



## **The Danger of Compromise:**

### **The Round Table Meeting when the Claimant wants to settle**

#### **The Claimant's Dilemma**

In 1950 a US mathematician called A. W. Tucker invented “*a two person, non co-operative, no-zero-sum game*” he called “*The Prisoner's Dilemma*”. The problem continues to exert considerable influence and provides a useful analytical tool for social scientists and political philosophers alike. Two prisoners are confronted with the following situation: if they both confess, they will both receive reduced sentences; if one confesses and the other does not, the confessor is released and the other goes to jail for the maximum period of time; if neither confesses they are both sentenced for a lesser offence. The game theory posits that in balancing the risks the most rational thing for each to do is to confess as the reduced sentence is guaranteed: “*the dominant alternative achieves a stable equilibrium*”.

The Claimant in a personal injury action is confronted with an analogous dilemma: he or she can take the risk of going to court, if he or she succeeds in some, most, or all of the arguments put forward the award of damages will be maximised and (presumably) exceed the compromise offered by the Defendant before trial. If, however, the Defendant's arguments are

preferred the Claimant faces not only the possibility of receiving less than the sum offered by the Defendant by way of compromise, but the potential additional burden of having to pay the Defendant's costs of trial. The "*dominant alternative*" to achieve a "*stable equilibrium*" is to compromise: balancing the risks, avoiding the uncertainty of trial, and achieving certainty at an early stage. We probably do not need mathematicians from the Princeton School of Advanced Study to tell us that "*a bird in the hand is worth two in the bush*".

The role of the legal representative is to consider those areas where the line between certainty and uncertainty are blurred: where there is concern that the other side is asking for too much to be discounted from the claim, the arguments are finely balanced either way, or it is simply impossible to know which way the court and the evidence might go. In all cases these will be matters of judgment. In many case such fine distinctions will become academic as in the overall analysis of the case and the global settlement figure offered, the risks in relation to one head of claim will be balanced against the favourable concessions made by the Defendant in relation to others: "*swings and roundabouts*".

Perhaps a distinction can be drawn between what we could categorise as "hard" and "soft" law, "hard" law being that which can be derived from arguments that are tried and proven, either because subject to binding or persuasive authority, or experience suggests that they will regularly succeed in court. The party riding against the currents will be in

considerable difficulty. Those factors which are “soft” are those which may be peculiar to the Claimant, the circumstances of his or her life, or the particular issues in the case: how he or she will fare as a witness, the extent to which his or her expectations are properly met by the pleaded case, the extent to which the heads of claim are vulnerable to being unpicked under cross-examination, underlying assumptions within the case that are simply unknowable.

For the purposes of this paper I am concerned with those area of “hard” law where Counsel can provide some guidance in a round table meeting, how arguments can be deployed on the Claimant’s behalf, based on case law and experience that can assist in maximising any settlement and represent “safe” – as opposed to “dangerous” - compromise.

### **Arbitrary or Reasonable Discounting?**

#### 1. Care

1.1 The most accessible guidance given in relation to care rates is probably

*Facts & Figures 20/11* pp. 287-291.

1.2 It is notable that despite the decision of the Court of Appeal in *Evans v*

*Pontypridd Roofing* [2001] EWCA Civ 1657; [2002] PIQR Q5, Counter Schedules continue to discount by 33% following *Housecroft v Burnett* [1986] 1 All ER 322 (CA).

- 1.3 The authorities have moved beyond the strictures of *Mills v British Rail Engineering* [1992] PIQR Q130 (CA) that awards are limited to very serious cases and only for care that is provided “*well beyond the ordinary call of duty*”, see *Giambrone v Sunworld Holidays Ltd* [2004] EWCA Civ 158; [2004] PIQR Q4, and *Newman v Folkes* [2001] EWCA Civ 591
- 1.4 The Court of Appeal has repeatedly refused to lay down any general rules or guidance, the test is “*to enable the voluntary carer to receive proper recompense for his or her services*”, per Lord Bridge in *Hunt v Severs* [1994] 2 AC 350 at 363A.
- 1.5 The BNA rates – currently found in *Facts & Figures 2011/11* at pp. 292-294 – are a guide and provide a ceiling.
- 1.6 The discount applied must reflect the particular circumstances of the case, the amount of care provided, the nature of the care, who provided it, and when.
- 1.7 A 20% reduction is based on what would ordinarily be deducted for tax and National Insurance, cf. *Hassell v Abnoof* (QBD, 6 July 2001) a 15% reduction was justified on the basis that the care provided, cleaning, was likely to incur tax and NI at such a level.
- 1.8 The court may consider it unnecessary to discount the commercial rate in certain circumstances:

- where the carer has given up well paid employment. [*Hogg v Doyle* (6 March 1991, unreported); *Fish v Wilcox* [1994] 5 Med LR 230; *Abdul-Hosn v Trustees of the Italian Hospital*, Kemp & Kemp B2-006]
- where the carer provides services during unsociable hours, weekends, and/or public holidays: *Newman v Folkes* [2002] EWCA Civ 591; *A v B Hospitals NHS Trust* [2006] EWHC 1178 (QB); *Warrilow v Norfolk and Norwich Hospitals NHS Trust* [2006] EWHC 801 (QB).
- where low rates are claimed: *parry v NW Surrey Health Authority* (29 November 1999, unreported, QBD).
- where care provided was of an extremely high quality: *Lamey v Wirral Health Authority* [1993] CLY 1437; *A v National Blood Authority* [2001] Lloyd's Rep Med 187; *Brown v King's Lynn v Wisbech NHS Hospitals Trust* (20 December 2000, unreported).
- where the claim is modest and does not exceed the personal annual tax allowance: *Lake v Lake (Deceased)* LTL 31/7/2007.

A table of cases and the discount applied is included in Latimer-Sayer et al, *Personal Injury Schedules. Calculating Damages 3rd Edition* (2010) pp. 269-71

## 2. Interest

2.1 Many cases take a long time to reach the point when the claim can be issued and a Schedule of Loss served.

2.2 In many instances the Defendant will take the point that the Claimant's entitlement to interest should be reduced on account of delay. On occasions a specific period will be highlighted as representing a period of culpable delay but more often than not the Defendant will ask for a percentage reduction in interest.

2.3 This approach is not correct. It is not enough for the Defendant to assert that the claim should have been brought on sooner and that an arbitrary reduction be applied to the whole period. The issue is what is culpable delay. In *Eagle v Chambers (No 2)* [2004] EWCA Civ 1033 interest for 7 out of the 14 years since the accident was disallowed, see also *Nash v Southmead Health Authority* [1993] PIQR Q 156; *Read v Harries (No 2)* [1995] PIQR Q34; *Spittle v Bunney* [1988] 1 WLR 847.

2.4 The Defendant should set out arguments in the counter schedule relating to the Claimant's conduct of the case and plead specific delay with reference to dates and where it is said steps should have been taken to progress the claim. Asserting the period of culpable delay is particularly important when interest rates have remained comparatively low in recent years: i.e. the more recent the delay the lower the interest rate, so the lower the any deduction will be.

### 3. Discount of Expenses Relating to Work

3.1 In its Counter Schedule the Defendant will often plead that the Claimant must give credit for expenses that would have been incurred in earning a living: for example, childminding expenses, clothing for work (shoe leather), and travel expenses (i.e. from work to home). However, it is rare that such deductions are based on evidence, except perhaps in the case of the self-employed.

3.2 In *Eagle v Chambers* (No 2) [2004] EWCA Civ 1003 the Court of Appeal upheld the trial judge's deduction of 15% of past loss of earnings for travel expenses that would have been incurred in any event, though in doing so observed that no explanation had been provided for such a figure by the trial judge and it was illogical to apply it only to past and not to future loss of earnings.

3.3 On appeal the Claimant relied on a passage of Lord Griffiths from *Dew v The National Coal Board* [1988] AC 1:

*Where ever a man lives he is likely to incur some travelling expenses to work which will be saved during his period of incapacity, and they are strictly expenses necessarily incurred for the purpose of earning his living. It would, however, be intolerable in every personal injury action to have an inquiry into travelling expenses to determine that part necessarily attributable to earning the wage and that part attributable to a chosen life-style. I know of no case in which travelling expenses to work have been deducted from a weekly wage, and although the point does not fall for decision, I do not encourage any insurer or employer to seek to do so. I can, however, envisage a case where travelling expenses loom as so large an element in the damage that further consideration of the question would be justified as, for example, in the case of a wealthy man who commuted*

*daily by helicopter from the Channel Islands to London. I have only touched on the question of travelling expenses to show that in the field of damages for personal injury, principles must sometimes yield to common sense.*

3.4 In *Eagle v Chambers* the Court of Appeal took this passage as a warning to prevent “*inordinate time being spent on not very significant items in the context of an exercise which is attempting to assess damages in a broad way*”. So the first instance judge’s decision was upheld.

