

Claims arising from death

Webinar
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28 April 2020

Introduction

- No remedy for dependants or estate at common law
- Different framework imposed by statute
- Three statutes under which a claim on behalf of the estate/dependants/victims can be brought:
 - Law Reform (Miscellaneous Provisions) Act 1934 (s1(1))
 - Fatal Accidents Act 1976 (s1(1))
 - Human Rights Act 1998 (s6) and Article 2 of European Convention on Human Rights

Law Reform (Miscellaneous Provisions) Act 1934

- Claim is brought for the benefit of the estate
- Covers damages/ loss up to death – the claim of the deceased
 - PSLA: if death not instant, then damages can be awarded for loss of amenity alone
 - Traditional ‘Specials’
 - No “lost years” – lost year claims can only be brought when Claimant is alive (s1(2)(a)(ii))
- Funeral expenses recoverable

FAA 1976 – bringing the action

- Who is entitled to bring the action?
 - Executor or administrator of the estate (s2(1))
 - If there is no executor or administrator, or if no action brought by executor or administrator, then *“the action may be brought by and in the name of all or any of the persons for whose benefit an executor or administrator could have brought it”* (s2(2))
- No more than one action can be brought (s2(3))

FAA 1976 - for whom can the action be brought? (I/II)

- The Deceased must have been entitled to bring an action had he survived, i.e. tortious act (s1(1)) resulting in personal injury
 - Suicide caused by tort doesn't extinguish claim (**Corr v IBC** [2007] EWHC 1875)
 - But no claim if death not caused by injury/disease
- Action will be for the benefit of the dependants of the Deceased
- Beware previous conclusion of claim

Kore v Brocklebank

- Sweeping up the claims
- [2019] EWHC 3491
- Pre-action Part 36 claim expressed to be “whole of the claim” for dependency; bereavement and funeral costs
- Only apply to the named defendants
- Viability of claims by potential defendant unaffected

Points of note (I/II)

- Statutory list: **no discretion**
 - Cohabitants: the “2 year rule”
 - Goes well beyond immediate family unit, i.e. to grandparents, grandchildren, aunts, uncles (including by marriage) and cousins, and step-children
 - But child of surviving unmarried partner is not dependant even if living as family unit

Points of note (II/II)

- Court of Appeal in **Swift v Secretary of State for Justice** [2013] EWCA Civ 193 rejected extension of list of dependants:
 - “court should accord a generous or wide margin of discretion to Parliament in relation to the legislative choices that it made in enacting section 1(3) of the 1976 Act”
 - Legitimate aim to confine the right to recover damages to those who had relationships of some degree of permanence and dependence
 - Proportionate pursuit of that aim to have 2 year cohabitation requirement for eligibility

Dependants for bereavement award (s. 1A)

Narrow list:

- Married
 - Can be in process of divorce
 - *Hayes v SE Coast Ambulance Service* [2015] EWHC 18 – marry/ divorce
- Children under 18
 - Only if legitimate child

Bereavement Award

- Set and raised by statute
- *Damages for Bereavement (Variation of Sum)(England and Wales) Order 2020* rise death on or after 1 May 2020 to £15,120
- From 1 April 2013 - £12,980
- One award which is shared if more than one person capable of recovering it

Different Jurisdiction

- Northern Ireland award £15,100
- *Damages for Bereavement (Variation of Sum) Order (Northern Ireland) 2019*
- Death after 1 May 2019
- Second rise
- Damages (Scotland) Act 2011 different scheme: assess by actual relationship

Bereavement for Cohabitee

- **Smith v Lancashire Teaching Hospitals NHS Foundation Trust** [2017] EWCA Civ 1916
- Declaration of incompatibility: cohabitee
- *The Fatal Accidents Act 1976 (Remedial) Order 2020* laid before parliament 8 May 2019
 - June/ July 2020
- Expand bereavement to 2 year + cohabitee

Outcome

- Government act in accordance with CA ruling
- Co-habitees + 2 years to gain bereavement
- No plans for wider reform
- Joint select committee suggest wider reforms
 - Better use of language
 - Increasing amount of damages
 - Considering roles of wider family/ children

Is there a dependency?

