

Reason versus chance

How do you calculate a loss of earnings in light of *Herring v Ministry of Defence*? Keith Carter of Keith Carter & Associates discusses putting the 'reasonable career model' into practice



The case of *Herring v Ministry of Defence* [2003] raised a number of important questions in respect to how the courts should quantify a loss of career earnings. Should it be approached using a 'chance factor', as in the case of *Doyle v Wallace* [1998], or using a reasonable career forecast?

Employment is a major aspect of most people's lives, as noted by Judge Braussard in the case of *Foley v Interactive Data* [1988]:

A man or woman does not normally enter into employment solely for money: a job is status, reputation, a way of defining one's self worth and worth in the community.

How then should we approach quantifying its loss or displacement?

In the case of *Doyle* we had a minor who was injured in a road traffic accident and was unable to work as a result of the injuries she suffered. It was contended at the original trial that the claimant would have qualified as a teacher. However, had she been unsuccessful in passing the necessary exams, she would have obtained a clerical or administrative job. The judge had assessed the claimant's chances of qualifying at 50% and had accordingly awarded damages for past and future loss on the basis of the mid point between a teacher and a clerical worker's likely salary. The defendants appealed but the case was upheld.

The difficulty in cases such as *Doyle* is the subtle difference between 'loss of a chance' and 'loss of an opportunity'.

It is perhaps unfortunate that the approach adopted following *Doyle* was commonly referred to as 'loss of a chance' as this infers the outcome rests

largely with 'fate'. As it would be unprofessional to try to quantify something that was 'in the lap of the Gods' it is not surprising that argument raged over whether the loss of a chance existed or could be applied.

Herring clarifies, I believe, the position by substituting 'loss of a chance' with 'loss of a quantifiable opportunity'. With this change in emphasis, it is possible to present a 'reasonable career model' and with it, likely earnings.

'The starting point for constructing a reasonable career model claim is to look at education, qualifications and career aspirations, before considering external labour market factors.'

The case of *Herring v The Ministry of Defence* involved a young man who, it was argued, would have joined the police force but for an accident.

While the trial judge accepted this contention, he applied a discount factor of 25% to reflect various imponderables. While this might more accurately be referred to as the 'chance of a loss', turning the old saying on its head, it suggests that the claimant had a 75% chance of a career as a police officer.

The relevant factors

But what factors need to be taken into consideration to argue for the loss of a career using a reasonable career model over the loss of a chance?

The starting point for any employment expert would be to look at certain key areas such as education, qualifications and career aspirations. To these would need to be applied external labour market factors such as:

- competition for positions in the claimant's occupational/geographical area;
- the likely chance of progression, typical timings of advancement, etc;
- chances of unemployment and/or redundancy; and
- salary rates (trends) in the relevant trade or profession and at key stages of a career.

In practice, the three major questions that are likely to be asked in cases such as *Herring* are:

- Would the claimant have got the job in the first place?
- Would they have progressed in that employment?
- How much would they have earned?

A final question might be: if the claimant had not entered that particular career, what would they have done?

As to the first question, consideration would need to be given to what recruitment criteria exists and whether the claimant would have met these.

While career information suggests there are no formal academic requirements to become a police officer, it is necessary to be in good physical and mental health, with a good level of fitness and the minimum eyesight requirement. It is also necessary to pass an entrance test and an interview board followed by a two-year probationer training period.

Asking the claimant to sit the 'mock' entrance tests is one approach to helping assess the probability of entrance. It is also necessary to look in detail at the individual's circumstances and the labour market.

In *Herring* the claimant was a young man in the Territorial Army Special Air Services. He was an SAS-standard physical education instructor who also worked for the Welsh Sports Council and was pursuing an HND in law. Add to this a high level of motivation and an intake of some 3,800 recruits a year and I believe the court was right to assume selection.

This, however, would not be appropriate in every case. In a recent matter we were involved in we had a young man who had low academic qualifications, worked in the retail sector, had not applied to join the police force at the time of the accident and failed the mock police entrant test given to him. In this case, it was not possible or appropriate to provide a reasonable career model.

Advancement within an occupation can be illustrated by using either statistical data (eg the Defence Analytical Services Agency in a case involving service personnel) or industry trends. It is also possible to provide guidance as to the age at which 'key stages' in a career are reached.

