PART I
INTRODUCTION

1.1 This is the seventh consultation paper in our "examination of the principles governing and the effectiveness of the present remedy of damages for monetary and non-monetary loss, with particular regard to personal injury litigation".[1] The current Fatal Accidents Act reached the statute book in 1976 and was substantially amended by the Administration of Justice Act 1982, which introduced a number of reforms based on the recommendations of the Law Commission[2] and of the Pearson Commission.[3] We were keen to consider once more damages for wrongful death because aspects of the present law remain controversial and difficult. For example, there is continuing controversy over damages for bereavement, which were made available for the first time in 1982.[4] Other reforms introduced in 1982 have, in some respects, had more far-reaching effects than appear to have been intended.[5] And there is continuing dissatisfaction over the statutory list of dependants, which many see as too restrictive.[6] In addition to these areas of concern, this paper presents us with the opportunity to examine coherently and in depth an area of law which has developed in a piecemeal fashion with a view to eradicating any anomalies and inconsistencies that have been created.

1.2 In addition to a claim under the Fatal Accidents Act, an action can often be brought against the defendant by the personal representatives of the deceased for the benefit of the estate of the deceased under section 1 of the Law Reform (Miscellaneous Provisions) Act 1934. Unlike the Fatal Accidents Act, the right of action of the estate is a survival of the action that the deceased would have had against the wrongdoer, and the action therefore survives irrespective of whether the death was caused by the wrong.

1.3 The estate can claim against the wrongdoer for the pain, suffering and loss of amenity suffered by the deceased, for the loss of earnings before death, for the

[1] Item 2 of our Sixth Programme of Law Reform (1995) Law Com No 234 (formerly Item 11 of our Fifth Programme of Law Reform (1991) Law Com No 200). The other papers and reports so far published are Structured Settlements and Interim and Provisional Damages (1992) Consultation Paper No 125; (1994) Law Com No 224; Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132; Personal Injury Litigation: How Much is Enough? (1994) Law Com No 225: Liability for Psychiatric Illness (1995) Consultation Paper No 137; Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140; Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144; and Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147. This last paper has been published on the same date as this paper.

[2] Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, paras 257, 259, 262(c), 172-180.

[3] Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054 ("The Pearson Commission Report"), Vol I, para 404.

[4] See paras 2.63-2.74 and 3.126-3.180 below.

[5] See paras 2.43-2.60 below.

[6] See paras 2.12-2.16 below.

deceased's medical and nursing expenses and funeral expenses.[7] An accident victim whose life expectancy has been reduced can claim for the loss of prospective earnings in these "lost years".[8] As originally enacted, the Law Reform (Miscellaneous Provisions) Act 1934 allowed the estate to recover for the lost years.[9] This made it possible for a defendant to face a claim for lost earnings in the lost years and also a claim under the Fatal Accidents Act for a loss of a dependency flowing from those earnings. This possibility of double compensation was regarded as unacceptable and, by section 4 of the Administration of Justice Act 1982, Parliament intervened to exclude a claim for the lost years from claims made under the Law Reform (Miscellaneous Provisions) Act 1934.

1.4 In this paper, we are not concerned with the survival of the victim's claim under the 1934 Act except to the limited extent that it is relevant to the Fatal Accidents Act 1976 (for example, in Part III we shall consider the radical argument that the Fatal Accidents Act should be abolished in favour of extending the 1934 Act and we also consider whether, contrary to the present law, bereavement damages should survive for the benefit of the claimant). We have looked at the survival of damages for non-pecuniary loss in our consultation paper on Damages for Personal Injury: Non-Pecuniary Loss.[10]

1.5 Part II of this paper surveys the present law relating to fatal accidents.[11] It contains an examination of, for example, the nature of the right of action under the Fatal Accidents Act 1976, the dependants who can benefit from such an action, the types of pecuniary loss that can be compensated, and the existence and scope of bereavement damages. In Part III we discuss the options for reform and our provisional recommendations. Part IV contains a summary of recommendations and consultation issues. Appendix A looks at the equivalent law in other jurisdictions and Appendix B sets out the relevant sections of the Fatal Accidents Act 1976, as amended by the Administration of Justice Act 1982 and the Damages for Bereavement (Variation of Sum) (England and Wales) Order.[12] It also contains section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 as amended by the Administration of Justice Act 1982, and former versions of the Fatal Accidents Act.

1.6 We are very grateful for the help received from the Lord Chancellor's Department, who gave us the use of the responses to its 1990 consultation paper *Damages for Bereavement: A Review of the Level*. We would also like to thank the following for the assistance given to us in the preparation of this paper: Lord Justice Otton, Mr Justice Girvan, Mr J W Davies of Brasenose College, Oxford,

7 Law Reform (Miscellaneous Provisions) Act 1934, s 1(2).

8 *Pickett v British Railway Engineering Ltd* [1980] AC 136.

9 Although this was not made clear until *Gammell v Wilson* [1982] AC 27.

10 Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.126-4.137.

11 We do not examine in detail in this paper the limitation periods applicable to claims under the Fatal Accidents Act 1976. These will be considered in our current project on limitation periods.

12 SI 1990 No 2575.

Timothy Scott QC, Ronald Walker QC, the Scottish Law Commission, the Association of British Insurers, the Association of Personal Injury Lawyers, the Civil Litigation Committee of the Law Society, the Department of Social Security and the Office of National Statistics.

PART II
THE PRESENT LAW

1. THE NATURE OF THE RIGHT OF ACTION UNDER THE FATAL ACCIDENTS ACT

(1) The liability/damages distinction

2.1 Prior to 1846, the dependants of a deceased person, who had died as a result of another's wrong, were unable to bring an action for damages for the loss that they suffered as a result of that wrongful death.[1] They had no right of action unless they had a cause of action which existed independently of the wrong causing the death.[2] Parliament intervened with the Fatal Accidents Act 1846, which gave dependants an action where the death was caused by the wrongful act of another. Known as Lord Campbell's Act, the statute was a response to fatalities on the railways.[3] Parliament developed the scope of the Act with further legislation in 1864 and 1959.[4] The statutes were consolidated in the Fatal Accidents Act 1976.[5] Substantial amendments were made by the Administration of Justice Act 1982. The current law is contained in the Fatal Accidents Act 1976, as amended (hereinafter often referred to as "the Fatal Accidents Act" or "the 1976 Act").

2.2 Liability under the Fatal Accidents Act 1976 is governed by section 1(1), which states:

> 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.

2.3 The effect of section 1(1) was succinctly explained by Lord Denning MR in *Gray v Barr*:[6]

> If [the deceased] had lived, ie, only been injured and not died, and living would have been entitled to maintain an action and recover

[1] *Baker v Bolton* (1808) 1 Campb 493; 170 ER 1033. See also *Admiralty Commissioners v SS America* [1917] AC 38. At one time homicides were criminal offences and the goods of a defendant were seized by the Crown. There would have been little point in the dependants bringing an action. Furthermore, under the common law doctrine of merger, a civil action would not lie where a person had died as a result of a felony. See Stuart Speiser, *Recovery for Wrongful Death* (1966) p 5.

[2] Eg *Jackson v Watson & Sons* [1909] 2 KB 193 (CA). A wife died of food poisoning from food bought by her husband. In an action for breach of contract he recovered for the loss of her services.

[3] Eg *Hansard* 21 August 1846 vol 88 col 926 (Lord Campbell).

[4] Fatal Accidents Act 1864, Fatal Accidents Act 1959.

[5] *Hansard* (HL) 4 March 1976, vol 368, col 1150 (Lord Llewelyn-Davies) and 16 March 1976, vol 369, col 151 (Lord Elwyn-Jones LC).

[6] [1971] 2 QB 554 (CA), 569D (emphasis in original).

damages - then his widow and children can do so. They stand in his shoes in regard to *liability*, but not as to *damages*.

2.4 More specifically, the approach of the courts has been to hold that section 1(1) requires the deceased to have been able successfully to maintain an action at the moment of death had the death not taken place.[7] So an action cannot proceed if the deceased had already obtained judgment against the defendant.[8] Nor will the action succeed if the claim of the deceased had been settled.[9] Complete defences, such as *volenti non fit injuria*, that would have defeated the claim of the deceased will also be a complete defence to a Fatal Accidents Act claim.[10] A contract that validly excluded a claim by the deceased excludes a claim under the Fatal Accidents Act.[11] If the claim that the deceased could have made was statute-barred at the date of death, the Fatal Accidents Act claim will fail.[12]

2.5 Similarly, if the deceased's claim would have failed on the grounds of remoteness no action will lie for the benefit of the dependants. This has led to problems where the death is the result of a subsequent event, such as a further accident which was a consequence of the accident victim's impaired mobility or a suicide which was brought on by depression resulting from the initial accident. The issue is whether it is necessary that the deceased's suicide or second accident be not too remote a consequence of the defendant's act, neglect or default, or whether it is sufficient merely that the chain of causation between the wrongful act and the death has not been broken. The wording of section 1 of the Fatal Accidents Act 1976 can, arguably, be interpreted as providing that it is not necessary that the subsequent death be reasonably foreseeable, and the leading English case on the issue, *Pigney v Pointers Transport Services Limited*,[13] may be regarded as adopting this

[7] Eg see *British Electric Railway Co Ltd v Gentile* [1914] AC 1034 (PC).

[8] The strength of this rule was demonstrated in *Murray v Shuter* [1972] 1 Lloyd's Rep 6 (CA), where the claim of an accident victim was adjourned in order that his dependants could claim under the Act after he died. See also *McCann v Sheppard* [1973] 1 WLR 540, where the Court of Appeal indicated that where a deceased dies pending an appeal there can be no action under the Act: [1973] 1 WLR 540, 544H-545E, *per* Lord Denning MR, 553B-E, *per* James LJ.

[9] Eg *Read v Great Eastern Railway Co* (1868) LR 3 QB 555. The House of Lords assumed that a settlement precludes a Fatal Accidents Act claim in *Pickett v British Rail Engineering Ltd* [1980] AC 136. Lord Wilberforce stated that this assumption was supported by authority: [1980] AC 136, 146F-147A.

[10] Eg *Smith v Baker & Sons* [1891] AC 325.

[11] *Haigh v Royal Mail Steam Packet Co Ltd* (1883) 52 LJ QB 640 (CA); *The Stella* [1900] P 161. Such contracts will now be subject to the Unfair Contract Terms Act 1977, s 2(1).

[12] *Williams v Mersey Docks and Harbour Board* [1905] 1 KB 804 (CA) approved in *British Columbia Electric Railway v Gentile* [1914] AC 1034 (PC). See also *Chappell v Cooper* [1980] 2 All ER 463 (dismissal for want of prosecution and expiry of limitation period). Assuming the deceased's claim was not time-barred, the claim of the dependants has its own independent limitation period, that is unaffected by the amount of time left to run on the deceased's limitation period: Limitation Act 1980, ss 12-14. The amount of time left on the deceased's limitation period may be a factor in extending the limitation period of the Fatal Accidents Act claim under the Limitation Act 1980, s 33.

[13] [1957] 1 WLR 1121. See also *Haber v Walker* [1963] VR 339, where the Full Court of Victoria, following *Pigney*, reached a similar conclusion about the Wrongs Act 1958;

interpretation. However, it has been argued in other jurisdictions and by academics that *Pigney* simply applied the old *Re Polemis*[14] remoteness rules to the Act and that, after the *Wagon Mound (No 1)*,[15] the death must be reasonably foreseeable.[16]

2.6 On the other hand, the action of the dependants has been described by Lord Blackburn in *The Vera Cruz* as "new in its species, new in its quality, new in its principle, in every way new".[17] And certainly the damages recoverable under the Fatal Accidents Act are different from those that would have been recoverable by the accident victim.[18] Indeed this inevitably follows from the fact that the Fatal Accidents Act claim is distinct from the survival to the estate of the action that the deceased would have had against the wrongdoer.

2.7 In *Nunan v Southern Railway Company*[19] it was held that if, prior to the accident, the deceased had agreed that the damages recoverable for personal injuries should be limited, that limit would not apply to a claim made under the Act. It may appear difficult to reconcile this with the fact that a contract excluding liability will bar a Fatal Accidents Act claim.[20] The explanation is that in the case of the clause limiting damages, the deceased could have sued (receiving limited damages) and that is sufficient to establish a Fatal Accidents Act claim (at which point the limitation is then disregarded), whereas in the total exclusion case the deceased could not have sued as the claim would have been barred. Similar reasoning was employed in *Gray v Barr*.[21] It was held that in assessing damages for assault the court can take into account mitigating factors, such as provocation. But such factors are irrelevant to the dependant's claim under the Act provided that the courts would have awarded the deceased a sum as damages, however small that sum might have been.[22]

Zavitsanos v Chippendale [1970] 2 NSWR 495, 500 where Begg J commented *obiter* that foreseeability is irrelevant.

14 [1921] 3 KB 560.

15 [1961] AC 388.

16 This interpretation was advanced by Hudson J in his dissent in *Haber v Walker* [1963] VR 339; by the Supreme Court of British Columbia in *Swami v Lo* (1979) 105 DLR (3d) 451; by the Supreme Court of Queensland in *Richters v Motor Tyre Service Proprietary Limited* [1972] QD R 9; by the Ontario Court of Appeal in *Cotic v Gray* (1981) 124 DLR (3d) 641; by the British Columbia Court of Appeal in *Wright v Davidson* (1992) 88 DLR (4th) 698; by Glanville Williams at [1961] 77 LQR 179, 196; and by K M Stanton, *The Modern Law of Tort* (1994) p 212.

17 (1884) 10 App Cas 59, 70-71.

18 See para 2.3 above.

19 [1924] 1 KB 223 (CA). See also *Grein v Imperial Airways Ltd* (1935) 52 TLR 28 (Lewis J), [1937] 1 KB 50 (CA).

20 Para 2.4 above.

21 [1971] 2 QB 554 (CA).

22 [1971] 2 QB 554, 569E-H, *per* Lord Denning MR.

2.8 The decision in *Burns v Edman*[23] appears inconsistent with these decisions in that the rule of *ex turpi causa non oritur actio* was applied to bar the claim of the dependants. The support given by the deceased to the dependants had proceeded directly from the proceeds of criminal offences and the possibility of the deceased reforming was entirely speculative and unproven to the point of improbability. Yet it would seem that the dependants should have been entitled to bring a Fatal Accidents Act claim because the *ex turpi causa* rule would not have prevented the deceased from bringing an action in respect of his injuries (although it might have done if he had been killed whilst on a criminal enterprise). Applying the liability/damages distinction the Fatal Accidents Act claim should have been unrestricted by the *ex turpi causa* maxim, just as the claim in *Nunan v Southern Railway Company* was unfettered by the agreed limitation on damages.[24] Nevertheless, in *Hunter v Butler*,[25] in which the dependants were claiming damages for loss of support which the deceased would have provided partly by means of defrauding the Department of Social Security, the Court of Appeal reached a similar decision, refusing on public policy grounds to consider the proceeds of the deceased's fraud.

2.9 Similarly if the assessment of damages for the dependants is independent of the deceased's claim, the contributory negligence of the deceased ought not to affect the claim of the dependants. Yet, under section 5 of the Fatal Accidents Act 1976 damages will be reduced for contributory negligence on the part of the deceased.[26] Of course, it is in accordance with normal principles that where one of the dependants was contributorily negligent, the claim of that dependant will be reduced.[27]

(2) Provisional damages

2.10 Where an accident victim faces the prospect of a serious deterioration of his or her condition, a claim for provisional damages can be made in preference to the usual lump sum award.[28] Awards of provisional damages comprise two elements; damages for the existing injuries, calculated on the assumption that the deterioration will not take place, combined with an entitlement to return to court and receive further damages should that assumption be proved false.

[23] [1970] 2 QB 541.

[24] R A Percy describes the decision in *Burns v Edman* as surprising: *Charlesworth & Percy on Negligence* (8th ed 1990) p 1120, para 15-09 n 28. See also the editorial "Damages - The Sins of the Fathers" (1969) 119 NLJ 1083.

[25] *The Times* 28 December 1995. Hobhouse LJ commented that this case was stronger than *Burns v Edman* because the widow in this case had knowledge of her husband's fraud and was, therefore, claiming damages for the loss of the expected proceeds of the wrongdoing of not only of her husband, but also of herself.

[26] The position has been described as "illogical, though doubtless good practical sense": W V H Rogers, *Winfield & Jolowicz on Tort* (14th ed 1994) p 689-690.

[27] *Mulholland v McCrea* [1961] NI 135 (Northern Ireland CA), 150, *per* Lord MacDermott LCJ. A dependant wholly to blame for the death cannot make a claim: *Dodds v Dodds* [1978] QB 543, 545H. The negligence of one dependant does not affect the claims of other dependants who were not negligent: *Dodds v Dodds* [1978] QB 543, 550F, *per* Balcombe J.

[28] Supreme Court Act 1981, s 32A; County Court Act 1984, s 51.

2.11 It was *possible* to argue that once the injured victim had been awarded provisional damages (and hence obtained judgment against the defendant) this barred any action by the dependants under the 1976 Act (albeit that the estate would have an action for the further damages where the victim's condition deteriorated and he or she died as a consequence[29]). But following a recommendation in our Report on Structured Settlements and Interim and Provisional Damages,[30] section 3 of the Damages Act 1996 has made clear that a provisional damages award does not bar a claim under the Fatal Accidents Act 1976, although the award will be taken into account in assessing damages payable to the dependants under the 1976 Act.

2. PECUNIARY LOSS: WHO CAN CLAIM?[31]

2.12 To recover damages for pecuniary loss under the Fatal Accidents Act, a person first has to qualify as a dependant within sections 1(3) to (5). The claimant must then demonstrate that he or she had a reasonable expectation of pecuniary benefit as of right, or otherwise, from the continuance of the life of the deceased.[32]

2.13 The Fatal Accidents Act 1846 only provided for a limited group of claimants, stating that the action would be for the benefit of the wife, husband, parent and child of the deceased. The Act defined parents as including grandparents and step-parents, and children as including grandchildren and stepchildren. The term "dependant" was first used in the Fatal Accidents Act 1959. Under the Fatal Accidents Act 1976, the following relatives of the deceased are (and, even before the 1982 amendment, were) "dependants" so as to be able to benefit from an action brought under the Act:

(a) The spouse.[33]
(b) The parents and grandparents.[34]
(c) The children and grandchildren.[35] An illegitimate child is to be treated as the legitimate child of his mother and reputed father.[36] Stepchildren are

[29] This interpretation derived support from *Middleton v Elliott Turbomachinery Ltd, The Times* 29 October 1990 (CA).

[30] (1994) Law Com No 224, para 5.37.

[31] Actions under the Fatal Accidents Act can be brought by the executor or administrator of the deceased (s2(1)) but if there is no executor or administrator, or if the executor or administrator delays for more than six months, the action may be brought by any of those who stand to benefit from the Fatal Accident Act proceedings (s 2(2)). Only one action can be brought (s 2(3)) and the plaintiff is required to furnish full particulars of those who will benefit from the action and of the nature of the claim (s 2(4)). A dependant not included in the action can intervene: *Cooper v Williams* [1963] 2 QB 567. See generally *McGregor on Damages* (15th ed 1988) paras 1541-1542.

[32] See para 2.17 below.

[33] s 1(3)(a) of both the original Fatal Accidents Act 1976 and the version amended by the Administration of Justice Act 1982.

[34] s 1(3)(b) of both the original Fatal Accidents Act 1976 and the version amended by the Administration of Justice Act 1982.

[35] s 1(3)(c) of both the original Fatal Accidents Act 1976 and the version amended by the Administration of Justice Act 1982.

[36] s 1(4)(b) of the original Fatal Accidents Act 1976 and s 1(5)(b) following its amendment by the Administration of Justice Act 1982.

also treated as children.[37] An unborn child conceived before the death qualifies if born alive.[38]

(d) The brothers, sisters, uncles and aunts and the issue of these relatives.[39]

2.14 Relationships of affinity[40] are to be treated as relationships of consanguinity and relationships of the half blood are to be treated as relationships of the whole blood.[41]

2.15 The Administration of Justice Act 1982 extended the list of dependants who could recover under the Fatal Accidents Act 1976 to include:

(a) Former spouse.[42] This includes a person whose marriage to the deceased had been annulled or declared void.[43]

(b) Cohabitants. This is discussed in the next paragraph.

(c) Any ascendant of the deceased.[44]

(d) Any descendant of the deceased.[45]

(e) Any person who was treated by the deceased as his parent.[46]

(f) Children, who were not the deceased's own children, of any marriage to which the deceased was at any time a party and whom the deceased treated as a child of the family in relation to that marriage.[47]

2.16 The original Administration of Justice Bill 1982 did not include the unmarried partner.[48] Provision was made for such cohabitants after debate in the House of Lords.[49] But to guard against a perceived fear of exaggerated claims the courts

[37] s 1(4)(a) of the original Fatal Accidents Act 1976 and s 1(5)(a) following its amendment by the Administration of Justice Act 1982.

[38] *The George and Richard* [1871] LR 3 A & E 466; *Lindley v Sharp* (1974) 4 Fam 90. Harvey McGregor QC understands the rule to apply to children conceived before the injury, but submits that children conceived after the injury should also qualify as dependants, whether born before or after the death: *McGregor on Damages* (15th ed 1988) para 1536.

[39] s 1(3)(d) of the original version of the Fatal Accidents Act 1976 and s 1(3)(g) following its amendment by the Administration of Justice Act 1982. These classes were introduced by the Fatal Accidents Act 1959, s 1.

[40] Ie relationships created by marriage.

[41] s 1(4)(a) of the original version of the Fatal Accidents Act 1976 and s 1(5)(a) following its amendment by the Administration of Justice Act 1982.

[42] s 1(3)(a). In *Shepherd v Post Office*, *The Times* 15 June 1995, a divorced woman who returned to live with her first husband qualified under section 1(3)(a) as a former wife.

[43] s 1(4).

[44] s 1(3)(c).

[45] s 1(3)(e). Ascendants and descendants are probably restricted to lineal ascendants and descendants as uncles and aunts are specifically included under s 1(3)(g): Mary Duncan & Christine Marsh, *Fatal Accident Claims* (1993) p 7.

[46] s 1(3)(d).

[47] s 1(3)(f).

[48] Sometimes referred to as the "common law" spouse.

[49] *Hansard* (HL) 8 March 1982 vol 428 cols 37-38, 46-47; 30 March 1982 vol 428 cols 1281-1291; 4 May 1982 vol 429 cols 1105-1109.

were directed to consider the lack of an enforceable right to legal support.[50] This provision appears to add nothing of substance, for the courts would, in any event, take into account potential future changes in the level of support.[51] Three conditions for cohabitants to qualify as dependants are laid down by section 1(3)(b) of the Fatal Accidents Act 1976 as amended by the Administration of Justice Act 1982:

(1) They must have been living with the deceased in the same household immediately before the date of death. The court must look at the whole of the facts in determining whether the deceased was living in the same household.[52]

(2) They must have been living with the deceased in the same household for at least two years before the date of death. Brief absences on the part of the deceased do not prevent the claimant from establishing his or her claim.[53]

(3) They must have been living during the whole of that two year period as the husband or wife of the deceased.[54]

3. PECUNIARY LOSS: NATURE, ASSESSMENT AND COLLATERAL BENEFITS

(1) Nature of the pecuniary loss

2.17 Apart from funeral expenses (which we consider separately below),[55] the pecuniary loss recoverable under the Fatal Accidents Act 1976 is the loss of any pecuniary benefit that the claimant expected to receive from the continuation of the life[56] and that does not flow from the business relationship between the claimant and the deceased.[57] In short, the relevant loss is the loss of a non-business benefit or in lawyers' rather circular jargon, 'loss of dependency'. This includes, for example, the loss of the money that the deceased brought into the household,[58] the loss of provisions of goods and money,[59] the loss of a pension received in respect of the

[50] Fatal Accidents Act 1976, s 3(4); *Hansard* (HL) 4 May 1982 vol 429 col 1106, 1112-1113. In *Drew v Abassi and Packer* (CA) (Unreported) 24 May 1995, the Court of Appeal observed that the trial judge had found that the long-standing relationship between the plaintiff and the deceased was one which "would have survived as well as any marriage". However the Court of Appeal held that the trial judge was entitled to discount the appropriate multiplier by two years (from 15 to 13) in light of the wording of s 3(4) and in consideration of the fact that the plaintiff had no enforceable right to financial support by the deceased: see [1995] JPIL 309.

[51] Eg *Dolbey v Goodwin* [1955] 1 WLR 553 (CA); *Owen v Martin* [1992] PIQR Q151 (CA).

[52] *Pounder v London Underground Ltd* [1995] PIQR P217, P218.

[53] *Pounder v London Underground Ltd* [1995] PIQR P217, P220.

[54] s 1(3)(b) Fatal Accidents Act 1976.

[55] See para 2.61-2.62 below.

[56] *Franklin v SE Rly* (1858) 3 H&N 211, 214; 157 ER 448, 449, *per* Pollock CB; *Dalton v SE Rly* (1858) 4 CB (NS) 296; 140 ER 1098. See also *Kassam v Kampala Aerated Water Co Ltd* [1965] 1 WLR 668.

[57] See para 2.22 below.

[58] *Grzalek v Harefield and Northwood Hospital Management Committee* (1968) 112 SJ 195.

[59] *Dalton v South Eastern Railway Company* (1858) 4 CB (NS) 296; 140 ER 1098.

deceased partner,[60] or the loss of fringe benefits such as a company car.[61] Where the deceased and dependant both brought money into the household, a benefit arises by virtue of the sharing of the expenses.[62] The expected benefit lost as a result of the death may also be a loss of gratuitous services, such as housekeeping or "do-it-yourself" services or the loss of the services of a mother.[63]

2.18 Provided there was a reasonable expectation of benefit, rather than a mere speculative possibility,[64] damages are available to compensate for its loss whether or not such a benefit had previously been enjoyed, and even if it is a one-off benefit. For example, in *Betney v Rowland and Mallard*[65] a daughter was able to claim for the anticipated contribution her deceased parents would have made to her wedding.

2.19 Subject to the requirement of reasonable expectation, parents losing the future support of their offspring can claim under the Act. Damages were recovered by the parents of a sixteen year old daughter nearing the completion of her apprenticeship as a dressmaker,[66] but not by the parents of a three year old child.[67] As well as resulting from the age of the child, the absence of any present benefit may be due to the fact that the parents did not require assistance at the time of the death.[68] In one case, the parents had intended to leave Iraq and be supported by their daughters working in London, but the children were killed in an aircrash. The parents were able to recover for the loss of the future dependency.[69]

[60] *Feay v Barnwell* [1938] 1 All ER 31.

[61] *Clay v Pooler* [1982] 3 All ER 570.

[62] *Burgess v Florence Nightingale Hospital for Gentlewomen* [1955] 1 QB 349, 362.

[63] *Hay v Hughes* [1975] QB 790 concerning the loss of a mother's services; *Franklin v South Eastern Railway Company* (1858) 3 H & N 211; 157 ER 448, concerning the loss of a son's services; *Berry v Humm & Co* [1915] 1 KB 627; *Clay v Pooler* [1982] 3 All ER 570. Note that the action for the loss of a wife's services or society following her injury in a non-fatal accident was abolished by the Administration of Justice Act 1982, s 2. See *Hansard* (HL) 8 March 1982, vol 428, col 27.

[64] *Franklin v South Eastern Railway Co* (1858) 3 H & N 211, 214; 157 ER 448, 449. Although once it is demonstrated that there was a reasonable expectation of support (or that the deceased had already been supporting the dependant) the fact that the court must speculate as to the level of support is not an obstacle: *Lindley v Sharp* (1974) 4 Fam 90.

[65] [1992] CLY 1786. See also *Piggot v Fancy Wood Products Ltd* (Unreported) January 31, 1958; *Kemp & Kemp* paras 21-007 and M5-012, where the court found that the deceased would have assisted his parents obtain a house and so they were able to recover the loss of that expected contribution.

[66] *Taff Vale Railway Company v Jenkins* [1913] AC 1. See also *Buckland v Guildford Gas Light and Coke Company* [1949] 1 KB 410, where the child was 13, and *Wathen v Vernon* [1970] RTR 471 (CA).

[67] *Barnett v Cohen* [1921] 2 KB 461. At this age predictions as to the future of both the child and the parent until the former is able to support the latter are too speculative.

[68] *Hetherington v North Eastern Railway Company* (1882) 9 QBD 160; *Bishop v Cunard White Star Company Ltd* [1950] P 240.

[69] *Kandalla v British European Airways Corporation* [1981] QB 158.

2.20 The need to show a reasonable expectation of benefit means that a separated spouse is required to show a significant prospect of reconciliation.[70] A husband can recover for the loss of future wages of a wife who was bringing up children if she would have returned to work.[71]

2.21 The lost benefits for which dependants are able to claim damages under the 1976 Act may include the loss of greater benefits which they would have received had the deceased continued to live. For example, in *Davies v Whiteways Cyder Co Ltd*,[72] the dependants were able to claim damages for the estate duty they had to pay on gifts from the deceased as a result of the deceased being killed less than seven years after the gifts were made. Similarly, in *Singapore Bus Service (1978) Ltd v Lim Soon Yong*[73] the Privy Council upheld a claim by dependants that they had suffered a loss of benefit from the deceased's endowment insurance as a result of the deceased's premature death. Had the accident not occurred, both the deceased and his employer would have continued to pay into the fund. The benefit of these further payments would have been received by the dependants either (a) directly under the terms of the endowment policy as a lump sum had the deceased died before the age of 55; (b) as increased maintenance payments from the deceased after, upon the deceased reaching the age of 55, the policy had paid out; or, (c) as increased inheritance upon the deceased's death after the age of 55.[74]

2.22 A pecuniary loss cannot be recovered if it stems from a business relationship between the claimant and the deceased. For example, in *Burgess v Florence Nightingale Hospital for Gentlewomen*[75] a husband and wife were dancing partners. Their earning capacity as a couple was greater than their individual abilities to earn an income. The husband could not recover for the loss of his income as a dancer after her death. Similarly, where the deceased was employed by his father, the loss of the son's help and experience precluded the father from taking the same contracts, but the father was unable to recover any damages.[76] On the other hand, where the services of the deceased were supplied to the dependant at less than the market rate, that reduction can be attributed to the personal relationship rather than to the professional relationship and so is recoverable.[77] Similarly, where the

[70] *Davies v Taylor* [1974] AC 207. See also *Gray v Barr* [1971] 2 QB 554 (CA), 570-571, *per* Lord Denning MR.

[71] *Regan v Williamson* [1976] 1 WLR 305.

[72] [1975] QB 262.

[73] [1985] 1 WLR 1075 (PC).

[74] For another example of dependants' claims that their inheritance would subsequently have been greater than it in fact was, see *Nance v British Columbia Electric Company Ltd* [1951] AC 601.

[75] [1955] 1 QB 349. But see *Oldfield v Mahoney*, where the practice of a school was to appoint a married man to the post of housemaster. Following the death of his wife, a schoolmaster recovered damages for his reduced chances of promotion: (1968) *Kemp & Kemp* para 21-006; noted at M3-055 and M3-122.

[76] *Sykes v North Eastern Railway Co* (1875) 44 LJCP 191. See also *Malyon v Plummer* [1964] 1 QB 330.

[77] Eg *Franklin v South Eastern Railway Co* (1858) 3 H & N 211; 157 ER 448, commented upon in *Malyon v Plummer* [1964] 1 QB 330 (CA), 352, *per* Diplock LJ.

deceased paid a dependant more than the market rate, the dependant can recover the sum received minus a reasonable remuneration for the services rendered.[78]

(2) Calculating the damages for loss of pecuniary benefit

(a) The multiplier method

2.23 Where the losses of the claimants are specific, identifiable instances of loss, the calculation of damages is a simple matter of adding them up. Assessment of a continuing dependency is more difficult and will inevitably be artificial and prone to inaccuracy,[79] difficulties which are, to some extent, common to all assessments of future pecuniary loss. Awards for loss of dependency made under the Fatal Accidents Act are split into two parts, the first relating to the period between the deceased's death and the trial and the second relating to the period post-trial. This division is required because interest is awarded on the former (at half the rate on the special account between date of death and trial) but is not awarded on the latter.[80] However, unlike the assessment of damages for personal injury even pre-trial losses are usually estimated using the multiplier method. That is, the multiplier is calculated from the date of death rather than from the date of trial. Although damages are assessed from the date of death, events that have occurred between the death and the trial (for example the death of a dependant[81] or an increase in the wages that the deceased would have earned)[82] are taken into account by the courts.

(i) The multiplicand(s)

2.24 The division between pre-trial and post-trial losses generally necessitates the use of a separate pre-trial and post-trial multiplicand. The first step in calculating these multiplicands is to assess the annual value of the lost dependency at the date of the deceased's death. This may be done by simply adding together the value of the benefits received by the claimants from the deceased. Alternatively, if the deceased's lifestyle justifies the assumption, the courts may deduct from the deceased's net salary his or her exclusively personal expenditure. In a standard case of a husband supporting his wife and children, and in which there are no unusual features, there has developed a convention that the multiplicand be three quarters of the deceased's earnings for the period when the children are dependent and two thirds thereafter.[83]

2.25 The value of the dependency at the date of the deceased's death must then be revised in the light of the likely changes in the deceased's income that would have

[78] *Malyon v Plummer* [1964] 1 QB 330 (CA), 343, *per* Sellers LJ, 346, *per* Pearson LJ, 351-353, *per* Diplock LJ.

[79] Eg *Cookson v Knowles* [1979] AC 556 (HL), 568E-569A, *per* Lord Diplock.

[80] *Cookson v Knowles* [1979] AC 556 (HL).

[81] *Williamson v John I Thornycroft & Co Ltd* [1940] 2 KB 658 (CA); *The Swynfleet* (1947) 81 Ll L Rep 116.

[82] *The Swynfleet* (1947) 81 Ll L Rep 116.

[83] *Harris v Empress Motors Ltd* [1984] 1 WLR 212, 216H-217C, *per* O'Connor LJ; *Robertson v Lestrange* [1985] 1 All ER 950, 955D, *per* Webster J. The second case also illustrates how the multiplicand can vary over a period of time.

occurred between death and trial (as regards the pre-trial multiplicand) and changes in the deceased's income that would have occurred after trial taking account of likely promotion but ignoring increases in pay owing to inflation (as regards the post-trial multiplicand).[84]

(ii) The multiplier

2.26 The multiplier used to calculate losses is assessed from the date of the deceased's death, rather than from the date of the trial as in personal injury cases.[85] While, as we shall see,[86] one can argue that there should be no difference, the difference is to be explained on the ground that there is not only the uncertainty of the claimant's future dependency to consider, but also the uncertainty of the deceased's life expectancy, or working life expectancy, or willingness to continue the support, which latter uncertainties begin from the point of the deceased's death.[87] As Lord Fraser said in *Cookson v Knowles*,[88]

> In a personal injury case, if the injured person has survived until the date of the trial, that is a known fact and the multiplier appropriate to the length of his future working life has to be ascertained as at the date of trial. But in a fatal accident case the multiplier has to be selected once and for all as at the date of death, because everything that might have happened to the deceased after that date remains uncertain.

2.27 Having arrived at an overall multiplier, the courts then apply as the pre-trial multiplier the number of years between the deceased's death and trial. That part of the multiplier which remains is applied to the post-trial multiplicand to assess the post-trial losses.[89] However, in *Corbett v Barking, Havering & Brentwood HA*,[90] the Court of Appeal ruled that, where a long delay had occurred between the date of death and date of trial, it was unrealistic to apply a multiplier from the date of death without considering the uncertainties which had been removed. The dependant's mother had died after giving birth to the dependant. The multiplier chosen at first instance was 12 but 11½ years had passed between the deceased's death and trial, and so only six months was applied for the future loss by the court of first instance. The Court of Appeal substituted a multiplier of 15 which left the figure of 3½ for future loss. Although the Court noted that its decision might encourage delay by plaintiffs, it felt that other weapons such as the discretion to

[84] *Mitchell v Mulholland (No 2)* [1972] 1 QB 65, 78-81, *per* Edmund Davies LJ, and 86-87, *per* Sir Gordon Willmer.

[85] Usually, a single sum of damages is awarded, and then apportioned between the claiming dependants. However, in some cases different multipliers have to be used for different dependants. For example, in *Cresswell v Eaton* [1991] 1 WLR 1113, where a mother died leaving three children, aged 7, 6 and 4, three different multipliers of 8, 8½ and 10½ were applied.

[86] See paras 3.50-3.52 below.

[87] *Graham v Dodds* [1983] 1 WLR 808 (HL). See also *Price v Glynea and Castle Coal Co* (1915) 85 LJKB 1278; *Barnett v Cohen* [1921] 2 KB 461.

[88] [1979] AC 556, 576C-D.

[89] See, eg, *Cookson v Knowles* [1979] AC 556 (HL), where the judge chose a multiplier of 11. The trial occurred 2½ years after the death, and so the multiplier finally applied was 8½.

[90] [1991] 2 QB 408 (Ralph Gibson LJ dissenting).

withhold interest under section 35A of the Supreme Court Act would compensate for this.[91]

2.28 The choice of multiplier varies according to the period for which the dependants would have received support from the deceased. An initial figure is chosen, based on the life expectancies of the deceased and his or her dependants. This figure is based mainly on the ages of the persons concerned, although it may be affected by hazardous working conditions, and it has been held to be affected by the hazards of wartime.[92]

2.29 A deduction is made to counter the overcompensation that could result from the dependant's receipt of all the money at once rather than over the period of years that he or she would have enjoyed the dependency. The award is designed to give the dependant a sum of money which can be invested; the lost pecuniary benefit is replaced by a combination of interest and withdrawals from the capital.[93] We have previously recommended that the courts should be required to take into account the ILGS rate when determining the rate of return which a plaintiff may be expected to receive on the lump sum awarded, although the Lord Chancellor should have the power to prescribe by statutory instrument an alternative indicator of real rates of return.[94] The Damages Act 1996 provides that the determination of the return on the award which a dependant can be expected to receive should be made by reference to the rate of expected return which may be prescribed by an order made by the Lord Chancellor.[95] In the linked appeals in *Wells v Wells*, *Thomas v Brighton HA* and *Page v Sheerness Steel plc*,[96] the Court of Appeal rejected the plaintiffs' argument that the calculation ought to be based upon the ILGS rate and confirmed the traditional 4.5% discount. The influence of the ILGS rate on the rate set by the Lord Chancellor will become apparent if and when such a rate is announced, but the outcome of this litigation will clearly be important.[97]

2.30 A further discount is made in respect of the vicissitudes of life,[98] that is the possibility that other contingencies might in any event have shortened the working life of the deceased or the life expectancy of the dependant. However, as Harvey

[91] [1991] 2 QB 408, 428G-H, *per* Purchas LJ.

[92] *Hall v Wilson* [1939] 4 All ER 85. The deceased died prior to the outbreak of the Second World War. The increased risk of death in wartime was taken into account. In *Bishop v Cunard White Star Company Ltd* [1950] P 240 the deceased were killed at sea during the war. As the hazards of life at sea were regarded as not "conspicuously greater" then those on land, the multiplier was not "materially reduced": [1950] P 240, 248, *per* Hodson J.

[93] *Cookson v Knowles* [1979] AC 556, 576G-H, *per* Lord Fraser of Tullybelton.

[94] Structured Settlements and Interim and Provisional Damages (1994) Law Com No 224, paras 2.24-2.36.

[95] Damages Act 1996, s1.

[96] [1997] 1 WLR 652. Appeals to the House of Lords in all three cases are awaiting hearing.

[97] See *Hansard* (HL) 13 May 1996, vol 572, cols 374 & 382; *Hansard* (HL) 4 June 1996, vol 572, col 1233 & 1234.

[98] Eg *Whittome v Coates* [1965] 1 WLR 1285 (CA), 1292, *per* Diplock LJ; *Graham v Dodds* [1983] 1 WLR 808 (HL(NI)), 816H, *per* Lord Bridge of Harwich. See also *Miller v British Road Services Ltd* [1967] 1 WLR 443.

McGregor QC points out, there is no more reason to assume that a person would have died earlier than expected than to assume that he would have outlived the life expectancy.[99] Similarly, not all vicissitudes will work to a person's disadvantage. There is force in the observation of Windeyer J that:[100]

> ... the generalisation, that there must be a "scaling down" for contingencies, seems mistaken. All "contingencies" are not adverse: all "vicissitudes" are not harmful... Why count the possible buffets and ignore the rewards of fortune?

It should be noted that, as we have seen,[101] the multiplier is already adjusted to take into account factors such as hazardous working conditions or the lack of an enforceable right to support.

2.31 To encourage consistency and greater accuracy, we have previously recommended in our report on Structured Settlements and Interim and Provisional Damages[102] that greater use should be made of actuarial tables such as the Ogden Tables. It should be stressed that in our view the use of these tables does not preclude the individual characteristics of particular cases from being taken into account.[103] In a judgment delivered shortly after the publication of our Report, this point was recognised by Morland J, who said that the Ogden Tables should not be used to fix the multiplier, but that they could be used as an aid to decide the multiplier appropriate to the particular circumstances and contingencies of the case.[104] The Court of Appeal, in the linked appeals of *Wells v Wells, Thomas v Brighton HA* and *Page v Sheerness Steel plc*,[105] confirmed that the tables were "very useful as a check" but went no further. In accordance with the recommendations in our report, under section 10 of the Civil Evidence Act 1995, the Ogden Tables will be admissible as evidence to assist in the assessment of damages, *inter alia*, in claims under the Fatal Accidents Act 1976.[106] The tables may be proved simply by the production of a copy published by The Stationery Office.[107]

(b) Quantifying the loss of a deceased's services

2.32 Where the deceased did not bring money into the household, but rather provided "services", one faces the difficulty of how to put a value on those services. The loss of a deceased's services is usually quantified by reference to what it would cost, or

[99] *McGregor on Damages* (15th ed 1988) para 1476.

[100] *Bresatz v Przibilla* (1962) 108 CLR 541 (High Court of Australia), 544.

[101] See paras 2.16 & 2.28 above.

[102] (1994) Law Com No 224, paras 2.9-2.15.

[103] *Ibid*, para 2.15.

[104] *Read v Harries* [1995] PIQR Q25, Q28.

[105] [1997] 1 WLR 652.

[106] And also in claims for personal injury and claims under the Law Reform (Miscellaneous Provisions) Act 1934.

[107] The Act received Royal Assent on 8 November 1995, but is not yet in force.

is costing, to pay a third party to provide the services[108] (and a multiplier method may again be adopted). Alternatively, where a third party gives up work to provide replacement services, the damages for the loss of services have been assessed by reference to the third party's loss of earnings.[109]

2.33 The quantification of the services provided by a mother is particularly difficult.[110] Often a mother's services have been quantified by reference to the cost of employing a housekeeper or nanny.[111] However a mother obviously does more for her children than mere housekeeping and childminding,[112] and she provides her services with more commitment than would a hired-help.[113] The deceased mother will usually have unique qualities that no hired replacement can offer. Furthermore, the deceased may have performed certain services concurrently, or different household members may perform different tasks on different occasions. Valuing the performance of each function separately and cumulatively may have the effect of disproportionately inflating the damages award, even though these services themselves represent only the "commercial" aspect of the wife and mother's domestic contribution.[114] An additional consideration is that the benefit received by a child from its mother varies with the age of the child. While the child is young, the value of a nanny's services may be an appropriate figure by reference to which damages may be set. As a child gets older the value of a nanny's services becomes less appropriate.[115] A strict mathematical calculation on the basis of a notional housekeeper or nanny has trouble coping with all these different considerations, and recent cases such as *Stanley v Saddique*[116] indicate that the courts will apply a less precise, discretionary approach which assesses the award in the same way that a jury would. That case also establishes that lower damages will be awarded if the mother was unreliable and unlikely to have looked after her

[108] *Franklin v South Eastern Railway Company* (1858) 3 H & N 211; 157 ER 448. See also *Berry v Humm & Co* [1915] 1 KB 627; *Clay v Pooler* [1982] 3 All ER 570.

[109] See *Mehmet v Perry* [1977] 2 All ER 529. In *Cresswell v Eaton* [1991] 1 WLR 1113, in which the children's aunt gave up her job as a traffic warden to look after the children, the damages for loss of services were assessed by reference to the salary which the aunt would have earned had she not surrendered her job. In that case the mother was also a wage earner and so the loss of services and the loss of financial dependence were assessed separately.

[110] See eg Dr J Blaikie, "Personal Injuries Claims: The Valuation of "Services"" (1994) 17 SLT 167.

[111] *Regan v Williamson* [1976] 1 WLR 305.

[112] There is perhaps no adequate list of the conventional functions of the housekeeper/mother. They cover a broad spectrum, including: housekeeper, nurse, counsellor, child-minder, book keeper, chauffeur, plumber/electrician/gardener, cook, dishwasher, clothes washer: R H Kierr, "Proof of Damages Arising from the Death of a Housewife" (1961) 8 Louisiana Bar Journal 215.

[113] See the comments of Watkins J in *Regan v Williamson* [1976] 1 WLR 305, 309; *Mehmet v Perry* [1977] 2 All ER 529.

[114] See Dr J Blaikie, "Personal Injuries Claims: The Valuation of "Services"" (1994) SLT 167, 170; Speiser, *Recovery for Wrongful Death* (2d) § 4.4; J Yale, "The Valuation of Household Services in Wrongful Death Actions" (1984) 34 Univ of Toronto LJ 283.

[115] *Spittle v Bunney* [1988] 1 WLR 847; *Corbett v Barking, Harvering and Brentwood HA* [1991] 2 QB 408.

[116] [1992] QB 1 (CA). See also *Hayden v Hayden* [1992] 1 WLR 986.

children properly.[117] It has been held that damages for the lost services of a mother may be awarded even where these services are subsequently rendered gratuitously by another.[118]

2.34 In *Hunt v Severs*,[119] the House of Lords overruled *Donnelly v Joyce*[120] and recognised that, when a personal injury victim is provided with gratuitous services by another, then the pecuniary loss in respect of those services is not that of the victim, but that of the party who provided the services. The plaintiff recovers damages in respect of those services, but holds them on trust for the carer. However, when the tortfeasor is the party providing the care, as was the case in *Hunt v Severs*, the plaintiff does not recover for the services on the reasoning that there is no point in the tortfeasor paying the plaintiff a sum in damages, only for the plaintiff to pay it back to the tortfeasor. The courts have not yet considered the implications of this analysis for fatal accident cases concerning gratuitous services.

(c) Inflation

2.35 An award made under the Fatal Accidents Act is not increased to compensate for inflation. Lord Diplock in *Mallett v McMonagle*[121] thought that the only practicable course for the courts to take was to ignore both the effects of inflation and the countering effects of investment and capital appreciation. In *Taylor v O'Connor*,[122] Lord Reid questioned this approach, arguing that to refuse to take inflation into account at all was unrealistic. However, the majority in *Taylor v O'Connor* approved Lord Diplock's approach, and this has since been confirmed by the Court of Appeal in *Young v Percival*[123] and by the House of Lords in *Cookson v Knowles*.[124] It should be noted that, as the ILGS rate gives a guaranteed rate of return over and above inflation, our previous recommendation[125] that the ILGS rate be used to calculate the 'lump sum' discount necessarily involves taking inflation into account.

[117] See also *Hayden v Hayden* [1992] 1 WLR 986 (CA) and Catherine Leech, "Valuing a Mother's Worth" (1994) 144 NLJ 1438.

[118] *Hay v Hughes* [1975] QB 790, although see also *Hayden v Hayden* [1992] 1 WLR 986 and paras 2.78 to 2.81 below.

[119] [1994] 2 AC 350.

[120] [1974] QB 454.

[121] [1970] AC 166, 176C-E. Lord Diplock did note that interest rates could be applied to payments to a dependant in order to calculate what those payments would be in the future.

[122] [1971] AC 115, 129G-130A. See also *Mitchell v Mulholland (No 2)* [1972] 1 QB 65 (CA), 78A-79C, *per* Edmund Davies LJ, 86F-87D, *per* Sir Gordon Willmer; *Miller v British Road Services Ltd* [1967] 1 WLR 443, 445, *per* Waller J.

[123] [1975] 1 WLR 17, 29B-H.

[124] [1979] AC 556, 573B-D, *per* Lord Diplock, 576E-577G, *per* Lord Fraser of Tullybelton.

[125] See para 2.29 above.

(d) Taxation

2.36 Damages for personal injuries or wrongful death are not subject to taxation.[126] However, the income from the award will be subject to tax. The usual rule, as expressed by Lord Oliver in *Hodgson v Trapp*, is that:[127]

> the incidence of taxation in the future should ordinarily be assumed to be satisfactorily taken care of in the conventional assumption of an interest rate applicable to a stable currency and the selection of a multiplier appropriate to that rate.

Lord Oliver admitted that there might be exceptional cases in which the tax element might have to be considered by the courts, and an alteration made to the award, but said that they could not be readily imagined.[128] It is unclear whether an alteration to the award will be made by way of adjustment to the multiplier or to the multiplicand.[129]

(e) Actual or predicted changes in the marital or family status of the dependant or deceased

(i) Marriage of the deceased

2.37 Where parents had been supported by their deceased child before his death, the courts have taken into account the likelihood of the deceased's marriage and the consequential reduction of contributions to the parents.[130]

(ii) Remarriage of the dependant

2.38 Prior to 1971 the courts took a widow's prospects of remarriage into account in order to assess her damages under the Fatal Accidents Act.[131] This assessment was much criticised.[132] Some of the criticism may have been misplaced,[133] but as a result of this dissatisfaction, section 4 of the Law Reform (Miscellaneous Provisions) Act 1971 provided that in assessing the claim of a widow neither her

[126] Taxation of Chargeable Gains Act 1992, s 52 (formerly Capital Gains Tax Act 1979, s 19(5)).

[127] [1989] AC 807, 835B.

[128] [1989] AC 807, 835B-F.

[129] See *McGregor on Damages* (15th ed 1988) para 1577.

[130] *Dolbey v Goodwin* [1955] 1 WLR 553 (CA); *Wathen v Vernon* [1970] RTR 471 (CA).

[131] *Goodburn v Thomas Cotton Ltd* [1968] 1 QB 845 (CA); *Miller v British Road Services Ltd* [1967] 1 WLR 443. Where the wife had remarried, her dependency was held to have ended: eg *Mead v Clarke Chapman & Co Ltd* [1956] 1 WLR 76 (CA).

[132] Eg *Buckley v John Allen & Ford (Oxford) Ltd* [1967] 2 QB 637, 644G-645E, *per* Phillimore J; *Hansard* (HL) 16 November 1966 vol 277 col 1323 (Baroness Emmet of Amberley); Report of the Committee on Personal Injury Litigation (1968) Cmnd 3691 paras 378-379. Various women's groups were also dissatisfied with this law: *Hansard* (HC) 29 January 1971 vol 810 col 1122 (Mr Arthur Probert MP).

[133] Much was made of hurtful questions in court and inquiry agents trailing widows, but doubts were expressed as to whether such incidents were widespread: *Hansard* (HL) 20 April 1971 vol 317 col 541 (Lord Diplock).

prospects of remarriage nor her actual remarriage would be taken into account. This provision remains the law.[134]

2.39 It should be emphasised that what is now section 3(3) of the 1976 Act affects only a widow's damages. The widow's prospects of remarriage must still be taken into account in assessing her child's damages under the Act; and a widower's prospects of remarriage are unaffected by section 3(3). An unmarried dependant's prospects of marriage are also to be taken into account.

