DEKA CHAMBERS

BRIEFING
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PERSONAL INJURY

Welcome to the latest Deka Chambers Personal Injury Team briefing. In this edition we will be looking at 'The Discount Rate,' 'Third Party Costs Orders in Credit Hire' and hot off the press, the recently published 17th edition of the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Claims.

Under current legislation, the Government must review the Discount Rate 'at least' every 5 years. With the rate having been set at -0.25% since 5th August 2019, a review must start by mid-July 2024. **Andrew Spencer** and **Conor Kennedy** look at the background to the Discount Rate, the mechanics and timetable of how it is set, and the questions that the Government are considering, in what will be a crucial decision this summer.

Holly Tibbitts explains the key findings arising from the recent judgment of *Kindertons Ltd v (1) Murtagh (2) Esure Services Ltd [2024].* The case serves as a stark warning to credit hire companies of the risks of a non -party costs order being made against them in cases where they had a 'very strong stake' in litigation which subsequently failed in relation to the hire costs.

And **William Dean** takes a look at the recently published 17th edition of the Judicial College Guidelines. On the shelves from 19th March 2024, the Guidelines come two years after the 16th edition, following a period of very high inflation. The Guidelines comprehensively move the dial upwards on general damages awards.

Deka Chambers' 80 barrister strong Personal Injury team offers outstanding depth and breadth across all levels of seniority. We are particularly pleased to celebrate this month the appointment of Paul Stagg KC and Ed Lamb KC as King's Counsel, taking Deka's complement of personal injury and clinical negligence Silks to 13.

The team is recognised as being at the forefront of both claimant and defendant work, ranked as a Band 1 set by both Chambers & Partners and the Legal 500. We specialise in providing a sophisticated service focused on understanding the particular needs of each client and identifying the right strategy to resolve every case.

Laura Johnson KC and Adam Dawson

Joint Heads of the Personal Injury Team

THE DISCOUNT RATE: AN INTRODUCTION

By Andrew Spencer and Conor Kennedy

The purpose of the discount rate is to translate long-term losses into lump sum awards. Reflecting the principle that damages should, as far as possible, put victims in the same position they would have been in had the accident not taken place, the discount rate is intended to reflect the real rate of return that a recipient of a lump sum can reasonably expect to earn if they invest their lump sum upon receipt of their damages. Because the investment will need to cover their lost earnings, care, etc. the rate of return is assessed net of expenses and taxation. A lower discount rate means a lower real rate of return is expected on investments, with the consequence that a higher initial lump sum is required to ensure compensation for the claimant's loss. Given the periods of time involved, seemingly small differences to the expected rate of return on investments and therefore the discount rate can make an enormous difference to lump sums awarded by the courts.

The present discount rate of -0.25% for England and Wales was set on 15 July 2019, coming into force on 5 August 2019. It must be reviewed at least every 5 years, which means the next review must be commenced by 15 July 2024.

Previously, the discount rate has always been set as a single real rate. A new legislative methodology was established by the Civil Liability Act 2018, which required the Lord Chancellor to consider the returns on a 'mixed portfolio' of investments based upon:

- the actual returns available to investors;
- the actual investments made by investors of relevant damages;
- such allowances for tax, inflation and expenses as thought appropriate; and
- wider factors.

As part of the last review which led to the 2019 (and present) rate, a representative claimant and associated investment portfolio was collated, and assumptions were made around tax, inflation, expenses, and other factors. The Government Actuary then provided a range of possible single discount rate figures to the Lord Chancellor.

The Lord Chancellor then considered the levels of under and over-compensation under each of the rates provided, whilst acknowledging that there could be no guarantee for claimants that their investment performance would ensure coverage of their needs in all circumstances.

Dual or Multiple Rates?

Perhaps the most interesting issue raised is whether dual or multiple rates should be adopted. Other jurisdictions use dual or multiple rates, in some cases based on the duration of the award, and in other cases based on the heads of loss. The Lord Chancellor decided in 2019 that the evidence base at that time was insufficient to justify such a change, but committed the government to seeking additional views and evidence for the 2024 review. Accordingly, in January 2023, the MOJ issued a call for evidence on the introduction of dual or multiple rates in England and Wales. A summary response document was issued in September 2023.

The call for evidence indicated that in the event a dual rate by duration is adopted, a dual rate approach largely based around the model used in Ontario was generally favoured. This has one rate for short-term losses, and another rate for long-term losses, with the threshold between the rates being 15 years. The short-term rate is intended to reflect current economic conditions, with the long-term rate anticipating reversion to a long-term average. The objective behind the Ontario model is to avoid "cliff edges". Further to expressing a preference for the Ontario model, the call for evidence explained that "a broad cross section of stakeholders also suggested that a model whereby different discount rates are applied to different heads of loss might be a viable alternative in a dual/multiple" rate option, i.e. one rate could be applied to care and accommodation costs to reflect higher inflation expectations, whereas a different rate could be applied for medical devices.

