CHALLENGING LOSS OF EARNINGS AND PENSION: CASE NOTES

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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%.

Jones v Garnett (Inspector of Taxes) **[2007] 1 W.L.R. 2030**

This is a HL decision on the construction of the Income and Corporation Taxes Act 1988. The HMRC were seeking to close a taxation "loophole" allowing a husband to gift shares in a company in which he was the sole/main breadwinner to his wife.

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."

Van Wees v Zarkour **[2007] EWHC 165**

A 34-year old well-paid businesswoman suffered a head injury. She had a reasonably good career history but the employer she was working for at the time of the accident subsequently collapsed. She resumed work in a well paid job but this did not work out, largely because it was beyond her capabilities rather than because of her injuries. Langstaff J. declined to approach her award on the multiplier/multiplicand but, after giving very detailed reasoning, awarded her £750,000 by way of *Blamire* award.

(The judge's reasoning illustrates that this head of claim need not be a "finger-in-the-air" exercise).

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%).

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.

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.

Hardwick v Hudson **[1999] 1 W.L.R. 1770**

C ran a garage business. He was injured and temporarily unable to run it. His wife, who had always done bookkeeping work for the business, did an extra unpaid 20 hours per week for over 3 years, after which she became a partner in the business. During this period, the business prospered. A claim was brought for her gratuitous services. The judge made no award. C appealed.

The CA dismissed the appeal. Gratuitous services provided in a commercial setting are not compensatable. However, the CA strongly hinted that had she entered into a contract and been paid for her hours, such a claim would succeed.

***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 clamed 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).

***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.

***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.

(It seems that Ogden & is likely to include further material upon which to base an adjustment to the discount factors – see Victoria Wass' article in [2008] J.P.I.L. 154 at 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.

***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.

***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.

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