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**#HardwickeBrew
Your Takeaway Cup**

*These notes follow the #HardwickeBrew given by Hardwicke’s Clinical Negligence and Personal Injury Team on 28 July 2020 which looked at the changes and updates occasioned by Ogden 8.*

**Headline Points**

* Ogden 8 was published on 10 October 2020, 9 years after the publication of Ogden 7.
* The tables have been revised in the 8th edition to use updated mortality assumptions. The multipliers in the 7th edition were based on 2008 mortality projections. The 8th edition is based on mortality rates from 2018 mortality projections.
* For younger male and female claimants life expectancy is 1 to 2 years respectively less in Ogden 8 than in Ogden 7 (1 to 2%). For older claimants, life expectancy could be as high as 8 to 9% less in Ogden 8 than in Ogden 7.
* Section A has been updated. The section on life expectancy has been expanded, and there is new guidance and new examples regarding the interpolation of multipliers and calculating split multipliers for variable losses.
* There are new tables for loss of earnings to ages 68 and 80 and loss of pension commencing at ages 68 and 80.
* There are new “Additional Tables” at various discount rates. These tables allow for the calculation of multipliers from any age at trial to any future ages, up to 125. These are provided in Excel format on the Government Actuary’s Department website.

<https://www.gov.uk/government/publications/ogden-tables-actuarial-compensation-tables-for-injury-and-death>

* These tables help with accurate interpolation and calculation of split multipliers especially for retirement ages that are not contained in the main tables.
* The multipliers derived from the additional tables are more accurate and reliable than other previous methods of interpolation such as using the apportionment method. They should be treated as definitive.

**The Disability Threshold for Contingency Discounts**

* OT8 was due in 2012, but as result of the delay, we now have better data on what is disability and impairment.
* Disability (or otherwise) remains at the heart of OT8. It is the single factor which makes the most substantial difference to the discount rate (and therefore final multiplier).
* Disability is not a medical definition. Disability (as understood in the tables) is an entirely legal construct. Notes to OT8 point out the Ogden disability definition follows that of the Disability Discrimination Act (DDA) 1995 and not the Equality Act 2010.
* Is that important?Potentially.
* The DDA - which first introduced the concept of discrimination on the basis of Disability, had to try to define it.
* Those Notes contain all sort of quirks and features about what is (and isn’t) disability but which are rarely used to assist judges in those cases where is it said that the claimant falls one side of the disability line or the other or Reduction Factor (‘RF’) variation.
* The Guidance is referenced in the OT8 Notes but points out that the Guidance is not exclusive or exhaustive in the definitions of disability
* Ogden 8 takes that definition and refines it slightly:

*“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:

1. The person has an illness or a disability exceeding a year or is a progressive illness; and
2. The **DDA 1995** 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
3. The effects of impairment limit either the kind or the amount of paid work he/she can do.

“*Not disabled*”: is helpfully defined as ‘everybody else’

