UK Bodily Injury Claims Settlement Framework

Natasha Regan and Charl Cronje
UK Bodily Injury Claims Settlement Framework
A History of the Ogden Discount Rate
A brief history of the Ogden discount rate

Sir Michael Ogden QC, 1926-2003

• Highly successful barrister with a wide range of clients including Robert Maxwell and Bernie Corfield;

• He gained his knighthood by chairing and raising the profile of the Criminal Injuries Compensation Board (1975-89), a government department of 600;

• In 1982 headed a working party that developed the actuarial tables to quantify damages in fatal accident and personal injuries cases – “the Ogden tables”.

25 April 2019
### Table 1  Multipliers for pecuniary loss for life (males)

<table>
<thead>
<tr>
<th>Age at date of trial</th>
<th>Multiplier calculated with allowance for projected mortality from the 2008-based population projections</th>
<th>Age at date of trial</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>-2.0%</td>
<td>-1.5%</td>
</tr>
<tr>
<td>0</td>
<td>264.76</td>
<td>195.32</td>
</tr>
<tr>
<td>1</td>
<td>259.11</td>
<td>191.95</td>
</tr>
<tr>
<td>2</td>
<td>252.28</td>
<td>187.68</td>
</tr>
<tr>
<td>3</td>
<td>245.58</td>
<td>183.46</td>
</tr>
<tr>
<td>4</td>
<td>239.02</td>
<td>179.29</td>
</tr>
<tr>
<td>5</td>
<td>232.59</td>
<td>175.19</td>
</tr>
<tr>
<td>6</td>
<td>226.29</td>
<td>171.15</td>
</tr>
<tr>
<td>7</td>
<td>220.14</td>
<td>167.18</td>
</tr>
<tr>
<td>8</td>
<td>214.13</td>
<td>163.28</td>
</tr>
<tr>
<td>9</td>
<td>208.23</td>
<td>159.43</td>
</tr>
</tbody>
</table>

25 April 2019
The 1990s – The Damages Act and Wells v Wells

The Damages Act, 1996

An Act to make new provision in relation to damages for personal injury, including injury resulting in death;

• Public sector settlements as well as insurance settlements;
• Amended to include provision for PPOs (next slide), and the Civil Liability Act 2018 for setting the discount rate.

Wells v Wells, 1998, Appeal to the House of Lords

• Road traffic accident with serious brain injury;
• Court of appeal had used a discount rate of 4.5% (original court used 2.5%);
• The House of Lords appeal was successful – the injured plain.
The Noughties, including the introduction of PPOs

Discount rate change, 2001

• In 2001 Lord Chancellor Lord Irving of Lairg set the discount rate to 2.5% (from 3%), based on a 3-year average of real yields on index linked gilts;

The first Periodic Payment Orders (PPOs)

• Prior to 2003 structured settlements were (occasionally) used to protect claimants from financial uncertainties around future life expectancy;

• Courts Act 2003 gave the power for the courts to impose a PPO. Prior to Courts Act 2003 a claim could only be settled via a structured settlement if both parties agreed;

• Thompstone v Thameside NHS trust, appeal December 2008 – Appropriate to link escalation to ASHE 6115 (care assistants and home carers’ salaries) rather than RPI.
Discount rate change from 2.5% to -0.75%

First change since 2001!

February 27th 2017 - Lord Chancellor and Justice Secretary Liz Truss said:

• The law is absolutely clear – as Lord Chancellor, I must make sure the right rate is set to compensate claimants;
• I am clear this is the only legally acceptable rate I can set.

Four key pledges made to the London Stock Exchange:

• Ensuring the NHS Litigation Authority has appropriate funding to cover changes to hospitals’ clinical negligence costs;
• DoH to work closely with GPs to ensure appropriate funding;
• Consultation within weeks whether there is a fairer or better framework;
• Chancellor Philip Hammond to meet with insurance representatives.
Consultation - How the discount rate should be set

Consultation ran from 30 March 2017 to 11 May 2017 (135 responses received)

• What principles should guide how the rate is set?
• How often should the rate be set?
• Who should set the discount rate?

Follow-up analysis and discussion (will the discount rate be between 0% and 1%?):

• July 2017 – Personal Injury Discount Rate Analysis by GAD (requested by the MoJ);
  – Considered two investment strategies at -0.75% discount rate and both gave over-compensation at the median;

• The Justice Select Committee asked about an Impact Assessment based on the Government’s “assessment” that the discount rate would be between “0% and 1%”. The Government replied it did not consider it to be appropriate to speculate on the outcome of the first review of the rate under the new law
The Civil Liability Act, 2018

Changes under the Civil Liability Act (which received Royal Assent on 20th December 2018)

- Discount rate set by reference to a low risk diversified portfolio of investments rather than very low risk investments as at present;

- to be reviewed promptly after the legislation comes into force (i.e. by 5 August 2019) and, thereafter, at least every five years;

- to be set by the Lord Chancellor following consultation on the first review with the Government Actuary and HM Treasury; and, on the second and subsequent reviews, with an independent expert panel chaired by the Government Actuary, and, as at present, HM Treasury.
Announcement of the first review of the personal injury discount rate, March 2019

Announcement by Lord Chancellor David Gauke MP

- Highly successful barrister with a wide range of clients including Robert Maxwell and Bernie Corfield;
- He gained his knighthood by chairing and raising the profile of the Criminal Injuries Compensation Board (1975-89), a government department of 600;
- In 1982 headed a working party that developed the actuarial tables to quantify damages in fatal accident and personal injuries cases – “the Ogden tables”.

