CLOISTERS

DAMAGES: AN OVERVIEW (PART 2)

Catriona Stirling, Cloisters

1 February 2019

AvMA Course
Clinical Negligence: Law, Practice and Procedure

1

CLOISTERS   *Topics*

1. Damages
   General Principles
   Ogden Tables
   Discount Rate

2. Life Expectancy

3. Periodical Payments after *Thompstone*

4. Local Authority Care / Reverse Indemnities

2

CLOISTERS   *Damages – General Principles*

- PSLA, interest, past and future losses
- Full compensation
- Reasonable
- Recognised in law
- C's own loss (exceptions)
- Caused by negligence
- Net loss only

3

Future Losses
- Lump Sum Now
- Losses and Expenses in Future

4

Future Losses – Discount Rate

- Why not just add up all of the future losses?
e.g. £200 physiotherapy cost for next 5 years

Year	Annual loss	Award
Year 1	£200	£200
Year 2	£200	£200
Year 3	£200	£200
Year 4	£200	£200
Year 5	£200	£200
Total	£1,000	£1,000

5

Future Losses – Discount Rate

- Claimant gets lump sum now

- For future losses – not spending it now

- Can invest it and get a return on that investment

6

The Discount Rate

Where the discount rate comes in

Set by Lord Chancellor using powers under s.1 Damages Act 1996

2.5% until 20 Mar 2017; Currently -0.75%
About to change!

7

The Discount Rate

- Need to apply a factor to the future losses to recognise the return on investment

- This factor is the discount rate

- Multipliers are different for different discount rates

- Different discount rate = different assumed rate of return on investment

8

Positive Discount Rate

- Positive discount rate
  = assumes +ve return (after inflation etc.)
- Adding future losses and awarding as lump sum = over-compensation
- e.g. £200 loss for next 5 years:

Year	Annual loss	Award
Year 1	£200	£200 x 0.9 = £180
Year 2	£200	£200 x 0.8 = £160
Year 3	£200	£200 x 0.7 = £140
Year 4	£200	£200 x 0.6 = £120
Year 5	£200	£200 x 0.5 = £100
Total	£1,000	£700

9

Slide 10

CLOISTERS

Negative Discount Rate

- Negative discount rate
  = assumes -ve return (after inflation etc.)
- Adding future losses and awarding as lump sum = under-compensation

e.g. £200 loss for next 5 years:

Year	Annual loss	Award
Year 1	£200	£200 x 1.1 = £220
Year 2	£200	£200 x 1.2 = £240
Year 3	£200	£200 x 1.3 = £260
Year 4	£200	£200 x 1.4 = £280
Year 5	£200	£200 x 1.5 = £300
Total	£1,000	£1,300

10

Slide 11

CLOISTERS

Calculation of Future Losses

- Future losses are calculated as:

  Multiplier x Multiplicand

11

Slide 12

CLOISTERS *The Ogden Tables*

- 28 Tables
- Now in 7th edition
- Come with Explanatory Notes prepared by Gov Actuary Dept (a little out of date now)
- Give multipliers for future losses
- For various different discount rates including -0.75%

2017/18

12

Slide 13

CLOISTERS

Different Types of Future Loss

- One-off losses
- Periodic losses
- Continuing for fixed period
- Continuing for life
- Loss of earnings and pension
- Losses in fatal accident claims

13

Slide 14

CLOISTERS

The Ogden Tables

- Tables 1 - 2 = Losses for Life
- Tables 3 – 14 = Loss of Earnings
- Tables 15 – 26 = Loss of Pension
- Table 27 = Discount factors
  for term certain
- Table 28 = Multipliers for
  term certain

14

Slide 15

CLOISTERS

One-Off Loss

Wheelchair costing £8,000

Needed by claimant in 5 years

Need to apply discount factor (from Table 27)

At discount rate of -0.75%, Table 27 gives discount factor of 1.0384 for 5 year deferment

So calculation is:

Cost	Multiplier (Table 27 at -0.75%)	Award
£8,000	1.0384	£8,307

NB. Can also use single payment column of Table A5, p40 F&F

15

Periodic Future Loss (1)

CLOISTERS

e.g. new mattress costing £5,000 with replacements needed every 4 years for life

Different methods:
(1) Calculate loss for each
rep separately and add together

(2) Use periodic multipliers

(3) Annualised loss

16

Periodic Future Loss (2)

CLOISTERS

Periodic Multipliers
- Table A5, p40 F&F 2018/19 (at -0.75%)
- Need to know how frequent expenditure is and over what period

e.g. £3,000 every 5 years over 32 years

Table A5 gives 6.86

Frequency	Cost	Multiplier (Tab A5)	Award
5 years	£3,000	6.86	£20,580

- NB. Need to add extra cost x 1 where immediate purchase

17

Periodic Future Loss (3)

CLOISTERS

Individual Discount Factors
- Usually easier to use periodic multipliers
- But Table A5 does not cover:
    - All intervals e.g. 9 or 11 years
    - Irregular intervals
    - Irregular amounts
- In these situations, need to do separate calculations.

NB. Again, need to add extra cost x 1 where immediate purchase

18

CLOISTERS *Periodic Future Loss (4)*

Annualised Loss

e.g. new mattress costing £3,000 with replacements needed every 4 years for life from age 24

Annual loss = £3,000 / 4 = £750pa

Lifetime multiplier = 81.75 (M) (more on this later)

Annual Cost	Multiplier (Table 1)	Award
£750	81.75	£61,312

Less accurate than periodic multipliers

19

CLOISTERS *Continuing Losses*

Fixed Period (Table 28)

OR

Continuing for Life (Table 1 or 2)

Sometimes use Table 28 multiplier for lifelong loss => more on this later

20

CLOISTERS *Losses for a Fixed Period (1)*

Use Table 28 = multiplier for term certain

e.g. chiropody costs at £500 pa for next 10 years

Annual Cost	Multiplier (Table 28 at - 0.75%)	Award
£500	10.39	£5,195

21

Losses for a Fixed Period (2)

CLOISTERS

If losses do not start straight away, need to apply discount factor from Table 27.

e.g. if the above chiropody costs were not going to start for 7 years:

Delay	Cost	Discount Factor (Table 27 at -0.75%)	Award
7 years	£5,195	1.0541	£5,476

22

Losses for Life

CLOISTERS

Use Table 1 or 2 = multiplier for lifelong loss

e.g. physiotherapy costs at £200pa for life for 32 year old man

Table 1 gives multiplier of 68.14

Annual Cost	Multiplier (Table 1 at -0.75%)	Award
£200	68.14	£13,628

23

Splitting multipliers - fixed term

CLOISTERS

e.g. £200 loss for 3 years then £500 loss for 5 years:

1. Multiplier for total period of 8 years = 8.25 (Table 28)
2. Multiplier for first period of 3 years = 3.03 (Table 28)
3. Multiplier for second period is the difference = 8.25 - 3.03 = 5.22

24

Splitting multipliers - fixed term (2)

So calculation is:

Period	Annual Loss	Multiplier (Split from Table 28)	Award
Year 1 to Year 3	£200	3.03	£606
Year 4 to Year 8	£500	5.22	£2,610
Total		8.25	£3,216

25

Splitting multipliers - loss for life

e.g. 32 year old female

£10,000 pa care costs to age 50

£20,000 pa care costs to age 60

£30,000 pa care costs for rest of life

Lifetime multiplier (Table 2 at -0.75%) is 73.54

Life expectation is 57.1 (from Table A3, p18 F&F 2018/19)

26

Splitting multipliers - loss for life (2)

- Calculate fixed term mult. (Table 28) for life expectation of 57.1 years = 71.18
- Split across different periods as before and calculate proportion of total:

Period		Multiplier (Split from Table 28)	Proportion of total multiplier
Year 1 to Year 18		19.28	0.27
Year 18 to Year 28	(=31.17-19.28)	11.89	0.17
Year 28 to Year 58	(=71.18-31.17)	40.01	0.56
Total		71.18	

27

Splitting multipliers
- loss for life (3)

- Then apply these proportions to the lifetime multiplier to get the appropriate multipliers for each period

Period			Multiplier (Split from lifetime multiplier)
Year 1 to Year 18		(= 0.27*73.54)	19.86
Year 18 to Year 28		(= 0.17*73.54)	12.50
Year 28 to Year 58		(= 0.56*73.54)	41.18
Total			73.54

28

Splitting multipliers
- loss for life (4)

- Then apply the multipliers for each period to the costs for each period:

Period	Annual loss	Multiplier (Split from lifetime multiplier)	Multiplier (Split from lifetime multiplier)
Year 1 to Year 18	£10,000	19.86	£198,600
Year 18 to Year 28	£20,000	12.50	£250,000
Year 28 to Year 58	£30,000	41.18	£1,235,400
Total			£1,684,000

29

Loss of Earnings and Pension

Can claim difference between:

EARNING CAPACITY BUT FOR INJURY
and
EARNING CAPACITY NOW
(may be zero where badly injured)

30

Loss of Earnings and Pension

CLOISTERS

To select the right Ogden table, need to know:

- Age (at trial) of claimant
- Sex of claimant
- Expected retirement age

- Tables 3-14 earnings
- Tables 15-26 pension

31

Loss of Earnings and Pension

CLOISTERS

- Then need to apply contingency discount from Tables A-D (at pp66-67 Facts & Figures 2018/19) to allow for periods of absence from workforce
- Contingency discount depends on:
  - Age at trial / sex
  - Whether employed at time of injury
  - (Likely) level of education
  - Whether within definition of disabled

32

Loss of Earnings and Pension

CLOISTERS

Worked example:

32 year old male with degree who was earning £50,000 pa before injury, expected to retire at 70.

Now disabled with earning capacity of £30,000 pa, expected to retire at 55.

33

CLOISTERS

Loss of Earnings and Pension

Multiplier for earnings 'but for' injury (Table 11) = 41.95

Contingency discount from Table A (not disabled, degree educated) = 0.92

Earning capacity but for injury
= £50,000 x 41.95 x 0.92 = £1,928,320

34

CLOISTERS

Loss of Earnings and Pension

Multiplier for earnings after injury (Table 5) = 24.67

Contingency discount from Table B (disabled, degree educated) = 0.59

Earning capacity after injury
= £30,000 x 24.67 x 0.59 = £436,659

Claim £1,928,320-£436,659 = £1,491,551

35

CLOISTERS *Fatal Accident Claims*

Claims under FAA 1976 (bereavement award, dependency claims) and LRMPA 1934 (PSLA and other losses of deceased)

Concerned here with multipliers for dependency only (claims otherwise outwith scope of paper)

36

Dependency Multipliers

Old approach:
- Multiplier fixed at time of death, <u>not</u> trial.
- Work out what Deceased's life multiplier would have been at date of <u>death.</u>
- Deduct period from death to trial
- Deducted figure was used to calculate loss to trial (past loss)
- Remaining figure was multiplier for future loss.

37

Dependency Multipliers

New approach (following Knauer v MoJ [2016] UKSC 9)
Past Loss:
- Take no. years from death to trial.
- Apply relevant discount based on Table E, Ogden Tables (p75 F&F 2018/19) to reflect risk that the Deceased may have died prior to Trial in any event.

38

Dependency Multipliers

- **Future loss to retirement:**

(1) Period Deceased would have continued to provide dependency – 0% column of Tables 3-14 using age at trial.

