Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

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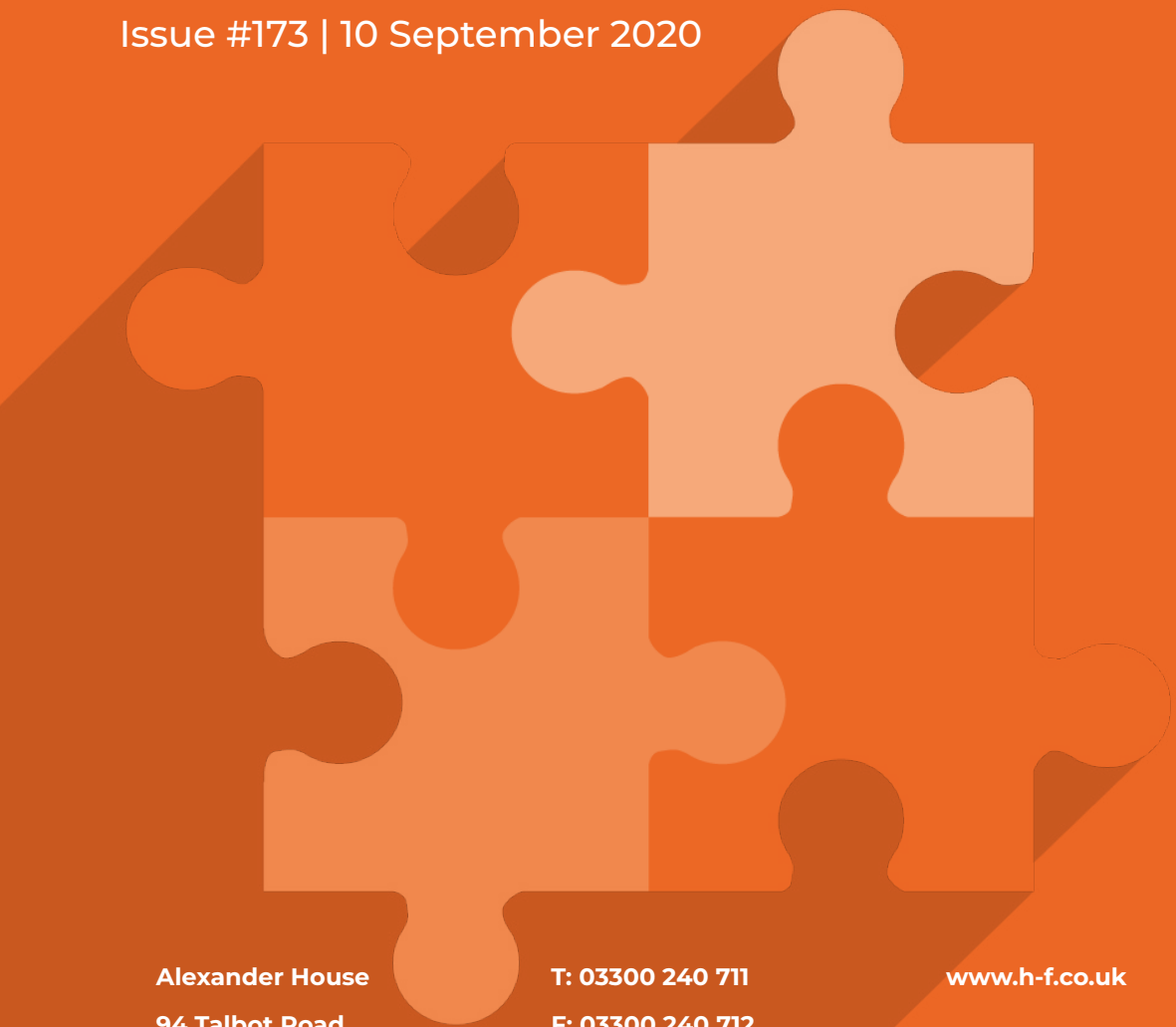

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Welcome to Insight

Welcome to this week's edition of Insight in which we report cases relating to:

- Damages in a Fatal Accident Act claim
- An attempt to introduce a new expert close to trial

Malcom Henké
Partner & Head of LACIG

Quantum/Fatal Accident Act

Rix (Deceased) v Paramount Shopfitting Company Limited (2020) EWHC 2398 (QB)

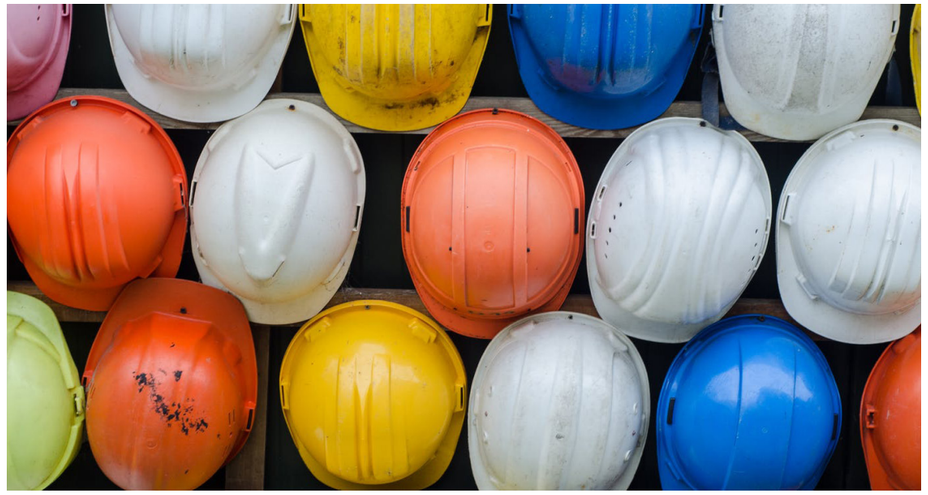
This was a claim for damages arising from the death of the claimant's husband (the deceased), on 20 April 2016, from an asbestos-related mesothelioma, at the age of 60. The mesothelioma had been contracted by the deceased, many years before, when he was exposed to asbestos whilst working for the defendant company as an apprentice carpenter/shopfitter in the 1970s. Liability was admitted by the defendant.

After leaving the defendant's employment in the 1970s, the deceased spent the rest of his working life building up a successful business. At the time of his death, he ran a profitable company, which had three main lines of business, construction/ building, joinery, and the manufacture of granite worktops. Shortly before the deceased fell ill, in October/November 2015, the business had moved into purpose-built premises.

The claimant brought claims under the Law Reform (Miscellaneous) Provisions Act 1934, and the Fatal Accidents Act 1976 ("FAA"). The claimant's primary contention was that her financial dependency should be calculated by reference to her share of the annual income that she and the deceased would have received from the business if he had lived ("Basis 1").

The secondary, alternative, contention was that her financial dependency should be quantified by reference to the annual value of the deceased's services to the business as managing director, calculated by reference to the cost of employing a replacement ("Basis 2"). These were the only issues to be determined at the trial.

The defendant denied that the claimant had a financial dependency claim at all, because the family business had been more profitable since the deceased died than before his death, and argued in addition, that each of the two methods of quantification relied upon by the claimant were misconceived.



The High Court Judge found that there was no doubt that, prior to her husband's death, the claimant was financially dependent on her husband. He was the main breadwinner. However, the figures showed that the business which was the source of his income had continued to thrive, even after his death. It had become more profitable than before. The claimant's shareholding in the business was greater now than it was before the deceased died.

After reviewing the applicable law and the authorities, the judge set out the following findings of principle:

> (1) The question whether there had been a loss of financial dependency, and, if so, how much, was a question of fact.
>
> (2) The courts would take a realistic and common-sense approach to these questions.
>
> (3) There was no hard-and-fast or prescriptive approach to the determination, or quantification, of loss of financial dependency.

