DAMAGES FOR PAIN, SUFFERING AND LOSS OF AMENITY: 2024

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1

REMEMBER

- The PowerPoints have been sent out to you.
- You can ask questions and I will get to these at the end.
- This is part of a series.

2

TODAY

- Looking at the most basic of matters relating to personal injury actions.
- The award for pain and suffering.
- So common we often ignore it, take it for granted.
- This has practical implications.

3

TWELVE PRACTICAL POINTS



4

THE PLAN

- The legal principles underlying awards for PSLA.
- Issues of proof.
- Factors that affect the award.
- Multiple injuries.
- The “tariff” awards.
- Appealing awards.
- Practical steps



5

THE AIM

- You understand what is being awarded for PSLA and why it is being awarded.
- You are aware of problem areas.
- You know what practical steps you can take in relation to potential problems.

6

BREAKING THE AWARD DOWN

- Pain.
- Suffering.
- Loss of amenity



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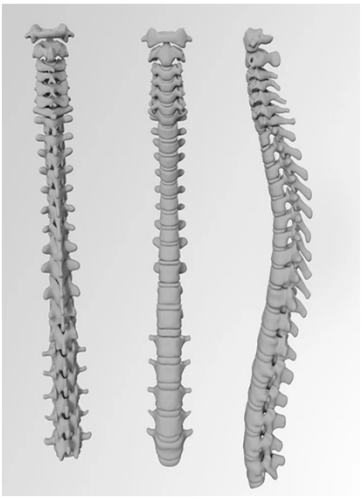
THE SAME PRINCIPLES APPLY ACROSS THE WHOLE RANGE OF INJURIES

- Most minor
- Most severe
- EXCEPT for “whiplash” injuries.



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A “POTTED HISTORY” OF THE LAW OF PAIN AND SUFFERING

- Historically most PSLA awards were by jury.
- The Common Law Procedure Act 1854 gave a litigant in the Queen’s Bench the option of a trial by jury or judge alone.

9

ADMINISTRATION OF JUSTICE (MISCELLANEOUS PROVISIONS) ACT 1933

- Guaranteed right of jury in QBD for fraud, libel, slander, malicious prosecution, false imprisonment, seduction and breach of promise of marriage.

“save as aforesaid, any action to be tried in that Division may, in the discretion of the court or a judge, be ordered to be tried either with or without a jury."

10

Ward v James [1966] 1 QB 273, CA

- Before 1951 it was not the practice for counsel to refer the court or the jury to awards in comparable cases. It is obvious that counsel could not call witnesses to give the figures in other cases. Nor could counsel give figures himself from his own experience or from the books. If counsel sought to refer to any comparable case, it would be rejected out of hand on the ground that it was res inter alios acta.

11

A CHANGE IN 1951

Since *Bird v. Cocking & Sons Ltd.* [159] in 1951 a change has set in. When the case is tried by a judge alone, or heard on appeal by the Court of Appeal, counsel is allowed to refer to awards in comparable cases. This is because we now recognise that the award is basically a conventional figure, and in order to arrive at it, it is relevant to refer to comparable cases. If this be so before a judge alone, or the Court of Appeal, why should it not also be so in trial by jury? Why should the jury not receive the same guidance as a judge?

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THE RESULT…

The result of it all is this: We have come in recent years to realise that the award of damages in personal injury cases is basically a conventional figure derived from experience and from awards in comparable cases. Yet the jury are not allowed to know what that conventional figure is. The judge knows it, but the jury do not. This is a most material consideration which a judge must bear in mind when deciding whether or not to order trial by jury. So important is it that the judge ought not, in a personal injury case, to order trial by jury save in exceptional circumstances.

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SO JUDGES STARTED REFERRING TO COMPARABLES

- Kemp and Kemp

1st edition 1954



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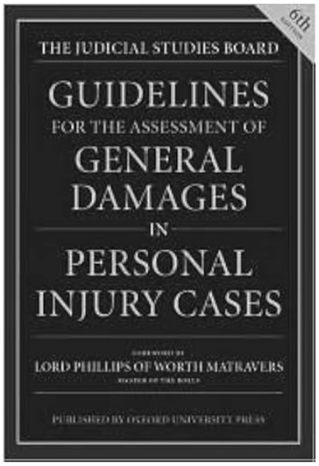
AND THEN THE JUDICIAL COLLEGE GUIDELINES APPEARED… IN 1992



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DAMAGES FOR THE INJURY

- Damages for the personal loss are ‘compensation’ and not a solatium.
- There are dicta in the older cases which suggest that damages for the injury itself, as distinct from the financial loss entailed, are not compensation at all, but a kind of solatium, a sympathetic payment admitted to be less than is really due.
- These cases are wrong.

16

THE CLAIMANT NEED NOT BE CONSCIOUS OF THE LOSS

H West & Son Ltd v Shephard [1964] AC 326, *[1963] 2 All ER 625, HL*

- A claimant is entitled to substantial and not merely token damages for being deprived of the joys of life, although by reason of prolonged unconsciousness there is little or no distress about the loss.
- It was not in dispute that a claimant who was aware of the situation would have substantially more because of the mental distress.
- The point of the decision is that damages are not 'consolation money'. They are given for the harm actually sustained

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Baker v Willoughby [1969] 3 All ER 1528 at 1532, HL:

''A man is not compensated for the physical injury; he is compensated for the loss which he suffers as a result of that injury. His loss is not in having a stiff leg; it is in his inability to lead a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned …''

18

PRACTICAL POINT 1: A CLAIMANT HAS TO PROVE THEY HAVE SUFFERED A LOSS



19

CLAIMANT MUST PROVE THAT THERE HAS BEEN PAIN AND SUFFERING

The burden is on a claimant to prove that the defendant's acts or omissions caused pain and suffering.

