

*Death and Tort*

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## I. INTRODUCTION

‘TORT’ COVERS A variety of claims. They are usually claims for compensation, brought by someone who has suffered harm, against someone else who is alleged to have been responsible for that harm. The harm is usually personal injury of some kind, although other types of harm are recognised (eg, injury to reputation or to property interests) and the responsibility usually takes the form of a ‘duty of care’, that is, a legal duty to act with reasonable care and skill to avoid harming the interests of others (also called a duty to avoid ‘negligence’). For current purposes, we can say that most tort cases concern personal injuries allegedly caused by negligence, although for completeness we need to mention injury to reputation or ‘defamation’ (ie ‘libel’ or slander’), interference with proprietary interests (‘trespass to land’, ‘negligent damage to property’ and ‘nuisance’) and other sorts of economic injury (including, in restricted circumstances, ‘purely economic loss’).

How does death matter in all of this? There are really two questions, the first rather easier to answer than the second:

1. What effect does the death of one party to a tort dispute have on that dispute?
2. Does it make any difference whether the death was caused by the other party, and/or was a consequence of the injuries the dispute was about?

The second question really only arises in the context of personal injury actions—in theory someone might die through indignation on being libelled, but in practice these things don’t happen—and will be considered later.

## II. THE FIRST QUESTION: THE EFFECT OF DEATH ON TORT ACTIONS

The modern position, established since 1934, is that tort actions have a life of their own, and do not die with either of the people involved in them. Put more formally:

[O]n the death of any person ... all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate (Law Reform (Miscellaneous Provisions) Act 1934, section 1(1)).

This reversed the early common law rule that *actio personalis moritur cum persona*—‘a personal action dies with the person’. In other words, it terminates automatically on the death of either claimant or defendant. From the early medieval perspective, of course, the old rule made quite a lot of sense: common law was then concerned not so much with reaching a fair resolution of each dispute as with preventing extra-judicial resolution through feud or vendetta. From that perspective, the death of one of the parties constituted the end of the dispute.

The modern rule—that rights of action usually don’t die with either of the people involved, even if they are ‘personal’ rights—is therefore the opposite of the medieval rule. But the change is not quite as important as it sounds. What the modern rule does is to ensure *survival* of rights of action. If, at the instant before death, there was a right to sue, then that same right is available after the death. But the right does not expand or grow. By and large, nothing that occurs after the claimant’s death can be regarded as a legal wrong to the claimant: nothing that happens to their body can be an ‘injury’; and they no longer have any property or other assets to be taken from them. This branch of the law therefore pays little heed to dignity or respect for the deceased, as discussed by Price (chapter twelve this volume; the criminal law is different, see Herring, chapter thirteen this volume). Again, dead people aren’t regarded as blameworthy, and so a case that the defendant was responsible for some harm or other will have to be based on the defendant’s pre-death behaviour. The effect of death is that all the rights and liabilities accumulated up to that point are transferred to the deceased’s estate, to be sorted out by the executors or administrators. It is really just a more subtle application of the medieval approach, allowing property disputes to continue (because, after all, *someone* must own the property in dispute), but closing down more ‘personal’ disputes—not with the abruptness of the medieval rule, but nonetheless quite firmly. The old attitude still applies in very ‘personal’ disputes: actions for injury to reputation terminate with the death of either party (though this aspect of the 1934 Act has been criticised for failing to include other torts protecting merely dignitary interests, such as false imprisonment); and claims for ‘exemplary damages’—meant to call attention to outrageous breaches of duty—do not survive the death of the claimant.

The general effect of death on tort claims, therefore, is to crystallise the claim at that point. Any claims which existed immediately before the death remain in existence, and must be resolved as part of the process of administering the deceased's estate. Death neither increases nor reduces one's liabilities: it simply draws a convenient line under them.

### III. THE SECOND QUESTION: WHAT IF THE DEATH IS THE INJURY COMPLAINED OF?

What is the response of the law of tort where the very complaint being made is that the defendant's conduct resulted in the death?

In the early days of the common law, the maxim *actio personalis moritur cum persona* applied, regardless of whether the death was the very thing complained of. This sounds ludicrous to modern ears, but was more understandable in the light of the purposes of tort law at that date. If one of the parties to a dispute was dead, then there was no longer a dispute for the common law to resolve. If the death didn't seem fair or just, well, death rarely was.

