Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

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Welcome to Insight

Welcome to this week's edition of Insight in which we report cases relating to:

- The Civil Liability (Contribution) Act 1978
- Limitation and vicarious liability in a Scottish case

And we bring news of the publication of the 8th edition of the Ogden Tables.

Malcom Henké
Partner & Head of LACIG

Extraterritorial application of the Civil Liability Act 1978

Roberts (a minor) v The Soldiers, Sailors, Airmen and Families Association and another and Allgemeines Frakenhaus Viersen GMBH (Third Party) (2020) EWCA Civ 926

In this case the point at issue was whether the Civil Liability (Contribution) Act 1978 ("the 1978 Act") had extraterritorial effect.

In June 2000, the claimant suffered brain damage at birth in a hospital in Germany. His claim was that this occurred as a result of the negligence of the attendant midwife, who was employed by the first defendant the Soldiers, Sailors and Airmen but he also sued the Ministry of Defence, which would indemnify the first defendant in respect of any successful claim.

There were third party proceedings, which were only effective if the claimant succeeded against the first defendant. The basis of the contribution claim was the statutory liability laid down by the 1978 Act. The relevant sections from the 1978 Act were sections 1, 2(3), 6(1) and 7(3). The critical point was whether the 1978 Act had extraterritorial effect. It was agreed that under the operation of private international law, the proper law of the liability for contribution would be German law. It was also agreed that if German law applied to the contribution, then the claim for contribution would be out of time. If, however the 1978 Act had extraterritorial effect, and the liability arose under the Act, the contribution claim would be in time.

The appeal arose from a preliminary issue as follows:

"a. the defendant's claims for contribution against the part 20 defendant will not be time-barred if the question whether the defendants are entitled to contribution is covered by English law by reason of the applicability of the Civil Liability (Contribution) Act 1978…, but will otherwise be time-barred because German law applies;

b. the relevant question for the purposes of the trial of the preliminary issue is whether or not the 1978 Act has mandatory or overriding effect and applies automatically to all proceedings for contribution brought in England and Wales, without reference to any choice of law rules. If not, German law will apply to the Defendants' claims for contribution against the Part 20 Defendant and they will be time-barred".

At first instance, a High Court Judge held that the answer to the preliminary issue was that the 1978 Act did have mandatory/ overriding effect.

The Court of Appeal dismissed the third party's appeal.

The question of statutory construction had to be approached with three principles in mind. Firstly, what was the ordinary and natural meaning of the language considered in context and thus the presumed intention of Parliament?

Secondly, what was the purpose of the legislation, so far as that could properly be ascertained? Thirdly, in the context of this case, did the approach laid down by Lord Sumption in Cox (2014) enfranchise an interpretation of the statute which gave it extraterritorial effect? The three principles would interact.

The fundamental approach to the interpretation of statutory language was laid down by Lord Reid in *Black-Clawson International Ltd (1975)*. The entitlement to the contribution claim under the Act, provided for in S1(1), was dependent upon threshold provisions in Ss1 (2), (3) and (6). Since the instant primary case was a tort case, the liability of tortfeasor one and tortfeasor two to the claimant was confined to "liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage".

This threshold condition arose in respect of each of tortfeasor one and tortfeasor two. The second part of S1 (6), in making the qualification which followed, (" it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales") made it clear, as a matter of ordinary language, that the relevant liability must have been or must be able to be established in an English court, but not necessarily by an application of English law.

For example, in a case where the application of private international law had or would result in a ruling that an English court would be the forum conveniens, then the threshold condition would be satisfied even though the English court would apply foreign substantive law. The phrase "any issue" could not naturally be read down to mean "any single issue". On the face of it, therefore, the necessary threshold condition could be established where an English court gave or would give judgment against tortfeasor one and tortfeasor two, even when applying foreign law to all the issues in the case(s).

'Provided liability could be established against tortfeasor one and tortfeasor two, so as to gain judgment in an English court whether or not any issue or issues were decided by foreign law, the threshold condition for a contribution claim was fulfilled…'

It was not a straightforward question of the Act providing a "complete code". The question was crisper. Provided liability could be established against tortfeasor one and tortfeasor two, so as to gain judgment in an English court whether or not any issue or issues were decided by foreign law, the threshold condition for a contribution claim was fulfilled.

