BACKGROUND

The personal injury discount rate prescribed by the Lord Chancellor under section 1 of the Damages Act 1996 provides a simple way of avoiding complex and costly litigation as to what the financial settlement should be in individual cases.

The rate, which has to be taken into account by the court in assessing the size of a lump sum award of damages for future financial loss in a personal injury case, was recently lowered by the Lord Chancellor, acting in accordance with the relevant case law, from 2.5% to minus 0.75%. This change is expected to increase significantly the size of awards of damages for future loss.

The change of the rate has led to calls for a re-consideration of the way the rate is set. There are concerns that the present method, which derives from principles established in the 1998 House of Lords case Wells v Wells which assumes claimants to be highly risk averse, intrinsically over-compensates many claimants, contrary to the overall objective of an award of damages, namely to meet in full the costs and losses caused to the claimant by the injury, neither more nor less.

PURPOSE OF QUESTIONNAIRE

A consultation paper (link) on the personal injury discount was published by the Ministry of Justice on 30 March 2017. One of the key aims of this consultation is to obtain evidence of how claimants actually invest awards of damages for future financial loss.

This questionnaire is intended to obtain such evidence by presenting to wealth managers a number of 'pen pictures' which are reflective of typical personal injury claimant profiles, and asking the wealth managers what their portfolio recommendations would be for these individuals matching these 'pen pictures', based on a number of different scenarios.

It should be noted that the wealth managers, who are being asked to complete this questionnaire, deal primarily with personal injury awards where the Court of Protection is involved. As such, the types of injury sustained by the claimants are typically severe and tend to relate to the high end of the range of compensation packages for personal injury cases. The representative 'pen pictures' have been selected with this type of claimant in mind.

However, given the nature of the injuries with which such wealth managers are likely to be involved, the investment advice given in such circumstances is likely to be closest to that assumed in Wells v Wells and therefore especially salient in informing any change to the current law in this area.

CONFIDENTIALITY

Information provided in response to this questionnaire, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process any personal data in accordance with the DPA and in the majority of circumstances, this will mean that personal data will not be disclosed to third parties.

PEN PICTURES (Overview)

The table on the next page, together with accompanying notes, provides information that should be used by wealth managers as the basis for their portfolio recommendations. In addition, a brief description of each case, providing a more qualitative insight into the claimants being considered, together with details of how the claimant was compensated, is provided below for reference.

Pen Picture 1: Clinical Negligence Case

As a result of clinical negligence shortly after birth, a baby suffers serious brain damage and will need extensive care and medical supervision for life. The claim is settled 10 years later, at which point the child has an impaired future life expectancy of 50 years. The care costs are to be paid as a Periodical Payment Order (PPO).

Pen Picture 2: Road Traffic Accident

A 17-year-old suffers a catastrophic injury in a road traffic accident and is rendered quadriplegic. They require daytime care and significant modifications to their accommodation. The claimant was employed prior to the accident but will never be able to work again, although their life expectancy is not expected to be impaired due to the accident. The claim is settled three years after the accident.

Pen Picture 3: Workplace Injury

A 48-year-old is involved in a serious accident at work, suffering spinal damage and resulting in being confined to a wheelchair. Following the accident, the claimant has full upper-body mobility and is able to find a new job, in which he is frequently able to work from home. The claimant has taken a modest pay cut from the job that he was in prior to the accident. His life expectancy is not expected to be impaired as a result of the accident. The claim is settled two years after the accident.

Summary of Future Annual Ongoing costs assumed in Compensation paid for above cases:

Compensation Element (£ p.a.)	Case 1	Case 2	Case 3
Care Costs & Case Management	100,000	50,000	10,000
PPO for Care Costs & Case Management?	Yes	No	No
Ongoing therapy, equipment and adaptions[1]	14,000	7,000	3,000
Loss of Earnings	20,000	17,000	5,000
Loss of Pension	0	0	1,250

Note: The period between any claimant's injury and the point when compensation is actually paid can be significant. For the purposes of this questionnaire, it is assumed that all compensation paid for past losses, and for purchasing equipment or making alterations required to ensure as normal a life as possible, is used by the claimant (or their representative), to fund (or pay off) up-front costs that are typically required in such cases. As such, the amount assumed available for investment (shown as Total Compensation Lump Sum in the table on the next page) relates only to the amount of compensation paid in relation to ongoing expected annual expenses and costs as set out above.

[1] Relates to future ongoing costs that are separate from the care and case management costs assumed when determining compensation. This may include, for example, physiotherapy, education needs, and maintenance and replacement costs for aids, equipment, transport and assistive technology.

