5. Police Injury Pensions - Part 2.

5.1. The first chapter on police injury pensions introduced the subject and discussed aspects of the decision making process. This chapter looks at the meaning of the term "degree of disablement" and the cases on causation.

The meaning of "degree of disablement".

5.2. Once the decision is made by the SMP under Regulation 30(2)(c) that the officer is suffering from a permanent disablement which is the result of the execution of his duties, the SMP is required to address and answer the question under Regulation 30(2)(d), namely to determine the officer's "degree of disablement".

5.3. Although the decision is delegated to a doctor, determining the degree of disablement of a former police officer is not solely a medical issue. Instead, it involves an assessment of the extent to which an officer's current disablement (as caused by the duty injury) has affected his ability to earn a living. The meaning of the term "degree of disablement" is set out Regulation 7(5) PIBR as follows:

> "Where it is necessary to determine the degree of a person's disablement it shall be determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a member of a police force:
>
> Provided that a person shall be deemed to be totally disabled if, as a result of such an injury, he is receiving treatment as an in-patient at a hospital"

5.4. The Guidance describes the process that the Home Office recommends for the assessment of degree of disablement as follows:

> "8. An SMP may have difficulty in putting an exact figure on the extent to which earning capacity has been affected by the relevant injury. The task is made easier by the fact that the degree of disablement column is divided into 4 bands - slight, minor, major and severe. Percentage differences within these bands do not affect the award.

9. The Regulations do not set out a specified procedure for assessing the degree of a person's disablement. The Administrative Court has, however, commented that the task in assessing earning capacity is to assess what the person is capable of doing and thus capable of earning. It is not a labour market assessment of whether somebody would actually pay that person to do what he or she is capable of doing, whether or not in competition with other workers. What follows here is the procedure suggested by the Home Office. This has no binding authority but it is the procedure which has been followed in most forces and by boards over recent years.

10. In order to assess the degree of disablement the SMP will need to consider by reference to the person's background, skills and qualifications what kind of employment he or she could undertake, allowing for the particular effects of the qualifying injury. The SMP should seek information from the police authority to help with this assessment. A relevant consideration is whether the person could manage that job full-time or would have to work part-time.

11. There would then need to be a direct comparison between the person's earnings when employed as a police officer and the potential earnings in an outside job. If the person has actually found another job at the time of the assessment, there is an expectation that the SMP would take this factor into account. NB - The officer should provide evidence of his or her current salary if this is the case. It is not necessary for the person to have found work for an assessment to be made of degree of earning capacity. Nor do earnings in a current job necessarily accurately reflect potential earnings, if the present job is not commensurate with the person's experience, skills and educational qualifications. Although the relevant injury may have prevented the person from continuing to work as a police officer, where fitness standards are exceptionally high, the person may be fully capable of taking up other employment.

12. If the person's employment prospects are such that he or she could expect to earn, in an outside occupation, as much if not more than he or she was earning as a police officer, then the degree of disablement would be virtually nothing, which would place them in the "slight disablement" category. At the other extreme, if the person is incapable of earning any money because of the relevant injury he or she will have a "degree of disablement" in the "very severe" category. As noted, Regulation 7(5) provides that if the person is receiving hospital in-patient treatment as a result of the relevant injury, then he or she should be deemed to be totally (i.e. 100%) disabled for that period.

How is the comparison between outside earnings and police earnings made?

13. In all cases the police authority will ensure that the SMP is provided with information about current outside earnings and the relevant job descriptions so that the person's earning capacity can be established in the light of the SMP's assessment

of the person's capabilities after the injury. - The officer should provide evidence of his or her current salary. It is reasonable to use as a starting point the level of earnings in the UK as a whole. The fact that a person is living in a place of high unemployment or abroad should not affect the issue of earning capacity as a result of disablement. The likely attitude of employers or of the labour market towards those suffering the physical or mental disability in question is also irrelevant to the question of earning capacity.

14. Where an application is made for an injury award at the same time or immediately after medical retirement, the likely outside pensionable (or basic) earnings should be compared with the pensionable police salary earned when last serving and will not need to be adjusted for inflation. The police salary should include any competence related threshold payment given to the officer, since that is also pensionable. If the officer was not in receipt of a competence related threshold payment at the point of retirement no further account should be taken of it in his or her case. London weighting, which is pensionable should also be taken into account if it is to be assessed against outside earnings with a pensionable London weighting allowance.

15. The reason for using pensionable earnings for assessing both pre- and post-retirement earning capacity is to arrive at the fairest and most robust measure of loss of earning capacity for the purpose of a pension which may be payable for a considerable period of time. Income from overtime, and other allowances, special priority payments or bonuses should not be taken into consideration either for the purpose of establishing pre-injury or post-injury earning capacity. Similarly income in the form of commissions may often be a clearer indicator of the current economic climate than the person's earning capacity.

