

ST. JOHN'S COLLOQUIUM

JUNE 27-29, 2016

Actuaries working with the legal
profession – expert witness in personal
injury cases

Chris Daykin

chris@daykinactuary.co.uk



Canadian
Institute of
Actuaries



Institut
canadien
des actuaires



Typical process – 1

- Claimant suffers injury – and as a result
 - physical and/or mental damage
 - loss of earnings
 - loss of pension
 - costs of treatment and care
 - costs of modifying accommodation/transport
 - etc.
- Solicitor/advocate appointed to pursue claimant's case and obtain compensation for losses and costs (often referred to as 'heads of damage')

Typical process – 2

- Defendant may be
 - insurance company
 - medical defence union
 - hospital or national health service
 - employer (public or private)
- Solicitor/advocate appointed to defend position of defendant and settle the case with minimum payments to the plaintiff

Types of claim

- From an insurance company perspective this might be
 - medical malpractice
 - employer's liability
 - travel
 - motor
 - household
- Claims will usually be settled with a lump sum (or several)
- Some jurisdictions encourage (or the Courts can impose) Periodical Payment Orders (structured settlements)
 - with a PPO at least a part of the claim will be settled on a cash-flow basis with a continuing series of payments

Expert witnesses

- Either side may call expert witnesses
 - usually they are appointed one to each side
- Typically there may be a number of experts such as
 - physicians
 - surgeons
 - actuaries
 - forensic accountants
 - therapists
 - care assessors
 - economists
 - financial advisers

Legal process

- Case presented to the Court by plaintiff/claimant
- Preliminary hearings on process and timing
- Claimant's experts instructed to prepare reports
- Defendant's experts often see claimant's experts reports before preparing their own
- Court may require experts to meet and prepare joint reports
- Parties may then enter into negotiations (could happen earlier)
- If no agreement reached then Court hearing (at first instance)
- Either party may appeal to Court of Appeal
- May ultimately go to Supreme Court

Common Law jurisdictions

- UK – and countries influenced by UK
- Heavily dependent on legal precedents
- Typically little or no detailed prescription in statute law
- Weight of precedent depends on level of Court
- Court of Appeal trumps Court of 1st Instance
- Supreme Court trumps Court of Appeal
- For many small common law jurisdictions, e.g. the Channel Islands, Bermuda, St Lucia, Antigua, Trinidad, etc the Privy Council in London acts as Supreme Court

Some important precedents

- *Livingstone v Rawyards Coal Co* (1879-80) L.R. 5 App. Cas. 25 HL
 - common law principle of full compensation for losses where liability for damages is determined
- *Wells v Wells* [1999] 1 A.C. 345 HL
 - discount rate determined by reference to yields on UK index-linked government bonds (ILGs)
- *Helmot v Simon* [2012] Privy Council Appeal No 0064 of 2011
 - discount rate for Guernsey based on latest ILG yields
 - adjustment made for difference in RPI expectations
 - allowance made for real earnings growth for costs of care

Actuarial expertise

- appropriate mortality assumptions
- adjustments to mortality for impaired lives, smoking status, etc
- discount rate(s)
- differential price inflation assumptions*
- indexation issues for PPOs
- real earnings growth*
- valuation of future cash flows
- valuation of pension losses

** for these it may be useful also to instruct an economist*

Working with lawyers – 1

- Formal instructions issued
- May require CV, evidence of professional indemnity cover
- Fee quote for report and for follow-up work
- Terms of business
- Instructing lawyers will provide details of case
 - draft schedule of damages
 - relevant reports already received (e.g. medical)
 - specification of particular aspects to be covered
 - timetable for reports, joint reports, trial, etc

Working with lawyers – 2

- Instructing lawyer should not steer expert
- ...but may comment on clarity of arguments
- Experts may confer with other experts
- Normal to provide draft of report to legal team (and experts)
- Expert is required to provide objective opinion to court
- ...but can take a position which is beneficial to claimant or defendant (unless appointed as single independent expert)
- The court will decide whom to believe!
- Jurisdiction may have form of words which experts must use for Declaration and Statement of Truth

