

# Ministry of Justice The Law on Damages

Response by Thompsons Solicitors



July 2007

## About Thompsons

**Thompsons** is the UK's largest trade union and personal injury law firm with 22 offices across the UK. The firm has substantial teams specialising in serious injury, clinical negligence and asbestos cases.

Thompsons only acts for trade union members and the victims of injury. The firm acts in many fatal accidents, catastrophic injury and clinical negligence cases.

Thompsons acted for the victims of major disasters including Piper Alpha, Clapham, Ladbroke Grove, Kings Cross, the Channel Tunnel fire and Avonmouth.

The firm currently represents over 600 mesothelioma sufferers and their families and is campaigning for removal of the disparity between payment of bereavement damages that are awarded in Scotland compared to England and Wales. We provide details of the campaign in **Appendix I**.

## Thompsons' position

The Ministry of Justice Law on Damages consultation paper is a long-overdue attempt to address the issues raised by the Law Commission in 1998 (Law Commission No 257). Sadly, in failing to make any attempt to address the need for an increase in damages set out by the Commission, the consultation is a huge missed opportunity.

Disappointingly, the paper opens with a statement about the perception of a compensation culture and refers to "bad claims".

There is no compensation culture and the only perception of one is that encouraged by the insurance industry.

Setting this paper, which is about the bereaved and the seriously injured, in a context of compensation culture and bad claims is, in our view, inappropriate and irrelevant.

Other than to ensure fairness and proportionality, the government should not be concerned about what impact the law may have on the negligent party.

Non-meritorious claims should fail. They are only successful if the insurers settle when they should not. Only by fighting poor cases will we get good law and put off opportunists in the legal profession.

It is insulting to claimants to suggest – with no evidence in support – that fictitious medical evidence or fictitious claims are being presented. In a paper that is elsewhere well argued, this is an odd approach and appears to suggest that there has been pressure from the insurance industry.

On bereavement damages, the paper seems to be stuck in the mentality of "it's impossible to quantify or compensate for the emotional consequences of losing a loved one". Perhaps we should try. Defendants – whose negligence has caused a death – must be made to "apologise" adequately. The sum of £10,000 is arbitrary and out of date. As a value the law places on a life it is an insult to families (**Appendix I**).

## Responses to questions

### Claims for Wrongful Death

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

Yes. It is right that anyone who was financially dependant on the deceased should be able to claim.

The prescribed categories of family members entitled to damages should also be extended. The definition used should be that provided by the Damages (Scotland) Act 1976.

**b) Do you agree that this residual category should be limited to any person who was being wholly or partly maintained by the deceased immediately before the death?**

Yes, save in the exceptional case of a child born after the deceased's death, that was their biological child and would, but for the death, have been maintained by them.

**2. a) Do you agree that the fact of a person's remarriage or entry into a civil partnership should be taken into account when assessing a claim for damages under the FAA?**

No. That a bereaved person remarries should not affect their dependency claim or a claim for bereavement damages. Remarriage after the death of a breadwinner should not disturb the financial obligation on the tortfeasor who has caused the death.

To take the fact of a remarriage after the death into account would require courts to scrutinise the new relationship and to require the bereaved person to provide details of the income of the new civil partner or spouse. This would be wholly inappropriate.

**b) Do you consider that the fact of a person's financially supportive cohabitation of at least two years following the death should be taken into account?**

No. Any new relationship the spouse or partner of the deceased has should not have any bearing on their damages claim. Only the relationship they had with the deceased up to the death is relevant.

**c) Do you agree that the prospects of a person's remarriage, entry into a civil partnership or financially supportive cohabitation 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 it should not be taken into account for the reasons given above. To do so would be to pry into the bereaved person's circumstances, to penalise those who remarry and potentially to disturb the financial liability of the tortfeasor.

**3. a) Do you agree that the fact of a person's remarriage or entry into a civil partnership should be taken into account when assessing a claim for damages on the part of any eligible children?**

No. The duty of the tortfeasor to support a bereaved spouse, civil partner, child or other dependent should not be passed to a new partner and so the fact of a person's remarriage after the death is irrelevant to any damages claim.

b) Do you consider that the fact of a person's financially supportive cohabitation 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, for the reasons stated at 2(b).

