

Ogden 8: All Change or No Change?

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What's New? Headline Points

- ▶ Based on updated Life Tables
- ▶ Further tables for LOE to age 68 and age 80, and loss of pension from age 68 and 80 (8 new tables)
- ▶ New Additional Tables on Govt Actuary Dept website for more accurate interpolation of multipliers between any two ages up to age 125
- ▶ Contingencies other than mortality: new definition of disability, new educational categories and more guidance on when and how to depart from prescribed RFs
- ▶ Fatal accident section updated to take account of Knauer
- ▶ New section on multipliers for loss of earnings in PPO cases

Background

- ▶ Original Ogden tables published in 1984
- ▶ In 36 years, 7 further editions have been published
- ▶ Previous (7th) edition published in 2011
- ▶ Ogden 8 was published July 2020

Structure of the Ogden Tables

- ▶ Chairman's Introduction
- ▶ Explanatory Notes on behalf of the Ogden Working Party
- ▶ Explanatory Notes include 17 worked examples
- ▶ Explanatory Notes divided into five sections
- ▶ 36 Tables plus Additional Tables (the latter on GAD website)

Multipliers: Key Principles

- ▶ Methodology: multipliers are applied to the present-day value of a future annual loss with the aim of producing a lump sum equivalent to the capitalised value of the future losses (endorsed in *Wells v Wells*)
- ▶ The multiplier is the figure by which an annual loss is multiplied in order to calculate a capitalised sum, taking into account accelerated receipt, mortality risks and (in the case of earnings and pension) discounts for contingencies other than mortality
- ▶ Multipliers are calculated by reference to an annual assumed interest rate after tax and inflation (the Discount Rate, presently -0.25% in E&W) i.e. assumption is that the lump sum will be invested and yield an income but that over the period the capital sum will gradually reduce until it has been exhausted (though negative DR implies no net return achieved)
- ▶ Multipliers are calculated by reference to life tables, in this edition 2018-based projections published by ONS in December 2019 (Ogden 7 was based on 2008-based projections)

The New Life Tables

- ▶ Life expectancy projections have fallen slightly compared with the previous (2008) tables
- ▶ For a newborn baby boy, the approximate reduction in life expectancy is 1 year (88.96 reduces to 88.13)
- ▶ For a newborn baby girl, the approximate reduction in life expectancy is 2 years (92.57 reduces to 90.69)
- ▶ Thus, a difference in overall predicted life expectancy of 1-2% for younger claimants, but up to 8-9% for older claimants

The Explanatory Notes

Section A: General

Section B: Contingencies other than Mortality

Section C: Quantification of Pension Loss

Section D: Application of Tables to FAA dependency claims

Section E: Periodical Payments for Loss of Earnings

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Section A: General

- ▶ Guidance on how to adjust the multiplier if C has atypical life expectancy (paras 7-17)
- ▶ “Simple interpolation”: Guidance on how to interpolate for different ages and different retirement ages – Examples 1 & 2
- ▶ Interpolation using the Additional Tables (Excel spreadsheets) is more accurate method than “simple interpolation”
- ▶ Different columns with different DRs as the DR varies from one jurisdiction to another (E&W/NI/Scotland)

Section A: General (2)

- ▶ Tables for different retirement ages (50, 55, 60, 65, 70, 75, 80, also 68)
- ▶ Raw multipliers do not allow for contingencies other than mortality (illness, time out of workplace for childcare, redundancy, time between jobs)
- ▶ Use Table 36 (old Table 28) for fixed periods of time
- ▶ Splitting multipliers for variable losses/expenses: Additional Tables are the most accurate method, otherwise use the “apportionment method” (Table 36 and Tables 1&2)

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Section B: Contingencies other than Mortality

- ▶ The challenge: How to adjust a C's working life multiplier to take account of periods out of work whether voluntary (e.g. childcare, caring for dependants) or involuntary (e.g. illness, redundancy, time between jobs)
- ▶ This was first introduced in 2nd edition of Ogden tables,
- ▶ A new method/step change in 6th edition (2007): introduced tables A-D based on research by Verrall and Wass based on Labour Force Surveys 1998 -2003
- ▶ The 5 variables: sex (male/female), age (16 to 54), educational classification, disabled/not disabled, employment status (employed/not employed)
- ▶ The RFs are based on data from LFSs 1998-2003 (i.e. 17-22 years ago) as “this is the best data that we have”

Section B: Contingencies other than Mortality

Form of award: Multiplier/multiplicand or *Smith/Blamire*?

