

## Quantum Update

Edwina Rawson, Partner  
Richard Lodge, Kingsley Napley  
June 2011

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## Quantum update

# INTERIM PAYMENTS

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## Quantum update - INTERIM PAYMENTS

**Cobham v Benjamin Eeles** (March 2009)

Facts

- Young boy, brain damaged in RTA when baby
- Had interim payment of £450,000
- Wanted to buy property
- Sought further interim payment of £1.2m

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### Quantum update – interim payments



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### Quantum update - INTERIM PAYMENTS

#### Cobham v Benjamin Eeles

First Instance



- Yes, £1.2m
- Valued case at £3.5m if won at trial (on full and final basis)
- £1.2m would not exceed a reasonable proportion of final award

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### Quantum update - INTERIM PAYMENTS

Cobham v Benjamin Eeles (March 2009) C/A



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### Quantum update - INTERIM PAYMENTS

Cobham v Benjamin Eeles (March 2009) C/A

• **ASK**

1. Is it likely that trial judge will want to make PPO? Here, yes.
2. What would the trial judge award as lump sum? (or capitalised value) – separate out likely lump sum from periodicals

- Lump sum: General damages, past losses, interest, accommodation
- Possibly others from future losses if confidently predict that trial judge would award higher than above as lump sum. And, a real need.

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### Quantum update - INTERIM PAYMENTS

Cobham v Benjamin Eeles (March 2009) C/A

- Value of lump sum = £590,000
- Already had £450,000
- Reasonable house anyway

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### Quantum update - INTERIM PAYMENTS

## Life after Eeles

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### Quantum update - INTERIM PAYMENTS

- Preston v. City Electrical Factors (November 2009)
- FP v Taunton & Somerset NHS Trust (2009)
- Johnson v Serena Compton-Cooke (2009)
- Patel v. Patel (September 2009)
- Kirby v. Ashford & St. Peter's Hospital (2009 and 2011)
- Harris v. Roy (February 2010)
- Jessica Brown v. Liam Emery (March 2010)
- Muhammed Ali v. Frimley Park (2010)
- Best v Smyth (June 2010)
- Walton v Axa Belgium (February 2011)

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### Quantum update – INTERIM PAYMENTS

#### 1 Best v Smyth (June 2010)

- RTA, rented bungalow up for sale
- C sought £800,000
- Contributory negligence argued at 50%
- Judge said 30% and with interim payments
- £650,000 under 4 heads of *Eeles*, so not enough
- Argued to draw down from other heads, under second limb
- Refused – real need for a property but didn't need to make adaptations

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### Quantum update – INTERIM PAYMENTS

#### 2 Kirby v Ashford & St Peter's Hospital (March 2011)

- Brain injured child
- Previous interim payments of £1m for a property
- Application for £250,000 for outstanding building costs
- Costs had already been incurred
- And could only be met under the second limb of *Eeles*

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### Quantum update – INTERIM PAYMENTS

#### 2 Kirby v Ashford & St Peter's Hospital (March 2011)

- Awarded £150,000
- *Eeles* envisaged applications before the cost had been incurred, not retrospectively
- Could it be predicted with high confidence that the trial judge would save the C's parents from their financial irresponsibility. Yes.
- Health warning

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### Quantum update – INTERIM PAYMENT

#### 3 Walton v Axa Belgium (February 2011)

- Previous interim payments of £580,000
- £70,000 sought for adapted vehicle, total £650,000
- Agreed that C would get more than £650,000 lump sum at trial
- D argued that would change the status quo that would affect the trial judge's assessment of the vehicle claim. Uneven playing field. Judge may make a higher award.
- Rejected: A modest step, unlikely that a judge would be diverted from objectivity, and not interested in how the money would be spent

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### Quantum update – ENHANCED INTEREST

#### Andrews v Aylott (March 2010)

- Liability trial, C won 75% with damages to be assessed
- Court orders interest at 5% above base rate on 33% of damages, to reflect D's failure to beat a P36 offer
- Later, settles for lump sum and ppo
- Interest applied only to lump sum, on basis that C should not be kept out of compensation due to the D's failure to accept Part 36 offer. Not apply to future payments as no delay.

