

# The Ogden Tables and Claims for Loss of Earnings

Actuarial Calculation or Impressionistic Tinkering?

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## Introduction

- Heads of loss
- Calculation of future loss: lump sum or PPO
- The multiplier/multiplicand method
- Discounting for:
  - Accelerated receipt
  - Mortality
- Ogden Tables 3-14
- s10 Civil Evidence Act 1995 – not yet in force!

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## Discounting for Contingencies

- The historical judicial approach
- The Ogden methodology
  - Educational attainment
  - Whether employed or unemployed
  - Whether disabled or not
- Using Tables A-D – reduction factors

**Table C**  
**Loss of Earnings to Pension Age 60 (Females – Not disabled)**

Age at date of trial	D	Employed GE-A	O	D	Not employed GE-A	O
16-19		0.81	0.64		0.77	0.59
20-24	0.89	0.82	0.68	0.84	0.76	0.60
25-29	0.89	0.84	0.72	0.83	0.75	0.61
30-34	0.89	0.85	0.75	0.81	0.75	0.63
35-39	0.89	0.86	0.78	0.80	0.74	0.63
40-44	0.89	0.86	0.80	0.78	0.72	0.60
45-49	0.87	0.85	0.81	0.72	0.64	0.52
50	0.86	0.84	0.81	0.64	0.55	0.43
51	0.85	0.84	0.81	0.60	0.51	0.40
52	0.84	0.84	0.81	0.56	0.46	0.36
53	0.83	0.83	0.81	0.50	0.41	0.32
54	0.83	0.83	0.82	0.44	0.35	0.27

**Table D**  
**Loss of Earnings to Pension Age 60 (Females – Disabled)**

Age at date of trial	Employed			Not employed		
	D	GE-A	O	D	GE-A	O
16-19		0.43	0.25		0.35	0.19
20-24	0.64	0.44	0.25	0.58	0.33	0.17
25-29	0.63	0.45	0.25	0.50	0.32	0.16
30-34	0.62	0.46	0.30	0.44	0.31	0.15
35-39	0.61	0.48	0.34	0.42	0.28	0.14
40-44	0.60	0.51	0.38	0.38	0.23	0.13
45-49	0.60	0.54	0.42	0.28	0.18	0.11
50	0.60	0.56	0.47	0.23	0.15	0.10
51	0.61	0.58	0.49	0.21	0.14	0.09
52	0.61	0.60	0.51	0.20	0.13	0.08
53	0.62	0.62	0.54	0.18	0.11	0.07
54	0.63	0.66	0.57	0.16	0.09	0.06

## Disability

A person is disabled if all 3 of the following conditions are met:

- i. He has an illness or disability which has/is expected to last for over 1yr or is progressive
- ii. The impact of the disability substantially limits his ability to carry out normal day-to-day activities
- iii. His condition affects either the kind or amount of paid work he can do

- “Substantial” = more than minor or trivial (Equality Act s.212)
- Where an impairment is subject to treatment or correction (e.g. the use of a prosthesis by an amputee), that treatment or correction is to be disregarded in determining whether the impairment has a substantial adverse effect on ability to carry out normal day-to-day activities (Equality Act Sched 1 para 5)
- A person whose progressive condition (e.g. motor neurone disease) is likely to result in a substantial adverse effect on day-to-day activities in the future will be treated as impaired from when his condition first has some adverse effect (Sched 1 para 8)
- See Guidance Notes on DDA 1995 and EA 2010

## Ogden Explanatory Notes paras 31-32

- *In many cases it will be appropriate to increase or reduce the RF to take account of a particular claimant’s disabilities*
- *The Tables are intended as a “ready reckoner” which provides an initial adjustment, but cannot take account of all circumstances, and it may be appropriate to argue for higher or lower adjustments in particular cases*
- *There may still be cases where the Smith v Manchester or Blamire approach remains applicable or otherwise where a precise mathematical approach is inapplicable*

***Conner v Bradman [2007] EWHC 2789  
(HHJ Coulson QC)***

- Male aged 51
- Saab mechanic - £20,327 net
- Would have worked to 65
- Severe injury to knee, with significant instability
- Constant pain when walking, difficulty with stairs, bending, prolonged standing etc – “disabled”
- Would have to give up work at Saab in 12-18mths
- Capable of working as taxi driver - £13,645 net

- Appropriate multiplier to 65 – 11.40
- Table A discount – 0.82
- Table B discount (disabled) if applied – 0.49
- Award if Ogden disabled - £113,934
- Split discount – 0.655
- Judge’s award - £86,114
- Similar figure if awarded annual difference in earnings (£6,682) + 1yr *Smith v Mancs*
- “Impressionistic tinkering”?

