

# Fatal accident claims: a beginner's guide

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# History: common law position

- Common law recognised no claims arising from death, either for the benefit of the dependants or of the estate of the deceased (*Baker v Bolton* [1808] 1 Camp 493).
- 2 rules:
  - 1) The cause of action of a tortiously injured person is a personal action which does not survive for the benefit of their estate; and
  - 2) Death of a human being could not be complained of as an injury.

# Legislative response

- Claims for dependants introduced by Lord Campbell's Act, FAA1846.
- The Fatal Accidents Act 1976 is a direct descendant.
- Claims for the benefit of the estate were introduced by the Law Reform (Miscellaneous Provisions) Act 1934, which provides (subject to exceptions) that a claim vested in a person who dies shall survive for the benefit of their estate.

# 1934 Act claims

- May include a claim for funeral expenses: s.1(2)(c).
- Otherwise, losses or gains to the estate arising out of death are excluded. So, for example, probate costs are irrecoverable: s.1(2)(c).
- But note s51 Senior Courts Act 1981. Costs of and incidental to the civil proceedings recoverable. (Where probate was necessary in order to bring the claim it will be recovered)
- Excludes a number of types of claim, including “lost years” claim.

# Heads of loss under 1934 Act

- Will ordinarily consist of up to three items:
  - Pain, suffering and loss of amenity between accident and death.
  - Financial losses suffered between accident and death: loss of earnings, medical expenses, the value of care, etc.
  - Funeral expenses.

# The 1976 Act

“Sole legal basis on which a claim can be made for bereavement or loss of dependency in English law”

Lord Sumption

*Cox v Ergo Versicherung AG* [2014] UKSC 22 at [6]

# The 1976 Act

- S1: Right of action for wrongful act causing death.
- S1A: Bereavement.
- S2: Persons entitled to bring the action.
- S3: Assessment of damages.
- S4: Assessment of damages: disregard benefits.
- S5: Contributory negligence.
- S6: Consequential amendments and repeals.
- S7: Short title, etc.

# 1976 Act: section 1

- First prerequisite is a death caused by a wrongful act, neglect or default.
- S1(1): If the deceased could but for death have maintained an action for damages for personal injuries, then the defendant will be liable notwithstanding the death.
- S1(2): The action is brought for the benefit of the “dependants”



# Section 2:

- S2(1): the action is brought by the executor or the administrator of the deceased.
- S2(2): if not executor or administrator or no action brought within 6 months of death then action can be brought in the name of any dependant.
- S2(3): Only one claim can be brought against the defendant.

# Procedural requirements

- CPR Part 16 Practice Direction

“5.1 In a fatal accident claim the claimant must state in his particulars of claim:

- (1) that it is brought under the Fatal Accidents Act 1976,
- (2) the dependants on whose behalf the claim is made,
- (3) the date of birth of each dependant, and
- (4) details of the nature of the dependency claim.

5.2 A fatal accident claim may include a claim for damages for bereavement.

5.3 In a fatal accident claim the claimant may also bring a claim under the Law Reform (Miscellaneous Provisions) Act 1934 on behalf of the estate of the deceased.”

# S1(3): definition of dependant

- “(a) the wife or husband or former wife or husband of the deceased;
- (aa) the civil partner or former civil partner of the deceased;
- (b) any person who—
  - (i) was living with the deceased in the same household immediately before the date of the death; and
  - (ii) had been living with the deceased in the same household for at least two years before that date; and
  - (iii) was living during the whole of that period as the husband or wife or civil partner of the deceased;
- (c) any parent or other ascendant of the deceased;
- (d) any person who was treated by the deceased as his parent;
- (e) any child or other descendant of the deceased;
- (f) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
- (fa) any person (not being a child of the deceased) who, in the case of any civil partnership in which the deceased was at any time a civil partner, was treated by the deceased as a child of the family in relation to that civil partnership;
- (g) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.”

# Potential heads of loss

- Bereavement award: : s1A. These are damages for non-financial losses in a fixed sum.
- Loss of intangible benefit of special attention and affection (Regan v Williamson [1976] 1 WLR 305)
- Past and future loss of services previously provided by the deceased
  - Child minding
  - Domestic chores
  - Bookkeeping and finances
  - Painting and decorating
  - Home maintenance
  - DIY
  - Gardening

# Potential heads of loss cont.

- Funeral expenses (if paid by dependant s3(5))
- Past and future dependency on the deceased's earnings/income (includes future promotions, career advancement, fringe benefits and pension)
- Gifts or luxury items (wedding presents, birthday gifts and cultural celebrations)
- Interest on post death, pre-trial losses

# Bereavement Awards: who can claim?

“S1A(2) A claim for damages for bereavement shall only be for the benefit—

(a) of the wife or husband or civil partner of the deceased;

(aa) of the cohabiting partner of the deceased; and

(b) where the deceased was a minor who was never married or a civil partner—

(i) of his parents, if he was legitimate; and

(ii) of his mother, if he was illegitimate.

