

Quantum update

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CHAMBERS

Cases

- *Haxton v Phillips Electronics [2014] EWCA Civ 4*
- *Reaney v (1) University Hospital of North Staffordshire NHS Trust and (2) Mid-Staffordshire NHS Foundation Trust*

Haxton - Facts

- FAA claim
- Mr. H employed by Defendant for 45 years.
- Exposed to asbestos and develops mesothelioma in 2008
- Died in 2009.
- Mrs. H brings the claim, damages agreed and consent order made.
- She *also* had contracted mesothelioma from asbestos exposure
- The claim she had brought (as a Dependant) was settled on the basis of a life expectancy of 0.7 years (which she had outlived).

Haxton - Facts

- She then brings her own claim
- Damages agreed save for one item:
- *“but for Phillips’ negligence, her life would not have been cut short and the assessment of her dependency claim in the first action would have been significantly greater.”*
- = £200,000
- Refused at first instance so Claimant appeals.

Haxton – Claimant’s submissions

- Starting point is the passage from Lord Blackburn in *Livingstone v Raywards Coal Co (1880) 5 App. Cas 25,39:*

“...Where an injury is to be compensated by damages, in settling the sum of money to be given...you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong...”

Haxton – Claimant’s submissions

- Next step was to establish a causal link
- And then establish the extent of that loss
- Lord Nicholls in *Kuwait Airways v Iraqi Airways* (Nos 4 and 5) [2002] 2 AC 883 –

“the inquiry is whether the plaintiff’s harm or loss should be within the scope of the Defendant’s liability, given the reasons why the law has recognised the cause of action in question. The law has to set a limit to the causally connected losses for which a defendant is to be held responsible.”

Haxton - Defendant's submissions

“I consider that it would be wrong as a matter of principle for me to permit the use of second proceedings to enable Mrs. Haxton to recover what she was not entitled to claim for loss of future dependency in the first proceedings.

...there is no future dependency on her husband to which she is entitled beyond her predicted life expectancy. Mrs. Haxton has made a full recovery in the second proceedings of what he was entitled to, including her own claim for lost years.”

Haxton – Defendant's submissions

- It was inconsistent with the scheme of the Fatal Accidents Act to allow Mrs. Haxton to recover in her own right what she was unable to recover in her dependency claim.
- There was no claim to dependency loss at common law. The act was intended to remedy that wrong and did so in careful and deliberate way.
- It was true that the defendant has caused loss but that was not sufficient grounds for a claim in law.

Haxton - Decision

- The critical question was whether there was any reason of principle or policy that should deprive the appellant from recovering damages to reflect the loss she has in fact suffered.
- There no policy objection.
- No reason why the diminution in the value of that right (a Statutory right) that results from the negligence of the respondent cannot be recovered as a head of loss in Cs own personal action.

Haxton - Decision

- Allowing such a loss does not involve any interference with the principles governing the payment of compensation under the legislation.
- There was nothing that could be inferred from the legislation to indicate otherwise.
- It is a common-law claims damages and it is a claim to diminution in the value of a valuable chose in action, a statutory right.

Haxton - Decision

- Certain authorities lend support to that conclusion.
- *Fox v British Airways [2013] EWCA Civ 972* – Claimant died 3 weeks after dismissal. Had he not been dismissed his dependents would have benefitted from a death in service payment (3 x salary). Benefit belonged to the son, the dismissal removed the benefit and he should be compensated if dismissed unfairly. Therefore a diminution in the value of a contractual right may be recoverable even if not directly suffered by the claimant.
- Same situation here.

Haxton - Conclusions

- Necessarily will only apply to very few claims
- Does not have to be the same Defendant
- Still have to prove that you would have succeeded in establishing that part of the claim that is said has diminished in value.

Reaney - Facts

- Diagnosed with transverse myelitis in December 2008 - T7 paraplegic.
- During a period of hospitalization she suffers deep grade 4 pressure sores and severe sequelae.
- The TM would have kept her in a wheelchair for life.
- The issue was to what extent the sores and the sequelae have made her essential condition *worse than it would have been* but for their development and what damages should therefore be paid by the Defendant.

