

A PRESENTATION FOR APIL

**WHEN, WHY AND HOW  
(POST JACKSON) TO INSTRUCT  
EXPERT ACCOUNTANTS**

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Presented by:

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1. MY BACKGROUND AND EXPERIENCE

See CV at end

2. 'WHEN' AND 'HOW' TO INSTRUCT EXPERT ACCOUNTANTS

These are related so I deal with them first.

Rule No 1 Come to me early. Certainly before you have to file the Precedent H Costs Budget.

Rule No 2 Give me all the facts and the relevant financial information obtained to date. Might include draft Witness Statements or comments from the Claimant and financial information, such as payslips, annual accounts, etc.

Rule No 3 Try and direct me to areas you think you need help.

There will be one of three results to this early contact:

Result 1 You need a fully CPR-compliant expert witness report and I'll give you a letter setting out (for the Case Management Costs Judge) exactly why you need a forensic accountancy report and fee estimates for every step of the way. Based on past cases.

Result 2 Suggest act as your behind-the-scenes expert to achieve largest possible settlement/award for your client, some examples later. No formal report, just detailed calculations to be attached to Schedule of Loss. No Court permission required but if filed a Cost Budget our fees will come out of your fees – NB our chargeout rates.

Result 3 Can't help! Actually though, I will set out for you how I think the claim should be put forward (without needing my help) so that should be very helpful to you. No charge!

### 3. 'WHEN' AND 'WHY' TO INSTRUCT EXPERT ACCOUNTANTS

These two are also related and I deal with them next.

#### AREAS WHERE WE CAN HELP IN PERSONAL INJURY, CLINICAL NEGLIGENCE AND FATAL ACCIDENT CASES

	<b>Expert adviser</b>	<b>Expert witness</b>
Loss of earnings calculations (including valuing overtime, allowances, bonuses and benefits and for MOD claims: Operational Allowances, LSA, etc)	✓	✓
Loss of pension calculations:		
- final salary ( <i>Auty, Longden, Swain</i> )	✓	✓
- personal pension schemes	✓	✓
Loss of dependency calculations on earnings, benefits and pension	✓	✓
Loss of chance calculations (promotion, career advancement, increasing profits) <i>Langford</i>	✓	✓
Detailed dependency percentage calculations	✓	✓
Full Schedules of Special Damage and Future Loss (particularly in complex or clinical negligence claims)	✓	n/a
Reports on advantages/disadvantages of Periodical Payment Orders	n/a	✓
Reviewing wording and formulae in draft PPO Orders	✓	n/a

4. FINAL SALARY (OR CAREER AVERAGE REVALUATED EARNINGS) SCHEMES

Still based on *Auty v National Coal Board (1985)*, as amended by later cases.

Points to watch include:

- (i) expected Pensionable Salary at date of retirement (not accident) but at current rates, eg promotion
- (ii) expected Reckonable Service at date of retirement (not accident)
- (iii) full credit for any actual ill-health pension in receipt, but only from date of expected retirement – *Parry v Cleaver*
- (iv) annual pensions taxable so deduct tax
- (v) include any widow/widower benefit in the multiplier
- (vi) loss of expected lump sum (discounted back to date of trial)
- (vii) appropriate credit for actual lump received – *Longden*
- (viii) interest on that actual lump received – *Swain v London Ambulance Service*
- (ix) Discount for contingencies: *Auty?* – no *Page*

5. PERSONAL PENSION SCHEMES (INCLUDING NESTs FROM 2012 AND AVCs)

Personal pension contributions and/or Additional Voluntary Contributions are dealt with here.

Pre-trial and future expected employee contributions: as a minimum there is a claim for loss of tax relief to be included in the earnings' claim (*Abul Hosn*).

There is also a claim for any pre-trial or future expected employer contributions. Can be claimed as a tax-free benefit and added to expected income or create a pension fund and value under *Auty* (see below).

Since October 2012 and up to September 2017 (depending mainly on size of employer) every employer has to contribute (unless the employee opts out) into a National Employment Savings Trust 'NEST' for full-time employees over the age of 22 at rates that are being phased in, starting at 1% and rising to 3% from October 2018 from the employer, with employee contributions that attract tax relief.

