ASSESSING QUANTUM IN UNUSUAL PERSONAL INJURY CLAIMS

Introduction

The starting, and ideally finishing, point for a court when assessing damages for personal injuries is the well known statement of Lord Blackburn in Livingstone –v- Rawyards Coal Company (1880) 5 App Cas 25 that:

> "I do not think that there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which would put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

This focus on "full compensation" for the individual concerned inevitably means that damages for expenses and losses will depend very much on the situation of each particular Claimant.

Consequently, a broadly similar injury suffered by one person might, depending upon individual circumstances, result in a much higher award of compensation than a claim involving an almost identical injury suffered by another person.

Three recent cases usefully illustrate this approach in practice.

The Footballer

In Appleton -v- El Safty [2007] EWHC 631 (QB) the Claimant was a professional footballer playing for West Bromwich Albion, then in the Championship, having previously played for Manchester United in the Premiership.

Unfortunately, after an injury whilst training the Claimant suffered an adverse outcome, as a result of sub-standard medical treatment, which ended his playing career.

West Bromwich Albion were promoted to the Premiership at the end of the season in which the Claimant's injury occurred. Consequently, had he been able to continue with his career, the Claimant had real prospects of playing at the top level whether with his current club or as a result of transfer to another Premiership team.

The Court was faced with the complicated task of assessing loss of earnings which depended on the terms of the Claimant's existing contract, the level at which he might have played had his career not ended prematurely and how long that career would have continued.

The judgment provides an interesting insight into the range of contractual benefits often available to professional footballers. In addition to a basic salary the Claimant was entitled to a signing on fee (a lump sum payable annually), a loyalty bonus, a terminal bonus, appearance money, personal appearance fees, a promotion or retention of status bonus and a sell-on fee. Damages, for loss of these contractual benefits had to be assessed, taking account of the prospect the Claimant's earnings could have been enhanced had he returned to play in the Premiership.

Although the judge considered the Claimant was a footballer with a relatively low profile an award was also made for loss of media and sponsorship opportunities, in addition to loss of earnings as a player.

Recognising, in the words of the judge, that "to play professional football at the highest level is many a school boy's dream" an award of £25,000 for loss of congenial employment was made, a very high figure for damages under this head.

It was difficult to predict whether the Claimant would have had a long-term career in football, for example as a coach or assistant manager, after the end of his playing days had it not been for the early termination of his career. Nevertheless, the judge concluded it would be unjust to make no award and a lump sum of £60,000 was given on the basis of Blaimire -v- South Cumbria Health Authority [1993] P.I.Q.R. Q1.

Furthermore, as the Claimant would need a knee replacement in the future which would affect his position on the labour market a Smith -v- Manchester Corporation (1974) 118 S.J. 597 award of £10,000 was made in addition to the Blaimire lump sum.

These awards were all, of course, based upon the Claimant's pre-injury situation as a high-earning professional sportsman.

Even if a Claimant has not yet achieved career ambitions it may be possible, as the next case illustrates, to recover damages based upon future prospects the Claimant has lost as a result of the injury.

The Lighting Designer

In Leesmith -v- Evans [2008] EWHC 134 (QB) the Claimant, though working as a warehouse technician at the time the injuries were suffered, had hoped to become a lighting designer in the rock music industry.

The Claimant first worked in the entertainment industry on a casual basis at a theatre in Great Yarmouth. He then took a series of jobs, some of which were in the entertainment industry, eventually the job as a warehouse technician. This position offered the Claimant experience in working with lighting equipment and, perhaps more importantly, the opportunity for making contacts which might lead to future work as a lighting designer.

The Claimant's income at the time of the accident, which largely reflected earnings in earlier years, was £13,000 a year.

When seeking damages for loss of future earnings the Claimant contended that, after two years or so working as a warehouse technician, he would have been able to work as a lighting designer in the rock music industry. The Claimant argued that this, in turn, would have allowed further career progression so that, by the age of 40, he would have been a top lighting designer earning over £150,000 a year.

