

The Ogden Tables and Loss of Earnings
Scientific Calculation or Impressionistic Tinkering?

Introduction

1. As we all know, damages in personal injury cases generally fall into 3 types. First, general damages for non-pecuniary loss, principally comprising an award for pain, suffering and loss of amenity, but in appropriate cases including other heads of loss such as damages for loss of congenial employment, loss of enjoyment of a holiday or loss of use of a vehicle. Second, there is an award for past pecuniary losses and expenses (special damages), such as loss of earnings, medical and treatment expenses, and care and case management costs. Whilst the recoverability and proof of such expenses may be in dispute, their calculation is usually a straightforward question of arithmetic, to which interest is added.

2. The third (and normally the largest) area of loss is damages for future losses and expenses resulting from the injury. Here, the problems of recoverability and proof are compounded by the question of calculation. On the one hand, the court must follow the overriding principles of (a) restoring the claimant to the position he or she would have been in but for the accident, and (b) awarding *full* compensation for the loss which the claimant has suffered. On the other, and as part of that process, the court must take into account the claimant's life expectancy, together with the income which the award may generate through investment, so as to ensure that the compensation is sufficient to cover his estimated annual loss over the whole of the period during which that loss is likely to continue, but without leaving him in a better financial position than he would have been in at the end of that period apart from the accident. Inevitably, the assessment of future loss is not an exact science, and there will always be cases where some claimants turn out to be under-compensated, and others over-compensated.

3. Since April 2005, damages for future loss may be awarded wholly or partly under a periodical payments order (PPO), in which payment of the annual loss or expense is

guaranteed throughout the claimant's lifetime, and linked to an appropriate index to ensure that it keeps pace with inflation. By this method, the risks of under or over-compensation as a result of the claimant living longer or shorter than expected are removed, as is the need for the claimant to ensure that the award is invested so as to keep pace with inflation. Despite the existence of the power to make a PPO, however, the lump sum award remains the conventional basis by which future losses are recovered. This paper is accordingly concerned with lump sum assessments, particularly those for loss of earnings.

4. The appropriate lump sum is assessed using the multiplier/multiplicand method. The multiplicand reflects the annual loss or expense. It is always calculated as at the date of trial, although the possibility that the loss or expense may increase or decrease in the future will be taken into account as appropriate. The multiplier reflects the number of years for which the loss or expense will be incurred. Since the claimant will receive immediately money which will only be required to be spent over many years, the multiplier must be discounted for mortality and accelerated receipt. As to mortality, in the absence of evidence to the contrary, the claimant will be taken to have an average life expectancy. As regards accelerated receipt, it has always been assumed that the claimant will invest the award so as to generate interest. The capital and interest will be drawn down as required to pay for losses for the period over which they are expected to arise, expiring on the very last day of the period of loss (which will often be the expiry of the claimant's life).

Historical Perspective

5. Older members of this Association will remember a time, prior to the 1990s, when damages for future loss were calculated using what were known as "judicial multipliers". Based on a spread of multipliers in comparable cases, they were said to take into account inflation in a rough and ready way, on the assumption that this could be dealt with by a prudent investment policy. The multipliers were based on a discount rate of about 4.5%, reflecting the assumed rate of return (net of inflation) on a basket of equities and gilts. A further discount was then applied for the

“vicissitudes of life”, which generally involved an arbitrary reduction to reflect the possibility that the prediction of the claimant’s future needs might be wrong. This approach generally resulted in a maximum life multiplier of 18.

6. Over time, however, an actuarial approach to the calculation of multipliers has developed. In 1981, Index-Linked Government Securities (ILGS) were first placed on the market, making available a virtually risk-free and inflation-proof investment. In 1984, the first edition of the Ogden Tables was prepared by an inter-professional Working Party of actuaries and lawyers under the chairmanship of Michael Ogden QC. As the Introduction to the Tables remarked: “the size of some of the figures in the tables will undoubtedly come as a surprise to lawyers”. For example, the previously accepted maximum life multiplier of 18 was now shown to be the appropriate life multiplier for a male aged 32 years, even adopting a discount rate of 4.5%. The tables set out multipliers for lifetime losses, loss of earnings and loss of pension, at rates of interest ranging from 1½% to 5%, but advocated the use of ILGS as the fairest approach to calculating multipliers. A similar recommendation was made by the Law Commission in 1994.
7. Surprisingly, although s10 of the Civil Evidence Act 1995 makes the Ogden Tables admissible in evidence in personal injury actions, that provision has never been brought into force!
8. The enactment of the Damages Act 1996 required the court to take into account the rate of return prescribed by the Lord Chancellor in determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss. It was not until June 2001, however, that the power to prescribe the discount rate was first exercised.
9. In the meantime, in its seminal decision in *Wells v Wells* [1999] 1 AC 345, the House of Lords emphasised the principle of full compensation, namely that an award of damages should represent no more and no less than the net loss suffered by the claimant as a result of his injury. The Ogden tables should be regarded as the starting

point for calculating multipliers, rather than merely as a check. Once the life multiplier had been determined from the tables, there should be no further discount for vicissitudes. Most importantly, it was held that personal injury victims were not in the position of ordinary investors, who could ride out the highs and lows of the investment market by choosing when to withdraw funds. As a result, personal injury victims should not be required to take risks when investing an award of damages. When assessing damages for future loss, the court should assume that the claimant would invest in ILGS, and determine the discount rate accordingly.

10. At the time of the decision in *Wells*, the average rate of return on ILGS was determined to be 3%. In the Damages (Personal Injury) Order 2001, the Lord Chancellor set a discount rate of 2.5%, with the intention that this should be a single rate for all cases, which was easy to apply in practice and which should obtain for the foreseeable future. Despite overwhelming evidence in subsequent years that the rate of return from ILGS has consistently remained well below 2.5%, it was not until February 2017 that the Lord Chancellor prescribed a new rate of -0.75%, based on the current 3-year average return from ILGS. The effects of improving life expectancy and the current discount rate is that, if one uses the latest ONS life tables, the current life multiplier for either a male or female child born in 2018 is over 130, a far cry from the maximum of 18 which held sway until well into the 1980s.

Multipliers for Loss of Earnings

11. Tables 3-14 of the Ogden Tables set out the appropriate multipliers for loss of earnings to retirement ages ranging from 50 to 75. For intermediate retirement ages, the appropriate multiplier may be derived either by performing the calculation explained in paragraphs 13-14 of the Explanatory Notes to the Ogden Tables, or by using one of the calculation tools available online.

Taking into account contingencies other than mortality

12. Whilst the multipliers for loss of earnings in Tables 3-14 take into account mortality and accelerated receipt, it is also necessary to take into account other contingencies,

such as the risk of redundancy, unemployment, periods of absence due to sickness or raising a family and so on, in order to provide a multiplier which takes into account only those periods when the claimant would be expected, on average, to be in work. Historically, this was done by the judge applying a percentage discount, based on little scientific evidence, or by the adoption of a broad-brush *Smith v Manchester* award for handicap in the labour market.

