Law Society of Scotland

Consultation Response

The personal injury discount rate: how it should be set in future

11 May 2017

Introduction

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We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Civil Justice Sub-committee welcomes the opportunity to consider and respond to the Scottish Governments consultation*: The personal injury discount rate: how it should be set in future*. The Sub-committee has the following comments to put forward for consideration.

The present system

Q1: Do you consider that the law on setting the discount rate is defective? If so, please give reasons.

Yes.

As a matter of substance, the critical defect in the law on setting the discount rate is the close link between the discount rate and returns on Index-Linked Government Stock (ILGS).

It is widely known that the link to ILGS returns was recommended by the Law Commission in its personal injury work in the 1990s and had been proposed by Sir Michael Ogden in early editions of the tables of multipliers which take his name. Equally, it is well-understood that the legal link between the present discount rate and returns on ILGS arises from a combination of the Damages Act 1996, the leading case of Wells v Wells [1998] and the two rate-setting Orders made by respective Lord Chancellors in 2001 and 2017 (along with the reasons given and materials associated with those two Orders), which Orders were replicated in Scotland in 2002 and 2017.

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Purely for the purposes of this response, it is accepted (i) that the link between the discount rate and ILGS returns may have been an appropriate one to have advocated around 25 years ago and to have implemented nearly 20 years ago in common law (Wells) and in the first statutory Order some 16 years ago and (ii) that the current Lord Chancellor considered herself bound, by the case law and by her predecessor's reasoning, to set a discount rate based on ILGS returns.

That said, conditions in the ILGS market in particular and in the national economy generally (and in global markets after the 2007/08 crash) have changed dramatically since the 1990s such that in our view the ILGS link is clearly no longer fit for purpose. [This point is acknowledged, almost in passing, in the Lord Chancellor's 2017 reasons: "I note that real yields have witnessed steady decline since 2001".] At the macro level, there are well-known supply and demand tensions in the ILGS market which have depressed yields. Regulatory requirements applying to institutional investors have affected the price/yield of the stocks and are also relevant, as is the programme of Quantitative Easing. At the micro level of an individual claim, the practical barriers to investing in ILGS as a private individual claimant are such that it is virtually impossible to do so (even if they were considered an appropriate asset class). It should be noted that we reiterate and develop these points in our response to question 10 below.

The other defects in the current law are much more administrative in nature and stem from the near-complete absence of detail about the procedure, mechanics and scheduling of setting a rate and of keeping it under review.

Evidence

Q2: Please provide evidence as to how the application of the discount rate creates under or over-compensation and the reasons it does so.

Using a discount rate is an intrinsic part of calculating future income streams (investment returns) or payments at net present value as a lump sum.

In personal injury cases, the future income streams valued using the discount rate method are of uncertain duration. This is purely because the calculation is fixing, at one point in time, evidence-based assessments of the periods of the future losses. Those assessments will inevitably be incorrect on any given case. Put more bluntly, the lump sum method is always going to be wrong in practice: people will live for longer, or for less time, than was assumed when the sum was computed. This is an inevitable flaw in any discount rate calculation (and is not unique or limited to an ILGS-based discount rate).

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It is mathematically self-evident that any divergence between the assumed discount rate and the actual percentage future return will lead to a mis-match. This risk of mis-match is inherent in the use of discount rates generally to calculate net present values and should not be regarded as a special feature of any particular discount rate used to value future pecuniary losses in personal injury claims.

If the discount rate used is lower than the actual future investment growth it follows that the lump sum will exceed the accrued future income. In personal injury terms, this will amount to over-compensation. Similarly, if it is higher there will be under-compensation.

The reality is that no claimant will be advised to invest solely in ILGS and no claimant in fact does so. That may be about choice but will also be due to the impracticability of using, or inability to actually purchase, ILGS. Higher returns are available without higher risk. However as soon as a gap emerges between returns implicitly in the discount rate and actual investment returns, over-compensation becomes implicit in the approach to compensating claimants.

In many cases this will lead to claimants amassing surplus cash amounting to many millions of pounds even at the end of the loss period, or more likely having available funds way beyond that needed to meet their losses. Such a situation cannot be tolerated. This arises as soon as the real rate of return experienced by claimants exceeds the statutory one and the reality is no-one is seriously suggesting claimants are not in that position. What is required from the present exercise is to bring the assumptions and principles guiding assessment of the discount rate in line with the real world as well as the objective risk profile attributed to personal injury claimants.

Q3. Please provide evidence as to how during settlement negotiations claimants are advised to invest lump sum awards of damages and the reasons for doing so.

As a defendant / defender law firm, we are not privy to discussions that take place between the claimant, the claimant legal team and financial advisors. We cannot provide evidence for it is a part of negotiations we are not engaged in.

It is inevitable that offers are subject to discussion with financial advisers encompassing how the settlement monies can be managed by investment after allowances for immediate capital purchases and contingencies are made. Inevitably the issue of risk is considered. Knowing that claimants do not invest in ILGS (see below) - which is the key investment assumption underpinning the present discount rate - it is likely that the advice is tailored to the settlement proposals – for example, particularly if there is a liability deduction, that the sum on offer invested in portfolio X, carrying risk Y may deliver returns Z and this will reasonably provide for the claimant’s needs. The reality is that the discussions never seriously touch on the use of ILGS other than as a component part of a diversified portfolio achieving higher returns but with very low levels of risk.

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Q4: Please provide evidence of how claimants actually invest their compensation and their reasons for doing so.

We are unable to provide evidence of individual claimant investment decisions as we are not involved in that activity. One point we will make is that it is extremely unlikely that anyone would be advised to invest in a means that promises a negative return - a loss - which is now the clear and direct consequence from continuing to link the discount rate to the negative yields from ILGS.

Moreover, having considered the findings of the Ipsos MORI Social Research Institute paper of 2013 it was notable that, in 6.1, the response from Financial Advisors interviewed was not, simply, that claimants buy ILGS. What is described there is, as expected, a process of devising an investment portfolio to meet the risk and cash needs of the claimant. Moreover, at 6.4, it is said that claimants prefer “low-risk” investments and when advised “typically took on a mixed portfolio of investment….different asset classes with different characteristics were included in the portfolio…claimants were rarely comfortable with high or even moderate levels of risks”. It is not being proposed that high or moderate risk is relevant, but these sections indicate the choice of low risk mixed asset approaches.

