[2016 Gib LR 314]

BERNAL v. RILEY

SUPREME COURT (Jack, J.): September 16th, 2016

Tort—personal injuries—damages—guidelines—not appropriate to apply English Guidelines for Assessment of General Damages in Personal Injury Cases (inter alia because standard of living higher in Gibraltar)—as no Gibraltar guidelines, appropriate to apply Northern Ireland Guidelines

The claimant sought damages for personal injury.

The claimant had sustained an injury to his neck in a car accident in 2012 caused by the defendant. He continued to suffer intermittent neck pain which was likely to be permanent. As a result of his injuries he had become much less active, giving up running and resigning from the Royal Gibraltar Regiment.

When assessing damages in such cases, the court had usually followed the *Guidelines for the Assessment of General Damages in Personal Injury Cases* issued by the Judicial College of England and Wales ("the English Guidelines"). The court considered whether it was appropriate to continue to do so for four reasons: (a) the economy and standard of living in Gibraltar were now very different from that of England and Wales; (b) the Court of Appeal in England and Wales had increased general damages by 10% as part of reforms to civil litigation costs but that increase might not apply in Gibraltar; (c) the impact of the reduction in the discount rate for future losses had not yet been taken into account in England and Wales in assessing general damages in respect of future pain, suffering and loss of amenity; and (d) in serious cases there needed to be some reasonable comparison with the general damages for other torts, such as wrongful imprisonment.

The claimant submitted that the court should apply the *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland*.

Held, ordering as follows:

(1) It was not appropriate to follow the English Guidelines. They would be treated as part of the practice of the English High Court and s.15 of the Supreme Court Act 1960 provided that the jurisdiction vested in the Supreme Court "shall be exercised (as far as regards practice and procedure) in the manner provided by this or any other Act or . . . in substantial conformity with the law and practice . . . in England in the High Court of

Justice." The Guidelines were not, however, binding law. Indeed, in so far as they were part of the common law of England and Wales, they could be modified, as provided in s.2(1) of the English Law (Application) Act 1962, if they were unsuitable to the circumstances of Gibraltar. Furthermore, the rule of substantive law for assessing the quantum of damages was that it should be a sum of money that would put the claimant in the same position as he would have been in had he not sustained the wrong. In so far as the English Guidelines did not do that, the Gibraltar courts should not follow them: practice must give way to substantive law. The English Guidelines were not appropriate for Gibraltar because, first, damages had to be appropriate for local conditions and the standard of living in Gibraltar was higher than that in England and Wales. Secondly, the 10% increase in general damages in England and Wales that had been brought about by the Court of Appeal acting in a legislative capacity could not be applied in Gibraltar—as a matter of Gibraltar law the Court of Appeal of England and Wales had no legislative powers that extended to Gibraltar. Thirdly, the current English Guidelines appeared substantially to undervalue claims in respect of long-term pain, suffering and loss of amenity. Lastly, general damages for different torts should bear some reasonable relation to each other but, in England, the general damages for catastrophic personal injury produced annuity figures well below the daily rates awarded for wrongful imprisonment. Gibraltar should have different guidelines but, as it was not possible to fix guidelines without further material, it was appropriate to apply the Northern Irish Guidelines in the present case (paras. 12–23; paras. 40–43; para. 57; paras. 65–74).

(2) Applying those Guidelines, the claimant would be awarded damages of £14,166. That sum comprised £14,000 for pain, suffering and loss of amenity, of which about £4,000 was in respect of the accident itself and the few weeks immediately thereafter, and the remaining £10,000 reflected the intermittent pain and continuing loss of amenity; £140 interest on the sum since service of the claim on the defendant; and £26 in respect of analgesics. The claimant would also be awarded his costs of £2,441 (paras. 77–81).

Cases cited:

(1) *AS* v. *Home Secy.*, [2015] EWHC 1331 (QB), considered.
(2) *Application under Supreme Court Rules, r.2*, *In re*, 2001–02 Gib LR 329, referred to.
(3) *Chan Wai Tong* v. *Li Ping Sum*, [1985] A.C. 446; [1985] 2 W.L.R. 396; [1985] 1 Lloyd's Rep. 87, considered.
(4) *Chaplin* v. *Boys*, [1971] A.C. 356; [1969] 3 W.L.R. 322; [1969] 2 All E.R. 1085; [1969] 2 Lloyd's Rep. 487, referred to.
(5) *Cunningham* v. *Harrison*, [1973] Q.B. 942; [1973] 3 W.L.R. 97; [1973] 3 All E.R. 463, *dicta* of Lawton, L.J. applied.
(6) *Harding* v. *Wealands*, [2006] UKHL 32; [2007] 2 A.C. 1; [2006] 3 W.L.R. 83; [2006] 4 All E.R. 1; [2006] 2 C.L.C. 193, referred to.

