In the face of uncertainty

Asela Wijeyaratne & Mamata Dutta report on *Mathieu v Hinds* & the limited scope for *Blamire* awards

IN BRIEF

▶ The appropriate method of assessing future loss of earnings where the loss is subject to multiple uncertain contingencies.

In *Mathieu v Hinds* [2022] EWHC 924, [2022] All ER (D) 66 (Apr) the High Court (Hill J) considered the vexed question of the appropriate method of assessing future loss of earnings where the loss is subject to multiple uncertain contingencies. The case reflects a developing trend of moving away from broad-brush lump-sum '*Blamire* awards' towards assessment on the more conventional multiplier/multiplicand approach (the multiplier approach).

The claimant was a Canadian artist. In 2013 he began studying on a masters degree course in fine art at Goldsmiths College, London, one of the leading institutions in the field worldwide. By this time his art had already been included in group exhibitions in Quebec City, Washington DC and France. In 2014, during a break from his course, his art was exhibited in Montreal and Paris, and he gained a residency in Aruba. In January 2015, the claimant won a competition for a solo show at the Institute of Contemporary Arts in London.

The index accident occurred on 28 November 2015. The claimant was crossing a road at a pedestrian crossing in London when he was struck by a moped ridden by the first defendant, which he had stolen earlier that day. The claimant sustained a serious brain injury as a result.

The judge noted that the experts agreed that the claimant had made 'a very good recovery from his injuries'. He had also 'gone on to enjoy a very successful artistic career'. His case, however, was that 'the headaches, fatigue and cognitive issues from which he continues to suffer as a consequence of his brain injury have hampered his productivity, such that he is not able to produce and sell as much art as he would otherwise have been able to'.

Unsurprisingly, Hill J noted that predicting the future loss of income for any artist was a difficult exercise. Future income was dependent on a number of contingencies including 'staying in vogue, market preferences, variation of discounts, economic calamities, geopolitical instabilities, sustainability of pricing, competition, physical health, other emotional demands, perhaps even another pandemic'.

At trial the claimant contended for a calculation based on the traditional multiplier approach. The second defendant's case was that if ongoing loss was found, there were far too many uncertainties to use the multiplier approach and that a lump sum *Blamire* award should be made.

In *Blamire v South Cumbria HA* [1993] PIQR Q1, the claimant, a 21-year-old nurse, suffered a back injury. In the period before trial the claimant had various absences from work and ultimately resigned, taking up employment as a secretary. By the time of trial, she was not working following the birth of her first child. It was held that the claimant had to give up nursing as a result of the injuries sustained in the accident and that she would probably have to continue working as a secretary when she took the decision to return to work.

There were, however, many uncertainties, including potential difficulties in obtaining work, the possible recurrence of back problems throughout her working life and whether (but for the accident) the claimant would have worked full or part-time. The judge at first instance did not assess loss using the multiplier approach, choosing instead to make a lump-sum award of £25,000. This was upheld by the Court of Appeal. In the judgment of Steyn LJ: 'It seems to me the judge carefully assessed the prospects and the risks for the plaintiff. He had well in mind that it was his duty to look at the matter globally and to ask himself what was the present value of risk of future financial loss. Inevitably one is driven to a broad brush approach. He had in mind that there was no perfect arithmetical way of calculating compensation in such a case. The law is concerned with practical affairs and, as Lord Reid said in *BTC v Gourley,* very often one is driven to making a rough estimate of the damages.'

A *Blamire* award was also upheld by the Court of Appeal in *Ward v Allies and Morrison Architects* [2012] EWCA Civ 1287, [2012] All ER (D) 95 (Oct). It held that there were 'too many imponderables' to enable the trial judge to make the necessary findings for a multiplier approach calculation as to the claimant's likely earnings capacity but for the accident and his residual earnings capacity.

