The Law Commission

(LAW COM No 263)

CLAIMS FOR WRONGFUL DEATH

Item 1 of the Seventh Programme of Law Reform: Damages

November 1999

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Honourable Mr Justice Carnwath CVO, *Chairman*
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When the terms of this report were agreed on 8 September 1999, Professor Andrew Burrows was also a Commissioner.

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EXECUTIVE SUMMARY

When a person is killed through the fault of another, particular persons (for example, members of the deceased's immediate family) are able to claim compensation under the Fatal Accidents Act 1976 for losses which they suffer as a result of the death. This report (with accompanying Draft Bill) recommends reform to the availability of compensation in such cases. A key aim of our recommendations is to modernise the existing legislation, so as to bring this area of the law into line with the values of modern society. We also seek to render the law fairer and more certain than it is at present.

The present law arbitrarily excludes from an entitlement to claim compensation for financial loss some people who were financially dependent on the deceased. Our proposed reform would remove that anomaly by adding a generally worded class of claimant to the present fixed list.

We also consider it unjustified that the award of bereavement damages, which compensates non-financial losses (such as grief and sorrow), is currently available only to the deceased's spouse and parents. We recommend extending the list to include the deceased's children, siblings and long-term partner. We also propose that the quantum of the award of bereavement damages should be uplifted to £10,000 (with an overall maximum award for any one death of £30,000) and that it should subsequently be adjusted to keep pace with changing economic conditions (through index-linking).

Some of our recommendations are concerned to eliminate rules which give rise to overcompensation in this area of the law. In particular, we recommend reform of the present section which requires all benefits accruing to a dependant as a result of the death to be ignored. We also recommend that the Ogden Working Party (an expert body of lawyers and actuaries including the Government Actuary) should consider and explain more fully how actuarial tables now being generally used in the assessment of damages should be applied or amended to produce accurate assessments of damages in wrongful death cases.

It is for Government and Parliament to decide whether to implement by legislation the main recommendations in this report.

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THE LAW COMMISSION

CLAIMS FOR WRONGFUL DEATH

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Item 1 of the Seventh Programme of Law Reform: Damages

CLAIMS FOR WRONGFUL DEATH

To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain

PART I
INTRODUCTION AND SUMMARY OF PRINCIPAL RECOMMENDATIONS

1. THE SCOPE OF THIS REPORT

1.1 The Law Commission's Seventh Programme of Law Reform includes, as did the Fifth and Sixth Programmes, an item concerning damages. The Programme recommends:

> … that an examination be made of the principles governing and the effectiveness of the present remedy of damages for monetary and non-monetary loss, with particular regard to personal injury litigation. Certain matters to which specific consideration is to be given include:
>
> … (c) the law relating to fatal accidents, including bereavement damages….[1]

1.2 This report is concerned with the Fatal Accidents Act 1976.[2] The main function of the Fatal Accidents Act is to provide compensation in the event of a wrongful death for the pecuniary losses of persons who were dependent on the deceased.[3] The Act also enables the recovery of two other heads of damages. The first is an award for reasonable funeral expenses, recoverable under section 3(5).[4] The second, bereavement damages, was introduced into the Fatal Accidents Act by the Administration of Justice Act 1982.[5] Bereavement damages currently comprise a fixed award of £7,500, available to a narrow, fixed class of persons listed under section 1A(2) of the 1976 Act.[6]

1.3 In addition to a claim under the Fatal Accidents Act, section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 provides that the deceased's personal

[1] Seventh Programme of Law Reform (1999) Law Com No 259, Item 1.

[2] In this report references to the Fatal Accidents Act 1976 are references to that Act as amended by the Administration of Justice Act 1982.

[3] Recovery is limited to benefits other than those which the claimant expected to receive as a result of a business relationship with the deceased.

[4] This award is also recoverable by the estate under s 1(2)(c) of the Law Reform (Miscellaneous Provisions) Act 1934.

[5] Fatal Accidents Act 1975, s 1A, inserted by the Administration of Justice Act 1982, s 3.

[6] See paras 2.69-2.71 below.

representatives may be able to bring an action against the defendant for the benefit of the estate. Unlike an action under the Fatal Accidents Act, the right of action for the benefit of the estate is a survival of the action that the deceased would have had against the wrongdoer, and therefore lies irrespective of whether the death was caused by the wrong. The action under the 1934 Act enables the deceased's personal representatives to recover damages for losses suffered by the deceased before his or her death (for pain, suffering or loss of amenity, for the loss of any earnings before the time of death and for any medical and nursing expenses incurred).[7] As such, the action has a very different focus from that under the Fatal Accidents Act. We are not concerned with the survival of the victim's claim under the 1934 Act in this report except to the very limited extent that it is relevant to our discussion of the Fatal Accidents Act.[8]

2. THE BACKGROUND TO THIS REPORT

1.4 Our consultation paper, Claims for Wrongful Death,[9] was published in September 1997. Our review of the Fatal Accidents Act was not motivated by a dissatisfaction with the general scheme of the Act. Nevertheless, we were aware of calls for reform to a number of aspects of the law relating to Fatal Accidents Act claims, and took the provisional view that a number of improvements could be made within the existing framework of the Act. We shall now briefly recap on the criticisms which have been made of the present legislation, and summarise the provisional views contained in the consultation paper.

(1) The present law excludes deserving claims for a loss of dependency

1.5 Under the Fatal Accidents Act the right to claim damages for pecuniary loss is limited to a fixed list of persons. This feature of the present law is said to preclude the recovery of damages in some deserving cases. It has been criticised, for example, in leading texts such as *McGregor on Damages*[10] and *Clerk and Lindsell on Torts*,[11] and now by an experienced judge. In *Shepherd v Post Office*[12] Otton LJ cited passages from the texts mentioned, and said:

> I too would question whether there is any need for such an elaborate listing of entitled dependants and it would be simpler if Parliament were persuaded to provide that any person is entitled to a claim who can show a relationship of dependency and thus dispense with the lists.

[7] An award for reasonable funeral expenses is also recoverable by the estate under s 1(2)(c) of the 1934 Act.

[8] See the discussion at paras 3.1-3.4 below, where we consider the radical argument that the Fatal Accidents Act should be repealed, and replaced by a model where the deceased's dependants rely wholly on their rights against the deceased's estate for compensation of their losses. We also consider whether an entitlement to bereavement damages should survive for the benefit of the potential claimant's estate: see paras 6.63-6.65 below.

[9] (1997) Consultation Paper No 148.

[10] (16th ed 1997) para 1733.

[11] (17th ed 1995) para 27.40.

[12] *The Times* 15 June 1995.

We took the provisional view that the current rules governing who is entitled to make a claim under the Act do exclude persons whom we felt deserved to be able to recover damages for their pecuniary losses. We therefore took the view that the present fixed list should be replaced by a generally worded test, and asked consultees which of two tests they preferred.[13]

(2) Problems of undercompensation

1.6 The assessment of damages in a Fatal Accidents Act case must reflect a range of uncertainties, including uncertainty as to everything that might have happened to the deceased after the point of death. However, it is arguable that the traditional method for taking these uncertainties into account (which we will explain later) is imprecise and results in undercompensation.[14] In the case of *Corbett v Barking, Havering and Brentwood Health Authority*,[15] the Court of Appeal recognised the limits of the traditional approach, and applied a modified rule. However, as counsel for the claimant in *Corbett*, Harvey McGregor QC argued that even the modified approach would result in undercompensation, and David Kemp QC has recently expressed the same view.[16] We asked consultees whether they thought that there was a need for reform in this regard.[17]

(3) Problems of overcompensation

1.7 Section 3(3) of the Fatal Accidents Act 1976 provides that, when assessing the damages to be awarded to a widow in a Fatal Accidents Act claim, the fact or prospect of her remarriage should not be taken into account. This provision was introduced because of a concern that Fatal Accidents Act trials generated distasteful and distressing inquiries for widows. However, the provision has the effect that a widow can recover damages where it is clear at the time of trial that she has suffered no pecuniary loss, and has been heavily criticised. For example, Professor Atiyah has criticised the section as "one of the most irrational pieces of law 'reform' ever passed by Parliament."[18] We asked consultees whether they were in favour of reform of section 3(3).[19]

1.8 Section 4 of the 1976 Act provides that any benefit which the claimant has received as a result of the deceased's death (for example life insurance payments, an inheritance or a survivor's pension) should be disregarded when assessing damages for the purposes of a Fatal Accidents Act claim. Section 4 was introduced into the Act to implement recommendations made by the Law Commission and

[13] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.18-3.37.

[14] That is, the application of the multiplier from the date of the deceased's death in the assessment of damages.

[15] [1991] 2 QB 408.

[16] David Kemp QC and Rowland Hogg, "Assessing Future Pecuniary Loss Using the "Ogden Tables"" [1999] JPIL 42, 47-48.

[17] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.50-3.52.

[18] P S Atiyah, *Accidents, Compensation and the Law* (2nd ed 1975) p 163. The current edition expresses the same opinion: P Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed 1999) p 113.

[19] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.56-3.68.

the Royal Commission on Civil Liability and Compensation for Personal Injury, but the very broad wording of the section has generated a wider rule of non-deduction than appears to have been intended.[20] The section therefore enables the claimant to be doubly compensated where there is arguably no justification for ignoring the benefits which he or she has received. The consultation paper examined the possibility of reform to section 4 of the 1976 Act.[21]

1.9 A related issue is that in personal injury cases (but not Fatal Accident Act claims) the claimant is not allowed double compensation through the recovery of damages in addition to social security benefits which meet the same loss as damages. Instead, rather than pay the damages to the claimant, the defendant is required to reimburse the state for any benefits which it has paid to the claimant as a consequence of the defendant's wrong. There is seemingly no good reason why this scheme should not also be applied in Fatal Accidents Act cases, and we provisionally recommended that the scheme should be extended in that way.[22]

(4) Reform to the award of bereavement damages

1.10 The award of bereavement damages was introduced into the Act in 1982.[23] Since that time, there have been a number of calls for reform to the level and scope of the bereavement award. For example, in the wake of a series of national disasters, the award was the subject of a 1988 Private Member's Bill in the House of Commons,[24] and although the Bill did not become law, it prompted the Lord Chancellor to review and ultimately to increase the level of the award.[25]

1.11 Nevertheless, the award continues to attract criticism, and has been the subject of a number of recent Parliamentary Questions.[26] We also note that in a recent independent review of the scheme of criminal injuries compensation in Northern Ireland, the bereavement award (which at present mirrors the award under the 1976 Act) has been deemed to be in need of reform.[27] We provisionally proposed a number of reforms to the award of bereavement damages, so as to increase the

[20] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, paras 254-256; Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054-I, paras 537-539. See A Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) p 219.

[21] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.73-3.109.

[22] *Ibid*, at paras 3.120-3.125.

[23] Administration of Justice Act 1982, s 3(1).

[24] The Citizen's Compensation Bill, cl 6. See further para 2.71, n 177 below.

[25] Damages for Bereavement: A Review of the Level (1990) A Consultation Paper issued by the Lord Chancellor's Department; Damages for Bereavement (Variation of Sum) (England and Wales) Order SI 1990 No 2575. See further para 2.71, n 177 below.

[26] Written Answer, *Hansard* (HC) 23 June 1997, vol 296, col 621; Written Answer, *Hansard* (HC) 30 Mar 1999, vol 328, col 610.

[27] Report of the Review of Criminal Injuries Compensation in Northern Ireland (June 1999), paras 8.94 and 8.95.

class of persons able to claim the award, to update the quantum of the award, and to clarify the purpose of the award.[28]

3. OVERVIEW OF OUR FINAL RECOMMENDATIONS

1.12 We received 99 responses to our consultation paper, Claims for Wrongful Death,[29] from which we have derived great assistance. A list of respondents to the consultation paper is set out in Appendix C to this report. We would like to express our gratitude to all those who invested time and effort in responding to the consultation paper.

1.13 On the basis of the near unanimous support of consultees, we remain of the view that the present statutory list of those able to claim damages for their pecuniary losses under the Act is too narrow. We recommend that an additional, generally worded class of claimant should be added to the list, so that any person who was, or but for the death would have been, wholly or partly maintained by the deceased should also be able to claim under the Act.[30]

1.14 We also conclude that there is a likelihood of undercompensation under the current rules for the assessment of damages in Fatal Accidents Act cases. We recommend that the Ogden Working Party (which includes the Government Actuary) should consider and explain more fully how the existing actuarial Ogden tables should be used, or amended, to produce accurate assessments of damages in Fatal Accident Act cases (as opposed to personal injury cases).[31]

1.15 There was widespread support for some reform of section 3(3) on a widow's remarriage. However, in the light of recurrent concern about "distressing and distasteful inquiries", we do not propose wholesale abolition of the existing rules.[32] We rather propose reform to the scope of section 3(3), so that, unless a person is engaged to be married at the time of trial, the prospects of his or her (re)marriage (or that he or she will enter into a new relationship) should not be taken into account when assessing damages under the Act.[33] On the other hand, the fact that

[28] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.126-3.180.

[29] (1997) Consultation Paper No 148.

[30] See para 3.46 below.

[31] See para 4.23 below. The Ogden Working Party was set up in 1984. This was essentially a private initiative and involved representatives of the Bar and the Law Society, along with representatives of the Faculty of Actuaries and the Institute of Actuaries (including the Government Actuary), working to produce actuarial tables and explanatory notes for use in personal injury and fatal accidents cases. The Chairman throughout has been Sir Michael Ogden QC. The first edition was published in 1984 by Her Majesty's Stationary Office for the Government Actuary's Department. The tables and explanatory notes, which are commonly referred to as the "Ogden tables", are now in their third edition, published in 1998. The tables, as issued from time to time by the Government Actuary's Department, and published by Her Majesty's Stationary Office, are made admissible in evidence (and hence given statutory recognition) by section 10 of the Civil Evidence Act 1995 (but note that this section has not yet been brought into force).

[32] See paras 4.35-4.40, 4.53 below.

[33] See paras 4.41-4.42, 4.53 below.

he or she has already married by the time of trial should be taken into account.[34] Our view is that this reform better balances the need for an accurate assessment of the dependant's losses against concerns about distressing and distasteful inquiries.

1.16 We take the view that a policy analogous to that underlying our proposed reform of section 3(3) should apply to an assessment of the prospect of breakdown in the relationship between the deceased and his or her partner. We believe that it is no less distasteful for a judge to be forced to speculate about the future of a relationship than it is for a judge to assess the likelihood of a person's marriage.[35] We therefore recommend that the prospects of breakdown in a relationship should only be taken into account where there is clear evidence to that effect (that is, where there is a separation, or where one of the couple has petitioned for divorce, judicial separation or nullity).[36]

1.17 Consultees were generally of the view that section 4 of the 1976 Act as amended in 1982 (on the disregarding of benefits) is overinclusive and in need of reform. Further, the vast majority of consultees were in favour of consistency between this area of the law and the treatment of collateral benefits in personal injury cases. We recommend that the existing section 4 should be repealed and replaced by a provision which lists the collateral benefits to be disregarded when assessing damages under the Fatal Accidents Act: that is, charity, insurance, survivors' pensions and inheritance.[37] Under our recommendation the position in Fatal Accidents Act cases would be consistent with that in personal injury cases. We are also of the view that the scheme for state recoupment of social security benefits from wrongdoers, under the Social Security (Recovery of Benefits) Act 1997, should be extended to apply to benefits received by dependants under the Fatal Accidents Act.[38]

1.18 A related recommendation relates to cases where the deceased provided services (such as care or domestic assistance) to a claimant under the Act, and following the deceased's death, those services are provided gratuitously by another. Consultees were again overwhelmingly of the view that the provider's position should be consistent with that in personal injury cases. Our report, Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits,[39] recommends reform to this aspect of the law in the personal injury context, and in this report we make analogous recommendations for Fatal Accidents Act cases.[40] The personal injury provisions are fully explained in Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits.[41] In particular, we recommend that any damages awarded to compensate for the loss of services

[34] See paras 4.48 and 4.53 below.

[35] See paras 4.58 and 4.66 below

[36] See para 4.64 and 4.66 below.

[37] See paras 5.21 and 5.39 below.

[38] See para 5.69 below.

[39] (1999) Law Com No 262.

[40] See paras 5.53 and 5.55 below.

[41] (1999) Law Com No 262, paras 3.44-3.86.

which have been provided before trial gratuitously by another should be subject to a personal obligation to account in favour of the provider.[42] We also recommend that the dependant should be able to recover damages in respect of gratuitous services regardless of whether the provider is also the defendant.[43]

1.19 Finally, consultees generally supported the reforms to bereavement damages which we provisionally recommended. We recommend that the list of persons entitled to claim bereavement damages should comprise a spouse, parent, child, sibling or fiancé(e) of the deceased.[44] Further, we recommend that a cohabitant who was in a marriage-like relationship with the deceased for more than two years immediately before the deceased's death should be entitled to bereavement damages.[45] We also recommend that the award of bereavement damages should be raised to £10,000 and subsequently index-linked;[46] that a defendant's liability to pay bereavement damages should be limited to £30,000 for a single death;[47] that the award of interest on bereavement damages should be calculated in the same way as is interest on non-pecuniary loss in personal injury cases;[48] and that it should be made clear that contributory negligence (of the claimant as well as of the deceased) reduces bereavement damages as it does damages for pecuniary loss.[49]

1.20 Appendix A to this report contains a draft Bill which, if implemented, would give effect to our recommendations (by way of amendments to the Fatal Accidents Act). We should make clear that we have considered whether the draft Bill complies with the European Convention on Human Rights, and in our view it does.

1.21 Some facts and figures may help to put this report in context. The Royal Commission on Civil Liability and Compensation for Personal Injury ("the Pearson Commission") found that there were 21,420 deaths per year from accidental or purposely inflicted injury in the United Kingdom, using the averages of figures for 1973, 1974 and 1975.[50] In the latest edition of *Atiyah's Accidents, Compensation and the Law*, Professor Cane states that there are about 15,000 deaths from accidental injury each year in Britain, and that in 1996 there were about 700 offences recorded as homicide.[51] The decrease in the number of deaths

[42] See para 5.53 below.

[43] See para 5.55 below.

[44] See para 6.31 below.

[45] *Ibid*. This includes persons engaged in a same-sex relationship with the deceased.

[46] See paras 6.41 and 6.43 below.

[47] See para 6.51 below.

[48] See para 6.54 below.

[49] See para 6.62 below.

[50] Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054-II, p 8, Table 1.

[51] Professor Cane also provides some figures for deaths from other causes, but comments that: "Of disease victims, only a very small proportion are the victims of disease caused by (potentially actionable) human activities; but the number of deaths and disabilities attributable to diseases is undoubtedly significant, and much greater than the number of

resulting from injury results, for example, from significant decreases in the number of deaths on the road and at work.[52] It is interesting to compare the number of fatalities per year with the number of non-fatal accidental injuries per year, which the Pearson Commission estimated to be about 3,000,000.[53]

1.22 The Pearson Report suggests that tort compensation is recovered in respect of only about a fifth of deaths resulting from injury. This compares to their finding that 6-7 per cent of people with non-fatal injuries receive some payment through the tort system. However, in view of the much larger number of non-fatal accidents, this translated, in the years analysed by the Pearson Commission, to approximately 4,500 payments yearly for wrongful death claims, and 210,500 for personal injury claims.[54] In other words, two per cent of payments of tort damages were in respect of wrongful death claims and 98 per cent in respect of personal injury claims.

1.23 As throughout our damages project, we have had in mind the costs of our recommendations. In this respect, it is important to realise that, while most of our recommendations would increase a defendant's liability (e.g. extending the list of those who can claim bereavement damages and uplifting the quantum of the award), some would or might have the effect of lowering awards (e.g. the reforms recommended to sections 3(3) and 4 of the 1976 Act). One must also think of the general saving in costs of rendering the law fairer and more certain so that litigation is less likely.

1.24 It is also significant that the statistics we have included above[55] show that the number of successful wrongful death claims annually is small in absolute terms. Moreover, it is a very small proportion of the total number of successful claims for personal injury or death. Accordingly, even if our recommendations were to result in a net increase in damages awards in wrongful death cases, this is most unlikely to have a significant impact on the cost of liability insurance.

1.25 We should point out, however, that we have found it difficult to obtain detailed estimates of the likely effect on insurance premiums of the recommendations in this report. In particular, the Association of British Insurers ("ABI"), who on other reports have provided invaluable help in assessing the impact on insurance premiums of our recommendations, had insufficient data on claims for death (as opposed to personal injury claims) to provide a straightforward model for making such an assessment (although they have told us that they are carrying out further

deaths and disabilities attributable to accidents." See P Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed 1999) pp 12-14. See also J Stapleton, *Disease and the Compensation Debate* (1st ed 1986) chapters 6-8.

52 See P Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed 1999) pp 12 and 177.

53 They adopted a definition which included only injuries which resulted in an absence from work of four days or more, and for those not at work, an injury of comparable severity: Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054-II, paras 16 and 22.

54 Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054-II, paras 59, 73 and 74.

55 See paras 1.21-1.22 above.

research on the impact generally of recent and proposed reforms of the law on damages in personal injury and death cases). We are aware that government departments are required to make an assessment of the economic consequences of proposed legislation, and given that the ABI are unable to help us on this occasion, and that it would be wholly wrong to produce speculative figures, we think it preferable to leave the detailed costings for the Lord Chancellor's Department.

1.26 We would stress however, that if, contrary to our expectations, costs arguments against our proposals emerge, there are two crucial factors which should not be lost sight of. First, our recommendations are aimed at securing a just result, in keeping with modern values and the views of consultees, where a person has been wrongfully killed by another. Secondly, the costs of a wrongful killing for which damages would become available will not disappear if our proposals are not implemented. Rather, they will be left to lie where they currently fall: that is, on the victims of a wrongful killing (and those who provide help to these victims). These considerations highlight that anyone who argues against our proposals because of their cost has a heavy burden to discharge.

4. THE STRUCTURE OF THIS PAPER

1.27 Part II of this report sets out the present law. Part III deals with a number of general issues, and sets out our recommendations for reform to the class of persons able to claim for pecuniary loss under the Fatal Accidents Act. Part IV sets out recommendations for reform to the assessment of damages in Fatal Accidents Act cases. Part V sets out our recommendations for reform in relation to the treatment of collateral benefits under the Fatal Accidents Act. Part VI deals with reforms relating to the award of bereavement damages. Part VII sets out a summary of our recommendations. Appendix A contains a draft Bill (with explanatory notes) which, if implemented, would give effect to our recommendations. Appendix B reproduces the Fatal Accidents Act 1976 as it would appear if our recommendations were implemented. Appendix C contains a list of persons who responded to our consultation paper on this subject.

5. ACKNOWLEDGEMENTS

1.28 We are grateful to the following for assistance in the preparation of this paper: Sir Michael Ogden QC, the Government Actuary Chris Daykin, the Association of British Insurers and David Kemp QC.

PART II
THE PRESENT LAW[1]

1. THE NATURE OF THE RIGHT OF ACTION UNDER THE FATAL ACCIDENTS ACT

2.1 Until 1846, persons who suffered loss as the result of the wrongful death of another were generally unable to obtain damages for those losses.[2] Compensation for such losses could only be sought in the unlikely event that a person had available to them a cause of action arising independently of the wrong causing the death.[3] Parliament intervened with the Fatal Accidents Act 1846, which gave dependants an action for losses suffered as a result of the wrongful death of another. Known as Lord Campbell's Act, the statute was a response to fatalities on the railways.[4] Parliament developed the scope of the Act with further legislation in 1864 and 1959,[5] and the statutes were consolidated in the Fatal Accidents Act 1976. Substantial amendments were made by the Administration of Justice Act 1982. The current law is therefore contained in the Fatal Accidents Act 1976, (hereinafter referred to as "the Fatal Accidents Act" or "the 1976 Act").

(1) The liability/damages distinction

2.2 Section 1(1) of the Fatal Accidents Act 1976 explains the relationship between the defendant's wrongdoing and the claim under the Act. It provides that:

> If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

The effect of section 1(1) was succinctly explained by Lord Denning MR in *Gray v Barr*, when he said: " … if [the deceased] had lived, i.e., only been injured and not died, and living would have been entitled to maintain an action and recover damages - then his widow and children can do so. They stand in his shoes in regard to *liability*, but not as to *damages*."[6]

2.3 More specifically, the approach of the courts has been to hold that section 1(1) requires the deceased to have been able successfully to maintain an action at the moment of death had the death not taken place.[7] So an action cannot proceed if

[1] This is an updated, shortened version of Part II of Consultation Paper No 148.

[2] *Baker v Bolton* (1808) 1 Camp 493; 170 ER 1033; *Admiralty Commissioners v SS Amerika* [1917] AC 38. See S M Speiser, *Recovery for Wrongful Death* (1st ed 1966) p 2.

[3] *Jackson v Watson & Sons* [1909] 2 KB 193. A wife died of food poisoning from food bought by her husband. In an action for breach of contract he recovered for the loss of her services.

[4] *Hansard* 21 August 1846, vol 88, col 926.

[5] Fatal Accidents Act 1864, Fatal Accidents Act 1959.

[6] [1971] 2 QB 554, 569 (emphasis in original).

[7] *British Electric Railway Co Ltd v Gentile* [1914] AC 1034, 1041.

the deceased had already obtained judgment against the defendant.[8] Nor will the action succeed if the claim of the deceased had been settled.[9] A complete defence, such as *volenti non fit injuria*, which would have defeated the claim of the deceased will also be a complete defence to a Fatal Accidents Act claim. A contract that validly excluded a claim by the deceased excludes a claim under the Fatal Accidents Act.[10] If the claim that the deceased could have made was statute-barred at the date of death, the Fatal Accidents Act claim will fail.[11]

2.4 Similarly, if the deceased's claim would have failed on the grounds of remoteness, no action will lie for the benefit of the dependants. This has led to problems where the death is the result of a subsequent event, such as a further accident which was a consequence of the accident victim's impaired mobility or a suicide which was brought on by depression resulting from the initial accident. The issue is whether it is necessary that the deceased's suicide or second accident be not too remote a consequence of the defendant's act, neglect or default, or whether it is sufficient merely that the chain of causation between the wrongful act and the death has not been broken. The wording of section 1 of the Fatal Accidents Act 1976 can, arguably, be interpreted as providing that it is not necessary that the subsequent death be reasonably foreseeable, and the leading English case on the issue, *Pigney v Pointers Transport Services Ltd*,[12] may be regarded as adopting this interpretation. However, it has been argued in other jurisdictions and by academics that *Pigney* simply applied the old *Re Polemis*[13] remoteness rules to the Act and that, after the *Wagon Mound*,[14] the death must have been reasonably foreseeable.[15]

[8] The strength of this rule was demonstrated in *Murray v Shuter* [1972] 1 Lloyd's Rep 6, where the claim of an accident victim was adjourned in order that his dependants could claim under the Act after he died. See also *McCann v Sheppard* [1973] 1 WLR 540, 544-545, 553, where the Court of Appeal indicated that where a deceased dies pending an appeal there can be no action under the Act.

[9] *Read v Great Eastern Railway Co* (1868) LR 3 QB 555. The House of Lords assumed that a settlement precludes a Fatal Accidents Act claim in *Pickett v British Rail Engineering Ltd* [1980] AC 136. Lord Wilberforce stated that this assumption was supported by authority: [1980] AC 136, 146.

[10] *Haigh v Royal Mail Steam Packet Co Ltd* (1883) 52 LJ QB 640; *The Stella* [1900] P 161. Such contracts will now be subject to the Unfair Contract Terms Act 1977, s 2(1).

[11] *Williams v Mersey Docks and Harbour Board* [1905] 1 KB 804 approved in *British Electric Railway Co Ltd v Gentile* [1914] AC 1034, 1042. Assuming the deceased's claim was not time-barred, the claim of the dependants has its own independent limitation period, that is unaffected by the amount of time left to run on the deceased's limitation period: Limitation Act 1980, ss 12-14. The amount of time left on the deceased's limitation period may be a factor in extending the limitation period of the Fatal Accidents Act claim under the Limitation Act 1980, s 33.

[12] [1957] 1 WLR 1121. See also *Haber v Walker* [1963] VR 339, where the Full Court of Victoria, following *Pigney*, reached a similar conclusion about the Wrongs Act 1958; *Zavitsanos v Chippendale* [1970] 2 NSWR 495, 499-500 where Begg J commented *obiter* that foreseeability is irrelevant.

[13] [1921] 3 KB 560.

[14] *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388.

[15] This interpretation was advanced by Hudson J in his dissent in *Haber v Walker* [1963] VR 339, 367-369; by the Supreme Court of British Columbia in *Swami v Lo* (1979) 105 DLR

2.5 Where the defendant's possible liability to the deceased was merely *limited* by express agreement between those parties, as opposed to excluded, that limit does not apply to a claim made under the Act.[16] Similarly, although damages for assault are affected by mitigating factors, such as provocation, such factors are irrelevant to the claim under the Act - it is simply necessary that the defendant would have been liable to some extent.[17] On this basis, the contributory negligence of the deceased ought not to affect the claim of the dependants. Yet under section 5 of the Fatal Accidents Act 1976, damages will be reduced for contributory negligence on the part of the deceased.[18] Further, it also appears that the doctrine of *ex turpi causa non oritur actio* (illegality) may bar a claim under the Fatal Accidents Act even though the illegality would not have prevented the deceased from bringing an action.[19]

(2) Provisional damages

2.6 Where an accident victim faces the prospect of a serious deterioration of his or her condition, a claim for provisional damages can be made in preference to the usual lump sum award.[20] It was once arguable that an award of provisional damages barred any action by the dependants under the 1976 Act, because the deceased had obtained judgment against the defendant.[21] But following a recommendation in our report, Structured Settlements and Interim and Provisional Damages,[22] section 3 of the Damages Act 1996 has made clear that a provisional damages award does not bar a claim under the Fatal Accidents Act 1976. The award will be taken into account in assessing damages payable to the dependants under the 1976 Act.

(3d) 451, 454; by the Supreme Court of Queensland in *Richters v Motor Tyre Service Proprietary Ltd* [1972] Qd R 9, 21-22; by the British Columbia Court of Appeal in *Wright v Davidson* (1992) 88 DLR (4th) 698, 702; by Glanville Williams, "The Risk Principle" (1961) 77 LQR 179, 196; and by K M Stanton, *The Modern Law of Tort* (1st ed 1994) p 212.

16 *Nunan v Southern Railway Co* [1924] 1 KB 223; *Grein v Imperial Airways Ltd* (1935) 52 TLR 28 (Lewis J); [1937] 1 KB 50 (CA).

17 *Gray v Barr* [1971] 2 QB 554, 569.

18 Of course, it is in accordance with normal principles that where one of the dependants was contributorily negligent, the claim of that dependant will be reduced: *Mulholland v McCrea* [1961] NI 135, 150. A dependant wholly to blame for the death cannot make a claim: *Dodds v Dodds* [1978] QB 543, 545.

19 *Burns v Edman*[1970] 2 QB 541. R A Percy has doubted whether this is the correct approach: *Charlesworth & Percy on Negligence* (9th ed 1997) para 15-09, n 28. See also *Hunter v Butler* [1996] RTR 396.

20 Supreme Court Act 1981, s 32A; County Court Act 1984, s 51; CPR, Rule 41. Damages for the existing injuries are awarded, calculated on the assumption that the deterioration will not take place, but the claimant is entitled to return to court and receive further damages should that assumption be proved false.

21 Ordinarily, if the deceased obtained judgment against the deceased, the action under the Fatal Accidents Act does not lie - see para 2.3, n 8 above.

22 (1994) Law Com No 224, para 5.37.

2. PECUNIARY LOSS: WHO CAN CLAIM AND FOR WHAT TYPE OF LOSS?[23]

(1) Who can claim?

2.7 To recover damages under the Fatal Accidents Act for the loss of pecuniary benefits, a person must fall within section 1(3). Under the Fatal Accidents Act 1976, the following relatives of the deceased are "dependants" so as to be able to benefit from an action brought under the Act:[24]

(a) The spouse, including former spouses. This includes a person whose marriage to the deceased has been dissolved, annulled or declared void.[25]

(b) Cohabitants. This is discussed in paragraph 2.8 below.

(c) Any parent or other ascendant of the deceased.

(d) Any person who was treated by the deceased as his parent.

(e) Any child or other descendant of the deceased. An illegitimate child is to be treated as the legitimate child of his mother and reputed father.[26] Stepchildren are also treated as children.[27] An unborn child conceived before the death qualifies if born alive.[28]

(f) A child (not of the deceased) of any marriage to which the deceased was at any time a party and whom the deceased treated as a child of the family in relation to that marriage.

(g) Any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

[23] Actions under the Fatal Accidents Act can be brought by the executor or administrator of the deceased (s 2(1)), but if there is no executor or administrator, or if the executor or administrator delays for more than six months, the action may be brought by any of those who stand to benefit from the Fatal Accident Act proceedings (s 2(2)). Only one action can be brought (s 2(3)) and the claimant is required to furnish full particulars of those who will benefit from the action and of the nature of the claim (s 2(4)). A dependant not included in the action can intervene: *Cooper v Williams* [1963] 2 QB 567. See generally *McGregor on Damages* (16th ed 1997) paras 1741 and 1742.

[24] Fatal Accidents Act 1976, s 1(3)(a)-(g).

[25] Section 1(4).

[26] Fatal Accidents Act 1976, s 1(5)(b).

[27] Section 1(5)(a).

[28] *The George and Richard* [1871] LR 3 A & E 466, 480-482; *Lindley v Sharp* (1974) 4 Fam Law 90. Harvey McGregor QC understands the rule to apply to children conceived before the injury, but submits that children conceived after the injury should also qualify as dependants, whether born before or after the death: *McGregor on Damages* (16th ed 1997) para 1732.

Relationships of affinity[29] are to be treated as relationships of consanguinity and relationships of the half blood are to be treated as relationships of the whole blood.[30]

2.8 The original Administration of Justice Bill 1982 did not include the unmarried partner. Provision was made for such cohabitants after debate in the House of Lords.[31] But to guard against a perceived fear of exaggerated claims the courts were directed to consider the lack of an enforceable right to legal support.[32] This provision appears to add nothing of substance, for the courts would, in any event, take into account potential future changes in the level of support.[33] The conditions for cohabitants to qualify as dependants are laid down by section 1(3)(b) of the Fatal Accidents Act 1976 - that the claimant and the deceased had been living in the same household as man and wife for at least two years immediately before the deceased's death.[34]

(2) Nature of the pecuniary loss

2.9 Apart from funeral expenses (which we consider separately below),[35] damages awarded under the Fatal Accidents Act 1976 generally compensate the loss of any non-business[36] benefit that the claimant reasonably expected to receive from the deceased had the deceased continued to live (often referred to as "loss of dependency").[37] Thus, damages under the Act may provide compensation for the loss of money brought into the household by the deceased,[38] for the loss of

[29] Ie relationships created by marriage.

[30] Fatal Accidents Act 1976, s 1(5)(a).

[31] *Hansard* (HL) 8 March 1982, vol 428, cols 37-38, 42, 46-47; *Hansard* (HL) 30 March 1982, vol 428, cols 1281-1291; *Hansard* (HL) 4 May 1982, vol 429, cols 1105-1109.

[32] Fatal Accidents Act 1976, s 3(4); *Hansard* (HL) 4 May 1982, vol 429, col 1106-1109, 1112-1113. In *Drew v Abassi and Packer* [1995] JPIL 309 the Court of Appeal observed that the trial judge had found that the long-standing relationship between the claimant and the deceased was one which "would have survived as well as any marriage". However the court held that the trial judge was entitled to discount the appropriate multiplier by two years (from 15 to 13) in light of the wording of s 3(4) and in consideration of the fact that the claimant had no enforceable right to financial support by the deceased.

[33] *Dolbey v Goodwin* [1955] 1 WLR 553; *Owen v Martin* [1992] PIQR Q151.

[34] See *Pounder v London Underground Ltd* [1995] PIQR P217.

[35] See paras 2.13 and 2.14 below.

[36] See para 2.11 below.

[37] *Franklin v The South Eastern Railway Co* (1858) 3 H & N 211, 214; 157 ER 448, 449; *Dalton v The South Eastern Railway* (1858) 4 CB(NS) 296, 305-306; 140 ER 1098, 1101-1102; *Kassam v Kampala Aerated Water Co Ltd* [1965] 1 WLR 668, 672.

[38] *Grzelak v Harefield and Northwood Hospital Management Committee* (1968) 112 SJ 195.

gratuitous services performed by the deceased (including domestic work)[39] and for the loss of fringe benefits, such as a company car.[40]

2.10 Damages can be claimed for the loss of one-off benefits: it is not necessary that a benefit had previously been enjoyed.[41] The lost benefits for which dependants are able to claim damages under the 1976 Act may also include the loss of greater benefits which they would have received had the deceased continued to live.[42] However, a mere speculative possibility of receipt is insufficient.[43]

2.11 The restriction on the "reasonable expectation" test is that benefits expected as the product of a business relationship with the deceased are not recoverable. For example, in *Burgess v Florence Nightingale Hospital for Gentlewomen*[44] a husband and wife were dancing partners. Although their earning capacity as a couple was greater than their individual abilities to earn an income, the husband could not recover for the loss of his income as a dancer after her death.

2.12 In addition to damages for the loss of reasonably expected non-business benefits, damages can be recovered for pecuniary expense incurred to replace the loss of reasonably expected non-business benefits. For example, damages are recoverable for the cost incurred in employing someone to do work previously done by the deceased, such as a housekeeper, child-minder or gardener.[45]

(3) Funeral expenses

2.13 The dependants may recover the expenses of the deceased's funeral.[46] They are recoverable even where there is no loss of pecuniary benefit, or where a claim for

[39] *Hay v Hughes* [1975] QB 790 concerning the loss of a mother's services; *Franklin v The South Eastern Railway Co* (1858) 3 H & N 211; 157 ER 448, concerning the loss of a son's services; *Berry v Humm & Co* [1915] 1 KB 627; *Clay v Pooler* [1982] 3 All ER 570. Note that the action for the loss of a wife's services or society following her injury in a non-fatal accident was abolished by the Administration of Justice Act 1982, s 2.