3.5 Three points can be made. *Eagle v Chambers* is not authority for the proposition that deductions should be made by a fixed percentage – 10 or 15% - from the Claimant’s past loss of earnings. It is certainly not authority for the proposition that such a deduction is justified in the circumstances where there is a large claim for future loss of earnings. Lord Griffiths was not concerned with allowing such deductions when there were large claims for loss of earnings. It was appropriate to deduct such expenses in situations in which large travel expenses had been incurred prior to the injury. Thirdly, if this is a matter which should not trouble the courts who bears the risk of running the argument?

3.6 Where there is evidence the court apply a reduction: in *Sparks v Royal Hospitals NHS Trust* (21 December 1998, unreported) McKinnon J. deducted £ 3 a week for travel costs.

### Expenses incurred in any Event

4.1 A difficult issue is what credit should be given for those items of expenditure recommended by the OT or other expert when it is said that this expense would have been incurred in any event. Related issues are the amount of DIY or gardening for which the Claimant would have required assistance in any event, and what he or she would have spent on computers and other technology. These questions are genuinely difficult to answer as in reality we simply do not know.

4.2 In some instances the Claimant can distinguish between what was formerly a matter of choice and is now a matter of need. Moreover, because of that need, maintenance, servicing, upkeep, and replacements have to be more regular. However, in many cases extensive inquiries would have to be made of family members which may simply not be proportionate or possible. There is a clear advantage in compromising such heads of loss: if only because no-one wishes to waste judicial time *per* Lord Griffiths in *Dew*.

### Life Expectancy

5.1 In *Edwards v Martin* [2008] EWCA Civ 413 the parties' neurologists agreed that the head injury sustained by the Claimant gave rise to no reduction in the Claimant's expectation of life. The Defendant's case was that because the Claimant was a smoker and had recurring episodes of depressive illness his expectation of life was reduced below that of the general population.

5.2 In arriving at a lower expectation of life figure the Defendant's expert adopted a method of calculating life expectancy used by life insurers (the DEALE method). The actuarial assessment involved was different from that engaged by the court when considering expectation of life for the purposes of a personal injury claim. It took into account "bad" lifestyle factors without placing any comparable weight on those factors that might count in his favour, i.e. "good" lifestyle factors.

5.3 The judge observed that the Ogden Tables include smokers and non-smokers, the obese and the non-obese, people with and people without depressive illnesses. He also held that the issue was not a medical question but a statistical one. In the circumstances the conventional approach was correct, though it is worth observing that the judge found as a fact that the Claimant became a smoker after the accident, and that there was no evidence that his depressive illness gave rise to a risk to life.

## **Ogden V1**

### Disabled or Not Disabled

6.1 In *Conner v Bradman & Co* [2007] EWHC 2789 (QB) HHJ Peter Coulson QC (as he then was) considered the definition of disablement under the Disability Discrimination Act 1995. He considered the guidance notes published by the Secretary of State. On the facts of the case he considered that the Claimant, who had suffered a knee injury requiring surgery, was

disabled. The medical evidence was that the Claimant could probably work as a minicab driver until normal retirement age. The judge refused to apply the full discount allowed by the tables for the Claimant's residual earning capacity of 0.49, instead he applied a midpoint discount for contingencies of 0.655 (which was the midpoint discount between someone who is disabled and someone who is not disabled).

6.2 In *Garth v (1) Grant (2) MIB*, QBD, Lawtel 17/7/2007, HHJ Hickinbottom (as he then was) (sitting as an additional judge of the High Court) had to decide whether a morbidly obese Claimant was disabled at the time of the accident so as to justify a higher discount to her potential future earnings. At the time of the accident the Claimant weighed 28-30 stones and accepted that she had had a "*long and tortuous fight against obesity*". However, she gave evidence that she used to play tennis, do aquaerobics, and her weight had never affected her work. The judge accepted that she was not significantly functionally disabled by her weight and therefore applied Table C as opposed to Table D.

6.3 In *Leesmith v Evans* [2008] EWHC 134 (QB) the parties' respective employment consultants agreed that the Claimant had a residual earning capacity of £10,000 net pa. The Defendant argued that this multiplicand already took into account the degree of disability of the Claimant and therefore to apply the Table B discount factor of 0.54 was unjust. The judge said that he partly agreed with the submission and reduced the discount to 0.60.

