APIL SEMINAR

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LOSS OF FUTURE EARNINGS:
CAREER MODELS AND THE LOSS OF A CHANCE

Speaker: Paul Kilcoyne

1 Temple Gardens

TEMPLE

London

EC4Y 9BB

pkilcoyne@1templegardens.co.uk

1. Since the introduction of the Ogden Tables there has been relatively little opportunity for dispute in relation to the arithmetical calculation of claims for substantial future loss of earnings where the Claimant has had a settled career pattern by the time of the accident. In such cases the Tables give an actuarially appropriate multiplier and the discount to be made on that multiplier to reflect contingencies other than mortality is specified in the guidance that accompanies the Tables.

2. The position is not so straightforward where the Claimant has either not yet begun on a settled career path or is at the outset of his career and contends that he would have made substantial progress in his chosen field. In such cases everybody is inevitably gazing into a crystal ball in which the Claimant's notional future is subject to a great variety of possibilities, uncertainties and imponderables. In recent times the approach of the Courts, in substantial personal injury cases, to this problem has undergone at least a significant change in emphasis. Whereas in the late 1990s the prevailing orthodoxy seemed to be to regard this type of problem as susceptible to solution through the adoption of a percentage chance assessment, more recent guidance from the Court of Appeal in the Case of **Herring -v- MOD** [2004] 1 All ER 44 has moved away from this approach in favour of the adoption of a realistic career model uncomplicated by elaborate assessments of the percentage chance which the Claimant might be thought to have had of obtaining the kind of position in his notional career for which he contended.

The earlier approach

3. A classic example of the percentage loss of chance approach is found in **Doyle -v- Wallace** [1998] PIQR Q146. In that case the Claimant was aged 19 at the time of the accident and had suffered a brain injury. Her case was that she would have qualified as and been employed as a drama teacher. If she had not so qualified she would have been employed in more mundane clerical work. Her case was put on the basis that she had a 50% chance of qualifying as a drama teacher and that her future loss of earnings should be assessed on the

basis of a middle point between her notional earnings in clerical employment and her earnings as a drama teacher so as to reflect that 50% chance. In the Court of Appeal the Defendant attacked that approach on the basis that it could not be said that it was probable that she would have qualified as a drama teacher. Accordingly no allowance should be made for lost earnings as a drama teacher. This attack was rejected and the percentage chance method endorsed as the appropriate method to apply in this situation. In so doing the Court of Appeal approved the approach of the trial judge in **Anderson -v- Davis** [1993] PIQR Q187 where an issue had been whether the Claimant would have secured promotion to the post of principal lecturer from his existing post as a lecturer. The Judge in that case had held that there was a 2/3rd chance of securing such a promotion. Accordingly he went on to state:
"Where the question for the Judge is one of past facts, then mere balance of probability wins the day. Where the question is one of what might have been in the situation in a hypothetical state of facts, then, to the extent that a chance of the event necessary for an award of damages falls significantly below 100% the award should be discounted in my view."

Accordingly he went on to award the Claimant in that case 2/3rd of his projected loss of earnings as a principal lecturer.

4. Whereas the percentage chance approach might be thought to be relatively straightforward and workable where the possibilities were limited, it clearly becomes more difficult to apply in circumstances where there are a number of different possibilities that might occur. Logically the percentage chance of each of these possibilities would need to be assessed and the result could produce a highly complex and contorted solution. The classic example of this is **Langford -v- Hebran** [2001] PIQR Q13 in which the Claimant had been a hod carrier for some ten years at the time of the accident during which time he had also pursued an interest in kick boxing. By the time of the accident he had become the World Light Middleweight Amateur Kick Boxing Champion, after which he turned professional and won his only professional contest. His second contest was apparently abandoned after his opponent got cold feet. The accident then intervened and his case was presented on the basis that four

alternative scenarios needed to be considered depending upon the extent to which the Claimant succeeded in his new professional career. An award of damages should then be made which reflected the chance of each of these scenarios materialising. The Judge accepted that this was the appropriate way to proceed, following the guidance given by the Court of Appeal in Doyle -v- Wallace and went on to attempt to evaluate the percentage chances of each of the four scenarios taking place.

