

THE OGDEN TABLES (6TH EDITION)

1. Three parts:
 - a) Background: multipliers in general, discount rate and Ogden 6
 - b) Ogden 6 in practice
 - c) Case law

BACKGROUND

Multipliers

2. Multipliers are used in the calculation of most future financial losses eg loss of earnings, care costs and loss of services. The Multiplier is the figure by which it is appropriate to multiply the multiplicand by, in order to arrive at a lump sum award. The Court makes an assumption about how the award will be invested and how much interest (ie rate of return) will be generated- in order to calculate an assumed annuity.
3. The assumed rate of return at the moment is 2.5%.

Discount rate

4. The 2.5% discount rate; what it is- how did we arrive at it?
5. The aim of the assessment process; to assess the present capital value of future annual loss. The underlying rationale of the multipliers is that the lump sum will be invested, generate a return, and yield income. Over the period of loss in question, the capital sum will gradually reduce so that at the end of the period it is exhausted.
6. How is the appropriate rate of return assessed? Historically Courts adopted a rule of thumb approach and assumed that damages would earn 4.5% as a rate of return. The publication of actuarial tables, falling interest rates and shifts in the value of stocks and shares has led to a re-evaluation of this assumption.
7. In **Well v Wells, Thomas v Brighton HA and Page v Sheerness, [1999] 1AC 435**, a landmark case, the HL held that the multiplier should be calculated on the assumption that the Claimant would invest in index-linked Gvt Securities (ILGS) as opposed to equities and concluded that a discount rate of 3% was appropriate.

- The rationale for this decision derived from the view that a Claimant had no duty to run a risk in his investment and could properly decide to invest his damages in solid, if not entirely risk free government stock
 - Although the Court found it appropriate that a Claimant would invest his award in ILGS, he is under no obligation to do so and can still, should he wish, invest in higher risk shares even though this may result in over compensation. How the money was actually invested was irrelevant.
8. For present purposes 2 points arise from Wells v Wells:
 - Judicial backing was expressly given to the Ogden tables which “should now be regarded as the starting point rather than a check”
 - Judges now have much less room for applying judicial discount to represent other unforeseen contingencies. Lord Lloyd of Berwick recognised that there was no point in the Court attempting to accurately predict the Claimant’s future needs of the resulting sum is then subject to “arbitrary reduction for no better reason than that the prediction might be wrong”.
 9. Under Section 1 of the Damages Act 1996, the Lord Chancellor was given the power to set the appropriate discount rate to be applied by the Court to future pecuniary loss claims in personal injury cases.
 10. On 25 June 2001 the LC exercised his power under Section 1 of the Act and decided to fix the discount rate at 2.5%. (NB under s1(2) Damages Act 1996, the Court can make variation to the discount rate if any party shows that it would be more appropriate in the case in question).

Ogden Tables

11. Between 1973 and 1993, the Law Commission repeatedly recommended the use of actuarial tables in awarding lump sums.
12. The advantages of actuarial approach:
 - Greater accuracy (though not perfect)
 - Greater certainty/consistency
13. The explanatory notes to the 1st edition of the Ogden Tables (Sir Michael Ogden) stated:

“When it comes to the explanatory notes we must make sure that they are readily comprehensible. We must assume the most stupid circuit judge in the country and before him are the two most stupid advocates. All three of them must be able to understand what we are saying”.

14. The 6th edition of the Ogden Tables with explanatory notes was published on 3 May 2007.
15. Facts and Figures: Tables for Calculation of Damages, 2008/2009 sets out the Ogden tables and provides explanatory notes and is a must have.

The 6th edition:

16. The tables show some modest changes as a result of changes in mortality rates but is the treatment of contingencies other than mortality that constitutes the most radical departure from the previous editions.
17. The working party responsible for the production of the tables included representatives from RBS insurance, FOIL and the NHS litigation authority.

Contingencies

18. Multipliers have to be adjusted - ie reduced- to take into account certain contingencies.

Mortality

19. For the most part, the Gvt's actuary department uses mortality rates from the latest population projections (based on data from latest census). The Loss of Earnings Tables (Tables 10-14) factor in the mortality contingency. Unless there is clear evidence to show that an individual is atypical and will enjoy longer or shorter expectation of life, no further increase or deduction is required for mortality alone (para 5 of the Guidance notes)
20. Perhaps the most important change is in the approach to contingencies other than mortality in claims for future loss of earnings.

