

Next Talk: 15:00 – 15:40

# Fatal Accident Claims:

## How have they changed in the last 12 months?

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# Five cases for today:

- ▶ Chouza v Martins [2021] EWHC 1669 (QB)
- ▶ Head v Culver Heating Co [2021] EWCA Civ 34
- ▶ Haggerty-Garton v ICI Ltd [2021] EWHC 2924 (QB)
- ▶ Rix v Paramount Shopfitting Co Ltd [2021] EWCA Civ 1172
- ▶ Witham v Steve Hill Ltd [2021] EWCA Civ 1312

# Five cases for today

- ▶ A highly unusual 12 months
- ▶ Four of the five were mesothelioma
- ▶ Four were FAA claims, one was “lost years”
- ▶ Three are appellate decisions
- ▶ Principles apply across the board
- ▶ Five cases in 40 minutes!
- ▶ Concerted challenge by disease insurers to quantum?
- ▶ This talk is neutral as between C and D



# Chouza v Martins [2021] EWHC 1669 (QB)



# Chouza v Martins [2021] EWHC 1669 (QB) - PSLA

- ▶ Minibus vs HGV
- ▶ Expert evidence – *‘It is conceivable ... [the deceased] may have remained conscious for a short period ... it is more likely that not ... killed instantly at the point of impact ... would have been aware that a severe collision was inevitable for period of between one and five seconds before the impact... would have experience intense fear ...’*



# Chouza v Martins [2021] EWHC 1669 (QB) - PSLA

## ▶ C arguments

- ▶ 'Sufficient' physical suffering before death
- ▶ Intense fear prior to death
- ▶ Compensable

## ▶ D arguments

- ▶ Intense fear does not sound in PSLA claim
- ▶ Non-compensable

# Chouza v Martins [2021] EWHC 1669 (QB) - PSLA

- ▶ Spencer J's decision
- ▶ *Although the deceased's death followed very quickly after the physical injury, nevertheless physical injury was sustained, and the expression "pain, suffering and loss of amenity" should be taken to include the fear and mental anguish which precedes physical injury. I therefore agree with Mr Swoboda that compensable damage was sustained in this case.*
- ▶ £500

# Chouza v Martins [2021] EWHC 1669 (QB) - PSLA

## ▶ The controversy

- ▶ JC guideline 15<sup>th</sup> Ed. Ch 1(D) – *Immediate unconsciousness/death within one week*
- ▶ Ch 1(E) – *Mental anguish.*
  - ▶ *Fear of impending death...*



# Chouza v Martins [2021] EWHC 1669 (QB) - PSLA

- ▶ *Hicks v Chief Constable of South Yorkshire* [1992] 2 AER 65 (HL)
  - ▶ Hillsborough disaster – two teenage victims failed to prove any suffering before death
  - ▶ traumatic asphyxia - lost consciousness within a matter of seconds - death within five minutes.
- ▶ Lord Bridge
  - ▶ *It is perfectly clear law that fear by itself, of whatever degree, is a normal human emotion for which no damages can be awarded.*

# Chouza v Martins [2021] EWHC 1669 (QB) – Dependency ratios

- ▶ When can you depart from *Harris v Empress Motors* (67/75) dependency ratios?
- ▶ Evidence in this case:
  - ▶ Worked abroad – expenses paid
  - ▶ Deceased spent little on himself
  - ▶ Generous with family
- ▶ No evidence:
  - ▶ Banks statements
  - ▶ Household bills
- ▶ D position – financial documentation a pre-requisite

# Chouza v Martins [2021] EWHC 1669 (QB) – Dependency ratios

▶ *Harris v Empress Motors* - O'Connor LJ

*In times past the calculation called for a tedious enquiry into how much for housekeeping money was paid to the wife, who paid how much for the children's shoes, et cetera.*



# Chouza v Martins [2021] EWHC 1669 (QB) – Dependency ratios

► Owen v Martin (1992) (CA)

*O'Connor LJ did not intend to lay down any rule that in the absence of striking evidence to the contrary two thirds of net income must be regarded as the value of the dependency ...the value of the dependency ... must always depend on facts.*

# Chouza v Martins [2021] EWHC 1669 (QB) – Dependency ratios

- ▶ Spencer J

*it is not necessary, in order to depart from the conventional percentages, to descend into the nitty-gritty of the family finances and work out precisely how much was spent on the various individual items of expenditure.*

- ▶ 85% pre-retirement and 70% post-retirement

# Chouza v Martins [2021] EWHC 1669 (QB) – Non-typical dependencies

- ▶ Three sons –
  - ▶ Two took over family business
  - ▶ David left role as trained financial consultant
  - ▶ Lucas left role as apprentice heating and refrigeration engineer
  - ▶ Alberto provided money to family as didn't have deceased's income
- ▶ None found to be recoverable
- ▶ All found to have suffered loss as a result of the death
  - ▶ €96,101; €48,962; and c€10,000



# Chouza v Martins [2021] EWHC 1669 (QB) – Non-typical dependencies

- ▶ What is recoverable loss?

