aimed at providing a clear set of provisions which are fair to both parties, and which avoid as far as possible the need for intrusive inquiries. In the light of the fact that the proposals received the support of the majority of respondents, we consider that taking the fact, but not the prospects, of remarriage or entry into a new civil partnership into account would strike a fair balance. We do not agree that consideration of the prospects of remarriage should be allowed in relation to engagements in view of the intrusive inquiries that this would be likely to encourage.

Similar considerations apply in relation to financially supportive cohabitation, and we consider it reasonable that the fact, but not the prospects of any such new arrangement should be taken into account when the cohabitation has been of at least two years' duration. Some responses perceived a discrepancy between this proposal and the absence of any qualifying period proposed for dependency claims by cohabitants being maintained by the deceased at the time of death. However, it should be recognised that cohabitees are likely to have less financial protection than spouses. Whereas proof of dependency would be required to substantiate any dependency claim, we consider that the uncertainty regarding a cohabitant's financial position could lead to unfairness if the fact of a financially supportive cohabitation were taken into account from the outset. We therefore consider that a two year qualifying period would be appropriate.

In relation to claims on behalf of eligible children, certain responses pointed out that the deceased would have had a statutory obligation to maintain their children, which (short of adoption) would not apply to any new partner. We consider that in these circumstances, as was indicated by a judicial response to the consultation, the fact of remarriage, entry into a civil partnership or entry into a financially supportive cohabitation should only be taken into account as

far as the judge thinks it appropriate to do so, and should not be determinative.

Divorce and breakdown of financially supportive cohabitation

The consultation paper proposed that the courts should only take into account the prospect of divorce, dissolution or breakdown in the relationship between the deceased and his or her spouse or civil partner in three situations: where one has petitioned for divorce, judicial separation or nullity; where one has begun the procedure for dissolution of the civil partnership; or where the couple are no longer living together at the time of the death.

A clear majority supported the prospects of divorce, dissolution or breakdown being taken into account in the former two situations, and the Government considers that this would represent the fairest approach to take. To include consideration of the prospects of breakdown in all circumstances as proposed by some would involve intrusive inquiries in all cases, and we consider that this would be disproportionate. However, we believe that not to take the prospects of breakdown into account where clear formal steps had been taken to bring the relationship to an end would also be unreasonable.

Views in relation to the third situation, where the couple are no longer living together at the time of the death, were more mixed. As a number of responses pointed out, situations could arise where the couple were living apart for other reasons, or where the estrangement would only have been temporary. However, if this were the case, it would be possible for the claimant to bring evidence to clarify the position, and on balance the Government considers that it is reasonable for the prospects of breakdown to be taken into account in this situation as well.

The consultation paper also proposed that section 3(4) of the FAA should be repealed and replaced by a provision to the effect that the prospect of breakdown of a cohabiting relationship should not be taken into account when assessing damages under the FAA. Responses to this question were mixed. However, as a number recognised, unlike the position in relation to a marriage or civil partnership, in practical terms there is no objective factor or formal steps which could be identified to signal the imminent breakdown of a cohabiting relationship. The Government believes that to open up consideration of the prospects of breakdown generally would be too intrusive, and that on balance it is preferable that they should not be taken into account at all. As the consultation paper indicated, where the couple were no longer living together at the time of the death, this fact would be taken into account.

We do not consider that this can properly be interpreted as favouring cohabitation over marriage. In relation to perceptions of a discrepancy between this proposal and the absence of any qualifying period proposed for dependency claims by cohabitants being maintained by the deceased at the time of death, as noted above cohabitees are likely to have less financial protection than spouses. Whereas proof of dependency would be required to substantiate any dependency claim, the uncertainty regarding a cohabitant's

financial position could lead to unfairness if the prospects of breakdown of the financially supportive cohabitation were taken into account.

Mesothelioma claims

The consultation paper also welcomed views on the extent to which difficulties arise for mesothelioma sufferers and their families in relation to any difference in the value of claims settled before or after the death of the claimant, and on possible options for addressing any problems that exist.

21 responses were received on this issue from a range of different perspectives. The Government is considering these responses with a view to taking forward discussions with key stakeholders.

Chapter 2 – Bereavement Damages

Availability and purpose of bereavement damages

The consultation paper asked in general terms whether the award of bereavement damages should continue to be available. Nearly all those responding considered that it should, and the Government accepts that the award should remain.

A number of helpful suggestions were made in relation to explaining and clarifying the purpose of the award, although many considered that in practical terms this would be likely to make little difference to the way in which the award was perceived. As indicated in the consultation paper, the Government shares those doubts. However, it will give further consideration to all the suggestions put forward in preparing the explanatory notes for the primary legislation required to implement the proposals on bereavement damages.

Extending the statutory list of claimants

Parents of the deceased

The consultation paper considered a number of proposals in relation to parents of the deceased. Firstly, it proposed that a parent should only be able to claim bereavement damages for the loss of their child where the child is under 18 and unmarried (which reflects the current law). A small majority of responses agreed with this proposal, and those opposed were primarily divided between those who considered that parents should be eligible to claim regardless of the child's age and those who considered that a different cut off point of 21 or 25 would be more appropriate (as this would be more likely to cover children who were living at home or who were in full time education).

As the consultation paper indicated, the Government considers that there is a need to keep the bereavement award within finite limits and to avoid diluting the award to those who are likely to be closest to the deceased, such as their spouse or minor children. As it explained, a blanket extension to parents of

children of any age would also increase the need for evidence of the closeness of the tie and could undermine the simplicity and clarity of the current system. Raising the age for eligibility to 21 or 25 would not necessarily catch all children living at home or in full time education, and would still result in difficult borderline cases arising. The age of majority is recognised by the law as the dividing line in a range of different circumstances, and we continue to take the view that it provides the most appropriate and practical limit.

Secondly the consultation paper proposed that unmarried fathers with parental responsibility should be able to claim bereavement damages for the loss of a child under 18. This was supported by the great majority of responses. We do not consider that linking eligibility to contact with or maintenance of the child would be appropriate, as this would necessitate evidence and inquiries that could encourage disputes between the parents and undermine the simplicity of the current system. We consider that the most simple and practical method of providing a clear definition of eligibility would be through reference to parental responsibility under the terms of the Children Act 1989 (as amended).

