OUTER HOUSE, COURT OF SESSION

[2017] CSOH 153

PD348/17

OPINION OF LORD BRODIE

In the cause

JOSEPH GLEN

Pursuer

against

LAGWELL INSULATION COMPANY LIMITED

Defenders

Pursuer: Di Rollo QC; Thompsons
Defender: Galbraith; Clyde & Co

15 December 2017

Introduction

[1] The pursuer in this Chapter 43 action was born on 10 July 1997. He sues for £2,000,000 as damages for personal injuries sustained by him in an accident on 29 October 2013 while working for the defenders under a scheme placing school leavers with employers with a view to the school leavers being taken on as apprentices. The pursuer suffered traumatic amputation of the tips of the index, middle and ring fingers of his left hand when using an unguarded guillotine machine. The defenders admit their liability to make reparation to the pursuer in respect of his injuries. Quantification of damages remains in dispute.

[2] The case called on the pursuer's motion for issues. That motion was opposed by the defenders on the ground that special cause existed for the allowance of proof: Court of Session Act 1988 section 9(b). Mr Di Rollo QC appeared for the pursuer. Ms Galbraith appeared for the defenders.

Submissions

Defenders

[3] Parties had agreed that Ms Galbraith should begin which she did by immediately accepting that it was for the defenders to show that special cause existed for not allowing issues. She submitted that in this case there was special cause. The case raised a number of matters of complexity. These included calculation of pension loss and the amount to be attributed to the cost of prostheses, as well as the obscurity of a claim in the sum of £20,000 for "miscellaneous costs (past and future)" but in Ms Galbraith's submission what primarily made the case unsuitable for jury trial was the approach adopted by the pursuer to the calculation of future wage loss.

[4] In order to provide context for her argument, Ms Galbraith drew attention to the following averments by the pursuer:

> "[The pursuer] was off work for four months. He is disabled. He has additional needs due to his injuries ...all more fully described and costed in a report dated 7 September 2016 by Helen Buri of Jacqueline Webb & Co Ltd. He is an apprentice thermal insulation engineer employed by the defenders. He is due to complete his apprenticeship in around summer 2018. He is unlikely to be kept on by the defenders after his apprenticeship as he struggles with many of the tasks. Other apprentices carry out tasks much faster than he is able to. He requires to ask other workers for help whilst working. He has been advised ...to consider retraining for a non-manual job. But for the accident he would have enjoyed career earnings upon qualification as a thermal insulation engineer of around £22,997 net of tax and national insurance per annum. In his injured state he is likely to earn much less, around £13,275 net of tax and national insurance per annum. He will lose income at increasing rates of pay. He will lose pension benefits. He is at a disadvantage on the labour market due to his

> injuries. He will be permanently compromised on the labour market in that he will have difficulty in undertaking permanent employment requiring the use of both hands. He will have a permanent cosmetic deficit in the left hand. He needs prosthetic fingers which will require to be regularly replaced. His prosthetic needs are set out and costed in a report by Moose Baxter of Dorset Orthopaedic Company Limited."

[5] Ms Galbraith then turned to the Statement of Valuation of Claim, which had been lodged by the pursuer on 22 November 2017. There the valuation of future income loss (from 1 July 2018 to retirement age 68) is stated at £782,790, loss of pension benefits at £46,967, and prosthetic costs at £175,000 (including interest on past costs).

[6] To further explain the pursuer's approach to the claim for future wage loss Ms Galbraith referred to certain paragraphs of the Employment Report prepared by Brian Keith on behalf of the pursuer and dated 26 July 2016 (production 6/1). At paragraph 1.4 it is stated that due to the reduced function in his left hand the pursuer is no longer confident that he will be able to develop a stable long term career as a thermal insulation engineer. Accordingly, Mr Keith had been asked to prepare a report giving the pursuer's likely vocational position, assuming that he will be paid off by his current employer when his apprenticeship comes to an end in 2018 (paragraph 1.5). At paragraphs 3.2 to 3.5 of his report Mr Keith gives his reasons for the view that a fully qualified thermal insulation engineer, such as the pursuer will be when he completes his apprenticeship, with no functional restrictions would be expected to pursue a career in the field and to achieve over a lengthy career an average annual wage of £29,162 gross or £22,997 net. That is the career path posited for the pursuer had he not been injured in the accident. In section 5 of his report Mr Keith considers the pursuer's future employment prospects on the assumption that the pursuer will be paid off and will not work thereafter as a thermal insulation engineer. Mr Keith there suggests that on the basis that only lighter low-skilled occupations will be available to the pursuer, he might

be expected to achieve a career average annual wage of £14,864 gross or £13,275 net (see, in particular, paragraphs 5.3, 5.6, 5.10 and 5.11 of the report).

