FUTURE LOSS OF EARNINGS / BLAMIRE:

WORKSHOP ANSWERS

Gabriel Farmer & Anthony Reddiford, Guildhall Chambers

IN THE BIRKENHEAD COUNTY COURT **CLAIM NO. 09LI00001**

BETWEEN

ALBERT TRYON

Claimant

AND

U.M.B. JOKING LTD

Defendant

ANSWERS

1. Work history, family history, uncertainty regarding career, lack of prospects for media studies graduate, extent of disability, alcoholism, speculative nature of residual earning capacity etc.

2. Disability status: is he disabled because of his history of alcoholism (see *Garth v Grant & MIB)*.

   Educational attainment: can you argue that, although he was a graduate, he was not doing a graduate level job and therefore should have a discount factor fixed by reference to lower educational attainment? C.f. paragraph 35 of the Ogden tables:

   "Note: "educational attainment" is used here as a proxy for skill level, so that those in professional occupations such as law, accountancy, nursing etc who do not have a degree ought to be treated as if they do have one."

   Employment status: just because he happened to be employed briefly at the time he was injured, should he not be treated simply as being "employed", in the light of his earnings history? (see *Huntley v Simmonds* [2009] EWHC 406).

3. In *Peters v East Midland Strategic HA* [2008] EWCA 117 the court applied a 40% reduction to past and 50% for future losses (standard Ogden discount would be 32%).

4. Arguably not: *Poste House Hotels Ltd v Brown* CA 14/10/1999 (unreported). This would need further expert exploration.

5. At very least, argue that it is not a *Herring* case but a *Brown v MOD* [2006] PIQR Q109, where the percentage chance of each step of promotion has to be assessed.

6. It's wrong. The first two periods (3 years each) are not discounted by accelerated receipt (although this may suit the Defendant as the losses during these periods are less). The correct method is that in paragraph 23 of the Ogden tables, namely working out the percentage of the total actual period that each slice represents, and then applying that percentage to the appropriate working life multiplier.

7. The 50% reduction for the risk of recidivism regarding alcoholism would require expert evidence but see also arguments re. contrib. (Q8 below) and "disability" (Q 2 above).

The “disabled” discount factor should be attacked. Is the Claimant disabled from working as a journalist: should there be any reduction in the discount factor to take account of this and/or should a *Connor v Bradman* argument be advanced?

8. Contributory negligence. See *Dalling v Heale* [2011] EWCA Civ 365. The Defendant would really need expert evidence dealing with the nature of addiction and how relapses occur. Witness evidence of how the relapse occurred would also be beneficial.

NOTES

Terminology

Blamire award:
A lump sum award covering future (and sometime past) earnings loss/earning capacity/handicap.

***Smith v Manchester* award / Handicap award:**
A lump sum award made to a Claimant now back in the same or similar work but with diminished prospects arising from his disability. Reflects risks of lower earnings / more time off work / longer periods of unemployment in the future. From *Moeliker v Reyrolle* [1977] 1 WLR 132.

Loss of earning capacity:
A lump sum or multiplier / multiplicand award made to reflect a diminution in ability to earn.

"Multiplier/multiplicand" award:
An award made using the Odgen Tables formula.

Does it matter which?
Yes – lump sum awards are almost always significantly lower than multiplier / multiplicand awards.

Ok. How do I go about achieving a Blamire/lump sum award, avoid a multiplier/multiplicand and thereby reduce my client's exposure?
Read on!

***Blamire v South Cumbria HA* [1993] PIQR Q1**
1985. The Claimant, a nurse aged 22, injured her lower back making it permanently vulnerable. Off work for succeeding years for various periods of time. In 1988 she had an appendix operation and sustained a whiplash injury. In the latter part of 1988, she became pregnant and in January 1989, she ceased work. By November 1989 she recognised that she was not able to continue work as a nurse. In December 1989, she obtained part time work at a residential home. She gave up work in 1990 and in May 1991 she gave birth to a second child.

The trial judge also found that but for the accident, the Claimant would have pursued a lifelong career in nursing, and that she would probably have to work as a secretary, that it would be significantly more difficult to obtain such work and that it was reasonable to expect some recurrence of back trouble during her working life. The judge did not accept the multiplier / multiplicand approach and took into account loss of pension benefits, and awarded £25,000 for future loss of wages, pension and damages for handicap in the labour market. The Claimant appealed.

