

## **COUNTER-SCHEDULES: EARNINGS, OGDEN AND SMITH v MANCHESTER**

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### **PAST LOSS OF EARNINGS**

#### **(a) The dishonest Claimant: a reminder of an unsatisfactory rule**

1. When the Claimant has been earning “cash in hand” prior to the accident, can he rely on those earnings to bring a claim for lost earnings? It depends on whether he has also falsely been claiming state benefits. If he has, then the claim is barred on public policy grounds (*Kanu v Kashif* [2002] EWCA Civ 1620).
2. If he has not been falsely claiming benefits, then there is no absolute bar on the claim (*Newman v Folkes* [2002] EWCA Civ 591). In a *Newman* case, the problem, of course, may be as much one of proof as of principle.

#### **(b) The oft-forgotten credits/deductions**

3. In addition to earnings actually received and income from state benefits deductible under the CRU scheme, a Defendant is generally entitled to deduct sums received in consequence of the accident (*Hodgson v Trapp* [1989] 1 AC 807). The two main exceptions to this are the fruits of an insurance policy paid for by the Claimant and receipts due to the benevolence of third parties. The following are common examples of sums the Defendant is entitled to deduct from the Claimant’s past loss of earnings claim:
  - (a) State benefits paid in foreign countries (where there is no equivalent CRU scheme);
  - (b) State benefits paid in this country falling outside the CRU scheme, for example housing benefit<sup>1</sup>, council tax benefit<sup>2</sup> (reduction due either due to unemployment or disability).
  - (c) Tax credits, namely working tax credit (paid to low earners) and the disability element of working tax credit (an additional payment to the disabled).
  - (d) Child benefit: as from 7/1/2013 higher rate taxpayers earning £50,000 to £60,000 will have to pay a “charge” in order to receive child benefit. Those earning over £60,000 are, in effect, unable to claim child benefit. Thus, an injured Claimant with children who loses higher rate earnings accrues a benefit.
  - (e) *Ex gratia* payments made by the tortfeasor (*Gaca v Pirelli General PLC* [2004] EWCA Civ 373).
  - (f) Payments by an insurance policy held by an employer for which the Claimant did not pay. There has to be some evidence of payment for such benefits not to be deductible by the Defendant (*Gaca v Pirelli*).
  - (g) Employment Tribunal compensatory (but not basic) awards, where the loss overlaps.
  - (h) Redundancy payments, where it can be proved that the redundancy was caused by the injury (*Wilson v National Coal Board* 1981 SLT 67 and *Colledge v Bass Mitchells & Butlers Ltd* [1988] 1 All ER 536).
  - (i) Saved expenses such as travel, child care etc (*Eagle v Chambers* [2004] 1 WLR 3081).

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<sup>1</sup> *Clenshaw v Tanner* [2002] EWCA Civ 1848

<sup>2</sup> *Smith v Rod Jenkins* [2003] EWHC 1356

4. Future, as well as past, benefits are deductible. If the benefits are means tested then, upon receipt of an award of damages the entitlement may lapse and so there is nothing to be deducted. This will not apply in respect of benefits that are not means-tested. However, the Court may apply a lower multiplier to the deductible benefit than for the loss from which it is deducted, to take account of the possibility that the benefit may cease to be paid.

## **FUTURE LOSS OF EARNINGS**

### **Conner v Bradman still alive and kicking**

5. In *Conner v Bradman* [2007] EWHC 2789, the judge accepted that the Claimant was `disabled` within the meaning of the DDA but declined to apply a full table B discount factor to the residual earnings multiplier. Instead, he chose a discount factor lifted directly from table B (0.49), he applied instead a discount factor (0.655) that was mid way between the disabled factor and the non-disabled one (0.82).
6. *Conner* has been met with squeals of indignation by various commentators. It has led to the promise in the introductory notes to Ogden 7 that in the 8<sup>th</sup> edition, consideration will be given as to whether data can be provided so as to make the “*Conner* adjustment” more scientific.
7. However, courts (unsurprisingly) continue to make *Conner* adjustments to the residual earnings multiplier with considerable frequency.
8. In *Leesmith v Evans* [2007] EWHC 2789, Cooke J applied an adjusted discount factor in the case of a sound engineer whose “but for” earnings were £33,000 p.a. and whose residual earning capacity was £10,000. Where the disabled discount factor was 0.54 and the uninjured factor was 0.92, the judge applied a factor of 0.60.
9. In *Clarke v Maltby* [2010] EWHC 1201, Owen J declined to apply a different discount factor in respect of the Claimant’s residual earning capacity, on the basis that her disadvantages had been catered for by adjusting the multiplicand. The Claimant was a solicitor with multiple and serious physical injuries, as well as a brain and associated psychological injuries. The judge accepted that she would, but for her accident, have earned at a level of earnings rising to £110,000 p.a. She had a loss of chance of gaining promotion to earn £130,000 p.a. and a further loss of chance of rising to a level earning £180,000. As to her residual earning capacity, this was determined at £40,000 p.a. A conventional Ogden 6 multiplier was used in respect of each.
10. In *Higgs v Pickles* [2011] PIQR P15, HHJ Ellis declined to make any adjustment to the disabled discount factor in table B. The Claimant was a 53-year-old self-employed brick layer, who suffered orthopaedic injuries that prevented him from returning to manual work. He had done a CAD course but not yet found suitable work. The jointly instructed employment consultant placed the Claimant’s chances of getting any work at less than 50% and of getting CAD work at lower still. Standard discounts were applied to create the “but for” multiplier to be applied to his pre-accident earning capacity of £17,000. To the residual earning capacity of c. £13,000, the judge applied the full disabled/unemployed discount factor of 0.15.
11. The lesson to be drawn from these cases is the rather obvious one that treating all “disabled” people as being equally disadvantaged on the labour market is unlikely to be correct. The appropriate discount factor to be applied to their residual earning capacity will, in large part, depend upon the following factors:
  - degree of disability,
  - size of the residual earning multiplicand,
  - work record.
12. On argument, worth advancing but unlikely to succeed alone, is that in the original research that led to the formulation of the discount factors, the cohort of people labelled `disabled` will include those who are disabled and unwilling to work as well as the stoical disabled, keen to

