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Billett v MOD ~ Back to the future? By Rob Hunter and Marianne Tutin

In the much-anticipated decision of *Billett v Ministry of Defence [2015] EWCA Civ 773*, the Court of Appeal considered the application of Ogden Tables A-D, which purport to provide a more scientific approach to calculation of claims for loss of earnings. Rob Hunter and Marianne Tutin look closely at the decision and conclude it is not all bad news for supporters of the statistics.

Background

Mr Billett, a driver for the Royal Logistics Corp, suffered a non-freezing cold injury in 2009. Before leaving the army, he had been designated Medically Fully Deployable. Upon his return to civilian life in 2011, he found employment as an HGV driver.

The main issue at first instance was whether any disadvantage on the labour market should be compensated by means of a traditional *Smith v Manchester* award or by the application of the Ogden Tables A and B, with or without adjustment of the reduction factors. Practitioners will be familiar with the large disparity in outcome between these approaches.

At first instance, the judge concluded that a traditional lump award was inappropriate. Instead, he calculated damages by application of the Ogden Tables but with a significant adjustment to the reduction factor. Although the Claimant was obliged to avoid working outside in cold conditions for appreciable periods of time, the overall effect of his injuries was minor. As such, the claimant was “only just” disabled under the Equality Act 2010 (perhaps not surprising given that the PSLA award was only £12,500). In the circumstances, he adopted a reduction factor that was equal to the mid-point between the discount applicable to disabled and non-disabled workers.

More detailed examination of the first instance decision can be found in Stephen Cottrell’s [article](#) for J.P.I.L., Issue 1 2015.

The Court of Appeal decision

The Court of Appeal rejected the Defendant’s appeal against the finding that the Claimant was disabled. In relation to what constitutes a “substantial adverse effect” on a person’s “ability to carry out normal day to day activities”, the Court of Appeal endorsed Langstaff J’s statement of the test in *Aderemi v London and South Eastern Railway Ltd [2012] UK EAT/0316/12* that unless the effect is trivial, it is to be treated as substantial.

Although the Court of Appeal accepted that the first instance Judge was entitled to conclude that the Claimant was disabled, they were not prepared

to entertain modified application of the Tables. This was because the Claimant was at the outer fringe of the spectrum of disability and his injuries affected his chosen career much less than his activities outside work. Accordingly, said the Court of Appeal, there was no rational basis for determining how the reduction factor should be adjusted.

The Judge's award of £90,000 was substituted with a lump sum of £45,000, equivalent to slightly more than 2 years' loss of earnings. This might be regarded as towards the upper end of the scale of traditional *Smith v Manchester* awards.

The Court of Appeal went on to consider the application of Tables A-D in any event. Giving the leading judgment, Jackson LJ commented, *obiter*, that the determination of appropriate adjustments to the reduction factor is "a matter of broad judgment". If Tables A-D were applied, a reduction factor closer to the non-disabled factor would have been appropriate.

Comment

Does the decision herald the renaissance of *Smith v Manchester* awards?

Given the Court of Appeal's approach to disability status, the Tables will be of potential relevance in a large number of claims. The issue will be whether it is possible to adjust the reduction factors in a reasoned way.

The commentary of Dr Wass was referenced in the judgment but not subjected to scrutiny by the Court of Appeal. She has emphasised the value of the Tables, pointing to the number of separate and distinct effects caused by disability and the significance of certain factors such as education on a person's ability to stay in work.

The Court of Appeal appeared to countenance the adjustment of reduction factors in proportion to the impact of an injury upon day-to-day living, which would imply upward and downward adjustments.

Arguably, the assessment of reduction factors can and should be subjected to a more nuanced approach, drawing from the work of Dr Wass and others. However, having rejected a statistical analysis in *Billett*, the Court of Appeal did not engage with the exercise, even as a cross-check or ready reckoner.

Given the unusual facts, it is hard to disagree with the Court of Appeal's conclusion that the Ogden Tables were not the most suitable method of assessment in Mr Billett's claim. However, the decision leaves much still to be litigated. For example, in a case of more serious injury, how should the reduction factors be adjusted (if at all)? What of the subtly-brain-injured client in a demanding job which magnifies the effect of cognitive impairment not evident outside work? The remarks of Jackson LJ that in many instances the use of Tables A-D will be a valuable aid to valuing the claimant's loss of earning capacity offer encouragement in this respect. Proponents of the Tables should not abandon hope following this decision.

Rob has recognised expertise in dealing with high value personal injury claims arising from serious injury or fatality, clinical negligence and catastrophic injury. He is ranked as a leading junior for PI by both Chambers UK and Legal 500. Marianne is a pupil barrister and has worked with Rob on a wide range of personal injury cases during her pupillage. For more information on their recent case highlights, please visit the 'Barristers' section on devereuxchambers.co.uk or contact clerks@devchambers.co.uk or 0207353 7534.



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