

Loss of Pension

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The Conventional Approach

Wider Principles

- Pension loss is a head of future pecuniary loss like any other and not an esoteric subject outside the routine assessment of damages.
- The much but unfairly criticised previous leading case of *Auty v National Coal Board*¹ embodied no abstruse method but only the then conventional approach.
- As the conventional approach has shifted following *Wells v. Wells*² so must the assessment of pension loss, away from the old method in *Auty*, into line with the present application of the conventional approach.
- While it is beyond the scope of this Chapter, there is no reason why future pension shortfall cannot be taken by way of periodical payments.

Conventional Approach in Practice following Wells v. Wells

The Conventional Approach:

- assesses damages for personal injuries net of tax³
- takes no account of future inflation, setting the multiplicand at date of trial and ignoring the particular avenues of investment open to an individual Claimant⁴
- adopts a rate of discount to be set in the future by the Lord Chancellor and at the time of writing taken to be 2 ½ % pa⁵
- no longer makes *judicial* discounts, using the Ogden Tables now as a starting point rather than a check, being slow to depart from the relevant actuarial multiplier on impressionistic grounds or previously decided multipliers,⁶ and where there is agreed life expectancy an arithmetical multiplier is to be taken over that life expectancy⁷

¹ [1985] 1 W.L.R. 784, [1985] 1 All E.R. 930, C.A.

² [1998] 3 W.L.R. 329, H.L.

³ *British Transport Commission v. Gourley* [1956] A.C. 185, H.L.

⁴ *Mallett v. McMonagle* [1970] A.C. 166 H.L.(N.I.) 175B-176D

Lim Poh Choo v. Camden and Islington Area Health Authority [1980] A.C. 174 H.L. 193B-194B; upheld on this point in *Wells v. Wells* [1998] 3 W.L.R. 319 - per Lord Lloyd 334A, Lord Steyn 353C and Lord Clyde 361E

⁵ *Wells v. Wells* supra - eg per Lord Lloyd 344A;

⁶ *Wells v. Wells* supra - per Lord Lloyd 347D-E

⁷ *Wells v. Wells* supra - per Lord Lloyd 345H-347F

- refuses to make pseudo-findings of *future fact* on the balance of probabilities, but reflects future chances by assessing the damages based upon an *assumption* which aims at doing justice in monetary terms balancing the favourable and adverse contingencies.⁸ Sometimes all the contingencies are taken into account when the assumptions are articulated. On other occasions the assumption is taken at the nearest convenient starting point and then varied further for contingencies.
- involves *doing one's very best*; *making the best use of such tools to assist the process as are available*¹⁰; and *now that detailed calculations and tables founded on a reasonably reliable basis are available, taking full advantage of them.*¹¹

Conventional Approach - Binding on Pensions

Given the cornerstones of the conventional approach, first instance decisions before *Wells* based on *Auty* as binding authority were clearly correct¹². The wider ratio of those cases (that the conventional approach, whatever its current form determined in other cases, applies to pension loss) remains intact following *Wells*. Discount rates covering future losses are governed by the Damages Act 1996 as amended. If it is wrong to attempt to adduce evidence to value future nursing care by reference to a different index or set of criteria¹³, it is wrong for the same reasons to obtain evidence from the markets of its view of the value of an annuity to generate a sum to make up the loss: this is to substitute the view of the markets about investment return against inflation for that set by the Lord Chancellor and is another form of impermissible collateral attack on the conventional discount rate¹⁴. Encouragement to obtain a quotation on the financial markets to make good the loss and to proffer it as the measure of damage should be ignored.¹⁵ One might as well suggest that nursing care beginning at some future date to run until the end of a Claimant's life¹⁶ be valued by reference to the cost of a deferred annuity; or, without any change in the logic, the cost of immediate nursing care to a simple annuity; or loss of earnings... . All of which is not the law as it stands.

⁸ Mallett v. McMonagle [1970] A.C. 166 H.L. (N.I.) 173F, 174D and 176E-F; *Wells v. Wells* supra - per Lord Hope 356F-357A

⁹ *Wells v. Wells* supra - per Lord Lloyd 332H-333A and Lord Clyde 361A

¹⁰ *Wells v. Wells* supra - per Lord Hope 357E

¹¹ *Wells v. Wells* supra - per Lord Clyde 3464C

¹² *Page v. Sheerness Steel Company* [1996] P.I.Q.R. Q26, Q38 Dyson J

Longden v. British Coal Corporation [1995] P.I.Q.R. Q48, Q50 - C.A. noting Douglas Brown J's unchallenged decision on that score

¹³ *Cooke v United Bristol Health Care* [2003] EWCA Civ 1370

¹⁴ Similar attacks at first instance on different points have failed in *Patel v Wright & Midas* [2005] EWHC 347 and *Page v Plymouth Hospitals NHS Trust* [2004] EWHC 1154

¹⁵ Indeed, with respect, one should not follow even encouragement from one as experienced as Beldam LJ in *London Ambulance Service National Health Service Trust v Swain* CA unrep 12 March 1999 (a 2 Judge Court.) The encouragement was clearly *obiter* and the point neither argued nor necessary for decision. It is unfortunate that this case is still referred to in the JSB Civil Bench Book; and practitioners should beware that Courts influenced by that publication may come from a different starting point.

