motoring news

Headlight

welcome

to 'Headlight', Dolmans Solicitors' motoring news bulletin.
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article

Personal Injury Discount Rate review: England and Wales – update

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Palmer v Timms

During the morning rush hour on a major road into London, Simon Palmer was filtering through slower traffic by undertaking. Meanwhile, another motorcyclist was overtaking the defendant's lorry. As Palmer passed the lorry, the defendant moved left, narrowing Palmer's space. Palmer's motorbike hit a camera on the lorry, causing him to lose control, fall and collide with a bollard. Sadly, Palmer died as a result of his injuries. The incident was recorded by multiple cameras. Experts determined that the lorry was moving at about 18 mph and Palmer at 25-26 mph. The defendant was acquitted of causing death by careless driving.

Palmer's widow (the claimant) claimed that the defendant deliberately or recklessly blocked Palmer or acted negligently by not checking if it was safe to move left. The defendant argued there was no evidence for these claims and that he had moved due to an oncoming van and the narrowing space for the other motorcyclist. He also suggested Palmer was significantly contributory negligent. The court dismissed the widow's main argument, finding no evidence of intentional obstruction and deeming it the least plausible explanation for the defendant's actions.

However, the court found that the defendant lacked credibility, his narrative of the events had developed over time and his account was not reliable. As such, the court found the defendant negligent for moving his vehicle to the left without ensuring it was safe. His claim that he had assessed the situation and deemed it safe was rejected. The court emphasised that he should have been aware of his surroundings, especially in a busy city environment where two-wheeled vehicles often pass on both sides. The defendant's failure to make a careful assessment and his inattentiveness, despite his experience as a professional driver, led to the accident. Had he checked his surroundings, the accident could have been avoided.

The court's decision on apportioning liability was based on evaluating the relative causative potency and blameworthiness of both parties. The defendant created a hazardous situation by not checking his surroundings in a busy city environment. Although Palmer had a responsibility to ensure his own safety, his decision to ride into a narrow space was influenced by the defendant's actions. The court found the defendant's blameworthiness significantly greater than Palmer's, but Palmer was still found one-third contributorily negligent for trusting the defendant to maintain his position on the road.

Tindall v Chief Constable of Thames Valley Police

In 2014, Mr Tindall was killed in a collision caused by another driver losing control on black ice. An hour earlier, another accident had occurred on the same road due to the same icy conditions.

In that first accident, Mr Kendall, who suffered minor injuries, warned other drivers about the ice until the police arrived and put up a 'Police Slow' sign. After the police cleared the scene and removed the sign, no further warnings were given. Mr Tindall's accident happened 25 minutes later. The appellant claimed that the police were negligent by removing Mr Kendall and the sign, arguing that they had a duty of care since they controlled the accident scene.

Initially, the judge denied the respondent's request to dismiss the claim, but the Court of Appeal later ruled in favour of the respondent, stating that the police had not worsened the situation and had no duty of care in this context. The appellant appealed to the Supreme Court, arguing that the police should have known that their actions prevented Mr Kendall from helping and, thus, had a duty to provide necessary assistance, extending liability to situations where control over a danger source was lost.

The Supreme Court dismissed the appeal and held that the danger had originated from a patch of black ice located some distance from the site of the fatal accident. It was not claimed that the police had taken any actions that could be seen as controlling this patch of ice, which was the source of the danger. Furthermore, to establish a duty of care, it must be shown that the respondent knew or should have known (i.e. it was reasonably foreseeable) that their actions would have a certain effect. In this case, there was no evidence that the police knew or should have known that Mr Kendall had been or was planning to warn other motorists about the ice hazard. Therefore, there was no reasonable basis to argue that the police owed a duty of care to Mr Tindall by making the situation worse by displacing Mr Kendall from the scene.

Senay v Muslane

This decision is similar in outcome to Reynolds v Chief Constable of Kent Police. Although the judgment has only recently been reported, it was handed down in May 2024, at which time the judge noted there was no clear and binding authority on the issue of whether dishonesty in a personal injury claim meant that the whole claim should be dismissed.

The claimant was a taxi driver who was involved in an accident with the defendant's vehicle. He made a claim for losses arising out of the damage to his vehicle and for damages for personal injury. The judge found that the claim for personal injury was fundamentally dishonest. The issue for the court to determine was whether the finding of fundamental dishonesty impacted the claimant's claim for damage to his vehicle.

The judge considered previous decisions (which were only available on barristers' websites and which indicated that there had been decisions on the issue going either way) and parliamentary material, in particular the parliamentary debates in relation to Section 57 CJCA 2015. The court held that the question was one of the construction of the words in Section 57, which states that it applies to "proceedings" on a claim for damages in respect of personal injury and defines that as the "primary claim".

It then states that where the court finds a claimant is entitled to damages in respect of the claim (which means damages for the primary claim), but that the claimant has also been fundamentally dishonest in relation to the primary claim or a related claim (so the personal injury claim or a claim related to it), the court must dismiss the primary claim (the personal injury claim), unless the claimant would suffer substantial injustice. The duty to dismiss includes the dismissal of any element of the primary claim (the personal injury claim) in respect of which the claimant has not been dishonest.

