Finally, in cases involving moderate brain damage, where an award of £110,000 would previously have been awarded, the increase was 21.4% to £121,426.

It is important to note that post *Heil v Rankin* awards should continue to be increased in line with inflation. However, this has not occurred. In 1962 paraplaegia was valued at £25,000. Today that valuation, applying the RPI, is £470,000. The latest edition of the Judicial College Guidelines provides a bracket of £156,750 to £203,000.

1.4.2 Post *Heil v Rankin*

Post *Heil v Rankin* it was intended that awards for pain and suffering should increase in line with inflation, and that the courts should continue to keep the tariffs up to date, but as part of his 'package' of reforms.[7] Lord Justice Jackson recognised that awards for general damages were generally low and proposed that such awards should be increased by 10%. This recommendation was implemented by the decisions of the Court of Appeal in *Simmons v Castle*.[8] The outcome of these two decisions is that with effect from 1 April 2013 the proper level of general damages in all civil claims (both in tort and contract) for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, or (v) mental distress, will be 10% higher than previously, save for cases in which the claimant entered into a CFA before 1 April 2013.

A new 12th edition of the Judicial College Guidelines to reflect this increase is expected in 2013.

1.4.3 Multiple injury claims/quantification

The claimant will often suffer injuries to more than one part of his body. Assessment of damages is calculated by looking at the individual injuries, ascertaining their value, adding them up and then discounting by a factor. It is largely impressionistic. Assistance may be gained from looking at other awards for multiple injuries and then standing back and comparing them with the claimant's overall disabilities. By way of simple example, if the claimant suffers a straightforward broken wrist, the loss of his index finger and a torn cartilage in his knee, the individual awards might be approximately £3,750, £9,500 and £10,000, the total damages being £23,000, where an award of no higher than £20,000 would, perhaps, be appropriate.

However, note that the court may not always apply a discount.[9] The claimant suffered head injuries and a de-gloving injury to the left foot

7 Final Report on Civil Litigation Costs, December 2009, recommendation 10.

8 [2012] EWCA Civ 1039, and [2012] EWCA Civ 1288.

9 *George v Stagecoach SE London* [2003] EWHC 2042, [2003] All ER (D) 522 (Jul).

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together with damage to his hearing in the form of tinnitus. The general damages were assessed at £35,000 for brain injury, £20,000 for the foot injury and £4,000 for the hearing damage. The court simply aggregated those elements together to create the total damages figure with no discount as each injury was distinct and did not overlap.

The Court of Appeal provided helpful guidance in relation to cases where the injuries overlap. In *Sadler v Filipiak*[10] Pitchford LJ stated:

> 'It is, in my judgment, always necessary to stand back from the compilation of individual figures, whether assistance has been derived from comparable cases or from the (Judicial College) Guidelines advice, to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all injuries upon the injured person's recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting.'

His Lordship believed that it was probably in the majority of cases that an adjustment, which may occasionally be significant, will be necessary.

1.4.4 Asymptomatic

Pleural plaques are localised areas of fibrous tissue on the lining of the lung. In 99% of cases they are asymptomatic. They are caused through asbestos exposure. In the past, these claims were usually resolved by a settlement of £5,000 on a provisional damages basis with a right to return in the event of a contraction of one of the more sinister asbestos illnesses. There are considerably more pleural plaques cases than any other asbestos condition. Pleural plaques occur in approximately 50% of persons with heavy and prolonged exposure to asbestos.[11]

In 2006[12] the Court of Appeal overturned a decision from Holland J who found that pleural plaques cases were actionable. The claimants' argument in the eleven test cases heard in the Manchester High Court was that the aggregation of the asymptomatic plaques, in combination with the risk of developing one of the more serious long term diseases and the anxiety such a prospect understandably created, amounted to an injury which was actionable in damages. The Court of Appeal, with Lord Phillips giving the lead decision of the majority, found that despite pleural plaques 'blighting the lives' of some of the sufferers, as a matter of policy there was no legal precedent for aggregating three heads of claim which individually could not found a cause of action.

10 [2011] EWCA Civ 1728.

11 *Asbestos related lung disease* O'Reilly, McLaughlen, Beckett & Sime. Vol 75 No 5 American Family Physician 3/07.

12 *Rothwell v Chemical and Insulating Co Ltd* [2006] EWCA Civ 27.

The 'disabled' discounts in Tables B (for males) and D (for females) are fixed for particular categories of qualifying claimant, but once a claimant is deemed to be 'disabled', the tables make no allowance for differences in the severity of the claimant's disability. The Ogden Working Party suggest adjustment to the discount factor as circumstances dictate[18] and in a number of cases the Courts have addressed this aspect of the multiplier by adjusting the discount factor accordingly:

Connor v Bradman.[19] The claimant suffered a serious knee injury. He was due to undergo a knee replacement which would restrict his movement and prevent him from returning to work as a motor mechanic. He had been retraining as a taxi driver and would be able to do this after surgery. The trial judge accepted that the claimant was 'disabled' within the meaning of the Disability Discrimination Act 1995. The 'disabled' discount factor for his residual earnings according to Table B was 0.49 but the trial judge increased this to 0.655 to reflect the fact that he would be undertaking work that was compatible with his injured state.

Leesmith v Evans.[20] The claimant sustained serious injuries which prevented him from eventually working as a lighting technician. Following the accident he found employment as a theatre technician which provided a modest annual income. The 'disabled' discount factor for his residual earnings according to Table B was 0.54 but the trial judge increased this to 0.6 to reflect the fact that the multiplicand used to calculate his future loss already took account of his disability.

Sharma v Noon Products Ltd.[21] The claimant sustained injuries to his right hand while working as a machine operator. He was handicapped in a number of respects particularly in relation to work involving fine manual dexterity. Following the accident he found employment as a security guard but his annual earnings were roughly the same as pre-accident. The trial judge accepted that the claimant was 'disabled' and that his area of work was thereby reduced. The 'disabled' discount factor for his residual earnings according to Table B was 0.4 but the trial judge increased this to 0.6 reflect the fact that the claimant was now in more secure employment than he had been before the accident, and the fact that although 'disabled' the claimant was far less seriously handicapped than many others who came within that category.

2.4.2.2 Employment

The Tables provide different discount rates depending on the employment status of the claimant.

[18] See Ogden 7th edition. Section B, paras 31–33.
[19] [2007] EWHC 2789.
[20] [2008] EWHC 134.
[21] [2011] Lawtel.

The fact that a claimant was in work at the date of the accident does not necessarily determine which category he should fall into. In *Huntley v Simmonds*,[22] the claimant had a troubled past and a poor employment history with intermittent work as a builders' labourer, but he happened to be in work at the time of the accident. The trial judge accepted the defendant's argument that the claimant should not be categorised as 'employed' for that reason alone when determining the appropriate discount factor. He preferred a broad brush discount which took account of all the contingencies (other than those taken into account in Table A) in particular taking account of the claimant's pre-accident history (judgment, paragraph 134).