[40] *Clay v Pooler* [1982] 3 All ER 570.

[41] *Betney v Rowlands and Mallard* [1992] CLY para 1786. See also *Piggott v Fancy Wood Products Ltd*, unreported, 31 January 1985 (noted in Kemp & Kemp, *The Quantum of Damages* vol 3 para M5-012), where the court found that the deceased would have assisted his parents obtain a house and so they were able to recover the loss of that expected contribution.

[42] For example, in *Davies v Whiteways Cyder Co Ltd* [1975] QB 262 the dependants were able to claim damages for the estate duty they had to pay on gifts from the deceased as a result of the deceased being killed less than seven years after the gifts were made.

[43] *Franklin v The South Eastern Railway Co* (1858) 3 H & N 211, 214; 157 ER 448, 449-450. Although once it is demonstrated that there was a reasonable expectation of support (or that the deceased had already been supporting the dependant) the fact that the court must speculate as to the level of support is not an obstacle: *Lindley v Sharp* (1974) 4 Fam Law 90.

[44] [1955] 1 QB 349. Contrast *Oldfield v Mahoney*, unreported, 12 July 1968 (noted in Kemp & Kemp, *The Quantum of Damages* vol 3 paras M3-055 and M3-122) where the practice of a school was to appoint a married man to the post of housemaster. Following the death of his wife, a schoolmaster recovered damages for his reduced chances of promotion.

[45] *Watkins v Lovegrove*, unreported, 5 May 1982 (noted in Kemp & Kemp, *The Quantum of Damages* vol 3 paras M3-075 and M3-135). See also *Cresswell v Eaton* [1991] 1 WLR 1113.

[46] Fatal Accidents Act 1976, s 3(5).

that loss fails.[47] These expenses are also recoverable by the estate under section 1(2)(c) of the Law Reform (Miscellaneous Provisions) Act 1934. If the estate claims the funeral expenses, an advantage is that no reduction will be made for any contributory negligence on the part of the dependant.[48]

2.14 The expenses, to be recoverable, must be reasonable in all the circumstances, including the deceased's station in life, creed and racial origin.[49] Claims for the cost of a wake,[50] or a memorial or monument to the deceased have failed;[51] but claims for a simple gravestone[52] and for embalming[53] have been successful.

3. PECUNIARY LOSS: ASSESSMENT

(1) The multiplier method

2.15 In personal injury cases, post-trial losses are calculated using the multiplier method. Under this method, one calculates a multiplier, based principally on the claimant's life expectancy (which is then discounted for the vicissitudes of life and for the early receipt of the money), and uses it to multiply the annual loss (the multiplicand). Pre-trial losses are simply totalled up. However, for the purposes of an action under the Fatal Accidents Act, pre-trial losses are also assessed using the multiplier method; that is, the multiplier is calculated from the date of death rather than from the date of trial.[54] This is subject to the fact that events occurring between the death and the trial (for example the death of a dependant or an increase in the wages that the deceased would have earned) are taken into account by the courts at trial when assessing damages to be awarded.[55]

[47] *Stanton v Ewart F Youldon Ltd* [1960] 1 WLR 543, 545; *Burns v Edman* [1970] 2 QB 541, 546.

[48] *Mulholland v McCrea* [1961] NI 135, where the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 was discussed.

[49] *Gammell v Wilson* [1982] AC 27, 43; *Goldstein v Salvation Army Assurance Society* [1917] 2 KB 291; *Stanton v Ewart F Youldon Ltd* [1960] 1 WLR 543, 545-546. For an extreme case involving the death of a member of the Ghanaian royal family see *Quainoo v Brent & Harrow Area Health Authority* (1982) 132 NLJ 1100.

[50] *Gammell v Wilson* [1982] AC 27, the House of Lords affirming generally the unreported judgment of Mr B A Hytner QC sitting as a deputy judge. See also *Quainoo v Brent & Harrow Area Health Authority* (1982) 132 NLJ 1100.

[51] *Stanton v Ewart F Youldon Ltd* [1960] 1 WLR 543, 545; *Hart v Griffiths-Jones* [1948] 2 All ER 729, 730-731.

[52] *Stanton v Ewart F Youldon Ltd* [1960] 1 WLR 543, 546.

[53] *Hart v Griffiths-Jones* [1948] 2 All ER 729, 730.

[54] Usually, a single sum of damages is awarded, and then apportioned between the claiming dependants. However, in some cases different multipliers have to be used for different dependants. For example, in *Cresswell v Eaton* [1991] 1 WLR 1113, 1119, where a mother died leaving three children, aged 7, 6 and 4, three different multipliers of 8, 8½ and 10½ were applied.

[55] *Williamson v John I Thornycroft & Co Ltd* [1940] 2 KB 658; *The Swynfleet* (1947) 81 Ll L Rep 116, 121.

2.16 Awards made under the Fatal Accidents Act are nevertheless divided into damages for pre-trial and post-trial losses.[56] This division is required because interest is awarded on the former (at half the rate on the special account between date of death and trial), but is not awarded on the latter.[57]

(a) The multiplicand(s)

2.17 The division between pre-trial and post-trial losses generally necessitates the use of separate pre-trial and post-trial multiplicands. The first step in calculating these multiplicands is to assess the annual value of the lost dependency at the date of the deceased's death. This may be done by simply adding together the value of the benefits received by the claimants from the deceased. Alternatively, if the deceased's lifestyle justifies the assumption, the courts may deduct from the deceased's net salary his or her exclusively personal expenditure. In a case of a husband supporting his wife and children, and in which there are no unusual features, there has developed a convention that the multiplicand be three-quarters of the deceased's earnings for the period when the children are dependent and two-thirds thereafter.[58] Where the dependant who has survived also brought income into the household, the dependency is calculated as a percentage of the joint family purse less his or her net income.[59]

2.18 The value of the dependency at the date of the deceased's death must then be revised in the light of the likely changes in the deceased's income that would have occurred between death and trial (as regards the pre-trial multiplicand) and of changes in the deceased's income that would have occurred after trial taking account of likely promotion but ignoring increases in pay owing to inflation (as regards the post-trial multiplicand).[60]

(b) The multiplier

2.19 That the multiplier is calculated from the date of death, rather than from trial, has been explained on the following basis. An assessment of the loss caused by the defendant must take into account the uncertainty as to whether the deceased would have continued to provide the claimant with support. There is uncertainty in this regard from the moment of the deceased's death.[61] In *Cookson v Knowles* Lord Fraser said:

> In a personal injury case, if the injured person has survived until the date of trial, that is a known fact and the multiplier appropriate to the

[56] *Cookson v Knowles* [1979] AC 556, 569, 573, 575.

[57] *Cookson v Knowles* [1979] AC 556, 572-573, 578-579.

[58] *Harris v Empress Motors Ltd* [1984] 1 WLR 212, 216-217; *Robertson v Lestrange* [1985] 1 All ER 950, 955. Contrast *Owen v Martin* [1992] PIQR Q151, Q155-Q156, Q159-Q160, Q165-Q166.

[59] *Coward v Comex Houlder Diving Ltd,* unreported, 18 July 1988 (noted in Kemp & Kemp, *The Quantum of Damages* vol 3 paras M2-042 and M2-232).

[60] See in the analogous personal injury context, *Mitchell v Mulholland (No 2)* [1972] 1 QB 65, 78-81, 86-87.

[61] *Graham v Dodds* [1983] 1 WLR 808. See also *Price v Glynea and Castle Coal and Brick Co* (1915) 85 LJKB 1278; *Barnett v Cohen* [1921] 2 KB 461.

> length of his future working life has to be ascertained as at the date of trial. But in a fatal accident case the multiplier must be selected once and for all as at the date of death, because everything that might have happened to the deceased after that date remains uncertain. [62]

2.20 Having arrived at an overall multiplier, the courts then apply as the pre-trial multiplier the number of years between the deceased's death and trial. That part of the multiplier which remains is applied to the post-trial multiplicand to assess the post-trial losses.[63]

2.21 This is now subject to the decision of the Court of Appeal in *Corbett v Barking, Havering and Brentwood Health Authority*.[64] In that case, the court ruled that the date of death calculation could be adjusted at trial where delays between death and trial removed some uncertainty as to the claimant's losses. The claimant's mother had died after giving birth to him. The multiplier chosen at first instance was 12 but 11½ years had passed between the deceased's death and trial, and so only six months was applied for the future loss by the court of first instance. The Court of Appeal substituted a multiplier of 15 which left the figure of 3½ for future loss.

2.22 The choice of multiplier varies according to the period for which the dependants would have received support from the deceased. An initial figure is chosen, based on the life expectancies of the deceased and his or her dependants. This figure is based mainly on the ages of the persons concerned, although it may be affected by hazardous working conditions, and it has been held to be affected by the hazards of wartime.[65]

2.23 A deduction is made to counter the overcompensation that could result from the dependant's receipt of all the money at once rather than over the period of years during which he or she would have enjoyed the dependency. The award is designed to give the dependant a sum of money which can be invested; the lost pecuniary benefit is replaced by a combination of interest and withdrawals from the capital.[66]

2.24 The Damages Act 1996 provides that the rate of return which a dependant can be expected to obtain may be prescribed by an order of the Lord Chancellor.[67] Until the decision of the House of Lords in *Wells v Wells*,[68] the discount was made at the

[62] *Cookson v Knowles* [1979] AC 556, 576.

[63] See *Cookson v Knowles* [1979] AC 556, where the judge chose a multiplier of 11. The trial occurred 2½ years after the death, and so the multiplier finally applied was 8½.

[64] [1991] 2 QB 408.

[65] *Hall v Wilson* [1939] 4 All ER 85. The deceased died prior to the outbreak of the Second World War. The increased risk of death in wartime was taken into account. In *Bishop v Cunard White Star Co Ltd* [1950] P 240 the deceased was killed at sea during the war. As the hazards of life at sea were regarded as not "conspicuously greater" then those on land, the multiplier was not "materially reduced":[1950] P 240, 248.

[66] *Cookson v Knowles* [1979] AC 556, 576.

[67] Damages Act 1996, s 1. No order has been made.

[68] [1999] 1 AC 345.

rate of 4.5 per cent. In our report, Structured Settlements and Interim and Provisional Damages, we recommended that the discount should be made at the ILGS rate.[69] As the ILGS rate reflects the effects of inflation, our view was that reference to that rate would enable the court to assess as accurately as possible the loss suffered by the claimant in real terms. The House of Lords agreed, and held that when assessing damages for anticipated future losses and expenses in a personal injury case, the court should fix the award by assuming that the claimant will invest their damages in index-linked government stock.[70] Subject to the Lord Chancellor's power under the Damages Act 1996 to adjust this rate, the ILGS rate will now be used by the courts when assessing future losses, and the rate was fixed for the time being at three per cent.[71]

2.25 The multiplier is also discounted in respect of the "vicissitudes of life" - the possibility that other contingencies might in any event have shortened the period for which benefits would have been provided.[72] However, in *Wells v Wells*[73] the House of Lords held that, once the multiplier has been identified, no discount should be made for the possibility that the vicissitudes of life will affect the victim's life expectancy. Lord Lloyd, with whose speech the remainder of the House agreed on this point, said:

> There is no purpose in the courts making as accurate a prediction as they can of the plaintiff's future needs if the resulting sum is arbitrarily reduced for no better reason than that the prediction might be wrong. A prediction remains a prediction... The whole point of agreeing a life expectancy if it can be done, is to exclude any further speculation.[74]

He continued:

> There may well be special factors in particular cases. But the [actuarial] tables should now be regarded as the starting point, rather than a check. A judge should be slow to depart from the relevant actuarial multiplier ….[75]

Although the decision in *Wells* was made in the context of a claim for damages for personal injury, the ruling will apply equally in fatal accidents cases. Therefore, under *Wells*, the multipliers derived from the Ogden[76] tables should be treated as already dealing accurately with general life expectancies, albeit that some adjustment may be made to account for factors particular to the claimant's

[69] Structured Settlements and Interim and Provisional Damages (1994) Law Com No 224, paras 2.24-2.36.

[70] [1999] 1 AC 345, 373-374, 386-387, 393, 396-397, 403-404.

[71] *Ibid*, at pp 375-376, 388, 393, 397, 404.

[72] *Whittome v Coates* [1965] 1 WLR 1285, 1292; *Graham v Dodds* [1983] 1 WLR 808, 816. See also *Miller v British Road Services Ltd* [1967] 1 WLR 443, 445.

[73] [1999] 1 AC 345.

[74] *Ibid*, at pp 378-379.

[75] *Ibid*, at p 379.

[76] Government Actuary's Department, *Actuarial Tables with Explanatory notes for use in Personal Injury and Fatal Accident cases* (3rd ed 1998).

circumstances (for example that he has an illness which means that he is expected to die within five years). This does not appear to affect the fact that the multiplier can be discounted in respect of other vicissitudes - for example, that the deceased might in any event have lost his or her job.

(c) Quantifying the loss of a deceased's services

2.26 Where the deceased did not bring money into the household, but rather provided "services", there is a difficulty in putting a value on those services. The loss of services provided by the deceased is usually quantified by reference to the cost of employing a third party to provide the services.[77] Alternatively, where a third party gives up work to provide replacement services, the damages for the loss of services have been assessed by reference to the third party's loss of earnings.[78]

2.27 The valuation of services provided by a parent is particularly difficult.[79] These services have often been quantified by reference to the cost of employing a housekeeper or nanny.[80] The analogy between care provided by a parent and that provided by a housekeeper or childminder is clearly imperfect, for a number of reasons. In particular, the quality of care provided by a parent differs from that offered by a professional. On the other hand, if the deceased performed a number of responsibilities concurrently, to value the performance of each function separately and cumulatively could have the effect of disproportionately inflating the damages award.[81] Perhaps for these reasons, amongst others, recent cases such as *Stanley v Saddique*[82] indicate that the courts will apply a less precise, more discretionary approach which assesses the award in the same way as a jury.

2.28 A recent decision of the House of Lords may have implications for Fatal Accidents Act cases involving gratuitous care. In *Hunt v Severs*[83] the House of Lords disapproved the reasoning adopted by the Court of Appeal in *Donnelly v Joyce*[84] and recognised that, when a personal injury victim is provided with gratuitous services by another, the loss suffered in respect of those services is not that of the victim, but that of the party who provided the services. If the claimant recovers damages in respect of those services, he or she holds them on trust for the carer.

[77] *Franklin v The South Eastern Railway Co* (1858) 3 H & N 211; 157 ER 448. See also *Berry v Humm & Co* [1915] 1 KB 627; *Clay v Pooler* [1982] 3 All ER 570.

[78] *Mehmet v Perry* [1977] 2 All ER 529. In *Cresswell v Eaton* [1991] 1 WLR 1113, in which the children's aunt gave up her job as a traffic warden to look after the children, the damages for loss of services were assessed by reference to the salary which the aunt would have earned had she not surrendered her job. In that case the mother was also a wage earner and so the loss of services and the loss of financial dependence were assessed separately.

[79] See eg J Blaikie, "Personal Injuries Claims: The Valuation of "Services"" (1994) 17 SLT 167.

[80] *Regan v Williamson* [1976] 1 WLR 305.

[81] See J Blaikie, "Personal Injuries Claims: The Valuation of "Services"" (1994) 17 SLT 167, 170; J Yale, "The Valuation of Household Services in Wrongful Death Actions" (1984) 34 Univ of Toronto LJ 283.

[82] [1992] QB 1. See also *Hayden v Hayden* [1992] 1 WLR 986.

[83] [1994] 2 AC 350.

[84] [1974] QB 454.

However, when the tortfeasor is the party providing the care, as was the case in *Hunt v Severs*, the claimant cannot recover for the services. The reasoning behind the decision was that it would be pointless for the tortfeasor to pay the claimant a sum in damages, only for the claimant to pay it back to the tortfeasor. The courts have not yet considered the implications of this analysis for fatal accident cases involving gratuitous services, but there appears to be a strong argument that the same analysis should apply where a dependant received gratuitous services from the deceased, and after the deceased's death receives those services from another. If *Hunt v Severs* were applied in this situation, damages recovered by the dependant for the loss of the deceased's services, where those services have been gratuitously provided by a third party, should be held on trust for that third party.

(d) Inflation

2.29 An award made under the Fatal Accidents Act will not be specifically increased to take account of future inflation.[85] However, under *Wells v Wells*[86] lump sum awards for future losses in personal injury cases are to be assessed by reference to the ILGS rate, which gives a guaranteed rate of return over and above inflation.[87] The same must be true of Fatal Accidents Act cases. Accordingly, damages under the Fatal Accidents Act will now automatically take account of the effects of inflation.

(e) Taxation

2.30 Damages for personal injuries or wrongful death are not subject to taxation.[88] However, the income from the award will be subject to tax. The usual rule, as expressed by Lord Oliver in *Hodgson v Trapp*, is that:

> the incidence of taxation in the future should ordinarily be assumed to be satisfactorily taken care of in the conventional assumption of an interest rate applicable to a stable currency and the selection of a multiplier appropriate to that rate.[89]

Lord Oliver admitted that there might be exceptional cases in which the tax element might have to be considered by the courts, and an alteration made to the award, but said that they could not be readily imagined.[90]

[85] *Mallett v McMonagle* [1970] AC 166, 176; *Taylor v O'Connor* [1971] AC 115, 137-138, 142-143; *Young v Percival* [1975] 1 WLR 17, 29; *Cookson v Knowles* [1979] AC 556, 573, 576-577; *Lim v Camden and Islington Area Health Authority* [1980] AC 174, 193-194.

[86] [1999] 1 AC 345.

[87] See para 2.24 above.

[88] Taxation of Chargeable Gains Act 1992, s 51 (formerly Capital Gains Tax Act 1979, s 19(5)).

[89] [1989] AC 807, 835.

[90] *Ibid*, at p 835.

(2) Actual or predicted changes in the marital or family status of the claimant or deceased

(a) Marriage of the deceased

2.31 Where parents had been supported by their child, and their child is later the victim of a wrongful death, the courts have taken into account the likelihood of the deceased's marriage and any likely reduction in the support provided for his or her parents.[91]

(b) Remarriage of the dependant

2.32 Until 1971, the courts took a widow's prospects of remarriage into account in order to assess her damages under the Fatal Accidents Act.[92] This assessment was much criticised.[93] Whilst some felt that this criticism was misplaced,[94] section 4 of the Law Reform (Miscellaneous Provisions) Act 1971 provided that in assessing the claim of a widow neither her prospects of remarriage nor her actual remarriage would be taken into account. This provision remains the law.[95]

2.33 It should be emphasised that what is now section 3(3) of the 1976 Act affects only a widow's damages. The widow's prospects of remarriage must still be taken into account in assessing her child's damages under the Act, and a widower's prospects of remarriage are unaffected by section 3(3). An unmarried dependant's prospects of marriage are also to be taken into account.

(c) Prospects of divorce

2.34 A linked question is whether the likelihood of a divorce between the dependant and the deceased should be a factor in assessing damages under the Act. The Royal Commission on Civil Liability and Compensation for Personal Injury recommended that this possibility should not be a factor, citing the absence of certainty and the undesirability of inquiring into the state of the relationship.[96] But in *Owen v Martin*[97] the Court of Appeal held that the potential for divorce must be taken into account.[98] The deceased in that case was the claimant's second

[91] *Dolbey v Goodwin* [1955] 1 WLR 553; *Wathen v Vernon* [1970] RTR 471.

[92] *Goodburn v Thomas Cotton Ltd* [1968] 1 QB 845; *Miller v British Road Services Ltd* [1967] 1 WLR 443. Where the wife had remarried, her dependency was held to have ended: *Mead v Clarke Chapman & Co Ltd* [1956] 1 WLR 76.

[93] *Buckley v John Allen & Ford (Oxford) Ltd* [1967] 2 QB 637, 644-645; *Hansard* (HL) 16 November 1966, vol 277, col 1323; Report of the Committee on Personal Injuries Litigation (1968) Cmnd 3691, paras 378 and 379. Several women's groups were also dissatisfied with this law: *Hansard* (HC) 29 January 1971, vol 810, col 1122.

[94] Much was made of hurtful questions in court and inquiry agents trailing widows, but doubts were expressed as to whether such incidents were widespread: *Hansard* (HL) 20 April 1971, vol 317, col 541.

[95] Fatal Accidents Act 1976, s 3(3).

[96] Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054-I, para 417.

[97] [1992] PIQR Q151.

[98] The Court applied the reasoning that any factor which could affect the expectation of continued dependency upon the deceased, had he lived, must be regarded as a relevant

husband. The claimant's first marriage had ended in divorce on the grounds of her adultery, and shortly after the death of her second husband, she started a relationship with a married man whom she had married by the time her claim was heard by the court. The court held that the length of the claimant's dependency would be affected by subsequent divorce, and so the chances that the claimant's marriage to the deceased might end in divorce was a factor which had to be considered when assessing the multiplier.

2.35 Applying this same reasoning to cohabitation, it can be expected that the courts will consider the likelihood of a break-up in the relationship between cohabitants. This will be in addition to the statutory requirement that the courts must take into account the lack of an enforceable right to financial support between cohabitants.[99]

(d) Adoption

2.36 Where a child has been adopted following the death, the adopting parents have a legal obligation of maintenance and the child must be treated as if born to the new parents. Although the child's right of action is not extinguished, the value of the dependency following adoption must be taken into account by the courts in calculating the value of the lost dependency.[100]

4. COLLATERAL BENEFITS: SECTION 4 OF THE 1976 ACT[101]

2.37 At common law the basic approach was that benefits arising from the death of the deceased had to be taken into account in assessing a claim under the Fatal Accidents Act.[102] But since the late nineteenth century there has been a gradual growth in the scope of legislation on this point. Insurance policies,[103] followed by certain pensions[104] and then national insurance contributions[105] were excluded from consideration in the assessment of damages under the Act. The scope of non-deduction was further widened by the Fatal Accidents Act 1959, the relevant section of which was re-enacted as the original version of section 4 of the 1976 Act. Under these provisions no account was to be taken of "any insurance money, benefit, pension or gratuity" which had been or was expected to be paid as a result of the death.[106]

consideration. See also *Julian v Northern and Central Gas Corp Ltd* (1978) 5 CCLT 148, 162-163 (affirmed (1981) 118 DLR (3d) 458, 469-470), where the possibility of a breakdown in the marriage led to a "substantial reduction" in damages.

99 Fatal Accidents Act 1976, s 3(4). See para 2.8 above.

100 *Watson v Willmott* [1991] 1 QB 140.

101 See Claims for Wrongful Death (1997) Consultation Paper No 148, paras 2.43-2.47 for a fuller discussion of the law before the introduction of section 4.

102 *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601.

103 Initially by private Acts, and then extended to all insurance policies by the Fatal Accidents (Damages) Act 1908.

104 Widows', Orphans' and Old Age Contributory Pensions Act 1929, s 22.

105 Law Reform (Personal Injuries) Act 1948, s 2(5).

106 For comment on the changes made by the Fatal Accidents Act 1959 see J Unger and O Kahn-Freund, "Two Notes on the Fatal Accidents Act, 1959" (1960) 23 MLR 60, 62.

2.38 In 1982, section 4 of the Fatal Accidents Act 1976 was amended and now states:

> In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.[107]

2.39 The amendment was introduced following recommendations by the Law Commission and the Royal Commission on Civil Liability and Compensation for Personal Injury that, in addition to the benefits listed under the former section 4, benefits arising from the estate of the deceased should not be taken into account.[108] Lord Hailsham LC regarded it as a "small change",[109] seemingly to effect only the recommendations of the Law Commission and the Royal Commission on Civil Liability and Compensation for Personal Injury.[110] This view of the intention of the legislature is supported by the retention in the Act of section 3(3), which explicitly excludes benefits accruing as a result of a widow's remarriage from consideration in the assessment of damages.[111] Nevertheless, a natural reading of the section suggests that all benefits accruing as a result of death should be disregarded.

2.40 Still, the courts have distinguished between situations where a benefit prevents the claimant suffering a loss, and situations where the claimant can be said to have

[107] The amendment was made by the Administration of Justice Act 1982, s 3(1). The difference made by the amendment can be seen in *Cresswell v Eaton* [1991] 1 WLR 1113, 1124-1125. Following the death of the mother, an aunt looked after the children. She received foster allowances from the local authority. These allowances were deducted under the old system applied by Simon Brown J, but he indicated that the payments would now be disregarded. For a straightforward example of the application of section 4 - where the same result would have been reached under the old section 4 - see *Pidduck v Eastern Scottish Omnibuses Ltd* [1990] 1 WLR 993.

[108] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, paras 254-256; Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054-I, paras 537-539.

[109] *Hansard* (HL) 8 March 1982, vol 428, col 28. Its potential was nevertheless quickly appreciated: Andrew Borkowski & Keith Stanton, "The Administration of Justice Act 1982 (Parts I and III): Darning Old Socks?" (1983) 46 MLR 191, 196.

[110] We note that the writers of *Kemp & Kemp* disagree with this analysis: "In fact the enacting history, including Lord Hailsham's speech when introducing the amendment, clearly shows that the amendment was intended to have the wide construction that the natural meaning of the words requires" (Kemp & Kemp, *The Quantum of Damages* vol 1 para 19A-003). In support of this interpretation, they rely on extracts from Lord Hailsham's speech in which he states that the Bill is intended to give effect to the recommendations of the Law Commission and the Royal Commission on Civil Liability and Compensation for Personal Injury, and to render "all benefits coming from the estate of the deceased" non-deductible: *Hansard* (HL) March 8 1982, vol 428, col 28. In our view, these extracts do not support the view that the Bill was intended to render any collateral benefit accruing to a claimant non-deductible. For example, there is nothing in Lord Hailsham's speech to suggest that section 4 of the 1976 Act was intended to ensure that gratuitous care should be disregarded (as it was in *Stanley v Saddique* [1992] QB 1). Neither the Law Commission nor the Royal Commission on Civil Liability and Compensation for Personal Injury recommended that "all benefits" should be disregarded when assessing damages.

[111] This argument was rejected by the Court of Appeal in *Stanley v Saddique* [1992] QB 1, 13-14.

suffered a loss despite the receipt of benefit. In the former situation, they have regarded section 4 as irrelevant.[112]

2.41 This distinction was at issue in *Auty v National Coal Board*.[113] One of the plaintiffs, Mrs Popow, was in receipt of a widow's pension. In her claim under the Fatal Accidents Act 1976 she claimed damages for the loss of her husband's support *and* for the loss of the widow's pension she would have received had her husband survived the accident and died in his retirement. She argued that section 4 required the court to ignore her actual widow's pension in assessing damages for both of these losses. The court agreed that section 4 required the pension to be ignored in respect of her claim for the loss of her husband's support. However, in respect of her claim for loss of her own pension, it was held that Mrs Popow had suffered no loss because she was receiving precisely the pension she would have received had her husband died in retirement.[114] Section 4 was therefore irrelevant to that aspect of her claim.

2.42 The difficulties of interpreting section 4 are further illustrated by two decisions of the Court of Appeal. In *Stanley v Saddique*[115] a child claimed damages under the Act following the death of his mother. After the accident his father met and married another woman. It was found that the child was receiving better care from his father's wife than could have been expected from his mother. The court held that this was a benefit resulting from the death within section 4 and so should not be taken into account in assessing the child's damages. It ruled that the words "or otherwise" indicated that Parliament had intended greater reform than merely adding benefits received from the deceased's estate to the list of benefits to be disregarded.[116]

2.43 However, in *Hayden v Hayden*,[117] a child lost her mother in a driving accident caused by her father's negligence. The father gave up work to look after his daughter.[118] Sir David Croom-Johnson and McCowan LJ considered themselves bound by *Stanley v Saddique*,[119] but differed on the application of the decision to the facts. In Sir David Croom-Johnson's view the father's services were not a benefit to his daughter resulting from her mother's death because the claimant's

[112] *Wood v Bentall Simplex Ltd* [1992] PIQR P332, P349.

[113] [1985] 1 WLR 784.

[114] *Ibid*, at pp 799, 806. Harvey McGregor QC supports this decision by reference to Lord Reid's speech in *Parry v Cleaver* [1970] AC 1, 13: *McGregor on Damages* (16th ed 1997) paras 1828 and 1829.

[115] [1992] QB 1.

[116] *Ibid*, at pp 13-14. The decision effectively reverses *Mead v Clarke Chapman & Co Ltd* [1956] 1 WLR 76, which was not referred to in the judgments.

[117] [1992] 1 WLR 986. For criticism see David Kemp QC, "Substitute Services and the Fatal Accidents Act" (1993) 109 LQR 173.

[118] At common law, following *Hay v Hughes* [1975] QB 790, it could be expected that the father's services would be held to be a benefit not resulting from the death and therefore ignored. However, since section 4 states that benefits resulting from the death are to be ignored, the reasoning in *Hay v Hughes* would imply that the benefit would have to be taken into account, the opposite result to that in *Hay v Hughes*.

[119] [1992] QB 1.

father was doing no more than fulfilling his parental obligations.[120] McCowan LJ, dissenting, interpreted *Stanley* more broadly:

> The principle which emerges from *Stanley v Saddique* is that there is to be no reduction in the amount of damages which would otherwise be awarded to take account of care voluntarily provided in substitution for the deceased's motherly services.[121]

He therefore decided that the father's care ought not to be deducted in assessing the claimant's damages.

2.44 Parker LJ reached the same conclusion as Sir David Croom-Johnson, but on different reasoning. He considered that there should be no award because the daughter had suffered no loss.[122]

2.45 A related issue was that to ignore the father's services would be to require the father to overcompensate the claimant. McCowan LJ thought this the logical implication of *Stanley v Saddique*.[123] In Parker LJ's view the tortfeasor could reduce his liability by alleviating the claimant's loss.[124] Sir David Croom-Johnson addressed the issue briefly in the context of how the services should be valued:

> On the facts of this case, the whole concept of valuing the lost services by reference to a "notional nanny" is inappropriate. Whether this expedient is useful in other cases is another matter, but there is no room for using it when on the facts a nanny would never have been employed... The jury, approaching this assessment, would have ignored all questions of a "notional nanny," and simply gone on the established facts of what had happened in the past and was likely to happen in the future.[125]

This reasoning seems to us to be essentially the same as that underpinning Parker LJ's decision. As such, Sir David Croom-Johnson's judgment appears to contain inconsistent lines of argument.

2.46 Whether or not the reasoning in *Hayden v Hayden*[126] bears close scrutiny, it seems to us that the majority judges sought to exclude the father's care from the effects of section 4 so that the value of it could be taken into account. In the consultation paper, we took the view that the decisions in *Stanley v Saddique*[127] and *Hayden v Hayden* are inconsistent.[128]

[120] [1992] 1 WLR 986, 999-1000.

[121] *Ibid*, at p 993.

[122] *Ibid*, at pp 1004-1005.

[123] *Ibid*, at p 993.

[124] *Ibid*, at p 1005.

[125] *Ibid*, at p 998.

[126] *Ibid*, at p 998.

[127] [1992] QB 1.

[128] Claims for Wrongful Death (1997) Consultation Paper No 148, para 2.56.

2.47 A recent decision of the Divisional Court, *R v Criminal Injuries Compensation Board ex parte K*,[129] has revisited these issues. The Criminal Injuries Compensation Board held, applying *Hayden v Hayden*,[130] that the claimants had suffered no loss of general parental care (as opposed to their mother's individual care), since they received at least equivalent care from an uncle and aunt. The Divisional Court quashed that decision. Brooke LJ and Rougier J agreed with the majority in *Hayden* that *Stanley v Siddique*[131] was binding authority. Brooke LJ distinguished between the ascertainment of the claimant's loss, and the assessment of the damages to be awarded. Making reference to the reasoning of Oliver LJ in *Auty v National Coal Board*,[132] he said:

> Oliver LJ enjoins us, however, to observe the provisions of section 4(1) at both stages of the inquiry. When we do so, we are bound by *Stanley v Siddique* to hold that in so far as the value of the replacement services formed a benefit resulting from the death (like the stepmother's services in that case) we must disregard them when assessing damages. In other words at the first stage of the inquiry we cannot say that the children have suffered no loss because the only way in which we could do so would be to take into account something which we are not allowed to take into account. The factual position is quite different from the factual position in *Hayden v Hayden*, in which the majority of the Court of Appeal held that the value of the tortfeasor father's replacement services was not to be disregarded under section 4(1), whether because section 4(1) did not apply at all (Parker LJ) or because this situation was totally different from a case in which the replacement services are voluntarily provided by a third party (Sir David Croom-Johnson).[133]

2.48 Rougier J also referred to the fact that Sir David Croom-Johnson and Parker LJ were able to distinguish *Hayden v Hayden*[134] on two specific differences of fact - (1) that in *Hayden* the benefits had been provided by the defendant, and (2) that since the services were provided by the father, who had a duty to care for the child, they could not be regarded as a benefit arising as a result of the death.[135]

2.49 Accordingly, this decision clarifies the effect of section 4 to some extent by confirming the correctness of the decision in *Stanley v Siddique*.[136] However it might be regarded as leaving open how section 4 should be applied in a case where the carer is the tortfeasor, and/or was under a duty to provide the care before the death.

[129] [1999] 2 WLR 948.

[130] [1992] 1 WLR 986.

[131] [1992] QB 1.

[132] [1985] 1 WLR 784, discussed at para 2.41 above.

[133] [1999] 2 WLR 948, 956 (citations omitted).

[134] [1992] 1 WLR 986.

[135] [1999] 2 WLR 946, 959.

[136] [1992] QB 1.

2.50 It should also be explained that, as we have indicated above, the application of *Hunt v Severs*[137] has not yet been considered in the context of a Fatal Accidents Act claim. On the face of it, a dependant's claim for loss of the deceased's services where services have been gratuitously rendered by a friend or relative is analogous to a personal injury victim's claim for the expenses of nursing and domestic care where the services have been gratuitously rendered by a friend or relative.[138] It is therefore somewhat surprising that *Hunt v Severs* was not even mentioned in *R v Criminal Injuries Compensation Board ex parte K*.[139] Although approaching the matter on a different basis, whereby the loss is regarded as the service provider's rather than the claimant's, *Hunt v Severs* provides support for the view that *Hayden v Hayden*[140] was justified in awarding no damages because the service provider was the defendant.

2.51 A further example of the uncertain width of section 4 is its possible impact on a claimant's earning capacity. In *Malone v Rowan*[141] a woman was planning to give up work to have a child when her husband was killed. She claimed damages for the loss of the support she had expected to receive once she had given up work. Her cause of action accrued before the current section 4 was introduced by the Administration of Justice Act 1982 and so the section was not in issue. Russell J reluctantly followed the Court of Appeal in *Higgs v Drinkwater*[142] and found that no loss had been suffered. Whilst as a matter of principle the claimant's income should be set off against the loss of support, it is also strongly arguable that section 4 would now result in the widow's earning capacity being disregarded.

2.52 In the consultation paper, we suggested that the decision of the Court of Appeal in *Jameson v Central Electricity Generating Board*[143] was further evidence of the difficulties caused by section 4.[144] During his lifetime, Mr Jameson brought an action for damages against his employer, Babcock Energy Limited ("Babcock"), claiming that the malignant mesothelioma which he suffered was the result of his employer's negligence. The claim was settled for £80,000, which was agreed to be approximately two-thirds of the value of the claim. Mr Jameson died shortly after the settlement had been agreed (but before the damages had been paid). His widow inherited the £80,000 settlement. Mr Jameson's executors then brought an action under the Fatal Accidents Act 1976 against an alleged concurrent tortfeasor, Central Electricity Generating Board ("CEGB"). At first instance and in the Court of Appeal it was held that the settlement between Mr Jameson and Babcock did not debar a claim against a concurrent tortfeasor. Since the effect of

[137] [1994] 2 AC 350.

[138] Although one can argue that the starting point of the claim is different, in that in a Fatal Accidents Act claim, the dependant has a claim for loss of the deceased's services, whereas a personal injury victim's claim is for the expense of obtaining services.

[139] [1999] 2 WLR 948.

[140] [1992] 1 WLR 986.

[141] [1984] 3 All ER 402.

[142] Unreported, 9 May 1956.

[143] [1998] QB 323.

[144] Claims for Wrongful Death (1997) Consultation Paper No 148, para 2.59.

section 4 was that Mrs Jameson's inheritance was to be ignored in the claim against CEGB, these decisions meant that she stood to recover a measure of double compensation.

2.53 The House of Lords overturned the decision of the Court of Appeal by a majority of four to one.[145] However, whilst the decision of the House of Lords denied Mrs Jameson double compensation, it is clear from their Lordships' reasoning that a claimant might be able to obtain double compensation on different facts.

2.54 Lord Hope, with whom Lord Browne-Wilkinson and Lord Hoffmann agreed, noted that once a claimant's claim has been satisfied by any one of several concurrent tortfeasors, his cause of action for damages is extinguished against all of them.[146] The issue was therefore whether the deceased's claim had been satisfied by the receipt of a sum less than the amount which the claimant would have been awarded had he been successful at trial.[147]

2.55 In the instant case, the settlement had been expressed to be in full and final settlement and satisfaction of all the causes of action in Mr Jameson's claim against Babcock. As such, Lord Hope found that the settlement had satisfied the deceased's claim against Babcock, and said:

> I think that it follows that, if the claim was for the whole amount of the loss for which the defendant as one of the concurrent tortfeasors is liable to him in damages, satisfaction of the claim against him will have the effect of extinguishing the claim against the other concurrent tortfeasors.[148]

2.56 However, the majority also recognised that a settlement with a concurrent tortfeasor may leave open the possibility of a claim against other concurrent tortfeasors. Lord Hope said:

> There may be cases where the terms of the settlement, or the extent of the claim made against the tortfeasor with whom the plaintiff has entered into the settlement, will show that the parties have not treated the settlement as satisfaction for the full amount of the claim of damages. In the same way a judge, in awarding damages to the plaintiff in his action against one concurrent tortfeasor, may make it clear that he has restricted his award to a part only of the full value of the claim.[149]

2.57 Further, the majority recognised the importance not only of the agreement, but of *performance* of the agreement. Lord Hope said:

[145] *Jameson v Central Electricity Generating Board* [1999] 2 WLR 141, Lord Lloyd dissenting.

