Welcome

Welcome to this week's edition of BC Disease News.

In the last week, Lord Justice Jackson has revealed detailed plans which would see a 'grid' of fixed costs on all civil claims worth up to £250,000. Elsewhere, LJ Jackson has also called for the legal profession to create a not-for-profit third-party litigation funder, with suggested funders including the National Lottery amongst others.

This week we present a feature article which reviews the approach to Smith v Manchester awards in light of two recent decisions Billett v Ministry of Defence, and Murphy v Ministry of Defence.

Any comments or feedback can be sent to Boris Cetnik or Charlotte Owen.

As always, warmest regards to all.

SUBJECTS

CMCs Operating In PI Market Sees Decrease

It has been reported by the Claims Management Regulator (CMR) that the number of claims management companies shut down in the past three months fell dramatically compared with the same period in 2014.  

From October to December 2015, the CMR cancelled 8 licences compared to 70 in October to December 2014. It has been said that the difference is largely due to operational reasons, as the majority of licences not renewed during the year were dealt with earlier in 2015 rather than in the final quarter, as was the case in 2014.

The CMR, run from the Ministry of Justice, appears to have significantly increased its activity, making 273 visits from October to December last year, compared with 22 in the same period in 2014. In total, 33 investigations were started, more than double the number started during the same period in 2014. Four financial penalties were issued in the fourth quarter of 2015, with 51 warnings issued.

The update notes that the CMR continues to ‘closely monitor’ claims management companies’ compliance with the ban on referral fees, which came into force in April 2013. It audited 45 CMCs in relation to the ban from October to December and issued 12 warning notices.

During the period, the regulator worked on two investigations into CMCs regarding their personal injury claims-handling and provided statements to West Midlands Police and City of London Police. The number of CMCs operating in the PI market fell from 1,900 at the start of 2013 to 917 by the end of December 2015.

On nuisance calls and texts, the CMR imposed fines of £850,000 on the National Advice Clinic and £91,845 on Complete Claim Solutions during the period. The regulator audited 30 CMCs engaged in direct marketing and warned 11 of them. It continues to investigate six companies for possible breaches of rules relating to nuisance calls and texts.

Lord Justice Jackson: ‘Fixed Costs – The Time Has Come’

Last week, at the 2016 Insolvency Practitioners Association (IPA) Annual Lecture, Lord Justice Jackson revealed detailed plans which would see a ‘grid of fixed costs’ on all civil claims worth up to £250,000.

He began the lecture by pointing out that high litigation costs inhibit access to justice. He said ‘they are a problem not only for individual litigants, but also for public justice generally. If people cannot afford to use the courts, they may go elsewhere with possibly dubious results. If costs prevent access to justice, this undermines the rule of law’.

Seeing fixed costs as the solution he pointed out that fixed costs is an effective way of ensuring that a party’s recoverable costs and its adverse costs risk are proportionate to the subject matter of the litigation. He also stated that the traditional costs shifting regime tends to drive up the incurred costs of both parties and leads to disproportionate costs recovery.

In addition to this, LJ Jackson highlighted the importance of fixed costs have in providing certainty and predictability. He said that ‘this is something which most litigants desire and some litigants desperately need’. Not only does a fixed regime provide certainty but, LJ Jackson said that ‘this is something which most claims management companies will welcome’.

When considering whether costs should be fixed for all civil cases or just for the fast track and the lower reaches of the multi-track, LJ Jackson favoured the latter as i) switching to a totally fixed costs regime for all claims, however large, would be too great a change for the profession to accept, certainly in the short term. The justice system only functions because of the high level of support which the profession provides and ii) reform is best done incrementally so we can see how it is working out’.