The court found it was notable that the provisions of Section 57 did not provide that parts of a claim, other than the primary claim (being the personal injury claim), must be dismissed. This is because the section defines the primary claim as the claim for damages for personal injury and then provides that it is the primary claim which is to be dismissed where fundamental dishonesty is found to be present. If any other meaning to the words of Section 57 were to be correct, the effect would be to abrogate the property rights of claimants whose vehicles were damaged in accidents caused by negligent defendants. Whilst the policy behind section 57 is self-evidently to penalise claimants who bring dishonest personal injury claims, the court found it would be expected that clear words would be used if parliament had intended to deprive claimants of their property rights as well as damages for personal injury.

The parliamentary material which was considered by the court made it clear that the intention of the legislature was that the dismissal of a claim consequential on a finding of fundamental dishonesty would apply to the personal injury claim and claims related to the personal injury only. That intention coincided with the judge's interpretation of the words of Section 57. It, therefore, followed that the claimant's claim for personal injury was dismissed, but his claims in respect of damage to his vehicle, its recovery and storage and for loss of use were not.

Butt v Gargula

Following a routine road traffic accident where it was alleged that one party changed lanes causing a collision, the defendant argued that there were no eyewitnesses.

After legal proceedings began, the claimant introduced evidence from a supposed 'independent' witness who claimed to have seen the accident and blamed the defendant. The claimant also responded to a Part 18 Request stating that he did not know the witness before the accident.

However, the defendant's investigations uncovered that the claimant and the witness (i) had residential connections to five properties, (ii) were both directors of the same company and (iii) were involved in another road traffic accident less than 12 months after the initial collision.

The defendant applied to strike out the claim, arguing that the claimant's actions, which were alleged to be dishonest, were "likely to obstruct the just disposal of the proceedings".

HHJ Brown followed the decisions in *Summers v Fairclough Homes Ltd [2012] UKSC 25*, *Arrow Nominees v Blackledge & Ors [2001] BCC 591* and *Excalibur & Keswick Groundworks Ltd v McDonald [2023] EWCA Civ 18*. He held that the jurisdiction to strike out a claim was engaged if the claimant's conduct was "of such a nature and degree as to corrupt the trial process so as to put the fairness of the trial in jeopardy" (as per Excalibur).

The claimant argued that the claim should proceed to trial, but HHJ Brown rejected this. He referred to the Court of Appeal's decision in *Arrow Nominees v Blackledge & Ors [2001] BCC 591* at [55], which stated that a fair trial should be conducted without undue expenditure of time and money, and with proper regard to the demands of other litigants on the court's finite resources. The court does not serve justice if it allows its process to be abused, making the real issue secondary to investigating the impact of one party's fraudulent conduct on the trial's fairness. The judge concluded that striking out the claim was consistent with the overriding objective.

Doughty v Kazmierski

On 25 February 2019, a four-vehicle accident occurred on the A40. The defendant's Vauxhall Zafira hit the rear of a VW Polo, pushing it into the central reservation and a VW Passat. The claimant's Suzuki motorcycle then collided with the rear of the Zafira. There was a dispute about whether the Zafira hit the Polo first or if the motorcycle caused the Zafira to hit the Polo.

During the trial, four witnesses gave oral evidence and three additional written statements were included from the police investigation. Each witness had a different perspective on the accident. A police forensic collision investigator found no evidence at the scene to determine the sequence of collisions. Two accident reconstruction experts, Dr Darren Walsh for the claimant and Mr Ric Ward for the defendant, provided evidence but disagreed on key aspects, especially contributory negligence.

Deputy High Court Judge Geraint Webb KC concluded that the defendant's Zafira had collided with the Polo before being struck by the motorcycle. The Zafira was likely travelling over 35 mph, too fast for the stop-start traffic conditions. The defendant was found negligent for causing the collision with the Polo and reducing the stopping distance for the motorcycle, leading to its collision with the Zafira. The Judge found Dr Walsh's evidence more persuasive than Mr Ward's, but the expert evidence was limited due to the lack of physical evidence. The independent witness provided the most reliable account, with expert evidence serving as a check. However, the claimant was also found to be travelling too close and/or too quickly for the traffic conditions, contributing to the injuries. The judge apportioned 25% of the blame to the claimant, with the majority of the responsibility on the defendant.

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Personal Injury Discount Rate Review: England and Wales - Update

Readers will recall that the ongoing Personal Injury Discount Rate review was covered in the spring edition of this publication. This update is designed to provide a brief overview of the current position and news from other jurisdictions which may be of relevance to the likely announcement to be made regarding the discount rate.

