A MODEST AND USEFUL LITTLE BILL?

This, without the interrogatory, is how Lord Birkett described the Fatal Accidents Act, 1959,[1] on its second reading in the House of Lords.

This private member's Bill in its ultimate form had a two-fold effect. It extended the range of dependants under the Fatal Accidents Act, 1846,[2] "to include any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased person"[3]. Moreover, in deducing any relationship for the purpose of the Act there was to be no distinction as to whether it arose by affinity or consanguinity, by the half-blood or the whole blood, by a step-relationship or by legal adoption or as resulting from illegitimacy.[4] Secondly it allowed in assessing damages under the Acts that no account be taken of any insurance money, benefit, pension or gratuity which has been paid or will be or may be paid as a result of the death.[5]

Unlike much of the main recent torts legislation the Act was not inspired by the recommendations of a Law Reform Committee,[6] whose recommendations are in turn often influenced by a hard case or

1. 7 & 8 Eliz. 2 c.65.

2. The Fatal Accidents Act, 1846, (9 & 10 Vict, c.93) as amended by the Fatal Accidents Act, 1864 (27 & 28 Vict, c.95) and the Fatal Accidents (Damages) Act, 1908 (8 Edw. 7 c.7) covered the wife, husband, parent and child of the deceased — s.2 — and parent included father and mother, grandfather and grandmother and stepfather and stepmother and children likewise included grandchildren and stepchildren — s.5. Illegitimate children and legally adopted children came within the definition of child by s.2(l) of the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5 c.41).

3. The Fatal Accident Act, 1959 s.1(1).

4. S.1 (2) and 1(3). Ss.l(4) and 1(5) brought the categories of dependants under the Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5 c.30) and the Carriage by Air Act, 1932 (22 & 23 Geo. 5 c.36), into line with the Fatal Accidents Acts, 1846-1959.

5. S.2 — This section was added only at the Committee stage in the Commons, where it was passed 7-5 with one member stating he gave his support though the amendment would not be carried (see Fatal Accidents Bill Standing Committee C. 1959 Col. 31). S.2 (2) states that in this section "benefit" means benefit under the National Insurance Act, 1946 (9 & 10 Geo. 6 c.67) as amended by any subsequent enactment or any corresponding enactment of Northern Ireland and any payment by a friendly society or trade union for the relief for maintenance of a member's dependants, "insurance money" includes return of premiums and "pension" includes a return of contributions and any payment of a lump sum in respect of a person's employment.

6. Law Reform (Miscellaneous Provisions) Act, 1934, influenced by if not resulting from the Interim Report of Law Revision Committee, 1934 (Cmd. 4540).

cases.[7] But as regards the scope of dependants, it was seemingly spurred on not by any actual unfortunate case before the courts[8] but by a general feeling and suspicion that there could be worthy and needy relations who would suffer as not being covered by the pre-1959 definition *e.g., a* widow depending on her father-in-law, a mother-in-law depending on her daughter's husband, or an unmarried sister, in particular an invalid, relying on the support of her brother.[9] Next on the point of deduction it was to rectify the anomalous situation whereby if a group pension scheme was run for a firm by an insurance company, the sum resulting to the estate of a member of the firm negligently killed was "a sum paid or payable on the death of the deceased under any contract of assurance or insurance" within the Fatal Accidents (Damages) Act, 1908 and so not deductible, but if the firm ran its own pension scheme any such benefit was not so covered and was therefore deductible from the damages given under the Act.[10]

In studying the 1959 Act and its parliamentary history [11] one cannot but be conscious that like so much law reform and particularly that sponsored by private members, it suffered from a desire to succeed in its limited aims without a full examination into and appreciation of the subject and its *rationale.* In view of this the success of the Act now merits examination.

A preliminary point of note is a statute from a neighbouring jurisdiction, the Republic of Ireland, *i.e.* the Fatal Injuries Act, 1956.[12] Its sections can be divided into three groups, (a) those consolidating the

Law Reform (Married Women and Tortfeasors) Act, 1935, based on Interim Report of Law Revision Committee (Cmd. 4537).

Law Reform (Contributory Negligence) Act, 1945, (8 & 9 Geo. 6 c.28) based on report of Law Revision Committee on the subject in 1939 (Cmd. 6032).

The Defamation Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c.10), enacted most of the changes suggested by Lord Porter's Committee set up 1949 (Cmd. 7536). Occupiers Liability Act, 1957 (5 & 6 Eliz. 2 c.31), in substance based on the Law Reform Committee set up in 1954 (Cmd. 9305).

7. *E.g., London Graving Dock Co.* v. *Horton* [1951] A.C. 737 resulted in criticism by the Law Reform Committee (Cmd. 9305 at pp. 77-78) which led to statutory reversal by s.2(4) of the Occupiers' Liability Act, 1957.

8. But see speech of Lord Birkett on the 2nd reading in the House of Lords (216 H.L. Deb. Col. 1081), where he refers to actual occurrences that have arisen — a widow not being able to sue for death of her father-in-law who supported her because such relationship by marriage was not recognised.

9. Although most unmarried sisters, except for invalids would be career girls as even the more elderly today belong to the era of emancipated womanhood.

10. *Smith* v. *British European Airways Corporation* [1951] 2 K.B. 813; *Green* v. *Russell, McCarthy (Third Party)* [1959] 2 Q.B. 226.

11. H.C. Deb. (5th Series) Vol. 595 cols. 411-412, Vol. 597 col. 740, Vol. 605 cols. 723-759 and Vol. 609 cols. 1460-1466 and H.L. Deb. Vol. 216 cols. 284, 1079-1090 and Vol. 217 cols. 304-307, 736-743, 842.

12. No. 3 of 1956. The 1956 Act has since been repealed and re-enacted in its entirety by the Civil Liability Act, 1961 (No. 41 of 1961) in ss.8 and 47-51. Also s.49(1)(d) introduces for a three year period provision for dependants to sue for damages for mental distress up to £1000 in a particular case.

English Acts of 1846, 1864 and 1908, (b) those enacting provisions already existing in English law,[13] and (c) those bringing in changes by extending the range of dependants to cover brothers and sisters[14] and to allow "that a person *in loco parentis* to another shall be considered the parent of that other"[15] and to state that in assessing damages no account was to be taken of any pension, gratuity, or other like benefit.[16] Usually torts legislation of a reformatory nature in Ireland follows in the wake of a similar United Kingdom Act,[17] and it would be interesting to know if the sponsors of the English Bill were aware of the Irish changes.[18]

THE RANGE OF DEPENDANTS

On the subject of dependants English law had remained virtually static since the original rules of the 1846 Act. Posthumous children were held children within the Act,[19] and while by decision[20] illegitimates

13. *E.g.,* s.2(2)(b) extending the range of dependants under the Acts to cover illegitimates as had been partly done in England by the Law Reform (Miscellaneous Provisions) Act, 1934, s.2(1) which stated that a man's illegitimate child was to be a child for the purposes of the Fatal Accidents Act, or s.3(6) allowing the action to be brought within 3 years, as distinct from 12 months as previously, changed in England's Law Reform (Limitation of Actions, etc.) Act, 1954, (2 & 3 Eliz. 2 c.36), s.3 for all actions (except as regards under Maritime Conventions Act, 1911, s.8 where the period is 2 years).

14. S.2(1).

15. S.2(2)(c).

16. S.5.

17. Contribution between joint Tortfeasors was only introduced in Ireland by the Tortfeasors Act, 1951 (No. 1 of 1951), while it was in existence in England since the Law Reform (Married Women and Joint Tortfeasors) Act, 1935, s.6(1)(c). The abolition of the doctrine of common employment came in England by the Law Reform (Personal Injuries) Act, 1948 (11 & 12 Geo. 6 c,41), but in Ireland not until the Law Reform (Personal Injuries) Act, 1958 (No. 38 of 1958). There is as yet no equivalent of the Occupiers' Liability Act, 1957, although, of course, it may be felt there is no need for such changes.

    However, in certain fields Irish law has not hesitated to be more ready to make changes, *e.g.,* by s.2 of the Married Women's Status Act, 1957 (No. 5 of 1957), husband and wife may sue each other in tort; (the possibilities in topics such as libel, slander and assault give cause for thought). This change only came in England by the Law Reform (Husband and Wife) Act, 1962 (10 & 11 Eliz. 2 c.48). And the Civil Liability Act, 1961 (No. 41 of 1961) has introduced many changes and while some merely bring Irish law into line with provisions already existing in England there are several interesting differences, *e.g.* in the rules relating to the survival of causes of action on death, contributory negligence, wrongs to unborn children, the right to dependants entitled under the fatal accident sections of the Act to sue for damages for mental distress. Indeed the Act must be one of the most comprehensive tort statutes in the common law world. For a commentary on some of its points, see J.B. McCartney, "A Note On The Civil Liability Act, 1961" [1961] Irish Jurist at p.25.

