

CHAPTER EIGHT
REMEDIES

8.5. COMPENSATION: PERSONAL INJURY AND DEATH

8.5.3. ENGLISH LAW

Introductory Note

a) In English law, a clear distinction is made between actions for damage resulting from personal injury, on the one hand, and from a fatal accident (i.e. death), on the other hand. The distinction originated from an old common law rule that no one could recover damages in tort for the death of another.¹ That position was however altered by the Fatal Accidents Act passed in 1846;² and the present statutory provisions are to be found in the Fatal Accidents Act 1976.³ As a result, the assessment of damages in case of death is largely governed by statutory provisions.

– In the case of *personal injury*, the plaintiff may claim damages for non-material loss. Heads of non-material damage are pain and suffering, loss of amenity and any permanent physical or mental effects of the injury itself (often called the loss of faculty).⁴ Heads of material damage are medical and other expenses (including services rendered by a third party), loss of earnings and any loss of earning capacity.⁵

– In the case of *death*, two types of loss may be recovered: bereavement and material loss (including funeral expenses) suffered by the dependents as a result of the death. The assessment of the latter damages, though very similar to the assessment of damages resulting from personal injury, is affected by some provisions of the Fatal Accident Act dealing with benefits which have accrued or will accrue as a result of the death.⁶

b) The *method of assessment of future damage* in a personal injury case has been discussed in Section 3.⁷ This section deals with compensation for loss of earning

¹*Clerk & Lindsell on Torts* at para. 27-38.

²9 & 10 Vict., c. 93 (“Lord Campbell’s Act”); until that legislation, it was said that under English law it was “cheaper to kill than to maim”.

³*Supra*, Chapter II, **2.E.10**.

⁴See for an overview Rogers at 759ff; *Clerk & Lindsell on Torts* at para. 27-21ff.

⁵See for an overview Rogers at 768ff; *Clerk & Lindsell on Torts* at para. 27-10 ff.

⁶See for an overview Rogers at 809ff; *Clerk & Lindsell on Torts* at para. 27-43 ff.

⁷*Infra*, **8.E.22**.

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capacity⁸ and the issue of collateral benefits, as where a relative gratuitously renders assistance to the injured plaintiff.⁹

*Court of Appeal*¹⁰
Moeliker v. A. Reyrolle and Co. Ltd.

8.E.49.

LOSS OF EARNING CAPACITY

Injured craftsman

The plaintiff is entitled to damages for loss of earning capacity if there is a substantial risk that he will lose his present employment at some time before the end of his working life.

Facts: The plaintiff, a craftsman, was injured in an industrial accident. He retained his employment and sustained no loss of wages. He claimed damages for loss of earning capacity.

Held: The court of first instance awarded GBP 750 in respect of loss of earning capacity. That award was upheld by the Court of Appeal on the ground that the risk of the plaintiff losing his existing job, or his being unable to obtain another job or an equally good job, or both, were only slight.

Judgment: BROWNE LJ:¹¹ "... [T]his problem generally arises in cases where a plaintiff is in employment at the date of the trial. If he is then earning as much as he was earning before the accident and injury (as in the present case), or more, he has no claim for loss of future earnings. If he is earning less than he was earning before the accident [references omitted] he has a claim for loss of future earnings which is assessed on the ordinary multiplier/multiplicand basis. But he may have a claim, or an additional claim, for loss of earning capacity if he should ever lose his present job.

In *Smith v. Manchester Corporation* (1974) 17 KIR 1 at 8, Scarman LJ said that it was wrong to describe this sort of loss of earning capacity as a 'possible loss' and that –

'It is an existing loss: [the plaintiff] is already weakened to that extent, though fortunately she is protected for the time being against suffering any financial damage because she does not, at present, have to go into the labour market.'

But what has somehow to be quantified in assessing damages under this head is the present value of the risk that a plaintiff will, at some *future* time, suffer financial damage because of his disadvantage in the labour market...

Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk that he will, at some time before the end of his working life, lose that job and be thrown on the labour market? I think the question is whether this is a

⁸*Infra*, **8.E.49.**

⁹*Infra*, **8.E.50.**

¹⁰[1977] 1 All ER 9, CA, sub nom. *Nicholls v. National Coal Board* [1976] ICR 266..

¹¹Stephenson and Shaw LJJ concurring.

'substantial' risk or is it a 'speculative' or 'fanciful' risk (see *Davies v. Taylor* [1972] 3 All ER 836 at 838, [1974] AC 207 at 212 [further references omitted])... In deciding this question all sorts of factors will have to be taken into account, varying almost infinitely with the facts of particular cases. For example, the nature and prospects of the employers' business; the plaintiff's age and qualifications; his length of service; his remaining length of working life; the nature of his disabilities; and any undertaking or statement of intention by his employers as to his future employment. If the court comes to the conclusion that there is no 'substantial' or 'real' risk of the plaintiff's losing his present job in the rest of his working life, no damages will be recoverable under this head.

But if the court decides that there is a risk which is 'substantial' or 'real', the court has somehow to assess this risk and quantify it in damages. Difficult as this is, the courts sometimes have to assess the money value of a chance in other contexts (see for example, *Chaplin v. Hicks* [1911] 2 KB 786, [1911-13] All Rep 224 and *Otter v. Church, Adams, Tatham & Co* [1953] 1 All ER 168, [1953] Ch 280). Clearly no mathematical calculation is possible. Edmund Davies and Scarman LJ said in *Smith v. Manchester Corpn* that the multiplier/multiplicand approach was impossible or 'inappropriate', but I do not think that they meant that the court should have no regard to the amount of earnings which a plaintiff may lose in the future, nor to the period during which he may lose them. What I think they meant was that the multiplier/multiplicand method cannot provide a complete answer to this problem because of the many uncertainties involved...

I do not think one can say more by way of principle than this. The consideration of this head of damages should be made in two stages. 1. Is there a 'substantial' or 'real' risk that a plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materializes, having regard to the degree of the risk, the time when it may materialize, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job.

It is impossible to suggest any formula for solving the extremely difficult problems involved in the second stage of the assessment. A judge must look at all the factors which are relevant in a particular case and do the best he can."

Notes

(1) The annotated judgment shows that English law, unlike German law, is not opposed to compensation for loss of earning capacity which does not immediately lead to tangible pecuniary loss, as is the case where the plaintiff is still in employment at the date of trial. The judgment explains that such loss is not a possible (one might say hypothetical) loss but is an existing loss, in the sense that a present risk of financial damage as such constitutes an existing loss. The inherent

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difficulties of assessing such damage is recognized and it has been said that the assessment of damages under this head usually involves “nothing but a guess”.¹²

The award in the annotated judgment was low (allowing for subsequent inflation, about GBP 2,750 now) on account of the only slight risk of the plaintiff being unemployed. Today, an award of GBP 15,000 is not unusual, but, because of the diversity of the relevant circumstances, there is great divergence in the levels of awards.¹³

(2) In personal injuries cases damages are also awarded for pain and suffering and loss of amenity, including any discomfort or inconvenience experienced by the plaintiff in the exercise of his or her occupation and his or her need to make additional efforts in order to carry out the same work. In the annotated case, the plaintiff was awarded GBP 3,000 (about GBP 11,000 now) for pain and suffering and loss of amenity covering discomfort at work and at home, the effects on the plaintiff’s leisure activity and the cosmetic disability sustained.

