Whither the Discount Rate?

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What is the "Discount Rate"?

More appropriately – the Net Rate of Return:

- Investment yield on damages invested (and mortality)
- [less cost of financial advice]
- Less inflation
- Less taxation

  = net yield

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A brief history of multipliers

<u>The Dark Ages (1970's and before):</u>

- take the life expectancy, divide it by 2 and then subtract 2

- Kemp & Kemp tables

A brief history of multipliers

The renaissance (1980 and 90's)

- The Ogden tables 1st ed (1984) – ILGS
- No "one-size-fits-all discount rate: varied by tax status of Claimant
- Law Commission Report No.224 (1994) – ILGS
- Common law:4.5% - a mixed portfolio

And finally ....

Wells v Wells [1998] UKHL 27

- Accepted that claimants would invest via low risk ILGS
- Rate of return analysed and assessed at 3%

Wells v Wells [1998] UKHL 27

In May 1997 [the average gross return of ILGS] was 3.68%, by May 1998 it was only 2.8%. Less tax at say 15% would give a net return of 2.38%...

Over the last 6 and 12 months to March 1998 the average return has been 3.02 and 3.28%, respectively...

These figures justify a guideline rate of return of 3%

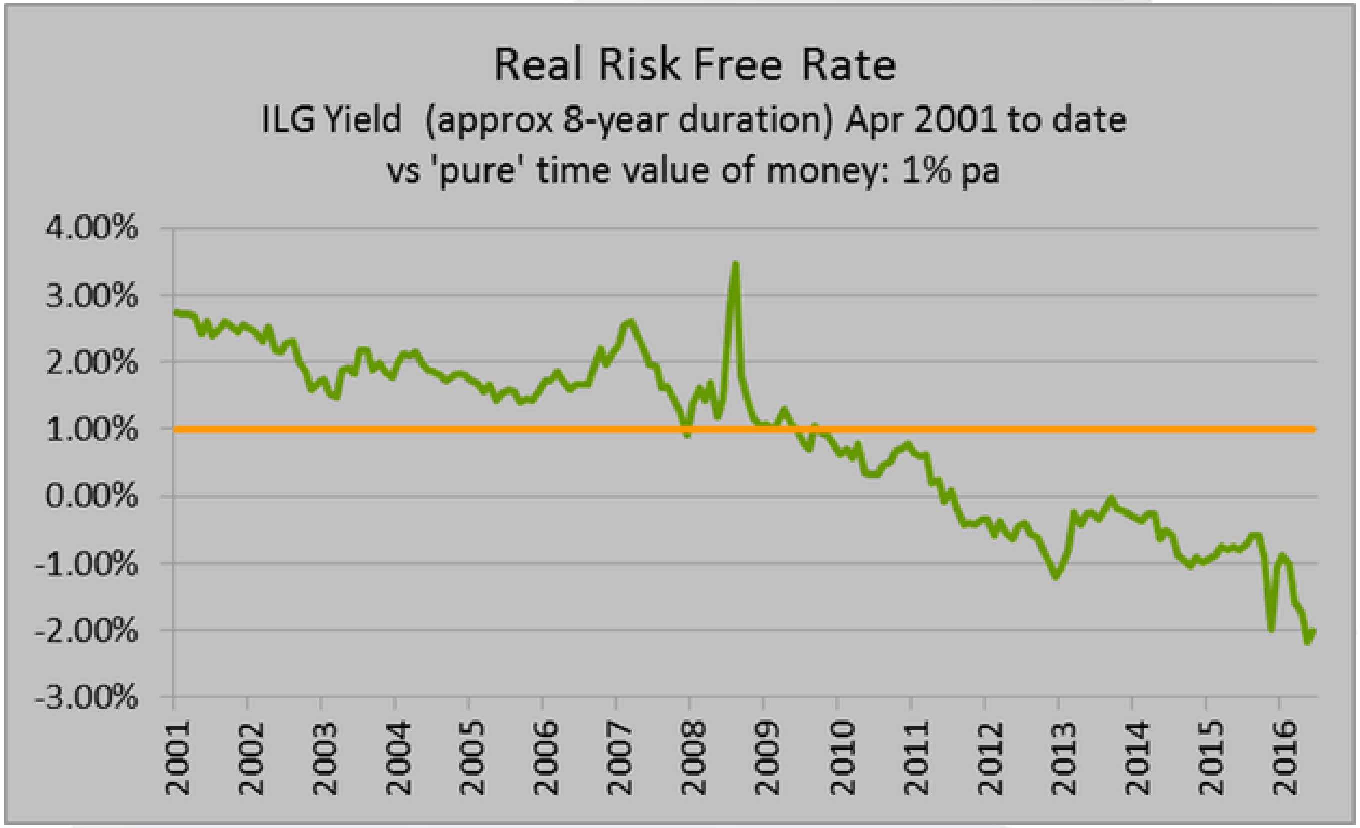
In the meantime: Damages Act 1996

s.1(1)

In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court shall, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.

