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The Ogden Tables and The Discount Rate

A Solicitor's Perspective

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Introduction

Introduction

- What are the Ogden Tables?
  - They are a set of tables complete with explanatory notes used as an aid for actuaries, lawyers and others when calculating the lump sum to be paid in compensation for future financial losses or expenses (such as care costs) directly caused by personal injury or death.
  - Widely known as the Ogden Tables, they are prepared by an inter-disciplinary working party of actuaries, lawyers, accountants and insurers. They are currently in their 7th edition.

Introduction

- What is the discount rate?
  - Compensation in personal injury claims is intended to put the person making the claim (Claimant) in the position they would have been, had they not suffered an injury.
  - In some cases a Claimant will receive a lump sum of compensation to cover their future financial losses, such as lost earnings, future treatment and future care needs. The Claimant is expected to invest this money and receive a return, which they can then use for their future needs.
  - The discount rate reflects the likely rate of return on the investment.

Introduction

- The House of Lords considered the discount rate in the case of ***Wells –v- Wells 1999***. In that case they decided that the 100% principle should apply, namely that the injured party should be placed in the same financial position as but for the accident, no more, no less, and this was the objective of the award of damages. That objective was to be met by applying a discount rate based on the interest of a risk free investment which protected the injured party against the inflation risk and market risk.

Introduction

- Until 1999 the discount rate was 4.5 per cent as it was assumed a Claimant could attain an annual return of 4-5 per cent by investing his damages on the open market.
- This was reduced to 3 per cent by ***Wells v Wells*** on the basis that a Claimant should not be expected to invest his damages in “risky” investments.

Introduction

- In 2001, the then Lord Chancellor reduced the rate to 2.5 per cent using his powers under the Damages Act 1996.
- The discount rate had been set at 2.5% since 2001.
- An announcement in February 2017 changed all that!

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What happened in February 2017?

What happened in February 2017?

- The Lord Chancellor Elizabeth Truss dramatically reduced the discount rate from 2.5% to -0.75%. This became effective on 20 March 2017.
- The Lord Chancellor treated Claimants as a risk adverse investor and applied the 3 year rate of return of index linked gilds to reach -0.75%. The Lord Chancellor effectively ignored the fact that Claimants do not only invest in index linked gilds.
- The discount rate cut had a massive impact on the personal injury market, dramatically increasing damages awards to all Claimants receiving future loss awards.

What happened in February 2017?

– Table A shows the percentage of future loss to an award based on an overall lump sum settlement of £8million. The impact of the discount rate is dependent on the proportion of the future loss element of the total compensation award, applying a range of between 65%-85%.

Table A

Percentage of future loss to overall award	Future loss element of £8,000,000 overall settlement	Percentage increase in future loss award	Increase in future loss award	Potential increase of £8,000,000 settlement with new discount rate
65%	£5,200,000	30%	£1,560,000	£9,560,000
70%	£5,600,000	40%	£2,240,000	£10,240,000
75%	£6,000,000	50%	£3,000,000	£11,000,000
80%	£6,400,000	55%	£3,520,000	£11,520,000
85%	£6,800,000	60%	£4,080,000	£12,080,000

What happened in February 2017?

– Table B shows the increase in multiplier from a discount rate of 2.5% to -0.75% and increase in an annual future loss claim of £200,000 when applying the new multiplier.

Table B

Term (years) (Ogden Table 28)	Multiplier with discount rate of 2.5%	Multiplier with discount rate of minus 0.75%	Increase to £200,000 future loss claim with new discount rate multiplier
5 years	4.70	5.10	£80,000
10 years	8.86	10.39	£306,000
15 years	12.54	15.88	£674,000
20 years	15.78	21.58	£1,160,000
25 years	18.65	27.51	£1,772,000
30 years	21.19	33.66	£2,494,000
35 years	23.43	40.04	£3,322,000
40 years	25.42	46.68	£4,252,000
45 years	27.19	53.56	£5,274,000
50 years	28.72	60.71	£6,398,000
55 years	30.08	68.14	£7,612,000
60 years	31.29	75.84	£8,910,000

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7 September 2017

7 September 2017

- On 7 September 2017 the Lord Chancellor issued a regulatory news story (RNS) to the stock exchange which confirmed that new draft legislation would be brought forward to reset the current personal injury discount rate of -0.75%.
- The RNS indicated that ministers believe a new discount rate, if it were to be a single rate, may lie in the range from 0%-1%.

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What have been the implications of these changes?

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-Reviewing offers

- In February there was an urgent need to review offers and identify those from Claimants which were still available to accept and which suddenly looked attractive as well as revising any Defendant offers upon which we may wish to rely particularly if Trial was due shortly after 20 March.
- Rather than withdrawing Part 36s it could be emphasised that any revised/new offer was only been made because of the discount rate change. Although we cannot say that the argument will succeed it adds some substance to it and may be influential to some extent.

What have been the implications of these changes?

- Keeping an eye on costs
  - Claimants using the discount rate change to justify excessive additional work on updating Schedules of Loss etc and/or amending Costs Budgets and/or claiming the increased value of the claim sets a new context for proportionality. Does the substitution of a multiplier involve much additional work? Does the higher value necessarily effect the issue of proportionality?

What have been the implications of these changes?

- Initially when the announcement was made in February none of the columns in the Ogden Tables had a -0.75 column!

– Impact on reserving

  – We needed to review reserves on all current cases in the light of the changes.

What have been the implications of these changes?

- Policy limits
  - The very significant increases in settlement sums may impact limits of liability in public liability policies for businesses and even household liability covers, it may even cause some to go above Employers Liability limits.
  - **Reinsurance limits**
  - Extra costs may take cases above reinsurance retentions and could also impact on reinsurance pricing.

What have been the implications of these changes?

- Joint Settlement Meetings
  - Joint Settlement Meetings which were due to take place between February and 20 March were rescheduled or alternatively approached by Claimants at least on the basis of recognising early implementation of the new rate.

What have been the implications of these changes?

- Head of Loss Containment
  - One of the ways of combating the impact of the discount rate change is to make sure that everything that is done on a case, from indemnity, liability, rehabilitation, quantum investigation and assessment is as tight as it can be so that the multiplicand part of the “M x M” equation is contained at the optimum level as it will be multiplied by a higher multiplier.

What have been the implications of these changes?

- Loss of likely benefit from proposed changes aimed at reducing whiplash claims.
- PPO v Lump Sum decisions may change.
- Accommodation claims and a possible different approach to ***Roberts v Johnston***.

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The future

The future

- The Government recognises there was a need for a fairer and better framework for the setting of the discount rate and intends to make the following changes to the law:-
  - The rate will be set by reference to expected rates of return on a low risk diversified portfolio of investments;
  - In assessing those rates the actual investment practices of Claimants and the investments available to them should be considered;
  - The principles for setting the discount rate should be set out in statute;

The future

- The rate is initially to be reviewed promptly after the legislation comes into force and, thereafter, at least every 3 years, with that period being reset when the rate is changed. Reviews will be completed within 180 days of starting;
- The rate is to be set by the Lord Chancellor with advice from an independent expert panel, although the initial review will be by the Lord Chancellor with advice from the Government actuary.

Stop Press

- A Law Society Gazette report of 10 November indicates that Lord Keen of Elie may have been too ambitious in expecting a discount rate reform in early 2018 as had been indicated.
- Now it has emerged that civil servants have told APIL the rate will actually be reviewed and subsequently changed by the end of 2018 or the start of 2019.

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