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## Fatal Accident Claims

Jayne Adams QC

24 The Ropewalk, Nottingham, NG1 5EF | Tel: +44 (0) 115 947 2581 | Fax: (0115) 947 6532

DX: 10060 Nottingham 17 | Email: [clerks@ropewalk.co.uk](mailto:clerks@ropewalk.co.uk) | [www.ropewalk.co.uk](http://www.ropewalk.co.uk)

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1. The area of fatal accident claims is a wide one and, on occasion, a very complicated one. This handout and indeed the lecture which it accompanies is not intended to cover every aspect of such claims. To do so would take too much time and would, in any event, fail to cover every eventuality.
2. It is of course possible to read the entirety of the chapter on fatal accident damages in Kemp and Kemp or a similar text book and consider that that answers every question. To think that would be a mistake. Whilst it provides excellent guidance, the reality is that these claims more than any other have the basis for a great deal of manoeuvring and a broad application of principle to achieve a result which fits with the Courts' sympathies. An understanding of the principles and then the cases which historically have shaped the Court approach is necessary. Most of all, it is an area in which once the statutory provision is understood, a "feel" for what the Court will think appropriate in each fact specific case is needed. The question to be asked at all times is where the sympathies of the Court in relation to each argument are going to lay.
3. In essence, because provision following fatality is entirely a creature of statute the results are arbitrary, often based on hypothesis and an assessment of chance. The cases are fact sensitive and leaves a potential for a great deal of discretion within a range of awards the Court might make. What is more, as long as the Judge stays within a wide range of acceptable calculation the awards are unlikely to be interfered with by a superior court.
4. It is clear that the Supreme Court does not like the current provision for fatal accidents awards: see for example, as the latest manifestation, Cox -v- Ergo Versicherung AG [2014] UKSC22.
5. What I intend to do is set out some of those areas in which the practitioner can expect a relatively standard result and some areas in respect of which the need for testing of the evidence is all the more important.
6. The provision for awards for fatal accidents comes from two statutes namely the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976. I will look at each in turn.

#### Law Reform (Miscellaneous Provisions) Act 1934

7. In practical terms the 1934 Act preserves for the benefit of the estate any action which the Deceased could have brought on his or her own account prior to death. Accordingly, it takes account of pain and suffering, in

so far as the Deceased had suffered from such events between the date of the tortious act (or the development of disease) and death. That encompasses a wide range. It could be for short periods from those, for example, who lived in extreme pain for an hour or two after the accident in question through to those for example remained in a coma for several weeks. It could be a severe burns case where the Deceased lived with and underwent treatment for weeks or months before organ failure or infection set in. At the other extreme damages for those living with what they know to be a terminal illness are significantly higher. In respect of pain and suffering it is necessary to look at the Judicial College Guidelines and associated cases for the range which can come into play in this scenario.

8. It is possible to claim for funeral expenses under both the 1934 Act and the 1976 Act. However, obviously, double recovery is not permitted. Associated with funeral expenses are the cost of the wake, the cost of the memorial service, the cost of the headstone and probate costs. Of those, both sides put forward arguments but the most consistent decisions remain that the costs of probate are not recoverable; see for example *Dalton -v- South Eastern Railway Company* (1858) 4CBMS 296 and of course, more recently, *Mosson -v- Spousal* [2016] EWHC 53.
9. In relation to the cost of a wake, again, decisions slightly differ but there is consistency to be found in the cases of *Mosson -v- Spousal* again, together with *Grant -v- Secretary of State for Transport* [2017] EWHC 1663 (QB) and *Blake -v- Mad Max Limited* [2018] EWHC 2134 (QB).
10. It has always seemed illogical to me that funeral expenses are paid since death is the one thing inevitable for every Claimant, notwithstanding the basis of the claim, but convention has meant that the award is made.
11. The other group of damages to be awarded under the 1934 Act are past losses. The past losses will include care costs, aids and equipment costs, loss of earnings, and indeed all the heads of damage familiar to any personal injury practitioner. The calculation of loss for past losses is the same as any other personal injury claim.
12. However, it is important to remember 2 points. The first is that the right of a person to claim under Section 1(a) of the Fatal Accidents Act 1976 i.e. the bereavement award, shall not survive for the benefit of the estate on his or her death: See Section 1 (1A) of the Law Reform (Miscellaneous Provisions) Act 1934. Accordingly, if, for example, a couple were both injured in a road traffic accident and one died before the other the estate in relation to the latter death could not claim the bereavement award arising from the death of the former.

