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Quantum Issues in Catastrophic Injury Cases

David White, 12 Kings Bench Walk

Presentation to APIL South of England Group

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Outline of Talk: Current "Hot Topics"

1. The Change in the Discount Rate
2. Accommodation Claims
3. Adjusting loss of earnings multipliers for contingencies other than mortality
4. Expert Evidence on Life Expectancy
5. Pension Loss claims

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New Discount Rate

- The Civil Liability Act 2018 received Royal Assent in December 2018
- Review period is 140 days, hence has to conclude by 5/8/19
- The Lord Chancellor will announce the new DR by 5/8/19 at the very latest
- As part of his review, the LC must consult with both the Government Actuary and HM Treasury
- The assumption is that the new rate will be 0-1% but who knows???

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New Discount Rate: Implications

- The rate will apply immediately to all cases from the date of the announcement onwards
- Parties will need to apply for permission to rely upon re-pleaded Schedule of Loss and Counter Schedule
- *Roberts v Johnstone* claims may become viable again
- Previous settlement offers will have to be reconsidered in the light of the new DR
- Another round of JSMs?

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Accommodation Claims

- The problem: How to compensate a claimant who has to purchase a more expensive property as a result of accident-related injury?
- In *Roberts v Johnstone* [1989] QB 878 the solution was to compensate C for the loss of return on the extra capital invested in property, and 2% was taken as the rate of return on risk-free investment
- Full capital cost of the property was rejected as a solution in *R v J* as that would remain in intact at date of C's death and would represent a windfall to the Estate

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Accommodation Claims

- The rate of return was taken as the DR
- On 20/3/17 DR was reduced from +2.5% to -0.75%
- As long as there is a negative Discount Rate, application of the *R v J* formula results in a Nil award
- The point has been argued in two recent cases namely *JR v Sheffield Hospitals NHS Foundation Trust* [2017] EWHC 1245 (QB), and *Swift v Carpenter* [2018] EWHC 2060 (QB)
- In both cases C's claim for the additional capital costs of accommodation was dismissed at first instance and C appealed

JR v Sheffield Teaching Hospitals NHS Foundation Trust [2017] EWHC 1245 (QB)

- CP case
- C was 24 at Trial
- Cost of suitable accommodation was held to be c. £900K
- C argued for 2.5% applied to the increased capital cost, with the award capped at the capital cost of the property
- William Davis J rejected this. Considered himself bound by *R v J* and held that the mortgage interest approach had been rejected in *R v J* (as rate of mortgage interest was so high) and he had no evidence as to rates

JR v Sheffield Teaching Hospitals NHS Foundation Trust [2017] EWHC 1245 (QB)

- "I have to consider the return on a risk-free investment as representing JR's loss"
- D contended that "there is at present no ability to obtain any positive return on a capital fund based on risk free investment", hence no need to compensate C
- William Davis J emphasised "the need to find a solution to the accommodation conundrum" but expressed no view on the correct solution
- C was granted permission to appeal but NHS compromised the appeal, so issue never reached CoA

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Swift v Carpenter [2018] EWHC 2060 (QB)

- C a passenger in car driven by her partner, D
- Suffered severe lower limb injuries, particularly L leg below knee amputation and multiple fractures R foot
- C lived in a 3 bed house in Hammersmith and it was agreed that it was no longer suitable for her growing family's needs
- Dispute as to if and when C would have changed property absent the accident, and the cost of a suitable property, but the Judge held that the extra capital cost was £900K (£2.35m less £1.45m)

Swift v Carpenter [2018] EWHC 2060 (QB)

C proposed 4 alternative formulae:-

- *R v J* with a different rate of return, namely 2% "in line with the interest award on General Damages"
- Cost of interest-only mortgage but no expert evidence – at 3.8% (the figure contended for) this would give £1.89m
- PPO for annual costs of an interest-only mortgage – this would exceed actual capital costs though
- An award reflecting the cost of renting an appropriate property i.e. £48K p.a.

Swift v Carpenter [2018] EWHC 2060 (QB)

C also relied on PIBA/Rob Weir QC submissions in *JR* appeal. PIBA has suggested the following options:-

- PPO to fund an interest-only mortgage
- Loan of capital sum by D with D having a charge over the property
- Rental arrangements
- Capital sum to meet mortgage interest costs

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Swift v Carpenter [2018] EWHC 2060 (QB)

"The real point which Mr Arney was making to me, both in the Schedule and in his oral submissions, is that the Roberts v Johnstone formula is no longer fit for purpose in the modern context of a negative discount rate. It leads to unfairness and a result which is not consistent with the principle of full restitution. He submits that it could never have been the intention of the Court of Appeal to have devised a formula which resulted in a nil award."

