

Capitalisation of income needs in Inheritance Act claims: Duxbury or Ogden?



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Background and history

The purposes of this article are to review the methods of capitalising income needs which have been employed in claims under the Inheritance (Provision for Family and Dependants) Act 1975 (“the 1975 Act”), and to compare, by means of illustrative calculations, the figures given by Duxbury and Ogden calculations for capitalisation of relatively low income needs in cases where the claimant is an elderly person. In the course of his practice, of which 1975 Act claims constitute a substantial element, the author regularly encounters such cases. The conclusion to be drawn from the illustrative calculations is that the figures obtained by the two methods are similar both in amount and in sensitivity to changes in net rate of return, and that, given the approximations inherent in all methods of capitalisation, there is no principled justification for preferring Duxbury to Ogden calculations in cases of the type considered in this article.

Over the last fifty years, methods of capitalising income needs, whether in personal injury claims, claims for financial provision under the Matrimonial Causes Act 1973 (“MCA 1973”), or claims for provision under the 1975 Act have become a great deal more sophisticated, and as Thorpe LJ observed in his appendix to the judgment of the Court of Appeal in *Wells v Wells* [1997] 1 All ER 673, at 707, there does not seem to be a distinction of fundamental principle between providing for the future needs of plaintiffs in personal injury litigation and of applicants in proceedings under the two Acts mentioned above.

The question of how to calculate a capital equivalent of a future recurring expense or loss of income was not a new one in the 1970s; at that time; it had, of course, been a feature of personal injury litigation for many years. However, actuarial calculations were still regarded with some suspicion by the courts and the attempt of the respondent in the personal injury case of *Mitchell v Mulholland (no.2)* [1972] 1 QB 65, [1971] 2 All ER 1205 to contend for what the court described as an “actuarial approach” was unsuccessful^[1]. The award was calculated employing the multiplier-multiplicand approach which was then in general use.

The purpose of the Ogden Tables, the first edition of which was compiled in 1984, is to provide an aid for those assessing the lump sum appropriate as compensation for a continuing future pecuniary loss or consequential expense or cost of care in personal injury and fatal accident cases. They were made admissible in evidence for the purpose of such assessment, in actions for personal injury, by s.10(1) of the Civil Evidence Act 1995, but it has never been suggested that they would not be admissible for the purpose of assessing the lump sum required to meet future expense in claims under either MCA 1973 or the 1975 Act. The question whether they have been, or might be, the method of choice for such assessments is discussed below. The Ogden Tables deal with the annual loss or expense over three different periods of time^[2], and in the context of such claims the relevant period is the period beginning immediately^[3] and continuing for the whole of the claimant’s life. The corresponding Ogden Tables in the current (6th) edition, 2007, are tables 1 and 2, and the multipliers in those tables allow for different potential

lifespans, including the possibility of early death or prolonged life. Those multipliers enable the user to calculate the current capital value of a future annual loss or expense, over a range of rates of return; compare the Duxbury tables, which set out the sums which will fund specified net income needs for persons within a range of ages, assuming a standard rate of return.

Under the Inheritance (Family Provision) Act 1938, jurisdiction was vested exclusively in the Chancery Division of the High Court, except where the value of the estate was below the County Court equity limit. Superimposed on the scepticism about actuarial calculations was the reluctance of some Chancery judges to engage in any calculations or to explain how their awards were arrived at^[4]. Indeed, the first reported case under the 1975 Act in which a calculation was made was *Malone v Harrison* [1979] 1 WLR 1353, in which Hollings J, a judge of the Family Division, employed the multiplier-multiplicand method. There was little judicial enthusiasm for this approach^[5], which has since been employed in only one reported 1975 Act case^[6].

