

QUANTUM: An update

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Summary

- JC Guidelines – 16th Edition
- Wrongful birth
 - *Khan v Meadows* [2021] UKSC 21
- Fatal Accidents Act:
 - *Steve Hill Ltd v Witham* [2021] EWCA Civ 1312
 - *Rix v Paramount Shopfitting Co Ltd* [2021] EWCA Civ 1172
- Lost years
 - *Head v Culver Heating Company* [2021] EWHC 1235 QB
- Accommodation claims post *Swift v Carpenter*
 - *PAL (a child) v Davison* [2021] EWHC 1108 (QB); *AL v A* [2021] EWHC 1761 (QB)
- Provisional damages and dementia risk
 - *Mathieu v Hinds & Anor* [2022] EWHC 924 (QB)
- Fundamental dishonesty & quantum
 - *Cojanu v Essex Partnership University NHS Trust* [2022] EWHC 197 (QB)

JC Guidelines – 16th Edition

- Updated for RPI increase of 6.56% (as at end of Sep 2021)
- Removed figures which do not incorporate *Simmons v Castle* 10% uplift – apart from mesothelioma cases, likely to be very few cases where pre-uplift figures are relevant
- Psychiatric/psychological injuries section updated in respect of physical and sexual abuse
- Reproductive injuries for women section changed – previously focused on effects on fertility and reproduction, now also includes effects of sexual dysfunction:

JC Guidelines – 16th Edition

- *(a) Infertility whether by reason of injury or disease, with sexual dysfunction, severe depression and anxiety, pain, and scarring. The upper end will be in cases with significant medical complications, for example, following failure to diagnose ectopic pregnancy, and in a younger person.*
 - *£114,900 to £170,280*
- *(b) Sexual dysfunction which is likely to be permanent in the case of a person with children or who would not have had children in any event. The upper end will include cases with significant medical complications, e.g. ectopic pregnancies or multiple surgeries.*
 - *£43,010 to £102,100*
- *(c) Infertility with no aggravating features and no sexual dysfunction in a young person without children.*
 - *£56,080 to £71,350*

Khan v Meadows [2021] UKSC 21

- Can claim for the costs of bringing up a child with haemophilia
- Cannot claim for the costs associated with bringing up a child with autism
- What is the scope of duty of the claim being advanced, and does this mean that some of the losses might fall outside of that scope?

Steve Hill Ltd v Witham [2021] EWCA Civ 1312

- Facts:
 - The Respondent's husband died from mesothelioma.
 - FAA claim.
 - The couple had two foster children.
 - R had brought a dependency claim for the cost of childcare at the commercial rate.
 - 17.02.20: Damages assessed in the sum of £928k including £666k for valuation of lost childcare / domestic services

Steve Hill Ltd v Witham [2021] EWCA Civ 1312

- Following the assessment:
 - Children removed from care of R
 - R's solicitors properly notified A
 - The Appellant sought to rely on fresh evidence arising after the trial which showed that the children were no longer in R's care.

Steve Hill Ltd v Witham [2021] EWCA Civ 1312

- ISSUE 1: FRESH EVIDENCE
- Held: (Nicola Davies LJ)
 - The fresh evidence was admitted for the appeal.
 - To refuse to admit the evidence would affront common sense or a sense of justice.
 - Remit to trial judge for re-evaluation of the dependency in light of the new evidence

Steve Hill Ltd v Witham [2021] EWCA Civ 1312

- ISSUE 2: MEASURE OF SERVICES DEPENDENCY
- On assessment: found that the proper measure of damages for those services should be their commercial cost.
- A argued that, as R had been accepted to be the person who would care for the children, the judge should not have costed care at the commercial rate.
- This argument failed.

Steve Hill Ltd v Witham [2021] EWCA Civ 1312

'It is the value of the services lost which requires assessment and compensation, not the value of how the dependant manages following the death. The decision of the judge to value care, not on the basis of the gratuitous replacement by a friend or relative, but on the basis of the estimated cost of employing labour to replace the lost service, was one open to him to make. Further, having so found, there is no identified requirement to make a 25% or other deduction.'