(iii) Prospects of divorce

2.40 A linked question is whether the likelihood of a divorce between the dependant and the deceased should be a factor in assessing damages under the Act. The Pearson Commission recommended that this possibility should not be a factor, citing the absence of certainty and the undesirability of inquiring into the state of the relationship.[135] But in *Owen v Martin*[136] the Court of Appeal held that the potential for divorce must be taken into account. The deceased in that case was the plaintiff's second husband. The plaintiff's first marriage had ended in divorce on the grounds of her adultery, and shortly after the death of her second husband, she started a relationship with a married man, whom she had married by the time her claim was heard by the court. The Court held that the length of the plaintiff's dependency would be affected by subsequent divorce, and so the chances that the plaintiff's marriage to the deceased might end in divorce was a factor which had to be considered when assessing the multiplier.

2.41 Applying this same reasoning to cohabitation, it can be expected that the courts will examine any signs of a break-up of the relationship between cohabitants. This will be in addition to the statutory requirement that the courts must take into account the lack of an enforceable right to financial support between cohabitants.[137]

(iv) Adoption

2.42 Where a child has been adopted following the death, the adopting parents have a legal obligation of maintenance and the child must be treated as if born to the new parents. An adoption must be considered by the courts in calculating the dependency, although the child's right of action is not extinguished.[138]

[134] Fatal Accidents Act 1976, s 3(3).

[135] The Pearson Commission Report (1978) para 417.

[136] [1992] PIQR Q151. The Court applied the reasoning that any factor which could affect the expectation of continued dependency upon the deceased, had he lived, must be regarded as a relevant consideration. See also *Julian v Northern & Central Gas Corp Ltd*, where the possibility of a breakdown in the marriage led to a "substantial reduction" in damages: (1978) 5 CCLT 148 (High Court of Ontario), affirmed 118 DLR (3d) 458.

[137] Fatal Accidents Act 1976, s 3(4). See para 2.16 above.

[138] *Watson v Willmott* [1991] 1 QB 140.

(3) Section 4 of the 1976 Act: "benefits accrued … as a result of death" to be ignored

(a) common law

2.43 Although the law on 'collateral benefits' is now governed by section 4, it is important first to understand what the position was at common law. At common law, benefits arising from the death of the deceased had to be taken into account in assessing a claim under the Fatal Accidents Act.[139] But the common law rule was often interpreted narrowly by the courts. A good example is provided by the decision in *Peacock v Amusement Equipment Co Ltd*[140] in which it was held that a payment made voluntarily to a widower by his stepchildren upon their inheriting a share of the deceased's estate did not result from the death and so was ignored in calculating the widower's damages. Again, in *Schneider v Eisovitch*[141] the fact that the father of the deceased had helped to run his loss-making business for the widow was not taken into account when assessing her damages. Similarly, no deductions were made in *Rawlinson v Babcock & Wilcox Ltd*[142] notwithstanding that the daughter of the deceased had been accepted into her uncle's home and family, or in *Hay v Hughes*,[143] where the children of the deceased were voluntarily looked after by their grandmother.

2.44 However, the courts were not consistent in their approach, and in some instances a narrow interpretation of the deduction rule was not adopted. For example, in *Mead v Clarke Chapman & Co Ltd*[144] while damages were awarded in a case where the child of the deceased now had a good stepfather, the Court of Appeal nevertheless held that the remarriage could not be disregarded in assessing those damages. Voluntary payments made by the defendant employers in *Jenner v Allen West & Co Ltd*[145] were deducted.

2.45 The approach of the courts appears to have been influenced by a concern not to discourage voluntary assistance to the dependants: relatives could be deterred from assisting dependants if they considered that their help would reduce the damages recoverable. This was certainly a factor in *Rawlinson v Babcock & Wilcox Ltd*,[146] where Chapman J feared that if such benefits were to be deducted, it would put an end to all charity and benevolence towards orphaned children. On the other hand,

[139] *Davies v Powell Duffryn Associated Colleries Ltd* [1942] AC 601.

[140] [1954] 2 QB 347 (CA). Somervell LJ interpreted the payment as resulting from the stepchildren's consideration (and perhaps affection).

[141] [1960] 2 QB 430.

[142] [1967] 1 WLR 481. Chapman J admitted that it could be seen that contributions arising fundamentally from charity and benevolence would not have been made but for the death, but nevertheless held that they must be ignored: [1967] 1 WLR 481, 486H.

[143] [1975] QB 790 (CA).

[144] [1956] 1 WLR 76. See also *Reincke v Gray* [1964] 1 WLR 832 (CA), decided after stepfathers came under a legal obligation to maintain stepchildren.

[145] [1959] 1 WLR 554. Lord Evershed MR suggested that the payment was made in recognition of an obligation of humanity: [1959] 1 WLR 554, 568-569.

[146] [1967] 1 WLR 481, 485C. See also *Parry v Cleaver* [1970] AC 1, 14C-D, *per* Lord Reid.

in cases such as *Jenner v Allen West & Co Ltd*[147] where the assistance came from an employer who was also the defendant, judges were concerned that a refusal to take the support into account could deter other employers from exhibiting the same generosity for fear of having to pay twice for their negligence. As we saw above, adoption of a dependant is a factor considered by the courts.[148] The distinction between the approach of the court in adoption cases and in those such as *Rawlinson v Babcock & Wilcox Ltd* is that the adoption is not simply a gratuitous act, but a legal process resulting in a fundamental change of status.[149]

2.46 While the cases above can be explained on policy grounds, the judgments usually employed arguments of causation to support their conclusions. Furthermore, in some cases benefits have been disregarded where voluntary assistance was not a factor (and there was no other obvious policy factor in play).[150] It is difficult to resist the conclusion that at common law the courts reached inconsistent decisions based on thin and artificial distinctions.[151]

2.47 There was similar uncertainty at common law as to whether the future earning capacity of a claimant under the Fatal Accidents Act should be deducted. In *Howitt v Heads*,[152] the plaintiff was intending to give up work due to her pregnancy, when her husband died. Cumming-Bruce J, approving Australian authority,[153] held that the plaintiff's future earning capacity was to be ignored and should not be deducted. However, in *Cookson v Knowles*,[154] the plaintiff widow's earning capacity was deducted from her damages, and the Court of Appeal[155] cast doubt on *Howitt v Heads*. Lord Denning MR, giving the judgment of the court, said:[156]

> [The plaintiff's] prospects of remarriage are, of course, to be disregarded: but not her prospects of going out to work and earning money: see *Malyon v Plummer*.[157] It is very different from those cases where the widow was not working at the time of his death, so that her earnings did not come into the family pool. In those cases it may be said that she is not bound to go out to work so as to reduce the award:[158] though we are not sure about this.

[147] [1959] 1 WLR 554, 569, *per* Lord Evershed MR.

[148] See para 2.42 above.

[149] *Watson v Willmott* [1991] 1 QB 140, 147G, *per* Garland J.

[150] Eg *Buckley v John Allen and Ford (Oxford) Ltd* [1967] 2 QB 637. A widow took in lodgers after the death, but no deduction was made in respect of this new source of income.

[151] See *Stanley v Saddique* [1992] QB 1 (CA), 12B-C, *per* Purchas LJ.

[152] [1973] QB 64. See also *Davies v Whiteways Cyder Co Ltd* [1975] QB 262; *Dodds v Dodds* [1978] QB 543

[153] *Carroll v Purcell* (1961) 107 CLR 73 and *Goodger v Knapman* [1924] SASR 347.

[154] [1977] QB 913.

[155] The House of Lords did not consider the matter. See *Cookson v Knowles* [1979] AC 556 (HL).

[156] [1977] QB 913, 922.

[157] [1964] 1 QB 330, 346 *per* Pearson LJ.

[158] See *Howitt v Heads* [1973] QB 64.

The basis upon which Lord Denning appears to have distinguished *Howitt v Heads* is factually inaccurate, however, for the plaintiff in *Howitt* was working at the time of her husband's death. *Higgs v Drinkwater*,[159] in which, prior to either of the above cases, the Court of Appeal decided that the expected increase in dependency of a woman who was planning to give up work to start a family should not be taken into account when assessing damages for dependency, was not cited in either *Howitt v Heads* or *Cookson v Knowles*.

(b) statute

2.48 The first inroad into the common law was made by private Acts of Parliament. Certain insurance companies arranged through private Acts that compensation received under their policies would not be taken into account in assessing damages for wrongful death claims.[160] The advantage that these companies enjoyed over their rivals led to forty other insurers wanting their own private bills.[161] These arrangements were therefore made applicable to all insurance policies by the Fatal Accidents (Damages) Act 1908. Parliament then declared that certain pensions were not to be taken into account.[162] The non-deduction of national insurance benefits was introduced by the Law Reform (Personal Injuries) Act 1948.[163] The scope of non-deduction was further widened by the Fatal Accidents Act 1959, the relevant section of which was re-enacted as the original version of section 4 of the 1976 Act. Under these provisions no account was to be taken of "any insurance money, benefit, pension or gratuity"[164] which had been or was expected to be paid as a result of the death.

2.49 In 1982, section 4 of the Fatal Accidents Act 1976 was amended and now states:

> In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.[165]

[159] (Unreported) [1956] CA Transcript 129A.

[160] Railway Passengers Assurance (Consolidation) Act 1892, s 31; General Accident, Fire and Life Assurance Corporation Act 1907, s 13; Ocean Accident and Guarantee Corporation Limited Act 1907, s 3. Sir Hudson Kearley claimed that the Railways Passenger Assurance Company had not asked for the provision and that Parliament had imposed it on them in 1849 or 1864: *Hansard* 10 July 1908 vol 192 col 261.

[161] *Hansard* 10 July 1908 vol 192 col 261 (Sir Hudson Kearley).

[162] Widows', Orphans' and Old Age Contributory Pensions Act 1929, s 22.

[163] Section 2(5).

[164] "Benefit" included not only social security benefits, but also payments made by trade unions and friendly societies for the relief or maintenance of a member's dependants, "insurance money" included a return of premiums and "pension" included a return of contributions and any payment of a lump sum in respect of a person's employment: section 2(2) Fatal Accidents Act 1959 and section 4(2) Fatal Accidents Act 1976. For comment on the changes made by the Fatal Accidents Act 1959 see J Unger, O Kahn-Freund, "Two Notes on the Fatal Accidents Act, 1959" (1960) 23 MLR 60, 62.

[165] The amendment was made by the Administration of Justice Act 1982, s 3(1). The difference made by the amendment can be seen in *Cresswell v Eaton*. Following the death of the mother, an aunt looked after the children. She received foster allowances from the local

The amendment was introduced following recommendations by the Law Commission and the Pearson Commission that, in addition to the benefits listed under the former section 4 (that is, insurance monies, benefits, pensions and gratuities)[166] benefits arising from the estate of the deceased should not be taken into account.[167] However, the wording of the section abandons a listing of the benefits to be disregarded and, on a natural interpretation, can be construed as requiring the courts to disregard *all* benefits accruing as a result of the death.

2.50 But even on a wide interpretation of section 4, the courts have to decide where the line is to be drawn between benefits that go to the initial question of whether the plaintiff has suffered a loss; and the disregarding of benefits after one has determined that the plaintiff has suffered a loss. Say, for example, a rich man whose income derives from his substantial investments is killed. His wife inherits the investments. One *could* say that the inheritance is a benefit accruing as a result of the death and, on the widow's claim for loss of dependency, should be disregarded under section 4. Alternatively, and more attractively, one can say that the plaintiff has suffered no loss of dependency because in financial terms the widow has suffered no loss, and section 4 has no part to play.[168]

2.51 This distinction between the initial question of loss and the subsequent question of benefit was at issue in *Auty v National Coal Board*.[169] A widow received a pension after the death of her husband. She claimed that she should be entitled to damages not only for the loss her husband's support but also for the loss of the post-retirement widow's pension that she would have received if her husband had survived the accident and died in his retirement. Her argument was that section 4 should be applied and the widow's pension that she had received since her husband's death should be ignored. As against her claim for the loss of her husband's support, the pension she received was ignored. However, as against that part of her claim for the loss of her post-retirement widow's pension, her argument was rejected; since she was in receipt of a widow's pension, she had suffered no loss of widow's pension.[170] There is, however, no logical justification for the difference in the Court of Appeal's treatment of the two elements of the widow's claim. During both the periods for which she claimed a loss, she would be in receipt of her widow's pension.

authority. These allowances were deducted under the old system applied by Simon Brown J, but he indicated that the payments would now be disregarded: [1991] 1 WLR 1113, 1124C-1125G. For a straightforward example of the application of section 4 - where the same result would have been reached under the old section 4 - see *Pidduck v Eastern Scottish Omnibuses Ltd* [1990] 1 WLR 993 (CA).

[166] See para 2.48 n 164 above for definitions.

[167] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56 paras 255-256; The Pearson Commission Report (1978) paras 537-539.

[168] *Wood v Bentall Simplex Ltd* [1992] PIQR P332, 349, *per* Staughton LJ.

[169] [1985] 1 WLR 784.

[170] [1985] 1 WLR 784, 799 E-F, *per* Waller LJ, 806 H-807A, *per* Oliver LJ. McGregor supports this decision by reference to the judgment of Lord Reid in *Parry v Cleaver* [1970] AC 1: *McGregor on Damages* (15th ed 1988) paras 1599-1600.

2.52 The difficulties of interpreting section 4 are well-illustrated by the Court of Appeal's decisions in *Stanley v Saddique*[171] and *Hayden v Hayden*.[172] In the first of these two contrasting cases, a child claimed damages under the Act following the death of his mother. After the accident, his father met and married another woman. It was found that the child was receiving better care from his father's wife than could have been expected from his mother. The Court held that this was a benefit resulting from the death within section 4 and so should not be taken into account in assessing the child's damages. It ruled that the words "or otherwise" indicated that Parliament had intended greater reform than merely adding to the list of benefits to be disregarded, benefits received from the deceased's estate.[173]

2.53 In *Hayden v Hayden*,[174] a child lost her mother in a driving accident caused by her father's negligence. The father gave up work to look after his daughter.[175] The Court of Appeal decided by a majority that the plaintiff's damages should be reduced to the extent that her father remedied the loss of her mother's services. Sir David Croom-Johnson distinguished *Stanley v Saddique* on the basis that the plaintiff's father was doing no more than fulfilling his parental obligations to his daughter, and concluded that the father's services were not a benefit to his daughter resulting from her mother's death and did not fall within section 4. Parker LJ followed *Auty*[176] reasoning and held that, before the issues of quantification of damages and section 4 arose, it had first to be decided whether the daughter had suffered a loss. The issue was whether the daughter had lost any services - the fact that her mother used to provide them was irrelevant - and she had not, because her father was now providing the services.

2.54 McCowan LJ, dissenting, said:[177]

> The principle which emerges from *Stanley v Saddique* is that there is to be no reduction in the amount of damages which would otherwise be awarded to take account of care voluntarily provided in substitution for the deceased's motherly services. That principle cannot, in my judgment, be affected by whether or not the person providing the care was the tortfeasor.

The present case fell squarely within that principle, and therefore he decided that the father's care ought not to be deducted in assessing the plaintiff's damages.

[171] [1992] QB 1 (CA).

[172] [1992] 1 WLR 986.

[173] [1992] QB 1, 13E-14A, *per* Purchas LJ. The decision effectively reverses *Mead v Clarke Chapman & Co Ltd* [1956] 1 WLR 76 (CA), which was not referred to in the judgments.

[174] [1992] 1 WLR 986 (CA) (McCowan LJ dissenting). For criticism see David Kemp QC, "Substitute Services and the Fatal Accidents Act" (1993) 109 LQR 173.

[175] At common law, following *Hay v Hughes* [1975] QB 790 (CA), it could be expected that the father's services would be held to be a benefit not resulting from the death and therefore ignored. However, since section 4 states that benefits resulting from the death are to be ignored, the reasoning in *Hay v Hughes* would imply that the benefit would have to be taken into account, the opposite result to that in *Hay v Hughes*.

[176] [1985] 1 WLR 784. See para 2.51 above.

[177] [1992] 1 WLR 986, 993F.

2.55 A related issue was that, if the value of the father's services was not deducted from the damages the plaintiff received, the father would be compensating the plaintiff twice. McCowan LJ was not troubled by this prospect, following *Stanley v Saddique* to its logical conclusion. Parker LJ recognised that the point had been raised but, as his decision was based upon the prior issue of whether a loss had been suffered at all, he did not have to address it in detail. Any move made by the tortfeasor to replace the services would go to reduce the loss of the plaintiff and therefore reduce the liability of the tortfeasor. Sir David Croom-Johnson addressed the issue only briefly in connection with the applicability of a "notional nanny" as a means by which to value loss of services:[178]

> The fallacy in employing that device was exposed in argument when it was asked "what would have been the position if the defendant had actually employed a nanny and paid for her himself?" Mr Brent's reply was that the plaintiff would still have been entitled to make her claim on the basis of a "notional nanny" with the result that the defendant would have ended by paying twice. Mr Crowther's reply to that was that it would penalise a tortfeasor to make him do so; the same would apply if he had given up his work. This, said Mr Crowther, would be against public policy. But there is no need to introduce a special rule to protect tortfeasors. The jury, approaching this assessment, would have ignored all questions of a "notional nanny," and simply gone on the established facts of what had happened in the past and was likely to happen in the future.

This surely amounts to an acceptance of Parker LJ's reasoning that no loss has been suffered when the services have been replaced. It is puzzling, therefore, why Sir David Croom-Johnson's primary reasoning was not based on the same approach.

2.56 It seems plain that, whether their reasoning stands up to close scrutiny or not, the majority judges were searching for a way to exclude the father's care from the effects of section 4 so that it could be deducted. *Stanley v Saddique* and *Hayden v Hayden* are, in our view, inconsistent and while the question of how to deal with services provided following death is inevitably a difficult one, those decisions graphically illustrate the added problems caused by the present section 4.

2.57 A further example of the uncertain width of section 4 is its possible impact upon the law relating to a claimant's earning capacity. In *Malone v Rowan,*[179] a woman was planning to give up work to have a child when her husband was killed. She claimed damages for the loss of the support she had expected to receive once she had given up work. Russell J reluctantly followed the Court of Appeal in *Higgs v Drinkwater*[180] and found that no loss had been suffered. We agree with Russell J that there is no distinction between the prospect of increased dependency as a result of giving up work to start a family (for which damages are not recoverable) and, for instance, the prospect of increased dependency as a result of the expectation that the deceased would shortly begin to earn money which would be

[178] [1992] 1 WLR 986, 998C-D.

[179] [1984] 3 All ER 402.

[180] (Unreported) [1956] CA Transcript 129A. See para 2.47 above.

used to support the dependant (for which damages are recoverable).[181] As a result of her husband's death, the widow had lost an expected dependency; she would not receive the support which she had expected to receive from her husband had he not died. It is arguable, however, that there should be set against this the fact that, as a result of the death she would presumably carry on working. Her cause of action accrued before the current section 4 was introduced by the Administration of Justice Act 1982 and so the section was not in issue. However, it is strongly arguable that under the present law, without the reasoning which Russell J was so unhappy to follow, the widow's damages would include the loss of the expected dependency and section 4 would result in the benefit of the widow's earning capacity being disregarded.

2.58 Parliamentary history suggests that a wide interpretation of section 4 was not intended. As we have seen, it was drafted in response to a minor amendment suggested by the Law Commission and Pearson Commission. Lord Hailsham LC regarded it as a "small change".[182] The clearest indication of this is that the rule against consideration of the remarriage of a widow remained in the Act.[183] Yet, on a wide interpretation, section 3(3) has been rendered obsolete and the remarriage of widowers has been rendered non-deductible.[184]

2.59 A further cause for concern in the operation in practice of section 4 emerged in the case of *Jameson v Central Electricity Generating Board*.[185] Mr Jameson, who suffered from malignant mesothelioma, brought an action for damages against his employers, Babcock Energy Limited ("Babcock"). This action was settled shortly before Mr Jameson's death, for what was later found to be, roughly speaking, two thirds of the full liability value of the claim. The settlement (of £80,000) included a sum in respect of the deceased's loss of earnings during the "lost years". Mr Jameson's executors then brought an action, on behalf of the dependants, under the Fatal Accidents Act 1976 against an alleged concurrent tortfeasor, Central Electricity Generating Board ("CEGB"). It was held by the Court of Appeal,[186] confirming the decision at first instance, that that action was not debarred by the settlement between Mr Jameson and Babcock. That settlement barred a claim against Babcock for the dependants under the Fatal Accidents Act 1976 because, under section 1 of the 1976 Act, the deceased could not have brought such a claim (the settlement constituting a discharge of Babcock's liability to him). But that settlement did not bar a claim against the concurrent tortfeasor, CEGB. The dependants therefore stood to recover compensation against CEGB under the Fatal Accidents Act 1976, from which, owing to section 4, no deduction would be

[181] *Taff Vale Railway v Jenkins* [1913] AC 1; *Regan v Williamson* [1976] 1 WLR 305.

[182] *Hansard* (HL) 8 March 1982, vol 428 col 28. Its potential was nevertheless quickly appreciated: Andrew Borkowski & Keith Stanton, "The Administration of Justice Act 1982 (Parts I and III): Darning Old Socks?" (1983) 46 MLR 191, 196.

[183] Fatal Accidents Act 1976, s 3(3).

[184] May J considered himself bound by *Stanley v Saddique* [1992] QB 1, para 2.52 above, to ignore the effect of the possible remarriage of a widower in *Topp v London Country Bus (South West) Ltd* [1993] 3 All ER 448, 461G. The claim was defeated on the issue of liability at first instance and in the Court of Appeal: [1993] 1 WLR 976.

[185] [1997] 3 WLR 151. We understand that there is to be an appeal to the House of Lords.

[186] Auld LJ gave the only speech, with which Sir Patrick Russell and Nourse LJ agreed.

made in respect of the damages inherited from the deceased. In effect, therefore, compensation would be paid twice over for the same loss. Mr Jameson's widow would obtain double recovery of at least some of her husband's lost future earnings already included in the £80,000 settlement. It should be stressed that this problem of double recovery would not have arisen prior to the enactment of the new section 4. At common law the deceased's damages for lost future earnings would have been deducted from the Fatal Accident Act damages.[187]

2.60 Three final points on collateral benefits are noteworthy. First, the statutory regime applicable in Fatal Accident Act cases can be contrasted with the position in respect of personal injuries, where the deduction of benefits is still largely governed by the common law.[188] Secondly, where a plaintiff claims damages for personal injuries and is also in receipt of social security benefits, the state has the power to recoup from the compensator an amount of money totalling the social security benefits that the accident victim would be paid in a five year period.[189] No such provision for the recoupment of social security benefits exists in respect of Fatal Accident Act claims. Thirdly, as we have seen above,[190] by section 3 of the Damages Act 1996 provisional damages awarded to the deceased should be deducted from an award made under the Fatal Accidents Act. This implements a recommendation made in our 1994 Report on Structured Settlements and Interim and Provisional Damages.[191]

(4) Funeral expenses

2.61 The dependants may recover the expenses of the deceased's funeral.[192] They are recoverable even where there is no dependency (that is, no loss of pecuniary

[187] *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601. See para 2.43 above. It may be that the problem of double recovery raised by the *Jameson* case extends more widely than the fact situation in that case. In particular, it is arguable that, applying section 4, a dependant who brings an action under the Fatal Accidents Act 1976 against more than one concurrent tortfeasor can recover twice over. Recovery from one concurrent tortfeasor does not discharge the liability of the other and the "other damages" could be argued to be non-deductible under section 4 as a benefit arising from the death.

[188] See Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147.

[189] Social Security Administration Act 1992, Part IV (previously Social Security Act 1989, Part IV). When it is brought into force, the Social Security (Recovery of Benefits) Act 1997 will replace part IV of the 1992 Act. The essential change made by the new Act is to protect damages awarded for pain, suffering and loss of amenity against recoupment of social security benefits. In the 1992 Act there was a provision specifically excluding Fatal Accident Act claims from the recoupment scheme. The 1997 Act has no such provision but will not apply to fatal accidents because first, section 1 of the 1997 Act is concerned with benefits being paid to or for a person who has suffered an accident, injury or disease and this is inapplicable to Fatal Accident Act claimants and, secondly, the listed social security benefits to be recouped do not include those that would be paid to dependants consequent on another's death. We understand that the new Act is to be brought into force in October 1997.

[190] See paras 2.10 & 2.11.

[191] (1994) Law Com No 224 para 5.37.

[192] Fatal Accidents Act 1976, s 3(5).

benefit) or the claim for the dependency fails.[193] These expenses are also recoverable by the estate under section 1(2)(c) of the Law Reform (Miscellaneous Provisions) Act 1934. One advantage of the estate claiming the funeral expenses is that no reduction will be made for any contributory negligence on the part of the dependant.[194]

2.62 The expenses, to be recoverable, must be reasonable in all the circumstances, including the deceased's station in life, creed and racial origin.[195] Claims for the cost of a wake,[196] or a memorial or monument to the deceased have failed,[197] but claims for a tombstone,[198] embalming,[199] and the expenses of friends who helped a widow after her husband was killed in France and arranged for the return of the body have succeeded.[200]

4. BEREAVEMENT DAMAGES

2.63 At common law no damages can be awarded for bereavement.[201] Section 3 of Administration of Justice Act 1982, inserting section 1A into the Fatal Accidents Act 1976, introduced for the first time a statutory claim for damages for bereavement in respect of the death of a limited class of close relatives.

[193] *Stanton v Ewart F Youldon Ltd* [1960] 1 WLR 543, 545; *Burns v Edman* [1970] 2 QB 541, 546E.

[194] See *Mulholland v McCrea* [1961] NI 135 (Northern Ireland CA), where the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 was discussed.

[195] *Gammell v Wilson* [1982] AC 27 (CA); *Goldstein v Salvation Army Assurance Society* [1917] 2 KB 291; *Stanton v Ewart F Youldon Ltd* [1960] 1 WLR 543, 545. For an extreme case involving the death of a member of the Ghanaian royal family see *Quainoo v Brent & Harrow AHA* (1982) 132 NLJ 1100.

[196] *Gammell v Wilson and Swift and Co Ltd* [1982] AC 27, the House of Lords affirming generally the unreported judgment of Mr B A Hytner QC sitting as a deputy judge. See also *Quainoo v Brent & Harrow AHA* (1982) 132 NLJ 1100.

[197] *Stanton v Ewart F Youldon Ltd* [1960] 1 WLR 543, 545; *Hart v Griffiths-Jones* [1948] 2 All ER 729, 730E-731A.

[198] *Goldstein v Salvation Army Assurance Society* [1917] 2 KB 291. Distinguishing between a tombstone and a memorial can prove problematic. In *Gammell v Wilson* [1982] AC 27 (CA), the Court of Appeal approved the approach "that there is a distinction between a headstone finishing off, describing and marking the grave, which is part of the funeral expense, and a memorial, which is not." See 42H-43F, *per* Megaw LJ, and 55B, *per* Sir David Cairns.

[199] *Hart v Griffiths-Jones* [1948] 2 All ER 729, 730D-E.

[200] *Schneider v Eisovitch* [1960] 2 QB 430. Paull J ruled that the services of the friends had to be reasonably necessary, that the expenses would have been incurred in any event and were reasonable, and that the plaintiff had undertaken to pay the friends for their services.

[201] *Blake v Midland Railway Company* (1852) 18 QB 93; 118 ER 35; *Taff Vale Railway Company v Jenkins* [1913] AC 1, 4, *per* Viscount Haldane LC; *Baker v Dalgleish Steam Ship Company* [1922] 1 KB 361 (CA), 371, *per* Scrutton LJ; *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601, 617, *per* Lord Wright; *Hinz v Berry* [1970] 2 QB 40, 42, *per* Lord Denning MR. See Liability for Psychiatric Illness (1995) Consultation Paper No 137, para 2.4.

2.64 The statutory claim for bereavement implemented recommendations contained in our 1973 report that such damages ought to be recoverable.[202] We found evidence to suggest that an award of damages, albeit small, could have some consoling effect in situations where parents had suffered the loss of an infant child, or where a spouse had lost a husband or wife.[203] It was our conclusion that, in these two cases, modest damages for bereavement should be recoverable.[204]

2.65 It was intended that the introduction of this head of damages would mitigate the effect of another of the recommendations contained in our Report on Personal Injury Litigation, namely the abolition of the common law claim for loss of expectation of life as a separate head of damages in a personal injury case.[205] When permitted to survive to the estate of a deceased accident victim by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934,[206] damages in respect of this head of loss amounted, in effect, to the provision of an indirect "solatium" for the relatives of the deceased.[207]

[202] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, paras 177-180. The broader proposals put forward in 1978 by the Pearson Commission Report (1978) paras 418-429, that an award to compensate for loss of society (rather than just grief and suffering) should be available to a group of claimants which included children of the deceased and not just the spouse and parent, were subsequently rejected by the government: see *Hansard* (HL) 8 March 1982, vol 428, cols 45-46.

[203] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 173-174.

[204] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 175. Our original position, as outlined in our Working Paper No 41 (1971) para 203, was that non-pecuniary loss of this kind ought not to be recoverable. Our final position was that a sum of damages should be recoverable for "bereavement": the purpose of the award should comprehend such losses as that of the deceased's counsel and guidance (as acknowledged by the Scottish Law Commission in their Memorandum No 17, dated 10 April 1972, para 99) as well as the claimant's grief: Law Com No 56 (1973) para 172. The Pearson Commission Report recommended the adoption of the Scottish "loss of society" claim, with an extension of the right of action to the unmarried minor child of a deceased, as well as the spouse and parents of the victim: para 424.

[205] See Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 107. Loss of expectation of life as a separate head of non-pecuniary damages was first recognised in *Flint v Lovell* (1935) 1 KB 354, when Acton J awarded damages to a 70 year-old plaintiff in a non-fatal personal injury case. See also Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 2.6-2.9.

[206] See *Rose v Ford* (1937) AC 826, in which the House of Lords upheld for the first time a claim for loss of expectation of life by the estate of a plaintiff who died without regaining consciousness.

[207] The assessment of damages under this head involved the courts in an unedifying attempt to place a value on life, and awards varied greatly until the intervention of the House of Lords in *Benham v Gambling* (1941) AC 157, which established a standard conventional sum of £200. Although this figure was increased in subsequent cases in order to keep pace with inflation (see *Naylor v Yorkshire Electricity Board* [1968] AC 529; *Gammell v Wilson* [1982] AC 27; *Jefferson v Cape Insulation*, (Unreported) 3 December 1981, noted in *Kemp & Kemp*, para F2-020) the modest nature of the sums involved merely rendered the award largely irrelevant in the wider context of a personal injury or survival action. As a result of recommendations in our Report of 1973 (see Law Com No 56, para 107) the award for loss of expectation of life was abolished as a separate head of damages in 1982, although the court must take into account, in awarding damages for pain and suffering in a personal injury case, an appropriate additional amount in respect of any suffering caused or likely to

2.66 The recommendations of our 1973 Report and the subsequent introduction of a direct and explicit claim for damages for bereavement constituted an acknowledgement that the provision of a solace had been of some benefit to the parent or spouse of a deceased accident victim.[208] The new award was also widely perceived as performing a further symbolic function of providing some "sympathetic recognition"[209] by the state of the fact of bereavement, and an expression on the part of society of the gravity with which it regards the loss of a human life.[210]

2.67 The action for bereavement is subject to the overarching principle applicable to all actions under the 1976 Act, that the person injured would have been entitled to maintain an action in respect of the wrongful act had death not ensued.[211] However, an action for damages for bereavement represents an exception to the general principle of damages, in that there is no requirement for the plaintiff to prove any loss.

2.68 Section 1A(2) provides an exhaustive list of persons eligible to claim damages under this head. A claim for damages for bereavement shall only be for the benefit

(a) of the wife or husband of the deceased; and
(b) where the deceased was a minor who was never married -
  (i) of his parents, if he was legitimate; and
  (ii) of his mother, if he was illegitimate.

2.69 The Act thus prescribes a significantly narrower class of eligible claimants than are permitted to bring an action for loss of dependency under section 1.[212] The former husband or wife of the deceased is excluded from recovery, as is any person who, though not married to the deceased, was nevertheless living in the same household with the deceased as his or her husband or wife, irrespective of the period of time for which the parties may have resided together. Outside the marital relationship, the action is restricted to one additional class of claimant, namely the natural parents of a deceased unmarried minor child. A further distinction is made upon the basis of the deceased child's legitimacy: the father of an illegitimate child cannot claim under the section.[213] Where both parents claim bereavement damages

be caused by awareness of lost life expectancy: s 1(1)(a) Administration of Justice Act 1982. Thus damages for non-pecuniary losses are no longer recoverable by the estate in cases of instant death: see Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, para 2.51. See also Pearson Commission Report, Vol I, paras 363-372.

[208] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 174.

[209] Lord Scarman: *Hansard* (HL) 30 March 1982, vol 428, col 1294.

[210] See Hansard (HL) 8 March 1982, vol 428, cols 41-42 (Lord Elystan-Morgan); *Hansard* (HC) 3 March 1989, vol 148, col 544 (Mr Alfred Morris MP).

[211] Fatal Accidents Act 1976, s 1(1).

[212] See paras 2.12-2.16 above.

[213] See Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 177, where we recommended that "child" should not be defined as "child of the family", so as to avoid courts being faced with the task of determining the distribution of the fixed sum amongst several claimants, where the child happens to be a "child of the family" in relation to two or more marriages simultaneously.

the damages shall be equally divided between them.[214] The requirements that the deceased child be under 18 years of age and unmarried have the capacity to produce what may be regarded as arbitrary results. In *Doleman v Deakin*[215] the plaintiffs were refused a bereavement award in respect of the death of their unmarried son who died as a result of the defendant's negligence less than a month after his eighteenth birthday.[216]

2.70 Perhaps the most noticeable exclusion from the statutory list of claimants is that of the child who has lost either or both parents as a result of the defendant's negligence. In our 1973 Report on Personal Injury Litigation[217] we strongly opposed any judicial inquiry into the "psychic consequences" of bereavement and degrees of grief,[218] and it was regarded as difficult to perceive the award as a solace in the case of a very young infant who never knew his or her parent.[219]

2.71 Section 1A(3) prescribes the amount of damages that may be recovered. The Administration of Justice Act 1982 provided for the recovery of a fixed conventional sum of £3,500.[220] Section 1A(5) gave the Lord Chancellor the power to vary this sum by statutory instrument. In 1990 the Lord Chancellor issued a Consultation Paper[221] on the question of quantum, which outlined three possible options: 1) to increase the award in line with changes in the value of money since the award was introduced on 1 January 1983, to a new level of £5,000; 2) to

[214] Section 1A(4).

[215] *The Times* 30 January 1990 (CA).

[216] The Court of Appeal rejected the plaintiff's argument that because the deceased's head injuries were very severe and he never regained consciousness, he was for all practical purposes dead from the date of the accident, when he was still a minor: *ibid*. See also A Unger, "Pain and Anger", NLJ (March 20 1992) p 394.

[217] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56.

[218] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 175.

[219] The exclusion of children of the deceased from the list was also justified on the basis that the child would be likely to receive substantial dependency damages in any case, and that an additional sum for bereavement could add little or nothing to these: see *Hansard* (HC) 8 March 1982, vol 428, cols 28, 45-46. But see Pearson Commission Report, Vol I, paras 423-424.

[220] Our recommendation in 1973 was for a sum of £1,000: Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, paras 177-178. Updated to March 1996, this sum is approximately £6,650.

[221] Damages for Bereavement: A Review of the Level (1990). The Lord Chancellor's Review was prompted by the introduction in 1988 of a Private Member's Bill by Mr Lawrence Cunliffe MP, aimed at augmenting the level of the bereavement award to £10,000, in favour of a wider class of claimants: see Citizens' Compensation Bill, cl 6; *Hansard* (HC) 3 March 1989, vol 148, cols 511-550; House of Commons, Official Report, Standing Committee C (Citizens' Compensation Bill) 3 May 1989, cols 16-21; *Hansard* (HC) 7 July 1989, vol 156, cols 637-647. The Bill came in the wake of a series of national disasters, such as the Hillsborough stadium deaths, the fire at King's Cross Station and the Zeebrugge ferry disaster, which focused public disquiet at the level of the bereavement award. Although the Bill did not become law, the Solicitor-General announced the Lord Chancellor's review of the level of bereavement damages: House of Commons, Official Report, Standing Committee C (Citizens' Compensation Bill) 3 May 1989, cols 20-21; *Hansard* (HC) 7 July 1989, vol 156, cols 645-646 (Sir Nicholas Lyell MP).

increase the award by more than the rate of inflation to, for example, £10,000; 3) to retain the award at £3,500 for the time being. Following consultation, a compromise was sought between the first two options and the award was uprated to £7,500 in respect of deaths occurring on or after 1 April 1991.[222]

2.72 Interest is awarded upon damages in respect of bereavement at the full special account rate from the date of death.[223] It should be noted that this is out of line with the calculation of interest both on pecuniary loss in Fatal Accidents Act claims[224] and on non-pecuniary loss in personal injury claims.[225]

2.73 It would appear that any damages awarded for bereavement are subject to section 5 of the Act, which states that "any damages recoverable in an action under this Act" shall be reduced as a result of the deceased's contributory negligence.[226] In addition, it is in accordance with normal principles that where one of the claimants was partly to blame for the death, the claim of that dependant will be reduced.[227]

[222] Damages for Bereavement (Variation of Sum) (England and Wales) Order (SI 1990 No 2575).

[223] See *Prior v Hastie* [1987] CLY 1219; *Khan v Duncan* (Unreported) 9 March 1989, Popplewell J. The current special account rate is 8%.

[224] On which interest is awarded at half the special account interest rate from the date of death.

[225] On which interest is awarded at 2% from the date of service of the writ until the date of trial.

[226] This interpretation is supported by s 3(2) of the Administration of Justice Act 1982, which amended s 5 of the 1976 Act to omit reference to the "dependants" of a deceased. See also *Winfield & Jolowicz on Tort* (14th ed 1994) p 690.

[227] See para 2.9 n 27, above. It is argued in Kemp & Kemp, *The Quantum of Damages*, that where a parent is responsible for the death of his or her legitimate child, the whole

2.74 By section 1(1A) of the Law Reform (Miscellaneous Provisions) Act 1934, a claim for bereavement damages does not survive for the benefit of the estate of the bereaved claimant.[228]

bereavement award should go to the innocent parent as a matter of public policy: vol 1, para 4-007/2. However, this is contrary to the unreported decision of Deputy District Judge Radcliffe in *Navaei v Navaei* in the Eastbourne County Court (6th January 1995) in which the innocent parent was awarded only half the conventional bereavement award (£1,750 because the death had occurred before 1 April 1991, and so the increased award of £7,500 was not available).

[228] This is in line with our Report on Personal Injury Litigation (1973) Law Com No 56, para 180.

PART III
OPTIONS FOR REFORM

1. SHOULD THE FATAL ACCIDENTS ACT CLAIM BE ABOLISHED?

3.1 The Administration of Justice Act 1982, section 4(2), abolished the estate's claim for loss of earnings in the lost years. The previous law was objectionable in two main respects. First, and primarily, where the deceased's dependants were not also the beneficiaries of the estate, a defendant was faced with having to pay damages to the estate for loss of earnings in the "lost years" *and* damages to the dependants for loss of dependency under the Fatal Accidents Act 1976. Secondly, it was not clear what precise loss the estate's "lost years" claim was intended to compensate. So, for example, in *Gammell v Wilson*[1] the parents of a deceased 22-year-old unmarried man with good earning prospects stood to recover a substantial sum as beneficiaries under the estate for the loss of their son's earnings in the lost years. This sum was much larger than the loss they had suffered as a consequence of the deceased's death and which was compensatable as a loss of dependency under the 1976 Act.[2]

3.2 However one can argue that to abolish the estate's "lost years" claim was the wrong way to proceed and, in particular, that it produces a strictly logical, but harsh, result where the victim was tortiously injured but, before damages have been recovered, dies other than as a result of the tort. Moreover, the abolition of the "lost years" claim does not remove the rest of the estate's claim so that there remains the prospect of two separate actions against the tortfeasor, one by the estate and one by the dependants under the 1976 Act. Hence it has been suggested by, for example, Professor Waddams and the Ontario Law Reform Commission that the Fatal Accidents Act 1976 should be repealed,[3] and that instead the estate should be given the right to recover all the damages the deceased could have recovered including earnings in the "lost years".[4] Waddams sees the simplification of the law as the principal benefit of this proposal, as only one claim would have to be made against the wrongdoer.[5] And while dependants might have to make claims against the estate in relation to the distribution of the damages, this

[1] [1982] AC 27 (HL).

[2] Most members of the House of Lords reached this result with reluctance. Lord Diplock described it as neither sensible nor just: [1982] AC 27, 62C.

[3] S M Waddams, "Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?" (1984) 47 MLR 437. In Ontario the Law Reform Commission has proposed a similar model to replace third party claims under sub-sections 61(1) and 61(2)(e) of the Family Law Act with a first party claim for loss of earning capacity and loss of the capacity to provide care and guidance, which would survive death: Report on Compensation for Personal Injury and Death (1987) pp 14-36. But see the dissenting opinion expressed by one of the Commissioners, Mrs Margaret A Ross: *ibid* pp 70-74.

[4] Some American jurisdictions compensate surviving families on the basis of a "loss to the estate" measure of damages: see Appendix A, para A.59-A.60.

[5] Although at present the two claims can be joined under RSC O 15 r 1. In the unlikely event that the estate brings a claim under the Law Reform (Miscellaneous Provisions) Act 1934 and does not bring a claim under the Fatal Accidents Act 1976, leaving it to one of the dependants, the claims could be joined under RSC O 15 r 4.

claim already exists where a dependant contests the distribution of the estate.[6] He also points in support of his argument to characteristics of Lord Campbell's Act that are inconsistent with the notion that the Act affords an independent action vested in the dependants.[7] Waddams argues further that the distribution of the estate is more suited to problems of numerous dependants, especially where there is a conflict of interest between the various claimants, than the Fatal Accidents Act claim.[8] Repeal of the Act would also facilitate the introduction of a single rule on housekeeping services, regardless of whether the housekeeper is killed or disabled.[9]

3.3 The Ontario Law Reform Commission emphasised that certain problems, such as distasteful inquiries into the relationship between the claimant and the deceased, and the effect that the remarriage of a widow should have on the claim for the loss of dependency by that widow, arise because Fatal Accident Act claims depend on the loss of the claimant.[10] Removing the Act would lead to the claim being based on recovery by the estate.[11] The repeal would also counter the problem of changing the list of dependants in the Fatal Accidents Act to keep pace with changing social ideas; if the deceased made a will, then recovery by dependants would not be frustrated by the necessity of coming within the list of dependants in the Act.[12] This, however, does not affect the necessity of having a statutory list of claimants defined in the Inheritance (Provision for Family and Dependants) Act 1975 to protect those dependants not provided for by means of testamentary disposition.

3.4 It is further argued by proponents of recovery through the estate that the proposal would mean that there would no longer be a need for special statutory provisions on, for example, insurance benefits and pensions; valuation of the benefit that the dependants receive from the estate;[13] or procedural rules preventing a multiplicity of suits. The single action by the estate would also solve the problem of dividing the award between adult and child dependants.

3.5 Waddams anticipated that a major objection to his suggested approach would be that, where there are no dependants, the estate would receive a windfall in recovering for the lost years. His response to this was to refer to an accident victim

6 S M Waddams, "Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?" (1984) 47 MLR 437, 445.

7 *Ibid*, 451.

8 *Ibid*, 448-449. Waddams also views the concept of dependency as unhelpful: *ibid*, 449-450.

9 *Ibid*, 450-451. See also Damages for Medical and Nursing Expenses (1996) Consultation Paper No 144, paras 2.21-2.29.

10 Report on Compensation for Personal Injury and Death (1987). It is arguable that the scheme would not, in fact, remove the need for an investigation into the relationship of the deceased and the claimant: see p 72.

11 S M Waddams, "Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?" (1984) 47 MLR 437, 441-442.

12 See paras 2.12-2.16 above.

13 Although see now Fatal Accidents Act 1976, s 4, as amended by the Administration of Justice Act 1982. Benefits accruing from the estate of the deceased are exempt from deduction.

who recovers for the lost years and then dies. The estate will still inherit this sum even if there are no dependants.[14]

3.6 But in our view, the major disadvantage of repealing the Fatal Accidents Act lies in the difference between what is recoverable by the estate and what is recoverable by the dependants.[15] Certainly, compensation through the estate by way of inheritance would more accurately reflect the wishes of the accident victim. However, this would be achieved only by ignoring the loss suffered by dependants as a consequence of the wrongful death of another. There would be the risk of under-compensation of dependants where their entitlements on intestacy do not match their pecuniary losses,[16] or where a loss of support is suffered by a claimant ineligible to claim under the rules of intestacy or under the Inheritance (Provision for Family and Dependants) Act 1975. It is also the case that the losses that dependants seek to recover do not necessarily flow from the loss of earnings of the deceased. An important example of this is that a dependant can presently claim for the loss of gratuitous services.[17] In certain cases, such as the death of a parent at home, those services will form, at least, the bulk of the damages.[18] Similarly, an action by the estate is necessarily inconsistent with the recovery by surviving relatives of their own non-pecuniary losses such as the loss of society, care and companionship of the deceased and grief at the wrongful death.[19] Fatal accidents legislation would appear the only logical context in which to compensate such losses.[20]

3.7 In *Gammell v Wilson*,[21] repeal of the Fatal Accidents Act was described by Lord Scarman as "socially unattractive" given its now well-established place in our law. It is our view that the disadvantage in having two separate claims is outweighed by the very fact that these two claims are for separate losses. We also see the difficulty of recovering indirect pecuniary benefits, such as services, as a major objection to repealing the 1976 Act. **Our provisional view therefore is that the Fatal Accidents Act claim should not be abolished and that it should remain the**

[14] S M Waddams, "Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?" (1984) 47 MLR 437, 441-442. The same point has been made in respect of damages for loss of amenities for unconscious plaintiffs: Peter Cane and Donald Harris, "Administration of Justice Act 1982, s 4(2): A lesson in how not to Reform the Law" (1983) 46 MLR 478, 480.

[15] See paras 2.3 and 2.6 above.

[16] Similarly the net estate of the deceased may be very small, not allowing for substantial recovery by claimants once the costs of a claim have been paid.

[17] See para 2.17 above.

[18] See paras 2.32 - 2.34 above.

[19] Although the Ontario scheme proposes to allow the estate to recover for the deceased's loss of capacity to provide care and guidance, which could then be claimed by statutory dependants.

[20] We provisionally recommend the retention of a right by certain claimants to recover damages in respect of bereavement, which would include elements relating to grief and sorrow and the loss of society and guidance suffered by the claimant as a consequence of the death: see para 3.138 below.

[21] [1982] AC 27, 80.

law that the "lost years" claim should not survive for the benefit of the deceased's estate. We ask consultees whether they agree.

2. THE NATURE OF THE RIGHT OF ACTION

(1) Introduction

3.8 We have seen in Part II above[22] that there is some uncertainty and inconsistency in the cases as to the extent to which the claim under the Fatal Accidents Act is independent of the claim that the deceased would have had had he or she survived. The general position is that matters going to liability (that is as to whether the deceased had a claim at all) are equally relevant to the dependant's claim, whereas matters going to the assessment of damages are irrelevant to the dependant's claim. The most significant exceptions to this position are: (i) remoteness of damage (that is, whether the death was reasonably foreseeable) which, although a matter going to liability for the death, does not limit the dependants' claims; and (ii) by reason of section 5 of the 1976 Act, contributory negligence of the deceased which, although now a matter going to the assessment of damages, limits the dependants' claims.

3.9 In our view, the nature of an action under the Fatal Accidents Act, as laid down in the wording of section 1(1) of the 1976 Act, has stood the test of time well and the distinction between matters going to liability, which affect the dependants' claim, and matters going to damages, which do not affect the dependants' claim is, in general, sensible. Indeed, it is the two main exceptions to that distinction (remoteness of damage and contributory negligence) which require further careful consideration.

(2) Remoteness

3.10 If death is too remote a consequence of the wrong, in that it was not reasonably foreseeable, we provisionally consider that the law should be reformed so that the dependants do not have a claim: in this respect, we favour the approach taken in more recent cases in Australia, Canada and British Columbia[23] to that adopted, on one interpretation, in the leading English case of *Pigney v Pointers Transport Services Ltd*.[24] It is our provisional view therefore that the wording of section 1(1) should be amended to ensure that the remoteness of the death is a bar to the dependants' claim under the 1976 Act.

(3) Contributory negligence

3.11 Under the current law,[25] the deceased's contributory negligence acts to reduce the damages recovered by claimants under the 1976 Act. On the face of it, this is unfair as the claimants are wholly innocent third parties. Consequently, we were initially attracted to the argument that the defendant should be liable to the dependants in full but should be given the right to pursue the deceased's estate for

[22] See paras 2.1-2.9 above.

[23] See para 2.5 n 16, above.

[24] [1957] 1 WLR 1121. See para 2.5 above.

[25] See para 2.9 above.

a contribution in proportion to the deceased's contributory fault. Such a reform has previously been suggested by academics[26] and would place the burden of the deceased's carelessness upon his estate, arguably the most appropriate place for it. The beneficiaries of the estate would lose, but their claim to a testamentary windfall is not as strong as the claim of the dependants to full compensation.

3.12 However, contribution normally proceeds on the basis that a legal wrong has been committed[27] and, in being contributorily negligent in his or her death, the deceased has not committed any legal wrong: there is no tort of contributing to one's own death. Further, were a special legislative provision to be introduced allowing contribution in such cases, an all or nothing distinction would be created between those cases in which the death was caused partly by the deceased's carelessness (in which the dependants would recover in full) and those in which the death was caused wholly by the deceased's carelessness (in which the dependants would not recover their loss). For these two reasons we provisionally believe that the law concerning contributory negligence should remain in its current form.

3.13 **We ask consultees whether they agree with our provisional views that: (a) the nature of the right of action under section 1(1) of the 1976 Act does not, in general, require reform; (b) it should be made clear that the dependants have no claim if the death was too remote a consequence of the defendant's wrong and to that limited extent section 1(1) of the 1976 Act requires amendment; (c) section 5 of the 1976 Act, laying down that contributory negligence of the deceased operates to reduce the dependants' damages, should be retained.**

3. PECUNIARY LOSS: WHO CAN CLAIM AND FOR WHAT TYPE OF LOSS?

3.14 The two questions of who can claim and for what type of loss are closely linked and together control the scope of the Fatal Accidents Act claim for pecuniary loss. The Fatal Accidents Act is a long-standing exception to the law's general antipathy to the recovery of unintentionally - caused pure economic loss. But those who are entitled to claim, and the type of pecuniary loss that is recoverable, are both restricted. Under the present law, it is not the case that anyone who suffers non-remote economic loss as a result of a wrongful death can recover damages for that loss from the wrongdoer. To be entitled to claim, the claimant must be a dependant defined according to the statutory list.[28] And, apart from funeral expenses, the pecuniary loss recoverable must be the loss of a pecuniary benefit that the dependant reasonably expected to receive from the continuance of the life which does not flow from the business relationship between the claimant and the deceased.[29] In this section we shall essentially be considering the extent to which the restrictions, on who can claim and the type of loss recoverable, should be eased. A strong argument can be mounted that a restriction on the type of loss

[26] Glanville Williams, *Joint Torts and Contributory Negligence* (1951) 442, §115. See also Malcolm M MacIntyre, "The Rationale of Imputed Negligence" (1944) 5 Univ of Tor LJ 368, 381.

