motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
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Amjad v UK Insurance Limited

The claimant, a taxi driver, was involved in a road traffic accident for which he brought a claim for damages for personal injuries, recovery and storage charges, and for the cost of hiring a replacement vehicle from a credit hire company (CHC). The CHC charged a much higher rate than the basic higher rate, with the eventual bill totalling around £51,600. The claimant averred that he was impecunious at the time of hire and argued that the CHC charges were justified.

At first instance, the judge struck out the impecuniosity claim for breach of an unless order for disclosure of income on the basis that the claimant's accounts and tax returns were insufficient. The claimant was awarded £10,000 for the total claim. The defendant had made a Part 36 offer for £15,700, which the claimant had failed to beat. As a result, the first instance judge ordered the claimant to pay the defendant's costs from expiry of the offer on the standard basis.

Furthermore, under CPR.44.16(2), the defendant was granted permission to enforce the costs against the claimant up to a maximum of £15,000, which was £5,000 more than the damages awarded and, therefore, above the QOCS cap. The judge's reasoning was that the largest part of the claim had been for credit hire, meaning that it was a claim made for the financial benefit of a person other than the claimant, and the gateway to lifting the QOCS cap under CPR.44.16(2)(a) applied. The judge also held that it was a claim "other than a claim to which this section applies" within the CPR.44.16(2)(b) gateway. The claimant appealed.

Mr Justice Ritchie overturned the decision to lift the QOCS cap, stating that the first instance judge, having found that the third-party exception under CPR 44.16(2)(a) applied, failed to consider making a non-party costs order before leaving the claimant liable for the defendant's costs. Mr Justice Ritchie also held that the case would not have constituted a 'mixed claim' so as to justify lifting under CPR 44.16(2)(b) and, in any event, the factors making such order 'just' were not made out. Mr Justice Ritchie was also critical of the decision to strike out the impecuniosity pleading, stating that disclosure of the accounts and tax returns submitted to the Inland Revenue were the best evidence of the claimant's income and that it was unfair on the claimant to strike out the claim on this basis. Mr Justice Ritchie also expressed concern about the use of the unless order when there had been no prior breach of the rules.

Armstead v Royal & Sun Alliance Insurance Company Limited

The claimant was involved in a non-fault accident in 2015 and, as a result, hired a Mini on credit terms from Helphire Limited. When driving in Helphire's vehicle, the claimant was involved in a further accident with the defendant's insured and the hire car was damaged. Liability for the accident was subsequently admitted by the defendant. The claimant was able to continue driving the Mini, but it had to be repaired once she returned it at the end of her hire period. For the 12 days during which the car was being repaired, it was unavailable for hire by Helphire.

The rental agreement between Helphire Limited and the claimant included a clause which stated that the claimant would pay on demand the full contractual rate, for up to a maximum of 30 days, in respect of Helphire's loss of use for each calendar day the vehicle was unavailable to be hired. This sum amounted to £1,560. The claimant claimed this sum, along with the cost of repairs, from the defendant as damages for the negligence of its insured driver. The defendant admitted liability for the cost of repairs, but disputed the claim for the sum payable to Helphire. The defendant argued that it was either pure economic loss, or too remote, or outside the scope of the driver's duty of care, or not a reasonable estimate of Helphire's loss of use.

After the point was successfully defended in the County Court and at the Court of Appeal, the Supreme Court granted permission to hear the claimant's appeal. The Supreme Court held that the claimant was entitled to damages for the clause in the hire agreement, upholding that a claimant in the tort of negligence can recover, by way of damages, the amount of any contractual liability that a claimant owes to a third party when it is incurred as a result of the defendant's wrongful act. The main issue was whether the Court of Appeal was entitled to conclude that the clause sum was too remote to be recoverable on the ground that it was not a reasonable pre-estimate of the loss.

