Contingency rethink sparks new approach

The sixth edition of the Ogden Tables has the revised treatment of "contingencies other than mortality". At first glance, it would appear to favour defendants. Jamie Clarke reports

PRACTITIONERS AND INSURERS greeted with a mixture of excitement and trepidation the revised treatment of "Contingencies other than Mortality" in the sixth edition of the Ogden Tables (*Ogden* 6), published in March 2007.

The courts had become familiar with the old approach to contingencies other than mortality, which required a discount to be applied to a given multiplier for loss of earnings to take account of factors such as the claimant's age, gender, type of occupation and level of economic activity.

In truth, the reductions, and in theory the increases, were little more than tinkering. For a 40-year-old male with loss of earnings to age 65, the discounted multiplier would range from 1425 to 15.28, a swing either way of plus or minus 3.5 per cent. Taking a typically modest claim with a multiplicand of £12,000 the range would come out at about £6,000 in either direction. Of course, the range was more meaningful in more valuable claims, but in general the differences were comfortably within parties' room for negotiation, or enabled a judge to exercise some conservatism without being too mean to one party or the other. In practice, only a modicum of thought was given to contingencies other than mortality. The battlegrounds tended to be elsewhere.

With a more mobile and versatile working population, together with other factors such as a shrinking manufacturing industry, it was probably inevitable that the old approach to contingencies other than mortality had had its day. As explained in the explanatory notes to the *Ogden* 6, the factors in previous editions were taken from research that relied on Labour Force Surveys dating back to the 1970s and early 1980s. These were intended to provide a cross-sectional snapshot of the working-age population, and collected information on an extensive range of socio-economic and labour-force characteristics.

The new approach is based on research by Professor Verrall et al and Dr Wass using data from more recent Labour Force Surveys. This has established that the "key" factors in determining the extent to which an individual will remain in work until retirement age are employment status, disability status and educational attainment. Simply put, the research establishes that a non-disabled male educated to degree level already in employment in his early thirties is the least likely to suffer periods of non-employment and absence from the workforce. The research establishes that in the normal course of events, this male would be out of work for 8 per cent of his working life to age 65, and the multiplier would need to be adjusted accordingly. By contrast, his counterpart, a disabled male in his early thirties with no qualifications and no job, would be assumed to work for just 23 per cent of the time before age 65. The reduction to his multiplier is enormous.

Different demographics

It is dear that the old factors such as geography or job type are now largely to be disregarded. There is not even a distinction between, say, blue- and white-collar. The explanatory notes are clear: "The research also considered the extent to which a person's future working life expectancy is affected by individual circumstances such as occupation and industrial sector, geographical region and education. The researchers concluded that the most significant consideration was highest level of education achieved by the daimant and that, if this was allowed for, the effect of the other factors were relatively small... This is a change from the previous editions of the Ogden Tables, where adjustments were made for types of occupation and for geographical region." The proof of this is in the pudding: whereas the adjustment for contingencies were fairly confined, the new approach— in theory at least —provides for discounts of between 10 and 94 per cent!

On the face of it, the new approach appears favourable to defendants and their insurers. However, the new tables can be used in another way to produce far more generous loss of earnings awards for claimants who are rendered "disabled" by an accident but have a residual earning capacity. Conventional practice was simply to calculate a multiplicand by deducting the residual earning capacity from the pre-accident earning capacity and then apply a single multiplier.

To compensate the claimant for the future contingent risk of being out of work, a claim would also be made for a *Smithy Manchester* award, and/or a *Blamire* award (where there are too many uncertainties to assess future loss), expressed as a lump sum typically by reference to between six months and five years of the net annual pre-accident earnings. At times, assessment of these types of awards has been not much more than an exercise of sticking a judicial finger in the air.

While it is not the end of such awards, the new approach will be more generous to claimants left disabled by an accident: "but for" earnings will be based on a multiplier subject to a modest discount for contingencies other than mortality, from which is deducted residual earnings subject to a different multiplier calculated by applying the greater discount referable to a disabled person.

This is best illustrated by a worked example:

- Cis aged 51. He intends to retire at 65.
- Before his accident, C was in good health and earned £20,327 net per annum as a mechanic.
- The accident rendered him disabled but he has a residual earning capacity of £13,645 per annum as a taxi driver.
- Under the old, *pre-Ogden* 6 approach, C's ongoing net loss (multiplicand) is £6,682. The multiplier would be 11.4 subject, say, to a discount of 5 per cent for occupation and geographic location, giving a total loss of earnings of just over £72,000. A *Smith v Manchester* award might be appropriate,

butit would probablybe modestbecause the risks of being out of work are probably the same between the two relevant occupations and given C's age. He might spend, say, an additional 6-12 months out of work in the next 14 years as a result of the accident, perhaps j ustifying a further award of £10,000.

