Introduction

The FOCIS members act for seriously injured Plaintiffs with complex personal injury and clinical negligence claims including group actions.

The objectives of FOCIS are to:

1. Promote high standards of representation of Plaintiff personal injury and medical negligence clients.
2. Share knowledge and information among members of the forum.
3. Further better understanding in the wider community of issues which arise for those who suffer serious injury.
4. Use members expertise to promote improvements to the process and to informed debate.
5. Develop fellowship amongst the members.

See further www.focis.org.uk

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 25 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Seven of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold
Atherton Godfrey
Ashtons Legal
Balfour + Manson
Bolt Burdon Kemp
Dean Wilson
Digby Brown
Fieldfisher
Fletchers
Freeths
Hodge Jones & Allen
Hugh James
JMW
Irwin Mitchell
Leigh Day
Moore Barlow
Osbornes
Potter Rees Dolan
Serious Law
Slater and Gordon
Stewarts
Thompsons NI

FOCIS members act for seriously injured Plaintiffs with complex personal injuries and clinical negligence claims. In line with the remit of our organisation we restrict our responses relating to our members experiences, and to practices and procedures relating to complex injuries claims only. We leave it to others to respond to the impact relating to other classes of case.

FOCIS welcomes the opportunity to comment in response to the Ministry of Justice Damages (Return on Investment) Bill.

Is the statutory methodology to calculate the personal injury discount rate the most appropriate to achieve as close to 100% compensation as possible?

The most appropriate way to calculate as close to 100% compensation as possible is on the basis of the Wells –v- Wells formula. That is the only methodology that avoids Plaintiffs being exposed to both investment and inflation risk simply to try and ensure their compensation lasts to meet their assessed future injury related needs.

Has the new methodology the potential to veer towards over compensation and if so how can this be rectified?

Any move to an assumption that an injured person should be treated as a low risk investor, as opposed to very low risk or risk adverse, can only veer towards under compensation.

The notional portfolio set out at page 6 and paragraph 12, allows for 10% to be invested in cash or equivalents. The experience of solicitors advising Plaintiffs with significant injuries is that most will leave a significant amount of their compensation in a bank or building society at least initially. Plaintiffs may also have to use some of the compensation to carry out adaptations to their accommodation before investing the remainder so that the amount ultimately invested for a return can be significantly less than the total amount awarded. Consequently a significant proportion of the future damages award will not generate any investment return.

We note and agree with the Ministry of Justice Expert Panel[1] who in their 2015 report The Discount Rate A Report for the Ministry of Justice).believed that any truly low risk portfolio would require at least 75% investment in ILGS with the remaining 25% invested between UK corporate bonds, global government inflation linked bonds and global equities and that any other asset classes posed unacceptable levels of risk.

When comparing the two portfolios considered by the MOJ expert panel in chapter 4 of this report we note that the 1st portfolio had a standard deviation of 2.5%, double the standard deviation of the 2nd portfolio. That shows the 1st portfolio had too much risk of some Plaintiffs' portfolios performing much worse than expected and their fund running out during their lifetime. Likewise it also increases the prospects of other Plaintiff's portfolios unnecessarily outperforming their needs. The lucky Plaintiffs do not of course share the overage with those whose funds run out (unlike an insurer can do so across a book of claims). Consequently we agree with the panel of experts that the 2nd portfolio, whilst still exposing Plaintiffs to a risk of under-compensation, represents the lowest level of erosion of the full compensation principle of all of the model portfolios thus far considered.

Requiring an injured person to gamble with a compensation award by investing in higher risk assets places an unacceptable burden on the injured person and removes the responsibility from the wrongdoer of providing adequate compensation.
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We also believe that the proposed standard adjustment at page 6 paragragh 10 of 0.75% to reflect the impact of taxation and the cost of investment advice is too low and would lead to under compensation.