### Employed or Not Employed

6.4 In the Northern Irish case of *Hunter v MOD* [2007] NIQB 43 Stephens J. assessed the future loss of earnings for a Corporal in the Royal Irish Regiment. The main live issue concerned the appropriate discount to the multiplier for the Claimant's residual earning capacity. Since the Claimant was unemployed and disabled as at the date of trial, Table B suggested a discount of 80%. However, if he was in employment and disabled the discount would have been 61%. The judge held on the basis of the medical evidence that there was no reason why the Claimant should not be in employment and therefore approached the assessment on the basis that the Claimant was employed. He held that: "*in arriving at the appropriate reduction to the multiplier, the court is required to consider the degree of the plaintiff's disability and where the plaintiff falls in the range of potential reductions to the multiplier*".

6.5 In the circumstances a discount of 40% was held to be appropriate (i.e. half of the discount that would otherwise have been expected from a straightforward application of the tables).

### Female Claimants

6.6 In *A v Powys Health Board* [2007] EWHC 2996 (QB) the Defendant argued for a discount reflecting the chance that the female claimant might have had time off work to have and bring up children. Expert employment evidence suggested that many women take between 5 and 10 years off

work to bring up children and most would return on a part-time basis. Paragraph 40 of the guidance notes specifically states: “*The factors in Tables A to D allow for the interruption of employment for bringing up children and caring for other dependants*”. The judge refused to apply a discount over and above that already allowed for in the tables. If childbirth and childrearing has already been taken into account in the discount for contingencies, there is no need to take account of it again.

### Clarke v Maltby

6.7 *Clarke v Maltby* [2010] EWHC 1201 (QB) was a subtle brain injury case.

The Claimant’s loss of earnings claim was based on her earnings as a solicitor and her likely career progression, rising to salaried partner in a city law firm. Lost earnings were calculated using the multiplier to age 65 at a discount rate of 2.5%. The Claimant’s case was that her residual earning capacity was £ 24, 000 per annum (gross) based on reduced working hours, 3 days per week. This was equivalent to £ 40, 000 on a full time basis. The Defendant contended for a continuing gross earnings residual earning capacity of £ 45, 000.

6.8 The judge held that the issue was whether or not the Claimant was limited to a three day week in a less demanding role. The judge found that the likelihood of the Claimant working a three day week was pessimistic and she could probably work a five day week in a less stressful role. Therefore her residual earning capacity was of the order of £ 40, 000. The judge did not apply any discounts as set out in *Ogden VI* he held that: “*her degree of*

*disability has been fully reflected in the difference between her lost and residual earning capacity”.*

### Practical Advice

6.9 Each case will be decided on its own facts. Where the Claimant’s pre-accident functional capacity is being challenged, detailed witness evidence regarding his or her ability to carry out day-to-day activities is essential. Where post-accident disability is challenged it will be useful to prepare detailed witness evidence dealing with the factors set out in the Guidance Notes to the Disability Discrimination Act 1995. Medical experts need to be given careful guidance on the definition of disablement. It cannot be guaranteed that someone who is unemployed as at the date of trial will be treated as such, especially if he or she ought to have been able to find suitable alternative work. It is worth considering arguments regarding the multiplicand for residual earning capacity in advance to counter any further discount to the claim.<sup>1</sup>

---

<sup>1</sup> Professor Wass has commented on some of these cases in JPIL, see in particular “Discretion in the Application of the New Ogden Six Multipliers: The Case of Conner v Bradman and Company”, [2008] JPIL Issue 2 pp. 154-163.

## **Accommodation**

### Credit for equity in “but for” property

8.1 The schedule of loss can set out a number of variables in relation to the accommodation the Claimant would have had but for the accident: the purchase of a shared flat, followed by purchase of a larger flat/house when married, and a larger property when the Claimant would have had a family. Such projections are hugely hypothetical but allow for limited credit of half to two thirds in the property that would have been bought in any event: see *M (a child) v Leeds HA* [2002] PIQR Q46 (50% equity); *Iqbal v Whipps Cross University Hospital NHS Trust* [2006] EWHC 3111(QB) (67%); and *Sarwar v (1) Ali (2) MIB* [2007] EWHC 1255 (QB) (50%).

8.2 Careful consideration has to be given to the Claimant’s likely earnings in order to assess his or her likely borrowing capacity: something which may alter over the course of time, one wonders if the approach taken above is still sustainable in a contracting property market?

