

Disability and the 2010 Equality Act: Relevance in Personal Injury Claims

Introduction

Medico-legal experts instructed to write reports for use in personal injury claims may be perplexed by the number of those instructions which ask for an opinion about whether the claimant is disabled.

Medical experts may be concerned that labelling the claimant as disabled might be regarded as a somewhat pessimistic approach. However, lawyers seeking an opinion on this point do so for valid, technical, reasons which this article will explore.

The purpose of this article is to explain why lawyers so often ask medical experts whether it is considered the claimant can be properly be described as disabled. It is hoped that will enable medical experts to appreciate the significance of an opinion on this point, particularly so far as estimating claims for future loss of earnings is concerned.

After outlining what might be described as the traditional method of calculating future loss of earnings the article will turn to the modern method increasingly being adopted by the courts in appropriate cases and seek to explain why the concept of disability is so important to that methodology.

It is hoped this analysis will help explain why so many medico-legal instructions now raise the question of disability and help to put such instructions into proper perspective.

Background

Where an injured person has continuing symptoms, even if these are not particularly significant, that may be important in the employment context and have a bearing on future earnings potential.

There are, of course, cases where the injuries have an immediate, and continuing, effect on earnings and employment prospects. A more insidious problem is that faced by the injured person who gets back to work, perhaps doing the same job, but is likely, nevertheless, to face problems in the future which, whether or not the same level of earnings can be maintained, will probably result in a shorter, overall, working life.

Even if the claimant has no immediate and continuing loss of earnings the courts accept that there may be a claim for the loss of future earning capacity. In Farley –v- John Thompson (Design and Contracting Division) Ltd [1973] 2 Lloyd's Rep 40 Lord Denning MR explained:

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

Over the years the courts have endeavoured to adopt a more scientific approach to calculating loss of future earnings. What might be termed the “traditional” method of calculation has often, but not always, been superseded by a more modern methodology.

Traditional Method

In Billett –v- Ministry of Defence [2015] EWCA Civ 773 Jackson LJ observed:

“Where at the date of trial the effect of the claimant’s injury continues to inhibit his ability to work, the court needs to compensate him for the difference between his predicted future earnings and his notional future earnings if he were uninjured. The court does this by calculating the annual loss (the multiplicand) and then applying an appropriate multiplier. The court derives the multiplier by subtracting the claimant’s actual age from his retirement age, then making reductions to take account of accelerated receipt and contingencies. The contingencies are all the hazards of life which might have prevented the claimant from working continuously from the date of trial to retirement age, even if he had not sustained the injury for which he is now being compensated.”

Jackson LJ went on to state:

“When I started at the Bar, judges derived the appropriate multiplier on the basis of judicial experience and citation of authority.”

When awarding compensation for loss of earning capacity, as opposed to loss of earnings, Jackson LJ explained:

“As a matter of convention a claim for damages on this basis is commonly referred to as a *Smith v Manchester* claim. In practice such awards usually range between six months’ and two years’ earnings: see *Court Awards of Damages for Loss of Future Earnings: an Empirical Study and an Alternative Method of Calculation* by R Lewis and others, [2002] *Journal of Law and Society*, Vol.29, pages 406-435 at 414.”

This traditional approach has been largely, though not entirely, replaced by a modern, more statistical, approach. Crucially, however, this methodology depends upon the court finding that the claimant is, in contrast to the pre-injury

situation, disabled; hence the increasing incidence of requests, when seeking medical opinion, for a view on this very point.

Modern Method

The modern method of estimating future loss of earnings is derived from the Ogden Tables.

In Billett Jackson LJ noted:

“In the 1980s Sir Michael Ogden QC chaired a working party which developed the well known Ogden Tables. These tables enable the court to derive an appropriate multiplier, which takes into account the risk of certain contingencies and the benefit of accelerated receipt.”

Over the years the Ogden Tables have been refined and updated, as further statistical information has become available. The sixth edition, published in 2007, introduced new tables setting out a series of what are termed “reduction factors” that can be applied to the basic relevant multiplier for loss of earnings.

