

# Problems with Ogden 6

**Robin de Wilde, Q.C.,**

218 Strand Chambers  
Third Floor  
218, Strand  
London WC2R 1AT





# Problems with Ogden 6

- The discount Rate
- Fatal Accidents Act date for calculating the multipliers
- Paragraph 20 of the Explanatory Notes
- The Reduction Factors for Future Loss calculations

# The Purpose of the Ogden Tables.

- Since they were introduced in 1984, their aim has been to do one thing only, which is to calculate future losses, an ambition shared by astrologers and others for many centuries.
- One judge, in Victorian times, remarked that when he was being asked to look into the future he was required to possess the foresight of an Hebrew prophet and the agility of an acrobat.

# Background to the Tables

- In reality, no one is particularly good at it and the black arts of calculating pensions (which are, after all, only deferred income) is usually left to Actuaries and Pension Fund managers.
- Mr. Warren Buffett is perhaps the exception that proves the rule. We know from experience that they are not in fact much better than the rest of us, because it depends on the financial circumstances at the time and the prospects for the economy.

# Background to the Tables

- The economy, as we know from current experience, is not always growing and can meet with unpredictable tremors and earthquakes, whether stimulated by greed and the selling of sub-prime mortgages to those without any prospect of repaying them in the United States, and then selling them on to those elsewhere in the financial system as Collateral Debt Obligations of dubious quality.

# The Legal Principle of Compensation.

- This was enshrined in a dictum by Lord Blackburn in **Livingstone v. Rawyards Coal Company (1880) 5 App Cas 25** at 39 when he said as follows:

*"I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position that he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation."*

- In the case of **Wells v. Wells (H.L.) 1 A.C. [1999] 345**, these principles have been restated, as though they are matters which are not in dispute. For example Lord Lloyd said at 332F:
- *"It was common ground between all parties that the task of the Court in assessing damages for personal injuries is to arrive at a lump sum which represents as nearly as possible full compensation for the injury which the Plaintiff has suffered."*

- Later he says at 332H-333B:
- *“It is of the nature of a lump sum payment that it may, in respect of future pecuniary loss, prove to be either too little or too much. So far as the multiplier is concerned, the Plaintiff may die the next day, or he may live beyond his normal expectation of life. So far as the multiplicand is concerned, the costs of future care may exceed everyone's best estimate. Or a new cure or less expensive form of treatment may be discovered. But these uncertainties do not affect the basic principle.*

- The purpose of the award is to put the Plaintiff in the same position, financially, as if he had not been injured. The sum should be calculated as accurately as possible making just allowances, where this is appropriate, for contingencies. But once the calculation is done, there is no justification for imposing an artificial cap on the multiplier. There is no room for judicial scaling down. Current awards in most serious cases may seem high. The present appeals may be taken as examples. But there is no more reason to reduce the awards, if properly calculated, because they seem high than there is to increase the awards because the injuries are very severe."

# The discount rate

- At the centre is the discount rate.
- The Lord Chancellor has the power under the Damages Act 1996 to set it.
- He also has the duty to review it from time to time, having consulted a number of people.
- He set it in a document issued on 27<sup>th</sup> July 2001.
- He has not amended it since.
- Since then almost 7 years have passed.
- Financial circumstances have changed.