Reaney – the ‘but for’ scenario

- Defendant (Tromans) = Because of pre-existing problems she would not have been able to achieve independent transfers after the onset of her paraplegia irrespective of the pressure sores.
- Claimant (Gardner) = She would have been able to manage transfers independently with a sliding board at least until 70, by which time she would probably have required some help, and then greater help at 75.
- Decision = Preferred the evidence of Gardner.

Reaney – the ‘but for’ scenario

- The consequence would have been a far better quality of life
- Importantly – would not have needed a carer 24/7. Her care would have been from family and the LA (a carer each morning for 60 mins).
- Current care – 24hr care by two carers

Reaney – Defendant's submissions

- Cannot be liable to compensate for any loss that had occurred before their breach of duty which would have occurred in any event (*Performance Cars Limited v Abraham [1962] 1QB 33*).
- Must take your victim as you find him, whether it be to the advantage or disadvantage of the Claimant.

Reaney – Defendant's submissions

- Only liable for the additional disability.
- The Claimant's approach involved the proposition that just because she can identify someone with the funds to pay for what she reasonably requires, that person must pay for all of them, regardless of the situation beforehand.
- Recognised that the submissions are unattractive, but the law is on D's side.

Reaney – Decision

- For practical purposes the Claimant's case can be distinguished from those cited by D.
- In all those claims both acts were tortious, meaning that there were therefore potential compensators available for the full loss.
- *It is clear from these cases that where there are two distinct tortious acts causing distinct injuries, those responsible are not to be seen as concurrent (or joint) tortfeasors and thus responsible for the whole damage. Where distinct tortious acts cause the same damage, the position may, of course, be different.*

Reaney - Decision

- Where a Defendant has been shown to have done one or the other of these things in relation to an injury sustained by the claimant, then that claimant is entitled to full compensation.
- The question of how aspects of that compensation full to be evaluated in financial terms presents difficulties where one half of the claimants overall disability was not caused or contributed to by the only wrong doer available as a compensator.

Reaney – Decision

- *Sklair v Haycock* [2009] EWHC 3328
- Care would have been met by Husband and Local Authority.
- No credit save for where there had been actual expenditure.
- Value of voluntary care should not be taken into account.

Reaney - Decision

“I see this case at the reflection of the principle that all fees must take his victim as he finds him and if that involves making the victim’s current damaged condition worse, then he (the tortfeasor) must make full compensation for that worsened condition.”

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Cases

Both judgments given by Mr Andrew Edis QC

JXL and another v Britton [2014] EWHC 2571
QB

Billett v Ministry of Defence [2014] EWHC 3060
QB

JXL and another v Britton

Facts:

Claim for damages brought by two sisters who were victims of historic sexual abuse.

A helpful case for considering quantum awards in this type of case where aggravated damages are applicable.

JXL and another v Britton

Two sisters visited a neighbour's flat in the late 1980's. JXL older was 10-11 at the time, SXC was younger aged 7-8.

SXC raped twice, first when on her own, the second occasion when she visited the Defendant with JXL who was also raped.

JXL was also sexually assaulted on a later date.

JXL and another v Britton

The sister's mother reported to the police but no action taken.

The Police re-opened investigation in 2010 when another victim reported Defendant's sexual attack. Charged 21 counts.

The Defendant contested all counts and was convicted of raping both sisters- although jury acquitted on first rape of SXC.

JXL and another v Britton

Quantum: What was sought by the Claimants?

Both JXL and SCX suffered permanent PTSD – claimed at bracket B - Moderately Severe (no 10% uplift applied)

JXL was able to qualify as a nurse and was married.

SCX suffered further psychiatric harm, substance abuse and was unable to work.

JXL and another v Britton

JC Guidelines: (no 10% increase)

(b) Moderately Severe £17,000 - £44,000

This category is distinct from (a) above because of the better prognosis which will be for some recovery with professional help. However, the effects are still likely to cause significant disability for the foreseeable future. While there are awards which support both extremes of this bracket, the majority are between £21,000 and £27,000.

JXL and another v Britton

JC Guidelines:

Note:

- Where cases arise out of sexual and/or physical abuse in breach of parental, family or other trust, involving victims who are young and/or vulnerable, awards will tend to be at the upper end of the relevant bracket to take into account (A)(vii) below.

