

AN OVERVIEW OF CLAIMS FOR AND FOLLOWING DEATH



Introduction

1. *actio personalis moritur cum persona*...(the personal action dies with the person)
2. However this was: '...not in fact the source from which a body of law has been deduced, but a confusing expression, framed in the solemnity of the Latin tongue, in which the effect of death upon certain personal torts was inaccurately generalised.' (Viscount Simon in *Stewart v London, Midland and Scottish Railway* 1943)
3. There are three main types of claims for and following death: 1) Claimant's 'lost years' claim, 2) Estate's claim, 3) Dependant's claim. Conceptually very different.
4. From a damages p.o.v: '...it is cheaper to kill than maim.' (Andrew Ritchie QC in *Kemp*)

<u>Living Claimant</u>	<u>Deceased Claimant</u>
Future loss of earnings	LY/financial dependency claim
Future care & case management	-
Medical and treatment expenses	Limited
Accommodation claim	-
Lifelong services & equipment	Loss of services dependency
Travel/holidays/bills	-

5. Summary of claims under Law Reform Act 1934 and Fatal Accidents Act 1976:

<u>LR(MP)A</u>	<u>FAA 1976</u>
(a) PSLA	(a) Bereavement award £12,980 for a select class of people (s1A(2))
(b) Special damages - clothing and possessions - loss of earnings (to death) - medical expenses/treatment - care (provided to or by the deceased) - travelling expenses	(b) Dependency on - past/future earnings and income including pension - gifts and other one-offs - services
(c) Funeral expenses	(c) Funeral expenses
(d) Probate fees (usually)	-
(e) Miscellaneous expenses	-
(f) Interest on past losses	(f) Interest on past losses

Lost Years Claims

Origin

1. The cause of action was confirmed to exist in the House of Lords case of *Pickett v BRE* [1980] AC 136.

Who can sue and why?

2. A living Claimant whose life expectancy has been curtailed (e.g. mesothelioma)
3. For the lost years in which they would have earned a salary, pension and have other of their 'financial expectations' met.
4. If, but for the negligent act the Claimant would have earned to 65 and lived to 85, and will now only live to 50 he has 15 'lost' earning years and 20 'lost' pensionable years.
5. The conceptual basis for recovery: losing the ability to spend your (future) earnings in a way of your choosing – on yourself or others – is loss of a thing of value.
6. The Claimant is deprived of future pleasures which are capable of being valued now.

What can be claimed for?

7. All reasonably foreseeable 'financial expectations'; so not limited to lost earnings
8. Successful claims include: LOE, pension loss, loss of inheritance, loss of company car/savings made from company accommodation, provision of gratuitous care to others.

How are damages assessed?

9. Unlike future loss of earning claims for the long-lived Claimant.
10. In the case of a Claimant with a normal life-span they will receive all of their lost salary (discounted for early receipt) but then have to pay the cost of living out of it.
11. The soon-to-be-deceased Claimant does not receive all their future salary because s/he has no living expenses to meet, so the cost of living during the period is estimated and deducted: otherwise Defendants are bearing costs which will never be incurred. The aim is to arrive at a figure representing personal disposable income.

12. The deduction is '...the proportion of the victim's net earnings that he spends to maintain himself at the standard of life appropriate to the case' *Harris v Empress Motors* [1984] 1 WLR 212. The remainder is the 'available surplus'.

How can these claims be minimised?

13. Deny any head of claim involving the 'fancies of mere speculation'.

14. Prioritise evidence of high living expenses with which to off-set the lost income award. Some commentators suggest a starting point of 50% reduction. (Based on the FAA apportionment of expenditure as 33% for your spouse and 16.5% for joint expenses).

15. Look for evidence of contingencies other than mortality to be applied to the multiplier – these are applied more generously in LYC; see *Iqbal*

16. Claims by children are technically irrecoverable (*Iqbal v Whipps Cross University NHST Hospital* [2007] EWCA Civ 1190). But cases are currently settled where the loss is not too remote. In *Iqbal* the Court of Appeal felt bound to follow *Croke v Wiseman* [1982] 1 WLR 71 despite its being inconsistent with what was said in *Pickett*, but gave the Claimant permission to appeal, the case settling before the appeal was heard.