We believe evidence of the returns achieved by organisations involved in the management of personal injury damages is relevant to this question, for these are the funds to which claimants (and Deputies in respect of the English and Welsh Court of Protection) turn. For these funds to remain viable and in business they must be used by a client base i.e. claimants and Deputies, and it follows that published performance figures are indications where claimants invest damages and of the level of returns actually achieved.

- IM Asset Management Ltd, part of the Irwin Mitchell Legal organisation, have recorded an annualised total return over 6 years of 5.6% gross.

- Seven Investment Management Personal Injury fund states that “the fund aims to provide a long term total return from investment in a range of asset classes”. Although some funds delivered a negative return in the last year, it has delivered aggregate growth of 20% over the last 5 years.

- Prospect Wealth Management deliver investment services to Court of Protection Deputies. Their low volatility portfolio delivered 7.9% returns in the last 12 months and annualised returns of 5.9% since inception in 2006.

- Cazenove “Cautious” Discretionary portfolio, a low to medium risk profile aimed at managing risk cycles, preserving capital and superior risk adjusted returns, has produced annualised returns of 4.6% since inception.

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- The Ministry of Justice Equity Index Tracker fund, available to Court of Protection clients and child claimants, delivered a 10 year performance of 80.75% and 5 year performance of 59.57%. The most recent 1 year performance is 24.44%.

We have just selected 5 examples, easily and quickly accessible from an internet search of firms advertising their services and performance levels. It stands to reason that the number of “commercial” providers available must mean that these firms are managing a significant client base consisting of personal injury funds (though not all the examples are specifically targeted at personal injury claimants though some are), and claimants are not purchasing ILGS with 100% of their damages. All providers recommend diversified portfolios which again undermines the 100% ILGS benchmark. It is also worth pointing again to the gross and unacceptable disparity that would obviously arise between someone receiving damages on a -0.75% basis and then obtaining returns such as those being mentioned by providers, even allowing for the performance being gross.

We might add that these returns exceed even those highlighted in the 3 experts report (see pages 102 and 103) but even at those rates, the level of over compensation being delivered by an ILGS linked discount rate will be unacceptable.

Although in Wells it was said that what a claimant actually did with damages after settlement was not relevant, the application of this rule seems to have been predicated on the belief that use of ILGS was at least a possibility. However, there is a difference between something that a claimant can do and chooses not to, where it may be the rule applies (though whether it should is for another day!), and where what the claimant is objectively assumed to do is based on something claimants never and cannot do. In the latter instance, the issue is with the use of an improper and unrealistic benchmark for assessing the claimants' damages.

Q5: Are claimants or other investors routinely advised to invest 100% of their capital in ILGS or any other asset class? Please explain your answer. What risks would this strategy involve and could these be addressed by pursuing a more diverse investment strategy?

In our view claimants are routinely advised not to invest 100% in ILGS. In fact it is likely that they do not invest in ILGS at all.

Our knowledge of this comes from views expressed by IFAs during case handling and expert reports which, of course, we cannot disclose in response to this consultation. However it is not really necessary to do so as these comments match those openly made by IFAs specialising in investment of personal injury damages, in articles and presentations – there really doesn't seem too much controversy about this.

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We draw the MOJ’s attention to an article by Nestor “The discount rate reduction – a Gilty Myth” in which the following comments are made with which we entirely agree:

“it is therefore clear that an investment strategy relying solely on ILGs will fail to meet a claimant’s long term needs…..claimants should not be under an illusion that adopting a simplistic basket of ILGS is free of danger or risk….investing solely in ILGs is impractical and unwise…the all eggs in one basket approach carries far more risk for claimants than the theory might imply”.

Also John Frenkel of Frenkels in his article “The Discount rate conundrum” :

“it is one of the worst kept secrets that no claimants ever invested all of their damages (I suspect in fact the same could be said for any of their damages) in ILGS. In fact any IFA suggesting that would probably have been considered negligent for advising a client to do this.”

The risks that are highlighted are many and include:

- inability to purchase ILGS in any event (as usually massively over-subscribed and dominated by institutions at auction)
- inability to match to cash flow needs
- reinvestment risk as holdings sold to make money available for needs, and/or price fluctuations causing loss on sale and re-purchase
- need to make mortality assumptions when attempting to plan purchases taking into account maturity dates
- inability to invest to whole life spans due to the absence of sufficient spread of redemption dates
- volatility of the asset class price and potential capital loss

Our understanding is that if ILGS are used at all, they are a minority allocation of funds in an otherwise diversified portfolio; those portfolios are still regarded as low or very low risk but nevertheless are achieving much higher returns than the unrealistic ILGS benchmark.

We anticipate that the “3 Expert” report would have confirmed the above comments had it been free to comment outside the constraints of its terms of reference, though the inclusion of models not 100% invested in ILGS, at its Chapter 4, introduced something approaching a real-world approach. These models produced real positive returns. Those comments and examples of the earlier reported performance of

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specialist fund managers indicate that claimants can and do obtain positive real returns with the assistance of specialist professional advice. As far as we are aware, and as demonstrated in this response overall, claimants do not make an irrational choice to sustain investment losses by holding large portfolios of ILGS.

Q6: Are there cases where PPOs are not and could not be made available? Are there cases where a PPO could be available but a PPO is offered and refused or sought and refused? Please provide evidence of the reasons for this and the cases where this occurs.

In Scotland, PPOs cannot be judicially imposed. It is, though, possible in Scotland for parties to agree a PPO resolution (D's Parent v Greater Glasgow Health Board 2011 S.L.T. 1137). In England and Wales, the statutory position is different in that the court can order a PPO even when parties do not agree to have one. If it is proposed to legislate in Scotland to allow the court to order a PPO even when parties do not agree to have one, detail of the proposed legislation is required. It is an essential prerequisite that there are procedures in place for the operation of such a power. There are detailed provisions under English procedure. These could be adapted for Scotland but bespoke provisions would, nonetheless, be required. The recent dramatic reduction in the discount rate from 2.5% to minus 0.75% has the potential to give rise to more frequent over-compensation in Scotland than in England and Wales given the inability of the courts to order PPOs.

To begin with it must be remembered that wherever mention is made of PPOs, and this is common to all "PPO" questions, it is wrong to speak as if there was a binary distinction between a case settled on a PPO basis and a case settled on a lump sum basis.

