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COVID-19 STARGAZING - THE IMPLICATIONS FOR DAMAGES IN PERSONAL INJURY LITIGATION

A. Introduction

1. The COVID-19 pandemic, also known as the Coronavirus pandemic, is an ongoing pandemic of Coronavirus 2019 (COVID-19), caused by severe acute respiratory syndrome Coronavirus 2 (SARS-Cov-2) 1.¹
2. The virus is primarily spread between people during close contact, most often via small droplets produced by coughing, sneezing, and talking.
3. On 31st January 2020 the first two cases of COVID-19 were confirmed in the United Kingdom.²
4. On 23rd March 2020 the Government of the United Kingdom announced a partial lockdown requiring the public to stay at home except for very limited purposes. As at 30th April 2020 the ONS confirmed there had been 33,841 deaths involving COVID-19 in England and Wales between 1st March and 30th April 2020. When the death toll

¹ “Naming the Coronavirus disease (COVID-19) and the virus that causes it”. The World Health Organisation (WHO).

² “Two Coronavirus cases confirmed in the UK”. BBC News. 31st January 2020. Retrieved 2nd February 2020.



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was assessed using the number of expected deaths as a measure, the number exceeded 50,000 official figures confirmed on Tuesday 12th May 2020.³

5. The COVID-19 pandemic is a relatively new phenomenon. There remain many unknowns. Will it be possible to find a vaccine? Is there medication which exists or will be invented that will significantly ameliorate the symptoms? Is someone who has suffered COVID-19 immune from reinfection? If so, for what period of time?
6. The purpose of this article is to consider the potential effects of the COVID-19 pandemic on the assessment of damages in personal injury claims and to provide some legal backdrop as to how matters will be addressed by the Courts.

B. Loss of Earnings

i. The macro economic picture

7. The most obvious and immediate impact of COVID-19 is on the economy of the United Kingdom. The UK economy shrank at the fastest monthly pace on record in March 2020 as the Coronavirus lockdown triggered a crash in activity and demand. The Bank of England has forecast the Coronavirus crisis will push the UK economy into its deepest recession in 300 years, and that it will plunge almost 30% in the first half of the year.⁴

³ “Excess UK deaths in COVID-19 pandemic topped 50,000”. Article in the Financial Times by Chris Giles on 12th May 2020.

⁴ “Bank of England’s monetary policy report of May 2020 and “Bank of England warns UK set to enter worse recession for 300 years” Article by Chris Giles, Financial Times on 7th May 2020.



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8. The Office of Budget Responsibility’s report dated March 2020 considers the COVID-19 pandemic to be a “fast moving situation and forecasts necessarily become speculative”. It has observed the notion that a mild “V-shaped” shock seems less likely and that a “domino” scenario with broad contagion around the globe, points to a deeper and possibly more prolonged economic slowdown.⁵

9. Some authors have pointed out that most of the evidence indicates that the economic effects of the 1918 Spanish Flu influenza pandemic was short term. Sectors based in the service and entertainment industry suffered losses whilst those in healthcare products experienced an increase in revenues. Academic research also suggests that the 1918 influenza pandemic caused a shortage of labour that resulted in higher wages for workers although the temporal nexus to the World War I cannot be ignored.⁶
 - ii. *Claimants with a residual earnings capacity*

10. For Claimants who were working before their injuries, who have undergone a period of convalescence but now might wish to re-enter employment, an issue arises over their ability to find new work.

⁵ See page 40 of “Economic and Fiscal Outlook – March 2020 Office for Budget Responsibility”.

⁶ See page 22 of “Economic Effects of the 1918 Influenza Pandemic: Implications for a Modern-Day Pandemic” by Thomas A. Garrett (Federal Reserve Bank of St Louis) November 2007.



