LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

Setting the Discount Rate

Consultation by the Department of Justice and Equality (June 2020)

Response of Law Society Litigation Committee

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Litigation Committee Subcommittee:

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1. Introduction

The Law Society welcomes the initiative taken by the Minister for Justice and Equality in seeking views from interested parties on the setting of the discount rate in personal injury lump sum awards.

This submission was prepared by members of the Law Society's Litigation Committee who have expertise in dealing with personal injury cases in which substantial compensation including future special damages calculated by reference to the discount rate were awarded.

It is noted that the aim of the consultation is to ascertain views on whether the current system of settling the discount rate needs to be updated and that it is not intended to change the fundamental principle that a Claimant should be fully compensated. This is welcomed.

2. General Questions

2.1. In determining the discount rate, should it be left to the Judiciary to decide on the appropriate rate on a case by case basis, or should the existing section 24 of the Civil Liability and Courts Act 2004 be amended by introducing principles and policies to allow the Minister for Justice and Equality to determine the rate and review at intervals thereafter? Please provide an explanation for your preference.

2.1.1. We believe that neither approach is preferable and suggest an alternative which would empower the Judicial Council to set the discount rate subject to certain provisions. Further detail is provided below. Adopting a case by case approach creates uncertainty and makes the settlement of cases more difficult. This approach also requires a Claimant to advance a case to Court for determination of this issue with the attendant legal risk and costs. The latter suggestion of allowing the Minister to make the decision is constitutionally uncertain and appears to be contrary to the doctrine of the separation of powers. This may be somewhat ameliorated by retaining judicial oversight in the case of such decisions. The level of the discount rate is of such importance to the concept of 100% compensation that such a power cannot, and should not, be taken out of the hands of the judiciary.

2.2. If you favour updating existing legislation, and introducing principles and policies, can you please provide a view on what you think the investment strategy underpinning the discount rate should be? Options include:

i. Maintaining the existing risk averse approach as set out in the *Gill Russell V HSE* case (low risk investments), or;

ii. Adopting the approach recently introduced in the UK of determining the rate by reference to expected rates of return on low risk diversified portfolio of investments.

2.2.1. We agree that the risk averse approach set out in the *Russell v HSE*[1] case is the most appropriate as the only approach which can fully safeguard the principle of the full and proper compensation of individuals who have suffered severe lifelong injuries as a result of the wrongdoing of another as enunciated by (then) Irvine J in *Russell v HSE*.

2.3. Please outline any other options that you think would be feasible for calculating the discount rate explaining why you think these would be appropriate.

2.3.1. We believe that, if legislation is to be enacted, another method exists which has not been suggested to date and which could be achieved by a small and straightforward legislative amendment. Under the Judicial Council Act 2019, the Judicial Council has already been empowered to set both personal injuries guidelines and sentencing guidelines. It seems a sensible compromise between the options outlined above that the Council would be

[1] [2015] IECA 236

similarly empowered by legislation to set the discount rate. This would require a committee appointed by the Judicial Council comprised of judges to undertake the commission of appropriate research. The committee should be granted specific powers to access resources and expertise and to consult with all appropriate stakeholders. This should also be coupled with a power for the courts to depart from the set rate in individual cases where that is necessary in order to avoid an injustice. This approach would have the effect of achieving certainty and avoiding the substantial constitutional problems that would arise were the Minister to be provided with unfettered power to set the discount rate.

2.4. In setting out your favoured option can you please provide supporting evidence of how Claimants actually invest their compensation and their reasons for doing so?

Investment options available to Claimants were thoroughly considered by the Court of Appeal in its judgment delivered on 05 November 2015 in *Russell (a minor) -v- Health Service Executive*[2]. It is beyond doubt that the courts in this jurisdiction and in the UK are firmly of the view that a Claimant should be entitled to invest their award in as risk-free an investment strategy as is available.