(2) Period Dependant would have been dependent (0% column Table 1/2 using age at trial / fixed period where child)

(3) Take shorter of the two periods

39

CLOISTERS

Dependency Multipliers

- **Future loss to retirement (cont.):**

(4) Take that period as fixed term and calculate multiplier (from Table 28)

(5) Apply adjustment from Tables A-D as for loss of earnings to reflect risk of periods out of work

(6) Apply adjustment from Table F to reflect risk that Deceased would not have survived to trial

40

CLOISTERS

Dependency Multipliers

- **Future loss from retirement:**

(1) Period Deceased would have continued to provide dependency – 0% column of Tables 1-2 using age at trial.

(2) Period Dependant would have been dependent (0% column Table 1/2 using age at trial / fixed period where child)

(3) Take shorter of the two periods

41

CLOISTERS

Dependency Multipliers

- **Future loss from retirement (cont.):**

(4) Take that period as fixed term and calculate multiplier (from Table 28).

(5) Deduct multiplier calculated for period before retirement before discount for contingencies or the risk of early death.

(6) Apply adjustment factor from Table F.

42

43

44

45

CLOISTERS — *Lifestyle Factors*

Affect life expectancy before and after injury

EVIDENCE

Allowed to adduce evidence?

46

CLOISTERS — *Lifetime Multipliers*

- Tables 1 and 2 or Table 28?

- Assessment of all factors for fixed life expectancy = Table 28

- Otherwise = Tables 1 or 2

47

CLOISTERS — *Periodical Payments*

- Why are they indexed?

48

Periodical Payments

CLOISTERS

- How are they indexed?

- Care and case management (*Thompstone)*

- Other heads of loss

49

Common Areas of Dispute

CLOISTERS

- Indexation
- Stepped payments
- Frequency / timing of payments
- Timing of uplifts
- Timing of stepped changes
- Repayment of o/s balance?

50

Local Authority Care

CLOISTERS

- Care Act 2014: LA must provide, but can charge for it – means-tested

- Calculate capital and income to assess entitlement. Disregards:
  – PI payments for first 52 weeks
  – Capital and income in PI trust / under court
  – Not deliberate avoidance measures

51

CLOISTERS   *Indemnities*

- Indemnity: security or protection against a loss or financial burden

PI context: C using state funding =>
seeks guarantee that D will meet private funding if state funding does not continue

52

CLOISTERS   *Reverse Indemnities*

- Reverse indemnity:

PI context: C claiming for private funding
=> D worried C will claim state funding in future and seeks guarantee that if C does so, D will not be required to meet cost of private funding.

53

CLOISTERS   *Peters – Court of Appeal, 2009*

- Claimant entitled to select between state and private funding

- BUT where risk of double recovery (as there was an entitlement to claim statutory funding), how should this be dealt with?

54

Peters

CLOISTERS

Court of Appeal's solution:
Peters undertaking

Deputy offered under-
taking that would apply
to Court of Protection
for limitation on authority so
that could not apply for public funds
without approval.

55

Tinsley – Court of Appeal, 2017

CLOISTERS
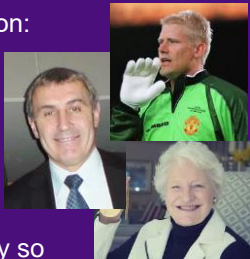
- T obtained damages on basis of private funding of care and accommodation

- Running out of money, so Deputy applied for statutory funding

56

Tinsley (cont.)

CLOISTERS

- Court of Appeal held that could obtain statutory funding even where funds left

- *Peters* obiter since finding in that case no risk of double recovery

- Undertakings in that case to protect tortfeasor from double recovery, not local authority

57

Tinsley (cont.)

- No argument in *Peters* that C had right to seek statutory funding after receipt of damages
- Not right for CoP to have burden of deciding whether C entitled to LA provision by way of deputies giving undertakings – for Admin Court
- Is *Peters* undertaking now sufficient to control risk of double recovery?

58

Questions?

59

THE END

Catriona Stirling
0207 827 4089
cs@cloisters.com

60