13. The other point is that there is no “lost years” claim in relation to the Deceased after death. Section (2)(a) of the 1934 Act, as amended by the Administration of Justice Act 1982, makes it clear that a claim on behalf of the estate shall not include any damages for loss of income in respect of any period after that person’s death. If the accident victim therefore has no dependents any financial loss dependency ends with their death.

#### Fatal Accidents Act 1976

14. The Fatal Accidents Act claims are essentially for the loss of dependency. The claim for dependency only exists in so far as the Deceased has not settled a claim for damages within his or her lifetime.
15. In addition to the requirement that the Deceased has not already settled the claim within his or her lifetime, there are the provisions of the Limitation Act 1980 and particularly Section 12. Put succinctly, if the Deceased was still within the appropriate time limit for bringing a claim, i.e. within 3 years of injury or 3 years of date of knowledge of injury then the dependents have 3 years from the date of death to bring a claim.
16. There is something of a confusion between Section 12(1) and Section 33 of the Limitation Act 1980. Section 33 of the Limitation Act 1980 does appear to make some provision for taking into account the Deceased’s ability to have made a Section 33 application, which is ruled out by Section 12 (1) but the safest way of proceeding is to assume that if more than 3 years from date of knowledge of the Deceased has passed, the dependents are barred from making a claim. However, the dependents are entitled to rely on Section 33 discretion in relation to their own application: Section 12 (3).
17. Finally, there is only one dependency claim. It is important therefore to identify all potential dependants and include them otherwise there is a risk of another dependant (especially if for example a spouse has remarried before death and both the former spouse and the new partner and all their children have to be included or, more commonly, has left their partner to co-habit in a new relationship which has lasted for more than two years) applying to be joined to the proceedings or, potentially more difficult, suing for professional negligence for not being included in the first place.

#### Heads of Loss under the Fatal Accidents Act 1976

18. The three Heads of Loss are:
  - i) Funeral expenses if not claimed on behalf of the estate

ii) Bereavement damages

iii) The claim for loss of income and services dependency

19. Funeral expenses are dealt with above, therefore I look, in turn, at the claim for bereavement and the claim for loss of income and services dependency.

### Bereavement damages

20. There are a very limited number of people who can claim bereavement damages and the decision is wholly arbitrary.

21. Essentially, the claim is limited to spouses or civil partners in respect of the death of the other, or parents in respect of the death of an unmarried minor child. All other categories are not eligible. There is only one award. If there are claiming both parents in relation to the death of their child the statutory figure, currently £12,980, is divided between them.

22. The limited scope of such claims has been challenged in the cases of *Smith -v- Lancashire Teaching Hospitals NHS Trust and Others* [2017] PIQRP4 and In the matter of the application of Siobhan McLaughlin [2018] 1WLR4250. The latter, together with a number of other recent cases, is in respect of state benefits following bereavement but the principle, that the arbitrary nature of the award of benefits after death, particularly in relation to cohabittees, which arise from the statutory provision for the bereavement award or indeed bereavement benefits is contrary to the European Convention on Human Rights, Article 8 and Article 14.

23. The Government has been urged to reconsider these categories repeatedly by the higher courts, including the Supreme Court, upon the basis that they are in conflict with Articles 8 and 14 but, despite the matter being initially dealt with in the Civil Reform Bill 2010 and, further, there being a Government consultation period in relation to the bereavement award in 2019, the Government does not appear to have any appetite for dealing with that at the current time. Since therefore bereavement damages are entirely a creature of statute, the superior courts have recognised that whatever they might declare by way of human rights, any change requires legislative procedure and that does not look likely to be something happening in the near future.