*Clarke v Maltby [2010] EWHC 1201*  
*(Owen J)*

- Female aged 45
- Successful commercial solicitor – potential earnings up to £180,000
- Brain injury, with dizziness, mental fatigue, disinhibited temper and cognitive impairment
- Reasonable to change to less onerous work as employed solicitor – residual earnings £40,000 (if increased from 3 to 5 days)

- Owen J concluded that inappropriate to apply Table D discount post-accident, as her degree of disability was fully reflected in difference between lost and residual earnings
- Multiplier to 65 – 15.09
- Table C discount applied to both – 0.87
- Table D discount (disabled) – 0.60
- Award if Ogden disabled – increase by £120,340 (over 5 years' current net salary)

***XYZ v Portsmouth Hospital NHS Trust [2011] EWHC 243 (Spencer J)***

- Male aged 40
- High-flying pharmaceutical market researcher
- Would have worked to 70
- Irreversible kidney damage and nerve damage to leg, with lack of energy, impaired mobility and urinary frequency
- Restricted to part-time research work to age 57.5

- “Borderline decision” whether ‘disabled’!
- Raw multiplier for residual earnings to 57.5 – 13.7
- Table A discount – 0.88
- Table B discount (disabled) – 0.57
- Split discount – 0.73
- Effect – residual earnings M increased from 7.81 to 10.00

*Leesmith v Evans [2008] EWHC 134  
(Cooke J)*

- Male aged 24
- Lighting technician
- Above-knee amputation and fractured right hand
- Reduced earning capacity from £33,000 net to £10,000
- D submitted unjust to adopt disabled factor of 0.54, as reduced earnings fully took account of disability
- Judge only partly agreed – adjusted by 0.6

*Sharma v Noon Products (2011) QBD  
(HHJ Yelton)*

- Male aged 35
- Employed through agency as engineer
- Amputation of right fingertip, with impaired dexterity for fine manual tasks
- Obtained more secure employment as security guard at similar pay
- Was “disabled”, but less so than many
- Adjustment factor raised from 0.4 to 0.6
- “Matter of impression” in all the circumstances



*Higgs v Pickles [2011] PIQR P15*  
*(HHJ Ellis)*

- Male aged 53
- Skilled bricklayer and builder
- Would have worked beyond 65
- Knee fracture and shoulder injury, with on-going pain and laxity, limiting walking and lifting
- Unfit to return to building work
- Re-trains as CAD technician, but unable to find work and <50% prospects of doing so

- Judge refused to apply additional discount to Table A factor (0.80) for pre-accident earnings, as no evidence of increased risk of injury to bricklayers
- Was disabled, although now GE-A
- No special features to justify departure from Table B adjustment factor of 0.15
- Refused to adjust Table B figure to 0.6
- Would involve resort to old-fashioned approach of “feel”

*Johnson v Le Roux Fourie [2011] EWHC 1062 (Owen J)*

- Female aged 49
- Very successful business career
- Would have achieved £800,000pa to age 63
- Negligent cosmetic surgery leading to nerve damage and profound psychological impact
- Confidence and ability to operate in business considerably undermined
- Residual earnings capacity of £40,000

- Judge declined to adjust multiplier for pre-accident earnings, as risk of unemployment negligible and no loss of earnings if sick
- Uncertain prognosis and risks of unemployment already taken into account in residual earnings figure
- Application of the Ogden methodology was “case sensitive”

*Davison v Leitch [2013] EWHC 3092*  
(Andrews J)

