



Cayman Insurance Litigation Q1 2016 Review

Welcome to the Q1 2016 Stuarts insurance litigation review. In this edition, we address calculating future loss of earnings. Stuarts acts for a number of leading Cayman Islands Insurance Companies and specifically advises and acts for Insurers in defending large loss personal injury claims. We hope you will find the review of interest.

Calculating Future Loss of Earnings- "A snap shot"

"Though arithmetical precision is not always possible ... in estimating future pecuniary loss a judge must make certain assumptions (based upon the evidence) and certain adjustments, he is seeking to estimate a financial compensation for a financial loss. It makes sense in this context to speak of full compensation as the object of the Law". Lord Scarman, Pickett v British Rail Engineering [1980] A.C. 136 at 168B-D.

The Conventional Approach

The conventional approach is to take the figure (1) for the Plaintiff's annual earnings less the amount, if any, which he can now earn annually, and multiply this by a figure (2) which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now instead of receiving periodical payments and also to take into account any other relevant factor(s). The first figure is known as the multiplicand and the second, the multiplier.

The Multiplicand

The starting point is the annual earnings that the Plaintiff would have been earning *but for* the accident, as at the date of trial (*Auty v National Coal Board* [1985] 1 WLR 784 CA). The figure may be subject to adjustment due to the extent of incapacity or disability, depending upon appropriate medical expert evidence. So, if the Plaintiff retains some earning capacity, then a deduction needs to be made to account for his ability to earn post-accident.

The Multiplier and the Ogden Tables

The starting point for the multiplier is the number of years over which the loss is to be incurred. The multiplier for any particular loss (or phase of loss) is commonly calculated with reference to the *Ogden Tables*, which are actuarial tables representing statistical research in the UK which give the number of years over which the loss is calculated but are discounted to allow for the interest which is expected to accrue on the lump sum award.

There are different tables to use for calculating lost future earnings depending on the retirement age which applies. There are also different tables for calculating cost of care for males and females for life or for a term certain and for loss of pension. When using the appropriate table to calculate any head of loss, the age of the person and the selection of the relevant discount rates (general and specific) will result in a multiplier, which when multiplied by the multiplicand, will produce the total loss amount under that head of special damage.

The Approach of the Cayman Islands Courts

The first reported case in the Cayman Islands to calculate damages for loss of earnings with reference to the Ogden Tables was the case of *Allen v. Ebanks* [1998 CILR 190]. However it was not until the case of *Archer v. UBS (Cayman Islands) Limited* [2009 CILR 531] where the use of the tables was endorsed more generally by the Grand Court. In following the approach used in *Allen, Quin* J held that "... in the absence of actuarial tables specific to the Cayman Islands, the court would rely on the Ogden Tables to determine the appropriate multiplier to calculate future lost earnings".



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Prior to *Archer* there had been some reluctance to using the *Ogden Tables* in the Cayman Islands such as the case of *Carter (as Administratrix of the Estate of D.V. Carter, deceased) v. D.A. Dawson, A.B. Dawson, F.M. Dawson and British Caymanian Insurance Company Limited* [1998 CILR 204] where Smellie CJ held that they "... were based on information and assumptions about UK residents which did not apply to the Cayman Islands". Similarly, in *Bodden v. Solomon* [2008 CILR 385] judicial discretion was used to fix the multiplier, reduced by an appropriate notional rate of return discount and discounted further to allow for other considerations.

However, in addition to the case of *Archer* and more recently, the case of *K. Wilson and K. Wilson v. C. Ebanks and J.J. Ebanks* [2011] (1) CILR 447 has shown the Courts' increased acceptance of the *Ogden Tables*. In this case Smellie CJ held at paragraph 52 "... for the purpose of providing an appropriate multiplier once a just rate of discount is identified—the *Ogden Tables* can be a useful tool".

The discount rate for return on investment remains open to judicial discretion, but, is adopted generally as 2.5% as this is considered the reasonable rate of return to expect on investment. There are also other discount rates taken from the *Ogden Tables* which may be applied to further adjust the multiplier, to account for a variety of factors.

The application of the *Ogden Tables* was endorsed by the Court of Appeal in *Chin (as personal representatives of the Estate of Chin) v Yates* [2014] 2 CILR 196 where it was held that the Grand Court "had adopted the correct approach for calculating the respondent's loss of earnings". This was by subtracting the amount that the respondent was likely to earn in the future from the amount which he would have earned but for the collision. The Court projected both of those figures by using the *Ogden Tables*. The difference between the two figures generated was the award.

However, on appeal the award was revised as it was held that the Judge should have adjusted the multiplicand for earnings but for the accident, to account for, on the facts of the case, the likely change in those earnings before retirement. It was also held that the Judge had erred in not accounting for unrelated health issues, reducing the Plaintiff's life expectancy, which would result in an adjustment to the multiplier for expected earnings *but for* the accident. The multiplier for post-accident earnings was also revised to reflect "a fair reduction for disability". It was generally held that: "The Judge was correct to resort to the *Ogden Tables* as the ready reckoner for the calculation. However she fell into error in her unqualified acceptance of the figures in the tables and her failure to adjust the multiplier and multiplicand where the necessity arose". The Court dismissed the Respondent's/Plaintiff's cross appeal to reduce the standard 2.5% discount rate for return on investment to 0%. It was held that this was a matter for the legislature to change and to implement.

Variation from the Conventional Method

In a minority of cases, where there are a number of imponderables which make the scientific multiplier/multiplicand approach too restrictive and rigid, the Judge can choose to give a global award. This has become known as a *Blamire* award, taken from the English Court of Appeal case of *Blamire v South Cumbria Health Authority* [1993] PIQR QI.

In *Chin* the Grand Court had been correct to opt for the standard multiplier/multiplicand approach as opposed to making a *Blamire* award and it was held that "The Judge was entitled to adopt the conventional approach. There was sufficient evidence for the working assumptions to be adopted". It is noteworthy that there are no reported cases in the Cayman Islands where a *Blamire* award has been made.

Conclusion

Therefore, whilst calculating loss is no exact science, over time the law has developed and endorsed a fairly structured approach, primarily through the application of the *Ogden Tables* after careful analysis of the evidence in the hope that the awards represent an accurate reflection of the actual loss sustained. It is only in those cases where there are simply too many uncertainties should an award be considered in place of calculating loss using the conventional method.

This publication is for general guidance and is not intended to be a substitute for specific legal advice. Advice should be sought about specific circumstances. This review relates to Cayman Islands Law only as at 1 April 2016. If you would like further information please contact Richard Annette of Stuarts Humphries.



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