The full proposed costs table is as follows:

<table>
<thead>
<tr>
<th>Price</th>
<th>BAND 1</th>
<th>BAND 2</th>
<th>BAND 3</th>
<th>BAND 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value</td>
<td>£25,000 - £250,000</td>
<td>£250,001 - £750,000</td>
<td>£750,001 - £2,000,000</td>
<td>£2,000,001 - £20,000,000</td>
</tr>
<tr>
<td>tot.</td>
<td>£57,000</td>
<td>£1,700,000</td>
<td>£5,700,000</td>
<td>£15,700,000</td>
</tr>
</tbody>
</table>

This table is accompanied by a set of rules which governs its use and can be found within LJ Jackson’s speech which is accessible here.

Interestingly, LJ Jackson stated that ‘the profession is now more willing to accept fixed costs than it was in the past’. This, he said, was for two main reasons, firstly, such a regime would dispense with the need for costs budgeting, which not everyone enjoys. Secondly, experience of the fixed costs regimes introduced in recent years has been satisfactory for both practitioners and litigants – he based this on the fact that there were a high number of personal injury claims in the fast track which are still being pursued and the widespread advertising for claimants, which continues to appear.

However, since the speech, lawyers have responded negatively to LJ Jackson’s call to introduce fixed fees for all civil claims worth up to £250,000. In particular, it has been reported that the head of a leading claimant firm has described the judge’s speech as another ‘report from an Ivory Tower that fails to address how the changes will impact on real people’. He went on to say that: ‘Nowhere does Lord Justice Jackson properly consider the impact on the deterrent effect of litigation in health and safety, nor how defendants being able to calculate the maximum costs of negligence will impact on the risks they take with workers safety’.
Law Society president Jonathan Smithers said the society supported the principle of fixed costs for ‘lower value and less complex’ cases, but was “extremely concerned” at a £250,000 limit.

He said: ‘The application of fixed costs for highly complex cases is likely to be totally inappropriate and would raise significant questions about the ability of many people to access justice. A single approach for all cases, regardless of complexity, will lead to many cases being economically unviable to pursue which undermines the principle of justice delivering fairness for all. We are also concerned by the suggestion that these proposals could be consulted on and implemented within a year as we believe this is unrealistic’.

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The Law Society have said that there must be scope for exemptions and escapes for complex or unusual cases, ‘there must be rigorous empirical evidence and research undertaken to justify the initial setting of the rates as well as the level of thresholds’.

Bar Council chair Chantel-Aimée Doerries QC agreed that fixed costs ‘may help’ in straightforward cases, but added: ‘Large corporations and governments may well be willing to spend large sums of money – beyond what is recoverable – on legal disputes with individuals or smaller corporations whose costs are fixed at a much lower rate. Instead of levelling the playing field, this proposal could tilt it further in favour of big business and the state. There is also a risk that access to justice will be restricted. Using the value of a case to determine costs will not always be appropriate. A low value but legally complex case may demand a great deal more work than the allocated cost band will allow. This means lawyers may not take on complicated, low-value cases, thus preventing legitimate claims from being pursued.’

A Ministry of Justice spokesman has said that the government remains supportive of extending fixed recoverable costs and will consider Lord Justice Jackson’s comments carefully. We will continue to report on any developments on the extension of fixed costs.

### Jackson’s Call for Not-For-Profit Third-Party Funder

The legal profession should create a not-for-profit third-party litigation funder to back both regular litigation and ‘deserving’ cases which would otherwise not be attractive because of the level of damages sought, Lord Justice Jackson has said this week.

Seed funding could come from the government, the National Lottery or ‘quasi-debentures’ bought by individual lawyers and/or institutions. Sir Rupert said a Contingent Legal Aid Fund (CLAF) could finally ‘flourish’ in a market where for-profit third-party funders were now established.

Speaking at IBC’s Solicitors Costs Conference earlier this week, he called on the Law Society, Bar Council and Chartered Institute of Legal Executives to work together to promote the establishment of a CLAF.

‘Unlike other funders, the CLAF would not have owners or shareholders creaming off the profits,’ he said. “Instead it would plough all profits back into building up reserves and future litigation funding. The CLAF would be an independent body established by the legal profession in the public interest. Its function would be to promote access to justice’.