5. The Court of Appeal agreed that this was the appropriate approach and proceeded to improve upon the Judge's methodology while following the same approach themselves. The consequence was, as appears from the report of the case in PIQR, that the loss of earnings claim was set out in an appendix which was divided into the following categories (i)chance of whether the Claimant would win one national or European title, (ii)whether upon an assumed move to the U.S. he would win state or other titles (iii) whether he would then become world champion for a year (iv)whether he would become world champion for two years and then remain in the U.S. working as a professional instructor. A figure based upon the percentage chance of each of these scenarios occurring was then selected.

Herring -v- Ministry of Defence

6. In **Herring -v- MOD** the Court of Appeal was invited by the Defendant to adopt the percentage chance approach to the calculation of loss in respect of a young man who had been contemplating a career in the Police but had not actually embarked upon such a career. He had not got as far as an application to join the police but had worked as a qualified sports coach and lifeguard in a leisure centre and was an SAS standard physical training instructor. He was pursuing an HND course in law with a view to applying to join the police. Competition to join the police was fierce but he was thought to be a very strong candidate. The Court of Appeal declined the Defendant's invitation to reduce the claim for loss of earnings and pension by a factor of 25% to reflect the chance that the Claimant would not have become or remained a policeman.

In refusing to adopt this approach Lord Justice Potter said:

"In any claim for injury to earning capacity based on long-term disability, the task of the court in assessing a fair figure for future earnings loss can only effected by forming a view as to the most likely future working career (the career model) of the claimant had he not been injured. Where, at the time of the accident, a claimant is in an established job or field of work in which he was likely to have remained but for the accident, the working assumption is that he would have done so and the conventional multiplier/multiplicand method of calculation is adopted, the court taking into account any reasonable prospects of promotion and/or movement to a higher salary scale or into a better remunerated field of work, by adjusting the multiplicand at an appropriate point along the scale of the multiplier. However, if a move of job or change of career at some stage is probable, it need only be allowed for so far as it is likely to increase or decrease the level of the claimant's earnings at the stage of his career at which it is regarded as likely to happen. If such a more or change is unlikely significantly to affect the future level of earnings, it may be ignored in the multiplicand/multiplier exercise, save that it will generally be appropriate to make a (moderate) discount in the multiplier in respect of contingencies or 'the vicissitudes of life'.

In the situation of a young claimant who has not yet been in employment at the time of injury but is still in education or has otherwise not embarked on his career, or (as in this case) one who has taken time out from employment in order to acquire a further qualification for a desired change of direction, it may or may not be appropriate to select a specific career model in his chosen field. In this connection the court will have regard to the claimant's previous performance, expressed intentions and ambitions, the opportunities reasonably open to him and any steps he has already taken to pursue a particular path. In many cases it will not be possible to identify a specific career model and it may be necessary simply to resort to national average earnings figures for persons of the claimant's ability and qualification in his likely field(s) of activity. In other cases, however, it may be possible with confidence to select a career model appropriate to be used as the multiplicand for calculating loss.

In either case, the purposes and function of the exercise is simply to select an appropriate 'baseline' for calculation of the claimant's probable future earnings whatever his future occupation may in fact turn out to be. Thus if the career model chosen is based upon a specific occupation (such as the police force in this case), the chance or possibility that the claimant will not in the event enter that occupation or, having done so, may leave it, will not be significant if the likelihood is that he will find alternative employment at a similar level of remuneration.

These are truisms so far as the conventional approach to the assessment of injury to earning capacity is concerned. Similarly, it is a truism that the assessment of future loss in this field is in a broad sense the assessment of a chance or, more accurately, a series of chances as to the likely future progress of the claimant in obtaining, retaining or changing his employment obtaining promotion, or otherwise increasing his remuneration. None the less, such assessment has not traditionally been regarded as necessitating application of the technique of percentage assessment for 'loss of a chance' based on the likely actions of third parties, as articulated by Stuart-Smith L.J. in *Allied Maples Group Ltd. -v- Simmons & Simmons (a firm)* [1995] 4 All ER 907, [1995] 1 WLR 1602. In cases such as *Doyle -v- Wallace* [1998] PIQR Q146 and *Langford -v- Hebran* [2001] PIQR Q160 the court has in special circumstances felt obliged to adopt such a method in order to calculate particular aspects of the claimant's future loss claim. However, those decisions have not purported generally to replace the traditional method of adjusting the multiplier or multiplicand within the career model appropriate to the particular claimant so as to reflect (a) The likelihood of an increase in earnings at some point in the claimant's career and (b) those contingencies/vicissitudes in respect of which a discount appears to be appropriate.

