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King's Bench Walk

Sarah Witham (as Executrix of the Estate of Neil Witham, deceased) v Steve Hill Ltd. What counts as a dependency under the 1976 Act and how should you value it?

Steven Snowden QC and John-Paul Swoboda were instructed in this case by Dushal Mehta of Fieldfisher to represent the Claimant.

Neil Witham died at the age of 55 from mesothelioma leaving behind his wife (the Claimant) and his two foster children. At the heart of the dispute between the parties in this case was the width and breadth of the Fatal Accidents Act 1976 and the proper method to quantify the dependency if it fell within the scope of the Act.

The matter came before Mr Anothony Metzer QC, sitting as a Deputy High Court Judge, to determine the issue of quantum. Neil (the deceased) and Sarah (the Claimant) had, long prior to Neil's development of mesothelioma, decided to foster two children, a biological brother and sister (A and B) who both had disorders on the autistic spectrum. Although A and B attended school it was necessary for one parent to look after the children as their sole occupation (and this was a condition of the fostering agreement with the local authority). Neil was to be the carer so that Sarah could pursue her rewarding and challenging career as a specialist paediatric diabetes nurse. As a result of Neil's untimely death, caused by the Defendant's negligence, Sarah gave up work so as to look after her foster children. As a result, she lost her career. The principle question for the court was whether this loss was a dependency within the meaning of the Fatal Accident's Act with it being argued for the Claimant that there was a recoverable dependency (albeit with unusual factual circumstances) whereas that Defendant argued the claim advanced was beyond the scope of the Act and was an illegitimate attempt to bypass the fact that the foster children were not recognised dependants as defined in the Act.

Mr Metzer QC, having considered the authorities cited, accepted that section 3(1) of the Act, which defines recoverable dependency, was *"a wide gateway and if the dependant can establish that pecuniary loss resulted from the death then that would meet the requirements…".* He further found that the dependency was the Claimant's and was not an illegitimate 'relabelling' of A and B's irrecoverable dependency. In this regard he accepted that even though A and B were involved in the dependency (as the care Neil would have provided was to them) it was nevertheless the Claimant's loss and not A and B's: the children in fact suffered no loss as their foster mother (the Clamant) replaced the care provided by their deceased foster father, and that when looking at the reality of the situation the court was entitled to consider a pecuniary loss suffered by all members of the family even though some of the members of the family might not be recognised dependants. Finally the judge rejected the submission that the Claimant's loss was a loss 'incidental' to the relationship of husband and wife as he found Sarah and Neil did not foster A and B for business reasons, nor for the state funds which were paid upon fostering, but rather as a family decision, which is to say it was a decision they made as a husband and wife acting in the capacity as a husband and wife.

When valuing the dependency, the judge decided to use the cost of replacement care of the services Neil would have provided, rather than the Claimant's lost earnings, as the measure of the loss. It was in issue whether the dependency should be valued by adopting the commercial rate for replacement care or whether there should be a 25% discount to the commercial rate. The judge accepted that the situation under the Fatal Accidents Act is different to that where an injured Claimant receives care on a gratuitous basis from family or friends. The former involves a valuation of the services provided by the deceased, which is to be done by reference to the commercial rate and does not require the valuation of the services now provided (which is what is done in a PI claim where there is a discount typically of 25% where the care is provided gratuitously). The judge found support for this approach in the authorities, particularly *Knauer v MOJ* [2014] EWHC 2552 and *Daly v General Steamship Navigation* [1981] 1 WLR 120. *Houscroft v Burnett* [1986] 1 All ER 332 CA was distinguished as a) *Daly* (supra) was not cited and b) it was a PI case to which different principles applied.

On this basis the learned judge made an award of £929,857.22. The Defendant was refused permission to appeal

by the judge. It is not known whether the Defendant will seek to renew their application for permission to appeal before the Court of Appeal.