Ministry of Justice
Damages Act 1996: The Discount Rate Review of the Legal Framework

A response by the Association of Personal Injury Lawyers

May 2013

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have around 4,400 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

APIL welcomes the opportunity to respond to a further consultation on the discount rate. We believe that the legal parameters of the discount rate should remain as they are, as stated in *Wells v Wells*[1]. The most important principle when assessing appropriate solutions should be certainty and security of investment for the claimant. Forcing the claimant to expose their lump sum award to market risk will lead to damages being diminished, and the claimant being undercompensated; having to turn to the state for financial assistance to cater for their needs when their compensation is exhausted.

APIL is concerned that this consultation is pre-occupied with changing the legal parameters governing the way in which the discount rate is set for the wrong reasons. We hope that the Ministry of Justice has not been influenced by the insurer lobby assertion that 'a reduction in the [discount] rate could add over £1 billion in costs to insurers.'[2]

Not only is this assertion made without any supporting evidence, but in fact the rate of return on ILGS yields has, for the past ten years, been sliding in a downwards direction and has stayed significantly below the current discount rate. For example, the average yield for the 36 months leading up to November 2010 was only 0.84% and has continued to fall steadily since then: for recent cases the discount rate should be around 0%. This means that defendants have been quietly profiting from the current discount rate for years: as awards have been overly discounted using the current rate.

This is illustrated by the graph appended to this response[3] which shows the discount rate plotted in pink. The blue plotted lines clearly show that the monthly gross redemption yields for ILGS (over 5 years, with inflation of 5%) from November 1998 to November 2010 consistently fell below the discount rate. The article containing this graph also confirms the serious under-compensation of claimants, while insurers have reaped the financial benefits of the existing discount rate.[4]

Q1. Do you agree that the general principles of accuracy; transparency and simplicity and stability should be used to assess the appropriateness of proposed solutions? If not, please give reasons.

We note here that there are tensions between the principles proposed to assess the appropriateness of proposed solutions. Accuracy would be achieved at the cost of simplicity

[1] [2008] EWHC 919

[2] Email, Huw Evans of the Association of British Insurers, to Geoffrey Baldwin, Cabinet Officer, and others, 9 February 2012. (See appendix)

[3] The Law Gazette: Time to review the discount rate in personal injury claims, by Felix Chan, Wai-Sum Chan and Jonny Li. 6 December 2010. (See appendix)

[4] Ibid, note 3 above.

and stability, for example. One of the most important principles is that the claimant's award should be safe from risk when invested, to secure the claimant's finances for the future.

Q2. Do you agree that accuracy is the most important of these three general principles? If not, please give reasons.

If discretion were to be given to the Lord Chancellor it would become difficult to anticipate changes to the rate and that would make it problematic for all parties involved in calculating the value of the claim as settlement approaches. More important to all, is certainty. In order to achieve that, there should be an agreed formula allied to an annual review of the discount rate. It is right that the rate should change to reflect market changes: but historical data should be used when calculating the rate, as there is a very poor record of forecasting yields. This can be demonstrated by the fact that in 2001, the Lord Chancellor set the assumed rate of return at 2.5 per cent, based on average gross redemption ILGS yields and his prediction that yields were likely to rise. In fact, as is evident from the graph on page 12 of the consultation document, by May 2012, the pre-tax average yields had *declined* to 0.2 per cent. The forecast proved to be completely wrong.

Looking at an average of the past three years is a sensible approach. Forecasting would introduce an element of speculation and uncertainty which would be unacceptable. Certainty through historical data of ILGS yields means that both claimants and defendants can see what is happening to yields as they approach a settlement. Additionally, liability insurers would know what the discount rate would be when setting premiums. This then offers certainty to defendants when calculating their potential liabilities in each claim. Future speculation benefits no-one.

Q3. Are there any other issues relating to the setting of the discount rate and the possible encouragement of the use of periodical payments that you would wish to draw to our attention? Please give reasons.

