DEKA CHAMBERS

BRIEFING
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PERSONAL INJURY

In this Deka Chambers Personal Injury Team briefing we are focusing on recent topical developments in the quantum and settlement fields.

Hugh Rimmer provides a practical assessment of the case of *Barry v MOD*, which addressed the correct approach to adjustments for contingencies other than mortality and is a case all personal injury practitioners need to be aware of.

Ella Davis considers the often fraught issue of property adaptations, which can be a very high value and contentious head of loss. She gives important guidance on the relevant principles and the focus both parties should apply to building their evidence.

William Dean looks at recent, important changes to Part 21 that have not attracted much attention. The Practice Direction has been removed with many of its provisions moving into rules. Practitioners need to be aware of the increase in awards that can be managed without the appointment of Deputy and the Part 21 provisions generally, in particular when applying for deductions for success fees and ATE premiums.

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BARRY V MINISTRY OF DEFENCE OR: HOW I LEARNED TO STOP WORRYING AND LOVE ADJUSTMENTS TO CONTINGENCIES OTHER THAN MORTALITY

By Hugh Rimmer

Although the Ogden Tables (8th Edition) were published in July 2020 there is little by way of reported case law regarding the revised (and remarkably helpful) explanatory notes which accompany them.

Barry v Ministry of Defence [2023] EWHC 459 (KB) is a helpful example demonstration of how the revised guidance notes approach contingencies other than mortality.

The Case

The Claimant, Mr Barry, claimed damages for noise induced hearing loss sustained during his service in the Royal Marines. He had enlisted in 2013 for 18 years but was medically discharged due to bilateral hearing loss and tinnitus in 2017. Breach of duty was admitted, though there were arguments on contributory negligence and some difference on the extent of the hearing loss.

The issue of widest interest to personal injury practitioners, however, is the High Court's consideration of the revised guidance in the Ogden Tables (8th Edition).

Disabled?

The Claimant contended that he was disabled, and that the adjustment factors for a disabled person should apply. The MoD did not admit that Mr Barry was disabled (and as a consequence there was little or no real loss on the basis of an Ogden calculation).

It was the MOD's case that Mr Barry did not satisfy the definition of disability in the Disability Discrimination Act 1995, as his hearing loss did not have a substantial adverse effect on his normal day -to-day activities. It also asserted that his problems were ameliorated by the use of hearing aids.

On the latter point, treatment or aids of this sort are specifically excluded from the questions of whether someone is "disabled" or not (schedule 1 paragraph 6 of the DDA 1995). It must be determined on what the effects are without them. That being so, the court found that the Claimant fell squarely within the examples given in the statutory guidance to the DDA 1995 and he was found to be disabled for the purposes of an Ogden calculation.

The court then went on to consider the nature and extent of the Claimant's disability, and whether the strict application of the figures in Tables A to D was appropriate.

Applying or Departing from Tables A-D

It may not always be realistic to apply the figures which a strict reading of the tables would produce.

There can be cases at the outer fringe of the spectrum covered by disability, where the Ogden disability does not fairly model the Claimant's likely future in the workplace. The court made specific reference to Billett v Ministry of Defence [2015] EWCA Civ 773, where the multiplier multiplicand approach was dismissed in favour of an award of general damages for loss of earning capacity.

Cases of that sort aside, there are cases where the Ogden disability calculation is appropriate, but the tables do not quite fit with the nuances of that particular Claimant's circumstances. In those cases, the calculation may need adjustment.

It was noted by the court there is a natural temptation to simply adjust the factor within the range of the Claimant's disabled figure and non-disabled figure. In the case of Mr Barry that was between 0.45 (disabled) and 0.89 (non-disabled). The mid-point would be 0.67.

That is not, however, the approach which the explanatory notes to the Ogden Tables suggest.

The relevant section of the explanatory notes starts at paragraph 83. Those notes explain that there is often a misconception that the impairment and activity-limitation must be severe or at least moderately severe to qualify as a disability. In fact,

the adjustment factors for disability have been determined on the basis of an average across the range of all those in employment who have a disability. The most severe may fall outside that range, unable to work at all. The question is what is the 'norm' for the severity of disability for those who are in work?

