Civil Law Reform Bill

Response to Questionnaire

By Sir Henry Brooke

Before I respond, I would like to start by saying how much I deplore the fact that it has taken such an immensely long time for the Law Commission's recommendations on reforming the law of damages to come before Parliament in the form of a draft Bill. As a common lawyer who had had much practical experience of personal injuries law (unlike most Chairmen of the Commission) I remember Lord Mackay impressing on me how much importance he paid to the then current law reform project on damages when he persuaded me to become Chairman of the Commission in November 1992. Most of the proposals in this draft Bill were obvious candidates for reform at that time, over 17 years ago. I hope that at a time when Parliament is intent on burnishing its image and re-establishing its credibility with the public, it will take effective steps to ensure that comparable delays in enacting worthwhile measures of law reform never occur again.

To some extent we have all been here before. During my chairmanship (January 1993-Decmber 1995) I was in close dialogue with Parliamentarians of all parties in both Houses, and we succeeded in seeing 13 Law Commission law reform proposals enacted in 14 months. Parliament then went back to its old ways, and I greatly welcome this opportunity for pre-legislative scrutiny as a harbinger of much better things in future. I remember getting myself invited in two successive years to a session with the Home Affairs Committee of the House of Commons, when I succeeded in persuading them, I think, that making the law fairer and more simple in mundane matters of significant importance to their constituents was every bit as important to their constituents as many of the policy-driven legislative proposals which consume so much parliamentary time. I was able to demonstrate historically that Law Commission Bills, having been so expertly prepared, took up very little Parliamentary time at all.

I now respond to the Questionnaire.

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

1. Fatal Accidents

I agree with the proposals in clauses 1-4 of the draft Bill. It is difficult to do complete justice in all cases involving cohabitants, but a line must be drawn somewhere, and I know no reason to alter the "two year" requirement, although this may do injustice in some cases where there is a loving, committed relationship of cohabitation lasting just less than two years and the surviving partner has no claim under the Act.

As to bereavement damages, it is high time the law was altered to give a claim to the surviving "two-year" cohabitant of the deceased. More than 80% of the respondents to the Law Commission's consultation paper supported this change in the law, and great unhappiness and hardship have been caused unnecessarily because Parliament has not acted sooner on the Law Commission's 1999 recommendation. In recent years such claimants have been driven to invoke Article 8 of the European Convention of Human Rights to establish their entitlement to bereavement damages, and arguments of this kind, to put right an obvious injustice in statute law, simply add to the costs of

litigation every time the issue has to be argued. I had recent experience of such a case, where the young mother of the deceased's child was outraged that the law did not permit her to recover any bereavement damages unless she tried to go by the Human Rights Act route.

I remember at the time being surprised by the Law Commission's recommendation that siblings should recover bereavement damages in all cases (their award being equal to the awards to spouses etc and minor children), subject to an overall statutory inflation-adjustable cap of £30,000 on the total award. On the other hand, where there is no other candidate for bereavement damages, substantial injustice may be done if a sibling who is devastated by the deceased's death (perhaps because they lived together, as unmarried siblings often do) has no claim under the Act, as the Government proposes. I hope this point will be carefully scrutinised before the Bill becomes law.

2. Gratuitous Care

I agree with these proposals. The Law Commission received powerful submissions from "the vast majority of its respondents" to the effect that the House of Lords' ruling in *Hunt v Severs*, however logical it may have been, should be reversed. Its report was published in November 1999, and it is scandalous that this injustice has been allowed to continue for a further ten years before a correcting Bill is put before Parliament.

3. Aggravated damages etc

It is clearly sensible to include the tidying-up provisions of Clause 9. I regret the fact that the Government is not willing to take this opportunity to tidy up the law in relation to exemplary damages, which was a law reform project commenced in my time. Instead, a lot of litigants' money will have to be spent before the Supreme Court at last has an opportunity to straighten out those parts of the decision in *Rookes v Barnard* which have rightly not been followed by the courts in comparable common law countries.

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

No comment.

Do you have any comments on the draft clauses of the Bill relating to the setting of pre- and post-judgment interest?

Long experience in the courts makes me very suspicious of any provision which gives the Lord Chancellor an apparently unfettered power to specify interest rates at a time of his choosing. The rate of interest on judgment debts was fixed at 8% in 1993 and has not been altered since. The Law Commission was critical of this continued failure to take action in 2004 and interest rates have plunged further since then.

