

# **A Transatlantic Dialogue on Personal Injury & Wrongful Death Damages**

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NAFE / Transatlantic Dialogue Session

# Background – The Meetings and The Book

"Transatlantic Dialogue" began in 2004 (Edinburgh), Matt Kelly and Robert McNabb as Guests of NAFE

NAFE-sponsored collaboration in the US and Europe in subsequent years. 21<sup>st</sup> International meeting

Past Meetings: Edinburgh, Dublin, Boston, Chicago, Bath, London and 13 EEC sites

Focus: comparing US vs UK/European damages methodologies, scheduled damages- Zoltan Butt, Steven Haberman, Richard Verrall, Victoria Wass, Shane Whelan. Ogden Tables and Tort Reform in the U.S.

Deficiencies of Ogden Tables- Lewis and Wass – underestimate losses to plaintiffs- Net discount rate inflexible, lack of adjustments for productivity changes, age earnings growth.

Ward, Thornton Edited Book ( 2010)– the Transatlantic Dialogue – attempt to summarize the dialogue and explore the transferability of scheduled damages to the U.S. and the U.S. model to the U.K.

A Model for U.S. Tort Reform? David Bernstein, Lewis, et al. undercompensates

# Core Comparisons

US: adversarial, expert-driven modeling, high relative costs, multi jurisdictional

UK: scheduled damages via Ogden Tables, loser pays, no enrichment, uniformity

Key distinction: individualized modeling vs standardized multipliers

# Ogden Methodology Overview

Multiplicand × Multiplier framework

Multipliers incorporate: mortality, discount rate, contingencies

Reduction factors adjust for employment/disability risks

Government-issued tables, periodically updated – fixed real discount rate

UK, Wales and Northern Ireland and largely applies to Scotland

Latest Edition 2020, update 2022

# UK Legal Framework

Objective: full compensation without enrichment, few collateral source restrictions on calculations, exception private insurance

Net-of-tax earnings basis

Deduction of public benefits (no double recovery)

Judge-based decisions (limited expert role)

Loser pays

Non- economic damages not capped and punitive damages rare

# US Methodology Overview

Year-by-year projection of earnings/benefit to WLE

Justice Hand Rule  $B=PL$  as objective of awards

Use of: Work-life tables based on Markov models, Growth and discount assumptions

Expert-driven, case-specific analysis

Non economic damages Caps, vertical and horizontal inequity

Punitive damages common – objective to limit harmful products and actions through awards

# Role of Experts (US)

Central to damages calculation, adversarial?

Competing methodologies (Daubert/Frye standards)

Key battleground: Discount rates, Growth assumptions, Work-life expectancy

High Costs

50 State and Federal jurisdictions

Case Law and Statutes direct analysis

Directed by case law and statutes – great diversity

# Key Similarities

Goal: make plaintiff whole, but in UK – no enrichment

Lump sum awards common

Recovery includes: Lost earnings, Household services, Future medical costs

# Key Differences

UK: uniformity, predictability as objectives, no collateral source exclusions ( except personal insurance)

US: variability across states and National, collateral source exclusions

Definitions of economic damages in U.S. ( Hedonic Damages, advice, counsel, companionship and protection) that vary by jurisdiction

UK: net income basis

US: typically gross income (exceptions, Texas, etc.)

US includes punitive damages; UK largely does not

# Litigation Cost Comparison

US tort costs: ~\$529B (2022)

~\$4,200 per household

Growing ~7% annually

Much higher than European systems

# Cost Drivers (US)

Contingency fees (25–40%)

Expert witness costs

Discovery and depositions

American rule (each party pays own fees)

# Cost Structure (UK)

"Loser pays" rule

Lower variability in awards

Reduced reliance on experts

Greater predictability in outcomes

# Advantages of Ogden System

Uniformity across cases

Predictability of outcomes

Lower transaction costs

Reduced expert conflict

# Limitations of Ogden

Less case-specific precision

Limited expert input

Simplified treatment of contingencies

Coarse discount rate adjustments, Judge can select from range of rates

Life earnings cycle adjustments absent – judge can adjust multiplicand by age

Ward paper – simulation Ogden with and without age earnings adjustments using US tables – significant understatement of multipliers

Treatment of lost household services limited

# Areas of Convergence

Markov work-life estimates emerging in UK

Improved reduction factors – disability states

Greater incorporation of labor-market data

Movement toward US-style modeling elements

# Transferability Issues

US system highly fragmented (state-based)

Difficult to implement uniform tables

Cultural/legal differences in tort objectives

Political barriers to reform

# Hybrid Possibilities

Partial adoption of structured multipliers and scheduled damages

In catastrophic cases

Greater standardization of assumptions

Use of scheduled elements in specific contexts

Example: September 11 VCF, Vioxx/Merk \$4.5 billion fund (1999)

# Proposed Enhancements to Ogden

Household services valuation tables

Improved self-consumption estimates

Age-earnings cycle adjustments

Greater use of national survey data

More flexible net discount rate in multiplier

# Household Services Example

US: "Dollar Value of a Day" (DVD)

UK: potential use of Time Use Survey

Benefit: objective, standardized valuation

# Self-Consumption Improvements

Current: rule-of-thumb estimates

Proposed: data-driven tables

Based on: Income, Family size, Age

Family expenditure survey data use in UK?

# Age-Earnings Adjustments

Current UK approach: broad adjustments

Proposed: detailed lifecycle earnings tables

Based on education and demographics

# Future of the Dialogue

Continued collaboration (NAFE, CAVOL, York)

Integration of actuarial and economic methods

Ongoing refinement of damages modeling