Thirdly, the consultation paper sought views on whether stepparents who were living with and had caring responsibilities for a child under 18 should be eligible to claim bereavement damages. Although most responses supported stepparents being eligible in these circumstances, the Government is concerned that their inclusion could undermine the simplicity of the current system (as evidence would be required regarding the nature of their relationship with the child) and at the potential for disputes and conflict with the natural parents (whether or not the stepparent was entitled to an additional award or would have to split the award with the natural parents). On balance we take the view that it would not be appropriate to include stepparents in these circumstances.

Children of the deceased

The consultation paper proposed that children of the deceased (including adoptive children) who are under 18 should be added to the statutory list, but that eligibility should not be extended to adult children of the deceased. A small majority of responses agreed with this proposal, and those opposed were primarily divided between those who considered that children should be eligible to claim regardless of their age and those who considered that a different cut off point of 21 or 25 would be more appropriate.

Similar considerations arise here as in relation to the proposal regarding the eligibility of parents to claim for the death of a child. As noted above, there is a need to keep the bereavement award within finite limits and to avoid diluting the award to those who are likely to be closest to the deceased, and so a blanket extension to children of any age would increase the need for evidence of the closeness of the tie and could undermine the simplicity and clarity of the current system. Similarly, raising the age for eligibility to 21 or 25 would not necessarily catch all children living at home or in full time education, and would still result in difficult borderline cases arising. We believe that the age of majority again provides the most appropriate cut off point. A number of responses referred to the ability of children to claim for “special care and

services" and that there could be some overlap if they were also entitled to claim bereavement damages. However, in view of the fact that bereavement damages constitute no more than a payment in acknowledgement of grief, the Government does not consider that any such overlap would arise.

Brothers and Sisters

The consultation paper proposed not to include brothers and sisters in the statutory list, and this was supported by a clear majority of responses. We recognise the grief that can be felt at the loss of a sibling and that they can often be as close as other family members. However, as the consultation paper explained, we consider that there is a need to place broad practical limits on the ability to claim, and the wider the eligible categories are, the greater the need for a cap on payments and the possibility of diluting the award to others who may have a closer bond. A number of responses suggested possible exceptional circumstances in which siblings should be eligible. However, these would all involve the need for evidence and inquiry and would affect the simplicity of the system, while not necessarily avoiding unfairness. On balance, the Government therefore continues to take the view that brothers and sisters should not be eligible.

Cohabitants

Nearly all responses agreed with the proposal that those 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 should be eligible to claim, and that remains the Government's view. We do not agree with the view that the same level of grief may not be felt by a cohabitant as by a married person. As indicated in the consultation paper, we consider that a qualifying period of two years would be appropriate to ensure that the relationship is one of permanence and commitment. We do not consider that a shorter period would be appropriate, or that there is a discrepancy with the proposal at Q1(b), in that as was pointed out in one response, bereavement damages follow automatically from eligibility to claim, unlike dependency damages.

Engaged Couples

A clear majority of responses supported the proposal that engaged couples should not be eligible to claim, and on balance that remains the Government's view. Similar considerations arise as in relation to siblings regarding the need for limits to be placed on the ability to claim, and although some responses considered that the consultation paper may have exaggerated the evidential difficulties that might arise in relation to proving an engagement, others agreed that these could present a problem, particularly because of the differences between cultures and religions. Also, we do not consider that engaged couples would be unfairly disadvantaged as compared to cohabitants. As the consultation paper explained, the requirement of a two year cohabitation period would demonstrate the couple's commitment to the relationship, and the existence of an engagement alone would not automatically prove this.

Amount of bereavement award

The consultation paper asked a number of questions relating to the amount of the bereavement award. Firstly, it asked whether the current award (which has been increased to £11,800 in respect of causes of action arising on or after 1 January 2008) should be available to the deceased's spouse, civil partner or cohabitant without dilution, and that additional sums should be available to any other eligible claimants.

A substantial majority of responses supported this proposal. Those opposing took the view that the award should be higher, or should be divided equally between all those eligible (or both). As the consultation paper explained, the award of bereavement damages is only a token payment in acknowledgement of grief, and should not be regarded as reflecting in any way the value of the deceased's life or as a punishment for the negligent person who caused the death. We therefore consider that a fixed payment of a limited amount is appropriate, and continue to take the view that the award to those in what are generally regarded as the closest categories of relationship to the deceased should not be diluted.

The one proposed exception to this approach was that where a spouse or civil partner and a cohabitant were both eligible to claim, the award should be divided between the two. A clear majority also supported this proposal. Some considered that the size of the award meant that there should be no further dilution, and that this could upset those affected and cause disputes. The Government recognises that this possibility may arise. However, the number of instances in which this situation would arise (ie where a husband and wife or civil partners had separated but not divorced or dissolved the partnership, and the deceased had entered into a new cohabiting relationship of over two years' duration) are likely to be rare, and on balance the Government considers that the approach proposed in the consultation paper is appropriate.

Although no question was asked on the issue, a number of responses raised points regarding the uprating of the award for inflation. As noted above, the award has subsequently been increased in relation to causes of action arising on or after 1 January 2008, and as indicated in the consultation paper the Government intends to make further increases every three years thereafter. We consider that it is appropriate for the award to be increased regularly in line with inflation to avoid it becoming progressively smaller in real terms over time, and believe that a three-yearly increase would be an appropriate period to avoid the uncertainty of frequent minor adjustments to the amount of the award and to assist insurers and the NHS in building the effect of future increases into their reserves and financial plans.

The paper also proposed that the award to the parents of an unmarried child under 18 should continue to be divided equally between them. Again, a substantial majority supported this proposal. The approach of dividing the award in these circumstances is well established, and the Government does not consider that it should change.

The paper proposed that an award of £5000 should be made to each eligible child under 18 in respect of the death of a parent (in line with the recent increase in the current bereavement award, a figure of £5900 would now be appropriate). There was a clear lack of consensus in the responses to this question, with those against the proposal coming from the opposing perspectives that either a higher award is appropriate or that the award of £10,000 (now £11,800) should be divided equally between all eligible children. The Government considers that the proposal it put forward strikes a fair balance between these opposed perspectives and therefore continues to take the view that a payment of £5900 to each eligible child would be appropriate.