In *Kadir v Mistry [2014] EWCA Civ 1177*, the Court of Appeal upheld a finding that damages for pain and suffering could not be awarded to the estate of a deceased claimant in a case where there was a negligent delay in diagnosing cancer.

20

AN EXAMPLE OF THINGS GOING WRONG



21

Kavak v FMC – HHJ Pearce Manchester CC 24.04.18

- C had been in two other accidents in the previous six months.
- The judge found that the claimant had not established that he had suffered any additional injury over and above that he was already suffering as a result of the previous accidents.
- The claimant, the judge found, was not dishonest, but unable to prove his case.

22

IT WAS THE CLAIMANT'S CHOICE

"The decision as to whether to pursue a personal injury claim was that of the Claimant (and his lawyers). Such a claim could not or at least should not have been pursued unless both the Claimant believed that he had suffered personal injury and the lawyers acting on his behalf consider that he had a reasonable prospect of showing that."

23

CLAIM COULD NEVER HAVE BEEN PROPERLY BROUGHT

"The Claimant's evidence in court amounted to an acceptance that he could not say whether he had suffered injury or not. In those circumstances, I do not see that he could ever properly have brought a claim for such injury."

24

NO ASSERTION OF ANY INJURY

“The Claimant would only have been exposed to the risk of a finding that he had lied about suffering personal injury if he had asserted that he had suffered injury. For the reasons set out above, I do not see that he had the material upon which to assert that he had suffered injury.”

25

PAUSING THERE: A VERY BASIC POINT

- Can you prove that the claimant has suffered injury as a result of the negligence?
- A basic point.
- More difficult in some clinical negligence cases, but also in RTAs such as Kavak.

26

PRACTICAL POINT 2: WE HAVE TO KNOW WHAT AN "INJURY" IS



27

Johnston v NEI International Combustion Ltd [2007] UKHL 39, [2007] 4 All ER 1047, [2007] 3 WLR 876.

- Were pleural plaques caused by negligent exposure to asbestos an "injury".

- The plaques are symptomless .



28

LORD HOFFMAN

‘‘Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability.’’

29

DAMAGE MEANS BEING WORSE OFF

‘‘Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability.’’

30

NO CLAIM FOR PSYCHIATRIC INJURY

A claimant who suffered an identifiable psychiatric illness as a result of discovering pleural plaques could not recover damages. Whilst it was foreseeable that a claimant who suffered an asbestos-related disease may suffer psychiatric damage, that event had not occurred. The claimant had suffered psychiatric illness caused by apprehension that the event may occur. Psychiatric illness caused by apprehension of an unfavourable event which had not actually happened did not give rise to a cause of action

31

Dryden and others v Johnson Matthey Plc *[2018] UKSC 18*

- The claimants worked in factories making catalytic convertors.
- The factories were not cleaned properly and the claimants were exposed to platinum salts. This led to them developing platinum salt sensitisation.
- This is a condition causing no symptoms & the defendant kept the claimants away from salt.
- However exposure to chlorinated platform salts was likely to cause an allergic reaction, with physical symptoms including asthma, rhinitis or skin rashes.
- After the exposure was detected the defendant no longer allowed them to work in an environment where they were exposed to salt.

32

SUPREME COURT HELD THAT THIS *WAS* AN INJURY

If the sensitisation is viewed as an injury, as in my view it should be, then it did exist before the skin test revealed it. The restrictions on the work that can be done by claimants who have tested positive are attributable to the sensitisation, to which the protective provisions of the collective agreement were a response. Those provisions reflect the fact that, because of the negligence and/or breach of statutory duty of their employers, these claimants' bodies are now in such a state that they need to avoid further exposure to platinum salts which, according to the evidence, would be likely to provoke allergy in most people.

33

A QUESTION OF FACT IN EACH CASE

"…it is a question of fact in each case whether a man has suffered material damage by any physical changes in his body. It is a question of fact that must be determined in the light of the legal principles applicable to personal injury actions, and this case has provided a useful opportunity to clarify some of those principles. The process has led me, for all the reasons I have set out, to differ from Jay J and the Court of Appeal and to conclude that the concept of actionable personal injury is sufficiently broad to include the damage suffered by these claimants, which is far from negligible."

34

LOSS OF PART OF THEIR CAPACITY TO WORK

"… the sensitisation of the claimants in this case marks that they have already been exposed to platinum salts, but unlike the plaques, it constitutes a change to their physiological make-up which means that further exposure now carries with it the risk of an allergic reaction, and for that reason they must change their everyday lives so as to avoid such exposure. Putting it another way, they have lost part of their capacity to work or, as the claimants put it in argument, they have suffered a loss of bodily function by virtue of the physiological change caused by the company's negligence."