- No need requirement that eligible dependant was in receipt of a pecuniary advantage at the time of the Deceased's death (**Taff Vale Railway Co v Jenkins** [1913] A.C. 1)
- Sufficient for an eligible dependent to have a reasonable expectation of a pecuniary benefit
- Level of proof for expectation “a substantial possibility” not “more likely than not” (**Davies v Taylor** [1974] A.C. 207)

Other Factors

- Contributory negligence: s5
- Re-marriage
 - s3(3) FAA 1976 specifically rules out taking account fact of or prospects of the widow remarrying
 - Fall foul of Human Rights Act?
 - Potentially deal with via section 4: disregard of benefit as per **Stanley v Saddique** [1991] 2 W.L.R. 459
- Breakdown of relationship of co-habitees – lack of enforceable right to financial support must be taken into account (s3(4))
- But also prospect of marriage breakdown to be considered in assessment: **Dalziel v Donald** [2001] PIQR Q5

Human Rights Act 1998

- Relevant article of ECHR is article 2: right to life
- Confined to situations where a citizen's Convention rights have been breached by a public authority
- Person may bring the claim if a “victim” pursuant to section 7 (1) HRA 1998: particular connection must be shown: direct or indirect victim
 - Kemp & Kemp has very good chapter
- Successful claim in **Rabone v Pennine care NHS Foundation Trust** [2012] UKSC 2

Human Rights Act 1998

Rabone

- Mentally ill 24 year old released from detention at a mental hospital: subsequently committed suicide
- Defendant owed operational duty to protect Deceased from the real and immediate risk of suicide subsequent to assuming responsibility for her welfare and by exercising control over her (albeit she was not detained)
- No reasonable psychiatrist would have allowed the Deceased 2 days' leave, and therefore no reasonable steps taken
- Deceased's parents successful in HRA claim: no renunciation of article 2 claim through settlement of negligence claim under LR(MP)A 1934, as no right to damages for non-pecuniary loss in domestic law claim
- Both parents awarded £5,000 each: it was a “bad” breach of article 2.

ASSESSING LOST SERVICES

Section 3 FAA 1976

- 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
- 3(2) apportionment between dependants in such shares as may be directed

Loss of services

- Includes as applicable
 - DIY
 - gardening
 - Care
 - car servicing
 - IT skills

Lost services

- Most commonly where the deceased was a father or mother looking after children
- Determined by life expectancy of survivors if lower than life expectancy of deceased but for tort (Desktop report or GP letter if no access to medical records)

Approach of the Court

- Element of the judge reaching a “jury” award, that is, putting himself in the position of a jury awarding damages and finding the sum which appears to be reasonable compensation, looked at overall as a lump sum, for the loss sustained. What is reasonable?
- Often significant uncertainty so % reductions to mathematical calculations
- What is the test: anticipated actual cost of meeting C’s needs as against what the deceased would have provided
- Expert evidence – ‘dependency report’ from care experts
- As with financial dependency, defendants, even if come within definition, have to show deceased would have continued to provide services, and for how long
- Real possibility enough, not BPR **Davies v Taylor** [1974] AC 207

Hay v Hughes [1975] QB 790

- Established as the 'best instrument' for assessing the loss of dependency the cost of a nanny/carer over the period during which the dependent would be expected to receive the benefits of dependency, but ignoring the value of the support he had in fact received from relatives.
- This commercial cost can be enhanced to reflect the special features of a mother's care and attention. So the calculation differs from that in non-fatal cases, where it is the actual cost, so far as it can be calculated, of gratuitous care actually given which is the measure of damages.

What has happened?

- If surviving parent has employed a housekeeper or nanny, then dependency on services likely to be assessed by reference to the actual cost, both for past loss and looking into future as the children grow older
- Otherwise net in hand figure to be used, see **Corbett v Barking**
- Discount then made to reflect e.g. mother was caring part-time or the probability care needs will decrease over time

Knauer

- In **Knauer v MOJ** [2014] EWHC 2553 (QB) Mrs K dies at 46 of mesothelioma. D argued Mr K had not in 5 years employed cook, cleaner, gardener, decorator or housekeeper: no damages for loss of services past or future. Mr K said he had not been able to afford to employ help and the tasks had not been done or he had done them
- Bean J short shrift to D: ignores basic principles of tort, and in **Hay v Hughes** [1975] QB 790 at 809B Lord Edmund-Davies said that “the fact that a widower decided to manage himself after the death of his wife would not disentitle him to sue for and recover damages for the pecuniary loss he had sustained.” **Court must assess what has been lost.**
- Allows cost of agency care at £16,640 per year and £1,500 gardening and decorating. Plus £3,000 **Regan** award.