¹⁶ An exact analogy for a future loss of pension claim and the same method can be used in such cases.

A Modern but nevertheless "Conventional" Approach

The concept of using the Ogden Tables as a universally adopted basis for the calculation of future recurring losses and expenses over any future tracts of time commended itself to the House of Lords in *Wells*¹⁷. Indeed, the House of Lords used the Ogden Tables in relation to pensions to solve the question of how much discount should be given from an already paid ill-health retirement lump sum in *Longden v. British Coal Corporation*¹⁸. While the first edition of the Ogden Tables had just been published at the time of *Auty*, it had not gained the widespread acceptance which took over a decade in coming, and the Judges in *Auty* did their best, perhaps with misunderstandings as to the nature of actuarial evidence, using the English Life Tables based upon Past Expectation of Life and the Bacon and Woodrow Arithmetical Discount Tables. It should go without saying in the light of the adjustments to the conventional approach enunciated so clearly in *Wells* that the time has come to move on from *Auty*, using the Ogden Tables "to do one's very best"¹⁹.

Overview of Types of Pension Claims

There are 2 broad types of claim.

- *Type 1*: where the Claimant is young without an established working history; where the position is insecure; or where there are major uncertainties. In such cases the best one can do is to evaluate a notional claim using the Ogden Pension Tables as at the date of compulsory retirement which can then only be discounted dramatically with a broad brush given the flavour of the case. This Chapter is not really concerned with this type; but with Type 2 cases, where much greater precision is possible²⁰.
- *Type 2*: where the Claimant is in long term secure employment with a good quality pension scheme and where there are multiple options for voluntary early retirement, ill-health retirement and death in service benefits. In these cases, if one is to do one's best following *Wells* and make proper compensation, a more subtle approach is required with an appreciation of the monetary effects of early/ill-health retirement or death in service.

The Basic Ogden Multipliers

There is now widespread familiarity with the concept of earnings multipliers and life multipliers which are applied to a current multiplicand to generate a lump sum providing a steady stream of income for the period up to the assumed date of retirement or death, with the fund extinguished at that point. A pension's multiplier is a multiplier to be applied again to a present multiplicand to provide a stream of payments from the assumed date of retirement until the assumed date of death. It already includes an actuarial discount for the chance of early death over the whole period and an arithmetical discount from the date of expected retirement to the date of calculation.

¹⁷ supra - per Lord Clyde 364B-C

¹⁸ [1998] A.C. 653 and vide infra

¹⁹ See footnote 9 supra; but this must be subject to practicalities e.g. taking into account all the minute changes in tax relief and state pension entitlements at different ages will render calculations so unwieldy, difficult and tedious that, in the context of necessarily imperfect assumptions, the exercise is not worth the attempt. See the worked example below.

²⁰ Nevertheless, see the text leading to footnote 22 below.

Solution to Type 1 Cases Using the Ogden Tables

Worked Example using basic Ogden Multipliers

Male, 23, in service for 2 years prior to road accident when lost a leg, compulsory retirement age at 65, and now unfit for work. Pension would have been based on the formula (very common):

Length of service (maximum 40 years) x 1/80 x final year's pensionable pay.

On ill-health retirement, length of service enhanced by 5 years or to 15 years whichever is the greater (again a common type of term.)

Pensionable pay £10,000 pa

Pension if retired at 65

40 years x 1/80 x £10,000 = £5,000 pa²¹

Pension now payable

15 years x 1/80 x £10,000 = £1,875 pa

Annual loss £3,125

Multiplier (Ogden Table 21
at age 23 at 2.5 % pa discount) x 5.10

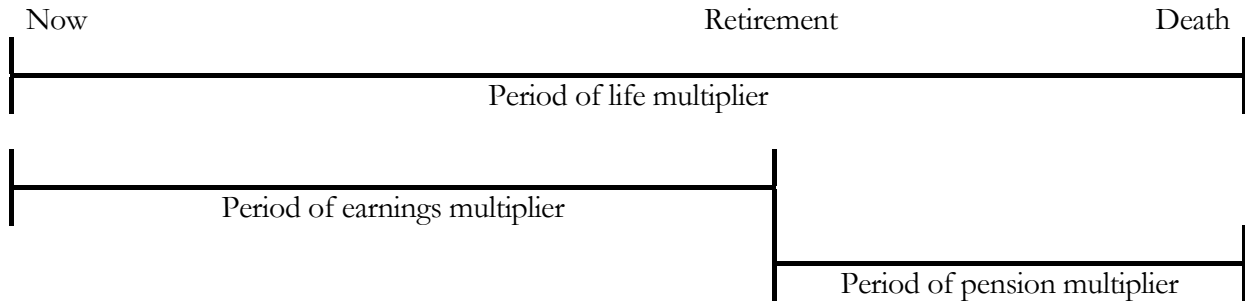
Current value capitalised annual loss £15,937