18. However as these extensions are found in certain Canadian jurisdictions this source may have been tapped.

19. *The George and Richard* (1871) L.R. 3 A. & E. 466 — which however is not of judicial authority on this point for, a few months later in *Smith* v. *Brown* (1871) L.R. 6 Q.B. 729, the Court of Queen's Bench held in prohibition that the Court of Admiralty has no jurisdiction to entertain claims under Lord Cambell's Act and after some doubt this opinion was confirmed by the House of Lords in *Seward* v. *Vera Cruz* (1884) 10 App. Cas. 59 over-ruling *The Franconia* (1877) 2 P.D. 763.

20. *Dickinson* v. *North Eastern Railway Company* (1863) 2 H. & C. 735.

were held not within the term, change came by statute in s.2(l) of the Law Reform (Miscellaneous Provisions) Act, 1934. It also extended the definition to cover legally adopted children, both changes being on the advice of the Third Interim Report of the Law Revision Committee,[21] which, however, made no comment regarding any further extension. Then all of a sudden in 1959 a considerable extension was made so that, provided they can prove dependency, "it goes so far as to include the illegitimate child of an aunt by marriage or the adopted child of a sister-in-law".[22] In its parliamentary course there was no discussion of the wisdom of this provision and while in the debates in the Dail, the Irish lower house, and the Senate[23] there was quite a field-day on what range was to be covered, again the arguments to the contrary were scarcely touched on and these should be examined.

Will insurance companies argue that in face of the Act they will be so liable to a considerable increase of claims by the new classes of dependants that they will have to increase their premiums, even though the extent of such increase may well be mythical and exist only in the minds of companies?[24] Time alone can answer this. While with a sense of realism one might feel that insurance companies are salesmen with a product to sell and therefore must be conscious of their market and whether it will bear any rise in prices or whether a prospective clientele will trade elsewhere or not at all, one must also consider that compulsory insurance is an extremely regular phenomenon today, and that accident policies for obvious reasons will always remain popular. Moreover, in view of the present law (as explained subsequently in this article) investment in other fields *(e.g.,* stocks and shares) has its dangers if death results in circumstances giving rise to an action under the Acts.

Then is there a danger of the wife and children, the main losers, being adversely affected by the new categories where an executor will be bringing an action not only for them but, *e.g.,* for an aunt or niece of the deceased who try to show a pecuniary loss? Will a judge not occasionally find himself bemused where parents, widow, children and more remote relations are all claiming dependency? Will the new classes not abuse the system and aunts and cousins claim that the deceased always gave them £25. 0. 0. at Christmas or paid their rent? Here one does not have to await events before giving an answer for these are surely exaggerated difficulties. If the aunt can prove a dependency, albeit limited, the wife is not a loser for she will never have had the sum

21. Cmd. 4540.

22. Mr. Hobson in 605 H.C. Deb. col. 751.

23. Dail Eireann Debates Vol. 146 col. 1306, Vol. 153 cols. 833-856, 1137, 1150 and Vol. 154 cols. 70-71 and Seanad Eireann Debates Vol. 45 cols. 797-816, 828-838, 1035-1037 and 1111.

24. Lord Silkin, a solicitor, stated in the House of Lords that in the course of forty years practice he had never come across any case covered by the new extension — 216 H.L. Deb. col. 1085. One speaker in the House of Commons third reading, Major Hicks Beach, said that insurance companies would not object to the Act: 605 H.C. Deb. col. 758.

in the deceased's lifetime.[25] The judge even with the more limited pre-1959 scope had to examine each and every claim carefully as to its validity, and abuses by the new categories are as likely or unlikely as they were before.[26]

But a more serious problem is for compensation to what range of dependants can a defendant guilty of negligence in a motor, industrial or other accident fairly be held liable? This difficulty was seen in the judgment of Devlin J. (as he then was) in *Burgess* v. *Florence Nightingale Hospital for Gentlewomen.*[27] There he explained how, on a man's death, there were invariably serious repercussions on those who had come into immediate contact with him and such repercussions could take the form of pecuniary advantage or pecuniary disadvantage. (He cited among others the straightforward example of how on a man's death one member of a firm might receive his position by promotion while another, a favourite of the deceased, might well be thrown out of employment and find difficulty in obtaining a post equally rewarding in the financial sense to his obvious pecuniary detriment). Yet, although loss of this and similar forms would result, the law must necessarily limit the scope within which it can allow recovery. English law has adopted the solution that it will not allow any action for loss of a kind which can be termed business loss, for it is felt that once such allowance was made it would be impossible to see where it would end. In other words it is feared that litigation would be a regular occurrence and the stage would be reached where an architect would claim that his partner killed by the negligence of the defendant had the necessary social contacts and success to attract clientele while the claimant acted as imaginative draftsman and backroom boy and so by his partner's death he has suffered severe pecuniary loss.[28] But actions only lie at the suit of certain members of the deceased's family who can prove financial dependency on him arising from such relationship. Prior to 1959 the family was, with the obvious exception of a widow (or widower), the deceased's direct lineage,

25. A suggestion by one speaker during the Committee stage of the Irish Act — 153 Dail Eireann Debate col. 1142 of a percentage system being adopted where there are several claimants and that by such the widow should be awarded, say 80% completely misses the underlying notion of the award of damages under the Acts — to compensate for the pecuniary loss suffered and likely to be suffered and in any particular case from the total awards it could be seen that the widow's share might be as high as 95% or as little as 20%.

26. A survey of some decisions on the Acts *e.g.,* those in Kemp and Kemp, *The Quantum of Damages* (London, 1954), Vol. 2, should satisfy anyone who fears lest a lackadaisical attitude is occasionally adopted by the courts.

27. [1955] 1 Q.B. 349.

28. *E.g.,* in *Burgess's* case, *supra,* a husband brought an action under the Acts not only for the loss of his wife's contribution to their joint living expenses but for his loss in being deprived of her services as a professional dancing partner. But Devlin J. held that as there was no benefit arising from the dancing partnership that could properly be attributed to the relationship of husband and wife the claim under this head failed. See also an earlier case *Sykes* v. *N.E Railway Company* (1875) 44 L.J.C.P. 191 where it was held that in order to maintain an action under the Fatal Accidents Act, 1846 it is not enough if the only pecuniary benefit to the plaintiff from the deceased's life was derived from the fact that both plaintiff and deceased were in business together and the business was not so successful owing to the death and it did not affect the issue that the deceased was in fact the plaintiff's son.

though illegitimate and adopted children were recognised. Now the definition is considerably widened to cover what could be termed the outposts of the family circle *e.g.,* collaterals, remoter in-laws.[29] The result (apart from the problem of insurance premiums) is sensible in that the cases under the new rules will be few and if dependency in such circumstances could be proved the lack of such provisions would have led to definite hardship. As it happens the cases more likely to arise are in the closer rather than the further reaches of the new categories — a widow dependent on her father-in-law obviously is a more regular occurrence than that a deceased supported a cousin's adopted child. But in view of this recognition of what one may consider the deceased's complete family circle as extended from his immediate household other categories surely at least merit examination.

The possibility of allowance for "the parent of any illegitimate child of the deceased who has at the date of the writ, and is reasonably expected to retain, the care of such illegitimate child" was discussed at the House of Commons Committee stage.[30] This phraseology suggests that the mother's damages would be expended for the support of the child. If so, the clause is unnecessary[31] for if the child is supported by the father either because the father is legally liable under an affiliation order[32] or by gratuitous payments resulting from the father's sense of moral obligation[33] he or she is already covered by the pre-1959 law — and if he or she is not being kept there is no pecuniary loss by the father's death. However, if the idea of the amendment was that the action was to be to compensate the mother for her own pecuniary loss where such existed (with the child being already a party to the suit on its own account), then the *rationale* for the mother's action presumably is that the liaison with the deceased had taken on a certain permanency by the arrival of an off-spring and that the maternal duties of the woman would place a definite obstacle to the possibility of her obtaining employment to support herself. If so however the problem must be faced that, if the deceased had survived, the claimant could at any time have ended her union with the deceased and transferred her affections elsewhere. This would have to be taken into consideration by the court. A lesser but knotty technical point is that the personal representative under s.2 of the 1846 Act might find himself in the embarrassing situation of bringing an action for the wife, the mistress, the illegitimate child or children and the lawful children, a situation even more aggravated if, as often happens, the executor is the lawful spouse. Finally, if the deceased had been supporting the

29. Certainly English law now allows a defendant to be liable for categories he might not reasonably expect but which the deceased's goodness of heart took in. In the Dail Debates it was felt unfair to a defendant that he should be responsible for such magnanimity on the part of the deceased.

30. As an amendment to an amendment which merely said "the parent of any illegitimate child of the deceased" — standing Committee C. 1959 Fatal Accidents Bill, col. 4.

31. In other words the original amendment was the correct wording in order to have the problem of a mistress discussed or to have the extension made.

