

The measure of damages and quantification of damages in personal injury and clinical negligence claims has been in doubt since September 2016 when Jack J (as he then was) gave his ruling in *Bernal v Riley* [2016] Gib LR 314 (find our summary of that case here: <https://www.triay.com/wp-content/uploads/2017/05/MR079-The-New-Measure-of-Damages-for-Personal-Injury-in-Gibraltar.pdf>).

What is the uncertainty?

Following that decision, claimants and defendants have been arguing over the applicable guidelines which the Court refers to when deciding the amount to award in compensation of an injury. It has, since then, generally been the case that claimants have argued for the application of the Northern Irish guidelines, which on the whole provide for more generous awards, and defendants have argued for the continued application of the English guidelines which had always been applied in Gibraltar and were applied until the decision.

Separately, the discount rate applied in personal injury cases was also in doubt. The discount rate is a discount applied to awards for future losses, such as future loss of earnings, to take into account the fact that the claimant is receiving that compensation early as a lump sum, and will be able to invest that money. To make it fair to the defendant, and to ensure that the claimant is not overcompensated, the discount reduces the award thereby ensuring that the claimant is put in the same position he would have been had the wrongful event not occurred.

In March 2017, the discount rate in England went from a positive discount rate of 2.5% to a negative discount rate of -0.75%, meaning that rather than having the lump sum discounted, claimants ended up with more money because it was assumed that claimants, unlike ordinary investors, could not afford to take any risk on their investments as their damages were often required to provide for costs of care. This meant that the rate of return that claimant could achieve on their investments would be less the rate of inflation, so they needed more money to not end up being undercompensated.

Traditionally, Gibraltar always applied the English discount rate. Following comments Jack J made in *Bernal* and the change in the English discount rate, some claimants tried to apply a separate discount rate to Gibraltar which was as low as -3.5%. This increased the size of claims massively. As an example, a claim which might have ordinarily been worth £400,000 on a discount rate of +2.5% was now worth £1.5million on a discount rate of -3.5%.

Why is that a bad thing?

Firstly, this has prevented many cases from settling quickly or even settling at all. Because the differences are so big, parties have been too far apart to reach an agreement, making it less likely that a case will settle, and more likely that a claim will drag on for far longer than it would usually. This inevitably resulted in both parties spending more on legal fees and on obtaining expert actuarial and economic evidence to support their case. Further, claimants had to wait considerably longer to get the compensation they might need in order to be able to move on with their lives.

Secondly, the defendant in most (if not all) personal injury and medical negligence claims is indemnified by an insurance company. The local insurance industry in Gibraltar is reliant on UK insurers who understandably questioned the wisdom of writing business in a small market where the risks were significantly higher than what they used to be, and significantly higher than the UK. There was a risk that the level of damages sought by claimants was simply not sustainable, giving rise to the possibility that local insurance providers would have had to increase premiums considerably, or even not offer insurance services at all.

How has this been fixed?

On 15 July 2019, the Gibraltar Parliament intervened and debated legislation designed to put an end to the uncertainty, and passed the Damages Act 2019 which received Royal Assent by the Governor on 23 July 2019. This provides for:

1. The Minister for Justice to be able to set a discount rate specifically for Gibraltar. Unless and until he does so, the rate applicable in England & Wales (-0.25% from 5 August 2019) will apply.
2. The Chief Justice to be able to issue local guidelines for the assessment of general damages in personal injury cases in Gibraltar. Unless and until he does so, the guidelines applicable in Gibraltar will be the Judicial College Guidelines of England and Wales.

Therefore, until the Minister for Justice and the Chief Justice exercise their powers under the Damages Act 2019, the position will be restored to what it was before September 2016.

However, whilst the Damages Act has been passed by Parliament, it does not come into force until a day appointed by the Minister for Justice by notice in the Gibraltar Gazette. Until then, the present confusion continues, but with the passing of the Damages Act certainty is undoubtedly on the horizon.

Going Forward

If you have any questions or want to find out more about what services we might be able to offer you, please do not hesitate to contact our Personal Injuries team: personalinjuries@triay.com.

The Personal Injuries Team: Simon P. Triay & Dhiraj S. Nagrani.



Simon P. Triay
Director
E: simon.triay@triay.com
T: +350 200 72020



Dhiraj Nagrani
Associate
E: dhiraj.nagrani@triay.com
T: +350 200 72020

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