



**RESPONSE TO  
THE MINISTRY OF JUSTICE  
CIVIL LAW REFORM BILL CONSULTATION**

## **Introduction**

AvMA's role is to support and advance the interests of patients who have been injured as a result of receiving medical treatment. It operates a Referral Panel to which solicitors with specialist expertise in pursuing clinical negligence claims on behalf of claimants belong, subject to passing stringent qualification tests. It also runs high quality specialist training for those working in the field of clinical negligence claims. We also operate a helpline, Monday to Friday, which allows us to give advice to potential claimants and complainants but also to gather statistics and gauge the impact on access to justice of changes in the law and gauge the need in the population for legal advice as to claims. We are able to identify through that work where claims lie. One particular area where we have expertise is in advising clients about levels of damages they may expect to recover in fatal accident claims. In this role we regularly assess and comment on the level of damages obtainable by claimants in clinical negligence civil claims.

We therefore make the following comment on the Civil Law Reform Bill in respect of the Fatal Accident Act amendments proposed. We will not be commenting on any other aspects of the Civil Law Reform Bill.

## **Questions: Response**

### **1. Damages**

Our comments on the draft clauses of the Bill relating to the Law of Damages.

We note the intention of the Civil Law Reform Bill to contain provisions in relation to gratuitous care and applaud the amendments that will mean awards made for gratuitous care are no longer held in trust for the provider of past care. This reform would simplify the method by which the claimant may account to any provider of past gratuitous care services. We also fully endorse and support the approach of the Act to ensure that awards for future care are not held in trust for any assumed provider. Claimants' circumstances may change in the future and the need for care is what needs to be catered for rather than assuming the identify of a potential carer in advance of them having provided the care.

What we wish to make particular comment on, however, is the reforms proposed to the legislation governing the rights of dependents to recover damages for their loss arising from the death and the proposed changes to creating a wider range of people able to claim damages including bereavement damages.

Our principal concern is that the amendments are too narrow and do not implement key Law Commission recommendations as set out in the Law Commission Report No. 263, 1999, and as a consequence do not properly reflect current attitudes and approaches towards the recovery of damages in fatal accident cases.

The category of persons able to recover damages will be extended by the Civil Law Reform Bill by inserting a new paragraph 1(3)(h): "any person not falling within any of the paragraphs (a) to (g) who is being maintained by the deceased immediately before the death." In itself adding all potential dependants is a worthwhile addition to the category of potential claimants for a dependency claim and will now include potential claimants previously excluded by the FAA 1976 provisions.

However, the Act also defines a "person being maintained by another person" as being someone who "makes a substantial contribution in money or monies worth towards the claimant's reasonable needs". We firstly query what the definition of "monies worth" might be; specifically what services would count as monies worth in respect of this Act? We have seen a wide range of claims that include services provided by the deceased in the following format:

- (1) As a carer to a grandchild.
- (2) The provision of assistance in a business run from the family home.

- (3) The provision of wrap around care before and after school where parents are separated but are both active in the care of their child.
- (4) The provision of care by the parent of an adult child with mental health or long term disability conditions that indicate care or supervision needs.

Would the care provided in the above instances be quantifiable under the Act as “monies worth”? We would argue that further definition of monies worth needs to be made in this act to prevent the occurrence of satellite litigation as to what the meaning of “monies worth” might be.

Furthermore, definition needs to be made of the term “substantial contribution” again, to prevent satellite litigation.

We also query why the Act extends the right of action to anyone who may be able to prove they are dependant but fails, when looking at the question of bereavement damages, to extend the same extension to those entitled to receipt of bereavement damages. The Civil Law Reform Bill proposes that damages for bereavement may be claimed by a person who had been living with the deceased as the deceased's husband or wife or civil partner for a period of at least two years ending with the date of death, or a child of the deceased who is aged under 18 at the date of the death. Thus the Act extends the categories of those able to claim bereavement damages. We applaud this extension. However, we query why this extension is so limited given the Law Commission report proposed that a bereavement damage should be recoverable by any parent of the adult or minor deceased, any adult or minor child of the deceased, any brother or sister of the deceased, a fiancée, and/or a co-habitee of two years or more. There was good reason for this recommendation. The Law Commission Report of 1999 recognised that the categories of those who suffer unusual bereavement following the untimely death of a loved one through someone else's negligence is not limited to spouses and parents of minors and the changed nature of the family unit since the FAA 1976 was promulgated. It recognised the range of the immediate family. The immediate family is as a minimum any parent of the deceased, any child of the deceased and any sibling of the deceased.

The present restricted group of persons who may claim bereavement damages pursuant to the Fatal Accident Act 1976 promotes the view that large categories of people are of no importance. Despite a death occurring in negligent circumstances minimal damages as low as £1,000 may be awarded for the deceased's pain and suffering. Siblings, adult children and parents of the deceased are left with no legal recognition of their loss.

