

Statutory Bereavement Damages Extended (Only) to Cohabiting Partners

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The Fatal Accidents Act 1976 (Remedial) Order 2020 ("the Order") came into force on 6 October 2020.

The effect of the Order is to extend the eligibility for bereavement damages under section 1A of the Fatal Accidents Act 1976 ("the Act") to cohabiting partners, provided that such partners are able to satisfy the same criteria they currently have to satisfy to qualify for dependency damages under section 1 of the Act.

The Order can be viewed [here](#).

The position in respect of bereavement damages prior to the Order

A claim for bereavement damages has long been available in England and Wales under section 1A of the Act. However, it has only ever been available to a very limited class of claimants.

When section 1A of the Act first came into force, the list of claimants who could benefit from bereavement damages under that section was limited, by the wording of section 1A(2) of the Act, to the following:

- (a) the wife or husband of the deceased; and
- (b) where the deceased was a minor who was never married:
 - (i) the child's parents if the child was "*legitimate*"; or
 - (ii) (only) the child's mother if the child was "*illegitimate*".

Since then, the only addition to the list of claimants entitled to recover bereavement damages was brought about by section 83(7) of the Civil Partnership Act 2004. With effect from 5 December 2005, the words "*or civil partner*" were added to (a) above and "*or a civil partner*" added to (b) above, to give civil partners the same rights as spouses and to give parents the same residual rights irrespective of whether their child was neither married nor a civil partner.

The limited eligibility for bereavement damages under section 1A of the Act has stood in contrast to the much broader (albeit still limited) class of claimants who are able to claim damages for dependency under section 1 of the Act. For example, a claim for dependency damages under section 1 of the Act can be brought by any child, brother, sister, aunt, uncle or parent or other ascendant of the deceased. Most notably, a claim can be brought by the deceased's cohabiting partner, subject to them satisfying certain criteria in respect of their relationship with the deceased.

The limited eligibility for bereavement damages under section 1A of the Act has also stood in contrast to the position in Scotland, where section 4 of the Damages (Scotland) Act 2011 entitles a much broader category of "*relatives*" to bereavement damages.

Inevitably, those contrasting positions have led to various calls and proposals for reform of the class of claimants entitled to bereavement damages under section 1A of the Act. Indeed, the Law Commission, as long ago as November 1999, recommended "*extending the list to include the deceased's children, siblings and long-term partner*" (see Law Commission, [Claims for Wrongful Death](#) (Law Com No 263, 1999), Executive Summary).

The case of *Smith* and the need for the Order

It wasn't until the recent case of *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] QB 804 ("*Smith*") that the issue of the legitimacy of the limited class of claimants entitled to bereavement damages came before the courts.

In *Smith*, the claimant was the unmarried partner of a man who died as a result of clinical negligence. As a cohabiting partner, she was able to claim dependency damages under section 1 of the Act but was unable to claim bereavement damages under section 1A of the Act. Her inability to claim bereavement damages was purely a result of her being unmarried to the deceased. On that basis, her case was that section 1A of the Act was incompatible with Articles 14 and 8 of the European Convention on Human Rights ("the Convention") and she invited the Court of Appeal to make a declaration of that incompatibility in accordance with section 4 of the Human Rights Act 1998. The Court (Sir Terence Etherton MR giving the leading judgment) agreed and declared section 1A to be incompatible with the Convention.

The decision in *Smith* can be found [here](#).

As a result of the declaration of incompatibility in *Smith*, the Government had to legislate to amend section 1A of the Act so that it would thereafter comply with Articles 14 and 8 of the Convention.

Many had considered that the decision in *Smith* would reignite a wider debate for reform of the eligibility for bereavement damages and would result in significant general change. Indeed, the UK Parliament's Joint Committee on Human Rights published a report on 16 July 2019 in response to the draft of the Order ("the Report"), in which it expressed the view that, whilst the draft order remedied the incompatibility identified in *Smith*, *"section 1A of the FAA is discriminatory against certain close family members. We therefore suggest that the Government should use this opportunity to look more broadly at the bereavement damages scheme and undertake a consultation with a view to reforming the scheme"* (paragraph 54).

