Neutral Citation Number: [2021] EWCA Civ 1312

Case No: B3/2020/0460

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION
ANTHONY METZER QC (SITTING AS A DEPUTY HIGH COURT JUDGE)
[2020] EWHC 299 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/08/2021

Before:

LADY JUSTICE NICOLA DAVIES
LORD JUSTICE STUART-SMITH
and
SIR PATRICK ELIAS

- -

Between:

STEVE HILL LTD	**Appellant**
- and -	
MRS SARAH WITHAM	
(Widow and Executrix of the Estate of Neil Witham, deceased)	**Respondent**

- -
- -

Michael Kent QC (instructed by **BLM**) for the **Appellant**
Steven Snowden QC and John-Paul Swoboda (instructed by **Fieldfisher**) for the **Respondent**

Hearing date: 6 July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30 am on Thursday 26 August 2021.

Lady Justice Nicola Davies:

1. This is an appeal by the appellant/defendant in respect of a claim brought by the respondent/claimant under the Fatal Accidents Act 1976 ("FAA") and the Law Reform (Miscellaneous Provisions) Act 1934 for damages arising from the death of her husband, Neil Witham ("Mr Witham"). He died from mesothelioma on 10 January 2019 at the age of 55 caused by exposure to asbestos when working as a general labourer for the defendant in the late 1990s. Judgment on liability and causation was entered in March 2019. An assessment of damages hearing took place in 2019 before Anthony Metzer QC sitting as a Deputy High Court Judge ("the judge"). The judge assessed the claimant's damages in the gross sum of £928,827.22 inclusive of interest. It is the judgment and the order made by the judge dated 17 February 2020 which is the subject of this appeal.

2. Permission to appeal was granted by Coulson LJ on three of the four original grounds of appeal. Coulson LJ stated that the three grounds were matters of principle which could only be argued "within the four corners of the findings of fact made by the judge". The judge refused permission on ground 4, which contended that the judge wrongly rejected the opinion of the defendant's expert as to the valuation of the deceased's childcare and other services because he misunderstood the expert's evidence. This ground has not been pursued. Permission was also granted to the defendant to adduce fresh evidence and to add a further ground of appeal (ground 5).

Factual background

3. The claimant and her husband married in 2003. The claimant worked as a specialist paediatric diabetes nurse, her husband worked as a builder. They do not have biological children but from July 2015 they began a temporary fostering placement of two children, a brother ("A") and a sister ("B"). A has been diagnosed with autism spectrum disorder ("ASD") and attention deficit hyperactivity disorder ("ADHD"). B has been diagnosed with ADHD and an attachment disorder. The fostering placements were made permanent in January 2018. Mr and Mrs Witham were foster carers under a "Foster Plus" agreement with Oxfordshire County Council ("the Council").

4. Following her husband's death the claimant continued as the sole foster carer for the children under a new Foster Plus agreement.

5. At the damages assessment hearing the relevant FAA issues which the judge had to determine were: (a) the valuation of the claimant's dependency upon the deceased for remaining at home to provide childcare and domestic services; and (b) the valuation of the claimant's dependency upon her husband for other services.

6. The claimant and her mother gave evidence. Ms Noble, an Independent Child Protection Chair and Independent Reviewing Officer at the Council, who had assisted with the placement of A and B, gave evidence. She confirmed the foster care arrangements and confirmed that there were no issues with the care provided by Mr and Mrs Witham, indeed she praised their raising of the children. Expert evidence was separately given relating to the nature and level of care required by each of the children.

The judge's findings of fact

7. The judge found that the claimant and her husband were extremely happy and would have stayed together to old age were it not for the onset of his illness. As a couple they discussed important life decisions and reached agreement which would then be acted upon. One such decision was to foster the children, not only to provide the dual benefit of giving them a family of their own but also to help children in foster care who had previously experienced traumatic and difficult beginnings. Although they received £50,000 from the Council as a fostering allowance, the judge found that their decision to foster A and B was not a business decision nor a choice to maximise their finances but one of the decisions they made as a loving couple as to how they would like their family to be constituted ([38]).