(7) *Heil* v. *Rankin*, [2001] Q.B. 272; [2000] 2 W.L.R. 1173; [2000] 3 All E.R. 138; [2000] P.I.Q.R. Q187, applied.
(8) *Jag Singh* v. *Toong Fong Omnibus Co. Ltd.*, [1964] 1 W.L.R. 1382; [1964] 3 All E.R. 925, applied.
(9) *John* v. *MGN Ltd.*, [1997] Q.B. 586; [1996] 3 W.L.R. 593; [1996] 2 All E.R. 35; [1996] E.M.L.R. 229, applied.
(10) *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25; 7 R. (H.L.) 1, applied.
(11) *Mallett* v. *McMonagle*, [1970] A.C. 166; [1969] 2 W.L.R. 767; [1969] 2 All E.R. 178, considered.
(12) *Mitchell* v. *Mulholland (No. 2)*, [1972] 1 Q.B. 65; [1971] 2 W.L.R. 1271; [1971] 2 All E.R. 1205, considered.
(13) *R.* v. *Brockhill Prison Gov.*, *ex p. Evans (No. 2)*, [1999] Q.B. 1043; [1999] 1 W.L.R. 103; [1998] 4 All E.R. 993, referred to.
(14) *R.* v. *Durham Prison Gov.*, [1984] 1 W.L.R. 704; [1984] 1 All E.R. 983; [1983] Imm. A.R. 198, referred to.
(15) *R.* v. *Kirby*, *ex p. Boilermakers' Socy. of Australia* (1956), 94 CLR 254; further proceedings, *sub nom. Att. Gen. (Australia)* v. *R. (The Boilermakers' case)* (1957), 95 CLR 529, referred to.
(16) *R. (NAB)* v. *Home Secy.*, [2011] EWHC 1191 (Admin), considered.
(17) *Robba* v. *Gibraltar Sports & Leisure Auth.*, Supreme Ct., December 11th, 2014, unreported, considered.
(18) *Senior* v. *Barker & Allen Ltd.*, [1965] 1 W.L.R. 429, considered.
(19) *Simmons* v. *Castle*, [2012] EWCA Civ 1039; [2013] 1 W.L.R. 1239; [2013] 1 All E.R. 334; [2012] C.P. Rep. 43; [2012] 5 Costs L.R. 931; further proceedings, [2012] EWCA Civ 1288; [2013] 1 W.L.R. 1239; [2013] 1 All E.R. 334; [2013] C.P. Rep. 3; [2012] 6 Costs L.R. 1150, distinguished.
(20) *Simon* v. *Helmot*, 2009–10 GLR *N* [16]; on appeal, 2009–10 GLR 465; on further appeal, [2012] UKPC 5; 2011–12 GLR 517; [2012] Med. L.R. 394, considered.
(21) *Simpson* v. *Harland & Wolff plc*, [1988] NI 432; [1988] 13 NIJB 10, applied.
(22) *Summers* v. *Bundy*, [2016] EWCA Civ 126; [2016] P.I.Q.R. Q6, considered.
(23) *Thompson* v. *Metropolitan Police Commr.*, [1998] Q.B. 498; [1997] 3 W.L.R. 403; [1997] 2 All E.R. 762, applied.
(24) *Wells* v. *Wells*, [1999] 1 A.C. 345; [1998] 3 W.L.R. 329; [1998] 3 All E.R. 481; [1998] I.R.L.R. 536; [1998] P.I.Q.R. Q56, considered.
(25) *Wright* v. *British Rys. Bd.*, [1983] 2 A.C. 773; [1983] 3 W.L.R. 211; [1983] 2 All E.R. 698, applied.

Legislation construed:

English Law (Application) Act 1962, s.2(1): The relevant terms of this sub-section are set out at para. 68.

Supreme Court Act 1960, s.15: The relevant terms of this section are set out at para. 41.

s.36B: The relevant terms of this section are set out at para. 31.

C. Pizzarello for the claimant;
The defendant did not appear and was not represented.

1 **JACK, J.:** By a claim form issued on May 6th, 2015, the claimant ("Mr. Bernal") seeks damages for personal injury sustained in a road traffic accident on Queensway, Gibraltar, on May 7th, 2012, caused by the defendant ("Mr. Riley"). Mr. Riley did not file an acknowledgement of service and judgment for damages to be assessed was entered against him on August 9th, 2016.

2 The police report on the accident noted that Mr. Riley was not insured but Ms. Pizzarello, who appeared for Mr. Bernal, thought the position was less clear. However, if he was insured, the steps required by the Insurance (Motor Vehicles) (Third Party Risk) Act 1986, s.13(2)(a) to notify the insurer appear not to have been taken. Certainly no direct action had been brought against any insurer under s.13A of the 1986 Act. It is therefore doubtful whether, assuming Mr. Riley did have insurance, a claim strictly lies against the insurer. Insurers do sometimes waive the point, since they would otherwise be repudiating liability to their own assured.

3 If (as is more likely) Mr. Riley was uninsured, then (pursuant to Gibraltar's obligations under art. 10 of the Motor Vehicle Insurance Directive (European Parliament and Council Directive 2009/103/EC)) the Motor Insurers' Bureau ("M.I.B.") would be liable. However, it is unclear whether the conditions precedent for liability on the part of the M.I.B. have been satisfied. Under the Uninsured Drivers' Agreement of May 3rd, 2001 between H.M. Government of Gibraltar and the M.I.B., there are various obligations to notify the M.I.B. of claims when issuing proceedings. Failure to notify the M.I.B. relieves it of liability. I note, however, that the copy of the May 3rd, 2001 agreement posted on the M.I.B. website is a garbled version which omits cl. 9, the clause which (I infer from the other terms of the agreement) gives the name and address of the insurer nominated by the M.I.B. to handle claims under the agreement.

4 The significance of the omission of cl. 9 on the website version of the Uninsured Drivers' Agreement and indeed any questions regarding insurance or the liability of the M.I.B. are not, however, before me. I am asked to determine damages solely as against Mr. Riley.

The facts

5 The only evidence was that of Mr. Bernal himself plus his medical notes. He was a candid witness, who did not exaggerate his injuries and ongoing intermittent pain. I accept his evidence.

6 Mr. Bernal was born on April 18th, 1967, thus he was 45 at the date of the accident and 49 now. He left school in London at 16 to take up an

apprenticeship in mechanical engineering. When he was 29 he joined the Territorial Army. He served eight years, including a tour of duty in Iraq in 2003. He emigrated to Gibraltar in 2006 and joined the Royal Gibraltar Regiment.

7 On May 6th, 2012, the day of the accident, he was working for the Ministry of Defence at the electricity generating plant on Queensway. He was given a break from work and was picked up by his wife. As she drove north up Queensway, her car was struck from behind by a vehicle driven by Mr. Riley. Mr. Riley failed to stop after the accident but he was able to be identified by CCTV cameras.

8 Mr. Bernal was thrust forward and sustained injury to his neck. He was taken to Accident and Emergency at St. Bernard's Hospital in a state of shock. He was diagnosed as having sustained a soft tissue injury and advised to take two days off work, which he did. On July 21st, 2014, over two years later, he was seen by Dr. Perez, who noted continuing intermittent left hand side neck pain but no other symptoms. He arranged for Mr. Bernal to receive physiotherapy but unfortunately this did not improve the symptoms.

9 The current position is that Mr. Bernal continues to suffer intermittent neck pain which he treats with Nurofen Plus when the pain becomes intolerable. He tries not to let it interfere with his life but, whereas previously he had been a keen runner, he has had to stop running. Indeed as a result of his injuries he has become much less active. At the time of the accident, he had been contemplating resigning from the Royal Gibraltar Regiment but the injuries sustained in the accident made the decision to resign an easier one. The intermittent neck pain is likely to be permanent.

