Future Imperfect

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In this article, Stephen Cottrell discusses the difficulties inherent in judicial adjustment of multipliers for future pecuniary loss as illustrated in the recent cases of Reaney v University Hospital of Staffordshire NHS Trust[1] *and* Billett v Ministry of Defence.[2]

Two recent decisions

Reaney and *Billett* both involved High Court judges (Foskett J in *Reaney* and Andrew Edis QC, shortly before his elevation to the High Court bench, in *Billett*) grappling with the dilemma articulated by Andrew Edis QC in *Billett* at [61]:

> "A judicial approach to the assessment of damages involves an exercise of judgment in the individual case being considered. Sometimes statistics give an answer which appears obviously too high, given the picture which emerges in the particular case. Where that happens, the Judge has to make an apparently arbitrary adjustment to that result, or to decline to use the statistical material at all."

Both cases produced outcomes that were favourable to the individual claimants on approaches which, if followed, will be of significant benefit to future claimants in many clinical negligence and personal injury cases. Both cases are currently under appeal to the Court of Appeal, with permission granted in each case.

The drive towards certainty

Since the decision of the House of Lords in *Wells v Wells*,[3] and especially since the publication of the sixth and then seventh editions of the Ogden Tables, there has been a drive towards increasing mathematical certainty in the assessment of damages for future pecuniary losses. One problem with a strict application of the mathematical approach is that such an approach will often lead to a result which appears on the face of it to be too generous—or not generous enough—in any given case. The struggles of the respective judges in *Reaney* and *Billett* illustrate the difficulties inherent in a strict application of the multipliers in the Ogden Tables but also demonstrate the difficulty in straying from the path marked out by the Tables.

The cases—*Reaney*

Janet Reaney was 61 years old when she began to experience sudden back pain with increasing weakness in her legs. She was taken to the defendants' hospital where it was discovered that she was suffering from the very rare inflammatory condition transverse myelitis causing damage to the spinal cord. There was

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[1] *Reaney v University Hospital of Staffordshire NHS Trust* [2014] EWHC 3016 (QB); [2015] P.I.Q.R. P4 per Foskett J and *Reaney v University Hospital of Staffordshire NHS Trust*, Unreported, October 31, 2014 QBD.

[2] *Billett v Ministry of Defence* [2014] EWHC 3060 (QB).

[3] *Wells v Wells* [1999] 1 A.C. 345 HL.

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no negligence to cause the onset of this condition. The transverse myelitis left her "T7 paraplegic". She was left doubly incontinent and with little or no power in her lower limbs.

Unfortunately, during her time in the defendants' care she developed severe pressure sores with consequent osteomyelitis, flexion contractures and a hip dislocation. These additional injuries significantly worsened Mrs Reaney's situation—whereas she would have spent most of her time sitting in a wheelchair but for the defendants' negligence, she was instead bed-bound for the majority of the time and the high risk of infection to the pressure sore sites combined with her incontinence meant that a much higher level of care was needed than if the claimant had been a typical T7 paraplegic.

At trial—when the claimant was aged 66—the defendants deployed a number of unsuccessful arguments. The lead spinal experts were Mr Gardner for the claimant and Mr Tromans for the defendants. The Judge decided that:

- He did not accept Mr Tromans' evidence that the fact of a previous shoulder injury (remarkably Mr Tromans did not feel the need to examine the shoulder when giving this opinion) and some apparent breathlessness would have rendered her unable to make transfers without assistance in any event.
- Given that the initial paraplegia was not caused by a separate tortfeasor and given that the defendants had caused or materially contributed to the condition which gave rise to the claimant's current needs and losses, the defendants were liable to meet *all* of the costs of the claimant's care. This is potentially a very significant decision, if upheld. I will not explore this issue in this article, but it is worth noting that in reaching this decision, Foskett J took into account that:
  - — The care that the claimant would have accessed had she not been negligently injured would have been provided gratuitously through the NHS and benefits system. She would not have had the means of paying for it. The notional cost of providing this care did not fall to be deducted from the cost of providing the overall care package required as a result of the defendants' negligence.
  - — The assessment by a public body of a claimant's needs was a different exercise to that performed by a court when assessing a claimant's reasonable needs, especially in a climate of austerity. It followed that the assessment by the claimant's expert of the level of care that a statutory body would have been required to provide in order to meet Mrs Reaney's needs but for the negligence of the defendants could not be taken to be indicative of her needs as determined by the Court when assessing damages.