[7] Ms Galbraith understood the pursuer's valuation of future income loss at the (very precise) sum of £782,790 to have been arrived at by capitalising the proposed annual differential as between the career average of £22,997 which the pursuer would have earned as a thermal insulation engineer and the average of £13,275 which he is likely to earn in lower-skilled employment using a calculation derived from the *Actuarial tables with explanatory notes for use in personal injury and fatal accident cases prepared by an Inter-Professional Working Party of Actuaries, Lawyers Accountants and other interested parties* (the Ogden Tables, currently in their 7th edition, published in 2011). When Mr Di Rollo came to address me he confirmed that this was so. It is convenient now to describe that calculation.

[8] With effect from 28 March 2017 the discount rate for Scotland for the purpose of personal injury damages is -0.75%: Damages (Personal Injury) (Scotland) Order 2017, SSI 2017/96, made in terms of the Damages Act 1996. This reduction from the previous rate of +2.5% followed an announcement on 27 February 2017 to the same effect by the Lord Chancellor in respect of England and Wales. Following the reduction, supplementary tables to the Ogden Tables were issued by the Government Actuary's Department. Mr Di Rollo put forward a multiplier of 55.84 for loss of earnings from age 20 to pension age 68. I take that to be derived from table 11 (multipliers for loss of earnings to pension age 70) using the technique described in the Explanatory Notes to the Ogden Tables to adjust that to pension age 68. Table 11 discounts for mortality only. It does not take account of any of the other contingencies which might arise in an employment career. Contingencies other than mortality are addressed in section B of the Explanatory Notes and at paragraphs 33 to 42 a methodology is described which is designed to allow for the risk of

periods of non-employment and absence from the workforce because of sickness and how this might differentially impact on workers depending on their employment status, their disability status and their educational attainment. Reduction factors reflecting a combination of these elements are set out at paragraph 42 of the Explanatory Notes for males, in tables A (males -not disabled) and B (males – disabled). The reduction factor is a figure less than 1 by which the mortality based multiplier should be multiplied with a view to making an adjustment for the risk of ill-health or unemployment. A high reduction factor reflects the greater likelihood of a person with a history of employment, having no disability and being well educated, finding and retaining employment, whereas a low reduction factor reflects the greater likelihood of being unemployed faced by a person with no history of employment, who is disabled and who has a low level of educational attainment. Taking the pursuer as employed, being aged 16 to 19, having completed his apprenticeship and being without any disability, table A produced a reduction factor of 0.9. Applying that to a multiplier of 55.84 and then applying the resulting adjusted multiplier to a projected annual net wage of £22,997 produced a total of £1,155,737. That is the figure the pursuer proposes as the present day value of what he would have earned over a career to age 68 had it not been for the accident. However, if the pursuer is taken as unemployed and disabled (the consequence, as he would argue, of the accident, once he completes his apprenticeship) then the reduction factor produced by table B is 0.49. Applying that to a multiplier of 55.84 and then applying the resulting adjusted multiplier to a projected annual net wage of £13,275 produced a current value for the projected total career earnings post-accident of £363,225. On Mr Di Rollo's suggested approach, the pursuer's loss of future earnings consequential on the accident is the first value for projected total career earnings less the second value for projected total career earnings (ie £1,155,737 less £363,225, or £782,790).

