

12
King's Bench Walk

An introduction to fatal claims

Niall Maclean

1

12
King's Bench Walk

The statutory basis

- ❑ Law Reform (Miscellaneous Provisions) Act 1934
 - Causes of action survive the death for the benefit of the estate
 - The estate can claim damages for heads of loss that could have been claimed by the deceased in life, and for a limited range of losses caused by the death

- ❑ Fatal Accidents Act 1976
 - A claim on behalf of the relatives and dependants of the deceased for bereavement and loss of dependency
 - Claim is usually brought by the executor or administrator of the deceased's estate along with the LR(MP)A claim

2

2

The Estate's Claim

Law Reform (Miscellaneous Provisions) Act 1934

3

3

LR(MP)A 1934: Summary of heads of loss

- General damages for PSLA
- Items of special loss incurred from injury to death
 - Loss of earnings
 - Care and services
 - Property damaged in the accident
 - Travel expenses
 - Medical costs
- Funeral expenses
- Costs of probate?
- Interest on incurred losses

4

4

General damages for PSLA

- ❑ Important determinants of the award:
 - Period of suffering
 - Intensity of suffering (e.g. mesothelioma claims)
 - Awareness of impending death
 - Concern for those left behind: *Zambarda v Shipbreaking (Queenborough) Limited* [2013] EWHC 2263
 - Instantaneous death (or almost) will attract no award for PSLA: *Hicks v Chief Constable of West Yorks.* [1992] PIQR P63
- ❑ But time spent in a persistent vegetative state before death will attract an award for loss of amenity: *West v Shepherd* [1964] AC 326.
- ❑ Awards can vary widely:
 - *Jones v Robert McBride Homecare* [2017] £103,741 RPI for 6 years of mesothelioma symptoms and multiple medical interventions
 - *Riley v AC Products* [1992] £1,229 RPI for serious head and spinal injuries which caused death after two days, during which period the claimant was conscious for perhaps a couple of hours

5

5

Special damages

- ❑ Past net loss of earnings from injury to death
- ❑ Damage to property caused in the accident
- ❑ Travel expenses
 - Incurred by the deceased, e.g. medical appointments
 - Incurred by carers, provided the care was itself reasonably incurred
- ❑ Care (gratuitous and professional), and services that would have been provided by the deceased that had to be replaced
- ❑ Medical expenses, e.g. treatment and equipment – but also some 'alternative' or 'complementary' therapies: *Najib v John Laing PLC* (2011) EWHC 1016 (mesothelioma claim brought during life)
- ❑ Increased domestic costs (special foods, heating, electricity)

6

6

Hospice costs

- ❑ ***Drake and Starkey v Foster Wheeler Ltd*** [2010] EWHC 2004 (QB)
 - The deceased was cared for in the final stages of his mesothelioma by a charitable hospice that did not charge for its services
 - The executrices felt morally obliged to make a donation
 - They brought a claim for the cost of his care that was not PCT-funded, i.e. which was funded from the hospice's charitable endowment, much of which was made up of family donations
 - The claim was held to be valid, by analogy with ***Hunt v Severs*** [1993] QB 815 and the recoverability of the costs of gratuitous care provided by family members or friends
 - Had the hospice charged for its services, those charges would have been straightforwardly recoverable in any event
 - These sort of claims are infrequent and there is no danger of a 'floodgates' argument
 - D was ordered to pay the sum claimed directly to the hospice

7

7

LR(MP)A 1934: Other heads and issues

- ❑ Funeral expenses
 - Can also be claimed under FAA 1976
 - Costs must be reasonable, taking into account the deceased's circumstances and position in life
 - The recent case law suggests the costs of a reception or wake are (still) not recoverable
- ❑ Probate costs
 - Not mentioned in the Act, but sometimes agreed
 - Refused in ***Mosson v Spousal (London) Ltd*** [2016] EWHC 1429 (QB)
 - Sometimes dealt with as costs of the litigation if the reason for seeking the grant was to pursue the claim
- ❑ Deductible benefits
 - e.g. Pneumoconiosis Etc. (Workers' Compensation) Act 1979 payments in asbestos exposure cases

