



## **Damages in Fatal Accidents Claims: Supreme Court decision as to proper basis for calculations of future loss**

**By Abigail Cohen**

**In *Knauer (Widower and Administrator of the Estate of Sally Ann Knauer) v Ministry of Justice* [2016] UKSC 9, the Supreme Court has held that the correct date as at which to assess the multiplier when fixing damages for future loss in claims under the Fatal Accidents Act 1976 should be the date of trial and not the date of death. In doing so it refused to follow two decisions of the House of Lords (*Cookson v Knowles* [1979] AC 556 and *Graham v Dodds* [1983] 1 WLR 808) pursuant to which the relevant date had been the date of death.**

### **The claim**

- I. The claim was brought by Mr Knauer, the widower of Mrs Knauer who had died from Mesothelioma. It was accepted that she had contracted the disease as a result of exposure to asbestos during her employment with the Respondent. The claim was brought under the Fatal Accidents Act 1976.

### The issue

2. The issue for the Court to determine on appeal was whether the multiplier for future loss in fatal claims should be calculated from the date of death or the date of trial?
3. If the answer was to be the date of trial this gave rise to a subsidiary issue of whether it was open to, or proper for, the Court to depart from the approach laid down by Lord Diplock and Lord Fraser of Tullybelton in *Cookson* and by Lord Bridge of Harwich in *Graham* or whether any defect in the present law is one which should be left to Parliament to cure.

### Which date is the proper approach?

4. The Court outlined the argument against the long standing approach in fatal accidents cases to take the date of death as the relevant date. In short, in most cases this approach leads to under compensation and therefore offends the aim of damages which is to put the victim insofar as possible in the position he would have been in had the harm not been done. As the Court explained:

*“Calculating damages for loss of dependency upon the deceased from the date of death, rather than from the date of trial, means that the claimant is suffering a discount for early receipt of the money when in fact that money will not be received until after trial.”* (§ 7)

5. The Court also cited the views of the Law Commission in its Report on Claims for Wrongful Death which was that the approach in fatal cases should reflect that in other personal injury claims such that multipliers – now provided for by the Ogden Tables – should be used for calculating future losses from the date of trial.

6. The Court agreed and held that calculation of the multiplier from the date of trial was the proper approach.

#### **Departure from previous House of Lords authority**

7. The above meant that the Court had to consider whether it was appropriate to depart from the earlier decisions of the House in *Cookson* and *Graham*. Whilst the Court acknowledged that it ought to be "very circumspect" about invoking the 1996 Practice Statement concerning judicial precedent, on this occasion the Court had "no hesitation" in doing so as the application of the reasoning in those two cases in the current legal climate would be "illogical" and result in "unfair outcomes".
8. Why were these decisions deemed to be so outdated? First, the Court emphasised that *Cookson* and *Graham* were decided in an era where the calculation of damages in cases of personal injury or death was wholly unscientific. This was in stark contrast to today where practitioners and the courts are able to make use of actuarial data comprised in the Ogden Tables.
9. In both of the previous cases the Court had favoured the date of death as more appropriate given the uncertainties as to what would have happened between the date of death and date of trial. If these cases had arisen today the Court said that there is a "perfectly sensible way of addressing the uncertainty point" by using the Ogden Tables, such that Court's primary concern in *Cookson* and *Graham* was now met. Further the other concern raised - that there would be an incentive for claimants to delay trial - was met by the advent of the Civil Procedure Rules 1998 under which the courts can now impose strict case management timetables.

10. It was therefore due to this "material change in the relevant legal landscape" that gave rise to "an overwhelming case for changing the law."
11. The Court rejected the suggestion that this a change of this kind to the approach under the 1976 Act is a matter for Parliament, or that as there are other aspects of the Act which lead to over compensation (such as ignoring remarriage or other benefits which accrue as a result of the death under ss 3 and 4 of the Act), there needed to be a wholesale review of the scheme of the Act.
12. The Court was clear that it was appropriate for it to address the discrete issue of the correct date for calculation of the multiplier as the practice of using date of death had arisen not from legislative choice but from judicial decision. The other examples of over compensation - arising from the application of sections 3 and 4 of the Act - arose from legislative choice and it would therefore be for a Parliament to address the need for any change.

### **Conclusion**

13. For practitioners this decision brings the approach in fatal claims in line with that in other personal injury cases. For claimants it will lead to increased damages though the sums may not be significant in many cases. In cases approaching trial where Schedules and Counter Schedules have been pleaded on the "old" basis it is expected that the bottom line figures will now be revisited and where there are Part 36 offers in place it would be wise for the offering party to satisfy itself that the offer remains appropriate and still provides adequate costs protection when applying the date of trial approach.