KNAUER V MINISTRY OF JUSTICE – A REVIEW

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Summary

- The Supreme Court has overturned previous House of Lords authorities (including *Cookson v. Knowles*) on the calculation of multipliers in Fatal Accidents Act claims, and claimants will now receive more compensation

- Past losses in Fatal Accidents Act cases should be calculated as they would in non-fatal cases, but with a small deduction for contingencies other than mortality (as per the Ogden Tables) – future losses should be calculated using a multiplier starting at the date of trial

- All parties should review any existing 'fatal' claims within their case load, redraft their schedules (or counter-schedules) if necessary, and consider whether any existing Part 36 offers should be revised or withdrawn

Background

When *Cookson* [1979] AC 556 was decided music was all sold on vinyl; Mrs Thatcher had just become Prime Minister; and the Soviet Union stirred up worldwide protest by invading Afghanistan. Only two members of the current PI team were in practice, and several others had not yet been born.

Much has changed since then, but until *Knauer*, the law on the calculation of losses in FAA 1976 claims remained the same.

In any FAA case the court has to determine an annual multiplicand – a figure which represents the value each year of the financial support and the loss of services that the deceased's dependants have suffered as a result of the death. Under *Cookson* the court would then use the deceased's date of *death* as a starting point, and use that date to calculate a multiplier for the entire loss of dependency (past and future). The period of time which had elapsed between the death and the trial would be calculated, and deducted from that multiplier. That deduction represented 'past' losses; the remainder of the multiplier represented the claimant's 'future' loss.

The main problem with this approach arose because multipliers for future loss are (and have for a long time been) calculated using the Ogden Tables. The multipliers in those Tables recognise the fact that if a claimant is to be compensated for the loss of, say, £10,000 per annum for a period of 10 years, then simply giving him or her £100,000 will result in over-compensation, because s/he will have all the money in a lump sum right away. To counteract this, the tables include a discount for accelerated receipt: they enable the Court to work out the *present* value of a party receiving a specified sum each year over a given period of time.

This characteristic of the Tables (the discount for accelerated receipt) means that if multipliers derived from them are applied to *past* losses then the claimant will end up giving a 'discount' for the early receipt of money that he or she has not in fact had. This is the outcome that *Cookson* was producing in respect of claimants' past losses.

It was a result that was heavily criticised, not least by the Law Commission, and for many years PI practitioners have recognised that *Cookson* was an authority ripe for challenge. Even prior to the decision in *Knauer* many experienced claimant lawyers were pleading their schedules using multipliers for future loss based on the date of trial, not the date of death, in anticipation that defendants would settle cases at a level of damages somewhere between the two approaches.

In *Knauer* the point has finally been addressed, and the problem rectified.

The decision

The Supreme Court recognised the bald fact that the approach mandated by *Cookson* "*results in under-compensation in most cases*" (paragraph 7), and then considered why the 'error' (my word, not theirs) had been made. Their answer was that *Cookson* "[was] *decided in a different era, when the calculation of damages for personal injury and death was nothing like as sophisticated as it now is*" (paragraph 12).

The Court then went on to distinguish the *pre*-Ogden approach, which it described as "*wholly unscientific*", and as having followed accepted rules of practice "*which depend[ed]... upon being 'in the know' rather than reality*" (paragraph 12), from the *post*-Ogden approach. The Ogden Tables are described as "*a staple of personal injury and fatal accidents practice*", and the Court repeated the guidance given in *Wells v. Wells* [1999] 1 AC 345, reiterating that

> *the tables should now be regarded as the starting-point, rather than a check...* [and that] *a judge should be slow to depart from the relevant actuarial multiplier on impressionistic grounds, or by reference to a spread of multipliers which were fixed before actuarial tables were widely used* (paragraph 16).

In these circumstances, where the previous House of Lords authority was producing obvious injustice with uniform regularity, and where there had been "*a material change in the relevant legal landscape since the earlier decisions, namely the decision in* Wells v. Wells *and the adoption of the Ogden Tables*", the Supreme Court considered that the case for overturning its own earlier decision was "*overwhelming*" (paragraph 23).

What approach should be taken now?

Past losses (from the date of death to the date of trial) are now to be calculated in a similar fashion to those in *non* fatal cases, but with a small deduction to take account of the possibility that the deceased (to use the words of the Law Commission) – might in any event have died or given up work before trial. Guidance on how to do this is given in the Ogden Tables (see page 42 of the current edition of the PNBA's *Facts and Figures*, or consult your friendly local barrister if unsure).

Future losses are then calculated taking the date of trial as the starting point for the multiplier.

Practice points

These are, in essence, as set out in the final bullet point above. Claimants who have pleaded their schedule of loss on the 'old' basis should revise it and send a copy to the defendant at the first opportunity. All parties would be wise to co-operate to implement any changes to both schedules and counter-schedules that might be required as a result of this change in the law.

Claimants who have made Part 36 offers which are premised on the value of the claim under the 'old' approach should consider whether those offers are now too low, and if they are they should be formally withdrawn in accordance with the requirements of the CPR. Defendants should look at existing offers that claimants have been made and may wish to consider trying to accept them.

Defendants should also consider any Pt 36 offers that they have made themselves, and determine whether they should now be increased.