If by its own terms the Act applied in relation to the principal liability of the tortfeasors, even where the proper law of the tort was foreign law, then why should a consequential contribution claim where the proper law of the claim was foreign law, fall outside the ambit of the Act? As a matter of ordinary language, the meaning of S1 (6) was tolerably clear.

The language of S2(3) added little illumination to the issue in question. In limiting the amount of contribution

required to be paid to the amount to which recovery by the claimant against tortfeasor two would be confined, by English or foreign law, if litigated before an English court, this provision appeared simply consistent with the language of S1. Contribution claims which were not enfranchised by S1 could not be enfranchised by S2. S2 (3) did not clarify the ambit of the Act.

Looking at the provisions themselves, the purpose of Parliament was tolerably clear. At the forefront, was the object of simplifying and standardising contribution claims, whatever form of liability gave rise to the common liabilities to the "person… [suffering]… damage". This was the main thrust of the interpretation of liability and damage set out in S6 (1).

The Act was wholly directed to contribution claims. It would have been simplicity itself to provide that where the proper law of the contribution claim was a foreign law, then the statutory right did not arise. Parliament set no such limit or exclusion.

Turning to the principles laid down in Cox, no reliance could be placed upon these observations, which were tangential to the reasoning in that decision and were not the consequence of focused argument.

The defendants were represented by the Government Legal Department

The third party was represented by DAC Beachcroft LLP

Comment

This judgment removes any doubt that there may have been that the Civil Liability (Contribution) Act 1978 has extraterritorial effect. As a consequence, any claim for contribution that the defendants may need to make would not be out of time. As would have been the case under German law.

Vicarious Liability

JXJ v The Province of Great Britain of the Institute of the Christian Schools (2020) EWHC 1914 (QB)

Between September 1972 (when he was 10) and September 1974 (when he was 12), the claimant attended a school in Scotland to which juvenile offenders and others who were considered to be in need of care and protection could be sent by order of a juvenile court or the Secretary of State.

Legal responsibility for the management of the school lay with a board of managers appointed by the Catholic Archbishop of Glasgow. The headmaster, deputy headmaster and many of the teaching staff were members of the Institute of the Brothers of the Christian Schools (the brothers)

During his time at the school, the claimant was repeatedly subjected to sexual assaults, some involving considerable violence, by James McKinstry, a lay member of staff who worked at the School as a gardener and night watchman. McKinstry was convicted of those assaults, and of assaults against other boys at the school, at the High Court in Edinburgh in 2003. There was no dispute that those sexual assaults took place. The claimant alleged that he was also physically assaulted by brothers who taught at the school. These alleged assaults were not admitted.

The claim had three elements: that the defendant was vicariously liable for:

(a) the sexual assaults perpetrated by McKinstry;

(b) the acts and omissions of the headmaster of the School, in exposing the claimant to the risk of abuse and/or in failing to protect him from that abuse; and

(c) further assaults committed by a number of named brothers.

The defendant accepted that the assaults of which McKinstry was convicted took place, but pleaded a limitation defence and, in addition:

(a) denied that it was vicariously liable for McKinstry's assaults;

(b) accepted that it was vicariously liable for any breach of duty on the part of the headmaster but did not admit any such breach of duty; and

(c) accepted that it was vicariously liable for any physical assault committed by any of the brothers, but did not admit that any of the assaults alleged took place.

The claim was first notified to the defendant on 2 July 2014. It was issued in June 2018.

The allegations in this case related to a period between 45 and 47 years ago and the judge noted the proper approach to historic allegations of sexual assault, as set out in *BXB v Watch Tower Bible and Tract Society of Pennsylvania (2020).*

The judge considered the Prescription and

Limitation (Scotland) Act 1973) as modified by the Limitation (Childhood Abuse) (Scotland) Act 2017. He concluded that the new Scottish limitation provisions should be applied in the following way:

(a) In cases to which S17A of the 1973 Act applied, the disapplication of the triennium meant that there was no time bar to be disapplied, no presumption that stale actions should not be brought and no onus on a claimant to demonstrate a good reason for delay in raising an action.

