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# Quantum of Damages in the Employment Tribunal and Civil Courts



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20 March 2024



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# Quantum in the Civil Courts

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# QUANTUM IN THE CIVIL COURTS

- General Damages
  - PSLA
  - Loss of Congenial Employment
- Special Damages
  - Loss of earnings/pension
  - Care and assistance
  - Medical treatment

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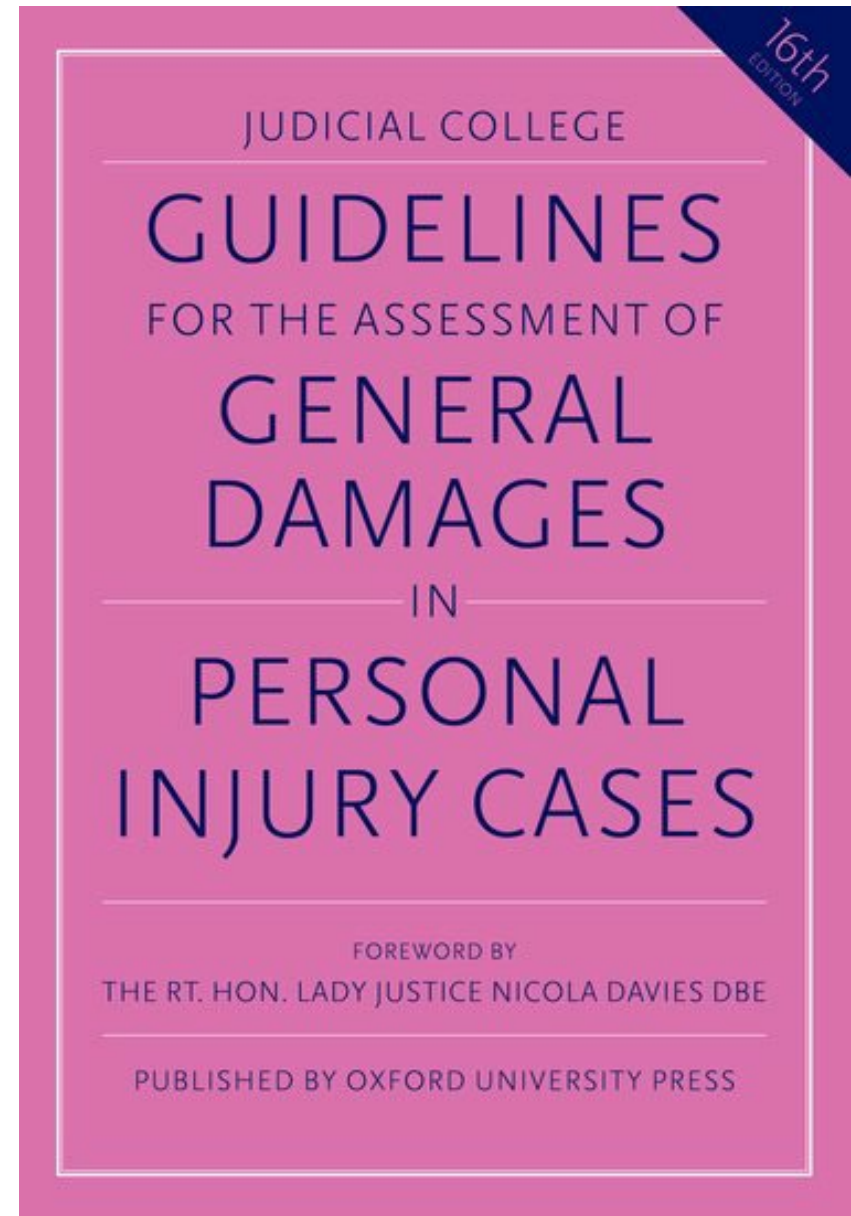
# GENERAL DAMAGES – PSLA

Starting point: what are you assessing?

- Pain, suffering and loss of amenity
  - All past, present **and future** physical and psychiatric symptoms
  - Loss of enjoyment of life or a reduction in ability to perform everyday tasks