13. Since the 2nd Edition (1994), however, the Ogden Tables have provided guidance as to how such contingencies should be assessed, based on actuarial research. Further evidence was available to the Working Party when the 6th Edition was published in 2007, based on research undertaken by labour economists at City University, London and Cardiff University. This research suggested that the principal factors affecting the proportion of time likely to be spent in employment were the age, sex and educational attainments of the claimant, whether or not he/she was working at the time of the accident, and whether he/she is disabled or not. In many cases, the claimant will not have been disabled prior to the accident, but will be disabled as a result of his injuries. In such cases, it will often be necessary to calculate an uninjured earnings multiplier (to be applied to his anticipated pre-accident earnings) and a residual earnings multiplier (to be applied to his residual earning capacity).
14. The relevant reduction factors are set out in Tables A-D. They are intended as a ready-reckoner to provide an initial adjustment to the multiplier for loss of earnings, based on the claimant's employment status, disability status and educational attainment. Since the figures are based on averages, in many cases it will be appropriate to increase or reduce the discount in the tables to take account of the circumstances of the particular claimant, including in particular the claimant's pre-accident employment record.
15. The Tables are subdivided into 3 levels of educational attainment, namely:
 - a) "D" – Degree Equivalent or higher, which includes NVQ level 4 or 5, HNC/HND qualifications, nursing or teaching qualifications etc;

- b) "GE-A" - GCSE grades A–C up to A-Levels or equivalent, which also includes NVQ level 2 or 3, City & Guilds craft or advanced crafts or some trade apprenticeships;
- c) "O" - Below GCSE C or CSE 1 or equivalent, or no qualifications.

16. The factors in Tables A-D assume retirement at age 65 for males and age 60 for females, as data for alternative retirement ages was not available in the Labour Force Surveys for 1998-2003 upon which Tables A to D were compiled. The Ogden Working Party accordingly suggests that where the retirement age is different from age 65 for males or 60 for females, this should be ignored and the reduction factor should be applied to the claimant's age as at the date of trial, with no adjustment (i.e. assume that a male claimant would have retired at age 65 and a female claimant at age 60). However, if the retirement age is close to the claimant's age at the date of trial, then it may be more appropriate to take into account the circumstances of the individual case, as the prospects of retaining employment increase towards a factor of 1 in the last few years to retirement for those in work, whilst the prospects of obtaining employment decrease towards 0 for those who are not in work¹.
17. So far as I am aware, this issue has only been directly addressed in one reported case. In *Marsh v MOJ* [2017] EWHC 1040, Thirlwall LJ (sitting as a judge of the High Court) accepted that upward adjustment of the Table A reduction factor of 0.79 was necessary, in the case of a 56 year-old prison officer who would have worked to age 65, to reflect the difference between 54 and his current age, and the reality that the work of a prison officer is secure. Her finding that these 2 factors were properly reflected by a RF of 0.83 suggests that a linear approach (ie adjusting by 0.2 for each year that the Claimant's age grew closer to 65) is appropriate. It seems to be reinforced by her finding that the adjustment factor for residual earnings, in a case where the Claimant was unemployed but not disabled, but would be 57 before he was able to look for work and older still by the time he found it, should be reduced from a starting point of 0.59 (the category O RF for an unemployed male aged 54

¹ In *Fleet v Fleet* [2009] EWHC 3166, Mackay J reduced the multiplier by 10% in the case of a 56 year-old man who would have worked to 65

years) to 0.49 (broadly suggesting a linear adjustment from a RF of 0.59 at age 54 to 0 at age 65). That seems to me to be an entirely sensible approach in the majority of cases.

18. The methodology can be illustrated by a simple example. Suppose the claimant is a woman aged 30 years at trial, who has educational qualifications above GCSE grade C level, and was employed full-time as a legal secretary prior to her accident, with a net annual income of £22,000. Her raw pre-accident multiplier (at the current -0.75% discount rate) to a current state pension age of 68 years would be 42.93. The relevant Table C reduction factor would be 0.85, as she is aged 30-34, employed, with educational status GE-A and was not disabled pre-accident. The net multiplier for uninjured earnings is therefore 42.93×0.85 , namely 36.49, giving an uninjured earnings claim of £802,780.
19. Suppose that, as a result of her injuries, she has permanent impairments and will be restricted to part-time work, such that she is no longer suitable for her previous job. She is therefore disabled, and has yet to find alternative employment, although it is anticipated that she could earn £10,000 net per annum. The reduction factor from Table D will be 0.31, resulting in a residual earnings multiplier of 42.93×0.31 , namely 13.31. Her anticipated residual earnings would therefore be £133,100, giving a loss of earnings claim of £669,680

Disability

20. It will immediately be apparent that there is a significant difference between the reduction factors in Tables A and C on the one hand, and Tables B and D on the other. Disability is recognised to be a key issue affecting a person's future working life, alongside employment status and educational attainment. There is an element of certainty in establishing employment status or educational attainment. An individual is either in or out of work, and either does or does not have a particular qualification, certificate or degree. Sometimes, the Court will need to make findings about such issues. If, for example, the claimant was about to start a degree course at the time of

her accident, the Court is likely to conclude that, but for her accident, she would have been a graduate by the date of trial. Equally, if the claimant had been offered a job, but had not yet started work, the Court might make a finding that, but for the accident, she would have been employed at the date of trial, and treat her accordingly.

21. Disability by contrast can be an elusive concept. The starting point for considering whether the disabled factor should be applied to the multiplier is to consider the guidance at paragraph 35 of the Explanatory Notes to the 7th edition, which is based on the definition in the Equality Act 2010. This states that:

A person is classified as being disabled if all three of the following conditions in relation to the ill-health or disability are met:

- i. the person has an illness or a disability² which has lasted or is expected to last for over a year or is a progressive illness;
- ii. the person satisfies the Equality Act 2010 definition that the impact of the disability substantially limits³ the person's ability to carry out normal day-to-day activities; and
- iii. their condition affects either the kind **or** the amount of paid work they can do.

22. Normal day to day activities mean those carried out by most people on a daily basis, such as walking up a flight of stairs, using public transport, using a knife and fork, reading newsprint (wearing glasses or contact lenses), or being able to carry a tray without spilling or dropping its contents. Further useful guidance and examples are contained in the Government's Guidance on the Equality Act, available to download on the www.gov.uk website. The Equality Act 2010 test for disability focuses on whether the individual's condition has a substantial adverse effect on their ability to carry out such normal day to day activities.

23. It is important to emphasise that:

² The Equality Act uses the wording "physical or mental impairment"

³ The Act uses the wording "adversely affects"

- a) The term “substantial” is defined in s212 of the Act, as meaning “more than minor or trivial”
- b) Where an impairment is subject to treatment or correction (e.g. the use of a prosthesis by an amputee, or a hearing aid by a person with a hearing impairment, but not sight impairments which are capable of correction by spectacles or contact lenses), that treatment or correction is to be disregarded in determining whether the impairment has a substantial adverse effect on the ability to carry out normal day to day activities (Sched 1 para 5)
- c) A person who has a progressive condition which is likely to result in a substantial adverse effect on day-to-day activities **in the future** will be treated as impaired from when his condition first has **some** adverse effect.

24. There has been some debate as to whether the Ogden definition of disability differs from the statutory definition in the Equality Act 2010⁴. In my view it does not. The examples given in paragraph 35 of the Explanatory Notes are drawn from the Guidance on the Disability Discrimination Act 1995, which was in essentially similar terms to the current Guidance under the Equality Act 2010. The examples given are simply that – illustrative examples. They cannot undermine or replace the statutory definition. Since any impairment which has a more than minor or trivial effect upon the ability to carry out normal day-to-day activities will qualify, the bar is set fairly low.