PPO cases are always a mixture of certain heads of future loss settled on a PP basis and other heads settled on a conventional lump sum basis using a discount rate. Where a case is subject to a PPO, very often the heads of future loss settled on a periodical basis are no more than one or two, possibly three. In most high value cases as many as 15 – 20 principal heads of future loss may form part of the claim (and each one broken down into myriad items of loss). This is an important factor for if there is any proposal that all future losses are paid periodically this inevitably raises questions about claimant choice and also the complexity of orders, the costs of administration and insurer reserving and capital requirements, linked to difficulty of fixing appropriate indices for each of the heads.

Also to be borne in mind is that cases which may be subject to the discount rate, i.e. wherever there are future losses calculated on the multiplier and multiplicand basis, may involve losses down as low as £100,000, and perhaps even lower. Conversely, PPOs are sought by claimants (as opposed to offered by defendants, with the exception of the NHS Resolution and MIB) usually only for cases of much higher severity particularly those involving significant life-long care needs. This is where the real "no risk" protection of a PPO is essential.

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It follows that any debate about the part played by PPOs must recognise that they are applicable to only a subset of cases which is affected by the rate change and it would not, in our view, be practicable nor acceptable to insurers and claimants to try to move all future loss cases to which a discount rate applies into a periodical payment regime.

When speaking of cases in which PPs could not be made available, there are two aspects: that they can't be made available regardless of the nature of the claim; or they can't be available because they are an inappropriate means of meeting the claimant's needs.

A PPO can't be made available

A PPO can't be available where, for example, there are issues over whether the continuity of payments is secure. That may be because the liability of the insurer may not be backed by a statutory form of protection, or the defendant is uninsured (other than in road traffic cases) or has limits on the policy indemnity which mean insufficient funds would be available to meet the periodical payments into the future.

A PPO is inappropriate for the claimant

A PPO may be inappropriate, and thus unavailable, for a number of reasons.

At one end there may be claimant choices such as a wish for a clean break from the defendant or to create the possibility of a fund for the family after death.

There may be factors such as those in PD 41B which impact the Court's discretion in addition to the preferences of the parties. In particular contributory negligence may mean that the claimant perceives that the best chance of being able to meet needs is by managing the lump sum award, as reduced by the percentage for contributory negligence. This can be a very big factor in claimants deciding that PPOs just can't be made to work for them: the freedom to make the most of the lump sum and investment returns is essential for them.

Similarly there will be situations where the claimant's future needs will be variable and do not easily fit with the rigidity of a periodical payment order – the management of a lump sum more easily allows needs which will vary widely and unpredictably, to be met. Changes in needs that may not easily be accommodated within a fixed or stepped PPO, and inappropriate for a variation order, may need to be dealt with through a managed lump sum fund to meet capital and contingency needs.

In addition there will be cases which nevertheless involve future losses, but the amounts involved are too small to justify the costs of setting up and administering a PPO, or it is in the claimant's interests to make the choice to have the losses capitalised into a lump sum to spend as desired.

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In theory, there are a great many claims where a PPO could technically be employed. Any future loss could be so paid. However we believe this could bring very significant difficulties and the choice of claimants and also defendants must continue to be respected. Taking all future loss cases as a whole, the preference of most claimants - other than in the most severe cases, and even then in respect of selected heads - is to have a lump sum settlement. Save for those defendants who are prepared to contest for periodical payments, frequently a request from a claimant for a lump sum is likely to be acceptable to defendants and a true wish for a periodical payment is likely to be seen to be almost certain to be accepted if a case went to trial. On this basis, the situations envisaged by the question (offer and refusal of a PPO) do not ordinarily arise in practice.

Perhaps only in the very specific case of substantially compromised but uncertain life expectancy has there been experience of defendants wishing to settle on a PPO basis yet claimants seeking a lump sum. The context is obvious: the defendants wishing to limit payments to the period in which the claimant is actually alive and the claimant wishing to increase the chance of a surplus fund available to the family.

Q7. Please provide evidence as to the reasons why claimants choose either a lump sum or a PPO, including where both a lump sum and a PPO are included in a settlement.

We cannot provide evidence as the reasoning behind the claimant's choice. That is known only to the claimant.

To some extent this question and answer overlaps with Q6 in that the unavailability or inappropriateness of a PPO will dictate why a lump sum is chosen, though that is unlikely to cover all the reasons for the choice.

Lump sums may be the preferred approach for claims involving future loss where the claimant's injuries are not of the most severe order, where most of the loss relates to future loss of earnings and the claimant wishes to have the lump sum to manage as they please.

PPOs remain the preferred choice where claimants are recovering damages in full and wish to have the benefits of protection against inflation, investment and mortality risk. Usually choice is retained for the most expensive cases, and particularly where court approval of the settlement is required.

Q8: How has the number of PPOs changed over time? What has driven this? What types of claims are most likely to settle via a PPO?

We do not have market data of our own and have to refer to available sources.

The Institute and Faculty of Actuaries periodical payment working party report in mid-2016 indicated that only 20-35% of Motor claims with damages over £1m settled by PPO. However based on settlement year the number of claims settled on PPO basis had been falling year on year since 2012.

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In pure numbers the combined Motor and Casualty PPOs, regardless of cost, declined by settlement year from around 90 in 2010 to marginally over 50 in 2014 and even below that in 2015. In passing, we say we believe this low level of claimants opting for a risk free PPO settlement suggests that many claimants still found lump sum settlement at a 2.5% discount rate the more appropriate way to meet their needs. Although the data does not record specific information about the settlements, it is very unlikely that the low level of claimants seeking PPOs is due to contributory negligence making PPOs unworkable but more to do with the returns likely to be available on investment strategies actually adopted by claimants.

Claims most likely to settle as lump sums are young claimants with brain injuries, though brain injury is the most common injury type for younger ages, there is more equality between spine and brain for older groups.

Relationship of the lump sum award and periodical

Q9: Do claimants receive investment advice about lump sums, PPOs and combinations of the two? If so, is the advice adequate? If not, how do you think the situation could be improved? Please provide evidence in support of your views.

Yes, as far we know. It is inevitable that in any significant future loss case the claimant will have the benefit of IFA advice. We are unable to comment on the adequacy of it as it is seldom seen by defendants.

Q10: Do you consider that the present law on how the discount rate is set should be changed? If so, please say how and give reasons.

Yes.

We consider that the present law on setting the discount rate should be changed. Reform is a necessary and logical consequence of the defect in the present law we identified in our answer to question 1 above.

In that response, we pointed out that the critical defect in the present law on setting the discount rate is its close link to the returns on ILGS. First and foremost, it is this element that should be changed.

To summarise our views:

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•	The link to ILGS is no longer tenable, if it ever was. It creates a benchmark divorced from the real world of how damages are invested, and incorporates a mode of investment which claimants do not use and probably could not use even if they wanted to.