The law was not completely helpless, however. If a particular person could be identified as responsible for the death, then a plea of felony could be made, resulting in official action against the killer. Sometimes the official response included an order for reasonable compensation, to prevent the dead man's relatives taking more drastic measures (Baker, 1979: 411–13). There was also the curious doctrine of the deodand, by which a physical object which had caused a death was forfeit, a process which sometimes meant that the deceased's relatives received a share of the thing's value (Sutton, 1997; and Baker, 1979: 322). But all of these processes were increasingly exploited for the benefit of the officials involved in them, depriving the victim's family of any financial remedy. The procedures in cases of feud quietly evolved into something resembling modern criminal law, being confined to cases of murder and manslaughter, and with the killer being punished not for the injury to others but for breach of fealty owed to the King. All his assets were forfeit, but they went to the King and not to the victim's family. And the profits of the deodand were quietly appropriated for the officials involved. So by 1600, the *actio personalis* maxim governed completely: death of either party to personal injury litigation terminated it; and causing the death of another was not a ground for civil action.

Change did not come until the 1840s, when the spread of the railways across Britain led to an increasing number of injuries and deaths. The fact that injured railway passengers could sue, but dead ones could not, became something of a public scandal. Inventive lawyers revived the antique action for a deodand, which in its 19th-century form no longer permitted forfeiture of the railway engine involved in the death, but allowed juries to

impose fines on the railway companies—which they did with enthusiasm. This situation was then skilfully used by the Chief Justice of the day as a bargaining chip, promoting a Bill to abolish deodand as anachronistic, but insisting that the price of reform was the introduction of personal injury liability on more modern lines (Kostal, 1994: 289). The result was the Fatal Accidents Act 1846, which created a cause of action in favour of the dependants of the deceased. The basic principle having been conceded, later reforms were less controversial. Abolition of the *actio personalis* rule in all but a handful of cases was effected in 1934, and the dependency action has since been restated and broadened.

So by the time the modern rule—that tort actions survive the deaths of the parties to them—was introduced, a great many decisions as to the function and scope of tort law had already been made, and were not lightly to be disturbed. In principle, from 1934 onwards, the death of the claimant could be regarded as an injury for which compensation could be given. But the wording of the statute does not encourage this—‘the damages ... shall be calculated without reference to any loss or gain to his estate consequent on his death’—and the rules on damages ensure that any such claim comes to nothing (Law Reform (Miscellaneous Provisions) Act 1934, section 1(2)). There is an exception for funeral expenses. Death of the claimant is only rarely a ground for increasing damages, and frequently a ground for reducing them. If it is asked: ‘What price does tort put on a life?’ the answer is in the region of £0. The only substantial claim allowed is that of dependent relatives, who can demand at least part of the income stream they would have received had the death not occurred.

The tort lawyer’s attitude to death was therefore established well before the massive expansion of claims which occurred over the 20th century, and the result of which is so much a matter of political debate today. Personal injury actions in the early 21st century in fact overwhelmingly focus on very particular sources of injury: injuries at work, on the roads and through negligent health care together account for over 95 per cent of all claims. Official and unofficial insurance arrangements ensure that claims proceed in a routine manner. The people supposedly in dispute with one another actually have very little to do with the process: the claim proceeds in much the same way whether claimant and defendant are alive or dead—indeed, the defendant is in practice almost invariably an insurance company, and so was only ‘alive’ in a rather technical sense in the first place. (In road accident cases, the defendant is nominally the driver whose driving caused the accident, although in practice this individual has little to do with the processes that follow.) The court’s response to the accident can only consist of an award of money, and the decisions on whether an award is payable and if so how large it should be, depend on relatively abstract rules, which only occasionally mention death as a special case.

### A. Death: Liability

The classic statements of negligence liability make no special mention of death. Indeed, such statements are classic precisely because they ignore irrelevant particulars and focus at precisely the right level of abstraction. So, as each new class of tort students learns, the duty on the defendant in negligence cases goes like this:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question (*Donoghue v Stevenson*<sup>1</sup>).

Death is therefore one of a range of things which might ‘injure your neighbour’ or ‘affect’ him or her. It is obviously at the higher end of seriousness in that regard: creating a risk of accidental death, even a quite small one, makes it ‘likely’ that your ‘neighbour’ will be ‘affected’ by your conduct. Accordingly, the range of people you ‘ought reasonably to have ... in contemplation as being so affected’ can be quite broad, and can include people who wouldn’t normally have any hope of a claim against you.

