

## Ogden 8: Contingencies other than Mortality

### Introduction

1. This note on the approach to contingencies under the 8<sup>th</sup> edition of the Ogden Tables accompanies the webinar by 12 King's Bench Walk barristers **Aliyah Akram** and **James Beeton** on loss of earnings.
2. When calculating the relevant earnings multiplier under Tables 3–18, it is necessary to apply a discount for contingencies other than mortality to the pre-and-post-accident multipliers based on the claimant's employment status, disability status, and educational attainment. The relevant discount factors are set out in Tables A–D. These represent the starting point for assessment of the contingencies,<sup>1</sup> although they do not take into account pre-accident employment history.<sup>2</sup>
3. Highest educational qualification is used as a proxy for human capital/skill level, so that those in professional occupations such as law, accountancy, nursing, etc. who do not have a degree ought to be treated as if they do have one.<sup>3</sup> Three broad levels of educational attainment are described,<sup>4</sup> with a further breakdown also provided.<sup>5</sup>

### Disability

4. The question of whether a person is disabled by their injury has a significant impact on the relevant discount factor. The definition of whether a person is disabled for the purposes of the Tables is as follows<sup>6</sup>:

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

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<sup>1</sup> *Herring v MoD* [2003] EWCA Civ 528; Ogden Tables Explanatory Notes at [60].

<sup>2</sup> Explanatory Notes at [31]. So, it may be appropriate to uplift or discount the relevant factor if the history of employment has been particularly secure or weak.

<sup>3</sup> Ogden Tables Explanatory Notes at [71].

<sup>4</sup> Ogden Tables Explanatory Notes at [72].

<sup>5</sup> Ogden Tables Explanatory Notes at [73].

<sup>6</sup> Ogden Tables Explanatory Notes at [68].

(i) The person has an illness or disability which has lasted or is expected to last for over a year or is a progressive illness; and

(ii) The Disability Discrimination Act 1995 definition is satisfied in that that the impact of the disability has a substantial adverse effect on the person's ability to carry out normal day-to-day activities<sup>7</sup>; and

(ii) The effects of impairment limit either the kind **or** amount of paid work he/she can do.

*Not disabled: All others."*

5. The Ogden definition of disability is based on the definition of disability set out in the Disability Discrimination Act (DDA) 1995 (supported by the accompanying guidance notes). This is because this is the definition that applied at the time of the underlying LFS research which underpins the suggested Table A to D reduction factors.
6. Section 1(1) of the DDA defines disability as having a physical or mental impairment, which has a substantial and long-term<sup>8</sup> adverse effect on his ability to carry out normal day-to-day activities. In order to assist interviewers and respondents in determining a respondent's disability status, a set of Guidance Notes is provided. This is based on ss. D15–D27 of DDA<sup>9</sup> and is reproduced in the Explanatory Notes of the Ogden Tables at [70].
7. The "Disability Discrimination Act 1995 – Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (1996)" was issued by the Secretary of State under s. 3 of the Disability Discrimination Act 1995. It is a requirement of the Act at s. 3(3) that the Guidance is taken into account where relevant in determining whether a person is disabled. It has three sections A – C all of which must be taken into account in determining whether a person is disabled.

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<sup>7</sup> That is "those which are carried out by most people on a daily basis and which include those carried out at work": Ogden Tables Explanatory Notes at [69].

<sup>8</sup> Having lasted or likely to last longer than 12 months: DDA, sch. 1, para. 2.

<sup>9</sup> These factors are also listed in summary form in the DDA, sch. 1, para. 4 as being determinative of whether an impairment affects the ability of the person concerned to carry out normal day-to-day activities.

8. The term “substantial adverse effect” in the second Ogden condition means an effect which is “more than minor or trivial”.<sup>10</sup> However, it is not sufficient that an impairment solely has an effect which is more than minimal since “there is a gap between a disability which is more than minimal and one that satisfies the guidance notes”.<sup>11</sup> Claimants who fall into this gap between disability which is more than minimal and one that satisfies the Guidance Notes should be approached on a *Smith v Manchester* basis.<sup>12</sup>
9. Professor Victoria Wass explains that, outside clinical medicine and public health “it is the limitation of activity and/or participation which defines disability”. For example, those with visual impairment who have activity limitation (unable to read books, instructions, etc. in regular-sized print) or participation limitations (unable to work in jobs which require reading regular-sized print) are a subset of those with functional impairment. Here, disability is understood to arise from interactions between the functional limitation, environmental barriers, and supports (for example, accommodation through job description or equipment).<sup>13</sup>
10. The less exacting approach under the Equality Act 2010 (as adopted in the 7<sup>th</sup> edition of the Tables) is rejected in the most recent edition.<sup>14</sup> The basic wording of the DDA and Equality Act 2010 definition of disability is the same, as is the guidance on the meaning of the word “substantial”. What is different is the requirement to show that impairment affects one of the specific capacities set out in the DDA Guidelines.<sup>15</sup> This list was dropped from the Equality Act 2010.

