OGDEN 8: DISCUSSION AND CURRENT TOPICS

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PART ONE

Richard Henderson

PART TWO

John Pollock

Major Ogden 8 changes: an overview

- Published on 17th July 2020
  - New Tables - now 36 Tables – eight new tables
  - New Multipliers – Tables 1 – 34 have been changed to reflect new life expectancy data
  - Explanatory notes covering contingencies other than mortality have been revised
  - Changes in respect of pension loss calculations
  - They cover indexation of loss of earnings PPOs
  - Additional Tables

New Tables

- There are new Tables for loss of earnings to retirement and loss of pension for males and females at retirement ages of 68 and 80
- Reflects the fact that the state retirement age is regarded as 68
- Means no longer necessary to interpolate multipliers in these cases

New Tables

- The new Tables are:
  - Table 11 multipliers - loss of earnings to pension age 68 (m)
  - Table 12 multipliers - loss of earnings to pension age 68 (f)
  - Table 17 multipliers - loss of earnings to pension age 80 (m)
  - Table 18 multipliers - loss of earnings to pension age 80 (f)
  - Table 27 multipliers - loss of pension commencing age 68 (m)
  - Table 28 multipliers - loss of pension commencing age 68 (f)
  - Table 33 multipliers - loss of pension commencing age 80 (m)
  - Table 34 multipliers - loss of pension commencing age 80 (f)

New Multipliers

- Introduction
  - Ogden 7th Ed. was published in 2011 – it was based on mortality projections from data published in 2008
  - Ogden 8th Ed. is based on the ONS data from 2018 – published at the end of 2019
  - The 2018 data showed a reduction in mortality projections
  - The new multipliers reflect this

New Multipliers

- Reduction in mortality projections
  - October 2019 – the ONS published the National Life Statistics for 2016 - 2018
    - (1) Perhaps surprisingly, since 2011, mortality has not increased as much as had previously been expected
    - (2) More pessimistic assumptions adopted by the ONS regarding future improvements in mortality
  - Both male and female life expectancy has been increasing at a slower rate than expected

New Multipliers

- **Worked Example**
  - Lifetime future care of £10,000
  - Male and female claimants – at aged 30, 50 and 70
  - Use Tables 1 and 2 respectively at a discount rate of minus 0.75%

New Multipliers

Worked Example

- **30 (m) – "O7"** = (71.43 X £10k) = **£714,300**; … **"O8"** = (69.82 x £10k) = **£698,200**. Difference = £16,100. **Percentage damages reduction = 2.25%**
- **30 (f) – "O7"** = (76.95 x £10k) = **£769,500**; … **"O8"** = (74.05 x £10k) = **£740,500**. Difference = £29,000. **Percentage damages reduction = 3.77%**
- **50 (m) - "O7"** = (41.44 x £10k) = **£414,400**; … **"O8"** = (40.06 x £10k) = **£400,600**. Difference = £13,800. **Percentage damages reduction = 3.33%**
- **50 (f) – "O7"** = (45.71 x £10k) = **£457,100**; … **"O8"** = (43.43 x £10k) = **£434,300**. Difference = £22,800. **Percentage damages reduction = 4.99%**
- **70 (m) - "O7"** = (18.85 x £10k) = **£188,500**; … **"O8"** multiplier = (17.34 x £10k) = **£173,400**. Difference = £15,100. **Percentage damages reduction = 8.01%**
- **70 (f) – "O7"** = (21.41 x £10k) = **£214,100**; … **"O8"** = (19.45 x £10k) = **£194,500**. Difference = £19,600. **Percentage damages reduction = 9.15%**

New Multipliers

- What can we see from the Worked Example?
- Changes have a greater impact for older claimants.
  - Multipliers for claimants have decreased more markedly with age
- Females are disproportionately affected
  - Life expectancy has reduced by more, proportionately, for females than for males.
  - Expect further life expectancy reductions in any Ogden 9. The latest projections are more pessimistic than Ogden 8.

