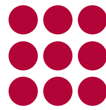

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PERSONAL INJURY

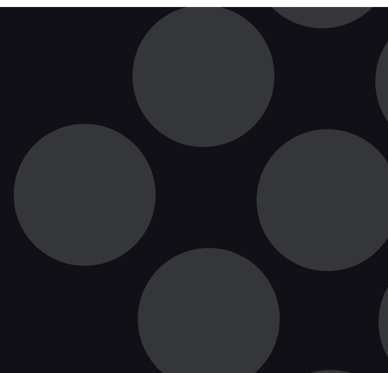
We Need To Talk About Katie

ABSTRACT

This article considers the impact of ***Katie Ward – v – Allies and Morrison Architects*** [2012] EWCA Civ 1287 on the litigation landscape regarding loss of earnings awards by reason of moderate or subtle injuries.

By Michael Lemmy and Matthew Snarr

23 November 2012



www.9sjs.com
civilclerks@9sjs.com
9 St John Street, Manchester, M3 4DN
DX Address: 14326 MANCHESTER 3
Tel: 0161 955 9000

Introduction

1. In *Ward v Allies and Morrison Architects* [2012] EWCA Civ 1287 the Court of Appeal adjudicated on the appropriateness of making a Blamire award as opposed to adopting a conventional Ogden 6[1] multiplicand / multiplier calculation to compensate future loss of earnings and on whether the determination of whether an injured party is disabled is conclusive in adopting the Ogden 6 multiplicand / multiplier approach.

A Short History

2. Upon the publication of the first edition of the Ogden Tables in 1984 it became possible for Courts and practitioners to adopt a more accurate approach to predicting future pecuniary losses, including future loss of earnings. The Civil Evidence Act 1995, Section 10, makes the Ogden Tables admissible per se in evidence.

3. The Ogden Tables were approved by the House of Lords in *Wells v Wells* [1999] AC 945 per Lord Lloyd at p379 who stated,

> *"I do not suggest that judges should be a slave to the tables. There may well be special factors in particular cases. But the tables should now be regarded as a starting point rather than a check. A judge should be slow to depart from the relevant actuarial multiplier on impressionistic grounds or be referenced to "a spread of comparable cases, especially when the multipliers were fixed before actuarial tables were widely used."*

4. Personal injury practitioners will be familiar with the concept of discounting the multipliers in tables 3 to 14 to reflect contingencies other than mortalities under the auspices of what used to be termed general labour market forces. The art of discounting became a crude but somewhat predictable exercise, perhaps imprecise or unjust from the claimant's perceptive, it carried a degree of certainty amongst practitioners and the Court.

5. Research carried out by Dr Victoria Wass at Cardiff University and Zoltan Butt, Richard Verrall and Stephen Habberman at City University demonstrated that the key issues affecting a person's future working life are dependent on:

   a) Gender;

   b) Disability status;

c) Educational attainment;

d) Employment status.

6. The Ogden 6 Tables were published in May 2007 and incorporated Tables A-D to provide for separate adjustments to be made for individual employment status, educational and vocational qualifications and disability.

7. According to the Introduction to the 7th Edition of the Ogden Tables, the research by Victoria Wass and her colleagues demonstrates that people without disabilities spend more time out of employment than earlier research suggested. It also demonstrates that factors such as occupation, geography, industrial sector and level of economic activity are less important than had previously been considered.

8. The new approach to calculating future loss of earnings endorsed in Ogden 6 (now Ogden 7) heralded a significant increase in valuation and awards of claimant's future loss of earnings claims. Arguably it also began the demise of *Smith v Manchester* awards. An example of the increased level of compensation is shown below:

Example A: Pre-Ogden 6

A 35 year old man, living in the North West, suffers an amputation to his right dominant leg causing him to be unable to continue his work as a lumberjack in which he earned £20,000 net per annum. He now works as a part-time car park attendant earning £10,000 per annum.

Difference between pre and post-accident earnings = £10,000 p.a.

Ogden Table 9 (multiplier for loss of earnings to pension age 65 (males)) at a discount rate of 2.5% for a 35 year old male is 20.57.

The discount factor for medium economic activity for a man aged 35 is 0.96. That discount factor is reduced by 0.02 to reflect the risky nature of the Claimant's employment and by 0.02 to reflect his geographical location giving a discount factor of 0.92.

0.92 × 20.57 × £10,000 = £189,244.

Example B: Post Ogden 6 calculation

(i) but for earnings = £20,000 per annum (multiplicand × 18.33 [0.89 – Table A × 20.6 Ogden Table 9]) = £366,600;

(ii) as is earnings = £10,000 per annum (multiplicand × 8.03 [.38 – Table B × 20.60 Ogden Table 9]) = £80,300;

(iii) £366,600 – £80,300 = £286,300.