4. Do you agree that the courts should only take into account the prospect of divorce, dissolution or breakdown in the relationship between the deceased and his or her spouse or civil partner:

a) where the couple are no longer living together at the time of the death

No. The only point at which the relationship ceases to be relevant is after a decree absolute (or equivalent in civil partnership) is granted. Until then the court is making an assumption about a relationship that it is inappropriate for it to do. The fact of whether a couple were living together is not the decisive factor.

b) where one has petitioned for divorce, judicial separation or nullity

No, for the reason given above.

c) where one has begun the procedure for dissolution of the civil partnership?

No, as above.

5. Do you agree that section 3(4) of the FAA 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 FAA?

Yes

## Mesothelioma claims

It is appropriate here to record Thompsons' comments on paragraphs 27-30 of the consultation paper. Four options are set out for consideration in mesothelioma claims. Earlier this year, Thompsons launched its campaign for Justice for Asbestos Families, aimed at levelling up the rights of mesothelioma sufferers and their families in England and Wales compared with the statutory rights the same family would have if they were entitled to bring their claim in Scotland (**Appendix 1**).

### 1. Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007

This legislation was specifically designed to preserve relatives' claims for non-patrimonial loss. In this jurisdiction the nearest equivalent to the Scottish concept of non-patrimonial loss is bereavement compensation as provided for by the Fatal Accidents Act 1976.

In Scotland, what currently happens in mesothelioma claims is that during lifetime the sufferer reaches settlement on all heads of loss including general damages for pain and suffering, financial losses (past and future), nursing care and services claims etc. A conventional approach is still adopted in calculating the "lost years" claim by discounting 50% for the sufferer's living expenses. The agreed terms of settlement are binding and cannot be revisited post-death. The terms of settlement are then recorded in a joint minute (a court order) between the parties which provides that:

- a) the proceedings are stayed pending the claimant's death
- b) in the event of death being due to mesothelioma the defendant meets (i) the contingent claims from relatives for non-patrimonial loss pursuant to the 2007 Act and (ii) the funeral expenses

- c) the defendants pay the costs of the claim to the date of the lifetime settlement and the costs of the relatives' contingent claims.

## **2. Amendment of CPR to allow a claimant to obtain an interim payment.**

This would enable a mesothelioma sufferer to commence a court action during their lifetime and obtain an interim payment on account of damages. The claim would then be suspended pending death. It would potentially leave all heads of claim unresolved.

The claimant's desire in our experience is often to achieve the knowledge and satisfaction of finality and the reassurance that their dependants will be financially secure. This proposal will not achieve those outcomes. Furthermore the defendants would not necessarily know the full potential value of the claim they face. Such an amendment, if envisaged, would also need to be considered carefully in the context of CPR Part 36 to avoid the claimant or their personal representative being exposed to costs penalties which may arise if a defendant chooses to make an offer during their lifetime, pursuant to Part 36 in full and final settlement of all or part of the claim.

## **3. Special provision to permit recovery of FAA claims during lifetime.**

The FAA claims are two-fold:

- a) Bereavement damages
- b) Dependency claims.

It is conceptually difficult to justify an entitlement to bereavement compensation arising before death.

As to the dependency claim see comments on 4 below

## **4. Legislative removal of different approaches to calculating damages for the "lost years" claims and dependency claims.**

There is judicial support for this proposition. See the recent comments of Hickinbottom J in his judgment dated 24 May 2007 on the assessment of damages in a lifetime mesothelioma claim – *Raymond Thomas Shanks -v- Swan Hunter Group PLC*

*"the difference between the conventions as to deductions for living expenses in a claim under the Fatal Accidents Act on the one hand and a claim by a living claimant on the other has no obvious rational basis, given the principle behind allowing lost years claims by a living claimant expressed by Lord Wilberforce and the merit (as he saw it) of bringing lost years claims into line with amounts recoverable under the Fatal Accidents Act (see Pickett, at page 151A). Why should a married man without children recover only 50% of his earnings if he sues for lost years himself, when his estate would recover 66% if he dies and his estate sues in respect of the same loss?"*

Overall, in order to achieve the best possible, most rational and fair outcome, Thompsons would favour a combination of:

- Legislation along the lines of the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 which would preserve relatives' claims for bereavement awards and recovery of funeral expenses plus
- Legislative removal of the distinction between "lost years" and dependency claims so that, in mesothelioma cases, the lost years claim is calculated as if in fact it were a dependency claim, thereby entitling the claimant to recover at least 66% of the loss or a greater proportion where there are dependant children.