Swift v Carpenter [2018] EWHC 2060 (QB)

"If Mr Arney had seriously intended that I depart from the Roberts v Johnstone formulation, then I would have expected to receive, either in writing or in oral submissions, a reasoned justification for the departure. However, no fully realised arguments were deployed."

"I have no doubt that I am bound by Roberts v Johnstone"

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Swift v Carpenter [2018] EWHC 2060 (QB)

"Each alternative formulation advanced by the Claimant in this case would produce, if capitalised, a final figure greater than the loss which the formula is intended to address. Each formulation would produce the "windfall" which the Court in Roberts considered to amount to over-compensation. As I have said, so far as I am concerned, that must be the end of the matter."

Swift v Carpenter [2018] EWHC 2060 (QB)

- Permission to Appeal to CoA granted
- Due to be heard end July 2019
- PIBA have applied to intervene and make submissions
- The “problem” may become academic (for the time being) *if* there is a positive Discount Rate

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Adjusting loss of earnings multipliers for contingencies other than mortality

The problem: How, if at all, does one adjust the Ogden Reduction Factors (Tables A-D) to reflect contingencies other than mortality for any given claimant on (a) Uninjured Scenario, and (b) Injured Scenario?

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Adjusting loss of earnings multipliers for contingencies other than mortality

See para 30 of Explanatory Notes to Ogden Tables:-

*"The suggestions which follow are intended as a **ready reckoner** which provides an initial adjustment to the multipliers according to the employment status, disability status and educational attainment of the claimant when calculating awards for loss of earnings and for any mitigation of this loss in respect of any potential future post-injury earnings…**the methodology does offer a framework for consideration of a range of possible figures**" (my emphasis)*

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Adjusting loss of earnings multipliers: *Swift v Carpenter*

- *Mrs S was 43, a graduate of Newcastle University and worked in travel journalism and marketing*
- *C worked on content for BA magazines for in house and customer consumption*
- *C was earning c. £41K net p.a. at the time of accident (5 days/week)*
- *Post-accident C had returned to work and was working 4 days/week earning £33 360 p.a.*
- *C contended that absent the accident she would have earned c. £57K p.a.*

Adjusting loss of earnings multipliers: *Swift v Carpenter*

C's case at Trial:-

Uninjured

- £57 076 (5 days/week) x 22.15 x 0.89 (Table C) = £1 264 000

Injured

- £33 360 (4 days/week) x 22.15 x 0.6 (Table D) = £443 354

- Loss is c. £820K

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Adjusting loss of earnings multipliers: *Swift v Carpenter*

Adjusting the RFs: C's case

"In respect of both reduction factors applied, Mr Arney submitted that there would be reasonable grounds for adjustment: upwards in respect of Table C and downwards for Table D. In particular he submits that the Table D reduction factor could lawfully go down much further as, as an amputee, the Claimant is more than averagely disabled and more disabled than the population sample on which the Table D reduction factor is based."

Adjusting loss of earnings multipliers: *Swift v Carpenter*

D's case:-

"Mr Audland also challenges the application of a reduction factor to the multiplier for residual earnings. He argues that this amounts to double recovery for the Claimant in that the impact of her disability is already reflected in the difference between the uninjured and injured multiplicands. Alternatively, he submits that I should adjust the reduction factor in Table D upwards. This would be a legitimate and lawful approach and the course adopted by the judge in Connor v Bradman [2007] EWHC 2789."

Adjusting loss of earnings multipliers: *Swift v Carpenter*

D's alternative case:-

"Alternatively, he submits that if I were to conclude that the Claimant was more likely than otherwise to lose her job, or remain unemployed for longer by reason of her disability, then this should be reflected in a modest lump sum award of £40,000 to reflect her handicap on the labour market."

Adjusting loss of earnings multipliers: *Swift v Carpenter*

Held: Court rejected D's "double recovery" argument:-

"Although this was the approach taken by Owen J in Clarke v Maltby [2010] EWHC 1201, his approach was fact specific. More generally, the purpose of the Ogden 7 reduction factor is to reflect that, by reason of a disability, ***a claimant is more likely to experience periods of time when he or she is not working at all and that periods of unemployment may be longer because of the disability****."*

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Adjusting loss of earnings multipliers: *Swift v Carpenter*

"…As the text of Ogden 7 sets out at paragraph 33 "under this method, multipliers for loss of earnings obtained from Tables 3 – 14 are multiplied by factors to allow for the risk of periods of non-employment and absence from the workforce because of sickness". I therefore find that a reduction factor should be applied to the multiplier. It does not amount to double recovery."

Adjusting loss of earnings multipliers: *Swift v Carpenter*

The solution?