> *Example*
> *If a person had earnings as a police officer of £25,000 a year and it is thought that he or she could now earn £20,000 a year, then the loss in earning capacity would be £5,000, which would be 20% and would place the person in the "slight disablement" category.*

16. In the case of an after-appearing injury, or in the case of a review of degree of disablement, the medical retirement may have occurred a considerable time ago. In such cases the former police pensionable salary should be re-valued to current police pay levels to the equivalent point on the salary scale for the rank concerned. This will allow full account to be taken of the effect of inflation during the intervening period. No account should be taken of the amount of any police pension received by the person when considering a retired officer's current earnings.

5.5. The task for the SMP is set by the wording of the Regulations. The Guidance can be useful in explaining the task in straightforward language but the Guidance cannot change the meaning of the words of the Regulation or add in additional requirements: see *R (Simpson) v Police Medical Appeal Board & Ors* [2012] EWHC 808 (Admin).

5.6. The words of the Regulations suggest that, in establishing the degree to which earning capacity has been affected by the relevant injury, the SMP should compare:

a) The present earning capacity that the former officer would have had in jobs for which he would have been suitable assuming all other things are the same but assuming that he had not suffered the duty injury ("**the uninjured earning capacity**"); and

b) The present earning capacity of the former officer based on his ability to earn money in jobs for which he is currently suitable notwithstanding his disablement as a result of his duty injuries ("**the actual earning capacity**").

5.7. The difference between the former officer's uninjured earning capacity and his actual earning capacity is then expressed as a percentage. So if the former officer was a police sergeant earning £45,000 per year and can now only work part-time in an administrative role earning £15,000 per year, his loss of earning capacity is £30,000 per years, and that amounts to a degree of disablement of 66%. That degree of disablement percentage is then used to set the award in accordance with a table at Schedule 3 to the Regulations. A 66% degree of disablement puts the officer in Band 3, and if this officer had served full time for 20 years he would get a gratuity of 37.5% of his Average Pensionable Pay ("**APP**") and a Minimum Income Guarantee ("**MIG**") of 75% of his APP. Based on an APP of £45,000 per year, that amounts to a gratuity of £16,875 and a tax free annual pension of £33,750 per year. The actual payment may be less than that level because 75% of the value of any ill-health pension received by an officer is required to be deducted and there can also be deductions if the officer is entitled to certain welfare benefits.

The meaning of the term "reduction in earning capacity".

5.8. The fixing of a degree of disablement can be a fairly straightforward task in a factually simple case but the principles have to be applied in numerous different factual circumstances, many of which throw up problems in seeking to identify the correct approach. The Guidance is very helpful in assisting medical authorities undertake this task but, as always with non-statutory guidance, it should be treated with some caution. The Guidance cannot change the meaning of the Regulations or suggest approaches which are add to or are inconsistent with the wording of the Regulations. The Guidance is largely accurate but there are a number of potential problems with this part of the Guidance. In particular, neither the Guidance nor the caselaw is wholly consistent on what is meant by the term "*earning capacity*" or "*reduction in earning capacity*" in relation to police pensions.

5.9. The meaning of the term "*loss of earning capacity*" as that terms has been defined by courts in other legal areas, such as personal injury caselaw, is the anticipated loss of earnings that an individual could reasonably be expected to achieve during the remainder of his working life, bearing in mind his qualifications, his experience and other factors relating to his life. In *Moeliker v A. Reyrolle & Co. Ltd* [1977] 1WLR 132, Browne LJ said that a plaintiff's loss of earning capacity arises where "*as a result of his injury his chances in the future of getting in the labour market work (or work as well paid as before the accident) have been diminished by his injury*". Thus, in personal injury cases, the evidence concerning loss of earning capacity is focused on establishing how much the particular individual's earnings are likely to be affected by a relevant injury from the date of the assessment up to the date of his anticipated retirement. Damages for "loss of earning capacity" in personal injury cases, often referred to as "*Smith v Manchester*" damages,[1] predominantly arise in a personal injuries case where an injured individual has retained his or her job (at least for the time being) and so suffers no present loss of earnings, but would face a diminished

[1] See *Davies v Taylor [1974] A.C. 207, [1972] 10 WLUK 72*, *Smith v Manchester Corp (1974) 17 K.I.R. 1, [1974] 6 WLUK 31* and *Clarke v Rotax Aircraft Equipment [1975] 1 W.L.R. 1570, [1975] 7 WLUK 96*.

chances in the labour market if the job is lost or the individual were to decide to move to another job. In other cases, damages are based on a calculation of actual loss of earnings and there is only a limited role for an assessment of loss of earning capacity.

5.10. The legal approach to the meaning of loss of earning capacity in the police pensions context has to be different for at least three reasons:

a) First, the calculation of loss of earning capacity arises in all cases because, by definition, by the time the assessment is undertaken, the former officer is not still earning a police salary[2]. Thus it can never cover a "*Smith v Manchester*" situation where the individual remains in the same job with the same earnings after the incident which gave rise to his disablement;

b) Secondly, it is a calculation which is based on the former officer's current position (i.e. at the date of the assessment), not a calculation that looks into the future: see *R (South Wales Police Authority) v Medical Referee & Anor* [2003] EWHC 3115 (Admin) at §33 where the Judge speaks of "*capacity … of what is now achievable*" and *R (McGinley) v Schilling* [2005] ICR 1282 where the Court of Appeal decided that the assessment was based on the former officer's degree of disablement at the date of the assessment, even if that was different to the former officer's degree of disablement at the date of retirement. Hence the SMP is required to look at the former officer's present reduction in earning capacity, as opposed to estimating the potential loss of earning capacity going forward as his medical condition improves or deteriorates. If there is a change in future earning capacity, an adjustment to the pension to reflect this change can be made under a Regulation 37 review: see *R (South Wales Police Authority) v Medical Referee & Anor* [2003] EWHC 3115 (Admin). Thus, the Guidance is right to suggest that the SMP should conduct a comparison based on the current position.