Professionalism aspects

- integrity
 - impartiality
- competence
 - communication
- no conflicts of interest
 - no contingent fees
- working with others
 - respect for alternative views
- sufficient knowledge of legal process and precedents
- Code of Conduct and ISAP1 (or equivalent) apply
- IFoA APS X3: The Actuary as an Expert in Legal Proceedings
- consider whether there is a need for peer review (ISAP 1)

Formal report

- Duty owed to the Court, e.g. declaration may state
 - I understand that my duty in providing written reports and giving evidence is to help the Court, and that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me.
- Communication skills critical
 - judges are highly intelligent but not technical experts
- Need to set comments in legal context
- Explain your arguments (tell the story)
- Recognise where there is uncertainty
- Alternatives may be required in some jurisdictions

Case Study 1 – *Wells v Wells* [1999]

- Several cases co-joined in appeal to House of Lords
- Main issue was the discount rate
 - Plaintiffs argued for yields on ILGs (as per Ogden Working Party recommendation)
 - Defendants argued for expected returns on mixed portfolio of equities, bonds and other assets
- Decision came down clearly in favour of ILGs – 3% p.a. real return at the time – but no allowance for real earnings growth
- Investments likely to be made by claimant in practice were not a relevant consideration (nor was impact on defendant)
- ILG yields were taken as a measure of risk-free real returns

Case Study 2 – *Helmot v Simon* [2012]

- Guernsey case appealed to Privy Council
- Main issue was the discount rate
 - Plaintiffs argued for current yields on ILGs (as per *Wells v Wells* brought up to date)
 - Defendants argued for 2.5% p.a. as introduced by statute law in UK in 2001
- Decision came down clearly in favour of plaintiff
 - UK statute law has no relevance to Guernsey
 - *Wells v Wells* is relevant and implies recent ILG yields
 - allowance should be made for systematic RPI differences
 - allowance should be made for real earnings growth

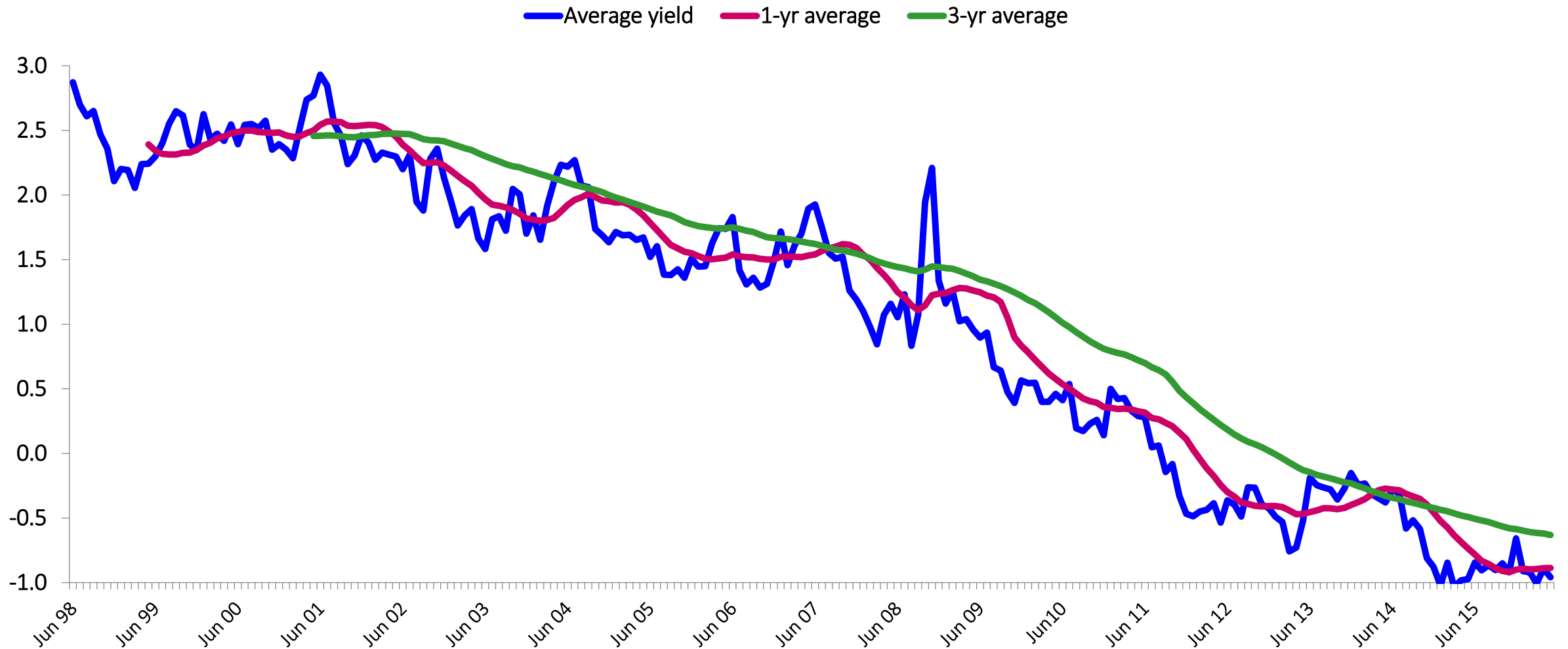
Case Study 2 – *Helmot v Simon* [2012]