Loss of earnings: contingencies other than mortality

- Revision– basic methodology in Ogden future loss of earnings claims
  - Calculate separately (a) uninjured earnings and (b) residual earnings as a result of the injury
  - Select an appropriate multiplicand for each
  - Select an unadjusted multiplier reflecting age and retirement date
  - Select a reduction factor in terms of Tables A – D for each

Loss of earnings: contingencies other than mortality - *summary*

- Ogden 8 – changes in outline in this area
- (1) Reduction factors in Tables A - D have been calculated at a new level of a discount rate of 0%
  - brings them more into line with the discount rates used in the Tables
- (2) The categories of highest educational attainment have been rewritten and revised
- (3) The definition of disability has been changed
- (4) There is new guidance on departure from or adjustment to the reduction factors in Tables A - D

Highest education attainment categories

- Ogden 7 – referred to categories of highest educational attainment –
  - D - Degree or equivalent or Higher
  - GE-A - GCSE Grades A to C up to A levels or equivalent
  - O - Below GCSE C or CSE 1 or equivalent or no qualifications

Highest education attainment categories

- Ogden 8 – sets out different categories in a helpful re-classification
  - Level 3 - Higher degree, degree or equivalent, higher education qualification below degree level
  - Level 2 - A level or equivalent (at least one pass Level E) GCSE or equivalent (at least one pass at Level A* to C/9 to 4)
  - Level 1 – Low level qualifications below GCSE, no qualifications and other qualifications

Disability

- Background
  - Disability is one of the relevant factors when deciding on the discount which may result in a much reduced multiplier
  - Ogden 8 sets out a revised definition of disability
  - Has led to disputes in cases concerning the contingences discount on post-injury earnings – residual earnings
    - *Billett v Ministry of Defence* [2015] EWCA Civ 773 is referred to in the 8th Edition

Disability

- The definition of disability has changed
  - Ogden 7 - 3 conditions
    - (i) an illness or disability which has or is expected to last for over a year or is a progressive illness;
    - (ii) satisfies the Equality Act 2010 definition that the impact of the disability "substantially limits the person's ability to carry out normal day-day activities";
    - (iii) their condition affects either the kind or the amount of paid work they can do.

Disability

- Ogden 8 – all three conditions must be met –
  - (i) person has an illness or a disability which has or is expected to last for over a year or is a progressive illness;
  - (ii) the DDA 1995 definition is satisfied in that the impact of the disability has "a substantial adverse affect on the person's ability to carry out normal day-day activities"; and
  - (iii) "the effects of impairment limit either the kind or the amount of paid work he/she can do."

Disability

- Impact of this change?
  - The categories of those who are regarded as disabled has been narrowed to some extent
  - The threshold is still low
  - Para 70 is significant and the DDA 95 guidance has assumed significance in this area - should be considered carefully in the appropriate case

Departure from strict application of reduction factors

- Approach in Ogden 7 -
- The reduction factors for contingencies other than mortality were discussed
- Suggestions made in the 7th Edition Explanatory Notes were described as a "ready reckoner" providing an initial adjustment according to "key issues" affecting a person's future working life:
  - Employment status
  - Disability
  - Educational status
- The ready reckoner was said to provide an initial adjustment to the multipliers – but could not take into account all circumstances
- Methodology was described as offering a framework for a range of possible figures
- It was clear that it might be appropriate to argue for higher or lower adjustments in particular cases

Departure from strict application of reduction factors

- Ogden 8 states:
- Application of Table A - D reduction factors is the suggested method for contingences other than mortality - applicable in most circumstances
  - Reduction factors are based on group averages which are statistically verifiable
- *Smith v Manchester* or *Blamire* approaches may remain applicable in appropriate cases
- Even in cases of uncertainty about the future judges should be slow to depart from multiplier/multiplicand by resorting to the *Blamire* approach unless they really have no alternative