He explained: ‘Quasi-debentures would offer a more than average return on a bond but would expose the bond-holder to the risks of the CLAF being unprofitable, thereby sharing both risk and reward on the seed capital. I understand that such an arrangement would not prejudice the not-for-profit status of the fund’.

As to who would invest in a CLAF, Jackson identified two possibilities – ‘Individual barristers, solicitors or other professionals may be willing to buy bonds of, say, £10,000 if they have confidence in the management of the scheme. They would note that investors in certain third-party funders have done well and the CLAF does not have any shareholders clamouring for dividends. In this way, the lawyers would be contributing to a much-needed scheme, while receiving a reasonable return for only a modest risk’.

Second, he said a bank or similar institution might assemble a ‘partnership’ of institutional type investors, such as pension funds.

As to how the CLAF would work, cases could be chosen by experienced lawyers employed by the fund – or even by revived committees of solicitors and barristers who used to determine applications for legal aid – and importantly there would be no entitlement to support as of right.

Jackson LJ said whether the CLAF should be liable for adverse costs, or protected like the Legal Aid Agency, was a policy decision for others.

He noted that liability for adverse costs on normal principles would be an additional incentive ‘for the CLAF to choose cases wisely’ – although there would have to be an agreement between the CLAF and

Possible sources included the National Lottery or charitable foundations, the government, or capital raised by means of ‘fixed interest coupons’ or quasi-debentures.

It has been the lack of seed funding which has prevented the development of CLAF, but Sir Rupert said that ‘if the governments and professions in other jurisdictions have managed to find seed-corn funding, surely England and Wales can do the same?’.
the claimant as to what costs risk each was accepting – while giving it protection would require consultation and probably legislation, delaying the creation of the CLAF.

To protect itself from an adverse costs risk, he continued, the CLAF might take out block or case-by-case after-the-event insurance; alternatively it could self-insure ‘up to a point’.

Sir Rupert said costs management would make it ‘much easier’ for the CLAF to assess the adverse costs risk, as would the adoption of his proposal last week for fixed costs for all civil cases up to £250,000.

He concluded: ‘The time for setting up a CLAF has come and I invite the Bar Council, Law Society and CILEx to consider taking forward this proposal.’

Enterprise Bill Update

The Enterprise Bill 2015 has this week received its second reading in the House of Commons. The Bill, once enacted, will introduce an amendment to the Insurance Act, by inserting Clause 13A, to change the law of England and Wales to allow late payment of damages. This would bring the law of England and Wales into line with that of the rest of the UK.

The Rt Hon Sajid Javid for the Conservative Party, said during the second reading of the Bill: ‘It is vital that insurance companies also pay out quickly. Doing so helps small businesses to help themselves and gets them back on their feet, but it does not always happen. Unnecessary delays by insurers can spell the end for vulnerable small companies, which hits employees, suppliers, the wider community and the economy. The Bill will create a legal obligation on insurers to pay up within a reasonable timeframe’. However, this was countered by Labour MP, Ms Angela Eagle who said ‘I am not saying that the issue of late payments is trivial; I am saying that in dealing with it, the Government’s response is far too limited and very disappointing’. She went on to say; ‘this Bill contains a much more modest aim in seeking to establish a small business commissioner to assist in late payment disputes and signpost advice services for small businesses. The Opposition will support this, but we are disappointed by its small scale and its very limited remit’.

The Bill passed the second reading and has been referred to the Public Bill Committee for further scrutiny. The Public Bill proceedings have been scheduled to conclude on Thursday 25th February 2016. We will continue to keep you informed of the passage of this Bill.

Pure Legal Costs Expansion

We have previously reported on Pure Legal which was licensed as an alternative business earlier this year. Pure Legal is the brainchild of Phil Hodgkinson, the former owner of Compass Costs and CEO of Quindell Legal Services. In edition 106 of BC Disease News we reported on Pure Legal Costs Consultants, the arm of Pure Legal which provides loans to claimant firms with the aim of helping with NIHL cash flow issues (link here).