Non-commercial care

- E.g. father or other relative steps in
- Generally pleaded not at gratuitous care rates (see section 4 point below) but at commercial cost
- Reduction at least to net value (no tax and NI paid)
- 25% *Housecroft v Burnett* reduction

McGregor on Damages

- 36-095 Interesting feature of all the cases is that in only one of them was a nanny housekeeper engaged. In each case the family had sprung to the rescue ... has therefore, not surprisingly, been a resistance to awarding the full commercial cost of a nanny housekeeper when that cost was never going to be incurred...
- There has, curiously, not been the same move to develop, in line with the position in the related field of personal injuries, a pattern of compensation for the caring relatives at a level short of commercial rates of pay, though recoveries of damages have nevertheless been somewhat muted.
- 36-096 Attempts to bring relative's services into account by way of deduction are misguided, see collateral benefits

Issues decided

- Ignore benefits after death: s4 disregard
- Cost of replacement as nanny
- Reduces over time: 50% once at school
- No double recovery: nanny & school
- Additional claim for love and support
- Loss of chance for future projects
 - Marriage
 - Help buying home

AB v KL [2019] EWHC 611

- Adult children still dependant
- Three adult sons have money set aside for first home and weddings
- Discount on contingency basis
- How to challenge?
- Look at overall “pot”
- Tax free wedding gifts possible too

Carer gives up own job

- See **Martin and Browne v Grey** (13 May 1998): £29k per year as housekeeper = start; discounted to £22,500 as multiplicand; court won't take earnings of stepmother at c£45k as start
- **Batt v Highgate Private Hospital** [2005] PIQR Q1 p1 where not reasonable for father to have given up job so Q based on housekeeper costs, much less than earnings
- Test is reasonableness: Kemp says if reasonable give up work get higher figure
- Have seen cases where job given up but higher notional cost of housekeeper sought
- In **Bailey v Barking & Havering AHA** (Times July 1978) Peter Pain J declines to assess on basis of housekeeper costs where father has given up work and earnings less than housekeeper

H v S [2002] 3 WLR 1179 (CA)

- Damages in respect of relative's services are in trust for the relative, and if terms of trust seem unlikely to be fulfilled court should take steps to avoid that. On facts Kennedy LJ orders payment into court of all sums children entitled to

No Children

- **Sloan v Halsen** (Lawtel 2010) PPs of £23,200 pa for care and companionship deceased would have given to widow : healthcare assistance and case manager
- **Zambarda v Shipbreaking (Queenborough) Ltd [2013]** EWHC 2263: widow's claim : had complex pre-existing health problems.
 - What would have been provided
 - Care to 76
 - Once 79 husband could not have assisted
 - Claim therefore ends
 - Intangible benefit added on @ £4,000

Regan v Williamson award

- **Regan v Williamson** [1976] 1 WLR 305
 - The “special qualitative factor of the lost maternal care”
- **Mehmet v Perry** [1977] 2 All ER 529
 - award to both to husband and children
- **H v S** [2003] QB 965
 - Kennedy LJ awarded £3,500 and £4,500
 - CA accepts maximum of £5,000 for very young children

Love & Affection

- Can challenge the *Regan* award
- Clear that bereavement is for grief and loss
- Challenge paying out a second time
- A way to fill “loop hole” for children etc

Action plan

- Look for evidence
- Disclosure of spending patterns
- Social media searches
- Must be active relationships
- Focus on what is to happen not reasonable need or offset costs
- Sticking point is “one sided”

Challenge Poor Relationship

- Look at real relationship
- Seeking to divorce: lesser claim

CALCULATIONS

Earnings dependency: multiplicand

- How is dependency on earnings assessed?
- **Harris v Empress Motors** [1984] 1 WLR 212 start point
 - 66% or 75%
- If partner working then **Coward v Comex Houlder Diving Limited** (1984) The Independent 25th July, CA
 - add partner's earnings to the “pot”
 - apply dependency fraction
 - deduct all of survivor's earnings
- Accurate calculation