Finally, the paper proposed that legislation should make clear that contributory negligence on the part of the claimant would reduce the bereavement award. A substantial majority of responses agreed with this approach. The view was expressed by some that this would not accord with the nature of bereavement damages as a token award. However, as indicated in the consultation paper, we consider that it would be unjust for the defendant to be made liable to pay the full amount of the award to a person who is partly responsible for their loss. A number indicated that any legislation should exclude contributory negligence on the part of children under 14, which it was said would reflect current case law. The Government is minded to include a general provision in legislation which the courts could then apply as appropriate in individual cases, but will give further consideration to this point in drafting the legislation.

Chapter 3 – Liability for Psychiatric Illness

The consultation paper did not ask any specific questions in this area, but indicated that the Government would welcome any views that consultees wished to express. Responses on this issue were mixed, with a small majority disagreeing with the Government's position that it is preferable to leave development of the law in this area to the courts. Widely differing views were expressed on particular aspects of the current common law framework, such as the "shock" requirement and the range of people who should be eligible to claim.

The arguments in this complex and sensitive area are finely balanced. On balance the Government continues to take the view that it is preferable for the courts to have the flexibility to continue to develop the law rather than attempt to impose a statutory solution.

Chapter 4 – Collateral Benefits

General Principles

The consultation paper proposed that the preferred outcome in principle when collateral benefits arise should be that the claimant is compensated for his or her losses, but only once, and that wherever practicable this should be at the

expense of the tortfeasor rather than a collateral benefit payer. It also suggested that the best way of achieving this would be to disregard the benefit in assessing damages and to give the payer a right of recovery.

A small majority agreed with the preferred outcome, but a significant number were opposed, and most did not agree with the proposal that disregarding the benefit and giving a right of recovery would be the best way of achieving it. The Government continues to take the view that the preferred outcome is desirable in principle. However, in view of the concerns expressed it does not intend to take forward any overarching general reform in this area, subject to the conclusions on individual issues set out below.

Gratuitous Care

The consultation paper proposed that the approach established by the case of *Hunt v Severs* of requiring claimants to place damages for gratuitous care in trust for the carer should be replaced by a personal obligation to account; that this should apply to damages for future as well as past gratuitous care; that it should apply regardless of the identity of the carer, but that damages should not be awarded for past gratuitous care provided by the tortfeasor; and that the FAA should be amended to allow damages to be awarded for services gratuitously provided to a dependant of the deceased.

A substantial majority of responses supported a personal obligation to account, and that this should extend to future gratuitous care. Concerns primarily focused around the possibility of double recovery and the view was expressed that a legal obligation to compensate the carer would be more appropriate as otherwise the claimant might not in fact do so. However, the Government considers that a legal obligation would be too rigid, and that a personal obligation would give greater flexibility, for example to enable the claimant to pay for future gratuitous services only when and to the extent that they are actually provided. As noted in the consultation paper, a personal obligation for future gratuitous care would fit well with periodical payments orders in cases of significant future loss. As one response acknowledged, some uncertainty about future arrangements is inherent in lump sum compensation for future loss. However, on balance, the Government continues to take the view that a personal obligation should apply to damages for both past and future gratuitous care.

A majority of responses also supported the view that the personal obligation should generally apply regardless of the identity of the carer, but that damages should not be awarded for past gratuitous care provided by the tortfeasor. Opposition generally focused on the latter issue, with some taking the view that neither past nor future care should be recoverable. However, as some responses pointed out, denying payments for future gratuitous care to a caring tortfeasor could mean the claimant having to get commercial care, and the Government does not consider that this would be appropriate.

As certain responses pointed out, payment of past gratuitous care by the tortfeasor would also appear inappropriate, as the money would simply be returned to the tortfeasor. A number of suggestions were made as to particular

circumstances in which the payment of past gratuitous care to the tortfeasor would be appropriate. However, it would be difficult to frame any legislative provision which would effectively differentiate between situations where awards for past gratuitous care to a tortfeasor might or might not be appropriate. In view of the fact that such claims are not currently possible, and in light of the general principle set out in the consultation paper that legislation and procedural change will only be appropriate where there are positive identifiable benefits, on balance the Government considers that damages should continue not to be awarded for past gratuitous care provided by the tortfeasor.

A clear majority of responses agreed with the proposal that the FAA should be amended to allow damages to be awarded for services gratuitously provided to a dependant of the deceased, which would bring the position under the FAA into line with that in personal injury cases. The Government shares the view expressed by one respondent that there is no reason in principle for this issue to be treated differently merely because the claim arose from a fatal accident, and does not consider that a statutory provision on this point should create confusion in relation to the common law.

Other collateral benefits

The consultation paper sought views on the treatment of collateral benefits in a number of other specific areas. The proposals that no action was needed in relation to the law on charitable payments, pensions and redundancy payments all received support from the great majority of responses. The Government considers that any uncertainty which might exist in relation to certain aspects of the law in these areas is best left to the courts to resolve, and does not propose to take any legislative action on these issues.

The paper also sought views on whether the law on insurance payments and sick pay needed clarification. In relation to the former, views were sought on whether insurance payments should be disregarded in the assessment of damages regardless of who paid the premiums, and on whether contractual provisions for recovery should be enforceable regardless of the nature of the insurance. There was substantial opposition to both approaches from the insurance industry, which opposed a general disregard on the basis that this could lead to double recovery and would be unfair where defendants had paid the insurance premiums. As the consultation paper indicated, case law already provides for insurance to be disregarded where the claimant has purchased the insurance policy, and some responses indicated that the courts applied that principle with little difficulty. In the light also of a number of comments from claimant bodies that no significant problems were experienced with the current system, the Government does not intend to legislate on this point. In view also of concerns about the potential uncertainty that could arise from any provision in relation to the enforceability of contractual provisions, the Government similarly intends to take no further action in this area.

In relation to sick pay, the paper sought views in principle on whether sick pay should be disregarded in the assessment of damages, if this should apply only to sick pay above the statutory minimum, and if there should be an exception

where the employer is also the tortfeasor. A majority of responses opposed any change to the law on this issue, including some claimant bodies as well as insurers and defendant bodies. Although disregarding sick pay would reflect the Government's preferred approach on collateral benefits in principle, in view of the lack of any consensus and the range of opposition, we do not intend to legislate on this issue.

Chapter 5 – Private Care

The consultation paper sought views in principle in relation to the possible repeal of section 2(4) of the Law Reform (Personal Injuries) Act 1948 in the light of recommendations in the Chief Medical Officer's 2003 report *Making Amends*, and indicated that further consultation would take place on any proposals which were developed as a result of this consultation. A wide range of views were expressed on the issues raised, and these will require further consideration to determine whether any further action in this area is appropriate.