Adjustment after such a basic calculation will vary depending on the nature of the job and the likelihood of a sustained career. A policeman or fireman with 2 years' service is much more likely to have a long term career than a private soldier (even if he hopes for promotion) where average length of service for raw recruits is very low. There are always exceptional cases, however, and care should be taken to examine the evidence.

²¹ Bearing in mind increased personal allowances for those over 65, any tax at this sort of level is tiny. See examples below for help in calculating deductions for tax.

Solution to Type 2 Cases Using the Ogden Tables

Type 2 cases are those where there is a likelihood of a sustained career.



The Multiplier

If one refers to the linear diagram of multipliers above the following relationship becomes apparent:-

$$\text{Earnings Multiplier} + \text{Pension Multiplier} = \text{Life Multiplier}$$

If one does not presently accept the relationship it is evident from the Ogden Tables themselves. At any given age, whatever the age of retirement, the sum of the earnings multiplier and the pension multiplier is the life multiplier. In fact, we do not really need the Ogden Pension Tables at all so long as we have the Life and Earnings Tables.

The relationship can be rearranged to yield a simple but powerful formula in the calculation of pension loss.

$$\text{Life Multiplier} - \text{Earnings Multiplier} = \text{Pension Multiplier}$$

The Ogden Tables already take into account mortality so that contingency is satisfied if the Tables are used as the starting points for the life and earnings multipliers. Unless there is medical evidence to the contrary or the Claimant has a hazardous lifestyle, there is no justification following *Wells* for tinkering with the life multiplier. The major contingency on the earnings multiplier is the age of retirement. If, when deciding the earnings multiplier the Judge considers only the contingencies as to length of service (leaving contingencies as to *wage* e.g. promotion etc for consideration when setting the earnings multiplicand - more logical after all), whatever the process of balancing the contingencies from the basic Ogden earnings multiplier, those very same contingencies are substantially taken into account in the case of a Claimant with long term secure employment if the pension multiplier uses the actual earnings and life multipliers assessed on other heads of loss. A *tailored* pension multiplier can be reached by simply taking the earnings multiplier in the case away from the life multiplier in the case. This is not an entirely *bespoke* multiplier but better than an *off the peg* Ogden multiplier for the starting point.

The Multiplicand

Having established the best starting point for the pension multiplier, the multiplicand needs to be tailored to fit with the multiplier: the correct length of service to be taken in the formula for the calculation of the pension itself must match the assumption for length of service in the multiplier. The potential problem can easily be solved. If the Judge in setting the earnings multiplier and using the Ogden Tables articulates the "assumption" as to age at retirement, we will know in turn the correct assumption as to the length of service in order to fix the multiplicand under a final salary scheme. Even if the assumption is not specifically articulated, it can be estimated with reasonable precision using the Ogden tables in reverse.

Further Adjustment

It would be a mistake to think that there will be *no scope at all* for adjustment on the facts of each case after the above method has been followed; but it provides more than the best starting point in a Type 2 case.

There can be no scope for *further* adjustment for a contingency which has *already* been taken into account in setting the multiplier and the multiplicand. The length of service was set as a fair assumption, already considering the risks of falling under a bus, unrelated ill health, redundancy, liquidation of the company etc when the multiplier for loss of earnings was set. If that is the *prediction* for the major head of damage on earnings, one should not be doubtful in one's very doubts and discount again when assessing pension loss for identical risks. The same goes for pensionable pay if the multiplicand has been carried forward from the loss of earnings claim.

Adjustment may be necessary, however, if the various contingencies have not been compartmentalised between multiplier and multiplicand quite as clearly as hoped. If the Judge provides for the prospects of promotion by enhancing the multiplier rather than the multiplicand everything will be thrown out of line. As already discussed, the job may not involve long term secure employment. The quality of the pension scheme may be poor so that there is no entitlement to early retirement/ill-health pension before the date of compulsory retirement. In all those circumstances one can revert to using the Ogden Pension Tables but remembering that much greater adjustment will be needed with a broad brush. By way of contrast, sometimes there are identifiable chances of an improved pension which can be used to offset any temptation to discount (and may lead a claim for an additional *loss of chance* of increased pension if the multiplicand has not already taken that factor into account.)