32. See *Kelliher* v. *Ground Explorations* [1955] Current Law 741 — Kemp and Kemp, *op. cit.* Vol. 2, at p.138.

33. *Phipps* v. *Cunard White Star Company Ltd.* [1951] 1 T.L.R. 359.

child merely by gratuitous payments, and not as liable under an affiliation order (and this occurs whether the mistress is claiming for herself or not) the court has the double duty, seemingly, of trying both the Fatal Accidents claim and the issue of paternity. This opinion is reinforced by the usage of the wording "reputed father". It may be supposed, too, that the moral principles involved would have to be taken into account.[34]

As regards an ex-wife she may either have secured provision under s.19(2) of the Matrimonial Causes Act, 1950, or if not (as such an action did not survive against the estate of the deceased within section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934), now, by section 3 of the Matrimonial Causes (Property and Maintenance) Act, 1958, the court is empowered to order reasonable provision to be made for her, if she has not remarried, out of the estate of the former husband. But, suppose she has a maintenance order for support but not secured provision and he is killed leaving no estate (for his whole earnings were taken up with keeping himself and her) except what is awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, which may amount to very little, the divorced wife may well be sorely hit.

But a more obvious gap is that the type of adoption relationship recognised is one 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.[35] Dr. Unger and Dr. Kahn Freund have both pointed out and been critical that this means that foreign adoptions are to be excluded.[36] Moreover a person not legally adopted under the Adoption Act, 1958, or other relevant enactment would have no rights. Lord Silkin, throughcut the various stages in the House of Lords debates,[37] suggested that this was a weakness which from his own knowledge could lead to injustices as particularly in the less economically prosperous ranks of society the children of parents who died or were unable to support them lived with relations or friends who either through ignorance or thoughtlessness did not bother to undergo the prescribed legal formulas. While legal adoption rather than this fosterage should be encouraged, it can scarcely be claimed that a harsh penalty of this nature on those who do not conform is valid as an incentive to make them go through the legal formalities for adopton. And the liklihood of spurious claims by either foster-parents or foster-children is as probable or as improbable, as abuse by any other category. Probably the Irish Act, by allowing for parents to include those *in loco parentis*, would cover this circumstance,[38] although unfortunately as yet there is no decision and the Act did not

34. A mistress has been granted legal rights by statutory provision *e.g.*, s.24 of the National Insurance (industrial Injuries) Act, 1946 (9 & 10 Geo. 6 c.62).

35. S.1 (3)

36. "Two Notes on the Fatal Accidents Act, 1959" (1960) 23 M.L.R. 60. Dr. Unger also points out that the Act may well be expected to increase the difficulty of persuading the courts that *Re Wilson, Grace* v. *Lucas* [1954] Ch. 733 and *Re Wilby* [1956] P. 174 should not be followed.

37. *Loc. cit.*, note 24 *supra*.

38. S.2(2)(c).

oblige by providing an interpretation of the phrase.[39] Of course, in England the child today may well be in such a relationship to his acting father as to be provided for under some other provision of the Act *e.g*., he might be a nephew or a cousin. But, if not, then unfairness may ensue either on the death of the person who has provided his support or equally where he in return probably for all their past kindnesses is contributing to the support of what can be termed his foster-parents. A final circumstance which would deserve to be surveyed is where a deceased has made himself responsible for helping a remote relative not covered by the new Act or, more likely, the child of a close personal friend not by supporting him in his own home, but in some definite material manner as *e.g.,* education. Here on his death the recipient suffers acute loss. However, this might well be considered too remote a possibility to be covered and could be dangerous as leading to other claims not coming under the forbidden head of business loss but extending the type of relationship already recognised in family relationship to too fine a point.[40]

But it is to be regretted that when the scope was being enlarged that the difficulties that could arise and the underlying principles were not mooted, and that when this extension was so diverse that other needy cases were scarcely given thought, in particular the child either not legally adopted or adopted legally abroad and possibly the woman who is wife in all but legal form and the divorced wife.

PRINCIPLES OF ACCOUNTABILITY

If the question of the range of dependants sounds an academic tone, the problem of deductions strikes a practical note relevant to many cases.

39. It can scarcely be supposed that it is to be interpreted to cover the cases recognized to rebut the presumption of resulting trusts by showing advancement. For certain of these categories are already covered by the Act, *e.g.,* the presumption of advancement applies in the case of illegitimate children — *Beckford* v. *Beckjord* (1774) Loftt. 490; *Kilpin* v. *Kilpin* (1831) 1 Myl. & K. 520 — but illegitimate children came within the Act — s.2(2)(b) which would result in duplication, and while certain cases where the presumption arises, *e.g.,* son-in-law *(Cox* v. *Bennett* (1870) 18 W.R. 519) are not covered by the Irish Act it is unlikely such cases are meant to be covered by the phrase. The proposer in the Committee stage — 153 Dail Eirann Deb. col. 1140 — said it was to cover informally adopted children and children being reared by uncles or aunts.

40. The Sociological implications of the English Act as a revival of the recognition of the kinship relation as a source of legal rights has been commented on by Dr. Kahn Freund *op. cit.* at p.60. Concerning the Irish Act it is pertinent to ask to what extent it might be influenced in its provisions on brothers and sisters by the local factor that in a predominantly agricultural community with a low marriage rate unmarried sisters remain on the family farm after the death of the parents as unpaid housekeepers for the unmarried brothers — and on the topic of "*in loco parentis*" whether there is any cause for the provision in that in the Republic of Ireland as a predominantly Roman Catholic country where, owing to Roman Catholic teaching on birth control, there is a likelihood of extremely large families some of the members may, to ease the economic burden, be supported by close friends or relatives (not within the recognized range of dependants under the Act) who are childless or at least have small families — and whether legal adoption is much less availed of than in England; certainly a layman's investigations and calculations seem to show that there are proportionate to the population a slightly large number of legal adoptions *per* year in England, *i.e.* about four to three.

The starting point of damages under the Acts[41] is that a dependant must be compensated for pecuniary, and only pecuniary, loss[42] suffered or likely to be suffered as a result of the death,[43] but this is the loss of each individual dependant as distinct from a group loss.[44] Now, as the principle is so firmly set on a financial basis it has been recognised from the earliest decisions that any gains which result to a dependant must be taken into account as relevant. This attitude is seen in the words of

41. The Fatal Accidents Act, 1846 went through its various stages in Parliament in conjunction with a statute abolishing *deodands* — 9 & 10 Viet, c.62. *A deodand* was a personal chattel which having been the immediate occasion of a death was forfeited to the Crown the value being awarded to the lord of the manor or given to pious uses or to charity (presumably the family of the deceased) and later the chattel was rarely taken but the value thereof was awarded by a coroner's jury to the dependants of the dead person. It would be interesting to know if Lord Campbell's Act was at all influenced by pressure groups from the new railway companies who were worried not so much by the lack of provision in our law for the dependants of someone killed by negligence but objected to the fact that the value of their engines, tenders and wagons was being awarded by coroner's juries to the dependants of persons killed by their negligence. The preamble to the Act abolishing *deodands* referred to the rule as unreasonable and inconvenient. For background see Hamilton Ellis, *British Railway History, 1830-1876* at p.75.

42. From earliest decisions it has been laid down that no compensation is payable as *solatium, i.e.* consolation to aggrieved relatives. Their only right of action is as dependants for financial loss suffered or reasonably likely to be suffered. See discussion of *solatium* further on in this article.

43. It is not a condition precedent to the maintenance of an action under the Acts that the deceased should have been actually earning money or money's worth or contributing to the support of the plaintiff dependants at or before the date of death provided that the plaintiff had a reasonable expectation of a pecuniary benefit from the continuance of the life, *e.g., Taff Vale Railway Company* v. *Jenkins* [1913] A.C. 1 — sum awarded for loss of 16 year old daughter who was just finishing her term of apprenticeship to the dress-making trade and so was likely in the near future to earn remuneration which might quickly have become substantial.

However a mere speculative possibility is not sufficient — there must be a reasonable probability. So in very many cases the courts have refused to give compensation for the loss of a child who was not likely for several years to take up employment. But see an unusual Irish case *Hamilton* v. *O'Reilly* [1951] Ir.R. 200.

But the actual financial loss need not be considerable — even a slight dependency will prove sufficient ground for compensation, *e.g., Hetherington* v. *N.E. Railway Company* (1882) 9 Q.B.D. 160, 51 L.J. Q.B. 495 (occasional financial help by son to father when father out of work); *Dalton* v. *S.E. Railway Company* (1858) 4 C.B. (N.S.) 296 (son brought present of groceries every fortnight to parents); *Franklin* v. *S.E. Railway Company* (1858) 3 H. & N. 211 (son assisting father in position as coal porter by doing heavy work for which father unable but for which he was paid).

And the loss need not be actual financial loss but, *e.g.,* gratuitous services rendered by a wife in the home which are equivalent to pecuniary benefit — for on her death the husband will have to employ domestic help — *Berry* v. *Humm & Co.* [1915] 1 K.B. 627.