35

"SHOCK"



36

Kimathi & Ors v The Foreign and Commonwealth office [2018] EWHC 1305 (QB)

- **Mr Justice Stewart held that "fear" did not amount to a personal injury.**
- **The judge was considering whether a claimant had suffered an "injury" which was an essential prerequisite to the court's ability to extend time under section 33 of the Limitation Act 1980.**

37

A RECOGNISED PSYCHIATRIC INJURY

None of these submissions, in my judgment, changes the position clearly founded in the authorities that anything short of a recognised psychiatric condition cannot amount to a personal injury.

38

PRACTICAL POINT 3: HOW DOES THE COURT GO ABOUT ASSESSING DAMAGES FOR PSLA



39

ONCE YOU HAVE PROVEN INJURY HOW ARE DAMAGES ASSESSED



40

THE CLAIM FOR THE PHYSICAL INJURY IS COMPENSATION AND NOT A SOLATIUM

The central point here is that the damages for the physical injury *are* compensation and not a mere solatium; neither are they a reward or 'winnings'.

41

THE PERSONAL LOSS COVERS MORE THAN PAIN

''If a plaintiff has lost a leg, the court approaches the matter on the basis that he has suffered a serious physical deprivation, no matter what his condition or temperament or state of mind may be. That deprivation may also create future economic loss which is added to the assessment. Past and prospective pain and discomfort increase the assessment. If there is loss of amenity apart from the obvious and normal loss inherent in the deprivation of the limb – if, for instance, the plaintiff's main interest in life was some sport or hobby from which he will in future be debarred, that too increases the assessment. If there is a particular consequential injury to the nervous system, that also increases the assessment. These considerations are not dealt with as separate items but are taken into account by the court in fixing one inclusive sum for general damages.

H West & Son Ltd v Shephard [1964] AC 326, *[1963] 2 All ER 625, HL*

42

PAIN AND DEPRIVATION

- Serious physical deprivation.

- “Past and prospective pain and discomfort increase the assessment.”

43

LOSS OF AMENITY

“If there is loss of amenity apart from the obvious and normal loss inherent in the deprivation of the limb – if, for instance, the plaintiff's main interest in life was some sport or hobby from which he will in future be debarred, that too increases the assessment”



44

ONE INCLUSIVE SUM

These considerations are not dealt with as separate items but are taken into account by the court in fixing one inclusive sum for general damages



45

THE WEST CASE



46

West –v- Shepherd [1963] UKHL 3

- West was a case where a young woman was completely paralysed but had little consciousness of her affliction.
- Arguments were presented that the measure of damages is loss of happiness, so where there is limited awareness of this and the plaintiff would be unable to spend or enjoy the money, damages should be moderate.

47

NO AWARENESS OF LOSS: DAMAGES FOR PSLA ARE STILL AWARDED

that substantial damages are due for a serious injury and loss of the enjoyment of life, although there is little or no awareness of the loss

48

DAMAGES WOULD BE GREATER IF THERE WERE CONSCIOUSNESS

damages would be greater where there was consciousness of the loss, because this adds mental suffering to the injury;

49

SHORTER DURATION OF DAMAGES: LOWER AWARD

If life is shortened, damages are proportionate to the *duration* of the loss.

(But remember there is a distinct award for damages for knowledge that life span is reduced)

50

NOT A SUBJECTIVE TEST

Subjective happiness is not the measure of damages;

51

THE COURT IS NOT CONCERNED WITH HOW THE MONEY IS SPENT

If the right figure is awarded, the court is not concerned with the use which the claimant does or can make of it

52

PRACTICAL POINT 4: YOU HAVE TO KNOW ABOUT THE FACTORS THAT MAY IMPACT UPON THE AWARD FOR PAIN AND SUFFERING



53

An already disabled or injured claimant

In *Frank v Cox (1967) 111 Sol Jo 670, CA* the plaintiff was aged 77 years. Sachs LJ stated (at 670):

‘‘I take the view myself that when one has a person in advancing years, in some respects of impairment of movement may perhaps be more serious than it is with a younger person. It is true … that he has not got as many years before him through which he has to live with this discomfort, pain and impairment of movement. But it is important to bear in mind that as one advances in life one's pleasures and activities particularly do become more limited and any substantial impairment in the limited amount of activity and movement which a person could undertake, in my view, becomes all the more serious on that account.

54

Mustard v Morris [1982] 1 CLY 11, CA,

‘‘With respect, I think that argument is misconceived. If a man who is a diabetic and who has arterial disease to the extent that this plaintiff had, is severely injured so that life is much more difficult to bear than otherwise it would have been, a defendant is in my view, quite unable, with justification, to say that a reduction in damages should be brought about. Indeed, an argument to the contrary might well be made. To impose upon a man who, through natural causes, has been made ill to a certain extent, very grave injuries such as were sustained by this plaintiff and which reduces his capacity to bear natural ill health, is in my judgment more likely to increase than reduce damages.’’

55

IN SUMMARY

- There may be no justification for a lower award because the claimant was already disabled or injured.
- The key practical difficulty is often assessing what the difference in the injuries is.



56

THE AGE OF THE CLAIMANT

In Miller -v- Imperial College HealthCare NHS Trust [2014] EWHC 3772 (QB) HHJ Curran QC (sitting as a judge of the High Court)

"The suggestion (if that is what it was) that *Nutbrown* is authority for a proposition that an award of damages for a 72-year old should be approaching half that which would have been appropriate for a 30-year old, does not bear detailed examination. It is perfectly clear that Potts J took into account in that case in particular the plaintiff's limited life expectancy and his limited insight into his condition. The facts of that case were very different from the facts of the instant case."

