

*Burgess (brother and administrator of the estate of Mrs
Michelle Griffiths) v Sikorski* [2026] EWHC 1245 (KB)

By [Eva Ferguson](#)

Introduction

1. This decision of Deputy High Court Judge Eardley KC represents a significant development in dependency claims. Not only were professional deputyship fees for dependants lacking capacity held to be recoverable, but it provides further support for claimants seeking to value services dependency by reference to full commercial costs. It remains to be seen whether it will withstand appellate scrutiny.

The Claim and the Issues

2. The Deceased, killed in an RTA, was a mother, wife, and professional carer, who also provided extensive daily care to her two adult sons (both of whom had learning disabilities and one of whom had epilepsy). Her husband was also a dependant.
3. The claim was brought under the **Fatal Accidents Act 1976 (FAA)**. Liability was admitted subject to 30% contributory negligence. Most heads of loss were agreed. The interesting outstanding issues were:
 - (1) **Recoverability of professional deputyship fees as part of the dependency claim.** Both sons lacked capacity and were “protected beneficiaries” under CPR part 21. Where damages are over £100,000 the Court is required under CPR r.21.11(9) to direct the litigation friend to apply to the Court of Protection for the appointment of a deputy. Both deputyship experts agreed this should be a professional rather than a lay deputy. For the first time the Court had to decide whether such fees should be allowed under the FAA.
 - (2) **Need for professional deputyship and proportionality of the fees.** Subsidiary issues arose as to whether appointment of a professional deputy was reasonable (it was) and whether the amount of fees should be in proportion to a percentage of the fund to be administered (no they shouldn’t).
 - (3) **Quantification of future services dependency.** The Judge valued the future services dependency using full commercial rates. These included provision for employment related costs and case management services (by agreement). This article asks whether these really are losses recoverable under the FAA.
 - (4) **Apportionment between the husband/father and two sons.** The Judge preferred a detailed approach rather than the pragmatic solution urged by the defendant.

Recoverability of professional deputyship fees

4. D submitted:
 - common law rules do not apply to the assessment of damages arising from death. Such assessment is a creature of statute – the FAA. By section 3, other than damages for bereavement and funeral expenses, the only damages recoverable are such damages that “*may be awarded as are proportioned to the injury resulting from the death to the dependants respectively*”;
 - as per Diplock LJ in *Malyon v Plummer* [1964] 1 QB 330, at 349 this means the only damage recoverable is “*the loss of a benefit in money or money’s worth, which if the deceased had survived, would have accrued*” to the dependant from the relationship to the deceased; and as summarised in *McGregor on Damages* (22nd Edition 42-048), case law has interpreted this provision to mean that “*the dependant is entitled by clear principle of law, to full compensation for the loss of this pecuniary benefit, but ... no more*”;
 - the cost of deputyship was a cost arising because of the Deceased’s death, not a benefit that the Deceased would otherwise have conferred on the sons had she continued to live. As such, the fees were not recoverable under the FAA.
5. C argued: given the rules of court, the deputyship fees were a “necessary corollary” to the award for loss of services, and referred to a phrase of Jay J in *Rupasinghe v West Hertfordshire Hospitals NHS Trust* [2017] PIQR Q1 at paragraph 47 where it was said that the Act is “*only concerned with losses which flow from what the Deceased did when alive: either by the making of a financial contribution to the household, or by providing childcare and similar services (capable, under the common law, of being accorded a financial value)*”.
6. The Judge: accepted that a dependant cannot claim losses which simply arise as the result of death, but only those that represent the loss of a future benefit a deceased would have provided. He also accepted that the administration of the fund awarded for the benefit of the sons was not itself a benefit that the Deceased would have conferred had she lived.
7. However, placing emphasis on the principle of “*full compensation*” the Judge held the costs were recoverable as damages because: “*it is clear (not least from the approach taken by both parties in the present case, who differ in this respect only on factual matters) that when deciding what “full compensation” means in a particular case, the Court must take a realistic view of what sum is needed to replace, in practical terms, the identified services that the deceased would otherwise have been providing. Thus it is the parties’ agreed position in this case that, at a certain point in time (about which they disagree) not only will it be reasonable to replace Michelle’s services to the boys by engaging a support worker at an hourly rate, but also, in order to ensure that the support*

*worker does indeed replicate those services appropriately, it will be necessary to incur ancillary case management costs... The case managers are not themselves replacing what Michelle did – that will be done by the support worker – but their fees are a necessary corollary of ensuring that the sums awarded for engaging a support worker are actually spent in a way which best serves to replace what Michelle was doing for the boys... **Given that “full compensation” for the loss of services would appear to include the costs of allowing dependants to make effective use of funds intended to finance replacement services, I agree that the deputy fees are a “necessary corollary” and should be regarded as part and parcel of the sum required to give full compensation for the loss of pecuniary benefit that is provided for by FAA s3;***