The Supreme Court found that in order for a contractual liability, such as this clause, to fall within the reasonably foreseeable type of loss it is necessary for a claimant's contractual liability to reflect the reasonable loss of use of the hire company, which can be a pre-estimate instead of the actual loss, which may be difficult to calculate in advance. Ultimately, the Supreme Court found that agreeing the damages for Helphire's loss of use, by taking the contractual rate that the claimant had already agreed, was a reasonable way of pre-estimating that loss.

AXA Insurance UK Plc v Kryeziu & Others

The first respondent alleged that his car had been hit by a van driven by a person insured by the appellate insurance company. The second to fifth respondents had alleged that they had been passengers in the car. All alleged that they had suffered personal injuries in the collision. The appellant paid the claims, but subsequently discovered that the first respondent and the insured were 'Facebook friends'. The appellant had come to believe that, in fact, there had been no genuine accident and the evidence suggesting there was a prior connection between the defendants was to form part of the insurer's case in deceit and conspiracy to recover insurance monies the appellant had paid out.

The appellant waited until the respondents had committed themselves to a particular version of events in their witness statements which denied a prior connection to each other. The appellant then sought permission, after the exchange of evidence, to amend its case to plead the additional evidence as to the connection between the respondents. The first respondent applied to strike out the parts of the appellant's statement exhibiting the Facebook material on the grounds of non-disclosure. The second to fifth respondents reached agreement with the appellant to repay sums paid out in return for the appellant agreeing not to take further action against them.

The trial judge refused to permit the appellant's amendments and refused permission to rely on the Facebook evidence, as the document demonstrating the Facebook friendship was disclosable under the court's order for standard disclosure and not disclosing it was a knowing and deliberate breach of the court's disclosure order. The claim was then struck out, as the facts relied on leading to a suspicion of fraud had not been properly pleaded. The judge also granted a declaration for the second to fifth respondents that the appellant was estopped from seeking adverse findings against them, as this would constitute 'taking further action', contrary to their agreement. The appellant appealed. Among other matters, the appellant argued that, in a Particulars of Claim, it was not necessary to plead the facts relied on to establish fraud, provided that the legal ingredients of the tort had been set out.

The High Court held the appellant ought to have set out the alleged Facebook friendship between the individuals involved in the accident because their prior connection was a key part of the evidence from which the appellant had asked the court to infer the road traffic accident was not genuine. Although the High Court was critical of the appellant's breach of the court order, the High Court decided that it was in the interests of justice to grant relief from sanctions and to allow the appellant to amend its case to plead the evidence it had previously withheld. Although the appellant had committed a serious and significant breach of a court order, refusing to allow the amendment would deprive the appellant of possibly the key part of the its case. There would be no significant prejudice in requiring the respondents to deal with the additional piece of evidence. As such, the High Court decided that refusing to allow the appellant to seek exemplary damages was a suitable way to mark the breach.

Last Bus Limited (t/a Dublin Coach) v Dawsongroup Bus and Coach Limited

This case involved a transaction where the claimant had purchased 5 Mercedes Benz coaches that were financed by Dawsongroup in a series of hire purchase agreements that included an exclusion clause which excluded the statutory term as to fitness implied by Section 10(2) Supply of Goods (Implied Terms) Act 1973. The claimant began proceedings seeking damages on the basis that the coaches were not of satisfactory quality. The defendant applied for summary judgment, relying on the exclusion clause. In holding the term to be reasonable, the High Court considered that there was no inequality of bargaining power between the parties and there was no real prospect of the claimant resisting the defendant's argument that the exclusion clause was reasonable under the Unfair Contract Terms Act 1977 s.11. The claimant appealed against the summary dismissal of its claim.

The case concerned the extent to which the exclusion clause satisfied the requirement of reasonableness under section 6(1A)(b) and section 11 of the Unfair Contract Terms Act 1977 ("UCTA").

The Court of Appeal ruled that the judge in the High Court was wrong to hold that the parties were of equal bargaining position where the claimant was trading on the defendant's standard terms and there were no materially different terms available in the market.