Severity of Disability

The explanatory notes refer to a Health and Disability Survey with data that matches the data on which the reduction factors are based. In that, by reference to a severity scale of 1 to 10, 43% were in the range 1 to 3 (mild) and 44% were in the range 4 to 7 (moderate). Only 13% score in the range 7 to 10 (severe). The vast majority are mild to moderate. The median level of severity in that survey is 4; the norm is not the severe end of the scale, it is the mild end of the mild to moderate category.

That being so, an adjustment using the range between the disabled and non-disabled figures, particularly if adopting the mid-point, is likely to be too great a departure. The guidance notes to the Ogden Tables also set out that, although the figures given represent a central estimate, the observations cluster closely around that central estimate. If there is to be a departure, most should be modest.

How to Adjust the Adjustments

The court considered, and followed, the guidance notes on the approach to take. Instead of considering the range between disabled and not disabled adjustment factors, the more appropriate approach is to use instead the different "disabled" adjustment figures as a guide. Consider the "disabled" adjustment factors for a Claimant of that same sex and age, but with different levels of educational attainment to the Claimant, or in a different employment category.

The Adjustment for Mr Barry

In the case of Mr Barry, the court considered the nature and extent of the Claimant's impairments at work and his history of work since leaving the Royal Marines (notably that he had maintained consistent employment ever since his discharge from the military). It also took account of the ameliorating effect of his hearing aids. While they had to be disregarded for determining whether he had a disability or not, the court considered they could be taken into account when considering the adjustment to his disability factor.

It was ultimately concluded that although Mr Barry was in fact educational level 2, his circumstances were better reflected by the adjustment factor of someone with educational level 3. In other words, the assistance of a hearing-aid and Mr Barry's determination and consistency in the workplace were such that it could be modelled as being broadly equivalent to the advantage gained from a higher education qualification beyond A level. The adjustment factor applied was therefore one of 0.56; significantly closer to his 'standard' disabled adjustment factor of 0.45 than his non-disabled factor of 0.89.

The Guidance Notes

Despite the passage of time since the latest edition of the Ogden Tables were published, Barry is one of the first reported cases to show the application of this section of the revised guidance notes.

Those guidance notes contain many more useful pointers, explanations and worked examples.

For example, when considering the Table A-D adjustments, it is notable that they only go up to age 54. Why? The notes explain that for older ages with those who are employed the reduction factor tends to increase towards 1 at retirement age. Conversely, for the unemployed the reduction factor falls towards 0. The reduction factors become much more dependent on individual circumstances. It opens up the potential to argue, depending on the particular facts of the case and the Claimant's circumstances, for a substantial adjustment or alternatively a negligible one.

To take another example, what about the potential for future employment being interrupted by bringing up children? Should the multiplier be adjusted? Once again, the answer is in the notes. The factors in Tables A to D already account for that

The case of *Barry* is a useful one. Not only for its clear demonstration of the right approach to adjustments to Tables A-D, but also because it highlights quite what essential reading the guidance notes to the Ogden Tables are for practitioners involved in calculating of future losses.

PROPERTY ADAPTATIONS

By Ella Davis

After grappling with all the arguments that can arise out of how to compensate a claimant for the need for a new property (how to deal with short life expectancy, what credit to give for properties which would have been purchased in any event and so on), property adaptation claims do not always get the attention they deserve. However, they can involve very large sums (sometimes more than any Swift v Carpenter award) and also generate significant legal argument. It is crucial that practitioners acting for claimants or defendants marshal their evidence as thoroughly as possible to put them in the best position to make those arguments.

This article looks at some basic principles, what can be claimed, what evidence is needed, and considers the specific issue of claims for more than one set of adaptations.

Principles

When considering any claimed adaptation, practitioners should ask themselves the following questions:

- Is there a need for the adaptation? There is no standard set of disability adaptations and it is important to consider the particular needs of the claimant. See for example *Robshaw v United Lincolnshire Hospitals NHS Trust [2015] EWHC 923* (QB) at paragraph 234, where it was held that the nature of that claimant's disability meant it was reasonable for him to be able to access the whole property in his powered wheelchair, while noting that it is "possible to envisage some disabled claimants for whom this would not be a factor of any significance, if at all."
- Is the need caused by the defendant's breach of duty? For example, the claimant may have had an unmet pre-existing need for an adaptation but the cost of meeting this need in any new/newly adapted property should not be borne by the defendant. The claimant may have had some need for adaptations as they aged in any event in which case credit for these should be given.
- Is the proposed adaptation reasonable? For example in *Whiten v St George's Healthcare NHS Trust [2011] EWHC 2066* (QB), while landscaping costs were allowed in so far as they provided a safe and stimulating area for the child claimant to play in, the cost of a timber cube (£2,750 plus VAT) and of garden lighting (£3,525 plus VAT) were not.
- Is the claimed/proposed adaptation consistent with the claimant's duty to mitigate their loss? Is there a more reasonable means of meeting the claimant's reasonable need? For example, where a claimant has purchased or is proposing to purchase a property which will need extensive adaptation, an argument might be made that at least some of those adaptation costs could have been avoided by the purchase of a more suitable property.