2.4.2.3 Older age groups

The tables do not give figures for the appropriate discount for ages above 54. The Ogden Working Party recommend that the future employment of a victim in this age range will be particularly dependent on individual circumstances.[23]

In *Fleet (Dec) v Fleet*,[24] in which the deceased died from mesothelioma at the age of 56, Mackay J rejected the defendant's submission that the appropriate discount for ages over 54 should be derived from the Tables on a straight-line basis (which would have resulted in a discount of 80%) and instead reduced the multiplier for earnings dependency by 10% on the basis that the deceased '… had a long history of employment with the same employer which is in a sound way of business and he was highly motivated and well thought of.' [paragraph 22]

The application of some of these principles is illustrated by the example given below:

Example

An able bodied man aged 40. Employed as a teacher with a degree, intending to retire at age 65. The evidence indicates that he would have been earning £25,000 pa net in his uninjured state.

(i) Multiplier to age 65 (Ogden 7th edition table 9): 18.09

(ii) Discount for contingencies other than mortality (Ogden 7th edition. Section B, Table A): 0.88

(iii) Appropriate multiplier: 0.88 × 18.09 = 15.92

(iv) Uninjured earnings: 15.92 x £25,000 = £398,000

[22] [2009] EWHC 406.
[23] 7th edition, para 42.
[24] [2009] EWHC 3166.

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the army and trained as a physiotherapist. She sought damages for loss of pension on the basis of a full 22 year army career including promotions. The defendant argued that as the average length of service for female recruits was just over six years, a pension loss claim based upon 22 years' service could not be sustained. The District Judge found that she would have completed the full 22 years' service and assessed her loss on that basis with promotion to Staff Sergeant, and then a 30% chance of promotion to Warrant Officer. On appeal, the Deputy Circuit Judge also found that the claimant would probably have completed a full term in the army and probably have reached the rank of Staff Sergeant, but was unable to assess her prospects beyond that rank.

In the Court of Appeal the defendant argued that in assessing future loss the court was required to assess the 'chance' of a particular event or events occurring and could not assess future loss on a simple balance of probabilities. The Court of Appeal agreed and noted that the judges below appeared to have misunderstood the effect of *Herring*, stating that there was no inconsistency between the decisions in *Doyle, Langford* and *Herring*:

> '... each of which simply provides an example of the application of the same principles to different factual situations. In each case the court was seeking to assess by the most appropriate means having regard to the particular circumstances of the case the chances that the claimant would have enjoyed a particular level of economic benefits had his or her working career not been interrupted or prevented by the injury in question. The most appropriate way of making that assessment may vary from case to case, but the underlying principles remain the same. Provided a fair career model is chosen as the basis for the assessment of loss of future earnings and pension entitlement, the prospects of enhanced or reduced earnings resulting from the ordinary chances of life can be allowed for by adjustments to the multiplicand and multiplier as appropriate. It is only when the court has to consider the possible effects of an unusual turn of events that would have a significant effect on earnings or pension rights that it is necessary to assess the chances of such events occurring and to assess their financial consequences.' [paragraph 24]

On the facts in *Brown,* for the reasons explained in *Herring*, it was reasonable to adopt a 22 year career in the army as the basis for assessing loss of future earnings without any reduction for the chances of the claimant failing to complete 22 years' service, although as her earnings as a physiotherapist were comparable to army pay no loss of earnings in fact arose.

However, completion of 22 years' service would have entitled the claimant to an immediate pension, whereas if she had left the army early she would have had to wait to age 60 for her pension to start. This was an unusual feature of the case that would have had a significant effect on her pension rights. The judges below had assessed the claimant's loss of pension

without making any allowance for this special factor. The Court of Appeal stated that in valuing the claimant's pension loss the chances of her completing 22 years' service therefore called for assessment and they assessed the pension loss claim afresh on the basis of the chances of her reaching 6, 12 and 22 years' service.

In the light of these decisions, it is suggested that the correct approach to valuing future loss of earnings and any significant changes in a claimant's career path is as follows:

(i) if possible, the court should attempt to do the best it can to identify the claimant's likely career path as the baseline for future loss of earnings;

(ii) any adjustment for the prospect of increased or reduced earnings can usually be dealt with by adjustment to the multiplier(s)/ multiplicand(s) as appropriate;

(iii) where there is a real chance of some change in the claimant's likely career path that would have a significant effect on earnings or pension rights the court should assess the chances of that event occurring and value the consequent increase or decrease in earnings/pension loss accordingly;

(iv) it is not necessary for that chance to be a probability, as long as it is 'real' or 'substantial';

(v) even in a case involving the assessment of the chance of a particular event occurring, it may still be appropriate to apply an additional overall discount for uncertainties and contingencies.[35]

The evidence required to support a claim that includes an increase in income because of promotion/re-deployment prospects needs particular attention. A useful starting point may be statistical information on the proportion of workers in a particular occupation or workplace who go on to obtain promotion, and when such promotion usually takes place (ie average ages for promotion in the armed forces and/or police). If available, a claimant's personnel records should always be reviewed. Thereafter, the particular characteristics of the claimant must be taken into account in determining his chances of promotion and when this might have arisen.

[35] *Collett v Smith* [2009] EWCA Civ 583; *XYZ v Portsmouth Hospitals NHS Trust* [2011] EWHC 243 at [200]; but see *Clarke v Maltby* [2010] EWHC 1201, where the approach was instead to adjust down the multiplicand to reflect contingencies other than mortality.

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5.3 EVIDENCE

The claimant has to show that he has lost employment that was congenial. Some claimants will fail to do this because they will not be able to show that their employment was enjoyable. It is therefore important that the claimant's proof of evidence is comprehensive in considering the factors that give rise to this head of damage.

This is demonstrated by the claimant in *Lane v The Personal Representatives of Deborah Lake (decd)*[4] in which the claimant construction site project manager lost his employment but was able to show the High Court Judge that he had always been a hard worker who enjoyed his work in the building industry. His Lordship stated:

> 'He told me with feeling that he loves his work, always wanted to be a carpenter and that when he was a lad he used to love going onto sites with his father. I suspect it is one of the things he misses most.'

A sum of £5,000 was awarded. The claimant was able to show that despite commencing his working life as an apprentice joiner and carpenter, he subsequently had achieved a City and Guilds Craft Certificate in Carpentry and Joinery with a credit for his written work and distinctions in assignments and on course-work assessments; and then subsequently obtained the Advanced Crafts Certificate in Carpentry once more with credits in site procedure, site practice and course-work assessment.

The need for the claimant to demonstrate the congeniality of the employment was further demonstrated in *Hanks v The Ministry of Defence*.[5] The claimant had been a naval pilot who suffered a neck injury resulting in his discharge from the Navy and ended his anticipated career of flying jets, for which he had begun training. He was able to show the court that at school he had joined the RAF section. On joining the Navy a report on his progress concluded 'during his time in the Royal Navy, Hanks has ably demonstrated he has excellent all-round qualities and an abundance of potential. He is an officer that the Service can ill-afford to lose'. Royce J accepted that he was very much looking forward to 16 years flying with the Royal Navy and thereafter working as a pilot in civil aviation. An award of £9,000 was made.

5.3.1 The proof of evidence

(1) The nature of the job;

(2) the qualifications of the claimant to perform that job;

[4] (Unreported) 18 July 2007, QBD, John Leyton Williams QC, sitting as a Judge of the High Court.

[5] [2007] EWHC 966, QB.

(3) the intellectual or physical requirements of the job that make it challenging;

(4) the level of skill that the claimant has had to acquire to perform the job;

(5) the training that he has undertaken both in-house and externally to do the job better;

(6) the career development/job prospects;

(7) the job security;

(8) the length of time that the claimant has performed the job;

(9) the environment in which the claimant performs the job;

(10) the social factors associated with the work, eg camaraderie, team working, etc;

(11) whether the job has a vocation, eg public servants;

(12) whether the job has a perceived value to the general public.

