Till Death Do Us Part: Reforming the Fatal Accidents Act 1976

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Abstract—The Fatal Accidents Act 1976 has been subject to criticism since its inception. The Act is over-complex and outdated; it must be reformed. Reforming the Act in line with the 'loss to the estate' theory will clarify the confused theoretical basis of the Act. This can be effectuated by allowing recovery by the estate, alongside the reinstating of the claim for the 'lost years.' This reform will remove considerations of 'dependency' from the Act, modernising it. Section 1(3), the fixed list of claimants, must also be repealed. This reform will allow for greater flexibility and less manifest unfairness in periods of emotional distress.

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Introduction

At its initial introduction in 1848, the Fatal Accidents Act was a ground-breaking piece of legislation. Statute now provided the dependents of an individual suffering wrongfully caused death the right to claim compensation from the tortfeasor. Allowing such dependants a claim in tort was a 'pragmatic and rational response to the problem of wrongful death in the mid-nineteenth century'.[1] Despite the 1976 reforms, it has become apparent that the Act remains over-complex and ill-suited to the current social climate, given the new demands generated by the last 50 years.

This article will advocate for the reform of the Act in a new format with additional elements. The proposed reforms are as follows:

1. Bringing the Act in line with the 'loss to the estate' theory which underpins wrongful death. This will be effectuated by allowing recovery by the estate, alongside the reinstating of the claim for the 'lost years'.

2. Under these reforms, the dependants of the deceased would bring their claims through the traditional division of an estate channels. This is different from the current functioning of the Act as the claim against the tortfeasor would be made by the estate. The estate of the deceased would then be divided as it would have been in the case of a natural death.

3. The elimination of outdated terminology. Reform under the 'loss to the estate' theory will eliminate

[1] Donal Nolan, 'The Fatal Accidents Act 1846' in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature* (Hart 2012) 131-157.

terminology such as 'dependency,' which has obfuscated the aims of the Act in the modern day.

4. The repeal of the 'fixed list' of claimants under section 1(3) of the Act. This will remedy the inflexibility of the Act by enabling non-nuclear survivors to claim against the estate. Introducing judicial discretion as to which claimants will be able to recover will allow the purposes of the Act to be better effectuated.

This revised Fatal Accidents Act will be better suited to the modern day. It will be theoretically coherent, resolving the problems which have plagued the Act since its inception. It will allow for greater flexibility and less manifest unfairness in periods of emotional distress.

1. Current Law

The primary function of the Fatal Accidents Act 1976 is to provide compensation in the event of a wrongful death. The compensation it provides, the 'primary sum' for the pecuniary loss of the dependents, is also commonly referred to as the 'dependency claim'. There are two further sums which are recoverable under the Act. First, Section 3(5) provides that an award for reasonable funeral expenses may be recovered. Second, the Administration of Justice Act 1982 introduced bereavement damages into the Act. For the purposes of this article, it is important to note that the Administration of Justice Act 1982[2] abolished the survival to the deceased's estate of his or her claim for loss of earnings in the 'lost years'. This sum was previously

[2] The Administration of Justice Act 1982, s 4(2).

available in a dependency claim. This article will later advocate for the reinstatement of this claim.

A claimant must meet four conditions under the act to bring their claim:

1. The defendant must have committed a tort in relation to the deceased.
2. This tort must have caused the deceased's death.
3. The resulting death must be a non-remote consequence as confirmed in *Corr v IBC Vehicles Ltd.*[3]
4. The deceased would have been entitled to sue for damages if death had not occurred.

To bring a dependency claim, a claimant must meet a further two conditions:

1. The claimant must be able to show that they have or will have suffered a loss.
2. The claimant must demonstrate that they had a reasonable expectation that they would have received such a benefit if the deceased continued to live.