The basic multiplier reflects life expectancy whilst the reduction factor takes account of, in the specific context of likely working life, the claimant’s gender, educational qualifications, employment status and, most importantly for present purposes, whether or not the claimant is disabled.

The adjusted multiplier, reached by applying the reduction factor to the basic multiplier, should allow a more accurate assessment to be made. The theory goes, about the likely duration of the claimant’s future working life than just the exercise of judicial discretion. That, in turn, should result in a more accurate estimate of future lost earnings.

The reduction factors are found in tables A, B, C and D. Jackson LJ, in Billett, explained how these tables are used in practice when he said:

“The operation of Tables A-D may be illustrated by taking examples at the two extremes. According to Table A, in the case of a fit man in employment aged 25-29 with high educational qualifications the RF is .93. So his multiplier for loss of future earnings is only reduced by 7% in order to allow for contingencies other than mortality. According to Tables B and D, in the case of an unemployed disabled person, aged 54, with low educational qualifications, his/her RF is .06. So the multiplier for loss of future earnings of such a person is reduced by 94% in order to allow for contingencies other than mortality.”

On this basis the Ogden Tables allow a mathematical calculation of likely future loss of earning capacity, as well as ongoing loss of earnings, by comparing a calculation, adopting the pre-injury reduction factor, of likely pre-injury lifetime earnings and then subtracting, on the basis of a further calculation but this time

using the post-injury reduction factor, of likely post-injury lifetime earnings. The resulting figure reflects the best estimate, using this methodology, for future loss of earnings.

Whilst other factors, such as gender and educational qualifications, are unlikely to have changed following the injury, it is often the case that a claimant who was not disabled pre-injury is now disabled. Hence an assessment of the claimant's disability status becomes of crucial importance to legal practitioners as part of the process to ensure an accurate estimate of future lost earnings is made.

Disability?

The Ogden Tables base the definition of "disability" on the terms of the Equality Act 2010 and adopt the following terminology:

"A person is classified as being disabled if all three of the following conditions in relation to the ill health or disability are met:

- (i) has an illness or a disability which has or is expected to last for over a year or is a progressive illness
- (ii) satisfies the Equality Act 2010 definition that the impact of the disability substantially limits the person's ability to carry out normal day-to-day activities
- (iii) their condition affects either the kind or the amount of paid work they can do"

It is notable that the claimant in Billett was accepted as being disabled by the trial judge, a ruling which was upheld by the Court of Appeal with Jackson LJ noting:

"...the factual position, as established at trial, was that the claimant suffered from minor NFCI, which had a substantial impact on his day to day life in cold weather."

Consequently, lawyers instructing medical experts to advise on disability status should do so by reference to the terms of the 2010 Act (as an opinion on this issue will allow the claimant's representatives to correctly calculate future loss of earnings by reference to the Ogden Tables). That is why the topic of disability is raised in so many medico-legal instructions.

Applicability

That is not to say the courts will necessarily apply the modern methodology, based on the Ogden Tables, to estimating future loss of earnings simply because the claimant is assessed as being disabled.

In Billett, whilst accepting the claimant met the definition, the court recognised that this did not prevent the claimant from working and that it was inevitable some

adjustment would be required to the reduction factors found in the Ogden Tables, to reflect the fact that the claimant only just met the definition of “disabled”. Indeed the circumstances required an adjustment so significant that it was more straightforward to revert to tried and tested judicial experience and simply award a lump sum for loss of earning capacity in the traditional way.

Role of Medical Experts

Whether or not the claimant should be treated as disabled is, ultimately, a matter for the court. Nevertheless, a judge is likely to find the opinion of an appropriate medical expert helpful in determining this issue. That is why medical experts will often be asked, when reporting, for a view on this specific point.

Summary

It is hoped this article explains why so many instructions to medico-legal experts now ask for an opinion about whether the claimant is disabled.

Legal practitioners welcome, so far as this is based on matters of medical opinion, a view on whether the claimant does meet the criteria of the 2010 Act. That, in no sense, is intended to generate a pessimistic viewpoint but is a very important consideration in helping to formulate, agree, and if necessary have assessed by the court an accurate estimate of damages for future loss of earnings so that these are approached in a scientific, rather than a potentially speculative, way.

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