



# Rix v Paramount Shopfitting Co Ltd and the effect on dependency claims

*Will Young, Outer Temple Chambers*

**T**his decision by the Court of Appeal in July 2021 relates to quantification of dependency claims under the Fatal Accidents Act (“the FAA”, which applies in many mesothelioma cases), and sets out some principles applicable to such dependency claims, confirming a position that is broadly favourable to Claimants.

## Background

The Deceased in this case, Mr Rix, was exposed to asbestos by the Defendant in the 1970s. He developed mesothelioma and died in 2016 aged 60. His widow brought a claim against the Defendant under the FAA for damages including a claim for loss of financial dependency.

## The proceedings

The Claimant argued that the financial dependency should be calculated by reference to the profits from Mr Rix’s business. He had started a business in 1977, initially installing kitchens and bathrooms and subsequently expanding and becoming very profitable. Mr Rix was Managing Director, but the Claimant was also a shareholder as were their two children (Mr and Mrs Rix held 40% of the shares each, with the children holding 10% each).

The Claimant did not work in the business, but she was paid a salary and dividends as a (perfectly above-board) tax-efficient way of taking profits out of the business. Significant profits were left in the business year-on-year. Had Mr Rix not died, he had planned to continue to work in the business, having taken out a 15-year business mortgage, which would have continued until he was aged 74.



## The law

The relevant parts of the FAA are as follows, in sections 3 and 4:

*“3. Assessment of damages.*

*(1) In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.*

...

*(3) In an action under this Act where there fall to be assessed damages payable to a widow in respect of the death of her husband there shall not be taken account the re-marriage of the widow or her prospects of re-marriage.*

...

*4. Assessment of damages: disregard of benefits.*

*In assessing damages in respect of a person’s death in an action under this Act, benefits which have accrued or may accrue to any person from his estate*

*or otherwise as a result of his death shall be disregarded.”*

### The High Court case

In the High Court, the Defendant had argued that there was in fact no loss of dependency at all, as the Claimant had inherited the business, which remained profitable after Mr Rix’s death (indeed it had become more so). Hence it was said that there was no loss under section 3 of the FAA. The judge (Cavanagh J), however, decided that the Claimant had in fact suffered a loss of dependency on the profits from the business. The court assessed the level of dependency as being based on 70% of the estimated annual profits of the business, less the annual rental income from some commercial properties. It also treated the salary and dividends received by the Claimant from the business as amounting to part of the dependency - i.e. as being part of Mr Rix’s earnings, rather than as her own, for the purposes of the *Coward v Comex* formula.

### The appeal

The Defendant appealed, on three grounds:

1. At least part of the profits from the business amounted to income generated by capital (as opposed to being earned by Mr Rix’s efforts). Since the assets of the business had been inherited by the Claimant, profits that were generated by them could not form part of the dependency.
2. It was an error of law to treat the income actually received by the Claimant from the business before Mr Rix’s death as being entirely Mr Rix’s income, rather than hers.
3. It was necessary in assessing the net annual loss and applying the *Coward* formula, to deduct the Claimant’s share of the profits of the company and her director’s salary.

The Court of Appeal considered the existing authorities on the assessment of financial dependency under the FAA when it arises from the loss of profits from a business, as distinct from the more straightforward situation involving dependency on salary.

### Authorities & the principles of the appeal

Having reviewed the authorities (in particular *Wood v Bentall Simplex Ltd* [1992] PIQR 332, *Cape*

*Distribution v O’Loughlin* [2001] EWCA Civ 178, *Welsh Ambulance Services NHS Trust v Williams* [2008] EWCA Civ 81, and *Head v Culver Heating Co Ltd* [2021] PIQR Q2 – the latter not a claim under the FAA but applying analogous reasoning), the Court distilled the following principles:

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 dependant upon 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 capital which the dependants have inherited;
5. The dependency is fixed at the moment of death, it is what the dependants would probably have received as 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; and
6. The damages awarded under the FAA can be greater than would be justified upon a strict view of the dependants’ loss.