In mesothelioma claims death is inevitable within a short timeframe. Death is an indisputable fact in these cases, usually within a period of months. The intention behind the proposed legislative reform would be to enable a mesothelioma sufferer to achieve full recovery during lifetime of future pecuniary

losses arising after the anticipated date of death to be calculated on the basis as if it were a dependency claim - whilst also preserving relatives' entitlement to bring claims for bereavement awards and recovery of funeral expenses after death.

## Bereavement Damages

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

Yes. There has to be recognition of bereavement caused through the negligence of someone else. A failure to recognise the grief relatives have gone through and will continue to endure will only exacerbate the emotional distress and resentment they feel.

### 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?

It is important to provide explanation of the purpose of bereavement damages but it is inappropriate to refer to these as a "token". Bereavement damages, though inevitably inadequate – as no amount of money can compensate for the death of a loved one – are nevertheless an important acknowledgement of the emotional pain and suffering caused.

The level of bereavement damages though is, in Thompsons' view, currently too low and the definition of eligible relatives is far too narrowly prescribed.

The concept of bereavement damages needs to be understood and explained in plain English in the context of a personal injury claim. This is a specialist area of legal advice that falls outside the remit of the important service delivered by the Citizens Advice Bureau (CAB).

CABs could act as a signpost to specialist help by referring people to trade union legal services and expert lawyers. This should be done by a specialist legal adviser.

Claimants should be advised to seek professional advice such as may be available through their trade union, which provides access to free legal advice on these matters or from other experienced lawyers.

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

See our response to 7. a). It is for a professional legal adviser to explain how compensation is assessed.

### 8. a) Do you agree that a parent should only be able to claim bereavement damages for the loss of their child where the child is under 18 and unmarried/in a civil partnership?

No. The loss of a child is unbearable whatever their age. It is unnatural that any child should pre-decease their parents.

The child's marital status makes no difference to the grief felt by the parents but it is right that, where the child is married, the bereavement award goes to their partner, issue or dependants. Where the child has no partner, issue or dependants it is unacceptable that the parents of a child who dies at any age cannot claim bereavement damages.

Even if the amount of the award payable in England and Wales is increased as Thompsons suggests that it should, it is still a modest award and therefore it is reasonable to extend the class of claimant to parents of a child with no partner, issue or dependants regardless of their age.

Parents should also be able to claim for stillborn babies.

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

Yes. The marital status of a father is immaterial in their relationship with their child.

**c) What is your view on whether stepparents who were living with and had caring responsibilities for a child under 18 should be able to claim bereavement damages?**

Thompsons' view is that Schedule 1 of the Damages (Scotland) Act 1976 provides an appropriate definition of "relative" in relation to a deceased person, including as it applies to stepparents:

**9. Do you agree that children of the deceased (including adoptive children) who are under 18 should be added to the statutory list, but that eligibility should not be extended to adult children of the deceased?**

We again refer to the Schedule 1 of the Damages (Scotland) Act 1976. The statutory list should include all children, including adoptive children, regardless of age.

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

We believe they should be eligible. We again refer to the Schedule 1 of the Damages (Scotland) Act 1976. This includes, in the definition of "relative", "any person who was, or was the issue of, a brother, sister, uncle or aunt of the deceased".

**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 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?**

No. The statutory list should be extended to unmarried people living together as husband and wife regardless of how long they had lived together. The length of time of co-habitation prior to death is not relevant. This is consistent with the position adopted in The Damages (Scotland) Act 1976.

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

No. We support the recommendation of the Law Commission to include engaged couples.