For the purpose of this article, the most important finding (or agreed fact, endorsed by the Judge) at trial was that the claimant's life expectancy was until the age of 78, another 10.75 years. Rather optimistically, the Judge indicated that:

> "If the relevant Table by which the multiplier should be calculated cannot be agreed, I will invite written submissions on the issue."

There were indeed further submissions on that issue—and on several other issues, many of which the Judge (understandably) felt he had determined in favour of the claimant in the main judgment. For that reason there are currently two separate judgments.

The main issue that fell to be determined when the case came back before Foskett J was how the multiplier for pecuniary losses for life was to be determined. Should Table 2 be used, or was the effect of the agreement that the claimant's life expectancy was 78 that a multiplier for a term certain should be used? The claimant argued that to use Table 2 would be to apply a "double-discount"—in reaching their

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conclusion that Mrs Reaney would live to age 78, the experts had taken account of significant issues such as the fact that she was a smoker and had been significantly overweight prior to her illness; the defendants argued that using Table 28 meant that other "ordinary" contingencies (the risk of accidental death, for example) would not be taken into account and that the claimant would therefore be over-compensated.

Foskett J reviewed a long line of authorities including *Royal Victoria Infirmary v B*,[4] *Crofts v Murton*[5] and *Whiten v St George's Healthcare NHS Trust*.[6]

There is clearly a distinction to be drawn between cases in which an expert (or experts) state that, by reason of a claimant's injury, her life expectancy has been reduced by, say, five years, and those cases in which the evidence is that this individual claimant can expect to live for a further, say, 10 years. In the former case, a claimant cannot simply go to the life tables, select the remaining life expectancy, subtract five and then apply the Table 28 multiplier to that figure—on that example no account has been taken of contingencies at all. On the latter example, experts giving an opinion on the likely longevity of an individual claimant should be taken to have considered all of the relevant information about that claimant's health that was available to them, unless they otherwise indicate; to make a deduction to a claimant's life expectancy to take account of her smoking and then to allow a further "Table 2 discount" that takes to account factors such as lung cancer and heart disease would be unfair.

At [13], having reviewed the authorities and the principles, Foskett J reached the conclusion that:

> "In my view, what was agreed between Mr Gardner and Mr Tromans (and endorsed by me) was a predicted life expectancy of this claimant. The most significant factors affecting her life expectancy (for example, her immobility, her weight and her smoking) were taken into account in arriving at this prediction. Mr Feeny contends that the claimant still has all the usual contingencies associated with mortality, but that does not seem to me necessarily to be so: at all events, because of her immobility some of the risks that more mobile people will face are obviated, but, of course, she faces the risks associated with immobility. There is, of course, no certainty with any prediction of this sort, but, in my judgment, adopting Table 2 would result in an additional, and thus unfair, discount."

It followed that the Table 28 multiplier was to be preferred.

In truth, neither method will ever be perfect in any given case, but this illustrates that it is unrealistic to expect the Ogden multipliers to produce a perfect answer in every case. In a case such as *Reaney* (or *Whiten*) in the absence of extremely precise expert evidence and statistical analysis of data, it is very difficult for a trial judge to make any meaningful adjustment to the multipliers in the Tables. Use of the Tables will tend to produce consistency and predictability for practitioners in the majority of cases, encouraging settlement. Judicial adjustment to the multipliers in the few litigated catastrophic injury cases is likely to encourage a degree of horse-trading in negotiations, and when dealing with technical issues, such as life expectancy, may be unwarranted and meaningless. But in some cases a degree of judicial adjustment is likely to be necessary, as amply demonstrated by our next case study.

