UNDERSTANDING AND USING THE 6TH EDITION "OGDEN TABLES"

1.   Identifying the Changes:

The assumptions as to Mortality

The Impact of using Life Expectancy for the whole United Kingdom

Impaired Lives Multiplier

Contingencies Other than Mortality

2.   Admissibility:

The Civil Evidence Act 1995

Wells v Wells [1998] 3 All ER p481

Ability to deny use of the Explanatory Notes

3.   The Discount for "Contingencies other then Mortality":

Discounts generally

Disability Discrimination Act law

Claims for Smith v Manchester

Practical help

4.   Conclusions

Mortality

a) The 4th Edition Tables introduced a significant change from simply applying historical data in order to estimate Life Expectancy, to using a "forecast" of the likely Life Expectancy based on historical data. In the early Tables each approach was converted into Multipliers and two parallel sets of Tables were produced. Now the 6th Edition Tables, following the 5th Edition, rely only of the forecast of mortality given by the Government Actuary Department ("GAD").

b) However, there is a new change: previously the Tables used in this jurisdiction were based on the experience of mortality from England & Wales. The experience in Northern Ireland and Scotland was not taken into account. These new Tables rely on assumptions which take into account Scotland and Wales.

c) It is not possible to say with certainty that this has had a depressive effect on the multipliers, although it is probable. We can see from the Interim Life tables produced by GAD that both those jurisdictions generally experience a lower life expectancy than we do; the figures in brackets represent the difference in LE as a percentage figure which has been rounded up or down, usually to the nearest half percent:

Table 1

Age	E&W	Scot	NI
20 M	57.60	55.02 (4.5%)	56.88 (1.25%)
20 F	61.72	59.89 (3%)	61.44 (0.5%)
30 M	47.98	45.58 (5.0%)	47.38 (1.25%)
30 F	51.89	50.11 (3.5%)	51.62 (0.5%)
40 M	38.45	36.31 (5.5%)	37.88 (1.5%)
40 F	42.17	40.47 (4%)	41.90 (0.5%)
50 M	29.23	27.33 (6.5%)	28.69 (2%)
50 F	32.73	31.12 (5%)	32.47 (1%)
60 M	20.64	19.05 (8%)	20.17 (2%)
60 F	23.77	22.40 (6%)	23.54 (1%)
70 M	13.19	12.17 (8%)	12.78 (8%)
70 F	15.60	14.66 (6%)	15.41 (1%)

d) Thus, the impact of the lower life expectancy of Scotland and NI on a 60 or 70 year male English / Welsh claimant could be quite significant. This impact probably has depressed all the Multipliers which take mortality into account.

e) Generally speaking there is an increase in LE. The next Table compares the LE for <u>Males</u> based on the experience of England & Wales for 2002/04 and 2003/05 (i.e. comparing the Life Tables in PNBA 2006 and 2007/8).

Table 2

Age	E&W 2002/04	E&W 2003/05	% change
20	57.26 *77.26*	57.60 *77.60*	0.6
30	47.66 *77.66*	47.98 *77.98*	0.7
40	38.15 *78.15*	38.45 *78.45*	0.8
50	28.94 *78.94*	29.23 *79.23*	1.0
60	20.36 *80.36*	20.64 *80.36*	1.4
70	12.95 *82.95*	13.19 *83.19*	1.9

f)   These are different from the Life Expectancy based on the "forecast" figures, see B3 for 2006 and 2007/8, again for <u>Males</u>, but which also show a slight increase.

Table 3

Age	Age attained in 2006 E&W 2004 forecast	Age attained in 2007 E&W 2004 forecast	% change
20	64.9	65.1	0.3
30	54.2	54.3	0.2
40	43.6	43.7	0.2
50	33.5	33.6	0.3
60	24.0	24.1	0.4
70	15.4	15.6	1.3

g)   Now compare that to the effect on the "whole life" multipliers. I reproduce Table 1 from the Newsletter Article which compares the 5th Edition with the 6th Edition 0% column from the Ogden Tables 1 (Male) and 2 (Female) :

Table 4

Age	5th (M)	6th (M)	% Increase	5th (F)	6th (F)	% Increase
20	63.08	64.87	*2.84*	66.99	68.61	*2.43*
30	52.97	54.10	*2.13*	56.69	57.74	*1.85*
40	42.81	43.52	*1.66*	46.39	47.01	*1.34*
50	32.84	33.40	*1.71*	36.29	36.69	*1.10*
60	23.37	23.97	*2.57*	26.69	26.88	*0.71*
70	14.89	15.50	*4.10*	17.45	17.74	*1.66*

h)   Thus, the increase in the whole life multipliers would seem to exceed the increases in Life Expectancy, whether compared with historical or forecast figures. The Working Party and GAD seem to have an optimistic view of life expectancy!

