Pension Loss and How to Assess it

by Patricia Baxter

Damages for loss of pension income often form an important part of personal injury claims, the parties attempting to determine the Plaintiff s loss due to a change in employment status, or in a dependency claim, loss of life. This challenge faced by lawyers and insurers is fraught with problems due to the range of approaches adopted, and ignorance and confusion on the part of practitioners.

In the words of Lord Bridge in ***Hussain -v- New Taplow Paper Mills Limited HL*** (1989) 1 All ER 541 "Many eminent common law Judges..., have been baffled by the problem of how to articulate a single guiding rule to distinguish receipts by a Plaintiff which are to be taken into account in mitigation of damage from those which are not."

The universal rule established in ***British Transport Commission -v- Gourley*** (1956) AC 185 is that the Plaintiff cannot recover more than he has lost. Therefore any financial gains which accrue to him/her as a result of the injury, should be taken into account when assessing the loss suffered. This is subject to two well established exceptions:-

(i) where a Plaintiff recovers under an insurance policy for which he has paid premiums, (***Bradburn -v- Great Western Railway Company***) (1874) L.R. 10 Ex 1

(ii) where the Plaintiff receives money which people have donated out of sympathy, such as in a disaster fund (***Redpath -v- Belfast & County Down Railway***) (1947) N.I. 167.

There is an obvious conflict between the principles established in **Gourley** and **Bradburn** which comes to the fore when the parties are considering a claim for pension loss.

Key points have emerged from case law which provide some guidelines, although these are continually subject to challenge.

Invalidity Pension Income v. Loss of Earnings

In ***Parry & Cleaver HL*** (1969) 1 All ER 555 a policeman injured in a road traffic accident was unable to continue with his work and was awarded a police disablement pension. In this case the employer was not the tortfeasor ('wrongdoer').

The Plaintiff was discharged from the police 12 years early and obtained a clerical job thereby suffering a partial loss of earnings. Whilst a policeman he was obliged to contribute to the police pension scheme, and, as a result, he received the disability pension until the date on which he would normally have been retired, and then subsequently received a retirement pension. The Defendant sought to offset the disability pension income against the Plaintiff s claim for loss of earnings during the same period.

It was argued by the Defendant that the disability pension income was not like an insurance receipt and therefore did not fall within the **Bradburn** exceptions. This was because the wages loss and disablement pension came from the same source. It was held that it was not the source of the income but the nature of the income that was important, the pension income being the fruit of a *kind* of insurance. The distinction was that whilst the disability pension was being paid, the Plaintiff would normally have been in receipt of wages and therefore, he was not comparing "like with like". However, for the period *after* retirement, he *was* comparing 'like with like' and any pension income could be offset against any pension loss claimed from retirement date. This remains good law.

In ***Smoker -v- London Fire & Civil Defence Authority and Wood and British Coal Corporation HL*** (1991) 2 WLR 1052 the Defendants had contributed to the Plaintiff s disability pension as his employers. They now as tortfeasor were required to compensate him for loss of earnings for the period in which he received the benefit of that disability pension. They argued they were therefore paying twice. The Court disagreed. They could not benefit, as tortfeasors from the fruit of money set aside, whatever the source.

The Court was asked to follow the approach of recent legislation which provided that benefits were deductible from damages. Again the Court disagreed. They also declined to depart from **Parry & Cleaver** because other countries had relied on it. Insurance companies, employers and trade unions had based their industrial relations on it, and that it was a matter for Parliament to alter the law. *Lord Templeman also said that insurance companies and employers were at liberty to draft pension schemes so as to negate the effect of* ***Parry & Cleaver.***

Lump Sum Pension Award

Parry & Cleaver did not deal with lump sums awarded prior to retirement; they have traditionally been offset against any lump sum expected on normal retirement age. ***Longdon -v- British Coal Corporation CA*** (1995) I.C.R p.957 concerned employers who were the tortfeasors, and incapacity pension payments which were not deducted from the loss of earnings claim. When the Plaintiff was retired on medical grounds in 1986 he also received a lump sum. The Defendant tried to offset the incapacity pension together with the lump sum against the future retirement pension claimed because of the double recovery (i.e. longer term pension income extinguishing the future loss). The Court did not agree and the offset, including the lump sum element, was not allowed.

The **Longdon** case could be important for those drafting pension schemes. The lump sum could be specifically designated as an option to take on early retirement as opposed to being an incapacity benefit. It should then fall within the 'like for like' provisions as per **Parry & Cleaver** and per **Smoker**. The Courts should respect the rights of those drafting pensions to put in specific provisions on how lump sums are to be dealt with so that they could be expressly "offsettable".

Defendants, lawyers and insurers should be aware that Plaintiffs will seek to rely on **Longdon.** It is also important to bear in mind that in some pension schemes it may be the case that the level of retirement pension annuity may be diminished by the earlier receipt of a larger lump sum, i.e. the Plaintiff may elect to take the lion's share of his or her pension in a form which is not applied against future

loss, and this will then increase any claim for loss because of the diminished retirement annuity.

