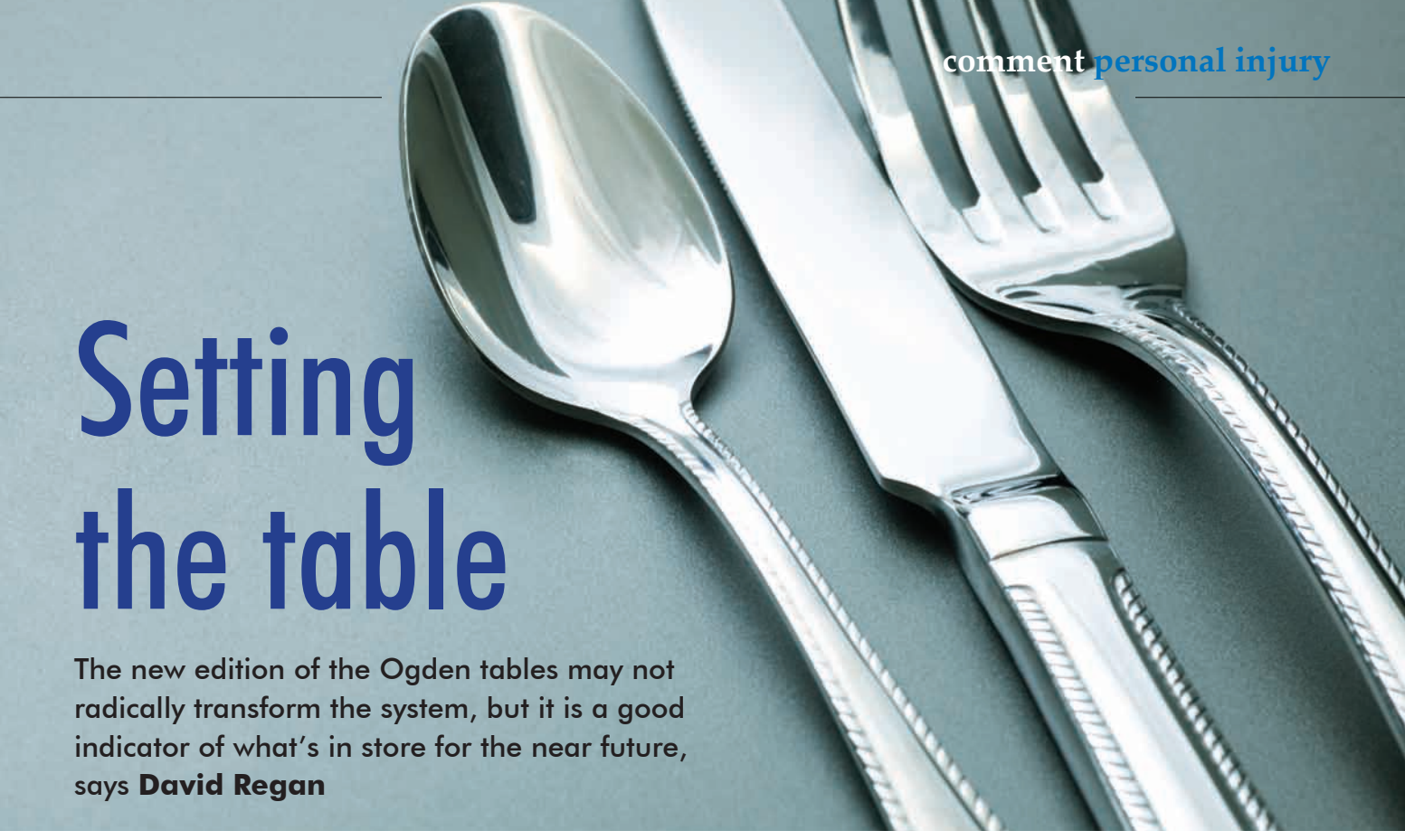

Setting the table

The new edition of the Ogden tables may not radically transform the system, but it is a good indicator of what's in store for the near future, says **David Regan**

The 7th edition of the Ogden tables, published on 10 October 2011, is perhaps as important for what it foreshadows and renders possible as for what it effects. Most notably anticipated is the likely reduction in the discount rate, presently under consideration by the Lord Chancellor.