2.4.1. The Consultation Document[3] acknowledges that the discount rate is used in relation to a small number of very severe personal injuries cases, in most of which the Claimant is either a minor or a person who, as a result of the injuries sustained, requires to be made a Ward of Court. In such cases, the compensation award is managed by the Accountant of the Courts of Justice. The recently published report for the year ending 30 September 2019 sets out the performance of the net assets under management by the Courts Service in the preceding twelve-month period.

2.4.2. The fact that the Joint Oireachtas Committee on Justice and Equality has called for an independent review to examine the management of funds belonging to wards of court who lost significant amounts of money during the financial crisis highlights that this model is not an appropriate reference point for setting a discount rate for catastrophically injured claimants[4].

2.4.3. Notwithstanding the performance of the funds which are invested by the Accountant and notwithstanding that certain returns have been achieved, the Court of Appeal[5] noted that the High Court in *Russell (a minor) -v- HSE*[6] had expressed the view that *"just because equities had performed in a certain manner over a limited number of years in the past, it did not necessarily follow that similar results would be achieved in the future".*

[2] Ibid

[3] Page 4.

[4] Loss of money belonging to wards of court needs review, Irish Times, 22 February 2018

[5] [2015] IECA 236 , para 95

[6] [2014] IEHC 590, Cross J.

2.4.4. In addition, the Court of Appeal stated that it is not entitled to look at what investment a non-wardship plaintiff is likely to pursue, and accordingly it must adopt a similar position in respect of plaintiffs who are likely to remain in wardship.

2.4.5. These views were supported by the Court of Appeal in its 05 November 2015 judgment which held that *"how such a plaintiff may intend to use or invest their award is not a matter that the court is entitled to investigate or act upon when deciding upon the discount rate to be applied. Thus the real rate of return should be computed absent a consideration of whether or not the plaintiff's fund will be managed by the courts investment service".*

3. Legislation Questions

3.1. If you consider that the discount rate should be the subject of legislation please indicate:

Whether the Minister for Justice and Equality should retain the existing power under section 24 of the 2004 Act to set the discount rate

3.1.1. All parties involved in personal injuries claims concerning serious long-term injuries would benefit from well-informed and up-to-date guidance on the discount rate. Currently the discount rate is updated solely through case-law which is an uncertain and inefficient method. However, it is essential that any legislative provision for the "fixing" or "setting" of the discount rate acknowledges that such fixing/setting is solely for guidance purposes and it respects the power of the Court to apply more appropriate rates if it considers that the application of the rate prescribed would result in an injustice being done.

3.1.2. The Society recommends that the Judicial Council Act 2019 should be amended to allow the Judicial Council to set the guideline discount rate at regular intervals with the assistance of expert advice and subject to the discretion of the courts to apply more appropriate rates where justice so requires.

3.1.3. Despite coming into operation on 31 March, 2005[7], section 24 of the Civil Liability and Courts Act 2004[8] has not been utilised by the Minister. It is important to note that s.24 (3) provides that the court may apply a discount rate other than the rate prescribed by the Minister if it considers that the application of the rate prescribed would result in an injustice being done. This reflects the fundamental role of the courts in vindicating the rights of seriously injured and disabled claimants. However, it is not clear that this alone is sufficient to meet these constitutional requirements. It is suggested that such concerns would be allayed if this role were assigned to the Judicial Council.

If so, should a panel of experts be established to advise the Minister with regard to the setting of the discount rate?

3.1.4. The guideline discount rate should be set with the benefit of relevant and impartial expertise. Furthermore, it should be supported by appropriate reasons which should be published. Transparency is essential.

