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# LOSS OF EARNINGS CLAIMS: THE BASICS

By Richard Borrett



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# PART 1: PAST LOSS

# PRINCIPLES



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- Earnings but-for the injuries
  - Earning capacity (**net**)
  - Less actual earnings
  - Causation?



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## Employees: Capacity

- What would C have earned?
- Regular earnings?
- Variable Hours?
- Bonuses? – affected?



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# Employees: Evidence

- Payslips: 13 weeks
  - Representative?
  - Depends on role / contract
- P60: end of year
  - Beware additional elements



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# Employees: Issues

- New job – unreliable evidence?
- Bonus?
- Irregular hours - Availability of work?
  - Seasonal?



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# Employees: Actual earnings

- Remember sick pay
- Consider payslips for injury period
- Other causes for reduction?
  - Irregular hours
  - Timing of absence (pre accident?)
- Expenditure saved (e.g. Childcare? (*Eagle v Chambers No.2 2004*))





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# Self-employed Claimants

- Is C Self-employed?
- Sole trader – not a limited company
- No employees
- Earnings = Profits (turnover – expenditure)





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# Self-employed: Loss of 'earnings'

- Profits but for injury (Capacity)
  - Calculate Average
- Profits in fact made (Actual)
- Remember tax.

# Self-Employed: Evidence of Capacity



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- Accounts (prepared by accountant)
- Tax Returns
- SA302

# Issues with capacity (self-employed)



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- Missing / unreliable tax returns / accounts
  - Is there any credible evidence?
- Does income fluctuate?
  - Calculate a weekly average
- Is historic turnover a good indicator?
  - New business?
  - Slowdown?

# Evidence of Actual Earnings (self-employed)



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- Accounts (if available)
- Evidence of turnover for relevant period?
- Evidence of billings for relevant period?

# Issues with actual earnings (self-employed)



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- No accounts available
  - Calculate turnover
  - Calculate expenditure (should be lower)



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# Limited companies

- C is shareholder in limited company
- May look like 'self-employed'
- However company is a separate entity to the Claimant



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# Limited Companies

- Any loss of *profit* belongs to company NOT to claimant
- Claimant – loss of income only
- Income often comprised of
  - Salary
  - Dividends
- Has time off caused any reduction?



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# Partnerships

- Business with multiple owners
- Not a separate entity to the partners
- Traditional or 'limited liability'
- Partner has 'interest' in partnership (50%?)



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# Partnerships

- Loss only to the extent of that interest (Kent v BRB 1995)
- **But:** Ward v Newalls:
  - Wife's contribution nil
  - Partnership simply for tax purposes
  - Therefore her 'interest' ignored
  - Look to the *reality* of the partnership.



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# Loss of Chance

- Employee or self employed
- Real chance
- Not fanciful or speculative
- Opportunity profitable
- Causation





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## PART 2: FUTURE LOSS



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# Principles

- Claimant's but-for earnings
- (Minus) earning capacity
- Multiplier / Multiplicand



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## But for earnings

- Past earnings as starting point
- Likely increases (promotions etc)?
  - Ability / aptitude
  - Availability
  - Competition
- Loss of a chance (% claim)



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# Earning Capacity

- Ability to do the *same* job is irrelevant
- What **could** the Claimant earn with injury?
- Bear in mind employment history / age
- Not necessarily any difference
  - Later retirement age?



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# Ogden VI method

- Compares ‘uninjured multiplier’ with ‘injured multiplier’
- Disabled people spend longer out of work
- Only relevant where C is **disabled** by injuries.
- See *Billett v MOD*
  - Technically disabled but Ogden VI not appropriate.





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# Smith v Manchester

- Claimant is in work but injuries cause a 'handicap' on the open labour market
- Less common following Ogden VI
- But used where
  - Not 'disabled' but disadvantaged
  - 'disabled' but only technically (Billett)
- Must be pleaded



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# Smith v Manchester

- Moeliker v A Reyrolle & Co 1977
  - Substantial/real risk C will lose job
  - Evaluate present value of that risk
- Real (not speculative) risk, else no claim.
- Risk must be proven



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# Smith v Manchester

- Award is for handicap caused by injury
- If risk materialises, will C be worse off as a result of injury?
- Lump sum – multiplier of annual earnings
- 6 months – 2 years.



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# Blamire

- Lump-sum award for future LOE (and *Smith*)
- ‘Too many imponderables’
- Bullock:
  - uncertainties do not of themselves justify a departure from multiplier/multiplicand...
  - “*judges should be slow to resort to Blamire*”



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