Seminar:Fatal Claims

By James Hawkins

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Profile

James undertakes general commercial and business law, including claims concerning commercial contracts. He does an increasing amount of employment work. He does personal injury work (both claimant and defendant) in fast track and multi-track cases. In his personal injury practice, he has a particular interest in cases in relation to accidents that have occurred abroad (including coach crashes and air crashes). He also has experience of Inquests.

Publications and Lectures: James contributes to client bulletins produced by Chambers in Personal Injury and Travel. He has participated in seminars for client firms on Travel, and also delivered a talk to a major insurer on aspects of the litigation of personal injury claims.

James Hawkins has recently provided a talk, with Navjot Atwal to a team of Personal Injury Solicitors on 'Fatal Claims & Inquests'. The hand-outs to the seminar are available for download here.

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Introduction

1. It is intended, in this short seminar, to summarise the main principles and points to consider when formulating and advising on a claim for damages arising out of a fatal accident. Hopefully, this will p₦2ØλŘŜ l· ΨǑKŜǑ⟧ťăúΩ ØKλǑK may be of some practical use. One or two points will be looked at in more detail. In addition, two recent Supreme Court decisions which may impact on at least some types of fatal accident claims will be discussed.

The claim fœ damages: a checklist of claims to include (or consider)

2. In the usual claim, there are two types of damages claimed: those which are claimed on behalf of the estate of the deceased, and those which are ǑfI·λϒŜŘ ŦƵ₦ úKŜ ŘŜǑŜI·ăŜŘΩă ŘŜLJŜyŘŜyűă¢

(a) Damages claimŜŘ ŦƵ₦ űKŜ ōŜyŜŦλű ƵŦ úKŜ ŘŜǑŜI·ăŜŘΩă ŜăűI·ûŜ

3. The Law Reform (Miscellaneous Provisions) Act 1934 treats as enduring for úKŜ ōŜyŜŦλű ƵŦ úKŜ ŘŜǑŜI·ăŜŘΩă ŜăűI·ûŜ ǑŜ₦űI·λϒ ǑfI·λϒă ŦƵ₦ ŘI·ϒI·ƎŜă ØKλǑK úKŜ deceased would have been entitled to bring up until the time of his or her death. These therefore include the usual past losses that would be expected in non-fatal injury claims, such as:

(i) Past loss of earnings;

(ii) Past care and assistance;

(iii) DIY and services;

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(iv) Travel expenses;

(v) Aids and equipment;

(vi) Medical expenses; and

(vii) Any miscellaneous expenditure or losses.

Interest should also not be forgotten.

4. Many of these will obviously apply only if there has been a period of time ōŠűøŠŠy˘űKŠ ƛy?dzNè l·yŘ űKŠ ŘŠŎŠl·ăŠŘΩă ŘŠl·úK℗ Ly˘űKŠăŠ Ôl·ăŠăΣ l·y˘l·øl·NŘ 2₮ general damages is possible too. However, where death occurs instantaneously, or perhaps within a few minutes of the accident which causes injury, an award of general damages is unlikely.

5. A claim has also succeeded (Drake v. Foster Wheeler Ltd [2011] 1 All ER 63, High Court) in respect of hospice care received by the deceased, where the hospice was a charity and did not charge fees to those who used its services. A proportion of the cost to the hospice of providing those services was l·øl·NŘŠŘ ű2 űKŠ ŘŠŎŠl·ăŠŘΩă ŠăűI·ûŠΣ øK2 øƛăKŠŘ ű2 Y˘l·ke a donation to the hospice. The amount was calculated on the proportion of costs for which the hospice did not receive PCT funding, and the family of the deceased had made it clear that any money received under this head of claim would be paid immediately to the hospice. The Judge approached the matter along similar lines to a gratuitous care claim. He added:

"Claims for hospice care are inevitably infrequent. They can only arise where a lingering and painful dying period has occurred as a result of illness or injury

caused by the actionable acts or omissions of a tortfeasor. Such claims have always been rare. However, they may now become more frequent because it is only relatively recently been possible to recover damages on behalf of a deceased whose lingering and painful death has been caused many years previously by unwarranted exposure to asbestos dust or similarly noxious substances. Recovery of the costs of hospice care in such cases does not give rise to a fear that the so-called floodgates will open or that a new head of recovery has suddenly been opened up. Rather, recovery is consistent with established principles and it is unlikely that there will be a significant number of claims in the future."

