

FATAL ACCIDENTS

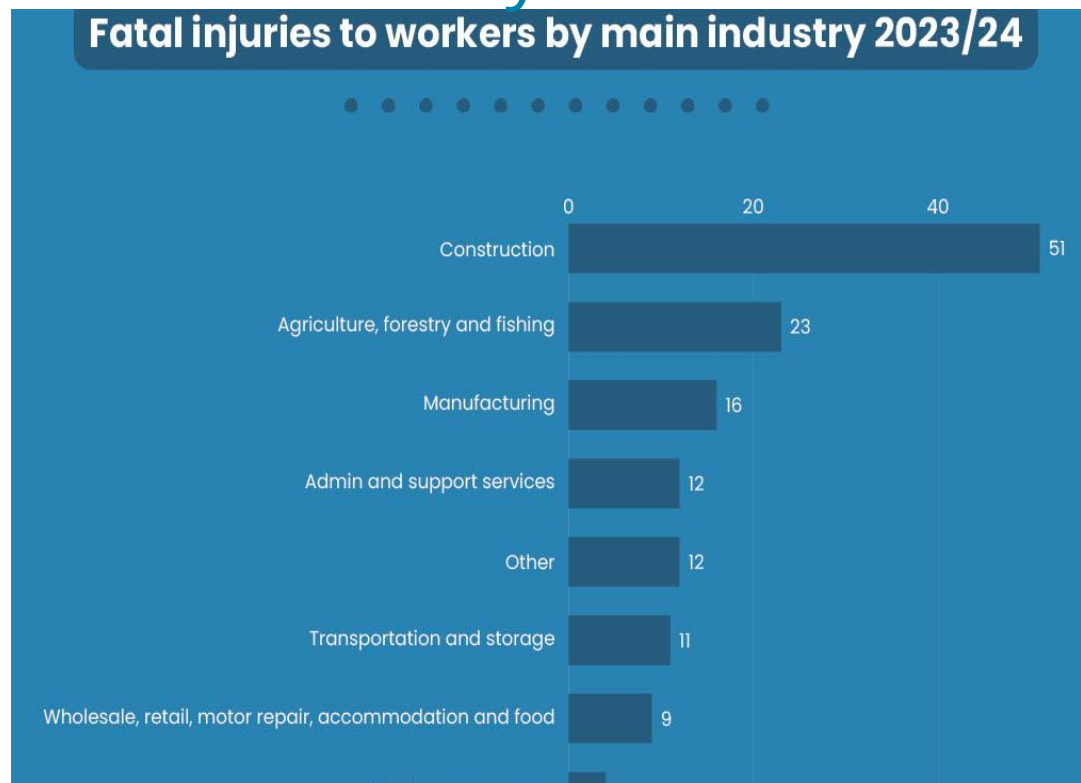
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Fatal Accidents in Great Britain 2023/4

- In 2024 there were 1633 deaths in road traffic accidents and 138 at work.
- Stable over recent years.
- Largest single type of road user was motorcyclist.
- At work, it was those in construction followed by agriculture/forestry/fishing.
- Falls from height and being struck by a moving object account for 70% of all work deaths.
- Fourth largest was 'Administrative and Support Services'.

HSE Fatality Statistics 2023/4

Fatal injuries to workers by main industry 2023/24



The 1976 Act (1)

- If in doubt, refer to the act
'The sole legal basis on which a claim may be made for bereavement or loss of dependency'
Lord Sumption in *Cox v Ergo Versicherung AG* [2014] UKSC 22 at [6]
- Usual personal injury concepts unhelpful
- Criticism both judicial and academic
- *'an artificial and conjectural exercise'* – Lord Diplock in *Cookson v Knowles* [1979] A.C. 356
- Atiyah – *'one of the most irrational pieces of law 'reform' ever passed by parliament'*

The 1976 Act (2)

- The dependency is fixed at the date of death
- A reasonable expectation of benefit test
- No requirement to mitigate
- Collateral benefits set aside
- Administration of Justice Act 1982 brought about s4 1976 Act:

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.