- Female aged 36
- Successful career as equity sales trader with “stellar” prospects
- Would have achieved c£200,000pa gross until 2013, then £82,625pa net to retirement at age 55
- Negligent obstetric surgery leading to anal sphincter damage with significant bowel problems and psychological issues
- No longer fit for work on trading floor or crowded office, but might start own interior design business
- Residual earnings capacity of £25,000 gross

- Agreed earnings multiplier to 55 = 14.52
- Judge applied uninjured Table C adjustment of 0.89
- Submission that adjustment should be 0.8 due to higher risk of redundancy in banking sector rejected, given her attractiveness to potential employers
- No justification for departure from Table D figure of 0.42 for residual earnings
- Total loss of earnings = £946,882

***Seers v Creighton & Son [2015] EWHC  
(W Davis J)***

- Male aged 43, who always worked in manual capacity
- Lower back injury through lifting at work as fabricator welder
- Accepted redundancy when back worsened despite operation
- Since changed to part-time work as driver and administrative role with minibus company
- Long-term prognosis was for permanent lower back pain, with impaired sitting, bending and kneeling, and limited to light sedentary employment not involving repetitive lifting or exposure to cold or damp

- J rejected suggestion C had voluntarily accepted redundancy and had failed to mitigate loss
- Accepted C was “disabled”
- Rejected lump sum approach, as a proper assessment could be made on a multiplier/multiplicand basis
- Uninjured earnings £30,868
- Current earnings £7,500, but J found that underestimated his abilities, and was capable of earning £17,000 after further 12mths
- Uninjured multiplier to 67.5 =  $17.65 \times 0.88$
- Residual multiplier =  $17.65 \times 0.39$  (Table B) – would be unfair to reduce factor, given optimistic residual earnings figure

***Billett v MOD [2015] EWCA Civ 773***

- Male aged 29
- Minor non-freezing cold injury to feet as Army L/Cpl, with permanent sensitivity of feet to effects of cold
- Would have left Army in any event to work as HGV driver, where he could largely avoid exposure to cold as in heated cab
- Ability to carry out normal day-to-day activities was affected, as could not work outside in cold
- Employment experts agreed C was disadvantaged on labour market, as would have to avoid jobs outside
- J accepted he was hard-working and capable, but would have more difficulty finding other work if he lost his current job, so longer search for work

- Net annual earnings to 68 = £21,442, unaffected by injury
- Raw M to 68 = 24.29. RF = 0.92 (Table A); 0.54 (Table C)
- J awarded £99,062, using *Conner v Bradman* approach (RF 0.73)
- CA accepted C was “disabled” (but “only just”), as focus should be on what he cannot do, not what he can (Army had graded him as medically fully deployable)
- Determining appropriate adjustment factor is a matter of broad judgment
- In many instances Tables A-D will be valuable aid to assess loss of earning capacity, but not here, as disability minor and injury had less impact on work than on leisure activities, so no rational or scientific basis to determine RF (or RF should have been much closer to Table A)
- This was classic case for Smith award - £45,000

*Murphy v MOD [2016] EWHC 3 (HHJ Coe QC)*

- Male aged 26
- Electrician in Parachute Regiment
- Widespread chronic pain/fibromyalgia, with mixed anxiety and depressive disorder, following minor neck injury
- Permanent back pain, maintained by psychological factors and depression, with some prospect of improvement after CBT and pain programme
- Had learned to deal with condition by not pushing himself too hard
- Would have remained in Army for 24yrs
- Now employed as NHS estate workforce manager

- Unfit for heavy lifting or work involving hectic pace or stress
- *Blamire* award inappropriate, as there were not so many imponderables that it was only sensible option
- C was “disabled”, but “modest only”, as most of restrictions affected home and personal life
- Award based on difference between non-disabled RF (0.89) and disabled RF (0.42) would be disproportionately high, as unlikely to be out of work for more than a few relatively short periods during working life, so substantial adjustment would be required
- This was a classic *Smith v Mancs* situation - £50,000 (c2yrs' loss), in add'n to red'n in earnings

