

# DEFENDING THE DEPENDENCY CLAIM: CASES AND STATUTORY MATERIALS

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## Civil Law Reform Bill 2009<sup>1</sup>

### **1 Extension of right of action**

- (1) Section 1 of the Fatal Accidents Act 1976 (right of action for wrongful act causing death) is amended as follows.
- (2) In subsection (3), at the end insert:-
  - “(h) any person not falling within any of paragraphs (a) to (g) who was being maintained by the deceased immediately before the death”.
- (3) After subsection (6) add:-
  - “(7) For the purposes of this Act, a person (A) is maintained by another person (B) if B, otherwise than for full valuable consideration, makes a substantial contribution in money or money’s worth towards A’s reasonable needs.”

### **2 Assessment of damages: effect of remarriage etc**

- (1) Section 3 of the Fatal Accidents Act 1976 (assessment of damages) is amended as follows.
- (2) For subsection (3) substitute:-
  - “(3) In assessing the damages to be awarded to a dependant, the court must take into account the fact that since the death the dependant has:-
    - (a) married or remarried,
    - (b) entered into a civil partnership, or
    - (c) entered into a relevant relationship.”
- (3) After subsection (3) insert—
  - “(3A) In assessing the damages to be awarded to a person who is a child of the deceased, the court may take into account the fact that since the death the surviving parent of that child has:-
    - (a) married or remarried,
    - (b) entered into a civil partnership, or
    - (c) entered into a relevant relationship.
  - (3B) For the purposes of this section a person (A) has entered into a relevant relationship if:-
    - (a) at the time when the action is brought, A lives with another person (B) as B’s husband or wife or civil partner,
    - (b) A has been so living with B for at least 2 years, and

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<sup>1</sup> See <http://www.justice.gov.uk/publications/docs/draft-civil-law-reform-bill.pdf>: Crown copyright.

(c) A is maintained by B.”

### **3 Assessment of damages: possibility of relationship breakdown**

(1) Section 3 of the Fatal Accidents Act 1976 (assessment of damages) is amended as follows.

(2) After subsection (3B) (inserted by section 2) insert:-

“(3C) In assessing the damages to be awarded to a person who is a dependant by virtue of section 1(3)(a) or (aa), the court may, if subsection (3D) applies, take into account the prospect (if the deceased had not died) of the dependant’s marriage or civil partnership to the deceased being annulled or dissolved.

(3D) This subsection applies if:-

(a) the dependant or the deceased had:-

- (i) petitioned for divorce, judicial separation or nullity of marriage, or
- (ii) applied for an order to dissolve or annul the civil partnership, or

(b) immediately before the date of the death, the dependant and the deceased were no longer living together.

(3E) But in assessing the damages to be awarded to a person who is a dependant by virtue of section 1(3)(b), the court may not take into account the prospect (if the deceased had not died) of the dependant ceasing to be in the relationship in question.”

### **4 Assessment of damages: effect of lack of right to financial support**

In section 3 of the Fatal Accidents Act 1976 (assessment of damages), omit subsection (4).

### **5 Damages for bereavement**

(1) Section 1A of the Fatal Accidents Act 1976 (damages for bereavement) is amended as follows.

(2) In subsection (2), after paragraph (a) insert:

“(aa) of a person who had been living with the deceased as the deceased’s husband or wife or civil partner for a period of at least 2 years ending with the date of the death; (ab) of a child of the deceased who was aged under 18 at the date of the death;”.

(3) In that subsection, in paragraph (b):-

- (a) for “a minor who” substitute “aged under 18 and”,
- (b) after “civil partner” insert “, of the deceased’s parents.”, and
- (c) omit sub-paragraphs (i) and (ii).

(4) In subsection (3), after “this section” insert

“on a claim for the benefit of a person within subsection (2)(a), (aa) or (b)”.

(5) After that subsection insert:-

“(3A) The sum to be awarded as damages under this section on a claim for the benefit of a person within subsection (2)(ab) shall, in the case of each person to

whom the claim relates, be a sum equal to half the sum for the time being specified in subsection (3) (subject to any deduction falling to be made in respect of costs not recovered from the defendant).”

(6) After subsection (3A) insert:-

“(3B) Where there is both a claim for damages under this section for the benefit of a person within subsection (2)(a) and a claim for damages under this section for the benefit of a person within subsection (2)(aa), the sum awarded is to be divided equally between them (subject to any deduction falling to be made in respect of costs not recovered from the defendant).”

(7) After subsection (4) insert:-

“(4A) The references in this section to the deceased’s parents are references to the persons who, at the date of the death, had parental responsibility (within the meaning of the Children Act 1989) for the deceased.”

## 6 Minor amendment

In section 1(3) of the Fatal Accidents Act 1976 (definition of dependant), for paragraph (b) substitute:-

“(b) any person who has been living with the deceased as the deceased’s husband or wife or civil partner for a period of at least 2 years ending with the date of the death.”

### **Kotke v Saffarini [2005] EWCA Civ 221**

The deceased and K were struck by the defendant's car. The deceased was killed and K was injured. The judge found that the parties were not living together as man and wife in the same household from March 1998. The evidence showed that the deceased retained his own home, leaving there his wardrobe and possessions, and living out of an overnight bag at K's house, until such time as he could dispose of his own house and purchase a new home with K. The mere sharing of shopping expenses when K and the deceased were together at her house was evidence of a sharing relationship but one which fell short of the establishment of a joint household. The CA held that the judge was correct in the conclusion to which he came. He was correct in drawing a distinction between wanting and intending to live in the same household, planning to do so and actually doing so.