21. Prior to the 6th edition, regard had to be had to geographical location, type of occupation and levels of economic activity.
22. But, the position has changed with the introduction of the 6th edition. Out goes geographical location, type of occupation and levels of economic activity- in comes employment status, disability status and educational attainment; as at the time of the accident.
23. The reasoning behind the change? Recent research has revealed what factors have most impact on a person's future employment status; these include:
 - whether the person was employed or unemployed at the time of the accident
 - whether or not the person was disabled at the time of the accident
 - Educational attainments at the time of the accident.

Employed

24. Explanatory notes at paragraph 35
 - Employed- those who at the time of the accident are employed, self employed, or on a government training scheme.
 - Not employed- all others, including those temporarily out of work, full time students and unpaid family worker.

Disabled

25. Explanatory notes at paragraphs 35

A person is disabled if all three of the following apply:

- He/she has a progressive illness or an illness which has lasted or is expected to last for over a year and
- He/she satisfies the DDA definition that the impact of the disability substantially limits the person's ability to carry out normal day- to -day activities, and
- Their condition affects either the kind or the amount of paid work they can do.

26. Unless the individual meets all three of the above, he/she is classified as not disabled.

Educational attainment

27. Explanatory notes at paragraph 35

Three levels of educational attainment are recognised:

- D Degree or equivalent or higher
GEA GCSE grades A to C up to A levels or equivalents
O Below GCSE grade C or CSE Grade 1 or no qualifications.

General comments

28. There are 4 tables, Tables A, B, C and D(pp60-61 of the 2008/9 edition of Facts and Figures) and provided as part of this handout.
29. In order to calculate the value of earnings C would have received if the injury had not been suffered, C's employment status and disability status need to be determined as at the date of the accident so that the correct table can be applied.
30. Tables A and C should be used for Claimant's who were NOT disabled at the time of the accident and Tables B and D should be used for those with a pre-existing disability.
31. The very first column provides the age of the C at the date of trial and provides 12 categories of age range from 16-54.
32. In all 4 tables the next three left hand columns are for those who were employed at the time of the accident. The three right hand columns are for those who were unemployed at the time of the accident. There are three columns for each, as each represents a different educational attainment (D, GEA and O).
33. A separate assessment is made for:

- (a) The value of earnings the C would have received if the injury had not been suffered
- (b) The value of the C's earnings (if any) taking account of the injuries sustained.

34. The loss is arrived at by deducting (b) from (a)

35. Significance: will make a Smith and Manchester award otiose in many cases.

Claimants under 16

36. Where C is under 16 at the time of the accident

- Choose the level of educational achievement that the child would have achieved but for the accident
- Assess whether or not the child would have been employed or unemployed
- Use the relevant factor for age 16
- Discount by the appropriate factor from Table 27 (Discounting Factors for Term Certain) from the number of years between age at trial to age 16.

Claimants over 54

37. Table A-D cover factors up to the age of 54 only. For older ages the reduction factors fall towards 1 at retirement age for those who are employed and fall towards 0 for those who are not employed

38. However-according to the notes, for individuals over 54, the likely future course of employment status will be dependent upon individual circumstances

39. Having said all that; see table A2 (nil discount tables at a glance, pp-8-11 of the 2008/9 Facts and Figures) cover Claimant's up to the age of 74.

Different retirement ages

40. Tables A-D assume retirement at age 65 for males and 60 for females. Where the retirement ages are different, it is suggested that this should be ignored and the adjustments and reduction factors be taken from the above tables for C's as at age

of trial with no adjustment ie assume that retirement age is 65 for males and 60 for females.

41. Alternatively see A2: the retirement ages given are 50, 55, 60, 56, 70 and 75 (male and female)

OGDEN 6 IN PRACTICE

1. Choose the table relating to C's sex and the relevant period of loss (eg loss until retirement)
2. Choose the appropriate discount column (currently 2.5%)
3. In that column, find the appropriate figure for C's age at trial; the basic multiplier.

Example 1

C is female aged 35 at the date of trial and intended to retire at 60

- 1) Go to table 8 (multipliers for loss of earnings to pension age 60-females)
- 2) Go to age column; age 35
- 3) Track across to 2.5% column
- 4) Basic loss of earnings multiplier: 18.39

Loss of earnings

4. Adjust basic multiplier to take account of contingencies other than mortality. These contingencies include C's employment status, disability status and educational attainments. The basic multiplier should be multiplied by the appropriate figure in Tables A to D to produce the adjusted table multiplier.
5. Multiply the multiplicand (ie net annual loss) by the adjusted table multiplier.