Mr Hodgkinson has announced a five year business plan to make Pure Legal a very prominent and significant player in the legal market. Given his background it appears that Mr Hodgkinson has intentions to focus on costs, NIHL claims and as reported in edition 121 (link here) with the £13m acquisition of York-based Pryers LLP, clinical negligence work.

Following this, it has been reported this week, that Pure Legal Costs Consultants has made its first acquisition by acquiring ‘York firm Connect Costs for a ‘six-figure sum’. Mr Hodgkinson indicated that there were two more acquisitions in the pipeline. This news is in line with signs that the costs market is slowly consolidating.

This week Pure held a 2 day symposium on NIHL claims in which they set out their views on the future of the market and which we will report on next week.

We will also continue to report on further Pure Legal expansions.

Feature

Smith v Manchester Awards: Minor Injuries and The Ogden Tables

Introduction

In editions 84 and 85 of BCDN we reviewed the nature and scope of Smith v Manchester awards (SM awards), the grounds for making an award and the calculation of SM awards. We also considered the making of SM awards in disease cases. We then went on to consider whether SM awards would survive the Ogden/multiplier-multiplicand approach to the assessment of damages following the introduction of the 6th edition of the tables which introduced discounts for contingencies other than mortality.
This feature will pick up from where we left off and consider the applicability of SM awards in light of two recent decisions, *Billett v Ministry of Defence*,2 and *Murphy v Ministry of Defence*.5 Firstly, let us briefly recap on the position prior to these decisions.

**Background**

As we noted in edition 84, the courts have largely adopted the position that there can be no mathematical approach to determining SM awards. However, while the courts settled on that position, the 6th edition of the Ogden tables (published in 2007) introduced changes it was thought, could herald the end of SM awards. The Ogden tables, of course, are the foundation of the multiplier/multiplicand approach to assessing damages, which seeks to determine a claimant’s annual loss of earnings (the multiplicand) and multiply them by a period of time accurately reflecting – so far as possible – the loss over the remainder of the claimant’s working life having regard to mortality risks (the multiplier). The Ogden tables are the source of multipliers.

Prior to the 6th edition of the tables, the tables only accounted for mortality. However, the 6th edition introduced discounts for contingencies other than mortality, namely educational attainment, employment status and whether the claimant is disabled or not. For example, a multiplier would be more highly discounted for a less educated claimant compared with a well-educated claimant on the basis that a less well-educated claimant would be likely to earn less throughout the remainder of their working life.

Of particular interest in this case is that the tables accounted for disability, discounting multipliers more heavily for disabled persons compared with able-bodied persons on the basis of research showing disability adversely impinges on likely future earnings. So there was now a method to statistically account for disability when determining damages. What impact would this have on SM awards? The explanatory notes – repeated in the current 7th edition of the tables at paragraph 45(6) – had this to say:

‘If the claimant has a residual earning capacity, allowance should be made for any post-accident vulnerability on the labour market: the following paragraphs show one way of doing this, although there may still be cases where a conventional Smith v Manchester Corporation award is appropriate.’

For the sake of brevity we will not outline again the procedure set out in the notes but they can be found in edition 85 ([here](#)). When that method is adopted, the notes to the Ogden tables say ‘there will usually be no need for a separate Smith v Manchester Corporation award’.

In edition 85 we also asked ourselves how this approach was adopted by the courts. Here we consider whether the recent Court of Appeal decision of *Billett* and the following High Court decision of *Murphy* has changed this position and if so what useful principals can be drawn from them.

**Billett v Ministry of Defence**

In *Billett*, the Ministry of Defence appealed against a decision awarding damages ([2014] EWHC 3060 (QB)) after it had admitted liability in respect of a non-freezing cold injury sustained by the claimant (B).

