

Significant Change to Calculation of Awards in Personal Injury and Fatal Accident Cases

By Giahna Soles-Hunt

In the case of Cadet Car Rental v Pinder¹ (**Cadet**), the Judicial Committee of Her Majesty's Privy Council (**PC**) (The Bahamas' final court of appeal), recently effected a sea change in Bahamian law and practice regarding the calculation of Loss of Future Earnings (**LFE**) in personal injury and fatal accident cases. This is the result of a ruling in which the PC clarified the correct use of the Ogden Tables¹; a set of statistical tables compiled and regularly updated in the United Kingdom for the purpose of making it easier to calculate LFE.

In its 9-page judgment in *Cadet*, the PC quashed the appellant's LFE award of \$93,238.96 and substituted it for \$650,043.21. This unanticipated ruling has unsettled both insurance companies and attorneys, and those who have regained their equilibrium have begun to re-examine the correct and appropriate methods of calculating LFE. The questions of the moment are whether The Bahamas is ready for the practical implications of the decision in *Cadet*? How will Bahamian courts apply the Ogden Tables, a construct based upon UK statistics, within The Bahamas, when the two nations and the relevant facts and circumstances present in each nation such as cost of living etc. differ so significantly? And, what will The Bahamian courts do when the opportunity arises to rule on this matter again?

In brief the relevant facts of *Cadet* are that Mr. Pinder's car collided with Mr. Boname's car, which Mr. Boname had rented from Cadet's Car Rental (**CCR**). Mr. Boname died as a result of the accident and Mr. Pinder suffered serious injuries which left him permanently disabled. Mr. Pinder commenced legal proceedings against the estate of Mr. Boname and CCR claiming damages for negligence for personal injury and consequential losses. At the time of the trial Mr. Pinder was 34 and unemployed but still able to work. While liability was not an issue, the parties disputed the assessment of damages inclusive of LFE.

At first instance, the Supreme Court Judge (**SCJ**), used what is commonly known as the Multiplier/Multiplicand approach (**M&M approach**) of calculating LFE. The multiplier represents the number of years remaining in a person's working life until retirement; however, it is a starting point to be adjusted (i.e. discounted) for the "contingencies, vicissitudes and uncertainties of life."² The multiplicand represents the annual earnings a person could be expected to earn over that aforementioned period. As has been customary in Bahamian courts, the SCJ multiplied a multiplicand of \$20,000 by a multiplier of 19.1 years to produce a total of approximately \$380,000 for LFE. The SCJ rejected CCR's submission that a *Smith v*

¹ [2019] UKPC 4

² *Thompson and another v Strachan and others* [2017] 1 BHS J 108

Manchester award (**S&M Award**) was more appropriate. An S&M award is generally ordered when a plaintiff's competitive position on the labour market has been weakened as a result of the injuries suffered from an accident³. In such cases, the M&M approach may not be appropriate.

CCR appealed on the grounds that, (1) an S&M award ought to have been made instead; and (2) using a multiplier of 19.1 was wrong in law. The Court of Appeal (**CA**) held that in the circumstances, the SCJ was correct to use the M&M approach but that a multiplier of 19.1 was wrong in principle. The CA referred to the Ogden Tables^[1] to derive a multiplier of 4.8461 and substituted the \$380,000 award for LFE with one of \$93,238.96. Mr. Pinder appealed to the PC on the following grounds:

1. The CA erred in law in substituting its award for that of the SCJ in circumstances where there was no basis for disturbing the award below;
2. The CA erred in substituting a multiplicand of \$19,240.00 and holding that the SCJ was wrong in law in applying a multiplier of 19.1; and
3. The CA erred in its application and use of the Ogden Tables.

Generally, an appellate court will not interfere with an assessment of damages ordered by a lower court unless the award is shown to be the result of an error of law or so inordinately high or low so as to be plainly wrong⁴. In this case, the PC quashed the CA's award on the reasoning set out below.

The PC agreed with the CA that using the M&M approach to calculate LFE was more appropriate than a S&M Award. The PC held that the Ogden Tables may be used in the calculation of the LFE; however, it is not mandatory. Further, any jurisdiction relying upon the Ogden Tables ought to consider that the Ogden Tables are a construct of and for the United Kingdom based upon the specific conditions of the UK. In The Bahamas the Ogden Tables are of persuasive use only and should not be applied without adjustment. The PC further opined, that if the parties intend to rely upon the Ogden Tables, they should be used correctly.