[2] Because only a former police officer is eligible for an injury award.

c) Thirdly, the final outcome of the process needs to take account of both causation issues and the question of apportionment between cause of the former officer's disablement between the duty injury and other causes. Causation and apportionment is considered below.

The assessment of loss of earning capacity.

5.11. Whatever approach is taken to assessing the injured or uninjured earning capacity of a former officer under PIBR, logic dictates that the same approach should be taken to calculating the injured and uninjured earning capacity. That is, perhaps, where the Guidance and, to a lesser extent, the caselaw does not make matters as clear as could be hoped. Given the task for the SMP in assessing both the injured and uninjured earning capacity, it is possible to take an expansive or a narrow approach to assessing either element of the earnings capacity of a former officer. However, if an expansive approach is taken to the officer's present earnings capacity, an expansive approach should also be taken to the officer's uninjured earning capacity. Equally, if a narrow approach is taken to determining the officer's uninjured earning capacity, a narrow approach should be taken to determining the officer's injured earning capacity.

5.12. The starting point for calculating the uninjured earning capacity for a police officer is usually the police salary that the former officer was earning at the date when he retired. This is a necessary starting point in most cases because it can usually be assumed that a police officer would have been able to continue in office and thus would have continued to earn a police salary. This was confirmed by Supperstone J in *R (Simpson) v Police Medical Appeal Board & Ors* [2012] EWHC 808 (Admin)[3] ("*Simpson")* who said at §32:

> "The degree of a person's disablement should be determined by reference to the degree to which *his* (emphasis added) earning capacity has been affected as a result of the injury. The focus is on the individual's earning capacity which, in the case of a former officer, may or may not involve the police officer's salary"

[3] See http://www.bailii.org/ew/cases/EWHC/Admin/2012/808.html We had to go all the way to the Court of Appeal to get permission on this.

5.13. It is usually irrelevant whether a police officer would have chosen to stay in office or not if he had not suffered the injury in question, because the question involves an assessment of the earnings capacity of the former officer, not whether the officer would have chosen to exercise that capacity by continuing to serve as a police officer. A person who wins the National Lottery and gives up a £20,000 a year job to live on his winnings will usually retain an earning capacity of £20,000 a year. His earning capacity should not be affected by his decision not to exercise that capacity by giving up work. He still has the capacity to work as a police officer even if he chooses not to do so.

5.14. The same approach means that a former officer who was facing disciplinary proceedings where, on the balance of probability, he was likely to have been dismissed, should have his police salary treated as his uninjured earnings capacity. In such a case, if the officer had not suffered the injury, the SMP will have to decide if he would have been dismissed and thus lost his income as a police officer[4]. That may, of course, depend on the SMP having the difficult job of working out whether he would have been dismissed and hence resolving factual disputes about the likely outcome of any disciplinary proceedings in order to reach a view on his loss of earning capacity: see *R (Williams) v Merseyside Police Authority* [2011] EWHC 1119 (Admin).

5.15. The same logic applies to a former officer who suffered from another serious medical condition (not duty related) which would have led to him having to give up police service even if he had not suffered the duty injury. In such a case, it could be argued that he would not have had the earning capacity of a police officer at the date of the assessment, irrespective of suffering the duty injury, and thus his loss of earning capacity as a result of the duty injury cannot be assessed by reference to a police salary.

[4] This is slightly complicated by the fact that police disciplinary proceedings can be continued after the officer has left the service. In theory, a PPA who discontinued those proceedings could still argue that the officer would have been dismissed if they had continued.

5.16. Equally, as Supperstone J accepted in the above quotation from *Simpson,* the pay that the officer earned from his police work may well not be properly reflective of his real "earning capacity" at the date of the assessment, and it is certainly not limited to his "pensionable" pay in his former role. This can arise for a number of reasons.

a) First, if the officer routinely undertook overtime or received any other payments that were not pensionable, there does not appear to be any logical reason why these should not be included in the assessment of his overall uninjured earning capacity. These were, after all, "*earnings*" for the officer which resulted in regular money going into his bank account. The limitations in the Guidance which suggest earnings should be restricted to pensionable pay propose a restriction which is not contained in the wording of the Regulations and may be incorrect: see *R (Simpson) v Police Medical Appeal Board & Ors* [2012] EWHC 808 (Admin) for an example of where the Court has overturned Guidance which departed from the wording of the Regulations.

