RESPONSE TO

DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

(now the Ministry of Justice)

CONSULTATION ON THE LAW OF DAMAGES

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Introduction

Action against Medical Accidents (AvMA) was originally established in 1982. It is the UK charity specialising in advice and support for patients and their families affected by medical accidents. Since its inception AvMA has provided advice and support to over 100,000 people affected by medical accidents, and succeeded in bringing about major changes to the way that the legal system deals with clinical negligence cases and in moving patient safety higher up the agenda. The legal reforms of Lord Woolf in the clinical negligence field and the creation of agencies such as the National Patient Safety Agency and the Healthcare Commission have followed after years of campaigning by AvMA.

AvMA is proud of the key role it has played in making clinical negligence a specialism within legal practice. It continues to accredit solicitors for its specialist panel (without membership of AvMA's or the Law Society Panel a law firm is not entitled to a clinical negligence franchise) and promotes good practice through comprehensive services to claimant solicitors.

Chapter 1: Claims of Wrongful Death

Question 1(a):

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

AvMA has been concerned for a long time about the restrictive category of people permitted to claim for financial loss as dependants under the FAA. Accordingly, the notion of a residual category to include any person who was being wholly or partly maintained by the deceased immediately prior to the death is a welcome extension. AvMA therefore agrees that such a residual category should be added to the statutory list of those entitled to claim for financial loss.

Question 1(b):

Do you agree that this residual category should be limited to any person who has been wholly or partly maintained by the deceased immediately before a death?

Whilst we agree that most people will fall within the residual category as outlined at paragraph 5 of the consultation paper, such a category would exclude those who would have become a dependant but for the death. Such cases might include an elderly relative who might have planned to reside with the deceased or prospective adoption. We know, for example, of a tragic case where a mother had employed a surrogate to have a baby for her but tragically died following a delayed diagnosis of an aggressive cancer that meant she died two days prior to

the adoption taking place. Accordingly, although these cases may be exceptional, the need is significant. We do not agree that it is too open ended or difficult to prove as both examples would have been well evidenced.

Question 2(a):

Do you agree that the fact of a person's re-marriage or entry into a civil partnership should be taken into account when assessing a claim for damages under the FAA?

On balance, we do agree.

Question 2(b):

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

No. Any enquiries would be highly intrusive and distasteful.

Question 2(c):

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

We agree. We categorically oppose the notion of a person's re-marriage prospects being taken into account when determining a dependency claim.

Question 3(a):

Do you agree that the fact of a person's re-marriage or entry into a civil partnership should be taken into account when assessing a claim for damages on the part of any eligible children?

We are not clear as to what is proposed exactly. If the fact of it is to be explored evidentially the court can make an assessment of whether the child is supported by anyone else. However, there is no obligation on a new partner to support the child although there is a legal obligation on the real parent.

Furthermore, to undertake this exercise would entail the delving into the financial position of the new partner and would be intrusive, invasive and unpleasant and may jeopardise the will of the new partner to maintain the children at all, if not the relationship as a whole.

Question 3(b):

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

No. Please see our response to Question 3(a) above. We do not agree for the same reasons as stated above.

Question 4:

Do you agree that the court should only take into account the prospect of divorce, dissolution or breakdown in the relationship between the deceased and his/her spouse or civil partner?

(a) where the couple are no longer living together at the time of death,
(b) where one has petitioned for divorce, judicial separation or nullity,
(c) where one has begun the procedure for dissolution of the civil partnership.

We agree that paragraphs (b) and (c) are evidence that separation is envisaged. Nevertheless, even if parties agree to separate it does not mean that maintenance is necessarily severed as well. However, in these situations a discounting may be appropriate subject to the evidence. However, we do not believe that just because a couple are no longer together at the time of death is tantamount to evidence of separation. This does not allow for the fact that some couples have different domestic arrangements. Some couples may be undergoing a trial separation. One partner may be working overseas. Therefore, we believe that there may be more speculation involved in (a) and therefore living apart is not necessarily tantamount to evidence that there was the prospect of divorce or breakdown.

Question 5:

Do you agree that section 3(4) of the FAA should be repealed and replaced by provision to the effect that the prospect of breakdown of a relationship between the deceased and his/her partner should not be taken into account when assessing damages under the FFA?

We agree.