* You look to the DDA definition of disability - and the impact upon the normal activities of daily Living (‘ADL’) being more that *minor* or *trivial*.
* This means that you can find guidance on what that means in the EAT decisions of the period (certainly after 1998) which shows how the courts were trying to wrestle with an entirely new concept after the DDA came into being. [Note: EAT decisions rank in legal hierarchy alongside those of the HC]
* But the data concerning disability in 2019/2020 is substantially better than it was in the period before 1995. Asthe Notes point out the prevalence of disability in the working age population was 19% in 2019 but was only 12% on 1998 – a rise of over 50%.
* This is attributed to increased reporting of qualifying activity-limiting impairments rather than an increase in the number or severity of such impairments according to the Office of National Statistics.
* Normal ADL’s do not of course include the specific job requirements of the claimant. The fact that he/she cannot install double-glazing or be a furniture remover as they were before it not in fact all that relevant. But the job they do is relevant to the RF.
* Normal day-to-day activities are those which are carried out by most people on a daily basis and which include those carried out at work.
* *Billett v MOD***[[1]](#footnote-1)** in was a point of controversy in which Dr Wass (Panel member) was called to confirm that *Billet* was not – in fact – disabled under the definition. The CA ignored that evidence and then awarding damages equivalent to a *Smith v Manchester* basis anyway.
* *Billet* has few if any followers in the Courts since it was heard.
* The Notes may make a point that *Billet’s* disability may well have qualified under the EA 2010 definition – but not the DDA definition.
* The definitions in the Notes have not changed and they reflect the original DDA guidelines. However, (i) the Notes places those in context; (ii) bear in mind the Notes were intended to deal with discrimination, not working ability; and (iii) ADL’s were referenced only to assist in definition/identification of disability – not the impact upon person ability to work or earn an income.
* The Notes make the following important points to give courts/parties explicit guidance.
* Departing from the reduction factors:
	+ The Notes effectively invite the courts to stop fiddling around with reduction factors on an impressionistic basis.
	+ Disability is *binary* - measured as either disabled or not disabled and both categories include different levels of severity of impairment and activity-limitation.
	+ It is a misconception that impairment and activity-limitation must be severe or at least moderately severe to qualify as a disability.
	+ The Notes point out - by reference to specific data – as long as the claimant meets the Ogden definition of disability, a departure on the basis of a perceived mild impairment / activity-limitation might not be appropriate
	+ Any departure should be one in context: how the degree of residual disability may have a different effect on residual earnings depending upon its relevance to the claimant’s likely field of work.
	+ In this regard there is a distinction between **impairment and disability.**
	+ For example, a lower limb amputation may have less effect on a sedentary worker’s earnings than on the earnings of a manual worker.
	+ Likewise, cognitive problems may prevent someone from continuing to work in a professional capacity where the same problems may not prevent continuing employment in job roles with low cognitive demands.
	+ This is where the DDA and the OT8 overlap: Disability is more closely related to employment outcomes than is impairment. You are impaired by an amputation no matter what job you do. But the impact upon your actual or occupation may vary significantly.
* Disability is the better predictor of employment prospects than the impairment itself. New employers are unwilling to look past the disability and are much less concerned with the actual impairment.
* Interpolation using a mid-point between the disabled and non-disabled reduction factors is not advised (as the HC did in **Sharma v Noon Products[[2]](#footnote-2)** in 2011). That is too great a departure and Dr Wass suggests you look at her guidance on how to approach that issue[[3]](#footnote-3).
* In some cases, it may be helpful to consult expert opinion. Expert opinion may also be required to advise upon how the suggested reduction factors should be applied and/or adjusted when the claimant was already disabled at the time of the injury.
* Injury causing disability (as defined above) has two separate and distinct effects:
1. **The wage effect** is the reduction in earnings caused by injury, which may result from changing role, working less hours or missing out on promotions. Changes in multiplicand account for and reflect that.
2. **The employment effect** is the impact of the person’s disability on their long-term employment prospects.
* In particular, disability is known to increase job search periods, cause longer periods out of work and is associated with a greater risk of early retirement. See, for example the very substantial impact disability has on the reduction factor if, at the time of calculation, the disabled person is unemployed and looked for work, as opposed to being employed.
* It is a mistake to conflate these two separate and distinct effects.

**Tables A to D: Employment and Education**

* Likely to be new battlegrounds in addition to disability. The notes give guidance on when a claimant’s circumstances may justify a departure from a certain educational level or employment status.
* For example, the new Levels 1, 2 and 3 to determine educational attainment:
	+ Cheryl Cole, left school at 16 with no GCSEs to become a pop star. Is she really Level 1 or perhaps better represented by a higher educational category?
	+ Kevin and Perry, 5 GCSEs each, with a C in PE, the rest were Es and Fs. Might their educational status be really Level 1 educational category rather than Level 2?
	+ An injured nurse with residual earning capacity in a basic clerical role. Maybe her residual earnings should be calculated on a lower educational status?
* Guidance suggests that a change of employment status around the date of the injury/the date of the trial may require a departure from a strict application of the employed/not employed status.
* Also, taking into account employment risks – i.e. family firms, or on the other hand a chequered employment history.

**Pension Loss**

The explanatory notes to Ogden 8 (p.42-46) are well worth a read, even if you feel comfortable grappling with pension loss calculations and especially if you don’t. These have been comprehensively re-written and now contain a helpful section:

* Introducing the concepts, such as what the difference is between defined benefit and defined contribution pension schemes (the 2 main categories);
* Setting out a summary of the law on pensions;
* The conventional approach to calculations (and the drawbacks, plus alternatives);
* Helpful worked examples to take you step by step through the process.

In terms of the actuarial tables within Ogden 8, these have been expanded to provide a wider range of ages at which a party starts drawing a pension (or would have done) to cater for the changes in the job market. Tables now span a 30-year period from pension commencing at age 50 (we can all dream) to age 80 (more likely). There are also tables from age 68 for pensions (as well as for earnings to age 68) which avoid the need for interpolation given the gradual changes to state pension age since the last tables were released. Overall, the whole thing is more user friendly and time saving.