The Court of Appeal confirmed that UCTA is not limited in application to consumer contracts and applies with full force (subject to the exceptions in Schedule 1) to commercial contracts where one party is dealing on the other's standard terms or where the contract is one of hire purchase. The Court of Appeal held that the clause was prima facie unenforceable, contrary to the High Court judge's ruling.

Hassam & Another v Rabot & Another

This matter concerned two claims (*Rabot v Hassam* and *Briggs v Laditan*) originating in the County Court at Birkenhead arising out of road traffic accidents which occurred in May 2021. Each claimant suffered both whiplash injuries and other non-whiplash injuries for which liability and causation was admitted by the respective defendants. Consideration had to be given as to the proper approach to assessing damages payable for Pain, Suffering and Loss of Amenity where a claimant in a road traffic accident case had suffered both a whiplash injury, for which the Civil Liability Act 2018 s.3 limited the damages payable by reference to a tariff set out in the Whiplash Injury Regulations 2021 reg.2, and non-whiplash injury, for which damages were not so limited.

At first instance, District Judge Hennessey added the tariff amount to the PSLA for non-whiplash injuries and then applied a reduction to avoid over-compensation for concurrently caused PSLA. The defendants appealed and, by a majority decision, the Court of Appeal upheld the District Judge's decision. At the point of the defendants' appeal, the claimants cross-appealed to the Supreme Court.

The defendants argued that the correct approach was that one should first take the tariff amount laid down in the Regulations and then add the amount of common law damages for PSLA for the non-whiplash injury, but only if the claimant established that the non-whiplash injury had caused different PSLA. As their primary case, the claimants argued that one should add together the tariff amount for the whiplash injury and the amount of common law damages for PSLA for the non-whiplash injury without any consideration of whether there should be a deduction to avoid double recovery for the same loss. As a secondary case, the claimants argued that one should first add together the tariff amount for the whiplash injury and the common law damages for PSLA for the non-whiplash injury, and then stand back to consider whether to make a deduction to reflect any overlap between the amounts. Any deduction had to be made from the damages for the non-whiplash injury, but the deduction should not reduce the overall amount of damages below the amount that would be awarded for the non-whiplash injury alone.

The Supreme Court unanimously dismissed the appeals and cross-appeals, but confirmed the correct approach was the claimants' secondary case. The District Judge was right to add the tariff amount to the PSLA for non-whiplash injuries and then apply a reduction to avoid over-compensation for concurrently caused PSLA. This approach is correct because the statutory intent of the 2018 Act sought to reduce damages for whiplash injuries and not other types of injury.

The Ministry of Justice launches the call for evidence in relation to the second review of the Personal Injury Discount Rate

"The underlying principle of personal injury claims is that when damages are paid they should, as far as possible, put the claimant in the same position as they would have been in if the accident had not happened – no more and no less …"

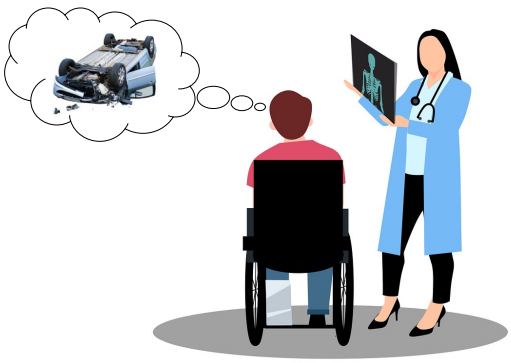
Lord Christopher Bellamy KC,
Parliamentary Under Secretary of State for Justice,
foreword to the Ministry of Justice's Call for Evidence

On 16 January 2024, the Ministry of Justice launched a call for evidence in relation to the long awaited second review of the Personal Injury Discount Rate, which now needs to be commenced by 15 July 2024.

Responses to this call for evidence were to be submitted to the Ministry of Justice by 9 April 2024 – within a 12 week turnaround period. Following this, a summary of responses from the various interested parties (see below) will be published before the Lord Chancellor decides upon any action or amendment in relation to the Personal Injury Discount Rate (PIDR).