So when the claimants’ lawyers look back on a chain of events that ultimately led to a death, they are looking for a defendant who ought reasonably to have foreseen the possibility of injury, and who then acted in a manner which was insufficiently careful in the light of that possibility. Does it matter that death resulted? It matters in the sense that serious injuries are taken more seriously: defendants are expected to think further ahead if serious injuries are possible; more care is expected of them; and defendants receive less sympathy if they argue that the loss was too ‘remote’, that is, too unlikely a prospect to contemplate before the event. But there is no great difference in attitude in death cases and cases of serious injuries. Indeed, while in practice it is hard to avoid completely, nonetheless the courts will be adamant that these cases are not to be judged with hindsight. The question is not how we view the facts now that we know a death has resulted, but how the defendant should have viewed them before the event, when injury was a mere possibility. Death is therefore special in this context because it is an exceptionally severe consequence, with an unfavourable prognosis. However, the rules on damages then take most of that significance away, reducing most claims by dead claimants’ estates to very low figures indeed.

<sup>1</sup> *Donoghue v Stevenson*, [1932] AC 562 (HL) 580, Lord Atkin.

**B. Death: Damages—Claims by the Estate**

As to the calculation of damages for death, a brief introduction to damages generally is necessary. Early 19th century damages law left the ascertainment of the precise sum in these cases to juries, which were forbidden to give a reason for their verdicts. While the trial judge or appeal court might strike down an apparently unreasonable award, this was relatively rare. But over the late 19th and early 20th centuries, judicial willingness to go along with high awards distinctly lessened. The causes are not very clear, but almost certainly included the increasing number of claims, the practical impossibility of concealing from the jury whether the claim was to be met by insurers, and the increasing democratisation of juries as a result of universal suffrage. Whatever the cause, by the 1930s a jury was only summoned in a personal injuries case if an exceptionally strong case to that effect was made to the trial judge, which rarely happened. Later cases changed ‘rarely’ to ‘almost never’ (see especially *Ward v James*<sup>2</sup>).

Assessment was therefore left in the hands of the trial judges, who in the early years felt free to be almost as inscrutable as juries, simply awarding a sum or sums under very broad heads such as ‘pain and suffering’ or ‘loss of income’. Again, appeal courts would only rarely hold any award to be unreasonable. In time, however, a more systematic approach was adopted. The turning point was in 1970, where the Court of Appeal laid down that precise itemisation of each award was mandatory (see *Jefford v Gee*<sup>3</sup>; *George v Pimnock*<sup>4</sup>). It was increasingly recognised that efficient dispute resolution involved minimising court hearings, and that predictability of result was far more valuable than any supposed benefit from allowing individual judicial scrutiny of each case. In the light of those considerations, the modern law aims at greater and greater precision. Personal injuries claims boast a 99 per cent settlement rate, unusually high for any area of contested litigation, and which would be quite impossible if individual judges were able to differ sharply on the amounts they could award.

In the modern law, while of course any loss suffered by the claimant in consequence of the defendant’s tort may be itemised and proved (as ‘special damages’), the courts expect the ‘general damages’ for personal injury to fall under these five heads:

1. Pain and suffering
2. Loss of the amenities of life
3. Loss of future earnings
4. Loss of earning capacity
5. Future expenses

<sup>2</sup> *Ward v James* [1966] 1 QB 273 (CA).

<sup>3</sup> *Jefford v Gee* [1970] 2 QB 130 (CA).

<sup>4</sup> *George v Pimnock* [1973] 1 WLR 118 (CA).

The last three items are ‘pecuniary’ items, meant to represent as accurately as possible sums lost or bills incurred as a result of the injury. The first two ‘non-pecuniary’ items are attempts to capture the injury to feelings entailed by the accident, and bear no relationship to any other sum of money involved in the facts. The relative size of the ‘non-pecuniaries’ usually depends on the severity of the case. Where the injury is medically relatively trivial—so the injury is largely to the claimant’s dignity and sense of well-being—the ‘non-pecuniary’ sum may constitute the bulk of the award. At the other end of the scale, say where a high-earning claimant comes out of the accident as a quadriplegic requiring constant care, then the figures for loss of earnings and for future expenses will be very large, and the figure for non-pecuniary loss, while substantial, will be nowhere near as great.

To get an idea of the value put on life itself, we need to look at the items one by one:

(i) *Pain and Suffering*

The court asks how great the pain was, what its quality was, and how long it lasted. These figures are largely conventional. While ultimately a court might resolve such a case by gut feeling, the first resort of lawyers and judges is past precedent. As a matter of theory, this head of damages is rather unprincipled, the more glaringly so as greater and greater efforts go into refining the other heads. The sums

could be multiplied or divided by two overnight and they would be just as defensible or indefensible as they are today (Cane, 1993: 139).

