Neutral Citation Number: [2015] EWCA Civ 773

Case No: B3/2014/3119

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION
MR ANDREW EDIS QC (SITTING AS A JUDGE OF THE HIGH COURT)
HQ13X02292

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd July 2015

Before :

LORD JUSTICE JACKSON
LORD JUSTICE PATTEN
and
LORD JUSTICE MCFARLANE

- -

Between :

JOHN EDWARD BILLETT	**Claimant/ Respondent**
- and -	
MINISTRY OF DEFENCE	**Defendant/ Appellant**

- -
- -

Mr Louis Browne (instructed by **Kennedys**) for the **Defendant/Appellant**
Mr Nigel Poole QC, Miss Laura Collignon and **Mr Nicholas Maggs** (instructed by **Bolt Burdon Kemp**) for the **Claimant/Respondent**

Hearing dates: 1st and 2nd July 2015

- -

Approved Judgment

Lord Justice Jackson :

1. This judgment is in seven parts, namely:

Part 1. Introduction

2. This is a defendant's appeal against the quantum of damages awarded in a personal injury action. The principal issue is how the court should assess damages for loss of future earning capacity in circumstances where the claimant suffers from a minor disability, is in steady employment and is earning at his full pre-accident rate. Should the court follow the traditional *Smith v Manchester* approach or should the court use the Ogden Tables, suitably adjusted?

3. We are told that this is an important appeal, because it is the first occasion upon which the Court of Appeal has considered the application of Tables A to D, which were incorporated into the Ogden Tables in 2006.

4. The only statute relevant to this appeal is the Equality Act 2010 ("the Equality Act"). Section 6 of the Equality Act provides:

"**Disability**

(1) A person (P) has a disability if —

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

…

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1)."

5. Section 212 (1) of the Equality Act provides:

"**General interpretation**

In this Act—

…

'substantial' means more than minor or trivial."

6. Paragraph 12 of Schedule 1 to the Equality Act provides:

"**Adjudicating bodies**

In determining whether a person is a disabled person, an adjudicating body must take account of such guidance as it thinks is relevant.

(2) An adjudicating body is—

(a) a court;

(b) a tribunal;

…"

7. The Secretary of State has published Guidance Notes pursuant to section 6 (5) of the Equality Act. These include commentary on what does and does not constitute "disability" within the meaning of the Act.

8. After these introductory remarks, I must now turn to the facts.

Part 2. The facts

9. The claimant was born on 14th April 1985. He left school at 16, having studied for six GCSEs and achieved modest grades.

10. In January 2002, when he was still aged 16, the claimant joined the army. He became a member of the Royal Logistics Corps, where he trained as a driver. He obtained a LGV licence, categories C and C + E. This entitled him to drive heavy lorries with trailers. He also obtained a BTEC level 3 qualification, which is similar to A or AS level. In 2009 the claimant was promoted to lance corporal.

11. Whilst on a field exercise near Aldershot in February 2009, the claimant was required to live outdoors in freezing cold weather and snow for six days. The army provided unsatisfactory footwear. As a result the claimant suffered non-freezing cold injury ("NFCI") to his feet. There was a question whether he suffered similar injury to his hands.

12. The claimant received treatment for his condition at the Institute of Naval Medicine ("INM") in Alverstoke between June 2009 and June 2010. The INM discharged the claimant on 29th June 2010, on the basis of examining him in mid-summer.

13. On 15th September 2010 the claimant was upgraded to "MFD". This meant that he was medically fit for deployment anywhere in the world. There was an "L2 marker" on his records, which revealed his previous history of NFCI.

14. The claimant continued to suffer symptoms in cold weather. In June 2011 he applied for early termination of military service. That application was successful. The claimant left the army on 3rd October 2011.

15. Having returned to civilian life, the claimant went to live with his partner, Anna-Marie Knight, in Croxley near Wells. Their household included the claimant's daughter and Ms Knight's son. The claimant obtained employment as an HGV driver, commencing on 10th October 2011, with Frampton Transport Services, a firm based in Shepton Mallett.

16. The claimant continued to suffer symptoms as a result of the injury to his feet. He considered that the army was responsible for his condition. Accordingly he commenced the present proceedings.

Part 3. The present proceedings

17. By a claim form issued in the Mayor's and City of London Court on 2nd February 2012 the claimant claimed against the Ministry of Defence damages for negligence and breach of statutory duty in exposing the claimant to injury by cold weather. The action was subsequently transferred to the Queen's Bench Division of the High Court.

18. In due course the parties reached agreement that the defendant was liable for 75% of the damages caused by the claimant's NFCI. The parties were unable to agree quantum. Accordingly that issue went to trial.

19. The claimant's medical expert was Major General Craig, formerly of the Royal Army Medical Corps. He commanded the respect of both parties. His report was agreed and constituted the only medical evidence before the court.