[para.52]

Rix v Paramount Shopfitting Co Ltd [2021] EWCA Civ 1172

- Facts:
 - ▶ C's husband died from mesothelioma.
 - ▶ The deceased had built up a successful family business, incorporated as a limited company
 - ▶ He owned 40% of the shares and his wife, C, was also a 40% shareholder and director.
 - ▶ C received a director's salary and dividends but did not work in the business.
 - ▶ After he died C inherited the shares, their eldest son took over the company and it continued to thrive with turnover and profits increasing.

Rix v Paramount Shopfitting Co Ltd [2021] EWCA Civ 1172

- Quantification of the loss:
 - C brought a claim for financial dependency either by reference to her share of the annual income which she and the deceased would have received from the business had he lived (“basis 1”), alternatively, by reference to the annual value of the deceased’s services to the business as managing director, calculated by reference to the cost of employing a replacement (“basis 2”)
 - D resisted the claim on the grounds that the business had been more profitable since the deceased’s death than before and, since C’s shareholding had increased in value there was no financial dependency claim.

Rix v Paramount Shopfitting Co Ltd [2021] EWCA Civ 1172

- Cavanagh J: quantification would be by reference to her share of the annual income which she and the deceased would have received had he lived.
- C.A:
 - (i) the question to be addressed was what was the extent of the dependants' loss based upon a reasonable expectation of pecuniary benefit from the continuance of the life of the deceased;
 - (ii) the assessment was dependent upon the facts of the particular case;
 - **(iii) capital assets which the dependants had the benefit of during the deceased's lifetime and continued to enjoy following the death were not taken into account either as part of the dependency or as a deduction from it;**

Rix v Paramount Shopfitting Co Ltd [2021] EWCA Civ 1172

- (iv) the question for the court was how much loss had arisen because the deceased was no longer alive and able to work, and how much of the deceased's income was derived solely from capital which the dependants have inherited;
- (v) the dependency was fixed at the moment of death, it was what the dependants would probably have received as benefit from the deceased had the deceased lived: post death events were irrelevant, save for those which affected the continuance of the dependency and the rise or fall in earnings to reflect the effects of inflation;
- (vi) the damages awarded under the 1976 Act could be greater than would be justified upon a strict view of the dependants' loss.

Rix v Paramount Shopfitting Co Ltd [2021] EWCA Civ 1172

- In summary:
 - Where the deceased is a business owner, it is critical to distinguish between (a) the loss of the income derived from the deceased's services and (b) the loss of income derived from a capital asset in order to value the dependency claim.
 - Income was only derived from capital if it was identifiable as having been received without the deceased's labour and services. In this case, there was no identifiable element of the profits which was not affected by the deceased's management; the company would not have continued to generate money regardless of who was in charge of it.
 - Therefore, it was logical to treat the whole of the profit available to the deceased as earned income and part of the financial dependency.
 - Further, the fact that the company had thrived since the deceased's death was irrelevant for the purposes of calculating the dependency claim.

Head v Culver Heating Company [2021]

EWHC 1235 QB

- Re-assessment of damages following decision by Court of Appeal
- Similar principle to Rix
- Lost years claim regarding dividend income to the deceased from his work in his business
- The lost income is that which has been caused by the deceased's work, not by passive investment
- Should not draw artificial distinctions between dividends, undistributed profit and salary
- What best reflects the earning capacity which has been lost?

Accommodation claims post *Swift v Carpenter*

- *Swift* left open the door for ‘short’ life expectancy cases
 - ‘The position will be different in short life expectancy cases ... these may require a different approach’ (Underhill LJ)
- Not clear what amounts to ‘short’
- Not clear what the ‘different approach’ should be
- By way of example: with 5 year life expectancy C would only recover around 20% of additional capital cost.
- Issue not yet been before the court but dealt with in JSMs / mediations

Accommodation claims post *Swift v Carpenter*

- *Swift* generally improves the prospects of obtaining an interim payment to purchase accommodation because a substantial element of the property cost can now be brought into account at the *Eeles* stage 1 assessment
- Even where C falls short at *Eeles* stage 1, the stage 2 process remains an option, particularly where C is in unsuitable accommodation.
- ***PAL (a child) v Davison* [2021] EWHC 1108 (QB); *AL v A* [2021] EWHC 1761 (QB)** These are two (separate) cases where Cs successfully obtained interim payments in order to purchase a house where it was immediately required.