The cases in which the percentage 'loss of a chance' approach has been adopted appear to me to be those where the chance to be assessed has been the chance that the career of the claimant will take a particular course leading to significantly higher overall earnings than those which it is otherwise

reasonable to take as the baseline for calculation. Thus, it was appropriate in *Doyle's* case to assess on a percentage basis the chance that the claimant might have a remunerative career as a drama teacher rather than the more prosaic baseline activity of clerical or administrative work. Similarly, in *Langford*'s case the same technique was applied to the chance that the appellant might become a highly successful full-time kick-boxing champion, rather than a bricklayer with five fights a year at what might be called 'journeyman level'. In a case where the career model adopted by the judge has been chosen because it is itself the appropriate baseline and/or is one of a number of alternatives likely to give more or less similar results, then it is neither necessary nor appropriate to adopt the percentage chance approach in respect of the possibility that the particular career identified will not be followed after all. That seems to me to be the position in this case."(Potter LJ @ paras 23-26)

7. In Herring the trial judge had in fact applied a substantial discount to the multiplier to reflect the uncertainties. He had said "The fairest way of reflecting the lack of certainty in a case such as this is to calculate the Claimant's loss on the basis that he would have become a police officer, rising to sergeant in seven years and then to discount the normal multiplier to reflect the uncertainties on which I have touched."

Those uncertainties included the possibility that the Claimant might not apply to join the police, that he might have become disenchanted with life in the police, or that he might have found a police career difficult to reconcile with family life. The Judge's discount for uncertainties had been 25%. The Court of Appeal rejected this approach entirely on the basis that if the police career model was an appropriate one, it had to be recognised that the Claimant would probably have earned similar earnings elsewhere if he had left the police. Accordingly, so the Court of Appeal said "There was no reason to adopt a baseline for the Claimant's earnings from an occupational career outside the police force which was substantially lower than that within it and it is clear that the Judge did not do so. There was thus no proper basis for a discount to be applied simply because of the risk that the claimant would not become a

policeman in the first place". The Court went on to state that the level of discount suggested in the guidance notes to the Ogden Tables should be adopted unless there were special circumstances which justified a departure from them.

8. That Herring now represents the orthodox approach to this type of problem is evidenced by two relatively recent decision in the High Court, namely **Rashid -v- Iqbal** [2004] EWHC 1148 LTL 21/05/04 (Andrew Smith J.) and **Dixon -v- Were** [2005] EWHC 2273 LTL 28/10/04 (Gross J.). In Rashid the Claimant was a 30 year old with some 10 years experience in the City who worked in the field of asset management. He had joined his employers three years before. At the time of trial the market for employees of his type was relatively depressed but he had been successful and the Judge found had "good reason to hope for further advancement". The Judge expressly adopted the career model approach prescribed in Herring and found that the Claimant would have been promoted to director by 2002 and senior director by 2006 with a 50% chance thereafter of promotion to chief investment officer. Damages were awarded on this basis without the need for the involved percentage calculations such as had been carried out in Langford -v- Hebran A percentage chance approach was applied to the last promotion only with the relevant multiplicand being taken at a midway point between the salaries of senior director and Chief Investment Officer.

