Neutral Citation Number: [2020] EWHC 299 (QB)

Case No QB-2018-000443

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13th February 2020

Before:

Anthony Metzer QC sitting as a Deputy High Court Judge

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Between:

SARAH WITHAM **(as Executrix of the Estate of Neil Witham (Deceased))**	**Claimant**
- and –	
STEVE HILL LIMITED	**Defendant**

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Steven Snowden QC and John-Paul Swoboda (instructed by **Fieldfisher**) for the **Claimant**
Michael Kent QC (instructed by **BLM solicitors**) for the **Defendant**

Hearing dates: 7 November and 6 December 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Background

1. This claim has been brought by the Claimant Sarah Witham who is presently aged forty-three years old. It arises out of the death of her husband Neil Witham ("Neil") on 10 January 2019 at the age of fifty-five years old as a result of Mesothelioma. Liability is no longer in issue; it is agreed that his death was caused by exposure to asbestos when he worked as a general labourer for the Defendant in the late 1990s. Judgement on liability and causation was entered by Master Gidden in March 2019 at a "show cause" hearing and the action has proceeded as an assessment of damages hearing before me on 7 November 2019 and 6 December 2019 with further written submissions considered on 16 December.

2. The Claimant brings the claim both under the Law Reform (Miscellaneous Provisions) Act 1934 on behalf of Neil's estate and under the Fatal Accidents Act 1976 in respect of her dependency upon him.

3. I am grateful that the parties were able to agree quite a number of the heads of loss which I shall set out below. Other heads were not the subject of agreement however, particularly the issue of dependency on the deceased's childcare and domestic services from January 2019 within the Fatal Accidents Act awards section.

4. In order to determine the assessment of the appropriate level of damages, it was necessary to hear live evidence from the Claimant; Ms Carol Noble, the family's social worker; and two care (non-medical) experts, namely Ms Lynn Hannon on behalf of the Claimant and Ms Joan Gowans on behalf of the Defendant who were both registered nurses. In addition as far as the evidence is concerned, there was the agreed witness statement of Mrs Penelope Neath, the deceased's mother, as well as medical evidence on behalf of the Claimant from Professor Twort and on behalf of the Defendant from Professor Bowen-Jones, both of whom are consultant physicians who produced a joint statement, as did Ms Hannon and Ms Gowans. Finally, there was the signed witness statement of Neil himself which he provided just over five months before his death.

5. The Claimant and Neil had been together since 1993 and married ten years later. They did not have biological children of their own together but from July 2015 began fostering two children who are brother and sister, now aged thirteen and nine years old respectively. Their names are known to the Court but in the interests of preserving their privacy and protecting their personal and family life, I shall refer to them in this judgment as A and B. They both have diagnoses of disorders which are on the autistic spectrum, namely ASD and ADHD in A's case and a form of ASD analogous to Asperger's and an attachment disorder in B's case. Evidence was given by the Claimant in relation to how she and the deceased dealt with these issues. Although the fostering began as a temporary placement, these were finally made long term placements in January 2018.

6. As far as employment of both the Claimant and Neil was concerned, he worked in building and labouring jobs and the Claimant worked as a specialist paediatric diabetes nurse. The records indicated that the initial plan was that the Claimant would be the main carer for any foster children, but it is the Claimant's case, set out more fully below, that once A and B had been placed with them as a couple under a "Foster Plus" arrangement (covering children with additional or special needs) and that they had

appreciated those children's particular needs, they made a decision that Neil would stop work and the Claimant would initially reduce to work bank shifts, but that the plan was that she would resume her nursing career leaving Neil as the main carer for the children. The issue of arrangements which had been reached between Neil and the Claimant was one of the central questions for my determination as well as whether under the Fatal Accidents Act ,the Claimant was entitled to a claim for damages as a dependent upon Neil for remaining at home to provide childcare and domestic services so that she could go to work, or whether as the Defendant characterised the position that as A and B are foster children and therefore are not eligible dependents within Section 1(3) of the Fatal Accidents Act, the Claimant was seeking to claim this dependency where Neil's services were in fact provided to A and B, not to her. There was also a substantial difference in valuation in respect of the Claimant's claimed dependency upon Neil for other services.

The Areas of Agreement between the Parties

7. The following heads have been agreed:

(a) All aspects of the miscellaneous costs claim, save for hospice costs;

(b) Funeral costs in the sum of £6,859;

(c) The statutory bereavement award in the sum of £12,980;

(d) Loss of spousal care and affection agreed (without admission by the Defendant as to the legal basis for this head of claim) in the sum of £2,500.

The Issues requiring determination

8. The outstanding issues under the LR(MP)A 1934 were:

(i) The appropriate award of general damages for Neil's pain, suffering and loss of immunity;

(ii) The value of the care which the Claimant provided to Neil through his illness until his death (although this head was compromised at the outset of closing submissions in the agreed sum of £25,000);

(iii) The hospice costs claim within the miscellaneous losses.

9. Further, under the FAA 1976:

(i) The valuation of the Claimant's dependency upon Neil for remaining at home to provide child care and domestic services;

(ii) The valuation of the Claimant's dependency upon Neil for other services.

