Response to the Ministry of Justice's Call for Evidence on Setting the Personal Injury Discount Rate April 2024

About Stewarts

Stewarts is an international litigation-only firm specialising in high value disputes. Our practice areas include Personal Injury, Clinical Negligence, International Injury and Aviation.

Within these practice areas, the claims we undertake exclusively relate to injuries of the utmost severity or death. Our specialisms are recognised by top-tier rankings in the leading legal directories, Chambers, the Legal 500 and The Times.

Whilst there are many firms of solicitors which do some complex and high-value personal injury litigation, we are one of very few firms in the UK that exclusively specialise in such claims and do not conduct claims relating to non-disabling injuries (aside from the rare scenario when there are secondary claimants involved in the same incident as a claimant with severe injuries). We also acted for the Claimants in a number of leading cases concerning periodical payments[1] and concerning negative discount rates in Bermuda[2] and other jurisdictions.

We are, therefore, well placed to provide a response to this consultation, as almost all our cases involve significant future loss claims.

Executive Summary

Full compensation is one of the fundamental principles of our civil justice system. The party who caused the civil wrong should be required to provide for full financial reparation to the injured party. Otherwise the cost of meeting the balance of those needs of the injured party unfairly falls to the injured party and/or the state / taxpayer.

We agree with the foreword to this consultation[3] that injured parties should receive sufficient compensation to meet their current and future needs. It is therefore very important that any changes to the PIDR do not place claimants into the position of being required to take investment risks to avoid being left without compensation to cover their needs in later life.

To provide truly full compensation it is crucial to apply an inflation assumption to reflect the impact of earnings inflation on the vast majority (over 80% on our data) of the heads of future loss which apply PIDR. We contend that, assuming continuation of a single PIDR, the inflationary assumption applicable on a broad-brush basis to all future losses should be CPI +1.5%.

In relation to the average assumed investment period our data suggests that the start point should be a median life expectancy of 30 years, but then deducting at least 2 years to allow a reasonable period before the majority of the damages are invested. However, for consistency within the UK we conclude that the 30 year investment period assumption within the Scottish Legislation is a reasonable and fair assumption.

---

[1] **Sarwar v Ali and Motor Insurers Bureau [2007] EWHC 1255 (QB)**

[2] First Instance; Colonial Insurance Company Limited v Thomson [2016] CA (Bda) 6 Civ, [2017] 3 LRC 1. We have also pursued and settled similar cases in Jersey.

[3] **Setting the Personal Injury Discount Rate: A call for evidence - GOV.UK (www.gov.uk)**

The adjustment to the PIDR for investment management charges and taxation has been set far too low. The GAD's previous assumption of passive management of claimant investments is wholly insufficient to guard against the risks of loss and respond to fluctuating markets, inflation and claimant needs. The adjustment for investment charges should reflect claimant investor experience and consequently allow 1.5%-2% for investment expenses and a further 0.2%-1% for taxation. As a composite for these two factors we propose a reduction of 2.25%.

The Government has repeatedly said that it intends to preserve the full compensation principle. Even the insurance lobby says that it subscribes to that principle, but there is no such thing as an average claimant and we cannot have a system in which a substantial minority of severely injured are, through no fault of their own, seriously undercompensated.

The adjustment of -0.5% to moderate the risk of under compensation has already proved insufficient for those receiving compensation since 2019 under the current PIDR. It also ignores the longevity risks they face. We propose that it be increased to a reduction of 1%.

Stewarts Data

In the short time period allowed by this Call for Evidence Stewarts collected cases data for a full financial year, 2022 – 2023. To provide a reliable cohort for analysis we applied the following exclusions to the data collected:

- Cases with damages of less than £500,000 that were likely to have little or any future losses and/or also be subject to the next exclusion.

- Cases which settled either so early pre-proceedings that no schedule of loss with a particularised future loss claim had been prepared and/or for commercial risk-based reasons on such a heavily compromised basis that no meaningful assessment of individual heads of loss could be obtained.

- Damages assessed by reference to foreign law.

This exercise resulted in a cohort of 47 cases. We accept that this is relatively small, such that some caution is required when interpreting this data, especially any attempt to break it down into smaller sub-sets (e.g. to address questions relating to alternative representative claimants). We do however consider it to be consistent with the experience of our injury departments who have been recognised as market leading for several decades and who exclusively specialise in such claims. Accordingly, throughout this response, we indicate specific trends that we have identified in this data set.

In addition we already had data, from 230 cases with data for the periods of future years loss spanning the four years from financial years ending 2020 – 2023. In contrast to the above 22/23 dataset, this cohort includes cases that settled for under £0.5 million damages. From these 230 cases there were 203 cases that also had data for the simple division between past losses, general damages and future losses (but without a split by heads of loss).

RESPONSE TO QUESTIONS

Question 1

Please provide evidence relating to the numbers of claims split by value and length of awards (By length we mean the period damages were awarded for in the damages schedule and therefore the period of time a claimant will invest their award. Preferably split into periods of 10, 20, 30, 40, 50, 60, 70, 80+ years).

From the Stewarts 2022 – 2023 data the numbers of claims split by value totalled 47. Note that the values referred to below solely relate to future losses, rather than the overall compensation figures inclusive of past losses and general damages. We refer to the Figures below in response to this question. References to "m" represent millions of British pounds (£). Figures one to three relate to 2022 / 2023 data and as mentioned in the preamble we have been able to provide future years loss data for a 4-year period from Financial Year 2020 to 2023, which Figure Four relates to. Figure's **One** and **Two** demonstrate the number and value of claims by damages band, Figure **Three** shows the number of claims split by periods of future years and Figure **Four** shows future years loss for a 4-year period between financial year 2020 to 2023.

Figure One – (2022 – 2023) Number of Claims by Future Loss damages bands

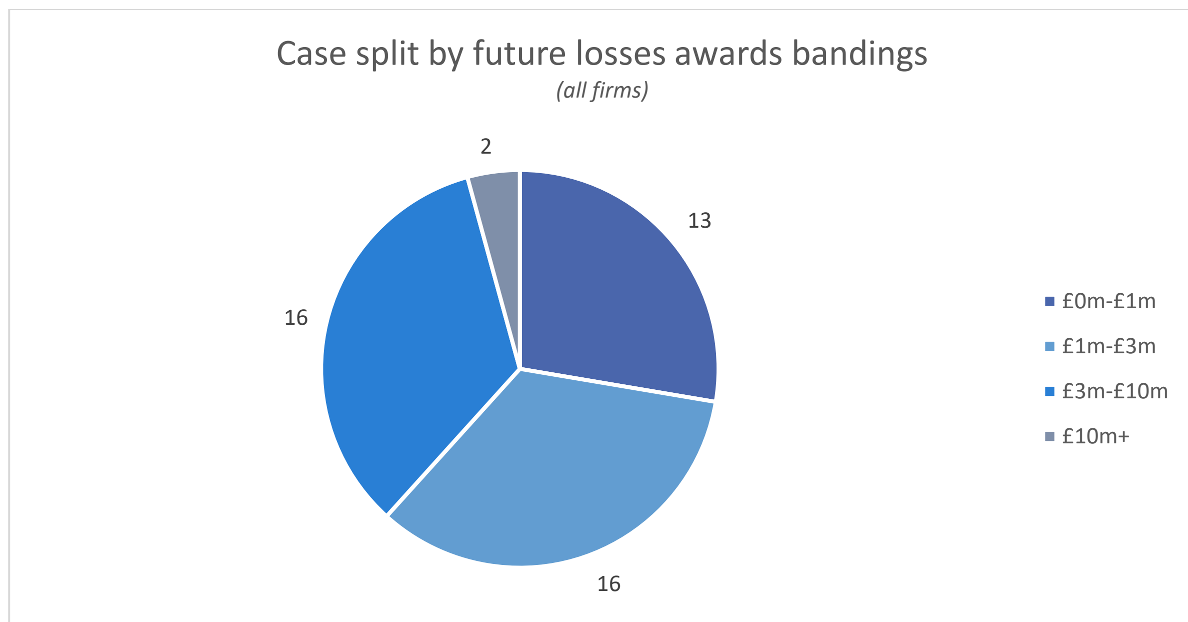
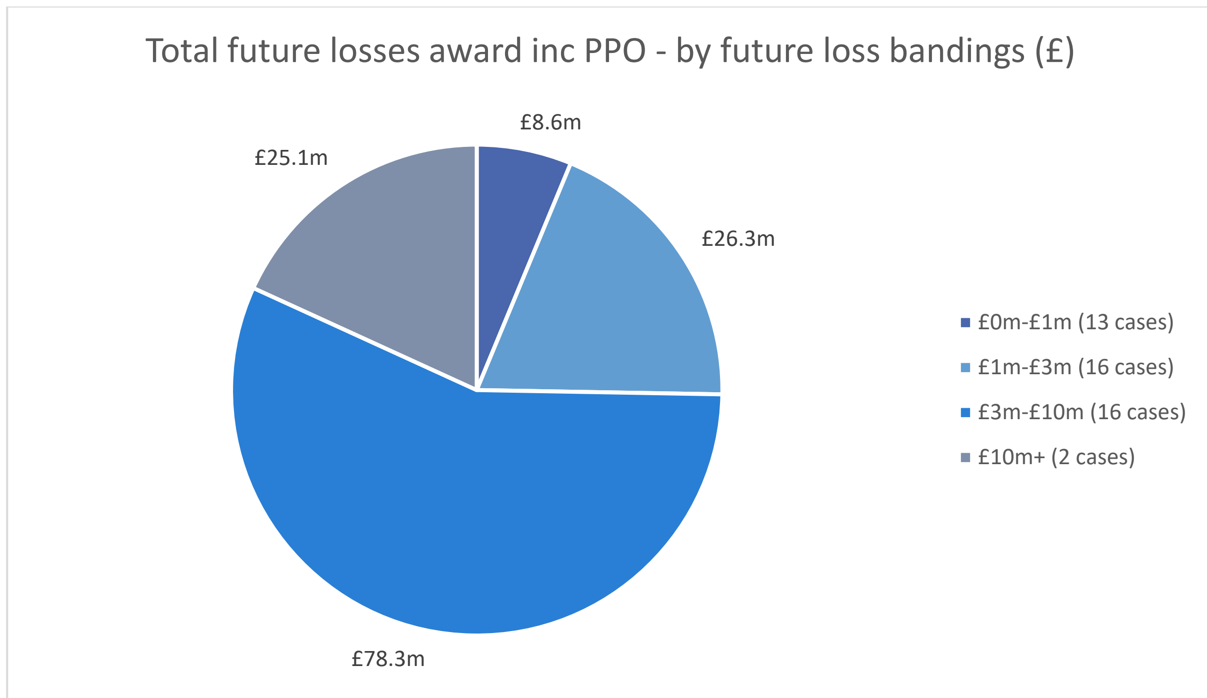