B was aged 30. He had been employed by the ministry as a lance corporal and suffered the injury in February 2009 when undertaking physical exercises in cold weather. He claimed that his condition had been caused by the army’s failure to provide suitable footwear. Following treatment, he was found to be medically fit for deployment, but he left the army in October 2011. He immediately found new employment as a lorry driver. He maintained that he continued to suffer various symptoms in cold weather. The judge accepted his evidence that he had difficulty in doing various household tasks and always stayed inside in cold weather, limiting his ability to do various things such as play and engage with his children, undertake gardening and DIY, swim and play rugby. He conceded that he continued to go fishing and clay pigeon shooting all year round, but only in good weather.

B’s principal claim related to loss of future earning capacity/handicap on the open labour market. His earnings as a lorry driver were the same as his earnings before his injury. However, two experts agreed that although he had an excellent driving qualification and a good CV, if he lost his present job he would be at a disadvantage in finding new employment because of his injury.

The claimant argued for a strict application of the Ogden reduction factors and in the alternative for a SM award equal to three years of his post-injury earnings. The Judge adopted the Ogden approach but compromised the clam by awarding a reduction factor of 0.73, equal to the midpoint between the disabled (0.54) and non-disabled (0.92) (See *Conner v Bradman and Company Ltd* [2007] EWHC 2789 (QB)). 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 0.92.

ii) Because he is disabled, his RF derived from Table B is 0.54. That should be adjusted to 0.73 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 0.92 = 22.35. Because of the claimant’s NFCI his multiplier is 24.29 x 0.73 = 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.

The Judge justified this compromise on the basis that the effects of the claimant’s injury were minor and were not accurately represented by an average reduction factor.

The defendant appealed the judge’s assessment of damages under this head on three grounds. Firstly, the claimant is not disabled within the definition set out in the Ogden Tables. Secondly even if the claimant did fall within the definition of disabled, an SM award provides a better method of assessing damages for loss of future earning capacity than the Ogden Tables in the particular circumstances of this case. Finally, even if the judge was correct to use the Ogden Tables, he erred by taking too low a reduction factor.

Disability

The criteria for disability are set out at para 35 of the Explanatory Notes (7th Edition) and they state;

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 satisfied the Equality Act definition that the impact of the disability substantially limits the person’s ability to carry out normal day to day activities and

iii) The condition affects either the kind or amount of work they can do.

A set of Guidance Notes on Disability to assist with classification in relation to (ii) above is reproduced immediately after the definition of disability in para 35 of the Explanatory Notes. These originate from s.D15 to s.D27 of the Disability Discrimination Act (DDA) (1995) Guidance and are also reproduced in the Labour Force Survey (LFS) to guide interviewers and respondents when deciding on disability status. A different set of Guidance Notes is used to define disability under the Equality Act 2010. These can be found in the Appendix to the Equality Act 2010 Guidance. It is the older Notes associated with the DDA that are used in the reduction factors.7

Dr Victoria Wass, member of the Ogden Working Party disputed that the Judge in Billett applied the correct approach to the reduction factors.8 Wass claims that the Judge at para [55] wrongly rejected the DDA Disability Guidelines and in any event he did not replace them with the Equality Act Guidelines as he should have done. Instead the Judge, at paras [55] and [58] indicated his intention ‘to decide whether the claimant is disabled by the Ogden test’, but he applies a different test: ‘In doing so, I use the ordinary legal meaning of the word ‘substantially’ which means ‘more than minimal’.

Wass, argues that there is a clear disjoint between disability which is ‘more than minimal’ and one that satisfies the Guidance Notes on Disability in either the DDA or the Equality Act. She claims that the reduction factors are based on the Guidance Notes definition where the threshold for impairment and limitation is higher than has been applied here and that such mild impairments as seen in Billett are not included in the disability-adjusted reduction factors and therefore the claimant should not be deemed ‘disabled’ (although she does not advocate the use of SM awards – see her alternative approach, outlined below). However, this point was not argued on appeal. Instead, the defendant disputed whether or not the claimant was disabled within the definition the Judge adopted, based on the ability of Mr Billett to carry out various activities, rather than attacking the methodology of the Judge’s assessment of disability.