Some writers insist that there must be a genuine attempt to ascertain how much pain the particular claimant is or has been in, suggesting that otherwise the entire exercise is a sham. Others, including a significant number of trial judges, are aghast at any emphasis on individual suffering, because they imagine it will lead to increasing protestations by claimants that they are in agony—protestations which in some cases the judges suspect to be merely strategic. However, this general lack of satisfactory theoretical backing is not usually seen as a reason to cut back on these damages. On the contrary, the Court of Appeal recently increased them substantially, on the ground that insufficient allowance for inflation had been made in the past (*Heil v Rankin*<sup>5</sup>). Statute provides that the knowledge that the accident has shortened the claimant’s life is to be reflected in the award for pain and suffering. (Administration of Justice Act 1982, section 1(1)). The Act also abolished ‘loss of expectation of

<sup>5</sup> *Heil v Rankin* [2001] QB 72 (CA).

life' as a distinct head of damages. This had previously been an entirely conventional, free-standing sum (*Benham v Gambling*<sup>6</sup>).

The death of the claimant, however, is not seen as attracting generous damages here. On the contrary, death is seen as terminating any suffering involved and damages for pain and suffering are given only for the period between the accident and the death. It follows that no damages at all are awarded under this head in a case where death instantaneously follows the defendant's negligence, or if the accident instantaneously rendered the claimant unconscious, and death ensued without consciousness ever being regained. It has also consistently been held that even the most painful death does not in itself attract an award for pain and suffering: the last few moments of mental agony and pain are in reality part of the death itself, for which no action lies under the 1934 Act (*Hicks v Chief Constable of South Yorkshire Police*<sup>7</sup>).

This can be seen as mildly paradoxical: ordinary pain and suffering merits compensation, whereas an agonising death does not. A possible resolution of the paradox is that an ordinary award can be seen as a sop to bruised feelings, whereas a dead person is incapable of having their feelings so mollified; no sum of money will make any difference to how they feel, so the courts may as well give nothing as something. There is probably some truth in this, though it invites the question of why awards for pre-death pain and suffering survive to the estate at all, as the same could be said of those—*by the time the damages are paid*, they can do nothing to alleviate the feelings they are supposed to compensate for (for an example of such an award see *Watson v Willmott*<sup>8</sup>). But issues of that sort cannot really be resolved on any principled basis until we first have a principled basis for assessing pain-and-suffering damages, which the lawyers do not have, and suspect that no one else does either.

(ii) *Loss of the Amenities of Life*

This head attempts to compensate for the fact that the injury did not simply inflict pain but also deprived the claimant of opportunities for enjoyment of life. The court therefore asks the extent to which the accident lowered the claimant's emotional quality of life, and in particular whether the injury prevented or interfered with the claimant's hobbies, sex life, social life, or ability to relax.

This award also is highly reliant on past precedents, and in most situations is in practice part of the same enquiry as for ascertaining pain and suffering damages—if indeed the two are distinguished from one another at all. For some limited purposes, the two *are*

<sup>6</sup> *Benham v Gambling* [1941] AC 157 (HL).

<sup>7</sup> *Hicks v Chief Constable of South Yorkshire Police* [1992] 1 All ER 690 (CA).

<sup>8</sup> *Watson v Willmott* [1991] 1 QB 140 (QB).



distinguished. So, claimants who are in a persistent vegetative state as a result of the accident receive no damages for pain and suffering because, so far as the court can tell, they aren't in pain, but they have received substantial sums for loss of amenity because this represents a genuine loss, whether or not the claimants are aware of it (*West and Son v Shepherd*<sup>9</sup>). However, this 'logic' has never yet been used to justify an award in respect of a period after death (see Grubb, 2002: 7.11). Death marks the end of any compensatable loss of amenity.

(iii) *Loss of Future Earnings*

Earnings lost as a result of the injury are usually assessed on a multiplier-multiplicand basis, that is to say the court multiplies two figures:

- The multiplicand, consisting of a 'typical' year's earnings of the claimant—usually taken to be his/her earnings in the year immediately preceding the accident; and
- The multiplier, which is meant to reflect the number of years over which the loss will be suffered. The multiplier will be lower than the actual number of years involved: a claimant who suffers a five-year drop in earnings is over-compensated by a multiplier of five, as the damages will consist of a lump sum received considerably before the lost wages would have been paid. The multiplier therefore reflects not only the length of time over which the injury persists, but also a discount for the early receipt of the money. There is also some attempt made to reflect hypothetical future contingencies, such as (in the claimant's favour) lost chances of promotion and (on the defendant's side) the chance of other accidental injury.

