

Bereavement damages and cohabittees

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Yesterday the Court of Appeal gave its judgment in the case of *Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust and others* [2017] EWCA Civ 1916. The Fatal Accidents Act 1976 allows cohabittees to claim for dependency but does not permit them to claim bereavement damages. This distinction was found to be incompatible with the European Convention on Human Rights. While the Act remains law, consideration should be given to paying bereavement damages to cohabittees.

Key points:

- Cohabittees of long-standing should be entitled to bereavement damages, but are not while the Fatal Accidents Act is in its present form;
- Arguably, other classes of claimants may be entitled to bereavement damages;
- Until the Act is changed compensators (including public authorities) are not obliged to pay bereavement damages to cohabittees; and
- Where bereavement damages are paid to a claimant, he or she should not be entitled to a further award for loss of care and attention.

Miss Smith's claim

From March 2000 until his death on 12 October 2011 Jacqueline Smith lived with her partner, John Bulloch, who died as a result of admitted negligence on the part of the first two defendants. Miss Smith sought compensation on her own behalf and on behalf of his estate.

Despite their long and close relationship Miss Smith was unable to recover an award of bereavement damages. This was because the Fatal Accidents Act 1976 does not permit cohabittees to receive this award. She therefore joined the Secretary of State for Justice as the third defendant and proceeded against him in respect of her claim for bereavement damages. She argued that the provisions of the Fatal Accidents Act were discriminatory and contrary to the European Convention on Human Rights.

Broadly, the Fatal Accidents Act allows two types of claim for damages. It allows the dependants of a deceased to claim for the loss of their dependency, and it allows a restricted class of individuals to obtain bereavement damages.

The classes of people able to claim for dependency and for bereavement are set out below:

Dependency	Bereavement
(a) the wife or husband or former wife or husband of the deceased; (aa) the civil partner or former civil partner of the deceased;	(a) of the wife or husband or civil partner of the deceased
(b) any person who— (i) was living with the deceased in the same household immediately before the date of the death; and (ii) had been living with the deceased in the same household for at least two years before that date; and (iii) was living during the whole of that period as the husband or wife or civil partner of the deceased;	
(c) any parent or other ascendant of the deceased;	(b) where the deceased was a minor who was never married or a civil partner — (i) of his parents, if he was legitimate; and (ii) of his mother, if he was illegitimate.
(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 was treated by the deceased as a child of the family in relation to that marriage or civil partnership;	
(g) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.	

Thus, Miss Smith who had been living for Mr Bulloch for a long period, as his de facto spouse, is not permitted by the Fatal Accidents Act to recover bereavement damages notwithstanding the grief his death would have caused.

All legislation must comply with, or justifiably depart from, the provisions of the European Convention on Human Rights. Article 14 of the Convention provides that the Convention rights must be enjoyed "without *discrimination on any ground such as sex, race...birth or other status*".

In Smith the Court of Appeal found that the provision of bereavement damages was a measure by which the State shows respect for family life, which is a core value of Article 8 of the Convention. There was no real justification to discriminate against long-standing cohabitants particularly in circumstances where those same people could recover damages for loss of dependency, and where those same people would inevitably experience the profound grief that the award of bereavement damages is intended to compensate.

The Court of Appeal declared that the relevant part of the Fatal Accidents Act is incompatible with the Convention. It now falls to Parliament to amend the Act.

How should compensators respond to this decision?

Until the Act is amended compensators are not obliged to pay bereavement damages to cohabitants. While it is unlawful for public sector compensators to fail to act in accordance with the Convention, s.6(2) of the Human Rights Act 1998 provides a defence where the public authority is acting in that way because they are obliged to by primary legislation (in this case, s.1A(2) of the Fatal Accidents Act).

Should separate awards be made for loss of care and affection?

The Court of Appeal confirmed that bereavement damages are an award of compensation for grief. While the Court of Appeal did not comment on claims for damages for the loss of a partner's care and attention (as distinct from bereavement damages), its confirmation of what bereavement damages compensate for is a clear indication that where a person receives bereavement damages they should not normally receive a separate award for loss of a partner's care and attention.

Will other people be able qualify for bereavement damages?

As the table above demonstrates, there is a marked difference between the class of people who can claim for loss of dependency and the class of people who can claim bereavement damages.

Because bereavement damages fall within the ambit of Article 8 of the Convention, they should be enjoyed without discrimination on the grounds of, for instance, birth. It is therefore arguable that brothers, aunts, children, and parents of adult children should qualify for bereavement damages (as they can for loss of dependency).

The Court of Appeal identified an important limitation to the scope of bereavement damages; that they are "*...intended to reflect the grief that ordinarily flows from the intimacy which is usually an inherent part of the relationship between husband and wife and civil partners.*" Nevertheless, at least until such time as the Fatal Accidents Act receives further scrutiny in Parliament there is a risk that people other than spouses and parents of minor children will have an arguable claim for bereavement damages.

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