The Actuarial Profession

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consultation response

THE LAW ON DAMAGES

Department of Constitutional Affairs: Consultation Paper CP 9/07

Response by The Actuarial Profession

August 2007

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Response by the Actuarial Profession (the Faculty and Institute of Actuaries)

INTRODUCTION

The Damages Working Party of the Actuarial Profession is pleased to respond to Consultation Paper CP 9/07 issued on 4 May 2007 by the Department for Constitutional Affairs (now the Ministry of Justice).

Actuaries are likely to come into contact with the law on this subject in their professional capacity:

1. as advisers to insurers of tortfeasors (e.g. motor insurance);
2. as advisers to insurers of insured parties (either directly or, for example, via insurance arranged by an employer);
3. as advisors to injured parties seeking redress;
4. as advisors to pension schemes paying disability pensions.

We address questions 15 and 18 – 20 (on collateral benefits) below, but have not answered the remaining questions as they address matters that are generally outside the area of expertise of the profession.

However, we also note that there are other issues raised in the Law Commission's 1999 report *Claims for Wrongful Death* (LC263) that are pertinent to the profession. As mentioned on page 12 of the current Consultation Paper, The Law Commission specifically suggested reform in the way that multipliers are to be calculated in fatal accident claims and in particular criticised the manner in which these are calculated from the date of death rather than from the date of trial. As noted, the Ogden Working Party did subsequently explain how the Ogden Tables might be used to implement reform but the Courts have apparently felt themselves bound by precedent in following Cookson v Knowles (1979) AC 556.

We encourage the Ministry of Justice not to lose sight of this issue as present practice is, as has been repeatedly explained, logically incorrect and its continuation perpetuates injustice. We suggest that consideration be given to a change in the law to facilitate change in practice in this area.

Our other submissions are set out below under the questions copied from the consultation document.

Q15

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

b) 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?

We do not agree with the principle as set out in paragraph 107. Whilst claimants should of course be compensated for their losses we think that in general collateral benefits should be deducted for this purpose. This is simpler than the Government's proposals and may tend to reduce litigation rather than increase it; it removes the confusion and inconsistency which has characterised this area (as summarised for example in paragraph 10.9 of Law Commission Paper No 262); and, we suggest, be more in accord with a common sense view, in that compensation for actual financial loss is provided.

Our proposal would mean that tortfeasors would pay less in certain cases where collateral benefits arise. We suggest that this would not have significant public policy disadvantages in terms of reducing deterrents to bad behaviour: tortfeasors are not likely to be less careful as a result. On the other hand, in cases where the tortfeasor is also the collateral benefit payer, the present position, for example in relation to ill health pensions, may provide a disincentive to provide such benefits, which serve a valuable social purpose.

Under our proposal collateral benefit payers would pay what they do now. We do not think it is practical or desirable to give providers the right to recoup the expense from the tortfeasor, where not the same. Collateral benefits arise under a variety of arrangements where payment is normally made in a range of circumstances, including all those where no tortuous event occurs. They provide security to individuals who are content to pay, or have paid on their behalf, the estimated cost. Similarly, providers charge the estimated cost based on the present position. Any moves to introduce rights of recovery or to withhold payments would introduce complexity, delay and uncertainty into all these arrangements.

Q18

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?

It will be clear from our answer to Question 15 that we do not support these proposals. It would create another dimension of complexity in the insurance contract in that it would have to state the circumstances, and the extent to which, a claim could be withheld or recovered. If an insurance contract continued in force after a claim, it is not clear how these provisions would stand the test of time in relation to the changing circumstances of the claimant. We believe that collateral benefit payments under insurance contracts should be deducted from damages.

We note that both our proposal, and that in the consultation document, would reduce the total payments to the complainant in many cases. Our proposal may therefore result in a marginal reduction in the cost of insurance for tortfeasors. The Government's proposal may result in a marginal reduction in claimant's insurance costs.

Q19

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

No, we think the law should be changed to allow pensions to be deducted from damages to the extent that they are a collateral benefit. In this connection, pensions can be broadly divided as follows:

(a) the accrued pension which the claimant had earned already and could be paid at normal retirement age (or earlier subject to deduction);

(b) the additional pension which the claimant may become immediately entitled to as a result of the tort;

(c) the further additional pension which the complainant would have received from normal retirement age (or earlier if that was likely) if he had not been injured.

Category (b) above is a collateral benefit to the extent that it is paid before the age at which the claimant would have retired if he had not been injured. It should be deducted from damages in our view, but only for that period up to when the claimant would have retired if he had not been injured. Category (c) above is a matter for estimation and its value increases damages, being the pension lost as a result of the injury. For these purposes lump sum payments from pension schemes should be treated in the same way as the corresponding pensions.

Whilst we are not legal experts, we question whether the consultation paper is correct in stating (in paragraph 125) that pension payments which become collateral benefits will usually be contractual. Collateral benefits would not normally arise from personal or stakeholder pensions, or from defined contribution occupational schemes, because of the general absence of provisions for augmented ill health retirement pensions within these arrangements. On the other hand, provision for ill health retirement is commonly found within defined benefit occupational pension schemes, both in the public and private sector. Within the private sector these are generally provided through the trust mechanism and eligibility for them, the level and the continuation of ill health pensions once granted, would depend on the detailed provisions contained within each pension scheme. Given the role of trustees, and the restrictions on pension scheme amendments, this also means, we suggest, that the trustees of such schemes would have difficulty in including provisions enabling the scheme to recover or withhold ill health pensions in the circumstances suggested in paragraph 126. We are not aware of this happening in practice.

Our proposal would therefore not result in any reduction in cost for pension schemes but there would be a reduction in overall payments for claimants in receipt of collateral pensions and hence in tortfeasor costs, and their insurers.

Q20

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

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

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

We do not agree that the law should be changed to disregard sick pay; it should continue to be deducted from damages for lost earnings. It would be perverse that a prudent and enlightened employer who had made provision, through an insurance contract, for his employees to receive sick pay should, in the case where he was also the tortfeasor, be denied the opportunity to thereby reduce any liability to make good lost earnings.

We do not think the Government's proposals for employers to recover sick pay are practical. Given the length and complexity of litigation, it would involve time consuming and difficult administration in terms of making payments, ascertaining whether or not recovery may be possible and then going through a recovery process some years later, which may itself require assistance from the Courts.

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