•	The practical barriers to ILGS investment include that the assets:

o	are nearly impossible for individual claimants to obtain

o	are impractical, since maturities cannot easily be matched to cashflow needs

o	give rise to re-investment, price and capital loss risks

o	require an assessment of mortality in order to match distribution of maturity dates

o	are RPI-based, which is not reflective of the CPI measure of inflation (running 1% lower)

o	are traded in a market that has been subject to significant distortion due to short term factors, and

o	show a yield heavily influenced by market price and not just the interest returnable as represented by the coupon rate.

An additional and relevant point is that the idea of investing in ILGS is based on a fallacy of purchase on day 1 after settlement and holding to redemption whereas day 1 purchase would not allow for prudent spreading of asset purchases.

•	ILGS investment does not reflect an investment risk profile that it is reasonable to attribute to personal injury claimants, nor one which is evident from real world claimant activity. Claimants are low risk investors - not very low risk, or extremely low risk and ILGS is not "no risk" (on which point see our response to question 12 below).

•	Awarding damages based on this objective investment approach - whereas claimants achieve positive returns without exposure to unacceptable levels of risk - leads to a risk of massive over compensation and cash surpluses at the end of loss periods. This would be completely inconsistent with the suggested principles for setting the rate, with which we are in agreement and which are addressed in question 11.

Q11: If you think the law should be changed, do you agree with the suggested principles for setting the rate and that they will lead to full compensation (not under or over compensation)? Please give reasons.

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We agree with the aim of paragraph 36 of the consultation paper which attempts to set down general principles for setting the rate. In our view the three elements in its part (b) should not prove controversial. Paragraph 36 is laid out below in a slightly different format from that in the paper.

The discount rate should be the rate that in the reasonable opinion of the setter is:

(a) consistent with the returns expected from the investment strategy implied by the appropriate risk profile of the claimant (see below); and

(b) satisfies the following:

- the lump sum payable after the application of the discount rate plus the assumed income expected to be earned should represent the full loss, neither more nor less, caused by the wrongful injury;
- the losses and costs assessed by the court to flow from the injury should be met on time; and
- the capital and the income assumed to be earned from the award must be exhausted at the end of the period for which the award is made.

Consideration of part (a) of paragraph 36 could prove more controversial.

Under the current law, "the investment strategy implied by the appropriate risk profile of the claimant" is an ultra-low risk strategy which is assumed to be met by investment of 100% of award for future pecuniary losses in ILGS.

We would suggest that it should be capable of agreement that claimants in personal injury actions are not in the same position as ordinary investors. The difference was explained by Lord Steyn in Wells v Wells: "The premise that plaintiffs, who have perhaps been very seriously injured, are in the same position as ordinary investors is not one that I can accept. Such plaintiffs have not chosen to invest: the tort and its consequences compel them to do so."

However, Lord Steyn then used the rest of the same paragraph in his opinion to set out the reasons why this difference led him to favour the use of ILGS returns as the benchmark for the personal injury discount rate. We set out below his analysis in full before explaining why we now suggest it is time to revisit his approach.

"If a comparison is to be made - and in this field all comparisons are inexact - the position of plaintiffs are much closer to elderly, retired individuals who have limited savings which they want to invest safely to provide for their declining years. Such individuals would generally not invest in equities. But for plaintiffs the need for safety may often be more compelling. In any event, it seems to me difficult to say that an

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investment in index-linked securities by plaintiffs would be unreasonable. After all, life companies are now accustomed to investing their annuity funds in index-linked gilts to meet index-linked annuities. Similarly, when the only liabilities of a pension fund are to pay index-linked pensions, the pension fund will invest entirely in index-linked government securities. Plainly insurers and pension fund managers, in so investing, are acting prudently. In these circumstances one cannot realistically say that an injured plaintiff who invests in index-linked government securities is acting imprudently. I therefore share the views of the Ogden Working Party and the Law Commission that it is reasonable for such a plaintiff to take the safe course of investing in index-linked government stock. From this it follows that the discount rate ought to be fixed on this assumption".

His key points in effect here are:

(i) that claimants have a need for safety in their investment approach

(ii) that investment in ILGS by regulated institutional providers of financial services would justify private individuals also investing in them

(iii) it is therefore not unreasonable or imprudent for claimants to invest in ILGS, and

(iv) the discount rate should reflect the assumption that they do.

While we can agree the first point, we would take issue with the remaining three.

In respect of the second, financial services companies such as insurers are effectively required to invest in ILGS (for certain product lines and liabilities) because of the detailed regime which they are required to adhere to by their regulator. Private individuals are not subject to these, nor to financial reporting and solvency / capital adequacy obligations. They are not compelled to invest in ILGS and, coming to the third point above, might choose to do so if that was demonstrably a reasonable or prudent option for some or all of their award.

Although we do not have specifically commissioned material on the point, the evidence of which we are aware is that claimants do not actually invest to any great extent in ILGS (see the comments from well-known IFAs specialising in the personal injury field at question 5 above).

Although the ILGS asset class provides protection against inflation, in present financial conditions it is generally subject to a negative rate of return - shown only too clearly in the Lord Chancellor's recent reasons for setting a rate of -0.75%. This negative return, along with the market distortions set out at questions 1 and 10 above, and the practical difficulties in accessing and managing these assets in the market have together caused us to conclude that it would be unreasonable and imprudent for claimants to

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invest to a significant degree in ILGS. If this conclusion is accepted, it would follow that element four of Lord Steyn's analysis in Wells can no longer hold.

It troubles us to have reached a conclusion that is different from such a seminal and important authority of the House of Lords and one which has been highly influential in some jurisdictions in which a common law approach to setting a discount rate still applies. However, the conditions that were present twenty years ago when Wells was decided simply no longer prevail. The ILGS asset classes has experienced significant yield / price distortion and regulatory pressures in the intervening two decades which, in our view, signal clearly that is no longer of itself the most appropriate benchmark for setting the discount rate for personal injury claims.

Q12: Do you consider that for the purposes of setting the discount rate the assumed investment risk profile of the claimant should be assumed to be:

(a) Very risk averse or "risk free" (Wells v Wells)

(b) Low risk (a mixed portfolio balancing low risk investments)

(c) An ordinary prudent investor

(d) Other

Please give reasons.