17. No claim can be made for the loss of unpaid services (DIY etc). In *Phipps v Brooks Dry Cleaning Services Ltd* [1996] PIQR Q100 the Court of Appeal said: 'The Claimant has not lost anything of value in performing work which would save him expense which he will never incur...insofar as anything can be recovered in respect of inability to do DIY...during the lost years, this is a loss of amenity and falls to be taken into account in general damages to a modest extent

18. Funeral expenses (this is a claim to be made post-mortem)

19. Income on investments – this is not 'lost' as long as it is gifted in a will (*Adsett v West* [1983] QB 826)

20. If there has been final settlement of a claim for an injury which led to death there is no right to bring an FAA claim subsequently *Thompson v Arnold* [2007] EWHC 1865.

Law Reform (Miscellaneous Provisions) Act 1934

Overview

- The 1934 Act preserves the personal claim of the injured person
- It survives for his estate to pursue
- In contrast to FAA claim, LRMPA claims do not necessarily arise out of a fatal tort, rather they survive in spite of it
- The main heads of damage are: PSLA, loss of earnings, costs of care, expenses etc

Framework of the 1934 Act

Section	Effect	Comment
1	Preserves causes of action extant at the time of death for the estate	The exception is defamation
1A	Removes the right to recover a bereavement award that the deceased would have been entitled to	The pain of bereavement is presumed extinguished by their death
2a	Debars recovery of exemplary damages, or damages for loss of income after death	This prevents double recovery of lost future earnings under both a LYC and dependency claim
2c	Disregards any loss or gain to the estate consequent on the death	Allows funeral expenses
...		

General damages:

1. S1(1)(b) Administration of Justice Act 1982 – the court shall take account of any suffering caused or likely to be caused by awareness of a reduced life expectation.
2. Knowledge and fear of impending death is not relevant to the calculation of damages as in one of the Hillsborough cases. Fear is a normal human emotion for which no damages can be awarded; *Hicks v Chief Constable of South Yorkshire Police* [1992] All ER 65, HL.
3. Generals for loss of amenity, if not for pain and suffering can still be recovered even where the injury rendered the Claimant unconscious; *Lin Poh Choo v Camden & Islington* [1980] AC 174.
4. Generals will be minimal where the catastrophic outcome is off-set by a short duration.

Special damages:

5. These are of the usual type:
 - a. Loss of earnings (from injury to death)
 - b. Care (from injury to death)
 - c. Medical/travel expenses etc
 - d. Funeral expenses (but not the wake or a memorial)

Minimising estate claims

6. Limitation Act 1980, s11(5) – an estate claim must be brought 3 years from death, or from the date of knowledge of the PR
7. If a Claimant dies intestate an estate claim is started without a grant of probate/letters of administration are 'incurably a nullity' *Millburn Snell v Evans* [EWCA] Civ 557. This cannot be rectified by CPR Part 19(8).
8. Funeral expenses: There is a range of decisions suggesting what might be allowable. They are not entirely consistent. See e.g. *Wilson v Welsh Ambulance Services NHS Trust* [2008] Civ 81

Fatal Accidents Act 1976

1. If, but for the death, a Defendant would have been liable, they remain liable to an FAA claim when the injured person dies.
2. But a Defendant will only be liable if the negligence '...entitled the person injured to maintain an action and recover in respect thereof...' [s1(1)].

Bereavement award

3. £12,980 since 1st April 2013.
4. An unusual award in that it assumes love and affection where there may be none and denies it exists where it plainly does. It requires no evidence of true proximity.
5. For the benefit of a wife/husband/civil partner, or the mother/parents of an unmarried minor. [s1A(2)]
6. The Civil Law Reform Bill 2009 extended the class to include children, single fathers and cohabiting parents, but never became law (see below).

Dependency claims

7. Conceptually nothing to do with a deceased's rights. Dependency claims are based on a dependent's reasonable expectation that financial/service needs would continue to have been met.
8. A claim does however depend on the deceased having an extant cause of action at the time of his/her death (i.e. not time barred and not already settled) [s1(1)]
9. It is peculiar to our jurisdiction (within Europe) that we define a category of eligible Claimants. Mostly the fact of the dependency (if evidenced) is enough.
10. Who is a dependant?
s1(3) In this Act "dependant" means—
 - (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.
11. s3(3) provides that no account shall be taken of a widow's remarriage or prospect of remarriage in assessing damages 'in respect of the death of her husband'.
12. What is taken into account though is whether the Dependent is married/cohabiting at the time of death: Laurie Swift had only lived with her partner for 6 months when he was killed. Their son was born after his father died and had a valid dependency claim. Hers was debarred by reason of s1(3)(b) and she challenged it as discriminatory under art. 8 and 14 ECHR.
13. In *Swift v Secretary of State for Justice* [2013] EWCA Civ 193 the Court of Appeal endorsed Mr Justice Eady's view that whilst the current state of the law was potentially unfair in arbitrarily cutting out those who had genuinely lost dependency the ECHR required no more than the current law provides.
14. The categories of dependency are for the time being closed.

