

Deduction of benefits flowing from death: does s. 4 mean what it says?

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S.s 3 Fatal Accidents Act 1976

3(1) *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.*

Smith LJ in Arnup

There is no dispute that these slightly obscure words mean that a claimant is entitled to recover only his or her net loss. In other words, under section 3, a claimant must set off against the loss of dependency any benefits he or she receives as the result of the death.

S.s 4 Fatal Accidents Act 1976

- 4 *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.* (introduced by AJA 1982)

S.s 4 Fatal Accidents Act 1976

Smith LJ in *Arnup*

Until 1982, the process of assessing damages had two stages...The first stage was the quantification of the loss of dependency. The second stage was the deduction of any benefit which the dependant had received as a result of the death... In effect, section 4 swept away the second stage of the assessment.

Cox v Ergo Versicherung AG [2014] AC 1379

Sumption JSC at [10]:

“What is clear is that sections 3 and 4 mark a departure from the ordinary principles of assessment in English law, which can fairly be described as anomalous. They provide for what Lord Diplock in Cookson v Knowles [1979] AC 556, 568, called an “artificial and conjectural exercise” whose “purpose is no longer to put dependants, particularly widows, into the same economic position as they would have been in had their late husband lived”

History

- Common law rule: benefits flowing from death are deducted (*Davies v Powell Duffryn Assoc Collieries* [1942] AC 601)
- Categories of exemption from deduction progressively introduced.
- s. 4 FAA 1976 as originally enacted
“insurance money, benefit, pension or gratuity”
- Scope of s.4 extended by AJA in 1982

Adsett v West [1983] 1 QB 826

- “lost years” claim by the estate (abolished by AJA 1982) so predating new s.4
- one of the Dec’d’s sources of income claimed was interest on a capital sum
- Judge rejected income on capital as a source of loss as the capital would pass to his estate, so there was no loss.

Auty v National Coal Board [1985] 1 WLR 784

- C (Popow) received widow's pension when husband died.
- Claimed that lost the widow's pension that she would have been entitled to on his natural death and argued s.4 meant had to ignore widow's pension actually received.
- CA rejected the claim

Auty continued

Oliver LJ:

But it is still necessary to establish that the defendant has in fact suffered an injury (i.e. lost something) as a result of the death. Here what is claimed as the injury is the loss of the very thing (i.e., a widow's pension) that the widow in fact has gained as a result of the fulfilment of the conditions of the scheme earlier rather than later, and whilst section 4 precludes setting the benefit of the pension against damage suffered under some other head, there is nothing in that section which requires one to assume, in ascertaining whether there has been any injury at all, that that which has happened in fact has not happened.

The fallacy of the plaintiffs' reasoning is, in my judgment, that it premises a loss which has not occurred and which cannot be substantiated either in fact or in law.

Pidduck v Eastern Scottish Omnibuses Ltd [1990] 1 WLR 993

- Widow claimed dependency on Deceased's pension
- D argued that widow's pension relevant to loss under s.3
- CA rejected argument:
 - Source of her dependency was her husband, not his pension provider
 - The 2 pensions paid under separate clauses of the pension fund rules

Wood v Bentall Simplex [1992] PIQR P332

- Partner in farm business died, partnership could not afford to pay his family his share, so transferred a house and some land, as well as a reduced share in the farm profits.
- D argued that income from land and farm relevant under s. 3.
- CA held that the source of the dependency was not “***the very thing***” that the family had inherited: there was a loss and s.4 applied.

Wood continued

Staughton LJ:

"To take the extreme case where the whole family income is derived from the husband's investments, the widow who takes his whole estate on his death will have no claim under the Fatal Accidents Act."

The question to my mind is whether that principle was changed in 1982 by the introduction of the new section 4 in the 1976 Act. To adopt a familiar and homely metaphor, can the dependants inherit the goose and still claim that they have been deprived of eggs?

Wood continued

Staughton LJ

In my judgment such cases are not concerned with the question whether a benefit accruing to the widow should be deducted, but with the loss that she has suffered. In financial terms she has suffered none. The distinction between loss which has not occurred and a benefit which might be deducted was drawn by Oliver L.J. in Auty

Wood continued

Staughton LJ:

One then turns to the case where the income is in part derived from labour and in part from capital....

My answer is that one must again determine what the dependants have lost; no question of deduction arises. The court has to ascertain how much loss has arisen because the deceased is no longer alive and able to work, and how much of the deceased's income was derived solely from capital which the dependants have inherited.