[27] See Civil Liability (Contribution) Act 1978, s1.

[28] See paras 2.12-2.16 above.

[29] See paras 2.17-2.22 above.

recoverable is a sufficient control mechanism and that there is no need, additionally, to restrict the range of who can claim by means of a statutory list. In line with this, we have found it convenient to examine, in the first subsection, the type of loss of pecuniary benefit from the continuation of the life that should be recoverable under the Fatal Accidents Act, before going on (in the following two subsections) to consider who should have a claim. A final subsection looks at funeral expenses and analogous losses.

(1) What type of loss of pecuniary benefit should be recoverable?

3.15 Apart from funeral expenses, the pecuniary loss recoverable under the 1976 Act is the loss of any pecuniary benefit that the claimant reasonably expected to receive from the continuation of the life that does not flow from the business relationship between the claimant and the deceased.[30] In short, the relevant loss is the loss of a non-business benefit or, in lawyers' rather circular jargon, "loss of dependency". This can include the loss of money, property or services; and extends to the loss of expected one-off gifts. Indeed, as there appears to be no 'significant' loss threshold (beyond the normal *de minimis* bar) trivial losses, such as the loss of birthday or Christmas presents or the value of lifts by car to school or work, are in principle recoverable. In this respect, as well as because services are included, it would be misleading to regard the relevant type of pecuniary benefit as being confined to "maintenance" or "support" (in the usual senses of those terms).

3.16 Is the major restriction - to the loss of *non-business* benefits - justifiable? Our provisional view is that it is justified. If business loss were to be recoverable, there would be no good reason why anyone who suffered pure economic loss as a result of another's wrongful death should not have a claim against the wrongdoer. In our view, this would go too far and would open the floodgates of litigation. Certainly it would be odd to differentiate between the claim of an employer, who has suffered a business loss as a result of the death of an employee to whom he is related, and an employer who has suffered an identical loss as a result of the death of an employee who is not a relative. Even if one restricted claims to dependants, removal of the need for a loss to be a non-business loss could produce a significant increase in the number of claims made under the Fatal Accidents Act, particularly if the classes of 'dependants' under the Act were also widened. An extension of the basis of recovery to include business loss would also be likely to increase substantially the size of awards in many cases, particularly where the deceased made a valuable contribution to a successful business operation.

3.17 **It is our provisional view that no change is needed to the present law on the type of loss of pecuniary benefit that is recoverable under the Fatal Accidents Act and, in particular, that the relevant loss should continue to be confined to the loss of non-business benefits. We ask consultees whether they agree with that provisional view. If consultees disagree, we would welcome their views on the limits, if any, that should be placed on the type of loss of pecuniary benefit that is recoverable.**

[30] See paras 2.17-2.22 above.

(2) Is the present list of dependants too restrictive?

3.18 In placing the Administration of Justice Act 1982 before the House of Lords, Lord Hailsham LC described the Bill as "a good-housekeeping measure which would not give rise to a great deal of confusion or controversy."[31] This approach, whilst helping the Bill find its way on to the statute book, excludes certain classes of persons that arguably merit recovery of damages in respect of their financial losses as a result of a wrongful death. These include:

i) Cohabitants who were living as husband and wife but who do not satisfy the two year rule.[32] The two year rule was intended to preclude frivolous claims by an unmarried partner of the deceased and to restrict recovery to those persons who enjoyed a committed relationship with the deceased which amounted to a marriage in all but form. This statutory wording has subsequently been adopted in other contexts.[33] Yet the arbitrary nature of a qualifying time limit entails the potential for injustice in some circumstances. There may be more reliable indicators of the commitment of the relationship in question, for example where the union has produced a child. Under the present law, unless unmarried parents have lived together as husband and wife immediately prior to the death of one of them and for at least two years before, the surviving parent will remain precluded from claiming for his or her loss of support.[34] There may also be a problem where one partner has had to stay permanently in hospital for a long period before the death.[35] It should be emphasised that if one abandoned the statutory list altogether, in favour of, for example, a single qualification of financial dependency,[36] the problem of the need to define specifically an eligible category of cohabitant claimants would be removed.

ii) Cohabitants who are involved in a committed sexual relationship but who do not live as husband and wife. One is here concerned with partners of the same sex. In the light of the nature of many modern social relationships, it is arguable that there no longer exists any proper justification for the exclusion of recovery by factual dependants solely on the basis of their sexual preference.

iii) Children who are not the deceased's but lived with the deceased while he or she was engaged in a de facto relationship with their parent.[37] Where the child is not a

[31] *Hansard* (HL) 30 March 1982, Vol 428, Col 1283.

[32] See Andrew Borkowski & Keith Stanton, "The Administration of Justice Act 1982 (Parts I and III): Darning Old Socks?" (1983) 46 MLR 191, 195.

[33] Eg Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(ba), as inserted by Law Reform (Succession) Act 1995, s 2; Criminal Justice Act 1988, s 111(11)(a). Cf the Housing Act 1985, s 58(2) which takes into account the entitlements of "any other person who normally resides with him as a member of his family or in circumstances in which it is reasonable for that person to reside with him".

[34] It may be that the decision in *K v JMP Co Ltd* [1976] QB 85, that a reduction in the income of an unmarried mother upon the death of the father may amount to a recoverable loss to the children, remains of relevance in cases in which a cohabitant falls foul of the two year rule: *Winfield & Jolowicz on Tort* (14th ed 1994) p 688.

[35] John Munkman, *Damages for Personal Injuries and Death* (10th ed 1996) p 134.

[36] See paras 3.24-3.37 below.

[37] See also John Munkman, *Damages for Personal Injury and Death* (10th ed 1996) p 134.

child or other descendant of the deceased,[38] he or she must have been treated as a "child of the family" within the context of a *marriage* to which the deceased was at some time a party in order to qualify as a dependant under the Act.[39] A *de facto* relationship between the deceased and the child's parent will not suffice for these purposes.

iv) A friend's children who the deceased helped to support
Say the deceased made a covenant to pay a certain sum to help in the education of children of one of his former colleagues, and that the covenant was expressed to terminate on the death of the covenantor. Under the present law, the children would have no claim under the Fatal Accidents Act. We see no reason why they should not have such a claim.

v) Certain distant relatives, such as a great nephew supporting a great aunt.[40] Beyond the lineal ascendants and descendants of the deceased, recovery is restricted to any person who is, or is the issue of, the brother, sister, uncle or aunt of the deceased.[41] It would appear unjust to preclude a claimant from recovering his or her loss of dependency solely because the claimant was not a member of the deceased's more immediate family as prescribed by the Act.

vi) Non-relatives who live together and share expenses but who do not enjoy a marriage-like relationship.[42] Examples of deserving claimants in this category might include two elderly people who live together for companionship and consequently share expenses. It is also commonplace today for young people to share accommodation, either as students or as professional people, and it is conceivable that the wrongful death of one such person could have serious pecuniary implications for dependent friends (although one would expect that such losses could normally be mitigated).

3.19 It is our provisional view that, in the light of the above exclusions the list of dependants in the Fatal Accidents Act 1976 is too restrictive. We consider that in general terms, the Act ought to compensate for the loss of the non-business pecuniary benefits that an individual would have received but for the wrongful death. Under the present list, too many deserving claimants remain barred from obtaining compensation in this respect. **We ask consultees whether they agree with our provisional view that the list of dependants in the Fatal Accidents Act 1976 is too restrictive.**

[38] And so does not qualify under s 1(3)(e) of the 1976 Act.

[39] Fatal Accidents Act 1976, s 1(3)(f).

[40] *McGregor on Damages* (15th ed 1988) para 1537.

[41] Fatal Accidents Act 1976, s 1(3)(g).

[42] Where the deceased and the dependant both brought money into the household, a benefit arises by virtue of the sharing of expenses: *Burgess v Florence Nightingale Hospital for Gentlewomen* [1955] 1 QB 349, 362.

(3) Options for reforming the list

(a) Extending the statutory list

3.20 An extension of the statutory list would have the advantage of certainty in respect of those classes of claimants that the list prescribes. However, the further away one moves from conventional family relationships, the more difficult it becomes to define those to whom one would wish to extend recovery. The category of non-relatives deserving of compensation provides the most acute example. Members of this category may have enjoyed widely varying degrees of personal relationship with the deceased, their one common characteristic being the financial loss they have suffered as a result of the death.

3.21 The relationship of the unmarried cohabitant (whether heterosexual or homosexual) is more amenable to statutory definition, but the employment of qualifying time periods inevitably involves a degree of arbitrariness. One option would be to reduce or abrogate entirely the time requirement where, for example, the cohabiting couple have had a child together.[43] Or the time requirement could be dispensed with completely, as in Scotland where patrimonial damages (that is, damages for pecuniary loss) are awarded to any person, not being the spouse of the deceased, who was, immediately before the deceased's death, living with the deceased as husband and wife.[44] This approach could be extended to same sex relationships by extending the statutory list to incorporate the relationship between two persons whether of a different or the same gender who, although not legally married to each other, live in a relationship like the relationship between a married couple.[45]

3.22 However, adding to the list of dependants would not guarantee the inclusion of every deserving case. Indeed, the sense of injustice for someone who is excluded from a wide list could be greater than that of someone who is excluded, along with many others, from a narrow list. Moreover, a list cannot cope easily with changes in society and technology. For example, does the present list include as a dependant a child conceived after the death of either (or even both) biological parents by artificial methods? It is not sensible to continue to add to the list in an *ad hoc* manner if a more coherent underlying basis of recovery can be found.

(b) Adding judicial discretion to the statutory list

3.23 A second option would be to add a catch-all provision, giving the courts discretion to develop the list by analogy with the existing categories and in accordance with changing circumstances. This option would be unlikely to open the floodgates of litigation and could cope with changes in society and technology. But it "ducks" the central issue by throwing to the courts the problematic question of where the

[43] See eg Saskatchewan Fatal Accidents Act, RSS 1978, s 1(d)(ii); Manitoba Fatal Accidents Act, CCSM 1987, s 3(5)(b).

[44] Damages (Scotland) Act 1976, Sch 1, para 1(aa), inserted by Administration of Justice Act 1982, s 14(4).

[45] This definition was recommended by the Queensland Law Reform Commission in their Report No 48, *De Facto* Relationships: Claims by surviving *de facto* partners under the Common Law Practice Act 1867 for damages for wrongful death (1994) p 46. See Appendix A, paras A.38-A.40 below.

line, between those who can claim and those who cannot, should be drawn. Reasoning by analogy assumes that there is an obvious principle underpinning the present list but that is not so. In particular, the list does not just include relatives, by marriage or blood, but includes some cohabitants in a sexual relationship. One extension 'by analogy' would therefore be to extend the entitlement to claim to all cohabitants in a sexual relationship. Another would be to extend it to all cohabitants, whether in a sexual relationship or not. Another would be to extend it to all friends. Another would be to focus more on the type of loss and to extend the entitlement to claim to all individuals who reasonably expected to receive a pecuniary benefit from the deceased that does not flow from the business relationship between them. All this would be left to the courts to resolve, whereas the question seems more amenable to resolution by legislation. A further difficulty of this option is that, until the appellate courts have dealt with the matter, the entitlement to claim would be uncertain; and once the House of Lords has ruled, the range of those entitled to claim would be frozen, subject to the House of Lords overruling itself, so that this approach would not produce much more flexibility than a statutory list.

(c) Removing the statutory list

3.24 A third possible solution would be to abolish the statutory list and to require only proof of the relevant type of financial loss (or, as it is sometimes alternatively expressed, proof of the dependency). Such a reform has been suggested by, for example, Harvey McGregor QC, *Clerk and Lindsell on Torts*, and Otton LJ.

3.25 Harvey McGregor QC expresses the point as follows:[46]

> The extensions in the statutory list of entitled dependants [in the Administration of Justice Act 1982] are to be welcomed. They reflect not only a continuingly more liberal attitude but also the view that, even within the framework of Victorian morality, the initial statutory list was much too narrowly drawn. Nevertheless, it may be questioned whether there is any need for such an elaborate listing of entitled dependants as is now on the statute-book; surely, it would be simpler to enact that any person is entitled to claim who can show a relationship or dependency upon the deceased. This would indeed be more satisfactory in that it would prevent the exclusion of the occasional family member who still does not appear in the statutory listing - such as the great-aunt supported by a great nephew. It is noticeable that many countries outside the common law have encountered no difficulty in casting the ambit of recovery as widely as this and dispensing with lists.

3.26 *Clerk and Lindsell on Torts* observes as follows:[47]

> Although the list of dependants is now a wide one, it is still capable of causing hardship, which calls into question the need for a restriction

[46] *McGregor on Damages* (15th ed 1988) para 1537. In supporting such a reform, Harvey McGregor QC observes in a footnote that France, Belgium, Switzerland, the Scandinavian and also the Islamic countries have dispensed with a statutory listing.

[47] (17th ed 1995) para 27.40.

beyond financial dependency. For example, the financially dependent friend and companion of the deceased remains excluded, as does the homosexual cohabitee.

3.27 Otton LJ in *Shepherd v Post Office*,[48] after citing the above passages from *McGregor on Damages* and *Clerk and Lindsell on Torts*, said that he agreed with the principle expressed in both observations. He added, "I too would question whether there is any need for such an elaborate listing of entitled dependants and it would be simpler if Parliament were persuaded to provide that any person is entitled to a claim who can show a relationship of dependence and thus dispense with the lists".

3.28 While most common law jurisdictions continue to rely on a 'list' of eligible dependants, France has long managed without a list, and in Victoria, under section 17 of the Wrongs Act 1958, the action is for the benefit, of the "dependants" of the deceased, defined as such persons as were "wholly, mainly or in part dependent on the deceased at the time of his death, or who would but for the incapacity due to the injury which led to the death have been so dependent".

3.29 It may also be thought relevant that, while concerned with different issues, section 1(1) of the Inheritance (Provision for Family and Dependants) Act 1975 extends the class of those, who are entitled to apply for a court order to deal with the inadequate provision that has been made for them through the deceased's will or on intestacy, from spouse and child of the deceased to any other person "who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased". And by s 1(3), "a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person". As we have explained above,[49] however, it seems preferable in the context of the Fatal Accidents Act to avoid reliance on the terms 'maintenance' or 'support'.

3.30 In our view, if the list is to be abandoned and one is to require proof of the relevant type of pecuniary loss only, the choice lies between two main tests:- (i) any individual can claim who had a reasonable expectation of a non-business benefit from continuation of the life; or (ii) any individual can claim who was, or but for the death would have been, dependent, wholly or partly, on the deceased.

3.31 The first of these is more precise and clear and more obviously focuses only on the relevant type of loss. The second is more elegant but may be thought question-begging as to what one means by 'dependent, wholly or partly, on the deceased'. Was a person who received a lift to work and birthday presents from the deceased "partly dependent" on the deceased? To produce the same results as the first test, the courts would need to interpret 'dependent' to include the receipt of services and one-off gifts, while excluding business loss. On the other hand, one can argue that the inherent vagueness of the term 'dependent' gives the courts a welcome

[48] *The Times* 15 June 1995.

[49] See para 3.15 above.

flexibility in, for example, excluding trivial claims by those with a weak personal link to the deceased.

3.32 A feature of both tests is that, in contrast to the present law, they draw a coherent line between those who can, and cannot, recover damages under the Fatal Accidents Act. All who have suffered the relevant type of loss can recover, whether relatives, cohabitants in a sexual relationship, cohabitants in a non-sexual relationship, or non-cohabiting friends.

3.33 One should note, however, that both tests limit recovery to *individuals*. The tests are confined to losses flowing from 'personal' relationships - relationships with people - and not from 'relationships' with companies or institutions. It would be a significant further step (which, at this stage, we would not support) to allow, for example, a charity (whether incorporated or unincorporated) to have a claim under the Fatal Accidents Act for the cessation of regular donations that the deceased made to it.[50]

3.34 While we provisionally favour the abandonment of the statutory list and the adoption of either of the above tests, there are at least two counter-arguments that must be addressed. The first is that eliminating the statutory list might open the way for an individual to claim for relatively trivial losses, such as a colleague who occasionally received a lift home from work, and might even encourage the inflation or invention of these claims. However, we consider that judges are perfectly able to decide whether there has been any loss caused, and a strict application of the costs rules should also deter fraudulent or frivolous actions. One should also remember that, even under the present law, a dependant on the statutory list, who has suffered a small loss, is entitled to damages for it, and this does not appear to have caused difficulties. Although we would not at this stage regard this as necessary (and defining it would be difficult), a threshold of significant loss could be introduced to prevent any possibility of actions for trivial claims.

3.35 A second possible objection to the abandonment of a list would be the increased burden on whoever brings the action, since that person needs to ascertain the full range of claims that can be made under the Fatal Accidents Act.[51] This task would be more difficult where there is no "checklist" to refer to, although in most cases the identities of those people who received a pecuniary benefit from the deceased will presumably be readily ascertainable. Provided the courts do not impose too high a standard on those bringing proceedings to ascertain the claims of others, we do not regard this as a substantial obstacle to removing the statutory list.

3.36 **We are of the provisional view that the statutory list should be abolished and replaced by a test whereby any individual has a right of recovery who had a reasonable expectation of a non-business benefit from continuation**

[50] We would distinguish a gift to a company from a gift to individuals (eg, children) held on trust by a company for those children. In the trust situation, the beneficial interests of the children would trigger the entitlement to claim.

[51] Section 2(4) of the 1976 Act: see para 2.12 n 31 above. See also S M Waddams, "Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?" (1984) 47 MLR 437, 449.

of the deceased's life, or a test whereby any individual has a right of recovery who was or, but for the death, would have been dependent, wholly or partly, on the deceased. We ask consultees:- (a) whether they agree that the statutory list should be abolished; and (b) bearing in mind their respective advantages and disadvantages, outlined in paragraph 3.31 above, which of the two tests they prefer or whether they prefer some other (and if so, what) test.

3.37 **If consultees do not agree that the statutory list should be abolished, we ask them to state the reasons for their view and whether they would prefer to see the statutory list remain as it is or reformed by (a) extending the list as discussed in paragraphs 3.20-3.22 above; or (b) adding a judicial discretion to the list as discussed in paragraph 3.23 above; or (c) reformed in some other way which we have not discussed.**

(4) Pecuniary losses resulting from the death other than the loss of benefits from the continuation of the life (for example, funeral expenses)

3.38 In this section, we examine the extent to which pecuniary losses resulting from the death, other than the loss of benefits from the continuation of the life, should be recoverable. Under the present law, of these types of loss, only funeral expenses are recoverable. Indeed a specific statutory provision was needed in relation to funeral expenses because the courts confined recovery to the "loss of dependency".[52] Presumably the explanation for their restrictive approach (which was not dictated by the wording of the Fatal Accidents Acts) was the belief that one should confine recovery (of what, after all, is pure economic loss) to the most serious types of pecuniary loss.

(a) Funeral expenses

3.39 Funeral expenses are recoverable by a dependant or by the estate, depending on who has incurred them, provided that they are reasonable.[53] The strictly logical approach, based on the fact that funeral costs will have to be incurred by everybody eventually, that damages should be limited to the difference between the actual costs of the deceased's funeral and the present value of future funeral costs has not been accepted in practice. This is probably due to the necessarily complex calculations such an approach would involve, for comparatively small sums.[54] The extent of funeral expenses may in practice be dependent upon the culture or community in which the deceased lived: some cultures may require expensive ceremonies.[55] There appears to be no English case on the question

[52] See paras 2.61-2.62 above.

[53] See paras 2.61-2.62 above.

[54] See Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 9.6.1.

[55] See eg *Williams v Mould* (1991) 3 CNLR 186 (British Columbia Supreme Court); Australian Law Reform Commission, Community Law Reform for the Australian Capital Territory: First Report (1985) Report No 28, paras 48-52. In its preliminary submission, APIL argued the expenditure should be reasonable within the context of the community concerned. In *Quainoo v Brent And Harrow Area Health Authority* (1982) 132 NLJ 1100 Croom-Johnson J drew a distinction between recoverable "funeral expenses" and the non-recoverable expenses of a reception (equivalent to a wake). But in respect of some cultures, it will be hard to distinguish the two.

whether the courts would regard the full cost of such ceremonies as "reasonable", although we think it likely that a court would take the view that reasonableness should be judged according to the cultural and religious traditions of the deceased.

3.40 **Our provisional view is that the law on the recovery of funeral expenses in Fatal Accident Act claims is not in need of statutory reform. But we ask consultees: (a) whether, contrary to the present law, they would favour an approach whereby the recoverable costs would be discounted by reason of the inevitability, ultimately, of a funeral; (b) whether they would favour an approach whereby the reasonableness test is applied according to the cultural and religious traditions of the deceased and, if so, whether there should be a statutory provision to that effect.**

(b) Costs incurred in settling the deceased's affairs

3.41 The costs of settling the deceased's affairs are borne by his or her estate. One might argue that, particularly as funeral expenses are recoverable, the beneficiaries of the deceased's estate (who will nearly always be dependants) ought to be able to recover those losses from the wrongdoer under the Fatal Accidents Act, albeit with a discount reflecting the inevitability of those costs being incurred at some stage. Indeed we are surprised that there appears to have been very little discussion of this issue in the past;[56] and it may be that denial of such damages is not perceived as causing any injustice or hardship. **We ask consultees whether they would favour giving the deceased's personal representatives, on behalf of the deceased's estate, a right under the Fatal Accidents Act to recover the reasonable costs incurred in settling the deceased's affairs (with the costs being discounted to reflect the inevitability of those costs being incurred at some stage).**

(c) Grief counselling

3.42 A claimant may undergo grief counselling conducted by a professional counsellor or psychiatrist, thereby incurring a pecuniary loss. This loss is not recoverable under the present law, although where the claimant is suffering from an actionable psychiatric illness,[57] such losses may be recoverable as part of the reasonable medical costs incurred (as with any other personal injury claim). The question is whether the costs of grief counselling should be available to at least some family members who suffer bereavement following wrongful death, where such counselling is reasonably required to deal with or adjust to the circumstances of the death. In Alberta damages are recoverable for the fees incurred for grief counselling for the benefit of the spouse, cohabitant, parent, child, brother or sister of the deceased,[58] although this is a smaller class than was originally recommended

[56] *McGregor on Damages* (15th ed 1988) para 1549 points out merely that a son's expenses of travelling thousands of miles to his father's funeral, or a wife's expenses dealing with personal correspondence of sympathy and condolence on her husband's death are irrecoverable. We note that in Prince Edward Island, under s 6(3)(b) of the Fatal Accidents Act, RSPEI 1988, c F-5, up to $500 "toward the expenses of taking out administration of the estate" may be recovered if the action is brought or continued by the deceased's personal representative. See para A.25 below.

[57] For example, if a relative witnessed the death of the deceased in the accident. See Liability for Psychiatric Illness (1995) Consultation Paper No 137.

[58] Alberta Fatal Accidents Act, RSA 1980, s 7(d), as introduced by RSA 1994, c 16.

by the Alberta Law Reform Institute.[59] Similar recommendations have been made by the Law Reform Commission of British Columbia.[60] If the costs of grief counselling are to be recoverable, it may be thought sensible and appropriate to limit their availability to those who are entitled to bereavement damages (which we discuss below).[61]

3.43 There are, however, significant counter-arguments to compensating the costs of grief counselling. It may lead to litigation concerning, for example, the level of reasonable grief counselling costs or whether it is reasonable to incur such costs without first consulting a GP. Further, it would be difficult to assess whether the sums claimed as costs for grief counselling were reasonable without assessing the extent of the grief suffered. This raises the prospect of a distasteful and distressing examination at a time when the witness is vulnerable. Our reluctance to contemplate this has influenced our provisional recommendations below concerning bereavement damages,[62] and for this reason the recovery of the costs of grief counselling might be thought to sit uneasily with them.

3.44 **We invite the views of consultees as to: (a) whether the reasonable expenses of grief counselling that have been, or will be, incurred should be recoverable under the Fatal Accidents Act; and (b) if so, whether those entitled to recover such expenses should be limited to those who are entitled to bereavement damages.**

(d) Losses incurred in looking after the deceased's dependants.

3.45 Under the present law, a dependant has no claim under the Fatal Accidents Act for the pecuniary value of services that he or she has rendered to a dependant of the deceased. For example, an aunt who has given up work to look after her deceased niece's children has no claim for the value of her services (or wages lost or expenses incurred) under the Act. This is because, even though she is a dependant on the statutory list, the pecuniary loss she has incurred does not comprise the loss of an expected pecuniary benefit from the continuation of the life. This is to be distinguished from the fact that the children would have a claim under the Act for the value of the lost services of their mother.

[59] See Appendix A, para A.27 below.

[60] Report on Pecuniary Loss and the Family Compensation Act (1994) LRC 139, pp 19-21. See Appendix A, para A.27 below. The LRC recommended that of those persons entitled to a claim under the British Columbian Family Compensation Act only those claimants who were part of the deceased's domestic household should have a claim for the costs of grief counselling.

[61] See paras 3.141-3.157 below.

[62] See, for example, our policy on whether bereavement should be proved or presumed, paras 3.158-3.159 below, and our provisional recommendation that the bereavement award be a fixed award, para 3.161 below. The Alberta Law Reform Institute did not regard it as a problem that bereavement damages were recoverable without proof of actual grief; and it was confident that "there is no incentive to incur fees just to increase the amount that the wrongdoer must pay": Alberta Law Reform Institute, Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the Fatal Accidents Act (1993) Report No 66, page 30.

3.46 While we think that, following the personal injury case of *Hunt v Severs*,[63] there is an issue as to whether the dependants (in the above example, the children) should be accountable for the 'lost services' damages to, or should hold them on trust for, the carer (in the above example, the aunt), we do not think that the carer should herself or himself have a right of recovery under the Fatal Accidents Act for the value of the gratuitous services rendered. This is for a number of reasons:-

(i) To allow such a claim would conflict with the position in personal injury cases where carers of personal injury victims do not have *direct* claims against tortfeasors for the value of the gratuitous services rendered.

(ii) To allow the carer a claim under the Fatal Accidents Act would produce a potential conflict with the claims of the dependants for the value of the lost services of the deceased.

(iii) The carer's loss is more remote from the wrongful death than the dependants' loss of the deceased's services. Again, the carer's loss in a fatal accidents scenario is more remote than a carer's loss in rendering gratuitous services to a personal injury victim in the sense that, in the former situation, the carer's services are consequential on an initial loss of beneficial services.

(iv) Although this would not be an objection if one were to abandon the idea that the entitlement to recover under the Fatal Accidents Act is limited to statutory listed dependants, it would be invidious to distinguish between the carer who is a dependant (the aunt) and the carer who is not a dependant (the friend next-door).

3.47 **It is our provisional view that, for the above reasons, a carer should not have a claim under the Fatal Accidents Act to recover losses incurred in looking after the deceased's dependants. We ask consultees whether they agree.**

(e) Medical expenses

3.48 Medical expenses relating to the injuries of the deceased incurred by a dependant cannot be recovered under the Fatal Accidents Act because they do not result from the death, but from the injuries preceding the death.[64] Rather they are recoverable by the injured victim and that claim survives for the benefit of the victim's estate. Some Canadian jurisdictions, however, utilise their fatal accidents legislation to allow claims in death cases for the cost of medical expenses incurred by them during the period between the injury and the consequent death of the deceased.[65] **We are provisionally of the opinion that it is unnecessary to depart from the theoretical basis of the Fatal Accidents Act 1976 so as to**

[63] [1994] 2 AC 350. See Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 2.16-2.36, 3.43-3.72.

[64] See *McGregor on Damages* (15th ed 1988) para 1548. Recovery of pre-death medical expenses is dealt with in full in a separate consultation paper as part of our review of the law of damages: see Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144.

[65] Eg British Columbia Family Compensation Act 1979 RSBC, c 120. See para A.25 below.

enable dependants to recover under the 1976 Act medical expenses incurred for the benefit of the deceased. We ask consultees whether they agree.

(f) Other pecuniary expenses

3.49 **We ask consultees, particularly those with practical experience in this field, whether there are any other pecuniary losses, that we have not discussed in this section, which in their view ought to be recoverable in a Fatal Accidents Act claim but under the present law are not recoverable.**

4. PECUNIARY LOSS: ASSESSMENT

(1) Should the multiplier be calculated from death or trial?

3.50 The calculation of a plaintiff's loss of dependency as a result of the death of the deceased is made using the multiplicand and multiplier method of assessment.[66] However, unlike the assessment of pecuniary loss in non-fatal personal injury cases, the multiplier is calculated from the date of death of the deceased, and not from the date of trial.

3.51 However, distortions in the calculation of the multiplier can occur where there has been significant delay between death and the trial of the action resulting in very low multipliers being applied to the multiplicand for future loss. In *Corbett v Barking, Havering & Brentwood HA*,[67] the facts of which we have examined above,[68] Purchas LJ identified the question at the heart of the issue as at what date should the known facts be taken into account when calculating the likelihood of the continuance of the dependency and the relevant actuarial discount. He recognised that to ignore the fact that the plaintiff had survived to trial in such cases would be illogical.[69] The Court of Appeal confirmed that the multiplier must be selected once and for all at the time of death, but in so doing held that account must be taken of the removal of many of the uncertainties surrounding the provision and receipt of the dependency consequent upon the survival of the claimant to trial.[70]

[66] See para 2.23 above.

[67] [1991] 2 QB 408 (Ralph Gibson LJ dissenting). See also *Spittle v Bunney* [1988] 1 WLR 847, where the plaintiff was aged three at the time of his mother's death. A delay of 7½ years between death and trial resulted in a multiplier for the assessment of post-trial damages of 3½.

[68] See para 2.27 above.

[69] [1991] 2 QB 408, 427E-F. He explained the approach of Lord Fraser in *Cookson v Knowles* [1979] AC 556 as dealing with the usual case of the death of a wage-earning husband and father, where the multiplier depends almost exclusively upon the prospects of the provider of the dependency. He did not think that Lord Fraser had in mind a case where the main determinative factor was the period of years during which the *beneficiary* could be expected to continue to receive support: *ibid*, 427H-428A.

[70] As a result the discount from the 18-year period made to take into account those uncertainties was reduced, and the multiplier increased from 12 to 15 (Ralph Gibson LJ dissenting).

3.52 It has been argued that the multiplier for future loss of support should instead be calculated as at the date of trial.[71] The pre-trial loss could then be calculated in the same manner as for a personal injury action, discounted to take account of the uncertainty as to whether the deceased would have survived to trial and other uncertainties relating to the likelihood of the continuance of the support up to trial had the deceased lived (for example, the possibility of divorce or other accidents). The court's power to withhold interest for an appropriate part of the period of time elapsing between death and the date of trial could be invoked to offset any incentive on the part of dependants to delay.[72] While much the same result follows from the Court of Appeal's approach in *Corbett*, of calculating the multiplier from the date of death and then increasing it to take account of the removal of some of the uncertainties, the approach of calculating the multiplier from the date of trial would tend to increase the multiplier selected in respect of future pecuniary loss and might be thought to be simpler and more accurate.[73] On the other hand, one can argue that, given the significant discount for contingencies that would need to be made, even in calculating the dependants' pre-trial loss, it is correct in principle to take a significantly different approach to calculating personal injury damages as opposed to Fatal Accident Act damages and that the multiplier for the latter should continue to be calculated from death rather than from trial. **We would welcome the views of consultees as to whether, contrary to the present approach of the courts, the multiplier used in assessing Fatal Accident Act damages should be calculated from the date of trial rather than from the date of death.**

(2) Quantifying the loss of a deceased's services

3.53 Dependants are compensated for their loss of dependency, whether in money or money's worth, consequent upon the death of the deceased. The translation of domestic services, where the pecuniary benefit is afforded in kind, into a financial award has caused particular problems for the courts.[74] The most significant context in which such considerations have arisen is in the loss consequent on the death of a wife and/or mother. The general approach of the courts is to take the reasonable replacement cost of those household services and to this end the market cost of a "notional nanny" or housekeeper may be used as a guideline. But an additional sum may be awarded in recognition of the "special qualitative factor"

[71] See eg *McGregor on Damages* (15th ed 1988) para 1563.

[72] See eg *Corbett v Barking, Havering and Brentwood HA* [1991] 2 QB 408, 428G-H, *per* Purchas LJ.

[73] Had the plaintiff's submission been accepted by the House of Lords in *Corbett v Barking, Havering and Brentwood HA*, and a multiplier of 5 been selected from the date of trial, the effect would have been to increase the plaintiff's damages from the trial judge's award of £35,000 to £46,075: [1991] 2 QB 408, 433, *per* Ralph Gibson LJ. In the event a multiplier of 3½ was selected for the loss of the future dependency.

[74] See paras 2.32-2.33 above; *McGregor on Damages* (15th ed, 1988) paras 1586-1589. For compensation for the loss of the plaintiff's ability to do work in the home in non-fatal personal injury cases, see Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 2.34, 3.66-3.71.

associated with the constant attendance and more valuable service of a mother than a commercial nanny.[75]

3.54 We have seen that there are difficulties with the "commercial rate" approach as the sole method of valuing household services.[76] It is ordinarily the case that a housewife/mother must typically perform a whole range of different services, each requiring an assessment of their replacement value and an adjustment to reflect the quality of the deceased's performance. Such an itemised approach to domestic contribution may bear no relation to the reality of the role of a spouse or parent within the family unit. In addition, the market is not readily capable of accounting for those qualities and abilities that are peculiar to the individual carer in question. In *Mehmet v Perry*[77] damages were awarded instead on the basis of the husband's loss of wages after the court had decided that he had acted reasonably in the circumstances in giving up his work in order to care for his children. The circumstances of the case were exceptional, however, in that the rare blood disorder suffered by his two younger children entailed that no stranger could provide the extent of services that would be necessary to substitute for both parents. This approach certainly possesses the advantage of certainty in that there exists a ready yardstick by which to ascertain the loss. However, the deficiencies of this method of assessment are apparent where a carer's lack of qualifications or experience in the work place mean that his or her loss of potential earnings is low or non-existent, or where it is difficult to gauge a carer's potential in the labour market.[78] Of course it is also the case that this measure of the loss bears no relation at all to the carer's skill or otherwise in rendering the services. In some recent cases the court has emphasised that the matter should be dealt with as a jury question and this may indicate some preference for a more discretionary determination of the loss.[79]

3.55 We do not think that it would be appropriate to lay down in legislation how the quantum of damages for loss of services should be assessed. This would be particularly inappropriate at a time when the courts have not yet considered the impact of *Hunt v Severs*[80] (a personal injury case on gratuitous services) on gratuitous services provided to dependants following a wrongful death. **We therefore provisionally conclude that the law in relation to the quantum of damages for the loss of a deceased's services is not in need of statutory reform. We ask consultees whether they agree with this provisional view.**

[75] Eg *Regan v Williamson* [1976] 1 WLR 305; *Mehmet v Perry* [1977] 2 All ER 529.

[76] See para 2.33 above.

[77] [1977] 2 All ER 529.

[78] Dr J Blaikie, "Personal Injuries Claims: The Valuation of "Services"" (1994) SLT 167, 171.

[79] Eg *Cresswell v Eaton* [1991] 1 WLR 1113, 1121, *per* Simon Brown J; *Stanley v Saddique* [1992] QB 1.

[80] [1994] 2 AC 350. See Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 2.16-2.36, 3.43-3.72.

(3) Actual or predicted changes in the marital status of the dependant or the deceased.

(a) Remarriage or prospect of remarriage of the dependant spouse[81]

3.56 The rule against taking account of the remarriage or prospects of remarriage of a widow in assessing her claim is unsatisfactory for a number of reasons. At a fundamental level, it flies in the face of the rationale of tort damages, which is that the defendant should compensate the plaintiff for the plaintiff's loss, but for no more than that. Indeed, Professor Atiyah has said of section 4 of the Law Reform (Miscellaneous Provisions) Act 1971 (now section 3(3) of the 1976 Act):[82]

> This must be one of the most irrational pieces of law 'reform' ever passed by Parliament.

3.57 As we have seen above,[83] the reasons for the 1971 reform were that taking into account widows' prospects of remarriage exposed the widows to distressing cross-examination and consideration by the judiciary of their appearance.[84] The exclusion of the *fact* of remarriage therefore appears unnecessary since neither cross-examination nor prediction are involved.[85] In addition, the protection against distressing questioning that section 3(3) provides is not complete for, subject to the impact of section 4 of the 1976 Act,[86] the evaluation is only avoided for the claim of the widow. Where the widow has children who qualify as dependants, her chances of remarriage will still have to be taken into account in assessing their claims.[87] Further, an assessment of the claimant's (re)marriage prospects still has to be carried out in all other cases, including where a claim is brought by a widower,[88] a cohabitant, an unmarried divorcee[89] or an unmarried woman.

[81] For the purposes of this discussion we shall ignore section 4 of the Fatal Accidents Act 1976 which may have an unforeseen effect on the issue of the remarriage of the dependant. On one possible interpretation of section 4, remarriage may now be ignored regardless of whether it is a widow, widower or a child of a widow or widower who is seeking to recover a dependency. This interpretation of section 4, which we discuss at para 2.58 above and para 3.74 below would therefore render section 3(3) otiose.

[82] Peter Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) p 115.

[83] See paras 2.38-2.39 above.

[84] Although it is to be noted that Lord Diplock doubted whether such questioning was widespread, commenting that nothing of the sort had ever occurred in any cases which he had tried: *Hansard* (HC) 20 April 1971, vol 317, col 541.

[85] The argument in favour of disregarding a remarriage is that the law would be brought into disrepute if two widows were to receive different damages on the basis that one was married before trial and the other just after. See the speech of Lord Stow Hill: *Hansard* (HL) 20 April 1971, vol 317, col 534. Yet the law will also be brought into disrepute if a now wealthy remarried widow is compensated for the loss of a dependency which she does not now need.

[86] See para 3.74 below.

[87] Eg *Thompson v Price* [1973] QB 838.

[88] Eg *Regan v Williamson* [1976] 1 WLR 305. The draft bill attached to our 1973 Report, Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56 provided that the remarriage prospects of widowers also be excluded.

3.58 Recent years have witnessed a significant fall in the proportion of people who marry and an increase in cohabitation.[90] Cohabitants have been included in the statutory list of dependants and, in the absence of an express statutory provision along the same lines as section 3(3),[91] consideration must presumably be given, when assessing damages under the 1976 Act, to the financial support, if any, that is received by the claimant from his or her cohabitant or to the prospects of such financial support flowing from cohabitation in the future.[92] Professor Waddams has made the forceful point that[93]

> It would be ironic if a claimant's remarriage could not be proved but a claimant's extra-marital affairs could be fully investigated to show the formation of, or possible formation of, *de facto* relationships.

3.59 It is of interest to note how the issues of remarriage and cohabitation are dealt with in family law matters. When dealing with applications concerning ancillary relief the courts take account of the fact of remarriage or clear evidence of impending remarriage (although little account is taken of cohabitation).[94] '*Duxbury*'[95] calculations to capitalise periodical payments are not attempted where the applicant spouse has indicated that she will or is likely to remarry. On the other hand, there is no discount within the '*Duxbury*' model to take account of a general 'background' chance of remarriage. Similar issues arise in the context of applications for reasonable financial provision made under the Inheritance (Provision for Family and Dependants) Act 1975. The financial resources and financial needs which the applicant has or is likely to have in the foreseeable future are relevant to the court's assessment as to whether the applicant has received reasonable financial provision.[96] Past and clear evidence of impending remarriage are relevant to this because of the financial support which the applicant's spouse is or will be obligated to provide. But general prospects of remarriage are not taken

[89] The Law Commission, in recommending the inclusion of divorcees as dependants under the Act, realised this problem but made no recommendation: Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56 paras 259-260.

[90] The proportion of all non-married women aged 18 to 49 who were cohabiting in Great Britain has doubled since 1981 to 25% in 1995/6: Office of National Statistics, *Social Trends* (1997).

[91] And assuming that section 4 of the Fatal Accidents Act 1976 is not relevant; see para 3.56 n 81 above.

[92] Although we are unaware of any English case directly on this point, it has been held in Scotland that the courts should take into account the support which flowed to a widow (and her child) from a *de facto* relationship formed after her husband's death: *Morris v Drysdale* 1992 SLT 186. See para A.5 n 20, below.

[93] S M Waddams, "Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?" (1984) 47 MLR 437, 447.

[94] Pursuant to section 31(7) Matrimonial Causes Act 1973 the cohabitation of the supported party is considered as a general change of circumstance which might affect the level of support payments. The courts have, however, resisted equating cohabitation with remarriage as a factor automatically disentitling the ex-wife to support. This has been explained to be because cohabitation, unlike marriage, does not create a legal obligation of support; see *Atkinson v Atkinson* [1988] 2 FLR 353 and *Hepburn v Hepburn* [1989] 1 FLR 373.

[95] *Duxbury v Duxbury* [1987] 1 FLR 7.

[96] Section 3(1)(a) of the Inheritance (Provision for Family and Dependants) Act 1975.

into account. As cohabitation does not carry with it any obligation of support, it is ignored here also.

3.60 We do not believe that the lack of a legal obligation to provide financial support to a cohabitant should mean that the actual financial support which often accompanies this increasingly common domestic arrangement[97] should be ignored in the assessment of damages under the 1976 Act. In some cases, it may be shown that a cohabitation relationship does not involve any financial support, and when this is so the damages awarded should not be adjusted. However, in most cases cohabitation will include elements of financial support, and to overlook this would be to depart from the compensatory aim.

3.61 Reform of section 3(3) has foundered on what the correct approach should be. Both the Pearson Commission and the Law Commission expressed unease at the rule, but felt unable to propose any replacement.[98] Cane argues that the only solution to this problem, and others involving changes in the circumstances of claimants, is to pay compensation in the form of periodical payments rather than a lump sum.[99] Interestingly, Lord Diplock moved an amendment to the Law Reform Bill 1971 to this effect, but later withdrew it as the machinery for implementing such a scheme was not then available. There is no doubt that a system of periodical payments which could be reviewed and varied as the plaintiff's circumstances change would most accurately achieve full but not over-compensation. But this would be at the expense of finality in litigation. Moreover it would seem odd to introduce reviewable periodic payments only in this area, when the courts are so frequently required to estimate future imponderables. We should also stress that the concept of 'provisional damages' is inappropriate to deal with this situation. Although a break with the traditional once-and-for-all lump sum system, provisional damages enable a later sum of damages to be awarded where there is a serious deterioration in the plaintiff's condition.[100] The onus is on the plaintiff to return to court for an increased award. Such damages are inappropriate when it is an improvement in the situation of the plaintiff which is in issue, as with prospects of remarriage.[101] **We therefore provisionally believe that it would not be appropriate to provide that reviewable, periodic payments should be awarded under the Fatal Accidents Act 1976 to deal with the problem of remarriage prospects. We ask consultees whether they agree, and if not, to say why not.**

[97] The proportion of all non-married women aged 18 to 49 who were cohabiting in Great Britain has doubled since 1981 to 25% in 1995/6, Office of National Statistics, *Social Trends* (1997).

[98] Although the Pearson Report did call for a remarriage before trial to be taken into account and the Law Commission recommended that the 1971 Act be extended to widowers and the children of the widow: The Pearson Commission Report (1978) paras 409-412; Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56 paras 247-252.

[99] Peter Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) p 115.

[100] See section 32A of the Supreme Court Act 1981.

[101] Further, structured settlements are not reviewable and so can only present a solution to this problem if the parties agree to incorporate into the structure a term providing that the periodic payments cease upon remarriage (or cohabitation).

3.62 We believe that there are four main options for reform of section 3(3). The first is that section 3(3) be extended so that the fact and prospects of the claimant's or another's[102] (re)marriage would be ignored in all cases. This would mean that there would be consistency in ignoring (re)marriage, or the prospects of (re)marriage, between the claims of widows, children, widowers and cohabitants.

3.63 A second option is that the prospects of remarriage of a widow be disregarded, but that the *fact* of a widow's remarriage be taken into account. To disregard such a relevant and incontrovertible factor as actual remarriage means that the plaintiff is indisputably being overcompensated. Yet no distressing inquiries are required to determine the fact of remarriage. True, this option might encourage plaintiffs to delay their remarriage until after judgment so as to secure a windfall. But, even if thought valid today, the argument put forward at the time of the 1971 Act that this would encourage 'living in sin' cannot stand as a rational objection if the fact of financially supportive cohabitation is taken into account.

3.64 The third option is that section 3(3) be repealed entirely and that both the prospects and the fact of a widow's remarriage be taken into account. This is the option which adheres most closely to the strictly compensatory rationale of tort damages. While it would be undesirable to encourage distasteful and distressing questioning and intrusive enquiries, which the 1971 reform was introduced to prevent, we note that Lord Diplock, for one, did not believe that such practices were as prevalent as Parliament believed them to be.[103] **We would be very interested to know from practitioners with experience in the field whether they believe that the alleged problem of distressing and distasteful enquiries would be a real and serious one if section 3(3) were simply to be repealed.** It does seem odd that currently there appears to be no problem with distasteful or intrusive questioning regarding a widow's prospects of remarriage in connection with claims by a widow's children if such questioning really was a major problem before the 1971 reform. Moreover it is not clear to us why the fact, or prospects, of (financially supportive) cohabitation do not throw up the same difficulties.

3.65 The fourth option represents a modification of the third option. This is that the fact of a widow's remarriage should be taken into account but that, in the vast majority of cases, the prospects of remarriage should only be incorporated into the assessment of damages in the form of the objective, statistical probability that the plaintiff will remarry. Such a solution was suggested nearly twenty five years ago by Professor Ogus.[104] Statistics are available from the Department of Social Security on the number of claimants of widowed mother's allowance and widow's pension who cease to claim these benefits because they remarry.[105] Unfortunately,

[102] Eg the widowed mother of a child dependant.

[103] *Hansard* (HL) 20 April 1971, vol 317, col 541. Cf the comments of Lord Hailsham LC, applauding the passing of the "hideous and rather ugly arguments ... on damages' claims about the widow's prospects of remarriage": Hansard (HL) 30 March 1982, vol 428, col 1303.

[104] See A I Ogus, "Remarriageable Widows" (1968) 31 MLR 339; Ogus, *The Law of Damages* (1973) pp 269-271.

[105] Social Security Contributions and Benefits Act 1992, s 37(3) (widowed mother's allowance) and s 38(2) (widow's pension). Statistics are also available for widows who begin

the data is very raw, and is not broken down to allow for the widow's age, religion, socio-economic background, or whether she has children. Nevertheless, we believe that the data does provide a rough indication of the chance that a widow will remarry; and that it would be sufficient to enable the courts to apply a rebuttable presumption as to the prospects of remarriage.[106]

3.66 In some cases, however, an objective statistical approach would be clearly inappropriate. A widow who at the time of the trial is engaged to be remarried is obviously more likely to remarry and more likely to remarry sooner than one who is not engaged. Similarly, a plaintiff may have religious or moral beliefs or attitudes which might make the statistical chance that she will remarry unacceptably high and therefore inappropriate for her case. The fourth option would therefore require that both the plaintiff and defendant have the option of rebutting the statistical presumption if there be clear and incontrovertible evidence to support the contention that it is inappropriate in the particular case before the court. Obviously, the frequency with which the statistics would be challenged depends upon the willingness of the courts to entertain the proceedings which would follow. However, we do not anticipate that such challenges would often be necessary.

3.67 **We therefore ask consultees which, if any, of the following four options for reforming section 3(3) they support. Prior to hearing the views of consultees (and especially the responses from practitioners to the question posed in paragraph 3.64) we have not reached a provisional view as to which of these options, if any, we prefer:**

(1) That section 3(3) be extended such that the actual and prospective (re)marriage of the claimant (or another) would be ignored in all cases.

(2) That the prospects of remarriage of a widow be ignored, but that the past fact of a widow's remarriage be taken into account.

(3) That section 3(3) be entirely repealed and that both the prospects and the fact of a widow's remarriage be taken into account.

(4) That the fact of a widow's remarriage be taken into account, and that one applies a rebuttable presumption as to the prospects of remarriage based on objective statistical probability.

If consultees do not support any of the above four options, we ask them whether they would prefer to leave section 3(3) as it is or whether they would favour a different reform and, if so, what that reform would be.

3.68 We also ask consultees;

to live with a man, to whom they are are not married, as husband and wife: Social Security Contributions and Benefits Act 1992, ss 37(4)(b) (widowed mother's allowance) and 38(c) (widow's pension).

[106] The same can be said as to the prospects of cohabitation.

(a) whether they agree with our understanding of the present law that, leaving aside the conceivable impact of section 4 of the 1976 Act, the fact or prospects of financially supportive cohabitation are relevant considerations in the assessment of damages under the 1976 Act; and

(b) whether any reforms are needed in relation to the present law on the relevance of the fact, or prospects of, financially supportive cohabitation and, if so, what reforms.

(b) The prospects of divorce

3.69 In *Owen v Martin*[107] the Court of Appeal decided that the potential for a divorce between the dependant and the deceased, had he or she survived the accident, must be taken into account in the assessment of the dependency.[108] In Scotland also, a claimant's prospects of divorce are considered when the court is assessing the claimant's patrimonial loss.[109] At first sight, this seems no more objectionable than requiring a wife separated from her husband to prove that there was a significant prospect of reconciliation.[110] However the Pearson Commission rejected the idea of taking the possibility of divorce into account where this would prove detrimental to the plaintiff, on the grounds that the prospect of divorce could not be ascertained with any degree of certainty and that one should avoid distasteful inquiry.[111] We sympathise with these concerns. To say to a bereaved widow that her damages are to be reduced because of the prospect of divorce from her deceased husband, to whom she was happily married, is unappealing. On the other hand, to ignore prospects of divorce in the clearest of cases would be knowingly to overcompensate plaintiffs; we believe that there are some objective and incontrovertible indicia that a particular marriage might be heading for divorce, such as the fact that the couple had been living apart for a period of time. **We provisionally recommend that the prospects of divorce should be taken into account at least when there is clear evidence (for example a separation) that the claimant and the deceased might well have divorced. We ask consultees whether they agree.**

3.70 But should one go further? In line with our discussion concerning chances of remarriage, we believe that statistical data on marriages which end in divorce

[107] [1992] PIQR Q151. The deceased was the plaintiff's second husband. The plaintiff's first marriage had ended in divorce on the grounds of her adultery, and shortly after the death of her second husband, she started an adulterous relationship with a married man, whom she had married by the time her claim was heard by the court.

[108] See para 2.40 above.

[109] *Morrison v Forsyth* 1995 SLT 539, in which the plaintiff and the deceased had been separated for a number of months prior to the deceased's death. See also *Farrell v British United Trawlers (Granton) Ltd* 1978 SLT 16, in which the marriage "had its ups and downs" due to the deceased's drunken violence, and *Wilson v Chief Constable, Lothian and Borders* 1989 SLT 97, in which the husband's violence might ultimately have led to estrangement.