*In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively. (section 3(1) FAA)*

# Chouza v Martins [2021] EWHC 1669 (QB) – Non-typical dependencies

- ▶ Spencer J
- ▶ Accepted section 3(1) gateway wide
  - ▶ But how wide?
- ▶ Alberto – loans to the family as money recorded in ‘family book’
  - ▶ a question of cash flow – does not fall within s3(1) gateway

# Chouza v Martins [2021] EWHC 1669 (QB) – Non-typical dependencies

- ▶ Spencer J

- ▶ David and Lucas

- ▶ Claim already covered by income dependency

- ▶ Lost earnings simpliciter not within s3(1)

- ▶ Reason for loss too inchoate

- maintenance of family reputation or honour or name is too inchoate or intangible to be able to amount to a services-type benefit which gives rise to the alleged dependency claims*

- ▶ Was this right?



# Chouza v Martins [2021] EWHC 1669 (QB) – Loss of intangible benefits

- ▶ Can adult children claim?
- ▶ Spencer J – No
- ▶ But - *ATH v M2* [2002] EWCA Civ 792 – award for 19 year old
- ▶ *Beesley v New Century Group Ltd* [2008] EWHC 3033 (QB) (Hamblen J)

# Head v Culver Heating Co [2021]

## EWCA Civ 34

- ▶ A living mesothelioma claim
- ▶ Is the approach to a lost years claim the same as a FAA financial dependency?
- ▶ In mesothelioma/ cancer cases is there benefit/ disbenefit to resolving financial dependency in life?

# Head v Culver Heating Co [2021]

## EWCA Civ 34

- ▶ Mr H founder, MD and driving force of business
  - ▶ Family business
- ▶ 90% shareholding
- ▶ Mrs H did some book-keeping but paid enhanced wage for tax efficiency
- ▶ Two sons in business (10% share)
- ▶ Damages assessed at nil at trial
- ▶ Successful appeal - re-assessed at £2.44 million
- ▶ Striking similarity to *Rix*

# Head v Culver Heating Co [2021]

## EWCA Civ 34

- ▶ The approach in the living claim

*at the time of Mr Head's death all the income which he and his wife received from the company (save for the small deduction in respect of Mrs Head's work) was the product of his hard work and flair, not a return on a passive investment. (Bean LJ)*



# Head v Culver Heating Co [2021]

## EWCA Civ 34

- ▶ The approach in the fatal claim (*Rix*) - Nicola Davies LJ  
*income is only derived from capital if it is identifiable as having been received without the labour and services of the deceased. In short, it is passive [...] On the facts of this case, there was no identifiable element of the profits which was not touched by the management of Mr Rix.*
- ▶ No discernible difference in approach
- ▶ But there is a difference to calculation
  - ▶ 50 vs 67/75 less spouses income

# Haggerty-Garton v ICI Ltd [2021] EWHC 2924 (QB)

- ▶ A fatal case with a difference -



# Haggerty-Garton v ICI Ltd [2021] EWHC 2924 (QB)

- ▶ Fatal mesothelioma
- ▶ Solatium = PSLA
- ▶ £97,250



# Haggerty-Garton v ICI Ltd [2021]

## EWHC 2924 (QB)

- ▶ Loss of Society – General damages for relatives in fatal claims

▶ £12,980

vs

▶ £115k + £40k x2 + £35k + £50k x 2 + £28k x2 + £18k

▶ £404k

- ▶ Interest

- ▶ £40k



# Haggerty-Garton v ICI Ltd [2021]

## EWHC 2924 (QB)

- ▶ Services claim
- ▶ Multiplicand - £10,000 vs £600 CS vs £2,000 D skel
- ▶ ONS – a Government body, in their *2016 Household Satellite account on household service work done throughout the UK* – Average £18,932 pp
- ▶ Ritchie J - £8,064 but 25% discount applied - £6,000

# Rix v Paramount / Witham v Steve Hill

Two cases with some similar features heard at the same time:

- ▶ Rix heard in CA 24<sup>th</sup> June 2021
- ▶ Witham Heard in CA 6<sup>th</sup> July 2021
- ▶ Rix judgment 28<sup>th</sup> July 2021
- ▶ Witham judgment 26<sup>th</sup> August 2021
- ▶ Nicola Davies LJ gave leading judgment in both

# Rix v Paramount Shopfitting

- ▶ Martin Rix was the driving force of a small family business, a limited company in construction and building work: kitchens, bathrooms, commercial, residential, local authority, granite worktops, joinery
- ▶ His skill, acumen, business flair
- ▶ Shareholdings and dividends
- ▶ Mr Rix 40%, Mrs Rix 40%, sons 10% each
- ▶ Took some profits; left some in the company

# Rix v Paramount Shopfitting

- ▶ He died in April 2016 of mesothelioma, at the age of 60
- ▶ Mrs Rix inherited his shareholding
- ▶ Sons took on running the business and employed managers too
- ▶ Business continued to thrive
- ▶ What was the loss under the FAA?



# Rix v Paramount Shopfitting

## Previous authorities

- ▶ *Wood v Bentall Simplex Ltd* (1992), Beldam LJ:
  - ▶ The foundation of the claim is the dependants' loss of expectation of future pecuniary benefit
  - ▶ Assets which continue to be enjoyed after death are not taken into account
- ▶ Staughton LJ:
  - ▶ Consider what loss the dependants have suffered before considering the s.4 disregard
  - ▶ How much loss has arisen because the deceased is no longer alive and able to work?
  - ▶ How much of deceased's income was derived **solely** from capital which the dependants have inherited?
  - ▶ Geese and eggs (!)

# Rix v Paramount Shopfitting

## Previous authorities

- ▶ *Cape v O'Loughlin* (2001), Latham LJ
  - ▶ Property development business
  - ▶ Again, test from *Pym v Great Northern Railway* “*extent to which the dependants have been deprived of a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased*”
  - ▶ Fact-specific
  - ▶ If there's a loss, then use whatever material best fits the facts of the particular case to determine the extent of that loss
  - ▶ Loss was the flair and business acumen to increase capital and income
  - ▶ In that case, it was measured by the cost on investment advice

# Rix v Paramount Shopfitting

## Previous authorities

- ▶ *Williams v Welsh Ambulance* (2008), Smith LJ
  - ▶ Builders merchant business and property business
  - ▶ Workaholic, driving force, “wealth creator”
  - ▶ Family carried on the business and it thrived
  - ▶ Judge was right that family lost not income derived from a capital asset but the contribution of the deceased
  - ▶ Therefore there was a dependency and loss
  - ▶ What actually happened to the business after his death was irrelevant
  - ▶ A dependant cannot by their own actions after death affect the value of the dependency at the time of the death
  - ▶ Dependency fixed at the time of death
  - ▶ Loss could be measured by cost of replacing his services

# Rix v Paramount Shopfitting

- ▶ The shareholding was not an income-generating asset, independent of the work and labour of Mr Rix himself
- ▶ Company was not a “money-generating beast”
- ▶ Judge took a realistic and common-sense approach to separating out income derived from capital from that which was derived from labour
- ▶ Dependency fixed at the moment of death – what would the dependants receive if he’d not died (not a comparison of before and after)
- ▶ Look at the practical reality of the case



# Rix v Paramount Shopfitting

- ▶ The whole of the profit (even the part left in the business) was earned income and therefore part of the financial dependency
- ▶ No part of the profit was “passive”
- ▶ Underhill LJ’s emphasis from *Wood* of “income derived **solely** from capital which the dependants have inherited” not being part of the dependency
- ▶ Mrs Rix’s salary and dividends were the result of his work, not hers, so they were part of the dependency
- ▶ Not part of the *Coward v Comex* calculation

# Witham v Steve Hill Ltd

- ▶ Sarah and Neil Witham were a married couple
- ▶ They fostered two children, as their family
- ▶ The children had special needs and requirements
- ▶ They agreed she would return to her nursing career and he would be the one at home and available for the children, “house husband”
- ▶ Judge made a number of strong findings of fact about the reasons for fostering, longevity of the fostering, Sarah’s return to work and the extent of Neil’s domestic work and child care, and cost of care

# Witham v Steve Hill Ltd

- ▶ Neil died of mesothelioma in January 2019 aged 55
- ▶ Because of the terms of the fostering agreement, Sarah could not return to work or pursue her career
- ▶ She took on what Neil would have done at home and for the children
- ▶ After the trial, in a wholly unexpected turn of events, the fostering arrangement was ended by the Local Authority

