

ECONOMY, ENERGY AND FAIR WORK COMMITTEE

**DAMAGES (INVESTMENT RETURNS AND PERIODICAL PAYMENTS) (SCOTLAND)
BILL**

SUBMISSION FROM BTO Solicitors LLP

Damages (Investment Returns and Periodical Payments) (Scotland) Bill

General

1. What are your views on the Bill overall? Is legislation in this area required? How far do you think the Bill will achieve what it sets out to do?

Overall the Bill is a welcome step forward as this area of the law is in need of urgent reform. We are pleased to see the proposed legislation being introduced to allow Scottish courts to award PPOs. PPOs allow those pursuers who are risk-averse or those with the lowest appetite to risk to settle by PPO rather than lump sum thereby reducing the risk that their compensation will not meet their future needs.

BTO fully supports the principle that pursuers should receive “100% compensation, no more, no less” as per the decision of the House of Lords in *Wells v Wells*. A review of the methodology in terms of how the discount rate should be set is therefore welcomed as it is well recognised that the assumption that pursuers would invest 100% in ILGS was inaccurate and has led to many pursuers being overcompensated. Similarly, the current discount rate does not align with the principle of 100% compensation and is serving to overcompensate pursuers for their losses. This impacts on society in terms of increased insurance premiums and increased costs on the public purse including, but not limited to, the NHS.

Whilst we are supportive of reform in this area of the law there are some aspects of the Bill which we are not fully supportive of as follows:-

The aim of the Bill is to ensure the law affecting the discount rate is set is clear, certain, fair, transparent and credible whilst retaining the underlying principle of 100% compensation. Whilst the Bill sets out to achieve the above aim, one aspect which departs from the 100% principle are the “standard adjustments” which the Government itself acknowledges will result in the “probability of over-compensation”. This is neither fair nor credible and contravenes the stated aims that the Bill wishes to achieve.

The knock on impact of over compensation is not only in relation to the damages awarded to pursuers but also to the fees that pursuers’ solicitors can recover. An amendment to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act, which is supported by Scottish Ministers, allows damages for future loss payable to a pursuer to be taken into account (up to a maximum of £1 million) in Damages Based Agreements for pursuers’ solicitors’ fees.

As framed, there is also the possibility for a different rate to be applied in Scotland from the rate set in England & Wales. We would observe the risk of forum shopping as a result.

Part 1

2. Part 1 of the Bill aims “to reform the law on the setting of the personal injury discount rate in order to make provision for a method and process which is clear, certain, fair, regular, transparent and credible”. Is it an aim with which you agree? And to what extent do you believe the reform will achieve all these things – a clear, certain, fair, regular, transparent and credible method and process?

The underlying aim of the Bill is one with which we agree. It is accepted that the setting of the discount rate is not, and will never be, an exact science but the aim is to have a system which is fairly balanced on both sides.

However, the Bill as presently framed risks over compensating pursuers. If the objective is to provide 100% compensation the “standard adjustments” raise a probability of overcompensation for pursuers. This has been acknowledged by the Scottish Government in the Policy Memorandum which states that, in changing the methodology away from a rate based on ILGS, the Scottish Government has made provision for a portfolio constructed on the basis of portfolios described as cautious. The Scottish Government believes such portfolios would meet the needs of an individual in the position of a hypothetical investor who is described in the legislation. If the cautious portfolio approach is adopted and if the hypothetical investor is truly reflective of pursuers then an additional 0.5% adjustment is not required and conflicts with the 100% compensation principle. The Policy Memorandum concedes there will “inevitably be a probability of over-compensation but it will be less than if the rate were set by reference to ILGS.” The likelihood of overcompensation is increased if the rate assessor chooses to round the rate of return down instead of up.

3. In terms of who sets the rate, the Scottish Government proposes to have the rate reviewed by the Government Actuary rather than Scottish ministers (as is the current situation). It believes that this will remove the setting of the rate from the political sphere “where there is the potential for pressure from external interests to attempt to influence the outcome” and “should provide fairness to all parties involved”. What are your views?

On one view, the aim of taking the decision of how the discount rate is set out of the political sphere is sensible. However, accountability is key. The Bill as tabled does not in any event remove the setting of the rate from the political sphere as the specification for the investment portfolio and alterations to the standard adjustments remain within the power of the Scottish Ministers.

The suggestion in the UK Government’s consultation on the discount rate is that the rate is to be set by the Lord Chancellor in conjunction with a panel of experts. We consider that the Bill should make provision for the rate assessor to consult with an independent panel of experts.