[110] *Davies v Taylor* [1974] AC 207. The plaintiff in that case had left her husband, and refused a number of his offers of reconciliation. The husband had just asked his solicitor to commence divorce proceedings when he died.

[111] Pearson Commission Report, vol I, para 417.

could assist the courts in providing an objective and sufficiently certain means by which to assess the likelihood that a plaintiff and his or her spouse would have divorced had the death not occurred. Data exists on the overall proportion of couples married in a given year who subsequently divorce and has been broken down into subgroups to reflect the length of the marriage, the age of each partner at marriage, and their marital status before the marriage in question.[112] Unfortunately, no data exists, as far as we are aware, which incorporates the religious beliefs of the couple, the number of children of the marriage or their ages or the couple's socio-economic background. Nevertheless, in most cases, the available statistics provide a sound basis for a rebuttable presumption as to the chance that the plaintiff would have become divorced from the deceased.

3.71 Of course, as with remarriage, the application of actuarial probabilities will not be appropriate in all cases. It may be that clear and incontrovertible evidence shows that divorce was far more likely than the statistics may indicate. In such a case, however, we would anticipate that the actual chances that the claimant and the deceased would have divorced would be investigated. Conversely, the statistical chance of divorce might be unrealistically high, for example because a couple may be shown to have had particularly devout religious beliefs. If statistical probabilities are to be used, it should therefore always be open to the parties to rebut a statistical presumption of divorce. But if rebuttal of the presumption were allowed too frequently, this would reduce certainty and would tend to undermine the actuarial approach.

3.72 The question remains, however, whether it is acceptable to reduce a grieving plaintiff's damages on the basis of a statistical presumption that he or she would have become divorced from his or her deceased spouse. Even an actuarial approach may be thought unjustifiably insensitive. **We ask consultees whether they consider that, going further than the provisional recommendation in paragraph 3.69 above, the courts, in assessing damages under the 1976 Act, should apply a rebuttable presumption as to the prospects of a plaintiff's divorce from the deceased based on objective statistical probability.**

(4) Section 4 of the 1976 Act

(a) Should the present section 4 be repealed?

3.73 Under section 4 of the Fatal Accidents Act 1976, all benefits which arise as a result of the death must be disregarded by the courts in assessing the damages to which a dependant is entitled.[113] As we have seen, the current section 4 was introduced by the Administration of Justice Act 1982 in response to recommendations from both the Law Commission and the Pearson Commission.[114] The previous statutory provisions dealing with collateral benefits in fatal accident cases simply listed those benefits which were not to be deducted,

[112] John Haskey, "The proportion of married couples who divorce: past patterns and current prospects" (Spring 1996) 83 Population Trends 25.

[113] See para 2.49 above.

[114] See para 2.49 above.

namely insurance monies, benefits, pensions and gratuities.[115] The Law Commission and the Pearson Commission were concerned that the effect of some benefits being included on the list, and others not, was that some dependants were being prejudiced by reason only of the means by which the deceased saved, or indeed by the fact that he saved at all.[116] The effect of the draft Bill attached to our 1973 Report on Personal Injury Litigation - Assessment of Damages was simply to add benefits received from the deceased's estate to the list of benefits to be disregarded. The provision enacted in the Administration of Justice Act 1982 abolished the list of disregarded benefits in favour of a general description of benefits to be disregarded: "benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death". Events have proved this formulation to be too widely framed to capture the intention of Parliament. It seems that this general description was not intended by the legislature to cover any benefits which were not from the deceased's estate and also were not specifically required to be ignored under the previous statutory provisions.[117] However, not surprisingly section 4 has been interpreted literally and consequently its effect is potentially far wider than that which was intended by either Commission or appears to have been intended by the legislature.[118]

3.74 The fact, or the prospect of remarriage, may be within the scope of section 4, thereby rendering section 3(3) otiose.[119] In *Topp v London Country Bus (South West) Ltd*,[120] both counsel and May J accepted that, due to *Stanley v Saddique*,[121] the effect of Mr Topp's possible remarriage, should be disregarded under section 4. Whatever one's view on the rule that a widow's remarriage be ignored,[122] we disapprove of section 4 achieving the same result by a "side-wind". The same criticism can be made of the possible effect of section 4 on whether the fact, or the prospects, of financially supportive cohabitation are to be taken into account.[123]

3.75 The position at common law in respect of a dependant's earnings was uncertain.[124] A wide interpretation of section 4 would include earning capacity within its ambit such that it would not be deducted. We have seen that in *Malone v Rowan*[125] a widow claimed damages for the loss of the support which she would have received from her husband on the basis that, had he not died, she would have given up work to start a family. Russell J reluctantly followed the Court of Appeal in *Higgs v*

[115] See Fatal Accidents Act 1976, original s 4; Fatal Accidents Act 1959, s 2.

[116] See Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, paras 255-256; The Pearson Commission Report (1978) paras 537-539.

[117] See para 2.58 above.

[118] See paras 2.49-2.59 above.

[119] See para 2.58 above.

[120] [1993] 1 WLR 976.

[121] [1992] QB 1.

[122] See paras 3.56-3.68 above.

[123] See para 3.58 above.

[124] *Howitt v Heads* [1973] 1 QB 64. See also *Cookson v Knowles* [1977] QB 913 (CA) and para 2.47 above.

[125] [1984] 3 All ER 402. See para 2.57 above.

Drinkwater[126] and found that no actual loss had been suffered because the widow could still go to work. The result, namely that damages were not awarded for a loss of expected dependency which was, in fact, made up for by the dependant's increased earnings, seems to us correct; but under the present law this result could only be reached by outflanking section 4 by concluding at an earlier stage that no loss had been suffered.[127]

3.76 In our view, in line with the apparent intention of Parliament, the present section 4 should be repealed and there should be a return to the statutory listing of the types of benefit resulting from the death that are to be disregarded in assessing damages. If this were so, recourse to the fine distinction between benefits that go to the initial question of whether the plaintiff has suffered a loss and the disregarding of benefits after one has determined that the plaintiff has suffered a loss would not be required as often in order for the courts to reach sensible decisions. **We therefore provisionally recommend that (a) the present section 4 should be repealed and (b) there should be a return to the statutory listing of the types of benefit resulting from the death that are to be disregarded in assessing damages.[128] We ask consultees whether they agree.**

(b) Further options for reform of section 4

(i) Introduction

3.77 Historically the rules for the treatment of collateral benefits in cases of fatal personal injury have developed separately from the rules applied to non-fatal cases, yet there seems to be no reason to approach this issue differently depending on whether the injury inflicted was fatal or not. The arguments of principle and policy relevant to what the law should be are surely the same whatever the severity of the injury. Harvey McGregor says of this issue:[129]

> The path taken by the collateral benefits issue in fatal accident claims has been curiously different from the path it has followed in the field of personal injury. Whereas there was for long general acceptance of the rule that the damages in a personal injury claim were not to be reduced because benefits had been conferred upon the plaintiff by third parties which mitigated his loss, the general rule was the exact opposite where the claim was in respect of a fatal injury, and it became accepted, without any real dispute, that only the net pecuniary benefit accruing to the dependants was recoverable as damages....Gradually however, serious inroads were made by statute upon this rule of deduction of collateral benefits.

3.78 It is our strong view that this historical anomaly should be corrected and that there should be consistency between the law on collateral benefits in fatal accident claims and the law on collateral benefits in personal injury claims. **We ask**

[126] (Unreported) [1956] CA Transcript 129A. See also *Auty v National Coal Board* [1985] 1 WLR 784 (CA).

[127] See para 2.57 above.

[128] This is without prejudice to the further options for reform of section 4 considered below.

[129] *McGregor on Damages* (15th ed, 1988), paras 1015-1016.

consultees whether they agree with our provisional view that there should be consistency between the law on collateral benefits in personal injury claims and Fatal Accident Act claims.

3.79 It follows that, in our view, consultees should favour the same option for reforming section 4 as they have favoured in Consultation Paper No 147 for reforming the law on collateral benefits in personal injury cases. In the next subsection we will explore how each of the options for reform in Consultation Paper 147 applies in the context of fatal accidents.

3.80 Two other matters, not discussed in Consultation Paper No 147, are also relevant to reforming section 4 so as to ensure consistency with personal injury claims. We deal with these two issues in the final two subsections of this section. The first is the treatment of gratuitous services rendered to a dependant as a result of the death; for example, a near-relative may look after a child following the death of the child's parent. The law on gratuitous services rendered to personal injury victims has recently been changed by the House of Lords in *Hunt v Severs*.[130] We have discussed this in Consultation Paper No 144 on Damages for Personal Injury: Medical, Nursing and Other Expenses and have provisionally recommended some changes to the law laid down in *Hunt v Severs*.[131] We here consider how our preferred approach in personal injury cases should be consistently applied to Fatal Accident claims. Secondly, the terms of reference for our damages project has explicitly prevented us from dealing with the recoupment of social security benefits under the Social Security Administration Act 1992.[132] But a separate issue, which it is appropriate for us to deal with, is whether the recoupment regime for social security benefits ought to be extended to Fatal Accident Act claims.

(ii) Reforming section 4 in line with the options for reform of the law on collateral benefits in personal injury cases set out in Consultation Paper No 147

3.81 Our consultation paper on collateral benefits in personal injury cases,[133] which has been published on the same day as this paper, looks in detail at the options for reforming the law relating to collateral benefits in personal injury cases and we refer consultees to our detailed reasoning in that paper. On our provisional view that there should be consistency between the treatment of collateral benefits in personal injury and Fatal Accident Act claims the option for reform chosen in relation to the former should be applied to the latter.

[130] [1994] 2 AC 350.

[131] See Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.43-3.72.

[132] We were asked to examine "the principles governing and the effectiveness of the present remedy of damages for monetary and non-monetary loss, with particular regard to personal injury litigation." Specific consideration was to be given to "deductions and set-offs against monetary loss (*excluding, unless expressly approved, the recovery provisions of the Social Security Administration Act 1992)*" (emphasis added). See the Sixth Programme of Law Reform (1995) Law Com No 234, item 2: formerly Fifth Programme of Law Reform (1991) Law Com No 200, item 11. The Social Security (Recovery of Benefits) Act 1997 comes into force in October 1997.

[133] Damages for Personal Injury: Collateral Benefits (1997) Consultation paper No 147.

3.82 In the collateral benefits paper we examine six options for reform in relation to whether collateral benefits should be deducted or not.[134] We shall now move to consider, albeit much more briefly than in Consultation Paper No 147, the six options as they would apply to fatals claims as opposed to personal injury claims. We ask consultees particularly to bear in mind the issue of consistency between fatal and non-fatal cases when letting us know their views. If they favour a solution for Fatal Accident Act cases which is inconsistent with that preferred by them for non-fatal cases, we ask that they set out fully their justification for the discrepancy.

3.83 The first two options derive from what we term in the Collateral Benefits paper "the proposition underpinning the deduction options". This argument in summary is that:

(a) Compensation, but no more than compensation, for those injured by a legal wrong should be seen as the primary purpose of tort law. Pursuit of this objective requires the deduction of collateral benefits in the assessment of damages where they meet the same loss.

(b) The correctness of this conclusion is supported by a policy argument based on relevant empirical evidence. Tort damages reach very few victims of illness and injury and at a high cost. This cost is met by the large pool in society which contributes to liability insurance. Double compensation should be avoided, so that the cost to individuals and to society of tort compensation may be reduced, thereby potentially increasing the funds available in society to improve provision for disabled people.[135]

(c) Policy arguments may override the case against double recovery which this analysis sets up. However, it is a matter for debate whether the policy arguments accepted by the courts for ignoring some collateral benefits in the assessment of damages withstand close scrutiny.

(d) It follows that there is a case for accepting (and we put it no higher than that) the following proposition:-

> Subject to where the provider of the collateral benefit has a right to recover the value of the benefit from the victim in the event of a successful tort claim, or to recover the value of the benefit from the tortfeasor by being subrogated to the victim's undischarged tort claim, collateral benefits, unless essentially coincidental, received by the victims of personal injury should be deducted from damages which meet the same loss.[136]

[134] We also consider in that paper the rights of the provider of the collateral benefit. Consultees should bear that linked question in mind (we discuss it in detail in this paper at paras 3.110-3.116 below) when considering the "deduction or not" options.

[135] See in respect of these two conclusions the Ontario Law Reform Commission Report on Compensation for Personal Injuries and Death (1987).

[136] Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, para 4.51.

3.84 The analogous proposition for Fatal Accident Act claims, would be that: **Subject to where the provider of the collateral benefit has a right to recover the value of the benefit from the plaintiff in the event of a successful tort claim,[137] collateral benefits (unless essentially coincidental) received by plaintiffs should be deducted from damages under the Fatal Accidents Act which meet the same loss.[138] We ask consultees whether they agree or disagree with this proposition.**

3.85 In order to specify the two options for reform which follow from this contention, it is necessary to consider the practical consequences of it for the particular (private) collateral benefits encountered in claims under the Fatal Accidents Act, namely charitable payments, life insurance payments, survivor's pensions and inheritance from the deceased's estate.[139] In particular we need to consider whether each of these types of collateral benefit meets the same loss as damages awarded under the Fatal Accidents Act.[140]

3.86 We do not consider that the fact that *a charitable payment* is made in response to a fatal personal injury rather than a non-fatal personal injury changes its nature. One can argue that charitable payments to dependants are essentially intended to meet the pecuniary loss or non-pecuniary loss (that is, mental distress) suffered by the dependants and should therefore be deducted from the total sum of Fatal Accidents Act damages.

3.87 There are, however, counter-arguments. First, it is arguable that some charitable payments are not made to alleviate loss, but to express sympathy. This view may be thought to have greater weight where the occasion of the donation is a bereavement, rather than a personal injury. Secondly, even if it is right that charitable payments are made to meet loss, in Fatal Accident Act claims the only non-pecuniary damages recoverable are bereavement damages, which are limited to £7,500. In other words, damages under the Fatal Accidents Act, unlike tort

[137] We have deleted in this context the reference to subrogation in the equivalent personal injury section because, as we understand it, a life insurer has no automatic subrogation rights (and, arguably, could not contract for such rights) because life insurance is non-indemnity insurance.

[138] We consider separately below (at paras 3.117-3.119) the provision of gratuitous services, albeit that our preferred approach to gratuitous services is consistent with the general conclusion set out here.

[139] With regard to the last three of these, one might argue that the collateral benefit is not the whole of the insurance payment, survivor's pension or inheritance but merely their accelerated value in that the dependant would have received these benefits in any event (that is, on the natural death of the deceased). But we think this argument for reducing the value of the collateral benefit is normally counterbalanced because the wrong renders the receipt certain, whereas, had there been no wrong, the beneficiary might have died before the deceased and received nothing.

[140] We should emphasise that this question is posed on the assumption that certain claims for loss under the Fatal Accidents Act can only be sensibly formulated in a way that automatically takes account of the gain made. For example, a claim for loss of the greater value of a payment under a life insurance policy that would have been received had the deceased lived longer must take into account the life insurance payment actually received. For discussion of the line between benefits that go to the initial question of whether the plaintiff has suffered a loss and the disregarding of benefits after one has determined that the plaintiff has suffered a loss, see paras 2.50-2.51, 2.57 and 3.75-3.76 above.

damages at common law, do not claim to be fully reparative. There is therefore a greater likelihood here than in the non-fatal context that a charitable payment would be to meet loss, particularly non-pecuniary loss, for which compensation is unavailable. If charitable payments were nevertheless deducted from Fatal Accident Act damages as a whole, plaintiffs who received such gifts would be left undercompensated for the losses to which the gifts were not comparable.

3.88 The pensions which may be in issue in this context will always be *survivors' pensions*. In our view it is clear that, as in the case of non-fatal personal injuries, these are to meet income loss. Applying the proposition in paragraph 3.84 above would therefore mean that survivors' pensions would be deducted from damages for loss of dependency. This would prevent the double recovery which the present law allows, demonstrated by, for example, *Pidduck v Eastern Scottish Omnibuses Ltd*.[141] This approach would be equivalent to deducting disablement pensions, and retirement pensions received earlier than anticipated because of a tort, from damages for loss of earnings in personal injury cases.

3.89 *Life insurance* is classically a contract under which the insurers undertake, in consideration of specified premiums being continuously paid throughout the life of a particular person, to pay a certain sum of money for the benefit of specified beneficiaries upon the death of that person.[142] The non-deduction of all insurance payments came about because some insurance companies in the late nineteenth century had secured what was seen to be an advantage over their competitors, through the passage of Private Acts of Parliament providing that those companies' life insurance payments should be ignored in the assessment of damages for wrongful death. Not surprisingly the remaining life insurance companies were prompted to lobby for a general rule that all life insurance be ignored, and Parliament obliged in 1908.[143] This singular set of circumstances does not, however, justify the continuing existence of the rule that life insurance is ignored. The idea that the take-up of insurance would be discouraged by a rule laying down that insurance payments are to be deducted, is open to debate.[144]

3.90 Applying the proposition in paragraph 3.84 above, the argument for deduction of life insurance payments from damages under the Fatal Accidents Act is that they are designed to maintain the standard of living of the deceased's dependants: that is, that they do meet the same loss as damages for the wrongful death. The strong counter-argument is that life insurance payments are not earnings-related and the taking out of an insurance policy can be regarded as essentially an investment

[141] [1990] 1 WLR 993. The widow was in receipt of a widow's pension, but this was not set off against her damages for the loss of those pecuniary benefits which she would have received from her husband had the accident not occurred. See para 2.49 n 165 above.

[142] *Dalby v India and London Life Assurance Co* (1854) 15 CB 365; 139 ER 465. We do not here consider what is sometimes termed endowment insurance which provides for the payment of a capital sum on a given date if the assured survives to that date (with or without a provision for the making of a payment or a repayment of premiums, if he dies before that date). Our conclusion that life insurance should be ignored applies equally (and arguably more obviously) to endowment insurance.

[143] See para 2.48 above.

[144] See para 2.48 above and discussion of this issue in Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 4.35-4.39.

intended to provide benefits to dependants (or non-dependants) irrespective of the benefits that would have been provided for them during the deceased's working life.

3.91 In general, *an inheritance from the deceased's estate* does not meet the same loss as damages under the Fatal Accidents Act. Damages under the Fatal Accidents Act for loss of dependency are to meet the loss to the dependant because the deceased is no longer there to provide an income stream from which to support the dependant. An inheritance will generally be from funds entirely separate from those from which the dependant was supported. An exception is where the plaintiff inherits the assets used by the deceased to support the plaintiff; for example, where the deceased lived off investments which were subsequently left to his or her dependants. In this situation application of the proposition in paragraph 3.84 above would mean that the income from the inheritance should be deducted from the dependant's damages for loss of dependency.

3.92 The inheritance may be of a capital sum or of an actual asset. Indeed a relevant asset may have been converted into a capital sum on administration of the estate, for example because there were several beneficiaries, and we consider that the income from this sum should be deducted from the dependency claim in the same way that the income from the asset would have been. In this situation the court would need to make a decision (which would not always be straightforward), whether the sum inherited represented, wholly or partly, the source from which the dependant had been supported.

3.93 An analogous situation would be where the deceased had received damages for loss of earnings in the "lost years", and those damages have been inherited by his or her dependants. If, but for the injury, the deceased would have supported the dependants from the earnings for which damages were awarded, application of the proposition in paragraph 3.84 above would mean that those damages should be deducted from damages for dependency in the Fatal Accidents Act 1976 claim. This is the situation which arose in *Jameson v Central Electricity Generating Board*.[145]

3.94 Again in this situation there may be a forensic exercise for the court to undertake to identify that part of the pre-decease settlement which was in respect of damages for loss of earnings in the "lost years". Again there may be some difficulty in this task, although we do not see it as insuperable. Also we think it likely that this sort of factual situation is rare.

3.95 Having examined whether the different types of collateral benefit which will be encountered in claims under the Fatal Accident Act 1976 are to meet the same loss as damages under that Act, we can now set out the two deduction options which flow from the proposition in paragraph 3.84 above.

(a) Option One

3.96 (1) Subject to the provisos set out in (6) and (7) below, charitable payments made in response to a fatality should be deducted from the total sum of damages under the Fatal Accidents Act.

[145] [1997] 3 WLR 151. See para 2.59 above.

(2) Subject to the provisos set out in (6) and (7) below, survivors' pensions should be deducted from damages for loss of dependency under the Fatal Accidents Act.

(3) Subject to the provisos set out in (6) and (7) below, where a plaintiff inherits capital or an asset (or the monetary equivalent of the asset) from the deceased, which was used before the fatality to support the plaintiff, the income from that inheritance should be deducted from damages for loss of dependency under the Fatal Accidents Act.

(4) Subject to the provisos set out in (6) and (7) below, where a plaintiff inherits damages for loss of earnings in the deceased's "lost years", where the deceased would have supported the plaintiff from the earnings for which damages were awarded, this sum should be deducted from damages for loss of dependency under the Fatal Accidents Act.

(5) All other inheritance, and insurance payments, should be ignored in the assessment of damages under the Fatal Accidents Act.

(6) A first proviso to (1) - (4) above is that where the benefit is expressed to be on account of a particular loss it should be deducted only from damages for that loss.

(7) A second proviso to (1) - (4) above, is that where the provider of the collateral benefit has a right (by contract or by operation of law) to recover the value of the benefit from the plaintiff in the event of the plaintiff recovering damages in respect of the fatality, the collateral benefit should not be deducted from tort damages.[146]

We ask consultees whether they favour this option.

3.97 As framed above, this option takes the view that life insurance payments are not comparable to damages under the Fatal Accidents Act 1976. **Consultees are referred to paragraph 3.90 above and are asked to indicate if they favour the contrary view that life insurance should be deducted from damages for loss of dependency, because it is taken out by people essentially to provide for the maintenance of their dependants.**

[146] A charity might provide contractually with the plaintiff for repayment should the plaintiff recover damages, or it might make the payment conditionally. See Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 2.12 and 2.84-2.91. It is conceivable that a pension fund would make the payment to the survivor, subject to a contractual repayment right, or conditionally, although we believe this to be unlikely. See Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 2.41, 2.63 and 2.84-2.91. Similarly, it is conceivable that the payment would be made to the beneficiary subject to a contractual repayment right or conditionally. Presumably however this would have to be provided for in the terms of the will. Again, this seems most unlikely.

3.98 We cannot think of other collateral benefits likely to arise in this context, but if there are any,[147] under this option for reform their treatment should be governed by the proposition set out in paragraph 3.84.

(b) Option Two

3.99 This option differs from that above only in that charitable payments would also be ignored in the assessment of damages, on the basis of the arguments set out in paragraph 3.87 above. Consultees may also think it significant that the other countries we have examined universally ignore charitable payment in both personal injury and fatal accident cases. **We ask consultees whether they would favour this option according to which one would reform the law as in option one above, except that charitable payments would continue to be ignored in the assessment of damages under the Fatal Accidents Act.**

(c) Option Three

3.100 We anticipate that the remaining options for reform will be of appeal only to those consultees who have rejected the "proposition underpinning the deduction options".[148] Option three would be to reform the law as we have suggested in paragraph 3.96, but to add a further proviso that where a collateral benefit, which would otherwise be deducted, was intended to be in addition to tort damages, it should be ignored in the assessment of damages.

3.101 However, it is not entirely clear how this would work in relation to inheritance of an asset which had been used to support the plaintiff. It would seem very odd to take account of an intention that such a collateral benefit be paid in addition to tort damages, when the effect of the inheritance would patently be to extinguish the loss of dependency. Indeed this serves as a good example of the reasons why, even if one rejects the "compensation equals deduction" approach, one may be unconvinced that weight should be attached to the plaintiff's intentions that a benefit be additional to tort damages. It is also arguable that this option causes uncertainty where it is difficult to establish the provider's intentions.

3.102 **We ask consultees whether they would favour this option according to which option 1 or 2 above (and consultees should say which they prefer) would be qualified, and a collateral benefit which would otherwise have been deducted, would be ignored where the provider intended it to be in addition to any tort damages.**

(d) Option Four

3.103 In the collateral benefits paper we consulted on the option of changing the law only to the extent of providing for the deduction of disablement pensions from damages for loss of earnings.[149] The nearest equivalent in this context would be to

[147] One possibility is the situation which arguably follows from *Jameson v Central Electricity Generating Board*, [1997] 3 WLR 151, discussed in para 2.59 above.

[148] See para 3.84 above.

[149] See Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 4.95-4.97.

change the law to provide for the deduction of survivors' pensions from damages for loss of dependency.[150] Charitable payments, life insurance and inheritance would continue to be ignored.

3.104 The basis for adoption of this option would be that it is in relation to pensions that the argument for deduction is strongest, but that in other respects the present approach to collateral benefits in Fatal Accident Act claims is acceptable.

3.105 The counter-arguments to reforming the law in this way rest on the objections set out above and in the collateral benefits paper to ignoring charitable payments and inheritance (where, for example, it comprises the assets from which the deceased supported the plaintiff).

3.106 **We ask consultees whether they would favour this option of leaving charitable payments, life insurance, and inheritance out of account, while reforming the law by ensuring that survivors' pensions would be deducted from damages for loss of dependency (subject to provisos (6) and (7) set out in paragraph 3.96.)**

(e) Option Five

3.107 Option Five would be to ignore all collateral benefits. In contrast to personal injury claims, this represents the present law under section 4, in relation to Fatal Accident Act cases. In Consultation Paper No 147 we provisionally reject this option as being furthest away from the "compensation equals deduction" approach.[151] For the same reasons we reject it here. Indeed to recommend ignoring all collateral benefits would be tantamount to contradicting the provisional view that we have reached (albeit for rather different reasons) in paragraph 3.76 above that section 4 should be repealed. **We ask consultees whether they agree with our provisional view that the option of ignoring all collateral benefits in Fatal Accidents Act cases should be rejected.**

(f) Option Six

3.108 Option Six in Consultation Paper No 147 was the option of "no change". In the context of personal injury claims, this meant, broadly speaking, that charitable payments, insurance and pensions should be ignored, but that sick pay and redundancy payments should generally be deducted. Probably the nearest equivalent in fatals claims would be to ignore charitable payments, insurance, survivors' pensions and inheritance. This would differ from the present section 4 to the extent that the four types of benefit to be ignored would be listed (and there would therefore be no question of the section having a wider effect than intended).[152] This option would therefore come close to the old section 4[153] and even closer to the Law Commission's recommendations in our 1973 Report on

[150] See also our suggestion regarding the ambit of section 4 at paras 3.73-3.76 above, and in relation to social security at paras 3.120-3.125 below.

[151] See Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 4.98-4.100.

[152] See, as regards this problem with the present section 4, paras 3.73-3.76 above.

[153] See para 2.48 above.

Personal Injury Litigation - Assessment of Damages (albeit that those recommendations dealt also with social security benefits).[154] The counter-arguments to reforming the law in this way rest generally on its wide-ranging departure from the "compensation equals deduction" approach and on the objections set out above and in the collateral benefits paper to ignoring charitable payments, pension, or inheritance (where, for example, it comprises the assets from which the deceased supported the plaintiff).

3.109 **We ask consultees whether they would favour this option of ignoring in Fatal Accident Act cases - and listing - charitable payments, insurance payments, survivors' pensions and inheritance.**

(g) The rights of the provider of a collateral benefit

3.110 As section 4 provides that all collateral benefits are ignored in the calculation of damages under the Fatal Accidents Act, the question of whether the provider of the benefit should have a right to recoup the value of it from the tortfeasor does not arise under the present law, but it is theoretically possible, although unlikely in practice, that a third party would have a contractual or restitutionary right to recover the value of the payment from the dependant.

3.111 If the law were reformed so that some collateral benefits were deducted, the issue would arise whether there should be a new recoupment right. The benefits in respect of which there may be such a right under some of the options set out above would be charitable payments, survivors' pension and an inheritance which represented the assets from which the dependant was supported. In respect of the latter the possibility of a recoupment right can, it would seem, be rejected from the outset for its circularity. If the estate were to recoup part of the inheritance, it would be redistributed, most likely to the same beneficiary.

3.112 This leaves charitable payments and survivors' pensions. We refer consultees to the Collateral Benefits consultation paper for detailed analysis of the arguments for and against a new statutory recoupment right.[155]

3.113 Under the present law, the decision of the Court of Appeal in *Metropolitan Police District Receiver v Croydon Corp*[156] stands in the way of the common law developing a general recoupment right for providers of deductible collateral benefits. **We ask consultees whether:**

(1) They agree with our provisional view that the reasoning of Slade J at first instance in *Metropolitan Police District Receiver v Croydon Corp*[157] is to be preferred to that of the Court of Appeal: that is, that the payment under legal compulsion of a deductible collateral

[154] See paras 2.49 and 3.73 above.

[155] See Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 5.3-5.20.

[156] [1957] 2 QB 154. See Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 5.5-5.6.

[157] [1956] 1 WLR 1113.

benefit does benefit the tortfeasor by discharging a liability of the tortfeasor.

(2) If they agree with (1) - and in the light of the arguments of principle and policy analysed in the Collateral Benefits consultation paper - do they favour giving (a) charitable donors and/or (b) providers of survivors' pensions a new statutory right to recoup the value of the collateral benefit from the tortfeasor (in the event that the collateral benefit is deducted in assessing damages under the Fatal Accidents Act).

3.114 The next question is whether there should be a new statutory right to recover non-deductible collateral benefits from the dependant in the event of a successful tort claim. If the law were to remain as it is, this would apply to all the collateral benefits encountered in cases of fatal accident, so far as they met losses for which damages were then recovered.[158] We refer consultees to discussion of this issue in the Collateral Benefits paper,[159] which we consider to be applicable in this context (although in practice it is less likely that the collateral benefits encountered in a claim under the Fatal Accidents Act would have been made subject to a contractual repayment right.)

3.115 We referred in that paper to a model put forward by the Ontario Law Reform Commission for giving the provider of a collateral benefit a repayment right against the victim. The suggestion was that damages in respect of the loss covered by the collateral benefit be awarded to the plaintiff to be held on trust for the collateral source. The wrongdoer might also elect to pay the damages covering the collateral benefit direct to the collateral source.[160] Although the recommendation made by the Ontario Law Reform commission appears to have been in respect of non-fatal cases only, it is still of interest in this context.

3.116 We ask consultees if they agree with our provisional view that the collateral source's right to repayment from the dependant in the event of a successful tort claim should be left to common law development and does not require legislative reform. We would also be grateful for views on the Ontario Law Reform Commission's proposals that damages covering the collateral benefit should be held by the dependant on trust for the collateral source but that the wrongdoer should additionally be entitled to make payment of such amount direct to the collateral source.

[158] In the case of inheritance, provision for such a claim would again seem somewhat bizarre, because of its circularity. See para 3.111 above.

[159] See Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 5.22-5.26.

[160] See Ontario Law Reform Commission, "Report on Compensation for Personal Injuries and Death" (1987), pp 179-194. See our Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 3.87-3.95 & 5.25-5.26.

(iii) Reforming section 4 in line with our preferred reforms to the law on gratuitous services

3.117 In *Hunt v Severs*,[161] the House of Lords overruled *Donnelly v Joyce*[162] and changed the way in which the provision of gratuitous services are perceived in personal injury actions. The relevant loss is now regarded as being that of the third party 'carer' and the damages recovered by the plaintiff are therefore held on trust for the carer.[163]

3.118 The cases of *Stanley v Saddique*[164] and *Hayden v Hayden*,[165] which we have discussed at length above,[166] concerned the gratuitous provision of services. *Stanley v Saddique* allowed recovery by the plaintiff for a loss of care which was, in fact, made up by the plaintiff's father and stepmother, whereas in *Hayden v Hayden* the plaintiff did not recover damages for a loss of services which was made up by the tortfeasor. Both cases were decided before *Hunt v Severs*,[167] and so the focus in both is on the loss of the plaintiff, not that of the third party carer. To bring the fatal accidents position into line with the current law concerning personal injuries,[168] the plaintiff should recover damages in respect of the services which are being provided, but should hold them on trust for the carer, unless the carer is the tortfeasor, in which case the plaintiff would not recover damages for the services supplied by the tortfeasor at all.

3.119 In our recent consultation paper discussing medical and nursing expenses, we considered gratuitous services in detail.[169] Our provisional opinion was that much of the analysis in *Hunt v Severs*[170] is correct. We agreed that the loss incurred by the carer should be compensated, but we provisionally recommended that, for various policy reasons, damages should be recovered even when the carer was the tortfeasor.[171] We do not propose to repeat here the arguments which led to those conclusions, but we believe that they are convincing. We also questioned the imposition upon the plaintiff of a trust, and invited comment on the alternatives of

[161] [1994] 2 AC 350.

[162] [1974] QB 454.

[163] See para 2.34 above.

[164] [1992] QB 1.

[165] [1992] 1 WLR 986.

[166] See paras 2.52-2.56 above.

[167] [1994] 2 AC 350.

[168] For the current law see para 2.34 above.

[169] Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144.

[170] [1994] 2 AC 350.

[171] Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.59-3.68. The basis for this provisional recommendation was that: first, otherwise plaintiffs would be encouraged to enter into contracts for the provision of care for payment, the genuineness of which may become an issue in proceedings; secondly, plaintiffs may be discouraged from accepting the care of the defendant; thirdly, plaintiffs may be encouraged to engage professional carers instead of relying on the help of friends and family; fourthly, not to award damages for this head of loss against the defendant-carer would potentially lead to anomalous results where there were two or more defendants.

imposing upon the plaintiff a personal obligation to account to the carer, or even the granting to the carer of a separate right of action against the tortfeasor.[172] Our provisional recommendations concerning gratuitous services were: (i) that the plaintiff should recover damages in respect of services already provided gratuitously, or to be provided gratuitously, by third parties, even if that third party is the tortfeasor; and (ii) that the plaintiff should either (a) hold these damages on trust for the providers of past and future care or (b) that a personal obligation should be imposed upon the plaintiff to account to the providers of past and future care for their services. **Our provisional view is that our proposals concerning *Hunt v Severs* should also be applied to fatal accident cases where gratuitous services are rendered to a dependant as a result of the death. We ask consultees whether they agree with that provisional view.**

(iv) Reforming section 4 in line with the social security recoupment provisions

3.120 The "claw-back" provisions by which social security benefits received by a plaintiff in a personal injury case are deducted from his or her damages,[173] and the deduction used to reimburse the Department of Social Security, were originally introduced in the Social Security Act 1989. They can currently be found in Part IV of the Social Security Administration Act 1992, but will shortly be replaced by the Social Security (Recovery of Benefits) Act 1997.[174] In contrast under section 4 of the Fatal Accidents Act 1976, social security benefits paid to the defendant are not deducted from his or her damages.[175]

3.121 Under the Social Security Administration Act 1992, the amount of any "relevant benefits"[176] paid out to a plaintiff, are to be disregarded from the assessment of damages. However, a compensator should advise the Department of Social Security within 14 days of a claim in excess of the £2,500 small-payment threshold being made against them. Within 28 days the Compensation Recovery Unit should provide the compensator with a Certificate of Benefit Paid to the plaintiff since the date of the accident, up to a maximum of five years from the accident.

[172] Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.43-3.58.

[173] The provisions apply equally to out of court settlements, whether proceedings have been commenced or not: section 82 of the Social Security Administration Act 1992. The scheme also covers structured settlements (section 88) and payments into court (section 93).

[174] The new Act will come into force in October 1997. It will apply to all compensation payments made on or after the day on which the Act comes into force, except those payments made pursuant to a court order or agreement made before that day.

[175] Social security benefits were expressly included in the list of benefits to be disregarded under the original section 4 of the 1976 Act, and even section 2(2) of the Fatal Accidents Act 1959.

[176] Relevant benefits are those from the Social Security Acts which have been prescribed by the Secretary of State, namely: attendance allowance, disablement benefit or pension, family credit, income support, incapacity benefit, mobility allowance, benefits payable under the Industrial Injuries and Diseases (Old Cases) Act 1975, reduced earnings allowance, retirement allowance, severe disablement allowance, statutory sick pay, unemployment benefit, disability living allowance, and disability working allowance: Social Security (Recoupment) Regulations 1990 (SI 1990/332), reg 2 as amended by SI 1995/829. The major benefits excluded from the scheme are, *inter alia*, housing benefit, child benefit and widow's benefit.

This certified sum is then deducted from the settlement which the plaintiff receives and is paid, within 14 days of the payment to the plaintiff, to the Compensation Recovery Unit. The deduction is currently made from the total settlement which the plaintiff receives, including those damages which are to compensate for the plaintiff's non-pecuniary losses of pain, suffering and loss of amenity. This has been widely perceived as unfair to plaintiffs where the recoupment reduces the amount of the damages for non-pecuniary loss, for these damages do not redress the same loss which is alleviated by social security benefits. To the extent that a plaintiff's non-pecuniary damages are reduced, the state is, therefore, recouping its costs not from the tortfeasor, but from the victim of the tort.

3.122 The 1997 Act, while retaining much of the mechanics of the scheme,[177] makes a number of significant revisions. One of these is that damages for pain, suffering and loss of amenity will no longer be subject to state recoupment of benefits. Benefits will only be recovered from damages for that type of pecuniary loss which the benefit was paid to compensate.[178] A further development is the abolition of the small-payment threshold of £2,500. Relevant benefits paid to all claimants will be deducted from their damages for pecuniary loss irrespective of the size of their claims.[179]

3.123 We largely agree with the principles behind the recoupment scheme. We think it correct that the loss incurred by the state in alleviating the harm caused to the plaintiff by the tortfeasor be recoverable from the tortfeasor.[180] Moreover, in principle social security benefits paid to dependants in response to a wrongful death should be dealt with in the same manner as those paid to plaintiffs in response to a wrongful personal injury. And, given that the recoupment is up-and-running in personal injury cases, it seems unlikely that the costs involved in extending the scheme outweigh the benefits of so doing. The 1992 Act contained a provision expressly excluding any application of the recoupment provisions from payments pursuant to a fatal accident.[181] There is no such provision in the Social Security (Recovery of Benefits) Act 1997. Nevertheless it is clear that the Act is not to apply to Fatal Accident Act claims. This is for at least two reasons. First, section 1 of the 1997 Act is concerned with benefits being paid to or for a person who has suffered an accident, injury or disease and this is inapplicable to Fatal

[177] The onus remains on the compensator to apply for a certificate of recoverable benefits before making a compensation payment and to deduct the sum of recoverable benefits from the compensation payment.

[178] Section 8 and Schedule 2 of the 1997 Act list the specific benefits which are to be deducted from the individual heads of damages that a plaintiff may receive. Compensation for loss of earnings, for costs of care and for loss of mobility are listed. Compensation for pain, suffering and loss of amenity, however, is not included in the list.

[179] Under Schedule 1, para 9 of the 1997 Act a small-payment threshold may be reintroduced by means of a regulation. At present, however, we are not aware of any plans to make such a regulation.

[180] See the examination of the arguments of principle in relation to the analogous question of NHS recoupment in Damages for Personal Injury: Medical Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.19-3.42.

[181] Social Security Administration Act 1992, s 81(3)(c).

Accident Act claimants. Secondly, no heads of damage recoverable under the Fatal Accidents Act 1976 are listed in Schedule 2 of the 1997 Act.

3.124 The benefits with which the scheme is most likely to be concerned if it is extended to fatal accident cases, other than the standard income-related benefits of income support and family credit, are the widow's payment, the widowed mother's allowance and the widow's pension. The widow's payment, unusually, is a one-off payment of £1,000 made to women upon the death of their husbands, if they are not of pensionable age at the date of his death.[182] Although it is in no way income-related, it was introduced to help widows through the financial upheaval caused by their husband's death.[183] The widowed mother's allowance is a benefit top-up available for widows with children in respect of whom they are entitled to claim child benefit.[184] The rationale behind it is that caring for her children will prevent the widow from working.[185] The widow's pension, is available to women, not living with a man as husband and wife, who were widowed between the age of 45 and 65 and who are not entitled to a widowed mother's allowance.[186] These benefits are all concerned with a widow's loss of financial support.[187] Therefore, in line with the changes made in the 1997 Act to exclude recoupment of relevant benefits against that part of the damages compensating for pain, suffering and loss of amenity,[188] the recoupment of all these benefits should not include recoupment from bereavement damages.

3.125 The current system by which defendants should not pay out to a claimant without first being furnished with a certificate detailing the benefits the claimant has received would work just as well for wrongful death claims as it does for personal injury claims. **Consultees are invited to comment on whether the social security recoupment scheme which applies to personal injury actions should be extended to fatal accident cases (albeit that there should be no recoupment from bereavement damages).**

5. BEREAVEMENT DAMAGES

3.126 At common law no damages can be awarded for mental distress caused by death (that is, bereavement).[189] The Administration of Justice Act 1982, inserting section 1A into the Fatal Accidents Act 1976, introduced damages for bereavement.[190]

[182] Social Security Contributions and Benefits Act 1992, s 36.

[183] See the Government's Green Paper Vol 1, *Reform of Social Security*, (1985) Cmnd 9517, paras 10.11 and 10.12 and Vol 2, *Reform of Social Security: Programme for Change* (1985) Cmnd 9518 para 5.51. Cf Ogus, Barendt & Wikeley's *The Law of Social Security* (4th ed 1995) p 283.

[184] Social Security Contributions and Benefits Act 1992, s 37(2).

[185] Ogus, Barendt & Wikeley's *The Law of Social Security* (4th ed 1995) p 283.

[186] Social Security Contributions and Benefits Act 1992, s 38.

[187] Originally the allowance was reduced for earnings above a certain earnings threshold, but this proved very unpopular and was abolished in 1964 by s 1(5) of the National Insurance Act 1964.

[188] See para 2.60 above.

[189] See para 2.63 n 201 above.

(1) The role of bereavement damages: Should they be available at all?

3.127 The very availability of bereavement damages is a controversial issue. Much of the controversy is due to a misunderstanding of the purposes of the award. There are at least five distinct purposes which an award of bereavement damages *might be seen* to serve. These are:

(a) Compensating relatives for their mental suffering (that is, their grief and sorrow, both immediate upon the deceased's death and continuing).
(b) Compensating relatives for the non-pecuniary benefits which they would have enjoyed (that is, the loss of the care and guidance of the deceased, and/or the loss of society with the deceased).
(c) Providing practical help for the relatives.
(d) Symbolising public recognition that the deceased's death was wrongful.
(e) Punishing the tortfeasor who caused the wrongful death.

3.128 In 1973, in recommending that damages for bereavement ought to be recoverable, we regarded the award for bereavement as constituting compensation for all non-pecuniary loss suffered by the surviving relatives. We stated that the purpose of the award should go beyond compensation for "grief" or "mental suffering" to include other deprivations, although we did not define in any detail what those might be. It was our belief that the award would also have some consoling effect for the bereaved.[191]

(a) Compensating the relatives for the grief and sorrow they suffer

3.129 To compensate mental distress is to compensate something which cannot be precisely measured. As one cannot assess grief by precise monetary value, it has been argued that it is something which the law should not seek to do.[192] This argument was a key feature of the Parliamentary debates which accompanied the introduction of the bereavement award in 1982[193] and the Citizens' Compensation Bill in 1989.[194]

[190] See paras 2.63-2.74 above. The change followed our earlier recommendations: Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56 paras 160-180.

[191] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56 paras 100, 173-174; *Hansard* (HC) 3 March 1989, vol 148, col 558 (The Solicitor-General, Sir Nicholas Lyell MP). The Pearson Commission also found evidence to support this view: see the Pearson Commission Report (1978) paras 420-421.

[192] *Hansard* (HL) 30 March 1982, vol 428, col 1294 (Lord Rawlinson). Otto Kahn-Freund thought that in assessing damages for loss of expectation of life in fatal cases (before this head had been abolished) the attempt to value life in terms of money touched on "blasphemy" and was "beyond ... human reason": "Expectation of Happiness" (1941) 5 MLR 81, 89. See also Trevor Aldridge, "Life is Priceless" (1994) 138 SJ 1174. The argument that the loss cannot be adequately compensated was a factor in the dissent of two members of the Pearson Commission from its proposals for an award in respect of loss of society; Pearson Commission Report (1978) para 425.

[193] *Hansard* (HL) 8 March 1982 vol 428 cols 27-28, 45 (Lord Hailsham LC); 30 March 1982, vol 428, col 1294 (Lord Rawlinson), col 1300 (Lord Hailsham LC).

[194] See para 2.71 n 221 above. *Hansard* (HC) 3 March 1989, vol 148, col 527 (Mr James Arbuthnot MP); Standing Committee C (Citizens' Compensation Bill) 3 May 1989, col 17 (Mr James Arbuthnot MP); *Hansard* (HC) 7 July 1989, vol 156, col 637 (Mr James Arbuthnot MP).

3.130 Our response to this argument is that it is likely to be more insulting and offensive to the bereaved if nothing at all is awarded.[195] It might also be considered paradoxical if, because no sum could ever be adequate, nothing were to be awarded at all.[196] Money might not be able to cure the loss, but it remains the only means available in civil law to compensate for the wrongful destruction of a life.[197] Moreover, the law compensates non-pecuniary loss in personal injury cases (including pain and suffering) and a range of other cases (for example ruined holidays).

3.131 Compensation for grief is often criticised on the ground that bereavement should be borne and accepted as a normal part in one's life.[198] Indeed, mental distress (unless consequent on an injury to oneself) has not generally been protected elsewhere in tort law.[199] This reflects a concern about the lesser nature of the loss, the potential for bogus claims, the spectre of unlimited liability, and the practical problems of investigation and valuation. However, it can readily be presumed that those close to the deceased will in fact suffer grief and distress on his or her death. Concern at the prospect of unlimited liability can be addressed by confining the availability of the award to a limited class of claimants, most sensibly those in respect of whom the presumption is most easily made.[200]

(b) Compensating the surviving relatives for their loss of care, guidance and society

3.132 We regard this as another sort of mental distress, consequent on death, but distinguishable from grief and sorrow: it is the loss of mental benefit that one would have derived from the deceased had he or she lived. We do not believe there to be any overlap between the damages awarded for loss of services as a pecuniary loss and this perceived aim of bereavement damages. The quantum awarded for loss of a mother's services is increased to represent the fact that the deceased would have provided more intangible services to the claimant than a hired nanny or housekeeper,[201] but this is merely a crude recognition of the 'high

[195] See *Hansard* (HC) 3 March 1989 vol 148 cols 519-520 (Mr Lawrence Cunliffe MP), 544 (Mr Alfred Morris MP); Standing Committee C (Citizens' Compensation Bill) 3 May 1989 col 9 (Mr Alfred Morris MP).

[196] *Rose v Ford* [1937] AC 826, 848, *per* Lord Wright; *Hansard* (HC) 3 March 1989, vol 148, col 519 (Mr Lawrence Cunliffe MP). The same argument was used against the implementation of Lord Campbell's Act, but was rejected by Lord Brougham: *Hansard* (HL) 24 April 1846, vol 85, col 969.

[197] *Rose v Ford* [1937] AC 826, 848, *per* Lord Wright; *Hansard* (HC) 3 March 1989 vol 148 col 519 (Mr Lawrence Cunliffe MP); *Mason v Peters* (1982) 139 DLR 3d 104, 118.

[198] *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310, 416G; Bell, "The Function of Non-Pecuniary Damages" (paper presented at the Manchester Conference on Compensation for Personal Injuries: Prospects for the Future, March 1992) para 4.2.

[199] See Liability for Psychiatric Illness (1995) Consultation Paper No 137, para 2.4.

[200] Ie those closest (in terms of relationship) to the deceased, such as the immediate relatives. See paras 3.144-3.157 below.

[201] See para 2.33 above; *Regan v Williamson* [1976] 1 WLR 305, 309; *Mehmet v Perry* [1977] 2 All ER 529, 537.

quality services' available from the mother. It is not an attempt to compensate for loss of the mental benefit which a mother's care and guidance provides.[202]

(c) Providing practical help for the surviving relatives

3.133 Although an award of money can never replace or make up for the loss of a loved one, it can make life more tolerable,[203] or help to achieve aims such as moving home or taking a holiday.[204] However, we do not think that the purpose of the bereavement award is or should be to compensate pecuniary loss. Pecuniary loss should be claimed and calculated as such. At present, it is true that not all pecuniary losses suffered by a dependant as a result of the death are recoverable, but the question as to whether all such losses should be recoverable ought to be faced head-on without the issue being confused by arguing that a fixed sum of bereavement damages, bearing no necessary relation to the pecuniary loss suffered, 'covertly' compensates pecuniary loss.

(d) Symbolising public recognition that the deceased's death was wrongful

3.134 The award of damages can be an important gesture which recognises and acknowledges the grief and suffering that the bereaved experience on the wrongful death of a close relative.[205] The Pearson Commission accepted that damages for loss of expectation of life provided an indirect acknowledgement of the bereaved of their loss and that its removal, without replacement, would cause widespread resentment.[206] In the context of his proposals to increase and extend the bereavement award, Mr Lawrence Cunliffe MP argued that the sum did not make the bereaved any happier, but it at least made them feel that their loss had been recognised.[207] Bereavement damages may also serve an even more significant

[202] The Pearson Commission reached a similar conclusion when considering their proposed loss of society award: "We would have thought it right to include in the pecuniary damages all those services which can theoretically be replaced in return for money, or can at least be valued in terms of money; and to regard the loss of society award as something quite separate, intended to acknowledge the loss of those intangible services which defy attempts at valuation." The Pearson Commission Report (1978), para 431.

[203] Report on Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the Fatal Accidents Act, Alberta Law Reform Institute Report No 66 (1993) p 31.

[204] Standing Committee C (Citizens' Compensation Bill) 3 May 1989 col 19 (Mr Roger Gale MP).

[205] Lord Scarman has said that the award "amounts only to a recognition by the state that ... the fact of bereavement should qualify for some sympathetic recognition": *Hansard* (HL) 30 March 1982, vol 428, cols 1294. Lord Mishcon said that it was "a gesture by society ... which recognises grief and bereavement": *Hansard* (HL) 30 March 1982, vol 428, col 1295. This argument formed the basis of the proposals made by the Alberta Law Reform Institute: Report No 66, Report on Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the Fatal Accidents Act (1993) p 18. See also Professor DM Walker, quoted in Personal Injury Litigation: Assessment of Damages (1971) Law Com Working Paper No 41 para 200.

[206] The Pearson Commission Report (1978) paras 370, 419, 421. The dissentients objected to the alternative proposal for the payment of a small fixed sum "as a gesture of consolation" to the relatives themselves: para 425.

[207] Standing Committee C (Citizens' Compensation Bill) 3 May 1989, col 18.

symbolic function as an expression on the part of society of the gravity with which society regards the loss of a human life.[208]

3.135 Such symbolic awards are not unheard of in our law. The bereavement award may be compared to the availability of nominal damages when the court recognises that a wrong has been committed but no actual damage has been suffered. However, there is no reason why the symbolic statement by society must entail an award of *substantial* damages. The symbolic statement could be made equally effectively by a judicial declaration of the tortfeasor's wrongdoing, or even by the court's judgment in an action by the deceased's estate or by dependants for their pecuniary losses.