[146] [1999] 2 WLR 141, 150.

[147] *Ibid*, at p 151.

[148] *Ibid*, at pp 152-153. Lord Clyde agreed with this conclusion, but on slightly different reasoning.

[149] [1999] 2 WLR 141, 153.

> The settlement itself was silent on these matters, but I think that the correct view of its nature was that it was to take effect as soon as the agreement was made as having discharged the deceased's claim of damages, subject to an implied resolutive condition which would render it void ab initio if the debt which was due under it was not satisfied....The same view would be taken if the plaintiff's claim had been dealt with by means of a judgment.[150]

2.58 In summary, the settlement in the instant case had the effect of discharging the deceased's claim against the other concurrent tortfeasors with effect from the date of settlement.[151] Since the dependants could not satisfy the requirements of section 1(1) of the 1976 Act, there could be no claim under that Act.[152] Yet although double recovery was prevented on the particular facts of the case,[153] the decision of the House of Lords in *Jameson* leaves open this possibility where a settlement permits a further action against a concurrent tortfeasor.[154]

2.59 Aside from the question whether a benefit received as a result of the death should be taken into account in the assessment of damages, there are a series of related questions concerning the third party provider of the benefit. The fundamental issue here is who, ultimately, out of the provider and the tortfeasor, should bear the cost of the benefit. In our report, Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits, we have provided a fuller description of the present law on this issue in personal injury cases.[155] We refer the reader to that discussion, since it is relevant here. We shall now briefly set out the position for wrongful death cases.

2.60 A third party provider of a (non-deductible) payment resulting from the death normally has no right to recover the value of the payment from the dependant. This is because the third party provider has rendered the benefit either as a volunteer (for example, where the collateral benefit comprises a charitable payment) or in accordance with a valid contractual (or perhaps statutory) obligation owed to the dependant (for example, where the collateral benefit comprises life insurance, an inheritance or a survivor's pension).

2.61 In general, therefore, the only possibilities for recovery are where the provider has a contractual right to repayment (for example, where the victim promises to repay the provider of the collateral benefit in the event of recovering damages); or where the benefit is rendered on the basis of a condition that "fails" so that the provider has a claim for restitution grounded on "failure of consideration" (for example, where the benefit is rendered conditionally on the victim not succeeding in a tort

[150] [1999] 2 WLR 141, 155-156.

[151] *Ibid*, at p 156.

[152] *Ibid*, at pp 150, 157.

[153] *Ibid*, at p 156.

[154] More speculatively, this might also be possible if the deceased's estate did not enforce an unsatisfied judgment or settlement until after damages had been recovered from a concurrent tortfeasor.

[155] Damages for Personal Injury: Medical, Nursing and Other Expenses (1999) Law Com No 262, paras 10.58-10.78.

claim).[156] It is theoretically possible that payments to a dependant as a result of a death would be subject to a contractual repayment right in the event of damages being recovered, or paid conditionally on damages not being recovered.[157] Nevertheless it seems to us somewhat unlikely that this would happen in practice.

2.62 What about recoupment by the provider from the wrongdoer of deductible benefits (other than state benefits)? That is, if contrary to section 4, a third party's payment was deducted, would the provider of the payment have a restitutionary right to recover its value from the tortfeasor? The answer seems to be "no". This follows from the decision of the Court of Appeal in *Receiver for the Metropolitan Police District v Croydon Corp*.[158] In that case the claimant had made payments of sick pay to the victim pursuant to a statutory obligation. He was denied the right to recoup the payments from the tortfeasor. Reversing the decision of Slade J at first instance, the Court of Appeal reasoned as follows: given that sick pay is deducted in assessing a victim's damages, the defendants had incurred no liability to the extent that the victim had received sick pay. The Court of Appeal therefore held that the payments could not be regarded as discharging any liability of the defendants, and that as a result, the defendants had not been enriched by the payments.[159]

2.63 An associated issue is that indemnity insurers' have the right, which arises by operation of law,[160] to be subrogated to a tort victim's claim to recover the value of insurance payments made. The question is whether these rights are relevant here. It seems to us that they are not, since the only type of insurance which might be paid to a dependant as a result of a death is life insurance, which is classified as non-indemnity insurance.

2.64 The final issue regarding third party rights concerns social security. Where a person claims damages for personal injuries and is also in receipt of social security benefits, the state has the power to recoup from the compensator an amount of money totalling the social security benefits that the accident victim would be paid

[156] "Failure of consideration" is wide enough to embrace the failure of a non-promissory condition. See *Chillingworth v Esche* [1924] 1 Ch 97; *Essery v Cowlard* (1884) 26 Ch D 91; *Re Ames' Settlement* [1946] Ch 217; Birks, *An Introduction to the Law of Restitution* (1st ed with revisions 1989) pp 223-226.

[157] For example a charity might provide contractually with the claimant for repayment should he or she recover damages, or it might make the payment conditionally: see Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 2.12 and 2.87. It is conceivable that a pension fund would make payments to a survivor subject to a contractual repayment right, or conditionally: see Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 2.41, 2.63 and 2.87. Similarly, it is conceivable that an inheritance would be paid to a beneficiary subject to a contractual repayment right or conditionally. Presumably however this would have to be provided for in the terms of the will.

[158] [1957] 2 QB 154.

[159] But cf *Land Hessen v Gray & Gerrish*, unreported, 31 July 1998, which is discussed further in our report, Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, paras 10.70-10.72.

[160] Although it is common for subrogation to be expressly provided for in a contract of indemnity insurance.

in a five year period.[161] However, no such provision for the recoupment of social security benefits exists in respect of Fatal Accident Act claims.

5. BEREAVEMENT DAMAGES

2.65 At common law no damages can be awarded for bereavement.[162] However, pursuant to a recommendation made in our report, Personal Injury Litigation - Assessment of Damages,[163] section 3 of the Administration of Justice Act 1982 (inserting section 1A into the Fatal Accidents Act 1976) introduced a statutory claim for damages for bereavement in respect of the death of a limited class of close relatives.

2.66 When preparing our report, Personal Injury Litigation - Assessment of Damages, we found evidence to suggest that an award of damages, albeit small, could offer some consolation in situations where parents had suffered the loss of an infant child, or where a spouse had lost a husband or wife.[164] We therefore took the view that a sum of damages should be recoverable for "bereavement": the purpose of the award should comprehend compensation for such losses as that of the deceased's "counsel" and "guidance" as well as the claimant's grief.[165]

2.67 We also thought that the introduction of bereavement damages would mitigate the effects of another recommendation made in that report - that is, the abolition of the separate common law claim for loss of expectation of life.[166] Damages in respect of this head of loss, so far as surviving for the benefit of the estate, [167] had amounted, in effect, to the provision of an indirect "solatium" for the relatives of the deceased.[168] The new head of claim under the 1982 Act was also widely perceived as performing a further symbolic function of providing some

[161] Social Security (Recovery of Benefits) Act 1997. See paras 5.56-5.60 below.

[162] *Blake v Midland Railway Co* (1852) 18 QB 93; 118 ER 35; *Taff Vale Railway Co v Jenkins* [1913] AC 1, 4; *Baker v Dalgleish Steam Shipping Co* [1922] 1 KB 361, 371; *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601, 617; *Hinz v Berry* [1970] 2 QB 40, 42. See Liability for Psychiatric Illness (1995) Consultation Paper No 137, para 2.4.

[163] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, paras 172-180.

[164] *Ibid*, at para 174. Our original position, as outlined in Personal Injury Litigation - Assessment of Damages (1971) Working Paper No 41, para 203, was that non-pecuniary loss of this kind ought not to be recoverable.

[165] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 172. In this respect we followed the approach of the Scottish Law Commission: see Damages for Injuries Causing Death (1972) Memorandum No 17, para 99.

[166] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, paras 100 and 107.

[167] The assessment of damages under this head involved the courts in an unedifying attempt to place a value on life, and awards varied greatly until the intervention of the House of Lords in *Benham v Gambling* [1941] AC 157, which established a standard conventional sum of £200. Although this figure was increased in subsequent cases in order to keep pace with inflation (see *Yorkshire Electricity Board v Naylor* [1968] AC 529; and *Gammell v Wilson* [1982] AC 27) the modest nature of the sums involved merely rendered the award largely irrelevant in the wider context of a personal injury or survival action.

[168] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 100.

"sympathetic recognition" by the state of the fact of bereavement,[169] and an expression on the part of society of the gravity with which it regards the loss of a human life.[170]

2.68 The action for bereavement is subject to the overarching principle that an action under the 1976 Act can only be brought if the person injured would have been entitled to maintain an action against the wrongdoer had death not ensued.[171] However, an action for bereavement represents an exception to general common law principles, in that the claimant is not required to prove any loss.

2.69 Section 1A(2) provides an exhaustive list of persons eligible to claim damages under this head. A claim for damages for bereavement shall only be for the benefit

(a) of the wife or husband of the deceased; and

(b) where the deceased was a minor who was never married -

(i) of his parents, if he was legitimate; and

(ii) of his mother, if he was illegitimate.

2.70 As such, the Act creates a significantly narrower class of eligible claimants than are permitted to bring an action for the loss of pecuniary benefits under section 1.[172] Outside the marital relationship, the action is restricted to one additional class of claimant, namely the natural parents of a deceased unmarried minor child. A further distinction is made upon the basis of the deceased child's legitimacy: the father of an illegitimate child cannot claim under the section.[173] Where both parents claim bereavement damages the damages shall be equally divided between them.[174] The requirements that the deceased child be under 18 years of age and unmarried have the capacity to produce what may be regarded as arbitrary results. In *Doleman v Deakin*[175] the claimants were refused a bereavement award in respect of the death of their unmarried son who died as a result of the defendant's negligence less than a month after his eighteenth birthday.[176]

2.71 Section 1A(3) prescribes the amount of damages that may be recovered. The Administration of Justice Act 1982 provided for the recovery of a fixed

[169] *Hansard* (HL) 30 March 1982, vol 428, col 1294.

[170] *Hansard* (HL) 8 March 1982, vol 428, cols 41-42; *Hansard* (HC) 3 March 1989, vol 148, col 544.

[171] Fatal Accidents Act 1976, s 1(1). See para 2.2 above.

[172] See para 2.7 above.

[173] See Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 177, where we recommended that "child" should not be defined as "child of the family", so as to avoid courts being faced with the task of determining the distribution of the fixed sum amongst several claimants, where the child happens to be a "child of the family" in relation to two or more marriages simultaneously.

[174] Fatal Accidents Act 1976, s 1A(4).

[175] *The Times*, 30 January 1990 (noted in Kemp & Kemp, *The Quantum of Damages* vol 3 paras M5-018 and M5-102).

[176] See A Unger, "Pain and Anger" (1992) 142 NLJ 394.

conventional sum of £3,500. Section 1A(5) gave the Lord Chancellor the power to vary this sum by statutory instrument. In 1990 the Lord Chancellor issued a consultation paper on the question of quantum, which outlined three possible options: 1) to increase the award in line with changes in the value of money since the award was introduced on 1 January 1983, to a new level of £5,000; 2) to increase the award by more than the rate of inflation to, for example, £10,000; 3) to retain the award at £3,500 for the time being.[177] Following consultation, a compromise was sought between the first two options and the award was updated to £7,500 in respect of deaths occurring on or after 1 April 1991.[178]

2.72 Interest is awarded upon damages in respect of bereavement at the full special account rate from the date of death.[179] It should be noted that this is out of line with the calculation of interest both on pecuniary loss in Fatal Accidents Act claims[180] and on non-pecuniary loss in personal injury claims.[181]

2.73 It would appear that any damages awarded for bereavement are subject to section 5 of the Act, which states that "any damages recoverable in an action under this Act" shall be reduced as a result of the deceased's contributory negligence.[182] In addition, it is in accordance with normal principles that where one of the claimants was partly to blame for the death, the claim of that dependant will be reduced.[183] However, it is not entirely clear that this normal principle is meant to apply to bereavement damages given that a claim by more than one parent (only one of whom may have been contributorily negligent) leads to *equal* division under section 1A(4) of the 1976 Act.

[177] Damages for Bereavement: A Review of the Level (1990). The review was prompted by the introduction of the Citizens' Compensation Bill by Mr Lawrence Cunliffe MP, aimed at augmenting the level of the bereavement award to £10,000 in favour of a wider class of claimants: *Hansard* (HC) 3 March 1989, vol 148, cols 519-521. The Bill came in the wake of a series of national disasters, such as the Hillsborough stadium deaths, the fire at King's Cross Station and the Zeebrugge ferry disaster, which focused public disquiet at the level of the bereavement award.

[178] Damages for Bereavement (Variation of Sum) (England and Wales) Order SI 1990 No 2575.

[179] See *Prior v Hastie (Bernard) & Co* [1987] CLY para 1219; *Khan v Duncan*, unreported, 9 March 1989 (noted in Kemp & Kemp, *The Quantum of Damages* vol 3 paras M3-071 and M3-140). The current special account rate is 8 per cent.

[180] On which interest is awarded at half the special account interest rate from the date of death.

[181] On which interest is traditionally awarded at 2 per cent from the date of service of the writ until the date of trial: *Wright v British Railways Board* [1983] 2 AC 773.

[182] This interpretation is supported by s 3(2) of the Administration of Justice Act 1982, which amended s 5 of the 1976 Act to omit reference to the "dependants" of a deceased. However, where there are concurrent causes of death, the bereavement award should not be apportioned as between those causes: see *Griffiths* v *British Coal Corp* (1998) 15 Personal and Medical Injuries Law Letter 5.

[183] See para 2.5, n 18 above. It is argued in Kemp & Kemp, *The Quantum of Damages* vol 1 para 4-007/2, that where a parent is responsible for the death of his or her legitimate child, the whole bereavement award should go to the innocent parent as a matter of public policy. However, this is contrary to the decision of Deputy District Judge Radcliffe in *Navaei v Navaei*, unreported, 6 January 1995 (noted in Kemp & Kemp, *The Quantum of Damages* vol 1 para 4-007/2) in which the innocent parent was awarded only half the conventional bereavement award.

2.74 By section 1(1A) of the Law Reform (Miscellaneous Provisions) Act 1934, a claim for bereavement damages does not survive for the benefit of the estate of the bereaved claimant.[184]

[184] This accords with our recommendations in Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 180.

PART III
REFORM: GENERAL ISSUES (INCLUDING THE LIST OF THOSE ENTITLED TO CLAIM FOR PECUNIARY LOSS)

1. SHOULD THE FATAL ACCIDENTS ACT CLAIM BE ABOLISHED?

3.1 The Administration of Justice Act 1982, section 4(2) abolished the survival to the deceased's estate of his or her claim for loss of earnings in the lost years.[1] In the consultation paper, we looked at the argument that this was the wrong way to proceed.[2] The alternative approach would have been to abolish the Fatal Accidents Act and to reinstate the survival of the claim for the "lost years". This approach has been advocated by Professor Waddams,[3] and by the Ontario Law Commission.[4]

3.2 Our provisional view was that the Fatal Accidents Act claim should not be abolished, and that the estate's "lost years" claim should not be reinstated.[5] The consultation paper set out a number of arguments in support of this view.[6] We expressed concern that, if compensation for fatal accidents were only to be made available through the deceased's estate (rather than directly to the dependants), the dependants' losses might not be compensated. This would be the case where a potential claimant's losses were greater than his or her entitlement under the deceased's will, on intestacy[7] or under the Inheritance (Provision for Family and Dependants) Act 1975.[8] Moreover, an action brought by the estate for "lost earnings" would not recover damages for particular losses that might be suffered by dependants - for example, the loss of gratuitous services provided by the deceased, and the non-pecuniary losses of care, guidance and society which we consider are compensated by the bereavement award.[9]

1 In Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.1, we highlighted two reasons for this reform. First and primarily, the possibility that the defendant would be faced with having to pay two substantial sets of damages. Secondly, the fact that it was not clear what precise loss the "lost years" claim compensated.

2 Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.2.

3 S M Waddams "Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?" 47 (1984) MLR 437. Professor Waddams argues that simplification would be the principal benefit of his scheme, although it is possible to bring an action under the Fatal Accidents Act with an action on the estate under CPR, Rule 7.3.

4 Report on Compensation for Personal Injuries and Death (1987) pp 14-36.

5 Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.7.

6 *Ibid*, at para 3.6.

7 Damages accruing to the deceased's estate would devolve according to the rules of intestacy if not dealt with under the terms of the deceased's will.

8 This Act applies both where the deceased left a will and where he or she died intestate.

9 See para 6.5 below.

3.3 The vast majority of consultees - nearly 90 per cent - supported our provisional view. Further, consultees highlighted a number of subsidiary reasons why the Fatal Accidents Act should not be repealed.[10] In the light of this widespread support, we remain of the view that both the action under the Law Reform (Miscellaneous Provisions) Act 1934 (without the "lost years" claim) and the action under the Fatal Accidents Act are needed to compensate two different sets of losses.

3.4 **We therefore recommend that the Fatal Accidents Act claim should not be abolished, and it should remain the law that the "lost years" claim should not survive for the benefit of the deceased's estate.**

2. THE NATURE OF THE RIGHT OF ACTION

(1) General

3.5 In the consultation paper, we discussed the character of the claim under the Fatal Accidents Act, and suggested that the root distinction between matters going to liability and matters going to damages has stood the test of time.[11] As such, we did not consider this feature of the Act to be in need of reform.[12] Virtually every consultee in favour of retaining the Fatal Accidents Act agreed with this view.

3.6 **We therefore recommend that the nature of the right of action under section 1(1) of the 1976 Act, under which a claim can only be made if the deceased would have had a claim against the tortfeasor, does not in general require reform.**

(2) Remoteness

3.7 We recognised that there was some uncertainty as to whether the doctrine of remoteness operates to bar claims under the Fatal Accidents Act wherever the death was not reasonably foreseeable.[13] We expressed the opinion that it ought to do so.[14] However, on the basis that the case of *Pigney v Pointers Transport Services Ltd*[15] may be authority to the opposite effect, we suggested that the law was in need of reform. We therefore took the provisional view that section 1(1) should be amended to ensure that there is no claim under the Fatal Accidents Act where the death is too remote a consequence of the defendant's wrong.[16]

[10] These included the following: the possibility that the estate might be subject to other claims with priority to those of dependants, or indeed insolvent (Professor Andrew Tettenborn); the incidence of inheritance tax (Ian A R McClaren QC); the fact that an individual entitlement to damages protects the deceased's dependants against the risk that a sole beneficiary will squander the damages (George Pulman QC); a concern that without the Fatal Accidents Act, dependants might not recover for torts committed in other jurisdictions (Dr Gerhard Dannemann).

[11] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.9.

[12] *Ibid*, at para 3.13.

[13] *Ibid*, at paras 2.5 and 3.10.

[14] *Ibid*, at para 3.10.

[15] [1957] 1 WLR 1121.

[16] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.13.

3.8 Although a majority of consultees agreed with our provisional view, we have resiled from it, and now consider that there is no need for legislation on this point. This is for three main reasons. First, on a straightforward interpretation of the 1976 Act, normal remoteness rules, and hence the reasonable foreseeability test laid down in *The Wagon Mound*,[17] apply. Secondly, *Pigney v Pointers Transport Services Ltd*[18] was decided before *The Wagon Mound*, and is no longer authoritative. Thirdly, as we have seen, the straightforward interpretation which we favour is supported by judges in a number of other jurisdictions and by academics.[19]

3.9 **We therefore recommend that, although it is our view that no action under the Fatal Accidents Act should lie if the deceased's death was too remote a consequence of the defendant's wrong, we do not consider that there is a need for legislation in this regard.**

(3) Contributory negligence

3.10 We were initially attracted to the view that the deceased's contributory negligence ought not to reduce the damages recovered by a wholly innocent dependant.[20] However, we suggested in the consultation paper that there were difficulties with the alternative approach under which the defendant is liable in full to claimants under the Fatal Accidents Act, but is given the right to pursue the deceased's estate for a contribution in proportion to the deceased's contributory fault.[21] First, contribution proceedings are normally only available against a person who has committed a legal wrong,[22] which is not the allegation directed at a person who negligently contributed to his or her own death. Secondly, we were reluctant to create an "all or nothing" distinction between those cases in which the death was caused partly by the deceased's carelessness (in which claimants under the Act would recover in full) and those in which the death was caused wholly by the deceased's negligence (in which claimants under the Act would not recover their loss). We therefore took the provisional view that section 5 of the Fatal Accidents Act 1976 should not be reformed. There was almost unanimous support for our provisional view.

3.11 **We therefore recommend that section 5 of the 1976 Act, laying down that contributory negligence of the deceased operates to reduce a dependant's damages, should be retained.**

[17] *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388.

[18] [1957] 1 WLR 1121.

[19] See para 2.4, n 15 above.

[20] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.11.

[21] *Ibid*, at para 3.12.

[22] Civil Liability (Contribution) Act 1978, s 1.

3. PECUNIARY LOSS: WHO CAN CLAIM AND FOR WHAT TYPE OF LOSS?

(1) What type of loss of pecuniary benefit should be recoverable?

3.12 The Fatal Accidents Act is an exception to the general irrecoverability of damages for pure economic loss in the law of torts. As we have seen, damages are recoverable for the loss of non-business benefits which the claimant reasonably expected to receive from the deceased (and for expenses incurred in replacing the loss of those benefits).[23]

3.13 We asked consultees whether they thought that any change was needed to the irrecoverability of damages for the loss of "business benefits".[24] In the consultation paper, we took the view that the restriction was justified.[25] This view was based on a "floodgates" concern - that to allow the recovery of damages for the loss of business benefits would be to increase substantially the volume of litigation and the quantum of awards under the Fatal Accidents Act. Eighty-four per cent of consultees to express a view on this matter agreed with our provisional view.

3.14 **We therefore recommend that benefits expected as the product of a business relationship between the deceased and a claimant should remain irrecoverable under the Fatal Accidents Act.**

(2) Is the present list of persons entitled to claim under the Act too restrictive?

3.15 Under the current law only those who satisfy the statutory definition of "dependant" under section 1(3) of the Act are entitled to claim under the Fatal Accidents Act. In the consultation paper, we took the provisional view that the present list is too restrictive, and that the class of persons able to claim under the Act should be expanded.[26]

3.16 The consultation paper highlighted particular classes of persons excluded from section 1(3) of the Act, but whom we thought merited a right of action under the Fatal Accidents Act.[27] In particular, we highlighted the position of cohabitants who were living together as husband and wife but who do not satisfy the "two year rule"; same-sex couples; children who were not of the deceased but who were supported by the deceased whilst he or she was engaged in a marriage-like relationship with their parent; children otherwise supported by the deceased (such as a friend's children); certain distant relatives supported by the deceased (such as a great-nephew supporting a great-aunt); and non-relatives who live together but do not enjoy a marriage-like relationship. We considered that these examples provided powerful support for the view that the present list is too restrictive.

[23] See paras 2.9-2.12 above.

[24] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.17.

[25] *Ibid*, at para 3.16.

[26] *Ibid*, at para 3.19.

[27] *Ibid*, at para 3.18.

3.17 Virtually every consultee to express a view on this matter agreed with our provisional view. The present list was criticised as "arbitrary" and "discriminatory".

3.18 **We therefore recommend that the list of those who can claim under the Fatal Accidents Act 1976 is too restrictive and should be reformed.**

3.19 The more difficult question, to which we now turn, is how the present list should best be reformed.

(3) Reforming the list

(a) Options for reform

3.20 In the consultation paper, we identified three options for the reform of section 1(3).[28] These were as follows:

(i) Extending the statutory list

3.21 We suggested that although this option for reform would preserve the merit of certainty, an extension of the statutory list would not guarantee the inclusion of every case deserving of recovery under the Act.[29] Moreover, we noted that the history of the Act provides evidence that lists too easily become outdated and need periodic review.[30] We therefore sought an alternative to the present model of a fixed list.

(ii) Adding a judicial discretion to the list

3.22 The addition of a "catch all" judicial discretion to extend the class of persons who can claim under the Fatal Accidents Act, incrementally and by analogy with the existing categories, would eliminate some of the inflexibility in the law as it stands.[31] However, we also noted the reality - that the common law too becomes frozen when the appellate courts, and in particular the House of Lords, have ruled on a point.[32] We expressed a reluctance simply to pass to the judiciary the job of deciding the problematic question as to where the line should be drawn between those who can claim and those who cannot, and we also recognised that, until the appellate courts have dealt with this matter, the entitlement to claim would be uncertain.[33]

(iii) The removal of the list

3.23 We took the provisional view that the list should be abolished and replaced by a test requiring proof only of the relevant type of loss.[34] As such, the list would be

[28] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.20-3.35.

[29] *Ibid*, at paras 3.20 and 3.22.

[30] *Ibid*, at para 3.22.

[31] *Ibid*, at para 3.23.

[32] *Ibid*, at para 3.23.

[33] *Ibid*, at para 3.23.

[34] *Ibid*, at para 3.36.

replaced by a single, generally worded test. We identified two possible tests, and asked consultees which, if either, they preferred.[35] Those tests were:

(1) Any individual should be able to claim if he or she had a reasonable expectation of a non- business benefit from continuation of the deceased's life.

(2) Any individual should be able to claim if he or she was, or but for the death would have been, dependent, wholly or partly, on the deceased.

(b) Consultation

3.24 Sixty-three per cent of consultees supported our provisional view that the statutory list should be replaced by a generally worded test. A further seven per cent took the view that a generally worded class ought to be added to the list. Of those in favour of the abolition of the list, a small but clear majority were in favour of the second test put forward - "any individual who was, or but for the death would have been, dependent, wholly or partly, on the deceased".[36]

(c) Reform

(i) The "reasonable expectation of a non-business benefit" test

3.25 Under the current law, the "reasonable expectation of a non-business benefit" test governs the type of loss for which the claimant can recover.[37] One could argue that any person with such a reasonable expectation should be able to bring an action under the Fatal Accidents Act, and that the "reasonable expectation of a non-business benefit" should also govern the question "who can claim?"

3.26 However, the loss that is compensated by the Fatal Accidents Act is often referred to as "loss of dependency". If this expression is literally interpreted, it must refer to the loss of benefits for which the claimant was dependent on the deceased, and closer inspection of the "reasonable expectation of a non-business benefit" test reveals that it has a broader scope than the concept of "dependency". In other words, a person might "reasonably expect" to receive a benefit from another without being in any way "dependent" on that other: for example, where siblings habitually buy one another birthday presents, they might "reasonably expect" to receive such a gift, but will not ordinarily be "dependent" on one another.

3.27 Again, while section 1(3) lists a class of persons who are to be treated as "dependants" for the purposes of the Act, those persons do not need to establish that they were as a matter of fact "dependent on the deceased" before they can claim damages.[38] By limiting recovery under the Act to a class of claimants that includes many of the people who are likely to have been in some way dependent

[35] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.30 and 3.36.

[36] Fifty-two per cent expressed a clear preference for the second test, and 36 per cent for the first.

[37] See paras 2.9-2.12 above.

[38] See T Weir, *A Casebook on Tort* (8th ed 1996) p 114; P Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed 1999) p 111, n 10.

on the deceased, compensation available under the Act may *approximate* to compensation for "losses of dependency", but the "reasonable expectation of a non-business benefit" test under the current law in fact enables the recovery of a wider class of losses than "losses of dependency".

3.28 The adoption of the "reasonable expectation of a non-business benefit" test instead of the statutory list would further distance the Fatal Accidents Act from the function of compensating dependency losses. The Act would instead purely serve the function of compensating the loss of reasonably expected non-business benefits. Although the adoption of the "reasonable expectation of a non-business benefit" test has constituted a significant (albeit often unrealised) departure from the function of compensating "dependency losses", it should be recognised that, both historically and as a matter of principle, the Act is strongly tied to dependency. Historically, since 1959 the Act has described the class of persons entitled to claim under the Act as "dependants". Further, the class of persons who can recover under the Act has been limited to many of those likely to have been in some way dependent on the deceased, and the expansion of the list has reflected the way in which changing social patterns have affected the class of persons who are likely to be in some way dependent on the deceased.

3.29 We would also emphasise that the Act creates an exception to the general principles of tort law, in that an action is made available to a person other than the *primary* victim of a breach of duty (and the recovery is therefore of pure economic loss). This exception requires a powerful justification. Whilst the history of the Act indicates that the compensation of "losses of dependency" is a broadly accepted justification for the Act, it is not clear that the compensation of "reasonably expected benefits" is equally so.

3.30 For all these reasons, we would not recommend wholly abandoning the concept of dependency by permitting recovery by anyone who had "a reasonable expectation of a non-business benefit from the continuation of the deceased's life". Such a test would render the Act too wide ranging. This test was also favoured by fewer consultees than the "wholly or partly dependent" test.

(ii) The "wholly or partly dependent" test

3.31 This test is similar to that used in the fatal accidents legislation in Victoria. Under section 17 of the Wrongs Act 1958 (as amended by section 4 of the Wrongs (Dependants) Act 1982), an action under the Act is available to the "dependants" of the deceased, defined as persons who were "wholly mainly or in part dependent on the deceased at the time of his death or who would but for the incapacity due to the injury which led to the death have been so dependent."

3.32 There was majority support amongst consultees for the adoption of the "wholly or partly dependent" test, which would make an action under the Fatal Accidents Act available to any person who could establish that he or she was actually dependent on the deceased. However, the discussion above highlighted that the concept of "dependency" is narrower than the concept of "reasonably expected benefits".[39] Under the current law, a person who falls within the scope of section 1(3) can

[39] See para 3.26 above.

recover for the loss of reasonably expected non-business benefits even though they are not in fact dependent on the deceased. It follows that the adoption of the "wholly or partly dependent" test in place of the statutory list would reduce the ambit of the Fatal Accidents Act, and would deny recovery under the Act to persons who can recover under the current law. In other words, the objection here is the converse of the objection to the reasonable expectation of the non-business benefit test; it is an objection to narrowing the entitlement to claim, rather than widening it too far.

3.33 When undertaking a review of the Fatal Accidents Act, we had no intention of reducing the class of persons able to sue under the Act. Although there was widespread support from consultees for the "wholly or partly dependent" test, we did not draw attention in the consultation paper to the fact that replacing the list by this test might reduce the ambit of the Act. Further, whilst there was a general consensus that the class of persons able to recover under the Act is in some respects too narrow, not a single consultee clearly expressed the view that in other respects that class is too wide. We have come to the conclusion that there is no single, generally worded test which would both preserve the rights of those currently able to sue under the Act and also expand the law as we and every virtually every consultee wanted.

3.34 On further reflection therefore, we now take the view that to replace the existing list by either of the two tests put forward would be problematic. Instead, a different approach is called for than that of replacing the present list by a single generally worded test.

(iii) The retention of the list with the addition of a generally worded "wholly or partly maintained" test

3.35 In order to preserve the rights of those currently able to sue under the Act, we are now of the view that the list should be preserved. However, to expand the class of potential claimants as supported by consultees, we recommend adding a generally worded class to the list. This will entitle any person who was, or but for the death would have been, dependent on the deceased to claim damages under the Fatal Accidents Act. Crucially, whilst this approach has the same great advantage as the replacement of the list with a single test, giving effect to the wishes of a majority of consultees, it does not have what we see as the disadvantageous effect of reducing the class of persons currently able to claim.

3.36 In the consultation paper, we suggested that the generally worded class might use the terminology of "dependent, wholly or partly, on the deceased".[40] However, we have come to the view that it would be preferable to adopt the definition of dependency provided for in another piece of legislation concerned with the rights of dependants: the Inheritance (Provision for Family and Dependants) Act 1975. Under that Act, any person who "immediately before the death of the deceased was being maintained, either wholly or partly by the deceased" can apply for a court order to deal with the inadequate provision that has been made for them under the deceased's will or on intestacy.[41] Under section 1(3), "a person shall be

[40] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.30 and 3.36.

[41] Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(e).

treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person."

3.37 Our understanding is that the crucial parts of this test - those relating to "a substantial contribution" and "the reasonable needs of that person" - have not given rise to any difficulties of interpretation in the context of the Inheritance (Provision for Family and Dependants) Act 1975.

3.38 On the other hand, we note that the phrase "otherwise than for full valuable consideration" has given rise to difficulties of interpretation in relation to claims under the 1975 Act. The phrase has been interpreted as requiring that the value of the contributions made by the relevant parties should be balanced against one another; where the contributions are unequal, one party can be regarded as maintaining the other.[42] However, two decisions of the Court of Appeal (*Jelley v Iliffe*[43] and *Bishop* v *Plumley*[44]) have clarified that where one party contributes earnings and the other takes responsibility for domestic work, the contributions are not commensurate: rather, the party with responsibility for domestic work should be regarded as dependent on the other.

3.39 In our view, these decisions illustrate the impracticality of an approach based on the "balancing" of benefits which take very different forms. However, more fundamentally, we do not consider it appropriate that substantial contributions towards the maintenance of a loved one (whether by way of monetary payment or in the form of domestic work) should be regarded as provided in "consideration" or in exchange for other benefits. In reality, the maintenance of another in shared domestic life involves a pooling of time, energy and resources, rather than an exchange of benefits. Further, we consider that one should not distinguish the case in which one party brought no money into the home from the case in which the parties were financially dependent on one another: for example, where the parties each contributed equal sums of money to the payment of a mortgage which neither could afford alone. We consider that the latter case should also be recognised as a case in which the parties are each making a substantial contribution towards the other's reasonable needs. Indeed, given that section 1(3) defines "maintenance" so as to include benefits provided in *money's worth* as well as in monetary form, this suggests that under section 1(3), a party with full responsibility for domestic work in the shared home should also be regarded as maintaining the party with responsibility for earnings.[45]

3.40 Nevertheless, whilst we have reservations concerning the application of the "full valuable consideration" limb of the test, we are reluctant to recommend legislation

[42] See *Re Beaumont* [1980] 1 Ch 444, 453; affirmed in *Jelley v Iliffe* [1981] Fam 128 and *Bishop v Plumley* [1991] 1 WLR 582.

[43] [1981] Fam 128.

[44] [1991] 1 WLR 582.

[45] This analysis can also be seen to apply in relation to Fatal Accidents Act claims, where a claimant is entitled to damages for a loss of the deceased's services: see paras 2.26 and 2.27 above.

which adopts only part of the definition provided for in the 1975 Act. In our view, this approach would also give rise to difficulties of interpretation regarding the relationship between the two provisions. Further, in our opinion, the decisions in *Jelley v Iliffe*[46] and *Bishop v Plumley*[47] mark a step towards our preferred interpretation, and provide powerful evidence that the "full valuable consideration" test will not be interpreted so as to prevent the Fatal Accidents Act from fulfilling its clear purpose of providing compensation for losses of dependency.

3.41 We would also emphasise that section 1(3) of the 1975 Act puts it beyond doubt that a person may be maintained by the deceased other than through the receipt of money payments: that is, by the provision of goods, or more likely, services. In the present context, it is also necessary for the provision to include any person who *would have been* maintained by the deceased, and we would alter the definition found in the 1975 Act to this end.

3.42 Under this approach, any of the persons listed in paragraph 3.16 above, and whom we argued deserved to be able to claim under the Fatal Accidents Act, would be entitled to claim if they were able to establish that they were, or but for the death would have been, maintained by the deceased, in the following sense: that, other than for valuable consideration, the deceased made (or but for his or her death would have made) a substantial contribution in money or money's worth to their reasonable needs.

3.43 It is necessary to consider, finally, how the "reasonable expectation of a non-business benefit" test will relate to the new, generally worded class to be added to the list of persons able to claim under the Act. Under the new entitlement, any individual who can establish that he or she was maintained by the deceased will be able to claim some measure of damages under the Fatal Accidents Act. It might be thought that the natural measure of damages to be awarded to a person claiming by virtue of their maintenance would be the value of the benefits received. As such, claims brought under the new generally worded class would be based wholly on the principle of dependence or maintenance.

3.44 However, our view is that the "reasonable expectation of a non-business benefit" test should continue to govern the question "for what type of loss can compensation be claimed under the Fatal Accidents Act?", even where the claim is brought under the new, generally worded class. We think that there are a number of important reasons in favour of this view. First and most importantly, we are against a system which treats some entitled claimants less favourably than others. Although a person seeking to claim under the new, generally worded class will need to establish maintenance by the deceased (which a person within the scope of the present list does not), once this fact is established, we think that it would be unfair to create a "two-tier" system and to offer different measures of damages to different groups of entitled claimants. Secondly, the reasonable expectation test is well established, whereas a new test for the type of loss recoverable would add to the uncertainty for litigants seeking to claim damages under the new, generally worded class. A third point is that, as a test of quantum rather than entitlement,

[46] [1981] Fam 128.

[47] [1991] 1 WLR 582.

the concept of "maintenance" has the potential to create difficult disputes over what are probably trifling amounts: for example, do occasional unexpected gifts form part of the relationship of maintenance, or do they fall outside its scope? We do not wish to further complicate litigation under the Act by creating scope for this sort of marginal dispute. A final and related point is that, as applied to a person who was in fact maintained by the deceased, it seems that the difference between the two tests is likely in the majority of cases to be marginal. "Reasonably expected" benefits for which the claimant was not dependent on the deceased are likely to be limited to luxury items, such as occasional gifts. The uniform use of the "reasonable expectation" test not only has the virtue of equal treatment of all dependants and of simplicity, but is also likely to make only a marginal difference to the liability of defendants in practice.

