

# Maximising Damages – Annual Claimant Conference 26<sup>th</sup> April 2007

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12KBW Seminar: Maximising Damages – Annual Claimant Conference  
Thursday 26<sup>th</sup> April 2007

## **Indexation of Periodical Payments Frank Burton QC**

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## MAXIMISING DAMAGES:

PRICES OR WAGE INFLATION FOR PERIODICAL PAYMENTS IN  
RESPECT OF FUTURE LOSS OF EARNINGS AND CARE/CASE  
MANAGEMENT COSTS?

### 1. The Problem and the Legal Background

- 1.1 In the combined cases of *Cooke v United Bristol Healthcare NHS Trust* [2004] 1 WLR 251 the Court of Appeal was presented with uncontested evidence that in cases of catastrophically injured Claimants conventional awards for future care and case management on a lump sum basis premised upon the rate of return of 2.5% for multipliers would, over time, be likely to produce substantial shortfalls, leading eventually to the award running out prior to the predicted date of death of the Claimants. This was because historically labour costs for care had increased at a rate of approximately 1½-2% above the retail price index which the discount rate was loosely associated with. Nevertheless the Court of Appeal unanimously rejected the Claimants' contentions that to avoid this deficit the multiplicand should be revised

over time with stepped increases. The Claimants' position was simply that if this was not permitted the principle of full compensation set out in Wells v Wells [1999] 1 AC 345 (at 394G, 400E, 403C D) would be routinely denied. Lord Justice Dyson said in Cooke that the attempt to calculate damages by allowing for future inflation for some heads of claim but not others was a plain attempt to subvert the rate of return set by the Lord Chancellor in July 2001 at 2.5%. The Court of Appeal further stated that the full compensation principle could only be achieved in a "rough and ready" way (per Lord Justice Laws para 12). The reason why the Claimants in Cooke sought to increase the multiplicand rather than the multiplier was because of the earlier decision of the Court of Appeal in Warriner v Warriner [2002] 1WLR 1703 which had held that Section 1(2) of the 1996 Damages Act (which permitted an alteration to the Lord Chancellor's discount rate where it was "more appropriate in the case in question") could only be invoked in exceptional cases. The Court in Warriner held that the Lord Chancellor clearly had in mind Claimants with life expectancies of between 30 and 50 years when setting the rate and there was nothing in the normal catastrophic cases with considerable life expectancies which made it more appropriate to apply a different rate.

- 1.2 The problem of systematic under compensation in such cases is substantial. In 1963 an annual payment of £1,000 indexed to RPI would have risen to £14,483 in 2006. If, however, salary based care costs had risen in line with AEI, the cost of providing £1,000 of care

would now be £32,891. The shortfall of £18,358 means that only 44.1% of the annual cost of provision would be available after 44 years. In *A V B Hospitals NHS Trust* Mr. Justice Lloyd-Jones accepted evidence that if the infant Claimant's care needs were met by a periodical payment indexed to RPI, assuming a differential of 1.7 per annum between RPI and AEI, there would be a shortfall of £29,030 pa by year 10, £193,091pa by year 27 and £347,015 pa by year 36. Master Lush, in a paper published in the London Law Review on 19 April 2005, gave details of the case of *Charlie Beattie*, who was knocked off his motorcycle on 19 July 1998, just before his eighteenth birthday. This case settled in 1992 for £1,530,000, £1,050,000 of which was put into a structured settlement providing an annuity of £64,500 then and currently £87,500. Regrettably for Charlie Beattie, between 1992 and 2004 RPI increased by 35%, but his care costs have increased by 60%. The linking of the structured settlement to RPI is producing a substantial shortfall.

- 1.3 On April 1 2005 the amended Section 2 of The Damages Act 1996 came into force pursuant to the Courts Act 2003 which provided that a Court may make an order for periodical payments even if the parties do not consent. The Department of Constitutional Affairs provided guidance on the new provisions stating that periodical payments were usually a "much better and fairer way of compensating those facing long term future loss and care needs". The explanatory notes to the amendments made by the Courts Act 2003 indicated the Government's

intention to promote the widespread use of periodical payments, something which with Lord Chancellor's Department in 2002 had hoped would become the norm in large cases. CPR47.1 and PD41B require that the Court should have regard to all the circumstances of the case and in particular which form of award best meets the Claimant's needs, having regard to all the factors. Specifically, the factors contained in the Practice Direction include issues of contributory negligence, the reasons for the Claimant's preference, the nature of any financial advice received by the Claimant and the form of award preferred by the Defendant, including the reasons for their preference. Section 2 (8) of the Damages Act 1996 provides:

“(8) An Order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the retail prices index (within the meaning of Section 833(2)) of the Income and Corporation Taxes Act 1988) at such times, and in such a manner, as may be determined by or in accordance with Civil Procedural Rules”.

However, this default position of RPI as the index for periodical payments, is subject to Section 2 (9) which reads:

“(9) But an Order for periodical payments may include provision -

- (a) disapplying subsection (8); or
- (b) modifying the effect of subsection (8)".

1.4 The first attempt to re-litigate the issue of indexation under the new regime and in the light of governmental support for periodical payments came in the case of *Flora v Wakom (Heathrow) Limited* 2006 EWCA 1103, [2004] 4 All ER 982. The Claimant sought to invoke sub-section (9) and to adduce expert evidence that a wages index would be more appropriate for periodical payments for future care. The Defendant's response was to attempt to strike out that part of the Claimant's Statement of Case and to exclude the evidence of the expert, contending that Section 2 (9) should only ever be used in exceptional circumstances. The Court of Appeal disagreed, saying that there was nothing in the language of either Section 2 (8) or Section 2 (9) to suggest that the power to disapply or modify the effect of Section 2 (8) could only be triggered in an exceptional case. Further, the Court emphasised that the principles of full compensation apply equally to periodical payments and the purpose of a periodical payment was to ensure that the real value of annual payments should be retained over the whole period for which they were payable. The Court also emphasised that a periodical payment was quite different from a lump sum and if Section 2 (9) was read down to only apply to exceptional circumstances, then there would be a real threat that the new legislative scheme would not have the beneficial effect that was intended by Parliament. Accordingly, the Court permitted the Claimant to adduce expert

evidence on the issue of what was the most appropriate index to achieve full compensation. The Defendant's petition to the House of Lords was rejected.