Views were also sought on the interface between the public and private provision of care and accommodation services because of the difficulties that had arisen in this area in large value personal injury claims. In the light of the range of responses received and the lack of consensus on the best approach to be taken, we will give further consideration to the most appropriate way forward.

Chapter 6 – Accommodation Expenses

The consultation paper sought views on possible alternatives to the method established by the courts in the case of *Roberts v Johnstone* in relation to the treatment of damages for the purchase of new accommodation for the claimant or the cost of alterations to his or her existing property. The responses revealed no clear consensus on the best approach in these circumstances. There was substantial opposition to both of the specific alternatives which were identified and a number of other suggestions were made. However, many considered that *Roberts v Johnstone* remained the best option.

In the light of the lack of consensus on this complex and technical issue, the Government intends to ask the Civil Justice Council's Serious Injury Committee to review the area and consider the merits of the various suggestions raised, and to provide recommendations on any change which may be appropriate.

Chapter 7 – Aggravated, exemplary and restitutionary damages

The consultation paper sought views on a number of issues in this chapter. It emphasised the Government's view that the availability of exemplary damages in civil proceedings should continue to be a matter for the common law and should not be extended through statute. Almost all of those who responded supported the proposal that the one existing statute referring to exemplary damages (the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951) should be amended to refer instead to aggravated damages, and the Government intends to legislate to this effect. Certain barristers expressed the view that aggravated damages would be inappropriate in that context, and that legislation should not be amended simply for tidiness. We do not consider that an award of aggravated damages in this context would create confusion (as noted in the consultation paper, it would accord with the view of the Act expressed by Lord Kilbrandon in the 1972 case of *Broome v Cassell*), and in any event the fact that the provision in the Act has been seldom (if ever) used means that any uncertainty would be minimal. We also consider that it is a proper function of legislation to remedy anomalies in earlier statutes.

The great majority of those who responded agreed that there was no need for legislation on restitutionary damages; to confirm that the purpose of aggravated damages is compensatory and not punitive; or to clarify the interface between aggravated damages and damages for mental distress, and the Government continues to take the view that these issues are best left to the courts.

A number of responses to these questions referred to particular areas in which exemplary damages are or are not available under the common law. As noted above, the Government considers that the law in relation to exemplary damages should be left to the courts to develop, and should not be the subject of new statutory provisions.

Additional Damages

The consultation paper proposed that it may assist in clarifying the law if the term "additional damages" in the Copyright, Design and Patents Act 1988 and the Patents Act 1977 were replaced by "aggravated and restitutionary damages". A number of responses called for exemplary damages to be available under the 1988 Act. As noted above, the Government does not consider that any new statutory provision for exemplary damages is appropriate. Mixed views were expressed on whether the amendment proposed would provide greater clarity, with some taking the view that it might confuse matters further.

However, as noted in the consultation paper, the term "additional damages" appears nowhere else, and has itself been the subject of much uncertainty. The concepts of aggravated and restitutionary damages are more firmly established in the common law, and on balance the Government considers that the proposed change would be beneficial. In order to ensure that the possibility of the change reducing claimants' existing rights does not occur, as noted in the consultation paper we would propose to confirm in the

explanatory notes accompanying legislation on the subject that aggravated and restitutionary damages under the 1988 and 1977 Acts are intended to cover all the aspects set out in Article 13.1 of EU Directive 2004/48/EC on the enforcement of intellectual property rights, including both damages and an account of profits. As indicated in the consultation paper, we would also propose to clarify that aggravated and restitutionary damages under the two Acts can be awarded to corporate claimants.

Gowers Review of Intellectual Property

In the light of a recommendation in the Gowers Review, the consultation paper sought views on how the system of damages currently works in relation to patents; designs; trade marks and passing off; and copyright and related rights.

Responses from bodies representing intellectual property rights holders primarily focused on the need for higher levels of damages to be awarded, whether through exemplary damages, “pre-established” damages, a wider availability and interpretation of aggravated damages, or a greater willingness on the part of the courts to award additional damages. As noted above, the Government does not consider that statutory provision for exemplary damages is appropriate. The Government also does not support the use of “pre-established” damages, which would be more akin to a fine and would represent a move away from the principle that damages should be assessed in a way which provides full compensation in the circumstances of an individual case. The amendment and clarification proposed above in relation to the types of damages available under the Copyright, Design and Patents Act 1988 should help to clarify the nature of the damages available and ensure that a wide interpretation is given so that the courts can award them wherever appropriate. This may also assist in encouraging claimants to bring claims.

A specific issue which was raised in several responses was the fact that it is currently possible to acquire licences for software applications after an infringement has been discovered without any penalty being imposed. The Government recognises that the absence of such a penalty does not provide any incentive to acquire the licence prior to use. However, it does not believe that distorting the civil law to provide for exemplary damages to counter the absence of any penalty is the answer, and the imposition of a fine may be a more appropriate course in these circumstances. We will therefore give further consideration to whether an appropriate civil or criminal penalty should be introduced where licences are not acquired prior to use.

It may also be appropriate for claimants to request the courts to use “publicity orders” in such cases. As part of the implementation of the Enforcement Directive (2004/48/EC) a specific reference to “publicity orders” was added to the Practice Direction supplementing part 63 of the Civil Procedure Rules. This provides that where the court finds that an intellectual property right has been infringed, the court may, at the request of the applicant, order appropriate measures for the dissemination and publication of the judgment to be taken at the defendant’s expense.

A number of responses expressed the view that the existing system of damages does not meet the requirements of the TRIPS agreement or the Directive on the enforcement of intellectual property rights. The Government does not agree with this view. As noted in the consultation paper, we believe that the Intellectual Property (Enforcement etc) Regulations 2006 fully implement Article 13 of the Directive in relation to damages. Similarly we believe that current provisions on damages fully comply with the requirements of Article 45 of the TRIPS agreement, which requires that judicial authorities have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury he or she has suffered.

Conclusion

The Government would like to thank all those who took the time to respond to this consultation paper. We believe that the proposals which we intend to take forward in the light of consultation will help to provide a fairer and more coherent system to deliver fair compensation to claimants with valid claims.