(3) The case of the injured housewife raises problems also under English law. The leading case is *Daly v. General Steam Navigation Co. Ltd.*,¹⁴ relating to an injured housewife who became partially incapable of undertaking housekeeping duties, but ran her home with the assistance of her husband. A home help was not employed. In assessing damages, the court drew a distinction between future partial loss of housekeeping capacity and the loss in respect of the period before the trial. In respect of future loss, the court held:

“Once the judge had concluded... that, to put the plaintiff, so far as money could do so, in the position in which she would have been if she had never been injured, she was going to need, in the future, domestic assistance for eight hours a week, it seems to me that it was entirely reasonable and entirely in accordance with principle in assessing damages, to say that the estimated cost of employing labour for that time, for an appropriate number of years having regard to the plaintiff’s expectation of life, was the proper measure of her damages under this heading.”¹⁵

Evidence of the plaintiff’s intention that such a home help would be employed was not required and the court recognized the plaintiff’s freedom to use the money received:

“It is really quite immaterial, in my judgment, whether having received those damages, the plaintiff chooses to alleviate her own house-keeping burden, which is an excessively heavy one, having regard to her considerable disability to undertake housekeeping tasks, by employing the labour which has been taken as the basis of the estimate on which damages have been awarded, or whether she chooses to

¹²Per Megaw LJ in an unreported case, cited in H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at 1036, para. 1584.

¹³*McGregor on Damages*, *ibid.* at 1036, para. 1584.

¹⁴*Daly v. General Steam Navigation Co. Ltd.* [1981] 1 WLR 120, CA.

¹⁵*Ibid.* at 127, per Bridge LJ.

continue to struggle with the housekeeping on her own and to spend the damages which have been awarded to her on other luxuries which she would otherwise be unable to afford.”¹⁶

Likewise, in the case of loss of the services of a killed housewife, the multiplicand may be assessed on the basis of the cost of employing substitute domestic help. It has been held that this also holds true where no commercial help is engaged, but in that event the net wage without tax and insurance contributions should be used as the measure.¹⁷

However, in *Daly v. General Steam Navigation Co. Ltd*, damages were not assessed on that basis in respect of the period before trial because the plaintiff had not incurred the cost of employing a domestic help and it was held that the proper approach was to increase the sum for pain and suffering and loss of amenity taking account of the difficulties in performing the housekeeping services as a consequence of the disabilities.¹⁸ In fact, in assessing that sum, the court took into account the fact that the plaintiff’s husband had given up his part-time employment and the resulting loss of earnings.

This judgment has been criticized because of the distinction drawn between past and future loss, i.e. if the cost of employment is not a proper basis for the assessment of past loss, then it should not be used to measure future loss where the plaintiff does not have the intention of employing domestic help.¹⁹ The annotated judgment also raises the question of compensation for the husband’s loss of earnings and for his gratuitous assistance. The law on this issue was changed by *Hunt v. Severs* which will now be discussed.

*House of Lords*²⁰
Hunt v. Severs

8.E.50.

COLLATERAL BENEFITS: RECOVERABILITY OF COST OF SERVICES RENDERED BY A
RELATIVE

Tortfeasor taking care of the plaintiff

The plaintiff is entitled to recover the reasonable value of services rendered gratuitously by a member of the family in the provision of nursing care or domestic

¹⁶Idem.

¹⁷See Rogers at 694, referring to *Spittle v. Bunney* [1988] 1 WLR 847, CA and *Corbett v. Barking HA* [1991] 2 QB 408, CA.

¹⁸*Daly v. General Steam Navigation Co. Ltd.* [1981] 1 WLR 120 at 128, CA.

¹⁹H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at 1032, para.1580; see also the Law Commission’s Consultation paper *Damages for personal injury: medical, nursing and other expenses. Consultation paper No. 144* at para. 3.73-78.

²⁰[1994] 2 AC 350, HL.

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assistance rendered necessary by the plaintiff's injuries; however the plaintiff is required to hold these damages in trust for the voluntary carer. Where the voluntary carer was himself the tortfeasor, there could be no ground in public policy or otherwise for requiring him to pay to the plaintiff a sum of money representing the value of services which he had himself rendered.

