

Ministry of Justice consultation
Personal Injury Discount Rate
– how it should be set in future

Response by
Thompsons Solicitors

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About us

1. Thompsons is a UK-wide law firm with a network of offices across the UK, including the separate legal jurisdictions of Scotland and Northern Ireland. As the largest trade union and personal injury law firm in the UK, we specialise in personal injury and employment law for trade union members, their families and private clients. At any one time we will, as a firm, be handling over 50,000 cases.
2. In the field of personal injury, Thompsons is a leading specialist in handling serious injury cases, fatal accident claims, spinal cord injuries, traumatic brain injuries, amputation claims and serious medical injury claims.
3. The firm participates regularly in government consultations on a wide range of issues relevant to our trade union and private clients.

Introduction

4. We support the long overdue correction to the discount rate made by the Lord Chancellor in March 2017.
5. There is no statutory requirement for the government to consult on the discount rate. We note with interest that the consultation was announced just 30 days after leading insurers met with the Chancellor of the Exchequer, and are concerned that this gives an impression of a powerful lobby pressurising government into make allowances for it when there is no need or precedent for it to do so. The speed of this consultation's announcement risks it being perceived as a sop to insurance companies which is intended to pave the way for a swift reversal of the correction to the discount rate. This would be to give in to insurers' demands to the direct disadvantage of people struggling with serious long term injuries.
6. For those who sustain the most serious of injuries it is impossible to restore their quality of life. They are often unable to work at all, or only in a reduced capacity. This affects their ability to support themselves and their families. In many cases victims require ongoing medical help, adapted accommodation, therapies, support with daily living and specialist equipment. Depending on their age when the injury was sustained, victims may have to live in such hugely diminished circumstances from early childhood until their death. Providing the necessary life-long care and support for seriously injured people comes at a cost. As per long-established principles of English law, it is only right that this cost is borne by the 'polluter' – in practice, the insurer of the party responsible - and not by the state and the taxpayer.
7. The person responsible for the injuries has paid for insurance to cover precisely this type of expense. In calculating compensation, almost every penny recovered is allocated to a specific need in the future. The implication¹ that damages awarded are in some way generous to the claimant and that the injured party can sustain the hit of reduced damages is not just factually wrong, but an insult to victims. Our experience of working with serious injury victims will mirror that of other personal injury law firms - these are people motivated only by getting a fair level of damages to meet their needs and certainly not by greed.

¹ <https://www.lawgazette.co.uk/news/truss-slashes-discount-rate-but-warns-of-impact-on-nhs/5060008.article>

8. The language used by insurers in their campaign to argue against the changes to the discount rate - “individual and business motor insurance policies could be affected in order to over-compensate a few thousand claimants a year”² (emphasis added) - makes no mention of the fact that the essential purpose of compensation is to ensure that the claimant, injured by the negligent insured defendant, can continue with a quality of life as close as possible to that which they would have enjoyed had they not been injured in the first place. This kind of statement also belittles the experiences of those severely injured people. They may be fewer in number than other personal injury claimants, but they are some of the most serious and life-altering cases. They should be treated accordingly and not swept aside as an inconvenience. Insurers have recently sought to argue that, in the context of road traffic accident related whiplash injuries, many personal injury (PI) claimants only have “minor” claims and trivial injuries but also, confusingly, state that: “The [insurance] industry supports the principle that fair payment should be made to claimants with more serious injuries.”³ Logically, if this principle stands for some injuries then it should also govern insurers’ approach to all, whether serious or “minor”.
9. It is entirely disingenuous of insurance companies to claim that the change in the rate occurred is a shock⁴ – the Association of Personal Injury Lawyers (APIIL) has made representations on the issue for years and in 2016 they launched a Judicial Review to challenge the delay in its review. The Lord Chancellor had no lawful alternative but to correct the discount rate in the way that she did. That action must not be overturned to appease any particular interest group, however influential.

Q1: Do you consider that the law on setting the discount rate is defective? If so, please give reasons.

10. We do not consider the law defective as it stands. The change enacted on 20th March 2017 reset the discount rate to an appropriate level that reflects a more realistic return on money invested by an average person.

Q2: Please provide evidence as to how the application of the discount rate creates under- or over-compensation and the reasons it does so.

