Change in the discount rate for personal injury damages

Steven Snowden QC, Patrick Blakesley, Andrew Davis and Adam Taylor review the announcement made this morning

This morning (27.2.17) the Ministry of Justice announced the long-anticipated change in the discount rate, see the announcement in full here:

The Lord Chancellor has set the rate, which is presently 2.5%, at -0.75% with effect from 20.3.17. This will have an immediate and massive effect on multiplier/multiplicand claims for future loss in personal injury cases.

No new methodology has been used in arriving at the new rate; according to the announcement it is based on a simple recalculation of the 3-year average yield on index-linked gilts.

The likely immediate impact is that claimants will be withdrawing existing Part 36 offers in any case where there is a significant element of future loss, while defendants will be trying to accept any such offers before they are withdrawn. Settlements which are not binding while they await Court approval may have to be re-calculated, if that is possible. Schedules and counter-schedules will have to be re-drafted. Urgent consideration will have to be given as to whether defendant Part 36 offers which have been made on the basis of current multipliers can afford any (and if so what) costs protection into the future.

In the next few months the Lord Chancellor will be consulting further on the method of calculation (i.e. the link to ILGS), the frequency of future review of the rate and on the possibility of setting up an independent body to set the rate.

It is thought that a negative rate makes a renewed judicial review challenge by the ABI more likely. It will certainly lead insurers to adjust reserves and premiums and will require additional funding for the NHS and other public bodies to meet clinical negligence and other large claims. It has already been suggested that the government might use the increase in the NHS damages bill to increase pressure for fixed costs in clinical negligence cases.

The huge effect of the change is seen, by way of illustration and assuming normal life expectancies, by noting that the Table 1 life multiplier for a 20 year old male will go up from 32.10 to just short of 89; and a five year old female will now have a life multiplier of just over 125 (previously 35.47: a 3.5 times increase).

Practically, there is no column for a minus 0.75% discount rate in the current edition of the Ogden Tables. Care is needed as the multipliers are not linear and it is not actuarially correct simply to average the rates for -0.5% and -1% for a given term. The Government Actuary needs urgently to issue revised authoritative tables which include the -0.75% column. Of course, if the Government Actuary chooses at the same time to update the life expectancy data on which the tables are based to the current experience, there will be a yet further increase in multipliers which reflects the increases in life expectancy since the data used for Ogden 7. We understand that the membership of the Ogden working party has recently been revised but we understand that it currently has no funding to produce a further edition.

There are other consequences which will need to be resolved. One is how the rate change affects *Roberts v Johnstone* calculations for future accommodation costs. The 2.5% rate used to de-capitalise the value of the property was of course not linked to the discount rate set by the Damages Act. However, *if* the new discount rate applies in place of the current 2.5% (which is open to argument), it would give no claim at all for future accommodation costs or, in theory, would lead to a negative outcome. The Lord Chancellor or the Court will need to give guidance, perhaps having heard evidence as to the appropriate manner of de-capitalising such sums. Guidance on *Roberts v Johnstone* claims is of course long overdue, particularly in the light of other options available to parties (even if they cannot be ordered by the Court) – and these might become more attractive to claimants and insurers alike whilst the position is clarified.

Another perhaps unintended consequence may come in the form of the enhancements to the multipliers usually adopted in pension loss claims.

We query also what happens in respect of the Table 27 discount for accelerated receipt. Does it necessarily follow that there is an additional increment to be added to the future value of a single lump sum item to arrive at its present day value; in effect an enhancement for early receipt?

Claimants and insurers alike are going to need to take careful stock on a case-by-case basis as to the extent to which periodical payments should be sought in high value claims (which will depend to some extent on the decisions the Lord Chancellor has not yet made about how often and against what measure the discount rate may vary in the future).

Whatever happens, there will be, at least in the short-term: (1) increases in the need for financial advice on the merits of periodical payments against lump sums based on increased multipliers; (2) higher costs bills being treated as proportionate and reasonable (because damages will be higher); (3) a flurry of applications to amend schedules / counter-schedules and to revise costs budgets to cover additional work in reconsidering multipliers; (4) higher professional indemnity premiums being necessary for barristers and solicitors given the higher levels of damages; and (5) recently-settled (but as yet unapproved) cases having to be reviewed. It also seems likely to us that this change will lead to increased focus on the Table A to D discounts for contingencies and on discounting factors in each individual case.

Unfortunately, it also seems that the current uncertainty surrounding the discount rate looks set to continue pending the Lord Chancellor publishing the further guidance and also pending any attempts at Judicial Review.

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27.2.17