



Claims for Dependency, for the Estate of the Deceased and for those terminally injured or ill

Introduction

1. Actions for damages in respect of the consequences of the death following a tort may be brought as follows:
 - (1) By the injured person, claiming “lost years” as a result of foreshortened life. Such an action is barred by the death of the claimant.
 - (2) By the estate of the deceased, pursuant to Law Reform (Miscellaneous Provision) Act 1934.
 - (3) By a dependent of the deceased or person entitled to a “bereavement award” pursuant to Fatal Accidents Act 1976. Do not forget that a dependent may enjoy other rights which are not consequent upon the tort (eg pursuant to Inheritance Act 1975 or Trusts of Land and Appointment of Trustees Act 1996).

Claims for the terminally ill

2. A claim for "lost years"

The law with regard to lost years claims is in flux.

(a) An adult victim with dependents may make a claim for loss of life expectancy, including lost earnings in the lost years, *Iqbal v Whipps Cross University NHS Trust [2007] EWCA civ 1190*. However, damages are conventionally based upon 50% of net earnings as representing the level of income over and above that necessary for subsistence.

(b) The Court of Appeal has found that claims for lost years by a young child are not permissible in principle because the injuries are so catastrophic that there could never be any dependents, *Iqbal v Whipps Cross*. The Court in *Iqbal* followed previous Court of Appeal authority, *Croke v Wiseman [1981] 3 All ER 852* even though this departed from earlier authority of the House of Lords allowing such claim, *Pickett v Wilson [1982] AC 227*. The issue will remain unclear until heard by the Supreme Court.

3. A "lost years claim" is not recoverable *by the estate* in respect of deaths on or after 1 January 1983, s 4 AJA 1982.

4. There are conflicting authorities as to whether a living Claimant is able to recover damages for his own funeral: Bateman v Hydro Agri (UK)

Ltd 15/9/96 QBD (a mesothelioma action: allowed); *Watson v Cakebread [2009] EWHC 1695 QBD* (dismissed).

Claims on behalf of the Estate

Law Reform (Miscellaneous Provisions Act 1934

5. s1. LR(MP)A 1934 abolished the common law rule that personal injuries died with the person. Any personal claim of the deceased now survives through the deceased's estate.

6. Locus standi
An administrator cannot sue under s 1. LR(MP)A 1934 before a grant has been obtained, *Ingall v Moran [1946] KB 65*.

7. General damages for pain, suffering and loss of amenity.
The key factor is the time between injury and death. Damages are not awarded per se for the loss of expectation of life but are increased by an awareness of foreshortened life for a period of time, *s.1 (a)(a) AJA 1982*. If a claimant is unconscious damages are only recoverable (potentially) for loss of amenity. Fear of impending death does not give rise to a cause of action to benefit the estate; *Hicks v CC S Yorkshire [1992] 2 All ER 65*.__Awards are available in cases of

continuing unconsciousness, *Dolman v Deakin* 24.1.90 (unreported)

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8. Claims for lost years are barred

The estate cannot make a claim for the "lost years" of the deceased in respect of deaths on or after 1 January 1983, s 4 Administration of Justice Act 1982 (overturning the decision of the House of Lords in *Gammell v Wilson* [1982] AC 27).

9. A claim for funeral expenses is allowed by s. 3(1)(5) FAA 1976 and LR(MP)A 1934.

10. The following have been allowed:

(1) The cost of a headstone, finishing off and marking a grave, *Hart v Griffiths-Jones* [1948] 2 All ER 729

(2) A memorial for £3,600 *Kegworth v British Midland* (unreported)
Sir Michael Davies

(3) Probate fees, *Executors of E Whittaker (deceased) v BBA Group Plc* (*Kemp*)

(4) The additional estate duty paid on gifts made because the deceased had not lived for 7 years after making them, *Davies v Whiteways Cyder Co Ltd* [1975] QB 262.

11. The following have not been allowed:

(1) The costs of a memorial service, *Harding v Scott-Moncrieff*
23/7/04 Buckley J

(2) The costs of a wake and mourning clothes, *Gammell v Wilson*
[1982] AC 27.

12. The estate cannot claim future loss of earnings from the date of death but can potentially claim for lost future capital which would have been received: A claim for a legacy which would have been payable when a child became 18 was allowed – discounted for accelerated receipt - in *Gammell v Wilson [1982] AC 27*

Claims under Fatal Accidents Act 1976

Procedural Requirements

13. The cause of action vests in the executor (from the date of death) or the administrator (from the date of the grant of probate), s. 2 FAA 1976. s 2(1) FAA 1976 is mandatory and states: 'the action shall be brought by and in the name of the executor or administrator of the deceased'.