# JUDICIAL COLLEGE GUIDELINES

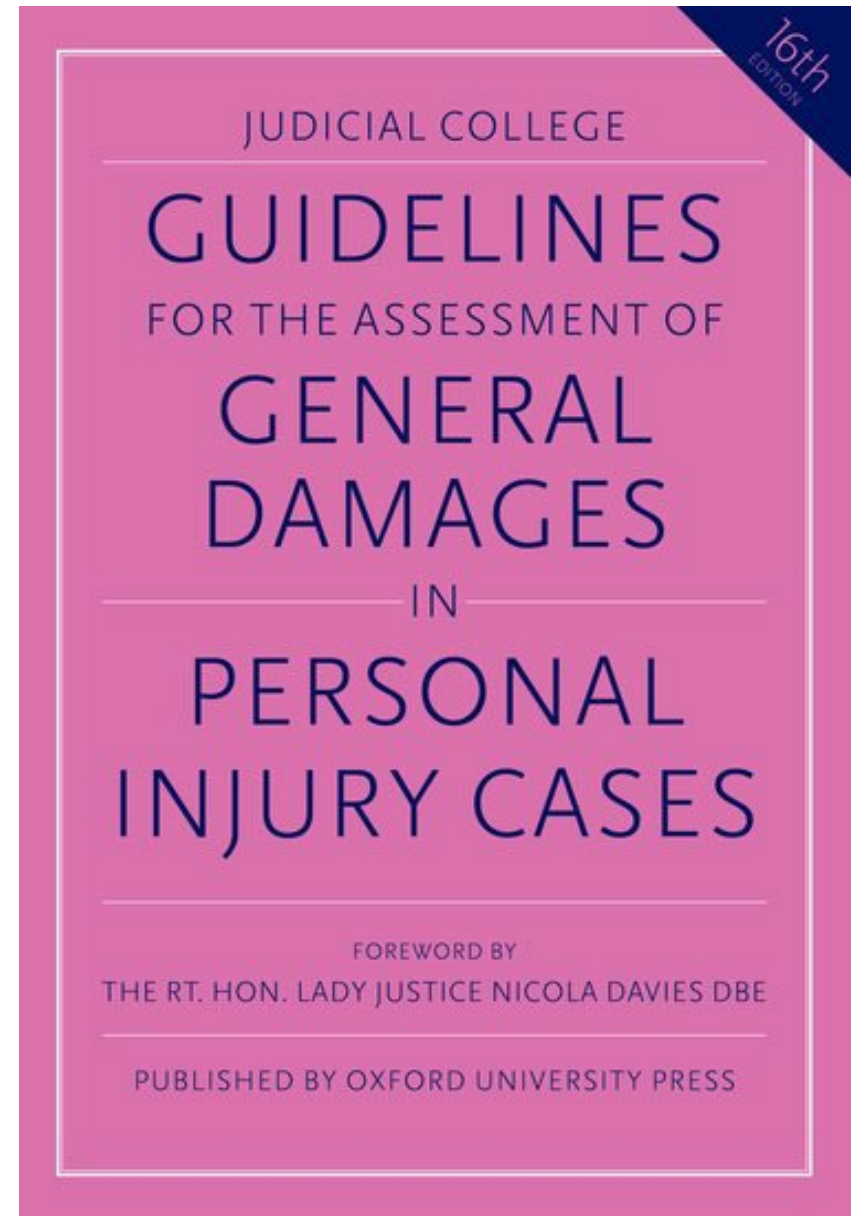
- 16<sup>th</sup> edition (until **Friday 5 April 2024!**)
- Chapter 4 : Psychiatric and Psychological Damage
  - Section (A) – Psychiatric Damage Generally
  - Section (B) – PTSD
  - Section (C) – Sexual and/or Physical Abuse\*
    - NB: this section has (apparently) been significantly updated in the 17<sup>th</sup> edition



# JUDICIAL COLLEGE GUIDELINES

The factors to be taken into account in valuing claims of this nature are as follows:

- the injured person's ability to cope with life, education, and work;
- the effect on the injured person's relationships with family, friends, and those with whom they come into contact;
- the extent to which treatment would be successful;
- future vulnerability;
- prognosis;
- whether medical help has been sought.