3.45 We expressed a concern in the consultation paper that under a single test, trivial losses would be recoverable under the Act.[48] Under our proposed reform, there would equally be no limit on the value of "reasonably expected non-business" benefits which could be claimed through an action under the Act. However, this is already the case under the present law, and does not appear to create problems. Moreover, not a single consultee made this objection to the "reasonable expectation" test generally. We would also stress that the proposed increase in the scope of the Act will be limited to persons who were maintained by the deceased. It therefore seems likely that the bulk of actions brought by those within the new, generally worded class will not extend to the recovery of trivial losses.

3.46 **We therefore recommend that:**

(1) **the present list of those able to claim should be retained, but there should be added to the list a generally worded class of claimant whereby any other individual 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" shall be able to bring an action under the Fatal Accidents Act. A person shall be treated as being wholly or partly maintained by another if that person, "otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards his reasonable needs"** (Draft Bill, clause 1);

(2) **although no legislation on this is necessary, it may be helpful for us to clarify that, like any other claimant, a claimant under this class should be able to recover damages for the loss of reasonably expected non-business benefits.**

(4) Pecuniary losses resulting from the death other than the loss of benefits from the continuation of the life (for example funeral expenses)

3.47 At present, the only pecuniary losses recoverable in addition to reasonably expected non-business benefits are reasonable funeral expenses. We asked consultees whether they thought that the law governing the recovery of funeral

[48] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.34.

expenses was in need of reform.[49] Further, and in the light of the fact that funeral expenses are already recoverable, we asked consultees whether they thought that an award for any other pecuniary losses ought to be available to claimants under the Act.[50]

(a) Funeral expenses

3.48 Reasonable funeral expenses can be recovered under the Fatal Accidents Act by anyone within the scope of section 1(3) who incurs those expenses.[51] We asked consultees whether they supported reform in either of the following respects. First, whether the award ought to be discounted to reflect the fact that funeral costs are ultimately inevitable, and as such would have been incurred irrespective of the accident.[52] Secondly, whether they favoured an approach whereby the reasonableness test would be applied according to the cultural and religious traditions of the deceased, and whether they thought that there should be a legislative provision to this effect.[53]

3.49 A majority of consultees were in complete agreement with our provisional view that the availability of funeral expenses was not in need of any reform. With regard to the specific points on which we sought the views of consultees, approximately 85 per cent thought that no discount should be made for inevitability. The suggestion that the award should be discounted was described variously as "distasteful" and "penny-pinching". That the law does not adhere to strict compensatory principles was generally seen to be a concession to the unexpected and tragic circumstances of the death. Whilst there was a similar level of support for the application of the criterion of reasonableness according to the deceased's cultural tradition, there was a preference for the view that no reform of the law was necessary to this end.[54] As such, we remain of our provisional view.

3.50 **We therefore recommend that the law governing the recovery of funeral expenses in Fatal Accident Act claims is not in need of statutory reform.**

(b) Costs incurred in settling the deceased's estate

3.51 In the consultation paper, and in the light of the fact that an award for reasonable funeral expenses is already available, we asked consultees whether they thought that an award ought to be available for the costs of settling the deceased's estate.[55] The parallel with funeral expenses exists in the fact that both sets of expenses are ultimately inevitable, but in the event of a wrongful death are often thrust upon those close to the deceased in unexpected and unusually distressing circumstances.

[49] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.40.

[50] *Ibid*, at para 3.49.

[51] Fatal Accidents Act 1976, s 3(5).

[52] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.40.

[53] *Ibid*.

[54] This accords with our account of the present law at para 2.14 above.

[55] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.41.

The possibility that, if such an award were to be introduced, it might be subject to a discount to reflect the inevitability of the expense was again canvassed.[56]

3.52 There was a division of opinion amongst consultees on this question. A bare majority were in favour of some award. Those in favour were split in the ratio 2 : 2 : 1 as follows - in favour of an undiscounted award : in favour of a discounted award : in favour of a fixed award. Many of these consultees did indeed see the issue as impliedly linked to funeral expenses, particularly in that both sets of costs might not have been incurred by the dependants in other circumstances (for example, the deceased might have made arrangements later in life).

3.53 However, a very large minority were against reform of the law on this point. Arguments against the award varied. Most commonly, consultees stressed the fact that the award of funeral expenses is illogical, and while acceptable as a sympathetic gesture to the bereaved in the light of the unexpected death, the anomaly should not be extended. Others saw funeral expenses as a discrete and easily calculated sum, whilst the same was not true of the costs of settlement. The point was also raised that the costs would not be sufficient to merit recovery unless the estate was large, in which case the costs should be covered by the wealthy estate. It was also suggested that the availability of the award might needlessly encourage the employment of professionals.

3.54 It is notable that whilst many consultees suggested that the issue directly parallels the availability of funeral costs, only a minority (one-fifth) were in favour of precisely parallel treatment - an undiscounted, variable award. Whilst the parallel clearly exists in theory, we regard the availability of funeral expenses as an anomaly, which, while now too well established to be cut back, should not be extended.[57]

3.55 **We therefore recommend that the Fatal Accidents Act should not make available to the deceased's dependants a right to recover the reasonable costs of administering the deceased's estate.**

(c) Grief counselling

3.56 We further asked for consultees' views as to whether the reasonable cost of grief counselling ought to be recoverable.[58] If such an award were to be made available,

[56] Claims for Wrongful Death (1997) Consultation paper No 148, para 3.41.

[57] The Parliamentary debates on the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act 1934 offer no explanation for the introduction of a right to recover reasonable funeral expenses.

[58] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.44. An award for the cost of grief counselling is available in Alberta: Fatal Accidents Act 1980, s 7(d) (inserted by the Fatal Accidents Amendment Act 1994, s 4). The award is recoverable by a spouse, cohabitant, parent, child, brother or sister of the deceased: Fatal Accidents Act 1980, s 3(1). The Law Reform Commission of British Columbia has advocated the availability of damages for the costs of grief counselling: Pecuniary Loss and *The Family Compensation Act* (1969), pp 19-21.

we raised the possibility that it might sensibly be restricted to those entitled to bereavement damages.[59]

3.57 Over two-thirds of consultees opposed the availability of such an award. Some pointed to the fact that the benefits of counselling are still a matter of scientific doubt, and were against encouraging a counselling "culture" and industry. A large number suggested that this cost could be seen as covered by bereavement damages; others emphasised the distinction between the costs of treating psychiatric illnesses, which are compensatable, and the costs of treating mere grief, which is an inevitable part of life.[60]

3.58 Given that there is uncertainty as to whether grief counselling is always beneficial, we are reluctant to make available an award which would encourage bereaved persons to arrange such counselling when they would not otherwise have done so.

3.59 **We therefore recommend that the Fatal Accidents Act should not make available to the deceased's dependants a right to recover the reasonable costs of grief counselling.**

(d) Losses incurred in looking after the deceased's dependants

3.60 Under the Fatal Accidents Act, a person within the scope of the current section 1(3) cannot claim damages from the tortfeasor for any expense incurred in rendering services to another person who was dependent on the deceased. Any such expense is not within the scope of losses currently recoverable - it does not represent the loss of a non-business pecuniary benefit which the carer reasonably expected to receive from the continuation of the life of the deceased. After the House of Lords decision in *Hunt v Severs*,[61] it is strongly arguable that the recipient of the service who recovers damages for the loss of the deceased's services ought to be accountable to the carer for the "lost services" damages. However, we expressed the provisional view that the Fatal Accidents Act should continue not to give the carer a direct action for the value of the services provided.[62] We expressed a wish to avoid conflict with the law governing non-fatal accidents, and with the right of the recipients of the services to recover for their losses.[63] Virtually every consultee to express a view on this matter agreed with our provisional view.

3.61 **We therefore recommend that a carer should not have a direct claim under the Fatal Accidents Act to recover expenses incurred in looking after the deceased's dependants.**

[59] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.44.

[60] See paras 6.55 and 6.56 below for a discussion of the relationship between grief and psychiatric injury.

[61] [1994] 2 AC 350.

[62] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.47.

[63] *Ibid*, at para 3.46. In Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, paras 3.51-3.53, we take the view that the carer should not be given a direct action in the personal injury context.

(e) Medical expenses

3.62 Medical expenses incurred by dependants before the death of the deceased are not recoverable under the Fatal Accidents Act, because the costs are not a loss resulting from the death, but from injuries preceding the death.[64] Rather, they are recoverable by the injured victim, and that claim survives for the benefit of the victim's estate. However, in some jurisdictions, including British Columbia, the Fatal Accidents legislation is utilised for this purpose.[65] We thought this departure from the theoretical basis of the Act unnecessary, and asked consultees whether they agreed.[66] Over 90 per cent of consultees to express a view on this question agreed with our provisional view. The current model is perceived as working "perfectly well".

3.63 **We therefore recommend that there should be no departure from the theoretical basis of the Fatal Accidents Act so as to enable dependants to recover medical expenses incurred for the benefit of the deceased.**

(f) Other pecuniary expenses

3.64 We invited the views of consultees as to whether they thought that any other pecuniary expenses not enumerated in the consultation paper and irrecoverable under the present law ought to be recoverable under the Fatal Accidents Act.[67]

3.65 There were relatively few suggestions. Moreover, we have argued that whilst a claimant can recover reasonable funeral expenses under the current law, this right is anomalous, and can only be explained as a sympathetic concession that has long been accepted.[68] As such, and in the light of the fact that consultees have shown little support for the extension of this sympathetic award to other expenses, our view is that there should be no reform in this regard.

3.66 **We therefore recommend that Fatal Accidents Act should not be reformed so as to enable a dependant to recover damages for any other pecuniary expenses.**

[64] *McGregor on Damages* (16th ed 1997) para 1748. Recovery of pre-death medical expenses is dealt with in full in a separate report as part of our review of the law of damages: see Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262.

[65] Family Compensation Act 1979, s 3(8).

[66] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.48.

[67] *Ibid*, at para 3.49.

[68] See para 3.49 above.

PART IV
REFORM: ASSESSING DAMAGES FOR PECUNIARY LOSS (INCLUDING SECTION 3(3) OF THE 1976 ACT)

1. SHOULD THE MULTIPLIER BE CALCULATED FROM DEATH OR FROM TRIAL?

(1) Consultation on this issue

4.1 We asked consultees whether they thought that, contrary to the present approach of the courts, the multiplier used in assessing Fatal Accident Act damages should be applied from the date of trial, rather than from the date of death.[1] This question must be considered in the light of the decision of the Court of Appeal in *Corbett v Barking, Havering and Brentwood Health Authority*[2] in which a majority of the court decided that the multiplier selected at the date of death can and should be adjusted so as to take account of matters which have become certain by the time of trial.

4.2 In the consultation paper, we suggested a number of reasons why, in spite of the decision in *Corbett v Barking, Havering and Brentwood Health Authority*,[3] the law might be thought in need of reform.[4] One possible reason for reform was that the multiplier selected at the date of death might be significantly lower than a multiplier selected at the date of trial. As counsel for the claimant in *Corbett*, Harvey McGregor QC argued that the multiplier would have been greater still than that adopted in the ruling if it had simply been selected at the date of trial.[5] Further, we suggested that the application of the multiplier from the date of trial might be thought simpler and/or more accurate than date of death assessment. We noted that if a "date of trial" calculation were adopted as the general rule, it would be necessary to make a deduction from the figure calculated at trial to take into account the possibility that the deceased might in any event have died or stopped work between the dates of death and trial.

4.3 The responses of consultees were very evenly split, with the balance of opinion marginally in favour of a date of trial calculation. In spite of the ruling in *Corbett v Barking, Havering and Brentwood Health Authority*,[6] some consultees in favour of date of trial calculation were still concerned about the impact of pre-trial delays suggesting that multipliers calculated at the date of death underestimate the

[1] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.52.

[2] [1991] 2 QB 408.

[3] *Ibid*.

[4] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.52.

[5] *Corbett v Barking, Havering and Brentwood Health Authority* [1991] 2 QB 408, 433. Had the claimant's loss been assessed from the date of trial, a multiplier of 5 would have been selected. Damages would therefore have been assessed at £46,075. In the event, the Court of Appeal selected a multiplier of 3½, and damages were assessed at £42,175.

[6] [1991] 2 QB 408.

claimant's losses. Others regarded it as illogical that the multiplier should be based on estimates rather than on clear facts where the latter are known by the time of trial. Some consultees rejected the argument that damages for fatal accidents must necessarily be treated differently from damages for non-fatal personal injuries - future losses in respect of both were equally uncertain. They thus criticised *Corbett* as an unnecessary hybrid. There was also some support for the view that the life expectancy of the *deceased* should be calculated using data available at the time of death, whilst that of the *claimant* should be calculated from the date of trial.

4.4 The arguments of those in favour of the law as it stands - selection of the multiplier at the date of death - were less varied. Some stressed the fact that they regarded the reasoning of Lord Fraser in *Cookson v Knowles*[7] as correct in principle, arguing that there is uncertainty about everything after the time of death in Fatal Accidents Act cases. Many were concerned that a date of trial calculation might encourage claimants deliberately to delay proceedings. Nevertheless, some expressly regarded *Corbett v Barking, Havering and Brentwood Health Authority*[8] as an acceptable qualification of the orthodox approach.

4.5 Our view is that the law on this issue is unsatisfactory. We now explain in some detail our reasoning.

(2) Reasons for regarding the present law as unsatisfactory.

4.6 In a Fatal Accidents Act case, the identification of the multiplier involves two separate calculations: one as to the period for which the claimant's need was likely to have continued, and another as to the period for which the deceased was likely to have continued to provide benefits.[9] These two calculations raise different issues, and will initially be given separate consideration. We then point out the difficulties in accurately applying the Ogden tables under the present law.

(a) Cases in which the multiplier is controlled by the duration of the deceased's ability to provide support

4.7 In the majority of cases it is the life expectancy of the deceased, and hence the period for which he or she would have continued to provide benefits to any dependants, which will govern the multiplier. It was in this context that the "date of death" rule was adopted, on the basis that "everything that might have happened to the deceased after that date remains uncertain".[10]

4.8 It is true that where the multiplier is controlled by the life expectancy of the deceased, the only information which will usually be relevant to that calculation is that which was known about the deceased at the time of death. On the other hand, it is possible to imagine facts on which matters emerging as certain after the deceased's death do affect the period for which it is estimated that he or she would

[7] [1979] AC 556. See para 2.19 above.

[8] [1991] 2 QB 408.

[9] *Corbett v Barking, Havering and Brentwood Health Authority* [1991] 2 QB 408, 422-423. The lower of the two figures will be adopted as the multiplier.

[10] *Cookson v Knowles* [1979] AC 556, 576. See para 2.19 above.

have continued to provide benefits. For example, the deceased might have suffered from a life-shortening medical condition which could not be treated in his or her lifetime. If by the time of trial it is known that, within a year of his death, a treatment for the condition had been developed, this would inevitably affect the accuracy of any multiplier calculated at the date of death. Thus, even in cases where the *deceased's* life expectancy controls the multiplier, we do not agree with Lord Fraser's assertion that the multiplier should inevitably be selected "once and for all" as at the date of death.[11]

4.9 Further, although there will inevitably be uncertainty as to the period for which the deceased would have continued to offer support, we do not consider that this can only be reflected in a multiplier applied from "date of death". As we noted in the consultation paper, damages awarded using a date of trial calculation can take account of these possibilities.[12] There seems to be no reason why a multiplier should not be applied from the date of trial, and a discount made from the award for pre-trial losses to take account of the small possibility that the deceased would in any event have ceased to provide support before the time of trial.

(b) Cases in which the multiplier is controlled by the duration of the claimant's need for support

4.10 While in the majority of cases, the multiplier will be governed by the life expectancy of the deceased (about which there is uncertainty from the time of death), there are cases in which the claimant's need for support would have come to an end before the end of the deceased's working life. For example, in *Corbett v Barking, Havering and Brentwood Health Authority*[13] the claimant was a child who would have been dependent on his deceased young mother only until adulthood. In cases such as *Corbett*, it is the duration of the claimant's need which controls the multiplier. In this type of case, the selection of the multiplier as at the date of death has no logic whatsoever: it is the claimant's circumstances, not the deceased's, which are relevant to the selection of the multiplier, and the claimant's circumstances are best viewed in the light of all the facts known at trial.

4.11 Thus, the concern on which the "date of death calculation" rule was based does not arise when the multiplier is controlled by the claimant's need. Rather, as *Corbett v Barking, Havering and Brentwood Health Authority*[14] shows, the period for which the claimant's need for support will last can only become more certain as time goes on. Indeed, it is unclear whether the decision of the House of Lords in *Cookson v Knowles*[15] was intended to apply to cases in which the multiplier is controlled by the duration of the claimant's need for support. It is therefore unclear as to whether the Court of Appeal in *Corbett* was correct to consider itself bound by *Cookson*.

[11] *Cookson v Knowles* [1979] AC 556, 576. See para 2.19 above.

[12] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.52.

[13] [1991] 2 QB 408.

[14] *Ibid*.

[15] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.52.

4.12 As we have seen, the decision of the majority in *Corbett v Barking, Havering and Brentwood Health Authority*[16] goes some way to mitigating the injustice potentially caused by the use of the date of death calculation. However, the majority in *Corbett* declined to use a simple date of trial calculation. Purchas LJ was of the opinion that a date of trial calculation would "ignore other factors which should reduce the multiplier. These include the changes and chances affecting the hypothetical continuation of the deceased's provision of support."[17] He went on to mention fatal accidents and illnesses, and divorce as relevant in this regard.[18] However, we have already explained our view that the possibilities to which Purchas LJ refers can be factored into the assessment of damages by way of a small reduction to the award for pre-trial losses.[19]

4.13 In spite of the mitigating effect of the decision in *Corbett v Barking, Havering and Brentwood Health Authority*,[20] our view is that the present law can still be subjected to two powerful criticisms. First, it is both irrational and unduly complex to calculate the *claimant's* life expectancy at the time of death, only to make an adjustment to the inaccurate "date of death" figure to take account of information relevant to the original calculation. The present law appears to have developed on the erroneous assumption that the deceased's life expectancy will always control the multiplier. Secondly, as highlighted above, the approach in *Corbett* may still result in the adoption of a lower multiplier than simple date of trial calculation, raising the criticism of inaccuracy.[21] Whilst in theory, the two approaches ought to give rise to the same result, the decision in *Corbett* suggests that in practice, there will be some inconsistency between the results derived from the two approaches. *Corbett* also provides evidence that this inconsistency will work to the claimant's disadvantage, and that the decision in that case may create a problem of undercompensation.

4.14 Although the source of this inconsistency is not entirely clear, it is arguably attributable to the way in which the courts make a deduction from the multiplier to account for the early receipt of the damages. In *Corbett v Barking, Havering and Brentwood Health Authority*,[22] it seems that the discount was made from the whole multiplier selected at the date of death.[23] However, as a matter of principle, this discount should only be made from the proportion of the multiplier to be used in the calculation of the claimant's *future* loss. It is possible that this erroneous approach is encouraged by the present "date of death" rule, and that any adjustment made to the date of death calculation at trial will be insufficient to counteract the erroneous discount for early receipt.

[16] [1991] 2 QB 408.

[17] *Ibid*, at p 428.

[18] *Ibid*, at p 428.

[19] See para 4.9 above.

[20] [1991] 2 QB 408.

[21] See para 4.2 above.

[22] [1991] 2 QB 408.

[23] *Ibid*, at pp 421-423.

(c) The Ogden tables

4.15 Although explicitly intended for use in personal injury *and fatal accident* cases, it is of crucial importance that the present date of death calculation does not enable lawyers and courts to make proper use of the Ogden tables.[24] As laid down by the House of Lords in *Wells v Wells*[25] these are now to be the starting point when calculating multipliers.[26] Multipliers under the Ogden tables are adjusted so as to reflect a discount for early receipt. This discount is calculated to take effect from the date of trial, when the claimant is assumed to receive any award due to him. It follows that multipliers derived from the present Ogden tables should only take effect from trial. If pre-trial losses are calculated as they are at present, by simply subtracting the duration of the period between death and trial from the multiplier derived from the Ogden tables, the deduction for early receipt incorrectly takes effect on pre-trial losses. For example, say the deceased was a female aged 45 at the time of death. The dependant's claim comes to trial five years later. The present approach is to take the multiplier at the date of death (which, using a three per cent discount in table 14 of the Ogden tables, would be 14.70) and for future loss to apply that multiplier minus 5 (ie 9.70). Yet the multiplier for a 50 year-old woman, using the same table, would be 11.78 to which there would need to be *a small discount* for the risk (which the present Ogden tables, geared primarily for personal injury, do not take account of) that the deceased might have died, or given up work, in any event pre-trial. We have been advised that in the above example an actuarially accurate multiplier for future loss is 11.66. On the other hand, the present approach of the courts does not factor into the calculation of pre-trial losses the possibility that the deceased would have died before trial. That is, for pre-trial loss the courts simply apply to the multiplicand the number of years before death and trial. The award for pre-trial losses therefore overcompensates the claimant. However, because the possibility that the deceased would in any event have died between death and trial is small, it is unlikely to cancel out the substantial loss resulting from the inaccuracy in relation to future loss (in the above example, the inaccuracy being the application of a multiplier of 9.70 instead of 11.66). We conclude that the present approach of the courts will result in the adoption of too low a multiplier in at least the vast majority of cases.

(3) Reform

4.16 Our view is that the present law is without a firm theoretical basis, and in some cases generates undue complexity. More importantly, it tends to lead to undercompensation.

4.17 Under our preferred approach, as in personal injury cases, actuarially calculated multipliers would be used in Fatal Accidents Act cases for the purposes of calculating future losses, and thus should be applied from the date of trial. If the multiplier is controlled by the life expectancy of the deceased, it should reflect his or her life expectancy at the time of trial had he or she lived. If the multiplier is controlled by the claimant's need, the selection of the multiplier at trial should

[24] Government Actuary's Department, *Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident cases* (3rd ed 1998).

[25] [1999] 1 AC 345.

[26] See para 2.25 above.

ensure greater accuracy in the compensation of the claimant's losses. In both types of case, pre-trial losses can be assessed straightforwardly as in personal injury cases, without the need to calculate a multiplier: the estimated annual loss can simply be multiplied by the number of years between death and trial. Under this approach, the only significant difference from the approach to pre-trial losses in personal injury cases is that one will then need to make a small deduction to take account of the possibility that the deceased might in any event have died or given up work before trial.

4.18 We should clarify, however, that the simple proposition - "the multiplier should be calculated from trial, not death" - is ambiguous. This is because a straightforward application of pre-trial loss involves a multiplier, albeit a multiplier which is not actuarially calculated and which simply comprises the number of years between death and trial. We therefore think that, instead of saying that multipliers should be calculated from trial not death, our policy is more clearly expressed by saying that a multiplier which has been discounted for the early receipt of the damages shall only be used in the calculation of post-trial losses.

4.19 At one stage, we thought that the way forward was to change the approach applied in *Cookson v Knowles*[27] by a legislative provision. However, after much deliberation, we have come to the view that legislation is probably neither necessary nor appropriate. Our reasoning is as follows.

4.20 First, the majority of the Court of Appeal in *Corbett v Barking, Havering and Brentwood Health Authority*[28] considered that it was possible to adopt a more flexible approach than that laid down in *Cookson v Knowles*.[29] Although the dissenting judge, Ralph Gibson LJ, thought the contrary, *Corbett* indicates that *Cookson* leaves room for judicial manoeuvre without legislation. Moreover, the whole position has been radically changed by the House of Lords in *Wells v Wells*[30] which has authoritatively laid down for the first time that the Ogden tables should be the starting point for the assessment of damages for future pecuniary loss.[31] This will be further cemented in the law as and when section 10 of the Civil Evidence Act 1995 is brought into force.[32] All in all, therefore, it seems to us that after *Wells v Wells* the courts should have no difficulty in applying a new, more scientific, approach despite *Cookson v Knowles*.

4.21 Secondly, the refinement of the correct approach to multipliers in Fatal Accident Act cases is something that is difficult to lay down in detail in legislation. It seems to us to be more appropriately articulated by the Ogden Working Party (which includes the Government Actuary) through the explanatory notes which accompany the publication periodically of their tables.

[27] [1979] AC 556.

[28] [1991] 2 QB 408.

[29] [1979] AC 556.

[30] [1999] 1 AC 345.

[31] See para 2.25 above.

[32] See para 1.14, n 31 above.

4.22 Thirdly, it seems to us that the present Ogden tables may need some modification in order to produce actuarially correct answers in Fatal Accident Act claims, as opposed to personal injury claims. While this is ultimately a matter for the experts on that Working Party (who include actuaries, lawyers, accountants and other interested parties), it would seem premature for the Law Commission to recommend legislative reform based on one approach if those experts have in mind other solutions.

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

2. QUANTIFYING THE LOSS OF A DECEASED'S SERVICES

4.24 Where the deceased provided domestic services for his or her dependants, it is necessary for the purposes of an award under the Fatal Accidents Act to put a value on those services. In the consultation paper we highlighted the difficulties involved in this assessment, particularly in the context of the services provided by a wife and/or mother.[33] Given the intangible benefits of care and affection that accompany domestic services provided within the family, we recognised the difficulty in placing a value on the services. We also noted that the courts have not yet considered the impact of the decision in *Hunt v Severs*[34] on wrongful death claims.[35] In the light of these issues, we took the provisional view that it would not be appropriate to legislate in respect of the quantification of damages for lost services.[36]

4.25 Over 80 per cent of consultees to express a view on this issue were in agreement with our provisional view. Emphasis was placed on two factors: that flexibility is needed to deal with the difficulties highlighted above, and that the effect of *Hunt v Severs*[37] on quantum is not yet clear, so that legislative intervention would be premature and hence inappropriate.

4.26 **We therefore recommend that the law governing the quantification of damages for the loss of a deceased's services is not in need of legislative reform.**

[33] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.53 and 3.54.

[34] [1994] 2 AC 350. See para 2.28 above.

[35] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.55.

[36] *Ibid*.

[37] [1994] 2 AC 350.

3. ACTUAL OR PREDICTED CHANGES IN THE PERSONAL LIFE OF THE CLAIMANT OR THE DECEASED

4.27 An award of damages at large under the Fatal Accidents Act is intended to be compensatory. As a matter of principle, it follows that if the claimant receives or reasonably expects to receive any compensating benefit which will affect the quantum of the dependency loss, this should be taken into account when assessing the damages to be awarded.[38] Among the most obvious benefits that might alleviate a dependency loss are those which might be provided by a new spouse or partner. As such, the fact and prospects of marriage, remarriage and financially supportive cohabitation have implications for the assessment of damages under the Act.

4.28 If damages are intended to be compensatory, then it follows that a factor which would have brought the relationship of dependency to an end should also be taken into account when assessing damages for the purposes of the Act. As such, the possibility that the financially supportive relationship between the deceased and the claimant might have broken down is also a factor relevant to the assessment.

4.29 This section will consider whether there is a need for reform to the law as it relates to these two issues.

(1) Marriage and financially supportive cohabitation

(a) Marriage and the prospects of marriage

4.30 In the consultation paper we expressed concern that section 3(3) of the Fatal Accidents Act 1976 may be an unsatisfactory piece of legislation, on the basis that it creates a large and possibly unjustified exception to the rule that damages under the Act should be assessed so as to compensate as accurately as possible the loss suffered by the claimant as a result of the wrongful death.[39] We reviewed the arguments for and against the exclusion of a widow's remarriage and the prospects thereof from the assessment of damages under the Act.[40]

4.31 Section 3(3) was introduced in the light of concerns that the inquiry into a widow's remarriage prospects generated distasteful and distressing inquiries.[41] However, there has been disagreement as to the extent to which these inquiries did create a real problem before the reform of 1971. We therefore specifically asked consultees whether they believed that the problem of distressing and distasteful

[38] Section 4 and collateral benefits generally are dealt with in Part V below. The following discussion will ignore the present s 4 of the Fatal Accidents Act to which we propose reform.

[39] The Law Commission and the Royal Commission on Civil Liability and Compensation for Personal Injury have both previously considered reform of s 3(3), but their recommendations were not implemented. The Law Commission recommended the extension of s 3(3) to claims by widowers and children: Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 252. The Royal Commission on Civil Liability and Compensation for Personal Injury called for the fact of remarriage before trial to be taken into account: Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054-I, para 412.

[40] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.57-3.60.

[41] See para 2.32, ns 93 and 94 above.

inquiries would indeed be a real and serious one if section 3(3) were simply repealed.[42]

4.32 We suggested a number of options for reform.[43] At present, a widow's remarriage or the prospects thereof are only excluded from an assessment of damages to be awarded to her personally, and not for the purposes of an award to her children, or indeed anyone else. We therefore asked consultees whether they thought section 3(3) should be extended so that the fact or prospects of the claimant's remarrying would be ignored when assessing damages in all cases (option 1). Alternatively, we asked whether consultees were in favour of a partial reform of section 3(3) such that the *fact* of a widow's remarriage could be taken into account, whilst the *prospects* of remarriage would continue to be excluded (option 2). As a third option, we asked consultees whether they thought that section 3(3) should be repealed entirely, and that both the fact and prospects of remarriage should be taken into account in all cases (option 3). We also suggested as a fourth option that the widow's prospects of remarriage could be taken into account by way of a rebuttable presumption based on an objective statistical probability (option 4).[44]

4.33 In the consultation paper, we took the provisional view that reviewable, periodic payments should not be introduced to deal with changing personal circumstances for two combined reasons.[45] We expressed concern about any violation of the general interest in the finality of litigation, and in any case thought it inappropriate to introduce them solely in this context when the courts are so frequently required to estimate future imponderables. Virtually every consultee to express a view on the matter agreed with our provisional view, and there was almost unanimous support for the reasons we gave in the consultation paper. In particular, the marriage issue was regarded as one of the weaker reasons for a move to periodic payments; it was seen as less pressing than, for example, the uncertainty of medical conditions. Accordingly we remain of our provisional view.

4.34 **We therefore recommend that reviewable, periodic payments should not be awarded under the Fatal Accidents Act to deal with the problem of marriage prospects.**

4.35 Of consultees to express a view on the reform of section 3(3), 60 per cent thought that there would be distasteful and distressing inquiries if section 3(3) were simply repealed, whilst 30 per cent disagreed outright. The remainder thought that there would indeed be a problem, but that this simply had to be endured in the light of the compensatory function of the damages to be awarded.

4.36 Of those concerned about the problem, matters specifically highlighted were the possibility of humiliating cross-examinations and comments by defence counsel,

[42] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.64.

[43] *Ibid*, at paras 3.62-3.68.

[44] This option is based on the work of Professor Ogus: A I Ogus, "Remarriageable Widows" (1968) 31 MLR 339; A I Ogus, *The Law of Damages* (1st ed 1973) pp 269-271.

[45] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.61. Contrast P Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed 1999) p 113.

the use of private detectives and video evidence, and the difficult position of the judge in having to make the assessment.

4.37 Consultation has therefore highlighted that the policy concern about "distressing and distasteful inquiries" in fact has two distinct dimensions. The first is that which seems to have motivated the 1971 reform: that it is simply distasteful for a member of the judiciary to assess a widow's prospects of remarriage, and particularly so in the context of a recent bereavement.[46] The second is that distasteful inquiries will be made to gather evidence about, and there will be cross-examination concerning, the claimant's personal life and relationships. The use of surveillance or private detectives might transform a well founded civil action for dependency losses into a process of "dirt digging" simply in order that the defendant's liability might be reduced.

4.38 In addition to these views and in response to option 4, many consultees forcefully expressed the view that it would be inappropriate to rely on actuarial statistics when assessing a claimant's marriage prospects. The use of statistics was criticised on the basis of inaccuracy, and was condemned as "tasteless" and "insensitive" in this context. There was a real strength of feeling that the assessment of a matter as personal and private as the likelihood of marriage by reference to statistics is entirely inappropriate. Concern was also expressed that attempts to rebut the presumption would result in claimants being subjected to exactly the same sorts of inquiry as occurred under the pre-1971 law.

4.39 The views of consultees were split in respect of the four options for reform. Roughly a quarter supported option 1, in the main the same respondents as were very concerned about distressing and distasteful inquiries into a claimant's personal life. A fifth supported option 2, for the reason that it is correct as a matter of principle, to estimate as accurately as possible the claimant's actual future losses, but one should seek to avoid distressing inquiries. Nearly a third supported option 3, maintaining the view that damages under the Act should compensate estimated losses, and no more. A tenth supported option 4, although many were very strongly against the use of statistics. A small number were opposed to any reform, some manifesting a feeling that this problem simply cannot be resolved satisfactorily, whilst a few expressed no clear preference.

4.40 Thus, almost 90 per cent of consultees took the view that there should be some reduction in the ambit of section 3(3) so as better to fulfil the compensatory function of the Fatal Accidents Act. The consultation process therefore supported our feeling that section 3(3) is an unsatisfactory piece of legislation, and that reform is desirable. On the other hand, a majority of those to express a view on the matter were of the clear opinion that the matter involves a risk of distasteful and distressing inquiries into the widow or widower's personal life.

4.41 We accept that it would be inappropriate to dismiss the concern on which the 1971 reform was based, and which was reiterated in response to the consultation paper: that there is no acceptable means of assessing a person's prospects of marriage, other than where there is clear, objective evidence on which one can

[46] See para 2.32, ns 93 and 94 above.

base that assessment. Our view is therefore that the Fatal Accidents Act should continue to exclude any judicial assessment of a widow's prospects of remarriage unless the widow is engaged to be married at the time of trial.

4.42 We recognise that there may be some difficulty in determining whether a person is engaged to another. However, we find the Family Law Act 1996 helpful in this respect. Certain provisions of the 1996 Act apply as between "associated persons",[47] defined in section 62(3)(e) as including two people who have agreed to marry.[48] Under section 44 of the 1996 Act an agreement to marry may only be established by evidence in writing of the existence of the agreement, the gift of an engagement ring by one party to the agreement to the other in contemplation of their marriage, or a ceremony entered into by the parties in the presence of one or more witnesses. In order to avoid uncertainty as to whether a person is in fact engaged, we recommend that these requirements should apply for the purpose of establishing that a widow is engaged to be remarried.

4.43 A number of consultees noted that the arguments discussed above are not confined in their application to widows. In particular, a number argued strongly that there is no good reason why widowers should be excluded from the scope of the protection created by section 3(3).[49] The present law was described as "anomalous" and "absurd". The section was thought to reflect a by-gone age when "women would have no gainful employment".

4.44 We believe that the exclusion should not be confined to widows, but should apply to any person whose marriage prospects might be assessed in a Fatal Accidents Act claim. In particular, it is clear that widowers are likely to have a claim under the Act in respect of their wife's wrongful death, and although some might regard it as less objectionable - on the ground that the female "beauty parade" element is missing - a judicial assessment of widowers' prospects of remarriage is objectionable for the same sort of reasons which underpinned the 1971 reform. Further, given that a person's prospects of marriage might be relevant to the claim of another person (most obviously, that of his or her children), our view is that it would be equally distasteful for the court to assess that person's prospects of marriage in assessing the other's claim. We therefore recommend that unless a person is engaged to be married at the time of trial, it should not be possible to

[47] Section 33 of the Act reforms the courts' powers to make occupation orders in respect of property, whilst s 42 of the Act is concerned with domestic violence, and reforms the courts' powers to make non-molestation orders. Both sections were implemented on 1 October 1997 by the Family Law Act (Commencement No 2) Order 1997, SI 1997 No 1892.

[48] The list of "associated persons" between whom the powers might be exercised was extended at the report stage to include persons who had agreed to marry. The Lord Chancellor had initially expressed concern that to extend the list in that way would create uncertainty, and would create the need for a preliminary trial on the question of entitlement. However, he subsequently accepted that there was a powerful case for extending ss 33 and 42 to persons who had agreed to marry, and took the view that the problem of uncertainty would be adequately dealt with by the introduction of s 44: *Hansard* (HL) 25 May 1995, vol 564, cols 1061-1067.

[49] These consultees included George Pulman QC, Prue Vines, Mark Lunney, Geraldine McCool of Leigh, Day & Co., Arpad Toth, RoadPeace and The Medical Defence Union.

take into account that person's prospects of marriage when assessing damages under the Fatal Accidents Act (whether that person is the claimant or not).

4.45 A remaining question is as to whether the fact that a widow or widower has remarried by the time of trial should be taken into account when assessing damages under the Fatal Accidents Act. Taking into account the views of those in support of options 2, 3 and 4,[50] a clear majority of consultees thought that the fact of a marriage should be taken into account. Indeed, it is at first sight difficult to see why section 3(3) was extended to exclude the fact of a widow's remarriage from the assessment of damages if it was the undesirability of judges having to assess widows' prospects of remarriage that gave rise to the 1971 reform.

4.46 Nevertheless, the consultation paper did note a different argument against the taking into account of the fact of marriage, which is as follows.[51] If the law were to take into account the fact but not the prospects of marriage, this would simply give claimants an incentive to hold back their marriage until after trial, rendering the distinctions drawn entirely artificial. Further, in giving claimants this incentive, the law would be encouraging them to "live in sin".

4.47 Whilst it is true that the creation of any threshold can have the effect that claimants arrange their affairs in an evasive fashion, we believe that the following point addresses this objection. Our reform of section 3(3) must take the form of a compromise between two competing interests: the need to assess damages as accurately as possible, and the desire to avoid an assessment of the prospects of marriage. As such, it will inevitably involve the setting of a threshold. In striking the best balance between those interests, we are concerned to give claimants minimal scope to evade the rules by tactically arranging their personal lives. The chances that they will be able to do so are limited when both the present fact of financially supportive cohabitation, and the immediate prospect of marriage (indicated by an engagement) are taken into account when assessing damages, for the reason that it is at these points that a mutually supportive relationship is likely to develop.[52] In respect of the argument that the law should not encourage couples to "live in sin", we do not believe that this argument can be sustained when the law has already recognised that cohabitants should be entitled to claim under the Act, and when the fact of financially supportive cohabitation is taken into account when assessing damages.