3.136 It is only if the *size* of the award is also seen as symbolic, for example of the value of the deceased's life or of the deceased's potential, that symbolism demands substantial damages. Indeed, because the claim arises on and out of death, and does not purport to relieve the consequential financial hardship which the claimants may have suffered, the award is quite capable of being perceived as a sum representing the intrinsic worth of life itself or as a vindication of the interests of someone who is no longer able to act on their own behalf.[209] This is clearly the way in which many of the bereaved themselves perceive the award.[210] The danger in making this link between the award and the life of the deceased is that the chances of the level of the award being regarded as satisfactory are greatly diminished. Once the award is seen as reflecting the value of the life of the deceased, no sum of money will be regarded as enough.[211]

(e) Punishing the tortfeasor who caused the wrongful death

3.137 A punitive aspect to bereavement damages can be detected, since the deceased herself or himself can no longer be compensated.[212] However, dissatisfaction with the unavailability of exemplary damages and the inadequacies of the criminal law

[208] *Hansard* (HL) 8 March 1982, vol 428, cols 41-42 (Lord Elystan-Morgan). See also *Hansard* (HC) 3 March 1989, vol 148, col 544 (Mr Alfred Morris MP).

[209] In acknowledging the life of the deceased, society perhaps also recognises to some extent his or her future and potential: letter to the Law Commission from Mr and Mrs K J Fellows, dated February 1992.

[210] *Hansard* (HC) 3 March 1989, vol 148, cols 519 (Mr Lawrence Cunliffe MP), 533 (Mr Menzies Campbell MP), 544 (Mr Alfred Morris MP); Standing Committee C (Citizens' Compensation Bill) 3 May 1989, col 19. See also *Hansard* (HL) 8 March 1982, vol 428, col 41-42. A variety of respondents to *Damages for Bereavement: A Review of the Level* (1990) LCD consultation paper saw the award as being symbolic of the value of the life of the deceased.

[211] Sir Nicholas Lyell MP, the Solicitor-General, said that the sum is not intended to represent the value of anything tangible, let alone the value of the life which has been lost: *Hansard* (HC) 3 March 1989, vol 148, col 558.

[212] Eg Peter Cane claims that damages for bereavement "get close to being punitive" although in theory they are meant to provide solace: *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) p 360. A number of respondents to *Damages for Bereavement: A Review of the Level* (1990) LCD consultation paper wanted bereavement damages to be used punitively. See also Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, paras 2.17-2.19, 4.19-4.20.

in fatal accident cases[213] should not distort the purpose of bereavement awards. If the purpose of the award was to punish the tortfeasor, at least two problems would be raised. First, a punitive bereavement award would be inconsistent with the present law on punitive damages.[214] Secondly, the level of the award is fixed and not commensurate with the degree of fault on the part of the defendant. Nor is it proportionate to his ability to pay. We do not think that the purpose of a bereavement award is, or should be, to punish the wrongdoer.

(f) Conclusion

3.138 It is clear from, for example, the responses to the Lord Chancellor's consultation Paper on the level of bereavement damages[215] that the public *expect* a bereavement award to be made to the relatives of a deceased person. While we continue to believe that bereavement damages should be awarded, we dislike the perceptions that the award symbolises public recognition that the deceased's death was wrongful or that it in any way values the life of the deceased, or that it is designed to provide help with pecuniary loss or that it serves to punish the wrongdoer. In our view, it is these misconceived notions which have contributed most to the frustration felt by the public with the current level of award. **We provisionally recommend that, while bereavement damages should be retained, the Fatal Accidents Act 1976 should be amended to make clear the purposes of the bereavement award. The Act should make clear that the award is to compensate for:**

(a) the grief and sorrow of the relative caused by the deceased's death

(b) the loss of such non-pecuniary benefit as the relative might have been expected to derive from the deceased's care, guidance and society if the deceased had not died.

We ask consultees whether they agree with this provisional recommendation.

[213] For the inadequacy of, and difficulty in, enforcing other measures for dealing with wrongful death see Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237; David Bergman, *Deaths at Work: Accidents or Corporate Crime* (1991); James Gobert, "Corporate Criminality: Four Models of Fault" (1994) 14 LS 393; "TUC proposes 'Manslaughter at Work' charge", *The Independent* 10 December 1994; "PLC, What is Your Plea", *The Times* 13 December 1994. See also *Hansard* (HC) 7 July 1989, vol 156, col 645 (Mr Alfred Morris MP) referring to the need of the bereaved to hold to account those responsible for the death of a close relation. This may be particularly so in relation to large and powerful defendants, such as corporations or institutions, who are those most likely to be responsible for large scale disasters. On the desire for public vindication see *Stubbings v Webb* [1991] 3 All ER 949 (CA), 958f, *per* Bingham LJ. A significant number of the respondents to *Damages for Bereavement: A Review of the Level* (1990) LCD Consultation Paper supported a higher level of bereavement damages because of the perceived inadequacy of criminal sanctions.

[214] Punitive (or exemplary) damages are only available if the 'categories test' and the 'cause of action test' are satisfied: see *Rookes v Barnard* [1964] AC 1129 and *AB v South West Water Services Limited* [1993] QB 507. However, the bereavement award is available in circumstances much wider than those which are covered by these tests.

[215] See para 1.6 above.

3.139 The Scottish legislation providing for the recovery of damages to compensate for non-patrimonial loss,[216] also includes an express statement of the types of non-patrimonial loss for which the award compensates. It includes, not just the two purposes that we have provisionally recommended be in a statutory statement of the purposes of the bereavement award, but also a third element:[217]

> to compensate the distress and anxiety endured by the relative in contemplation of the suffering of the deceased before his death.

3.140 We have omitted this element from our provisional recommendation above for three reasons. First, the distress caused by contemplation of the deceased's suffering before death is, strictly speaking, not distress caused by the death. It is distress caused by the accident, and as such is suffered to some extent by the relatives of every person who suffers a non-trivial personal injury. Secondly, in contrast to the law in Scotland, we provisionally recommend that the bereavement award continue to be a fixed award.[218] If the bereavement award were to include an element of compensation for the mental distress caused by contemplation of the suffering of the deceased's before death, it would be less satisfactory to make a fixed award. It would be unreal not to consider at the very least the manner of the deceased's death, if not the extent of the relatives' grief, and vary the bereavement award accordingly. Thirdly, we believe that, in a very loose sense, mental distress caused by the manner of the deceased's death is included within the first element of the statement of the purpose of the bereavement award which we provisionally recommend above be enshrined in statute.[219]

(2) Who can claim bereavement damages?

3.141 Currently, the only people who can recover bereavement damages are the wife or husband of the deceased,[220] the parents of an unmarried legitimate minor,[221] or the mother of an unmarried illegitimate minor.[222] This is a smaller class of claimant than that of "dependants".[223] The current statutory list is open to criticism on the basis that it defines the classes of claimants for bereavement damages too narrowly, thereby excluding other deserving classes.[224]

[216] Section 1(4) of the Damages (Scotland) Act 1976, as amended by the Damages (Scotland) Act 1993. See appendix A, para A.7 below.

[217] Damages (Scotland) Act 1976, s 1(4)(a).

[218] See para 3.161 below.

[219] See para 3.138 above.

[220] Fatal Accidents Act 1976, s 1A(2)(a).

[221] Fatal Accidents Act 1976, s 1A(2)(b)(i). The damages are divided equally between the parents: s 1A(4).

[222] Fatal Accidents Act 1976, s 1A(2)(b)(ii).

[223] See paras 2.12-2.16 above.

[224] A wider approach was put forward in the Citizens' Compensation Bill. See para 2.71, n 221 above.

(a) Abolishing the statutory list or its exhaustive nature

3.142 No finite list based on ties of blood or marriage could encompass all who might be deeply affected by the death of another.[225] The exclusion of deserving cases could be avoided by abolishing the statutory list completely, requiring each claimant of bereavement damages to prove "close ties of love and affection" with the deceased,[226] or even actual mental distress, in order to recover. The emphasis on the quality of the relationship has the merit of enabling recovery by those (for example close friends) who arguably have claims that are as meritorious as those of members of the deceased's immediate family. But there would be difficulties in assessing the state of the relationship prior to the death, and such inquiries might prolong litigation and cause yet more suffering to the claimants whose distress would be investigated and quite possibly challenged.

3.143 An alternative is to maintain a statutory list of claimants who could recover without more, but which would no longer be exhaustive. A person outside the fixed statutory list would be required to prove a close tie of love and affection to claim bereavement damages. However, we dislike any regime in which the relationship between claimant and deceased, or the extent of the deceased's grief would be a fact in issue. **We therefore provisionally consider that an exhaustive statutory list for those entitled to bereavement damages should be retained. We ask consultees whether they agree and if not to say what they would advocate instead of an exhaustive statutory list.**

(b) Extending the exhaustive statutory list

3.144 The current statutory list is, in our view, too limited.[227] For instance, the limitation on damages for the death of an illegitimate child to only the mother of the child should be removed. It prevents a devoted father from recovering bereavement damages when there is no practical distinction between his relationship with the child and that of a married father and his offspring. Similar injustices can be found in the other family situations that we examine below. We believe that relationships within the conventional nuclear family, namely those of spouse, parent, child and sibling of the deceased are relationships which, *prima facie*, should give rise to an award of bereavement damages. However, we recognise the difficulties inherent in extending the categories of claimants; with each step away from the relationships of parent and spouse, which might be expected to be the closest relationships, there is an increased risk of bereavement damages being recovered by undeserving relatives whose relationship with the deceased falls within the categories prescribed by the statute but who in fact had no close relationship with him or her.

[225] See working Paper on Pecuniary Loss and the Family Compensation Act (1992) Law Reform Commission of British Columbia, Appendix C: Non-Pecuniary Loss, p 55-57.

[226] A 1975 resolution of the Council of Europe on compensation for injury or death provides that compensation should cover the mental suffering of a spouse, child, parent or fiancee who has maintained close bonds of affection with the victim up to the time of death. See the Pearson Commission Report (1978) para 419. See also Liability for Psychiatric Illness (1995) Consultation Paper No 137, paras 5.14-5.17.

[227] Some Commonwealth jurisdictions provide non-pecuniary damages on death to the same classes of relatives as are entitled to claim for loss of dependency: eg Northern Territory (Australia): see Appendix A, para A.46 below.

(i) Parents

3.145 The current restriction on recovery to the parents of unmarried minor children is capable of giving rise to arbitrary and unfair results. In *Doleman v Deakin*[228] the deceased was born on 15 April 1966. Injured in a car accident on 14 March 1984, he never recovered consciousness and died on 30 April 1984 after his 18th birthday. No bereavement damages could be awarded. In many cases such as this, parents will be denied compensation for the grief they suffer at the death of a person who is of paramount importance in their life, and the solace which such compensation would provide.[229] This situation has incited justifiable public concern.[230] Although it is to be expected that as a child attains adulthood his or her parents will come to rely less upon the companionship of their child, this is not to say that a parent will not experience profound grief upon the death of an independent adult child. The lasting and unique significance of the parent-child relationship should be recognised by a removal of all restrictions upon recovery by a parent in respect of the death of a child, irrespective of the age or marital status of the child.[231]

3.146 Where the deceased child was illegitimate, only the mother can claim for bereavement damages. The assumption is that the father is unlikely to have shared a relationship with the deceased child that is sufficiently close to justify an entitlement to the award and, therefore, that such an award of damages would be a windfall to the absent father and a possible insult to the mother.[232] However, the rise in the number of unmarried couples living with children must render that assumption open to question. A requirement that the father resided and continues to reside with his illegitimate son would reduce the number of "windfall" cases, although it would deny recovery to the deserving but absent fathers. A possible alternative solution would be to entitle the father of an illegitimate child to claim

[228] [1990] 13 Law Society Gazette 43; *The Times* 30 January 1986.

[229] The Hillsborough stadium disaster and the consequent litigation highlighted the plight of many parents unable to claim bereavement damages in respect of their adult children: see A Unger, "Pain and Anger", New Law Journal (March 20 1992) p 394.

[230] See, for example, Support for the Families of Road Death Victims: A report of an Independent Working Party convened by Victim Support (1994) Victim Support, para 6.77 or the response of the Daily Express and the Daily Star, in February 1992 to the inability of a couple to recover bereavement damages following the death of their son, an unmarried student over the age of 18, in a road traffic accident.

[231] There was strong support from respondents to *Damages for Bereavement: A Review of the Level* for removing the current age limit, with respondents pointing to the care that had been given to the children in the past and the hopes that the parents had for their future. The law in Scotland makes no distinction between minor and non-minor children in respect of recovery of loss of society damages: Damages (Scotland) Act 1976, s 1(4); see also *Rose v Belanger* (1985) 17 DLR (4th) 212 (Manitoba Court of Appeal); *Lian v Money* (1994) 93 BCLR (2d) 16 (British Columbia Supreme Court).

[232] To require the unmarried father to have been granted parental responsibility by the courts would be impracticable, as such orders are usually only granted when the relationship between the parents breaks up or a particular incident, such as the need for consent to an operation on a child, brings the desirability of the order to the attention of the parents.

only where he was able to evince a settled intention to treat the child as a child of the family.[233]

(ii) Children

3.147 The exclusion of children from the statutory list was based on the view that a child was already likely to receive substantial dependency damages and that, although bereavement damages compensate a different loss from dependency damages, they could add little or nothing to these.[234]

3.148 It has also been suggested that children who, because of their very young age at the time of the death, never really knew their deceased parent cannot suffer grief and therefore should not recover bereavement damages.[235] However, if the bereavement award is to compensate not just the immediate grief of the bereaved but also the loss of love, care and guidance which they would have received from their parent[236] this argument loses its force.

3.149 As with the loss experienced by a parent upon the death of a child, the grief and emotional suffering caused by the deprivation of a parent's care and guidance, companionship and society, is likely to be felt just as acutely in many cases in which the bereaved child has attained the age of majority, left the parental home or married, as in those cases where the child has not become independent.[237] We are of the opinion that it would be anomalous to acknowledge the non-pecuniary loss suffered by a parent but not to do the same for a child who had lost one or both parents.[238]

(iii) Brothers and sisters

3.150 In many cases the grief and sorrow at the death of a brother or sister and the consequent loss of society can be at least as great for a sibling as that of a parent on the death of a child.[239] There is therefore a strong case for including brothers and sisters of the deceased.[240] We are aware of the increased risk of providing

[233] See Nova Scotia Fatal Injuries Act, RSNS 1989, c 63, s 12. See Appendix A, para A.21 n 72.

[234] Even where the parent who dies was not a breadwinner, the child will be able to claim for the loss of the services of the parent. See para 2.33 above. See also the minority of the Pearson Commission: The Pearson Commission Report (1978) para 426.

[235] *Hansard* (HL) 30 March 1982, vol 428, cols 1293, 1298 (Lord Hailsham LC). Cf *Hansard* (HC) 7 July 1989, vol 156, cols 639-640 (Mr Lawrence Cunliffe MP).

[236] Which we believe the rationale of the bereavement award to be. See paras 3.126-3.140 above.

[237] See the Citizens' Compensation Bill 1988, cl 6(2).

[238] See Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the Fatal Accidents Act, Alberta Law Reform Institute Report for Discussion No 12 (1992) para 97.

[239] Memorandum of Observations on the Scottish Law Commission Paper entitled "The Effect of Death on Damages" (Discussion Paper No 89, 1991) Law Society of Scotland p 5-6.

[240] Eg Report on Damages for Personal Injury and Death (Topic 10) (1984) Law Reform Commission of Hong Kong, para 8.19. See also the comments of Hidden J in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 337-338.

damages to undeserving plaintiffs that is attendant upon such an extension of the statutory list of claimants. The Scottish wrongful death legislation does not include siblings within the "immediate family" who can claim for non-patrimonial loss.[241] However, we do not believe that this is a sufficient reason for applying stricter qualifications for recovery in respect of the death of a sibling than for the death of a parent or child.

(iv) Cohabitants

3.151 Under the present law, cohabitants cannot claim bereavement damages for the loss of their partner.[242] This runs contrary to our view that those closest to the deceased at the time of death should be entitled to such damages.[243] However we believe that an award to the deceased's partner on the basis of little or no additional proof of genuine personal commitment to the deceased would raise the strong possibility of an unjust "windfall" recovery by an undeserving plaintiff.

3.152 We have already expressed our dissatisfaction with the two year cohabitation requirement for claims for pecuniary loss by cohabitants under the Fatal Accidents Act 1976.[244] In Scotland non-patrimonial loss is recoverable by "any person, not being the spouse of the deceased, who was, immediately before the deceased's death, living with the deceased as husband or wife",[245] although in determining whether the parties are a cohabiting couple, the court shall have regard to all the circumstances of the case, including the time for which it appears they have been living together and whether there are any children of the relationship.[246] We dislike, however, any judicial investigation into the quality of a claimant's relationship with the deceased and prefer to use objective factors to limit the class of claimants to those we regard as most likely to have had a relationship of permanence and commitment with the deceased. In spite of the inevitable degree of arbitrariness, for the claimant to come within the definition of cohabitant for bereavement purposes, we favour a requirement that the couple have cohabited together for a

[241] See s 10(2) Damages (Scotland) Act 1976. This provision has not escaped criticism: see, for example, *Quinn v Reed* 1981 SLT (Notes) 117; F Maguire "The Damages (Scotland) Act 1993" 1993 SLT 245, 248. In their Report on the Effect of Death on Damages (1992) Scot Law Com No 134 at para 3.25, the Scottish Law Commission expressed 'considerable sympathy' with proposals that siblings be included within the class of eligible claimants, but felt that consideration of the issue was not within their remit, postponing consideration to a future, more extensive review of damages.

[242] It was only at a late stage that cohabitants were able to claim for the loss of pecuniary benefits under the Fatal Accidents Act: See para 2.16 above.

[243] Several respondents to *Damages for Bereavement: A Review of the Level* (1990) LCD Consultation Paper supported the inclusion of cohabitants, but there was little agreement as to a definition of the term.

[244] See para 3.18 above.

[245] Damages (Scotland) Act 1976, s 10(2) and Sched 1, para 1, as amended by Administration of Justice Act 1982 (Scotland), s 14(4).

[246] *Hansard* (HC) 19 October 1982, vol 29, cols 294-297.

specific minimum period, two years for example, which period may be reduced or even dispensed with altogether where the relationship has produced a child.[247]

3.153 There is an arguable case that the extension of the action to cohabitants ought to include not just those engaged in a stable, cohabiting, heterosexual relationship but also those persons in a stable, cohabiting same-sex relationship. It would not be wholly consistent with our aim of providing compensation for mental distress and a solace to those persons closest to the deceased if this class of potential claimants were to be denied the award of the bereavement sum solely on the basis of sexual preference.[248]

(v) Other relatives

3.154 It is possible that the deceased could have been emotionally close to another relative at the time of death, for example an uncle, aunt, grandparent or grandchild, particularly if the relatives to whom we have referred above were already dead. We hesitate to recommend extension of the claim to "related members of one's household"[249] because we are concerned about the uncertainty that would accompany such a vague provision and we would favour more specific provisions defining persons in relationships comparable to those included in the statutory list.

3.155 The Citizens' Compensation Bill included provision for "any other person who, in the opinion of the court, by virtue of his or her special relationship with the deceased has suffered bereavement loss", where the "special relationship" referred to was, in all the circumstances, substantially the same as a marital, parental or child relationship.[250] The objection to this form of provision is that it opens up a potential for inquiry into the nature of the "special relationship". The Law Society has suggested that a "guardian", such as an uncle caring for a child, should also be entitled to recover.[251] Alternatively, "parents" as defined in the Administration of

[247] This approach has been adopted in some Canadian jurisdictions: eg in Manitoba, Fatal Accidents Act CCSM 1987, c F-50, s 3(5); Saskatchewan, The Fatal Accidents Act RSS 1978, c F-11, s 1(d)(ii). See Appendix A, para A.21 n 73 below. Where non-pecuniary damages are recoverable for loss of care, guidance and companionship, the normal time requirement for cohabitation is reduced from five years to one year immediately preceding the death where there is a child of the union. In Saskatchewan, pecuniary loss only is awarded to a claimant who can show a continuous period of cohabitation of not less than three years, or, if the couple are parents of a child, that they enjoyed a relationship of some permanence: s1(d)(ii).

[248] See also our provisional view that *de facto* spouses (defined using the wording in the Fatal Accidents Act 1976) and those in a stable homosexual relationship should be able to claim damages for negligently inflicted psychiatric illness: Liability for Psychiatric Illness (1995) Consultation Paper No 137, para 5.19.

[249] Rationalizing Actionable Fatalities Claims and Damages (1977) Manitoba Law Reform Commission Working Paper p 41. See also Pecuniary Loss and the Family Compensation Act (1992) Law Reform Commission of British Columbia Working Paper, Appendix C: Non-Pecuniary Loss, p 56.

[250] Citizens' Compensation Bill, cl 6(2). There were no restrictions in respect of the age or marital status of a claimant within this category.

[251] In its response to *Damages for Bereavement: A Review of the Level* (1990) LCD Consultation Paper.

Justice Act 1982 could be re-defined to include step-parents, adoptive parents, any person in the position of *loco parentis*, and any person treated by the deceased as her or his parent, or provision might be extended to "parents" of a deceased "child of the family".[252] "Children" could be defined to include step-children, adopted children, children in respect of whom the deceased was in a relationship of *loco parentis*, and any person treated by the deceased as her or his child.[253] Another comparable relationship could be that of an engaged couple, but the commitment between an engaged couple can vary enormously.

3.156 **We provisionally recommend that bereavement damages be recoverable by: (a) A spouse, parent, or child of the deceased. "Child" should be defined to include an adopted child and a person who treated the deceased as his or her parent. "Parent" should be defined to include an adoptive parent and a person who treated the deceased as his or her child. While we recognise that the further one moves from these core relationships, the more likely it is that entitlement to a fixed bereavement award without proof of actual mental distress is inappropriate, we also provisionally believe that the list should include: (b) A brother or sister of the deceased. "Brother" or "sister" should be defined to include the adoptive brother and sister of the deceased, and the half-brother and sister of the deceased where he or she lived in the same household as the deceased. We ask consultees whether they agree with this provisional recommendation.**

3.157 **We further ask consultees whether they believe that the list should include: (c) A cohabitant of the deceased, who we would provisionally define as a person with whom the deceased had lived in a sexual relationship for a period of no less than two years immediately prior to the accident. If consultees are in favour of this, we ask them: (i) whether the existence of a sexual relationship between the deceased and the cohabitant should be a qualifying requirement; (ii) whether a requirement of two years' cohabitation, or some other period, is appropriate; and, (iii) whether such a requirement should be waived when other circumstances demonstrate that the relationship in question is one of some commitment and permanence, for example, where the relationship has produced a child.**

[252] For a definition of "child of the family" see Domestic Proceedings and Magistrates' Courts Act 1978, s 88(1) (as substituted); Matrimonial Causes Act 1973, s 52(1) (as substituted). See generally M Parry, *The Law relating to Cohabitation* (3rd ed 1993) p 189 n 27. We were opposed to the extension of the claim to "parents" of a "child of the family" on the ground that there would then be a dispute between the real parents of the child and the *de facto* parents over the award: Report on Personal injury Litigation - Assessment of Damages (1973) Law Com No 56 para 177. This problem might still arise should the class of "parents" be re-defined. One solution to this would be to restrict recovery to *de facto* parents where the deceased's real parents are no longer living: see Report on Damages for Personal Injury and Death (Topic 10) (1984) Law Reform Commission of Hong Kong para 8.18.

[253] For the definition of "parent" and "child" for the purposes of claim for pecuniary loss under the Fatal Accidents Act see para 2.13 above.

(3) Should bereavement be proved or presumed?

3.158 To recover the loss of a pecuniary benefit under the Fatal Accidents Act, a claimant must demonstrate that he or she is a dependant within the meaning of the Act and that a pecuniary benefit has in fact been lost.[254] In contrast, it is not necessary to prove grief in order to claim bereavement damages under section 1A of the Act.

3.159 Judicial inquiries into the existence and extent of mental distress or grief following a death are always unpleasant and we believe that they should be avoided wherever possible.[255] It may readily be assumed that those persons who would qualify for the bereavement award under the statutory list will have suffered mental distress upon the deceased's death. Consequently very few people will be over-compensated by reason of the irrebuttable presumption that grief has been suffered. The creation of even a *rebuttable* presumption that the claimant had suffered grief would cause needless anxiety to legitimate claimants, as there would always be the possibility of an inquiry, with the accompanying features of forensic investigation of personal injury claims, such as surveillance and intrusive and distressing questioning at trial into the details of the plaintiff's relationship with the deceased.[256] The dissatisfaction with the process of litigation revealed by the responses to *Damages for Bereavement: A Review of the Level* indicates that even a strong presumption would thwart the aim of the current system to provide bereavement damages in as simple and unobtrusive a manner as possible. **Our provisional view is that, as under the present law, proof of actual "loss" (that is, actual mental distress) should never be a necessary condition for the award of bereavement damages. We invite the views of consultees on whether they agree.**

(4) Quantum

3.160 Damages for bereavement consist of a fixed sum, which can be varied by the Lord Chancellor.[257] The original value of the award was £3,500. Public attention was then focused on a series of national disasters such as the Hillsborough stadium tragedy, the King's Cross fire and the sinking of the Zeebrugge ferry. Apparent dissatisfaction with the award led to the introduction of the Citizen's Compensation Bill 1988 by Mr Lawrence Cunliffe MP. This Bill proposed to increase the amount of the award to £10,000 and to widen the categories of claimants.[258] It failed to reach the statute book, but the Solicitor-General announced a review of the level of bereavement damages.[259] A Consultation Paper

[254] See paras 2.12-2.22 above.

[255] See Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 175.

[256] Similar problems might arise where it was not necessary to prove actual loss, but it was necessary for a plaintiff to satisfy a non-automatic requirement, eg "closeness" between the claimant and the deceased.

[257] Fatal Accidents Act 1976, s 1A(5).

[258] See para 2.71 n 221 above.

[259] House of Commons, Official Report, Standing Committee C (Citizens' Compensation Bill) 3 May 1989, cols 20-21 and *Hansard* (HC) 7 July 1989, vol 156, cols 645-646 (The Solicitor-General, Sir Nicholas Lyell MP).

was issued by the Lord Chancellor.[260] Following consultation on the question of quantum, the award was increased to £7,500 for awards made after 1 April 1991.[261]

(a) Fixed or discretionary award?

3.161 A fixed sum fails to reflect variations in the mental distress actually suffered by claimants.[262] However, we believe the alternative, an award at large, to be even worse. It would involve a distasteful judicial inquiry into the reality of the grief and its extent or degree,[263] requiring a close examination of the nature of the relationship between the claimant and the deceased.[264] It would take place at an inappropriate moment and would probably exacerbate the grief and suffering already experienced.[265] A further consideration is that a fixed sum available to all claimants, irrespective of the facts of the individual case, reduces the chance that the award will be perceived as valuing the deceased's life, and avoids the problems that would develop were different awards seen to value some deceased persons more highly than others.[266] For these reasons we feel that we cannot endorse the Scottish approach to the provision of non-patrimonial loss, which permits an award at large.[267] **We invite the views of consultees on whether they agree with our provisional recommendation that the bereavement award should continue to be a fixed sum.**

[260] *Damages for Bereavement: A Review of the Level* (1990). See para 2.71 above.

[261] Fatal Accidents Act 1976, s 1A(3) and Damages for Bereavement (Variation of Sum) (England and Wales) Order SI 1990 No 2575.

[262] Peter Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) 76-77. He views the bereavement award solely as compensation (solace) for loss, which inevitably varies. See also The Actions for Loss of Services, Loss of Consortium, Seduction and Enticement (1968) Working Paper No 19, para 65(b).

[263] S M Waddams goes further and questions whether "the whole concept of money for loss of society [is not] more distasteful than the idea of survival of an action for the deceased person's own loss": *The Law of Damages* (2nd ed 1991) para 6.1080.

[264] Eg how well the spouses got on together, how much the children were admired or loved, and whether the parties sometimes got drunk at nights: *Hansard* (HL) 8 March 1982, vol 428, col 46; 30 March 1982, vol 428, col 1303 (Lord Hailsham LC). See also (1971) Working Paper No 41, para 201; Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, paras 171, 175; The Pearson Commission Report (1978) para 427; *Hansard* (HL) 8 March 1982, vol 428, col 42 (Lord Elystan-Morgan); 30 March 1982, vol 428, col 1306 (Lord Rawlinson); Standing Committee C (Citizens' Compensation Bill) 3 May 1989, col 20 (The Solicitor-General, Sir Nicholas Lyell MP).

[265] See *Hansard* (HC) 3 March 1989, vol 148, cols 527 (Mr James Arbuthnot MP).

[266] 18% of recipients of Fatal Accident Act awards said that they did not want to go to court because it was insulting to put a price on the accident victim's head: Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225, s 13.10. See also *Hansard* (HL) 30 March 1982, vol 428, col 1305 (Lord Foot); cols 1305-1306 (Lord Rawlinson).

[267] See Damages (Scotland) Act 1976, s 1(4); see also Report on the Effect of Death on Damages (1992) Scot Law Com No 134, para 3.24.

(b) Level of a fixed award

3.162 The level of any award for non-pecuniary loss - even one made following a detailed investigation into the extent of the mental distress suffered - cannot be arrived at with mathematical precision. The same applies to damages for bereavement. Our aim is to fix a level of award which provides some solace to the bereaved, does not encourage the views that the award is punitive or represents a valuation of the deceased's life, and which is in tune with other awards for non-pecuniary loss. The Citizens' Compensation Bill proposed an increase in the level of damages recoverable by individual relatives to £10,000. The increase to £7,500 made by the Lord Chancellor was in excess of that which would have been justified had the aim merely been to update the award in line with inflation.

3.163 Although we believe that the fact that the death was caused by a legal wrong means that relatives should receive compensation for their grief and anguish even though such damages are irrecoverable for relatives of accident victims who are injured,[268] we are also of the opinion that the bereavement award should not be too high.[269] Any substantial increase in the award would increase the chances of it being seen as punitive, and the larger the award, the more difficult it becomes to justify claimants receiving bereavement damages without having to prove their loss. We also think it very important to bear in mind that mental distress consequent on the death of a loved one may be suffered irrespective of whether the death was wrongfully caused (albeit that the grief, sorrow and deprivation of 'non-pecuniary benefit' is likely to be particularly severe where the death was not natural). Further, we do not believe that there should be any distinction between the level of fixed award which the various classes of claimant are awarded.[270] Such distinctions are based on assumptions as to the extent of the mental distress suffered by different classes of claimant and we believe that this should be avoided.

3.164 Several respondents to *Damages for Bereavement: A Review of the Level* made unfavourable comparisons between the levels of defamation awards and bereavement awards.[271] We dislike the disparity between awards for defamation and awards for all other forms of non-pecuniary loss (including bereavement) and

[268] See para 3.131 above.

[269] A high level of bereavement damages might also expose relatives of a severely injured accident victim to the distressing accusation that their decision as to whether to continue with the use of a life support system as being influenced by financial considerations. In *Airedale NHS Trust v Bland* the Official Solicitor told the House of Lords that there had been cases in which the differing amount of damages recoverable if the victim was alive or dead had been a factor in the decision on whether he or she should be kept alive: [1993] AC 789, 879.

[270] The Alberta Fatal Accidents Act RSO 1980, now awards $25,000 to each eligible child of the deceased (s 8(2)(c)), but $40,000 each to the surviving spouse and parent(s) of the deceased (s 8(2)(a) and (b)). See also Report on Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the *Fatal Accidents Act* (1993) Report No 66, p 39, 42 (see [1993] 19 Commonwealth law Bulletin 1524, 1525). See Appendix A, paras A.34-A.36 below.

[271] See also *Hansard* (HC) 3 March 1989, vol 148, col 546 (Mr Alfred Morris MP).

have provisionally made a recommendation to correct this inconsistency.[272] We accordingly do not believe that the level of the bereavement award should be set by reference to recent defamation awards. Nor do we believe that the treatment of relatives of victims of some of the major disasters which occurred in the 1980's,[273] to which several respondents referred, should be used as a guide to the correct level of the award given the highly charged and public circumstances in which the payments were made.

3.165 The bereavement award should fit within a coherent hierarchy of tariffs for non-pecuniary losses. The current level of £7,500 approximates to the sums plaintiffs would receive as compensation for non-pecuniary loss for moderate post-traumatic stress disorder[274] and is considerably more than a plaintiff would recover for minor post-traumatic stress disorder. In the light of such a comparison, we do not believe the level of the bereavement award to be unreasonably low. One can argue, however, that the tariffs for post-traumatic stress disorder are disproportionately low compared to those for physical injuries.[275]

3.166 The responses to our recent Consultation Paper on damages for non-pecuniary loss, indicated strong support for an uplift at the top end of the tariff scale.[276] Further, significant support was given for increases at the lower end of the scale.[277] We agree that an increase in the tariffs for all types of non-pecuniary loss is required, and any proposed level for the award has to be fixed with such a broad uplift in mind. Increasing the figure of £7,500, set in April 1991, to take inflation into account, delivers a figure of £8,621.[278] In our Consultation Paper on non-pecuniary loss we discussed the desirability of a Compensation Advisory Board to advise on the appropriate levels of damages for non-pecuniary loss.[279] If a

[272] See Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.86-4.104. In the interim, the Court of Appeal in *John v MGN Ltd* [1996] 3 WLR 593 has taken a similar approach.

[273] P&O paid £5,000 for bereavement and £5,000 for pre-death pain and suffering after the Herald of Free Enterprise disaster. Following the King's Cross disaster, London Underground Transport paid £7,500 for bereavement and £3,500 for pre-death pain and suffering. British Rail paid £10,000 for bereavement and £4,000 for pre-death pain and suffering following the Clapham rail disaster. Figures from Pannone Napier.

[274] See the Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases (3rd ed 1996).

[275] For example the Judicial Studies Board Guidelines recommend that for a simple fracture of the radius or ulna (the bones in the forearm), from which a complete recovery is swiftly made, £2,750 should be awarded. The recommended award for a simple fracture of the tibia or fibula (the bones in the lower leg) with a complete recovery is approximately £3,750. The recommended band for minor post-traumatic stress disorder is only £1,600-£3,250.

[276] Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140. 72% of those who addressed the issue believed that an increase in the damages available for the most serious injuries was required.

[277] Although 22% of respondents opposed any increases at the bottom end of the scale, a large proportion of respondents, at least 43% and maybe up to 64%, were in favour of such an increase.

[278] Using the inflation tables reproduced in *Kemp & Kemp*, para 0-110.

[279] See Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.68-4.72.

Compensation Advisory Board were to be introduced it is arguable that the Board should also set the level of the bereavement award, although one may regard that award as *sui generis* in that it is a fixed award that is not dependent on proof of actual mental distress and, is, of course, not dependent on any personal injury suffered by the plaintiff.

3.167 **We provisionally believe that (in 1997) the appropriate level of the bereavement award should be £10,000. This figure allows for inflation since April 1991 and incorporates a further modest increase in the tariff.[280] We invite consultees, bearing in mind the importance of establishing a coherent hierarchy of tariffs for non-pecuniary loss, to state whether they agree with our provisional view, and if they do not, to suggest a level for the award and to give their reasons.**

(c) Updating the fixed award

3.168 There was considerable dismay amongst the respondents to *Damages for Bereavement: A Review of the Level* that there had been such a long interval between the introduction of bereavement damages and the opportunity to change the original level. Even respondents who did not specifically address the issue of updating the award used the effects of inflation to justify their support for a higher award than £3,500. Views as to the frequency of any review varied widely. Some respondents suggested that the award should be index-linked. This appears to be the better solution. The award would not fall behind the level at which it was supposed to be when it was last altered. Nor would any change be subject to the cost and time that a regular review would entail. It would also remove the necessity to debate continually the level of the award. Most importantly, by index-linking the award the risk of causing undue distress to the bereaved, by creating the possibility of one set of claimants receiving a significantly different sum to another group merely because the difference in the awards depended on whether the death occurred before or after the decision to increase the award, would be avoided. The non-pecuniary loss tariff for pain and suffering and loss of amenity in personal injury cases is already updated for inflation by reference to the Retail Price Index.

3.169 We therefore consider that the award should be indexed to the Retail Prices Index in order to provide for *automatic* increases as the relative value of money declines. If the award was to be capable of variation in this manner, then we would consider that the power of the Lord Chancellor to increase the award would no longer be necessary. **We invite the views of consultees as to whether they agree with our provisional view that the award should be index-linked and that the power of the Lord Chancellor to vary the level of damages should be repealed.**

[280] We also note that under the Criminal Injuries Compensation Scheme (which was introduced by the Home Secretary on 12 December 1995 in exercise of the powers conferred on him by sections 1-6 and 12 of the Criminal Injuries Compensation Act 1995) where there is only one qualifying claimant the tariff of standard compensation payable upon the death of the victim of a criminal injury is £10,000: para 39 of the scheme. Where there is more than one qualifying claimant, the tariff drops to £5,000 for each claimant. (There is also provision in the scheme for compensation of the pecuniary loss of dependants.)

(d) Should there be a maximum sum?

3.170 Under the present law there is a single bereavement award of £7,500, regardless of whether one or two relatives claim the award.[281] This produces the result that where two parents qualify for the award, they are each only half compensated for their grief. Extending the statutory list would exacerbate this problem, as it would enable several different people to claim bereavement damages in respect of one death with the consequent appearance of a dilution of damages.

3.171 This apparent dilution of damages could be avoided if each claimant receives his or her own full award with, if necessary, a maximum placed upon the defendant's total bereavement liability. For example, the Citizens' Compensation Bill, which proposed a figure of £10,000 for the level of damages, provided for a maximum claim of £50,000 in respect of each death. Alternatively, a statutory maximum could be introduced on the amount recoverable by a particular class of claimant. The Alberta Law Reform Institute provisionally recommended that where there are three or more eligible children, a fixed sum should be awarded and divided equally among such children.[282] However, it abandoned this proposal following consultation as it felt that it had been wrong to assume that a large family would have a better support group to deal with the loss, that it would be unfair to treat children differently according to the size of their family and that the limit had the undesirable effect of suggesting that the grief and loss of some children was less than that of others.[283]

3.172 The disadvantage of imposing a maximum sum is that fixing that sum would be essentially arbitrary. On the other hand, it may be that this element of arbitrariness is a price that has to be paid for extending the category of claimants and increasing the quantum of bereavement damages in the ways that we have proposed.

3.173 **We provisionally recommend that the fixed award of bereavement damages (which we have provisionally proposed as being £10,000) should not be a maximum sum to be divided among all the claimants. We ask consultees if they agree. If consultees do agree, we would welcome their views as to: (a) whether there should be a maximum sum laid down for bereavement damages; (b) what that maximum sum should be (we would suggest £50,000); and (c) whether they agree with our provisional view that, if there were to be such a maximum sum, it should be divided equally among all entitled dependants rather than full fixed awards being guaranteed to some entitled dependants (for example, spouses) and the residue then being divided among the other entitled dependants (for example, children).**

[281] Fatal Accidents Act 1976, s 1A(4).

[282] Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the *Fatal Accidents Act*, Report for Discussion No 12 (1992) recommendation 10, p 136.

[283] Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the Fatal Accidents Act, Alberta Law Reform Institute Report No 66 (1993) p 42.

(5) Interest on bereavement damages

3.174 Interest on bereavement damages is awarded from the date of death at the full special investment account rate.[284] This is in contrast to the conventional 2 per cent rate awarded for non-pecuniary loss in non-fatal cases.[285] In *Khan v Duncan*[286] the higher rate of interest was justified by Popplewell J on the basis that the award for bereavement was more akin to special damages than general damages, interest upon which is reduced to take account of the expected investment return. We take a different view. As we have explained above the bereavement award should be seen as compensating for a non-pecuniary loss. We provisionally recommend that interest be awarded on bereavement damages in the same way that it is awarded on other non-pecuniary loss awards. In our Consultation Paper, Damages for Personal Injury: Non-Pecuniary Loss, we considered in detail the issue of interest on damages for non-pecuniary loss in personal injury cases, and we refer consultees to that discussion.[287] **We invite consultees to say whether they agree with our provisional view that interest should be awarded on damages for bereavement in the same way as it is awarded on damages for non-pecuniary losses in personal injury cases.**

(6) Can the plaintiff recover both damages for bereavement and damages for a recognised psychiatric illness?

3.175 Damages are available under the common law, in some circumstances, for recognised psychiatric illnesses where the illness results from the death or serious physical injury of another person.[288] It is, therefore, possible for the dependant to have a claim for the bereavement award under section 1A of the 1976 Act and a claim for psychiatric illness under the common law. However, it appears that there is no danger of over-compensation of such a plaintiff. The courts have emphasised that in assessing damages for psychiatric illness they seek to exclude the normal grief that is inevitably suffered: only the illness caused, or contributed to, by the shock of actually witnessing the accident or its immediate aftermath is compensated.[289] It follows from this that the availability or otherwise of damages

[284] *Prior v Hastie* (1987) CLY 1219; *Khan v Duncan*, a decision of Popplewell J, 9 March 1989, reported in *Kemp & Kemp*, vol 3, M3-140. See para 2.72 above.

[285] *Wright v British Railways Board* [1983] 2 AC 773. Harvey McGregor QC was of the opinion that the 2% rate would presumably also apply to interest awarded on the sum for bereavement: *McGregor on Damages* (15th ed 1988) para 612.

[286] (Unreported) 9 March 1989. Popplewell J purported to adopt the reasoning of the Court of Appeal in *Prokop v Department of Health and Social Security*, (Unreported), 5 July 1983 (Stephenson, Griffiths and May LJJ). See *Kemp & Kemp*, vol 1, paras 16-017-16-022 and 16-031-16-032.

[287] (1995) Consultation Paper 140 paras 4.105-4.125.

[288] See Liability for Psychiatric Illness (1995) Consultation Paper No 137.

[289] *Hinz v Berry* [1970] 2 QB 40 (CA). Evans LJ in *Vernon v Bosley* [1997] 1 All ER 577 put forward a qualification of *Hinz v Berry* but it would appear that this was not agreed with by the other two Court of Appeal judges. In *Vernon*, Evans and Thorpe LJJ (Stuart-Smith LJ dissenting) dismissed the defendant's appeal on liability and held that the plaintiff had suffered an actionable psychiatric illness, whether labelled post-traumatic stress disorder (PTSD) or pathological grief disorder (PGD). Evans LJ regarded it as unnecessary to discount damages for the normal grief that is inevitably suffered in situations where, unlike *Hinz v Berry*, the feelings of grief "have worsened into illness or were partly the cause of the plaintiff's illness" (p 604). But Thorpe LJ made no specific reference to this point and

for psychiatric illness should not affect the quantum of a claim for a bereavement award, and vice-versa.[290] In any event, insofar as there were thought to be an overlap, this would be better dealt with by the courts in assessing the quantum of damages for psychiatric illness, rather than affecting what we have provisionally recommended, that is that there should be a fixed sum for bereavement. **We ask consultees whether they agree with our provisional views that (a) a plaintiff should not be barred from recovering both damages for bereavement and, assuming liability can be established, damages for a recognised psychiatric illness; (b) the quantum of bereavement damages should not be affected by the quantum of damages recoverable for psychiatric illness; (c) the quantum of damages for psychiatric illness should not be affected by the quantum of damages for bereavement.**

(7) Contributory negligence

3.176 Section 1A(3) of the Act states that "the sum to be awarded as damages under this section shall be £7,500", which could imply that the amount of bereavement damages would be unaffected by contributory negligence. However, section 5 of the Fatal Accidents Act 1976 states that "any damages recoverable in an action ... under this Act shall be reduced" for the deceased's contributory negligence.[291] The reduction for the deceased's contributory negligence would therefore appear to apply also to the award of bereavement damages, although there is no reported case authority to this effect.[292]

3.177 We have already stated our provisional recommendation that the deceased's contributory negligence should continue to reduce the defendant's liability to the dependants,[293] and we believe that the same arguments and the need for consistency require that the same approach be taken with bereavement damages.

3.178 Although again there is no case in point, it would appear that the contributory negligence of the *bereaved* is also relevant to the assessment of bereavement damages.[294] One problem with this is that the attribution of a degree of fault to a

generally approved the reasoning of the judge at first instance who had discounted damages for normal grief. Stuart-Smith LJ applied *Hinz v Berry*, without qualification, in reaching his conclusion that only PTSD, and not PGD, was actionable and that, on the facts, PTSD had not been proved to have been caused by the accident.

[290] The same conclusion is reached by Mullany & Handford, *Tort Liability for Psychiatric Damage* (1993) pp 274-275: "Although it is true that certain emotional states encompassed in solatium awards such as grief can develop into illnesses of a recognised psychiatric nature, the two categories of relief are distinct and sums granted may differ greatly, particularly in the light of the modest limits imposed upon the legislative awards. The decision to compensate for either loss should have no bearing therefore on the question whether to award damages for the other or upon the issue of the size of the prospective award."

[291] Upon the introduction of the bereavement action, the Administration of Justice Act 1982, s 3(2), amended s 5 of the 1976 Act to omit reference to the "dependants" of a deceased.

[292] See *Winfield & Jolowicz on Tort* (14th ed 1994) p 690. See para 2.73 above.

[293] See paras 3.11-3.13 above.

[294] Note that *Kemp & Kemp* argue, contrary to the unreported judgment of Deputy District Judge Radcliffe in *Navaei v Navaei* in the Eastborne County Court on 6th January 1995, that where one parent of a legitimate child is responsible for the death, the whole

member of the deceased's family could have a severely detrimental effect upon family relations at such a sensitive time.[295] Nevertheless, it might be considered particularly unfair on a defendant to pay damages without proof of loss to an individual who is partly responsible for that loss and the larger the bereavement award becomes, the more unjust it may be thought to be for the damages payable by the wrongdoer to be unaffected by the contributory negligence of the bereaved. Accordingly, we provisionally consider that the bereaved's contributory negligence should reduce his or her bereavement damages as appears to be the present law.[296]

3.179 **We ask consultees whether they agree with our provisional view that, as appears to be the present law, (a) the contributory negligence of the deceased should reduce bereavement damages; and (b) the contributory negligence of the bereaved should reduce that claimant's award of bereavement damages.**

(8) The survival of the award

3.180 A claim for bereavement damages does not survive for the benefit of the claimant's estate should he or she subsequently die.[297] This was following our recommendation in 1973 that bereavement damages should not survive to the estate of a deceased claimant given their personal nature.[298] In our recent Consultation Paper on Damages for Personal Injury: Non-Pecuniary Loss we considered the question whether claims for non-pecuniary loss should survive the death of the person in whom the action is vested, and we refer consultees to that discussion.[299] In particular, we were concerned that were the action not to survive, defendants would have an incentive to delay making a settlement,[300] and the same might be said for bereavement awards.[301] We further believe that it is important to

bereavement award should go to the innocent parent: see *Kemp & Kemp* para 4-007/2. See para 2.73 n 227 above. Under our provisional recommendations,this is no longer an issue as each innocent parent is individually entitled to a whole bereavement award, subject to a possible deduction if the tortfeasor's total bereavement liability exceeds the maximum sum.

295 See the Pearson Commission Report, Vol I, para 1462.

296 See para 2.73 above.

297 Law Reform (Miscellaneous Provisions) Act 1934, s 1(1A). For the purposes of clarity, we should emphasise that "claimant" refers to the bereaved relative who has a claim for bereavement damages in relation to an initial wrongful death but who subsequently dies before judgment or settlement of the claim.

298 Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, para 180.

299 Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.126-4.137. Currently all actions (including those for non-pecuniary losses) other than actions for bereavement or defamation survive for the benefit of the deceased's estate, see Law Reform (Miscellaneous Provisions) Act 1934, s 1.

300 Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, para 4.130.

301 Such delays were one of the reasons behind the recent changes in Scotland, where a deceased's right to a s 1(4) award now transmits to his executor, in respect of deaths occurring on or after 16 July 1992. The claim is restricted to the period prior to the relative's death: Damages (Scotland) Act 1976, s 1A (as introduced by the Damages (Scotland) Act 1993, s 2). See Report of the Effect of Death on Damages (1992) Scot Law

be consistent in our treatment of all forms of compensation for non-pecuniary loss. However, were the action for the bereavement award to survive for the benefit of the claimant's estate, it would be necessary to determine that part of the award which would relate to mental distress suffered before the claimant's death and that part which would relate to the distress which would have been suffered had the claimant not died. Yet because the sum awarded is of a fixed amount and is awarded irrespective of the claimant's subjective feelings, such apportionment would be wholly inappropriate. It would be indefensible to allow an action for the fixed bereavement award to survive where the deceased had suffered the bereavement for only a short time (for example, a matter of minutes). It is for this reason that, with some reluctance, we provisionally believe that the law should not be changed, notwithstanding that the current position might provide an incentive for defendants to delay reaching a settlement. **We invite consultees to say whether they agree with our provisional view that the action for damages for bereavement should continue not to survive for the benefit of the estate of the claimant.**

Com No 134 paras 3.1, 4.7-4.10; Frank Maguire, "The Damages (Scotland) Act 1993" Scots Law Times issue 26, 20 August 1993, p 247.

PART IV
SUMMARY OF RECOMMENDATIONS AND CONSULTATION ISSUES

4.1 We set out below a summary of our questions and provisional recommendations on which we invite the views of consultees.

1. SHOULD THE FATAL ACCIDENTS ACT CLAIM BE ABOLISHED?

4.2 Our provisional view is that the Fatal Accidents Act claim should not be abolished and that it should remain the law that the "lost years" claim should not survive for the benefit of the deceased's estate. We ask consultees whether they agree. (paragraphs 3.1 - 3.7)

2. THE NATURE OF THE RIGHT OF ACTION

4.3 We ask consultees whether they agree with our provisional views that: (a) the nature of the right of action under section 1(1) of the 1976 Act does not, in general, require reform; (b) it should be made clear that the dependants have no claim if the death was too remote a consequence of the defendant's wrong and to that limited extent section 1(1) of the 1976 Act requires amendment; (c) section 5 of the 1976 Act, laying down that contributory negligence of the deceased operates to reduce the dependants' damages, should be retained. (paragraphs 3.8 - 3.13)

3. PECUNIARY LOSS: WHO CAN CLAIM AND FOR WHAT TYPE OF LOSS?

(1) What type of loss of pecuniary benefit should be recoverable?

4.4 It is our provisional view that no change is needed to the present law on the type of loss of pecuniary benefit that is recoverable under the Fatal Accidents Act and, in particular, that the relevant loss should continue to be confined to the loss of non-business benefits. We ask consultees whether they agree with that provisional view. If consultees disagree, we would welcome their views on the limits, if any, that should be placed on the type of loss of pecuniary benefit that is recoverable. (paragraphs 3.15 - 3.17)

(2) Is the present list of dependants too restrictive?

4.5 We ask consultees whether they agree with our provisional view that the list of dependants in the Fatal Accidents Act 1976 is too restrictive. (paragraphs 3.18 - 3.19)

(3) Reforming the list

4.6 We are of the provisional view that the statutory list should be abolished and replaced by a test whereby any individual has a right of recovery who had a reasonable expectation of a non-business benefit from continuation of the deceased's life, or a test whereby any individual has a right of recovery who was or, but for the death, would have been dependent, wholly or partly, on the deceased. We ask consultees:- (a) whether they agree that the statutory list should be abolished; and (b) bearing in mind their respective advantages and disadvantages,

outlined in paragraph 3.31 above, which of the two tests they prefer or whether they prefer some other (and if so, what) test.

