The 2022 Personal Injury and Clinical Negligence Seminar Series

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Well It's Your Fault Too! Developments in Contributory Negligence

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Contributory Negligence ("CN")

- Law Reform (Contributory Negligence) Act 1945
- Only relevant if the Defendant is found to be negligent themselves
- The burden is upon the Defendant to show that the Claimant was in breach of their own duty of care and that this caused at least some of the damage
- If proven then the Court is to balance the respective blameworthiness of the parties and apportion responsibility between them (including an assessment of causative potency) and assess the percentage by which it is just and equitable to reduced the Cs damages.

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Campbell v Advantage Insurance Co. Ltd

- C was a drunk passenger who was in a car with a drunk driver suffering consequent injury when the car crashed.
- Finding at trial was that C should have appreciated the drunkenness of the driver and damages were reduced by 20%.
- This finding and the apportionment was upheld on appeal.

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LJ Dingemans

- "A reasonable, prudent and competent man in Mr Lyum Campbell's position as he assisted Mr Dean Brown to move him from the front passenger seat to the back seat of the Seat Ibiza motor car would have appreciated that Mr Dean Brown had drunk too much to drive safely. The finding of contributory negligence was therefore properly made by the judge. For the same reasons the judge was right to make the assessment of apportionment of responsibility by using an objective standard of the reasonable, prudent and competent adult to judge both Mr Dean Brown and Mr Lyum Campbell's responsibility for the injuries suffered by Mr Lyum Campbell."

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LJ Underhill

- "It is important, however, to note McHugh J's reference to the passenger being, although intoxicated, "sober enough to enter the car voluntarily". A person who while unconscious through drink is put by friends or others into a car which is then driven by an (evidently) drunken driver will not be guilty of contributory negligence, because they have done no voluntary act: to put it another way, they will not have consented to being driven at all. However foolish it may be to drink yourself into a stupor, you cannot be treated as having consented to things that are then done to you while in that state. That is of course an extreme case: a person who is not totally unconscious may nevertheless be in a state where they are incapable of making a decision. The decision where exactly to draw the line between voluntary and involuntary conduct – between consent (even if drunken consent) and no-consent – in a particular case is a fact- sensitive question which must, within reasonable limits, be left to the judge."

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Parker v McClaren

- A more straightforward car vs pedestrian case.
- C suffered brain injury and could give no evidence about the facts of the accident, there were no other witnesses and so the only evidence was from the D and accident reconstruction experts from C and D
- Useful summary of authorities paragraphs 46 to 54
- A reduction of 50% was made, but serves as a reminder of the fact specific nature of CN.

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Gul v McDonagh and MIB

- Another car vs pedestrian case.
- Ds driving was especially egregious, driving at 3 times the safe speed for the road. C, 13 at the time, looked, but misjudged the speed of the car and was struck.
- The finding of 10% contributory negligence was upheld on Appeal

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Long v Elegant Resorts Ltd

- Accident at work where C struck his head on a door frame
- He was moving to assist a fellow employee whom he regarded as in danger
- Liability was admitted by the D, but multiple issues relating to causation and dishonesty
- In that context his hitting his head was momentary inadvertence and there was no finding of CN

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Dalton v Southend University Hospital NHS Trust

- C brought a claim for the delayed diagnosis of cancer caused by the negligence of the D breast clinic
- CN was not pursued at trial by D, but had been pleaded
- It had been contended that C had been instructed to return if the cyst became enlarged and/or painful, but had failed to do so
- However, that did not match Ds factual evidence. Their witness several times stating that she would say that patients should come back if there was "anything new or different".

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Yip J paragraphs 29 to 33

- "I consider that the circumstances in which a finding of contributory negligence can properly be made in a clinical negligence claim will be rare. Certainly, they do not arise here. I imagine that the allegation was a difficult one for Mrs Dalton to read (particularly at a time when the prognosis was less optimistic than it is now). I am not entirely sure that there was a sufficient evidential basis for it to be made. However, I commend Mr Kennedy for not persisting with it and make it clear that I find Mrs Dalton blameless."