The call for evidence was encapsulated in a 43 page document produced by the Ministry of Justice which provides background information in regard to a range of issues and then questions posed to interested parties. Detailed consideration of this document is beyond the scope of a highlighting article such as this and, in any event, any such article is, realistically, no substitute for considering the document itself, which is of considerable interest. The issues to be grappled with, by all, are far from easy or straightforward. This is an unenviable task for all concerned, whichever side of the perennial claimant/ defendant divide within the market they reside.

Practitioners in the field of personal injury claims are constantly alive to the relevant PIDR since it is one of the most important, if not the most important, touchstones by which personal injury multipliers are arrived upon by reference to the Ogden Tables. Thus, the relevant PIDR at any given moment is of great importance to all parties in the personal injury market, but, obviously, its greatest significance is in the context of catastrophic claims litigation and, from the defendant perspective, the setting of appropriate reserves by both insurers and reinsurers regarding various heads of loss intrinsic to such claims.



The PIDR is now periodically reviewed pursuant to the mechanism set out in Part 2 of the Civil Liability Act 2018.

Historically, readers will be aware that the PIDR remained static at +2.5% for the period 2001 to 2017, when it was changed to -0.75%, before being increased to -0.25% following the first review under the new 2018 Act mechanism, in the period March to July 2019, which followed a call for evidence from the Ministry of Justice in the period December 2018 to January 2019. In this second review pursuant to the Act, for the first time, an independent expert panel will provide advice to the Lord Chancellor ahead of any new rate(s) being set. As to the significance of the term “rate(s)” (plural), see later comments. The independent expert panel will be made up of experts with experience in actuarial matters, the management of investments, economists and in consumer matters as related to investments.

As above, the review must commence by 15 July 2024 and, judging by previous performance, the review period generally lasts circa 3 to 4 months. It remains to be seen if the involvement of an independent panel of experts reduces or extends that period. However, in essence, by year end, a review of the PIDR rate should likely have been undertaken and a new rate (or rates) potentially implemented. Thus, for those involved in the personal injury market, the call for evidence represented the “starting pistol” to a period of explicit uncertainty and possible change, necessitating a possible review of reserves in some detail by year end.

Many readers will be aware of the impact of changes to the PIDR and, therefore, the importance of the outcome of this process.

However, even in that context it is perhaps worth reiterating the text of paragraphs 11 and 12 from the call for evidence document:

"The PIDR is intended to reflect the real rate of return that a recipient of relevant damages could reasonably expect to receive if they invested their award. It reflects the expected nominal investment returns, adjusted for the expected future rate of inflation applied to claimants' damages and reflects the effects of expenses and taxation."

"A lower PIDR means a lower real rate of return is expected on the claimants' investments and therefore, all other things being equal, a higher initial lump sum is required to meet the claimants' needs – and vice versa."

In a wider context, changes to the PIDR will impact offers (CPR Part 36 or otherwise) and settlement strategies in general, together with Schedules and Counter-Schedules of Loss, at trial and before. The ripples from this review process will, therefore, spread wide in the coming months. In the longer term, changes to damages payments and reserves inevitably impact the setting of policy premiums for the market.

The call for evidence takes the form of a range of questions on various topics which can be summarised as follows:

- The size and length of personal injury awards.
- The differing heads of loss and the inflationary increases applied to the same.
- Shape of damages.
- Mortality experience.
- Claimant investment experiences, in particular:
  - Typical investment strategies employed by claimants and factors influencing variations from those strategies for different claimant groups.
  - How investment strategies change or are expected to change over 'claimant time horizons' and how they manage risk inherent in investment strategies over time.
- Expenses and tax payable by claimants on their investments.
- Changes in general since the 2018 call for evidence.
- Impact and practicalities of adopting a dual/multiple PIDR driven by duration of award or by heads of loss.
- Context around which lump sum payments are awarded, including the factors which influence the award of lump sum payments rather than Periodical Payments Orders.