The Calculations

In addition to the obvious initial building costs of adapting the property, adaptation claims can include the following:

- Increased running costs/insurance. Particularly where properties are extended, there are likely to be increased utility bills, increased insurance costs and increased regular property maintenance costs. It is important to distinguish such increased maintenance costs from any other claim for home maintenance which the claimant would have carried out themselves but will now have to pay for.
- Additional furniture, carpets and curtains. Again, these will all be necessary where extensions such as a carer's suite are proposed.

- Restoration. Some disability related adaptations will lower the value of the property and there will be a cost associated with removing them before the property can be sold.
- Credit for betterment. Other adaptations, such as those which increase the footprint of the property, will increase the value of the property. Credit should be given for such betterment. Both parties should ensure they ask their experts to address restoration and betterment so that they are equipped to meet the other side's arguments in this respect.
- Professional fees. In addition to architect's fees, there may be the cost of an occupational therapy report to advise on the suitability of adaptations or there may be legal fees associated with some larger projects.
- Maintenance and replacement of specialist equipment. As well as costing for the initial installation of specialist equipment (for example wash and dry toilets, body dryers, video intercoms etc.), experts should be asked to provide costs for the regular maintenance of such equipment, as well as an opinion on its likely lifespan. These issues may be addressed by either accommodation or occupational therapy experts as appropriate.
- Contingencies for building projects. There will often be a claim for a contingency recognising that initial estimates of the cost of building projects can be affected by changes in the cost of materials, issues of availability of materials, unforeseen issues when work starts etc.

Evidence

All practitioners need to ensure that their evidence (lay and expert) both addresses all of the above points, and creates a consistent narrative. There is nothing wrong with having evidence that addresses a number of possible options/ scenarios, indeed this will often be desirable, but each party will ultimately want to ensure that their reports enable them to draft a schedule or counter schedule which puts forward a logical, consistent position.

Medical Evidence

Medical experts need to be asked to give relevant opinions on need and suitability of adaptations. In particular if it is asserted by a claimant that there is a medical/therapeutic need for an adaptation, rather than it simply being something it would be nice for them to have (a classic example being swimming or hydrotherapy pools), the experts on both sides need to address this argument. A defendant who wishes to challenge a proposed adaptation on the grounds that it is unsuitable, maybe even dangerous, again needs to check that this is covered by the relevant medical experts.

Witness Statements

The claimant's injury needs will generally be assessed by the relevant experts, but witness statements should cover any needs specific to the claimant's situation which might not be covered by such assessment. For example, the claimant might have a reasonable need arising from their pre-accident lifestyle which should be accommodated in any new/newly adapted property. If it is proposed that the claimant will continue to live with family members, it may be reasonable for the court to consider the specific needs of those family members (see for example *Whiten* at 441), but these will have to be evidenced in the witness statements.

Accommodation experts

Unless practitioners supply their experts with the right documents and ask the right questions, there is a danger that accommodation reports can become generic, one size fits all documents that do not properly address the needs of the specific claimant. Practitioners must be sure to ask accommodation experts to review all relevant documents in the case (including witness statements, other expert reports, pleadings etc.) and then to check the reports for inconsistency with those other documents. For example, if a party is proposing that a claimant will have 24/7 care including the provision of all meals, their accommodation report should not generally be proposing extensive adaptations to the kitchen, unless either in support of an alternative position or perhaps because there is an argument that some ability to use the kitchen would promote the claimant's independence. Similarly, if the medical and occupational therapy evidence is to the effect that wheeled mobility aids will only be used outside

the house, accommodation reports should not include the costs of widening doorways to allow the passage of wheeled mobility aids.