Summary: Intervention & Options

Department /Agency: Ministry of Justice	**Title:** Damages for Wrongful Death, Bereavement and Gratuitous Care	
Stage: Consultation response	**Version:** Final	**Date:** May 2009
Related Publications: Consultation paper "The Law on Damages" (CP 9/07)		

Available to view or download at:

http://www.justice.gsi.gov.uk

Contact for enquiries: Paul Norris **Telephone:** 020 3334 3220

What is the problem under consideration? Why is government intervention necessary?

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

What are the policy objectives and the intended effects?

The proposals aim to modernise the existing legislation in the Fatal Accidents Act 1976 to reflect the views and values of modern society. Under the Government's proposals more categories of people, who are close to the deceased, will be able to make a claim for financial loss or bereavement damages, than can at present. The current law will also be simplified in relation to the treatment of damages for gratuitous care.

What policy options have been considered? Please justify any preferred option.

Three options were considered on consultation: option 1, to accept all of the Law Commission's recommendations as contained in the draft Bill attached to its report; option 2, to extend the list of persons able to make a claim for financial loss and bereavement damages, and provisions on the amount of the bereavement damages award, only as far as set out in the consultation paper; option 3, make no change. It also sought views on whether or not to introduce legislation to reform in certain respects the treatment of damages for gratuitous care. In the light of the consultation responses, the Government intends to introduce legislation in relation to financial loss, bereavement damages, and gratuitous care as proposed in the consultation paper.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? Not yet applicable.

Ministerial Sign-off For implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

.....Date:

Summary: Analysis & Evidence

Policy Option:	Description: Damages for Wrongful Death, Bereavement and Gratuitous Care

COSTS

ANNUAL COSTS	
One-off (Transition) **Yrs**	Description and scale of **key monetised costs** by 'main affected groups'
£ 0	Costs of the proposals in relation to bereavement damages and dependency claims under the Fatal Accidents Act would fall to be met by the insurance industry and, in the case of clinical negligence, by the National Health Service Litigation Authority and medical defence organisations. Any costs in relation to proposals on gratuitous care are estimated to be minimal.
Average Annual Cost (excluding one-off)	
£ 5,450,000 10	**Total Cost** (PV) **£ 47,000,000**

Other **key non-monetised costs** by 'main affected groups'

BENEFITS

ANNUAL BENEFITS	
One-off **Yrs**	Description and scale of **key monetised benefits** by 'main affected groups'
£ 0	
Average Annual Benefit (excluding one-off)	
£5,450,000	**Total Benefit** (PV) **£ 47,000,000**

Other **key non-monetised benefits** by 'main affected groups'

More categories of claimant would be able to claim for bereavement damages and for dependency under the Fatal Accidents Act, and the treatment of damages for gratuitous care would be made simpler and allow claimants to receive care from someone close to them without worrying that they cannot pay them. These changes would provide a fairer and more certain system, which is in line with the values of modern society.

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	Net Benefit Range (NPV)	NET BENEFIT (NPV Best estimate)
		£ 0	**£ 0**

What is the geographic coverage of the policy/option?	England and Wales
On what date will the policy be implemented?	Not known
Which organisation(s) will enforce the policy?	N/A
What is the total annual cost of enforcement for these organisations?	£ N/A
Does enforcement comply with Hampton principles?	N/A
Will implementation go beyond minimum EU requirements?	N/A
What is the value of the proposed offsetting measure per year?	£ Nil
What is the value of changes in greenhouse gas emissions?	£ Nil
Will the proposal have a significant impact on competition?	No

Annual cost (£-£) per organisation (excluding one-off) – information being sought in this consultation	Micro **Not Known**	Small **Not Known**	Medium **Not Known**	Large **Not Known**
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase £ Not Known Decrease £ Not Known **Net** £ Not Known

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Evidence Base (for summary sheets)

Background

The purpose of the Fatal Accidents Act (FAA) is to provide compensation in case of a wrongful death for the financial losses of persons who were dependent on the deceased. It also enables the recovery of bereavement damages and reasonable funeral expenses. The Law Commission made a number of proposals for reform of the FAA. The Government's consultation paper accepted certain of the proposals, but indicated that it did not propose to implement the Commission's recommendations in full.

The consultation received a range of responses from the legal profession, insurers, the judiciary, academics, victims' organisations and other bodies, and from a number of individuals.

Claims for Financial Loss by Dependants of the Deceased Person

The FAA provides for a fixed list of persons to be entitled to claim damages for financial loss. The Law Commission considered that this list is too restrictive and should include in addition, a 'residual' class of persons. This would comprise "any person who was being wholly or partly maintained by the deceased immediately before the death or who would, but for the death, have been so maintained at a time beginning after the death". The Commission gave examples of people who could potentially have been supported by the deceased - for example, those who had lived together as husband and wife for less than two years; same sex couples; stepchildren of cohabiting relationships; the children of friends; distant relatives and non-relatives who live in the same household.

The Government's consultation paper indicated that it did not propose to implement this recommendation in full, as the extension of eligibility to people who would have been maintained at a time beginning after the death could encourage speculative claims that would be difficult to prove or disprove. It therefore proposed to limit the residual category to any person who was being wholly or partly maintained by the deceased immediately before the death.

Following the consultation exercise, the Government response indicates that it intends to introduce legislation on the basis proposed in the consultation paper.

Bereavement Damages

The other major reform proposed by the Commission concerned bereavement damages. At present, only the deceased's spouse, civil partner, or, if the deceased was under eighteen and had never been married, the deceased's parents (including adoptive parents) can recover bereavement damages. The Civil Partnership Act 2004 amended the FAA to allow registered partners to claim bereavement damages on the same basis as spouses (from the date of implementation of the 2004 Act).

The Commission recommended that the statutory list should be extended to include children of the deceased (including adoptive children); a brother or sister of the deceased (including an adoptive brother or sister); a person who immediately before the death was engaged to be married to the deceased; and any person who had lived with the deceased as husband and wife (or in an equivalent same sex relationship) for not less than two years immediately prior to the death.

The Government's consultation paper indicated that it did not propose to extend bereavement damages to all the categories of claimant proposed by the Commission, and that this was because a finite limit must be placed on the sums awarded. Any increase in the categories of eligible claimants should not result in the dilution of the award to family members who are likely to be closest to the deceased, such as their spouse and minor children.

In view of these considerations, the Government proposed to extend eligibility to claim bereavement damages to people who, although not married to the deceased, have lived with him or her as husband

and wife (or if of the same sex in an equivalent relationship) for not less than two years immediately prior to the death; to children under 18 for the loss of a parent; and to unmarried fathers with parental responsibility for the loss of a child under 18.