9. More interestingly, apart from the increase in awards for classic future loss of earnings calculations, claimants' representatives began to adopt an Ogden 6/7 calculation in respect of what had previously been *Smith v Manchester* type claims on the basis that the actuarial figures and discounts incorporated the likelihood that a claimant, disabled by their injury, was likely to spend more time out of work than a non-disabled person and accordingly this method of calculation was more accurate than the broad brush approach of a *Smith v Manchester* award.

10. The effect of this approach is to increase compensation for future loss of earnings awards where claimants have suffered serious injury but have returned to work. An example of such case is set out below:

Example C: Nil Ongoing Loss

An employed chauffeur aged 25 suffers an accident at work when a fellow employee shuts a car door on his hand resulting in a crush injury to his left, non-dominant hand, with a continuing minor to moderate lack of grip strength. The injury does not prevent the claimant from carrying out any of his work related activities as a chauffeur; he drives an automatic vehicle and can handle most baggage. He would, however, have obvious difficulties with a manual gearbox or indeed any heavy manual employment. Technically the claimant may fall within the definition of disabled within the meaning of the Equality Act 2010. Pre-Ogden 6 such a claimant would probably have contended for a *Smith v Manchester* award in the region of approximately one or two years. Post-Ogden 6 a claimant would now be likely to plead his claim as follows: –

(i) 'but for' the accident the claimant would have earned £20,000 per annum × 18.33 [0.89 – Table A × 20.66 – Ogden Table 9] = £366,600;

(ii) pursuant to Ogden 6 the claimant will now earn £20,000 per annum × 8.03 [0.39 – Table B × 20.60 – Ogden Table 9] = £160,600;

(iii) total equals £366,600 – £160,600 = £206,600;

(iv) if such an approach were accepted by the Court, it is likely that the Court would adjust the multipliers proposed above.

11. The position therefore is that many practitioners argue that the Ogden 6 Tables are the starting point for claimants valuing claims of this nature.

The Rise and Demise of Handicap on the Open Labour Market Awards

12. Traditionally the scenario in which an injured claimant remains in work has been compensated by the provision of a Smith and Manchester award. Although it was not the first of its kind *Smith v Manchester Corporation* [1974] 17 K.I.R. 1CA became the guideline authority for the provision of an award to compensate the loss of earning capacity represented by the physical handicap produced by the injury as opposed to an actual loss of earnings.

13. Two preconditions must be satisfied in order for a *Smith v Manchester* award to be made:

(i) There must be a "substantial" or "real" risk that a claimant will lose his present job at some point before the estimated end of his working life;

(ii) If there is such a risk, the Court must assess and quantify the present value of the risk of the financial damage which the claimant will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the claimant's chances of getting a job at all, or an equally well paid job[2].

14. Once these two preconditions are satisfied, the Court must calculate the present value of that future loss. This is normally done by reference to the claimant's annual net income. However, the approach of Smith and Manchester awards has led to some criticism that the process remains quite arbitrary and that Courts tend to lean to the ungenerous side in their awards.[3]

15. The introduction of the new method of calculating future loss of earnings in the 6th Edition of the Ogden Tables was accompanied by views expressed by practitioners and academics that the new method would make *Smith v Manchester* awards mainly redundant.[4] The premises for this approach is that the Ogden 6 Tables provided within them statistical calculations designed to reflect the risk that a disabled working or non-working individual would come on to the open labour market.

16. In practice, although slowly, the Courts have tended to lean towards adopting a multiplier/multiplicand approach using the Ogden 6 Tables as against making a *Smith v Manchester* award. In *Sharma v Noon Products Limited* [2011] QBD an agency worker suffered a crushing injury to his right index finger resulting in the finger being considerably shorter, pain and limited dexterity. At the time of trial the claimant was in direct employment. He had been employed for 3 years. The defendant contended for a 6 months *Smith v Manchester* award in the sum of £7,500, the claimant contended for a life loss of £150,000. The Court held that the claimant's residual disability meant that his prospects of employment and promotion were severely limited. Those risks were accounted for in the 6th Edition of the Ogden Tables and adopted a multiplier approach. Importantly, the Court uplifted the disabled multiplier discount figure from Table B from 0.4 to 0.6, resulting in a future loss of earnings of £92,000.