Wells v Wells, 1998, Appeal to the House of Lords

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- Court of appeal had used a discount rate of 4.5% (original court used 2.5%)
- The House of Lords appeal was successful – the injured plain
Technical Memorandum by the Government Actuary’s Department (GAD)

- Prepared in advance of the discount rate review announcement to set out the method and assumptions that will be used;

Method, Assumptions, Outputs and Sensitivities

- Method – Stochastic modelling of claimant outcomes (are funds sufficient?)
- Assumptions – 3 main sets of assumptions that vary within the model:
  - How the investment portfolios are constructed;
  - The claimant and the profile of damages that they receive; and
  - Economic and financial assumptions.
- Distributions of claimant outcomes on various bases + sensitivity tests;
- Adjusted for tax and expenses in the light of Call for Evidence responses.
GAD Technical Memorandum, Asset Returns

Median asset class return simulations (in excess of RPI) – currently 2017 ESG

<table>
<thead>
<tr>
<th>Median money weighted real return</th>
<th>5 years</th>
<th>10 years</th>
<th>15 years</th>
<th>20 years</th>
<th>30 years</th>
<th>50 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nominal gilts</td>
<td>-2.1%</td>
<td>-2.1%</td>
<td>-1.7%</td>
<td>-1.4%</td>
<td>-1.0%</td>
<td>-0.4%</td>
</tr>
<tr>
<td>Index-linked gilts</td>
<td>-4.2%</td>
<td>-5.8%</td>
<td>-5.2%</td>
<td>-4.4%</td>
<td>-3.3%</td>
<td>-2.1%</td>
</tr>
<tr>
<td>Investment grade credit</td>
<td>-1.3%</td>
<td>-1.0%</td>
<td>-0.7%</td>
<td>-0.4%</td>
<td>0.1%</td>
<td>0.6%</td>
</tr>
<tr>
<td>UK equities</td>
<td>1.0%</td>
<td>1.9%</td>
<td>2.3%</td>
<td>2.4%</td>
<td>2.5%</td>
<td>2.5%</td>
</tr>
<tr>
<td>Overseas equities</td>
<td>1.5%</td>
<td>2.3%</td>
<td>2.7%</td>
<td>2.4%</td>
<td>2.5%</td>
<td>2.5%</td>
</tr>
<tr>
<td>Cash</td>
<td>-1.9%</td>
<td>-1.6%</td>
<td>-1.4%</td>
<td>-1.3%</td>
<td>-1.0%</td>
<td>-0.6%</td>
</tr>
</tbody>
</table>

Legislation assumes damages are invested using an approach that involves:

i) More risk than a very low level of risk, but
ii) Less risk than would ordinarily be accepted by a prudent and properly advised individual who has different financial aims

25 April 2019
Call for Evidence, 6 Dec 2018 – 30 Jan 2019

Invites consultees to provide evidence on the following:

- Investments available to claimants;
- Investment advice provided to claimants;
- Investments made by claimants;
- Taxation;
- Inflation
- Investment management costs;
- Model investment portfolios;
- Other considerations.

<table>
<thead>
<tr>
<th>Asset class</th>
<th>Portfolio (i)</th>
<th>Portfolio (ii)</th>
<th>Portfolio (iii)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cash or equivalents</td>
<td>12.5%</td>
<td>10%</td>
<td>5%</td>
</tr>
<tr>
<td>Gilts (conventional)</td>
<td>37.5%</td>
<td>20%</td>
<td>7.5%</td>
</tr>
<tr>
<td>UK equities</td>
<td>10%</td>
<td>12.5%</td>
<td>30%</td>
</tr>
<tr>
<td>Overseas equities</td>
<td>20%</td>
<td>15%</td>
<td>22.5%</td>
</tr>
<tr>
<td>Corporate bonds</td>
<td>7.5%</td>
<td>20%</td>
<td>17.5%</td>
</tr>
<tr>
<td>Property</td>
<td>0%</td>
<td>5%</td>
<td>5%</td>
</tr>
<tr>
<td>Other types</td>
<td>12.5%</td>
<td>17.5%</td>
<td>12.5%</td>
</tr>
</tbody>
</table>

Above: Illustrative low-risk investment portfolios for comment
What does this mean for PPOs?

PPO Propensity trend

• **To be completed** – Awaiting confirmation on consistency with others in PPO working party (who are speaking at the afternoon workshop);

Survey at GIRO 2018
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