i)   Thus when considering most recent experience of Life Expectancy and the new Whole Life multipliers we have the following three figures to compare (all for Males):

Table 5

Age	Life Table Expectancy	Forecast Expectancy	Ogden Table 1 @ 0%
20	57.60 *77.60*	65.10 *85.10*	64.87 *84.87*
30	47.98 *77.98*	54.30 *84.30*	54.10 *84.10*
40	38.45 *78.45*	43.70 *83.70*	43.52 *83.53*
50	29.23 *79.23*	33.60 *83.60*	33.40 *83.40*
60	20.64 *80.64*	24.10 *84.10*	23.97 *83.97*
70	13.19 *83.19*	15.60 *85.60*	15.50 *85.50*

j) As to whether the fact that the Tables now include life expectancy for Scotland and Northern Ireland has had a deleterious impact on the rest of the Ogden Tables is difficult to assess. I cannot tell what the figures would have been if the better England & Wales experience (plus "forecast") only had been applied. All I can do is reproduce my Table 3 from the Newsletter Article which compares the 5th Edition and 6th Edition Tables: If one looks at the multipliers for loss of income, taking Tables 9 (Male to NRA 65) & 10 (Female to NRA 65), and applying the 2.5% discount rate, there seems to be a negative effect, given that Ogden Table 1, 0% column, forecasts an increase in LE (Cf with Table 4 above):

Table 6

AGE	T9 5th Ed	T9 6th Ed	% change	T10 5th Ed	T10 6th Ed	% change
20	26.55	26.56	0.04	26.83	26.83	0
30	22.81	22.78	(0.13)	23.04	23.04	0
40	18.05	18.01	(0.22)	18.24	18.24	0
50	12.08	12.06	(0.17)	12.22	12.23	0.08
60	4.58	4.59	0.22	4.63	4.63	0

k) For Defendants this is good news in that the multipliers seem to be generally speaking lower than they might otherwise have been.

l) Claimants from England & Wales (particularly young claimants with care claims who are not going to seek periodical payments) will need to consider whether to argue that applying the 6th Ed Tables will inevitably result in him receiving less than 100% compensation since his LE must be greater than the figure used for the United Kingdom.

m) However, the corollary is that it is likely that actuarial evidence will be required to establish the "correct" multiplier.

Impaired Lives

a) The <u>law</u> is clear that where life expectancy is determined by agreement (or I suppose by the court, after contested expert evidence) then that LE should suffer no further reduction and the multiplier is gleaned by applying Table 28 to the LE figure supplied, see the House of Lords in *Thomas v Brighton Health Authority*[1] where they condemned the defendant's submission that the figure of a fixed number of years of life expectancy given by the expert required another discount to take into account the chance that he might die sooner. Per Lord Lloyd,

"*But there is no room for any discount in the case of a whole life multiplier with an agreed expectation of life. .... there is room for a judicial discount when calculating the loss of future earnings, when contingencies may indeed affect the result. But there is no room for any discount in the case of a whole life multiplier with an agreed expectation of life. In the case of loss of earnings the contingencies can work in only one direction – in favour of the defendant. But in the case of life expectancy, the contingency can work in either direction. The plaintiff may exceed his normal expectation of life, or he may fall short of it.*"

He went on,

"*There is no purpose in the courts making as accurate a prediction as they can of the plaintiff's future needs if the resulting sum is arbitrarily reduced for no better reason than that the prediction might be wrong. A prediction remains a prediction.*"

Lord Lloyd seems to suggest that a life expectancy figure is a prediction of when that claimant is going to die.

The same argument was rejected in *RVI and Associated Hospitals NHS Trust v B (a Child)*[2]. Tuckey LJ went further and said that the application of Table 28 to the figure given for Life Expectancy (i.e. without any further discount for mortality) would apply to a case, such as there, where the Judge had reached a decision on LE, as opposed to where there was agreed evidence (as in *Thomas*).

a) In the Explanatory Notes (§20) the Committee begs to differ, suggesting that it is necessary still to convert that figure into an actuarial multiplier - who is correct?

b) The Actuaries! Why?