## Love

24. Partly as a result of the limited category of bereavement, not least the lack of any award to a child for the loss of a parent, there have developed a number of authorities dealing with basically an award for loss of love and affection. With children who have lost a parent, that commences with the case of Regan -v- Williamson [1976] 1WLR305. This type of award also extends to widows and widowers in relation to the loss of support in relation to bringing up children.
25. However, there has been a repeated argument about the extent to which a claim for love and affection can otherwise be made. The view taken by some is that the bereavement award is meant to cover that. However, a series of cases have basically suggested that insofar as there is any financial compensation, it is not for loss of love and affection but for the intangible benefit of having a partner able to carry out, for example, DIY, childcare and the like. The compensation appears to be made as recompense for time spent in getting in commercial help for something which would otherwise have been done gratuitously by the deceased. Where awarded, the sum is in the region of £2,500. On this point, see for example:-

Mosson -v- Spousal as above.

Grant -v- Secretary of State for Transport as above.

Magill -v- Panel Systems (DB) Limited [2017] EWHC 1517.

## Potential Dependents

26. Once outside of the arena for the bereavement award, there is a much wider range of potential dependents than there are those who can claim bereavement.

In relation to potential dependents, the range covers spouses, civil partners and former spouses or former civil partners. Parents, people treated as parents (including in-laws), children, including unborn children, children treated as a child of the deceased by reason of marriage or civil partnership, brother, sister, uncle, aunt and the issue of that category and by marriage are all potentially eligible.

27. Please note that dependents therefore do not include foster children, nor do they include the children of a cohabitee with whom the deceased was living but not married. So a family of, for example, two people divorced from their original partners who set up a new unit in which their respective children are all provided for but decide not to marry may find the ability to claim dependency very difficult.
28. There also remains a claim for a cohabitee provided that the cohabitee and the deceased had lived together for at least two years immediately prior to death in the same household as if husband and wife or civil partners. (The wording on this is very old fashioned.)
29. There is therefore a clear distinction between married people or those who have undergone a civil partnership, the very nature of that legal relationship meaning that they automatically qualify, from the cohabitee.
30. The automatic entitlement of a married partner or someone in a civil partnership takes place even if the marriage occurs after the tortious action or knowledge of injury; see for example *Phillips -v- Grampian* 1989 SC101.
31. In practice, cohabitees of relatively short duration, particularly without children, can prove the most problematic and complex of cases. In particular, a young cohabitee who may not have been entirely to the liking of the deceased's family can face much hostility when producing evidence to suggest not only that they had lived with the deceased for two years but that they would continue doing so into the future. Particularly when parents of an adult child are likely to obtain limited recompense (notwithstanding the fact that for most, the grief far outweighs any financial compensation), the fact that a partner who was not in what might be regarded by some families as a particularly stable relationship with the deceased receives a very large sum of money potentially on their death is something which creates real factual and emotional difficulties. Quite simply, it needs both sensitive handling and a proper review of the facts.
32. The circumstances in which the two year rule acts adversely to the position of the cohabitee is seen, for example, in *Kotke -v- Saffarini* [2005] EWCA Civ. 221.

#### Former Spouses or Civil Partners

33. In relation to an ex-spouse, the court has to look at the prospects of a successful reconciliation on a percentage basis. The general approach by the court can be illustrated by two particular cases, namely:-

*Haynes -v- SE Coast Ambulance Service* [2015] EWHC18

CC -v- TD [2018] EWHC 1240 (QB)

34. In both cases, the finding of the court is perhaps not surprising. In general though, where the prospect of reconciliation is entirely speculative, then the dependency would be limited to that which the former spouse would have recovered under the divorce settlement and no more. Of course, dependent children of a divorced couple would be able to claim the dependency arising from the maintenance payments that would otherwise have been made on their behalf as well as additional spending which the deceased parent might have made on them. This is, similarly, fact sensitive.
35. One way in which the court looked at the financial dependency of adult children whose father had been divorced from their mother was to make awards for expected contribution to presents and holidays as well as an award that reflected the potential for contribution for deposits to a house and for payment to weddings; see AB -v- KL [2019] EWHC611. It seems to me that an award of this nature might only be reasonably made when the deceased was of significant means and/or had sufficient savings or income to make the type of gesture in question. In other words, within an ordinary family, the income goes on providing the dependency which is already taken into account for financial loss, and there is unlikely to be spare money for such things as deposits and weddings. Whether such award can be sought, far less made, will depend upon the factual scenario in each case.

