England and Wales High Court (Administrative Court) Decisions

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CRIMINAL INJURIES COMPENSATION BOARD ex parte AARON, MARIAN and MICHAEL KAVANAGH, R v. [1998] EWHC Admin 801 (30th July, 1998)

IN THE HIGH COURT OF JUSTICE CO/1477/97
QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)

Royal Courts of Justice
The Strand
London WC2

Thursday 30th July, 1998

B e f o r e:

LORD JUSTICE BROOKE
MR JUSTICE ROUGIER

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R E G I N A

\- v -

CRIMINAL INJURIES COMPENSATION BOARD
Respondents
ex parte AARON, MARIAN & MICHAEL KAVANAGH
Applicants

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(Handed down Transcript of Smith Bernal Reporting Ltd
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Official Shorthand Writers to the Court)

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MR F BURTON QC (Instructed by The Official Solicitor to the Supreme Court, London WC2A 1DD) appeared on behalf of the Applicants

MR B LANGSTAFF QC and MR H KEITH (Instructed by The Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondent

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J U D G M E N T
(As approved by the Court)
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1. LORD JUSTICE BROOKE: In September 1989 Lorraine Kavanagh was murdered by her husband Gerard. Her three young children, then aged 3, 2 and 1 years old were taken into the family of her husband's brother and his wife, and have lived there ever since. They have been very well looked after. In July 1993 a single member of the Criminal Injuries Compensation Board, Mr Conrad Seagrott QC, awarded them £35,000 in respect of the loss of their mother's services, based on a multiplier of seven and an annual loss of £5,000. The Official Solicitor, who represented them, sought an oral hearing because he considered that the multiplier was too low. On 3rd February 1997 a panel of the Board (Judge Sir Jonathan Clarke and Mr Roderick MacDonald QC) reduced the award to £9,000. They did so because they considered themselves bound by the majority decision of the Court of Appeal in *Hayden v Hayden* [1992] 1 WLR 986 to hold that the general parental services provided by their uncle and aunt were at least as good as those provided by their mother before her death, so that the children had suffered no loss, and that those substituted services should not be disregarded by reason of the operation of Section 4 of the Fatal Accidents Act 1976 (as substituted by the Administration of Justice Act 1982). The value of their mother's individual care as a mother was assessed by the Board at £3,000 in respect of each child.

2. The Official Solicitor has told us that this is the first time, within his knowledge, that the Board has acted in this way, so that the decision on this application is of general importance to children who claim compensation from the Board following the death of their mother through criminal injuries. Mr Langstaff QC, for his part, has told us that different members of the Board hold different opinions on this topic and the Board is anxious to receive authoritative guidance from this court as to the law it should apply to children's claims. The new tariff scheme operated by the Criminal Injuries Compensation Authority provides for a level 5 award of £2,000 for each child, to which an appropriate multiplier would be applied, together with what is called a Paragraph 39 standard award for each child. Thus if the multiplier of seven were thought to be appropriate, each child under the new scheme would be awarded £19.000 instead of the £3,000 awarded under the old scheme in the present case.

3. Before the intervention of statute in 1982, there would have been no difficulty in assessing the value of the children's claim. When *Hay v Hughes* [1975] 1 QB 790 was decided, the governing principle was set out in section 2 of the Fatal Accidents Act 1846 which empowered the jury to "give such damages as they may think proportioned to the injury resulting from such death to the parties

respectively for whom and for whose benefit such action will be brought". After the parents of two boys had been killed in a road accident one of their grandmothers took them into her home and looked after them as if she was their mother. Counsel for the defendant had argued that no loss measurable in money terms had been caused to the boys by the loss of their mother's services, alternatively that the services now rendered by their grandmother were benefits resulting from the death which should be taken into account.