As a result, claims that should be brought and deaths that should be compensated for are not, and this, in our view, promotes an attitude as regards to treatment of the elderly, the long term disabled and long term mentally ill in particular, that their lives are worth less than that of the young child, or the mother or father in a stable married relationship. This is grossly unjust in a changing and evolving society. Reports issued recently into changing social attitudes have charted that there is much greater acceptance of families that are not based on the traditional married set-up, and of single parent families. We welcome the acknowledgement that these families are normal and socially acceptable units.

There has also been key social research identifying that children and members of single parent families are more likely to be involved in a claim, as they are more likely to have poverty issues. Poverty is linked to an increased need for healthcare and therefore an increased exposure to the risk of a medical accident and/or death as a result of another's negligence. By limiting the entitlement to bereavement damages to parents of minors or adults within a stable relationship a massive swathe of potential claimant population is excluded and we believe sustains an attitude that they have no worth to society.

The Law Commission made these recommendations 10 years ago. This Act is an opportunity to get through enormously important and significant changes to the law.

Furthermore, we would point out that the common law has made certain advances in recent years to embrace the changing family structures by recognition of the wider range of people who may or should be entitled to some form of bereavement damages. In particular, we point to the award of damages for the loss of the Intangible Benefit of a child or spouse. These awards, often called "*Regan*" awards, provide for recovery of a small sum of damages for the loss of the particular love and attention and services one has from a close family member. We would argue that the proposed Act therefore falls far short of the needs and social norms of modern society.

We recognise that expanding the categories of those entitled to Bereavement Damages will increase costs to defendants as it will increase numbers able to claim, and the value of their claims.

The Human Rights Act has expanded the category of claimants who may have a claim arising out of an accident, for instance the case of *Savage* in which the daughter of the deceased was able to make a claim as an interested party under the Human Rights Act. In other words, common law and use of other statutes is already expanding the categories of claimants, and it would be just and fair to use the Civil Reform bill to formalise this approach. The Civil Law Reform Bill by increasing the range of parties able to receive bereavement damages will simply be putting into place through statute a trend that is already developing within the common law.

We also wish to raise our concern that no attempt has been made to address the shortcomings of the current system of calculating multipliers in fatal accident claims. The case law of *Cookson v Knowles* established quite clearly that claimants, when calculating their loss of dependency on the deceased's income, have to take a multiplier from date of death not date of trial, notwithstanding the fact that there was certainty as to the past damages suffered up to the date of trial, and that a multiplier is intended to make some discount for the uncertainties of life and of predicting future damages, which is not an issue when assessing past damages in FAA claims.

However, the Act makes no attempt to rectify this situation. We direct you to the Law Commission's report, and to the prologue in the Ogden VI tables which sets out extremely clearly and coherently the arguments against applying a multiplier from date of death rather than date of trial.

We would also add to the comments of the Ogden Committee and the Law Commission, whose findings as to this issue we endorse, the following comments. Firstly, suggestions that having a late multiplier would encourage the claimant to drag out a case is misguided. CPR promotes active and fast pursuit of claims and claimants themselves do not want delayed cases in order to gain small amounts of additional damages. Furthermore, the courts have the ability through case management powers and the awards of interest to send out clear messages to claimants that delays in order to reduce multipliers is not going to be tolerated. The tools are there to avoid abuse of an Ogden VI approach.

The cost of this change would be modest because for the average Fatal Accident claim the difference will be at most £10,000 increases in damage, but most likely considerably less. The change only affects those Fatal claims where a dependency rather than solely entitlement to bereavement damages and funeral expenses and General Damages for the Estate are due.

Furthermore, recently the government brought in periodical payment orders. Periodical payment orders, as set out in the terms of the Act, envisage that PPO's may apply to Fatal Accident Act claims as well as to standard personal injury claims. However, one of the criteria for a PPO to function is that it can only apply to future damages. By its nature, the *Cookson v Knowles* calculation of PPO's means that the damages which you are working with to put into a PPO incorporate an element of past losses, something not allowed by the statute. This has proved in a number of cases a fatal flaw. In large Fatal Accident Act claims, where a PPO might be appropriate to provide a regular income on an annual basis being

close to the family's position prior to the deceased's death, PPO's are not appropriate or obtainable.

As stated above, we support the draft Act as it stands. However we are concerned that it does not go far enough in its failure to widen sufficiently the categories of those entitled to Bereavement damage. In its definition of what renders a person dependent. It also fails entirely to address the issue of multipliers.

We have knowledge of a number of cases in the last 18 months where there had been an admission of liability in a fatal accident case and where an Ogden approach to the calculation of multipliers was relied on by the Claimant. Though those cases were defended they were later compromised on an extremely beneficial basis to the claimant, we suspect in order to avoid the case being taken through to the Supreme Court (or the House of Lords as it was then) in order to seek an overturning of *Cookson v Knowles*. The government, by incorporating these changes into legislation now, could avoid prolonged litigation costs on these issues and bring the legislation in line with current modern legal thinking on the issue of multipliers.

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