'Where…the deceased worked in a business that benefited from his or her hard work, the dependants would have lost the value of that hard work as a result of the deceased's death and so would have a financial dependency claim'

(4) There was a difference between an income-producing asset, such as a rental property or an investment, on the one hand, and a business which was benefiting from the labour, work, and skill of the deceased, on the other. Where the value of an income-producing asset was unaffected by the deceased's death, there was no financial loss or injury as a result of the death, and so there was no claim for loss of financial dependency in relation to it under S3 FAA. Where, however, the deceased worked in a business that benefited from his or her hard work, the dependants would have lost the value of that hard work as a result of the deceased's death and so would have a financial dependency claim.

(5) The question whether a dependant had suffered a loss of financial dependency, for the purposes of S3 FAA, was fixed and determined at the date of death.

(6) It followed from the fact that the loss of financial dependency was fixed at death that, in a "work/skill" case, the existence of the right to claim loss of dependency, and the value of the loss, was not assessed by reference to how well the business had been doing since the deceased's death;

(7) Moreover, a dependant could not by his or her own conduct after the death affect the value of the dependency at the time of the death; and

(8) Therefore, even if the business was now thriving and doing better than ever, the law would treat there as having been a financial injury and so a loss of financial dependency.

Applying his findings on the evidence to those principles, the judge held that:

(1) The claimant had a financial dependency claim arising from the death of her husband.

(2) That claim was to be quantified by reference to the earnings that she would have continued to receive from the work done by her husband in the family company if he had survived. This was Basis 1. No discount should be made for the fact that the company had, in fact, thrived since the deceased died and the claimant had continued to receive an income from the business.

(3) The annual value of the financial dependency claim, for each year in which the deceased would have continued to work full-time in the business was £75,108 for the period from 20 April 2016 to 30 June 2019, £64,616 for the period from 1 July 2019 until 20 May 2021, £67,460 pa from 21 May 2021 to 20 March 2022, and £64,612 thereafter.

(4) The deceased would have continued to draw an income from the business after retirement from full-time work. He would have drawn 20% of the income that he drew when in full-time work; and

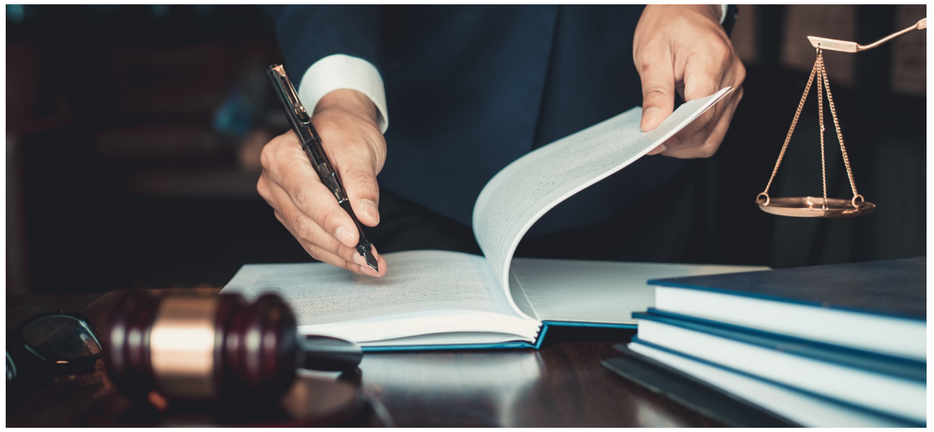
(5) The question of an appropriate deduction for personal expenses under Basis 2 did not arise. If it had arisen, the appropriate deduction would have been 17.5%, not 33%, because of the deceased's relatively modest expenditure on himself.

The claimant was represented by Irwin Mitchell LLP

The defendant was represented by DAC Beachcroft Claims Ltd

Comment

The judge commented that there was some logic in both parties' positions. Neither argument was self-evidently wrong, but the answer was to be found in three leading Court of Appeal authorities, which he considered in detail: Wood v Bentall Simplex Limited (1992); Cape Distribution v O'Loughlin (2001) and Welsh Ambulance Services NHS Trust and another v Williams (2008).