20. After examining the claimant and studying his medical records, Major General Craig reached the following conclusions:

    i) The claimant suffered minor NFCI to his feet as a result of exposure to extreme cold weather whilst wearing unsuitable boots.

    ii) He had less severe symptoms in his hands, but these probably did not amount to NFCI.

    iii) The INM doctor was wrong to conclude that the claimant was cured in June 2010.

    iv) The claimant needs to protect his feet with thick socks and special footwear in winter.

    v) In the future the claimant will be more vulnerable to cold weather than persons who have not been so injured.

21. The action came on for trial before Mr Andrew Edis QC, sitting as a High Court judge, ("the judge") in July 2014. Both the claimant and his partner, Ms Knight, gave evidence as to the effect of his injuries.

22. In paragraphs 86 to 89 of his witness statement the claimant described the effects of his injuries as follows:

> "**The symptoms of my cold injury**
>
> 86. Since the PNCO course I have suffered with various symptoms of my cold injury, which can get much worse in cold conditions and include:
>
> a. Tremors: I can sometimes be clumsy with my hands.
>
> b. Burning sensations in my hands and feet, particularly my feet. My hands tend only to be painful when in cold weather.
>
> c. Pins and needles in my feet.
>
> d. Swollen and painful joints.
>
> e. Unable to gauge temperature with my feet.
>
> f. Sweats: I cannot control this and means that l go through clothes, particularly socks, far quicker than others.

> g. Reduced sensation in my feet: In the shower my feet are warm under the water but within half an hour of getting out my feet are freezing cold.
>
> h. My hands and feet can be cold and my circulation is not great, this has affected my sex life.
>
> i. A fear of cold conditions: I am reluctant to go outside when it's cold.
>
> 87. It has taken me some time to get to grips with my condition. I have difficulty doing various things around the house and have developed ways by which I manage my symptoms and get on with my life as best I can:
>
> a. I take paracetemol and ibuprofen regularly, which helps relieve the pain to some extent.
>
> b. I use a foot spa regularly.
>
> c. I soak and massage my feet regularly, to stimulate the blood flow.
>
> d. I wear lots of layers of clothes, gloves and socks in particular. I also have to carry spare socks with me all the time and powder my feet every day.
>
> e. I have thermometers at home, to check the temperature in the house and in the bath.
>
> f. I avoid DIY and gardening when it is cold outside.
>
> g. When at home, switch the heating on regularly, even when it is warm outside.
>
> 88. Before my cold injury I used to love the outdoors and sports. I used to play rugby and swim regularly, but I no longer do these sports. I now exercise in an indoor gym.
>
> 89. It also grates against me when I cannot play or engage fully with my children, for example, when it is cold outside I will always stay indoors."

The judge accepted that evidence, in so far as it related to the injuries to the claimant's feet.

23. In his oral evidence the claimant conceded that he went fishing and clay pigeon shooting all year round. But he explained that he only did this in good weather.

24. Ms Knight gave similar evidence about the effect of the claimant's injuries. That evidence was not challenged in cross-examination.

25. There appears to be a discrepancy between Major General Craig's description of the claimant's NFCI as "minor" and the claimant's evidence concerning the symptoms which he suffered. Nevertheless the judge accepted the claimant's evidence. Therefore the factual position, as established at trial, was that the claimant suffered from minor NFCI, which had a substantial impact on his day to day life in cold weather.

26. An important feature of the evidence was that the claimant's NFCI had less impact on his work as a lorry driver than it had on his leisure activities. Whilst driving lorries the claimant was able to keep warm in his cab.

27. Major General Craig stated in his report:

> "He seems to be settled in his present job and his condition is not causing him problems."

The claimant conceded in cross-examination that the only problem which he encountered at work was that on occasions he had difficulty pulling down the shutters of his lorry in cold weather. This related to the condition of his hands, not his feet.

28. The claimant's principal financial claim related to loss of future earning capacity. At the time of trial the claimant was still working for Framptons. His net earnings were £21,442 per annum. This was the same as the claimant would have been earning if he were uninjured. So there was no current loss. The fact remained, however, that if the claimant lost his job at Framptons, he would be at a disadvantage in finding new employment by reason of his injury.

29. Both parties called employment experts to assist the court in assessing the claimant's loss of future earning capacity. The claimant's expert was Ms Debra Fox. The defendant's expert was Mr Alasdair Cameron. The two experts provided a helpful joint statement, which included the following at paragraph 5.2:

> "We agree that Mr Billett:
>
> Has a disadvantage on the labour market for some occupations due to his injuries. He will have to avoid jobs that require him to work outside and therefore will be more limited in terms of choice."

30. In the course of his oral evidence Mr Cameron made the point that the claimant had an excellent driving qualification. Furthermore his experience as a military driver and his subsequent experience at Framptons would give him a very good CV for finding future work.

31. The claimant invited the judge to assess his loss of future earning capacity using the Ogden Tables, in particular Tables A and B. The defendant invited the judge to assess this head of loss on the basis of *Smith v Manchester Corporation* (1974) 17 KIR 1.

