Life expectancy evidence—practical considerations for PI and clinical negligence claims

PI & Clinical Negligence analysis: Rob Hunter, barrister at Devereux Chambers and counsel for the successful claimant in Dodds, discusses the types of cases impacted by life expectancy evidence, when such evidence is admissible and what should be addressed when applying for permission to use life expectancy evidence, pointing to recent case law.

This analysis was first published on Lexis®PSL on 8 December 2020 and can be found here (subscription required).

What types of cases are impacted by life expectancy evidence?

Life expectancy has an impact in very many personal injury and clinical negligence claims, but, in most cases, standalone expert evidence is not required.

The main reason it has such a wide impact is that lifelong losses are frequently compensated with a single payment. In order to convert to a lump sum, the court needs to know how long the claimant will live. Even in catastrophic injury claims, where periodical payments orders are the norm for certain heads of claim, at least some continuing losses are usually capitalised using the claimant's life multiplier.

Despite the overarching relevance, standalone expert evidence on life expectancy is usually not required. This is because the Ogden Tables already factor in life expectancy. Tables 1 to 34 include multipliers for a range of periods that take account of typical male and female life expectancy, applying the latest Office for National Statistics data for the whole of the UK.

Standalone expert evidence on life expectancy will have an impact if the court decides that the claimant is atypical. This may be because the injury itself has shortened the claimant's life or for some other reason.

When is life expectancy evidence admissible?

Admission of expert evidence on life expectancy is the exception rather than the rule. Courts start from the position that the claimant's life expectancy is normal (*Rowley v London and North Western Railway Company* (1873) L.R. 8 Exch. 221). As such, expert evidence will not usually be reasonably required to resolve the proceedings (CPR 35.1).

References:
The Ogden Tables

The explanatory notes to the Ogden Tables put it this way (see paras [7] and [8]):

> 'The Tables are based on a reasonable estimate of the future mortality likely to be experienced by average members of the population alive today and are based on projected mortality rates for the United Kingdom as a whole…
>
> The Tables do not assume that the claimant dies after a period equating to the expectation of life, but take account of the possibilities that the claimant will live for different periods, e.g. die soon or live to be very old. The mortality assumptions relate to the general population of the United Kingdom. Therefore no further increase or reduction is required for mortality alone, unless there is clear evidence in an individual case that the claimant is "atypical" and can be expected to experience a significantly shorter or longer than average lifespan, to an extent greater than would be

> encompassed by reasonable variations resulting from place of residence, lifestyle, educational level, occupation and general health status.'

These principles tend not to give rise to difficulty in catastrophic claims when it is often obvious that the claimant's injury has significantly shortened their life expectancy. It follows that the claimant is 'atypical'; the evidence is admissible; and the issue is where the claimant falls within a cohort of those with a similar condition. This is a 'bottom-up' assessment informed by the claimant's particular characteristics.

Analysis of the literature is beyond the scope of this paper. As a starting point, the court is likely to consider one of the following, depending upon the nature of the injury:

- Recent trends in cerebral palsy survival. Part II: individual survival prognosis (Brooks, Strauss et al, 2014)
- Long-term survival in spinal cord injury: a fifty year investigation (Frankel et al, 1998)
- Long-Term Survival After Traumatic Brain Injury Part II: Life Expectancy (Brooks, Shavelle et al, 2015)

Whether it is appropriate to admit expert evidence on life expectancy is more problematic in serious injury, as distinguished from catastrophic injury, claims. The same issues also arise in fatal accident claims. This is partly because there is no definition of 'atypical' and partly because the deviation from 'normal' life expectancy is often less marked.

Is there any recent case law on life expectancy evidence?

Several recently reported cases illustrate how courts have come to different conclusions on the evidence required to resolve the issue of life expectancy.

In *Mays v Drive Force (UK) Ltd* [2019] EWHC 5 (QB), Deputy Master Hill QC decided to admit expert evidence on the issue of the claimant's life expectancy in addition to opinion from the clinical experts. The claimant had been involved in a fall at work resulting in a traumatic brain injury and other injuries. He was a smoker, obese and had suffered from hypertension and ulcerative colitis prior to the accident. The clinical experts (neurologists) had advised that they were unable to comment on the pre-morbid conditions. The defendant served expert evidence that suggested a global reduction of approximately 11 years. Permission for life expectancy experts was granted to both parties. It would be up to the trial judge to decide whether the evidence was of assistance, and to consider any challenges to the credibility of the evidence.