Submissions to the current review process have been made by appropriate special interest groups, including, predictably, the Association of Personal Injury Lawyers (APIL), the Association of British Insurers (ABI) and the Federation of Insurance Lawyers (FOIL). Inevitably, in that context, views have been polarised along predictable lines. In April 2024, APIL indicated to the Ministry of Justice that, in their view, the discount rate must not be approached as though it were "a hypothetical maths problem" (Law Society Gazette, 16 April 2024). APIL's President (Jonanthan Scarsbrook) stated:

"The Civil Liability Act requires the assumption that damages are invested in a portfolio which is less risky than that of the ordinary investor. The government did not do that when the rate was set in 2019. At that time, even with the lord chancellor's 0.5 per cent adjustment to reduce the projected level of under compensation, a third of claimants were still expected to be unable to meet their total financial losses.

One of the realities is that claimants are usually advised to invest through a discretionary fund manager who can actively manage the portfolio … The actual cost of this must be taken into account, as must the increased tax burden, with personal allowance not moving over time and with capital gains tax and dividend allowances falling back significantly since 2019.

Compensation is not a lottery win and neither is setting the discount rate a hypothetical maths problem. We are talking about unfortunate individuals – and one day any of us could be in that position …"

Meantime, the insurance industry was obviously concerned as to the impact of the discount rate on claims in general and on insurance premium inflation in particular, which remains a topic for discussion and debate. At the same time (April 2014), the ABI's response to the call for evidence in relation to the review indicated that it felt *"the rates in the UK should be re-evaluated to better reflect the real returns accumulated by low-risk investors of lump sums and have been working to feed into calls for evidence which will inform a decision this year."*

There was speculation, following the original announcement of the discount rate review, that models from overseas jurisdictions, where multiple or differing discount rates are utilised for differing types of losses, might prove to be of attraction to the Ministry of Justice in the UK.

Before and since the closure of the evidence gathering element of the process, there have been regular meetings of the Ministry of Justice Expert Panel charged with the review process. Minutes of these meetings are available via the Ministry of Justice page on the government website. A cynic might say that the author of these minutes is well versed in their art – the minutes give very little away at all, perhaps anticipating their being scoured for clues by interested personal injury practitioners on both sides of the claimant and defendant divide.

In the meantime, pending 11 January 2025, news from other jurisdictions not too far away from England and Wales has been seized upon by readers as possible indications of what may happen in the larger jurisdiction in the New Year.

On 27 September 2024, the Northern Ireland Executive announced that it had determined that the new Personal Injury discount rate in Northern Irish cases would be + 0.5%. This is an increase from the previous rate of – 1.5% which had been in place since March 2022. The new rate of + 0.5% will remain in place until at least the next review in Northern Ireland in July 2029. On the same date (27 September 2024) a + 0.5% discount rate was announced for Scotland (a rise from the previous rate, in place since 2019, of – 0.75%).

What does this mean for England and Wales?

At the risk of stating the obvious, the decisions regarding Scotland and Northern Ireland have no direct impact on any decision as regards to England and Wales. The disparity of rates hitherto across the three jurisdictions readily illustrate that differing approaches have prevailed for some time.

However, the likelihood of a move to a positive discount rate (which would be consistent with the approach taken in both Scotland and Northern Ireland, one would think, must be increased by these decisions given that similar material is being considered and similar investment conditions prevail in all three jurisdictions. Moreover, albeit the underlying rates in Scotland and Northern Ireland were different, they both now have a positive + 0.5% discount rate. Thus, it is tempting to "predict" a similar figure prevailing in England and Wales come 11 January 2025, if not before. A consistent figure across all three jurisdictions would have obvious attraction.

Any move toward a positive discount rate favours insurers and defendants in most, but particularly in catastrophic injury, claims as it has the effect of reducing multipliers in cases involving future losses, particularly over lengthy periods of future loss. The table featured on the following page, hopefully, provides some illustration of this.

It is also of interest to note that both Scotland and Northern Ireland have opted to retain a single discount rate, rather than opting for multiple discount rates for differing heads of loss or periods of future loss. As above, these multiple discount rate models are favoured in other (overseas) jurisdictions and have, in the past, been seen as a solution (or one possible solution) to the perceived inherent unfairness in the system. It appears, at least for the moment, that this approach has not gained traction within the UK, and it remains to be seen if this is now repeated in England and Wales. Inevitably, pending the decision as to the discount rate, there will be Part 36 offers predicated on the current discount rate and multipliers derived from the same "in play". On larger cases, clearly, those offers will need to be re-evaluated, by both sides.

Ogden Table (8th Edition)	Exemplar Claimant Details	Multiplier @ Minus 0.75% Discount Rate	Multiplier @ Minus 0.25% Discount Rate	Multiplier @ Plus 0.5% Discount Rate
Table 1 (Loss for life)	25 year old male	78.31	66.05	52.17
Table 9 (Loss to pension at 65)	25 year old male	45.42	41.00	35.40
Table 9 (Loss to pension at 65)	40 year old male	26.60	24.97	22.78

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:

Simon Evans at simone@dolmans.co.uk

Capital Tower, Greyfriars Road, Cardiff, CF10 3AG

Tel : 029 2034 5531

www.dolmans.co.uk

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