- ▶ “there **may** be some cases where the SvM or Blamire approach remains applicable or otherwise where a precise mathematical approach is inapplicable” (para 59)
- ▶ “For example, there may be no real alternative to a *Smith v Manchester* or *Blamire* award where there is **insufficient evidence** or **too many imponderables** for the judge to be able to make the findings necessary to support the conventional multiplicand/multiplier approach. But, merely because there are uncertainties about the future does not of itself justify a departure from the well-established multiplicand/multiplier method and **judges should therefore be slow to resort to the broad-brush *Blamire* approach, unless they really have no alternative**” (para 59)
- ▶ “the Table A to D reduction factors should generally be used unless there is a good reason to disapply or to adjust them” (para 60).
- ▶ “it may be appropriate in certain circumstances to depart from the published reduction factors in Tables A to D by increasing or reducing the reduction factor to better account for the individual characteristics of the claimant” (para 60)

Definition of Disability (1)

- ▶ Ogden 8 introduces a new, more restrictive definition of disability for the purposes of deciding whether a claimant is disabled or not for tables A-D
- ▶ 3 requirements:-

“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:

- (i) The person has an illness or a disability which has or is expected to last for over a year or is a progressive illness; and
- (ii) The DDA1995 definition is satisfied in that the impact of the disability has a **substantial adverse effect on the person’s ability to carry out normal day-to-day activities**; and
- (iii) The effects of impairment limit either the kind **or** the amount of paid work he/she can do.

Definition of Disability (2)

- ▶ Since the introduction of the EA2010 the threshold for disability has lowered and so its prevalence in the working population increases (disability prevalence was 12% in 1998 and 19% in 2019)
- ▶ Accordingly, the difference in employment risks between the two cohorts narrows: the employment chance among the wider disability group are higher than for those under the narrower definition of disability.
- ▶ But the data underpinning Tables A-D relates only to the older and narrower DDA definition and so the EN advocate application of this test rather than the broader EA2010 definition and making reference to the examples in the DDA1995 Guidance Notes
- ▶ But:
 - ❑ The definition of disability in DDA 1995 (s.1) and EA2010 (s.6) is near-identical
 - ❑ The only difference is the DDA 1995 Guidance Notes, which are given increased weight by Ogden 8 Explanatory Notes

Definition of Disability (3)

- ▶ EN refer to *Billett v MOD* [2015] EWCA Civ 773 and say that while C was disabled under the EA2010 definition, he was “arguably not” under the DDA1 test as his impairment (NFCI) was “not sufficiently limiting relative to the criteria set out [in the DDA Guidance Notes]” – para 69
- ▶ However, as the EN accept, while the DDA Guidance Notes were available to survey respondents, (1) they were not intended to be inclusive or exhaustive and (2) it is unclear to what extent respondents referred to them

Adjusting for Educational Classification

- ▶ Changes... 3 new categories
- ▶ Old: categories O (lowest), GE-A and D (highest)
- ▶ New: Levels 1 (lowest), 2 and 3 (highest)
- ▶ All these categories are a proxy for human capital/skill level so those who work in professional occupations (law, accountancy, nursing etc) but do not have a degree may be treated as if they do have one – para 71

When and how should we depart from the RFs? : Factors other than disability

“It is in the nature of assessing damages that a single estimate based on a group average will be inaccurate for an individual claimant and a certain degree of inaccuracy must be accepted” (para 83)

Examples of claimants for whom it may be appropriate to depart from the RF (education or employment status)

- ▶ Upwards adjustment: “A claimant who dropped out of the education system before reaching their potential highest qualification for “positive reasons” (such as an offer of employment) might be better represented by a higher educational category”
- ▶ Upwards adjustment: “Claimants who are established in employment in an expanding niche market or in a thriving family firm will face lower than average employment risks for their group”.
- ▶ Either way: A claimant who changed status around date of accident or date of settlement; a claimant whose qualifications are “close to the border” (e.g. 1 GCSE)
- ▶ Downwards adjustment: “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 will face higher than average employment risks for their group”

When and how should we depart from the RFs? : Disability (1)

- ▶ Details the spread of disability within the cohort of “disabled” people in the data
- ▶ “The message here is 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” (para 89)
- ▶ Distinction between disability and impairment: occupation is irrelevant to impairment but very relevant to disability e.g. a manual worker is likely to be more disabled by a below-knee amputation than a sedentary worker
- ▶ “Disability is the better predictor of employment prospects than the impairment itself and close regard must be given to the effects of the claimant’s impairments on his or her future intended occupation.” (para 90)

When and how should we depart from the RFs? : Disability (2)