6. A statutory exception to the general position under this Act that a claim is made for those losses that the deceased could have claimed is that funeral expenses incurred by the estate are recoverable: section 1(2)(c). (A claim by a living mesothelioma sufferer for future funeral expenses was held to be wrong in principle in Watson v. Cakebread Robey Ltd [2009] EWHC 1695 (QB). There is a previous decision which suggests the contrary ς Bateman v. Hydro Agri (UK) Ltd (15.9.95) ς but this was not followed in Watson.)

7. There have been a number of decisions as to what expenses are recoverable dzyŘŜℕ ŭĸŜ ŘŜšǍÖℕ⅄LJŭ⅄2y˜ ά₮dzyŜℕI·f ŜÈLJŜyãŜšé℗ ¢ĸŜ Ö2ăŭă 2₮ I· ĸŜI·Řăŭ2yŜΣ 2₮ embalming the body, of transporting the body to the grave and of wreaths have been held to be recoverable. On the other hand, the costs of a wake and of a memorial service have been held not to be recoverable.

8. It should be noted that claims for future loss of earnings of the deceased are specifically excluded by section 1(2)(a), as are any claims for exemplary damages.

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(b) Claims for the dependents of the deceased

9. There are two main heads of loss that can be claimed on the part of certain dependents of the deceased under the Fatal Accidents Act 1976:

(i) Damages for bereavement; and

(ii) Damages for loss of income and services dependency.

In addition, the 1976 Act allows recovery of funeral expenses incurred by the dependents. Double recovery is not permitted, so if the dependent who incurred the expense is also bringing the action for the estate the expenses can only be recovered under either the 1934 Act or the 1976 Act.

10. The first stage to each head of claim under the 1976 Act is to determine whether or not the relationship between the claimant and the deceased was such that the claimant falls into one of the specified categories of dependents who can bring a claim. This is different in respect of the claims for damages for bereavement and damages for loss of dependency.

11. Claims for damages for bereavement may be made for the benefit of:

(i) The wife, husband or civil partner of the deceased; or

(ii) ¢KŜ ŘŜŎŜIáŜŘůå parents where the deceased was an unmarried child (although if the deceased was an illegitimate child, the claim is for the benefit of the mother).

12. Damages are set by statute (subject to revision) at £11,800. Where both parents are entitled to claim, this sum is to be divided equally between them. Interest may be awarded on this sum from the date of death.

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13. There has been considerable criticism of the restrictive eligibility criteria for an award of bereavement damages. In particular, it is widely felt that the entitlement should extend to so-ǑǏffŜŘ άǑƨΥΥƨΥ fǏ·ά ăLJƨdžăŜăɛ¢ ¢ĶŜ [Ǐ·ά Commission published a paper to this effect in 1999. Eventually, the Civil Law Reform Bill 2010 proposed extending eligibility to cohabitants of the deceased of two years or more, as well as to children whose parent had ŘʎŜŘ¢ {ʎ IŜyŊè .Ŋƨƨ]Ŝ ó₮ƨŊΥŜŊ₮è .Ŋƨƨ]Ŝ [Wó ĶǏ·ă ØŊʎűűŜyˇűĶǏ·ű ĶŜ άŘŜLJfƨŊŜѡŘ6ɛ űĶŜ fŜyƎűK ƨ₮ ûʎΥŜ ûĶǏ·ú ădzǑK ŊŜ₮ƨŊΥ ĶǏ·Ř úǏ·]ŜyΣ Ǐ·yŘ ûĶǏ·ú άƎŊŜǏ·ű dzyĶǏ·LJLJʎyŜää Ǐ·yŘ ĶǏ·ŊŘăKʎLJɛ ĶǏ·Ř ōŜŜyˇǑǏ·dzăŜŘ¢ I ƨØŜØŜŊΣ ʎű Ǐ·LJLJŜǏ·Ŋă ûĶǏ·ű such unhappiness is to continue, as the Government has announced that it has decided not to ʎΥLJfŜΥŜyű ûĶŜ .ʎff ƨyˇűĶŜ ōǏ·ăʎă ûĶǏ·ú ʎű άØƨdzfŘ yƨú Ǒƨyű[1]ŊʎōdzúŜ ûƨ ûĶŜ ŘŜ₮ʎØŜŊè ƨ₮ ûĶŜ DƨØŜŊyΥŜyűΩă]Ŝè LJŊʎƨŊʎűʎŜăɛ[1].