Answer: (b)

We accept that the claimant is a special investor. We do not accept a "risk free" category as it is unhelpful to have a category which does not reflect any form of investment approach that is actually available. The category appears to derive from a mistaken belief that investment in ILGS is "risk free". That was not the view taken even in the "3 Expert report". That misconception has been dealt with by the many comments about the impracticability and risks inherent in use of 100% ILGS as well as the fallacies inherent in concepts of Day 1 purchase and holding to maturity. The reality is that there are forms of investment as low in risk as ILGS which deliver better returns. These may incorporate ILGS, as part of a mix of assets, but the "risk free" world of 100% ILGS envisaged in "Wells" does not exist.

The claimant should be regarded as a low risk investor, i.e. option (b). However terminology is potentially misleading here. An investment portfolio of mixed assets may be viewed as "low risk", "very low risk" or

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"extremely low risk". Even the mixed portfolios considered by the 3 Experts are regarded by some as so low in risk as to not be ones that would be recommended by investment managers.

It is our view that the correct mix of the special investor status and the reality of modern investment portfolio approaches and the risks attaching thereto, means that the claimant should be assumed to have a "low risk" investment profile. There will need to be a process for (1) identifying the "basket" of investment portfolios that fit that "low risk" profile, which is higher than "very low" and "extremely" low risk, (2) the past and expected performance of those portfolios and (3) how that should influence determination of the discount rate as a consequence.

Q13: Should the availability of Periodical Payment Orders affect the discount rate? If so, please give reasons. In particular:

- ***Should the refusal to take a PPO be taken as grounds for assuming a higher risk appetite? If so, how big a difference should this make to the discount rate?***
- ***Should this assumption apply in cases where a secure PPO is not available?***

The Scottish position on PPOs put above in answer to Q6 is referred to.

Yes, the availability of PPOs should affect the discount rate.

However, our answer is "no" to the two bulleted questions.

In our view the availability of PPOs goes to the setting of the discount rate across the board and is not a matter for case by case consideration. We support the general principles set out at para 36 of the consultation paper to the effect that: "Due regard should be given for… [the] availability of a PPO in respect of some or all of the loss", but only for setting the rate to be applied to all cases rather than on a case-by-case basis. So, in our view "the loss" in paragraph 36 should be read as "a loss".

This issue goes to the policy factors which determine the discount rate to be applied to all cases and should not be devolved to a case-by-case discretionary factor. These policy factors were previously taken into account at the time the Lord Chancellor exercised his powers under s1 of the Damages Act. It is essential that going forward the ability to apply policy factors is not lost or that the terms of reference delivered to any new body fixing the rate reflect a set of principles as to how the availability of an alternative form of settlement – periodical payments – should impact the discount rate selection.

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It is our view, dealt with elsewhere, that it is no longer appropriate to set the discount rate by reference to the average of redemption yields on ILGS. The reasons are given but we also say here that Wells must be seen now against the absence of any alternative means by which a claimant could - at the time the case was decided - obtain true (as opposed to ILGS not being so) risk free methods for investing compensation. Had PPOs been available at the time of Wells it is probable that a different decision would have arisen (not least a strong argument that each of the three cases would have in fact been settled on a PPO basis). It cannot be assumed that the statements in that decision about the special investor status of the claimant would have been expressed the same way if PPOs had been available.

The Lord Chancellor in exercising her powers under s1 is entitled to take into account policy factors. In that context the Lord Chancellor, or anybody involved in rate setting powers, can and should take notice of the availability of PPOs as an alternative way of receiving damages which removes investment, mortality and inflation risk. For the claimant who wishes to incur “no risk”, PPOs are available. It is not necessary to create a no-risk “mirror image” regime for lump sums and different considerations can apply. Claimants are able to seek, and the court is able to impose, in England and Wales, the “no risk” PPO regime, even against the claimant’s wishes, for those claimants with the greatest need for certainty over the future. With that in mind, the policy decisions behind setting the discount rate should seek balance between claimant’s and defendant’s interest by not adopting a no risk investment approach. It should be set on the basis set out elsewhere in our response. It is this “policy” level consideration which should continue to be exercised by the Lord Chancellor when setting a rate or, if that is to be the approach, set out as a principle to be applied by any new body.

Turning to the two bulleted questions, we do not agree that this should be left to be taken on a case-by-case basis. That would be the effect if it was based on refusal to take a PPO. That would open up an enquiry in that case as to the reasons why the PPO had been refused (although as we also said previously it is seldom the case, other than for NHS Resolution and MIB, that defendants offer and claimants refuse PPOs).

We do not believe that a different discount rate based on higher assumed risk appetite consequent upon refusal of a PPO, should be introduced into individual cases and based on consideration of the claimant’s reasons for the refusal. That would introduce additional uncertainty, argument and cost. It would also open up a situation where the claimant wants some heads as PPO, but refuses others – the situation where there may be heads paid as PP, some heads paid one rate (the rate for the higher risk appetite because the PP was refused) and some heads paid as a lump sum using a different discount rate (being heads for which no PP was refused). Of course the point almost suggests all future loss heads being “offered” and “refused” on a PP basis, but we have already said that would not be attractive due to the administrative and costs burden as well as the difficulties arising from indexation.

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Q14: Do you agree that the discount rate should be set on the basis that claimants who opt for a lump sum over a PPO should be assumed to be willing to take some risk? If so, how much risk do you think the claimant should be deemed to have accepted? Please also indicate if you consider that any such assumption should apply even if a secure PPO is not available. Please give reasons.

As long as this is approached as a policy decision behind setting the rate (as opposed to considering options by claimants on a case-by-case basis) we agree with it. Yes, claimants should be taken to be willing to accept some risk when damages are paid in whole or part on a lump sum basis. The question of how much risk cannot be dealt with in isolation here for the very reason that the benchmark risk attaching to ILGS is not risk free and the alternative models referred to elsewhere deliver a better return for a low level of risk. Again we repeat that this is not a matter to be considered at case level.

The same comments should apply regardless of whether or not continuity of payments is secure in any one case, in the interests of simplicity and not having different rates for different cases.

More than one discount rate

Q15: Do you consider that different rates should be set for different cases? Please give reasons. If so, please indicate the categories that you think should be created.

No.

A single rate

The model of using a single rate to apply to all cases has applied to date, both at common law and at statute. It is the simplest approach in practice and therefore brings about a high degree of certainty for claimants, defendants / defenders (and their indemnifiers) and their advisers. These attributes are recognised in the Lord Chancellor's 2017 reasons at paragraph 11:

(a) There should be a single, fixed rate to cover all cases. This accords with the solution adopted by the House of Lords in Wells v Wells. It eliminates argument about the applicable rate at court and avoids the complexity and extra costs that a formula would entail.

