

A Year in Fatal Accident Claims

12
King's Bench Walk

Speakers:



Charles Robertshaw
robertshaw@12kbw.co.uk



Achas Burin
burin@12kbw.co.uk

Overview

- ▶ **Hill v Witham** [2021] EWCA Civ 1312
- ▶ **Paramount Shopfitting v Rix** [2021] EWCA Civ 1172
- ▶ **Chouza v Martins** [2021] EWHC 1669 (QB)

Hill v Witham [2021] EWCA Civ 1312

- ▶ C was widow of Mr Witham (W) - died of mesothelioma
- ▶ Had fostered two children (A & B) - Significant care needs
- ▶ Term of the foster care: at least one parent must be available in respect of the fostering
- ▶ Fostering allowance of £50k/year
- ▶ W gave up work to stay at home with the children
- ▶ When W died: C gave up work to care for the children

Hill v Witham [2021] EWCA Civ 1312

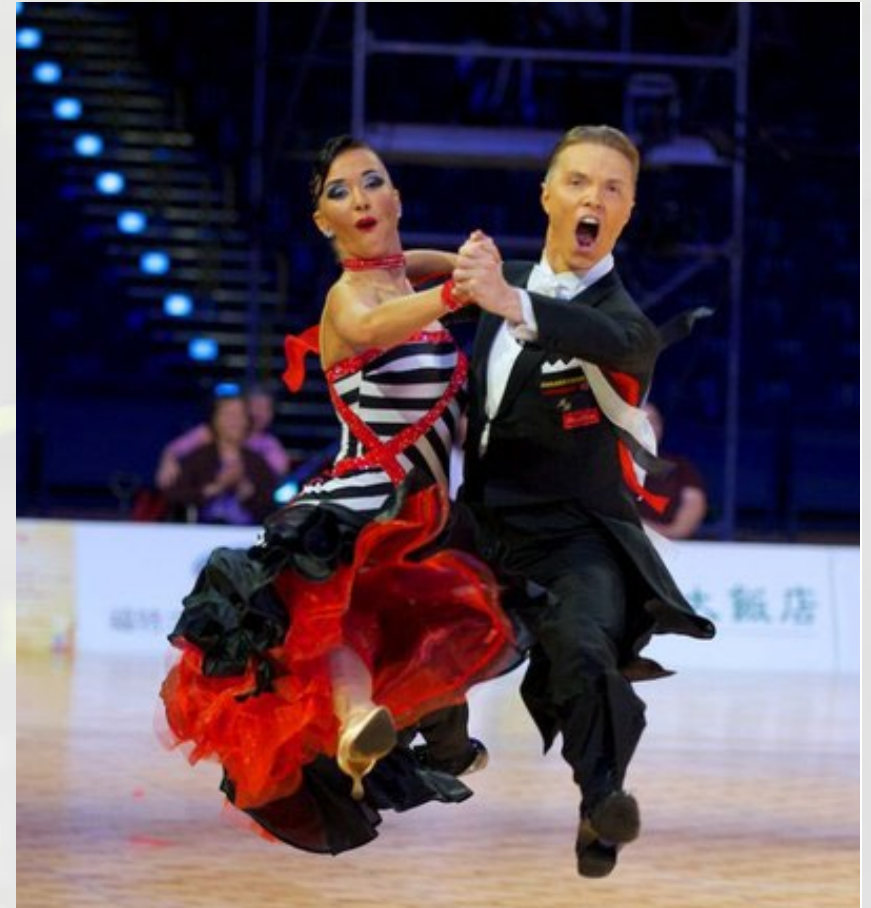
- ▶ Problem: Foster children not a dependent according to FAA s.1(3)
- ▶ Solution: C claimed for the loss of dependency on W in respect of childcare
- ▶ First instance: C awarded £666k for the lost childcare and domestic services provided by W
- ▶ C awarded commercial cost of care
- ▶ D appealed

Hill v Witham – D argument

Dependency not recoverable:

- ▶ C had not lost any dependency
- ▶ Loss to C arose from a business relationship, not from the relationship of husband and wife

Burgess v Florence Nightingale Hospital for Gentlewomen [1955] 1 QB 349



Hill v Witham – CA decision

- ▶ *“The reality”* of the claim = C was depending on W to be able to pursue her career
- ▶ The decision to foster = *“core”* part of the husband/wife relationship
- ▶ *“there is no prescriptive method by which such damage is to be identified, or calculated...”*
per Latham LJ in *Cape Distribution v O’Loughlin* [2001] ECA Civ 178
- ▶ C can claim the cost of replacing W’s care of the children

Hill v Witham – Rate of care

D's alternative argument: Rate of care

- ▶ C had taken over care of the children herself (not paid for carers)
- ▶ Therefore, contrary to principle to assess the value of the dependency by reference to the full commercial rate of replacing the lost services
- ▶ The court should look at the reality of the situation and award a gratuitous rate