4.7 If consultees do not agree that the statutory list should be abolished, we ask them to state the reasons for their view and whether they would prefer to see the statutory list remain as it is or reformed by (a) extending the list as discussed in paragraphs 3.20-3.22 above; or (b) adding a judicial discretion to the list as discussed in paragraph 3.23 above; or (c) reformed in some other way which we have not discussed. (paragraphs 3.20 - 3.37)

(4) Pecuniary losses resulting from the death other than the loss of benefits from the continuation of the life (for example, funeral expenses)

(a) Funeral expenses

4.8 Our provisional view is that the law on the recovery of funeral expenses in Fatal Accident Act claims is not in need of statutory reform. But we ask consultees: (a) whether, contrary to the present law, they would favour an approach whereby the recoverable costs would be discounted by reason of the inevitability, ultimately, of a funeral; (b) whether they would favour an approach whereby the reasonableness test is applied according to the cultural and religious traditions of the deceased and, if so, whether there should be a statutory provision to that effect. (paragraphs 3.39 - 3.40)

(b) Costs incurred in settling the deceased's affairs

4.9 We ask consultees whether they would favour giving the deceased's personal representatives, on behalf of the deceased's estate, a right under the Fatal Accidents Act to recover the reasonable costs incurred in settling the deceased's affairs (with the costs being discounted to reflect the inevitability of those costs being incurred at some stage). (paragraph 3.41)

(c) Grief counselling

4.10 We invite the views of consultees as to: (a) whether the reasonable expenses of grief counselling that have been, or will be, incurred should be recoverable under the Fatal Accidents Act; and (b) if so, whether those entitled to recover such expenses should be limited to those who are entitled to bereavement damages. (paragraphs 3.42 - 3.44)

(d) Losses incurred in looking after the deceased's dependants.

4.11 It is our provisional view that a carer should not have a claim under the Fatal Accidents Act to recover losses incurred in looking after the deceased's dependants. We ask consultees whether they agree. (paragraphs 3.45 - 3.47)

(e) Medical expenses

4.12 We are provisionally of the opinion that it is unnecessary to depart from the theoretical basis of the Fatal Accidents Act 1976 so as to enable dependants to recover under the 1976 Act medical expenses incurred for the benefit of the deceased. We ask consultees whether they agree. (paragraph 3.48)

(f) Other pecuniary expenses

4.13 We ask consultees, particularly those with practical experience in this field, whether there are any other pecuniary losses, that we have not discussed in this section, which in their view ought to be recoverable in a Fatal Accidents Act claim but under the present law are not recoverable. (paragraph 3.49)

4. PECUNIARY LOSS: ASSESSMENT

(1) Should the multiplier be calculated from death or trial?

4.14 We would welcome the views of consultees as to whether, contrary to the present approach of the courts, the multiplier used in assessing Fatal Accident Act damages should be calculated from the date of trial rather than from the date of death. (paragraphs 3.50 - 3.52)

(2) Quantifying the loss of a deceased's services

4.15 We provisionally conclude that the law in relation to the quantum of damages for the loss of a deceased's services is not in need of statutory reform. We ask consultees whether they agree with this provisional view. (paragraphs 3.53 - 3.55)

(3) Actual or predicted changes in the marital status of the dependant or the deceased.

(a) Remarriage or prospect of remarriage of the dependant spouse[1]

4.16 We provisionally believe that it would not be appropriate to provide that reviewable, periodic payments should be awarded under the Fatal Accidents Act 1976 to deal with the problem of remarriage prospects. We ask consultees whether they agree. (paragraph 3.56 - 3.61)

4.17 We would be very interested to know from practitioners with experience in the field whether they believe that the alleged problem of distressing and distasteful enquiries would be a real and serious one if section 3(3) were simply to be repealed. (paragraph 3.64)

4.18 We ask consultees which, if any, of the following four options for reforming section 3(3) they support. Prior to hearing the views of consultees (and especially the responses from practitioners to the question posed in paragraph 3.64) we have not reached a provisional view as to which of these options, if any, we prefer:

(1) That section 3(3) be extended such that the actual and prospective (re)marriage of the claimant (or another) would be ignored in all cases.

(2) That the prospects of remarriage of a widow be ignored, but that the past fact of a widow's remarriage be taken into account.

[1] For the purposes of this discussion we shall ignore section 4 of the Fatal Accidents Act 1976 which may have an unforeseen effect on the issue of the remarriage of the dependant. On one possible interpretation of section 4, remarriage may now be ignored regardless of whether it is a widow, widower or a child of a widow or widower who is seeking to recover a dependency. This interpretation of section 4, which we discuss at paras 2.58 and 3.74 above would therefore render section 3(3) otiose.

(3) That section 3(3) be entirely repealed and that both the prospects and the fact of a widow's remarriage be taken into account.

(4) That the fact of a widow's remarriage be taken into account, and that one applies a rebuttable presumption as to the prospects of remarriage based on objective statistical probability.

If consultees do not support any of the above four options, we ask them whether they would prefer to leave section 3(3) as it is or whether they would favour a different reform and, if so, what that reform would be.

4.19 We also ask consultees;

(a) whether they agree with our understanding of the present law that, leaving aside the conceivable impact of section 4 of the 1976 Act, the fact or prospects of financially supportive cohabitation are relevant considerations in the assessment of damages under the 1976 Act; and

(b) whether any reforms are needed in relation to the present law on the relevance of the fact, or prospects of, financially supportive cohabitation and, if so, what reforms. (paragraphs 3.62 - 3.68)

(b) The prospects of divorce

4.20 We provisionally recommend that the prospects of divorce should be taken into account at least when there is clear evidence (for example a separation) that the claimant and the deceased might well have divorced. We ask consultees whether they agree. (paragraph 3.69)

4.21 We ask consultees whether they consider that, going further than the provisional recommendation in paragraph 3.69 above, the courts, in assessing damages under the 1976 Act, should apply a rebuttable presumption as to the prospects of a plaintiff's divorce from the deceased based on objective statistical probability. (paragraphs 3.70 - 3.72)

(4) Section 4 of the 1976 Act

(a) Should the present section 4 be repealed?

4.22 We provisionally recommend that (a) the present section 4 should be repealed and (b) there should be a return to the statutory listing of the types of benefit resulting from the death that are to be disregarded in assessing damages.[2] We ask consultees whether they agree. (paragraphs 3.73 - 3.76)

[2] This is without prejudice to the further options for reform of section 4 considered below.

(b) Further options for reform of section 4

(i) Introduction

4.23 We ask consultees whether they agree with our provisional view that there should be consistency between the law on collateral benefits in personal injury claims and Fatal Accident Act claims. (paragraph 3.77 - 3.78)

(ii) Reforming section 4 in line with our preferred reforms to the law on collateral benefits in personal injury cases set out in Consultation Paper No 147

4.24 Subject to where the provider of the collateral benefit has a right to recover the value of the benefit from the plaintiff in the event of a successful tort claim, collateral benefits (unless essentially coincidental) received by plaintiffs should be deducted from damages under the Fatal Accidents Act which meet the same loss.[3] We ask consultees whether they agree or disagree with this proposition. (paragraphs 3.81 - 3.84)

(a) Option One

4.25 (1) Subject to the provisos set out in (6) and (7) below, charitable payments made in response to a fatality should be deducted from the total sum of damages under the Fatal Accidents Act.

(2) Subject to the provisos set out in (6) and (7) below, survivors' pensions should be deducted from damages for loss of dependency under the Fatal Accidents Act.

(3) Subject to the provisos set out in (6) and (7) below, where a plaintiff inherits capital or an asset (or the monetary equivalent of the asset) from the deceased, which was used before the fatality to support the plaintiff, the income from that inheritance should be deducted from damages for loss of dependency under the Fatal Accidents Act.

(4) Subject to the provisos set out in (6) and (7) below, where a plaintiff inherits damages for loss of earnings in the deceased's "lost years", where the deceased would have supported the plaintiff from the earnings for which damages were awarded, this sum should be deducted from damages for loss of dependency under the Fatal Accidents Act.

(5) All other inheritance, and insurance payments, should be ignored in the assessment of damages under the Fatal Accidents Act.

(6) A first proviso to (1) - (4) above is that where the benefit is expressed to be on account of a particular loss it should be deducted only from damages for that loss.

(7) A second proviso to (1) - (4) above, is that where the provider of the collateral benefit has a right (by contract or by operation of law) to recover the value of the benefit from the plaintiff in the event of the plaintiff recovering

[3] We consider separately the provision of gratuitous services, albeit that our preferred approach to gratuitous services is consistent with the general conclusion set out here.

damages in respect of the fatality, the collateral benefit should not be deducted from tort damages.

We ask consultees whether they favour this option.

4.26 Consultees are referred to paragraph 3.90 above and are asked to indicate if they favour the contrary view that life insurance should be deducted from damages for loss of dependency, because it is taken out by people essentially to provide for the maintenance of their dependants.

(b) Option Two

4.27 We ask consultees whether they would favour this option according to which one would reform the law as in option one above, except that charitable payments would continue to be ignored in the assessment of damages under the Fatal Accidents Act. (paragraph 3.99)

(c) Option Three

4.28 We ask consultees whether they would favour this option according to which option 1 or 2 above (and consultees should say which they prefer) would be qualified, and a collateral benefit which would otherwise have been deducted, would be ignored where the provider intended it to be in addition to any tort damages. (paragraph 3.100 - 3.102)

(d) Option Four

4.29 We ask consultees whether they would favour this option of leaving charitable payments, life insurance, and inheritance out of account, while reforming the law by ensuring that survivors' pensions would be deducted from damages for loss of dependency (subject to provisos (6) and (7) set out in paragraph 3.96.) (paragraph 3.103 - 3.106)

(e) Option Five

4.30 We ask consultees whether they agree with our provisional view that the option of ignoring all collateral benefits in Fatal Accidents Act cases should be rejected. (paragraph 3.107)

(f) Option Six

4.31 We ask consultees whether they would favour this option of ignoring in Fatal Accident Act cases - and listing - charitable payments, insurance payments, survivors' pensions and inheritance. (paragraph 3.108 - 3.109)

(g) The rights of the provider of a collateral benefit

4.32 We ask consultees whether:

(1) They agree with our provisional view that the reasoning of Slade J at first instance in *Metropolitan Police District Receiver v Croydon Corp*[4] is to be

[4] [1956] 1 WLR 1113.

preferred to that of the Court of Appeal: that is, that the payment under legal compulsion of a deductible collateral benefit does benefit the tortfeasor by discharging a liability of the tortfeasor.

(2) If they agree with (1) - and in the light of the arguments of principle and policy analysed in the Collateral Benefits consultation paper - do they favour giving (a) charitable donors and/or (b) providers of survivors' pensions a new statutory right to recoup the value of the collateral benefit from the tortfeasor (in the event that the collateral benefit is deducted in assessing damages under the Fatal Accidents Act). (paragraph 3.110 - 3.113)

4.33 We ask consultees if they agree with our provisional view that the collateral source's right to repayment from the dependant in the event of a successful tort claim should be left to common law development and does not require legislative reform. We would also be grateful for views on the Ontario Law Reform Commission's proposals that damages covering the collateral benefit should be held by the dependant on trust for the collateral source but that the wrongdoer should additionally be entitled to make payment of such amount direct to the collateral source. (paragraphs 3.114 - 3.116)

(iii) Reforming section 4 in line with our preferred reforms to the law on gratuitous services

4.34 Our provisional view is that our proposals concerning *Hunt v Severs* should also be applied to fatal accident cases where gratuitous services are rendered to a dependant as a result of the death. We ask consultees whether they agree with that provisional view. (paragraphs 3.117 - 3.119)

(iv) Reforming section 4 in line with the social security recoupment provisions

4.35 Consultees are invited to comment on whether the social security recoupment scheme which applies to personal injury actions should be extended to fatal accident cases (albeit that there should be no recoupment from bereavement damages). (paragraphs 3.120 - 3.125)

5. BEREAVEMENT DAMAGES

(1) The Role of Bereavement Damages: Should they be available at all?

4.36 We provisionally recommend that, while bereavement damages should be retained, the Fatal Accidents Act 1976 should be amended to make clear the purposes of the bereavement award. The Act should make clear that the award is to compensate for:

(a) the grief and sorrow of the relative caused by the deceased's death
(b) the loss of such non-pecuniary benefit as the relative might have been expected to derive from the deceased's care, guidance and society if the deceased had not died.

We ask consultees whether they agree with this provisional recommendation. (paragraphs 3.126 - 3.138)

(2) Who can claim Bereavement Damages?

(a) Abolishing the statutory list or its exhaustive nature

4.37 We provisionally consider that an exhaustive statutory list for those entitled to bereavement damages should be retained. We ask consultees whether they agree and if not to say what they would advocate instead of an exhaustive statutory list. (paragraphs 3.141 - 3.143)

(b) Extending the exhaustive statutory list

4.38 We provisionally recommend that bereavement damages be recoverable by: (a) A spouse, parent, or child of the deceased. "Child" should be defined to include an adopted child and a person who treated the deceased as his or her parent. "Parent" should be defined to include an adoptive parent and a person who treated the deceased as his or her child. While we recognise that the further one moves from these core relationships, the more likely it is that entitlement to a fixed bereavement award without proof of actual mental distress is inappropriate, we also provisionally believe that the list should include: (b) A brother or sister of the deceased. "Brother" or "sister" should be defined to include the adoptive brother and sister of the deceased, and the half-brother and sister of the deceased where he or she lived in the same household as the deceased. We ask consultees whether they agree with this provisional recommendation.

4.39 We further ask consultees whether they believe that the list should include: (c) A cohabitant of the deceased, who we would provisionally define as a person with whom the deceased had lived in a sexual relationship for a period of no less than two years immediately prior to the accident. If consultees are in favour of this, we ask them: (i) whether the existence of a sexual relationship between the deceased and the cohabitant should be a qualifying requirement; (ii) whether a requirement of two years' cohabitation, or some other period, is appropriate; and, (iii) whether such a requirement should be waived when other circumstances demonstrate that the relationship in question is one of some commitment and permanence, for example, where the relationship has produced a child. (paragraphs 3.144 - 3.157)

(3) Should bereavement be proved or presumed?

4.40 Our provisional view is that, as under the present law, proof of actual "loss" (that is, actual mental distress) should never be a necessary condition for the award of bereavement damages. We invite the views of consultees on whether they agree. (paragraphs 3.158 - 3.159)

(4) Quantum

(a) Fixed or discretionary award?

4.41 We invite the views of consultees on whether they agree with our provisional recommendation that the bereavement award should continue to be a fixed sum. (paragraph 3.161)

(b) Level of a fixed award

4.42 We provisionally believe that (in 1997) the appropriate level of the bereavement award should be £10,000. This figure allows for inflation since April 1991 and

incorporates a further modest increase in the tariff. We invite consultees, bearing in mind the importance of establishing a coherent hierarchy of tariffs for non-pecuniary loss, to state whether they agree with our provisional view, and if they do not, to suggest a level for the award and to give their reasons. (paragraphs 3.162 - 3.167)

(c) Updating the fixed award

4.43 We invite the views of consultees as to whether they agree with our provisional view that the award should be index-linked and that the power of the Lord Chancellor to vary the level of damages should be repealed. (paragraphs 3.168 - 3.169)

(d) Should there be a maximum sum?

4.44 We provisionally recommend that the fixed award of bereavement damages (which we have provisionally proposed as being £10,000) should not be a maximum sum to be divided among all the claimants. We ask consultees if they agree. If consultees do agree, we would welcome their views as to: (a) whether there should be a maximum sum laid down for bereavement damages; (b) what that maximum sum should be (we would suggest £50,000); and (c) whether they agree with our provisional view that, if there were to be such a maximum sum, it should be divided equally among all entitled dependants rather than full fixed awards being guaranteed to some entitled dependants (for example, spouses) and the residue then being divided among the other entitled dependants (for example, children). (paragraphs 3.170 - 3.173)

(5) Interest on bereavement damages

4.45 We invite consultees to say whether they agree with our provisional view that interest should be awarded on damages for bereavement in the same way as it is awarded on damages for non-pecuniary losses in personal injury cases. (paragraph 3.174)

(6) Can the plaintiff recover both damages for bereavement and damages for a recognised psychiatric illness?

4.46 We ask consultees whether they agree with our provisional views that (a) a plaintiff should not be barred from recovering both damages for bereavement and, assuming liability can be established, damages for a recognised psychiatric illness; (b) the quantum of bereavement damages should not be affected by the quantum of damages recoverable for psychiatric illness; (c) the quantum of damages for psychiatric illness should not be affected by the quantum of damages for bereavement. (paragraph 3.175)

(7) Contributory negligence

4.47 We ask consultees whether they agree with our provisional view that, as appears to be the present law, (a) the contributory negligence of the deceased should reduce bereavement damages; and (b) the contributory negligence of the bereaved should reduce that claimant's bereavement damages. (paragraphs 3.176 - 3.179)

(8) The survival of the award

4.48 We invite consultees to say whether they agree with our provisional view that the action for damages for bereavement should continue not to survive for the benefit of the estate of the claimant. (paragraph 3.180)

APPENDIX A
OTHER JURISDICTIONS

SCOTLAND

A.1 The present law on the recovery of damages in respect of wrongful death is governed by the Damages (Scotland) Act 1976, as amended by the Damages (Scotland) Act 1993. As in England,[1] the right of action arises when the death occurred as a result of another's act or omission for which the tortfeasor was liable in damages to the deceased.[2]

A.2 The relatives eligible to recover are defined in Schedule 1 to the Damages (Scotland) Act 1976 and consist largely of those persons permitted to claim as "dependants" under the English Fatal Accidents Act 1976.[3] The Administration of Justice Act 1982, amended the Damages (Scotland) Act 1976 to include within the list of relatives "any person, not being the spouse of the deceased, who was, immediately before the deceased's death, living with the deceased as husband or wife."[4] This provision is less restrictive than its English counterpart,[5] in that it does not require the *de facto* spouses to have been living in the same household for at least two years before the date of the death.[6] A further distinction between the legislative frameworks of the two jurisdictions in respect of recovery by *de facto* spouses is that the English courts - but not those in Scotland - are required to take

[1] Section 1(1) of the Fatal Accidents Act 1976. See Appendix B below and paras 2.1-2.9 above.

[2] Damages (Scotland) Act 1976, s 1(1).

[3] "Relative" is defined in Schedule 1 of the Damages (Scotland) Act 1976 to include spouses, divorced spouses, children, step-children, cohabitants living as husband and wife, aunts, uncles, cousins, in-laws and other ascendants and descendants. As in England and Wales (see para 2.13 above), the deceased's posthumous child qualifies as a relative, if born alive: *Cohen v Shaw* 1992 SLT 1022.

[4] Damages (Scotland) Act 1976, Schedule 1, paragraph 1(aa), inserted by Administration of Justice Act 1982, s 14(4).

[5] See Fatal Accidents Act 1976, s 1(3)(b).

[6] This inconsistency between the respective provisions in England and Scotland is due to a House of Commons amendment to the original Bill as it was to apply in Scotland. The alternative wording sought to reflect that employed in the Matrimonial Homes (Family Protection)(Scotland) Act 1981. Section 18(2) of the 1981 Act asserts that in determining whether a man and woman are for the purposes of the section a cohabiting couple, the court shall have regard to all the circumstances of the case, including the time for which it appears they have been living together and whether there are any children of the relationship. The Solicitor-General for Scotland confirmed in Parliament that the eligibility of a cohabitee to recover in respect of the death of a partner was also to be determined by the court upon consideration of the facts and circumstances of the individual case, including the length of time they might have cohabited and the support that might be given: *Hansard* (HC) 19 October 1982, vol 29, cols 294-297; (HL) 27 October 1982, vol 435, cols 566-567.

into account "the fact that the dependant had no enforceable right to financial support by the deceased as a result of their living together".[7]

A.3 The qualifying relatives are able to claim damages for patrimonial[8] "loss of support" suffered by them since the death or likely to be suffered in the future.[9] The nature of this head closely resembles that of section 3(1) of the Fatal Accidents Act 1976 and redresses financial loss only, the damages being calculated by much the same methods as by the English courts.[10] "Loss of support" has a wide ambit - it can include the cost to a widower of employing a housekeeper after his wife's death.[11] The Administration of Justice Act 1982 provides statutory guidance for the award of a "reasonable sum" by way of damages for the loss of "personal services" under section 1(3) of the Damages (Scotland) Act 1976.[12] Recoverable "personal services" in this context are of a kind which, when rendered by a person other than a relative, would ordinarily be obtainable on payment and which the deceased might have been expected to render gratuitously to a relative. A general concept of "reasonableness" is applied by the courts to whatever evidence they may have as to the pecuniary value of the loss to the dependants. The provisions operate alongside the statutory award for non-patrimonial loss,[13] thus providing a sharp and clearly discernible distinction between those benefits compensatable as pecuniary losses - largely housekeeping and general household maintenance - and those intangible advantages of a personal relationship that are properly characterised as the non-pecuniary benefits of society and guidance.[14] In addition to damages for loss of support a claimant may recover reasonable funeral expenses.[15]

[7] Section 3(4) Fatal Accidents Act 1976. See para 2.40 above. It was observed by Mr Donald Dewar MP during the Bill's passage through Parliament that the consequence of such a "sharp distinction" between the positions in England and Scotland would be that the English cohabitee would recover considerably less than his or her Scottish counterpart: *Hansard* (HC) 19 October 1982, vol 29, col 295. It is strongly arguable, however, that the English provision is merely declaratory of what both English and Scottish courts would do in any case.

[8] That is, pecuniary.

[9] Damages (Scotland) Act 1976, s 1(3).

[10] That is, by means of the multiplier and multiplicand method.

[11] *Finnie v Cameron* 1979 SLT 57.

[12] Administration of Justice Act 1982 ss 9(2) & (3). These provisions followed recommendations of the Scottish Law Commission in its Report on Damages for Personal Injuries (1978) Scot Law Com No 51, paras 34-44.

[13] Damages (Scotland) Act 1976, s 1(4).

[14] Although it has been argued that the non-pecuniary benefit encompassed in the "parental contribution to a child's personality, sense of value, sound judgment and good moral standards have a potential of great *pecuniary* impact over a lifetime" [emphasis added]: *Campbell et al v Varanese* (1991) 102 NSR (2d) 104 (Nova Scotia Supreme Court, Appeals Division) per Chipman JA. Lord Edmund-Davies has commented that such a proposition may one day have to be judicially considered: *Hay v Hughes* [1975] 1 QB 790, 802H-803A (CA).

[15] Damages (Scotland) Act 1976, s 1(3).

A.4 Section 1(5) of the Act as amended lists the categories of collateral benefits which are not to be set off against the relatives' recovery of damages and consists of property inherited from the deceased, or accruing by settlement or succession on his death, whether or not provided by him.[16] Also non-deductible, where paid as a result of the death, is: (i) insurance money, including premiums returned; (ii) benefit, whether under social security legislation or from a friendly society or trade union; (iii) any pension, and (iv) any gratuity.[17] As in England a new subsection has been inserted into the 1976 Act, specifically providing that an award of provisional damages to the deceased during his lifetime will not bar a claim for damages by a relative; but in quantifying loss of support there is to be taken into account any part of a provisional award relating to future patrimonial loss intended to cover the period after the date of death.[18]

A.5 The remarriage of a widow or her prospects of remarriage are not to be taken into consideration in the assessment of damages,[19] although it has been held that any benefit which her children receive from such a remarriage may be considered in assessing their claims.[20]

A.6 Prior to 1976, dependent relatives were able to recover an award of solatium as compensation for their grief, either at common law[21] or under statute.[22] Following the recommendations of the Scottish Law Commission,[23] these claims were

[16] Damages (Scotland) Act 1976, s 1(5)(a).

[17] Damages (Scotland) Act 1976, s 1(5)(b).

[18] See s 1(5A) Damages (Scotland) Act 1976.

[19] See Law Reform (Miscellaneous Provisions) Act 1971, s 4(1) (which was repealed in England and Wales by the Fatal Accidents Act 1976, Schedule 2 and became section 3(3) of the Fatal Accidents Act 1976, but remains in force in Scotland). See *M'Kinnon v Reid* 1975 SC 233, OH for a case in which the actual remarriage of the pursuer was disregarded in assessing her claim for loss of support.

[20] See *Burlison v Official Solicitor* [1974] CLY 834; *The Times* 14 December 1974. The position with respect to cohabitants may be similar: in *Morris v Drysdale* 1992 SLT 186 (OH) a widow claimed loss of support and loss of society damages on behalf of herself and her child in respect of the death of her husband. The pursuer had, since her husband's death, been cohabiting with and was being supported by another man. The court decided that it would not be sensible to ignore this fact and also that the pursuer's child had been accepted into the cohabitee's family and that, by virtue of s 1(d) of the Family Law (Scotland) Act 1985, the child was entitled to be supported by the cohabitee.

[21] See *Quin v Greenock and Port-Glasgow Tramways Co* 1926 SC 544; *Elliot v Glasgow Corporation* 1922 SC 146. Statutory enactments subsequently encroached upon the common law position: see n 22 below.

[22] The Law Reform (Damages and Solatium)(Scotland) Act 1962 declared that the fact that the father of the child is alive was not to be a bar to any right of a mother or a child to recover damages or solatium in respect of the death of, respectively, her child, or his or her mother, respectively, that the father of the child is alive: s 1. In addition, the parent of an illegitimate child was afforded the right to recover damages or solatium in respect of the death of that child as if he were legitimate: s 2. Section 2(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 had already stated that an illegitimate child could recover damages or solatium in respect of the death of either of his parents, as if he were legitimate. Both the 1962 Act and s 2 of the 1940 Act were repealed by the Damages (Scotland) Act 1976.

[23] See Report on the Law Relating to Damages for Injuries Causing Death (1973) Scot Law Com No 31, paras 102-113.

replaced by section 1(4) of the Damages (Scotland) Act 1976 which allowed recovery by a member of the deceased's immediate family of "such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if he had not died". It was envisaged that this reform would lead to the courts making higher awards to the deceased's relatives in respect of their non-pecuniary loss under section 1(4) of the Act, than they made prior to 1976 as solatium.[24] However, after allowing for inflation, awards for non-pecuniary loss have remained at approximately the same levels as the solatium awards made prior to 1976.[25] It is not clear to what extent this state of affairs is a direct consequence of the terms of the 1976 Act and the apparent confusion over the proper interpretation of section 1(4).[26]

A.7 In 1992, the Scottish Law Commission concluded that, on a strict reading of the Act, section 1(4) could not be stretched to include compensation for such losses as distress and anxiety in the contemplation of the deceased's pre-death suffering, or grief and sorrow at the death itself,[27] sources of non-patrimonial harm which had been taken into account in the calculation of solatium awards under the common law.[28] Following their recommendations the Damages (Scotland) Act 1993 amended the subsection to include expressly the three specific sources of emotional suffering which they had identified:[29]

(a) distress and anxiety endured by the relative in contemplation of the suffering of the deceased before his death;

[24] See Report on the Effect of Death on Damages (1992) Scot Law Com No 134, para 2.21.

[25] Report on the Effect of Death on Damages (1992) Scot Law Com No 134, para 2.21, which cites from the Scottish Law Commission Memorandum No 17 (1972), para 94: awards quoted as typical in 1972 range from £1,250 to £1,500 for a widow and from £600 to £750 for a child. After adjustment to 1991 values, that equates to a range from £10,100 to £12,100 and from £4,900 to £6,100 respectively. The range of settlements in 1992 was probably between £10,000 and £12,000 for a widow and from £5,000 to £6,000 for a child.

[26] In *Dingwall v Walter Alexander & Sons (Midland) Ltd*, 1982 SC (HL) 179, the Lord Justice-Clerk, Lord Wheatley, went so far as to suggest, in accordance with widespread public expectations, that the 1976 Act had introduced an entirely new basis for the award of non-patrimonial damages, increasing the considerations to be taken into account: "Loss of society and guidance covers more aspects of family relationships than grief and sorrow, although grief and sorrow may be an inevitable consequence of the loss of society and guidance." *ibid*, 209. Lord Kissen, however, was of the opinion that section 1(4) was merely a clarification of the existing law and did not constitute a new regime. Further, in *Donald v Strathclyde Passenger Transport Executive*, 1986 SLT 625, the Court was of the opinion that there was nothing in section 1(4) of the Act of 1976 which required it to make a larger or smaller award in respect of loss of society than it would have made in respect of solatium. The Court noted that despite the Lord Justice-Clerk's suggestion in *Dingwall* that "the new basis" had increased the considerations to be taken into account in assessing awards in respect of loss of society, when his Lordship came to describe these considerations, he listed none which would have been irrelevant in making an assessment for solatium, *ibid*, 628.

[27] See Report on the Effect of Death on Damages (1992) Scot Law Com No 134, paras 2.21-2.33.

[28] See *Elliot v Glasgow Corporation* 1922 SC 146, 148-149; *Smith v Comrie's Executrix* 1944 SC 499, 500; *Black v North British Railway Co* 1908 SC 444, 453.

[29] Damages (Scotland) Act 1993, s 1(1).

(b) grief and sorrow of the relative caused by the deceased's death;

(c) the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died.

In making an award under section 1(4) the court is not required to ascribe specifically any part of the award to any of the individual elements.

A.8 The category of relatives eligible to claim under this head is more restrictive than that eligible to claim for patrimonial loss, being limited to members of the deceased's 'immediate family': any person who immediately before the deceased's death was the spouse of the deceased; and any parent or child of the deceased or any person who was accepted by the deceased as a child of his family.[30] In contrast, the provisions under the Fatal Accidents Act 1976 allowing recovery of bereavement damages to specified relatives, which are the closest English equivalents to section 1(4),[31] do not permit recovery by a child of the deceased, as well as distinguishing between legitimate and illegitimate children.[32] In addition, Schedule 1, paragraph 1(aa) of the Damages (Scotland) Act 1976 permits recovery of a section 1(4) award by "any person, not being the spouse of the deceased, who was, immediately before the deceased's death, living with the deceased as husband or wife".[33] *De facto* spouses are precluded from claiming bereavement damages in England. The Scottish law therefore allows recovery for non-patrimonial loss to a wider range of "relatives".

A.9 Prior to its Report in 1973,[34] the Scottish Law Commission had assumed that duplication of damages should be avoided, leading to the stated objective in the 1973 Report to separate clearly the claims of a deceased's executor and those of his or her dependants through the rule against survival of the right to solatium.[35] However, in reversing that policy in its 1992 Report, the Commission recognised that seeking to set off the deceased's claim against the relative's claim is

[30] See Damages (Scotland) Act 1976, s 10(2). Damages for loss of society can be claimed in respect of a child who has died from injuries inflicted before birth, such injuries being properly described as "personal injuries" within s 1(1) of the Damages (Scotland) Act 1976: *Hamilton v Fife Health Board* 1993 SLT 624.

[31] Before the 1993 amendments to s 1(4) of the 1976 Act, it was argued by some that Scottish law did not compensate, or even purport to compensate, for grief, as did the English bereavement award, and that loss of society must be even more nebulous a concept for which to provide compensation: Lord Hailsham, *Hansard* (HL) 8 March 1982, vol 428, col 46. Of course, grief and sorrow at the death of the deceased has now received statutory recognition and is an element to be taken into account in awarding compensation under s 1(4) by virtue of the Damages (Scotland) Act 1993, s 1(1).

[32] Fatal Accidents Act 1976, s 1A.

[33] As inserted by Administration of Justice Act 1982 (Scotland), s 14(4). See *Hansard* (HC) 19 October 1982, vol 29, cols 294-297.

[34] Report on The Law Relating to Damages for Injuries Causing Death (1973) Scot Law Com No 31.

[35] See Report on the Effect of Death on Damages (1992) Scot Law Com No 134, paras 3.26-3.28; Report on The Law Relating to Damages for Injuries Causing Death (1973) Scot Law Com No 31, paras 46-52, pp 15-17.

misconceived.[36] The new policy was implemented[37] bringing Scottish law into line with the law of England as laid down in the Fatal Accidents Act 1976, and giving statutory recognition to the Scottish common law principle as established in *Dick v Burgh of Falkirk*,[38] that allowing the deceased's claim for solatium to survive as part of his or her estate in addition to the relative's separate claim for loss of support does not involve duplication of damages.

IRELAND

A.10 The law relating to the recovery of damages in respect of wrongful death is governed in the Republic of Ireland by Part IV of the Civil Liability Act 1961.[39] The provisions of the Act are substantially similar to the English legislation, and the Irish case law draws heavily upon English cases. It has been submitted that the Irish courts are not precluded by the legislation from recognising a common law right to sue for wrongful death which might enable recovery for those items of loss held non-compensatable under the statute.[40] However, in *Hosford v J Murphy Ltd*[41] Costello J refused to recognise that the defendant who injured the plaintiff's father (and for which damages had already been paid) also owed an independent duty of care in respect of consequent damage to the children's relationship with their father. Under the Act, one action may be brought by the personal representative of the deceased or, in default,[42] by all or any of the "dependants" of the deceased, for such damages as the judge shall consider "proportioned to the injury resulting from the death to each of the dependants"[43] as well as "reasonable compensation for mental distress resulting from the death" to each of the dependants.[44]

A.11 To recover under the Act a claimant must prove the loss of a financial dependency on the deceased, or the suffering of mental distress consequent upon the death of the deceased, and, a family relationship with the deceased that falls within the range of close relationships prescribed by the Act.[45] Precluded from recovery are *de*

[36] See Report on the Effect of Death on Damages (1992) Scot Law Com No 134, para 3.28. Respondents to the Commission's Discussion Paper No 89 agreed unanimously that there should not be such a set-off.

[37] Damages (Scotland) Act 1976, s 1A (as introduced by Damages (Scotland) Act 1993, s 2). The claim is restricted to the period prior to the relative's death.

[38] 1976 SC 1. The case was decided a few months before the 1976 legislation came into force.

[39] This enactment replaced the Fatal Injuries Act 1956, which itself replaced Lord Campbell's Act 1846.

[40] J White, *Irish Law of Damages For Personal Injuries and Death* (1989) vol 1, paras 7.4.01-7.4.18; McMahon & Binchy, *Irish Law of Torts* (2nd ed 1989) pp 734-735.

[41] [1988] ILRM 300.

[42] At the expiration of 6 months from the death: s 48(3).

[43] Section 49(1)(a)(i) as amended by s 4 Courts Act 1988 (No 14).

[44] Section 49(1)(a)(ii).

[45] Eligible "members of the family" include the wife, husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister: s 47(1). In addition, legally adopted persons and illegitimate persons are considered the legitimate offspring of the parents, and a person *in loco parentis* to another is considered the parent of that other: s 47(2).

facto[46] and former spouses, all relations by affinity, except stepchildren and stepparents, and remoter relatives, for example, uncles and aunts.[47]

A.12 Recovery of pecuniary losses may be had only in respect of reasonably expected benefits: the dependant's claim must be based on facts which reasonably support the inferences as to future expenditure by the deceased that the court is invited to draw, otherwise the claim is likely to fail as being founded upon mere speculation.[48]

A.13 It is long-established that, in general, any benefits accruing from the deceased's estate in consequence of the death are to be deducted, although no deduction is to be made - even on the basis of the acceleration of benefits - in respect of family property the use of which the dependants would have continued to enjoy had the deceased lived.[49]

A.14 Under section 49(2) of the 1961 Act recovery may be made in respect of "funeral and other expenses" actually incurred, by reason of the wrongful act, by the deceased, the dependants or the personal representative, where the benefit of recovery will enure to one or more of the dependants.[50] It follows that the expenses need not have been incurred after the death of the deceased. Section 49(2) is specifically wider than the corresponding English provision in that, in addition, it provides for "other expenses", and these will typically include the travelling expenses of dependants attending the funeral and visiting the deceased while injured before his death, the cost of a wake and the cost of mourning clothes for the dependants.[51] Where the benefit will enure to one or more of the dependants, medical expenses incurred in the course of treating the deceased's injuries before his death are also recoverable.[52]

[46] White argues that if a *de facto* spouse has dependent children by the deceased, the children may recover in respect of the mother's loss of support during their dependency upon their mother, under the principle advanced in *K v J M P Co Ltd* [1976] 1 QB 85 (CA): see J White, *Irish Law of Damages For Personal Injuries and Death*, vol 1, para 8.2.03.

[47] In England the Fatal Accidents Act 1976 extends recovery to uncles, aunts and their children, as well as former spouses and, under certain conditions, cohabitants: s 1; see above, paras 2.12-2.16.

[48] *Byrne v Houlihan and De Courcy* [1966] IR 274. But see *Horgan v Buckley (No. 1)* [1938] IR 115 (SC); *(No 2)* [1938] IR 675 (SC); *O'Sullivan v Coras Iompair Eireann* [1978] IR 409 (SC). *In Dowling v Jedos* (Unreported) 30 March 1977 (SC) Walsh J, giving the judgment of the Supreme Court, regarded as pure conjecture the conclusion of the judge at first instance that there was a "reasonable probability" that the deceased - a 17 year old boy - would have married by the age of 23. No evidence was given at the trial of the boy's intention or prospects regarding matrimony, and the judge based his findings on the past "family pattern of marriage", namely the early age of marriage of each of the parents and of the brother and sister of the deceased. The Supreme Court ordered a retrial in respect of the damages resulting from the loss of dependency. But see also *Hamilton v O'Reilly* [1951] IR 200 (HC).

[49] *Murphy v Cronin* [1966] IR 699; *O'Sullivan v Coras Iompair Eireann* [1978] IR 409 (SC).

[50] Otherwise recovery must be by the estate in a survival action under Part II of the 1961 Act.

[51] See J White, *Irish Law of Damages For Personal Injuries and Death* (1989) vol 1, para 12.2.06.

[52] In England claims for a wake, travel expenses to and from the funeral, a memorial or monument have been rejected: see above, paras 2.61-2.62. Expenses incurred before the

A.15 The question of the recovery of the pecuniary or non-pecuniary value of the deceased's personal services is yet to be determined at Irish law. There exists no case under the 1961 Act in which the issue has been argued in respect of the dependant's loss of society, protection, consortium or, in the case of a child's claim, the loss of parental education and training.[53]

A.16 The reasonable prospect of alteration of the dependant's and the deceased's circumstances will be taken into account by the court. An anticipated increase in the deceased's earnings or an anticipated change in the dependant's needs are factors for the court's consideration, as are adverse contingencies such as labour strikes or ill-health, which would have reduced the deceased's capacity to benefit the dependants. In estimating the future loss of the dependants the life expectancies of the dependants, and of the deceased had he lived, are relevant to the assessment of damages. There exists no reported authority upon the question of whether there is to be made a deduction in damages in respect of the actual remarriage, or the prospect of remarriage, of a surviving spouse.[54]

A.17 Section 49(1)(a)(ii) of the Civil Liability Act 1961 provides for the recovery of an amount in respect of the "mental distress" suffered by the dependants as a result of the death.[55] An award under this head may be made to a dependant notwithstanding that he has not suffered an "injury resulting from the death" within the meaning of section 49(1)(a)(i). The original legislation provided for a cap upon the total of any amounts awarded for mental distress of £1,000, but this was raised in 1981 to £7,500.[56] In order to recover compensation under this head, a claimant must prove that he or she actually suffered some degree of mental distress as a result of the death, in addition to proving the requisite family relationship.[57] Early cases were even more restrictive in their assessment of mental

deceased's death, such as medical or travelling costs are irrecoverable under the Fatal Accidents Act 1976: see above, paras 3.38-3.49.

53 Although the concept of pecuniary loss appears to have been judicially stretched at times in child-death cases: in *Hamilton v O'Reilly* [1951] IR 200 (HC) O'Byrne J held that it was reasonable to anticipate that a young girl - aged 3 years at the time of her death - would have gone into employment at or about the age of 14 and that she would have continued in employment and in residence in the parental home until the age of 23 or thereabouts. In these supposed circumstances it was a reasonable prospect that the parents would have received a definite pecuniary benefit from the girl had she lived.

54 Although the problem was discussed *obiter* by the Supreme Court in *Byrne v Houlihan and De Courcy* [1966] IR 274. Kingsmill Moore J referred to the decision of the English Court of Appeal in *Mead v Clarke Chapman & Co* [1956] 1 All ER 44: "if the matter is to be looked at as of the date of the death, there was no real expectation of benefit to the child accruing from the death by reason of the possibility of a future marriage to a kind stepfather. Such a possibility seems to me too remote and speculative to form a basis for computation ... The case is an authority to show that the actual state of affairs at the date of the trial must be considered."

55 This was a novel element of recovery in the 1961 Act. Note that, unlike the English bereavement provisions, the Irish legislation does not limit the availablility of damages for non-pecuniary loss to a more restrictive class of dependants than that which is entitled to damages for pecuniary loss under the s 49(1)(a)(i) Civil Liability Act 1961.

56 Courts Act 1981, s 28(1).

57 Although there must remain some question as to the substance of this qualification. In *McCarthy v Walsh* [1965] IR 246 (SC) O Dalaigh CJ asserted that "a member of the family is far from being necessarily synonymous with a member of the family who suffers mental

distress damages. In *Cubbard v Rederij Viribus Unitis & Galway Stevedores Ltd*[58] Lavery J took the view that section 49(1)(a)(ii) was not intended to provide monetary compensation for every member of the deceased's family. He decided that "some real intense feeling" over and above ordinary grief must be suffered by a dependant in order to recover.[59] However, this authority has not subsequently been followed. In *McCarthy v Walsh*[60] O Dalaigh CJ stated that the test to be applied was one of reasonableness, and that damages should be awarded in accordance with what is fair in the circumstances of the case. If the sum assessed as reasonable damages for mental distress exceeds the statutory maximum, then the maximum sum is divided among the dependants in proportion to their shares in the original sum as assessed. Damages should not be measured by reference to the imagined worse case, fixing damages for such a case at the statutory limit.[61]

A.18 Contributory negligence on the part of the deceased or dependant is a defence in part to an action under the 1961 Act. The award is reduced by such amount as the court thinks just and equitable having regard to the relative degrees of fault of the deceased[62] and the dependant.[63] Where only one of a number of dependants is contributorily negligent, the necessary reduction is applied only to the award which would have been made to the negligent dependant. In the case of mental distress damages where the statutory maximum operates, any reduction for contributory negligence is to be made without regard to the statutory cap.[64] It is only if this reduced sum exceeds the statutory maximum that a further reduction must be made to bring the damages down to the maximum permitted level. Thus it will still be possible for a contributorily negligent dependant to recover the maximum amount of £7,500 mental distress damages.

CANADA

A.19 All Canadian provinces, except Quebec, have enacted wrongful death legislation modelled upon Lord Campbell's Act.[65] The differences that exist between the

distress", yet went on to make awards to each of seven brothers and sisters of the deceased aged between 4 and 18 years old. In *McDonagh v McDonagh* [1992] 1 IR 119 (HC) Costello J awarded the figure of £7,500 in equal parts between the deceased's parents and 4 year old child, but determined that the second child of 18 months old was too young to have suffered mental distress. In England bereavement damages are recoverable by a statutory claimant without proof of loss or distress.

58 [1965] 100 ILTR 40 (HC).

59 As a result he awarded mental distress damages to each of the unmarried deceased's mother, sister and niece, who resided with the deceased in the family home, to the amount of £450. He awarded nothing to a brother of the deceased who also lived in the family home, and nothing to three other brothers and sisters who did not live with the deceased.

60 [1965] IR 246 (SC) subsequently followed in *Dowling v Jedos* (Unreported) 30 March 1977 (SC).

61 *McCarthy v Walsh* [1965] IR 246 (SC)

62 Section 35(1)(b).

63 Section 35(1)(d).

64 See *McCarthy v Walsh* [1965] IR 246.

65 The first example of such legislation was introduced by Upper Canada in 1847 and was identical to the English Act. The remaining provinces and territories did so subsequently. The current legislation is as follows:

various statutes are in the definitions of the qualifying claimants and the type of damages awarded under each statute.

A.20 Section 2 of the Alberta legislation enables a court to:

> ...give to the persons respectively for whose benefit the action has been brought those damages that the court considers appropriate to the injury resulting from the death.

The wording of this section is very similar to that found in Lord Campbell's Act and British Columbia, Newfoundland, Saskatchewan and the Northwest Territories have similar provisions.[66] The courts have interpreted these provisions to allow recovery for pecuniary loss only.[67] Other jurisdictions have enacted in statutory form existing common law authority allowing the recovery of pecuniary loss.[68]

A.21 The categories of eligible claimants under the Acts characteristically comprise the immediate family of the deceased. All provinces allow recovery to the spouse, child and parent of the deceased, whilst Alberta, Manitoba, New Brunswick and Ontario extend recovery to the deceased's siblings in addition.[69] "Child" and

Alberta, Fatal Accidents Act, RSA 1980, c F-5, as amended by the Fatal Accidents Amendment Act 1994;

British Columbia, Family Compensation Act 1979 RSBC, c 120;

Manitoba, Fatal Accidents Act CCSM 1987, c F-50;

New Brunswick, Fatal Accidents Act, RSNB 1973, c F-7, as amended;

Newfoundland, Fatal Accidents Act, RSN 1990, c F-6;

Nova Scotia, Fatal Injuries Act, RSNS 1989, c 163;

Ontario, Family Law Act, RSO 1986, c F-3;

Prince Edward Island, Fatal Accidents Act, RSPEI 1988, c F-5;

Saskatchewan, The Fatal Accidents Act, RSS 1978, c F-11;

Northwest Territories, Fatal Accidents Act, RSNWT 1988, c F-3;

Yukon, Fatal Accidents Act, RSY 1986, c 64.

In certain circumstances, recovery will be governed by Canadian federal law: eg tortious liability which arises in a maritime context is governed by that body of federal maritime law encompassing common law principles of tort, contract and bailment, which is uniform throughout Canada; it has been held that provincial fatal accidents legislation is inapplicable within the jurisdiction of federal maritime law: see eg *Shulman v McCallum* (1993) 79 BCLR (2d) 393.

66 Newfoundland, s 6(1); Northwest Territories, s 3(2); Saskatchewan, s 4(1).

67 *Blake v Midland Ry* (1852) 18 QB 93; *St Lawrence & Ottawa Ry v Lett* (1885) 11 SCR 422; *Grand Trunk Ry v Jennings* (1888) 13 App Cas 800 (PC); *Sakaluk v Lepage* [1981] 2 WWR 597 (Sask CA).

68 Manitoba, s 3(2); New Brunswick, s 3(2); Prince Edward Island, s 6(2); Ontario, s 61(1). In Ontario, each claimant under s 61 is required to bring a separate action, in contrast to the position under Lord Campbell's Act which requires that only one action be brought on behalf of all claimants.

69 There is no express provision allowing for a claim by a brother or sister in Prince Edward Island, but s 1(f)(vii) of the Act (RSPEI 1988, c F-5) permits recovery to "any other person

"parent" are commonly defined to include grandchildren, stepchildren, grandparents and stepparents.[70] Alberta and Ontario are the only jurisdictions not to provide expressly for the extension of recovery to children to whom the deceased stood *in loco parentis* and to a person who stood *in loco parentis* to the deceased.[71] In New Brunswick, Newfoundland, Northwest Territories and Saskatchewan further express provision is made for the situation where a child is adopted into the family. The statutes of Alberta, New Brunswick and Nova Scotia provide for the illegitimate child.[72] Alberta, British Columbia, Manitoba, Nova Scotia and Saskatchewan enable the courts to award damages under the legislation to a person who, though not married to the deceased, cohabited with the deceased as man and wife for a specified period of time prior to the death of the deceased.[73]

A.22 In 1994 the Law Reform Commission of British Columbia published its report on the rights of recovery for pecuniary loss suffered by a relative or dependant of a person who is wrongfully injured or killed by another.[74] The Commission concluded that, where the basis of the legislation was to restore lost support, it was not obvious why the fact of dependency alone should not be a sufficient ground for bringing a claim.[75] Consequently, the Commission recommended that new legislation should enable anyone who was financially dependent on the deceased to claim compensation for lost support and lost services.

A.23 The main type of pecuniary loss consequent upon another's death is loss of support, which is calculated by the Canadian courts in much the same way as in

who for a period of at least 3 years immediately prior to the death of the deceased was dependent upon the deceased for maintenance and support". It was suggested by McQuaid J in *Reeves v Croken* (1986) 22 DLR (4th) 272, 275, that this might on the facts of a case encompass a sibling.

[70] Although the Ontario legislation fails to make express provision for recovery by stepchildren and stepparents.

[71] Section 12 of the Nova Scotia Fatal Accidents Act probably achieves the same effect by extending recovery to a child or parent of the deceased where the child has been treated as a child of the family.

[72] Although the Nova Scotia legislation aims to preclude the absent father from recovering by providing that only the mother of an illegitimate child automatically has the right to claim in respect of the death of the child. It would appear that the father of an illegitimate child may claim only under s 12 of the legislation by evincing a settled intention to treat the child as a child of the family.

[73] In Nova Scotia the couple need only have lived together as man and wife for one year prior to the death of the deceased: s 13. In British Columbia the necessary period of cohabitation is two years: s 1. In Saskatchewan cohabitation must have been continuous for a period of not less than three years, or, if they are the parents of a child, they need merely enjoy a relationship of some permanence: s 1(d)(ii). In Manitoba the couple enjoy the same rights as a husband and wife where the deceased cohabited with a person continuously for a period of not less than five years immediately preceding the death in a relationship in which that person was substantially dependent upon the deceased; or, where there is a child of the union, they cohabited for not less than one year; or where the deceased was paying maintenance to a person pursuant to a written agreement or court order: s 3(5).

[74] Report on Pecuniary Loss and the Family Compensation Act (August 1994) LRC 139.

[75] Report on Pecuniary Loss and the Family Compensation Act (August 1994) LRC 139, 24-26, 34.

England.[76] As in England, the parents of a deceased minor may succeed in recovering an award for loss of support only if they are able to prove a reasonable probability of pecuniary advantage had the child survived.[77] They will fail if they can show no more than a mere speculative possibility of such financial support by the child.[78]

A.24 As in England, compensation is recoverable under the Fatal Accidents legislation for the loss of services that would have been afforded by a deceased spouse or parent had he or she lived. Where the replacement of lost services can be valued in monetary terms, that loss may be recovered.[79]

A.25 All Canadian provinces that had wrongful death statutes amended them to allow claimants to recover funeral expenses they incurred as a result of the death of the deceased, although reasonable expenses only are recoverable.[80] In Manitoba, New Brunswick, Newfoundland and Yukon the only recoverable expenses are funeral expenses.[81] The Fatal Accidents legislation in the remaining provinces allow recovery of some other types of expenses. Prince Edward Island allows an amount not exceeding $500 toward the expenses of taking out administration of the estate where the proceeding is continued or brought by the deceased's personal representative.[82] British Columbia,[83] Saskatchewan and Northwest Territories

[76] Capital sums of damages are awarded. These are calculated by means of a multiplicand and a multiplier, the latter of which is set by means of mortality tables.

[77] See above, para 2.19. Some awards have been made without proof of any definite expectation of financial benefit. See *Powers Estate v Roussell Estate* (1978) 23 NBR (2d) 298 (QB). However, the weight of authority is behind the principle that, in the absence of such proof, no award can be made: see Waddams, *Law of Damages* (2 ed 1991), para 6.220, n 73. See *Mason v Peters* [1980] 117 DLR (3d) 417, where a mother claimed for the death of her 11 year-old son. It was held that the court must consider the attitude and disposition of the boy towards his mother, the mother's circumstances, and the likelihood of the child contributing to his mother's care and comfort in adulthood. The court awarded the mother $45,000 but there existed an alternative ground of recovery under the Ontario Family Law Act 1986 for loss of care and companionship.