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Quantum update

# FATAL ACCIDENTS

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Quantum update - FATAL ACCIDENTS ACT 1976

Watson v Cakebread Robey Ltd (2009)



- Mesothelioma at work
- Claim during life
- Funeral expenses claimed. C said whilst alive he should be able to step into shoes of estate



- LR(MP)A 1934 made it clear claim arose on death
- Otherwise, any C with reduced life expectancy could claim irrespective of extent of reduction

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Quantum update

# CARE

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### Quantum update - CARE

- private vs state



Review

- Sowden v Lodge (2004), C/A  
D pays only to extent necessary to 'top up' state care by private care
- Crofton v NHSLA (2007), C/A  
State funding for care should be taken into account.  
Discounted **multiplier**

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### Quantum update - CARE

#### Chantelle Peters (March 2009), C/A

- Congenital rubella syndrome
- Care home costs shared between LA and PCT, costing about £132,000 per annum

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### Quantum update - CARE

#### Chantelle Peters (March 2009), C/A

**BIG QUESTION:** Was C obliged to make use of state care or could she claim full cost of care privately?




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### Quantum update - CARE

**Chantelle Peters** (March 2009), C/A

Having looked at statutory framework and principles of tort ...

“There was no reason in policy or principle why a C who wished to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right, provided there was no double recovery.”

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### Quantum update - CARE

**Chantelle Peters** (March 2009), C/A

- Not a question of mitigation but who bears the cost
- £4m for her residential care needs
- But, is the fight over?

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### Quantum update - CARE

**Sklair v Haycock** (December 2009)

- C had Asperger's Syndrome, pre-existing
- Cared for by family
- RTA
- Mobility impaired and big psychological deterioration
- Claims now 24 hour care
- D argues

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### Quantum update - CARE

- 1) C only claim difference in care
  - Judge disagreed. Where care is given by love and affection before the accident and, but for the accident, this would have continued, no reason why has to put a value on it and give credit for it.
- 2) C should get care from the state
  - Judge disagreed. Applied Peters

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### Quantum update - Care

#### (1) Drake (2) Starkey (executors) v Wheeler (Aug 2010)

- Novel claim for hospice costs, mesothelioma
- Donation £10,000 (running costs over what given by PCT)
- D said medical treatment, and no authority
- Allowed, no floodgates because only if "lingering and painful dying period"
- Consistent with principles because if had paid for, could have claimed

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### Quantum update – CARE

#### Warner v (a firm) (July 2010, March 2011)

- Professional negligence
- Settled £425,000 – approved by court of protection
- Settled at an undervalue of about £1.2 m
- Failed to instruct a case manager in accordance with care expert
- Failed to obtain care statements and up to date assessment

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### Quantum update - CARE

#### Warner v (a firm) (July 2010, March 2011)

- Firm joins in the care expert by Part 20, saying did not make it clear that case manager was needed before trial
- Summary judgment in care expert's favour, reasonably clear
- Upheld in court of appeal

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### Quantum update

## EARNINGS

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### Quantum update - EARNINGS

#### Blamire awards

- Where loss of earnings/pension subject to imponderables, court would approach case by "impression" rather than "precise calculation"

#### Multiplier and multiplicand




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### Quantum update - EARNINGS

#### Collett v Smith (July 2009), C/A

- Budding footballer for championship level
- Strong evidence
- Reduced by 15%, reasonable



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### Quantum update - EARNINGS

#### Cedric Abbs v Somerfield (April 2010)

- Self-employed plumber, worked alone
- Age 56
- Hip injury
- Orthopaedic experts both said fine for desk work
- Neuropsychological expert some underperformance in reading/writing
- Joint Employment expert said should learn basic computer skills, which he could do in his home town



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### Quantum update - EARNINGS

- BUT Cedric says ...

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### Quantum update - EARNINGS

- For last 5 years, I have not looked for work
- I do not intend to look for work
- If I did look for work, I wouldn't get a job anyway
- Never used a computer and didn't want to
- Only ever worked on my own
- Have "an aversion to paperwork, reading, routine or repetitive work and to working with people"

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### Quantum update - EARNINGS



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### Quantum update - EARNINGS

- Judge says .....