- ▶ If one is to depart from the prescribed RF, how?
- ▶ *“Where a departure is considered to be appropriate, it could be in either direction and it would normally be expected to be modest. Interpolation using a mid-point between the disabled and non-disabled reduction factors is not advised. Disability results in substantial employment disadvantage and therefore applying a mid-point between the pre- and post-injury reduction factors will normally be too great a departure. Professor Victoria Wass, a co-author of the reduction factors, has published advice on when and how to consider an adjustment on the basis of severity of disability. This advice involves using 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.” – para 91*
- ▶ Suggests expert involvement **may be appropriate** or when C was already disabled at the time of the injury that founds the claim

When and how should we depart from the RFs? : Disability (3)

Wage effect/employment effect

- ▶ The EN emphasise the distinction between these two effects that are said to be “separate and distinct” (para 93)
- ❑ **Wage effect:** C has to change to a less well-paid job because of his/her disability
- ❑ **Employment effect:** C’s time in work is reduced because of the disability

EN says that in 2019 the disability employment gap (employment effect) in 2019 was 29% whereas pay gap (wage effect) was 10 – 20%

- ▶ *“It is a mistake to conflate these two separate and distinct effects⁴⁴. A lower post-injury multiplicand to account for a reduction in earnings following injury does not make any allowance for reduced employment prospects. Assuming that the claimant meets the Ogden definition of disability, then the application of the disability-adjusted reduction factor is also required. There is extensive literature on the impact of both effects of disability, with the employment effect being the most important”* (para 94)
- ▶ But aren’t these two effects inextricably related? E.g. a below knee amputee performing a sedentary office job (that imposes less strain on the injured leg) might be expected to have less time off work and less time between jobs than an amputee in a non-sedentary job that imposes more strain on the legs and where mobility is a key component of the work he/she does?

Claimants older than 54

“Where the claimant is older than 54, it is anticipated that the likely future course of employment status will be particularly dependent on individual circumstances, so that the use of factors based on averages would not be appropriate. Hence reduction factors are not provided for these older ages” (para 82)

Summary of application to LOE claims

- 1) Choose correct table (1-34)
- 2) Choose appropriate discount rate (-0.25% for E&W)
- 3) Find appropriate figure for C's age at trial ("Basic Multiplier")
- 4) Adjust basic multiplier by Table A-D as appropriate for contingencies other than mortality
- 5) Net annual loss x adjusted multiplier = capitalised value of future LOE
- 6) If there is a REC, repeat above steps to calculate post-accident earnings
- 7) Deduct injured scenario from uninjured scenario

"Where the above methodology is used there will usually be no need for a separate Smith v Manchester award" (para 98)

There are six worked examples in the EN

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Section C: Quantification of Pension Loss

- ▶ Distinction between DB/DC schemes
- ▶ Two worked examples using the Tables
- ▶ Suggests using Tables A-D to adjust a claim for lost employer's contributions to a DC pension, and for contributions to a DB scheme

“A simplistic calculation of her loss of pension is to treat the lost employer pension contributions as a tax-free benefit during the period of expected employment.”
(para 122)

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Section D: Application of Tables to FAA dependency claims

- ▶ Re-written in the light of *Knauer v Ministry of Justice* [2016] UKSC 9 which overturned *Cookson v Knowles* [1979] AC 556 – i.e. multipliers in a fatal claim are now calculated from the date of trial rather than date of death
- ▶ Summary of basic approach: compensation for post-trial dependency based on present value at the date of the trial of the dependency during the expected future joint lifetime of the deceased and the dependant, subject to any limitations on the period of dependency and any expected future changes in the level of dependency, notably for the post-retirement period.
- ▶ Both pre- and post-trial periods are subject to an adjustment for risk of the deceased having died pre-trial in any event. (para 132) –see Tables E&F. Adjustment is negligible if deceased was under 40 at death.
- ▶ If the dependency stems from deceased's earnings, apply Tables A-D
- ▶ Three worked examples

Anticipated effect on FAA claims

Tables E & F – adjustments greater

Particularly important for the elderly

Joint-life expectancies (and complications)

