ASSESSING QUANTUM:
SPECIAL DAMAGES, PAST AND FUTURE LOSS

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SERJEANTS' INN CHAMBERS

Life expectancy
Calculation of multiplier in reduced life expectancy cases

- Conventional approach: life expectancy prediction by C&P expert & refer to Table 28
- Ogden recommended approach (see Impaired Lives section, paragraph 20 of the Introduction to Ogden Tables):
  - Argues against using Table 28 for remaining years of life because Table 28 does not allow for distribution of deaths around that life expectancy
  - Ogden recommends using Tables 1 & 2 = lower multiplier

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Life expectancy
Calculation of multiplier in reduced life expectancy cases cont...

- The Ogden approach is widely regarded as flawed where the life expectancy has been reached by a combination of general life expectancy statistics adjusted to individual characteristics of C. It has been rejected in first instance cases, eg:
  - Lloyd-Jones J in *Sarwar -v- Ali* (2007) EWHC 274; Flaux J in *Burton -v- Kingsbury* (2007) EWHC 2091, and *Whiten v St George's Healthcare NHS Trust* (2011) EWHC 2066

Loss of earnings, pensions and promotions

In short life expectancy cases:

- Plead loss of earnings & pension as PPOs
- If evidence allows, escalate PP for promotions
- NB: ASHE average earnings do not take account of benefits in kind, eg. employers’ pension contributions, company car, private healthcare
- Defendants argue for reduction for ‘costs’ of employment, such as travel. Counter-argue, these costs are off-set by benefits in kind

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Lost years claim

- Primary case: PPOs for lost earnings
- Some Ds (eg some MDOs) cannot provide reasonable security for PPOs
- Secondary case:
  - multiplier & multiplicand lump sum for life exp.
  - Plus damages for lost earnings in lost years

  (discount multiplicand for money that would have been spent on C's own living expenses)

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Court of Appeal cases on lost years

- In *Croke v Wiseman* [1982] 1 WLR 71 the Court of Appeal had rejected a claim for loss of earnings during the lost years of a child aged 9 at the date of trial.
- In *Whipps Cross University NHS Trust v Iqbal* the Court of Appeal felt bound under the doctrine of stare decisis to follow *Croke*. However, in *Iqbal* the Court of Appeal held that *Croke* was inconsistent with the House of Lords' decisions in *Pickett and Gammell*

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House of Lords cases on lost years

- 2 decisions of the House of Lords recognise loss of earnings during the lost years is a valid head of claim:
  - *Pickett v BREL* [1980] AC 136, and
  - *Gammell v Wilson* [1982] AC 27
- Such claims are not limited to adults with dependants. Child claimants can bring these claims.
  - See the Court of Appeal case of *Whipps Cross University NHS Trust v Iqbal* [2007] EWCA Civ 1190

Whipps Cross University NHS Trust v Iqbal Gage LJ said:

- *In summary, in my opinion, the effect of Pickett is to hold that claims for loss of earnings in the lost years are permissible and that such claims are not restricted to adult wage earners with dependants. A claim by the estate of an adult or adolescent wage earner without dependants can clearly be made.*
- *…Gammell makes quite clear…that the age of a victim is not as a matter of principle relevant to the issue of whether or not a claim can be made for the lost years. Further, the lack of dependants cannot be a factor which defeats a claim for damages for loss of earnings in the lost years.*

Valuing care: gratuitous care and variations on hourly rates

- Purpose: award the reasonable value or proper recompense for gratuitous care: see *Hunt v Severs* [1994] 2 AC 350
- Starting point: assess gratuitous care by reference to commercial rates

Valuing care: gratuitous care and variations on hourly rates

- Normal approach: use National Joint Council Local Authority Spinal Point 8 rates
- Standard v aggregate rates?
  - *Fairhurst v St Helens & Knowsley HA* [1995] PIQR = standard rates
  - *Massey v Tameside* [2007] EWHC 317 = aggregate rates
  - *Whiten v St George's Healthcare NHST* [2011] EWHC 2066 = aggregate

Valuing care: gratuitous care and variations on hourly rates

- Relevant factors:
- severity of disability & intensity of care
- whether carer lives with claimant & provides care in own home
- whether carer has lost earnings to provide care
- care has been unremitting, during week days, evenings, nights and weekends
- care has intruded in to relaxation and leisure times

Housecroft v Burnett discount range 0-33%, eg:

- 25% discount in *Fairhurst v St Helens HA* [1994] 5 Med LR 422, Judge Clarke QC;
- 20% in *Burns v Davies* [1999] Lloyds Rep Med 215 Connell J;
- No discount in *Newman v Folkes* [2002] PIQR Q2, CA, due to the demanding nature of care of a violent claimant at any time of the day or night.

Sklair v Haycock [2009] EWHC 3328 (QB) Edwards-Stuart J

- C suffered from Asperger’s Syndrome and Obsessive Compulsive Disorder. His father had met C’s basic care needs such as cooking and laundry but was over 80 at the time of the claim. C was injured in a RTA & developed a chronic Adjustment Disorder necessitating 24 hour care.
- D argued the loss was the difference in the level of care C would have required in any event from his father or subsequently the local authority after his father’s death, and the additional level of care C now required.

