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## **NEW 6<sup>TH</sup> EDITION OGDEN TABLES:- COMMENTARY AND EXPLANATION OF CHANGES IN RELATION TO CALCULATION OF LOSS OF EARNINGS AND RESIDUAL EARNING CAPACITY**

### **LOSS OF EARNINGS: “Refining the Impossible Calculation”**

The latest edition of the Ogden Tables is published in May 2007. This has two principal changes. First, actuarial alterations have been made to all the Tables but particularly those affecting loss of life. These reflect the encouraging trend for people to live longer. The Tables are based solely on the actuarial projections for longevity and there is no parallel set of tables for the alternative historical basis, which is now rejected. The old bases for calculating loss of earnings using contingencies other than mortality, based on economic activity, risks in a particular type of job and geographical location have been abandoned. There are now much more radical factors to be applied to reflect other contingencies than mortality which grapple with the issues of the level of disability prior to the accident and its effect on employment; whether the individual was unemployed prior to the accident and, most significantly, the level of educational attainment of the claimant broken down into three categories. There are new Tables A to D reflecting these new contingencies. It is suggested that by employing these contingencies, particularly the disabled contingency, it should be possible to calculate both the adjusted loss of earnings if there had been no accident and the residual level of earning capacity; the loss of earnings damages claim would be the difference between the two figures. In most cases, it is suggested, that this would obviate any need to calculate any additional sum for “*Smith v Manchester*” loss of earning capacity and vulnerability in the labour market.

In practical terms, the loss of earnings calculation is meant to be more scientific and more precise. Much more attention will have to be paid to obtaining evidence from claimants in relation to their physical capacity prior to the accident, their educational attainments and in preparing for advocacy and negotiations when trying to break out of the strait jacket imposed by these Tables in particular cases, which are case-specific. Also, more time is going to be required to calculate the contingencies: I anticipate that the calculators in the PI toolkit, Kemp and Kemp programmes, etc. will be re-programmed in the near future. In the meantime, it is essential to obtain a copy of the new Tables so that reference can be made to the contingency factors set out in Tables A to D (pages 16 to 18 of the Explanatory Notes). If there is any difficulty in obtaining these, the Clerks at 4, King's Bench Walk will be able to assist.



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### NEW 6<sup>TH</sup> EDITION OGDEN TABLES CONTINUED:-

For an academic analysis of the need for the changes brought about by these Tables, please see an article written in the Journal of Personal Injury Law 2002 No. 2 entitled "Methods of Calculating Damages for Future Earnings: Lewis et al".

As a result of academic research (see above paragraph), it has been discovered that people spend less time in full-time employment than was originally thought and that apart from gender factors relating to time spent out of work looking after children for career breaks, the key factors were whether someone was employed or unemployed at the time of analysis: i.e. immediately pre-accident; whether that person was initially suffering from a disability and the level of educational attainment. The definition of disabled follows the Disability Discrimination Act definition which is very wide, but essentially one is dealing with someone who has a progressive illness or an illness lasting or expected to last over one year and where that condition affects the kind or amount of paid work they can do.

The definition of educational attainment for the purposes of the new Tables is broken down into three categories:

- (1) "D": A degree or equivalent or higher educational attainment, this includes people who have obtained professional qualifications, such as a lawyer, even if they have not obtained a degree itself.
- (2) "GE-A": This is to cover people who have achieved GCSE grades A to C, and up to A levels, or equivalent.
- (3) "O": This is to deal with people who have a below GCSE grade C or CSE grade 1 or equivalent or, no qualifications.

The definition of "employed" at the date of accident is somebody who is in paid employment, self-employed or in government training. Note that "unemployed" includes the temporary out of work, full-time student and unpaid family worker.

The methodology to be employed in calculating a normal loss of earnings case which has no case-specific features or unusual factors should be as follows:

Two sets of calculations need to be carried out. First, the value of the earnings of the individual claimant if there had been no injury and secondly, the valuation of the earnings of the claimant with the disability caused by the accident, in other words, the residual earning capacity.