4. The Court of Appeal rejected both those arguments. It held that the children had a claim in principle for the loss of their mother's services and that while the need for their grandmother's care undoubtedly arose from the mother's death, the view which a reasonable jury would be likely to adopt would be that the children had benefited not as a result of their mother's death but simply because the grandmother had taken it upon herself to render them services. Lord Edmund-Davies said of the grandmother at p 809E:

"Then aged 49, she already had substantial domestic responsibilities of her own (she had three teen-age children and she, too, lived in a three-bedroomed house) and it would not have been surprising had she decided against adding to them. In my judgment, it would be an unreasonable conclusion were a jury or judge of fact to hold that, because she was moved by their plight to act as she did, her generous action fell within section 2 of the Act of 1846."

5. At p 807B he had spoken of the presumption against deducting the value of unpaid services rendered to a bereaved person. Buckley LJ said at p 813D that the proper approach was first to place a valuation upon those losses which the children had suffered in consequence of the death of their parents, and then to set against those losses any benefits which it was proper to take into account as benefits that had come to them as a result of the accident. In this context he said at p 816A that it was more realistic to say that the grandmother's services to her grandchildren resulted from a decision made by her on her own initiative after the accident than that they resulted from their parents' deaths in the accident. Ormrod LJ reached a similar conclusion at p 818G.

6. The argument of counsel for the plaintiff at pp 797E-799C and the judgment of Ormrod LJ at pp 817E-818D show the difficulties that were confronting the courts in those days after Parliament had been proceeding on an ad hoc basis to add to the list of benefits which it was enjoining the courts not to take into account when deciding what award to make under the Fatal Accidents Acts. In 1982, however, Parliament decided to adopt a much more broad brush approach, and Section 4 of the Fatal Accident Act 1976, as substituted by the Administration of Justice Act 1982, now reads:

"In assigning damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate of otherwise as a result of his death shall be disregarded."

In *Stanley v Saddique* [1992] 1 QB 1 the Court of Appeal unanimously held that this wide wording was not to be cut down by reason of its juxtaposition to Section 3 of the Act, as substituted. In that case a child's parents were estranged at the time when he was born, and he lived with his mother, but when his mother died in a road traffic accident the boy, then three months old, was taken in by his father, who shortly afterwards met and then married a young woman who accepted the boy as a member of their new family. The Court of Appeal held that on its proper construction the word 'benefit' in Section 4 of the 1976 Act, as amended, was not restricted to direct pecuniary benefit but included the benefit accruing to the plaintiff as a result of his absorption into a new family unit consisting of his father, stepmother and siblings.

7. In those circumstances, by virtue of Section 4, that benefit was to be wholly disregarded for the purposes of assessing damages for loss of dependency (see Purchas LJ at p 14A, who continued:

"This then substantially disposes of the grounds of appeal as contained in the notice of appeal, namely that the plaintiff had suffered no loss").

8. If that decision had stood alone, there would not have been the slightest difficulty about the present case. The benefit conferred on the applicants by their uncle and aunt taking them into their own home would fall to be disregarded, and the applicants would be entitled to recover for the loss of their mother's services, however those might be valued.

9. The difficulty arises from the decision of the Court of Appeal in *Hayden v Hayden* [1992] 1 WLR 986, and it is important, in my judgment, to see what that case was all about, and what it appears to have decided.

10. A four-year old girl was living with her mother and father and her four older siblings. Her father ran a garage business and her mother helped with the paperwork of that business and also looked after the children. In August 1983 her father was driving a motor car towing a caravan, and when the car and caravan turned over, her mother, who was a passenger in the car, was killed. Her father took the responsibility of bringing the girl up on his own. He disposed of his business six months after the accident and had not worked since.

11. At the trial seven years later the judge awarded the girl £20,000 as a dependant of the deceased under the Fatal Accidents Act, apportioned as to £15,000 up to trial and £5,000 for the future. He held that the plaintiff had suffered a real loss which was capable of being quantified in money terms and that the fact that the defendant had provided substitute services did not defeat the claim in principle.

12. It is necessary to avoid thinking that *Hayden's* case sets out any principles of law of general application to the valuation of children's claims for three reasons. The first is that the assessment of damages is a jury question and the Court of Appeal had no power to interfere with the judge's award of £20,000 unless it was plainly too high or too low. The second is that in that case the father was the tortfeasor who was liable to pay the damages for the benefit of his child. The third was that there was no third party who stepped in to look after the orphaned child, like the grandmother in *Hay*, the estranged father's new wife in *Stanley*, or the uncle and aunt in the present case: it was the father himself who expanded the scope of his parental duties towards his daughter in the home they shared.