# Witham v Steve Hill Ltd

- ▶ D argued that there was no loss in respect of the children as foster children are not dependants under the FAA
- ▶ C said this misconstrued the case – the Judge had found a loss in Sarah's inability to work and earn and pursue her career; the cost of childcare was a means of measuring that loss, not a loss in itself; loss of Sarah's earnings had been advanced as an alternative



# Witham v Steve Hill Ltd

Main arguments:

- ▶ Was this Sarah's (recoverable) dependency or the foster children's (irrecoverable) dependency, with no loss to them as Sarah replaced Neil's care?
- ▶ Did the fact of receipt of fostering payments make this a business decision incidental to the relationship of husband and wife?
- ▶ Could Sarah recover for tasks Neil would have done for the benefit of the whole family (i.e. including those who were not dependants under the FAA)?
- ▶ How to value the care Neil would have provided?

# Witham v Steve Hill Ltd

- ▶ CA emphasised the fact-specific nature of FAA claims
- ▶ CA upheld the Judge's approach
- ▶ Applied *Wood v Bentall Simplex* and *Cape v O'Loughlin* in finding that the test of loss of expectation of pecuniary benefit is a wide one
- ▶ The Judge had correctly looked at "the reality of the situation" (*Malyon v Plummer*)
- ▶ There was no prescriptive method by which the damage / loss was to be identified (*O'Loughlin*)

# Witham v Steve Hill Ltd

- ▶ Judge rightly concluded that C was dependant on Neil being at home for the foster children to allow her to pursue her career
- ▶ That was a pecuniary loss, and it came from the relationship of husband and wife – it was a “family” decision, not one from a business relationship or incidental to the husband/wife relationship (distinguishing *Burgess*)
- ▶ Once a dependency loss was established, there was no prescriptive method by which it was to be calculated (*O’Loughlin* again)

# Witham v Steve Hill Ltd

- ▶ One means of measuring Sarah's loss was by calculating childcare costs, and the Judge was perfectly entitled to use that approach
- ▶ D's argument, that C suffered no loss because the children continued to be looked after (by her) and she was paid to do so, missed the point – the loss identified was her loss of career and her income from that
- ▶ The fact that a non-eligible person also suffered the loss does not prohibit recovery by the eligible dependant



# Witham v Steve Hill Ltd

- ▶ In calculating childcare costs, it was not necessary to apply a 25% *Housecroft v Burnett* discount
  - ▶ What is in issue in a dependency claim is the value of the services the deceased would have provided had they not died – see [52]
  - ▶ Applied *Daly v Steamship Navigation*
  - ▶ Also *Knauer v MoJ* (at first instance)
  - ▶ Open to Judge to use commercial cost without discount
  - ▶ ? Might it have been open to have valued this dependency by reference to Sarah's loss of earnings?
  - ▶ In any event, *Housecroft* in a PI case might allow the full commercial rate to be used – Judge entitled to use it here

# Witham v Steve Hill Ltd

Points to take away:

- ▶ There is a wide threshold to whether there is a dependency loss: see *Wood, O'Loughlin*, etc and it is a fact-specific question
- ▶ There is a wide discretion to how to quantify a dependency loss, once it is found to exist
- ▶ *"no prescriptive method"*
- ▶ Look at the reality of the situation
- ▶ Could use lost earnings or commercial value of care

# Witham v Steve Hill Ltd

The other issue

- ▶ The foster children were unexpectedly removed from Sarah's care, and not returned
- ▶ Although this happened after Neil's death (and after the trial and judgment, though during the period for an appeal) it was relevant to the dependency
- ▶ The CA would not let the damages be assessed on what was then known to be a wholly false basis
- ▶ They decided to admit evidence of that (*Mulholland v Mitchell*), and argument about it (*Jones v MBNA*)

# Witham v Steve Hill Ltd

- ▶ On the highly unusual facts of this case, this was a post-death event directly relevant to the continuance of the dependency (as contemplated in *Williams v Welsh Ambulance*), so should be taken into account
- ▶ Remitted to trial Judge to reconsider dependency from the date on which the children were removed from Sarah's care
- ▶ Case has since been settled



# All change or business as usual

- ▶ Scope of s3(1) – controversy remains
- ▶ Quantification of dependencies
  - ▶ What measure
  - ▶ What discount
  - ▶ Dependency ratios
- ▶ PSLA
- ▶ Conflicts and applicable law – English law not as generous as many others