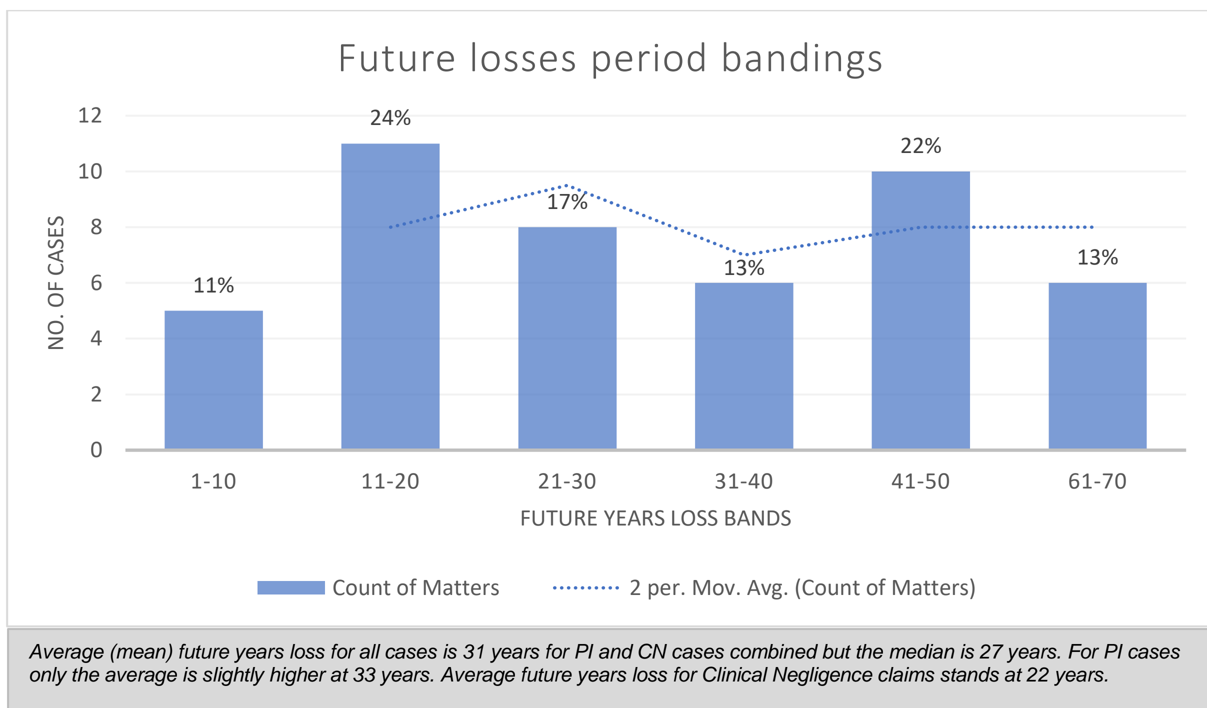
Figure Two – (2022 – 2023) Value of Future Losses by damages bands



These charts demonstrate that:- :

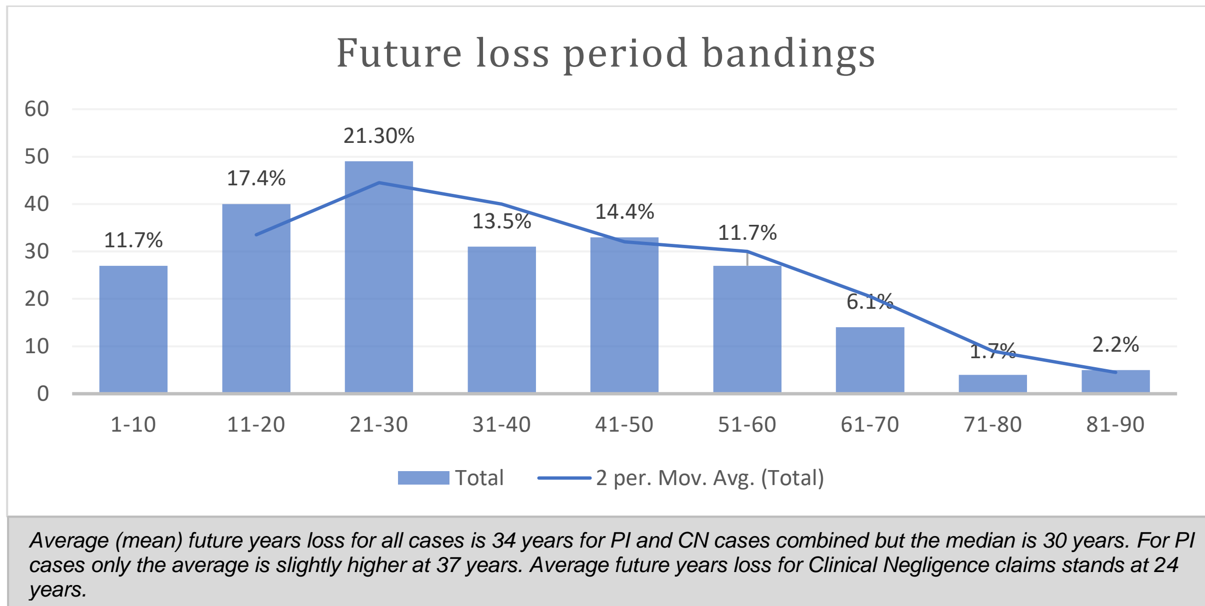
- The two future loss bandings with the greatest number of cases of were £1-3m and £3-10m.
- But by value of those future losses the £3-10m banding was by far the most significant at 57% of all future losses
- The future losses in the banding >£10m represented 18% of all future losses, similar to the value of the cases in the £1-3m banding and three times the value of the larger number of cases in the up to £1m banding.

Figure Three – (2022 – 2023) % of cases per future loss period



Average (mean) future years loss for all cases is 31 years for PI and CN cases combined but the median is 27 years. For PI cases only the average is slightly higher at 33 years. Average future years loss for Clinical Negligence claims stands at 22 years.

Figure Four – (FY 2020 – 2023) – % of cases[4] per future loss period



Average (mean) future years loss for all cases is 34 years for PI and CN cases combined but the median is 30 years. For PI cases only the average is slightly higher at 37 years. Average future years loss for Clinical Negligence claims stands at 24 years.

Our larger data set shows that our experience of the average future loss period is 33 years, but the mean is just 30 years. However, the average investment period is likely shorter still for two reasons, as further explained in our answer to question 3 below.

Question 2

In relation to the evidence you have provided for Question 1 above, please provide details on the split between a) The various heads of loss i.e., the value of different components in claimants' damages schedule such as care management and care costs (and how these change over time); b) The shape of these heads of loss before allowing for inflationary increases i.e. flat, increasing or decreasing; and c) the term over which these heads of loss are awarded i.e., for life or a fixed period.

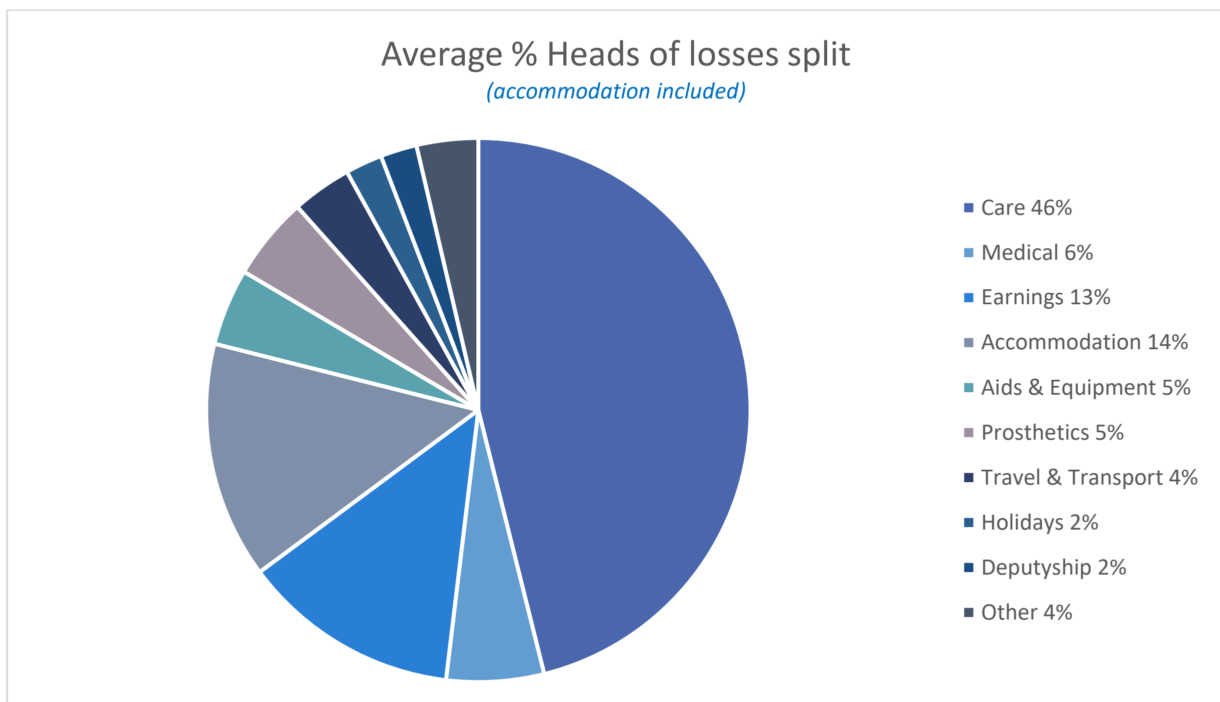
a) We do not have the splits by heads of loss for the financial year 2020 -2023 data set. However, to address this question and to try and inform this call for evidence we asked all of the solicitors in our department to estimate the splits by heads of loss of all of their cases which they concluded in our last complete financial year 2022/2023 for damages of £500,000 or more. Virtually all injury claims settle for composite figures, without any agreement between the parties regarding the applicable sums for each head of loss. The only exceptions are the rare few cases that are subject to a court determination of quantum issues or in so far as a PPO is agreed for one or more heads of loss (usually limited to care and case management). However, providing a schedule of loss had been prepared to calculate the claim on a head-by-head basis then our highly experienced solicitors were able to provide informed estimates of the proportion of the claim attributable to each head of loss. In many cases that estimate was also informed by advice from counsel to assist the consideration of offers to settle and

[4] 230 cases in this financial year 2020-2023 dataset

accompanying advice to clients. In cases involving protected parties these estimated breakdowns were usually provided to the court.

b) We applied two different methodologies towards obtaining the average split percentages. One of the approaches was the traditional monetary subtotals using the combined monetary total per head of loss as a percentage of its total future losses award. Another approach was to calculate the average percentage, which involved calculating the average percentage per case and using the combined average of those percentages to arrive to the heads of losses split. The average percentage split method demonstrated an average increase in percentage split of both care and earnings heads of loss, by approximately 2% and 3% respectively. Heads of loss affected by earnings inflation was also relatively higher by 3% while those affected by prices inflation fell by 2% in comparison to the monetary subtotals. Whilst the overall difference was no more than 3%, the risk involved with using average percentages per case is the unreliability within the data associated with combining average percentages across cases with different claim values. For this reason, the majority of our data analysis is based on monetary subtotals.

Figure Five – (2022 / 2023) <u>% average heads of loss with accommodation</u>



Following the Swift v Carpenter decision, the calculation of the cost of purchasing and adapting accommodation to meet disability related needs no longer uses the PIDR. Consequently, we consider that the values attributable to accommodation claims should be excluded from this exercise and accordingly the losses and average percentages of losses shown below, exclude any element of future loss associated with Accommodation.

Figure Six – (2022 / 2023) % average heads of loss without accommodation.