# JUDICIAL COLLEGE GUIDELINES

## (a) Severe

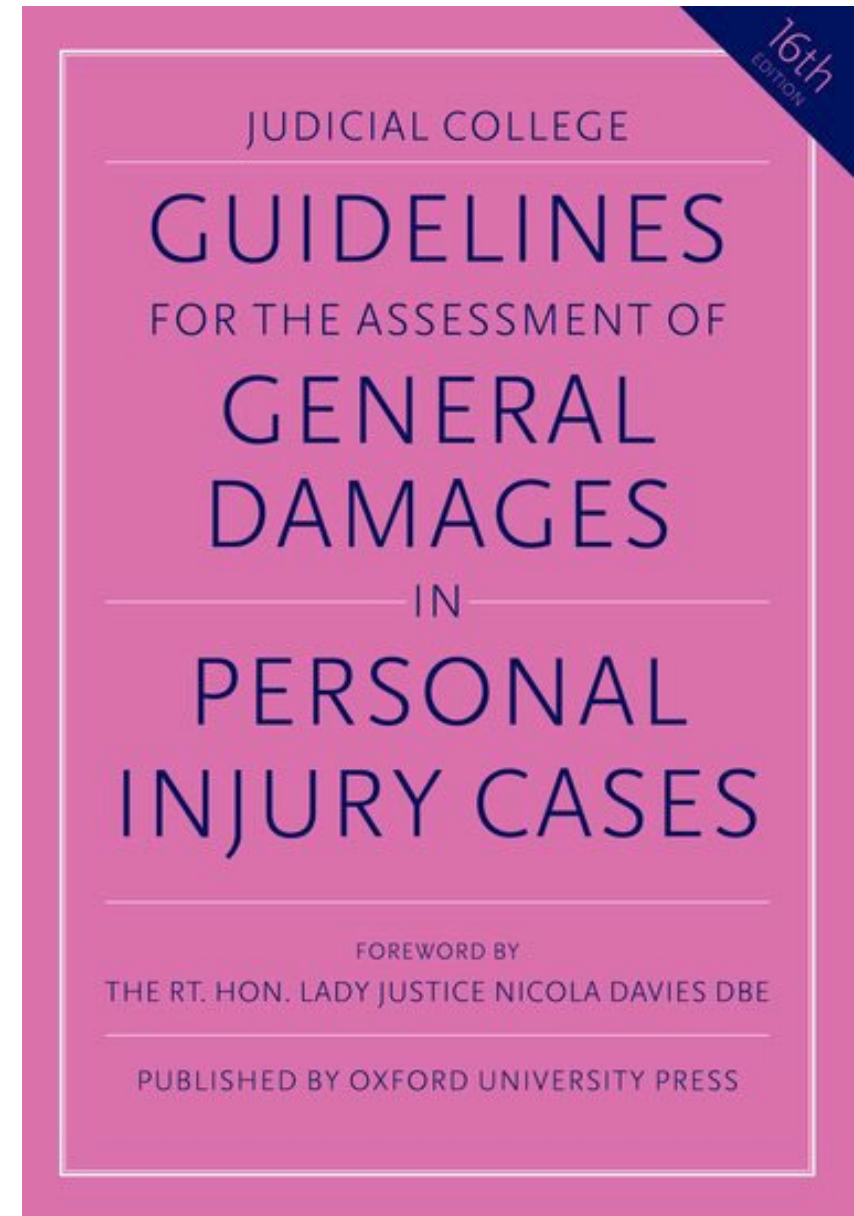
In these cases the injured person will have marked problems with respect to factors (i) to (iv) above and the prognosis will be very poor.

**£54,830 to £115,730**

## (b) Moderately Severe

In these cases there will be significant problems associated with factors (i) to (iv) above but the prognosis will be much more optimistic than in (a) above. While there are awards which support both extremes of this bracket, the majority are somewhere near the middle of the bracket. Cases involving psychiatric injury following a negligent stillbirth or the traumatic birth of a child will often fall within this bracket. Cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would appear to come within this category.

**£19,070 to £54,830**





# JUDICIAL COLLEGE GUIDELINES

## (c) Moderate

While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good.