Actuarial calculations have found readier acceptance in the matrimonial jurisdiction, where the Duxbury method^[7] had become well established long before it was, apparently, first used in a 1975 Act claim^[8]. In fact, the first reported 1975 Act case which featured an actuarial calculation was *Rees v Newbery and the Institute of Cancer Research*, [1998] 1 FLR 1041, in which the Ogden tables were employed^[9], and the first reported 1975 Act case in which the award was based on a Duxbury calculation is *Singer v Isaac* [2001] WTLR 1045. Since then, Duxbury calculations have been employed in *Re Scott-Kilvert, Robinson v Fernsby*^[10], while both methods were canvassed in the 1975 Act case of *Re Myers* [2004] EWHC 1944 (Fam), [2005] WTLR 851 at 887^[11]. There, it was submitted on the one hand that a Duxbury calculation was inappropriate (reference being made to the judgment of Singer J in *A v A (Elderly Applicant: Lump Sum)* [1999] 2 FLR 969 and to the Ogden tables) and on the other that “there was no warrant for introducing the Ogden tables into the [1975 Act] jurisdiction^[12], any more than in the matrimonial jurisdiction”^[13] and the use of the Duxbury method in *Re Scott-Kilvert, Robinson v Fernsby* was also drawn to Munby J’s attention. The award of £200,000 in respect of the 60 year old claimant’s capitalised income needs was calculated on the Duxbury basis. It may be that, following *Re Myers*, Duxbury is becoming the method of choice in 1975 Act cases; see *Fielden v Cunliffe* [2005] EWCA (Civ) 1508, [2006] 1 FLR 745, CA^[14]. However, it is submitted first, that the judgment of Munby J is not authority for the proposition that the Duxbury method is the only permissible method of capitalising income needs in 1975 Act claims, and second, that the Ogden tables can provide a perfectly satisfactory basis for capitalisation of income needs in appropriate cases.

It is here suggested that the attempt to exclude Ogden as a basis for capitalisation of income needs stems not so much from what were perceived in 1997 to be the imperfections of its underlying assumptions as from the fact that Duxbury was already well established in the matrimonial jurisdiction, together with a misunderstanding of what Holman J meant by the words “industry standard” in *F v F (Duxbury Calculation: Rate of Return)* [1996] 1 FLR 833. At 850A he said:-

“In my view it is important that there should indeed be ‘an industry standard’ for the purpose of the Duxbury approach and in my experience that standard has already settled at around 4.25%”.

A contemporary commentator had understood this correctly. Woelke observed in the aftermath of the Duxbury versus Ogden debate^[16] :-

“an understandable desire on the part of courts and legal advisers to have some certainty in the overall uncertainty of a discretionary system. It is therefore understandable if the courts advocate ‘an industry standard’ for a rate of return”.^[17]

An earlier passage in Holman J’s judgment makes it clear that he was not specifying the Duxbury method as an ‘industry standard’ for capitalisation of income needs in all circumstances. At 846C-D he had said:-

“In particular it is well known that the Duxbury approach can have a very distorting effect both in the case of a relatively young wife after a relatively short marriage and in the case of a relatively old wife after a long marriage. In the former case it produces too high a figure in proportion to the length of the marriage. In the latter case it may well produce a rather low figure which fails to reflect adequately a long marriage”.

This nuanced exposition of the limitations of the Duxbury method seems to have been transformed into a broader view of the phrase 'industry standard' as a result of the judgment in *Dharamshi v Dharamshi* [2001] 1 FLR 736 CA, at 741. At paragraph 11, Thorpe LJ said that he saw "no warrant for introducing the Ogden tables into ancillary relief. The use of the Duxbury tables has had this court's approval for many years" He continued, in rejecting any need to consider Ogden in preference to Duxbury for ancillary relief capitalisations, by saying that "The field of ancillary relief is already sufficiently esoteric without disputing or discarding what was aptly described as 'the industry standard' by Holman J in *F v F (Duxbury Calculation: Rate of Return)* [1996] 1 FLR 833". That seems to mean that there is, and can be, no other legitimate approach to the capitalisation of income needs in ancillary relief. If that is what those words mean, it is submitted that they are an inaccurate gloss on what Holman J actually said, and should be treated with caution. There are, of course, many cases in which Duxbury calculations give as good a starting-point for capitalisation of income needs as any other, but uncritical adherence to them (or any other basis of calculation) in all circumstances is liable to lead to unrealistic results. As Wall LJ observed in *Fielden v Cunliffe*,^[18] :-

"As has been said more than once, the only thing one can be sure about Duxbury is that the figure is likely to be too high or too low. It remains, however, a useful guide".^[19]

The same, of course, could be said of Ogden or any other method.