## DDA Guidance Notes

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<sup>10</sup> Paragraph 3.2 of the DDA Code of Practice; DDA Guidance Notes at [A1].

<sup>11</sup> Ogden Tables Explanatory Notes at [69]; “*Billett v MOD and the meaning of disability in the Ogden Tables*”, Victoria Wass, 2015 JPIL 37, 40; “*Billett v Ministry of Defence: a second bite*”, Victoria Wass, 2015 JPIL 243, 246. An example of a claimant who suffered a “more than minimal” impairment but who arguably did not meet the more exacting standard set by the guidance notes was in *Billett v Ministry of Defence* [2015] EWCA Civ 773. *Billett* was applied in *Murphy v MoD* [2016] EWHC 0003 (QB) but a more cautious approach was urged in *Kennedy v London Ambulance Service NHS Trust* [2016] EWHC 3145 (QB).

<sup>12</sup> “*Billett v Ministry of Defence: a second bite*”, Victoria Wass, 2015 JPIL 243, 251. Professor Victoria Wass has also suggested that an alternative approach where the claimant does not meet the disability threshold is to use the non-disabled reduction factor as the starting point and consider adjustments from this using reduction factors for other characteristics negatively associated with employment prospects: “*Billett v MOD and the meaning of disability in the Ogden Tables*”, Victoria Wass, 2015 JPIL 37, 41.

<sup>13</sup> “*Billett v Ministry of Defence: a second bite*”, Victoria Wass, 2015 JPIL 243, 249.

<sup>14</sup> Ogden Tables Explanatory Notes at [69].

<sup>15</sup> “*Billett v Ministry of Defence: a second bite*”, Victoria Wass, 2015 JPIL 243, 249.

11. Section A of the DDA Guidance Notes gives guidance on “substantial”. Of particular relevance are the following paragraphs:

- a. A2: the time it takes for the person to carry out normal day-to-day activity should be considered.
- b. A3: the way in which the person carries out normal day-to-day activity should be considered.
- c. A4–A6: guidance is given on considering the cumulative total effect of an impairment.
- d. A7: account should be taken of how far a person can reasonably be expected to modify his or her behaviour to reduce the effect of an impairment on normal day-to-day activities – “If a person can behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities the person would no longer meet the definition of disability”.
- e. A10: this refers to the effects of environment that may exacerbate or lessen the effect of an impairment.
- f. A11–A14: where an impairment is being treated or corrected, then the impairment is to be treated as having the effect it would have without the measures in question. This applies “even if the measures result in the effects being completely under control or not at all apparent”, such as the use of a hearing aid. There is a specific exception for the use of spectacles or contact lenses.

12. Section C covers guidance on “normal day-to-day activities”. The examples in the Guidance Notes “are not intended to be exhaustive or exclusive but to be illustrative of the level of activity limitation which defines the threshold between disability and non-disability in the LFS and therefore in the reduction factors.”<sup>16</sup>

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<sup>16</sup> “*Billett v Ministry of Defence: a second bite*”, Victoria Wass, 2015 JPIL 243, 245.

13. The Explanatory Notes in the Ogden Tables set out part of the wording of the examples, but not all of it. Importantly, the Notes do not include (and have never included) the examples of difficulties that would not qualify as disabling. This aspect is actually very useful for personal injury practitioners seeking to determine whether an individual meets the threshold for disability. I have included the most important extra details in the account below:

- a. *Mobility* - for example, unable to travel short journeys as a passenger in a car, unable to walk other than at a slow pace or with jerky movements, difficulty in negotiating stairs, unable to use one or more forms of public transport, unable to go out of doors unaccompanied. Falling below the threshold are (i) difficulty walking unaided a distance of about 1.5km or a mile without discomfort or having to stop; (ii) inability to travel in a car for a journey lasting more than two hours without discomfort.
- b. *Manual dexterity* - for example, loss of functioning in one or both hands, inability to use a knife and fork at the same time, or difficulty in pressing buttons on a keyboard. Falling below the threshold are (i) inability to undertake activities requiring delicate hand movements, such as threading a small needle; (ii) inability to reach typing speeds standardised for secretarial work; (iii) inability to pick up a single small item, such as a pin.
- c. *Physical co-ordination* - for example, the inability to feed or dress oneself; or to pour liquid from one vessel to another except with unusual slowness or concentration. Falling below the threshold are (i) mere clumsiness; (ii) inability to catch a tennis ball.
- d. *Problems with bowel/bladder control* - for example, frequent or regular loss of control of the bladder or bowel. Occasional bedwetting is not considered a disability.
- e. *Ability to lift, carry or otherwise move everyday objects (for example, books, kettles, light furniture)* - for example, inability to pick up a weight with one hand but not the other, or to carry a tray steadily. Falling below the threshold are (i) inability to carry

heavy luggage without assistance; (ii) inability to move heavy objects without a mechanical aid.

- f. *Speech* - for example, unable to communicate (clearly) orally with others, taking significantly longer to say things. A minor stutter, difficulty in speaking in front of an audience, or inability to speak a foreign language would not be considered impairments.
- g. *Hearing* - for example, not being able to hear without the use of a hearing aid, the inability to understand speech under normal conditions or over the telephone. What needs to be considered is the effect that would be experienced if the person were not using the hearing aid. Falling below the threshold are (i) inability to hold a conversation in a very noisy place, such as a factory floor; (ii) inability to sing in tune.
- h. *Eyesight* - for example, while wearing spectacles or contact lenses - being unable to pass the standard driving eyesight test, being unable to recognise a known person by sight across a moderately-sized room, total inability to distinguish colours (excluding ordinary red/green colour blindness), or inability to read newsprint. Account needs to be taken of the effect of spectacles or contact lenses. Falling below the threshold are (i) inability to read very small print without the aid of a magnifying glass; (ii) inability to distinguish a known person across a substantial distance (e.g. playing field); (iii) inability to distinguish between red and green.
- i. *Memory or ability to concentrate, learn or understand* - for example, intermittent loss of consciousness or confused behaviour, inability to remember names of family or friends, unable to write a cheque without assistance, or an inability to follow a recipe. Falling below the threshold are (i) occasionally forgetting names; (ii) inability to concentrate on a task requiring application over several hours; (iii) inability to fill in a long, detailed, technical document without assistance; (iv) minor problems with writing or spelling.
- j. *Perception of risk of physical danger* - for example, reckless behaviour putting oneself or others at risk, inability to cross the road safely. This excludes (significant) fear of heights or underestimating risk of dangerous hobbies.

## Adjustments to the Factors

14. It may be possible to argue for higher or lower discount factors based on the circumstances of the individual claimant.<sup>17</sup> There is a need for caution, since (i) a degree of inaccuracy is unavoidable<sup>18</sup> and (ii) there will always be a distribution of observations on either side of the group average.<sup>19</sup> It is wrong to assume that the adjustment should always be down. As Windeyer J commented in *Bresatz v Przibilla* (1962) 108 CLR 541, 544:

“The generalisation that there must be a ‘scaling down’ for contingencies seems mistaken. All ‘contingencies’ are not adverse: all ‘vicissitudes’ are not harmful. A particular claimant might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad.”<sup>20</sup>

15. Examples of cases potentially meriting adjustments to the reduction factors are:

- a. Claimants who dropped out of education before reaching their potential highest qualification for positive reasons (such as an offer of employment) may be better represented in a higher category.<sup>21</sup>
- b. Claimants whose qualifications are close to the borderline may be better represented in a lower category. However, in these cases, interpolation between categories may be preferable to a full category change.<sup>22</sup>
- c. Claimants who changed employment status around either the date of the injury or the date of settlement.<sup>23</sup> Those with a long and unblemished work history will want to emphasise this.<sup>24</sup> Defendants may question whether continuing unemployment is reasonable.<sup>25</sup>

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<sup>17</sup> *Pearce v Linfield* [2003] EWCA Civ 647; *Connor v Bradman* [2007] EWHC 2789 (QB).

<sup>18</sup> Ogden Tables Explanatory Notes at [83].

<sup>19</sup> Ogden Tables Explanatory Notes at [84].