(2A) In subsection (2) “cohabiting partner” means any person who—

(a) was living with the deceased in the same household immediately before the date of the death; and

(b) had been living with the deceased in the same household for at least two years before that date; and

(c) was living during the whole of that period as the wife or husband or civil partner of the deceased.”

# Reform of s1A(2):

- *Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust and others* [2017] EWCA Civ 1916
  - Cohabitee obtained declaration that s1A(2) of 1976 Act incompatible with Art 14 & 8 of HRA 1998
- The Fatal Accidents Act 1976 (Remedial) Order 2020

# Bereavement Awards: what can be claimed?

- The Damages for Bereavement (Variation of Sum) (England and Wales) Order 2020 increases bereavement award to £15,120 for deaths on or after 1.5.20: £15,120
- Previous levels of award:
  - Death from 1.4.13: £12,980
  - Death from 1.1.12: £11,800
  - Death from 1.1.08: £11,200



# Bereavement Awards:

- S1A(4) The prescribed sum is shared by everyone who qualifies for a bereavement award
- Bereavement award is personal. It does not transfer from the dependant upon their own death.

# 1976 Act claims – general rules

- Particular rules for the assessment of damages include:
  - A widow's remarriage or prospects of remarriage are not to be taken into account: s.3(3). This provision may be subject to human rights challenge for unequal treatment.
  - In case of unmarried partners, the court must take into account the lack of an enforceable right to financial support: s.3(4).
  - Benefits accruing to dependants from the death are disregarded: s.4. (e.g. life insurance). This has been widely interpreted, is generous to claimants, and has been much criticised.
  - S5: If the deceased was contributorily negligent, the dependants' damages will be accordingly reduced

# Effect of statutory origins

- Assessment of claims depends upon interpretation of statute
- Potential for arbitrary distinctions
- Not always in accordance with gut feelings or natural justice

# Departure from the common law

“sections 3 and 4 mark a departure from the ordinary principles of assessment in English law, which can fairly be described as anomalous. They provide for what Lord Diplock in *Cookson v Knowles* [1979] AC 556, called an ‘artificial and conjectural exercise’ whose ‘purpose is no longer to put dependants, particularly widows, in the same economic position as they would have been in had their late husband lived.’ Others have gone further. *Atiyah's Accidents, Compensation and the Law*, 8<sup>th</sup> ed (2013), described damages for bereavement as ‘highly objectionable’ (p 89) and the exclusion of maintenance from a subsequent remarriage as ‘one of the most irrational pieces of law ‘reform’ ever passed by Parliament’ (p 133).”

Lord Sumption *Cox v Ergo Versicherung AG* [2014] UKSC 22 at [10]

# Entitlement to claim

- Section 3(1) of 1976 Act

“In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.”

- There must be “injury”

# Entitlement to claim cont.

“reasonable expectation test”

- Reasonable expectation of pecuniary benefit
- Arising from dependent family relationship
- But for deceased’s death
- Pecuniary: ‘money or money’s worth’

# The Court's task

“examine the particular facts of the case to determine whether or not any loss in money or in money's worth has been occasioned to the dependants and, if it determines that it has, it must then use whatever material appears best to fit the facts of the particular case in order to determine the extent of that loss”

Latham LJ

*Cape Distribution v O'Loughlin* [2001] EWCA Civ  
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# Assessment takes place as at the date of death

“The dependency is fixed at the moment of death; it is what the dependants would probably have received as benefit from the deceased, had the deceased not died. What decisions people make afterwards is irrelevant. The only post death events which are relevant are those which affect the continuance of the dependency (such as the death of a dependant before trial) and the rise (or fall) in earnings to reflect the effects of inflation.”