57

A DOUBLE EDGED SWORD

At paragraph [D108] the authors suggest that the argument concerning age is "*double edged*". Young Claimants may argue that they have a greater length of time to suffer with the effects of the injury, and can also put forward their previous active lifestyle and show much how they have lost. "*[A]n alternative argument*" (they say) can be made by the elderly Claimant. He or she is less resilient than the young and so suffers the relevant injury for longer, or perhaps for life. Moreover, the older Claimant may have had extensive plans for retirement. (Alternatively, I would add, as in this case may have had very real plans to continue working in employment which she enjoyed, and which gave her real satisfaction and fulfilment, in agreeable West End surroundings, far beyond normal retirement age).

58

VALUABLE YEARS

"These valuable years have now been blighted by injury, and an award can be increased due to the Claimant's limited prospects of any social interaction. The very fact that the Claimant had only a limited ability to perform hobbies can be very telling if even that has now been removed. Therefore, Potts J's approach in *Nutbrown v. Sheffield Health Authority* of assessing a man in the prime of his life and then deducting for particular circumstances, may also apply in the opposite direction. If a circumstance means a man beyond the prime of his life suffers more, then the award should be increased." [Ibid.]"

59

KEY POINTS

- Again the age of a claimant is not necessarily a reason for reducing damages for pain and suffering.
- Arguing "age" is a double-edged sword



60

GENDER? JUDICIAL COLLEGE GUIDELINES

- Dame Janet Smith

"My suggestion is that when judges (or counsel) are considering an award in a case involving any element of disfigurement, they should consciously put out of their minds the claimant's gender as a factor in the assessment. They should look at the reported cases and brackets for both men and women and evaluate the damages against the framework of that wider range of awards. And, when giving judgment, they should say that, although the claimant is a man (or woman), that per se has played no part in the assessment. Then we might be able to move away from the separate reporting of awards for men and awards for women."

61

DOES IT MATTER HOW RICH YOU ARE?

Pain and suffering is experienced equally by the wealthy and the poor, and the application of the same guidelines across the whole of England and Wales leaves no room for the notion that differential average earnings in a particular locality can be a determinant of a just level of compensation"



62

Attorney General of St Helena v AB & Ors (St Helena) [2020] UKPC 1

"It is obvious, for example, that in reality a particular sum of money, such as £100,000, may have a radically greater potential effect in improving the life of a poor person than it would in improving the life of a multi-millionaire. But the common law treats each of them equally when quantifying damages for PSLA."

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KEY POINTS FOR PRACTITIONERS

- Ask the Claimant about the things they cannot do.
- Do not just rely on the medical report.
- Put matters of loss of enjoyment in –but be moderate and careful.

64

PRACTICAL POINT 5: THE COURT IS AWARDING ONE SUM FOR PSLA

(Putting aside provisional damages for the moment).



65

HEIL –v- RANKIN *[2000] PIQR Q187*

Lord Woolf MR observed that:

‘‘In determining what is the correct level of damages for PLSA [pain, suffering and loss of amenity], it is not usual for the court to attribute differing sums for different aspects of the injury. The court's approach involves ***trying to find the global sum which most accurately in monetary terms reflects or can be regarded as reflecting a fair, reasonable and just figure for the injuries which have been inflicted and the consequences they will have in PLSA***. A sophisticated analytical approach distinguishing between pain and suffering and loss of amenity is not usually required … We do, however, accept the submissions … that to consider the individual strands of PLSA can provide a check as to the adequacy of the whole. ***There can also be special circumstances in a particular case which makes separation necessary.’’***

66

A FAIR, REASONABLE AND JUST FIGURE

"… trying to find the global sum which most accurately in monetary terms reflects or can be regarded as reflecting a fair, reasonable and just figure for the injuries which have been inflicted and the consequences they will have in PLSA"

67

HOW DO JUDGES ASSESS DAMAGES?

- Historically damages for PSLA were awarded by a jury.
- 1933 jury trials in civil cases where abolished (with certain exceptions).
- Problem arose because of judges quantifying losses.

68

SO JUDGES LOOK AT COMPARABLE CASES

- Practice started of judges looking at what other judges had awarded



69

Bird v Cocking & Sons Ltd [1951] 2 TLR 1260 at 1263, CA,

‘‘Although there is no fixed and unalterable standard, the courts have been making these assessments for many years, and I think that they do form some guide to the kind of figure which is appropriate … when, therefore, a particular matter comes for review, one of the questions is, ***how does this accord with the general run of assessments made over the years in comparable cases?’’***

70

Rushton v National Coal Board [1953] 1 QB 495 at 502

‘‘The only way … in which one can achieve anything approaching a uniform standard is by considering cases which have come before the courts in the past and seeing what amounts were awarded in circumstances so far as may be comparable with the case which the court has to decide.’’

71

Waldon v War Office [1956] 1 All ER 108 at 112,

‘the desire which everyone has had for years to get as near as one can towards some form of scale or regularity in assessing damages’. They do not detract from the necessity of weighing each case upon its own individual merits, since no two cases are exactly alike. But they do enable the court to seek guidance, not by referring to any particular case and treating it as a precedent, but by looking at the general level of damages in the same type of case, or cases which offer some means of comparison by analogy.”