However, there are situations in which Ogden may have some advantages over Duxbury, as it covers a wider range of circumstances. Thus, first, the Ogden tables run from age range 0 to 100, compared with 40 to 80 for the Duxbury tables in At A Glance. Second, the Ogden multipliers can be used to capitalise income needs of any amount, whereas the published Duxbury tables do not cater for net annual income needs of less than £10,000, and the lowest income need which can be capitalised using the @eGlance programme is £5,000. Third, the Ogden tables provide multipliers for net rates of return of 0 to 5% at 0.5% intervals, whereas the Duxbury tables are tied to the current 'industry standard' of 3.75% and the @eGlance programme does not permit variation of that rate of return. Fourth, Duxbury assumes that the claimant receives or will be entitled to receive the full State retirement pension, which is not always the case. It is true that all of those restrictions can be overcome by using Capitalise, but the author's experience suggests that Capitalise is not widely used by practitioners handling 1975 Act claims.

The following calculations compare the results obtained by using the Ogden tables with the Duxbury figures calculated using Capitalise 13.3, in a number of situations where a Duxbury figure cannot be obtained from At A Glance or the @eGlance programme.

Examples

Calculation 1

Male aged 81, figures for net annual income needs in the range £10,000-£15,000. No capital resources. He receives the full State pension of £4,716 pa but has no other income. Net rate of return is assumed to be 3.75%. The "tax take" is the percentage of that amount of taxable income which would be taken in income tax assuming that he had the benefit of the full age allowance for a person over 75, which is £9,180 in the current year. The perceived deficiencies of Ogden in relation to income tax^[20] are relatively small when the income tax payable is such a small percentage of the taxable income.

For the Ogden sum I, the multiplier of 6.41, obtained by interpolation between the figures in Table 1 (multipliers for pecuniary loss for life, male) for net rates of return 3.5% and 4% is applied to the multiplicand, which is the amount by which the total net income requirement exceeds his pension income. The Ogden sum II is calculated from Table 28 (multipliers for pecuniary loss for term certain), the multiplier being 6.93. The reason for including this calculation is that in *A v A (Elderly applicant; lump sum)* [1999] 2 FLR 969, Singer J adverted to the possibility that the claimant (in that case the 79 year old husband) had a real and significant chance of exceeding the life expectancy of 8 years which he had according to the PMA 80 tables. An Ogden calculation using Table 28 would be based on a fixed life expectancy, as would Duxbury, whereas the multipliers in Tables 1 and 2 are calculated so as to allow for different potential life spans, including the possibility of early death or prolonged life^[21]. PMA 92 predicts a life expectancy of 8 years for a man aged 81, and the Table 28 multiplier for that length of term certain at a rate of return of 3.75% is 6.93.

Table 1					
Net annual income need	Tax take (%)	Ogden multiplicand	Ogden sum I (multiplier 6.41)	Ogden sum II (multiplier 6.93)	Duxbury sum using Capitalise
10000	1.64	5284	33870	36618	35086
11000	3.31	6284	40280	43548	41739
12000	4.7	7284	46690	50478	48355
13000	5.88	8284	53100	57408	54971
14000	6.89	9284	59510	64338	61647
15000	7.76	10284	65920	71268	68263

Calculation 2

Female, 73, net annual income needs in the range £8,000-13,000. Her age allowance in the current year is £9,030. She has no capital resources. She is not entitled to the State pension but receives pension credit (£124.05 per week in the current year). However, the deduction of tariff income of £1 per week from her pension credit for every £500 in excess of £6,000 means that if she has capital of over £68,000, the whole of the pension credit will be wiped out by the tariff income deduction.