Facts: In 1985 the plaintiff was seriously injured due to the defendant's negligence. The defendant, whom the plaintiff married in 1990, was concerned for her care. The plaintiff claimed damages for travelling expenses incurred by the defendant in visiting her in hospital and for the value of services rendered (and to be rendered) by him in assisting in her care. (The defendant was, of course, insured so that the cost of the damages, if awarded, would have been borne by his insurers and the benefit would have been enjoyed by him and his wife).

Held: The court of first instance held that the voluntary nature of the assistance provided by the defendant did not preclude the plaintiff from recovering such sums. The court of appeal²¹ dismissed the defendant's appeal but the House of Lords allowed the defendant's appeal from the court of appeal.

Judgment: LORD BRIDGE OF HARWICH:²² "My Lords, a plaintiff who establishes a claim for damages for personal injury is entitled in English law to recover as part of those damages the reasonable value of services rendered to him gratuitously by a relative or friend in the provision of nursing care or domestic assistance of the kind rendered necessary by the injuries the plaintiff has suffered. The major issue which arises for determination in this appeal is whether the law will sustain a claim in respect of gratuitous services in the case where the voluntary carer is the tortfeasor himself..

The starting point for any inquiry into the measure of damages which an injured plaintiff is entitled to recover is the recognition that damages in the tort of negligence are purely compensatory. He should recover from the tortfeasor no more and no less than he has lost. Difficult questions may arise when the plaintiff's injuries attract benefits from third parties. According to their nature these may or may not be taken into account as reducing the tortfeasor's liability. The two well established categories of receipt which are to be ignored in assessing damages are the fruits of insurance which the plaintiff himself has provided against the contingency causing his injuries (which may or may not lead to a claim by the insurer as subrogated to the rights of the plaintiff) and the fruits of the benevolence of third parties motivated by sympathy for the plaintiff's misfortune. The policy considerations which underlie these two apparent exceptions to the rule against double recovery are, I think, well understood: see for example, *Parry v. Cleaver* [1970] AC 1, 14 [further references omitted]. But I find it difficult to see what considerations of public policy can justify a requirement that the tortfeasor himself should compensate the plaintiff twice over for the self-same loss...

²¹[1993] QB 815, CA.

²²Lord Keith of Kinkel, Lord Jauncey of Tullichettle, Lord Browne-Wilkinson and Lord Nolan concurring.

The law with respect to the services of a third party who provides voluntary care for a tortiously injured plaintiff has developed somewhat erratically in England. The voluntary carer has no cause of action of his own against the tortfeasor. The justice of allowing the injured plaintiff to recover the value of the services so that he may recompense the voluntary carer has been generally recognised, but there has been difficulty in articulating a consistent juridical principle to justify this result. [There follows an overview of English and Scots case-law.]

Thus, in both England and Scotland the law now ensures that an injured plaintiff may recover the reasonable value of gratuitous services rendered to him by way of voluntary care by a member of his family... But it is nevertheless important to recognise that the underlying rationale of the English law, as all the cases before *Donnelly v. Joyce* [1974] QB 454 demonstrate, is to enable the voluntary carer to receive proper recompense for his or her services and I would think it appropriate for the House to take the opportunity so far as possible to bring the law of the two countries into accord by adopting the view of Lord Denning MR in *Cunningham v. Harrison* [1973] QB 942 that in England the injured plaintiff who recovers damages under this head should hold them on trust for the voluntary carer.

By concentrating on the plaintiff's need and the plaintiff's loss as the basis of an award in respect of voluntary care received by the plaintiff, the reasoning in *Donnelly v. Joyce* diverts attention from the award's central objective of compensating the voluntary carer. Once this is recognised it becomes evident that there can be no ground in public policy or otherwise for requiring the tortfeasor to pay to the plaintiff, in respect of the services which he himself has rendered, a sum of money which the plaintiff must then repay to him...