Example 2

Female aged 35 at trial, intended to retire at 60

Pre-accident: not disabled with A levels

Pre-accident earnings: £25,000 pa net.

Post accident- no residual earning capacity.

- 1) go to table 8 (multipliers for loss of earnings to pension age 60-females)
- 2) go to age column; 35
- 3) Track across to 2.5% column
- 4) Basic loss of earnings multiplier: 18.39
- 5) Apply Table C discount of 0.86
- 6) Adjusted table multiplier $18.39 \times 0.86 = 15.82$
- 7) Loss $\text{£}25,000 \text{ pa} \times 15.82 = \text{£}395,500$

Loss of earnings and residual earning capacity

6. If C has a residual earning capacity, allowance should be made for any post accident vulnerability on the open labour market i.e. *Smith v Manchester*
 - Where appropriate, repeat steps 1-5 replacing the pre-accident employment and disability status with the post accident employment and disability status in step 4 and replacing the net annual loss by the assumed new level of net earnings at step 5. It will only be necessary to reconsider educational attainments if these have changed between the date of the accident and the date of the trial.
 - The results will represent the capitalised value of C's post- accident earnings.
7. Deduct the sum yielded by step 6 from that yielded by step 5 to obtain the net amount of loss of earnings, allowing for residual earning capacity. NB where the above

methodology is used, there will usually be no need for a separate Smith v Manchester award.

Example 3

Female aged 35 at trial

Pre-accident; not disabled with A levels,

Pre-accident earnings £25,000 pa net, retirement age of 65

Post accident earning capacity £5,000 pa net

Post-accident; disabled

- 1) go to table 8 (multipliers for loss of earnings to pension age 60-females
- 2) go to age column; 35
- 3) Track across to 2.5% column
- 4) Basic loss of earnings multiplier:18.39
- 5) Apply Table C discount of 0.86
- 6) Adjusted table multiplier $18.39 \times 0.86 = 15.82$
- 7) Loss $\text{£}25,000 \text{ pa} \times 15.82 = \text{£}395,500$
- 8) Less residual earning capacity of $\text{£}5,000 \text{ pa}$
- 9) Apply Table D discount of 0.48 to basic loss of earnings multiplier of 18.39 ie
 $18.39 \times 0.48 = 8.83$
- 10) $\text{£}5,000 \times 8.83 = \text{£}44,150$
- 11) Loss is $\text{£}395,500 - \text{£}44,150 = \text{£}351,350$

NB Old approach

- 12) Table 8 for multiplier of 18.39 (as above).
- 13) To assess what would have been earned but for accident, discount factor to reflect contingencies other than mortality, here $=0.97$ (ie 0.95 to reflect high economic activity, plus 0.01 for occupation and 0.01 for geographical region)
- 14) But for accident, would have earned $\text{£}25,000 \times 18.39 \times 0.97 = \text{£}445,957.50$
- 15) Residual earning capacity $\text{£}5,000 \times 18.39 \times 0.97 = \text{£}89,191.50$
- 16) Loss is $\text{£}445,957.50 - \text{£}89,191.50 = \text{£}356,766$

Example 3 B

If exactly same scenario is assumed but the Claimant's post accident earnings are assumed to be higher at £15,000, follow stages 1-7 above

- 8) Less residual earning capacity of £15,000 pa
- 9) Apply Table D discount of 0.48 to basic loss of earnings multiplier of 18.39 ie
 $18.39 \times 0.48 = 8.83$
- 10) $£15,000 \times 8.83 = £132,450$
- 11) Loss is $£395,500 - £132,450 = £263,050$

NB Old approach

- 12) Table 8 for multiplier of 18.39 (as above).
- 13) To assess what would have been earned but for accident, discount factor to reflect contingencies other than mortality, here =0.97 (ie 0.95 to reflect high economic activity, plus 0.01 for occupation and 0.01 for geographical region)
- 14) But for accident, would have earned $£25,000 \times 18.39 \times 0.97 = £445,957.50$
- 15) Residual earning capacity $£15,000 \times 18.39 \times 0.97 = £267,574.50$
- 16) Loss is $£445,957.50 - £267,574.50 = £178,383$

Therefore the Claimant is nearly £85,000 better off on the Ogden 6 calculation than under the old method of calculation. (NB although the Claimant might also have been entitled to/awarded a Smith v Manchester lump sum)

Example 4

Male aged 40 at date of trial,
disabled before the accident
intending to retire at age 65,
with 6 O levels,
unemployed before the accident
earning capacity £15,000 pa but for the accident
no residual earning capacity

Old approach

- 1) multiplier/multiplicand approach?
- 2) Or too speculative?0- perhaps Blamire- £20,000-£30,000?