Assuming a net rate of return of 3.75% and taking her life expectancy from PFA92 as 16 years, to the nearest year, her Ogden Table 2 (pecuniary loss for life, females) multiplier is 10.90 and her table 28 multiplier is 12.09. Note that it is necessary to use Capitalise to calculate the Duxbury sum because the Duxbury tables and the At A Glance programme assume that the claimant is receiving the full state pension.

Table 2					
Net annual income need	Tax take (%)	Ogden multiplicand	Ogden sum I (multiplier 10.90)	Ogden sum II (multiplier 12.09)	Duxbury sum using Capitalise
8000	Nil	8000	87200	96720	92984
9000	Nil	9000	98100	108800	104578
10000	1.94	10000	109000	120900	116201
11000	3.58	11000	119900	132990	127822
12000	4.95	12000	130800	145080	139645
13000	6.11	13000	141700	157170	151068

Calculation 3

In view of the possibility that net rates of return will fall below the current 'industry standard' of 3.75%, this calculation has been carried out in order to show how sensitive the capitalised sum is to variations in the net rate of return. The net rates of return used in the calculations based on Capitalise assume zero inflation and attribute the rate of return equally to capital growth and income yield.

Table 3A

Effect of varying rate of return for M aged 81 with net annual income need £15,000 of which £4,716 is funded by his State pension, giving a multiplicand of £10,284.

Table 3a							
Net income 15000	annual need	Rate of return (%)	Ogden multiplier (Table 1)	Ogden sum 1	Ogden multiplier (table 28)	Ogden sum 2	Duxbury sum using Capitalise
		3.75	6.41	65920	6.93	71268	68263
		3	6.66	68491	7.12	73222	72196
		2	7.01	72091	7.4	76012	75415
		1	7.4	76102	7.69	79084	78753
Ratio of capitalised sums, lowest to highest rate of return				1.154		1.11	1.154

Table 3b							
Net income 10000	annual need	Rate of return (%)	Ogden multiplier (Table 2)	Ogden sum 1	Ogden multiplier (table 28)	Ogden Sum 2	Duxbury sum using Capitalise
		3.75	10.9	109000	12.09	120900	116201
		3	11.55	115500	12.75	127500	125646
		2	12.54	125400	13.71	137100	135840
		1	13.67	136700	14.79	147900	147225
Ratio of capitalised sums, lowest to highest rate of return				1.254		1.223	1.267

Table 3b

Net income 10000	annual need	Rate of return (%)	Ogden multiplier (Table 2)	Ogden sum 1	Ogden multiplier (table 28)	Ogden Sum 2	Duxbury sum using Capitalise

These results show that, for elderly claimants with relatively low income needs, the capitalised sums derived from Duxbury and Ogden calculations differ by fairly small amounts, and that the two types of calculation show roughly the same sensitivity to variations in the net rate of return. It is therefore submitted that, whatever may be the practice in capitalising income needs for spouses in ancillary relief proceedings, there is no reason in principle why the Ogden tables should not be employed for capitalisation in the not uncommon circumstances illustrated by the above calculations.

NOTES

[1] The judgment quotes from the speech of Lord Pearson in *Taylor v O'Connor* [1971] AC 115 at 140, who considered that actuarial calculations would give a false impression of accuracy and precision in a sphere where conjectural estimates have to play a large part. He preferred to rely on accumulated judicial experience.

[2] There are also tables (3-14 in the current, 6th edition covering loss and expense beginning immediately but continuing only until the claimant's retirement or death prior to retirement, and (15-26) beginning at the claimant's retirement and continuing until his or her death.

[3] That is, at the date of divorce or of the death of the person out of whose estate the claim for provision is being made, though in practice an award under the 1975 Act is often calculated as from the date of the hearing.

[4] In the case of *Brown v Knowles* (1955) 105 L.J.169, an application by a surviving spouse under the Inheritance (Family Provision) Act 1938, Wynn-Parry J went so far as to say that a Judge when exercising his discretion should do no more than name a figure and should not condescend to an analytical statement of how he arrived at that figure.