A full impact assessment is (explicitly) to be conducted later, once the review itself has been concluded, and to support the Lord Chancellor's decision re the PIDR changes.

Stakeholders explicitly canvassed in relation to the PIDR call for evidence are predictable and include:

- Major insurers (both motor and in other lines of business).
- The Association of British Insurers.
- The Association of Personal Injury Lawyers (APIL).
- The Forum of Insurance Lawyers (FOIL).
- The Forum of Complex Injury Solicitors.
- The Bar Council.
- Law Firms (on both sides of the claimant/ defendant divide) involved in personal injury litigation.

As above, it is in the context of complex and life changing injury that the impact of this debate and fluctuations in the PIDR becomes most impactful. Changes to the discount rate, and, therefore, multipliers to be applied in each case, particularly regarding lifetime or near lifetime losses, can have a massive impact on damages returns (on the claimant side of the debate) and/or reserves (on the defendant side of the debate). Moreover, issues such as investor behaviour in the context of this universe will always attain a degree of controversy.

Historically, the view from the claimant side has been that seriously injured claimants are naturally cautious in their investment strategy; they have to be since their damages represent their single and precious source of income for life.

However, on the defendant side, concern has been expressed that investment advice provided to claimants, as part of the sophisticated market which has grown up to support seriously injured claimants in the personal injury sphere, is now very mature and proactive, undermining the view that personal injury damages are simply "put in the bank" and nothing more sophisticated or lucrative is done with them. It is the Lord Chancellor's unenviable task to seek to sail a straight course between these opposing views. Thus, the call for evidence, from relevant stakeholders is a vital part of that process.

Inflation is an obvious aspect of the consultation process which is illustrative of this multifactorial situation. The 2018 review of the PIDR assumed inflation would be CPI +1% on average. It is clearly difficult, in the context of the present cost of living crisis (so called), to see that view as persisting. One might suggest inflation has cooled, or is certainly showing signs of cooling recently, but the sense that inflation in the G20 could be regarded as completely stable for long historical periods has been exploded by recent world events and this is, obviously, a factor to be considered. The other side of the same coin, so to speak, is the need, within the call for evidence process, to consider claimant investment behaviours. There are explicit questions within the document around investment strategies in the context of higher rates of return due to higher inflation generally.

Another area of particular interest is the series of questions around dual or multiple PIDRs. This approach was at least considered as part of the first review of the PIDR, in government actuarial advice, but not actually taken up by the then Lord Chancellor. At that stage there was a commitment to further consider the issue of dual PIDRs as part of the next review process. Thus, this aspect is now under scrutiny once again and it will be interesting to see if dual PIDRs (like the so called 'Ontario model' – considered in 2019) will be further considered in 2024.

Finally, in terms of this article, the call for evidence also considered the ongoing debate around periodical payments and their continued perceived underrepresentation in personal injury settlements. Efforts, once again, to understand this underrepresentation are suitably engaged.

The main purpose of this article is to highlight to readers that this process is formally underway: the 'starting pistol' has now been fired. There has been a great deal of expectation and informal speculation as to when the process of the inevitable review of the PIDR would commence. It has now commenced and the review itself will need to begin by 15 July 2024.

Those defendants and insurers with significant interest in the catastrophic claims market will have been awaiting the firing of this starting pistol for some time and have now moved long planned response mechanisms into action in terms of engaging with the consultation process. In a similar manner, on the claimant side, bodies like APIL and PIBA have engaged a similar process. The world in 2019 suddenly seems a very long way away from the world we all inhabit now. The impact of a pandemic, the realities of Brexit, the first war in Europe in decades and now significant instability in the Middle East all conspire to create a climate of uncertainty in the context of this important touchstone regarding claims assessment in personal injury litigation.

Against that background it will be very interesting to see how this consultation process develops in the coming months.

If there are any topics you would like us to examine, or if you would like to comment on anything in this bulletin, please email the editor:

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