Following the consultation exercise, the Government response indicates that it intends to introduce legislation on the basis proposed in the consultation paper.

Gratuitous Care

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

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

The Government's consultation paper agreed with the Law Commission's recommendations. In relation to its 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, whilst assessing future need is inherently uncertain, a personal obligation to account to the carer should also apply to future gratuitous services actually provided.

Following the consultation exercise, the Government response indicates that it intends to introduce legislation on the basis proposed in the consultation paper.

[1] [1994] 2 AC 350

Preferred Option:

- In relation to bereavement damages, to extend eligibility to people who, although not married to the deceased, have lived with him or her as husband and wife (or if of the same sex in an equivalent relationship) for not less than two years immediately prior to the death; to children under 18 for the loss of a parent; and to unmarried fathers with parental responsibility for the loss of a child under 18.

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

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

Costs and benefits

Sectors affected

The following groups have been identified with an interest in the proposals:

- Claimants - any individual who suffers the loss of a family member, or any other person on whom they were financially dependent, as a result of the wrongful act or omission of another person

- Defendants - any individual or organisation subject to a claim for damages in such circumstances

- Insurers - mainly general insurers and Medical Defence Organisations (MDOs)

- Taxpayers

- Public Sector NHS

Bereavement Damages and Dependency Claims

Benefits

- This would ensure that all those actually dependant on the deceased at the time of death could claim, and that bereavement damages were available to those closest to the deceased.

- It would avoid the possibility of speculative claims and recognise the need for a finite limit to be placed on bereavement damages awards.

- The main social benefits are that the list of those able to claim bereavement damages and compensation for financial loss would be extended more widely. These changes would provide a fairer and more certain system, which is in line with the values of modern society.

Costs

- The number of compensation claims for financial loss and for bereavement damages would be likely to increase, reflecting the extension of the law to categories of people who are currently excluded from making a claim.

- The economic costs would be met either directly by the organisation or individual that is responsible for a death or by their insurers. Again, for those with insurance the impact of any change is likely to be reflected in insurance premiums.

Estimated costs to insurance industry

Bereavement damages - motor liability

The Department for Transport reports that in 2007 there were 2,664 fatalities in road accidents in England and Wales. Of these, 112 were children, and the remaining 2,552 were adult. However, not all fatal accidents will involve a claim for bereavement damages: for example, not all accidents will involve negligence and not all adults who lose their lives will be cohabitants or will have children under 18. For the purposes of the IA we have therefore assumed that bereavement damages will be claimed in 50 per cent of cases.

Extending to children

The average number of children a woman has in her lifetime if she lives until the end of her reproductive life is 1.90. Based on these figures 2552 adult fatalities would result in 4,849 people losing a parent per year, if all the adults who died had 1.90 children on average at the time of the accident (as not all accident victims will live to the end of their reproductive age we are assuming that the figures following from this assumption would result in the top of the range of estimations of the impact). However, in practice this will not be the case, and in addition a proportion of accidents will involve single men with no children. On that basis, a more accurate figure may be half of this, i.e. 2,424.

Only children under 18 would be able to make a claim for loss of a parent. In 2005 the Office for National Statistics (ONS) estimated that the population was around 53.7 million and that 11,637,450 of these people were children under the age of 18. This means that approximately 21.66 per cent of people in England and Wales were under 18. Therefore, if 2,424 people lose a parent, on average 525 would be under 18 and thus would potentially be able to make a claim. However, as noted above not all road fatalities will result in a claim. Applying the assumption that 50 per cent of the potential claimants (say 263) will claim for bereavement damages, at £5,900 per child this would cost approximately **£1,550,000**.

Extending to cohabitants

Statistics from the 2007 General Household Survey show that 27 per cent of the population were cohabiting, and of those 53 per cent were unmarried, therefore, on average 365 of the adult fatalities would have been cohabiting and unmarried.

From figures by the ONS showing *duration of past cohabitations which did not end in marriage by number of past cohabitations and sex*, taken from the 2007 General Household Survey, we can estimate that approximately 60 per cent of cohabitants live together for two years or more. Therefore on average 219 of the adult fatalities would have been cohabiting for two or more years.

On the assumption that 50 per cent of these (say 110) will claim bereavement damages, at £11,800 per cohabitant this would cost **£1,290,000**.

Bereavement Damages - Employer's Liability

The Health and Safety Executive reports that in 2007/08 there were 192 fatalities in the work place in England and Wales. However, as is the case with motor accidents, not all fatalities will involve a claim for bereavement damages. If it is assumed again that 50 per cent of these accidents will involve a bereavement damages claim, the cost of extending the list is calculated below.

Extending to children

The average number of children a woman has in their lifetime is 1.90 (see analysis above). Based on this figure, 192 fatalities would result in on average 365 children losing a parent per year. However, on the basis adopted for road traffic accidents, a more accurate figure is likely to be half of this, i.e. 182.

Only children under 18 could make a claim for loss of a parent. As observed above, it is estimated that 21.66 per cent of the population of England and Wales is under 18. Therefore, of the 182 people losing a

parent on average 39.42 (say 39) would potentially be able to make a claim for the loss of their parent. Applying the assumption that 50 per cent (say 20) will claim bereavement damages, at £5,900 per child this would cost **£118,000**.

Extending to cohabitants

As noted above, the General Household Survey suggests that 27 per cent of the population are cohabiting, and of those 53 per cent are unmarried. This means an estimated 27.48 of the fatalities in the work place would be cohabiting. Of those, 60 per cent would have been cohabiting for more than 2 years, therefore on average 16.49 of the fatalities give rise to potential claims for bereavement damages. On the assumption that 50 per cent (say 8) will claim bereavement damages this would result in a cost of **£94,400**.

Bereavement Damages - Public Liability

The Health and Safety Executive found that in the year 2007/2008 there were 65 fatal injuries to members of the public. It is not known how many of these actually gave rise to a public liability claim, nor what proportion were adults or children. Without this information we cannot do a full analysis of the costs that may arise from implementing the proposed changes. However, if it was assumed that all of these fatalities gave rise to public liability and the victims were all children under 18 or married adults, there would be no extra costs involved as parents and spouses may already bring a claim under the FAA.

Alternatively, if it is assumed that the victims are all adults, it is then possible to estimate the maximum costs involved as a result of extending the categories of claimants to children under 18 and cohabitants.