### 1.5 Subsequent Cases

In *A V B Hospitals NHS Trust [2006] EWHC 2 833* the infant Claimant, who was catastrophically injured during his birth in 1999, did not wish to undertake the delay and expense of contesting the issue of indexation and asked the Court to be permitted to take a lump sum of approximately £6.5m. Mr. Justice Lloyd-Jones accepted limited accountancy evidence put before him that if the Claimant took his future care costs as a periodical payment linked to RPI, as the Defendants wished, it would lead **“to a result that there will be a massive shortfall in provision for future care for the Claimant”**. The Judge considered investment evidence which produced calculations showing a medium equity range forecast of a net rate of return of 4.34% per annum over the next 10 years, with a maximum range of 8.07% on a lump sum award. On this basis the Judge considered that there was a good prospect that investment returns would go substantially further than would periodical payments if they were linked to RPI. In those circumstances, the Judge permitted the infant Claimant to accept the lump sum award.

1.6 In *Thompstone v Thameside and Glossop Acute Services NHS Trust [2006] EWHC 2904* the Court first heard expert opinion from a labour economist, an actuary, a financial adviser and an accountant as to whether his periodical payments for future care should be linked to a wages rather

than a price index. Mrs. Justice Swift, in a well structured judgment, concluded that the default RPI index should be displaced for an earnings index, namely ASHE 6115 at the 75th percentile (£8.47 average hourly rate). Her choice of this index was on the basis that it was sufficiently sensitive to track changes specific to the care market which were likely to have an effect on the Claimant's care costs.

1.7 In Corbett v South Yorkshire Strategic Health Authority [2006] EWCA CIV 1797 the Defendant Health Authority attempted to adjourn the issue of indexation pending the outcome of the appeal in Thompstone where Swift J gave the Defendant's permission to appeal to the Court of Appeal. The Court of Appeal in Corbett agreed with the first instance decision that the trial on quantum including the issue of indexation should go ahead on the basis that that was a reasonable CMC management decision to make and that if appropriate Corbett could be joined with Thompstone on appeal. Corbett proceeded to trial and the Judge (HHJ Bullimore) has written his judgment which is to be handed down possibly on the 4th May. Indications from Counsel in that case are that the Claimants' evidence on indexation appeared to be well received.

1.8 Sarwar v Ali HQ 04X00501

Lloyd Jones J has heard evidence and submissions on the issue of indexation in this action for damages where a 25% reduction for contributory negligence for failing to wear a seatbelt had been agreed. The effective Defendants are

the MIB as Mr Ali was an uninsured driver. The Claimant's initial preference as opened in the case was for periodical payments in respect of future loss of earnings and future care and case management to be on a periodical payment basis but only if linked to an earnings measure. However, following delay between the end of the evidence and submissions the Claimant changed his instructions to a preference for a lump sum. The MIB, however, expressed its preference for periodical payments (linked to RPI) partly on the basis that its annual income was derived from on a levy following estimates of the MIB's financial requirements to pay claims in the following year. The members of the MIB contribute to the levy proportionately according to the amount of motor insurance that each underwrites. The MIB contended that periodical payments enabled it to spread over a longer period its liabilities and therefore the immediate cost to the insured members and through them the insurance paying members of the public would be lower. Judgment is expected in May. The case raises the interesting issue as to what weight should be given to the Claimant's preference in circumstances where comprehensive expert evidence has been adduced on his behalf in the trial that his best financial interests would be met by periodical payments on an earnings index. The experts in this case all came to agree that the appropriate measure for a periodical payment in respect of future loss of **earnings** would be an earnings based measure although they differed on the appropriate measure. They continued to dispute the appropriate index for care.

## 2. Issues in the Indexation Debate

## **The Claimant's contentions**

2.1 The Claimant's case is that RPI is not an appropriate index for carer's earnings or a Claimant's own loss of earnings because it is a measure which relates to growth in prices. Historically average earnings have increased at c1.5-2% pa above prices. Failure to link a loss of **earnings** claim to an earnings index deprives the Claimant of increases in future productivity that all other workers in the Claimant's pre-accident position continue to enjoy. The **cost of care and case management** is overwhelmingly made up of labour costs in the region of 95%. Average carer's earnings are likely to continue to increase at a faster rate than prices in the future, probably in the region of 1.7% per annum. Evidence from Maggie Sargent has indicated that in her organisation care costs have increased significantly over RPI and also over AEI in recent years. The reasons for this are disparate but include the effect of the European Working Time Directive, the Care Standards Act, the Manual Handling Regulations, the minimum wage legislation, demand for care in an ageing population and the increasing professionalisation of the care system.

2.2 Once the Claimant has adduced evidence that RPI as an index for periodical payments is inappropriate and may produce substantial under-compensation, it is a matter for the Court to determine which is a more appropriate index. The Claimants have tended to ask the Court to consider AEI, ASHE (at the mean £32,774 for male earnings in 2006, or at the median £25,769), or ASHE6115 at the appropriate percentile matched to the

averaged hourly rate in the actual care regime. Other ASHE classifications may be more appropriate for loss of earnings such as SOC1 (£53,879 in 2006) if the Claimant was likely to be a relatively high paid manager.

2.3 The Claimants have accepted that there is no specific index/measure relating to the costs of employing carers in the private sector in the specific area where the Claimant lives and therefore the Court needs to determine the comparative value of different measures or indices to choose the best or least worst.

2.4 English insurers are able to, in the majority of cases, self-fund and the Claimant can obtain the protection of the Financial Compensation Services Scheme. The MIB are now considered by the court to be a relatively secure provider and the NHSLA/NHS Trusts agreement permits continuity of periodical payments from the health budgets. It is accepted that a difficulty arises with foreign insurers who would not come under the FCSS umbrella. It is also accepted that at present there are no annuities on the market linked to AEI/ASHE and accordingly the solution for a foreign insurer would be to purchase an annuity link to RPI plus a fixed percentage, say 1.7%,. In this context the Government actuary has assessed earnings increases as likely to exceed prices by a margin of 1.5-2%.

2.5 Failure to link periodical payments to an earnings index both in respect of care/case management and earnings would produce significant under-compensation and undermine the 100% principle.

### **3. The Defendant's Contentions and the Claimant's Responses**

#### **3.1 Burden of Proof**

It is for the Claimant to not only adduce evidence on indexation but to opt for a specific index when making an application under Section 2(9).

#### **Response**

This line of argument was rejected by Swift J who determined that the function of the Court was to see what index best suited the Claimant's needs and to determine what was appropriate, fair and reasonable to ensure the value of the index was maintained over the whole of the period for which it was required. This was not a matter to be resolved by appeals to the burden of proof as once the Claimant had adduced evidence the RPI was potentially unsuitable the Court would look at all indices to determine which was the more appropriate.