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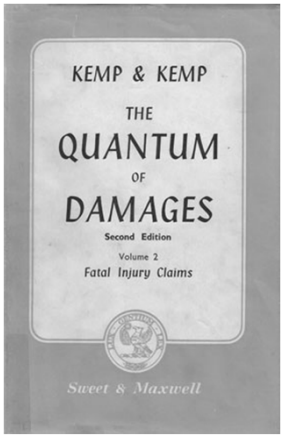
MID TO LATE 1950s



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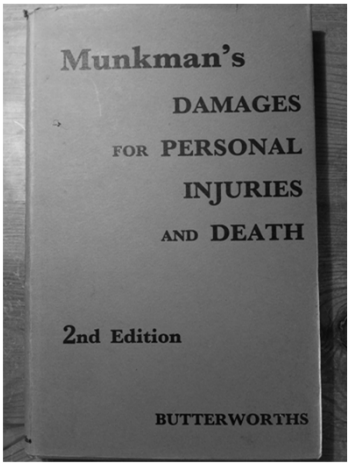
FIRST EDITION 1956



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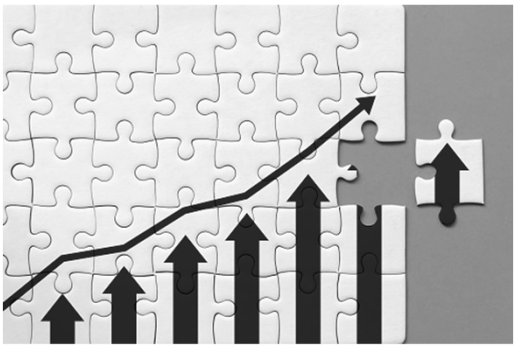
ADJUSTMENT FOR INFLATION

- Remember when looking back at “old” cases that awards for PSLA have to be adjusted for inflation.



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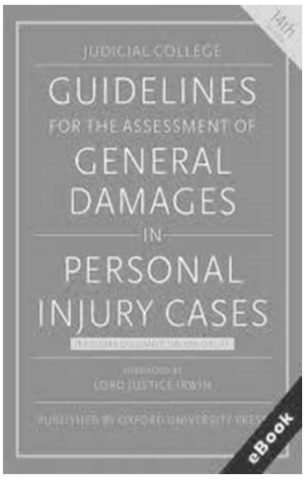
PRACTICAL POINT 6: THE IMPACT OF THE JUDICIAL COLLEGE GUIDELINES



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Attorney General of St Helena v AB & Ors (St Helena) [2020] UKPC

Issue over whether awards for PSLA should be lower in St Helena because cost of living was lower.

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FIRMLY EMBEDDED

There can be no doubt that the JC Guidelines (as they are now called) have become firmly embedded in the common law of England and Wales. In his foreword to the 1st edition of the (then) JSB Guidelines in March 1992 Lord Donaldson of Lymington said:

80

DISTILLATION OF CONVENTIONAL WISDOM

"What it is intended to do, and what it does quite admirably, is to distil the conventional wisdom contained in the reported cases, to supplement it from the collective experience of the working party and to present the result in a convenient, logical and coherent form."

81

THE PROCESS

"The distillation to which Lord Donaldson refers came from a very large number of decided cases (some indifferently reported) in which judges were required to quantify PSLA damages where, as Lord Donaldson said, no monetary award can compensate in any real sense, so that the damages could not be assessed by a process of calculation."

82

SO START WITH THE GUIDELINES

- Where (reasonably) do the figures come within the Guidelines.
- If there is more than one injury.
- There are still cases outside the Guidelines.

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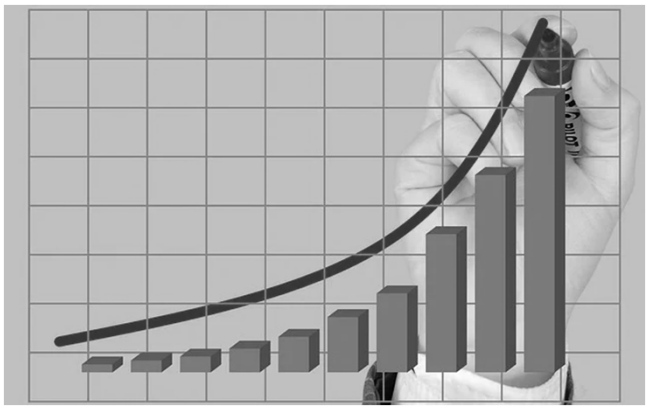
PRACTICAL POINT 7: REMEMBER INFLATION PUTS THE GUIDELINES OUT OF DATE

- Blair v Jaber [2023] EW Misc 3 (CC)



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12% ADDITION IN MARCH 2023

"T**he Judicial College Guidelines are just that – guidelines. If there is a change in circumstances between April 2022 and today, that is a matter to take into account when assessing damages. The very substantial drop in the value of money which has taken place since April 2022 is just such a circumstance. Accordingly, the Judicial College figures needs to be increased by, in my judgment, about 12%.**"

