Law Reform Committee

The Law Reform Committee of the Bar Council of England and Wales response to the consultation on the Civil Law Reform Bill 2010.

The Law Reform Committee of the Bar Council of England and Wales welcomes the opportunity to comment on the Civil Law Reform Bill 2010.

Question 1. Do you have any comments on the draft clauses of the Bill relating to the law of damages?

1. We deal with the proposed reforms clause by clause below.

FATAL ACCIDENTS DAMAGES

Clause 1 – Extending the right of action under the FAA

2. Where someone's death is caused by negligence or breach of duty of another, only dependants of the deceased have a right of action against the wrongdoer under section 1 of the FAA. "Dependant" is given a statutory definition in section 1, and includes spouses and civil partners, cohabitants[1]. Anyone not within section 1 cannot bring a claim, even if they were in fact financially dependent on the deceased.

3. Clause 1 proposes adding a "catch-all" to the list, so that any person receiving a substantial contribution in money or money's worth towards his or her reasonable needs from the deceased immediately before death will be

[1] A term we use for shorthand in this paper: section 1(3)(b) of the FAA refers to a person living in the same household as the deceased immediately before the death of date and for at least two years before that date, and living together as spouses or civil partners. Clause 6 of the Bill would reword this to "any person who has been living with the deceased as the deceased's husband or wife or civil partner for a period of at least 2 years ending with the date of death."

classified as a dependent.

4. We welcome this change. It is a sensible alteration to ensure that people who are in fact dependant on someone who has died are not left without a claim because of the wording of the statutory list. It has the effect that the two-year relationship requirement for cohabitants is removed, allowing the court to deal justly in individual cases with the facts of the case rather than be faced with an inflexible two year requirement as a threshold condition for recovering any damages.

5. We suggest that a definition of "person" is included. If it is not the "cats home" which the deceased supported would qualify.

Clause 2 – Changing the effect of remarriage

6. Clause 2 proposes the following changes:

   (a) When assessing damages for a dependant, the court must take into account the fact of the dependant (re)marrying, entering a civil partnership or becoming a cohabitant;

   (b) When assessing damages for a dependant who is a child of the deceased, the court may take into account the fact that the surviving parent has (re)married, entered a civil partnership or become a cohabitant.

7. We agree with the first of these changes. It is appropriate that the court takes into account the fact of a new marriage / civil partnership / cohabitating relationship, without the court being barred from awarding any damages in such circumstances. The aim is to achieve appropriate compensation for dependants, and if the loss is reduced because such post-accident developments, then the courts ought to take this account in assessing the level of continuing loss to avoid over-compensation.

8. We did not agree with the original proposal to include children in this change to the law because the decision to remarry or cohabit is not one taken by the children and not one over which they exercise any control. We did not feel that it was right that the financial consequences of that decision should be visited on the children.

9. On the other hand we can see the force of the contention that if the children are being supported financially in the new relationship as well or better than they were by the deceased then to give them a claim to dependency may involve "double compensation".

10. In fact the proposal in the bill is that whilst the obligation upon a court to take into account a dependant's (re)marriage / new civil partnership / new cohabitating relationship is mandatory a similar power to take such factors

into account in the case of a child of the deceased is only discretionary. This discretion should be sufficient for the court to deal with cases fairly.

Clauses 3 and 4 – the possibility of relationship breakdown

11. The first change in clause 3 allows the court to take into account the prospect of the deceased and his spouse / civil partner ceasing to be married / in a civil partnership, if either person had sought a court order to end the marriage or civil partnership, or if they were no longer living together immediately before the date of death. The second change in clause 3 is the court cannot take the prospect of the relationship of cohabitants ending.

12. At present, section 3(4) of the FAA provides that where a cohabitant claims damages as a dependant, the court must take into account "the fact that the dependant had no enforceable right to financial support by the deceased as a result of their living together". The practical effect of the measure was to reduce the damages to a cohabitant as compared to a spouse or civil partner in otherwise identical situations. Clause 4 proposes to repeal this provision

13. We agree with the changes made by both of these clauses. It is inappropriate to have courts assess the prospects of divorce etc in all cases unless steps to end the marriage or civil partnership had actually been taken, either by recourse to the courts or by ceasing to live together. Similarly, it is difficult to identify objective factors indicating imminent separation between cohabitants. There is clear potential for distress to be caused by such unpleasant enquiries, before and at trial.

Clause 5 – Damages for bereavement

14. At present, section 1A of the FAA limits a claim for damages for bereavement to the spouse or civil partner of the deceased, and the parents of a minor (someone under the age of 18) who was never married or in a civil partnership.

15. Clause 5 proposes to add to the list of those who can claim bereavement damages:

    (a) The cohabitant of the deceased;
    (b) The children of the deceased, if aged under 18 at the date of death.