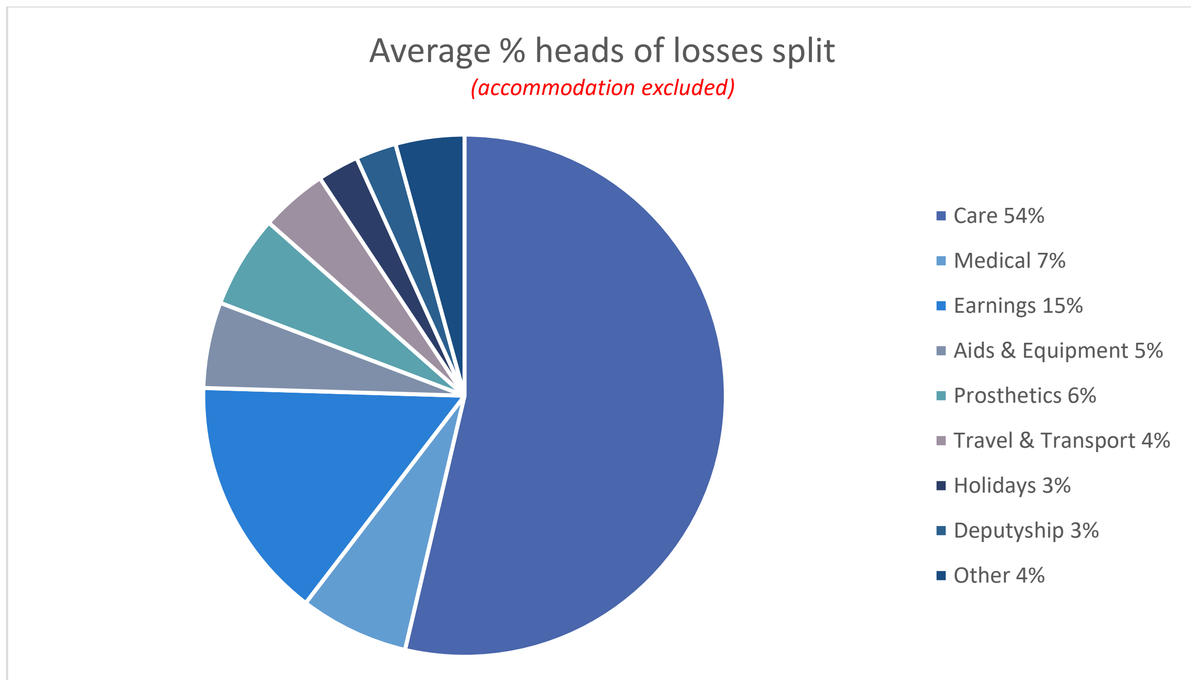
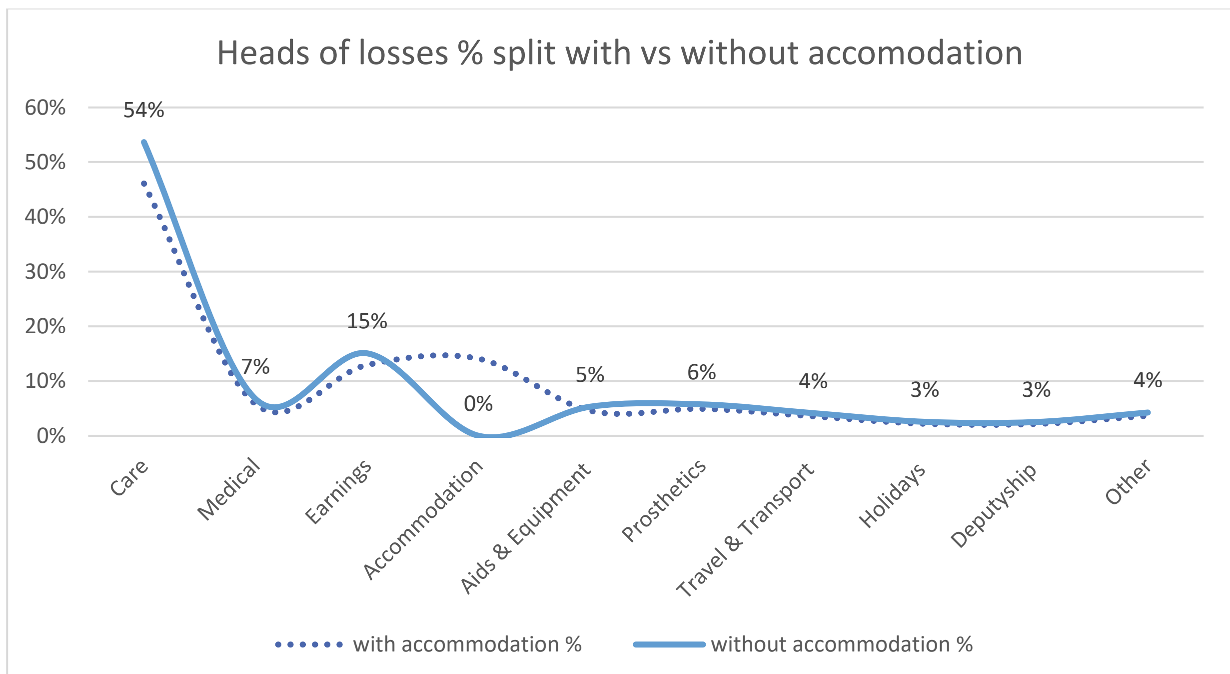


Figure Seven – (2022 / 2023) % average heads of loss, with and without accommodation.



c) In our experience by the time most serious injury claims conclude (which is usually 2-5 years post incident) the claimant's rehabilitation is largely complete and so their needs are assumed to be relatively consistent for a period of time. Real life is of course less predictable and hence inevitably claimants experience greater fluctuations in their needs, and the cost of meeting them, in the years that follow resolution of their claims. Some of those needs (like care) are an annual expense. Others like aids and equipment and adapted vehicles will include periodic cycles of replacement.

In most cases they will then increase in later years as ageing compounds their injuries. This phenomenon is most apparent in relation to care claims, but also arises in relation to aids and equipment with some claimants finding their needs increase so they require a powerchair instead of (or as well as) a self-propelling wheelchair, and a requirement for hoists in later years.

In most cases that increase will be moderate (say +10-25% of the base line needs) but still significant from an investment management approach. However, four of the cases in our data set demonstrated a rise in the costs of care and case management of more than 25% over time, with two of these cases showing more than one significant increase in value over time. One further case demonstrated a rise in the loss of earnings element of more than 25%.

Each claimant has their own individual characteristics both pre and post-accident such that the shape of the different heads of loss, before accounting for inflationary increases, will differ dependent on whether the claimant has any pre-existing medical condition which affects the impact upon them of catastrophic injury, whether they have young children whose care they can no longer provide such that there will be an additional element to the care which will persist until the child reaches majority (unless disabled in which case for longer) and whether they had an established career with significant promotions likely through life.

Stewarts' injury work concerns clients who have suffered catastrophic injuries. The largest heads of loss which we observe relate to care and case management, the term for which heads of loss is whole life. Another large loss is earnings (including pension loss) which claims are predominantly for the working lifetime of the claimant.

Question 3

Based on the evidence supplied in 2018 / 2019, the Government Actuary's advice to the Lord Chancellor assumed the representative claimant invested over a period of 43 years. Does 43 years remain a suitable assumption (please explain the rationale and evidence for your response)?

The evidence for the 43 years assumption has never been published and we remain sceptical that it is an accurate average for the claimants with significant future loss claims which usually relate to disabling injuries some of which will result in impaired life expectancy. We are sceptical that it is representative for personal injury claimants and even more doubtful that it is a fair assumption for clinical negligence claimants.

The equivalent assumption taken within the Scottish legislation[5] for the PIDR is 30 years, which we consider to be a reasonable and fair assumption.

As above the Stewarts data from 2022/2023 shows an average (mean) future years loss for all injury cases (PI and CN cases combined) of 30 years with a median of 27 years. For PI cases only the average is slightly higher at 33 years. Average future years loss for Clinical Negligence claims stands at 21 years.

If instead we look at our larger dataset from financial years 2020-2023 then the average (mean) future years loss for all cases is 34 years with a median of 30 years (see **Figure**

[5] Schedule B1, paragraph 7(2)(b), Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019

Four). For PI cases only the average is slightly higher at 37 years. Average future years loss for Clinical Negligence claims stands at 24 years.

Each claimant only has one claim, and the calculation of compensation needs to be as fair as is possible for them, not simply an average for all. Hence, we contend the median figures are fairer than the mean.

In addition, once a reliable median figure is arrived at then, when setting the PIDR, an allowance needs to be made for the fact that Claimants do not invest their damages on the day of settlement/award. In our experience they do not invest the majority of their damages for a further period of at least one, commonly three and potentially up to five years. There are a number of reasons for this. Firstly, it commonly takes a year (and can take longer) to resolve the cost issues relating to the claim. Until that occurs some of the funds are tied up and the claimant does not yet know what net sum, they will be left with. Secondly many seriously injured claimants will need to find, then adapt then move to a new home that meets their disability related needs. That process commonly takes between one and three years. Again, until it is completed many claimants are unwilling to proceed with investments due to uncertainty over the net residual sum. Finally, it also commonly takes between one and three years for the claimant to select an IFA, consider their advice, develop a relationship of trust then start to make investment decisions.

Factoring in all of the above issues our data suggests that the start point should be a median life expectancy of 30 years, but then deducting at least 2 years to allow a reasonable period before the majority of the damages are invested.

However, for consistency within the UK we conclude that the 30 year investment period assumption within the Scottish Legislation is a reasonable and fair assumption.

Question 4

Are there any cohorts of 'alternative representative claimants' that you believe have characteristics which are materially different from the representative claimant defined above, and who should therefore be considered separately when modelling claimant outcomes? Please define the characteristics of these cohort(s).

Claimants with claims for high levels of earnings, very high care needs or needs that dramatically change over time (such as children) have characteristics which materially depart from the average.

We refer to our answer at **question 2(b)** above, in which we identified four out of a cohort of 47 cases in which the amount of at least one head of future loss will increase by more than 25% at a point in time one year or more after settlement of the claim. However, we suspect that this was a difficult point for our solicitors to identify for this data collection exercise. Our general experience is that step changes (including those less than 25%) consequent to the compounding effect of ageing on disability are quite common in very serious injury cases.

As we refer to in answer to questions 1 and 3, our clinical negligence claimants on average have a materially shorter future loss period.

It would be helpful for variant modelling to be done to consider these alternative representative claimants to ascertain the extent to which they may be at a greater risk of under compensation and consider options to reduce that.

Question 5

Where available please provide evidence or data on actual mortality experience relative to claimant life expectancy when awards are granted.

The Civil Liability Act 2018[6] suggest that the Lord Chancellor is limited to setting the rate to that applicable only to losses that occur within the period for which they are awarded. This means that no damages can be awarded for losses beyond a claimant's life expectancy as assessed within the claim award period.

We do not have any data in relation to actual mortality against life expectancy upon which future losses are calculated, because we do not have an on-going working relationships with all of our clients after we have resolved their claims. Anecdotal stories confirm exactly what you would expect, some sadly die earlier than predicted and others outlive their life expectancy.

Life expectancy is usually calculated based on average mortality and it is the case that some claimants will in fact exceed the anticipated life expectancy but still have the same care and other needs, persisting after the period for which compensation has been awarded. This risk alongside real earnings growth means that claimants will have to take greater investment risks to ensure that their compensation lasts for their lifetime of need and that they do not need to turn to the state.

Question 6

Please provide evidence of the rates of inflation which apply to claimant's damages overall and split by different heads of loss (including any projection of damages inflation produced for other purposes – such as reserving at an insurance company).