In its 2019 response to the Ministry of Justice Call for Evidence on the Discount Rate for England and Wales FOCIS sought data from its members and professional deputies and trustees of personal injury trusts concerning investment charges incurred in relation to the investments for their clients. FOCIS collated the data sheet attached to the submission which illustrates the investment portfolios of 389 clients provided by 9 different firms with settlements between £67,336 and £7,450,000. A letter from Ian Gunn of PFP one of the authors of the MOJ's 2015 Expert Report which summarises and comments on this data was also attached and is included with this submission.

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[1] *Paul Cox, Richard Cropper, Ian Gunn and John Pollock*

We analysed the 389 client portfolios to calculate the average total investment charges and investments of up to and over 1.5 million. The average total charge incurred across all 389 cases was 1.58%. However if we restricted the data to settlements known to be up to 1.5 million the data demonstrates an average charge of 1.77%, with a range between 1.66% and 1.93%. By way of comparison, 58 portfolios with a known value of over 1.5 million have a slightly lower than average investment management charge of 1.53 but as a counter point it is likely that these portfolios would incur higher levels of Capital Gains Tax and Income Tax so that the combined reduction on the investment return is likely to be similar to the portfolios of less than 1.5 million. The investment management charges detailed in the FOCIS data include where applicable:

- *Independent Financial Advisor Fees*
- *Platform Fees*
- *Fund Manager Fees*
- *Third Party Fund Charges*
- *Foreign Stock*
- *Broker Commission*
- *VAT*
- *Stamp Duty*

In the data set there is one example of a percentage charge of 3.32% on an investment of 1 million. Whilst this is one of the highest charges demonstrated the fees included a high Front Manager Charge. Similarly Firm 8's data showed advisor F at a bottom level charge of 0.59% on an investment of £197,477. The investment fund itself was much smaller than the average given however the size of the fund it suggests that the Plaintiff did not have any significant disability and was less likely to require advice to plan to meet such needs. We understand that Advisor F was an investment management company rather than an IFA. Sometimes the smaller funds and hence low or no disability clients are more inclined to use this type of provider rather than an IFA. However even if they do it should be appreciated that charges may have been higher at the outset of the investment by way of set up charges for example and such charges were beyond scope of this data collection exercise.

Our own enquiries within FOCIS and the investment professionals who work with their clients suggests that the primary aim of investment advisers is almost always to devise an investment strategy based on meeting the client's need for their life-time (including the longevity risk). This requires regular review and reappraisal. Some funds may have an element of 'active' management in so far as a professional may need to review the portfolio bi-annually or annually, at a cost and undertake any necessary re- alignment. The charges revealed by this data would not have been incurred unless they were necessary to maximise the prospects of the investments lasting to meet the client's needs.
Consequently we understand from having spoken to experts in this field that investment advice is likely to be charged at 1.5% - 2% per annum and the costs of investment advice are likely to be higher the lower the sum of compensation is. We therefore believe that at page 6, paragraph 10, 2 (b), should be removed and 1.5% as a percentage point inserted to represent

i. *The impact of taxation and*
ii. *The cost of investment advice and management.*

Has the new methodology the potential to veer towards under compensation and if so how can this be rectified?

Yes. See answer above.

Does the new statutory methodology reflect how a Plaintiff would be advised to invest their award?

We do not have access to this information. Also we believe that referring to any evidence of historic Plaintiff's investment behaviour when the rate was 2.5% is unreliable. The DoJs suggested rate of -1.75% affirms that for some considerable time Plaintiffs have been severely under compensated. Plaintiffs therefore have had to consider investing in higher risk investments to achieve the assumed rate of return underlying the 2.5% discount rate. Furthermore how Plaintiffs have invested in the past and whether or not they have made risky or non-risky investments should be irrelevant as to how compensation is calculated. It is our position that injured people should not be forced to take risks to reduce the wrong doer's responsibility to compensate appropriately. If the wrong doer does not compensate adequately the responsibility shifts to the injured person or the State to make up the shortfall. Insurers are in a much better position to aggregate their funds and hedge their exposure to fluctuations in the financial markets than individual Plaintiffs.