#### **3.2 Exceptionality**

Section 2(9) should only be used in exceptional cases as RPI is the default position under the Act.

#### **Response**

First instance Courts are bound by **Flora** which rejected this proposition. The House of Lords may indicate otherwise but the wording of the Statute appears to be relatively straightforward to construe.

### **3.3 Overcompensation of Other Heads**

The Court should consider the benefit to the Claimant of other heads linked to RPI which out perform price inflation. The main example is the accommodation claim that typically occurs in catastrophic cases. House inflation has increased at approximately 2.5% pa over AEI in the last 25 years. This should lead the Court to question whether such “overcompensation” should be notionally off-set against the total award or alternatively bring into question the appropriateness of having some heads of claim linked to RPI and others to an earnings measure, so-called cherry picking.

### **Response**

Swift J rejected this line of reasoning on the basis that there was no overcompensation as the Roberts v Johnstone [1989] QB 878 claim has been endorsed by the House of Lords in Wells v Wells and accordingly the appellate Courts have deemed that the 100% principle( and impliedly no more than 100%) applies to accommodation claims. Further, as a matter of practice, any value to the Claimant cannot be realised by him but inures principally to the benefit of his Estate. Equity Release schemes are available but usually from the age of 55 or above and the financial markets have not yet

responded to cases of shortened life expectancy or altered accommodation. Further, given the way in which accommodation claims are structured through Roberts v Johnstone a Claimant is always required to expend substantial parts of his general damages and/or loss of earnings to purchase the accommodation and it is not immediately therefore obvious as to why the Claimant has a personal advantage. In any event, as a matter of principle, offsetting offends the reasoning in Parry v Cleaver [1970] AC1 (per Lord Reid 20g-21c) and Longden v British Coal Corporation [1998] AC 653 (per Lord Hope at 663d-664) which determined that a perceived benefit or credit in one head of loss (in this case accommodation) cannot be offset against a loss in another head of claim (such as care). It is also arguable that offsetting is contrary to the principle that a Court does not look at what the Claimant has or will spend his money on (Wells v Wells [1999] AC 345 per Lord Clyde at 394h, Lim Poh Choo v Camden & Islington Area Health Authority [1980] AC 174).

### **3.4 Distributive Justice**

The NHSLA in Thompstone adduced evidence that linking periodical payments to an earnings index would cost the National Health Service something in the region of £1.678bn, approximately £255m per annum. Accordingly the Court should invoke the concept of distributive justice as set out by Lord Hoffman in White v Chief Constable of South Yorkshire [1999] 2AC 455 and Lord Steyn in McFarlane v Tayside Health Board [2002] 2AC 59. This engages a concept that if public opinion was consulted it would be of the clear view that notwithstanding the grievous nature of those

catastrophically injured they should not receive full compensation because of shared democratic notions of what is fair, just and reasonable in society with a national health system.

## **Response**

Mrs Justice Swift dispensed with this argument as essentially having little to do with the facts on indexation. It is essentially an argument over affordability. It is well settled law that the issue of affordability is not one which the Court can properly take into account (Heil v Rankin [2001]QB 272, Wells v Wells ). Swift J said it was not just or indeed practicable for the Courts to determine the perception of where justice would lie in the public's view. The concept of distributive justice (rooted in Aristotle's Nicomachean Ethics, book V) has been analysed by Brooke LJ in Parkinson v St James NHS Trust [2002] QB 266. He indicated that it would only be exceptionally that there would be a need to recourse to this principle rather than the legal concept of fair, just and reasonable. Adrian Whitfield QC has recently persuaded the Court in Hayhurst v Cambridge University Hospitals NHS Trust that this concept of distributive justice has in fact nothing to do whatsoever with compensation in Aristotle's ethics and the Court disallowed the Defendant's Application in that case to adduce actuarial evidence on the issue of so called distributive justice. Similarly in RH v United Bristol Healthcare NHS Trust [2007] EWHC 251 QB Mr Justice Owen refused permission to the Defendants to adduce evidence on distributive justice as the issue, if relevant at all, could be dealt with by submissions on principle. It is obviously open to the House of Lords to take a wider perspective on this issue. Even if the argument was applicable to the

NHSLA (which seems to be doubtful) it is difficult to see how it could apply to a general insurer.

### **3.5 Methodological Attacks on the Indices/Measures**

#### **5.1 AEI**

This is a measure of earnings data on an aggregate basis which is indicative of movements in the whole of the economy and therefore not to any particular sector such as carers. A periodical payment index should reflect hourly rates and AEI does not do this. Further AEI is skewed towards higher earnings at the mean because the effect of a small number of very high earners. It also excludes the self-employed and those employers employing less than 20 employees.

#### **Response**

Although a measure of a rate of increase AEI can easily be turned into an actual figure such as ASHE mean. It is accepted that at the lower hourly rates for care AEI has the potential for slight overcompensation although this is much less than the substantial undercompensation by using RPI. AEI is a long-standing and well respected measure which is shortly to be used to index pensions. On the facts of Thompstone Swift J did not prefer AEI because of its potential to overcompensation. This will be a question of fact depending

on the hourly rate for care. With respect to earnings losses AEI may well be an appropriate index depending on the likely level of earnings of the Claimant.

### **5.2 ASHE (mean, median or centiles)**

ASHE has only been available since 1998, it is an annual survey of 1% of all employees amounting to a sample of 240,000 collected in April, published in October and confirmed in the October the following year. As with AEI using ASHE at the mean or average can create a distortion because of the effect of high earners. Using ASHE median does not take into account so-called pay drift and productivity improvements which can lead to costs in a Claimant's care package being lower than costs in the general care market.

### **Response**

ASHE is a well respected aggregate measure replacing the NES and is relatively familiar to lawyers. The median may be a better measure than the mean for the same reasons concerning AEI namely it avoids the potential to over compensate due to the effect of high earners. It remains the most comprehensive sample of inflation on the level of earnings in Great Britain. The data can be used on an hourly or an annual basis annual wage basis and can be analysed by regions.

### **5.3 ASHE 6115**

The sample for ASHE 6115 is relatively small and the data shows substantial annual fluctuations indicating that the index is volatile. It is not known what

the precise composition of the sample is but it is probably dominated by local authority workers and workers caring for the elderly in residential homes and this may not therefore match home-based carers earnings. Reclassification is due in 2010 which could produce difficulties if, as is likely, home-based carers are put into a separate occupational classification. Like all of the ASHE data it fails to take into account pay drift and productivity. Difficulties arise in calculating the average hourly rate. For example, averaging the hourly rate between days, nights and weekends raises the issue as to whether a night sleeper should be treated as six hours for which they are paid or for ten hours for which they are actually on the premises.