***Kennedy v London Ambulance Service [2016] EWHC 3145 (HHJ  
Hughes QC)***

- Female aged 44
- Solo responder for ambulance service
- Chronic PTSD following CO poisoning from exhaust
- Off sick, then restricted duties, before employment terminated as incapable of return to solo responder
- Would have worked to age 60, earning £24,660
- With successful CBT, should return to less stressful employment in 2yrs, earning £16,000

- WH Auden: *“thou shall not sit with statisticians”*
- Danger that in search for mathematical precision we lose sight of object to provide fair compensation for an uncertain future
- Rejected *Smith* award of £100,000, distinguishing *Billett*
- Award for 2yrs' loss =  $1.95 \times £24,660$  (£48,087)
- Uninjured earnings =  $11.31 \times 0.8 \times £24,660$  (£223,124)
- RF of 0.42 for residual earnings would be too pessimistic, so adjusted to mid-point of 0.62 (£112,195)
- Total award £159,015

***Marsh v MOJ [2017] EWHC 1040  
(Thirlwall LJ)***

- Male prison officer, aged 56
- Negligent delay in investigating unfounded sexual misconduct allegations led to chronic depression, persisting for 7½yrs rather than 2yrs
- Dismissed for ill-health, and U/E at trial
- Would have worked to age 65, earning £24,660
- With further treatment, would be able to apply for alternative jobs from 57, but at much reduced earning capacity (£20,000 max)

- C was not disabled
- Uninjured RF in Table A (to 54) adjusted from 0.79 to 0.83, as C was nearly 57 and in previously secure employment (suggests broadly linear adjustment)
- Residual RF in Table A (to 54) adjusted from 0.59 to 0.49, reflecting difficulties in securing employment given age and prolonged history of illness



***XX v Whittington Hosp [2017]***  
***(Sir Robert Nelson)***

- Female aged 29
- Invasive cervical cancer due to negligent smear test, with irreparable damage to uterus and ovaries, causing premature menopause, infertility and urinary/bowel frequency and urgency
- Returned to previous work as station store manager, but had to queue for public toilet and declined promotion as unable to travel
- Despite resilience, J found real risk of handicap on labour market

- Disabled, although able to carry out previous job at same pay
- Ogden calculation produced “clearly excessive” loss of earnings claim of £258,265 (nearly 30% of future earnings)
- Applying *Billett*, figure was quite unrealistic, and suggested much greater handicap than she had
- Broad brush award of 4yrs’ earnings (£100,109)

*Swift v Carpenter [2018] EWHC 2060*  
*(Lambert J)*

- Female aged 43
- Graduate, employed in travel journalism for marketing agency (£41,712pa net)
- Would have worked to 67, with salary of £49,000 net
- Below-knee amputation due to RTA
- Returned to work 4 days/wk (£33,360pa net), and unable to increase due to pain and fatigue

- Table C RF of 0.89 applied to uninjured earnings
- No dispute C was disabled
- Rejected contention Table D RF would be double recovery – reflected likelihood of periods of U/E due to disability
- But legitimate to adjust from 0.6 to 0.7 as C was capable and committed, with good mobility with prosthetic limb
- Such adjustment was not “impermissible judicial tinkering”
- Future loss of earnings = £481,573

*Inglis v MOD [2019] EWHC 1153*  
(*P Marquand*)

- Male, aged 39
- Left Royal Marines aged 32 due to NIHL
- Would have served to age 40, before career in health and safety
- Hearing difficulties made him unsuited for jobs with background noise, but had secured work as H&S officer
- Judge accepted C was “disabled”

- Judge rejected *Smith v Manchester* award on basis of *Billett*: “The multiplier/multiplicand method is the conventional method of calculating future loss of earnings and should normally be used”
- However, given C had good post-injury work record, leaving RF unadjusted would result in over-compensation
- RF adjusted from 0.58 to 0.7
- Future loss of earnings = £257,518

***FZO v Adams & LB Haringey [2019] EWHC 1286  
(Cutts J)***

- Male, aged 52
- Historic sexual abuse aged 13-21, leading to complex PTSD etc
- Lost management role with KPMG when suffered breakdown in 2011, and unable to take lucrative job in Dubai in 2013
- Employment history peppered with many short periods of employment, to which abuse may have been a contributory factor, but could not prove on balance of probabilities