In our experience Plaintiffs (a) do not invest in risk assets with the aim of maximising returns in order to generate over compensation that they can spend on 'wants' rather than 'needs', and (b) sometimes accept risk in order to facilitate the maintenance of their needs over time, often having also looked at family support to create a saving on care costs, state support and compromising or foregoing needs.

This position is further complicated by any Plaintiff who did not recover compensation on a full liability basis, perhaps because there was a litigation risk of them losing their case, or where there has been a deduction from the global damages for contributory negligence.

Some Plaintiffs will also have been effectively forced to take investment risk because the cost of meeting their needs increased beyond the basis on which their claim was settled, or their damages awarded by the Court. This could happen by the effect of real earnings growth, and/or inflation for disability-related items that due to the specialist nature of the market do not necessarily increase consistently with RPI (or CPI). It is our members' experience that in most injury claims, particularly those with injuries of utmost severity, damages for care and case management account for 50% or more of the Claimant's damages. Once loss of earnings claims and medical/therapeutic cost claims are factored in the proportion of damages that are subject to earnings related inflation typically rises to 70% or more. It is well established, and recognised by the periodical payment regime, that earnings inflation in the long term rises at an average of at least 1.5% more than prices inflation. In the Scottish legislation that factor was acknowledged and resulted in RPI being

selected. In the English legislation an allowance for damages inflation of 1% above CPI. We contend that the proposed RPI provision for Northern Ireland is the minimum acceptable inflationary adjustment and if the alternative of CPI were to be contemplated it would then require an adjustment of at least 1%.

What are the likely effects of using an investment period of 43 years rather than 30 years in the model and do you agree with this approach?

Every case varies as to its facts including in relation to life expectancy and it is accepted that both sides may make concessions on life expectancy to facilitate settlement. In reality the investment advisor and their client must plan for outliving the impaired life expectancy or run the risk of the compensation running out before the end of the Plaintiff's life. 43 years is a considerable period of time to assume as applicable to an average Plaintiff and the evidential basis for this surprisingly high figure is unclear. It would clearly be inapplicable to any Plaintiff who was already over 45, or whose life expectancy has been significantly compromised by severely disabling injuries. Given the uncertainties of the market and the boom and bust economy that we have experienced since the 1990s the Plaintiff is likely to experience both scenarios during the lifetime of their investment either at 30 years or at 43 years. The rationale for adopting a period of 43 years is unclear.

Whilst a notional period of 30 or 43 years might on the face of it be workable, it would not be applicable to all Plaintiffs. The key point is that each client deserves full compensation and this should not be based on a set rate that leaves a cohort of Plaintiffs under-compensated. There would be a significant minority of Plaintiffs with life expectancy of less than 30 years, and the rate should not undercompensate those Plaintiffs.

As there are readily available and highly credible statistics concerning longevity, we contend that the GAD should factor them into any further analysis and modelling. The final model portfolio and resultant discount rate could then be determined to ensure there would be not be under-compensation for more than 5-10% of Plaintiffs, incorporating the longevity risk. Alternatively, recognising that calculating the impact of longevity has complexities, we propose that a further contingency adjustment of say 0.5% is applied to the discount rate to mitigate the risk of various real variable factors, such as longevity and the risk that funds are required in a different manner than when the award was granted. For the avoidance of doubt this is in addition to the NI Assembly's approach of setting a "further margin adjustment" of 0.5%, to "mitigate the broader risk of under-compensation" .

What are the advantages or disadvantages of transferring responsibility for setting the rate from the Department of Justice to the government actuary and is there an appropriate level of accountability in the new statutory methodology?

The method of calculating the discount rate should be depoliticized. The discount rate has been set at an inappropriate level for many years. It is clear that on each occasion that a discount rate adjustment has been contemplated in Northern Ireland, Scotland, England and Wales the relevant minister has been reliant on the Government Actuary to calculate what that rate should be,taking the responsibility

away from the Department of Justice is preferred. Having a formula pre-determined by legislation and empowering government actuaries to review and implement the revised rate creates transparency which is important for all personal injury Plaintiffs in Northern Ireland. This has been recognised by the role recently given to the Government Actuary in the Scottish legislation.