17. In *Evans v Virgin Atlantic Airways* [2011] EWHC 1805 (QB) His Honour Judge McKenna adopted an Ogden 6 calculation in a case involving a beauty therapist who had suffered a work related upper limb disorder as a consequence of her employment but had been redeployed into a clerical position at a lower salary. The Court assessed future loss of earnings on the basis that the claimant would retrain to work at a lower professional level than a full therapist.[5]

Blamire – the magic bullet

18. Blamire awards are generally seen as the exception. They can be appropriate in cases where there is some significant uncertainty as to the projected earnings path of the claimant. Invariably they involve the Court awarding a lump sum of damages on a broad brush approach basis. The Courts may adopt a multiplier/multiplicand approach initially and then review that stepping back having regard to the risks and uncertainties on the evidence.

19. The distinction between awards made under *Smith v Manchester Corporation* and *Blamire v South Cumbria Health HA* [1993] PIQR Q1 are that the latter may be appropriate where the uncertainties of a case made by the multiplier/multiplicand are unworkable, whereas a *Smith v Manchester* award seeks to compensate a claim for the possibility that at some point in future he/she will lose their job and suffer a handicap on the labour market. They compensate different heads of loss. It is possible to have a case where a judge makes an award of both.

20. In *Bullock v Atlas Ward Structures Limited* [2008] EWCA Civ 194 a claimant developed dermatitis as a consequence of his work as a paint sprayer requiring him to cease working in that profession. He claimed loss of earnings on a multiplier/multiplicand basis for the shortfall of approximately £5,000 per annum as he was now working as a window cleaner. In addition he claimed a *Smith v Manchester* award. The defendant alleged that there were significant uncertainties and advocated a Blamire approach. The judge agreed and awarded £50,000 loss

of earnings plus a 1 year Smith and Manchester . Both sides appealed. On appeal the Court of Appeal substituted a figure of £90,000 for the Blamire award and the Smith and Manchester award was not interfered with. Keen LJ said:

> *"Merely because there are uncertainties about the future does not of itself justify departure from that well established method. Judges should be slow to resort to the broad brush Blamire approach, unless they really have no alternative."*

21. In *Woodward v Leeds Teaching Hospitals NHS Trust* [2012] EWHC 2167 (QB) HHJ Stuart Baker found that there were "far too many imponderables" to take the conventional approach and found instead that a Blamire award was appropriate.

Judicial Tinkering

22. However, even under the Ogden 6 regime the Court's approach has not always led to consistent compensation for claimants.[6] Focussing on three cases it is possible to show how the Courts have adopted inconsistent approaches:

    (i) *Conner v Bradman* EWHC 2789 [2007];

    (ii) *Hunter v MOD* NIQB 43 [2007];

    (iii) *Lee-Smith v Evans* EWHC 134 [Q.B.] [2008].

    In each of these cases the claimants worked in manual employment and suffered injuries to their legs with subsequent impairment to mobility. Victoria Wass analysed the Court's approach to reduction factors (employment risks and averages for broadly defined groups of working age individuals) and found as follows:

    (i) *Connor*: the reduction factor was reduced from 40% to 20%;

    (ii) *Hunter*: the reduction factor was reduced from 78% to 33%;

    (iii) *Lee-Smith*: the reduction factor was reduced from 41% to 35%.

23. Overall Victoria Wass's criticism of the Court's approach was that the reduction factors provided for in Tables A-D already included any allowances for effects of severity, impairment and transferability of skills which were associated with gaining employment. In short, it

appears that Wass was cautioning lawyers against tinkering too much with the reduction factors.

24. The resultant effect has meant it has become more difficult to value certain types of claims but especially those involving an ongoing partial loss of earnings (where a different, lower multiplier is applied to the residual earning capacity) or where the claimant has remained in employment and appears to suffer no actual loss of earnings.

Update: *Ward v Allies and Morrisons Architects*

25. The claimant was a model maker with a first class degree. She suffered an injury whilst on a short term placement in which the index finger of her left (non-dominant) hand was cut off and her middle finger dislocated. Her index finger was re-attached and she made a considerable recovery. The claimant's case was that she would now no longer be able to work as a model maker in theatres or in the performing arts. However, the Court was not satisfied that the claimant would not be able to obtain model making work for architects at a similar level of remuneration and found that she was "not the most reliable of historians".

26. The unchallenged medical evidence was that she suffered hypersensitivity and that the index finger was largely cosmetic but that the rest of the hand was entirely normal with normal grip strength, i.e. she had lost some of her former dexterity but not much.