Nevertheless, the logic can be extended even to Type 1 cases to get to the best starting point. If, for instance, the assumption/prediction of 7 years service in the Army for a new recruit was good enough to govern the claim for loss of earnings (balancing the Claimant's contention for full service with that of the MoD for only 3 years), why should it not represent the best starting point also for loss of pension, leading to a moderate arithmetical claim calculated from the tailored multiplier applied to the multiplicand carried forward? The advice in *Wells*, not to depart from the starting point on *impressionistic* grounds, should lead to this figure standing untouched unless there is some logical reason, based on evidence and capable of articulation, to depart from it²².

²² In this instance there would probably have to be a small uplift rather than a deduction for contingencies – although a slim chance, the Claimant may have completed full service to entitle him to payment of an immediate pension on retirement (rather than waiting to age 55), which would increase the loss from the starting point considerably, and the contingency deserves to be incorporated in the assessment to reach a fair result. The point illustrates the wider one – adjustment is quite possible, indeed obligatory, *if* some logical reason can be articulated. No logical reasoning = no tinkering.

At any rate, adjustments in earlier reported cases are not part of their *ratio* but on their own facts as part of the conventional approach to the assessment of damages which tries to reflect the chances, good and bad. It is a mistake to pick a previous decision and purport to apply it to a current case on a *pro rata* basis comparing the number of years before retirement. In any event, in recent years we have all got better at refraining from unreasoned discounts;²³ and earlier decisions are apt to over-discount in line with the times.

In the current climate, there may be some doubt as to whether an advantageous final salary pension scheme will remain open even to existing members in some occupations (particularly outside of the public sector) right up to normal retirement. Some adjustment may be reasonable if there is evidence to show that a replacement money purchase scheme is likely to be less valuable overall. While there have been a few high profile cases, a court is unlikely to want to discount for the slim chance of fraud on the pension scheme.

The Evidential Framework

Much of the evidence going to the assumptions required for pension loss calculation is assembled in relation to the heads of loss other than pension. Nevertheless, the following matters are relevant and can be stored on a standard draft for ease of completion and to ensure a methodical approach.

1. Claimant's age at date of calculation.
2. Claimant's life multiplier at date of calculation (using the Ogden Tables for Projected Mortality as a starting point²⁴, only to be adjusted in the light of cogent evidence, when that evidence may give a life expectancy and an arithmetical multiplier from Table 28 should then be used).
3. The *assumption* for age at retirement if the accident had not occurred and hence length of service.
4. The *assumption* as to wage at retirement and hence *pensionable pay*.
5. Claimant's attitude to any possible commutation of periodical payments to a tax free lump sum.
6. Spouse's age.
7. Spouse's life multiplier (using similar considerations as for the Claimant's life multiplier)

²³ As Lord Clyde observed in *Wells v Wells* - supra: "If each of the elements has individually achieved the best approximation possible to the proper compensation for each particular aspect of the claim, then the total figure should correspondingly represent the best assessment possible for the total claim. If at the conclusion of the exercise the judge is uneasy at the total result he should not seek to make any overall adjustment in either direction to the total award to meet his unease; he should return to reconsider each element in the calculation and secure that there is no need for revision at that level." 395C-D.

²⁴ *Worrall v. Powergen plc* [1999] P.I.Q.R. Q103

The pension fund trustees should then be invited to answer a questionnaire (which can again be stored as a standard draft) and to provide the main terms of the scheme which are usually within an Explanatory Booklet for Employees²⁵.

1. What is the formula for pension entitlement under the final salary scheme?
2. What constitutes "pensionable pay" under the scheme as distinct from overall earnings?
3. What entitlement is there to a lump sum?
4. If the lump sum is a commutation of entitlement to periodical payments, how is it calculated and with what effect upon annual pension?
5. When did the Claimant's pensionable service commence?
6. Has there been any "pension's holiday" in respect of the Claimant's service?
7. What are the provisions for:-
 - (a) Voluntary early retirement?
 - (b) Ill-health early retirement?
 - (c) Any payments under the pension scheme on redundancy?
 - (d) Preservation of pension on voluntary resignation?
 - (e) Benefits on death in service or otherwise?
 - (f) Widow's pension?
8. In the case of a Claimant who has already retired, what is the current value of the actual entitlement to pension and, if a commuted lump sum has been paid, when and how much?

The trustees can be invited to show a worked example based upon the present day value of the assumptions contended for, so as to make clear how the calculation is to be done in the event of alternative assumptions requiring calculation at a later date.

Answers to the above questions coupled with the explanatory booklet should be more than sufficient in most cases. The problem with calculating pension loss is, and always has been, not so much a difficulty in carrying out the arithmetic once the correct evidence has been obtained, but in making sure that there is a sufficient breadth of evidence so that when the assumptions upon which the damages are to be awarded are articulated by the Judge the figures are easily available and converted. If there is any difficulty in understanding the information from the trustees then, at a relatively late stage just prior to trial, when the issues between the parties are delineated, the trustees can be invited to fill in a questionnaire which can be tailored to meet the competing contentions of the parties and the possible middle ground.

