Employment, Disability and the Ogden Tables

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The loss of future earnings calculation

annual wage x years of employment = lump sum

- predicted wage based on likely occupational average
- Remaining years to retirement discounted for death and early receipt
- Further discount for likely periods of non-employment (RF)
The calculation under Ogden Five

In *Wells v Wells* [1999] 1 AC 345, Lord Lloyd said at 379: “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 by reference to ‘a spread of comparable cases’, especially when the multipliers were fixed before actuarial tables were widely used.”

The law further stated by Potter LJ in *Herring v Ministry of Defence* [2003] EWCA Civ 528 was as follows: “In order to justify a substantially higher discount by reason of additional future contingencies, there should in my view be tangible reasons relating to the personality or likely future circumstances of the claimant going beyond the purely speculative.”
Conner v Bradman (2007) EWHC 2789

- Claimant sustained serious injury to left knee
- In constant pain, much less mobile than previously
- Injury had psychological impact
- Claimant was a mechanic and could no longer pursue this work (£20,327)
- Claimant could work as a taxi driver (£13,645)
- Medical evidence suggested Claimant would deteriorate within 10 years and total knee replacement likely
- Judge dismissed Defendants’ argument that Smith v Manchester or “Blamire” approach should be adopted
Strict application of the Ogden WLE

51 year old (not disabled) and was earning £20,327 at time of injury. After injury he is disabled and earning £13,645.

Old Style method

\[(£20,327 \times 11.40 \times 0.82) – (£13,645 \times 11.40 \times 0.82) + \text{Smith v Manchester £13,645} = £76,108\]

Ogden Six new approach

\[(£20,327 \times 11.40 \times 0.82) – (£13,645 \times 11.40 \times 0.49) = £113,796\]

The difference is £37,688 (50%)

The court’s discretion in Conner v Bradman
Mixed response from lawyers

- Claimant lawyers complain about the reduced pre-injury multipliers
- Defendant lawyers and insurance companies complain about the size of the post-injury adjustment
- Large increases in damages for loss of future earnings for post-injury capacity. Reflects large disability-induced employment disadvantage which previously went unrecognised and under compensated
- Judiciary have taken a conservative approach

Other studies of disability impacts

Health and Disability Survey 1997 and General Household Survey 1972-2004 (40% disadvantage)

Dame Carol Black 2008 (The Black report) The Health of the Working Age Population
Employment rate 75% working age population but only 48% for those with a DDA defined limitation

National Equality Panel (2010) Anatomy of Economic Inequality in Britain ‘disabled people face some of the greatest employment disadvantages of any group we examine’ p. 117 34% (2006-2008)
OECD rating: Disabled employment rates

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Are the RFs correct?

- Imprecision – correct on average for the population but wrong for the individual
- Omitted variables – we can’t measure everything
- Bias- imprecision is systematic and the average, measured for the LFS-disabled, is not the true average for claimants
Claimants are different

- Disability status is crude, subjective and dependent on employment status. The LFS-disabled are differently and more severely disabled than are claimants.
- Employment status over the course of a year does not measure employment history and there is more historical non-employment for the LFS-disabled than for claimants.

Disability in the LFS

Labour Force Survey classification
1. Impairment must be long term (over a year)
   and it effects must
2. Substantially adversely affect ability to carry out day-to-day activities (ADL-limiting) (same as DDA 1995)
   and
3. Adversely affect the amount and/or the type of work that can be undertaken (Work-limiting)

Disability which gives rise to claims
1. Long-lasting (OT assumes over a life time)
2. Work-limiting (otherwise no loss of future earnings)
3. ADL-limiting (DDA definition of disability)
4. Threshold and objectivity (must justify the costs risks of litigation any condition is investigated by at least two physicians)
Employment rate and cause of disability

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<td>%</td>
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<tr>
<td>Medical cause</td>
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<td>From birth</td>
<td>17</td>
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<td>Accident, injury or work-related illness</td>
<td>36</td>
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LFS 2002

Employment status

- Claimants are different from the LFS disabled (by age, sex education and starting employment status) in terms of their employment history. There is more historical inactivity in the LFS disabled.
- This difference in employment history matters for their future employment prospects.
Why is the disability employment gap so wide and persistent?

- Functional impairment makes some work tasks more difficult to achieve (medical model)
- Employers overstate functional impairment (inaccurate beliefs based upon negative stereotypes)
- Employers overstate task sets for jobs (not bone fide occupational requirements)
- Misunderstanding of DDA. Employers must do more than attempt to fit someone who is disabled into a position designed for someone who is not

Transitions in the LFS

\[ \begin{array}{cc}
\text{Transitions in the LFS} & \\
\text{a) Smoothed E to NE rates from LFS 1998 - 2003} & \\
\text{b) Smoothed NE to E rates from LFS 1998 - 2003} & \\
\end{array} \]

- Matched CVs by sex, age, qualifications, skills and experience (blind, cerebral palsy, non-impaired)
- Applications for 120 advertised vacancies in private sector
- 63% employers discriminated against the disabled
- Hidden discrimination because false reasons given for rejection

Summary

- Ogden Six/Seven RFs explicitly model the effects of disability on employment
- Large impact on FLE reflects large impact of disability on employment chances
- Main employment disadvantage lies in re-entry/recruitment
- RFs are imprecise but they are not biased
- Only justification for a discretionary adjustment is that the claimant is different from her peer group in a way which is more likely than not to affect her employment chances and in a predictable direction