J. McQuater
Solicitor, Atherton Godfrey
J.McQuater@athertongodfrey.co.uk

Disability and the 2010 Equality Act: relevance in personal injury claims

INTRODUCTION

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

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

Therefore, the purpose of this article is to explain why lawyers so often ask medical experts whether they consider that the claimant can properly be described as disabled according to the criteria set down in the 2010 Equality Act. It is hoped that this will enable medical experts to appreciate the significance of an opinion on this point, particularly so far as estimating claims for future loss of earnings is concerned.

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

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

BACKGROUND

Where an injured person has continuing symptoms, even if these are not particularly significant, this may be important in terms of their future employability and may have a bearing on their future earning potential.

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

Even if the claimant has no immediate and continuing loss of earnings, the courts accept that there may be a claim for the loss of future earning capacity. In Fairley *versus* John Thompson (Design and Contracting Division) Ltd (1973), Lord Denning MR explained:

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

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

TRADITIONAL METHOD

In Billett *versus* Ministry of Defence (2015) LJ Jackson observed:

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

Jackson went on to state:

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

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

> "As a matter of convention a claim for damages on this basis is commonly referred to as a *Smith v Manchester* claim. In practice such awards usually range between six months' and two years' earnings: see *Court Awards of Damages for Loss of Future Earnings: an Empirical Study and an Alternative Method of Calculation* (Lewis et al, 2002)."

This traditional approach has been largely, though not entirely, replaced by a modern, more statistical, approach. Crucially, however, this methodology depends upon the court finding that the claimant is, in contrast to the pre-injury situation, disabled; hence the increasing incidence of requests, when seeking medical opinion, for a view on this very point.

MODERN METHOD

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

In the Billett case, Lord Justice Jackson also noted:

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

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

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

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

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

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

On this basis, the Ogden Tables allow a mathematical calculation of likely future loss of earning capacity, as well as ongoing loss of earnings, by comparing a calculation, adopting the pre-injury reduction factor, likely pre-injury lifetime earnings and then subtracting, on the basis of a further calculation but this time using the post-injury reduction factor, of likely post-injury lifetime earnings. The resulting figure reflects the best estimate, using this methodology, for future loss of earnings.

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

DISABILITY?

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

> "A person is classified as being disabled if all three of the following conditions in relation to the ill health or disability are met:
>
> (i) has an illness or a disability which has or is expected to last for over a year or is a progressive illness
> (ii) satisfies the Equality Act 2010 definition that the impact of the disability substantially limits the person's ability to carry out normal day-to-day activities
> (iii) their condition affects either the kind or the amount of paid work they can do"

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

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

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

APPLICABILITY

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

In Billett, whilst accepting the claimant met the definition, the court recognised that this did not prevent the claimant from working and that, as it was inevitable, some adjustment would be required to the reduction figures found in the Ogden Tables, in order to reflect the fact that the claimant only just met the definition. Indeed, the circumstances required an adjustment so significant that it was more straightforward to revert to tried and tested judicial experience and simply award a lump sum for loss of earning capacity in the traditional way.

ROLE OF MEDICAL EXPERTS

Whether or not the claimant should be treated as disabled is, ultimately, a matter for the court.

Nevertheless, a judge is likely to find the opinion of an appropriate medical expert helpful in determining this issue. That is why medical experts will often be asked, when reporting, for a view on this specific point.

SUMMARY

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

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

REFERENCES

1. **Denning AT.** Fairley v. John Thompson (Design and Contracting Division) Ltd. 1973 2 Lloyds Rep 40.
2. **Jackson LJ (2015) EWCA Civ 773**
3. **Lewis R, et al (2002) Court awards of damages and loss of earnings: an empirical study on an alternate method of calculation.** *Journal of Law and Society* 29: 406-435
4. **Ogden Tables for use in Personal Injury and Fatal Accident Cases (2007) 6th Edn HMSO**

EDITORIAL COMMENT

I have become increasingly concerned and confused when providing opinions in personal injury cases when asked to give a view as to the claimant's status in relation to the definition of disability outlined in the 2010 Equality Act. Many of the claims on which I am asked to opine concern back injuries including disc prolapse and chronic "soft tissue" problems. In my clinical practice, I spend much of my time trying hard to disabuse patients of the notion that they are disabled because of degenerative disc disease, "crumbling spine", twisted pelvis or whatever other diagnosis may have been floated before them prior to my seeing them. Therefore, to go into print and label someone as disabled or suffering from a chronic illness because they have ongoing degenerative back pain or back pain as part of a biopsychosocial disorder is something of an anathema to me.

Under the 2010 Equality Act, we have to consider whether the claimant in front of us has illness or disability that has been present for over a year that substantially restricts their ability to carry out normal day-to-day activities and limits their employability. In the context of the Act, *substantial* is defined as "more than minor or trivial".

For this reason, I believed that it would be useful to have the legal perspective on this requirement for the label of disability to be applied in these cases. Mr McQuater, a senior solicitor with considerable experience in this field has outlined the rationale for the request. Armed with this information and background, I believe that we have to remove our clinician's hat and don the expert's hat, as this is the requirement of the court and the legal process that we are involved in, even though it might not sit entirely comfortably with our day-to-day clinical practice.

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