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11. Questions which arise are:
- (i) If it is anticipated that there is going to be an economic downturn, how long will it last for?
 - (ii) Is the economic downturn likely to be relevant to the sector in which the Claimant was working, wished to work or is capable of working in?
 - (iii) Is it legitimate to now hold out for a larger loss of earnings compensatory award on the diminished chance of finding new work due to a COVID-19 related downturn in the economy?
 - (iv) How is this diminished chance of obtaining employment to be measured?
 - (v) Is an additional reduction to the reduction factors in Tables A to D of the Ogden Tables justified?
 - (vi) If so, would it be equally fair to reduce the non-disabled reduction factor by the same amount thereby negating the loss.
 - (vii) If agreement cannot be reached on the reduction factor, should expert evidence be sought?⁷
12. Practitioners will need to think about how they approach the evidence before the Court of the economic quandaries of the COVID-19 pandemic.

⁷ A position advocated by Dr Victoria Wass in the Q&A article “Ask the Expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden reduction factors” Journal of Personal Injury Law 2013 at page 45.



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13. Older practitioners may recall that prior to the 6th edition of the Ogden Tables (published in May 2008) the determining factors in calculating the discount to apply to multipliers were occupation, economic activity and geographical location. Since the 6th edition of the Ogden Tables these were replaced by discounts based on educational achievement, employment status and whether or not the Claimant is disabled within the meaning of the Equality Act 2010.
14. Whilst there may be room for some judicial tinkering on reduction factors in light of the expert medical evidence but the question arises as to how much scope the Court has alter the reduction factors based on economic factors without opinion evidence or useful statistics.
15. Clearly the relevance of these issues will depend on the stage at which the case is at (i.e. is an assessment of damages imminent?) and probably should be factored into any case plan or theory of the case.

iii. Claimant's with no residual earning capacity
16. If a Claimant worked before their injury and continues to be unable to work due to the severity of their injuries s/he will want to be clear about what would have happened with their employment. This is an issue which Defendants will become increasingly interested in. The simple fact is that employees represent the largest overhead for most employers.
17. Relevant questions will be:



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- (i) Would they have remained employed or been furloughed?⁸
- (ii) If they would have been furloughed, has there been a top-up of the remaining 20% earnings?
- (iii) Can the employer speak confidently on these issues or is the evidence speculative?
- (iv) Is there a relevant loss of earnings comparator?
- (v) Is there a statistical backdrop to the employer's operation i.e. 50% of all staff have been furloughed?
- (vi) Is there a business plan which reflects future plans for the employer's staff?
- (vii) What has been the impact of COVID-19 on the sector of the economy in which the Claimant worked and what is the likely in the future?⁹

iv. Employment Experts: relevance and admissibility

18. Evidencing the difficulty of returning to the labour market may see a resurgence of employment experts being permitted by the Court, subject to the requirement to restrict expert evidence to that reasonably required to resolve proceedings, see CPR 35.1 and the very useful case of **British Airways Plc v. Spencer [2015] EWHC 2477 (Ch)**.

⁸ According to a business survey by the ONS conducted between 6th April and 19th April 2020, 28% of the UK workforce had been furloughed by their employers, of which the accommodation and food services and entertainment industries saw the highest proportion, with 73% and 70% of its workforce respectively being furloughed, see "UK Economic Update: COVID-19 Pricewaterhousecoopers", 13th May 2020.

⁹ Clearly some sectors are going to be more affected than others for example; travel, tourism, leisure, hospitality, fitness industry, etc. Other sectors may see an upswing particular data and healthcare.