Assessment

'The dependency is fixed at the moment of death; it is what the dependants would probably have received as benefit from the deceased, had the deceased not died. What decisions people make afterwards is irrelevant. The only post death events which are relevant are those which affect the continuance of the dependency (such as the death of a dependant before trial) and the rise (or fall) in earnings to reflect the effects of inflation.'

Smith LJ in *Welsh Ambulance Services NHS Trust v Williams*[2008] EWCA Civ81 at [50]

Who is a dependant? (1)

- Section 1(3), also s.1A(2) where bereavement award to be considered.
- Only in 2020 were cohabiting partners allowed a bereavement award.
- Section 1(3) a broad category but gaps.
- *Swift v Secretary of State for Justice* [2013] EWCA Civ 193. Here, a dependency claim by a cohabitee of less than six months (with a child of the relationship) was prevented by s1(3)(b). CA held this not incompatible with Art 8./Art.14 as the two year cut-off was a proportionate means of ensuring the '*requisite degree of permanence and constancy in the relationship*'.
- *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916 where exclusion of cohabitees over two years from a bereavement award for was held to be incompatible with Art.8/Art.14 ECHR. Led to 2020 amendment.
- Ex-spouse no longer living with deceased may recover.
- Simple test: proof of dependency?

Who is a dependent? (2)

- *Kotke v Saffarini* [2005] EWCA Civ 221
- Example of analysis by court of unmarried partners' living arrangements with a view to meeting requirement that 'living in the same household' [s1 and s1A].
- Multiple factors to be considered (the *Consortium Vitae*) but abiding rule is 'household' is not the same as 'house'. Nevertheless, the court will apply a fairly rigorous test.
- Not simply living arrangements but social media and how others viewed the couple.
- Need for flexibility given changing patterns of living.

Sections 3 and 4

Section 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.

Section 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.

Section 4 therefore provides for any benefit accruing as a result of the death to be disregarded.

Sections 3 & 4 – causation first, and last

- For a time, questions of collateral benefits still debated
- Cases such as *McIntyre v Harland & Wolff Plc* [2006] EWCA Civ 287
- *Arnup v M.W. White Ltd* [2008] EWCA Civ 447 placed focus back on causation and s3.
- The practice of identifying total loss and only then disregarding benefits is pointless.
- The only question is set by section 3: What is the dependent's loss?
- Not whole answer – see *Wood v Bentall Simplex* [1992] P.I.Q.R P332, CA

Section 3 in practice – *Witham v Steve Hill Ltd*

- *Witham v Steve Hill Ltd* [2021] EWCA Civ 1312
- An example of court taking care to identify actual dependency
- Deceased husband cared for foster children while his wife worked FT. After the death she took over their care.
- Foster children are not recognised as dependents within s1(3)
- Argued by D that the lost care for children was their loss, not that of the widow.
- CA looked more broadly at the reality

Witham v Steve Hill (2)

"The reality of the claim before the judge was that the claimant lost her career as a result of her husband's death and her loss of his services. She was dependent upon him taking the role of househusband and principal carer for the children so that she was able to pursue a career in the knowledge that the children would be properly cared for. This was the finding by the judge, it reflected the evidence and provided a sound basis for his determination that the loss was that of the claimant. The fact that the children also benefitted from the deceased's care does not detract from, still less undermine, the claim of Mrs Witham." [41] per Davies LJ

Logic of this was that Mrs Witham recovered the commercial cost of care, not her lost salary and pension. This was notwithstanding the fostering arrangement required personal care from her.