The Cases—*Billett v MOD*

The basic facts and outcome on the evidence in *Billet* are striking:

- The claimant was 24 years old when injured and 29 at trial. He suffered a non-freezing cold injury ("NFCI") when he was on manoeuvres as an acting Lance-Corporal in the Royal Logistics Corps.

[4] *Royal Victoria Infirmary and Associated Hospitals NHS Trust v B (A Child)* [2002] EWCA Civ 348; [2002] P.I.Q.R. Q10.
[5] *Crofts v Murton* (2008) 152(35) S.J.L.B. 31 QBD per Cranston J.
[6] *Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 (QB) per Swift J.

- Since the injury, the claimant had been become a Lance Corporal; he was medically downgraded but then upgraded. He was able to complete a tour of Afghanistan in 2009/2010 despite his injury and he was assessed as "fit for deployment anywhere".
- He subsequently left the army, the Judge found, through choice and not by reason of his injury—he was earning comparable amounts as an HGV driver at a well-established and stable family business.
- The continuing effects of the injury appear to have been modest, although there is reference to continuing use of painkillers most days and the use of foot powder. At [57] the Judge found that the claimant's feet were "permanently sensitised to cold and give him pain when they become cold". He was therefore unsuitable for work that required him to work outdoors in cold conditions.
- Having decided that the claimant was disabled (as to which, see below), the Judge commented (at [59]) that:

  > "I find it hard to conceive of very many people who could be classified as disabled who are as fit and able as is this claimant. It must be remembered that when he left the Army he was medically fully deployable. He could be deployed anywhere in the world to do anything."

- Against that background the Judge employed the Ogden Tables, and in particular Tables A and B (which deal with reduction factors for disability and that first appeared in the Sixth Edition of the Ogden Tables) but made an adjustment. He awarded £99,026.04 for loss of earning capacity. Had he not made any adjustment, the figure would have been more than twice as much.

At first glance, an award of almost £100,000 for future loss of earnings for a claimant who, in his injured state, had been able to complete a tour of duty in Afghanistan and who had been in steady, secure employment as a lorry driver since leaving the army may seem high.

The battleground in the case was in part to do with the use of the Tables as opposed to the application of a "traditional" lump-sum award along the lines of *Smith v Manchester Corp*[7] or *Blamire v SE Cumbria HA*.[8] As is often the case, there is a huge disparity between the kinds of figures produced by these respective approaches. The Judge summarised the position at [40]:

> "… if I use Ogden Tables A and B reduction factors (RF) the loss is 21,442 x 10.41 = 223,211. If I use a traditional method, it is suggested it should be 21,442 x 3 = £64,326."

The employment experts (a rarity these days!) agreed 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."

The Judge accepted that the claimant would have more difficulty finding alternative work than if he had not been injured and that there was a risk that the claimant may find himself out of work in the future for a variety of reasons. He said this, at [41], of the "traditional method":

> "The traditional method was based on a judicial assessment of the chances of a particular claimant failing to find work quickly when necessary, and of the chances of that claimant becoming unemployed and thus needing to look for other work. If he has another 41 years of working life, there is obviously a substantial chance that he will need to find other work, but the traditional method did not offer any

[7] *Smith v Manchester Corp* (1974) 17 K.I.R. 1 CA (Civ Div).
[8] *Blamire v South Cumbria HA* [1993] P.I.Q.R. Q1 CA (Civ Div).

formula for assessing that chance, or of the extent to which his actual difficulty may cause him longer periods of unemployment than otherwise would have been the case."