4.48 For reasons analogous to those discussed above, our view is that the fact of a marriage should be taken into account in a relevant case whether the married person is the claimant or not.

[50] On the basis that those in favour of option 4 were in favour of taking a claimant's prospects of remarriage into account, we assume that they were also in favour of taking the fact of their remarriage into account.

[51] Claims for Wrongful Death (1999) Consultation Paper No 148, para 3.63.

[52] See paras 4.49-4.52 below.

(b) The fact or prospect of the claimant spouse entering into a relationship of financially supportive cohabitation

4.49 We asked consultees whether they thought that, apart from the conceivable impact of the existing section 4 of the 1976 Act, the fact or prospects of financially supportive cohabitation are relevant considerations in the assessment of damages under the 1976 Act, and further whether they thought that reform was needed to the present law in this respect.[53]

4.50 This was an issue on which relatively few consultees expressed a clear view. Of those that did, a majority thought that existing and prospective cohabitation should be taken into account, whilst the remainder were split between those expressing a preference for taking only the present fact of cohabitation into account, and those who opposed taking cohabitation into account at all. As such, there was again widespread support for the view that damages should be assessed as accurately as possible, and taking into account any factor which alleviates the loss of dependency.

4.51 However, our view is that the concerns widely expressed in the debate about section 3(3)[54] apply equally in the context of an inquiry into the prospect of the claimant entering into a relationship of financially supportive cohabitation. Further, a judicial or statistical assessment of the prospect that the claimant will enter into a new relationship raises much the same issues as those arising in relation to taking account of prospects of marriage.

4.52 Whilst engagement provides a clear, objective indication that a relationship will very likely develop into a relationship of dependence, we do not believe that there is any similar factor indicating a likelihood that a couple will move in together. It is therefore our view that the prospect of a claimant entering into a relationship of dependence with a cohabitant should be excluded altogether from the assessment of damages under the Fatal Accidents Act. On the other hand, the fact that a couple are cohabiting should be taken into account wherever relevant.

4.53 **We recommend that:**

(1) **section 3(3) of the Fatal Accidents Acts should be repealed. Unless a person is engaged to be married at the time of trial, the prospect that he or she will marry, remarry or enter into financially supportive cohabitation with a new partner, should not be taken into account when assessing any claim for damages under the Fatal Accidents Act. The fact of a marriage and, as appears to be the present law, the fact of financially supportive cohabitation should be taken into account wherever relevant;**

(2) **as under the Family Law Act 1996, it should not be possible to establish an agreement to marry other than by evidence in writing of the existence of the agreement, by the gift of an engagement ring by one party to the agreement to the other in contemplation of their**

[53] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.68.

[54] See paras 4.35-4.38 above.

marriage, or by a ceremony entered into by the parties in the presence of one or more witnesses. (Draft Bill, clauses 4 and 6(5))

(2) Divorce and breakdown of financially supportive cohabitation

(a) The prospect of divorce or breakdown in a marital relationship

4.54 As a general rule, when assessing damages for the purposes of the Fatal Accidents Act any factor which affects or would have affected the quantum of benefits received by the claimant from the deceased should be taken into consideration. The prospect of divorce between the claimant and the deceased is clearly a factor with relevance to that assessment, and under the present law is taken into account when assessing damages for the purposes of the Act.[55]

4.55 As with marriage, the prospect that a couple "would have divorced" can be divided into the statistical or "background" chance that the couple would have divorced, and the more imminent prospect of divorce, identified from clear objective evidence of the couple's relationship. The evidence on which the Court of Appeal relied in *Owen v Martin*,[56] when taking into account the prospect of divorce between a married couple, fell somewhere between these two extremes. The case did not deal with the background chance of divorce, but nor was there any sign of deterioration in the relationship between the deceased and his wife. Rather, the prospect of divorce was inferred from the wife's character: her past infidelity, and the fact that by the time of trial, she had remarried.

4.56 In the consultation paper, we identified arguments for and against taking into account the prospect of divorce between the deceased and the claimant.[57] We expressed a concern that it is unappealing to take into account the prospect of divorce between a couple who were happily married at the time of the deceased's death. We also expressed sympathy with concerns about the uncertainty of the assessment and about the prospect of distasteful inquiries. However, we also took the view that it would be wrong knowingly to overcompensate claimants, where there were objective and incontrovertible indicia that a particular couple were likely to divorce. We therefore provisionally recommended that the prospect of divorce should be taken into account where there is clear evidence that the claimant and the deceased might well have divorced.[58] We also asked consultees whether, contrary to our provisional view, they thought that the "background

[55] See para 2.34 above. A number of consultees thought it important that the following point should be emphasised. What is crucial for present purposes is not the likelihood of divorce in a marriage, but the likelihood that the provision of support will cease at some stage in the future. Where a marriage has ended in divorce, the support that was provided as a part of the marital relationship may continue to be available through maintenance payments by one party to the other. It is on this basis that former spouses of the deceased have a right to claim under the Fatal Accidents Act. As such, account should be taken of the fact that divorce in a relationship does not necessarily mean that the provision of financial support by one party to the other will cease.

[56] [1992] PIQR Q151, discussed at para 2.34 above.

[57] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.69.

[58] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.69.

chance" of divorce ought to be taken into account by way of a rebuttable presumption.[59]

4.57 Over two-thirds of consultees agreed with our provisional view, although there was a variety of views as to what would constitute clear evidence. It is also important to note that consultees drew the threshold in identifying "clear evidence" higher than did the Court of Appeal in *Owen v Martin*,[60] and instead looked for evidence that the couple were having problems in the relationship: that they were contemplating divorce, or had separated, or that divorce proceedings had been commenced. Concern was expressed by consultees about the way in which the inquiry into whether divorce was likely would be conducted. About one-sixth were in favour of taking all prospects of divorce into account, half of whom were in favour of using a rebuttable presumption. However, there was also a strength of feeling that the statistical approach was inappropriate and insensitive in this context, as in the context of marriage. Of the minority of respondents who thought that the prospect of divorce should never be taken into account when assessing damages under the Act, their concerns echoed those expressed in the consultation paper.[61]

4.58 In the light of both the consultation process and our conclusions on the question of marriage, we remain of the view that the statistical, background chance of divorce between the claimant and the deceased should not be taken into account when assessing damages for the purposes of the Fatal Accidents Act. The use of the actuarial approach in this context was criticised as "repugnant", "socially" and "politically unacceptable" and "very distasteful". These criticisms reflect the same strength of feeling, that it is thoroughly insensitive to make judgments about intimate aspects of people's personal lives on the basis of statistics, that we have seen in relation to marriage. Further, we believe that the criticisms are, if anything, more potent than in the marriage context, given that here the statistics would be used to cast doubts over the claimant's relationship with the deceased, rather than to denote the prospect of a new relationship in the future.

4.59 Although consultees expressed a variety of views as to what they considered to be "clear evidence that the couple might well have divorced", they universally interpreted the expression as denoting the need for some deterioration in the relationship between the couple. We believe that there are two powerful reasons in favour of this view.

4.60 First, we would concede that, in principle, evidence of the claimant's other relationships might be relevant to the assessment of the prospect of divorce. However, *Owen v Martin*[62] provides support for the view that this sort of evidence can only be taken into account in an arbitrary, unprincipled way. In that case, the claimant had been married three times by the time of trial, and was known to have committed adultery twice. Having concluded that her relationship with the deceased was also likely to end in divorce, the Court of Appeal reduced the

[59] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.72.

[60] [1992] PIQR Q151.

[61] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.69.

[62] [1992] PIQR Q151.

multiplier from 15 to 11. In our view, it is impossible to estimate with any degree of precision whether and when a happy relationship would have come to an end. Further, even on the arguably extreme facts of *Owen*, the result was a relatively small reduction in the multiplier. We would therefore question whether the assessment in *Owen* was a realistic one, and whether a marriage is in fact likely to last for 11 years if divorce is so likely that it can be identified even when the couple are experiencing no difficulties in their relationship. If the reality of *Owen* is that claimants simply suffer a deduction for their past infidelities, it is difficult to countenance such an unprincipled assessment.

4.61 A second argument stems from a matter discussed at length above: that it is distasteful for a court to assess a claimant's prospects of marriage. Our view is that this objection applies analogously in this context. It would be inconsistent to vest in the judiciary a responsibility for assessing the likelihood of divorce in a relationship when there has been widespread objection to the suggestion that they should make an assessment of a person's prospects of marriage. Rather, and this view was expressed by a large number of consultees, the two questions are linked: it is distasteful for judges to reach speculative conclusions about intimate aspects of people's lives.

4.62 Our view is that we should not propose legislation simply to the effect that "the prospect of divorce shall not be taken into account unless there is clear evidence of a likelihood of divorce". This would leave open the possibility that the courts could maintain the approach in *Owen v Martin*,[63] arguing that evidence of other relationships is clear evidence. It is therefore necessary to identify the extent to which a relationship must have deteriorated before it can be said that there is "clear evidence" of a likelihood of divorce.

4.63 Above, we argued that only the fact of the claimant's engagement is sufficiently clear evidence for a judge to be able fairly and tastefully to conclude that a person is likely to marry. Analogously, we are of the view that the assessment of the prospect of divorce should rely on clear, objective indicia of a deterioration in the claimant's relationship with the deceased.

4.64 In the light of the sensitive subject matter with which this assessment is concerned, we do not believe that individual incidents or events, or even a more extended period of difficulty can be regarded as clear objective evidence of a likelihood of breakdown in a relationship. However, where divorce proceedings have been commenced, it would be neither premature nor distasteful for a judge to conclude that the couple would have divorced. That a couple have separated and are no longer living together is also a clear factor which might enable the court to reach the conclusion that the couple would have divorced. We also think that the court should be able to take account of the fact that one of the couple has petitioned for judicial separation or nullity. We would stress that periods of separation in the past after which the couple had recommenced living together, should not be taken into account. If the couple had resolved their difficulties, it would be wrong to infer that they were still likely to divorce.

[63] [1992] PIQR Q151.

4.65 Analogously to our recommendations regarding marriage and cohabitation set out above, our view is that the exclusion must also apply where the person claiming damages is someone other than the deceased's widow or widower.

4.66 **We therefore recommend that the prospect of divorce or breakdown in the relationship between the deceased and his or her spouse should not be taken into account when assessing damages for the purposes of any claim under the Fatal Accidents Act unless the couple were no longer living together at the time of death, or one of the couple had petitioned for divorce, judicial separation or nullity.** (Draft Bill, clause 4)

(b) The prospect of breakdown in a relationship of financially supportive cohabitation between the claimant and the deceased

4.67 Where the claimant cohabited with the deceased, section 3(4) of the Fatal Accidents Act has the effect that the assessment of an award of damages to the claimant should take into account the fact that the claimant had no enforceable right to support from the deceased.

4.68 On its face, the purpose of this provision in referring to the right to support is not absolutely clear. During the House of Lords debate on the Administration of Justice Bill, Lord Hailsham LC explained that the provision was intended to draw attention to the fact that a cohabitant "does not have the same expectation ...of the relationship enduring" as a person who was married to the deceased.[64] Whether or not this assumption is correct, we do not believe that it is clearly expressed by reference to a wife's common law right to support from her husband. As such, we believe that an initial criticism of the current section 3(4) is that it is opaque and fails clearly to reflect the policy underpinning the subsection.

4.69 However, whether a judge should assess the prospect of breakdown in a relationship between cohabitants is a matter very much akin to the divorce issue discussed above. Any inquiry into this possibility must raise exactly the same concern as was expressed in that context: that it is distasteful for a judge to assess the likelihood of breakdown in a relationship. Nor would we want to distinguish the issues given that one of our guiding principles is the need to eliminate prejudice against those who choose to cohabit rather than to marry.

4.70 Above, we proposed that the prospect of divorce should not be taken into account unless the couple had separated, or one of the couple had petitioned for divorce, judicial separation or nullity. We have not been able to identify any objective factor which might indicate the imminent prospect of separation in a relationship between cohabitants.

4.71 **We therefore recommend that section 3(4) of the Fatal Accidents Act should be repealed, and replaced by a provision to the effect that the prospect of breakdown in the relationship between the deceased and his or**

[64] *Hansard*, (HL) 4 May 1982, vol 429, col 1108.

her partner should not be taken into account when assessing damages under the Act.[65] (Draft Bill, clauses 4 and 6(5))

[65] Under our recommendation, where cohabitants had already ceased to live together at the time of death, this fact would be taken into account by the courts (as appears to be the present law). On the other hand, it would be wrong to assume in these circumstances that the *dependency* had also ended before that time, because as in a marital relationship, financial commitments (such as mortgage repayments) may endure after the point at which the couple separated.

PART V
REFORM: COLLATERAL BENEFITS (SECTION 4 OF THE 1976 ACT)

1. OUR QUESTIONS TO CONSULTEES

5.1 As we have seen above,[1] section 4 of the Fatal Accidents Act 1976 states that:

> In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.

The section has been interpreted literally by the courts, contrary to the apparent intention of the legislature. For example, in *Topp v London Country Bus (South West) Ltd*[2] May J accepted a concession by counsel that a widower's prospects of remarriage should be disregarded under section 4, despite section 3(3), which explicitly provides for the remarriage only of widows to be ignored.[3] In the consultation paper we disapproved of this extension of the rule in section 3(3) by a "side-wind".[4] We thought that the same criticism might be made of the possible effect of section 4 on whether the fact, or the prospects of, financially supportive cohabitation should be taken into account.[5]

5.2 We noted that the courts have at times reached the conclusion that particular benefits should be taken into account despite section 4, on the basis that the benefit prevented the dependent from suffering any loss.[6] We acknowledged that this may achieve the correct result in principle, but considered that this was at the cost of creating fine distinctions.[7]

5.3 We provisionally concluded that, in line with the apparent intention of Parliament, the present section 4 should be repealed, and that there should once again be a statutory list of the types of benefit which should be disregarded in the assessment of damages.[8] We asked consultees if they agreed.

5.4 We went on to consider which benefits should be taken into account and which should be disregarded. We noted that the rules for the treatment of collateral benefits in actions under the Fatal Accidents Act had developed differently from

1 See para 2.38 above.

2 [1992] RTR 254.

3 *Ibid*, at p 267.

4 Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.74.

5 *Ibid*.

6 *Ibid*, at para 3.75.

7 *Ibid*, at paras 3.75 and 3.76.

8 *Ibid*, at para 3.76.

those in cases of personal injury.[9] We could see no justification for this. We asked consultees if they agreed with our provisional conclusion that there should be consistency between the law on collateral benefits in personal injury claims and in Fatal Accidents Act claims.[10]

5.5 We referred to our consultation paper, Damages for Personal Injury: Collateral Benefits,[11] which we published simultaneously with our consultation paper on wrongful death. We applied our reasoning about collateral benefits in personal injury cases to claims for wrongful death. We sought consultees' views on 6 options for reform.[12] These corresponded to the 6 options put forward in our paper on collateral benefits in personal injury cases.[13]

5.6 The first two options derived from an argument which can be summarised as follows:

(a) The primary purpose of tort law should be seen as compensation, but no more than compensation, for those injured by a legal wrong. Pursuit of this objective requires the deduction of collateral benefits in the assessment of damages where they meet the same loss.

(b) The correctness of this conclusion is supported by a policy argument, based on relevant empirical evidence. Tort damages reach very few victims of illness and injury and at a high cost. This cost is met by the large pool in society which contributes to liability insurance. Double compensation should be avoided, so that the cost to individuals and to society of tort compensation may be reduced, thereby potentially increasing the funds available in society to improve provision for disabled people.

(c) Policy arguments may override the case against double recovery which this analysis sets up. On the other hand, it is a matter for debate whether the policy arguments accepted by the courts for ignoring some collateral benefits in the assessment of damages withstand close scrutiny.

5.7 It follows that there is a case for accepting the following proposition for personal injury cases:

> Subject to where the provider of the collateral benefit has a right to recover the value of the benefit from the victim in the event of a successful tort claim, or to recover the value of the benefit from the tortfeasor by being subrogated to the victim's undischarged tort claim, collateral benefits, unless essentially coincidental, received by the

[9] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.77.

[10] *Ibid*, at para 3.78.

[11] (1997) Consultation Paper No 147.

[12] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.96-3.109.

[13] Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 4.80-4.105.

> victims of personal injury should be deducted from damages which meet the same loss.[14]

5.8 The analogous proposition in the Fatal Accidents Act context is as follows:

> Subject to where the provider of the collateral benefit has a right to recover the value of the benefit from the claimant in the event of a successful tort claim, collateral benefits (unless essentially coincidental) received by claimants should be deducted from damages under the Fatal Accidents Act which meet the same loss.[15]

We termed this "the proposition underpinning the deduction options" and asked consultees if they agreed with it.[16]

5.9 We considered the implications of the proposition for the different benefits which might be received by a claimant under the Fatal Accidents Act.[17] We identified the relevant benefits as charity, survivors' pensions, life insurance and inheritance.[18] We explored whether these could be said to meet the same loss as damages under the Fatal Accidents Act. No conclusion was reached in respect of charity.[19] For the other benefits our views were as follows:

(1) Survivors' pensions and some inheritances meet the same loss as damages for loss of dependency under the Fatal Accidents Act. Inheritance indemnifies loss of dependency where the claimant inherits an asset (or a share in the proceeds of sale of an asset) the income from which was used by the deceased to support the claimant and, in addition, where the claimant inherits damages recovered by the deceased for loss of earnings in the "lost years".[20]

(2) Life insurance does not meet the same loss as damages under the Fatal Accidents Act.

5.10 On the basis of the conclusions reached, we formulated the two deduction options.[21] *Option 1* was as follows:

[14] Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, para 4.51.

[15] We have deleted in this context the reference to subrogation because, as we understand it, a life insurer has no automatic subrogation rights (and, arguably, could not contract for such rights) because life insurance is non-indemnity insurance. See para 2.63 above.

[16] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.84.

[17] *Ibid*, at paras 3.85-3.94.

[18] We considered gratuitous care provided to a dependant separately: Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.117-3.119.

[19] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.86 and 3.87.

[20] *Ibid*, at paras 3.88 and 3.91-3.94. See further our discussion of *Jameson v Central Electricity Generating Board* [1999] 2 WLR 141 at paras 2.52-2.58 above.

[21] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.96 and 3.99.

(1) Subject to the provisos set out in (6) and (7) below, charitable payments made in response to a fatality should be deducted from the total sum of damages under the Fatal Accidents Act.

(2) Subject to the provisos set out in (6) and (7) below, survivors' pensions should be deducted from damages for loss of dependency under the Fatal Accidents Act.

(3) Subject to the provisos set out in (6) and (7) below, where a claimant inherits capital or an asset (or the monetary equivalent of the asset) from the deceased, which was used before the fatality to support the claimant, the income from that inheritance should be deducted from damages for loss of dependency under the Fatal Accidents Act.

(4) Subject to the provisos set out in (6) and (7) below, where a claimant inherits damages for loss of earnings in the deceased's "lost years", where the deceased would have supported the claimant from the earnings for which damages were awarded, this sum should be deducted from damages for loss of dependency under the Fatal Accidents Act.

(5) All other inheritance, and insurance payments, should be ignored in the assessment of damages under the Fatal Accidents Act.

(6) A first proviso to (1) - (4) above is that where the benefit is expressed to be on account of a particular loss it should be deducted only from damages for that loss.

(7) A second proviso to (1) - (4) above, is that where the provider of the collateral benefit has a right (by contract or by operation of law) to recover the value of the benefit from the claimant in the event of the claimant recovering damages in respect of the fatality, the collateral benefit should not be deducted from tort damages.[22]

Option 2 differed from Option 1 only in that it provided for charity to be ignored.

5.11 We anticipated that the remaining options would be of appeal only to consultees who rejected the proposition underpinning the deduction options.[23] *Option 3* was to reform the law in keeping with one of the deduction options, but to add the proviso that a collateral benefit which was intended to be in addition to tort damages should be ignored.[24] We asked consultees who favoured this option to specify whether the qualification should be applied to Option 1 or to Option 2.[25]

[22] See paras 2.59-2.64 above.

[23] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.100.

[24] *Ibid*.

[25] *Ibid*, at para 3.102.

5.12 Under *Option 4* the law would be altered only to provide for survivors' pensions to be deducted. Charity, life insurance and inheritance would continue to be ignored.[26]

5.13 *Option 5* provided for all collateral benefits to be ignored.[27] In the personal injury context this would require the law to be changed, but is the existing law under the Fatal Accidents Act. We provisionally rejected this option as being the furthest from the "compensation equals deduction" approach.[28] We also noted that to favour it would be inconsistent with the view we had reached earlier that section 4 should be repealed.[29]

5.14 The final option in consultation paper No 147 was that there should be "no change".[30] For personal injury claims this meant, broadly speaking, that charity, insurance and pensions should be ignored, but that sick pay and redundancy payments should be deducted. The nearest equivalent here, and therefore *Option 6* in this context, would be for charity, insurance, survivors' pensions and inheritance to be specified in legislation as non-deductible.[31] This option would come close to the pre-1982 section 4 and even closer to our recommendations in our Report on Personal Injury Litigation - Assessment of Damages (albeit that those recommendations also dealt with social security benefits).[32]

5.15 The next major issue addressed in the consultation paper was whether there should be any change in the law regarding the rights of providers of collateral benefits. We first considered whether the provider of a deductible collateral benefit should have a right to recoup the value of the benefit from the defendant and referred consultees to the detailed discussion of this issue in our consultation paper on collateral benefits.[33]

5.16 We observed that the decision of the Court of Appeal in *Receiver for the Metropolitan Police v Croydon Corp*[34] stands in the way of the common law developing a general recoupment right for providers of deductible collateral benefits. We asked if consultees agreed with our provisional view that the reasoning

[26] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.103.

[27] *Ibid*, at para 3.107.

[28] *Ibid*, at para 3.107. See further Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 4.98-4.100, where we reached the same view in respect of the equivalent option for personal injury cases.

[29] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.107.

[30] Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, para 4.101.

[31] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.108. We address the issue of damages in respect of care provided to a dependant at paras 5.47-5.55 below.

[32] See para 2.37 above, and Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, paras 1.23-1.59.

[33] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.110-3.113; Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 5.1-5.31

[34] [1957] 2 QB 154.

of Slade J at first instance in that case is to be preferred.[35] He argued that the payment of a deductible collateral benefit under legal compulsion benefits the tortfeasor by discharging his or her liability.[36] If consultees agreed, we asked if, in the light of the arguments of policy and principle analysed in Damages for Personal Injury: Collateral Benefits,[37] they favoured giving charitable donors, and/or providers of survivors' pensions, a statutory right to recoup the value of their payments from the tortfeasor (assuming the payments had been deducted from the claimants' damages).[38]

5.17 Secondly, we asked consultees if there should be a statutory right to recover non-deductible collateral benefits from the recipient of tort damages.[39] We referred consultees to the detailed discussion of this issue in our consultation paper on collateral benefits,[40] although we noted that in practice it is unlikely that the benefits encountered in a Fatal Accidents Act claim would be made subject to a contractual repayment right.[41]

5.18 We referred consultees to a model proposed by the Ontario Law Reform Commission, for giving the provider of a collateral benefit a repayment right against the tort victim. The suggestion was that damages in respect of the loss covered by the collateral benefit should be awarded to the claimant to be held on trust for the collateral source. The wrongdoer should also be entitled to repay the collateral source direct.[42] Our provisional conclusion was that the collateral source's right to repayment from the recipient in the event of a successful tort claim should be left to common law development. We asked consultees if they agreed, and also sought their views concerning the Ontario Law Reform Commission's suggestion.[43]

5.19 We next turned to consideration of what the law should be regarding the provision of gratuitous services to a claimant under the Fatal Accidents Act.[44] We referred to the provisional recommendations for reform made in our consultation paper, Damages for Personal Injury: Medical, Nursing and Other Expenses.[45] We

[35] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.113. The decision of Slade J is reported as *Receiver for the Metropolitan Police District v Croydon Corp* [1956] 1 WLR 1113.

[36] [1956] 1 WLR 1113, 1119, 1130 and 1131.

[37] (1997) Consultation Paper No 147, paras 5.3-5.20.

[38] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.113.

[39] *Ibid*, at paras 3.114-3.116.

[40] Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 5.22-5.26.

[41] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.114. See para 2.61 above.

[42] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.115.

[43] *Ibid*, at para 3.116.

[44] *Ibid*, at paras 3.117-3.119.

[45] (1996) Consultation Paper No 144.

provisionally concluded that the proposals for reform made there should be applied to Fatal Accidents Act cases, and asked consultees if they agreed.[46]

5.20 Finally, we discussed the social security recoupment provisions.[47] We asked consultees if they thought the recoupment scheme which applies in personal injury actions should be extended to fatal accident cases.[48]

2. CONSULTEES' RESPONSES AND OUR RECOMMENDED REFORMS

(1) The existing section 4 should be repealed and the law reformed in line with Option 6

5.21 The first issue is whether section 4 is in need of reform. We remain convinced that it is. We have been particularly influenced by the fact that 82 per cent of consultees who addressed this issue agreed with our provisional view that the current section 4 should be repealed, and that there should be a return to the statutory listing of benefits which should be disregarded in the assessment of damages. Moreover *R v Criminal Injuries Compensation Board ex parte K*[49] demonstrates that the interpretation of section 4 continues to cause difficulty. We have therefore concluded that there should be a return to a statutory listing of benefits to be ignored. This will solve the problems which have been caused by the overinclusiveness of section 4 as currently drafted. **We therefore recommend that the existing section 4 be repealed.**

5.22 The much more difficult question is what the new law should be. Our conclusion is that the law should be reformed in line with Option 6. That is, the law on collateral benefits in Fatal Accidents Act cases should be rendered as consistent as possible with the common law on collateral benefits in personal injury cases, through listing charity, insurance, survivors' pensions and inheritance as non-deductible. The main reasons for our view are that:

(1) First, although consultees thought the rules on collateral benefits in both fatal accident and personal injury cases were in need of reform,[50] there was considerable dissension about what form the new law should take. The only real measure of agreement was that 92 per cent thought there should be consistency between the law on collateral benefits in personal injury and in Fatal Accident Act claims.

(2) Secondly, the one option which commanded sufficient consensus to provide a way forward, Option 4, appeared on closer scrutiny to be unworkable in practice.

[46] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.119.

[47] *Ibid*, at paras 3.120-3.125.

[48] *Ibid*, at para 3.125. We did not consider that there should be any recoupment from bereavement damages.

[49] [1999] 2 WLR 948, discussed at paras 2.47-2.49 above.

[50] Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, para 11.17.

These considerations led us to the view that the law in personal injury cases should be left unchanged.[51] Analogously for wrongful death claims, we have concluded that the law should be altered only to remove the problems caused by the overinclusiveness of the current section 4, and to create consistency with personal injury cases.

5.23 We shall now set out more fully how we have reached this position and the precise form which we believe the new law should take. In doing so we shall advert to consultees' views. We shall also set out conclusions that we have reached on a number of subsidiary issues, in the hope that these will be of assistance both in the continuing development of the law by the courts and should the Government wish to give consideration to further reform of the law on collateral benefits.

5.24 Beginning first at the non-deduction end of the spectrum, around 18 per cent of consultees who chose an option favoured Option 5, according to which all collateral benefits should be ignored. Some of this support was, however, contingent on the creation of statutory repayment rights for the providers of collateral benefits, which we reject below.[52] Moreover there was a very substantial majority who supported our provisional view that Option 5 should be rejected.

5.25 We have no hesitation in agreeing with the majority that Option 5 should be rejected. Most importantly, and in common with very many consultees, we believe that to ignore all collateral benefits is wrong because it flies in the face of the cardinal principle that (with limited exceptions) tort damages are compensatory. The approach required by principle is also supported by the argument of policy for deduction mentioned above.[53] We are therefore convinced that, prima facie, collateral benefits which meet the same loss as tort damages should be deducted.

5.26 In reaching this view we have taken account of the arguments made in support of Option 5. Some consultees argued that ignoring all collateral benefits is justified despite the compensatory principle, since in fact awards fall far short of being compensatory. Peter Andrews QC said:

> The objection to [disregarding collateral benefits] is the argument that tort damages are compensatory in nature. However this is a chimerical illusion. In practice, the present law of the once and for all, lump sum compensation for personal injury or death, as a matter of actuarial inevitability, cannot hope to produce damages which are fair and adequate, no more and no less, for the wrong done. There are many examples, of which the decision in [the Court of Appeal] in *Wells v Wells* … is the most obvious in its downsizing effect on quantum claims. Against this background the concept of double recovery is fanciful. The widow or other dependant needs all the financial help which is available - from whatever source.

[51] Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, para 11.18.

[52] See para 5.70-5.73 below.

[53] See para 5.6 above.

Our view remains that it is inappropriate to make up for the insufficiency of awards by abandoning the compensatory principle in the rules governing collateral benefits.[54] Rather the causes of the inadequacy should be addressed directly, which we seek to do in the recommendations made in this report and elsewhere in our work on damages.[55]

5.27 Moreover, we note that the particular and substantial criticism of tort damages made by Mr Andrews has been remedied by the decision of the House of Lords in *Wells v Wells*.[56] In our view this decision significantly increases the likelihood that lump sum awards for future pecuniary losses will be sufficient to cover the losses sustained. As a result, if anything, the decision in *Wells v Wells* now strengthens the case for ensuring that the rules governing the treatment of collateral benefits adhere to the compensatory principle.

5.28 We acknowledge the further argument made in favour of Option 5 that it ensures simplicity and certainty. We are, however, not convinced by this contention, particularly in the light of ongoing litigation concerning the meaning of the existing section 4.[57]

5.29 Turning now to the deduction options, and commencing with those which go the furthest in this direction, we have concluded that Options 1 and 2 should be rejected. This is because, quite simply, they received insufficient support: about 20 per cent favoured Option 1 and about 29 per cent Option 2. Moreover some of the support for these options was contingent on the creation of a statutory recoupment right for providers of collateral benefits, which we reject below.[58]

5.30 Consultees' opposition to the deduction of charity was particularly clear. For example Peter Weitzman QC considered that deduction of charitable payments would be "an affront to donors". Others, such as Prue Vines and Dr Gerhard Dannemann, commented that in other jurisdictions such payments are invariably disregarded.

5.31 Option 3 is the next of the deduction options. According to it either Option 1 or Option 2 should be adopted, but with the additional proviso that a collateral benefit which was intended to be in addition to tort damages should be ignored. This approach received very little support here or in the responses concerning personal injury cases.[59] Option 3 was emphatically rejected by many consultees, particularly on the basis that it would be unworkable to inquire into the intentions of providers of collateral benefits. Ian A B McLaren QC said:

[54] Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, para 11.27.

[55] Damages for Personal Injury: Non-Pecuniary Loss (1999) Law Com No 257; Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262.

[56] [1999] 1 AC 345, discussed at paras 2.24 and 2.25 above. See Damages for Personal Injury: Non-Pecuniary Loss (1999) Law Com No 257, paras 2.46-2.58.

[57] See paras 2.40-2.51 above.

[58] See paras 5.70-5.73 below.

[59] Some four per cent in the responses to the consultation paper on wrongful death.

> I do not regard [Option 3] as a workable option. It involves trying to find out the intention [of the provider of the collateral benefit] which is not going to be clear in many cases. It just adds to the problems.

In line with consultees' marked opposition, we reject Option 3.

5.32 Option 4 is the final of the deduction options. According to it the law should be changed to provide for the deduction of survivors' pensions from damages for loss of dependency. Around 16 per cent of consultees gave Option 4 as their first choice. However, since it is implicit in Options 1, 2 and 3 (as was pointed out by several consultees), it follows that 69 per cent favoured reform at least on the basis of Option 4.[60] It is noteworthy that there was similar support for Option 4 in personal injury cases.[61]

5.33 In the light of consultees' views we were at first persuaded that the law should be reformed in line with Option 4. Aside from the extensive support for it, we found it significant that many consultees made a particular argument of principle which might be taken to require reform at least to the extent of Option 4 (although it may also support a modified Option 1 or 2). They argued that there is a difference of principle between damages for pecuniary and for non-pecuniary loss. Since the latter are to compensate for losses which are, by definition, unquantifiable, it was thought wrong for the law to be based on the idea that there is one "right" valuation of such losses. Non-deduction of collateral benefits which meet non-pecuniary loss should not therefore be regarded as causing overcompensation.

5.34 We adverted to this argument in the consultation paper, particularly when considering the nature of charitable payments.[62] We also consider it in our report, Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits, where we identify the major counter-arguments.[63] These are: first, that tort law aims to compensate fully and in so doing values non-pecuniary loss. Internal consistency requires the law to view that valuation as definitive. Secondly, and in relation to personal injury cases only, the recommendations made in our report, Damages for Personal Injury: Non-Pecuniary Loss, will, if implemented, ensure that awards for non-pecuniary loss in personal injury cases are widely regarded as fair.[64] An injured person who received tort damages for non-pecuniary loss on top of other payments to meet the same loss might then be widely regarded as having received "too much" compensation. Thirdly, there is the argument of policy described above in favour of the deduction of collateral benefits.[65] We concluded for personal injury cases that in certain circumstances these three

[60] Moreover this support was not contingent on creation of new recoupment rights.

[61] Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, para 11.40.

[62] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 2.86 and 2.87.

[63] Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, paras 11.45-11.49.

[64] Damages for Personal Injury: Non-Pecuniary Loss (1999) Law Com 257.

[65] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 2.86 and 2.87.

counter-arguments might be persuasive.[66] For example, if it was clear that wide ranging deduction of collateral benefits was the only way to enable increases in tort damages for personal injury to be made elsewhere, this might be decisive in rejecting the distinction between collateral benefits which meet pecuniary loss (and should be deducted) and those which do not (and should not be deducted).

5.35 In the context of wrongful death claims it is notable that the first and second counter-arguments carry less weight, since the only damages for non-pecuniary loss which are recoverable are bereavement damages. Even after our recommended reforms, these will be limited to £10,000 per claimant, with an overall limit of £30,000.[67] Damages for wrongful death, therefore, even as altered in the light of our recommendations, do not claim to be fully reparative. It follows that there is no internal inconsistency in not treating them as such. Moreover it is less likely that a person who received the bereavement award, as well as other payments to meet non-pecuniary loss, would be generally regarded as receiving "too much" compensation.

5.36 Nevertheless, when we came to work out the detail of legislation to change the law in line with Option 4, we encountered significant difficulties. These resulted from the links between pensions and insurance. In particular, a pension may be payable out of a fund which has been wholly or partly invested in contracts in the nature of endowment insurance policies. Moreover a pension may be payable under a straightforward risk insurance contract, ie a contract with no investment elements taken out to insure against the financial consequences of a particular event. Finally, and specifically in relation to wrongful death claims, pension schemes often provide both for life assurance payments and for survivors' pensions.

5.37 All of these considerations mean that in some situations it is difficult to distinguish between survivors' pensions and life assurance. Legislation to implement Option 4 would therefore need to spell out very clearly when a payment was to be regarded as a survivor's pension. This would inevitably lead to complexity. It is also quite likely that, however carefully the provision was drafted, there would still be uncertainty about how some payments should be categorised. The upshot of our enquiry into the detail of Option 4 was therefore that it did not provide a workable solution.

5.38 Moreover the practical problems inherent in Option 4 highlight the difficulties in principle of distinguishing between pensions and insurance in the assessment of damages. This suggests that if the question of reforming the law on collateral benefits is revisited by the Government with a view to providing for radically increased deduction, the models for reform which should be entertained are Options 1 and 2, possibly modified to distinguish between non-pecuniary and pecuniary loss.[68]

[66] Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, para 11.49.

[67] See paras 6.41 and 6.51 below.

[68] See paras 5.33-5.35 above.

5.39 **In conclusion, therefore, we recommend that the law should be reformed in line with Option 6. In other words, the position in fatal accident claims should be made consistent with that in personal injury claims, through listing charity, insurance, survivors' pensions and inheritance as non-deductible.** (Draft Bill, clause 5)

5.40 There are two aspects of our proposed legislation to give effect to this recommendation which we should highlight. First, it seemed to us that if the new law were simply to provide for non-deduction of the specified benefits, the case law under the existing section 4 suggests that this would either lead to some instances of blatant double recovery, or the courts would distort the meaning of the statute in order to deduct benefits in certain cases.[69]

5.41 Both of these outcomes are plainly undesirable. It is significant that in *Jameson v Central Electricity Generating Board*,[70] both Lord Hope and Lord Clyde reiterated the view that it is wrong in principle for the law to permit obvious double recovery. Lord Hope said:

> It seems unjust that … the plaintiffs should be able to obtain … what would amount to double recovery in respect of the same loss.[71]

Similarly, Lord Clyde said:

> If he were allowed to [pursue his claim]... that would offend against the principle that he would be getting all or part of his damages twice over.[72]

5.42 Blatant double recovery is also inconsistent with the position in personal injury cases.[73] For example, where a personal injury victim claims damages for loss of retirement pension, their existing retirement pension is taken into account in the assessment of that loss.

5.43 Accordingly, we have concluded that the legislation should include an exception to enable the courts to deduct the listed collateral benefits in order to avoid blatant double recovery. In order to achieve this our proposed legislation provides for the non-deduction rule to be disapplied where there is a correspondence between the benefit and the particular loss claimed in the action in respect of a dependant, and the correspondence is such that in effect the loss is not suffered or is compensated for. In particular, this would require deduction in the situations in which the courts have to date deducted benefits despite the existing section 4, as follows:

(1) Deduction would follow under the first limb (ie because receipt of the benefit means that a particular loss is, in effect, not suffered) where:

[69] See paras 2.40-2.58 above.