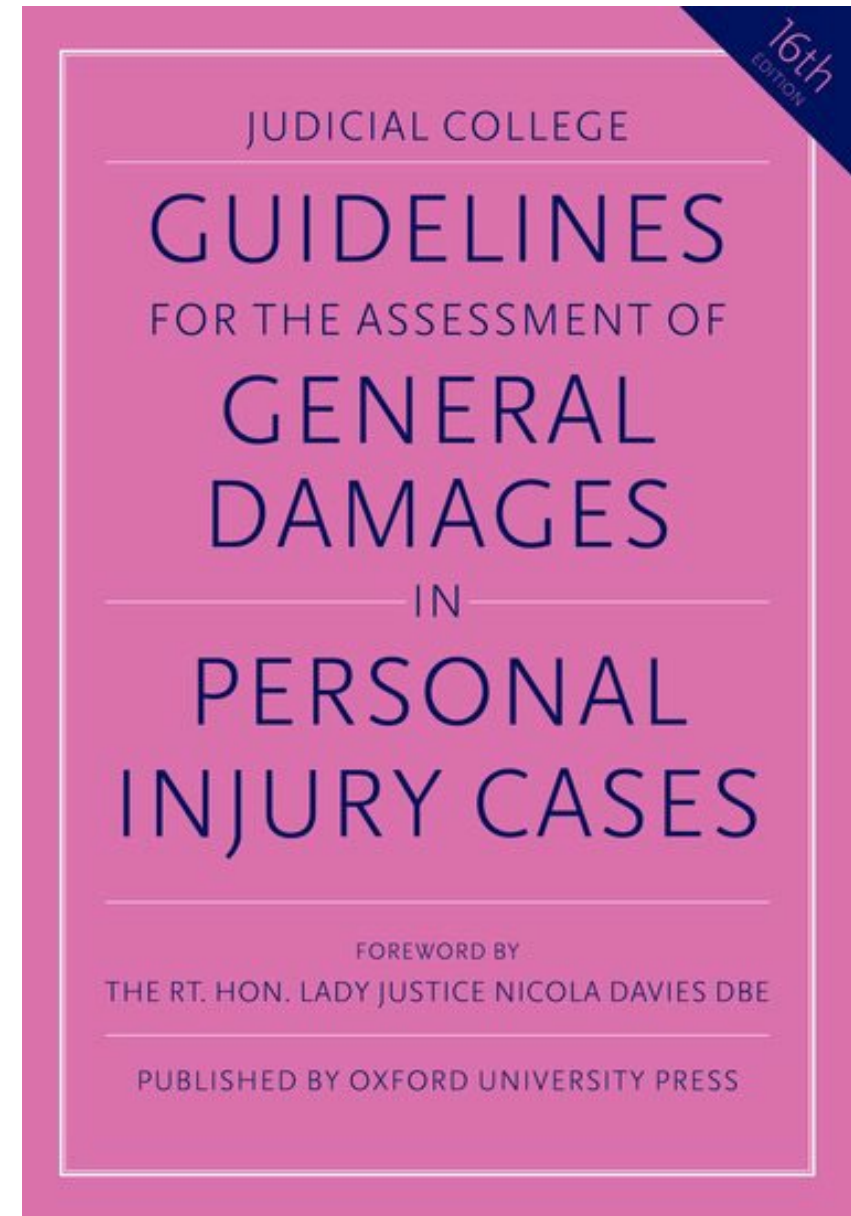
Cases of work-related stress may fall within this category if symptoms are not prolonged.

**£5,860 to £19,070**

## (d) Less Severe

The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep were affected. Cases falling short of a specific phobia or disorder such as travel anxiety when associated with minor physical symptoms may be found in the Minor Injuries chapter.

**£1,540 to £5,860**





## PSLA - CASE LAW

- Illustrative not authoritative
- Fact specific
  
- Key factors
  - Major injury
  - Duration
  - Prognosis
  - Age
  
- Unusually low/high awards are often reported
  
- Lexis PSL
- WestLaw / Lawtel
- Kemp & Kemp



# LOSS OF CONGENIAL EMPLOYMENT

Starting point: what are you assessing?

*Wilbye v Gibbons* [2003] EWCA Civ 372

*It was important to keep damages for loss of congenial employment in proportion. The claimant was being compensated for **being unable to pursue a career she thought she would have enjoyed**. She never actually embarked on that career, although she probably had the ability to obtain the qualifications required, and **in financial terms she had been fully reimbursed under the head of future loss of earnings**, so it was really an **award for a particular disappointment**, which might or might not be prolonged.*

- Usually employment of an unusual nature
- Often 'vocational' employment but not always
- Key point is often a loss of satisfaction / fulfillment

# LOSS OF CONGENIAL EMPLOYMENT

The award takes into account factors such as:

- Age of the claimant
- Nature of the job that has been lost
- Evidence that the claimant enjoyed it
  - enjoyment of the work (as opposed to salary/financial status)
  - *Morrow v Shrewsbury Rugby Union Football Club Ltd* [2020] EWHC 379 (QB)
- Qualifications and training required
- Social factors (e.g. camaraderie)
- Notion of public service
- Environment in which the job was performed

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# VALUE OF THE AWARD

- “Important to keep in proportion”
- Not linked to earnings
- Often between £5,000 - £10,000
- Can be exceptionally high awards
  - *Appleton v El Safty* [2007] EWHC 631 (QB) at [85]
  - £25,000 for a professional footballer

# VALUE OF AWARD

*Barry v Ministry of Defence* [\[2023\] EWHC 459 \(KB\)](#)

- Royal Marines
- £8,000

*Preater v Betsi Cadwaladr University Health Board* [\[2022\] Lexis Citation 141](#)

- Marketing
- £7,500

*Elgamal v Westminster City Council* [\[2021\] EWHC 2510 \(QB\)](#)