14. If there is no executor/ administrator or no action is brought within 6 months after the death an action may be brought by or for all or any of those persons for whom an executor/ administrator might bring it, s.2(2) FAA.

15. The executor/administrator must take all reasonable steps to inform such dependants of the action: *Cooper v Williams [1963] 2 QB 581*. Failure to take such steps may amount to negligence. A dependant who is wrongly excluded can apply at any time before judgment to be joined.

16. **CPR 16 PD 5**. The Practice Direction to Part 16 sets out what must be included by a claimant in particulars of claim in relation to a fatal accident claim.

Defences

Procedural Defences

17. The Fatal Accidents Act does not itself create a cause of action
Instead, it allows it to persist despite the death for the benefit of the Dependents. Thus a claim may be barred by a previous claim by the deceased. In *Thompson v Christine Arnold [2007] EWQB 1875 Langstaff J*. The Defendant had wrongly diagnosed a cancerous lump in T's breast as benign. T subsequently issued proceedings. The schedule of loss and damage made no claim for the lost years. T obtained a judgment in default of defence. The claim was subsequently settled. Later proceedings were commenced for

dependency. HELD: The purpose of the 1976 Act was not to ensure that there was a benefit conferred upon the children of the deceased: the focus was on ensuring that the tortfeasor did not escape paying damages. If death brought the right of action into play that would give rise to the prospect of double recovery for the same wrongful act.

18. Rules of law which would prevent a further claim by the deceased bar a claim by the dependent, thus a settlement against one defendant will bar a claim against another defendant concurrently liable unless the settlement is clearly restricted to only part of the full value of the claim, *Jameson v Central Electricity Generating Board [1999] 1 All ER 193*.

19. Issue (without service) of proceedings during the deceased's life time does not bar the dependent's claim, *Cachia v Faluyi [2001] WECA civ 998*. Similarly, if the deceased commenced proceedings which were discontinued after his death, *Reader & ORS V Molesworths Bright Clegg [2007] EWCA Civ 169 2*. The Court of Appeal held that the deceased's wife - had a separate cause of action against the underlying tortfeasor, s. 1 FAA 1976 which was not rendered an abuse if brought despite the discontinuance of the deceased's action.

20. An award for provisional damages made within the lifetime of the deceased does not itself bar a subsequent claim under *Fatal Accidents Act per S.3(2) Damages Act 1996*.
21. A child's claim is not barred by Judgement in a foreign court in proceedings brought by her widowed mother, because settlement requires the approval of the English Court, *Black v Yates [1992] QB 526; CPR 21.10*

Limitation

22. No action for dependency may be brought if the Deceased's action was statute barred at the date of death (*s. 12(1) Limitation Act 1980*).
No account may be taken of the possibility that the Court may have directed that the primary limitation period does not apply in respect of the ***deceased's*** action.
23. The Dependent's action must be brought within 3 years of the date of death or of the ***dependent's*** date of knowledge, *s. 12(2) LA 1980*
24. The limitation act operates separately for each dependent (*s 13(1) LA 1980*) and the Court must exclude dependent's whose claim is statute barred.

25. The Court may disapply the primary limitation period in respect of the **dependent** under s. 33 LA 1980 (per s 12(3) LA 1980).

Bereavement Awards

26. The level of the award

The award – currently £11,800 (for causes of action accruing after 1/1/08) – is governed by s. 1A FAA 1976.

27. Qualifications for receipt of the award

- (1) s. 1A FAA 1976

“An action under this Act may consist of or include a claim for damages for bereavement.

(2) A claim for damages for bereavement shall only be for the benefit--

(a) of the wife or husband [or civil partner] of the deceased; and

(b) where the deceased was a minor who was never married [or a civil partner]--

(i) of his parents, if he was legitimate; and

(ii) of his mother, if he was illegitimate.”

(2) The award is purely a creature of statute and not prevented by the grant of decree nisi, *Martin v Grey* QBD 13/5/98

(3) Where the deceased child was a minor at the date of injury but was over 18 at the date of death there is no bereavement award claim *Doleman v Deakin* TLR 30/1/90 CA

Dependents

28. Who is a dependent?

S. 1(3) FAA 1976(1) defines "dependent" as:

- (a) The wife or husband or former wife or husband 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 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 descendent 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.