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

An award should be available to the same categories of relatives as defined in Schedule 1 of the Damages (Scotland) Act 1976. The level of awards in England & Wales should be increased in line with the amounts payable in Scotland.

We refer again to **Appendix I**.

**b) Do you agree that where a spouse or civil partner and a cohabitant are both eligible to claim, the sum of £10,000 should be divided between the two?**

No. They should receive individual awards if they are both eligible to claim. The same entitlement should apply to claimants in England and Wales as it does in Scotland.

**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?**

Yes but we have made the point about the inequality between Scotland and England and Wales. In Scotland the level of award to parents of an unmarried child under 18 is up to £20,000 and the younger the child the greater the award. That should be the same in England and Wales.

**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?**

In the absence of a system to increase awards in line with inflation, the level of awards should be assessed by the courts, as they are in Scotland.

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

This is a debate between the legal and the moral position and is extremely difficult to answer. The grief of the bereaved is no less because the deceased has contributed to their demise. Indeed it may be even more acute.

We agree that there should be no contributory negligence where the deceased is under the age of 14.

## Liability for Psychiatric Illness

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

Yes.

**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?**

It is right that the tortfeasor should pay but, if we are not to offend the principle against double recovery, it is not right that the claimant gets the money twice. If there is a double payment to the claimant then the payer should have the right to recovery, subject however to the equitable doctrine of estoppel ie that the payee spent the money in good faith.

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

Yes.

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

Yes, though whether the individual pays back is a matter for them.

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

Yes.

**c) 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?**

This should apply regardless of the identity of the carer. We do not agree that damages should not be awarded for past gratuitous care provided by the tortfeasor. A spouse who was driving the claimant at the time of the accident and who then goes on to care for the claimant should have their assistance recognised, just as anyone receiving care from another source should.

Ultimately the paying party is the defendant's insurer.

**d) 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.

**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?**

Yes, clarification on

- a) is needed regarding insurance paid by employers in order to prevent double recovery
- b) no, the law on this is sufficiently clear.

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?

Insurers should not be able to force a claimant into litigation to recover payments the insurer has made.

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

Yes

**20. 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?**

There should be no change to a) and b) c) not applicable

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

Yes.

## Cost of Private Care

**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?**

No.

A claimant should be free to have the reasonable and necessary care that they need from a source of their choice paid for by the tortfeasor without restriction.

There are many drawbacks. We wonder what standard of care would be provided once the tortfeasor had persuaded the court to agree to their NHS package? What monitoring would there be of delivery, how realistic is any monitoring? What would happen if the standard dropped below that promised to the court (and the claimant)?

What would happen if they did not take up the care immediately; would the money for that care be used to cross-subsidise another area of the NHS? In the light of constant NHS re-organisations and change, would the care be available still when needed?

What about the insecurity in the future of the NHS? Who knows what the level of state provision will be in future years?

How can the NHS be both the defender and the provider of care? Why should someone who has been injured at the hands of the NHS be compelled to receive treatment or surgery from the same source?

If the NHS is the only provider, what if the claimant moves house? Another PCT may refuse to provide the care.

What if a seriously injured person decided to move abroad, for any number of personal, medical or family reasons? Who in that country would provide the care?

What if the individual was advised to go abroad to take innovative treatment to, say, help them to walk again? They would be unable to get the treatment if there was no care provision in that country.

All those uncertainties result in more costs and risks for everyone. There is the likelihood of more litigation, which would surely be a major drawback for the defendants, and the need to return to court if there is a failure of provision.

For the taxpayer the implications are serious. If the NHS is forced to provide the care for the victims of personal injury, there is a risk that resources will be shifted away from core NHS services. There is a real risk of the creation of a two-tier system and the decline of the NHS for other users.

If the purpose of these proposals is to simplify provision of care, then the government should consider the impact of the Woolf reforms which were meant to do that in relation to costs but have instead created a huge costs industry.

The only way to ensure that claimants and their carers retain a sense of control over the care provided is for them to continue to have choice and control over that choice.

Placing any element of that control into the hands of the defendants would mean that claimants could only retain control by resorting to further litigation to secure additional money or court rulings as to the care necessary

**23. What benefits or drawbacks might there be for:**

- a) claimants
- b) defendants
- c) the taxpayer

See response to 25 below.