14. A wider class of claimant is provided for in claims for loss of dependency. Those who may claim are:

(i) Wife or husband, or ex-wife or ex-husband;

(ii) Civil partner or former civil partner;

(iii) Unmarried partners who had been living under the same roof as the deceased immediately before his or her death and for at least 2 years;

(iv) Parent or other ascendant (grandparents, etc);

(v) A person who was treated by the deceased as his parent;

(vi) Child or other descendant (grandchildren, etc);

[1] Report on the Implementation of Law Commission Proposals, Ministry of Justice, 24 January 2011, page 13

(vii) A person who, although not a child of the deceased, was treated by the deceased as a [illegible] partnership to which the deceased was at any time a party;

(viii) Brother, sister, aunt or uncle, or any of their children.

Half-siblings and step-children are included in the above.

15. There was, again, proposal for reform in the Civil Law Reform Bill 2010, to allow a claim by any person who was financially dependent on the deceased before his or her death.

16. Once eligibility is established, damages may then be claimed insofar as it is proven that the claiman[illegible] [illegible] as well as any money which the deceased would have spent on them. Broadly, [illegible] [illegible]

17. In addition to these two categories, a Regan v. Williamson award may be made in respect of children and spouses of the deceased to reflect the loss of special care and support provided by a parent/spouse. Such awards may be in the order of £2,000 to £3,000, and may depend on the facts of an individual case.

18. It should be noted that only losses which occur within the relationship of dependency are recoverable [illegible] so that, for instance, if the spouse of the deceased was also a business partner, losses which are in reality associated with the business relationship may not be included.

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19. Assessing dependency is generally done on the usual principles commonly applied in personal injury cases. For instance, there may be past and future dependency, and a multiplier-multiplicand approach may be applied (however, the multiplier being taken as at the date of death, rather than the date of trial; careful consideration also needs to be given to the multiplier to reflect contingencies, such as whether or not a relationship would have continued). Services dependency may consist of DIY, housekeeping, and child-rearing. These matters are familiar from other non-fatal cases.

20. In respect of income dependency, it also has to be determined how much of the decel·ăŜŘℚă ʎyŎ2Y˙Ŝ ø2ʤztŘ ōŜ ăLJŜyΰ ƨy˝Kʎă ŘŜLJŜyŘŜyΰă℗ ¢KŜℕŜ ʎă l· ℕʤztŜ ƨ₸ thumb, which derives from Harris v. Empress Motors Ltd [1984] 1 WLR 212, which is often adopted where the deceased was the family earner:

(i) Where the only dependent is the spouse/co-habitee, loss of dependency is taken as being two-thirds of the lost net income;

(ii) Where, as well as the spouse/co-habitee, there is one or more children, loss of dependency is taken as being three-quarters of the lost net income.

21. This is only a rule of thumb, and where there are other features which need to be taken into account this should be done.

22. Where both the deceased and his or her spouse/co-habitee worked, and but for the accident both would have continued working, a principle based on the case of Coward v. Comex (18.7.88) may be applied: deductions for living

expenses may be made in line with Harris, but on the joint, pooled income. CNƵ Y ŭKλă I·Y ƵdzyŭΣ ŭKŜ ŎfI·λY I·yŭΩă ƵøyˇλyŎƵY Ŝ λă ŘŜŘdzŎŭŜŘ

23. Further complications arise when the spouse stops working after the ŘŜŎŜI·ăŜŘΩă ŘŜI·ŭKΣ I·yŘ øKŜyˇŭKŜ ăLJƵdzăŜ ŘλŘ yƵŭ øƵNˀ ŌŜŦƵNŜKI·yŘ ŌdzŭŌŜƎI·yˇ ŭƵ øƵNˀ I·ŦŭŜNøI·NŘăΦ ¢KŜNŜ I·NŜ ŎI·ăŜă øKλŎK ădzƎƎŜăŭ ŭKI·ŭ ŭKŜ ăLJƵdzăŜΩă earning capacity afterwards should be taken into account, at least when the spouse was working before the accident (e.g. ² ƵfŦŜ Øɸ 5ŜfΩLyYƵŎŜyŭλ [2006] EWHC 2694 (QB)). Where the spouse would not have worked but for the accident, then it would seem, following Wolfe and section 4 of the 1976 Act (see below), that any earnings which he or she has received by reason of having to work should not be taken into account.