return to work. In pursuance of the duty to mitigate, Claimants are required to attempt to find suitable alternative work. Accordingly, assessing their chances of doing so by reference to statistics including both the stoical and lazy disabled, is methodologically incorrect.

### **Using the Ogden tables to calculate a *Smith v Manchester* award**

13. In cases where the Claimant is, at the time of trial, earning at least as much as he/she was pre-accident, it is common to see a claim where the loss is valued at the difference between the disabled and non-disabled multipliers, multiplied by the annual salary.  
  
E.g. 30-year-old male Claimant earning £20,000 p.a. pre-accident and is now, despite lasting effects of injuries, still able to earn that amount. Multiplier to 65 is 22.84. non disabled discount factor is 0.91 and disabled discount factor is 0.52. Claim is calculated as follows:  
 $[22.84 \times 0.91 = 21.93] - [22.84 \times 0.52 = 11.88] = 10.05 \times £20,000 = £201,000$
14. Although paragraph 45 of the Explanatory Notes to Ogden 7 acknowledges that cases still exist where *Smith v Manchester* damages are appropriate, the implication seems to be that the primary way of calculating loss is using the tables, even where there is no difference between the pre-accident and residual annual earning capacity figures.
15. Courts have been slow to use this method and do tend to prefer a standard *Smith* award, although the size thereof may be informed by the Ogden calculation.
16. In *Sharma v Noon Products Ltd* 7/4/2011 QB (Unreported) a maintenance mechanic lost the tip of his finger and suffered PTSD/depression following an industrial accident. He found replacement work as a security guard earning £15,600 p.a. which was at least as high as his pre-accident earnings. He was, however, handicapped on the open labour market. The Claimant sought an award of £156,000 using the Ogden method of calculation. The Defendant contended for a conventional award of £7,500 (described by the judge as "...a jury figure – in other words a figure plucked out of the air"). HHJ Yelton made a "Conner adjustment" but still adopted an Ogden approach and awarded what seems to have been about £93,000!
17. In *Hindmarch v Virgin Atlantic Airways Ltd* [2011] EWHC 1227, a masseuse in Virgin's First Class lounge at Heathrow developed a WRULD. She was back at work earning at least what she had done previously. HHJ McKenna declined to adopt the Claimant's suggested Ogden calculation for a handicap on the open labour market award and made a conventional award of 1 year's gross salary (£29,000).
18. The conventional approach will nearly always yield a lower award and *Hindmarch* should be cited as authority against using Ogden 7 to calculate a *Smith*.

### **Multipliers and impaired lives: the correct method**

19. Where a Claimant has a reduced life expectancy of  $x$  years, it is common to see the multiplier from table 28 selected for  $x$  years and then applied to the annual loss. Paragraph 20 of the Ogden tables notes suggests that this is incorrect. In *Whiten v St George's Healthcare NHS Trust* [2012] Med LR 1 at paragraph 105, Swift J heard argument on the topic and held (following earlier authorities that pre-dated the guidance in paragraph 20 but without the benefit of actuarial evidence) that using table 28 was the right method. Unfortunately, this tends to lead to slightly higher multipliers than the method in paragraph 20. It is still arguable that the paragraph 20 method should be preferred. The difference is illustrated below.

e.g.

A male Claimant has a life expectancy of 51 years.

The table 28 method simply takes a life multiplier of 29 (assuming a rate of return of 2.5%), being the multiplier for a fixed period of 51 years from Ogden table 28.

The paragraph 20 method would be to treat the Claimant as if he were aged 35 (the age at which he would be if he had an unimpaired life expectancy of 51) and then take the life multiplier for a 35-year-old male from table 1, at the correct rate of return (assuming 2.5%), namely 28.15.

20. Thus, there is a difference in the multiplier of 0.85, depending upon which method is used. In a care claim with a big multiplicand, this can make a real difference.

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