[9] Ms Galbraith accepted that each case had to be considered on its own facts and circumstances. The mere fact that a party intended to value a claim by reference to the Ogden Tables was not of itself a reason not to allow a jury trial. However, this is not a straightforward case. There is a dispute as to what the pursuer is capable of doing. The defenders do not accept that he will be paid off at the end of his apprenticeship or that he will not be able to pursue a career as a thermal insulation engineer. There will be a legal question to resolve as to how valuation of the possibility of future wage loss should be approached. It will be the defenders' submission that this head is no more than contingent or, if that is not so, then it is at least associated with so many uncertainties that it is more appropriately valued by a lump sum award of the sort made in *Smith* v *Manchester Corporation* (1974) 17 KIR 1 (and see *Moeliker* v *A Reyrolle & Co Ltd* [1977] 1 WLR 132) or *Blamire* v *Cumbria Health Authority* [1993] PIQR Q1. If, on the other hand, a multiplier and multiplicand approach were to be adopted this would involve complexity. There would be at least three possibilities to consider: the pursuer remaining in the employment of the defenders, his going elsewhere but continuing to work as a thermal insulation engineer, or the pursuer taking on other work. The jury may have to consider a split multiplier given the length of the pursuer's projected employment career. They will be asked by the pursuer to apply a reduction factor to the Ogden Table 11 derived multiplier, the associated difficulties of which are discussed at paragraphs 31 and 32 of the Explanatory Notes. Because of the very significant impact of a claimant's disability status for the calculation of the table B adjustment factor, evidence would have to be led as to whether the pursuer falls to be regarded as "disabled" for the purposes of the methodology on which he proposes to rely (see Ogden Tables Explanatory Notes paragraph 35). Using the methodology would be to over-compensate the pursuer. It was relevant that, as far as counsel's research had revealed,

there are no instances of this methodology having been adopted by a judge. It was rejected by Lord Malcolm in *McGhee* v *Diageo plc* [2008] CSOH 74 at paragraph [9] and by Lord McEwan in *Brand* v *Transocean North Sea Limited* [2011] CSOH 57 at paragraph [47].

[10] In Ms Galbraith's submission the difficulties with the assessment of the pursuer's claim for future wage loss would be better considered by a judge sitting alone. Her motion was that I should refuse issues and order a Proof.

Pursuer

[11] At the beginning of his submissions Mr Di Rollo QC sought leave to amend the pleadings by deleting "He will lose income at increasing rates of pay" where it occurs at page 8B of the Record. Ms Galbraith expressed no objection. I accordingly granted leave to amend.

[12] Mr Di Rollo went on to ask the rhetorical question: can it be that simply because a pursuer opts for a particular method of calculating future loss that makes a case unsuitable for jury trial? Mr Di Rollo invited me to answer his question in the negative. There were a number of ways of calculating future wage loss. The apposite question was whether the particular method proposed was capable of being presented in front of a jury. In Mr Di Rollo's submission there was nothing in the method which relied on the adjustment of the multiplier derived from table 11 of the Ogden Tables to account for the pursuer's disability consequential on the accident by the application of a reduction factor, which made it inappropriate for consideration by a jury, properly directed. That was so irrespective of the fact that Mr Di Rollo could not point to any reported case, either in Scotland or in England and Wales, in which future wage loss had been calculated in the way now described in paragraphs 33 to 42 of the Explanatory Notes to the 7th edition of the Ogden

Tables (Mr Di Rollo explained that notwithstanding that fact, reduction factors were frequently used to quantify future wage loss during the negotiation of reparation claims). The pursuer offered to prove that he was "disabled" as that expression is used in tables A and B. He may or may not succeed in that, but even if he did, the jury would still have to decide whether it was appropriate to use an adjusted mortality multiplier. It would be open to the defenders, by way of evidence and submissions, to attempt to show that it was not. It could not be assumed that a jury was either more or less likely to apply a reduction factor than a judge would be. There was no reason why they should follow the method set out in the Ogden Tables slavishly. Historically the bench may have underestimated the difficulty that a disabled person is likely to have in finding employment. The claim in the present case was relatively straightforward. It was not proposed to argue for a split multiplier. The pursuer was a very young man. He will have to go through a long period during which his ability to work will be adversely affected by difficulties with the function of his left hand. Contrary to what had been argued by Ms Galbraith, the use of a reduction factor to adjust a mortality multiplier did not involve any questions of mixed fact and law. A judge was in no better position to decide than a jury. The object of an award of damages was, as far as a pecuniary award made this possible, to put the pursuer in the same position as he would have been had it not been for the accident. Adoption of a multiplier based on the application of a reduction factor was no more than an attempt to do this. Other methods were no doubt available but just because they may be associated with a particular case (eg *Smith* v *City of Manchester*) does not confer any particular status on them. They are no more than methods of assessing the likely factual consequences of a particular accident.