Substituting an expert close to trial

Hinson v Hare Realizations Limited (2020) EWHC 2386 (QB)

The claimant appealed against the decision of a recorder whereby she refused his application to adjourn the trial and to rely on an expert acoustic engineering report in place of the report from the single joint expert who had been instructed by the parties.

Having dismissed the application to adjourn, the recorder proceeded to hear the evidence and, having exercised her discretion to override the provisions of S11 Limitation Act 1980 (the Act) and allowed the claim to proceed pursuant to S33 of the Act, she dismissed the claim on its merits on the basis that the claimant had failed to persuade her that he had been subjected to a daily exposure of more than 90 dB (A) which, it was agreed, he needed to do if the claim was to succeed.

The claimant was employed by the defendant for about 10 years between 1976/77 and 1986/87. He worked in the Machine Shop and claimed to have been exposed to high levels of noise without being provided with any or adequate hearing protection or any training regarding the risks associated with exposure to excessive noise.

Proceedings were issued in September 2017, alleging negligence and breach of statutory duty and seeking damages for Noise Induced Hearing Loss ("NIHL"). The claim was supported by a medical report from a consultant ENT surgeon. A defence denying liability was served.

A district judge made an order allocating the claim to the fast-track and giving directions. There were then discussions between the parties as to the instruction of a single joint expert to produce an engineering report. The single joint expert's report was sent to the parties but did not support noise levels which would have been sufficient to enable the claimant to succeed in his claim.

The claimant's solicitors raised questions of the expert, pursuant to CPR Part 35, the responses to which led to a letter from the defendant's solicitors to the claimant's solicitors highlighting what was, in their view, the lack of merits and prospects of success in relation to the claim.

The trial was originally listed to be heard on 5 November 2019 but was vacated due to lack of judicial availability and relisted for 6 December 2019. At that stage, there had been no application to adjourn the trial or for permission for the claimant to rely upon an alternative expert. The second trial date was also vacated, this time on the claimant's application as he was in hospital and unable to attend. On 19 December 2019, the court relisted the trial to take place on 27 February 2020.

What then happened was that, on 20 December 2019, in discussions with another expert, in relation to another claim

for NIHL, the claimant's solicitor learned that there were, or might be, deficiencies in the single joint expert's report relating to the applicability of the PERA Survey of Noise in Engineering Workshops (1996) setting out typical machine shops noise levels.

Taking advantage of the further delay, on 23 December 2019 the claimant applied to the court to put further Part 35 questions to the single joint expert, based upon what the solicitors had learned from the other expert. A district judge granted permission to the claimant to put the further Part 35 questions to the single joint expert.

On 10 February 2020, the claimant's solicitors wrote to the defendant's solicitors advising that they were "obtaining the claimant's instructions" in the light of the single joint expert's further replies: at the same time, the claimant's solicitors commissioned a report from the other expert, although they did not inform the defendant that they were doing so. This new report, which was favourable to the claimant, was received by the claimant's solicitors on 24 February 2020, three days before the date listed for trial, and an application was immediately issued for an order that would have vacated the trial; reallocated the claim to the multi-track; and given the claimant permission to rely on the new expert's report.

In successfully opposing the application, the defendant placed considerable emphasis on the lateness of the application. It was pointed out that this was a relatively low value, fast-track claim where the claim for damages for pain, suffering and loss of amenity was limited to £5,000.

Submissions were made about the relative merits of the experts' reports but the strongest emphasis was placed on the overriding objective involving considerations of "saving expense, dealing with cases in a manner which is proportionate to the amount of money involved and the complexity of the issues and dealing with case expeditiously and fairly; also allotting an appropriate share of the court's resources while taking into account the need to allot resources in other cases also."

Dismissing the claimant's appeal, a High Court Judge held that the starting point was that the hurdle faced by a claimant in seeking to persuade an appellate court that the exercise of discretion by a judge at first instance was erroneous was a significant one.