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### Quantum update - EARNINGS

- Cedric was not unreasonable and had not failed to mitigate
- Ingrained attitude, age, lack of qualification, lack of aptitude in reading, studying, made him incapable of finding work

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### Quantum update - EARNINGS

#### Clarke v Maltby (May 2010)

- C solicitor in banking
- RTA, recovers from physical
- Cognitive impairment
- Approach is to consider a number of scenarios (i.e. equity in local firm, medium city firm, large city firm) and to give each scenario a % chance that would earn over a basic level

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### Quantum update - EARNINGS

#### Hion v Morrisons Supermarket (May 2010)

- 37, injured leg in RTA
- Uninjured, little casual work and benefits
- No mathematical basis
- Injured leg would disadvantage him getting work
- £25,000

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### Quantum update - EARNINGS

#### Penny Johnson v Le Roux Fourie (May 2011)

- Cosmetic surgery case
- Liability admitted
- £6.2m, about £5.9m for earnings
- Successful own business set up in 2000
- Claims about £66m (including interest) for past and future earnings loss
- D argued for Blamire
- Loss of a chance

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### Quantum update - EARNINGS

#### Penny Johnson v Le Roux Fourie (May 2011)

- Although business unique, comparisons with competitors were helpful
- 2003-2011, real and substantial chance that business would have turnover of £25m p.a
- Needed to be discounted to reflect possibility of not achieving that, to £20m p.a.
- Assume net profit of 10% of turnover at 2010. Gives £2m net profit to be shared equally between her and husband
- Reduced to £800,000 p.a. to reflect changes in share holding. Less residual earnings

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### Quantum update - EARNINGS

#### XYZ v Portsmouth Hospitals (February 2011)

- C donated kidney to father
- Admitted liability
- PSLA, some past and future losses agreed at £888,000
- Dispute earnings (and medical treatment)
- High powered in the pharmaceutical industry
- Invited to make conclusions

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### Quantum update - EARNINGS

- **XYZ (February 2011)**
- Virtual certainty that would have set up own business
- Not up and running, but initial steps
- Witness evidence from people doing similar
- Virtual certainty of £2m turnover after 2 years. No discount.
- Mapped out over a 10 year period

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### Quantum update - EARNINGS

- **XYZ (February 2011)**
- 50% chance of annual turnover of £5m within 5 years
- Years 3,4 and 5 calculate on annual turnover of 75% of £3.5m
- 20% chance of annual turnover of £10m after 10 years
- Years 6 and 7, no increase in £5m
- Years 8 and 9, calculate on annual turnover of £6.5m
- Final year, £8m

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### Quantum update - EARNINGS

- **XYZ (February 2011)**
- Percentage chance to be applied:
  - Years 6 and 7, 50%
  - Years 8 and 9, 40%
  - Final year, 30%
- Based on:
  - equity share at end of year 2 of 34%
  - Net profit margin of 22% throughout
  - Deduction of 15% to net loss of earnings (for uncertainties not already taken into account)
- 75% chance that would have worked between 65-70 at same pay

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### Quantum update

# OGDEN TABLES

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### Quantum update – OGDEN TABLES

#### Penny Johnson v Le Roux Fourie (May 2011)

- Issue whether there should be further discount under Tables A-D to allow for risk of periods of unemployment and sickness
- Remarkable career so risks of non-employment were negligible. Income unlikely to have been affected by sickness or demands of caring for children
- No further discount

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### Quantum Update - HOLIDAYS

- Divergence in approach
- Objective rather than subjective
- Usually modest

#### Pankhurst v (1) White (2) MIB (2009)

Test is one of reasonableness  
 Rejected multiplier/multiplicand  
 Lump sum £160,000  
 Rejected C's evidence



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### Quantum update - DISCOUNT RATE

#### Helmot v Simon (January 2010)

- Guernsey Court of Appeal
- C 39 at trial
- Not bound to apply 2.5%, case by case
- 0.5% for future recurring non-earnings heads
- -1.5% for earnings-related losses including care
- 36.64 and 59.07
- Just under £14m
- Difference of over £5m just for care

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### Quantum update – DISCOUNT RATE

#### Love v Dewsbury (November 2010)

#### Day v Randhawa and MIB (January 2011)

- both sought adjournment, on basis of Helmot
- both failed, too uncertain whether rate would change and may not be decreased.

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THANK YOU

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