He then went on to deal with the Ogden approach, noting that the Tables and Explanatory Notes (but not the introductory commentary to the Tables) were admissible under the Civil Evidence Act 1995 but that he was not obliged to follow the Tables. He summarised the Explanatory Notes and highlighted the fact that the Notes specifically contemplate cases in which the *Smith/Blamire* approach remains applicable and that the Tables amounted to a "ready reckoner" which, "cannot take into account all circumstances and it may be appropriate to argue for higher or lower adjustments in particular cases." There then followed a long discussion about the desirability or otherwise of making adjustments to the reduction factors, including an article in which Dr Victoria Wass, one of the members of the Ogden Working Party, was interviewed at length. In essence, the problem in making reductions was a lack of certainty and the need for an expert assessment of the effect of the injury on the claimant's employability in each case. The Judge concluded that there were three options:

"(i) A traditional award of a lump sum as in *Smith v. Manchester Corporation*, *Blamire v. South Cumbria Health Authority* [1993] PIQR, and *Ward v Allies & Morrison Architects* , [2012] EWCA Civ 1287; [2013] P.I.Q.R. Q1.
(ii) An award based on Ogden tables A and B without adjustment.
(iii) An award using Ogden tables A and B as suggested in paragraph 32 of the Explanatory Notes."

The Judge began by dismissing the first option and distinguishing the case of *Ward* on the basis that in that case there was too much uncertainty about the claimant's likely career path (the facts were unusual—the claimant was a university student injured on work-experience as a model-maker). He then went on to consider the Tables and the question of disability—a pre-requisite for the use of the Tables—and noted (at [53]) that:

"… the definition of disabled in the Notes is very broad and captures people such as the claimant with very mild conditions, and others with very severe ones. Obviously, as is pointed out, those who are in work, or able to work, will tend towards the lower levels of disability and the statistical results of analysing their career paths will tend therefore to concern predominantly those towards the milder end of the disability spectrum. Therefore, there is a level of self-correction in the statistics."

He then went on to consider the definition of disability in the Explanatory Notes which provide that:

"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) the person has an illness or disability which has lasted or is expected to last for over a year or is a progressive illness,
(ii) the person 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, and
(iii) their condition affects either the kind or the amount of paid work they can do."

Crucially, at [55], the Judge noted that the list of ways in which a disability may effect a person's day-to-day activities in the Explanatory Notes had previously formed part of the definition of disability under the Disability Discrimination Act 1995 (to which the Explanatory Notes had initially referred) but that the list was not part of the Equality Act (which had replaced the Disability Discrimination Act) so that it was no longer necessary for a claimant to prove that he fell within the list in order to be categorised as disabled. A rather looser—and somewhat subjective—definition of disability appeared to have been used by the Labour Force Survey which was the statistical basis of the Tables. On this basis the Judge

decided that the claimant satisfied the Equality Act definition of disability by reason of the fact that his day-to-day activities were limited "because he cannot work or do anything else outside in cold conditions for any appreciable period of time". Importantly, the Judge considered that the ability to work was a "day-to-day activity" even though that created some overlap in the definition of disability. Finally he found that the injury affected the kind and amount of paid work he could do as the claimant had to avoid working outside in cold conditions. The claimant was therefore disabled.

Because of the very limited extent of the claimant's disability, the Judge decided that he had to take "option 3" and apply the Tables with an adjustment. He noted (at [60]) that "I have no expert evidence or guidance as to what adjustment I might make from the Explanatory Notes, although on my findings about this case there is, in my judgment, a very clear indication from paragraphs 31 and 32 of the Notes that I should do something". Having rejected suggestions put forward by Dr Wass in an article on the basis that they would over-compensate the claimant, he decided (at [61])

> "… that I should use the multiplier/multiplicand method but that my multiplier will be substantially reduced for contingencies other than mortality to reflect the minor nature of the disability. I consider that in the absence of any other evidence or guidance I should take a midpoint between the not disabled RF of 0.92 and the disabled RF of 0.54, which is 0.73. There is little logic in this approach, except that it gives a figure which appears to me to reflect fully the loss sustained by the claimant, but to do so in a way which does not obviously overstate that loss."

It is interesting to note that the Judge felt that the effect of adopting the method suggested by Dr Wass was too high because it would have meant that the claimant was being in effect compensated for nine years' loss of earnings and he felt that this was unrealistic. However, the award made amounts almost to five years' loss of earnings with no discount for accelerated receipt.

