

## 14. Damages

### 14.1 Introduction

Personal injury claims usually give rise to little technical difficulty on liability. The most common issues concern negligence, breach of health and safety regulations, and contributory negligence. Disputes at trial on liability are relatively uncommon compared with disputes about damages which are a significant proportion of the work of the county court.

The assessment of damages, by contrast, has its own special rules and jargon. Below the rules and jargon of personal injury damages assessment are provided as an introduction to those who have had no prior experience in this field.

### 14.2 General damages

The first head of damages in any personal injury claim is for general damages for pain and suffering and loss of amenity (PSLA). These are damages awarded for the injury itself and for its effect on the life of the claimant. An award can only be right or wrong in the sense that it is consistent with other awards. The essential starting point are the JSB Guidelines<sup>1</sup>. This short book suggests brackets of damages taken from the case law against broad descriptions of different kinds of injury.

Advocates will seek to rely on comparable cases, drawn from sources such as Kemp & Kemp or Current Law. Old awards should be brought up to date by using an RPI adjustment, because general damages are awarded on the current value at the date of trial rather than at the date of injury. Substantial cases decided before March 2000 will require an additional increase to take account of the adjustments made by the Court of Appeal in *Heil v Rankin*<sup>2</sup>. Even in cases of lasting injury, the age and other individual characteristics of the claimant usually make surprisingly little difference to the level of general damages.

Where there are multiple injuries, it is usual to look first at the most serious injury. The addition made for another injury suffered at the same time may be less than would have been awarded for the other injury standing alone, since there is likely to be an overlap of the pain and suffering, unless the second injury is of an entirely different nature such as, for example, that between physical and psychiatric injuries. When all the relevant factors have been taken into account, the outcome is usually expressed as a single lump sum award.

### 14.3 Special damages

The award for past and future financial loss and expense is called special damages. These damages are capable of being calculated by arithmetic, although a characteristic of personal injury claims is that they often involve difficult, uncertain and imprecise predictions of the future, both of the actual future prospects for the injured claimant and of the future prospects that have been lost as a result of the injury. The usual measure of damages in tort applies: the award should be the sum of money which will restore the claimant to the position he would have been in if the wrong had not been done to him.

<sup>1</sup> OUP. The current edition is the 7th published in 2004. Reissues are published roughly every two years. A copy is usually provided on publication to every judge who hears civil claims.

<sup>2</sup> *Heil v Rankin* [2000] PIQR Q187 in which the Court of Appeal gave partial effect to a recommendation for a general increase in general damages for PSLA made by the Law Commission.

The claimant is required to set out the claims for past and future losses and expenses in a schedule which should be attached to the particulars of claim<sup>3</sup>. The defendant may reply to this, but in a serious case the extent of the claimant's final recovery, and therefore the final extent of his financial losses, may still be uncertain. The CPR make no specific provision for a revised schedule to be served, but this is almost always ordered during case management when a claim approaches trial and the final schedule should be answered by a comprehensive counter-schedule which sets out in detail the nature and extent of the disputes. It is helpful when the counter-schedule is in Scott Schedule format, but the rules do not require this and it is not always the case.

#### 14.4 Multipliers

When a lump sum of damages is awarded to compensate for a future loss, the claimant has the benefit of the money in advance. To allow for this, calculations of future loss must make a discount. The discount rate is fixed by an order of the Lord Chancellor (as he then was)<sup>4</sup> that the court should at present assume that the claimant will earn a real rate of return of 2.5%. The Ogden Tables<sup>5</sup> set out the results of actuarial calculations which take account of mortality and the rate of return in order to enable the court to select an appropriate multiplier. For example, if a 39-year-old female will suffer a loss of £2,000 per year to age 65, a calendar period of 26 years, Table 10 of the Ogden Tables gives a multiplier of 18.77 at a discount rate of 2.5%. The annual rate of loss is the multiplicand, and the award is £37,540. The Tables also help with calculating the discount for a one-off future expense such as a future need for surgery.

Two important points follow:

1. Future inflation is ignored. The award for a future loss is always made in the value of money at the date of trial. The rate of return used for the multiplier is the 'real' rate after allowing for the effect of future inflation.
2. The only factors taken into account in the Tables are mortality and the rate of return. In a claim for future loss of earnings, there are other contingencies which affect the likelihood of the claimant having had steady work to retirement age if there had been no injury: for example, risks of illness or redundancy. An additional discount to the multiplier should be made to take account of these contingencies, and the Introduction to the Ogden Tables makes some suggestions for this discount.

#### 14.5 Past loss of earnings

The assessment of past loss of earnings is in principle a simple mathematical calculation. There may be issues of fact, for example on the amount of overtime pay the claimant would have received, or possibility of promotion, or a complaint that the claimant has failed to mitigate his loss by taking reasonable steps to find alternative employment. But it is reasonable to expect that the advocates will agree as much as possible of the arithmetic, a process which is helped by the exchange of schedule and counter-schedule shortly before trial. Damages are awarded on the basis of net earnings and the damages received by the claimant are not taxed as income.

