Personal injury

Where do we stand?

Katherine Deal assesses the current stance on discount rates

IN BRIEF

- Falling investments increasingly causing concerns to claimants.
- Still no indication as to whether the statutory rate of return of 2.5% will be adjusted.
- In *Simon v Helmot*, has the Privy Council offered any hope for claimants?

Scenario: a claimant aged 30 suffers a serious accident and loses his lower leg. He is 25% liable for the accident and does not want an order for periodical payments because no annual payment will compensate him for the actual expense to which he will be put in the future. He would rather take his chances in the market and invest a lump sum to provide him with sufficient return year on year. Nor is the defendant amenable to prolonging the case—it is quite happy to make a lump sum payment and close its file.

Our claimant's care needs are costed at £20,000 per annum and will continue for life. Using the conventional discount rate of 2.5% and the 7th edition of the Ogden Tables, the multiplier will be 29.60, which will result in an award for him reflecting his contributory negligence of £444,000. But a discount rate of 0.5% would give a multiplier of 48.68, and a total award of £730,200. Should he or the defendant be the one to suffer the risks of the vagaries of the markets?

Background

Aside from the fairly select group of cases in which an order for periodical payments (PPO) under s 2(1) of the Damages Act 1996 (DA 1996) might be appropriate, English law requires that an award of damages must take the form of a single lump sum taking into account as at trial, as far as possible, the numerous uncertainties of what will happen in the future. Adjustment is made to the lump sum to reflect the fact that the claimant will receive now that which he will be required to spend at regular intervals over the rest of his life (or that which, as with loss of earnings, he would otherwise have expected to receive at regular intervals). The aim, as has been stated in numerous cases, is to award a lump sum that will amount to no more and no less than the claimant's net loss.

That adjustment is made by reference to a discount rate, based on the notion that a claimant will invest in index-linked government securities (ILGS), with income withdrawn rather than re-invested. In *Wells v Wells* [1999] 1 AC 345, [1998] 3 All ER 481, the House of Lords held that the lump sum should be calculated on the basis of the return available on ILGS, which was calculated on the basis of a rate of return of 3%.

On 28 June 2001, by the Damages (Personal Injury) Order 2001 (SI 2001/2301) (the 2001 Order), the then Lord Chancellor fixed the rate of return at 2.5% pursuant to his powers to do so under s 1 of DA 1996. There it has remained ever since. Although the court has the power in any given case to depart from this discount rate "if any party to the proceedings shows that [a different rate] is more appropriate", this is notoriously hard to do in practice. In *Warriner v Warriner* [2002] EWCA Civ 81, [2003] 3 All ER 447 the Court of Appeal held that this would only be appropriate if the case came into a category that the Lord Chancellor had not considered or had "special features or circumstances". Certainly, this writer has not been involved in, or heard of, any cases in which the court has agreed to depart from the rate of 2.5%.

Instead, the courts have turned with increasingly frequency to PPOs, which can be linked to different indices, eg a wage-related index such as ASHE 6115 for care assistants and care workers. But what of our claimant, for whom a PPO is not sought and will not be made?

In response to growing disquiet, and the stated intention of the Association of Personal Injury Lawyers judicially to review the 2001 Order setting the rate, in 2010 the Lord Chancellor announced his intention to review the discount rate. The Ministry of Justice announced that it would consult publicly and a consultation paper is now expected over the course of the next few months. This could lead to a decision by around the end of the year.

Attempts have been made, particularly by claimants, to wait and see what will happen before bringing the case to trial. The English courts have been quick to rule that out—the court's role is to apply the discount rate as it stands and not to stay proceedings until some indeterminate time in the future when the rate might (or might not) have been altered, *Day v MIB* (Lawtel 12 April 2011) and *Love v Dewsbury* [2010] EWHC 3452 (QB).