# The discount rate - 2

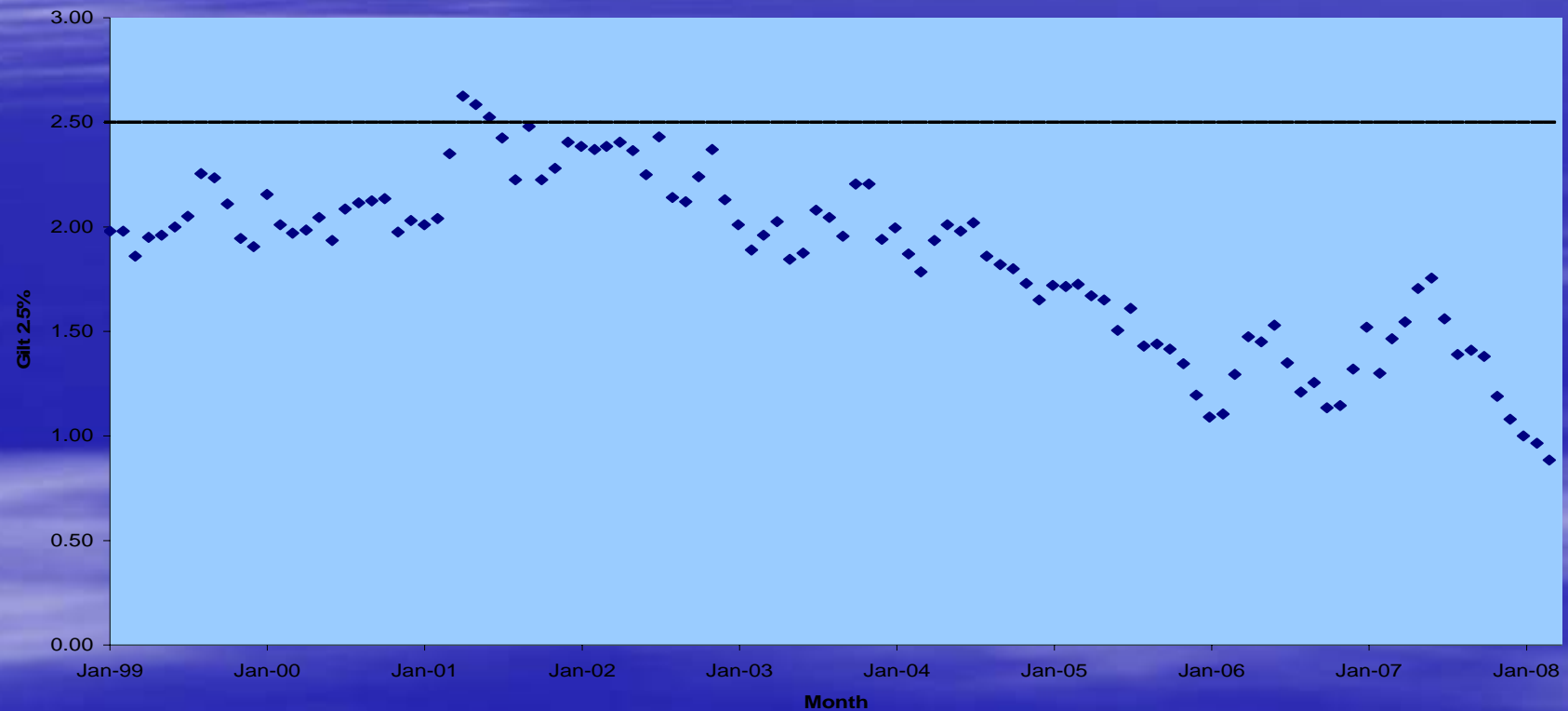
- At the time of Wells and when the Lord Chancellor was setting out his reasons for ignoring what the market was telling him, it was stated that the then low ILGS yields were a temporary aberration. 10 years later, which is half a lifetime for many of the PI victims, they still remain low!
- The graph below shows that during the last 9 years, ILGS yields have exceeded 2.5% for about 3 months in 2001; they have been languishing in the 1%-2% range for most this period, at the lower end of this range for the last 3 years and currently at about 1%.

# The discount rate - 3

- If the principles set out in Wells are applied properly then victims receiving awards at the current time should be expecting their compensation to have been calculated at a discount rate of about 1% (if the effects of tax are taken into account then the discount rate should be even lower, but let's leave this argument for another day).
- The disparity between the discount rate that should prevail under current conditions (1%) and that actually set out by the Lord Chancellor is crystallised in the multipliers as follows (Table 1 from Ogden 6 for say loss of care for male victims):

# The discount rate – 3A

Yields - Index linked gilts



# The discount rate – 3B

	A	B	B/A%
Discount Rate	= 2 ½ %	=1 %	
Age 10	33.72	52.69	156%
Age 30	29.05	41.19	142%
Age 50	21.86	27.86	127%

# The discount rate - 4

- So, for example, a 10 year old male victim who has been awarded future care costs of say £10,000 pa should, for parity with current market conditions, be receiving a lump sum award of £527,000 whereas in practice, under the Lord Chancellor's assessment, he would only receive £337,000. The 'scandal' as you put it, can be interpreted in one of two ways:
- The court says it is compensating him £10000 pa to purchase future care but is in fact only offering enough to purchase £6,400 pa at risk free rates ( $10000 \times 33.72 / 52.69$ ). This is not quite what the layman would understand as 'restitutio in integrum' (assuming he was well versed in Latin), so there is at the least a problem of communicating what the system is really providing.