Because we do not have an on-going working relationship with all of our clients after we have resolved their claims, we do not have any data on how the actual costs they experience after the resolution of their claims increase.

The indexation of PPOs provides a good indicator and was only arrived at after extensive expert evidence and rigorous testing through the courts.

We note that the Institute and Faculty of Actuaries, Periodical Payments Orders Working Party Update (2021)[7] applies a broad-brush but informative assumption that claims exceeding £1m are subject to damages inflation at 7% per annum. This inflation assumption is one which the Faculty of Actuaries has consistently applied since 2011 (p.17) and does not appear to have been challenged by the insurers who are the main readers of this report.

Question 7

Please provide evidence of whether these rates of inflation are linked to defined inflationary measures such as RPI, CPI, CPIH, AWE, ASHE 6115 (or other) and what the reasons for such linkages are.

The only data with which this question can be answered is based on our experience of the indexation of PPOs. This is that:-

---

[6] Part 2, Paragraph 10, Schedule A1, s.4 (2) (b) and (c), Civil Liability Act 2018

[7] Periodical Payment Orders Working Party Update, 2021 Industry Survey (PPO Working Party)

- Care and case management PPOs are subject to ASHE 6115
- Loss of earnings to AWE or the closest matching ASHE category to the claimant's career[8].
- Deputyship costs to the relevant ASHE category or RPI
- Medical treatment and therapies formerly to HCHS and now to RPI

All of the above heads of loss are predominantly associated with earnings inflation. The other heads of loss are more likely associated with prices inflation.

Question 8

Is the 2019 position that the representative claimant's damages are inflated at a rate of CPI +1% (as shown in paragraph 28 above) on average still a suitable assumption and if not, how would you change it (please provide evidence / reasoning for your response).

Care and case management, earnings, and related benefits (including pension), medical treatment and expenses and deputyship costs are all heads of claim the principal component of which is the cost of labour (of differing specialities). They are all patently subject to inflation related to earnings growth. Despite a recent period of rampant price inflation in the UK, over the medium to long-term the vast majority of economists expect earnings inflation to rise at a rate which exceeds prices inflation. This assertion has been repeatedly accepted by the Courts with it being specifically noted that:

"There can be no justification for holding that, on these admittedly bare and rather crude facts, damages should be assessed using a discount rate based on RPI inflation. Such an assessment would be bound to lead to under-compensation"[9]

In the Stewarts case of Sarwar Ali v MIB, Lloyd-Jones J noted that the experts were in agreement that:

"*average earnings generally increase at a faster rate than prices, that on the balance of probabilities average earnings growth is likely to exceed growth in prices in the future and that, on the basis of historical data, linking Periodical Payments to loss of earnings for RPI would be very likely to undercompensate the Claimant*. "[10]

The current long-term (2071-2072) forecast from the Office for Budget Responsibility (OBR) 2022 report predicted real-earnings growth of 1.8% (gross earnings growth of 3.8% less CPI growth of 2.0%). We understand this to be the most reliable, or at least official projection.

We agree with the Professor Victoria Wass[11] in her response to this call for evidence when she observed that:-

"There is also an important wage depressor in social care in the form of local authority commissioning of care at below market rates. The impact of this has been a failure to increase carers wages relative to other low paid occupations. In March 2022, vacancy

---

[8] **Ogden Tables 8th Edition**; See paragraphs 175 to 177 in the Guidance for the use of the applicable ASHE occupational classifications when seeking to apply an inflationary index or a PPO for future loss of earnings

[9] **Dylan Simon v Manuel Paul Helmot [2012] UKPC 5 Privy Council** , paragraph 113

[10] Paragraph 142, **Sarwar v Ali and Motor Insurers Bureau [2007] EWHC 1255 (QB)**

[11] Expert economist, Emeritus Chair at Cardiff University and member of the Ogden Working Party

rates in social care were around 12% of employment (Skills for Care (SfC) 2022). This compares to an aggregate vacancy rate of 4.3% (ONS March 2022). This shortage of carers is important when thinking about future wage growth in the care sector.

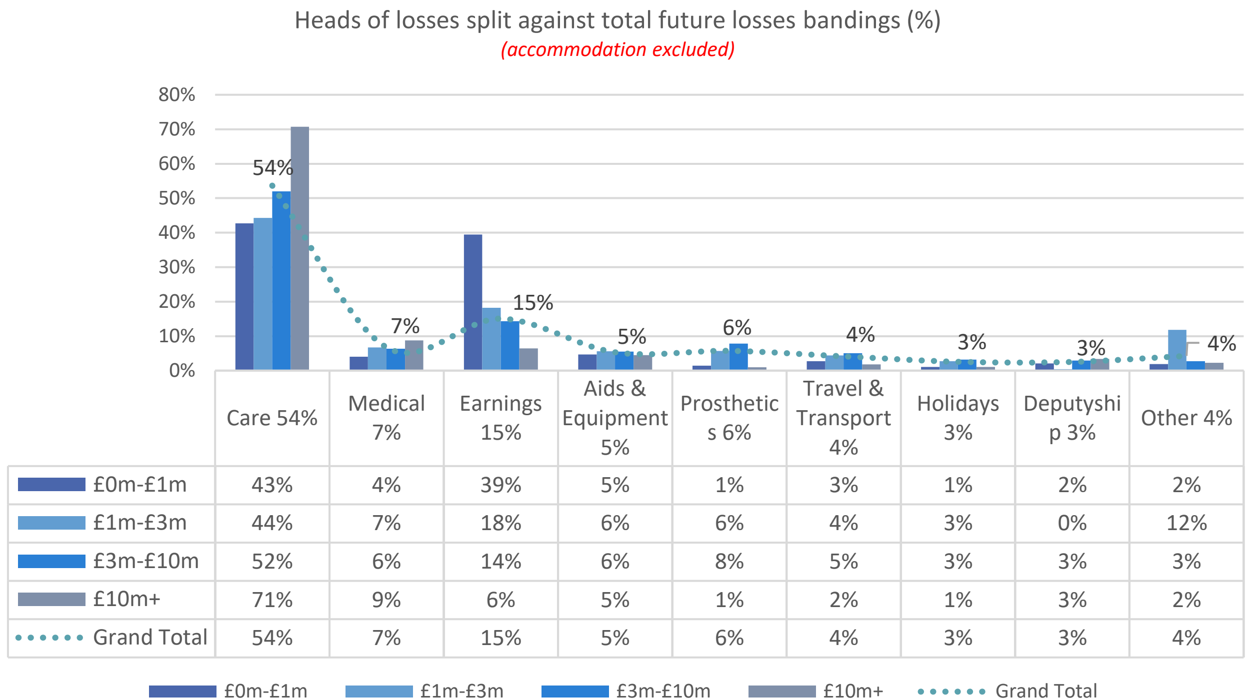
The UK is ill-prepared to meet the pressures of recruiting and retaining a medical and care workforce of sufficient size to meet increasing demand for health and social care. This is and will continue to be a huge policy issue for the UK. Overall, the drivers and barriers will combine to exert upward pressure on wages in care that we haven't seen before."

We would also mention that for seriously injured claimants even the "prices" heads of loss which differ significantly from the typical CPI basket of goods and services because they are frequently very specialist in nature. For example, disability aids and equipment are constantly developing to better the lives of seriously injured and disabled people. The majority of these are low production very specialist goods which are not included in the CPI basket and for which the developer will need to recoup the significant costs of research and development by way of the cost of the product. After a new model comes out, the previous model tends to go out of production. So even if there is an element of qualitative change between the new and the old model the claimant has no choice but to buy the new model.

In our 2023 response to the consultation on a possible dual / multiple rate PIDR, we provided a prices/product example of the under compensation likely to occur if the PIDR is set at the CPI rate. The example we provided related to the cost of a prosthetic knee joint which cost £12,510 in 1998 but with developments and time cost £28,500 in 2023, a cost increase of 130.5%. CPI rose 77.67% between 1998 and 2023 which demonstrates clearly the worrying insufficiency of compensation where the PIDR is set only by reference to CPI. If the same calculation is conducted using CPI +1% then over the same period this provides an increase of 129.58%, which is closer to but still not matching the actual rise in cost of this specialist equipment. Whilst this is more in line, there is still under compensation occurring even with this approach, contrary to the stated aim of setting the PIDR to ensure 100% compensation for injured claimants. The difference changes depending on the specialist equipment involved and developments and the cost of improvements can very easily outstrip even the CPI +1% model.

As vividly illustrated by the Stewarts 22/23 data for the splits of damages by heads of loss, the vast majority of the claim for future losses are for losses subject to earnings growth. That phenomenon increases further once you exclude accommodation purchase claims as they are no longer subject to PIDR. For an overview we refer to the pie charts set out in our answers to Q2 above. We also refer to the **Figure Eight** which shows the percentage of the total award represented by each head of loss at the differing damages bandings.

Figure Eight – (2022 / 2023) % total award against head of loss and damages banding (accommodation award excluded)



	Care 54%	Medical 7%	Earnings 15%	Aids & Equipment 5%	Prosthetics 6%	Travel & Transport 4%	Holidays 3%	Deputyship 3%	Other 4%
£0m-£1m	43%	4%	39%	5%	1%	3%	1%	2%	2%
£1m-£3m	44%	7%	18%	6%	6%	4%	3%	0%	12%
£3m-£10m	52%	6%	14%	6%	8%	5%	3%	3%	3%
£10m+	71%	9%	6%	5%	1%	2%	1%	3%	2%
Grand Total	54%	7%	15%	5%	6%	4%	3%	3%	4%

Our observations on the Stewarts 22/23 data excluding accommodation are as follows:

(a) Losses affected by earnings inflation (care and case management, earnings, medical treatment and therapies and deputyship costs) accounted for an average of 81% of the total.

(b) Care and case management alone represents on average 54**%** of all PIDR related future losses, rising to 71% in cases where the future losses exceeded £10m.

(c) Loss of earnings claims demonstrated the opposite effect in that they were a greater proportion 39% of all PIDR related future losses in the lowest damages banding. However, when you combine these trends for care and case management and earnings, they tend to balance each other out providing a reasonably reliable overall pattern that earnings inflationary heads of losses are across all damages bandings: -

- 67-84% of all future losses.
- 70-89% of all PIDR related future losses (excluding accommodation).