## **Response**

The sample is a valid and reliable one produced by the ONS and conforms to statistical norms and no expert has yet made any proper methodological attack upon it. 6115 is the closest match there is to carers' earnings.

In some cases the Defendants have attempted to adduce evidence to counter Maggie Sargent's evidence on the cost of care in recent years. For example, Barbara Scandrett from Complete Case Management Limited has indicated that in her organisation, contrary to Maggie Sargent's experience, they have managed to produce care packages over time running at or below RPI. However her analysis is based upon four clients only out of c17 or which are cared for at home.

What the Defendants describe as volatility in the index may be construed as the index being a reliable and valid one flexible enough to pick up changes in

the care market such as the effect of the Working Time Regulations, the Care Standards Act and increasing use of immigrant workers.

The concept of pay drift is probably a red herring. Pay drift refers to the differences between wage settlements reached by agreement in the public sector principally affecting Local Authority workers and actual increases in the rate of pay in that sector. The two rates are different for a number of reasons such as service based increments, productivity agreements, bonuses, and pay restructuring. The fallacy of this argument is that it assumes that the Claimant employing carers in his own home will somehow be immune to the effects of wages in the larger public sector. On the contrary it is likely that if a Claimant wishes to keep a high quality carer or maintain the quality of general carers he will have to pay the market rate which will be influenced by what carers could obtain both in terms of pay and conditions elsewhere such as in the public sector.

As to productivity few examples have been provided by the Defendants as indicating why over time the level of care will decline because of technological or other changes. Most Claimants already have the benefit of up to date technology in the form of beds, mattresses, chairs and environmental controls. Those with directly employed carers have also obtained the productivity which can accrue from moving away from agency-based care.

Reclassification is likely to occur in ASHE 6115 but the ONS has indicated that they intend to obtain two years' data during the years of reclassification so that if carers are put into a new category on the basis of them working at home they can be traced and the appropriate percentile in the new occupational category easily ascertained.

Once the Court decides on how to calculate night sleeping care it is a matter of simplicity to construct an average hourly rate and the correct decile for ASHE 6115 could be read off from a table published in Facts and Figures updated annually

(Swift J also dealt with other technical problems such as the 18 month delay between the collection of ASHE data and publication in her Judgment at p.134-35.

## **SUMMARY**

4. These are the main arguments used by both parties in this issue and no doubt other ones will emerge over time. It would appear at present that the Claimants are obtaining an ascendancy on this issue particularly in the form of the quality of the expert evidence they have been able to adduce. What the Court of Appeal or possibly the House of Lords will make of the issue remains to be seen. So far the indexation issue has been associated with catastrophically injured Claimants. In principle, particularly with respect to loss of earnings, there is no reason why the argument should not be applied to cases where there is a substantial loss of earnings over a substantial period of time.

**Frank Burton QC**

**24 April 2007**



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## **5<sup>th</sup> EU Directive on Motor Insurance** **Harry Steinberg**

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## **The Fifth EU Directive on Motor Insurance**

### **“The reasoned offer procedure”**

1. On 11<sup>th</sup> May 2005, the Council of the European Union adopted the Fifth Directive on motor insurance (Directive 2005/14/EC). The directive came into force on 11<sup>th</sup> June 2005 (the date of publication in the Official Journal of the European Union) and Member States must implement it by 11<sup>th</sup> June 2007<sup>1</sup>.
2. The Fifth Directive covers a wide range of motor-insurance topics. It contains some potentially important provisions relating to personal injury claims.
3. Significantly, it extends the scope of the Fourth Directive on Motor Insurance (2000/26/EC). It is therefore necessary first to consider the impact of the Fourth Directive.

### The Fourth Directive

4. One of the aims of the Fourth Directive was to make it easier for an EU resident, who had been the victim of a motor vehicle accident in another member state, to pursue a claim for compensation without the difficulties and delays encountered in dealing with an unfamiliar legal process.
5. Perhaps the most significant feature, in this context, was the establishment of a direct cause of action for a person injured in an accident abroad against the motor insurers of the person responsible for the accident.
6. This direct cause of action against insurers was introduced in the UK not just in these circumstances, but in all claims arising from a road traffic accidents, domestic or cross-border, by The European Communities (Rights against Insurers) Regulations 2002.
7. The Fourth Directive envisaged the “reasoned offer procedure” to supplement the direct cause of action. It was introduced as a practical measure to help achieve the ambition of swift and simple community-wide compensation.

#### The reasoned offer procedure

8. The twofold aim of the reasoned-offer procedure was (a) to ensure that those injured abroad were compensated quickly and (b) to establish an efficient system of compensation that kept legal costs to a minimum.<sup>2</sup>

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<sup>1</sup> See Article 6 of the Fifth Directive.

<sup>2</sup> See Proposal for the Fifth Directive, Commission European Communities, 2002/0124 (COD), paragraph 1.2.

9. The framework of the “reasoned offer” procedure was set out in Article 4 of the Fourth Directive in the following terms:

“... 6. The Member States shall create a duty, backed by appropriate, effective and systematic financial or equivalent administrative penalties, to the effect that, within three months of the date when the injured party presented his claim for compensation either directly to the insurance undertaking of the person who caused the accident or to its claims representative:

(a) the insurance undertaking of the person who caused the accident or his claims representative is required to make a reasoned offer of compensation in cases where liability is not contested and the damages have been quantified, or

(b) the insurance undertaking to whom the claim for compensation has been addressed or his claims representative is required to provide a reasoned reply to the points made in the claim in cases where liability is denied or has not been clearly determined or the damages have not been fully quantified.

Member States shall adopt provisions to ensure that where the offer is not made within the three-month time-limit, interest shall be payable on the amount of compensation offered by the insurance undertaking or awarded by the court to the injured party”

#### Implementation of the reasoned offer procedure

10. The provisions of the Fourth Directive were implemented in the UK through a mixture of primary and secondary legislation:

(1) The Financial Services and Markets Act 2000; under sections 138, 156 and 157(1), the FSA can implement the Fourth Directive through rules and guidance;

(2) The Financial Services and Markets Act 2000 (Fourth Motor Insurance Directive) Regulations 2002 (SI No.2706); introduced by the Treasury Department, in accordance with its powers under the above Act, to enable the FSA rules to require insurers to make interest payments. Further, these regulations provided

that contravention of the new rule (under the Fourth Directive) regarding timely reply will be actionable and those contravening the rule will be required to pay interest.