[13] As far as Ms Galbraith's other criticisms were concerned, the claim for miscellaneous expenses was explained by the application of a whole life multiplier of 88.96 applied to an

annual cost of £224 as brought out in the rehabilitation cost report, production 6/2 of process. The lifetime cost of prostheses was calculated on the same basis under reference to the lodged report on prosthetic needs. Pension loss had been calculated in what Mr Di Rollo described as "the standard way" by taking 6 per cent of future wage loss as reflecting the loss of employer's contribution to a pension scheme associated with a given wage loss.

Decision

[14] The determination of whether special cause exists to allow Proof in an action for damages for personal injury is a matter for the discretion of the Lord Ordinary but it is a discretion to be exercised in a statutory context which provides that, in the absence of the consent of both parties to the allowance of Proof, an action for damages for personal injuries *shall* be tried by jury unless special cause is shown. Ms Galbraith immediately conceded as much. She accepted that it was for the party seeking to avoid a jury trial to establish special cause. She also accepted that special cause is a cause which is indeed special; that is something relating to a particular feature of the case under consideration, as opposed to a consideration which is general in character: *M'Lellan* v *Western SMT* 1950 SC 112 at 115, *Morris* v *Fife Council* 2005 1 SC 72 at paragraph 6.

[15] Ms Galbraith argued that there was special cause in the present case but before going further it is convenient to note what she did not argue. She did not argue that the brevity of the pursuer's pleadings or the need to supplement them by a perusal of the productions lodged on behalf of the pursuer presented any real difficulty in understanding what the pursuer's case was about. She did not argue that the fact that the claim was to be advanced under reference to the Ogden Tables made it unsuitable for trial by jury. She did not argue that the currency of what is by any standard an extraordinarily low discount rate risks

grossly over-valuing a claim which relates to a long period of future time. I do not suggest that any of these points should or could have been argued, but I see their absence as providing further context for the consideration of what Ms Galbraith did argue.

[16] Ms Galbraith founded on what she characterised as the complexity of the pursuer's proposed method of calculating his future wage loss. She said that it involved difficult mixed questions of fact and law. She anticipated that it would require the use of split multipliers. She suggested that a judge would find it difficult to give the jury clear directions as to how they should assess this head of damages.

[17] On the facts, the pursuer's case, at least once explained under reference to the Employment Report and the relevant parts of the Ogden Tables (which Ms Galbraith was content that I should look at), is relatively straightforward. He offers to prove: that but for the accident it was his intention to follow a career as a thermal insulation engineer on completion of his apprenticeship in 2018; that over such a career he is likely to have earned about £22,997 net per annum on average, at current values of money; that because of the injuries he sustained in the accident he is significantly disabled and that because of that disability and the difficulty it causes him at work he is no longer able to continue on his intended career path; that nevertheless it is likely that he will obtain alternative employment, albeit at a lower skill level; that the likely level of earnings in such lower-skilled employment will be about £13,275 net per annum; that as well as being likely to earn less per annum in lower-skilled employment than he would have enjoyed as a thermal insulation engineer, his job security, in the sense of the likelihood of obtaining and retaining jobs, will be less than it would have been as a result of his disability and the fact that he will have no history of employment in the relevant capacity; and that accordingly he will lose wages as a result of his reduced earning capacity. What are put forward as very exact

figures for annual earnings are of course no such thing, but a pursuer cannot be criticised for doing what he can to introduce precision into the calculation by putting forward one approach to quantifying what can only be a likely estimate. Such a case is clearly relevant, it being for the fact-finder, judge or jury, to determine the extent to which it is made out on the evidence led. Thus far, I do not see it to be at all complex and I did not understand Ms Galbraith really to suggest otherwise, although she did emphasise that it would be the intention of the defenders to challenge the premise that the pursuer is unlikely to work as a thermal insulation engineer after 2018 and, following from that, she envisaged the jury having to consider three directions in which the pursuer's career might go: being retained as a thermal insulation engineer by the defenders, working as a thermal insulation engineer but elsewhere, and working in some other capacity. Where, on Ms Galbraith's submissions, complexity arises is when the pursuer turns to the selection of the multipliers he proposes to put forward to calculate (a) the value of his probable life-time earnings as a thermal insulation engineer, had it not been for the accident and (b) the value of his probable life-time earnings in the lower skilled employment which is all that he claims is now available to him.