[7] Civil Liability and Courts Act 2004 (Commencement) Order 2004 (SI 544 of 2004)

[8] 24.—(1) The Minister may, by regulations, prescribe the discount rate that shall apply for the purposes of the assessment of damages in respect of future financial loss.
(2) Regulations under subsection (1) may prescribe different rates in respect of different classes of financial loss or different periods of time.
(3) The court may apply a discount rate other than the rate prescribed under subsection (1) if it considers that the application of the rate prescribed would result in injustice being done.
(4) In this section "discount rate" means, in relation to the assessment of damages by a court, the rate commonly referred to by that name that is applied by the court for the purpose of determining the current value of any future financial loss.

In the alternative, should a panel of experts be established to set the discount rate?

3.1.5. The discount rate has a profound effect on damages in a serious personal injuries claim and while a panel of experts should help inform the process, the ultimate setting of the discount rate should be a matter for the courts. This is best achieved by the Judicial Council and the courts.

What principles or policies would you like to see included in the amended legislation?

3.1.6. The response at 2.3.1 refers. In addition, deadlines should be established to ensure that the discount rate is reviewed and updated on a periodic basis in a timely manner.

Should the principles and policies underpinning revised legislation assume the profile of the claimant to be:

i. **very risk averse – as is currently the case;**

ii. **low risk – a mixed portfolio of balancing low risk investments – as in the UK;**

iii. **an ordinary prudent investor;**

iv. **another type of investor.**

Please give reasons for your response.

3.1.7. The Consultation Paper states "*it should be noted that, in engaging in a public consultation on the issue, the intention is not to change the fundamental principle that a* ***Claimant should be fully compensated*** *[emphasis added] but to ask a series of questions about what if anything needs to be done in order to update the current system of setting the discount rate*."[9]

3.1.8. The principles which have been adopted by the Irish Courts and by courts throughout the common law world, were as stated by (then) Irvine J, in *Russell v HSE*[10]:

"It is thus of vital importance to state in no uncertain terms that it is mandatory for the Court to approach its calculation of future pecuniary loss on a 100% basis regardless of the economic consequences that the resultant award may have on the Defendant, on the insurance industry or on the public finances. It is acknowledged that it is equally important that the sum awarded does not over compensate the Plaintiff and that the Defendant is given every opportunity to contest each integral component of the final award. Public policy has no part to play in the assessment of damages of this nature. If large awards in respect of claims of this nature have an adverse effect on insurance premiums or place pressure on the pockets of State Defendants, that is not something

[9] Consultation document on setting the discount rate, Department of Justice and Equality, June 2020, Page 3.
[10] [2015] IECA 236

that the Court can take into account and as a result in some way moderate or reduce its award. The damages so awarded are after all destined to do no more than restore a Plaintiff in financial terms to as close a position as they would have enjoyed in terms of wealth and independence had they not been the unwitting victim of the Defendant's wrongdoing…"

3.1.9. The fundamental principle that a claimant should be fully compensated requires that the current risk averse approach should be the basis for the discount rate.

3.1.10. It is clear that a claimant disabled by serious long-term injuries cannot be equated with an ordinary prudent investor or indeed another type of investor. As stated by (then) Irvine J in *Russell (a minor) -V- Health Service Executive*[11]:

"Having considered the authorities on this issue and in particular the decision of the House of Lords in Wells, this Court is satisfied that it would be fundamentally flawed reasoning for a court to assume that the same investment policy would be prudent for all investors. The catastrophically injured plaintiff who needs to replace their lost income or to provide for their future care is simply not in the same position as the ordinary investor who has an income and has surplus funds to invest. The latter is clearly in a position to absorb greater risk. They are not dependant on such monies to meet their basic day to day requirements and indeed may not need to access these surplus funds for many years. Accordingly, they might prudently be in a position to invest in equities given their ability, should the market fall, to hold onto their investment and wait until the market recovers before selling. Even if they end up losing on their investment the outcome is not catastrophic. However, most injured plaintiffs enjoy no such comfort. Almost inevitably they are dependent upon their award of damages to meet their needs as they arise on a day to day basis. Accordingly, this Court is satisfied that the High Court judge was correct when he concluded that the plaintiff was entitled to have his damages calculated on the basis that he should be entitled to pursue the most risk averse investment reasonably available to meet his needs."

