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How do you intend to spend discount rate day next month? Following the very recent revelation that the Government *may* (as soon as 3rd August) be planning to say *something* about the shock revision of discount rates for future loss multipliers (down to -0.75%), it now looks as if the insurers' prayers may soon be answered (albeit, only *up to a point Lord Copper*).

We will see … . However, I can certainly think of nothing that I would rather do in August than curl up with a copy of the latest Ministry of Justice press release and a copy of the actuarial tables. For those of a similar mind, there is much to look forward to in the coming days and weeks. Ah, sweet days of Summer!
For those of you who insist on less taxing forms of recreation: Happy Holidays and see you next (legal) year.

Discount rates and foreign applicable law: substance and procedure

The announcement in early 2017 – after years (indeed, decades) of procrastination – that the discount rate for the identification of multipliers for future loss was to be revised from 2.5% to -0.75% took many by surprise (to put it mildly). The effects of this are already being felt in the context of accommodation claims (and, of course, in high value settlement negotiations): see for example, as to ***Roberts v Johnstone*** calculations in the new climate, ***JR v Sheffield Teaching Hospitals NHS Trust*** [2017] EWHC 1245 (QB).

It may be that further change (or, at least, creative uncertainty) is already on the horizon. A few days ago the Law Society Gazette reported as follows: "*In a House of Lords debate last month, Conservative peer Lord Hodgson of Astley Abbotts said the Ministry of Justice will respond to its consultation on the issue by 3 August. Hodgson tabled a motion of regret at then-lord chancellor Liz Truss' decision to amend the rate from 2.5% to -0.75% before the consultation had even started. He said the action was 'draconian' and a sign that Truss did not understand, or was not briefed on, the full impact of the decision. It was revealed during the debate that 135 responses were made to the consultation, which closed in May, but justice minister Lord Keen of Elie gave little away about the government's response.*

'Underlying the consultation was the wish of the government to make sure that the way the rate is set is put on the firmest possible footing in future, so that we have a better and fairer system for claimants and defendants, and, in so doing, keeping true to the 100% principle—namely, that claimants are paid no more but no less than they should be,' said Keen. 'An announcement of the government's conclusions will be made at the earliest possible opportunity. Of course, the interests of all parties concerned will be considered, and there will be an impact assessment.' Keen insisted Truss acted correctly by changing the rate before consulting, saying this was her legal obligation. To fail to act, he suggested, would be to have 'knowingly maintained an inappropriate rate for what might have been a considerable period of time'. Hodgson urged the government to act decisively on what he called a 'running sore' and insisted it was 'extraordinary' for the lord chancellor to change the rate now when none of her predecessors had felt the need to do so since 2001." (***Law Society Gazette***, 19 July 2017)

Those of us more accustomed to asking overseas lawyers about the calculation of future loss and to scuttling about in sources like the *Gazette du Palais* (or equivalent) in order to find appropriate discount rates in cross-border personal injury claims may regard the recent shifts in English law with a degree of detachment. The applicable (foreign) law will

set the discount rate (won't it?) and if the English rate is -0.75% (or, in due course, something else) then this will not affect our English Claimant or foreign insurer clients. However, the recent generosity of the Lord Chancellor might, at least, prompt a revisit to the question whether the applicable (foreign) law sets the discount rate for future loss multipliers. If this proposition is correct, what is its source and how reliable is it?

The source can, of course, be found in the boundary between the substantive applicable law and the procedural law (of the forum Court): a demarcation preserved, as we all know, by Articles 1(3) and 15(c) of the Rome II Regulation. The problem is that the line between substance and procedure is not (and never has been) a very bright one. Is the discount rate a matter of substantive law or a matter of mere procedure? In an oft-cited academic paper Rushworth and Scott raised the concern that an applicable law discount rate might "*not* [be] *an attempt factually to determine the claimant's loss, but instead is an artifice by which to lower insurance premiums ...* ." (A Rushworth & A Scott, "*Rome II: Choice of Law for Non-contractual Obligations*" [2008] LMCLQ 274, 294).

In ***Stylianou v Toyoshima*** [2013] EWHC 2188 (QB) Sir Robert Nelson held that the discount rate was a matter of substance for the applicable law (by reference to Article 15(c)), rather than a matter of evidence and procedure for the law of the forum. This decision significantly reduced the value of the lump sum awarded to the injured Claimant because the discount rate in Western Australia (the applicable law pursuant to Article 4 of Rome II) was a whopping 6%. In the course of his detailed judgment, the following appeared: "[95] *Mr Weir* [who appeared for the Claimant] *submits that a discount rate is an attempt, factually, to calculate future economic loss by way of a current lump sum. Life expectancy tables are fact, and a discount rate is simply a means of converting future recurring losses over a person's life into the current lump sum required in its calculation of damages by the English courts. The discount rate is, therefore, Mr Weir submits, also a matter of fact. As indeed is inflation and other local economic facts which recital (33) requires the court to take into account. Dicey, Mr Weir submits, makes no mention of discount rate which is not the same as a statutory ceiling, which might properly be regarded, as Dicey says, as a matter of law.* [96] *I do not accept Mr Weir's submission. The Law Reform (Miscellaneous Provisions) Act 1941 states, by section 5, that future loss shall be quantified by adopting a discount rate of 6%. In other words, this is mandatory. Whilst there have been decisions in Queensland, on the basis of the expert evidence before me, tempering the effect of this, no such decisions have yet been made in Western Australia. Further, I see no difference between a mandatory 6% discount rate which operates*

as a ceiling on damages for future loss created by statute and a general ceiling on damages so created. In my judgment, the 6% discount is a rule of law."

By contrast with ***Stylianou***, in the more recent case of ***Syred v PZU SA*** [2016] EWHC 254 (QB) Polish law applied to an ***Odenbreit***-style claim brought in the English Courts against a Polish insurer. The multiplier was largely agreed between the parties and a conventional Ogden tables approach was adopted for calculating future loss.

If we are looking for a principled approach to the substance/procedure distinction then we might proceed by asking these questions. First, **is this rule concerned with the *administrative or judicial machinery* by which the assessment of damages is *conducted*?** If the answer is yes, then the rule is procedural and a matter for the law of the forum and if the answer is no, then it is necessary to ask a further question: namely, **is this rule – (a) concerned with the assessment of the losses *actually experienced* by the Claimant (to put the matter another way, is the rule concerned with the *organisation* of the factual evidence by which the loss is accurately to be calculated); or, (b) is it *determinative* of the *valuation* of the claim (whatever the actual losses might have been)?** If (a) then the rule is procedural/evidential within the meaning of Article 1(3) and dealt with by the forum and if (b) then it is part of the applicable law for Article 15(c). It seems to me (for what it is worth) that approaching matters in this way suggests that discount rates (for future loss) are – at least in most jurisdictions – procedural, rather than substantive.

However, the pragmatic answer may be that found by the parties in ***Syred***: the English Court will use an English discount rate unless anyone bothers to take the point.

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