85

INFLATION CALCULATORS SINCE APRIL 2022

- Hargreaves Lansdown calculator
- The cost of goods and services increased by 12.8% over this period

86

PRACTICAL POINT 8: MULTIPLE INJURIES REQUIRE A LOT OF CONCENTRATION



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MULTIPLE INJURIES (*Hicks v Barnes (13 January 1988, unreported), QBD*, cited in BPILS I 45.1(c))

:‘‘There is no satisfactorily rational way in which to evaluate a claim such as this. It would be unrealistic to approach the individual injury or groups of injuries and award a sum for each and arrive at a total. What has to be done is for the judge, as best he may, to sit back from it all and try to farm an overall impression, both of the impact of the injuries and how as best, but imperfectly as he may, evaluate that it terms of money. It is not just the individual judge's assessment of money because, of course, his award has to be more or less in line with awards in broadly comparable cases, and I lay emphasis on the word “broadly”, because no two of these cases are strictly comparable. No two individuals respond equally to the same insult, whether it is of a physical or non-physical kind.’’

88

DON'T SIMPLY ADD UP EACH INJURY TO GET A TOTAL

It would be unrealistic to approach the individual injury or groups of injuries and award a sum for each and arrive at a total



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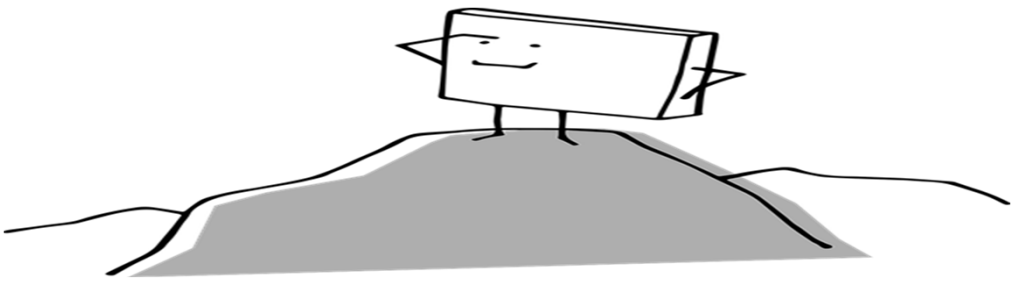
THE "OVERVIEW" APPROACH

"…. sit back from it all and try to farm an overall impression, both of the impact of the injuries and how as best, but imperfectly as he may, evaluate that it terms of money."



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Brown v Woodall [1995] PIQR Q36

"In this type of case, in which there are a number of separate injuries, all adding up to one composite effect upon a plaintiff, it is necessary for a learned judge, no doubt having considered the various injuries and fixed a particular figure as reasonable compensation for each, to stand back and have a look at what should be the aggregate figure and ask if it is reasonable compensation for the totality of the injury to the plaintiff or whether it would in the aggregate be larger than was reasonable?"

91

SADLER –V- FILIPAK

"It is in my judgment always necessary to stand back from the compilation of individual figures, whether assistance has been derived from comparable cases or from the JSB guideline advice, to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured person's recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary."

92

PSLA AND "MULTIPLE CASES"

- Start with the individual injuries.
- "Add them up"
- Consider the likely overlap and discount.
- (Roughly one-third – but that is not a "rule".

93

IF IT WAS A PERCENTAGE RULE – IT COULD BE RIDICULOUS

- Break a finger on one arm - £3,000
- Lost the other arm £128,000
- Clearly be unjust to add them together and then deduct a third.

94

PRACTICAL POINT 9: THE NEW WHIPLASH TARIFF SCHEME



95

THE PROBLEM WITH WHIPLASH TARIFF CASES AND COMMON LAW DAMAGES

- This has been identified as a major difficulty.
- Ongoing process to select appropriate cases as “test cases”.

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Section 3(8) of the Civil Liability Act 2018

(8)Nothing in this section prevents a court, in a case where a person suffers an injury or injuries in addition to an injury or injuries to which regulations under this section apply, awarding an amount of damages for pain, suffering and loss of amenity that reflects the combined effect of the person's injuries (subject to the limits imposed by regulations under this section)"

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Lord Wolfson of Tredegar (Grand Committee Debate 26th April 2021)

Section 3(8) of the Act provides that, where a claimant suffers injuries in addition to a whiplash injury, the court is not prevented from awarding damages that reflect the combined effect of the injuries sustained. The courts will therefore need to determine how mixed injuries are addressed. We are confident that judicial expertise will address these matters on a case-by-case basis…

98

THE WIDE DEFINITION OF WHIPLASH

"Whiplash injury" etc

(1)In this Part "whiplash injury" means an injury of soft tissue in the neck, back or shoulder that is of a description falling within subsection (2), but not including an injury excepted by subsection (3).

(2)An injury falls within this subsection if it is—

(a)a sprain, strain, tear, rupture or lesser damage of a muscle, tendon or ligament in the neck, back or shoulder, or

(b)an injury of soft tissue associated with a muscle, tendon or ligament in the neck, back or shoulder.

(3)An injury is excepted by this subsection if—

(a)it is an injury of soft tissue which is a part of or connected to another injury, and

(b)the other injury is not an injury of soft tissue in the neck, back or shoulder of a description falling within subsection (2)."