Applying those principles to the Defendant’s appeal, the Court concluded first of all that: *“Income is only derived from capital if it is identifiable as having been received without the labour and services of the deceased. In short it is passive”,* and that, *“On the facts of this case, there was no identifiable element of the profits which were not touched by the management of Mr Rix”* (emphasis added). The business was not an independent beast that would have generated money regardless of who was in charge of it. Hence the Claimant’s loss of dependency was the loss of the income generated by Mr Rix through the business, irrespective of the fact that the business employed or owned capital assets. Hence the calculation of the dependency based on the loss of the company’s profits, (and all of them) rather than the cost of employing a

replacement manager, was a permissible approach for the High Court to have taken.

The Court also noted (in a significant difference compared to the position of living Claimants making personal injury claims) that it was irrelevant that the business had thrived since Mr Rix's death, and hence that there was arguably no financial "loss" on the basis of a comparison between the position before and after his death. This was because the value of the dependency is assessed and fixed at the date of death, and because section 4 of the FAA prevents consideration of any benefits that accrue to the Claimant as a result of the death.

Secondly, and based on the previous authority of *Malyon v Plummer* [1964] 1 QB 330, the judge had been correct to look at the practical realities of the situation, rather than the legal formalities, and hence to conclude that the Claimant had not herself earned anything from the business, and so there should be no credit given for her salary or dividends from the company in the *Coward* formula.

Thirdly, and following on inevitably, there could be no deduction of monies received by the Claimant from the business, since it all derived from Mr Rix's efforts.

Hence the Defendant's appeal was dismissed.

### **Analysis of the dismissal**

One can perhaps understand why the Defendant felt aggrieved by this outcome, since the overall result for Claimants in FAA claims is often more beneficial than the position familiar to personal injury claims. The last of the Court of Appeal's points of principle is crucial here: damages under the FAA can potentially be greater than would be justified on a strict view of the dependant's loss (and more than would be allowed under an orthodox restitutionary approach to tortious damages). Hence a Claimant can in theory recover a loss of dependency based on the profits of a business which the Claimant has in fact herself inherited, and which has remained profitable after the death of the deceased.

That, however, is simply a feature of the way the FAA is drafted: section 4 of the Act being a striking departure from the normal tortious rules of recovery. Section 3 was the provision in issue in this case – but it is section 4 that caused the result to

which the Defendant really objected: the fact that the Claimant did not have to give credit for the income of the family business that she inherited after the deceased's death.

It might be argued that it is somewhat surprising that no part of the profits from Mr Rix's business were held to arise from the assets themselves. The Defendant contended that the business could have been expected to generate at least some income if Mr Rix had been replaced by another manager; and hence that not all of the profits from the business were derived from his labour.

Underhill LJ addressed this point in a concurring judgment, in which he pointed to the decision in *Wood*, and derived from it the principle that a Claimant will only be unable to show loss for the purposes of section 3 of the FAA if the Deceased's income was "derived solely" from capital which the dependants have inherited. "*Income is only "derived from capital" if it is identifiable as having been received without the husband's services – in short if it is passive.*" He went on to conclude that it was legally permissible, on the facts of this case, to calculate the value of the dependency based on the lost profits from the business – as opposed to the cost of replacing Mr Rix as manager. It was not mandatory, however, to use this method, and there will be cases in which this calculation will not be possible, and the cost of replacing the lost services will have to be used as "a good proxy".

### **Observations**

There is potentially a degree of tension between Underhill LJ's reasoning and Cavanagh J's conclusion at first instance that "*the financial dependency claim is concerned only with income produced by Mr Rix's labour, not with income produced by his capital assets, or with income produced by a mixture of capital assets and labour*" (emphasis added).

In one sense, however, this seems to be primarily about framing: the Defendant sought essentially to frame the claim as being one for lost dependency on Mr Rix's contribution to the business, whereas the Claimant presented, and the Courts accepted, the claim as being one for dependency on the value of Mr Rix's earnings mediated through the business. The argument being that the business was merely the vehicle for his earning capacity; and it is that earning capacity which was lost – and wholly lost –

as a result of his death, rather than simply his contribution to the business (which might in theory be replaceable, at least in part).

In any event, as things stand, the decision will be gratefully relied upon by Claimants in any dependency claims under the FAA involving the death of persons whose earnings come from self-employed businesses (at least those of limited size).

It is understood that the Defendant in Rix has sought permission to appeal to the Supreme Court, and any developments in that direction will no doubt be followed with interest.

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