At the Supreme Court level, the SCJ assessed the multiplicand at "about \$370.00/week or about \$20,000 per year," even though there was evidence that Mr. Pinder was likely to earn \$370/week. The PC rejected the estimate and assessed the multiplicand to be \$19,240 per year based upon the evidence. Respecting the multiplier, the SCJ accepted the multiplier submitted by Mr. Pinder's counsel of 19.1 (which was based upon the incorrect application of the Ogden Tables) as "reasonable". The PC and the CA rejected this method.

The correct approach is to calculate a "capitalised figure for the value of the earnings Mr. Pinder would have received if the injury had not been suffered employing Table 9 and

³ Smith v Manchester [1974] 17 K.I.R 1 CA

UK Government Actuary's Department. Actuarial Tables for Personal Injury and Fatal Accident cases, 7th ed (2011)

⁴ Nance v British Columbia Electric Railway Co Ltd [1951] AC 601

Table A of the Ogden Tables (Loss of earnings to pension age 65 (Males-not disabled-employed)). The SCJ should then have calculated a capitalised figure for likely post-injury earnings employing Table 9 and Table B (Loss of Earnings to pension age 65 (Males – disabled – not employed)). The difference between the two figures would be the appropriate award of damages for loss of future earnings.”⁵ Simply, the loss is arrived at by subtracting the value of the plaintiff’s earnings taking to account any injuries, from the value of the plaintiff’s earnings had he not suffered any injuries. Neither the SCJ nor the CA correctly applied the Ogden Tables.

At the CA level, the panel calculated the capitalized figure for loss of earnings to pension age 65 for Males- disabled- *not employed* without taking into consideration the first step of calculating loss of earnings to pension age 65 for Males- disabled- *employed*. This incorrect method yielded a multiplier of 4.8461 for a 34-year-old man, which the CA concluded was reasonable.

Using the Ogden Tables correctly, the value of Mr. Pinder’s earnings without injuries would have amounted to \$750,842.09. The value of Mr. Pinder’s earnings considering the injuries suffered would have amounted to \$100,798.88. The difference between the two figures is \$650,043.21, which is the LFE that should have been awarded to Mr Pinder. The appeal was allowed; the award of \$93,238.96 quashed and \$650,043.21 substituted.

While Mr. Pinder will receive an award that almost doubles his first instance award of \$380,000, what does this ruling mean for The Bahamas?

1. This judgment is binding. It was delivered by the PC which is the highest appellate court of The Bahamas. There are no further arguments to submit; there are no further appeals. If the Ogden Tables are to be referenced in the calculation of LFE, the method set out in *Cadet* is to be used.
2. The proper use of the Ogden Tables ought to make awards for LFE more predictable. However, using the Ogden Tables decreases the Court’s jurisdiction to adjust the awards for whatever reason a judge considers necessary or appropriate.
3. Akin to the above, it is likely that the level of LFE awards will increase as the statistics used to establish the Ogden Tables are based upon statistical data generated from the population of the United Kingdom, which is vastly different from that of The Bahamas.
4. As the PC stated, the Ogden Tables ought not to be used in The Bahamas without adjustment. Such indiscriminate application may result in artificially skewed awards unsuitable for the conditions of The Bahamas.

⁵ Fn 1 para 14

5. It is likely that we will see an increase in the number of claims for LFE based upon the Ogden Tables as well as in the number of appeals for matters that may have used the Ogden Tables incorrectly.

On one side of the double-edged sword, LFE awards based upon the above method should be more predictable, certain and less subjective. Even though the Ogden Tables are of persuasive use only, it is likely that they will be heavily relied upon in the calculation of LFE, even if it is a starting point to be adjusted, as the PC held. The issue arising from reliance upon the Ogden Tables, without adjustment, is that the awards for LFE may not be aligned with the cost of living and conditions of The Bahamas. The level of the awards based upon the Ogden Tables without adjustment are likely to be so inordinately high that persons will not be able to afford to pay. Further, insurance companies (if they have not done so already) are likely to adjust their premiums accordingly to pass on the risk to the Bahamian population, who again, will not be able to afford to pay. How will this issue be resolved?

This is an opportunity for The Bahamas to be proactive and to design an approach suitable for The Bahamas. The Legislature may step in to provide a resolution or the Judiciary may use its wide jurisdiction to remove references to the Ogden Tables all together? Or, perhaps we will dare to establish our own Ogden Tables as was suggested by the PC. Either way, a change has come, and it is up to The Bahamas to determine its way forward.