

# article

July 2009

## PENNIES FROM HEAVEN

**Calculating Fatal Accident Claims for Loss of Dependency in the non-nuclear family and the future of fatal accident claims in the light of the Government's Response to the *Law on Damages Consultation Paper*.**

For Claimant lawyers, one of the most challenging features of handling fatal accident claims is having to explain that the law values injuries significantly (albeit only in relatively terms) more valuable than human life. Whilst we may all hold our own views as to the inadequacy of general damages for pain and suffering, it is even easier to criticise the apparent shortfalls in our current system for valuing damages in fatal accident claims. Perhaps the long awaited published response, of the Government, to the Department of Justice's Consultation Paper on the Law on Damages promises some hope for the future?

Calculating loss of dependency has its own special features. For some 25 years, practitioners undertaking Fatal Accident Act claims have adopted the conventional mathematical formulae adopted by the Court of Appeal in *Harris –v- Empress Motors*<sup>1</sup> as the starting point for the calculation of loss of dependency. The calculation is simple. Where there is a husband and wife (or a couple living a such for at least two years), their net incomes are added together and multiplied by 75% (where there is at least one child and until the youngest child ceases full- time education) or by 66.6% (where there are no children, or from when the child ceases full-time education) and then deduct the surviving spouses net income to arrive at the appropriate multiplicand. The multiplier reflects the number of years of dependency lost. Simple then. Job done. No problem!

But life (and death) is not always so simple. We now live in an age where couples co-habit and death sometimes inconveniently comes knocking before the statutory required two year period, people move on and form new relationships, and that sometimes results in pregnancies. All of these issues were of significance in *Conlon –v- Permasteelisa and Newnorth* (2009) (*unreported elsewhere*).

Stephen Conlon was working as a building labourer on a site in London. As a result of improper loading onto a crane, several sheets of glass fell from a considerable height onto Conlon. He sustained multiple injuries and was taken by air ambulance to hospital. He fell into and out of consciousness over the course of the next month, during which time he underwent below- knee and then above- knee surgical amputations before finally succumbing to his injuries.

---

<sup>1</sup> [1984] 1 WLR 212

# DAVIES ARNOLD COOPER

---

At the time of his death, Conlon was living with a partner. The couple had been together for some 20 months and she had become pregnant by him. The child, E, was born after Conlon died. Prior to this relationship, Conlon had been in another relationship and the couple had a child, M. That first relationship had broken up and at the time of his death, Conlon was only providing ad hoc financial support for M and nothing for M's mother.

So who had claims for dependency and how was it to be calculated? The starting point for identifying the dependents is the Fatal Accidents Act 1976. M's mother had no claim; she was neither a spouse, nor a former spouse, nor someone actually being financially supported. E's mother also had no claim. Certainly, the couple were living as husband and wife and there was financial dependency – but they had not been living together for the appropriate two years. As for the children, M certainly had a claim – but how was his dependency to be calculated; and what about E? E could not show any history of pre-death dependency- she had not even been born. There seemed to be no reported case law that dealt with this unusual situation.

This is how I presented the claim for the dependency.

I assumed (humour me here) that E's mother and deceased had been living together for the requisite two years. I then applied the *Harris –v- Empress Motors* calculation at 75% to calculate the notional dependency for mother and child.

I assumed that the mother and child would share the financial dependency equally and therefore, the child, E would be entitled to one half of the resulting dependency.

I then applied a multiplier for a period until the child ceased full time dependency.

For M, I referred to the Child Support Agency's website. This includes an online calculator for determining entitlement under the Child Support Act. This gave rise to a much smaller claim than E's – but in my view was the correct approach.

Having regard to the disparity between the two children's claims, it became apparent that a conflict of interests might arise. M found legal representation elsewhere, but my methodology was (eventually) adopted by M's new solicitors and agreed (in principle) by the Defendants.

Following a joint settlement meeting, damages were agreed on the basis of this methodology.