(g) Any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

(h) A civil partner, or child of the family.

29. Qualifying Claimants

The definition of dependency is predicated upon relationships of blood and marriage. It has been reformed to include civil partners. Unmarried partners are dealt with in a more restricted fashion

30. Statutory guidance

(a) Any relationship by affinity shall be treated as a relationship by consanguinity, any relationship of the half blood as a relationship of the whole blood, and the stepchild of any person as his child (a relationship by affinity means by marriage, a relationship by consanguinity means by blood).

(b) An illegitimate person shall be treated as the legitimate child of his mother and reputed father. *S.1(5) FAA*

31. Adopted children are included in the definition, *s.39(1) Adoption Act 1976*. So are children born after the parent's death *Hyams v West Yorkshire Metropolitan County Council (unreported) 19/6/87 Potts J.*

32. The right of the unmarried to claim

(a) A divorced woman who remarried but returned to live with the deceased did not have to fulfil the qualifying period of 2 years of *S.1(3)(b); Shepherd v Post Office TLR 15/6/95*

(b) The requirements relating to cohabitants are strictly enforced: A partner (or even an unacknowledged partner can claim if she falls within S.1(3) but see *Kotke v Saffarini [2005] EWCA civ 221*:

- i) The Claimant had a relationship of more than 4 ½ years with the deceased. They each owned a house. His sister confirmed that they were “living as a couple” for at least 2 years. Within the last 2 years she became pregnant and they had a child. The deceased contributed £40 per month to her prior to the pregnancy. They decided not to sell his house which was in £4,000 negative equity. He continued to keep most of his possessions there.
- ii) “Household” was not the same as “house.”
- iii) There was a distinction “between wanting to live in the same household, intending to do so, making plans to do so and actually doing so.”
- iv) The Judge found that only with the pregnancy did the deceased’s “centre of gravity” change to establish that they lived in 1 household, this was in the last 2 years and the requirements of the statute were not met.

33. Swift v Sec of State 2012] EWHC 2000 (QB)
s.1 (3) is not incompatible with Art 8 European Convention of Human Rights
34. Case law on other qualifications to claim
- (1) The fact that the dependency arose after the deceased had sustained the tortious injury is no bar to a claim by the dependant in respect of that tort; *Phillips v Grampian Health Board [1989] SLT 538*
 - (2) An unborn child at the date of death was able to claim: *Hyams v West (unreported) 1987.*
 - (3) The Categories of dependent (although deriving from statute) may not be closed: A claim by the child of the deceased's partner (where there was no marriage or civil partnership) was allowed: *Fretwell v Betz 8.1.01 unreported*
35. Disputes as to whether an individual qualifies as a dependent should be decided as a preliminary issue, *Pounder v London Underground Ltd [1995] PIQR P217.*

The extent of the liability of the tortfeasor:

Contributory Negligence of the deceased

36. S. 5 Fatal Accidents Act provides:

“Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under the Law Reform (Miscellaneous Provisions) Act 1934 the damages recoverable would be reduced under section 1(1) of the Law Reform (Contributory Negligence) Act 1945, any damages recoverable in an action . . . under this Act shall be reduced to a proportionate extent.”

37. Where the death is solely caused by the negligence of a dependent the claim of that dependent (but not others) is barred, *Dodds v Dodds* [1978] QB 543.

Causation

38. Causation is subject to a statutory definition

(a) A dependent may claim if *“death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action ...”* (s.1(1) FAA).

(b) Injury is statutorily defined as including 'any disease and any impairment of a person's physical or mental condition'.

(c) Jurisdiction: The statute creates a cause of action for the benefit of the dependants, even if the death results from a collision of foreign ships outside the jurisdiction in international waters: *The Esso Malaysia* [1975] QB 198, [1974] 2 All ER 705

39. The Claimant must establish that the death occurred on the balance of probabilities as a result of the cause of action which gives rise to the claim.

40. Suicide does not necessarily break the chain of causation: A claim may be made where a tort causes psychological injuries to a person leading them to commit suicide *Corr (administratrix of Corr, dec'd) v IBC Vehicles Ltd* [2006] EWCA civ 331. The deceased became depressed as a result of a factory accident and committed suicide six years later. The deceased's suicide was a reasonably foreseeable consequence of the depression arising out of the accident for which the defendant was responsible.

41. Dependent causing the death

(a) The dependant's claim will be reduced proportionately to their share in the responsibility for the death: *Mulholland v McCrea* [1961] NI 135.