#### Financial Dependency on Income

36. As is now clearly established by the case of Knauer -v- Ministry of Justice [2016] UKSC9, the multiplier to be applied to a loss of financial dependency is the same as in any other personal injury claim. That is, the period between death and trial is dealt with as a past loss. For the future, the multiplier applied is that appropriate from the date of trial. Prior to Knauer, there was a different rule for fatal claims in that the multiplier was fixed from the date of death. That anomaly, although it stood for a long time, has generally been regarded as appropriately replaced once the reasoning in Knauer was considered.
37. The basis for considering financial dependency is fixed, conventionally, by the cases of Harris -v- Empress Motors Limited [1984] 1WLR212 and Coward -v- Comex [1988] CA July.
38. Put simply, the convention is that a dependency is 66% of the joint family income, less the income of the surviving partner, when dealing with a couple, and 75% of the joint family income, less the income of the surviving partner, when dealing with dependent children.

39. So, for example, if the deceased was earning £35,000 net (net figures being the basis of calculation) and the surviving partner was earning £25,000, if there were no children, the calculation would be:

$$£35,000 + £25,000 = £60,000$$

$$£60,000 \times 66\% = £39,600$$

$$\text{Less earnings of partner } £25,000 = \text{Dependency of } £14,600.$$

40. If there were dependent children, the figure of £60,000 would be multiplied by 75% to equal £45,000 which, after deduction of the remaining partner's income would produce a dependency of £20,000.
41. This comes from the rationale that within a couple each partner will spend a third of their income on themselves and two thirds on each other or joint expenses. When children are involved the amount available to spend on themselves is reduced to 25%. Once the dependency is calculated, it has to be apportioned between the respect dependants.
42. In line with standard principle, whilst the prospect of promotion is taking into account (as best chance percentage) income is otherwise taken as at the date of death with inflation not taken into account.
43. The convention is rarely challenged, and yet in the current economic climate the number of households where each partner is able to spend a third or even 25% of their income on themselves seems to me to be very limited. To obtain a different percentage result it would be necessary to reveal full bank statements, living expenses, savings, income sources etc to actually prove the amount spent. Most Claimants do not want to do this, and will accept the convention, but the potential remains in a suitable case.
44. With children the approach historically has been that they are dependant until they end education, but with the number of children remaining at the parental home or returning to live there because of the cost of the housing market and the number of adult children still requiring financial assistance from their parents this is an approach open to challenge.
45. When dealing with a claim involving income dependency it is relatively easy if the deceased was employed in stable employment. All that needs to be considered is likely promotion, likely redundancy and the likely retirement age. Similarly, for the partner left behind. It is important to remember that dependency is fixed at the date of death but what is considered is what would have happened had the death not intervened. So, a

partner who gives up work to care for children with the intention of returning once the children reach school age, for example, will still have to take those earnings into account when calculating dependency even if the death means such return to work does not take place.

46. A much more difficult scenario arises if the deceased was the driving force behind, for example, family finances or more particularly a business endeavour and/or when a couple were making retirement provision by way of, for example, investment in property rather than conventional pension.
47. The way in which the courts approach such a scenario can be seen usefully by analysis of the cases of:-

Welsh Ambulance Services -v- Williams [2008] EWCA Civ. 81,

Grant, again as referred to above, and the very recent High Court decision of Witham -v- Steve Hill Limited [2020] EWHC 299.

48. A careful reading of all three cases is extremely useful for the purposes of looking at how the courts might approach what is regarded as wealth creation or, in the case of Witham, a total change of circumstances where the true dependents, the foster children, do not fall into the category of an accepted dependent within the statute.
49. What is notable, both from Welsh Ambulance Service and from Witham, is that the court has applied the commercial cost of replacing the services of the deceased, without deduction for the gratuitous nature of such provision, even though in both cases such expenditure was not incurred but a member of the family stepped up to help.
50. This is however again fact sensitive. There are equally authorities in respect of which the court has taken an approach which differs from this depending upon the court considers the merits of the case to be. See for example Dr. Rupasinghe -v- West Herts NHS [2016] EWHC 2848. Where for example, a dependant claims full time live in care but it is clear that no such provision will actually be utilised the Court will be more reluctant to award that. It will, as ever, be a manipulation of the facts.

### Section 3 and Section 4 of the Fatal Accidents Act 1976

51. There remains the provision, in relation to all dependents, that what shall be ignored is any benefit arising from death; see Section 4 of the 1976 Act.