44. *Pym* v. *Great Northern Railway* (1863) 4 B. & S. 396, so that if on the death by negligence of a wealthy man certain dependants suffer at the expense of others who are considerably better off than they were in the deceased's lifetime nevertheless the former have a valid claim, *e.g.,* if the deceased's income arose from realty and personalty and on his death intestate by the rules of intestacy an heir takes to the disadvantage of other dependants they nevertheless have a claim under the Acts.

the Privy Council in *Grand Trunk Railway of Canada* v. *Jennings*[45] — "Their Lordships are of opinion that all circumstances which, though insufficient to exclude a statutory claim may legitimately be pleaded in dimunition of it ought to be submitted [to the jury]....it appears to their Lordships that money provisions made by a husband for the maintenance of his widow in whatever form are matters proper to be considered. . . . . ." And, Bankes L.J., in another case,[46] has been equally succinct. "I cannot myself see why, when assessing compensation under Lord Campbell's Act, any distinction should be drawn between an assessment of what is a reasonable expectation of benefit had the deceased person lived and what is the reasonable expectation of benefit in consequence of the deceased person's death. Both must be taken into consideration in arriving at the real loss. Both may legitimately in my opinion be arrived at by the same process."

But despite this general rule, within only a matter of a few years of the passing of the 1846 Act, inroads were being made into the principle that all gains must be deducted. Lord Campbell himself in his charge to the jury in *Hicks* v. *Newport, Abergavenny & Hereford Railway*[47] suggested that awards under accident policies might be deducted for they were taken out with the very circumstances which had happened in view. But as regards life insurance, as the death was bound to occur sometime, there should be deduction only in respect of the premiums that would have been paid by the family or the deceased himself if the fatal accident had not occurred. In *Jenning's case,* from which the strong words previously quoted about deducting all gains were taken, nevertheless this principle was repeated and it was held that account should be taken only of the accelerated receipt of the benefit of the policy by the method suggested in the earlier case. But if sums resulting from accident policies are deducted from damages awarded under Lord Campbell's Act, if the death of the holder is caused as is more than likely by someone else's negligence, this would prove a positive disincentive to dealing in such commodities. Naturally this fact was well realised by insurance companies as shrewd business men. A railway passengers insurance company had a private Act passed in 1864[48] under which it was provided that in the case of a fatal accident arising in connection with any policy of the company the damages recoverable by the representatives of the deceased should not be liable to such deduction. Two more private companies had this privilege extended to them in 1907.[49] And by 1908 there were 25 sponsored bills queueing outside the Lords while when the 1908 Bill was discussed in the Commons the number had jumped from 25 to 40 between February and July. While Parliament

45. (1888) 13 App. Cas. 800 at p.804.

46. *Baker* v. *Dalgleish S.S. Co.* [1922] 1 K.B. 361 at p.368.

47. (1857) B. & S. 403n.

48. Railway Passengers Assurance Companies Act, 1864 (27 & 28 Viet. c. cxxv).

49. Ocean Accident and Guarantee Corporation Ltd., Act, 1907 (7 Edw. 7 c. xlv) Royal Insurance Company Ltd., Act, 1907 (7 Edw. 7 c. ii).

could have revoked the benefit conferred on the three, it chose the alternative of extending the privilege to all. This was the reason for the Act[50] and not, as one member suggested in the 1959 Commons Debate, to bring the law in fatal accident cases into line with that in personal injuries claims[51] where insurance monies are not considered,[52] for the underlying principle in personal injuries claims is completely different.[53] However the sensible reason for the Act surely was that the sum resulting to the dependants had already been paid for by the deceased, and that prior to the Act the deceased in taking out a policy was not insuring himself but the insurance companies.

In *Curling* v. *Lebbon*[54] Lord Hewart C.J., reluctantly, held that contributory pensions under the Widows Orphans and Old Age Contributory Pensions Act, 1926, had to be deducted, a situation immediately rectified by statute.[55] The 1959 Act consolidated these two exceptions and added the new category[56] of any pension contributory or otherwise, this obviously also covering a lump sum[57] or periodic payment by trade unions, industrial companies *etc.* The need for this reform was actuated by the inconsistencies in the group pension cases[58] but again the sensible reason is that these gratuities or pensions are in fact a portion of the emolument

50. Possibly inspired by a case mentioned by the Earl of Granard on 2nd reading in the House of Lords in 1908 — 184 H.L. Deb. col. 568 — *Sykes* v. *Lancashire and Yorkshire Railway (seemingly unreported)* which said that the amount awarded under insurance policies must be deducted (this presumably meant accident policies) reiterating *Hicks* v. *Newport, Hereford and Abergavenny Railway Co. supra.*

51. Bingham Standing Committee C. H.C. 1959 col. 16. Although admittedly in the House of Lords second reading on the bill when it was first presented in 1907 Lord Courtney of Penrith mentioned the effect in its favour, 179 H.L. Deb. col. 1691, as did the President of the Board of Trade in the Commons — 192 H.C. Deb. col. 260.

52. Accident insurance policies are not taken into account in working out damages in personal injuries claims — *Bradburn* v. *Great Western Railway* (1874) L.R. 10. Ex. 1; *Payne* v. *Railway Executive* [1952] 1 K.B. 26.

53. In a personal injuries claim the plaintiff not only can claim for special damages, *i.e.,* loss of earnings both up to the date of the action and also for prospective earnings between the date of judgment and the anticipated date of death or recovery, hospital and medical expenses, damage to clothing but for general damages — loss of expectation of life, loss of amenities of life, pain and suffering. While the former are genuine financial loss, the latter obviously are a form of *solatium,* a consolation to the aggrieved claimant.

54. [1927] 2 K.B. 108.

55. S.22 of the Widows Orphans and Old Age Contributory Pensions Act, 1929 (20 & 21 Geo. 5 c.10), re-enacted in s.40 of the Widows Orphans and Old Age Contributory Pensions Act, 1936 (26 Geo. 5 & 1 Edw. 8 c.33) repealed s.65 of National Insurance Act, 1946, replaced s.2(5) of the Law Reform (Personal Injuries) Act, 1948, — now dealt with s.2(2) of the Fatal Accidents Act, 1959.

56. S.2.

57. *E.g.,* under Regulation 13 of the National Health Service Superannuation Regulations, 1955.

58. *Smith* v. *British European Airways Corporation* [1951] 2 K.B. 893; *Bowskill* v. *Dawson* (No. 2) [1955] 1 Q.B. 13; *Green* v. *Russell, McCarthy* (*Third Party*) [1959] 2 Q.B. 226.

of the deceased[59] — they are something he has earned over the years and in calculating his pay allowance has been made for the fact of such extraneous benefits towards which he may well have been a contributory.[60] Indeed this may well have been a factor which attracted the deceased to a particular position and of course the trend today is for more and more positions in all spheres and at all levels of working life to be pensionable.

But if statute definitely breached the solid dyke of accountability for gains case law has widened the gap. Funeral expenses awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, shall not be considered[61] — the dependant will have had to pay them and presumably the same principle would apply to any hospital expenses incurred. But even more considerable an exception is that no account shall be taken of a freehold house[62] or a leasehold house[63] which accrue to the dependant on the death, the reason being expressed by Lord Goddard C.J. in *Heatley* v. *Steel Company of Wales Ltd*: [64]

> "What allowance if any should be made in the assessment of damages for the beneficial interests thus accruing to the widow, and in some small degree to the children by reason of the death? It is very difficult to see how any substantial sum whatever can be allowed for these interests. Pending any sale of the house the widow will no doubt continue to live in it with her family exactly as she did before, the children being provided with a home there exactly as they were before. What the court has to try and ascertain in these cases is: How much have the widow and family lost by the father's death? This is not a case where by the death of the father the widow will come into some large sum of money of which she never before had the handling. She will simply continue to live in the house and provide a home there for the children until it is sold, and when it is sold she will have to get another house. . . . . .The court cannot see that there is really any sum to be deducted for the value of the house at all."[65]

If the dependants live on in the family home, whatever its nature as suitable to the deceased's position in the community then there is no deduction as there is no benefit — for the basic principle is to place them in the position they were before the death so it cannot be argued that they should change their standards of living and move to a smaller house.

59. This has been recognised in personal injuries claims — see *Payne* v. *Railway Executive* [1952] 1 K.B. 27.

60. Of course awards of damages under the Acts may be taken into account in the evaluation of pensions — for Ministry of Pensions, April 1955 practice, see Kemp and Kemp, *op. cit*., Vol. 2 at p.318. A feasible idea is that no evidence of pensions to be awarded to the dependant should be allowed at the hearing of an action for fear lest it might prejudice the judge into thinking that dependants do not need so much — whereas as stated the pension has already been paid for.

61. *Joyce* v. *British Electric Authority* 1955 C.A. No. 185 *unreported,* see Kemp and Kemp, *op. cit*., Vol. 2 at p.48.

62. *Bishop* v. *Cunard White Star Company Ltd.* [1950] P. 240.

63. *Heatley* v. *Steel Company of Wales Ltd.* [1953] 1 W.L.R. 405.