b) Secondly, if the officer had real prospects of promotion (but for the duty injury), the salary that he would have earned has to include the possible increase due to this anticipated promotion. No reason is set out in the Guidance to explain why that increase in potential earnings should not be factored into the calculations. Whether it should be included in any individual assessment depends, of course, on the particular factual situation for that former officer. However someone who was on a clear course for promotion may be able to argue that his earning capacity should be increased to reflect his potential promotion. An officer who had passed or was due to take exams for a promotion or was in the process of being considered for a promotion can legitimately ask for that potential increase in his wages to be taken into consideration by the SMP in fixing the uninjured earning capacity. If the evidence does not support a clear path to promotion, it is unlikely to lead to an SMP concluding that the former officer's earning capacity should include an element for potential promotion;

c) Thirdly, any increase in police earnings since retirement is relevant because the assessment involves a consideration of the former officer's earning capacity as a police officer as at the date of assessment, not the date when the officer retired. As Garnham J noted in *R (Fisher) v The Chief Constable of Northumbria & Anor* [2017] EWHC 455 (Admin) at §42, when considering uninjured earning capacity:

> "The task for the Board is to assess what the pensioner would have been capable of earning if he had not suffered the injury in question. Since all the claimants appearing before the Board previously worked as police officers, and since the precondition for a claim to an injury award is the fact that the Claimant suffered an injury on duty, the previous police earnings must, it seems to me, at least feature in the Board's analysis"

5.17. However, a police salary will not invariably be appropriate as the Judge noted in the following paragraph in that case:

> "It may well be that there is evidence to suggest, in a particular case, that police earnings do not fairly represent the pensioner's current earning capacity if he had not suffered the injury on duty under consideration. The pensioner may have suffered other injuries, or may have acquired other skills, or lost skills he previously displayed, so that his earning capacity, had he not suffered the duty injury, would not fairly be represented by earnings in the police. But absent circumstances such as that, what the pensioner previously earned in the police must at least be a relevant consideration in determining his uninjured earning capacity"

5.18. Thus, for example, if the police officer was also a qualified commercial pilot and could have worked as a commercial pilot (whether he was planning to do so or not) but cannot now do so as a result of his duty injury, the above dictum from Garnham J suggests that his uninjured earning capacity should be that of a commercial pilot and not be limited to a police salary. In *Anton* Ouseley J said:

> "The task, in my judgment, in assessing earning capacity is to assess what the interested party is capable of doing and thus capable of earning. It is not a labour market assessment, or an assessment of whether somebody would actually pay him to do what he is capable of doing, whether or not in competition with other workers"

5.19. That would suggest that the Chief Constable can put forward any job that the former officer could theoretically undertake, regardless of the likelihood of the officer securing that job, and ask the SMP or the PMAB to use that job to work out the officer's actual earning capacity. That would mean that the SMP or the PMAB were adopting a view of "earning capacity" that was theoretical rather than looking at the jobs that the officer was likely to be able to secure. In contrast, a more pragmatic approach was taken by the Court of Appeal in *Metropolitan Police Authority v Laws & Anor* [2010] EWCA Civ 1099[5] where Laws LJ discounted a possible job for the claimant where he said jobs should only be taken into account if there were:

> ".. concrete results in terms of actual job prospects"

5.20. The "*concrete prospects*" test was rejected by Garnham J in *Fisher* where one of the points was whether, in assessing the injured earnings capacity, the PMAB acted wrongly in taking into account jobs in other parts of the country where wages were significantly higher. Mr Fisher complained that this was unrealistic as he lived in Morpeth and so any jobs which were used as comparators should be limited to those within "within a reasonable commute of his home in Morpeth". That submission was rejected by the Judge. The Judge said:

> "The concept of "earning capacity" in the regulations imports no element of earning prospects and warrants no allowance for market conditions"

5.21. In reaching this conclusion, Garnham J rejected the argument that the reference in *R (Metropolitan Police Authority) v Laws* [2010] EWCA Civ 1099 to a change in the former officer's qualifications did not affect her earning capacity unless it had "*concrete results in terms of actual job prospects"* did not mean that, in assessing earning capacity, a former officer had to show that he or she had an actual prospect of securing a job before it could be a comparator.

[5] See http://www.bailii.org/ew/cases/EWCA/Civ/2010/1099.html

5.22. However, assuming the same approach is taken for both the injured and uninjured earning capacity, this open ended approach appears problematic for a series of reasons. First, a person does not have the "capacity" to undertake a job unless the person has (at the very least) the entry qualifications for the job. But some high paying jobs have no formal entry qualifications and depend on a balance of talent, connections and good fortune. Anyone can apply to be a professional footballer, a newsreader or a fashion model and thus, at least in theory, achieve the high earnings in such roles. The argument could be made that, at least in theory, these roles are open to anyone. But a police officer cannot sensibly argue that, despite working as a traffic patrol officer, he could have been a television newsreader earning £200,000 per year. The reason why that argument is plainly wrong is that the former officer could not be said to have had any real prospect of getting that job, even though it required no formal qualifications. Perhaps more relevantly, many former police officers work in various forms of "security" in dangerous parts of the world and secure very high earnings as a result. If the only entry qualification for working as, for example, a security guard in Iraq is a background as a police officer and the assessment of earning capacity contains no element of "*earning prospects and warrants no allowance for market conditions*", it seems hard to understand why every former police officer could not argue that he has an "earning capacity" of say £150,000 per year by taking up such a security role, particularly as those are roles that are more than theoretically open to fit former officers.