1) If one applies the logic of *Thomas* and *B (a Child) v RVI* then in every case we should ignore Tables 1 and 2, and instead work out the Claimant's LE from Table B3 and apply Table 28 to that figure. This will give a larger multiplier (for a 30 year old male LE is 54 which by Table 28 produces a multiplier of 29.82; by Table 1 the multiplier would be 29.05). Why should a claimant with an impaired life be better off than one with a "normal" LE?

2) Experience suggests that the Medical Experts usually do no more than look at the LE for that claimant given his age and gender, and then decide how much reduction should be made taking into account his particular ailment. This seems to be no more than an adjustment of the average life expectancy.

3) This approach does not take into account "mortality".

---

[1] See *Wells v Wells* [1998] 3 All ER p481, Lord Lloyd at 496j to 497j.
[2] [2002] EWCA Civ 348; [2002] PIQR Q10. Please note however, the admission by Tuckey LJ at P Q144 §24 that he did not "fully understand" the argument.

4) There is a difference between "Life Expectation" and "Mortality". The Life Table shows an average expectation of life.

Table 7

Age (x)	Lx	Ex
0	100,000	77
20	99,000	58
30	98,300	48
40	97,200	38
50	95,000	29
60	89,600	21
70	76,600	13
100	655	2

5) This Table comes from Life Tables based on the 2003-05 experience at B3 in PNBA 2007/08. The figures have been rounded up or down as appropriate for demonstration purposes. It shows:-
If you take 100,000 all born in 2007 then 100,000 are aged 0 and they all have a life expectancy of 77 years.
At age 20 only 99,000 are still alive. Now those survivors will live to 78
At age 30 only 98,300 are still alive. Now those survivors will live to 78
At age 60 only 89,600 are still alive. Now those survivors will live to 81.
But the estimate is that 655 will reach 100 (i.e. a period much greater than their LE).

This means that of 100,000 born with exactly the same life expectancy 2,800 had already died by the time they reached 30.
Equally, 655 survived beyond their LE at birth.

6) A "multiplier" takes into account the chance of any one of the 99,000 at age 20 either dying before attaining age 78 or living to 100+.

c) Someone should take this back to the House of Lords to get it overturned!

Other Contingencies

a) Undoubtedly the most controversial part of the new Tables.

b) Start with the facts: the 5th Ed tables were recommending discounts of up to about 3% for younger claimants, up to 10% for those aged 55 plus; based on economic activity (almost always "medium"), geography and the risk of the occupation.

c) Under the new "regime" it is a matter of 'qualification' and 'disability'.

d) The new Tables A – B distinguish between a "Not Disabled" claimant and a "Disabled" employee. In each table there are a set of columns for a claimant who is "Employed" and one who is "Not Employed". Note how much worse off a disabled person not in employment at trial is compared with one who is in employment.

e) Compare old and new discount factors for pre-accident earnings (Males) Table A in employment at the accident:

Table 8

	5th Ed +/- 0.02	6th "D"	+/- from 5th	6th "GEA"	+/- from 5th	6th "O"	+/- From 5th
20	0.98	0.92	6	0.92	6	0.87	11
30	0.97	0.92	5	0.91	6	0.89	8
40	0.96	0.88	8	0.88	8	0.88	8
50	0.93	0.83	10	0.83	10	0.83	10
60	0.90	0.83		*		*	

* Here the multiplier will increase towards 1.

f) Under the old scheme there was no specific "discount" for the claimant's residual earnings. Some parties have calculated the sum by reference to a "Smith v Manchester" lump sum award, others by seeking a notional discount on the multiplier for his residual earnings. The next Table shows the different discounts for an uneducated employee who is not in employment at the time of the trial (i.e. comparing Table A with Table B:

Table 9

		Disabled	Not disabled
20		0.24	0.83
30		0.23	0.81
40		0.15	0.78
50		0.10	0.70

g)   There are some general lessons to be learned:

First, apparently, even qualified non-disabled employees are not working for as long during the period until their retirement.

Secondly, qualifications are likely to increase the longevity of working life.

Thirdly, if you are disabled and not in work, you will not work for as long as a similar colleague who is in work. This seems to suggest that the time is between injury and trial is critical: rehabilitation into employment will improve the longevity of working life.