The Evidence

10. The Claimant was called to give oral evidence. She confirmed that the contents of her three witness statements dated 15 May 2019; 11 July 2019 and 9 September 2019 were true. Summarising that evidence, the Claimant confirmed that A and B initially came

into their care on a temporary/interim basis. They decided that the deceased would look after them on a full time basis and she would return to full time work. She confirmed they were appointed as long-term foster carers on 11 January 2018, the children having arrived in their care on 30 July 2015. Reference was made to a Foster Plus agreement which required one, or other or both of the Claimant and the deceased to be:

> "… flexible and available for a variety of tasks in relation to the placement, such as would generally be afforded by the absence of other work commitments or very flexible work arrangements" and "to be able to respond to difficulties at school … availability is also required for other tasks such as attendance at meetings and at professional appointments." Further as revised, the Foster Plus agreement stated that it was:
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> > "… a full-time commitment so within the foster family the main carer is expected to be a full-time carer … If a couple, then at least one of them …. will need to take on this role as their only employment."

11. The Claimant described both A and B noting their different manifestations of behaviour requiring particular attention. In regard to A, she referred to his increased and heightened anxiety levels and his reaction to every-day setbacks wearing his heart on his sleeve. B has difficulty in building relationships with people she does not know, in particular men other than Neil.

12. She described Neil's very hands on role with the children and their care as well as considerable assistance with domestic tasks. She considered them a good fit in terms of the way they parented the children and allocated the domestic tasks and juxtaposition with work.

13. The Claimant described that Neil had always been a very fit and active man before the onset of the mesothelioma and described the debilitating effects of that disease before his death.

14. She referred to their future fostering plans in which Neil agreed to be the full-time carer which he had wanted to do essentially as a replacement for his career. The Claimant then referred to her own career and work in which she has a background of paediatric nursing, referred to her decision to leave a previous full-time role at Ashford and deciding to go over to bank work with the desire to return to a full-time role including applying as a diabetes nurse specialist at Cheltenham and Gloucester Adult Services to which she was invited to go for an interview (and made reference to the documents in the trial bundle) but was unable to attend the interview or take on other roles because of the diagnosis and dramatic deterioration in Neil's health.

15. The Claimant referred to the difficulties about her future employment prospects now not being able to work until the children are eighteen years old, which has caused considerable upset to her and her registration as a nurse was due to end in July 2019.

16. The Claimant was also required to take over as a result of Neil's deteriorating health post-diagnosis until he passed away. She gave more details about the effects of his illness upon Neil in her further statement and estimated the time she spent helping him

in different regards in her third and last witness statement in which she produced additional documents in relation to A in particular including the CAMHS assessment reports for A and B.

17. In her oral evidence, the Claimant gave more details about the particular difficulties in bringing up A and B stating that A could shout and become quite aggressive and it would take time for him to calm down and that Neil would spend more time with him and be more effective in that way as A was closer to her in personality. B would hold onto things for a time then effect a sort of punishment generally aimed at her which would be challenging and she noted they are very different in approach.

18. The Claimant referred to the document within the fostering agency documentation confirming that she and Neil regarded A and B as "very much part of the family". She stated they did not take this on half-heartedly and always intended for it to be long-term. They were regularly introduced to the wider family who helped enormously.

19. The Claimant referred in the foster care supervision plan notes to the reference to "permanent home". She indicated that they did want them to remain in long-term placement and she was now considering them for adoption, which she had previously discussed with Neil.

20. The Claimant maintained that she was desperate to go back to work once A and B were more settled and she made reference to the job she applied for in Gloucestershire.

21. The Claimant referred to the medical evidence concerning A and B to demonstrate their respective behaviour and also was taken to the school records she maintained were accurate. She stated that she and Neil discussed domestic life and Neil was very happy to be involved in respect of taking primary responsibility in looking after the children. He had always carried on the daily chores and had always been very involved in domestic issues. The Claimant referred to her qualifications and stated it was very rare for a nurse to have those qualifications in paediatric diabetes. She was able to work with both adults and children and she did her degree course in two years as well as working full-time. She wanted to work within the areas of adult paediatric diabetes and planned to take a strategic role within NHS England to improve services countrywide. The strategic role would include peer review, of which she had experience, on a local and national level.

22. She described Neil's symptoms running from late 2017 until his death in January 2019 and confirmed that the only time his pain was managed was in his last three days. Until then they tried everything and he was never out of pain.

23. The Claimant was cross-examined and described where she and Neil lived at various times and confirmed that she would have taken the job in Cheltenham and Gloucester in respect of adult diabetes if she had been offered it. She told them she had two foster children which she considered sensible as she would still be a mother in a partnership and needed additional flexibility for example to go to Christmas plays and Social Services meetings. Since they had A and B they did not consider further fostering of children.

24. The Claimant agreed that the fostering reports initially referred to her looking after the children at home and not Neil and agreed that that was not inaccurate at the time

those discussions initially took place but the discussions took place over a long period and her priorities changed. She described herself as "challenge-driven". She stated that the records were historic and that when A and B presented in 2015 hers and Neil's expectations covered every angle and she agreed that in the early stages she was the main carer. Neil had stopped work because of his mental health issues and by October 2015, she had returned to work three days a week in a permanent job and handed in her notice in October 2017. She and Neil had made the decision that they wanted him to be the full-time carer at home. Their plans had changed.

25. The Claimant was taken to the fostering allowance payment statement from Oxfordshire County Council and confirmed that they received £50,000 per year for both children. Neil was originally registered as a self-employed worker and all funds went in his name but she is now registered and out of the £50,000 per year she is taxed in relation to £11,000 or £12,000. She was asked questions about allowances and benefits.