- C was disabled, though none of the listed descriptors (e.g. mobility) was really captured by the listed examples
- No doubt that C was disabled in a way that may threaten her employment status
- C came across as capable and committed and functioning to a high standard – evidence from a colleague
- RF for Injured Scenario adjusted upwards to 0.7

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Adjusting loss of earnings multipliers: *Inglis v MOD*

- C brought a claim for NIHL as a result of 15 years service as a Royal Marine
- Had left RM aged 32 after 15 years because of NIHL and took lucrative work in marine security industry, then a H&S role
- Liability agreed 80/20 in C's favour
- C had permanent hearing loss and tinnitus
- C wore bilateral hearing aids prescribed by D's expert
- A major issue was how future loss of earnings was to be assessed

Adjusting loss of earnings multipliers: *Inglis v MOD*

Impact of disabiliity:-

- Agreed by employment experts that C was unsuited to a H&S role in an environment with high levels of noise or background noise
- C said he could not hear well on a construction site and had to take notes and check with client at end of session
- C was undertaking an NVQ Level 6 qualification
- C believed he would not progress to manager level because of his hearing disability

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Adjusting loss of earnings multipliers: *Inglis v MOD*

C argued:-

- C's hearing loss was serious enough to render him "disabled" for the purpose of an Ogden M/M calculation
- C's future loss of earnings should be calculated using the Ogden methodology
- Although the methodology is not appropriate in every case, the Court should be slow to depart from it in favour of any less scientific approach
- The test for rejecting the Ogden methodology is not that the former simply produces a result that is felt to be "too high"
- C is quite different from the C in *Billett v MOD* (NFCI case) who was "only just" disabled and whose disability has minimal impact on his ability to work

Adjusting loss of earnings multipliers: *Inglis v MOD*

D argued:-

- C's hearing loss was **not** serious enough to render him Ogden "disabled"
- In any event, even if he was the Court should assess future loss of earnings with a "sense of reality"
- C had never been out of employment since leaving the RM
- He had had three separate employments, the last of which saw him more than he earned with RM
- He should be compensated by way of a 2 year Smith award
- An Ogden award –even with an adjusted Reduction Factor from Table B - would assume that C would be out of work for unrealistically long periods of time

Adjusting loss of earnings multipliers: *Inglis v MOD*

Peter Marquand held:-

- C was “disabled” within the meaning of EA 2010
- Even with hearing aids C had difficulty hearing other and communicating by ‘phone
- The Ogden methodology is now conventional and should normally be used
- But where there is evidence available to allow for a reasoned adjustment to the RF this is the approach the Court should adopt
- Evidence pointing to an *increase* in the RF in C’s case included his record of employment since leaving the RM, his work ethic, his hearing loss being mild and his undertaking an NVQ
- Evidence pointing to a *decrease* in the RF included the impact of tinnitus on his concentration and his age (on the cusp of two brackets 35/39 and 40/44)

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Adjusting loss of earnings multipliers: *Inglis v MOD*

- RFs without adjustment would be 0.9 (Table A) and 0.58 (Table B) - C was treated as a disabled man with a degree
- Held: RF determined at 0.7, giving a future LOE award of £257 518, less credit for the enhanced past earnings from early departure from RM (c.£24K)

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Inglis: Implications

- The merits of the scientific and now conventional Ogden approach have been affirmed
- But, the Courts continue to show a willingness to make adjustments to the RFs when they perceive a need to do so
- Evidence needs to address the implications of the disability for the particular claimant – this material would allow the Court to make a reasoned adjustment
- But is the process of adjusting RFs anything other than impressionistic?

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Expert Evidence on Life Expectancy

- Both recent cases concern admissibility of evidence from Prof Bowen-Jones
- *Mays v Drive Force* [2019] EWHC 5 (QB)– Deputy Master Hill QC
- C suffered a TBI as a result of a fall from height
- D sought permission at CCMC to rely upon a desktop report from Prof Bowen-Jones
- B-J asserted reduction in pre-accident life expectancy of 11 years from co-morbidities, namely smoking, hypertension, obesity, colitis

Expert Evidence on Life Expectancy

Held: Evidence was allowed:-

- Consultant Neurologists had not opined on the issue
- High value claim
- Proportionate

Expert Evidence on Life Expectancy

Dodds v Aviva [2019] EWHC 1512 (QB)– Master Davison

- 75 year-old woman with a TBI arising from an RTA
- C relied upon expert evidence of a neurologist and geriatrician
- D applied for permission to rely upon a desktop report from Prof Bowen-Jones, a consultant physician
- D's application refused
- Master held that the first port of call should be an appropriate clinician i.e. a neurologist

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Expert Evidence on Life Expectancy

"It seems to me that bespoke life expectancy evidence from an expert in that field should be confined to cases where the relevant clinical experts cannot offer an opinion at all or state that they require specific input from a life expectancy expert"

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Expert Evidence on Life Expectancy

Conclusions?