64. *Ibid*. at p.407.

65. A certain misconception in his statement about not receiving a large amount of money will be pointed out subsequently.

This exception would also cover what can be termed the concomitants of a house — furniture and other fittings. "A widow after the death of her husband intestate will take his personal chattels absolutely but these may consist of articles such as furniture of which the widow would have had the use when her husband was alive in the home and in respect of which no deduction falls automatically to be made. . . . . "[66] This would prove quite straightforward in the normal case and is following the logical course that if no notice is taken of the value of the house the same rule should apply to such articles as make the house a home. But what if the furniture includes an early Picasso or a couple of Ming vases? While strictly they are articles of which the widow would have had the use in her husband's lifetime (presumably use is a composite term to cover both the functional and the ornamental) the answer probably lies in the word "automatically" and a distinction would be drawn between the normal fittings expected in a home of the kind of the deceased, and items which are more of the nature of investments — between the functional/ornamental and the ornamental/investment (though interesting problems could arise if the dining-room table is a Hepplewaite — coming under both categories). In *Bishop* v. *Cunard White Star Company*[67] Hodson J. said that personal effects were to be deducted "unless these consist of articles of which a widow claimant would have had the use when her husband was at home. In other words, personal effects are not automatically to be deducted any more than the value of deceased's estate should be so deducted. The estate may consist in the main of a house and furniture. . . . . "[68] This phraseology — the use of the words "any more than" the estate consisting of house and furniture — might suggest a further category of personal chattels not to be deducted. "Personal chattels" under the Administration of Estates Act, 1925,[69] cover as well as furniture such things as horses, cars, jewellery, wines, consumables. Such a wide interpretation, however, could include objects extremely beneficial to the recipient either under a will or the widow on intestacy. So it is more likely that unless Hodson J. meant to say household effects "any more than" the house which is certainly not suggested by his words, it covers articles not coming under the heading of furniture yet found in the normal household — garden implements, bicycles, possibly the family car if retained by the dependants.[70]

66. *Bowskill* v. *Dawson* (No. 2) [1955] 1 Q.B. 13, per Morris L.J. at p.21.

67. [1950] P. 240.

68. *Ibid*. at p.248

69. (15 & 16 Geo. 5 c.23) s.55(1)(x).

70. A gift to a dependant from a third party is not deducted but on a different principle that it is not a consequence of the death, but the donor's generosity is a *novus actus interveniens.* See: *Peacock* v. *Amusement Equipment Co. Ltd,* [1954] 2 Q.B. 347; though MacDermott, one of the speakers, in the Report state of the Commons Debate on the 1959 Act points out that underlying the judgments of both Somervell L.J. and Birkett L.J. is the feeling that if the dependants had some intimation before such an accident that they would be cared for ("if anything ever happens I will look after you") this sum would be deducted — see his speech 605 H.C. Deb. cols. 733-735.

But though the principle is severely hacked the bones remain, and there is still deduction in many cases. If the dependants or any such under the Acts are those entitled to the deceased's estate which contains damages awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, for pain and suffering and loss of expectation of life, the latter must be taken into account,[71] so must any real property "when the deceased did not earn his own living but had an annual income from property, one half of which has been settled upon his widow, the jury might reasonably come to the conclusion that to the extent of that half a widow was not a loser by his death;"[72] stocks and shares and other investments "where stocks and shares and comparable income producing investments are concerned and the probable family interest is thereby accelerated the deduction will normally be made in full,"[73] personal chattels (not within the range of normal furniture and family items) and residuary estate. Moreover, in many cases full deduction has been made whereas what should have happened would have been to deduct the accelerated receipt.[74]

It is submitted that the present position is completely illogical and unreasonable.[75] If the *rationale* is as was stated in the argument for not deducting sums payable under any accident policy (and this argument could equally apply to life policies, widows' pensions, and lump or periodic superannuation payments) that the benefit came to the dependant because of the death itself while for legacies and residuary estate although death is the *sine qua non (i.e.* the event without which there cannot be payment) it is not the *causa causans (i.e.* the reason for the payment), a question arises. Why should the principle of non-deductibility be granted to freehold or leasehold houses which are in the same categories as legacies

Nor is a sum donated by a charitable organisation deducted, *e.g.,* a fund for the dependants of persons killed in a railway or mining disaster. Note the words of Andrews L.C.J. in a Northern Ireland case concerning a personal injuries case — *Redpath.* v. *Belfast and County Down Railway* [1947] N.Ir. 167 — the defendants claimed to deduct from the sum for which they were liable the sums received by the plaintiff from a Lord Mayor's disaster Fund. The judge refusing this submission pointed out how the fund was entirely a *novus actus interveniens* — the *causa causans* of the fund was not the accident but the bounty of the subscribers.

71. *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601. See, Munkman, *Damages for Personal Injuries* (2nd Ed., 1960) 119 footnote (k).

72. *Grand Trunk Railway Company of Canada* v. *Jennings* (1888) 13 App. Cas. 800.

73. *Bishop* v. *Cunard White Star Company Ltd.* [1950] P. 240 at p.248.

74. *Bath* v. *British Transport Commission* [1954] 1 W.L.R. 1013; *Zinovieff* v. *British Transport Commission,* "The Times" April 1, 1954 — see: Kemp and Kemp, *op. cit.*, Vol. 2, at p.81.

75. An amendment was introduced in the House of Commons at the Committee stage which if passed would have had the effect of not taking into account any sum coming under wills *etc.* It would of course have overturned the existing principle if it can still be said to be standing. One speaker, the proposer Madden, had some interesting observations — Fatal Accidents Bill see Standing Committee C. cols. 13 and 14 — but one might disagree that non-accountability would only affect a few cases and his argument that because insurance companies were behind the 1908 Act they would favour this amendment misses the point that, as regards insurance policies, they had to say the least a certain interest. And that certain members of the Commons would wish no change see: MacDermott, 605 H.C. Debs. col. 735 and Hobson 605 H.C. Deb. col. 736.

— namely the reason why they pass to the dependants is because of the deceased's will, while damages for pain and suffering and loss of expectation of life which are in the same category as insurance (*i.e.* — death is both the reason and the circumstance for their payment) are deductible?

If one examines the underlying principle for the previous point the feeling presumably is that pensions and superannuation grants are not consumable by the deceased in his own lifetime unlike legacies and investments which are not so immune. But, then, why should houses be non-deductible as to value for they are consumable in this sense and a life insurance policy, while privileged under the 1908 Act, (although it can be specifically taken out so as to mature only on death) nevertheless, can be surrendered and a money payment be taken in exchange, *i.e.,* it too can be used up by the deceased in his lifetime.

Nor is there any validity in the claim that where there is no accountability it is because the deceased earned such sums while where there is accountability it is because the sums involved there were the fruits of someone else's labours — although a close examination of *Jenning's* case might suggest this was at least a factor the judges considered in the older case.[76] For it should be realized that while pensions and superannuation sums have been paid for either in contributions or by services rendered, an insurance policy, while usually paid for by the deceased, could have been bought for him by someone else, and houses belonging to the deceased which pass on his death could have been inherited. (Possibly in such cases the judicial discretion not to make a deduction would not have been applied although the reasoning of Lord Goddard C.J. in *Heatley's* case[77] with the emphasis on the fact that the family have to live somewhere and that the family had no direct benefit would suggest otherwise.) Moreover, investments in either stock, shares and other securities or the land or chattels belonging to the deceased which pass on his death may well be the products of the deceased's exertions physical or intellectual. For there are as yet many professions, trades and positions which do not carry a pension scheme contributory or otherwise — some people choose them voluntarily, in the humbler grades there is little choice — and while the holder of such a position may make provision for himself and his dependants by taking out insurance policies he may prefer to use one of the other means which is likely to pay larger dividends. Yet such admirable qualities of thrift and foresight are in the present state of the law penalized.

All the speakers in the 1959 debates willingly admitted the illogicalities — though one, Bingham[77a] seemed to suggest that if the system was

76. (1883) 13 App. Cas. 800 at p.804. "When a man has no means of his own and earns nothing it is obvious that his wife and children cannot be pecuniary losers by his decease. In like manner when by his death the whole estate from which he derived his income passes to his widow or his child. . . . . no statutory claim will lie at their instance. A very different case arises where the means of the deceased have been exclusively derived from his own exertions whether physical or intellectual. It then becomes necessary to consider what but for the accident which terminated his existence would have been his reasonable prospects of life, work and renumeration, and also how far these if realized would have conduced to the benefit of the individual claiming compensation."

77. [1953] 1 W.L.R. 405.

77a. H.C. Deb., Standing Committee C, Fatal Accident Bill, 1959, cols. 17-19.

illogical it was sensible. Now, it could be argued that insurance policies, pensions schemes and the owning of houses is the province of the average man while investments in real property or stock or Ming vases is the field of the more economically fortunate in our community. Even allowing that the pension or superannuation grant, that since 1959 is non-deductible, could be an exceedingly large lump sum to an already exceedingly wealthy widow and that investments as mentioned before are no longer the prerogative of a surtax class,[78] it is not a fair way (or even if one may say it a satisfactory method) of penalizing the rich to lay down a general principle penalizing everyone, make exceptions by statute and decision which tend to favour the average man and leave other circumstances which could hurt the rich indirectly on the not very likely contingency of such a person being killed by someone else's negligence.

