# FAMILY VALUE

**Richard Kayser and Rob Hunter on a case highlighting the difficulty in valuing a mother's care**

Damages after a death have been available for more than 150 years, but the law of fatal accidents continues to occupy the courts.

In the last few years, the courts have grappled with (among other issues): calculation of the multiplier; eligibility of dependants; and financial dependency of adult children (see *Knauer v Ministry of Justice* [2016] UKSC 9; *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916; and *AB v KL* [2019] EWHC 611 (QB)).

This article is concerned with two aspects of fatal accident claims that have received less attention in reported cases, but are often encountered in practice: damages for services dependency and management of children's shares. These were both considered in *OB (Administrator of the Estate of AB, Deceased) v King's College Hospital NHS Foundation Trust*.

## Background facts

The claimant's case arose from treatment that the deceased ('AB') received during the birth of her third child.

AB had a known medical history of sickle cell disease. As a result, her pregnancy was considered high risk and she was referred for care under the Obstetric and Haematology Team.

A caesarean section was scheduled for 16 July 2015, but on 5 July 2015 AB was admitted to hospital. Her oxygen levels raised concern that she had developed a pulmonary embolism, and so AB was started on blood thinning medication as a precaution.

AB was transferred to Kings College Hospital on 7 July 2015. The plan for delivery was to withhold blood thinning medication for 24 hours prior to the caesarean section, and transfuse three units of blood in advance and a unit of blood postnatally.

On 11 July 2015, AB went into labour and a caesarean section was undertaken under general anaesthetic. Tragically, AB developed serious complications associated with post-partum haemorrhage and sickle cell disease.

During and after the operation, AB's heart rate and blood pressure were raised, but she did not receive blood. Her symptoms deteriorated in recovery, but this was not recognised and subsequently AB suffered a cardiac arrest.

Radiological investigations indicated catastrophic hypoxic brain injury and on 31 July 2015 death followed a further cardiac arrest.

### Dependency

At her death, AB was 39 years old and lived with her husband and three young children. AB had played a large part in her elder children's lives, having not returned to work in order to care for them. She also undertook the majority of the household chores.

AB's youngest child was born just 18 days before AB's untimely death. It follows that AB would have provided a significant amount of care.

Since the death, the family had coped by relying on the claimant, extended family, au pairs and nursery. Cover at night had been required because from time to time the claimant's profession required him to work night shifts.

AB had planned to return to her profession once her children were old enough. However, the likely pay disparity with her husband was such that there was no dependency on earnings. There was also no claim for dependency in retirement given AB's reduced life expectancy on account of sickle cell disease.

### The claim

Both parties were represented at an inquest in August 2016 touching AB's death, when the coroner concluded that the cause of death was:

'Natural causes contributed to by a failure to escalate her deteriorating condition post operatively in the recovery ward to senior staff and by a failure to transfuse blood in recovery, both of which amounted to neglect.'

Thereafter, a letter of claim, informed by the Inquest, was sent to the defendant and prompted a full admission of liability.

> *In practice, eligible dependants are entitled to claim for income or services that the deceased would have provided but for the death*

Attention turned to quantum. Due to the amount of support that AB provided to her husband and children, an expert was instructed to consider the replacement value of her services.

In view of the number of hours of childcare that AB would have provided, the expert concluded that two nannies would be required. A live-in nanny was not feasible because the family home was too small. Appropriate childcare arrangements were necessary to allow the claimant to continue to provide for his family.

### Principles of assessment

As is well known, certain categories of dependants are entitled to damages if their relative is killed by the defendant's tortious conduct. Their claim arises from a statutory cause of action governed by the Fatal Accidents Act 1976, which provides as follows:

*'3 Assessment of Damages*

'In the action such damages... may be awarded as are proportioned to the injury resulting from the death to the dependants respectively...'

In practice, eligible dependants are entitled to claim for income or services that the deceased would have provided but for the death. This requires the court to undertake what has been described as an 'artificial and conjectural exercise' (*Cookson v Knowles* [1979] AC 556 per Diplock LJ at 568). It may involve damages for the chance of dependency if that would have been a substantial possibility (*Davies v Taylor* [1974] AC 207, 220).

Where the deceased was employed or receiving a pension, the family is likely to be dependent on their income. This is often the largest part of the claim.