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19. In **Spencer** the Court¹⁰ articulated, at paragraph 63 and 68, a three stage test to decide whether expert evidence should be admitted:
- (i) Is expert evidence necessary to decide the issue rather than just merely helpful? If so, it should be allowed.
 - (ii) If the evidence is not necessary, will it assist the Judge in determining an issue (even if it could do so in the absence of such expert evidence)?
 - (iii) If it is not necessary but will assist, the Court should consider if expert evidence on that issue is reasonably required to determine proceedings. In deciding whether it is reasonable the Court should consider the context of proceedings as a whole including:
 - (a) The value of the claim (proportionality);
 - (b) The cost of the evidence;
 - (c) Who will pay for it;
 - (d) Whether any delay will be caused or any trial date lost;
 - (e) Whether the evidence addresses multiple issues;

¹⁰ A judgment on appeal by Warren J regarding the use of expert actuarial evidence in pension schemes but the Judge's consideration of the discretion to permit or restrict expert evidence is of general application and incorporates a consideration of other cases such as **Mitchell v News Group Newspapers Limited [2014] EWHC 3590 (QB)** as to the admissibility of a phonetics expert to comment on the time taken to speak within the timeframe allowed according to CCTV footage.



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v. The role of a Blamire award

20. Other matters which legal advisers will want to consider is the economic impact on the potential for promotion and whether or not given the degree of speculation which currently subsists Blamire awards may prove attractive to the Courts.¹¹
21. Blamire awards have seen recent judicial consideration. In **Irani v. Ducchon [2019] EWCA Civ 1846**, the Claimant unsuccessfully sought to appeal a future loss of earnings award comprising of £30,000 for disability in the labour market and £150,000 for Blamire award. The Claimant sought to argue the Judge should have assessed damages on the basis of an ongoing loss. The Court of Appeal accepted the Defendant's submission that the Claimant's statement in evidence that he believed he would have been earning approximately £10,000 per annum in the future was simply "a statement of his opinion or belief". It was not a statement of fact relating to residual earnings. The Defendant did not suggest that the Claimant may not have had that opinion or belief. The Defendant's case was that the Claimant's opinion or belief as to future earning capacity was not probative evidence which was accepted by the Court.¹²
22. Practitioners should bear in mind the authority of **Bullock v. Atlas Ward Structures Limited [2008] EWCA Civ 194** at [17] and [21].

¹¹ **Blamire v. South Cumbria Health Authority [1993] PIQR Q1.**

¹² There is a useful consideration of this authority on well known website www.civillitigationbrief.com "Proving Things 168".



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23. In **Bullock** Keene LJ summarised the proper approach as follows at [19], [21]:

“19. ...All assessments of future loss of earnings in personal injury cases necessarily involves some degree of uncertainty. As far as possible, the task of the Court is to seek to arrive at the best forecast it can make of the scale of such loss, normally on a well-established basis of multiplying an anticipated annual loss by an appropriate multiplier.

...

21. Merely because there are uncertainties about the future does not of itself justify a departure from that well-established method. Judges should therefore be slow to resort to the broad-brush Blamire approach, unless they really have no alternative”.

24. In **Irani Hablen** LJ stated at paragraph 22

“There will be no real alternative to a Blamire award if, for example, there is insufficient evidence or there are too many imponderables for the Judge to make the findings necessary to support the multiplicand/multiplier approach”.

25. Hablen LJ went on to say at paragraph 23

“In order to calculate the multiplicand, it is necessary for the Claimant to establish on the balance of probabilities (i) the but-for earnings and (ii) the residual earnings. This will include considerations of both the type of work and the level of remuneration over time.”

26. In **BXB v. Watchtower and Bible Track Society of Pennsylvania and Anor [2020]**

EWHC 156 (QB) the Claimant, who had been the unfortunate victim of rape, was unable to establish either a Blamire award or a Smith award.¹³ The reason for this decision was the Court could not be satisfied on the available evidence to support the contention that the Claimant would have obtained a degree, post-graduate training qualifications and employment. The evidence before the Court was speculative and a

¹³ **Smith v. Manchester [1974] EWCA Civ 6.**



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number of imponderables meant the Court could not be satisfied that but for the sexual assault the Claimant would have been more remuneratively employed or there is a real risk that she would lose her employment or that she would have difficulty securing future employment despite ongoing recurrent depressive illness. On the latter issue the Court was not satisfied that such an illness would in or of itself be likely to dissuade potential employers from offering employment.