9. In **Dixon -v- Were** Gross J. was concerned with a cheerful and sociable public schoolboy looking to make a career in the City. He had been injured while at Newcastle University where in his first year he appears to have failed all of his exams and in his second year had occupied himself with re-sits following which he changed his course. He was expected to graduate with a 2:2. The Judge found that he would have made a living in the financial services sector where his personality and possible contacts would have been an advantage and made specific findings as to the level of earnings which he would have obtained. For example £45,000 gross by the time of trial, £50,000 from October 2005, £55,000 from October 2011, and £65,000 from October 2021. The Judge described the correct approach to this type of claim as "recently and

authoritatively summarised by Potter L.J. in Herring -v- MOD" and described his task as being to do his "best with the available evidence, proceeding with caution so as to steer a course between, on the one hand, any undue expectations on the part of claimants and, on the other, any unwillingness on the part of defendants to recognise the true financial consequences of the injury for which they are responsible."

10. He expressly drew a distinction between the 'baseline' earnings which the Claimant might have expected and which were represented by the multiplicands he had selected and the chance of very high earnings for which the Claimant also contended. In respect of such earnings the judge cited the approach set out in **Davis -v- Taylor** [1974] AC 207 and reiterated in Herring which was to the effect that to establish any loss under this head the Claimant had to establish that the chance

"… 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. It must be left to the good sense of the tribunal to decide on broad lines, without regard to legal niceties, but on a consideration of all the facts in proper perspective."(Lord Reid @ 212)

11. The Judge went on to conclude that damages could be awarded for a loss of chance as low as of the order of 10% provided that the figures involved were not de minimis and the loss was not speculative. On the facts of Dixon he awarded nothing on the basis that the loss was in fact speculative.

Browne -v- Ministry of Defence

12. The Court of Appeal has recently revisited the principles set out in the Herring case in **Browne -v- MOD** (2006) EWCA Civ. 546. In this case the Claimant was aged 24. She enlisted into the Army in February 1998 but within 8 weeks into her initial training she suffered a severe left ankle fracture which led to her medical retirement with effect from 16th October 1999. She did not claim

for loss of earnings on the basis that she was obtaining similar earnings as a physiotherapist. She did claim the loss of an Army pension (£148,000) on the assumption that she would have served 22 years within the Army. In addition she also made claims for handicap on the open labour market and loss of congenial employment.

13. Liability was not in issue. It was accepted by the District Judge and subsequently the Circuit Judge on appeal that she would have served for 22 years which would have provided her with an immediate pension entitlement at the age of 46. Applying what they regarded as the principles in Herring this pension loss was recovered in full. Further both judges made findings that it was a likelihood and/or probability that she would have completed 22 years service.

14. The Court of Appeal held that this was the wrong approach. Although it accepted that on the evidence the correct basis to assess the Claimant's potential loss of earnings would have been on the basis of her lost Army career, it was not appropriate and also not within the reasonable/fair career model to allow for a full pension loss without referring to the percentage chance of completing 22 years service. The Court of Appeal found that immediate pension entitlement at 48 (22 years service) was an "unusual turn of events" that would have had a significant effect on pension rights and it was therefore necessary to assess the chances of such events occurring and to assess their financial consequences.

Lord Justice Moore-Bick at paragraph 24 stated "It can be seen from this that the decision in **Herring -v- Ministry of Defence** is not in any sense inconsistent with the principle in **Davies -v- Taylor** which continues to be of general application. Nor is there any inconsistency between the decision in **Doyle -v- Wallace**, **Langford -v- Hebran** and **Herring -v- MOD** each of which simply provides an example of the application of the same principles to different factual situations. In each case the Court was seeking to assess by the most appropriate means having regard to the particular circumstances of the case the chances that the Claimant would have enjoyed a particular level of

economic benefits had his or her working career not been interrupted or prevented by the injury in question. The most appropriate way of making that assessment may vary from case to case, but the underlying principles remain the same. Provided a fair career model is chosen as a basis for the assessment of loss of future earnings and pension entitlement, the prospects of enhanced or reduced earnings resulting from the ordinary chances of life can be allowed for by adjustments to the multiplicand and multiplier as appropriate. It is only when the Court has to consider the possible effects of an unusual turn of events that would have a significant effect on earnings or pension rights that it is necessary to assess the chance of such events occurring and to assess their financial consequences. Thus in **Doyle -v- Wallace** the Court had to assess the chances of the Claimant having a well paid career as a drama teacher and in **Langford -v- Hebran** it was necessary to assess the Claimant's chances of becoming a highly successful professional sportsman.