The case for the plaintiff was argued in the Court of Appeal without reference to the circumstance that the defendant's liability was covered by insurance. But before your Lordships [Counsel for the plaintiff], recognising the difficulty of formulating any principle of public policy which could justify recovery against the tortfeasor who has to pay out of his own pocket, advanced the bold position that such a policy could be founded on the liability of insurers to meet the claim... The short answer, in my judgment, to [that] contention is that its acceptance would represent a novel and radical departure in the law of a kind which only the legislature may properly effect. At common law the circumstance that a defendant is contractually indemnified by a third party against a particular legal liability can have no relevance whatever to the measure of that liability."

Notes

(1) The annotated speech deals with the collateral benefit consisting in the care which is provided gratuitously by third parties. Before discussing the annotated speech in detail, some clarification is needed in respect of common law principles governing the deductibility of collateral benefits in general.

As mentioned in the excerpt, if the compensatory principle forbids a plaintiff to recover more than he has lost, the defendant's liability should be reduced where the plaintiff receives a benefit as a consequence of the injurious event. However, that

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principle does not receive unqualified application,²³ and the two main categories of collateral benefits which are not deducted at common law are insurance payments and gratuitous payments. The reasons for this were considered in *Parry v. Cleaver*,²⁴ where the House of Lords stated that it would be contrary to public policy if the injured party's damages were reduced "so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer",²⁵ and with regard to insurance payouts, that since the victim had bought the insurance "it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor."²⁶

(2) In respect of personal care²⁷ provided gratuitously by relatives, English law was at first opposed to an award when the voluntary carer did not suffer loss by giving up employment, but allowed an award if the carer gave up employment (frequently requiring the relative to have entered into a legal agreement for reimbursement).²⁸ The law was carried forward in *Donnelly v. Joyce*,²⁹ relating to a mother who had given up employment to take care of her injured child. The defendant argued that a small child had no legal or moral obligation to reimburse his or her parents for their care following on the tortious accident and that therefore the child, as plaintiff, could not recover the cost of such care. That argument failed: the court emphasized that the plaintiff's claim was not to be regarded in relation to another's loss; rather the plaintiff's "loss is the existence of the need for those nursing services, the value of which for purposes of damages – for the purpose of the ascertainment of the amount of his loss – is the proper and reasonable cost of supplying those needs [emphasis added]."³⁰ That cost was quantified as being equal to the mother's loss of wages.

²³See for a discussion of the possible qualifications based upon the criterion of a causal relationship, the source of the collateral benefit or its nature and purpose: *Clerk & Lindsell on Torts* at 1451-1453, para. 27-19.

²⁴*Parry v. Cleaver* [1970] AC 1, HL.

²⁵*Ibid.* at 14 per Lord Reid.

²⁶*Ibid.*

²⁷Where, following on the plaintiff being tortiously injured, his wife makes a contribution to the plaintiff's *business* (as distinct from providing him with nursing care or other essential *personal* services), without there being any obligation, express or implied, to pay her for her work, the plaintiff is not entitled to recover damages on account of her unpaid contribution: *Hardwick v. Hudson* [1999] 1 WLR 1770, CA.

²⁸See in further detail H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at 1089-1090, para. 1677-1678.

²⁹*Donnelly v. Joyce* [1974] QB 454, CA.

³⁰*Ibid.* at 462.

This analysis, resembling the German view relating to damage resulting from increased need (*vermehrte Bedürfnisse*),³¹ differed from that adopted in *Cunningham v. Harrison*,³² a judgment of another division of the Court of Appeal handed down a day before *Donnelly*. Although the court reached the same solution, Lord Denning MR stated:

“It seems to me that when a husband is grievously injured - and is entitled to damages - then it is only right and just that, if his wife renders services to him, instead of a nurse, he should recover compensation for the value of the services that his wife has rendered. It should not be necessary to draw up a legal agreement for them. On recovering such an amount, *the husband should hold it on trust for her and pay it over to her* [emphasis added]. She cannot herself sue the wrongdoer [references omitted]; but she has rendered services necessitated by the wrongdoing, and should be compensated for it. If she had given up paid work to look after him, he would clearly have been entitled to recover on her behalf; because the family income would have dropped by so much [references omitted]. Even though she had not been doing paid work but only domestic duties in the house, nevertheless all extra attendance on him clearly calls for compensation.”³³

The annotated decision of the House of Lords adopts this view and overrules *Donnelly v. Joyce*. As a consequence, the plaintiff’s claim was dismissed for indeed, when the loss to be compensated is not the plaintiff’s need as such, it is illogical to condemn the defendant to pay the value of services which he himself renders to the plaintiff and which the plaintiff then must repay to the defendant. As the annotated speech makes clear, the fact that the defendant is insured does not change this position.

