

Claims arising from death – recent developments and a refresher

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Claims arising from death

When a person who has suffered an injury as a result of negligence dies, two distinct claims may be brought:

1. For the benefit of the deceased's estate under the Law Reform (Miscellaneous Provisions) Act 1934; and/or
2. On behalf of the dependants of the deceased under the Fatal Accidents Act 1976 (FAA 1976).

Bereavement Award – recent developments

On 6 October 2020, changes to the FAA 1976 came into force which expand the class of people entitled to a 'bereavement award'. This award is fixed at £15,210 for deaths which occurred after 1 May 2020; £12,980 for deaths from 1 April 2013 and £11,800 for deaths from 1 January 2012.

Those who are eligible for this award now include the deceased's cohabiting partner in addition to the wife, husband or civil partner of the deceased or the married parents or the unmarried mother of a child who died under the age of 18. Where more than one person is entitled to the award, the award will be divided equally between them.

This change in law was put into motion following the Judgment of the Court of Appeal in 2017 where it was declared that excluding the cohabiting partner of the Deceased (who had been living together for at least two years prior to the death) from the list of those eligible for the bereavement award was incompatible with the European Convention on Human Rights (*Smith v Lancashire Teaching Hospitals NHS Foundation Trust and others* [2017] EWCA Civ 1916).

This change does not have retrospective effect. However, where the statutory award is not available, we expect that we will continue to see claims from the cohabiting Claimant relying on the case of *Smith* for a sum equivalent to the bereavement award.

Given the level of the bereavement award and what remains a limited class of eligible claimants, we do not expect that this change will greatly affect the overall damages outlay of Defendants and Insurers.

Dependency Claims and the new Ogden 8

In addition to this, dependants (i.e. those who relied upon the deceased for support and fall within the list set out at s.1(3) FAA 1976 - which is much broader than those who are eligible for the bereavement award) are entitled to claim for, amongst other things, losses in respect of:

1. the part of the deceased's income that the deceased spent on them (a financial dependency claim); and
2. the loss of services that the deceased provided from which they benefited (a services dependency claim).

Future losses are often calculated on a multiplier/multiplicand basis using the Ogden Tables and this is no different for dependency claims.

The new 8th Edition of the Ogden Tables, which was published in July 2020, provides some helpful guidance.

Calculating dependency claims using the Ogden Tables

What is unique to the calculation of a dependency claim using the Ogden Tables is the adjustment of the multiplier for the risk that the deceased might have died anyway before the date of Trial (Table E contingency factors for pre-Trial loss and Table F factors for post-Trial loss).

With the new 8th Edition of the Ogden Tables, these tables have been expanded and updated. Whilst the updated factors are marginally lower than those set out in Ogden 7 (varying between 1 (i.e. no reduction) to 0.40 (i.e. a 60% reduction) for pre-trial losses and 1 to 0.08 (i.e. a 92% reduction) for post-trial losses) the reality is that, for most cases, the impact of these factors will be small.

The explanatory notes at Section D have also been updated following the Supreme Court decision in *Knauer v Ministry of Justice* [2016] UKSC 9 (which held that multipliers applied to future loss dependency claims are to be calculated from the date of trial) and useful step-by-step examples as to how the Tables can be applied to the calculation of dependency claims have been set out.

The Court's approach to quantifying dependency claims

We must not forget that whilst the Ogden Tables are useful, they are not prescriptive. The Courts will take a realistic and common-sense approach and will adopt the method of valuation which best suits the facts of the particular case.

The question as to whether there has been a loss, and, if so, how much, is a question of fact based upon the evidence. It is important to consider all factors that have the potential to affect the multiplier, for example the state of the relationship between the deceased and dependants (i.e. if this was on the verge of breakdown/separation, then losses may be limited).

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