Justice Select Committee
Pre-legislative scrutiny: draft personal injury discount rate legislation
Written submission from Thompsons Solicitors
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About us

1. Thompsons Solicitors 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. We participate regularly in government consultations on a wide range of issues relevant to our trade union and private clients. We have also regularly participated in select committee enquiries, providing written and oral evidence.

4. We would be happy to provide oral evidence in respect of this piece of pre-legislative scrutiny if it would be of value to the committee.

Objective of legislation

5. 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.

6. It is only right that claimants are compensated in full.

7. The person responsible for the injuries has paid for insurance to cover precisely this possible situation. In calculating compensation, almost every penny recovered is allocated to a specific need in the future.

8. The government's objective, by implication, suggests that some claimants may achieve more in compensation than is justifable. In our experience this is almost never the case.

9. The implication that damages awarded are in some way generous to the claimant 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 injured through no fault of their own, motivated only to achieve a fair level of damages to meet their needs and certainly not by greed.

10. The government's langauge in these matters is important and should be sensitive to the facts above and to the reality of the vast majority of injured peoples' experiences. It is a concern that the government's stated objective includes an implication that so-called 'over-compensation' exists to such a degree as to make it a factor in its draft legislation.

11. It is our ongoing concern that the government's language, indicative of its wider position, is still too heavily influenced by the concerns of the insurance lobby, who, in their campaign against the changes to the discount rate, suggested that "individual and business motor insurance policies could be affected in order to *over-compensate* a few thousand claimants a year"[1] (emphasis added). Yet the insurers make 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.

12. Turning to the proposed legislation:

    i. We do not believe the law should be changed - the discount rate should continue to be set by the government according to the priniplces enshrined in *Wells v Wells* and the Damages Act 1996.

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

ii. We disagree with the presumption set out in Annex B to Command Paper 9500 that the level of risk for the investment of a lump sum award of damages should be moved from “very low” (or “risk free”) to “low”.

iii. The Lord Chancellor should, as per the draft legislation, continue to be responsible for reviewing the rate of return.

iv. It is appropriate that mechanisms to ensure that a claimant receives a full level of damages over the duration of their injury are based in effective legislation. But this should be supplemented with strong non-legislative mechanisms, including close partnership working between the government and the Financial Conduct Authority, to ensure that injured people are always provided with the best investment advice, appropriate to their unique situation, and not left to be captured by commercial and loosely regulated financial advisors whose best interests may not always be aligned with their clients’.

Fairness of legislation

13. Fairness to claimants is of paramount importance.

14. The discount rate should be set using a very low risk investment profile, as per *Wells v Wells*; claimants should not be forced to risk their settlement monies in order to achieve growth to meet their essential care needs.

15. We would encourage the legislation to include explicit definitions of different investment profiles (“low risk” etc.) and set out how the government will arbitrate whether the desired risk profile has been achieved by any change in the discount rate recommended by the expert panel.

16. We encourage a rigorous evidence-led approach. In our experience claimants take a highly risk averse approach to managing lump sum damages, as any working person

unaccustomed to financial speculation would be, and this is the basis upon which our recommendations are made.

17. The government's choice of which risk profile to inform the discount rate should be made based on independent evidence of claimant's investment behaviour over the duration of their injuries. While this may not be easy to achieve, it is necessary.

18. It would be wrong to make the two processes - of claimants' investment behaviour post-settlement and of the calculation of damages - contingent upon each other. Damages should be calculated based on the facts of the given case, the severity of the injury, its likely duration, and the extent of its effect on the claimant's life and circumstances.

Impact of legislation

19. The Impact Assement appears to have been based on assumption rather than rigourous assessment of existing evidence, or where it does not exist, the accumulation of new evidence to inform the proposed legislation.

20. There has been no attempt to quantify economic costs or benefits to affected groups. For such a sensitive and important piece of proposed legislation this is uncceptable. The government seems content to rely on assumptions, but does not set out the basis for these assumptions, giving interested parties little opportunitiy to interrogate the logic of their approach - except to say there does not appear to be any.

21. It is vital that any legislative or non-legislative change does not have a negative impact on claimants. It must be remembered that this system exists to protect victims of serious, long-term injury, not the insurers of those responsible for it. To rely on mere assumptions is a serious deriliction of the government's duty of care and fairness.

22. That the Impact Assessment recognises that the proposed change would "result in smaller lump sum compensation payments, which will be a cost to claimants..." and that "Some claimants with a low appetite for risk may face increased costs associated with

the volatility of investments or lower returns than implied by the PIDR...". Meanwhile, "defendants...will benefit from lower lump sum payments...".

23. This describes a direct disbenefit to victims and a direct benefit to insurers. This would be unacceptable, unfair and unjust.

24. The government is naive at best to assume that insurance companies will pass on savings. The Risk Assessment assumes that "in an open and competitive market insurance companies will pass on any savings derived from a higher PIDR rate onto consumers in the form of lower insurance premiums" yet this assumption flies the face of recent, and well publicised evidence.

25. This only goes to show how influenced ministers continue to be by the insurer lobby. The LASPO reforms to personal injury - despite ushering in major concessions for insurers - have not resulted in any change in premiums. On the Association of British Insurers' own figures, motor insurers have saved at least £8bn[2] in claims costs over the last five years, yet overall premiums are higher than they were in 2016[3].

26. Insurers' responses to the proposed change to the discount rate for RTA soft tissue injuries saw some saying they could pass on savings but others staying silent, and latterly, since the increase in Insurance Premium Tax, several insurers have openly questioned whether any previously-comitted savings could now be passed on.

Process proposed by legislation

27. We support the existing system and do not advocate the establishment of an expert panel. If a panel is to be formed, it should be advisory and the final decision must stay with the Lord Chancellor.

[2] Cumulative saving on claims costs by net written premium from 2010 to 2015 (latest publically available ABI figures) - https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/2013/industry%20data/Annual%20General%20Insurance%20Overview%20Statistics%20-%202015.xlsx (tab 4)
[3] See AA British Insurance Premium Index - http://www.theaa.com/newsroom/bipi/car-home-insurance-news-2016-q3-bipi.pdf (p10)

28. If a panel is to be formed, it must include a member who is a recognised representative of victims of long term serious injury.

29. We endorse a more frequent review of the rate - two years rather than three, as currently proposed. A higher frequency is appropriate, particularly while market volatility is high.

30. The review frequency should also include - in legislation - a mechanism by which any significant shift in the market, up or down, triggers an ad hoc review of the rate.

For further information please contact
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