11. Thus the FSA was the body responsible for the implementation of Article 4 of the Fourth Directive.
12. The FSA has achieved implementation of the reasoned offer procedure via the Insurance Conduct of Business sourcebook (the "ICOB"). Chapter 7, in particular ICOB 7.6, deals with motor-vehicle liability insurers.

The reasoned offer procedure under the Insurance Conduct of Business sourcebook

13. The reasoned offer procedure was introduced by the ICOB rules. The material provisions are as follows:

ICOB 7.6.8R:

(1) Within three months of receipt of a claim for damages from an injured party, or his representative, the motor vehicle liability insurer must (directly, or through a claims representative):

- (a) make a reasoned offer of settlement if liability is admitted and damages have been fully quantified; or
- (b) provide a reasoned reply to the points made in the injured party's claim if liability is denied, or not admitted, or the claim for damages has not been fully quantified.

(2) If liability is initially denied, or not admitted, within three months of any subsequent admission of liability, the motor vehicle liability insurer must (directly, or through a claims representative) make a reasoned offer of settlement, if, by that time, the relevant claim for damages has been fully quantified.

(3) If an injured party's claim for damages is not fully quantified when it is first made, within three months of the subsequent receipt of a fully quantified claim for damages, the motor vehicle liability insurer must (directly, or

through a claims representative) make a reasoned offer of damages, if liability is admitted at that time.

(4) A claim for damages will be fully quantified under (1)(a), (2) or (3) when the injured party provides written evidence which substantiates or supports the amounts claimed.

#### ICOB 7.6.9R:

(1) If the motor vehicle liability insurer, or its claims representative, does not comply with ICOB 7.6.8 R(1)(a), (2) or (3), the motor vehicle liability insurer must pay simple interest on any damages eventually paid, unless interest is awarded by any tribunal which determines the injured party's claim.

(2) If (1) applies, the amount of interest that the motor vehicle liability insurer must pay must be calculated as follows:

(a) the interest calculation period begins three months after:

- (i) receipt of the claim for damages, if the motor vehicle liability insurer or its claims representative breaches ICOB 7.6.8 R(1)(a); or
- (ii) any subsequent admission of liability, if the motor vehicle liability insurer or its claims representative complies with ICOB 7.6.8 R(1)(a) but breaches ICOB 7.6.8 R(2); or
- (iii) the subsequent receipt of a fully quantified claim for damages, if the motor vehicle liability insurer or its claims representative complies with ICOB 7.6.8 R(1)(a) and (2) but breaches ICOB 7.6.8 R(3); and

(b) the interest calculation period ends on the date when the motor vehicle liability insurer pays compensation to the injured party, or the injured party's authorised representative;

(c) the interest rate to be applied throughout the period in (a) to (b) is the Bank of England's base rate (from time to time), plus four per cent.

#### ICOB 7.6.10R:

A motor vehicle liability insurer will be taken to have received a claim, or a fully quantified claim, for damages when that claim, or fully quantified claim, for damages is delivered to the motor vehicle liability insurer, or a claims representative, by any person by any method of delivery which is lawful in the motor vehicle liability insurer's, or its claims representative's, respective State of residence or establishment.

14. These provisions do not restrict or interfere with the injured party's legal rights against the person who actually caused the accident (or their motor insurers); see ICOB 7.6.11.

## Status of the Insurance Conduct of Business sourcebook

15. The Insurance Code of Business sourcebook is part of the FSA handbook. The FSA's power to make such rules derives from section 138 of the Financial Services and Markets Act 2000. This was the section under which ICOB 7.6.8 was established. Provisions made under section 138 are therefore deemed "general rules".
16. Under section 150 of the 2000 Act, a breach of the rules by an insurer is actionable at the suit of a private person who suffers loss as a result. In other words, a claimant can bring a claim for damages against an insurer who fails to comply with the procedure. This is the means by which the provisions can be enforced.

## The Fifth Directive

17. Currently, the reasoned offer procedure applies only to those cases where an injured person had a claim arising from an accident occurring in a European Union member state other than their country of residence which was caused by a vehicle normally based and insured in a Member State other than that of their residence.
18. Article 4e of the Fifth Directive provides that Member States "shall establish the procedure provided for in Article 4(6) [of the Fourth Directive] for the settlement of claims arising from any accident caused by a vehicle covered by insurance..." (emphasis added). The effect is to apply this same claims settlement procedure to all third party motor insurance claims.
19. The reasoned offer procedure will thus apply where a UK resident has a claim resulting from an accident in the UK.

20. The Fifth Directive has not yet been implemented through UK legislation, but the FSA has already published its proposed amendments to the ICOB. The amendments apply in relation to claims received after 11<sup>th</sup> June 2007.
21. It is worth stressing here that the key event for the applicability of the new procedure is the date on which the claim is received rather than the date of the accident.
22. The amendment to ICOB is simply to extend the procedure, laid out by rules 7.6.8 to 7.6.10 (see above), to all claims for damages caused by vehicles based in the UK.
23. It is apparent from the narrow scope of the proposed amendments, that the FSA intends that the existing reasoned offer procedure, established by the ICOB as a result of the implementation of the Fourth Directive in respect of cross-border claims, shall simply be applied in the same way to exclusively domestic claims.

#### The mechanics of the reasoned offer procedure

24. The trigger for the procedure is receipt of a letter of claim. The procedure will then be as follows:
  - (1) Where the insurer admits liability and damages have been fully quantified, the insurer must make a reasoned offer of settlement within three months of receipt of the claim; ICOB7.6.8R(1)
  - (2) If liability is denied or not admitted, there must be a reasoned reply within three months to the points made in the claim;

- (3) If liability was initially denied (or not admitted) but is subsequently admitted, they must make a reasoned offer of settlement (if the claim has been fully quantified) within three months of the subsequent admission; ICOB 7.6.8R(2);
- (4) If the claim was not fully quantified at the outset, but is fully quantified at a later stage (and liability is admitted) the insurer must make a reasoned offer within three months of the receipt of the fully quantified claim; ICOB 7.6.8R(3);
- (5) A failure to comply with the procedure will attract an award of interest “on any damages eventually paid”, unless determined by a Court, at 4% above base rate;
- (6) In the event of a breach of the rules, interest will run from a date three months after the date on which liability had been admitted and the claim had been fully quantified (i.e. the date by which a reasoned offer should have been made under the rules).