JXL and another v Britton

JC Guidelines:

Note:

(A)(vii)

- Claims relating to sexual and physical abuse usually include a significant aspect of psychiatric or psychological damage.
- The fact of an abuse of trust is relevant to the award of damages.
- A further feature, which distinguishes these cases from most involving psychiatric damage, is that there may have been a long period during which the effects of the abuse were undiagnosed, untreated, unrecognised or even denied.
- Aggravated damages may be appropriate.

JXL and another v Britton

JXL's case:

Sought three categories of General Damages:

1. £20,000 for the rape itself – with listed 'aggravating features'
 - She was young and a virgin at the time of the rape.
 - The Defendant was acting in a position of trust, was in breach of that trust.
 - The Claimant's were not believed when disclosed by their mother.
 - The Defendant put the Claimant's through giving evidence

JXL and another v Britton

JXL's case: Sought three categories of General Damages:

2. £35,000 for the subsequent PTSD – using the JC Guidelines

And

3. £20,000 Aggravated damages for injury to feelings, humiliation, loss of pride

JXL and another v Britton

SCXs case:

More seriously affected. Suffered from Emotionally Unstable Personality Disorder, with poor self-esteem, recurrent self-harm, substance abuse, suicidal ideation and unstable mood.

Also suffered from PTSD, similar to JXL –
18 months intensive therapy may reduce but not cure for either disorder.

JXL and another v Britton

SCXs case:

SCX also claimed 3 categories of General Damages seeking:

1. £27- 30,000 for the two rapes with aggravating features same as JXL.
2. £50,000 made up of £30,000 for EUPD and substance dependency and £30,000 for PTSD – but reduction of £10,000 for overlap.
3. £25,00 for Aggravated Damages.

JXL and another v Britton

Courts Assessment:

Rejected the concept of three distinct categories. The case of *AT and others v Dulghieru* [2009] EWCH 225 did not establish this principle.

General damages should be assessed in two stages:

First identify the sum designed to compensate each Claimant for pain suffering and loss of amenity.

Second: award Aggravated damages to reflect the injury to feelings, humiliation, loss of pride and feelings of anger or resentment.

JXL and another v Britton

Courts Assessment: General Principles:

In assessing the first stage; damages for PLSA, the Court must have regard to whether or not an award for aggravated damages is to be made.

If aggravated damages are to be awarded it is important to approach assessment (of PSLA) without regard to any element which will be represented by that Aggravated Damages award.

Both elements of the award are compensatory and not punitive and the court must assess the total final award to ensure that it is proportionate in the result.

JXL and another v Britton

Courts Assessment: General Principles:

It was difficult and unrealistic to draw a firm line between the immediate effects of the rape and the psychological consequences. The real adverse impact of a traumatic crime would often be seen most clearly in the impact it had had on the mental state of the victim.

JXL and another v Britton

Courts Assessment: General Principles:

“The most significant factor in determining the final size of the award would usually therefore be the psychiatric or psychological evidence, and the evidence of the victim about the consequences of the offending for her.”

“There is no difference between male and female victims of sexual crime in the principle as far as quantifying damages is concerned.”

“The very young ages of the victims at the time of the offending tended to increase the awards”

JXL and another v Britton

Courts Assessment: Awards made

Each Claimant has suffered without treatment for decades. They have lost their childhood and youth. SCX suffered greater damage than JXL.

There was no serious physical violence and the extent of any false imprisonment was short – so the awards will be significantly lower than cases such as *Dulghieru*.

JXL and another v Britton

Courts Assessment: Awards made for PSLA

JXL

£32,500

SCX

£40,000

JXL and another v Britton

Courts Assessment: Awards made for Aggravated Damages:

Both had to give evidence at the criminal trial where it was suggested they were not telling the truth.

Award compensates the Claimants for the distress and humiliation which occurred at the time of the offences and with which they have had to live ever since.

JXL and another v Britton

Courts Assessment: Awards made for Aggravated Damages:

JXL – awarded £15,000

SCX – awarded £25,000.

Differences: repeated rape of SXC, she gave evidence about the first occasion and was not believed, she believed that she failed to protect JXL.