The calculations here have become increasingly sophisticated, as pro-claimant or pro-defendant lobbyists are able to point to systematic bias against them. In particular, the rather impressionistic approach, in the earlier cases, to selection of the multiplier was convincingly shown to favour defendants (because the courts tended to over-estimate contingencies which might have reduced the claimant's income for other reasons), and as a result the courts are now directed to official tables for the calculation of multipliers, which incorporate actuarial data on income and age (formal provision for the use of these 'Ogden Tables' is made by the Civil Evidence Act 1995, section 10). Ferocious battles between rival lobby groups routinely occur over the size of the discount for early receipt, currently set at 2.5 per cent (Damages (Personal Injury) Order 2001). The Court of Appeal regards itself as free to depart from this figure where sufficient cause is shown (*Warriner v Warriner*<sup>10</sup>). There are

<sup>9</sup> *West and Son v Shepherd* [1964] AC 326 (HL).

<sup>10</sup> *Warriner v Warriner* [2002] EWCA Civ 81.

currently moves towards allowing the court to avoid much of the problem by encouraging the award of a tax-free annuity (a ‘structured settlement’) rather than a lump sum in damages.

The effect of the claimant’s death on the future earnings claim has followed a convoluted path. In 1962, the Court of Appeal considered such a ‘lost years’ claim, where but for the accident the claimant would probably have been in remunerative employment, but on the facts as they stood *was expected to have died*. They ruled that there was no claim for earnings in those ‘lost years’: while the loss was genuine enough in purely financial terms, an award of that sum would not correct this injustice. A dead man does not feel any better, or even any richer, by being presented with a large sum for lost wages (*Oliver v Ashman*<sup>11</sup>). However, this reasoning was rejected as being over-simplistic by the House of Lords in 1980. The deceased does indeed not suffer a loss in any real sense, but his/her dependants do, and awarding a sum for earnings in the ‘lost years’ compensates for that loss (*Pickett v British Rail Engineering Ltd*<sup>12</sup>). As a result, the court should calculate the extent of the wages lost, then deduct from it the bare minimum cost of living for the same period, which, on the logic of this claim, is an expense which the claimant has saved as a result of the accident—on the calculation of this saved expense see especially *Harris v Empress Motors Ltd*<sup>13</sup>. The resulting figure, calculated on a multiplier-multiplicand basis, is payable as damages. Opinion was divided on whether this award of ‘wages in heaven’ was fair. In 1982, Parliament ruled that while the injustice to dependants implicit in the earlier approach was real enough, it did not arise where those dependants could make a claim of their own under the Fatal Accidents Act 1976 (considered below). Accordingly, the ‘wages in heaven’ claim can only be made by a live claimant, this head of claim terminating with his/her death (Administration of Justice Act 1982, section 1(2)).

(iv) *Loss of Earning Capacity*

This head of damages, which is less relevant for present purposes, only arises where there is a substantial loss of earnings which is not amenable to the multiplier-multiplicand approach—typically where a young claimant of uncertain prospects is rendered unemployable by the effects of the accident. Even in a case such as that, the modern tendency is to apply the multiplier-multiplicand measure on the assumption that the claimant would, but for the accident, have earned the national average wage. Death of the claimant terminates such a claim.

<sup>11</sup> *Oliver v Ashman* [1962] 2 QB 210 (CA).

<sup>12</sup> *Pickett v British Rail Engineering Ltd* [1980] AC 136 (HL).

<sup>13</sup> *Harris v Empress Motors Ltd* [1983] 3 All ER 561 (CA).

*(v) Future Expenses*

Medical care and other expenses attributable to the accident are recoverable as part of the award. Where such needs are long-term, they are reduced to damages on the same multiplier-multiplicand basis as has already been discussed. The calculations are simplest when all such services are likely to be paid for. The damages then reflect the likely cost. Increasingly, the courts are according monetary value to care given on a voluntary basis: where the necessary care will be provided by family members, a figure for the value of that care may be included in the damages (eg, *Housecroft v Burnett*<sup>14</sup>). It is not yet entirely clear whether that sum, when paid, belongs to the victim or to the carer (Grubb, 2002: paragraph 6.65). Clearly, the main effect of death on this head of damages is to limit it: dead people do not require medical care.

In summary, therefore, personal injury damages law places a value of £0 on each life involved. Technically speaking, damages are not awarded for the death, but for the injury suffered. The fact that the injury resulting from the defendant's conduct proves fatal is not in itself a compensatable item, though (anomalously) a defendant who caused a death is liable for reasonable funeral expenses. The damages

shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included (Law Reform (Miscellaneous Provisions) Act 1934, section 1(2)(c)).