Again if a sum is to be deducted this should not be the whole sum coming to the dependants either by will or on intestacy as happened in *Bath* v. *British Transport Commission*,[79] and *Zinovieff* v. *Railway Executive*[80] — but only the accelerated receipt.[81] How this should be gauged was explained in *Muirhead* v. *Railway Executive*[82] — and if this solution were universally adopted many factors should be taken into account. The dependants definitely receive the sum whereas the deceased might have changed his will or wished to make provision for others, or the dependants or some of them might have predeceased him. The sum might have decreased especially if the deceased might have needed it in old age, but on the other hand it could have increased especially if, at the time of his death, the deceased was just reaching the zenith of his career. With these factors in mind the sum to be deducted should be the income of the sum received by the dependants subject to these factors multiplied by the number of years not of the earning capacity of the deceased which is the relevant period in working out dependency but the number of years the deceased could have expected to live. But, again, the question as to what extent the income would be taxed (which of course can vary greatly according to other factors, such as what other income the dependants had, whether it earned or unearned, allowances *etc.)* is relevant. This is where one might with respect criticize the phraseology,

78. See *Bath* v. *British Transport Commission* [1954] 1 W.L.R. 1013 where Savings Certificates to the value of £1050 saved by a deceased carpenter and joiner were deducted from damage of £4600 awarded under the Acts.

Anyway, the purpose of the Acts has always been to recompense for the financial loss suffered and, *e.g., Pym* v. *Great Northern Railway Co.* (1863) 4 B. & S. 396 shows that, the economic background of the claimants is not relevant. *Cf. Gillard* v. *Lancashire and Yorkshire Railway* (1848) 12 L.T. (o.s.) 356 where Pollock C.B., at p.356 said: "If for instance the wealthiest peer of England who rolled in riches were to marry a lady enjoying a pension during her life and she were to be killed by the negligence of another, her husband would be entitled to bring an action under the Act. . . . . "

79. [1954] 1 W.L.R. 1013.

80. "The Times", April 1, 1954, — see Kemp and Kemp, *op. cit.* Vol. 2, at p.81.

81. Though admittedly in these two cases working out the accelerated receipt according to the recognised principles as it would have equalled approximately the capital sum the same result would have been reached.

82. 1955 C.A. No. 178 see Kemp and Kemp, *op. cit.*, Vol. 2, at p.125.

if not the *rationale,* of Lord Goddard's decision in *Heatley's* case, *i.e.* that the widow who receives a large sum of which she never before has had the handling does not, except in the rarest circumstances, indulge in wild shopping sprees or eat up the capital, unless Lord Goddard was referring to the income (which she now receives as a legal right) as a large sum. And this would of course depend on the capital sum and the rate of interest. So the income on the capital (subject to other factors) multiplied by the number of years early it has been received is the deductible sum from the damages. It will require careful evaluation in each case and can sometimes be large and sometimes slight.

Even allowing for deduction, surely a fact that is extremely likely is overlooked. It is said the widow receives the income so many years earlier. But, surely, even if the husband survived she would have benefited by it if we appreciated the normal realities of matrimonial life. For if it is spent by the husband on some individual item *e.g.*, children's education, it will leave free more of his earned income for their general standard of living to be improved and if it merely is joined with his earned income it has the same result. Admittedly it must be faced that sometimes, however, in assessing the damages to be awarded under the Acts the consideration of overall income the wife received may result in the income from investment having been taken into account, and increases of salary.[83]

Finally it should be mentioned that the remaining rules of deductibility work not only to the detriment of the claimant but to the benefit of the defendant. Perhaps a hypothetical case will best illustrate the present unsatisfactory position. The deceased was a man of 57 in a non-pensionable post earning at his death £12 a week after deduction of income tax and National Insurance, and this was the financial ceiling of the post he was likely to remain in for the remainder of his working days. With his children self-supporting his sole dependant is a widow aged 54. They rent a small house, the furniture has been bought over the last eight or so years, *i.e.* since the dependency of the children ceased, with the income of the savings over that period. An insurance policy has matured and is to be used for his retirement to supplement his state pension and that of his wife, for by the time he retires his wife will also be eligible for one. Of the £12, £2 goes towards his savings which are to be for the wife after his death and at the time of his death these amount to £800. £2 is his own pocket money, and of the £8 which go to the wife £3 is spent on him in various ways and £5 is used for her support, the rent *etc.* Therefore, on his death eight years before he would have had to retire her loss of dependency would work out at £5 (her dependency) x 52 = £260 x 8 years = £2,080. The insurance policy results in her receiving a sum he would not have left to her but as the 1908 Act applies it is non-deductible. However, as she receives his £800 savings earlier, its accelerated receipt must be taken into account although it would very likely have come to her eventually, for taking the

83. See, *e.g.,* the case of *Daniels* v. *Jones* [1961] 1 W.L.R. 1103 where considerable increase in deceased's income in coming years was allowed for. But note that in this case there was deducted the value of shares which passed to the widow although it was shown she could have used as much of the annual Income from them during his life as she wanted.

recognized life expectancies she would probably have survived him, and moreover the savings might have increased in time. Nevertheless, to the contrary, the deceased might have had to break into the savings in his old age. So therefore the whole income over the 16 ½ years he might have been expected to live[84] must be deducted; investing in a paying concern, say 4½% this would be £36 x 16½ years = £594. So the damages awarded under the Act would be £2,080 — £594 = £1,486. But supposing the deceased had not saved that £2 per week but spent an extra £1 a week himself and given his wife an extra £1 for herself, her dependency would have increased to £6 per week which over eight years purchase would mean £2,496 with no accelerated receipt of savings to deduct and the insurance moneys not affected. While these facts, although not unlikely, were chosen to suit the writer's pleadings it does appear ludicrous that thrift by saving will lead to penalisation if the deceased dies in circumstances giving rise to damages under the Act.[85]

While these criticisms have been particular, general dissatisfaction is not hard to find. In the Debates in the Lords in 1907[86] (while at first sight the noble Lords seem somewhat petulantly dismayed that having had to insure their workmen compulsorily,[87] they are still liable to their dependants for damages until they are reassured that the dependants will only take twice over on the unlikely event of the master having given the servant the policy) at the committee stage,[88] Lord Balfour asked why this privilege was given to insurance companies and not other forms of investment. Lord Courtney of Penrith replied that it was open to question whether there should be any deduction whatever from the damages paid on the death of the deceased, but the bill was expressly directed to redress the inequality whereby three companies had a privilege for which numerous others were clamouring and further bills might well be neces-

84. According to Registrar General's Life Tables a woman of 54 has 21 years expectation while a man of 57 has 16.47 year expectation — so in our hypothetical case if he had lived until his normal expectation of 73.47 years, she would still have an expectancy of 1.53 years.

85. The only argument possible to support this is that, as a defendant held liable for damages under the Acts has to undergo a considerable matter of chance, the man he kills may be a bachelor with no dependants, or a family man with several children to whom all his earnings go, the man may be earning £10 a week of which £6 goes to his dependants or he may be earning £60 of which £36 go to his dependants — so chance plays a part in what dependants can sue for and what deductions have to be made. But surely different principles should apply to defendants invariably backed by wealthy insurance companies and to thrifty persons now penalized, especially allowing for the considerable pressure and propaganda expended to encourage investment in Government securities, British industrial concerns, *etc.* In working out damages it is too complicated to maintain an exact balance of fairness between the person who causes a fatal accident and dependants, but any element of benefit that remains should fall not on the side of the person who causes the accident but on the dependants.

86. The Bill was passed in the House of Lords in 1907, but as it did not make the other necessary journey in that year it was re-introduced the following year when it successfully mastered all hurdles.

87. Workmens' Compensation Act, 1906 (6 Edw. 7 c.58).

88. For debates on 1908 Act in the Lords see 179 H.L. Deb. cols. 737, 1690-1696 and 180 H.L. Deb. cols. 271-275 and 364.

sary in the future.[89] In the Commons, when Mr. Rawlinson[90] enquired why a man's providence in buying insurance should be rewarded while his precaution in investing in the purchase of a house[91] or government securities should be penalized, the Solicitor-General said the bill was not only to redress the inequalities but, on general principle, why should the defendant take the benefit of the deceased's good sense. While in 1959 there appeared no appreciation of the reasons why insurance policies, national insurance pensions and other pensions should not be deducted — *i.e.,* because they were earned — at least there was a general outcry for the reference of the problem to a Law Reform Committee.