Lord Justice Jackson, handing down judgment in the Court of Appeal, addressed the issue of disability at paras [81]to[92]. Specifically, at para [89] he stated that ‘the focus of the inquiry should be upon what he [the claimant] cannot do as a result of the injury to his feet’. He went on to state at paras [91] and [92] that:

‘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.

The judge’s overall conclusion on the disability issue at para [59] of the judgement 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.’

Smith v Manchester Awards

LJ Jackson then went on to consider whether the trial judge should have adopted the SM approach to assessing damages in this case rather than doing a mathematical calculation based upon the Ogden Tables.

It is here that the ministry gained some ground in their arguments. LJ Jackson at para [98] accepted 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.’

LJ Jackson concluded at para [99] that:

‘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’.
In his concluding remarks, LJ Jackson did address the criticisms of Dr Wass, regarding the claimant’s disability, but pointed out that those arguments propounded by her did not form any part of his reasoning, however, he highlighted that they both conclude that a direct application of the Ogden Tables is not appropriate for assessing loss of future earning capacity in the present case but do so via different routes.

It was therefore held 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 felt it could not do better than carry out a general assessment in accordance with the guidance in Smith v Manchester and therefore assess general damages for loss of future earning capacity at £45,000. The award of £12,500 for general damages for pain, suffering and loss of amenity was unchanged.

**Murphy v MOD**

The decision in *Billett* has since been followed by the High Court decision in *Murphy* which also involved a claim by a former soldier. The claimant, aged 21 at the time of the accident, had developed a long term and possibly permanent chronic widespread pain condition as a result of an accident which occurred while he was serving as a paratrooper. It was found that the case was toward the upper end of the lower bracket of ‘other pain disorders’ in addition to this he had minor injuries which resolved within three months. The court held that most of the physical limitations he suffered affected his personal life but there was some impact on his work. The claimant was from a military family and had joined the Army at 17. He claimed that he would have served a full career in the Army had it not been for the accident and would have attained the rank of staff sergeant. His disability was modest and his employment was secure and his handicap on the labour market was limited.

In respect of the calculation of future loss of earnings capacity, the Claimant put forward a claim on two bases;

i) Given his ongoing CWP and mental health difficulties, he qualifies as disabled for the purpose of the Equality Act 2010 and applying the Ogden tables, therefore his future earnings multiplier post-accident is significantly reduced since his future loss of earnings should be calculated by reference to the multiplier as a disabled person compared to that as an able-bodied person.

ii) Alternatively, the claimant claims a ‘Blamire’ type of award based on the current shortfall in take-home pay and the time he would have served in the Army. (Sum of £80,000)

The defendant argued that it is incorrect to categorise the claimant as disabled because his limitations were minor. Even if the future earnings multiplier on a disabled basis is appropriate then there should be some considerable adjustment towards the non-disabled multiplier. The defendant also disputed the appropriateness of a Blamire-type award to which the judge agreed.

In deciding whether the claimant is ‘disabled’ the judge, at para [205], considered the definition within the Equality Act (outlined above) and determined that ‘substantial’ meant ‘more than minor or trivial’.

It has already been pointed out that the trial judge in Billett determined that ‘substantial’ meant ‘more than minimal’. As the judgment in Murphy was handed down only last month, we cannot know Dr Wass’ opinion on this interpretation of ‘substantial’, however, it is fair to conclude that the approach in Billett and Murphy are fairly similar in nature and meaning. As a result it could be said that her opinion in Billett, that the ‘reduction factors’ are based on the Guidance Notes definition of disability, where the threshold for impairment and limitation is higher than the application of ‘more than minimal’ (applied in Billett) and therefore the claimant should not be considered disabled, would apply equally in this case.

Notwithstanding this, the judge in *Billett* determined that ‘substantial’ and the claimant’s circumstances, he did find the claimant to be ‘disabled’.