8. The terms of the Foster Plus agreement required at least one parent to be available in respect of the fostering of A and B. The judge accepted the claimant's evidence that as a couple, the claimant and her husband had decided that she would return to full-time work and that he would be the parent at home responsible for most, if not all, aspects of domestic life. That was part of their long-term aim to keep A and B together, with the intention one day of adopting them. At [40] the judge found that the claimant and her husband had made the decision that one of them needed to be available at all times for A and B's needs irrespective of the express terms of the Foster Plus arrangement.

9. The judge recorded that just before the onset of her husband's illness, the claimant had an ongoing job application. The claimant had a master's degree in a specialised area which would have given her a significant advantage upon returning to work and subsequently developing her career. The judge found that the claimant would have been able to find similar employment on a full-time basis in the short-term future which would have continued for the foreseeable lengthy period but for the tragic turn of events.

10. At [52] the judge, having considered the relevant authorities and made findings of fact, determined that the dependency is that of the claimant rather than A and B. When Mr Witham became seriously ill it was necessary for the primary care, which he had carried out for A and B, to be replaced by the claimant. The judge found that A and B had suffered no loss as the claimant, their foster mother, had replaced their foster father in providing care. Relying on the authority of *Malyon v Plummer* [1964] 1 QB 330 the judge stated that that was the "reality of the situation". This was a family loss. The claimant had lost her full-time career following her husband's death. The judge found that the claimant was dependent upon her husband as the principal carer for A and B, which allowed her to pursue a career for the benefit of the whole family in the knowledge that their children would be properly cared for. Putting it another way, the judge stated that it was "effectively the family's loss of Neil acting as principal carer and the family's finances decreasing by the measure of the Claimant's lost earnings, but that does not detract from the finding that it is the Claimant's loss."

11. Having found that it was the claimant's dependency on her husband which had been lost, the judge determined that was recoverable in law on the basis that she had a reasonable expectation of pecuniary advantage, namely the money she would have earned at work from the continuation of her husband's life who would have continued

to look after their home and their children ([55]). At [56] the judge determined that the claimant's dependency resulted from the relationship of husband and wife and stated:

> "… given the nature of the relationship between the Claimant and Neil as long-term co-habitees and a married couple, they would not have decided together to foster A and B and determine that Neil would be the principal carer other than as part of their relationship, and I find their decision to foster was a joint family decision, not one of business partners or with financial motivation at the forefront."

12. In valuing the claimant's dependency, at [59] the judge did not do so upon the basis of the claimant's loss of earnings and pension loss as he found it did not come within the ambit of section 3(1) FAA. The judge determined that replacement care was the appropriate measure of loss to be adopted. At [64] the judge, relying upon the decision of Bean J in *Knauer v Minister of Justice* [2014] EWHC 2552, found that the proper measure of damages for those services should be their commercial cost. Citing *Daly v General Steamship Navigation* [1981] 1 WLR 120 at p.127 the judge identified the question in respect of the FAA dependency claim as being "to determine the value of the service which would, but for his death, have been provided by him …". He considered the correct approach was to value the services which the claimant had lost as a result of her husband's death, not the valuation of the services which she was now providing. Following what he described as "that logic", he found "not simply that the commercial rate is the appropriate rate to apply but also there should be no 25% discount …", in doing so, he relied upon the authority of *Daly*.

The Fatal Accidents Act 1976

13. The relevant sections are as follows:

> "1. Right of action for wrongful act causing death.
>
> (1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.
>
> (2) Subject to section 1A(2) below, every such action shall be for the benefit of the dependants of the person ('the deceased') whose death has been so caused.
>
> (3) In this Act 'dependant' means—
>
> (a) the wife or husband or former wife or husband of the deceased;
>
> (aa) the civil partner or former civil partner of the deceased;
>
> (b) any person who—

> (i) was living with the deceased in the same household immediately before the date of the death; and
>
> (ii) had been living with the deceased in the same household for at least two years before that date; and
>
> (iii) was living during the whole of that period as the husband or wife or civil partner of the deceased;
>
> (c) any parent or other ascendant of the deceased;
>
> (d) any person who was treated by the deceased as his parent;
>
> (e) any child or other descendant of the deceased;
>
> (f) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
>
> …
>
> 3. Assessment of damages.
>
> (1) 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."