(b) the fact that one dependant was partly responsible for the death does not affect claims by other dependants, who can recover in their own right, without reduction: *Dodds v Dodds* [1978] QB 543, [1978] 2 All ER 539.

The assessment of dependency

42. Damages "may be awarded as are proportioned to the injury resulting from the death to the dependants respectively. s. 3(1) FAA 1976.

43. Standard of proof

The test is not whether on the balance of probabilities the Claimant would have been dependent but whether he had a substantial (i.e. not a fanciful) possibility of it.

(a) *Davies v Taylor* [1974] AC 207 where the deceased had separated from the widow and commenced divorce proceedings for adultery the widow had not established any loss.

(b) *Owen v Martin* [1992] PIQR P151: a 1 year marriage where the Claimant had committed adultery. The Court reduced both the

multiplier (from 15 to 11) and the multiplicand (by reducing the dependency percentage).

44. The loss must be to the Dependent

Thus, where a child dependent lived with her working mother (who received maintenance for the child from the father) and after her mother's death went to live with her father who thereby saved money, the child's financial dependency was not defeated by the fact that the result was that the father saved money overall, *Martin v Grey (QBD) 13.5.98 unreported*.

45. Re marriage

(a) The widow

When assessing dependency the Court must not take into account the remarriage "of the widow or her prospects of re-marriage", s. 3(3) FAA 1976

(b) The Widower

A widower's prospects of remarriage have been held to be relevant, *Khan v Duncan (QBD 9.3.89)*; but it was common ground that this was erroneous, *Stanley v Saddique [1992] 1 QB 1 CA*

46. Cohabitees

(1) s.3(4) FAA 1976 provides that "there shall be taken account (together with any other matter that appears to the Court to be

relevant to the action) the fact that the dependant had no enforceable right to financial support by the deceased as a result of their living together.”

(2) In *Drew v Abassi* CA 24/5/95 the Court of Appeal upheld the Judge reducing a multiplier from 15 to 13 despite a finding that the relationship “*would have survived as well as any marriage.*”

(3) Where a cohabitee does not qualify as a claimant, the children’s’ claim may still receive uplift to take account of the fact that their mother no longer being supported by their father, *K v JMP Co Ltd* [1976] QB 85, [1975] 1 All ER 1030, CA.

47. Remarriage and the dependency of a child

(1) The Court is not barred from considering the prospects of marriage of the surviving parent in a claim for dependency by the children of the deceased

(2) The referable case law is old, the test then being the likelihood both of remarriage and of the new partner accepting the child as a child of the family, *Thomson v Price* [1973] QB 838.

48. Divorce

The Court is not barred from considering the prospect of divorce on the dependency of a spouse (although there would of course have subsisted

rights under s.24 *Matrimonial Causes Act 1974*, *Owen v Martin* [1992]
PIQR P151

The mechanics of dependency

49. The calculation of the dependency multiplicand

(1) Take the Claimant's working capacity into account by adding their incomes together, applying the dependency percentage to the sum of both incomes and then subtracting the Claimant's residual earning capacity.

(2) The conventional dependency percentage is 75% with dependant spouse and 1 or more children and 2/3 with no dependent children. These can be displaced by a more rigorous analysis of the family's finances, *Harris v Empress Motor* [1983] 3 All ER 561; *Cox v Hockenhull* [1999] 3 All ER 577

(3) Alternative proportions may be appropriate

(a) Where there are different retirement ages the multiplier may be split, eg: *Crabtree v Wilson* [1993] *PIQR Q24*

(b) *Cox v Hockenhull* [2000] *PIQR Q230* dependency 50% in a low income case where most of the significant expenses were joint.

(c) *Farmer v Rolls Royce QBD 26/2/03* 85% dependency in a high income family with significant savings.

(d) *Ath v MS [2002] EWCA civ 792* 60% where dependent children were never really reliant on what their mother could earn.

50. The date for assessing the dependency

(1) The dependency should be assessed at the date of death, *Welsh Ambulance v Williams [2008] EWCA civ 71*

- a. Deceased father ran a property development business. His 2 children became involved in it.
- b. After his death the children managed the business successfully and remained as well off as before.
- c. Judge was correct to value the dependency as the cost of replacing the deceased's services within the business and assessing his personal expenditure at 12.5% of this.
- d. The adult children would have remained dependent on the skill of the deceased for the remainder of his working life (they had generated about £15,000 profit each but received about £75,000)
- e. "A dependent cannot by his or her conduct after the death affect the value of the dependency at the time of the death."