8. Recognising the novelty of the decision and the importance of the issue the Judge granted permission to appeal on this point.
9. Comment: it is easy to see why many would regard this as an equitable outcome since it avoids the situation whereby funds awarded to replace future services would either be inaccessible, or in effect reduced substantially by the fees required to administer and implement them. After all:
 - the sons lacked capacity (through no fault of D);
 - the Deceased was no longer alive to manage their affairs (due to the fault of D);
 - the sons received large damages awards because they had lost the services of the Deceased (due to the fault of D);
 - to unlock those sums, a professional deputy had to be appointed.
10. My view though is that the Judge did considerable violence to the wording of the Act and extended loss beyond that permitted by the FAA:
 - the original interpretation of section 3 as set out in *Franklin v S E Ry (1858) 3 H. & N. 211* per Pollock CB is that damages “*should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of life*” [my emphasis];
 - despite the wording of paragraph 47 of his judgment, Jay J in *Rupasinghe* did not extend recoverable losses under s.3 to anything other than an actual benefit (service) that a deceased would have provided had they lived. In paragraph 25 he explicitly recognised, referring to *Malyon v Plummer* that in interpreting s.3 “*the circumscribing principle is that damages are awarded as recompense for the loss of the benefits which would have enured to the dependants if the deceased had survived, flowing from the relationship between the deceased and these dependants*”;
 - whilst managing finances, appointments, safeguarding and decision-making might be regarded as part of the care services provided by the Deceased, and as such some of the services rendered by the Deceased could be regarded as akin to deputyship and thus capable of being

valued as a pecuniary benefit to be recovered under s.3, (which is not in any event how C appears to have argued the case) the fact remains that the sons would never have benefitted from the Deceased's services in terms of administering the fund, because had the Deceased lived there would never have been the need for such a service;

- whatever may have been the approach of the parties in this case, it is not clear on the authorities that 'full compensation' necessarily equates to the costs of replacing those services, let alone consequential expenses necessary to allow dependants to make use of funds to finance replacement services. That is more akin to the common law concept of providing full recompense to an injured claimant. The support drawn from the analogy with case management costs is questionable as discussed in the section below on quantification of future services dependency, especially in circumstances where the principle of an award for such costs had not been argued, but allowed by way of agreement (when D quite possibly might not have appreciated the unintended consequences of such agreement);
- it is clearly just that such costs should be allowed as damages, but to achieve that justice I would suggest legislative reform is required.

Proportionality of Deputyship Fees

11. Decisions on deputyship fees are rare, so whilst this was very much a subsidiary point it is nonetheless of some interest.
12. Excluding deputyship fees, D had put forward dependency figures of c.£195,000 for each of the sons, whilst C had put forward c.£1,167,290 (past and future services dependency and loss of intangible benefits). The parties had also agreed the deputyship costs for each of the sons depending on whether C's or D's figures were successful (ranging between £172,000 - £287,000).
13. In the event, the Judge's figure (excluding deputyship fees) was c.£449,000 for each of the sons. The Judge then awarded £227,566 and £186,525 for deputyship fees; the detail of his calculation based on the parties' rival figures is at [131-133].
14. D then argued by reference to an unreported decision of HHJ Yelton sitting as a Judge of the High Court that the award for deputyship fees should not exceed 30% of the sons' damages for other heads of loss.
15. The Judge had no trouble dismissing that suggestion, holding that whilst the fees should be proportionate to the sums to be administered, there was no rule that this should be assessed in some percentage proportion to the sum to be administered. The Judge noted he was in a better position evidentially to consider whether the fees were reasonable and in proportion to the overall value of the fund and the complexity of its administration, since the experts were agreed as what work would need to be done and the hourly rates both on C's scenario and D's scenario. He placed

weight on the fact that D's expert had not said that although the individual items were reasonable, the overall fees were out of kilter with the value of the fund.

16. As to the requirement for a professional deputy, the Judge noted that whilst it was ultimately for the Court of Protection to decide whether a lay or professional deputy should be allowed it would be appropriate to include the costs as damages (as happened in personal injury cases) unless there was real doubt as to the reasonableness of going down the professional route. Since both experts had agreed a professional deputy would be needed (and did not alter that view on the assumption D's figures were accepted) the Judge held there was no doubt that a professional deputy would be required.