8

8

Claims by relatives and dependants

Fatal Accidents Act 1976

9

9

- ❑ Available only to
 - spouse / civil partner of the deceased
 - parents of legitimate minors (provided the minor was never married nor in a civil partnership)
 - Mothers of illegitimate minors as above
- ❑ These are restrictive categories that are enforced strictly
- ❑ Frequently cited target for reform – ostensibly at least...
 - Pearson Commission (1978)
 - Law Commission “*Claims for Wrongful Death*” (1999)
 - Civil Law Reform Bill 2009 – shelved
- ❑ HRA 1998 compliant? No, it would seem
 - *Smith v Lancashire Teaching Hospitals NHS Trust* [2017] EWCA Civ 1916
- ❑ Fixed sum, varied periodically by the Lord Chancellor (currently £12,980 for deaths after 1 April 2013)

10

10

12
King's Bench Walk

FAA 1976 Dependency claims: who can bring?

- ❑ Dependants are defined in ss.1(3) – (5) of the 1976 Act
- ❑ Includes current and former spouses/civil partners, co-habitants living qua spouses in the same household for the entirety of at least the 2 years immediately prior to death, parents or persons treated as parents by the deceased, children or those treated as such by the deceased as a result of marriage or civil partnership, siblings, aunts/uncles
- ❑ Unborn children conceived before the accident are dependants: *Wheatley v Cunningham* [1992] PIQR Q100
- ❑ Dependency which arises only after the accident can still form the basis of a valid claim
- ❑ Still too narrow a class to avoid breaching HRA 1998?
- ❑ Proposals for reform
 - Civil Law Reform Bill 2009, clause 1(2) – shelved
- ❑ Defendants are frequently unwilling to allow judicial scrutiny of the boundaries: *Chivers v Metcalfe* [2004] 6 WLUK 304.

11

11

12
King's Bench Walk

FAA 1976 Dependency claims: what is recoverable?

- ❑ Section 3(1) of the Fatal Accidents Act 1976 provides:
 - *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...*
- ❑ This wording has been described as “wide and vague” by McGregor on Damages (20th edition, §40-017)
- ❑ Case law has placed some restrictions on the scope of recoverability:
 - Only pecuniary loss is recoverable (i.e. that which can be valued in monetary terms)
 - A reasonable expectation of receipt of a benefit is sufficient
 - Only losses that arise from the relationship of dependency itself are recoverable: *Burgess v Florence Nightingale Hospital* [1955] 1 QB 349

12

12

12
King's Bench Walk

The conventional categories (are merely that)

- ❑ Conventionally, dependency claims are divided into claims for **financial dependency** and claims for **services dependency**
- ❑ But these conventional categories are rules of thumb, not rules of law
- ❑ Always bear in mind the wide words of s.3(1) of the Act
- ❑ *"The starting point must be the terms of the relevant provision in the Fatal Accidents Act 1976... The task of the court [...] was originally the province of the jury. Neither successive statutes nor, in my judgment, any decisions of the courts lay down any prescriptive method by which such damage is to be identified, or calculated apart from the principle that it requires that some damage capable of being quantified in money terms must be established."* (per Latham LJ in *O'Loughlin v Cape* [2001] EWCA Civ 178)

13

13

12
King's Bench Walk

Financial dependency: types of loss

- ❑ Dependency on the deceased's earnings and pension are the most common examples – take care to account for promotions etc.
- ❑ Where the deceased ran a successful business, the cost of replacing his or her services can be used as a proxy for the value of the financial dependency (e.g. *O'Loughlin* [supra] and *Williams v Welsh Ambulance Services NHS Trust* [2008] EWCA Civ 81)
- ❑ Benefits related to employment with monetary worth (e.g. company car)
- ❑ Gifts (e.g. *Betney v Rowlands & Mallard* [1992] CLY 1786)
- ❑ Social security benefits diminished as a result of the death
- ❑ Damages from a previous accident suffered by the deceased, reduced as a result of his or her death (*Singh v Aitken* [1998] PIQR Q37)