[78] It has frequently been observed that any attempt to assess such damage must involve a prophetic speculation, "having regard to the sundry contingencies of the inscrutable future which may affect the lives of the parties and their pecuniary relationship to one another": *Nickerson & Nickerson v Forbes* [1955] 1 DLR (2d) 463, 467-8. In this context the line between "reasonable probability" and "speculative possibility" of benefit is very fine indeed. It was observed in a frequently cited English case that the claim in respect of the death of a young child will normally be "pressed to extinction by the weight of multiplied contingencies": *Barnett v Cohen* [1921] 2 KB 461, 472. Such contingencies must include the parents not surviving until the child is old enough to contribute financially to the support of the parents, or the parents not in fact receiving any such support due to the weight of the child's other commitments.

[79] Eg *St Lawrence & Ottawa Electric Co v Lett* (1885) 11 SCR 422; *Grant v Jackson* (1985) 24 DLR (4th) 598; *Neilson v Kaufmann* (1986) 26 DLR (4th) 21.

[80] See Waddams, *Law of Damages* (2 ed 1991), paras 6.240-6.270. In Alberta, Manitoba, New Brunswick and Prince Edward Island, survival legislation also provides for recovery by the estate of funeral expenses: see Manitoba, Trustee Act, s 53(1); Alberta, Survival of Actions Act, s 6; New Brunswick, s 6; Prince Edward Island, s 6(3)(a).

[81] Manitoba, Fatal Accidents Act CCSM 1987, c F50, s 3(3); New Brunswick, Fatal Accidents Act, RSNB 1973, c F-7, s 3(3); Newfoundland, Fatal Accidents Act, RSN 1990, c F-6, s 9; Yukon, Fatal Accidents Act, RSY 1986, c 64, s 3(3).

[82] See s 6(3)(b) of the Fatal Accidents Act, RSPEI 1988, c F-5.

allow recovery of those medical or hospital expenses which the injured person would have been able to recover had he or she not died. These provisions represent an expansion of the traditional basis of recovery under Lord Campbell's Act, in that they permit recovery of loss not consequent upon the death itself, but sustained before the death in consequence of the *wrongful act* which resulted in the injury. In consequence, they allow recovery of damages beyond that permitted by the English Fatal Accidents Act 1976, which restricts recovery of such other losses to an award in respect of funeral expenses.[84] Section 61(2) of the Ontario Family Law Act 1986 permits recovery, *inter alia*, for:

(a) actual expenses reasonably incurred for the benefit of the person killed;

(b) actual funeral expenses reasonably incurred;

(c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;

(d) where, as a result of the injury, the claimant provides nursing, housekeeping, or other services for the person, a reasonable allowance for loss of income or the value of the services.[85]

Unlike the Fatal Accidents Acts of British Columbia, Saskatchewan and the Northwest Territories, the Ontario Family Law Act 1986 in addition governs recovery in non-fatal personal injury cases.[86] Consequently, reasonable travel expenses and compensation for nursing, housekeeping, or other services provided

[83] In British Columbia the qualifying claimants may bring a claim under the Family Compensation Act 1979 RSBC, c 120, which would include elements for loss of support, funeral expenses and medical and hospital expenses incurred as a result of the accident leading to the deceased's death. It would also appear possible for the personal representative of the deceased to recover on behalf of third parties under s 66(2) of the Estates Administration Act 1979 RSBC, c 114, which provides for awards in respect of "all damage to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to" except for damages for physical disfigurement, pain and suffering of the deceased; loss of expectation of life of the deceased; expectation of earnings subsequent to death of the deceased which might have been sustained if the deceased had not died. The decision in *Lankenau v Dutton* (1988) 6 WWR 337 suggests that pecuniary loss arising because of "loss or damage to the person or property of the deceased" may be recovered by the deceased's personal representative on behalf of third parties.

[84] See s 3(5) Fatal Accidents Act 1976; see above, paras 2.17-2.22 & 3.38-3.49.

[85] In addition s 61(2)(e) permits recovery of an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not incurred: see below, para A.29. In 1994 the British Columbia Law Reform Commission recommended that the recovery of pre-death out-of-pocket expenses be expanded in accordance with the current Ontario legislation: see British Columbia LRC 139 (August 1994) pp 34-35.

[86] The original Fatal Accident Act enacted in 1847 was repealed in 1978 and its provisions were incorporated within the Family Law Reform Act 1978 which in turn was replaced by the Family Law Act, 1986 (now RSO 1990). The intention of the legislature was not to make substantive changes in the law relating to fatal accidents, but rather to extend the provisions of the Fatal Accidents Act to cases of non-fatal injury. Consequently the same heads of loss are recoverable in non-fatal cases as in wrongful death actions: Family Law Reform Act, 1978, c 2, s 60; E R Alexander, *The Family and the Law of Torts* (1979), p 20.

for the injured person are also recoverable under section 61(2) where the injured person survives.

A.26 Nova Scotia has also enacted provisions closely based upon this model.[87] And in 1994 the Alberta legislature (following the recommendation of the Alberta Law Reform Institute)[88] extended the Albertan Fatal Accidents Act 1980 to cover, *inter alia*, reasonable expenses incurred for the care of the deceased between injury and death, and reasonable travel and accommodation expenses incurred in visiting the deceased before his death.[89]

A.27 The law reform bodies of both British Columbia and Alberta believed that fees paid for grief counselling should be available in certain circumstances.[90] The Alberta Law Reform Institute recommended that damages for grief counselling be paid to any claimant under the Act if those expenses were incurred by any of the persons by whom or for whose benefit the action is brought. However the subsequent enactment in 1994 restricted the award of grief counselling damages to the spouse, cohabitant, parent, child or sibling of the deceased.[91] The British Columbia Law Reform Commission recommended that the claimant be part of the deceased's domestic household in order to limit recovery to those cases where it can perform a useful function in consoling the grief stricken.[92]

A.28 In addition to pecuniary loss, or as a subcategory within it, some Canadian jurisdictions permit recovery for the loss of care, guidance and companionship suffered by the relatives of the deceased. It appears to be normal practice for a

[87] See s 5(2) of the Fatal Injuries Act RSNS 1989.

[88] See Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the *Fatal Accidents Act*, Report No 66 (May 1993) pp 26-30. The proposals were initially conceived as a way to ensure that parents of children killed in fatal accidents received more than just the $3,000 compensation for bereavement: see Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the *Fatal Accidents Act*, Report for Discussion No 12 (June 1992), pp 82-89.

[89] See section 7 of the Albertan Fatal Accidents Act 1980, as amended by the Fatal Accidents Amendment Act 1994. The new s 7 states:

> "If an action is brought under this Act and if any of the following expenses and fees were reasonably incurred by any of the persons by whom or for whose benefit the action is brought, then those expenses and fees, in a reasonable amount, may be included in the damages awarded:
> (a) expenses incurred for the care and well-being of the deceased person between time of injury and death;
> (b) travel and accommodation expenses incurred in visiting the deceased between time of the injury and death;
> (c) expenses of the funeral and the disposal of the body of the deceased, including all things supplied and services rendered in connection with the funeral and disposal;
> (d) fees paid for grief counselling that was provided for the benefit of the spouse, cohabitant, parent, child, brother or sister of the person deceased."

[90] See Alberta Law Reform Institute, Report No 66, pp 30, 55; British Columbia LRC 139, pp 19-21.

[91] Section 4 of the Fatal Accidents Amendment Act 1994 substituting a new section 7 to the Fatal Accidents Act 1980. See n 89 above for the new s 7.

[92] See British Columbia LRC 139, pp 19-21.

child suing for the wrongful death of its parent to make a claim for damages for loss of care, education and training, or loss of care and guidance,[93] even in those jurisdictions governed by statutes that restrict recovery to "pecuniary losses".[94] However, those jurisdictions that permit recovery of damages for loss of care, guidance and companionship in situations other than in respect of a child's loss of its parent, generally do so on the basis that they are compensating a non-pecuniary loss.[95]

A.29 In *Vana v Tosta*[96] the Supreme Court of Canada allowed a claim in an Ontario case for the loss of the parent's care and guidance on the basis that it represented a pecuniary loss resulting from the deprivation of the care, education and training which only a mother can give. The Ontario Fatal Accidents Act was subsequently repealed, and has been replaced by the Family Law Act, 1986.[97] Section 61(1) entitles statutory claimants to recover their pecuniary loss resulting from the injury or death, which "may include" the heads of loss described in sub-section (2). Sub-section (2)(e) permits recovery of "an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred". Subsequent case law has established that the new provisions were expressly intended to extend the measure of damages by permitting recovery for loss of guidance, care and companionship on a non-pecuniary basis, reasoning that if this were not the case section 61(2)(e) would serve no useful purpose since all pecuniary losses were already recoverable under section 61(1).[98] In *Neilson v*

[93] See eg *Beauchamp v Entem Estate* (1987) 51 Sask R 99, 104-105; *Smith v Cook* (1981) 125 DLR (3d) 457, 460. See also Alberta Law Reform Institute, Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the *Fatal Accidents Act*, Report for Discussion No 12 (June 1992) p 33.

[94] Newfoundland, Fatal Accidents Act, RSN 1990, c F-6; Northwest Territories, Fatal Accidents Act, RSNWT 1988, c F-3; Prince Edward Island, Fatal Accidents Act, RSPEI 1988, c F-5; Saskatchewan, The Fatal Accidents Act, RSS 1978, c F-11; Yukon, Fatal Accidents Act, RSY 1986, c 64.

[95] Some jurisdictions refuse to award such damages. In *Reeves Estate v Croken* (1991) 84 NFLD & PEI R 298, the Prince Edward Island Supreme Court Appeals Division refused an award on the basis that the loss of the deceased's care, guidance and companionship represents only that amount of money that the dependants have lost or will likely lose as a result of that deprivation: the deceased child had not provided his parents with care, guidance or companionship of a type they would have to purchase elsewhere after his death. In *Beauchamp v Entem Estate* (1987) 51 Sask R 99, McLellan J asserted that loss of companionship, guidance and counsel was not a pecuniary loss and therefore was unrecoverable under the statute. This issue, however, was distinct from a claim for the services provided by the deceased in assisting with the raising of the plaintiff's other children, which was a loss of a pecuniary nature.

[96] (1968) 66 DLR (2d) 97 (SCC), 117.

[97] See para A.19 n 65 above.

[98] *Mason v Peters* (1983) 39 OR (2d) 27, 38, *per* Robins J: "guidance, care and companionship cannot ordinarily be equated in dollar value; the deprivation of these important elements of a family relationship is not generally capable of computation on a strictly monetary basis". In an earlier case, Linden J was forceful in his view that low damages awards produced in child-death cases by the application of the pecuniary loss principle were "barbaric" and "inhuman", and "did not reflect the prevailing views of our society which recognises that children have a special value that transcends the pecuniary benefits that they may some day bestow on their parents". He was of the opinion that section 61(2)(e) of the Ontario

Kaufman[99] the Ontario Court of Appeal stated that, although it was essentially non-pecuniary in character, there must be an actual loss of care, companionship and guidance.[100] The mere fact of a relevant relationship between a claimant and the deceased would not, of itself, establish the right to compensation under the statute, and an inquiry into the nature of the lost relationship is needed in each case.[101] In subsequent cases the Ontario courts have awarded separate sums for each of the three elements of care, guidance and companionship within section 61(2)(e), characterising loss of care as representing the replacement pecuniary value of household services such as cooking and housekeeping, and loss of companionship as an essentially non-pecuniary loss.[102] The intangible nature of the head of compensation for loss of companionship in such cases would appear to be significant. Indeed the Ontario Law Reform Commission has commented that it may in practice be impossible to distinguish damages for loss of guidance, care and companionship from damages for grief.[103]

A.30 Other jurisdictions expressly permit recovery for such losses on a non-pecuniary basis. Section 5(2) of the Nova Scotia Fatal Injuries Act 1989 specifically provides

legislation should be read as meaning that the loss of guidance, care and companionship is a pecuniary loss, only in the sense that the legislature intended it to be recoverable. In conceptual terms such a loss was in fact of a *non-pecuniary* nature. Linden J went on to state that loss of guidance, care and companionship can be suffered by any member of a family as a result of the death or injury of any other member of that family: *Thornborrow v MacKinnon* (1981) 123 DLR (3d) 124, 127-129.

99 (1986) 26 DLR (4th) 21.

100 *Neilson v Kaufman* (1986) 26 DLR (4th) 21, 33.

101 *Neilson v Kaufman* (1986) 26 DLR (4th) 21, 33: the court attempted to draw a distinction for these purposes between loss of care, guidance and companionship, on the one hand, and grief, on the other: in a hypothetical example, a brother who had not seen the deceased for 20 years, although they exchanged Christmas cards and infrequent telephone calls, would undoubtedly feel grief and sorrow at the death, but there would be no actual loss of care, companionship and guidance.

102 See *Miller v Bowness* 35 DLR (4d) 264, in which the Ontario High Court of Justice compensated the loss of care suffered by an elderly husband upon the death of his wife by awarding the commercial replacement value of the cooking and housekeeping services performed by the deceased. Giving the judgment of the court, Anderson J awarded damages of $25,000 for loss of care from the date of the death until the trial, and $10,000 for the future loss of those services. In addition, he awarded separate sums for loss of companionship in the order of $10,000 to the husband, on the basis of his long marriage to the deceased, and $5,000 to the couple's adopted adult son, on the basis of his genuine attachment to his mother. Anderson J commented that in the latter case it was a difficult matter to distinguish the son's loss of companionship from the element of grief at his mother's death, which was not recoverable: *Miller v Bowness* 35 DLR (4d) 264, 268-269. See also Report on Compensation for Personal Injuries and Death, Ontario Law Reform Commission (1987) p 32.

103 Report on Compensation for Personal Injuries and Death (1987) pp 26-27. The Commission concluded that section 61(2)(e) had been interpreted by the Ontario courts as providing damages for a type of non-pecuniary loss, which, while theoretically not extending to compensation for grief and mental anguish, was nonetheless indistinguishable from a type of solatium, and depended upon evidence concerning the value of the relationship between the deceased and the claimant: at p 32. It concluded that ss 61(1) and 61(2)(e) should be repealed and replaced by a first party claim for loss of “working capacity” which would include loss of care and guidance of the spouse, dependant children and dependant parents, calculated on the basis of a pecuniary loss: at pp 33-34, 237-238.

that "damages" means pecuniary and non-pecuniary damages, without restricting the generality of these definitions, and expressly allows for the payment of an amount to compensate for loss of guidance, care and companionship.[104] The Manitoba Court of Appeal has been explicit in its interpretation of the Manitoba Fatal Accidents Act 1987 as allowing recovery of damages for loss of guidance, care and companionship on a strictly non-pecuniary basis.[105]

A.31 In Ontario and Nova Scotia the quantum of damages awards for loss of care, guidance and companionship is determined on a case-by-case basis,[106] and an upper limit is being developed by the Nova Scotia courts for non-pecuniary damages of $10,000 to a wife and $2,500 to each parent.[107] In Manitoba, the Court of Appeal has held that the judiciary must establish modest conventional awards and must award them in all but the most unusual of cases.[108] It was a

[104] In *Campbell et al v Varanese* (1991) 102 NSR (2d) 104, Chipman JA confirmed that the loss of care, guidance and companionship were elements of a non-pecuniary character, yet the impact of them could have pecuniary consequences: "[T]he parental contribution to a child's personality, sense of value, sound judgment and good moral standards have a potential of great pecuniary impact over a lifetime": *Campbell et al v Varanese* (1991) 102 NSR (2d) 104, 109. However, grief and sorrow were not to be taken into account. See also para A.31 n 107 below.

[105] In *Larney Estate v Friesen* (1986) 29 DLR (4th) 444, the Manitoba Court of Appeal referred to the award under s 3(4) of the Fatal Accidents Act 1987, c F-50, as a "solatium", *per* O'Sullivan JA, at p 449, and as "a compassionate allowance unrelated to pecuniary measurement", *per* Monnim CJM, at p 447, quoting Hubard JA from *Rose v Belanger* (1985) 17 DLR (4th) 212, 219. The court awarded damages for loss of future companionship to the mother ($10,000), brother ($2,500) and sister ($2,500) of a deceased 19-year old girl who was independent and living away from home. The court found that all the members of the family were independent of one another and that therefore the issues of care and guidance were hardly relevant. The Manitoba Law Reform Commission has recommended the statutory recognition of the claim for loss of care, guidance and companionship, although it concluded also that the court should retain a discretion to determine the proper persons entitled to claim under the Fatal Accidents Act: Report on the Estate Claim for Loss of Expectation of Life, LRC 35 (October 22 1979) pp 23, 25

[106] Decisions in Ontario have diverged on the issue of whether restraint or indulgence is the appropriate attitude to compensation for loss of guidance, care and companionship. The Ontario Court of Appeal in *Neilson v Kaufmann* (1986) 26 DLR (4th) 21 stated it would be difficult to describe the "average" family for which a "conventional" award should be developed although the court's refusal to rule out the possibility of such a guideline being set in the future perhaps implies that some degree of restraint and consistency is desirable: see Ontario Law Reform Commission, Report on Compensation for Personal Injuries and Death (1987) pp 20-21.

[107] See *Morrell-Curry v Burke* (1990) 94 NSR (2d) 399 (NSSCAD) affirming Hallett J (1990) 92 NSR (2d) 402 (NSSCTD). In *Campbell et al v Varanese* (1991) 102 NSR (2d) 104 (Nova Scotia Supreme Court Appeals Division), Chipman JA stated that while it was impossible to measure the pecuniary impact over the lifetime of a child of the loss of a parent, it must be recognised that in most cases such loss will be more than nominal, which he estimated to be more than $10,000. Chipman JA was not prepared to lay down any guidelines for a conventional award for such cases, though this was not to suggest that such awards were not to be kept within reasonable limits on a case-by-case basis. He awarded $15,000 to one child (aged 8) and $22,500 to the other child (aged 3) of the deceased: *Campbell et al v Varanese* (1991) 102 NSR (2d) 104, 109.

[108] See *Rose v Belanger* (1985) 17 DLR (4th) 212; *Lawrence v Good* (1985) 18 DLR (4th) 734. The court has established conventional sums for loss of companionship of a spouse ($10,000); an adult child ($10,000) and a sibling ($2,500) but it has not yet adopted a conventional sum in respect of the death of a small child.

conclusion of the Alberta Law Reform Institute[109] that the courts in these jurisdictions have continued the Canadian tradition of awarding moderate damages for loss of guidance, care and companionship.[110] In British Columbia, where there is no express statutory provision for the award of damages for loss of care and guidance, and where the courts will award such damages only as a pecuniary loss,[111] the courts award a conventional sum for the loss of a parent's care, guidance, love and affection.[112] Recently the courts have awarded lesser conventional sums for such loss in respect of the death of an adult child.[113]

A.32 Only in Alberta and New Brunswick are damages available as compensation for grief.[114] Section 3(4) of the New Brunswick Fatal Accidents Act 1973 provides "an amount to compensate for the loss of companionship that the deceased might reasonably have been expected to give to the parents and an amount to compensate for the grief suffered by the parents as a result of the death". The statute is restrictive of the range of claimants who are eligible to claim under section 3(4).[115] The action is restricted to the parents of a deceased child under the

[109] See Report for Discussion No 12 at p 45.

[110] In a review of cases decided under the statutes of Ontario, Manitoba and Nova Scotia, the Institute found that six mothers received between $15,000 and $30,000 non-pecuniary damages. Two mothers received $45,000 or more. Three mothers received less than $15,000. Five fathers received damages between $15,000 and $24,000. Two fathers received less than $15,000. One father received nothing: see Report for Discussion No 12 (June 1992), at pp 44-45. In June 1996, the bereavement award of £7,500 recoverable under the English legislation equated to $15,675 (Can): Report for Discussion No 12 (June 1992), p 111.

[111] In *Loyie Estate v Erickson Estate* (1994) 94 BCLR (2d) 33 (SC), Parrett J accepted that the nature of such an award did not lend itself to rigorous and detailed analysis on an economic basis, and that this led in turn to the characterisation of some such awards as "conventional". However, such a characterisation could not materially change the nature of the award, which remained pecuniary in kind: at p 37.

[112] Today the conventional award for care and guidance for a very young infant child would appear to have reached $30,000: see *Loyie Estate v Erickson Estate* (1994) 94 BCLR (2d) 33 (SC); *Skelding v Skelding* (1994) 95 BCLR (2d) 201 (CA), from a level established in 1986 of $20,000: *Plant v Chadwick* (1986) 5 BCLR (2d) 305 (BCCA); *Wheeler v Muir* [1986] BCWLD 702. In *Kwok v British Columbia Ferry Corporation* (1988) 20 BCLR (2d) 318, the British Columbia Supreme Court awarded the conventional sum of $20,000 to a 10-year old boy in respect of the loss of love, guidance and affection of his mother, in addition to an award of $30,000 for the son's share of the pecuniary loss of the deceased's home care services. In *Jennings Estate v Gibson* (1994) 96 BCLR (2d) 342 (CA), Legg JA awarded $5,000 to each of two adult children in respect of the loss of care and guidance of their 56 year-old mother.

[113] See *Lian v Money* (1994) 93 BCLR (2d) 16 (SC), in which the court awarded $5,000 damages for loss of guidance and companionship to the mother of a deceased 20 year-old child. The court declared that the facts of the case differed from those in the Saskatchewan case of *Beauchamp v Entem Estate* (1986) 51 Sask R 99 (QB), in which such an award was refused: see para A.28, n 95 above.

[114] Alberta, under s 8 Fatal Accidents Act 1980 as amended by Fatal Accidents Amendment Act 1994, c 16, s 5; and in New Brunswick, under s 3(4) Fatal Accidents Act 1973 as inserted by Act to Amend the Fatal Accidents Act, 1986.

[115] As opposed to the position in Ontario, Nova Scotia and Manitoba, where recovery of non-pecuniary damages for loss of care, guidance and companionship is open to any claimant falling within the statutory categories of dependants.

age of 19,[116] or of a deceased child who was 19 or over and dependent upon one or more of the parents for support.[117]

A.33 The New Brunswick provision has been considered in *Nightingale v Mazerall*.[118] In this case, the New Brunswick Court of Appeal awarded separate sums for the loss of "care, guidance and companionship" as a non-pecuniary loss on the one hand and for "grief" on the other. It held that assessment of quantum is a matter for the court's discretion. The court was not of the opinion that the Act required it to award a substantial amount for grief - contrary to the conclusion of the trial judge[119] - and it went on to outline its criteria for reaching moderate conventional awards for grief. The court accepted that such an award can never truly compensate for the loss suffered, and that it must be objective and must promote predictability and certainty.[120] The Court of Appeal overturned the trial judge's assessment in respect of the death of two children and awarded damages of $15,000 for loss of companionship of the 6 year-old and $20,000 for loss of companionship of the nine month-old child. $15,000 damages for grief were in addition awarded in respect of each child and the court was of the opinion that the parents had suffered no more grief for losing two children than one.[121] Any amount awarded by the court under section 3(4) shall be apportioned between the parents in proportion to the loss of companionship incurred and the grief suffered by each parent as a result of the death.[122] Consequently, the award was divided between the parents, each receiving $32,500.[123] The minority judge rejected the formulation of conventional awards arguing that if the legislature had wanted to introduce a conventional award it would have legislated accordingly. As it had not, an assessment of damages for grief necessarily required an investigation into the parents' feelings.[124]

A.34 Since 1979 Alberta has awarded a fixed sum of damages for bereavement to a narrow class of eligible claimants.[125] In 1994 the Alberta legislature amended its

[116] See s 3(4)(a).

[117] See s 3(4)(b).

[118] (1991) 87 DLR (4th) 158 (NBCA).

[119] The trial judge awarded each parent $60,000 plus interest and costs, including $50,000 damages for grief to each parent, which had been increased because the parents had suffered the loss of two children.

[120] *Nightingale v Mazerall* (1991) 87 DLR (4th) 158 (NBCA), 164-165.

[121] *Nightingale v Mazerall* (1991) 87 DLR (4th) 158 (NBCA).

[122] See s 3(5).

[123] In *Nightingale v Mazerall* (1991) 87 DLR (4th) 158 (NBCA) the majority of the New Brunswick Court of Appeal interpreted section 3(5) as requiring it to assess damages in respect of the death of each child in question and then to apportion those amounts between the parents.

[124] *Nightingale v Mazerall* (1991) 87 DLR (4th) 158 (NBCA), 171, *per* Rice JA. He further stated that he did not think that there were grounds to interfere with the trial judge's assessment of damages.

[125] Before 1 September 1994, $3,000 was awarded to the spouse of the deceased; $3,000 to the mother or father of the deceased, to be divided equally if the action is brought for the benefit of both; and $3,000 to the minor child or children (son or daughter, whether

bereavement provisions under section 8 of the Fatal Accidents Act by providing for an enhanced fixed award representing "damages for grief and loss of guidance, care and companionship of the deceased".[126] Before this date, loss of guidance, care and companionship did not constitute part of the fixed award for bereavement, but was compensated separately as a pecuniary loss under the statute on a case-by-case basis.[127] The current section 8 award is a global sum and no itemisation of the damages is made as between loss of guidance, care and companionship on the one hand and grief on the other.

A.35 The reforms were a result of recommendations of the Alberta Law Reform Institute contained in its Review of section 8 of the Fatal Accidents Act.[128] The Alberta Law Reform Institute reported widespread criticism by consultees of the level of damages under the legislation,[129] but not of other elements of the scheme. It was also the case that most commentators wanted to keep grieving relatives out of the litigation arena on the issue of non-pecuniary damages. The Institute recommended the retention of a statutory quantification of damages without the need to provide evidence of emotional suffering, but with increased levels of recoverable damages. It recommended a fixed award of $40,000 to the spouse or cohabitant of the deceased (though not if the couple were separated at the time of death); $40,000 to the parent or parents of (a) a deceased minor; or (b) a deceased unmarried child who, at the time of death, was 18 or over, but less than 26 and who was not cohabiting with a partner of the opposite sex.[130] The award

legitimate or illegitimate) of the deceased parent, to be divided equally among the minor children for whose benefit the action is brought.

[126] Fatal Accidents Amendment Act 1994, c 16, s 5.

[127] The leading case was *Coco v Nicholls* (1981) 31 AR 386, in which four children claimed for the loss of their mother. The court awarded $6,000 to the 6 year-old child, $3,000 to the 12 year-old, $1,000 to the 16 year-old and nothing to the 18 year-old. Moir J stated that the award was not in principle to be a conventional amount. It was also not to be over-emphasised as that would lead to very high awards out of proportion to any real pecuniary loss sustained. Subsequent awards were more substantial: in *Flett Estate (Public Trustee) v Way-Mat Oilfield Services Ltd* (1989) 63 ALR (2d) 387, Berger J awarded $20,625 to an 18-month old child for the loss of care, guidance and companionship of his loving and caring father. In a different case he allowed $11,250 to a 10-year old boy for loss of care, guidance and moral training in respect of the death of the deceased who stood in loco parentis to the boy, and who had a close relationship with him: *O'Hara v Belanger* (1989) 69 ALR (2d) 158.

[128] See Alberta Law Reform Institute, Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the Fatal Accidents Act, Report No 66 (May 1993) pp 2-3.

[129] Prior to 1994, section 8 had caused much public dissatisfaction especially in cases of wrongful death of children: in many cases the statutory amount of $3,000 had been the maximum recoverable by the family in respect of the death of the child, the courts being, in the majority of cases, unable to estimate the loss of financial benefits incurred as a result of the death. Alberta Law Reform Institute, Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the Fatal Accidents Act, Report No 66 (May 1993) p 2.

[130] See s 8, as amended by Fatal Accidents Amendment Act 1994, c 16, s 5. Under the Act , a "cohabitant" is defined as a person of the opposite sex to the deceased who lived with the deceased for a period of not less than 3 years immediately before the death, and was held out by the deceased in the community in which they lived as his or her consort: see s 1(a.1) as amended by the Fatal Accidents Amendment Act 1994, c 16, s 2. This definition was suggested by the Alberta Law Reform Institute, see Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the Fatal Accidents Act, Report No 66 (May 1993) p 55.

would be divided equally if brought for the benefit of both parents. In addition $25,000 would be awarded to each child of the deceased who, at the time of death was (a) a minor; or (b) unmarried and 18 or over but less than 26 years old, and not cohabiting. It also felt that the terminology employed by the legislation should be amended to describe more accurately what was being compensated, concluding that the fixed non-pecuniary award recoverable under the section should encompass "damages for grief and loss of guidance, care and companionship of the deceased". The Institute was of the opinion that its recommendations fulfilled the need for a symbolic recognition of the seriousness of the loss, without putting the relatives' grief on trial and intruding into their bereavement. The recommendations were enacted in 1994 by the Fatal Accidents Amendment Act.

A.36 In all jurisdictions, except Prince Edward Island,[131] the claimant must bring into account any financial benefits accruing by reason of the wrong,[132] and any benefits derived from the estate that would not have accrued but for the wrongful death must be taken fully into account. The legislation in each jurisdiction contains provisions excluding sums payable under insurance contracts from being brought into account.[133]

AUSTRALIA

A.37 Each Australian state and territory has wrongful death statutes modelled upon Lord Campbell's Act. The different statutes vary in the categories of eligible claimants that they prescribe.[134] Generally the class consists of members of the deceased's immediate family.[135] In Western Australia specific provision is made for illegitimate and adopted children,[136] and several states allow persons to whom the deceased stood *in loco parentis* to claim.[137] In all jurisdictions except Queensland[138]

[131] See Prince Edward Island, Fatal Accidents Act, s 7(1).

[132] Eg *Maltais v Canadian Pacific Rly Co* (1950) 2 WWR 145 (Alberta SC). See also Waddams, *Law of Damages*, paras 6.400-6.650.

[133] Alberta, s 6; New Brunswick, s 7(a); Ontario, s 63; Manitoba, s 6(a); Northwest Territories, s 4(2); Newfoundland, s 7(a); Yukon, s 7(a); Saskatchewan, s 4(3); Nova Scotia, s 5(3); British Columbia, s 3(7); Prince Edward Island, s 7(1)(b).

[134] Queensland: s 13; South Australia: s 20(1), (4) Wrongs Act 1936-75; NSW: s 4; Tasmania: s 3; Australian Capital Territory: s 4; Western Australia: s 2,6(1)(3), Sch 2; Victoria: s 17(2); Northern Territory: s 4.

[135] In all jurisdictions except South Australia, the definitions of "parent" and "child" include in addition remoter ascendants and descendants. In all jurisdictions except Queensland siblings are eligible (whether half-blood or full-blood relations). Western Australia, Australian Capital Territory and the Northern Territory make provision for the divorced spouse.

[136] See s 3(2).

[137] Australian Capital Territory, New South Wales, Western Australia. In 1981 the Law Reform Committee of South Australia were of the opinion that it may already have been the case that the law provided for children to whom the deceased had stood in *loco parentis*, but it recommended legislative amendment in order that the matter should not remain in doubt: (1981) 56th Report Relating to the Fatal Accidents Provisions of the Wrongs Act 1936.

[138] In 1994 the Queensland Law Reform Commission recommended the amendment of s 13 to include the term "*de facto* partner" in the list of persons eligible to claim under the Act. The Commission recommended a requirement of continuous cohabitation within a relationship like that between a married couple (whether of a different or the same gender:

eligible claimants include *de facto* spouses, although there exists no consistency among the states in respect of the definition of the *de facto* spouse.[139] The legislation generally requires the claimant to have cohabited with the deceased as husband and wife for a continuous minimum specified period of time immediately preceding the death of the deceased,[140] although the Australian Capital Territory demands only a permanent and bona fide domestic relationship,[141] and in South Australia and Western Australia the time period requirement is dispensed with where the relationship produces a child.[142] In Tasmania, the court has a discretion to treat a person as a *de facto* spouse for the purposes of the Act, if it is satisfied that, taking all the circumstances of the case into account, it is proper to do so,[143] and in this regard, a person may apply to the court to be treated as a *de facto* spouse of the deceased person.[144]

A.38 The Victorian statute extends recovery on a general basis to all "dependants" of the deceased: such persons as were wholly, mainly or in part dependent on the deceased at the time of his death, or who would but for the incapacity due to the injury which led to the death have been so dependent.[145] In its 1994 Report, the Queensland Law Reform Commission briefly stated a preference for such an approach and recommended future detailed investigation into the possibility of adopting a similar model in Queensland,[146] in spite of its primary recommendation of extending the statutory list of claimants to include specific provisions for the "*de facto* partner".

A.39 The Victorian approach would suggest that a dependent partner could claim under the legislation even if he or she was of the same sex as the deceased. Indeed, Tasmania is the only Australian jurisdiction to state unequivocally that a *de facto*

see para A43 below) for at least one year immediately preceding the death. Where the deceased left a dependant who was a child of the parties to the relationship, there would be no time requirement but the couple must still be living together at the time of death. See *De facto* Relationships: claims by surviving *de facto* partners under the Common Law Practice Act 1867 for damages for wrongful death, (November 1994) Report No 48, pp 45-46.

139 Queensland Law Reform Commission, *De facto* Relationships: claims by surviving *de facto* partners under the Common Law Practice Act 1867 for damages for wrongful death, (November 1994) Report No 48, pp 19-23.

140 Tasmania: 3 years (s 3(1)(a)); South Australia: continuous cohabitation for 5 years or, during the 6 years immediately preceding the death, cohabitation for an aggregated period of not less than 5 years (s 11 of the Family Relations Act 1975); Western Australia: 3 years (s 6(1)(a)(ii) and Schedule 2, para (h)(ii)). In England cohabitants must have been living with each other as husband and wife for at least two years before the deceased's death: see para 2.16 above.

141 Section 4(2)(h).

142 South Australia: s 11 of the Family Relations Act 1975; Western Australia: Schedule 2, para (h)(i).

143 See s 3A(4) as inserted by the Fatal Accidents Amendment Act 1994.

144 See s 3A(2) as inserted by the Fatal Accidents Amendment Act 1994.

145 Wrongs Act 1958, s 17(2), as amended by Wrongs (Dependants) Act 1982, s 4.

146 Queensland Law Reform Commission, *De facto* Relationships: claims by surviving *de facto* partners under the Common Law Practice Act 1867 for damages for wrongful death, (November 1994) Report No 48, p 46.

spouse must be a person of the opposite sex to the deceased.[147] The Queensland Law Reform Commission recommended in its 1994 Report that a "*de facto* relationship" should be capable of consisting of a relationship between two members of the same sex living as a married couple. But it provided a traditional alternative provision in the event that the legislature proved unprepared to adopt a gender-neutral definition.[148]

A.40 As in England, Australian courts may award damages for pecuniary loss as they think are proportioned to the injury resulting from the death to each of the beneficiaries respectively. A single amount is apportioned between the claimants in such shares as the court thinks fit. Authority has long established that the possibility of a surviving spouse remarrying or forming a new *de facto* relationship is relevant to the assessment of damages for the pecuniary loss of reasonable expectation of support,[149] as is the occurrence of such a relationship between death and the trial,[150] although the courts have not been reluctant to express the familiar distaste at the necessary element of personal evaluation involved.[151] All jurisdictions allow recovery for funeral costs. Several jurisdictions permit recovery under their wrongful death provisions of medical expenses incurred as a result of the injury causing death.[152]

A.41 In some jurisdictions, no-fault legislation has been enacted in respect of injuries and deaths resulting from some types of accident which occurred after the dates in which the legislation came into force. In these situations, damages can no longer be recovered under wrongful death legislation if compensation is payable under the new provisions.[153] In other states, there exist caps on the amount of damages that are recoverable.[154]

A.42 In practice, the notion of pecuniary loss is given a wide interpretation by the courts. A claimant is able to recover for the loss of gratuitously rendered domestic services.[155] Moreover, it was held in *Fisher v Smithson*[156] by the Supreme Court of

[147] See s 3(1)(a).

[148] Queensland Law Reform Commission, *De facto* Relationships: claims by surviving *de facto* partners under the Common Law Practice Act 1867 for damages for wrongful death, (November 1994) Report No 48, p 46.

[149] *Carroll v Purcell* (1961) 107 CLR 73. Contrast the position in England under s 3(3) Fatal Accidents Act 1976: see above, paras 2.38-2.39.

[150] *Tegel v Madden* (1985) 2 NSWLR 591.

[151] *Public Trustee v Paniens* (1971) 1 SASR 297.

[152] South Australia: s 20(2a); Tasmania: s 10(2); Western Australia: s 5(1); Australian Capital Territory: s 10(2)(b); Northern Territory: s 4(1)(a).

[153] Eg, Northern Territory: Motor Accidents (Compensation) Act 1979, s 5; New South Wales: Workers' Compensation Act 1987, s 149(2).

[154] In Victoria, no more than a non-indexed sum of $500,000 is recoverable for death resulting from transport accidents after 1 January 1987: Transport Accidents Act 1986, s 93(9). In Western Australia, a maximum total award of $120,000 shall be recoverable in respect of an asbestosis action: Fatal Accidents Act 1959, s 7(4) and (5).

[155] *Wilson v Rutter* (1956) 73 WN (NSW) 294.

[156] (1978) 17 SASR 223.

South Australia that children can claim for the loss of such intangible benefits as the mother's care, encouragement and help rendered to them while she was alive. Bray CJ reported[157]

> a welcome tendency in recent decisions to include in the damages of the husband and children for the loss of the wife and mother an allowance for something more than the cost of replacing the services of the deceased by the paid services of a stranger. In most cases she provides them with a greater benefit which can fairly be characterised as a material benefit, however hard it may be to quantify.

Zelling J in the same case was of the opinion that the Canadian decisions correctly describe the loss which children suffer in such cases.[158] He expressed the desire to see this area of the law reviewed by the High Court of Australia. The Northern Territory remains the only Australian jurisdiction to provide by statute such a head of damages: where the deceased is survived by an infant child, damages may include an amount on account of the loss of care and guidance of the parent, in addition to the reasonable expenses that would be incurred in hiring a person to live in the home and care for the child until the age of 18.[159] In *Rozario v Fernandez*,[160] Ward J identified the Canadian decision in *Vana v Tosta*[161] as helpful in attempting to quantify this head of damages under the Northern Territory legislation. He considered it fair and reasonable to award each child $5,000 for damages for the loss of the care and guidance of the father as a parent, having concluded that it is arguable whether the loss of the care and guidance of a father is as grave as the loss of the care and guidance of a mother.[162]

A.43 It was a recommendation of the Law Reform Commissions of both Western Australia[163] and South Australia[164] that there should be legislative reform to take account of the loss of assistance and guidance involved in the loss of a parent. The Commission in South Australia accepted the dicta of the Supreme Court in *Fisher v Smithson*[165] but was of the opinion that a child should be entitled under *statute* to claim damages for the loss of all advantages, financial and otherwise, which that child would have enjoyed if the parent, step-parent, grandparent or the person

[157] *Fisher v Smithson* (1978) 17 SASR 223, 232.

[158] *Fisher v Smithson* (1978) 17 SASR 223, 241. He referred specifically to *Vana v Tosta* [1968] SCR 71. See para A.29 above.

[159] Section 10(3)(e). It was recognised by Ward J in *Curator of Estates of Deceased Persons and Rozario v Fernandez* (1977) 16 ALR 445 (NT) at p 458, that this provision inevitably involved an element of solatium and that there existed a risk of overlapping in awarding damages, where an amount could also be recovered for solatium under s 10(3)(f): see below, para A.47, n 186.

[160] (1977) 16 ALR 445 (NT)

[161] (1968) 66 DLR (2d) 97.

[162] (1977) 16 ALR 445, 464.

[163] Law Reform Commission of Western Australia, Report on Fatal Accidents, (19 December 1978) Project No 66, p 30. But at p 29 the Commission rejected introducing an award for solatium.

[164] 56th Report Relating to the Fatal Accidents Provisions of the Wrongs Act 1936, pp 7-9.

[165] [1978] 17 SASR 223.

who stood *in loco parentis* to the child, had stayed alive.[166] The Law Reform Commission for Western Australia recommended that assistance which would defy attempts at valuation should be compensated under a new head of damages by way of a lump sum termed a "loss of assistance and guidance award".[167] The Commission recommended enabling the spouse and *de facto* spouse of the deceased to recover, as well as extending recovery to the parent and unmarried child of the deceased, and an unmarried person to whom the deceased stood *in loco parentis*. It was further felt that quantum should not be determined by way of a statutory fixed sum, but that a prescribed maximum amount should be established by statute.[168] The proposals of the Western Australian Commission remain as yet unimplemented.

A.44 The parents of young children are seldom able to demonstrate a pecuniary loss as a consequence of the wrongful death of their child.[169] Where a parent is able to show a pecuniary loss, the saving to the parent as a result of no longer needing to maintain the child must be deducted.[170]

A.45 While at common law damages for grief and sorrow are non-recoverable,[171] two jurisdictions (South Australia and Northern Territory) provide specifically for awards in respect of intangible losses as the court thinks fit by way of solatium.[172] Napier CJ in a South Australian case described solatium as beginning where pecuniary loss ends.[173] South Australia restricts recovery to the parents or spouse or "putative spouse"[174] of the deceased.[175] The legislation provides caps on

[166] 56th Report Relating to the Fatal Accidents Provisions of the Wrongs Act 1936, p 9.

[167] Law Reform Commission of Western Australia, Report on Fatal Accidents, (19 December 1978) Project No 66, p 30.

[168] The maximum sums recommended were to be in addition to the claimant's pecuniary damages: a spouse and *de facto* spouse would recover no more than $5,000; a parent $2,500; an unmarried child and an unmarried person to whom the deceased stood in *loco parentis*, $2,500. These amounts would be adjusted broadly in line with inflation: Law Reform Commission of Western Australia, Report on Fatal Accidents, (19 December 1978) Project No 66, p 32.

[169] An exceptional case is *McDonald v Hillier* [1967] WAR 65 (FC): see Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 9.3.13.

[170] *Faehse v Sawford* [1937] SASR 424 (FC).

[171] *Public Trustee v Zoanetti* (1945) 70 CLR 266.

[172] South Australia: ss 23a, 23b and 23c; Northern Territory: s 10(3)(f). According to Dixon J in *Public Trustee v Zoanetti* (1945) 70 CLR 266, the South Australian provisions were prompted by the remarks of Cleland J in *Matthew v Flood* [1939] SASR 389, a case involving the assessment of damages under the provisions taken from Lord Campbell's Act, when he identified elements of "real damage arising from the death" which had nevertheless to be disregarded under the legislation of the time.

[173] *Jeffries v Commonwealth of Australia* [1946] SASR 106.

[174] 'Putative spouse' is defined as someone who is cohabiting with the person in question as the *de facto* husband or wife of that person, and (i) who has been cohabiting with that person continuously for the previous five years, or (ii) who has been cohabiting with that person for periods aggregating to not less than five of the previous six years, or (iii) who has had a child with that person; see Wrongs Act 1936-1975, s 3a and the Family Relationships Act 1975, s 11, as amended by the Family Relationships Act Amendment Act 1984, s 7.

recovery. Where both parents claim under the section, the award is divided between the claimants in such shares as the court directs.[176] In the case of the death of a child, recovery is restricted to a maximum amount of $3,000.[177] In the case of the death of a spouse or putative spouse, no greater sum than $4,200 may be awarded.[178] In practice, these maximum amounts are now awarded automatically, unless there is good reason for reducing the award.[179] Awards have been reduced where the judge had misgivings about the stability of a relationship,[180] and where the couple had been separated for 11 years but had maintained a good relationship.[181] Alternatively, the court may refuse to make any award at all.[182]

A.46 The simple provision for solatium under the governing statute in the Northern Territory permits recovery to any of the persons for whose benefit an action under the wrongful death statute is brought, and the award is not subject to an upper limit. However, Muirhead J in *Cook v Cavenagh*[183] regarded this situation as unsatisfactory and held that grief must be the yardstick for recovery. He consequently held that a four year-old sister of a deceased child of six was too young to suffer from such grief. In *Rafferty v Barclay*[184] Mayo J stated that the sum was intended to provide consolation for such non-pecuniary losses as loss of society and for suffering endured by the plaintiff contemporaneously with, and after, the death, and such suffering is unaffected by the wealth or standing of the parties. In contrast, the remarriage of a surviving spouse may be relevant, if there is a prospect of equal happiness.[185]

A.47 The Northern Territory is alone among the Australian jurisdictions in providing a statutory remedy in the form of a head of damages for loss of consortium, which includes loss of society and companionship after the death of a spouse.[186] It has

[175] See South Australia Wrongs Act 1936-1975, ss 23a & 23b. The South Australia Law Reform Commission was of the opinion that the anomaly that a child cannot claim solatium will not matter if its recommendations in respect of the loss of parental assistance are enacted; (1981) 56th Report Relating to the Fatal Accidents Provisions of the Wrongs Act 1936.

[176] See the South Australian Wrongs Act 1936-1975, s 23a(2); s 23b(3).

[177] *Ibid*, s 23a(1).

[178] *Ibid*, s 23b(1).

[179] Eg *Groom v Starling* [1967] SASR 352 and *Hamlyn v Hann* [1967] SASR 387.

[180] *Sloan v Kirby* (1979) 20 SASR 263, award reduced to $3,500.

[181] *Ratcliffe v Goodfellow* (1981) 95 LSJS 154, award reduced to $2,000.

[182] South Australian Wrongs Act 1936-1975, s 23c(2).

[183] (1981) 10 NTR 35.

[184] [1942] SASR 147 (affirmed (1942) 66 CLR 669n).

[185] Although s 10(4)(h) of the Northern Territory's Compensation (Fatal Injuries) Act 1974 prohibits the reduction of damages on account of remarriage or the prospect of remarriage of a surviving spouse, in *Jones v Bleakly* (1981) 12 NTR 1 it was held that remarriage could limit the grief for which damages are awarded by way of solatium.

[186] Section 10(3)(c). For a wide-ranging discussion of the case law see: *Rozario v Fernandez* (1977) 16 ALR 445 (NT) at pp 452-456. Ward J stated that he would award the wife of the deceased something between $10,000 and $15,000 as a global sum incorporating those heads of damage under s 10(3) to which he regarded her as being entitled: this included

been held that the provisions under the Northern Territory legislation permitting awards for solatium and loss of consortium operate to extend recovery to a *de facto* spouse.[187]

A.48 Pecuniary benefits accruing to the claimant from the death of the deceased must be set off against the loss suffered.[188] However the principle of set-off has been so heavily modified by statute[189] that it has been contended that there is a general statutory principle against the off-setting of pecuniary benefits. Luntz argues that the statutory exclusions have probably been due to a legislative reaction to the courts' parsimony in refusing to award damages for non-pecuniary loss.[190] All jurisdictions now exclude the consideration of any sum paid or payable on the death of the deceased under any contract of insurance; any sum paid or payable out of any superannuation, provident, or like fund, or by way of benefit from a friendly society or trade union. In Queensland, South Australia, Victoria, the Australian Capital Territory and the Northern Territory, the courts are required by legislation not to take account of sums paid or payable as a gratuity. In the other jurisdictions, it is likely that the court will behave similarly, although there are decisions to the contrary.[191] In addition, the uniform policy of the workers' compensation statutes is to avoid the cumulation of benefits by beneficiaries. Accordingly, the compensation received under a scheme by an individual who is also a claimant under fatal accidents legislation will have either to be deducted from the damages recovered or paid over to the employer after judgment in the same way as in a personal injury action. Even in the absence of such statutory provision, the court will ensure a similar result.[192] The principle also operates in Victoria and Tasmania in respect of no-fault motor accident benefits paid to fatal accidents claimants.[193] In the Northern Territory no action for damages for death may be brought in circumstances in which no-fault benefits are payable, and so the question of deduction of benefits should not ordinarily arise.

awards for reasonable expenses incurred and to be incurred for deprivation of household services customarily performed; and solatium, as well as for loss of consortium. Where the common law action for loss of consortium survives for personal injury cases - and it has been expressly abolished in New South Wales (Law Reform (Marital Consortium) Act 1984), Western Australia (Law Reform (Miscellaneous Provisions) Act 1941), and Tasmania (Common Law (Miscellaneous Provisions) Act 1986) - the right of action terminates upon the death of the injured party, in accordance with the common law rule in *Baker v Bolton* (1808) 1 Camp 493; 170 ER 1033. The statutory remedy under the Northern Territory Compensation (Fatal Injuries) Act 1974, s 10(3)(c) is the only exception in this regard.

187 *Australian Telecommunications Commission v Parsons* (1985) 59 ALR 535, 546 (Federal Court of Australia).

188 *Public Trustee v Zoanetti* (1945) 70 CLR 266, 276-277.

189 Western Australia: s 5(2); New South Wales: s 3(3); South Australia: s 20(2aa); Queensland: s 15C; Australian Capital Territory: s 10(4); Tasmania: s 10(1).

190 See Luntz, *Assessment of Damages for Personal Injury and Death* (3 ed 1990) para 9.5.1. He further argues that the exclusions are ill-thought out and can result in practice in a further regressive redistribution of wealth.

191 Eg *Nolan v Martin* [1946] SASR 210.

192 See *Williams v Usher* (1955) 94 CLR 450.

193 Tasmania: Motor Accidents (Liabilities and Compensation) Act 1973, s 27; Victoria: Transport Accidents Act 1986, ss 93(11)(b), 150.

A.49 In general, benefits which a claimant under fatal accidents legislation derives from the estate of the deceased must be taken into account in the deduction of benefits, although this is not so in Tasmania[194] or the Northern Territory,[195] and in the Australian Capital Territory any interest in a dependant's dwelling house or its contents which is inherited from the deceased is to be disregarded in assessing the damages of that dependant.[196]

A.50 It is generally the case that contributory negligence on the part of the deceased will reduce the amount of damages payable to the dependants in the same proportion as it would reduce the damages paid to the estate of the deceased suing on the deceased's cause of action after his death.[197] However, the contributory negligence of the deceased is ignored in the Australian Capital Territory[198] and in Victoria in respect of deaths occurring after 20 December 1982.[199] Further, in New South Wales[200] the deceased's contributory negligence is ignored in all fatal accident action other than those arising out of motor accidents and work accidents,[201] which in practice constitute the majority of claims.

NEW ZEALAND

A.51 In New Zealand a statutory no-fault accident compensation system provides compensation for the dependants of a deceased person. The Accident Compensation Act 1972, as amended by the Accident Compensation Amendment Act 1973, instituted the scheme in 1974, and it was subsequently re-enacted in 1982. The legislation bars all rights of action for damages, whether in tort, contract or under statute, arising directly or indirectly from personal injury or death as a result of an accident. Instead, accident victims and their dependants may recover compensation under the scheme.[202] Before 1 April 1974, the recovery of damages for wrongful death was governed by the Death by Accidents Compensation Act 1952,[203] which provided a wrongful death action in very similar terms to Lord Campbell's Act to the spouse, parents and children of the deceased.

[194] See Fatal Accidents Act 1934, s 10(1)(b).

[195] See Compensation (Fatal Injuries) Ordinance 1974, s 10(4).

[196] See Compensation (Fatal Injuries) Act 1968, s 10(4)(e).