32. The judge handed down his reserved judgment on 5th September 2014. He assessed damages in the total sum of £127,956.45, including interest.

33. I would summarise the judge's findings and conclusions as follows:

    i) The claimant has sustained minor NFCI to his feet, but not his hands.

    ii) The claimant suffers ongoing symptoms as set out in paragraph 86 of his witness statement (judgment paragraph 5). His feet are permanently sensitised to cold and give him pain when they are cold (judgment paragraph 58 (i)).

    iii) "His ability to carry out normal day to day activities is limited because he cannot work or do anything else outside in cold conditions for any appreciable period of time. A number of normal day to day activities involve being outside and it is not necessary to list them." (Judgment paragraph 58 (ii))

    iv) On the basis of those findings general damages for pain, suffering and loss of amenity are assessed at £12,500.

    v) The claimant left the army in 2011 because of his family commitments and his plans for civilian life, not because of his injury.

    vi) Accordingly the claimant's claims for substantial financial losses caused by leaving the army prematurely are rejected.

    vii) The claimant has suffered a loss of future earning capacity, because he must avoid working outside in cold conditions. This affects the kind of work he can do.

    viii) The claimant is "disabled" (as that term is defined in the Ogden Tables), but only just. The correct method of assessing the claimant's loss of future earning capacity is by using the Ogden Tables A and B, suitably adjusted, not by applying *Smith v Manchester*.

    ix) On that basis, assuming a retirement age of 68 and adjusting the Reduction Factor derived from Table B to .73, damages for loss of future earning capacity are £99,062.04.

    x) After adding in other items of damages and interest, none of which are now in dispute, the total award of damages amounts to £127,956.45.

34. The defendant is aggrieved by the level of damages awarded. Accordingly it appeals to the Court of Appeal.

Part 4. The appeal to the Court of Appeal

35. By an appellant's notice filed on 25th September 2014 the defendant appealed against two elements of the judge's decision, namely (i) his assessment of general damages for pain, suffering and loss of amenity in the sum of £12,500; (ii) his award of £99,062.04 for loss of future earning capacity.

36. The appeal was heard on 1st and 2nd July 2014. Mr Louis Browne appeared for the appellant/defendant. Mr Nigel Poole QC, leading Miss Laura Collignon and Mr Nicholas Maggs, appeared for the respondent/claimant. I am grateful to all counsel for their assistance.

37. Although counsel, very sensibly, dealt with the issues in this appeal separately, there is a link between the two as McFarlane LJ pointed out during argument. The view which the judge took as to the severity of the claimant's symptoms affected both his decision on general damages and also his assessment of the impact on the claimant's future earning capacity.

38. It would be logical for me to deal first with general damages for pain, suffering and loss of amenity.

Part 5. General damages for pain, suffering and loss of amenity

39. In arriving at his assessment of general damages the judge noted, correctly, that the Judicial College Guidelines (11th edition, 2012) do not deal with NFCI as a discrete topic. He considered, however, that some assistance was to be gained from section 7, dealing with vibration white finger syndrome. The range suggested for the moderate category is £6,175 to £12,000. The description of that category reads:

> "This bracket will include claimants in their middle years where employment has been maintained or varied only to remove excess vibration. Attacks will occur mostly in cold weather."

The judge noted similarities between that condition and the claimant's account of his symptoms, which the judge accepted.

40. The judge also took into account two previous cases of NFCI to hands and feet, namely *Hope v Ministry of Defence* [2003] 1 QR 11 and *Leeson v Siemens Plc* [2008] CLYB 2902. In *Hope* the agreed figure for general damages was £25,000 in 2001. Updated to June 2014 that figure became £36,909. In *Leeson* the district judge assessed general damages at £20,000 in 2007. Updated to June 2014 that figure became £24,644. The judge rightly noted that the injuries in both cases were much worse than the claimant's injuries in the present case.

41. Having considered the authorities and the Judicial College Guidelines, the judge arrived at his assessment. That was £12,500.

42. This case does not qualify for a 10% uplift under *Simmons v Castle* [2012] EWCA Civ 1039; [2013] 1 WLR 1239. That is because the claimant was proceeding on a conditional fee agreement entered into before 1st April 2013.

43. Mr Browne submits that £12,500 is simply too high as a figure for general damages. It is outside the permissible range of awards for the claimant's minor injury.

44. I would be inclined to agree with that submission, if we were simply proceeding on Major General Craig's assertion of a "minor" NFCI to the claimant's feet. But we are

not. The judge has accepted the claimant's evidence about the continuing effects of his injury, the pain which it causes and the interference with the claimant's normal life during cold weather.

45. If I had been the trial judge, I may have looked sceptically at the claimant's account of his symptoms against the background of the medical evidence. But I was not and am not the trial judge. The judge has heard the oral evidence of the claimant and his partner. The Court of Appeal has not. In those circumstances the Court of Appeal cannot go behind the judge's findings of fact concerning the claimant's continuing symptoms.