26. The Claimant confirmed she did not have the intention of employing anybody in the home given the difficulties that A and B exhibited in relation to autism and attention disorders and Neil no longer being around, she is not in a position to be able to work at the moment, that is despite the present ages of the children as they still require a considerable amount of attention and looking after.

Other Evidence

27. The witness evidence of Penelope Neath was agreed. In summary, she stated that she is the Claimant's mother and referred to the issue of her daughter and Neil taking over fostering and stated that she knew they had planned for the Claimant to return to work as a nurse full-time and that Neil was to stay at home and look after the children. The Claimant had worked long and hard to get into the highest nursing band she could and did not want to give up her career which she had worked so hard in and enjoyed. She described the help and support that Neil had provided prior to the onset of his illness in respect of child care and domestic help. She described the need to care for Neil during his illness and various expenses incurred by the Claimant and Neil owing to his illness. Carol Noble was also called by the Claimant and confirmed that she worked as an independent child protection chair and independent reviewing officer at Oxfordshire County Council and helped with the placement of A and B and subsequent care plan reviews. She stated as far as she could recall, the plan for them was always for them to be placed with the Claimant and Neil on a long-term basis and knew that the Claimant's plan was to return to full-time work as a nurse and that Neil would be the long-term carer for the children. She confirmed there were never any issues with the care they provided and then described the effects on the family of Neil's illness and how they had performed which she described as "fantastically well" to bring up the children and made reference to the Claimant's fantastic family network.

28. She was cross-examined and confirmed that neither A nor B have an EHCP (Education Health and Care Plan). They had done well educationally and that if one was required, they would have had one by now. She confirmed that local authorities are reluctant to issue an EHCP without various specific needs.

Expert Evidence

29. The Claimant called Ms Lyn Hannon who adopted the contents of her report and agreed the joint statement that she and Ms Gowans, the Defendant's expert, had provided. The summary areas of agreement and disagreement was set out in tabulated form at Pages 275 to 299 of Trial Bundle 1 and was helpful when determining the issues of quantum.

30. In cross-examination, Ms Hannon agreed that in respect of some of the calculations, the experts were not far apart and much would turn on the finding of fact as to whether the Claimant could recover based on a loss of service from Neil. She agreed that domestic assistance had been assessed in respect of both children to the age of eighteen and that for the Claimant this was an ongoing loss. She confirmed that there were calculations made for example on future transportation as it was impossible to calculate every journey that Neil would provide for B and A as well as other types of travelling. She confirmed that the costs were at the commercial rate except for the dog-walking which happened in any event.

31. In re-examination, she confirmed that she based her assessment upon children who suffered with autism which would increase the time and preparation to carry out activities in comparison with children who did not suffer from those disorders.

32. The Defendant's expert Ms Gowans, a registered nurse agreed the contents of her expert report and adopted that together with the joint statement.

33. In cross-examination, Ms Gowans agreed that she carried out a very different assessment of the financial value of the services that Neil provided for the Claimant. She agreed that in respect of past care, their figures were close but that was not true of the future care assessment. She had also assessed future care of the children to eighteen years of age and she maintained that she had made an allowance for the fact that the children suffered from the disorders and she described the children as "challenging" but did not accept they were at the high end and her views had not been modified by hearing the Claimant give evidence but accepted that there were continuing issues but not as frequently for the Claimant as when they were younger. She agreed she took the same approach in respect of her determination as to the figures for future loss as that of past loss and stated there was an extent of an overlap between the normal elements of child care and she applied a reduction straight across to a child who was suffering from those disorders. She accepted when the calculation was made in respect of each child the extent of additional time for care was about fifty minutes per day which equated to six hours per week and that that was the process that she undertook in respect of each of the heads of loss.

34. In addition to the disputed expert evidence, there was also medical evidence both from the Claimant, Professor Twort, Consultant Physician and the supplementary report as well as a GP's letter and a Defendant expert report of Professor Bowen-Jones, Consultant Physician with a supplementary letter which I shall refer to below in determining the issue of damages for pain, suffering and loss of amenity.

Submissions

35. Although there were some subsidiary issues relating to the relatively small difference between the parties in relation to general damages for pain, suffering and loss of amenity; whether the hospice costs should be recovered; which expert's evidence

should be preferred; whether a commercial rate should be applied as opposed to valuation of gratuitous care; and whether there should be a discount by 25% or not, the primary issue, which both parties accepted was clear of authority, was whether the Claimant could recover damages as a dependent upon Neil remaining at home to provide child care and domestic services which was maintained he would have done so that she could go to work. Both parties have provided extremely helpful and substantial assistance to me in their skeleton arguments in opening, closing and in respect of further written submissions on alternative child care calculations for which I am extremely grateful.

36. In essence, the Claimant maintains that she is entitled to recover in principle in accordance with Section 3(1) of the Fatal Accidents Act 1976; that it is her loss as a recognised dependent under the Act on the facts of the case; that that damage is capable of being quantified; that it is her loss as a dependent rather than that of A and B; and that the loss comes within the defined relationships specified in the Act.

