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Sent by email

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Dear Mr Givan

The Damages (Return on Investment) Bill

We write further to our communications with the Committee for Justice at the end of last year, with regard to the setting of the discount rate.

At the time of our last contact with the Committee the Department of Justice had decided not to proceed with a review of the Discount Rate under *Wells v Wells*, on the basis that, instead, the above Bill would be brought forward to change the methodology for setting the rate, to deliver 100% compensation, no more and no less.

Circumstances have obviously changed since then, with the DOJ now intending to bring forward secondary legislation to change the discount rate to -1.75% from 31 May 2021. The proposed Bill has now been introduced to put in place a new methodology but with the expectation that the Committee Stage will not now be completed until October, with the new legislation therefore delayed until next year at the earliest.

As organisations closely involved in the operation of the discount rate on the ground, we are concerned that the setting of a new rate of -1.75% might be seen as removing the imperative, recognised by all those involved on all sides of the litigation process, for the Bill to progress through the parliamentary process to become law as soon as possible. In fact, the introduction of the new negative rate makes it even more important that a new methodology is put in place as soon as possible if the severe financial ramifications of such a low rate are to be avoided.

A rate of -1.75% will inevitably deliver more than 100% compensation to injured claimants. Following detailed consultation and research in England and Wales and Scotland during the reform process in those jurisdictions, it is accepted that claimants do not invest their damages in the very low risk investments envisaged in *Wells v Wells* and

therefore by basing the rate on those investments claimants will be over-compensated. Taking, for example, in the case of a female plaintiff aged 30, with care costs of £100,000pa, the claim would increase from £3,068,000 at present, to £11,190,000 after 31 May, an increase of £8,122,000.

The requirement to pay damages in excess of 100% will have very serious implications for defendants. Some of the impact will fall upon insurance companies, but particularly outside of road traffic accidents, the impact will fall upon those much less able to bear the inevitable financial burden. A serious claim can arise in many situations – against a small business, a charity, or a householder: it is not an issue that just affects big business:

- At present, insureds typically buy Employers' Liability of £5m and may buy Public Liability cover of £3m-£5m although that is not legally required. At present that level of cover is likely to cover a catastrophic claim but it will no longer be sufficient under the new rate. Businesses are now being advised to increase their levels of cover four or five-fold, with inevitable increased costs.
- Cover at levels which would cover claims under a discount rate of -1.75% is difficult to obtain and may not be available to all insureds.
- Insureds with existing claims have no opportunity to increase their cover and are very likely to find themselves underinsured, facing the risk of administration or bankruptcy, with resulting loss of jobs.
- Insureds advised to buy increased cover under non-mandatory insurance such as Public Liability may choose not to do so, leaving themselves and potential claimants financially exposed.
- The cost of insurance is likely to increase in Northern Ireland. The pricing of premiums is a competitive decision for insurers and it is difficult to obtain and release information bearing in mind the restraints of competition law. However, it should be noted that following the decrease in the rate in England and Wales in 2017 to -0.75%, the MOJ estimated the cost to insurers at around £2bn a year, with an increase of £50-£75 on an average comprehensive motor policyⁱ. The Office for Budget Responsibility also reported an increase in insurance premiums as part of its fiscal forecast following the changeⁱⁱ.
- The Public Sector will be obliged to meet much higher damages awards, syphoning funds away from front-line services at a time when budgets are already under strain. When the rate was reduced to -0.75% in England and Wales, the government set aside £1.2bn to meet the expected additional costs to the public sector, as reported by the Office for Budget Responsibilityⁱⁱⁱ.
- Professionals who need insurance cover may find it hard to obtain, or only available at significantly increased cost.

The BMA has already warned of the impact of the change. Dr Alan Stout, the BMA NI GP committee chair has said, *"If this legislation [to change the rate to -1.75%] is passed it could have a catastrophic effect on General Practice in Northern Ireland. GPs here are currently the only health care professionals in the UK paying five figure personal indemnity costs, and this will significantly increase those costs and also the individual personal and financial risk that each GP carries. It is another factor putting junior doctors off becoming a GP and makes it hard for us to attract GPs from other parts of the country to work here. This issue and its potential impact need to be addressed urgently by the Department of Justice."*

Other professionals will also be affected. It is noted that the Justice Minister recused herself because of the impact any change may have upon her husband's profession as a dentist.

- Voluntary organisations, suffering at present from reduced levels of financial support as a result of the pandemic, will still need to obtain insurance cover for their activities. If that is too expensive or not available, they may no longer be able to continue their work.
- There is the potential for the insurance market in Northern Ireland to contract, making it harder for businesses and consumers to obtain cover. Northern Ireland is a relatively small market and rather than expose themselves to significant additional risk insurers and brokers may instead decide to withdraw.

It is difficult to present hard evidence of the likely economic impact of an increase in the rate. Insurance is a highly competitive market and competition law makes it difficult to obtain and share information on likely market activity. However, the comments from the BMA reported above make the position clear. The situation facing GPs seeking insurance cover in the light of the very severe reduction in the rate may be mirrored by other businesses and consumers seeking to buy insurance after the change. In the evidence from the MOJ and the OBR reported above, it should be noted that the figures relate to a decrease of 3.25% (from 2.5% to -0.75%). The change proposed for Northern Ireland is a full 1% more.

A discount rate of -1.75% for even a short period creates significant risk. After 31 May, every day presents the prospect of an accident occurring which will lead ultimately to the defendant losing his or her small business or his or her home; of businesses operating under or uninsured; of professionals unable to work because they cannot obtain cover at acceptable cost; of businesses, charities, small sports clubs, and volunteer groups closing because they are unable to obtain or afford insurance cover and are unwilling to take the risk of operating without it.

It is vital that damages are set at the right level, to ensure that justice is delivered, not only to injured claimants but also to defendants who must bear the cost of the award.

The Committee for Justice has recognised the urgent need for a new discount rate to be set and has indicated previously that it is willing and able to deal with the scrutiny of the Bill expeditiously. We write to ask the Committee, in the light of the very serious issues and risks that are raised by a very low discount rate based on outdated methodology, to review its timetable to complete the scrutiny within a time frame which will allow the Bill to become law this year.

Your sincerely

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ii <https://obr.uk/box/the-personal-injury-discount-rate/>

iii <https://obr.uk/box/the-personal-injury-discount-rate/>