

Foster family awarded damages in mesothelioma dependency claim (Witham (as executrix of the estate of Witham (deceased)) v Steve Hill Ltd)

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Personal Injury analysis: The claimant's husband died from mesothelioma as a result of his asbestos exposure during the course of his employment with the defendant in the late 1990s. The claimant and her husband had two foster children. With liability already established, an assessment of damages hearing took place. The judgment provides useful guidance on quantifying a deceased's childcare and domestic services as part of a spouse's dependency claim under the Fatal Accidents Act 1976 (FAA 1976). Written by Heetasha Khosla, solicitor at Leigh Day.

Witham (as executrix of the estate of Witham (deceased)) v Steve Hill Ltd [\[2020\] EWHC 299 \(QB\)](#), [\[2020\] All ER \(D\) 99 \(Feb\)](#)

What are the practical implications of this case?

The headline to take away from this judgment is that, although the ruling favoured the claimant and she was able to claim a dependency on the deceased's childcare services, the restrictive statutory definition of 'dependant' under [FAA 1976](#) should be interpreted widely in line with the values of modern society.

Claimant lawyers will be familiar with having to give advice to clients who have given up work to provide care or other services. The judgment provides further authority that a dependent's lost earnings fall outside the scope of [FAA 1976](#). Given the tragic circumstances of this case, with the claimant forgoing her career to care for two young foster children, it is difficult to envisage a case where lost income will be recovered. The writer questions whether the law fully recognises the hardship the loss of a loved one can have on a dependent and their family life and suggests this area should be considered for reform.

With a note of interest to both claimant and defendant lawyers, the High Court broke down the services Mr Witham provided into very into specific categories. The judge separated the household services Mr Witham provided for the claimant and those relating to the children and identified categories such as household administration services, window cleaning, pet care and driving services, quantifying each one according to its commercial value. This highlights the importance of obtaining detailed evidence on services and to bear in mind that the personal circumstances of each family must be examined in detail and can make a significant impact on a quantum.

What was the background?

Mr and Mrs Witham began fostering two children (a brother and sister aged thirteen and nine at trial) in around July 2015, prior to Mr Witham's diagnosis of mesothelioma. This was initially on a temporary basis and then on long term placements, from around January 2018. Both children had diagnoses of disorders on the autistic spectrum, and the 'foster-plus' arrangement into which the Withams had entered with the local authority required at least one parent to be a full-time carer for the children.

The couple intended to adopt the children in the future and between them decided that Mrs Witham, who had a specialist background in paediatric nursing and described herself as 'challenge driven', would return to work, with Mr Witham becoming the primary carer for the children.

As a consequence of the decline in Mr Witham's condition and his premature death on 10 January 2019 at the age of 55, Mrs Witham was unable to return to work and remained at home to care for the children. It was accepted by the court that she would likely remain with the

children until the youngest child reached 18. Given the children's special educational needs, Mrs Witham did not wish to employ anyone to provide this care.

The claimant brought a claim under the [Law Reform \(Miscellaneous Provisions\) Act 1934](#) on behalf of her husband's estate and under [FAA 1976](#) in respect of her dependency on him.

What did the court decide?

The principal contentions between the parties were:

- who qualified as a 'dependant' under [FAA 1976](#)
- whether the claimant could recover damages as a dependent based on her loss of the deceased's services remaining at home to provide childcare
- if this was permitted, how this loss should be quantified

The defendant argued that Mr Witham's services were provided to the foster children, who as a matter of law were not eligible dependents under [FAA 1976](#), and the claimant's dependency claim was an illegitimate attempt to bypass this fact.

Having considered the authorities, in his judgment Mr Anthony Metzer QC stated at para [47]: 'the court looks at the true situation irrespective of whether there is another party involved who is not a dependant', and at para [52] 'courts have indicated their willingness to acknowledge a loss can be a family loss in the sense of a loss to all members of family'.

Importantly, he therefore found that although the children were involved in the dependency, the dependency was in fact the claimant's, and the children suffered no loss as the claimant simply replaced Mr Witham in providing their care.

The question was then posed: how should the claimant's dependency be valued?

The claimant's dependency was pleaded on two alternative bases: (1) replacement care of the services Mr Witham provided to the children—or (2) with reference to the earnings foregone by the claimant in order to now provide those services.

The defendant relied on *Rupasinghe (suing on her own behalf and as administratrix of the estate of Rupasinghe deceased) v West Hertfordshire Hospitals NHS Trust* [2016] EWHC 2848 (QB), where the claimant had unsuccessfully argued her lost income should be awarded because it had arisen due to her need to move to Sri Lanka for support from her family, which would not have been the case had her husband not died.

In *Rupasinghe* Mr Justice Jay stated at para [47]: 'a free-standing claim for loss of earnings falls outside the scope [FAA 1976, s 3](#)... The Act is only concerned with losses which flow from what the Deceased did when alive: either by the making of a financial contribution to the household, or by providing childcare and similar services (capable, under the common law, of being accorded a financial value)'.

Mr Anthony Metzer QC determined it was not appropriate to value Mrs Witham's dependency on the (higher) basis of her loss of earnings as this was not within the ambit of [FAA 1976](#), and instead assessed quantum on the basis of the cost of replacing the services Mr Witham would have provided but for his death.

It was then disputed whether the dependency should be valued by adopting the commercial rate for replacement care or whether a discount should be applied. Metzer QC stated he could not see any reason why the proper measure of damages for these services should be anything other than their commercial cost. Further, he did not consider it was correct to apply a discount to reflect the fact the care would be provided to the children on a gratuitous basis. He determined the situation was different to that where an injured claimant receives care on a gratuitous basis and stated at para [64]: 'I consider the correct approach is seeking to value the services that the Claimant lost as a result of Mr Witham's death not the valuation of the services now provided by the Claimant.'

Case details

- Court: Court: Queen's Bench Division
- Judge: Anthony Metzer QC (sitting as a deputy judge of the High Court)

- Date of judgment: 13/02/2020

Heetasha Khosla is a solicitor at Leigh Day. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysis@lexisnexis.co.uk.

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