The judge then turned to the assessment using the Ogden tables and found that using the reduction factor for a disabled man i.e. 0.42 the loss would be calculated at £164,310, which in the context of this case and the limited extent of the claimant’s disability was found to be disproportionately high. The judge agreed with the defendant and felt that any adjustment in this case would have to be substantial and indeed he felt that the claimant’s reduction factor would have to be quite close to the non-disabled multiplier. It was this rationale that lead him to conclude at para [211] that:

‘In the circumstances I have concluded that in this case even though I find that the Claimant is disabled, a sufficient adjustment to the disable multiplier is an too contrived an exercise. The reality here is that the Claimant’s particular circumstances and the particular factual matrix of this case are not well-suited to the use of the Ogden Tables’.

When considering *Billett*, the judge noted that:

‘The judge at first instance in *Billett* adjusted the reduction factor to 0.73. The Court of Appeal considered that was too low. I consider that Mr Murphy’s case is nearly on all fours with Billett. As the Court of Appeal said in *Billett* determining an appropriate adjustment is a matter of broad judgment and “that exercise is no more scientific than the broad brush judgment which the court makes when carrying out a Smith v Manchester assessment”.

As such, HHJ Coe QC, concluded that a SM award would fit the facts much better and that this case was a classic *Smith v Manchester* situation. It was held that an appropriate award would be in the region of two years’ loss of earning and award was made under this head of £50,000.

**Comment and Conclusion**

It seems to be a common theme throughout these two judgments that where the claimant’s injury is minor, the somewhat convoluted Ogden approach and the
reduction factors are inappropriate for assessing loss of future earning capacity. Dr Wass argues that this is because ‘these mild impairments are not included in the disability-adjusted reduction factors’.

However, Dr Wass does not agree with the use of SM awards in their place and instead advocates an alternative approach. Where the claimant does not meet the disability threshold, Dr Wass argues that the non-disabled reduction factor should be used as the starting point and adjustments from this using reduction factors for other characteristics negatively associated with employment prospects, should be considered.

Applying this to the claimant in Billett, Wass claims that adjusting the non-disabled reduction factor downwards by assuming that Mr Billett’s starting status is non-employed and that he is either 10 years older or that he has only a low level qualification would produce an award in the region of £45,000 – the same as the SM award, awarded by the Court of Appeal in Billett.

If they produce the same results what is the benefit of Wass’ alternative approach?

Wass argues that the reduction factors work well when they are applied as intended, however, they are not intended to cover impairments such as seen in Billett and Murphy and so should not be ‘judged harshly’, when neither a strict application nor the recommended adjustment produce a credible result. The benefit of the Ogden reduction factors, she claims, is that it provides the courts with an alternative to the arbitrary SM award, one which would facilitate a more accurate and systematic valuation of future employment prospects and therefore greater accuracy, equity and predictability.

Despite this the Courts have not adopted Wass’ arguments and it would appear that where minor injuries are involved, the Courts prefer SM awards.

The recent decisions of the Court of Appeal in Billett and the High Court in Murphy show us three things;

i) SM awards have not been wholly replaced by the Ogden Table approach;

ii) SM awards are to be favoured where the injury/disability of the claimant is considered to be minor;

iii) The definition of ‘disability’ within the Ogden Tables requires judicial clarification.

These are positive decisions and defendant practitioners can take comfort in the fact that the first Court of Appeal decision on the application of the Ogden tables in claims for loss of future earning capacity has preferred the non-mathematical approach of the SM awards. However, one should be conscious of the fact that Billett and Murphy both involved injuries/disabilities which were considered minor and therefore practitioners should be ready to put forward arguments against the use of the Ogden tables in any claim for loss of future earning capacity.
References


4 [2015] EWCA Civ 773.


7 Ibid.


9 Ibid.
Disclaimer

This newsletter does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to provide an update on issues that may be of interest to those handling occupational disease claims. Specialist legal advice should always be sought in any particular case.

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