There is a fundamental flaw in this consultation document, in that it claims to focus on the principle of "full compensation for the claimant", yet the claimant will not receive full compensation if the legal parameters of the discount rate are changed, forcing claimants to expose their compensation awards to market risks, which will lead to the overall awards being diminished.

Claimants must have certainty in their investments, as stated in the case of *Wells*. Lord Steyn said "…It is therefore unrealistic to treat such a plaintiff as an ordinary investor. It seems to me entirely reasonable for such a plaintiff to be cautious and conservative…". Further, there is no real assessment of how the proposals would affect the disabled, in

particular disabled children- it does not point to these groups of people as particularly disadvantaged. They must ensure that damages awarded to them do not run out, and can cater for their needs for the rest of their lives. They cannot afford to lose any money through risky investment.

Further, page 3 of the consultation document states "instead, the initial evidence indicates, (claimants) seem to invest in mixed portfolios, including higher risk investments". Claimants have no other option available to them at the moment, unfortunately. They must risk their investments in mixed portfolios despite the fact that ILGS are the only way that they could escape risking their investments. In *Simon v Helmot*[5], Lord Hope commented on this, stating that "with ILGS…there was at last a tool that could be used to provide protection against inflation. It is tailor-made for investors who want a safe investment for the long term. In practical terms it is risk free". Unfortunately, because the discount rate has been kept too high, claimants will not get the returns that secure their care needs by simply investing in ILGS. The arguments in favour of a higher discount rate based on claimants investing in riskier portfolios are therefore self-perpetuating. Advisors will say that ILGS offer such a poor return that claimants will have to have a mixed portfolio in order to aim for the returns needed. That is why people invest in mixed portfolios.

If the discount rate was correctly set, a much higher proportion of claimants would invest a higher proportion of their awards in ILGS, because they would then have the security that Gilts are able to offer. If anecdotally they haven't been doing that, then it is only because the discount rate currently does not reflect the reality of ILGS poor returns.

Encouragement of the use of periodical payments

Periodical payments (PPOs) for cases over around £0.5 million are an excellent investment vehicle and provide the claimant with the correct financial assistance: and the set up costs are proportionate to the sums involved, whereas for smaller sums they are not.

PPOs are rarely used for cases valued below £0.5 million, and so will only be used in a relatively small percentage of total claims. For example, a small dental claim, where a claimant has lost teeth and will need regular treatment, is not suitable for a periodical payments order, as it is simply uneconomical to set one up for smaller awards. In other cases, defendant insurers who are keen to "close the books" on a particular case, will often offer a larger lump sum to persuade the claimant not to opt for a PPO.

Note that the courts already have powers under CPR 41 to impose PPOs and will do so even where both parties disagree in some circumstances. In *Mealing v Chelsea and*

[5] [2012] UKPC 5

Westminster NHS Trust[6] it was stated that "the court is obliged to consider an award for periodical payments and has the power to make such an award, even without the consent of the parties". In view of this, the encouragement envisaged in this paper should be directed towards the judiciary to encourage them to consider, more often, the prospect of ordering periodical payments where appropriate. More training and resources for the judiciary is the solution to this.

There are circumstances, however, where it is not possible to impose periodical payments because the defendant does not have sufficient financial standing: the courts have to be satisfied that the paying party is financially stable enough to guarantee that periodical payments will continue to be honoured. In light of this, it would be impractical to extend PPOs to all cases.

Q4. Do you consider that the legal parameters governing the setting of the discount rate should be changed? Please give reasons

We believe that the current legal parameters are correct. *Wells* is an extremely important decision, as it underlines the whole approach to compensation that is taken by the courts, and helps put the claimant back in the position that they were in before the tort occurred. This is being undermined. The claimant's aim, when adopting a conservative investment approach is to preserve his award and ensure, so far as is practicable, that he has sufficient monies for his needs for the duration of his expected lifetime. It is simply not right that issues for future care are exposed to market risk. The claimant will then risk diminishing the capital value of his award, and thus running out of vital funds. The claimant needs a guaranteed security, otherwise they risk running out of funds, they will not be put back in the position that they were in before the accident, and they will be undercompensated.