The LC and the discount rate

- June 2001: LC Irvine set rate at 2.5%



The LC and the discount rate

- *Warriner v Warriner* [2002] EWCA Civ 81
- *Cooke v UBHT* [2004] 1 WLR 251
- *Simon v Helmot* September 2010: Guernsey CA: -1.5% earnings, +0.5% other losses
- APIL MASS begin lobbying / JR April 11
- *Simon v Helmot* [2012] UKPC 5 March 2012
- MOJ consultation 2012
- Inconclusive, widely divergent views

The expert panel

2015 LC Grayling: “expert panel”: Cox, Cropper, Gunn and Pollock – published March 2017

https://consult.justice.gov.uk/digital-communications/discount-rate/results/discount-rate-report.pdf

- If ILGS, then -1%
- If 25% of portfolio is “non risk free”, then 0%.
- If 50% of portfolio is “non risk free”, then + 0.75%.

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Finally: 27.02.17

Liz Truss – Lord Chancellor's ministerial statement:

> *Having completed the process of statutory consultation, I am satisfied that the rate should be based on a three year average of real returns on Index Linked Gilts. Therefore I am setting it at minus 0.75%.*

Came into force 20.03.17

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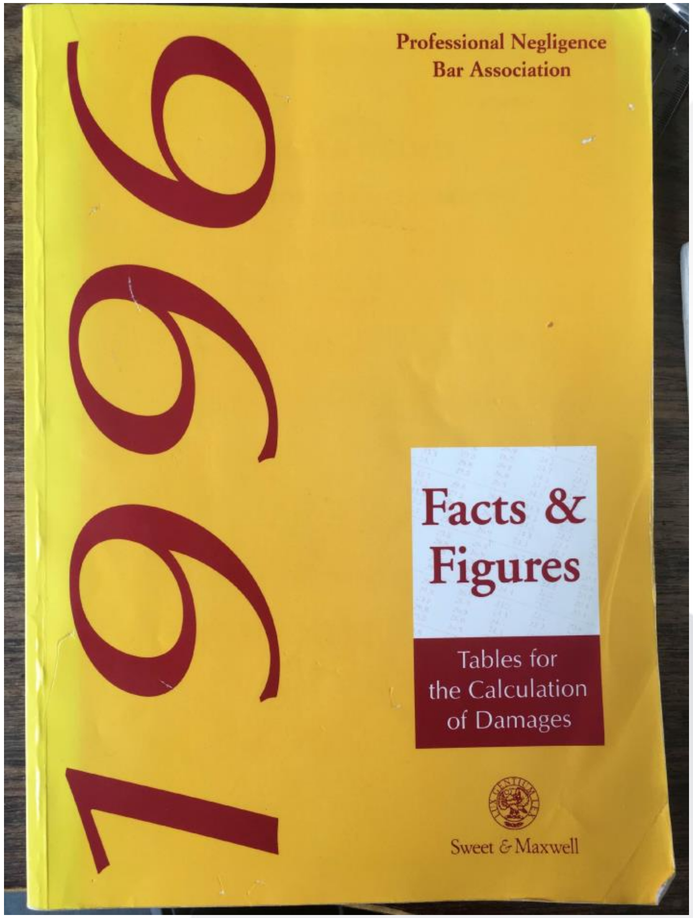
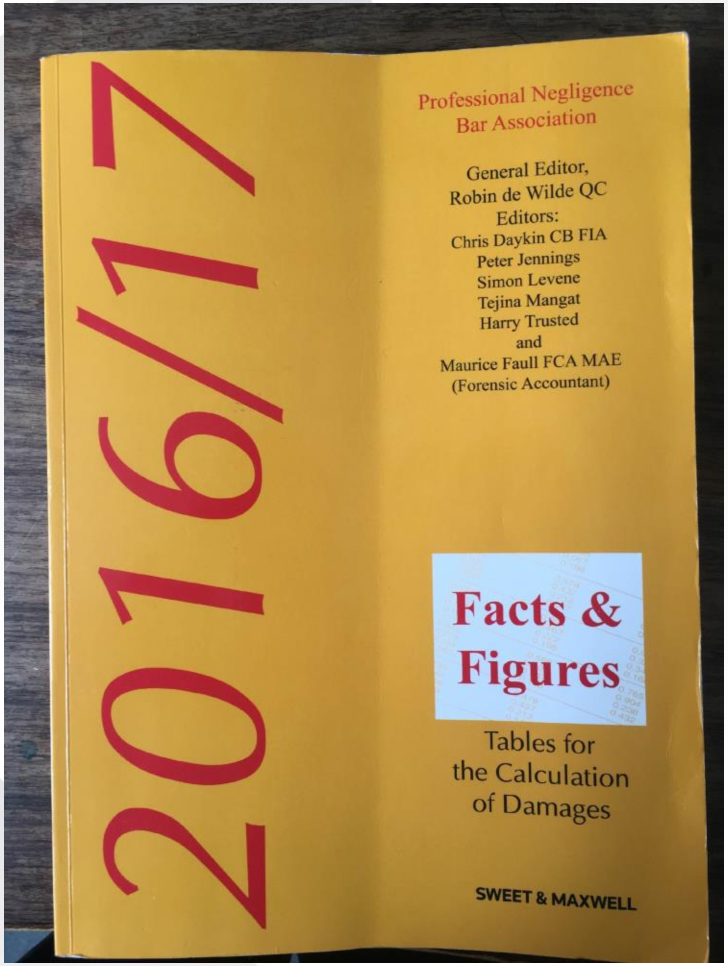
Facts & Figures: 21 years old!