37. By contrast, the Defendant maintains that the claim advanced based on the Claimant's lost earnings opportunity is beyond the scope of the Act and is an attempt by the Claimant to seek to recover in circumstances where, as the parties agree, A and B, as foster children, have no claim under the Act but the claim is put forward as if they did have such a claim by simply relabelling it as the Claimant's own services dependency which the Defendant maintains it is not. In essence, it is maintained that although it may be seen as harsh, the foster children not being eligible to the claim under the Act, it cannot be open to the Claimant to effectively bypass its provisions. I shall set out below authorities relied upon by both parties in support of their contentions as well as dealing with the other contentious issues summarised here. In order to determine the primary issue, I consider it necessary to make findings of fact which on the basis of how the cases were presented in court and the concessions made in closing are to a large, but not complete, degree accepted. Where a difference remains, I have sought to make express findings.

Findings of Fact

38. I find on the evidence that the Claimant and Neil were extremely happy together and would have stayed together to old age were it not for the deeply distressing onset of Neil's illness which substantially curtailed his life. I find that they would, as happy couples generally do, discuss important life decisions together and reach an agreement which would then be acted upon. Among the decisions that they made, was the one to foster children in circumstances where they did not have blood children which would have the dual benefit of giving them a family of their own but also to help children in foster care who had previously experienced traumatic and difficult beginnings. Although they received payment from Oxfordshire County Council, I find that the decision to foster A and B was not a business decision or a choice to maximise their finances but one of the decisions they made as a loving couple as to how they would like their family to be constituted. It was not suggested to the Claimant her motivation was financial or business-related and I find the payment, although clearly helpful, was not the motivation behind the decision to foster.

39. As far as the fostering application period was concerned, it appeared clear from the documents and the evidence that initially the Claimant and Neil were uncertain as to how their roles would play out. The Defendant accepted (at Paragraph 53 of its Closing

Submissions) that the current "Foster-Plus" agreement required the Claimant to treat the fostering of A and B as her only employment and the terms make clear that (at least) one parent would be required to be always available in respect of their fostering. The Defendant also accepted (at Paragraph 39 of its Closing Submissions) that there was evidence of the Claimant deciding to return to work around September 2017 although it is maintained that the contemporaneous material showed that flexible part-time work was being contemplated. Having heard the evidence from the Claimant, who impressed me as a witness, I accept her evidence that as a couple, they had decided that she would return to full-time work and that Neil would be the parent at home responsible for most, if not all, aspects of domestic life. The parties accepted that it was immaterial as to which gender the couple had decided would be the one returning to work and the other be the parent at home which must surely be right and therefore to that extent, irrelevant. The Claimant and Neil had also decided as part of their family life together that that would be how the arrangement would work in respect not only of their parenting but also their long-term aim to keep A and B together with the intention one day, as the Claimant indicated, that they would ultimately adopt them.

40. As indicated, recognising the terms of the "Foster-Plus" arrangement, one of the parents needed to be available at all times for A and B's needs. Given their autistic and ASD conditions respectively, I find that the Claimant and Neil had in fact made that decision irrespective of the express terms of the "Foster-Plus" arrangement. In support of my finding that the Claimant planned to return to work full-time I refer to the fact that she had a job application ongoing just before the onset of Neil's illness; the evidence of Carol Noble whose statement was accepted and who confirmed that the Claimant was going to work full-time and that Neil would be the long-term carer; the repeated references by the Claimant about A and B as "my" or "our" children and that they were being brought regularly to family occasions and that the Claimant had previously enjoyed a very good career before putting it on hold. She had unusual and important qualifications, namely a Master's degree in a specialised area, which would have given her a significant advantage upon returning to work and developing her career thereafter and, whether she would have accepted the interview and potentially been offered a job within the Gloucestershire area at that time but for Neil's illness or not, I find on the balance of probabilities that she would have been able to find similar employment on a full-time basis in the short term future which would have continued for the foreseeable lengthy period but for the tragic turn of events.

41. Finally, in respect of findings of fact as far as Neil's illness is concerned, I accept the Claimant's evidence as well as that of other witnesses including Neil himself in respect of the distressing and speedy decline in Neil's health which would have caused very significant pain and discomfort and would have caused the Claimant to take considerable steps to assist him and minimise the level of inconvenience, for example that he was only able to get comfortable to sleep downstairs and that sadly medication was unable to alleviate all of his symptoms. I also find that A and B's conditions are as set out in the medical reports summarised above and described in the Claimant's evidence. It is worth noting that their conditions and needs were different and although they both suffered from autistic disorders, they manifested themselves differently and that they are lifelong conditions.

Analysis of the Law in the Light of My Factual Findings

42. The starting point in respect of the Claimant's claim for dependency on Neil is Section 3(1) of the Fatal Accidents Act 1976 which states:

"In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively."

43. It is noteworthy that this language, described at Paragraph 18 of the Claimant's closing skeleton as "Victorian" reflects the fact that dependency has been defined that way since its precursor in 1846 where Clause II states:

> "And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have be so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased: and in every such Action the Jury may give such Damages as they may think proportion to the Injury resulting from such Death to the Parties respectively for whom and whose Benefit such Action shall be brought…"

44. As Latham LJ stated in O'Loughlin v Cape Distributions Limited [2001] EWCA Civ178 at Paragraph 11, there is no "prescriptive method by which such damage is to be identified, or calculated apart from the principle that it requires that some damage capable of being quantified in money terms must be established".

45. That decision approved (at Paragraphs 10 and 12) the decision in Pym v The Great Northern Railway Company [1863] 4 B&S 396 which stated that "the principle of whether a dependency can be established requires the court to consider whether the dependant had "a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased". There is therefore a wide gateway and if the dependant can establish that pecuniary loss resulted from the death then that would meet the requirements of Section 3(1). The decision in Cape confirms that the court is required to examine the particular factual circumstances of the case to determine whether there has been a monetary loss for the dependant and if so is required to assess the extent of the loss.