14. The court's approach to the assessment of loss under the FAA has been considered in a number of authorities.

Wood v Bentall Simplex Limited [1992] PIQR 332 (CA)

15. Beldam LJ at p.342 stated:

> "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 dependants under the Fatal Accidents Acts. It is, I think, helpful to begin from certain underlying principles without regard to the current statutory provisions:
>
> (a) The foundation of the claim is the dependants' loss of expectation of future pecuniary benefit from the deceased;
>
> (b) Assets which the dependants were enjoying and of which they had the benefit during the deceased's lifetime and which they continue to enjoy after his death are not taken into account either as part of the dependency or as a deduction from it. See Heatley v. Steel Company of Wales Ltd. [1953] 1 W.L.R. 405.

> (c) It is immaterial that after the deceased's death the family put the whole or part of the assets to a different use producing additional income. See Buckley v. John Allen & Ford (Oxford) Ltd. [1967] 2 Q.B. 637. …"

Cape Distribution v O'Loughlin [2001] EWCA Civ 178

16. Latham LJ, in considering the section 3 FAA dependency valuation, identified the question to be answered as that articulated by Erle CJ in *Pym -v- The Great Northern Railway Company* (1863) 4 B&S 396, namely the extent to which the dependants have been deprived of a "reasonable expectation of pecuniary advantage from the continuance of the life of the deceased". In addressing the task of the court, he stated at [11] that there is no "prescriptive method by which such damage is to be identified, or calculated apart from the principle that it requires that some damage capable of being quantified in money terms must be established." At [13], in respect of the loss of a husband's services, he stated that:

> "… His death, whatever other loss may result, will mean that the family will have to replace that expertise and advice at the appropriate market cost. That cost is as much a loss to the family as could be the cost of a gardener. …"

At [14] Latham LJ stated:

> "… it seems to me, that the court's task in any case is to examine the particular facts of the case to determine whether or not any loss in money or in monies worth has been occasioned to the dependants and if it determines that it has, it must then use whatever material appears best to fit the facts of the particular case in order to determine the extent of that loss."

Malyon v Plummer [1964] 1 QB 330

17. A fatal accident case in which the wife was employed by her husband's company and was paid more than the market rate as the wife of the business owner. The court held that in assessing dependency under the FAA, the court had to approach the matter realistically: the interposition of the company did not prevent the court from assessing truly the loss which the plaintiff had suffered. It determined that the wife had lost her husband, whose business had been destroyed by his death, and the revenue of which was in substance derived from him. The services which the wife had rendered to the company could not be treated as of no value and thus her dependency was reduced by such amount as represented the true value of her services. At p.342 Sellers LJ identified the approach of the court, which was to assess the true loss which the wife had suffered. Diplock LJ, in identifying the loss to be assessed pursuant to the FAA, identified a further principle, namely that the loss of the benefit to a claimant must arise from a defined relationship recognised by the FAA (p.349):

> "… the pecuniary loss recoverable is limited to the loss of a benefit in money or money's worth which, if the deceased had survived, would have accrued to a person within the defined

> relationship to the deceased, and would have arisen from that relationship and not otherwise."

Burgess v Florence Nightingale Hospital for Gentlewomen [1955] 1 QB 349

18. The plaintiff and his wife were professional dancing partners before and after their marriage. Their income was derived from fees and prize money. Following his wife's death the husband claimed damages under the FAA for *inter alia* the loss of his wife as a dancing partner and for the loss of her contribution to their living expenses. It was held that although the relationship of husband and wife was a convenient and usual incidence of such a dancing partnership, in essence the partnership was a business one with the marriage relationship superimposed on the dancing partnership. Accordingly, there were no services rendered by the wife to the husband and thus no benefit arising in the dancing partnership that could properly be attributed to the relationship of husband and wife.

19. Amended grounds of appeal:

    (1) On the facts found, the award of £585,904 in respect of the deceased's "Child Care and Domestic Services" was, on a proper construction of the FAA, not open to be made as a loss proportioned to any injury suffered by the claimant herself.

    (2) In the alternative the claimant's loss, in replacing the deceased's childcare services, can only be given a pecuniary value which takes account of the fostering allowance and other benefits she receives for doing so.

    (3) It was contrary to principle to assess the value of the dependency by reference to the full commercial cost of replacing the same notwithstanding the fact that such costs will not (and could not) ever be incurred by the claimant who will also not incur any liability for income tax or national insurance contributions on such award.