16. The distinction between claims brought by parents of deceased legitimate and illegitimate children is removed, in favour of a reference to persons with parental responsibility for the deceased child.

17. We consider that these changes are good, but should go further in one small respect.

18. The addition of cohabitants reflects changes in society of the years, and the two-year co-residence qualification period ensures that transient partnerships

are not included. We also think that it is appropriate to add children to the list of those who can claim. A reference to persons with parental responsibility is more appropriate way of addressing the issue than the current situation.

19. We consider that no 18 year limit should be attached. If this is retained then a 17 year old son who has lost his parents in a car crash will recover but his 18 year old sister will not. Love and bereavement do not disappear at 18.

20. The proposed method of dividing the award in some situations where there is more than one eligible claimant seems sensible.

Clause 6 – Definition of cohabitant

21. As noted earlier, clause 6 rewords the statutory definition of cohabitant to "any person who has been living with the deceased as the deceased's husband or wife or civil partner for a period of at least 2 years ending with the date of death". This simplification of the existing wording is unlikely to have major effects, but has the benefit of clarity.

DAMAGES FOR CARE

Clause 7 – Damages for gratuitous services

At present, if an injured person is awarded damages for care and assistance gratuitously provided to them by someone else, the injured person has an obligation in the law of trusts to pay that money to the person providing the care.

22. Clause 7 proposes to replace the trust concept with an obligation on the injured person to account to the provider of the care. We support this change. It is best if injured persons do not become trustees by accident in this way. An obligation to account still protects the position of the provider of the care, to whom that part of the compensation payment is due, and avoids the need to resolve questions about beneficial ownership of the money particularly when (in cases of ongoing care) the carer changes.

23. Clause 7 would make a further change. At present, if (for example) a wife is injured in an accident that was her husband's fault, she cannot recover damages to reflect the care and assistance that her husband has provided, or will provide in the future. This is because he would be compensating her with money that she was under an obligation to repay to him, making the exercise circular. This position has been criticised in the past as failing to take account of the fact that in most cases, the compensation will come from the husband's insurers, not from the husband personally, and so there is not as much circularity in the movement of the money as might at first appear.

24. Under the proposed changes, the wife would be able to recover damages to reflect care to be provided in the future by her husband, but not for the care that he has provided up to the date of trial. We welcome this change, but still think that damages for the past care provided by the tortfeasor in such

situations should be recoverable. In our view there is a risk with the approach adopted in the bill that claimants will structure their care arrangements in artificial ways to avoid the principle, either by entering contracts with the tortfeasor or seeking commercial carers rather than a more appropriate gratuitous carer. In the case of the former there is then a risk of the court being drawn into the question of whether such a contract is a sham.

25. We do not see a good reason in principle for distinguishing between past and future care in the way that clause 7 does.

Clause 8 – Damages for gratuitous services under the FAA

26. Clause 8 provides that a court may treat as part of a dependant's losses the gratuitous care that the deceased would have provided but for the death. It matches clause 7 by placing an obligation to account upon the dependant to persons providing the services, and by matching the distinction between irrecoverable past care provided to a dependant by a tortfeasor and recoverable future care.

27. We welcome this change, save for the same reservation about the inappropriate distinction between past and future care provided by a tortfeasor.

AGGRAVATED DAMAGES

Clause 9 – Using the term "aggravated damages"

28. Clause 9 proposes to substitute the word "aggravated" for "exemplary" in the provisions of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 that enable a court to award exemplary damages where judgment is enforced without the court's permission.

29. We do not agree with this change. Firstly, it seems unnecessary to deal with the wording when it appears that the relevant sub-section has never been relied upon, let alone given rise to any problems of construction, since it was enacted. Secondly, it seems unnecessary to carry out a minor piece of "tidying-up" of statutory language relating to exemplary damages without a wider consideration of the position of exemplary damages.

30. Clause 9 also proposes to use the phrase "such aggravated damages and such amount by way of restitution" instead of "such additional damages" in the Patents Act 1977 (power to award additional damages for providing false information) and the Copyright, Designs and Patents Act 1988 (power to award additional damages for copyright infringement).

31. We do not agree with these changes either, as the changes seem unnecessary. "Aggravated damages" is frequently used in the context of damages for mental distress, and it seems inappropriate for the rather different statutory regimes under the 1977 and 1988 Acts.

Question 2: In particular, do you have any views on how the concept of additional damages pursuant to the 2004 Directive should be expressed in terms appropriate to Scots law?

32. Matters of Scots law are outside the scope of the Law Reform Committee.

Question 3. Do you agree with the impact assessment on the proposed reforms relating to the law of damages at Annex C?