# The discount rate - 5

- Since the victim is at the mercy of the court what can he do? Assuming he is hell bent on taking the lump sum settlement, he needs to stretch the £337,000 to produce an income of £10,000 pa for life. An investment in risk free investments (as envisaged in Wells etc) will only provide £6,400 pa given the current yield on such investments.
- To produce a bigger income he has no other option but to take a risk with his investments (say a carefully constructed portfolio of equities and bonds) in anticipation of generating a sufficiently high yield. He may succeed with this strategy and all will be well
- On the other hand he may fail and his income might even transpire to be considerably less than the £6,400 he could have had on a guaranteed basis by locking into ILGS. Presumably the expectation is that the welfare state will then bail him out if all else fails, which of course raises a question about whether it is right for taxpayers to be subsidising defendants.

# The discount rate 6

- Whichever way one looks at this, there is a huge gap between theory and practice that needs to be explained - a gap which would not exist if 'fair value' pricing principles on which the investment markets survive were applied here (ie calculation at 1% discount rate, to reflect current yields).

# The Fatal Accidents Act problem

- Multipliers are calculated in Fatal cases from the date of death.
- The Ogden Working Party has always thought this to be wrong since the 4<sup>th</sup> Edition of the Tables.
- At last the Court of Appeal has had a case in which they have given leave to go the House of Lords on this point.
- **Fletcher Executrix of the Estate of Carl Fletcher Deceased v A Train & Sons Ltd (2008); Sir Mark Potter P , Hooper LJ , Moses LJ: Case No: B3/07/0783 Date: 24/04/2008**

# Paragraph 20 of the Explanatory Notes to Ogden 6

- This headed 'Impaired lives'.
- It is totally wrong and contrary to the law as set out in Royal Victoria Infirmary v B, [2002] Lloyds Medical 282, by the Court of Appeal and as recently applied in Burton v Kingsbury, Flaux J., [2007] EWHC 2091.
- As set out the argument is wrong and although it may be correct to the mathematical mind it is impenetrable to the rest of us.

## Section B Explanatory Notes of Ogden 6 - **Partial Future Loss - where the system failed.**

- It had been appreciated for some time that one area where the system failed to provide 'adequate, proper and sufficient compensation' was in the calculation of 'future partial losses', where, for example, the Claimant had been injured, but was able to return to work, but with lower income compared with the pre-injury income. The means of accounting for post-injury reduction in employment chances was arbitrary. There was no theoretical or empirical basis for an award of extra compensation for 6 - 24 months net loss of earnings. It was discovered that such empirical evidence which did exist showed that compensation based on the 6 - 24 month period was too low.

# Ogden 6 - the attempted remedy.

The old fashioned way to carry out this basic calculation is to work out precisely what the future financial loss would be if the claimant did not work again and then work out what, approximately he would be able to earn, with his reduced capacity.

One figure would then be deducted from another and the end result would be apparent. In many ways such a calculation was crude and inaccurate and not likely to meet the needs of the situation.

- It did not take into account the chances of the claimant returning to work at all, through to the idea that his disability and/or illness would put him in a different labour market.
- It also did not take into account his past work history and that of which he could have been capable if he had not been injured, and how he would react in his different situation post injury. These factors are matters to which I will return in much greater detail below.

# Section B Explanatory Notes - 2

- **Smith v. Manchester<sup>1</sup> and Blamire<sup>2</sup>.** These were two different cases that sought to provide a claimant with some degree of compensation for the uncertain future, whether it was called ‘loss of employability’ or ‘handicap on the labour market’ or some other suitable epithet.
- Both cases were neither thought to be fair to claimants or insurers and did not meet the real problems in calculating the nature of this type of future loss of earnings claims.
- In **Ronan v. Sainsbury’s Supermarkets Ltd and Anr [2006] EWCA Civ 1074**, Hughes LJ, at para. 22, set out the difference between Smith and Blamire.

<sup>1</sup> (1974) 17 KIR 1;

- <sup>2</sup> Blamire v. South Cumbria HA [1993] PIQR Q1.

- **The Need for Understanding.** I make no apology in setting out these basic issues, for without the background of understanding what the actual problems were that had to be resolved, the new system in Ogden 6 cannot be understood.
- Although it is put into elegant language there had been since the 2nd Edition of Ogden, in the heading of 'contingencies other than mortality', a whole series of factors (which practitioners mostly and correctly ignored) setting out variables for regions, type of occupation and so on. These were exposed as being, as it would be politely said, to be: 'unreliable'. They have now been abandoned completely.
- **Criticisms of Ogden 6.** There have also been some criticisms of this aspect of Ogden 6 and the solution, some of them valid, but some which can only be dignified as uninformed. I will deal with those criticisms as well below.