3.1.11. Option (ii) "low risk – a mixed portfolio of balancing low risk investments – as in the UK" would fail to meet the obligation to compensate the claimant fully. It is noted that the "Assumed rate of return on investment of damages: England and Wales" is to be based on a series of assumptions including:

"(d) the assumption that the relevant damages are invested using an approach that involves—

(i) more risk than a very low level of risk, but

(ii) less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims."[12]

[11] [2015] IECA 236

[12] Civil Liability Act 2018, PART 2 (England Wales Statute Book).

3.1.12. This approach assumes that the injured claimant can tolerate investment risk to some extent and reduces the lump sum which would be determined by the current risk averse approach in this jurisdiction by the extent of investment risk to be borne by the claimant.

3.1.13. A Discount Rate based on a mixed risk investment portfolio means that a risk averse claimant will be under-compensated or will be forced to take unnecessary risk with the compensation they need for their future care and living. If the risk is realised and the investment fails, the catastrophically injured claimant will suffer. The State will also carry the cost of care which should have been borne by the defendant/insurer. In this scenario, the defendant/insurer has had the benefit of an increased discount rate but has no obligation to make up any shortfall where the investment risk results in diminished compensation.

3.1.14. Clearly the key driver of a proposal to base the discount rate on a mixed risk investment strategy is to reduce the compensation payable by wrongdoers and their insurers and to give them the benefit of notional investment gains while placing all of the risk of such an investment strategy on the vulnerable, catastrophically injured, claimant. Such a strategy disadvantages the injured and disabled claimant and fails to vindicate their rights.

3.1.15. Concerns about over or under compensation for future special damages are best addressed through proper evidence; the courts; and Periodic Payments Orders ('PPOs'). However, it is acknowledged that the PPO regime is in need of reform if it is to be an attractive and effective alternative to a lump sum payment.

Should the courts retain the power to apply a different rate than the rate provided for in legislation?

3.1.16. Yes, it is essential that the courts retain the power to apply a different rate than the rate provided for in any proposed legislation in the interests of justice. Any curtailment of the role of the courts in this regard would raise many concerns including concerns relating to the Constitution, the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities.

Should the Minister (or expert panel) be empowered to set different rates for different classes of case?

3.1.17. This question refers to 'different classes of case' whereas the setting of different rates may also arise in relation to different classes of damages within the same case as occurred in Russell. The Society maintains that it is appropriate that the setting of the discount rate by the Judicial Council should extend to the setting of different rates for different classes of case or to different elements of claim within a particular case in conformity with current common law jurisprudence where, for instance, a different rate applies to care costs which provide lifesaving treatments compared with the rate that applies to loss of earnings. As to who should set the rate, we refer to our earlier replies.

3.1.18. Compensation to cover care costs which are necessary to maintain the life of a Claimant is not necessarily the same as a claim for a loss or partial loss of earnings.

3.1.19. It is logical that the lowest risk justification applies to awards that are lifesaving and this investment model may not necessarily apply to loss of earnings.

3.1.20. In a similar vein, some Claimants will have no prospect of making earnings into the future and the investment risk for their loss of earnings compensation must be regarded as lower than those Claimants who do have a prospect of generating income in the future. This was acknowledged by the Court of Appeal in *Russell (a minor) v. HSE* [2015] IECA 236:-

"A plaintiff who will never be in a position to work again and is dependant upon the investment of his lump sum for their own support and that of his family may be entitled to be treated similarly in terms of the investment risk he should have to absorb to the plaintiff who needs to cover the cost of their future nursing care on an annual basis."

3.1.21. It is acknowledged that differential rates may give rise to controversy about which rate should apply. In *Warriner v Warriner* [2002] EWCA Civ 81 at para.28:-

"Their Lordships recognised that a single rate was a somewhat rough and ready instrument, but they embraced it on policy grounds. These grounds were that the certainty of such a rate was desirable, would facilitate settlements, and result in saving the expense of expert evidence at trial: see per Lord Lloyd of Berwick at 373".