(2) The Court ought not to take into account the dependant's intended greater reliance on the deceased's earnings *Malone v Rowan* [1984] 3 All ER 402. This approach has received a fair amount of criticism. However, in *Howitt v Heads* [1973] 1 QB 64 the earnings of a wife who only went out to work following a death as a result of necessity were not be taken into account.

51. Sources of dependency

(1) Partnership

The fact that the dependency increased the profits of the family business of which they had been partners with their deceased husband and father was irrelevant to the calculation of the dependency at death *Welsh Ambulance v Williams* [2008] EWCA civ 71

(2) Corporate Income

The Court will consider the reality and not the form of the dependency. Where a wife was paid income by her husband's company to ensure that it was tax efficient, the Court accepted that it was properly part of her husband's earnings, less a deduction to reflect the market rate of the services the wife actually performed, *Malyon v Plummer* [1964] 1 QB 330.

(3) Investment capital

If the capital has passed on the death to the dependents it may not be possible to claim for the lost income deriving from it, unless that income was dependent upon the deceased's services, *Cape Distribution v O'Loughlin [2001] EWCA civ 178*.

(4) Dependency on benefits

- a. Benefits paid to the 'dependent' as a result of a business relationship with the deceased (eg invalid care allowance paid to the dependent for caring for the deceased), do not count..

- b. Benefits paid to the Deceased should be taken into account (eg: disability living allowance and severe disablement allowance, *Cox v Hockenhull [1999] 3 All ER 577*)

52. Dependency Multipliers

(1) The multiplier is calculated at the date of death, *Cookson v Knowles [1979] AC 556 HL*. Despite the Law commission recommendation in 1999 that the multiplier should be calculated at trial, the Court of Appeal has held it bound by *Cookson* in *Ath v MS [2002] EXCA civ 792*. It has more recently repeated this while recommending that the issue be reconsidered by the House of Lords *A Train v Fletcher [2008] EWCA civ 413*.

(2) There are 5 essentials in calculating the multiplier, *Corbett v Barking HA [1991] 2QB 408*

- (a) The likelihood of the provider of the support continuing to exist.
- (b) The likelihood of the dependant being alive to benefit from that support.
- (c) The possibility of the providing capacity of the provider being affected by the changes and chances of life either in a positive or negative manner.
- (d) The possibility of the needs of the dependant being altered by the changes and chances of life, again in a positive or negative way.
- (e) An actuarial discount to compensate:
 - (i) for immediate receipt
 - (ii) the principle that capital be exhausted at the end of the dependency.

(3) As a starting point, consider (a) and (c) together then consider (b) and (d) together then apply (e) to the lower of the 2.

(4) Splitting the multiplier:

(a) Where there are different retirement ages the multiplier may be split, eg: *Crabtree v Wilson [1993] PIQR Q24*

(b) For differing periods of dependency for adults and children

53. Two-family Households

Where parents live in separate households the Court must make an evaluation of the dependency of the dependant on the deceased. The fact that an estranged parent might thereby gain a benefit is irrelevant, per *Martin v Grey (unreported) QBD 13.5.98* where the dependant child lived with the deceased mother.

54. Dependency on services

(a) Damages are recoverable for the pecuniary value of the services provided by the deceased to the dependant, whether or not those services were replaced or the dependant has managed to forgo their need (*cf Martin v Grey*).

(b) A dependant is not prima facie entitled to provision making him better off, however, the commercial cost of replacing the services (eg by a housekeeper) will be awarded where reasonable. The provision of care by the surviving parent ceasing employment may lead to a calculation of the loss by reference to their loss of earnings where reasonable, *Mehemet v Perry [1977] 2 All ER 529*.

(c) Damages in respect of care should take into account the special nature of the care provided by a mother, *Regan v Williamson [1976] 1 WLR 305*.

55. Dependency on pension

Dependency on pension should be treated as if on earnings, *Pidduck v E Scottish Omnibuses Ltd* [1990] 1 WLR 993 although the actual receipt of a surviving spouses pension will be a benefit to be disregarded under s. 4 FAA 1976.. No recovery will be made for loss of the chance of receiving a widows pension after retirement age when that is actually received prior to it, *Auty v NCB* [1985] 1 WLR 784.