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

See response to 25 below.

**25. If section 2(4) is retained, is any action needed to avoid possible overcompensation 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?**

We object to the implication that seriously injured people are liable to not use damages for the cost of care appropriately. In Thompsons' extensive experience, injured people do spend the money on appropriate care. Judges can always refuse to award a lump sum for care, if appropriate, and can insist on future care needs being funded by way of periodical payments.

The tort system is designed to put the injured person in a position as if the injury had not happened, as far as money can ever do so.

Having choice over their care provision is part of that. These proposals will remove that choice.

It is wholly inappropriate for the defendant to pay direct to the care provider because it would take away the claimant's choice and control. In our experience, defendant insurers will always question the cost of care. They will certainly do so if they are in the driving seat, paying the bills directly.

The impact of an insurer questioning the bills and asking for them to be reviewed and revised could lead to the claimant losing their place in the queue or losing their chosen care provider altogether.

The result would inevitably be for the claimant to have to go back to the drawing board and launch further litigation to secure control of their care.

Thompsons is aware of proposals to develop a multi-track code of practice between APIL members and defendant insurers. Rehabilitation provision would be part of that code. Rehabilitation, like other care, must be the choice of the claimant, both in terms of whether to have it and what provider to choose. Rehabilitation must never be used as a stick to beat the claimant with.

And yet, we are aware that there is a proposal from defendant insurers that defendants be involved in the process of choosing rehabilitation. This is evidence, if any was needed, that defendants want to influence the care provision process. If the defendant pays direct to the claimant, they will certainly want to do so.

**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?**

The NHS provides a safety net and no more. Thompsons has always believed in the principle that the polluter must pay. Therefore the principle that the tortfeasor pays for the costs of care is right. That principle is reflected in the establishment of the Compensation Recovery Unit and the change in the law that allows hospitals to recover the costs of caring for road traffic victims.

It is a philosophy that must extend to the care of high value personal injury claimants, which can easily be £100,000 a year.

**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?**

The question implies that the way courts currently assess what care is appropriate is wrong. Thompsons does not accept that it is. The current system may not be perfect but it involves assessment of a claimant's care needs by experienced lawyers, care experts, case managers and a judge.

The only appropriate and safe way to cost care is to base the calculation on private provision.

It may be appropriate to consider the adoption in high value claims of a protocol similar in spirit to the Master Whittaker "Fast Track" for live mesothelioma victims. An early key issue in high value claims is to resolve the liability question quickly so as to give the parties certainty of outcome. The claimant is vulnerable, in need of care and usually without funds to pay for care. A protocol involving an early focus on the resolution of liability and the use of the split trial facility where necessary may be advantageous.

In successful cases, the claimant would then be able to benefit from an early interim payment and engage the services of an experienced independent case manager to assess the need for care and rehabilitation. The case manager will be able to provide early, detailed and independent commentary on the claimant's care needs.

## Accommodation Expenses

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

This may be a preferable option for some claimants but not for others.

The major problem facing many claimants is that they only receive part of the capital needed to purchase and adapt suitable property. The greater the claimant's life expectancy, the less the shortfall. The claimant's lawyer has to look for other pots of compensation, such as general damages or gratuitously provided past care, to take money from in order to make up the shortfall to allow for purchase and adaptation of accommodation.

Therefore, where general damages are high there is less of a problem. It is, however, wrong that compensation intended for another purpose has to be used in this way.

The system of charges being suggested is complicated and there are a number of points at which there could be costly disputes, e.g. when the sale should take place and the effect on value of alterations. However, although such uncertainties might well be off-putting for claimants, in some cases it may be preferable to the current system because it will give adequate funds to allow property purchase without causing a financial short fall in other areas.

**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?**

This has to be the preferred option. The *Roberts -v- Johnstone* approach causes unfairness as set out above. The purpose of law reform is to address this. Other options are considered in the consultation paper but as set out are unsatisfactory.

Ultimately, Thompsons supports the right of claimants to choose and control their own accommodation and make decisions about alterations.