In each case the development in question would have had a significant effect on the Claimant's earning capability. These decisions were both cited with approval in **Gregg -v- Scott** (2005) AC 176 as examples of the application in **Davies -v- Taylor**".

15. The Court of Appeal therefore assessed there was a 30% chance of the Claimant achieving 22 years service and reduced her pension loss accordingly. Guidance on the pension calculation can be found at paragraphs 34 to 37 of the judgment of L.J. Moore-Bick.

Where does all this leave the present position?

16. It can be said that for young claimants the career model is now the first step in valuing the loss. This gives a baseline model. The second step is to evaluate the chance that the career model may need to be adjusted to allow for the chance of unusually high earnings. What appears to have been discarded is the kind of automatic discounting in respect of the uncertainties associated with future events that was a feature of the approach adopted in the 1990s.

However if the reasonable/fair career model has within it the possible effects of an unusual turn of events that would give rise to a significant increase in earnings or pension rights that eventuality should be assessed on a loss of a chance basis in the light of the guidance given in the **Browne** case.

17. For defendants the career model is likely to prove more expensive than a percentage chance discount approach. It also places great importance upon a good employment consultant's report. Certainly the position now appears to have moved a long way from the old defendants' standby of **Blamire -v- South Cumbria Health Authority** [1993] PIQR Q1 in which a nurse suffered a back injury and was eventually unable to continue working as a nurse. She obtained alternative work as a secretary and there was an issue in the case as to whether she would have continued with her work due to the birth of children. The Judge's findings were that but for the accident the Claimant (who was then almost 22) would have pursued a lifelong career in nursing, that she would probably now have to work as a secretary and that it would be significantly more difficult to obtain such work. The Judge in that case felt that all the uncertainties were such that it was inappropriate for him to adopt a multiplier/multiplicand approach and he awarded the Claimant a round sum of £25,000 to include future loss of earnings, pension and earning capacity. On appeal the Claimant's position was that approaching the case on a multiplier/multiplicand way would have produced a prima facie loss of between £100,000 and £118,000. The Court of Appeal refused to interfere with the Judge's approach. Balcombe LJ said "there were far too many imponderables here for the Judge to have been bound to take the conventional approach". Making every allowance for the fact sensitivity of each individual case it is difficult to see that Blamire would have been decided in the same way today. The uncertainties in her case seem to have been on any view no greater than those for example in Herring or in Dixon.

18. Claimants' advisers should be aware not to exaggerate the reasonable career model. To do so in this context requires consideration of a recent case in connection with costs. In **Painting -v- Oxford University** [2005] PIQR Q5 the Court of Appeal allowed an appeal in respect of costs where the Claimant

had beaten the Part 36 payment but had been found to have significantly exaggerated her claim. She claimed about £500,000.00 less an agreed deduction of 20% for contributory negligence in respect of back, pelvic and head injuries. She was awarded £31,664.73 less 20% i.e. £25,331.78. The University had originally made a payment in of £184,442.91 but had withdrawn all but £10,000.00 of that sum when, so the report states, "the University, or its advisers, belatedly realised that it had significant video surveillance evidence which seemed to undermine Mrs. Painting's case in relation to the duration and severity of her injuries". The trial judge ordered the Defendant to pay her costs on the basis that although she had exaggerated her claim she had beaten the Part 36 payment. The Court of Appeal emphasized that it was important to keep in mind who had in reality been the victor in the litigation, albeit that the Claimant had recovered more than she had been offered. The Court of Appeal drew attention to the fact that CPR 44.3.5 specifically requires the Court to have regard to whether a Claimant had exaggerated the claim. In Painting's case this exaggeration had been deliberate. Both Maurice Kay LJ and Longmore LJ however not only emphasized the importance of the finding of deliberate exaggeration but went on to say that it was in all cases important that a Claimant negotiate sensibly and a Claimant who makes no attempt to negotiate can and should expect the Court to take that failure into account when considering questions of costs.

PAUL KILCOYNE
1 Temple Gardens
Temple
London EC4Y 9BB
Tel: 020-7583-1315
e-mail: pkilcoyne@1templegardens.co.uk

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