**New discount rate for PI claims - relief for claimants**

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Personal Injury analysis: From 5 August 2019 the discount rate for personal injury claims is minus 0.25%. Accident and personal injury claimant specialist, Bethany Sanders, associate solicitor at Leigh Day, comments on the practical implications of the new regime.

**What are the impacts of the new discount rate on future loss claims?**

Individuals should receive *full and fair compensation* for losses suffered as a result of personal injuries that are not their fault[[1]](#footnote-1). In order to try and achieve that, an adjustment is needed to future lump sum financial losses (such as future loss of earnings and care) to reflect the interest that can be earned by investing such payments (accelerated receipt), as well as the effects of tax, expenses and inflation on these returns. This adjustment is known as the discount rate.

The Damages Act 1996, as amended by the Civil Liability Act 2018, requires the court to apply the discount rate prescribed pursuant to the Act to future loss calculations. The level of the discount rate is set by the Lord Chancellor.

No rate of return was prescribed when the Damages Act 1996 came into force. In July 1998, the House of Lords (as it was then known) decided in *Wells v Wells[[2]](#footnote-2)* that in the absence of a prescribed discount rate, accelerated receipt should be assessed by modelling a risk-free rate of return, which they decided was best achieved by considering returns on index-linked Gilts. The upshot at that time was a discount rate of 3%. What this meant was that the court thought a reasonably prudent claimant not taking significant investment risks could generate a net return after tax and inflation of 3% on an award for future losses and the sum was discounted to reflect this.

This was later amended by way of Order in June 2001, setting the rate at 2.5%.

From about 2009 claimant PI lawyers felt that the rate was too high and did not reflect the unfavourable investment climate personal injury claimants were occupying – in simple terms it was not possible to generate a net return of 2.5% other than by taking risks on the stock market which few claimants can afford to do. This rate prevailed until 2017, when after much lobbying, an MOJ consultation in 2012 and a threatened judicial review, the then Lord Chancellor, Liz Truss MP, amended the rate to minus 0.75%, effective from 20 March 2017, much to the dismay of the insurance industry.

In December 2018, the Civil Liability Act 2018 received Royal Assent, introducing a change to the way that the PI discount rate is to be set in future, with reference to the return a claimant would reasonably expect to achieve if they invested in a “low risk” (as opposed to risk-free) diversified portfolio. This legislation sets out that the Lord Chancellor needs to have regard to the actual investments made by claimants, available returns and allowance for tax, inflation and investment fees.

An extensive review and consultation followed, after which the then Lord Chancellor, David Gauke MP, announced on 15 July 2019 that the new discount rate (effective from 5 August 2019) would be set at **minus 0.25%.**

Whilst this increased the rate by 0.5%, it was not as high a level as had been predicted following the MOJ’s previous indication that the rate might be back in positive territory, in the region of 0% to 1%.

The impact of this will be that when calculating future losses, claimants will need to apply a higher rate than has been in force for the last few years, but as it continues to be a negative rate, the costs of receiving the money in advance are still deemed to outweigh the benefits of accelerated receipt – in a nutshell interest on money held will not keep up with tax and inflationary pressures or costs of investment.

Below is an illustration of a future lifetime care calculation of £10,000 per annum for a 30 year old male showing the impact of the change in the discount rate:

|  |  |  |
| --- | --- | --- |
|  | -0.75% (current rate) | -0.25% (new rate as at 5 August 2019) |
| Lifetime multiplier | 71.43  | 60.83 |
| Future care | £714,300 | £608,300 |

This results in a reduction to the pleaded claim of £106,000 for that head of loss. It is perhaps alsoworth comparing this with the 2.5% rate where the claimant would have previously received £296,000 (£418,300 less) on a multiplier of 29.60.

Ultimately damages for lump sum future losses will be lower than under the current rate, but the impact has not been as bad as claimants feared.

The discount rate only applies to those who are receiving their future losses in lump sum form. It is commonplace in a serious injury settlement that the future losses, particularly care and case management costs, are paid to the claimant annually for life by way of a periodical payments order (PPO). This means that the claimant has certainty that the payment will continue for the rest of their lives, linked to the appropriate index, so that the discount rate or life expectancy issues are not a feature. This is often an attractive and preferred form of award for claimants even with a negative discount rate, as it provides the security of knowing they have enough funds to meet their lifelong needs.

