



Compass Chambers

QUANTUM UPDATE NOVEMBER 2018

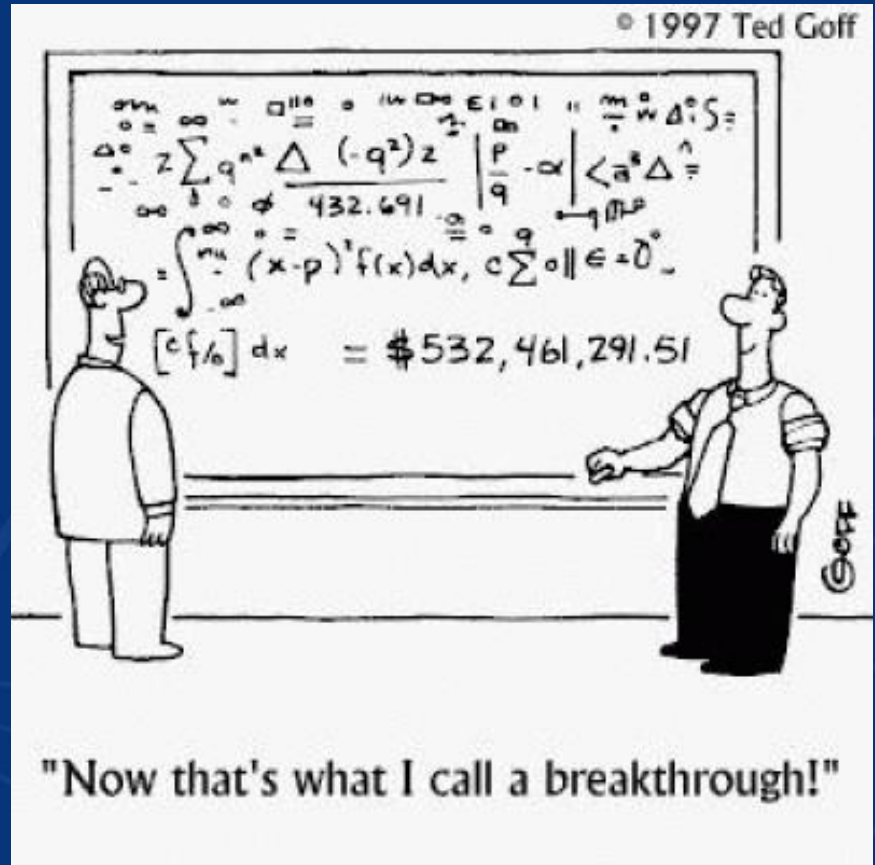
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THE DISCOUNT RATE

- Scenario
- Pursuer aged 25 with a serious spinal injury after an accident
- Will need care for life and unlikely to work
- Defenders tender £5million based on 1.0% discount rate
- No life expectancy issues
- Proof 8 days in November 2019





- The current rate is -0.75%
- Set by the Damages (Personal Injury) (Scotland) Order 2017 on 28 March 2017
- The previous rate was 2.5%
- It had been that rate since 2002
- Very substantial differences in valuation depending on the level of the discount rate.
- Lower the rate the higher the multiplier and the higher the damages award



- The -0.75% rate caused widespread surprise and shock
- For insurers and health boards it had a massive effect on damages payments
- Government agreed to an early review of the rate and how set
- What will be the next rate and when?



- Currently a Bill going through the Scottish Parliament
- A procedure and framework for setting the discount rate
- Damages (Investment Returns and Periodical Payments) (Scotland) Bill.
- It was introduced on 14 June this year.
- First stage is due to finish at the end of December.



- Look back at the changes in the discount rate
- The discount rate was originally based on Wells v Wells — 2.5%
- it was assumed that pursuers would adopt a very low risk investment strategy
- the rate was fixed by reference to Index linked Government Stock (ILGS)
- The yield on ILGS dropped over time and so there was pressure to change the rate and reduce it below 2.5%



- In 2012/13 there were attempts to argue that the court should use its discretion to set its own discount rate
- These challenges failed – *Tortolano v Ogilvie Construction* 2013 SC 313
- Very lengthy period of consultation over the next few years
- the rate was changed in England in early 2017 from 2.5 to - 0.75.



- Example – a 25 year old male with a brain injury and a lifetime claim for care
- Multiplier at 2.5% - 30.92
- $30.92 \times 60,000 = 1,855,200$

- Multiplier at -0.75% - 79.99
- $79.99 \times 60,000 = 4,799,400$



- The main conclusion of the consultation in England in 2017
- In future the discount rate should be based on the return from a low risk diversified portfolio rather than the current very low risk ILGS
- In the summary of proposals to the England and Wales legislation
- Based on the current evidence the government would expect that if a single rate were set the real rate might be set between 0% to 1%.