Judicial College Guidelines

10 It has hitherto been usual in Gibraltar to follow the *Guidelines for the Assessment of General Damages in Personal Injury Cases* issued by the (English and Welsh) Judicial College. The current edition is the 13th, published in 2015. The current case raises the question as to whether this is still appropriate. This is for four reasons:

(a) First, the economy and standard of living of Gibraltar are now very different from that of England and Wales.

(b) Secondly, general damages in England and Wales (but not in Scotland or Northern Ireland) were increased by 10% in *Simmons* v. *Castle* (19) as part of the Jackson reforms to the recovery of legal costs in civil proceedings. Yet these reforms may not apply, at least to their full extent, in Gibraltar.

(c) Thirdly, the impact of the reduction in the discount rate for future losses has not yet been taken into account in England in assessing general damages in respect of future pain, suffering and loss of amenity.

(d) Fourthly, in serious cases, where there are long-term sequelae, there needs to be some reasonable comparison with the general damages given for other torts, such as wrongful imprisonment. The English Guidelines on catastrophic injuries seem out of line with these.

The economy of Gibraltar

11 So far as the first reason is concerned, the Privy Council has held that damages need to be appropriate for local conditions: *Jag Singh* v. *Toong Fong Omnibus Co. Ltd.* (8) and *Chan Wai Tong* v. *Li Ping Sum* (3). In this court, in *Robba* v. *Gibraltar Sports & Leisure Auth.* (17), the then Attorney-General, Mr. Rhoda, Q.C., accepted that damages needed to be appropriate for local conditions. The claimant lost on liability, so the point did not need to be decided.

12 In *Jag Singh*, the plaintiff child was run over by a bus and had his right leg amputated just below the hip. At first instance in Malaya the trial judge had awarded 15,000 Malaya dollars (before a reduction for contributory negligence). This was a global award both for the pain, suffering and loss of amenity and for a lifetime's loss of earnings. The Privy Council held ([1964] 1 W.L.R. at 1385):

> "That to the extent to which regard should be had to the range of awards in other cases which are comparable such cases should as a [rule] be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist."

13 The Privy Council increased the global award (before the reduction for contributory negligence) to 25,000 Malaya dollars or £2,917 sterling. The Bretton Woods rate of exchange at that time was 8.57 Malaya dollars to the pound.[1] This was considerably less than would have been awarded in England for pain, suffering and loss of amenity just on its own. In *Chan Wai Tong* (3), the Privy Council disapproved an *obiter dictum* of the Hong Kong Court of Appeal that awards in Hong Kong should be comparable to English awards ([1985] A.C. at 456) and reaffirmed the principle cited above from *Jag Singh* (8).

14 Changes in the economic circumstances of a particular jurisdiction also mean that the quantum of general damages stands to be periodically

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1 https://en.wikipedia.org/wiki/Malaya_and_British_Borneo_dollar, accessed September 12th, 2016.

reassessed. Lawton, L.J. in *Cunningham* v. *Harrison* (5) warned ([1973] Q.B. at 952) that—

> "if judges do not adjust their awards to changing conditions and rising standards of living, their assessments of damages will have even less contact with reality than they have had in the recent past or at the present time."

15 The English Court of Appeal in *Heil* v. *Rankin* (7) said to the same effect ([2001] Q.B. 272, at para. 27):

> "Care must be exercised not to freeze the compensation for non-pecuniary loss at a level which the passage of time and changes in circumstances make inadequate. The compensation must remain fair, reasonable and just. Fair compensation for the injured person. The level must also not result in injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable."

Later, the court held (*ibid.*, at para. 31):

> "If the tariff is changed it will mean no more than that in bringing a previous award up to date it will be necessary to do more than merely apply the RPI [Retail Price Index]. The answer may involve applying a higher percentage than the RPI would give. What we are engaged in here . . . is still a quantitative not a qualitative exercise."

16 The need to have regard not simply to inflation but also to the general economic climate reflects the approach taken by the Court of Appeal in *Senior* v. *Barker & Allen Ltd.* (18). There the minor plaintiff had lost all his fingers, save to the first joint of the index finger, on one hand. The trial judge awarded £6,500 general damages and £504 7s 4d special damages. Lord Denning, M.R. said ([1965] 1 W.L.R. at 432):

> "This award of £7,000 today shows how the judges keep pace with the times. This figure, and I think Mr. Davies agreed on behalf of the boy, is far higher than would have been given a few years ago. *Wages have gone up*, money has altered, and so the sums which are awarded have gone up." [Emphasis supplied.]

17 Despite this view that the level of wages had to be taken into account as a proxy for general economic conditions and the general standard of living, awards in England and Wales did drop behind. Lord Lowry, L.C.J., giving the judgment of the Court of Appeal of Northern Ireland in *Simpson* v. *Harland & Wolff plc* (21) explained that awards there were about double those given in England. This was because the use of juries to assess general damages was only abolished in 1987. He said ([1988] NI at 440–441):

"When personal injury and fatal accident cases began to be tried by judges without a jury, the standard must initially have been the general level of jury verdicts in the recent past. This must have applied in England in 1934, just as it applied in Northern Ireland in 1987. It should be recognised that, while juries were in general use, the level of their verdicts rose steadily as the value of money declined. This process would no doubt have contined [*sic*] in England between 1934 and the present day, had juries continued to assess personal injury damages, as the process has continued up to 1987 in both jurisdictions in Ireland.

But [in] England what started in 1934 as the general level of jury awards has gradually but inevitably been transformed into the general level of judges' awards and the level of awards of general damages in England and Wales has tended to fall behind the level of awards of general damages here. This tendency is inevitable, since the age of judges ranges from middle-aged to elderly and, as objective people, (including, I believe, most High Court judges) will readily concede, elderly people (particularly men), if they are not in business or constantly dealing with pecuniary transactions of some kind, become less adaptable and less receptive to changing values, even though at the same time they may remain intellectually able and alert . . .

