

**Counter-Schedules  
&  
The practical application of  
post-accident contributory  
negligence**

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Guildhall Chambers  
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# *McKew v Holland*

The facts:

Conduct so unreasonable that it breaks the chain of causation.

# *Spencer v Wincanton Holdings*

The facts:

Was Mr Spencer's conduct "so unreasonable" or not?

# *Spencer v Wincanton Holdings*

Mr Spencer's conduct "fell far below what could be described as McKew unreasonable"

"the way he went about the task is a matter of contributory negligence" (1/3)

# Contributory Negligence – remind me

“where any person suffers damage as the result partly of his own fault....the damages in respect thereof shall be reduced...

to such extent as the court thinks just and equitable having regard to the Claimant’s share in the responsibility for the damage.”

# Typical conduct to look out for

Plainly unreasonable behaviour.

Failure to comply with uncontroversial medical advice, which could be followed with relative ease.

# Examples in Practice

- Infection – failure to consult GP.
- Misuse of pain relief – masking symptoms.
- Weight-gain – steps to counter obesity.
- Smoking – failure to reduce.
- Alcohol/drug misuse – failure to curb.

# Practice Points

- Plead contributory negligence.
- Judge the tone of criticism carefully.
- Spencer arguments enable the Court to make an instinctive % deduction.

# Undeclared earnings: 1

*Newman v Folkes* [2002] EWCA Civ 591

- If the Claimant does not declare his pre-accident earnings to HMRC, that does not bar a claim for lost earnings.

# Undeclared earnings: 2

*Kanu v Kashif* [2002] EWCA Civ 1620

- If the Claimant does not declare his pre-accident earnings to HMRC and if he falsely claims state benefits, that does bar a claim for lost earnings.

# Credit for sums received

- State benefits in foreign countries
- Non-CRU UK state benefits
- Tax credits
- Child benefit
- *Ex gratia* payments by tortfeasor
- Fruits of non-contributory employer's insurance policy
- ET compensatory awards
- Redundancy payments
- Saved travel/child care etc. expenses

# Ogden: *Conner v Bradman*

*Conner v Bradman* [2007] EWHC 2789

- Judge split the difference between the `disabled` discount factor of 0.49 and not disabled of 0.82 at 0.655.

# Ogden: *Conner v Bradman*

*Leesmith v Evans* [2007] EWHC 2789

- Where the disability is partly reflected in a reduced multiplicand for residual earnings, it may be double discounting also to apply a full `disabled` discount factor.
- Discount factor of 0.6 rather than 0.54 applied.

# Ogden: *Conner v Bradman*

*Clarke v Maltby* [2010] EWHC 1201

- Where the residual multiplicand was £40k, as against a pre-accident earning capacity of >£110,000, the same discount factors were applied.

# Ogden: *Conner v Bradman*

*Higgs v Pickles* [2011] PIQR P15

- Unemployed 53-year-old bricklayer who could not do manual work due to injuries. Full 'disabled' discount applied.

N.B. Uninjured multiplicand = £17,000

Residual multiplicand = £13,000

# Ogden: *Conner v Bradman*

## Factors:

- Degree of disability
- Differential between uninjured and residual earnings
- Work record
- `disabled` cohort includes stoical as well as lazy: relationship with failure to mitigate.

# Ogden: *Conner v Bradman*

A warning: *Ogden 7*:

*In particular the approach of the trial judges to the calculation of future loss of earnings in Conner ... and Clarke ...has generated some debate. These issues will be discussed in detail when drafting the eighth Edition and consideration given to whether or not the Explanatory Notes need amendment, especially as regards the circumstances in which it might be appropriate to depart from the suggested non-mortality reduction factors and the size of any adjustments that are made.*

# Ogden: *Smith v Manchester*

The method:

- 30-year-old male Claimant earning £20,000 p.a.
- Multiplier to 65 is 22.84.
- Non disabled discount factor is 0.91
- Disabled discount factor is 0.52.
- $[22.84 \times 0.91 = 21.93] -$   
 $[22.84 \times 0.52 = 11.88] = 10.05$

x £20,000 = £201,000

# Ogden: *Smith v Manchester*

## *Sharma v Noon*

- Court awarded £93,000 using the method but with a Conner adjustment to residual multiplicand.

# Ogden: *Smith v Manchester*

*Hindmarch v Virgin Atlantic Airways* [2011] EWHC 1227

- Court refused to use Ogden to value a Smith and awarded a conventional 1 year's earnings.

# Impaired lives and Ogden 7

- A male Claimant has a life expectancy of 51 years.
- Table 28: life multiplier of 29 (@ 2.5%).
- Paragraph 20 method: treat C as if aged 35 (age for an unimpaired life expectancy of 51). Table 1 for 35-year-old (@ 2.5%) = 28.15.
- See *Whiten v St George's Healthcare NHS Trust* [2012] Med LR 1.