Departure from strict application of reduction factors

- Ogden 8:
- The reduction factor approach is for guidance and is not prescriptive
- However, Table A to D reduction factors should generally be used unless there is a good reason to disapply or to adjust them
  - it may be appropriate to increase or reduce the published reduction factors to better account for the individual characteristics of the claimant
- Examples of circumstances which may warrant a departure are discussed …
  - there may be claimant specific characteristics relevant to future loss of earnings which are not included in the published factors
  - it may be appropriate to interpolate between educational qualification categories or to effect a category change
- Disability is described as being perhaps the characteristic where one of the parties is most likely to seek departure from strict application of the reduction factors
- Where a departure from the reduction factors is considered appropriate it would normally be expected to be modest
  - in the reduction factors the average is a central estimate with distributions on either side

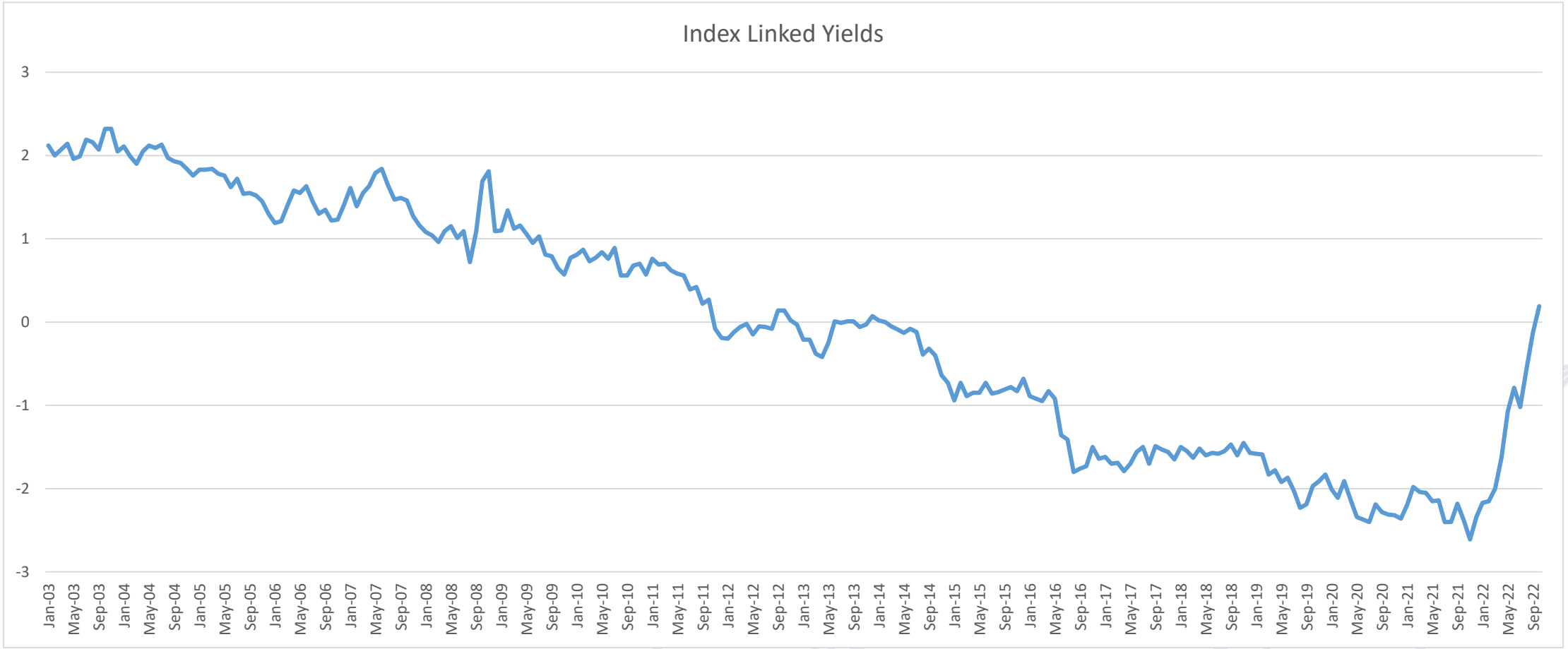
Discount Rate

- The rate used to determine lump sum awards to those suffering personal injuries. It is a real rate of return, the rate of return in excess of assumed inflation in the head of claim under consideration (in Scotland RPI, in E&W half CPI half CPI + 2%, basically same).
- From 1999 to 2019 it was set by reference to yields on (zero risk) index-linked gilts (ILGS) following *Wells v Wells* – 2.5% to 2017 then -0.75% from 2017 to 2019
- From 2019 it has been set by reference to the assumed achievable return on a diversified portfolio of 'low- risk investments'.
- Currently different jurisdictions have methodologies and therefore different rates.
  - Scotland - the rate is "minus 0.75%" (change effective from 27th September 2019)
  - England/Wales – the rate is "minus 0.25%" (change effective from 5th August 2019)
  - Northern Ireland – the rate is "minus 1.5%" (change effective from 22nd March 2022)

Discount Rate – What Next

- The prevailing rates will be reviewed by 2024. Consultations will continue on the methodology to be used when setting the rate and different rates may even apply for different durations of loss. What fun !
- In 2019 when the rate was set at -0.75% in Scotland, on a diversified portfolio basis the yield on ILGS was -2% (suggesting a discount rate of -2% had *Wells* not been set aside).
- There have been very substantial charges in financial markets over the last 12 months and yields on many investments, both risk bearing and risk free have increased markedly.
- Yields on ILGS are now 0%. Claimants can invest risk free at a rate higher than the DR !
- It would seem logical that the next move in discount rates will be up. This will impact on cases coming to Court in 2024 and even earlier if settlement is trying to be agreed.

ILGS yields are higher than the discount rate



Pension loss

- Ogden 8's Explanatory Notes contains a new section C on pension loss (at Paras 111 – 123) solicitors and Counsel are encouraged to 'have a go'.