Under the Fatal Accidents Act 1976, the dependants are only able to bring one action in conjunction with each other. This action can be brought by, or for the benefit of, any dependant stipulated under Section 1(3) of the Act[4]. These dependants are not limited to the immediate family of the deceased. Examples of dependants include former spouses,[5] those who live in the same

[3] *Corr v IBC Vehicles Ltd* [2008] 1 AC 884.
[4] The Fatal Accidents Act 1976, s 1(3).
[5] *ibid*, s 1(3)(a).

household as the deceased,[6] and even the children of the aunts and uncles of the deceased.[7]

2. Criticism of the Act

The Fatal Accidents Act has been subject to ferocious criticism since its inception, only heightened by its inability to function in the modern world. The criticisms have been directed at the complexity, the inflexibility and the outdatedness of the Act.

A. Complexity

The theoretical basis of the Act is unclear. There are two major forms of loss which result from a wrongful death. There is loss to the estate of the deceased person, and loss to the survivors. The major difference between the two is that under the latter theory of liability, dependants claim in their capacity as dependants, on the basis of their own personal loss. These two forms of loss represent the two different theories underlying liability. The Act contains elements of both theories. For instance, the deceased must have been entitled to sue for the action to be brought, which is suggestive of a 'loss to the estate' theory. However, the claimants are suing in their capacity as 'dependants', which is most consistent with a 'loss to the survivors' theory. The result of this is that the Act has no underlying principle. Kidner rightly argues that this lack of theoretical principle is a product of muddled and archaic common law defects, which have existed in the Act since its inception.[8] He suggests that many of the problems which exist

[6] The Fatal Accidents Act 1976, s 1(3)(b).
[7] *ibid*, s 1(3)(g).
[8] Richard Kidner, 'A History of the Fatal Accidents Acts' (1999) 50 NILQ 318, 334.

today are due to this lack of underlying principle.[9] Clarifying the objectives and the theoretical basis of the Act, Kidner appears to suggest[10], would result in a less complex statute. Consistent with such a claim, this article will demonstrate that significantly greater clarity may be achieved by reforming the Act in line with the 'loss to the estate' theory. The Act must have just one of these competing underlying principles to be coherent in the way that Kidner emphasises. These theories are mutually exclusive. Both theories demand competing interests to be proven. In the instance of the initial claim against the tortfeasor, the 'loss to the estate' theory takes no account of the relationship between the survivors and the tortfeasor. However, it is this relationship which is crucial under the 'loss to the survivors' theory. The Act currently adopting elements of both has resulted in its confused quality, with key terms under one theory (such as 'dependency' under the 'loss to the survivors' theory) being interpreted in a manner which is more consistent with the 'loss to the estate' theory (as seen in *Haxton v Phillips Electronics*[11]) depriving them entirely of meaning. Clarifying the Act in line with one theory, the estate theory, will more efficiently signpost the role which key terms in the Act are to play.

B. Inflexibility

Additionally, the right to claim damages for pecuniary loss is limited to a fixed list of persons under Section 1(3). Since the Fatal Accidents Act was reformed in 1976, society has seen the introduction of the civil partnership, and gay marriage. Divorce rates, second marriages, and partners having children outside of wedlock have all become increasingly common. Yet, the inflexibility of the list has been identified as having precluded the

[9] *ibid*, 334.
[10] *ibid*, 335.
[11] *Haxton v Philips Electronics UK Ltd* [2014] EWCA Civ 4.

recovery of damages in some deserving cases. A notable example of this is the case of *Smith v Lancashire Teaching Hospitals*,[12] where Smith's inability to recover damages amounted to a human rights violation[13]. Smith was unable to claim because the Act did not allow cohabiting unmarried partners to claim the award. Whilst a remedial order was subsequently made which allowed cohabiting partners to recover, this case demonstrates several problems with the fixed list. The list generates manifest unfairness in a time of emotional trauma. It does not allow for a flexible and modern inquiry by restricting the claimants to those identified by Section 1(3). This binds the courts to arbitrary and outdated traditional notions of a 'dependant', permitting them no discretion. It falls upon Parliament to continually review the fixed list in order to ensure that it is reflective of the relationships of dependency it is intended to protect. The legislature has evidently been slow to make updates despite substantial societal progression. The Law Commission had, in 1999, recommended extending the list of claimants outlined in Section 1(3) to include cohabiting couples, yet it was not until 2019 that the Joint Committee on Human Rights sought to effectuate the reform.[14] Crucially, this was only after the declaration of incompatibility made in the *Smith* case. In the same 2019 Report, the Joint Committee expressed other concerns with 'the definition of cohabiting couples, the exclusion of other family members, such as fathers following bereavement of a deceased child born outside of wedlock, the division of damages between claimants, and the stigmatising references to 'illegitimate children' which should be removed from the law.[15]