If claimants are undercompensated, the cost is put back on to the state. A person who needs care or support, who is perhaps no longer able to work as a result of their injury, will have to be funded by the state if they invest in risky portfolios and lose money. It is important for the Government that the claimant receives, and is allowed to keep, sufficient compensation for their needs for the duration of their life.

We note that the Government has already issued a consultation about what the rate should be. We feel that the correct approach should have been to look at the law; and the legal parameters in isolation first, to identify the effects and important principles to be taken into account. It should first have been addressed whether claimants, including disabled children, should be expected to invest their lump sum awards in risky markets just to enable them to

[6] [2007] EWHC 3254 (QB)

get a return that would cater adequately for their needs. This should have been done as a first step, rather than deciding the rate and then trying to fix the law to get that rate.

Q5. If you consider that the legal parameters governing the setting of the discount rate should be changed, what do you think they should be? Please give reasons and define any terms used.

As detailed in answer to question 4, we do not believe that the legal parameters governing the setting of the discount rate should be changed. *Wells* gives security to the claimant, and allows them to invest, free from market risk.

Q6. If you consider that the legal parameters governing the setting of the discount rate should be changed, what investments do you think the hypothetical claimant should be deemed to make for the purposes of calculating the rate of return? Please indicate the types and proportions of assets that should be included in the hypothetical claimant's portfolio of investments. Please give reasons.

If, against our recommendations, the legal parameters are changed, the rate should be regularly reviewed, at least annually. There should be transparency, so that everyone can see that the rate is being set correctly. APIL strongly feels, as expressed above, that the financial security of the claimant is extremely important. There should be an assumption that a high proportion of lump sum awards are invested in low risk investments such as ILGS.

Q7. Do you consider that the availability of periodical payments should affect the level at which the discount rate is set? Please give reasons and indicate what effect you think they should have.

We fail to see how this question is relevant. There is no regard for the discount rate when periodical payments are ordered. The application of the discount rate only relates to lump sums, so the availability of PPOs should not make a difference.

Q8. Should the court have power to depart from the prescribed rate and, if so, should the terms on which it may do so be expressly defined?

The courts have had a tendency to say that it is up to Parliament to decide the rate and that the courts should not depart from this. However, the courts do have a power to depart under the Damages Act 1996, and they should exercise this power when the circumstances require.

Q9. Should the power to prescribe different rates be available for:

a) **Different classes of case?**
b) **Different periods of time over which damages are paid?**
c) **Different heads of damages?**
d) **Cases where periodical payment orders are available and where they are not? And if so, for which classes, periods or heads would you specify different rates. Please give reasons.**

In APIL's view, there should be two rates: one for earnings related losses (including the cost of care) and the other for non-earnings losses, as was set out by Lord Hope in *Simon v Helmot*[7] at paragraph 42: "The correct discount rate to apply was – 1.5% for earnings related losses comprising the respondent's own loss of earnings and the cost of employing his carers. The correct rate for the non-earnings related elements of the future loss was 0.5%".

However, we are against the suggestion that different types of case should have different rates.

Q10. If you consider that the legal base for setting the rate should be changed, what methodology should be used to set the rate, including:

a) **What quantitative and qualitative data should be used (e.g. historic or forward looking, specific indices)?**
b) **What assumptions should be made (e.g. asset mix, weighting of assets)**
c) **How should inflation be taken into account?**
d) **What allowances should be made for tax, administration or management expenses and investment expenses?**

APIL believes that the legal basis for setting the rate should not change, and it should remain as the net return on ILGS. We are very concerned about the use of forward looking data, as it can be widely wrong, and introduces an element of speculation and uncertainty, which would be unacceptable. As above, we feel that an average of the past three years is a sensible approach.

Q11. Do you consider that the present level of usage of periodical payments is appropriate and that no change is necessary? Please give reasons.

If the level of usage is inadequate then this should be addressed by the judiciary using their powers to impose it. If there is inadequate usage of the power then training and resources for the judiciary should be provided. The law does not require change.

