



FATAL ACCIDENT CLAIMS

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Christopher was called to the Bar in 1966 and took silk in 1990. He sits as a Deputy High Court Judge and is a qualified mediator. He has a wide experience of personal injury litigation at all levels including the House of Lords and the Court of Appeal. He appeared in *Wells v Wells*, *Page v Sheerness Steel* and *Heil v Rankin*. He deals with all types of catastrophic claims and high value fatal accident claims. He has recently been involved in a 6 week case concerning noise induced hearing loss which is on its way to the Court of Appeal and in 2 fatal accident claims which are also on their way to the Court of Appeal. Other cases in which he appeared include *Hashtroodi v Hancock*; *Halsey v Milton Keynes NHS Trust*; *Cranfield v Bridgrove*; *Evans v Pontypridd*; and *Doyle v Wallace*.

Discussion Paper on Possible Problems under FAA 1976

1. Question

- a. Is there any, and if so what, claim for loss of dependency where following the death of a deceased, who ran a family business, other members of the family take on additional responsibility with the result that the business continues to grow at same rate as before the accident and the dependants suffer no loss of income.

2. Principles

- a. S.3 of the FAA provides the court may award 'damages apportioned to the injury resulting in the death'. This means that damages may be awarded for pecuniary loss, actual and prospective, suffered by the dependants.

Taff Vale Railway v Jenkins [1913] AC 1 per Lord Haldane

Davies v Powell Duffryn Associated Collieries [1942] AC at617 per Lord Wright

- b. To what extent do the courts take into account events subsequent to the death? The general rule is that “Courts in assessing damages are entitled to inform their minds of the circumstances which have arisen since the cause of action occurred and throw light on the realities of the case”, Scott LJ in *Williamson v Thomeycroft*.
- c. Does it matter that the claim arises out of a business partnership? Sometimes, yes it does. For a claim to be successful the loss must arise from the family relationship rather than the business relationship; *Burgess v Florence Nightingale Hospital for Gentlemen* [1955] 1QB 349
- d. Does the loss have to arise out of the prospective earnings or profits that the deceased would have made? The answer is no. A claim can be made for any loss of any financial benefit that the dependant might have expected had the deceased lived. For example, additional estate duty payable by the dependants as a result of the death was recoverable in *Davies v Whiteways Cyder* [1975] QB 262.
- e. Does it matter that the dependants are no longer children in need of support? No, it does not. There is no age on dependants listed in section 1(3) of the FAA1976.
- f. Does it matter that the dependant is wealthy? No, it does not. Dependency claims are not means tested. The wealth of the dependant does not as such reduce or disentitle a claim for loss of dependency, *Shiels v Cruickshank* [1953] 1 WLR 536.
- g. If the deceased share of the partnership assets pass to the dependants does this affect the claim? Yes. Capital assets left by the deceased to a dependant together with income derived from the asset are not taken into account as part of the dependency or as a deduction from it *Wood v Bentall Simplex Ltd* (1992)1 PIQR P 332. Any income that derives from an asset which the dependant continues to receive cannot represent a loss.

- h. But, if the capital asset does not pass to the dependant any loss of income deriving from the asset may be taken into account as part of the loss of dependency.
- i. Where income is derives partly from capital and partly from work of the deceased then if the dependant inherits the capital the loss of dependency is restricted to that part which derives from the work done by the deceased.

3. Historical Background

- a. Under the FAA 1846 all benefits received by the dependants were deductible with the result that the dependants only recovered the net pecuniary loss.
- b. Over the years the list of benefits to be disregarded was increased by successive Acts of Parliament until eventually in 1982 the Administration of Justice Act amended s.4 of the 1976 Act by providing that benefits that accrue 'from the estate or otherwise as a result of the death' shall be disregarded.
- c. Lord Diplock had already said in *Cookson v Knowles*[1979] AC 556 that
"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, into the same economic position as they would have been had their late husband lived".
- d. Accordingly, the court, when assessing loss of dependency, cannot simply compare the financial position of the dependants pre-accident with their position post- accident to determine the extent of the loss. This may have been the original purpose of the FAA 1846 but it is no longer the position under the FAA 1976.