(b) The rate should be one which is easy for all parties and their lawyers to apply in practice and which reflects the fact that the rate is bound to be applied in a range of different circumstances over a period of time. Given the uncertainties and imprecisions involved in the process of setting the discount rate, a rounded rate is preferable. Accordingly, I have decided to round to the nearest 0.25%. Ogden tables,

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applied by the courts to adjust awards according to a given discount rate, are currently published for rates at intervals of 0.5%. However, they can readily and swiftly be adapted to an intermediate rate.

There is therefore a great deal of merit in the single approach. It should be departed from only if there is a better approach.

Different rates generally

The question refers specifically to categories (of case) in the context of different discount rates.

The Damages Act 1996 refers to the power - which has never been exercised - to set “different rates of return for different classes of case” (section 1(3)). The text of the consultation paper itself refers to further criteria that might be used in considering different rates, such as the length [sic] of the award or its size. It also refers to the public or private sector nature of the defendant as another possible criterion and to the possibility of using different rates for different parts of the award. These factors are discussed at paragraphs 53 and 54.

We believe that the possibility of setting different rates for different periods of loss (in the same case) is worth further serious consideration.

Different rates for different periods in the same case (the Ontario model)

The only one of the various factors listed in the paper which we believe might be suitable to use as the basis for setting different discount rates would be “the length of the award”, on the assumption that that phrase can be understood to mean the period after settlement or resolution in which the particular element of the future loss in question is estimated to be incurred.

Understood in that sense, we suggest the approach used in Ontario and cited at paragraph 54 may be worth further consideration. For the reasons set out in the text above (and the associated footnote) we do not think that the power at subsection 1(3) of the 1996 Act currently allows for its introduction.

The structural features of this model would appear to be as follows:

(i) future losses to be incurred after settlement/resolution are split between the long term and the short term (the cut off being 15 years in the case of Ontario)

(ii) both these different periods have a different associated discount rate, each of which is derived using methodologies and assumptions appropriate to the period under consideration

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(iii) the short term period rate is based on fairly low risk assumptions about investment returns and is reviewed arithmetically every year and reset (if necessary) in a largely procedural way

(iv) the long term rate is based on different assumptions, not surprisingly based on considerations more suited to a longer term macro-economic view and is subject to an entirely different review cycle.

It seems to us that the key advantages of this approach, when compared to a single discount rate, are that it should provide for a more accurate assessment of awards and it should reduce volatility in awards precisely because the annual (or other, fairly frequent) review of the short term rate will create a smoothing effect when compared against largely ad hoc step changes in a single discount rate model.

We recognise that such an approach appears - on the face of things at least - more complex than a single rate model not only in valuing individual claims but also in having heavier rules-based infrastructure and expert involvement in keeping it up to date. In addition, as the paper points out, the flip side of the smoothing benefits of a frequent and scheduled review process "may however lead to a certain amount of gaming the system" (paragraph 53). However, in our view the relative complexity and simplicity of one or two rates may be over-stated because:

- using a single rate, as at the present, already necessitates several cross-references to the Ogden tables for various elements (notably in the use of reduction factors), and

- contrary to the second sentence of the Lord Chancellor's 11 (a) above, it would appear relatively straightforward to develop actuarial tables and/or software applications to deal with operating two rates in one claim.

We have deliberately isolated the structure and principles behind the model and have not focused on the detail of the actual rates used in Ontario, the particular cut off between the periods or on the review processes adopted there. At this high level, we would suggest - with some confidence and by no means tentatively - that it would be capable of being adopted in England & Wales and Scotland. Further impact assessment work would need to be done of course, but first impressions at this stage suggest that the benefits might be shown to outweigh any disadvantages.

Other than the obvious need for primary legislation, we cannot see any significant technical barriers that would prevent relevant expert stakeholders, institutions and experts working reasonably quickly to develop the detail that would be needed to bring points (i) - (iv) above alive in the English / Welsh and Scottish jurisdictions.

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Q16: Please also indicate in relation to the categories you have chosen whether there are any special factors that should be taken into account when setting the rate for that category.

No answer offered.

As explained in our answer to question 15 we do not favour any distinction in discount rates based on categories of case

Q17: Should the court retain a power to apply a different rate from the specified rate if persuaded by one of the parties that it would be more appropriate to do so? Please give reasons.

Yes. In Scotland, the law on this is set out in the Court of Session, Inner House case of Tortolano v Ogilvie Construction Limited 2013 S.C. 313. That case, in fact, demonstrates how important it is that a fair and real-world discount rate it set, with review subject to statutory trigger mechanisms, subject to a backstop minimum review period (on which, please see the answers below). Tortolano demonstrates that the “more appropriate” test for departure from the set rate will only be applied in Scotland if there are case-specific special reasons for justifying departure. We are unaware of any case in Scotland in which a different rate has been applied. As the Lord Justice Clerk concluded in Tortolano: “If the pursuer wishes to have the rate changed, he should do so through the political process or by way of judicial review”.

Yes.

It is recognised that the existing power at section 1(2) of the 1996 has been restrictively interpreted by the courts, with Warriner v Warriner being perhaps the clearest example. Although the power has not been used to date, we believe that there is merit in its retention to allow the element of flexibility, even if the circumstances in which it is used are going to be extremely restricted.

In order to preserve the existing case law (such as Warriner) associated with this subsection and to limit satellite litigation, we would suggest that the 1(2) power is retained in exactly the same language as present, save for removing the reference to 1(1), i.e.:

“[the new general rate-setting power] shall not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.”

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Q18: If the court should have power to apply a different rate, what principles should apply to its exercise?

As indicated in our response to question 17, the power should be set out in exactly the same language as in 1(2) of the 1996 Act so that existing case law concerning this provision may be preserved. It would then be for the courts further to refine this line of case law.

Q19: Do you consider that there are any specific points of methodology that should be mandatory? Please give details and reasons for your choice.

We would suggest the following elements.

- The arithmetical analysis (perhaps averaging or similar) of the yield on the relevant asset classes or mix selected (for which see our response at question 12) should be clearly set out so that the calculation supporting the arithmetical discount rate is transparent.

- Since consideration of yields is entirely backward looking, some allowance should be made to take account of forward looking economic conditions affecting the relevant asset class / mix.

- The impact of taxation should be taken into account in the prescribed discount rate and allowance should be made for basic rate tax only. This reflects the inevitability of tax on the investment of damages.