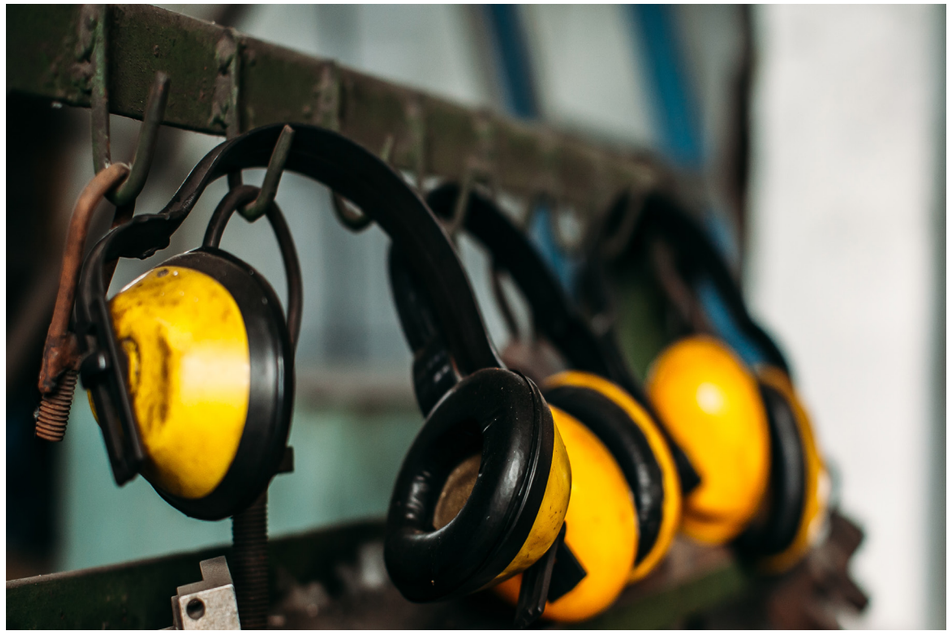
The correct approach to applications by parties to abandon a single joint expert and adduce their own expert evidence was that set out in Bulic (2012) which also referred to the Court of Appeal decision in Daniels v Walker (2000).

'…the Recorder was faced with the clear task of balancing the interests of the parties, taking into account not only the overriding objective but also the interests of justice generally…'

The judge concluded that "In the present case, the Recorder was faced with the clear task of balancing the interests of the parties, taking into account not only the overriding objective but also the interests of justice generally in seeing that cases are decided expeditiously, at proportionate cost and without undue inconvenience to other parties.

The approach of the Recorder to this task was impeccable. She was fully aware of the interests of the claimant and in particular the fact that the evidence of the single joint expert was central to the issues in the case, was technical and that the claimant had good reason for wishing no longer to rely upon that report. She also took into account that, for whatever reason, the application was being made at a late stage in a case which had already been adjourned twice, albeit not for reasons for which any blame could be attached to the claimant.

She took into account the fact that, but for the non-availability of a judge, the case would have been decided the previous November without any such application being made and the fact that the single joint expert had been chosen by the claimant and the claimant had raised questions of that expert on two occasions. She took into the account the fact that if she acceded to the claimant's application, what



would otherwise would have been fast-track trial would become a multi-track trial with a significant increase in costs.

Finally, she took into account the late stage of the application and the fact that it would involve the breaking of a fixture with potential waste of court time and inconvenience to other parties. She did not emphasise any particular aspect unduly, to the exclusion of other aspects, but she weighed up all those matters before deciding to exercise her discretion in the way that she did.

The decision by the Recorder was well within the generous ambit of her discretion and it could not be said that she erred in law or applied the wrong test or otherwise so misdirected herself that her decision was capable of challenge."

The claimant was represented by Walker Preston Solicitors

The defendant was represented by DWF Law LLP

Comment

This case is a reminder that, particularly in lower value cases, even meritorious applications may fail when they are made late in the day and threaten an existing trial date.

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