46. At first blush, the judge's award of £12,500 for a minor NFCI seems surprisingly high. But when one takes into account the continuing symptoms caused by the claimant's condition, the basis of the judge's assessment becomes explicable.

47. General damages for pain, suffering and loss of amenity are a sum of money which the law regards as proper compensation for an injury or a constellation of injuries. In truth, injury to the human body is not quantifiable in financial terms. Therefore the levels of general damages form a conventional structure created by judges. The exercise in this case, as in every personal injury case, is a matter of identifying where the claimant's injuries fit within that conventional framework. The judge carried out that exercise properly. He took into account the claimant's youth and his continuing symptoms. He noted certain similarities between the claimant's NFCI and moderate vibration white finger syndrome. Furthermore he chose a figure which was appropriately lower than the awards in two more serious NFCI cases.

48. The Court of Appeal always recognises the advantages which a trial judge has in assessing general damages. This court does not interfere unless the judge has moved outside the permissible bracket: see *Santos v Eaton Square Garage Ltd* [2007] EWCA Civ 225 at [2]. That did not happen in the present case. Accordingly I would uphold the judge's award of £12,500 general damages for pain, suffering and loss of amenity.

Part 6. Damages for loss of future earning capacity

(i) loss of future earnings and future earning capacity

49. Where at the date of trial the effect of the claimant's injury continues to inhibit his ability to work, the court needs to compensate him for the difference between his predicted future earnings and his notional future earnings if he were uninjured. The court does this by calculating the annual loss (the multiplicand) and then applying an appropriate multiplier. The court derives the multiplier by subtracting the claimant's actual age from his retirement age, then making reductions to take account of accelerated receipt and contingencies. The contingencies are all the hazards of life which might have prevented the claimant from working continuously from the date of trial to retirement age, even if he had not sustained the injury for which he is now being compensated.

50. When I started at the Bar, judges derived the appropriate multiplier on the basis of judicial experience and citation of authority. As I will explain in the next section, that approach has been replaced by a more scientific method.

51. In addition to the difference between the claimant's current rate of earnings and his notional (uninjured) rate of earnings, there is a separate head of loss to consider. That is the claimant's handicap on the labour market on those future occasions when he may be seeking employment. He may be unemployed for a longer period or he may be forced to accept a less attractive job offer than would otherwise be the case.

52. Even if the claimant's current rate of earnings is the same as his pre-accident rate, he may still have a claim for loss of future earning capacity. The claimant is entitled to a lump sum as compensation for the losses which he is likely to suffer in the future by reason of increased difficulty in obtaining or retaining employment.

53. In *Fairley v John Thompson (Design and Contracting Division) Ltd* [1973] 2 Lloyd's Rep 40 Lord Denning MR explained the difference between loss of earnings and loss of earning capacity in this way:

> "It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

54. In *Smith v Manchester Corporation* (1974) 17 KIR 1 the plaintiff developed a frozen shoulder as a result of an accident caused by her employer's negligence. At the date of trial the plaintiff was undertaking work for the same employer and at the same rate of pay as before (£16.50 per week), so that she had no current loss of earnings. Her employer undertook to continue employing her as long as it could properly do so. The Court of Appeal increased the plaintiff's award of damages so as to include £1,000 for future loss of earning capacity. The court explained that this sum was to compensate the plaintiff for the fact that, if she became unemployed, she would find it more difficult than uninjured persons to obtain employment. Both Edmund Davies LJ and Scarman LJ explained that they could not calculate this award using a multiplier and multiplicand. Instead they were looking at the matter in the round and making a general assessment. Stamp LJ agreed.

55. In *Moeliker v A. Reyrolle & Co. Ltd* [1977] 1WLR 132, Browne LJ said that a plaintiff's loss of earning capacity arises where "as a result of his injury his chances in the future of getting in the labour market work (or work as well paid as before the accident) have been diminished by his injury".

56. Browne LJ said that the first question to consider was whether there was a real or substantial risk that the claimant would lose his current job before the end of his working life. If the answer is yes, then Browne LJ gave the following guidance as to how the court should assess that head of damages:

> "Clearly no mathematical calculation is possible. Edmund Davies LJ and Scarman LJ said in *Smith v Manchester Corporation*, 17 K.I.R. 1, 6, 8, that the multiplier/multiplicand approach was impossible or "inappropriate," but I do not think that they meant that the court should have no regard to the amount of earnings which a plaintiff may lose in the future, nor

> to the period during which he may lose them. What I think they meant was that the multiplier/multiplicand method cannot provide a complete answer to this problem because of the many uncertainties involved. The court must start somewhere, and I think the starting point should be the amount which a plaintiff is earning at the time of the trial and an estimate of the length of the rest of his working life. This stage of the assessment will not have been reached unless the court has already decided that there is a "substantial" or "real" risk that the plaintiff will lose his present job at some time before the end of his working life, but it will now be necessary to go on and consider–(a) how great this risk is; and (b) when it may materialise–remembering that he may lose a job and be thrown on the labour market more than once (for example, if he takes a job then finds he cannot manage it because of his disabilities). The next stage is to consider how far he would be handicapped by his disability if he was thrown on the labour market–that is, what would be his chances of getting a job, and an equally well paid job. Again, all sorts of variable factors will, or may, be relevant in particular cases–for example, a plaintiff's age; his skills; the nature of his disability; whether he is only capable of one type of work, or whether he is, or could become, capable of others; whether he is tied to working in one particular area; the general employment situation in his trade or his area, or both. The court will have to make the usual discounts for the immediate receipt of a lump sum and for the general chances of life."