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### NEW 6<sup>TH</sup> EDITION OGDEN TABLES CONTINUED:-

The base multiplier has to be taken from the appropriate numbered Ogden Table which reflects mortality contingencies, currently of course one is still using the 2½% discount rate. The new Tables, with the alterations to those actuarial considerations, are set out in the 6<sup>th</sup> Edition in normal form: note that helpfully they include retirement ages from 55 to 70 and of course one selects the gender appropriate table. Once one has obtained that figure, it is reduced by multiplying it with the appropriate factor from Tables A to D as appropriate. The Tables have representative columns for the employment status at the time of the accident, the educational attainment based on the three categories set out above and the disability status of the individual. To give one example, the factor for the relevant employment status at time of the accident for a 50 year old would vary if employed: .83 and if unemployed .72 ! The new jargon to be used for the resulting amended base multiplier is: "an adjusted table multiplier". Having calculated the appropriate adjusted table multiplier for the claimant after the accident, then the appropriate loss of earnings figures are calculated applying the level of actual net earnings, as appropriate, and then the net loss can be calculated by deducting one from the other.

In theory, as I have already stated, this should reduce the need completely for any separate *Smith v Manchester* calculation. Please note however that there will be many cases where the *Blamaire* or *Smith v Manchester* calculation will still be required: where contingencies are just too difficult to calculate with any accuracy. Secondly, please note that this methodology does not work for claimants who are beyond the age of 54 because, in their cases, case-specific matters are likely to be so significant that the new Table method will not be accurate or appropriate.

It may be of assistance to give a worked example and I take this from the Explanatory Notes:-

The claimant is female, aged 35 at the date of trial. She has 3 A levels, but not a degree and was in employment at the date of the accident at a salary of £25,000 a year net or tax. She was not disabled before the accident. As a result of her injuries, she is now disabled and has lost her job, but has found part-time employment at a salary of £5,000 a year net of tax. Her loss of earnings to retirement age of 60 is assessed as follows:

- (i) Look up Table 8 for loss of earnings to pension age 60 for females.
- (ii) The appropriate rate of return is determined to be 2½% (the rate currently set under Section 1 of the Damages Act 1996).



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### NEW 6<sup>TH</sup> EDITION OGDEN TABLES CONTINUED:-

- (iii) Table 8 shows that, on the basis of a 2½% rate of return, the multiplier for a female aged 35 is 18.39.
- (iv) Now take account of risks other than mortality. Allowing for the claimant being employed, not disabled and having achieved A levels at the date of trial, Table C would require 18.39 to be multiplied by a factor of 0.86, resulting in a revised multiplier or adjusted table multiplier of 15.82.
- (v) The damages for loss of earnings are assessed at £395,500 (15.82 x £25,000).
- (vi) Allow for mitigation of loss of earnings in respect of post-injury earnings. As before, Table 8 shows that, on the basis of a 2½% rate of return, the multiplier for a female aged 35 is 18.39.
- (vii) Now take account of risks other than mortality. Allowing for the claimant being employed, disabled and having achieved A levels at the date of trial, Table D would require 18.39 to be multiplied by 0.48, resulting in a revised multiplier of 8.83.
- (viii) The amount of mitigation for post-injury earnings is assessed at £44,150 (8.83 x £5,000).
- (ix) Hence award for loss of earnings after allowing for mitigation is £395,500 minus £44,150 = **£351,350**.

Apart from the new methodology for calculating loss of earnings, the Tables should contain no new surprises. The Fatal Accidents Act approach of the Courts is criticised and the alternative methodology of calculating losses and multipliers at the date of trial is advocated. In this paper I will not go over old ground which will be familiar to personal injury practitioners, the Tables have a useful Explanatory Statement dealing with these issues.

If there are any problems which individual practitioners encounter, by all means please contact the author of this paper or other members of the Civil team at 4, King's Bench Walk. ( Tel: 0207 822 7000 E.mail: clerks@4kbw.co.uk)

**JOHN DENNISS**

**22<sup>nd</sup> May 2007**