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PPX v Aulach

- Suicide (attempted) case
- Following on from *Kirkham, Reeves* and *Corr*
- Claim failed on liability, but Mrs Justice Whipple would have made a reduction of 25%
- Moving away from the black and white of having (or lacking) capacity to a more nuanced approach looking at a sliding scale

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PPX v Aulach paragraph 54

- "... on the evidence I have heard I would have put this Claimant in the middle category suggested by Lord Neuberger at [69], where the answer lies between the two extremes. On the Claimant's version of events, his autonomy was overborne to an extent by his mental health condition which had gone untreated; one of its manifestations was his impulsivity and it was that impulsivity which caused him to attempt to take his own life: that is all part and parcel of his mental illness. On the other hand, his attempted suicide was plainly an autonomous act, by a person with capacity, designed to occur at a time when his ex-wife was outside his unit aware of what was happening (that can be the only sensible explanation for the sequence of events that night). I would have assessed the Claimant's own contribution, if I had to to that point, at 25%."

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Cojanu v Essex Partnership University NHS Trust

- Appeal on quantum, fundamental dishonesty and illegality.
- The C won on all counts
- In relation to CN the Defendant submitted at trial that the C had been offered (and refused) reconstructive surgery.
- This was rejected by the Recorder and was not the subject of appeal.

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Aviva Insurance Limited v SS for Work and Pensions

- Insurer judicial review of the CRU rules
- Multiple challenges, but the "first situation" in the appeal was whether there should be an obligation to repay the entirety of the CRU certificate where there had been a reduction in damages due to CN?
- CA roundly concluded that the overall scheme was fair and that whilst there were some more onerous areas there were equally some in favour of the Insurer (and ultimately C): the 5 year limit for example.

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Summary of Contributory Negligence in Clinical Negligence

- Still only one England and Wales authority that I am aware of where there was a reduction for CN (Pidgeon v Doncaster HA) (although there are authorities in Australia and Canada)
- Exception seems to be suicide cases
- BUT more often seeing the allegation pleaded
- However, as Dalton exemplifies. Will that stand up to scrutiny? Are the facts sufficient and/or appropriate for CN?

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Conclusions Generally

- Still difficult to predict in pedestrian claims
- Still have to think tactically in relation to CRU especially in cases where a large reduction for CN is likely
- Early settlement and/or limiting the heads of loss claimed will reduce the CRU liability and leave more damages for the C
- Always consider – is it more beneficial to agree a % reduction or to leave CN in dispute and perhaps a factor in a global settlement

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Covid: the ongoing impact on procedure and quantum

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Overview

- Increased unemployment.
- Changes in the way we work.
- Too many imponderables?
- Future loss of earnings and how the pandemic may impact on calculating loss.
- How we calculate future loss of earnings.

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Looking at future loss of earnings

- What method do we use to arrive at fair award for future loss of earnings?
- Potter LJ in **Herring v MOD [2003] EWCA Civ 528** at para 23.

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"The career model"

Herring v MOD [2003] EWCA Civ 528

- In any claim for injury to earning capacity based on long-term disability
- the task of the court in assessing a fair figure for future earnings loss can only be effected by forming a view as to the most likely future working career ('the career model') of the claimant had he not been injured.

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Herring v MOD [2003] EWCA Civ 528

- "Where, at the time of the accident, a claimant is in an established job or field of work in which he was likely to have remained but for the accident,
- the working assumption is that he would have done so and the conventional multiplier/multiplicand method of calculation is adopted…"

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Multiplier/Multiplicand

- How do they work?
- A very basic guide.

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The stages

- Aim is to provide a lump sum award.
- Establish the annual loss C has suffered.
- Multiply that annual loss by a multiplier.
- The multiplier is the period of time that C is going to suffer that loss, BUT…

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Discount rate

- The multiplier has to be adjusted.
- To take into account the accelerated receipt.
- C is to receive a lump sum, C could be overcompensated if D were simply to pay the annual loss of earnings multiplied by the rest of C's working life.

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overcompensation

- A 25 woman earns £30,000 net per annum.
- She suffers injuries in a car accident and is unlikely to work again.
- She was planning on working until the age of 65.
- Multiplying £30,000 by the period of loss (40years) is £1,200,000

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- Court assumes that C will invest that lump sum of £1.2 million.
- If C were to invest that sum in a building society or bank C will earn interest on that sum and after the 40 years of investment will end up with a surplus.
- So the lump sum awarded will require an adjustment to the multiplier (the 40 years).

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How do we arrive at the discount rate?