46. The Claimant relies upon the decision in Malyon v Plummer [1964] 1 QB 330 where Sellers LJ stated at Page 34:

"In my opinion, the interposition of F.P. Malyon Limited if that is how it should be regarded, does not prevent the court assessing truly the loss which the wife has suffered".

47. That was a case where a wife was employed by the husband's company and she was paid more than the market rate as the wife of the business owner. The factual circumstances were very different to the present case but the principle is clearly applicable namely that the court looks at the true situation irrespective of whether there is another party involved who is not a dependant. The Claimant argues that the 'interposition' of foster children who were not dependants under the Fatal Accidents Act does not prevent the court from identifying and quantifying the loss truly suffered by the Claimant. Reliance is also placed upon O'Loughlin v Cape Distribution Limited

already referred to. In the context of a PI claim Rix LJ stated in Lowe v Guise [2002] QB 1369 at Paragraph 27:

> "… if public policy and the law's transparent recognition of the special ties of family life can find, as it has done … a mechanism which enables it to value in pecuniary terms the gratuitous care thus provided, then there is, in my judgment, no difficulty in valuing in pecuniary terms the gratuitous service provided by a Claimant to his or her family household. Of course the carer does not expect or at any rate is willing to forego compensation for the service, for he contributes it willingly to the family: but, if he is deprived by another's fault of the ability to make that contribution of that financial sacrifice, the value of that can still be assessed as his loss".

48. The Defendant relied primarily upon three cases. First, in Burgess v Florence Nightingale Hospital for Gentlewomen [1955] 1 QB 349 a loss arose not out of relationship of husband and wife, but out of a professional business arrangement and was therefore not recoverable. It is necessary for a loss suffered by someone within the list of dependants set out in Section 1(3) of the Fatal Accidents Act to still be shown to relate to a loss of a benefit which arose in consequence of that relationship.

49. The Defendant also relied upon the decision in Cox v Hockenhull [2000] 1 WLR 750 where a claim based on the loss of Invalid Care Allowance paid to the Claimant in respect of his role as a full-time carer for the deceased (who had been his severely disabled wife) was not allowed. In the decision of the Court of Appeal, Stuart-Smith LJ stated at Paragraph 18:

> "In effect the state employed Mr Cox to care for a severely disabled person. If that person had been anyone other than his wife, the fact that she died and Mr Cox thereby lost his income would not give rise to compensatable loss. The fact that the relationship of marriage existed was as Devlin J put it: "Incidental". Accordingly, in my opinion, the judge was wrong to include this sum as being part of the make-up of the dependency".

49. Finally, and perhaps put forward with most force by the Defendant is the recent decision in Rupasinghe v West Hertfordshire Hospitals NHS Trust [2017] PIQR Q1 where Jay J stated at Paragraph 52:

> "Loss of earnings can only be deployed as a proxy measure in respect of the services the surviving partner is now providing herself or himself in substitution for the services previously supplied".

50. On the facts of that case, there was no dispute that the two children of the family were eligible to claim as dependants under the Fatal Accident Act. The claim based on reduction of the Claimant's own earnings resulting from her move to Sri Lanka in order to access the support of her family to replace the child care which the deceased had provided was rejected simply because the children's services dependency had already

been settled. Jay J also stated: "The disputed items do not constitute an attempt by the Claimant, applying some form of proxy measure, to value the loss of the Deceased's services but rather a broader endeavour predicated on reasoning that the Claimant has lost her career because of her husband's untimely death. That is, of course, correct as a matter of fact, but it does not avail her as a matter of law."

51. The Defendant argues with some support from the authorities that as A and B have no claim under the Fatal Accidents Act, the claim has essentially been put forward as if they did have such a claim by a simple re-labelling of the Claimant's own services dependence which they maintain in reality it is not.

52. Having considered the submissions and the authorities with considerable care, and based upon my findings of fact, I find that in the present case the dependency is in fact the Claimant's rather than A's and B's. Once Neil sustained his serious illness before his death, it became necessary for the primary care that he carried out for A and B to be replaced by the Claimant. Although in non-legal terms, A and B were effectively dependent, in fact they suffered no loss as the Claimant, their foster mother, simply replaced Neil, their foster father, in providing the care. That, I find, is the reality of the situation as identified by Sellers LJ in Maylon v Plummer. Courts have indicated their willingness to acknowledge a loss can be a family loss in the sense of a loss to all members of the family: see O'Loughlin v Cape Distribution Limited supra. In reality, on the findings of fact as set out above, the Claimant has lost her full-time career as a result of Neil's death. She was dependent upon him as the principal carer for A and B to allow her to pursue a career for the benefit of the whole family in the knowledge that their children, albeit foster children, would be properly cared for. In other words, it was effectively the family's loss of Neil acting as principal carer and the family's finances decreasing by the measure of the Claimant's lost earnings, but that does not detract from the finding that it is the Claimant's loss.

53. This finding does not, in my judgement, conflict with the authorities relied upon by the Defendant. In Burgess v Florence Nightingale Hospital, the relationship of marriage was effectively purely incidental to the loss as they were a professional dancing couple before marriage. The claim was therefore effectively one of a loss of business or employment revenue as the profits of dancing as a couple. Similarly in Cox v Hockenhull, that was a case relating to the claimed loss of state benefits for caring for a severely disabled person, namely lost income provided by the state. In the present case, there is no such income lost and no claim made and the claim is for the recovery of the separate and identifiable additional income which the Claimant and her family would have had were it not for the circumstances by which she was required to give up her career.