Finally, disability has a very significant impact on one's ability to stay in work (despite the Disability Discrimination Act 1995).

h)   Do we assume that this research is correct? (We now know that the research used in previous editions was not sound.) Soon the substance of the research will be in the public domain as it is published.

i)   Impact of *Herring v MOD*[3].   If the CA's approach in *Herring* is adopted then the court must find the relevant "model of earnings" (on the balance of probabilities) for the claimant and apply that as the base multiplicand. The effect of this method is to make it more important to take into account the claimant's chance of improved earnings in future years (over and above inflation) in the multiplier.

j)   Note the important *dicta* cited by Potter LJ in *Herring* from the seminal case of *Bresatz v Przibilla* (1962) 36 ALJR 212.

"*It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned.*"

Potter LJ went on,

"*Moreover the generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: all 'vicissitudes' are not harmful. A particular claimant might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune. Each case depends on its own facts.*"

k)   On this basis to take into account the chance of improved earnings it will be necessary to adjust the multiplier upwards. The method employed in the Ogden Tables does not take these possible 'benefits' into account.

l)   Arguably there is already a built in disparity in claims for loss of future earnings: in the lump sum approach the multiplicand does not take into account increased earnings through good economic activity, whereas in PP awards the index currently being applied, ASHE, will take into account the fact that wages have risen in a good economy, regardless of personal individual performance. Economic activity is not usually taken into account in our jurisdiction, whereas there is research that it should be, and it is in the USA.

---

[3] [2004] 1 All ER 44 CA

How Will the Discount Tables be used?

j)   §32 of the Explanatory Notes describes the Discount Tables as a "ready reckoner" and emphasises that it does not "take into account all circumstances" of the claimant. The Notes refer specifically to the pre-accident work history and the "range of disabilities".

k)   By implication each side will be able to contend for a "discount" greater or smaller than that set out in the Tables depending on those circumstances in their particular case.

m)   If the new 'Discount Tables' are to be used in this way, then first is the question whether your claimant is within the definition of "disabled" which has been applied, and then, secondly, the most vexing question will be how should the court make an adjustment to those Discount tables where the disability is minor, or even more severe than average?

n)   The Discount Tables adopt the language used in the Disability Discrimination Act 1995.

An examination of the relevant "definitions":

"Disabled" means: a progressive illness, or one which is expected to or has lasted more than 12 months;
Satisfies the DDA definition that the "impact of the disability substantially limits the person's ability to carry out normal day-to-day activities".

"the impact of the disability"
Showing that we are not concerned with the actual injury, we are concerned with how that injury affects that claimant.

"substantially limits"
The Government has issued "*Guidance on matters to be taken into account in determining questions relating to the definition of disability*", ostensibly in relation to the use of the Act – but will surely be relevant in relation to the application of these 'Discount Tables'.

"Substantially" is described as being more than *de minimis.* It does not denote something large or considerable, but something more than minor or trivial.

You must take into account the fact that in every day life people are different and have different abilities. The guidance refers to going beyond "the normal differences in ability which may exist among people".

4 important factors:

1)   time taken
2)   the way in which the activity is accomplished
3)   the cumulative effects on more than one activity
4)   **reasonable** modifications which reduce or eliminate the effects of the impairment.

Differentiate §4 from the effects of treatment. Essentially the effects of treatment should be disregarded even where the treatment effects a complete control of the condition or makes it completely not-apparent.

The exception to this rule seems to be where the treatment provides a permanent solution which renders the claimant outside the definition of disabled.

E.G. compare a deaf person with a hearing aid which works, and an undisplaced arm fracture which is reduced to anatomical perfection with no residual deficit; or pneumonia which is cured with antibiotics.

<u>"normal day-to-day activities"</u>
The list in the Explanatory Notes is not exhaustive under the Act.
Relate this back to an impairment which goes beyond ordinary differences in skill and ability.
Look beyond the complaint and consider if it will affect one of these types of activity to a more than insignificant degree.
It may be that a claimant can do all the activities, but he/she will be within the definition if pain/fatigue prevents immediate repeats of the activity, or the number of times in a day that he/she can do that activity.

There is some case-law which bears on these matters. E.g:

Abadeh :- the claimant could not use the Tube or an Airplane, which were forms of transport the claimant had to use in work and which would affect ability to carry out that work;

Cruickshank :- the activity in question was specialised to a particular social group, still "everyday" if applicable to a majority of that group;

Ekpe :- application of make-up considered a normal activity.

The rhetorical question is 'how does the court decide what is an appropriate change to the multiplier designated by the Tables?'