# Section B Explanatory Notes - 3

- **Key issues affecting future working life.**
- The new research upon which this is based concluded that such issues were:
  - employment status;
  - disability status; and
  - educational attainment.

# Section B Explanatory Notes - 4

- **The Labour Force Survey Figures (LFS).** These are produced by the Office for National Statistics and have been collected in their current form since 1998. It was designed originally to produce a periodic cross-sectional snapshot of the working age population and collects information on an extensive range of socio-economic and labour force characteristics. The LFS is carried out on a quarterly basis, with respondents being included in the survey over 5 successive quarters. This provides a panel element to the survey data which is utilised in the research.

- **The chances of movement between the different states of economic activity.**
- These are the core figures which have allowed the researchers to estimate the probabilities of movements of males and females between different states of economic activity, dependent on age, sex, employment status and disability status. These probabilities permit the calculation of the expected periods in employment until retirement ages, dependent on the initial starting state of economic activity, disability and educational attainment.

# Section B Explanatory Notes - 5

- **Definitions.** These are three in number:
  - **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 workers.
  - **Disabled:** A person is classified as being disabled if all three of the following conditions in relation to ill-health or disability are met:
    - Has either an impairment or a progressive illness or an illness which has lasted or is expected to last for over a year;
    - Satisfies the Disability Discrimination Act 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 **and/or** amount of paid work they can do.
  - **Not disabled:** all others.

# Section B Explanatory Notes - 6

## The factors - those used and those not used

Those that are used are only intended for use in calculating the loss of earnings up to retirement age.

- They are employment status at start, disability status and educational achievement, as well as sex and age.
- The most significant new consideration turned out to be the highest level of education achieved by the claimant and that this should be allowed for;
- The effect of the other factors such as occupation, industrial sector and geographical region were relatively small.
- The education level is divided into three categories:
  - Any degree or higher education qualification below degree level.
  - GCSE grades A to C up to A levels or equivalent.
  - Below GCSE grade C or CSE grade 1 or equivalent or no qualifications.

# Section B Explanatory Notes - 7

## Other factors that matter.

Although there are other practical matters that would concern anyone who has to apply the various multipliers, in part, these are the same factors that already would concern anyone making these calculations, whether for partial loss of earnings or a full loss of earnings claim. They are, I suggest, as follows:

- Pre-accident work history;
- Pre-accident medical history;
- If any breaks in employment since starting work, the reasons for such breaks.
- Evidence about quality and capacity at work; how good at the work task he/she was.
- The attempts to find and obtain work since the recovery from injury, even if still disabled.
- What the medical evidence says about condition and prognosis.
- Examine the GP Records in respect of pre-accident history and complaints.

# Section B Explanatory Notes - 8

- The above are the normal criteria which would apply in any case.
- The fact that it is a partial loss of earnings claim does not diminish that process but would, in certain circumstances, make such criteria more appropriate to be studied with care.

## The decision in *Conner v. Bradman* [2007] EWHC Civ 2789 (QB).

- The facts, insofar as they are relevant to the questions set out below, are that he was:
  - a 51 year old mechanic, with a good work history with Saab
  - who was unable to return to his former employment but was able to work as a part time taxi driver, giving him lower net earnings.
  - He would require a knee replacement operation within the next year from the trial date.
  - He will be left with a restriction of movement and will no longer be able to work in his former employment.
  - In ten to fifteen years time (in his mid sixties) he will require further revision surgery.
  - The evidence was that following such revision surgery he would still find it difficult to perform certain peripheral tasks as a taxi driver, such as the carrying of bags and the like, but would still be able to drive his taxi.

# The Preliminary Questions

- (1) Is there likely to be a loss of future earnings claim; - **Yes:** then
- (2) Has the claimant failed to mitigate his loss; - **No:** then
- (3) How should his/her future loss of earnings claim be calculated:
  - (i) Is it a full loss of earnings claim; - **No:** or
  - (ii) Is it a partial loss of earnings claim;- **Yes:**
  - (iii) Should the Tables be used; - **Yes:**
- (4) Should there be an Adjustment to the Tables in a partial loss of earnings claim; - **Yes:**
- (5) Is the Adjustment reasonable taking into account the nature of the disability; - **Yes:**

# Section B Explanatory Notes - 11

- Argument was about whether the proper factor to apply was 0.49 or 0.82; the Judge splits the difference and makes it 0.655.
- The difference reduced the Claim by £76,220.00.
- After applying the reduction for acceleration, the final sum becomes a reduction of £25,040.00 that is some 23% less.
- Result was an explosion at the Cardiff Business School by Dr Victoria Wass.