57. As a matter of convention a claim for damages on this basis is commonly referred to as a *Smith v Manchester* claim. In practice such awards usually range between six months' and two years' earnings: see *Court Awards of Damages for Loss of Future Earnings: an Empirical Study and an Alternative Method of Calculation* by R Lewis and others, [2002] Journal of Law and Society, Vol.29, pages 406-435 at 414.

(ii) The Ogden Tables

58. In the 1980s Sir Michael Ogden QC chaired a working party which developed the well known Ogden Tables. These tables enable the court to derive an appropriate multiplier, which takes into account the risk of certain contingencies and the benefit of accelerated receipt.

59. The Ogden Tables received the imprimatur of approval by the House of Lords in *Wells v Wells* [1999] 1 AC 345. Lord Lloyd observed at 379 that these tables should be regarded as a starting point; a judge should be slow to depart from them either on impressionistic grounds or by reference to the multipliers used in comparable cases.

60. Section 10 of the Civil Evidence Act 1995 provides that the Ogden Tables are admissible in evidence in personal injury litigation for the purpose of assessing damages for future pecuniary loss. However, contrary to paragraphs 43 to 44 of the judge's judgment, that provision has never been bought into force.

61. The main Ogden Tables fall into separate parts. The first part sets out whole-life multipliers. Judges and lawyers use these for calculating future care costs. The second part sets out multipliers for loss of earnings. These tables show the multipliers appropriate to different retirement ages. In each table a series of different multipliers are set out, to show the effect of taking different discount rates. For some years the discount rate fixed by the Lord Chancellor pursuant to section 1 of the Damages Act 1996 has been 2.5%.

62. The original Ogden Tables took into account two factors. The first factor was the benefit of early receipt. The claimant was receiving a lump sum (which he could invest if he wished) as compensation for losses which he would suffer in the future. The second factor was mortality. That was the risk that the claimant might die prematurely.

63. Later editions of the Ogden Tables have provided ways of taking into account risks and contingencies other than mortality.

64. In due course Sir Michael Ogden retired. He died in 2003. The working party which he had established remained in being. It continued to be known as the Ogden Working Party. Its membership changed over time, but it always included actuaries, lawyers, accountants and others with relevant expertise.

65. In the sixth edition of the Ogden Tables (2007) and the seventh edition (2011) the working party introduced four new tables known as Tables A, B, C and D ("Tables A-D"). The purpose of these tables is to take into account contingencies other than mortality, which may reduce a claim for loss of earnings.

66. Tables A-D set out a series of reduction factors ("RFs") which range between .93 at the highest and .06 at the lowest. The RF indicates the amount by which a multiplier for loss of earnings (derived from the main tables) should be reduced in order to take account of contingences other than mortality.

67. As Mr Poole explained during his submissions, the object of Tables A-D is to make the results of relevant research available for use by the courts. Amongst other things, Tables A-D attach numerical values to the general considerations which, according to *Moeliker*, the courts should consider when assessing loss of future earning capacity.

68. The operation of Tables A-D may be illustrated by taking examples at the two extremes. According to Table A, in the case of a fit man in employment aged 25-29 with high educational qualifications the RF is .93. So his multiplier for loss of future earnings is only reduced by 7% in order to allow for contingencies other than mortality. According to Tables B and D, in the case of an unemployed disabled person, aged 54, with low educational qualifications, his/her RF is .06. So the multiplier for loss of future earnings of such a person is reduced by 94% in order to allow for contingencies other than mortality.

69. The current members of the Ogden Working Party in their Explanatory Notes identify the research upon which Tables A-D are based. Some of the literature about that research is included in the authorities bundle.

70. Neither party has suggested that Tables A-D are unreliable. Nevertheless, for the avoidance of doubt, I should place on record that there has been no argument in the present case as to the adequacy of the research base or as to the correctness of Tables A-D. Therefore I am in no position to endorse Tables A-D (in the same way that other courts have endorsed the main Ogden Tables). Nor am I in any position to criticise Tables A-D. I do not criticise them.

71. Argument in the present appeal has proceeded on the assumption that Ogden Tables A-D are properly derived from a sufficiently broad statistical base. I am content to proceed on that assumption.

