

Fatal Accidents: The Old & the New

Speakers:



Charles Robertshaw
robertshaw@12kbw.co.uk



Charley Turton
turton@12kbw.co.uk

Outline

- Review of 3 recent cases
 - Witham v Steve Hill Ltd [2021] EWCA Civ 1312
 - Rix v Paramount Shopfitting Co Ltd [2021] EWCA Civ 1172
 - Chouza v Martins [2021] EWHC 1669 (QB)
- Two of them were mesothelioma claims
- All of them were FAA claims.
- Two are appellate decisions
- Principles apply across the board

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

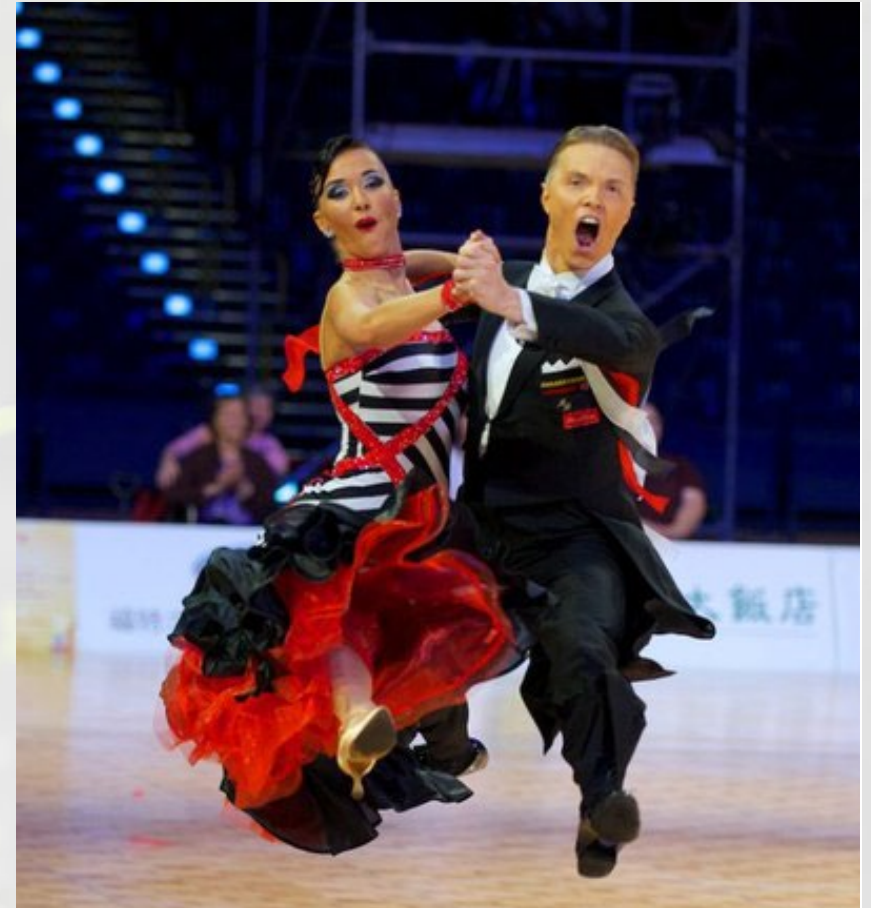
- Problem: Foster children not a dependent according to FAA s.1(3)
- Solution: C claimed for the loss of dependency on W in respect of childcare
- First instance: C awarded £666k for the lost childcare and domestic services provided by W
- C awarded commercial cost of care
- D appealed

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



Rix v Paramount Shopfitting

- **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.
- His skill, acumen, business flair were the driving forces behind the business.
- Shareholdings and dividends
- Mr Rix 40%, Mrs Rix 40%, sons 10% each
- Took some profits; left some in the company

Rix v Paramount Shopfitting

- **Facts**

- Martin Rix 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

- Mrs Rix proposed two alternative bases for calculating her financial dependency:
 - **Basis 1** – was by reference to her share of the annual income which she and the deceased would have received from the business, had Mr Rix lived.
 - **Basis 2** – was by reference to the annual value of the deceased's services to the business as managing director, i.e. the cost of employing someone to replace him in the business.
- At first instance, Mr Justice Cavanagh found for Mrs Rix on Basis 1.
- The Defendant appealed.

Rix v Paramount Shopfitting



Previous authorities

- *Wood v Bentall Simplex Ltd* (1992), Staughton LJ and Beldam LJ
- *Cape v O'Loughlin* (2001), Latham LJ
- ▶ *Williams v Welsh Ambulance* (2008), Smith LJ

Rix v Paramount Shopfitting

- *Wood, O'Loughlin and Williams* did not establish a principle that businesses like Mr Rix's should be treated as a capital asset.
- The key distinction is that income from capital is passive i.e., the asset is going to keep generating money with or without the Deceased's input.
- Mr Rix's business was not this kind of "money generating beast"
- Logical to treat the whole of the profit available to the deceased and the widow as earned income & part of the financial dependency.
- 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

- 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.

Chouza v Martins [2021] EWHC 1669 (QB)



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 R intended to wind up the company in 2018
- R was providing his personal services as a plant operator on construction sites

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 \neq 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 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