**What has been the reaction from the claimant / defendant side to the rate?**

Unsurprisingly, the Association of British Insurers’ (ABI) response to the change in rate was to condemn the decision as being a “*bad outcome*” for insurance customers and taxpayers, lamenting that it would inevitably lead to an increase in premiums. The Association of Personal Injury Lawyers (APIL) have noted that this is in contrast to Government figures which show the insurance industry is set to make savings of around £300 million from changes to the way personal injury compensation is calculated. As noted above, the rate has increased by 0.5% which will obviously result in lower compensation payments for seriously injured claimants, just not as low as defendants had hoped and expected.

The ABI said that they are frustrated that the Lord Chancellor did not adhere to the previously mooted rate of between 0 and 1%, at which level insurers have been reserving since the MOJ mentioned these figures back in September 2017.

For those representing claimants, the reaction was more of relief, following uncertainty about the impact of the Government’s new approach of setting the rate on the basis that injured people should be considered ‘low risk’ investors. As the calculation is designed to ensure that people who have suffered serious injuries have the funding they need for their care, equipment, loss of earnings etc for the rest of their lives, injured people should not have to take risks in the way they invest their damages.

In the period where the incoming rate was awaited but unknown for so long, personal injury practitioners were giving advice and drafting schedules and counter-schedules of loss in a vacuum. Clients without imminent trial dates who had been made early offers had to be advised on alternative discount rate scenarios, which was not ideal. It was yet another permutation that had to be factored in.

To have certainty is very much welcomed and as a Claimant personal injury solicitor representing people who have suffered severe injuries, it is pleasing that this rate has been set on a prudent and fair basis to ensure life-changing injuries receive the correct compensation.

**What are the practical implications of the rate change for practitioners over the coming months?**

Since the rate change in 2017, there has been much speculation as to when and to what level the new rate would be. It was considered that the minus 0.75% rate would be short lived and claimants feared that the insurance industry would succeed in their efforts to lobby the Government to significantly increase the applicable rate. Now that the rate is known, it should facilitate settlement discussions and mean that clear advice can be given to the parties regarding the future losses element of claims.

A significant remaining issue for the victims of life-changing injuries who require accommodation as a result, is that the continued negative rate will mean that claims for accommodation calculated with reference to *Roberts -v- Johnstone[[3]](#footnote-3)* will still result in a nil allowance for capital purchase costs. That is problematic not just for the settlement calculation, but also interim payment applications*[[4]](#footnote-4)*. This formula has undercompensated claimants for a long time, but there has been no alternative option.

On 23 July 2019 the case of *Swift v Carpenter[[5]](#footnote-5)* was part heard in the Court of Appeal when Underhill LJ, Irwin LJ and Nicola Davies LJ made it clear that they consider this is a test case and actively want to look at all of the available options for calculating accommodation claims.  The court specifically said it would “*welcome a fuller review of all possible alternatives”* to *Roberts v Johnstone.* The case is to be heard in full in Spring 2020, when we should hopefully have some long awaited clarity on accommodation claims under a negative discount rate.

**Do you have any predictions for the future in this area?**

The rate is to be reviewed within five years by an independent expert panel. The Lord Chancellor, when setting the latest rate, noted the need for it to be “*reviewed on a regular basis to make sure this important calculation is accurate every time*”. Whenever a change to the rate is on the horizon, it causes uncertainty. The exact timeframe for the next review is not yet known and we will therefore likely again find ourselves in the position where a new rate looms and the parties have to work on assumptions and estimates as to what the rate may be.

APIL have noted that the Government has faced sustained pressure from the insurance industry to set a rate which would not be appropriate for injured people and vigilance is required to ensure the new rate does provide them with fair compensation. It is anticipated that the data as to the expected net return for claimants will be kept under close review and where a change of the rate could be indicated, this will be called for by the respective parties to this issue.

The Government Actuary’s advice to the Lord Chancellor explored the idea of having two distinct discount rates based on term of loss. Following this latest review, the Lord Chancellor stuck to one rate for all claimants for simplicity of use and certainty. However, he did not completely ignore the twin-rate approach (that Jersey have adopted), which could in future potentially replace the single rate method.

1. The principle of restitutio in integrum – to put an injured party back into the position that they would have been absent the injury [↑](#footnote-ref-1)
2. [1999] 1 AC 345 [↑](#footnote-ref-2)
3. [1989] QB 878 [↑](#footnote-ref-3)
4. *Cobham v Eeles* [2009] EWCA 204 [↑](#footnote-ref-4)
5. [2018] EWHC 2060 (QB) [↑](#footnote-ref-5)