54. In Rupasinghe it appears that Jay J considered it noteworthy that the two children in the family were eligible to claim as dependants under the Fatal Accidents Act themselves and the rejected claim related to a reduction of the Claimant's own earnings in circumstances where the children's services dependency had already been compromised. Although Jay J stated that the Claimant could not rely "as a matter of law" upon the fact that she had lost her career because of her husband's untimely death which was factually the position, it is noteworthy that the Court of Appeal's decision in Cape Distribution Limited v O'Loughlin was not cited and it is clearly of higher authority, should the two decisions not be wholly reconcilable on their individual facts and circumstances.

55. In all the circumstances, I therefore find that when the Claimant's dependency is considered through the precise words of the statute, as interpreted by the case law, it was the Claimant's dependency on Neil which has been lost, that it is therefore recoverable in law on the basis that she had a reasonable expectation of pecuniary advantage, namely the money she would have earned at work from the continuation of Neil's life who would have continued to look after their home and their children. Finally on this point, I am not assisted by the Defendant's reliance on the Law Commission Report "Claims for Wrongful Death" (1999), as it did not appear to assist the Defendant's submission that the loss identified is something other than the Claimant's loss. The extent that it assisted in relation to my decision, it is noteworthy that the Law Commission recognised that Section 3 of the Fatal Accidents Act is a wide gateway which I have set out expressly above.

56. Having found that it is the Claimant's dependency, it is also necessary to find whether that dependency resulted from the relationship of Neil and the Claimant as husband and wife or was it simply and purely incidental to that relationship. For the reasons set out above, and distinguishing the present case on its facts from Burgess and Cox and given the nature of the relationship between the Claimant and Neil as long-term co-habitees and a married couple, they would not have decided together to foster A and B and determine that Neil would be the principal carer other than as part of their relationship, and I find their decision to foster was a joint family decision, not one of business partners or with financial motivation at the forefront.

The Valuation of the Claimant's Dependency

57. The Claimant pleads the valuation of her dependency upon two alternative bases, namely replacement care or the Claimant's loss of earnings and pension loss. If replacement care is to be adopted, it is necessary to determine which expert, namely Ms Hannon or Ms Gowans' figures should be adopted for the future noting that the Defendant has conceded Ms Hannon's figures can be adopted for the past care to date (at Paragraph 32 of the Defendant's closing submissions) and determine whether a commercial rate should be used to quantify the loss or should there be a 25% discount. Alternatively, if it is to be the Claimant's loss of earnings and pension loss, noting that the Defendant accepted the Claimant had formed the intention of returning to work albeit in the Defendant's submission for part-time flexible work, it would also be necessary to determine whether the Claimant would return to work when B was eighteen in 2029 which is the Claimant's primary submission or earlier, either at sixteen in 2027 or some other date as suggested by the Defendant in the counter schedule. There was also the question of whether the court should take into account the diminution in the Claimant's earnings when the Defendant maintains Section 3(1) of the Fatal Accident Act does not permit that to be taken into account, namely when she is able to return to the labour market at whatever time and whether the Act permits the Claimant's pension loss also to be taken into account and if so whether the pension loss calculation set out in the Claimant's schedule is correct or would it be necessary to take into account employee contributions as the Defendant maintains (at Paragraph 58 of its closing submissions).

58. The Defendant maintains that neither approach is sustainable on a matter of legal principle, the first being reliant upon the opinion of Ms Hannon but if necessary the Defendant maintained that without prejudice to its primary submission, the opinion of Ms Gowans should be preferred. Alternatively the Defendant maintains that there is no

basis in law under the Act to compensate for the Claimant's dependency on her own loss of earnings. For this submission too, reliance was placed upon the decision in Rupasinghe supra.

59. Having considered the submissions of both sides with care, I agree with the Defendant's submission in this regard that it is not appropriate to value the Claimant's dependency on the basis of the Claimant's loss of earnings and pensions loss which I find is not within the ambit of Section 3(1) of the Fatal Accidents Act. However, I agree with the Claimant that replacement care is the appropriate measure of loss to be adopted and it is therefore necessary to express a view on which expert's evidence I preferred in relation to the figures to be adopted for the future given that the parties' experts agreed figures in relation to care to date.

The Expert Evidence

60. In that regard I have considered both parties Schedules of Loss to determine the costs of child care and household and domestic assistance provided by Neil. Paragraph 10 of the Claimant's Schedule of Loss sets out the agreed position on the facts, namely that but for his suffering mesothelioma, Neil would have lived until July 2031 (aged 68.3 – a still reduced lifespan), and would have therefore provided household services and care until March 2028 when he would then be aged 65 and short-term and emergency foster care until March 2029 aged 66. As principal carer at home, he would also have undertaken the majority of the domestic tasks and services.

61. In determining the care provided by Neil to the children in term time on weekdays; term time on weekends and during school holidays when the Claimant would also be at home and school holidays when she was not at home, I am assisted by Ms Hannon's calculations. Although I was assisted by both experts, and although there was dispute between the experts, I found the evidence of Ms Hannon to be more credible. Ms Gowans stated in cross-examination that a direct comparison between her evidence and that of Ms Hannon was not possible as she had not provided her opinion on the basis of what services would be required to replace the child care and household and domestic assistance provided by Neil but rather upon what services the Claimant was now providing since Neil's death. There were therefore two vastly contrasting approaches to assessing the relevant calculations. I therefore was not assisted by Ms Gowans' evidence on the question of seeking to value the loss suffered by the Claimant with reference to the valuation of both child care and household/domestic assistance that Neil would have provided.