The phasing-in rules are complicated and we can do the calculations for you.

Recommended method: Projection of future pension fund value to take a lump sum and regular income so can apply *Auty*. New drawdown rules from April 2015. No requirement for an annuity.

## 6. CLAIMS IN FATAL ACCIDENT CASES

### Loss of dependency on earnings

These claims include valuing overtime, allowances, bonuses and benefits and for MOD claims: Operational Allowances, LSA, etc

Frequently, you will be able to value these claims without the benefit of expert forensic accountants, but I want to impress upon you the circumstances when forensic accountancy assistance may be required. Let me give you some examples.

### Typical cases

- (1) Loss of dependency on increased salary (through promotion), bonuses and share options.
- (2) Loss of dependency on earnings of an entrepreneur
- (3) Loss of dependency on earnings for a minority shareholder in a family trading company:

*O'Loughlin v Cape Distribution Ltd* [2001]

*Williams v Welsh Ambulance Services NHS Trust* [2008]

Quote from *Williams*:

“It was apparent to the judge that the method of assessment which had been adopted in *Wood* and *O’Loughlin* [the replacement cost method] was much the most convenient way of doing this. That was because, by focusing on the value of the deceased’s services, it was possible to exclude any benefit which had come to the family by inheritance under the deceased’s will. Any other method of assessment would have been difficult and complicated because of the need to separate out the income which was derived from capital from that which was derived from labour. The method adopted by the judge went straight to the value of the deceased’s labour. The judge was right to choose this method of assessment.”

## 7. LOSS OF CHANCE CLAIMS

Particularly for promotion, career advancement, increasing profits etc

Until 1998 the leading case on loss of chance had been the fatal accident case of *Davies v Taylor [1974] AC 207*. At first instance the trial judge held there was an onus on the claimant to prove that on a balance of probabilities she had an expectation of continued dependency – that it was more probable than not that there would have been a reconciliation. In that case the claimant had admitted to her husband that she had committed adultery. The husband wanted to reconcile, but she had refused just five weeks before he died so he had commenced divorce proceedings. The House of Lords held that the balance of probabilities test was not appropriate.

Lord Reid said:

“To my mind the issue, and the sole issue, is whether that chance or probability was substantial. If it was it must be evaluated. If it was a mere possibility it must be ignored. Many different words could be and have been used to indicate the dividing line. I can think of none better than ‘substantial’ on the one hand, or ‘speculative’ on the other.”

However, there remained some confusion. It was not necessary for the chance to be a probability, but the 'mere possibility' was not sufficient.

In *Doyle v Wallace [1998] PIQR 146* the Court of Appeal clarified the position. As long as there was a 'significant chance' of an event, damages could be awarded. In that case the claimant was a clerk at the date of the accident, but her evidence was that she intended to retrain, qualify and find employment as a drama teacher. The trial judge found that there was a 50/50 chance of her succeeding and he awarded the mid-point of her claim as a clerk and as a drama teacher. The defendant appealed on the basis that the claimant had failed to get home on a balance of probabilities, but the appeal was dismissed.

Here, for the first time substantial damages were being awarded on a mathematical calculation where the chance was less than 51%.

My firm was one of the few firms in the country to recognise the potential of that decision. As long as the chance was something more than speculative or remote, damages could be awarded for loss of opportunity. Mere possibilities could now result in substantial damages and I had a perfect case to test the water.

*Langford v Hebran and Nynex Cable Communications* (Court of Appeal, judgment handed down on 15 March 2001). In that case a young man of 27 had turned professional as a kick boxer and won his only fight before being injured in a road traffic accident. He lost the opportunity to advance his career and my task was to value that lost opportunity. I put forward a basic claim and four alternative career scenarios. The basic claim assumed that he would do no better in his career than he had achieved by the date of the accident. The four alternative scenarios were based on increasing levels of success. Scenario one assumed he would become a national champion. Scenario two assumed he would have become European champion and would move to America where he would become a State champion. Scenario three assumed that he would become world champion for a year. Scenarios two and three assumed that the claimant would retire to England after his kick boxing career was over and resume his career as a bricklayer. Scenario four assumed two years as world champion and remaining in America to open his own gym, earning \$350,000 per annum (before tax) up to retirement age.

