Bar Council response to the Ministry of Justice "Setting the Personal Injury Discount Rate" call for evidence

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation paper entitled "Setting the Personal Injury Discount Rate: A Call for Evidence."[1]

2. The Bar Council represents nearly 18,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

The Bar Council endorses the submission of the Personal Injuries Bar Association (PIBA) attached.

Bar Council
5 April 2024

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[1] https://www.gov.uk/government/calls-for-evidence/setting-the-personal-injury-discount-rate

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Introduction

PIBA is a specialist Bar association with about 1,700 members, who undertake the full range of personal injury work for claimants and defendants. PIBA is neutral as between claimant and defendant interests: members represent both sides.

PIBA does not have independent data upon which to base our answers and our commitment to neutrality prevents us from searching for or commissioning evidence which might support a case for or against any particular position. However, the members of the Association are among the most experienced in dealing with the practical effects of discount rates on damages awards particularly in England and Wales but also, to a lesser extent, abroad. The specialist barristers who make up PIBA's membership advise on the quantum of personal injury claims on a very regular basis. They are also highly experienced in bringing PI claims to a resolution, most often through negotiated settlement but also at trial. They are very well placed to comment on how any given reform in this area is likely to affect the system for ensuring the proper compensation of claimants.

In these circumstances, PIBA has confined its response to this Call for Evidence to only six questions, being those with which it considers it is well placed to assist. PIBA has answered questions 4, 22, 25, 28, 29 and 30.

General Observations

As a general point, PIBA submits that any system of personal injury damages must adhere to the principle of 100% compensation (sufficient compensation to provide full compensation, no more and no less), although there must be a sense of realism as to the extent to which that is truly achievable. It must also be fair, predictable, and workable. The 100% principle is the primary principle which ensures damages are fair and predictable.

The current approach to the discount rate is workable. PIBA's guiding principle when responding to this consultation is that any change to the application of discount rate(s) in the personal injury system must neither undermine the 100% principle nor make the system unworkable.

There is no clamour within PIBA that the current approach to the discount rate is unfair. All systems have winners and losers as no system is perfect. PIBA understands the main driver behind consideration of dual rates to be the perceived inadequacy of treating all claimants the same in respect to discount rates: e.g. younger claimants who require compensatory damages for life are more able to ride out the economic cycle (premised as being of 5 to 10 years in duration) but older claimants less so. Whilst having an aim of better meeting the 100% principle by taking the individual claimant's circumstances into account to a greater extent is laudable, it may also give rise to new winners and losers. For example, those at the margins may be moved into a discount rate category incorrectly; tapering will minimise but not eliminate this issue. It is also inevitable that with greater complexity, as a dual or multiple discount rate would be over a single discount rate, there will be greater recourse to ambiguity and therefore a higher chance of contested litigation, which is undesirable from both the claimant and defendant perspective (as stress, delay and costs increase). There are also issues as to predictability of outcome.

PIBA is not opposed to change but does consider it imperative that change has a demonstrable benefit and that the cost (undesirable consequences) of implementing any change does not outweigh the real / anticipated benefit.

Question 4

Are there any cohorts of 'alternative representative claimants' that you believe have characteristics which are materially different from the representative claimant defined above, and who should therefore be considered separately when modelling claimant outcomes? Please define the characteristics of these cohort(s).

The cohorts of "alternative representative claimants" for whom separate modelling might be necessary include:

(a) claimants with very short life expectancies (either for medical reasons or because they are in their old age at the time of the assessment). Such claimants will probably invest their damages differently to the "representative claimant". Fatal mesothelioma claims are an example of a substantial cohort with a typically short life-expectancy; the claimants in such cases are often elderly.

(b) claimants with very long life expectancies, for example a claimant injured in utero or in infancy but who is otherwise likely to have a normal life expectancy. Claimants with very long periods of investment will invest their damages differently to the "representative claimant" in order to ensure that they still have funds available at the end of their long lifespan.