A judge's award of general damages is not intrinsically better than a jury's. The chief merit of the former is not in its amount but in its greater predictability and consistency, which ought to be readily achievable by a numerically small judiciary. These qualities are based on the knowledge of other awards in like cases and on the ability, through experience, to make fine distinctions and adjustments between one case and another and they promote fairness, as between one claimant and another. But it does not follow that a judge, equipped with all the experience of the standard of the reasonable juror, should reject that experience in an effort to conform to a different standard. One comes back to the principle that the standard in this jurisdiction is that of the reasonable ordinary person, as it was in England and Wales in 1934. One can and should logically and fairly retain that standard while at the same time cultivating that predictability and consistency which a group of judges can achieve so much more easily than even the best jurors. *It would, however, be wrong for the standard of general damages to become frozen while other standards, including the standard of special and fatal accident damages, are continuously being adjusted in accordance with the value of money itself.* Accordingly, I would reject the suggestion that our calculations of general damages are 'wrong' if they do not conform to standards observed in other jurisdictions since Northern

> Ireland, like Scotland and the Republic of Ireland, constitutes a separate legal jurisdiction with its own judicial and social outlook. The courts have their own standards of, for example, sentencing in criminal and damages in civil causes, and those are the standards established or approved by the people whom the courts in this jurisdiction exist to serve." [Emphasis supplied.]

18 Lord Lowry, L.C.J. does not state expressly what he means by "the value of money," but he did not give it the narrow meaning of sterling adjusted by the Retail Price Index (or some other index like the Consumer Price Index). This is shown by the reference, which I have italicized, to general damages having to bear some relationship to special damages. Special damages (especially loss of earnings and nursing costs) will reflect changes in the general economic outlook of the jurisdiction. If the economy is expanding in real (post-inflation) terms, the relative real value of money will be less, simply because in a booming economy there is more money about. In a rich economy, damages for pain and suffering will be greater than in a poor economy (as is shown by the two Privy Council cases).

19 Northern Ireland has published its own *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland*, now in its fourth edition (2013). It is generally referred to as the Green Book. The first edition (1996) noted that awards since the abolition of jury trials of such claims in 1986 had been increased in line with the RPI. This has continued to be the practice in the current edition despite Lord Lowry, L.C.J.'s view that wider changes in the economy should be taken into account. It may therefore be that the Northern Ireland Guidelines have themselves slipped behind, particularly given the boost given to the Northern Irish economy by the Good Friday Agreement of April 10th, 1998.

20 I am conscious that I have had no adversarial argument on this point and no formal evidence of Gibraltar's economy has been presented. It is, however, legitimate to use publicly available sources to consider the state of the economy. I am also entitled to take judicial knowledge of the fact that the standard of living in Gibraltar is higher than in England and Wales.

21 The last published statistics suggest that gross domestic product ("GDP") for Gibraltar was £53,361 per capita in 2015–16.[2] This is much

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2 https://www.gibraltar.gov.gi/new/sites/default/files/HMGoG_Documents/National%20Income.pdf, accessed September 12th, 2016.

higher than the last figures for the United Kingdom of £28,714 per capita for 2015.[3]

22 It may be that other economic indicators, such as real (post-inflation) wages, should also be taken into account. Economists, I think, generally consider GDP to be the best overall measure of prosperity but wages will also be relevant. In the long term the two measures should converge but in the short or medium term the share of wages in the fruits of economic growth is liable to fluctuate.

23 I shall return below to my conclusions on the consequences of the divergence in economic performance between Gibraltar and the parts of the United Kingdom.

The Simmons v. Castle 10% uplift

24 Jackson, L.J. wrote two monumental reports on costs: the *Review of Civil Litigation Costs: Preliminary Report* (2009) ("the Preliminary Report") and the *Review of Civil Litigation Costs: Final Report* (2009) ("the Final Report"). The Jackson review was prompted by concern that the costs of civil litigation in England and Wales were spiralling out of control and placing an unfair burden on defendants and their insurers. A particular worry was the recovery from defendants of legal costs increased by the uplift claimed by claimants' solicitors under conditional fee agreements ("CFAs") and by the ability of personal injury claimants to recover the cost of after-the-event ("ATE") legal expenses insurance against defendants. *Simmons* v. *Castle* (19) was one of the steps used to implement Jackson, L.J.'s recommendations.

25 The background to the Jackson review is this. Before 1990, neither barristers nor solicitors could agree that their fees would depend on the outcome of a case. This was changed by the Courts and Legal Services Act 1990, which allowed lawyers to enter CFAs. Initially, however, any CFA uplift was not recoverable against a defendant on a taxation or detailed assessment. Equally, whilst a claimant (and defendant for that matter) had always been entitled to take out ATE insurance to insure against adverse costs orders, the premium for the ATE insurance was not recoverable. Both these restrictions were changed by the Access to Justice Act 1999 which inserted new sections (namely ss. 58, 58A and 58B) into the 1990 Act. The new s.58A(6) allowed recovery of a CFA uplift against

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3 See the Blue Book 2016, table 1.5–2, at http://www.ons.gov.uk/economy/grossdomesticproductgdp/compendium/unitedkingdomnationalaccountsthebluebook/2016edition/unitedkingdomnationalaccountsthebluebook2015edition, accessed September 12th, 2016.

a defendant. Section 29 of the 1999 Act similarly allowed recovery of an ATE premium.

26 These provisions had the intended effect of widening access to justice but led to greatly increased legal costs. In particular, a claimant litigating under a CFA did not have to pay his own legal costs. Further, the ATE insurance market developed a scheme whereby the ATE insurer lent the claimant the premium for the ATE policy on terms that the loan would only be repayable in the event that the case succeeded. Thus, in relation to an ATE premium the claimant was not at risk of paying costs either. A claimant had no incentive to keep his own costs down and claimants' lawyers duly ramped their costs up, safe in the knowledge that the only control on their costs would be at a detailed assessment at the end of the case.

27 All this was changed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The changes recommended by Jackson, L.J. were described in the explanatory memorandum to the legislation as follows:

> "282 Section 44 amends sections 58 and 58A of the Courts and Legal Services Act 1990, which currently make provision as regards the regulation of CFAs and the recoverability of success fees. The effect of the amendments is that a success fee under a CFA will no longer be recovered from a losing party in any proceedings. A lawyer will still be able to recover a success fee from a client under a CFA, but how it is to be calculated in certain proceedings will now be subject to further regulation."

Section 46 of the 2012 Act inserted a new s.58C into the 1990 Act, the effect of which was to abolish the recoverability of an ATE insurance premium from a defendant.