The annotated decision has been criticized because the introduction of the trust concept raises difficult questions as to its application.³⁴ In addition, it has been argued that plaintiffs may decide to employ more expensive professional carers or to obtain assistance from a relative other than the defendant to evade the non-recoverability of the care provided by the defendant.³⁵

(3) The recoverability of gratuitously provided care raises the question of its assessment. The leading case in this respect is *Housecroft v. Burnett*³⁶ where the court of appeal remarked that there are two extreme solutions to assess “the proper and reasonable cost of supplying the plaintiff’s needs” (as was said in *Donnelly v. Joyce*): at the full commercial rate for supplying the needs by employing someone

³¹*Supra*, 8.G.42., Note (3).

³²*Cunningham v. Harrison* [1973] QB 942, CA.

³³*Ibid.* at 952.

³⁴See for further details H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at 1091-1092, para. 1680.

³⁵*McGregor on Damages*, *ibid.* at 1092-1093, para. 1682. See also Kemp and Kemp, *The Quantum of Damages*, para. 5-028 to 5-028/4.

³⁶*Housecroft v. Burnett* [1986] 1 All ER 332, CA.

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and at nil.³⁷ The court held that neither of those solutions was right and that the assessment should be somewhere in between, depending on the facts of the case.³⁸ In *Housecroft v. Burnett* the Court of Appeal expressly proceeded on the premise that *Donnelly v. Joyce* was rightly decided and that Lord Denning MR's observation in *Cunningham v. Harrison* that the compensation for unpaid care would be held on trust for the carer was *per incuriam*. But unless and until the House of Lords overrules its decision in *Hunt v. Severs*, annotated above, that premise must be regarded as mistaken. However, even though the Court of Appeal envisaged that the compensation on account of the unpaid care would be set aside voluntarily by the plaintiff for the benefit of the carer whereas *Hunt v. Severs* envisages that it will be held by the plaintiff on trust for that purpose, the conclusion of the Court of Appeal in *Housecroft v. Burnett*, as expressed in the following passage from the judgment of O'Connor LJ, is generally thought still to provide good guidance as to the correct assessment of damages on account of the care needed by a plaintiff and provided to him or her by an unpaid carer:

“Once it is understood that this is an element in the award to the plaintiff to provide for the reasonable and proper care of the plaintiff and that a capital sum is to be available for that purpose, the court should look at it as a whole and consider whether, on the facts of the case, it is sufficient to enable the plaintiff, among other things, to make reasonable recompense to the relative. So, in cases where the relative has given up gainful employment to look after the plaintiff, I would regard it as natural that the plaintiff would not wish the relative to be the loser and the court would award sufficient to enable the plaintiff to achieve that result. The ceiling would be the commercial rate.... I would also ask: is it sufficient for this plaintiff should her mother fall by the wayside and be unable to give as she gives now?... The court is recognising that part of the reasonable and proper cost of providing for the plaintiff's needs is to enable her to make a present, or series of presents, to her mother.”³⁹

(4) The issue of collateral benefits may also arise in various other cases.

(a) The issue of social security benefits in the case of *personal injury* is governed by complex statutory provisions, contained in the Social Security (Recovery of Benefits) Act 1997,⁴⁰ providing for a recoupment of the benefits by the State.⁴¹

³⁷Ibid. at 342.

³⁸Ibid. at 343.