[5] See *Re Wood* (1982) 89 L.S.Gaz 774, where Mervyn Davies J found the calculation along those lines "interesting and instructive" but declined to adopt it; *Clark v Jones*, 2nd December 1985, unreported, CA; per Dillon LJ, the approach of calculating a dependency and a multiplier might be convenient but there was no hard and fast rule; *Williams v Roberts* [1986] 1 FLR 349, where Wood J was referred to the calculations in *Malone v Harrison* but did not find the approach of great assistance.

[6] The method was employed at first instance, and its use accepted by the Court of Appeal, in *Re Pearce* [1998] 2 FLR 705

[7] *Duxbury v Duxbury (Note)* [1992] Fam 62, sub nom. *Duxbury v Duxbury* [1987] 1 FLR 7, CA.

[8] *Nott v Ward*, an unreported decision of 13th December 1994, by HH Judge Bromley QC sitting as a High Court Judge

[9] See also *Re Thompson* (2000) 97 L.S.Gaz., per HH Judge Weeks QC

[10] [2003] EWCA 30 (Ch) at para 133, [2003] EWCA (Civ) 1820 at paras 61-62 and 109; also reported, as *Robinson v Bird and anr.*, [2003] WTLR 529, *Robinson v Fernsby and anr.*, [2004] WTLR 257, CA.

[11] Paragraph 95

[12] *Rees v Newbery and the Institute of Cancer Research*, above, was not referred to

[13] Echoing what Thorpe LJ had said in the matrimonial case of *Dharamshi v Dharamshi* [2001] 1 FLR 736, CA, at 741

[14] Also reported at [2006] WTLR 29

[15] See Thorpe LJ's appendix to *Wells v Wells* [1997] 1 ALL ER 673, at 702]-704b. His criticisms related to the then current (3rd) edition, and the problem relating to tax which he identified at 703b has since been addressed. That passage has not appeared in the 4th and subsequent editions (the current edition being the 6th edition, 2007) and indeed the 4th edition recommended the use of software similar to that used in Duxbury calculations to deal with cases in which the impact of income tax and CGT was likely to be significant; see paras 16 and 73 of section A.

[16] *Wells v Wells* [1997] 1 All ER 673, CA, in particular the Appendix at p.699 written by Thorpe LJ; revsd., [1999] 1 AC 345, HL, where Lord Lloyd of Berwick, at 374D-G .agreed with Thorpe LJ's criticism of the assumptions underlying the way in which the then current (3rd) edition of the Ogden tables dealt with income tax. Several articles were subsequently published in Family Law on various aspects of Duxbury; see The Hon Mr Justice Singer, N.Mostyn QC, L.Marks, P.Lobbenberg, T.Lawrence, A.Gallop, D.Wreford and N.van Lennep, *Duxbury-The Future* [1998] Fam. Law 741; T.Lawrence, *Duxbury-Is there a right rate of return ?* [1999] Fam.Law 562; A.Woelke, *Is Duxbury The Answer ?*, [1999] Fam. Law 766. ; J.Merron, P.Baxter and M.Bates, *Is Duxbury Misleading ? Yes It Is* [2001] Fam.Law 747; L.Marks, QC, *Duxbury-The Future ? Episode II* [2002] Fam Law 408

[17] A.Woelke, loc. cit, n.14

[18] [2005] EWCA Civ 1508, [2006] WTLR 29 at 54A, para 91.

[19] For similar judicial dicta as to the extent to which and the purpose for which Duxbury can be relied on, see the commentary to Table 21 in the current (17th) edition of *Tables At A Glance*, which contains a representative selection.

[20] See note 13. Essentially the 3rd edition of Ogden proposed that the selected rate of return should be scaled down proportionately to the percentage of tax that the recipient would pay on the income from the sum he received, so that, if he were paying tax at 25% and the selected rate of return was 3.5%, that would be scaled down by 25% to 2.625%, which would be rounded down to the next lowest figure for which a multiplier was given; in that case, 2.5%.

[21] Explanatory notes to the 6th edition (2007), section A, paragraph 3