Figure Nine – (2022 / 2023) Earnings[12], Prices and Accommodation Index per Damages Band

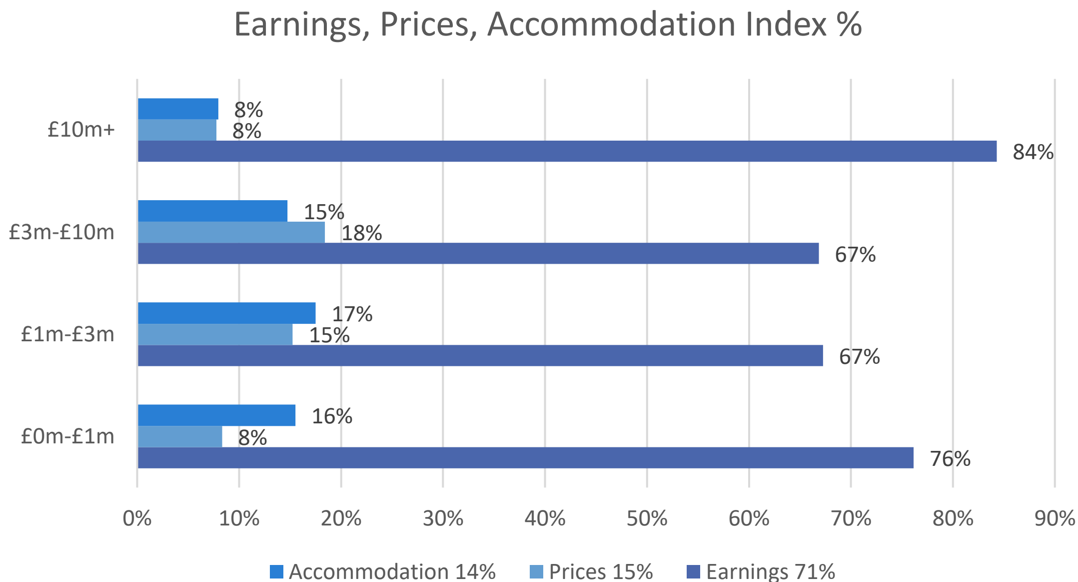
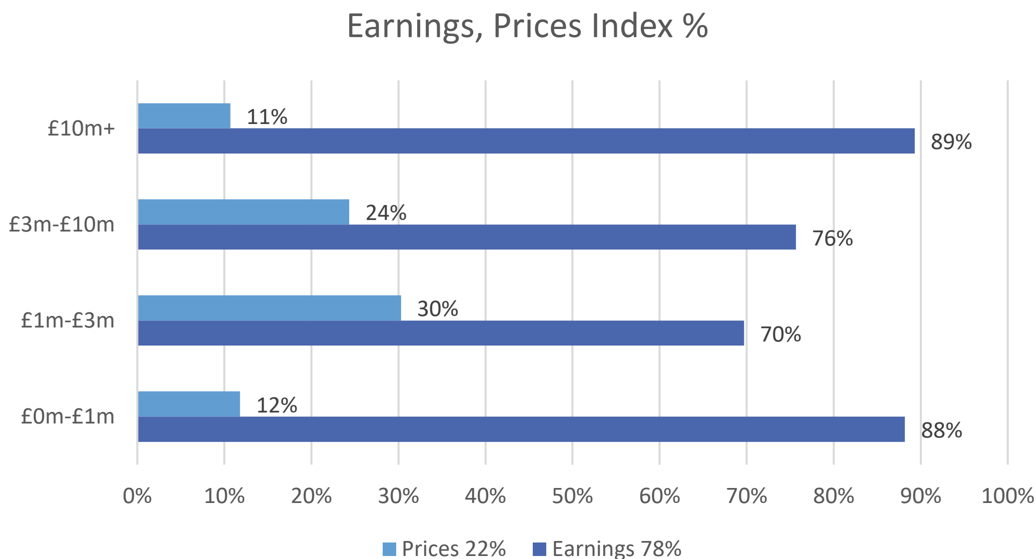


Figure Ten – (2022 / 2023) Earnings and Prices Index per Damages Band



It is imperative that the Lord Chancellor does not set the PIDR at a figure which requires claimants to unfairly take any additional risks with their investments to try to counter the effects of future earnings growth, rather the PIDR must be set at a rate which fairly accounts for the likely effects of both earnings and prices inflation.

Our data indicated that losses affected by earnings inflation accounted for an average of 81% of the total of future losses that were subject to PIDR. Consequently, we contend that circa 80% of the OBR long term forecast of a 1.8% differential is the appropriate

[12] We contend the care and case management, loss of earnings, medical treatment/therapies and deputyship costs of predominantly subject to earnings inflation.

adjustment; so, CPI + 1.44%, which for simplicity we propose be rounded up to 1.5%. In light of the point we make above about the very specialist nature of many items of disability aids and equipment even CPI+1.5% may well be an underestimate.

Question 9

What asset classes should be included in a "low risk" portfolio and are there any asset classes that are not generally available and/or suitable for personal injury claimants (please provide reasoning and/or evidence in support of your views)?

We are not investment specialists, nor do we act as professional deputies or trustees for injured claimants, so we do not have first-hand experience of the investments made by seriously injured claimants.

We agree with their point that asset classes must minimise the risks of sequencing, drawdown and deviation and they must have a narrow dispersion of real returns over time with a low level of downside risk and low exposure to tail risks. We continue to support the MOJ's expert panel in their 2015 report in which they concluded that a truly low risk portfolio would require at least 75% ILGS with the remaining 25% invested in a split between corporate bonds, global government inflation-linked bonds and global equities.

Question 10

Please provide any evidence you may have on how low-risk claimants who receive lump sum damages awards are both advised to invest and actually invest over the length of their award (including changes over this time). Information should be provided on a) the split between growth and matching assets, as well as specific asset classes; b) The prevalence of active, passive or semi-passive investment approaches and their resulting impact; c) Consideration of liquidity risk and/or the prevalence of matching cashflow approaches with the aim of meeting the claimant's income needs as they fall due, e.g. through purchase of matching bonds' or annuities to provide a more known income stream; and d) The prevalence of risk management strategies as a claimant's investment horizon changes.

We endorse the experience revealed by the data gathered in 2018 by FOCIS from professional deputies, as further described in answer to **question 16** below. That data showed that the vast majority of claimants were advised to and did opt for active investment management. Active management better responded to changes in the economic markets and to the variability of the claimants' needs throughout their lifetime (including as they need to de-risk in latter years).

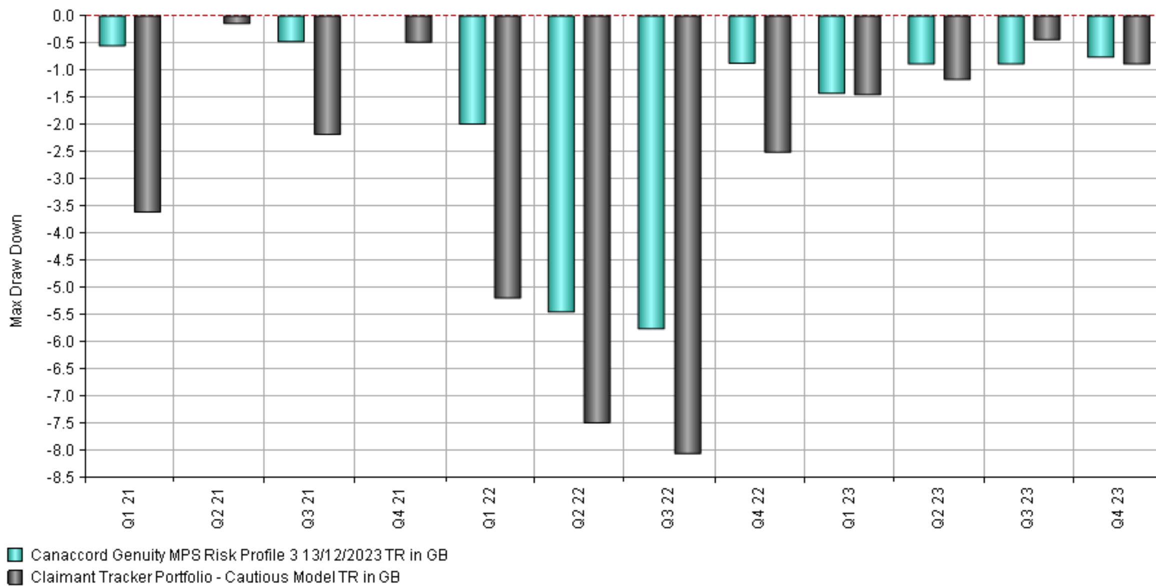
We agree with the following response of APIL (assisted by Paul Rosson of Adroit) on this issue. **Figure Eleven** shows how active management has helped moderate losses that virtually all claimants will have faced since the PIDR was last set in 2019: -

"*is not necessarily to achieve consistent outperformance as compared against any particular benchmark or strategy; rather it is to provide the claimant with an appropriate and adequate level of downside protection when markets are performing poorly. This has been vividly illustrated by the poor performance (relative to inflation) of the markets since the PIDR was last set in 2019.*

This is illustrated by the chart below. The chart shows the maximum level of drawdown (reduction in portfolio value) each quarter, over the last four years, for a fully passive

portfolio[13] versus an actively managed portfolio[14], where the asset allocation of each is broadly in line with the GAD Cautious Model Portfolio:

Figure Eleven – Maximum drawdown of active vs. passive portfolio



As can be seen, the passive investment strategy has consistently fallen in value more than the active strategy over this period. The ability of the investment manager in this instance to shelter the portfolio from downside risk is clearly evident and reinforces our view that such a strategy is appropriate for claimants. It should not be forgotten that seriously injured claimants, unlike many other types of investors, do not tend to have any other ways (e.g., wages) to supplement their portfolios. Plus, they need the funds not just to maintain their standard of living but also to meet core disability related needs."

As referred to at **question three** above, in our experience, claimants keep most or all of their compensation in a deposit in a bank, often for several years. This often occurs through one or more factors including; resolving cost issues, finding, buying, and adapting a home to live in and developing trust in the investment advice. These early lost years of investment will inevitably shorten the time-period for investment. This should be factored into the modelling and performance of any hypothetical portfolios to take account of this real-life behaviour of seriously injured claimants.

---

[13] Comprising 12.5% Vanguard Money Market, 35% iShares UK Gilts All-Stocks, 22.5% iShares Corporate Bond, 22.5% iShares World Equity Index and 7.5% Aviva Target Return.

[14] Represented by Canaccord Genuity MPS Risk Profile 3.

Question 11

Do you believe the investment strategy that was assumed to be adopted by the representative claimant in the 2019 Government Actuary's analysis (as described in paragraphs 33 to 36 Table 1 above), remains appropriate? If not, how would you change it for a current view of the representative claimant or alternative representative claimants?

No, the Central portfolio involves more risk than we consider to be consistent with that prescribed under the Civil Liability Act 2018[15].

As mentioned above claimants do not invest the entirety of their award until several years after their cases conclude. Even when they do they retain much more significant cash funds both out of caution (they are usually inexperienced and unsophisticated investors) and to meet income needs during their lifetime so as to reduce the incidence of having to withdraw from the investments to meet their varying needs at times when values have fallen. Some of those cash funds may be self-managed in high street bank accounts and hence not accounted for in any data relating to investment management portfolios.

We agree with APIL's submission that on the portfolios GAD modelled, the GAD Cautious model to be more aligned to the way in which claimants invest. However, we believe that the cash component would typically be significantly in excess of the 10% assumed in the Cautious (and Central) model and instead would usually be closer to 30% of the award with the accompanying weighting of GILTs and bands at more like 40%. When combined, these retain the overall 70% weighting of the Cautious model.

As above we take issue with the GAD assumption as to passive versus active investment management. Personal injury claimants have been placed into a position of often considerable financial difficulty as a result of the tortfeasors actions. The clients we deal with have often suffered serious life-long injuries with little likelihood that they will be able to return to work in the same capacity as before and frequently our clients will in fact require lifelong care and assistance.

The approach required by Civil Liability Act 2018 is methodologically unsound. To take into account the actual returns that claimants are likely to receive on investments would be what the actuarial profession refer to as a 'budgeting approach.' This would only be appropriate if the adequacy of the compensation could be reviewed from time to time and the amount topped up if the estimated returns have not been achieved as in the funding of a defined benefit pension plan by a sponsoring employer.