3.1.22. However, in this jurisdiction the pre-existing common law practice of different rates has not had the undesirable effect obstructing settlements or creating uncertainty.

3.1.23. It is also instructive that in this jurisdiction, the legislature has already distinguished between types of Claimants in the Civil Liability (Amendment) Act, 2017 insofar as the PPO regime applies where damages are awarded for a 'catastrophic injury' which means "*a personal injury which is of such severity that it results in a permanent disability to the person requiring the person to receive life-long care and assistance in all activities of daily living or a substantial part thereof*".

3.1.24. It is submitted that it should be possible to clearly and cogently set out different categories of case according to which different rates would apply and this would represent a proportionate approach to the Claimant's right to full compensation balanced against the Defendant's right to be protected from over-compensation.

How often should the discount rate be reviewed?

3.1.25. The Society believes it would be appropriate for the discount rate to be reviewed every three years. That said, and in light of the dramatic impact of the Covid-19 crisis on macro-economic and market conditions worldwide, it would like to see some capacity for flexibility in exceptional circumstances. It would be important to establish clear deadlines for this process so as to ensure that it is completed in a timely manner.

4. Periodic Payment Orders (PPOs) Questions

4.1. What impact would changes to the existing discount rate have on the use of Periodic Payment Orders in catastrophic injury cases?

4.1.1. It is worth highlighting the fact that the impetus for the PPO legislation which came into effect on 01 October 2018 was the Judicial Working Group on Medical Negligence, Report (Module 1) which recommended inter alia that:

"Provision within the legislation must be made for adequate and appropriate indexation of periodic payments as an essential prerequisite for their introduction as an appropriate form of compensation. In particular the group recommends the introduction of earnings and cost related indices which will allow periodic payments to be index linked to the level of earnings of treatment and care personnel and to changes in costs of medical and assistive aids and appliances. This will ensure that plaintiffs will be able to afford the cost of treatment and care into the future."

4.1.2. However, in stark contrast to what was recommended by the Judicial Working Group as an essential prerequisite to make payment of damages by periodic payments an acceptable form of compensation, the 2017 Act provides that *"the index used to calculate the revision shall be the annual rate of Irish Harmonised Index of Consumer Prices (HICP) as published by the Central Statistics Office"*[13].

4.1.3. In essence, the 2017 Act completely ignores the recommendation of the Judicial Working Group regarding the use of earnings, health and care costs related indices as a means to link indexation for future payments. Instead, the inflation index provided for in the 2017 Act measures consumer prices over a broad range of consumer goods. Thus, the PPO regime as introduced ignores the vast difference in likely future price inflation in consumer goods compared to the much greater likely increase in medical wage inflation and treatment costs. This is the opposite of what the Judicial Working Group recommended.

4.1.4. The rationale for the approach chosen to introduce the PPO regime via the 2017 Act, without an appropriate indexation, appears to have been a desire to mitigate the potential negative impact on the insurance industry and on premia rather than to ensure appropriate compensation for the injured person. The report of the Department of Justice & Equality "Regulatory Impact Analysis of the Bill" states:

"Towers Watson having examined international models and consulted the insurance industry in Ireland, concluded that it would be feasible to develop legislation encompassing state and non-state defendants. It made a series of recommendations aimed at mitigating the potential negative impact on the insurance industry and on premia."[14]

[13] Section 51L (i)

[14] Page 5.