### Credit for parents / partner living rent free

8.3 No credit should be given to reflect the benefit to the Claimant’s parents receive by living in the Claimant’s new accommodation: *Parkhouse v North Devon Health Care NHS Trust* [2002] Lloyd’s Rep Med 100; *Iqbal v Whipps Cross University Hospital NHS Trust* [2006] EWHC 3111(QB);

*M (a child) v Leeds HA* [2002] PIQR Q46 and *Parkhouse v Northern Devon Healthcare NHS Trust* [2002] Lloyd's Rep Med 100.

8.4 In *Lewis v Shrewsbury Hospital NHS Trust* HHJ MacDuff, QBD, as he then was, made a discount where on the facts of the case the Claimant's parents were renting out their property for a profit.

8.5 In *Noble v Owens* [2008] EWHC 359 (QB) the Defendant sought credit for the "notional costs" of accommodation that the Claimant had saved as a result of his new accommodation. At the time of the accident he was living in his partner's house (mortgage free) and he paid her a weekly sum for his keep. The judge held that there was no need to give credit for these "notional costs". Equally, if the partner was now living rent free in the Claimant's accommodation, this was a benefit to her and could not be offset against the Claimant's claim for damages.

### **Reasonableness**

9.1 One of the perplexing aspects of the law of damages for personal injury is the lack of agreement over what the principle of "reasonableness" actually is.

9.2 In *A v Powys* Lloyd Jones J applied the test of reasonableness as stated in *Railis v Mitchell* and *Snowden v Lodge* [2005] 1 WLR 2129 as:

*The claimant is entitled to damages to meet her reasonable requirements and reasonable needs arising from her injuries. In deciding what is*

*reasonable it is necessary to consider first whether the provision chosen and claimed is reasonable and not whether, objectively, it is reasonable or whether other provision would be reasonable. Accordingly if treatment claimed by the claimant is reasonable it is no answer for the defendant to point to cheaper treatment which is also reasonable.*

What is reasonable?

9.3 It is necessary to consider the nature and extent of the Claimant's needs and then to consider whether what is proposed by the Claimant is reasonable having regard to those needs. However, "need" is not the only aspect of this test, or at least the word "need" should not be construed narrowly or held to synonymous with "necessary".

9.4 The reason for this is that the underlying principle of the law of damages is that the Claimant should be returned to the position that he or she would have been in had the accident not occurred. This allows for the law of compensatory damage to encompass a much broader range of claims, and those for aids, equipment, and technology in particular, than those which are narrowly construed as being required as a necessity. So, for example, in *Burton v Kingsbury* [2007] EWHC 2091 (QB) Flaux J allowed various items of assistive technology because:

*If such technology is available to give the Claimant a level of independence so that he does not have to summon a carer or his wife to switch on a light or a piece of equipment or to draw a curtain or blind, it seems to me that he should be entitled to it and to recover its cost from the Defendant.*

9.5 Recovering such items not only went some way to put the Claimant back in the position he would have been in had he not been injured, but went some way to making him more independent, in making his life “better” in a qualitative way.

9.6 In some instances the courts have been antipathetic to claims which are intended to improve the quality of the Claimant’s life but could not otherwise be described either as necessary or reasonable. For example, In *Iqbal v Whipps Cross University Hospital NHS Trust* [2006] EWHC 3111(QB) Sir Rodger Bell refused the claim for a wheelchair lift to allow the Claimant to access the grassy part of his garden because he found that the bungalow was suitable for his needs without requiring access to the grassy area. To this extent there is an apparent conflict between a law of damages that seeks to limit damages to that which is “compensatory” on the one hand but aspires to put the Claimant in the position he or she would have been in had the injury never occurred on the other.

#### Cost

9.7 As the above quotations from Flaux and Lloyd Jones JJ. illustrates once it has been accepted that the claim is reasonable, the Defendant cannot meet the claim by arguing about the cost or the availability of a cheaper alternative. Stepping back from this proposition for a moment one might think that such a rule creates a glass ceiling for the Claimant where if he or she can show a need the cost will be met no matter what the expense: i.e. no principle of proportionality or mitigation applies. The reality of most

claims is that the reasonableness test itself is a suitable control mechanism. Evidence of inordinate expense is likely to indicate that the claim is unreasonable. However, in the context of round table discussions the Defendant's protestations that cheaper alternatives are available can be met with the response that if the claim is reasonable the Claimant's costings should follow.

