

# Loss of malpractice insurance for spinal surgeons: why you need to know about the discount rate

Michael A Foy

**The Medical Defence Union (MDU) have recently announced that it is impossible for them to continue to provide indemnity to members practicing spinal surgery because the cost of settling claims in spinal surgical cases has escalated massively due to the Government's recently announced policy to cut the discount rate from 2.5% to -0.75%.**



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The general response from my clinical colleagues (spinal and non-spinal) when this subject has been raised has been a look of blank disinterest. They have enough concerns in day-to-day clinical practice with issues of patient management, issues with hospital/departmental policies, protocols and guidelines, junior staff, Montgomery etc., etc. Why on earth should a Government policy like this have any relevance to them?

However, it is an interesting saga and worth telling. What is the discount rate? The discount rate (also known as

the Ogden rate) forms part of the overall mechanism to determine the level of compensation awarded for cases involving serious injury, whether that injury is caused by medical negligence or by a road traffic accident or an industrial injury. The majority of claimants who have a serious injury which requires long-term care, for example, someone who has been judged to have been negligently paralysed by a spinal surgeon, choose to take their compensation as a lump sum rather than as an annual payment over the rest of their lifetime.

Since 2001, when the discount rate was last changed, it has

been set at 2.5%. This means that any lump sum is discounted to allow for a predicted 2.5% per annum investment return. On Monday 27th February, the then Lord Chancellor Liz Truss announced that the rate would be reduced to -0.75%. The change will apply to all claims settled after 20th March 2017, regardless of when the injury occurred. The discount rate is linked, by law, to returns on low risk investments, typically index linked gilts, i.e. Government Bonds. With low interest rates the returns on these investments have fallen dramatically since 2001. Therefore all future settlements will be increased to reflect a predicted negative investment return on the lump sum awarded to claimants...!

Consider this, you have been fortunate enough to win, be given or inherit a million pounds and wish to place it in a safe investment environment to provide for your dotage. What do you do? Most, if not all of us, would consult a trusted independent financial

adviser (IFA) and explain that we are risk averse and ask for an investment strategy that mirrored that risk averse position. No one in their right mind would put a million pounds solely into Government linked bonds. It would be crazy. Yet this is the model that the Government have used to predict investment returns. The effect will not only fall on the insurance industry but also, massively, onto the NHS. The Lord Chancellor obviously recognised this pointing out that the Government was committed to ensuring that the National Health Service Litigation Authority (NHSLA), now NHS Resolution (NHSR), had sufficient funding to cover

changes to hospitals' clinical negligence costs.

As you might expect, the position taken by claimants solicitors and insurers differs somewhat. The solicitors complain that it is a disgrace that it has taken so long for the rate to change and that their clients have been under-compensated. The insurance industry believes that it is a reckless decision from the Lord Chancellor's Department.

You may then ask what difference does this make, and the answer is a huge difference, particularly to large claims in younger people. For example, a 21 year old

requiring long-term care, but with a normal life expectancy after a spinal cord or similar injury having been awarded £1 million prior to 20th March 2017 would now, at the new discount rate of -0.75%, receive £2.3 million. A similar claim at £5 million would now settle at around £12million.

In view of the number of variables there is 'no rule of thumb' which can be applied to assess the overall impact to the total value of a claim due to the increase in the discount rate. An analysis by Mark Burton at Kennedys Solicitors (2017) set out below an early 'broad-brush' assessment of the impact of a -0.75%

discount rate on a £5 million claim of a claimant with normal life expectancy (Figure 1).

Age	% increase in value of claim	Revised total
10 – 20	100 – 200%	£10m - £15m
20 – 30	80%	£9m
30 – 40	75%	£8.75m
40 – 50	70%	£8.25m
60 – 70	40 – 50%	£6m - £7.5m

Figure 1: Calculation of the impact of a -0.75% on a £5 million claim on an individual with a normal life expectancy.