[7] [2012] UKPC 5

Q12. If not, please indicate the measures that you think should be taken to increase their use. Please give reasons.

There must be training for judges on exercising powers. Courts should award all costs to the claimant associated with getting investment advice associated with getting PPOs or lump sums. Previously in *Wells*, it was said that the claimant would not need costs for investment advice, as they would just invest in ILGS. If the changes take place, this will not be the case.

Q13. Do you consider that claimants and defendants are sufficiently informed about the availability of periodical payments and how they operate? Please give reasons.

We feel that claimants are sufficiently informed about the availability of periodical payments and how they operate. This is because they will be advised by their solicitor and counsel, and will be advised to take financial advice if the claim is big enough.

Q14. Why are periodical payment orders not used in a larger proportion of cases? Are there, for example, types of cases where periodical payment orders are not appropriate? Or are there particular costs, obstacles, risks or circumstances which limit the use of periodical payment orders?

Please see our answer to questions 3 and 11, above.

Q15. Where periodical payments are used in conjunction with a lump sum, what determines the balance between the lump sum and the periodical payment elements of the overall award of damages?

This is a very broad question, and the answer depends on the circumstances of each different case. Whilst it is impossible to give a specific answer, there are some common circumstances, such as the need to adapt or buy a house as part of the compensation award, which will prescribe how much award needs to be a lump sum.

Q16 (Scotland only). Do you consider that there would be merit in reviewing the existing approach to periodical payments in Scotland? If so, please give reasons.

We feel that there should be a review of the existing approach to periodical payments in Scotland. Periodical payments can be set up by both sides, but this rarely occurs. We feel that Scotland should benefit from the power of the court to be able to impose periodical payments in cases where they feel it is suitable. It should not be solely up to the parties to set them up.

Impact assessment

We would like to make a general comment that the evidence base of the consultation proposals appears to be largely anecdotal. The proposed changes affect a fundamental legal principle, and proceeding without a fully researched evidence base could have catastrophic effects for injured people.

- Ends -

Association of Personal Injury Lawyers

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Appendix

APIL response:
Ministry of Justice
Damages Act 1996: The Discount Rate Review of the Legal Framework

From: Evans, Huw [mailto:Huw.Evans@abi[redacted]]
Sent: Thursday, February 09, 2012 11:26 PM
To: 'Geoffrey.Baldwin@cabinet-office[redacted]' <Geoffrey.Baldwin@cabinet-office[redacted]>; Dalton, James <James.Dalton@abi[redacted]>; Starling, Nick <Nick.Starling@abi[redacted]>; Katy.Owen@cabinet-office[redacted] <Katy.Owen@cabinet-office[redacted]k>; Kate.Starkey@cabinet-office[redacted] <Kate.Starkey@cabinet-office[redacted]>; Chris Turner; Clare Lombardelli; Ameetpal Gill; Samuel.Nguyen@cabinet-office[redacted] <Samuel.Nguyen@cabinet-office[redacted]>
Cc: David Halpern; Will.Cavendish@cabinet-office[redacted] <Will.Cavendish@cabinet-office[redacted]>
Subject: RE: Insurance summit