14

14

12
King's Bench Walk

Financial dependency ratios

- ❑ The task for the court is to assess how much of the deceased's income would be spent on the dependant(s)
- ❑ The court excludes that proportion of income the deceased would have spent exclusively on him or herself
- ❑ This is typically done using conventional ratios: *Harris v Empress Motors Ltd* [1984] 1 WLR 212, e.g.
 - For couples with dependant children: 75%
 - For couples with no dependant children: 67%
- ❑ But conventional ratios may be displaced with evidence, e.g.
 - the deceased's income was very high or low: *Williams* (supra.)
 - the level of dependency on the deceased was in fact very low: *ATH v MS* [2002] EWCA Civ 792
- ❑ The surviving dependant's earning capacity must usually be taken into account: *Coward v Comex* [18 July 1988, CA] – this can have harsh effects

15

15

12
King's Bench Walk

Financial dependency versus lost years claim

- ❑ Assume the deceased was married with no children, earning £30,000 p.a. at the date of his death, with spouse earning the same
- ❑ Assume a multiplier of 20
- ❑ Financial dependency:
 - Deceased: £30,000
 - Spouse: £30,000
 - Combined: £60,000
 - Ratio of 67%: £40,200
 - Less spouse: £10,200 (£40,200 less £30,000)
 - Multiplier of 20: **£204,000**
- ❑ Lost years claim for same period
 - Deceased: £30,000
 - Ratio of 50%: £15,000
 - Multiplier of 20: **£300,000**
- ❑ Dying clients need to be carefully advised – fatal claims are not always more valuable than claims brought during life

16

16

12
King's Bench Walk

Services dependency: types of loss

- ❑ Relevant services include looking after children, other forms of care, cooking, domestic assistance, DIY, gardening, car maintenance etc.
- ❑ Again, the **reasonable expectation** of provision suffices
- ❑ On the right facts, these claims can be substantial:
 - *Zambarda v Shipbreaking (Queenborough) Ltd* [2013] EWHC 2263
 - *Knauer v Ministry of Justice* [2014] EWHC 2553

17

17

12
King's Bench Walk

Services dependency: measure the loss, not the “need”

- *Knauer v Ministry of Justice* (supra)
 - D disputed whole claim for services dependency: C had not replaced services or paid out
 - Past services: D argued no loss
 - Future services: C had managed for 5 years, which D argued showed he did not “need” any outside help
- This focus on need rather than loss was described by Bean J as

“... misconceived on basic principles of the law of tort”
- *Hay v Hughes* [1975] QB 790:

“... the fact that a widower decided to manage for himself after the death of his wife would not disentitle him to sue for and recover damages for the pecuniary loss he had nevertheless sustained...”
- The proper measure is simply what claimants have lost, not what they “need”

18

18

12
King's Bench Walk

Services dependency: putting figures to the loss

- ❑ The starting position is to work out the nature and extent of the services that have been lost, and the commercial cost of their replacement (*Bordin v St Mary's NHS Trust* [2000] 1 WLUK 589)
- ❑ But the assessment must be realistic, e.g. it will be more reasonable to use the commercial costs of a nanny to value care to very young children rather than to teenagers
- ❑ Care actually replaced gratuitously is valued in the usual way
- ❑ DIY is usually valued broad-brush (conventionally £1,000 to £3,000 per year)
- ❑ In rare circumstances, earnings lost as a result of providing replacement care can form the basis of the loss, e.g. *Mehmet v Perry* [1977] 2 All ER 529
- ❑ For stable provision, the Court will usually adopt a multiplier / multiplicand approach. Broad-brush awards are used when provision was less certain.