- The new *Ogden* 6 approach takes the multiplier of 11.4 and, by reference to "Table A", Column GE-A (qualified trade mechanic) for a man aged 51, discounts it by 0.82, so the overall multiplier becomes 9.3548. Thus, if C had remained employed as a mechanic, he could have earned E20,327 x 9.3548 = £190,155 to age 65.
- From this, credit is given by deducting C's residual earnings. Given C's disability, "Table B" indicates that the discount factor is 0.49, giving a multiplier of 5.586. Thus there is a residual earning capacity of £13,645 x 5.586 to give a total of £76,220.
- Therefore, under the new approach, C's loss of earnings are £[190,155 - 76,220] = £113,935.
- There is no need, and indeed nobasis, for any further award, for example, for a handicap in the open labour market, because the discount applied by "Table B" reflects the level of C's future occupational activity (i.e. absences) as disabled employee.
- Under the new approach, C is more than £30,000 better off and has not had to rely on the vagaries of a *Smithy Manchester claim.*

It can be seen therefore that in this way, claimants will be better off, and do not need to rely on the vagaries of 'makeweight' *Smith v Manchester* or Blamire claims.

The figures in the worked example are extracted from the facts of the first reported application of the new approach by HIT Peter Coulson QC (now Coulson J) sitting as a Judge of the High Court in *Connery Bradman & Company Limited* [2007] EVVHC 2789 (QB). However, the actual decision differed from the worked example in one key respect, namely the discount factor applied to the multiplier for the residual earnings side of the calculation.

HHJ Coulson QC was persuaded to apply a discount factor of 0.655, not 0.49. This gave residual earnings of £101,887.21 and a final award of future loss of earnings of £88,267.79. This is well within the range of awards that might have prevailed under the old approach. This is dearly a good result for defendants and is probably as much a disappointment for Professor Verrall and Dr Wass as it is for daimant advisers. This probably gives a sense that rumours of the demise of the "judicial finger in the air" were short-lived.

Si takeaway

- The application of "contingencies other than mortality' to claims for future loss of earnings in Ogden 6 has a more significant impact on multipliers than the old, defunct approach.
- This is because new research demonstrates that people without disabilities spend more time out of employment than earlier research had suggested.
- This suggests previous awards have been too generous to those not disabled by an accident and vice versa.
- The new approach to contingencies other than mortality is more generous to claimants classified as "disabled" with a residual earning capacity
- 1-- Otherwise, awards will be less generous to claimants
- IN The test of disability has a relatively low threshold.
- Ei To ameliorate that, the courts will retain a discretion to adjust the discount, despite *Ogden 6* having been based on detailed actuarial evidence.
- The new approach is just a starting point, albeit more scientific than its predecessor
- Therefore we have not seen the end of judicial discretion to adjust the multipliers, although it is clear that generally the adjustments in *Ogden 6* will have a more significant impact in either direction on damages awards.
- It remains to be seen whether *Smith v Manchester/ Blamire* awards will become more or less relevant, but the prospect of parties being less reliant on the vagaries of this approach may be welcomed.
- It also remains to be seen whether in an appropriate case the courts will consider actuarial evidence as to the adjustment to be made to the discount factor

However, one should be wary of jumping to criticise the approach of a judge who has a reputation for sensible, thoughtful judgments in his familiar territory in the TCC. It is clear from the judgment that he took his customary care in considering the issues in this claim. The difficulty probably stems from the fact that the so-called new approach can only apply where the Defendant is rendered "disabled" by the accident. Practitioners will appreciate that probably a majority of those daimants rendered unable to return to their pre-accident occupation could not easily be defined as "disabled" in layman's terms.

Definitions of disability

However the indications are that the threshold is relatively low. Given the possible effects of *Ogden* 6, it is no surprise that the principal issue of fact in *Conner v Bradman & Company Limited* was whether, on the medical evidence, Mr Conner was "disabled" within the meaning of the Disability Discrimination Act 1995. As HHJ Coulson QC put it: "...this is highly relevant to the claimant's claim for loss of future earnings". On the facts it was held that Mr Connor is "disabled".

In the face of that finding, the defendant then argued against the use of the discount factor of 0.49 in Table B. Counsel argued that on the basis of the claimant's abilities, notwithstanding his disability, it would be wrong to apply such a low discount. The daimant's counsel pointed to the detailed actuarial evidence underpinning the new approach which "...should not be the subject of impressionistic 'tinkering' by the judge". While sympathetic to that, the judge noted that the explanatory notes make it "...plain that they are not to be taken as inviolable where, on the facts of a particular case, the evidence demonstrates the need for an adjustment". He also noted the guidance in Kemp & Kemp, that "the relatively low threshold to the definition of 'disabled' will result in the need for potentially significant adjustment depending on the extent of the claimant's disabilities... on a case-by-case basis."

HHJ Coulson QC approached the issue quite simply. Effectively, he noted that the Table B calculation presumed the claimant would work in his residual capacity for less than half of the time to retirement, but could not accept that. Ile preferred to strike a middle ground between the discounts of 0.49 and the 0.82 that would have applied to a non-disabled claimant, unscientifically producing the figure of 0.655 as the "most realistic assessment of the claimant's claim for future loss of earnings".

It is not clear that HHJ Coulson QC was referred to or had in mind the introduction to Ogden 6 by Robin de Wilde QC. Either way, the Chairman of the Ogden Committee anticipated "...in many cases it will be appropriate to increase or reduce the discount in the tables to take account of a particular claimant's disabilities". On that basis, it is difficult to criticise the judgment in *Conner y Bradman & Company Limited,* which confirms the impact of *Ogden 6* may not be as dramatic as feared.

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