

POLICY NOTE

THE DAMAGES (PERSONAL INJURY) (SCOTLAND) ORDER 2017

SSI 2017/96

1. The above instrument was made in exercise of the power conferred by section 1 of the Damages Act 1996 (c. 48), as amended by the Scotland Act 1998 (Consequential Modifications)(No. 2) Order 1999 (S.I. 1999/1820, schedule 2, paragraph 126). The instrument is subject to the negative procedure. The Order comes into effect on 28 March 2017.

2. The order does not comply with the 28 day rule. This is because any delay between making the Order and its entry into effect would prejudice settlements of claims for damages for personal injury. This would lead to delays in the courts or in reaching settlements while one or other party sought to postpone cases so as to obtain the benefit of the new rate.

Policy objectives

3. The Order sets out the rate of return (“the discount rate”) to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury. The courts must take this rate into account unless a party to the action shows that another rate would be more appropriate in the case in question.

4. The objective of an award for damages for personal injury is to put the pursuer in the same position, financially as they would have been if it had not been for the injury. When damages are awarded for personal injury, sometimes a one-off payment will suffice. However, if the injured person will suffer loss of earning or need care stretching into the future, it may be more appropriate to assess damages in terms of their life expectancy and the losses which are expected for the future.

5. The discount rate is used to determine how much cash needs to be paid at the time of the award to provide a capital sum which can be used to yield exactly enough to cover the anticipated needs and lost earnings every year, for as long as they are expected to continue. It is not intended that the pursuer is left with a capital sum when the period covered by the award has expired.

6. Assessment of the amount of an award is complex. It takes into account the annual cost a pursuer is likely to need, the number of years over which the losses are likely to continue and applies a discount to reflect the effects of paying the whole amount in one lump sum. The discount rate indicates how much a prudent investor should get, allowing for inflation, and reflecting the fact that they are financially dependent on the lump sum, often for long periods or for the remainder of their life.

7. In the English case of *Wells v Wells* [1999] 1 AC 345, the House of Lords unanimously concluded that, in order to provide full compensation the discount rate should be based on the average rate of return from investment in Index Linked Government

Securities (ILGS) and on the assumption that the successful pursuer would invest prudently and invest their money in ILGS.

8. The rate currently used by the courts in Scotland was set in 2002 and is 2.5%. It was considered appropriate at that time, taking into consideration the ILGS rate. There have been significant changes in the markets since 2002.

9. The Lord Chancellor set the rate at minus 0.75% for England and Wales and this came into force on 20 March 2017. The Lord Chancellor placed her statement of reasons in the libraries of the House of Parliament on 27 February 2017¹.

10. Scottish Ministers have considered all relevant material before them in deciding the rate for Scotland. The Scottish Government accepts the Lord Chancellor's reasons for setting the rate at minus 0.75% and believes that there are no particularly Scottish factors that would indicate a need for a different rate in Scotland. A statement of that decision is annexed.

Consultation

11. In setting the rate, section 1 of the Damages Act 1996 requires that the Scottish Ministers consult the Government Actuary and that has taken place. While the Lord Chancellor must also consult with HM Treasury, there is no such requirement on Scottish Ministers, but they have sought the Chief Economic Adviser's advice.

12. The Scottish Government joined the UK Government and the Northern Ireland Executive on 2 previous consultations concerning the discount rate: the first published in 2012, Damages Act 1996: the discount rate - how should it be set?² The second, Damages Act 1996: the discount rate - review of the legal framework was published in February 2013³. The 3 administrations also sought the views of an expert panel in 2015⁴.

Financial effects

13. In making their decision Scottish Ministers did not consider the financial impact of a change to the discount rate, including to their own interests as potential defenders. They only considered the relevant material before them as set out in the annex. No Business and Regulatory Impact Assessment was therefore prepared before they made their decision.

14. There will be a financial impact on the public sector, such as the NHS. There will also be an impact on insurers who will bear much of the costs of increased awards against local government, business and private individuals (particularly motorists).

Scottish Government Justice Directorate
March 2017

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/594972/discount-rate-statement-of-reasons.pdf/

² <https://consult.justice.gov.uk/digital-communications/discount-rate/>

³ <https://consult.justice.gov.uk/digital-communications/damages-act-1996-the-discount-rate-review-of-the/>

⁴ <https://consult.justice.gov.uk/digital-communications/discount-rate/results/discount-rate-report.pdf/>

Annex - Discount rate in Scotland: statement of the Scottish Ministers - 27 March 2017

Scottish Ministers have the power, under section 1 of the Damages Act 1996, from time to time, to set the rate of return (discount rate) applied to sums awarded as damages for future pecuniary loss in an action for personal injury.

Scottish Ministers have carried out a review of the discount rate for Scotland. In the course of that review and in coming to a decision on the appropriate discount rate, they have considered all relevant material before them. This includes: responses to a joint consultation with the UK Government and the Northern Ireland Executive in 2012; the report of an expert panel in 2015 (which reached majority and minority conclusions); the reasons why the Lord Chancellor (on 27 February 2017) set the rate for England and Wales at minus 0.75%⁵; the response of the Government actuary, who under section 1(4) of the Damages Act 1986 Scottish Ministers must consult before setting the discount rate in Scotland; the response of the Chief Economic Adviser to the Scottish Ministers; a statement made by the Association of British Insurers (ABI) and arguments made by the Medical and Dental Defence Union for Scotland (MDDUS) in their pre action protocol letter for judicial review of the Lord Chancellor's decision on the discount rate for England and Wales.

The responses to the joint consultation in 2012 were published by the Lord Chancellor on 27 February 2017.

This statement sets out the decision of Scottish Ministers on a new discount rate for Scotland and the reasons for that decision.

Decision

Scottish Ministers have decided that the appropriate discount rate for Scotland is minus 0.75%.

Reasons

The Lord Chancellor set the rate at minus 0.75% for England and Wales on 27 February 2017 and made a statement setting out her decision and reasons on that day. The Scottish Ministers accept the Lord Chancellor's reasons for setting the rate at minus 0.75% and consider that those reasons apply equally in Scotland. Scottish Ministers consider that there are no particularly Scottish factors that would indicate that it is appropriate to set a different discount rate in Scotland.

Following the decision of the Lord Chancellor on 27 February 2017, the ABI issued a statement in relation to the impact of the new rate in England and Wales on insurance premiums. Scottish Ministers do not consider the issues dealt therein to be a relevant consideration in determining the discount rate for Scotland.

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/594972/discount-rate-statement-of-reasons.pdf

The MDDUS issued a pre action protocol letter for Judicial Review challenging the Lord Chancellor's decision on 10 March 2017 and seeking the withdrawal of the Order making the change.

Scottish Ministers have considered the reasoning set out in the MDDUS' Pre-Action Protocol letter and disagree with their conclusions. Scottish Ministers consider that their discretion has to be operated within the principles laid down in the decision in *Wells v Wells* [1999] 1 AC 345.

MDDUS also argue that the Lord Chancellor should have completed a review of the methodology for setting the rate before setting the rate - the earlier consultation in 2013 on that issue and the work of the expert panel did not provide a clear steer on a new approach. If Scottish Ministers were to await the conclusion of a further review it would mean that a rate which is recognised as being wrong and therefore detrimental to injured parties, particularly those who have suffered catastrophic injury and are reliant on long term care, would remain in place for such time as it takes to conclude the review and implement any changes including any necessary legislative change.