A PIBA GUIDE TO PENSION LOSS CALCULATION

written for

the Personal Injuries Bar Association

by

JAMES ROWLEY Q.C.

MATTHEW WHITE, BARRISTER

with contributions from

RICHARD WHITEHALL, BARRISTER

JASON WELLS, BARRISTER

KANE SIMONS, BARRISTER

HANNAH SAXENA, BARRISTER

First published in 2020

Further copies of this book can be purchased from www.piba.org.uk

ISBN: 9789403601359

Foreword by Lord Justice Irwin, President of PIBA

The Personal Injuries Bar Association is 25 years old this year, and Facts and Figures is only slightly younger at 24 years, with the first edition having been published in 1996. Both are thriving.

Over that quarter century, there have been enormous changes in the approach to personal injury cases. Practitioners have moved away from a pretty simplistic and sometimes downright crude system of conventions to an approach which is markedly more cerebral, exact and developed. Over the same period, life expectancy has continued to extend (at least until very recently), financial products and pension law have developed, and old-fashioned final-salary pension schemes have become as rare as hen's teeth, even amongst those in long-term stable employment. We have also left behind the traditional band of interest rates, where a Bank Rate of around 5-6% was regarded as low to normal, and entered an era of extremely low interest rates, which looks set to persist for some time yet. According to the life expectancy calculator on the website of the Office of National Statistics, the average life expectancy of a man aged 40 today is to live to be 85, with a 1 in 4 chance he will live to be 94, and a chance of nearly 6% he will live to be 100. At the same time, the statutory discount rate is -0.25%.

The combination of these factors can produce striking results. As this Guide points out (see §6.1-§6.2), before *Wells v Wells*, the pension multiplier for a man aged 40, who but for his accident would have retired at 60, was 3.9, before reduction by the application of a 'judicial discount'. It would now be 27.58. No wonder pension claims have become so much more important and prominent.

James Rowley penned his first guide to this field in 1995 and this is the successor work. James is now being more than ably assisted by his co-author and contributors. They are to be congratulated, as is the Association for sponsoring and publishing the Guide. Practitioners will find the Guide practical and informative, with plentiful examples allowing the reader to structure calculations of increasing complexity. Practitioners are also provided with template tables, available to be downloaded from the PIBA website.

This publication calls for compliments, but I am not being merely complimentary in suggesting it will become indispensable.

Stephen Irwin

Glossary

TABLE OF CASES

Glossary

Accrual	Build-up of pension entitlement with the passage of pensionable service
Actuarial reduction	Factor by which a pension is reduced if the pension is drawn before *Normal Pension Age* [NPA]
Annual pension	Annual sum paid in retirement, for life, taxable as income in the year received, covering both scheme member's and *dependant's pensions*
CARE scheme	*Career Average Revalued Earnings* pension scheme, a modern defined benefit scheme and described more fully in §9.1 of the text
Commutation	Giving up part of a life-long, annual defined benefit pension for an immediate, tax-free lump sum
Defined benefit	Workplace pension in which entitlement to annual income in retirement for life (the benefit) is defined by a formula based on length of service and pensionable earnings, formerly often by reference to *final salary* and now to *career average revalued earnings*
Defined contribution	*Money purchase* pension fund in which entitlement depends on the investment return from contributions made by employer and employee (in a workplace scheme) or by a worker alone (in a personal pension) described more fully in §§7-8 of the text
Dependant's pension	Pension paid on the earlier death of the scheme member to surviving children (up to a certain age) and/or a nominated or automatic surviving beneficiary (to the survivor for life) – previously known as widow's pension
Final salary scheme	A workplace *defined benefit* pension scheme, where pensionable pay is defined by reference to the level of pay at or near the date of retirement

Lifetime allowance	Total of tax privileged pension funds a member can accrue during life before a tax charge applies
Lump sum	Tax-free payment of cash, typically to a maximum of the lower of (a) 25% of the whole pension fund value on retirement or (b) 25% of the remaining lifetime allowance. Formerly, often generated automatically; now, almost always by *commutation* – see above.
Money purchase	Covering both personal and workplace pensions, in which entitlement depends on the investment of contributions described more fully in §§7-8 of the text – a more descriptive way of saying *defined contribution*
NEST	National Employment Savings Trust, an auto enrolment Master Trust Corporation, which operates currently the largest workplace money purchase scheme described more fully in §20 of the text
NPA	Normal Pension Age, a matter of definition in any scheme but now commonly 65 or State Pension age [SPA], whichever is the later
Pension	Loose term covering both *defined benefit* and *money purchase* payments, see above
Pensionable earnings	That part of earnings used for calculating [1] entitlement to benefit in a *defined benefit* scheme or [2] entitlement to employer contributions in a *workplace money purchase* scheme
Personal pension	Pension scheme arranged by an individual (invariably a *money purchase* scheme)
State Pension	Universal, basic State-operated defined benefit scheme, funded by National Insurance contributions from employers and employees, and state subsidy and described more fully in §14
SPA	State Pension age