The claimant's personnel file may well provide valuable information in terms of his performance at work and his prospects. Equally it may harm his claim for damages by suggesting he is de-motivated and does not enjoy the work.

5.3.2 Witness evidence of colleagues

The claimant may well say that he enjoys a job. Supporting evidence from colleagues confirming that he does and/or that they equally do when performing the same tasks will be helpful.

5.3.3 Witness statement of the claimant's partner

Spouses are usually all too well aware of whether the injured person enjoys their work or not and can provide a succinct analysis of how much the job meant to their partner.

5.3.4 Certificates/qualifications

Documentary proof of educational/training qualifications will be within the claimant's possession and should be disclosed.

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services, the value of which for purposes of damages … is the proper and reasonable costs of supplying those needs'. He continued to conclude 'the loss is the plaintiff's loss'.

The confusion was clarified by *Hunt v Severs*[3] when Lord Bridge stated '… the reasoning in *Donnelly* diverts attention from the award's central objective of compensating the carer'. The House of Lords was concerned to ensure that the voluntary carer received recompense for his or her services. The carer husband to the injured wife was also the tortfeasor. She was prevented from obtaining damages on his behalf because he had been responsible for the cause of her injuries.

Therefore, a claim for care services provided by a relative gratuitously is justifiable and the carer is entitled to receive the monies claimed unless he is also the tortfeasor.

7.1.3 Definition of care

It is important to clarify the difference between care and services provided by a volunteer with the claimant's loss of capacity to undertake housework or other household activities (see further at Chapter 10).

Recent assistance in defining 'care' was given by May LJ in *Evans v Pontypridd Roofing Ltd.*[4] The claimant had fallen from a roof whilst he was at work and suffered a serious limitation of movement in his cervical spine. His life had been devastated by the injury and he would need help with all daily activities. His wife was his main carer. The Court of Appeal did not interfere with the trial judge's view that the claimant wanted and needed 'a chat at night' which was described as 'important pillow talk'. His wife was an emotional crutch for him. In addition, she undertook strip washing, partial washing, undresssing and re-dressing. She washed his hair, tended to his use of a commode and helped him out of and back into his chair. Also, because of the potential suicide risk, she ensured that he fell asleep before she did in order to ensure that he did not harm himself. In addition, she performed the sort of tasks that are more routine, namely the preparation and cooking of meals, shopping, laundry and jobs concerned with the maintenance of the house.

The court dismissed the approach of Stuart Smith LJ in *Fitzgerald v Ford*[5] when he stated 'in many cases the actual nursing or physical assistance may only take a few hours distributed throughout the day or night. For the rest of the time it was spent in preparation and cooking of meals, shopping, laundry, jobs concerned with the maintenance of the house, all of which have to be done for the carer and any other members of the family in any case'.

3 [1994] 2 AC 350.
4 [2001] EWCA Civ 1657, [2002] PIQR Q5, CA.
5 [1996] PIQR Q72, CA.

In *Evans* the court found that the judge had not made an over-assessment of the services provided by Mrs Evans and 'it is neither necessary nor to be expected that a full time carer should spend every hour of the day or night engaged in providing physical services'.

In other words, care can be wide-ranging. Mrs Evans was 'fiercely dedicated to her family'. She provided '24-hour care'.

The decision in *Mills v British Rail Engineering Ltd,*[6] is often cited by defendants in an attempt to suggest that damages under this head should only be awarded in serious cases. The judgments in that case are interpreted to create a three-stage test for an award of damages, namely:

(1) that the claimant 'would otherwise require nursing care' (per Dillon LJ);

(2) that the care provided should go 'distinctly beyond that which is part of the ordinary regime of family life' (per Staughton LJ); and

(3) that taken in the round 'it must only be in a very serious case that an award is justified' (per Staughton LJ).

This test was carefully examined by His Honour Judge McDuff QC in *Giambrone v JMC Holidays Ltd.*[7] In that case, a number of children had suffered from gastro-enteritis or similar illnesses resulting from food they had eaten at a hotel on holiday. Their parents had to provide constant care for them over periods from two to three weeks to a couple of months. The defendants argued that such care did not satisfy the *Mills* criteria. In the *Mills* case the wife cared for her husband prior to his death from an asbestos-induced lung cancer. The cases are indeed starkly different. However, despite this, awards were made in respect of the care provided to the children.

The judge analysed the three stages of the test as follows:

(1) The *Oxford English Dictionary* defines 'to nurse' as including 'to attend to a sick person'. The parents of the children did exactly that. There is no requirement for any technical expertise in respect of such attendance.

(2) It is not part of the regime of ordinary life for parents to spend their time looking after sick children for 'in ordinary life' children are not sick, they go to school. Accordingly, in looking at the *Mills* case, if Mr Mills had been unwell some months prior to his contraction of the asbestos illness, Mrs Mills would still have cared for him. Would

6 [1992] 1 PIQR Q130.
7 *Giambrone v JMC Holidays Ltd* [2003] All ER(D) 202 (Jun).

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(2) As a result of his injury/disability he can no longer perform that task(s) or can no longer perform it to the extent he was previously able to.

(3) The task(s) in question will now have to be carried out by some other person.

Past loss can be calculated in one of two ways:

(1) Where the claimant has employed professionals to carry out the task in question (for example decorating his house), he may recover the cost of their services but only the cost of labour (not materials, as he would have had to pay for these anyway) and only to the extent that the outlay is for work he would have done himself but for his injury.

(2) If the claimant has relied upon friends or family to carry out the task in question (decorating or cutting the lawn etc) then he can recover the value of the work carried out. This is usually based upon commercial rates which are then discounted for tax, national insurance, travelling expenses etc in the same way as a claim for gratuitous care.

In either case the loss claimed is subject to the test of reasonableness. The claimant cannot recover the cost of employing a Formula 1 engineer to service his car if he could reasonably have had the work done locally at much less cost. Similarly, the value of assistance provided by friends or family is unlikely to exceed the reasonable commercial cost of having the work done.

No claim can be made in respect of *past loss* where no work has been done, either professionally or by friends or family.

The claimant can recover the cost of commercial or gratuitous services *post-trial* irrespective of whether he intends to employ anyone to undertake these tasks.

> 'It is really quite immaterial, in my judgment, whether having received those damages, the Plaintiff chooses to alleviate her own housekeeping burden, which is an excessively heavy one having regard to her considerable disability to undertake household tasks, by employing the labour which has been taken as the basis of the estimate on which damages have been awarded, or whether she chooses to continue to struggle with the housekeeping on her own ...' (per Bridge LJ in *Daly*).

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8.3 EVIDENCE/QUANTIFICATION

Past loss must be supported by the following evidence:

(1) Lay witness evidence from the claimant and/or others of the tasks that he undertook before his injury. This should be sufficiently detailed to enable the judge to ascertain the extent of the work done and how often it was carried out. (It is no use the claimant's statement simply recording that he has been unable to decorate since the accident. The statement should give some indication of the size of house and how often the claimant decorated.) The claimant should also refer to any particular skills he may have (for example as a professional electrician/plumber etc) which enabled him to undertake far more of the household maintenance than usual.

(2) Medical evidence to support the contention that he has been unable through injury or disability to perform those tasks. This may be implicit from the nature of the injuries but if it is not obvious the claimant's solicitors may need to seek confirmation of the extent of the claimant's disability in relation to DIY etc from the medical expert.