They are not, therefore, the same as other categories of investors. Their investment is only made to ensure that the compensation that they have been awarded actually meets their overall needs to the conclusion of their lifetimes. They are heavily dependent on this compensation and rarely have any other source of financial income.

The main aim of claimants therefore is not to maximise an investment return, but rather to protect against deterioration or loss which may lead them to requiring state support and care later in their lives and/or unable to purchase appropriate specialist equipment.

Passive management of any investment would be wholly insufficient to guard against the risks of loss arising from investment and in reality, all Claimants will be looking to have their investments actively managed not only to prevent loss but to tailor periodically to meet their needs in any given period of time.

---

[15] Part 2, Paragraph 10, Schedule A1 3(d)(i) and (ii), Civil Liability Act 2018

In Stewarts case of *Thomson v Thomson and Colonial Insurance Company Limited*[16], at first instance in the Supreme Court of Bermuda, Chief Justice Kawaley observed at paragraph 38 that the case appeared to be the first occasion in which a common law court has been required to consider the respective merits of an assumed investment of the entire lump sum to be awarded in ILGS as opposed to in a mixed basket of investments.

At paragraph 93 of the *Thomson* Judgment, it was observed that Mr Gorham, a Canadian Actuary whose expert evidence was relied upon by the Defendants:

> "*…conceded under cross-examination by Mr. Harshaw that on his investment model between 50 and 33% of plaintiffs would not have sufficient funds. He viewed his approach as fair to both Claimants and defendants.*"

Chief Justice Kawaley commented:

> "*I viewed his approach as a stunning dilution of the prevailing legal policy preference, in the future loss discount rate calculation context, for a hypothetical investment in an instrument likely to generate a risk-free rate of return.*"

We observe that an assumption that was considered by Chief Justice Kawaley to be a stunning dilution of the full compensation principle is very close to the assumed outcome of the -0.5% adjustment made by the Lord Chancellor in 2019 that, on rosier economic predictions than subsequently transpired, circa 35% of claimants would see their damages fund run out and so be under compensated.

At paragraph 100 in *Thomson*, Chief Justice Kawaley also referred to the evidence of the Claimant's Actuary, Christopher Daykin, as follows:

"*As Mr. Daykin explained, institutional investors are able to safely invest in a wider range of investment instruments because they are investing on behalf of multiple ultimate investors whose needs to redeem their investments stretch out over multiple lifetimes. Such investors are also able to hedge against short-term risks in ways which are generally impossible for the typical individual personal injury Claimant. I find that there is a fundamental distinction between the investment goals of the hypothetical prudent investor, especially an institutional investor, (who is not investing sums received by way of compensation for tortious injury), and the investment goals of the hypothetical prudent plaintiff*."

The Bermuda Court of Appeal fully endorsed the Judgment of the Chief Justice. Bell JA commented at paragraph 23 that:

"*What Mr. Daykin was saying is essentially that Mr Gorham's theory of sufficiency demonstrated that, using his model, there is approximately a 50% chance of a Claimant receiving a fund sufficient to meet expenses and losses, with the other side of the coin being that 50% of Claimants would not have sufficient assets to do so. Consequently, Mr. Daykin concluded that these figures come nowhere near meeting the principle of full compensation which has been accepted over many years by the courts. What Mr. Daykin said in relation to the 90 to 95% figures was not that these represented over-compensation on the basis of the Chief Justice's ruling, but that if one were to test a model proposed in place of the Wells mechanism (as advocated by Mr Gorham), then there would have to be a demonstration that the payments were sufficient for the*

---

[16] Colonial Insurance Company Limited v Thomson (conjoined with Harvey v Warren) Court of Appeal for Bermuda CIVIL APPEAL No. 13 of 2015

Claimants in at least 90 to 95% of cases in order to come close to providing full compensation."

As David Westcott QC persuasively argued before the Court of Appeal in Bermuda in *Thomson*, the adoption of a discount rate based on ILGS does not lead to a single claimant being "over-compensated". Rather, claimants may choose to take investment risks so as to improve their financial position. However, to require them to do so would make them the only class of investor required to take risks so as to advantage some other party, ironically the person who committed the tort against them.

Despite repeatedly subscribing to preserving the principle the government is still struggling to define what it means by full compensation. They have indicated that full compensation is solely based on the needs of a seriously injured claimant and is not an exercise in balancing those needs against the cost to insurers, the NHS and taxpayers. But that begs the question why the Lord Chancellor must consult the Treasury under s2(4)(b) of Schedule A1[17]?

Over 5 years after the passing of CLA 2018 we are also still in the dark on the related question of what proportion of claimants does the government consider it acceptable to go under-compensated as a result of the new 'low risk' investment approach? All we know is that in 2019 the Lord Chancellor accepted that the median approach would be too much under compensation. But is it really full compensation for 20%, 30% or even 40% of claimants to have their compensation run out early and fall back on whatever help they can get from the state?

We remain of the view that whether the PIDR remains a single rate or is changed to a dual or multiple rate, it ought to be set at levels that are premised on well over 90% of claimants actually being fully compensated. Anything less cannot truly be described as a full compensation regime.

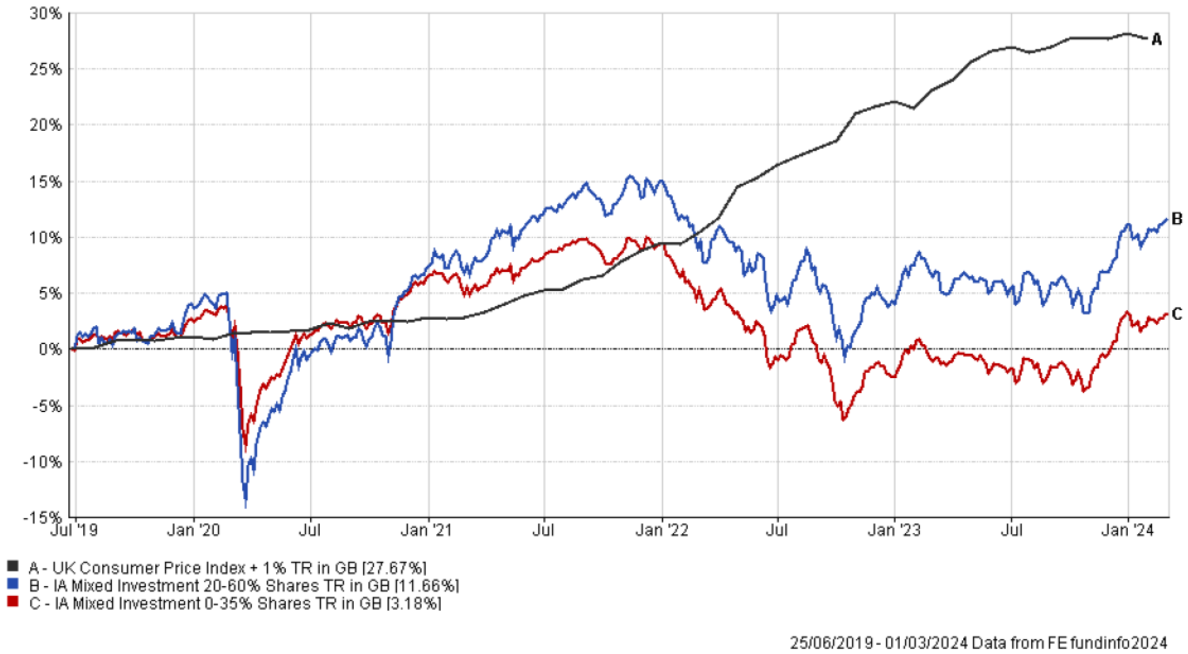
Question 12

To what extent has the way claimants are advised to, and actually, invest been affected by recent changes in economic conditions (e.g., high interest and inflation rates)?

As above we are not investment specialists, nor do we act as professional deputies or trustees for injured claimants, so we do not have first-hand experience of the investments made by seriously injured claimants. Accordingly on this question we defer to submissions in response to this call from evidence from Richard Cropper of PFP who have significant expertise in advising claimants with life-changing injuries. Notably the following extracts from their response to this question: -

[17] Part 2, Paragraph 10, Schedule A1, 2(4) (b), Civil Liability Act 2018

"Since the GAD 2019 report on which the PIDR was based, the average fund in this sector has performed as follows:

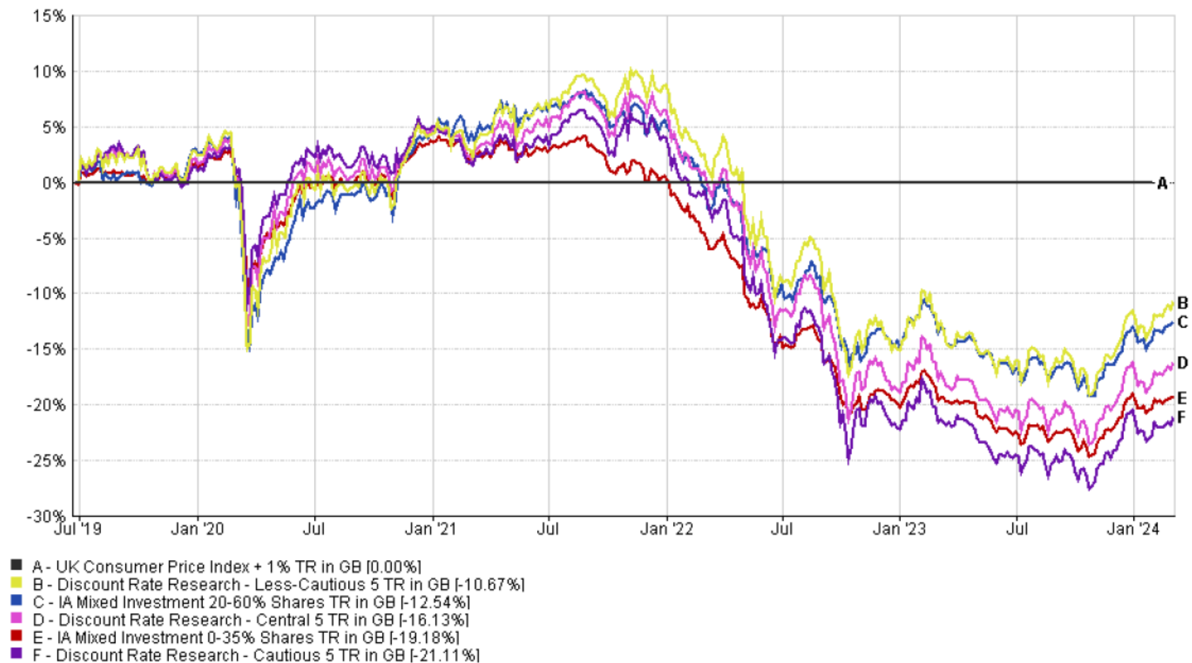


One can see that the nominal return is 11.68% over the period shown, but CPI plus 1% inflation is 27.67%. The best and worst performing funds in this sector are included on the following chart, to illustrate the wide range of potential outcome:

In real terms, the average funds have performed as follows:

After 4.75 years, the assumption is that the average claimant will have achieved 0.25% per annum below the CPI plus 1%, that being minus 1.2%, whereas the average fund is currently at minus 12.54%. I have replicated the GAD portfolios used in the 2019 report,

assuming that only passive investments would be used. Below is the performance of those funds:



The 'central' portfolio would have realised minus 16.13% in real terms. Holding cash with higher interest rates has been a recent event, rather than having been an option over the past 4.75 years. Taxation would also remove up to 45% of any gross interest return in high value cases. Such rates were not modelled in the GAD report.