<u>Chapter 2: Bereavement Damages</u>

Question 6:

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

We agree with the Commission that bereavement damages do serve a valid purpose. Therefore we do agree that bereavement damages should continue to be available. However, it is the case that many claimants find the amount of damages to be derisory. However, the effect of this may be mitigated if more than one category in the class of people entitled to claim the award is entitled to the compensation i.e. instead of the total award (currently £10,000) being divided up between the claimants, each of the eligible class are entitled to claim £10,000. Also, once it is explained to claimants what the £10,000 represents – that it is a recognition that something that went wrong as opposed to a valuation of that person's life, many do accept this. It is managing their expectations. However, what is much harder for prospective claimants to accept, is those who would otherwise be eligible on grounds of merit for public funding in order to pursue a bereavement claim, are denied this because the value of the award is too low and therefore does not meet the cost:benefit criteria. In practical terms, given the nominal value of the award, public funding is not available in any but the most exceptional circumstances. In fact, the Legal Services Commission (LSC) refuses to fund any investigation into a claim that relates to an elderly person as opposed to a child. Similarly, legal expenses insurance may not be available because of issues regarding proportionality (i.e. the costs of investigating and pursuing a claim may well exceed the damages). This has real implications for access to justice and denies many potential claimants the right to a full investigation if not compensation. This is particularly offensive where a death has occurred and is to be contrasted with a situation where a catastrophic injury might have arisen based on similar facts.

For this reason, AvMA recommends that the amount awarded for bereavement damages is increased and that the level of damages keeps up with inflation and is reviewed on an annual basis.

Question 7(a):

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

Clarification of the purpose of bereavement damages would be helpful. However, whilst the Commission concluded that it was not appropriate for bereavement damages to signify that the award was there to punish the tortfeasor who caused the wrongful death, AvMA believes that any clarification in the explanatory notes ought to state that it *is* payment for recognition that the deceased died because something went wrong. There needs to be public recognition of this fact. To deny such acknowledgement causes unnecessary

grief and agony. It is trite but most claimants want an explanation and lack of acknowledgment of a wrong quite literally adds insult to injury. It costs nothing to acknowledge the wrong doing by an explicit statement of what the damages are for and what they represent. As well as the recognition of a wrong doing, the award represents compensation for the anguish that has been caused by the death and loss of enjoyment of his/her company.

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

An explanatory note is helpful. Another possibility might be to re-define bereavement damages as damages for wrongful death.

Question 8(a):

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

No. We categorically do not agree. AvMA believes that the cut-off age of 18 is entirely arbitrary and artificial. A couple whose child dies in their thirties suffers the same degree of anguish as parents whose child dies if they are 18 or under. Frankly, we feel that there can be few things more traumatic than outliving your child. The trauma is profound in circumstances where the death was otherwise avoidable. Time and time again, AvMA finds it abhorrent that parents have no redress when the death of a child occurs. If their child is unmarried and/or with no dependants, often investigation into the circumstances of the death is denied to them because so often the only route of inquiry is to pursue litigation. There are no justifiable grounds for this.

Question 8(b):

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

Yes. The only issue is whether or not an unmarried father without parental responsibility is also entitled to claim bereavement damages. There are many unmarried couples who have not entered into formal parental responsibility agreements but take full responsibility for the child.

Question 8(c):

What is your view on whether step-parents who are living with and had caring responsibility for a child under 18 should be able to claim bereavement damages?

Whether or not a person acting as a parent is the birth or social parent is irrelevant. What is important is they act as a parent. Therefore, step-parents should also be able to claim bereavement damages in these circumstances.

Question 9:

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

We agree that children of the deceased that include adopted children should be added to the statutory list. We do not agree that it ought to be limited to those under 18. Whilst we note that the objection to phrasing the entitlement to those over the age of 18 is that it would widen the scope for claims and raise evidential issues in demonstrating a close relationship, AvMA believe that children of the deceased, in circumstances where there are no other claimants and thus no problems in dilution of the award to other family members, means that children of any age ought to be eligible. For the reasons that apply to the parents of the deceased discussed in our response to question 8 above, bereavement damages are often the only recognition that a wrong was done. There are often no other routes to obtain this acknowledgement. In the case of elderly parents and where there is no dependency claim, we do not think it right that where an individual has caused wrong doing just because a parent may not have a surviving spouse or child under 18 no redress is available. A child, over the age of 18 is likely to have a strong attachment to their parent and may even be caring for them. A child/children in these circumstances are often only the only advocate for the elderly parent. It is wrong to disentitle a child from the award.