A similar story is told when one considers the fate of the arrangements for specifying the appropriate discount rate to be adopted for the accelerated receipt of future payments in personal injury cases. In my time the Law Commission recommended that instead of the point being expensively argued in every case, the Lord Chancellor, who was then head of the judiciary, should fix

by order the appropriate discount rate from time to time. This was clearly a judicial act. His powers in this respect were retained by him at the time of the enactment of the Constitutional Reform Act 2005, so that what was intended to be a judicial act now became determined by the executive. It is universally accepted that with interest rates as low as they are now the discount rate of 2.5% is doing very significant hardship to grievously injured people (because their compensatory damages will all be used up a considerable time before their death) but the Lord Chancellor has taken no steps to correct this. Indeed, I am aware of a recent decision in the courts of Guernsey where a court, not governed by the Lord Chancellor's order under the Damages Act, considered on the evidence (which included the evidence of the former Government Actuary) that a 1% discount rate was more appropriate, thereby substantially increasing the plaintiff's damages for future care.

The Law Commission said in its report:

> "3.25 There is a need to balance two objectives. On the one hand, the rate should reflect the commercial reality of borrowing and investing. On the other hand, litigants want a single clear rate, which they can discover easily and which does not change too often. It is important that the rate should be more flexible than the judgment rate (which has not changed for a decade). However, the rate should be less flexible that the bank rate itself, which changes at unpredictable times, so that parties and their representatives may not be alerted to what the current rate is.
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> 3.26 This suggests a rate that changes on a set date each year. The rate should be clearly publicised on the Court Service website, on posters in court offices and in the legal press so that lawyers and litigants are aware of what it is."

I do not know why the Government did not follow the Commission's advice that the appropriate rate should be reset annually. I fear it may be driven by administrative convenience. I hope that Parliament will probe the Government's reasons in this respect, because otherwise there is a strong likelihood that interest rates awarded by the courts will again get seriously out of kilter with interest rates in the world outside the courts.

Subject to this, I agree with the proposals in this part of the draft Bill.

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?

No comment.

Do you agree with the impact assessment on the proposed reforms relating to the l the setting of pre- and post-judgment interest at Annex D?

No comment.

Do you have any comments on the draft clauses of the Bill relating to the distribution of estates of deceased persons?

No.

Do you agree with the impact assessment on the proposed reforms relating to the law of succession at Annex C?

No comment.

Do you have any comments on the draft clauses of the Bill relating to rights of appeal?

I am a little uneasy about there being no recourse at all to the High Court if an Inn refuses a student admission to the Inn on grounds, for example of bad character. After all his/her whole future career will evolve around this decision, and there may be human rights implications if he/she is completely barred from access to a court. I sat as Visitor to one of the Inns nearly 20 years ago in a case where a man had had a serious criminal record when he was about 20 and served terms of detention and imprisonment. 20 years later he received glowing references from the law faculty of the reputable university at which he had been studying as a mature student, so much so that his professor was willing to travel 200 miles to London to give evidence at the hearing.

I directed the Inn to reconsider the case on the basis that the Consolidated Regulations then contained a blanket ban on admission to the Bar in such a case, not allowing for any discretion to be exercised, which I considered to be unlawful. In the event the Inn was willing to admit him and the Regulations were changed.

I certainly would not wish to see the High Court flooded with unmeritorious applications, but I do think there ought to be some opportunity for recourse to the High Court in a case which raises an important point of principle. If the avenue of appeal is to be comprehensively blocked at the level of the Qualifications Committee of the Bar Standards Board, they may be seen to have a tendency to wish to uphold the letter of their regulations. Perhaps the Committee should have a right (which should be final) to grant permission to appeal to the High Court in an appropriate case.

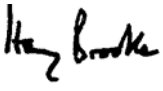
Apart from this, the proposed changes are long overdue, and I support them.

Do you agree with the impact assessment on the proposed reforms relating to rights of appeal at Annex C?

No Comment

About me

My name is the Rt Hon Sir Henry Brooke. I am responding to this consultation paper as a retired Lord Justice of Appeal and a former Chairman of the Law Commission. My address is Fountain Court, Temple, London EC4Y 9DH. I would like you to acknowledge receipt of my response.



25th January 2010