11. We do not accept that the correction to the discount rate will result in over-compensation but we would suggest that the previous discount rate did indeed leave claimants under-compensated. Under the previous rate, lump sum payments which successful claimants received would often not last for as long as they were needed, to pay for care and / or to compensate injured people for changes in their ability to earn wages. The consultation paper gives examples of the increases in lump sum payments given to people who have suffered catastrophic injury, implying that such increases are to fund excessive lifestyles. From our decades of experience working with victims of injuries, we can say that this is categorically not the case. If anything, the opposite is closer to the truth: even with carefully calculated damages, victims of serious injury can still face a daily struggle to live with even a minimal degree of quality.
12. The average net rate of return on investments has, since 2001 and certainly since the stock market crash in 2008, consistently been well below 2.5% above inflation.
13. This was a fact made clear by the Lord Chancellor when she announced the rate change on the 27th February 2017, acknowledging the prevailing expert opinion and economic reality⁵.
14. Since 2001, therefore, insurers have been making undeserved savings and claimants have been receiving less compensation than they need.

² <https://www.lawgazette.co.uk/news/truss-slashes-discount-rate-but-warns-of-impact-on-nhs/5060008.article>

³ ABI Responses to Reforming the Soft Tissue injury (“Whiplash”) Process

⁴ <http://www.telegraph.co.uk/business/2017/02/27/uk-insurers-hit-back-crazy-personal-injury-rate-change-share/>

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/594972/discount-rate-statement-of-reasons.pdf

15. The previous discount rate, whilst nominally taking into account the returns on investment, ignored the administrative costs of investing. Claimants, when awarded a lump sum, are expected to cover the costs of investment and financial advisors. It is very difficult for laymen, coping with additional difficulties of being seriously injured, to invest their compensation in a way that maintains pace with inflation without the help of financial advisors. A re-adjustment of the discount rate, as was done in March 2017, goes some way to ensuring that these costs do not reduce the amount available to cover the necessary outgoings associated with their injury.

Q3: Please provide evidence as to how during settlement negotiations claimants are advised to invest lump sum awards of damages and the reasons for doing so.

16. In our experience, no advice is given to claimants on investment as part of the settlement negotiations. In the vast majority of cases claimants seek settlement via a Payment Protection Order (PPO).

Q4: Please provide evidence of how claimants actually invest their compensation and their reasons for doing so.

17. We cannot give specific evidence of how our clients invest their money after their case has been concluded as we are not party to those decisions. We can, however, repeat our comments above that, in our experience, no advice is given to claimants as to how to invest the damages awarded during a claim. At the conclusion of a settlement the injured person is usually left with few options other than using a professional financial advisor to support them in how to properly invest sums, which may be quite large. Most claimants we work with do not have the expertise, time or energy to maintain a portfolio of investments themselves or to maximise their return; they simply want their damages to be managed safely and competently and in a way that will provide them with an adequate return so they can afford to live with their injuries.
18. The necessary use of financial advisers further reduces the money available to claimants to pay for the care and rehabilitation they need, yet the cost of this advice is not part of the calculation determining the value of damages in the first place.

Q5: Are claimants or other investors routinely advised to invest 100% of their capital in ILGS or any other asset class? Please explain your answer. What risks would this strategy involve and could these be addressed by pursuing a more diverse investment strategy?

19. As a solicitors' firm we cannot comment on how injured people are advised to invest the damages awarded to them in a lump sum. Financial advisors, employed at the claimants' cost, will offer advice on how to do so and hope representatives of that profession will be consulted with by the government in relation to this question. Claimants seek low risk investments because they need the funds for their care and cannot risk a shortfall.

Q6: Are there cases where PPOs are not and could not be made available? Are there cases where a PPO could be available but a PPO is offered and refused or sought and refused? Please provide evidence of the reasons for this and the cases where this occurs.

20. In our experience, the use of PPOs is often an appropriate option but the influence of the insurer side means it is one that is very rarely taken. Certainly, most claimants would prefer a PPO as it provides them with a regular and consistent payment rather than one large lump sum, which is harder to manage, at the outset. Insurers want to minimise the risk they take, but PPOs mean their risk is extended for the whole life of the claimant. The only situation where a PPO would not be sensible would be if there was a significant element of contributory negligence limiting the settlement payment, so as to make a PPO unaffordable.