### The likely impact

25. In the event that insurers fail to comply with the reasoned offer procedure, the Fifth Directive makes interest recoverable outside of litigation. This interest will be awarded at an enhanced rate.
26. It should be noted, however, that interest under this procedure runs from the date of the breach of the rules not, as is usual in civil proceedings, from the date of loss.

27. The reasoned offer procedure imposes a requirement on insurers to give a reasoned offer or reply within 3 months of the letter of claim. This goes further than the pre-action protocol for personal injury claim, which merely requires an answer on the question of liability.
28. To comply with the ICOB, it appears that the insurers need to make an actual offer. And these provisions, unlike the pre-action protocol, will be backed up by the threat of interest penalties at 4% above base rate.
29. If the insurer initially denies (or does not admit) liability, but does so at a later stage (say when further evidence has been obtained) the rules require the insurer to make a reasoned offer if the claim has been fully quantified. Similarly, if an injured party fails to quantify the claim at the outset, but does so at a later stage, the procedure is again invoked.
30. Perversely, one of the effects of the Fifth Directive may be to discourage early compromise on liability. The new procedure, and therefore the potential interest penalties, applies only where liability is admitted.

### Potential problems

31. The proper interpretation of the reasoned offer procedure is likely to be the contentious. The ambiguity of the ICOB wording may generate much argument.

*“Fully quantified”*

32. There is likely to be much debate about the meaning of “fully quantified”. This phrase itself appears to be a mis-implementation of the Fourth Directive, which imposed a requirement on the insurer to make a reasoned offer where liability had been agreed and the claim had been quantified.
33. ICOB 7.6.8(4)R states that a claim will be fully quantified “when the injured party provides written evidence which substantiates or supports the amounts claimed.” This places the onus on the claimant to provide evidence, but the definition is too wide to be of any real use. Evidence that will suffice to *support* a claim may not go far enough to *substantiate* it. And how strong does the evidence need to be? Must there be proof on a balance of probabilities?
34. The phrase “fully quantified” is so vague that the possible arguments seem almost endless. Is a claim fully quantified only if the whole claim has been established? Or is each head of loss to be treated separately? Conversely, if the whole claim has to be substantiated for the claim to be fully quantified, it is difficult to see how the procedure could ever be invoked.

*“Written evidence”*

35. The terms used to define “fully quantified” give rise to further issues. Would a schedule of loss, verified by a statement of truth, amount to *written evidence* under the procedure? A verified schedule of loss is considered to be evidence for certain purposes under the CPR, but it is difficult to see how this would support or substantiate the quantification of a claim. A schedule of loss usually does no more than set out that which is being claimed.

*“Reasoned offer”*

36. The Fifth Directive requires insurers to make *reasoned* offers of settlement. This is not necessarily the same as saying that the offer must be *reasonable*.

*“Unless interest is awarded by any tribunal”*

37. This phrase, which appears at ICOB 7.6.9R(1), appears to suggest that the award of interest by a Court (or other judicial tribunal) would oust the interest provisions under the procedure. It may be, however, that Courts will be guided by the procedure (and the provision of enhanced rates) when exercising their discretion as to interest.

Conclusion

38. The new reasoned offer procedure will provide the opportunity for claimants to apply pressure on insurers before the litigation process has begun.
39. If a case is prepared properly, and sufficient evidence is gathered in advance of the letter of claim, the interest penalties could become a potent new weapon.
40. Ultimately, however, the vagueness and ambiguity of the FSA rules will probably nullify the intended effect of the directive.

12 King's Bench Walk  
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Harry Steinberg  
24<sup>th</sup> April 2007



# The Fifth EU Directive on Motor Insurance

“The reasoned offer procedure”

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**Name – Harry Steinberg**

**Date – 26<sup>th</sup> April 2007**

# Adoption and Implementation

- ❑ Adopted by Council of EU on 11<sup>th</sup> May 2005
- ❑ Came into force 11<sup>th</sup> June 2005
- ❑ Member States must implement by 11<sup>th</sup> June 2007

- ❑ Wide range of motor-insurance topics.
- ❑ Potentially important provisions relating to personal injury claims
- ❑ Widens the scope of the Fourth Directive

# The Fourth Directive

- ❑ To make it easier to obtain compensation for accidents in other member states.
- ❑ Established direct cause of action for a person injured in an accident abroad against motor insurers.
- ❑ Implemented in UK by The European Communities (Rights against Insurers) Regulations 2002.
- ❑ The Fourth Directive envisaged the “reasoned offer procedure”

# The reasoned offer procedure

## The idea....

- ❑ Article 4(6)
- ❑ That within 3 months of presentation of a claim the insurer must:
  - a. Make a reasoned offer if liability is admitted and the claim is fully quantified*

Or if not ...

*b. Give a reasoned reply*

- ❑ Enforced by interest penalties.

# The reasoned offer procedure Implementation...

- ❑ FSA was the body responsible
- ❑ Procedure introduced via the Insurance Conduct of Business sourcebook (“ICOB”)
- ❑ Part of the FSA handbook

# The reasoned offer procedure the rules...

- ❑ ICOB 7.6.8R
- ❑ ICOB 7.6.9R

- ❑ Section 138 of the Financial Services and Markets Act 2000
- ❑ “General Rules”
- ❑ A claimant can bring a claim for damages against an insurer who fails to comply with the procedure; Section 150

# The Fifth Directive

- ❑ Extends reasoned offer procedure to domestic claims
- ❑ Will therefore apply where a UK resident has a claim for an accident in the UK.
- ❑ Applies to claims **received** after 11<sup>th</sup> June 2007.

# The reasoned offer procedure Mechanics...

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- ❑ The trigger for the procedure is receipt of a letter of claim...

## More Mechanics...

- ❑ Where liability is admitted and damages fully quantified, the insurer must make a reasoned offer of settlement within three months; ICOB7.6.8R(1)
- ❑ If liability is not admitted, there must be a reasoned reply within three months;
- ❑ If liability is subsequently admitted, they must make a reasoned offer of settlement within three months; ICOB 7.6.8R(2);
- ❑ If the claim is fully quantified at a later stage the insurer must make a reasoned offer within three months of quantification ICOB 7.6.8R(3);

- ❑ A failure to comply will attract an award of interest “on any damages eventually paid”, unless determined by a Court, at 4% above base rate.
- ❑ Interest will run from a date three months after the date on which liability had been admitted and the claim had been fully quantified.