- Wells v Wells [1997] 1 WLR 652
- the House of Lords held that the discount rate should be based on the yields on Index Linked Government Stock.
- Now in England and Wales the discount rate is fixed by the Lord Chancellor.
- Current discount rate minus 0.25% in England and Wales

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Jurisdiction	Rate	Effective Legislation	Review
England & Wales	-0.25% (from 5 August 2019)	Civil Liability Act 2018 – rate determined by the Lord Chancellor and the Damages (Personal Injury) Order 2019[13]	Rate set by Lord Chancellor – reviewed at least every 5 years[14]
Scotland	-0.75% (from 27 September 2019)	Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 – rate determined by the Government Actuary[15]	Rate set by the Government Actuary[16] – reviewed at least every 5 years
Northern Ireland	-1.75% (from 31 May 2021)	The Damages (Personal Injury) Order (Northern Ireland) 2021[17]	n/a

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Ogden tables

- The Ogden table are used to find discount rate applicable.
- Ogden 8 is the current version.
- Useful guidance.
- Sets out tables where discount can be found depending on age at trail, sex of C and predicted retirement age.

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Basic discount rate
First step loss of future earnings

- Tables 3 to 18 provide multipliers where the loss or expense is assumed to begin immediately (i.e. as at the date of trial or assessment) but to continue only until the claimant's retirement age or earlier death.
- They take account of mortality but not other contingencies such as ill health, loss of employment or time away from work.

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Section B of Ogden

- Contingencies other than Mortality.
- Once you have established the appropriate discount rate from tables 3 to 18, you have to then apply a further discount to that multiplier to reflect contingencies other than mortality.
- By way of illustration Ogden 8 section B gives the following example.

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Worked example 7 p.37 Ogden 8

- Example 7 – loss of earnings to a retirement age of 68 using Table 12 at -0.25%
- The claimant is a Welsh female aged 35 at the date of the trial who brings her claim in Cardiff. She has three A levels, but not a degree, and was in employment at the date of the accident at a salary of £25,000 a year net of tax. She was not disabled (as defined in Section B) before the accident.
- As a result of her injuries, she is now disabled and has lost her job but has found part-time employment at a salary of £5,000 a year net of tax.

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- She expected to retire at age 68 pre-accident and still intends to retire at this age, if she can, following her injuries. Her future loss of earnings is assessed as shown below:
- Look up Table 12 for loss of earnings to pension age 68 for females.
- Table 12 shows that, on the basis of a -0.25% rate of return, the multiplier for a female aged 35 is 33.59.

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Table 12 Multipliers for loss of earnings to pension age 68 (females)

Age at date of trial	Multiplier calculated with allowance for projected mortality from the 2018-based population projections and rate of return of:												Age at date of trial
	-2.00%	**-1.75%**	-1.50%	-1.00%	**-0.75%**	-0.50%	**-0.25%**	0.00%	0.50%	1.00%	1.50%	2.00%	2.50%	
32	51.57	**49.03**	46.65	42.34	**40.39**	38.55	**36.83**	35.21	32.26	29.65	27.34	25.28	23.44	32
33	49.56	**47.19**	44.97	40.93	**39.09**	37.37	**35.75**	34.22	31.43	28.95	26.75	24.78	23.02	33
34	47.58	**45.38**	43.31	39.53	**37.81**	36.19	**34.67**	33.23	30.59	28.24	26.15	24.27	22.59	34
35	45.65	**43.60**	41.68	38.15	**36.54**	35.02	**33.59**	32.24	29.75	27.53	25.54	23.75	22.15	35
36	43.76	**41.86**	40.07	36.79	**35.28**	33.86	**32.52**	31.24	28.91	26.81	24.92	23.23	21.69	36

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Contingency for risks other than mortality

- Now take account of risks other than mortality: allowing for the claimant being employed, having achieved A-levels and not being disabled at the date of trial, Table C (Level 2) indicates 33.59 should be multiplied by a reduction factor of 0.86, resulting in a revised multiplier of 28.89.
- The claimant's expected earnings in the absence of the accident are therefore £722,250 (£25,000 x 28.89).