Sklair v Haycock [2009] cont...

- The court rejected D’s argument. Where C would have incurred expenditure if the accident had not occurred, being expenditure which he will now not incur, it is only fair and reasonable for credit to be given.
- But, where C would have continued to enjoy care given out of love and affection which he cannot now enjoy because of the accident, there was no reason in logic or justice why C should be required to place a value on that care and then give credit for it.

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Contingencies eg for new technology & price changes

- Kemp & Kemp 18-010: “The courts, depending on the evidence, will only take the possibility of technological developments into account in a broadest of ways.” There is no authority cited to support this statement
- Multiplicands are fixed at the date of trial with no account of future price changes – see *Cooke v United Bristol Healthcare NHS Trust* [2004] 1 WLR 251

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Contingencies eg for new technology & price changes

- The approach to be taken :
  - Is there a real or substantial as opposed to speculative or fanciful chance that the item of expense/loss will be incurred? A court can award damages to compensate for pecuniary loss even where the chance of that loss coming to pass is less than 50%.
  - What is the correct amount? This will usually be the present day value of the loss or expense unless there is good evidence to suggest otherwise.
  - What is the appropriate discount for early receipt? Apply a discount factor at the prevailing discount rate.
  - What is the appropriate discount for uncertainty?

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Provisional damages

- Statutory provisions: Section 32A of the Senior Courts Act 1981 and section 51 of the County Courts Act 1984.
- Four grounds of the award:
  - C has suffered personal injuries; and
  - C faces a chance or risk of…
  - developing a serious disease or deterioration in his conditions; and
  - the discretion should be exercised.

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Provisional damages

- Court of Appeal decision in *Curi v Colina* (unrep July 29, 1998) Roch LJ stated that to qualify as a chance, the risk had to be measurable rather than fanciful.
  - Likely to occur (50%+) = once and for all award is probably correct
  - Less than probable but more than de minimis = territory for provisional award
  - *De minimis* = no provisional damages award

Provisional damages

- Even if the statutory criteria for provisional damages are met this gives rise only to a discretion whether to award provisional damages.
  - There is a preference for once and for all settlements, especially where damages can be awarded to reflect the chance of a deterioration.
  - *Slava Davies v Bradshaw* [2008] EWHC 740 (QB) the Court declined to award provisional damages to C who was suffering from incomplete paraplegia and faced a low risk of syringomyelia.

Variable periodical payment orders

- Variation of PPOs is provided for by the Damages (Variation of Periodical Payments) Order 2005.
- This Order largely applies the same rules for provisional damages in lump sum claim
- One notable difference favouring D: it is now open to a court to provide for a variation of the order if there is a chance that in the future the claimant will enjoy some significant improvement

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Roberts v Johnstone calculation

- Life expectancy say 20 more years
- 2.5% multiplier = 15.78
- Property purchase price £750,000
- Multiplicand £18,750
- 15.78 x £18,750 = £295,875
- Shortfall: £750,000 - £295,875 = £454,125

Instead of this:

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You can buy this:

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Plead a challenge to *R v J*

- *Roberts v Johnstone* provides inadequate compensation
- Principle: so far as financially possible, a claimant should be compensated in full for all pecuniary losses (eg. see *Wells v Wells* [1999] AC 345 at 382-3, 390A and 363H)
- This principle is infringed if a claimant has to use damages allocated to another head of loss to buy the property

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Distinguish *R v J*

Facts in *R v J*:

- the claimant’s family owned a property which was sold for £18,000 and a new one was purchased for £86,500 with a £10,000 reduction in this capital price agreed between the parties.
- The resultant extra capital cost was only: £86,500 - £10,000 - £18,000 = £68,500.

Changes since *R v J*

- Accommodation costs (especially around London) now represent a disproportionately larger part of the total lump sum award.
- This disproportionate effect is exacerbated once periodical payment orders other heads of loss, such as care and case management.
- The assumption underlying *RvJ* is that a claimant should invest part of the lump sum award in his own property to achieve a return on that investment.

Unfairness of *R v J*

Argue this assumption is no longer valid nor fair:

- in current economic conditions
- for claimants with shortened life expectancies who are more vulnerable to the fluctuations in the property market
- Claimants should be entitled to choose to invest their awards of capital, intended of other heads of loss, without taking risks with the property market

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Periodical payments

Unlike in *R v J*, the court can now award PPOs

- PPOs and their effect on the overall lump sum award were not a consideration in *R v J*
- PPOs = norm for care and case management
  - = highest component of future damages
  - Effect of care and case management PPOs is to cause raid on other heads of loss to buy home
- If other future losses were capitalised to be invested in the property, these sums would not be available to pay for the future costs for which they are awarded

Success fee deductions from General Damages

- General damages are often used to fund capital shortfall
- Success fee reductions reduce available capital = another point of distinction from *R v J*

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Plead alternatives to *RvJ*

Consider reasonable alternative proposals the defendant may suggest for accommodation

- Eg:
  - Funding by a mortgage, paid by indexed PPOs, or
  - defendant advances the capital purchase price in return for:
  - A charge over the property in respect of this sum, or
  - A reversionary Trust,
  - all subject to provisions enabling a move

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Thank you

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