On appeal:

The burden of proof rested on the Claimant. It was clear that the judge took the view that a multiplier / multiplicand approach was inappropriate because there was significant uncertainty based on:-

1. what the Claimant would have earned over the course of her working life if she had not been injured.

2. The Claimant might have more children.

3. She clearly would have liked to have done part time rather than full time work.

4. She and her husband had taken out a mortgage, but that would be less of a burden as the years went on.

5. There were uncertainties as to the likely future pattern of her earnings.

Cited: *British Transport v Gourley* [1956] AC 185 "very often one was driven to making a very rough estimate of the damages."

Other examples where Blamire approach has succeeded:

- *Hannon v Pearce* 24/01/2001 (unreported)
  - £600k claim for future loses of earnings in horse training business. Uncertainty. Judge awards £50k.
- *Rees v Dewhirst* [2002] EWCA Civ 871
  - C awarded future loss via (discounted) multiplier/multiplicand approach of £90k. CA say "far too high" and reduce to £45k using "a conventional approach". Odd decision?
- *Willemse v Hesp* [2003] EWCA Civ 994
  - Future loss of £110k reduced to £50k by CA – as fixed multiplicand not appropriate given uncertainties re C's future work intentions.
- *Crouch v Kings Healthcare NHS Trust* [2004] EWCA Civ 853
  - 60 year old dentist suffers arm injury. Claims 25% diminution in earnings based on multiplier/multiplicand. CA uphold judge who awarded lump sum on basis of uncertainty.
- *Palmer v Kitley* [2008] EWHC 2819 (QB)
  - C 16 at injury. Judge rejecting multiplier/multiplicand approach because earnings "but for" the accident too uncertain.
- *Hindmarch v Virgin Atlantic Airways Ltd* [2011] EWHC 1227
  - Ogden "handicap" assessment rejected – one years' loss awarded as lump sum.

But…

- *Sharma v Noon Products Ltd* 7/4/2011 QB (Unreported)
  - Ogden "handicap" assessment accepted - £93k awarded!
- *Van Wees v Zarkour* [2007] EWHC 165
  - £750k Blamire award…!

The Key to achieving a Blamire = <u>uncertainty</u>

Key questions:

1. What would C have earned had he not been injured?
2. What will C now earn in the light of his injury?

Build "a minefield of uncertainty"

Factors to assess:

- Track record of earnings
  - Is there an established / predictable career at all?
  - Frequent job changes?
  - Forensic history?
  - How did / do C's siblings fare?
  - Cases where C was stressed/struggling pre-accident
  - Is C simply a weirdo?

- Medical history
  - The usual suspects – back pain, depression, frequent attendees
  - Familial history?
  - Impaired life expectancy?

- Career intentions
  - What is C's partner doing?

- What happens once the mortgage is paid off?
- Effect of potential inheritance?

- Plans to start a family
  - Particularly females, but we live in a modern age…
  - But Ogden 7 para 40: The factors in Tables A to D allow for the interruption of employment for bringing up children and caring for other dependants.

- Market forces / economic factors
  - Niche players are more vulnerable.
  - Employment expert required to distinguish the case from the "Ogden norm"? Care needed.

So far so good but you may get hit by:

***Bullock v Atlas Ward Structures Ltd* [2008] EWCA Civ 194**

C developed dermatitis as a consequence of his work as a paint sprayer and had to cease that work. C claimed loss of earnings on a multiplier/multiplicand basis being a shortfall of about £5,000 p.a. between his paint sprayer's earnings and residual earnings as a window cleaner. He claimed a full multiplier of c.18 plus a *Smith* to cover his residual earning capacity. D alleged significant uncertainties in the pre-and post- accident earning capacity and advocated a *Blamire* award. The judge agreed and awarded £50,000 plus a 1-year *Smith.* D appealed and C cross-appealed.