[70] [1999] 2 WLR 141.

[71] *Ibid*, at p 150.

[72] *Ibid*, at p 161.

[73] Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 10.5-10.8.

(a) A dependant claims damages for the loss of their own survivor's pension and they are in receipt of a survivor's pension. (See *Auty v National Coal Board.*[74])

(b) The deceased supported his or her dependants wholly or partly from an asset (or assets), or from income produced by an asset (or assets) and a claimant inherits the asset (or assets), and/or all or part of the proceeds of sale of it. (See *Wood v Bentall Simplex Ltd.*[75])

(2) Deduction would follow under the second limb (ie because receipt of the benefit means that a particular loss is, in effect, compensated) where the deceased recovers damages for pecuniary loss in "the lost years" in such circumstances that a claim against a concurrent tortfeasor under the Fatal Accidents Act is not debarred and the damages are left to a dependant who succeeds in an action against the concurrent tortfeasor. (See *Jameson v Central Electricity Generating Board.*[76])

5.44 On the other hand, if the provider has the right to recover the value of a benefit from the dependant, it could not be said that its receipt means that a particular loss is in effect not suffered or is compensated for. Accordingly in those circumstances the disapplication of the non-deduction rule would not apply.

5.45 Still, the exception should be construed narrowly and confined to instances of blatant double recovery. In particular, we would stress that the treatment of gifts, such as those made through disaster appeals or out of sympathy for the dependant, is most unlikely to be affected, since such benefits are very unlikely indeed to be referable to any particular (pecuniary) loss. The exception is not intended to undermine the standard common law approach of ignoring charity.

5.46 Secondly, we should explain the use of the expression "gift of money or other property" in the draft legislation. This plainly covers charity both in cash and in kind.[77] But it excludes services, which are dealt with separately in the draft legislation, as we explain immediately below.[78]

[74] [1985] 1 WLR 784.

[75] [1992] PIQR P332, P349.

[76] [1999] 2 WLR 141.

[77] Although it is theoretically possible that a person would be entitled to an insurance benefit in kind on death, this is likely to be so unusual an occurrence that it would be very odd to legislate to provide for it. Hence our suggested legislation refers to insurance money (in keeping with the Fatal Accidents Act 1959 and section 4 of the Fatal Accidents Act 1976 prior to the 1982 amendment).

[78] It is conceivable, although perhaps unlikely, that a dependant would receive a benefit in kind other than a service which was legally voluntary but was not motivated by benevolence, as occurred in the personal injury case, *Dimond v Lovell* [1999] 3 WLR 561. Such a benefit, because not a "gift", would not be within the ambit of our proposed new section 4. Note also that, for reasons that we explain below (see para 5.68), social security benefits are not within the ambit of the section. The treatment of these benefits would therefore fall to be determined in accordance with section 3(1) of the Fatal Accidents Act, which the courts have interpreted as basically laying down a compensatory principle, whereby benefits will be deducted against losses like for like (see *Davies v Powell Duffryn*

(2) The law governing damages in respect of gratuitous care should be reformed in line with our recommended reforms for personal injury cases

5.47 Over 80 per cent of consultees to express a view on the matter agreed with our provisional view that the proposals for reform of the law on gratuitous services expressed in our consultation paper, Damages for Personal Injury: Medical, Nursing and Other Expenses,[79] should equally apply to Fatal Accidents Act cases. In our view, and in accordance with the views of consultees, we consider that the same policy reasons are in play where a dependant received services from the deceased, and after the deceased's death those services are provided gratuitously by another. Accordingly, we believe that the recommendations on gratuitous services made in our report, Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits,[80] should be applied to Fatal Accidents Act cases. We shall now set out a summary of the recommendations made in that report, as well as an account of how those recommendations should apply within the fatal accidents context.

5.48 We believe that the policy underlying the award of damages for the third party's loss lies in the fact that it is often in the best interests of the claimant to have those services provided gratuitously by a friend or relative. We would not wish to discourage such third parties who may be best placed to provide those services. However, without an award of damages, the claimant may be forced to enter into sham contracts with a friend or relative to ensure proper remuneration for the work done. Alternatively, the claimant may be forced to use commercial services.[81]

5.49 Where care is provided gratuitously to a tort victim, it seems to us that the decision in *Hunt v Severs*[82] correctly identifies the relevant loss as that of the carer, rather than of the claimant.[83] Nevertheless, in our report, Damages for Personal Injury: Medical Nursing and Other Expenses; Collateral Benefits,[84] we recommend reform, or clarification of, two aspects of the decision in *Hunt v Severs.* First, we recommend that instead of a trust being imposed on damages for the gratuitous provision of services, the claimant should be under a personal legal obligation to account for those damages to the service-provider. However, the claimant should be placed under a legal obligation only in respect of damages for *past* gratuitous services, and not in respect of damages for future gratuitous services. If a legal

Associated Collieries Ltd [1942] AC 601). Applying this strictly one may therefore expect such benefits to be deducted against losses like for like. This analysis is strongly supported by the approach of the common law in analogous personal injury cases. See the result in *Dimond v Lovell* [1999] 3 WLR 561, and, for social security benefits, *Hodgson v Trapp* [1989] AC 807. See also *Cresswell v Eaton* [1991] 1 WLR 113 for consideration of the effect of *Hodgson v Trapp* in a fatal accident claim prior to the 1982 amendment of section 4.

79 (1996) Consultation Paper No 144, paras 3.43-3.72.

80 Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, paras 3.62 and 3.66.

81 Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.48 and 3.49.

82 [1994] 2 AC 350. See also para 2.28 above.

83 Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, para 3.47.

84 (1999) Law Com No 262.

obligation were imposed in respect of damages for future gratuitous services, difficulties would arise where events do not turn out as predicted at trial. We are particularly concerned that one should not run the risk of compensating the "carer" at the expense of undercompensating the dependant.[85]

5.50 Our conclusion in this context is therefore that damages in respect of the services provided by the gratuitous carer should be awarded to the dependant, and held under a personal legal obligation to account to the carer. It is, however, arguable that section 3(1) of the Fatal Accidents Act 1976 stands in the way of the law being developed in accordance with this approach. It says:

> In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.

This section embodies the courts' power to award damages for pecuniary loss under the 1976 Act but mentions only "injury...to the *dependants*", whilst both the decision in *Hunt v Severs*,[86] and our preferred approach, are predicated on the view that the loss in gratuitous care cases should be regarded as that of the *carer*. We therefore recommend an amendment to section 3(1) in order to put it beyond doubt that the courts are empowered to award damages for the loss incurred by a person who has gratuitously provided services to a dependant.

5.51 There are other ways in which it is important to note that a Fatal Accidents Act claim differs from a personal injury claim. First, only one action can be brought under the Fatal Accidents Act in respect of a particular wrong,[87] and the damages recovered are apportioned amongst those who have suffered the relevant loss in proportion to the injury suffered.[88] It is clear that where the claimant has received gratuitous care from another, and is made liable to account to that other, the compensation payable to the carer should only be deducted from the damages to which the claimant is entitled, and not from the entire pool of damages. Secondly, the types of services which one might expect a dependant to receive may differ from those received by personal injury victims: a dependant is more likely to benefit from domestic services, such as care and housework, than the nursing care often provided to personal injury victims. In addition, there is no equivalent to the claim in respect of the costs of hospital visits in Fatal Accidents Act cases.

5.52 We should add that, in accordance with our recommendations in the personal injury context, we leave it open to the courts to award no damages where services have been provided gratuitously, if the policy conditions for an award are not in

[85] Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, paras 3.54-3.62.

[86] [1994] 2 AC 350.

[87] Fatal Accidents Act 1976, s 2(3). Under s 2(1) of the Act, proceedings under the Act must usually be brought in the name of the executor or administrator of the deceased. Only if there is no executor or administrator, or if the executor or administrator fails to bring an action within six months of the death, can those who have suffered the relevant loss bring proceedings under the Act: see s 2(2) of the Act.

[88] Fatal Accidents Act 1976, s 3(1). Under s 3(2) of the Act, the shares into which the damages should be divided may be directed by the court.

play.[89] We would also seek to clarify that services provided by, for example, a charity helper are not gratuitous services even though provided without a contractual right to payment, because they are performed in the course of a vocation. Whether they will be left out of account will fall to be dealt with under section 3(1), which the courts have interpreted as basically laying down a compensatory principle, whereby benefits will be deducted against losses like for like (See *Davies v Powell Duffryn Associated Collieries Ltd*[90]). Applying this strictly one would expect that, if the point ever arose, services of a charity helper would be deducted in assessing a claim for loss of a deceased's services. However, the courts have not always adhered to a strict compensatory interpretation of section 3(1) (see, for example, *Hay v Hughes*[91]); and, in line with the general common law approach in personal injury cases of leaving out of account charitable benefits[92] the courts might decide not to deduct a charity helper's services.

5.53 **We therefore recommend legislation which provides that:**

(1) **damages may be awarded under the Fatal Accidents Act in respect of services gratuitously provided to the dependant;**

(2) **the dependant should be under a legal obligation to account for damages awarded for *past* services to a relative or friend who has in the past provided the gratuitous services.**

But the legislation should not impose a legal duty on the dependant to pay over the damages awarded in respect of *future* gratuitous services. (Draft Bill, clause 3).

5.54 *Hunt v Severs*[93] also decided that the claimant should not be able to recover damages in respect of care provided by the defendant, because, using the trust approach, the damages would be recovered from and held on trust for the same person. As we have already said, this may be regarded as supporting the decision in *Hayden v Hayden*[94] that a dependant should not be entitled to damages for services where the lost services have been provided by the defendant.[95] This is the second aspect of the decision in *Hunt v Severs* that we recommend should be reversed (and, by analogy, we disagree with the equivalent aspect of *Hayden v Hayden*). This is for a number of reasons. First, denying damages where the defendant is the service provider encourages claimants and their carers to enter into contracts for the provision of care. Secondly, a related problem is that there is some doubt as to whether agreements of that nature should be regarded as shams. Thirdly, the

[89] Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, para 3.65.

[90] [1942] AC 601.

[91] [1975] QB 790.

[92] See Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, paras 10.10-10.12.

[93] [1994] 2 AC 350.

[94] [1992] 1 WLR 986.

[95] See para 2.50 above.

decision in *Hunt v Severs* encourages claimants to refuse care from the person who is often best placed to provide it. Professionals might therefore be employed instead, resulting in needless increases in awards of damages and the cost of insurance. Fourthly, the decision creates the possibility of serious injustice where a defendant carer (D1) is only partly to blame for an injury. D1 may be liable to the claimant for the full amount of his or her losses, but unable to seek contribution for the cost of care from a concurrent tortfeasor D2, because D2 would not be liable to the claimant.[96]

5.55 **We therefore recommend legislation which ensures that a defendant's liability under the Fatal Accidents Act to pay damages to the claimant for gratuitously provided services is unaffected by any liability of the claimant on receipt of those damages to pay them (or a proportion of them) back to the defendant as the person who has gratuitously provided such services.** (Draft Bill, clause 3).

(3) There should be recoupment of social security benefits in claims under the Fatal Accidents Act, in line with the position in personal injury cases

5.56 Almost all social security benefits received by a claimant as a result of a tort are recouped by the State.[97] This recoupment or "claw-back" scheme was first introduced in 1989 and is now given effect in the Social Security (Recovery of Benefits) Act 1997.[98]

5.57 Under the Social Security (Recovery of Benefits) Act 1997, a compensator should notify the Department of Social Security within 14 days of a claim being made against them. The 1997 Act lists the benefits which are "recoverable" by the DSS,[99] and within 28 days, the Compensation Recovery Unit should provide the compensator with a Certificate of Recoverable Benefits since the date of the accident, up to a maximum of five years from the accident.

[96] Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, paras 3.70-3.72.

[97] The provisions apply equally to out of court settlements: Social Security (Recovery of Benefits) Act 1997, s 1(3).

[98] This Act updated the scheme provided for in Part IV of the Social Security Administration Act 1992.

[99] "Recoverable benefits" are defined in section 1(4)(c) as "any listed benefit which has been or is likely to be paid as mentioned in subsection (1)(b)." Section 1(1)(b) describes "listed benefits paid to or for [the claimant] during the relevant period in respect of the accident, injury or disease." Under section 29, "listed benefits" are those listed in column 2 of Schedule 2, that is to say, those from the Social Security Acts which have been prescribed by the Secretary of State, namely: disability working allowance, disablement pension payable under section 103 of the Social Security Contributions and Benefits Act 1992, incapacity benefit, income support, invalidity pension and allowance, jobseeker's allowance, reduced earnings allowance, severe disablement allowance, sickness benefit, statutory sick pay, unemployability supplement, unemployment benefit, attendance allowance, care component of disability living allowance, disablement pension increase payable under section 104 or 105 of the Social Security Contributions and Benefits Act 1992, mobility allowance, mobility component of disability living allowance. Major benefits excluded from the scheme include housing benefit, child benefit and widow's benefits.

5.58 Until 1997, the certified sum was deducted from the total settlement which the claimant received. However, it was widely perceived as unfair to claimants that benefits were set off against damages for non-pecuniary loss, because social security benefits do not redress non-pecuniary loss. Under the 1997 Act, therefore, benefits are no longer set off against damages for pain, suffering and loss of amenity, nor against heads of pecuniary loss to which they do not relate. Instead the 1997 Act specifies which recoverable benefits may be set off against which heads of damages: for example, unemployment benefit is one of the benefits matched with damages for loss of earnings.[100] The compensator must still, however, pay the full certified sum to the Compensation Recovery Unit within 14 days of the payment to the claimant.

5.59 Prior to the 1997 Act, the "claw-back" scheme only applied to claims in excess of £2,500. The new scheme has no such threshold, and benefits paid are recouped from the tortfeasor regardless of the quantum of the claim.[101] But the position remains that recoupment is of benefits that have been paid, or are likely to be paid, for a maximum of five years from the accident.[102]

5.60 The position regarding the application of the 1997 Act to payments under the Fatal Accident Act is somewhat confused. The Social Security Administration Act 1992 expressly excluded payments pursuant to a fatal accident from the recoupment provisions.[103] There is no equivalent section in the 1997 Act, but section 1, which states that the Act applies where a payment is made "to or in respect of any other person in consequence of any accident, injury or disease," might be regarded as excluding such payments. This view is supported by the fact that no heads of loss recoverable under the Fatal Accidents Act 1976 are listed in Schedule 2 to the 1997 Act. Nevertheless, regulation 2(2)(a) of the Social Security (Recovery of Benefits) Regulations 1997[104] expressly excludes payments under the Fatal Accidents Act from the recoupment scheme, which seems to suggest that prima facie they are covered by the 1997 Act.

5.61 In the consultation paper, we expressed agreement with the principles behind the recoupment scheme.[105] Our view was that the loss incurred by the state in alleviating the harm caused to the claimant by the tortfeasor, constitutes an unjust enrichment of the tortfeasor: an analogy can be drawn with the compulsory discharge of another's liability. We therefore took the view that the state should be

[100] See section 8 and Schedule 2 of the 1997 Act. The heads of damages from which benefits may be deducted are loss of earnings, the costs of care and loss of mobility. Compensation for pain, suffering and loss of amenity is not included in the list.

[101] Although under Schedule 1, para 9 of the 1997 Act, a small-payment threshold may be reintroduced by means of a regulation, we are not aware of any plans to make such a regulation.

[102] After five years, social security benefits are to be disregarded in assessing damages: see ss 3 and 17 of the 1997 Act.

[103] Social Security Administration Act 1992, s 81(3)(c).

[104] SI 1997 No 2205.

[105] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.123.

able to obtain restitution from the tortfeasor.[106] Further, we considered that, in principle, social security benefits paid to claimants under the Fatal Accidents Act should be dealt with in the same manner as those paid to claimants in personal injury cases. Given that the recoupment scheme is up and running in personal injury cases, we thought it unlikely that the costs involved in extending the scheme to fatal accidents cases would outweigh the benefits of so doing.[107]

5.62 At present, the main benefits with which the scheme would be concerned if extended to fatal accident cases (other than the standard income-related benefits of income support and family credit) are the widow's payment, the widowed mother's allowance and the widow's pension.[108] The widow's payment, unusually, is a one-off payment of £1,000 made to women upon the death of their husbands, if they are not of pensionable age at the date of his death.[109] Although it is in no way income-related, it was introduced to help widows through the financial upheaval caused by their husband's death.[110] The widowed mother's allowance is a benefit top-up available for widows with children in respect of whom they are entitled to claim child benefit.[111] The rationale behind it is that caring for her children will prevent the widow from working.[112] The widow's pension, is available to women, not living with a man as husband and wife, who were widowed between the age of 45 and 65 and who are not entitled to a widowed mother's allowance.[113] We note that the Welfare and Pensions Reform Bill, currently before Parliament, contains a number of proposed reforms to these benefits.[114] Under the Bill, the widow's payment would be replaced by the bereavement payment, an award of £2,000 available to both widows and widowers; the widowed mother's allowance would be replaced by the widowed parent's allowance, available to both men and women; and the widow's pension would be replaced by the bereavement allowance, available to both men and women, but only during the first six months of bereavement.

[106] *Ibid*, at para 3.123. See the examination of the arguments of principle in relation to the analogous question of NHS recoupment in Damages for Personal Injury: Medical Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.19-3.42, and in our report, Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, paras 3.22-3.24.

[107] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.123.

[108] See also fostering payments which were deducted in *Cresswell v Eaton* [1991] 1 WLR 1113, 1124-1125 under section 4 of the Fatal Accidents Act 1976 prior to its amendment in the Administration of Justice Act 1982.

[109] Social Security Contributions and Benefits Act 1992, s 36.

[110] Reform of Social Security (1985) Cmnd 9517, paras 10.11 and 10.12; Reform of Social Security: Programme for Change (1985) Cmnd 9518, para 5.51; Ogus, Barendt & Wikeley, *The Law of Social Security* (4th ed 1995) p 283.

[111] Social Security Contributions and Benefits Act 1992, s 37.

[112] Ogus, Barendt & Wikeley, *The Law of Social Security* (4th ed 1995) p 283.

[113] Social Security Contributions and Benefits Act 1992, s 38.

[114] The latest version of the Bill, including the amendments made in Committee in the House of Lords, was published on 20 July 1999 and is available at the following website: http://www.publications.parliament.uk/pa/ld199899/ldbills/086/1999086.htm

5.63 The benefits discussed above are all concerned with a widow's loss of financial support. It should therefore be stressed that (in line with the changes made in the 1997 Act to exclude set off of benefits against that part of the damages compensating for pain, suffering and loss of amenity[115]) if there were to be recoupment in Fatal Accident Act claims, the benefits should not be set off against bereavement damages.

5.64 We asked consultees whether they thought that the social security recoupment scheme which applies to personal injury actions should be extended to fatal accident cases. Of those to express a view on the matter, 60 per cent agreed that it should be; a further six per cent agreed with the need for consistency, even though they regarded the scheme itself as undesirable or unsatisfactory. Of the remainder, 27 per cent were opposed to an extension of the scheme, and seven per cent of responses were ambivalent or unclear.

5.65 We remain in agreement with the principles behind DSS recoupment. We also maintain our view, supported by two-thirds of consultees, that this should operate consistently in personal injury and in fatal accidents cases. We recognise that the quantum of benefits payable in the event of a death will often be less than is in issue in cases of personal injury, and that there is therefore a question as to whether the reform would be justifiable on cost-benefit grounds. However, as we mentioned in the consultation paper, given that the recoupment scheme is already up and running in cases of personal injury, the costs involved in extending it seem unlikely to be significant.[116] Further, there is no longer a minimum threshold for the operation of the scheme in cases of personal injury. We believe that this undermines the argument that the scheme should not be extended to fatal accident cases because of the relatively small sums of money in issue.

5.66 We have therefore reached the view that the social security recoupment provisions should be extended to fatal accidents cases.[117] However, unlike the bulk of our conclusions in this paper, we have not appended draft legislation to give effect to this. We have adopted this approach for a number of reasons.

5.67 First, reform of the Social Security (Recovery of Benefits) Act 1997 is outside our terms of reference. Secondly, the 1997 Act is a highly complex and technical piece of legislation. Our view is that the Department of Social Security is better placed to instruct Parliamentary Counsel to draft the legislation necessary to extend the 1997 Act to benefits received by Fatal Accidents Act claimants.[118] Thirdly, it is significant that the 1997 Act applies to Scotland in addition to England and Wales.

[115] See para 5.58 above.

[116] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.123.

[117] However, it is our view that, contrary to ss 3 and 17 of the Social Security (Recovery of Benefits) Act 1997, social security benefits paid, or to be paid, after five years should be deducted from damages meeting the same loss (and, preferably, recouped) rather than ignored. See Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com 262, para 11.18, n 14.

[118] There is also the consideration that this approach avoids resources being spent in drafting legislation which is bound to be out of date within a short period, given the Welfare Reform and Pensions Bill.

This report, on the other hand, is concerned with the Fatal Accidents Act 1976, which extends only to England and Wales. The Scottish Law Commission has not been involved in other aspects of this project. We therefore do not feel that we should put forward detailed proposals on an issue which will require consideration in relation to its application to Scotland.

5.68 Having concluded that we should not put forward draft legislation to extend the recoupment scheme, the question arises whether social security benefits should be within the ambit of our proposed new section 4. It seems to us that they should not be. In particular this would establish a prima facie non-deduction rule, which would be inconsistent with our view that social security should be deducted and recouped by the state. We have explained above how the courts should approach the treatment of benefits (other than services) falling outside the scope of our proposed new section 4.[119]

5.69 **Our view is therefore that the scheme of the Social Security (Recovery of Benefits) Act 1997 should be extended so as to apply to benefits received by a claimant under the Fatal Accidents Act, but that it would not be appropriate for us to put forward legislation to this effect.**

(4) There should be no statutory right to recover the value of private collateral benefits

5.70 Relatively few consultees responded to the questions asked about the rights of third party providers of private collateral benefits. Around 70 per cent of consultees who addressed the issue agreed with our provisional recommendation that a collateral source's right to repayment from the dependant in the event of a successful tort claim, should be left to common law development. We therefore adhere to that view.[120]

5.71 As regards statutory recoupment rights for the providers of deductible collateral benefits, 93 per cent agreed with our provisional view that the reasoning of Slade J at first instance in *Receiver for the Metropolitan Police District v Croydon Corp*[121] is to be preferred to that of the Court of Appeal: that is, that the payment under legal compulsion of a deductible collateral benefit does benefit the tortfeasor by discharging a liability of the tortfeasor. Around 55 per cent agreed in principle with creating a new statutory right to recoup from tortfeasors the value of deductible collateral benefits. However, some of this support was contingent on either Option 1 or Option 2 being adopted.

5.72 We are persuaded by the limited support amongst consultees for the creation of new statutory recoupment rights that we should make no recommendation for

[119] See para 5.46, n 78 above.

[120] A possible model for the development of new repayment rights in personal injury cases is that suggested by *Hunt v Severs* [1994] 2 AC 350, whereby tort damages are awarded to the victim to compensate a third party, and a legal obligation is imposed on the victim to pay the damages to the third party. As we have explained above, the courts might be regarded as prevented by section 3(1) from awarding damages on this basis under the Fatal Accidents Act 1976: see para 5.50 above.

[121] [1956] 1 WLR 1113.

legislation in this regard. It was apparent that there was no clear support for creating recoupment rights for the providers of any of the collateral benefits with which we are here concerned. There was also the important objection that creation of such rights would cause complexity. We therefore consider, as in the personal injury context,[122] that the existence of such rights should be left to the developing common law of restitution.

5.73 **We therefore do not recommend the creation of statutory rights to recover the value of private collateral benefits, either from the tortfeasor or the tort victim.**

[122] See Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, paras 12.25-12.32.

PART VI
REFORM: BEREAVEMENT DAMAGES

1. THE ROLE OF BEREAVEMENT DAMAGES

(1) Should bereavement damages be available at all?

6.1 In the consultation paper, we recognised the controversial nature of bereavement damages, and in particular the controversy surrounding their function.[1] However, we also drew attention to other arguments against the availability of bereavement damages. These included the following: that grief cannot be measured in monetary terms, the ultimate inevitability of grief, the subsidiary importance of compensation for grief (as opposed to for pecuniary losses), the possibility of bogus claims and the difficulty in identifying those suffering grief.[2] Nevertheless, we provisionally recommended the retention of bereavement damages,[3] to serve a function to be explained below.

6.2 The vast majority of consultees agreed that bereavement damages should continue to be available. Some were against the availability of bereavement damages in principle, but expressed the view that they are now entrenched in our law. However, the majority regarded bereavement damages as desirable in serving one of the purposes described below. We do not therefore recommend the abolition of bereavement damages. Instead we turn to consider whether the law dealing with bereavement damages is in need of reform.

(2) Clarifying the purpose of bereavement damages

6.3 In the consultation paper, we distinguished five purposes which bereavement damages *might be seen* to serve, and expressed a view on the relationship between bereavement damages and each of those purposes.[4] We suggested that much of the controversy surrounding the availability and scope of bereavement damages seems to be a product of misconceptions about their function.[5] Our view was that bereavement damages are *compensatory*, in that they compensate *non-pecuniary* losses - specifically grief and sorrow, and the loss of care, guidance and society provided by the deceased.[6] As such, they are not intended to compensate pecuniary losses, nor to punish the defendant, nor to symbolise that the deceased's death was wrongful. It is because the damages available under the Act are thought insufficient to punish the defendant or to reflect the value of the deceased's life that claimants under the Act regard bereavement damages as unsatisfactory. We suggested that the laying down in the Act of the compensatory purpose of bereavement damages would alleviate much of this criticism.

[1] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.127 and 3.138.

[2] *Ibid*, at paras 3.129 and 3.131.

[3] *Ibid*, at para 3.138.

[4] *Ibid*, at paras 3.129-3.138.

[5] *Ibid*, at para 3.138.

[6] *Ibid*, at para 3.138.

6.4 There was substantial support for our provisional view - over 40 per cent of consultees responding on this question agreed with it. A further 14 per cent also thought that bereavement damages were compensatory, but only for grief and sorrow, and not for the loss of care, guidance and society. As such, a majority expressed the clear view that bereavement damages are compensatory. The remainder of consultees expressed a variety of views as to the function of bereavement damages. In general however, those who did not agree with our provisional view were either against the expression of the purpose in the statute, or did not express a view on the specific question as to whether the purpose ought to be so expressed.

6.5 We remain of the view that bereavement damages should be regarded as compensatory. The majority of consultees agreed with our view, and we are unpersuaded by the arguments of those who disagreed. We also still believe, supported by a large proportion of consultees, that bereavement damages should compensate a loss of care, guidance and society, as well as grief and sorrow. However, after discussions with the draftsman, we now consider that it would be more appropriate to explain the purpose of bereavement damages in the explanatory notes to the new replacement clause on bereavement damages, rather than trying to explain this on the face of the Bill.

6.6 In formulating an explanation of the purpose of bereavement damages for the explanatory notes, one should bear in mind that, under our recommendation in paragraph 6.51 below, not all claimants under the Fatal Accidents Act will necessarily receive the same fixed sum of bereavement damages. This is because claimants may only receive a share of an overall sum assessed by reference to an overall ceiling on bereavement damages.[7] Our opinion is that the relationship between compensation and bereavement damages is accurately expressed by saying that the function of bereavement damages is to compensate, *in so far as a standardised award of money can*, grief, sorrow, and the loss of the non-pecuniary benefits of the deceased's care, guidance and society.

6.7 **We therefore recommend that bereavement damages should continue to be available under the Fatal Accidents Act. However, the Explanatory Notes to our replacement clause on bereavement damages should clarify that the function of bereavement damages is to compensate, in so far as a standardised award of money can, grief, sorrow and the loss of the non-pecuniary benefits of the deceased's care, guidance and society.**

2. WHO CAN CLAIM BEREAVEMENT DAMAGES?

(1) Abolishing the statutory list or its exhaustive nature

6.8 Currently, the only people who can recover bereavement damages are those included on the fixed statutory list under section 1A(2) of the Fatal Accidents Act 1976. The advantages and disadvantages of a fixed statutory list of possible claimants were canvassed above, in the context of claims for pecuniary losses under the Act.[8] There, we have expressed a concern that finite lists inevitably

[7] See para 6.51 below.

[8] See para 3.21 above .

exclude deserving claimants, a problem avoided if the list were to be replaced or extended by a general class of persons entitled to sue. In the context of pecuniary losses, we have recommended that the list should be extended to include, as a generally worded class, those who were or would have been wholly or partly maintained by the deceased.[9] In the context of bereavement damages, the analogous option for reform would seem simply to be to require claimants to prove their bereavement. If this were to be the case, the quality of the relationship at the time of death and the extent of the claimant's grief would be facts in issue at trial. In the consultation paper, we thought this wholly undesirable, and took the provisional view that the model of a finite statutory list of those who can claim bereavement damages should be retained.[10]

6.9 Nearly 90 per cent of consultees to express a view on the matter were in agreement with our provisional view. The reasons given by consultees reflected our concerns in the consultation paper - the desirability of certainty, and the undesirability of protracted, distressing litigation.[11] A number of consultees also pointed out that our provisional proposal - discussed at paragraph 6.32 below - that bereavement should be presumed (rather than subject to proof) turned on there being a fixed list of claimants in the first place.

6.10 **We therefore recommend that the model of an exhaustive statutory list for those entitled to claim bereavement damages should be retained.**

(2) Extending the statutory list

6.11 In the consultation paper, we took the view that the scope of the present list was too limited and should be extended.[12] For example, we criticised the inability of the father of an illegitimate child to sue for bereavement damages.[13] However, we also noted the risk that the extension of the list beyond those who are closest to the deceased created a risk that bereavement damages would be recovered by undeserving claimants.[14] In addition to the deceased's parents, we considered the position of his or her children, siblings, cohabitants and other relatives.[15]

(a) Parents and children

6.12 A parent can currently only claim for bereavement damages if the deceased was a minor who had never married.[16] Further, if the deceased was illegitimate, his mother can claim bereavement damages but his father cannot.[17] We took the provisional view that both restrictions should be removed, for the reason that the

[9] See para 3.46 above.

[10] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.143.

[11] *Ibid*, at paras 3.142 and 3.143.

[12] *Ibid*, at paras 3.144-3.157.

[13] *Ibid*, at para 3.146.

[14] *Ibid*, at para 3.144.

[15] *Ibid*, at paras 3.145-3.154.

[16] Fatal Accidents Act 1976, s 1A(2).

[17] Fatal Accidents Act 1976, s 1A(2)(ii).

death of one's child is likely to be the source of profound grief in any circumstances.[18] Further, we suggested that the term "parent" should be defined so as to include adoptive parents, and any person who treated the deceased as his or her child.[19] Sixty-three per cent of consultees supported our provisional view in its entirety, whilst a further ten per cent only supported the removal of the restriction that the deceased child must be a minor. Indeed, this restriction was strongly criticised. Further, apart from the seven per cent who were against any change at all, very few seemed opposed to recovery by the father of an illegitimate child. In addition to these figures, the views of some consultees were not wholly clear. For example, eight per cent simply expressed the view that "parents" should be able to recover.

6.13 We also took the provisional view that children are likely to suffer grief and sorrow in the event of their parent's death, and as such should be able to recover bereavement damages.[20] We considered their current exclusion to be anomalous in the light of a parent's entitlement to bereavement damages in the event of a child's death.[21] In response to the argument that young children who never really knew the parent do not suffer grief, we emphasised our view that the damages also compensate the loss of care, guidance and society. We thought that the term "child" should be defined to include adoptive children and anyone who treated the deceased as a parent. Sixty-seven per cent of consultees agreed with our provisional view, and a further 23 per cent were of the clear opinion that children should have a right to bereavement damages, although some of those disagreed with our proposed definition of the term "child".[22]

6.14 We remain of the view that a parent should be able to recover for the death of his or her child, irrespective of whether that child was under eighteen years or not, married or not, and whether legitimate or illegitimate. We are unpersuaded by the arguments of those who were against giving children an entitlement to bereavement damages. The terms "parent" and "child" would include adoptive parents and children.[23] However, in the light of consultees' comments, we no longer believe that parents should be defined so as to include "anyone who treated the deceased as a child", nor that child should be defined to include "anyone who treated the deceased as a parent". Rather, we take the view that, with the exception of cohabitants, it would be problematic to extend the right to bereavement damages to this wider class of persons. We now explain this further.

[18] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.145, 3.136 and 3.156.

[19] *Ibid*, at paras 3.148 and 3.149.

[20] *Ibid*, at para 3.149.

[21] *Ibid*, at para 3.156.

[22] Of this 23 per cent, a further 4 per cent were clear that adopted children should be able to recover; 2 per cent that step-children should recover; 4 per cent that children should recover regardless of age; 6 per cent gave no definition. The remainder were in favour of some restriction on the age of children able to recover.

[23] Adoption Act 1976, s 39(6).

6.15 In considering options for reform of the statutory list, we have regarded the following principles as important. First, given that a person included in the statutory list will not need to prove bereavement, the statutory list of those entitled to bereavement damages must be limited.[24] Secondly, the list should not be internally inconsistent, and should treat like cases alike. Thirdly, it is undesirable that the list should be complex. We now take the view that, if the statutory list were to be extended beyond the deceased's immediate family, it is inevitable that the list would *either* contain inconsistencies *or* would become highly complex and likely to result in overcompensation (that is, compensating those who have suffered little or no grief or sorrow, or little or no loss of a non-pecuniary benefit).

6.16 This view is illustrated by two examples. The first relates to our provisional view that a child should be entitled to bereavement damages if the deceased treated the child as his or her own whilst cohabiting with one of the child's parents. Dr Gerhard Dannemann pointed out that, under our provisional view, the child would be able to claim bereavement damages, whilst his or her parent - the deceased's partner - would not be so entitled unless he or she had been cohabiting with the deceased for at least two years at the time of the accident.[25] We agree that this inconsistency would be unacceptable, but do not believe that the proposed definition of "cohabitee" should be amended so as to give the parent an automatic entitlement to bereavement damages.

6.17 A second example relates to our provisional view that, in addition to the deceased's full-siblings, half-brothers and sisters living in the same household as the deceased should be entitled to bereavement damages. The aim of this recommendation was to distinguish half-siblings forming part of the deceased's immediate family from those living in a different household (and who are therefore less likely to have had a close relationship with the deceased). However, we have now come to the view that it would be illogical to treat this class of half-siblings differently from step-brothers and sisters who lived with the deceased. Yet it is not possible to draw the line at step-brothers and sisters, because step-brothers and sisters should arguably be treated no better than unrelated children who live together because two of their parents cohabit. If the Fatal Accidents Act were to provide all of the persons discussed in this paragraph with a right to bereavement damages, the list would be both highly complex and likely to result in overcompensation.

6.18 Our view is that these difficulties are avoided if the entitlement to bereavement damages is limited to the deceased's immediate family (that is, his or her spouse, parents, children and siblings) and/or his or her long-term partner.[26] Thus, in respect of the deceased's parents and children, we recommend that any parent or any child of the deceased (including adoptive parents and children) should be able to recover bereavement damages. Contrary to our provisional view, we do not recommend that the meaning of parent of the deceased should be extended to

[24] See para 6.34 below.

[25] We provisionally took the view that a cohabitant should only be able to claim bereavement damages if he or she had been cohabiting with the deceased for at least two years at the time of the accident: Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.157.

[26] By which we mean the deceased's fiancé(e) or cohabitant partner of two years standing.

include "any person who treated the deceased as his or her child", nor that the meaning of child of the deceased should be extended to include "any person who treated the deceased as his or her parent".

(b) Brothers and sisters

6.19 In the consultation paper, we expressed the provisional view that the deceased's brothers and sisters ought to be able to recover bereavement damages in the event of his or her death.[27] We conceded that this would create a greater risk of overcompensation than is the case in relation to parents and children, but suggested that the potential for grief in the event of a sibling's death is as great as that for a parent or for a child.[28] We thought that the terms "brothers and sisters" should be defined so as to include adoptive brothers and sisters and half-brothers and sisters living in the same household as the deceased.[29]

6.20 Most consultees agreed with this view. Nearly 70 per cent were in favour of our provisional view. Three per cent expressed some intermediate position.[30] The remaining 30 per cent were opposed to giving siblings a right to bereavement damages. The Scottish Law Commission directed us to judicial criticism of Scots law under which siblings cannot recover.[31] This general consensus satisfies us that even if the case for awarding bereavement damages to a sibling is weaker than that for a parent, spouse or child, the bereavement of a sibling warrants compensation. However, we no longer believe that a half-brother or sister should have any entitlement to bereavement damages. We have explained the difficulties encountered in extending the entitlement to bereavement damages to all those whom the deceased treated as a sibling.[32] Having rejected this option, we do not think that all half-siblings should be entitled to bereavement damages. By definition, a large proportion of half-siblings will not live with one another, and it seems that many half-siblings will not therefore develop a close relationship. Our view is that an automatic entitlement to bereavement damages for any half-sibling of the deceased would be likely to give rise to overcompensation. On this basis, we recommend that only the deceased's full-siblings should be entitled to bereavement damages.

(c) Cohabitants

6.21 In the consultation paper we expressed the view that the exclusion of cohabitants from the list of those able to recover bereavement damages was contrary to the premise that the damages should be available to those closest to the deceased, and most likely to be aggrieved by their death.[33] However, we also acknowledged the

[27] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.150 and 3.156.

[28] *Ibid*, at para 3.150.

[29] *Ibid*, at para 3.156.

[30] For example, the Law Reform Advisory Committee for Northern Ireland suggested that siblings should recover where there was no spouse, nor any parents or children.