13. Both McCowan LJ (who dissented) and Sir David Croom-Johnson said that the court was bound by the earlier decision in *Stanley v Saddique* (see [1992] 1 WLR 986 at pp 993 and 996). Both were satisfied that as a decision of the Court of Appeal on the proper construction of Section 4 of the 1976 Act, as substituted, they were bound to follow it. Sir David Croom-Johnson, who was a member of the court which decided *Stanley v Saddique* , was conscious that it had held that benefits equivalent to those rendered by the grandmother in *Hay v Hughes* did accrue to a child as a result of the death within the meaning of the new statute, and that to that extent *Hay v Hughes* should not now be followed (see p 996D-F). In those circumstances, Mr Langstaff accepted that we ought not to follow the opinion expressed by Parker LJ in *Hayden* so as to hold that we might be at liberty to follow *Hay v Hughes* rather than *Stanley v Saddique* and to find that Section 4 did not apply at all.

14. What divided Sir David Croom-Johnson from McCowan LJ was their application of the law, as explained in *Stanley v Saddique,* to the particular facts of the case before them. Sir David considered

that the court should first ask itself "Has the plaintiff suffered any loss at all?" and then "Are there any benefits which accrued to the child as a result of the death which are to be disregarded?"

15. The judge did not reveal the process by which he arrived at his figure of £20,000.

16. Sir David said that he had plainly included in his award an element of financial benefit from the mother's earnings, but he was not persuaded that the judge distinguished the element in respect of the loss of services provided by the mother which were replaced by the defendant from the element in respect of the loss of those which were not. He rejected the proposition that a jury would have valued the lost services by reference to the cost of a "notional nanny". It would simply have gone on the established facts of what had happened in the past and was likely to happen in the future.

He said at p 998G:
"If the result of making an allowance for the fact that the defendant has himself continued to act as a loving father means that his ultimate financial liability to the plaintiff is smaller, there is nothing wrong or objectionable in that. Emotive phrases like allowing the defendant "to profit from his wrongdoing" are beside the point. It is preferable to say that what he had done has had, as one result, the reduction of his liability. Mr Crowther has submitted that to award any damages under his heading (i) [viz for the loss of services provided by the deceased which were replaced by the defendant] was wrong in law, but I do not think it was. There must be a claim for loss of the mother's services, in the special circumstances of this case, over and above what the defendant has been able to replace. The judge has included it, and rightly so, although he has not particularised the amount."

17. This, then, was what Sir David held the child had lost in the particular context of a case in which she had remained at home and her father had replaced the mother's services to a certain extent. He then went on to consider at p 999 whether at the second stage of the exercise there were any benefits which had to be disregarded under Section 4. He said at pp 999H:

"The facts in the instant case, however, are wholly different from those in *Stanley v Saddique* . The plaintiff remained in the family home with her father and, for a time, with her older brothers and sisters until they left home. She continued to be looked after by him. No reasonable judge or jury would regard the defendant, in doing what he did, as doing other than discharge his parental duties, many of which he had been carrying out in any event, and would be expected to continue to do. The reasoning of the trial judge in the instant case seems to be that he was making the first of Diplock LJ's two estimates, that is, of the initial loss to the plaintiff caused by the death of the mother. Whether that is so or not, the continuing services of the father are not a benefit which has accrued as a result of the death. In the end, what is a "benefit" must be a question of fact."

18. It follows that both Sir David Croom-Johnson and McCowan LJ agreed that they were bound by *Stanley v Saddique* but were unable to agree on the way in which the principles established in that case were to be applied on the facts in *Hayden* (for McCowan LJ's dissenting view, see p 993B-F).

19. Parker LJ for his part, adopted a rather different approach. He started his judgment at p 1000C-D by saying that when faced with claims by dependant children under the Fatal Accident Act the court was faced with the task of quantifying in money that which in reality could not be so quantified, even in cases without complications. The facts of the case in *Hayden* were such that the difficulties of reaching a just solution were greatly increased.