4. Authorities

- a. *Wood v Bentall Simplex* [1992] PIQR P332: the deceased and his wife ran a family farm in partnership with their two sons. Following the death of the deceased the sons claimed loss of dependency derived partly from the deceased's labour and partly from the asset value of his farm. Beldam and Staughton LJJ considered that the loss of dependency should be restricted to that part which derived from the value of the deceased's work on the farm as the asset value of the farm had passed to the dependants following the death.
- b. In *Cape Distribution v O'Loughlin* [2001] EWCA 178 the deceased was a property developer. On his death, his widow inherited the assets of the business in the form of the property portfolio but she did not have the necessary aptitude or management to run the business.. The Court of Appeal held that the skills that the deceased brought to bear on the business and the time, effort and energy he devoted to maintaining and building up the portfolio were clearly of economic benefit to his dependants which had been lost by reason of his death. The value of those services was assessed by reference to what it would have cost to employ someone with the same skills as the deceased to manage the portfolio. It was immaterial that the widow had not employed a manager and had sold some of the properties.
- c. In *Auty v National Coal Board* [1985] 1WLR 784: Oliver LJ quoting the words of the statute said the court must first establish what 'injury has resulted to the dependants from the death'.

5. Answer

- a. The dependants clearly lost the financial benefit of the services that the deceased would have provided had he lived.

- b. That loss derived essentially from the family relationship. It was therefore claimable as loss of dependency. It was not a loss that derived from a business relationship.
- c. It was immaterial to consider what the dependants did with the business after the death.
- d. It is not appropriate merely to look at the accounts of the business to determine the extent of the loss, because
 - i. The other members of the family had taken on additional work and responsibility.
 - ii. The success and profits may have been affected by external factors.
 - iii. The deceased had he lived might have made the business even more profitable.
- e. The better way of assessing the value of the loss would be by reference to what it would have cost to replace the value of the services that the deceased would have provided had he lived.

6. Comment

- a. The value of any additional work or responsibility taken on by a dependant following the death should not reduce the dependant's claim for loss of dependency.
- b. A dependant is not under a duty to take on any additional work. It cannot be said that he has failed to mitigate his loss if for any reason he decides not to do so.
- c. Similarly a dependant's claim for loss of dependency should not be reduced as a result of additional work and responsibility taken on by other dependants. Any benefit that he receives from their additional work or responsibility is immaterial to the assessment of loss or should be disregarded as being a benefit received as a result of the death.
- d. If additional work by a dependant had the effect of reducing his claim for loss of dependency, the effect would be that the benefit of the additional work would accrue to the defendant rather than the dependant. This remarkable proposition cannot be right.

- e. If it were the position, a dependant would be better advised to employ someone to take over the deceased's responsibilities rather than take on any additional work himself as the cost of as the cost of employing someone else would be recoverable as damages..

7. **Second Question**

- a. Where following the death of an employee, a dependant of the deceased receives a sum of money from a trust set up by the employer specifically for the benefit of his employees and their dependants should that sum be deducted from any damages that the employer might otherwise have to pay to the dependant under the FAA or should the payment be disregarded as being a benefit pursuant to s.4 of the Act.

8. **Construction of the Fatal Accidents Acts s.3 Assessment of Damages**

- a. This section provides that damages may be awarded as are 'proportioned to the injury resulting from the death'. This wording might suggest that payments made by or on behalf of a defendant should be taken into account, unless there is express provision otherwise.

9. **Construction of the Fatal Accidents Act s.4 Assessment of Damages**

- a. This section requires that 'benefits which have or will or may accrue to any person from [the deceased's] estate or otherwise as a result of his death shall be disregarded'.
- b. Benefits that accrue to a dependent 'from the [deceased's] estate as a result of his death' are readily identifiable. They include all assets and benefits passing to the dependant from the estate of the deceased, either under his will or on intestacy. Such sums clearly have to be disregarded.

