dte forensic update

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SPOTLIGHT ON.......quantifying losses in fatal accident claims

At DTE Forensic Accounting, we have gained significant experience over the last 25 years of reporting, whether instructed by the Claimant or Defendant, on the losses sustained by the dependants in fatal accident claims. In this latest bulletin we discuss a number of the key aspects of the losses in such claims, where there may be changes to the conventional approach.

1. Multipliers

Most practitioners will probably be aware already that in the case of *Knauer -v- Ministry of Justice [2014] EWHC 2553 (QB)*, the Claimant has been given permission to appeal directly to the Supreme Court on the issue of the date at which the multipliers for future loss should be assessed. The Claimant's case is that multipliers should be assessed at the date of trial or judgment rather than at the date of death.

The conventional approach to assessing multipliers has been to fix the multiplier as at the date of death and after deducting the pre-trial period from that multiplier, the remaining multiplier is that to be applied to the post-trial multiplicand. This conventional approach was set out and adopted in the decisions of the House of Lords in *Cookson -v- Knowles [1979] AC 556* and *Graham -v- Dodds [1983] 1 WLR 808*.

This approach has, however, been criticised for many years as being illogical as it results in the future losses being discounted for accelerated receipt not only in respect of the post-trial period but also in respect of the pre-trial period from the date of death to the date of trial.

Following the Law Commission report in 1999 on Claims for Wrongful Death and ever since the publication of the Fourth Edition of the Ogden Tables (and continued to the current Seventh Edition), the Ogden Working Party has recommended the assessment of multipliers in fatal accident cases at the date of trial. The actuarially recommended approach is set out in detail at paragraphs 64 to 87 of the Explanatory Notes to the Seventh Edition of the Ogden Tables and takes into account the possibility that the deceased might have died in any event prior to the trial date. This possibility that the deceased might not have survived to provide either the full pre-trial and/or any of the post-trial dependency is catered for by the application of a discount factor, as set out in Tables E and F, to the pre-trial and post-trial losses respectively. This discount is additional to that inherent in the reduction factors (at Tables A to D) applied to the actuarial earnings multiplier to take into account contingencies other than mortality (in particular the risk of unemployment or inability to work due to sickness).

In *Knauer*, the judge expressed the view that he would have followed the above actuarially recommended approach if open to him to do so but, as in cases such as *White -v- Esab [2002] PIQR Q6,* the judge found himself bound by the House of Lords' decisions in *Cookson -v- Knowles* and *Graham -v- Dodds.*

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Since the announcement that an appeal to the Supreme Court on this issue has been granted, when instructed by the Claimant we have been asked in fatal accident claims to assess the post-trial multipliers based on both the conventional and actuarially recommended approaches. In one recent case, involving the death of a high earning female at the age of 54 years 9 months, we found that assessing multipliers from the assumed trial date at about age 57, rather than from the date of death, would increase the post-trial multiplier for loss of dependency on earnings to age 60 from 1.63 to 2.30 and the post-trial losses by about £30,000, which was just over one-third higher than when the multiplier was assessed at the date of death. We therefore await with interest the Supreme Court's decision in *Knauer* later this year.

2. Dependency proportion

As with multipliers, following the decision in *Harris -v- Empress Motors Limited [1983] All ER* 561, a conventional approach has been generally adopted for the appropriate dependency proportion, namely two-thirds where the sole dependant is the surviving spouse (or co-habitee or civil partner) and there are no dependent children or 75% where there are also dependent children. The dependency proportion is of course designed to reflect the amount of household net income which would have been spent on the deceased personally and which, therefore, does not form part of the dependency.

Where it is considered that there are grounds for believing that the standard dependency proportions may not be appropriate, we have on a significant number of occasions been asked to investigate the appropriate dependency proportion, either by the Claimant or Defendant. If instructed by the Claimant we would generally ask the surviving spouse initially to complete a checklist of monthly/weekly household expenditure prior to the deceased's death. Only if review of the completed checklist suggested further investigation was warranted, would we proceed to a more detailed review of the household finances.

Such investigations can require detailed analysis of expenditure from bank and building society accounts and credit and store card accounts over a representative period of, say, the year prior to the deceased's death, identifying where possible the nature of the expenditure and for whose benefit the expenditure was made. This is not always an easy exercise and in some cases we have had to curtail our investigations and conclude that there is insufficient evidence to depart from the conventional dependency rates.

There are, however, cases where the exercise has yielded information that indicated the conventional dependency rate was probably not appropriate. For example in *F -v- Cambridge University NHS Foundation Trust* (Personal Injury Compensation August/September 2009), we assisted the Court with an analysis of the household finances. In that case the husband (the surviving spouse) and his wife (the deceased) were both academics but not in particularly high paid employment. They had high mortgage commitments in relation to their income and nursery fees for the children, such that at the time of the wife's death their expenditure actually exceeded their income. Clearly this situation would not continue in the long term but the settlement reflected a higher dependency proportion than conventionally adopted.

In another case where we were instructed on behalf of the Defendant, we were asked to consider an analysis of household expenditure prepared by the Claimant's expert accountant. The Claimant's accountant had concluded that his analysis suggested a dependency proportion of close to 90% was appropriate, rather than 75%, however we were able to demonstrate that the analysis was not reliable as the expenditure included one-off capital costs (including purchase of a second-hand car for the deceased's adult daughter, who was only living with the deceased temporarily) and, in any event, the expenditure on the dependants was calculated as a percentage of the total expenditure analysed, rather than the higher figure of household net income, on which the dependency was being claimed.

Where the deceased had an expensive hobby and spent more on himself than conventionally assumed, it might also be open to the Defendant to argue that the conventionally accepted dependency proportion is too high.

Departing from the conventionally accepted dependency percentages by 5% or 10% either way could have a significant impact on the multiplicand and overall loss of dependency calculations and accordingly consideration of whether the conventionally accepted dependency proportions should be adopted clearly justifies more than a cursory glance.

If you consider that you might require assistance in any personal injury, clinical negligence or fatal accident claim, then please do not hesitate to contact Nick Fail, Jackie Clifford or Peter Whittam, who will be more than happy to discuss matters on a no obligation basis.

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