Q7: Please provide evidence as to the reasons why claimants choose either a lump sum or a PPO, including where both a lump sum and a PPO are included in a settlement.

21. In our experience, many claimants would prefer periodical payments. This is testament to the difficulties and costs involved in handling a lump sum. Claimants would rather have the security of knowing that the costs of their ongoing needs will be covered for their lifetime. The relative practical ease of receiving more manageable amounts of money at a time is also helpful to most claimants.

Q8: How has the number of PPOs changed over time? What has driven this? What types of claims are most likely to settle via a PPO?

22. There is little empirical evidence that use of PPOs has materially changed over time. As previously stated, most claimants prefer a PPO settlement, but the vast majority of insurers seek a lump sum settlement. We have noticed a greater degree of willingness to settle via a PPO by the NHSLA, but that is not the case with commercial insurers.

Q9: Do claimants receive investment advice about lump sums, PPOs and combinations of the two? If so, is the advice adequate? If not, how do you think the situation could be improved? Please provide evidence in support of your views.

23. Different law firms will have different procedures and therefore while some claimants may receive advice, others may not. Our practice is to seek financial advice on PPO viability during the course of the claim, advice which we place before the court.
24. Before settlement, we will almost always advise our seriously injured clients that a PPO is the better option because this ensures they will have the funds available each year of their lives to meet the costs of their injury.

Q10: Do you consider that the present law on how the discount rate is set should be changed? If so, please say how and give reasons.

25. No, it is appropriate that the discount rate continues to be set by the Lord Chancellor.
26. In addition, any change in the discount rate should be made in an evidence-based manner which reflects the economic reality for the average person and what return they can feasibly get for their investment. Any change in the rate should also not be to the disadvantage of injured people, for whom compensation has to last a lifetime. These people deserve a high level of certainty. The current state of affairs, where the government makes a decision which is subsequently put at risk of being altered as a result of pressure from special interests, is not in this spirit.
27. The rate as it now stands is a correction. That this correction is based on economic reality reflects well on the way that the present law works.
28. However, serious questions must be asked as to why this consultation is even being held. The speed with which the government responded to the protestations of the insurance companies, who have for years been benefitting from a ludicrously high discount rate, is a serious concern.

29. If the mechanism by which the discount rate is set is heavily influenced by insurers, people cannot expect to get a fair deal when they are injured through no fault of their own.

Q11: If you think the law should be changed, do you agree with the suggested principles for setting the rate and that they will lead to full compensation (not under or over compensation)? Please give reasons.

30. We do not believe that the law should be changed – the discount rate should continue to be set by the government according to the principles enshrined in Wells v Wells and the Damages Act 1996.
31. This should ensure that there is neither ‘over’ nor ‘under’ compensation.

Q12: Do you consider that for the purposes of setting the discount rate the assumed investment risk profile of the claimant should be assumed to be:

- (a) Very risk averse or “risk free” (Wells v Wells)
- (b) Low risk (a mixed portfolio balancing low risk investments).
- (c) An ordinary prudent investor
- (d) Other.

Please give reasons.

32. The discount rate should continue to be set by the government according to the principles enshrined in Wells v Wells and the Damages Act 1996. We therefore believe option ‘a’ to be appropriate.
33. We would like to see an evidence-led approach taken. The discount rate should be set using a low risk investment profile; claimants should not be forced to risk their settlement monies in order to achieve growth to meet their essential care needs.
34. Claimants should not be encouraged to make high risk investments using a lump sum calculated to meet their needs (no more and no less) for a lifetime. We would therefore encourage any move made by the government to work with the Financial Conduct Authority to ensure injured people are provided with the very best advice, appropriate for their unique situation.

Q13: Should the availability of Periodical Payment Orders affect the discount rate? If so, please give reasons. In particular:

- Should refusal to take a PPO be taken as grounds for assuming a higher risk appetite? If so, how big a difference should this make to the discount rate?
- Should this assumption apply in cases where a secure PPO is not available?

35. No.
36. Opting for a lump sum payment rather than a PPO should not be taken as grounds for assuming an appetite for higher risk. Not all claims settle for the full amount and therefore a PPO, for example based on only a 50% recovery of the damages, would not be enough to provide for the claimant’s long term care. In such cases we might reject a PPO in order to use the lump sum payment to better support the claimant for as long as possible before they have no option but to revert to being supported by family or the state.