Nor have judicial pronouncements been lacking. The inroads of *Bishop's* case, *Heatley's* case, *Bowskill* v. *Dawson*, it is submitted, show a judicial realisation of and desire to alleviate the harsher aspects of what in many cases becomes a Draconian principle and for a stronger pronouncement one has but to look at the decision of Humphreys J. in *Roughead* v. *Railway Executive.*[92] There, although the parties agreed that deduction should be made of the value of the estate the learned judge stated "in my humble opinion it is a grisly way of looking at things to say that a widow benefits from her husband's premature death because she received what he proposed to leave her, and in the present case it is everything he had, earlier than she would otherwise have done, nor am I in the least satisfied that it is a universal rule which could be applied to all cases".[93]

It is to be hoped that it is now clear that the principle of accountability for gain has been eaten away with statutory and judicial exceptions showing an appreciation of the unsatisfactoriness of the principle.

The arguments for the present state of the law do not hold for the cases where there is no accountability are often no more immune from consumption by the deceased during his lifetime than many of the fields where there is such accountability. Moreover, the cases where deductions are made are, particularly in this day and age, just as likely the result of the deceased's own hard labour rather than the spoils of the industry or exploitative tendencies of a remote ancestor. And finally it is not just a system that will only affect the very rich who will not notice it but as examples can show a method of penalizing thrift only benefitting the defendant. Even if there is deductibility this should only be the

89. As investments had been specially mentioned it is this form of saving that is meant (anyway contributory pension schemes were not introduced at the date of Debate).

90. 192 H.C. Deb. col. 264.

91. This precaution would be penalized no longer — *Bishop* v. *Cunard White Star Company* [1950] P. 240 and *Heatley's* case [1953] 1 W.L.R. 405.

92. (1949) 65 T.L.R. 435. The deceased, killed at 43, had 27.13 years of life before him (according to the Registrar-General's Life Tables) so the wife could be said to have the income on her £2500 that many years earlier a sum which would have equalled if not exceeded the capital sum. However, as at the date of his death the deceased was just approaching the peak of a brilliant career and as his savings would probably have increased considerably it can scarcely be said the widow benefitted.

93. *Ibid*, at p.435.

accelerated receipt worked out extremely carefully, but it too may result in unfairness.

PROVISIONS FOR SOLATIUM

The question whether damages should be awarded for mental suffering and anguish, for lacerated feelings, was not touched upon during the recent parliamentary discussions except that Lord Birkett in the House of Lords Committee stage referred to absence of allowance for such damages as a defect,[94] and in a paper criticizing certain aspects of the present law it should be touched upon. Prior to the 1846 Act there was no allowance for it in English law, although it was recognized in Scottish law. After the Act the question soon arose whether it covered an action for *solatium* by the range of dependants within the Act. Pollock C.B. in *Gillard* v. *Lancashire and Yorkshire Railway Company*[95] stressing how in his opinion it would be impossible to award any sum to compensate a parent for the loss of an only child said the only loss recognized was pecuniary loss. But the matter was fully discussed in *Blake* v. *Midland Railway*,[96] a Queen's Bench decision in 1852. A widow brought an action under the 1846 Act arising from the death of her husband killed by the admitted negligence of the defendants and the only problem in dispute before the court was whether she should be allowed damages for grief. Counsel for the wife opened by pointing out how Scottish law recognized that "where damages are sought for the loss of a father, husband, *etc*., through the improper negligence or misconduct of a party, they are not to be estimated merely by the pecuniary advantage which the family derived from his exertions in business but a *solatium* will be given even where the death of the sufferer instead of being a loss might be regarded as a benefit on account of his bankruptcy and dissipated habits."[97] He added that in a — then — recent case, *viz. Duncan* v. *Findlater*[98] before the House of Lords from the Court of Session, Sir John Campbell, the then Attorney-General appearing for the defence, stressed the sensible provisions of Scottish law; and counsel suggested it was reasonable to suppose that the Act of Parliament subsequently passed for England contemplated

94. 217 H.L. Deb. col. 305. The Provision for *solatium* in Irish law was introduced at the committee stage of the Civil Liability Act, 1961 in the lower house — Parliamentary Debates, Civil Liability Bill, 1960 Special Committee at p.46 — where Mr. Haughey, the proposer, said that the reason was that it was most unjust that if a wife was negligently killed her husband unless he had suffered financial loss (which was often unlikely) was remediless. Of course the husband has to show that he has suffered mental distress. And as has already been stated the change is on trial for three years during which the judge will assess *solatium* up to £1000 maximum in a given case. But in the debates there was no discussion of the wisdom of the change along the lines dealt with in this paper.

95. (1848) 12 L.T. (o.s.) 356.

96. (1852) 18 Q.B. 93.

97. *Ibid*, at p.99.

98. (1839) 6 Cl. & Fin. 894.

an equally extensive remedy.[99] He pointed out that in other branches of the law, *e.g.,* in claiming damages for seduction or criminal conversation or for defamatory statements, the damages were hard to evaluate. Yet, that did not hinder allowances being made for such and that the fact that the enquiry must be difficult, as Pollock C.B. had said in *Gillard's* case, was no ground for narrowing the operation of the Act — and he granted that in working out the damages it would have, of course, to be examined whether a relative was truly grieved. Further he quoted in favour of his contentions two arguments from the phraseology of the Act itself. Firstly he claimed that as by section 2, the action was to be for the benefit of the wife, husband, parents and children of the deceased and that as by section 5 the word "parent" is interpreted to include father, mother, grandfather and grandmother and stepfather, and stepmother, and as it was comparatively seldom that these relations or the remoter ones at any rate suffer pecuniary loss, the inference is that the action is not for pecuniary loss only, but family feeling was considered in the enactment. Secondly, he claimed that as by section 4 the plaintiff has to deliver particulars of the person or persons for whom and on whose behalf such action shall be brought and particulars of the nature of the claim in respect of which damages shall be sought to be recovered, that this contemplated something more than a simple estimate of pecuniary loss — *i.e.,* that the plaintiff had to give details of both pecuniary loss and what damages claimed for pain and anguish. Counsel for the defendants replied with the points that firstly it would be difficult to work out a sum for *solatium,* that, secondly, it would often be a problem to say whether a relative really was needing of a sum of consolation, and that, thirdly, if the deceased left several close relatives, each presumably would have to be awarded *solatium* which would be an unfair financial burden on the defendant. As regards the arguments on the wording, he answered that the relatives for whom compensation was provided by section 2 were those most likely to be in a situation of pecuniary dependence on the deceased. Anyway, he went on, if distress of mind on the loss of a near relative was to be a ground, surely brothers and sisters would have been included — and he claimed that the particulars required by section 4 were the pecuniary claims of the different dependants all suing as the Act demanded through the deceased's executor. Coleridge J.. in delivering the judgment of the court, said that what they had to look at was the actual language Parliament used and that it could only be interpreted as allowing for pecuniary damages. He accepted the defendants' interpretation of section 4 "these words will be abundantly satisfied by a statement of the manner in which the pecuniary loss to the different persons for whom the action is brought is alleged to have arisen".[1] And in refusing to construe the Act as allowing for *solatium* he stressed the fact that Parliament would surely have laid down rules for guiding the jury in such a difficult matter, particularly if as was possible, there were several relatives claiming such *solatium* — and how

99. The Attorney-General of 1838 was in 1846 Lord Chancellor and sponsor of the Fatal Accidents Act of that year which is often referred to as Lord Campbell's Act. Presumably what plaintiff's counsel was suggesting was that if Campbell, in 1838, was so impressed by the concept of *solatium* he must surely have made allowance for it in the Bill he piloted.

1. (1852) 18 Q.B. 92 at p. 111.

if all or several were entitled this could mean the awarding of damages to the ruin of the defendant — "we must recollect that the Act we are construing applies not only to great railway companies but to little tradesmen who send out a horse and cart in the care of an apprentice" [2] — and he also pointed out the difficulty in deciding the measure of a person's grief.

Munkman[3] states that *Blake's* case "was a piece of judicial legislation quite unwarranted by the language of the statute". But, prior to the statute there was no provision in English law for damages either for pecuniary loss or for *solatium* and so it might be imagined that if Parliament did intend to make allowance for both, it would explicitly have said so and there is nothing in the wording of the Act which clearly points so.[4] And the defendant's contentions in *Blake's* case *re* sections 2 and 4 are convincing, although it is interesting to note on the submission that, if it was to cover *solatium,* surely brothers and sisters would have been included that by Scottish law they were and are not within the range of those entitled to sue for *solatium*.[5] At any rate the principle established in this case has been regularly reiterated [6] and indeed there has scarcely ever been any judicial pronouncement of objection to the rule.[7]

But what are the valid arguments which a person advocating the reform of the existing law to allow for *solatium* must squarely face? The main arguments are fourfold (the first three of these being the difficulties fully mooted in *Blake's* case). Firstly, granting that it can be shown that a person has suffered distress of mind, how can such an incommensurable be worked out? Secondly, how can the courts deal with the circumstances where there is no genuine sorrow? Thirdly what happens if there are several claimants within the range allowed for? Will this not put a completely unjustified and unfair burden on the responsible party? Finally, if provision for *solatium* is allowed, what will be the attitude of the insurance companies and will they not retaliate by an

2. *Ibid.*

3. *Damages for Personal Injuries* (2nd ed., 1960) at p.96.