(c) claimants who cannot recover certain significant heads of loss, the investment of which would be assumed for the "representative claimant", for example a claimant beyond retirement age, who will not be investing damages for lost earnings, or a claimant with a sizeable loss of earnings but no care needs.

(d) claimants with a significant shortfall in their award of damages by reason of a sizeable deduction for contributory negligence. Such claimants are forced to "stretch" their award to cover the cost of care etc. The investment of damages in this scenario is likely to be different than for the "representative claimant".

(e) Claimants with a significant underlying condition that pre-exists and is unrelated to the negligence that forms the basis of the claim – such as negligent dental treatment to a Claimant with learning disabilities who already lives in sheltered accommodation.

Question 22

How much additional complexity or difficulty would implementing a dual rate by duration approach add to the litigation process (please provide evidence to quantify this either by time to settlement, additional legal costs and/or any other relevant factors)?

PIBA cannot and does not collect data as a matter of routine and can only speak from its collective experience as a body of experienced personal injury barristers.

PIBA refers to the response provided in respect of this issue as provided in the MOJ consultation, *"Personal Injury Discount Rate, Exploring the option of a dual/multiple rate"* and makes the following points:

- Multiple rates are likely to impose a substantial layer of complexity on claims, both for the legal advisers but also for claimants in seeking to understand their position. Such complexity will also impact not only pre-settlement / pre-judgment financial planning but also ongoing financial planning after settlement / judgment, which may lead to difficulty, lack of certainty and/or a continuing reliance on financial and legal professionals.

- The disadvantages of different rates for different periods, leaving aside issues relating to the selection of the rate, are practical. Can practitioners easily find the appropriate multiplier and how predictable will the rate be on the other side of a review?

- It is imperative that litigants can find the applicable multiplier easily, without the need for algorithms or expert input. §§66 to 68 of the Call for Evidence, *"Personal Injury Discount Rate, Exploring the option of a dual/multiple rate"* referred to 3 different approaches to calculating the multiplier where there are different rates for different periods, with the 'blended' approach being the approach favoured by the GAD. It is not immediately clear how one goes about finding the multiplier for a loss which will endure beyond the switchover point, where the cashflow for each subsequent year is discounted twice, once for the short-term period (at a lower rate) and again for each year after the switchover (at the long-term rate).

- It is unknown how frequently each of the rates will be subject to review. At present, a review of the single rate takes place every 5 years. There must be an argument for more regular reviews if

there is to be a short-term rate (as there is in Ontario). The more rates there are, the more the parties to personal injury litigation will have to try to predict in the period leading up to a rate review. The less predictable the rates which will apply at trial, the harder it will be to settle claims. Further, as the rate review approaches, there is a greater incentive on the party which believes a change in the rate will be to their advantage to behave tactically in fixing the date for the joint settlement meetings, the party that perceives it will be a loser may stall – this very notion of multiple rates susceptible to regular review will complicate the flow of litigation.

- A further problem arises in respect of settlement approval around the time of reviews of the discount rate. Settlements reached on behalf of children or protected parties are not binding until the court has approved them and either party is at liberty to withdraw from the settlement before that time. If a settlement is reached at a time when more than one discount rate relevant to the settlement is due to change, the risk of a party withdrawing from the settlement before it is approved is likely to be greater.

- Similarly, applications for interim payments in high-value personal injury claims require the court to forecast the likely value of certain heads of loss during the litigation in order to ensure that such a payment does not risk exceeding a reasonable proportion of the likely amount of the final judgment. This task would be much more difficult if more than one discount rate relevant to the value of the claim is likely to change before the end of the litigation.

- This difficulty in being able to predict what DR will apply when the litigation reaches trial would be even more problematic if there is any possibility that the discount rates might revert to a single rate at the next review.

- There is also a risk of satellite litigation as to how the different rates apply in unusual circumstances. It is not difficult to imagine that scenarios may arise where the application of the methodology at the switchover point is controversial, with potentially sizeable sums in damages at stake.

Question 25

How much additional complexity or difficulty would this approach add to the litigation process, and would this be greater/lesser/about the same as if a dual rate by duration were implemented? Please provide evidence to quantify this either by time to settlement, additional legal costs and/or any other relevant factors.