72. The principal issue in this appeal is whether Tables A-D are applicable to Mr Billett and, if so, whether the judge applied them correctly.

73. The variables which Tables A-D take into account are the following:

i) The claimant's age at the date of trial;

ii) Whether the claimant is male or female;

iii) Whether the claimant is employed or unemployed at the date of trial;

iv) The claimant's educational attainment;

v) Whether or not the claimant is disabled.

74. Factors (iv) and (v) involve considering broad bands of educational attainment and broad bands of disability. Therefore the user may need to adjust the RF in order to reflect where a particular individual falls within those bands.

75. The working party explains the need for adjustment of the RF in paragraph 32 of the Explanatory Notes as follows:

> "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 potential future post-injury earnings. Such a ready reckoner cannot take into account all circumstances and it may be appropriate to argue for higher or lower adjustments in particular cases. In particular, it can be difficult to place a value on the possible mitigating income when considering the potential range of disabilities and their effect on post work capability, even within the interpretation of disability set out in paragraph 35. However, the methodology does offer a framework for consideration of a range of possible figures with the maximum being effectively provided by the post injury multiplier assuming the claimant was not disabled and the minimum being the case where there is no realistic prospect of post injury employment".

76. For the purposes of Tables A-D the working party define disability as follows in paragraph 35 of the Explanatory Notes:

> "Disabled:
>
> A person is classified as being disabled if all three of the following conditions in relation to the ill-health or disability are met:
>
> i) has an illness or a disability which has or is expected to last for over a year or is a progressive illness
>
> ii) satisfies the Equality Act 2010 definition that the impact of the disability substantially limits the person's ability to carry out normal day-to-day activities
>
> iii) their condition affects either the kind or the amount of paid work they can do
>
> Not disabled: All others
>
> Normal day-to-day activities are those which are carried out by most people on a daily basis, and we are interested in disabilities/health problems which have a substantial adverse effect on respondent's ability to carry out these activities.
>
> There are several ways in which a disability or health problem may affect the respondent's day to day activities:
>
> ***Mobility -*** for example, unable to travel short journeys as a passenger in a car, unable to walk other that at a slow pace or with jerky movements, difficulty negotiating stairs, unable to use one or more forms of public transport, unable to go out of doors unaccompanied.
>
> ***Manual Dexterity -*** for example, loss of functioning in one or both hands, inability to use a knife and fork at the same time, or difficulty in pressing buttons on a keyboard.
>
> ***Physical co-ordination -*** for example, the inability to feed or dress oneself; or to pour liquid from one vessel to another except with unusual slowness or concentration.
>
> ***Problems with bowel/bladder control -*** for example, frequent or regular loss of control of the bladder or bowel. Occasional bedwetting is not considered a disability
>
> ***Ability to list, carry or otherwise move everyday objects (for example, books, kettles, light furniture) -*** for example,

> inability to pick up a weight with one hand but not the other, or to carry a tray steadily.
>
> ***Speech -*** for example, unable to communicate (clearly) orally with others, taking significantly longer to say things. A minor stutter, difficulty in speaking in front of an audience, inability to speak a foreign language would not be considered impairments.
>
> ***Hearing -*** for example, not being able to hear without the use of hearing aid, the inability to understand speech under normal conditions or over the telephone.
>
> ***Eyesight -*** for example, while wearing spectacles or contact lenses - being unable to pass the standard driving eyesight test, total inability to distinguish colours (excluding ordinary red/green colour blindness), or inability to read newsprint.
>
> ***Memory or ability to concentrate, learn or understand -*** for example, intermittent loss of consciousness or confused behaviour, inability to remember names of family or friends, unable to write a cheque without assistance, or an inability to follow a recipe.
>
> ***Perception of risk of physical danger -*** for example, reckless behaviour putting oneself or others at risk, mobility to cross the road safely. This excludes (significant) fear of heights or underestimating risk of dangerous hobbies."

77. The reference in that passage to "the Equality Act 2010 definition" is a reference to the provisions of the Equality Act which I have set out in Part 1 above.

78. In paragraph 45 of the Explanatory Notes the working party states that Tables A-D provide one way of assessing damages for the claimant's future handicap on the labour market. They add that "there may still be cases where a conventional *Smith v Manchester* award is appropriate".