The Ogden tables are regularly revised by an interdisciplinary working party of actuaries, lawyers and accountants. The tables and their commentary have sought to bring science and certainty to the calculation of awards for future lump sums that were formerly in a state of flux. As it recognises, it is not for the working party to determine the discount rate, but it does provide an informed commentary that very properly never quite oversteps the mark of making suggestions as to the development of the law. We may all have sympathy with the judgment of Lord Oliver in *Hodgeson v Trapp* [1989] 1 AC 833 that in making findings as to future loss of earnings "the exercise upon which the court has to embark is one that is inherently unscientific... average life expectancy can be actuarially ascertained but to assess the probability of future political, economic and fiscal policies requires not the services of an actuary or an accountant but those of a prophet".

The purpose of the Ogden tables is to provide a consistent and intelligible method enabling the user to assess the present capital value of future annual loss or expense taking account of the contingency of mortality for males and females of any given age. It was always central to the intention of Sir Michael Ogden to render the system readily comprehensible. As he put it himself: "We must assume the most stupid circuit judge in the country and before him are the two most stupid advocates. All three of them must be able to understand what we are saying."

> **"A system that fixes the discount rate has the benefit of simplicity but lacks flexibility"**

While sometimes this may actually seem a trifle disconcerting, just remember the confused and contradictory state of conflicting actuarial evidence that all too often preceded the Ogden system.

Establishing certainty

In 2007 the 6th edition of the tables provided the profession with methods of taking account of the most important contingencies other than mortality: unemployment and disability. This has illustrated how the provision of fresh method and a novel tool can transform practice just as fundamentally as alterations to law or statute. Perhaps most importantly the results of calculations under the 'Ogden 6' method have informed and guided awards that might otherwise have been made as unliquidated awards for handicap on the open labour market or for likely diminished future earnings pursuant to *Blamire v S Cumbria HA* [1993] PIQR Q1. In doing so, they have made those awards less uncertain and more robust.

The introduction to the 7th edition of the tables promises that they will be superseded by an 8th edition by the autumn of 2012. This reflects the fact that we are presently in a time of transition. Although one may hesitate to apply the words of the Chinese curse of 'may you live in interesting times' to the dry subject of actuarial evidence, that is the reality in which the profession presently finds itself.

The most obvious change effected by the 7th edition is that the tables no longer provide discount rates from zero per cent to five per cent but range from -2 per cent to three per cent. Nothing perhaps more starkly anticipates the outcome of the Lord Chancellor's present consideration of the necessity of using his powers under section 1 of the Damages Act 1996 to revise the applicable discount rate from 2.5 per cent. It is of course only the extent of the downwards alteration that is uncertain.

For the uninitiated, the multiplier is a bit like a mortgage. It allows the calculation of a sum the interest on which is expected to yield income, which in conjunction with progressive use of the capital meets the loss so that at the end of the period of loss the capital is exhausted. Thus a reduction of

the discount rate reflects the low prevalent level of interest rates that have depressed the return on capital. In short: low interest rates make it necessary to award more capital to defray the same loss.

Discount rate disagreement

For some time now the level of the discount rate has been a matter of critical comment. The court has recognised that the present value of periodical payments is substantially higher than lump sums (*Flora v Wakom* [2006] EWCA Civ 1103). While the court has power to depart from the prescribed rate if "more appropriate", a statutory wording that could not be more wide (section 1(2) of the Damages Act 1996), the Court of Appeal has consistently refrained from doing so (*Cooke v United Bristol Health Care* [2003] EWCA Civ 1370). Its motivation has largely been to simplify litigation by preventing the exception from becoming the rule.

