

Future Loss of Earnings & The Ogden Tables (6th Ed)

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(i) INTRODUCTION

1. Over the last few years, a number of measures have been introduced to standardise and simplify quantum assessments in personal injury claims. In 1992, the JSB published its "Guidelines for the Assessment of General Damages ..." Though advocates insisted that these were not to be viewed as "tramlines", their persuasive effect has been such that in the foreword to their 8th Edition, it is trumpeted that "it is now only in rare cases that courts make awards outside the margins reproduced in the Guidelines". The first edition of the Ogden tables was published as long ago as 1984. The tables only really came of age following the decision in *Wells v Wells* [1999] 1AC345, in which the House of Lords established the multipliers for future loss should be selected on the basis of a net return of 3% per annum. Even after that date, the tables were still but a starting point for a majority of cases; there still remained substantial scope for a judicial discount to be applied after the choice of a multiplier from a relevant table, to take into account various contingencies other than mortality. The current, 6th edition of the tables seek to remove the need for a Court to make any such adjustments to reflect the particularities of a case, in all but a few extraordinary circumstances. Do they succeed?
2. It is worth reviewing the circumstances in which a Court has traditionally been prepared to depart from a straightforward assessment of a future loss claim on a multiplier/multiplicand basis, to assess the impact and relevance of the 6th edition tables.

(II) BLAMIRE AWARDS

3. Where a Court is persuaded that there is a continuing loss of earnings suffered by a Claimant, but that there are too many uncertainties to adopt a conventional multiplier and multiplicand approach, it may compensate such a loss by means of a lump sum. Such cases are exceptional and are likely now to prove even more so, since the 6th edition of the Ogden Tables seeks to make allowance within a multiplier/multiplicand approach for (a) personal disabilities of a Claimant and (b) whether or not the Claimant was un/employed at the date of his accident or thereafter.
4. There are actually very few reported cases in which a “Blamire”/lump sum award has been made. Some examples are detailed below, which show how atypical the situations are in which such awards are made. Blamire itself is a case in which there were superimposition of a number of levels of imponderables (which might have been resolved differently, if heard post *Herring v MOD*, for which, see below). The other two examples relate to self-employed individuals, Hannon at the outset of a joint business venture, Willemse a skilled artisan.
5. *Blamire v South Cumbria Health Authority* [1993] P1QR Q1. Here, a 22 year old woman suffered a back injury. But for the accident, it was found that she would have worked as a nurse, but her pattern of earning (whether full or part time and for what period) was problematic, not least because she had started a family before the trial date. Equally, there were very great evidential difficulties in creating a model for her likely earnings, post accident, as a secretary.
6. *Hannon v Pearce* (24/01/01, unreported). A 25 year old woman suffered a severe closed head injury, leading to some cerebral deficits. At the time of the accident, she had just set up a race-horse training business with her husband. Her ability to contribute to that business had diminished, but demonstrating how that reduced contribution might lead to a financial loss was not at all clear.
7. *Willemse v HESP* [2003] EWCA Civ 994. A 33 year old man suffered a modest brain injury, leading to some cerebral deficits. He was a craftsman,

working as an ornamental blacksmith and boat builder. His accounts for the years prior to his accident showed very modest receipts. There was a concern that the accident had affected his artistic ability. There was a great deal of uncertainty as to the nature and direction of his employment in the future.

(ii) SMITH v MANCHESTER

8. It is trite law that two pre-conditions have to be satisfied before such an award is made: (a) that there is a substantial risk that at some point in the Claimant's working life he will find himself on the labour market for some reason; (b) the Claimant's disability would place him at a disadvantage by comparison with an able-bodied contemporary. (See *Moeliker v A. Reyrolle & Co. Ltd* [1976] 1WLR 132).
9. In looking at these pre-conditions, Courts have been invited to consider the nature and prospects of the employer's business; the Claimant's age and qualifications; his length of service; his remaining length of working life; the nature of his disabilities; any statement by his employers as to his future employment; the general situation in his trade or area; the workings of the Disability Discrimination Act 1995.
10. The current Ogden tables necessarily take a broad brush consideration of such factors. A methodology is suggested to avoid the need for lump sum compensation for loss of earning capacity, by adopting a two stage calculation, factoring in the effect of disability and educational attainment to separate multipliers for pre-accident and residual earning capacity.
11. Certainly, for a Claimant who was employed at the time of the relevant accident, the suggested methodology will provide compensation far greater than that realised by a traditional *Smith v Manchester* award, so it is important to pay close attention to the acknowledged limitations of the methodology.
12. Firstly, the actuarial approach cannot take into account pre-accident work history of the individual

13. Secondly, the definition of disability adopted in the tables cannot import with it a standard effect on a Claimant's residual earning capacity. As is noted in the tables, "the loss of a leg may have less effect on a sedentary worker's earnings than on a manual worker's".
14. In my view, the tables are a blunt tool in all but the most standard of cases. It is likely that *Smith v Manchester* awards will still be commonplace. However, it is equally likely that they will be quantified more generously than has been the case up until now, since a Court may well use the tables as a useful starting point, before taking a step back and considering the totality of the evidence.