Question 10:

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

No we do not agree. In circumstances where there are no other relatives claiming the bereavement award and there is no risk of the award being diluted, we recommend that the category be extended in those circumstances. As the Commission stated, siblings frequently grieve for the loss of another.

Question 11:

Do you agree that the statutory list should be extended to include people who, although not married to the deceased, have lived with the deceased's as husband and wife (or if of the same sex in an equivalent relationship) for not less than two years immediately prior to the accident?

We do agree.

Question 12:

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

We do not agree. The government states that provided a couple have co-habited as husband and wife or in an equivalent same sex relationship for at least two years before they qualify, this demonstrates the couple's commitment to the relationship. It is to be contrasted, they say, with an engagement. However, this makes no recognition of the fact that for cultural or religious reasons the couple may not co-habit beforehand. We do not believe that there would be evidential difficulties in proving the couple's commitment to be together.

Question 13(a):

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

The size of the award has already been discussed (see answer to question 6 above). Notwithstanding this, we agree that where a spouse/civil partner and a co-habitant are both eligible to claim, the award should not be divided but the sum is paid to each beneficiary.

Question 13(c):

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

We have already stated that we believe that the bereavement award ought to be available to the parents of a child regardless of age or marital status. Each person should receive the same amount of £10,000.

Question 13(d):

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

As stated already, an award should be made to each child regardless of age or marital status. Each child should be eligible for the full bereavement award.

Question 14:

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

Yes, we do agree that this is fair.

Chapter 3: Liability for Psychiatric Illness

AvMA are disappointed to note that the Government are rejecting the Law Commission's recommendation for legislative reform in this area.

Broadly speaking, AvMA support the Law Commission's recommendations.

One area identified in that report is of particular concern to AvMA, that is the requirement for the claimant's psychiatric illness to be induced by shock which has been described as 'a sudden assault on the nervous system'.[1]

Medical accidents differ from the majority of personal injuries in that frequently, the injuries develop as a result of a series of events some or all of which may be negligent acts or omissions. This can affect both the primary victim, where no physical injury occurs for example a misdiagnosis and secondary victims. Relatives often witness a series of horrific incidents and the prolonged suffering of their loved one as they experience the negligent acts and omissions rather than the aftermath of the injury. Indeed in some cases it is the prolonged nature of the events that causes particular psychiatric harm to the relatives. Although to some extent this has been recognised in recent case law, it would be preferable to offer certainty to both claimants and defendants and the subsequent saving in costs by removing the requirement of shock.

We believe the arguments concerning floodgates were dealt with adequately in the Law Commission's response and we do not intend to repeat those arguments. However, we note that the consultation suggests that without the shock requirement it will be difficult to separate cases of severe grief from cases where a psychiatric illness had resulted. We would suggest that there has been significant development in medical knowledge in recent years and that the Government should consult further with medical experts in this area to determine whether that is indeed the case.

We do feel that the Commission's recommendations should be reconsidered as the recommendations allowed for some structure and certainty whilst not entirely preventing the courts from developing the law in this area.

[1] Lord Keith in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 398

We note the costs put forward by the ABI and the NHSLA should the Commission's recommendations be accepted. These costs must be acknowledged as extremely speculative. It is suggested that consideration could also be given to savings to the public purse in terms of the costs of both the NHSLA and publicly funded claimants. AvMA further believe that in any event achieving justice and fairness for the injured party must outweigh cost considerations and that any 'savings' must not be made at the expense of one particular group.

Chapter 4: Collateral benefits

Question 15a):

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

Although in theory it might be deemed fairer for the claimant not to recover twice and to be to be compensated once - at the expense of the tortfeasor, this has to be qualified in certain circumstances. For example in a situation where a claimant had the foresight to purchase initial illness cover that indemnifies the claimant for loss of earnings for a period, it would be wrong to penalise the claimant for not availing him/herself of such cover on the basis that the claimant may require it some time in the future (and would be precluded from so doing under the policy). Most people purchase such policies to cover themselves in the event they become incapacitated through illness not through the fault of someone else (why should the claimant be penalised anyway for simply having the good sense to purchase a policy for which s/he has paid the premiums). Claiming on one occasion may disentitle the claimant to make a claim in the future or be detrimental e.g. result in a hike in the cost of premium cover.