33. We are not in a position to comment on the accuracy of the financial estimates contained in the impact assessment.

INTEREST

Q4: Comment on pre and post judgment interest changes.

34. Compound interest. There are differing views on compound interest. Claimants groups consider that compound interest is the right measure of compensation. Defendant groups consider that it is a step too far and merely increases already high compensation.

35. The interest rate: So long as the Lord Chancellor revises the interest rate properly in line with the average interests rate available to claimants and defendants for savings in the UK this should achieve fairness.

36. Discretion to refuse or reduce the rate: clause 10(8) retains the discretion for the court to penalise a Claimant for delaying a case unreasonably or for acting in some other unreasonable way. We support this discretion.

Q5: Impact assessment

37. No comment.

ARQC 15.1.2010

Civil Law Reform Bill

Comments by the Law Reform Committee of the Bar Council of England and Wales on draft Clauses 15 – 17 and 23(3) of the Bill [Part 3 – Distribution of Estates]

Clauses 15 and 16

1. These clauses make welcome amendments to the law on the impact on succession of a disclaimer or a forfeiture.

2. The nature of the amendment in each case is that succession to the disclaimed or forfeited property interest is now to be determined on the footing that the person disclaiming or forfeiting had died immediately before he would otherwise have acquired that property interest.

3. The impetus for these amendments has no doubt been in relation to forfeiture rather than disclaimer. The consequences of the forfeiture that was the subject of the decision in *Re DWS (deceased)* [2001] Ch 568 (CA) were unsettling. That was an intestacy case but the problem could arise just as easily where the victim died testate – as in "I leave my estate to X [the offender] but if he dies before me, then to his children".

4. The way in which the problem on disclaimer and forfeiture has been solved at clauses 15(2) and 16(2) is straightforward and workable.

5. But we are less happy with the proposed new section 46B Administration of Estates Act 1925 and section 33B Wills Act 1837 introduced at clauses 15(3) and 16(3) of the draft Bill:

    - infants are commonly beneficiaries under a will or an intestacy

    - s. 114(2) of the Senior Courts 1981 already provides that, wherever a minority interest arises under a will or intestacy, administration of the estate should be granted either to a trust corporation with or without an individual, or to two individuals, unless it appears to the court to be expedient that there should be a sole administrator

    - s. 116 of the Senior Courts Act 1981 already contains a wide, and well-known, power in the court to appoint, whenever by reason of any special circumstances it appears to the Court to be necessary or

expedient to do so, any suitable person to be administrator of an estate instead of the person, or the persons, entitled under the ordinary rules

- so the safeguard in the proposed new sections already exists

- nor is it clear why the court should have power to interfere with the trusts applicable to the infant's property

- further, the mischief which the proposed new sections are intended to address is the possibility that the offender, being a parent of the infant beneficiary, abuses that position by benefiting from the forfeited property; but the relevant infant might well not be a child of the offender; in an intestacy, it might be a younger sibling, or a cousin; under a will, it could be anyone; and there is no reason to assume that the possibility of abuse is confined to a parent-child relationship

- if a person forfeits, say, his share of a gift to the children of A, and there are three such children, the shares of the other two increase – those two might well be infants; but the safeguard would not apply to them because (a) they are not children of the offender and (b) they have not become entitled to a share in the estate or an interest under the will by reason of the forfeiture [although this particular point can easily be dealt with by adding in the expression "or greater interest"]

- the possibility of abuse where an infant takes a share in an estate is obvious; it may be heightened where an infant takes a share or greater share in an estate as a consequence of a forfeiture; but it is fanciful to suppose that the infant will be protected save on application by some third party, probably a family member; that application will be made in the context of an application for a grant of representation to the estate; and there already exists full power in the court to protect the infant if such protection is required (in particular where the offender is - as will commonly be the case – the sole person or one of the persons entitled under the ordinary rules to a grant of representation to the relevant estate)

- situations of real difficulty may arise where, for example, the forfeited asset is the former matrimonial home, in which the offender and the infant beneficiary or beneficiaries are living together – in a situation such as that, a provision such as draft clause 15(3)(7) may not be helpful.

6. On balance, we consider the proposed new sections 46A(2) and 33B to be unhelpful, and likely to lead to increased expense in the administration of estates in circumstances which are bound to be tragic but are otherwise unpredictable

7. We do not understand the reason for the delay (not less than three months from the date of enactment) in implementing Part 3. Subject to what we have said above in relation to the proposed new sections 46B and 33B, the reforms in clauses 15 and 16 are long overdue.

Clause 17:

8. This deals with an anomaly in the law of intestate succession where an unmarried infant survives his parent and (while still an unmarried infant) dies with issue.

9. We welcome this proposed amendment to the law. The amendment is simple and workable.

18 January 2010