[197] South Australia: Wrongs Act 1936, s 27a(8); Queensland: Law Reform (Tortfeasors Contribution etc) Act 1952, s 10(4); Tasmania: Tortfeasors and Contributory Negligence Act, s 4(4); Western Australia: Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947, s 4(2); Northern Territory: Compensation (Fatal Injuries) Act 1974, s 11.

[198] Compensation (Fatal Injuries) Act 1968, s 11, substituted by Compensation (Fatal Injuries) (Amendment) Act 1991, s 4.

[199] Wrongs Act, s 26(4).

[200] Law Reform (Miscellaneous Provisions) Act 1965, s 10(4).

[201] Motor Accidents Act 1988, s 75; Workers' Compensation Act 1987, s 151N(5).

[202] See s 27(1) Accident Compensation Act 1982. See generally Stephen Todd (Gen Ed) *Law of Torts in New Zealand* (1991) ch 2; Ken Oliphant,"Distant Tremors: What's Happening To Accident Compensation In New Zealand?" (Paper prepared for Torts Section, SPTL Conference, Cardiff, 14 September 1995).

[203] See (1975) Reprinted Statutes of New Zealand, Vol 9, p 135.

Although the 1952 Act has never been abolished, it appears to have been rendered obsolete by the advent of the compensation scheme.[204]

A.52 In 1992 the scheme was radically amended by the Accident Rehabilitation and Compensation Insurance Act ("ARCIA 1992") amid governmental concern about the persistent increases in running costs of the scheme.[205] Consequently the provisions governing the recovery of compensation in respect of the death of a deceased are now contained in Part IV of the 1992 Act.[206]

A.53 The Act retains the general exclusion of other actions in situations that are covered by the Act,[207] and permits recovery by three categories of dependant: the "child" of the deceased, being the natural child of that person, or a step-child, where that child would ordinarily be regarded as a child of the deceased; the "spouse" of the deceased, either as a result of a legal marriage, or a person of the opposite sex to the deceased, with whom the deceased was in a relationship in the nature of a marriage immediately before his or her death; and "other dependant".[208] A claimant will not qualify as a "spouse" for the purpose of the legislation where he or she was living apart from the deceased at the time of the death and the deceased was not contributing financially to the person's welfare, unless the parties

[204] But see B Coote, "Suicide and the Claims of Dependants" (1976) NZLJ 54, who suggests that the case of the suicide victim who takes his own life whilst institutionalised or in custody may not fall within the ambit of the scheme. It has also been suggested since the implementation of the 1992 changes that the fact that ARCIA no longer describes itself as a "code" re-opens the possibility of an action at common law for negligently inflicted personal injuries that do not satisfy the statutory definition of an "accident": see D M Carden, "Accident Compensation and Lump Sums" (1992) NZLJ 404. Such an argument may have similar implications for the operation of the 1952 Act in fatal injury cases.

[205] The reforms replaced statutory lump sums for non-pecuniary loss in personal injury cases with a periodic sum payable as an "independence allowance". However, lump sum provisions in fatal injury cases were retained. The New Zealand government's concern arose from its observation that costs had increased at an average rate of 25% per annum between 1985 and 1990, and they exceeded $1 billion in the financial year, 1990-1991. In addition costs were expected to double in the subsequent four years: Hon W F Birch, *Accident Compensation - A Fairer Scheme* (1991) p 7. For general discussion of the 1992 changes see Ken Oliphant, "Distant Tremors: What's Happening To Accident Compensation In New Zealand?" (Paper prepared for Torts Section, SPTL Conference, Cardiff, 14 September 1995); R S Miller, "An Analysis And Critique Of The 1992 Changes To New Zealand's Accident Compensation Scheme" (1992) Cant Law Review 1; D Rennie, "Planned Changes to the New Zealand Accident Compensation Scheme" (April 1992) 18 CLB 768; R Mahoney, "Trouble in Paradise: New Zealand's Accident Compensation Scheme", published in S A M McLean (ed) *Law Reform and Medical Injury Litigation* (1995). The Accident Compensation Scheme is once again under review, this time by a government-appointed committee: see *Accident Compensation* (1995).

[206] At ss 55-62, as subsequently amended by 1993 No 55, ss 23-25.

[207] See s 14.

[208] The Act defines "other dependant" as a person who was financially dependent on a deceased person immediately before the deceased person's death by reason of the physical or mental condition of the person and who (a) had an annual income at the date of the deceased's death which did not exceed $12,740; and (b) is not a spouse of the deceased or a child of the deceased who has not attained the age of 18 years: s 3.

were living apart principally because of the health, imprisonment, or employment obligations of either of the parties.[209]

A.54 Under section 56 of the Act a surviving spouse is entitled to receive a lump sum or "survivor's grant" of $4,000 in respect of the death by personal injury of the deceased, to be divided equally where there exists more than one eligible "spouse" within the statutory definition in section 3. Similarly, a grant of $2,000 is to be awarded to each child of the deceased under the age of 18, and to any other dependant of the deceased.[210]

A.55 In addition, all three categories of dependant are eligible in certain circumstances for the receipt of a "weekly compensation". In the case of a surviving spouse, the award will comprise 60 per cent of the compensation for loss of earnings or loss of potential earning capacity (where the deceased was in full-time education) to which the deceased would have been entitled at the expiry of 5 weeks of incapacity or 6 months of incapacity, respectively, had he or she remained alive but been totally incapacitated.[211] Within this context, the amount of the deceased's entitlement had he lived is calculated by reference to his average weekly income before the disabling injury.[212] The method of calculation of the weekly compensation accruing to a child of the deceased or other dependant is similar, save that they are unable to recover a greater proportion than 20 per cent of the deceased's entitlement had he survived totally incapacitated.[213]

A.56 The period of compensation is regulated by the statute according to the category of dependant in question. Compensation payable to a surviving spouse will cease upon the latest of either, the expiry of 5 years from the date it first became payable, or the surviving spouse ceasing to have the care of any child (or other dependant) of the deceased, or that child attaining 18 years of age.[214] The receipt of weekly compensation is not affected by the subsequent remarriage of the spouse nor (similarly with the other classes of dependants) the age that the deceased would have attained had he lived.[215] Compensation payable to a child of the deceased shall cease upon the expiry of the calendar year in which the child reaches the age of 18, or upon the completion of full-time study at a place of education, whichever is the later. Where education continues past the age of 18, weekly compensation will cease in any case upon the child reaching 21 years of age.[216]

[209] See s 3.

[210] See s 56(b)(c).

[211] See s 58(4).

[212] See s 39. An election to purchase the right to receive compensation for loss of potential capacity may be made by "non-earners" - any person who has had at least 12 months continuous employment and makes the election while still in employment or within one month of leaving employment - for a period of between 3 months and 2 years: s 45.

[213] See ss 59(2); 60(2).

[214] See s 58(2).

[215] See s 58(3).

[216] See s 59(4).

A.57 Different criteria apply to claimants who are "other dependants". In their case periodic compensation is to cease upon the latest of the attainment of a capacity for work of 85 per cent or more,[217] the receipt of annual savings greater than $12,740, or the attainment of the national superannuation qualification age.[218]

A.58 There exist additional technical provisions concerning the entitlement to weekly compensation of the spouse or "other dependant" where they may be in receipt of national superannuation.[219]

THE UNITED STATES

A.59 Today each of the states has some statutory framework to provide for the recovery of "wrongful death" damages. The great majority have substantially adopted the provisions of Lord Campbell's Act, allowing recovery to certain classes of surviving dependants.[220] Other states' legislation more closely resembles - to varying degrees - survival statutes under which damages for the wrongful death of a deceased are measured with regard to the loss occasioned to the deceased's estate by the death.[221]

A.60 There are, however, many additional complications. Some "loss to the estate" statutes require that damages, once recovered, be distributed amongst statutory beneficiaries.[222] Several "true" wrongful death statutes[223] have been judicially construed as requiring assessment of damages to be made with regard to the loss to the estate in certain circumstances,[224] or in all instances,[225] although, once recovered, damages are then distributed to the statutory beneficiaries. Many states have *both* wrongful death acts and survival statutes.[226] Another statutory form exists

[217] Determined in accordance with statutory scales prescribed by the Act.

[218] As specified in s 3 Social Welfare (Transitional Provisions) Act 1990.

[219] See ss 58(5), 60(4).

[220] Eg Arizona, Arkansas, Colorado, District of Columbia, Florida.

[221] Eg Connecticut, New Hampshire, Tennessee. See Speiser, *Recovery for Wrongful Death* (2d) § 3.2. Assessment of damages under "loss to the estate" statutes has been performed in accordance with a variety of different criteria in different states, although Speiser argues that the most prevalent measure of the loss - the present value of the deceased's probable future net earnings had he lived out his normal life expectancy - approximates in any case to the measure recovered under statutes modelled upon Lord Campbell's Act, since the deceased's earnings less his own personal expenses would usually equate to the amount his dependants could recover for pecuniary losses under most "loss to survivors" statutes: *Recovery for Wrongful Death* (2d) § 3.62. But see below (loss of inheritance) para A.68.

[222] See, for example, the statutes of Louisiana, Maine, New Hampshire, Rhode Island and Tennessee. See also Speiser, *Recovery for Wrongful Death* (2d) § 3.2.

[223] That is, statutes under which a new cause of action in favour of the survivors arises upon the deceased's death.

[224] See, for example, Delaware's "true" wrongful death statute. If the deceased was a married adult damages are assessed by reference to the loss to the survivors, but if the deceased is an unmarried adult or a child, then the damages are assessed on a "loss to the estate" basis.

[225] See, for example, the wrongful death statute of Kentucky.

[226] See, for example, Delaware: if no action for fatal injuries is pending at the time of death, then the survivors must pursue an action under the wrongful death statute. If, however, such a fatal injuries action is pending upon the deceased's death, then damages must be

only in Alabama: there the statute is essentially penal rather than compensatory in nature, and the entire wrongful death award consists solely of punitive damages assessed in proportion to the degree of the wrongdoer's culpability.[227] In some instances, there may exist a separate remedy under federal law,[228] or special legislative schemes for deaths occurring in certain circumstances.[229] In addition to these statutory remedies, the United States Supreme Court in *Moragne v States Maine Line, Inc*,[230] has created a judge-made cause of action under general maritime law for the instance of wrongful death caused by a violation of maritime duties.[231]

A.61 Actions for damages for wrongful death, even those brought under provisions modelled upon Lord Campbell's Act, are normally brought in the name of the deceased's personal representative rather than by the specified dependants themselves.[232] Many wrongful death statutes set up separate classes of preferred claimants based upon the relationship of the claimant to the deceased: where no members of a primary preferred class exist, the right of action passes to the class next in line of preference. Other states merely designate certain persons as those on whose behalf the action is to be brought,[233] and these vary from state to state.

A.62 As a general rule it would appear that a *de facto* partner may not recover under a wrongful death statute for pecuniary loss in respect of the death of a partner, being neither a spouse nor an heir, even where the couple had lived together as husband and wife for a period of 7 years.[234]

recovered in the enlarged survival-death action; or Maine: if death was preceded by conscious pain and suffering then death damages must be recovered in the survival-death action.

[227] See *Eich v Gulf Shores* 300 So 2d 354 (1974, Ala).

[228] Eg Federal Torts Claims Act, which provides an exclusive remedy for actions against the United States government. The cause of action is enforced under the Act in accordance with the law of the state in which the wrongful act or default occurred and, therefore, with certain exceptions, state law is controlling on issues of both liability and damages.

[229] Eg Workers' Compensation statutes, which operate in many states to displace wrongful death acts as the exclusive remedy for certain kinds of fatal injury; in Connecticut there exists special provision for the recovery of damages from the State Highway Commission in respect of injury or death caused by the neglect or default of the state in the maintenance of public highways: Gen Stats: s 13-87.

[230] 398 US 375 (1970), on remand 5th Cir, 446 F2d 906.

[231] In so doing the Supreme Court rejected the contention that the rule enunciated in *Baker v Bolton* (1808) 1 Camp 493; 170 ER 1033 had at any time been observed in the United States. This decision is important in that its significance as a precedent is not restricted to the field of maritime law. In *Gaudette v Webb* 284 NE 2d 222 (1972), the Supreme Court of Massachusetts decided that a common law right to an action for wrongful death existed in that state.

[232] Eg *Webster v Norwegian Mining Co* 70 P 276 (1902). Although under many of the statutes a dependant may bring the action: eg *Nunez v Nunez* 545 P2d 69 (1976).

[233] Over half of the states do not classify beneficiaries: see Speiser, *Recovery for Wrongful Death* (2d 1975) vol 1, § 10.1, n 17.

[234] *Cassano v Durham* 436 A 2d 118 (1983, New Jersey).

A.63 The child of the deceased is expressly provided for in most of the wrongful death statutes, though sometimes as a secondary, rather than a primary, beneficiary. It is often the case that the statute will include the child within the definition of the phrase "heirs" or "next of kin", which are alternative terms for "dependants" employed in some instances. In *Levy v Louisiana*[235] it was held by the US Supreme Court that the legitimacy or otherwise of a child was irrelevant to the tortfeasor's liability, and subsequent cases have confirmed this approach.[236] A number of cases have held that an action for the wrongful death of an adoptive parent is maintainable by, or for the benefit of, a legally adopted child,[237] and in some states there exists express statutory provision to this effect,[238] but different conclusions have been reached under differently worded statutes.[239] The cases are also in conflict on the issue of whether a parent may recover for the death of an adopted child.[240] The cases concerned with the recovery of damages for the wrongful death of a stepchild or step-parent are far from numerous, but it is generally the practice of the courts to construe the terms "mother", "father", "parent" or "child" to preclude recovery for the death of a step-relation,[241] although it has been held that where a deceased had stood *in loco parentis* to the child, recovery would be allowed.[242]

A.64 Grandchildren who are the next of kin or the closest heirs of the deceased clearly are included within the terms of a statute designating heirs or next of kin as beneficiaries of an action in respect of the wrongful act. But such persons cannot claim under a statute which more specifically designates beneficiaries and yet does not include grandchildren.[243] It is possible that grandparents may be included in the term "parents" in some states depending on the circumstances.

A.65 Specific provision is made in some jurisdictions for recovery by brothers or sisters of the deceased,[244] and where the legislation allows recovery generally to "next of kin" the courts have consistently held that siblings fall within that class of beneficiaries.[245] The courts in some, though not all, jurisdictions favour a broad construction of "heirs" and "next of kin", awarding damages to remoter collateral

[235] 391 US 68 (1968).

[236] Eg *Hollingsworth v Taylor* 442 NE 2d 1150 (1982).

[237] Eg *Moon Distributors v White* 434 SW 2d 56 (1968); *Martz v Revier* 170 NW2d 83 (1969).

[238] At least in some circumstances: eg Florida.

[239] Eg *Kruse v Pavlovich* 6 La App 103 (1927): the Louisiana court denied recovery to an adopted child in respect of the death of her adoptive mother where adopted children are not among the persons specifically designated by the legislation as beneficiaries.

[240] See Speiser, *Recovery for Wrongful Death* (2d 1975) vol 2, § 10.14.

[241] Speiser, *Recovery for Wrongful Death* (2d 1975) vol 2, § 10.13, 10.9.

[242] *Moon Distributors v White* 434 SW 2d 56 (1968).

[243] See *Viau v Batiste* 332 So 2d 512 (1976, La App)

[244] Eg in Arkansas, Florida, Louisiana, Maryland, Missouri, New Mexico, Virginia, Washington, Wisconsin.

[245] Eg *Collins v Becnel* 297 So 2d 506 (1976, La App); *Martz v Revier* 170 NW 2d 83 (1969).

relatives, although at least some of the older authorities restricted the interpretation of "heirs" to lineal descendants.[246]

A.66 Occasionally legislation grants a right to recovery for the benefit of any person wholly dependent upon the deceased, in addition to those beneficiaries specifically designated by the statute, who often are not required to prove dependency at all.

A.67 Recovery for claimants' loss of support is universally recognised by those states that compensate individual beneficiaries' losses, and damages will include the loss of all financial contributions the deceased would have made to his dependants had he lived.[247] All the deceased's personal expenses which ceased at death and all the expenses of running a business, service or profession which ceased at death are to be deducted from the deceased's gross future earnings.[248]

A.68 It is clear then that loss of support constitutes only what it is likely that the deceased would have spent on the beneficiaries during his or her lifetime. Any surplus accumulation cannot be recovered as loss of support, but may be recoverable as loss of inheritance.[249] This head of damages applies not merely to the husband-wife relationship but also to other relationships that fall under the relevant statute. For example, in *Sheahan v North Eastern Illinois Regional Computer*,[250] it was held that siblings of the deceased may recover under the Illinois wrongful death statute for a proven loss of inheritance.

A.69 There exists little consensus upon the possible recovery of pecuniary expenses such as medical and funeral expenses, and the law is often unclear. A number of state and federal courts have asserted that medical expenses are a proper element of damages, at least where the beneficiary is liable to pay them.[251] Other states have denied recovery.[252] A minority of jurisdictions statutorily provide for the award of funeral expenses,[253] and even where recovery is expressly allowed, the wrongful death statutes vary, for example, in regard to who may recover damages. However, funeral expenses are in practice recoverable in a majority of states under federal non-statutory death remedies when the plaintiff has paid or is legally liable to pay

[246] Eg *Myers v Denver & RGR Co* 157 P 196 (1916).

[247] See *Sea-Land Services, Inc v Gaudet* 414 US 573 (1974); *Circle Line Sightseeing Yachts v Storbeck* 325 F 2d 338 (1963, CA2 NY).

[248] Eg *Meehan v Central R Co* 181 F Supp 594 (1960, DC NY), (applying New Jersey law)

[249] *Yowell v Piper Aircraft Corp* 703 SW 2d 630 (1986, Tex). Those jurisdictions that disallow recovery of such damages appear to do so on the basis that the loss is too speculative.

[250] 496 NE 2d 1179 (1986, Ill App 1st Dist 3d Div).

[251] Eg *Barnett v Trinity Universal Ins Co* 286 So 2d 770 (1973, La App).

[252] Eg *Acme Products Co v Wenzel* 448 SW 2d 139 (1969, Tex Civ App).

[253] Alaska, Connecticut, District of Columbia, Georgia, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, New Jersey, N Carolina, Ohio, Pennsylvania, S Carolina, Tennessee, Virginia, Wisconsin, Wyoming.

them. Further, in some states, the costs of administering the deceased's estate are also recoverable.[254]

A.70 It is widely accepted in actions brought under the type of wrongful death statutes modelled on Lord Campbell's Act that the fair and reasonable pecuniary value of services which the beneficiaries might have expected to receive had the deceased lived may be awarded in damages.[255] The husband, wife, parents, and children of the deceased have recovered such losses,[256] and where there is sufficient proof to show a reasonable expectation, remoter relatives may also recover.[257]

A.71 A child's loss of training, nurture, education and guidance as a result of his or her parent's death is also characterised as a pecuniary loss in almost all jurisdictions that have provisions akin to Lord Campbell's Act, at least where the parent in question was qualified by disposition and education to supply the training and education for which damages are sought. Many authorities have asserted the need for proof that the parent was so qualified.[258] In some states specific provision is made for this head of damages under the state wrongful death legislation.[259]

A.72 The great majority of American states also permit recovery to some surviving dependants of such damages as loss of companionship, society and consortium, although emotional distress and bereavement consequent upon the death are not generally compensatable. Generally, however, the dependants entitled to recover are restricted to spouses, parents and children.[260] Consortium has been defined in a number of ways and no precise definition has ever been commonly accepted. In 1974 the United States Supreme Court asserted in *Sea-Land Services v Gaudet*[261] that the term "society" embraces a wide range of mutual comforts enjoyed by members of a family. These benefits include love, affection, care, attention, comfort, companionship and protection. In *Hitaffer v Argonne Co*[262] it was stated

[284] For example, Georgia, Illinois, Indiana, and Pennsylvania. See also *Onward Corp. v National City Bank* 290 NE2d 797 (1973, Ind App); *Scott v Eastern Air Lines, Inc.* 399 F2d 14 (1967, CA3 Pa) and *First Nat. Bank v Niagara Therapy Mfg Corp.* 229 F Supp 460 (1964, DC Pa).

[255] See *Sea-Land Services v Gaudet* 414 US 573 (1974). Generally such damages are also recoverable under "loss to the estate" statutes where damages, once recovered, are distributed amongst the statutory beneficiaries, but otherwise they are not, on the basis that the loss of services of the deceased is personal to the survivors rather than to the estate.

[256] See Speiser, *Recovery for Wrongful Death* (2d), § 3.43, nn 23-26.

[257] Eg *Small v Memorial Hospital* 106 Misc 2d 487 (1980): recovery by brother.

[258] Eg *O'Connor v US* 269 F 2d 579 (1959, CA2 NY), a Federal Torts Claims Act case applying Oklahoma law.

[259] Eg Alaska, Hawaii, Kansas, Maryland, Massachusetts.

[260] But see criticism of this restriction in *Childers v Shannon* 444 A 2d 1141 (1982) and the decision of the California court in *Butcher v Superior Court* 139 Cal App Jd 58 (1983) that cohabitation may be a sufficient basis for recovery if the plaintiff is able to establish that the relationship is "stable and significant".

[261] 414 US 573 (1974), reh den 415 US 986. The case was decided under the general maritime law after the Supreme Court decision in *Moragne v States Maine Lines, Inc* 398 US 375 (1970), on remand 5th Cir, 446 F 2d 906. However the court made it clear that it was summarising in addition the rules of law applicable to recovery under state wrongful death statutes.

[262] 183 F 2d 811 (1950).

that the term included the love, affection, society, companionship, sexual relations and solace formerly provided by the deceased, "all welded into conceptualistic unity".[263] More recent decisions have echoed these conclusions. In *Howard Frank v Supreme Court*,[264] the Arizona Supreme Court held that the basic elements of loss of consortium included love, affection, protection, support, services, companionship, care, society and - where the relationship is marital - sexual relations. The whole bundle of elements was abbreviated to simply "loss of society and companionship". Numerous wrongful death statutes expressly provide that such elements may be recovered,[265] and several jurisdictions ordinarily bound by the pecuniary loss rule nevertheless permit the award of the "pecuniary value" of this head of loss as an element of compensatable pecuniary injury.[266] It would appear that the trend in American jurisdictions is irrefutably in favour of recovery of such loss.[267]

A.73 Some states have extended recovery to the emotional trauma suffered by survivors in consequence of the death of the deceased.[268] However the majority of American states, including all "loss to the estate" jurisdictions and several jurisdictions which apply statutes similar to Lord Campbell's Act and which allow damages for other types of essentially non-pecuniary loss such as loss of consortium, preclude recovery for such intangible elements as bereavement, emotional trauma or mental anguish of the survivors. The Texas state courts, which have allowed such recovery assert that:

> the term "mental anguish" implies a relatively high degree of mental pain and distress. It is more than mere disappointment, anger, resentment, or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and or public humiliation.[269]

This wide definition is commonly cited in Texas to award damages for mental anguish in any wrongful death action, not merely in respect of a parent's loss of a

[263] *Hitaffer v Argonne Co* 183 F 2d 811 (1950), 814, *per* Circuit Judge Clark.

[264] 722 P 2d 955 (1980 Ariz).

[265] Eg Alaska, Arkansas, Florida, Hawaii, Kansas, Missouri, Nevada, W Virginia, Wisconsin, Wyoming.

[266] See *Bullard v Barnes* 102 Ill 2d 505, 468 NE 2d 1228: the Illinois Supreme Court observed that, of the 23 states which limit recovery to "pecuniary loss", 14 allow recovery for loss of society of a child.

[267] See Speiser, *Recovery for Wrongful Death* (2d), § 3.49 (1987 Supplement).

[268] See Tex Rev Civ Stat Ann art 4671; in *McCardless v Beech Aircraft Corp* 779 F 2d 220 (1985), a distinction was drawn between loss of society, which was regarded as the loss of positive benefits by a survivor, and the head of mental anguish and grief, which was a purely negative emotional response to the death itself. The court in *Sanchez v Schindler* 651 SW 2d 249 (1983, Tex) awarded $102,500 in respect of the mental anguish of a mother upon her son's death; in *Wheat v US* 630 F Supp 699 (1986, US DC WD Tex), it was held that the parents of an adult, married woman could recover under the FTCA, to which Texas law applied, for physical pain and mental anguish in the amount of $200,000 each.

[269] *Trevino v Southwestern Bell Tel Co* 582 SW 2d 582 (1979).

child;[270] there need also be no evidence produced as to the degree of mental pain and suffering of the claimant: the mere fact of a family relationship between the plaintiff and the deceased is sufficient to require that the issue be considered by the jury.[271] This is not the case, however, in the majority of states that allow such awards: most require proof of physical injury resulting from the mental anguish or a physical manifestation of mental anguish or, at least, the showing of more than normal grief upon the death of a loved one.[272] In Arkansas, Florida,[273] Kansas, Maryland[274] and West Virginia damages for the survivors' mental anguish and grief are expressly provided by statute.

A.74 The wrongful death statutes of many states originally included ceilings on "wrongful death" damages recoverable. However, today no general limitations on the damages recoverable for pecuniary or non-pecuniary loss as a result of a wrongful death remain.[275] Some states impose limits where there are few dependants,[276] and Maryland still has a limit on the quantum of funeral expenses recoverable.[277]

A.75 As a general rule, the Collateral Source Rule applies in wrongful death actions, that is to say that benefits received from a collateral source are generally disregarded when assessing the damages awarded under a wrongful death statute.[278] The rationale behind the rule is commonly said to be that the windfall which these collateral sources represent ought to be received by the estate or the dependants and not by the defendant who in no way caused, created or contributed to it.[279] However, where the source of the collateral benefit is the defendant, then the benefit does not spring from a collateral source and the damages awarded are reduced accordingly.[280]

A.76 It is well-settled that the benefits of any life assurance policy are disregarded.[281] Similarly, hospital and medical insurance payments do not go to diminish the

[270] *Cavnar v Quality Control Parking* 696 SW 2d 549 (1985, Tex).

[271] *Moore v Lillebo* 722 SW 2d 683 (1986, Tex).

[272] See eg *Payton v Abbott Labs* 437 NE 2d 171, 175 (1982).

[273] In an action by the parents for the death of a minor child or spouse.

[274] Where the deceased was a minor child or spouse.

[275] See, Speiser, Recovery for Wrongful Death (2nd ed 1975 & Cumulative Supplement 1987), §§ 7.1-7.2.

[276] For instance, in Indiana a limit remains if there is no surviving spouse or dependent child; and a limit still applies in Oregon if there is no surviving spouse, dependent child, or dependent parent.

[277] See Maryland Code Ann Art 93, §112 (1957).

[278] See generally, Speiser, Recovery for Wrongful Death (2nd ed 1975 & Cumulative Supplement 1987), §§ 6.7-6.11.

[279] See eg *Stathos v Lemich* 213 Cal App 2d 52 (1963); *El Paso E R Co v Buttrey* 260 SW 897 (1924); *Smymer v Gaines* 332 So 2d 655 (1976). See also Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 4.4-4.51.

[280] See eg *Weiman v Ippolito* 324 A 2d 582 (1974); *Trice v Wilson* 149 SE 2d 530 (1966).

[281] *Bangor Aroostook R v Jones* 36 F 2d 886 (1929); *El Paso E R Co v Buttrey* 260 SW 897 (1924).

damages awarded.[282] It has been held that insurance for funeral expenses does not fall within the collateral source rule,[283] although other states apply the rule differently.[284] Receipt of public or private pensions or social security payments do not go to mitigate damages where the beneficiary is entitled to the pension as the deceased's survivor.[285] The value of medical care granted free of charge by the government is generally not deducted from damages.[286] The benefit of this windfall is, however, negated by statutory provisions under which the Federal Government is subrogated to the claim for the reasonable value of care and treatment already furnished or to be furnished in the future.[287] Receipts from the deceased's estate are also generally disregarded when assessing damages,[288] although there is authority for the proposition that damages cannot be claimed for the loss of expected income which would have been derived from investments of the deceased, which investments the claimant has inherited.[289]

FRANCE

A.77 In France[290] the dependant's action for damages in respect of wrongful death is in general governed by *droit civil*, as laid down by the French Civil Code.[291] However, where the wrongful death is caused by a public authority the essentially judge-

[282] *Burke v Byrd* 188 F Supp 384 (1960) (a personal injury case in which the principle was said to apply to wrongful death claims also); *Saunders v Schultz* 170 NE 2d 163 (1960).

[283] *Freer v Rowden* 247 NE 2d 635 (1969, Illinois).

[284] *Schales v United States* 488 F Supp 33 (1979, Arkansas).

[285] *Hughes v Clinchfield R Co* 289 F Supp 374 (1968) (pensions); *United States v Hayashi* 282 F 2d 599 (1960) (social security payments).

[286] See eg *Sainsbury v Pennsylvania Greyhound Lines, Inc* 183 F 2d 548 (1950, Maryland); *Reichle v Hazie* 71 P 2d 849 (1937, California); *Mullins v Bolinger* 55 NE 2d 381 (1944, Indiana). Some states do not, however allow recovery for medical care provided free of charge by the government: *Englewood v Bryant* 68 P 2d 913 (1937, Colorado); *Di Leo v Dolinsky* 27 A 2d 126 (1920, Connecticut).

[287] 42 USCS §§ 2551-2653. See Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper 144, para A.70.

[288] *Wiester v Kaufer* 247 NW 237 (1933, Minnesota); *Sloss-Sheffield Steel & Iron Co v Holloway* 40 So 211 (1905, Alaska).

[289] *Denver & R G R Co v Spencer* 52 P 211 (1898). See also *Elliott v Willis* 412 NE 2d 638 (1980, Illinois).

[290] French law has provided the model for a number of other jurisdictions, including Belgium, which has a Civil Code very similar to that of its neighbour. The relevant provisions are Articles 1382 to 1386 of the Code, and although judicial decisions have varied, the text of the law itself is, to a large extent, common to the two countries. Most notably, both jurisdictions permit the recovery of "moral damages" to survivors, but not the award of a statutory sum for bereavement: see H McGregor, *International Encyclopaedia of Comparative Law*, vol XI, ch 9; S Fredericq, "The Belgian System", published in C Oldertz & E Tidefelt (eds) *Compensation for Personal Injury in Sweden and Other Countries* (1988).

[291] Recovery to the deceased's dependants is afforded via a liberal interpretation of Chapter II, Articles 1382-1384 of the Code. The Code is supplemented by further legislation, such as the law relating to road accidents of 5 July 1985, *Loi No 85-677*, also called *Loi Badinter*, which introduced a strict objective liability upon the owner or driver of a vehicle for damage, including personal injury or death, caused by a motor vehicle: see P Szollosy, "Recent Trends in the Standard of Compensation for Personal Injury in a European Context" (1991) 3 Nordisk Forsikringstidsskrift 191, 193.

made *droit administratif* applies, in which case the action falls within the jurisdiction of the administrative courts.[292]

A.78 French law awards damages for both pecuniary losses and *dommage moral*, and it draws no basic distinction between the two: the qualifying claimant is entitled to recover for all his or her losses. Anyone who can actually prove a loss is eligible to claim.[293] With regard to the dependants' future pecuniary loss, a surviving spouse will receive a lump sum or annuity exhaustible upon attaining the age of 60 or 65. The likely period of loss attributed to surviving children will run until the age of 16, 18 or 20 depending on the likely duration of the child's educational career. Reasonable funeral expenses are recoverable by the survivors. Medical expenses will generally be covered in full or in part by social security or work compensation schemes.[294]

A.79 Payments made under private insurance contracts are not deducted from tort damages. However where a claimant has received benefits to which he or she has a right under social security legislation, his or her right of action at tort law subsists only in respect of that proportion of his or her loss that has not been so compensated. The relevant public authority is subrogated to the victim's right of action against the tortfeasor in respect of "physical" loss for which the claimant has received compensation under social security legislation.[295]

A.80 French law recognises the non-pecuniary loss suffered by persons closest to the deceased as an element of loss within *dommage moral*, the equivalent to the English bereavement award. This is recoverable by an extensive range of claimants and includes compensation for bereavement and loss of society of, generally, anyone able to prove such loss or distress. A fiancé(e) or child to whom the deceased stood *in loco parentis* may claim, as may a mistress but she must prove the nature of the relationship.[296] The award is made as a global sum and will vary according to the nature of the relationship between the deceased and claimants.[297]

[292] See L Neville Brown & J S Bell, *French Administrative Law* (4th ed 1993) p 174-177.

[293] See G Viney & B Markesinis, *La Reparation du Dommage Corporel* (1985) p 83.

[294] Eg the social work accident insurance system pays benefits at a per diem rate dependent upon the gross monthly salary of the deceased subject to an official ceiling (at 1 January 1991) of Ff 11,620: see W Pfennigstorf, *Personal Injury Compensation* (1993) para 4.1.

[295] See the law of 27 December 1973, confirmed by Article 25 of the law of 5 July 1985.

[296] See G Viney & B Markesinis, *La Reparation du Dommage Corporel* (1985) p 84.

[297] Several studies provide examples of the probable levels of awards in various hypothetical fact situations. One such work estimates the award of non-pecuniary damages to the wife and two children of a 40 year-old doctor of Ff 80,000 and Ff 60,000 respectively: see D McIntosh and M Holmes, *Personal Injury Awards in EU and EFTA Countries: An Industry Report* (1994) p 171. In a different model, it is estimated that the parents and siblings of a 20 year-old single woman would be entitled to Ff 160,000 and Ff 30,000 each respectively for bereavement upon the death of the deceased: *ibid*, at p 178. Pfennigstorf suggests similar sums would be awarded by French courts: in respect of the death of a 75 year-old woman, the quantum of non-pecuniary damages would be in the order of Ff 60,000 to the spouse, Ff 30,000 to each child, Ff 15-20,000 to each sibling, and Ff 12,000 to each other eligible relative; in the case of the death of a medical student, each parent is likely to be able to recover in the region of Ff 60,000 moral damages: W Pfennigstorf, *Personal Injury Compensation* (1993) pp 37-63. See also P Szollosy, "Recent Trends in the Standard of

A.81 Where recovery is governed by *droit administratif*, the courts have in the past been less generous than the civil courts with regard to the categories of loss recognised and in the measure of damages. The Conseil d'Etat had long refused to indemnify for mental anguish, but more recent decisions have departed from this case law[298] and increasingly generous awards have been made. The benefits that may be derived by surviving dependants under social security or accident compensation legislation are not to be taken into account in the assessment of non-pecuniary damages.

GERMANY

A.82 The recovery by dependants for the wrongful death of a deceased is governed in Germany by Articles 844 to 846 of the German Civil Code.[299] Article 844(II) defines an eligible "third party" claimant as someone to whom, by virtue of his or her relationship with the deceased, the deceased was or would have been under a legal duty of maintenance. This duty of maintenance must exist at the time of injury, even though no support may yet have been provided at this time. Such claimants may include the spouse, minor children, ascendants and, in certain circumstances, the separated and divorced spouses of the deceased.[300] However, the fiancé(e) or cohabitant of the deceased will be excluded, there being no such legal obligation of support prior to or in the absence of marriage.[301]

A.83 The categories of recoverable loss under German law have been described as very much like those under the common law.[302] A claimant cannot claim for mental anguish but may be compensated for pecuniary loss.[303] Article 844 of the Civil Code provides for the recovery of the funeral costs by the person who has the duty to bear those costs.[304] In practice an elaborate and complex system of social insurance and accident compensation schemes provide for the principal elements of pecuniary loss suffered by dependants.[305] Such benefits may include medical expenses, funeral expenses, survivors' benefits and pensions.

A.84 Article 845 allows further compensation in respect of the loss of services of the deceased in the claimant's household or business. Article 845 actions are rarer

Compensation for Personal Injury in a European Context" (1991) 3 Nordisk Forsikringstidsskrift 191, at p 216.

[298] See *Letisserand*, CE 24 November 1961, where the Conseil d'Etat departed from its earlier decisions and awarded Ff 1,000 to a father in respect of his mental anguish upon the death of his son in a road accident involving a negligently driven administrative vehicle.

[299] *Burgerliches Gesetzbuch (BGB)*.

[300] The list is subject to the detailed provisions contained in the family law section of *BGB*: see Articles 1360-61, 1569 (*et seq*), 1601-2, 1766.

[301] See eg *KG NJW* 1967, 1089.

[302] See Professor B S Markesinis, *The German Law of Torts* (3rd ed 1994) p 926.

[303] Including all medical expenses reasonably incurred prior to the death: Article 249 II *BGB*.

[304] Recoverable expenses include the costs of the burial place, obituary notice, providing food for the funeral guests, and a clothing allowance for the funeral clothes (solely to relatives of the deceased): see notes on presentation given by Mr Peter Fendel, APIL European Conference, 9 March 1996.

[305] See W Pfennigstorf, *Personal Injury Compensation* (1993) p 65.

than those of the preceding provision and are characteristically brought by senior family members upon the death of a younger relative: under certain provisions of German law, natural and adopted children are, in certain circumstances, under a duty to provide such services.[306] However, the wrongful death of a wife will entitle her husband to claim for loss of support damages under Article 844 (II), rather than for the loss of her services.[307] The operation of the two provisions clearly overlap and it does not appear that the distinction between loss of support and loss of services operates in the manner to which many of the common law jurisdictions are accustomed.[308]

A.85 All the consequences of the death must be taken into account in order that the claimants recover solely their net loss as a result of the death. Accordingly the general rule is that collateral benefits are deducted from the plaintiff's damages, although the third party provider of the benefit will often be subrogated to the plaintiff's claim. In particular social security and compensation scheme benefits[309] are to be deducted from recoverable loss of support damages. Damages are not recoverable, or may be reduced, if it can be shown that the plaintiff would have lost his maintenance income in any case.[310] The dependant's claim will also be reduced to take into account the deceased's contributory fault in the occurrence of the harm.[311]

[306] See Articles 1619, 1754 *BGB*.

[307] *BGHZ* 51, 109.

[308] See Professor B S Markesinis, *The German Law of Torts* (3rd ed 1994) ch 4; H McGregor, *International Encyclopaedia of Comparative Law*, vol XI, para 9-223.

[309] Eg those benefits recovered under the Road Traffic Act, 19 December 1952 (s 7 *StVG*, *BGBl I* p 837). Unlike the provisions of the *BGB*, s 12 *StVG* imposes caps on recovery: eg even in the case of the deaths of more than one person, damages may not exceed DM 750,000 as a lump sum or DM 45,000 in the form of an annuity.

[310] Eg, through an imminent dismissal: *BGHZ* 10, 6; *BGH VersR* 1963, 674.

[311] Article 844 (II) *BGB* in conjunction with Article 254 *BGB*.

A.86 It is accepted under the Code that awards can either be made as a lump sum to the claimant or in the form of periodic payments, although a preference is expressly stated for the latter.[312] The payment of an annuity avoids the problem of assessing once and for all at trial the likelihood of remarriage of a surviving spouse, and also the problem of the impact of future inflation upon capital sums. Such annuities are capitalised on the basis of mortality tables and standard interest discounts. However, it would appear that in practice, lump sums are normally awarded as that is what both plaintiffs and defendants prefer.[313]

[312] Article 843 (II) provides that the payment of an annuity will be the norm, unless a good reason ("ein wichtiger Grund") exists.

[313] See Professor B S Markesinis, *The German Law of Torts* (3rd ed 1994) p 919; D McIntosh and M Holmes, *Personal Injury Awards in EU and EFTA Countries: An Industry Report* (1994) p 188; P Szollosy, "Recent Trends in the Standard of Compensation for Personal Injury in a European Context" (1991) 3 Nordisk Forsikringstidsskrift 191, at p 206.

APPENDIX B
STATUTES

CURRENT STATUTES

FATAL ACCIDENTS ACT 1976[1]

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;

(b) any person who-

(i) was living with the deceased in the same household immediately before the date of 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 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 child of the family in relation to that marriage;

(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.

(5) In deducing any relationship for the purposes of subsection (3) above-

(a) any relationship of affinity 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.

[1] As amended by the Administration of Justice Act 1982 and the Damages for Bereavement (Variation of Sum) (England and Wales) Order SI 1990 No 2575.

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 of the deceased; and

(b) where the deceased was a minor who was never married-

(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 £7,500.

(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.

2. Persons entitled to bring the action

(1) The action shall be brought by and in the name of the executor or administrator of the deceased.

(2) If-

(a) there is no executor or administrator of the deceased, or

(b) no action is brought within six months after the death by and in the name of an executor or administrator of the deceased,

the action may be brought by and in the name of all or any of the persons for whose benefit an executor or administrator could have brought it.

(3) Not more than one action shall lie for and in respect of the same subject matter of complaint.

(4) The plaintiff in the action shall be required to deliver to the defendant or his solicitor full particulars of the persons for whom and on whose behalf the action is brought and of the nature of the claim in respect of which damages are sought to be recovered.

3. Assessment of damages

(1) In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.

(2) After deducting the costs not recovered from the defendant any amount recovered otherwise than as damages for bereavement shall be divided among the dependants in such shares as may be directed.

(3) In an action under this Act where there fall to be assessed damages payable to a widow in respect of the death of her husband there shall not be taken account the re-marriage of the widow or her prospects of re-marriage.

(4) In an action under this Act where there fall to be assessed damages payable to a person who is a dependant by virtue of section 1(3)(b) above in respect of the death of the person with whom the dependant was living as husband or wife there shall be taken into account (together with any other matter that appears to the

court to be relevant to the action) the fact that the dependant had no enforceable right to financial support by the deceased as a result of their living together.

(5) If the dependants have incurred funeral expenses in respect of the deceased, damages may be awarded in respect of those expenses.

(6) Money paid into court in satisfaction of a cause of action under this Act may be in one sum without specifying any person's share.

4. Assessment of damages: disregard of benefits

In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.

5. Contributory negligence

Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under the Law Reform (Miscellaneous Provisions) Act 1934 the damages recoverable would be reduced under section 1(1) of the Law Reform (Contributory Negligence) Act 1945, any damages recoverable in an action under this Act shall be reduced to a proportionate extent.

6. Consequential amendments and repeals

(1) Schedule 1 to this Act contains consequential amendments.

(2) The enactments in Schedule 2 to this Act are repealed to the extent specified in the third column of that Schedule.

7. Short title, etc

(1) This Act may be cited as the Fatal Accidents Act 1976.

(2) This Act shall come into force on 1st September 1976, but shall not apply to any cause of action arising on a death before it comes into force.

(3) This Act shall not extend to Scotland or Northern Ireland.

LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1934[2]

1. Effect of death on certain causes of action

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act 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. Provided that this subsection shall not apply to causes of action for defamation.

(1A) The right of a person to claim under section 1A of the Fatal Accidents Act 1976 (bereavement) shall not survive for the benefit of his estate on his death.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:-

(a) shall not include-

(i) any exemplary damages;

(ii) any damages for loss of income in respect of any period after that person's death;

[2] As amended by the Administration of Justice Act 1982.

(b) ...

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, 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.

(3) ...

(4) Where damages has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

(5) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts 1846 to 1908 ... and so much of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1) of this section.

(6) In the event of the insolvency of an estate against which proceedings are maintainable by virtue of this section, any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.

REPEALED STATUTES

FATAL ACCIDENTS ACT 1846

'Whereas no action at Law is now maintainable against a person who by his wrongful Act, Neglect or Default may have caused the Death of another Person, and it is often-times right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Inquiry so caused by him:' Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That whensoever the Death of a Person shall be caused by a wrongful Act, Neglect or Default, and the Act, Neglect or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death shall have been caused under such Circumstances as amount in Law to a Felony.

II. And be it enacted, That every such action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose benefit such Action shall be brought; and the Amount so recovered, after deducting the Costs not recovered from the

Defendant, shall be divided amongst the before-mentioned Parties in such Shares as the Jury by their Verdict shall find and direct.

III. Provided always, and be it enacted, That not more than One Action shall lie for and in respect of the same Subject Matter of Complaint; and that every such Action shall be commenced within Twelve Calendar Months after the Death of such deceased Person.

IV. And be it enacted, That in every such Action the Plaintiff of the Record shall be required, together with the Declaration, to deliver to the Defendant or his Attorney a full Particular of the Person or Persons for whom and on whose Behalf such Action shall be brought, and of the Nature of the Claim in respect of which Damages shall be sought to be recovered.

V. And be it enacted, That the following Words and Expressions are intended to have the Meanings hereby assigned to them respectively, so far as such Meanings are not excluded by the Context or by the nature of the Subject Matter.; that is to say, Words denoting the Singular Number are to be understood to apply also to a Plurality of Persons or Things; and Words denoting the Masculine Gender are to be understood to apply also to Persons of the Feminine Gender; and the Word "Person" shall apply to Bodies Politic and Corporate; and the Word "Parent" shall include Father and Mother, and Grandfather and Grandmother, and Stepfather and Stepmother; and the Word "Child" shall include Son and Daughter, and Grandson and Granddaughter, and Stepson and Stepdaughter.

VI. And be it enacted, That this Act shall come into operation from and immediately after the passing thereof, and that nothing therein contained shall apply to that Part of the United Kingdom called *Scotland*.

VII. And be it enacted, That this Act may be amended or repealed by any Act to be passed in this Session of Parliament.

FATAL ACCIDENTS ACT 1864

'Whereas by an Act passed in the Session of Parliament holden in the Ninth and Tenth Years of Her Majesty's Reign intituled *An Act for compensating the Families of Persons killed by Accident*, it is amongst other things provided, that every such Action as therein mentioned shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused as therein mentioned, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased: And whereas it may happen by reason of the Inability or Default of any Person to obtain Probate of the Will or Letters of Administration of the Personal Estate and Effects of the Person deceased, or by the Unwillingness or Neglect of the Executor or Administrator of the Person deceased to bring such Action as aforesaid, that the Person or Persons entitled to the Benefit of the said Act may be deprived thereof; and it is expedient to amend and extend the said Act as herein-after mentioned:' Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

1. If and so often as it shall happen at any Time or Times hereafter in any of the Cases intended and provided for by the said Act that there shall be no Executor or Administrator of the Person deceased, or that there being such Executor or Administrator no such Action as in the said Act mentioned shall within Six Calendar Months after the Death of such deceased Person as therein mentioned have been brought by and in the Name of his or her Executor or Administrator, then and in every such Case such Action may be brought by and in the Name or Names of all or any of the Persons (if more than One) for whose Benefit such Action would have been, if it had been brought by and in the Name of such Executor or Administrator; and in every Action so to be brought shall be for the Benefit of the same Person or Persons, and shall be subject to the same Regulations and Procedure as nearly as may be, as if it were brought by and in the Name of such Executor or Administrator.

2. 'And whereas by the Second Section of the said Act it is provided that the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and whose Benefit such Action shall be brought, and the Amount so recovered, after deducting the Costs not recovered from the Defendant shall be divided between the before-mentioned Parties in such Shares as the Jury shall by their Verdict direct :' Be it enacted and declared, That it shall be sufficient, if the Defendant is advised to pay Money into Court, that he pay it as a Compensation in One Sum to all Persons entitled under the said Act for his wrongful Act, Neglect, or Default, without specifying the Shares into which it is to be divided by the Jury; and if the said Sum be not accepted, and an Issue is taken by the Plaintiff as to its Sufficiency, and the Jury shall think the same sufficient, the Defendant shall be entitled to the Verdict upon that Issue.

3. This Act and the said Act shall be read together as One Act.

FATAL ACCIDENTS (DAMAGES) ACT 1908

1. Exclusion of payments by insurers in assessment of damages

In assessing damages in any action, whether commenced before or after the passing of this Act under the Fatal Accidents Act, 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act.

2. Short title

This Act may be cited as the Fatal Accidents (Damages) Act, 1908; and the Fatal Accidents Act 1846, the Fatal Accidents Act, 1864, and this act may be cited together as the Fatal Accidents Acts 1846 to 1908.

FATAL ACCIDENTS ACT 1959

1. Extension of classes of dependants

(1) The persons for whose benefit or by whom an action may be brought under the Fatal Accidents Act, 1846, shall include any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased person.

(2) In deducing any relationship for the purposes of the said Act and this Act-

(a) an adopted person shall be treated as the child of the person or persons by whom he was adopted and not as the child of any other person; and, subject thereto,

(b) any relationship by affinity 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

(c) an illegitimate person shall be treated as the legitimate child of his mother and reputed father.

(3) In this section "adopted" means adopted in pursuance of an adoption order made under the Adoption Act, 1958, or any previous enactment relating to the adoption of children, or any corresponding enactment of the Parliament of Northern Ireland; and for the purpose of any proceedings under the Fatal Accidents Act, 1846, an adoption authorised by any such order made in Scotland or Northern Ireland may be proved by the production of any document receivable as evidence thereof in that country.

(4) In section six of the Law Reform (Married Women and Tortfeasors) Act, 1935, there shall be substituted for the words "wife, husband, parent or chide" in paragraph (b) of subsection (1), the word "dependants", and for paragraph (a) of subsection (3) the following paragraph:-

"(a) the expression 'dependants' means persons for whose benefit actions may be brought under the Fatal Accidents Acts, 1846 to 1959; and".

(5) In paragraph 1 of the Second Schedule to the Carriage by Air Act, 1932 (which specifies the persons for whose benefit actions in respect of a passenger's death may be brought under that Act) the following shall be substituted for the words from "In this paragraph " to the end of the sentence:-

"(2) For the purposes of this paragraph the following shall be taken to be the members of the passengers family, that is to say, the passenger's wife or husband, parents, grandparents, children and grandchildren and any person who is, or is the issue of, a brother, sister, uncle or aunt of the passenger.

(3) Subsection (2) of section 1 of the Fatal Accidents Act, 1959, shall apply for in deducing any relationship for the purposes of this paragraph as it applies in deducing any relationship for the purposes of the Fatal Accidents Acts, 1846 to 1959, but as if it extended to the whole of the United Kingdom; and the definition of 'adopted' in subsection (3) of that section shall apply accordingly."

2. Exclusion of certain benefits in assessment of damages

(1) In assessing damages in respect of a person's death in any action under the Fatal Accidents Act, 1846, or under the Carriage by Air Act, 1932, there shall not be taken into account any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death.

(2) In this section-

"benefit" means benefit under the National Insurance Acts, 1946 (as amended by any subsequent enactment, whether passed before or after the commencement of this Act), or any corresponding enactment of the Parliament of Northern Ireland and any payment by a friendly society or trade union for the relief or maintenance of a member's dependants;

"insurance money" includes a return on premiums; and

"pension" includes a return of contributions and any payment of a lump sum in respect of a person's employment.

3. Short title, etc

(1) This Act may be cited as the Fatal Accidents Act, 1959; and the Fatal Accidents Act, 1846, the Fatal Accidents Act, 1864, and this Act may be cited together as the Fatal Accidents Acts, 1846 to 1959.

(2) References in this Act to the Fatal Accidents Act, 1846, are references thereto as amended by and read together with the Fatal Accidents Act, 1864.

(3) The enactments specified in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule

(4) This Act shall apply only to actions brought in respect of deaths occurring after the commencement of this Act.

(5) The following provisions of this Act, that is to say, subsection (5) of section one, and so much of section two as relates to actions under the Carriage by Air Act, 1932, extend to Scotland and Northern Ireland, so much of section three and the Schedule as relates to the Law Reform (Personal Injuries) Act, 1948, extends to Scotland, and so much of that section and Schedule as relates to the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, extends to Northern Ireland; but except as aforesaid this Act does not extend to Scotland or Northern Ireland.