Question 15b):

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

No, because we do not believe it to be appropriate in all circumstances for the tortfeasor to have the benefits payable to the claimant deducted from damages.

Question 16:

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

We do agree that whether a sum advanced has to be repaid in the event that damages are recovered is a matter of agreement between the claimant and the charity.

Question 17a):

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

Yes we do agree that this is the preferred approach.

As it is often the carer that administers the money, even if under the auspices of the Court of Protection, there is no practical difficulty in the carer accessing the money due. Such an arrangement also allows for contingencies that the Trust arrangement does not.

Question 17b):

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

We do agree for the reasons stated above. It makes sense for any arrangement to take account of the fact that future needs and care arrangements may change and therefore any payment needs to take account of actual care that might be rendered as opposed to the damages in respect of care belonging to the carer from the outset which is the case with the Trust arrangement.

Question 17c):

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

We disagree with the blanket notion that past gratuitous care provided by the tortfeasor should not be compensatable. In a personal injury context, the tortfeasor could be the spouse of the claimant, say in a road traffic case.
However, we do agree with the principle that a personal obligation to account should be applied regardless of the identity of the carer.

Question 17d):

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

Yes

Question 18:

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

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

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

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

Please see our response to questions 15a) and 15b). It is not reasonable for the claimant to be saddled with any litigation between the insurer and the tortfeasor in relation to recovery of insurance payments. This will add to the stress and burdens of many claimants as well as the costs and is arguably punitive.

Question 19:

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

We agree

Question 20a):

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

AvMA believes that the current system where many employees are contractually bound to repay employers any sick pay recovered generally works well and does not require changing. As current compensatory arrangements deal with loss of earnings on a net loss basis (after deductions for sick pay) we cannot understand the need for this head of claim to be any different and therefore do not agree that change is necessary.

Question 20b):

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

N/A.

Question 20c):

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

If the government wishes to reflect the principle that the tortfeasor pays and in situations where the tortfeasor is the employer the government ought to be encouraging prudent practise by employers in ensuring that their position is best protected by inserting provisions in the contract of employment that allow for recoupment of sick pay where recovery occurs. The law does not need changing.

Question 21:

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

This is best left up to the courts on a case by case basis.

Chapter 5: Cost of private care

Question 22: Do you consider in principle that section 2(4) should be repealed? If so, how might a new system of care packages work? What difficulties would need to be addressed in developing such arrangements?

AvMA made it clear in our formal response to the CMO paper "making Amends" in 2003 that we did not agree to any suggestion that section 2(4) should be repealed. There is nothing that has happened in the interim to make us change our mind. We are therefore somewhat disconcerted to note that when we set down our view that not to apply s.2(4) to clinical negligence cases would set clinical negligence claims apart from ordinary personal injury claims has now resulted, inappropriately, in our view, in the government considering excluding section 2(4) to ***all*** personal injury claims-including clinical negligence claims. We believe that a claimant should be entitled to have all his future claims met albeit medical, housing or care provision privately if s/he chooses without the need to justify the choice. The unsatisfactory situation in which claimants now find themselves amid the spate of litigation that has recently mushroomed in many catastrophic or serious injury claims is deeply concerning. The apparent conflict between the statutory duties with which health and social services are charged and the principle that the tortfeasor pays is in urgent need of clarification. However, the answer is not, in our view one that requires repeal of section 2(4). We agree with the initiative proposed by the CJC that, if anything section 2(4) needs extending making it of application not only to NHS expenditure but to include all local authority care, aids, equipment, and accommodation etc.

First and foremost it is the tortfeasor that is liable to the claimant for restitution. Accordingly, the tortfeasor pays. AvMA finds the recent stance taken by defendant bodies in clinical negligence claims, placing the onus on claimants to mitigate their losses by seeking out state care and entitlements worrying. The claimant is entitled to choose a package that affords him/her the most convenience and flexibility not just the package that is cheapest for the defendant.

Furthermore, as stated originally in our response to this issue in Making Amends, there is something rather repugnant about making the claimant that has been placed in a situation of reliance on care services often (in a clinical negligence context) because of an act or omission by the state dependant upon the state to deliver further services and benefits whether managed at a national or local level. We do not believe that repealing section 2(4) is likely to ameliorate the problem of litigation. It is more, not less likely, to lead to arguments about what constitutes reasonable care and whether private care is necessary.

