When Should a Court say a Personal Injury Claimant doesn’t really have a disability?

Theo Huckle QC
Civitas Law

Body: In *Wells v Wells [1999] 1 AC 345* the House of Lords adopted the so-called 100% principle of compensation. In order to consider how future losses should be accurately computed for this purpose, the Ogden committee has for many years been considering detailed actuarial advice and evidence. Use of the Ogden tables was specifically sanctioned by the House of Lords in *Wells* and has become standard practice.

As part of the process of updating the tables, the 6th Edition (“Ogden 6”) included a methodology for computing future loss of earnings or earnings capacity based upon the gross multiplier for the remainder of the Claimant’s working life, but applying reduction factors to that multiplier which vary according to (1) whether the Claimant had and now had a “disability”, originally within the meaning of the Disability Discrimination Act 1995 and now (Ogden 7) within the similar meaning of the Equality Act 2010, (2) whether the Claimant was and now is in employment, and (3) the educational attainments of the Claimant.

There is no doubt that the computation suggests that the future earning capacity of persons with disabilities is much more restricted than has historically been assumed. Thus, by way of example, if a 35 year old man’s gross multiplier for earnings to age 70 is 23 (using the current Lord Chancellor's discount rate of 2.5%), then his “non-disabled multiplier” if he is of middle qualifications and has been employed pre- and post-accident will, applying Table A reduction factor, be 0.91*23 = 20.93 whereas the “disabled multiplier” for the same man will, applying Table B, be 0.52*23 = 11.96. Thus even if the Claimant’s earning have remained the same, and he is in the same job even, the applicable multiplier to those earnings will be 20.93-11.96 = 8.97. The result is that for that man on average earnings of about £26,000 gross, £20,000 net, this derives a future loss of earnings/capacity of 8.97*20000 = £179,400. This takes account of the Claimant’s vulnerability in the labour market as to retention of jobs and ability to find new jobs, but is clearly far more than a judge would have awarded under the *Smith v Manchester* principle, where a form of
general damages award was made usually equating to no more than about $2 \times$ net current earnings, in this case a maximum of about £40,000, thus a difference of at least £139,400.

Unsurprising, judges have concerns in applying the Ogden methodology as to possible overcompensation, and Defendants habitually contend that a case is not appropriate for the application of that method, urging the court to consider the case one of “too many variables” or “too uncertain” as in the Blamire line of cases and thus apply the (cheaper) Smith basis of award. I understand that it is thought in some quarters of the liability insurance world that - to their surprise given the provenance of the Ogden data - some Claimant lawyers can be “afraid” of the size of awards thus computed and able to be persuaded quite easily into lower settlement bases rather than run cases to trial because of the “all of nothing” nature of these arguments.

However, generally speaking the courts have shown themselves prepared to adopt what some judges call the “now conventional” Ogden 6 method. Recent examples of this can be found in my rather media-exposed case of the airport lounge masseuses, Jayne Evans v Virgin Atlantic Airways (2011) unreported, QBD (HHJ McKenna), and also Sharma v Noon Products (2011) unreported, 7 April (HHJ Yelton) where the injury was confined to the loss of a finger tip. This should not be a surprise. After all, the data underlying the reduction factors are based on detailed specially-commissioned research into the factors which really do affect earning capacity, replacing old assumptions about the effects of geography and “level of economic activity” used in earlier Ogden versions with research-based criteria. It is very important to keep in mind that the Ogden Committee comprises leading distinguished representatives from the UK legal professions (including the NHSLA and Forum of Insurance Lawyers, the UK Law Societies, PIBA and PNBA), labour economists, actuaries (including the Government Actuary’s Department) and forensic financial advisors.

What judges have tended to do, however, faced with the logic of potentially far higher awards using the Ogden 6 method, is to apply adjustments to the reduction factors where the Claimant is considered “not so badly disabled as some”. This was done in Sharma, and earlier in cases such as Conner v Bradman & Co. Ltd. [2007] EWHC 2788 (QB) (HHJ Coulson QC), Hunter v MOD [2007] NIQB 43 and Leesmith v Evans [2008] EWHC 134 (QB) (Cooke J). These earlier cases were criticised in expert articles: “Fair Compensation Needs Actuaries” (Daykin) JPL 48 (2009) and “The Impact of Judicial Discretion in the Application of the New Ogden 6 Multipliers” (Wass) (updated April 2009). The criticism is not about the principle of adjusting the reduction factor for the particular circumstances of a case, but that Judges are simply not equipped to analyse the correct adjustment and do so without expert help. What may appear to the lay person (including the judge) to be a modest adjustment is, in statistical terms, massive, and out of proportion to variance of the particular disability from “median” levels founding the chosen factor. Even limited levels of disability may well cause the sorts of effects translating into reduction factors as published, and those factors are not intended to reflect the most serious levels of disability but rather those medians. Thus judges can be as wrong now in adjusting the reduction factors without evidence as they were previously in assuming that diminution of earning capacity could fairly be measured in a year or two of net earnings. The experts also note that so far no judge has proposed to increase the disability reduction factors where the Claimant is “more than averagely” disabled so that “only the gander gets the sauce”.
The real lesson, of course, is that there is no substitute for evidence on the subject to enable the judge to make the correct adjustment. I would suggest that once the evidence is sufficient to enable the Ogden computation to be made at all, that can then be done upon the basis of Ogden 6/7 alone, and any adjustment to the reduction factors should only be undertaken upon the basis of appropriate expert evidence. Presumably the evidential burden at least will lie on the Defendant.

As this discussion might suggest, one thing that the Ogden Committee and the judiciary have longed for is Court of Appeal guidance on (1) the circumstances in which the court may properly consider someone “not disabled” or the evidence too uncertain, depart from the Ogden 6 method, and apply Blamire/Smith, and (2) how the court should approach adjustments to the reduction factors.

The first of these is directly the subject of an appeal due to be heard in June, Ward v Allies & Morrison, where HHJ Cleary found that a 21 year old model-maker was not “disabled” within the statutory definition when her non-dominant left index finger was excised by a circular saw and, though sewn back on, is withered and useless, with pain in an adjoining finger and difficulty found using cupboard handles, carrying shopping etc. The second is raised by the way the case was sought to be argued by me to the judge. This may be an opportunity for the Court of Appeal to consider and help practitioners and judges with both important questions.