28 In return for the abolition of the recovery of a CFA uplift and the ATE premium, Jackson, L.J. proposed that changes be made to the Civil Procedure Rules so that in most personal injury cases a losing claimant was not liable for the defendant's costs in any event. This form of qualified one-way costs shifting is now in the CPR, r.44.13 *et seq.*, as amended with effect from April 1st, 2013 by the Civil Procedure (Amendment) Rules 2013.

29 As regards the irrecoverability of the CFA uplift, part of Jackson, L.J.'s proposals was that (in effect as a *douceur*) general damages should be uplifted by 10%. In *Simmons* v. *Castle* (19), the English Court of Appeal, in a specially constituted panel consisting of Lord Judge, L.C.J., Lord Neuberger of Abbotsbury, M.R. and Maurice Kay, L.J., gave effect to this proposal and in its judgment handed down on July 26th, 2012 declared ([2013] 1 W.L.R. 1239, at para. 20)—

> ". . . that, with effect from 1 April 2013, the proper level of general damages for (i) pain, suffering and loss of amenity in respect of personal injury, (ii) nuisance, (iii) defamation and (iv) all other torts which cause suffering, inconvenience or distress to individuals, will be 10% higher than previously."

30 After the handing down of the judgment, the Association of British Insurers pointed out that this gave a windfall to those who had entered CFAs prior to April 1st, 2013. They were still entitled to recover their CFA uplifts and the ATE premium from the defendants under the transitional provisions in the 2012 Act. As a result, in *Simmons* v. *Castle*, the Court of Appeal, on October 10th, 2012 added a rider to the declaration so that claimants in that position were not entitled to the 10% uplift.

31 There are a number of problems with translating these changes into Gibraltarian law and practice. First, s.36B of the Supreme Court Act 1960 provides:

> "Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy."

32 This constitutes an exception to the general rule that this court follows the practice and procedure of the English High Court Act 1960, s.15. The CPR does not contain rules preventing the recovery of ATE premiums (because the new s.58C of the 1990 Act abolished recovery in England). An ATE premium is thus still recoverable in Gibraltar.

33 Secondly, it is unclear whether CFA uplifts are still recoverable in Gibraltar. In *In re Application under Supreme Court Rules, r.2* (2), Schofield, C.J. held that s.33(1) of the Supreme Court Act 1960 (application of English rules to barristers and solicitors) meant that CFAs were lawful in Gibraltar and therefore that the CFA uplifts were recoverable. Whether the changes in the British legislation have the effect of undermining the reasoning behind Schofield, C.J.'s holding is a difficult question which it would be inappropriate for me to determine without adversarial argument. Likewise I shall not decide whether, in the event that CFA uplifts were not directly recoverable from a losing defendant, an ATE policy could be worded so that the ATE policy would pay the CFA uplift. If it could be, then arguably the CFA uplift could be recovered indirectly from a defendant via the ATE premium. This would depend on whether the claimant's liability to pay his own solicitor the CFA uplift was "a liability in those proceedings" under s.36B.

34 Thirdly, Jackson, L.J. concluded (Final Report, at 5.6) that "the level of general damages in England and Wales is not high at the moment." If

that is right, then the general level of damages should be increased regardless of any other considerations. However, Lord Judge, L.C.J. made it clear ([2012] EWCA Civ 1288, at para. 17) that the 10% uplift being ordered was not part of a general review of the adequacy of damages; it was part of the package of reforms recommended by Jackson, L.J.

35 Fourthly, there is a constitutional problem. What the English Court of Appeal did in *Simmons* v. *Castle* (19) was to make legislation. This can be seen clearly from the fact that the judgment was prospective. It was to take effect (and only take effect) from April 1st, 2013, eight months later, when the bulk of the Jackson reforms were to take effect, whereas a court when giving guideline judgments in personal injury matters is always acting retrospectively (*Heil* v. *Rankin* (7) ([2001] Q.B. 272, at para. 31)). Further, in *Simmons* v. *Castle*, the Court of Appeal in October expressly amended the declaration it made in July to reflect a matter overlooked earlier, again a typically legislative act.

36 Moreover, although ostensibly a judgment in the particular claim brought by Mr. Simmons, in fact the judgment on damages which the Court of Appeal gave had nothing to do with Mr. Simmons' claim. He had recovered £20,000 general damages in a road traffic accident. He appealed because of the risk of his developing fulminant septicaemia and the Court of Appeal approved a Part 36 offer made by the defendant, whereby Mr. Simmons could apply for further damages in the event of his developing that form of septicaemia.

37 The legislative nature of the judgments in *Simmons* v. *Castle* was (at least impliedly) recognized in *Summers* v. *Bundy* (22), where the Court of Appeal held that a judge at first instance had no discretion whether to give the 10% uplift or not: he was obliged as a matter of law to give effect to it. This is in marked contrast to the general rule as to the legal effect of guideline decisions given by the Court of Appeal. As the House of Lords in *Wright* v. *British Rys. Bd.* (25) said ([1983] 2 A.C. at 785):

> "A guideline as to quantum of conventional damages or conventional interest thereon is not a rule of law nor is it a rule of practice. It sets no binding precedent; it can be varied as circumstances change or experience shows that it does not assist in the achievement of even-handed justice or makes trials more lengthy or expensive or settlements more difficult to reach."

38 The legislative nature of *Simmons* v. *Castle* (19) produces a problem as regards applying that decision in Gibraltar. The Gibraltar Constitution 2007, s.32 vests the general legislative power in the Gibraltar Parliament. The Governor has a limited power to make legislation in respect of matters reserved to him (foreign affairs, defence and internal security, including the police): ss. 34 and 47(1). With one possibly relevant exception, to which I shall come, the only legislation of the United Kingdom which has

direct application to Gibraltar is an Act of the Westminster Parliament which either expressly or by necessary implication applies to Gibraltar and an Order in Council which is similarly so expressed.

39 The United Kingdom has of course no written constitution. The British constitution can authorize novel developments such as giving the English Court of Appeal the power to make prospective legislative (as opposed to guideline) determinations in respect of damages. The means of implementing the 10% uplift proposal was that envisioned by Jackson, L.J. As Lord Judge, L.C.J. explained ([2012] EWCA Civ 1288, at para. 7), the Jackson reforms had been approved by Parliament and unanimously by the judiciary, so that it was appropriate for the Court of Appeal to make the declarations it did.

