Consultation response on behalf of Health and Social Care NI - 30.04.21

Based on the experience of a recent case, a claim settlement of c.£9 million would translate into a settlement of £35 million at the new proposed rate of -1.75%. This would be a total increase of £26 million for one individual plaintiff.

The gap between the new proposed rate for Northern Ireland against the rest of the UK creates a stark difference which has implications for various industries, including the commercial insurance industry, public sector bodies and the health budget.

The proposed discount rate being recommended as an interim measure creates further uncertainty for the Government and Insurers in creating adequate reserves against present and potential future claims. The large difference of £26 million illustrated above between the present discount rate and the proposed rate further emphasises the issue of potential overcompensation to many plaintiffs and resultant ramifications for public funds.

As set out below, one safeguard against overcompensation would be to ensure cases are settled by means of a Periodical Payment Order with as many Heads of Claim as possible being paid on an annual basis thus reducing the need for a lump sum payment calculated using multipliers and discount rates.

Is the new statutory methodology to calculate the personal injury discount rate the most appropriate to achieve as close to 100% compensation as possible?

The objective of the new statutory methodology is to enable a discount rate which will result in damages awards that are fair between claimants and defendants in helping to provide 100% compensation, neither more nor less, for the wrongful injuries. Historically Plaintiffs were entitled to have damages calculated on the basis that they should be entitled to pursue the most risk averse investment reasonably available to meet his/her needs. The argument for this was that he/she is not in the same position as the ordinary investor, who has income and has surplus funds to invest. At the time the Court took the view that index linked gilts (ILGs) were the most effective way of providing certainty and removing risk. However, this is contrary to what occurs in practice, and does not reflect reality. A recent review of how the discount rate is calculated has led to a change in methodology. This has resulted in a decision that the discount rate should now be set by reference to expected rates of return on low risk diversified portfolio of investments, rather than very low risk investments. This is a significant policy change and has resulted in the discount rate moving. Whilst it is agreed that Plaintiffs should not be pushed to invest in high risk portfolios in order to deliver fair compensation the method used to calculate the discount rate should reflect a risk profile that is informed by how Plaintiffs actually invest their compensation and the returns they are able to achieve. The rate is in essence a rate of return on investments assumed to be made by claimants as a single class. However, the issue remains where plaintiffs adopt a different investment strategy, which has the potential to outperform the low risk free rate, then they have the possibility to place themselves in a better situation financially compared with one where the basis for the claim had not arisen in the first place.

Has the new methodology the potential to veer towards over compensation and if so how can this be rectified?
Has the new methodology the potential to veer towards under compensation and if so how can this be rectified?

The current approach assumes that all Plaintiffs will adopt a similar investment strategy "at low risk" which produces over-compensation based on research into actual investment practices. Most personal injury claimants in receipt of significant sums have expert investment advisors (sometimes arms of the legal firm which acted in their claim, and costs are included within their compensation). Plaintiffs will therefore be over-compensated on cases where their investment risk profile was higher than that of a "low risk" approach. This is brought into particular focus with the current -1.75% rate which produces exceptional multipliers for future loss.

In terms of rectifying the issues that arise:

- In England & Wales models have been discussed how Government defendants could provide claimants with an investment product which guarantees a rate of return of inflation or above, thus removing the perceived need for a highly conservative (currently negative) discount rate, and;

- Promotion of Periodical Payment Orders (PPO's). One safeguard against over/under compensation is the use of PPOs with as many Heads of Claim being paid on an annual basis thus reducing the need for a lump sum payment calculated using multipliers and discount rates. Heads of claim such as earnings, care and other therapies, which often have large costs, can be placed into a PPO and this will allow the claimant to manage a large settlement amount spanning many years and provides them with assurance of a continuous annual income being received every year for the remainder of their life. NHS Trusts, being government-backed, are able to offer PPOs in all suitable claims. This contrasts with a lump sum award where the claimant takes on the responsibility for managing the money and for its investment, inflation and longevity to ensure it lasts until they die.