    (5) The award in relation to future loss of services dependency can now be seen to be erroneous in light of events which have occurred since trial, namely that A and B are no longer in the claimant's care.

20. It was agreed between the parties and the court that ground 5 should be taken before grounds 1 to 3.

Ground 5

21. By an application notice dated 9 October 2020 the defendant sought and was granted permission by Coulson LJ to rely upon fresh evidence and to add a fifth ground of appeal. The claimant objects to the admission of the evidence but has accepted that it could be considered by the court *de bene esse*.

22. The evidence is that A and B no longer remain in the care of the claimant. By a letter dated 17 July 2020 Fieldfisher, solicitors for the claimant, properly drew to the attention of the solicitors for the defendant the fact that the children no longer remain in the care of the claimant. The letter stated that the claimant "is considering her

options for the children to be returned to her care". In a second letter dated 1 October 2020, Fieldfisher stated:

> "We understand from our client that her foster children were not returned to her care following respite care at the end of May 2020. Our client envisaged that the children would be returned at the end of respite care but that was not the case".

23. Further information is contained in the letter of the personal difficulties experienced by the claimant, which resulted in a meeting between the claimant, her fostering team and her GP at which her concerns as to the lack of support provided by social care to herself and the children were set out. It is her case that in seeking help from the Council's social care team, the claimant's position was misinterpreted as an inability to provide care for the children. This was contrary to the content of the reports regarding her care which were before the judge. The claimant was requesting additional support, in part to assist with her plan to adopt A and B, she was not indicating that she could not or did not want to care for A and B.

24. The claimant has made a written complaint to the Council, as a result of which an internal investigation is taking place as to the circumstances surrounding the removal of the children from her care. As at the date of this hearing the investigation had not concluded.

25. Mr Snowden QC, on behalf of the claimant, stated that her hope is that the children will be returned to her care. She has not seen the children since 19 May 2020 and has no knowledge of their whereabouts.

26. In considering this ground, I accept the general principle that there must be an end to litigation save in a very exceptional case: *Bull v Richard Thomas & Baldwins Ltd* (unreported), 23 May 1960 (CA). As to whether new evidence should be admitted, the matter is one of discretion and degree: *Mulholland v Mitchell* [1971] AC 666 HL. Lord Wilberforce stating at 679-80:

> "Negatively, fresh evidence ought not to be admitted when it bears upon matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made. … Positively, too, it may be expected that courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice. All these are only non-exhaustive indications; the application of them, and their like, must be left to the Court of Appeal. The exceptional character of cases in which fresh evidence is allowed is fully recognised by that court."

27. By his order dated 17 February 2020, the judge assessed the claimant's damages in the gross sum of £928,857.22 inclusive of interest. Within that sum he awarded £666,181.00 for the valuation of lost childcare and domestic/household services of the deceased, a valuation which was directly referable to the deceased's care of A and B.

28. The claimant contends that no attempt was made at trial to cross-examine herself or witnesses and/or to make submissions to the judge as to the likelihood of the fostering

arrangements not working. Given the evidence before the judge of the considered decision of the claimant and her husband to foster A and B and the successful nature of the foster care, I accept the defendant's point that there were no grounds upon which to properly base such questioning or submissions.

29. Further, even if statistics had been deployed at trial, upon which the claimant or the social worker could have been cross-examined or submissions made as to the likelihood of the foster arrangements ending, the most that would have been achieved would have been a reduction in the multiplier to take account of uncertainties. At trial, this was not identified as an area of uncertainty. What has subsequently occurred is of a wholly different nature. It is the unforeseen and undisputed fact that the children have been removed from Mrs Witham. It follows that since their removal the factual basis of the dependency claim no longer exists.

30. I accept, as was stated by Smith LJ in *Welsh Ambulance Services NHS Trust and another v Jennifer Mary Williams* [2008] EWCA Civ 81, that dependency is valued as at the date of death. That said, there are qualifications to that statement as identified by Smith LJ at [50]:

> "… The dependency is fixed at the moment of death; it is what the dependants would probably have received as benefit from the deceased, had the deceased not died. What decisions people make afterwards is irrelevant. The only post death events which are relevant are those which affect the continuance of the dependency (such as the death of a dependant before trial) and the rise (or fall) in earnings to reflect the effects of inflation."

