Disability and employment risks in the Ogden Tables

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Rough Guide

1. The ‘new’ Reduction Factors
2. Propensity to adjust
3. Daniel Kahneman
   ‘thinking like a human and thinking like an econ’
4. Quality of the RF and the size of the employment gap
5. Reasons for departure
6. Psychological injury
7. Clarke v Maltby and Johnson v Le Roux Fourie
8. Self-employment
9. Tactics
The loss of future earnings calculation

annual wage x years of life x proportion in employment = pre-injury lump sum

- Predicted annual 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)
- Work-life expectancy
- Mitigation lump sum includes reduced wage and disability-adjusted RF
Judicial Adjustments
RF adjustments before Ogden Six

Lord Lloyd Wells v Wells [1999] 1 AC 345
“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.”

Potter LJ in Herring v Ministry of Defence [2003] EWCA Civ 528
“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.”
RFs after Ogden Six

➢ Magnitude
➢ Differentiation
➢ Method of calculation
➢ Propensity to adjust
  • Ignores Herring
  • Large adjustments
  • No stated (rational) basis
  • Uncertainty
  • Under-compensation
  • Impairment not severe
Conner v Bradman
1. *Hopkinson v MOD* [2008] EWHC 699 (QB)
2. *Peters v East Midlands Strategic Health Authority* [2008] EWHC 778 (QB)
5. *Clarke v Maltby* [2010] EWHC 1201 (QB)

Daniel Kahneman

Cognitive illusions as a source of predictable errors in judgement

Two types of thinking

1. Automatic -fast, instinctive, associative
2. Reflective -self-aware, calculative, slow

Automatic thinking basis for common sense reasoning. Based on heuristics which can lead to mistakes.
A bat and ball cost one pound and ten pence. The bat costs a pound more than the ball. How much does the ball cost?
In a lake there is a patch of lily pads. The patch doubles every day. It takes 48 days to cover the whole lake. How long does it take for the patch to cover half the lake?
Seven rules of thumb

1. Representativeness
2. Availability
3. Confirmation bias
4. Bias towards positive answers
5. Association
6. Attributional bias
7. Framing
Each card has a number on one side, and a patch of colour on the other. Which card(s) must be turned over to test the idea that if a card shows an even number on one face, then its opposite face is red?
‘The Linda experiment’

a. works in financial services
b. works in financial services and is active in the feminist movement
c. works in a book store and takes yoga classes
d. a life insurance sales person
e. an orthopaedic surgeon
Quality of the Reduction Factors

➢ Group averages

➢ Unbiased and efficient (peer reviewed)

➢ Same results as in other studies

➢ Imprecision - fit for purpose?
  groups not individuals
  omitted variables (severity)
  limited number of tables
Calculating compensation for loss of future earnings: estimating and using work life expectancy

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[Read before The Royal Statistical Society on Wednesday, January 16th, 2008, the President, Professor D. J. Hand, in the Chair]

Summary. Where personal injury results in displacement and/or continuing disability (or death), damages include an element of compensation for loss of future earnings. This is calculated with reference to the loss of future expected time in gainful employment. We estimate employment risks in the form of reductions to work life expectancies for the UK workforce by using data from the Labour Force Survey with the purpose of improving the accuracy of the calculation of future lifetime earnings. Work life expectancies and reduction factors are modelled within the framework of a multiple-state Markov process, conditional on age, sex, starting employment state, educational attainment and disability.

Keywords: Disability-adjusted multipliers; Dynamic multiple-state Markov model; Ogden tables; Personal injury compensation; Work life expectancy (reduction factor)
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)
Size of the employment gap
How wide? How persistent?

<table>
<thead>
<tr>
<th>Year</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>50.36</td>
</tr>
<tr>
<td>1999</td>
<td>49.33</td>
</tr>
<tr>
<td>2000</td>
<td>49.69</td>
</tr>
<tr>
<td>2001</td>
<td>49.69</td>
</tr>
<tr>
<td>2002</td>
<td>49.09</td>
</tr>
<tr>
<td>2003</td>
<td>47.35</td>
</tr>
<tr>
<td>2004</td>
<td>46.90</td>
</tr>
<tr>
<td>2005</td>
<td>47.38</td>
</tr>
<tr>
<td>2006</td>
<td>46.48</td>
</tr>
<tr>
<td>2007</td>
<td>46.91</td>
</tr>
<tr>
<td>2008</td>
<td>46.67</td>
</tr>
<tr>
<td>2009</td>
<td>45.14</td>
</tr>
<tr>
<td>2010</td>
<td>44.17</td>
</tr>
<tr>
<td>2011</td>
<td>43.90</td>
</tr>
</tbody>
</table>
Why is the disability employment gap so wide and so persistent?