- ❑ Insurers need to make an actual offer
- ❑ Interest recoverable outside of litigation
- ❑ This interest will be awarded at an enhanced rate
- ❑ Interest penalties apply only where liability is admitted (ICOB 7.6.9 R(1))
- ❑ No enforcement of reasoned reply

# Potential Problems...

- ❑ The proper interpretation is likely to be contentious.
- ❑ Ambiguity of ICOB wording may generate argument.
  - “Fully Quantified”
  - “Written Evidence”
  - “Reasoned Offer”
  - “Unless interest is awarded by any tribunal”

- ❑ Possible advantages where –
  - (a) liability is admitted, and
  - (b) the claim can be fully quantified at an early stage
  
- ❑ Necessary to prepare in advance and gather evidence early

## *But...*

- ❑ Vagueness and ambiguity of FSA rules will probably nullify the intended effect of the directive.



12KBW Seminar: Maximising Damages – Annual Claimant Conference  
Thursday 26<sup>th</sup> April 2007

## **Multipliers and the New Ogden Tables** **Richard Methuen QC**

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# 12

King's Bench Walk

## Multipliers

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**Richard Methuen QC**

**April 2007**

- ❑ Tables 1-26
  - Discount for mortality – the Tables in the sixth edition are based on average life expectancy projections from 2004 based population projections
  - And discount for accelerated receipt – current rate 2.5%
  
- ❑ Tables 27 and 28
  - Discount for accelerated receipt only
  
- ❑ The Tables do not take into account reduced life expectancy or other contingencies (unemployment, ill-health etc)

- What is the Claimant's date of birth?
- What is his life expectancy?

- Factors that should alert us to the possibility of reduced life expectancy include
  - Immobility – single biggest factor
  - Cognitive and intellectual dysfunction
  - Swallowing problems and tube feeding
  - Epilepsy
  - Incontinence
  - Other physical factors related or unrelated to the accident – eg heart, breathing or visual problems
  - Lifestyle – drugs, alcohol etc

- ❑ Medical opinion on life expectancy
  - Usually neurologist or spinal expert
  - Statistical evidence may be relevant and admissible but best not used on its own but rather to inform the views of the clinicians **Royal Victoria Infirmary** (2002) Lloyd's Reports Medical 282
  - Make sure expert is using the most up to date life tables – current latest Facts and Figures 2006 page 115
  - Be wary of the expert who says that life expectancy is reduced by a certain percentage – risk of pessimism bias
  - Check precisely what the expert is saying – if it is said that a 23 year old tetraplegic will live to 72, does that take into account fatal accidents or diseases unrelated to the injuries caused by the accident

## Translation of life expectancy into a multiplier

- ❑ Table 1 if life expectancy is normal
- ❑ But if reduced, Table 28 or Table 1, and how is Table 1 used?
- ❑ If life expectancy is reduced to a certain age and all factors have been taken into account including risks of unrelated fatal accidents or illnesses then use Table 28 – **Royal Victoria** case – eg 23 year old male will live to 72 - multiplier is 28.42
- ❑ If life expectancy is reduced by a specified number of years then use Table 1 in the following way – 23 year old male whose life expectancy is reduced by 3 years – use Table 1, add 3 years to his age, assume he is 26 – multiplier 29.88
- ❑ In a small minority of cases the evidence may not be so clear cut – Defendants like **Tinsley v Sarkar** (2006) PIQR Q1

- ❑ 23 year old male
- ❑ Life expectancy to 72 – 49 years
- ❑ Multiplier 28.42 – Table 28
- ❑ Needs £100,000pa care for next 10 years and £125,000pa thereafter
- ❑ Multiplier for 10 years = 8.86 – Table 28
  - $£100,000 \times 8.86 = £886,000$
  - $£125,000 \times 19.56 (28.42 - 8.86) = £2,445,000$
  - Total £3,331,000

## Trickier split multiplier

- ❑ Male of 23
  - would have worked to 65 - multiplier 25.52 - Table 9
  - would have earned £20,000pa for the first 10 years and £30,000pa thereafter
  
- ❑ For ease of explanation contingencies other than mortality are ignored
  
- ❑ The overall period is 42 years for which a Table 28 multiplier is 26.14
  
- ❑ Therefore
  - $£20,000 \times 8.65 (8.86 \times 25.52 \div 26.14) = £173,000$
  - $£30,000 \times 16.87 (25.52 - 8.65) = £506,100$
  - Total - £679,100

- ❑ Male of 23
- ❑ Life expectancy to 72 – a further 49 years
- ❑ Needs a powered wheelchair costing £10,000
- ❑ Replacement every 5 years
- ❑ For a 5 year replacement over 49 years the periodic multiplier is 5.10 – Facts and Figures 2006 page 17
- ❑ Therefore
  - Capital cost - £10,000
  - Replacement cost -  $£10,000 \times 5.10 = £51,000$
  - Total = £61,000

- ❑ Same facts as the last example but he will not need his first wheelchair for 5 years
- ❑ 5 year replacement over 44 years – multiplier 4.78
- ❑ Therefore
  - Capital cost - £10,000
  - Replacement cost - £10,000 x 4.78 = £47,800
  - Total = £57,800
- ❑ 5 years acceleration – Table 27 – 88.39%
- ❑ £57,800 x 88.39% = £51,089

- ❑ No multiplier
- ❑ Therefore all contingencies have to be deducted from the multiplicand
- ❑ 23 year old male – would have worked to 65 – earning £20,000pa
- ❑ Conventional lump sum calculation
  - $£20,000 \times 25.52 \times 92\%$  (deduction for contingencies) = £469,568
- ❑ Periodical payment calculation
  - $£20,000 \times 92\% = £18,400\text{pa}$  to age 65

- ❑ More up to date mortality rates used
  - Not much difference for loss of earnings multipliers
  - Life multipliers up for younger ages – Table 1 for 23 year old male goes up from 30.62 to 30.92
- ❑ New section on fatal accident cases
  - Inserts the courts' current approach, multipliers calculated from date of death – as well as proposals for reform, multipliers calculated from date of trial
- ❑ New section and new tables for deduction for contingencies other than mortality for loss of future earnings

## Contingencies other than mortality

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- ❑ In every case there is a risk that the individual will have spells of unemployment due to ill-health, redundancy, taking time out to have children etc
- ❑ What discount should we make to the arithmetical multiplier to reflect those risks?