56. Dependency on children

(1) Children residing with the dependent parent

The Court awarded dependency on the basis of a son's household contribution, reduced for the prospect of his having married and left home, *Dolbey v Goodwin* [1955] 1 WLR 553.

(2) The prospect of support in retirement

An award may be made if the prospect were real. An award was made to the immigrant parent of 2 deceased daughters who were medical practitioners, where the dependant would have resided with them and could not recover his money from Iraq, *Kandalla v British European Airways* [1980] 1 All ER 341.

57. Questionable sources of earnings

(1) The known proceeds of crime may amount to a dependency but are barred from being claimed by the doctrine of *ex turpi causa* *Burns v Edman* [1970] 2 QB 541, [1970] 1 All ER 886.

(2) The same applies where the widow knew that the earnings in part derived from benefit fraud, *Hunter v Butler* [1996] RTR 396

(3) Where the dependent is not complicit in the wrong doing it is possible that a claim for dependency may still arise, *LeBagge v Buses Ltd* [1958 NZLR 630] (a milkman delivering milk in breach of a working hours regulation; the contract on which the dependency was based was lawful; the method of performance was not)

(4) Where the Deceased had failed to account fully to the revenue the dependent could still claim dependency on the basis of the net income calculated as if lawfully declared, *Duller v SE Lincs Engineers* [1981] CLY 585.

58. Estate duty

A widow and son were able to claim as the loss of expectancy of a future pecuniary benefit the increase in estate duty (now inheritance

tax) caused by the deceased dying within 7 years of an inter vivos gift,
Davies v Whiteways Cyder Co Ltd [1975] QB 262.

Benefits resulting from the death

59. s. 4 FAA 1976

"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."

60. The issue is extremely fact sensitive, *Wood v Bentall Simplex [1992] PIQR P32.*

61. Benefits are not restricted to pecuniary benefits

Where a child had lived with her unreliable mother, who died, subsequent to which she received a higher quality of care in the family of her father and step mother, this was held to be a benefit to be disregarded, *Stanley v Saddique [1992] 1 QB 1.*

62. Replacement of care by the father

Where following the death the father provided care which had previously wholly been provided by the mother, this was a benefit resulting from the death to be disregarded, *MS v ATH [2002] EWCA civ 792*.

63. A Widow's pension

Receipt of a widows pension in place of a deceased's husband's pension was a benefit to be disregarded, *Pidduck v Eastern Scottish Omnibuses [1990] 1 WLR 993*.

64. Adoption

Where a child who's parents were killed was subsequently adopted by her aunt and uncle, the adoption extinguished the claim for dependency on the mothers services and set off against the income of the uncle (now adoptive father) against the financial dependency on the natural father), *Watson v Wilmott [1991] 1 QB 140, [1991] 1 All ER 473, QBD*.

65. *Arnup v MW White Limited [2008] EWCA civ 447*

(a) D tortfeasor employer made 2 payments (total £229,000 odd) to widow from "death benefit scheme" and "employee benefit trust."

- (b) The benefits accrued as a result of the death (S. 4 FAA 1976) and neither ought to be deducted from the dependency claim.
66. An award pursuant to a claim made under the *Pneumoconiosis etc. (Workers' Compensation) Act 1979* was not a "benefit" for the purpose of the *s.4 Fatal Accidents Act 1976* and was therefore to be taken into account when assessing damages under the 1976 Act, *Cameron v Vinters Defence Systems Ltd [2007] EWHC 2267*

Apportionment

67. The Court will advance the majority of the award for the use of the surviving parent to provide for the child, *Rawlinson v Babcock & Wilcox Ltd [1966] 3 All ER 882*.

Disputes between dependents

68. In the event of a dispute as to who is a dependant, this can be decided as a preliminary issue: *Pounder v London Underground Ltd [1995] PIQR P217* per Sir Michael Davies. If there is a conflict between dependents they should be separately representation.

69. The Court is required to divide the award between dependents (s. 3(2) FAA 1976)
70. On a dispute between dependents the Claimant may apply to the Court for directions, *re Beddoe [1893] 1 Ch 547*.
71. A payment in to Court is in satisfaction of the cause of action and does not require to specify how it is divided (s. 3(6) FAA 1976).

Settlement

72. It is a condition precedent to the validity of an agreement between the claimant and defendant that:
- (a) Each dependent who wishes to and is party to the claim has approved the agreement, *Jeffrey v Kent cc [1958] 3 All ER 155*.
 - (b) The Court has approved the settlement in respect of each protected party. Agreement is only binding on approval, *Dietz v Lennig Chemical Ltd [1969] 1 AC 170*

Appeal

73. An individual Dependent may appeal and the Court of Appeal increase the original award without altering the awards to other dependents, *Mead v Clarke Chapman & Co Ltd* [1956] 1 All ER 44.