31. In my view, the new evidence is directly relevant to the continuance of the dependency. As the children are no longer in the care of the claimant, the dependency cannot be said to be continuing as the premise upon which it was based no longer exists.

32. *Jones v MBNA International Bank* [2000] EWCA Civ 514 is authority for the proposition that a new point should only be allowed in exceptional circumstances. This is new evidence and a new point is being taken. At the trial, the judge carefully considered and evaluated the evidence and, based upon it, made factual findings. Since those findings were made, the factual matrix has fundamentally changed. I accept the need for finality but the evidence now adduced is not derived from statistics, it is fact dependent and could not reasonably have been foreseen at trial. The new evidence is of a wholly different kind from that given at the assessment hearing.

33. I regard the new evidence as being of such a nature as to undermine the judge's original findings and the resultant valuation, which was based upon the fact that the foster care arrangements would continue until 2029. To refuse to admit the evidence "would affront common sense, or a sense of justice".

34. Applying the principles identified in *Ladd v Marshall* [1954] 1 WLR 1489, and subject to the view of their Lordships, I would admit this evidence. Given the potential effect of the same upon the valuation of the claimant's dependency, I am of

the view that, absent agreement between the parties, the only reasonable course is to remit this matter to the trial judge to allow for a re-evaluation of the claimant's dependency in the light of the new evidence.

Ground 1

35. The essence of this ground of appeal is that the true loss of the deceased's services was to the foster children who do not fall within the category of dependants as set out in section 1(3) FAA. It was the children who lost the benefit of the services of the deceased, not his wife. The defendant accepts that had the services been provided by the deceased to the claimant it would not be an objection to an award that such services might also have benefited third parties who are not eligible to claim as dependants.

36. The defendant contends that the only loss suffered by the claimant was that resulting from her lost opportunity to return to work but this was, as the judge held, not a loss which she could recover under the FAA. Further, it was a loss which arose from a business relationship (fostering) not that of husband and wife.

37. The claimant relies upon the findings of fact made by the judge. The judge identified and assessed the loss which had truly been suffered, it was the loss of the claimant. The reality is that the claimant lost her career as a consequence of her loss of her husband's services, it is immaterial whether A and B also suffered a loss.

38. The loss was within the defined relationship of husband and wife rather than being a business decision. That was the evidence before the court accepted by the judge. The judge correctly identified the nature and value of the loss. It was the claimant's dependency on her husband which had been lost, in that she had a reasonable expectation of pecuniary advantage from the continuance of his life. The judge chose to measure the loss with reference to childcare costs, he was entitled so to do.

Discussion and conclusion

39. Permission was granted by Coulson LJ upon the basis that the appeal proceeds upon the findings of fact made by the judge. The judge's finding that the claimant had sustained a loss was premised upon other findings of fact, in particular that her husband would have been the primary carer for A and B, so as to enable her to return to work and pursue her career.

40. The judge's findings at [52] that "… the Claimant has lost her full-time career as a result of [her husband's] death. She was dependent upon him as the principal carer for A and B to allow her to pursue a career for the benefit of the whole family in the knowledge that their … foster children, would be properly cared for" were founded upon the evidence and are not open to challenge in this appeal.

41. The assessment of the dependency valuation is fact specific. In approaching such an assessment, the court should identify and assess the loss which is truly suffered. The reality of the claim before the judge was that the claimant lost her career as a result of her husband's death and her loss of his services. She was dependent upon him taking the role of househusband and principal carer for the children so that she was able to pursue a career in the knowledge that the children would be properly cared for. This

was the finding by the judge, it reflected the evidence and provided a sound basis for his determination that the loss was that of the claimant. The fact that the children also benefitted from the deceased's care does not detract from, still less undermine, the claim of Mrs Witham.

42. Undisputed was the evidence that the claimant and her husband had a stable and long-term relationship. The decision they made to foster A and B was properly described on behalf of the claimant as having "at its core" a decision to have a family, one of the most fundamental decisions a husband and wife can make as a couple. Flowing from that decision, the manner in which they approached the issue of family commitments and their respective employment was clearly a decision between a husband and wife in respect of children and properly so found by the judge. His finding of fact on that issue is unassailable. There was nothing "incidental" to the husband/wife relationship in this decision, it was its core.