[31] *Quinn v Reed* 1981 SLT (Notes) 117.

[32] See para 6.17 above.

[33] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.151.

possibility that to open up the availability of bereavement damages to cohabitants is to create a greater likelihood of overcompensation.[34] We suggested that the availability of bereavement damages to cohabitants should turn on the presence of objective indicia of a relationship of *permanence and commitment*. [35]

6.22 Our view was that appropriate indicia would be that the claimant had cohabited with the deceased in a sexual relationship (whether heterosexual or not) for at least two years immediately prior to the accident.[36] We asked for views as to whether these requirements might be waived if other circumstances demonstrated a sufficient degree of permanence and commitment - for example, where the relationship had produced a child.[37]

6.23 Over 80 per cent of consultees who dealt with this matter were in favour of including cohabitants (whether heterosexual or not) in the class of persons entitled to claim bereavement damages. However, there was divergence on the question as to how the general class of "cohabitants" should be defined. Half of those supporting the inclusion of cohabitants were in favour of the two year qualifying period suggested in the consultation paper,[38] whilst only 17 per cent expressly opposed the application of any qualifying period (some of whom proposed that the class of those entitled to claim should be described more generally).[39] The remainder were in favour of a qualifying period either shorter than two years or of an unspecified duration. In accordance with our position in the consultation paper, consultees seemed to take the view that, while the application of a qualifying period would be arbitrary in its effect, it provided a necessary filter.

6.24 We note that a qualifying period of two years would be in accordance with section 1 of the 1976 Act, and with the recommendations made in our report, Liability for Psychiatric Illness.[40] Our recommendation is therefore that a person who had cohabited with the deceased for two years immediately before the date of death should be entitled to bereavement damages.

6.25 Very few respondents expressly commented on the distinction between cohabitants engaged in a same-sex relationship as opposed to a heterosexual relationship, but almost every person who did so was in favour of equal treatment for cohabitants engaged in a same-sex relationship. We remain of that view.

[34] Claims for Wrongful Death (1997) Consultation paper No 148, para 3.151.

[35] *Ibid*, at para 3.152.

[36] *Ibid*, at para 3.152.

[37] *Ibid*, at para 3.152. This approach has been adopted in some Canadian jurisdictions: Fatal Accidents Act 1987, s 3(5) (Manitoba); Fatal Accidents Act 1978, s 1(d)(ii) (Saskatchewan).

[38] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.152 and 3.157.

[39] Suggestions included that the deceased and the claimant should have been "living together as man and wife", in a relationship of "stability and permanence", or simply that they should have been in a relationship of "cohabitation".

[40] (1998) Law Com No 249. See para 6.26 below.

6.26 We dealt with an analogous question in our report, Liability for Psychiatric Illness.[41] To recover for damages for negligently inflicted nervous shock, a secondary victim has to establish a close tie of love and affection with the primary victim of that negligence.[42] To minimise inquiries into the quality of relationships, we proposed that there should be a fixed statutory list of persons presumed to have such a relationship with immediate victims.[43] Under the reform proposed in that report, a cohabitant is presumed to have the requisite tie of love and affection if he or she and the immediate victim, although not married, had been "living together as man and wife" (or if of the same gender, in the equivalent relationship) for a period of at least two years.[44] Our view is now that the same test as was proposed in the Liability for Psychiatric Illness report should be adopted for present purposes.[45]

6.27 Few respondents commented on the possible waiver of the qualifying period. Of those who did so, over three-quarters supported some provision for waiver, and several explicitly mentioned the situation where the couple had a child together. We have therefore given particular attention to the possibility that the court should be able to waive the qualifying period in such a case. However, we do not consider that the birth of a child is necessarily a good indication of a committed relationship between the parents. For example, one or other of the parents may not have wanted the child. Further, if one were to include the birth of a child as the test for whether the cohabiting parents can or cannot recover, one would be distinguishing between parents who have a child and those who lose a child before birth (for example, because the mother miscarries).

6.28 Further, we reject the view of some consultees that the court should waive the qualifying period if the claimant is able to establish by general evidence a relationship of "permanence and commitment". This would involve judicial assessment of the quality of the relationship, the very process which our proposed retention of the fixed list seeks to avoid. Therefore, to avoid both overcompensation and possible inconsistency in the list of cohabitants entitled to bereavement damages, and to avoid inquiries into the quality of the deceased's relationships, we do not recommend that there should be any provision for waiver of the qualifying period.

[41] Liability for Psychiatric Illness (1998) Law Com No 249.

[42] *Ibid*, at paras 2.19-2.27.

[43] *Ibid*, at paras 6.24-6.27.

[44] *Ibid*, at para 6.27.

[45] It is true that under the reform proposed in Liability for Psychiatric Illness (1998) Law Com No 249, para 6.26, anyone not included within the fixed list would be able to argue that he or she nevertheless had a close tie of love and affection with the immediate victim. Nevertheless, the difference in approach can be explained on the basis that damages can only be recovered in that context if the claimant has suffered a psychiatric illness. If a claimant has indeed suffered such an illness, this is likely to be regarded as most powerful evidence that he or she did indeed have a close tie of love and affection to the immediate victim. As such, there is little prospect of a distressing assessment of the quality of a relationship.

(d) Other relationships

6.29 Few consultees suggested that any other relation should be added to the fixed list. However, of those who did, there was recurrent support for the inclusion of fiancé(e)s. We consider it likely that a person who was engaged to be married to the deceased is likely to suffer grief, sorrow and a loss of care, guidance and society as a result of the death. We consider that it would be inconsistent to entitle cohabitants (albeit of two years standing) to bereavement damages, but not to extend the right to bereavement damages to fiancé(e)s. This is particularly so when people have personal reasons for choosing not to cohabit with their fiancé(e) until they are married, or are unable to do so. We therefore consider that a person who was engaged to be married to the deceased should also be included in the list of persons entitled to bereavement damages.

6.30 We recognise that there may be some difficulty in determining whether a person was actually engaged to the deceased. In presenting our recommendations for reform of section 3(3) of the 1976 Act, we referred to section 44 of the Family Law Act 1996, which sets out evidential requirements for the proof of an agreement to marry.[46] We consider that section 44 of the 1996 Act is also helpful in this context, and recommend that, where a person claims that he or she was engaged to the deceased, and thus claims bereavement damages, it should only be possible to establish the agreement to marry by evidence in writing of the existence of the agreement, the gift of an engagement ring by one party to the agreement to the other in contemplation of their marriage, or a ceremony entered into by the parties in the presence of one or more witnesses.

6.31 **We therefore recommend that bereavement damages should be recoverable by the following persons:**

(1) **a spouse of the deceased;**

(2) **a parent of the deceased, including adoptive parents;**

(3) **a child of the deceased, including adoptive children;**

(4) **a brother or sister of the deceased, including an adoptive brother or sister;**

(5) **a person who was engaged to be married to the deceased, as established by evidence in writing of the existence of the agreement to marry, by the gift of an engagement ring by one party to the agreement to the other in contemplation of their marriage, or by a ceremony entered into by the parties in the presence of one or more witnesses (in accordance with the Family Law Act 1996);**

(6) **a person who, although not married to the deceased, had lived with the deceased as man and wife (or if of the same gender, in the equivalent relationship) for not less than two years immediately prior to the accident.** (Draft Bill, clause 2)

[46] See para 4.42 above.

3. SHOULD BEREAVEMENT BE PROVED OR PRESUMED?

6.32 For the reason that judicial inquiries into the existence and extent of a claimant's grief are likely to prove unpleasant, we provisionally recommended that the law should continue to give effect to an irrebuttable presumption that those on the list have been caused grief by the deceased's death.[47] We also suggested that in the light of the restricted nature of the statutory list, very few people would in reality be overcompensated by bereavement damages.[48]

6.33 Virtually every consultee to express a view on the matter agreed with our provisional view that distressing and distasteful litigation about whether a claimant is aggrieved should not be countenanced. We therefore remain of our provisional view. This conclusion is clearly supported by the emphasis which consultees put on this same concern in the context of the question "who can claim bereavement damages?", a concern which motivated our proposed retention of the fixed list.[49] Whilst we recognise that there will be cases in which a claimant will receive a windfall - for example, where a father who has never known his child recovers bereavement damages - we do not believe that we could create an exception sufficiently narrow to eliminate this risk without creating a widespread risk that claimants would generally be subjected to distasteful inquiries.

6.34 **We therefore recommend that proof of actual loss (that is, actual mental distress) should continue not to be a necessary condition for an award of bereavement damages.**

4. QUANTUM

(1) Fixed or discretionary award?

6.35 It follows from the above that we would not favour a judicial inquiry into the extent of the claimant's grief, and that bereavement damages should, on our view, continue to take the shape of a fixed award rather than damages at large. Our provisional view was to this effect.[50]

6.36 Again, virtually every consultee to express a view on this matter agreed with our provisional view, and again there was strong concern about any inquiry into the existence or extent of an individual's grief. **We therefore recommend that the award of bereavement damages should continue to be a fixed sum.**

(2) Level of a fixed award

6.37 On the basis that no award for non-pecuniary loss can ever be calculated with mathematical precision, the consultation paper highlighted a number of factors which should be considered when setting the level of the award for bereavement damages.[51] These included the need to provide compensation for the bereaved, the

[47] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.159.

[48] *Ibid*.

[49] See paras 6.8 and 6.9 above.

[50] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.161.

[51] *Ibid*, at para 3.162.

need to keep the quantum of the award in tune with other awards for non-pecuniary loss, and a need not to encourage misconceived impressions about the function of the award (for example, that it is a reflection of the value of the lost life).

6.38 We accepted that the larger the award, the more difficult it is to justify the fact that the claimant will not have to prove his or her bereavement.[52] Further, a larger award is more likely to encourage the impression that the award is punitive, or represents the value of the lost life.[53] We also thought it significant that grief at the loss of a loved one might ultimately be inevitable.[54] In the light of these factors, and given the level of damages available for non-pecuniary loss generally, we suggested that the current award of £7,500 is not unreasonably low.[55]

6.39 Nevertheless, in the light of responses to our consultation paper, Damages for Personal Injury: Non-Pecuniary Loss,[56] which supported an uplift other than for trivial injuries, we suggested that to raise the award to £10,000 would take into account the effects of inflation since the introduction of the present award, and would give effect to a further moderate increase.[57] We were not in favour of an award which differed as between different claimants for the reason that this would imply differential levels of grief, an assumption that we thought would be distasteful.[58]

6.40 Consultees expressed a general feeling that the current award is too low. Two-thirds were in agreement with our provisional recommendation, whilst another quarter suggested increases in the award between £10,000 and £100,000. The remainder were either in favour of an unspecified increase or were against any reform to the level of bereavement damages.

6.41 In the light of this widespread support for our provisional view, and the consensus of opinion that bereavement damages should be increased, we maintain our view that the level of the bereavement award should be increased to £10,000. **We therefore recommend that the level of the award of bereavement damages should be increased to £10,000.** (Draft Bill, clause 2)

(3) Updating the fixed award

6.42 In the consultation paper, we noted the concern of respondents to Damages for Bereavement: A Review of the Level that there had been such a long interval between the introduction of bereavement damages and the opportunity for review

[52] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.163.

[53] *Ibid*, at para 3.163.

[54] *Ibid*, at para 3.163.

[55] *Ibid*, at para 3.165.

[56] (1995) Consultation Paper No 140.

[57] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.166 and 3.167. In July 1997, an increase in the figure of £7,500 to take into account inflation between that time and April 1991 gave rise to a figure of £8,621. This was calculated using the figures in Kemp & Kemp, *The Quantum of Damages* vol 1 para 0-118.

[58] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.163.

of the level.[59] There was also disagreement as to the frequency with which reviews should be conducted. As such, our provisional view was that the better solution would be to link the award to the Retail Prices Index so that it would not fall behind the level to which it was last adjusted, removing the need for review.[60] It would also remove the possibility that awards made to claimants shortly before and after a review might diverge greatly. We noted that this approach is already used in respect of the non-pecuniary loss tariffs for pain and suffering and loss of amenity.[61] We also noted that it would remove the need for the Lord Chancellor's power to increase the award, which could then be repealed.[62]

6.43 Nearly 80 per cent of consultees to express a view on the matter agreed with this recommendation, and largely adopted the reasons given in the consultation paper. **We therefore recommend that the award for bereavement damages should be linked to the Retail Prices Index, and the power of the Lord Chancellor to vary the level of damages should be repealed.** (Draft Bill, clause 2)

(4) Should there be a maximum sum?

6.44 Under the present law, the defendant can only be liable for a single payment of £7,500 in bereavement damages. If both parents claim bereavement damages in respect of the death of their child, the award is divisible between them.[63] This controls the defendant's total liability, but in so doing creates the risk that the award of bereavement damages will undercompensate the claimant.

6.45 Our view is that the current restriction to a single award, divisible between the claimants, could not be maintained if the list were to be reformed as proposed and the award set at £10,000. The effect would be that a number of unconnected persons might be severely undercompensated.[64] However, we suggested in the consultation paper that a ceiling could be placed on the defendant's total liability.[65]

[59] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.168.

[60] *Ibid*, at paras 3.168 and 3.169.

[61] *Ibid*, at para 3.168.

[62] *Ibid*, at para 3.169.

[63] Fatal Accidents Act, s 1A(4). Under the current law, these are the only circumstances in which there can be more than one claim for bereavement damages in respect of a single wrongful death.

[64] That the claimants might be connected is relevant on the following argument - that a family aggrieved by a death can support one another, and alleviate some of the suffering that might have occurred but for that support. This was the basis on which the Alberta Law Reform Institute provisionally recommended that a single award of bereavement damages should be made where there are three or more eligible children, and the award should be divided between them: Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the *Fatal Accidents Act* (1992) Report for Discussion No 12, pp 120-123. However, the assumption that the large family group could alleviate some of the suffering was rejected after consultation, as was the proposal: Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the *Fatal Accidents Act* (1993) Report No 66, pp 41 and 42.

[65] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.171. The Citizen's Compensation Bill proposed a ceiling of £50,000: *Hansard* (HC) 3 March 1989, vol 148, col 520.

We recognised that such a provision might have arbitrary effects, but asked consultees whether they thought this was the price to be paid for an extension of the statutory list.[66] We also asked consultees what they thought that an appropriate ceiling might be, and how they thought that the total amount should be divided - into equal shares, or otherwise.[67]

6.46 Consultees suggested a wide variety of models for limiting the liability of the defendant. Ten per cent, who were against reform of the statutory list, were also in favour of maintaining the current restriction to a single divisible award of £7,500 or £10,000, and roughly the same number thought that an award of £10,000 should be divisible between an extended class of claimants. We remain of the view that these suggestions are unacceptable, and would potentially result in severe undercompensation.

6.47 A further five per cent were in favour of dividing a larger single award, of £25,000 or even £100,000, amongst the wider class. Although we recognise that this approach might confront the problem of undercompensation, it cannot be maintained when the great majority of consultees were in favour of a much smaller award. The approach would also cause overcompensation in a great many cases.

6.48 In spite of this division, over half of consultees to express a view on this matter were in favour of controlling the defendant's liability through an overall ceiling, and then dividing the total equally amongst all claimants. Of those, half were in favour of setting the ceiling at £50,000. Others suggested a variety of figures between £25,000 and £125,000.

6.49 Only 20 per cent of consultees were against any restriction of the defendant's liability. As such, the great majority of consultees were in favour of limiting the defendant's liability in some way. We therefore recognise that it is necessary to identify a model which fairly and sensibly resolves the competing concerns expressed by consultees. We believe that the model favoured by the largest proportion of consultees (an overall ceiling of liability, and equal division of that sum where necessary) would perform that task. Whilst the expanded liability of the defendant would be controlled by an overall ceiling, there would be no assumption that the grief of any one claimant is any greater than that of any other. This is a principle which we have sought to maintain in other aspects of our proposed reform.[68] Further, in the light of our proposals for reform - the increase in the award to £10,000, and the expansion of the list of possible claimants - we believe that a ceiling of £30,000 will balance the interests of the defendant against the interests of potential claimants under the Act. Considering an example in which the deceased was a married man with two children, a ceiling of £30,000 would enable the deceased's wife and children each to recover the full award of £10,000. If the deceased had a wife, two children and two siblings, each would be entitled to recover an award of £6,000. We believe that, by operating a ceiling of £7,500, the current law creates a real risk of undercompensation, and consider that our recommendations would considerably reduce that risk.

[66] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.172 and 3.173.

[67] *Ibid*, at para 3.173.

[68] See paras 6.8, 6.9, 6.32 and 6.33 above.

6.50 In the light of our proposal that bereavement damages should be linked to the Retail Prices Index, it follows that the ceiling on liability should also be index-linked. If this were not the case, the effect of inflation would be that damages recovered by individual claimants would, in real terms, be ever diminishing. Alternatively, the ceiling would need periodic review by Parliament or by the Lord Chancellor. It was precisely the wish to avoid these difficulties which led us to propose index-linking of the award of bereavement damages.[69] So as not to reintroduce the same problem at a different point, we recommend that the ceiling should also be linked to the Retail Prices Index.

6.51 **We therefore recommend that a defendant's liability to pay bereavement damages should be limited to a maximum of £30,000. If the number of people validly claiming bereavement damages is greater than three, the £30,000 should be apportioned equally amongst them (subject to any reduction for contributory negligence of the bereaved claimant). The overall limit of £30,000 should also be linked to the Retail Prices Index.** (Draft Bill, clause 2)

5. INTEREST ON BEREAVEMENT DAMAGES

6.52 Interest on bereavement damages is currently awarded from the date of death at the full special investment account rate.[70] This is in contrast to the conventional rate of two per cent for non-pecuniary loss in non-fatal cases.[71] The higher rate of interest has been justified on the basis that bereavement damages are more akin to special damages than general damages, and that as such there should be no deduction for future investment return.[72] In the consultation paper, we criticised this reasoning on the basis of our view that bereavement damages in fact offer compensation for non-pecuniary loss.[73] We therefore provisionally recommended that the award of interest ought to be the same as is awarded generally for non-pecuniary loss.[74] Nearly 80 per cent of consultees to express a view on this question were in favour of consistency with damages for non-pecuniary loss generally.[75]

[69] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.168 and 3.169.

[70] *Prior v Hastie (Bernard) & Co* [1987] CLY para 1219; *Khan v Duncan*, unreported, 9 March 1989 (noted in Kemp & Kemp, *The Quantum of Damages* vol 3 paras M3-071 and M3-140).

[71] *Wright v British Railways Board* [1983] 2 AC 773. It is arguable that, after *Wells v Wells* [1999] 1 AC 345, the rate should be 3 %.

[72] *Khan v Duncan*, unreported, 9 March 1989 (noted in Kemp & Kemp, *The Quantum of Damages* vol 3 paras M3-071 and M3-140). Popplewell J purported to adopt the reasoning of the Court of Appeal in *Prokop v Department of Health and Social Security*, unreported, 5 July 1983 (noted in Kemp & Kemp, *The Quantum of Damages* vol 1 para 16-020).

[73] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.174.

[74] *Ibid*, at para 3.174.

[75] Sixty-three per cent were clearly in favour of our provisional view, 11 per cent were in favour of consistency with interest on damages for non-pecuniary loss generally *subject to* bereavement damages being index-linked, 1 per cent were against interest in principle but in favour of consistency should interest be awarded and 4 per cent were in favour of

6.53 Our report, Damages for Personal Injury: Non-Pecuniary Loss,[76] sets out in detail our views as to how interest should be calculated on damages for non-pecuniary loss.[77] In that report, we resiled from our provisional view that interest should only be awarded on pre-trial non-pecuniary loss. Consultees expressed the view that it would be inappropriate, arbitrary and artificial to apportion the damages as between pre-trial and post-trial losses. We also thought that the advantage to the claimant in awarding interest on the full amount balanced the disadvantage suffered through the assessment of damages from the date of the service of the writ.[78]

6.54 **We therefore recommend that interest on bereavement damages should be assessed according to the same rules as interest on damages for non-pecuniary loss in personal injury cases.** (Draft Bill, clause 2)

6. CAN THE CLAIMANT RECOVER BOTH DAMAGES FOR BEREAVEMENT AND DAMAGES FOR A RECOGNISED PSYCHIATRIC ILLNESS?

6.55 Under the present law, an award of bereavement damages is not taken into account when assessing damages to be awarded for a psychiatric illness suffered as a result of the death of another, and vice versa.[79] In other words, the two heads of damages are regarded as serving different functions. In the consultation paper, we took the provisional view that this position is correct as a matter of principle.[80] As such, our view was that the two causes of action ought to continue to be available concurrently, and that the quantum of damages available for one ought not to be affected by any damages awarded for the other.[81]

6.56 Over 80 per cent of consultees fully agreed with our provisional view, and considered that there was a distinction between "normal bereavement" and psychiatric illness.[82] Nearly all of the remainder were of the opinion that the actions should remain available concurrently, but that the quantum of damages available for psychiatric illness should take account of the availability of bereavement damages. They argued that where a claimant suffers both grief and psychiatric illness, the former is subsumed in the latter. We disagree with that argument. Whilst the symptoms of psychiatric illness can involve severe grief, they can also take very different forms - for example, post-traumatic stress disorder. Further, to the extent that psychiatric illness and "normal" grief can occur on the

consistency subject to conditions set out in their responses to Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140.

[76] (1999) Law Com No 257.

[77] Damages for Personal Injury: Non-Pecuniary Loss (1999) Law Com No 257, paras 2.29-2.58.

[78] Rather than from the date of the accident, when the claimant's losses actually began.

[79] *Hinz v Berry* [1970] 2 QB 40. In *Vernon v Bosley (No 1)* [1997] 1 All ER 577, 604, Evans LJ put forward a qualification of *Hinz v Berry*, but it would appear that this qualification was not accepted by the other members of the Court of Appeal.

[80] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.175.

[81] *Ibid*, at para 3.175.

[82] The point was encapsulated by a consultee: "By definition, recognised psychiatric illness begins where normal bereavement ends."

same facts, the courts have always treated psychiatric illness as something above and beyond mere grief. As such, an award of compensation for psychiatric illness is calculated so as not to include compensation for grief suffered. Finally, we take the view that in addition to providing compensation for grief and sorrow, bereavement damages also compensate for loss of care, guidance and society.[83] We do not think it arguable that this loss is also subsumed within the psychiatric illness suffered.

6.57 **We therefore recommend, although we do not think that legislation on this is necessary, that:**

(1) **a claimant should not be barred from recovering both damages for bereavement and, assuming liability can be established, damages for a recognised psychiatric illness;**

(2) **the quantum of bereavement damages should not be affected by the quantum of damages recoverable for a recognised psychiatric illness;**

(3) **the quantum of damages for psychiatric illness should not be affected by the quantum of damages for bereavement.**

7. CONTRIBUTORY NEGLIGENCE

6.58 Under section 5 of the Fatal Accidents Act 1976, "any damages recoverable in an action … under this Act shall be reduced" for the deceased's contributory negligence. Although there is no reported authority to the effect that this provision applies to bereavement damages, both the open wording, and the legislative history of section 5 suggest that it does.[84] In the consultation paper, we took the view that this should continue to be the case, for the same reasons as were set out above in the context of the action for pecuniary losses.[85]

6.59 We also took the view that the contributory negligence of the bereaved should be relevant to the assessment of bereavement damages.[86] We recognised that the attribution of fault to a member of the deceased's family might have detrimental effects on family relations at a difficult and sensitive time.[87] However, our view was that it would be wholly unjust if the defendant were to be made liable to pay damages for an assumed loss to a person who is also partly responsible for that loss.[88]

6.60 There was nearly 90 per cent support for each part of our provisional view. We remain persuaded that the issue of the deceased's contributory negligence cannot

[83] See para 6.5 above.

[84] Section 5 was amended by s 3(2) of the Administration of Justice Act 1982, the legislation which introduced the award for bereavement damages, to omit reference to the "dependants" of the deceased.

[85] Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.11-3.13 and 3.177. See para 3.10 above for these arguments.

[86] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.178.

[87] *Ibid*. See further the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054-I, para 1462.

[88] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.178.

be resolved satisfactorily through the introduction of contribution proceedings against the deceased's estate.[89] We are also impressed by the fact that consultees expressed consistent views on this question and on that dealing with the action for pecuniary loss. Finally, we maintain our view that it would be wholly unfair to the defendant not to take account of the bereaved's own contributory negligence when assessing damages payable to the latter.[90]

6.61 However, in the light of the broad wording of the present section 5, under which "any damages" awarded under the Act should be reduced proportionately to any contributory negligence, we do not believe that there is a need for legislation to ensure that contributory negligence of the deceased results in a proportionate reduction in the defendant's liability. On the other hand, as regards the contributory negligence of the bereaved claimant the position is not entirely clear: we note that section 1A(4) of the 1976 Act does not contemplate the unequal division of the bereavement award where one of the claimants was contributorily negligent.[91] We therefore recommend that the legislation should make clear that in line with normal principles, the bereavement award for a bereaved claimant should be reduced for that claimant's contributory negligence.

6.62 **We therefore recommend that, as under the present Fatal Accidents Act 1976, the contributory negligence of the deceased should continue to reduce bereavement damages. Further, we recommend legislation to make clear that the contributory negligence of the bereaved claimant should reduce that claimant's award of bereavement damages.** (Draft Bill, clause 2)

8. THE SURVIVAL OF THE AWARD

6.63 A claim for bereavement damages does not survive for the potential claimant's estate in the event of his or her death.[92] As such, the position is different from that which applies generally in the context of damages for non-pecuniary loss.[93] The main problem with the present law is that it gives defendants an incentive to delay settlement of a claim. However, in the consultation paper, we expressed the provisional view that the rule should not be reformed.[94] This view was motivated by the fact that it would be inappropriate to consider the extent to which the potential claimant had suffered grief before his or her death, and to decide what fraction of the fixed amount should be awarded to compensate that suffering.[95] The fact that bereavement is compensated by way of a fixed award is due to the wish to avoid inquiries such as this. We also noted the scope, should the action

[89] See para 3.10 above.

[90] Professor Luntz commented that to take account of the bereaved's own negligence was "probably unavoidable in a fault[-based] system."

[91] See para 2.73 above.

[92] Law Reform (Miscellaneous Provisions) Act 1934, s 1(1A), following our recommendation in Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 180.

[93] An action for defamation is another exception to the general rule, and does not survive for the benefit of the deceased's estate, Law Reform (Miscellaneous Provisions) Act 1934, s 1.

[94] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.180.

[95] *Ibid*.

survive, for the action to be brought where the potential claimant survived the deceased by a mere matter of minutes, and took the view that this would be undesirable.[96]

6.64 Our view was supported by over 80 per cent of those to express a view on the matter. Further, a number of respondents argued that it is the responsibility of the claimant's solicitor to take appropriate action if it appears that the defendant is delaying settlement. Whilst some respondents were reluctant to accept this position, their proposed compromises did not solve the crucial problem as to how damages should be calculated for pre-death bereavement.[97] We therefore remain of the view, with some reluctance, that the action for bereavement damages should not survive for the benefit of the bereaved's estate.

6.65 **We therefore recommend that the action for bereavement damages should continue not to survive for the benefit of the bereaved's estate.**

[96] Claims for Wrongful Death (1997) Consultation Paper No 148, para 3.180.

[97] For example, the suggestion that the action should be allowed where the claimant has initiated proceedings before his or her death, a suggestion based on Swiss and Dutch law; or that the action should survive if the potential claimant survived the deceased by a specified period - 6 or 12 months.

PART VII
SUMMARY OF RECOMMENDATIONS

1. GENERAL ISSUES

(1) Should the Fatal Accidents Act claim be abolished?

7.1 We recommend that the Fatal Accidents Act claim should not be abolished, and it should remain the law that the "lost years" claim should not survive for the benefit of the deceased's estate. (Paragraph 3.4)

(2) The nature of the right of action

7.2 We recommend that the nature of the right of action under section 1(1) of the 1976 Act, under which a claim can only be made if the deceased would have had a claim against the tortfeasor, does not in general require reform. (Paragraph 3.6)

7.3 We recommend that, although it is our view that no action under the Fatal Accidents Act should lie if the deceased's death was too remote a consequence of the defendant's wrong, we do not consider that there is a need for legislation in this regard. (Paragraph 3.9)

7.4 We recommend that section 5 of the 1976 Act, laying down that contributory negligence of the deceased operates to reduce a dependant's damages, should be retained. (Paragraph 3.11)

(3) Pecuniary loss: who can claim and for what type of loss?

7.5 We recommend that benefits expected as the product of a business relationship between the deceased and a claimant should remain irrecoverable under the Fatal Accidents Act. (Paragraph 3.14)

7.6 We recommend that the list of those who can claim under the Fatal Accidents Act 1976 is too restrictive and should be reformed. (Paragraph 3.18)

7.7 We recommend that:

(1) the present list of those able to claim should be retained, but there should be added to the list a generally worded class of claimant whereby any other individual 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" shall be able to bring an action under the Fatal Accidents Act. A person shall be treated as being wholly or partly maintained by another if that person, "otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards his reasonable needs";

(2) although no legislation on this is necessary, it may be helpful for us to clarify that, like any other claimant, a claimant under this class should be able to recover damages for the loss of reasonably expected non-business benefits. (Paragraph 3.46; Draft Bill, clause 1)

7.8 We recommend that the law governing the recovery of funeral expenses in Fatal Accident Act claims is not in need of statutory reform. (Paragraph 3.50)

7.9 We recommend that the Fatal Accidents Act should not make available to the deceased's dependants a right to recover the reasonable costs of administering the deceased's estate. (Paragraph 3.55)

7.10 We recommend that the Fatal Accidents Act should not make available to the deceased's dependants a right to recover the reasonable costs of grief counselling. (Paragraph 3.59)

7.11 We recommend that a carer should not have a direct claim under the Fatal Accidents Act to recover expenses incurred in looking after the deceased's dependants. (Paragraph 3.61)

7.12 We recommend that there should be no departure from the theoretical basis of the Fatal Accidents Act so as to enable dependants to recover medical expenses incurred for the benefit of the deceased. (Paragraph 3.63)

7.13 We recommend that Fatal Accidents Act should not be reformed so as to enable a dependant to recover damages for any other pecuniary expenses. (Paragraph 3.66)

2. ASSESSING DAMAGES FOR PECUNIARY LOSS

(1) Should the multiplier be calculated from death or from trial?

7.14 We recommend that, in the first instance, the Ogden Working Party (which includes the Government Actuary) should consider, and explain more fully, how the existing actuarial Ogden tables should be used, or amended, to produce accurate assessments of damages in Fatal Accident Act cases (as opposed to personal injury cases). We would point out to that working party our preferred approach as set out in paragraphs 4.17 and 4.18 and, in particular, our view that a multiplier which has been discounted for the early receipt of the damages should only be used in the calculation of post-trial losses. (Paragraph 4.23)

(2) Quantifying the loss of a deceased's services

7.15 We recommend that the law governing the quantification of damages for the loss of a deceased's services is not in need of legislative reform. (Paragraph 4.26)

(3) Actual or predicted changes in the personal life of the claimant or the deceased

7.16 We recommend that reviewable, periodic payments should not be awarded under the Fatal Accidents Act to deal with the problem of marriage prospects. (Paragraph 4.34)

7.17 We recommend that:

(1) section 3(3) of the Fatal Accidents Acts should be repealed. Unless a person is engaged to be married at the time of trial, the prospect that he or she will marry, remarry or enter into financially supportive cohabitation with a new partner, should not be taken into account when assessing any claim for damages under the Fatal Accidents Act. The fact of a marriage

and, as appears to be the present law, the fact of financially supportive cohabitation should be taken into account wherever relevant;

(2) as under the Family Law Act 1996, it should not be possible to establish an agreement to marry other than by evidence in writing of the existence of the agreement, by the gift of an engagement ring by one party to the agreement to the other in contemplation of their marriage, or by a ceremony entered into by the parties in the presence of one or more witnesses. (Paragraph 4.53; Draft Bill, clauses 4 and 6(5))

7.18 We recommend that the prospect of divorce or breakdown in the relationship between the deceased and his or her spouse should not be taken into account when assessing damages for the purposes of any claim under the Fatal Accidents Act unless the couple were no longer living together at the time of death, or one of the couple had petitioned for divorce, judicial separation or nullity. (Paragraph 4.66; Draft Bill, clause 4)

7.19 We recommend that section 3(4) of the Fatal Accidents Act should be repealed, and replaced by a provision to the effect that the prospect of breakdown in the relationship between the deceased and his or her partner should not be taken into account when assessing damages under the Act. (Paragraph 4.71; Draft Bill, clauses 4 and 6(5))

3. COLLATERAL BENEFITS

(1) The existing section 4 should be repealed and the law reformed in line with Option 6

7.20 We recommend that section 4 be repealed. (Paragraph 5.21)

7.21 We recommend that the law should be reformed in line with Option 6. In other words, the position in fatal accident claims should be made consistent with that in personal injury claims, through listing charity, insurance, survivors' pensions and inheritance as non-deductible. (Paragraph 5.39; Draft Bill, clause 5)

(2) The law governing damages in respect of gratuitous care should be reformed in line with out recommended reforms for personal injury cases

7.22 We recommend legislation which provides that:

(1) damages may be awarded under the Fatal Accidents Act in respect of services gratuitously provided to the dependant;

(2) the dependant should be under a legal obligation to account for damages awarded for *past* services to a relative or friend who has in the past provided the gratuitous services.

But the legislation should not impose a legal duty on the dependant to pay over the damages awarded in respect of *future* gratuitous services. (Paragraph 5.53; Draft Bill, clause 3)

7.23 We recommend legislation which ensures that a defendant's liability under the Fatal Accidents Act to pay damages to the claimant for gratuitously provided

services is unaffected by any liability of the claimant on receipt of those damages to pay them (or a proportion of them) back to the defendant as the person who has gratuitously provided such services. (Paragraph 5.55; Draft Bill, clause 3)

(3) There should be recoupment of social security benefits in claims under the Fatal Accidents Act, in line with the position in personal injury cases

7.24 Our view is that the scheme of the Social Security (Recovery of Benefits) Act 1997 should be extended so as to apply to benefits received by a claimant under the Fatal Accidents Act, but that it would not be appropriate for us to put forward legislation to this effect. (Paragraph 5.69)

(4) There should be no statutory right to recover the value of private collateral benefits

7.25 We do not recommend the creation of statutory rights to recover the value of private collateral benefits, either from the tortfeasor or the tort victim. (Paragraph 5.73)

4. BEREAVEMENT DAMAGES

(1) The role of bereavement damages

7.26 We recommend that bereavement damages should continue to be available under the Fatal Accidents Act. However, the Explanatory Notes to our replacement clause on bereavement damages should clarify that the function of bereavement damages is to compensate, in so far as a standardised award of money can, grief, sorrow and the loss of the non-pecuniary benefits of the deceased's care, guidance and society. (Paragraph 6.7)

(2) Who can claim bereavement damages?

7.27 We recommend that the model of an exhaustive statutory list for those entitled to claim bereavement damages should be retained. (Paragraph 6.10)

7.28 We recommend that bereavement damages should be recoverable by the following persons:

(1) a spouse of the deceased;

(2) a parent of the deceased, including adoptive parents;

(3) a child of the deceased, including adoptive children;

(4) a brother or sister of the deceased, including an adoptive brother or sister;

(5) a person who was engaged to be married to the deceased, as established by evidence in writing of the existence of the agreement to marry, by the gift of an engagement ring by one party to the agreement to the other in contemplation of their marriage, or by a ceremony entered into by the parties in the presence of one or more witnesses (in accordance with the Family Law Act 1996);

(6) a person who, although not married to the deceased, had lived with the deceased as man and wife (or if of the same gender, in the equivalent relationship) for not less than two years immediately prior to the accident. (Paragraph 6.31; Draft Bill, clause 2)

(3) Should bereavement be proved or presumed?

7.29 We recommend that proof of actual loss (that is, actual mental distress) should continue not to be a necessary condition for an award of bereavement damages. (Paragraph 6.34)

(4) Quantum

7.30 We recommend that the award of bereavement damages should continue to be a fixed sum. (Paragraph 6.36)

7.31 We recommend that the level of the award of bereavement damages should be increased to £10,000. (Paragraph 6.41; Draft Bill, clause 2)

7.32 We recommend that the award for bereavement damages should be linked to the Retail Prices Index, and the power of the Lord Chancellor to vary the level of damages should be repealed. (Paragraph 6.43; Draft Bill, clause 2)

7.33 We recommend that a defendant's liability to pay bereavement damages should be limited to a maximum of £30,000. If the number of people validly claiming bereavement damages is greater than three, the £30,000 should be apportioned equally amongst them (subject to any reduction for contributory negligence of the bereaved claimant). The overall limit of £30,000 should also be linked to the Retail Prices Index. (Paragraph 6.51; Draft Bill, clause 2)

(5) Interest on bereavement damages

7.34 We recommend that interest on bereavement damages should be assessed according to the same rules as interest on damages for non-pecuniary loss in personal injury cases. (Paragraph 6.54; Draft Bill, clause 2)

(6) Can the claimant recover both damages for bereavement and damages for a recognised psychiatric illness?

7.35 We recommend, although we do not think that legislation on this is necessary, that:

(1) a claimant should not be barred from recovering both damages for bereavement and, assuming liability can be established, damages for a recognised psychiatric illness;

(2) the quantum of bereavement damages should not be affected by the quantum of damages recoverable for a recognised psychiatric illness;

(3) the quantum of damages for psychiatric illness should not be affected by the quantum of damages for bereavement. (Paragraph 6.57)

(7) Contributory negligence

7.36 We recommend that, as under the present Fatal Accidents Act 1976, the contributory negligence of the deceased should continue to reduce bereavement

damages. Further, we recommend legislation to make clear that the contributory negligence of the bereaved claimant should reduce that claimant's award of bereavement damages. (Paragraph 6.62; Draft Bill, clause 2)

(8) The survival of the award

7.37 We recommend that the action for bereavement damages should continue not to survive for the benefit of the bereaved's estate. (Paragraph 6.65)

(*Signed*) ROBERT CARNWATH, *Chairman*
ANDREW BURROWS
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*
8 September 1999

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APPENDIX A

Draft
Fatal Accidents Bill

ARRANGEMENT OF CLAUSES

[The draft Bill followed by Explanatory Notes can be found on the following pages. Appendix B begins on p 130.]