(3) Evidence of the costs of having the work done. Either proof of expenditure for work done by professionals or quotes from professionals (decorators, architects or surveyors) for the cost of the work carried out by friends or family. In the case of friends and family it is advisable to obtain a statement from the person in question setting out what he has done and when.

In respect of future loss the claim is based upon the commercial cost of having the work done regardless of whether the claimant intends to employ professionals. The evidence required to support the claim is essentially that set out above but it is important also to set out any plans the claimant may have had for the future: for example to 'do up the house' when he retired or to 'spend more time in the garden'. Defendants often contend that a claimant would only have been able to manage a limited amount of DIY/decoration in addition to his employment and family commitments. Conversely, in retirement the claimant will have far more time on his hands to do these things.

8.4 QUANTIFICATION

It should usually be possible to determine future loss on the basis of a multiplier/multiplicand.

interests, including the defendant's, to fund a move at an early stage. It is important for the claimant to have as much say as possible in his own destiny at the earliest moment. If things are left, it may be years later, well after the trial has taken place, before the necessary steps are taken to move the claimant into appropriate accommodation.

9.2.2 Quantification of claim

The claimant has to be compensated for incurring the increased cost of the new accommodation. Balanced against this, the capital asset is likely to be secure and inflation proof, albeit that it will not be realised for a very long time and probably not until after the claimant's death. A pragmatic formula is used by the courts, which is sometimes referred to by the name of the leading case *Roberts v Johnstone*.[1]

The court makes certain assumptions. It is assumed that the claimant will pay for the additional accommodation out of his own capital, and that the capital will be risk free and protected against inflation as house prices tend to rise. Neither the capital costs of buying the new accommodation nor the mortgage repayments on the new property are recoverable.

The claimant has lost the income which the capital would have earned over the period of the award, after the deduction of tax. But the lost income is not calculated by reference to a commercial rate of interest. Normally interest includes two elements: a reward for taking a risk with capital and a reward for forgoing the use of the capital for the time being. The courts have decided that as only the second of these two elements is applicable, the lost interest can only be claimed at a reduced rate. Damages are assessed by taking a percentage of the net additional capital cost of the accommodation and multiplying it by an appropriate multiplier, usually life. The resulting figure is based on the amount that would have been generated had the claimant invested the additional sum in Index Linked Government Securities, sometimes referred to as ILGS, which are low risk investments. The approach was confirmed by the House of Lords in *Thomas v Brighton HA*.[2]

There has been, and continues to be, considerable debate about the appropriate discount rate. For the time being at least this was settled by the Lord Chancellor in June 2001 when he used his powers under s 1 of the Damages Act 1996 and set the rate at 2.5%.

The additional costs of moving including estate agent's fees and legal expenses and subsequent additional expenses such as property maintenance, council tax and gardening are recoverable as separate items of special damage.

1 *Roberts v Johnstone* [1989] QB 878.
2 *Thomas v Brighton HA* [1999] 1 AC 345, per Lord Lloyd.

As there is no provision for the capital cost of suitable accommodation many claimants tend to utilise other heads of damages to fund the cost.

An illustration of the calculation is set out below.

9.2.3 Interim and periodical payments

A claimant is often not in a position to be able to afford to move to more suitable accommodation. In such cases a substantial interim payment may be appropriate.

An application for a substantial interim payment may be made for accommodation in a case in which periodical payments are likely to be awarded. The Court of Appeal discussed the issues which arose in *Eeles v Cobham Hire Services Limited*.[3] In that case a two stage approach was endorsed:

(1) Assess the likely amount of final judgment leaving out of account those heads of future loss which may be made the subject of a periodical payment order. This should include general damages for pain and suffering and loss of amenity and past loss, plus interest. Accommodation costs may also be included. Provided the assessment has been conservative, a reasonable proportion may well be a high proportion. For this part of the process the judge need have no regard as to what the claimant intends to do with his money.

(2) Further sums of future loss may also be included where the Judge can 'confidently predict' that the trial judge will award more than the sums set out in (1) alone. At this stage the judge must be satisfied that there is a real need for the interim payment eg if the request is for accommodation there is a real need now, as opposed to after the trial, and that the amount of money requested is reasonable. At this stage the judge should not make the order unless he is satisfied that the award is reasonably necessary.

In such a case the claimant's representatives may have to make a difficult decision whether to make an application to purchase a suitable home prior to trial which is likely to be contested, or to press ahead for an early trial. It should be born in mind that the facts of *Eeles* were unusual in that the claimant failed to clearly demonstrate a need to move into another substantial property prior to trial. For further details see Chapter 18 on 'Interim Payments'.

3 [2010] 1 WLR 409.

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fuse the joint (arthrodesis). If the claimant is working he may wish to have the operation performed privately so that it can be done at a time which is convenient to him and minimises the disruption to his work.

Since the introduction of the Rehabilitation Code in 1999 some insurers have been far more pro-active in providing private funding to expedite treatment of a claimant at an early stage when it is most needed. A copy of the 2007 Rehabilitation Code can be found in the *PNBA Facts and Figures* 2012/2013 K6 and *APIL Personal Injury Law, Practice and Precedents*, Division F4 (Jordan Publishing).

10.1.2 What is reasonably necessary?

The line as to what is reasonably necessary may be difficult to draw. When representing claimants it is important to try and provide evidence that the item or therapy claimed is of medical or therapeutic value.

- In *Cassel v Riverside Health Authority*[1] the Court of Appeal reversed the decision of Rose J who awarded £32,000 for the cost of a swimming pool which was the claimant's principal source of relaxation and pleasure. The decision was based on the fact that the medical evidence did not support the contention that swimming was a necessary therapy. Recent cases on whether a hydrotherapy pool is reasonably necessary have been decided on the particular evidence in the case:
  - in *Burton v Kingsbury*[2] the medical evidence did support the need for a swimming pool for a tetraplegic. Flaux J awarded the full purchase price of the house including the pool (see Chapter 9 on housing) and the running costs of the pool which came to £4,000 pa. A similar conclusion was reached by HHJ MacDuff in *Lewis v Royal Shrewsbury Hospital NHS Trust*[3] and Bell J in *Haines v Airedale NHS Trust*[4].
  - On the other hand in *Whiten v St George's Healthcare NHS Trust*[5] Swift J rejected the claim for a hydrotherapy pool on the basis that the claimant failed to establish a clinical need which could not be met by physiotherapy exercises carried out in an ordinary swimming pool with suitably trained carers.
- The claimant may, as a result of injuries, spend much more time in the home watching television. Increased home running costs are recoverable, but it will be difficult to prove that a claim for satellite

1 [1992] PIQR Q1 and Q 168.
2 [2007] EWHC 2091.
3 (Unreported) 29 January 2007.
4 (Unreported) 2 May 2000.
5 [2011] EWHC 2066 (QB).

TV is reasonably necessary as a result of injuries sustained in an accident as it is likely that the claimant would have had satellite TV anyway.