25. It follows that the definition of disability is about rather more than stereotypical concepts associated with disability, such as wheelchairs and limb amputations. A range of individuals with different types of impairment affecting them in very different ways can meet the definition. The test focuses on what the individual **cannot** do, or can only do with difficulty. It follows that some individuals who meet the definition of disability are more limited in their ability to live their lives than others. As a result of their condition some individuals may never work again. Others may be able to return to work but with a reduced earning capacity. Others may suffer

⁴ See Dr Victoria Wass: *Billett v MOD* and the meaning of disability in the Ogden Tables (2015) JPIL 37

no loss of earnings despite having acquired disabled status, or they may have suffered no immediate loss but their intended career path may be affected. Others may have minor impairments which appear to have little effect on their earning capacity. The courts have had to grapple with the concept of disability when considering whether or not the disabled factors in the Ogden Tables should be applied uniformly to all individuals that meet the definition of disability, or whether there is room for further judicial discretion to adjust the factors for disability in the Tables.

26. I consider the case law below. In short, however, there has undoubtedly been a tendency among many judges to adjust the reductions factors in Tables A-D, sometimes with little or no apparent justification for doing so. I leave it to you to judge whether such adjustments may be regarded as appropriate adjustments, or whether they are no more than impermissible judicial tinkering.

Cases of Disability where Some Employment Potential Remains

Conner v Bradman [2007] EWHC 2789 (QB) HHJ Coulson QC

27. *Conner v Bradman* was the first case decided with the then new approach of the 6th Edition of the Ogden Tables to the assessment of the effect of disability on working life. This case continues to set the tone for later judicial usage of the Tables in cases of disability where some return to work is still possible.
28. In 2002 the Claimant, a Saab mechanic, was knocked off his motorbike in a collision with a car driven by an employee of the Defendant. He suffered a severe injury to his left knee as a result of the accident.
29. The first question for HHJ Coulson QC (as he then was) was to establish whether the Claimant was disabled for the purposes of the Disability Discrimination Act 1995 (the predecessor to the Equality Act 2010). The Judge, having considered the Act and Guidance Notes, found that the Claimant fitted precisely into the definition of disability under the Act under s1(1) and Sched 1. He made particular reference to the fact that the Claimant, as a result of the accident, suffered constant knee pain, had

difficulty with stairs, squatting and bending, and was restricted in many activities of daily living, including DIY and gardening. Although he was still working for Saab at the date of trial, it was accepted that he would have to give up such work within 12-18 months, and that he was permanently disadvantaged on the open labour market.

30. Prior to the accident, the Claimant was earning £20,327 net per annum as a mechanic working for Saab. The judge agreed that the Claimant would, but for the accident, have continued in this role until age 65. The Claimant had been working part-time as a taxi driver to supplement his income (a fact he only declared shortly prior to trial!). He intended to turn his part time employment into full-time work as a taxi driver. It was agreed that his likely net earnings in this occupation were £13,645 per annum.
31. The Judge followed the *Wells v Wells* approach in using the Ogden Tables, accepting that “the conventional approach is to treat them at least as the starting point”, leaving the possibility of departing from the Tables where necessary.
32. He rejected a *Smith v Manchester* award as inappropriate, as such an award is to compensate a claimant where he has not lost his present job but would be handicapped in the labour market were he to do so in the future. Here, the Claimant was definitely going to suffer a loss of future earnings. The judge also rejected a *Blamire* award, as such an award is appropriate where there are too many uncertainties as to its nature, scope and extent to enable any future loss of earnings to be quantified by the conventional multiplier/multiplicand approach. None of those uncertainties existed in the present case.
33. Instead, the judge was entirely confident that the Claimant would suffer a quantifiable loss of earnings for an appreciable time. The Ogden Tables must therefore be the starting point for his assessment.
34. Despite expressing sympathy with the view that Tables based on detailed actuarial evidence should not be the subject of impressionistic “tinkering” by the judge, it

might be argued that HHJ Coulson QC did just that! The judge made the point that the Tables according to their own introduction are not “inviolable where, on the facts of a particular case, the evidence demonstrates the need for an adjustment.” He also referred to *Kemp and Kemp* (at para 10-015), which says that “the relatively low threshold required to [meet] the definition of ‘disabled’ will result in the need for potentially significant adjustment depending on the extent of a claimant's disabilities. This will have to be considered on a case by case basis.”

35. The Judge concluded that he should adjust the residual earnings multiplier. He split the difference between the Table A figure (non-disabled) of 0.82 and the Table B figure (disabled) of 0.49, resulting in an adjustment factor of 0.655. Had the Claimant been treated as disabled, future loss of earnings would have been calculated as £113,796. Instead, they were calculated as £86,114, a difference of £27,682.
36. Dr Wass⁵ has criticised the decision on the basis that the judge had no evidence on which to determine where in the scale of disability the Claimant fell, compared with those on whom the statistical research was based.

Clarke v Maltby [2010] EWHC 1201 (QB) Owen J

37. The Claimant was a solicitor in private practice who sustained severe physical injuries and a brain injury in a road traffic accident. The nature and effect of the impact of the brain injury on her cognitive function was in issue, as was the degree to which the brain injury may have affected the Claimant’s ability to progress in her career as a solicitor. Owen J found that the Claimant’s injury resulted in occasional dizziness, fatigue, disinhibited temper and various cognitive impairments, such that she would not be able to sustain the required level of performance as a solicitor undertaking transactional work in banking, the area in which she had specialised prior to the accident, and that the Defendant’s concession that it was reasonable for her to withdraw from financial services law and move into less onerous employment in the law was well made. The case of *Clarke* therefore was similar to that of *Conner* in that

⁵ See “Discretion in the Application of the New Ogden 6 Multipliers” JPIL issue 2/2008 pp154-163

there was a finding of disability, and the move by the Claimants to employment with a reduced earning capacity to that which they enjoyed prior to the accident was held to be reasonable.

38. The Judge accepted expert evidence that, in the absence of the accident, the Claimant had a 100% chance of obtaining equity partnership in a regional firm with a salary of £110,000, an 85% chance of achieving partnership in a medium-sized City/central London firm with potential earnings of £130,000, and a 30% chance of progressing to partnership with a larger City/central London firm, earning £180,000.
39. There was no reason to depart from the normal retirement age of 65, and the multiplier was calculated with reference to the Ogden Tables. This was then used as a basis for calculation of her future notional earning capacity of £1,138,220.
40. As to residual earnings, the judge found that the Claimant's earning capacity was limited to work as an employed solicitor. Her future earning capacity was in the order of £24,000 per annum gross based upon working a three day week (which equated to a salary of £40,000 on a full time basis), but the judge considered it unduly pessimistic that she would be limited to a three day week, given that she was relieved of the stress of partnership, and assessed her residual earnings capacity as £40,000 gross.
41. Despite a judgment running to no fewer than 107 paragraphs, he dealt with the issue of adjustment of the residual earnings multiplier in just two sentences, concluding that it was not appropriate to apply a Table D discount, as "her degree of disability has been fully reflected in the difference between her lost and residual earning capacity." This meant that the recommended approach of the Ogden Tables, and indeed *Conner*, was not followed, and her residual earnings were assessed using the same Table A discount as for uninjured earnings, resulting in a calculation of £387,650. The overall loss of earnings award was therefore £750,570.