4. One finds in the parliamentary debates no reference to what they were really attempting to do.

5. *Eisten* v. *North British Rail Company* (1870) Macp. 980. The relatives who can sue for *solatium* are husband and wife, ascendants and descendants, parents for children and vice-versa and adopted children count as children for this purpose. Parents cannot sue for *solatium* for the loss of an illegitimate child though a parent may sue where the child has been legitimated between the date of the accident and the date of the action — *McLean* v. *Glasgow Corporation* [1933] S.L.T. 396 though by statute the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, s.2 an illegitimate child may sue in respect of either parent.

6. See *E.g., Franklin* v. *S.E. Railway Company* (1858) 3 H. & N. 211; *Pym* v. *Great Northern Ry. Co.* (1862) 2 B. & S. 759; *Royal Trust Co.* v. *Canadian Pacific Railway* (1922) 38 T.L.R. 899.

7. But see judgments of Birkett L.J. (as he then was) in *Lewis* v. *Ribble Motor Services* 1953 *unreported* C.A. No. 274, Kemp and Kemp. *op. cit.*, Vol. 2 at p.39 and *Austin* v. *London Transport Executive* 1952 *unreported* C.A. No. 293 see Kemp and Kernp, *op. cit.*, Vol. 2 p.69.

extremely sharp increase in premiums with this as an excuse whether true or not?

How can *solatium* be measured and anyway surely "a man of wealth losing his only child the heir of his honours and fortunes and the object of all his human hopes might be entitled to claim an almost indefinite sum for nothing on earth could compensate such a man for such a loss"?[8] But English courts and juries have often and do often, particularly in the law of torts, have to face up to the problem of awarding damages where such are not easy or indeed are highly tricky to evaluate as *e.g.,* damages for loss of expectation of life in personal injuries claims[9] by executors for the estate of a deceased under the Law Reform (Miscellaneous Provisions) Act, 1934, for loss of amenities of life in personal injuries claims,[10] for exemplary damages [11] *etc*., and they have usually managed to find a workable solution. And as regards the circumstances here, granted no sum could compensate for the loss of a close loved one, a comparative study might well be made of and our courts could possibly follow the pattern laid down by Scottish courts. While it was recognized by Lord President Dunedin [12] "the element of *solatium* is an element which is under any circumstances extremely difficult to quantify and may not unfairly be said to represent no more than a mark of acknowledgment of the grief and sorrow needlessly inflicted on the surviving relatives. To define the limits within which the assessment ought to be confined except in the most general way is impossible", in an earlier case he stated [13] "where there is nothing to place in the scales except the pain and grief which the accident has occasioned to a bereaved survivor no standard for fixing the amount to be awarded as *solatium* is available. No parent for example would pass through such an experience for any sum of money. On the other hand it is quite clear that *solatium* is not met by a nominal award . . . . . .The only possible solution is that the sum awarded must be a substantial acknowledgment of the pain and grief which the defender's action has caused but must be strictly confined within a modest range. A rough standard can be worked out but each case must depend on its own circumstances and the award made in one case cannot be used to fix an unsurpassable limit or to help in forming a proportionable scale or standard by which the amount of a reasonable award can be artificially determined in another case". This could be the basis of a *test-solatium* is to be a substantial acknowledgment of the distress of mind but as such is an incommensurable and yet as nominal damages would obviously not be a sensible proposition the damages must be confined. Each case must be determined not on an actuarial reckoning but on its merits and with such a test our courts could soon establish trends and a definite attitude. Whether such factors as are taken into

8. *Gillard* v. *Lancanshire and Yorkshire Railway* (1848) L.T. (o.s.) 356 at 356.

9. See for discussion of principles Kemp and Kemp, *op. cit.,* Vol. 1 Cap. 5.

10. See, likewise, *ibid.* Cap. 4.

11. See, *e.g.,* Street, *The Law of Torts* (2nd ed., 1959) at p.451; Salmond, *The Law of Torts* (13th ed., 1961) at p.737.

12. *Quin* v. *Greenock and Port Glasgow Tramway Company* [1926] S.C. 544 at p.547.

13. *Elliott* v. *Corporation of City of Glasgow* [1922] S.C. 146 at pp.147-148.

account in Scottish law would have an influence in English law would be determined in due course *e.g.* the fact that the claimants saw the suffering to which the deceased was exposed before death actually supervened,[14] or the fact that where the claimants are children on the death of a parent that the loss of one parent makes the possibility of orphanhood more likely.[15]

As regards the second query, although in Scottish law damages will be awarded even if the death might be regarded as a benefit on account of the deceased's dissipated habits (though, surely, a dissipated spouse could be as sorely mourned as a thrifty sober one) evidence should be admitted to show that the deceased's death had not affected the claimants or been a source of anguish to them, provided the discussion on such a topic takes place at a common sense level. If it was clearly proved that the claimant would not miss the deceased because, *e.g.,* in the case of spouses, it was a completely unsuccessful marriage to which both were unhappily bound, then no claim for *solatium* should be upheld. But evidence of occasional rows, the understandable stresses and pitfalls of family life, should be overlooked. In other words, what should take place should be not a microscopic examination of the day to day happenings of the matrimonial home over the years, *i.e.,* did they row, did he drink, had he ever struck her, what impression did the neighbours glean from her conversation or demeanour in their contact with her, but the broad query "could the claimant be said to miss the deceased, did they get on together" and if so surely there would be grounds for *solatium.* Also it could be that evidence of the nature of the family background could be admitted not as a complete objection to the award but in reduction of the sum to be awarded.

The argument of financial unfairness to the defendant, if there are several claimants within the range recognized as entitled to *solatium* can be best met by an admittance that (even though the *solatium* awarded may be confined) the class of dependants entitled to sue for *solatium* would have to be considerably narrower than the range of persons at present recognized as regards pecuniary loss under the Acts 1846-1959. For many of the categories under those Acts would be unable to show pecuniary loss and yet feel entitled to claim some sum for mental suffering. While it is but a suggestion probably the claim for *solatium* would have to be limited to as narrow a field as spouses, parents, children (this covering legally adopted children and the mother of an illegitimate child, if she retains the care of it), and possibly brothers, sisters, but no wider. With this limitation the liability placed on a defendant could not be claimed as unfair. The gigantic families augured in *Blake's* case would be exceptional. Anyway, the damages for which a defendant is at present liable under the heading of pecuniary loss involve a considerable amount of chance, and so, if *solatium* is recognized, the risk of a large number of claimants would just be one more factor of chance.

14. *Black* v. *British Railway Company* [1908] S.C. 444. The judgment of Lord President Dunedin in this case gives, incidentally, an interesting resume of the historical development of the notion of *solatium* in Scottish law.

15. *Kelly* v. *Corporation of City of Glasgow* [1951] S.C. (H.L.) 15.

Finally, on the question of the attitude of insurance companies, it must be realized that while the changes made by the 1959 Act in the extension of the range of dependants for pecuniary loss will rarely be taken recourse to, a recognition of *solatium* would have a substantial financial side effect. But, if the increase in liability for damages arising from awards of *solatium* worked out over an estimable period, was divided among all the policy holders (and this of course is the solution in dealing with a further increase in the range of dependants claiming pecuniary loss and if complete non-deductibility is recognized) the increase would be slight. It would just be another example of the insurance system applying in the award of damages for torts.

CONCLUSION

In view of the points raised in this paper it is submitted that there could well be an examination by the Law Reform Committee of the damages to be awarded in fatal accidents claims. The tasks give to the Committee should be (a) to say what range of dependants should be entitled to claim, in particular examining the possibility of extension to ex-wives, mistresses, children not legally adopted, and children legally adopted abroad, (b) to examine the principle of accountability which it is submitted is not only in a mess, but can lead to ludicrous results, and (c) to decide whether to allow provision to a limited range of dependants to sue for *solatium* which could be a fair and workable extension. The main argument against all these reforms is the problem of the attitude of the insurance companies, but as has been stressed before even if premiums would have to be increased, would this not be a fair solution, *i.e.* a further example of the insurance principle in damages for torts?

It is appreciated that there are many topics awaiting the present Committee, probably some more urgent from their relevance to daily happenings and their resulting harshness, but the question of damages in fatal accident claims is no mere academic quibble. If the 1959 Act results in the speeding up of some investigation of these difficulties it may indirectly prove a success (although the danger of passing an Act on a subject is that then Parliament feels justified in washing its hands of the matter for another decade or so). As it has alleviated hardship in certain cases the Act can be directly pronounced worthy but in view of its lack of appreciation of the under-lying problems and its furtherance of inconsistencies the answer to the title question must be "yes but . . . . . ."

MICHAEL KNIGHT*

* B.A., Ll.B.; Lecturer in the Department of Law, University College of South Wales and Monmouthshire.