Avoiding windfalls to claimants in respect of property purchase and adaptation appears to be why the law has evolved to a situation where established/accepted practice is the use of *Roberts -v- Johnstone* to calculate the amount a claimant will be awarded towards the cost of property purchase and adaptation. However, this causes the problem identified which is a major unfairness and an illustration of the law not working as it should.

In Thompsons' view there is nothing wrong with the claimant possibly ending up with a wind fall. What is distasteful is defendants making money out of injured claimants (we note the suggestion at paragraph 189 that the defendant could receive a charge for the increase in property value).

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

"No action" is not a satisfactory option for the reasons referred to in the answers to questions 28 and 29.

## **Aggravated, Exemplary and Restitutionary Damages**

**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"?**

These are not available to be pursued by bereaved families. There are other means of pursuing wrongdoers through the criminal process and the imposition of financial penalties. However, only the state benefits from these financial penalties. Families should be able to pursue such claims.

Thompsons has no further comment to make on questions 32, 33 and 34.

**35. Do you agree that in the Copyright, Design and Patents Act 1988 and the Patents Act 1977 the term "additional damages" should be replaced by "aggravated and restitutionary damages"?**

See response to Q36 below.

**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
- d) copyright and related rights?

Thompsons acts in copyright cases on behalf of the National Union of Journalists. The current system of damages lets down creators. Unless an award of additional damages is made then the party that has infringed copyright only has to pay what they would have paid had they lawfully secured a license to use the Intellectual Property (IP) work in the first place.

This is not an effective incentive to deter third parties from infringing IP rights.

Creators need a damages system, which protects them against infringers who have engaged in high handed and immoral treatment of their copyright, one that recognises the theft and properly compensates for it.

An enhanced award also needs to be given, if the identity of the infringer is such that the creator would never have willingly licensed them to use their work. The current system, which gives the court power to award “additional damages”, is intended to provide for this in that it is a response to the flagrancy of the breach. However, in reality, additional damages are rarely awarded and, because they are at the discretion of the court, it is difficult to factor them in during settlement negotiations.

The Ministry recommends that the term additional damages be replaced by “aggravated and restitutionary damages”. However, while aggravated damages are supposed to compensate the claimant for mental distress they are clearly not punitive. In Thompsons’ view the door should be left open in extreme cases of copyright infringement for punitive additional damages to be awarded.

Restitutionary damages are designed to strip from a defendant gains made by infringing IP rights. Arguably this is the same as an award for an account of profits – an award based on the profits the defendant has made as a consequence of the infringement – which the claimant can elect as an alternative to damages at the time the claim is commenced.

**Thompsons has no comment on the remaining questions**

## Further information:

Jennie Walsh  
Head of Media  
Thompsons Solicitors  
jenniewalsh@thompsons.law.co.uk  
07711 378877

# Appendix I: Justice for Asbestos Families Campaign Materials

## Press Release I

### Justice for Asbestos Families

Thompsons Solicitors is launching a national campaign to achieve justice for asbestos families across the UK.

Thompsons, one of the UK's leading claimant personal injury law firms, is demanding equality for families affected by asbestos in England and Wales after it was revealed they are receiving tens of thousands of pounds less in compensation than their Scottish counterparts.

The firm is highlighting an injustice in the way compensation for bereavement is awarded to families who have lost a relative to mesothelioma, a cancer of the lining of the lung caused by asbestos.

In England and Wales the level of compensation is set at £10,000 by law and is only payable to the spouse but over the border in Scotland payments up to £30,000 have been made to bereaved widows.

Not only widows but other family members in Scotland can also receive compensation of between £10,000 to £15,000.

Thompsons wants to see a change in the way payments are assessed so families across the UK receive compensation in line with the amount currently paid to families in Scotland.

Thompsons head of asbestos policy, Ian McFall said: "The law must be changed to ensure families in England and Wales are entitled to the same level of compensation for bereavement a family in Scotland. The imbalance is unjust and cannot continue.

"£10,000 is a derisory sum for the grief caused by the death of a close family member. Whole families suffer terribly when they lose a loved one to mesothelioma. They carry the emotional burden with them the rest of their lives."