New Approach

- 1) Go to table 9 (multipliers for loss of earnings to pension age 65-males)= basic multiplier= 18.01
- 2) Apply Table B discount of 0.23; $18.01 \times 0.23 = 4.14$
- 3) $£15,000 \times 4.14 = £62,100$

8. Generally, the new approach favours those who are to be treated as disabled but have a residual earning capacity and acts against those who have no residual post accident earning capacity (because discount factors for contingencies other than mortality are generally higher, and sometimes a lot higher than under the 5th edition approach)

Lifetime losses

9. Where a loss will continue for life, follow steps 1-3 to find the appropriate multiplier in the table. NB Where the normal life expectancy is inapplicable use the approach set out at paragraph 20 of the Explanatory notes (page 52)
10. This figure may need adjustment to allow for the particular circumstances of the case
11. Multiply the annual loss or expense by the multiplier as adjusted

Variable Annual Losses

12. In cases where there will be different losses at different periods it may be necessary to split the multiplier.

Example 5

Male aged 25 at the time of trial,

Degree

Pre-accident; employed and not disabled

Post accident; incapable of working

He would have received promotion at age 35 and again at 45 and retired at 65.

- 1) working life = 40 years. The loss of earnings multiplier from table 9, taking account of mortality but not other contingencies is 24.78
- 2) The multiplier for a term certain of 40 years from table 28 is 25.42
- 3) period 1: aged 25-35, (total duration 10 years)
 - multiplier for fixed period of 10 years (table 28) = 8.86
- 4) period 2, aged 35-45, (total duration from 25y is 20 years)
 - multiplier for fixed period of 20 years (table 28) = 15.78
 - $15.78 - 8.86 = 6.92$
 - relevant basic multiplier for 2nd period = 6.92
- 5) period 3; aged 45-65, (total duration from 25y is 40 years)
 - multiplier for fixed period of 40 years is 25.42
 - $25.42 - (8.86 + 6.92) = 9.64$
- 6) Each segmented multiplier can be shown as a % of the 40% term certain multiplier of 25.42
 - Period 1; $8.86 / 25.42 \times 100 = 34.9\%$
 - Period 2; $6.92 / 25.42 \times 100 = 27.2\%$
 - Period 3; $9.64 / 25.42 \times 100 = 37.9\%$
- 7) Apply the above percentage to the loss of earnings multiplier of 24.78
 - Period 1; $34.9\% \text{ of } 24.78 = 8.65$
 - Period 2; $27.2\% \text{ of } 24.78 = 6.74$
 - Period 3; $37.9\% \text{ of } 24.78 = 9.39$
- 8) Now apply the relevant contingency discount factors for contingencies other than mortality using Table A; discount factor = 0.93.
- 9) Therefore the adjusted multipliers for each period are as follows:
 - Period 1; $8.65 \times 0.93 = 8.04$
 - Period 2; $6.74 \times 0.93 = 6.26$
 - Period 3; $9.39 \times 0.93 = 8.73$

Fixed Period and Deferred Losses

13. Where a loss will continue over a fixed period, the appropriate multiplier can be found at Table 28.

14. Where a loss will not commence until some future date, multiply the appropriate multiplier by a discount figure taken from Table 27. NB this does not apply to pension loss which has its own tables.

Practical tips

- Recalculate existing schedules
- Shortcut no 1: Facts and figures, Section A4, (pp18-29), Loss of earnings multipliers adjusted for education, disability and employment status.

Example 6

Female aged 35 at date of trial

Pre-accident; not disabled with A levels

Pre-accident earnings, £25,000 pa net.

Post accident no residual earning capacity

- 1) got to A4 (p19)
- 2) select loss of earnings table, not disabled, employed, good GCSE level of equivalent
- 3) select age in 1st column; 35
- 4) select appropriate retiring age;60
- 5) adjusted multiplier = 15.82

- Shortcut no 2, Sweet and Maxwell's Personal injury Toolkit; check for latest edition

CASE LAW

1 Interpretation on disability

Richmond Adult Community College v McDougall [2008]EWCA Civ 4,

Court of Appeal required to determine by way of statutory interpretation on the construction of paragraph 2(2) of Schedule 1 to the DDA 1995. The Respondent had been suffering from a schizo-affective disorder for a period of at most 8 months and a recurrence was deemed to be unlikely. There was no question therefore of permanent disability or even disability it not have lasted for a period of 1 year.