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[12] *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916.

[13] A declaration of incompatibility was made in accordance with Section 4 of the Human Rights Act 1998.

[14] Proposal for a draft Fatal Accidents Act 1976 (Remedial) Order 2019, HL Paper 405, 2019.

[15] 'Fatal Accidents Act Changes Welcomed by Committee - News from Parliament' (*UK Parliament*, 16 July 2019)

These problems exist even though the list has been extended, revealing that the inflexibility of a list format is the heart of the issue. Tort laws growing outdated is an issue which recurs in many areas of the law. An example of this is the set of rules that govern recovery for psychiatric injury. Parliamentary recognition of the benefit of permitting judicial discretion as a mechanism for the modernisation of this part of the law could have important wider benefits.

C. Inability to Serve the Modern Family

The Act is unable to serve the modern family in several respects. Claimants must bring one joint action, regardless of their relationship to one another. The use of 'dependency' as a test has resulted in unclear jurisprudence emerging from the courts. 'Dependency' is an outdated and stigmatising word which does not befit the society of the modern day.

A principal issue that this article takes with the Act is the requirement for a joint action, irrespective of the claimants' relationships with one another. Since the inception of the Act nearly 200 years ago, society has seen a divergence from the traditional nuclear family, with second marriages and the children that follow becoming more common. The Office for National Statistics indicated that in 2013, around a third of all marriages involved a party who is remarrying.[16] This presents a complication

<https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2017/fatal-accidents-report-published-17-19/> accessed 21 August 2019.

[16] Elizabeth McLaren, 'Marriages in England and Wales: 2013' (Office for National Statistics, 26 April 2016) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/marriagesinenglandandwalesprovisional/2013#first-time-marriages-continue-to-rise-while-remarriages-decline> accessed August 22 2019.

for claims brought under the Fatal Accidents Act, under which it is the responsibility of the plaintiff to join together all parties which are entitled to claim. Waddams incisively notes that a conflict of interest will inevitably occur as the various parties 'seek shares in a limited pot'.[17] The dependants having to bring the claim does not account for internal family tensions. It may give rise to certain dependants taking advantage of others, especially given that many dependants may be children. The dependants will not necessarily be on an even footing to assert their own interests. It is a false legalistic conception to present these different interests as one claim. This article contends that a claim under the Fatal Accidents Act does not provide a means of dealing with such a conflict of interest.

A further problem generated by the outdated nature of the Act is that the claims are based upon 'dependency.' At the time the Act was first introduced there was a 'general consensus that a wife suffered a financial loss on the death of her husband'.[18] However, with the advancement of women's rights, this dependency is less common in the modern world as many women are in the workplace. The ability of a spouse to claim for a loss which is not present is highly anomalous in the law. Removing this basis of claims will enable the Act to better secure its aims in the modern day, as it will no longer shoehorn modern familial relationships into outdated terminology. The use of the term 'dependent' within the Act obfuscates the real basis of the claim: a claimant is only required to show that they have suffered a 'loss'. This is distinct from showing a relationship of dependency, thereby concealing the true requirements of the Act behind patriarchal notions of the nuclear family. From a feminist

[17] SM Waddams, 'Damages for wrongful death: has Lord Campbell's Act outlived its usefulness?' (1984) 47 MLR 437, 449.
[18] *ibid* 449.

viewpoint, one may contend that even the use of the term dependency is inappropriate.