Damages (Investment Returns and Periodical Payments) (Scotland) Bill.

- The rate will be set by the Government Actuary (UK)
- The rate is to be reviewed every 3 years
- The rate (of return) will be based on a national portfolio which includes equities over a 30 year period
- Inflation - retail prices index – the current RPI is 3.3%
- Over the last 5 years the RPI has varied from 0.7% in October 2015 to 4.0% in October 2017



- What about investment advice costs – are they are a separate head of claim?
- The government actuary must take deduct 0.5%
- Represent the costs of investment advice/ management and the impact of inflation
- And a further 0.5% is deducted for a further margin in relation to the rate of return – this reflects the risks in even the most carefully invested portfolio



- There is a financial memorandum produced by the government with the Bill
- Para 26 – “the portfolio and adjustments in the Bill would currently produce a discount rate of 0%
- Examples of future care etc claims:



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Care claims

	-0.75%	0.0%	1.0%
Brain injured male baby future losses at 40k for life	5,149,200	3,558,400	2,333,600
19 year old male major injuries 20k for life	1,816,000	1,336,200	978,200
58 year old woman future loss at 25k for life	879,250	768,500	650,250



Future loss of earnings claims

	-0.75%	0.0%	1.0%
Male aged 35 retirement age 68 annual loss 20k	645,400	571,600	488,600
Female aged 55 retirement age 67 annual loss 20k	202,600	193,400	182,400



- What does it all mean for PI practitioners?
- Discount rate likely to increase
- Probably to 0.0% maybe up to 1.0%
- The value of all future loss claims will be lower after the new rate is set
- But when will that be ?
- The Bill should become law next year
- How long after that will the government actuary fix the new rate?



- Pursuers
- If the case already raised – in ASPIC likely to conclude before the new rate even if longer than 4 days needed
- Court of session cases – proof dates depend on the length of the diet
- If recently raised longer proof diet likely to be in 2020



- Cases not yet raised for pursuers
- Need to consider the choice of court
- Weigh up the pros and cons of ASPIC v CoS
- Likely proof diet depends on whether 4 days (similar) or longer needed (different)



- Defenders
- Look at when likely to conclude
- Tactical early tenders based on potential new rate
- May be unattractive to pursuers but rate change later may make the tender bite
- The effect of Periodical Payment Orders under the Bill
- Lump sum now rather than a PPO