Section 3 in practice – reality of loss

- *Rupasinghe v West Hertfordshire Hospitals NHS Trust* [2016] EWHC 2848
- The claimant was a doctor in the UK but was born in Sri Lanka. After her husband's death she moved back to Sri Lanka with her children.
- She claimed a past earnings dependency on the basis that she had been obliged to give up her work in the UK and accept a lower salary in Sri Lanka. Also, a future earnings dependency for the same reasons. These losses were described as a services dependency, i.e the move was prompted by the need to better care for her children whilst working.
- The court held that her actions were reasonable. However, the sums sought did not amount to a loss under s3, i.e a loss of the deceased's income or services. The reality was that this was an attempt to recover earnings lost by the surviving spouse.
- It was possible to use lost earnings by the surviving spouse as a proxy measure for loss of services previously provided by the deceased but, here, this had already been claimed as gratuitous and commercial care.

What is the dependency where the deceased ran a business?

- A number of cases, but one broad question. Did the deceased add value to the business?
- Best illustrated by reference to case law.
- *Wood v Bentall Simplex Ltd* [1992] P.I.Q.R P332, CA
- Deceased a partner in farming business where much income re-invested in the farm. Upon his death a share of that business was transferred to the widow via inheritance. Thus she received in that way part of the income generating capital. In her claim she sought the full dependency figure derived from the farm assets as a whole, however she had now received part of those assets by inheritance.
- CA held that first task is to calculate the loss to the dependants. In doing so it was necessary to try and strip out from the dependency figure that part of the income derived from the capital assets the widow had now received via inheritance. There was no question of simply disapplying what she had inherited under s4 as this sum was relevant to the assessment of what she had actually lost.
- In practice, there was no good evidence on this point and it was assumed that the deceased had worked hard and re-invested such that much of the inherited capital represented the fruits of his labour. In this way no deduction was made here, but the principle was clear: what must be assessed is the value of the deceased's services, whether as income or capital growth

Business dependency (2)

- Principle followed.
- *Cape Distribution v O'Loughlin* [2001] EWCA Civ 178
- Property development business inherited by widow but dependency existed in the form of a replacement for the deceased's 'flair, business experience and entrepreneurial skills'
- *Welsh Ambulance Services NHS Trust v Williams* [2008] EWCA Civ 81
- The deceased was the prime mover in a family business where his wife and children were partners. After his death the children took over the running of the business with success and in this way the surviving partners earned more than at the time of death.
- Held that, as the expectation is assessed at the date of death, their subsequent success was irrelevant to s3. What they had lost was a reasonable expectation of increased business success as a result of the deceased's labours and not their own.
- The award was assessed by reference to the cost of replacing the services provided by the deceased. This was the annual cost of a manager plus NI etc for the businesses.

Sections 3(3), 3(4) – Marriage and Cohabitation

- **S3(3) v s3(4)**

(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.

Section 3 in practice – State Benefits (1)

- Look at question through s3 lens.
- *Cox v Hockenhull* [2000] 1 W.L.R 750, CA
- C was a FT carer for his wife, who was killed. Before her death their income was solely state benefits, some of which related to her disability.
- D argued (1) that the claimant's dependency was on the state, not his wife, or (2) that those benefits relating to the deceased's wife's disability could not amount to a dependency under s3.

State Benefits (2)

- (1) easily dismissed. State was source of income, but this does not mean a lack of dependency which existed unless sums after death the same – which would usually be the case, albeit adjusted to reflect only one person now supported.
- As to (2), the payment of invalid care allowance (paid in respect of the husband's care for his wife) was deductible on the basis that it was not 'an injury resulting from her death' [s3(1)].
- Relying on *Burgess v Florence Nightingale Hospital for Gentlewomen* [1955] 1 Q.B. 349 (the dancing partners case), the court held that to be a 'dependency' under the Act, it must be referable to the qualifying relationship – here that of marriage – and not a mere loss as a result of the death, i.e the relationship here was that between carer and cared for, not husband and wife.
- Disability living allowance paid to Mrs Cox was nevertheless treated as part of the claimant's dependency.