The ineptness of 'dependency' is further illustrated by the unclear jurisprudence emerging from the courts as to how central this dependency must be. *Haxton v Phillips Electronics*[19] is just one example of this. In *Haxton*, the Court of Appeal overturned a High Court decision on whether a widow could recover the diminution in the value of her dependency claim caused by the defendant's tortious reduction of her life expectancy. The High Court had accepted that it ought not to allow recovery for dependency loss after death because the claimant would no longer be dependent. In the Court of Appeal, Elias LJ, giving the leading judgement, overturned this, holding that the loss was recoverable as there was no reason of principle or policy to prevent the claimant recovering the loss which she had suffered. The Act provides no definition of dependency. The interpretative function of the judiciary is complicated by the lack of an overarching theory which guides the application of key terms. This has generated uncertainty as to which relationships will satisfy this requirement.

Moreover, the lack of certainty caused by using an Act modelled on dependency is particularly visible when one considers the death of a child. *Barnett v Cohen*[20] and *Taff Vale Railway Co. v Jenkins*[21] both dealt with the suitability of actions under the Fatal Accidents Act in the event of the death of a child. *Barnett* concerned the aftermath of the death of a 4-year-old. The court refused his father's claim under the Fatal Accidents Act due to the difficulty of predicting what would have happened had his son not been killed. Furthermore, the court found that the

[19] *Haxton v Philips Electronics UK Ltd* [2014] EWCA Civ 4, [2014] 2 All E.R. 225.
[20] *Barnett v Cohen [1921] 2 K.B. 461.*
[21] *Taff Vale Railway Co. v Jenkins* [1913] AC 1.

claimant's wealth was relevant; it appeared unlikely that he would have been financially dependent on his son in the future. By contrast, the court in *Taff Vale Railway* allowed the claim, with the judges holding that the jury should consider all the circumstances concerning the home, in addition to the situations concerning the two parents, and all those concerning the daughter and her future prospects. Ultimately, the success of a claim is dependent on the reasonable prospect or chance of enjoying some financial benefit. The test discriminates between people who have suffered the loss of a child on the basis of wealth. Apart from this problem of discrimination, the test is speculative, relying on a forecast of the potential dependence a parent may have on their child in the future. This can be harmful and represents a very personal inquiry into the family. Moreover, one can see here that under the current law it is difficult prima facie to determine whether a claim will succeed or fail. This has difficult consequences for public confidence in the law. From the viewpoint of the dependant, it introduces uncertainty in a time of trauma. This is not a socially desirable result of legislation which deals with sudden deaths. Questions regarding how speculative the benefit should be lack a definitive answer, which in turn leads to somewhat arbitrary judgements.

D. Sentimentality

Lastly, there seem to be few substantiated arguments for the continued lifespan of the Fatal Accidents Act. In *Gammell v Wilson*,[22] Lord Scarman postulated that this reluctance to repeal the Fatal Accidents Act 1976 was rooted in sentimentality. He contended that 'the logical, but socially unattractive, way of reforming the law would be to repeal the Fatal Accidents Act.'[23]

[22] *Gammell v Wilson* [1982] AC 27.
[23] *ibid* 80.

Lord Scarman advocated for the position that this article takes. He commented that the repeal of the Fatal Accidents Act:

> 'would leave recovery to the estate; and the dependants would look, as in a family where the breadwinner is not tortiously killed, to him (or her) for their support during life and on death. They would have the final safeguard of the Inheritance (Family Provision) Act 1975. But the protection of the Fatal Accidents legislation has been with us for so long, that I doubt whether its repeal would be welcomed.'[24]

Here, we see Lord Scarman point explicitly at the reason he feels repeal is socially unattractive. It is not that the Act offers some form of unique protection in the law. It is that it has been a part of the law for many years. This unto itself is a wholly insufficient reason for non-reform of the act, especially given the importance of the other identified competing normative concerns. The law continually adapts to recognise new rights, obligations and heads of liability as the political values of society change. Legislation undergoes a constant process of repeal and reform. This is in recognition that legislation becomes outdated or ineffective. In this legal system, arguments that legislation should be retained because 'it has been here a long time' carry no force. Moreover, the judiciary ought to be entirely emotionally distant from pieces of legislation. To allow the judiciary to be sentimental would undermine their interpretative function under the doctrine of the separation of powers. They must be constitutionally impartial and objective. There is no place for sentimentality in the law.