- GB athlete
- £8,000

*Crosby v Wakefield Metropolitan District Council* [\[2020\] Lexis Citation 183](#)

- OSG Prison Officer
- £6,000



# SPECIAL DAMAGES

- Key Heads of Loss
  - Loss of earnings/pension
  - Care and assistance
  - Medical treatment

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# LOSS OF EARNINGS/PENSION

- Past Losses
  - Earning capacity (net)
    - 13-week approach
    - Use a longer period if appropriate
    - Consider promotions / pay increases
  - Less actual earnings
- Causation





# LOSS OF EARNINGS/PENSION

- Future Losses
  - Claimant's but-for earnings
  - (Minus) earning capacity
- Multiplier / Multiplicand
  - *Smith v Manchester*
  - *Blamire*

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# FUTURE LOSS OF EARNINGS/PENSION

- Multiplier/ Multiplicand
- Multiplicand
  - “But for” earnings and residual earnings on the balance of probabilities
  - Net earnings
  - Future promotions / pay increases
  - Alternative employment
  - Overtime
  - Job market
  - Retirement age

# FUTURE LOSS OF EARNINGS/PENSION

- Multipliers
  - Tables 3 – 18 (subject to adjustment for contingencies)
  - Adjustment factors (Table A4)
    - Employment status
      - » Employed/not-employed
    - Educational attainment
      - » Level 3 (Higher degree / degree equivalent / professional qualifications)
      - » Level 2 (A-level / GCSE (above grade C/4)
      - » Level 3 (Below GCSE grade C/4)
    - Disability status
      - » (i) He or she has either a progressive illness, or an illness or disability which has lasted or is expected to last for over a year, and
      - » (ii) he or she satisfies the Disability Discrimination Act 1995 definition that the impact of the disability has a **substantial** adverse effect on the person's ability to carry out **normal** day-to-day activities, and
      - » (iii) the effects of impairment limit either the kind or the amount of paid work he or she can do.

# FUTURE LOSS OF EARNINGS/PENSION

*Smith v Manchester* / Loss of earning capacity

- Separate lump sum award – **General Damages!**
- *Loss of future earnings or future earning capacity is usually compounded of two elements. The first is when a victim of an accident finds that he or she can, as a result of the accident, no longer earn his or her pre-accident rate of earnings. In such a case there is an existing reduction in earning capacity which can be calculated as an annual sum...*
- *The second element in this type of loss is the weakening of the plaintiff's competitive position in the open labour market: that is to say, should the plaintiff lose her current employment, what are her chances of obtaining comparable employment in the open labour market? ...*
- Risk needs to be **real** or **substantial**
- Multiplier/ multiplicand approach should be used unless it resulted in an '**obviously unreal result**' (see HHJ Peter Hughes QC in *Kennedy v London Ambulance Service NHS Trust* [2016] EWHC 3145 (QB))

# FUTURE LOSS OF EARNINGS/PENSION

Valuing *Smith v Manchester* awards:

- Based on the claimant's net earnings
- Generally, between 3 months' and 5 years' net earnings
- Awards between 6 months' and 2 years' net earnings are most common
- "Nothing more than a guess" (Megaw LJ in *Eaton v Concrete (Northern)* [1979] (unreported))
- Relevant factors:
  - claimant's skills
  - the nature of the disability
  - whether the claimant is only capable of one type of work, or is, or could become, capable of others
  - whether they are tied to working in one particular area
  - the general employment situation in their trade or their area, or both
- See Chamberlain J in *BXB v (1) Watch Tower and Bible Tract Society of Pennsylvania (2) Trustees of the Barry Congregation of Jehovah's Witnesses* [2020] EWHC 156 (QB) approving the dicta of Browne LJ in *Moeliker v A. Reyrolle & Co. Ltd* [1977] 1 WLR 132

# FUTURE LOSS OF EARNINGS/PENSION

## Blamire awards

*'A Blamire award and a Smith v Manchester award may be combined but they are quite distinct. The former is appropriate where the evidence shows that there is a continuing loss of earnings, but there are too many uncertainties to adopt the conventional multiplier and multiplicand approach to its quantification. The latter is nothing to do with a continuing loss. It is an award for a contingent future loss, in the event of the claimant losing his current job, where, as a result of the accident he would then be at a handicap on the labour market at which he would not have been but for the accident.'*