Duration remains the most important factor in respect of investment risk.

• Where the duration is short, the claimant's 'capacity for loss' limits exposure to risk assets, but there is less time for inflation to compound.

• Where the duration is long, the claimant's 'capacity for loss' limits allows for greater exposure to risk assets, but there is more time for inflation to compound. I expect that the reality of the recent economic environment fell outside of the range modelled by GAD, but given that the ESG assumptions were not disclosed, this is impossible to know."

The above analysis from Richard Cropper shows that claimants who have received lump sum awards for future losses since the PIDR was last set in 2019 will almost inevitably have funds that are now worth materially less than was assumed when that rate was set and consequently a materially higher risk that their funds will not last to meet their anticipated lifetime needs.

This must be a matter of significant concern and anxiety to the claimants who are now at increased risk of being unable to meet their own injury related needs, and also to their respective families. It will inevitably also be a matter of concern for the State, who will ultimately have to finance the care to injured claimants whose compensation was insufficient to last their lifetime.

Question 13

Please provide evidence which demonstrates how the following circumstances and/or characteristics affect claimant investment behaviours in practice: a) Size or length of award (including the effect of any interactions between these two variables); b) Availability of other income, including PPOs; Existence and requirements of financial dependents (e.g. spouse, civil partner, children) and d) Other factors or characteristics you deem relevant.

We are not investment specialists, nor do we act as professional deputies or trustees for injured claimants, so we do not have first-hand experience of the investments made by seriously injured claimants.

In relation to the length of award we refer to the above answer to **question twelve**, including our point that the investment period is usually two or more years shorter than the length of the award (or future loss period assumed for the purpose of settlement)

Question 14

How have historical changes to the PIDR which impact the size of the award, affected how low-risk claimants have been advised to or actually invest their award (please provide evidence and/or reasoning in support of your answer)?

We are not investment specialists, nor do we act as professional deputies or trustees for injured claimants, so we do not have first-hand experience of the investments made by seriously injured claimants.

We would add that whenever we have discussed these issues with IFAs, professional deputies or trustees acting for seriously injured claimants they have repeatedly emphasised that the methodology by which compensation is calculated, applying PIDR, is entirely separate from the advice they subsequently give to those claimants after their claims are settled. There are numerous factors, including deductions for litigation risk, the impact of legal costs and the claimant’s own decisions for, instance on accommodation purchases, which may mean that the residual damages are not the same as the calculation of the claimant’s claim. Their advice is entirely focussed on how best to manage the residual fund, whether larger or smaller, in ways that will maximise the chances that it will endure to meet the claimants needs over their entire lifetime (including the very real possibility they will outlive the assumed life expectancy). If the residual fund is too low to meet those needs in full consequent to any of the many factors, including the PIDR historically having been too high, then the claimant is left with the invidious choice of either having to seek State support, go without in relation to some of their needs, reduce the standard of living for them and their family, or try and take more investment risk to plug the gap (a gamble that could make their position even worse).

As we observed in our answer to **question 12**, the economic climate since 2019 has meant that claimants who were subsequently awarded damages on a -0.25% PIDR have funds that are now worth materially less than it was assumed they would be. That position will patently be even worse for claimants who were compensated at a PIDR of +2.5% real prior to 2017.

Question 15

To what extent do environmental, social and governance (ESG) considerations shape claimants' investment advice and approaches (please provide evidence to support your view)?

We agree with the submission from APIL, based on the experience of Brooks Macdonald who are one of the investment managers that Adroit work with, that ESG considerations are an additional reason why active management is required.

Question 16

Please provide any evidence available on the type and level expenses faced by claimants, assuming a low-risk investment portfolio is adopted. Respondents may wish to follow the grouping at paragraph 39 above and should add any other investment related expenses they believe are relevant. Answers should, where possible, highlight any differences in expenses due to the: a) Size of claimant award; b) Adoption of a passive or active investment approach; and c) Claimant time horizon (and how this changes over time).

We rely upon the FOCIS evidence, submitted in relation to the 2019 PIDR consultation, which demonstrated that the average total charge over 389 cases was 1.58%. Only a tiny minority were charged less than 1% and this was counterbalanced by a similar proportion who incurred charges over 2%. Virtually all of the 398 claimants in the FOCIS dataset had actively managed portfolios.

We note that the question of the availability and charges of investment managers with expertise in advising seriously injured claimants was recently considered by Her Honour Judge Hilder in IMTC v PW and the Public Guardian[18] who commented "*I also accept that management of damages awards is a specialist expertise, significantly different to the management of earned or inherited wealth, with a relatively small pool of firms offering such expertise and experience*." She also appeared to endorse the evidence of the experienced professional deputy witness when he said "*managing the investment of a personal injury damages award for a protected party is an entirely different prospect from managing an investment portfolio for a private client with capacity who may have acquired their wealth through employment, business interests, and inheritance or other means. For protected parties with personal injury damages awards, these funds are, in most cases, the only funds that the client will ever have. These clients will not have the opportunities to earn income from employment or business interests and these funds need to provide for their often complex needs for the rest of their lives. It therefore requires a specialist approach to investment*."

In this case the investment managers annual charges were 1.89%, but they was no suggestion that the Judge, Official Solicitor or Public Guardian considered that to be unusual or out of kilter with other investment managers who specialised in managing funds for claimants lacking capacity. By implication the charges were one of the factors considered in the scoring criteria in the "beauty parades" used to select the investment managers. The conflict finding was unrelated to the level of charges.

[18] [2024] EWCOP 16 see paragraphs 70 and 76

Question 17

Do the expense groupings, values and approach assumed in the 2019 analysis, as set out in Table 2 above, remain suitable for the representative claimant (or alternative representative claimants)? If not, what do you deem appropriate? Please provide evidence and/or rationale to support your answer.

No approach assumed in the 2019 analysis significantly underestimated the investment charges actually incurred by seriously injured claimants. It remains crucial for the Lord Chancellor to recognise that the vast majority of claimants require actively managed investments to respond to their needs, manage volatility and downside risk. They will incur investment charges ranging between 1.5 and 2%, which cannot be recovered from and do not form part of any compensation.

We refer to our above answer to **question 16** and to the FOCIS evidence, submitted in relation to the 2019 PIDR consultation.

Question 18

What types and rates of taxation typically apply to claimants on their investment returns, and how does the distribution of these vary by size, length of award and remaining claimant time horizon? Please consider a current view of the representative claimant or alternative representative claimants.

It is almost impossible to answer this question because each claimant is an individual with their own differing personal, financial, and familial backgrounds which will lead to varying taxation levels and types of tax paid as well as the types of investment that they are able to make. We are not aware of any data on this issue.

It is difficult to see how the PIDR can adequately address the issue of changing tax rates, particularly in times of economic uncertainty, such as post-Covid or where there is a change of government.

We refer to and endorse the response of FOCIS to this call for evidence, notably we agree that the long-term upward trend in the level of taxation (including the downward trend in allowances) is a further reason for the Lord Chancellor to either round up (not down) the tax adjustment to PIDR and/or increase the current 0.5% adjustment to moderate the impact of under-compensation.

Question 19

How might your answer to Question 18 change if a claimant had other annual taxable income of at least an amount to meet the threshold for personal income tax, or other reasonable level of taxable income? Please support this with any evidence or data on what other taxable income claimants typically have.

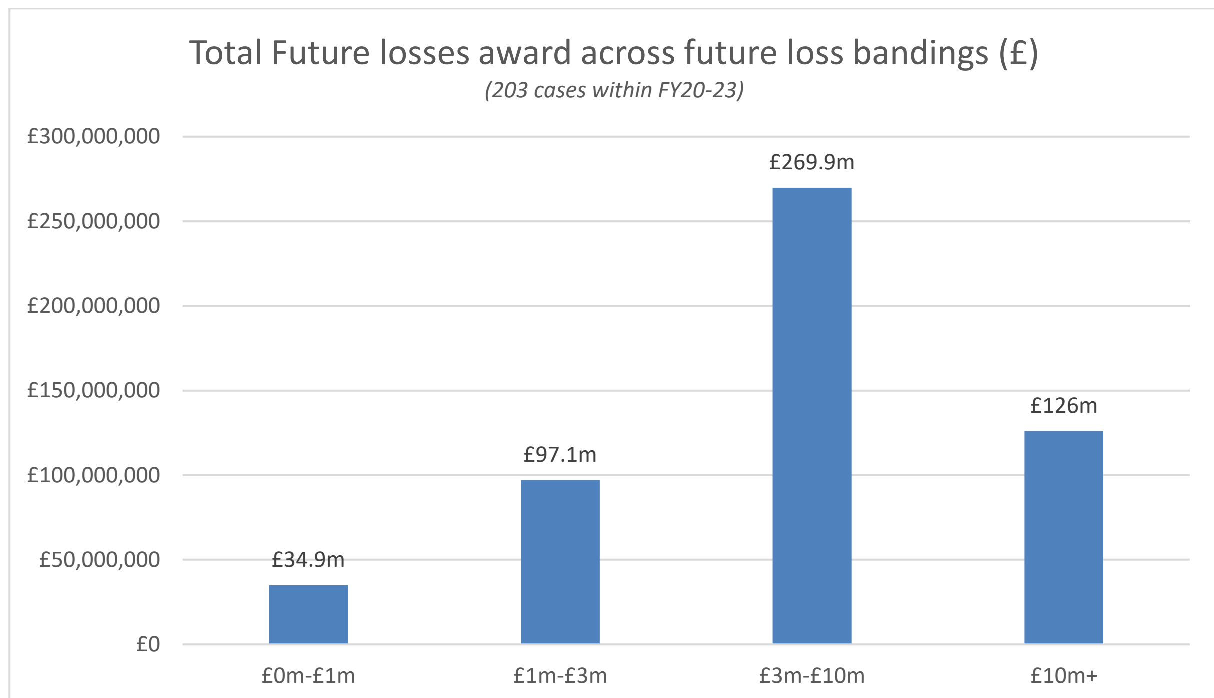
Patently the incidence of income tax would increase the more personal income the claimant has. Claimants with future loss awards at the lower end of the range are more likely to have either a shorter period of loss of future earnings or a residual earning capacity. Consequently, this ought to be factored into the modelling of likely tax for such claimants.

Question 20

Do you consider that the 2019 deduction for taxation of between 0.0% and 0.5% per annum (based on the initial award value) remains suitable in regard to the representative claimant or alternative representative claimants (please provide evidence and/or reasoning to support your position)?

No, that range was and still is too low. It appears to have been based on GAD examples of future loss awards of £100,000, £1m and £3m. Analysis of the Stewarts dataset of 203 cases in the 4 year period (20-23), shows a significant proportion and value of cases above the £3m level that GAD used for its tax examples:-

Figure twelve - Total future loss awards across future loss bandings – 20/23 data



The average future loss award from these 203 cases was £2,601,360 and the percentage of cases that settled over £3m is 30% which would rise to 35% is cases with total damages under £500,000 were excluded. The future loss award value for cases over £3m accounts for 75% of the total future loss award (£528m).

We contend that with reference to a broader range of values of claim) a more realistic range for the tax adjustment is between 0.2% and 1%.