<sup>20</sup> Approved by Potter LJ in *Herring v Ministry of Defence* [2002] EWCA Civ 528 at [29].

<sup>21</sup> Ogden Tables Explanatory Notes at [86].

<sup>22</sup> Ogden Tables Explanatory Notes at [86].

<sup>23</sup> Ogden Tables Explanatory Notes at [87].

<sup>24</sup> *Hopkinson v MOD* [2008] EWHC 699 (QB).

<sup>25</sup> *Hunter v MOD* [2007] NIQB 43.

- d. Claimants employed in an expanding niche market or thriving family firm, who will face lower than average employment risks.<sup>26</sup>
- e. Claimants who are in temporary work, who have had a chequered employment history, or who are restricted by injury to employment in a declining occupation or skill set, who will face higher than average employment risks.<sup>27</sup>
- f. Chaotic social or familial circumstances may be relevant, but the factors allow for the interruption of employment for bringing up children and caring for other dependants.<sup>28</sup>
- g. Where injury precludes use of an educational qualification or skill, a claimant may be better represented by a lower qualification group.<sup>29</sup> But defendants should query whether it is feasible that the claimant might end up in a higher qualification bracket post-accident following retraining.

16. So much for employment status and qualifications. In respect of disability, there is “often a misconception that impairment and activity-limitation must be severe or at least moderately severe to qualify as a disability”. In fact, the data show that “the norm for severity is not severe: it is at the mild end of the mild to moderate category. In the circumstances, as long as the claimant meets the above Ogden definition of disability, a departure on the basis of a perceived mild impairment / activity-limitation might not be appropriate”.<sup>30</sup>

17. The key question in deciding whether to depart from the reduction factors is what impact the injury has on the claimant’s likely field of work.<sup>31</sup> Disability in this context “is defined in relation to work and is specific to the skills that are required in a particular job and also to the outstanding effects of the impairment where barriers have not been overcome ... Disability is the better predictor of employment prospects than the impairment itself and

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<sup>26</sup> Ogden Tables Explanatory Notes at [87].

<sup>27</sup> Ogden Tables Explanatory Notes at [87].

<sup>28</sup> Ogden Tables Explanatory Notes at [78].

<sup>29</sup> Ogden Tables Explanatory Notes at [88].

<sup>30</sup> Ogden Tables Explanatory Notes at [89]. “As a result, the RFs are dominated by those with a relatively mild level of impairment”: “Ask the expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden reduction factors”, Latimer-Sayer and Wass, 2013 JPIL 36, 39–40.

<sup>31</sup> “One can of course be impaired without being at all disabled at work”: “Ask the expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden reduction factors”, Latimer-Sayer and Wass, 2013 JPIL 36, 42.

close regard must be given to the effects of the claimant's impairments on his or her future intended occupation."<sup>32</sup>

18. Where a departure is appropriate, it "would normally be expected to be modest." Using a midpoint between the disabled and non-disabled reduction factors is not advised since it will represent too great a departure.<sup>33</sup> The proper approach is to use the reduction factors for different employment or educational categories as a guide to the size of the departure rather than the difference between disability categories.
  
19. The but-for reduction factor for those with pre-existing disabilities is to be determined from the "disabled" Tables (Tables B and D).<sup>34</sup> In cases of pre-existing disability which has been worsened, it may be appropriate to make a *Smith v Manchester* or *Blamire* award or to obtain expert opinion to advise on how the suggested reduction factors should be applied or adjusted.<sup>35</sup>

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<sup>32</sup> Ogden Tables Explanatory Notes at [90]. The centrality of the impact on the claimant's chosen work can be seen in both *Billett v Ministry of Defence* [2015] EWCA Civ 773 and *Inglis v Ministry of Defence* [2019] EWHC 1153 (QB) at [213].

<sup>33</sup> The approach in *Conner v Bradman & Co Ltd* [2007] EWHC 2789 (QB) is therefore not appropriate. See "Ask the expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden reduction factors", Latimer-Sayer and Wass, 2013 JPIL 36; Professor Wass criticized *Conner* specifically in "Discretion in the Application of the new Ogden 6 multipliers: the case of Connor v Bradman and Company" (*Journal of Personal Injury Law* 2008, 2, 154-163).

<sup>34</sup> Ogden Tables Explanatory Notes at [76].

<sup>35</sup> Ogden Tables Explanatory Notes at [92].