

FROM LUMP SUMS TO PERIODICAL PAYMENTS AND BEYOND

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FULL COMPENSATION

Victims who have future loss as a result of a wrongful injury are entitled to full compensation -
that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation

Lord Blackburn
Livingstone v Rawyards Coal Company (1880)
5 App Cas 25 at 39

TRADITIONAL PRACTICE

- lump sum awards
- based on multiplier/multiplicand approach
- “finger in the air” for period of loss
- discount rate not risk-adjusted
- on average less than full compensation...
- ...sometimes gravely inadequate

OGDEN WORKING PARTY

- chaired by Sir Michael Ogden QC to 1982-2001
- first edition of Ogden Tables booklet 1984
- proposed use of index-linked gilt yields
- projected mortality introduced in 1998 (3rd ed.)
- methodology for fatal accident cases (2000)
- now chaired by Robin de Wilde QC (from 2001)

PERIODICAL PAYMENTS

- Courts Act 2003
- courts may award damages as periodical payments instead of lump sum
- limited review possibilities...
- ...for medical changes but not cost reasons
- payments awarded may increase with RPI

PERIODICAL PAYMENTS - ADVANTAGES

- better tailored to replacing lost income
- avoids overcompensation
- overcomes uncertainty over mortality
- ...and possibility of money running out
- avoids need for discount rate assumption...
- ...or allowance for tax

PERIODICAL PAYMENTS - DISADVANTAGES

- provision for RPI increases in payments
- payments may become inadequate if costs rise faster than RPI
- not reviewable for adequacy to meet costs
- need different index possibilities...
- ...or possibility of review on economic grounds
- no capital available to invest
- harder for insurers to reserve

DO WE STILL NEED OGDEN TABLES?

- smaller cases will still be settled by lump sum
- cases where RPI linkage is inadequate
- cases where defendant prefers closure
- use in periodic payments regime

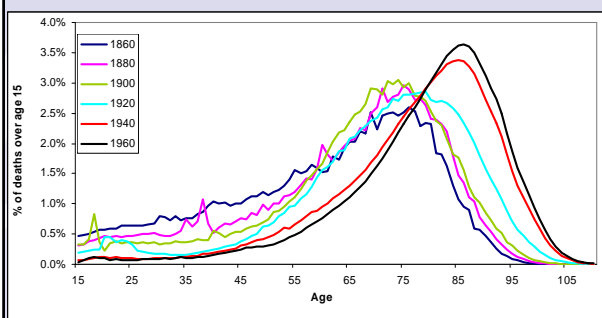
HOW MIGHT LUMP SUM COMPENSATION EVOLVE?

- allowing for different types of inflation
- allowing fatal accident losses to be calculated at the date of trial instead of date of death
- more up-to-date factors for contingencies other than mortality
- more accurate approach to offset for value of future earnings

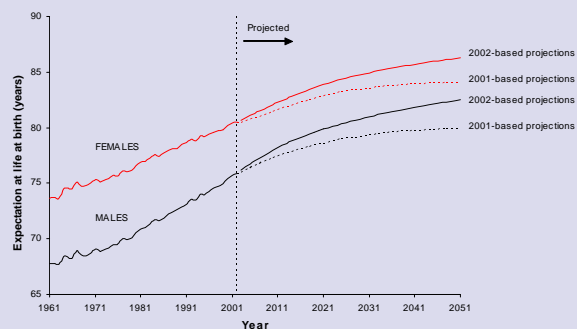
QUICK ACTUARIAL COURSE

Mortality and finance in 5 minutes

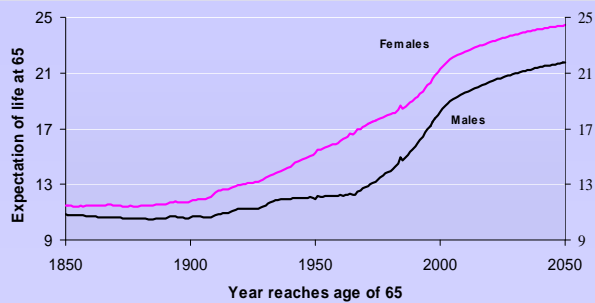
DISTRIBUTION OF DEATHS OVER AGE 15, ENGLAND & WALES



Period expectation of life at birth, UK



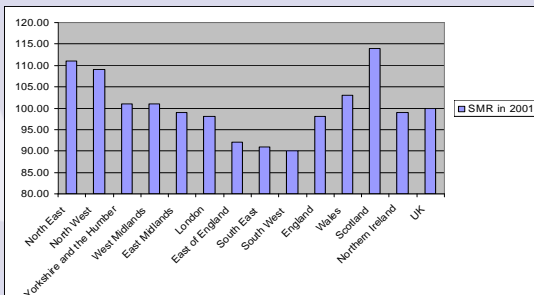
Expectation of life at 65 according to the mortality rates experienced or projected for cohorts, England & Wales



EXPECTATIONS OF LIFE, males

Age	E&W	Scotland	UK	UK (high)
20	63.1	60.7	62.9	67.0
30	53.0	50.8	52.8	56.4
40	42.8	40.8	42.6	45.5
50	32.8	31.0	32.7	34.8
60	23.4	22.0	23.2	24.6

**Regional variation in mortality
Standardised Mortality Ratios, 2001**



INFLATION

Costs generally go up by more than prices

- costs of care
- costs of hospitalisation
- costs of drugs and medicine
- general level of earnings
- earnings of an individual

RATE OF DISCOUNT IN DAMAGES ACT 1996

Section 1 (1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss...the court shall...take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.