42. One can only speculate as to how Ms Clarke may have fared since then, but I doubt very much that her disability would allow her to remain in employment for 87% of her remaining working life, as the judge's calculation assumed. Had he applied a "disabled" adjustment (0.60, rather than 0.87), the overall loss of earnings figure would have increased by £120,340, equivalent to a little over 5 years of her current net salary.

XYZ v Portsmouth Hospital NHS Trust [2011] EWHC 243 (QB) Spencer J

43. The Claimant, aged 39 at trial, had pursued a career as a high-flying market researcher in the pharmaceuticals industry, in which he would have worked to age 70. As a result of irreversible kidney damage caused by the Defendants' negligence, he was restricted to part-time research work, at significantly reduced earnings, from which he would have to retire early. Despite complications including constant health worries, lack of energy, urinary frequency and nerve damage affecting his right leg (such that he was unable to run and had difficulties on stairs and uneven ground), the judge concluded that it was a "borderline decision" whether those conditions met in full the relevant criteria to establish "disability". As in *Conner v Bradman*, he therefore adjusted the residual earnings multiplier to age 57.5 by a factor of 0.73, the mid-point between Table A (0.88) and Table B (0.57). The result was a residual earnings multiplier of 10.00, rather than 7.81.

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

44. Leesmith was a lighting technician who at the age of 24 suffered severe injuries in a motorcycle accident. He underwent an above-knee amputation and suffered permanent impairment of grip due to fractures to his right hand. As a result of his injuries he returned to work with a reduced earning capacity, from around £33,000 net to £10,000.
45. In assessing future loss of earnings, the pre-accident reduction factor was 0.92.

46. The post-accident reduction factor using Table B would be 0.54 (as an employed, disabled male with mid-level qualifications). The Defendant, however, submitted that given the wide definition of “disabled”, the figure of £10,000 fully took into account the degree of disability, and to adopt the full factor would be unjust. The court only partly agreed, and adjusted the factor from 0.54 to 0.60.

Sharma v Noon Products Ltd (2011) QBD HHJ Yelton

47. The Claimant (35) suffered a crush injury to his right index finger whilst attempting to repair a dough-cutting machine, leading to amputation of the fingertip and impaired dexterity for fine manual tasks, including use of a computer. He was unable to return to agency work as an engineer, but had obtained more secure employment as a security guard, at a similar level of earnings.
48. The judge rejected the Defendant’s contention that a *Smith v Manchester* award equivalent to about 6 months’ earnings should be made. He accepted that the Claimant fulfilled the definition of “disabled”, although he was not as disabled as many people to whom the Equality Act applied. Although there had been no loss of earnings, the Claimant’s area of potential work was considerably reduced.
49. Although the Claimant argued that the residual earnings multiplier should be reduced by 0.4 in accordance with Table B, the judge concluded that the court could adjust that figure on the particular circumstances of the case, although obviously adopting a more scientific approach than had hitherto been the case. He increased the adjustment factor to 0.6, observing that the particular figure is “a matter of impression in all the circumstances”.
50. It is difficult to fault this approach in the circumstances of the case, given that the Claimant was employed at the same level of earnings in a more secure job than pre-accident.

Higgs v Pickles [2011] PIQR P15 HHJ Ellis (Croydon CC)

51. Although only a county court decision, this case merits reference as the first reported decision in which a judge declined to depart from the reduction factors in the Ogden Tables.
52. The Claimant (53) was injured in a road traffic accident when he was knocked off his motorcycle. He suffered multiple injuries including a comminuted fracture of the right tibial plateau, a right shoulder injury and a depressive episode of mild to moderate severity. He had left school without any qualifications but had worked himself up the building trade and at the time of the accident he was working as a skilled bricklayer. He would have continued to do so beyond age 65, probably to age 70. It was agreed that, as a result of his injuries, he was unable to return to building work, although he had re-trained as a computer aided design (CAD) technician. A jointly instructed employment expert opined that the Claimant's prospects of obtaining any relevant employment were less than 50 per cent and the prospects of obtaining CAD work were poor until at least 2014 when the Claimant would be aged 56.
53. The Claimant had always been a hard worker and he was keen to obtain employment. He had made many job applications but had only received a handful of replies. The judge found that he would need a knee replacement operation at age 60 and a revision operation at age 75.
54. HHJ Ellis, helpfully set out the background to the publication of Ogden 6, making reference to the findings of the research carried out at City University in London and Cardiff University. He confirmed that the research established that the most important factors, other than sex and age, affecting future employment prospects were: (i) whether a person was employed or unemployed; (ii) whether the person was or was not disabled; and (iii) the educational attainment of the person. Likewise he reiterated the findings of the research that factors previously thought to be important such as occupation, industrial sector and geographical location were relatively insignificant once educational attainment had been taken into account, and

that the key finding established in this research was that disabled people were more likely to be out of employment than their non-disabled peers.

55. HHJ Ellis set out paras 31 and 32 of the Explanatory Notes to Ogden 6 including the passage referring to Tables A to D as a “ready reckoner”. He noted that there did not appear to be a reported case where a court had applied the starting point figure without adjustment. He then referred to the cases of *Conner v Bradman* and *Clarke v Maltby* where the judges had departed from the suggested discount factors.
56. The Defendant argued that the Court ought to adjust the Table A discount factor to reflect the physically demanding nature of the Claimant’s work in the building industry, with its attendant risk of injury or accident. However, the judge refused to make such a discount. There was no evidence before him to show that bricklayers were significantly more likely to be injured than other workers and he held that it would be wrong for him to make a further adjustment on that basis.
57. As regards the Claimant’s residual earnings, the Claimant was disabled within the meaning of the Equality Act 2010. He fell into category GE-A because, following the accident, he had re-trained as a CAD Technician, obtaining a City & Guilds Level 3 qualification in 2D drawing. The suggested Table B discount factor was 0.15. However, the Defendant argued that this should be increased to 0.6. The judge held that there was no statistical or actuarial basis for making such an adjustment which would amount to resorting to the old fashioned approach of “feel”. Since there were no special features on the facts of the case to justify a departure from the starting point indicated in Table B, the reduction factor of 0.15 was applied without adjustment.

Johnson v Le Roux Fourie [2011] EWHC 1062 (QB) Owen J

58. The Claimant (49) had run a very successful company with her husband, providing software for the business and financial markets sectors. In 2003, she underwent plastic surgery to her face and breasts, which was negligently performed, causing

permanent right facial nerve damage, with an abnormal grimace, of which the Claimant was acutely self-conscious, unequal breasts, and a profound psychological impact, involving a prolonged adjustment disorder with anxiety and depression. Her confidence and ability to operate in the business world had been considerably undermined, she was described by witnesses as a shadow of her former self, and it was unlikely that she would fully recover her previous personality.