With respect, the Judge was right to bemoan the lack of logic in the approach that he felt compelled to adopt. At first glance it seems odd to use a mid-point figure between the disabled and non-disabled figures in a case of such minor disability—surely a figure closer to the "non-disabled" figure would be more appropriate. However, the approach makes sense if it is accepted that there will be cases in which there should be no adjustment to reduction factor. Assuming that Andrew Edis QC's approach to the definition of disability is correct, it would be logical to assume that:

- there are many cases where no adjustment should be made;
- those cases would involve "moderate" disability where the claimant has (for example) a wrist fusion or an arthritic knee and where the effect of that disability neither completely hampers his pre-accident work nor permits him to continue unencumbered; and
- there are cases where the disability is very severe (for example paraplegia) or the effect of the disability on that particular claimant's ability to continue in his career is very severe (for example a manual worker in his 50s with an arthrodesis) where it is necessary to adjust the Reduction Factor downwards so as to provide a larger award.

One major problem with the Judge's approach is that it begs the question: why bother with the Tables at all? If the exercise is one of judicial fact-finding and assessment then why should the starting point be the Tables rather than the Judge's own assessment of the likely effect on the claimant of the injury/disability—i.e. the traditional method? Of course, one problem with the "traditional method" is that prior to the introduction of "Ogden 6" it had become somewhat atrophied, with judges tending towards "rule-of-thumb" type allowances of one and a half to two years' loss of earnings, and figures very unlikely to approach six figures. Further, the use of expert employment evidence is increasingly rare, leaving non-specialist personal injury judges in the unenviable position of having to guesstimate the loss of earnings to be suffered by a claimant—often a young, employed claimant—many years into the future. There was

an understandable judicial tendency towards conservatism that might lead to under-compensation with many awards typically in the region of £20,000–£40,000.

Perhaps the best use of the Tables in cases of "borderline" disability such as *Billett* is as a yardstick of reasonableness. The Ogden Tables and Explanatory Notes are generally admissible. Whatever definition of disability is used, it is clearly wrong that those who fall on one side of the definition should be eligible for a much higher award than those who narrowly miss out—the Tables and Explanatory Notes properly viewed are *evidence* of the effect of illness and injury on lifetime earnings and that evidence should be used to inform judges making assessments—whether mathematical or "rough and ready" of the claimant's likely loss. A judge who decides that the Tables do not produce a fair result and who is contemplating a lump-sum award should, it is submitted, have regard to the Tables as an indication of the suitability of that lump sum award. It can be seen that this is a "third way" that avoids the dilemma articulated by Andrew Edis QC at [61] and cited at the beginning of this article—the Judge would not be making an "arbitrary deduction" or ignoring the Tables, but rather checking his own assessment of the likely effect of the injury on a claimant's earning capacity by reference to an admissible statistical database.

Conclusions

The certainty produced by the use of multipliers in the calculation of damages for future pecuniary losses is helpful to litigants and their lawyers when it comes to evaluating the likely outcome at trial. In theory, a strict application of multipliers and the Ogden Tables should promote settlement in the majority of cases. However, in the very small minority of difficult, atypical cases that go to trial, application of a mathematical approach will often lead to injustice and the trial judge's role is to decide the case justly, not to have an eye on the potential ramifications of any given decision. Whereas the Tables are likely to be the starting point—and may well take centre stage—in negotiations, once at trial their role may prove to be less determinative.

The application of a strict mathematical approach is never likely to lead to the "right" answer in any given case, but absolute accuracy is barely ever attainable when it comes to an assessment of future events and losses—the only guarantee is that the precise amount awarded in any given case will always be too high or too low; the court should try to get as close to the likeliest "right" answer as possible, but should not become obsessed with precision when predicting uncertain events. In some cases, such as the assessment of life multipliers, there is little basis for judicial tinkering with established multipliers in the absence of very clear evidence as the multipliers will provide the best estimate of the likeliest outcome; in other instances, such as the assessment of the likely career path of any given claimant, old-fashioned judicial assessment may be more likely to produce an appropriate outcome than slavish dedication to fixed formulae. Properly understood, the Ogden Tables and the data that inform them are, at the very least, good evidence—and often the best evidence—of what the future may hold.