

► UK PERSONAL INJURY CLAIMS: NEW DISCOUNT RATE

Last week the Lord Chancellor, Liz Truss, made the long awaited announcement of the new discount rate to be used when setting the multiplier for certain future losses forming part of the compensation awarded to personal injury claimants in the UK.

This power to review the rate is vested in the Lord Chancellor by virtue of the Damages Act 1996 and there have been repeated calls by claimants' legal advisers for a review of the **2.5%** rate which has been applied since 2001. The discount rate has now been reduced to **minus 0.75%**. This is considerably lower than many had expected with 1.5% or possibly 1.0% having been widely mentioned.

The change comes into effect in just two weeks time, on 20 March 2017.

TO WHAT IS THE DISCOUNT RATE APPLIED?

Damages in personal injury claims for which a defendant is found or agreed to be 100% liable are intended to put the claimant in the financial position he or she would have been in had the injury not occurred. Additionally, the damages provide an element of compensation for the claimant's pain, suffering and loss of amenity (PSLA). PSLA and *past* financial losses (such as loss of earnings and care costs) are unaffected by this change. Since a large proportion of personal injury claims comprise only PSLA and past losses, the total outlay on these by defendants and their insurers will not rise.

However, in cases of serious injury, where there are ongoing losses, such as loss of earnings, which can be quantified on an annual basis, the effect of this change may be very great indeed.

Example

A 30 year old third engineer is seriously injured during the course of his employment on a cross channel ferry. The medical experts appointed by the parties agree that he will not be able to work at sea again but that he will be able to undertake some form of shore-based employment using his engineering knowledge and skills. His *net* annual income as a seafarer was £30,000 whereas he is only expected to be able to earn £20,000 net ashore. He expects to retire at the age of 60.

In order to calculate the value of his future loss of earnings claim, his annual net loss (the **multiplicand**) is multiplied by a **multiplier** to produce a lump sum payment. This is done with the aim that, if invested, the lump sum will provide a sufficient return. In this example the lump sum would produce £10,000 per annum for 30 years.

The multiplier is obtained from actuarial tables – the Ogden Tables. Each table sets out the appropriate multiplier for a different scenario and each includes a range of discount rates (the current edition has a range of 3% to -2%) to be applied to the actual number of years over which the loss is incurred. One of the tables sets out the multipliers to be used when calculating the loss of earnings for males who will retire at 60. The issue which claimants and their lawyers have had for many years is that the discount applied has been too high, such that in this example, the lump sum is insufficient to provide the £10,000 per annum for 30 years.

Applying the tables to the example:

Future loss of earnings using the current 2.5% discount rate

Multiplicand:	£10,000
Multiplier:	20.78
TOTAL:	£207.800

Future loss of earnings from 20 March 2017 using the -0.75% discount rate – strictly, the half way point between the figure for -0.5% and the figure for -1.0%; no details are provided in the Tables for -0.75%

Multiplicand: £10,000

Multiplier: **32.87**

TOTAL: £328,700

This represents an increase of over 50% to this one element of future loss and in very serious injury cases there are likely to be several elements to which the new regime will apply. In addition to loss of earnings, the most common future losses are care costs and loss of pension together, particularly in fatal accident claims, with loss of services such as DIY, gardening and child care.

ACTION REQUIRED IN THE LIGHT OF THE CHANGE IN RATE

Claims handlers and defendants' legal representatives will now need to review all claims which include future losses which have been or will be quantified on an annual basis.

1. If a formal (in England and Wales Part 36) offer of settlement where the deadline for acceptance has not yet passed has been made by a claimant, serious consideration should be given to whether it should be accepted now. Even if the deadline has passed, it is worth reviewing the offer to see whether an approach should be made to the claimant to try to agree the costs arising out of late acceptance - although there will no doubt be many claimants who are currently reviewing their Part 36 offers which have passed the deadline for acceptance with a view of withdrawing them!
2. If a defendant has made a Part 36 offer where the acceptance deadline has passed, their representative may want to consider increasing it to take account of the new discount rate in order to try to get rid of the claim. However, they should not withdraw any earlier offer since if the claim ends up going to trial and it is clear that on the basis on which damages are awarded the claimant would have recovered less under the old regime than the defendant's offer under the old regime, there is an argument which can be put forward that this should be recognised in the context of costs. Ultimately, the court *always* has discretion in relation to costs.
3. Defendants' Part 36 offers which have not yet reached the deadline for acceptance, are unlikely now to be accepted and should be reviewed after the deadline has passed. However, again, we recommend you do not withdraw these offers.
4. Finally, there are the claims where no offers have been made but where the file reserve or estimate takes account of future losses. These will all need to be reviewed but there is no need to rush to make a Part 36 offer as with any offer made now, the time for acceptance will expire after the new regime comes into effect!

IS THE RATE NOW FIXED FOR THE FORESEEABLE FUTURE?

There have been warnings of increased motor insurance premiums and huge additional costs to the NHS as a result of the change in discount rate, but to answer this question is to veer away from the legal nature of this article. However it is worth noting that the insurance industry has not taken this lying down and last Friday sector leaders met with the Chancellor, Philip Hammond. An article in the Law Society's Gazette reported that "The Association of British Insurers has revealed it will lobby Hammond for a law change on the calculation of the discount rate to be included in the Prison and Courts Bill, which was laid before

parliament last week. The rate is set to change from 20 March but insurers say reform ‘cannot wait until Easter’”.

We must now wait and see how matters develop.

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