#### Free State Provision and Means Testing

9.8 The strict application of the *Rialis/Sowden* test would suggest that free state provision is no proper response to the claim: if the need is made out it is reasonable for the Claimant to have that need met by the purchase of such equipment in the future.

9.9 Even if the Defendant were to pursue the argument of free state provision it is likely to fail at subsequent hurdles. The Defendant must adduce evidence that such equipment will be provided free and that such provision will continue into the future. The Claimant can point to the inevitable delay, time, and trouble involved in waiting for such state provision, the uncertainty of future provision, the lack of freedom of choice, and issues of quality.

9.10 It is not appropriate to deduct means tested state benefits from a claim for damages. For example, the Disabled Facilities Grant – very often deducted from the accommodation claim in the Counter Schedule – is a means tested benefit and should not be deducted.



## Fatal Accidents

10.1 The approach of the courts in fatal accident cases is to assess the multiplier at the date of death: *Cookson v Knowles* [1979] AC 556.

### *A Train v Fletcher* [2008] EWCA Civ 413

10.2 The Deceased died on 21 October 2004 from the effects of malignant mesothelioma acquired from exposure to asbestos while in the course of his employment with the Defendant. Judgment was handed down on 2 April 2007. The Claimant widow's financial dependency was assessed at: £ 35, 000 calculated from the date of death to date of trial (Period 1); future loss of £ 39, 000 from the date of trial to the Deceased's retirement (Period 2); and £ 123, 000 post-retirement (Period 3): a total of £ 197, 000.

10.3 The judge heard submissions on interest and awarded interest at the full rate on the whole amount, £ 197, 000, rather than as the Defendant submitted for Period 1 alone. The difference in the figures is striking:

#### *Defendant*

Interest at half rate on past loss	
.375% x £ 35, 184	2, 594. 83

#### *Claimant*

Interest at full rate on whole loss	
14.75% x £ 197, 000	35, 184. 10

10.4 The judge's reasoning was that if the multiplier operated from the date of death the loss to the dependent is the fund in its entirety and so allowed the claim for interest in full.

10.5 The Defendant appealed. In essence the Court of Appeal had a comparatively simple task. The court is bound by *Cookson v Knowles* that interest on damages for loss of financial dependency is only awarded on lost dependency between death and trial. The argument that *Cookson v Knowles* was only ‘a guideline’ was perhaps an ambitious one, particularly given Nelson J.’s judgment in *White v ESAB Group (UK) Limited* [2002] PIQR Q76, and *H v S* [2002] EWCA Civ 792, [2003] QB 965. Nevertheless the intellectual and policy coherence of the Claimant’s position is sound, and derives support from both the Law Commission and the Ogden Working Party.

10.6 The determination of the multiplier at the date of death creates injustice, resulting in under compensation of dependents. *A Train* provides a useful illustration of this injustice: had the appropriate multiplier been taken from the date of trial rather than death judgment would have been for £ 213, 000.

10.7 Sir Mark Potter considered that “*the time is ripe for a reconsideration of the position*”. Hooper and Moses LJJ. agreed.

10.8 Sir Mark Potter quoted with approval a passage of the judgment of Nelson J. in *White v ESAB*:

*29. When, however, the aim of the court is to do the best that it can to put the claimant as nearly as possible in the same position as he was before*

*he was injured, the existence of a method of calculation which provides a known under compensation should in my judgment be reassessed. There is no reason why a court should not be able to assess uncertainties post death in a fatal claim as at the date of trial in the same way as it does in a personal injury claim when considering the uncertainties facing a living claimant in assessing his future loss. The actuarial tables themselves now deal with the question of mortality risk and whether, for example, a deceased would have remained in employment or become ill, or for other reasons ceased to provide maintenance, are all matters which a court has to assess on the evidence available to it at the trial. The same is true of facts relating to a spouse such as mortality and the likelihood of divorce or separation leading to no further maintenance.*

*30 The Law Commission conclusions that a multiplier which has been discounted for the early receipt of damages should only be used in the calculation of post-trial losses has, in my view, considerable force, and if known facts as at the date of trial are to be taken into account by assessing the multiplier as at the trial rather than as at the date of death so as to avoid any illogical deduction for an accelerated receipt which has not taken place.*

10.9 Hooper LJ said:

*Using the 2.5% column in the Ogden Table 28, the life time multiplier to calculate the loss of dependency is 18.11 years. The figure 18.11 is then used in calculations of the period 2 and period 3 losses ..., the figure of 18.11 being based on the assumption that the amount of money required to compensate the widow will be paid at death. It was not. It seems to me therefore quite illogical to me not to award interest as from death. It was not. It seems therefore quite illogical to me not to award interest as from death on the whole sum payable.*

10.10 The Supreme Court is obviously the forum in which the future application of *Cookson v Knowles* has to be considered. In the absence of such reconsideration it is worthwhile pleading an alternative calculation based on applying the future loss multiplier from trial rather than death.