59. Owen J found that there was a real and substantial chance that, if she had been fully involved between 2003 and 2011, the turnover of her business would have increased to not less than £25m. He reduced that figure to £20m to reflect the risk of not achieving such turnover. The net profit would have been 10% of turnover, shared equally between the Claimant and her husband, which would have resulted in an annual loss of earnings, adjusted for probable share options to employees, of £800,000, continuing to age 63.
60. As to residual earnings, whilst she functioned intellectually at a very high level and continued to have the potential to deploy her outstanding abilities in the business context, account must be taken of the deep-seated psychological consequences and the uncertain prognosis, resulting in a heavily-discounted figure. Her residual earnings capacity was assessed at £40,000, commencing one year after judgment.
61. The judge declined to adjust either the loss of earnings multiplier or the residual earnings multiplier by reference to Tables C-D, observing that application of the Ogden methodology was case-sensitive. As to the uninjured multiplier, in the light of the Claimant's remarkable career prior to surgery the risks of unemployment were negligible, and as a principal shareholder it was unlikely that periods of sickness or the demands of caring for her teenage son would have affected her income. As to the residual earnings multiplier, the relatively uncertain prognosis and the risk that there might be periods when she was unable to work full-time had already been considered in determining the multiplicand.

62. The Claimant (36) enjoyed a successful career as an equity sales trader for Credit Suisse, with a gross annual income of over £200,000 and the potential for a “stellar career” with the Bank. During the delivery of her 1st child in 2008, the obstetrician negligently caused damage to her internal and external anal sphincters, leading to significant bowel problems and associated psychological illness.
63. But for her injury, Andrews J found that the Claimant would, following her husband’s transfer to a bank in Hong Kong, have successfully established herself as an equity sales trader in Hong Kong, at a salary of £185,000, and would have returned to work following the birth of her 2nd child in 2010. Although she would have returned to London following her husband’s unexpected redundancy in 2011, she would have secured re-employment with Credit Suisse at a salary of around £125,000, before returning to Hong Kong in 2012, earning £251,828. However, following the birth of her 3rd child in 2013, she would have moved to a less stressful position involving shorter working hours, with a reduced salary, conservatively assessed at £138,505 gross (£82,625 net), until retirement at age 55.
64. As a result of her injuries, she was no longer fit for work on the trading floor or in a crowded office environment, and she faced considerable challenges in finding suitable work, although she had expressed an interest in starting her own business as an interior designer. Her residual earnings were assessed on average at £25,000 gross (£19,819 net) over the remainder of her working life to age 55.
65. The judge applied a Table C adjustment of 0.89 to the multiplier of 14.52 for uninjured earnings, rejecting the Defendant’s contention that the discount should be 0.8 to reflect the higher risk of redundancy in the banking sector. Further, there was no justification for departure from the Table D figure of 0.42 for residual earnings, resulting in a total award for loss of earnings of £946,882.

66. The Claimant (43) suffered a lower back injury whilst lifting a heavy pre-fabricated staircase at work. Liability was admitted. Although he managed to return to work in a supervisory management role with increased pay, his back problems worsened, despite an operation, and he accepted a redundancy package of £8,000 from his employers. He obtained alternative employment with a minibus company, driving and performing administrative tasks, at a much reduced salary. Although he began such work on a full-time basis, he had to reduce to part-time hours owing to the ongoing symptoms in his back. The medical evidence suggested that, whilst there had been a great improvement, the Claimant's current state was permanent and further treatment might be required. In the long term, he would continue to have lower back pain, there was a 5% chance that he would require further interventions (injections or a spinal fusion), he was unfit for any heavy lifting work and would remain disadvantaged in the employment market. In addition, the Claimant had developed moderate depression, which would require anti-depressants and CBT.
67. General damages for PSLA were agreed at £25,000. The principal issue concerned loss of earnings. The Defendant suggested that: (a) the Claimant had left work voluntarily when offered redundancy for economic reasons; (b) the Claimant had failed to mitigate his loss, having initially continued to work for the Defendants despite his injury, and should have been able to take on similar work elsewhere, rather than part-time, low-paid employment. William Davis J rejected those contentions. It was inconceivable that the Claimant would have voluntarily left responsible employment with a salary of £30,868 in return for an £8,000 redundancy payment when he had no job to go to and continuing back problems. The true position was that he had been told that if he did not accept redundancy, he would be sacked. Had he been able to find work for similar pay, he would have done so, rather than taking a job driving a minibus. He was clearly not in a position to seek work that he was suited for. If he had not been mitigating his loss, he would not have attempted to work full-time, even though the demands of full-time work in his new job were beyond his capacity, requiring him to revert to a part-time role.

68. The judge accepted that the Claimant satisfied the conditions to be regarded as disabled, in that he had an illness or disability that had lasted for more than a year, that substantially limited his ability to carry out normal day-to-day activities and affected the type of paid work he could do. The Defendant's argument that there should be a lump sum award was rejected. However, the Court accepted the Defendant's evidence that, due to a decrease in turnover, the Claimant's earnings would not have increased in the years since he left their employment. His pre-accident earning capacity was assessed at £30,868 using a multiplier to age 67.5 of 17.65, adjusted by a factor of 0.88. As regards the multiplier for residual earnings, this was reduced by the full Table B factor of 0.39, resulting in a multiplier of 6.88. However, the judge found that, whilst his current earnings were only £7,500, this figure underestimated his capabilities. Although he was suffering from a disability, the Claimant had pride and would take all necessary sensible steps to provide for his family. The Court determined that his residual earning capacity was £17,000, commencing 1 year from the date of the hearing.

Billett v MOD [2015] EWCA Civ 773

69. The Claimant (29) had suffered a non-freezing cold injury to his feet in 2009 whilst undertaking exercises in cold weather as a Lance Corporal in the Army. He was medically downgraded initially, but was later upgraded, so that he was fully deployable. He nevertheless considered that his career prospects had been damaged and he was unhappy about the way he had been treated, so he left the Army in 2011 in order to take up employment as an HGV driver with a haulage company, at a net annual salary of £21,442.

70. Andrew Edis QC (as he then was) found that the Claimant had chosen to leave the Army for reasons unrelated to his injury, so that those losses which were said to flow from the termination of his Army career were irrecoverable. Nevertheless, the employment experts agreed that, as a result of the continuing symptoms in his feet and his sensitivity to cold conditions, the Claimant had a disadvantage on the labour

market, in that he would have to avoid jobs that required him to work outside. The judge accepted that, whilst the Claimant was a hard-working and capable man who was likely to be sought after by employers, he would have more difficulty in finding other work if he lost his current job than would otherwise have been the case. Although, as a result of having GCSEs in English and Maths, the Claimant would not be entirely limited to manual work, he was likely to be looking for work on several occasions throughout his working life, a disadvantage for which he was entitled to be compensated.

71. The judge rejected a submission that he should make a traditional lump sum award, based on 3 years' annual earnings, observing that "the cases where that approach was properly to be applied are cases where there is a great deal of uncertainty about what the Claimant would have done if uninjured." Here, there was no doubt that the Claimant would have worked as an HGV driver, probably at the same level of earnings. The only difference his injury had made was that, if he had to change jobs in the future, it would involve a longer search for work than otherwise would have been the case. That was the risk that had to be valued.

72. Although the Claimant was "disabled", he was only just so: "I find it hard to conceive of very many people who could be classified as "disabled" who are as fit and able as is this Claimant." Whilst the judge therefore accepted that he should apply the Tables A and B method, he considered that if the reduction factors were not adjusted significantly, they would involve a finding that the Claimant would be out of work because of his injury for over 10 years of his working life, a finding which was extremely hard to accept given the very low level of disability and his excellent work record. Recognising that there was little logic in his approach, he adopted a mid-point between the disabled (0.54) and non-disabled (0.92) reduction factors, concluding that the resultant figure of 0.73 fully reflected the loss sustained by the Claimant without over-stating that loss. When applied to a raw multiplier to age 68 of 24.29, the resulting claim for loss of earnings was £99,062.