Additional Receipt of Pension/Incapacity Pension

In many cases a Claimant will be able to exercise an early or ill-health retirement option following an accident and obtain periodical payments and/or a lump sum prior to normal retirement. The

²⁵ In fact, the explanatory booklets of very many schemes are now on the internet. Using a search engine such as Google usually leads straight to the booklet and enough information to forget the time-consuming approaches to the trustees. Sometimes the web site even has a tool to calculate the pension for you.

House of Lords' decision in *Parry v Cleaver*²⁶ is the leading authority and the following propositions from it are sound:

- Additional receipts of pension are not to be deducted from other heads of loss²⁷
- After the date of normal retirement, credit must be given for any payments under the scheme. Whether labelled as *retirement* or *incapacity/injury*, the pensions are of one and the same kind²⁸
- No credit is to be given for periodical payments prior to the date of normal retirement, not even from the later pension loss claim itself²⁹.

The first two propositions have never been challenged, nor were they in the recent case of *Longden v. British Coal Corporation*³⁰. However while the third proposition was clearly the ratio of *Parry v. Cleaver* it arose essentially from the monetary result of the case as against any detailed discussion of the issues involved. It was challenged in *Longden* but upheld. *Parry v. Cleaver* did not involve the commutation of periodical payments to a lump sum. In *Longden* the House of Lords decided that:

- The proportion of the lump sum which represents the period after normal retirement should be deducted³¹.

This is only logical bearing in mind the diagram set out above. We could again apply our formula but rearranged to give us a close approximation to the correct proportion to be deducted:

$$\text{Deductible Proportion} = \text{Pension Multiplier} \div \text{Life Multiplier}$$

Strictly, however, the multipliers should be taken *as at the date when the lump sum was actually paid*, not at trial/settlement, but using the "assumptions" found or contended for in the trial to fix the end point of the earnings multiplier. The strict formula to apply but using multipliers taken from the Ogden Tables at the date of actual retirement/receipt of the lump sum is:

$$\text{Deductible Proportion} = \frac{\text{Life multiplier} - \text{Earnings multiplier to the date of the retirement assumption}}{\text{Life multiplier}}$$

This will ensure internal consistency and that the same contingencies are taken into account in the same fashion, but may not be worth the candle for most people unless there is a long delay between retirement and trial.

²⁶ [1970] A.C.1 H.L.

²⁷ Ibid. Per Lord Reid at 20G-21A

²⁸ Loc. cit.

²⁹ Vide infra

³⁰ [1998] A.C. 653 H.L.

³¹ Ibid 672D-F

- *Longden* appears in the speech of Lord Hope to have been narrowly decided: that part of the lump sum attributable to the commutation of the post normal retirement pension is to be deducted. Neither in the speeches nor in the cases for the Applicant and the Respondent in the House of Lords is the nature of that lump sum set out explicitly; but the reasoning of Lord Hope suggested it was a commutation of future entitlement. In previous editions of this Handbook I have argued that, following this logic, *Longden* suggests that if the lump sum is not a strict commutation but paid compulsorily under the scheme, there should be no deduction of any part. Paid in a *different accounting period* and containing no element attributable to the period of loss, I posed the question, “What can there be to deduct?” and suggested that, while litigation would have to decide the point definitively, the better view was not to deduct any part. However, going back to the British Coal Staff Superannuation Scheme current at the date of the Plaintiff’s retirement in *Longden* (1986), it is clear that the lump sum at that time was not a formal commutation at all but paid compulsorily as part of the terms of the scheme³². It appears that the Plaintiff’s fall back position in *Longden* (as to partial deduction of the lump sum) was not as narrow as I had previously thought: it effectively encompasses *all* early pension lump sums as being on account of a stream of future payments *whether or not expressly calculated as such* under the terms of the scheme. In the light of the actual scheme in *Longden*, I must now reverse my previous advice and suggest that credit should be given using the *Longden* formula for all early lump sum payments³³.
- In *London Ambulance Service National Health Service Trust v Swain* CA unrep 12 March 1999, Beldam LJ upheld an increase in the credit for an already paid lump sum to bring its monetary value up to that at the date of trial, applying the tables using the then prescribed rate of 3% (now 2 ½%, not the Court Special Investment Account rate, for which the Appellants contended, or any other rate.) The case is mentioned by commentators³⁴ without any significant caveat and some, at least, should be provided. The problem is that this approach to the early lump sum, uplifting its value from the date of receipt to the date of trial or settlement, has no foundation in the reasoning³⁵ or arithmetical result³⁶ in *Longden* itself, where the point was not argued. Beldam LJ gave no reason for his decision but one can be provided from the way the Appellants put their case: the loss of pension lump sum is a *future* loss, to be calculated at the date of trial in monetary values current at that date in line with first principles; where a payment has been made in the past to defray that loss it should be updated to the trial date to compare like with like. Readers will have to form their own conclusion bearing in mind footnotes 35 and 36.