PIBA refers to the response provided in respect of this issue as provided in the MOJ consultation, *"Personal Injury Discount Rate, Exploring the option of a dual/multiple rate"* and makes the following points:

- The problem with multiple rates for different heads of loss, aside from the difficulty in settling on an appropriate rate for each, will be the significant uncertainty which this will introduce when trying to predict the outcome at trial during settlement discussions. How could a party predict what DR will apply to each head of loss on the other side of a rate review?

- Multiple rates are also likely to impose a substantial layer of complexity on claims, both for the legal advisers but also for claimants in seeking to understand their position. Such complexity will also impact not only pre-settlement / pre-judgment financial planning but also ongoing financial planning after settlement / judgment, which may lead to difficulty, lack of certainty and/or a continuing reliance on financial and legal professionals.

- Further, unless there is real clarity, there are likely to be arguments over the scope of each head of loss for which a different DR applies. Does future care include gratuitous care, agency care and directly employed care? Will the assumptions for future earnings inflation apply equally to high earners and low earners, employed and self-employed, those with good prospects of promotion and those without?

- In the final analysis, a single rate based on an assumption for damages inflation which is a compromise across all heads of loss (which is the current approach) may actually be fairer and more workable than trying to apply different DRs for each head of loss. The same point may be made a different way: given the lack of knowledge as to economic performance beyond the short term, there is a real doubt as to whether a dual or multiple discount rate system will bring

outcomes closer to the 100% compensation principle – whether at all and/or without a significant compromise in terms of fairness, predictability and/or workability.

- It is unknown how frequently each of the rates will be subject to review. At present, a review of the single rate takes place every 5 years. There must be an argument for more regular reviews if different rates will apply to different heads of loss (where the data underpinning the assumptions for each rate may change more regularly). The more rates there are, the more the parties to personal injury litigation will have to try to predict in the period leading up to a rate review. The less predictable the rates which will apply at trial, the harder it will be to settle claims. Further, as the rate review approaches, there is a greater incentive on the parties to behave tactically in fixing the date for the joint settlement meetings and the like.

- A further problem arises in respect of settlement approval around the time of reviews of the discount rate. Settlements reached on behalf of children or protected parties are not binding until the court has approved them and either party is at liberty to withdraw from the settlement before that time. If a settlement is reached at a time when more than one discount rate relevant to the settlement is due to change, the risk of a party withdrawing from the settlement before it is approved is likely to be greater.

- Similarly, applications for interim payments in high-value personal injury claims require the court to forecast the likely value of certain heads of loss during the litigation in order to ensure that such a payment does not risk exceeding a reasonable proportion of the likely amount of the final judgment. This task would be much more difficult if more than one discount rate relevant to the value of the claim is likely to change before the end of the litigation.

- This difficulty in being able to predict what DR will apply when the litigation reaches trial would be even more problematic if there is any possibility that the discount rates might revert to a single rate at the next review.

- In the particular case of a system in which different discount rates might be applicable to different heads of loss, there may well be uncertainty as to how specific items are to be categorised in order to identify which DR applies.

Question 28

Please provide evidence and/or data to support what heads of loss should be separately identified in such a model.

PIBA refers to the response provided in respect of this issue as provided in the MOJ consultation, *"Personal Injury Discount Rate, Exploring the option of a dual/multiple rate"* and makes the following points:

- PIBA does not have "evidence and/or data" for this, but we have our collective and considerable experience of PI litigation to offer.

- PIBA would favour the smallest number of applicable rates.