- It deals with the application of the Tables to pension loss claims and provides worked examples in simplified cases.
  - Defined benefit schemes - based on salary and service – mainly public sector
  - Defined contribution schemes –a fund builds up from member and employer payments.
  - Pension loss calculations are now required in historic abuse cases. Unlike a routine personal injury case these involve the assessment of many years of past losses as well as future losses. Need both expert vocational input and assumptions about what type and level of pension provision would have been offered to claimants perhaps over several decades. Tricky !
  - Remember *Parry v Cleaver* - if an ill-health pension comes into payment before normal retirement age it is only offset to the extent it is payable beyond that age and further the ill-health pension is not offset against earnings.

Fatal Accidents

- A joint life problem – valuing the loss of support from earnings and pension right to the dependent partner. The support can only be provided if both are alive. Damages (Scotland) Act 2011 says the dependency is 75% of the deceased's net earnings. It is very different, and more complicated, in England & Wales
- The Ogden Tables provide a framework for estimating losses based on an 'expected period of dependency'. So if a 60-year-old man is killed with a 70-year-old wife his life expectancy would have been 24.76 years (Table 1, 0%) but her life expectancy is 17.92 years (Table 2, 0%) so the dependency ceases on HER death and the multiplier is calculated for the expected period of dependency – which is HER expected future years of age.
- There is acknowledgment that this is not necessarily correct (paragraph 133) but that the Ogden methodology should be reasonable in most cases, and certainly for pre-retirement loss of support.
- Why might it not be quite right ? Because there is always the chance someone with a longer life expectancy will die before someone with a shorter life expectancy. The Courts seem disinclined to consider this in any detail, although it is sometimes raised in cases involving large claims for post-retirement loss of support.

Fatal Accidents

- Loss of support from earned income is invariably straightforward. If the deceased had the shorter life expectancy one can circumvent the lengthy calculation framework in the Tables and just proceed as follows:-
- Past loss of support from earned income = (75% of deceased's net income p.a.) X (years from death) X (Table E adjustment – to allow for change the deceased would have died in any event)
- Future loss of support from earned income = (75% of deceased's net income p.a.) X (loss of earnings multiplier to retirement age adjusted for 'other contingencies') X (Table F adjustment)
- Loss of support from post-retirement income is more complex as the support would come from not only pension rights that would have been earned between death and retirement but ALSO from pension rights accrued by the deceased BEFORE death AND from his or her State pension.
- In addition, for post-retirement loss of support the 'expected period of dependency' becomes more relevant and working through the methodology in the Tables to determine the post-retirement multiplier is needed.

