


Disadvantage and Disability in Loss of Earnings Claims

Julian Benson and Selena Plowden

Guildhall Chambers



A practical approach to Ogden 6


The limited ambit of this discussion

The different 'contingencies other than mortality' in Ogden 5 and 6, in non-disease PI cases

Points not to miss:


Life expectancy and projected mortality (post 2004)

Effects of a change in the discount rate



Comparing the contingency factors

1. Ogden 5 factors: economic activity, occupation, geographical region.
2. Ogden 6 factors: disability status, employment status, educational attainment.



Applying Ogden 6 in practice

The Chairman's Introduction and paragraph 35 and 41 of the Explanatory Notes make it clear that it is appropriate in the correct case to increase or decrease the discount factors

What is an 'appropriate case'?

How far ought the Courts to move from the tables?



Putting the contingency factors into context

Employment

Includes those employed, self employed, or on a Government training scheme at date of accident

Excludes full time students, unpaid family workers, a person even (very) temporarily out of work

In other words – a huge range of circumstances



Putting the contingency factors into context

Education

D Degree or equivalent or higher*
*(‘professional’ = PhD qualification)

GE-A GCSE grades A-C to A levels

O Below GE-A (+ no qualifications)



Putting the contingency factors into context

Disability I – the basics

1. Illness expected to/has lasted for 1+ year
2. Satisfies DDA definition “substantially limits person’s ability to carry out day to day activities
3. Affects ‘kind’ or ‘amount’ of paid work



Putting the contingency factors into context

Disability II – Application

1. “published reduction factors do cover a *wide* range of disability..”
2. “Adjustments for higher levels of disability would not normally be appropriate except in very extreme cases” (Daykin)



The decided cases under Ogden 6

Connor v Bradman [2007] EWHC 2789
(QB) Coulson J

The dangers of ‘splitting the difference’



The decided cases under Ogden 6

Hunter v MOD [2007] NIQB 43 (Stephens J)

Deeming the unemployed employed

Adjusting the 'disability' factors

(or 'avoid Stephens J')



The decided cases under Ogden 6

Leesmith v Evans [2008] EWHC 134
(QB) Cook J

Freddie Starr - Snow Patrol - Rolling Stones

Adjusting multiplicands

Adjusting factors for disability



The decided cases under Ogden 6

Hopkinson v MOD [2008] EWHC
(QB) Michael Harvey QC

When trying to help a Claimant backfires

Keep it simple!



The decided cases under Ogden 6

McGhee v Daqjo [2008] ScotsCS

Applying the tables would lead to an “excessive award” presumably because the tables are based on some average disability of greater severity than that which afflicts the pursuer.”

*Tiptoeing back to ‘Blamire’
(Come back Stephens J – all is forgiven!)*



The future

New and better tables?

How to persuade the Court to apply the tables in the Claimant's interest

Appellate scrutiny of the application of Ogden 6



Applying Ogden 6 in practice

Cases to date narrow field:

- Claimant in work at date of accident
- Out of pre-accident employment at trial
- Earning less or unemployed
- Male
- With a leg injury!



Applying Ogden 6 in practice

What if:

- Disabled Claimant remains in pre-accident work – *Smith v Manchester* scenario?
- Claimant is out of work at the date of accident-recession, career break, student?
- Is a woman?



Ogden 6 v *Smith v Manchester*

- 35 year old male
- Semi skilled precision engineer at defendant's factory
- £20,000
- Injured right arm
- Defendant has accommodated him & he is working on light menial tasks on previous wage
- Fears redundancy at end of case
- Defendant's witnesses sing his praises



Conventional *Smith v Manchester*

- Salary of £20,000
- *Smith v Manchester*:
 - 6 months – 2 years net salary?



Ogden 6

Earning Capacity Before Accident:

- Multiplier (Discount Table A): 18.2
- Projected earning capacity £365,400

Earning Capacity After Accident :

- Multiplier (Discount Table B): 8
- Projected earning capacity now £160,000

Difference: £205,400



Ogden 6 v Smith v Manchester

Do you have a £10,000 claim, a £200,000 claim or something in between?



Don't ignore the headline figure

- 35 year old woman: Children age 5 & 3
- Stopped work 3 years ago
- Intended to return when youngest age 5
- Previously semi skilled precision engineer at defendant's factory, £20,000
- Injured right arm – could do light non-skilled work
- Cost of child care £7,000



Don't ignore the headline figure

- Multiplicand for earning capacity but for accident?
- £20,000?
 - £13,000 after childcare?

- Multiplier for earning capacity?
- Discounted Table C – 14.34
 - Discount for risks of not returning?
 - Discount for discrimination?



Women's earning capacity

- Ogden Tables – what do these take account of?
- M v Leeds HA [2002] PIQR Q46
- A v Powys [2007] EWHC 2996
- Van Wees v Karkour [2007] EWHC 165



Conservative judges & opponents

Intellectual ammunition

- Challenge currency of assumptions behind old cases– greater accuracy is possible
- Give them confidence in tables A-D
- Use the introduction to the tables
- Use the literature: Dr Wass, Daykin; Melton QC
- Expose prejudice



Conservative judges & opponents

Evidential ammunition

- Remember to address their conventional concerns
- Risks of redundancy
- Reality of job market
- Trends