19

19

12
King's Bench Walk

Calculating the multiplier: the conventional approach

- ❑ Until recently, the conventional approach was to calculate the multiplier as at the date of the deceased's death
- ❑ This approach was deemed to be settled by high authority
- ❑ In *Cookson v Knowles* [1979] AC 556 HL, Lord Fraser held that the multiplier must be selected
"once and for all as at the date of death because everything that might have happened to the deceased after that date remains uncertain"
- ❑ In *Graham v Dodds* [1983] 1 WLR 808, Lord Bridge held the multiplier must be calculated from the date of the death because
 - we cannot assume the deceased would have remained alive, well and capable of providing the dependency to the date of the trial
 - a date of trial approach could lead to *"the highly undesirable anomaly"* that dependants could recover more damages by delaying the trial

20

20

12
King's Bench Walk

The conventional approach to multipliers: what's the problem?

- ❑ Both *Cookson* and *Graham* were decided in the pre-Ogden days when multipliers were selected impressionistically
- ❑ When an Ogden multiplier is calculated using a positive discount rate on the conventional (i.e. date of death method), a very unattractive anomaly arises
- ❑ In any fatal case there will be a period between the death and the trial
- ❑ The portion of the lost dependency in that period is clearly a past loss
- ❑ Calculating multipliers from the date of the death using a positive discount rate in effect forces claimants to give credit for accelerated receipt on a portion of their loss that has in fact already been incurred as a past loss
- ❑ In Mr Knauer's case, calculating the multiplier from the date of his wife's death rather than the date of trial reduced the value of his claim by almost £53,000

21

21

12
King's Bench Walk

Criticism of the conventional approach

- ❑ The Law Commission considered the issue in *Claims for Wrongful Death* (Law. Com. No.263, November 1999)
 - The conventional approach lacks a firm theoretical basis, generates undue complexity, and tends to lead to under-compensation (para. 4.16)
 - Dealing with uncertainty need not mean fixing multipliers at date of death - they could be fixed at date of trial with a discount applied to the pre-trial period to reflect risk of death etc. in that period (para .4.9)
- ❑ Sir Michael Ogden QC's introduction to the 4th edition of the Ogden tables (2000)
 - "We have concluded the Law Commission's basic criticism of the present system is valid..."
 - *Wells v Wells* laid down a new and more precise approach
 - It is inconceivable the House of Lords would have endorsed the use of the Ogden tables to give rise to the anomalous results it does now in fatal cases
 - "Consequently, we do not consider that any of the cases decided before *Wells v Wells* precludes courts from using our recommended procedure."

22

22

12
King's Bench Walk

Knauer v Ministry of Justice [2016] UKSC 9

- ❑ The Supreme Court overturned *Cookson* and *Graham*, and held that multipliers must be set at the date of trial not the date of death
- ❑ *Cookson* and *Graham* were decided before the usage of the Ogden tables became prescribed in *Wells v Wells* [1999] 1 AC 345
- ❑ The conventional date of death approach combined with usage of the Ogden tables leads to irrational results and under-compensation
- ❑ The correct (“actuarially recommended”) approach now is to:
 - Calculate the length of the pre-trial dependency (i.e. the time between death and trial)
 - Adjust this figure using a factor from Table E to reflect the chance the deceased might have died in any event during this period
 - Calculate the length of the post-trial dependency period i.e. the shorter of the time the deceased could have provided and the time the dependant would have received
 - Treat that period as a term certain and find the raw multiplier from Table 28
 - Apply any adjustment for contingencies other than mortality from Tables A – D
 - Adjust further from table F to reflect the chance the deceased would have died in any event before the trial