- Judge rejected *Blamire* award
- Not straightforward case, capable of precise calculation, but had to make reasonable award, inevitably approximation, given imponderables
- Uninjured earnings = probably £56,000/yr net
- M to age 67 = 15.175 (at -0.75%)
- Table A discount for uninjured earnings = 0.89
- Uninjured earnings rounded up from £756,322 to £850,000 to reflect chance of sustaining Dubai job
- Residual earnings = £37,500/yr (ASHE median computer consultant)
- RF for residual earnings = 0.75
- Total future earnings = £423,203

## Lump Sum Awards

- *Hiom v Morrison Supermarkets [2010] EWHC 1183 (Jack J)* – *Blamire* award reluctantly made to casual labourer, as not disabled and no mathematical basis for Ogden approach
- *Ward v Allies & Morrison [2012] EWCA Civ 128* – *Blamire* award of £30,000 upheld where C’s earnings not reduced, but Ogden calculation should normally be used “unless the judge really has no alternative”
- *Billett v MOD [2015] EWCA Civ 773* – *Smith* award substituted where exercise of adjusting RF is no more scientific than broad brush *Smith* judgment
- *Kennedy v London Ambulance [2016] EWHC 3145 (HHJ Hughes QC)* – “the Court should not depart from the multiplier/multiplicand approach unless...it throws up an obviously unreal result”

- *Hayden v Maidstone NHS [2016] EWHC 3276 (Jay J)* – “In my judgment it is right to apply the ordinary multiplier/multiplicand approach. This is not an exceptional case where C should be awarded a lump sum on a more impressionistic basis” (emphasis added)
- *AB v Devon NHS [2016] EWHC 1024 (Irwin J)* – “very modest” *Blamire* award of £5,000 where C had “very patchy work record” due to long drug history

***BDA v Quirino [2015] EWHC 2974***  
***(HHJ Wood QC)***

- Female (28), sexually abused by karate instructor when aged 15-18
- Disclosed when PhD student 2011, causing depressive illness during criminal trial, with lifetime 20% risk of recurrence
- 4-year delay in completing education
- Anticipated annual earnings £28,000 in bio-chemical/pharmaceutical industry
- *Blamire* award £75,000 to reflect 4-yr delay, discounted for contingencies
- *Smith v Mancs* award £30,000 for future risk of losing employment/absences due to recurrence of depression, as risk not substantial, C was highly resilient, and not “disabled”

***LXA & BXL v Willcox [2018] EWHC 2256***  
***(HHJ Robinson)***

- Historical child abuse, impairing earning potential
- LXA – *Blamire* award of £40,000, as grave doubts that analysis based on earnings statistics was appropriate
- BXL – not constrained to adopt *Blamire*
- Past loss of earnings £76,000
- Future - £17,564 on multiplier/multiplicand basis
- Additional claim for handicap on labour market rejected as too speculative

*Irani v Duchon [2019] EWCA 1846*

- Male (31) Indian research engineer
- Came to UK 2010 to complete MSc and obtain work
- Severe leg fractures, with chronic pain – “disabled”
- Made redundant from job in polymer factory due to injuries
- Since found alternative work, but break in continuity of employment scuppered application for indefinite leave to remain in UK
- Would probably have to return to India or other Commonwealth country in 2020, with red’n in earnings

- CA upheld finding that *Blamire* approach should only be used where no real alternative
- J entitled to conclude that uninjured earnings could be calculated from ONS data for engineering professionals, but insufficient evidence to show residual earnings in India would be limited to £10,000/yr
- Since no proper basis for determining residual earnings, *Blamire* approach appropriate
- Had multiplier/multiplicand been adopted, 50% discount would have been applied to residual earnings
- Instead, *Smith v Mancs* award of £30,000 for slight disadvantage re jobs involving heavy lifting
- Broad brush *Blamire* award of £150,000 for significant dislocation of employment and probability of reduced earnings in India

## Ogden 8?

- Dr Victoria Wass has joined the Working Party
- Substantial re-write of Explanatory Notes, including definition of “disabled”
- Will incorporate latest ONS mortality projections
- Adjustment of factors in Tables A-D will be discussed in detail
- But who knows when...