The full text of the Report can be found [here](#).

However, despite the Joint Committee's *"suggestion"*, the Government did not, in fact, use the *"opportunity"* to look more broadly at the bereavement damages scheme. What has, in fact, resulted from the incompatibility identified in *Smith* is a very limited amendment to section 1A of the Act to deal with the very specific incompatibility which arose in that case: cohabiting partners.

The Order

The Order simply, although not insignificantly, adds *"cohabiting partner"* to the class of persons entitled to bereavement damages under section 1A of the Act.

But not all cohabiting partners are eligible. The Order borrows the cohabiting partner relationship criteria from section 1 of the Act and so inserts a definition of *"cohabiting partner"* as:

"any person who –

(a) was living with the deceased in the same household immediately before the date of the death; and

(b) had been living with the deceased in the same household for at least two years before that date; and

(c) was living during the whole of that period as the wife or husband or civil partner of the deceased."

There are two further points which arise from the Order.

The first is that the Order is not retrospective. The amendments apply only to causes of action which accrue on or after 6 October 2020.

The second is that the award in respect of bereavement damages, currently set at £15,120 (recently increased from £12,980 as of 16 March 2020 by the Damages for Bereavement (Variation of Sum) (England and Wales) Order 2020), is intended as a global award to be shared between all eligible claimants.

Under the old regime prior to the Order, the only circumstance in which two claimants could jointly claim bereavement damages was if there were two parents of a *"legitimate"* unmarried child. That specific scenario was therefore expressly catered for: *"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"* (section 1A(4) of the Act; emphasis added).

However, the inclusion of a cohabiting partner as an eligible claimant gives rise to various other scenarios in which more than one claimant may claim bereavement damages, for example: a claim by the parent(s) and cohabiting partner of deceased who was an unmarried child, or a claim by both the cohabiting partner and a (separated) husband, wife or civil partner of the deceased.

Accordingly, the Order amends section 1A(4) of the Act and replaces the underlined text above with the words “*more than one person*”. The result is that where more than one person claims bereavement damages, the award of £15,120 shall be divided equally between them.

Criticisms of the position in respect of bereavement damages following the Order

At paragraph 48 of the Joint Committee Report, the Joint Committee, in response to the draft of the Order, identified a number of “*problems*” with the current, limited, categories of claimants entitled to claim bereavement damages under section 1A of the Act. Those problems, the Committee opined, persisted even after, and perhaps because of, the addition made by the Order.

Having identified those “*problems*”, the Report concluded at paragraph 49 that (emphasis added):

“Whilst we recognise that the categories of eligible persons must be limited to those family members closest to the deceased, and therefore those most likely to suffer grief, the current list of eligible claimants is unprincipled, discriminates against other family members in analogous positions to existing eligible claimants and stigmatises children. Although no declarations of incompatibility have been made in respect of other family members, we consider that section 1A as currently drafted risks further legal challenge.”

Conclusion

The effect of the Order is extremely limited: it extends the right to claim bereavement damages under section 1A of the Act to just one further category of claimant – “*cohabiting partners*” – and only then if specific criteria are satisfied. This is, perhaps, hardly surprising given that the sole purpose of the Order is to remedy the specific incompatibility (of section 1A of the Act with Articles 14 and 8 of the Convention) declared by the Court of Appeal in *Smith*, in which case the claimant was the “*cohabiting partner*” of the deceased.

The Government did not, on this occasion, in response to *Smith* and/or the Report, take the opportunity to pass primary legislation to reform the entire bereavement damages scheme so as to prospectively widen the categories of claimant entitled to claim bereavement damages under section 1A of the Act.

If the conclusion drawn by the Joint Committee in paragraph 49 of the Report is correct, it may be that section 1A of the Act (as amended by the Order) still “*discriminates against other family members in analogous positions to existing eligible claimants*”. Therefore, this could lead to the categories of claimant entitled to claim bereavement damages under section 1A of the Act being widened, not by primary legislation, but by further orders in response to specific applications to the Court for declarations of incompatibility in respect of particular types of relationship.

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