C. Life Expectancy

i. The Ogden Tables

27. The unfortunate consequences of the COVID-19 pandemic is relevant to both to life expectancy in the general population and to individual Claimants.

28. The Ogden Tables' loss of earnings and pension multipliers reflect the ONS mortality rates derived from the 2008-based population projections for the United Kingdom which were published in October 2009.¹⁴

29. In fact, the ONS 2018-based projected life expectancy data for the UK suggest that the 2008-based projections were over optimistic.

30. Facts and Figures (2019/20) has 'Expectation of Life' tables reflecting the ONS's 2019 figures predicated on its 2016-based population projections.

¹⁴ See paragraph 4 of the general introduction to the Ogden Tables (7th Edition).



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31. 2020 was anticipated to herald the arrival of the 8th Edition of the Ogden Table. Whilst the arrival of the updated Ogden Tables remains outstanding, Defendant practitioners will need to consider whether or not to plead multipliers based on 2018 ONS data and/or to delay settlement pending the updated Ogden Tables.¹⁵ Claimant practitioners will be well advised to use the existing Ogden Tables, with which the Courts will be familiar.

32. Average mortality improvements between 2000 and 2011 were typically over 2% per year, but have since fallen to about 0.5% per year.¹⁶

33. Some analysts blame the deterioration in longevity of life expectancy due to austerity, cuts in NHS spending whilst others point to worsening obesity, dementia and diabetes.¹⁷

ii. Covid-19's impact on life expectancy

34. Excess deaths from Coronavirus might arise both in those infected (direct effects) as well as those affected (indirectly, not infected) by altered access to health services; the physical, psychological, and the social affects of distancing; and economic changes.¹⁸

¹⁵ “New Life Expectancy Data Signals a Reduction in Life Multipliers” by Andrew Williamson, www.blmlaw.com.

¹⁶ This is a quote taken from Tim Gordon, Chair, CMI Mortality Projections Committee. See “Longer Term Influences Driving Lower Life Expectancy Projections”, 7th March 2019, www.actuaries.org.uk.

¹⁷ “Life expectancy falls by six months in biggest drop in UK forecasts”, Patrick Collinson, 7th March 2019, www.theguardian.com.



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35. A historical glance back to the Spanish flu pandemic of 1918 may provide an indication as to what might be expected but the comparisons must be very cautious for two reasons. First, the virus that causes COVID-19 is a Coronavirus, not an influenza virus that caused the Spanish flu. The age-specific mortality seems to be very different. The Spanish flu in 1918 was especially dangerous to infants and younger people. COVID-19 appears to be most lethal to the elderly.¹⁹
36. A broad range of estimates as to the global number of deaths from Spanish flu ranges somewhere between 17 to 40 million. In 1918 the Spanish flu epidemic in life expectancy at birth for England and Wales declined from 54 years to 41 years, but this blip was relatively short-lived.²⁰

¹⁸ “Estimating excess one-year mortality associated with the COVID-19 pandemic according to underlying conditions and age: a population based cohort study” Amitava Banerjee et al the Lancet, 12th May 2020.

¹⁹ “The Spanish flu (1918/20): The Global Impact of the Largest Influenza Pandemic in History by Max Roser, 4th March 2020, www.ourworldindata.org.