JXL and another v Britton

Observations:

- The Court focused on the need to quantify on the evidence rather than preconceptions of what caused most harm.
- The awards were compensatory not punitive.
- There is a wide range of discretion with Aggravated damages.
- The court will be alive to double recovery between PSLA and Aggravated Damages

Billett v MoD [2014] EWHC 3060 (QBD)

Judge vs Dr Wass:

Disabled for the purposes of the application of the Ogden Tables, vs Classified by the MOD as fit enough to be deployed in active service anywhere in the world.

Billett v MoD [2014] EWHC 3060 (QBD)

29 y.o. at trial

Minor Non-Freezing Cold Injury – with continued increased vulnerability to cold weather and “will need to look after his feet”

The Claimant left the army for reasons other than his injury.

Worked since as an HGV Driver

Billett v MoD

Ongoing problems:

Completed a tour in Afghanistan in the winter 2010-11 when symptoms were more acute.

Still enjoys fishing and clay pigeon shooting all year round;

Does have increased discomfort when in the cold, in hands and feet.

Billett v MoD

Ongoing problems:

Can work as HGV driver without problems as the cab is well heated.

But “Will have to avoid jobs that require him to work outside [in the cold] and therefore will be more limited in terms of his choices”

General Damages - £12,500

Billett v MoD

Future Earning Capacity: C's wish list:

Claimed £427,151 on basis of future army career- (but J found no link to injury.)

Alternatively – assess using the uninjured/injured multipliers to reflect the Claimant's disability on the labour market. $£21,442 \times 10.41 = £223,211$

Alternatively – award for handicap on the labour market – at least 3 years = £64,326

Billett v MoD

Future Earning Capacity

£21,442 p.a. the "net annual loss for each full year when Mr Billett is not in employment because of his restricted ability to work"

If the Claimant is Disabled – Reduction Factors Table A
and B = $10.41 \times £21,442 = £223,211$

Billett v MoD

Is he disabled?

What does 'disabled' mean?

Para 35 Explanatory Notes Ogden 7

- illness or disability 1yr+ or is progressive; Yes
- The person satisfies the Equality Act 2010
'substantially limits' day to day activities; Yes
- Affects either kind **or** amount of paid work; Yes

Billett v MoD

Substantially is taken as ‘more than minimal’

Some gap between the two positions?

“I find it **hard to conceive** of very many people who could be classified as ‘disabled’ who are **as fit and able** as is this Claimant.”

Billett v MoD

“I have concluded that I should use the multiplier/multiplicand method but that my multiplier will be **substantially reduced**...to reflect the minor nature of the disability.”

What number should be chosen?

Billett v MoD

Conner v Bradman:

Not Disabled 0.82

Disabled 0.49

Awarded the mid point - 0.655

Billet v MOD

Not Disabled – 0.92

Disabled – 0.54

Awarded the mid point– 0.73

Therefore multiplier is $4.62 \times \text{£}21,442 = \text{£}99,062.04$

Billet v MOD

Observations:

- Definition of Disability – A low threshold?
- The exercise becomes broad brush once the numbers don't 'feel right'.
- The mid-point seems to be the most popular outcome.
- Judges don't like to be told they can't deviate from the Ogden tables.

Billett v MOD

What does Dr Wass say? JPIL [2015] issue 1.

Should have called me as an expert.

The MOD have sought permission to appeal
and I will be the expert in the appeal.

The Judge's threshold for disability is too low:

More than minimal interference is not
substantial when considering the guidance
notes:

Billett v MOD

What does Dr Wass say? JPIL [2015] issue 1.

Guidance notes on mobility: “for example unable to travel short journeys as a passenger in a car, unable to walk other than at a slow pace or with jerky movements, difficulty in negotiating stairs, unable to use one or more forms of public transport, unable to go out of doors unaccompanied”

Billett v MOD

What does Dr Wass say? JPIL [2015] issue 1.

When comparing the guidance notes for identifying a disability with the Claimant's mobility; after the injury and before leaving the MOD the Claimant was 'medically fit for unrestrictive service worldwide'

Billett v MOD

What is the result?

Appeal is due to be heard on the 30th June 2015.

More guidance may be coming as to the threshold;

The End

Many thanks