- Resulting assumptions were as follows:
 - Use UK mortality (as in Ogden Tables for UK)
 - Discount rate based on ILG yields gave +1.25% p.a.
 - adjusted for Guernsey tax reduced it to +1.0% p.a.
 - Allowance for 0.5% systematic difference in RPI
 - So discount rate relative to prices of +0.5%
 - Real earnings growth of +2.0% p.a.
 - So discount rate relative to earnings of –1.5% p.a.

Case Study 3 – *Thomson v Thomson* [2015]

- Bermuda High Court decision (confirmed by Court of Appeal)
- Court decided
 - to approve *Helmot* approach but with US TIPS yields instead of UK ILGs (since BMD is linked to USD)
 - systematic CPI difference of 0.5% p.a. with US
 - real earnings growth of 1.6% (based on evidence of economist expert)
 - discount rate net of prices of –0.25% p.a.
 - discount rate net of earnings of –1.85% p.a.

Yields on UK ILGs (1998-2016)



Yields on US TIPS (2003-2016)

— Average for month — 1 year moving average — 3 year moving average



Challenges to legal precedents

- Do ILG yields still give a measure of risk-free real return?
- Do US TIPS yields give a useful measure relative to US CPI?
- Would a 'low risk' investor use ILGs/TIPS in practice?
- Difficult or impossible to immunise exactly with ILGs
- Should large compensation cases be settled using PPOs?
 - public sector bodies like PPOs
 - insurance companies are generally wary and prefer the finality of settling with a lump sum
- Are figures like 2%/1.6% appropriate for real earnings growth?

Application to other countries

- Are there any relevant index-linked bonds?
- If not then consider whether to use UK ILGs or US TIPS...
- ...perhaps with an RPI differential as in *Helmot*
- Recent case in Ireland used link to French € ILGs
- Otherwise assume currency change will offset RPI differences
 - based on fundamental principles for large economies
 - unless economist expert argues for a systematic difference
 - e.g. in recent case in Jersey it was argued that Polish RPI would exceed UK RPI by 1% p.a.
- allow for the relevant tax regime
- economist expert should opine on real earnings growth

Ogden Tables

- In the UK the Courts apply the Ogden Tables
- Also used in Guernsey, Jersey, Isle of Man
- Prepared by the Government Actuary's Department
- Based on recent UK projected population mortality (ONS)
 - including allowance for future mortality improvement
- Immediate lifetime annuities, annuities to retirement age and deferred annuities payable from retirement age (50 up to 75)
- Tabulated at interest rates from -2.0% p.a. to $+3.0\%$ p.a.
- Now also Hong Kong and Singapore 'Ogden Tables' exist

Why do expert witness work?

- It serves the public interest
- It is interesting and challenging to work on these cases
- Many claimants are severely affected by their injuries
 - good to be able to help them to get fair compensation
- Hones and tests your communication skills
- Learn to understand how lawyers think
- Preparing joint expert reports presents particular challenges
- Giving evidence in Court requires a new skill-set

Actuaries working with the legal profession – expert witness in personal injury cases

Chris Daykin

chris@daykinactuary.co.uk

Tuesday 28 June 2016