The trial judge found, and the Court of Appeal agreed, that the basic claim and four alternative scenarios that I put forward were “fair and reasonable and in accordance with the evidence” and that in the language of *Doyle* there was “a significant chance” that each of them would occur. However, the Court of Appeal criticised the specific percentages applied by the trial judge and substituted their own percentages, which came to almost exactly the same result, so the appeal was dismissed.

The trial judge expressed his award in terms of the stand-alone method, whereas the Court of Appeal expressed their award in terms of the additional claim method. However the two methods are identical.

The Court of Appeal percentages (under the stand-alone method) ranged from as little as 11%, so that now counts as a significant chance.

**In my view you now need to think about loss of opportunity claims in every type of case and how each element/scenario can be evaluated. If a ‘loss of opportunity’ claim is now put forward on behalf of the claimant it could be a very substantial head of claim.**

#### 8. OGDEN RECOMMENDED APPROACH TO MULTIPLIERS IN FATAL CASES

Current method: Take multiplier from the date of death and deduct the period between the date of death and the date of trial.

New method recommended in the Ogden Tables (since the Fourth Edition). Effectively takes multiplier from the date of trial, but adjusts for the risk of mortality in both the pre and post trial periods. This method results in a significant increase in multipliers, so is being resisted by defendants and insurers.

The recommended method is correct actuarially, but has not yet, to my knowledge, been adopted by a Court.

Important to provide the alternative. Adds 10% to 20% to the claim.

#### 9. DETAILED DEPENDENCY PERCENTAGE CALCULATIONS

Conventional *Harris v Empress Motors* [1983] 66.67%/75%

But: *Owen v Martin* [1992] – should be based on facts. We can help!



## 10. CONCLUSIONS

WHEN, WHY and HOW to instruct expert accountants

WHEN Whenever you have a suitable use

Whenever you are not sure if you have a suitable case – no charge for asking

As early as possible, preferably before the Precedent H Cost Budget

WHY Maximum level of settlement/award for your client eg *Langford* and *Auty* case.

You and Counsel are relieved of the number crunching

First class fully CPR-compliant report defended in Court at highly cost-effective rates

HOW Either: expert witness – fully CPR-compliant reports with detailed costing for every stage for your Precedent H Cost Budget

Or: behind-the-scenes expert adviser, maximising your claims and getting the arithmetic correct!

**I look forward to hearing from you!**

[contact details at foot of my CV on next page]

QUALIFICATIONS AND EXPERIENCE

**MAURICE FAULL MA(Cantab) FCA MAE**

I have a Law degree from Cambridge University.

I trained and qualified as a Chartered Accountant with the London office of KPMG.

I returned to my home town of Brighton and joined Hilton Sharp & Clarke, which is a firm of Chartered Accountants that has been established for over 140 years and has a wide cross-section of clients, ranging from self-employed individuals to companies with turnover in excess of £25 million.

For 20 years I was a partner in Hilton Sharp & Clarke. At 31 May 2010 I left that firm and became a Director and founder shareholder in HSC Forensics Ltd, which trades as Hilton Sharp & Clarke Forensic Accountants and specialises in the quantification of claims in personal injury, fatal accident and clinical negligence cases. I have acted as an expert forensic accountant in over 900 cases and I have given expert evidence in Court on numerous occasions.

I have been a Member of the Academy of Experts since 1992 and I am a Founding Member of the Expert Witness Institute. My credentials have been checked by the Law Society as an expert witness.

I accepted an invitation from the Chairman in April 2013 to join the influential Ogden Working Party and in September 2013 I accepted an invitation to join the Editorial Board of *Facts & Figures* (a leading industry publication) from 2014/15.

I am on the panel of experts nominated by the President of the Institute of Chartered Accountants in England & Wales to provide expert evidence.



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