- The need for investment advice should not be taken into account as part of the prescribed rate. It can be catered for as an element of the multiplicand and subject to proof of loss in the ordinary way.

- Rounding of the rate to be prescribed should be to the nearest 0.25% and actuarial tables should be produced on this basis.

When should the rate be set?

Q20: Do you agree that the law should be changed so that the discount rate has to be reviewed on occasions specified in legislation rather than leaving the timing of the review to the rate setter? If not, please give reasons.

Yes

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Q21: Should those occasions be fixed or minimum periods of time? If so, should the fixed or minimum periods be one, three, five, ten or other (please specify) year periods? Please give reasons.

Our response is dependent on whether there is to be a single or dual rate.

For the avoidance of doubt where we refer to a “dual rate” we mean a system similar to the Ontario model linked to loss periods. In all other circumstances a single rate should apply.

Single Rate system

If there is to be a single rate it should be linked to a trigger based on relevant low risk investment returns (as defined in the answer to question 12b) over a set period of time with a backstop of a minimum period for review of 5 years with that period effectively re-set whenever the trigger causes a change in the rate.

Dual Rate system

In a dual rate system the short term rate should be based on relevant investment returns and could be reviewed and re-set annually (see also 22 below). The long term rate should be linked to a different trigger and based on investment returns of a different nature and over a longer period of time. This long term rate could be reviewed every, say, 5 years. But being a rate that looks to the future and over the long term, it would not - in ordinary economic conditions - be expected to change at each and every 5 year review.

In respect of both rates, provision should be made for triggers that would prompt an out-of-cycle review in the event of significant relevant economic change. We would leave it to others to indicate how to define such triggers.

Q22: When in the year do you think the review should take effect? Please give reasons.

Any change in rates should be announced at a set time and with one quarter’s notice in advance of it being effective. We suggest that the change is announced at the end of calendar Q3 and becomes effective from the start of calendar Q1. This would also tie in with insurers’ financial reporting and regulatory obligations.

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Q23: Do you agree that the rate should be reviewed at intervals determined by the movement of relevant investments returns? If so, should this be in addition to timed intervals or instead of them? What degree of deviation should trigger the review?

Yes.

The investments selected will differ dependent on whether the model is single or dual rate, as will the period over which the investments are reviewed. In addition there should be a system of back stop reviews that are re-set in the event that a change is triggered by a shift in the index.

The degree of deviation is dependent on the model chosen. In a single rate model the degree should be 0.5% over a period of time for which it was reasonable to assess the investment. In the dual rate model the degree should be 0.25% for the short term rate and 0.5% for the long term rate.

Q24: Do you agree that there should be a power to set new triggers for when the rate should be reviewed? If not, please give reasons.

Yes.

However, there needs to be some structure around who exercises that power (in our submission this should be upon the recommendation of the independent body but authorised by the Minister), what can trigger the exercise of that power (in our submission this should be an extraordinary event), and when it can be triggered (again an extraordinary event). If our suggestion of backstop reviews was adopted then the occurrence of a backstop review would mean that there had been no rate change from the index for a considerable period.

Q25: Do you consider that there should be transitional provisions when a new rate is commenced? If so, please specify what they should be and give reasons.

No.

Transitional provisions would create uncertainty and a risk of inequity. The rate should apply to all claims resolved or adjudicated while the rate is in effect. Anything other than this would be unnecessarily complicated for claims such as infant claims or lack of capacity claims where resolution or adjudication can

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and often does take place many years after the incident giving rise to the claim. Transitional provisions also risk additional and unnecessary 'creative litigation' – a euphemistic description of parties manipulating the litigation process in order to accelerate or delay the progress of a claim to resolution or adjudication because they anticipate an imminent review to be for or against their interests.

Who should set the rate?

Q26: Do you consider that the discount rate should be set by:

(a) A panel of independent experts? If so, please indicate how the panel should be made up.

Qualified Yes.

As a matter of basic principle it is agreed that a panel of experts should determine the appropriate discount rate. The panel should have its own check and balance and should do no more than make recommendations for a Cabinet Minister to implement. It is highly important that the terms of reference for this panel are absolutely clear on the assumptions and principles that should guide their work, in particular any policy issues to be addressed (such as the impact of the availability of PPOs) or other "rules" (such as treating claimants as special investors but taken to accept low investment risks).

The panel should be independent in every possible way. It should be a new panel and not built on an existing body such as the Ogden Working Party or the Civil Procedure Rule Committee.

To ensure complete impartiality it is our submission that individuals and organisations who advise in the litigation process should not form any part of the panel. To reflect that those individuals and organisations have intimate knowledge of investment activity for claimants, they should be consulted with as part of the wider scope of any future consultation / rate setting.

The panel should be constructed to provide a balanced view to reflect past returns on investments, but also to be able to give an indication of likely future returns available to an investor by reference to the UK economy. The panel could be constructed to include, for example:

- The Governor of the Bank of England
- President of the Queen's Bench Division
- The Government Actuary
- Economists who will be able to help with projecting a long term view of the future

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- Investment managers with expertise on returns being achieved at the time of the review, as well as 0historical information.

The precise number of people forming the body is not considered to be important but there should be an equal number of experts in each area of expertise to provide a balanced view.

The overarching checks and balances should be provided the involvement of a Cabinet Minister - see (b) below.

(b) A panel of independent experts subject to agreement of another person? If so, on what terms and whom?

Yes.

The extent to which the panel requires agreement of another person will depend on the powers devolved to the panel. In our view no matter the extent of the powers devolved to the panel the process will require a Cabinet Minister to have oversight, as explained at (a).

The Minister should take the decision to change the Discount Rate and that power could be set out as a veto, depending on the power devolved to the panel, to be used at the discretion of the Government to reflect a need to retain a wide range of public policy considerations. No view is expressed as to the identity of the particular Cabinet Minister, but obvious candidates would appear to be the Lord Chancellor / Secretary of State for Justice or the Chancellor of the Exchequer.

(c) The Lord Chancellor and her counterparts in Scotland or another nominated person following advice from an independent expert panel? If so, on what terms?

It is not considered to be important whether the Lord Chancellor or her counterparts in Scotland take the decision, merely that the ultimate decision to change the discount rate is taken by a Cabinet Minister having taken advice from the panel of experts identified at 26 (a) above.

(d) The Lord Chancellor and her counterparts in Scotland as at present?

The current structure for review of the Discount Rate is no longer appropriate for the reasons identified within the consultation. The process should move to an independent body of experts over whom a Cabinet Member has ministerial control.