The appeal was dismissed and the cross-appeal allowed. A figure of £90,000 was substituted for the *Blamire* award and the *Smith* was not interfered with. Keene L.J. said:

"Merely because there are uncertainties about the future does not of itself justify a departure from that well-established method. Judges therefore should be slow to resort to the broad-brush Blamire approach, unless they really have no alternative."

So back-up plans are required…

A: Try to suppress the Multiplicand:

Deduct everything!

***Clenshaw v Tanner* [2002] EWCA Civ 1848**

C was seriously injured in an RTA and unable to work at any time prior to trial. In consequence he was paid £17,000 of housing benefit. D sought credit for such sum against C's past loss of earnings claim. Applying *Hodgson v Trapp* [1989] AC 807, the CA held that any non-CRU benefit received was deductible against any related head of claim. Thus, as C only got housing benefit because of his impecuniosity due to his loss of earnings, it was deductible by D from that head of claim.

***Eagle v Chambers* [2004] 1 WLR 3081**

Saved travel expenses are deductible from loss of earnings claims (*Dews v National Coal Board* [1988] AC 1, 13 being no authority to the contrary) but parties should not waste inordinate time arguing such trivial issues.

Partnerships:

***Kent v British Railways Board* [1995] P.I.Q.R. Q42**

A husband and wife (C) together ran a B&B business. For tax purposes profits were split 60:40 between them. The wife was injured and profits reduced. At first instance the judge awarded the whole of the partnership's loss to C as her loss of earnings. D appealed.

The CA allowed the appeal. D owed C's husband no duty and she could not claim his loss. Profits were apportioned in accordance with the statutory presumption of equality, not in line with the IR arrangement. This reflected the fact that they were, in reality, equal partners.

***Ward v Newalls Insulation* [1998] 2 All E.R. 690**

C was in partnership with E. Their wives were sleeping partners for reasons of tax efficiency,

each with a 25% profit entitlement. C was injured and the profits of the business diminished. C claimed 50% of the partnership's loss, being his and his wife's share. The judge allowed him his 25% loss. C appealed.

The CA allowed the appeal. The apportionment for taxation purposes was irrelevant as, amongst other things, it was terminable at will.

The test was what was C's "actual" or "real" loss? This was to be measured by his contribution to the business. As his wife made no such contribution, he was entitled to claim 50%.

Dependence on benefits:
Peters v East Midland Strategic H.A. **[2008] EWHC 778**
This is the first instance decision of the renowned public funding case. The Claimant was brain damaged at birth. It was agreed that she would have been of low average intelligence and restricted to unskilled or semi-skilled work. The judge ruled that because she came from a family where dependence on state benefits was the norm. In the light of that concession, past loss of earnings should be reduced by 40% and the multiplier for future loss of earnings by 50% (as opposed to an Ogden 6 discount of 32%).

B. Suppress the Multiplier:

How disabled is "disabled"?
Conner v Bradman **[2007] EWHC 2789**
C was a mechanic who suffered a knee injury that prevented him from continuing in that employment. He was to have a knee replacement operation and then resume work as a taxi driver. The Ogden discount factor for his pre-accident earnings was 0.82. The "disabled" discount factor was 0.49. D contended that this was an excessive discount, given that he would be undertaking work (taxi driving) compatible with his residual condition. The judge split the difference and applied 0.655.

(Ogden 7 did not include further material upon which to base an adjustment merely referring to the article by Dr Wass, *"Discretion in the Application of the New Ogden Six Multipliers: The Case of Conner v Bradman and Company",* published in JPIL Issue 2/2008 pp 154- 163)

Leesmith v Evans **[2008] EWHC 134**
C, a 24-year old who hoped to become a lighting technician for live music events, was very seriously injured in an RTA. He claimed significant future loss of earnings based upon a successful career as a lighting technician. The judge rejected a *Blamire* approach and awarded a lifetime average multiplicand of £45,000 gross.

It was agreed that the Claimant's residual earning capacity was the £10,000 net p.a. that he was at trial earning as a theatre technician.

The pre-accident discount factor was 0.92 and the "disabled" discount factor was 0.54. The judge acknowledged that the residual earnings multiplicand reflected C's disability and so increased the discount factor applicable thereto to 0.60.