Marriage and cohabitation

- *Craven v Davies* [2018] EWHC 1240 an example of the test to be applied where there is marriage breakdown. Whether there is a reasonable expectation of benefit from the deceased in a separated couple depends on proof of a real, as opposed to speculative, possibility of reconciliation. If so, a percentage falls to be applied to the amount of dependency that otherwise would have been awarded.
- Question of remarriage after the death of a spouse irrelevant [s3(3)]
- The effect of s3(4) is similar but outside a spousal dependency. Here the court may look at 'any other matter that appears to be relevant to the action'. This means the stability of the relationship and the degree, if any, the dependent could have enforced a right to financial support.
- In practice very messy and it may involve a granular examination of the relationship. In *Craven* the court declined to find there would have been a reconciliation and awarded as the dependency what would have been paid to the widow by way of maintenance. It made use of a family law barrister's advice.

Intangible benefits (1)

- Loss of a parent's/spouse's care awards
- *Regan v Williamson* [1976] 1 W.L.R 305; *Mehmet v Perry* [1977] 2 All E.R 529
- £1,500 in *Mehmet*. By 1990s it was £3,000 to the child and £2,000 to the husband (*Topp v London Country Bus* [1992] P.I.Q.R. P206)
- By 2008 it was £4,000 (*Manning v King's College Hospital NHS Trust* [2008] EWHC 3008)
- Conventional maximum about £5,000 for a young child (*Hayes v SECAMB NHS Foundation Trust* [2015] EWHC 18, by agreement, and followed in *Craven v Davies*). Inflation since, so £8,000+
- Not recoverable for an adult child (*Chouza v Martins* [2021] EWHC 1669).

Intangible Benefits (2)

Non-pecuniary loss arising from arranging alternative provision of services

- More dispute here
- *Mosson v Espousal (London) Ltd* [2015] EWHC where no award for widow who was seeking a sum for additional inconvenience of hiring outside contractors to do work formerly done by husband. Followed in *Magill v Panel Systems* [2017] EWHC 1517.
- However, in *Grant v Sec. of State for Transport* [2107] EWHC 1663 a distinction was made between the purely non-pecuniary loss of 'inconvenience' and a sum representing the cost incurred where the replacement services were not a perfect proxy for those lost.
- More recently, in *Blake v Mad Max Limited* [2018] EWHC 2135 £2,500 was awarded where a widow had to spend time arranging replacement services. 'a loss over an above the commercial cost' and 'not capable of scientific analysis'.
- Key is identifying, however vaguely, a pecuniary loss incurred in the replacement services.
- Put as part of the dependency claim for services.

Bereavement

- Statutory award currently £15,120 – since 2020
- Does not survive death of dependent [s1(1A) LRMPA 1934]
- ‘unprincipled’ and discriminatory – Parliament Human Rights Committee 2019.
- Repeated suggestions that should be amended ignored.
- Contrast Scottish ‘loss of society’ award for loss of companionship and grief. Damages (Scotland) Act 2011 enables court to look at relationship and award accordingly. £4,000 or so up to £100,000 plus.

Apportionment (1)

- One claim but individual dependencies.
- Where there are child dependents it will be necessary to obtain approval under CPR 21.10, so it requires explicit consideration. CPR 21.10(7) requires the court to be provided with details of the nature and extent of the dependency and any future earnings of the deceased.
- Where there are child dependents the bulk of any award will go to the surviving spouse as their needs will be met from the survivor's share.
- *F v Berkshire Healthcare NHS Foundation Trust* [2024] EWHC 872 an example. £925,000 award with £5,000 to each child and £62,000 to the deceased's mother.

Apportionment (2)

- Rule of thumb applied in *Young v Downey* [2020] EWHC 3457 (not disturbed on appeal).
- 25% for daughter and 75% for mother but where claim brought many years after death.
- Where there are a number of dependents not living in the same household then the percentage may be derived from the dependent's claim.
- Real risk in rare situation where widow/widower may re-marry in which case the new spouse may inherit the award in the event the survivor dies when the children are still young.