Other notable aspects of the first call for evidence on dual rates were:

- a level of disagreement over when the switch -over point should come in a dual/multiple rate system, with opinions ranging from 5 to 25 years;
- disagreement over the frequency of review of short-term rates, with some respondents expressing concern that more regular reviews might lead to delays, satellite litigation, and unpredictability.

The Present (Second) Call for Evidence —The Claimant Universe

The second call for evidence explains that setting the rate "requires an understanding of the universe of claimants and damages that they are awarded", including "ages, conditions, dependencies, claim sizes, investment periods and other features." As such, the questions asked in the second call for evidence focus on the claimant's real-world perspective as an investor. Questions are asked on (*inter alia*):

1. the value and length of awards;
2. the split between various heads of loss (e.g. care, loss of earnings), the shape of these heads of loss before allowing for inflationary increases; and the term over which these heads of loss are awarded;
3. evidence of actual mortality experience relative to claimant life expectancy when awards are granted;
4. rates of inflation overall and split by different heads of loss, and whether previous assumptions about rates of inflation remain valid;
5. what asset classes should be included in a "low risk" portfolio;
6. consideration of liquidity risk and/or the prevalence of matching cashflow approaches with the aim of meeting the claimant's income needs as they fall due;
7. the type and level of expenses faced by claimants (e.g. advisor, fund manager, and platform fees);
8. types and rates of taxation, and how these are affected by size and duration of award;
9. how much additional complexity or difficulty would implementing a dual rate by duration approach add to the litigation process (to be quantified by time to settlement, additional legal costs, and/or any other relevant factors);
10. how readily available are PPOs to claimants in practice, how does this vary by groups of claimants, and what factors influence the take up of lump sums versus PPOs.

A Chronology of the Review

The key chronology of the current review is as follows:

- On 16 January 2024, the MOJ issued its second (broader) call for evidence, which will close on 9 April 2024;
- By 15 July 2024 the next rate review will commence, and must be completed within 180 days of commencement.

Conclusion

As with the fund manager who promises investment returns, a degree of scepticism is warranted towards anyone who confidently predicts the outcome of the present review. What is clear, however, is that this review is taking seriously the possibility of a dual/multiple rate to allow for more tailored compensation. The main objection to such an approach at present appears to be complexity and cost, but some additional complexity and cost may be proportionate to the value of claims where losses are calculated using the discount rate. There are potential benefits to both claimants and defendants of a multiple rate: to claimants, because a lower short-term rate is likely to more accurately reflect the volatility of investment returns over the short term, and for defendants because a long term rate is likely to be higher (in Ontario it has remained at 2.5% for 22 years). Regardless of the ultimate revised rate/ rates, claimants and defendants will need to be ready for the possibility of somewhat greater complexity to their high-value disputes within the next year.

THIRD PARTY COSTS ORDERS IN CREDIT HIRE CLAIMS: A WARNING FROM *KINDERTONS LTD V (1) MURTAGH (2) ESURE SERVICES LTD* [2024] EWHC 471 (KB)

By Holly Tibbitts

"So opens yet another chapter in the continuing war of forensic attrition between motor insurers and credit hire companies", said Turner J in the opening remarks of this important judgment relating to non-party costs orders, particularly in the context of credit hire claims.

In February 2019 a Mr Ibrahim was involved in a minor road traffic collision with the First Defendant. It was alleged that the accident caused a small amount of damage to Mr Ibrahim's Audi.

Within two days of the accident a representative of Kindertons, a credit hire company, contacted Mr Ibrahim. Despite his rather vague report of minor damage to the car, Kindertons persuaded him that he ought not to be driving the vehicle and should hire an alternative vehicle from them. Kindertons specifically discouraged Mr Ibrahim from accepting a courtesy car from the First Defendant's insurer, Esure. He was also reassured that he would not have to pay for any hire or repair and the costs would be recovered from the First Defendant's insurer.

The following day Mr Ibrahim entered into a credit hire agreement with Kindertons for the hire of a Jaguar XF at the rate of £345.08 per day.

A subsequent assessment of the damage to Mr Ibrahim's Audi on behalf of Kindertons concluded that the accident had not caused any damage which would have rendered the car unroadworthy. The repairs were expected to take four to five days to complete.