PPOs

- Very common in England & Wales but rare in Scotland as they can only be arranged by agreement. For background see Lord Stewart's decision in *D's Parent v GGHB* and the discussion in a very helpful recent publication *'A Practical Guide to Periodical Payment Orders in Personal Injury Cases in Scotland'*
- The Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 was enacted in part in 2019 but the provisions within the Act for PPO's have yet to be enacted.
- PPO's are invariably the route to go down in catastrophic cases (if there is no contributory negligence) as they reduce risks for both the claimant and the compensator.
- The 'longevity risk' is removed. A lump sum award using the Ogden Tables assumes average life expectancy for a given age and gender. In practice we all live longer or shorter than this.
- The 'investment risk' is removed. The claimant does not need to worry that the return on investments will be insufficient to provide for care costs as they fall due in future.

PPOs

- Key issues are as follows:-
- Problem 1 -What to put in the PPO ? Mainly costs of routine care and case management, but sometimes nursing care beyond personal care (see *D's Parent*), therapies (occupational, physiotherapy, speech etc.). Less commonly include trust admin expenses and earnings.
- Section E of Ogden 8 discusses in PPO's for lost earnings but in practice these will be very rare. Of more interest is the discussion in Section E regarding indexation.
- Problem 2 – How to index the PPO's so future payments move in line with average costs for the head of claim being considered. See *Thompstone v Tameside & Glossop NHS Trust*.
- Default is to use the Annual Survey for Hourly Earnings. This is commonly ASHE 6115 for care and care assistants, but other ASHE occupational classifications are used for different heads of claim, e.g. Nursing, Lawyers etc.

Impaired Life Expectancy

- Discussed in Ogden 8 paras 7 to 15. *'The mortality assumptions relate to the general population of the UK as a whole. Therefore no further increase or reduction is required for mortality alone, unless there is clear evidence in an individual case that the claimant is "atypical".*
- Life expectancy evidence from clinicians and statisticians is routinely sought in catastrophic injury cases involving large impairments to longevity (TBIs, SCI's etc) but is increasingly also seen in more routine cases of personal injury and fatal accident cases where 'lifestyle' risk markers are considered. Recent cases are *Mays v Driveforce* and *Dodds v Arif* . Statistical input generally only required when there is no clinical agreement.
- An example might be a man who died of mesothelioma, but he was morbidly obese, diabetic and hypertensive before he was diagnosed. Defendant might argue that when calculating the spouse's loss of support that the Ogden Tables cannot be used without appropriate adjustment.

Impaired Life Expectancy

- Say we have a 25-year-old man who has had a TBI and an expected age at death of 55. He would have retired at age 68. His cost of care is £50,000 p.a. He earned £30,000 a year and would have had a pension of £15,000 p.a. (including State pension).
- Cost of care = £50,000 x 33.66 (Table 36, term 30 years, -0.75%) = £1,683,000.
- Loss of earnings (ignoring contingences for simplicity) - There is a full loss of earnings to age 55 but only 75% of the earnings can be recovered in the period of 'lost years' so multiplier is £30,000 x {33.66 + 0.75 x (49.15- 33.66)} = £1,358,325 where 49.15 is the loss of earnings multiplier to age 68 at age 25 from Table 11
- Loss of pension – All of the period after age 68 is in the 'lost years' so the loss of pension rights is 0.75 x £15,000 x 29.16 (Table 27) = £328,050.
- If life expectancy is above 68 but impaired the loss of earnings becomes easier (no split multiplier) but the loss of pension more difficult.

Ogden 8 - Additional Tables

- Exciting (!) new additional tables (.xls) are provided on www.gov.uk (ie. Not 1-36)
- Provide a method of calculating multipliers from any age at trial to and future age
- Split multipliers and unusual retirement ages become easy - no tedious arithmetic
- Just go down the age column to age at trial and then along the row to whatever age you required. Split multipliers can be obtained by subtraction.