Impact on Periodical Payments

a) Will these Tables have any impact on periodical payments?

b) How are you to determine the date by which periodical payments should cease in a claim for loss of earnings to (say) 65? If you leave the PP to run until he attains 65 then he will be "earning" for every year until retirement without discount for "other contingencies". If it is a case where there is a residual earnings capacity, how can you take into account Tables B and D?

c) Do you make a percentage deduction of the multiplicand across the whole period? If so, how do you calculate the relevant percentage?

Example of a 40 year old male in manual work employment at the date of the accident (NRA of 65), now capable of earning at a lower earnings level than pre-accident, but now out of work:

Multiplicand	=	£15,000
Residual Earnings =		£7,500
Multiplier gross =		18.01
Table A discount =		18.01 x 0.88 / (12%) = 15.85
Table B discount =		18.01 x 0.39 / (61%) = 7.02

This equates to £185,100 (including accelerated receipt and investment on open market)

15,000 x 88% = 13,200 for working life, less 7,500 x 39% = 2,925 for working life unless dies earlier?

I.e. 10,275 for working life unless dies earlier (25 years unless dies earlier)? If apply B3 (86.8%[4]) then he might receive £222,967 (without accelerated receipt but with the advantage of ASHE indexation added over the years).

BUT caution: you are using a factor or percentage which is to be applied to a multiplier which takes into account mortality and accelerated receipt and is not age specific (because it applies to bands of age).

d) If *Thompstone, Corbett* and others are upheld in the CA, then consider that in earnings claims where ASHE is used the multiplicand will be advantageous to claimants because economic growth will be built into the index, whereas the 2.5% discount and the application of the *Herring* "model earnings" approach is to the Defendant's advantage.

---

[4] i.e. @40 97,205/100,000 survived, but by 65 only 84,345/100,000 survived; therefore 13.2% died in between. Discount likely to be too great.

Impact on Smith v Manchester Claims

a)   If the new 'Discount Tables' are applied to cases involving claimants with a residual earning capacity, then, effectively, the disadvantage to that claimant caused by his injury if he or she goes onto the open labour market, will be taken into account.

b)   What will be the impact on the other types of claim?

c)   It is likely to have a substantial impact on lump sum Smith v Manchester awards. Research by Haberman and others shows that in general the courts have awarded up to about 24 months of net earnings in these claims. Compare that to Table B and D!

d)   Claimants now have a strong tool to argue that a much greater "years purchase" should be applied. There is now little mystery about whether a disabled claimant will suffer disadvantage in the future, and the amount of time off from work is substantially greater than had been supposed.

Admissibility

e)   These Tables and their Explanatory Notes do not have the force of law. They are not admissible as of right.

f)   Parliament intended that they should and included S.10 of the Civil Evidence Act 1995, which, if ever brought into force, would have made the Actuarial tables and the Explanatory Notes admissible without proof. However, so far that section has not been brought into force.

g)   Accordingly, it is open to a party to insist on proof of any part of the Tables and their Explanatory Notes. However, be warned; calling the experts to prove any part will be very expensive!

Very General Conclusions

1.	Beware how you use these Tables and how you draft your Schedules; the Tables are controversial and there is likely to be some litigation about them.

2.	So far there has not been much use of the new Discount Tables for Other Contingencies, so it is difficult to tell how litigants and courts are dealing with them.

3.	If the Claimant has no residual earning capacity do you want to saddle yourself with a discount under Table A or C? If your client has a large pre-accident earning capacity and still has a significant residual earning capacity <u>but</u> can be classified as "Disabled", then you will want to use these Discount Tables.

4.	Note that for Defendants the good news about an increase in the reduction for "Other Contingencies" for the earnings multiplier is wiped out by the enormous discount in the multiplier for residual earnings.

5.	It may be that parties will want to plead discounts for "other contingencies" without direct reference to the 6th Edition Ogden Tables.

6.	Seeking to substantiate the discount contended for may require evidence not used hithertobefore. For example, it may become more important to obtain from Medical Experts more precise evidence in relation to the "impact" of the claimant's injury and how it affects "every day tasks". We may see more evidence being sought from Employment Consultants on how a particular injury "impacts" on his ability to work, and therefore on his 'attractiveness' to an Employer.

7.	Defendants should become keener to effect good rehabilitation, both in terms of getting back to work before trial and in terms of helping a claimant to obtain qualifications.

8.	Smith v Manchester awards are set to climb.

Adam Chippindall
Guildhall Chambers Personal Injury Team.
November 2007