(b) A defender who relied on S17D (2) bore the burden of showing that "it is not possible for a fair hearing to take place".

(c) In assessing whether that test was met, the cases interpreting S19A of the 1973 Act would be relevant to the extent that the reasoning in those cases turned on whether it was possible for the defender to have a fair hearing.

(d) However, caution must be exercised in reasoning by analogy from other case law which turned on the application of the "real possibility of significant prejudice" test.

(e) In a case where the right of action accrued before the coming into force of the new provisions, S17D (3) applied if the court was satisfied of two things: first, that as a result of the retrospective operation of S17A, the defender could show that he "would be substantially prejudiced" if the action were to proceed; second, that this prejudice outweighed the pursuer's interest in the action proceeding.

(f) The test required by the first limb of S17D (3) required the defender to show that he would be substantially prejudiced, not just a "real possibility" of that. Secondly, the prejudice had to be "substantial", rather than merely "significant".

(g) The second limb of S17D (3) reflected the Scottish Parliament's view that there might be cases where the defender would suffer substantial prejudice, but the pursuer's interest was such that the action should proceed anyway. This meant that it would no longer be appropriate to focus on prejudice to the defender as a factor likely to be determinative in most cases.

(h) In assessing the extent of the pursuer's interest, the seriousness of the abuse which the pursuer claimed to have suffered and the claimed effects of that abuse would certainly be relevant. Read in context, however, the reference to the pursuer's "interest" did not require consideration of his or her reasons for delay.

Applying this law to the facts, insofar as the claim related to McKinstry's assaults, the defendant had not shown that it was not possible for a fair hearing to take place. The defendant had admitted the assaults of which McKinstry was convicted in 2003.

The second element of the claim was, however, of a very different character and could not proceed. It involved an allegation of negligence on the part of a named individual, the headmaster, in respect of his handling of an individual complaint. Such of the school's written records as were now available to the court contained no mention of any investigation into the claimant's or any other complaint. The defendant's evidence was that, when the school closed in 1982, it passed such records as it had to the local authority.

The documents available at trial were obtained pursuant to a Freedom of Information Act request from the Scottish Government. But they plainly did not include all of the school's records; and in any event there was no evidence that it would have been standard practice in the early 1970s to produce or retain written records of investigations into complaints of abuse. It would not be safe to infer that there was no investigation simply from the absence of any mention of one in the documents before the court. The headmaster had died in 1990.

The third element of the claim related to physical assaults said to have been committed by other brothers. In general, the date when a potential defendant ought to begin to take steps to gather evidence was the date on which formal notice was given of the intention to bring proceedings. That was not until 2014, by which time all but two of the individuals against whom allegations of physical assault were made were long dead. In relation to the allegations of physical abuse, it was not possible for a fair hearing to take place. S17D (2) therefore applied; and this part of the claim could not proceed.

'…it was necessary to look beyond the legal relationships and consider the degree of control exercised in practice by the defendant over the school and its staff…'

Applying the facts and law to the claim in respect of sexual abuse by McKinstry relevant to the issue of vicarious liability, it was necessary to look beyond the legal relationships and consider the degree of control exercised in practice by the defendant over the school and its staff.

The present case involved a pattern of relationships with legal and factual elements which differed from those found in any of the authorities cited by the parties. Unlike the brothers, staff members such as McKinstry took no vows and made no commitments to the Institute. They did not have to abide by its rules. On no view could they be regarded as akin to partners in the "business" of the Institute. Nor here did the Institute employ any of the school's staff. It had a relationship akin to employment with some of those staff (those who were brothers) because of the reciprocal obligations, but it had no relevant relationship with McKinstry or any of the other staff of the school who were not brothers. They were an integral part of the work, business and organisation of the school, but not of the Institute. The other staff were integrated into the work, business and organisation of the schools in which they were employed, but they were not integrated into the work, business or organisation of the Institute.