(iii) The present case

79. As noted in Part 3 above, the judge held that the claimant was "disabled" as that term is defined in paragraph 35 of the Explanatory Notes to the Ogden Tables. The judge rejected the submission that he should make a general assessment of damages for loss of future earning capacity in accordance with the *Smith v Manchester* guidance. Instead he used the Ogden Tables as a tool for calculating a precise award of damages under this head. The judge's actual calculation was as follows:

    i) At the date of trial the claimant is a man aged 25-29. He is in the middle range of educational attainment. He is employed. Therefore if uninjured his RF derived from Table A would be .92.

ii) Because he is disabled, his RF derived from Table B is .54. That should be adjusted to .73 because the claimant's disability is minor.

iii) The claimant's retirement age will be 68. Therefore his multiplier for loss of future earnings derived from the main Ogden Tables is 24.29. That figure only allows for accelerated receipt and mortality risk. An appropriate reduction factor must be applied to allow for other contingencies.

iv) Absent NFCI the claimant's multiplier would be 24.29 x .92 = 22.35. Because of the claimant's NFCI his multiplier is 24.29 x .73 = 17.73. Therefore the claimant's multiplier is reduced by 4.62 (i.e. 22.35 - 17.73) as a result of his NFCI.

v) 4.62 x £21,442 (the claimant's current earnings) = £99,062.04. Therefore that is the proper quantification of the claimant's loss of earning capacity.

80. Mr Browne for the defendant mounts three attacks on the judge's assessment of damages under this head.

i) The claimant is not "disabled" within the definition set out in the Ogden Tables.

ii) Even if the claimant falls within the definition of "disabled", *Smith v Manchester* provides a better method of assessing damages for loss of future earning capacity than the Ogden Tables in the particular circumstances of this case.

iii) Even if the judge was correct to use the Ogden Tables, he erred by taking too low a reduction factor.

81. I must first address the question whether the claimant was "disabled" within the definition in paragraph 35 of the Explanatory Notes to the Ogden Tables. The judge held that he was disabled and Mr Browne attacks that conclusion.

82. Mr Browne points out that before the claimant left the army he had been upgraded to MFD, which means Medically Fully Deployable. That is true, but Major General Craig in his agreed medical report is critical of the INM's assessment of the claimant in June 2010 when the claimant was discharged from the clinic in respect of NFCI.

83. Referring to paragraph 35 of the Explanatory Notes, Mr Browne concedes that requirements (i) and (iii) are satisfied. The claimant's NFCI has already lasted for more than a year. Also the claimant's NFCI does affect the kind of paid work that he can do. This is because the claimant cannot spend long periods outside in cold weather.

84. Mr Browne focuses his attack on requirement (ii). He submits that the claimant's NFCI does not substantially limit his ability to carry out normal day to day activities, within the meaning of the Equality Act.

85. I have looked at the Guidance Notes issued by the Secretary of State pursuant to section 6 (5) of the Act. The examples of disability and non-disability given in those notes are of limited assistance, because they tend towards the extreme on both sides.

86. The issue of what constitutes a "substantial adverse effect" on a person's "ability to carry out normal day to day activities" within the meaning of section 6 arose in *Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591. Langstaff J, delivering the judgment of the appeal tribunal, stated at paragraph 14:

> "Because the effect is adverse, the focus of a tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definitions of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."

87. That is an extremely helpful statement of how the test in section 6 (1) (b) should be applied. I propose to adopt the approach which Langstaff J set out in that paragraph.

88. Mr Browne points to all the activities which the claimant can still do. He can go fishing all the year round, provided the weather is good. He can go clay pigeon shooting all the year round, provided the weather is good. The claimant has no difficulty working full time as a lorry driver.

89. Those statements are all true. But, as Mr Poole points out, those submissions fall into the trap which Langstaff J identified in *Aderemi*. They are directed to what the claimant <u>can</u> do. The focus of the inquiry should be upon what he <u>cannot</u> do as a result of the injury to his feet.

90. The judge has accepted the claimant's evidence as to the things which he cannot do. These include DIY and gardening in cold weather; playing rugby and swimming regularly; playing with his children outside when it is cold.

91. The judge concluded that the claimant's NFCI had a substantial adverse effect on his ability to carry out normal activities. In view of the factual evidence which the claimant and Ms Knight gave and which the judge accepted, he was entitled to reach that conclusion.

92. The judge's overall conclusion on the disability issue at paragraph 59 of the judgment was:

> "His condition qualifies as a disability…, but only just".

The judge was entitled to reach that conclusion. I therefore reject Mr Browne's first argument.

93. I turn now to Mr Browne's second argument. This is that the judge should have adopted the *Smith v Manchester* approach to assessing damages for loss of future earning capacity, rather than doing a mathematical calculation based upon the Ogden Tables.

94. Here I am bound to say that I see more force in the appellant's arguments. Some of the bands used in Tables A-D are, of necessity, extremely wide. Disability, as defined in paragraph 35 of the Explanatory Notes, covers a very broad spectrum. In their article *Ogden Reduction Factor adjustments since Conner v Bradman: Part 1* [2013] Journal of Personal Injury Law, pages 219-230, the authors point out that the Health and Disability Survey 1996-7 measured severity of disablement on a scale of 1 to 10, where 10 denotes the greatest severity. 42.9% of those classified as disabled fall within categories 1 to 3. 43.9% of those disabled fall within categories 4 to 7. 13.2 % of the disabled population fall within categories 8 to 10.

95. There is no evidence as to how the claimant would be classified within that scale. The natural inference, however, from the judge's findings of fact is that the claimant would fall towards the bottom of category 1.