37. The availability of a PPO should not impact the discount rate because it is often the case that, while, theoretically, PPOs are available, insurers do not offer them. We may ask for a PPO for our client but ultimately insurers control whether or not to offer a PPO, and often attend settlement meetings with instructions to settle only via a lump sum payment.

Q14: Do you agree that the discount rate should be set on the basis that claimants who opt for a lump sum over a PPO should be assumed to be willing to take some risk? If so, how much risk do you think the claimant should be deemed to have accepted? Please also indicate if you consider that any such assumption should apply even if a secure PPO is not available. Please give reasons.

38. No. Claimants are not always offered the choice and it would therefore be a flawed assumption.

Q15: Do you consider that different rates should be set for different cases? Please give reasons. If so please indicate the categories that you think should be created.

39. No. The discount rate should be standardised. There are no compelling reasons for changing the discount rate across different cases, or across different heads of loss.

Q16: Please also indicate in relation to the categories you have chosen whether there are any special factors that should be taken into account in setting the rate for that category.

40. Applying different rates to different cases doesn't make sense. There is no reason to assume that the investment profile of victims in certain cases differ from another; the very nature of personal injury cases means that the accident could happen to anyone.

Q17: Should the court retain a power to apply a different rate from the specified rate if persuaded by one of the parties that it would be more appropriate to do so? Please give reasons.

41. We believe that the rate should be set by the Lord Chancellor and have universal application. To invite discretion into the process by individual courts would result in claimants facing a post code lottery and inconsistencies would inevitably arise.

Q18: If the court should have power to apply a different rate, what principles should apply to its exercise?

42. The discount rate should be set by the Lord Chancellor and not by the court.

Q19: Do you consider that there are any specific points of methodology that should be mandatory? Please give details and reasons for your choice.

43. The discount rate should be set by the Lord Chancellor and not by the court.

Q20: Do you agree that the law should be changed so that the discount rate has to be reviewed on occasions specified in legislation rather than leaving the timing of the review to the rate setter? If not, please give reasons.

44. We do. A fixed review schedule could be useful, stipulating a review every two years for example. This should include a mechanism by which any significant shift in the market, either up or down, triggers a review. This would remove the long lag with the incorrect rate. A fixed review schedule could be included in Government Budget announcements.
45. To fail to take into account the economic climate seriously disadvantages the injured person. Every part of the compensation awarded is accounted for and attributed to a particular need - economic changes, if not accounted for, have a serious impact on claimants' ability to provide for their needs.

Q21: Should those occasions be fixed or minimum periods of time? If so, should the fixed or minimum periods be one, three, five, ten or other (please specify) year periods? Please give reasons.

46. We believe that a two year review schedule would be appropriate. This should include a mechanism by which any significant shift in the market, either up or down, triggers a review.
47. This would ensure that if the market falls significantly as we have seen recently, claimants are not negatively impacted by an unadjusted discount rate.

Q22: When in the year do you think the review should take effect? Please give reasons.

48. The review could take place as part of Budget announcements.

Q23: Do you agree that the rate should be reviewed at intervals determined by the movement of relevant investment returns? If so, should this be in addition to timed intervals or instead of them? What do you think the degree of deviation should trigger the review?

49. As stated above, we believe that significant shifts in the market should trigger a review so as to ensure that claimants are not negatively impacted by lower investment returns.

Q24: Do you agree that there should be a power to set new triggers for when the rate should be reviewed? If not, please give reasons.

50. Yes. We believe that significant shifts in the market should trigger a review so as to ensure that claimants are not negatively impacted by lower investment returns.

Q25: Do you consider that there should be transitional provisions when a new rate is commenced? If so, please specify what they should be and give reasons.

51. No. Transitional provisions would mean that the claimant would suffer.

Q26: Do you consider that the discount rate should be set by:

- a) A panel of independent experts? If so, please indicate how the panel should be made up.
- b) A panel of independent experts subject to agreement of another person? If so, on what terms and whom? Would your answers to the questions above about a panel differ depending on the extent of the discretion given to the panel? If so, please give details
- c) The Lord Chancellor and her counterparts in Scotland or another nominated person following advice from an independent expert panel? If so, on what terms?
- d) The Lord Chancellor and her counterparts in Scotland as at present?
- e) Someone else? If so, please give details.