4.1.5. Towers Watson recommended the use of the CPI/HICP or CPI/HICP + a fixed percentage indexation while also acknowledging its flaws:

"Over prolonged periods there may be a mismatch between the Claimant's needs and the actual claim payments as a result of the simplified indexation. As a protection the use of a simplified index could be associated with a longer term review of the process to ensure index compensation is reviewed in line with the original formulae. This type of review process would increase the risk being borne by the Insurer to risks similar to the use of a bespoke medical inflation index. If such a review mechanism were put into effect it is likely to have a significant impact on insurer/reinsurer pricing."[15]

4.1.6. In essence Towers Watson Actuaries were accepting that, over a period of years, there would be a progressive under-compensation of seriously injured Claimants, by reason of the increase in annual PPOs only matching consumer price inflation (while not matching wage inflation). Such a situation clearly conflicts with the principles of compensation which have been followed in all common law jurisdictions "100% compensation" or "Restitutio In Integrum" principles.

4.1.7. It is for this reason that the High Court in the case of ***Hegarty (a minor) v HSE***[16] **(November 2019)** per Murphy J. concluded that:

"72. In the court's view [...] a PPO in which the annual amount is adjusted in accordance with the harmonised index of consumer prices will as a matter of probability result in significant under compensation of the plaintiff.

73. It is undoubtedly the executive's and the legislature's prerogative to enact legislation which they consider appropriate to meet the needs of catastrophically injured persons. They have done so and they have chosen to adjust PPO's in accordance with HICP. This too is their right. However, in circumstances where the expert evidence is unanimous, that the indexation chosen (HICP) will not meet the future care needs of catastrophically injured plaintiffs, then no judge charged with protecting the best interests of a plaintiff, which is the first requirement for the exercise of a court's discretion under the legislative scheme could approve a periodic payment order adjusted by reference to HICP."

4.1.8. The learned trial judge went on to find:

"It is clear on the basis of the expert evidence before the Court that no competent financial expert would recommend a periodic payment order linked to the harmonised index of consumer prices to provide for the future care needs of a plaintiff. In its current form therefore, the legislation is regrettably a dead letter. It is not in the best interests of a catastrophically injured plaintiff to apply for a PPO under the current legislative scheme."

[15] Feasibility Study on the Introduction of PPOs in Ireland, March 2014, page 43, paragraph 5.4.3.
[16] [2019] IEHC 788

4.1.9. In light of all of the foregoing, it is submitted that, no competent and prudent Solicitor or Counsel could recommend the current statutory scheme of PPOs to a catastrophically or seriously injured client. The only remaining choice, therefore, is lump sum damages which should be appropriately measured and subject to the use of an appropriate and realistic discount rate.

4.1.10. In summary, changing the discount rate on lump sum damages so as to compel the Claimant to invest in relatively riskier assets, will negatively impact on catastrophically injured Claimants, who will be left with an impossible choice to select between the lesser of two evils.

4.2. Has the decision in Gill Russell v the HSE made it more or less likely that Claimants will utilise PPO?

4.2.1. It is submitted that the premise of the question might suggest that the Court of Appeal's decision in Russell is at the root of the problem as to why Claimants are not in favour of accepting compensation by way of PPO. However, the Russell judgment is not the problem, rather (as outlined above) the unpopularity of PPOs lies squarely with a deficit in the legislation which introduced the regime and more specifically, the decision to link the future indexation of the PPO to price inflation, not wage inflation.

4.2.2. In addressing the question posed it is important to emphasise the basis of the court's approach to the awarding of lump sum compensatory damages for pecuniary loss in serious personal injury cases as enunciated by the Court of Appeal in the Russell case.

"69. It is undoubtedly the case that any modification of the discount rate in the present case, if applied across the board, will result in a general increase in the size of awards for future pecuniary loss. However, to leave in place an unrealistically high real rate of return would be to disregard the principle of 100% compensation given that the same would result in the under compensation of Plaintiffs with claims of that nature".