We have estimated how the multiplier referred to in the consultation paper would impact a 'typical' catastrophic birth injury claim where the claimant is aged 10 at settlement:

Type of loss	**2.5% DR**	**UK -0.25% DR**	**Scottish -0.75% DR**	**NI -1.75% DR**
		£	**£**	**£**
General Damage	500,000	500,000	500,000	500,000
Past losses	45,551	45,551	45,551	45,551
Future loss	9,099,541	21,600,862	27,071,271	39,333,312
Capitalised lump sum	**9.645,092**	**22,146,413**	**27,616,822**	**39,878,863**
Lump sum + PPO*	**2,593,541**	**7,118,413**	**8,252,145**	**11,866,863**
* assuming £200k per annum of periodical payments				

Some claimant investment advisers have a potential conflict of interest on the question of PPO v lump sum (the larger the lump sum, the higher the fees for investment advice charged by the firm). It is likely that with the negative discount rate further resistance to using PPO's may arise (outside the Care and Case Management Components).

The HSC believe it would be prudent to suggest to the DoJ to legislate to strengthen the provisions in the Damages Act dealing with PPO's so that Plaintiffs are required to accept the Defendant's offers of PPO's for future loss rather than being able to argue before the Court for lump sums. This approach would obviate reliance on estimates of future returns and inflation rates when such estimates will largely be economic and actuarial 'stabs in the dark'. This approach would obviously depend on Plaintiffs and the Court being satisfied that the Defendant will be in a position to meet the payments going forward. In this jurisdiction, the vast majority of high value personal injuries cases involve Health Trusts as Defendants and therefore the solution to this problem should take into account that in most cases the Defendant will be a public body who will be in a position to meet future PPO liabilities. The solution to the uncertainty of future investment return and inflation rates involves taking that uncertainty out of the equation and enforcing settlement of future loss claims by way of PPO's.

Does the new statutory methodology reflect how a claimant would be advised to invest their award?

Claimants receive investment advice from appropriately regulated, expert investment advisors who, sometimes, are associated with the legal firm that acted for them on their claim - they will be best placed to provide evidence as to how Claimants would be advised to invest their award.

What are the likely effects of using an investment period of 43 years rather than 30 years in the model and do you agree with this approach?

This requires input from actuarial experts.

What are the advantages or disadvantages of transferring responsibility for setting the rate from the Department of Justice to the Government Actuary and is there an appropriate level of accountability in the new statutory methodology?

Presently the discount rate within Northern Ireland sits at a rate of 2.5% and from 31st May 2021 it will move to -1.75%. Currently in England and Wales the discount rate is -0.25% which was introduced in August 2019. The present discount rate in Scotland is -0.75% which was reviewed by the Government Actuary and it was decided in September 2019 that this discount rate remained suitable and therefore has remained unchanged.

The England and Wales approach is that the rate is set by the Lord Chancellor and it emphasises political accountability. The Scottish approach is independent and dealt with by the Rate Assessor (the Government actuary) but the courts also retain the discretion to take a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question. The process is free from any political influence or interference.

The disadvantage of using the Government Actuary is a lack of political accountability as it does not take into account wider social and economic factors such as the impact on the health budget. In England and Wales, they have that level of accountability and it is subject to parliamentary scrutiny. In Scotland it is an exercise independent of political input or scrutiny. Of the two approaches, while some see political 'interference' as a negative, it is a positive as it opens the rate setting process to consideration of other important factors.

It is recommended, on behalf of the HSC, that we adopt the England and Wales model with parliamentary scrutiny, but to build in consultation with experts. All parties involved in litigation and affected by the Discount Rate should be invited to participate in any subsequent review (to include the Department of Health and the Health and Social Care Sector in NI.) A 5 year review is the preferred option also as these cases can take up to five years to settle and a three-year cycle would open the door to either party delaying settlement to potentially manipulate the system if they thought a review would be advantageous to their case.

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