³² Based on x3 annual pension, without reduction (*commutation*) in the later pension.

³³ I am grateful to Maurice Faull Esq, Partner in Charge of Litigation Support at Hilton Sharp & Clarke, Chartered Accountants, 30 New Road, Brighton for pointing out to me my earlier mistake; and for other helpful comments on the draft for this edition of the Handbook.

³⁴ e.g. JSB Civil Bench Book and Kemp & Kemp.

³⁵ There is no suggestion anywhere that the lump sum already received should be uplifted to the date of trial for early receipt. One of the main lines of thought of Lord Hope, when considering that the Claimant cannot fairly be expected to give credit for early receipt of ill health retirement pension against later claims for loss of pension, is that it is unreasonable to expect the Claimant, who requires the income to live on in one accounting period, to invest the payments he receives to abide a loss in a different accounting period. Similarly, most people use rather than reinvest a lump sum when they receive it, and all the more so when they have been forced into ill health retirement with a claim pending at Common Law.

³⁶ In *Longden*, there was no uplift on the figure of £1,630 (16% of £10,185.91 lump sum received) on account of early receipt. Albeit the point was not argued, the monetary result was an essential part of the *ratio* of *Longden*.

Miscellaneous

Widow's Pension

The method used in *Auty* can be adapted for use with our more modern tools.

The widow's pension is usually expressed as a proportion of the Claimant's entitlement - often $\frac{1}{2}$. If we add on to the Claimant's pension multiplier, as already evaluated, the extent by which the wife's life multiplier exceeds the Claimant's life multiplier *but reduced by the proportion of the widow's entitlement*, we have a combined pension multiplier for the couple, what I call an Adjusted Joint Life Pension Multiplier³⁷.

Alternative Occupational Pension

It was conceded in *Auty* that where the Claimant is able to obtain alternative pensionable work, the value of the additional pension should be offset. The eventualities of the alternative position are likely to be very different from those of the original. If so, it is not possible simply to subtract the alternative pension from the figures in the original calculation. Rather, a quick calculation in reverse gives the credit to be allowed, discounted back to date of trial, and then in turn adjusted for eventualities if necessary. Often the Claimant is unemployed at trial but with some residual earning capacity. The chance of obtaining alternative pensionable employment should be taken into account in the overall adjustment for eventualities, but there will usually be little or no chance of an injured Claimant obtaining work with entitlement to a much-coveted and increasingly rare (because expensive) *final salary* pension³⁸.

Tax Allowances and Relief

As in any personal injuries action the damages must be computed net of tax. It should be remembered that Personal Allowances are increased for those between 65-74 years and slightly increased again at 75. There is an income limit (total income) before the higher allowance is gradually whittled down. Very few claims for loss of *final salary* pension will qualify and recourse will then have to be made to the detailed provisions in any given tax year. While the old Married Couple's Allowance remains for those who qualified (with one or other 65 when abolition occurred) in April 2000, it has no longer any relevance for claims for loss of future pension. The age for women's entitlement to State pension will rise gradually from 2010 to age 65 by 2020.

Higher Personal Allowances

	2006/2007
Single person	
- aged 65-74	£7,280
- aged 75+	£7,420
Additional age-related allowance reduced by $\frac{1}{2}$ of income over	£20,100

³⁷ See the worked example below

³⁸ cf money purchase/personal pensions - vide infra

State Retirement Pension

2006-2007

Claimant (Category A)

£84.25 per week or £4,381 pa

Non-contributing spouse/adult dependent

- extra

£50.50 per week or £2,626 pa

The tax deductions fall, in line with first principles, to be taken from the top slice of tax. A little care is required to get details from the Claimant of other sources of income. For most it will be an entitlement to the basic State Pension only, hence the inclusion of its current levels in the information above. The total income as it should have been is to be netted down and then the netted down total of the actual income subtracted to leave the total net annual loss. Handy conversion charts for incomes in retirement have appeared since the 2004 edition of the *PNBA Facts and Figures Tables for the Calculation of Damages*; but the work is often published towards the end of a tax year and the table may be out of date when carrying out a calculation.