<sup>3</sup> CPR 16PD 4.2.

<sup>4</sup> The Damages (Personal Injury) Order 2001 SI 2001/2301.

<sup>5</sup> HMSO; an invaluable source is the annual PNBA publication *Facts and Figures: Tables for the Calculation of Damages*.

The claimant has to give credit for any contractual sick pay and Statutory Sick Pay he has received. If the claimant receives sick pay as a result of an injury caused by a third party, the terms on which the sick pay is given may require him to reimburse to his employer any sums recovered in a claim. If there is this obligation then the claim will include the amount of the sick pay, which is then recoverable by the claimant on behalf of his employer.

The claimant does not have to offset state benefits in the calculation of loss of earnings, because of the recoupment system explained below. He does not have to give credit for money he has received as an act of benevolence, nor for the proceeds of an insurance policy he had taken out, nor (in relation to pre-retirement age loss of earnings) for the benefit of a pension provided by the employer on early ill-health retirement caused by the accident injuries<sup>6</sup>.

#### 14.6 Future loss of earnings as a lump sum

If the claimant's capacity to earn has been lost or impaired by the accident injuries, the future loss is awarded under common law as a single lump sum which is assessed with the use of multiplier and multiplicand as explained above. The court has to make findings about the likely course of events, for example the loss of a chance of promotion, or an assessment of the remaining earning capacity that it is reasonable to impute to an injured claimant who has not yet found alternative work. These findings are worked into the calculation, allowing proportionately for uncertain losses or gains. Past facts are decided on the balance of probabilities but in assessing future chances which depend on the acts of third parties, for example a chance of promotion, the court will assess the value of the chance even if it is less than 50%<sup>7</sup>. Even where a future event is probable, there may be a discount in the assessment of damages for the contingency that the event may not happen.

Sometimes a future loss is so uncertain that the court is unable to make a meaningful multiplier/multiplicand calculation, and instead there may be a lump sum award which is a 'broad brush' estimate of the loss made without arithmetical calculation<sup>8</sup>. However this should be seen as a last resort.

#### 14.7 Loss of congenial employment

The non-financial consequences of an injury are relevant to general damages for PSLA and any special circumstances which particularly affect the individual claimant may be taken into account. For example, a keen sportsman who has to give up playing sport will receive an acknowledgement of this loss and may benefit from some increase in the award of damages. In practice however the impact of individual circumstances is relatively slight. One established exception to this rule is that a separate award may be made for the loss of a congenial form of employment. The typical case is for the loss of the camaraderie and job satisfaction of work in the Fire Service and similar professions, but the award is not limited to these categories.

##### 14.7.1 *Smith v Manchester Corporation damages*

Mrs Smith was able to return to work after suffering a wrist injury because she had a sympathetic employer, but the court accepted that if she were to lose this job for any reason

<sup>6</sup> *Parry v Cleaver* [1970] AC 1, *Smoker v London Fire etc Authority* [1991] 2 AB 502.

<sup>7</sup> *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602.

<sup>8</sup> For an example see *Blamire v South Cumbria HA* [1993] PIQR Q1.

(not necessarily an accident-related reason), it would be more difficult for her to find a new job because of her continuing symptoms and as a result she would probably have a longer period of unemployment. Although the many uncertainties make it difficult to assess the loss with any kind of accuracy, it is well established that the court should do its best to assess fair compensation for this kind of loss.

#### 14.8 Future loss as periodical payments

The single lump sum payment has the merit of certainty, but in cases of grave injury where there are substantial continuing losses or care expenses it is a system with significant disadvantages. The claimant's ability to make his damages last so that his needs will be met for his lifetime depends on the successful management of his investments and an accurate forecast of his expectation of life. The Courts Act 2003<sup>9</sup> has increased the powers of the court to include periodical payments in an award of damages. At present, consideration of periodical payments tends to be limited to large claims for grave injuries (although this need not necessarily be the case). A detailed discussion is beyond the scope of this text, save to say that in the early case management of a large claim it is worth ensuring that the parties have turned their minds to the possibility of a periodical payments order.

#### 14.9 Medical treatment

A claimant is entitled to recover the cost of private medical treatment when the treatment has been or will be on a private basis. The court must disregard, in deciding the reasonableness of medical expenses, the possibility of avoiding them by using the NHS<sup>10</sup>. Future treatment costs may need to be discounted for early payment: Table 27 of the Ogden Tables can be used to calculate the discount for a single future expense.