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Table C Loss of earnings to pension age 60: Females – Not disabled

	Employed			Non-employed		
Age at trial	Level 3	Level 2	Level 1	Level 3	Level 2	Level 1
16-19		0.81	0.66		0.78	0.63
20-24	0.88	0.82	0.69	0.86	0.78	0.63
25-29	0.88	0.83	0.72	0.84	0.77	0.64
30-34	0.88	0.84	0.75	0.82	0.77	0.65
35-39	0.88	0.86	0.77	0.81	0.76	0.65
40-44	0.88	0.85	0.79	0.79	0.73	0.62
45-49	0.87	0.84	0.80	0.73	0.65	0.53
50	0.85	0.83	0.80	0.65	0.55	0.44
51	0.84	0.83	0.80	0.62	0.51	0.40
52	0.83	0.83	0.80	0.57	0.46	0.36
53	0.82	0.83	0.81	0.51	0.40	0.32
54	0.82	0.83	0.81	0.45	0.34	0.28

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Worked example:

- Allow for mitigation of loss of earnings in respect of post-injury residual earnings. As before, Table 12 shows that, using a discount rate of -0.25%, the multiplier for a female aged 35 is 33.59.
- Now take account of risks other than mortality: allowing for the claimant being employed, having achieved A-levels and being disabled at the date of trial, Table D (Level 2) would require 33.59 to be multiplied by a reduction factor of 0.44,resulting in a revised multiplier of 14.78.

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Table D Loss of earnings to pension age 60: Females – Disabled

Age at trial	Employed			Non-employed		
	Level 3	Level 2	Level 1	Level 3	Level 2	Level 1
16-19		0.39	0.22		0.34	0.18
20-24	0.60	0.40	0.22	0.55	0.31	0.16
25-29	0.59	0.42	0.23	0.49	0.31	0.16
30-34	0.59	0.42	0.27	0.44	0.31	0.15
35-39	0.59	0.44	0.31	0.41	0.28	0.14
40-44	0.58	0.48	0.34	0.35	0.24	0.13
45-49	0.58	0.51	0.40	0.26	0.19	0.11
50	0.59	0.54	0.45	0.21	0.15	0.10
51	0.59	0.56	0.47	0.19	0.14	0.09
52	0.60	0.58	0.50	0.18	0.12	0.08
53	0.61	0.61	0.53	0.17	0.11	0.07
54	0.62	0.64	0.57	0.15	0.09	0.06

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Worked example

- The amount of mitigation for post-injury earnings is therefore £73,900 (£5,000 x14.78).
- Overall, the claimant's future loss of earnings after allowing for her anticipated residual earnings capacity is £722,250 minus £73,900, giving a total of £648,350.

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The Conventional Approach

- Not the only approach
- Multiplier/Multiplicand
- Blamire
- Smith v Manchester

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Blamire

- Blamire v South Cumbria Health Authority [1992] EWCA Civ 20

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Ward v Allies and Morrison Architects [2012] EWCA Civ 1287

- "A Blamire award is appropriate, where it was not possible to conclude, on a balance of probabilities, what the likely career pattern and earning capacity of the claimant would have been but for the accident and what it was likely to be taking into account the accident's effects."
- "In my view the judge was entitled to reach the conclusion that there were too many imponderables to enable him to hold, on a balance of probabilities, what the likely career pattern and earning capacity of the appellant would have been but for the accident and what it was likely to be as a result of the accident or that she would be likely to suffer a loss of earnings in the future."

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Blamire approach

- Judge able to dispense with the conventional approach and has discretion to award what is considered to be a fair award for future loss taking into account all the circumstances of the case.
- C may be undercompensated. Allows broad discretion to the judge.

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Recent guidance when apply Blamire

- *Khuzan Irani v Oscar Duchon* [2019] EWCA Civ 1846
- The general method of assessment of future loss of earnings is to use a multiplier/multiplicand methodology and the current Ogden Tables and guidance.

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Irani

- This method is to be preferred to the broad-brush approach of awarding an overall lump-sum figure after consideration of all the circumstances as in *Blamire*. It should be adopted unless the court is "*driven to conclude*" that there is "*no real alternative*" to a *Blamire* award.

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Irani

- There will be "*no real alternative*" to a *Blamire* award where:
  - There are "too many imponderables for the judge to be able to make the findings necessary to support the multiplier/multiplicand approach", rather than just "some degree of uncertainty…about the future"; and/or
  - The Claimant is unable to establish, on the balance of probabilities, (i) the but for earnings and/or (ii) the residual earnings;

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Irani

- C serious injuries RTA.
- C sought £1,259,256 at first instance by applying the conventional method.
- C from India, came to UK to finish studies and work; due to the accident C lost his opportunity to apply for indefinite leave to remain in UK.
- Judge at first instance found the evidence before him regards residual earnings did not provide "a proper basis to find the level at which he will be earning in India".