Smith LJ in Welsh Ambulance Services NHS Trust v Williams [2008] EWCA Civ 81 at [50]



# Determining financial dependency

- Ultimately a question of fact.
- “The percentages have become conventional in the sense that they are used unless there is striking evidence to make the conventional figure inappropriate ... Where the family unit was husband and wife the conventional figure is 33 per cent, and the rationale of this is that broadly speaking the net income was spent as to one-third for the benefit of each and one-third for their joint benefit. .... Where there are children the deduction falls to 25 per cent” (O’Connor LJ in Harris v Empress Motors Limited [1984] 1WLR 212 at p217 )

# Example: no children

- Deceased husband earned £30,000 pa
- Wife earns £20,000
- Combined earnings: £50,000
- Two thirds: £33,333.33
- Less wife's earnings = dependency of £13,333.33 pa

# Example: with children

- Deceased wife earned £70,000 pa
- husband earns £20,000
- Combined earnings: £90,000
- 75%: £67,500
- Less husband's earnings = dependency of £47,500 pa

# *Witham v Steve Hill Ltd* [2021] EWCA Civ 1312

- Deceased husband was the primary carer of two foster children, permanently fostered by C and her husband.
- C was required to give up her job to become primary carer for the children due to her husband's mesothelioma and eventual death
- Although foster children are not recognised as dependants within the scope of s1(3) of the 1976 Act, the court held that the dependency and loss was also C's and was therefore recoverable

# *Witham v Steve Hill Ltd* [2021] EWCA Civ 1312

- *“The reality of the claim before the judge was that the claimant lost her career as a result of her husband's death and her loss of his services. She was dependent upon him taking the role of househusband and principal carer for the children so that she was able to pursue a career in the knowledge that the children would be properly cared for. This was the finding by the judge, it reflected the evidence and provided a sound basis for his determination that the loss was that of the claimant. The fact that the children also benefitted from the deceased's care does not detract from, still less undermine, the claim of Mrs Witham.” [41]*

# *Witham v Steve Hill Ltd* [2021] EWCA Civ 1312

- C's loss was valued upon the basis of replacement care, rather than C's loss of earnings and pension loss. The latter was held to be outside of the scope of s.3(1) of the 1976 Act, see [59] of [2020] EWHC 299
- It was appropriate to award the commercial cost of care: "*the court is required to determine the value of the service which would, but for his death, have been provided by him and is not a valuation of the service provided to an injured Claimant*", see [64] of [2020] EWHC 299
- On appeal, there was new evidence that the foster children had returned to care, which undermined the judge's findings and therefore required the case to be remitted back to the trial judge for re-evaluation: [21-34]

# Determining services dependency

“Ordinarily, the court approaches the quantification of a services dependency claim by considering the cost of replacing the services formerly provided by the Deceased. In some situations, it is appropriate to approach this exercise by looking to the cost of furnishing commercial care in the form of nannies, au pairs, child-minders or the like. In other situations, the claim is in essence one for gratuitous care, and the authorities make clear that commercial rates fall to be discounted to reflect that. ...

In appropriate situations, the court values the services formerly provided by the deceased with reference to the earnings foregone by the claimant in order now to furnish these services herself or himself. This is not a claim for loss of earnings in the strict sense; it is a claim for loss of services but using the surviving partner’s earnings as a proxy or surrogate measure for the value of the services foregone.”

Jay J in *Rupasighe v West Hertfordshire Hospitals NHS* [2016] EWHC 2848 at [49] and [50].

# *Knauer v Ministry of Justice*

## [2016] UKSC 9

- The multiplier for dependency losses (on income or services) was traditionally fixed at the date of death as decided in *Cookson v Knowles* [1979] A.C.556.
- This was irrational, out of step with personal injury cases and disadvantageous to claimants.
- The Supreme Court in *Knauer* overturned *Cookson*. Now, losses between death and trial will be treated as past losses, and a multiplier applied only to what are at date of trial future losses.



# *Knauer v Ministry of Justice*

## [2016] UKSC 9

- Calculation of **past loss** in an ordinary case.
  - Assess the multiplicand. For example £18,000 pa dependency on deceased's earnings and £2,000 pa dependency on deceased's services. Total: £20,000.
  - Multiply by the number of years between death and trial.
  - Use an Ogden Table E discounting factor to reflect the chance that the deceased might in any event have died before trial.
  - Add interest at half the special account rate (full special account rate for bereavement damages).
  - So assume the deceased was a 60 year old woman and it took 6 years from death to bring the claim on for trial, past loss would be  $£20,000 \times 6 \times 0.98 = £117,600$ , to which interest would be added.

# *Knauer v Ministry of Justice*

## [2016] UKSC 9

- Calculation of **future loss** in an ordinary case using example of dependency on earnings.
  - Ascertain the multiplicand, i.e. the annual earnings dependency.
  - Ascertain the period of dependency in years from trial.
  - Treat it as a term certain and derive the multiplier from the -0.25% column of Ogden Table 36.
  - For an earnings dependency, apply the discounting factor for contingencies other than mortality from the Ogden Tables Introduction.
  - Apply an Ogden Table F discounting factor to reflect the risk that the deceased would have died before trial in any event.

# QUESTIONS