- If a medical therapy is recommended by a medical practitioner, there is unlikely to be difficulty in recovering the cost even if the treatment is unusual. In cases of post-traumatic stress disorder, for example, eye movement desensitivisation therapy has now been recognised by the National Institute for Clinical Excellence (NICE) and is for many psychiatrists the treatment of choice. This treatment is not easily available on the NHS. If a claimant suffers psychological symptoms after an accident, many clinical psychologists recommend cognitive behavioural therapy (CBT). To obtain this treatment on the NHS will often involve waiting months and privately funded CBT is frequently successfully claimed as a result.
- The cost of alternative therapies may be more difficult. Judges are increasingly inclined to allow the costs of acupuncture, chiropractors and osteopaths where the Claimant can demonstrate that it has been of benefit, occasionally even in cases where it has not been recommended by a medical practitioner. It will, however, be more difficult to obtain damages for the cost of more innovative types of treatment such as aromatherapy. In *Najib v John Laing plc*,[6] a mesothelioma case, the claimant rejected chemotherapy and opted for 'photodynamic therapy and drops' which he had researched on the internet. A doctor had told the claimant that there was evidence that the treatment had prolonged the life of other victims in other countries by several years. Davis J allowed the claim of £15,286 and appears to have attached importance to the attitude of the claimant's GP and oncologist, neither of whom sort to dissuade him from having the treatment.
- In an amputation case the cost of light-weight, high quality prosthetics can run into hundreds of thousands of pounds and it is vitally important to obtain good quality expert evidence from a reputable source. Even some orthopaedic consultants are out of touch with modern developments in this field.

10.2 QUANTIFICATION OF CLAIM

The capital cost of the item required should be claimed. An assessment should be made as to when the equipment will need replacing so that the replacement cost of the equipment can be claimed. The general principle is best illustrated by example.

6 [2011] EWHC 1016 (QB).

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this has been proved the evidential burden passes to the defendant to show that the rates claimed are unreasonable, see *Lagden v O'Connor*.[1]

If, however, a credit hire agreement was made at the claimant's home the Cancellation of Contracts made in a Claimant's Home or Place of Work Regulations 2008 apply which may render the credit hire agreement unenforceable. In this case the credit hire company had failed to serve a cancellation notice as required by the regulations. The credit hire cannot then be successfully claimed as against the tortfeasor, see *Chen Wei v Cambridge Power and Light Ltd*.[2] If the claimant is a company, failing to use a company car which was available to it may constitute a failure to mitigate loss, see *Beechwood Birmingham Ltd v Hoyer Group UK Ltd*.[3]

If liability is not admitted the claimant is entitled to wait until his own insurers authorise the repair, provided that period is not unreasonably protracted, see *Kingfisher Care Homes v Jones*.[4]

11.2.2 Collateral benefit

The claimant may have lost his job and with it his company car. The court then has to assess the annual loss. The AA and RAC provide tables which estimate running costs. It is necessary to consider whether running and standing costs can be legitimately claimed, or whether the claim is restricted to running costs only. These tables are reprinted in *Facts and Figures* produced by the Professional Negligence Bar Association.

11.3 TRAVELLING EXPENSES

Travelling expenses to and from medical appointments, etc are recoverable. These may include a claim for mileage, parking and, if the claimant required someone to drive him, a claim for the time of that person. Reasonable costs incurred by friends and relatives visiting the claimant in hospital will be recovered if the judge finds that the visits aided the recovery of the patient, or that additional services were being provided to the patient, eg assistance with eating, or helping the patient go for walks. Expenses incurred as a result of 'normal' visits which arose out of affection for the patient when the time was largely spent chatting would not, however, be recoverable, see *Havenhand v Jeffrey*.[5]

1 [2004] 1 AC 1067.
2 Judge Moloney QC Cambridge CC, 10 September 2010.
3 [2010] EWCA Civ 647.
4 *Kingfisher Care Homes v Jones* (1998) unreported, CA, 12 March, per Millet LJ.
5 *Havenhand v Jeffrey* (1997) unreported, CA, 24 February.

11.4 TRANSPORT COSTS

In the case of a seriously injured claimant, a claim for past and future transport costs may be appropriate. After an accident a claimant may find himself without the ability to travel independently. A claim for a suitable car should be considered as this can make a massive difference to the claimant's life.

11.5 QUANTIFICATION OF CLAIM

In order to be recoverable, claims for specific items of expenditure relating to a vehicle must be supported by the medical evidence.

11.5.1 Adaptations to claimant's car

Adaptations to a vehicle may be recoverable, eg to allow a wheelchair to be carried or for power steering. *Sarwar v Ali*[6] was a case in which the claimant, who was 17 years old at the time of the accident, was rendered a C5 tetraplegic. The parties agreed that the cost of a Chysler Voyager was recoverable. Lloyd Jones J also allowed:

(a) the cost of the Entervan conversion (£24,000), which allowed the claimant to take his wheelchair up a ramp into the vehicle, as a separate item. The conversion cost would not add to the value of the car on resale as the car would then be a few years old and not suitable for a significantly disabled person. Further, the conversion would make the vehicle more difficult to sell to members of the public who were not disabled. This figure was allowed in addition to the cost of the car;

(b) the cost of hand controls which allowed the vehicle to be adapted so that the claimant could drive it himself;

(c) the cost of specialist driving lessons.

In an appropriate case the increased cost of owning a car with automatic transmission may be recovered, see *McCrae v Chase International Express Limited*.[7]

11.5.2 Acquiring a new vehicle

Additional expenditure incurred in buying a car which enables the claimant to get about either by himself, or by being driven, may be recoverable. Because of the claimant's injuries reliability is much more important, as the consequences of a breakdown could be serious. It may

6 [2007] EWHC 1255.
7 [2003] EWCA Civ 505.

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(4) An act done, or decision made, under this Act or for the benefit of a person who lacks capacity must be done, or made, in his best interests.

(5) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

In essence, the objective of the Act was to be less restrictive of an individual's right to make decisions for himself where possible. The Act established a new Court of Protection, as a superior court of record with increased powers, and the new Office of Public Guardian, which has supervisory and regulatory functions.

12.3 THE TEST FOR CAPACITY UNDER THE ACT

The first question is whether the claimant lacks capacity. If the claimant lacks the requisite capacity, and is therefore a 'protected party',[4] no settlement or compromise of the claim is valid without court approval.

The test for capacity under the Act is set out in sections 2(1) and 3(1):

> '2(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'
>
> '3(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable to
> (a) understand the information relevant to the decision,
> (b) retain that information,
> (c) use or weigh that information as part of the process of making the decision, or
> (d) communicate his decision (whether by talking, using sign language or any other means).'

Note: an inability to satisfy any one or more of 3(1)(a) to (d) will be sufficient to establish incapacity.

Sections 2(1) and 3(1) of the Act provide a single test for financial, healthcare and welfare decisions but this test is not inconsistent with the existing common law tests.[5] For questions falling outside the ambit of the Act the Code of Practice suggests that the test under the Act may also be applied at common law, at the discretion of the judge.[6]

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4 CPR 21.10(1)(a), replacing the term 'patient'.
5 Mental Capacity Act 2005 Code of Practice, para 4.33; *In the Matter of MM (an adult)* [2007] EWHC 2003 (Fam), para 73.
6 Mental Capacity Act 2005 Code of Practice, para 4.33.

In *Saulle v Nouvet*[7] the court was asked to consider whether the definition of capacity under the Act applied to the question of whether the claimant had capacity to litigate as well as the question of whether he had the capacity to manage or control money recovered in the proceedings. The judge held that although the Act did not require the test in section 2(1) to be applied to the question of capacity to conduct the litigation, the provisions of CPR Part 21 (as amended) had that effect. Any suggestion made by the Code of Practice to the contrary was wrong.