In *Bullock v Atlas Ward Structures Ltd* [2008] EWCA Civ 194, [2008] All ER (D) 43 (May) Keene LJ outlined the tramlines to the scope of *Blamire* awards. It was said that all assessments of future loss of earnings in personal injury cases necessarily involved some degree of uncertainty. 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 the well established basis of multiplying an anticipated annual loss by an appropriate multiplier'. As such, judges 'should be slow to resort to the broad-brush *Blamire* approach, unless they really have no alternative'.

Similar restraint was urged by the Court of Appeal in *Irani v Duchon* [2020] PIQR P4. The trial judge's use of the *Blamire* approach was upheld on the basis that there had been a 'wholesale insufficiency' of evidence but the court noted that 'if the only issue had been one of uncertainty', a conventional multiplier approach could have been used.

The case law demonstrates that the courts have become adept at weighing lost opportunities and chances under the multiplier approach, without the need to resort to a *Blamire* award. This has been so even where the evidence on contingencies is complex and where the lost opportunities are said to be multiple, each with different prospects.

Langford v Hebran [2001] PIQR Q13 is a good example of such a forensic approach. The claimant was a kickboxer who had turned professional shortly before the

index accident. He adduced evidence that there were a number of alternative career scenarios, based on the potential escalating success of his career. To each such scenario a percentage chance of earnings was attached. While the Court of Appeal took the view that the percentage chance allocated to each scenario should reduce as the claimant's expected career advanced to take into account other contingencies which may have prevented that progression, the Court of Appeal ultimately endorsed the concept of a staged approach adopted by the trial judge and upheld the judge's awards of a percentage of each the scenarios, after weighing the prospects of their materialising.

Similarly in *Collett v Smith and Middlesborough FC* [2008] EWHC 1962, [2008] All ER (D) 74 (Aug) Swift J found that the claimant, a young professional footballer who was injured in a negligent tackle, was found likely to have been under contract to Manchester United until the age of 21. However, discounting was applied to claims thereafter to reflect the possibility of injury and other contingencies, with additional awards that were claimed for the possibility that he might become a football manager being rejected as being too remote a prospect.

Turning back to *Mathieu v Hinds*, Hill J took the view that although there were many uncertainties in the claimant's claim for future loss of earnings, the evidence was sufficient for the multiplier approach to be forensically deployed. In reliance on *Irani v Duchon* and other cases, Hill J came to the conclusion that the existence of uncertainties was not, of itself, a good reason to depart from the conventional approach. The judge stated: 'I have found myself able to continue to use the conventional multiplicand /multiplier approach advanced by the claimant for this period of loss, albeit with very substantial modifications and assessing the multiplicand in a broad-brush way. This is consistent with the authorities indicating that judges should not resort to the *Blamire* approach unless essential.'

For the first two years post-trial, the judge assessed quantum on the basis of the loss of profit caused by a shortfall on the number of works which the claimant was able to produce, reduced to reflect the fact that the claimant had only a 70% chance of achieving the sale values on which the calculation was based. The experts agreed that making predictions beyond two to three years was very much more difficult. The judge found that 'while there is some evidence that artists' later works can be prized more highly, the more common pattern described [by the expert] is of initial success, waning over time, and then petering out'.

There were corresponding significant decreases to both the multiplicand and loss of chance percentages in the future periods that followed. A 40% loss of chance was applied to the following five years and then a loss of chance of only 5% thereafter, for the remainder of the claimant's working life.

Mathieu v Hinds demonstrates that uncertainty of loss and difficulty of calculation are typically not sufficient reason to depart from the multiplier approach. The court will be inclined to use all forensic tools at its disposal to reflect those uncertainties by assessing the prospect of each potential outcome over time. As the judge noted that 'having conducted the assessment, the award may be very much smaller than that claimed, or may indeed be nil, but this does not mean that the court should not carry out the process'.

It may now be a relatively rare case in which there is an insufficiency of evidence to a degree that the court is left with no choice but to make a *Blamire* award. NLJ

Asela Wijeyaratne, counsel at 3 Hare Court (*www.3harecourt.com*) and **Mamata Dutta,** Partner at RPC (*www.rpc.co.uk*).