

Applying and Adjusting the Ogden
Reduction Factors: How it all went wrong
in Billett v MoD

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Rough Guide

- The 'new' Reduction Factors
- Adjustments
- Quality of the RF and the size of the employment gap
- Billett v MOD
- Questions

The loss of future earnings calculation

annual wage x years of life x proportion in employment = pre-injury lump sum

- Predicted annual wage based on likely occupational average
- Remaining years to retirement discounted for death and early receipt
- Further discount for likely periods of non-employment (RF)
- Work-life expectancy
- Mitigation lump sum includes reduced wage and disability-adjusted RF

RF adjustments before Ogden Six

Lord Lloyd in Wells v Wells [1999]] 1 AC 345

"I do not suggest that judges should be a slave to the tables. There may well be special factors in particular cases. But the tables should now be regarded as a starting point rather than a check. A judge should be slow to depart from the relevant actuarial multiplier on impressionistic grounds or by reference to a spread of comparable cases, especially when the multipliers were fixed before actuarial tables were widely used."

Potter LJ in *Herring v Ministry of Defence* [2003] EWCA Civ 528

"In order to justify a substantially higher discount by reason of additional future contingencies, there should in my view be tangible reasons relating to the personality or likely future circumstances of the claimant going beyond the purely speculative."

RFs after Ogden Six

- Magnitude
- Differentiation
- Method of calculation
- Propensity to adjust
 - Ignores Herring
 - Idea that impairment not severe enough
 - Large adjustments
 - No stated (rational) basis
 - Uncertainty
 - Under-compensation

Quality of the Reduction Factors

- Unbiased and efficient (peer reviewed)
- Same results as in other studies (replicated)
- Imprecision - fit for purpose?
 - scheduled damages
 - for groups not individuals
 - omitted variables (severity)
 - limited number of tables



J. R. Statist. Soc. A (2008)
171, Part 4, pp. 763–805

Calculating compensation for loss of future earnings: estimating and using work life expectancy

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[Read before The Royal Statistical Society on Wednesday, January 16th, 2008, the President, Professor D. J. Hand, in the Chair]

Summary. Where personal injury results in displacement and/or continuing disability (or death), damages include an element of compensation for loss of future earnings. This is calculated with reference to the loss of future expected time in gainful employment. We estimate employment risks in the form of reductions to work life expectancies for the UK workforce by using data from the Labour Force Survey with the purpose of improving the accuracy of the calculation of future lifetime earnings. Work life expectancies and reduction factors are modelled within the framework of a multiple-state Markov process, conditional on age, sex, starting employment state, educational attainment and disability.

Keywords: Disability-adjusted multipliers; Dynamic multiple-state Markov model; Ogden tables; Personal injury compensation; Work life expectancy (reduction factor)

Other studies of disability impacts

Richard Berthoud (2006, 2008, 2011)
Health and Disability Survey 1997 and General Household Survey 1972-2004 (40% disadvantage)

Dame Carol Black (2008) (The Black report) The Health of the Working Age Population
Employment rate 75% working age population but only 48% for those with a DDA defined limitation

National Equality Panel (2010) Anatomy of Economic Inequality in Britain 'disabled people face some of the greatest employment disadvantages of any group we examine' p. 117 34% (2006-2008)

Melanie Jones & Victoria Wass (2013) Labour Force Survey (1998-2012) (44% disadvantage)

Disability gaps

| | Source: LFS 2012 and WERS 2011 |
|--|--------------------------------|
| Employment | 38% |
| Non-employment | 136% |
| Wages | 10% |
| Wellbeing at work | 19% |
| Workplaces with zero disabled employees | 44% |
| Workplaces with a written EO policy | 77% (63%) |
| Workplaces with an EO policy supported by an EO practice on disability | 25% |

Why is the disability employment gap so wide and so persistent?