Geoff
Thanks for your note and for the conversation with James earlier after the respective notes crossed in email. I won't reiterate the details set out in the ABI note James sent but just confine myself to your main points:
MOTOR
1. We think the principle of trying to agree a sum which represents the cost that could be saved by meaningful reform is potentially promising. Our CEOs are likely to be fine to agreeing publicly that any major costs taken out of the system will result in lower premiums; this is a highly competitive market and members want to be able to lower premiums to attract new business. However, expectations are important here; even if reform is delivered radically and speedily (two big 'ifs' – see below), there will still be pipelines cases so it will be important to be transparent about timelines.
2. The four commitments (several of which, of course, are not new) are covering the right topics so the absolutely critical point will be how radical the Government is prepared to be when it comes to the detail of reform – especially when departments are not under the pressure that a PM summit temporarily places on officials and ministers. A bold approach across the four points could potentially take over £1 billion out of the system which would clearly impact on premiums significantly. In practice, this means:
- Jackson implementation; full and complete action on referral fees including investigating the regulation of the credit hire industry if any ban on referral fees is not to be sidestepped.
- Legal costs: the key here is the amount, given the Justice Minister has already promised on the floor of the House to reduce the fees in principle. This is not about just lowering the number. It has to reduce substantially so there is no economic value in a solicitor acquiring a claimant through referral or advertising. As the typical referral fee is £800 and the fixed cost is £1200, the fee has to come down to £400 or thereabouts if it is to work. I understand MoJ may not want to pre-empt the consultation but it is vital that the PM and ministers understand the economics of this or the system will not be cleaned up.
- Whiplash. We would welcome this commitment but again, the stronger the better given it is absolutely critical to tackling the overall premium problem. We would like an explicit commitment to 'legislate, if necessary', and a sense of urgency; nearly all the necessary changes will require legislation and will therefore take some time to flow through to premiums however bold the Govt is.
- Young drivers. This is the vaguest of the draft commitments and the one where the CEOs will be most sceptical given the history of Dft officials and ministers in the previous government and this one being hostile to the concept of imposing restrictions on young driver-voters. The prize for any meaningful and enforced restrictions over time would be far fewer catastrophic accidents among younger drivers which would then drive lower premiums. Here, as in many other areas of public policy, insurer pricing is just holding up a mirror to the real problem which in the UK's case is the appalling level of death and serious injury on our roads that results from our highly permissive young driver regime; more than

3,3000 young people are killed or seriously injured every year. Ultimately the Government has to want to tackle the problem head-on – if it does, it is likely to make a difference and this will lower premiums.

-

EMPLOYER LIABILITY

This wasn't covered in your note but as per the call, insurers would almost certainly agree to a new insert to go out with all policies and renewal notices to be clear what SMEs do or don't need to do on health & safety regulation, including tackling the perception that insurers want them to use health & safety consultants. This should be joint branded with HMG/DWP, HSE, FSB, Which? etc to give it authority and credibility. This would also cover the work experience issue. Overall the benefit of this is that it would tackle the root problem, namely the myths which continue to confuse and concerns SMEs. As we set out in the note and explained over the phone, insurers will not agree to any contract measures and do not accept there is any problem with gold-plating or the imposition of additional requirements.

OTHER POLICY AREAS

Two other areas which are likely to come up verbally and on which the PM should be briefed are:

- Discount Rate. This is the % by which large payouts to victims of catastrophic accidents/negligence victims are reduced to allow for the likely investment return that the victim will receive from investing the payment. It is set by the Lord Chx in consultation with HMT and both the formula used (which only uses UK Gilts and is therefore narrowly defined) and the level of the rate itself are being reviewed at the moment. A reduction in the rate could add over £1 billion in costs to insurers. In short, the gains of any radical reform on legal fees, whiplash and young drivers could easily be neutered by Govt if it reaches the wrong decision on the Discount Rate.
- Flooding. While out of scope for this summit, this is the single biggest area of difficulty between the general insurance industry and the Govt so it would be surprising if one of the CEOs was not to raise it. The ABI has (highly unusually) publicly criticised Defra for its handling to date of negotiations to establish a framework for long term flood cover for high risk households and has written to all MPs in England & Wales setting out its case.

LOGISTICS:

- The media handling is clearly the other critical piece. Please could you let me know who is handling this in no 10 so I can make contact and try and avoid an unnecessary briefing war ahead of the summit. To state (I hope) the obvious, it is vital our good work to establish some concrete outcomes is not undermined by any briefing that seeks to portray this as CEOs being hauled into explain themselves. Indeed, several CEOs have said they would publicly boycott the meeting if that were the story on the day. We would want to agree the broad outlines of what the pre-briefing looks like and be reassured that the PM's initial on-camera remarks are constructive and acknowledge the broader problems which the premiums reflect rather than attack the premiums themselves.
- We have several calls with our members tomorrow so will flag any major new issues to you and would be grateful if you did the same from your end.
- On late Monday or Tuesday morning, it would be helpful to agree the final choreography of the meeting; given the number of CEOs attending, we will agree in advance with them who answer the PM's initial questions on the key topics. As ever, it would seem sensible to agree an outline plan for the first half of the meeting and to ensure the PM is briefed to know which CEO is best placed to cover particular market issues.