It does not matter whether the disturbance or impairment is temporary or permanent.[8] Also, the question of what is in a claimant's best interests cannot be established merely by reference to his age or appearance, or a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.[9]

A person is not regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).[10] This consideration ties in with the principle of ensuring that all practicable steps have been taken to assist the claimant to understand the information necessary for the decision he is making.

The fact that a person is able to retain the relevant information for a short period only does not prevent him from being regarded as able to make that decision.[11] Relevant information includes information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision.[12]

As with the common law, the test of capacity under the Act is therefore both time ('at the material time') and issue ('the matter') specific.[13]

12.4 THE TEST FOR CAPACITY – CASE-LAW

The test for capacity is subjective in the sense that it relates to the person whose capacity is in question. Although it is not necessarily an easy test to overcome, the courts have repeatedly stated that the test should be applied in a common sense way:

> 'The expression "incapable of managing her own affairs and property" must be construed in a common sense way as a whole. It does not call for proof of

7 [2007] EWHC 2902 (QB).
8 Section 2(2).
9 Section 2(3).
10 Section 3(2).
11 Section 3(3).
12 Section 3(4).
13 Mental Capacity Act 2005, Code of Practice, para 4.4.

the settlement or compromise was reached before or after the issue of proceedings.[46] The court will require an opinion on the merits of the settlement or compromise from counsel or solicitor in all but the clearest cases.[47]

In respect of settlement before issue, the court will also require details of the circumstances of the accident (if applicable), the extent to which the defendant admits liability, the age and occupation of the protected party, the litigation friend's approval of the settlement, any financial advice, any medical reports and a schedule of loss.[48]

For settlements reached after proceedings have been issued the court will require a copy of any financial advice.

In either case the court will want to know whether periodic payments have been considered in respect of any claim for future loss, and, if the settlement includes provision for periodic payments, the court must be provided with the terms of the settlement or compromise or a draft consent order.[49]

A point may arise where the protected party acquires or regains capacity to conduct the litigation. However, the appointment of the litigation friend continues unless and until the court orders otherwise. The protected party, litigation friend or another party to the proceedings may apply for an order ending the appointment of the litigation friend. Once the order is made the protected party must serve notice on all other interested parties, stating that the appointment of his litigation friend has ceased, giving his address for service and stating whether he intends to continue with the proceedings.[50]

12.9.3 Investment and control of damages

Where damages are recovered by or on behalf of the protected party, or a payment into court is accepted, the court will give directions for the management of the money recovered.[51] Before giving directions the court must first consider whether the protected party is also a 'protected beneficiary' (ie a protected party who lacks the capacity to manage and control any of the money recovered on his behalf in the proceedings).

The court may direct that the money recovered should be paid into court for investment; may direct that certain sums should be paid direct to the protected beneficiary, his litigation friend or legal representative for the

[46] CPR 21.10.
[47] PD21, paras 5.2, 6.4.
[48] PD21, para 5.1.
[49] PD21, paras 5.4–5.5, 6.2–6.3.
[50] CPR 21.9.
[51] CPR 21.11, PD 8.

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immediate benefit of the protected beneficiary, and may direct that the application in respect of the investment of money should be transferred to a local district registry. The court will consider the general aims to be achieved for the fund by investment and will give directions as to the type of investment.[52]

The CoP has jurisdiction to make decisions in the best interests of the protected beneficiary. If the fund is £30,000 or more, unless there is already an attorney under a registered enduring power of attorney, the donee of a lasting power of attorney or a deputy appointed by the CoP to administer or manage the protected beneficiary's financial affairs, the order approving settlement will contain a direction to the litigation friend to apply to the CoP for the appointment of a deputy. The fund will then be dealt with according to the direction of the CoP. If the fund is less than £30,000 it may be retained in court and invested.[53]

12.10 INDEPENDENT MENTAL CAPACITY ADVOCATE

For those without support or representation the Act provides for the appointment of an Independent Mental Capacity Advocate to support and represent the protected party in respect of applications relating to medical treatment, accommodation in an NHS institution or local authority accommodation.[54]

12.11 FEES

Each application to the Court of Protection (Court of Protection Fees Order 2007, Part 9) will incur a fee, currently £400.[55] If a hearing is required an additional £500 is payable. The fees are not payable in respect of an application by the Public Guardian or if the applicant is in receipt of a qualifying benefit,[56] unless, in respect of the benefit exception, the applicant has received damages in excess of £16,000 which has been placed in a PI Trust so as to be disregarded for the purpose of determining eligibility for benefits.

A fixed fee of £100 is payable for assessing the supervision level of the deputy. Supervision fees incurred by the Public Guardian are also payable depending upon the level of supervision required. General supervision

[52] PD21, paras 8.1–8.4.
[53] PD21, para 10.1.
[54] Sections 35–39.
[55] Court of Protection Fees Order 2007.
[56] Qualifying benefits are listed in reg 8(3).

Note: that illegitimacy is not a bar to recovery as the Act specifies that an illegitimate child shall be treated as legitimate of the mother and reputed father.

Note: the meaning of 'dependant' in s 1(3) has been amended to include civil partners, former civil partners and any person treated by the deceased as the child of a civil partnership.[24]

13.3.6 Multiplier

The established approach is to calculate the multiplier at the date of *death* and then treat the period from death to trial as past loss, leaving the balance of the multiplier for future loss from the date of trial.[25]

This approach can lead to injustice, particularly where there is a significant delay between death and trial.[26]

The Ogden Working Party and the Law Commission have continued to argue that losses prior to trial should be treated as past loss, and the multiplier for future losses post-trial should be calculated from the date of *trial*. Thus far attempts to displace the clear authority of *Cookson* have been unsuccessful.[27]

The correct approach therefore appears to be:

(a) calculate the multiplier at the date of death;

(b) where appropriate discount this for contingencies other than mortality: the general approach is set out in the introductory notes to the Ogden Tables, 7th Edn – see Chapter 2, Loss of Earnings at para **2.4.1**);

(c) calculate past dependency to the date of trial;

(d) calculate future dependency using the balance of the multiplier.

[24] Civil Partnership Act 2004, s 83. In force from 5 December 2005: The Civil Partnership Act 2004 (Commencement No 2) Order 2005.

[25] *Cookson v Knowles* [1979] AC 556, [1978] 2 All ER 604, [1978] 2 WLR 978, [1978] 2 Lloyd's Rep 315. Confirmed in *Graham v Dodds* [1983] 2 All ER 953, [1983] 1 WLR 808 and *Fletcher (Dec) v A Train & Sons Limited* [2008] EWCA Civ 413.

[26] *Corbett v Barking, Havering & Brentwood Health Authority* [1991] 2 QB 408.

[27] See *Wilkens v Press Construction* (unreported), 30 November 2000; *White v ESAP Group (UK) Ltd* [2002] PIQR Q76 and *MS v ATH* [2003] QB 965.

13.3.7 Different working lives/life expectancy

The period of dependency for the dependent spouse is either:

(a) the deceased victim's life expectancy: the period during which he would have been able to provide the dependency; or, if shorter than (a),

(b) the dependent spouse's life expectancy or the period during which she (or the children) would have continued to be dependent on the deceased victim.

The multiplier for the dependency should be for the lesser of these two periods as this will more accurately reflect the true period of dependency.

This method applies equally to different periods of dependency, for example in the case of a child whose dependency will cease before the Deceased's predicted retirement age/life expectancy.