40 This, however, does not help with the position in Gibraltar. Where there is a written constitution providing for the separation of powers, it is illegitimate to vest legislative functions in a judicial body: *Att. Gen. (Australia)* v. *R. (The Boilermakers' case)*, affirming the High Court of Australia in *R.* v. *Kirby*, *ex p. Boilermakers' Socy. of Australia* (15). Accordingly, in my judgment, *Simmons* v. *Castle* cannot be recognized as part of Gibraltarian law. As a matter of the law of Gibraltar, the English Court of Appeal has no legislative powers which extend to Gibraltar.

41 The possibly relevant exception to this inability to recognize *Simmons* v. *Castle* (19) in Gibraltar is s.15 of the Supreme Court Act 1960, which provides:

> "The jurisdiction vested in the court shall be exercised (as far as regards practice and procedure) in the manner provided by this or any other Act or by such rules as may be made pursuant to this Act or any other Act and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

42 If the *Simmons* v. *Castle* uplift is a matter of practice or procedure, then effect must be given to it. In some circumstances, the quantum of damages is considered as a matter of procedure. At common law, where a claimant brings an action for a tort committed outside the jurisdiction, the recoverability of damages and of particular heads of damage is a matter for the *lex loci delicti*. However, the quantum of damages is treated as a procedural matter for the *lex fori*: *Chaplin* v. *Boys* (4); *Harding* v. *Wealands* (6). There are other elements to such causes of action but I do not need to consider these. This, however, is in my judgment a special rule of international private law; it is not a general proposition. Rules of law (as opposed to judicial guidance) on the quantum of damages are in a domestic context matters of substantive law.

43 Accordingly in my judgment the court cannot in Gibraltar apply the *Simmons* v. *Castle* uplift.

Discount rates for future losses

44 When assessing damages for future loss it is necessary to discount the future loss to reflect the fact that the claimant is receiving an accelerated payment. In *Mallett* v. *McMonagle* (11), the House of Lords approved a discount rate of 4–5%. Lord Diplock held ([1970] A.C. at 175) that a plaintiff would prudently invest any lump sum in a mix of property, shares and short-term high-yielding securities and achieve that return.

45 Unfortunately, that judicial investment advice proved wildly wrong. In 1973–74, the London stock market collapsed, as did the price of gilts. Inflation soared. Anyone following Lord Diplock's advice would have lost most of his or her money.

46 In *Wells* v. *Wells* (24), the House of Lords held that the discount rate for future losses should be assessed based on the rates available for UK Government index-linked stock. They held in the headnote to the report in *The Law Reports* ([1999] 1 A.C. at 345):

> ". . . [An] injured plaintiff was not in the same position as an ordinary prudent investor and was entitled to the greater security and certainty achieved by investment in index-linked government securities, in respect of which the current net discount rate was 3 per cent . . ."

47 Before *Wells* was decided, the Westminster Parliament had passed the Damages Act 1996. This gave the Lord Chancellor the power to fix the discount rate for future losses. However, in fact the Lord Chancellor decided to await the House of Lords decision in *Wells* before exercising those powers. After the result in *Wells* was known, he then consulted and in 2001 made the Damages (Personal Injury) Order 2001, which fixed the discount rate for future loss at 2.5%. This order is still in force, notwithstanding that the yields on index-linked gilts have since dropped.

48 In *Simon* v. *Helmot* (20), the plaintiff suffered catastrophic injuries in a road traffic accident in Guernsey. The Guernsey courts held that the Damages Act 1996 did not apply in the Channel Islands. They therefore had to determine the discount rate for the future loss. The plaintiff submitted that 0.5% should be taken as the discount rate for non-earnings related losses and –1.5% for earnings related losses. The defendant submitted that 2.5% would be appropriate for both. The Royal Court at first instance applied a single discount rate of 1% (2009–10 GLR *N* [16]).

49 The plaintiff appealed and the defendant cross-appealed. The Guernsey Court of Appeal (Sumption, Jones and Martin, JJ.A.) allowed the appeal and dismissed the cross-appeal. They approved the dual rates of

0.5% and –1.5% for which the plaintiff had argued (2009–10 GLR 465). The defendant's appeal to the Privy Council was dismissed ([2012] UKPC 5).

50 Whether the 2.5% discount rate or 0.5% rate or even the negative rate is appropriate is not a matter for me to determine in this case. What is important is to note that all of these rates are substantially lower than the 4–5% rate approved by *Mallett* v. *McMonagle* (11) in the 1960s.

51 The knock-on effect of a reduction in the discount rate has not been taken into account in England when assessing general damages. Yet it is a relevant factor. In *Mitchell* v. *Mulholland (No. 2)* (12), Widgery, L.J. said ([1972] 1 Q.B. at 83):

> "No one doubts that an award of damages must reflect the value of the pound sterling at the date of the award and conventional sums attributed to, say, the loss of an eye, have been adjusted upwards in recent years on that account. Inflation which has reduced the value of money at the date of the award must, thus, be taken into account, but an award which is proper according to the value of the pound at the date when it is made is not to be increased merely because each £1 awarded may have decreased in real value in five or ten years' time. Once the award is made, the plaintiff must protect himself against a subsequent fall in the value of money by prudent investment, as must a legatee under a will or the winner of a football pool. *This principle applies equally to an award of damages for loss of ability to earn as it does to an award for loss of amenity and pain and suffering.* Each is a capital sum to compensate for present loss." [Emphasis supplied.]

52 It follows that, if the discount rate drops, the capital sum required to compensate for future pain, suffering and loss of amenity must rise commensurately. It is true of course that damages for pain, suffering and loss of amenity have traditionally been given on a global basis. However, even if only as a cross-check, consideration needs to be given to the amount which a lump sum can produce as income for what may be a lifetime's suffering.