Simon v Helmot

Although the English common law has persuasive force, DA 1996 and the 2001 Order do not apply in Guernsey, and there is no statutory discount rate. The English rate had no current evidential value. Income tax is lower and the rate of inflation consistently higher than in UK. Against that background, Manuel Helmot, a man gravely injured when 28 years old, brought a claim for damages for injuries and consequential losses in the Royal Court in Guernsey in 2008. At first instance, the Royal Court awarded him some £9.33m in damages, using a single discount rate of 1% for his future losses.

Mr Helmot appealed, seeking a "discount" rate of -1.5% for loss of earnings and a discount rate of 0.5% for other future losses. The defendant cross-appealed, seeking a rate across the board of 2.5%. Mr Helmot's arguments prevailed and his award was increased as a result by around £4.5m.

The defendant appealed to the Privy Council (*Simon v Helmot* [2012] UKPC 5, [2012] All ER (D) 215 (Mar)). On 7 March 2012, the Board handed down judgment dismissing the appeal. Lord Hope gave the leading judgment, and founded his judgment on the undisputed premise that (as in England and Wales) the victim of a tort in Guernsey is entitled to be fully compensated. If the evidence shows that inflation will affect different heads of loss in different ways to an extent that can be evaluated, there is no reason why different rates should not apply to different heads. Whether that involves applying a discount rate that is actually an increase matters not.

The Board stressed the desirability of introducing PPOs in Guernsey or, in default, the possibility of developing the common law in such a way as to permit the equivalent of a PPO to maximise the likelihood of the claimant obtaining full compensation, no more and no less.

Conclusions

Where does that leave our claimant? Probably nowhere. It is not binding on the English court. Faced as he is by DA 1996 and the 2001 Order, it is still going to be exceedingly difficult to persuade an English court (certainly at first instance) that the conventional discount rate can and should be departed from. He may be unlikely even to obtain permission to adduce the sort of expert evidence on which Mr Helmot was able to rely regarding inflation and rates of return, since the Ogden Tables are intended to avoid the need for such evidence. The mere likelihood that he will be severely under-compensated if that rate is used would not appear to be the sort of special circumstance that would make it appropriate to adopt a different rate.

Practice points

- This case is likely to be of more use to claimants in negotiations than in formal submissions at trial. Some defendants may be prepared to pay more to pay off the risk (particularly with the results of a review perhaps mere months away); many will not.
- It may, however, provide more of a basis for adjourning an imminent assessment of damages to await the outcome of the Lord Chancellor's review, particularly once the consultation process has begun.
- Claimants may wish to explore seeking permission to obtain the kind of expert evidence as to rates of inflation that was so effective in *Helmot*. That might sway a court considering whether this case falls into the narrow band of cases where a departure from the conventional rate could be appropriate (or, at the least, give more room for manoeuvre in negotiations). No doubt defendants will object.
- Could a PPO or structured settlement be achieved even if at first blush it does not seem acceptable? In particular, would an annual sum reduced by, eg contributory negligence still provide more for a claimant over his lifetime than a lump sum discounted by 2.5%? NLJ

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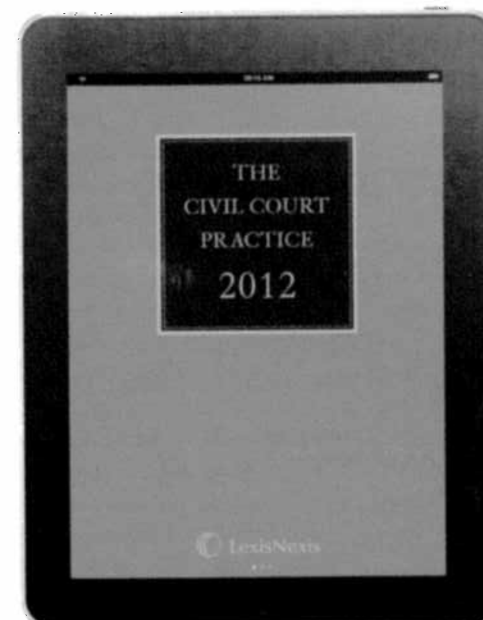

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