27. The Court was not satisfied that the claimant would be unable to carry out her ambition of being a model maker in the performing arts. Her major problem had been the fact that she had been out of circulation for a period of 4 years in an industry which is difficult to get started in unless doors were opened or contracts engaged. The judge concluded that the claimant could advance in another rewarding career as an architectural model maker which would prove equally rewarding to her desired career of being a model maker in the performing arts. Accordingly, he made a Blamire award in the sum of £30,000.

28. A number of arguments were advanced on appeal but the two key issues were:

    (i) when is it appropriate to use a Blamire approach as opposed to Ogden 6?

    (ii) is disability the determining factor in deciding to use the Ogden 6 Tables?

29. As regards the Blamire issue, the Court had heard evidence from the claimant, her former tutor at University and a senior associate at the defendant's firm. He was not satisfied that he

had sufficient evidence as to what the appellant had lost or what she was likely to earn in the future with her injuries.

30. The claimant argued on appeal that the judge had erred in law by failing to adopt an Ogden multiplicand/multiplier approach. The Court of Appeal, at paragraph 25, agreed with the trial judge's view that the evidence was uncertain on the following issues:

    (i) whether the appellant would have succeeded in becoming a theatrical model maker;

    (ii) whether she would remain in that position throughout her working career;

    (iii) what level of remuneration she would have achieved in that occupation;

    (iv) whether the physical or psychiatric recovery of the appellant was such that she could do either the job of the theatrical model maker or other jobs as a model maker after the accident;

    (v) whether there was likely to be any difference in earnings between the two job roles.

31. The Court of Appeal held in those circumstances the judge was "driven" to adopting a Blamire approach.

32. The claimant argued on appeal that it was necessary to determine whether she was regarded as disabled before concluding whether the Ogden 6 Tables were to be used or not. The Court of Appeal rejected this argument holding that the determination as to whether the claimant was disabled was not the determining factor in the application of the Ogden 6 Table. It was not an automatic trigger. It quoted paragraph 14 of the Introduction of the Ogden Tables which states that "there would be situations where it will be appropriate to use the factors set out in Section B Tables to calculate a claimant's residual earning capacity on a multiplier/multiplicand basis. However, in many cases it would be appropriate to increase or reduce the discount in the tables to take account of the nature of the particular claimant's disabilities. There will also be some cases where the *Smith v Manchester Corporation* or *Blamire* approach remains applicable. There may still be cases where a precise mathematical approach is inapplicable."

33. Lord Justice Aikens held that given this commentary the mere fact that a claimant could establish that they were disabled did not automatically lead to the application of an Ogden 6 approach. Moreover, in his view, he would not have considered the claimant to be disabled within the meaning of the Introduction provided to the Ogden Tables at paragraph 35 which states:

"The definition of employed/not employed, disabled/not disabled and educational attainment used in this analysis and which should be used for determining which factors to apply to the multipliers to allow for contingencies other than mortality are as follows:

......

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

— has either a progressive illness or an illness which has lasted or is expected to last for over a year;

— satisfies the Disability Discrimination Act's definition that the impact of disability substantially limits the person's ability to carry out normal day to day activities;

and

— their condition affects either the kind or the amount of paid work they can do.

Not Disabled:

— all others."

Analysis of *Ward v Allies*: Learning the Lessons

Lesson 1

34. The first lesson to be learned from the case of Ward is the importance of providing to the Court detailed and persuasive evidence upon which the contentions as to loss of earnings are based. It can be difficult for claimants to establish a career loss of earnings claim, especially when they are young, but the use of comparator evidence, employment consultants and witness evidence from the profession itself ought to be provided to the Court if the claimant is going to mount a serious argument as to those losses.

Lesson 2

35. In determining whether the claimant is disabled or not it is always important to ask this of the medical expert. It does not appear that that was specifically done in Mrs Ward's case.

36. The test is now as set out under the Equality Act 2010, this is important because the former Government decided to drop the requirement in the Disability Discrimination Act 1995 that, for an impairment to be considered to affect a person's ability to carry out normal day-to-day activities, it must affect one or more specified "capacities" – namely mobility; manual dexterity; physical coordination; continence; ability to lift, carry or otherwise move everyday objects; speech; hearing or eyesight; memory or ability to concentrate; learn or understand; or perception of the risk of physical danger (para 4(1), Schedule 1 of the Disability Discrimination Act). In the Government's view this list "served little or no purpose in helping to establish whether someone is disabled in the eyes of the law, and was an unnecessary extra barrier to disabled people in taking cases in courts and tribunals" (para 11.53, "The Equality Bill – Government Response to Consultation", July 2008 (Cm 7454)).