What can be claimed as dependency?

15. Anything 'reasonably expected' which arose as a result of the family relationship and would have continued after death.

16. Purely business arrangements are excluded, even if between man and wife; *Burgess v Florence Nightingale Hospital for Gentlewomen* [1955] AC 556 in which the family ties were incidental.

17. Loss of intangible benefits can be claimed. Usually in the sum of around £3-5,000; *Regan v Williamson*.

How is it to be assessed?

18. The assumption about financial dependency is that the childless Claimant would spend 1/3 on herself, her husband, and joint expenses. The claim is therefore for the lost 2/3rds of earnings.

19. Where there are children the personal spending element falls to 1/4 and the loss is 3/4 of earnings.

20. These presumptions can be shown to be wrong where e.g. the deceased had expensive hobbies and absorbed more than the third/quarter. (see below)

21. Pre-death losses are calculated and then future losses are assessed on an annual multiplicand (assessed at the date of trial) and multiplier (assessed from date of death) basis.

22. A reduction should be made where there are spouses' earnings. The (relatively) more the dependant earns in their own right the less they will be likely to have depended on the deceased for.

Disregard of benefits under s.4

23. **s4. 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.

24. The common law resists double recovery but as a creature of statute dependency claims allow this in a significant respect.

'Today the assessment of damages in fatal accident cases has become an artificial and conjectural exercise. Its purpose is no longer to put dependants, particularly widows, in the same economic position they would have been in had their late husband lived' *Cookson v Knowles* [1979] 1 AC 556 per Lord Diplock at 568

25. The definitive statement on why benefits are to be disregarded is found in *Arnup v MW White* [2008] EWCA Civ 447:

'It seems to me quite clear that the intention of Parliament in passing the 1982 amendment was to continue and complete the trend towards disregarding receipts so as ensure that all benefits coming to the dependant as a result of the death were to be left out of account.' Per Lady Justice Smith

Contributory negligence

26. s5 FAA operates to reduce any damages recoverable under the Act are subject to a reduction for contributory negligence.

Factors which might reduce dependency

Factor	For example	Evidence
Deceased had a diminished life expectancy in any event	A high earner with a strong family history of ...	Deceased's medical records
Reduced duration of dependency	Dependant husband of deceased wife is of poor health	Dependent's medical records
How they shared their earnings with the family	Deceased wife has expensive hobbies which leaves less for the husbands/joint pot	Establish more than the assumed 1/4 or 1/3 went on themselves
High earnings of the dependant	-	Dependent's salary details/accounts
Likelihood of relationship breakdown	Where there is a previous history of adultery	...

Defences to FAA claims:

27. Limitation Act 1980 s12:

12. Special time limit for actions under Fatal Accidents legislation.

(1) An action under the Fatal Accidents Act 1976 shall not be brought if the death occurred when the person injured could no longer maintain an action and recover damages in respect of the injury (whether because of a time limit in this Act or in any other Act, or for any other reason).

Where any such action by the injured person would have been barred by the time limit in section 11 [or 11A] of this Act, no account shall be taken of the possibility of that time limit being overridden under section 33 of this Act.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action under the Fatal Accidents Act 1976, but no such action shall be brought after the expiration of three years from—

(a) the date of death; or

(b) the date of knowledge of the person for whose benefit the action is brought;

whichever is the later.

(3) An action under the Fatal Accidents Act 1976 shall be one to which sections 28, 33 and 35 of this Act apply, and the application to any such action of the time limit under subsection (2) above shall be subject to section 39; but otherwise Parts II and III of this Act shall not apply to any such action.

s33 then rather confuses the matter by suggesting that 12(1) can be ignored if the claim was not allowed by reason of limitation having expired.

28. The more certain defence is where there has been a previous settlement: An FAA case may not be brought where there has been full and final settlement of an LR(MP)A claim: *Thompson v Arnold* [2007] EWHC 1875

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