Personal Pension Plans

There can be no claim for losses under personal pension plans, which are *money purchase* schemes, converted into an annuity with the option of a tax free lump sum at the date of retirement. There is no formula for fixing the value of the pension but rather only speculation on the performance of the fund against inflation. More importantly, it is not *future remuneration for past work*, in the form of insurance, following *Parry v Cleaver*. Rather it is easily distinguished as the proceeds of an *investment* by the individual of *remuneration already received*. One might as well claim the lost investment proceeds of speculation with the same money on the Stock Exchange, but not under a pension's umbrella (or gold bars under the bed), as attempt to shoe horn a claim for loss of personal pension into *Parry v Cleaver*. The Claimant should simply receive his loss of earnings *before* contributions into the fund. The loss of tax relief is a quite separate matter and if properly proved can be used to reduce the tax payable on the loss of *earnings* claim – it has nothing to do with loss of *pension*.

Hybrid Personal/Employer-Funded Schemes

Such schemes are *money purchase* plans but linked to an employer, perhaps instigated by and with contributions from him. Again there is no identifiable formula for fixing the value of the pension which depends upon the performance of the fund. Similarly, the scheme is essentially an investment of remuneration albeit *at source*. The only sensible solution in line with principle is to calculate the loss of earnings before deduction of the employee's contributions (but taking into account tax relief) and to value the employer's contributions as current (tax-free) benefits in kind. The scheme is an *investment*, as against a vehicle for payment of *future remuneration* in retirement within the spirit of *Parry v Cleaver*. There is no conflict with *Dews v National Coal Board*,³⁹ which can easily be distinguished as dealing with a classical final salary scheme.

Again, even weighty encouragement to obtain a quotation on the financial markets to make good either or both aspects of the supposed loss should be politely ignored. No other head of personal injury damage is calculated by reference to how the *financial markets* assesses the cost of making good the loss by *their criteria* in a lump sum investment, rather than the *Court* assessing it using the *current prescribed discount rate* (and standard rules such as the inclusion of current benefits in kind as part of the claim for loss of earnings). In fact, once the fog clears and the simplicity of the obvious answer is appreciated, the temptation to rush to the Financial Adviser can easily be overcome

³⁹ [1988] A.C. 1 H.L.

Average Life Expectancy Short of Retirement

Unless medical evidence practically rules out survival beyond normal retirement age, the chance that the Claimant may survive is an eventuality which calls for compensation under the conventional approach. The medical evidence should address the longest realistic life expectancy and a calculation carried out to that date but then heavily discounted against the flavour of the medical evidence for its improbability.

Death in Service Benefits

Quite apart from the pension payments under a final salary scheme, although unrelated to pension and to be paid prior to normal retirement, there is often death in service benefit. This has nothing to do with a claim for pension itself but certainly stands to offset any temptation to discount further for the risk of mortality. In fact, if the Ogden Tables are used as the starting point and mortality is thereby taken into account, the loss of death in service benefit is a separate loss that stands to be compensated and was in fact compensated in *Auty*. Those not entitled to *death in service benefits* have to provide for themselves by purchasing *term life assurance* at the cost of a regular premium. Provision for death in service benefits therefore amounts to another benefit in kind, which can be added on to the loss of earnings claim, as the *term* is usually for the term of the wage loss⁴⁰. Some evidence will be required as to the size of the benefit in kind i.e. the sort of premium that would be required each year to produce the lump sum envisaged under the scheme in the event of death.

Worked Type 2 Example including alternatives of Widow's Pension and Death in Service Benefits

Basic Facts

Male aged 40, married, previously worked as an established company accountant in industry (basic pay plus contractual overtime - £25,000 pa gross) but now, following brain injury, capable only of low grade clerical work (basic pay with no available overtime - £10,000 pa gross) with the same company who are a secure and sympathetic employer. The Claimant is very likely to have remained as an employed company accountant with them and is now likely to remain with them as a clerk. No impairment of life expectancy. Unconnected constitutional condition was/is likely to become increasingly troublesome and may force retirement between 55 and 65.

⁴⁰ Some schemes also provide for a lump sum on death in early retirement and multipliers longer than the earnings multiplier may be appropriate.

The Pension Trustees' Questionnaire

Question	Answer
1. What is the formula for pension entitlement under the final salary scheme?	Pension = length of service (years subject to an overall maximum of 40 years) $\times \frac{1}{80}$ \times final year's pensionable pay
2. What constitutes <i>pensionable pay</i> under the scheme as distinct from overall earnings?	Basic pay and contractual overtime pay only, without reference to bonus payments and additional voluntary overtime
3. What entitlement is there to a lump sum?	3 x gross annual pension tax free on top of the annual entitlement.
4. If the lump sum is a commutation of entitlements to periodical payments, how is it calculated and with what effect upon annual pension?	Not applicable
5. When did the Claimant's pensionable service commence?	Aged 22½
6. Has there been a <i>pension holidays</i> in respect of the Claimant's service?	None
7. What are the provisions for:- (a) Voluntary early retirement?	At 55 without penalty (subject to the company's approval which has never yet been known to be withheld.)
(b) Ill-health early retirement?	At any age without penalty (but with the approval of the company medical officer) with an ill-health enhancement of 5 years additional service on top of actual years service or up to 20 years total service, whichever is the higher.
(c) Payments under the scheme on redundancy?	Not applicable
(d) Preservation of pension on voluntary resignation?	Pension preserved with previous employer; or value transferable to new employer's final salary scheme; or value transferable into a personal pension plan.