24. Whilst it is useful to have these general approaches, the reasoning behind them must be borne in mind. They are designed to reflect the lost income of the deceased which would have been applied for the deLJŜyŘŜyŭΩă benefit, and therefore the dependency which he or she has lost. Each case should therefore be considered, when pleading or advising on a claim of this type, to see whether such an approach is appropriate.

25. Section 4 of the 1976 Act provides that benefits which accrue or may accrue I·ă I· NŜădzfŭ ƵŦ ŭKŜ ŘŜŎŜI·ăŜŘΩă ŘŜI·ŭK I·NŜ ŭƵ ŌŜ ŘλăNŜƎI·NŘŜŘɸ ¢Kλă øƵdzfŘ include matters such as life insurance or inheritance.

26. !făƵ ŭƵ ŌŜ ŘλăNŜƎI·NŘŜŘ I·NŜ I· øλŘƵøΩă LJNƵăLJŜŎŭă ƵŦ NŜ-marriage, or her actual re-marriage (section 3(3) of the 1976 Act). Oddly, the Act refers only to a

widow and not a widower. It is questionable whether (especially bearing in mind the Human Rights Act 1998) such a distinction would be maintained by the courts, although that is how the section is worded.

Recent Supreme Court decisions

27. Two cases have recently been decided by the Supreme Court which ought to be borne in mind by practitioners considering fatal accident claims.

28. First is the case of AB v. Ministry of Defence [2012] 2 WLR 643, which highlighted the issue of limitation when dealing with claims arising out of ŜÈLJƨăʤdzNJŜ ű2 KI·NJY˜Ŧʤzf Y˜I·ű$ŜNJʎI·fΣ I·yŘ ØKI·ű Ŏ2yãűʎűʤdzű$ŘŘ ά˜ly˜2ØfŜŘƎŜɛ Ŧ2NJ ŰKŜ purposes of limitation. It was held, by a majority, that a claimant has such knowledge when he first reasonably believes facts, even if they could not be supported or proven at that stage, with sufficient confidence to embark on investigating whether there is a claim in law. This did, however, have to amount to more than a mere suspicion, and the date on which a claimant first saw a solicitor or expert was not, without more, likely to be of significance. The discussion as to when a claimant has the required knowledge may be of importance in cases such as exposure to asbestos, or where clinical negligence has led to a terminal condition.

29. Second is the case of Durham v. BAI (Run off) Ltd [2012] 1 WLR 867. This case Ŏ2yãʎŘŜNJ$ŘŘ ØK$ű$KŜNJ ŜY˜LJf2èŜNJăΩ fʎI·ōʎfʎűè ʎyãʤdzNJI·yŎŜ LJ2fʎŎʎŜă Ŏ2Ø$ŜNJ$ŘŘ ŎfI·ʎY˜ă ōè employees who had contracted mesothelioma having been exposed to asbestos many years previously. It was held that negligent exposure of an employee during employment had a sufficient causal link for the policies to NJŜăLJ2yŘφ ² KŜNJŜ LJ2fʎŎʎŜă NJŜIjʤdzʎNJ$ŘŘ I· Ŏ2yŘʎűʎ2y˜ ű2 KI·ØŜ ōŜŜy˜ άăʤdzăűI·ʎy$ŘŘɛ 2NJ

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áŎ2yúNI·ŎúŜŘé øλúKλy ûKŜ LJŜNΛ2Ř 2Ŧ ûhe policy, it was sufficient that it was caused or initiated within that period even though it only developed or manifested itself subsequently.

30. This second case highlights a relevant consideration when dealing with fatal claims, especially when the event giving rise to the injury was some time previously: what are the prospects of recovery of damages even if a claim

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