

# NEGLIGENCE AND DAMAGES BILL

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Negligence and Damages Bill as introduced in the House of Commons on 13 October 2015 (Bill 76).

- These Explanatory Notes have been produced by Andy McDonald in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill. So where a provision of the Bill does not seem to require any explanation or comment, the Notes simply say in relation to it that the provision is self-explanatory.

## Overview of the Bill

- 1 The first part of this Bill seeks to amend the law so as to provide assistance to people who suffer psychiatric harm after witnessing the death or injury of others. This part of the Bill is based on draft provisions prepared by the Law Commission in 1999. The Government's response to the Law Commission was published for consultation in May 2007. At that time Ministers concluded that it was "preferable to allow the courts to continue to develop the law on liability for psychiatric illness rather than attempt to impose a statutory solution".
- 2 Part 1 of the Bill aims to place psychiatric injury or illness arising from the death of, or physical injury to, other persons on a similar footing to suffering direct physical harm, in terms of a person's entitlement to compensation (and the applicable criteria and steps required to gain access to that compensation). This reflects developments in medical science which demonstrate that psychiatric illness can be as debilitating as physical injury and that cause and effect in this area can be determined to a satisfactory degree.
- 3 The Fatal Accidents Act 1976 allows payment of only a fixed sum for bereavement damages which can be claimed only by the spouse or civil partner of the deceased and the parents of unmarried children under the age of 18 (or, if the child is illegitimate, the mother only). Following the 2007 consultation the Government undertook to increase this sum in line with inflation every three years.
- 4 The Damages (Scotland) Act 1976, as amended in 2011, provides for different amounts to be awarded and increases the categories of people and relationships eligible for compensation.
- 5 Parts 2 and 3 of this Bill repeal the Fatal Accident Act 1976 and make provision for a new way of providing damages to bereaved families in England and Wales which echoes the approach taken in Scotland since the mid-1970s.
- 6 In the autumn of 2013, the Association of Personal Injury Lawyers (APIL) commissioned research to discover public attitudes to bereavement damages. Of the 2,000 people surveyed, more than half thought bereavement damages should be more than £100,000; nearly three-quarters thought bereavement damages should be awarded on a case by case basis; and almost three-quarters of respondents felt that damages for grief and trauma associated with a bereavement should be higher than, for example, those available for a seriously injured thumb (between £14,000 and £25,000 at the time of the survey).

## Policy background

- 7 The policy context is provided in the then Government's response to the relevant Law Commission's recommendations of 1999, published by the then Department for Constitutional Affairs in 2007: "The Law on Damages" (Consultation Paper, CP 9/07 04/05/2007). Since then there has also been a report by the Commons Justice Committee entitled "Draft Civil Law Reform Bill: pre-legislative scrutiny" (Sixth Report, 2009-10, HC 300) which looked at the award of damages under the Fatal Accidents Act.

## Legal Background

- 8 The legal background is available in the Law Commission report "Claims for wrongful death" (LAW COM No 263, 'Item 1 of the Seventh Programme of Law Reform: Damages', November 1999).

# Territorial extent and application

9 This Act extends to England and Wales only.

## Commentary on provisions of the Bill

### Part 1 – Psychiatric Injury

#### Clause 1

- 9 This clause sets out new circumstances under which a defendant owes a duty of care to ensure someone does not suffer psychiatric injury as a result of the death or serious injury of another person.
- 10 Subsection 2 specifies that the injury suffered must be a recognisable psychiatric illness and subsection 3(b) requires that there must have been a close tie of love and affection between the person who was killed or injured (the immediate victim) and the person who has suffered psychiatric injury.

#### Clause 2

- 11 This clause sets out the circumstances under which a defendant owes a duty of care to ensure that someone does not suffer psychiatric injury as a result of the death or serious injury of the defendant. The details of this clause are almost identical to clause 1 but provides protection for the claimant, who should be entitled to claim compensation if the defendant kills or injures himself and there is a close tie of love or affection between them.