I hope this covers everything and look forward to hearing confirmation of the best no 10 media contact so I can follow up there.

Thanks and best wishes

Huw

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Cc: DHalpern@no10[redacted]; Will.Cavendish@cabinet-office[redacted]
Subject: Insurance summit

Huw & James:

Following our discussion this morning, we promised to come back to you on what the government will do.

1. Implement Jackson reforms in the Legal Aid, Sentencing and Punishment Offenders Bill.
2. Commit to reducing the £1,200 fee that lawyers can earn from small value personal injury claims. We can't give a figure until the consultation, but we can say that the govt is committed to reducing the fee.
3. Government will commit to taking action to reduce the number and cost of whiplash claims (and we will look at a number of options on how to do this in the next few months with ABI/insurance companies).
4. Government will look at what can be done on young drivers' risk and safety.

If government commits on these four things, can we get a commitment at the summit on Tuesday from ABI and insurance companies to commit to passing on savings to consumers/businesses? Government will want to indicate a figure of some sort, which we should discuss further; you've indicated that you would be unlikely to commit to a percentage reduction but we should be able to come to a ballpark view of what sort of cost reductions we could get from proposed changes (and say we should see this feeding through into premia.)

I'm around tomorrow, though in meetings for much of the morning.

Best,

Geoff

p.s. I believe that you owe Kate a note on what options you think there are on whiplash; we've discussed here and I am hoping that there will be good common ground here; we should aim to enumerate the types of things that we will peruse.

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The Law Gazette

Time to review the discount rate in personal injury claims

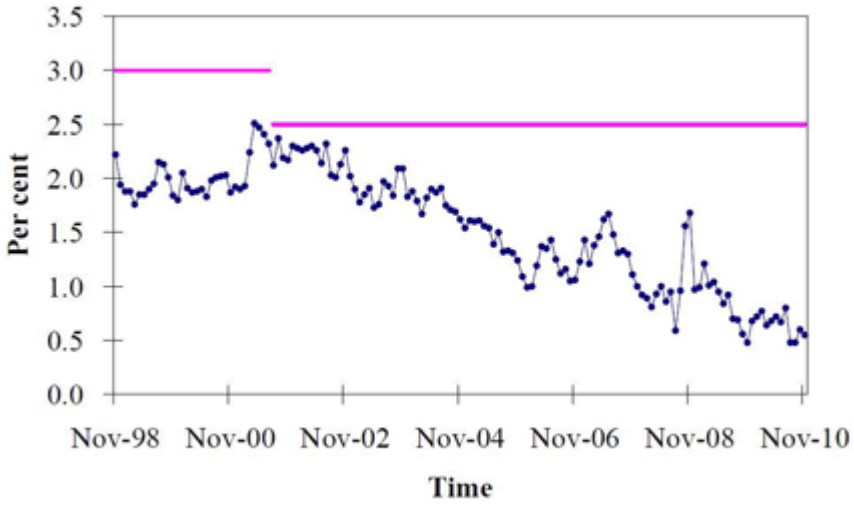
by **Felix Chan, Wai-Sum Chan and Johnny Li**
Created *06/12/2010 - 11:08*

When assessing future pecuniary loss in personal injury claims, the multiplicand/multiplier approach is often adopted. An important factor in determining multipliers is the net rate of return (discount rate) the claimant might expect to receive from a reasonably prudent investment of the lump sum compensation.

The last revision of the discount rate took place on 25 June 2001, when the then lord chancellor promulgated an order pursuant to section of the Damages Act 1996. He prescribed a discount rate of 2.5% per annum to reflect the change in the average redemption yields on Index-Linked Government Stock (ILGS) at that time.