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Blamire and Smith and Manchester

- Judge at first instance applied the broad brush approach of B and SM.
- Awarded £406,688
- Had claimed £1,259,256
- C appealed

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Issues

- But for accident C would have stayed in UK continued in the work and therefore loss of earnings should be conventional.
- The residual earnings of £10K were based on having to return to India. Supported by evidence from a friend with similar qualification. And job advertisements from India provided by C.
- C not xx on his residual earnings evidence.

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Trial judge considered proper approach citing *Bullock v Atlas Ward Structures Ltd [2008]* EWCA Civ 194

All assessments of future loss of earnings in personal injury cases necessarily involve some degree of uncertainty. As far as possible, 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.

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Merely because there are uncertainties about the future does not of itself justify a departure from that well-established method. Judges therefore should be slow to resort to the broad-brush Blamire approach, unless they really have no alternative."

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However, the trial judge found that the evidence before him did not provide a proper basis to find the level at which C would be earning in India. And in the circumstances held that he should make a *Blamire* and *Smith v Manchester* award rather than awarding damages on the basis of a multiplier/multiplicand approach.

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Irani CA para 35

- The assessment of the evidence and the weight to be given to it was a matter for the judge. He was entitled to find that the evidence provided "no proper basis" for determining a residual earnings figure and therefore the multiplicand. On any view, this was a factual conclusion which was open to him and cannot be said to be one which no reasonable judge could have reached.

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- Judge able to dispense with the conventional approach and has discretion to award what is considered to be a fair award for future loss taking into account all the circumstances of the case.
- Allows broad discretion to the judge.
- £400,000 odd as opposed to the claimed £1,200,000 odd.

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Going forward

- Covid impact
- Increased uncertainty
- Increased unemployment
- Changes in the way we work

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Applying Irani

- What has been the impact on the Career Model?
- Are there too many imponderables to project C's probable career earnings but for the accident?
- Are there now too many imponderables to project C's residual earnings?

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Where are we now?
ONS

- September to November 2021 estimates showed a continuing recovery in the labour market, with an increase in the employment rate and a decrease in the unemployment rate compared with the previous three-month period (June to August 2021).

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ONS

- Total hours worked decreased slightly compared with the previous three-month period and are still below pre-coronavirus pandemic levels, despite the loosening of coronavirus (COVID-19) restrictions

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ONS

- The UK employment rate was estimated at 75.5%, 1.1 percentage points lower than before the coronavirus pandemic (December 2019 to February 2020), but 0.2 percentage points higher than the previous three-month period (June to August 2021).

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ONS

- The UK unemployment rate was estimated at 4.1%, 0.1 percentage points higher than before the pandemic, but 0.4 percentage points lower than the previous three-month period.

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- The UK economic inactivity rate was estimated at 21.3%, 1.0 percentage point higher than before the pandemic, and 0.2 percentage points higher than the previous three-month period.

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So getting back to normal

- Or are we?

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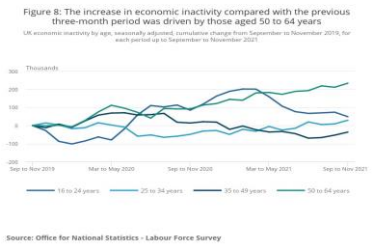
ONS



Source: Office for National Statistics - Labour Force Survey

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Increase in economic inactivity for over 50's

- Has the pandemic accelerated a technological shift in how we work?
- Are the less tech literate at risk?
- Statistics may suggest that to be the case.
- Time will tell.

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More ONS

Impact on bussiness

Businesses within the accommodation and food service activities industry reported the highest percentage of businesses having less than three months of cash reserves (including no cash reserves), at 54% in early January 2022, up from 44% in early December 2021.

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Impact

- Open to argue that career model has changed and that there are now too many imponderables especially so in the 50 to 65 age range and in certain industry sectors.
- Open to argue increased Smith and Manchester award. Difficulties of obtaining future employment.

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Evidence

- D may adduce evidence that post pandemic no longer safe to rely on the career model.
- C unable to prove, on the balance of probabilities, in light of post covid uncertainties, their “but for” or “residual earnings”.

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The End

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Any questions?

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