

Fatal cases: Quantum & Procedure

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Outline

- ▶ Some procedural tips and traps
- ▶ Review of 5 recent cases
 - ▶ 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

The statutes

Law Reform (Miscellaneous Provisions) Act 1934 - "**LR(MP)A**"

The Fatal Accidents Act - "**FAA**"

Procedural points

- ▶ Who can bring LR(MP)A claim?
 - ▶ Executor/executrix
 - ▶ Administrators – but get letters of administration first!
- ▶ Who can bring FAA claim?
 - ▶ Executor/executrix
 - ▶ Administrators – but get letters of administration first!
 - ▶ Dependents – after 6 months
- ▶ Only one FAA claim can be brought
 - ▶ Include all dependents
 - ▶ Conflicts can arise between dependents

Procedural points

- ▶ Limitation
 - ▶ If death within 3 years of tort/deceased's knowledge = 3 years from death or knowledge of claimant
 - ▶ Different dependents can have different limitation periods
- ▶ Particulars of claim
 - ▶ FAA particulars have to include specific matters
 - ▶ See CPR 16PD.5

Procedural points

- ▶ Bereavement award does not survive death
 - ▶ s.1(1A) LR(MP)A
- ▶ No claim for “lost years” under LR(MPA)
- ▶ Don't forget PPOs!

Procedural points

▶ Settlement

- ▶ Separate settlements for each dependents can be achieved
- ▶ Global settlement requires agreement of all dependents

▶ Apportionment

- ▶ Damages award/settlement must be apportioned between dependents
- ▶ If child dependents, settlement/apportionment must be approved by the court
- ▶ Apportionment at discretion of court

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



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 15th 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

Paramount Shopfitting v Rix [2021] EWCA Civ 1172

- ▶ Mr Rix was exposed to asbestos while working for D as an apprentice.
- ▶ Following his employment with D, Mr Rix set up a successful construction business.
- ▶ In 2016 he died from mesothelioma, aged 60.
- ▶ The business continued to thrive after his death.
- ▶ Mrs Rix, his widow, brought FAA and LR(MP)A claims

Paramount Shopfitting v Rix

- ▶ Did Mrs Rix have a valid claim for financial dependency?
- ▶ How it should be quantified?
- ▶ D 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.
- ▶ First instance judge used Basis 1 – D appealed

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.

Paramount v Rix – CA decision

- ▶ Distinguish income from services vs income from capital
- ▶ Income from capital = entirely passive
- ▶ Business was not a “money generating beast”
- ▶ Logical to treat the whole of the profit as earned income & part of the financial dependency.
- ▶ Fact that business had thrived since the deceased's death is irrelevant.

Paramount v Rix – CA decision

*“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.”*

- ▶ Salary and dividends received by Mrs Rix the result of Mr Rix’s work
- ▶ Therefore, included in the dependency valuation

Paramount v Rix – Takeaways

- ▶ FAA claims don't always 'feel' right

Nicola Davies LJ: *"there will be cases in which the valuation of the loss of dependency is greater than any financial loss sustained, that is what Parliament decided".*

- ▶ 'wealth creator' dependencies require very close analysis of the deceased activities in the business
- ▶ Expert accountancy evidence probably required

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