There was no principle of law that a business or organisation was vicariously liable for all those without whom it would be unable to operate. A business might choose to have some of the work essential to its mission carried out by independent contractors. If it did, it would not be vicariously liable for their wrongs. By the same token, a business which chose to operate by supplying staff to other organisations did not by doing so assume liability for wrongs committed by the other staff employed by those organisations.

It made no difference that the Institute exercised a considerable degree of control over the day to day operation of the school, including as regards the employment and deployment of staff. The law had not developed to the stage where a person who exercised de facto influence over the operation of a business was, by virtue of that influence, to be held vicariously liable for an employee of the business with whom he had no direct relationship.

The claimant was represented by Summit Law LLP

The defendant was represented by BLM Law

Comment

As well as providing an example of the application of the law on limitation in Scotland to cases of historical sexual abuse, it also sees a judge applying a brake on the extension of vicarious liability.

Ogden 8 is here

On 17 July, the Government published the 8th edition of the Ogden Tables. There are a number of significant changes since the 7th edition was introduced in 2011 (with updates in March 2017 and July 2019 to cope only with the -0.75% and then -0.25% discount rates).

Within the explanatory notes, the section relating to the adjustment of multipliers for loss of earnings set out in Tables A-D has been expanded. There are now slightly more detailed definitions for the 'employed' and 'not employed' but much more guidance on both disability and educational attainment. Some, but not all, of the adjustment factors within Tables A-D have also altered. There is much more guidance on what to do if it is necessary to depart from a strict application of those tables.

With the advent of workplace pensions and the assumption that a far greater number of claimants will now have a pension, there is an additional section to the notes dealing with pension loss calculations.

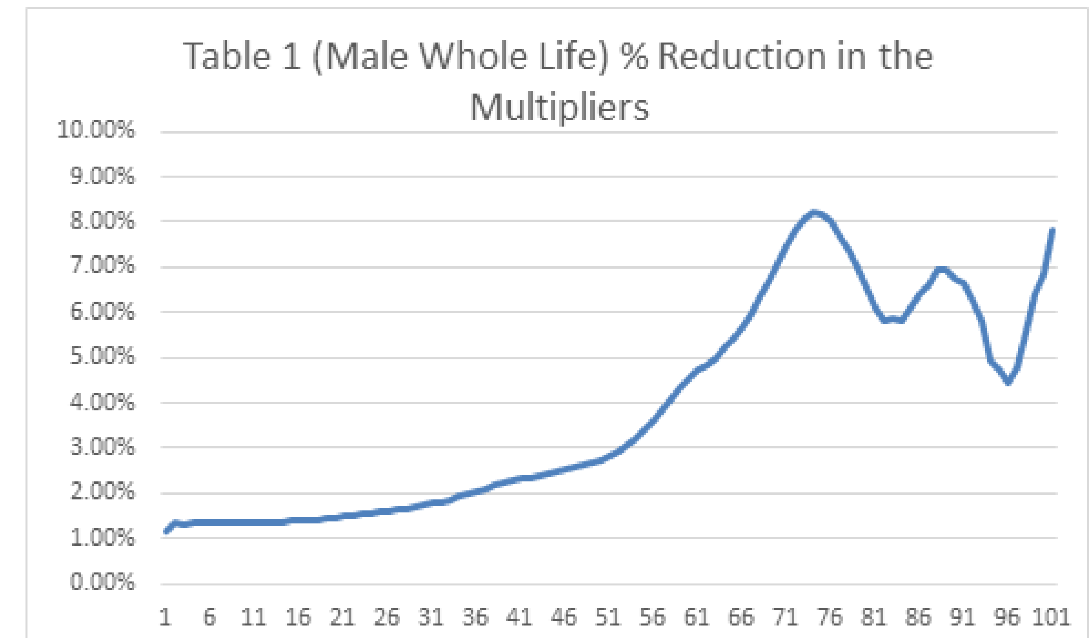
Following the Supreme Court decision in Knauer (2016) the 8th edition of the tables now sets out the approved methodology for calculating losses of dependency in Fatal Accident Act cases, with the previous methodology approved in Cookson (1979) consigned to history. This also brings Tables E and F fully into play (as has been the case since Knauer).