73. On appeal, the Court of Appeal upheld the finding that the Claimant was “disabled”, but “only just”. They pointed out that, although there were many things which the Claimant could do (noting that the Army had graded him as medically fully deployable), the focus should be on what he cannot do.
74. However, they disagreed with the judge’s use of the Ogden approach. Although in many instances the use of Tables A-D would be a valuable aid to the assessment of loss of earning capacity, in this case the disability was minor and the injury had less impact on the Claimant’s ability to work than on his leisure activities. Whilst determining the appropriate adjustment factor was a matter of broad judgment, there was no rational or scientific basis on which to do so in this case, which was a “classic case” for a *Smith v Manchester* award. Damages of £45,000 were awarded, equivalent to just over 2 years’ loss of earnings. Alternatively, had the judge been correct to adopt the Ogden approach, the adjustment factor should have been reduced to a figure much closer to the non-disabled figure in Table A, which would have given a similar result⁶.
75. Interestingly, Dr Wass weighed into the debate prior to the hearing of the appeal by suggesting that the judge ought to have found that the Claimant was not disabled using the Ogden criteria⁷, a suggestion which is difficult to reconcile with the wording of s212 of the Equality Act and which was rightly rejected by the Court of Appeal.

Murphy v MOD [2016] EWHC 3 (HHJ Coe QC)

76. The Claimant (21 at the date of the accident), a Sapper in the Parachute Regiment, was struck on the head by a heavy roll of fabric whilst unloading supplies in Afghanistan, causing a minor neck injury, leading to the development of chronic widespread pain or fibromyalgia, associated with a mixed anxiety and depressive disorder. As a result, he was medically discharged, causing him considerable

⁶ This suggests that an appropriate reduction factor would have been around 0.84, about the 20th centile between the non-disabled and disabled reduction factors.

⁷ See n5 above

unhappiness and frustration. He had since obtained employment as an estate workforce manager with the NHS.

77. The Claimant had been left with chronic thoracic and lumbar pain, infrequent episodes of incontinence, some numbness in the legs, and stress and low mood, due to the development of a somatoform symptom disorder, in which very minor residual symptoms were associated with significant disability, maintained by psychological factors and an excessive focus on his symptoms. His condition followed a typical pattern of improving with rest, but worsening with activity, such that he was unfit for very heavy lifting and physical work, or work involving a hectic pace and stress. His condition would be permanent.
78. The judge found that, but for the accident, the Claimant would probably have remained in the Army for a full 24-year engagement, being promoted to the rank of Staff Sergeant. Since he had obtained and maintained employment to date, and would endeavour to pursue his new career to retirement age, she did not consider a *Blamire* award to be appropriate. There were not so many imponderables that such an award was the only sensible option. Having considered the Equality Act definition of “substantial”, she concluded that the Claimant was “disabled”, but that his disability was “modest only”. Most of the restrictions affected his home and personal life, although he was not able to pursue hectic or stressful jobs and had some physical limitations with heavy lifting. He had learned to deal with his condition by not pushing himself too hard, and his psychiatric symptoms might improve with CBT or a pain programme, with a favourable impact on his chronic pain. In those circumstances, a figure based on the difference between the non-disabled reduction factor (0.89) and the disabled reduction factor (0.42) would be “disproportionately high”. Given his determination, he was unlikely to be out of work for more than a few relatively short periods of time during his working life, such that any adjustment to the reduction factor would have to be substantial, and quite close to the non-disabled multiplier. In the circumstances, even though she found that the Claimant was disabled, the reality was that his particular circumstances were not well-suited to the use of the Ogden tables. Applying *Billett*, she regarded this as a “classic *Smith*

v Manchester situation”, and made an award in the region of 2 years’ loss of earnings, namely £50,000. That award was in addition to the multiplier/multiplicand award based on the difference between his Army earnings and his residual earnings, and an award of £10,000 for loss of congenial employment.

Kennedy v London Ambulance Service NHS Trust [2016] EWHC 3145 (HHJ Hughes QC)

79. The Claimant was employed by London Ambulance Service as a solo responder, earning £24,660 per year. In 2011, she suffered carbon monoxide poisoning when she was provided with a vehicle with a defective exhaust. She went on to develop chronic PTSD, which the judge found was caused by that incident. Having been absent from work for a period, she returned to restricted duties, but her employment was terminated 4 years later on capability grounds, as she was unfit to return to her solo responder role. But for the accident, she would have continued working for the Ambulance Service to age 60.

80. HHJ Peter Hughes QC accepted medical evidence that, following successful CBT treatment, the Claimant was likely to resume work, but in a less stressful environment. Observing that there was “a degree of crystal ball gazing” and a lot of uncertainty as to what earnings she might achieve, he concluded that she ought to be fit enough to return to employment, earning £16,000 per year. Recognising that, in the drive for mathematical precision, there is a danger of losing sight of the fact that the object of the exercise is to provide fair compensation for an uncertain future, and that mathematical precision is an unattainable goal, he nevertheless rejected the Defendant’s submission that the imponderables were such that a *Smith v Manchester* award should be made: “In my view the Court should not depart from the multiplier/multiplicand approach unless, as in *Billett*, it throws up an obviously unreal result.”

81. He made a full loss of earnings award for the first 2 years ($1.95 \times £24,660 = £48,087$). He calculated “but for” earnings using a multiplier of 11.31 and a Table C adjustment factor of 0.8, resulting in a figure of £223,123. In fixing the reduction factor for

residual earnings, however, whilst he appears to have accepted that the Claimant was disabled, he concluded that a Table D reduction factor of 0.42 was too pessimistic, and adjusted it to 0.62, midway between Tables C and D, resulting in residual earnings of £112,195. The total claim for loss of earnings was accordingly £159,015. An additional award of £2,500 was made for loss of congenial employment, together with a broad brush award of £25,000 for loss of pension.

Marsh v Ministry of Justice [2017] EWHC 1040 (Thirlwall LJ)

82. The Claimant, a prison officer, suffered psychiatric injury involving chronic depression as a result of a delayed investigation of unfounded allegations of sexual misconduct against him. He had been dismissed on ill-health grounds in 2013, when the judge found that he would otherwise have worked to age 65, earning £24,512.84 net per year, in employment which was secure. Although his condition was much improved by the date of trial (when he was 56), it was agreed that he needed some further treatment, such that he would be unable to apply for alternative jobs until 2017, when he would be 57. The judge found that, but for the Defendant's breach of duty, the Claimant's psychological injury would have been limited to around 2 years, enabling him to return to work in 2012. As a result of the breach, it persisted for a further 5½ years. As a result of his prolonged illness and absence from work, his residual earning capacity was much reduced, to a maximum figure of £20,000. He was not, however, disabled.
83. The parties agreed that a Table A adjustment should be applied to the Table 9 multiplier when calculating both his uninjured earnings and his residual earnings, but there was a dispute as to whether the reduction factors should be adjusted. The judge rejected a suggestion that there was not much difference between the ages of 54 (the upper limit of Table A) and 56, and held that an upward adjustment should be made to reflect the fact that he was approaching 57. Equally, she rejected the suggestion that there should be an upwards adjustment to 0.9, holding that, although the employment of a prison officer is secure, with little risk of dismissal, there were still 8 years until retirement. She considered that (i) the difference between age 54

and the Claimant's current age and (ii) the reality that the work of a prison officer in the foreseeable future is secure were properly reflected in a RF of 0.83. As regards residual earnings, she agreed that the starting point should be the Table A RF for an unemployed male aged 54 of 0.59, but adjusted this downwards to 0.49 to reflect that he would be 57 before he was able to look for work and older still be the time he found it, and that his prolonged history of illness and the circumstances in which he lost his job would be off-putting to employers, making it more difficult for him to find work. In addition to future loss of earnings, she made an award of £7,500 for loss of congenial employment⁸.