*Higgs v Drinkwater*

10.11 In a recent article for JPIL Robert Weir QC offers some interesting insights into the continuing reliance placed on *Higgs v Drinkwater* [1956]

The Times (10 May 1956): that no award could be given to a widow for financial loss of dependency arising as a result of an intention to found a family.<sup>2</sup> Essentially the reasoning is that had the Deceased lived the loss would have been incurred but as he died no loss was incurred so therefore any loss claimed is irrecoverable.

10.12 The problem with this argument – logical though it may be – is that the measure of damages is the loss of dependency, a notional rather than an actual loss which excludes benefits accrued otherwise than as a result of the death. Section 4 of the Fatal Accidents Act which only came into effect in 1982 provides that:

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

10.13 As Rob Weir points out the claim for loss arising from Mr. Higgs' death was not a claim for actual income but a claim for a lost "dependency". If the Claimant persuades the court that she would have given up work and relied entirely on her deceased husband's earnings to found a family she should be entitled to a claim for loss of dependency based on her husband's lost income.

### **Lost Earnings in the Lost Years**

---

<sup>2</sup> [2010] JPIL Issue 4 pp. 209-214

11.1 In *Iqbal v Whipps Cross University Hospital NHS Trust* [2007] ECA Civ 1190; [2008] PIQR P9 the Claimant had dystonic tetraplegic cerebral palsy with life expectancy reduced to 41. A first instance Sir Rodger Bell allowed a claim for what the Claimant would have earned from age 41 to 62, “the lost years”, a sum of £ 46, 000.

11.2 On appeal the issue was whether or not the judge erred in law because he was bound by the Court of Appeal’s earlier decision in *Croke (A Minor) v Wiseman* [1982] 1 WLR 71 (CA) in which it was held that such a claim for a young claimant could not succeed: there were no dependents, unlikely to be any, and the claim was speculative.

11.3 The Court of Appeal held that it was bound by its earlier decision but not without expressing concern about the present state of the law under *Croke v Wiseman*: it was not consistent with *Pickett v British Rail Engineering Ltd* [1980] AC 136 or *Gammell v Wilson* [1982] AC 27. Gage LJ found it difficult to accept that if it is possible to assess prospective future loss of earnings for the lifetime of a young child it was not possible to assess damages for the lost years.

11.4 Lost years claims for adults and adolescents have not been affected by this decision. In cases involving children we have to await a suitable case being taken to the Supreme Court.

***Roberts v Johnstone***

12.1 In recent years there have been notable successes in persuading the House of Lords/Supreme Court to invoke the Practice Direction allowing their Lordships to depart from previous decisions. Most recently there is the decision in *Jones v Kaney*. In previous years there was the reversal of *Walkley* in *Horton v Sadler* and *Stubbings v Webb* in *A v Hoare*.

12.2 We have already seen how *Cookson v Knowles* and *Croke v Wiseman* are ripe for consideration by the Supreme Court. The Law Commission has provided a report casting doubt on the wisdom of *Hunt v Severs* but how long is *Roberts v Johnstone* going to avoid scrutiny by our highest court?

12.3 As this is a subject of another talk by far more distinguished speakers than I, I shall only pose the question.

## **Conclusions**

What can you do at the round table meeting when the Claimant wants to settle?

1. Instruct Counsel.
2. Make sure Counsel prepares a document for the JSM setting out the Schedule/the Counter schedule/and appropriate figures for compromise.
3. Present the claim clearly.
4. Clearly identify the evidential strengths and weaknesses of each claim.
5. Clearly set out the legal basis for each claim.
6. Don't give credit when you don't need to.
7. Don't allow arbitrary discounts.
8. Have a reason for everything.

There is no self-interest in point 1 of this advice whatsoever.

**7 April 2011**

**©Martyn McLeish**