Hill v Witham – rate principles

- ▶ *“money or money’s worth”*
- ▶ *“whatever material appears best to fit the facts of the particular case in order to determine the extent of that loss”*
- ▶ Starting point = the commercial cost of replacing the services
- ▶ Can use the loss of earnings
- ▶ Must be reasonable



Hill v Witham – CA decision on rate

“It is the value of the services lost which requires assessment and compensation, not the value of how the dependent manages following the death”

- ▶ Relied on *Housecroft v Burnett* [1986] 1 ALL ER 332
- ▶ If C had claimed her loss of earnings –higher level of damages than the commercial care costs
- ▶ Using the commercial rate of care was appropriate on the facts of this case

Hill v Witham - Takeaways

- ▶ Unlikely that any one reported case will be a silver bullet for your case

"No aspect of the law of damages has been found in practice to be more dependent upon the facts of each particular case than the assessment of loss of pecuniary benefit to dependents under the Fatal Accidents Act"

Beldham LJ in *Wood v Bentall Simplex Limited* [1992] PIQR 332 (CA)

- ▶ You can't always trust your gut



Hill v Witham - Takeaways

- ▶ Difficult to see facts on which a gratuitous rate would be used
- ▶ But arguable on the right facts
- ▶ The argument that foster care arose out of part of business relationship may also succeed on different facts



Hill v Witham – post-script

- ▶ A&B were taken away from C's care in July 2020
- ▶ Principle from *Welsh Ambulance Services NHS Trust & Anor v Williams* [2008] EWCA Civ 81
- ▶ CA decision: remitted back to the trial judge to consider

Paramount Shopfitting v Rix

[2021] EWCA Civ 1172

Facts

- ▶ Martin Rix was exposed to asbestos while working for the Defendant as an apprentice.
- ▶ Following his employment with the Defendant, Mr Rix set up a successful construction business.
- ▶ In 2016 he died from mesothelioma, aged 60.
- ▶ The Claimant, his widow, brought FAA and LRMPA claims

Paramount Shopfitting v Rix

Issue

- ▶ Did Mrs Rix had a valid claim for financial dependency?
- ▶ How it should be quantified?
- ▶ The Appellant argued that Mrs Rix had no financial dependency claim because the family business had been profitable since Mr Rix's death.

Paramount v Rix – C's case

- ▶ C proposed two alternative bases for calculating her financial dependency:
 - ▶ **Basis 1** – by reference to C's share of the annual income which she and the deceased would have received from the business, had Mr Rix lived.
 - ▶ **Basis 2** – by reference to the annual value of the deceased's services to the business as managing director, i.e. the cost of employing a replacement.

Paramount v Rix – grounds of appeal

- ▶ **Ground 1:** The judge erred in treating all of the profits generated by the company as providing the basis for the calculation, without regard to whether those profits survived his death and continued to accrue to her.
- ▶ **Ground 2:** The judge erred in law in treating the claimant's entitlement to a share of the profits of the company based on her own shareholding in the company as if it had belonged to the deceased.
- ▶ **Ground 3:** The judge erred in law in confining the credit for surviving income to rental income and C's state pension, and failing to take account of the claimant's surviving income in the form of a share of profits in the company and her director's salary.

Paramount v Rix – 6 general principles

1. Ask, what is the extent of the dependants' loss based upon a reasonable expectation of pecuniary benefit from the continuance of the life of the deceased?
2. The assessment is fact specific.
3. Capital assets are not taken into account.
4. Distinction between income from services vs. income from capital assets.
5. Dependency is fixed at the moment of death.
6. Damages under the **FAA** can be greater than would be justified upon a strict view of the dependants' loss.

Ground 1: Income from services vs. income from capital assets

- ▶ Inherited asset takes the form of a business in which the deceased had worked: review of previous case law.



Wood v Bentall [1992] PIQR P332

O'Loughlin v Cape [2001] EWCA Civ 178

Welsh Ambulance v Williams
[2008] EWCA Civ 81

Ground 1: Income from services vs. income from capital assets

- ▶ Held:
 - ▶ No general principle that businesses like Mr Rix's should be treated as a capital asset.
 - ▶ Income from capital = passive i.e., received without the deceased's labour and services.
 - ▶ Business was not a “money generating beast” which would generate money regardless of who was in charge.
 - ▶ Logical to treat the whole of the profit available to the deceased and the widow as earned income & part of the financial dependency.
 - ▶ Fact that business had thrived since the deceased's death = irrelevant.
 - ▶ There would be cases where the valuation of the dependency > the actual financial loss.

Ground 2: Practical reality

“The authorities have made clear that courts should look at the practical reality in relation to financial dependence, not at the corporate, financial or tax structures that are used in family arrangements. If one looks at the practical realities, it is clear that the income that Mrs Rix received as director and shareholder was entirely the result of her husband's work for the business.”

- ▶ **Malyon v Plummer** [1964] 1 QB 330
- ▶ **Ward v Newalls Insulation Co Ltd** [1998] 1 WLR 1722 (CA).

Ground 3: Deduction of post-death income

- ▶ No portion or percentage of Mrs Rix's post death income can be independent of the deceased and unaffected by Mr Rix's death.

