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Knauer v Ministry of Justice – Supreme Court overrules *Cookson v Knowles* and *Graham v Dodds*

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Christopher Sharp QC explains why this decision marks a fundamental change in claims for future loss of dependency in fatal accident cases.

In *Knauer v Ministry of Justice* [2014] EWHC 2553 (QB) Bean J admitted sympathy with the Claimant's argument that the rule established by the House of Lords in *Cookson v Knowles* [1979] AC 556 and *Graham v Dodds* [1983] 1 WLR 808 should no longer apply and the Law Commission's 1999 recommendation (and the notes to the Ogden Tables) followed (to divide the claim into, in effect, special damages to trial and then calculate a multiplier for future loss from the date of trial, as in normal personal injury claims for a living claimant, and not, as *Cookson* requires, from the date of death) but following Nelson J in *White v ESAB Group (UK) Ltd* [2002] PIQR Q6, Bean J accepted he was bound by those cases, despite finding the current approach "illogical". In February 2015 C was given permission to leap frog to the Supreme Court and that decision has now been published.

The Court has allowed the appeal, employing the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, enabling it to depart from previous decisions of the House of Lords. The Court rejected the suggestion that the matter should be left to the

legislature (despite the Scottish law having been changed by statute[1]) on the basis that while the change would be a change in a matter of legal principle, it was a principle established by judge made law and if it is shown to suffer from the defects from which the Court found it does suffer, then, unless there is a good reason to the contrary, it should be corrected or brought up to date by judges. The fact that (as the Defendant argued) there are elements of over compensation in fatal accident claims which arise from legislation (s. 3(3) of the Fatal Accidents Act 1976, which requires the court to ignore, not only the prospect but the actual remarriage of the claimant, s. 4, which requires that benefits which will or may accrue to any person as a result of the death shall be disregarded) was not a good reason not to correct the *Cookson* defect.

The rule in *Cookson* has given rise to sometimes significant under compensation, and it was agreed in the instant case that on an award of some £1/2m the difference was over £50,000 or 10%. The problem lies in the need to fix a multiplier at the date of death, which gives rise to an actuarially calculated multiplier which is not only affected by the vicissitudes of life but also the discount for accelerated receipt, and then deduct the chronological number of years between the date of death and the date of trial. The claimant has therefor given a discount for accelerated receipt over a period (between the death and the trail) when he has not in fact received the award.

Where the dependent is a child, this can have a dramatic effect. In *Corbett v Barking Havering and Brentwood Health Authority* [1991] 2 QB 408 where the dependant child was two weeks old at the mother's death, the multiplier for the mother's care of the child was fixed by the trial judge at 12 years and there was a period of 11.5 years between the death and the award. The multiplier for the post trial period (when the child was 11½ and would have been dependent for another 6½ years) was therefore only 6 months (12 – 11.5 yrs). While the Court of Appeal increased the multiplier (to 15) the result remained manifestly unjust.

This type of injustice resulted in courts adopting various devices such as seeking to apply full rates of interest to the whole award, but these were contrary to principle and

[1] See section 7(1)(d) of the Damages (Scotland) Act 2011, enacted by the Scottish Parliament following the recommendation of the Scottish Law Commission in their *Report on Damages for Wrongful Death* (2008) (Scot Law Com No 213), to the effect that the multiplier should be fixed as at the date of trial.

had to be overturned by the Court of Appeal (eg *Fletcher v A Train and Sons Ltd* [2008] 4 All ER 699). The Supreme Court (para 9) observed that:

> "The temptation to react to a rule which appears to produce an unjust result by adopting artificial or distorted approaches should be resisted: it is better to adopt a rule which produces a just result."

This in turn also justified the use of the *Practice Statement* to overturn previous authority. While the Court was keen to underline the importance of precedent and the consistency and predictability that brings, as Lord Hoffmann observed in *A v Hoare* [2008] AC 844, para 25 such injustice or illogicality arising out of binding decisions may encourage "courts … to distinguish them on inadequate grounds" which means that certainty and consistency are being undermined.

The Supreme Court asked the question why, if the problem and its resolution, now appears so clear, the House of Lords had twice reached the conclusion it did. The answer lay in the fact that there is now a wholly different legal landscape in personal injury and fatal accident litigation to that which then applied. Rather than reliance on judicial intuition and unscientific "feel", multipliers, and damages generally, are now calculated with a great deal more empiricism. Although, then, the use of actuarial tables or evidence was rejected or discouraged on the ground that they would give "a false appearance of accuracy and precision in a sphere where conjectural estimates have to play a large part", since the decision in *Wells v Wells* [1998] 3 All ER 481 and the adoption of the Ogden Tables, and the recognition (with which the judgment in *Knauer* in the Supreme Court opens) of the principle of full compensation, a different and much more sophisticated approach is applicable.

Following publication of the Law Commission's report, the tables have included fatal accident calculations based on the Law Commission's recommended approach, although until now they have not been able to be used. The principle is set out in para 65 of the Notes to the current edition of the Ogden Tables and there then follows a methodology for using the familiar Tables 1-26 which will work for most cases. There will (or at least may) of course be a need to apply a discount to the period from death to trial to reflect the risk that the deceased would have died during that period in any event. There may be room for argument over whether any other discount should be applied (for risks other than mortality). The Notes do suggest that in a complex case or

where the multiplier is of crucial importance, the advice of an actuary should be sought.

The decision in *Knauer* was not unexpected but it is to be welcomed. It is to be hoped that a similar opportunity to have the Supreme Court review the position of 'lost years' claims in the case of claims by children will also arise soon. In *Totham v King's College Hospital NHS Foundation Trust* [2015] EWHC 97 (QB) Laing J found herself constrained by the Court of Appeal's reluctant acceptance in *Iqbal v Whipps Cross University Hospital NHS* Trust [2007] of the binding nature of the decision in *Croke v Wiseman* [1982] 1 WLR 71, that a lost years claim for a child claimant cannot be sustained. However, she made clear she believed the policy justifications in *Croke* are inconsistent with two House of Lords decisions (*Pickett v BREL* and *Gammell v Wilson*) and that *Croke* is inconsistent with the full compensation principle. She would have wanted there to be an appeal direct to the Supreme Court but the Trust would not agree. As in *Iqbal* C would have to appeal to the Court of Appeal which would be bound to dismiss the claim and if C proceeds to the Supreme Court the case will no doubt settle. The issue will remain undecided unless a claimant with the funds and the determination takes up the cudgels.

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