- ❑ Trying to measure the difference between
  - What the Claimant would have earned but for the accident
  - What the Claimant is likely to earn now that he has been injured
  
- ❑ The difference is the damages for future loss of earnings

- ❑ Some guidance for deduction for contingencies from earnings would have achieved in any event
  - Suggestion that risks associated with type of job and geographical region
  - But suggested deductions very small and largely ignored
  
- ❑ No guidance on residual earning capacity for an injured person

- Give guidance on both issues

- ❑ Shows that the two most important factors that determine the amount of time a particular Claimant can expect to remain in employment until normal retirement age are
  - Educational attainment
  - Disability
  
- ❑ It also shows that
  - Those in work at the date of the accident are more likely to have remained in work than those unemployed on that date
  - Those in work at the date of trial are more likely to remain in work than those unemployed on that date

- There are 3 categories
  - **D** – defined as “degree or equivalent or higher” - there is further guidance as to what is equivalent
  - **GE=A** - “GCSE grades A to C up to A levels or equivalent”
  - **O** – below GCSE C, and includes no qualifications

- ❑ A person is classified as being disabled if **all three** of the following conditions in relation to the ill-health or disability are met
  - Has either a progressive illness or an illness which has or is expected to last over a year
  - **And** satisfies the Disability Discrimination Act definition that the impact of the disability substantially limits the person's ability to carry out normal day to day activities (these activities are defined)
  - **And** their condition affects either the kind or amount of paid work they can do

- ❑ There are 4
  - Table **A** - Males not disabled – loss of earnings to pension age 65
  - Table **B** - Males disabled
  - Table **C** - Females not disabled – loss of earnings to pension age 60
  - Table **D** – Females disabled
  
- ❑ Why not beyond 54?
  - Use of factors based on averages inappropriate – individual circumstances

## MALES NOT DISABLED

**Table A – Loss of Earnings to Pension Age 65**

Age at date of trial	Males – Not disabled					
	Employed			Not Employed		
	D	GE-A	O	D	GE-A	O
16-19	0.90	0.90	0.85	0.85	0.85	0.82
20-24	0.92	0.92	0.87	0.89	0.88	0.83
25-29	0.93	0.92	0.89	0.89	0.88	0.82
30-34						
35-39						
40-44						
45-49						
50						
51						
52	0.81	0.81	0.81	0.67	0.67	0.66
53	0.80	0.80	0.80	0.63	0.63	0.63
54	0.79	0.79	0.79	0.59	0.59	0.59

## MALES DISABLED

**Table B – Loss of Earnings to Pension Age 65**

Age at date of trial	Males – Disabled					
	Employed			Not Employed		
	D	GE-A	O	D	GE-A	O
16-19	0.61	0.55	0.32	0.61	0.49	0.25
20-24	0.61	0.55	0.38	0.53	0.46	0.24
25-29	0.60	0.54	0.42	0.48	0.41	0.24
30-34						
35-39						
40-44						
45-49						
50						
51						
52	0.54	0.49	0.41	0.22	0.16	0.08
53	0.54	0.49	0.42	0.21	0.15	0.07
54	0.54	0.50	0.43	0.20	0.14	0.06

# FEMALES NOT DISABLED

**Table C – Loss of Earnings to Pension Age 60**

Age at date of trial	Females – Not disabled					
	Employed			Not Employed		
	D	GE-A	O	D	GE-A	O
16-19	0.87	0.81	0.64	0.84	0.77	0.59
20-24	0.89	0.82	0.68	0.84	0.76	0.60
25-29	0.89	0.84	0.72	0.83	0.75	0.61
30-34						
35-39						
40-44						
45-49						
50						
51						
52						
53	0.83	0.83	0.81	0.50	0.41	0.32
54	0.83	0.83	0.82	0.44	0.35	0.27

# FEMALES DISABLED

**Table D – Loss of Earnings to Pension Age 60**

Age at date of trial	Females – Disabled					
	Employed			Not Employed		
	D	GE-A	O	D	GE-A	O
16-19	0.65	0.43	0.25	0.58	0.35	0.19
20-24	0.64	0.44	0.25	0.58	0.33	0.17
25-29	0.63	0.45	0.25	0.50	0.32	0.16
30-34						
35-39						
40-44						
45-49						
50						
51						
52	0.61	0.60	0.51	0.20	0.13	0.08
53	0.62	0.62	0.54	0.18	0.11	0.07
54	0.63	0.66	0.57	0.16	0.09	0.06

## Practical use of the Tables

- ❑ In many cases a two stage approach will be needed
  - What would the Claimant have earned but for the accident?
  - What is the Claimant's residual earning capacity?

- ❑ At the date of the accident
  - Male aged 23
  - No qualifications
  - Employed earning £20,000pa
  - Not disabled
  
- ❑ At the date of trial
  - Aged 26
  - Unemployed - if gets work likely to earn £10,000pa
  - Disabled

- ❑ Earnings but for the accident
  - Multiplier for a 26 year old working to 65 is 24.41
  - Deduction for contingencies to 89% - new Table A
  - Therefore
    - $£20,000 \times 24.41 \times 89\% = £434,498$
  
- ❑ Residual earning capacity
  - Same multiplier
  - Deduction – Table B to 24%
  - Therefore
    - $£10,000 \times 24.41 \times 24\% = £58,584$
  
- ❑ Loss of earnings - £375,914

- ❑ At date of accident
  - Female aged 23
  - Degree
  - Employed earning £20,000pa
  - Not disabled
  
- ❑ At date of trial
  - Aged 26
  - Employed earning the same
  - Disabled

- ❑ Earnings but for the accident
  - Multiplier for a 26 year old working to 65 is 24.67
  - Deduction for contingencies to 89% - Table C
  - Therefore
    - $£20,000 \times 24.67 \times 89\% = £439,126$
  
- ❑ Residual earning capacity
  - Same multiplier
  - Deduction - Table D to 63%
  - Therefore
    - $£20,000 \times 24.67 \times 63\% = £310,842$
  
- ❑ Loss of earnings - £128,284

- ❑ Some cases Tables of no use at all
  - Claimant may obviously have no residual earning capacity – PSV
  
  - Precise mathematical approach inapplicable – **Blamire** and **Smith** and **Manchester** still have their place
  
- ❑ If Tables are used adjusted or not then **no** Smith and Manchester

- ❑ Tables are crude
  - All disabilities lumped together
  - No distinction between short term and long term employed or unemployed
  - Ignore ill health falling short of disability
  
- ❑ So often appropriate to argue for higher or lower discounts in particular cases
  
- ❑ But useful starting point
  - Probably more so for earnings in any event than for REC