5.23. The observations set out above from Garnham J in *Fisher* were *obiter dicta*[6]. It is suggested that it would probably be better for everyone involved in the task of assessing the degree of disablement, and thus calculating both the injured and uninjured earning capacity, to limit the comparator jobs to ones where the former officer (a) has the relevant qualifications and (b) where the former officer has some real prospect of being able to secure the job (including being able to afford to take the job up without incurred substantial additional costs). That does not mean that it must

[6] A judge's expression of opinion uttered in court or in a written judgement, but not essential to the decision and therefore not to be treated as legally binding or establishing a precedent.

be established that the former officer would have a better than 50% chance of securing the proposed job, but the process should discount jobs where his chances of appointment are fanciful or it is wholly impractical for the former officer to apply for such roles. Fanciful or impractical jobs should be ignored in determining both the injured and uninjured earning capacity.

5.24. When calculating the uninjured earning capacity, the SMP should ask himself what the earning capacity of the former officer would have been at the date of the assessment if the former officer had not developed the duty injury. Equally, in assessing the injured earning capacity, the SMP should assess the present earning capacity of the former officer. Neither exercise involves looking back to assess the earning capacity of the officer on an earlier date: see *R (McGinley) v Schilling* [2005] ICR 1282.

5.25. The present earning capacity of the officer will include any increased earning capacity due to the former officer's acquisition of new skills since leaving police service. The proper approach was shown by Laws LJ in *Laws* at §27 as follows:

> "…. Regulation 7(5)[7] … allow[s] for the obvious possibility that the pensioner's earning capacity may vary from time to time by force of external factors (and of course one pensioner's earning capacity will differ from another's). Objectively, the extent to which a pensioner remains disabled from work by reason of a duty injury must be capable of being affected by the acquisition of new skills. The question under 7(5) then is, what is the impact of the duty injury on the pensioner's earning capacity as the SMP/Board find it on the facts before them. I have some sympathy with the view, forcefully urged by Mr Nugee, that if matters such as his client's law degree were taken into account, there would be a "disincentive to acquiring new skills" (skeleton argument paragraph 7.3). But the regime is designed to meet objective need; and Burton J in *Turner* was surely right to observe at paragraph 23 that "[b]y virtue of Regulation 7(5) that would include a scenario in which the degree of the pensioner's disablement had altered by virtue of his earning capacity improving"

[7] This provides "Where it is necessary to determine the degree of a person's disablement, it shall be determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a member of a police force".

5.26. This approach may, of course, act as disincentive to a former officer to acquiring new skills as any acquisition of new skills which could lead to increased job prospects may result in a reduction in their injury pension even if the former officer has not, in fact, acquired a better job based on his new skills. Hence, by way of example, a former officer who acquires an HGV licence or IT skills may find that his earning capacity now reflects the earning capacity of an HGV driver or an IT professional. There is no requirement on former officers to make the most of their working lives outside the police service and an officer cannot have his pension reduced by failing to take advantage of opportunities to acquire new skills, but the approach in *Laws* on the facts suggests that there have to be real, concrete job prospects from the newly acquired skills before they become relevant to an assessment process.

Calculating the degree of disablement and causation issues.

5.27. Once the SMP has identified suitable jobs which can lead to an assessment of both the injured and uninjured earning capacity, a comparison should be made between the current injured and uninjured earning capacity, expressed as a percentage that the former officer's earning capacity has been reduced as a result of the duty injury. The calculation of degree of disablement can give rise to complex questions of causation and apportionment.

5.28. Causation is straightforward where the officer has suffered a single "duty injury[8]" which leads to his permanent disablement and thus gives rise to the right to an injury pension. The percentage degree of disablement arises from a simple comparison of the injured and uninjured earning capacity. However, there are many cases where the medical cause of the officer's permanent disablement is far more complex.

Regulation 8 and a "substantial contribution" of the officer's disablement.

5.29. There are 2 different ways in which causation issues can be relevant for police injury pensions. First, causation issues can be relevant to whether an officer is awarded an

[8] A "duty injury" means an injury which (a) leads to the officer being permanently disabled from being able to perform the duties of a police officer or being permanently unfit to do so, and (b) was an injury was the result of the execution of the officer's duties.

injury pension in the first place. Secondly, causation can be relevant to the level of pension payable to the officer[9]. This is the distinction between, on the one hand, whether under a duty injury caused or substantially contributed to permanent disablement -- which is the causal, or entitlement question arising under Regulation 8 PIBR, and, on the other hand, the degree of disablement which was relevant to the calculation of the quantum of gratuity and pension to be paid to those entitled to an injury award, which was the question under Regulation 30(2)(d) PIBR: see *R (South Wales Police Authority) v Morgan and Lewis-Davidson* [2003] EWHC 2274 (Admin).