Future services dependency valuation

17. The Judge decided that although he had valued the past care services provided by the Deceased by reference to a gratuitous rate, going forwards from the time of trial it would be appropriate to value the lost services by reference to a commercial rate. In so doing:

- 17.1. the Judge appears to have accepted C's proposition that *"on the authorities, the starting point is that the measure for an award for future loss of service dependency is the cost of buying in replacement services at market rates, regardless of whether the dependants would ever actually enlist commercial service providers"*;

- 17.2. the Judge then allowed recovery for the commercial rates of a housekeeper (for all 3 dependants), of support workers for the sons, and of case managers for the sons (by agreement). Thus items such as an initial agency introduction fee, payroll assistance, DBS check etc (ie the costs of employing domestic help) were included, and a period of 57 weeks (to allow for holiday entitlement and sick days) was allowed. As for case management, which as noted elsewhere in the judgment would not actually be replacing services provided by the Deceased but was an ancillary cost corollary to the need for support workers, those costs will also have included travel expenses, travel time, and report writing time. The full commercial rates will also include an element to reflect tax and N.I payable.

18. Other than arguing that a deduction of 25% should be made for so long as the Claimant and the husband were likely to provide replacement services into the future (rejected as per 17.1 above) it does not appear from the judgment that there was any argument as to whether all the items involved in the commercial rates should be allowed, or indeed whether case management costs properly reflected lost services that the Deceased would have provided per s.3 FAA.
19. I would suggest that the starting point is not as clear-cut as stated by the Judge, and that none of the employment related costs, or indeed case management costs properly reflect the value of services that the Deceased would have provided or are an appropriate yardstick by which

to value those services. Whilst recognising that valuing a lost services dependency is a notoriously fact sensitive exercise the following argument can be made:

- 19.1. the task of the Court is to evaluate the level of services that would have been provided by a deceased but for the death. This is acknowledged to be a ‘jury question’ so there is a wide ambit of discretion. It is also conceptually different to the assessment of care needs in normal personal injury litigation which looks at the reasonable requirements of the injured person and how best to put them back into the position they would have been ‘but for’ the negligence;
- 19.2. the care that a deceased would have provided had they not died is not necessarily the same as the actual care that has been provided to dependants. Thus, where replacement services have been provided gratuitously (by say the surviving parent) and will be so provided into the future, that does not prevent an assessment of the value of the lost services by reference to the commercial rate of replacing those services if the commercial cost of replacing those services is a reasonable proxy for the value of those lost services;
- 19.3. but it is by no means clear on the authorities that the commercial replacement cost of lost gratuitous services is always the appropriate way to value such lost services, and it is even less clear that the full commercial rate is the appropriate proxy measure:
 - 19.3.1. in most of the cases concerning orphaned children (which are generally older cases) or where children were the only dependants, the ‘replacement’ care was provided gratuitously by relatives and would continue to be so provided. Against that backdrop the Courts were generally reluctant to award commercial rates as a proxy valuation of the care services provided and would instead adopt a ‘jury’ figure for the care provided. This is perhaps a reflection of the fact that originally awards under the FAA were treated as jury awards¹, and that the older cases were before the advent of widely available hourly rates that subsequently have been used in personal injury litigation much more frequently (and so the Courts were more willing to adopt their own figure for care services provided gratuitously);
 - 19.3.2. but in those cases where the claimants were a surviving husband and children, the lost gratuitous services were often calculated by reference to the expense incurred in procuring the surviving spouse with the services of a housekeeper or a home help;
 - 19.3.3. however, where commercial rates were used that rate was the ‘net in hand wage’ i.e., after deduction of tax and NI contributions, and with no addition of cover for weekends or holidays. This was made particularly clear in *Corbett v Barking Havering and*

¹ See *Spittle v Bunney* [1988] 1 WLR 847, CA per Croom-Johnson LJ at [853F]

*Brentwood Health Authority*² where the surviving husband and child were awarded the net in hand wage of a nanny/housekeeper in circumstances where Dad had replaced part of the care provided by Mum, and grandparents had replaced the rest of it, and there was no intention to hire a nanny/housekeeper in the future. On appeal the award of the net cost was not challenged, but the failure to allow ‘extra’ costs of employment such as holiday cover was (whilst the non-inclusion by the Judge of other items such as agency fees, uniform costs etc were not pursued on appeal). The Judge’s assessment of the appropriate multiplicand was upheld, and the CA specifically approved the Judge’s finding that “*A further reason for excluding these [extra costs] is this. What one is engaged in here is the valuation of the lost services and not what it would cost to provide those services. ... on the basis of the ‘nanny formula’ the net in hand figure for the nanny/housekeeper for 52 weeks of the year is, in my judgement, the appropriate figure to be used in valuing the lost services. All other items of notional expenditure are irrelevant and to be left out of account*” [421E-F]. Purchas LJ in upholding the rate chosen by the Judge noted that it was a jury question and that “*... it must never be forgotten in this particular exercise that the multiplicand/multiplier approach based upon the cost of hiring alternative commercial services is at the best a very crude and approximate instrument. It borders upon complete artificiality and, in my judgment, is acceptable only on the basis that there is no better means of approaching this difficult and almost unquantifiable aspect of dependency...*”.