23

23

12
King's Bench Walk

Loss of intangible benefits

- ❑ *Regan v Williamson* [1976] 1 WLR 305
 - In many cases, the dependants will have lost not only the services provided by the deceased, but also the fact these services were of particularly high quality through being provided from love and affection
 - This can sound in an additional lump sum award
- ❑ Evidence is required, and awards are usually modest: *Fleet v Fleet* [2009] EWHC 1598 (QB)
- ❑ Some doubt was cast on the recoverability of such awards in *Mosson v Spousal (London) Ltd.* [2016] EWHC 1429 (QB)
- ❑ But the more recent direction of travel appears to be to re-affirm their recoverability e.g. *Wolstenholme v Leach's of Shudehill Ltd.* [2016] EWHC 588 (QB) and *Blake v Mad Max Ltd* [2018] EWHC 2134 (QB)

24

24

12
King's Bench Walk

Less common forms of loss

- ❑ Remember the wide wording of s.3(1) of the Act
- ❑ There is scope for losses falling outside the conventional categories
- ❑ Examples include the claimant's own loss of earnings, caused by the death
 - *Oldfield v Mahoney* (unreported, 12 July 1968)
 - *Steer v Basu* (unreported, 1968)
- ❑ But a claim for "earnings dependency" was more recently rejected in *Rupasinghe v West Hertfordshire Hospitals NHS Trust* [2016] EWHC 2848 (QB)

25

25

12
King's Bench Walk

Benefits accruing from the death

- ❑ Section 4 of the Act:
 - *In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.*
- ❑ Examples of disregarded benefits include:
 - Widow's or widower's pension (*Pidduck v Eastern Scottish Omnibuses Ltd.* [1990] 1 WLR 993)
 - Death in service and ill-health retirement benefits (*McIntyre v Harland & Wolff* [2006] EWCA Civ 287)
 - Life insurance payouts
 - Replacement (but probably not merely increased) family care (*ATH v MS* [2002] EWCA Civ 792)
- ❑ Any suggestion of overcompensation arises from legislative choices, and did not trouble the Supreme Court in *Knauer*

26

26

12
King's Bench Walk

Investigating the length of the dependency

- ❑ The presumption that the deceased (but for the tort) and the dependant(s) will enjoy a normal life expectancy can be rebutted with evidence – it often repays defendants to scrutinise the medical records
- ❑ Dependencies arising as a result of co-habitation rather than marriage will be assessed taking into account *inter alia* the fact the dependant had no legally enforceable right to financial support: s.3(4) of the Act
- ❑ The court will consider the prospects of a marriage failing or a relationship breaking down (e.g. *Owen v Martin* [1992] 4 WLUK 209, CA), although post-divorce maintenance payments can form part of the dependency (*CC v TD* [2018] EWHC 1240)
- ❑ The re-marriage of a widow or her prospects of re-marriage are not to be taken into account: section 3(3) of the Act
- ❑ The same probably also applies to widowers (*Topp v London County Bus Ltd.* [1992] P.I.Q.R. P206)
- ❑ Where the deceased is a child who provided care to a parent, the prospect of the child's marriage can be taken into account (*Dolbey v Goodwin* [1995] 1 WLR 553)

27

27

12
King's Bench Walk

Apportionment between relatives and dependants

- ❑ Losses recovered pursuant to LR(MP)A are apportioned according to the will or the rules of intestacy
- ❑ Any bereavement award is divided equally between the qualifying relatives
- ❑ Apportionment between dependants can be done in a number of ways
 - Pragmatically, where the bulk of the dependency award is given to the surviving spouse on the assumption he or she will use the money for the benefit of any dependent minors
 - On a more detailed basis, reflecting the nature and extent of the loss suffered by each dependant

28

28

Don't forget PPOs

- ❑ Valid in principle in fatal cases
- ❑ Damages Act 1996, section 7(1)
 - “references to a claim or action for personal injury include references to such a claim or action brought by virtue of the [Law Reform \(Miscellaneous Provisions\) Act 1934](#) and to a claim or action brought by virtue of the [Fatal Accidents Act 1976](#).”
- ❑ An example: ***Sloan v Halsen Insulation*** (2010 Lawtel LTLPI 6/8/2010)
- ❑ Worth considering in more cases