62. Significantly, Ms Gowans accepted in oral evidence that A and B were "challenging children" although she maintained they had progressed considerably. She also did say that the "information I was given was that the children were not as bad" although it is not clear upon what basis she reached that conclusion and as she accepted she is not in a position to give expert medical evidence in relation to ASD children, although she had considerable experience as a nursing expert of the needs of such children. Ms Hannon had calculated the child care for the two children until they were eighteen years old whereas Ms Gowans had initially in her report done so only until sixteen years old despite acknowledging that foster children can stay with foster parents until they are eighteen from which the undisputed evidence was that they would have stayed with the Claimant and Neil into adulthood. I find that particularly given the autistic and ASD condition described in relation to A and B, the Claimant would be likely to remain with

them without returning to work until they were both eighteen years old. The evidence was clear and accepted that children with the conditions suffered by A and B were not straightforward and as Ms Hannon stated "everything takes longer with children with autism". That would apply to time needed to engage the children and in particular when things did not go to plan as well as to routine matters. It was also noted that no two children with ASD conditions are the same and in the present case A and B presented with very different conditions. The parent with primary caring responsibility would need to deal with unexpected situations which may occur during school hours. I accept the evidence of the Claimant that most single parents with two autistic children would simply not be able to go to work at all.

63. With due respect to her, I do not accept the evidence of Ms Gowans that the level of child care for A who suffers with ASD and ADHD was only fifty minutes per day which would be a surprisingly low figure even for somebody without either of those conditions and certainly not for someone in A's position. By contrast, I noted that Ms Hannon stated in cross-examination that her figures were based on her assessment of the services which Neil would have provided which is of direct assistance to me in my determination and note that the Defendant accepts at Paragraph 32 of its closing submissions that it "would not quarrel with the approach of [Ms Hannon with regards to past child care]". I also do not regard it as significant that A and B did not have an Education Care Health Plan because they remained on the special educational needs register and the evidence of Carol Noble was that the school obtained additional funding for admitting them via the pupil premium which allows for 1-1 sessions and that local authorities are reluctant to issue ECHPs in any event. The lack of ECHPs I find is an indication of the remarkable and impressive dedication of the Claimant and Neil and the care that they have provided to A and B. The requirement of the Foster Plus arrangement still remains that the parent needs to be available and not working. Whilst it may be that the children's need for long term child care may extend beyond the age of eighteen, I regard Ms Hannon's assessment as realistic and Ms Gowan's where she maintained it would be only to the age of sixteen to be unrealistic in the particular circumstances relating to A and B. Therefore, I find that the appropriate basis of assessment is the replacement care and for the purposes of calculation I preferred the evidence of Ms Hannon summarised at Section 7 and 8 of the Schedule of Loss and accept her assessment of Neil's household services of cleaning, laundry, shopping and meal preparation to be seven hours per week for the Claimant alone and a further seven hours per week for household services relating to the children; his household administration services at two hours per week; her assessment of Neil's DIY and decorating services for the Claimant alone at the commercial rate (see below); the commercial cost of Neil's window cleaning services and gardening services and pet care services and driving services as set out in the Schedules of Loss.

64. In relation to the proper measure of damages, having considered paragraph 14 of the Defendant's Further Written Submissions on Alternative Child-Care Calculations dated 10 December 2019, I nonetheless rely upon the decision of Bean J in Knauer v Minister of Justice [2014] EWHC 2552 and see no reason why the proper measure of damages for those services should be anything other than their commercial cost particularly relying upon the evidence which I accept from Ms Hannon in this regard. Although the Defendant contended at Section 8 of the counter schedule that the figures presented by Ms Hannon behalf of the Claimant were "excessive" and that a "more conventional" annual sum should be awarded relying in part upon Rupasinghe in which Jay J

acknowledged at Paragraph 49 that a different approach is sometimes is taken to quantification in respect of the application of commercial rates or discounted commercial rates, Jay J did not analyse when the court ought to apply the commercial rate and when not and Knauer supra as well as Lowe v Guise supra and Daly v General Steamship Navigation [1981] 1 WLR 120 all support the proposition that the proper measure damage is the "estimated cost of employing labour for that time". As set out in Daly at page 127, the question in respect of the Fatal Accidents Act dependency claim is not whether care is now being supplied to Neil on a gratuitous basis for injury suffered, because sadly he is deceased, but instead the court is required to determine the value of the service which would, but for his death, have been provided by him and is not a valuation of the service provided to an injured Claimant. I consider the correct approach is seeking to value the services that the Claimant lost as a result of Neil's death not the valuation of the services now provided by the Claimant which appears to be the Defendant's and Ms Gowans' position. Following that logic, I find not simply that the commercial rate is the appropriate rate to apply but also there should be no 25% discount that the Defendant maintained reflects the fact that care would be provided to them on a gratuitous basis but which for the reasons set out above I do not consider to be the correct approach. The Defendant sought to rely upon Housecroft v Burnett [1986] 1 All ER 332 CA, in which it is noted Daly was not cited. That case concerned a situation where a relative provides care to an injured person which is very different from the present circumstances involving a death and in any event O'Connor LJ in that case stated that where a person gives up employment to look after another they are entitled to recover the loss of earnings albeit that "the ceiling would be the commercial rate", at Page 14. In the circumstances, I find that it is not simply the commercial rate that should be applied but it would also therefore follow that no discount of 25% would be appropriate.