19.3.4. three more recent cases however that have departed from that approach: *Bordin v St Mary’s NHS Trust*³ (nanny substitute employed but relatives also assisted after Mrs Bordin died – Crane J allowed the full commercial rate for the nanny substitute, and that rate less 35%⁴ for the care provided by the unpaid relatives, and also allowed the expenses of the grandparents in travelling to and from the UK to provide the care); *Knauer v MoJ*^{5,6} (Bean J held that the widower and the children were entitled to the ‘value of that which they had lost’ assessed by reference to the agency rate of cooks/cleaners with no reduction on the commercial rate even though no cook/cleaner had in fact been employed); *Witham v Stephen Hill Ltd*⁷ (first instance Judge allowed the full commercial rate for replacement care provided gratuitously by the surviving foster mother who gave up work to do so – upheld on appeal because “*where earnings have been lost, the commercial rate of care*

² [1991] 2 Q.B 408. See also *Spittle v Bunney*, *ibid* where the net wages for a commercially hired nanny were recovered until age 22 but where the multiplicand was heavily reduced in the later years, and *Batt v Highgate Hospital* [2004] EWHC 707 at [30], and *Rupasinghe v West Hertfordshire NHS Trust* [2016] EWHC 2848 (QB) per Jay J at [49]

³ [2000] Lloyd’s Rep. Med. 287

⁴ At the time there was slightly more of a vogue for reducing gratuitous care by 1/3 compared to the 1/4 almost universally encountered nowadays in personal injury litigation

⁵ [2014] EWHC 2553 (QB)

⁶ This is the first instance decision. The case went to the Supreme Court but on different points

⁷ [2021] EWCA Civ 1312

may⁸ be appropriate). Space does not permit a fuller explanation of the problems with these first instant decisions but for current purposes it is worth noting that in *Bordin* and *Knauer* it does not appear from the judgments that there was any argument or reasoned judgment as to whether 25% (or 35%) should have been deducted from the commercial rate. In *Witham* criticisms can be made of the approach of the first instance judge and the authorities relied upon to arrive at the decision not to deduct 25%, but in any event *Witham* is no authority for the proposition that no reduction for tax/N.I should be made for valuing loss of future care services where the replacement care provider has not in fact given up work. In none of the cases was *Corbett* considered in detail;

19.3.5. it is difficult to see how the element of commercial rates that reflects tax/N.I can be said to be a benefit that would have accrued to dependants had a deceased survived. Ditto items such as the employment costs of hiring replacement services for the care a deceased would have provided, or the travel costs of support workers, or case management costs. A deceased could never have provided more than 52 weeks of care per year. There does not appear to be a properly reasoned and sound judgement addressing the rationale and propriety of recovering these items under s.3.

20. It is thus unfortunate in *Burgess* that the Judge used the parties' agreement to allow case management costs (the recoverability of which under s.3 has not faced judicial scrutiny) as the basis for allowing deputyship fees to be recovered

Apportionment

21. Somewhat unusually, in this case D was involved in the argument as to apportionment of damages between the three dependants. Usually this is viewed as a matter for the claimant, dependants, and Court if approval is needed. D's motivating factor would seem to be linked to the argument being advanced that deputyship fees should be no more than a percentage proportion of the funds to be administered – it was thus in D's interest to try and keep the sums apportioned to the sons for past and future services dependency as low as possible.

22. D submitted that all the damages for past services dependency should be allocated to the husband since he had in effect replaced the Deceased's care provision and, pursuant to *H v S* [2002] EWCA Civ 792, damages for past services dependency are held on trust for the person who has replaced the services gratuitously.

23. The Judge rejected that approach, noting that in the circumstances of this case there was no pragmatic benefit (unlike in the more common situation of a spouse with infant children and funds

⁸ Note the 'may'. In *Mehmetemin v Farrell* [2017] EWHC 103 (QB), personal injury case, the argument that where a relative had given up work the full commercial care rate should be awarded without reduction was rejected

under £100,000) and that it would be preferable to apportion in a way reflecting the actual loss to each dependant (and which was possible because of the detailed expert care evidence identifying the separate services provided to the husband, and each of the sons). There is a difference between asking what services a particular dependant has lost, and for whom should they hold the sum that reflects that loss.

Reflections

24. The appeal will be of great interest in this case. Given the Judge's reasoning on the recoverability of the deputyship fees, it is to be anticipated that consideration would have to be given to whether case management costs and the like are properly recoverable under s.3 FAA. Even if the appeal is compromised I doubt this will be the last word on the recoverability of such costs. For the moment though, the score is 1-0 for claimants.

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Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.