The discount rate has remained unchanged since. Yet, for the past 10 years, ILGS yields have been sliding down and significantly below that rate. The rate recently dipped below the 0.5% mark and the average yield for the 36 months leading up to November 2010 was only 0.84%. This is demonstrated in the graph below showing the monthly gross redemption yields for ILGS (over 5 years, with inflation of 5%) from November 1998 to November 2010.

The prescribed discount rates, respectively 3% under *Wells v Wells* (1998) and 2.5% under the Damages (Personal Injury) Order 2001, are also plotted in the graph with pink lines. The new lord chancellor Kenneth Clarke, succumbing to tremendous pressure from overwhelming public opinion (chiefly led by Muiris Lyons, president of the Association of Personal Injury Lawyers), finally agreed to initiate a review of the discount rate in early November.



Gross redemption yields on Index-Linked Government Securities (over five years, with inflation of 5%) and the prescribed discount rates (pink lines) from November 1998 to November 2010. The primary data were kindly provided by the FTSE Group

Quantitative easing
The Bank of England embarked upon a programme of quantitative easing (QE) in March 2009, when the world economy was on the brink of collapse. QE is a mechanism through which money is injected into the cash-starved banking system. By repurchasing government bonds from commercial banks, the Bank of England is expected to help commercial banks build up their reserves.

The goal is for the commercial banks with additional reserves to lend some of the money out to ensure that families and businesses in need of money can obtain loans when they need them.

Over £200bn of assets have been repurchased. As a result, the yield of ILGS halved from 1% (at the beginning of the QE programme) to the current level of around 0.5% only. On the other hand, the US government recently launched a second round of QE.

Facing a great uncertainty of the future movement of ILGS yield rates, is now the right time for the lord chancellor to review the discount rate? The answer is definitely 'yes'. It is abundantly clear from the current economic landscape that the rate of 2.5% is far too high, which could lead to serious under-compensation of injured claimants. After all, the lord chancellor's decision should be based on long-term economic trends without being influenced by short-term interruptive events.

A threshold formula

Recently, a threshold formula for setting the discount rate is proposed by the authors of this article (see *Journal of Personal Injury Law*, Issue 3, 2010). Under this approach, the monthly discount rate is set by the following threshold rules:

- If the three-year average of ILGS yields drops below the last month's discount rate for more than the threshold value (the suggested value is 0.253%), this month's discount rate will be revised downward for an amount of 0.5%;
- If the three-year average of ILGS yields climbs above the last month's discount rate for more than the threshold value, this month's discount rate will be adjusted upward for an amount of 0.5%; and
- If the three-year average of ILGS yields stays within the threshold bounds, there will be no revision and this month's discount rate is the same as the last month's one

The major advantage of the proposed formula is that it is adaptable to future long-term change of market conditions. It can also avoid controversies on the timing and size of the adjustment to the discount rate.

Serious under-compensation for younger victims

Using the ILGS data from November 1998 to November 2010, the threshold formula sets the discount rate at 1% from May 2008 to November 2010. The degree of under-compensation for pecuniary loss for life, due to the suppression of the discount rate, is illustrated in the following table.

Sex	Age	Multiplier (at 2.5%)	Multiplier (at 1%)	Degree of under-compensation
Male	10	33.72	52.69	56%
Male	20	31.63	47.14	49%
Male	30	29.05	41.19	42%
Male	40	25.79	34.7	35%
Male	50	21.86	27.86	27%
Female	10	34.14	54.5	58%
Female	20	32.54	49.22	51%
Female	30	30.15	43.4	44%
Female	40	27.09	37.01	37%
Female	50	23.37	30.24	29%

For a younger claimant such as a 17-year old boy who suffered serious head injuries in *Love v Dewsbury* ([2010] All ER (D) 217 (Nov)), the degree of under-compensation could be as high as 50%. For the sake of justice and public interest, judges and lawyers resolving personal injury disputes must bear in mind the lord chancellor's current review of the discount rate, the result of which should be available promptly without delay due to its great public importance.

Without doubt, how a legal system responds to the needs of vulnerable victims of personal injury or clinical negligence is certainly one of the key parameters for judging its level of morality and civilisation.

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