Enforcement

74. Although the statute creates (or preserves) only 1 cause of action each dependent is entitled to damages for the loss to him personally, *Pym v Great Northern Rly Co* (1863) 4 B & S 396 at 407.

Insurance

75. *BAI (Run Off) LTD v Durham* [2012] UKSC 14

In mesothelioma compensation claims, employers' liability insurance policies covering employers for disease contracted or injury sustained during the relevant insurance period applied to cases where the disease was caused during the insurance period, not merely when the disease manifested itself. Additionally exposure of an employee to asbestos in breach of duty could properly had a sufficient causal link with subsequently arising mesothelioma for the policies to respond.

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Appendix 1

Statutes

1 Right of action for wrongful act causing death

(1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

(2) Subject to section 1A(2) below, every such action shall be for the benefit of the dependants of the person ("the deceased") whose death has been so caused.

(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.

(4) The reference to the former wife or husband of the deceased in subsection (3)(a) above includes a reference to a person whose marriage to the deceased has been annulled or declared void as well as a person whose marriage to the deceased has been dissolved.

[(4A) The reference to the former civil partner of the deceased in subsection (3)(aa) above includes a reference to a person whose civil partnership with the

deceased has been annulled as well as a person whose civil partnership with the deceased has been dissolved.]

- (5) In deducing any relationship for the purposes of subsection (3) above—
- (a) any relationship [by marriage or civil partnership] shall be treated as a relationship by consanguinity, any relationship of the half blood as a relationship of the whole blood, and the stepchild of any person as his child, and
 - (b) an illegitimate person shall be treated as the legitimate child of his mother and reputed father.
- (6) Any reference in this Act to injury includes any disease and any impairment of a person's physical or mental condition.]

1A Bereavement

(1) An action under this Act may consist of or include a claim for damages for bereavement.

(2) A claim for damages for bereavement shall only be for the benefit—

(a) of the wife or husband [or civil partner] of the deceased; and

(b) where the deceased was a minor who was never married [or a civil partner]—

(i) of his parents, if he was legitimate; and

(ii) of his mother, if he was illegitimate.

(3) Subject to subject (5) below, the sum to be awarded as damages under this section shall be [£11,800].

(4) Where there is a claim for damages under this section for the benefit of both the parents of the deceased, the sum awarded shall be divided equally between them (subject to any deduction falling to be made in respect of costs not recovered from the defendant).

(5) The Lord Chancellor may by order made by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament, amend this section by varying the sum for the time being specified in subsection (3) above.]

3 Assessment of damages

- (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.
- (2) After deducting the costs not recovered from the defendant any amount recovered otherwise than as damages for bereavement shall be divided among the dependants in such shares as may be directed.
- (3) In an action under this Act where there fall to be assessed damages payable to a widow in respect of the death of her husband there shall not be taken account the re-marriage of the widow or her prospects of re-marriage.
- (4) In an action under this Act where there fall to be assessed damages payable to a person who is a dependant by virtue of section 1(3)(b) above in respect of the death of the person with whom the dependant was living as husband or wife [or civil partner] there shall be taken into account (together with any other matter that appears to the court to be relevant to the action) the fact that the dependant had no enforceable right to financial support by the deceased as a result of their living together.
- (5) If the dependants have incurred funeral expenses in respect of the deceased, damages may be awarded in respect of those expenses.
- (6) Money paid into court in satisfaction of a cause of action under this Act may be in one sum without specifying any person's share.]

S.5 Contributory negligence

Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under the [Law Reform \(Miscellaneous Provisions\) Act 1934](#) the damages recoverable would be reduced under [section 1\(1\)](#) of the Law Reform (Contributory Negligence) Act 1945, any damages recoverable in an action . . . under this Act shall be reduced to a proportionate extent.

Limitation Act 1980

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.

Appendix 2

Practical Exercises

1. Cordelia, the Claimant, is the wife of Andy. 5 years ago she left him for Kevin. They never commenced divorce proceedings. After living with Kevin for 4 years she left him and returned to live with Andy about a year ago. Two months ago Andy was killed in motorcycle accident.
 - (a) Can Cordelia bring a claim for dependency?
 - (b) Would it make any difference if Decree Absolute had been granted?
 - (c) Would it make any difference if Andie were a woman and she and Cordelia had entered into a Civil Partnership?