Moving to 'earnings', these are perhaps the easiest to provide 'base line' data for. However, where on a continuum is it likely that a particular individual will fall?

The basic on-entry earnings for a police officer (outside of London) are

£19,227pa gross, with earnings for a newly appointed sergeant in the order of £30,186pa gross.

Other professions (for example, the one most of you reading this article belong to) can be more difficult to present a reasonable career model for, as the variations can be considerable.

A solicitor in a small provincial law firm might expect earnings in the order of £35,238 (The Law Society, Omnibus Survey 2002), while a salaried partner

Comparison of wage rates

Teacher	121
Youth worker	115
Social worker	112
Police officer	100
Probation officer	98
Fire fighter	97
Paramedic	95
Security guard	69

'By bringing the calculation of loss back from the lap of the Gods and applying a reasonable career model, it is possible to more accurately assess whether a loss of earnings has occurred, and the value of any loss.'

- The stage which the claimant's career had reached at the time of the accident.
- Specific recruitment criteria of the industry and the 'typical' background of those holding such positions.
- Comparative data with regard to those in such positions and how their careers had progressed.
- Information from employers as to likely 'person specifications'.
- The working practices for advancement.

Armed with the above, it is possible to provide, I believe, 'a reasonable career model', an approach adopted in the recent case of *Waqar Rashid v Mohammed Iqbal* [2004].

Returning to the case of *Doyle*, and as it is often easier to illustrate by actual examples, let us consider the salaries that would be applied in a reasonable career model for a teacher (see box). While the reasonable career model in this case would result in a higher award than the loss of a chance, in others – for example the young man who, based on background information and recruitment criteria, would not get into the police force – it would not.

The question, of course, which will be asked when confronted with a model similar to the above is: but what if the claimant had not been successful in entering a particular career or had left at an early stage?

If the likelihood is that the claimant would have found alternative employment at a similar level, the same model would apply. By weighting annual earnings for a particular career at 100, it is possible to match this to other

with a firm in the magic circle, it is reported, could command in the order of £300,000pa gross. For a young lawyer in their first year of practice, what should the court accept as a reasonable 'career model'? It is here that more detailed consideration needs to be given to individual factors and 'typical' trends, for example:

- Success/failure of the claimant's education/career prior to the accident.

The reasonable career model for a teacher

On entry (1-3 years)	£18,558 - £22,059
Once established (3-5 years)	£20,025 - £28,743
Mid career (5 year+)	£25,137 - £34,851
Career potential (39 years of age)	£29,385 - £37,692

areas, as illustrated in the career wage comparison table.

By bringing the calculation of loss back from the 'lap of the Gods' and applying a reasonable career model it is, I believe, possible to more accurately assess whether a loss of earnings has occurred, and the value of any loss.

Sight should not be lost, in discussing *Herring*, of the fact that not only was the appeal against the 25% discount factor for contingency, but also the initial assessment as to the claimant's residual earning capacity.

If it is possible to provide for the court a reasonable career model to help calculate loss in an uninjured state, then equally it is possible to assess their injured position.

By looking in more detail at a claimant's personal characteristics, qualifications and transferable skills, as in the pre-accident reasonable career model, it is possible to present a more accurate post-accident assessment of their residual earning capacity.

Could a young man who was unable to join the police force, for example, obtain a qualification to allow him to

enter youth- or social work, or non-uniformed administrative and technical posts in the police force.

'By looking in more detail at a claimant's personal characteristics and skills, it is possible to present a more accurate post-accident assessment of their residual earning capacity.'

The claimant's level of disability would of course need to be factored into any suggested opportunities, but a reasonable career model can, I would suggest, be applied to both a claimant's

Case references

Doyle v Wallace

[1998] PIQR Q146

Foley v Interactive Data

[1988] Cal Ref 211

Herring v Ministry of Defence

[2003] EWCA Civ 528

Waqar Rashid v Mohammed Iqbal

[2004] EWHC 1148 (QB)

pre-accident and post-accident career opportunities.

While the loss of a chance would still have relevance, a move to a more empirical assessment of career earnings would mean it only applied in situations where the prospects could be put no higher than a true loss of a chance.

What impact *Herring* will have on the calculation of personal injury claims has yet to be seen, but a move towards a reasonable career model can only be welcomed.

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