- 2 apparently conflicting decisions, albeit on slightly different facts

- Cs should argue (in accordance with *Dodds*) that statistical life expectancy evidence (of the type produced by Prof Bowen-Jones) is premature as and until relevant clinicians have been asked to opine on those issues

- D may still get permission for such evidence though if clinicians unable to address the relevant issues

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Loss of Employer's Pension Contributions

- Many claims arising from membership of Defined Contribution (as opposed to final salary/ Career Average Defined Benefit) Schemes are being missed
- Auto enrollment has been phased in since 1/10/12
- It is now compulsory to enroll an employee in a NEST scheme
- Therefore, unless the employee has positively opted out, whenever there is a claim for past and/or future loss of earnings there will probably also be a claim for loss of employer's pension contributions to a NEST scheme

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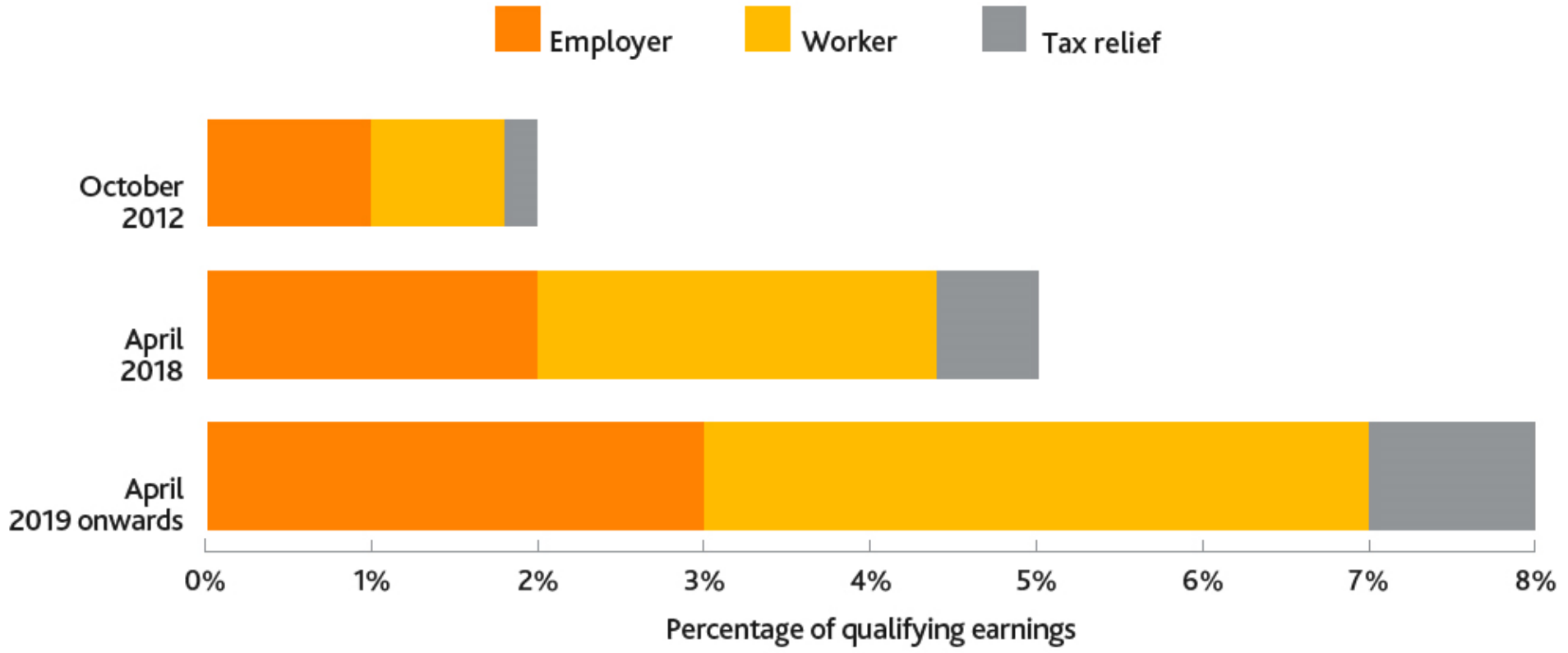
Loss of Employer's Pension Contributions



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Loss of Employer's Pension Contributions

n.b.:-

The loss is a percentage of "qualifying earnings"

- Gross earnings
- Above Lower Threshold (presently £6136)
- And below Upper Threshold (presently £50 000)

<u>Worked Example</u>

- C earns £30 000 p.a. gross
- "Qualifying earnings" are £30 000 less £6136 = £23 864 p.a.
- X 3% = £715.92 p.a.

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Thank You

white@12kbw.co.uk