Clarke v Maltby [2010] EWHC 1201 (QB)
Where the court accepts a lower (post accident) residual earning capacity it may not in addition accept a "disabled" discount from table B or D.

"There remains finally the question of the multiplier to be applied to the claimant's residual earning capacity. As to that, I am not persuaded that it is appropriate to apply a Table D Ogden discount. Her degree of disability has been fully reflected in the difference between her lost and residual earning capacity."

Treat C as unemployed pre-accident
Huntley v Simmonds **[2009] EWHC 406**
The Claimant suffered a serious head injury age 22. He had a troubled early and teenage life

but at the time of the accident he had settled down to some extent and was working, if not permanently, then for at least substantial periods of time. The Defendant argued that the Claimant should be treated as if her were unemployed, for the purposes of fixing the discount factor. The Claimant contended that, as he was employed, that should be the basis of the assessment. The judge concluded that it would be wrong to fix the factor by reference to whether the Claimant simply happened to be in work the date of the accident. He accepted the Defendant's discount factor basing his conclusion in part on the Claimant's history and in part on the intermittent availability of groundwork.

Other arguments:

Causation:
***Poste House Hotels Ltd v Brown* CA 14/10/1999**
A maths teacher suffered a whiplash injury, following which he took voluntary redundancy. The medical evidence was that his persisting symptoms were minor. The judge ruled that the Claimant acted reasonably in taking voluntary redundancy in the light of his symptoms. The CA ruled that this was the wrong test for causation of loss following injury. The test was whether the Claimant was unfit or unable to do his work, not whether he acted reasonably in deciding not do it.

Acceleration cases:
Try deducting money earned in the acceleration period but:
***Chambers v Excel Logistics* [2006] EWCA Civ 1031**
The agreed medical evidence was that C's accidents accelerated a protruded disc and sciatica by about 3 years. He managed to work for most of the following 3 years, with only relatively minor losses. Just over 3 years after the accidents, the Claimant was medically retired. The case in the CA centred on what the expert had actually meant. However, the CA accepted that if it meant that his medical retirement had been brought forward by 3 years, then his loss was 3 years' full loss, not the 3 years partial loss in the first 3 post-accident years.

If everything else has failed and you've read this far you're in trouble!

C's antidote: Baseline loss plus loss of a chance scenarios
***Herring v Ministry of Defence* [2004] 1 All ER 44**
The Claimant was a very fit young man whose ambition was to join the police force. A serious spinal injury prevented him from so doing. He claimed future loss of earnings as a constable, with promotion to sergeant after 7 years. The judge found that it was "virtually *certain"* that the Claimant would have applied to join the police, *"a strong likelihood"* that his application would have been successful but that it was *"inevitably less certain"* that he would have become a sergeant.

The judge rejected the Defendant's submission that the case was a loss of chance case and accepted the claim as pleaded. However, he discounted the multiplier by 25%. The Claimant appealed.

The CA allowed the appeal and said that where a "career model" was advanced that represented the "baseline" (i.e. minimum realistic) likely earnings that the Claimant might secure, then a loss of chance claim was not appropriate. Further, 25% was an excessive discount from the multiplier. Only on specific evidence should a court discount the multiplier by more than the Ogden tables suggests (although they then discounted it by 10% - more than the Ogden tables suggested in that case).

***Brown v M.O.D.* [2006] PIQR Q109**
A young woman was injured during the course of her basic training on joining the Army. She was discharged from the Army. She claimed loss of pension/handicap on the labour market based upon (full) 22 years service with 2 promotions during her service. The Defendant contended that the chances were that she would not complete full service and that her promotions were not assured. The judge assessed the loss upon the basis of full service and with promotion up one rank and then dealt with the second promotion as a loss of a chance.

The Defendant appealed unsuccessfully to the Circuit Judge and again to the CA. The CA held that although the Claimant's entry to the Army and her first promotion were her "baseline" earnings and should be awarded in full without discount, the same did not apply to the consequential pension loss. Because she would be entitled to a full pension on leaving the Army after 22 years, that was *"an unusual factor which would have had a significant effect on the value of her pension rights. The chances of her completing her 22 years' service therefore called for assessment in accordance with the principle in Davies v Taylor"* (i.e. a loss of chance).