### **Burgess v Florence Nightingale Hospital for Gentlewomen [1955] 2 WLR 533**

The plaintiff and his wife were professional dancing partners before and after their marriage in 1952, their income being derived from demonstration fees and prize money won in competitions. Their joint fees were paid to the husband in cash, which was put into a drawer and either of them took from the drawer whatever money was necessary for any particular purpose. In January, 1953, the plaintiff's wife died as a result of the negligence of a surgeon. The husband claimed damages under the Fatal Accidents Act, 1846, for the loss of his wife as a dancing partner and for the loss of her contribution to their joint living expenses. The CA dismissed the claim on the basis that the income, to qualify under the Act, had to be one which arose from the relationship between the parties, and although the relationship of husband and wife was a convenient and usual incident of such a dancing partnership, in essence the partnership was a business one, with the marriage relationship superimposed on the dancing partnership; accordingly, there were no services rendered by the wife to the husband and no benefit arising in the dancing partnership that could properly be attributed to the relationship of husband and wife.

**Welsh Ambulance Services NHS Trust v Williams [2008] EWCA Civ 81**

The deceased had established a successful family business in which both he and his wife and their children were partners. The judge found that the business had grown as a result of the deceased's drive energy and flair and described the deceased as a "wealth creator". The judge accepted the Claimant's case and adopted her proposed method of assessing the cost of replacing the services rendered by the deceased to the business and awarded her just over £1.7 million plus interest. The Defendant argued that as the business had continued to make a profit for the wife and children, there was no loss. The judge held that, in truth, this analysis offended s.4 and awarded damages on the basis of the cost of replacing the deceased's services.

**Wood v Bentall Simplex (1992) PIQR 332**

A farmer was killed and left the farm to his widow and brothers. They continued to farm it and she received a share of the profit from it. The CA held there was no loss since she had inherited the income-earning asset from which she had derived her dependency.

**Cape Distribution v O'Loughlin [2001] EWCA Civ 178**

The deceased had had built up a very successful property development business. Upon his death the Claimant received the full value of his capital assets and, in order to maintain her lifestyle, she sold three of the properties and enjoyed the investment income from those as well as the rental from the remainder. She never involved herself in the management or development of properties. The Claimant contended that the loss was the deceased's flair, experience and entrepreneurial skills, and the financial benefits that he would have brought to the family as a result of these qualities until he was at least aged 60. The CA upheld this basis of assessment.

**Cox v Hockenhull [2000] 1 WLR 750**

The deceased had been severely disabled all her life and before the accident the Claimant was her husband and full-time carer. State benefits were their only source of income. The Claimant's wife received both the care and mobility components of disability living allowance and severe disablement allowance, and the plaintiff received invalidity care allowance. They were both paid income support, housing benefit and council tax benefit. After the death of the wife invalid care allowance, disability living allowance and severe disablement allowance were no longer payable, but as a result of his own injuries the Claimant received incapacity benefit and the remainder of the benefits were revised to take account of his new circumstances, although his entitlement to income support was likely to cease if he received substantial damages. The CA upheld the judge's award of damages based upon benefits that the deceased had received herself but refused to award damages for dependency upon benefits they had jointly received (e.g. income support) which the Claimant had continued to receive, albeit in lower amounts since death, since there was no loss in respect thereof.

**Harris v Empress Motors [1984] 1 W.L.R. 212**

The CA held that the correct approach to the calculation of the deceased's living expenses was to assess as a percentage the available surplus after deducting from the net earnings the cost of maintaining the deceased in his station of life. Conventional figures of 2/3 and 75% were accepted.

**Coward v Comex (Unreported) CA 18/7/1988**

The Claimant, the widow of a professional diver, claimed dependency on her husband's earnings. She had and continued to work as a midwife. The CA held that she must give credit as against the *Harris* fraction for the one third of her own earnings that she would have spent exclusively on her husband.

**Arnup v White Ltd [2008] EWCA Civ 447**

The issue arose as to whether a discretionary payment under a death-in-service benefit scheme should be deducted from the Claimant's damages. The judge held that the Fatal Accidents Act 1976 s.4 did not require the payment to be disregarded in the assessment of damages, as the payments had not accrued to the Claimant as a result of her husband's death but had been paid as a result of independent decisions of the trustees of the fund. The judge then sought to apply the common-law exceptions to deductibility in personal injury cases. He concluded that the payment received under the death-in-service benefit scheme did not fall within the "benevolence exception" and had therefore to be deducted from the Claimant's loss of dependency. The CA allowed the appeal. Once the judge had decided that the payments did not result from the death, so that s.4 did not apply, he should then have adopted the common-law position that benefits which did not result from the death were equally to be disregarded because of that very lack of relationship with the death. If, therefore, the judge had been right about causation, he could not hold that either of the payments fell to be deducted from the loss of dependency. If they were not received as a result of the death, they were completely irrelevant to the whole question of assessment of damage.

**Cookson v Knowles [1978] 2 WLR 978**

The HL held that in calculating the multiplier for a dependency calculation, the multiplier should be set at death, with interest ordered on past losses.

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