(2) Subsection (1) above shall not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.

VALUING FUTURE PAYMENTS

Present value of future payment

= Amount of future payment

x probability of payment being made

x discount factor for time value of money

VALUING FUTURE PAYMENTS

Present value of future payment

= Amount of future payment

x probability of payment being made

x discount factor for time value of money

VALUING FUTURE PAYMENTS allowing for inflation

Present value of future payment

= Amount of future payment in today's money

x factor for relevant sort of inflation

x probability of payment being made

x discount factor for time value of money

VALUING FUTURE PAYMENTS in line with RPI

Present value of future payment

= Amount of future payment in today's money

x factor for price inflation (RPI)

x probability of payment being made

x discount factor for time value of money

VALUING FUTURE PAYMENTS in line with RPI

Present value of future payment
= Amount of future payment in today's money
x factor for price inflation (RPI)
x probability of payment being made
x discount factor for time value of money

VALUING FUTURE PAYMENTS in line with RPI

Present value of future payment
= Amount of future payment in today's money
x probability of payment being made
x real rate of return discount factor

- For example, if discount rate is 5% and assumption for future inflation is 3%, real rate of return is about 2%

REAL RATES OF RETURN

- the Lord Chancellor has declared the real rate of return to be 2½% net of tax
- currently the market implies a rate of 1.8% before any deduction for tax

VALUING FUTURE PAYMENTS in line with earnings

Present value of future payment
= Amount of future payment in today's money
x factor for earnings inflation
x probability of payment being made
x discount factor for time value of money

VALUING FUTURE PAYMENTS in line with earnings

Present value of future payment
= Amount of future payment in today's money
x factor for real earnings inflation (over RPI)
x probability of payment being made
x real rate of return discount factor

VALUING FUTURE PAYMENTS in line with earnings

Present value of future payment
= Amount of future payment in today's money
x probability of payment being made
x discount factor for real rate of return net of earnings

- For example, if discount rate is 5% and assumption for future earnings inflation is 4½%, real rate of return net of earnings is about ½%

COMPARATIVE VALUES

Multipliers for male aged 30:

Level payments for life (Table 1 at 5%)	18.4
Price linkage (Lord Chancellor's basis)	28.8
Price linkage (current market, say 1½%)	35.9
Costs rising 1% pa more than RPI	46.2
Earnings linkage (say 1½% over prices)	53.0

BALANCE OF INTERESTS

- Ogden tables offer factors and methods
- Courts decide on balance between parties
- “society” needs to set the level of compensation which will be regarded as “full” compensation
- present status quo still often favours insurers
- ...although not always

ATTITUDE OF COURTS

- alternative rates of discount have been rejected in two Court of Appeal cases:
- Warriner v. Warriner [2002] 1WLR 1703
- Cooke & others v. United Bristol Health Care & others [2004] 1 WLR 251

CONTINGENCIES OTHER THAN MORTALITY

- sickness, incapacity and unemployment
- value of loss of earnings needs to be reduced to allow for these factors...
- ...and increased to allow for career earnings prospects in excess of price inflation
- not appropriate to reduce without increasing?
- all of these are much more uncertain than mortality in their application to the plaintiff

SICKNESS AND UNEMPLOYMENT

- Section B offers factors to adjust multipliers
- based on Haberman & Bloomfield (1990)
- statistical basis now very dated
- new research under way at City University
- report expected towards end of 2005
- could be incorporated into 6th edition of tables

MITIGATION OF LOSS - 1

- loss of earnings may be mitigated...
- ...by return to some sort of work
- often dealt with as "Smith & Manchester"
- in principle, should value
 - stream of loss of earnings, and subtract
 - possible replacement earnings
- using different assumptions

MITIGATION OF LOSS - 2

- loss of earnings on standard Ogden tables...
- ...with appropriate adjustment under section B
- ...for risk of ceasing work before retirement
- replacement earnings should allow for:
 - probability of being reemployed
 - likely reduced income in reemployment
 - higher likelihood of cessation

MITIGATION OF LOSS - 3

Lewis, McNab and Wass (2002)

- "Methods of calculating damages for loss of future earnings"

Wass (2004 draft)

- "Estimating the impact of disability on lifetime employment rates"

Wass further developing methodology, in collaboration with Verrall and Haberman at City and preparing some "live" examples

OGDEN TABLES 6TH EDITION

- projected mortality from 2004-based population projections, to be published in September 2004
- revised Section B factors for contingencies
- methodology for mitigation of loss of earnings
- methodology for valuing payments increasing faster than prices
- ...possibly could be published early in 2006