Calculation

- Assume net weekly earning of £250
- While family at home, calculate a 75% (or $\frac{3}{4}$) dependency: therefore $(£250 \times 75\%) = £187.50$ per week
- Wife alone, calculated 66% dependency: therefore $(£250 \times 66\%) = £165$ per week
- Wife return to work when family grow up and earn £100 net per week, calculate 66% dependency on total weekly income. Wife remains dependent on 2 parts: therefore $(£250 + £100) \times 66\% = £231$; then subtract all wife's earnings so $£231 - £100$ leaving dependency on £131 per week

Calculating the multiplier

- **Knauer v Ministry of Justice** [2016] UKSC 9
- Change the law – Judge made so able to do so
- Decline to follow House of Lords in **Cookson v Knowles; Graham v Dodds**
- Multiplier from date of trial, not death
- In line with personal injury claims

Fatal Accidents Act 1976 s4

- s.4. Assessment of damages: disregard of benefits. *“In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.”*
- **Pidduck v Easter Scottish Omnibus** [1990] 1 WLR 993 CA disregard widow's pension when lost pension claim made
- **Arnup v. White** [2008] EWCA Civ 447: all benefits accruing after death are to be disregarded entirely. The sole question is to value the dependency

s4 continued

- **Wood v Bentall Simplex** [1992] 1 PIQR 332
business relationship cannot recover, only a family based dependant. What if businessman overpaid his family, who are staff?
 - Is the dependency reduced by taking into account assets of the business that pass to the widow?
 - Not deducted under s4; can they be taken into account under s3?
 - No says Court of Appeal
 - Look at loss suffered
 - Is there a loss resulting from the death? And
 - If there is, what are the appropriate damages for that loss?

Wealth Creator

- **Cape Distribution v Aine O'Loughlin**
[2001] EWCA Civ 178 deceased ran property portfolio
- Widow inherit properties but could not manage them: sold some and lived off income
- Is there a loss and how to calculate?
- Manager to replace business “flair” and disregard sale of business assets
- Court of Appeal approve approach and analysis

Wealth Creator

- **Welsh Ambulance Services NHS Trust v Williams** [2008] EWCA Civ 81
 - Deceased had entrepreneurial skills
 - Wife no part in the business essence, services of £3,000 pa to the company
 - All family work together but benefit beyond their contribution
 - Value the loss of the “wealth creator”
 - Disregard continued success of the business

Challenge the Future

- Seek details of the business itself
- Cannot recover for “economic loss”
- Needs to be the role of the deceased
- Look at replacement of role/ salary
- Have to disregard improvement of position
- What is the appetite of the family?

Will s4 Survive?

- Lord Sumption in **Cox v Ergo Versicherung AG** [2014] UKSC 22 described s3 (prospect of remarriage) and s4 as *“marking a departure from ordinary principles of assessment in English law, which can fairly be described as anomalous”*
- Calculate in line with German legislation: no disregard
- Would require primary legislation

FINAL POINTS

Lost years

- Claim brought and concluded before death cannot be revived: **Thompson v Arnold** [2007] EWHC 1875
- “Lost year” wages claimed before death but not after
- Larger damages with care claim and lost years earnings: all of wages not proportion
- Could lose out because no dependency on services

Periodical Payments

- Periodical payments can be awarded in Fatal Accident Act claims (s7 Damages Act 1996)
- Could resolve argument on dependency for children – until further education/ no longer a dependant
- Future care for widow for life

Apportionment

- Award needs Court approval if children involved
- Court of Protection may be involved thereafter
- However, much of calculation of dependency involves children's support exercised by remaining parent
- Court recognises this – 25% default valuation
- *F & H v Kaur* (Lawtel AM0201113 – 2007 claim) damages of £430,000 gave £395,000 to mother, £20,000 to 13 year old and £15,000 to 15 year old

Civil ADR Announcement

- fixed-fee arbitration and advisory adjudication schemes
- 5 year+ call barristers to silks
- binding arbitration or advisory adjudication in lower value claims which may struggle to find judicial time.
- scheme mentored by top international arbitrators and former Judges
- Full details [here](#)

Costs ADR

- costs ADR offering provisional assessments and detailed assessments from costs team
- including Peter Hurst, former Senior Costs Judge of England and Wales
- Full details [here](#)

Any queries?

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28 April 2020

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