[24] *ibid* 80.

Waddams describes Lord Scarman's position as 'a little puzzling',[25] but the articles dedicated to the history of the Act[26] give credence to Lord Scarman's reasoning in that they evidence its clear symbolic significance. Lord Scarman's position suggests that the English justice system is prioritising the sentimentality of judges and the historic significance of the Act above the needs of the bereaved and financially vulnerable dependents the Act is designed to protect. The sentiment of Lord Scarman's judgment is emulated in articles by other academics. When addressing criticisms of the Act in such an article, Peter Handford remarked that 'none of this should be allowed to obscure the significance of the original Fatal Accidents Act as an important and distinctive piece of law reform—virtually the only statutory interference with the common law of negligence that happened during the 19th century.'[27] Here one can see an instance of sentimentality being highlighted as a reason for the Act's significance. Yet, this should not be confused with a reason for leaving the Act as it was during the 19th century. The significance of the Act can be recognised whilst also pushing for reform. The changes advocated for by this article have been adopted by the Parliament for Scotland in the form of the Damages (Scotland) Act 2011. The devolved legislature adopting the reform proposed by this article indicates strongly that the current Fatal Accidents Act is not fit for purpose; Parliament should not refrain from reforming it on the basis of its original significance. This significance is, as *Gammell v Wilson* indicates, purely historical. The original significance of the Act has waned with the decline of the relationships which it was initially designed to protect. This

[25] Waddams (n 13) 441.

[26] For instance, Peter Handford, 'Lord Campbell and the Fatal Accidents Act' (2013) 129 LQR 420, Richard Kidner 'A History of the Fatal Accidents Acts' (1999) 50 NILQ 318.

[27] Peter Handford, 'Lord Campbell and the Fatal Accidents Act' (2013) 129 LQR 420, 421.

significance can be retained by reforming the Act, as opposed to repealing it.

3. Proposed Reform

The reform suggested here would result in only the estate having the right of recovery for the death of a person, including lost earnings, a claim often referred to as being for the 'lost years'. The dependants of the deceased would make their claims against the estate, as opposed to bringing a combined action. This reform would include the repeal of Section 1(3), which specifies who is entitled to recover.

A. Rationale for Reform

This article will suggest repealing and reforming certain components of the Act, instead of simply replacing it. Reforming the Act so that it is in accordance with just one theory is desirable as it will simplify the Act itself and improve consistency. Utilising just one theory will provide a clear framework within which the judiciary can operate. When terminology within the Act is the subject of contention, litigation can be reconciled by recourse to the single, clear, overarching theory. This would simplify the law in a manner which even loyal defenders of the Act, such as Nolan, concede.[28] A simpler Act will produce consistent case law and lead to a corresponding predictability of outcome. In cases which often involve a sudden and unexpected death, clarity in the law is crucial.

This article takes the position that the 'loss to the estate' theory is the preferable theory to adopt. The most significant consequence of this reform is that it would leave only one primary

[28] Nolan (n 1).