The inclusion of these expenses is anomalous, because the cost of a funeral is merely an accelerated expense—the deceased's estate would eventually have had to pay for a funeral anyway, whatever the defendant had or had not done. In other respects, the claim is limited to losses already suffered at the instant before death, and no further damages are recoverable for the period after death. The claimant no longer experiences pain or suffering, is taken to require nothing further for loss of the amenities of life, will not miss the wages that will not be earned, and will have no expenses in the future. So the overall effect of the death is to benefit the defendant rather than the claimant. This approach may seem striking at first glance, but it is in fact merely a none-too-surprising consequence of focussing on compensation alone. If it is said that tort seems incapable of expressing outrage at an unnecessary death, or of inflicting just punishment on those who caused it, the answer is that expressing outrage and inflicting punishment are not recognised goals of tort law. Where tort would be open to criticism in its own terms would be if the dependants of the deceased did not receive just compensation. To that question I now turn.

<sup>14</sup> *Housecroft v Burnett* [1986] 1 All ER 332 (CA).

### C. Death: Damages—The Dependency Claim

The main claim today remains the one introduced in 1846, though it has been restated and slightly expanded since. Briefly, if someone dies as the result of a tort, and if at their death they had one or more dependants, then those dependants acquire a cause of action against the tortfeasor for the value of the dependency. Not all dependants can sue in this way—the statute (the Fatal Accidents Act 1976) has a precise list of which relatives can sue, although today it's a pretty extensive list.

The dependency claim is unique as far as I know, and certainly has some non-standard features. The claim belongs to the dependants, not to the deceased person, although it is administered through the deceased's estate. It arises only where the deceased would have been able to sue if he or she had survived, and is defeated by any defence that would have been good against the deceased. In particular, if the deceased was  $r$  per cent responsible for the accident, the dependency claim is reduced by  $r$  per cent (Fatal Accidents Act 1976, section 5, see Appendix). In principle each dependant has an individual claim for their lost part of the dependency, although the statute says that all of the claims are to be handled together by the executor (Fatal Accidents Act 1976, section 2). It takes a purely factual criterion—the amount of income which would have been paid but for the defendant's misconduct—and substitutes a legal right to its continuance. This 'dependency' bears no necessary resemblance either to any right of maintenance the dependant could legally have demanded from the deceased, or to the amount they can demand when the deceased's estate is divided up. The build-up of case law reveals a gradual expansion of the concept of the 'dependency'. The courts have been prepared to include and to estimate a dependency which they imagine would have come into an existence later if the death had not occurred (*Taff Vale Railway Co v Jenkins*<sup>15</sup>). Moreover, the courts have since the 1970s begun to hold that the 'dependency' need not consist of money—so the death of a family member not in employment leads the court to assess the value of their services at home, which sum is then the basis of a dependency (eg *Hay v Hughes*<sup>16</sup>; accidents in the home are rarely the subject of tort actions, so these claims are relatively infrequent).

The statutory list of dependants of course mirrors the legislators' concepts of what a family looks like. The original 1846 list included only the deceased's spouse, parents, grandparents, step-parents, children, grandchildren and step-children. The 1976 list, now in force, seeks to be more inclusive, including all descendants and ascendants of the deceased, as well as brothers, sisters, uncles and aunts, and their children (Fatal Accidents

<sup>15</sup> *Taff Vale Railway Co v Jenkins* [1913] AC 1 (HL).

<sup>16</sup> *Hay v Hughes* [1975] QB 790 (CA).

Act 1976, section 1). Children treated by the deceased as part of the family are also included. Marriage is still of some significance under the detailed rules, but no longer has commanding status: illegitimate children have the same entitlement as legitimate, and anyone cohabiting 'as the husband or wife of the deceased' receives the same rights as a spouse, provided that the cohabitation had lasted at least two years (Fatal Accidents Act 1976, section 1(3); for some of the difficulties involved in the cohabitation provision, see *Kotke v Saffarini*<sup>17</sup>). The recent introduction of civil partnerships included modifications to the 1976 Act, so that civil partners have the same rights as spouses, and relationships can be established through civil partnership as well as by blood or by marriage (Civil Partnership Act 2004, section 83). The live question today is whether the list continues to serve a purpose, or whether it could simply be abolished. The Law Commission wants to bring in a general clause which would allow any person actually or potentially dependent on the deceased to bring a claim (Law Commission for England and Wales, 1999: paragraph 3.46).