Mathieu v Hinds & Anor [2022] EWHC 924 (QB)

- Facts:
 - C, a successful artist, sustained serious TBI
 - Issue: Whether the Claimant should be awarded provisional damages in relation to the chance of developing dementia due to his brain injury [para.289-358]
 - First limb of *Willson v MOD* test: Is there a chance of C developing the disease or deterioration in question
- Hill J:
 - Described the underlying science as ‘complex and controversial’
 - ‘328. *The Claimant needs to prove, on the balance of probabilities, that there is a more than fanciful chance that the TBI will cause him dementia in the future. This requires him to prove that as a matter of generality a single TBI can cause dementia, and that this risk applies to him.*
 - 329. *In my view the answer to this first, general question remains doubtful as a matter of science.’*

Mathieu v Hinds & Anor [2022] EWHC 924 (QB)

- Of more general application:
- *'342. ..the difficulty the court would face in future in addressing the causation question bears directly on the discretion which ... is a further reason why I decline to make this award.'*
- Post-TBI dementia not clearly diagnosable
- Any post-TBI dementia often not severable from consequences of initial TBI
- Difficult to assess level of aggravation / impact on day to day existence

Mathieu v Hinds & Anor [2022] EWHC 924 (QB)

- N.B. Interesting dicta on failure to mitigate by refusing to undertake potentially preventative headache treatment (amitryptiline) and/or withdrawing from OTC medication [para.87-131]
- The fact that there were two experts with differing views made it harder to find that C is acting unreasonably

Cojanu v Essex Partnership University NHS Trust [2022] EWHC 197 (QB)

- Facts:
 - C convicted of attempted murder of his wife after he attacked her with a knife
 - In the course of the incident C sustained tendon injuries to his fingers
 - At trial D trust found to have negligently delayed the surgical tendon repair
 - D trust also argued FD and illegality:
 - Allegation of dishonesty as to the facts of his original injury: In his statement in the civil case he maintained that he had sustained his initial injury by his wife attacking him with the knife.
 - Allegation of dishonesty as to the value of the claim: Schedule of Loss pleaded a loss of earnings claim based upon the rates of UK carpenters and costed future surgery fees based upon UK rates. This was incorrect because C by then had been deported to Romania.
- Recorder Gibbons: Found C to be fundamentally dishonest on both points.

Cojanu v Essex Partnership University NHS Trust [2022] EWHC 197 (QB)

- On the issue of dishonesty as to the facts of his original injury:
- *‘Regrettably there are hundreds of drugs related gang stabbings in London and around England each year. Young men cut and kill each other over territory and drugs or other matters. If every one of those who were brought into hospital or prison and who denied criminality or starting the fight (and yet was convicted) is to be deprived of any civil claim when the hospital negligently cuts off the wrong leg or fails to treat the young man at all (because he is presumed to be a criminal), then the common duty of care owed by the NHS to all residents would be wholly undermined and likewise the will of Parliament when it imposed the equality principle for medical treatment of prisoners.’ [para.69] Ritchie J*

Cojanu v Essex Partnership University NHS Trust [2022] EWHC 197 (QB)

- On the issue of dishonesty as to the value of the claim:

'I consider that the incorrect pleading and the failure to quantify the claim properly by the claimant's lawyers in the schedule is not in this case a fundamental dishonesty. It was not a dishonesty at all. In addition, on the facts of this case inadequate pleading is not within the mischief which Parliament aimed to prevent by the passing of section 57. Nor is incompetence, carelessness, negligence or mere omission by the lawyers. The section requires proof of the claimant's dishonesty not his lawyers' lack of competence.' [para.92]

Cojanu v Essex Partnership University NHS Trust [2022] EWHC 197 (QB)

- N.B. Interesting dicta on the defence of illegality where the injury giving rise to the negligent treatment was sustained in the commission of a crime:
 - *'103 Using the policy balance test set out by Lord Hamblen JSC, I do not consider that public policy is sufficiently engaged to deprive the claimant of his right to damages in the civil claim and I do not consider that the courts should use the common law doctrine of illegality to take away the force and effect of the decisions of Parliament to grant convicted and unconvicted persons in prison the equivalent rights to NHS care as are afforded to other members of the public.'*