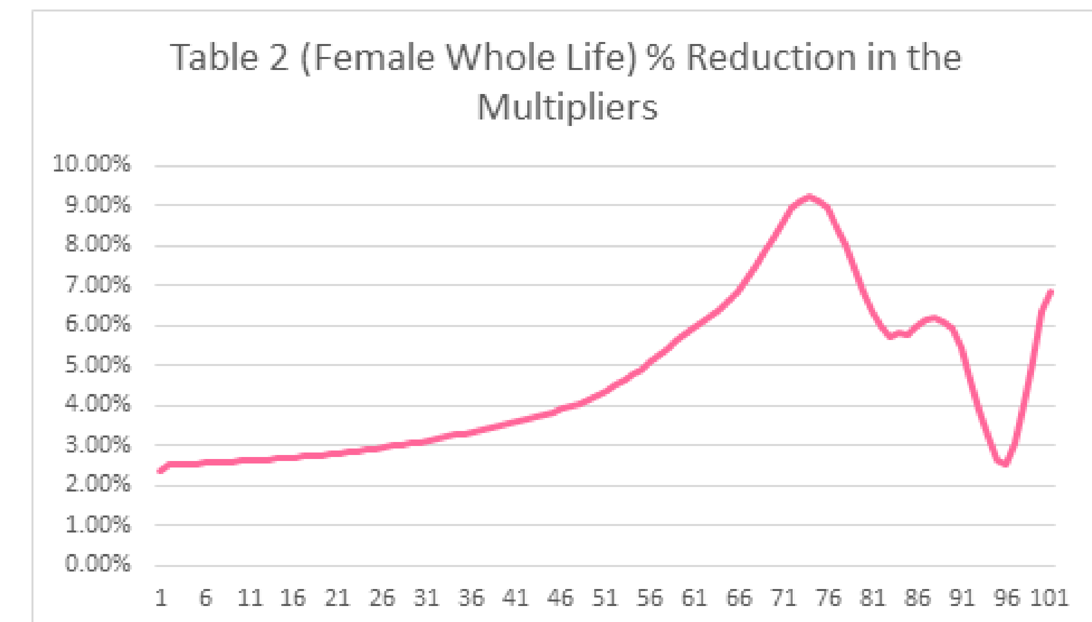
There is an entirely new section to the notes providing guidance of periodical payment orders.

The revised tables are set out with a discount rate ranging from -2.00% to +3.00% but with the columns for -0.25% and -0.75% (for Scotland) highlighted for ease of reference.

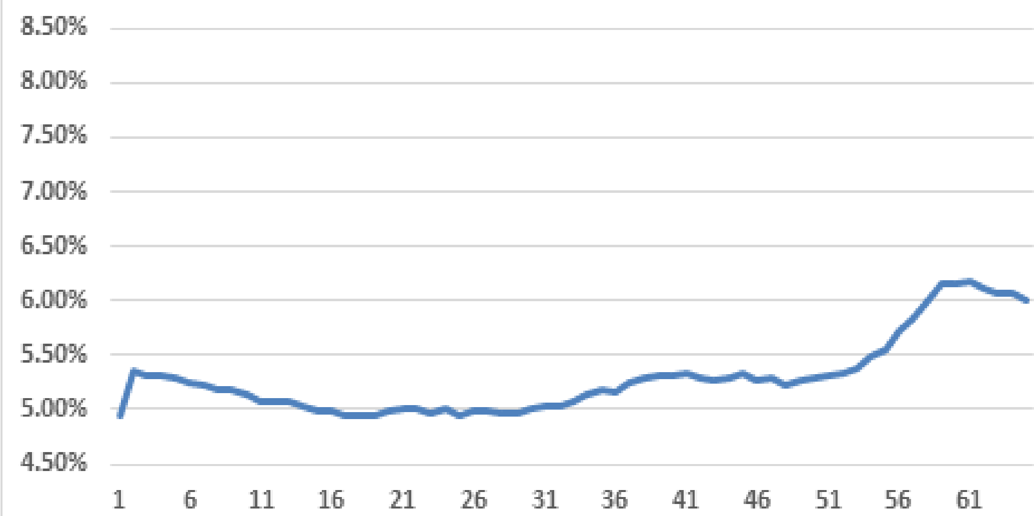
The 8th Edition takes account of the latest ONS statistics on life expectancy published in December 2019, the gist of which is that life expectancy increases are slowing. A comparison between the 7th edition of the tables and the latest set reveals a reduction in all multipliers for Tables 1 and 2 (losses for life) and also therefore reductions for the pension loss multipliers but increases in the multipliers in Tables 9 and 10 (loss of earnings to pension age 65).