OECD 'shared paradox' of medical advances (including in rehabilitation), employment flexibility, anti-discrimination legislation, growth in service sector employment but gaps are persistent

- Functional impairment makes some work tasks more difficult to achieve (medical model)
- Employers overstate functional impairment (inaccurate beliefs based upon negative stereotypes)
- Employers inflate task sets for jobs (not *bone fide* occupational requirements)
- Organisation and management of work (eg. functional flexibility within teams)

Recap

New RFS are different

- Magnitude and distribution
- New calculation
- Judicial adjustment

Scientific rigor and fitness for purpose

- Unbiased and efficient
- Replicated in other studies
- Guidelines for scheduled damages

Disability employment rate is low and stable

- Medical
- Social
- Psychological
- Organisational

Definition of disability

1. Long-lasting impairment/illness (over a year)
 2. ADL-limiting substantially adversely affects ability to carry out normal day-to-day activities
 3. Adversely affects either the amount or type of work that can be undertaken
- No measure of severity
 - Guidance on threshold for 2.

Billett v MOD



Case details

- Mr Billett was 29 at trial
- Suffers mild NFCI from injury in February 2009
- Joint Medical Employment Standing PULHHEEMS P2 (Medically Fit for Deployment)
- Completed a tour of Afghanistan 2009-10
- Leaves army in 2011 to become HGV driver
- Restricted ability to work outdoors in cold weather
- Requires painkillers, foot powder and specialist footwear

High Court decision

- Disabled under Ogden
- Application of Reduction Factors
- Upward adjustment applied because disability is unusually mild
- Wass adjustment mechanism is inadequate
- Mid-point adjustment 0.73 between non-disabled (0.92) and disabled (0.54) (para 61)
- Compensation for future loss of earnings is around £99k

‘a real divergence of view between Dr Wass and the judiciary about the way the tables should be used’ (para 47)

Court of Appeal decision

- Disabled under Ogden (on basis of Langstaff definition in *Aderemi*) (para. 92)
- But insufficiently disabled to apply the Reduction Factors (para. 94)
- Awards a *Smith v Manchester* £45k (two years of post-injury wage) (para. 100)

‘both she and I by different routes conclude that a direct application of the Ogden tables is not appropriate for assessing loss of future earning capacity in the present case’ (para. 104)

- Deficiencies in the *Smith v Manchester* approach

Moeliker v Reyrolle & co [1977] Browne LJ

The court must start somewhere, and I think the starting point should be the amount which a plaintiff is earning at the time of the trial and an estimate of the length of the rest of his working life...

(a) how great this risk [losing his job] is; and (b) when it may materialise—remembering that he may lose a job and be thrown on the labour market more than once (for example, if he takes a job then finds he cannot manage it because of his disabilities). The next stage is to consider how far he would be handicapped by his disability if he was thrown on the labour market—that is, what would be his chances of getting a job, and an equally well paid job. Again, all sorts of variable factors will, or may, be relevant in particular cases—for example, a plaintiff’s age; his skills; the nature of his disability; whether he is only capable of one type of work, or whether he is, or could become, capable of others; whether he is tied to working in one particular area; the general employment situation in his trade or his area, or both.

Disability definitions

➤ Langstaff J definition ‘more than minor or trivial’
Aderemi v London and South Eastern Railway Ltd
 [2013]

➤ Ogden definition (previous slide)
 Guidance on DDA/Eq Act component

“mobility - for example, unable to travel short journeys as a passenger in a car, unable to walk other than at a slow pace or with jerky movements, difficulty in negotiating stairs, unable to use one or more forms of public transport, unable to go out of doors unaccompanied”



| Target | Sub-group | Prevalence rate | Employment rate |
|-------------------|--|-----------------|-----------------|
| full target | Working age population males (MWAP) | 100 | 79.3 |
| white+black+ blue | MWAP no long-standing impairment (LSI) | 73 | 85.7 |
| red+yellow | MWAP LSI | 27 | 61.8 |
| red | MWAP LSI no limitation | 15 | 82.4 |
| yellow | MWAP LSI + limitation | 12 | 34.9 |

My opinion in Billett

- Mr Billett is not disabled on the Ogden test
- His claim can be brought into the Ogden approach
- Starting point is the non-disabled Reduction Factors
- Adjust these downwards by other characteristics - non-employed, older, less qualified
- Non-employed + (10 years older or low qualification) £45,000