Where the court has been free to depart from the prescribed rate it has done so. In a decision not binding on English and Welsh courts the Court of Appal of the Island of Guernsey presided over by Sumption JA rejected a single discount rate for future losses, applying instead one of 0.5 per cent for non earnings-related losses and minus 1.5 per cent for earnings-related losses, swelling an award of £9.3m to £14m (*Helmot v Simon* [2009-10] GLR 465).

In more domestic litigation, the fact that it is almost impossible to persuade the court to depart from the prescribed discount rate magnifies the importance of the rate that is set. Balancing the interests of those receiving periodical payments and those reliant on a lump sum award presents difficulties. So does the present disjunction between the historically low level of interest rates and the increasing, if presently historically moderate, level of inflation.

The pattern of the costs of technology reducing relatively with time is frequently a feature of litigation providing for the costs of aids and equipment for the disabled. What, however, of the increasing cost of labour within an ageing population? Will the altered range and inherent flexibility of the Ogden system lead the court in future to follow the approach of the Court of Appeal of Guernsey and apply different discount rates to distinct heads of loss?

A system that fixes the discount rate has the benefit of simplicity but lacks flexibility. Whether the rate is fixed for the court or determined by it, a prediction has to be made as to the future. In principle this is better made at a high level on a well-informed basis than repeatedly at first instance on competing evidence.

Frequently altering the discount rate may delay the determination of cases as litigants await the anticipation of future rates. However, where rates become as outdated as they have the gap between the actual loss and the damages received widens.

If the Ogden working party impliedly makes suggestions by the ways in which it empowers the court, it has elected at present not to provide tables for retirement ages greater than 75. One hopes that the 8th edition will follow this sensible approach. As the yield provided by pensions decreases it presently seems inevitable that the age of the working population will increase. Most will work longer through necessity. Individuals may well work longer than 75. However, expecting that the bulk of the population will do so is a

pessimistic scenario. Providing a tool for the profession systematically to postulate later retirement ages may offset such disadvantages to litigants as the out-of-date discount rate but would encourage litigation raising the exception to the level of the rule.

rule in *Cookson v Knowles* [1979] AC 566, which fixes the multiplier in actions under the Fatal Accidents Act 1976 at the date of death, unfairly limits dependency awards. The law has been amended by statute in Scotland to determine it at the date of trial, with a discount to loss between death and trial to reflect the fact that the deceased may not otherwise have lived to trial (section 7(1)(d) of the Damages (Scotland) Act 2011). The Court of Appeal gave permission to appeal the issue to the House of Lords in an appeal that was subsequently compromised (*Fletcher v A Train* [2008] EWCA Civ 413). It can surely only be a matter of time before the multiplier is fixed at trial.

"Where rates become as outdated as they have, the gap between the actual loss and the damages received widens"

The 7th edition of the tables incorporates increases to life expectancy identified by the Office of National Statistics in its data to 2008 published in 2009. One wonders how long it will be before the effect of the more prosperous society is balanced by the more calorific society.

Anticipating changes

In other respects the working party anticipates likely future changes. Not least it recites the continuing debate about the time for calculating the multiplier for the calculation of dependency in cases of fatal accident. It has long been observed that the

The 8th edition of the tables may alter the definition of disability and possibly include other methods of taking account of contingencies relevant to the individual case. The research to which the working party refers emphasises the past tendency of courts to depart from the tables in a manner disadvantageous to most claimants; in short, to find that the litigant before it, disabled by injury, is less disadvantaged than the average statistical group to which they belong. More precise guidance is promised in the 8th edition.

Since the development of the Ogden tables, the attitude of the courts has moved between the poles of applying a generalised system and tailoring it specifically to the individual circumstances of the case. It is sanguine to examine the research that suggests that the latter approach may oddly have led to litigants receiving lower awards than statistically justified on a routine basis.

If the 8th edition of the tables is able to provide a rigorous and intelligible justification inhibiting courts from departing from them in this fashion it will be very welcome.

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