FAMILY TIES

Theo Huckle QC on family businesses and the Fatal Accidents Act

The recent appeal in *Paramount Shopfitting Co Ltd v Rix* [2021] EWCA Civ 1172 has provided the opportunity to review the law on the interesting question of how the court should assess the loss of dependency in the 'family business' situation, when the business's founder and 'main (wo)man' has died, but the business continues successfully.

These are fascinating cases that challenge our understanding of what 'loss' really means. It is always worth reminding ourselves that claims arising out of a death are similar to other personal injury claims, but they are very much not the same, since they engage a discrete area of statutory law as interpreted in the case law.

This sometimes results in findings that might be considered counterintuitive. Here the question is: how can there be a claim for dependency where the party bringing the action is actually better off financially after the fatality?

We shall see whether *Rix* is reported in the full law reports. I have always wondered why the previous case of *Williams v WAST* [2008] EWCA Civ 81 – in which I acted as junior counsel for the Welsh Ambulance Services Trust – did not feature in the law reports. A leading silk commenting on the case at the time said it was 'almost certainly the most significant case in this area of litigation for many years' (Nigel Cooksley QC, JPIL 2008, 3, C128-134).

The same is true of the cases of *Wood v Bentall Simplex Ltd [1992] 2 WLUK 377* and *O'Loughlin v Cape Distribution Ltd [2001] EWCA Civ 178*, although both of those cases were published in the PIQR, as was the initial decision of Cavanagh J in *Rix*.

There are very important legal principles at stake here for PI practitioners assessing loss of dependency in fatal cases, and still more to work out. Authoritative review was welcome. What these cases show is that a clear understanding of the principles is crucial to optimal preparation of the evidence needed to formulate and maximise this type of claim.

Welsh Ambulance Services Trust v Williams

Mr Williams was tragically killed aged 49 when the ambulance speeding to a call lost control and crossed to the wrong side of the road into his path. He had no chance to avoid the collision, and liability was admitted.

At the age of only 22, Mr Williams had taken on the builder's merchant business when his father, who had established the business, died at age 52. Under the control of Mr Williams, the business prospered, diversified into property, and prospered more.

The judge found that Mr Williams was 'a man of unusual energy, flair and drive', and a 'wealth creator'.

By the time of his own death, though, he, his wife and their two eldest children (David, 24, and Sarah, 23) were unsalaried equal equity partners and the younger daughter, Ruth, 19, had begun to be involved; she also subsequently became a partner, so that the three children

effectively ran the business, which continued to prosper and became even more profitable after their father's death.

Their mother's role remained essentially administrative and supportive as throughout, valued in 'employee' terms at no more than about £3k pa.

The judge awarded nearly £2m damages against an already resource-restricted public authority for the loss of dependency of the family members upon Mr Williams.

We argued that in truth, there *was* no dependency; that the family were at least as well off after the death as before, as the family business had continued to provide them all with an even larger shared income, so that the family members' income dependencies were *on the business* rather than on Mr Williams, especially given that the judge was expressly asked to assess the loss of dependency of the family as a whole, and not to apportion it between the widow and children.

In the year before the death, the business profits were about £384k, with capital accounts showing c. £1.6 million including £650k in cash. There was also a family property portfolio, valued at c. £3.9m, a steam engine and farm machinery collection worth c. £300k, and overall the family was at the time of the death worth of the order of £6m.

In the years since Mr Williams's death, the business had enjoyed rising turnover and profits. Each year, profits had exceeded £400k and in the year to March 2005 they reached £513,000. It was said by the Court of Appeal to be 'not clear whether these increases were due to expansion of the business, improved financial management or external economic factors'.

Our appeal for the Ambulance Trust was dismissed by an admittedly strong Court of Appeal headed by Smith LJ, but also containing the future Lord Chief Justice, Lord Thomas.

It was fundamental that the judge found that if Mr Williams had lived, he 'would have gone on generating wealth for another thirty years', although this might be thought to be a rather 'courageous' finding where, as we saw it, he was already allowing 24-year-old David to drive the business, and given 'the proof of the pudding' profits figures.

However, the judge found that even David's actual contribution to the business at that stage was, like Sarah's, significantly less than the share of profits they enjoyed as equity partners, and it was still Mr Williams who was generating large profits by his management of the business.

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Despite our arguments, these findings were not overturned by the Court of Appeal which was, of course, fatal to the appeal. The court upheld the findings that:

- the elder children lost valuable dependencies despite their later success,
- 'nothing could be more obvious than that Mrs Williams lost a very valuable dependency on his death', she having played no significant role in the wealth creation, and
- the youngest, Ruth, had lost the required expectation of pecuniary benefit from a share of the profits generated by her father, which would have greatly exceeded the value of the services she would have rendered.

All were therefore dependants at the time of Mr Williams's death. The fact that each of them was as well off after the death as before, because David and Sarah took over responsibility for managing the business successfully, was 'nothing to the point'.