action against the tortfeasor. This action would require a single calculation to determine tortious liability for lost earning capacity. This action is often referred to as the claim for the 'lost years'. This sum would substitute the claim for the individual loss of the survivors, as this loss is derived from the future earning potential of the deceased. This streamlines the litigation against the tortfeasor, releasing the tortfeasor from the process more quickly. It also has 'soft' benefits, including allowing the survivors to begin the healing process after the death of a loved one by bringing to a close the adversarial process. Moreover, reforming the Act in this way would bring compensation for tortious death in line with the rest of the private law remedies in circumstances of death. These traditional private law remedies are typically consistent with the 'loss to the estate' theory of liability outlined above. For instance, when a party to a contract passes away before the contract is resolved, the claim goes to the estate. Indeed, tort law remedies are generally only available to the victim of a tort, and third parties who suffer losses are usually left to bear these losses themselves. Whilst there are other exceptions to this rule, McBride and Bagshaw highlight the Fatal Accidents Act as 'the most important exception to this rule-by far.'[29] It is an exception because the third parties are claiming in a joint action against the tortfeasor. They are claiming for their own losses against the tortfeasor. This reform would stop the Fatal Accidents Act from being an exception to the rule, leading to more coherency in recovery in tort law. Not only is this proposed reform more uniform with private law, but it is more uniform with the other features of the Fatal Accidents Act, which are consistent with the 'loss to the estate' theory. These features include the fact that claims under the Act are consequential to the deceased's ability to sue in their own name, and the reduction of claims in instances of contributory negligence. Reforming the Act in this manner

[29] Nicholas McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson Education, 2018) 810.

would clarify the confused theoretical basis Kidner references whilst providing additional benefits such as consistency across tort law.

Reforming the Act in line with the 'loss to the estate' theory would additionally address the problem of having multiple parties with multiple interests bringing a single claim against the tortfeasor. For instance, if the deceased has two families, these two families would currently *have* to claim together under the Fatal Accidents Act. They would have to combine their, often conflicting, interests into one claim. In the alternative, if the claim was to the estate, these two families could express their own interests through the traditional division of a legal estate channels. These channels will either be the intestacy rules, or in the event the deceased has a will, the division of the estate to the named beneficiaries. This process has flexibility for those who feel they have 'lost out' in the division of the estate. From the grant of probate, claimants who feel that they are entitled to a share of the estate but haven't received the benefit to which they feel they are entitled have six months to make a claim. This adversarial process would prevent one party taking advantage of another in a claim under the Act. The infrastructure for such complex divisions already exists in a format which has been continually refined. It is logical to utilise the intestacy and division of an estate framework. Making a single claim under the Fatal Accidents Act is simply too rigid for the demands of a large claimant pool. Balancing competing familial interests is something that the Act has never been designed to do.

This article suggests that reforming the Act in line with the 'loss to the estate' theory would also resolve the problems caused by the use of 'dependency' in the Act. Basing claims on 'dependency' is an element of the current Act which is consistent with the 'loss to the survivors' model. This article contended that it is the use of dependency which is obfuscating the true purpose

of the Act. Adopting a 'loss to the estate' model would circumvent the problems the courts have had with dependency in this context. This is because claims against the tortfeasor would not be based on the loss to the claimant, removing the need for explicit dependency, which following *Haxton* has had a meaning wider than its literal interpretation. The action against the tortfeasor would instead be based on the losses of the estate. The relationship between the survivors and the deceased would not be relevant to the claim at this stage. This would entirely eliminate dependency from the Act. This article suggests that removing the 'dependency' component of the Act would clarify the case law. This would produce more consistency in decisions. It would also produce greater predictability and certainty after the death of a loved-one, an essential rule of law concern. This would also modernise the Act by eliminating terminology which references stereotypical gender roles.

The benefit of adopting this reform is particularly evident in the cases of the death of a child. Allowing the claim for lost earnings to be made in the name of the deceased themselves, under the 'loss to the estate' model, removes many of the speculative considerations, namely that of whether the parent would eventually become financially dependent on their offspring. If the lost earnings were reasonable enough to be claimed by the estate, the parents of the deceased would have no further hurdles to clear, as the child, dying intestate, would have their estate divided between the surviving parents, irrespective of whether the parents would have been dependent or not. This resolves the major issues incurred by utilising the current test.

