Personal Injury

Turning the tables in fatal accident claims: Knauer v Ministry of Justice [2016] UKSC 9

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In an article first published by the PI Brief Update Law Journal in March 2016, Stephen Cottrell comments on the Supreme Court's judgment in *Knauer v Ministry of Justice* [2016] UKSC 9, handed down on 24th February.

In a major victory for claimants, multipliers in fatal accident claims have been brought in line with personal injury and clinical negligence cases after The Supreme Court reversed a 37-year-old decision of the House of Lords. Lord Neuberger and Lady Hale gave the judgment of the court and stated that their Lordships 'had no hesitation' in deciding that the law had to be changed. The decision will mean that bereaved relatives' damages are no longer assessed on a less generous basis than those for injured claimants, thus removing a significant anomaly in the law of negligence. Damages are likely to increase significantly in cases where the deceased had a well-paid job or good pension, or where the surviving dependants have a substantial need for care and assistance (as in the case of Mr Knauer following the death of his wife after exposure to asbestos).

The previous decision of the House of Lords in *Cookson v Knowles (1979) AC 556* had required damages for future dependency to be calculated from the date of death, not the date of trial.

Their Lordships noted that this decision was made 'in another era' when the Ogden Tables were not available and multipliers were not calculated scientifically. This led to under-compensation, most markedly in cases where there was a long period between death and trial/settlement. The advent of the Ogden Tables and their admissibility in evidence means that it is possible to calculate damages from the date of trial without over-compensating the dependants, provided that the possibility of the deceased dying of natural causes between the actual date of death and the date of trial is taken into account.

Lord Lloyd's opinion in *Wells v Wells [1999] 1 AC 345* was cited and applied – the Ogden Tables should be the starting point. The Court applied the 1966 Practice Statement so as to depart from *Cookson*. Clearly claimants will have to give credit when calculating losses between death and trial for the (usually small) possibility of a natural death during that period. Unless the deceased had some pre-existing illness the discounting factor for the possibility of natural death between actual death and trial is likely to be very small.

The Previous Position - a Recipe for Injustice

Under the law as it previously stood there was a real likelihood of Claimants being under-compensated in the vast majority of cases.

The potential for really serious under-compensation can be seen from the following **example;**

A is 40 years old when he dies. He has a dependent child, B, who is 5 when A dies. A was the primary carer for B and

also the breadwinner. Before the accident A was fit and well.

B has a congenital brain condition which means that his future care needs cannot be known until he is a young adult. His case therefore settles when B is 21 – 16 years after the date of death when A would have been 56.

The dependency multiplicand for care and loss of earnings is agreed at £40,000 p.a. to age 70, when A would have retired.

A's earnings multiplier to 70 (Table 11, 2.5% discount rate) at age 40 is 20.33.

Following *Cookson* – i.e. the old law - the multiplier for future loss of dependency to age 70 would be:

- 20.33 less reduction factor of 0.86 for contingencies other than mortality = 17.48.
- 17.48 – 16 = 1.48.
- The 16 years between death and trial are past loss x £40,000 = £640,000.
- The multiplier going forward is therefore only 1.48 to cover the entire period between ages 56 and 70 for A.
- His future loss = £40,000 x 1.48 = £59,200. Total loss = £699,200.
- Allowing half-rate interest at (say) 1% per annum on past losses, so 16% in total, the overall figure is **£801,600**.

Following *Knauer,* the result will be as follows - the multiplier for future loss of dependency to age 70 would be:

- A's earnings multiplier to age 70 (Table 11, 2.5% discount rate) at age 56 = 11.25.
- 11.25 less reduction factor of 0.79 for contingencies other than mortality = 8.89.
- The 16 years between death and trial are still past loss x £40,000 = £640,000. This figure is reduced by a factor to take account of the possibility of A's death over that period of 16 years – approximately 0.98 (Table E – Ogden Tables, 7th Edition, page 25) = £627,200.
- Half-rate interest (assuming 1% per annum over the 16 years) is 16% = £100,352.
- B's future loss = £40,000 x 8.89 = £355,600.
- Total loss including interest = £627,200 + £100,352 + £355,600 = **£1,083,152.**

This is an extreme example, but it produces a difference of over **£280,000.** Typically, the difference between the two methods will be less pronounced but there will be substantial increases to most fatal accident claims involving a meaningful dependency.

The Law Commission had highlighted the problem with *Cookson* in 1999, and the Supreme Court took little persuading that the *Cookson* method was unfair. In fact the Defendant did not seek to argue that the Claimant's argument was in principle wrong. Rather the Defendant pointed out that there are anomalies in the Fatal Accidents Act which place dependents in some ways in a better position than injured claimants, most obviously section 4 of the Fatal Accidents Act which prevents benefits flowing from the death (be they state benefits, widow's pensions or otherwise) from being taken into account in calculating damages. Lord Sumption had criticised this anomaly in *Cox v Ergo Versicherung AG [2014] UKSC 22* but of course section 4 was a policy decision implemented by Parliament whereas *Cookson* and *Knauer* were pure common-law decisions. The Defendant was anxious during submissions in *Knauer* not to suggest that damages in fatal accident cases were 'too generous' – hardly surprising when one considers the inadequacy of bereavement awards in England and Wales.

This is an important decision for all practitioners in Fatal Accident cases, and a very good outcome for claimants. In *Knauer* the financial effect of the decision was to increase damages by more than £50,000. In cases involving the death of high-earners the effect will be even more pronounced.

Stephen Cottrell has recognised expertise in dealing with high value PI claims arising from serious injury or fatality, clinical negligence and catastrophic injury. For more information, please visit www.devereuxchambers.co.uk.