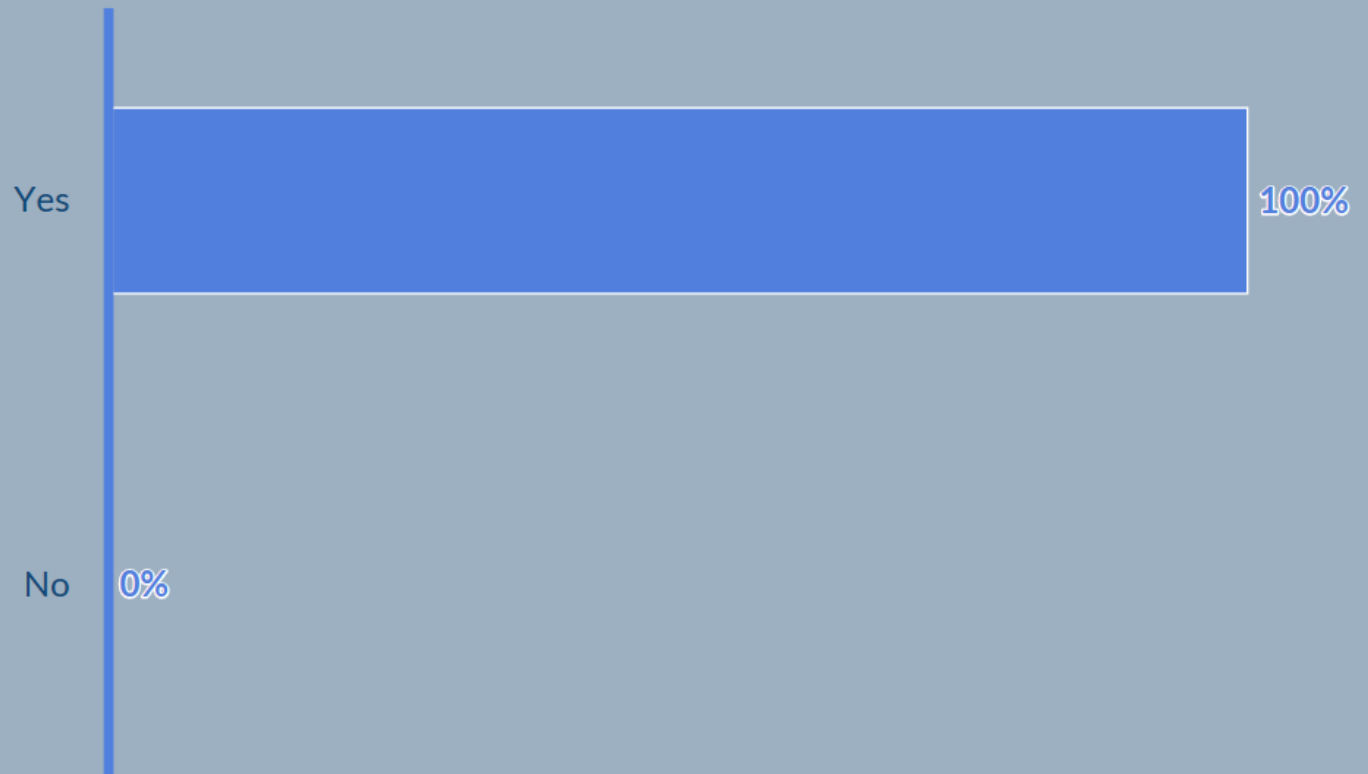
Scenario

- Pursuer aged 25 with a serious spinal injury after an accident
- Will need care for life and unlikely to work
- Defenders tender £5million based on 1.0% discount rate plus extra amount
- No life expectancy issues
- Proof 8 days in November 2019



- You are the pursuer
- You have received advice that on the basis of the current discount rate of -0.75% your case is worth around £6.75million
- But on a 1.0% rate around 4.75 million
- Defenders will not move on the tender
- Would you accept the tender or press on?

Quantum Update Poll 1: Would you accept the Tender?





ACCOMMODATION CLAIMS

- New house needed in light of the disability – buy and adapt
- Valued based on *Roberts v Johnstone* [1989] QB 878
- Large capital outlay needed for more expensive house
- Not the whole additional cost
- Allowed a sum to reflect the loss of investment opportunity
- Based on the discount rate of 2.5%



- Lets assume the additional cost is 200,000
- $200,000 \times 2.5\% \times 30 = 150,000$
- But the current negative discount rate means the deemed rate of return is negative
- So the Roberts calculation must be nil



- This was approach in JR v Sheffield Teaching Hospitals NHS Trust [2017] EWHC Civ 1245
- Followed Roberts approach and awarded nothing for the capital cost
- The costs of adaptations and legal fees etc were allowed
- JR appealed and shortly before the hearing the defender agreed to pay the full capital costs of suitable house



- In the summer *Swift v Carpenter* [2018] EWHC 2060 (QB)
- The claimant lived in London and the additional capital cost of a suitable house was 900,000
- Current house valued at 1.4 million
- So based on 2.5% the award would have been
- $900,000 \times 2.5\% \times 30 = 675,000$
- Judge felt bound by *Roberts* and awarded nothing



- The adaptations and additional running/ furniture costs were allowed – 970,000
- No evidence led on the cost of funding the additional purchase costs by way of a mortgage
- Is this fair to pursuers ?
- Additional costs of funding the purchase not recoverable



- Possible solutions
- Roberts assumes capital in a lump sum from damages
- Pursuer can borrow the money and repay it – a mortgage
- Need to lead evidence about the costs of funding the purchase by way of a mortgage
- Should be easy to calculate and difficult to argue against that



PROSTHETICS

- Issues around the number of prostheses – should a spare daily one be allowed; sports and water ones?
- Main issue around the type of prosthesis
- The one recommended for the pursuer tends to be the most expensive one on the market
- Is the pursuer entitled to that if it is the best one for the pursuer?



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- Damages to put the pursuer back into the position if not injured
- To meet reasonable needs (Sowden v Lodge 2004 EWCA Civ 1370)
- Proportionality ?