Possible anomalies

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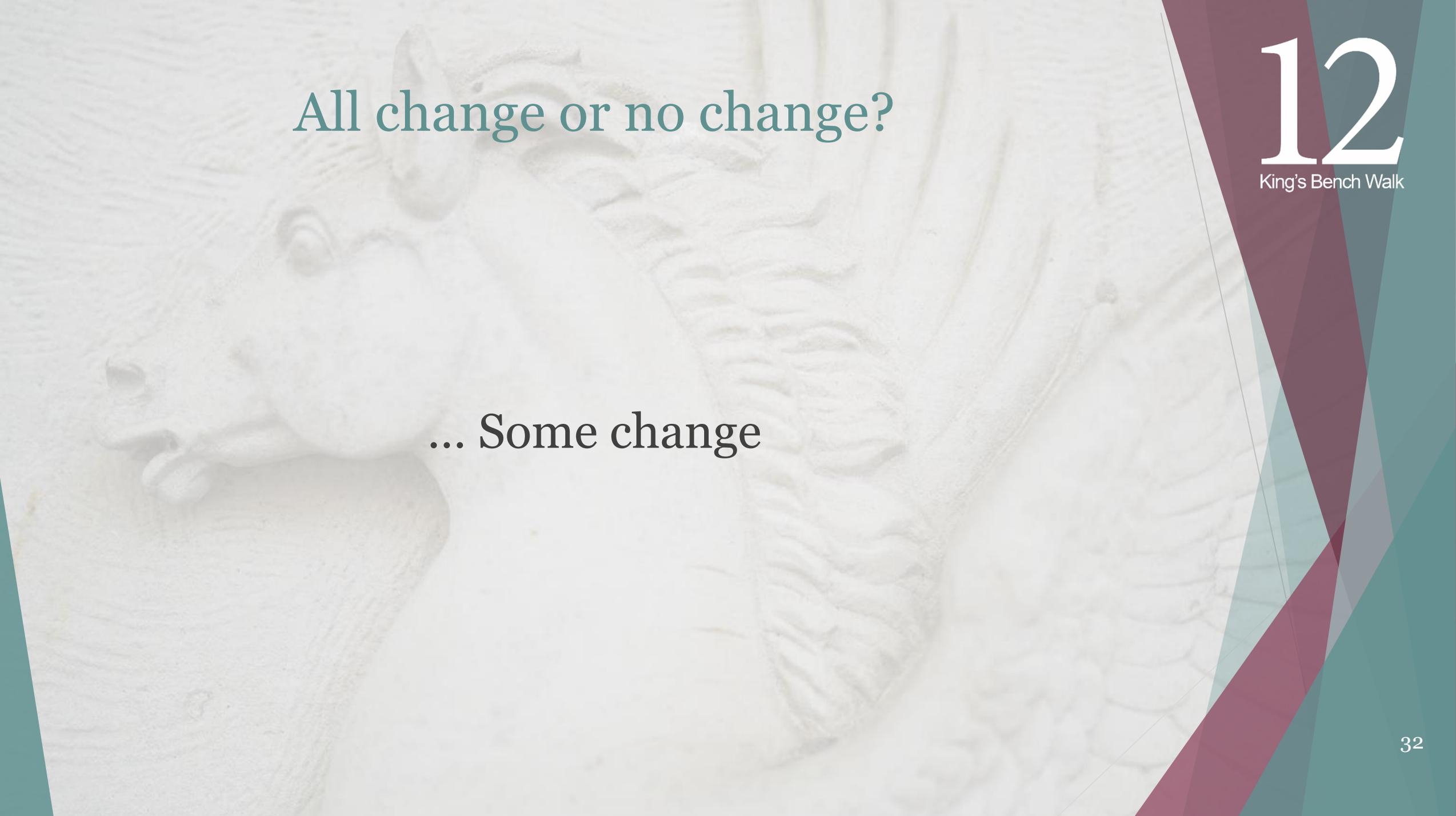
Section E: Periodical Payment for Loss of Earnings

- ▶ This is a new section
- ▶ As a matter of practice, PPOs are rare given the prevailing DR
- ▶ EN set out principles applying to choice of index for PPOs (e.g. 80th centile of ASHE 6115 for care and case management)
- ▶ Expert advice may be appropriate regarding the most appropriate measure for indexation
- ▶ Residual earning capacity – may be tied to a different index and different RF

Sets out the basis for the two different indexation calculations

Summary: Ogden 8 Key Changes

- ▶ Based on new life tables (slightly reduced LE)
- ▶ Further tables for LOE to age 68 and age 80, and loss of pension from age 68 and 80 (8 new tables)
- ▶ New Additional Tables on Govt Actuary Dept website for more accurate interpolation of multipliers between any two ages up to age 125
- ▶ Contingencies other than mortality: new more restrictive definition of disability, slightly different educational categories, more guidance on when and how to depart from prescribed RFs
- ▶ Disability: need to look closely at the DDA 1995 guidance notes
- ▶ EN discourage tinkering with the RF on basis of disability, but will the Courts agree? – the EN are guidance only



All change or no change?

... Some change

Conclusions

- ▶ Ogden 8 explanatory notes are guidance
- ▶ Key questions: will the Courts apply? To what extent?
- ▶ Will Ogden 8 increase or decrease damages?
- ▶ It depends



Thank You

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