*(Ronan v Sainsbury's Supermarkets Ltd and another [2006] EWCA Civ 1074)*

# FUTURE LOSS OF EARNINGS/PENSION

## Blamire awards

- Remember: the established multiplier/multiplicand approach should be followed unless there is 'no real alternative' to making a *Blamire* award (*Irani v Duchon* [2019] EWCA Civ 1846)
- Can arise where:
  - Employment history of the claimant is non-existent or vestigial and the range of alternative employment open to the claimant wide and varied (*Willemse v Hesp* [2003] EWCA Civ 994 at [29]–[30])
  - There is uncertainty as to the future (e.g. a claimant's plans to have more children and/or to reduce to part-time, rather than full-time, work) (*Blamire v South Cumbria Health Authority* [1993] PIQR Q1).
  - The claimant is very young and not started employment (*Devon County Council v Clark* [2005] EWCA Civ 266 at [29]–[32])
  - The claim is one for loss of profit of a one-person business (*Hannon v Pearce* (unreported) 24 January 2001, QBD, at pp 11, 15–17 of the transcript)
  - There is a stark absence of evidence (*Dureau v Evans* [1996] PIQR Q18 at Q23–Q25)



# FUTURE LOSS OF EARNINGS/PENSION

Valuing a *Blamire* award

- Generally lower than the multiplier / multiplicand approach
- Use the conventional approach as a starting point and consider allowances for uncertainties
- *Van Wees v Zarkour* [2007] EWHC 165
  - £750,000 *Blamire* award
- *Willemse v Hesp* [2003] EWCA Civ 994
  - Future loss of £110,000 claimed
  - Reduced to £50,000 *Blamire* award by CA
- *Palmer v Kitley* [2008] EWHC 2819 (QB)
  - £30,000 *Blamire* award
  - Calculated by reducing down the multiplier/multiplicand figure (£242,843) for various imponderables





# LOSS OF EARNINGS/PENSION

- Pensions
  - In principle, use the same approach as for earnings
  - Claimant's but-for pension
  - (Minus) 'pension' capacity
  - Key considerations
    - Lump sum payments
    - Money purchase schemes v defined benefit schemes
    - Actuarial evidence
- Can also be subsumed into 'lump sum'/*Blamire* awards

# SPECIAL DAMAGES – CARE AND ASSISTANCE

- Past Losses
  - What has C been unable to do?
  - Who has done it instead?
- Rates
  - Commercial care v Gratuitous care
    - 75% of the standard commercial care rate
      - » Basic rate v aggregate rate
    - Unless the claimant can justify a higher rate
      - » see *CCC v Sheffield Teaching Hospitals NHS Foundation Trust* [2023] EWHC 1770 (KB) where there was no discount for gratuitous care on the aggregate rates due to the high standard of care provided by the Claimant's mother
- Can include psychiatric support:
  - Prompts and reminders in the case of those with memory difficulties;
  - Help with digesting and dealing with post;
  - Emotional support and reassurance to help with regulating the injured person's emotional state.



# CARE AND ASSISTANCE

- Future Losses
  - What will C be unable to do?
  - Who will do it instead?
- Commercial rates
  - National Joint Council Pay scales – Spinal Point 2
  - Current rate:
    - £12.87 (day)
    - £13.92 (aggregate)
- Assistive technology
  - E.g. Alexa / Google Home
  - Apps

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# CARE AND ASSISTANCE

- Decorating / DIY / Gardening etc.
  - Labour costs only
- Beware of carers and double recovery
  - Field J. in *Noble v Owens* [2008] EWHC 359 (QB) disallowed any claim for loss of ability to carry out DIY and gardening on the grounds that these tasks would be carried out by the claimant's carers
  - Compare with *Eagle v Chambers (No 2)* [2004] EWCA Civ 1033 where this argument failed
- Remember PSLA as an alternative to special damages
  - An award will likely depend on whether a claimant has struggled before trial with domestic tasks and not paid anyone else to carry them out (see *Daly v Steam Navigation Co. Ltd.* [1981] 1 W.L.R. 120 at 128)

# SPECIAL DAMAGES - MEDICAL TREATMENT

- Often pleaded for psychological/psychiatric therapies
- But it shouldn't be forgotten in other scenarios
  - **Music therapy** (*Smith v East and North Hospitals NHS Trust* [2008] EWHC 2234 (QB))
- **Alternative therapies:**
  - See King J in *Jones v Royal Devon & Exeter NHS Foundation Trust* [2008] EWHC 558 (QB) at [137]:
    - “apply the *touchstone of reasonableness* and principles of *remoteness and proportionality*, including considering whether the alternatives were *akin to medical expenses* in that the claimant has shown she obtained positive benefit from them in the relief of her condition, whether for physical or psychological reasons”.
    - He awarded the cost of counselling but not the other heads of claim, saying that he was not satisfied they were legitimate on the grounds of “*benefit, reasonableness and proportionality*”
- Requires **medical or scientific literature to support its use** (see Swift J in *Whiten v St George's Healthcare NHS Trust* (2011) EWHC 2066 (QB) at [316] – [317]).