The Heads of Awards of Damages

Award for Pain Suffering and Loss of Amenity

65. I have considered the very recently published sixteenth edition of the Judicial College Guidelines which puts the bracket for mesothelioma between £59,730 and £107,410 (at Page 26). The figures have been uplifted for RPI to June 2019 and the further rise to November 2019 is 0.8% which would bring the brackets to between £60,208 and £108,269. The editor's note refers to most reported decisions save for those involving extremely short periods of symptoms or very elderly claimants fall within the middle and upper parts of the brackets. The mid-point of that range would be £96,254. I have taken into account the authorities relied upon by both parties in particular Grant v Secretary of State [2017] EWHC 1663 in which the award for general damages would be around £98,500 after inflation when there were some similar factors or counterbalancing ones, for example in that case there was a long duration of symptoms whereas the deceased in that case was considerably older and Blake v Mad Max Limited [2018] EWHC 2134 where the award for general damages would be around £93,500 after inflation for a similar period of symptoms but a Claimant who was older than Neil, and the submissions made on behalf of the Defendant noted how long the Claimant suffered the disease in Grant and in respects of Blake making reference to the agreement that Neil would have had a significantly reduced life expectancy for other reasons equating with a man aged around sixty-eight at death but also noting that in oral submissions, Mr Kent QC accepted that it would be difficult to argue for a figure below

£95,000, I find that the appropriate award for damages for pain, suffering and loss of amenity in the present case, allowing for inflation and applying the latest Judicial College Guidelines, is **£97,500**

Miscellaneous Costs, Personal Care and Assistance

66. The parties compromised the quantum for personal care and assistance at the date of closing submissions in the sum of **£25,000.**

Miscellaneous Costs

67. Most elements of this head of loss were agreed. The only outstanding issue was the hospice costs. I have considered the breakdown of hospice costs at Bundle 2 tab 49 and in accordance with the decision in Drake v Foster Wheeler [2010] EWHC 2004 QB which authority is acknowledged at Paragraph 7 of the Defendant's closing submission where the Defendant accepted that that set out the appropriate approach whereby an award based upon the reasonable voluntary contribution of the personal representative of a deceased would wish to make to a hospice, if able to afford it, in order to acknowledge the care provided at no financial cost to the deceased is applicable. But I find that there is no need to treat the cost of care by the hospice with any level of scepticism as once the principle is established that the cost of the hospice in providing Neil's care is properly recoverable, which appears to be the final position of the Defendant, there is no reason to go behind the actual cost of the hospice and award a lower sum. I therefore find that the costs that Katherine House Hospice have set out at Page 484 of the trial bundle properly represented the cost of care provided to Neil and I therefore make the full award under this head of **£16,063.32**.

Funeral Costs

68. This figure has been agreed between the parties as **£6,859**.

Interest on the Law Reform (Miscellaneous Provision) Act Claim

69. The parties have agreed the rate of interest to be 2% from 17 December 2018 to 6 December 2019 for pain, suffering and loss of amenity and 0.25% from 1 January 2018 to 6 December 2019.

The Fatal Accident Act Claim

Bereavement Award

70. This figure has been agreed in the sum of **£12,980**.

Dependency on Neil's Child Care and Domestic Services

71. Applying the Claimant's Schedule of Loss, my findings in relation to the dependency of the Claimant upon the deceased's child care and domestic services from January 2019 and applying the Ogden Table 28 multiplier in respect of March 2029 by which time the children will be twenty-three and nineteen years old respectively, which includes part-time fostering duties from March 2028 to March 2029, the former period

being the time the children would have been twenty-two and eighteen requiring full-time fostering duties and applying the commercial valuation of child care and domestic/household services in accordance with the expert evidence of Ms Hannon with no deduction, I find that the appropriate award for the valuation of lost child care and domestic/household services to be **£666,181**.

Dependency on Other Services

72. I have accepted the evidence of Ms Hannon in relation to the lost services by Neil's death comprising gardening at £1,280 per annum; decorating and DIY at home in the sum of £631 per annum; transport and driving in the sum of £2,500 per annum; window cleaning in the sum of £160 per annum; dog walking in the sum of £3,640 per annum and fish care in the sum of £2,379 per annum comprising a total annual value of other services in the sum of £10,590. The claim for decorating for Mrs Neath at £485 per annum was abandoned by the Claimant. By applying a multiplier of 9.41 that would give a loss for which I make the award in the sum of **£99,651.90**.

Loss of Unique Spousal Care and Affection

73. The parties agreed this item at the beginning of the trial in the sum **£2,500**

74. The total award, is therefore **£926,735.22** plus interest in the sum of **£2,122** making a total sum of **£928,857.22**.

75. In conclusion, I would once again like to thank again the extremely helpful submissions of all Counsel, Mr Snowden QC and Mr Swoboda for the Claimant and Mr Kent QC for the Defendant and their oral submissions which have been of considerable assistance in this extremely complex area of the law, and to convey my respect to the Claimant for the dignity in what must have been a distressing hearing, at how she conducted herself throughout the hearing.

76. I shall hear submissions on costs.