The settlement (because it involved children) required Court approval and on 6<sup>th</sup> July 2009 went before Master Roberts in the High Court in London for an Infant Settlement Approval hearing. The Court considered the methodology of starting with the *Harris –v- Empress Motors* approach and then disregarding E's mother's claim and accepted that this was a sensible approach. The Court also saw the sense in using the Child Support Agency figures as a starting point to calculate M's claim. As such the settlement was approved and damages apportioned in the terms suggested.

As to the other elements of the claim, there was no claim for a bereavement award (Conlon was not married). Although he sustained very serious injuries, Conlon was in and out of consciousness for the month following his accident until he died, so the claim for damages for pain and suffering settled for a relatively modest amount.

# DAVIES ARNOLD COOPER

---

## So is this justice?

Some ten years ago, the Law Commission published a report entitled *Claims for Wrongful Death*<sup>2</sup>. This report suggested that the Fatal Accidents Act 1976 was far too limiting in the categories of dependents that could claim for loss of dependency. The report suggested adding a category of dependent of “any person who was being wholly or partly maintained by the deceased immediately before the death....” In Conlon’s case, had the Commission’s recommendations been implemented then his partner (E’s mother) would have had a claim for dependency. As the law stands, she does not.

There is, however, good news for the future. In May 2007, the Department of Justice issued a Consultation Paper entitled ‘*The Law on Damages*’<sup>3</sup> which identified this anomaly in the law and The Consultation Paper stated that the Government proposed to accept the Law Commission’s recommendation in this regard. After a further two year wait, on 1<sup>st</sup> July 2009, the Government eventually published its intentions to implement that change.

In negotiations in the Conlon case, the Defendants argued that if my (half of 75%, *Harris –v- Empress Motors* approach was correct) then the multiplier should be adjusted to reflect the fact that the relationship with E’s mother would not have lasted (after all, there was evidence of a former failed relationship). This argument had some merit. Section 3 (4) of the Fatal Accidents Act 1976, suggests that the prospect of breakdown in the relationship between the deceased and his/her spouse is to be taken into account. Here, the Consultation Paper also offered hope to Claimants, in that it stated that the Government proposed to accept the Law Commission’s recommendation that Section 3 (4) be repealed and the prospect of a future breakdown in relationship ought not to be taken into account.

Finally what of bereavement awards? Neither Mr Conlon’s children nor partner were entitled to a bereavement award under the Fatal Accidents Act. The Law Commission and the Consultation Paper recommended extending the categories of claimant entitled to the bereavement award to include the infant children of a deceased. The Government’s published response indicates acceptance of that recommendation too.

So perhaps now, some ten years after the Law Commission recommended changes to the way we value fatal accident claims, we will take a further step to seeing those changes become a reality.

Warren Collins of Davies Arnold Cooper LLP (Coordinator of the Spinal Cord Injury SIG) represented E and Edwina Rawson of Charles Russell LLP (Secretary of the Damages SIG) represented M in Conlon.

**-ENDS-**

## **Notes to Editors:**

For further information: [rdwyer@dac.co.uk](mailto:rdwyer@dac.co.uk) 020 7293 4130

---

<sup>2</sup> Law Com No 263

<sup>3</sup> CP 9/07

# DAVIES ARNOLD COOPER

---

## About Davies Arnold Cooper LLP

Davies Arnold Cooper is a commercial law firm that specialises in dispute resolution and real estate. Established more than 80 years ago, the firm has offices in the UK, Spain and Mexico.

Best known for its work in the insurance and real estate sectors, Davies Arnold Cooper also tops the independent league tables for its work in product liability and is particularly highly rated in commercial litigation, construction and employment.

Davies Arnold Cooper has over 200 lawyers of whom over 70 are partners. Davies Arnold Cooper employs over 400 people in total.

For more information about Davies Arnold Cooper visit [www.dac.co.uk](http://www.dac.co.uk)