It's time to modernise the Fatal Accidents Act

The 1976 Act does not reflect the realities of modern living, particularly with regard to the definition of the dependants of the deceased, argues **Sanja Strkljevic**

Sanja Strkljevic is an associate solicitor at Leigh Day specialising in clinical negligence claims
@LeighDayClinNeg
www.leighday.co.uk

It has been more than 17 years since the Law Commission made its recommendations to reform the Fatal Accidents Act 1976. To date, none of the recommendations have been implemented. There have been subsequent proposals for reform, in the Civil Law Reform Bill that was abandoned in 2011 and most recently in the Damages and Negligence Bill, which made no progress beyond its first reading in parliament.

The most recent and notable amendments to the 1976 Act have been to section 1(3) after the enactment of the Civil Partnership Act 2004, and in 2013 the increase of the bereavement award by 10 per cent. The Act does not reflect the realities of modern living.

Before I address the difficulties practitioners encounter, it seems to me that two issues must be emphasised. First, the underlying principle is that the 1976 Act provides the dependants of a deceased person with the right to a bring a claim arising from the deceased's wrongfully caused death, and second, the burden of proof is on the dependants (or the personal representative of the estate if they are bringing the claim) to prove that the death had been wrongfully caused.

Dependency claim

Times have changed and the 1976 Act has to reflect the changing nature of the society we live in. At first blush, the class of people entitled to bring a claim for a dependency on the deceased seems reasonably inclusive. It is not, however.

Section 1(3) of the Act defines the persons on whose behalf the action can be brought as the deceased's dependants; namely:

"(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."

It is inevitable that there will be circumstances in which the deceased who had been wrongfully killed and the individual who had or would have had a reasonable expectation of a dependency in the future were living apart. I am referring to those individuals who for material, religious, or practical reasons would not have been living as partners for two years in the same household, yet who would have had a reasonable expectation of a dependency in the future.

A useful illustration of the inadequacy of the definition is the decision of the Court of Appeal in *Swift v Secretary of State for Justice* [2013] EWCA Civ 193. The claimant brought an action arising from the death of her partner, with whom she had been in a relationship for around six months prior to his death. The couple were expecting a child, who was born after the deceased's death. The claimant's claim failed – she did not satisfy section 1(3).

She argued that the first instance decision was incompatible with her Convention rights, namely the right to private and family life (article 8) and the right not to be discriminated against on any ground such as sex, race, colour, or other status (article 14). The claimant's argument was that a generous definition should be applied to "other status" in article 14, which would therefore encompass her circumstances. This argument was also rejected.

My view is that each dependency should be judged on its own facts. In *Swift*, there was a pregnancy. We should remember that the onus is on the claimant to prove the claim. If the claimant had a reasonable expectation of a dependency from the relationship with the deceased, it seems unfair that she should not be entitled to bring that claim, yet, for instance, a former spouse or civil partner of the deceased would be.

It would be wrong to suggest that extending the definition of dependant would open the floodgates of claims. It would not. These claims arise from wrongfully caused deaths. The claimant will still be required to prove a need for maintenance and his or her dependence on the deceased. The definition should be broadened to include people who are maintained by another person, thus including those who may not have been wholly dependent on the deceased, but derived a benefit from the deceased, for example financial support or gratuitous care.

The deaths of young unmarried people rarely result in claims being brought because of the constraints of section 1(3) and the fact that the bereavement award is not available. That is not right.

Bereavement damages

Bereavement damages were introduced into the 1976 Act by section 3 of the Administration of Justice Act 1982. The beneficiaries of the claim for bereavement damages are defined in section 1A(2) of the 1976 Act as "the wife or husband or civil partner of the deceased; and... where the deceased was a minor who was never married or a civil partner... his parents, if he was legitimate; and... his mother, if he was illegitimate."

As long ago as 1999, the Law Commission recommended that the class of people entitled to bereavement damages should be extended. This has not been put into effect. The definition is too narrow. What about cohabitees or partners of the deceased, parents of adult children, or siblings?

It is inconceivable to think that age is a determining factor in awarding what is a nominal sum for damages for bereavement. Close ties of love and affection do not cease or weaken when a child reaches 18. Likewise, losing a sibling is a painful and distressing experience.

Perhaps the Scottish system could be used as a model for reform. There is no maximum limit set for bereavement compensation. The Scottish courts have a discretion to award "loss of society" damages to a wider group of relatives of the deceased, the highest reported being £140,000. While I can see the rationale behind a fixed sum representing bereavement damages, as in England and Wales, and that the Scottish award can cause difficulties in assessing the appropriate level of this effectively token award, the award in England and Wales of £12,980 is too low. In Northern Ireland, the bereavement award is currently £14,400 and it is reviewed every three years.

Surely there should be a provision that bereavement damages should be available to those with familial ties or cohabitation rights to the deceased. After all, only one claim can be brought on behalf of the estate and the dependants of the deceased. That includes a claim for bereavement damages which should compensate the bereaved for their loss and grief. The damages have to be increased and they have to encompass more than just the spouse or parents of a minor child.

Other issues

After the claim has been settled or judgment awarded in the claimant's favour, the claimant will not receive all of their damages. First, with the abolition of legal aid under LASPO, a deduction is made of up to 25 per cent of the pain and suffering claim and past losses to cover the success fee and non-recoverable insurance premiums.

Second, personal injury trusts do not apply to these cases. If the claimant or one of the dependants is in receipt of means-tested state benefits, those will be lost until they have spent their compensation and their means return to a level within the capital and income limit. What of the instances where the deceased was a carer of the dependant who is also in receipt of state benefits? The dependant has lost a carer and then they will lose their entitlement to benefits on which they are reliant.

There are instances in which the dependant lacks capacity and as a consequence of the defendant's negligence, they will require a deputyship to manage their compensation, which they would not have needed otherwise. There is no provision that the defendant should meet the costs of managing a deputyship, yet one will be required. The dependant will once again lose out; the monies they have received representing the loss of services of the deceased relative will have to be used for this purpose. It is inequitable. Significant thought has to be given to fatal accidents claims and there has to be an immediate overhaul.

There is insufficient will in the government to act on this, but the fact is that people die as a result of negligent care and some of these claims do not receive the attention they should because of the constraints imposed by the law. This has to change. SJ

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