**Fatal Accidents**

The world of fatal accidents calculations has been simplified in the years since Ogden 7, in 2011. The main change has been the decision by the Supreme Court, in 2016, to consign *Cookson v Knowles* [1979] AC 556 and the requirement to calculate multipliers at the date of death, to history. In *Knaeur v MoJ* [2016] UKSC 9, it aligned the approach to multipliers in fatal accident cases to that in conventional accident cases: i.e. multipliers calculated at the time of trial.

A re-written section in the in the explanatory notes sets out:

* A summary of the history of the law and the current position on fatal accidents;
* The post-Knaeur approach to calculations;
* Updated Tables E & F\* in which there have been in places some fairly significant changes to the adjustment factors, as well as a helpful separation out between genders and provision of a wider spread of age groups and periods to trial to make calculations easier and reduce the need for interpolation.
* Helpful worked examples to take you step by step through the process.

\*as a reminder, Table E provides the discount factor to apply to pre-trial damages to take account of the risk that the Deceased would not have survived to the date of trial to provide the pre-trial dependency. Table F is the discount factor applicable to post-trial damages (future dependency loss) to take account of the risk that the Deceased would not have survived to the date of trial to provide the post-trial dependency.

**Strategy on revisiting Offers, Schedules and Counter Schedules**

The appropriate approach will of course vary infinitely depending on the facts of the case, the stage it has reached, the value, the date when the offer was made or the Schedule/ Counter Schedule served. But a few points to think about we suggest are:

* A knee jerk reaction is probably unnecessary and some careful calculation and reflection is appropriate before taking action. Unless, perhaps, you represent a Defendant and have made a large offer to and older Claimant in the last 21 days! You might wish to consider an application to vary or withdraw under CPR 36.10 given the change in circumstances in the meantime.
* But remember that the change in the level of multipliers may be more marginal where a rather younger Claimant is involved. The alteration in the value of the case, which might suggest the withdrawal of (or amendment to the terms of) an offer will need to be weighed against the benefit to be gained from a costs protective offer which may have been in place for some time. Also, the change in multipliers is not the only issue and alterations to discount factors and the other changes discussed above may make the impact on value more nuanced or more stark, depending on the facts of your case.
* On that subject, do not overlook the ability to vary (in writing) the terms of an earlier offer (which has not been accepted in writing), in CPR 36.9. If the change is to make it *les*s favourable to the *offeree*, the varied offer remains effective, for costs purposes, as if made at the date of the original offer. If the alteration makes it *more* advantageous to the *offeree*, the offer will be treated, not as the withdrawal of the original offer, but as the making of a new CPR 36 offer on the improved terms.
* Claimants may not want to rush to amend a Schedule if the (probable) effect is to reduce its value. But you will want to retain credibility and avoid giving an easy line of defence to the other party. A sensible recalibration of the Schedule in the lead up to a JSM or trial will put you in a stronger position to negotiate or argue the case before a Judge rather than ignoring the point and hoping (in vain) that no-one will notice.
* For a Defendant, there may be more incentive to amend a Counter Schedule sooner rather than later if the claim value is likely to decrease. But is this only going to increase costs if this is done before the Claimant amends the Schedule, as the Counter Schedule may need to be redone twice.
* An attempt to agree when and in what order any amended documents are prepared is not only what the CPR require (cooperation between the parties to further to overriding objective) but will probably save the Defendant client, insurer or NHSR costs in the long-run. Might it be better to await receipt of joint statements, for instance, rather than rushing to amend during the evidence gathering phase? Or if the claim has recently been served, seeking directions to deal with the impact of Ogden 8 at the first CCMC might be more proportionate than amending in the lead up to that hearing, unless the difference is really significant and might impact the evidence needed (e.g. about disability) or the approach to case and costs management. But if a JSM or Trial is looming, then a swifter response is undoubtedly called for.

**Charles Bagot QC**

**Colm Nugent**

**Jasmine Murphy**

**Helena Drage**

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1. [Billett v. Ministry of Defence [2015] EWCA Civ 773](https://www.12kbw.co.uk/billett-v-ministry-of-defence-2015-ewca-civ-773/) [↑](#footnote-ref-1)
2. <https://www.lawtel.com/UK/FullText/AC0128777QBD.pdf> [↑](#footnote-ref-2)
3. Wass V (2008) “Discretion in the Application of the New Ogden Six Multipliers: The case of Connor v Bradman”, Journal of Personal Injury Law, 2 pp. 155-164. [↑](#footnote-ref-3)