[18] As is explained at paragraph 3 of the Introduction to the 7th edition of the Ogden Tables:

> "The methodology is long-established whereby multipliers are applied to the present day values of a future annual loss (net of tax in the case of a loss of earnings and pension) with the aim of producing a lump sum equivalent to the capitalised value of the future losses."

Where both the average rate and the period of future loss are certain, once the rate of return on the invested (albeit diminishing by reason of periodic withdrawals) lump sum is assumed, choosing the appropriate multiplier to take into account early receipt is simply a

matter of arithmetic. However, calculation of future loss of earnings and pension is unlikely to be so straightforward. The future is by its nature uncertain; it is subject to contingencies. The most obvious contingency is mortality; the date of death of the person whose earnings and pension are under consideration. While it cannot be known when a particular individual will die, projected mortality rates are available for particular populations. By assuming that the individual's experience will conform to that of the population as a whole, a value can be assigned to the chance of his surviving to the end of the period of projected loss and an early receipt multiplier can accordingly be modified to take mortality into account. The technique is statistical but very widely used, for example in calculating annuities. Tables 1 to 26 set out multipliers calculated on that basis (mortality multipliers). Table 11 is the source of the relevant mortality multiplier for present purposes.

[19] Thus, table 11 takes into account the fact of early receipt and the contingency of death prior to (in this case) a retirement age of 68. There are of course other contingencies which may arise during a working life, whether that life is of an able-bodied person or a disabled person, and which prevent a worker working continuously. A worker may experience periods of unemployment or under-employment for a variety of reasons. Ill health is one. Redundancy is another.

[20] The 1st edition of the Ogden Tables, published in 1984, made no provision for contingencies other than mortality. That position changed with the publication of the 2nd edition in 1994 where it was recognised that a multiplier calculated only by reference to mortality should be reduced to take into account the risks and vicissitudes associated with an employment career. A methodology was proposed for making such an adjustment, taking occupation and geographical area as the relevant variables, but with the caveat that it purported to do no more than provide a "ready reckoner" as opposed to a precise figure.

The methodology first proposed in the 2nd edition continued to be put forward in the 3rd, 4th and 5th editions but in the 6th edition of the Ogden Tables, published in 2007, a slightly different approach was adopted. It is this approach which is repeated in the 7th edition and which is described in outline at paragraph [8] above. At paragraph 29 of the Explanatory Notes to both the 6th and the 7th editions it is explained that research using data from the Labour Force Surveys conducted from 1998 to 2003 has led to the estimation of the statistical probabilities of movement of males and females between different states of economic activity, dependent on age, sex, employment activity and level of disability, which probabilities permit the calculation of the expected periods in employment until retirement age, dependent on the initial starting state of economic activity, disability and educational attainment. The Explanatory Notes to the 7th edition further explain the methodology used to reduce mortality multipliers at paragraphs 31 and 32, paragraphs to which Ms Galbraith drew particular attention:

> "31. The methodology proposed in paragraphs 33 to 42 describes one method for dealing with contingencies other than mortality. If this methodology is followed, in many cases it will be appropriate to increase or reduce the discount in the tables to take account of the nature of a particular claimant's disabilities. It should be noted that the methodology does not take into account the pre-accident employment history. The methodology also provides for the possibility of valuing more appropriately the possible mitigation of loss of earnings in cases where the claimant is employed after the accident or is considered capable of being employed. This will in many cases enable a more accurate assessment to be made of the mitigation of loss. However, there may be some cases when the *Smith v Manchester Corporation* or *Blamire* approach remains applicable or otherwise where a precise mathematical approach is inapplicable.
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> 32. The suggestions which follow are intended as a 'ready reckoner' which provides an initial adjustment to the multipliers according to the employment status, disability status and educational attainment of the claimant when calculating awards for loss of earnings and for any mitigation of this loss in respect of potential future post-injury earnings. Such a ready reckoner cannot take into account all circumstances and it may be appropriate to argue for higher or lower adjustments in particular cases. In particular, it can be difficult to place a value on the possible mitigating income when considering the potential range of disabilities and their effect on post work

