

Personal Injury



Mixed blessing for claimants as discount rate remains negative

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On 15 July, David Gauke announced that the current discount rate, established in 2017, of -0.75% will be changed to -0.25%. The statutory instrument effecting that change was laid on the same day and the change will become effective on 5 August 2019. A link to the Lord Chancellor's announcement can be found [here](#).

Where a claimant has suffered losses that are likely to continue for a substantial period into the future, practitioners use the Ogden Tables to determine the correct multiplier to provide appropriate compensation for the claimant. This approach accounts for factors such as a discount for early receipt of compensation as a lump sum and other contingencies such as early mortality or loss of employment. The higher the discount rate is, the lower the sum is that will be received by the claimant. A negative discount rate implies that a claimant who invests their financial compensation properly would find that their investment did not keep pace with inflation. A negative discount rate should therefore lead to claimants receiving a larger sum due to the early receipt of the sums paid in compensation, an unpalatable situation for many insurers.

The change to a negative discount rate in 2017 came as a surprise at the time, and in recent years parties to many personal injury disputes have proceeded on the understanding that the discount rate was unlikely to remain so low, with parties negotiating on the implicit understanding that the discount rate was likely to increase by the time the matter came to trial. However, it was commonly estimated that the discount rate would rise to between 0.5% and 1%. The relatively modest increase to -0.25% is a change which will result in disappointment for insurers and a great relief for claimants.

There is an obvious benefit to claimants from the change, since naturally they can expect to recover greater sums in compensation than if the discount rate had been set higher, but also a benefit to all parties to personal injury litigation. The announcement provides certainty as to the discount rate to be applied by the courts, at least in the near future, and parties can now enter into negotiations with a better understanding of their shared position.

On the other hand, claimants, and claimant side practitioners, should be aware that with the discount rate remaining so low, insurers are likely to take a much more aggressive and forensic approach to claimants' future losses. With a higher sum of compensation potentially on the line, insurers may require clearer evidence before substantial continuing losses can be agreed and could consider that further steps to investigate those losses themselves are now justified. Although claimants should always be prepared to fully substantiate the future losses claimed for, this is likely to become even more important in light of the new discount rate. Alternatively, insurers may consider protecting themselves against perceived 'over-compensation' by expanding their use of periodical payment orders (PPOs) in higher value cases.

It should also be noted that the fact that the discount rate remains negative for the foreseeable future continues to present a significant problem for claimants seeking to recover compensation for special accommodation. Following the approach in *Roberts v Johnstone*, claimants risk receiving a nil award in compensation for the additional capital cost of purchasing special accommodation. The point was made in *Swift v Carpenter* (at paragraph 136) that the *Roberts* formula is no longer fit for purpose in the context of a negative discount rate. The Honourable Mrs Justice Lambert found herself bound by *Roberts* and awarded no compensation for this head in *Swift*, but this decision is subject to appeal. Given that the discount rate is likely to remain negative for some time following Gauke's announcement, this appeal, which comes before the Court of Appeal next week, is likely to be of great importance for claimants seeking

compensation for special accommodation.

Gauke also announced that he would review the discount rate within a five-year period following the change to -0.25%, and that future reviews would be conducted using an expert panel specifically established for the review. He also stated that he would lay an impact assessment, discussing the effect of the change on businesses, the public sector and charities, before both Houses.

Harry Sheehan has experience in a wide range of personal injury matters including road traffic accidents, occupiers' liability, public liability, stage 3 disposal, infant settlement agreements, employers' liability, fatal injuries, clinical negligence and asbestos related diseases. He represents both claimants and defendants, regularly acting as sole counsel in personal injury fast track cases, as well as in small claims hearings, and regularly carries out trials in such matters.