



## The Personal Injury and Medical Law Newsletter Addendum

*November 2011*

The talk being presented by Deirdre Goodwin at the next PI Team Seminar on 23<sup>rd</sup> November 2011 has been slightly amended:

*'OGDEN 7 – A rational approach or damn lies and statistics?  
- a review of recent developments and caselaw'*

The sentiments remain the same but the change in title takes into account the publication of the 7<sup>th</sup> edition of the Ogden Tables on 10<sup>th</sup> November 2011. These may be downloaded from the Government Actuary Department's website:

[http://www.gad.gov.uk/Documents/Other%20Services/Ogden%20Tables/Ogden\\_Tables\\_7th\\_edition.pdf](http://www.gad.gov.uk/Documents/Other%20Services/Ogden%20Tables/Ogden_Tables_7th_edition.pdf)

Ogden 7 addresses many of the issues and concerns expressed by practitioners and in reported decisions, not least *Conner v Bradman* [2007] EWHC 2789 (QB) and *Clarke v Maltby* [2010] EWHC 1201 (QB) where the courts have departed from the 'one size fits all' approach of Ogden 6 which, it was argued, did not recognise different degrees and severity of disability in the non-mortality reduction factors used at Tables A to D to calculate 'adjusted multipliers'.

There has been no significant change to the layout of the tables and thus there will be the user friendliness of familiarity. There are nonetheless changes which the Working Party state considered were needed to "*bolster its usefulness to practitioners*" and to take account of decided cases.

### **Key features are:**

- The use of **updated mortality tables** (based upon 2008 population data sets and projections. This results in an increase in life expectancies for both males and females. Some increases are very significant e.g. for males age 75 the increase is just under 15% and for females it is just over 14%.
- Corresponding **increases in life multipliers** for all ages. At a 2.5% discount rate the increase from Ogden 6 to Ogden 7 for males is just under 2% at age 25 and at age 50 it is 4%. For females the increase is about 1.5% at age 25 and just over 3% at age 50. The life multiplier for a male aged 50 in Ogden 6 was 21.86 and in Ogden 7 it is 22.69. The corresponding female life multipliers are 23.37 in Ogden 6 and 24.14 in Ogden 7.
- Relatively minor changes to earnings multipliers as increased retirement age multipliers can be calculated by interpolation (paragraph [10] of the introduction)
- Significant increases in **pension multipliers**. For a male aged 40 with a loss of pension commencing at age 65 the increase is just under 8.5%. For a female with a loss of pension commencing at age 60 the increase at age 40 is just over 5.5%.
- Most importantly, the **definition of "disabled"** has changed. (to meet the criticisms made by in recent caselaw)

- No changes in **fatal accidents** calculations but the Working Party notes that by section 7(1)(d) of the Damages (Scotland) Act 2011 in Scotland, unlike in England, the multiplier is now calculated at the date of trial not the date of death. This is the recommendation in Ogden 7.
- In hopeful anticipation of the outcome of Lord Chancellor's review of the **discount rate** (post the threatened APIL Judicial Review and the decision in *Helmut v Simon* (Guernsey Court of Appeal), Ogden 7 now includes **discount rates ranging from -2% to + 3%**

### Comment

Ogden 6 was a refreshing new change to the approach adopted in earlier editions in respect of the use of actuarial and arithmetical tables in the calculation of damages, in particular in respect of adjusted multipliers for reduced life expectancy and/or disability reduction factors to reflect non-mortality contingencies. Ogden 7 however is very much a transitional 'work in progress' with a view to finalising recommendations in the projected Ogden 8 as is apparent from Notes to Ogden 7. A particularly disappointing feature is the lack of a response to cases such as *Conner v. Bradman* which been eagerly awaited.

Some examples of the changes made are:

### Mortality Tables

Many practitioners have already been using the 2008 data (obtainable from the GAD website) and extrapolating the correct multiplier by use of the interpolation of the age-adjusted multiplier from the 0.00% column of Tables 1 and 2 and then applying the corresponding multiplier from the 2.5% column. The difficulty with this however is that the 2008 data is already of itself out of date and this is recognised by the Working Party which at paragraph [6] of the introduction states:

"the intention of the (OWP) is to accomplish this re-writing in the next (eighth) Edition which will rely on the further updated mortality projections due to be produced by the ONS later in 2011. It is hoped that the eighth edition will be available in autumn 2012"

### Definition of Disability

A driving force behind the changes in the definition of disability is Dr Victoria Wass who spoke recently on this topic at the annual residential Clinical Negligence Conference organised by the PNBA. 'Previously defined as "a progressive illness or an illness" expected to last over a year (the criteria traditionally applied by life insurers for 'permanent disability', 'disability' is now defined as "an illness or a disability which has or is expected to last for a year or is a progressive illness". This definition more closely matches the statutory definition in the Equality Act 2010 to which reference is now made rather than the Disability Discrimination Act 1995

The argument regarding non-mortality reduction factors will has not been concluded and will continue to rage as is made apparent in paragraph [18] of the Introduction where it is stated that:

"These issues will be discussed in detail when drafting the eighth Edition and consideration given to whether or not the Explanatory Notes need amendment"

The burning question is whether the courts will recognise the measured and empirical approach by the Working Party which is based upon sound evidence-based analysis, or whether judgments such as *Conner v Bradman* will continue to reflect a 'broad brush' judicial comfort zone rather than being reliant upon 'lies, damn lies and statistics'.

These matters will be discussed and expanded upon at the forthcoming presentation together with consideration of the approach to multipliers for reduced life expectancy together with worked examples.

Deirdre Goodwin

2<sup>nd</sup> November 2011