5.30. The primary causation provisions for the award of a pension are in Regulation 8 PIBR which provides:

> "For the purposes of these Regulations disablement or death or treatment at a hospital shall be deemed to be the result of an injury if the injury has caused or substantially contributed to the disablement or death or the condition for which treatment is being received"

5.31. This provision means that any "injury" (as that term is widely defined) suffered by a serving police officer which substantially contributes to his subsequent permanent disablement will be deemed to have caused the disablement even if there were other concurrent causes. There is an unresolved question as to precisely what is meant by "*substantial*" in Regulation 8. If a duty injury was one cause amongst 2 or 3 equal causes of the former officer's disablement, then the contribution of the duty injury to the overall disablement would clearly be "*substantial*" and thus satisfy the test in Regulation 8. However, if the duty injury was only a 10% cause (or lower) there may be a question as to whether the contribution of the duty injury was sufficient to surmount the "*substantial*" hurdle and thus satisfy the requirements of Regulation 8.

[9] This distinction was noted by Stanley Burnton J in R (South Wales Police Authority) v Morgan and Lewis-Davidson [2003] EWHC 2274 (Admin) who, using the 1987 Regulations, identified "*the distinction between, on the one hand, whether under A13 a duty injury caused or substantially contributed to permanent disablement -- which was the causal, or entitlement question arising under H2(2)(c) -- and, on the other hand, the degree of disablement which was relevant to the calculation of the quantum of gratuity and pension to be paid to those entitled to an injury award, which was the question under H2(2)(d)".*

5.32. Some guidance can be gained from the definition of this term in relation to causation from the Equality Act 2010 which is concerned with similar issues. Section 212 of the 2010 Act provides:

> ""substantial" means more than minor or trivial"

5.33. If that approach was taken, any cause of the officer's disablement which was more than minor or trivial would appear to surmount the "*substantial*" hurdle and thus satisfy the requirements of Regulation 8.

5.34. However, it is not clear from the present version of the Guidance that this is the right approach. The Guidance provides as follows at paragraph 12 of Section 4:

> **"Substantially contributed to.**
>
> 12. The Regulations do not interpret *substantially contributed to* and we are not aware of any interpretation given by the courts. It is suggested that *substantial* does not have to mean predominant. Whether the injury has or is not made a substantial contribution to permanent disablement is a medical decision"

5.35. The Guidance thus says what the word substantial does <u>not</u> mean – namely predominant. But it does not explain what the term substantial does mean. It may be significant that the previous version of the Guidance was far explicit in explaining what the word substantial meant. That version of the Guidance provided:

> "*substantial* means more than marginal but does not have to mean predominant."

5.36. It appears that the present version of the Guidance has unhelpfully had the words "*more than marginal*" removed. One interpretation of that is that, by its silence, it suggests that "*more than marginal*" set the Regulation 8 bar at too low a level. However, the meaning of statutory provisions cannot be ultimately defined by non-statutory Guidance (since that Guidance may be legally accurate or inaccurate). The former Guidance may remain an accurate interpretation of the meaning of Regulation

8. If that is right, it may well be no practical difference between a cause which is "*more than marginal*" and a cause which is, as per the Equality Act 20210, "*more than minor or trivial*". Although the point is not specifically addressed, the Judge in the *South Wales Police Authority* case appears to have accepted that the then version of the Guidance properly identified the approach the SMP should take, namely that a duty injury should be treated as a substantial cause of the officer's disablement if it the duty injury made a more than marginal contribution to the overall disablement. That accords with the approach under the Equality Act 2010, the effect of which was explained in *Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591 where Langstaff J said (of causation under the Equality Act 2010):

> "unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial"

5.37. It seems sensible for the same approach to be taken in police injury pension cases, namely unless a duty related cause of the injury can be classified as being "*more than marginal*", which should have the same meaning as "*more than minor or trivial"* it is required to be treated as a substantial cause and thus the execution of the officer's duties will be deemed to have caused his disablement.

The approach to assessing the degree of disablement where the former officer suffers a disablement is caused by multiple injuries.

5.38. Where the disablement suffered by a former officer has multiple causes, the degree of disablement is fixed by reference to the consequences on the earning capacity of the officer caused by the duty injury alone. Other factors have to be discounted. That analysis gives rise to the following issues in relation to causation:

a) An officer may become permanently disabled[10] as a result of multiple medical conditions, some of which may be duty related and others may not be duty injuries (A "**multiple injuries**" case);

[10] Or, if the officer is a member of the 2015 Scheme, may become permanently unfit. The same approaches apply whether the case is under the 2015 scheme or the 1987/2006 schemes.

b) The officer may suffer from a single physical or psychological medical condition which can be labelled as an "injury" and has led to his permanent disablement (such as a bad back or a psychiatric condition) but there may be more than one cause of that single injury, where one or more of the causes may be duty injuries and others may not be duty injuries (A "**single injury with multiple causes**" case); and

c) An injury arising from incident which the officer experienced whilst on duty which aggravated an existing medical condition or injury (which may have been previously symptomatic or asymptomatic) and where the injury led to the officer being permanently disabled. In these circumstances, the officer was not permanently disabled by the condition prior to the incident but became permanently disabled following the duty incident. Thus the duty incident has led to the officer becoming permanently disabled as a result of the combined effects of the duty incident acting on the underlying medical condition. The duty incident may thus have aggravated and/or accelerated the consequences for the officer of the existing underlying condition (an "**aggravation or acceleration**" case).