> capability, even within the interpretation of disability set out in paragraph 35. However, the methodology does offer a framework for consideration of a range of possible figures with the maximum being effectively provided by the post injury multiplier assuming the claimant was not disabled and the minimum being the case where there is no realistic prospect of post injury employment."

[21] In my opinion there is nothing inherently complex in the pursuer's claim in respect of future wage loss. As I have already indicated, parties in the present case put forward no more than three possible career paths which the pursuer might follow or might have followed but for the accident. It is assumed that the pursuer would have received or will receive remuneration at the middle of the range relative to his posited employment. No issue is raised about the possibility of promotion or other sort of career development. The pursuer will propose different multipliers for, on the one hand, calculation of the value of his probable life-time earnings as a thermal insulation engineer, had it not been for the accident and, on the other, calculation of the value of his post-accident probable life-time earnings in lower skilled employment, but the reasons for that can be explained in evidence. Despite Ms Galbraith's suggestion to the contrary, I do not see the pursuer's approach as involving a split multiplier.

[22] Neither do I see the case as involving difficult mixed questions of fact and law. As I understood this aspect of Ms Galbraith's submissions it related to whether the jury should opt for a multiplier/multiplicand approach to the valuation of future wage loss, as will be contended for by the pursuer, or whether it should opt for the lump sum approach associated with the decision in *Smith* v *Manchester Corporation* and that in *Blamire*, as may be contended for by the defenders. An aspect of that is whether the pursuer falls to be regarded as "disabled" for the purpose of selecting a reduction factor from Table B. I accept that this is a question which a jury would have to consider and I accept that it is important (as is illustrated by the recent decision of the Court of Appeal in *Billett* v *Ministry of Defence*

[2016] PIQR Q1, [2015] EWCA Civ 773). I also accept that, strictly speaking, it is a mixed question of fact and law in that a person is defined in paragraph 35 of the Explanatory Notes as being "disabled" only if: (i) the person has an illness or a disability which has lasted or is expected to last for over a year; (ii) the person 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; and (iii) their condition affects either the kind or the amount of paid work they can do. However, at least in the case of the pursuer, where what would be founded upon is the amputation of his fingertips and the loss of function consequent thereon, I do not see the question as to whether he satisfies the paragraph 35 definition to be so difficult for a jury to determine as to make the case unsuitable for jury trial.

[23] Inherent in Ms Galbraith's focus on complexity was the difficulty she suggested that would be experienced by the trial judge in giving the jury adequate directions on the assessment of damages in respect of future wage loss. For his part, Mr Di Rollo submitted that the critical question was whether the particular method proposed for assessing damages was capable of being presented in front of a jury. What I understood both counsel to be doing, entirely correctly, was directing my attention to the practicalities of a jury trial and asking me to consider how these might affect the prospects of a just outcome in the present case. In response to that invitation, I would accept that the trial of a claim for future wage loss under reference to the Ogden Tables is likely to be a more demanding exercise for all those concerned than a proof before a judge. I would anticipate evidence having to be led to explain the operation of the Ogden Tables. The judge will not have the opportunity of discussing with counsel the whole evidence in the case and what is to be made of it, in the course of submissions. Counsel and then the judge will have to provide full and precise explanations in their speeches and directions to a lay audience made up of people with no

previous experience of the exercise which they will be asked to carry out. That, however, is of the nature of a jury trial, and it is to be borne in mind that statute assumes that jury trial is the preferable mode of determining personal injury claims, a statutory assumption that has survived recent scrutiny by the Scottish Civil Courts Review (Report (2009) Part 1, paragraphs 156 to 163). Moreover, it appears to me that the difficulties associated with use of the Ogden Tables and, in particular, that part of the Ogden Tables which attempts to address contingencies other than mortality, can be overstated. In an appropriate case the Tables may make the jury's task easier than it would otherwise be.