53 I attach, as a schedule to this judgment, selected extracts of *Ogden's Tables*. A man of 36 (based on 2008 mortality tables) or 34 (based on 2004 mortality tables) has a life expectancy of about 50 years. If one assumed that he was permanently disabled with no prospect of recovery, then it would be necessary to consider the real income he would receive from the lump sum to compensate him for the pain *etc.* which he would suffer for the five decades to come. If one took a discount rate of 4.5%, then the number of years' purchase to produce a capital sum would be 19.52. If the court awarded him £100,000, that would give a lifetime annuity of £5,531 per annum (£100,000 divided by 19.52). If the discount rate were 2.5%,

then the years' purchase becomes 27.84. The £100,000 lump sum would produce an annuity of £3,592 per annum (or 65% of £5,531). At 0.5%, the years' purchase is 43.82 and the annuity £2,282 per annum (or 41% of £5,531).

54 It follows that, if the discount rate drops, the capital to produce a given annuity must increase. Thus with a 2.5% discount rate, a claimant would need £153,981 in capital to produce an annuity of £5,531 per annum. With a 0.5% rate, the sum needed becomes £242,375.

55 Another important result of a drop in discount rates is that the age of the claimant becomes much more significant. At 4.5%, the difference in years' purchase between the 34/36-year-old and a babe-in-arms who sustained permanent injuries at birth is 19.52 for the 34/36-year-old and 21.91 for the baby (a difference of 12%). At 0.5%, the difference is between 43.82 and 71.35 years' purchase (a 63% difference).

56 The current English Guidelines give a range for the most serious injuries (tetraplegia and very severe brain damage) of £271,430 to £337,700 (including the *Simmons* v. *Castle* uplift). The upper end of the range is 24% higher than the lower end. The Guidelines state that "other factors bearing on the award include age . . ." However, given that the bracket covers a range of seriousness, it is apparent that the claimant's age is given very little weight. That would be appropriate if a 4–5% discount rate were applied (see the previous paragraph) but not if a lower discount rate is applied.

57 The current English Guidelines appear substantially to undervalue claims in respect of long-term pain, suffering and loss of amenity.

Damages for wrongful imprisonment

58 I turn then to the quantum awarded for damages for wrongful imprisonment. The relevance of this is that general damages for different types of tort must bear some reasonable relation to each other. In *John* v. *MGN Ltd.* (9), Sir Thomas Bingham, M.R. held in relation to damages for libel ([1997] Q.B. at 614) that—

> "it is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable. The time has in our view come when judges, and counsel, should be free to draw the attention of juries to these comparisons."

59 The same applies as between personal injury damages and damages for wrongful imprisonment, as to which there is guidance of the English Court of Appeal. In *Thompson* v. *Metropolitan Police Commr.* (23), the

Court of Appeal took a similar approach to that in *John*. It said ([1998] Q.B. at 515):

> "In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for 24 hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days the daily rate will be on a progressively reducing scale."

60 Although historically almost all cases of wrongful imprisonment were actions against the police, in more recent times there have been actions against prison governors for not releasing prisoners timeously (*R.* v. *Brockhill Prison Gov., ex p. Evans (No. 2)* (13) and the *Hardial Singh* claims against the Home Secretary for failing to release illegal immigrants from custody as soon as it became clear there was no prospect of returning the immigrants to their home country within a reasonable time (see *R.* v. *Durham Prison Gov.* (14)).

61 In *Evans*, the plaintiff prisoner was held for 59 days longer than she should have been. The Court of Appeal increased the trial judge's award to £5,000 or £85 per day (say £135 per day, if increased in line with the RPI). Unlike in personal injury cases, in most cases of wrongful imprisonment, there is an element of damage to reputation. That was not, however, the case in *Evans*, because the plaintiff was of bad character. She was serving a sentence of two years' imprisonment and had committed a disciplinary offence whilst inside. The court accepted the submission that the £2,000 awarded at first instance (£35 per day) was too low ([1999] Q.B. at 1060).

62 In *R. (NAB)* v. *Home Secy.* (16), Irwin, J. expressed damages in terms of a daily rate of £75, so as to give a total of £6,150 for 82 days' unlawful detention. This rate seems to be the lowest that can currently properly be awarded in England and Wales for wrongful imprisonment. The claimant was liable to deportation to Iran. He would have been released from detention if he had cooperated by signing a document required by the Iranian authorities but had deliberately refused to do so. He had already been lawfully detained for a long period, so the continued custody was no shock to him. His continued detention was effectively his own fault (the judge rejected the Secretary of State's submission that this should deny him damages completely).

63 Most recently, in *AS* v. *Home Secy.* (1), an asylum seeker wrongfully detained was awarded £23,000 for 61 days' imprisonment (£377 per day) plus an additional £5,000 as aggravated damages.

64 These figures stand to be compared with the income which the lump sum for pain, suffering and loss of amenity can produce. The maximum award under the English Guidelines is £337,700. It will be recalled that, taking a discount rate of 4.5%, £100,000 will produce an annuity of £5,531 per annum for a man in his mid-30s. £337,700 (at the 4.5% discount rate) will produce an annuity of £18,678. This is a daily rate of only £51. If the 2.5% discount rate were appropriate, the daily rate would be £33 per day. At 0.5% the daily rate drops to £21.

65 Whatever the appropriate discount rate, the general damages for catastrophic personal injury produce annuity figures well below the daily rates awarded for wrongful imprisonment.

Conclusion on the application of the English Guidelines

66 Is the Supreme Court of Gibraltar bound to follow the English Judicial College Guidelines? The Guidelines are effectively the distillation of guideline cases decided mainly by the Court of Appeal from the 1960s onwards. As such they stand to be treated in the same way as the guideline cases themselves. They are in my judgment part of the practice of the English High Court, so that s.15 of the Supreme Court Act 1960 applies.

67 That does not mean, however, that this court is necessarily bound to follow them. First, as the passage from *Wright* v. *British Rys. Bd.* (25) I have cited shows, guidelines are not binding law. A judge at first instance is entitled—and indeed obliged—to go outside them if it is appropriate in a particular case. Accordingly, if the English guidelines are not appropriate for Gibraltar, then the court should not in my judgment follow them.

68 Secondly, s.2(1) of the English Law (Application) Act 1962 (omitting an irrelevant exception) provides:

> "The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require . . ."

69 Insofar as the English guidelines are part of the common law of England, they stand to be modified if they are unsuitable to the circumstances of Gibraltar.

70 Thirdly, the rule of substantive law for assessing the quantum of damages is that defined by Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.* (10) as (5 App. Cas. at 39)—

> ". . . that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

71 Insofar as the English Judicial College Guidelines do not do that, the courts in Gibraltar should not in my judgment follow them. Practice must give way to substantive law.