5.39. The issue as to how a medical authority should approach other causation issues has been examined a series of cases. In *R (South Wales Police Authority) v Medical Referee & Anor* [2003] EWHC 3115 (Admin)[11] ("***Crocker***") the former officer, PC Crocker, was suffering with a schizoaffective psychosis which meant he was permanently disabled from performing the ordinary duties of a member of the police force. The stress that PC Crocker suffered at work as a police officer was held to be a substantial contributory factor in the development of his disablement. There were, however, a series of other causes located in his private life.

The correct approach in a multiple injuries case.

[11] See http://www.bailii.org/ew/cases/EWHC/Admin/2003/3115.html

5.40. Where a former officer has 2 or more independent injuries, each of would have separately resulted in a loss of earning capacity for the disabled officer, in *Crocker* Ouseley J considered when assessing the officer's degree of disablement, this had to be based on the degree of loss of earning capacity caused by the duty injury alone. That meant the SMP should carry out an apportionment exercise, with the degree of disablement being that part of the former officer's overall loss of earning capacity which was attributable to the duty injury.

5.41. Hence if the pensioner's present loss of earning capacity can be attributed to 3 conditions, 2 of which are duty related and 1 of which is non-duty related and all have an equal contribution to his loss of earning capacity, the overall loss of earning capacity should be apportioned between the 3 causes. That would lead to his degree of disablement being 66% of his overall loss of earning capacity as compared to his pre-injury situation.

The correct approach where the former officer suffers a single injury with multiple causes.

5.42. It is different where an officer suffers from a single injury which has multiple causes (only one of which is duty related), the Judge decided a different approach is required. In *Crocker* Ouseley J said at §54 and §55:

> "54. The position may be simple enough at least conceptually, where there are two separate causes of the loss of earning capacity, each making a contribution to the total loss. That is clearly the situation envisaged in the Home Office guidance. The position is more complex where the total loss is attributable to the effect of a duty injury on an underlying condition, which may or may not be an injury within the definition in the Regulations, and which by itself may or may not have contributed to a separate loss of earning capacity. An officer might suffer from a condition which would not affect him or his earning capacity until aggravated by a duty injury. These may be circumstances, for example, in which an officer in better physical shape would have avoided any injury or loss of earning capacity.
>
> 55. I do not consider that the question of apportionment should be answered by trying to attribute a share of the loss of earning capacity to any underlying condition which, on its own, had not, or did not, cause a loss of earning capacity. The loss

should be attributed wholly to the duty injury which, albeit because of that underlying condition, has directly caused the loss of earning capacity."

5.43. It follows that, where an officer suffers a single injury which has more than one cause, the injury is nonetheless a duty injury for the purposes of the Regulations and the whole loss of earning capacity arising from the injury should be reflected in the degree of disablement. Thus, in *Kellam,* the officer had a single psychological injury which resulted from multiple causes, only some of which were duty related. That did not lead to any reduction in his degree of disablement due to apportionment between the different causes.

The correct approach where the duty injury aggravates or accelerates an underlying (non-duty related) condition.

5.44. The right approach where a duty injury aggravates an underlying condition which is not duty related, as highlighted by Ouseley J in the *South Wales* case, has also vexed the courts. In *Jennings v Humberside Police* [2002] EWHC 3064 (Admin) Wyn Williams J decided that, in an "*acceleration*" case, the injury from the accident should not be held to have caused the disablement. He said that such an injury did not cause or substantially or contribute to a disablement which would have happened anyway and hence no award should be made. The acceleration in *Jennings* was between 18 months and 2 years. However, that decision was not followed by the Court of Appeal in a fireman's case, *R (London Fire and Emergency Planning Authority) v Board of Medical Referees* [2008] EWCA Civ 1515. In that case Tuckey LJ said:

> "If the injury is trivial it will be open to a Board to conclude – as the judge did in *Jennings* – that the necessary causal link between the injury and the infirmity has not been made out. Likewise, if, for example, the affected joint had begun to show signs of arthritis before the qualifying injury occurred. On the other hand, it does not follow that, because the injury has merely accelerated the onset of symptoms a casual link cannot be made out. It is common ground that it will be made out in a case where the condition has been aggravated by the injury, but there is not, in my judgment, any bright line between cases of acceleration and cases of aggravation"

5.45. This problem next came before the courts twice in the case of Mr Walther. The history of his case is explained as follows:

> "3. … . In 1995, he was injured whilst attempting to restrain a prisoner. When he returned to work in August 1995 he was involved in a significant road traffic accident whilst on duty, and was off work with low back pain for several months, returning to full duties in July 1996.
>
> 4. In September 2001, the Claimant reported renewed back pain and was treated by a physiotherapist. An MRI scan in November 2001 showed degenerative disc disease in the lumbar region, as well as mild facet joint disease. In March 2003 he had an injury to his back during a training session but the injury resolved itself. A further MRI scan of early July 2004 reported "degenerative disc changes of the L4/5 and L5/S1 discs" and prominent disc bulges at T12/L1, L4/5 and L5/S1. However at this point the Claimant was able to return to full operational duties"

5.46. The reference to an injury during "training session" occurred when he was undertaking mandatory "safety training" a fellow officer weighing some 15 stone jumped on him. As a result PC Walther suffered immediate and continuing pain to his back. The SMP said the injury was *'the major contributor to the ongoing pain and disability*[12]*'*. However, the doctor observed that "*his problems are long standing resulting from progressive degeneration and that his condition was merely accelerated by the event of 2006 (i.e. the training incident)*". Thus, the evidence was that PC Walther may (or even probably would) have become disabled in any event at some undefined date in the future due to an underlying injury but the date of his disablement was brought forward by a duty injury. PC Walther's perspective was that he suffered "lost years" when, but for the duty injury, he would have earned a police salary. In contrast the Police Authority was, in effect, saying that his disablement was caused by his underlying condition and that no injury pension should be payable for a disablement that was caused by a medical condition that was not a duty related injury.

[12] See §6 of the judgment.

5.47. The first attempt to answer this problem was given by Irwin J[13] in *R (Walther) v The Police Medical Appeal Board & Anor* [2010] EWHC 3009 (Admin) (“***Walther I***”) who quashed a decision of the SMP based on the *Jennings* approach, namely that an acceleration of an underlying medical condition could not give rise to causation[14]. The Judge said at §42:

> “A short acceleration of the onset of a permanent disability is unlikely to be held to be a "substantial" contribution to that disability. Acceleration to any degree is some contribution, but not likely to be regarded as substantial. The opposite applies, it seems to me. A significant acceleration - taking the extreme case, an acceleration of a decade or more - clearly would be a significant contribution to a permanent disability. Where the dividing line comes must be a matter of fact in each case. In my judgment such an approach is consistent with the language of the Regulation and with common sense”

5.48. The case went back to the SMP who refused the former officer an injury pension, but that decision was reversed by the PMAB. The Police Authority then challenged the decision of the PMAB and the judicial review case came before Collins J in *Commissioner of Police of the Metropolis v The Police Medical Appeal Board* [2013] EWHC 1203 (Admin)[15] (“***Walther II***”). In *Walther II,* Collins J, with his usual precise and forensic focus, expressed some problems with the approach taken by Irwin J in *Walther I* saying at §16:

> “Since aggravation would, as apparently was agreed by counsel in that case, always justify an award but acceleration might or might not, the distinction between the two is of some importance. It is said there is no bright line, but aggravation would normally be appropriate to describe the position where the injury produced symptoms which would not otherwise have developed”

5.49. Collins J didn’t accept the correctness of the approach in *Walther I* or that it was right to go back to the *Jennings* approach or even to apply apportionment at the initial stage. Instead the Judge highlighted the importance of Regulation 7 saying at §20:

[13] Now Lord Justice Irwin.
[14] That incorrect approach was based on a fire service case,
[15] See http://www.bailii.org/ew/cases/EWHC/Admin/2013/1203.html

"Regulation 7(1) is in my judgment of fundamental importance in this regard. As will be recalled, it reads, so far as material:-

> "… a reference in these Regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the time when the question arises for decision and to that disablement being at that time permanent."

The only relevant time is when the 'question arises for decision' which is when the police authority refers the questions to the SMP as required by Regulation 30(2). If at that time there is a disablement which is permanent and if the injury sustained caused or substantially contributed to that disablement at that time, the right to receive an injury award arises"

5.50. The Judge thus went back to the language of the Regulations and focused on Regulation 8, saying at §28:

> "The true question is indeed whether at the relevant time the injury has substantially contributed to the permanent disability. Whether it has will be a question of fact which is likely to turn in most cases on the seriousness of the injury and its effects. Only if there will be no loss of earning capacity resulting from the injury when the officer is medically retired will it be likely to be the case that there was no substantial contribution"

5.51. The approach taken by Collins J seems to be both sensible and to follow the precise wording of the Regulations to a greater extent than the approaches in *Walther I* or *Jennings*. Thus Mr Walther was right to have got his injury pension and so should other police officers where there is an acceleration case or an aggravation case which takes the case beyond the date of assessment. However, the Judge highlighted the importance of the review provisions under Regulation 37. He said:

> "The matter can be reviewed pursuant to Regulation 37 and a suitable interval for such review can be determined by the police authority in the light of the forecast given of the degree of acceleration"

5.52. Hence if, 5 years later, the SMP were to conclude that PC Walther's duty injury had no continuing effect (or a lesser effect) because he would have had the same level of disablement but for the duty event, then he has no (or a reduced) continuing disablement as a result of the duty injury. That may mean his pension will be reduced to Band 1. Nonetheless, as this is a pension for life, once awarded it will never be totally removed.