In addition, it needs to be stated that there are many reasons why, even with a private care package in place, the claimant may need to seek assistance from the state in the future. Whilst there has been a spate of cases[2] that have found in favour of the claimant on the issue of indexation of periodical payments pending appeals on this issue the matter is by no means resolved. Therefore, whilst there remains the risk (so long as payments are linked to the RPI) that amounts recovered for care are likely to leave the claimant with a shortfall in the future, the claimant is likely to need to depend on benefits at some point later in his/her life. The same is true in circumstances where a claimant has agreed to a settlement on a discounted liability or contributory negligence basis and where the amount of damages for care awarded leaves the claimant dependent upon the state to some degree. In such circumstances it would be quite wrong to exclude the claimant from accessing state benefit.

So what are the principles at stake? It seems to AvMA that acceptance of the notion that the tortfeasor pays whilst acknowledging the principle that the claimant should not obtain double recovery of any head of damage including care may yet still be capable of being resolved. Legislation could provide that any local authority which finds itself obliged to make statutory payments to a claimant could seek an indemnity from either claimant (if s/he has received damages for which such outlay damages have been recovered) or from the tortfeasor. In circumstances where a state package is preferred, there would have to be a

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[2] **RH v United Bristol Healthcare Trust [2007] EWHC 1441**In this case the claimant sought an order uprating periodical payments for care and case management by reference to an earnings related measure rather than the retail prices index pursuant to section 2(9)(b) of the Damages Act 1996. The Judge found that RPI was not the appropriate measure to use, that there would be a significant shortfall for the claimant if it were used and preferred the use of ASHE 6115. This judgment, along with the cases of Thompstone, Corbett and Sarwar have all gone the same way on this point. The substantive appeal hearing is due in November.

guarantee from the Local Authority that service provision would not be altered or stopped at any time in the future unless the claimant desired it or that the funds made available would go toward the provision of private care instead. AvMA knows that the CJC have recommended that this issue of indemnities merits further investigation and we agree with that view.

Question 23: What benefits or drawbacks might there be for:
a) claimants
b) defendants
c) the taxpayer?

We do not agree that S.2(4) needs repealing. However, if it is extended to cover all losses then the benefits for claimants as have already been outlined are certainty as well as flexibility in being able to commission services required on a private basis. The benefit for the tortfeasor if as outlined above the local authority can seek an indemnity from the tortfeasor or claimant (having been paid by the tortfeasor) would result in the tortfeasor paying up in full and thereby allowing the insurance company to close its book on the claim. Local authorities would benefit from being able to divert much needed resources elsewhere and would avoid having to apply resources in making of the assessments.

Tax payers money would not be deployed in the provision of state services going toward the cost of caring for those injured following an accident (medical or otherwise) as the tortfeasor pays. In practice this can amount to the same thing where the tortfeasor is a public authority. Otherwise the public may pay indirectly through enhanced insurance premiums.

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

The only way in which a claimant can be assured that they have control over a care regime is one that is bespoke, ie commissioned privately.

Question 25: If section 2(4) is retained, is any action needed to avoid possible over-compensation and to ensure that damages for the cost of care are used appropriately? If so, would a requirement for the defendant to pay directly to the provider of care be appropriate?

The overriding objective ought to be to place the claimant in a position where s/he can exercise some degree of control over their affairs. We would be interested to know what evidence defendants have collated demonstrating claimants being compensated whilst later on claiming state benefits in situations where the award has not been exhausted or under threat of being exhausted: How wide spread a problem is this in reality?

One solution might be to provide for the court to have a power to vary the award should such circumstances arise and in situations where the claimant also finds that damages awarded have been exhausted. However, the problem we forsee in such an approach would be the claimant finding s/he is constantly having to look over her/his shoulder and not being able to achieve closure.

Question 26 : Do you agree that where there is a statutory duty or statutory obligation on public bodies to provide care and accommodation services to the claimant, the central principle should be that the tortfeasor should pay for the costs of care?

We do for the reasons as set out in our response to question 23.

Question 27: How could the practical difficulties surrounding the assessment of what care is appropriate be resolved in a clear and cost effective way that enables claimants and those close to them to retain a sense of control?