The issue arose again before Master Davison in *Dodds v Arif* [2019] EWHC 1512 (QB). Ms Dodds was injured at the age of 73 when she was struck by the first defendant's car. Her main injury was a moderate to severe traumatic brain injury. Pre-morbidly, she had elevated cholesterol and raised blood pressure. The defendants disclosed a report in which it was suggested the claimant's pre-accident life expectancy was reduced by a net figure of 3.29 years and further reduced by her head injury giving an overall loss of 5.08 years. It was argued that the claimant was 'atypical' because the head injury had reduced her life expectancy and there was no firm rule that evidence on life expectancy had to come from a clinical expert.

The claimant argued the orthodox position was that the evidence of clinical experts provided the normal and primary route through which the issue of life expectancy was to be addressed, citing *B (A Child) v The Royal Victoria Infirmary* [2002] EWCA Civ 348. It was also argued that the Ogden Tables do justice because they are based on the general population and so it would be inappropriate to admit expert evidence on the basis of lifestyle factors because they did not render a claimant 'atypical' (*Edwards v Martin* [2010] EWHC 570 (QB)).

Master Davison decided that expert evidence on life expectancy was reasonably required because the injury had reduced the claimant's life expectancy, but that it should come from the clinical experts. In his judgment, bespoke life expectancy evidence should be confined to cases where the clinical experts required assistance (such as *Mays* above), or where there was a disagreement in relation to the actuarial statistics.

In *Chaplin v Pistol* [2020] EWHC 1543 (QB), Mr Justice Jay approved *Dodds* and concluded that bespoke life expectancy evidence was not reasonably required over and above largely agreed evidence from neurological experts. Various aspects of the judgment are of interest. For example, Jay J observed that courts are accustomed to deciding cases on the basis of evidence that is 'adequate but not optimal'. This might be seen as particularly relevant in the context of life expectancy where estimates are inevitably fallible. Secondly, Jay J also commented that there would be obvious unfairness inherent in one party's expert relying on data that had not been published or peer-reviewed, and which the opposing party was unable to examine. This has been a feature of some expert evidence in this field. Thirdly, if a party wished to introduce evidence that radically upset an existing body of clinical evidence, they should ensure it was staked out at an early stage.

Jones v Ministry of Defence [2020] EWHC 1603 (QB) is a recent example of the court resolving a dispute between experts on life expectancy at trial. It is largely confined to its facts, the consequence of a missed diagnosis of HIV.

What should be addressed in applications for permission for such evidence?

If a party seeks permission for standalone expert evidence on life expectancy, they would be well-served by reviewing the principles Master Davison helpfully drew from the authorities in para [23] of *Dodds*. Briefly, he concluded:

- where the claimant's injury has not impacted on life expectancy, clear evidence that the claimant is atypical is required to displace the Ogden Tables—see what was then para [5] and is now para [8] of the Ogden Tables explanatory notes (quoted above)
- if the injury has impacted on life expectancy, expert evidence will be admissible
- even if expert evidence is admissible, permission for 'bespoke' life expectancy evidence will not ordinarily be given unless the clinical experts cannot provide satisfactory evidence on the issue

It is unlikely the case of *Dodds* will be the last word on the subject. For example, the suggestion that a reduction in life expectancy as a result of the injury is a gateway to expert evidence is potentially problematic. Although this is usually true in catastrophic injury claims, the position may be different in serious injury claims. The real issue may be whether it is appropriate to admit evidence, not simply because the injury has had some effect, but because it renders the claimant 'atypical' in the sense that the broad averages are inappropriate.

What are the practical considerations when dealing with life expectancy in PI and clinical negligence cases?

Practice points are as follows:

- there is no right to introduce expert evidence on life expectancy. Permission is required and the court is under a duty to restrict expert evidence to that which is reasonably required to resolve the proceedings (CPR 35.1 and 35.4)

- evidence that a claimant's life expectancy is reduced or increased will not be admitted unless the claimant is seen to be 'atypical'. This is likely to require something more than adverse or positive lifestyle factors (per *Edwards*)
- if life expectancy is in issue, in the first instance, it will be for one or more of the clinical experts to address it, assuming they are able (per *The Royal Victoria Infirmary*)
- if the application is left too late, consensus between the medical experts may go against admission of standalone expert evidence (per *Chaplin*)
- if the injury has reduced life expectancy and this functions as a gateway to expert evidence (per *Dodds*), there will be a 'clean slate' assessment so that all positive and negative factors are relevant

Interviewed by Barbora Kozusnikova.