52. We support option 'd' - the existing system should be maintained.

53. We believe that the Lord Chancellor should set the appropriate rate. The rate as adjusted in March was a correction and we believe that the Lord Chancellor, with advice from appropriate financial experts, is the best person to make discount rate decisions.

Q27: Do you consider that the current law relating to PPOs is satisfactory and does not require change? Please give reasons.

54. The law as it stands is satisfactory.

Q28: Do you consider that the current law relating to PPOs requires clarification as to when the court should award a PPO? If so, what clarification do you consider necessary and how would you promulgate it?

55. The law as it stands is clear.

Q29: Do you consider that the current law relating to PPOs should be changed by creating a presumption that if a secure PPO is available it should be awarded by the court? If so, how should the presumption be applied and on what grounds could it be rebutted?

56. We believe that the law is sufficient. Case law (*Thompstone v Tameside and Glossop Acute Services NHS Trust – Court of Appeal 2008*) establishes a presumption that care and case management should be dealt with by PPO.

57. The court has the power to impose a PPO and we believe this is sufficient.

Q30: Do you consider that the current law relating to PPOs should be changed by requiring the court to order a PPO if a secure PPO is available? If so, what conditions should apply?

58. The court currently has this power. The use of PPOs may be increased if a practice direction was introduced to insist that settlements say, in excess of £500,000, must have a PPO viability expert report.

Q31: Do you consider that the cost of providing PPOs could be reduced? If so, how.

59. Yes, that would require the Government, financial stakeholders, and insurers to build a cost effective investment product to provide low cost PPO provision.

Q32: Please provide details of any costs and benefits that you anticipate would arise as a result of any of the approaches described above.

60. If PPOs are more widely used and encouraged by the courts the issue regarding the discount rate becomes less significant. It would likely speed up settlements avoiding the long and often costly arguments over lump sum, or PPO awards. It would give financial security to claimants without worry that essential care needs can be afforded, and removes the burden of meeting any shortfall in care from the state/NHS/local services and back onto the tortfeasor.

Q33: Please provide any evidence you may have as to the use or expected use of PPOs in the light of the change in the rate and more generally.

61. As the new rate was only announced in March it is too early for us to provide evidence on this. We have seen no increase in the insurers' appetite to engage with claimants on PPOs, but that may be due to expectations of the outcome of this consultation.

Impact Assessment

Q34: Do you agree with the impact assessment that accompanies this consultation paper? If not, please give reasons and evidence to support your conclusions.

62. The impact assessment is written from the perspective of the insurers. The suggestion that the insurance market would have to significantly increase premiums as a result of the lower discount rate is false; they have for years been taking advantage of a disproportionately high discount rate and have not used this to lower premiums.
63. The insurers' suggestion supports the view that their only interest is maximising return for themselves and their shareholders. Why should policy holders suffer when all claimants are asking for is fair treatment? Claimants should be compensated by the insurer who accepted the premiums and therefore the risk and is responsible for meeting the costs of the injuries suffered when the risk eventuates. It should not be accepted that that responsibility should shift to consumers – the two issues are distinct and should not be confused.
64. Furthermore, the previous discount rate will have allowed insurance companies to make large savings (by paying significantly less compensation than was fair). Failure to have made provision for the inevitable correction to the discount rate shows insurers' short term view of maximising payments to shareholders and executives rather than retaining monies for the clearly foreseeable change which was to come. The costs of that imprudence should not be borne by consumers.
65. The discount rate, in many cases, applies to the some of the most vulnerable people. In cases of very serious injury that person will never regain the same quality of life. It is vital that all changes to the discount rate, or the law relating to PPOs, recognise that the impacts of any such changes must never be borne by those injured through no fault of their own.

Equalities Statement

Q35: Do you think we have correctly identified the range and extent of effects of these proposals on those with protected characteristics under the Equality Act 2010?

66. We do not have anything to add on this point.

Q36: If not, are you aware of any evidence that we have not considered as part of our equality analysis? Please supply the evidence. What is the effect of this evidence on our proposals?

67. We do not have anything to add on this point.