Traditionally, the claim was strictly for money lost: the 'dependency' was financial only, usually calculated on a multiplier-multiplicand basis. It included the anomalous claim for reasonable funeral expenses. But not a penny more was allowed for emotional pain. However, the narrow traditional conception of the claim has not proved satisfactory to all, and various rather ad hoc compromises have been introduced. If the widow of a deceased man remarries and her new husband is a wealthier or more generous provider, then on this narrow conception the dependency will be very low or even non-existent: the death has not caused the widow a significant financial loss. Therefore, a common tactic by defence counsel in the early 20th century was to parade the more attractive claimant widows before the court, to support an argument that a future profitable re-marriage was very likely (the 'cattle market' approach, as it was known). Outrage at this manoeuvre eventually led to a change in the law in 1971, so that the actual or potential re-marriage of a claimant widow is ignored (Law Reform (Miscellaneous Provision) Act 1971, section 1, now consolidated into the Fatal Accidents Act 1976, section 3(3)). The absence of any provision for non-financial loss was addressed in 1982, when legislation allowed for the claim to include a sum for 'bereavement', not corresponding to any financial loss. This is currently set at £10,000 (Damages for Bereavement (Variation of Sum) (England and Wales) Order, 2002). If the deceased was married, the sum belongs to their spouse; if he or she was an unmarried legitimate minor, it belongs to both his or her parents; if an unmarried illegitimate minor, then to her mother; otherwise, the sum is not claimable (Fatal Accidents Act, 1976, section 1A, inserted by the Administration of Justice Act 1982, section 3). This is obviously a little arbitrary, but then so would be any suggested replacement formula.

<sup>17</sup> *Kotke v Saffarini* [2005] EWCA Civ 221.

So, in summary, the injury done to those left behind by the death is seen as interference with their ‘dependency’, an unusual sort of a right to say the least. While, as I have shown, the tendency has been to expand the rights available here, nonetheless the rate of expansion has been slow. Are there any other avenues open to those who had been close to the deceased, before he or she was deceased?

#### D. Death: Damages—Secondary Nervous Shock Claims

A relatively unexplored route, though it is becoming more well-known, is to track the emotional effects of the death and to see which of their consequences can constitute actionable wrongs. This can take the court down strange doctrinal alley-ways (see particularly *AB v Leeds Teaching Hospital NHS Trust*<sup>18</sup>). The older, and to lawyers most familiar, route to liability here is the law of ‘nervous shock’. A nervous shock claimant has to show that they have suffered an injury, which usually consists of showing that they have a recognised psychiatric disorder, such as post-traumatic shock disorder (PTSD). A claimant with such an injury, who can show that it resulted from the activities of the defendant, will then have to show that this was in breach of a duty owed by that defendant. This is relatively easy if the claimant was foreseeably at risk from the defendant’s activities: if any reasonable person could have seen that carelessness by the defendant posed a risk of injury to the claimant (by reason of their physical or emotional proximity to the deceased), then a duty is owed, and the negligent defendant is liable for any injuries which result. That is the easy case, where the claimant is a ‘primary victim’ of the defendant’s activities. The more difficult case is where there never was any danger to the claimant, but rather to someone else of psychological significance to the claimant. The claimant’s shock results not because they were themselves in danger but because of what they see or hear, whether the deceased’s injuries occurred before their very eyes, or in another sufficiently shocking way. Such ‘secondary victims’ are often allowed to recover damages, but under very restrictive rules.

So where a death occurs as the result of the defendant’s negligence, and the claimant’s reaction to this death can be regarded as a psychiatric injury, then liability can be established, provided that the injury is sufficiently direct. ‘Directness’ for this purpose is not at all well defined, although it is agreed that the main factors are directness of perception (seeing someone being mangled to death is more shocking than reading that they have been mangled to death) and directness of relationship (the death of your child is more shocking than the death of a stranger). The current law tries as far as possible to treat shock as one injury with special features rather than as

<sup>18</sup> *AB v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644 (QB).

something wholly distinct from the rest of negligence law. The results are not, however, altogether satisfactory, and the law is in constant development as the judges flit from one awkward compromise to another.