2 Reduction factor cases

Connor v Bradman and Co Ltd, [2007] EWCA 2789, HHJ Coulson QC sitting as a HC Judge.

- Claimant a 51 year old motor mechanic
- Significant injury to the left knee resulting in residual pain
- Not able to return to work as a mechanic (previous employer Saab with good work history) but was able to resume part time work as a taxi-driver giving him lower net earnings.
- He would require a knee operation within a year of the trial date
- He would be left with a permanent restriction of movement
- Further revision surgery would be required in 10-15 years time
- Claimant would be able to drive a taxi although the evidence was that he would find it difficult to perform certain peripheral tasks such as carrying bags and the like
- The Court determined that the C was disabled within the meaning of the DDA 1995
- Not an appropriate case for Smith or Blamire award. The C was definitely going to suffer a future loss of earnings and there was reasonable clarity as to its essential nature.
- The Ogden tables were therefore the proper starting point to calculate damages

- The judge relied upon Kemp and Kemp paragraph 19-015 in which it is stated that “the relatively low threshold required to be disabled will result in the need for potentially significant adjustment depending on the extent of the Claimant’s disabilities. This will have to be considered on a case by case basis”
- What does this mean!
- In determining the figure for residual earning capacity the judge went on to take a figure at the midpoint of that for a disabled person in the C’s circumstances (0.49) and for a non disabled person (0.82)
- Essentially in doing so the judge neglected to consider that the Claimant was disabled and also unable to carry bags which ought to be part of the function of a taxi driver.

3 Similar approach taken in **Leesmith v Evans [2008] EWHC 134**, Mr Justice Cooke and **Hunter v Ministry of Defence [2007] NIQB 43**

4 **Billy McGhee v Diageo PLc [2008] CSOH 74 (16/05/08)**

Dr Victoria Wass comments:

On a strict Ogden 6 application, the RF would have been 0.24 (disabled, non employed and unqualified). After training it would have been increased to 0.41. The award of £149,000 for future earnings implies an RF of 0.56. This is in the range for those who are disabled, employed and with mid level qualifications. The issue in question is the severity of the Claimant’s disability. If we think of disability in relation to employment then the Claimant’s disability would be more severe in relation to unskilled manual work. Its severity declines to be of lower importance if (i) he successfully retrains in non-manual work and (ii) he finds employment to reverse the effects of his current signal of non employment (and disability). If he was presenting with these two characteristics then the RF would be 0.54.

I think your/our objective would be to get the courts to think in these terms. It is then for the judge to determine the likelihood of (i) and (ii) based on the evidence that he had heard (and I have not).

5 Chantelle Peters v E Midlands Strategic HA and Other [2008] EWHC 778

Dr Victoria Wass comments:

If the Claimant had been non employed at aged 20 years the RF would have been 0.60. The RF awarded by the judge is 0.50. His reasoning was sound. She came from a dysfunctional family with a poor employment history. We know that non employment is concentrated in households and that there are positive inter-generational effects. The 0.50 compares well with the disabled RFs of 0.25 and 0.17. I mention this because if her pre-injury social and intellectual problems had amounted to a disability, it is these RF's that would have applied.

6 Hopkinson v MOD & VT Services Ltd, (2008) EWCH 699

- Claimant was a seaman injured on board the Defendant's ship.
- Liability admitted.
- Consultant surgeon determined that the C would not be able to return to being a merchant seaman.
- C's case that he would have continued to have worked at sea until retirement in 2020
- Alternatively that had he been required to work on land, his earnings would have been of the same order
- The Court varied the non disabled RF multiplier because the Claimant's good work history implied that he would have continued to virtually full time employment until he retired.
- However the multiplicand for earnings was reduced by 10% to reflect the risk of unemployment. The residual earnings multiplicand was also reduced by 50%
- The result was the same as if there had been a straight application of the tables.

7 Conclusion; Apply the appropriate deductions as per the Tables in all schedules; do not build in further discounts. Government actuaries do not accept that judges should apply further discounts. However be cautious when advising; there is no guarantee that Tables A-D will be applied mechanically; judges do adjust the figures to reflect characteristics of certain Claimants. In some complicated cases RF tampering will be justifiable.

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October 2008