Extending to children

The average number of children a woman has in their lifetime is 1.90 (see analysis above). Based on this figure, 65 fatalities would result in on average 123.5 children losing a parent per year. However, on the basis adopted for other types of accident, a more likely figure is likely to be half of this, i.e. 62.

Only children under 18 could make a claim for loss of a parent. As observed above, it is estimated that 21.66 per cent of the population of England and Wales is under 18. Therefore, of the 62 people losing a parent on average 13.4 would potentially be able to make a claim for the loss of their parent. Applying the assumption that 50 per cent (say 7) will claim bereavement damages, at £5,900 per child this would cost **£41,000**.

Extending to cohabitants

As noted above, the General Household Survey suggests that 27 per cent of the population are cohabiting, and of those 53 per cent are unmarried. This means an estimated 9.3 of the fatalities giving rise to public liability would be cohabiting. Of those, 60 per cent would have been cohabiting for more than two years, therefore on average 5.58 of the fatalities give rise to potential claims for bereavement damages. On the assumption that 50 per cent (say 3) will claim bereavement damages this would result in a cost of **£35,000**.

Total

The estimated maximum impact on the insurance industry of extending the categories of claimant in bereavement damages cases is:

	£
Motor	2,842,000
Employer	212,000
Public	77,000
3,131,000	

Financial loss

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

It was estimated that the total cost of implementing the Law Commission's recommendation at the time would be £7.3million (made up of £6.8m for motor liability, £0.3m for employer's liability and £0.2m for public liability). The paper indicated that these figures would be reduced by the fact that the Government had only accepted the Commission's recommendation in part, and applied a 50% reduction to the figures, on the basis that there would be much less potential for loosely framed and speculative claims.

If we assumed that these figures would grow in line with the increases to bereavement damages over the period. This would give an overall estimated cost of **£3.78m**. Responses to the consultation paper did not identify any further information to assist in developing this estimate further.

Estimated costs to National Health Service

Bereavement damages

The consultation paper indicated that from figures provided by the NHSLA it appears that there are approximately 630 fatal clinical negligence claims against the NHS per year, and the NHSLA estimate that two-thirds of these (i.e. 420) would involve a claim for bereavement damages. From this figure, it estimated the increase in number of claims under the proposals in the consultation paper, and the associated costs as follows. The responses to the consultation paper did not provide any further information in this area.

	Children	Married People	Cohabitants (unmarried adults in a cohabiting relationship of at least 2 years)	Single Adults (unmarried or in a cohabiting relationship of less than 2 years)
Population in England	10,996,521	5,046,359	3,414,345	31,305,720

The 420 claims already being made can only have arisen from the death of a child or a married person, thus there are 420 fatalities of children and married people per year from clinical negligence (where liability can be established). This is 0.00262 per cent of the population of children and married people in England. Thus in relation to the whole population there is likely to be the following spread of fatalities arising from clinical negligence, assuming that each class of person is equally affected by the same proportion:

	Children	Married People	Cohabitants (adults in a cohabiting relationship of at least 2 years)	Single Adults (unmarried or in a cohabiting relationship of less than 2 years)
Average no. of fatalities	287.89	132.11	89.39	819.58

Extending to cohabitants

From the table above there would be an estimated 89.39 (say 89) fatalities arising from clinical negligence, where the deceased person was in a cohabiting relationship of at least two years. The partners of these people would now be entitled to make a bereavement damages claim. At £11,800 per claim this would cost **£1,054,767** per annum.

Extending to children

The average number of children a woman has in her lifetime is 1.90 (see analysis above). From the above table we see that the total number of adult fatalities is 1041.08. Of the 1041.08 fatalities there would be 1978.05 (say 1978) children losing a parent per year. However, on the basis adopted for other types of accident, a more accurate figure is likely to be half of this, i.e. 989.0 (say 989).

Under the proposed legislation, only children under 18 could make a claim for loss of a parent. It is estimated that 21.66 per cent of the population of England is under 18. Therefore, of the 989 people losing a parent on average 214.25 (say 214) would potentially be able to make a claim for the loss of their parent. At £5,900 per child this would cost **£1,264,000**.

Therefore the estimated total cost to the NHS in England of extending the categories of claimant in bereavement damages cases is approximately **£2,319,000** per annum.

It is not possible to say what the effect of the proposals would be on Wales, as each NHS trust handles its own litigation and responses to consultation did not provide any details of the average number of claims made.

Financial Loss

As with the costs to the insurance industry, compensation claims for financial loss would increase to some extent due to the extension of the statutory list to cover any person who was being wholly or partly maintained by the deceased immediately before his or her death. If the ratio of these costs to the NHS as compared to those falling to the insurance industry were to reflect the estimates for bereavement damages, an increase would result of approximately **£1,780,000**.

Gratuitous Care

Benefits

- The proposal creates consistency in the treatment of gratuitous services for both fatal accident and personal injury cases.

- The social benefits of the proposal on gratuitous care under the FAA are that it allows claimants, who may feel more comfortable receiving care and assistance from their friends and family following the death of someone close to them, to do so without worrying that they cannot pay them for their services.

- The economic benefits of the proposals are that providing gratuitous care damages could reduce overall damages awards, as the costs of gratuitous care are likely to be significantly lower than if commercial care was to be purchased.

- Unless the costs of gratuitous care can be claimed where the defendant is the carer, the claimant could consider it necessary in monetary terms to refuse future gratuitous care from the defendant in favour of another carer, even though the defendant is best placed to provide that care and the claimant would prefer the defendant to provide it.

Costs

- Prior to consultation, the ABI indicated that costs to the insurance industry would be limited to the area of medical and nursing care, on which it does not hold information.

- The NHSLA indicated that they currently have no cases where the defendant provides gratuitous services and therefore the proposed changes in this area would have minimal impact.

There was no information put forward in the responses to the consultation that would assist in quantifying the costs of these proposals. However, the Government believes that any costs would be minimal.

Competition Assessment

The competition filter undertaken as part of the competition assessment suggests that there is unlikely to be a negative impact on competition. The market affected by these proposals is the insurance industry.

It is not anticipated that the proposals will have a significantly greater impact on different firms, and thus will not change the market structure. New firms entering the insurance market would not be affected differently from existing firms. The proposals should not prevent the insurance industry from providing services that they otherwise provide.

Small firms impact test

Additional costs to small firms will be restricted to the presumed increase in insurance premiums.