XX v Whittington Hospital NHS Trust [2017] EWHC 2318 (Sir Robert Nelson)

84. The Claimant, aged 29, developed invasive cancer of the cervix as a result of clinical negligence, requiring her to undergo chemo-radiotherapy, leading to irreparable damage to her uterus and ovaries, with consequent infertility and premature menopause. She suffered episodes of urinary and bowel frequency, urgency and occasional incontinence, which were likely to persist, limiting her ability to travel and causing considerable difficulties in her life. Although she had returned to her pre-accident work as a station store manager, it had no toilet facilities, such that she regularly had to queue to use the public lavatory. She had declined an offer of promotion due to the need to travel between stations, and had taken a number of days off due to flare-ups in her condition. Described by the judge as “an intelligent woman with determination and resolve”, she was an excellent employee who did her job well, had adopted a stoic role and had fought hard to overcome her disabilities. Nevertheless, there remained a real risk that her resilience would diminish over the years, and that she would suffer a real handicap on the labour market as a result of her bladder and bowel problems. Although she liked her current job, she had a long-held ambition to become a counsellor.

⁸ A double whammy for the Defendant was the fact that, in the period between trial and judgment, the discount rate changed from 2.5% to -0.75%. The judge held that the award should be calculated at the new rate

85. The judge found that she was disabled under the Equality Act, although she remained able to carry out her pre-accident job at the same level of pay. An Ogden calculation of future loss of earnings produced a claim for £258,265, which the judge regarded as “clearly excessive”, representing nearly 30% of all her future earnings. He concluded that this claim was quite unrealistic, and suggested a much greater handicap that she in fact had. Applying *Billett*, he adopted a broad approach resulting in an award of 4 years’ earnings, amounting to £100,108.80.

Swift v Carpenter [2018] EWHC 2060 (Lambert J)

86. The Claimant, aged 43 at trial, suffered severe injuries to both lower limbs in a road traffic accident, leading to a below-knee amputation of her left leg. She was left with severe phantom limb pain on the left, in addition to stiffness of the right foot and ankle. Prior to the accident, she was an energetic woman who lived her life to the full, with work, sport and travel being equally important to her. She was a graduate who worked in travel journalism for a London marketing agency, earning £60,000 gross (£41,712 net). She enjoyed sport and exercise most days, including tennis, water-skiing, snow-boarding, swimming and cycling. She had travelled extensively. She married her partner (who was 16 years older than her, and had retired in his mid-50s) 2 years after the accident, and they had 1 child. It was her intention to re-claim as much of her busy work and sporting lifestyle as possible, given her disability. She had returned to work for 4 days per week, earning £33,360 net.

87. The judge described the Claimant as “dynamic and ambitious”. She accepted that, but for the accident, the Claimant would have continued working for 5 days per week until retirement at age 67, and would probably have been promoted, increasing her pre-accident salary to around £49,000 net (£70,000 gross). Having a family would not have diluted her resolve. Her pain and fatigue meant that she would not return to working 5 days per week and that her residual earnings would now plateau at their current level. The judge assessed pre-accident earnings using a multiplier adjusted from Table C by 0.89, resulting in lifetime uninjured earnings of £1,085,350. There was no dispute that the Claimant was now disabled. Rejecting the Defendant’s

contention that application of a Table D reduction factor to the multiplier for residual earnings would amount to double recovery, Lambert J stated that the purpose of the Ogden 7 reduction factor was to reflect the likelihood that the Claimant would experience periods of unemployment due to her disability. However, it was legitimate to adjust the factor upwards or downwards to reflect features of the particular case: such adjustment was not “impermissible judicial tinkering”. She concluded that the Table D reduction factor should be adjusted from 0.6 to 0.7, reflecting the fact that the Claimant was “capable and committed”, would have good mobility with her prosthetic limb, but that her ability to travel and to work late would be affected by pain and tiredness. After taking into account savings in travel costs due to receiving a Freedom Pass, future loss of earnings were assessed at £481,573.

Conclusions

88. The Courts generally appear willing to adjust the reduction factor for the post-injury multiplier to take account of the level of the disability. However, “there is certainly an argument that the true significance of Ogden 6 and the research upon which it is based is to demonstrate that small departures only are necessary, and that many of the traditional “broad brush” departures of the past can now be seen to have resulted in rather larger discounts to the overall multiplier than were in fact justified, when seen against the background of the new Ogden data”⁹. Relevant factors will include the degree of disability and the security of any residual employment.

Lump Sum Awards

89. Clearly the use of reduction factors serves to compensate a Claimant who has incurred loss of earnings for their future vulnerability on the open labour market. Where the reduction factors in Tables A to D are applied, the Explanatory Notes to the Ogden Tables state that there will usually be no need for a separate *Smith v Manchester* award.

⁹ See Kemp & Kemp para 10.014.2

90. However, it should be noted that the Ogden Tables have not done away with lump sum awards. Where there is no quantifiable loss of earnings but the Claimant is disadvantaged in the open labour market, then a *Smith v Manchester* or *Blamire* award may be appropriate, even if it is arguable that the Claimant is disabled. In *Hiom v Morrison Supermarkets [2010] EWHC 1183 (QB)*, Jack J made a £25,000 *Blamire* award to a claimant with a serious leg fracture, who had previously drifted in and out of casual work as a labourer or in a fast food outlet, having “reluctantly” concluded that there was no mathematical basis on which to assess future loss of earnings, and that the claimant was not “disabled”.
91. More recently, in *Ward v Allies & Morrison [2012] EWCA Civ 128*, the Claimant, a 1st class graduate in model-making with ambitions to work as a theatrical model maker, suffered a traumatic amputation of her non-dominant index finger (which was re-attached) and damage to her middle finger, together with PTSD, as a result of an accident with a circular saw whilst undertaking work experience at the Defendant architects’ firm. She was left with a shortened and largely cosmetic index finger, with poor pinch grip and no tripod grip, significant discomfort in extremes of temperature and discomfort in the middle finger when carrying shopping bags for more than a minute or two. The trial judge found that she was not incapable of working as a theatrical model maker, but the fact that she had been out of circulation for 4 years in a competitive field meant that she was unlikely to succeed, although she was quite likely to earn as much or more in another rewarding career, such as architectural model-making. The CA, whilst accepting at the outset that the multiplier/multiplicand methodology and the Ogden Tables should normally be applied when making an award for future loss of earnings, “unless the judge really has no alternative”, nevertheless upheld the trial judge’s decision to make a broad brush *Blamire* award of £30,000 for loss of future earnings, rather than a multiplier/multiplicand approach using Ogden 6, upon the basis that there was insufficient evidence as to what she had lost or was likely to earn in the future, or the time during which she needed to be compensated. They further upheld (albeit *obiter*) his conclusion that she did not fulfil the 3rd element of the definition of “disabled”.