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Multipliers: a historical contrast

Age/sex/table	2nd ed 4.5%	7th ed. 2.5%	7th ed. -0.75%
20/F/life	20.6	32.97	94.99
20/M/to 65	19.0	26.64	52.02

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And so yet another consultation

Opened 30.03.17, closed 11.05.17

- These are significant additional costs for the public and private sectors and they flow from the application of the present law. It is therefore legitimate to examine the basis on which the discount rate is set.
- Parliament can make judgments as to the *balance to be struck between different interests*.
- *The 100% rule will continue to apply*

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The 2017 consultation

Raises the following questions:

- How should the rate be set?
- [How frequently should it be reviewed?]
- [Can better use be made of PPO’s?]

How should the rate be set?

Issues:

- Are the present principles fit for purpose?
- What should the principles be?
- What investment return should be taken into account?
- Should the possibility of a PPO affect the decision as to relevant investments?
- Evidence needed: how C's invest & the use if PPO's + views on making the system “fairer”

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Criticisms:

- C's not as risk averse as has been assumed
- All C's treated as vulnerable (and risk averse) when many less dependent on the award and so less risk averse
- Must set the rate realistically – by reference to how C's do or are advised to invest
- ILGS distorted by special factors
- Irrational to invest in products guaranteed to make a loss
- No appetite for risk? PPO...

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Potential outcomes:

- Allow s.1 Damages Act 1996 to be used more freely? (Court assesses appropriate rate?) Warriner v Warriner [2002] EWCA civ 81
- Different rates per *Simon*
- Hong Kong / Ontario models:

< 5 years: -0.5%

5<10 years: 1%

> 10 years: 2.5%

Potential outcomes:

- Enforcement of PPO (+ 4.5%)
- Back to the mixed portfolio (but not 4.5%)

  (2015 expert panel: 50-75% ILGS)

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Roberts v Johnstone

Negative discount rate = the death of *Roberts v Johnstone* [1989] QB 878?

- *Rationale* of *RvJ*: loss of investment income on additional capital cost – C had already bought the house.

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Roberts v Johnstone

JR v Sheffield Teaching Hospitals NHS Foundation Trust [2017] EWHC 1245 (QB):

- Negative discount rate defeats existing methodology
- No evidence re cost of borrowing or other alternatives
- Nil award

Roberts v Johnstone

JR v Sheffield Teaching Hospitals: criticism:

- Conflates attitude to investment risk of uninjured and injured (c.f. *Wells*) investor.
- Uninjured investor with capital sum would accept higher risk to invest with some yield.
- Fact that C has benefit of a low risk/risk free investment (property purchase) does not defeat that loss.
- Legitimate to use a different yield rate

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Roberts v Johnstone

Alternatives:

- Notional rental value (but higher than cost of purchase);
- C buys with charge to D or
- D buys with life tenancy to C
- Both unattractive to D.
- Either cost of borrowing or lost return "ordinary" investor can secure.