Legal Aid Test

Where claimants bring a successful action, the costs of legal aid will be recouped from any award they receive through the statutory charge. In 2007-08 £776m (RAB) gross was spent on civil licensed work, and £220m was recouped through operating receipts. Therefore a rough estimate is that 28% of gross costs of civil licensed work are recovered.

In order to qualify for legal aid, applicants must, amongst other criteria, satisfy the cost-benefit test. The benefit element of a bereavement damages claim is a financial award fixed at £10,000. For costs of closed clinical negligence certificates where the costs were met from public funds in 2007-08, the average cost was £6,700. For cases where the prospects of success are considered ‘moderate’ (50-60%), the damages must exceed the costs by a ratio of 4 to 1. Therefore, it is unlikely that legal aid would be awarded for a claim for bereavement damages which is not part of a larger value dependency claim. However, the nature of the additional claimants (children and cohabitants) who would be able to claim means that any claim for bereavement damages will almost certainly be accompanied by a claim for a dependency award, which is likely to be significantly higher and therefore satisfy the cost-benefit test.

From the figures on page 9 above, it is estimated that there will be an additional 303 claims for bereavement damages per annum (89 by cohabitants and 214 by children under 18 for the death of a parent). Figures indicate that approximately 30 per cent of households are eligible for legal aid, therefore the following calculations assume that one third of these additional claims will be legally aided. All of these are likely to require initial Legal Help, which costs approximately £217; therefore an additional 101 claims would result in an extra cost to legal aid of **£21,917**. On the assumption that all 101 claims receive full representation, this would involve a cost of £676,700 (101 x £6700). However, on the basis that 28 per cent of this cost would be recovered via the statutory charge the net cost would be **£487,224.**

Race, Disability and Gender Assessment

Equality Impact: The proposals have been screened for impact on equalities. On the evidence available, we do not consider that any of the options impact differentially on individuals or groups within the population according to their ethnicity, religion, disability, age, gender or sexual orientation. Accordingly, it is our belief that no full equality impact assessment is required.

Human Rights Assessment

The Government is satisfied that the proposals being taken forward do not raise any human rights implications.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	*Results in Evidence Base?*	*Results annexed?*
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	N/A	N/A
Carbon Assessment	N/A	N/A
Other Environment	N/A	N/A
Health Impact Assessment	N/A	N/A
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	N/A	N/A

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 3334 4496 or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Gabrielle Kann
Consultation Co-ordinator
Ministry of Justice
6th Floor 102 Petty France
London
SW1H 9AJ

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **Introduction** section of this paper at page 3.

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.

2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

3. **Clarity of scope and impac**t – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

6. **Responsiveness of consultation exercise**s – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Annex A – List of respondents

The legal profession and representative organisations

Anthony Coombs, Solicitor
Association of Personal Injury Lawyers
Augustines, Solicitors
Bar Council Law Reform Committee
Beachcroft LLP
Berrymans Lace Mawer, Solicitors
Bond Pearce LLP
Browne Jacobson LLP
City of Westminster and Holborn Law Society
Cogent Solicitors
David Rudd, Solicitor
DWF Solicitors
Field Fisher Waterhouse LLP
Forum of Complex Injury Solicitors
Forum of Insurance Lawyers
Freshfields Bruckhaus Deringer, Solicitors
Greenwoods, Solicitors
Halliwells LLP
Hong Kong Bar Association Personal Injury and Practice Committee
Institute of Legal Executives
Irwin Mitchell, Solicitors
John Pickering and Partners LLP
Keoghs LLP
Kingsley Napley, Solicitors
The Law Society
Leigh Day & Co, Solicitors
London Common Law & Commercial Law Bar Association
Manchester Law Society
Motor Accident Solicitors Society
Nicholas Leviseur

Pannone LLP
Personal Injury Bar Association and Professional Negligence Bar Association
Potter Rees, Solicitors
Robin de Wilde QC
Serle Court Chambers
Shakespeare Putsman LLP
Shoosmiths, Solicitors
Stewarts, Solicitors
Thomson Snell & Passmore, Solicitors
Thompsons, Solicitors
Vizards Wyeth, Solicitors
Walker Smith Way, Solicitors

Insurers and defendant organisations

The Admiral Group PLC
Allianz Insurance PLC
Amlin Insurance Services
Association of British Insurers
AXA Insurance
Fortis Insurance Ltd
GHL Insurance Services UK Ltd
Groupama Insurance
International Underwriting Association
Link Insurance Co Ltd
Liverpool Victoria Insurance
Lloyd's Market Association
Medical and Dental Defence Union of Scotland
Medical Defence Union
Medical Protection Society
Motor Insurers' Bureau
NFU Mutual Insurance
NHS Litigation Authority
Norwich Union
QBE Insurance (Europe) Ltd

RBS Insurance
Zenith Insurance PLC
Zurich Financial Services

Judiciary

Council of Her Majesty's Circuit Judges Civil Sub-Committee
The Rt Hon Lady Justice Smith (on behalf of Master of the Rolls Working Group)

Trades Unions

TUC
Unite

Bodies representing intellectual property rights holders

Alliance Against IP Theft
Anti Copying in Design
Autodesk Ltd
BPI (British Recorded Music Industry) Ltd
Business Software Alliance
Federation Against Software Theft
Microsoft
Monotype Imaging Ltd

Organisations representing personal injury victims

Action Against Medical Accidents
Asbestos Victims Support Groups' Forum UK
Brake
RoadPeace

Individuals

Anita Sciberras
Chris Brand
Claude Rapose
Digby Carrington-Howell
Mike Ponsonby
Neil Mayo
Patricia Carrington-Howell

Sebastian Carrington-Howell
Steven Elliot
Teresa Evans

Academics and academic bodies
Annette Morris, Cardiff Law School
Dr Peter Gooderham, Cardiff Law School
Robert Stevens, University of Oxford
Society of College, **National & University Libraries**

Organisations promoting the interests of business
European Justice Forum UK National Committee
Federation of Small Businesses

Non-departmental public body
Civil Justice Council

Local authority
Hampshire County Council

Professional body for occupational therapy
College of Occupational Therapists Medico-Legal Forum

Actuarial body
The Actuarial Profession

Forensic accountant
Rowland Hogg

Police authority
Metropolitan Police Service

© Crown copyright
Produced by the Ministry of Justice

Alternative format versions of this report are available on request from
020 3334 3220 or paul.norris@justice.gsi.gov.uk.