PEN PICTURES (Profiles)

Case	1	2	3	Notes
Age Now	10	20	50	1
Sex	M	F	M	
Future Life Expectancy (yrs)	50	71	35	2
Assumed Pension Age	68	68	65	3
Annual Care Costs (£ p.a.)	100,000	50,000	10,000	3,4
Annual Outgoings excluding care costs (£ p.a.): Before Pension Age	40,000	35,000	32,000	3,4
Annual Outgoings excluding care costs (£ p.a.): After Pension Age	40,000	35,000	24,000	3,4
Annual Income: Non-Taxable (£ p.a.)	110,000	10,000	10,000	4,6
Annual Income: Taxable (£ p.a.): Before Pension Age	0	0	35,000	4,5,6
Annual Income: Taxable (£ p.a.): After Pension Age	0	0	20,000	4,5,6
Periodical Payment Order for Annual Care Costs?	Y	N	N	7
Total Compensation Lump Sum (Scenario 1: DR = -0.75%)	£2,000,000	£6,100,000	£770,000	8,9
Total Compensation Lump Sum (Scenario 2: DR = +1.00%)	£1,200,000	£3,300,000	£580,000	8,9,10
Total Compensation Lump Sum (Scenario 3: DR = +2.50%)	£790,000	£2,200,000	£470,000	8,9,10

1) For simplicity it should be assumed that Age Now = Age at Compensation Payment = Age when portfolio is invested.

2) To illustrate, Case 3 is expected to live to age 85. However, this is just an estimate, and investment managers should factor in their usual contingencies for death being earlier or later than expected.

3) Total annual outgoings will be made up of 'Annual Care Costs' (for life) and 'Annual Outgoings excluding care costs'. Annual Care Costs are not assumed to change at Assumed Pension Age. Annual Outgoings excluding care costs are assumed to change at Assumed Pension Age, so a figure is provided for both before and after Assumed Pension Age for each Case. Annual Outgoings excluding care costs includes normal living costs as well as some ongoing costs in relation to therapy, equipment and adaptions, as previously described.

4) All income and outgoings figures (including care costs) should be assumed to rise in line with inflation going forwards. The measure of inflation assumed should have regard to the type of income/outgoing being considered (in line with the usual assumptions used by the investment manager).

5) 'Annual Income: Taxable' is gross income, prior to any deductions for income tax or NI contributions.

6) Total annual income will be made up of 'Annual Income: Non-Taxable' and 'Annual Income: Taxable'. For simplicity, 'Annual Income: Non-Taxable' is not assumed to change at Assumed Pension Age. However, 'Annual Income: Taxable' is assumed to change at Assumed Pension Age, so a figure is provided for both before and after Pension Age for each Case.

7) For Case 1, the PPO makes up all of the assumed annual care costs (in this case £100,000). This amount has also been included in Non-Taxable Income.

8) Compensation Lump Sums have been calculated using representative factors from Ogden Tables (based on the 'Summary of Future Annual Ongoing costs assumed'). Figures based on three illustrative discount rates are provided, to assess how the recommended investment portfolio would change, depending on compensation amounts.

9) It should be assumed that the amount to be invested is equal to the Total Compensation Lump Sum amount provided (under each scenario).

10) It should be assumed that any required large one-off upfront purchases (e.g. a house) have already been made by the claimant (funded from compensation paid in relation to past losses or amounts assumed for buying equipment or making alterations), and should be ignored when producing portfolio recommendations. That said, any realistic assumptions about fluctuations in care costs, outgoings and income, should be factored into your recommendations. For example, access to cash or near-cash investments at short notice may be a requirement for a typical claimant (equivalently, annual figures shown above are indicative of the long-term rate).

PORTFOLIO RECOMMENDATIONS & COMMENTS ON EACH CASE

The excel workbook '2017.04.07 Pen Pictures – output template.xls' should be used to provide your responses to this questionnaire (it also includes a copy of page 3 of this document for reference).

For each of the three cases described above the information supplied in each template is the same. The only difference between them is the assumed Discount Rate and associated Compensation Amount, which can be found at the top of each sheet. This is because we are especially interested in how the composition of any recommended portfolio might change in relation to different levels of the Discount Rate.

Therefore there are 9 separate worksheets to complete for each combination of Case and Discount Rate, together with 3 worksheets for each Case where more general comments about how the portfolio has been constructed can be made if you think this would be helpful. This workbook should have been sent to you in the same e-mail that you received this document in.

We appreciate that completing the worksheets may take some time and we would like to take this opportunity to thank you for taking the time to do this.

ADDITIONAL INFORMATION

If you have any queries in relation to completing this questionnaire, please contact [TEXT REDACTED].

Should you feel that more information or changes are required to this questionnaire in order for you to be able to provide a complete and representative response, then please notify the above contact urgently by Wednesday 12th April.

Should you wish to provide any additional information (for example, graphical outputs), please provide this in a separate document.

Please e-mail your responses by Tuesday 2nd May, 2017, to [TEXT REDACTED] who has kindly offered to collate and anonymise the responses, prior to forwarding them to the Ministry of Justice.

Thank you for completing this questionnaire.