

DISCOUNT FOR CONTINGENCIES OTHER THAN MORTALITY

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A photograph of a sheep standing on a narrow, dark rock ledge between two large, grey rock formations. The sheep is facing left. A light blue speech bubble is positioned above the sheep, containing the text "Help! I need to find the right discount". The background shows a hazy, mountainous landscape under a cloudy sky.

Help!
I need to
find the right
discount

What are these contingencies?

Any factor (except for mortality & accelerated receipt) which would affect the longevity of the Claimant's expected employment.

“ ... in the case of loss of earnings the contingencies can work in only one direction – in favour of the Defendant”.

What are these contingencies?

Cf. Potter LJ in *Herring v MoD* [2004] 1 All ER 44 CA said,

“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.”

Lump Sum Compensation

Loss of Future Earnings

Multiplier / Multiplicand

Mortality – Accelerated Receipt – Other Contingencies.

Pleading the multiplicand – what do we need to have in mind?

The Old

Table A
Loss of Earnings to Pension Age 65 (males)

Age at date of trial	High	Medium	Low
20	0.99	0.98	0.97
25	0.99	0.98	0.96
30	0.99	0.97	0.95
35	0.98	0.96	0.93
40	0.98	0.96	0.92
45	0.97	0.95	0.90
50	0.96	0.93	0.87
55	0.95	0.90	0.82
60	0.95	0.90	0.81

The New

Table A
Loss of Earnings to Pension Age 65 (Males—Not disabled)

Age at date of trial	Employed GEA			Not employed GEA		
	D	O	O	D	O	O
16-19	0.90	0.90	0.85	0.85	0.85	0.82
20-24	0.92	0.92	0.87	0.89	0.88	0.83
25-29	0.93	0.92	0.89	0.89	0.88	0.82
30-34	0.92	0.91	0.89	0.87	0.86	0.81
35-39	0.90	0.90	0.89	0.85	0.84	0.80
40-44	0.88	0.88	0.88	0.82	0.81	0.78
45-49	0.86	0.86	0.86	0.77	0.77	0.74
50	0.83	0.83	0.83	0.72	0.72	0.70
51	0.82	0.82	0.82	0.70	0.70	0.68
52	0.81	0.81	0.81	0.67	0.67	0.66
53	0.80	0.80	0.80	0.63	0.63	0.63
54	0.79	0.79	0.79	0.59	0.59	0.59

Table B
Loss of Earnings to Pension Age 65 (Males—Disabled)

Age at date of trial	Employed GEA			Not employed GEA		
	D	O	O	D	O	O
16-19	0.61	0.55	0.32	0.61	0.49	0.25
20-24	0.61	0.55	0.38	0.53	0.46	0.24
25-29	0.60	0.54	0.42	0.48	0.41	0.24
30-34	0.59	0.52	0.40	0.43	0.34	0.23
35-39	0.58	0.48	0.39	0.38	0.28	0.20
40-44	0.57	0.48	0.39	0.33	0.23	0.15
45-49	0.55	0.48	0.39	0.26	0.20	0.11
50	0.53	0.49	0.40	0.24	0.18	0.10
51	0.53	0.49	0.41	0.23	0.17	0.09
52	0.54	0.49	0.41	0.22	0.16	0.08
53	0.54	0.49	0.42	0.21	0.15	0.07
54	0.54	0.50	0.43	0.20	0.14	0.06



Judicial Discretion

There is a tension between Statistics & Judicial Discretion

Best exemplified by the case of
Conner v Bradman & Co [2007] EWHC 2789

The basic facts

Mr Connor

51;

Fitter, & part time taxi driver. Cannot work as a fitter again. Injured



Continued

- Multiplier to age 65 = 11.40 (T9)
- Table A pre-injury discount factor = 0.82
- Found to be “disabled”, so post injury discount factor per Table B = 0.49
- i.e. Loss from pre-injury of 40% + of working-life multiplier

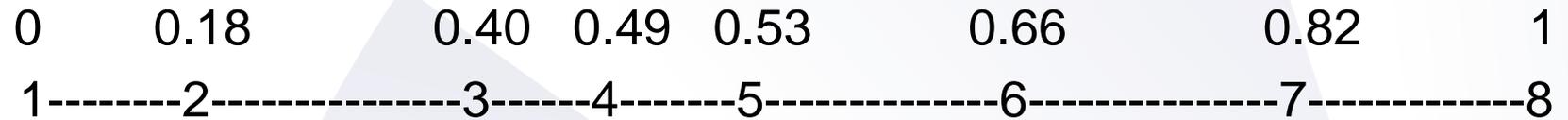
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D argued:

Could continue to work as a Taxi driver after future knee replacement for 10 – 15 years so cannot apply Table B without adjustment.

Judge found : 0.655 (i.e. the mid point between 0.49 and 0.82)

The Reduction Factor Line



What has happened since?

See follow-up article (JPIL 2012 #4)

In all but 1 of the 11 reported cases the Judge has made an adjustment to the figures in Table A / B

In none of those cases was evidence adduced about the Tables A-D or their evidential basis.

Can this be correct?

Explanatory Notes:

“ The suggestions which follow are intended as a “ready reckoner” which provides an initial adjustment to the multipliers according to the employment status, disability status and educational attainment of the claimant”

“...in many cases it will be appropriate to increase or reduce the discount in the tables to take account of the nature of a particular claimant’s disabilities”.

Yes. But how and based on what?

Neither the Ogden Tables themselves or the Explanatory Notes are admissible *per se* :

S.10 Civil Evidence Act 1995

Section 10. Admissibility and proof of Ogden Tables

- (1) *The actuarial tables (together with explanatory notes) for use in personal injury and fatal accident cases issued from time to time by the Government Actuary's Department are admissible in evidence for the purpose of assessing, in an action for personal injury, the sum to be awarded as general damages for future pecuniary loss.*
- (2) *They may be proved by the production of a copy published by Her Majesty's Stationery Office.*

was never brought into force!

But Legitimacy from *Wells v Wells*

Are Judges being consistent in their approach?



Assume a smoking obese Claimant who clearly falls outwith the “average” for mortality purposes.

Would a Judge take a Life Expectancy multiplier different from T1 & 2 without expert evidence ?

And the common law?

Herring v MoD [2004] 1 All ER 44

(dealing with the old – even less precise – discounts)

“In order to justify a substantially higher discount by reason of additional future contingencies, there should in my view be tangible reasons relating to the personality or likely future circumstances of the claimant going beyond the purely speculative.”

Where to now?



We await Ogden 8

Banding of current discounts in Tables A-D, to reflect different disability?

Greater information in Explanatory Notes on evidence which underpins those discounts?

Join the crowd