- c. Other benefits that accrue to a dependent 'otherwise as a result of [the deceased's] death' also fall to be disregarded. They would include any insurance, pension or state benefits to which the dependent becomes entitled by reason of the death.
- d. But the section does not provide that all benefits received by the dependants following the death are to be disregarded. The words used are that benefits to be disregarded are those that 'accrue as a result of [the deceased's] death'. This suggests that there should be a clear causal connection in the sense that the death should be the cause of the dependant's entitlement to the benefit.

10. Ex gratia payments made by or on behalf of a Defendant

- a. The courts have already recognised that there are good public policy reasons for taking ex-gratia payments into account in as mitigation of damages in personal injury actions *Pirelli General Plc v Gaca* [2004] EWCA Civ 373 paras. 30-31. The same principle should apply in fatal accident claims.
- b. The public policy reasons for taking ex gratia payments by a defendant into account in Fatal Accident claims which arise out of accidents at work are as follows:
 - i. Employers should be encouraged to make benevolent payments to dependants following the death of an employee. By making such payments deductible it is likely to encourage employers to make payments whereas making them non-deductible is likely to have the contrary effect: *Pirelli General* paras.28-31
 - ii. Employers should be encouraged to set up schemes and trusts for the purpose of making ex-gratia payments. Making such payments deductible would encourage employers to do so whereas making them non-deductible would have the contrary effect.

- iii. Defendants should not be required to make a payment that has the effect of making the defendant pay for the same loss twice. An ex gratia payment should mitigate a defendant's liability in damages pro tanto: Lord Bridge in *Hunt v Severs* [1994] 2 AC at 358.

- c. The scope and purpose of FAA s.4 should be construed to accord with principles of public policy. There is no express or necessary implication in the section that requires ex gratia payments to be disregarded. The causal connection between the death and the entitlement does not really exist because no entitlement arises until the defendant decides to make the payment. The true cause of the payment is the act of benevolence rather than the death. Such construction as to the meaning of s.4 of FAA does not require any undue constraint on the words used but flows from their natural and ordinary meaning.

11. Relevant Authorities

- a. There is no authority that requires ex gratia payments by a defendant to be disregarded either at common law or under s.4 of the Act.
- b. *Hay v Hughes* [1975] QB 790: both parents were killed, the value of grandmother's services was not taken into account as the benefit resulted from the generosity of the grandmother, not from the death of the mother.
- c. *Stanley v Saddique* [1992] QB 1: an infant child following the death of his mother went to live with his father and stepmother and was absorbed as part of the new family, the benefit arose as a result of the mother's death and therefore was disregarded under s.4 of the Act. Defendant's submission that s.4 related only to direct pecuniary benefits was not accepted.
- d. *Hayden v Hayden* [1992] 1 WLR 986: additional services were provided by a father to his children following the death of their mother, the father was also the defendant, accordingly the

value of his additional services were taken into account. Sir David Croom- Johnson at p 998

said:

'It is preferable to say that what [the defendant] has done has had, as one result, the reduction of his liability. ...

Parker LJ at page 1005 said:

'Suppose for example.... that the tortfeasor was a trained nanny and, appalled by what she had done, gave up her job and provided the child with services infinitely better than those provided by the deceased's mother. Can it possibly be the law that she must then pay the cost of employing another nanny? I think not'...