96. If one applied Ogden Tables A and B in the present case without any adjustment, the result would be an award of about £200,000 for future loss of earning capacity. That is hopelessly unrealistic for the claimant. He is pursuing his chosen career as lorry driver, with virtually no hindrance from his disability. He secured employment with Framptons within one week of leaving the army. He has strong qualifications for lorry driving and an excellent CV. Furthermore the judge held that the claimant was "a hard working and capable man, who is likely to be sought after by employers" (judgment paragraph 38 (a)). In order to bring a sense of reality to the present exercise, it is necessary to make a swingeing increase to the RF shown in Table B (.54). But what should that increase be? Determining an appropriate adjustment to the RF is a matter of broad judgment. In the present case that exercise is no more scientific than the broad brush judgment which the court makes when carrying out a *Smith v Manchester* assessment.

97. Mr Poole draws attention to a number of articles which argue the case for using Tables A-D, suitably adjusted, in preference to making a *Smith v Manchester* award. See *Ogden Reduction Factor adjustments since Conner v Bradman: Part 1* by Latimer-Sayer and Wass [2012] Journal of Personal Injury Law, pages 219-230 and *Ask the expert: William Latimer-Sawyer asks Victoria Wass some questions about the practical application of the Ogden Reduction Factors* by Latimer-Sawyer and Wass [2015] Journal of Personal Injury Law, pages 36-45.

98. I accept that in many instances the use of Tables A-D will be a valuable aid to valuing the claimant's loss of earning capacity. But the present is not such a case. I reach this conclusion for three reasons:

    i) Disability covers a broad spectrum. The claimant is at the outer fringe of that spectrum.

ii) The claimant's disability affects his ability to pursue his chosen career much less than it affects his activities outside work.

iii) Because of (i) and (ii) in this case there is no rational basis for determining how the reduction factor should be adjusted.

99. The Ogden Working Party acknowledge in their Explanatory Notes that in some instances the *Smith v Manchester* approach remains appropriate. In my view this is a classic example of such a case. The best that the court can do is to make a broad assessment of the present value of the claimant's likely future loss as a result of handicap on the labour market, following the guidance given in *Smith v Manchester* and *Moeliker*.

100. Reviewing all the factors which I have previously set out, I conclude that an appropriate award on that basis would be two years' earnings. I would be prepared to round that up to £45,000. In my view £45,000 would be just and fair compensation for the claimant's loss of future earning capacity.

101. In those circumstances, the appellant's third line of attack on the judge's decision does not arise. If I am wrong, however, on the previous issue, I would certainly accept that an RF of .73 is too low.

102. The claimant only just scrapes into Table B. That is the effect of the judge's finding in paragraph 59 of his judgment. Therefore I do not think that the judge was correct to take an RF half way between that stated in Table A (.92) and that stated in Table B (.54). The judge should have taken an RF much closer to that in Table A. The result would be to produce an award in the region of two years' loss of earnings. That is the same conclusion as I have reached by the *Smith v Manchester* route.

103. Let me now draw the threads together. For the reasons stated above, I would reduce the judge's award of damages for future loss of earning capacity to £45,000.

104. Finally, I note that Dr Wass (a member of the Ogden Working Party and a co-author of all the articles referred to above) is critical of the judge's decision in the present case. Dr Wass argues that Mr Billett was not "disabled", so he does not fall within Table B at all. See *Billett v MOD and the meaning of disability in the Ogden Tables* by Victoria Wass [2015] Journal of Personal Injury Law, 37. Dr Wass' article does not form any part of my reasoning. Nevertheless both she and I, by different routes, conclude that a direct application of the Ogden Tables is not appropriate for assessing loss of future earning capacity in the present case.

Part 7. Executive summary and conclusion

105. Whilst serving in the army, the claimant suffered a non-freezing cold injury to his feet. It has been agreed that the defendant is liable for those injuries to the extent of 75%.

106. After a trial on quantum only, the judge assessed damages on a full liability basis at £127,956.45. That includes an award of general damages for pain, suffering and loss of amenity in the sum of £12,500. It also includes an award of £99,062.04 in respect

of loss of future earning capacity. The defendant appeals against those two elements of the award.

107. In my view the judge's award of £12,500 as general damages for pain, suffering and loss of amenity should stand. In relation to loss of future earning capacity, I believe that the judge's assessment of £99,062.04 based upon the Ogden Tables was incorrect. In the particular circumstances of this case the court cannot do better than carry out a general assessment in accordance with the guidance given in *Smith v Manchester Corporation* (1974) 17 KIR 1 and *Moeliker v A. Reyrolle & Co Ltd* [1977] 1 WLR 132. On that basis I would assess general damages for loss of future earning capacity at £45,000.

108. If my Lords agree, the defendant's appeal will be allowed and the judge's assessment of damages will be varied to that extent.

Lord Justice Patten:

109. I agree.

Lord Justice McFarlane:

110. I also agree.