More than one set of Adaptations

Successive adaptations

Sometimes claims might me made for adaptations to successive properties. In *Whiten*, the parents of an injured child had made extensive adaptations to a property before trial, despite being advised that the property would not meet the claimant's long term needs even after adaptation. The defendant contended that it should not be expected to pay for both these adaptations, and the adaptations which would be needed to the more suitable property to be purchased in the future. The court held that in the circumstances of that case, it was reasonable for the parents to have carried out the adaptations and that they were therefore recoverable in principle. The court took into account the fact that the family were living in wholly unsuitable accommodation with a second child due imminently; the family's close ties to the area, including proximity to the claimant's school and therapies; the evidence at the time that the claimant only had a very short life expectancy; and the fact that the cost of the capital expenditure on a new property would have to be borrowed from other heads of loss[1], some of which were likely to be paid by way of periodical payments, such that it was unlikely that the defendant or court would have agreed to an interim payment large enough to facilitate a move to a property within the area. In those circumstances the court allowed recovery of two sets of adaptations while recognising that "in most cases, the incurring of duplicate adaptation costs will not be reasonable and should not be borne by a defendant." The case demonstrates the fact specific nature of the assessment of reasonableness and the importance of detailed evidence in support of any claim for successive adaptations.

Adapting properties of friends and family

In *Manna v Central Manchester University Hospitals NHS Foundation Trust [2012] EWCA Civ* 12 the Court of Appeal upheld an award for the purchase of a second adapted home for the father of a disabled claimant to enable the child to spend time with both of his divorced parents. In doing so, the court noted that the award should be regarded as generous and intensely fact-dependent. More commonly claims will be made for more modest adaptations to the homes of other family members.

Where the claimant is only likely to visit the other property infrequently, more limited adaptations will usually be allowed. In *Whiten*, a claim was made for adaptations to the claimant's grandparents' home in Barbados. While the court allowed a claim for such adaptations, nothing was allowed for the replacement of equipment as this was likely to be used infrequently, and only for the next five years or so after which it would become impractical for the claimant to travel to Barbados[2]. In Robshaw a claim was made to adapt the houses of the claimant's father and grandfather at a cost of £5,500 per property. The court preferred the defendant's suggestion that portable ramps at a cost of £500 each could be installed.

Conclusion

While many of the same issues arise often in adaptation claims, these claims are intensely fact specific, and it is important that parties therefore obtain detailed and coherent evidence in support of their respective positions.

The case was decided at a time when Roberts v Johnstone applied, although similar issues could arise since Swift v Carpenter.

1. The case was decided at a time when *Roberts v Johnstone* applied, although similar issues could arise since *Swift v Carpenter.*

2. See also *Biesheuvel v Birrell [199] PIQR Q40*

CHANGES TO PART 21 (APPROVAL & AND MANAGEMENT OF SETTLEMENTS ETC. FOR CHILDREN AND PROTECTED PARTIES)

By William Dean

With effect from 6 April 2023, Practice Direction 21 was revoked and Part 21 was amended to incorporate some of the provisions previously in PD21 (as well as some other changes).

Practitioners will be familiar with this section of the Civil Procedure Rules, which concern children (persons under 18) and protected parties (persons who lack capacity to conduct litigation).

Litigation Friends

Every protected party must have a litigation friend to conduct proceedings on her behalf: r.21.2(1). Every child must have a litigation friend unless the court permits her to conduct proceedings without one: r.21.2(2), (3) and (4). Where a litigation friend is required, no person may take a step in proceedings (save for issuing, serving or applying for a litigation friend) until there is one: r.21.3(2). A person may become a litigation friend by way of certificate of suitability or court appointment: r.21.5 and r.21.6.

Approval

Rule 21.10 provides that no "settlement, compromise or payment" (thus including any interim payment) in a claim by/behalf or against a child or protected party is valid without approval by the court. Accordingly, the court's approval must be sought by way of application where (for example) the litigation friend and an opposing party have reached an agreement to settle a claim. Previously, the applicable procedure was found spread across the rules in Part 21 and PD21. The recent amendment amalgamated all of the relevant provisions into Part 21.

Proceedings brought for the sole purpose of obtaining approval must be made using the Part 8 procedure: r.21.10(2)(b). The application must be supported by a draft consent order, details of to what extent liability is admitted, the age and occupation of the child or protected party, confirmation that the litigation friend approves the settlement, a copy of any medical, financial or other expert evidence or advice, details (in a personal injury claim) of the accident and claimed loss and damage, documents relevant to liability and "a legal opinion on the merits of the settlement, except in very clear cases, together with any relevant instructions unless they are sufficiently set out in the opinion": r.21.10(3). The draft order must be in Form N292 with appropriate amendments.