Example

The deceased dies at age 60, his wife is aged 68. The deceased's lifetime multiplier at the date of death is 18.3. His wife's lifetime multiplier is 15.89. The appropriate multiplier for her dependency for life is 15.89.

At the date of death the deceased's son was aged 15. He would have remained dependent to age 21 for which period the multiplier is 5.58. The multiplier for the period of his dependency is therefore 5.58.

Note: that the choice of the correct Ogden table for the whole life multiplier appears to depend on the nature of the evidence as to life expectancy in the absence of the (fatal) injury or disease. In *Whiten v St George's Healthcare NHS Trust*[28] the medical experts assessed the claimant's life expectancy by reference to his mortality risks as a whole, not just the risks associated with his accidental injury, and in those circumstances the appropriate life multiplier was calculated using Table 28 (multipliers for term certain). In *Crofts v Murton*[29] and *Smith v LC Window Fashions Ltd*[30] the medical experts did not give evidence about the claimant's overall expectation of life, only their opinion as to by how long the claimant's pre-morbid statistical life expectancy had been shortened as a result of his accidental injury. In those circumstances the appropriate life multiplier was calculated using Table 1, which takes into account mortality risks.

[28] [2011] EWHC 2066; see also *B (a child) v Royal Victoria Infirmary & Associated Hospitals NHS Trusts* [2002] Lloyd's Rep (Med) 282.

[29] [2009] EWHC 353.

[30] [2009] EWHC 1532.

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There is no reason in principal why the State Pension should not form part of the dependency.[37] Note: the calculation will vary depending upon whether the dependent spouse was entitled to a State Pension in her own right or whether her pension was to be paid as part of the deceased's entitlement based upon his national insurance contributions and following his death she receives a widow's benefit.

Certain state benefits can form part of the dependency.[38]

13.3.16 Other benefits resulting from the death

Section 4 of the Fatal Accidents Act 1976 provides:

> 'In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.'

Those benefits that have been held to have been caught by s. 4 and were therefore disregarded from the dependency calculation have included:

(a) Widow's pension (see above).[39]

(b) Replacement care provided to the dependant child by a surviving parent (and/or step parent).[40]

[37] *Lea v Owen* (unreported) 1980, summarised in *Kemp & Kemp*.

[38] *Cox v Hockenhull* [2000] PIQR Q230. The central question is whether there has been a loss. If there is a demonstrable loss it does not matter whether the source of income both before and after the death was the state. Benefits that continued after the death, such as housing benefit, income support and council tax benefit, would not form part of the dependency. Benefits paid exclusively to the claimant in order that he could care for the deceased, such as invalid care allowance, did not form part of the dependency as their marriage was incidental to the payment of the benefit. Other benefits, such as disability living allowance, which was paid to the deceased, did form part of the dependency.

[39] In *Auty v National Coal Board* [1985] 1 WLR 784, the widow claimed the loss of the widow's pension that she would have received if her husband had survived to retirement and then subsequently pre-deceased her. She was in fact already in receipt of a widow's pension as a result of her husband's death but argued that under s 4 this should be ignored. The Court of Appeal found that she had suffered no loss as she was already receiving the widow's pension. *Auty* was distinguished in *McIntyre v Harland & Wolff plc* [2006] EWCA Civ 287. In that case the deceased developed mesothelioma and chose to retire early, entitling him to a rule 9 (of a Provident Fund scheme) payment, which was in fact paid after his death to his estate which the widow inherited. The widow claimed as part of her dependency the loss of a rule 13 payment which would have been made on the deceased's retirement. The Court of Appeal distinguished *Auty* on the basis that the rule 9 and rule 13 payments were different in kind: they were made on different occasions and for different reasons. Because the rule 9 payment was a payment to the deceased, it only came to the widow as part of the deceased's estate and therefore had to be left out of account because of the effect of s 4.

[40] *Stanley v Saddique* [1992] 1 QB 1. A different approach was taken by the Court of Appeal in *Hayden v Hayden* [1992] 1 PIQR Q111, but in *R v CICB ex p K* [1999] QB 1131 the Divisional Court distinguished *Hayden* and followed *Stanley v Saddique*. In *ATH v MS* [2002] EWCA Civ 792, Kennedy LJ reviewed the authorities and concluded:

(c) Payments made to the surviving widow from death benefit schemes: *Arnup v MW White Limited*.[41] The widow's receipt of a payment from a Death Benefit Scheme, which was paid to the defendant company and then allocated to the widow, and a payment under the defendant's Employee Benefit Trust, which was paid to the widow under the sole discretion of the company trustee, were plainly benefits that fell to be deducted under s 4. The language of s 4 was very wide; it required that all benefits which accrued as a result of the death should be disregarded. The fact that the death was not the sole cause of the payments was not relevant as it was *a* cause of the payments being made to the widow. In the alternative, if, as the trial judge had wrongly concluded, the payments were not benefits that accrued as a result of the death, then they should have been left out of account altogether from the dependency calculation.[42]

13.3.17 Surviving assets

Dependency on earned income is relatively simple to calculate using the approach set out above. The calculation becomes more complex where the source of all or part of the deceased's income, for example a working farm or business, has survived and been inherited by the dependants.

In *Wood v Bentall Simplex*[43] the deceased was in partnership with his father, mother and brother in a family farm. The defendant argued that the value of the income from the deceased's share of the assets of the farming partnership, which were inherited by the claimant widow and her

'Where, as here, infant children are living with and are dependant on one parent, with no support being provided by the other parent, in circumstances where the provision of such support in the future seems unlikely, and the parent with whom they are living is killed ... after which the other parent (who is not the tortfeasor) houses and takes responsibility for the children, the support which they enjoy after the accident is a benefit which has accrued as a result of the death and, pursuant to s 4 of the 1976 Act, it must be disregarded, both in the assessment of loss and in the calculation of damages.' (para 29).

[41] [2008] EWCA Civ 447.

[42] In *Cameron (Dec) v Vinters Defence Systems Ltd* [2007] EWHC 2267, Holland J held that a payment to the deceased's widow pursuant to the provisions of the Pneumoconiosis etc. (Workers' Compensation) Act 1979 did result from the death of the deceased but it was nevertheless *not* a benefit that accrued to the widow in any event as it was dependent on the timing of the claim. If proceedings had been commenced earlier the 1979 Act payment would not have been made. It was therefore not a benefit within the meaning of s 4 and fell to be deducted. It is respectfully suggested that the decision in *Cameron* does not survive *Arnup v MW White Limited*. If the payment to the widow in *Cameron* was not made as a result of the deceased's death, but as a result of the timing of the claim, then it should not have been taken into account at all. Alternatively, given the wide meaning of the word 'accrued' in s 4, all benefits which came to the widow as a result of the death should be disregarded, even if the death was not the sole cause. The 1979 Act payment in *Cameron* was clearly made as a result of the death of the deceased (see para 17a in *Cameron*) and so fell within s 4 and should not have been deducted.

[43] [1992] PIQR P332.

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3. In this Schedule 'the 1992 Act' means the Social Security Contributions and Benefits Act 1992.

Example

A claimant has received £2,000 by way of Incapacity Benefit and no care related benefits. His claim for damages includes a claim for £1,500 in respect of loss of earnings and £1,000 in respect of the cost of care.

Only £1,500 of the Incapacity Benefit may be withheld from the damages by the defendant in respect of the loss of earnings claim and nothing in respect of the care claim.