#### Clause 3

- 12 At the moment, the law only assumes that there is a “close tie of love and affection” between parents and children, spouses, and fiancées. A person who falls into one of these categories is allowed to bring a case for psychiatric harm without having to prove that close tie. Anyone else who suffers psychiatric harm by witnessing the death or injury of someone to whom they are close has to prove that closeness.
- 13 Clause 3 provides a new, and longer, statutory list of relationships in which it is assumed that there is a close tie without the injured person having to prove it. The injured person must be able to prove that he has suffered mental harm to be able to make a successful claim.
- 14 The list of relationships in this part of the Bill is based largely on the list of people who are entitled to claim damages for bereavement in Scotland. Any relative not included in this section would need to prove that a close tie of love and affection existed prior to the death or injury.

#### Clause 5

- 15 This clause removes the current legal requirement that the event which causes the injury must be “shocking” in the sense that it makes a direct and immediate impact on the senses. The effect of the clause would be to extend eligibility to people developing psychiatric illnesses as a result of events which have taken place over a considerable period of time, for example a parent who is witnessing their child die slowly as a result of medical negligence.
- 16 The clause also removes the current legal requirement for the injured person to be close to the death or injury in time and space.

## Part 2 – Damages for Personal Injuries

### Clause 6, subsections 1-5

- 17 These subsections provide for compensation to be claimed by a terminally ill or fatally injured person in respect of the suffering incurred by knowing that he is going to die prematurely as well as wrongfully. In such circumstances, compensation is not payable simply for the fact that years of life are to be lost, but only when it can be proved that the person concerned is aware that such loss of years of life will occur.

### Clause 6, subsection 6

- 18 This subsection provides that, when compensating someone for the lost years of his life, a deduction in the payment of 25 per cent is made to allow for what the person would have spent on his own living expenses during those years. It also gives the court discretion to change this if reliance on such a calculation would be ‘manifestly unfair’.
- 19 A fixed deduction is intended to spare the bereaved family the potential intrusion, costs and/or consequent unpredictability that is likely to arise from financial investigation, assessment and possible arguable matters.

### Clause 7

- 20 This clause transfers the rights of the affected person to his personal representative if the claim for compensation is not concluded before his death. Recovery of compensation for financial (i.e. ‘pecuniary’) losses or other ‘non pecuniary’ losses (such as pain and suffering) is limited to losses which would have been incurred before the death.

## Part 3 – Bereavement Damages

### Clause 9

- 21 This clause sets out what kind of compensation is to be paid by the wrongdoer and which of the bereaved family is entitled to claim.
- 22 The clause entitles the immediate family to claim for loss of dependency after the death, including loss of income from earnings but also loss of personal ‘services’ from the deceased which would cost money to replace (for instance, DIY services, care, or driving the family car as sole household driver). The cost of replacing these services would have to be quantified before any claim could be made.
- 23 This clause also entitles the immediate family to claim compensation for grief and sorrow caused by the death in certain circumstances. This Bill widens the variety of relationships that make persons eligible to claim in this context (see also Clause 15). Using such lists is aimed at reducing the need to discuss or argue, within a case, who is more or less affected by a specific bereavement.

### Clause 10

- 24 This clause addresses compensation for loss of dependency.
- 25 The clause provides that the total amount of compensation available for loss of dependency in relation to the deceased’s family must not exceed 75 per cent of the deceased’s net income. It also provides that, with the exception of the spouse (or the person living with the deceased as married) and a dependent child, other members of the immediate family (as defined in clause 9) cannot receive more in compensation than they have actually lost.

- 26 It should be noted that the definition of a ‘dependent child’ for these purposes (i.e. immediate

These Explanatory Notes relate to the Negligence and Damages Bill as introduced in the House of Commons on 13 October 2015 (Bill 76)

family) is set out in subsection 3 and is narrower than the definition of a 'child' who can benefit from bereavement damages in the list in clause 15. Any child other than one related by blood would have to prove dependency.

