Insight 206

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of Insight, in which we report on the recent Court of Appeal ruling in the case of Paramount Shopfitting Co Ltd v Rix. The Court of Appeal considered whether a widow was entitled to a financial dependency award under the Fatal Accidents Act 1976 where she had received income as a director and shareholder from a family business which she had not worked in herself.

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Skill, knowledge, hard work and business flair.

Paramount vs Rix

We briefly reported on the decision of the High Court in Insight #173 in September 2020. We now look at the case in more detail.

Background

The claimant's husband ('the deceased') had died at the age of 60 from mesothelioma which he had contracted due to exposure to asbestos during the course of his employment with Paramount Shopfitting. After he had left Paramount Shopfitting he had built up a successful family business. The deceased and the claimant each had a 40% share of the business. The remaining 20% was divided equally between the deceased's two sons. The claimant did not work for the business.

In the year before his death the deceased took a salary of £8,060 and a net dividend of £18,999. The claimant was a director of the business and took a salary of £11,124 and a net dividend of £28,000. The claimant inherited the deceased's share of the business on his death and the business was then run by his two sons.

The claimant contended her financial dependency should be calculated by reference to her share of the annual income she and the deceased would have received from the business had he lived, or alternatively by reference to the annual value of the deceased's services to the business as managing director calculated by the cost of employing a replacement for him.

The defendant denied the claim for financial dependency on the basis the family business had been more profitable following the deceased's death and that the claimant's interest in the business was essentially a capital or income producing asset which precluded any claim for financial dependency.

The defendant further contended the claimant's salary and dividends did not count towards any financial dependency on the deceased as they were the claimant's own income.

The High Court Decision

The High Court held the claimant was entitled to a financial dependency award.

Under s3 of the Fatal Accidents Act 1976 a dependant could only recover damages if they suffered financial loss resulting from the death of the deceased. Notwithstanding the business was more

profitable following the death of the deceased dependency was established. The deceased's business produced an income for the family which was a consequence of the deceased's skill, knowledge, hard work and business flair.

Although the claimant was a director and shareholder of the business the reality was that the deceased was responsible for the success of the business. The claimant at the time of the deceased's death had a reasonable expectation of financial reward from the continuance of the life of the deceased.

The value of dependency was fixed at the time of death and the increased profitability of the business after the deceased had died was irrelevant.

The income received by the claimant from the business was entirely the result of the work put into the business by the deceased. It could not be said that such income did not count towards any financial dependency.

The claimant's and the deceased's shareholdings in the business could not be regarded, as the defendant contended, as an income or capital asset independent of the deceased's work and labour.

The correct approach to quantify the dependency was by reference to what earnings the claimant would have received if the deceased had survived with no discount for the increased profitability of the business.

Grounds of appeal

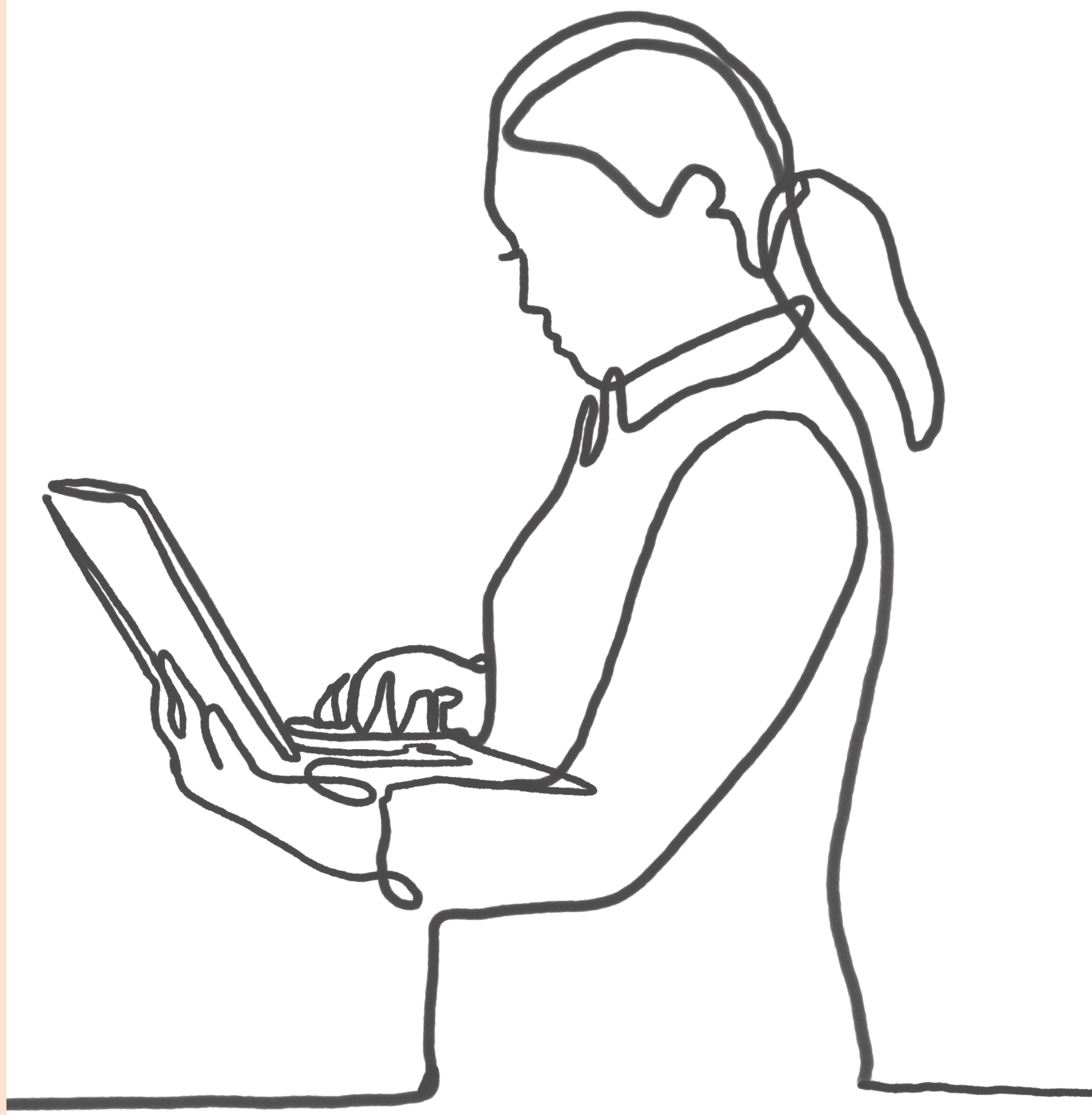
The defendant appealed the decision of the High Court Judge contending:

1. The Judge was wrong to treat all the profits generated by the family business as a basis for financial dependency without regard to whether those profits had survived the deceased's death and continued to accrue to the widow.; and
2. The Judge was wrong to treat the widow's entitlement to a share of profits from the business from her own shareholding as if it had belonged to the deceased.
3. The Judge was wrong in confining credit for surviving income to income other than profits from the business

Court of Appeal decision

The Court of Appeal concluded the following principles can be identified as to the correct approach to take when considering financial dependency under s3 of the Fatal Accidents Act 1976:

1. The question to be addressed is what is the extent of the dependants' loss based upon a reasonable expectation of pecuniary benefit from the continuance of the life of the deceased?
2. The assessment is dependent on the facts of the particular case.
3. Capital assets which the dependants had the benefit of during the deceased's lifetime and continued to enjoy following the death are not taken into account, either as part of the dependency or as a deduction from it.
4. The question for the court is how much loss has arisen because the deceased is no longer alive and able to work, and how much of the deceased's income was derived solely from the capital which the



dependants have inherited.

5. The dependency is fixed at the moment of death, it is what the dependents would probably have received as a benefit from the deceased had the deceased lived. Post death events are irrelevant, save for those which affect the continuance of the dependency and the rise or fall in earnings to reflect the effects of inflation.
6. The damages awarded under the Fatal Accidents Act can be greater than would be justified upon a strict view of the dependants' loss.

Ground 1

The CA held it was critical to distinguish between the loss of the income derived from the services of the deceased and the loss of income derived from the capital asset. If what is lost was a capital asset inherited by the dependant and it was an asset which was generating income for the dependant prior to the deceased's death, then no loss has resulted from his death following the inheritance. If, however what the dependant has lost is not income derived from a capital asset but the contribution of the deceased as the manager of the business and family assets, the flair, skill, expertise and energy in the wealth creating project upon which the deceased was engaged in, that is a loss which can be valued in money.

Income is only derived from capital if it is identifiable as having been received without the labour and services of the deceased. This did not apply in this case. The loss of the claimant was the loss of income generated by the deceased's services to the business

On this basis the whole of the profit available to the claimant and the deceased was earned income and part of the financial dependency.

Ground 1 of the appeal was dismissed.

Ground 2

The CA held, agreeing with the reasoning of the High Court, that the salary and dividends received by the claimant were the result of the work put into the company by the deceased. None of it represented her own earnings for work done. It was therefore correct to find the salary and dividends should be included.

Ground 2 of the appeal was dismissed.

Ground 3

Given the Court had found that all the income of the claimant and the deceased was wholly attributable to the endeavours of the deceased no portion of the claimant's post death income was independent of the deceased and unaffected by the deceased's death. It followed there could be no deduction of monies received by the claimant from the business post death of the deceased.

Further any such deduction would contravene the principal that dependency is fixed at the date of death.

Ground 3 of the appeal was dismissed.

Valuation of Dependency

The Court of Appeal noted the High Court had valued the dependency on what income from the deceased's services would have been (Basis 1) rather than the cost of employing a replacement for the deceased (Basis 2).

The basis of assessment is case specific. The High Court were perfectly entitled to adopt Basis 1 when assessing dependency.

Commentary:

The key issues to take from this case when assessing dependency on income derived from a family business are

- Dependency is fixed at the date of death. Post death events are generally irrelevant.
- The fact the business is more profitable post death is irrelevant.
- If income derives from a capital asset independent of the deceased, it cannot form part of the dependency.
- If the income is derived from the contribution to the business by the deceased, it does form part of the dependency.
- In the case of a surviving spouse who receives income from the business the court will take a practical view, and no deduction from dependency will be made unless the surviving spouse's income is derived from an active contribution to the business independent from the deceased and unaffected by the deceased's death.

We do not anticipate a further appeal by the defendant.