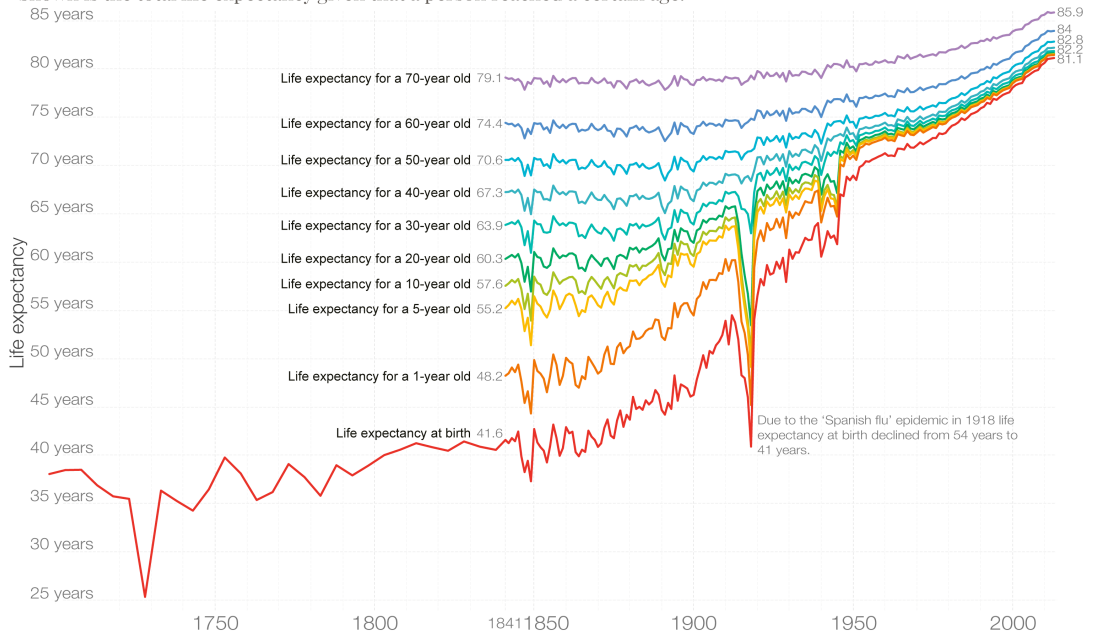
²⁰ Ibid.



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Life Expectancy by Age in England and Wales, 1700–2013

Shown is the total life expectancy given that a person reached a certain age.



Data source: Life expectancy at birth Clio-Infra. Data on life expectancy at age 1 and older from the Human Mortality Database. OurWorldinData.org - Research and data to make progress against the world's largest problems.

Licensed under CC-BY by the author Max Roser

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37. One can see the actuaries and statisticians busily recalculating the reserves for underwriting personal injury claims in the insurance industry but before the final excel spreadsheet column is calculated, it is worth bearing in mind the following:-
- (i) The Courts will ordinarily use the Ogden Tables as a starting point for any multiplier calculation.
 - (ii) As a macro statistical issue there is unlikely to be agreed evidence that either party will be able to adduce.

²¹ Data source: Life expectancy at birth Clio-Infra. Data on life expectancy at age 1 and older from the Human Mortality Database. See footnote 19 from which this graph is reproduced and licensed under CC-BY, see www.ourworldindata.org.



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iii. A bespoke approach: admissibility

38. So the issue is probably whether there is any justification for considering bespoke life expectancy opinion evidence. This is likely to apply to certain cohorts of the population and specific type of injuries, the most extreme example being an elderly person with a spinal cord injury, but certain factors may tip the scales in favour of life expectancy evidence i.e. a male over the age of 50 with diabetes who is a smoker.
39. In the **Royal Victoria Infirmary and Associated Hospitals NHS Trust v. B (a child) [2002] EWCA Civ 348**, the Court of Appeal held that
- “It would be wrong to allow a statistician, or an actuary, to do more than inform the opinions of the medical witnesses and the decision of the Court, on what is essentially a medical, or clinical issue”.**²²
40. In **Arden v. Malcolm [2007] EWHC 404**, Tugendhat suggested at paragraph [36]
- “It is only if there is disagreement between them on a statistical matter that the evidence of a statistician, such as Professor Strauss, ought normally to be required”.**
41. Recent decisions of **Mays v. Drive Force (UK) Limited [2019] EWHC 5** and **Dodds v. Arif and Another [2019] EWHC 1512** demonstrate the area of life expectancy remains contentious.
42. In **Dodds** Master Davison held at paragraph 23:

²² See paragraph 39 of the judgment of Sir Anthony Evans.