Survivor's pension	See *dependant's pension* above
Workplace pension	Pension scheme arranged by an employer

1 Introduction

It is now over a decade since the 3rd edition of PIBA's Personal Injury Handbook[1], which contained a chapter with practical advice on the principles behind and the calculation of pension loss for litigation of personal injury claims in England and Wales. While the law has not changed in any relevant way since 2007, pensions themselves, life expectancy and discount rates certainly have. As the discount rate has fallen and life expectancy has lengthened, loss of pension has assumed far more significance. Moreover, instead of having to attempt calculations based on limited information and not really knowing what difference, for instance, an earlier date of retirement might make, we now have internet access to comprehensive materials in relevant occupations. Employee pension scheme portals provide all the evidence one could wish for in an individual case. With so much more at stake and vastly improved raw materials, it is high time for fresh assistance.

While some experts still try to pretend otherwise, pension loss is a head of future pecuniary loss like any other and not an esoteric subject outside the routine assessment of damages. All the usual principles apply.

The aim, as with all pecuniary compensation in personal injury cases, is to award *reasonable compensation* bearing in mind the contingencies, favourable and adverse, to reach a monetary result that is fair. Depending on the shape of the case, there may often be different ways of formulating the assumptions from which the main calculations proceed and then fine tuning them, if there are chances not already taken into account, to reach a fair result. The same applies to the calculation of pension loss.

There is no detailed index to this work but the table of contents above shows, through the section headings, the route along which we will proceed. There will be a largely bullet point introduction of the legal principles, with references to the leading authorities and relevant passages in footnotes. We will examine the nature of modern pensions and how the interlinked assumptions for career and pension can be drawn to make the calculation of loss of earnings and pension cohesive, easier and more accurate. Templates will be provided. Short advice will be given in a number of related areas. Finally, the main provisions of the major pension schemes will be mapped out and the internet sources identified.

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[1] Jordans Publishing Limited 2007 – the "PIBA Handbook"

Aside from the description of the various common occupational pension schemes in §23, this work is not primarily intended to be a reference book but to be read from cover to cover after which, with familiarity and the necessary overview in place, it might be used as a reference resource. Its main thrust is to inculcate a more refined approach to the evaluation of loss of earnings, which will empower our approach to pension calculation.

We record our thanks to Vitek Frenkel for commenting on our calculations and areas involving taxation.[2] Tax calculations use the prevailing rates as at 1 July 2020.

2 Frenkels Forensics, Chartered Accountants; https://frenkels.com. Any slips that remain are, of course, our own.

2 Wider Principles

2.1 Historical perspective

- The much but unfairly criticised, early leading case of *Auty v National Coal Board*[3] embodied no abstruse method but only the then – for the 1980s and making use of the limited evidence available – conventional approach.

- As the methodology of the conventional approach shifted following *Wells v. Wells*[4] in the late 1990s so did the assessment of pension loss, away from the old ways in *Auty*, into line with a modern application of the conventional approach.

2.2 Conventional approach in practice following *Wells*

The modern conventional approach:

- still assesses damages for personal injuries net of tax.[5]

- still takes no account of future inflation (other than through the fixing of the correct discount rate), setting the multiplicand in the value of money at date of trial and ignoring the particular avenues of investment open to an individual claimant.[6]

- presently adopts a rate of discount, set under the Civil Liability Act 2018, at -0.25%.

- no longer makes pre-*Wells* arbitrary *judicial discounts*, instead using the Ogden Tables as the starting point rather than a check, being slow to depart from the relevant actuarial multiplier on impressionistic grounds or previously decided multipliers.[7]

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3 [1985] 1 W.L.R. 784, C.A. – "*Auty*"

4 [1999] 1 A.C. 345, H.L. – "*Wells*"

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

6 *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* supra – per Lord Lloyd 334A, Lord Steyn 353C and Lord Clyde 361E

7 *Wells* supra – per Lord Lloyd 347D-E