Cape Distribution v O'Loughlin [2001] PIQR Q73

- Dec'd was successful property developer and had a substantial income from his property portfolio, which his widow inherited.
- She did not value the dependency on the income but (to sidestep the point in Wood *et al*) claimed the cost of replacing his business skills. The claim succeeded.
- Acknowledgement of the effect of inheriting an income-earning asset.

Arnup v MW White Ltd [2008] ICR 1064

- Widow received 2 payments from employer.
- D argued both deductible. CA said neither were.
- Smith LJ
 - If benefits not paid on account of death, non-deductible because irrelevant; if paid on account of death, non-deductible due to s.4
 - Assessment now a 1-stage process

Welsh Ambulance Service v Williams [2008] EWCA Civ 81

- Dec'd entrepreneur employed his family in his property business. He left his assets to the family and upon his death, the business continued to flourish. C claimed (per O'Loughlin) cost of replacing his services.
- Smith LJ restated the principle in *Wood*
“...where the widow inherits the assets which have produced the income from which the dependency derived, she cannot have both the inherited assets and damages for loss of the income.”

Williams continued

- The measure of loss was the value of the Dec'd's services.
- Replacement services provided by the family to sustain business irrelevant to assessment.

Head v Culver Heating Company Ltd [2020] PIQR Q31

- “lost years” claim by owner of successful company, which will thrive even after his death.
- *“where earnings enjoyed in life survive and continue to be earned after death, those earnings have not been lost and cannot form part of a 'lost years' claim.”*
- Because the business’ income after his death will exceed his “surplus”: no loss.

Head continued

- *Adsett* applied. C declined to re-frame his claim *per O'Loughlin/Williams*.
- Court refused to accept Defendant's invitation to make a *Blamire* award.

Specific instances

Caught by section 4

- Occupational widow's pensions: *Pidduck*
- Insurance/ex-gratia payments: *McIntyre v Harland & Wolff* [2006] EWCA Civ 287
- Replacement parental care: *ATH v MS* [2002] EWCA Civ 792 if:
 - Carer not tortfeasor (*Hayden v Hayden*)
 - Damages will be paid to carer

Specific instances

Not caught by s. 4

- Capital and/or income therefrom passing to dependent

What about?

- Personal pension funds where no annuity?
- Working/child tax credits?
- State benefits generally?

Hunter v Butler [1996] RTR 396

- Dec'd was unemployed. On his death, the state benefits received by his family partially changed but there was no overall shortfall.
- CA held no loss. Hobhouse LJ:

Accordingly, the death of the deceased did not cause her any loss. Before and after she remained dependent on the state for support. In fact her financial position was not significantly changed one way or the other.

Hunter continued

She argued that she was entitled to exclude any sum which she received by way of widow's allowance or widowed mother's allowance from the calculation because of section 4 of the Fatal Accidents Act 1976. However she still has to show that in the relevant respect she has suffered a loss (an 'injury': see section 3(1)) as a result of his death. This she cannot do since it was not he who was making the benefit payments to her. The only thing which has happened is that the title under which she has been receiving payments from the state has changed.

Cox v Hockenhull [2000] 1 WLR 750

- Dec'd wife was disabled and the Claimant, her husband, was her carer. He claimed dependency on her disability benefits and his carer's allowance.
- CA allowed the claim based upon her benefits.
- CA rejected D's argument that *Hunter* can be explained on the basis that there can be no loss of dependency on state benefits.

Cox continued

Stuart-Smith LJ:

*In the ordinary case, of which Hunter v. Butler is probably typical, a family which is dependent on housing benefit and income support before the deceased's death, whether it be husband or wife, will continue to receive such benefits, **or their equivalents** as in Hunter's case, after death. In these circumstances there will be no loss, even if the income support is reduced to reflect the fact that one less adult is being supported. If, therefore, Mr. and Mrs. Cox had been dependent only on income support, housing benefit and council tax benefit before Mrs. Cox's death, and Mr. Cox had thereafter been in receipt of the same benefits (**or their equivalent**), there would be no loss, even though the amount of the after death benefits was lower to reflect the fact that only Mr. Cox was being supported.*

So what about state pension?

- Ss 49 and 50 Social Security Contributions and Benefits Act 1992: widow with ‘Category B’ pension receives benefit of her husband’s NI contributions on his death and thereby receives ‘Category A’ pension.
- On the basis of *Hunter* and *Cox*, is the Category A pension immune from s.4?

Thank you

Any questions?