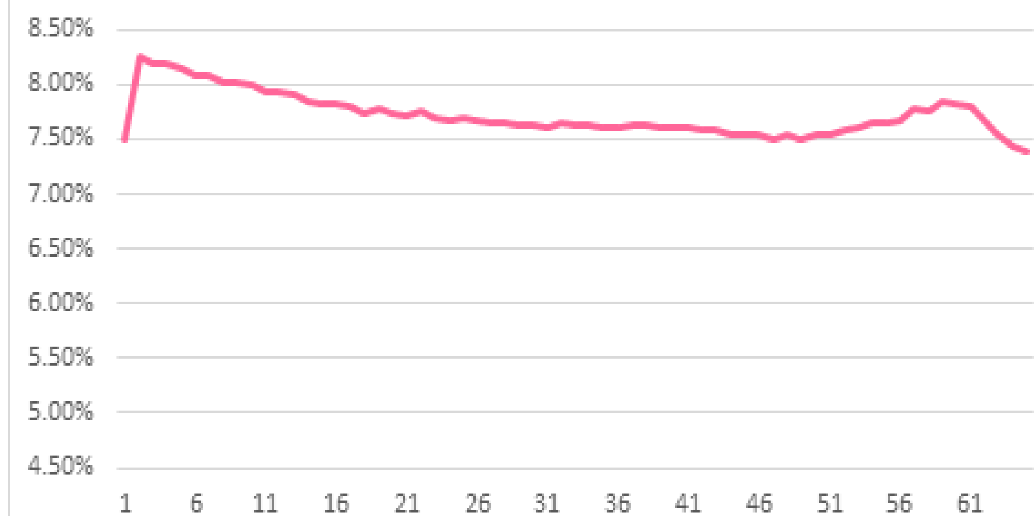
In Tables 1 and 2 the reductions in the multipliers become steadily greater for both men and women between 0 (-0.17% and -2.35% respectively) and 74 (-8.02% and -8.93%) but the extent of the decreases then vary between 75 and 100:



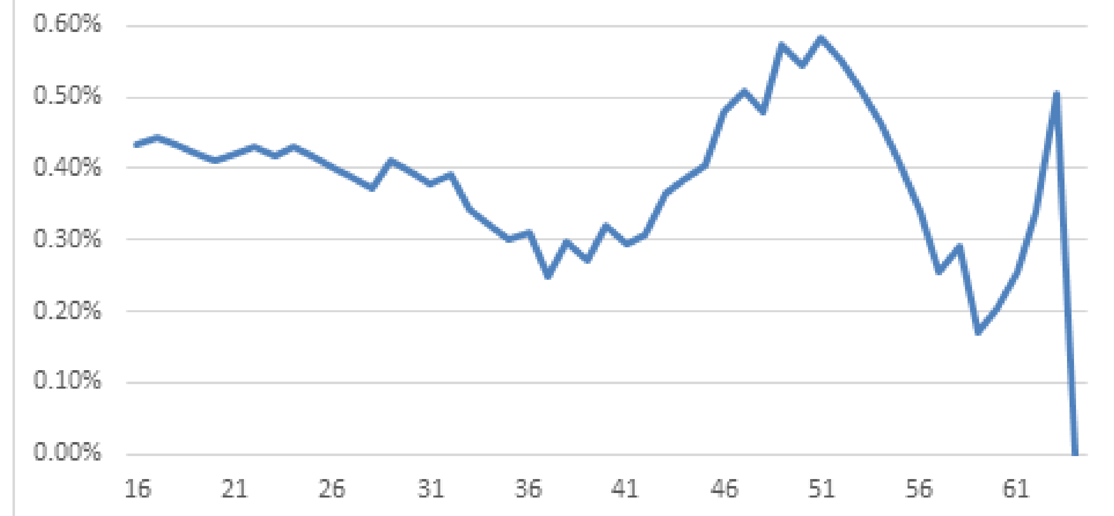


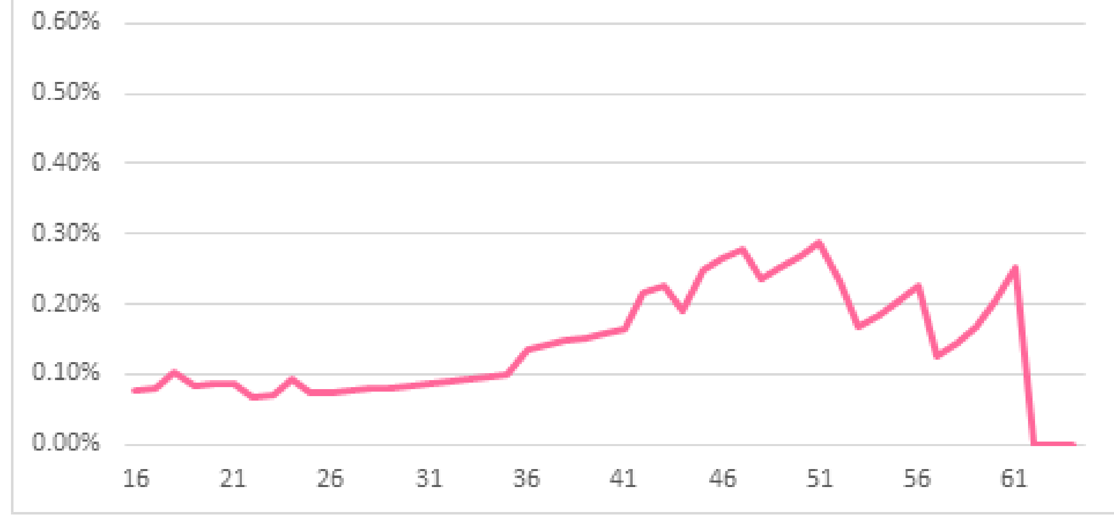
The following shows a slightly more uniform reduction in the multipliers for loss of pension at 65 for women than men. These are taken from Tables 25 and 26.





The multipliers for earnings have however shown a very slight increase. For example, the increases in the multipliers in Table 9 for men are greater than in Table 10 for women (see below). Again, the increases are not graduated but vary at different ages so that, for example, there is an increase of 0.43% for a 16-year old male; 0.30% for a 38-year-old; and 0.57% for a 49-year-old. At the equivalent ages for women the increases are 0.08%, 0.15% and 0.25% respectively:





To the existing ranges for loss of earnings to retirement ages from 55 to 70, there are new tables (11 and 12) for the multipliers for a retirement age of 68 for men and women respectively and the tables extend to a retirement age of 80. These changes are mirrored in the tables for loss of pension.

An important innovation is that a new set of tables has been published in Excel format only which enables the calculation of multipliers between any two given ages based on a discount rate of -0.25% (or -0.75% for Scottish claims). The table splits between males and females to account for the different mortality rates. In effect these tables combine the data from tables 1 to 35 and, for the more tech-savvy or number literate, replace the individual tables. w

Moreover, it is very easy to use this new Excel spreadsheet to create automatic calculators and once mastered, it makes it easy for any insurer or solicitor to create a reserve calculator and damages calculator. Perhaps the government missed a trick in not putting a straightforward user-friendly 'front end' on these tables. The danger is that too few people will take the time to get to grips with these electronic tables.

[View the new tables here.]

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