As to injury, the current approach is that injury is sufficiently established if there is a recognised psychiatric condition. Quite apart from any changes in legal attitude (and the courts tend to make major innovations here on a regular basis) the definition of ‘injury’ will fluctuate with whatever psychiatric knowledge can be brought to bear on the particular case—the law shows a deference to medical knowledge which it shows only patchily in other contexts (see Jackson, chapter three this volume; and Chau and Herring, chapter two this volume). PTSD is now a sufficiently well-established condition to count as an ‘injury’ for this purpose and most nervous shock cases are variants on this. But borderline cases are not uncommon. In the case of *Vernon v Bosley (No 1)*,<sup>19</sup> for example, the Court of Appeal had the unedifying task of deciding whether a father’s reaction to the loss of his daughters by drowning constituted ‘pathological grief disorder’ (an injury for which he could be compensated) or was ‘merely’ a severe grief reaction (not an injury, and so not compensatable). The objections to this approach are obvious: the knowledge that a sum in the order of half a million pounds hung on the precise label the courts placed on his mental state cannot have assisted his recovery. Further, it posed substantial temptations, which the father did not resist to the courts’ satisfaction: success in his personal injury action depended on showing that his condition was severe and long-lasting, whereas success in his family proceedings depended on showing the reverse—and a comparison of the evidence in those two separate actions made sorry reading indeed (see *Vernon v Bosley (No 2)*)<sup>20</sup>). The line drawn is plainly not satisfactory, but the courts currently see no other possibility short of holding that ‘mere’ grief is actionable, which for them would be a step too far.

As to directness, the criteria are reasonably well established: how direct was the claimant’s perception of the death? What was it that they actually perceived? Did they know the victim before the accident, and if so, did they care very much about what happened to him or her? These tests are easy enough to apply and the law seems relatively stable. The worry is, of course, that it is all nonsense, that it takes psychiatric commonplaces about who is likely to suffer shock, and turns them into moral injunctions. No doubt someone who suffers PTSD over a death they did not see, and/or whose victim they did not know, is unusual, but it is not clear how they can be stigmatised as a person of ‘insufficient psychological firmness’ and therefore undeserving of compensation (the requirement that the claimant demonstrate ‘the customary phlegm’ or come up to ‘a normal standard of

<sup>19</sup> *Vernon v Bosley* [1997] 1 All ER 577 (CA).

<sup>20</sup> *Vernon v Bosley (No 2)* [1999] QB 18 (CA).

susceptibility' derives from *Bourhill v Young*<sup>21</sup>). This is only one step away from saying that they should buck their ideas up and stop whingeing, which would not usually be seen as an appropriate response to a sufferer from a recognised disorder. For this reason, there is almost universal agreement amongst academics that the 'directness of perception' criterion should be abolished, though the 'directness of relation' criterion has rather more defenders.

In these 'nervous shock' cases, courts here are uncomfortably caught between two realities, one psychological and the other political. The psychological reality is that the injury caused by the death of a loved one is as real as any of the injuries the courts are more used to dealing with, and no legally valid reason for treating it less generously has been discovered. The contrary belief held by the legal system in the past represents not ancient wisdom but pre-scientific ignorance, deriving largely from an exaggerated fear of 'compensation neurosis'. The competing political reality is that giving full weight to the seriousness of such psychological injuries would cause a major storm, in the course of which the judges would be trenchantly criticised for encouraging a 'culture of compensation'. But the uneasy middle course the judges have followed is not really satisfactory from any point of view. The continual resort to psychiatric concepts is a particularly glaring example of buck-passing—no doubt there are arguments both for and against psychiatric recognition of 'pathological grief disorder', but none of them have to do with whether compensation should be paid to the sufferer. No doubt the line will continue to be blurred for quite a while yet.

#### IV. CONCLUSION

As a generalisation, therefore, the effect of death in a tort action is to wind it up, enabling a firm line to be drawn under the liabilities and the matter to be settled on the basis of how things stood at the instant before death. This is so even where the death of the claimant was itself the fault of the defendant, although in that case the deceased's relatives may argue that they have suffered a fresh injury, in the form of damage to their economic 'dependency' or (possibly) nervous shock.

In some ways this is surprising, shocking even. It can certainly lead to surprising results. Suppose the defendant's negligent driving results in the death of a 30-year-old adult, who had been a high earner with good prospects of promotion. As a result of the accident, however, the victim dies without ever regaining consciousness. If it turns out that this 30-year-old had dependants, the claim will probably be in the millions; if not, the claim will be limited to the cost of torn clothing and other property damaged in

<sup>21</sup> *Bourhill v Young* [1943] AC 92 (HL).



the accident, plus a reasonable sum for funeral expenses. Viewed in terms of the defendant's moral culpability, this makes little sense. But then it is a very long time since the law of personal injury was an exercise in morality, if indeed it ever was.

APPENDIX

**Fatal Accidents Act 1976**

Sections 1 and 1A are reproduced here. These texts were inserted by the Administration of Justice Act 1982, section 3. [Square brackets] indicate amendments currently in force.

**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 subsection (5) below, the sum to be awarded as damages under this section shall be [£10,000].
- (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.

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