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- (i) Where the injury itself had not impacted upon life expectancy, the party seeking to adduce life expectancy evidence would need to show the Claimant was atypical from the normal UK population;
 - (ii) Where the injury has impacted on life expectancy, the normal route for life expectancy evidence was a clinical expert;
 - (iii) The methodology to be adopted by the clinical expert was a matter for them;
 - (iv) Permission for bespoke life expectancy would not ordinarily be given unless the clinical experts were unable to offer an opinion or required specific input from a life expectancy expert or wished to deploy statistical material but disagreed with their counterpart on the correct approach to it.
43. Accordingly, specific life expectancy evidence may not be relevant or admissible if the medical expert feels able to comment. So, in a spinal cord injury case if the Consultant Spinal Rehabilitation expert feels able to offer a view that may well be sufficient or in a TBI case involving a person with, for example, a congenital neuro-developmental disorder, if the Consultant Neurologist feels able to opine on the issue of life expectancy, that could be sufficient for the Court to determine the issue.

D. Rehabilitation

44. The COVID-19 pandemic is likely to pose specific challenges to rehabilitation:
- (i) A diminished workforce due to sickness, shielding and redeployment to front line services;
 - (ii) The multi-faceted impact of social distancing including:
 - Socio-economic and psychological effects;



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- Isolation of patients from their families;
 - Restrictions on intervention that involved hands-on treatment, group interventions or aerosol generating procedures.
- (iii) An unquantifiable additional case-load of patients with post-COVID disability presenting with a wide range of problems.²³
45. An injured person's rehabilitation needs continue irrespective of the COVID-19 pandemic. Whether the rehabilitation needs are inpatient, outpatient or community based the consequences of COVID-19 are likely to produce a mixed bag of results.
46. It is perhaps to be anticipated that at the lower end of the severity scale, rehabilitation is likely to be put on hold, with either interrupted or patchy delivery and less effective provision (i.e. due to a focus of resources and an absence of direct contact with the patient).
47. There may be some benefits to the COVID-19 pandemic which satisfies the injured person's need for rehabilitation but can be achieved in a more cost efficient way, such as, for example, video conferencing with a case manager as opposed to the gold standard of face-to-face contact, thereby eradicating the travel cost associated with the provision of such services.

²³ "Rehabilitation in the wake of COVID-19 – A phoenix from the ashes. British Society of Rehabilitation Medicine, 27th April 2020.



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48. In the short-term many families are likely to take on the burden of rehabilitating and caring for their loved ones in place of professional staff. In such cases there will need to be consideration as to the appropriate carer rate to be applied and, what, if any, discount to be applied to the gratuitous provision of those services.
49. Planning and safely caring for seriously injured Claimants is going to take more time and effort which itself is likely to sound in additional cost, at least in the foreseeable short-term.
50. For people with spinal cord injuries living in the community, social isolation is probably going to be a primary, short-term goal. Here the cost of care may increase whereby care packages involving multiple daily visits could be converted to live-in care packages, thereby minimising the risk of infection spread from carers.²⁴ Furthermore, appropriate personal protective equipment may need to be provided whether for professional carers or family members which is likely to add to the overall cost burden.²⁵

E. Conclusion

51. It is to be hoped that a vaccine will be found to immunise against COVID-19 or that the coveted, golden chalice of herd immunity becomes a reality rather than a scientific

²⁴ Basic Guidance on Management of Spinal Cord Injury Patients during Coronavirus (COVID-19) Pandemic.
www.iscos.org.uk.

²⁵ Ibid.



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hypothesis. If so, the quandaries raised in this article may prove to be only short-term problems and by the time any meaningful statistical data is acquired, will be a distant memory, permitting its stargazing author to breathe a welcome sigh of relief. Insofar as the COVID-19 pandemic causes substantive, medium to long-term consequences, the aim of this article has been to leave its reader more informed.

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To view Matthew's profile, please [click here](#)