"Such deduction would contravene the principle that dependency is fixed at the date of death and nothing done by a dependant post death can affect the level of dependency from that source, save in limited circumstances which do not apply in this case." [69]

Chouza v Martins [2021] EWHC 1669 (QB)

- ▶ Mr Rodriguez (R) = front seat passenger in a minibus when it was hit by an articulated goods vehicle and he was killed
- ▶ Married to C for 20 years and they had 4 children
- ▶ R had set up a business providing HGV vehicles and other plant for use in the construction industry
- ▶ At time of death:
 - ▶ The business was in significant debt and was insolvent
 - ▶ R intended to wind up the company and pay off the debts in 2018
 - ▶ R was providing his personal services as a plant operator on construction sites and putting the money he made through his business to keep it going

Chouza v Martins - Issues

- ▶ PSLA award for fear/anguish very shortly before death
- ▶ Whether appropriate to depart from the conventional percentages for financial dependency
- ▶ Whether R's sons had dependency claim due to giving up work to run the family business

Chouza v Martins – the PSLA claim

- ▶ R aware that severe injury inevitable for 1-5 seconds
- ▶ Died instantly on collision or immediately unconscious and quickly died
- ▶ C claimed £2,500 for the intense fear experienced prior to impact
- ▶ D position: intense fear does not amount to PSLA
- ▶ Spencer J: PSLA should include fear and anguish prior to physical injury - £500
- ▶ Contradicts House of Lords in *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER 65

Chouza v Martins – Dependency %

- ▶ Conventional % ratios = *Harris v Empress Motors* [1984] 1 WLR 212
 - ▶ 75% of partner's income if dependent children
 - ▶ 66% (two thirds) if no dependent children
- ▶ But C claimed: 90% pre-retirement, 75% post-retirement

Chouza v Martins – Dependency %

▶ C argument:

- ▶ R worked away from home for long periods and his expenses were paid for by his contractors.
- ▶ R spent very little on himself in any event.
- ▶ R would have paid for the youngest child's education.
- ▶ R had lavished expensive gifts on his children

▶ D argument:

- ▶ Complete lack of documentary evidence
- ▶ Asserting R was frugal ≠ a 90% dependency
- ▶ R more likely to spend on himself whilst away from home

Chouza v Martins – Dependency %

“The percentages have become conventional in the sense that they are used unless there are striking evidence to make the conventional figure inappropriate because there is no departure from the principle that each case must be decided upon its own facts”

Per the judgment of O’Connor LJ in *Harris*

“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 ... It is clear that the value of of the dependency cannot be taken at such an arbitrary figure and must always depend on the facts.”

Per Parker LJ in *Owen v Martin* (19920 WL 895670)

Chouza v Martins – Dependency %

Spencer J's decision

- ▶ Not necessary to "*descend to the nitty-gritty of the family finances*"
- ▶ If a court decides to use a percentage approach, it may adjust the percentages to reflect any general evidence about the lifestyles of the family
- ▶ Awarded: 85% pre-retirement and 70% post-retirement

Chouza v Martins - Takeaways on dependency %

- ▶ Tough decision for D: the only documents with which to test C's witness evidence were in C's control and not before the court
- ▶ D made complaints at trial, but Spencer J said it was too late
- ▶ Tactical tip for Ds: make application for specific disclosure ASAP



Chouza v Martins – Giving up work

- ▶ David
 - ▶ Aged 24 at the death
 - ▶ Left Deloitte during his training
 - ▶ No permanent position for him after he returned and completed training
 - ▶ Took up employment in the hotel industry earning a similar sum as at Deloitte
 - ▶ Claimed disruption to career cost him €96k
- ▶ Lucas
 - ▶ Aged 20 at death
 - ▶ Studying and doing internship: heating engineer
 - ▶ Gave that up to assist with the business
 - ▶ Claims for lost income as a heating engineer (in sum of €49k)

Chouza v Martins – C's argument

- ▶ All that is required = identify the loss of *"a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased"*
- ▶ If dependent has suffered a loss *"in money or money's worth"* then it must use *"whatever material appears best to fit the facts of the particular case in order to determine the extent of that loss"*
- ▶ The pecuniary advantage here = an ability to a pursue career whilst R ensured family's financial stability
- ▶ The loss from familial relationship, not a business loss

Chouza v Martins – D's argument

- ▶ These are claims for loss of earnings as a result of death and are not recoverable in law
- ▶ Neither David nor Lucas were financially dependent on the deceased at the time of death
- ▶ It was not reasonable for David and Lucas to give up their jobs to run a company that was insolvent

Chouza v Martins – Spencer J’s decision

- ▶ R kept the business going by using the income generated from his personal services as a plant operator
- ▶ It was the loss of this income that made the business unviable without David and Lucas intervening
- ▶ David and Lucas’ services to the business were a replacement of the R’s income to the business
- ▶ That loss of income has already been awarded in the form of the financial dependency claim
- ▶ Therefore, David and Lucas’ claims are double-recovery
- ▶ No award made