The change in the discount rate from 2.5% to -0.75% has had a dramatic impact on reserves for nearly all claims where >>

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∞ You may then ask what difference does this make, and the answer is a huge difference, particularly to large claims in younger people. For example, a 21 year old requiring long-term care, but with a normal life expectancy after a spinal cord or similar injury having been awarded £1 million prior to 20th March 2017 would now, at the new discount rate of -0.75%, receive £2.3 million. A similar claim at £5 million would now settle at around £12million. ∞

there is a future loss element. This determines the amount of money the defence unions, insurers and NHSR have to set aside to provide for future predicted losses. Ultimately, this will come from increased subscriptions for indemnity, selective indemnity or refusal to indemnify at all, as with the MDU and spinal surgeons. It will also lead to increased insurance premiums and as far as NHSR is concerned an increased drain on the Treasury. According to the NHSR Annual Report for 2016/17, "The Government recognises that there will be a significant impact on public finances, and therefore has added around £1.2 billion a year to the budget reserve to meet the expected costs to the public sector, in particular to NHS Resolution." The latter will probably be compounded by a move of higher risk procedures from the private sector to the NHS. It should be noted that in calculation of settlement costs all future medical/care requirements are calculated on a private, not NHS, basis and this is another area that may merit discussion/consideration.

The change is seen most dramatically in catastrophic injury claims. This is demonstrated by an analysis of the percentage increase in Ogden Table 1 multipliers (Burton 2017). These are the tables that the legal profession

use to calculate settlement for future losses in catastrophic injury cases (Figure 2).

Age	2.5%	-0.75%	Percentage increase
10	34.08	108.32	217.84%
20	32.10	88.96	177.13%
30	29.60	71.43	141.32%
40	26.52	55.66	109.88
50	22.69	41.44	82.63%
60	18.30	29.19	59.51%
70	13.44	18.85	40.25%

Figure 2: Percentage increase in Ogden Table 1 multipliers (Burton 2017).

On the basis of this the MDU issued a statement indicating that they have, "reviewed the indemnity risk in relation to certain types of work undertaken by members and, regretfully, have concluded that the impact on the cost of settling spinal surgical claims make it impossible to provide indemnity for members undertaking private practice in this speciality". They went on to outline how the effect of the change in discount rate is profound and will, potentially, more than double the cost of many high value clinical negligence claims such as those arising from spinal surgery. The MDU will honour existing memberships up until the end of the current membership year but after this spinal surgeons will have to source alternative indemnity.

According to Stride (2017) the Medical Protection Society (MPS) and the Medical and Dental Defence Union of Scotland (MDDUS) will continue to provide cover for spinal surgeons, with new applications being assessed on a case by case basis by the former and for consultants who hold a substantive NHS contract by the latter.

However, there may be some light at the end of the tunnel. The Ministry of Justice (MoJ 2017) recently published its response to the discount rate consultation together with draft legislation. The salient features from this document are:

- The rate will be set with reference to "low risk" rather than "very low risk" which better reflects the actual investment habits of claimants
- The rate should be reviewed every three years
- The Lord Chancellor will conduct a panel of independent experts when setting the rate
- The proposals envisage that a review of the discount rate would be started within 90 days of the law coming in to force.

Whilst it is difficult to provide an estimate, based on currently available information, if the new system was to be applied today the rate would probably be in the region of 0-1%. Whilst this may mitigate, to a degree, the

predicted increased settlements to claimants with a discount rate of -0.75%, it will still cause increased demands in the areas discussed, i.e. indemnity payments, insurance premiums and Government provision.

Of course, the final point to be made is that if someone is genuinely, seriously or catastrophically injured by someone else's negligence, whether that someone is a surgeon, a car driver or an employer, the injured person deserves to be suitably and adequately compensated for those injuries and the effect that they have had on their life. That is the rule of law in a civilised society. ■

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## References

References can be found online at [www.boa.ac.uk/publications/JTO](http://www.boa.ac.uk/publications/JTO) or by scanning the QR Code.