- e. *R v Criminal Injuries Compensation Board ex p.K* [1999] QB 1131: Rougier J compared *Stanley v Saddique* with *Hayden v Hayden* and suggested that in *Hayden* the services of the father were to be taken into account because making him pay for them would effectively be awarding triple damages [page 1143]
- f. *H v S* [2003] QB 965: on facts similar to *Stanley v Saddique* the court confirmed that where infant children are living with and are dependent on one parent, with no support being provided by the other parent and the parent with whom they are living is killed with the result that the other parent (who is not the tortfeasor) houses and takes responsibility for the children, the support they enjoy after the accident is a benefit that has accrued as a result of the death and should therefore be disregarded pursuant to s.4.
- g. *McIntyre v Harland & Wolff plc* [2006] EWCA Civ 287: payments payable to the deceased before death from his employers provident fund scheme became part of his estate and passed to his widow on his death. As the payments accrued to the widow from the estate of the deceased they were disregarded as this was the express effect of s4 of the Act.

- h. *Auty v NCB* [1985] 1 WLR 784: the widow became entitled to a widow's pension which was payable either on the death of her husband in service or after retirement. The two conditions were mutually exclusive. The pension was disregarded in assessing loss of dependency based on earnings and retirement pension that the deceased would have received had he lived. But she was not entitled to claim loss of dependency in respect of the widow's pension that she would have received had the deceased lived a full life span because she was already receiving the pension and therefore had suffered no loss. The fallacy in the claim was that it premised a loss to have occurred which had not occurred.

12. Earlier Fatal Accident Act Statutes

- a. There is nothing in the earlier statutes to the effect that ex gratia payments by a defendant should be disregarded. Accordingly there is no reason to assume that the legislature intended such payments to be disregarded by s.4 of the 1976 Act.(as amended).
- b. Fatal Accidents Act 1846 s.2 provided: ' in every such action the jury may give such damages as they think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.
- c. Fatal Accidents (Damages) Act, 1908, s. 1, provided: "In assessing damages in any action whether commenced before or after the passing of this Act under the Fatal Accidents Act 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance whether made before or after the passing of this Act."
- d. Widows', Orphans' and Old Age Contributory Pensions Act, 1936 (re-enacting s. 22 of the Act of 1929) s. 40 provided: "In assessing damages in any action under the Fatal Accidents Acts, 1846 to 1908, whether commenced before or after the commencement of this Act, there shall not be

taken into account any widow's pension, additional allowance or orphan's pension payable under this Act."

- e. Law Reform(Personal Injuries Act 1948 s.2(5) provided: "In assessing damages in respect of a person's death in any action under the [Fatal Accidents Act, 1846](#) , as amended by any subsequent enactment, there shall not be taken into account any right to benefit resulting from that person's death.

(6) For the purposes of this section—

- (a) the expression 'benefit' means benefit under the National Insurance Acts, 1946, or any corresponding Act of the Parliament of Northern Ireland;
- (b) expressions used in the National Insurance Acts, 1946, for any description of benefit under those Acts have the same meanings as in those Acts, except that they include also the like Parliament of Northern Ireland;
- (c) an industrial disablement gratuity shall be treated as benefit for the period taken into account by the assessment of the extent of the disablement in respect of which it is payable".

13. Fatal Accidents Act 1959 s.2(1) provided: "In assessing damages in respect of a person's death in any action under the Fatal Accidents Act, 1846,there shall not be taken into account any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death.

(2) In this section—'benefit' means benefit under the National Insurance Acts, 1946 (as amended by any subsequent enactment, whether passed before or after the commencement of this Act), or any corresponding enactment of the Parliament of Northern Ireland and any payment by a friendly society or trade union for the relief or maintenance of a member's dependants;

'insurance money' includes a return of premiums; and 'pension' includes a return of contributions and any payment of a lump sum in respect of a person's employment".

14. Fatal Accidents Act 1976 s(1) originally provided: "In assessing damages in respect of a person's death in an action under this Act, there shall not be taken into account any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death.

(2) In this section 'benefit' means benefit under the enactments relating to social security, including enactments in force in Northern Ireland, and any payment by a friendly society or trade union for the relief or maintenance of a member's dependants, 'insurance money' includes a return of premiums, and 'pension' includes a return of contributions and any payment of a lump sum in respect of a person's employment."

15. Administration of Justice Act 1982 s3(1) Act replaced s4 of FAA 1976 with the following section: "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."

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