## Dr Wass says in an unpublished Paper

- The reduction factors for employment risks are averages for broadly defined groups. They cannot be more than averages, but the numbers make them statistically sound.
  - The groups are defined in terms of those variables which have the greatest impact on future employment. They are defined by three broadly defined groups:
    - Sex and age;
    - Current employment status;
    - Disability; and
    - Educational achievement
  - Within each group there is a wide variation in unmeasured individual characteristics and circumstances. The result is that the reductions factors will be imprecise when applied to the individual circumstances of a particular case.
  - That means the court has a discretion. This is echoed in paragraphs 31 and 32 of the Explanatory Notes, particularly where there is reference to the intention of the scheme being a ready reckoner.

## Connor v. Bradman

- was the first properly reported case where the court made use of the new reduction factors. A large discretionary element is applied to the post injury multiplier.
- The effects can be considerable as seen above, so it is essential that the discretion is properly applied.
- The arguments of the defendant in the case were misconceived because reliance was placed on the idea that the claimant would have a new knee. Not only is that wrong, for the fact of a new knee does not change the fact that he was, is and will be still disabled, but the new knee has a limited shelf life.
- Reliance was placed by the Judge in his reasoning on a passage in Kemp & Kemp, paragraph 19-015 which states 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.”*

- No one knows what this passage actually means!
  - The consequences are dramatic as seen above. This has led to imprecision or bias, if not both.

## Bias and/or Imprecision or both

- **Bias.** The claimant is disabled and employed and is classified as such. The appropriate reduction factor is that defined for the 'disabled and employed' category. This is the reference point for any consideration of any discretion.
- **Imprecision.** This would depend on four matters:
  - **Goodness of fit of the average.** The average is defined by those characteristics which have the greatest impact on employment.
  - **Direction of the adjustment and the reasoning for it.** There were equally, factors which work in the opposite direction that do not appear to be found or even considered by the Judge, such as:
    - the severity of the impact of disability on employment rather than the severity of impairment, per se. The impact of disability is particularly disadvantageous in the case of manual workers.
    - All the reduction factors are conditioned upon educational qualifications;
    - His pre-injury job was skilled. His post injury job was unskilled and he would not make use of his pre-injury skills.

## Size of adjustment.

- There is no measure of the severity of disability. The reality is that the magnitude of the adjustment in comparison with a change of educational level, say up to the next level, would raise the reduction factor from 0.49 to 0.53. The judges reduction from 0.49 to 0.655 is very large in comparison.
- **Comparison with the Life Expectancy Tables: Tables 3 to 14.**
- These are based on population averages, disaggregated by age and sex. The factors which influence life expectancy varies by amongst other things social class, heredity, health, employment status, weight and smoking habits. For example the average includes both 'smokers' and 'non-smokers'.
- Because such figures are based on the 'average', the courts have chosen not to alter those Tables, except in the case of very severe impairment and then on the basis of expert evidence, for example specific medical evidence.

- **The consequences.** These are that:
- a. there should be little adjustment as they are the averages by broadly defined groups.
- b. The intention is that the courts use their discretion in order to minimise the likely imprecision which arise from the use of the average reduction factors, when applied to the particular circumstances of a particular case.
- c. The average indicates the typical outcome for the average person within each defined group. As an average it indicates the norm. As a point within a distribution it is also suggestive of a starting point.
- d. The result of both these propositions is that the average will be imprecise, but for most people the level of imprecision is likely to be relatively low.

- **No measure of severity of disability.** As there is no measure of severity of disability, it cannot be accounted for in the reduction factors. It is the impact of disability on employment rather than the severity of impairment which is important. There is work yet to be carried out in this area.
- **Greater precision will mean even more Tables.** There is an inherent cost to greater precision. The next step will be the creation of yet even more complex Tables, with more scope for disagreement and the necessity for the understanding of some statistical theory. For example, it is possible to insert what are the bare bones of employment risk.
- **A recent example.** In **Leesmith v. Evans [2008] EWHC 134 (QB)**, 1st February 2008, Mr. Justice Cooke. At para 106, he, despite strong but uninformed argument to the contrary, altered the adjustment figure only from 0.54 to 0.6, which was more than enough, on the facts of that particular case.

- Other cases found by me:
- Peters v. East Midlands HA [2008] EWHC 2091
- Billy McGhee v. Diageo PLC [2008] CSOH 74; Lord Malcolm
- Judges are not to be blamed if the right arguments are not addressed to them.
- Be wary about excessive fishing in this pool.
- This is going to be an area where tinkering takes place.

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