The Court heard evidence that there was no clear career path for a lighting designer and earnings varied considerably between individual designers. Whilst it was true that a top lighting designer could earn over £200,000 a year there were, perhaps, only three or four such designers in the world.

The judge concluded that the Claimant's pre-injury employment did present potential opportunities for the future, though he considered there was an air of unreality about the prospects the Claimant contended for. Even so the Court was able to conclude the Claimant would have progressed to work as a lighting technician, had it not been for the injuries suffered, and would have made further progression in that career, although not to the extent of becoming one of the handful of top lighting designers in the world.

Consequently, there was a sufficient "career model" which gave the basis for a multiplicand to calculate future loss of earnings. That career path was certain enough for the Court to reject a calculation based on the loss of chance approach adopted in cases such as Doyle -v- Wallace (Times 22 July 1998) and Langford -v- Hebran [2001] EWCA Civ 361.

On the basis of likely earnings, over different periods in his working life, the Court was able to calculate a pro-rata average reflecting levels of earnings over each such time. That average came out at £45,000 a year. Because, in this way, the multiplicand reflected different levels of earnings no adjustment to the multiplier was required, save for the normal adjustment found in the Ogden Tables (Tables A to D) to reflect contingencies other than mortality.

Accordingly, although the Claimant had not yet established himself in his chosen career the evidence was sufficient for the judge to conclude it was likely he would have been able to successfully follow such a career. On that basis, reflecting the Claimant's individual skills, determination and prospects, future loss of earnings were calculated on an annual figure of £45,000 rather than the pre-accident figure of £13,000 a year.

Particular skills or attributes may also be a relevant factor when determining whether, and if so to what extent, there is a dependency under the Fatal Accidents Act as the third recent case explains.

The Wealth Creator

Welsh Ambulance Services NHS Trust -v- Williams [2008] EWCA Civ 71 concerned claims following the death of the deceased, described as a wealth creator and a man of "unusual energy, flair and drive".

The key issue was whether the spouse of the deceased and his adult children were dependents. If so there was a subsidiary issue about the extent of any such dependencies.

The background was that in the early 1960s the deceased purchased a builder's yard and began to develop the business as a builders' merchant. He later diversified into property.

By the time of the deceased's death the family was in an extremely comfortable financial position. The widow and all three children were partners in the business run primarily by the deceased. In the last year before the death of the deceased each partner was entitled to profits of £88,630. However, the economic value of the labour put in by the children was no more than £15,000, and in the case of the widow only £3,000.

Although the death of the deceased was a devastating blow to the family, and the period after his death anxious and distressing, the family members increased their input to the business and, as a result, it thrived with both turnover and profits increasing. Consequently, each family member received more profit, in subsequent years, than in the years before the death of the deceased.

S.3 (1) Fatal Accidents Act 1976 requires a dependent to show the death has resulted in loss which is capable of being valued in financial terms. That does not necessarily mean the dependent was in fact being financially supported by the deceased at the time of death or even that services were provided by the deceased. Rather, it was held to suffice if there was an expectation of future benefit, whether in money or services deriving from the deceased, lost as a result of the death.

The contribution of the deceased, through his particular skills, could be valued by reference to the cost of the remuneration package that would have to be offered to a manager, with the same skills, being brought into the business.

Because the loss could be valued in this way, and that valuation crystallised at death, it did not matter whether the family did then appoint a manager or not. Similarly it was irrelevant that, through the efforts which had been put in to it by the family, the business did so well without incurring the cost of a replacement manager.

The Court observed that the only post-death events which would be relevant were those which affected the continuance of the dependency, such as the death of a dependent before trial.

Accordingly, in this way, the Court was able to reflect, in the award of damages for dependency, the individual skills of the deceased as a wealth creator.

Conclusion

These recent cases illustrate the importance of assessing the individual Claimant, and in appropriate cases the deceased, not only in terms of previous achievement but also future prospects which have been lost. That, in turn, will inform the process of gathering relevant evidence and help ensure the objective of "full compensation", in line with the statement of Lord Blackburn in Livingstone, is achieved.