Had an Ogden 6 approach been used, with a finding that she was disabled, the Claimant's case was that the appropriate award was £176,633.

92. Likewise, the CA in *Billett v MOD [2015] EWCA Civ 773* preferred a *Smith* award in circumstances where the Claimant only just met the criteria to be "disabled", and there was no rational or scientific basis to determine the appropriate reduction factor, an approach which was followed in *Murphy v MOD [2016] EWHC 3*.
93. However, in *Kennedy v London Ambulance Service NHS Trust [2016] EWHC 3145*, HHJ Peter Hughes QC observed that "the Court should not depart from the multiplier/multiplicand approach unless, as in *Billett*, it throws up an obviously unreal result".
94. That approach was echoed by Jay J in *Hayden v Madsone NHS Trust [2016] EWHC 3276* (a case involving the accelerated onset of a pre-existing spinal disc prolapse) where he stated:

"In my judgment, it is right to apply the ordinary multiplier/multiplicand approach. This is not an *exceptional* case where the Claimant should be awarded a lump sum on a more impressionistic basis" (emphasis added).
95. In *BDA v Quirino [2015] EWHC 2974*, HHJ Wood QC was concerned with the assessment of damages in a case of historical sexual abuse. The Claimant (28) had been groomed and sexually abused by her karate instructor between the ages of 15 and 18, involving kissing, sexual touching and eventually full sexual intercourse. The abuse disrupted her A-level studies, delaying her entry to university by 1 year, although she went on to achieve a 1st Class biomedical science degree, and was part-way through a combined Masters and PhD course when she disclosed the abuse. She was required to give evidence against the Defendant in the subsequent criminal trial (in which he attacked her credibility and maintained that the sexual relationship was consensual), which led to his conviction on 4 counts of indecent assault. His appeal against conviction was dismissed. The ordeal of the criminal proceedings caused the

Claimant to suffer a depressive illness, leading to an overdose, with significant disruption of her PhD course, which she would not now complete until 3 years' later, in 2016. She was thereafter expected to achieve earnings of at least £28,000 per year as a graduate in the bio-chemical or pharmaceutical industry.

96. HHJ Wood QC found that the Claimant's career had been disrupted by 4 years as a consequence of her psychiatric and psychological injury, but noted that, since the wrongful conduct occurred at a very early stage in her life, when her career path was difficult to predict had her education not been interrupted, a broad brush *Blamire* approach was to be favoured because of the number of imponderables which did not enable a precise calculation. He accepted that anticipated earnings based on 4 years' loss was "a helpful starting point", but needed to be reduced to reflect the uncertainties. An appropriate figure for past/future loss of earnings was £75,000.
97. In addition, since the Claimant was at potential risk of losing her employment as a result of recurrent depression, or having periods of absence, or finding it difficult to obtain fresh employment with the stigma of absence due to mental health illness, he considered that an additional award should be made under *Smith v Manchester* for handicap on the labour market. Although such awards "are made far more rarely these days, in the light of the helpful assistance provided by Ogden 6", the Claimant was not specifically disabled, such that it was not unreasonable to adopt a more traditional approach. The risk was significant but not substantial, and given that the Claimant was a highly resilient and resourceful young woman, it was unlikely to lead to long periods of unemployment. It would result in over-compensation to use a conventional calculation based on 2-2½ years' salary. The risk was represented by the potential for slightly over 1 lost year of earnings, namely £30,000.
98. *LXA & BXL v Willcox [2018] EWHC 2256* was another historical child abuse case. HHJ Robinson accepted that the abuse had contributed to LXA not achieving his full earning potential from age 17 to 35, but had "the gravest of doubts" that an analysis based on comparison with average earnings statistics was appropriate. He concluded that the imponderables were such that a *Blamire* award of £40,000, rather than the

claimed figure of £75,513.56, justly reflected the diminution in LXA's income due to the abuse. In the case of BXL, he did not feel constrained to adopt a *Blamire* approach, although he might well have reached a figure close to his calculated award, after allowance for contingencies, of £76,000 for past loss of earnings, and £17,564.27 for future loss of earnings (calculated on a multiplier/multiplicand basis). A further claim for damages for handicap on the labour market was rejected as too speculative.

99. In *AB v Royal Devon NHS Foundation Trust* [2016] EWHC 1024, Irwin J made a "very modest" £5,000 *Blamire* award to a claimant who had a "very patchy work record" due to long involvement with drugs.

100. The making of a lump sum award does not always mean that damages will be modest. In *Irani v Duchon* [2018] EWHC 2314, the Claimant was a 31 year-old research engineer who came to the UK in 2010 to complete an MSc, and subsequently obtained work in the technology centre of a polymer factory in Yorkshire. He suffered severe fractures to his left leg which, despite a good functional recovery from an orthopaedic viewpoint, left him with chronic pain, such that he was only able to return to work on light duties for 4 days per week, before being made redundant in 2015. David Pittaway QC accepted that he had probably been made redundant as a result of his injuries. Although the Claimant had since found alternative work, the break in continuity of his employment scuppered an application for indefinite leave to remain in the UK. As a result, he would not be able to renew his visa after 2020, and would probably have to return to India or another Commonwealth country, resulting in a reduction in his earnings. Whilst the judge accepted that the Claimant was disabled, and that a *Blamire* approach should only be used where other methodology is not practicable, he considered that there was a real risk that it would create an obviously unreal result in this case. Although a calculation of uninjured earnings based on mean average UK earnings for engineering professionals was acceptable, there was insufficient evidence to support the suggestion that his residual earnings potential in India or elsewhere was only £10,000 per annum, given that the Claimant was "a highly educated young man with specialist qualifications". Had a

multiplier/multiplicand approach been adopted, the judge indicated that he would have substantially discounted the final figure by 50% to reflect the chance that the Claimant might be able to obtain better paid employment in India or elsewhere. In the event, the judge made a *Smith v Manchester* award of £30,000 to reflect the continuing disability which would place him at a slight disadvantage for jobs involving heavy lifting, together with a *Blamire* award of £150,000 for the “significant dislocation of his employment” when he returned to India and the probability that he would earn at a lower level at least until he was able to re-establish himself there or in another country. This represented “an acceptable broad-brush compensation in the absence of appropriate evidence to substantiate his claim”.

The 8th Edition

101. At the time of publication of the 7th Edition, we were told that the Ogden Working Party was currently working on the 8th Edition of these Tables. This edition would be based on further updates of mortality rates, but also promised a substantial re-write of the Explanatory Notes in order to improve their usefulness to practitioners. In particular, the issues regarding adjustment of the suggested discount factors in Tables A-D would be discussed in detail when drafting the 8th Edition. The fact that Dr Wass had been persuaded to join the Ogden Working Party was encouraging, as was the fact that she had suggested changes to the definition of “disabled” and clarification of some of the language in the Notes. However, since the Working Party has not met for some time, a new edition is certainly not on the horizon.

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EXCHANGE CHAMBERS
5th November 2018