Reimbursement of pension contributions

Should money which the Plaintiff would have contributed to the pension be added to his loss of earnings claim? This question was dealt with in the case of ***Dews -v- National Coal Board HL*** (1987) I.C.R 602. Initially, such an award was made but was later disallowed on appeal, as the contribution to the pension fund was not intended to give immediate benefit, and the Plaintiff had suffered no loss as he had not suffered loss of pension rights.

Claims under the Fatal Accidents Act 1976 (FAA)

Where pension loss forms part of a dependency claim we are guided by the case of ***Pidduck -v- Eastern Scottish Omnibuses Limited*** (1989) 1 WLR 317. The widow of a bank employee, who at the time of his death had taken early retirement and was in receipt of a non contributory pension from the bank, brought an action under the FAA. She was awarded an allowance under the pension scheme which this case established was to be disregarded under Section 4 of the FAA. The Defendants in this case argued that the widow's pension income should be offset against any claim for dependency on the Deceased's pension as being 'like for like'. The Court rejected this argument but agreed that the multiplier may be slightly reduced for contingencies in respect of the widow's life expectancy.

Lost year claims and personal pension arrangements

Lost years claims are becoming increasingly prevalent in the field of industrial disease claims. This was highlighted in the case of ***West -v- Versil CA*** (Unreported) 2.7.96. A man suffering from an ultimately fatal asbestos related disease claimed that he had both a loss during his lifetime and a 'lost years' claim because he would die 10 years prematurely. The Plaintiff had elected to alter his personal pension entitlement so that he received reduced annual amounts in order

that his widow would later benefit from the pension on his death.

On appeal the Defendants claimed that the widow's income on the Plaintiff's death should be offset against the 'lost years ' income claimed by him. This was rejected because the Plaintiff had paid for her to have this benefit by his reduced income, and the tortfeasor should not benefit from that. There was also no legal reason for the widow's income to be offset against the Plaintiff's loss.

The Defendants had agreed to compensate the Plaintiff for the shortfall in his own lifetime income brought about by his decision to elect for his widow to benefit. The Court held that the most important issue was how to deal with the financial consequences of the Plaintiff's own choice when it had an impact upon the recoverable damages. This was unfortunately not tried out in the Court because the Defendants chose not to argue it which Phillips L.J. thought was a mistake on their part. The Defendants in his view should not have been liable for the Plaintiff's reduced lifetime pension brought about by his own decision to alter his pension. This point could be very significant in view of the increasing reliance on personal pension arrangements which give the pension holder greater choice on how to manage his or her investments.

Once the practitioner is satisfied that the claim falls within these guidelines, it remains for him/her to assess the actual amount of loss.

Assessing the loss

How to reach a figure which will provide the Plaintiff with enough capital and interest which can be relied upon to compensate for his losses? The Courts are anxious to strike the balance to ensure that the Plaintiff receives adequate compensation - a lump sum which will be extinguished at the end of the period of compensation, and the need to ensure that the Plaintiff does not end up making a profit!

Many of the reported influential cases concerned employers and employees contributing to a pension which would provide defined benefits on retirement, principally occupational pensions. The calculation in these cases is quite

straightforward through reference to the final salary and the number of years of service, and although there may be some speculation as to the salary increases the calculations are by and large fairly easy to determine. Things are not always that simple.
Difficulties emerge in schemes where the benefits are determined by the value of the contributions paid, as in private pension arrangements. The return on these pensions is difficult to predict as it depends on how well the investment fund has performed and, although under LAUTRO Rules the pension values are predicted by pension companies at the rates of return of 6% and 12% for illustration purposes, these do not necessarily reflect the actual levels of return.

One way of dealing with this is to obtain a quotation from the insurance market for the cost of funding the pension loss. In order to do this it would be necessary to compute the value of the pension at normal pensionable age but for the accident and this therefore takes you no further forward.

Rates of return could be calculated by applying historical averages assuming rates remain unchanged, or by applying the current rate of return in the market. Another option is to calculate the loss by reference to the contributions payable into the scheme by the employer and/or the employee and these contributions are then repaid to the Plaintiff to invest as she or he would want. This would avoid the future rate of return problem altogether. This is unlikely to be acceptable to the Plaintiff who may have to start a fund from scratch which consequently would not be as lucrative.

Alternatively the contributions by the employee to the pension fund could be added back into the loss of earnings claim to invest. Attention would obviously need to be paid to the question of tax relief on the employee's contributions and again this may have to be paid back into the Plaintiff s claim for loss of earnings. This again may be unacceptable.

Once the amount of the pension income is gauged, the practitioner then has to assess the duration of any payments (and obtain a multiplier), apply this to the proposed annual income (multiplicand), and finally obtain a lump sum which will cover the envisaged period of loss. Assessment has been controversial. There has been concern over whether the conventional judicial approach to

assessing the multipliers should continue to be relied upon or whether actuarial evidence should now predominate. The Judges have traditionally looked at case precedent to provide a multiplier for a given life expectancy and altered it for reasons peculiar to the case. Actuarial tables provide multipliers for a Plaintiff of a given age based on varying % discount rates to allow for return on the investment.

