ALL CHANGE PLEASE!  An initial view from the Bar

Charlie Cory-Wright QC of 39 Essex Chambers and former Chair of the Personal Injuries Bar Association writes,

1. This is an immediate response to today’s announcements. It is in two sections: Comment and Strategy for Litigants Now.

Comment

2. There are obviously two main structural changes proposed:

   a) The proposed change to the method to be adopted when setting the discount rate so that (if set today) it would be somewhere in the range of 0 to +1%.

   b) Inbuilt flexibility (by way of 3 yearly reviews).

3. The thinking behind these changes is as follows:

   a) Most importantly, the underlying assumption has changed: the notional claimant for these purposes is now assumed to be a low risk investor, rather than a very low risk investor (who would place all of their damages into index linked gilts).

   b) It is this low risk investor approach which would, it is said, currently justify a discount rate in the range of 0 to +1%.

   c) It is also this which justifies (if it weren’t necessary already) the need for regular – as stated the proposal is for at least 3 yearly – review.

   d) There is also said to be greater transparency surrounding the process by which the discount rate will be set - which will include consideration of how claimants actually do invest their damages.

4. Those measures are expressly stated to be introduced in order to remove the possibility of over-compensation for claimants because of an “artificially low” discount rate.

   a) Set against a discount rate which is currently -0.75%, a level of return few investors would tolerate, it is hardly surprising that this is the language being used.

   b) Nonetheless this statement might be thought to be of concern given that it appears to assume that the current rate is “artificially low”; it is a little odd that neither the concerns of the claimant lobby that claimants will be under-compensated, nor the theoretical possibility of reduction of the rate, are specifically addressed in the language of the response.

   c) However the new over-arching principles against which the rate will now be set (that the rate should be set at a level which assumes the properly advised claimant will manage the lump sum so as to meet all his losses and costs but be exhausted at the end of the period for which they were awarded (usually the end of life) would meet the concerns of both over- and under-compensation, but only so long as the investment landscape upon
which the discount rate was set at the time damages were assessed does not significantly alter in the future.

d) Of course, in many higher value claims both parties can be protected against such risks by the use of a PPO (assuming the defendant, or rather their insurer, are reasonably secure).

5. The measures do seem to be intended as a permanent fix as to process. In so far as they introduce greater transparency to the decision making process, that is to be welcomed. But as the key twin decisions of whether to change the rate and what level to set the rate at remain with the Lord Chancellor there will certainly be greater and more frequent opportunity for political lobbying to have a specific effect on the discount rate in the longer term.

6. As to timing, in summary the intention appears to be:

   a) there will be a review under the current law to achieve a temporary rate change as soon as the changes are enacted,

   b) that change of rate will be completed within 270 days of the enactment\(^1\); but

   c) it is not yet clear when any enactment will be made and the draft changes still have to go through the Parliamentary process before they will be made and then come into force.

7. Any changes to the rate will not be retrospective but as soon as the Lord Chancellor announces a rate the courts will have to take that rate change into account, even if the mechanism for bringing it into force has not been completed. Without tight judicial control, this could result in long period of tactical stagnation of claims by whichever side believes it will most benefit from a change in the discount rate.

8. There remain unanswered questions in relation to accommodation claims and the continuing application of Roberts v Johnstone using whatever is the prevailing discount rate. The appeals in JR v Sheffield Teaching Hospitals NHS Foundation Trust may shed more light on this issue (albeit that the judgment appealed against was based on the current discount rate) are only due to be heard by 15 May 2018.\(^2\)

9. Generally, it is important to see these proposals in the litigation and market context as it currently is, which includes the following:

   a) In real terms, the market has continued to function even with a discount rate which has been viewed as ‘artificially low’ in that cases are still settled or settled as far as they can;

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\(^1\) “The Government is publishing draft clauses embodying these conclusions for further views, following consideration of the response to this pre-legislative scrutiny intends to introduce legislation to enact these proposed changes to the law into Parliament as soon as parliamentary time permits. Once enacted the changes will be brought into force in the usual way on a date to be specified by the Lord Chancellor, who will initiate a review of the rate (which will be the last rate under the previous law) within 90 days. This review will be completed within 180 days of the beginning of the review. A new rate will then be set if a change is considered by the Lord Chancellor to be appropriate. The new rate will come into force on a date to be fixed by the Lord Chancellor.”

\(^2\) According to the Court of Appeal’s case tracker service as at 7 September 2017.
b) The valuation of cases is primarily still (as it always has been) a function of multiplicand/risk on liability/contributory negligence; the discount rate issue is a stark one but has not prevented the market operating as before.

c) Regardless of the negative discount rate, many defendants have been operating on a 1% assessment so this change and the indication that, if set today, the discount rate would likely be between 0 - +1% is unlikely to require monumental shifts in the reserves currently held on claims.

10. As such, overall the proposed measures are unsurprising. Speculation (which is never a good thing for litigation) will be calmed, and the flexibility as to the future is on the face of it welcome, if it is operated with a steady and even hand.

11. There are however two possible structural concerns one might have (leaving aside strategic considerations for particular litigation, with which I deal below):

   a) First it should be noted that one set of uncertainty and speculations will be replaced by others, which are built in to the proposed system: these measures will inevitably give rise to future uncertainty further down the line (particularly in the run-up to any 3 year-review).

   b) What is impossible to tell from these proposals (whatever the intention in terms of design) is how in due course they will be operated: and in particular whether they will effectively end up being one-way (upwards) in terms of the rate. But it is perhaps premature to speculate about that.

12. It will only be possible to tell how great these concerns after we have experience of the operation of the system – i.e. probably not for 5 years or so.

**Strategy for Litigants now**

13. We do not know precisely when the changes will come in, save that it will not be for at least 9 months (270 days – see above)

14. As stated above it is said that the changes are not to be retrospective in nature, and we should I think assume that they will only affect rulings made after the change has come into force, as opposed to claims issued after that date, or on the basis of some other test for transition.

15. If that is right then the simple advice one can give is as follows,

   a) As to Claimants

      (i) They have an interest in getting cases on quickly, and should issue and proceed quickly for that purpose, in order to take account of the current discount rate, but

      (ii) any cases which are not coming on for trial in the next 12 months might sensibly be re-valued (for short term purposes at least) on the basis of discount rates set at 0% and 0.5% as well as the 1% which has taken hold of the market to date.

   b) As to Defendants
(i) It would be in Defendants’ interests to delay (to the extent legitimate: applications for adjournments on this basis would be highly unlikely to succeed!);

(ii) Defendants/insurers will no doubt wish to re-reserve (if necessary) on cases where trials are not imminent if the discount rate used on the reserve was less than 0%.

16. One needs to be aware that there will be further changes in due course, and indeed, it is of course possible that the whole system may have a wholly different and more radical overhaul further down the line.

17. Overall therefore the additional advice that I would give to either party at the moment remains as currently,

a) Settle on the basis of some appropriate compromise on this issue that fits the facts of your case (attempting to articulate a “one size fits all” compromise proposal is of course impossible).

b) Generally, whether at trial or in negotiations, a PPO, where it is appropriate, is likely to do better justice all round between the parties, and are certainly the safer bet for all concerned.

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