72 I come then to the question whether different guidelines would be appropriate in the light of the four reasons I have outlined. In my judgment, different guidelines for Gibraltar are appropriate because the damages for pain, suffering and loss of amenity which would stand to be awarded under the English Guidelines are too low in the particular circumstances of Gibraltar.

73 It is true that not applying the *Simmons* v. *Castle* uplift will produce lower awards, however, the other three matters which I have discussed will increase them substantially, particularly in relation to cases of future loss and most particularly in catastrophic injury cases. In due course, it would be desirable to have a full presentation of matters such as the figures for GDP, inflation and wages in England and Wales, Northern Ireland and Gibraltar and other evidence of the standard of living in these places. Consideration will also need to be given to the effect on the insurance market of an increase in general damages for personal injury. However, the extent to which insurance premiums are affected by changes in damages for personal injuries is highly controversial: see most recently "*Insurers Cheat Motorists*," *The Times*, August 27th, 2016, where the newspaper claimed that the savings made by the insurance industry from the Jackson reforms had not been passed on in the form of reduced motor insurance premiums in England and Wales.

74 Ms. Pizzarello accepted that without that further material it would be impossible to fix guidelines for Gibraltar. However, she was happy to make the submission that in the meantime the courts of Gibraltar should apply the Northern Irish Guidelines. In my judgment, pending more detailed evidence and submissions, that is a sensible way forward.

Assessment of damages

75 I turn then to the assessment of damages in this case. Ms. Pizzarello submitted that the two relevant brackets in the Northern Irish Guidelines were 7A(f) and (g). Bracket (f) encompasses—

> "relatively minor injuries which may or may not have exacerbated or accelerated some pre-existing unrelated condition but with, in any event, a complete recovery within a few years. This bracket will also apply to moderate whiplash injuries where the period of recovery is

fairly protracted and where there is an increased vulnerability to further trauma."

A band of £10,000 to £25,000 is given.

76 Bracket (g) relates to—

"minor soft tissue and whiplash injuries and the like where symptoms are moderate and full recovery takes place within, at most, two years."

A band of up to £12,000 is given.

77 In my judgment, the initial soft tissue injury was fairly minor but it did cause shock and necessitated his taking two days off work. However, the intermittent pain has continued and seems likely to be permanent. It has stopped Mr. Bernal's enjoyment of running and has made him a much less active man than he was when in the army. In my judgment, a figure of £14,000 for pain, suffering and loss of amenity is appropriate.

78 It is worth cross-checking that figure as a daily rate for future loss. About £4,000 of the £14,000 is in respect of the accident itself and the few weeks thereafter. The balance of £10,000 reflects losses in the four years up to trial and a lifetime of future intermittent pain. The *Ogden Tables* (7th ed.) calculate the years' purchase for a 49-year-old man as 23.10 at a 2.5% discount rate and as 32.97 at 0.5%. To those figures four years needs to be added to reflect the time from the accident to the date of trial. The total years' purchase is therefore 27.10 at 2.5% and 36.97 at 0.5%. The £10,000 lump sum therefore translates into £369 per annum (£1.01 per day) at 2.5% and £270 per annum (74 pence per day) at 0.5%. These are fairly low figures for a lifetime of intermittent neck pain and the continuing loss of amenity.

79 In addition, Mr. Bernal has a claim for £26 in respect of analgesics. He was paid for his two days' sick leave and the physiotherapy was provided by the Gibraltar Health Authority, so he suffered no losses in respect of those matters.

80 Mr. Bernal is entitled to interest for the six months since the service of the claim on Mr. Riley at 2% per annum. I award him £140 in respect of interest.

81 The total award is therefore £14,166. In addition Mr. Bernal is entitled to his costs, which I summarily assess at £2,441 in accordance with the schedule prepared by Ms. Pizzarello.

Order accordingly.

Schedule

% discount for accel'n	At birth Y/P	Annuity on £100,000	18/16 year old Y/P	Annuity on £100,000	36/34 year old Y/P	Annuity on £100,000
5	19.94	5015	19.45	5141	18.08	5531
4.5	21.91	4564	21.24	4708	19.52	5123
4	24.28	4119	23.35	4283	21.17	4724
3.5	27.17	3681	25.85	3868	23.06	4337
3	30.89	3237	28.87	3464	25.27	3957
2.5	35.41	2824	32.52	3075	27.84	3592
2	41.17	2429	37.00	2703	30.87	3239
1.5	48.60	2058	42.33	2362	34.45	2903
1	58.34	1714	49.46	2022	38.71	2583
0.5	71.35	1402	58.22	1718	43.82	2282
0	88.96	1124	69.41	1441	49.98	2001
–0.5	113.22	883	83.86	1192	57.46	1740
–1	147.14	680	102.74	973	66.60	1502
–1.5	195.32	512	127.66	783	77.86	1284
–2	264.76	378	160.89	622	91.82	1089

Notes

The figures for years' purchase are all taken from *Ogden's Tables*, more formally known as Government Actuary's Department, Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases, table 1: Multipliers for pecuniary loss for life (males).

I have given the figures for a boy at birth, for a young man of 16 or 18 and for an adult man of 34 or 36. The reason for the different ages is this.

The discount rates from 3% to –2% are taken from the 7th edition (2011), which were based on projected mortality from the 2008-based population projections.

The discount rates from 5% to 3.5% are taken from the 6th edition (2007), which were based on projected mortality from the 2004-based population projections.

The use of different editions was necessary because the 7th edition did not include those higher percentages whilst the 6th edition did not include any negative rates.

Expectation of life increased by about two years between 2004 and 2008. A 16-year-old's expectation of life in 2004 was roughly equivalent to an 18-year-old's in 2008 (both expected to live about another 70 years). Likewise with a 34-year-old's and a 36-year-old's (both expected to live another 50 years).

I have been told (but have not seen the evidence to support this) that life expectancy in Gibraltar is higher than in the United Kingdom, so the multipliers here in Gibraltar would be higher than in the table.

Further, if a true comparison is to be made with the court awards from the 1960s and earlier, it is not just discount rates which are relevant. Life expectancy then was much lower, so the appropriate years' purchase in the 1960s and before would for that reason alone be lower than in these editions of the *Ogden Tables*.