99

"MINOR" PSYCHOLOGICAL INJURIES ARE INCLUDED IN THE TARIFF

(3)If the claimant suffers one or more minor psychological injuries on the same occasion as the whiplash injury or injuries, the amount of damages for pain, suffering and loss of amenity payable in respect of the minor psychological injury or the minor psychological injuries, taken together, is to be an amount specified in regulations made by the Lord Chancellor.
(4)If regulations made by the Lord Chancellor so provide, the amount of damages for pain, suffering and loss of amenity payable in respect of—
(a)the whiplash injury or injuries, and
(b)a minor psychological injury or injuries suffered by the claimant on the same occasion as the whiplash injury or injuries,
taken together, is to be an amount specified in regulations made by the Lord Chancellor (notwithstanding subsections (2) and (3)).

100

THE TARIFF

Duration of injury	Amount –	
Not more than 3 months	£240	£260
More than 3 months, but not more than 6 months	£495	£520
More than 6 months, but not more than 9 months	£840	£895
More than 9 months, but not more than 12 months	£1,320	£1,390
More than 12 months, but not more than 15 months	£2,040	£2,125
More than 15 months, but not more than 18 months	£3,005	£ 3,100
More than 18 months, but not more than 24 months	£4,215	£4,345.

101

MULTIPLE INJURIES WITHIN THE DEFINITION OF WHIPLASH

(2) In this regulation, "duration of injury" means—

(a) the duration, or likely duration, of the whiplash injury a person has suffered; or

(b) where a person suffers more than one whiplash injury on the same occasion, ***the whiplash injury of the longest duration, or likely longest duration,*** suffered on that occasion,

if the person were to take, or had taken, reasonable steps to mitigate the effect of that injury or those injuries.

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THERE IS PROVISION FOR AN UPLIFT IN "EXCEPTIONAL CIRCUMSTANCES"

the court must be satisfied that—

(a) the degree of pain, suffering or loss of amenity caused by the whiplash injury or injuries in question makes it appropriate to use the greater amount; and

(b) it is the case that—

(i) the whiplash injury is, or one or more of the whiplash injuries are, exceptionally severe, or

(ii) where the person's circumstances increase the pain, suffering or loss of amenity caused by the injury or injuries, those circumstances are exceptional.

103

THE ADDITIONAL AMOUNT CANNOT EXCEED 20% OF THE TARIFF



104

INTERACTION BETWEEN TARIFF DAMAGES AND COMMON LAW DAMAGES

- The Courts could ignore the tariff award and award PSLA separately.
- The Court could take the "overview" approach.

105

S3(2) of the Act

""**The amount of damages for pain, suffering and loss of amenity payable in respect of the whiplash injury or injuries, taken together, *is to be* an amount specified in regulations made by the Lord Chancellor**.""

106

Hassam & Anor v Rabot & Anor [2023] EWCA Civ 19

- The majority view was that the Regulations could not be taken to reduce common law damages.
- The appropriate approach of the courts was to

(i) assess damages under the tariff;

(ii) assess common law damages for the non-whiplash injuries;

(iii) take an "overview" as to the award – but taking into account that the tariff award is lower than common law damages would have been.

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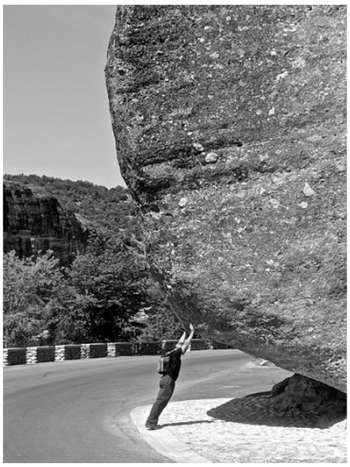
LAST I HEARD

This is on appeal to the Supreme Court…

108

PRACTICAL POINT 10: APPEALING AN AWARD FOR PAIN AND SUFFERING IS VERY, VERY DIFFICULT



109

Flint v- Lovell [1934] All ER Rep 200

"To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled. The result is that the appeal will be dismissed, with costs."

110

A RECENT EXAMPLE

Essex County Council & Ors v Davies & Ors [2019] EWHC 3443

- Claimants succeeded at trial in establishing liability for carbon monoxide poisoning in their workplace.
- Defendants argued *everything*, then appealed on *everything.*

111

DEFENDANT'S APPEAL AGAINST THE AWARD ON PSLA

It was accepted however that there were no specific guidelines addressing the injuries in issue and comparators were of necessity approximate. I asked Counsel for the First and Third Appellants at the outset of his oral argument what the alleged error of law was in relation to the Judge's decision on what was essentially a factual question on general damages. He candidly accepted that the basis of this appeal was that the amounts were simply too high. He also accepted that the amount by which he submitted the awards should be reduced (one third) was essentially arbitrary.