Whilst the remedial order made in the wake of the *Smith* case marked some progress towards a more modern Fatal Accidents Act, the Joint Committee on Human Rights in 2019 cited their continuing concerns with the bereavement scheme as

a whole.[30] This covered, notably, the exclusion of certain non-nuclear relationships. The relationship of dependency which the Act serves to protect is as likely to be present in these relationships as it would be in their 'nuclear' counterparts (for instance, a couple who are married.) It is clear from the 2019 report of the Joint Committee on Human Rights[31] that the fixed list in Section 1(3) will give rise to serious problems so long as society continues to recognise a wide range of non-nuclear relationships. This problem must be rectified by repealing the section altogether. These individuals would then be entitled to claim against the estate. This reform would remove the list of specified dependants,[32] and would enable claims from non-nuclear parties to be made against the estate. This will prevent cases like *Smith* reoccurring in the future, as the Act itself will not discriminate against certain non-nuclear parties. It could be contended that this is simply transferring the problem, creating contentious claims against the estate. However, one can see a parallel in similar claims against the estate in instances of non-tortious death.

The reform of the Fatal Accidents Act would simply prevent this action being brought on two fronts, consolidating the extension of possible claimants into a single right of action. This would have the overall effect of simplifying and refining the law. Furthermore, the removal of a specified list of dependants will enable the law to keep pace with societal developments more effectively. This is because 'division of the estate' cases in instances of both tortious and non-tortious death are frequently brought before the courts. The case law from each head of litigation would pool, having the overall impact of reducing the

[30] Proposal for a draft Fatal Accidents Act 1976 (Remedial) Order 2019, HL Paper 405, 2019, page 4.
[31] *ibid.*
[32] The Fatal Accidents Act 1976, s 1(3).

total volume of litigation. A simpler mechanism for recovery will have social benefits, as the Act specifically targets the recently bereaved. Clarity in a time of trauma is socially desirable and, this article contends, easily effectuated.

Finally, whilst Lord Scarman in *Gammell* suggested that the logical manner of reform would be to completely repeal the Fatal Accidents Act, this article contends that a better response to the criticism would be to reform certain aspects of the Act. Reform, rather than repeal, acknowledges the historical importance attributed to the Act, a symbolic significance which goes beyond its substance. Crucially, the 'Fatal Accidents Act' would still exist. This more easily reconciles the position this article takes with that of some of the defenders of the Act. Finally, this article advocates for the reinstatement of a claim for the 'lost years'. If this claim for the 'lost years' was not placed within the Fatal Accidents Act, a new piece of legislation would have to be created. This undermines the argument for complete repeal, as the Act would otherwise have to be recreated in all but name.

B. Counter-arguments

In 1999, the Law Commission published the report 'Claims for Wrongful Death.'[33] In this paper, the Law Commission concluded that the 'Fatal Accidents Act claim should not be abolished, and it should remain the law that the 'lost years' claim should not survive for the benefit of the deceased's estate.'[34] This conclusion runs contrary to the proposal of this article, and is therefore worth responding to.

One particular issue which the Law Commission takes with the abolishment of the Fatal Accidents Act is that an action

[33] Law Commission Report Number 263, *Claims for Wrongful Death (1999).*
[34] *ibid,* para 3.4.

brought by the estate for lost earnings would not recover damages for particular losses that may be suffered by dependants, for instance non-pecuniary losses. They argue that these non-pecuniary losses are accounted for in the bereavement award. [35] Yet, this claim is paradoxical. The bereavement award is currently set at £12,980,[36] which can only be claimed once, and has to be distributed out if there are multiple claimants. Tony Weir argues that these damages are 'not designed as compensation for grief but [are] simply… a replacement in money for a life lost. The lump sum is standard because people are equal, not because they are equally regrettable'.[37] Given that the bereavement award is fixed, it is difficult to see the sense in which it can aptly account for non-pecuniary loss, when this loss may vary from case to case. The fixed-bereavement award seems ill-suited to account for non-pecuniary losses. Especially once this sum is shared out amongst multiple defendants, the argument that it represents recovery for non-pecuniary loss seems bizarre. It is important to note that this is a sum which the tortfeasor will be liable for. Having a fixed sum prevents judicial discretion. It fails to accurately reflect the scope of the tortfeasor's negligence, and thus of their wrongdoing. There are different levels of tortious wrongs, and this fixed sum allows for no subjective reflection of this. An example of the different levels of 'wrongfulness' can be seen in the distinction between strict liability under the Merchant Shipping Act, under which a defendant may not have been able to foresee the harm caused, and liability for psychiatric injury under *Page v Smith*.[38] It therefore seems to penalise the tortious taking of a life in an