- | | | |
|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------|
| (e) | Benefits on death in service or otherwise? | 2 x final year's pensionable pay |
| (f) | Widow's pension? | Not applicable |
| 8. | In the case of a Claimant who has already retired, what is the current value of the actual entitlement to pension and, if a commuted lump sum has been paid, when and how much? | Not applicable ⁴¹ |

Example Schedule

Claimant's age:	40
Claimant's life multiplier:	25.61 (Ogden Table 1)
Assumption for age at retirement in keeping with the earnings multiplier	62 ½
Earnings multiplier:	16.5 (carried forward from future loss of earnings claim where based on Ogden Table 9 for retirement at 65 - 18.05 - but discounted for the chance of early retirement based on general contingencies and the constitutional condition)
Claimant's Pension multiplier:	25.61 - 16.5 = 9.11, say 9 after minor adjustment for risks
Length of service:	62.5 - 22.5 = 40 years

[If appropriate, expand to include widow's pension – see below for additional working*]

⁴¹ This is far too much information in most cases; but these pretty common terms go to show that the value of the pension is pretty secure and there should be no undue rush to discount for contingencies.

Annual income retiring as company accountant⁴²

40 years x 1/80 x £25,000 =	12,500		
State retirement pension			
£84.25 x 52 weeks	<u>4,381</u>		
Annual gross income	16,881	16,881	
Less higher personal allowance ⁴³	<u>-7,280</u>		
Taxable income	9,601		
Tax on 1 st £2,150 @ 10%		-215	
Tax on balance (£7,451) @ 22%		<u>-1,639</u>	
		-1,854	
Net income			15,027

Annual income retiring as clerk

40 years x 1/80 x £10,000 =	5,000		
State retirement pension			
£84.25 x 52 weeks	<u>4,381</u>		
Annual gross income	9,381	9,381	
Less higher personal allowance	<u>-7,280</u>		
Taxable income	2,101		
Tax on 1 st £2,150 (£2,101) @ 10%		-210	
Tax on balance (£0) @ 22%		<u>-0</u>	
		-210	
Net income			-9,171

Annual net loss in retirement

5,856

Claimant's [or *Adjusted Joint Life* – see below**] pension multiplier:

x 9

Total current capitalized value of lost annual pension

52,704

Loss of lump sum at the assumed age of 62 ½

As company accountant:	3 x	12,500	37,500	
Less as clerk	3 x	5,000	<u>-15,000</u>	
Loss at 62 ½				22,500
Discount over 22 ½ years to age 40 (table 27)				<u>x 0.5735</u>
Total current value of loss of lump sum				12,904

Total

£65,608

Adjustment for any other contingencies not already included ...

⁴² General templates in Word for this and the following tables are available to be downloaded at www.piba.org.uk along with the papers delivered at the PIBA Annual Conference 2006.

⁴³ The example calculation assumes the Higher Personal Allowance and entitlement to State Retirement Pension (tax year 2006/7) strictly only available at age 65 (even though the loss begins at 62 ½) throughout the period given the closeness to that age. This is balanced to some extent by also ignoring the slightly increased allowance at 75.

Additions incorporating widow's pension

[Insert in the preamble at * and use multiplier in the calculation at **]

Wife aged:	35		
Wife's life multiplier: [Ogden table 2]	28.51		
Less Claimant's life multiplier:	<u>-25.61</u>		
Widow's survival multiplier:		2.9	
Widow's entitlement ⁴⁴ :		<u>x 1/2</u>	
Widow's adjusted survival multiplier:			1.45
Add back Claimant's pension multiplier:			9
Adjusted joint life pension multiplier			10.45

If the figures are adjusted in the above calculation to use an Adjusted Joint Life Pension Multiplier, it makes £5,856 x 1.45 difference i.e. £8,491 on to the schedule, which is well worth the little effort required.

Loss of death in service benefits

As an accountant:	2 x	25,000	50,000	
Less as a clerk	2 x	10,000	<u>-20,000</u>	
Loss of term life assurance to the value of			30,000	
Equivalent to benefit in kind of annual premium:			100	
Earnings multiplier			<u>x 16.5</u>	
Total				£1,650

⁴⁴ In a pension scheme where the lump sum is a commutation, unlike this example, the widow's proportion is usually expressed as a fraction of the Claimant's pre-commutation entitlement. In other words, when commuting the retiring employee only commutes part of the pension during his/her own lifetime, and not on the joint lives of both. In those circumstances the widow's entitlement should be adjusted upwards as a true proportion of the post-commutation multiplicand – a point for purists only ...