

EXPLANATORY MEMORANDUM TO
THE DAMAGES (PERSONAL INJURY) ORDER 2017

2017 No. 206

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 In deciding the amount of damages to award for a personal injury the court is required to take into account the rate of return specified by the Lord Chancellor from time to time as the rate to be expected from the investment of a sum of damages for future costs and expenses (such as cost of care and loss of earnings). The instrument provides that the rate of return for this purpose will be minus 0.75%. This will have effect from and including 20 March 2017.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 Where personal injury damages are awarded for future losses, such as loss of earnings, care costs or other monetary expenses in the form of a lump sum, the award is adjusted to take account of the benefit to the claimant of being able to invest the money before the loss or expense in respect of which it is awarded has actually occurred. The factor applied to the award to make this adjustment represents the expected rate of return on investing the award and is known as the discount rate.
- 4.2 Under the Damages Act 1996, the Lord Chancellor has power to set a discount rate which courts in England and Wales must consider when awarding compensation for future financial losses in the form of a lump sum in personal injury cases. This power has previously been exercised only once, in 2001 (see the Damages (Personal Injury) Order 2001 (S.I. 2001/2301)). Before this time the rate was set by the courts themselves.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales only.
- 5.2 The territorial application of this instrument is England and Wales.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 The instrument is being made because the Lord Chancellor must keep under review whether any rate set is appropriate. Written Ministerial Statements have been made in both Houses of Parliament and a Statement of Reasons explaining the background to the decision has been placed in the Libraries of both Houses. The legal principles governing the setting of the rate were laid down by the House of Lords in the case of *Wells v Wells* [1999] 1 AC 345. In general terms they state that the rate should ensure that personal injury claimants are compensated (but not under- or over-compensated) and should be set on the basis that claimants are to be treated as risk-averse investors, reflecting the fact that they are financially dependent on the lump sum, often for long periods or for the remainder of their life.
- 7.2 The discount rate was last set in 2001, when the then Lord Chancellor, Lord Irvine, set the rate at 2.5%. He obtained this rate by taking the average gross real redemption yields on Index Linked Gilts (“ILGs”) across all maturity dates. He averaged yield over the previous three years and rounded after making allowances for various factors. Yields on ILGs gradually declined and in November 2010 the then Lord Chancellor (The Rt Hon Kenneth Clarke MP) began a review of the rate. A consultation paper “The Damages Act 1996: The Discount Rate: How Should it be Set?” was published on 1 August 2012.¹ In general terms, the paper sought views on two broad options for how the rate should be set: (a) to use an ILGs-based methodology applied to current data; and (b) to move from an ILGs based calculation to one based on a mixed portfolio of appropriate investments applied to current data. The consultation was published jointly with the Scottish Government and the Department of Justice in Northern Ireland. The instrument relates only to England and Wales.
- 7.3 In view of the lack of consensus in the responses to that consultation, the then Lord Chancellor (The Rt Hon Chris Grayling MP) appointed an expert panel to provide advice on what the rate should be under the present law and how it should be calculated. The expert panel reported in October 2015, providing further clarification on a number of issues in January 2016. On 7 December 2016 the Ministry of Justice announced the Lord Chancellor’s intention to announce the result of her review of the rate by the end of January 2017. As required by the Damages Act 1996 the Lord Chancellor then consulted the Treasury and the Government Actuary.² In the event, this timetable was not possible and when announcing this on 27 January 2017 the department stated that the Lord Chancellor remained committed to making an announcement in February 2017.
- 7.4 The rate of minus 0.75% is the result of rounding to the nearest 0.25% the simple average real yield (-0.83%) on ILGs over the three years to 30 December 2016, excluding ILGs with less than 5 years to maturity.

¹ <https://consult.justice.gov.uk/digital-communications/discount-rate/> or write to Civil Law Unit, Ministry of Justice, 3rd Floor, 102 Petty France, London SW1H 9AJ

² Damages Act 1996. S 1(4).

Consolidation

- 7.5 The instrument does not amend another instrument and so consideration of consolidation does not arise.

8. Consultation outcome

- 8.1 The Ministry of Justice has published a summary of the responses to the 2012 consultation paper “The Damages Act 1996: The Discount Rate: How Should it be Set?”³. The consultation period ran from 1 August 2012 to 23 October 2012. 73 responses to the consultation paper were received. Of these, the main group of responses (approximately one quarter) were from representatives of the insurance industry. Similar numbers of responses were received from defendant and claimant solicitors, financial and accountancy organisations, and general legal bodies and practitioners. Other responses received were from defendant organisations, charities, judicial bodies, and members of the public. Widely diverging views were expressed by different interest groups, and overall the responses demonstrated very little consensus on the methodology which should be used in setting the rate or on the technical considerations which should be applied to that process. Broadly, claimant respondents favoured using ILGs returns as the basis for setting the rate, whilst defendant respondents favoured using a mixed portfolio.

- 8.2 In view of the lack of consensus in responses to the 2012 consultation, the then Lord Chancellor (the Rt Hon Chris Grayling MP) decided to appoint an expert panel to provide advice on what the discount rate should be under the present law and how it should be calculated. The expert panel began its considerations in March 2015 and reported in October 2015, providing further clarification on a number of issues in January 2016. These documents are also being published today.

- 8.3 Statutory consultation with HM Treasury and the Government Actuary has been carried out in accordance with section 1(4) of the Damages Act 1996.

9. Guidance

- 9.1 The rate is used by the courts but is of significant interest to all parties involved in personal injury litigation where damages may be payable for future financial loss. The department has informed the Association of British Insurers and the Association of Personal Injury Lawyers of the change and has also issued announcements to the Stock Exchange and the press.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is to increase the amount of damages that may be payable in any personal injury action to which they may be party. This could have an effect on the cost of insurance.
- 10.2 The impact on the public sector is to increase the amount of damages that may be payable in any personal injury action to which they may be party.
- 10.3 An Impact Assessment has not been prepared for this instrument. The new rate gives effect to the legal principles governing the setting of the rate. No new policy is being

³ <https://consult.justice.gov.uk/digital-communications/discount-rate/> or write to Civil Law Unit, Ministry of Justice, 3rd Floor, 102 Petty France, London SW1H 9AJ

implemented. In particular, these principles do not permit the effect of a change in the rate on defendants to be taken into account.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses, but only has effect where the business causes a personal injury.
- 11.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 11.3 The department carried out a public consultation and included the Federation of Small Business among its consultees. It is not appropriate, applying the principles governing the setting of the rate, to apply a different approach to cases involving small business defendants from that applied generally.

12. Monitoring & review

- 12.1 The Lord Chancellor is under a continuing duty to ensure that any rate set remains appropriate.

13. Contact

- 13.1 Paul Hughes at the Ministry of Justice Telephone: 020 3334 3198 or email: paul.hughes@justice.gsi.gov.uk can answer any queries regarding the instrument.