15.4.1 Welfare Reform Act 2012

Schedules 2 and 9 of the Welfare Reform Act 2012 Act contain provisions amending parts of the 1997 Act. The following benefits are inserted into the table in Schedule 2 of the 1997 Act as follows:

'Universal Credit' is added to the list of benefits in the second column of the table in Schedule 2 in respect of compensation for earnings lost.[7]

'Daily living component of personal independence payment' is added to the list of benefits in the second column of the table in Schedule 2 in respect of compensation for the cost of care.[8]

'Mobility component of personal independence payment' is added to the list of benefits in the second column of the table in Schedule 2 in respect of compensation for the loss of mobility.[9]

These Schedule 9 changes came into effect for some parts of the UK on 8 April 2013.[10]

15.4.2 Period

Only benefits paid within 'the relevant period' are deductible. Section 3 of the Act sets an upper limit of five years commencing on the date of the accident or injury, or, in the case of disease, five years from the date when a claimant first claims a listed benefit in consequence of the disease. 'The relevant period' ends on the date of judgment/assessment of damages or settlement.

[7] Welfare Reform Act 2012, Sch 2 – as at the date of drafting this amendment is not yet in force.

[8] Welfare Reform Act 2012, Sch 9.

[9] Welfare Reform Act 2012, Sch 9.

[10] Welfare Reform Act 2012 (Commencement No 8 and Savings and Transitional Provisions) Order 2013, Art 7(2)(k).

Note: the relevant period does not apply to lump sum payments made under the Pneumoconiosis etc. (Workers' Compensation) Act 1979, the 2008 Diffuse Mesothelioma Scheme or extra-statutory payments made by the Secretary of State.

15.4.3 Requirements

The party paying, 'the compensator', is required to apply to the Secretary of State for a 'Certificate of Recoverable Benefits' prior to making any compensation payment. Assuming the application is made correctly, a certificate should be issued within four weeks of the application being received.

15.4.4 Certificate of recoverable benefits

The certificate should specify for each recoverable benefit the amount that has been paid and/or is likely to be paid up to a specified date and, if the benefit is continuing, the rate, period and intervals at which each benefit is likely to be paid.

15.4.5 Defendants' liability

A 'compensation payment' is defined as a payment to or in respect of any other person in consequence of any accident, injury or disease suffered by the other (section 1(1)(a)). There is currently no lower limit on the amount of compensation paid before the provisions of the Act apply.

Where a defendant makes a compensation payment he is liable to repay the Secretary of State an amount equal to the total amount of recoverable benefits. So if any compensation payment is made the defendant becomes liable to repay the whole of the recoverable benefits.

Only those benefits listed in Schedule 2 have to be repaid.

Even if the claimant's claim does not include a claim in respect of loss of earnings, care or mobility, the defendant still has to repay the *total* of the listed benefits received by the claimant.

If a claimant's award is reduced on account of contributory negligence, the defendant is still liable to repay the total amount of the recoverable benefits.

15.4.6 Interim payments

Where a compensator makes an interim payment he is liable to repay to the DWP all recoverable benefits or lump sum payments paid up to the date of the interim payment.

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17.6 INDEXATION

When periodical payments were introduced parliament anticipated that the claimant's annual award would normally rise in accordance with the RPI, see s 2(8), although sub section (9) provided for the disapplication of sub section (8) in undefined circumstances. The adoption of the RPI as the appropriate index has proved to be controversial. In cases where the claimant has been seriously injured the future care claim is often the largest head of damage. The RPI is a measure of changes in prices. Providing for carers is largely dependant on wage costs which in the last 40 years have risen at a faster rate than prices. Claimants have now successfully challenged the use of the RPI as the appropriate index.

The issue was fully argued in *Thompstone v Tameside & Glossop Acute Services NHS Trust*[6] when Swift J heard extensive expert evidence. She held that the RPI was a measure of changes in prices which if applied to periodical payments, a large proportion of which were wages, would not adequately compensate the claimant. Instead of the RPI the index which was most likely to adequately compensate the claimant was found to be by using the Aggregate Annual Survey of Hours and Earnings (ASHE 6115). It was appropriate, fair and reasonable for the court to modify the effect of s 2(8) by providing for the amount of periodical payments to vary by reference to the 75th percentile of ASHE 6115. ASHE 6115 was also adopted as the appropriate index at first instance in *RH v United Bristol Health Care NHS Trust*[7] and *Corbett v South Yorkshire Strategic Health Authority*[8] and *Sarwar v MIB*.[9]

The Court of Appeal upheld the decision of Swift J and endorsed the use of ASHE 6115, see *Thompstone*. Waller LJ, who gave the judgment of the court stated that:

> '100. We hope that as a result of these proceedings the National Health Service, and other Defendants in proceedings that involve catastrophic injury, will now accept that the appropriateness of indexation on the basis of ASHE 6115 has been established after an exhaustive review of possible objections to its use, both in itself and as applied to the recovery of costs of care and case management.'

The Court of Appeal also stated that in the absence of new evidence or significantly different argument it would not be appropriate to re-open the indexation issue. In practice, certainly when dealing with future care and case management costs, the ASHE 6115 figures on the 75th or 80th centile are now usually adopted.

6 *Thompstone v Tameside & Glossop Acute Services NHS Trust* [2006] EWHC 2904 (QB) 6 November 2006.
7 *RH v United Bristol Health Care NHS Trust* [2007] EWHC 1441.
8 *Corbett v South Yorkshire Strategic Health Authority* [2007] EWHC LS Law Med 430 4 May 2007.
9 *Sarwar v MIB* [2007] EWHC 1255 25 May 2007.

17.7 PERIODICAL PAYMENTS OR LUMP SUM DAMAGES

17.7.1 Advantages of an award for periodical payments

(a) greater financial security for the claimant who is able to predict the payments receivable. The money will not run out. This is particularly important where life expectancy is likely to be long;

(b) the risk of over or under compensation is reduced;

(c) there is a degree of flexibility as the court may make provision at the time of the hearing for step changes in the level of the annual payment. This will be frequently be necessary, for example:

   (i) when it is likely that the claimant's condition will deteriorate;
   (ii) when relatives (frequently parents) take it upon themselves to care for a disabled claimant for as long as they are able, after which the cost of professional carers will be necessary;

(d) tax and benefit advantages: payments in the hands of the claimant are without deduction:

   (i) tax: future periodical payments are tax free in the hands of the claimant, see s 329 of the Income and Corporation Taxes Act 1988 as amended by s 100(2) of the Courts Act 2003. This is the equivalent provision as that which previously existed under structured settlements;
   (ii) benefits: future periodical payments will be disregarded in calculating the claimant's welfare benefits, see Social Security Amendment (Personal Injury Payments) Regulations 2002, SI 2002/2442 and the National Assistance (Assessment of Resources) (Amendment) No 2 Regulations 2002, SI 2002/2531;

(e) reduction in the risk that the money will be used inappropriately. Relatively few claimants have experience in investing large sums of money. A lump sum may be dissipated, or invested unwisely. At the other extreme the claimant fearing a lump sum may run out may be excessively frugal;

(f) managing a large sum of money effectively is likely to involve its own expense. Under the periodical payment regime this risk is born by the provider;

(g) in relation to future expenses ASHE 6115 is now the normal measure of indexation and periodical payments have become more attractive to claimants as a consequence.

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