But what if the deceased contributed to the family in other ways? For example, if (as here) one partner is primarily responsible for bringing up children, their efforts may have been essential to the welfare of the family and their finances.

At the turn of the century, in the context of ancillary relief, the House of Lords cautioned against a 'bias in favour of the money-earner and against the home-maker and the child-carer' (*White v White* [2001] UKHL 54, 1 AC 596 per Nicholls LJ at 605E).

### Valuing childcare

The words of the Fatal Accidents Act offer little assistance to judges, and so it is necessary to look to case law.

The older authorities liken the judge's role to that of a jury, and emphasise the need to find the sum which appears as reasonable compensation, looked at overall as a lump sum (see, for example, *Spittle v Bunney* [1988] 1 W.L.R. 847 and *Stanley v Saddique* [1992] Q.B. 1).

The modern approach is more methodical (*Bordin v St Mary's NHS Trust* [2000] Lloyd's Rep. Med. 287 per Crane J):

'In so far as there is a reasoned basis which can be found for the assessment, it seems to me appropriate for the judge to use that basis, checking at each stage the reasonableness of the claim and standing back at the end of the calculation to check that there has been no over-compensation. It would be inappropriate to use a "broad brush" artificially to the total, or to do so arbitrarily...'

The first stage of the enquiry is therefore to consider the commercial cost of replacing the deceased's services. This is so, whether or not commercial providers have been engaged.

Although the incurred costs are relevant, the award is not capped by what has been spent. This is because the Court must assess what has been lost, not what has been provided or purchased (*Hay v Hughes* [1975] QC 790 per Lord Edmund-Davies at 809B).

Where the services have or will be replaced gratuitously, hourly rates are sometimes discounted to the net 'in hand' figure. For example, in *Corbett v Barking Havering & Brentwood Health Authority* ([1991] 2 QB 408; [1990] 3 WLR 1037) the carer's rate was discounted, and the Court excluded the on-costs of four weeks' annual paid holiday and sick leave.

However, other judges have awarded the commercial replacement cost. For example, in *Knauer v Ministry of Justice* at first instance ([2014] EWHC 2553) Bean J allowed agency care at £16,640 p.a. together with a further award of £1,500 for gardening and decorating.

The received wisdom is that as children age, the value of the services dependency falls, and the yardstick of a nanny's wage becomes less appropriate (*Spittle v Bunney* [1988] 1 WLR 847, [1988] 3 All ER 1031).

It is arguable, however, that the cost of a nanny remains more appropriate than spinal point 8 of the NJC pay scales, at least as a starting point.

### Outcome

The claimant's case was that care after the death fell short of that which AB would have provided.

The actual costs that had been incurred were therefore not an appropriate measure of damages.

Our view was that the cost of an experienced nanny better reflected the quality of care the children would have received from their mother, not least because au pairs tend to possess little experience and training.

Further, given the claimant's working hours, it was soundly arguable that a nanny's rate of pay would remain the appropriate yardstick for a long period.

A claim for additional accommodation was considered but not pursued at the mediation for various reasons. One of the considerations was the argument that with sufficient accommodation a single live-in nanny, as opposed to two live-out nannies, could provide the night care that was needed.

Damages were agreed on a global basis at a successful mediation in the sum of £735,000.

Settlement was reached when the prevailing discount rate was -0.75%, albeit that a change in the discount rate was anticipated.

Overall, the size of the award was unusual for a fatal accident claim, particularly in the absence of income dependency.

The assumptions underpinning the settlement must remain confidential, but the size of the award was obviously a reflection of the contribution that AB would have made to her family.

Suffice to say that damages assumed the commercial cost of childcare, including associated costs and without gratuitous discount, throughout childhood.

### Brexit

At an approval hearing in December 2018, Master Yoxall approved the proposed compromise and directed that the damages awarded to the claimant's two eldest children be placed into a designated commercial cash account.

The main features of the account were that it did not permit withdrawal until the age of 18, but offered a far more attractive rate of interest than the Court Funds Office (CFO) Special Account.

> *It became clear that the funds were likely to remain in the special account for longer than was desirable*

Management of the youngest dependant's award was more difficult because the investment horizon was longer, which favoured some stock market exposure, but the Litigation Friend was understandably wary of capital risk.