4.2.3. The Claimant is to be treated as risk averse and unlike an ordinary investor per the dicta of the Court of Appeal in Russell:

"84. Quite correctly in the view of this Court, Cross J determined that the assessment of the real rate of return is to be made on the assumption that the Plaintiff should be entitled to invest his award in as risk free an investment strategy as is available and which will likely meet his future care needs. In particular, we agree with his conclusion that the Plaintiff is not to be treated as an ordinary prudent investor for the purposes of calculating the likely return on the investment of his lump sum…"

4.2.4. The court went on to consider whether the High Court had decided correctly by holding that wage inflation would exceed general consumer price inflation:

"155. Accordingly, notwithstanding the defendant's submissions on the issue, having considered the evidence before the High Court, this Court is satisfied that the High Court

judge's downward adjustment of the real rate of return by 0.5% to take account of future wage inflation, for the purpose of the calculation of the plaintiff's claim for future care, was appropriate. He was clearly entitled to conclude that wage inflation in general would, over the period of loss, exceed CPI at a minimum of 1% and that if no adjustment was made, the plaintiff would not receive full compensation. Further, given that he accepted that wage inflation in the care sector would not fall into line with general wage inflation for a period of approximately five years, that being the opinion of Prof. Walsh's, he was entitled to reduce the adjustment required in the real rate of return to 0.5% to take this factor into account."

4.2.5. It is clear, from the foregoing quotations, that the Court of Appeal had regard to both the principle that the Claimant should be treated as being very risk adverse and also, the likely higher rate of inflation in earnings as compared to general consumer prices when fixing the correct discount rate for calculating lump sum damages. The court accepted when fixing the discount rate, that wages will rise at a rate up to 50% greater than consumer prices, whereas the PPO will only rise at a slower rate in line with consumer prices. Thus, following the Russell and Hegarty judgments, it is submitted that nearly all Claimants, will be advised by their lawyers and financial advisors to opt for a lump sum award of damages.

5. Recent UK Developments - Relevancy to Irish Market Questions

5.1. How relevant is the outcome of the UK consultation on the personal injury discount rate to the Irish market?

5.1.1. Prima facie, the UK consultation indicates an evidence base which has concluded that appropriate compensation can be dealt with on a basis other than assuming that investment is exclusively based on the Index Linked Government Stock model. However, that is a superficial appreciation of the UK consultation. In truth, there is no evidence that the investment models and options available to UK Claimants are readily available to Irish Claimants.

5.1.2. In any event, it is submitted that this evidence is irrelevant in circumstances where the Court of Appeal in this jurisdiction expressly acknowledged (in Russell):

> *"the assumed entitlement of a plaintiff to invest their award in as risk-free an investment as is available and suitable to meet their future needs".*

5.1.3. This means that, irrespective of the available evidence in other jurisdictions around Claimants' investment practices, this cannot disturb the basic premise that a Claimant is entitled to a risk-free investment.

5.2. What weight should be given to UK experience as part of this review process?

5.2.1. We would strongly caution against placing any weight on the UK experience in circumstances where there is no evidence that the investment models and options available to UK Claimants are also readily available to Irish Claimants and there is no comparable evidence that Irish Claimants have a similar investment risk profile. In any event, this theoretical exercise is entirely unnecessary and irrelevant in circumstances where the Irish Courts have acknowledged that a Claimant is entitled to a risk-free investment to meet their future needs.

6. Conclusion

The Law Society favours retaining the risk-averse approach enunciated by the Irish courts in *Russell v HSE*. The approach adopted in the UK does not offer certainty to the average Claimant and may, in fact, result in under compensation. The UK method should not be replicated in this jurisdiction.

We believe that the discount rate should neither be set by the courts on a case by case basis or by the Minister as both approaches are flawed. Instead, legislation should empower the Judicial Council to set the discount rate with the assistance of appropriate expertise. Assuming that the Court would still have the power to impose a different rate in circumstances where an injustice might arise, the approach would have the advantage of providing certainty and withstanding constitutional scrutiny.

Different rates for different classes of claims should be considered and the rates should be reviewed every three years, at a minimum.