The financial benefit they later brought to the family was irrelevant to the assessment of the dependency, because a dependant's actions after the death did not affect the value of the dependency at the time of the death, and s4 of the Fatal Accidents Act (added in 1982) requires the court to ignore any subsequent benefits resulting from the death when valuing a lost dependency.

The claimants' forensic accountant valued the various aspects of the work done by Mr Williams by costing notional replacement employees, including as a manager of the business, the sourcing of the steam engines, and also DIY at home, and derived a composite multiplicand which produced an overall financial dependency claim.

The judge made only 12.5% reduction factor for personal expenditure of the deceased. He had made specific reference to the perhaps artificial process of assessment for the court under the Act, quoting from McGregor on Damages:

'Even before the Act of 1982 swept all benefits into oblivion [buy adding s4], Lord Diplock in *Cookson v Knowles [1979] AC 556* , with reference to the provisions of the 1976 Act, was saying this: "Today the assessment of damages in fatal accident cases has become an artificial and conjectural exercise. Its purpose is no longer to put dependants, particularly widows, into the same economic position as they would have been in had their late husband lived."'

The judge had considered *Wood v Bentall Simplex Ltd [1992] PIQR P332* where, as here, the deceased's income before death had been derived partly from capital and partly from his labour. He referred to Staughton LJ's conclusion there that the judge had to ascertain how much loss had arisen because the deceased was no longer alive and able to work, and how much of his income had been derived from capital which the dependants had inherited.

In short, assuming that the dependants had inherited the capital (as was the case here) the judge had to separate out the proceeds of capital (which did not give rise to any loss of dependency) and income that had been earned, which would give rise to a loss of dependency because it would come to an end at the death. In *Wood*, the value of the deceased's labour had been accepted as the proper measure of the dependency.

The Court of Appeal considered that *O'Loughlin v Cape Distribution*

Ltd [2001] EWCA Civ 178, [2001] PIQR Q8 was particularly useful in considering the true nature of dependency in this type of situation.

There, the deceased had owned a number of properties. His employment had been to manage the existing properties and also to develop the portfolio. After his death, the widow inherited the properties and, for a while, she attempted to manage them as her husband had done, but she did not have the relevant aptitudes, so she sold some of the properties and lived on the income.

Forbes J held that, had he lived, Mr O'Loughlin would have gone on managing and enhancing the portfolio as before.

The judge valued the loss of dependency as the cost of replacing the deceased's skills as manager of the portfolio. The Court of Appeal approved this approach, including the judge's inference that there would have been 'consequential increases in both the capital and the income value of the portfolio'. This seems to me to involve a large measure of assumption, but it is an assumption that the court appears readily to draw.

Having analysed these cases, HHJ Hickinbottom (who gave the original judgment as DCJ in Cardiff, as he then was) summarised his rejection of the defence arguments in a passage approved by the Court of Appeal. He said the 'fatal flaw' in the defence arguments was the assertion that the business was a 'capital asset' that was still producing wealth, and should be left out of account altogether.

He added: 'What the dependants have lost is not income derived from a capital asset, but the contribution of Mr Williams as the manager of the business and family assets (including property and steam engines); his flair, skill, expertise and energy in the various wealth creating projects on which he engaged in his life and which, had he lived, he would have continued to engage upon.

'That is a real loss, which can be valued in money's worth. Given that that is their loss in my judgment, just as it was irrelevant whether Mrs O'Loughlin hired expert

assistance or not, it is irrelevant whether the Williams's dependants hired someone to replace Mr Williams's skills and services, or sold the business and reinvested the proceeds in capital assets or another business, or indeed (as they did) replaced those skills and services with their own.

'None of these can affect or diminish the true loss to the dependants as dependants.'

By reference to the *O'Loughlin* case, Smith LJ added this observation:

'To take Mrs O'Loughlin as an example, her dependency was the same whether she tried to run the property business but failed, or tried to run it and succeeded, or refused to try at all.

'In refusing to try, she might have decided to sell all the properties, or she might have employed someone to run it as a manager, or she might simply have done nothing and let it run downhill.

'Whatever she did, and with whatever result, good or bad, she could not affect the value of her dependency on her husband at the date of his death.'

Family or Business?

It is worth bearing in mind the separate situation, which ultimately did not apply here, of people who are business partners when one dies.

Burgess v Florence Hospital for Gentlewomen [1955] 1 QB 349 provides authority for the proposition that, where the relationship between the claimant and the deceased was primarily a business relationship, the claimant cannot claim a dependency merely because he or she also happens to fall within the statutory class of dependants. The Fatal Accidents Act does not give a right of recovery for the loss of business profits suffered by a surviving business partner, and the mere fact that the partners happen to be husband and wife, or father and son, does not enable the survivor to claim a dependency.

If, however, as here on the judge's findings, the relationship is primarily that of family membership where the deceased provides support or services for other members of the family, it makes no difference that their financial arrangements take the form of a business partnership.

Further it is clear, as repeated in all of these cases, that the court will look at the 'practical reality' in relation to financial dependency, and not feel restricted in its analysis of loss by the corporate, financial or tax structures used in family arrangements: *Malyon v Plummer* [1964] 1 QB 330.