➢ Social gradient (minor and reducing effect)

➢ Functional impairment makes some work tasks more difficult to achieve (medical model)

➢ Employers overstate functional impairment (inaccurate beliefs based upon negative stereotypes)

➢ Employers inflate task sets for jobs (not bone fide occupational requirements)

➢ Job design. Employers misunderstanding of DDA

➢ Shared paradox of medical advances, employment flexibility, growth in service sector employment but persistent gaps
Reasons for departure

➢ Severity of disability
➢ Loss of use of core skills or qualification
➢ Good employment history
➢ The Great Recession
➢ Pre-injury disability
Severity of Impairment
Definition of disability

1. ADL-limiting substantially adversely affects ability to carry out day-to-day activities
2. Long-lasting (over a year)
3. Adversely affects either the amount or type of work that can be undertaken

• No measure of severity
## Distribution of disability severity scores

<table>
<thead>
<tr>
<th>Severity score</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10</th>
</tr>
</thead>
<tbody>
<tr>
<td>% disabled</td>
<td>20.9</td>
<td>12.1</td>
<td>9.9</td>
<td>12.3</td>
<td>11.2</td>
<td>10.5</td>
<td>9.9</td>
<td>8.4</td>
<td>4.1</td>
<td>0.7</td>
</tr>
</tbody>
</table>
Unable to utilise pre-accident qualifications
➢ Skills widen job opportunities, increases chances of securing a job and achieving a good job match

➢ Converse is narrowing of these if post-injury job choice excludes pre-injury job

➢ Restrictions, reduced skills and reduced productivity

➢ May combine with hours, transport and accommodation restrictions
Good employment history

- Mr Hopkinson increased RF from .80 to .90 on the basis of not too much unemployment in merchant navy.

- Mr Fleet increased RF from .80 to .90 on the basis that he was self-employed in a business with a steady flow of work from a single employer fixing ceilings.

- Mrs Johnson increased pre- and post-injury RFs to 1.0 (complete certainty of continuous employment).

When, if ever? A good job match in a secure job (never 100%).

Continuous employment is not on its own sufficient.
The Recession

Unequal distribution of reduced employment prospects

- Skills
- Sex
- Disability

RFs cover a working life time which is likely to be longer than the current recession (although this might be longer than you think)
Psychological Injury
## Psychological Injury

<table>
<thead>
<tr>
<th>Condition</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mental illness, phobia, panics</td>
<td>13.0</td>
</tr>
<tr>
<td>Learning difficulties</td>
<td>20.0</td>
</tr>
<tr>
<td>Depression, bad nerves</td>
<td>26.4</td>
</tr>
<tr>
<td>Speech impediment</td>
<td>31.4</td>
</tr>
<tr>
<td>Epilepsy</td>
<td>40.8</td>
</tr>
<tr>
<td>Progressive illness</td>
<td>41.6</td>
</tr>
<tr>
<td>Legs or feet</td>
<td>42.1</td>
</tr>
<tr>
<td>Back or neck</td>
<td>43.1</td>
</tr>
<tr>
<td>Arms, hands</td>
<td>46.4</td>
</tr>
<tr>
<td>Difficulty in seeing</td>
<td>47.2</td>
</tr>
<tr>
<td>Other problems, disabilities</td>
<td>55.0</td>
</tr>
<tr>
<td>Difficulty in hearing</td>
<td>57.8</td>
</tr>
<tr>
<td>Stomach, liver, kidney, digestion</td>
<td>58.1</td>
</tr>
<tr>
<td>Heart, blood pressure, circulation</td>
<td>59.4</td>
</tr>
<tr>
<td>Chest, breathing problems</td>
<td>62.8</td>
</tr>
<tr>
<td>Skin conditions, allergies</td>
<td>69.3</td>
</tr>
<tr>
<td>Diabetes</td>
<td>71.1</td>
</tr>
</tbody>
</table>

*Source: Office for Disability Issues 2009*
Clarke & Maltby and Johnson v Le Roux
Departures

➢ Both involved subtle mental ill health
➢ Neither made a finding regarding disability under the EqA/DDA
➢ Both rejected disability-adjusted RF in the post-injury calculation
➢ Both claimed vaguely to have included additional employment risks in the multiplicand
Two separate and distinct sources of loss

(i) reduced annual earnings (occupational downgrading and lower hours)

(ii) reduced employment prospects (RF)

are conflated with the results that the larger one is ignored or understated and the calculation lacks transparency.

Employment effects are greater for mental ill-health and knowledge workers are especially affected
Self-employment

- Self-employment included in the RFs
- Disabled are over-represented
- Pull factors (niche market, specialist skills, high earnings)
- Push factors (low skills, low prospects as employee)
- Taxi driving (Mr Conner) and Payroll services
Tactics

➢ Keep the focus on the RFs
➢ Provide evidence of disability
➢ Seek to guide the court in the use of the RFs
➢ Consider potential for adjustments
➢ Seek permission to call an expert (Master Fontaine in Godding v Heath)
In my judgment, the claimant should be entitled to rely on this evidence. It does fall within the guidelines given to the court in respect of giving permission for expert assistance. It is relevant and will be useful to the trial judge.

The claimant is claiming his loss of earnings claim on the basis of Ogden 7 and Table B, which relates to disabled males. He will have to demonstrate that he is disabled within the meaning of the Equality Act and the judge will have to understand the underlying reasons for the differences between the tables. As this is a new table, and has come into force relatively recently, it seems to me that the judge will be assisted by reference to that underlying research and explanation and can form his or her own view as to whether Dr. Weiss' evidence is accepted and as to the appropriate methodology to be applied to the future loss of earnings claim, whether the court decides that it is the Ogden 7 and Table B that applies, or whether the future loss of employment claim is, as the defendant submits, assessed on the basis of a Smith v Manchester award.
Any questions...