Keoghs

# Client BRIEFING

27 January 2017

## Discount Rate Change: A Large Loss Perspective

In this briefing, Keoghs' partner Matt Perkins looks at practical considerations claims teams should take into account following the imminent announcement on the discount rate, specifically in the large loss, i.e. sub-catastrophic injury, value band.

It is probably fair to say that the recent High Court decision that went against the ABI's plea for a judicial review has caused a number of claims leaders to fear the worst in respect of the imminent announcement on the discount rate.

Whilst there is still hope in the industry that the Lord Chancellor will leave the rate untouched, many are forecasting a reduction and hence have started to fear that claims inflation is therefore inevitable.

Rather than focus upon the technical aspects of the change and indeed the impact on the multi-million pound claims (which will be a subject we will pick up in a separate article), this briefing focuses on the more pragmatic considerations claims teams need to take into account - specifically in the large loss, i.e. sub-catastrophic injury, value band.

Keoghs recognises that in order to achieve optimum results against the backdrop of a reduced discount rate, a tailored and indeed separate approach to claims valued in this band is necessary. Our approach can be narrowed down to the three Ps:

- **Proportionality**
- **Practicalities**
- **Principles**

### Proportionality – tipping the scales?

It is recognised that for large loss claims, proportionality is a constant feature requiring a delicate balancing act to properly analyse the commercial realities around indemnity spend. A large loss claims handler needs to act as the scales, balancing defence investigation costs, increased claimant costs and likely savings that are achievable.

Clearly, a reduction in the discount rate would have a considerable impact on heads of future loss. Accepted norms on previous claims, for example where investigation costs would be considered disproportionate, may now need renewed focus in a reduced discount rate world. These heads of loss and issues are now likely to be brought into sharp focus in the context of more compelling proportionality considerations. It is anticipated that a reduction in the discount rate will challenge conventional thinking in respect of a number of heads of future loss and that this exercise may result in a more bespoke and aggressive line of investigations aimed at achieving greater savings.

### Practicalities

From a practical perspective it is noted that if the discount rate drops by 1%, claims for lifetime future losses across the board are likely to increase in value by 20 to 30%.

*continued overleaf*

For losses related to earnings the increase could be in the region of 10 to 15%. Clearly these statistics are top-level, very broad brush and simplify a myriad of mathematical computations; but based on a broad age range and average earnings, it illustrates the potential scale of the change.

In the event this type of reduction becomes a reality, a two pronged approach is likely to be advocated;

- Firstly, where there is any realistic possibility of obtaining any reduction to the multiplier there will be a greater focus on expert life expectancy and other specialist forms of evidence, and;
- Secondly, more thorough investigations into the evidential basis for individual heads of loss are likely to be considered worthwhile.

It is important to note that as well as adopting new defendant approaches, the way claimants adapt to any rate change will need to be monitored. For instance, claimants may change their approach and start, as standard, to obtain their own life expectancy evidence suggesting that they would have lived longer than the actuarial averages suggest. In addition claimants may also focus on obtaining more proof/evidence in respect of their claims. While the former might ultimately lead to satellite litigation and ultimately input from the Ogden Working Party, the latter could be welcomed if it allows a clear view to be taken earlier on in the claims lifecycle.

Turning back to the defendant angle, from a practical perspective, there would be a greater drive to use trained specialists to spot any potential life expectancy issues, and harnessing this as a co-ordinated approach to develop databases of approved bespoke experts and sources of evidence will also bear fruit.

Whist not exclusive to the large loss arena, it is also considered that the following in particular may be brought into sharper focus by any rate reduction:

- Future earnings and pension losses – There will be a greater focus by defendants on the merits of *'Conner v Bradman'* approaches in cases assisted by experts who understand and can properly apply the 'disabled' definition where a claimant is 'on the cusp' of disability. In addition, a more forensic approach in respect of retirement ages, including detailed investigations in respect of peers, and if necessary employment evidence, will become more of a feature to offset the effect of rate change induced inflation;
- Future care claims – An increase in the use of care evidence in lower value claims may become the norm for both claimant and defendant solicitors. The 'prize' for even a very modest lifetime allowance will suddenly become more lucrative;
- Loss of services – More in depth investigations are likely to become the norm. Investment of resources into obtaining expert or comparator evidence for the likely 'true' cost of such services (including potentially setting up a network of approved quotation experts across the country); greater efforts to find and proof witnesses and documentary evidence with an increased focus on causation (such as using geriatrics evidence) will become more common place;
- Future surgery/treatment costs – There may be more focus on expert medical evidence trying to drive down the percentage chance such treatment may be required and if appropriate extend the period by which such treatment may become necessary in order to mitigate losses from the discount rate.

And these practicalities would just be the starting point…

## Principles

Finally, whilst it is acknowledged that a reduction in the discount rate will increase indemnity spend, the extent of additional damages can be significantly mitigated by insurers adopting a strategic and bespoke approach to claims in this area, which will, in Keoghs' view, necessarily involve a rethink of tactics on the ground.

Two principles on this surely have to be:

1) **Challenge the norm.** Don't assume that the current handling approach will provide an optimum outcome. What you previously thought disproportionate – may now be worth considering.
2) **Anticipate claimant behaviour.** How will the claimant fraternity seek to maximise any change and how will an insurer handle it?

It is only by doing this that an insurer will be able to mitigate the potential impact of any reduction in rate.

Whilst we hope for the best and plan for the worst, we will continue to assist our clients with information, tactics, tools and assistance to prepare for what could be the biggest change in the value of large loss claims since the discount rate was fixed at its current rate in 2001.

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