In almost all cases (even those which may be described as "very clear"), the court will be assisted by advice from a barrister who is specialist in the relevant area of practice. The advice will set out the facts and details of the agreement, analyse the claim and the range of reasonable settlements, and provide an opinion (including in light of, for example, risks on liability) on whether the settlement is reasonably capable of approval. The decision remains the court's; but, for reasons of practicality, often connected to the weight of business before the judge in the list, the advice will form important guidance as to the likely outcome of the application.

Investment and Management of Funds

The default rule is that settlement monies will be paid into the court special account on an application by the litigation friend: r.21.11(7). Money in the special account will be paid out when a child turns 18: r.21.11(8)(b). The application for investment directions will be on Form CFO320 for a child or Form CFO320PB for a protected party: r.21.11(6).

Money for the benefit of a child (who is not a protected beneficiary) may be paid directly to the litigation friend to be placed into an account for the child's use, per r.21.11(8)(a), but: (i) the court will be

slow to permit money intended to be retained until the child turns 18 to be used prior to that date; and (ii) the previous attraction of payments into personal accounts, namely the higher rate of interest, has been reduced by the recent recovery in the rate of interest applied to funds in the special account (4.25% at the time of writing). In a case involving a very significant sum of money, the court will expect an applicant seeking the funds to be paid into a bespoke account or trust to provide extensive detail as to the terms of investment and the use to which the money will (or may) be put. A copy of the terms of the trust will be scrutinised. In many cases, particularly given the (now better) interest rate and the facility to apply in writing for 'payments out' under r.21.11(10), the special account may well be adequate as an investment vehicle.

Appointment of a Deputy

A significant change in the new version of Part 21 is to the threshold above which the court must direct a protected party's litigation friend to apply to the Court of Protection for the appointment of a deputy for management of the fund. Prior to 6 April 2023, it was £50,000; that has now been raised to £100,000, with the intention of removing more cases from the (potentially lengthy and costly) Court of Protection procedure. There remain exceptions, set out in r.21.11(9), and the Court of Protection may permit the sum (even exceeding £100,000) to be retained in court and invested in the same way as a child's fund can be: r.21.11(9)(e).

Recovery of the Litigation Friend's Costs and Expenses

The old rules about what costs and expenses a litigation friend may recover from the child or protected party's settlement have been moved from PD21 into r.21.12.

Such expenses, according to r.21.12(1)(a) and (b), must have been reasonably incurred and reasonable in amount; and in assessing such reasonableness the court will consider all the circumstances of the case, including the usual factors in r.44.4(3), premised on the facts and circumstances as they reasonably appeared to the litigation friend: r.21.12(5) and (6). Any costs must be in line with the provisions in Part 46 and PD46 which would otherwise apply to the action.

Expenses may include an insurance premium and interest on a loan taken out to pay a premium or another disbursement: r.21.12(3). The detailed (mandatory) requirements for evidence in support of an application are now in r.21.12(10). The litigation friend must file a witness statement setting out: the nature and amount of expenses; a copy of the CFA/DBA, supporting risk assessment and reasons for selecting that basis of funding (including advice given about it); a bill or costs breakdown from the solicitor; details of costs (agreed, recovered or fixed) recoverable by the claimant; and an explanation of the amount agreed/awarded for general damages for pain, suffering and loss of amenity and for past financial loss (accounting for sums recoverable by the Compensation Recovery Unit). The exacting detail specified in the list indicates that a court may be slow to permit recovery of expenses where there has been no or partial compliance.

In recent years there has been some discussion (and reference to first instance decisions with differing outcomes) about the recoverability of ATE premiums in cases where the facts or liability appeared clear-cut. The reality is that in almost every claim where there is no existing litigation insurance it is likely to be appropriate for a litigation friend to take out insurance to cover the risk of, for example, an early Part 36 offer which cannot be evaluated before the expert or other evidence is complete. A litigation friend would be on uncertain ground if she were to purport to accept an offer to avoid adverse costs consequences where (because some evidence is outstanding) there were no guarantee of subsequent approval by the court.