20. After summarising the rival contentions he added at p 1000G:

"For the defendant it is pointed out that if his services are to be disregarded he will in effect be paying damages three times over. First he will be providing replacement services free of charge, secondly, he will be paying for the services which he has so provided, and thirdly he will have lost his employment in order to provide such services. This is true and on the face of it appears not to be in accordance with justice. Furthermore in cases in which it is shown that the services of the father are in every respect as good as, or even better than the services previously provided by the mother it is, again on the face of it, difficult to see that the child has suffered a recoverable loss. He will or she will of course have been deprived of the mother's love and affection but it is not and could not be suggested that this loss sounds in damages."

21. This passage shows that Parker LJ was concentrating his mind on the way to find a just solution in an unusual case where the father in a united family was not only providing the replacement services given by the mother, but was also the defendant tortfeasor from whom compensation was being sought.

22. On pp 1001-1003 Parker LJ reviewed the authorities and concluded that the court was entitled to prefer *Hay v Hughes* to *Stanley v Saddique* and hold that the gratuitous services of a relative do not constitute a benefit resulting from the death of the deceased. I have already explained why, in my judgment, this court is bound to follow the decision in *Stanley v Saddique* , buttressed as it is by the opinion of two members of the Court of Appeal in *Hayden.*

23. He then went on to stress on p 1004 that damages remained a jury question, albeit decided by a judge, and cited the well-known passage in the speech of Lord du Parcq in *Monarch Steamship Co Ltd v Karlshamms Oljebfrabriker (A/B)* [1949] AC 196 at p 232:

"in the end what has to be decided is a question of fact and therefore a question proper for a jury. Circumstances are so infinitely various that, however carefully general rules are famed, they must be construed with some liberality, and not too rigidly applied. It was necessary to lay down principles lest juries should be persuaded to do injustice by imposing an undue, or perhaps an inadequate, liability on a defendant. The court must be careful, however, to see that the principles laid down are never so narrowly interpreted as to prevent a jury, or judge of fact, from doing justice between the parties. So to use them would be to misuse them."

24. He then said at p 1004G-H:

"In my judgment before one gets to section 4 it must first be established what injury has been suffered by the child. What it has prima facie lost, is the services provided by the mother but the fact that they were provided by the mother is irrelevant. If in fact those services were replaced without interval of time up-to-date of trial by as good or better services it is in my view at least open to a judge or jury to conclude that the child has lost nothing up to that date. But if the replacement services can be discontinued it is of course exposed to the risk that such services may be discontinued and that risk must be quantified."

25. This passage must be read subject to the following qualification in the final paragraph of his judgment at p 1005F:

"I would add by way of postscript that, where the provider of the replacement services is the tortfeasor, arguments successfully advanced in earlier cases that it would be unjust if the tortfeasor were to benefit from the generosity of a third party cannot apply."

26. Dealing as he was with the case of a tortfeasor father in a united family who was himself providing the replacement services, Parker LJ then made very clear his view that the quantification of a just award in those circumstances was quintessentially a jury question. He said at p 1005C:

"If then it is a jury question, would a jury be likely to say that the tortfeasor who had provided the services and given up his job so to do must nevertheless pay what it would cost to provide the services which he himself had provided. That a jury could conceivably come to the conclusion must I suppose be accepted but if it reached the opposite conclusion it could not in my view be held to have reached an unreasonable verdict. Suppose for example that the deceased mother was hopelessly inadequate, that the tortfeasor was a trained nanny and, appalled by what she had done, gave up her job and provided the child with services infinitely better than those provided by the deceased mother. Can it possibly be the law that she must then pay the cost of employing another nanny. I think not and, if it were, I would regard it as regrettable."

27. Having stated the way he approached the case, he then compared the figure of £48,000, which had been quoted as the full cost of a nanny until the plaintiff was 11 and half such cost from 11 to 15, with the sum totalling £20,000 which the judge had actually awarded. He did not consider that the Court of Appeal had before them material to enable them to interfere with that award, which if he was right as to the approach appeared to him to be an entirely reasonable award and to do justice to the parties. It is completely clear that he was very heavily influenced by the consideration, which is wholly absent in the present case, that it was the tortfeasor who had supplied replacement services from whom the value of those services was now being sought by way of double compensation.