With the uncertainties of Brexit, the claimant sought the advice of the asset management team at Irwin Mitchell. The conventional option for a child of the dependant's age is to invest 70% in an Equity Index Tracker Fund (offered by the CFO) with the remaining 30% being placed in the Special Account.

The tracker fund invests directly in Legal & General unit trusts which track each of the world's major markets with 55% held in the UK, 35% held overseas and 10% held in emerging markets.

The concerns were that investing money into the index tracker could be severely affected if Brexit were to have a negative impact

**Edgar Gordon**
**MSc DDS BDS MGDS FFGDP**
AESCULAPIUS
**DENTISTRY**

**For a reliable and prompt service dental PI reports are prepared and forwarded the day of examination and alleged clinical negligence within ten days.**

33 Arden Road • Finchley • London N3 3AB
**Telephone:** 020 8346 1411 **Fax:** 020 8343 1601 **Email:** egordon@dentmedneg.demon.co.uk

(especially given that the damages are not invested over a phased period) and that the Special Account offered an uncompetitive rate of interest.

## Management of awards

CPR r 21.11 gives the court control of money recovered by or on behalf of a child or protected party, and requires that the Court give directions for management. The directions may provide that the money shall be wholly or partly paid into court and invested or otherwise dealt with.

Paragraph 8.1 of Practice Direction 21 records some of the management powers that are available, including payment into Court for investment or payment directly to the child or litigation friend.

Paragraph 8.2 emphasises the broad nature of the discretion: the Court will consider 'the general aims to be achieved for the money in court (the fund) by investment'.

The judge's discretion is, however, fettered if the child is 13 or older at the date of the investment directions and / or the fund is less than £10,000; then any damages held in Court must be held in the Special Account (section 14(2) The Court Funds Rules 2011).

Provided the child is under 13 and has been awarded more than £10,000, there is no restriction on the court's power to direct that money managed by the Court be proportioned in any particular share between the Special Account and the Equity Index Tracker fund or anywhere else.

This is reflected in 'A Guide to Court Funds Office practices' with regard to children's and protected beneficiaries' accounts:

'...The CFO will however accept a direction by the Judge or Master, if given, as to the particular percentages of investment to be made in the EITF, so long as the criteria for investment set out in Section 5(i) above are met in each individual case.

'The Judge or Master will wish to pay special attention to Section 4 of Form CFO 320 and to enter a special direction in that Section as to the percentages if he decides that those laid down in the frameworks should be varied. Any such special direction is then repeated at Box 9a of Form CFO 212.

'There may be cases however where investment in special account should not in any circumstances be permitted, e.g. where the parents of a Muslim child request investment that does not earn interest... Where the criteria for investment in the EITF are met, a special direction could be given for 100% investment in that fund.

'A special direction by the Judge or Master may... for example require that the percentage of investment in the EITF is maintained at its original level.'

The duty of the Court and practitioners to consider the best investment for the child was emphasised by HHJ Platt in *GW v BW* (LTL 22.7.11).

In his view, the Special Account should be treated as the 'place of last resort' for investment of children's damages.

Judges who simply ordered damages to be placed in the Special Account without considering alternatives were condemning children to lose considerable sums, which was an 'abrogation of judicial responsibility'.

## Outcome

The award to the youngest minor was temporarily held by the CFO pending a further investment hearing in the hope that Brexit's impact and investment options would be better understood.

It became clear, however, that the funds were likely to remain in the special account for longer than was desirable.

At the claimant's invitation, Master Yoxall exercised his discretion to move away from the conventional approach and instead directed that 50% would be invested in the Equity Index Tracker Fund (managed on behalf of the Court Funds Office) and the remaining 50% would be held in a designated commercial cash account that restricted withdrawals until the age of 18.

Master Yoxall's approach was a welcome departure from the standard approach to investment of minor dependants' damages.

It facilitated cautious stock market exposure in an uncertain climate, while at the same time freeing half the dependant's fund to be held securely at a competitive rate of interest.

*Richard Kayser is a senior associate solicitor at Irwin Mitchell and Rob Hunter is a barrister at Devereux Chambers. Both acted for the claimant in the above case*

Bet your spreadsheet can't do this!

Build court ready schedules of loss quicker and with greater confidence. Use **piCalculator™**, the trusted solution for more than 3500 solicitors and barristers.

For more information contact:

Seb Wright 07546 821 478 seb.wright@verisk.com

Verisk™