37. According to the explanatory act to the Equality Act 2010 "this change will make it easier for some people to demonstrate that they meet the definition of a disabled person. It will assist those who currently find it difficult to show that their impairment adversely affects their ability to carry out a normal day-to-day activity which involves one of these capacities" (para 682). It is important in considering Ogden 6 type cases that the issue of disability is properly determined by the medical experts and that they are given appropriate guidance by way of explanatory notes to the legislation and/or any relevant cases, for example, on the definition of substantial impairment.

Lesson 3

38. Ward reminds practitioners that in order for Ogden 6 to be engaged there are effectively three triggers:

(i) Is the Claimant disabled?

(ii) What is the likely pattern of the claimant's employment (pre-accident);

(iii) What is the likely pattern of the claimant's employment (post-accident).

A claimant will have to establish their evidence on all of these grounds. Clearly this is going to be fertile ground for defendants to seek to create confusion or to deconstruct and unpick the claimant's case so as to give the impression of uncertainty, see the matters raised in the Court of Appeal's Judgment at paragraph 25.

Lesson 4

39. Given Aikens LJ's view that disability is not the determining factor for the application of the Ogden 6 Tables, practitioners should take care not to assume that that will be the inevitable result. However, it is important to note that at paragraph 20 the Court of Appeal held:

> *"It is common ground that the multiplicand/multiplier methodology and the tables and guidance in the current edition of Ogden should normally be applied when making an award of damages for future loss of earnings, unless the judge really has no alternative."*

This is a restatement of the principle propounded in Bullock and confirms that the Ogden 6 method is the preferred method of the Courts.

Lesson 5

40. One of the issues that led to uncertainty in the trial judge's mind was the fact that the work undertaken by the claimant was freelance work with no guarantee of permanency and by its nature was temporary. This may present a greater degree of risk for claimants who are self-employed if they are not able to establish a degree of certainty about their future employment on contracts or the provision of work on a long-term basis.

41. Furthermore, it seems that if other Courts were to adopt a similar approach to the trial judge in Ward's case then children and/or young persons are likely to find it much more difficult to prove their future losses by reason of the fact that there is a greater degree of uncertainty about their future. This underlines the need to prepare a package of evidence in support of the claimant's claim. If that evidence is missing, on the basis of Ward, it will not be an unfair conclusion to draw that the earnings position is so uncertain that a Blamire award is justified.

Lesson 6

42. Interestingly, at paragraph 26 the Court of Appeal appears to leave the door open for a hybrid form of a Blamire award. The Court held at paragraph 28:

> *"Mr Huckle does not suggest that, if the judge was correct to use the Blamire approach, nonetheless the amount of the lump sum awarded for loss of future earnings was unreasonably low because it failed to take account of the appellant's disability. That submission was not advanced by any of the grounds of appeal or in his written oral argument."*

This appears to leave the door ajar for claimants who are genuinely disabled to argue that even if a Blamire award is made, some form of uplift or increase in the standard award ought to be made to reflect the fact that they are disabled (as is provided for within the Ogden 6 Tables).

Conclusions

43. Last month heralded the arrival of the 7th Edition of the Ogden Tables. As regards future loss of earnings there were limited changes to the multipliers, but it is anticipated that the 8th Edition of the Ogden Tables is going to include some significant revision and/or guidance from the Ogden working party on the calculation of future loss of earnings especially now that Victoria Wass has joined the Ogden working party.

44. The method by which the Courts assess future loss of earnings continues to be a movable feast and it remains to be seen whether the approach of the Courts or practitioners is simplified following the more detailed guidance anticipated on these issues after the publication of the 8th Edition of the Ogden Tables.

By Michael Lemmy & Matthew Snarr

9 St John Street
Manchester
M3 4DN

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Endnotes

1 The authors acknowledge the publication of the 7th Edition of the Ogden Tables in October 2012. For the sake of ease of understanding all references within this article to Ogden 6 are to be understood in that light. All examples are calculated using the 7th Edition Ogden Tables.

2 See *Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132.

3 See McGregor on Damages, 18th Edition, Chapter 35-095 – 35-099

4 See Kemp & Kemp Chapter 9-026

5 Interestingly, HHJ McKenna, in the case of *Hindmarch v Virgin Airways* [2011] EWHC 1227 (QB), a case that was heard together with *Evans*, awarded Hindmarch 1 year's *Smith v Manchester* award in circumstances where she was earning more than she did as a beauty therapist and where there was little evidence of any job insecurity.

6 For a more detailed analysis see "The Impact of Judicial Discretion in the Application of New Ogden 6 Multipliers" by Victoria Wass and "Ogden 6 Adjustments to Working Life Multipliers" by Chris Melton Q.C.

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