- These issues were considered in
- *Wagner v Grant* [2015] CSOH 51
- W had a below knee amputation
- At proof he had an NHS prosthesis
- Problems with stairs and uneven ground and the sockets
- Unable to mountain bike or climb ladders



- Massive difference between the prosthetics suggested by parties experts
- Pursuer – a foot/ankle prosthesis called a BiOM
- Active powered plantar flexion with significant benefits for walking up/down slopes

BiOM





- Defenders – a carbon fibre foot and a more comfortable socket
- Should allow him to use rough terrain
- No need for a water activity limb
- BiOM needed batteries and the burden of maintenance was greater than the benefit



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- Lord Uist preferred the evidence of the defenders expert
- Not persuaded what the pursuer's expert proposing was reasonably necessary
- The pursuer's expert was proposing a "Rolls Royce" prosthesis
- Defenders recommendation would allow the pursuer to pursuer an active lifestyle
- Appealed but settled prior to the hearing



- The issue came before the court in *Swift v Carpenter* case
- Prior to the accident claimant was fit and active – gym, cycling, swimming most days as well as snow boarding and water skiing
- An energetic woman who lived her life to the full
- At trial she had purchased a prosthesis called an “Elation”
- Ankle joint fixed so flat footed gait



- Her own prosthetist suggested she try a “Meridium”



- This was fitted with sensors and a microprocessor ankle so the foot could flex in a similar way to a natural foot
- Trial of the Meridium for 3 weeks



- Filmed the pursuer
- Said it made a real difference to the way she walked, more stable, no jolting on uneven surface

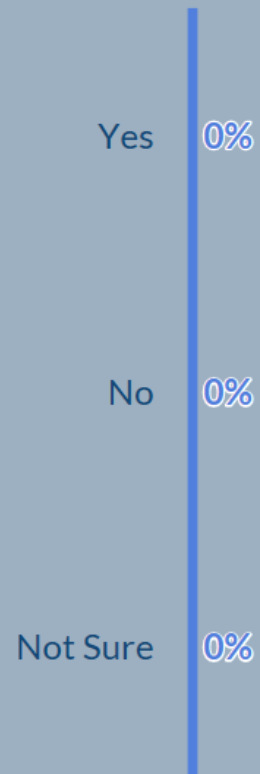


- felt much more confident and had more energy
- defenders suggested an “Echelon” foot
- similar to the Meridium but presumably a lot cheaper



- Judge decided in favour of the pursuer based on the pursuer's evidence of the trial
- As well as the benefits for her
- Fundamental difference between Swift and Wagner is that there was a 3 week trial
- Evidence of her using it and explain the benefits
- Wagner correctly decided ? YES/NO/NOT SURE

Quantum Update Poll 2: Was Wagner decided correctly?





- Wagner – liability strongly in dispute so no interims
- Swift – admitted liability
- What do you do for the pursuer if liability in issue?
- Costs of a prosthetics trial around 5 to 10k
- Potential total cost of prosthetics – Swift – over 500k?
- Funding / fairness / justice



SERVICES CLAIMS

- What about claims where the care comes from:
- A close friend or neighbour?
- A foster mother?
- A partner where not living together at the time of the accident?



- Section 8 Administration of Justice 1982
- *“Where necessary services have been rendered to the injured person by a relative in consequence of the injuries the responsible person shall be liable to pay to the injured person such sum as represents reasonable remuneration for those services”*
- Awards are restricted to relatives as defined in the Act (s13)
- Spouse, partner, living as husband and wife, children, parents, brothers, sisters, uncles, aunts etc



- Scottish Law Commission review
- In February 2018 they announced that they were going to
- Consider whether the definition of relative remains appropriate
- And whether that restriction should continue



- What about the situation where two people are in a relationship but don't live together?
- Dewar v Graham's Dairy [2016]
- Not living together
- Long term relationship
- Partner had a daughter from previous relationship
- Agreed to live separately
- The court took a broad approach to the question
- Living with the injured person as husband or wife



- Awarded 7,600 for past services for 18 month period
- Increased household tasks 14 hours a week
- Hourly rate of £7
- Previous case from 2012 *Wylie v Omniasig* £6 per hour awarded
- What about the foster mother caring for a brain damaged baby?



- Nothing recoverable for past care
- Future care possible on the basis of a care agreement
- What about where the partner providing the care is also the defender?
- Arose in *Swift v Carpenter* case
- Normal rule not recoverable
- But there was an agreement between the parties to pay for the services of the husband to avoid the extra expense of paid commercial care



Private health insurance payments

- Are they deductible from the loss of earnings claim?
- The Law Commission are reviewing this as well
- The argument is that the pursuer receives a windfall if not deducted
- But if the pursuer pays for the insurance in some way
- Section 10 Administration of Justice Act 1982 – any contractual pension or benefit shall not be taken into account



- Lewicki v Brown & Root Wimpey Highland Fabricators
1996 SC 200
- Held PHI payments not deductible as they were a contractual benefit rather than remuneration or earnings
- Situation in England is different
- Most cases are settled on a compromise basis
- Need more certainty about what's going to happen !



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