In England and Wales the amount of compensation paid to bereaved spouses is fixed at £10,000 by the Fatal Accidents Act 1976.

However, in Scotland the level of bereavement payments is decided by the courts. In Scotland each individual case is looked at on its merits. In Scotland compensation can also be paid to children, siblings, grandchildren, parents and common law partners.

In some fatal personal injury cases, Scottish juries have decided that compensation for bereavement of up to £50,000 should be paid to widows.

Recently the Scottish Parliament changed the law to make it easier for families to claim for compensation for mesothelioma. The change was made following a campaign by Thompsons Scotland and was covered extensively by Scottish media including the BBC at <http://news.bbc.co.uk/1/hi/scotland/6253709.stm>.

Press release 2 – June 11

## Campaign to achieve justice for families affected by Asbestos

### Equality needed for all mesothelioma victims

A campaign to achieve justice for asbestos families in England and Wales has been backed by MPs.

A Parliamentary Early Day Motion (EDM), laid down by Blaydon MP David Anderson, supports the campaign by Thompsons Solicitors, which is demanding equality for families affected by asbestos in England and Wales after it was revealed they are receiving tens of thousands of pounds less in compensation than their Scottish counterparts.

The EDM calls for the injustice in the way compensation for bereavement is awarded to families who have lost a relative to mesothelioma, to be resolved.

It has been signed by scores of MP, many from areas heavily affected by asbestos-related diseases, including: Ribble Valley MP, Nigel Evans; Portsmouth MP, Mike Hancock and Keighley MP, Ann Cryer.

### Mesothelioma Compensation

Mesothelioma is a cancer of the lining of the lung and is caused by exposure to asbestos.

In England and Wales the level of bereavement compensation is set at £10,000 by law and is only payable to the spouse of the deceased but over the border in Scotland payments up to £30,000 have been made to bereaved widows.

Not only widows but other family members in Scotland can also receive bereavement compensation of between £10,000 to £15,000 each.

The EDM urges the Government to “act swiftly to ensure that those suffering from this deadly disease have the same rights in England and Wales as they do in Scotland”.

The campaign is being led by Thompsons Solicitors, which has offices across the UK.

Thompsons head of asbestos policy, Ian McFall said: “Bereavement compensation for families of those who have died from mesothelioma should be equal no matter where you were exposed to asbestos in the UK.

“We are pleased many MPs have signed this EDM to show their support for the campaign and we hope they will fight with us to create a fairer system for all mesothelioma families in England and Scotland.”

### Justice for Asbestos Families – Briefing for MPs

Will this mean more government spending funded by the taxpayer?

**No. Payments will be made by the negligent companies responsible for causing the death, or by their insurers – in line with the principle that the polluter should pay.**

Will this lead to an increase in insurance premiums?

The insurance industry may say that it will but there is no reason why it should because:

- i) Insurers could and should have reserved for this contingency;
- ii) They make multi million pound profits annually and could pay for this out of some of those profits;
- iii) Insurance is about taking in premiums against a risk (premiums which they have been able to invest for years) and paying out what is fair if the risk becomes a reality.

Will this impact adversely on the government's reforms to mesothelioma compensation announced by the DWP in March 2007?

**No. Those (welcome) changes are about making the system of paying state benefits for mesothelioma fairer and faster.**

Didn't the DWP reforms announced in March 2007 mean an increased bill for the insurers in mesothelioma cases - so isn't it unfair to make them pay more again?

**No. Those changes ended a windfall that the insurers had benefited from since 2000 amounting to a saving of over £40m. They had deducted payments received by victims from the government but not paid those sums back to the government.**

Will this mean that people suffering from other fatal conditions can ask for the same increases?

They could, and in principle there is no reason why they should not. But the position for mesothelioma victims is unique because the condition is always fatal and almost always caused by exposure to asbestos. Their families experience unusually severe grief and an enduring sense of loss, often exacerbated by having witnessed the extreme pain, suffering and death of a loved one and knowing that it was caused by the negligence of a previous employer.

Can you tell me how this affects my constituency?

**We can let you have government statistics for the number of mesothelioma deaths in your constituency and therefore an indication of the number of families who would gain from the changes we are campaigning for.**