On the second day of the hire agreement Esure approached Mr Ibrahim and offered him an equivalent replacement vehicle at no cost to him at all. The cost to Esure was £63.45 per day. Given what he had previously been told by Kindertons, Mr Ibrahim declined this offer. He kept the credit hire vehicle for a total of 33 days.

Mr Ibrahim and his wife subsequently issued claims against the First Defendant seeking damages for personal injury. Mr Ibrahim also claimed for credit hire, repairs, recovery charges and additional charges totalling £16,757.75, all but £50 of which arose under the credit hire agreements.

Liability was denied and the matter came to trial before Mr Recorder Berkley QC. He concluded that Mrs Ibrahim had not been in the car at the time of the accident and that both Mr and Mrs Ibrahim were fundamentally dishonest. Furthermore, the damages claimed in respect of the repairs and hire charges had not been caused by the accident. Mr and Mrs Ibrahim were ordered to pay the First Defendants' costs of £12,000. Unsurprisingly they failed to do so.

Esure then applied for a non-party costs order against Kindertons. The application was not heard by the trial judge, but instead by Mr Recorder Gallagher. The Court considered the exceptions to qualified one-way costs shifting under CPR 44.16(2), which allows costs orders against the claimant to be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where the proceedings include a claim which is made for the financial benefit of a person other than the claimant. The judge also noted CPR 44 PD 12 which gives claims for credit hire as a specific example of where that provision might be applied.

Mr Recorder Gallagher concluded that the claim included a claim which was made for the benefit of Kindertons and ordered them to pay 80% of Esure's costs.

Kindertons appealed on a number of grounds.

The first ground of appeal was that the judge was wrong to conclude that the Kindertons had a financial benefit in the litigation such as to found a non-party costs order. Turner J considered this a "*brave contention*", noting that the whole purpose of credit hire companies was to make a profit out of the client's legal claim. He cited numerous passages from the judgment of Ritchie J in *Amjad v UK Insurance Limited* [2023] EWHC 2832 (KB) to the effect that in most such cases it is the credit hire companies that stand to gain from the litigation rather than the claimants themselves. In winning, the claimants absolve themselves of a largely theoretical debt to the credit hire company, but it is the credit hire company that actually receives the payment.

Turner J concluded that Kindertons stood to gain substantially from the claim brought in Mr Ibrahim's name. The claim for their services significantly exceeded the value of the personal injury and other claims brought by Mr Ibrahim and his wife, and it had been made clear to Mr Ibrahim that he would not have to pay a penny under the contract and the bill would be footed by Esure. In the circumstances Kindertons had a very strong stake in the litigation and any benefit to Mr Ibrahim in pursuing the claim for hire charges was all but illusory.

The second ground of appeal was that there was no proper basis for the judge's finding that Kindertons controlled the litigation. The Court held that the concept of control was almost invariably a matter of degrees. The greater the level of control exercised by the non-party, the more likely it will be that the Court will exercise its discretion in making a non-party costs order.

In this case Kindertons had a high degree of control. The contractual terms tied Mr Ibrahim into bringing a claim with the risk of serious financial consequences if he failed to comply. The threat and not the existence of actual repercussions formed the basis of the control. Further, Kindertons had actively discouraged Mr Ibrahim from engaging with Esure. The Court concluded that this was because Kindertons wished to choreograph the progress of the litigation to avoid compromising their interests.

The third ground of appeal was that the judge had failed to consider causation. Kindertons argued that Esure could not establish that but for Kindertons' involvement Esure would have incurred more costs than they would have done in any event. Kindertons relied on *XYZ v Travelers Insurance Co Ltd* [2019] 1 WLR 6075, in which the Supreme Court had considered the relevance of causation in claims for non-party costs orders against liability insurers.

However, Turner J drew a distinction between the liability insurance cases and credit hire claims. In the insurance cases the insurer's involvement in the claim is not primarily aimed at making a profit, but rather it comes about because it is obliged to fund the insured's defence. The liability of the insurer is typically involuntary, and the control which the insurer exercised arises from its contractual obligation, rather than a freely made decision to intermeddle. In contrast, Kindertons involved itself voluntarily and enthusiastically in the claim. It was a matter of choice in the expectation of profit specifically relating to the legal proceedings.

While expressly stating that he was not seeking to lay down a general rule relating to the appropriateness of non-party costs orders against credit hire companies, Turner J concluded that the Recorder had been right to find that it was just to make the order against Kindertons, and he was not obliged to make any specific finding of but for causation before doing so. Kindertons had been exercising a degree of control over the most valuable aspect of Mr Ibrahim's claim, and by instructing him not to engage with Esure had tried to neuter any attempt by Esure to limit its exposure to the hire claim. The Court considered that it was neither fair nor just that Kindertons should be permitted to do this without exposing itself to the potential consequences of a non-party costs order. By ordering Kindertons to pay 80% of the costs the Recorder was exercising his discretion to reflect the proportionate benefit which it stood to gain if the claim for hire charges had succeeded. An attempt to mathematically calculate on a but for basis would not have reflected the unfairness of allowing Kindertons *"a free ride on the coat tails of Mr Ibrahim's claim*".