43. In assessing the measure of the loss, the words of Latham LJ at [11] of *O'Loughlin* are relevant, namely that there is no "prescriptive method by which such damage is to be identified, or calculated …". What the claimant has lost is the benefit of the service which her husband provided in caring for the children. That being so, she can legitimately claim the cost of securing those services to enable her to place herself in the position she was prior to her husband's death. The value of his service is not affected by the fact that the claimant is required to care for the children pursuant to the fostering arrangements.

44. Accordingly, for the reasons given and subject to the views of their Lordships, I would dismiss this ground of appeal.

Ground 2

45. The defendant contends that the claimant suffered no loss because she took over the care of the children and continued to be paid for foster care by the Council. The judge failed to take account of events after the death (*Williams* [50]). As the claimant received the full fostering allowance, no loss was suffered.

46. It is the claimant's case that this point was not taken at trial. The claim was not for lost income provided by the state to care for A and B, it was for the recovery of the separate income and additional income which the claimant and her family would have received had she not had to give up her career. The judge so found at [53].

Discussion and conclusion

47. At [38] the judge found that the decision to foster was not a business decision "or a choice to maximise their finances", he found that the foster care payment was helpful but "was not the motivation behind the decision to foster".

48. Prior to her husband's death, the claimant, jointly with him, had the benefit of the foster care payment plus the benefit of his services. After his death she had the benefit of the foster care payment but had lost the benefit of his services. The fact that she had sole responsibility for fostering after the death, as opposed to joint responsibility before it, is neither here nor there. The foster care payment is and was a

constant, before and after the death. It does not affect the claimant's lost of dependency upon her husband's services.

Ground 3

49. The essence of this ground is that as the claimant was accepted to be the person who would care for A and B, the judge should have looked at the reality of the situation and should not have costed care at the commercial rate.

50. The claimant contends that it is for the trial judge to identify the appropriate measure of loss, there is no prescriptive methodology to be adopted. It is immaterial whether or how replacement care is provided and wrong in principle to attempt to value damages by reference to the replacement which is in fact provided. The judge was entitled to find that the commercial cost was the appropriate measure of damages, it was an evaluative judgment which fell within a range of decisions which a reasonable judge could make.

Discussion and conclusion

51. It was open to the judge to find the measure of loss appropriate to the facts of the case. The loss which would in fact have provided the highest level of damages would have been the claimant's loss of earnings. What is in issue in a dependency claim under the FAA is the value of the services which the deceased would have provided had he not died. In *Daly* at p.127 Bridge LJ stated:

> "… it was entirely reasonable and entirely in accordance with principle in assessing damages, to say that the estimated cost of employing labour for that time … was the proper measure of her damages under this heading. It is really quite immaterial, in my judgment, whether having received those damages, the plaintiff chooses to alleviate her own housekeeping burden, … by employing the labour … or whether she chooses to continue to struggle with the housekeeping on her own and to spend the damages which have been awarded to her on other luxuries …."

52. 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.

53. Finally, was it appropriate for the judge to adopt the commercial rate? In *Housecroft v Burnett* [1986] 1 All ER 332, a claim for personal injury arising from a road traffic accident, O'Connor LJ stated at p.343:

> "… in cases where the relative has given up gainful employment to look after the plaintiff, I would regard it as natural that the plaintiff would not wish the relative to be the loser and the court would award sufficient to enable the

> plaintiff to achieve that result. The ceiling would be the commercial rate."

54. This was not an FAA claim, but I regard it as authority for the proposition that where earnings have been lost, the commercial rate of care may be appropriate. Whether it is appropriate is a fact-specific assessment for the court. The approach of the judge was reasonable, it reflected the evidence given by the claimant's expert, there are no grounds upon which this court could interfere with the assessment.

55. Accordingly, and subject to the views of their Lordships, ground of appeal 5 is allowed. The revaluation of the claimant's dependency is remitted to the trial judge. Grounds 1 to 3 of this appeal are dismissed.

Lord Justice Stuart-Smith:

56. I agree.

Sir Patrick Elias:

57. I also agree.