Chapter 6: Accommodation expenses

What has not been addressed in this chapter are the problems that the application of the Roberts v Johnstone method have exacerbated since the introduction in the Courts Act gave the court the power to order periodical payments. This was probably not envisaged when the Commission originally looked at accommodation claims. Although periodical payments were designed to remove the uncertainties surrounding estimation of life expectancy, in practice the manner in which accommodation costs are awarded causes depletion of the capital fund and this has ramifications where a periodical payment order is awarded. The claimant needs to ensure sufficient quantum is generated outside of the periodical payment so that the capital cost of a property can be met (in effect subsidising the capital purchase by utilising other heads of damage). The claimant therefore risks a shortfall in other heads that s/he needs to rely on, such as the provision for future care (that in turn might lead to reliance on the claimant seeking state assistance even if private provision was made originally in the compensation award –see our responses in chapter 5).

AvMA therefore welcomes the idea of revisiting the Robert v Johnstone method in assessing accommodation claims: It is felt that more scoping work needs to be undertaken to assess the impact of any proposals. In particular, how many properties are purchased by the defendants comprising part of any settlement agreement? Both the NHSLA and the Medical Defence Organisations might be able to provide figures. Further, attention needs to be paid to regional variation: with the higher damages awards going to claimants residing in the South East of the country.

With the above in mind, we have the following responses to the specific questions:

Question 28: Do you consider that giving the defendant a charge over the property would be a possible alternative to the *Roberts v Jonhstone* method in relation to the purchase of new accommodation and the cost of altering the claimant's existing property?

We are broadly in favour of giving the defendant a charge over the property as an alternative to the Roberts v Johnstone method. However, as stated above the mechanisms employed in order to achieve this require in-depth investigation and thought. This is because AvMA forsee all sorts of difficulties that will need to be overcome. Two recent authorities exemplify the point: Iqbal v Whipps Cross University Hospital NHS Trust [2006] and Lewis v-Royal Shrewsbury Hospital NHS Trust [2007]. In the Iqbal case Rodger Bell LJ found that it might not be appropriate to claim rent as "set-off" in relation to the care component of the claim bearing in mind the sacrifices the parents had made. By contrast, Alistair Mac Duff LJ in Lewis proposed that in assessing accommodation needs, the rent from the former home needed to be taken into account and taken as part-payment for the care claim both past and future. This issue as to whether the family ought to give credit for the "saving" of family housing expenses is just illustrative of the details that need to be examined when assessing what kind of charge ought to be imposed. Complex and difficult calculations may arise surrounding pro-rating.

Another element that would need to be looked at carefully is the effect of the death of the claimant or change of circumstances. There would need to be a mechanism for recognising the family contribution. Also, AvMA is in agreement with the dicta of Rodger Bell LJ in Iqbal and and believes that there is scarce legal recognition of the (non-pecuniary) losses that the parents of a disabled child sustain. Consideration also needs to be given to what would happen in circumstances where the claimant's family move from a tenanted council home to the property with the claimant, should the family have some means of recognition in losing the right to buy discount?

On the whole, AvMA believes there to be benefits to the charge concept rather than relying on the Robert v Johnstone method that has demonstrated problems in an environment where periodical payments are ordered. However, whether or not a charge ought to be imposed needs to be consensual and not something imposed upon the parties by the courts. The claimant needs to have clarity and certainty from the outset with no nasty surprises or repercussions later on. What a claimant and his family do not want is a "claim" in effect hanging over them for the duration of the claimant's life.

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

AvMA notes that in some jurisdications the claimant does receive the full capital costs of his/her housing. However, we would anticipate objections from defendant quarters about such an approach.

Question 30: **Do you agree that no action is necessary in respect of these issues?**

We agree no action is needed.

Chapter 7: Aggravated, exemplary and restitutionary damages.

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

We do agree

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

We agree

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

We do agree

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

We agree

Question 35: Do you agree that in the Copyright, Design and Patents Act 1998 and the Patents Act 1997 the term "additional damages" should be replaced by "aggravated and restitutionary damages"?

We have no comment to make

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

a) patents
b) designs
c) trade marks and passing off and
d) copyright and related rights?

We have no comment to make as this also falls outside of our remit.

Fiona Freedland
Legal Director
AvMA

27 July 2007