28. Towards the end of his judgment Parker LJ had referred to the earlier decision of the Court of Appeal in *Auty v National Coal Board* [1985] 1 WLR 784. One of the claims made in *Auty* was by a widow who received a widow's pension under a Coal Board scheme on the death of her husband, which had been caused by the defendants' negligence. It was common ground that by virtue of Section 4 she did not have to give credit for this pension when the value of her dependency on her husband for the rest of his anticipated lifetime (from his earnings until his retirement, and thereafter from his pension until his death) was being calculated. It was maintained, however, that she was entitled to claim, as an additional head of damage, the loss of the widow's pension she would normally have expected to receive under the scheme at the end of his life following her husband's death at a mature age. This was said to result from the operation of Section 4.

29. The Court of Appeal unanimously rejected this submission. It was held that the plaintiff first had to establish a loss, and since she was receiving her widow's pension immediately she could not claim for the loss of the opportunity to receive something she already had (see Waller LJ at p 799F, Oliver LJ at pp 806H-807A and Purchas LJ at p 813B-F).

30. In his analysis of that problem Oliver LJ said at p 806F, after quoting Section 3(1) of the 1976 Act:

"There are thus two stages in the inquiry. First there must be ascertained what "injury ... to the dependants" has resulted from the death. Secondly, there must be assessed the damages which are to be awarded for that injury. No doubt in ascertaining the extent of the injury suffered (for instance, the loss of dependency or of the estate duty advantage with which *Davies v Whiteways Cyder Co Ltd* [1973] QB 262 was concerned) you do not take into account any countervailing advantage which may have resulted to the dependant from the death in the form of pension or insurance benefit. In other words, it is no doubt right to observe the provisions of section 4(1) at both stages of the inquiry.

But it is still necessary to establish that the dependant has in fact suffered an injury (ie lost something) as a result of the death. Here what is claimed as the injury is the loss of the very thing (ie a widow's pension) that the widow in fact has gained as a result of the fulfilment of the conditions of the scheme earlier rather than later, and whilst section 4 precludes setting the benefit of the pension against damage suffered under some other head, there is nothing in that section which requires one to assume, in ascertaining whether there has been any injury at all, that that which has happened in fact has not happened.

The fallacy of the plaintiffs' reasoning is, in my judgment, that it premises a loss which has not occurred and which cannot be substantiated either in fact or in law."

31. If one applies this approach to the case with which we are at present concerned, at the first stage it might be said that the applicant children had lost nothing, because they had need of the services of a carer both before and after their mother's death, and they have received excellent caring services both before and after her death. This was the approach the Board adopted, which was the reason why they received a small grant only, in recognition of the fact that they had lost the services only a mother can give.

32. Oliver LJ enjoins us, however, to observe the provisions of Section 4(1) at both stages of the inquiry. When we do so, we are bound by *Stanley v Saddique* to hold that insofar as the value of the replacement services formed a benefit resulting from the death (like the stepmother's services in that case) we must disregard them when assessing damages. In other words at the first stage of the inquiry we cannot say that the children have suffered no loss because the only way in which we could do so would be to take into account something which we are not allowed to take into account. The factual position is quite different from the factual position in *Hayden,* in which the majority of the Court of Appeal held that the value of the tortfeasor father's replacement services was not to be disregarded under Section 4(1), whether because Section 4(1) did not apply at all (Parker LJ) or because this situation was totally different from a case in which the replacement services are voluntarily provided by a third party (Sir David Croom-Johnson).

33. It follows, in my judgment, that the Board was wrong at the end of the first stage of the inquiry, after finding that the children had thrived in the care of their aunt and uncles, to say:

"In these circumstances, we have to consider whether there is in this case any claim at all for loss of services in respect of general parental care. The question which we have to ask ourselves is whether the children have in fact suffered any loss under this heard. In our view they have not. The general parental services which their mother was providing before her death have been replaced by the general parental services provided by their paternal aunt and uncle, which are at least as good as those that would have been provided by their mother had she not died: see the decision of the majority of the Court of Appeal in the case of *Hayden v Hayden* [1992] 4 All ER 681."