(iii) LOSS OF A CHANCE CLAIM

15. This term is used rather loosely in personal injury claims. Within its umbrella, one category of such claims comprises those in which a Claimant has yet to enter employment. There, a "career model" can be devised and a loss of earnings claim calculated on a multiplier/multiplicand basis. So long as that model is in itself an appropriate baseline, there is no need to make any additional significant % discount for future contingencies: *Herring v MOD* [2003] EWCA Civ 528.
16. The 6th Edition tables do assist in the task of constructing a "career model", by providing guidance on how to deal with variations in future earnings and costs. This is achieved, unexceptionally, by splitting the multiplier into segments, in respect of each of which a different multiplicand might be applied.
17. In *Brown v Ministry of Defence* [2006] PIQR Q9, the Court of Appeal reiterated that the multiplier/multiplicand basis is to be applied to most situations in which a career model can reasonably be chosen as a basis for assessment; the prospects of enhanced or reduced earnings resulting from the ordinary chances of life can be allowed for by adjustments to the multiplier and multiplicand as appropriate. It is only where account needs to be taken of a career change which would significantly alter earning potential that a Court should entertain a % discount to represent the risk of

that event not actually having occurred, as was done in *Doyle v Wallace* [1998] PIQR Q146 and *Langford v Hebran* [2001] PIQR Q160.

(iv) PERIODICAL PAYMENTS

18. Obviously, the Ogen tables themselves have no effect on periodical payment orders.

(v) CHANGES IMPORTED BY THE 6TH EDITION TABLES

19. There have been modest increases in the multipliers, which now use mortality rates from 2004 population projections, based on the UK population. (The 5th edition used data based on the population of England and Wales alone). The most significant changes are limited to multipliers at younger ages for loss of pension.

20. With the tables providing a reasonable estimate of the future mortality likely to be experienced by average members of the population alive today (including smokers, drinkers and other sinners) it is only where there is "clear evidence in an individual case to support the view that the individual is atypical and will enjoy longer or shorter expectation of life² that a further increase/decrease is required for mortality alone. Guidance is provided as how to go about this alteration.

21. The major revision has been to a consideration of "Contingencies other than Mortality". This has been alluded to in the discussion of *Smith v Manchester* awards above. The approach taken in the 5th (and earlier) Editions is now considered inaccurate and to be ignored. The factors which are now considered as having a bearing on the degree to which a multiplier for loss of earnings requires adjustment are:

21.1 Gender

21.2 Age

21.3 Employment status at the time of the accident and the time of settlement/trial

- 21.4 Disability status at the time of the accident and the time of the settlement/trial
- 21.5 Educational attainment at the time of the accident and the time of the settlement/trial.
- 22.As discussed earlier, methodology has changed. Up until now, in future loss of earnings' claims, a single multiplier would have been taken and singly adjusted for "contingencies other than mortality". It could then, of course, be broken down into segments to which different multiplicands are applied (having determined an annual residual earning capacity). Now, what is being urged is a two stage procedure, in which two different multipliers will be used:-
- 22.1 Firstly, a full loss of future earnings is calculated, using a multiplier/multiplicand based upon pre-injury prospects (£A)
- 22.2 Secondly, a residual earning capacity is calculated, using a multiplier/multiplicand based upon actual post accident earnings and future potential (£B)
- 22.3 Finally, the actual loss is measured as £A-£B
- 23.Those two multipliers can be significantly different, depending on the educational attainment, the employment & disability status of the Claimant at the time of the accident and settlement/trial. For instance, assume that the Claimant was a 40 year old employed man with a degree at the time of his accident, expecting to work until age 65. Then:-
- 23.1 Assuming him not be disabled at the time of his accident, the multiplier for the full loss of future earnings would be 0.88;
- 23.2 Assuming that, at the time of settlement/trial, he was aged 44 (being in the same actuarial bracket as a 40 year old), remained employed but was disabled, the multiplier for the residual loss of earnings would be 0.57.
- 24.Using the example above, it can be seen that it is likely that a calculation using the new methodology would result in an award significantly in excess of what would likely have been awarded by way of a traditional award for

future loss of earnings together with an additional *Smith v Manchester* award.

25. It will be interesting to see whether the “one size fits all” approach imported by the tables above actually leads to a re-appraisal of the use of evidence from employment consultants, calling into questions the use of the actuarial assumptions to the particular employment circumstances of the individual Claimant.
26. There remains obvious scope for challenging the methodology above. Without too much reflection, the following assertions hold weight:-
- 26.1 In the case of a worker employed outside one of the “professions”, a pre- and post-accident employment history may be more illuminating than a consideration of educational qualifications.
- 26.2 The effect of a disability on an individual’s earning capacity can only be judged when considered alongside the Claimant’s (a) employment history; (b) current work duties & associated physical/mental demands (as mitigated by any mechanical / medical or other reasonable / commonplace adjustments which can be made); (c) aspirations.
- 26.3 The discussion of pension loss is little changed.
27. The section in the explanatory notes dealing with fatal accidents claims has been extended. The debate continues as to whether or not multipliers should be calculated from date of death or trial. Guidance is provided to enable a “compromise solution”, whereby:
- 27.1 Multipliers remain to be selected from date of death, but
- 27.2 By selecting them from the 0% discount column, and applying a discount for early receipt following the trial/settlement, no unnecessary discount is made for the loss already suffered between death and that date.
28. All is not lost. However hard the Ogden Tables try, it does not seem likely that lawyers will be consigned to date in-putting alone.