- 27 If no immediate relative other than the spouse and dependent child has a claim for dependency, it is to be assumed that all the 75 per cent of net income was spent by the deceased on the spouse and dependent child.
- 28 A fixed percentage was recommended by the Scottish Law Commission (2008). The aim is again to reduce the potential intrusion, costs and/or consequent unpredictability that is likely to arise from financial investigation into family affairs, assessment and possible arguable matters. Clause 10(2) does, however, give the court the leeway to apply a different percentage if it thinks a result based on the 75 per cent calculation would be manifestly unfair.
- 29 This clause is also intended to address the unfairness in fatal cases (as opposed to non-fatal personal injury cases) where the losses claimed by a relative who was dependent on the deceased's earnings are assessed on a speculative basis rather than taking account of actual losses arising between death and judgment.

### Clause 11, subsection 1

- 30 This subsection allows the court to disregard any money which may have been left from, for example, life insurance, and reflects the law as it currently stands in the Fatal Accidents Act. The provision is aimed at preventing the penalisation of the dependents of a wrongfully killed person due to prudent life choices made prior to that person being killed.

### Clause 11, subsection 2

- 31 This subsection applies where the deceased had already received some compensation for his injury before he died, with the aim of compensating him for future financial losses. After his death, the amount previously paid to him cannot be recovered by his dependents. This subsection would prevent such 'double recovery'.

### Clause 11, subsection 3

- 32 This subsection provides that it is not necessary to prove that the deceased person had a legal duty to provide support but, if proof is available, it will be taken into account.

### Clause 11, subsection 4

- 33 This subsection limits the extent of dependency in cases of wrongful death to the category of people entitled to claim under clause 15. (Subsection 5 is self-explanatory.)

### Clause 12

- 34 Clause 12 provides for the limiting of damages payable to the representative of a successful, but deceased, claimant by clarifying that the time period the court can use in calculating the damages must finish immediately before the death of the claimant.

### Clauses 13 and 14

- 35 These clauses make further provision for the rights and prerogatives of claimants' personal representatives.

### Clauses 15 to 17

- 36 These clauses make provision for: the interpretation of certain terms and concepts; repeals; and extent, commencement and the short title of the Bill.

## Commencement

- 37 The Act comes into force on the day after it receives Royal Assent.
- 38 With respect to clauses 1 to 5, the Bill provides for a Minister to establish an "appointed day" by order. The provisions of clauses 1 to 4 apply if the events causing the death or injury, etc. occurred on or after that day. Clause 5 applies if the defendant's act or omission occurs on or after that day.

## Financial implications of the Bill

- 39 This Bill has negligible implications for public expenditure.
- 40 This Bill may increase the total amount of compensation available to the bereaved relatives of persons who die wrongfully.
- 41 This Bill may increase the efficiency of the administration of justice in the cases to which it relates, and reduce the costs of participants.

# NEGLIGENCE AND DAMAGES BILL

## EXPLANATORY NOTES

These Explanatory Notes relate to the Negligence and Damages Bill as introduced in the House of Commons on 13 October 2015 (Bill 76).

---

Ordered by the House of Commons to be printed, 13 October 2015

---

© Parliamentary copyright 2015

This publication may be reproduced under the terms of the Open Parliament License which is published at [www.parliament.uk/site-information/copyright](http://www.parliament.uk/site-information/copyright)

PUBLISHED BY AUTHORITY OF THE HOUSE OF COMMONS

LONDON - THE STATIONERY OFFICE LIMITED

Printed In the United Kingdom by The Stationery Office Limited

£ FOR TSO USE

These Explanatory Notes relate to the Negligence and Damages Bill as introduced in the House of Commons on 13 October 2015 (Bill 76)