Question 21

In 2019, a total deduction for tax and investment management expenses over the term of the award of 0.75 per cent was applied (derived from a range of 0% - 0.5% based on the initial award value for tax and 0.6%-1.2% for investment management expenses. Do you think this total deduction and how its elements are combined remain appropriate (please provide evidence and /or reasoning to support your answer)?

Whilst investment charges may reduce slightly as a percentage of the award where the investment sum is larger, taxation typically increases for the higher value awards. The composite deduction for these two issues should reflect claimant investor experience and

allow 1.5%-2% for investment expenses and a further 0.2%-1% for taxation as a composite for these two factors we propose a reduction of 2.25%.

Question 22

How much additional complexity or difficulty would implementing a dual rate by duration approach add to the litigation process (please provide evidence to quantify this either by time to settlement, additional legal costs and/or any other relevant factors)?

A shift to dual rates by duration would add a completely unnecessary layer of complexity to the litigation which would likely lead to each party to the proceedings obtaining expert advice from an actuary and/or forensic accountant. This will add to the costs of the litigation for all parties and is likely to delay their resolution.

In catastrophic injury cases, schedules of loss frequently have over ten heads of loss and using the existing single PIDR, approximately 300 multipliers are used to calculate future losses. Adding another level of complexity to the calculation by way of dual rate by duration is likely to increase the costs of production of the schedule and counter schedules. This is a labour-intensive task, usually requiring expert input (as reported by the lawyers in Ontario see our response to the dual rate consultation in 2023[19]) and the need to recalculate annually will add a significant sum of costs to the case for all parties.

Nor would the introduction of such a rate address the inflationary issue which it is attempting to address. It would delay settlements and require frequent recalculation of the short-term rate, a necessary feature of the short-term rate in Ontario. The high and volatile period of inflation since 2017 amply demonstrates why any short-term rate would have to be subject to annual reviews to avoid unfairness. A move to change to a dual rate is likely to be unpredictable and may involve over optimistic assumptions about future low-risk investment returns beyond a switching point which could significantly worsen the position for the claimant with an increased risk that they will not recover the intended 100% compensation.

A by-product of the need for annual reviews of short-term rates is that it will be difficult for parties to assess and advise upon Part 36 or other offers to settle. This will delay settlements and may encourage some parties to try to "game" anticipated changes to the short-term rate. It will protract the litigation process and will almost certainly lead to contested hearings, with potentially serious effects upon both claimants and defendants. It would be unjust to visit upon a party the consequences of a Part 36 offer because of a change to the dual rate driven by changes in the economy rather than issues directly arising in the case.

We are concerned that the introduction of a dual rate may also interfere with the rehabilitation of a claimants, because only a reasonable proportion of a conservative estimate of a claim can be awarded as an interim payment. Volatility in the PIDR and frequent recalculation is likely to make it difficult to assess the likely end lump sum, which could severely restrict either a claimant's ability to request interim payments, or the amount a claimant would be awarded, which could hamper rehabilitation efforts and the ability to meet immediate needs.

This significant degree of complexity, cost and uncertainty to all cases would not be warranted to try to address the relatively modest number of short life expectancy cases. We refer to the Stewarts data in answer to question 1 above which showed that only circa 12% of our serious injury cases involved a future loss (usually life expectancy)

---

[19] **Stewarts response to MoJ call for evidence PIDR**

period of 10 years or less. For that small cohort we consider PPOs to be a much better solution, so governmental efforts ought to focus on improving the availability of PPOs (see our answer to **question thirty** below).

Question 23

Should a dual rate mechanism be implemented, different asset returns would be assumed for the short and long-term. Under this mechanism, what changes to the following characteristics of the representative claimant (or alternative representative claimants) would apply: a) Investment period; b) Damage inflation; c) Investment portfolio; and d) Tax and Expenses assumptions.

This is such a complex issue that we defer to actuaries and independent financial advisors to answer this question.

The one observation we makes is that if a dual rate by duration is introduced, the short-term rate will apply not just to short life expectancy but also to the initial periods of cases where there is a far longer life expectancy. The changes required will be heavily dependent on how short the short-term rate period is and when the switching point arises.

Question 24

Should a discount rate by heads of loss be implemented, different damage inflation assumptions would be assumed for different heads of loss. Under this mechanism, what changes to the following characteristics of the representative claimant (or alternative representative claimants) would apply: a) Investment period (under the single rate methodology, 43 years was previously assumed); b) Investment portfolio (under the single rate methodology, a 57.5% allocation to matching assets and 42.5% allocation to growth assets was previously assumed. Please refer to Table 1 for full details); and c) Tax and Expenses assumptions (under the single rate methodology, a range of 0%-0.5% based on the initial award value for the former and 0.6%-1.2% for the latter, with a total modelled assumption of 0.75% was previously assumed).

The simple answer is that there would not be any material changes to assumptions a) to c) above.

The investment period would usually be the life expectancy with the one notable exception being for loss of earnings claim which would usually be until retirement age.

It is unlikely that the investment portfolio or taxation assumptions would differ from those required under a single PIDR to ensure that the compensation provides for their future needs.

Question 25

How much additional complexity or difficulty would this approach add to the litigation process, and would this be greater / lesser / about the same as if a dual rate by duration were implemented? Please provide evidence to quantify this either by time to settlement, additional legal costs and/or any other relevant factors.

A multiple rate approach per head of loss is unlikely to significantly increase the complexity and costs associated with drafting a schedule of loss / counter schedule and subsequent negotiations because the parties already need to consider whether a PPO would be more appropriate for each head of loss, which engages similar concepts (e.g.

the appropriate indexation to address inflation). If and when differential PIDRs by head of loss were prescribed it would be relatively straightforward to select the appropriate multiplier from the Ogden tables. Unlike the position for multiple rates by duration (aside from the small cohort of short life expectancy cases), each item of claim would only require one multiplier.

We have first-hand experience of calculating claims involving a multiple rate approach by head of loss for claims brought in, or subject to the laws of, a number of differing jurisdictions. Notably we acted for the plaintiff in the case of Thomson v Thomson & Colonial Insurance Company[20] in the Bermuda Supreme Court and Court of Appeal. Whilst these cases involved the complexity of arguments concerning whether the court should apply multiple rates and what those rates should be for differing heads of loss, the actual underlying calculations to apply those rates were not particularly complex.

Question 26

Should a discount rate by heads of loss be implemented, do you believe that the concept of modelling one representative claimant remains appropriate or is modelling a representative claimant for each head of loss a better approach?

We do not believe that modelling a representative claimant for each head of loss would be a better approach because it assumes a level of precision that is unlikely to be achievable.

We therefore contend that modelling should be based on a single representative claimant.

Question 27

Please provide any additional evidence you or your organisation may have on the practical implementation of such a heads of loss rate model.

As we refer to in answer to **question twenty-five**, we have first-hand experience of calculating claims involving a multiple rate approach by head of loss for claims brought in a number of differing jurisdictions.

Question 28 Please provide evidence and/or data to support what heads of loss should be separately identified in such a model.

We refer to our response to **question twenty-five** above. If there are to be separate assessments based on different heads of loss, in our view the most appropriate head of loss for its own rate would be care and case management.

Question 29

How readily available are PPO's to claimants in practice and how does this vary by groups of claimants (additional data on groups that are less likely to have a PPO made readily available would be helpful)?

It is worth noting that at Part 2, paragraph 4(3)(a) of the Civil Liability Act 2018[21], the assumption when setting the PIDR rate is that the damages will be payable as a lump sum rather than an order for periodical payments. The issue of availability of PPO's is not one therefore that is of direct relevance to the setting of the PIDR rate. We do however

[20] Colonial Insurance Company Limited v Thomson [2016] CA (Bda) 6 Civ, [2017] 3 LRC 1

[21] **Part 2, Paragraph 10, Schedule A1, s.4 (3) (a), Civil Liability Act 2018**

encourage the MOJ to take separate steps to make PPOs more accessible to claimants with serious injuries.

In our experience, Insurers are less willing to provide PPOs than state organisations such as the NHS or MIB. The Institute of Actuaries' report from 2021[22] shows that the uptake of PPOs in personal injury claims is very low despite the 2019 changes to the PIDR rate. The indication in that report was that the weighted average for PPO propensity for 2009 – 2020 was 24% but was just 5-12% in the years 2017 – 2020. Insurers reported that the driving force behind the decision to have a PPO was overwhelmingly the claimants' (75%) with only 24% of cases showing a preference from both claimant and defendant for a PPO. However, that anecdotal reporting from insurers is contradicted by the much higher incidence of PPOs in claims involving paying parties who are pro-PPO like the NHS and MIB. Collectively there is no difference between the future needs of claimants injured by uninsured and insured motorists. Consequently, we remain of the view that, behind closed doors most insurers do not consider the PIDR to be set at a level that is too low when contrasted with long term cost and risks to them of the alternative of PPOs. If they did then, consequent to their duties to their shareholders, you would see them adopt a pro-PPO stance from the outset of negotiations with seriously injured claimants. This would likely result in an increase to a similar proportion of PPO cases as achieved by the MIB.

In an analysis of 203 of Stewarts' cases concluded in financial years 2020-2023, 17% had a PPO. Of these 33 PPO cases, 85% were for future care and case management only. The remaining 15% included PPOs for earnings or deputyship.

Question 30

What factors influence the take up of lump sums versus PPOs. This could include the preferences and behaviours of one or more of the parties involved in the settlement process and associated litigation strategies?

As set out in our answer to question 29 above, insurers are less likely to offer to settle claims on a PPO basis than the NHS and MIB.

There are a class of cases in which PPOs are unavailable because the defendant either:-

a) Has no insurance (non-motor claims)

b) has purchased insurance with insufficient indemnity limits

c) is an overseas insurer who does not fall within FSCS protection

We urge the MOJ to take action to address the above scenarios to ensure claimants with life changing injuries are fully compensated. One option in employers' liability and public liability claims would be to make unlimited insurance compulsory, as with motor insurance. Likewise, a fund of last resort, similar to the MIB, would assist with making PPOs available to claimants with serious injuries arising out of non-motor claims.

Consideration should be given to making amendments to the CPR and pre-action protocols to ensure that PPOs are seriously considered early in the claims process and during case management of the litigation. We reiterate the proposal we have previously made that in claims for damages of in excess of £500,000 parties any Part 36 offer should be required to include a PPO option/variant or be accompanied by a witness

[22] Periodical Payment Orders Working Party Update, 2021 Industry Survey (PPO Working Party)

statement providing a fully reasoned explanation of why that is impossible or inappropriate for the claim in question.

Question 31

Please provide any evidence of how the setting of the discount rate may affect persons with protected characteristics.

The vast majority of personal injury claimants who have a significant claim for future losses have suffered serious injury and are therefore likely to have a protected characteristic under the Equality Act and must be treated as 'vulnerable' under FCA guidance. Many will be unable to manage their own financial affairs as a result of the injuries suffered. Catastrophically damaged individuals are disabled.

We agree with Victoria Wass' response to the MOJ's previous consultation in January 2019 in which she stated that "*claimants are being treated less favourably than the comparison groups in Q12, similarly placed pensioners in defined benefit or defined contribution schemes, whose exposure to investment risk would be less than is proposed in the GAD portfolio's through a combination of regulation and professional advice."*

It is imperative that a full impact assessment is conducted on any model portfolio(s) to ensure that claimants are not under compensated contrary to the intention to provide 100% compensation. It must not be the case that injured claimants are placed in a position of being treated less favourably than other low-risk investors, for instance pensioners.