2. Bill, aged 65 died last month from lung cancer contracted when exposed to coal dust in the 1960s. 5 years ago he started living together with Juliet.
 - (a) Can she bring a claim for dependency?
 - (b) What if prior to the relationship Bill had been diagnosed, brought proceedings and they had been settled?

3. Ida was the wife of Fred. They spilt up acrimoniously but never divorced. On 15th January 2004 he was injured in a road traffic accident fracturing his foot. The fracture became infected and on 15th

March 2007 he died. Ida only learnt of his death on 10th September 2007. Can she make a claim for dependency?

4. Maria and John started a relationship 5 years ago. Both divorcees each owned a house in separate towns. After a few months they started regularly spending 2 - 3 nights together in one or other of their houses. Neither wished to get married. John wished to have children but Maria did not. Her evidence is that they talked about their future together and John wished to remain with her. John's sister Katie will give evidence that from at least 3 years ago she considered them to be a couple. 2 months ago John was killed tortiously.

(a) Can Maria make a claim for dependency?

(b) Maria's evidence is that from 2005 onwards John retained his house because it was in negative equity. Does this alter matters?

(c) 18 months ago Maria became pregnant and 9 months ago gave birth to a daughter. Does this alter matters with regard to Maria's claim?

5. Freddie was born 2 months after his father Fred was killed? Can Freddie's mother make a claim for dependency on Freddie's behalf?

6. Jim is the father of Billy, who died aged 10. Jim and Annie, Billy's mother, never married and 2 years ago Annie left them.

(a) Can Jim claim a bereavement award?

- (b) Would it make any difference if Jim were the tortfeasor.
 - (c) If Billy would have received payment from a trust fund when he reached the age of 18, can Jim claim this?
7. Paul and Heather married and lived together 2 months before splitting up and commencing acrimonious divorce proceedings. It is alleged that Heather arranged for Paul's house to be burned down. Paul subsequently died of natural causes.
- (a) Can Heather Claim a bereavement award?
 - (b) If it was Heather who died could Paul claim?
 - (c) Would it make any difference in either situation if decree nisi had been pronounced before the death?
8. Barry and Yvonne, a devoted married couple, are involved in a road traffic accident. Barry is killed. Yvonne suffered serious injuries including Post Traumatic Stress Disorder caused by the loss of Barry. Can she also claim a bereavement award or is this double recovery?
9. Yvonne recovers quickly and after a year remarries. Does this end her claim for dependency? Would it make any difference if she and Barry had not been married or if the roles were reversed and it was Barry who had survived?
10. Katie was the pillion passenger on her own motorcycle driven by her longstanding boyfriend Kurt. The motorcycle was involved in an

accident with a car driven by Donald. Kurt is killed and Katie is injured. Kurt and Donald were each equally to blame for the collision.

- (a) What causes of action does Katie enjoy?
- (b) Could the same solicitors represent the family at the inquest and Katie in her civil claim?
- (c) What if the accident were partially due to a mechanical defect in the motorcycle caused by Katie's failure to get it serviced for 2 years?

11. Dougal's wife Kathleen is killed tortiously. Can Dougal claim any of the following items:

- (1) The cost of repatriating the body to Ireland
- (2) The funeral
- (3) A memorial costing £4,000
- (4) A memorial service.
- (5) A smart new set of mourning clothes
- (6) A wake?

12. Benedict and Beatrice were married for 10 years. They had 2 children aged 2 and 4. Benedict earned £20,000 per annum. Beatrice also earned £20,000 per annum until their first child was born. She had not intended to return to work until both children were at school. Benedict is killed in an accident:

- (1) How in principle should the dependency claim be calculated?

- (2) Ought the Court to take account of Beatrice's earning capacity?
 - (3) Would it make any difference if they had no children and Beatrice had intended to give up work but had not done so prior to the death?
 - (4) Would it make any difference if Benedict were likely to have been promoted?
 - (5) What if there were no children and either spouse had committed adultery?
13. Paul is run over by a lorry. He is in a coma for 2 weeks, on a ventilator for a further 2, appears to recover for a further 2 and then acquires an infection in hospital and dies. Can the estate recover damages for pain, suffering and loss of amenity?
14. Eddie has developed lung cancer tortuously and the prognosis is that he is likely to die within 1 year. Can he claim the costs of his own funeral?