The Court also concluded that there was no requirement by Esure to warn Kindertons that it would or might seek a non-party costs order. This point was without merit as Kindertons would have known only too well that the nature of its business put it at risk of a non-party costs order, with an express warning in CPR 44 PD 12.2.

The court also rejected Kindertons' argument that it was not just in all the circumstances to make a non-party costs order because Kindertons were victims of Mr and Mrs Ibrahim's dishonesty. Turner J stated that Kindertons had voluntarily assumed the risks that Mr and Mrs Ibrahim would turn out to be dishonest, unlike Esure had no say in the matter. This was a commercial decision the consequences of which must be borne by Kindertons.

This judgment gives a stark warning to credit hire companies of the risks of a non-party costs order being made against them in these cases. The Courts are not blind to the powerful position credit hire companies have in these claims and the enormous relative benefit to them, rather than claimants, of pursuing this kind of litigation. The Court will not allow them to simply hide behind claimants with little risk other than the potential non-recovery of the credit hire costs. The judgment is clear that with great power comes great responsibility, and, particularly where things go wrong, credit hire companies may well find themselves footing the bill for litigation which has been brought in their commercial interest.

NEW EDITION OF THE JUDICIAL COLLEGE GUIDELINES PUBLISHED

By William Dean

Last week saw the publication of the 17th edition of the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases*. As with previous editions, this one has a bold-coloured cover (a fetching purple, to replace the 16th edition's bright pink).

The first change most practitioners will notice from the 16th edition is the increase in all brackets to account for inflation. Previous editions have noted the requirement to uprate awards to reflect the time between publication and assessment, and particular attention has recently been paid to this point because of recent high inflation rates. There has been some discussion arising from some decisions in the last year, such as that in the first instance case of *Blair* v. *Jaber* [2023] EW Misc 3 (CC), about the correct approach; but there has long been commentary in the forewords to the *Guidelines* noting that inflation should be taken into account – just as comparator cases are routinely uprated to reflect increases in the RPI.

The 17th edition contains a specific "Note on Inflation", in which the editorial team records its surprise at the controversy and says, in terms, that "an inflationary increase to the guideline figures should be applied to ensure that figures remain up to date". It also records that figures in the 17th edition are accurate up to August 2023, so even at the date of publication a further increase is required. The RPI figure for March 2024 is not available at the time of writing, but the February figure was 381.0, indicating an increase of just over 1.1% already applies. (Of course, inflationary increases do not apply to whiplash tariff awards, although they are due to be reviewed later in 2024.)

The increases in the 17th edition are most notable in the higher brackets (for example, the upper end of bracket 3(A)(a), a very severe injury resulting from a brain injury, has risen to £493,000 from £403,990), but all categories have increased, and practitioners will need to ensure that pleadings and offers in existing cases are reviewed to ensure proper figures are being used. Those who have not practised in minor injury claims for some years might note with interest that a generic three-month injury is now worth nearly £3,000!

As expected, the vast majority of categories remain as set out in the 16th edition. Mrs Justice Lambert, writing as the chairperson of the editorial board, notes in her introduction some adjustments to the brackets for psychiatric injury arising from sexual abuse, based on judicial decisions. The number of subcategories has been increased from three to four (introducing "moderately severe" between "severe" and "moderate"). The higher brackets have also been increased significantly, well beyond inflation, better to reflect court awards: for example, the 16th edition's "severe" range of £45,000 to £120,000 has been updated in the 17th edition to £109,830 to £183,050.

The introduction also refers to comments about technology and equipment in *Scarcliffe* v. *Brampton Valley Group Ltd* [2023] EWHC 1565 (KB), where (at paragraph 207) the court observed that where "potential provision, e.g. of equipment, is not reasonable ... consideration should be given to reflecting any consequential loss within general damages". As summarised by Mrs Justice Lambert: "just as the provision of equipment may lower the award, so the non-provision of equipment or service may increase the award" – an important reminder of the need for an award to be set at a level appropriate to the facts of the particular case.

The judiciary already has access to the 17th edition, as have the Inns of Court libraries and some retailers. No doubt, within the next few weeks, all practitioners will have access to the new *Guidelines*, whether in electronic or hard copy,