In *Williams*, the Court of Appeal rejected the notion that the relationships were primarily business relationships, finding that 'It was plain that the members of this family were brought into what would otherwise have been Mr Williams' sole business because they were members of the

family and it was his intention that they should benefit from it.'.

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

The Court of Appeal has recently revisited the issues raised in these cases in a way that provides a good opportunity to take stock once more, this time in the context of late onset asbestos disease.

Martin Rix had, as a very young man, been employed by Paramount in the early 1970s; and it was during that employment that he was exposed to asbestos which later resulted in his sad demise through mesothelioma at the age of 60. In 1977 he left Paramount to set up his own construction / building / joinery business, and it was a great success.

At the date of death, the deceased owned 40% of the shares in his company and was the main breadwinner for the family. The widow also held 40% of the shares and their two sons, Jonathan and Adam, 10% each. Jonathan took over the business and it remained highly profitable after his death, with increased turnover and profits.

After the death, the widow's shareholding doubled when she inherited the deceased's shares. Overall, she found herself substantially better off in financial terms following her husband's death. Again, liability was admitted. Mrs Rix contended that her financial dependency should be calculated by reference to her share of the annual income that she and the deceased would have received from the business had he lived, or alternatively using the *Williams* basis by reference to the cost of employing a replacement managing director.

The judge accepted her primary contention on the first basis. Moreover, as a matter of 'practical reality' on the evidence before him, he was willing to treat the widow's earnings from her position as a director and as a shareholder as actually being her husband's earnings, notwithstanding contrary accounting arrangements adopted, eg. for maximal lawful tax efficiency.

This appeal was also dismissed. The Court of Appeal reiterated that the question was the extent of the dependants' losses based on a reasonable expectation of pecuniary benefit had Mr Rix survived.

Capital assets which the dependants had the benefit of during the deceased's lifetime, and which they continued to enjoy after their death, were not to be taken into account as they created no dependency loss. The court had to determine the amount of loss that had arisen because the deceased was no longer alive and able to work cf. the amount of the deceased's income that was derived solely from capital which the dependants had inherited; but the dependency was fixed at the moment of death and 'Lord Diplock's artificiality' (above) meant that the damages awarded under the Act could be greater than a strict view of the dependants' loss would imply, so that the valuation of the loss of dependency was greater than the actual 'financial loss' sustained.

Having thus reviewed *Wood*, *O'Loughlin* and *Williams*, the Court followed those authorities, but was clear that these do *not* establish a principle that a business such as this should be treated as a capital asset that would continue to produce a flow of income regardless of the death of its driving force.

Income was only derived from capital if it was identifiable as having been received *without* the deceased's labour and services. Here, each element of the business profits was affected by Mr Rix's management, and the company would not have continued to generate money regardless of who was in charge of it, so the dependency was truly upon *him* rather than *it*. The widow's loss was in the loss of income *generated by the deceased's services to the business*, irrespective of the fact that the business owned the capital assets, so that the whole of the profit was part of the financial dependency.

Moreover, the fact that the company had thrived since the deceased's death was irrelevant for the purposes of calculating the dependency claim; there would be cases such as this where the valuation of the loss of dependency was greater than the actual financial loss sustained.

The CA considered briefly the case of *Head v Culver Heating Co Ltd* [2021] EWCA Civ 34 [2021] PIQR Q2 decided by it six months earlier in January 2021.

This was a personal claim in damages by the claimant's estate (he had died in the course of the proceedings) for income during the 'lost years', and so was not a dependency claim under the Fatal Accidents Act.

However, in a way consistent with the authorities being discussed here, that court held that the fact that the claimant was the major shareholder and driving force behind a company meant that the income from it should be considered as loss of his earning capacity rather than loss of a return from passive investment.

Bean LJ noted that the income was 'the product of [Mr Head's] hard work and flair, not a return on a passive investment.'

Conclusions

It should therefore be well understood by those advising in the 'family business' type of fatal case that:

- The assessment of damages under s3 of the Fatal Accidents Act 1976 is highly fact-dependent, and based on the extent of a dependant's loss in relation to their *reasonable expectation of pecuniary benefit* from the continuance of the deceased's life. It is for this reason that apparently independent children may still have a dependency claim.
- It is critical to distinguish between the loss of income derived from the deceased's services and the loss of income derived from a capital asset, even where the deceased had been the driving force behind a business which owned / acquired the capital asset. To the extent that the dependency of the dependants is truly upon the *business / asset* that remains, then no loss will be recoverable, but if the loss is of the income generation abilities of the deceased, the court will compensate that loss.
- The court will use the best valuation method for the case on the facts, in particular by reference to share of profits if it can be analysed (*Rix*) or the cost of employing replacement staff to do the things the deceased had done (*Williams*).
- Because of the 'statutory artificiality' of the process of assessment of loss, the valuation of the loss of dependency can easily be greater than the actual financial loss sustained, especially where the deceased's business has continued to thrive after death.

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