112

NO ARBITRARY "KNOCKING DOWN" OF DAMAGES

That acceptance was both appropriate and telling. If one can arbitrarily "knock off" one third of the damages what is the appealable error in the Judge having decided to award that extra third? For the reasons set out below I have no hesitation in dismissing this appeal having had regard to Flint v Lovell [1935] 1 KB 354 at p.360, and to the principles which guide a court on such an appeal as summarised in McGregor on Damages (20th Edition) at para. 53-026

113

THE APPEAL COURT WON'T SECOND GUESS THE TRIAL JUDGE

In those circumstances, the Judge's assessment of PSLA derived from the application of his findings of fact and his impression of the Respondents in the context of the recorded contemporaneous and expert medical evidence, gave him a unique position. ***I cannot "second-guess" his assessments unless they fell outside the bounds of reasonableness.***

114

AN EXEMPLARY APPROACH

In my judgment, the Judge's approach to the specific case of each Respondent was exemplary. Each Respondent's award followed a detailed evaluation of their circumstances on an individual basis. The Appellants' arbitrary "lopping off" of one third from each award is unprincipled

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PRACTICAL POINT CASES 11: DEALING WITH CASES OUTSIDE THE GUIDELINES



116

FGX v Gaunt [2023] EWHC 419 (KB)

- "Image based abuse" ("revenge porn").
- Secret camera took photos of the clamant.
- These uploaded onto payment platform websites. Alongside a photo of her face

117

THE CIVIL PROCEEDINGS

- D convicted of voyeurism and other sexual offences.
- The Particulars of Claim record that the Defendant owed the Claimant an obligation of trust and confidence in relation to intimate and personal matters and information coming into his possession as a result of their relationship.
- Judgment entered in default.

118

WHAT IS THE APPROPRIATE SUM FOR PAIN AND SUFFERING?

36.Counsel could not identify a case directly on point to provide assistance in determining a suitable monetary award for general damages. I propose therefore to set out the relevant guidance and case law to which Counsel directed me, before drawing the strands together.

119

THE STARTING POINT

Counsel's starting point is the awards for psychiatric and psychological damage to victims of sexual/physical abuse in Section C of Chapter 4 of the Judicial College Guidelines 2022 ('Psychiatric and Psychological Damage'). His rationale is that the impacts on the Claimant arising from the nature and duration of her PTSD as well as the effect on her ability to cope with life and work also feature as some of the impacts of sexual abuse (as listed in the guideline as relevant to assessing quantum). Counsel submitted that the appropriate sub-category is b) moderate ("*Cases where the abuse is less serious and prolonged and there is a less severe psychological reaction with fewer effects on education, work, or relationships. …).* The range of awards in this category is £20,570 - £45,000.

120

A RELATIONSHIP BETWEEN DAMAGES

"I bear in mind the need to maintain a reasonable relationship between awards for misuse of information and personal injury (MGN at §61-62).

121

THE JC GUIDELINES

I accept Counsel's submission that the impacts on the Claimant are akin to the impacts of sexual assault listed in the Judicial College guidelines, albeit that the abuse in the present case is image based rather than physical. I note in this context that voyeurism is treated as a sexual offence. I take into account the Judicial College awards for psychiatric and psychological damage consequent on sexual abuse, which range from £20,570- £45,000.

122

DAMAGES FOR ADDITIONAL DISTRESS

I consider it appropriate, in principle, to make an award of damages to compensate the Claimant for additional distress arising from aggravating features of the Defendant's conduct. Aggravating features include the needless uploading of a photograph of the Claimant's face onto the pornographic website and the evidence that indicates the Defendant obtained payment for the images. A further aggravating feature is the Defendant's failure to participate in these proceedings. His failure to do so has deprived the Claimant of the opportunity to obtain information about the extent of publication, which remains a preoccupation for her and a barrier to her recovery. Nonetheless, I bear in mind the need to avoid double counting. The diagnosis of chronic PTSD appears to stem, in part at least, from these features of the Defendant's conduct. Accordingly, I do not make a separate award for aggravated damages and the uplift in this regard is modest.

123

AWARD OF £60,000

Drawing the strands together, I award general damages of £60,000. This figure includes an award for aggravated damages. In assessing this sum, I have sought to reflect the situation up to and as at the date of judgment. I do not therefore consider a separate award of interest on this head of loss is appropriate (see Rees v Commissioner of Police of the Metropolis [2021] EWCA Civ 49 per Davis LJ at [47]).

124

PRACTICAL POINT 12: INTEREST ON DAMAGES FOR PAIN AND SUFFERING



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- The Senior Courts Act 1981, s 35A(2) makes the exercise of the power to award interest obligatory if judgment is given for damages for personal injuries or death and the amount exceeds £200, unless there are ‘special reasons to the contrary’. But this does not necessarily mean interest on the whole of the damages, because the power relates to ‘all or any part’.

126

2% INTEREST

In *Pickett v British Rail Engineering Ltd* [1980] AC 136, [1979] 1 All ER 774, the House of Lords held that

- The claimant is entitled to interest for the personal loss as compensation for being kept out of his money, irrespective of the fact that the award will be increased in line with inflation.
- In *Wright v British Railways Board* [1983] 2 AC 773, [1983] 2 All ER 698, HL, approving *Birkett v Hayes* [1982] 2 All ER 710, [1982] 1 WLR 816, CA, the House of Lords held that the adjustment of the award for inflation is indeed relevant to the *rate* of interest allowed: this should be limited to 2%.

127

INTEREST RUNS FROM

Interest on damages for pain and suffering runs from *the date of service* of proceedings.

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IN SUMMARY

- What is being compensated for a PSLA award.
- Ask the claimant in relation to any specific matters in relation to PSLA.
- Can you identify the “injury”.
- The dangers of over-egging the pudding.

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ANY QUESTIONS



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THANK YOU FOR WATCHING

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