34. While I sympathise with the members of the Board's panel for the state in which they found the law, they should have asked themselves at the first stage whether they were taking into account something which they should have been disregarding pursuant to Section 4. If they had asked that question, they would have found that they were, and they should have gone on to compensate the children for the full value of the loss of their mother's services.

35. The effect of this judgment will enable the Board to revert to compensating child claimants for the most part as they used to do before this panel of the Board thought that the decision of the Court of Appeal in *Hayden* had made a much more radical change in the law. The correct way to resolve a claim by a child whose needs are met after its mother's death by someone who already owed

parental duties to it before the death will have to be resolved by the courts on another occasion, although fortunately that situation will not be complicated by the additional complicating factor in *Hayden* that the substituted parental carer and the payer are one and the same person.

36. Mr Burton took a further, procedural, point of challenge to the effect that the staff of the Board ought to have warned the applicants' counsel in advance that the Board might take a *Hayden v Hayden* point at the hearing. Although in an ideal world it would be nice if the Board could be resourced sufficiently to provide such a service, given that the cost of any necessary adjournment is not paid for by the Board, I cannot see that this argument offers any reasonable separate ground for impugning the validity of the Board's award. A fortiori when in his renewed application to the Board the Official Solicitor sought only to challenge the multiplier, whereas at the hearing his representative sought to challenge the multiplicand as well.

37. For these reasons I would direct certiorari to go to quash the Board's award. A new hearing should be arranged to enable a different panel of the Board to consider what award to make in the light of our judgment.

38. MR JUSTICE ROUGIER: I agree. The Board were faced with two distinct, though potentially complementary questions here:-

1. Has there been a loss? If the answer was to be "No", that was an end of the matter.
2. If "Yes", have any benefits, which have accrued to the orphans been the result of their mother's death, and thereby fall to be disregarded by virtue of section 4 of the Fatal Accidents Act 1976 as amended by section 2 of the Administration of Justice Act 1982?

39. The Board answered the first question adversely to the applicants by holding that there had been no loss since the children were, owing to the benevolence of their paternal uncle and his wife, receiving and would receive care of equal or probably better quality than they had enjoyed before their mother's murder. In so holding, according to the affidavit sworn by Mr MacDonald QC, a member of the Board, they based themselves on the decision of the Court of Appeal in *Hayden v. Hayden* [1992] 1 WLR p 986, and in particular certain observations of Lord Justice Parker when, at p 1004H he said:-

"In my judgment before one gets to section 4, it must first be established what injury has been suffered by the child. What is his prima facie loss, is the services provided by the mother but the fact that they were provided by the mother is irrelevant. If <u>in fact</u> those services were replaced without interval of time up to date of trial by as good or better services it is in my view at least open to a judge or jury to conclude that the child has lost nothing up to that date."

40. In the context of the judgment of the Court, viewed as a whole, I consider that the passage must be considered obiter.

41. The argument on behalf of the applicants is basically that besides the matters which are to be disregarded by virtue of the modern section 4 there is a parallel principle of exclusion based on common law and the case of *Hay v. Hughes* [1975] 1 QB 790 where the Court of Appeal decided that voluntary services provided by an orphan's grandmother did not result from the mother's death. However, it must be remembered, that, at the time when *Hay v. Hughes* was decided, the class of benefits which were to be disregarded was strictly limited by virtue of the existing legislation; it was not until 1982 that Parliament effected a major alteration by declaring that <u>all</u> benefits arising as a result of the death of a parent were to be disregarded. Following that enactment, the Court of Appeal,

in the case of *Stanley v. Saddique* [1992] 1 QB 1 decided that in a case where the deceased mother was decidedly unreliable and that by contrast to the services she would have provided, the motherly services being provided by the plaintiff's step-mother were excellent and of a higher standard than could have been expected of the deceased, they were benefits accruing to the plaintiff by reason of the mother's death and therefore to be excluded by virtue of section 4 of the 1976 Act, as amended.