DRAFT

OF A

B I L L

TO

Amend the Fatal Accidents Act 1976; and for connected purposes. A.D. 1999.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Extension of category of "dependants".

1.—(1) Section 1 of the 1976 Act (right of action for wrongful act causing death) shall be amended as follows.

(2) In subsection (3) (persons who may benefit from action for damages), there shall be inserted at the end—

"(h) any person not falling within any of paragraphs (a) to (g) above 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."

(3) At the end of the section there shall be inserted—

"(7) For the purposes of this Act a person shall be treated as being wholly or partly maintained by another person if the other person, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards his reasonable needs."

Bereavement damages.

2. For section 1A of the 1976 Act there shall be substituted—

"Bereavement damages.

1A.—(1) An action under this Act may consist of or include a claim for damages for bereavement.

(2) A claim for damages for bereavement shall be for the benefit of—

(a) the wife or husband of the deceased;

(b) any person who has lived with the deceased as husband and wife for a period of at least two years immediately before the death;

(c) any person of the same gender as the deceased who has lived with the deceased for such a period in a relationship equivalent to that described in paragraph (b) above;

(d) any person who, immediately before the death, was engaged to be married to the deceased;

(e) any parent of the deceased;

(f) any child of the deceased; and

(g) any brother or sister of the deceased.

(3) Subject to subsection (4) below, the sum to be awarded as damages for bereavement shall comprise the standard amount in respect of each claimant (subject to any reduction in respect of contributory negligence on the part of the claimant or the deceased).

(4) If, in a case where there are more than three claimants, the sum under subsection (3) above exceeds the maximum permitted amount, the sum to be awarded as damages for bereavement shall be that amount.

(5) For the purposes of this section—

(a) the standard amount is £10,000, and

(b) the maximum permitted amount is £30,000,

subject, in each case, to adjustment to take account of changes in the retail prices index during the period beginning with the passing of the Fatal Accidents Act 1999 and ending with the date on which the damages are awarded.

(6) Where damages for bereavement are awarded in respect of two or more claimants, any amount recovered shall (subject to any deduction in respect of costs not recovered from the defendant) be divided among the claimants in the proportions which the amounts in respect of each under subsection (3) above bear to the total amount under that subsection.

(7) In the case of damages for bereavement, an award of interest under section 35A of the Supreme Court Act 1981 or section 69 of the County Courts Act 1984 (powers of High Court and county court to award interest on damages) shall be—

1981 c. 54.
1984 c. 28.

(a) for the period beginning with the date on which the action is brought and ending with the date on which the damages are awarded, and

(b) at the same rate for the time being applicable to damages for non-pecuniary loss in an action for personal injury.

(8) For the purposes of subsection (2)(d) above a person shall only be taken to have been engaged to be married to the deceased if the court is satisfied that the engagement was evidenced—

(a) in writing;

(b) by the gift of an engagement ring by one party to the engagement to the other in contemplation of their marriage; or

(c) by a ceremony entered into by the parties in the presence of one or more other persons assembled for the purpose of witnessing the ceremony.

(9) In subsection (5) above "retail prices index" means the general index of retail prices (for all items) published by the Office for National Statistics or anything published by that Office as a substitute when that index is not published.

(10) In this section "claimant" means a person for whose benefit the claim for damages for bereavement is brought."

Treatment of gratuitous provision of services to dependant.

3.—(1) In section 3 of the 1976 Act (assessment of damages other than bereavement damages), after subsection (1) there shall be inserted—

"(1A) The court may treat the injury to a dependant resulting from the death as including the loss to an individual of gratuitously providing services for the dependant which the deceased would have provided but for his death.

(1B) The court shall not refuse to exercise the power conferred by subsection (1A) above merely because the individual is the defendant.

(1C) The reference in subsection (1A) above to providing services for the dependant includes, in particular—

(a) providing him with care, and

(b) carrying out any task as part of running or maintaining the home or supporting his domestic or family life.

(1D) For the purposes of subsection (1A) above an individual provides services gratuitously if he provides them—

(a) without having any contractual right to payment in respect of their provision, and

(b) otherwise than in the course of a business, profession or vocation."

(2) After section 4 of that Act there shall be inserted—

"Duty to account for damages for past gratuitous services.

4A.—(1) If a dependant, or his personal representative, recovers damages which consist of or include damages awarded by virtue of section 3(1A) above, he shall be under an obligation to account for so much of the damages so awarded as relates to the provision of services before the date of the award.

(2) The obligation under subsection (1) above is owed to the individual by whom the services were provided."

Assessment of damages: marriage of dependants etc.

4. After section 3 of the 1976 Act there shall be inserted—

"Assessment of damages: marriage of dependants etc.

3A.—(1) In assessing damages in an action under this Act, no account shall be taken of the following possibilities—

(a) where the deceased was married immediately before the death, the possibility that his marriage might have broken down; or

(b) where immediately before the death the deceased was living with another person as husband and wife or, if of the same gender, in an equivalent relationship, the possibility that the deceased might have ceased to so live with the other.

(2) Subsection (1)(a) above shall not apply if immediately before the death—

(a) the parties to the marriage were not living in the same household; or

(b) one of the parties to the marriage was petitioning for a decree of divorce, separation or nullity.

(3) In assessing the damages payable to a dependant in an action under this Act, there shall be taken into account (together with any other matter that appears to the court to be relevant to the action) the fact that since the death the dependant, or a person whose personal circumstances are relevant to the injury to the dependant—

(a) has married or re-married; or

(b) has entered into a relevant relationship.

(4) In assessing the damages payable to a dependant in an action under this Act, there shall not be taken into account the prospects of the dependant, or a person whose personal circumstances are relevant to the injury to the dependant—

(a) marrying or re-marrying; or

(b) entering into a relevant relationship.

(5) Subsection (4)(a) above shall not apply if the dependant, or person, is engaged to be married.

(6) For the purposes of subsection (5) above a person shall only be taken to be engaged to be married if the court is satisfied that the engagement is evidenced—

(a) in writing;

(b) by the gift of an engagement ring by one party to the engagement to the other in contemplation of their marriage; or

(c) by a ceremony entered into by the parties in the presence of one or more other persons assembled for the purpose of witnessing the ceremony.

(7) For the purposes of this section a dependant, or a person whose personal circumstances are relevant to the

injury to a dependant, enters into a relevant relationship if the dependant or person—

(a) lives with another person as husband and wife or, if of the same gender, in an equivalent relationship; and

(b) is wholly or partly maintained by the other person."

5. For section 4 of the 1976 Act there shall be substituted— Assessment of damages: disregard of certain benefits.

"Assessment of damages: disregard of certain benefits.

4.—(1) In assessing damages in an action under this Act, no deduction shall be made in respect of—

(a) any insurance money or private pension which has been or will or may be paid as a result of the death of the deceased,

(b) any gift of money or other property which has been or will or may be made as a result of the death of the deceased, or

(c) any benefit which has or will or may accrue to any person from the deceased's estate.

(2) Subsection (1) above shall not apply if, or to the extent that, it appears to the court that—

(a) there is a correspondence between the benefit concerned and particular loss claimed in the action in respect of a dependant, and

(b) the correspondence is such that in effect the loss is not suffered or is compensated for.

(3) In this section—

"insurance money" includes a return of premiums;

"pension" includes a return of contributions and any payment of a lump sum in respect of a person's employment;

"private", in relation to pension, means arising otherwise than under the enactments relating to social security (including those in force in Northern Ireland)."

6.—(1) The 1976 Act shall be amended as set out in subsections (2) to (5) below. Minor and consequential amendments and repeals.

(2) In section 1, in subsection (2) (which provides for the action for damages to be for the benefit of the dependants of the deceased), for "section 1A(2)" there shall be substituted "section 1A".

(3) In that section, in subsection (3), for paragraph (b) there shall be substituted—

"(b) any person who has lived with the deceased as husband and wife for a period of at least two years immediately before the death;".

(4) In that section, in subsection (6) (construction of references to injury), for "Act" there shall be substituted "section".

(5) In section 3—

(a) subsection (3) (which prevents the re-marriage or prospects of re-marriage of the deceased's widow from being taken into account in assessing damages); and

(b) subsection (4) (which requires the fact that a person with whom the deceased was living as husband or wife had no right to financial support to be taken into account in assessing damages);

are hereby repealed.

1973 c. 62.

(6) In section 35 of the Powers of Criminal Courts Act 1973 (compensation orders against convicted persons), for subsection (3D) there shall be substituted—

"(3D) The amount required to be paid under subsection (1) above to any person for bereavement in respect of a death shall not exceed the standard amount.

(3E) In the case of any death, the amount required to be paid under subsection (1) above for bereavement shall not exceed the maximum permitted amount.

(3F) For the purposes of this section—

(a) the standard amount is £10,000, and

(b) the maximum permitted amount is £30,000,

subject, in each case, to adjustment to take account of changes in the retail prices index during the period beginning with the passing of the Fatal Accidents Act 1999 and ending with the date on which the compensation order is made."

(7) In that section, there shall be inserted at the end—

"(4B) In subsection (3F) above "retail prices index" means the general index of retail prices (for all items) published by the Office for National Statistics or anything published by that Office as a substitute when that index is not published."

Short title etc.

7.—(1) This Act may be cited as the Fatal Accidents Act 1999.

1976 c. 30.

(2) In this Act "the 1976 Act" means the Fatal Accidents Act 1976.

(3) This Act shall come into force at the end of the period of two months beginning with the date on which it is passed.

(4) Sections 1 to 5 above and section 6(1) to (5) above shall not apply to any cause of action arising on a death before this Act comes into force.

(5) Section 6(6) and (7) above shall not apply in relation to any death before this Act comes into force.

(6) This Act extends to England and Wales only.

EXPLANATORY NOTES

References to “the 1976 Act” are references to the Fatal Accidents Act 1976.

Clause 1

Clause 1 implements the recommendation made at paragraph 3.46 of the report. The clause creates a new “residual” class of persons entitled to damages for pecuniary loss under the Act. This new class is additional to, and does not replace, the existing list of dependants.

Under new section 1(3)(h), damages for loss of dependency (and for funeral expenses) will be available to any person who was being wholly or partly maintained by the deceased immediately before the death or who would, but for the death of the deceased, have been so maintained at some stage in the future. The concept of being “wholly or partly maintained” is defined in clause 1(3), which inserts a new section 1(7) into the 1976 Act. The new provisions are modelled on section 1(1) and (3) of the Inheritance (Provision for Family and Dependants) Act 1975.

No provision is made for rules governing the quantum of the claim: it is envisaged that the standard rules governing the quantum of a claim for pecuniary loss under the 1976 Act will apply to claims brought for a person who falls within the new class.

Clause 2

Clause 2 implements recommendations made in Part VI of the report, and which concern the award of bereavement damages (see in particular paragraphs 6.31, 6.41, 6.43, 6.51, 6.54 and 6.62).

The main changes made by the clause are to extend the list of those who can claim bereavement damages, and to alter the amount of the award. The purpose of the award remains to compensate (in so far as a standardised award of money can) the non-pecuniary losses suffered by those close to the deceased in consequence of the death. The award is therefore made to compensate losses such as grief, sorrow, and the loss of the deceased’s care, guidance and society. To avoid distressing and distasteful inquiries of those close to the deceased (for example, into the extent of the grief suffered), the award is standardised and is not subject to a requirement of proof of non-pecuniary loss.

New section 1A(2) continues a spouse’s entitlement to bereavement damages, removes some previous restrictions relating to the rights of parents to claim bereavement damages and creates a new entitlement to bereavement damages for the following persons: the deceased’s cohabitant partner of two years standing (whether heterosexual or same sex), his or her fiancé(e), his or her children and his or her siblings. For the purposes of new section 1A(2)(d), new section 1A(8) (which is modelled on section 44 of the Family Law Act 1996) provides that an engagement can only be proved by particular forms of evidence.

EXPLANATORY NOTES

New section 1A(3)-(6) governs the quantum of the award of bereavement damages. New section 1A(3) and (5) provide that the standard amount of bereavement damages in respect of each claimant shall be £10,000 (index-linked), subject to any reduction for contributory negligence. Where the aggregate of the standard amounts exceeds the maximum permitted amount of £30,000 (index-linked), then by section 1A(4)-(6), the amount of the award is limited to that amount. Each claimant is then entitled to an appropriate proportion of the maximum permitted amount: see new section 1A(6) and the example below. Costs, such as a solicitor's entitlement to recover from his or her client costs not recovered from the defendant, should be deducted from the damages to be awarded to that client.

So, if there are four claimants (and assuming for the purposes of simplicity that no index-linking of the relevant figures is required, and that no deductions are to be made for costs or for contributory negligence), the sum awarded would be £30,000 (because four times the standard amount exceeds the maximum permitted amount). This should then be divided so that each claimant receives £7,500. However, if one of the claimants was 50% contributorily negligent, £30,000 would still be awarded. That sum would then be divided by three-and-a-half, so that three claimants receive £8571 and the contributorily negligent claimant receives £4286.

The index-linking of the award brings the award of bereavement damages into line with the law on damages for non-pecuniary loss in personal injury cases. Under this approach, the Lord Chancellor's power to adjust the quantum of the bereavement award becomes obsolete, and the power is therefore not reproduced in new section 1A.

New section 1A(7) provides that interest on the bereavement award should be calculated in the same way as is interest on damages for non-pecuniary loss in personal injury cases. The section therefore adopts a different approach from that taken in cases holding that interest on bereavement damages should be calculated in the same way as interest on damages for pre-trial pecuniary losses.

EXPLANATORY NOTES

Clause 3

Clause 3 implements recommendations made at paragraphs 5.53 and 5.55 regarding gratuitous services. In general terms, this clause achieves for Fatal Accidents Act claims what is brought about for personal injury claims by our draft Damages for Personal Injury (Gratuitous Services) Bill.

The new section 3(1A) puts beyond doubt that the courts have the power to award damages for the loss to an individual third party of gratuitously providing services for a dependant, which the deceased would have provided but for his death. Therefore the courts can, and in our view should, apply to Fatal Accidents Act claims the general approach of the House of Lords in *Hunt v Severs* [1994] 2 AC 350 which concerned the analogous situation where gratuitous services are provided to an injured person.

The new section 3(1B), however, prevents the actual decision in *Hunt v Severs* [1994] 2 AC 350 (according to which there can be no damages in a personal injury case for care provided gratuitously by the tortfeasor) being applied to services provided gratuitously to a dependant by the defendant. It also means that the courts are not bound by *Hayden v Hayden* [1992] 1 WLR 986, to the extent that that case can be interpreted as denying damages because the services were provided by the tortfeasor.

The new section 3(1C) sets out, without providing an exhaustive definition, the main types of services covered. The new section 3(1D) lays down the meaning of *gratuitous* services for the purposes of the Bill. The Bill only applies to services provided by an individual. Services provided by organisations or companies (for example, the NHS or local authorities) are therefore excluded.

Two conditions must be satisfied for the provision of services to be gratuitous. First, they must be provided otherwise than under a contract, whether with the injured person or someone else (eg, an employer) which provides payments for those services (subsection (a)).

Secondly, they must be provided otherwise than in the course of a business, profession or vocation (subsection (b)). Services provided by, for example, a charity helper, are not gratuitous services, even though provided without a contractual right to payment, because they are performed in the course of a vocation. Whether they will be left out of account will fall to be dealt with under section 3(1) which the courts have interpreted as basically laying down a compensatory principle, whereby benefits will be deducted against losses like for like (See *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601). Applying this strictly one would expect that, if the point ever arose, services of a charity helper would be deducted in assessing a claim for loss of a deceased's services. However, the courts have not always adhered to a strict compensatory interpretation of section 3(1) (see, for example, *Hay v Hughes* [1975] QB 790); and, in line with the general common law approach in personal injury cases of leaving out of account charitable benefits (see our report, Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits (1999) Law Com No 262, paragraphs 10.10-10.12) the courts might decide not to deduct a charity helper's services.

The new section 4A lays down that a dependant (or, if deceased, his personal representative) is under a duty to account for damages he has recovered in respect of past services to the individual who provided the services. This is in keeping with *Hunt v Severs* [1994] 2 AC 350, although the liability imposed is personal rather than proprietary, and it is made clear that it applies only to damages for past services. It should be noted, however, that clause 3(2) does not prevent the courts imposing a legal duty to the service-provider in respect of damages for future services (although for the reasons set out in paragraph 5.49 we regard this as almost always undesirable).

EXPLANATORY NOTES

Clause 4

Clause 4 implements recommendations made at paragraphs 4.53, 4.66 and 4.71. It changes the courts' powers to take into account a person's personal circumstances when assessing damages for a loss of dependency.

New section 3A(1) provides that, subject to one exception, the court should not take into account the prospect of breakdown in the relationship between the deceased and his or her spouse or cohabitant when assessing damages under the Fatal Accidents Act. The exception to this general rule is that provided by section 3A(2), whereby the possibility that the relationship would have come to an end might be taken into account if the deceased was married but had separated from his or her spouse, or had petitioned for divorce, separation or nullity. Section 3A(1) therefore changes the position at common law whereby the prospect of breakdown in a relationship of dependency is a factor which should be taken into account when assessing the damages to be awarded under the Act. This position was reinforced by section 3(4) of the 1976 Act, and that provision is therefore repealed by clause 6(5)(b).

New section 3A(3)-3A(7) takes a different approach from section 3(3) of the Fatal Accidents Act 1976; section 3(3) is repealed by clause 6(5)(a). Under new section 3A(3), the court must take into account the fact that at the time of trial the claimant, or any other person whose circumstances are relevant to the claim, has entered into a new marriage or "relevant relationship" (as defined in section 3A(7)). Therefore, new section 3A(3) reverses the effect of section 3(3) insofar as that provision prohibits the court from taking into account the fact that a widow has already remarried at the time of trial when assessing the damages to be awarded to her.

New section 3A(4) on the other hand maintains the effect of section 3(3) insofar as that provision prohibits the court from taking into account the prospect of a widow's remarriage when assessing the damages to be awarded to her. Under section 3A(4), subject to one exception, the court cannot take into account the prospect that a person will marry, remarry or enter into a new relationship of financially supportive cohabitation when assessing damages for a Fatal Accidents Act claim (whether their own claim or that of another). The exception to this general rule, under section 3A(5), is that the court can take into account the prospect of marriage where the relevant couple are engaged. The same evidential requirements for proof of engagement apply as under clause 2.

Thus, subject to a new exception, section 3A(4) extends to all persons the protection against distasteful inquiries afforded only to widows under section 3(3). For example, under clause 4, where the deceased lived with his heterosexual partner and their children, a court cannot take into account the prospect that the partner will marry (or enter into a new relationship of financially supportive cohabitation) when assessing the value of the children's claim unless she is engaged at the time of trial.

EXPLANATORY NOTES

Clause 5

Clause 5 implements recommendations made at paragraphs 5.21 and 5.39.

It replaces section 4 of the 1976 Act. The new section applies only to insurance money, private pensions or to gifts (of money or other property) arising as a result of the death of the deceased, and to benefits from the deceased's estate. The new section 4(3) provides that "insurance money" includes a return of premiums, and that "pension" includes a return of contributions and a lump sum in respect of a person's employment. It also defines "private" in relation to pensions.

"Gift of money or other property" covers, for example, charitable payments to dependants from a disaster fund; a charitable payment to dependants made by the deceased's employer or trade union; or the benevolent purchase of a bicycle for the dependant by a relative. "Gift of money or other property" does not cover gratuitously providing services, which are dealt with in the new section 3(1A) to (1D) and in new section 4A. Moreover the new section 4 does not say anything about state benefits (eg widows' pensions). State benefits will fall to be dealt with under section 3(1), which the courts have interpreted as basically laying down a compensatory principle whereby benefits will be deducted against losses like for like (see *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601). Applying this strictly, one may therefore expect state benefits to be deducted against losses like for like. Deduction of state benefits is strongly supported by this being the common law position in relation to damages for personal injury: see *Hodgson v Trapp* [1989] AC 807. (See also *Cresswell v Eaton* [1991] 1 WLR 1113, 1124-1125.) In this report, although outside our terms of reference, we have suggested that state benefits should not merely be deducted but should also be recouped by the state by extending the Social Security (Recovery of Benefits) Act 1997 from personal injury cases to Fatal Accidents Act claims (paragraph 5.69).

The new section 4(1) provides that the benefits to which it applies are not to be deducted in the assessment of damages. The new section 4(2) disapplies section 4(1) in certain circumstances, to enable the courts to prevent blatant instances of double recovery. The new section 4(1) is to be disapplied where there is a correspondence between the benefit and the particular loss claimed in the action in respect of a dependant, and the correspondence is such that in effect the loss is not suffered or is compensated for. The following are two situations where receipt of a benefit means that a particular loss is, in effect, not suffered:

(1) Where a dependant claims damages for the loss of their own survivor's pension and they are in receipt of a survivor's pension. (See *Auty v National Coal Board* [1985] 1 WLR 784)

(2) Where the deceased supported his or her dependants wholly or partly from an asset (or assets), or from income produced by an asset (or assets) and a claimant inherits the asset (or assets), and/or all or part of the proceeds of sale of it. (See *Wood v Bentall Simplex Ltd* [1992] PIQR P332, P349)

A situation where receipt of a benefit means that a particular loss is, in effect, compensated occurs where the deceased recovers damages for pecuniary loss in "the lost years" in such circumstances that a claim against a concurrent tortfeasor under the Fatal Accidents Act is not debarred and the damages are left to a dependant who succeeds in an action against the concurrent tortfeasor. (See *Jameson v Central Electricity Generating Board* [1999] 2 WLR 141)

On the other hand, if the provider has the right to recover the value of a benefit from the dependant, it could not be said that its receipt means that a particular loss is in effect not suffered or is compensated for. Accordingly in these circumstances the new section 4(2) would not apply.

Our intention is that the new section 4(2) should be construed narrowly as an exception to the general rule in section 4(1). We would stress that the treatment of gifts, such as those made through disaster appeals or out of sympathy for the dependant, is most unlikely to be affected, since they are very unlikely indeed to be referable to any particular (pecuniary) loss. The exception is not intended to undermine the standard common law approach of ignoring charity.

Clause 6

Clause 6(2) provides for a minor drafting amendment to section 1(2) of the 1976 Act. This follows from the fact that it is no longer necessarily the case that those who may claim bereavement damages are dependants under section 1 of the 1976 Act.

Clause 6(3) amends the wording of section 1(3)(b) to render it consistent with new section 1A. No substantive change is made.

EXPLANATORY NOTES

Clause 6(4) corrects an apparent minor drafting error in section 1(6) of the 1976 Act. Section 1(6) gives the standard statutory definition of "personal injury" as what is meant by "injury" in the 1976 Act. However, given that the references to "injury" in section 3 of the Act are not references to personal injuries, but rather to pecuniary loss, it is necessary to confine the application of the definition in section 1(6) to section 1 of the 1976 Act.

Clause 6(5) repeals section 3(3) and (4) of the 1976 Act, as explained above.

Clause 6(6) and (7) amend section 35 of the Powers of Criminal Courts Act 1973 to reflect changes implemented by new section 1A. Under section 35 of the 1973 Act, the court has a power to make compensation orders where a person has been convicted of a criminal offence. Section 35(3D) currently provides that compensation awarded in respect of bereavement "shall not exceed the amount for the time being specified in section 1A(3) of the Fatal Accidents Act 1976". Clause 6(6) and (7) therefore give effect to the policy underlying present section 35(3D) by applying the new limits on the quantum of bereavement damages (under new section 1A) to compensation orders in respect of bereavement.

APPENDIX B

FATAL ACCIDENTS ACT 1976 AMENDED IN ACCORDANCE WITH OUR DRAFT BILL

We thought it would be helpful for our readers to see the effect of our legislative recommendations, as contained in the Fatal Accidents Bill 1999. We have therefore produced a consolidated version of the Fatal Accidents Act 1976 which incorporates the amendments made by the Bill.

FATAL ACCIDENTS ACT 1976[1]

1. Right of action for wrongful act causing death

(1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

(2) Subject to **section 1A** below, every such action shall be for the benefit of the dependants of the person ("the deceased") whose death has been so caused.

(3) In this Act "dependant" means-

(a) the wife or husband or former wife or husband of the deceased;

(b) any person who has lived with the deceased as husband and wife for a period of at least two years immediately before the death;

(c) any parent or other ascendant of the deceased;

(d) any person who was treated by the deceased as his parent;

(e) any child or other descendant of the deceased;

(f) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;

(g) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased;

[1] As amended by the Administration of Justice Act 1982, the Damages for Bereavement (Variation of Sum) (England and Wales) Order 1990 (SI 1990 No 2575) and the Fatal Accidents Bill 1999. Text that has been inserted or substituted by the Fatal Accidents Bill 1999 is indicated by bold type (where it would not otherwise be used). Any sections or subsections that have been repealed by the 1999 Bill are indicated by an ellipsis ("…") in bold type.

(h) any person not falling within any of paragraphs (a) to (g) above 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.

(4) The reference to the former wife or husband of the deceased in subsection (3)(a) above includes a reference to a person whose marriage to the deceased has been annulled or declared void as well as a person whose marriage to the deceased has been dissolved.

(5) In deducing any relationship for the purposes of subsection (3) above-

(a) any relationship of affinity shall be treated as a relationship by consanguinity, any relationship of the half blood as a relationship of the whole blood, and the stepchild of any person as his child, and

(b) an illegitimate person shall be treated as the legitimate child of his mother and reputed father.

(6) Any reference in this **section** to injury includes any disease and any impairment of a person's physical or mental condition.

(7) For the purposes of this Act a person shall be treated as being wholly or partly maintained by another person if the other person, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards his reasonable needs.

1A. Bereavement

(1) An action under this Act may consist of or include a claim for damages for bereavement.

(2) A claim for damages for bereavement shall be for the benefit of-

(a) the wife or husband of the deceased;

(b) any person who has lived with the deceased as husband and wife for a period of at least two years immediately before the death;

(c) any person of the same gender as the deceased who has lived with the deceased for such a period in a relationship equivalent to that described in paragraph (b) above;

(d) any person who, immediately before the death, was engaged to be married to the deceased;

(e) any parent of the deceased;

(f) any child of the deceased; and

(g) any brother or sister of the deceased.

(3) Subject to subsection (4) below, the sum to be awarded as damages for bereavement shall comprise the standard amount in respect of each claimant (subject to any reduction in respect of contributory negligence on the part of the claimant or the deceased).

(4) If, in a case where there are more than three claimants, the sum under subsection (3) above exceeds the maximum permitted amount, the sum to be awarded as damages for bereavement shall be that amount.

(5) For the purposes of this section-

(a) the standard amount is £10,000, and

(b) the maximum permitted amount is £30,000,

subject, in each case, to adjustment to take account of changes in the retail prices index during the period beginning with the passing of the Fatal Accidents Act 1999 and ending with the date on which the damages are awarded.

(6) Where damages for bereavement are awarded in respect of two or more claimants, any amount recovered shall (subject to any deduction in respect of costs not recovered from the defendant) be divided among the claimants in the proportions which the amounts in respect of each under subsection (3) above bear to the total amount under that subsection.

(7) In the case of damages for bereavement, an award of interest under section 35A of the Supreme Court Act 1981 or section 69 of the County Courts Act 1984 (powers of High Court and county court to award interest on damages) shall be-

(a) for the period beginning with the date on which the action is brought and ending with the date on which the damages are awarded, and

(b) at the same rate for the time being applicable to damages for non-pecuniary loss in an action for personal injury.

(8) For the purposes of subsection (2)(d) above a person shall only be taken to have been engaged to be married to the deceased if the court is satisfied that the engagement was evidenced-

(a) in writing;

(b) by the gift of an engagement ring by one party to the engagement to the other in contemplation of their marriage; or

(c) by a ceremony entered into by the parties in the presence of one or more other persons assembled for the purpose of witnessing the ceremony.

(9) In subsection (5) above "retail prices index" means the general index of retail prices (for all items) published by the Office for National Statistics or

anything published by that Office as a substitute when that index is not published.

(10) In this section "claimant" means a person for whose benefit the claim for damages for bereavement is brought.

2. Persons entitled to bring the action

(1) The action shall be brought by and in the name of the executor or administrator of the deceased.

(2) If-

(a) there is no executor or administrator of the deceased, or

(b) no action is brought within six months after the death by and in the name of an executor or administrator of the deceased,

the action may be brought by and in the name of all or any of the persons for whose benefit an executor or administrator could have brought it.

(3) Not more than one action shall lie for and in respect of the same subject matter of complaint.

(4) The plaintiff in the action shall be required to deliver to the defendant or his solicitor full particulars of the persons for whom and on whose behalf the action is brought and of the nature of the claim in respect of which damages are sought to be recovered.

3. Assessment of damages

(1) In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.

(1A) The court may treat the injury to a dependant resulting from the death as including the loss to an individual of gratuitously providing services for the dependant which the deceased would have provided but for his death.

(1B) The court shall not refuse to exercise the power conferred by subsection (1A) above merely because the individual is the defendant.

(1C) The reference in subsection (1A) above to providing services for the dependant includes, in particular-

(a) providing him with care, and

(b) carrying out any task as part of running or maintaining the home or supporting his domestic or family life.

(1D) For the purposes of subsection (1A) above an individual provides services gratuitously if he provides them-

(a) without having any contractual right to payment in respect of their provision, and

(b) otherwise than in the course of a business, profession or vocation.

(2) After deducting the costs not recovered from the defendant any amount recovered otherwise than as damages for bereavement shall be divided among the dependants in such shares as may be directed.

(3) **...**

(4) **...**

(5) If the dependants have incurred funeral expenses in respect of the deceased, damages may be awarded in respect of those expenses.

(6) Money paid into court in satisfaction of a cause of action under this Act may be in one sum without specifying any person's share.

3A. Assessment of damages: marriage of dependants etc

(1) In assessing damages in an action under this Act, no account shall be taken of the following possibilities-

(a) where the deceased was married immediately before the death, the possibility that his marriage might have broken down; or

(b) where immediately before the death the deceased was living with another person as husband and wife or, if of the same gender, in an equivalent relationship, the possibility that the deceased might have ceased to so live with the other.

(2) Subsection (1)(a) above shall not apply if immediately before the death-

(a) the parties to the marriage were not living in the same household; or

(b) one of the parties to the marriage was petitioning for a decree of divorce, separation or nullity.

(3) In assessing the damages payable to a dependant in an action under this Act, there shall be taken into account (together with any other matter that appears to the court to be relevant to the action) the fact that since the death the dependant, or a person whose personal circumstances are relevant to the injury to the dependant-

(a) has married or re-married; or

(b) has entered into a relevant relationship.

(4) In assessing the damages payable to a dependant in an action under this Act, there shall not be taken into account the prospects of the dependant, or a

person whose personal circumstances are relevant to the injury to the dependant-

(a) marrying or re-marrying; or

(b) entering into a relevant relationship.

(5) Subsection (4)(a) above shall not apply if the dependant, or person, is engaged to be married.

(6) For the purposes of subsection (5) above a person shall only be taken to be engaged to be married if the court is satisfied that the engagement is evidenced-

(a) in writing;

(b) by the gift of an engagement ring by one party to the engagement to the other in contemplation of their marriage; or

(c) by a ceremony entered into by the parties in the presence of one or more other persons assembled for the purpose of witnessing the ceremony.

(7) For the purposes of this section a dependant, or a person whose personal circumstances are relevant to the injury to a dependant, enters into a relevant relationship if the dependant or person-

(a) lives with another person as husband and wife or, if of the same gender, in an equivalent relationship; and

(b) is wholly or partly maintained by the other person.

4. Assessment of damages: disregard of certain benefits

(1) In assessing damages in an action under this Act, no deduction shall be made in respect of-

(a) any insurance money or private pension which has been or will or may be paid as a result of the death of the deceased,

(b) any gift of money or other property which has been or will or may be made as a result of the death of the deceased, or

(c) any benefit which has or will or may accrue to any person from the deceased's estate.

(2) Subsection (1) above shall not apply if, or to the extent that, it appears to the court that-

(a) there is a correspondence between the benefit concerned and particular loss claimed in the action in respect of a dependant, and

(b) the correspondence is such that in effect the loss is not suffered or is compensated for.

(3) In this section-

"insurance money" includes a return of premiums;

"pension" includes a return of contributions and any payment of a lump sum in respect of a person's employment;

"private", in relation to pension, means arising otherwise than under the enactments relating to social security (including those in force in Northern Ireland).

4A. Duty to account for damages for past gratuitous services

(1) If a dependant, or his personal representative, recovers damages which consist of or include damages awarded by virtue of section 3(1A) above, he shall be under an obligation to account for so much of the damages so awarded as relates to the provision of services before the date of the award.

(2) The obligation under subsection (1) above is owed to the individual by whom the services were provided.

5. Contributory negligence

Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under the Law Reform (Miscellaneous Provisions) Act 1934 the damages recoverable would be reduced under section 1(1) of the Law Reform (Contributory Negligence) Act 1945, any damages recoverable in an action under this Act shall be reduced to a proportionate extent.

6. Consequential amendments and repeals[2]

(1) Schedule 1 to this Act contains consequential amendments.

(2) The enactments in Schedule 2 to this Act are repealed to the extent specified in the third column of that Schedule.

7. Short title, etc

(1) This Act may be cited as the Fatal Accidents Act 1976.

[2] We have not reproduced the consequential amendments and repeals in Schedules 1 and 2 to the 1976 Act.

(2) This Act shall come into force on 1st September 1976, but shall not apply to any cause of action arising on a death before it comes into force.[3]

(3) This Act shall not extend to Scotland or Northern Ireland.

[3] Amendments made to the 1976 Act by the Administration of Justice Act 1982 apply to causes of action accruing on or after 1 January 1983: Administration of Justice Act 1982, s 76(11). Amendments made by the Damages for Bereavement (Variation of Sum) (England and Wales) Order 1990 (SI 1990 No 2575) apply to causes of action which accrue on or after 1 April 1991: SI 1990 No 2575, para 1(2). Amendments made by the Fatal Accidents Bill 1999 apply to causes of action which accrue on or after the date on which the 1999 Bill is brought into force: Fatal Accidents Bill 1999, cl 7(4).

APPENDIX C

LIST OF PERSONS AND ORGANISATIONS WHO COMMENTED ON CONSULTATION PAPER NO 148

Judiciary

Mr Justice Bell

Lord Justice Brooke

Lord Justice Buxton

Judge Gareth O Edwards QC

Judge Simon P Grenfell

Master Leslie, Master of the Queen's Bench Division

Judge Alistair G MacDuff QC

Lord Justice Stuart-Smith

Judge Robert Taylor

Barristers

Peter Andrews QC

Piers Ashworth QC

Michael Brent QC

Andrew Buchan

Nigel Cooksley

Charles Foster

John Hendy QC

B A Hytner QC

David Kemp QC

Brian Langstaff QC

Charles J Lewis

Harvey McGregor QC

Ian A B McLaren QC

John Munkman

Sir Michael Ogden QC

George Pulman QC

Thomas Saunt

Timothy Scott QC

Raymond Walker QC

Ronald Walker QC

Peter Weitzman QC

Wyn Williams QC

Solicitors

Davies Arnold Cooper

Dibb Lupton Alsop

Evill and Coleman

John M Galt, T G Baynes

Hugh James

Irwin Mitchell

Geraldine McCool, Leigh, Day & Co.

C P Mather, Penningtons

Rodney M Nelson-Jones, Field Fisher Waterhouse

Pannone & Partners

Stephens & Scown with Murdoch Tromans

Thompsons

Insurers

Lloyd's

Accountants

Mark Bennet, Leigh, Day and Co.

Horwath Clark Whitehill, Chartered Accountants

Academics

Professor R A Buckley

Dr Gerhard Dannemann

J W Davies

Professor A M Dugdale

Professor G H L Fridman QC

Laura C H Hoyano

Professor J A Jolowicz QC

Mark Lunney

Professor Harold Luntz

Professor David Miers

Professor Jeffrey O'Connell

Professor Anthony I Ogus

Dr Werner Pfennigstorf

Professor W V H Rogers

Professor Andrew Tettenborn

Prue Vines

Individuals

Diane, Trevor and Clare Fellows

Justin Goldspink

Sandra Green

Rona O'Brien

Janet A Stowe, Personal Injury Claims Assessment Service

C B Tetlow

Arpad Toth

Stephanie Trotter, The Carbon Monoxide & Gas Safety Society

Government Departments

Treasury Solicitor's Department

Organisations

Association of British Insurers

Association of Personal Injury Lawyers

Association of Women Solicitors

British Medical Association

Compassionate Friends

Council of Circuit Judges, Civil Sub-Committee

Criminal Injuries Compensation Appeals Panel

Criminal Injuries Compensation Authority

Faculty and Institute of Actuaries

Forum of Insurance Lawyers

General Council of the Bar, Law Reform Committee

Healthcare Lawyers Association

Hymans Robertson

Law Reform Advisory Committee for Northern Ireland

The Law Society

The Law Society of Northern Ireland

The Law Society of Scotland

London International Insurance and Reinsurance Market Association

The Medical Defence Union

Medical Protection Society

The Patients Association

Personal Injuries Bar Association, Law Reform Sub-Committee

Police Federation

RoadPeace

Royal College of General Practitioners

Scottish Law Commission

Trades Union Congress

Victim Support