# MEDICAL TREATMENT

- Private treatment v availability of NHS treatment
  - Law Reform (Personal Injuries) Act 1948, s2(4)
- *Eagle v Chambers* [2004] EWCA Civ 1033

*[71] “The question is whether on the balance of probabilities the Claimant will obtain the services from the NHS .... It cannot be enough for the defendants to say “there is no evidence that the services will not be available from the NHS or social services”*

- Need to prove ....
  - Is the claimant likely to pay for the treatment?
  - If so, it is no answer for a defendant to say it is available freely on the NHS
  - If a defendant wishes to argue that a claimant will obtain therapies free from the State, then the burden lies on the defendant to prove it (*Eagle v Chambers* [2004] EWCA Civ 1033)

# TIPS FOR HIGH VALUE TRIBUNAL CLAIMS

- I shall be providing some top-level tips on:
  - Strategy.
  - Some principles.
  - How to gross up large awards.

# TIPS FOR HIGH VALUE TRIBUNAL CLAIMS

- Think remedy first.
- Think evidence.
- Dangers of overcooking it.



# TIPS FOR HIGH VALUE TRIBUNAL CLAIMS

## Multiple causes

- Where loss has been caused by a combination of factors, including some which are not unlawful discrimination, the compensation awarded can be discounted by such percentage as reflects the appointment of that responsibility, see *Thaine v LSE* [2010] ICR 1422; *Olayemi v Athena Medical Centre* [2016] ICR 1074, EAT.
- The tribunal is likely to be assisted by expert medical evidence (preferably on the basis of joint instructions); see *Hampshire County Council v Wyatt* UKEAT/0013/16.
- The tribunal should focus not on the divisibility of the causative contribution but on the divisibility of the harm: *BAE Systems (Operations) Ltd v Konczak* [2017] EWCA Civ 1188, [2017] IRLR 893: '*the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong*'.

# TIPS FOR HIGH VALUE TRIBUNAL CLAIMS

## Approach

- When compensation is ordered, it is to be assessed in the same way as damages for a statutory tort; “*just and equitable*” to do so, but that refers to the choice of remedy not to the amount of compensation (*Hurley v Mustoe (No 2)* [1983] ICR 422, EAT).
- No double recovery in the compensation awarded for loss suffered: *Al Jumard v Clwyd Leisure Ltd* [2008] IRLR 345, EAT.
- Financial loss including career loss: *Wardle v Credit Agricole Corporate and Investment Bank* [2011] ICR 1290.
- Mitigation. 9 principles of *Lindsey v Cooper Contracting Ltd* 0184/15 (22/10/15) [at 16].

# TIPS FOR HIGH VALUE TRIBUNAL CLAIMS

## ACAS uplifts

- Does it apply? Law is uncertain.
  - *Phoenix House Ltd v Stockman* [2017] I.C.R. 84 the EAT adopted a narrow approach.
  - By contrast, *Rentplus UK Limited v Couslon* [2022] EAT 81; supporting the view of Harvey [1922.01], the EAT rejected *Stockman* [at 29] stating the uplift can apply to SOSR and essentially it is a question of substance not form whether an employee is considered to be guilty of misconduct or not performing [at 30].
  - Which decision, if any, is right?
- Deductions not just uplift.
- *Secretary of State for Justice v Plaistow* UKEAT/0016/20.

*Where larger sums are involved, however, a more structured approach will be necessary and should allow for a final check, having regard to the principle of totality, so as to ensure the ET can be satisfied that the final sum is proportionate and that it is just and equitable that the award should be increased by the amount of the uplift [at 91].*

- *Sir Benjamin Slade Baronet and or v Biggs and ors* EA-2019-000687 (1/12/21); and *Rentplus* [at 32-38].

# TIPS FOR HIGH VALUE TRIBUNAL CLAIMS

## Tax

- The *Gourley* principle. An award of damages or other compensation will generally be calculated on the basis of the net loss to the claimant, after deduction of the income tax which he would have been required to pay in the absence of the relevant wrong (*British Transport Commission v Gourley* [1956] AC 185, HL).
- Focus on tax arises broadly occurs in two circumstances in discrimination dismissal case:
  - Basic pay for a notice period is taxed under ss. 402-402E ITEPA.
  - Payments above £30,000, s. 403 ITEPA.