[24] The Ogden Tables are not mandatory and they do not pretend to be. At paragraph 2 of the Introduction to the 7th edition the current chairman of the Working Party, Robin de Wilde QC, explains that the tables are designed simply to assist those concerned with calculating lump sum damages for future losses in personal injury and fatal accident cases. As appears from paragraph 31 of the Explanatory Notes (see paragraph [20] above), the methodology proposed in the tables to reduce a mortality multiplier is described as simply "one method" to take into account other contingencies. It is expressly acknowledged that there are other methods. The suggested methodology is put forward as no more than a "ready reckoner" to provide an initial adjustment (paragraph 32). That said, for all the Working Party's modesty, the Ogden Tables provide the most scientifically rigorous method for the calculation of future losses which is available to the court. I take that to have been recognised in the House of Lords *Wells* v *Wells* [1999] 1 AC 345 where Lord Lloyd observed, at 379, that the tables should be regarded as the starting point (see also *Billett*, Jackson LJ at paragraphs 50, 59 and 67). It is of course true that the basis for the calculation of both the mortality multipliers and the reduction factors is statistical, in other words it is a prediction of the future experience of a given population by reference to the past experience of that population. That, it can be said, has no necessary

relationship with the future experience of an individual member of that population. It is also true that Tables A and B only accommodate three variables: educational attainment, disability status, and employment status at a particular date, with "disabled" being very broadly defined. It is because of these (necessary) limitations that the Ogden Tables are a starting point. They may require to be adjusted, albeit with some care, or abandoned altogether, where the facts of a particular case do not fit within the assumption that the circumstances of the individual whose future losses are under consideration will broadly conform to the mean circumstances of the population of which he is a member. However, the other side of that coin is that where nothing can be identified in the circumstances of the individual to take him out of the generality or, to put the same thing slightly differently, to indicate that his life experience is likely to deviate from the mean life experience of the population of which he is a member, then there is no rational reason not to apply an Ogden Tables mortality multiplier as adjusted by the appropriate reduction factor. It is of course no more than an estimate but it is an estimate with a scientific basis, which cannot be said of the alternative methods. Before a jury it also has the advantages of being amenable to logical explanation and being simple to apply.

[25] I must confess that the information provided by Ms Galbraith, and not challenged by Mr Di Rollo, that there is no reported instance of the Ogden Tables reduction factors being used by a court and that on the two occasions that the methodology has been considered in Scotland it has been rejected, gave me pause. However, when one looks at *McGhee* v *Diageo plc* and *Brand* v *Transocean North Sea Limited* the reason why Lord Malcolm and Lord McEwan respectively did not apply the methodology was because, in the particular cases before them, they did not find the necessary factual premises on which the methodology depends to have been established to their satisfaction. Moreover it is not quite the case that there is no reported instance of the methodology being applied. *Conner* v

Bradman and Company Limited [2007] EWHC 2789 (QB) is one instance, albeit in that case the Deputy High Court judge considered it appropriate to adopt a reduction factor halfway between the figures indicated by the Ogden Tables for, on the one hand, someone who was not disabled and, on the other, someone who was disabled. In *Billett* the methodology was followed at first instance. It was not followed on appeal but that was because the Court of Appeal did not accept that the plaintiff was as a matter of fact "disabled" as that expression is to be understood in terms of the relevant part of the Ogden Tables.

[26] Accordingly, I have not been persuaded that the pursuer's claim for future wage loss is so complex as to require that it be determined at a Proof. Although very much subordinate to her submissions in relation to future wage loss, Ms Galbraith pointed to the lack of clarity in the pursuer's claims for pension loss, "miscellaneous costs (past and future)" and the cost of prostheses. While her criticisms were understandable, Mr Di Rollo was able to respond with the explanation that I have recorded at paragraph [13] above. On the basis that that is how the pursuer proposes to present his claim I see no reason why these heads too should not be considered by a jury.

[27] In my opinion special cause has not been established. I shall allow issues. I shall reserve all questions of expenses.