52. The effect of Section 4 is that for example any inheritance, any widow or widower's pension or similar, any acquisition of the whole of the family home through the passing of a joint tenancy or other inheritance of a house are not taken into account. Similarly, insurance policies, so long as there has been some contribution from the deceased to it, will not be taken into account.
53. Whilst this might not be unreasonable for a partner left for example with dependent children, it can constitute something of a windfall for a young partner with no responsibility who (again subject to grief of course) is free to move on with their life in due course.
54. The case of *Wood -v- Bentall Simplex Limited* [1992] PIQR P332 in which Lord Justice Staughton makes the point that, if the very asset from which the income on which the dependant relied was generated is inherited then there is in truth no loss, is still an argument to be considered. That view was expressly approved in *Welsh Ambulance Service -v- Williams* but, as is made clear in that latter case, there are multiple ways in which the Staughton LJ point can be manipulated.
55. In each particular case, it is fact sensitive and in need of full investigation. Sufficed to say that in the most complicated of cases, accountancy evidence will be invaluable.
56. The most outdated provision is that of Section 3 (3) which provides that there shall not be taken into account in the assessment of damages the remarriage or prospects of remarriage of a widow. There is no similar provision for the widower and no amendment was made in relation to civil partners. It seems utterly absurd in this day and age that there should be such a division of sexes. It is also, as Lord Sumption observed in *Cox*, offending of the principles of compensation to ignore the fact that a young widow without children might have remarried by the time of assessment of damages and yet receive a sum which allows for dependency for life. We have come a long way since Judges had to sit in court and determine whether a particular widow was going to remarry and the law should change accordingly.

#### Loss of Dependency on Services

57. This head of damage traditionally was dealt with by way of the inability to provide DIY, gardening, household services, care for children and the like. It has become much more complex. There is a growth of cases related to disabled children, disabled adult children, disabled partners and in particular those with dementia. This will only become more common as the development of medical science means the population lives for longer with medical conditions and the lack of social care means that it is the family who take responsibility.

58. Take, for example, a wife with a disease such as multiple sclerosis who can manage with the support of their spouse but with statutory carers coming in say three times a day for half an hour at a time. As long as the spouse is there to provide assistance and companionship as well as tasks whenever needed, the spouse with multiple sclerosis can manage. As soon as the healthy spouse dies however, statutory carers coming in three times a day gives rise to an unbearably limited life. In those circumstances, what is required, for example, is a move to residential care, or to commercially provided living carers. Even if the family take over the care, they are still effectively providing the 24 hour care that the deceased spouse had previously done. The Court will cost it in this way and the extent to which a deduction for the gratuitous nature of the care is made for a future claim depends very much on how the Court views the claim overall. Witham would suggest the commercial cost is appropriate. This is giving rise to very significantly larger claims than used to be anticipated and yet is a fact of modern life.
59. Similarly, claims for a grandparent providing care for a grandchild so that the adult child can go out to work is a regular feature. If that grandparent dies as a result of a tort, then the child/grandchild has a legitimate claim for loss of dependency depending, as always, upon the factual scenario.

### Life Expectancy

60. In relation to every aspect of financial loss and loss of services, it is trite but still worth saying that dependency can only exist for as long as there is life expectancy. For a couple, dependency is based on the life expectancy of the one with least time to live. A widow for example cannot obtain dependency for a period in excess of her deceased's husband life expectancy nor can she expect dependency for longer than she is likely to live. Whilst in most cases statistically calculated life expectancy is enough, when looking at case specific difficulties such as disability, dementia or cancers for example life expectancy evidence analysing the particular case will be required, as will evidence of physical ability to carry out care for example.
61. This is also important in relation to dependant adult children with disability. The extent to which a deceased parent could have coped into old age requires investigation.

### Concluding Comments

62. It follows that there are to be considered, in any fatal claim, a huge number of variables. The case might be relatively straightforward. On the other hand, it might show every permutation of the type set out above. It is not to be feared but it is to be investigated thoroughly and the facts applied carefully. More than any other

area though, in considering quantum, there is a great scope for variation in respect of which a degree of expertise is required.

63. It is probably apparent from the tenor of the note above that I consider the current statutory provision to be outdated and unsuited to modern life. The extent to which the Government acts upon that though or provides a new statutory framework, remains to be seen

Jayne Adams QC

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