42. It is difficult to resist the suspicion that *Hay v. Hughes* was a sympathetic decision based on the law as it stood at the time, and that had it been decided after 1982, the Court would probably have taken the simple course of declaring that the substituted services of the grandmother were to be disregarded, rather than embark on a somewhat artificial disquisition to explain why those particular services were <u>not</u> to be treated as resulting from the death.

43. For those reasons I have some considerable doubt whether there exists the common law category of exclusion of substituted services, running parallel to those provided by section 4, since that would imply that section 4 was not intended to be exhaustive.

44. However, to my mind there is a far more powerful argument available to the applicants based on section 4 itself and the case of *Stanley v. Saddique* .

45. The affidavit of Mr MacDonald QC does not suggest that the Board progressed beyond the first question - namely whether or not the children had suffered any loss. But if and in so far as they had considered section 4, it seems to me that they could have only have reached a conclusion adverse to the applicants in reliance on a further obiter remark by Lord Justice Parker in *Hayden v. Hayden* , to be found at page 1203G. Therein, having quoted the judgment of Purchas LJ in *Stanley v. Saddique* , Parker LJ said:-

"It is thus clear that he regarded the services of the step-mother as being a benefit resulting from the death of the deceased which is directly contrary to the decision in *Hay v. Hughes* . On the point of construction Ralph Gibson LJ with hesitation agreed with Purchas LJ and Croombe Johnson LJ agreed with both judgments. With conflicting decisions on the point whether the gratuitous services of a relative do or do not result from the death of a mother I for my part have no hesitation of following *Hay v. Hughes* rather than *Stanley v. Saddique* and if this is right section 4 does not apply."

46. It seems to me that if and in so far as the Board may have been relying on this observation in support of a decision that section 4 does not apply, they were overlooking two factors:-

47. First, the majority of the Court in *Hayden v. Hayden* declared that *Stanley v. Saddique* was binding upon them.

48. Secondly they were able to distinguish *Hayden's* case on two specific differences of fact - (1) that the defendant himself was the tortfeasor who was continuing to provide the services, so that to make him pay for them would effectively be awarding triple damages, and (2) that the defendant, as the father of the children, had been providing services before the death by reason of no more than parental duty, so that the services he provided after death could not be said to arise as a result of the death.

49. To my mind the facts of the present case, in so far as they deal with the quality of substituted care, are far more akin to those of *Stanley v. Saddique* and there is no effective comparison to be drawn with the facts of *Hayden v. Hayden* .

50. For those reasons I think this application succeeds and the matter should be remitted to the Board for the purposes suggested by My Lord.

POST JUDGMENT DISCUSSION

51. LORD JUSTICE BROOKE: For the reasons given in the judgment, which have been made available to the parties, this application is allowed and the matter is remitted to a different panel of the board to consider what order to make in the light of our judgment.

52. MR BURTON: My Lords, I am obliged. In those circumstances, I would ask that the applicants have their costs that there may be legal aid taxation for the applicant.

53. MR KEITH: My Lord, I cannot resist an application for costs. May I raise one other matter?

LORD JUSTICE BROOKE: Yes.

54. MR KEITH: I know that my learned friend Mr Langstaff raised it with your Lordships on the last occasion, the possibility of a leapfrog provision under the Administration of Justice Act.

LORD JUSTICE BROOKE: Yes.

55. MR KEITH: May I say for clarity that I have taken instructions from the board, they are extremely grateful for the guidance given by your Lordships in this judgment. They take the view, as do Mr Langstaff and myself, that there is sufficiently clear guidance to enable the board to act in the future with those guidelines in mind, so as there to be no necessity for an appeal. In those circumstances --

LORD JUSTICE BROOKE: Anywhere?

56. MR KEITH: No, we shall not be appealing anywhere, my Lord.

LORD JUSTICE BROOKE: Very well.

57. MR BURTON: I am very grateful to my learned friend for that indication and I am sure that the Kavanagh children will be.

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