³⁹Ibid. See for a discussion of other cases H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at 1094-1095, para. 1684 and the Law Commission's consultation paper: *Damages for personal injury: medical, nursing and other expenses*, Consultation paper No. 144 at para. 2.33-2.36.

⁴⁰Social Security (Recovery of Benefits) Act 1997, c. 27.

⁴¹Rogers at 779 ff.

(b) The issue of collateral benefits in case of *death* is governed by provisions of the Fatal Accidents Act 1976.⁴² Section 3(3) contains an exception to the common law rule according to which remarriage and the prospects of remarriage were to be taken into account, since a wife could not claim to be entitled to be treated as dependent upon two husbands at one time.⁴³ As a consequence of s. 3(3) of the Fatal Accidents Act 1976, a remarried widow who is supported by her second husband, remains entitled to damages for the loss of the support of her first husband and, moreover, the possibility of the widow's remarriage is not taken into account when assessing the length of time that the dependency would have lasted. It is notable that this statutory provision does not apply to the claims of widowers and children and thus, the courts continued to take remarriage or the prospects of remarriage into account.⁴⁴ The position changed, however, in *Stanley v. Saddique*,⁴⁵ relating to a child who was taken care of by his father's second wife, following the mother's death, in which it was held that the more general provision contained in s. 4 should not be restricted and did not exclude the beneficial effects on the child of his father's remarriage,⁴⁶ which should therefore be disregarded in assessing damages.

Section 4 of the Fatal Accidents Act 1976 also reversed the common law rule that any pecuniary benefit accruing to a defendant as a consequence of the death was to be taken into account so that only the net loss constituted the measure of damages.⁴⁷ Section 4 is applicable to benefits from the estate,⁴⁸ including the benefit gained by the dependents in receiving the deceased's estate sooner than otherwise, social security benefits, insurance money, pensions and so on.⁴⁹

(c) The question has arisen whether the assessment of the multiplicand is affected by the potential earnings of the widow who would probably resume

⁴²*Supra*, Chapter II, **2.E.10**.

⁴³See *Hay v. Hughes* [1975] 1 QB 790, CA at 816, per Buckley LJ. But the assessment of widows' prospects in the "marriage market" was felt to be unseemly, not to say cruel; and in this respect the position was originally altered by s. 4 of the Law Reform (Miscellaneous Provisions) Act 1971, c. 43. See also *Clerk & Lindsell on Torts* at 1477, para. 27-46.

⁴⁴H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at 1158, para. 1783, at 1165-1166, para. 1797 and at 1180 ff., para. 1819 ff.

⁴⁵*Stanley v. Saddique* [1992] QB 1, CA.

⁴⁶See for more details H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at 1183-1184, para. 1823; Rogers at 814-815.

⁴⁷*Davies v. Powell Duffryn Associated Collieries* [1942] AC 601, HL at 609.

⁴⁸French law reaches the same solution: Cass. civ. 2e, 2 February 1994, Bull. civ. 1994.II.27. As to the question which benefits from the estate must be taken into account when assessing the award under § 844(2) BGB, German law makes a distinction between the estate's value, the benefit gained in receiving the estate sooner and the income deriving from the estate; see Lange at 505-508.

⁴⁹*Clerk & Lindsell on Torts* at para. 27-50. However, the application of s. 4 is not without difficulties; see Rogers at 695-696; H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at 1184 ff., para 1824 ff.

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employment. That question has been answered in the negative.⁵⁰ Moreover, actual earnings have also been left out of consideration. In the Court of Appeal's judgment in *Cookson v. Knowles*,⁵¹ Lord Denning expressed doubts about whether a widow was not bound to go out to work and so mitigate her loss,⁵² but the widow's earning capacity has not yet been taken into account.⁵³

⁵⁰*Howitt v. Heads* [1973] QB 64.

⁵¹*Cookson v. Knowles* [1977] QB 913, CA; affirmed [1979] AC 556, HL.

⁵²*Ibid.* at 922.

⁵³H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at 1150, para. 1768.