In ***Taylor -v- O Connor HL*** (1970) 1 All ER 365 it was held that the multiplier was best assessed according to the experience of Judges and practitioners whilst actuarial tables which were technically admissible, were only useful as a check on the traditional methods. The low point for actuarial evidence came in the Court of Appeal case ***Auty and others and the National Coal Board CA*** (1985) 1 WLR 784 (Auty), where the Court refused to accept actuarial evidence. Lord Bridge in ***Hunt -v- Severs CA*** (1994) 2 All ER 385 said that the assessment of damages is not and never can be an exact science, there are too many imponderables. The Courts remain mistrustful of actuarial tables as the primary basis of calculation, approving their use only as a check on assessment arrived at by the familiar conventional methods. The irony is that certain aspects of any computation rely on tables such as life expectancy which are, in fact actuarial tables.

Auty calculations

The **Auty** case established a formula for calculating pension losses. The Plaintiff, whose working life had been shortened by an industrial accident, claimed he would suffer a reduced pension because the contributions ceased when his employment ended. The Court assessed this head of damage by applying a multiplicand for the annual loss to an appropriate multiplier for the Plaintiff's life expectancy assessed on a 4.5% rate of return. The resulting amount was further discounted by 5% for accelerated receipt to the age of 65, and by a further 27% for "imponderables". Early death was the major factor and the possibility of loss of employment through voluntary wastage, redundancy, dismissal, supervening ill health, or disablement was taken into account. This formula has been criticised principally for a double discount for early death, already dealt with by the life expectancy tables.

The rate of further discount for imponderables varies from case to case and relies

on assessment by the Judge according to the circumstances of the case and reference to precedent. A rule of thumb which has emerged is that about 1% reduction is made for every year of accelerated receipt: the younger the Plaintiff, the higher the discount.

Actuarial Method

Following **Auty** the Institute of Actuaries together with a working party of lawyers, under the chair of Sir Michael Ogden produced the HMSO Government Actuary Department actuarial tables in November 1993 with explanatory notes for use in Personal Injury and Fatal Accident Act cases **(Ogden Tables).** The multipliers in the tables take into account life expectancy and give discount for early receipt. All that remains for the practitioner to do is apply the current rate of return to get the appropriate multiplier.

The second edition Nov. 1993 incorporates suggested deductions from the multipliers for contingencies other than mortality, in particular unemployment, sickness and for regional economic variations. However the suggested deductions appear to be lower than those which have been used by the Courts.

The principal thrust of the explanatory notes is that when using the tables the practitioner should consider applying a discount rate of 2.5% as opposed to the traditional 4.5%, the former being the rate of interest akin to that obtainable for index linked Government stock (ILGS). This represents a minimal risk to the Plaintiff that any lump sum based on this figure will be exhausted prematurely.

Section 1 of the 1996 Damages Act provides that "in determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss the Court shall take into account such rate of return (if any) that may be from time to time prescribed by an Order made by the Lord Chancellor".

The proposed Section 10 of the 1995 Civil Evidence Act provided that the Ogden tables be used in personal injury and fatal accident cases, and are admissible in evidence. This section has not been brought in along with the rest of the provisions of the Act following on the Judgment of the Court of Appeal in the cases of ***Wells -v- Wells, Thomas -v- Brighton Health Authority and Page -v-***

Sheerness Steel (Unreported) CA 23.10.96.

In ***Wells, Thomas & Page*** the Court considered the issue in depth and rejected the explanatory notes deciding on a 4.5% discount rate on the basis that the Defendant was entitled to assume that the Plaintiff would act as any prudent investor and spread the risk to include equities which would produce a higher rate of return and therefore a lower multiplier. A 2.5% discount rate would in the Court's view provide the Plaintiff with risk free investment but could lead to over compensation. This is obviously good news for Defendants and insurers, but leave to appeal the decision to the House of Lords has just been granted.

The Court in **Wells** agreed with Lord Bridge in ***Hunt & Severs*** that there were too many imponderables in any situation to accept the certainty assumed by the actuarial tables, and that probabilities assessed by the Court came into play to get a fair multiplier. It remains the position that Judges are deemed best placed to assess the appropriate multiplier calculated on precedent or the life expectancy tables and assuming a rate of return of 4.5%. An appropriate discount for accelerated receipt is applied at 4.5%-5%, over the number of years of early receipt and then further discounts are applied for imponderables.

The Future

The projected annual income assessment is problematic and will undoubtedly become more so with further reliance on private pensions, and rates of return being impossible to predict with any accuracy. The key points for Defendants, insurers and employers to consider are how they draft their pensions to avoid lump sum provisions which cannot be offset, and which lead to subsequent reduced retirement annuities which could be used to show greater loss. Also they should be alert to the situation where losses occur because the Plaintiff alters his pension arrangements, albeit because of his/her injury and this may not be a loss the Defendant has to meet. Finally, the outcome of any ***Wells/Thomas/Page*** appeal will be crucial to the future position on multipliers.

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