# TIPS FOR HIGH VALUE TRIBUNAL CLAIMS

## Tax

- Section 401 Income Tax (Earnings and Pensions) Act 2003 :  
*(1) This Chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with—  
(a) the termination of a person's employment.*
- Section 406, ITEPA amended the injury exception:  
*(2) Although "injury" in subsection (1) includes psychiatric injury, it does not include injured feelings."*
- Following *Moorthy v Revenue & Customs* [2016] UKUT 13 (TC) and the amendment to ITEPA, it means that w.e.f 6 April 2018, injury to feelings (included aggravated damages) awarded in relation to termination of employment is also taxable (when the £30K allowance is exceeded).

# TIPS FOR HIGH VALUE TRIBUNAL CLAIMS

Tax: what does “in connection with” mean?

- *Crompton v HMRC* [2009] UKFTT 71 (TC). An army soldier sought redress pursuant to section 180/181 of the Army Act 1955 about misinformation he was provided about a different role following redundancy and the redundancy process. The Army Board upheld the complaint and he was awarded £153,864.47.
- The FTT agreed that C left the Army not because of those failings but of his own volition or by way of redundancy. There was no link between the payment and the termination.
- Therefore, not taxable.

# TIPS FOR HIGH VALUE TRIBUNAL CLAIMS

Tax: grossing up. Applying the Gourley principle.

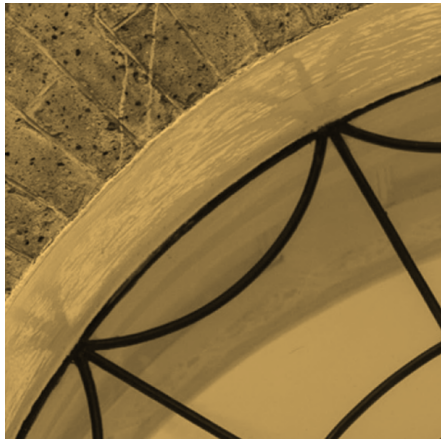
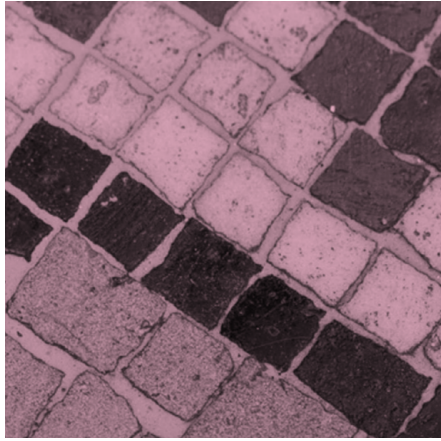
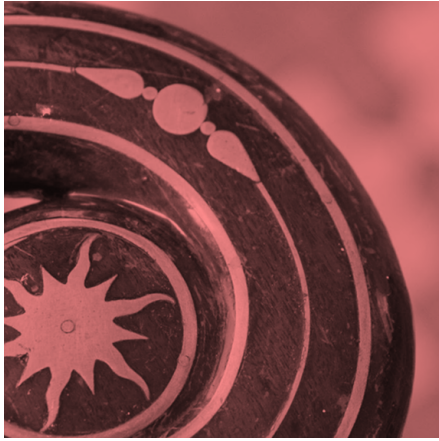
- So account has to be taken in calculation of the damages or compensation of the incidence of tax under s 401 ITEPA on the excess over £30,000 (*Shove v Downs Surgical plc* [1984] IRLR 17. Any statutory cap on the amount of compensation will continue to apply.
- Finlay tables: *PA Finlay & Co Ltd v Finlay* EAT 0260/14, 0062/16 & 0117/16. Reproduced and updated to 2020/21 rates by Harvey (next page), but see my spreadsheet for 23/24 rates which I shall go through.

# TIPS FOR HIGH VALUE TRIBUNAL CLAIMS

Finlay table

	Other Income			Taxable Tribunal Award		
	Gross	Tax	Net	Gross	Tax	Net
PA (0%) to 12,500	0	0	0	0	0	0
BR (20%) the next 37,500	0	0	0	0	0	0
HR (40%) up to 100,000	0	0	0	0	0	0
NR (60%) from 100,001 to 125,000	0	0	0	0	0	
HR (40%) 125,001 to 150,000	0	0	0	0	0	0
AR (45%) 150,001 upwards	0	0	0	0	0	0
TOTALS	0	0	0	0	0*	0
*Amount to be added to taxable and non-taxable awards is £0						





# ANY QUESTIONS?

- DO GET IN TOUCH!

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