[35] *ibid,* para 3.2.
[36] Emily Hartland, 'Bereavement Damages: Court Ruling Marks a Step in the Right Direction for Unmarried Couples' (2018) https://www.penningtonslaw.com/news-publications/latest-news/2018/bereavement-damages-court-ruling-marks-a-step-in-the-right-direction-for-unmarried-couples/ accessed 19 August 2019.
[37] Tony Weir, *An Introduction to Tort Law* (2nd edn, OUP, 2006) 215.
[38] *Page v Smith* [1996] 1 *AC 155.*

arbitrary manner which masquerades as non-pecuniary damages. Its inadequacy in this regard cuts against the weight the Law Commission places upon it as a convincing argument for preserving the current Act.

Interpretation in the courts of the Fatal Accidents Act has concluded that non-pecuniary losses should not form the basis of a claim. In *Taff Vale Railway*, Viscount Haldane L.C. held that the basis of awarding damages in a successful claim under the Fatal Accidents Act is not *solatium* (injured feelings) but based on compensation for a pecuniary loss'.[39] Placing emphasis on losses which the Act is not designed to compensate in order to justify its existence seems counter intuitive; it does not provide reasoning for the omission of non-pecuniary damages, merely stating their nonexistence.

Further to this, The Damages (Scotland) Act 2011, a later version of the 1976 Act, was suggested by Lord Scarman in *Gammell v Wilson*[40] as being an example of a jurisdiction which had already followed the 'logical'[41] step of repealing the Fatal Accidents Act. It does allow the injured party to recover certain non-pecuniary damages in the case where their expectation of life is diminished.[42] This is a less arbitrary measure than the fixed bereavement award included in the Fatal Accidents Act. If the Law Commission feels that the recovery of non-pecuniary losses by dependants is relevant, following the approach Scotland has taken to non-pecuniary losses is preferable to the current fixed sum.

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[39] *ibid*, 4.
[40] *Gammell v Wilson* [1982] AC 27.
[41] *ibid,* 80.
[42] Damages (Scotland) Act 2011, s 1(2).

Conclusion

As demonstrated, there are many arguments for the regime within which survivors' claims are against the estate, not the wrongdoer. Many of these arguments are not original; they have consistently surfaced throughout the Act's history, visible even in the original Parliamentary debate on Lord Campbell's Act.[43] The Fatal Accidents Act is an over-complex and outdated piece of legislation which does not sit comfortably with the theories of tort underpinning wrongful death. This article has advocated for the reform of the contents of the Act in a new format with additional elements. The family of the deceased will claim against the estate. The claim for the lost years will be reinstated. This will enable dependants to utilise the pre-existing channels for dividing an estate. This will prevent the exploitation or pressure which may arise when dependants seek to recover the sum of their dependency through one combined action. This is better suited to the modern world, where familial arrangements are frequently complex. It will also remove considerations of dependency from the Act. This will make the thrust of the claims much clearer. It will also enable the Act to better reflect the modern family, where relationships of dependency are not as common. This aim is also met by the proposed repeal of Section 1(3), the fixed list of claimants. Repeal of Section 1(3) will remedy the inflexibility of the Act, by allowing non-nuclear relationships to be awarded at the discretion of the judge. This will more accurately effectuate the purpose of the Act. It will also remove the onus to update the fixed list from Parliament.

[43] HC Deb 22 July 1846, vol 87, col 1365.