Multiplier from age at trial (row) to age (column), discount rate (-0.75% rate of return, males)

This worksheet contains one table. Some cells in this table are left blank, this is because age projected to cannot be less than age at date of trial

Age at date of trial	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26
0	1.00	2.01	3.02	4.05	5.08	6.12	7.16	8.21	9.28	10.35	11.42	12.51	13.60	14.70	15.81	16.93	18.06	19.19	20.34	21.49	22.65	23.82	25.00	26.18	27.38	
1		1.00	2.01	3.03	4.06	5.09	6.13	7.18	8.24	9.31	10.38	11.46	12.55	13.65	14.75	15.87	16.99	18.12	19.26	20.41	21.56	22.73	23.90	25.08	26.27	
2			1.00	2.01	3.03	4.06	5.09	6.14	7.19	8.24	9.31	10.38	11.46	12.55	13.65	14.76	15.87	16.99	18.12	19.26	20.41	21.57	22.73	23.90	25.09	
3				1.00	2.01	3.03	4.06	5.09	6.14	7.19	8.24	9.31	10.38	11.46	12.55	13.65	14.76	15.87	16.99	18.12	19.26	20.41	21.57	22.73	23.90	
4					1.00	2.01	3.03	4.06	5.09	6.14	7.19	8.24	9.31	10.38	11.46	12.55	13.65	14.76	15.87	16.99	18.12	19.26	20.41	21.57	22.73	
5						1.00	2.01	3.03	4.06	5.09	6.14	7.19	8.24	9.31	10.38	11.46	12.55	13.65	14.76	15.87	16.99	18.12	19.26	20.41	21.56	
6							1.00	2.01	3.03	4.06	5.09	6.14	7.19	8.24	9.31	10.38	11.46	12.55	13.65	14.76	15.87	16.99	18.12	19.26	20.41	
7								1.00	2.02	3.03	4.06	5.09	6.14	7.19	8.24	9.31	10.38	11.46	12.55	13.65	14.76	15.87	16.99	18.12	19.26	
8									1.00	2.02	3.03	4.06	5.09	6.14	7.19	8.24	9.31	10.38	11.46	12.55	13.65	14.76	15.87	16.99	18.12	
9										1.00	2.02	3.03	4.06	5.09	6.14	7.19	8.24	9.31	10.38	11.46	12.55	13.65	14.75	15.87	16.99	
10											1.00	2.02	3.03	4.06	5.09	6.14	7.19	8.24	9.31	10.38	11.46	12.55	13.65	14.75	15.86	
11												1.00	2.02	3.03	4.06	5.09	6.14	7.19	8.24	9.31	10.38	11.46	12.55	13.65	14.75	
12													1.00	2.01	3.03	4.06	5.09	6.14	7.19	8.24	9.31	10.38	11.46	12.55	13.64	
13														1.00	2.01	3.03	4.06	5.09	6.14	7.18	8.24	9.31	10.38	11.46	12.55	

Accommodation claims

- Historically *Roberts v Johnstone* calculations were made where the % recovery was calculated as (discount rate) x (whole life multiplier at age at trial). This is basically how an actuary works out a life interest say in a Will Trust. So the claimant gets some award but not all the cost as unlike normal damages the accommodation will not be expended over the expected future lifetime.
- Problem arose when the discount rate became negative – as *R v J* suggests NO award.
- Court of Appeal in *Swift v Carpenter* changed the methodology. The recoverable cost is the value of the property less the market value of a reversionary interest in the property. After hearing evidence, the value of the reversionary interest was calculated using a discount rate of 5%. This has led to a marked increase in accommodation awards.
- Example accommodation cost of £250,000. Claimant has a life expectancy of 20 years
- Award is £155,777 being £250,000 - £250,000 x 1.05^{-20}
- https://www.compasschambers.com/perch/resources/swift-v-carpenter-how-to-calculate-the-ri.pdf

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