#### 14.10 Family care

The award for the value of care provided to an injured claimant by family and friends has become a significant element in personal injury claims in recent years. The Court of Appeal<sup>11</sup> has approved the making of such awards, even in cases of relatively minor injury. There are no fixed rules for assessment, but the usual starting point is to assess the number of hours that have actually and reasonably been spent on care, and a suitable commercial hourly rate usually in the region of £6 to £7.50. A discount is then applied to the commercial value of care, usually about 25%<sup>12</sup>. In *Giambrone* the court approved lump sum awards made in round figures which took account of, but were rather less than, the outcome of this calculation.

#### 14.11 Recovery of state benefits

The state benefits paid to a claimant as a result of his injury will be recouped in part by the government. The mechanism is to require payment from a defendant who is liable for the injury (or rather, his insurer). The liability is to repay the benefits received up to the date when the claim is resolved or for the first five years, whichever is the less. The amount will be specified in a certificate which the defendant must obtain from the Department of Work and Pensions (DWP).

<sup>9</sup> By s.100 and s.101 which amend s.2 of the Damages Act 1996.

<sup>10</sup> Section 2(4) of the Law Reform (Personal Injuries) Act 1948.

<sup>11</sup> *Giambrone v JMC Holidays* [2004] 2 All ER 891.

<sup>12</sup> *Evans v Pontypridd Roofing* [2002] PIQR Q16.

The defendant will then be entitled to offset his liability to repay the benefits against the sum needed to satisfy the claimant's judgment, subject to the limitation that each benefit can only be offset against damages awarded for the same kind of loss. This means that there is no offset against general damages for PSLA and income-type benefits, such as Income Support, can only be offset against damages for loss of earnings, and care-type benefits, such as Disability Living Allowance for Care, against damages for care<sup>13</sup>. The offset can only take effect to the extent that there is an award of damages for the same kind of loss, so it sometimes happens that an insurer has a liability to the DWP which cannot be offset, in full, against the award of damages. Contributory negligence does not reduce the defendant's liability to the DWP, or the offset against the award of damages.

The important thing is that the recoupment liability can be ignored in carrying out the assessment of damages. All that is necessary is to record the amount of recoverable benefits in the final order.

#### 14.12 Provisional damages

If there is a chance that the claimant may suffer a future deterioration in his condition, the assessment of a lump sum award will take account of the chance, but will discount the damages awarded for the chance by reference to the degree of likelihood that it will happen. The outcome is an award that must be wrong: too much if the chance does not happen, too little if it does. Instead, the court can make a provisional award of damages<sup>14</sup>, which is assessed on the assumption that the chance will not happen, while identifying a future chance which, if it happens, would entitle the claimant to return to court for further damages.

Although sound in theory, provisional awards have not proved popular. Many claimants prefer to bring their claim to a conclusion and to hope that some undeserved damages may have been included in the award. Insurers, who must reserve for unpredictable and potentially large liabilities in the distant future under a provisional damages order, also prefer finality, and are sometimes willing to pay a premium to avoid this cost and inconvenience. The frequently encountered risk that a fracture involving a weight-bearing joint may lead to the onset of osteoarthritis has been held to be a risk that is not suitable for provisional damages<sup>15</sup> and should be assessed as part of a lump sum award. Provisional damages awards are therefore uncommon.

#### 14.13 Children and patients

A claim for a child, or a person who is a patient by reason of mental incapacity, must be brought by a litigation friend and cannot be compromised without the approval of the court. The procedure is set out in Pt 21 of the CPR and its Practice Direction. (see **Chapter 13 Awards to children and patients.**)

<sup>13</sup> There is a table relating types of benefit to heads of damages in Sch 2 of the Social Security (Recovery of Benefits) Act 1997.

<sup>14</sup> Section 51 County Courts Act 1984 and CPR Pt 41.

<sup>15</sup> *Wilson v Ministry of Defence* [1991] 1 All ER 638.

### 14.14 Fatal accidents

The assessment of damages where there has been a death is a topic too complex for full discussion here. Briefly, a living claimant who faces the prospect of an early death as a result of his injury can make a claim for the net loss of income during his 'lost years'. The estate of a deceased victim can make a claim for loss and expense, including general damages for PSLA, suffered between the date of injury and the date of death. The dependants of a deceased victim can bring a claim for the loss of their dependency under the Fatal Accidents Act 1976 (FAA). An FAA claim can include the statutory award for bereavement, currently £10,000, although the scope of dependants entitled to this award is narrow, being limited to spouses and the parents of minor unmarried children. Apart from this, a dependency claim requires an assessment of the loss of support from the deceased both financially and in the services of housekeeping etc.

### 14.15 Interest

Interest is awarded on general damages for PSLA at 2% per annum from the date when the proceedings were served on the defendant. This low rate is used because the damages are assessed in the value of money at the date of trial. Interest is awarded on special damages for past loss at the special account rate, which is 6% at present, from the date of injury. Where there has been a steady stream of loss, for example a continuous loss of earnings, interest is awarded on the full sum at half the rate.