(e) Someone else? If so, please give details.

Not applicable.

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Periodical Payment Orders

Q27: Do you consider that the current law relating to PPOs is satisfactory and does not require change? Please give reasons.

In Scotland, PPOs cannot be judicially imposed. It is, though, possible in Scotland for parties to agree a PPO resolution (D's Parent v Greater Glasgow Health Board 2011 S.L.T. 1137). In England and Wales, the statutory position is different in that the court can order a PPO even when parties do not agree to have one. If it is proposed to legislate in Scotland to allow the court to order a PPO even when parties do not agree to have one, detail of the proposed legislation is required. It is an essential prerequisite that there are procedures in place for the operation of such a power. There are detailed provisions under English procedure. These could be adapted for Scotland but bespoke provisions would, nonetheless, be required. The recent dramatic reduction in the discount rate from 2.5% to minus 0.75% has the potential to give rise to more frequent over-compensation in Scotland than in England and Wales given the inability of the courts to order PPOs.

Yes.

There is one 'hard' exception, which is the absence of the MIB as a secure funder as of right in the Damages Act 1996 (as amended). This is immediately on point and its status should be recognised and the Act should be amended in order to include the Bureau in the list of institutions in respect of which continuity of payments is deemed by statute to be secure.

There is also a 'soft', more procedural exception, which is that there needs to be clarity as to the ability of the defendant to address the court on the issue of whether a PPO or lump sum is the more appropriate form of award. Although the Court should take the defendant's preference into account there is no provision for the defendant to make representations on the subject and/or present financial advice from its own expert. We believe these matters should be addressed. This will become particularly important if claimants' appetite for periodical payments wanes in preference for large lump sums; whereas the claimant's best interests remain being served by a periodical payment order.

A final exception or consideration is that there also needs to be a review of case law developed since the PPO regime came into operation to consider whether any court-based rulings should now formally be incorporated into the legislation. Examples here are the decisions about those compensators from whom payments will be taken to be secure even though not falling within the "deeming" provisions.

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Q28: Do you consider that the current law relating to PPOs requires clarification as to when the court should award a PPO? If so, what clarification do you consider necessary and how would you promulgate it?

The comments on the Scottish position in response to Q27 are referred to.

No clarification required. The rules and practice direction provide an adequate framework for deciding when it would be appropriate to award a periodical payment order.

Q29: Do you consider that the current law relating to PPOs should be changed by creating a presumption that if a secure PPO is available it should be awarded by the court? If so, how should the presumption be applied and on what grounds could it be rebutted?

The comments on the Scottish position in response to Q27 are referred to.

No.

This would be too blunt a proposition and capture far too many awards where a periodical payment would be unsuitable and certainly against the claimant's and defendant's wishes (see our comments in question 6). It would only require for there to be an FSCS backed insurer, or compensator that has otherwise been found to be secure, for the "secure PPO availability" threshold to be met. Given that in theory a PPO is available whenever there is future loss that could be awarded on a multiplier and multiplicand basis, whereupon the PPO simply pays out the multiplicand periodically, that would result in damages almost routinely paid now as lump sums moving over into awards of periodical payments. It would also be necessary to deal with the question of which heads of damage this change would capture? If the answer was "all future heads" this would not only increase very significantly the number of PPOs but also the difficulties in setting a matching index for each of the heads to be built into the order.

There is also the question of what the change would achieve where the majority of settlements are not before the Court and there is no proposal – nor should there be – to fetter the ability of the parties in negotiation to agree lump sums or periodical payments orders as they both feel is appropriate, leaving only rare contests over the form of award to come before the Court. We note from the impact assessment that there is no intention to mandate insurers to settle claims on a periodical payment basis and that is something with which we agree.

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It follows that the current provisions requiring the court and the parties to consider whether a PPO is the more appropriate form of award for some heads of damages and the manner in which the Court, in respect of cases before it, approaches its powers is appropriate and should not be changed.

Q30: Do you consider that the current law relating to PPOs should be changed by requiring the court to order a PPO if a secure PPO is available? If so, what conditions should apply?

We believe our comments in relation to Q29 apply here.

Q31: Do you consider that the cost of providing PPOs could be reduced? If so, how.

The basic "cost" of a PPO derives from its annual amounts, anticipated payment period and indexation provisions. We do not anticipate any appetite for changing those fundamental features of the regime. However, it is very clear that the attractiveness of PPOs to insurers is affected by capital requirements linked to reserves against the open ended and uncertain liabilities attached to PPOs. We do not detect this position has changed as a result of the rate change.

The current revision of Solvency II may provide the opportunity for dialogue between insurers and the Government over how insurers may be permitted to account for these liabilities; anything that moderates the current obligations without undermining the need for prudent reserves and capital provisions may change the way PPOs are viewed by insurers.

It also should be recalled that at the introduction of the current statutory PPO regime for England & Wales, it was presented as being 'cost neutral' to compensators when compared to lump sum awards. The unattractiveness and capital issues derive from this cost-neutrality never arising, with general insurers invariably having to self-fund their periodical payment orders. Were it ever possible to achieve the original intention whereby general insurers closed off their interest through the purchase of an annuity, passing over the obligation for future payments to an industry well-versed in long term annuity provision, then the current appetite gap between lump sum and periodical payments might change.

The first decade or more of PPOs has been marked by the absence of any annuity market or other vehicle by which to achieve this original cost-neutral basis. We believe Government should look at investigating what options there may be for incentivising impaired life annuity provision or some other market solution.

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Q32: Please provide details of any costs and benefits that you anticipate would arise as a result of any of the approaches described above.

It is not possible to provide any costs for the suggestions set out above. The benefits would be to equalise for insurers the cost to them of lump sums or periodical payment orders - the cost-neutral position referred to above - which would in turn encourage use of such orders but without the current disadvantages for insurers.

Q33: Please provide any evidence you may have as to the use or expected use of PPOs in the light of the change in the rate and more generally.

It is too early to form any view on this given the extremely recent rate change. We anticipate claimants will find very attractive the lump sums calculated using a -0.75% discount rate – particularly given the complete absence of any history of intent to invest in ILGS, the benchmark for that rate – as opposed to following current practice which achieves gross returns of 5% to 7% resulting in massive cash surpluses over and above the funds required to meet the claimant's needs. One would anticipate, therefore, that claimants will increasingly choose not to pursue periodical payment orders and seek, in England & Wales, to persuade the courts away from implementing that form of award.

The Scottish position, as noted above, is again referred to.

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