- It is uncontroversial that different heads of loss are subject to different rates of inflation. In the context of the indexation of PPOs and this was explored in some detail by the Privy Council in *Helmot v Simon*. Thus:

    - the PC in *Helmot* applied one rate for "earnings related losses comprising the [claimant's] loss of earnings and the cost of employing his carers" and a different rate for the "non-earnings related elements of the future loss". Thus, the same rate was used for future loss of earnings as for future care.
    - ASHE 6115 has been routinely used for the indexation of PPOs for future commercial care since *Thompstone*.
    - Lloyd-Jones J in *Sarwar v Ali* used the ASHE aggregate for male full-time employees at the 90th percentile as the appropriate index for the PPO for future loss of earnings.
    - Foskett J used ASHE 212 (for engineering professionals) for the PPO for future loss of earnings in *Robshaw*.
    - Foskett J used ASHE 222 for the PPO for therapies and RPI for the PPO for CoP/deputyship costs in *Robshaw*.
    - the parties in *Farrugia* agreed to use the Guideline Hourly Rates as the index for the PPO for deputyship costs.

- Future costs of care and case management could be subject to a different discount rate if the inflation data for this head of loss differed so significantly as to make a divergence justifiable.

- A separate rate for future loss of earnings would be difficult to define. A simple application of national average earnings would give rise to under- or over-compensation in many cases and may not sit well with the court's findings as to the individual claimant's likely future career path. The judges in *Robshaw* and *Sarwar* selected an index from ASHE for the PP for loss of earnings applicable to the individual claimant.

- If a bespoke discount rate were considered appropriate for loss of earnings PIBA would not be in favour of multiple discount rates for loss of earnings depending on the circumstances of employment/ self-employment.

- As with loss of earnings, there is too much variability with other heads of loss to make a bespoke discount rate any more suitable than a generic discount rate for all heads of loss.

- A further complication arises in respect of claims arising out of fatal accidents. Under the Fatal Accidents Act 1976, the dependents of those fatally injured are entitled to claim for their lost dependency on the Deceased. The award for damages in these circumstances is a single sum representing the lost dependency of all dependants. It is not clear how multipliers for different heads of loss would apply to the calculation of damages in fatal accident cases.

Question 29

How readily available are PPOs to claimants in practice and how does this vary by groups of claimants (additional data on groups that are less likely to have a PPO made readily available would be helpful)?

PIBA refers to the response provided in respect of this issue as provided in the MOJ consultation, *"Personal Injury Discount Rate, Exploring the option of a dual/multiple rate"* and makes the following points:

- It is the experience of PIBA that:

1. in clinical negligence claims against the NHS, it remains common for the parties to agree to a Periodical Payments Order;
2. in accident claims, however, it remains unusual for the parties to agree to a PPO.

Question 30

What factors influence the take up of lump sums versus PPOs? This could include the preferences and behaviours of one or more of the parties involved in the settlement process and associated litigation strategies.

PIBA refers to the response provided in respect of this issue as provided in the MOJ consultation, *"Personal Injury Discount Rate, Exploring the option of a dual/multiple rate"* and makes the following points:

- There are several reasons why the parties less often agree to a PPO in accident claims.

- There are undoubtedly cases in which a claimant may not want a PPO. This may be because a lump sum would afford them greater flexibility or because their damages are discounted for contributory negligence or liability risk. Further, the low discount rate in recent years has made lump sum settlements more attractive to claimants.

- However, the main reason for a claim settling on a lump basis where a PPO would otherwise be viable is likely to be that the defendant's insurer is simply unwilling to offer it. It is common in PIBA's experience for defendants to refuse to settle on a PPO basis at a Joint Settlement Meeting, leaving the claimant with the option of either settling on a lump sum basis or pursuing the claim to trial. Most claimants in that situation would accept a lump sum settlement.

- The reasons for defendants' unwillingness to consider a PPO in many accident claims are probably:
    - commercial considerations related to the long-term financial commitment involved in a PPO;
    - the unavailability of excess loss reinsurance by which the defendant's insurer can spread the risks involved in a PPO;
    - the absence of a market through which life insurers might buy up PPOs from general insurers.

- It is also right to note that many Claimants dislike PPOs even if they could result in higher damages. Claimants predominantly wish litigation to end, to have a break and be able to rebuild their lives with whatever level of damages they obtain. A PPO requires a lifelong relationship with Insurers and the Defendant "by default". Emotionally it may feel as if the litigation never ends.

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Dated 28th March 2024