4. The Scottish Government has chosen to lay down in detail how the rate should be calculated in legislation. Do you support this proposal over the approach taken in England and Wales of leaving much more to the discretion of the Lord Chancellor and an expert panel?

As above, we believe the rate assessor should consult with a panel of independent experts. The purpose of this being to advise the decision maker on the prevailing economic conditions and the reality of how pursuers are actually investing their damages, together with the rates of return being achieved / forecast to be received.

5. With no statutory requirement for the discount rate to be reviewed regularly, currently there can be a 15 year gap between reviews in Scotland. The Government Actuary will start a review of the rate on the date on which the relevant provisions of the Bill are brought into force. Thereafter they will be required to start a regular review every three years and the Scottish Ministers may decide on an additional, out-of-cycle review, but which would not disrupt three-yearly reviews. Do you have any views?

The timescales for reviewing the discount rate in the Bill are clear. However, we would observe that the majority of catastrophic injury claims take longer than three years from the date of the incident to settlement of the claim. Therefore, a three yearly review risks claims driving behaviour where parties either seek to drive claims toward settlement or hold claims which ought to be resolved back from settlement, depending upon whether any change in the rate of return is expected to be favourable, or not. A shorter period for review risks creating uncertainty and instability. This is an outcome that could be avoided if the rate was reviewed either on a five yearly cycle or when there is a significant change in market conditions for investments that trigger a review of the rate.

There is provision for additional out of cycle reviews which can be used if required in the event of a significant change in the economy/market conditions. It is our position that, where such an out of cycle review takes place, the clock should start ticking for the next review from the date of the out of cycle review and not from the previous review as the Bill currently proposes.

6. In changing the methodology to move away from a rate based on Index-Linked Government Stock (ILGS), the Bill makes provision “on the basis of portfolios described as cautious and which we believe would meet the needs of an individual in the position of the hypothetical investor who is described in the legislation”. The Scottish Government also states: “The portfolio does reflect responses to the consultation that investing in a mixed portfolio of assets provides flexibility and is the best way of managing risk”. Do you think the Scottish Government is justified in assuming that injured people have access to the necessary expertise to achieve this?

This question is better addressed by pursuers’ solicitors. However, in our experience, claims in which the discount rate makes a major impact tend to be substantial claims involving significant claims for future loss. There appears to us to be no reason to believe that pursuers do not have access to the relevant expertise. Settlement discussions often imply that financial advice has been or will be obtained.

Part 2

7. Where damages for personal injury are payable, the Scottish courts may make a periodical payments order but only where both parties consent. This differs from England and Wales, where the courts have the power to impose such an order. Part 2 of the Bill will give courts the powers to impose periodical payments orders (PPO) for compensation for future financial loss. Respondents to recent consultations overwhelmingly supported courts in Scotland having the power to impose periodical payment orders, seeing this as a way of reducing uncertainty as well as the risk of over-/under-compensating pursuers. What is your position?

The lack of detailed provisions in the existing law in Scotland in relation to the procedures for entering into PPOs has been far from ideal. PPOs remove investment risks for pursuers who have the lowest risk appetite and should be capable of being ordered by the court in suitable cases. The Bill helpfully provides clarity on the considerations that will be taken into account when entering into a PPO.

8. How well used do you think the provisions would be in practice? What impact do you think the requirement on the court to ensure the “continuity of payment under such an order would be reasonably secure” would have?

It is difficult to predict how frequently PPOs will be used. On the basis of the current law parties can consent to settlement on the basis of a PPO. However, to our knowledge, this rarely happens.

The provision in relation to the court being satisfied that continuity of payment under a PPO is reasonably secure is important. We understand the same requirement exists for PPOs south of the border. This is unlikely to have any material impact given the majority of compensators are likely to be insurers or public bodies.

9. The proposals in the Bill would allow the courts to revisit a compensation award where there has been a change of circumstances (although only where this has been identified in advance). This would represent a change to the current law. Do you have any comments?

The proposals in the Bill would allow the courts to revisit a compensation award in limited circumstances. This is important to allow the principle of 100% compensation to be achieved. It is not clear from the proposed wording in the Bill that causation of the change to the pursuer’s physical or mental condition, arising from the original accident under which a PPO was granted, must be established for a variation or suspension. It may appear to be stating the obvious to stipulate that causation is established but it would do no harm to expressly say so for the avoidance of any doubt and to avoid satellite litigation.

We would also suggest the wording in section 2E(2)(a) be revised to mirror the current test applied by the Scottish courts in relation to motions for provisional damages i.e. “a significant improvement or serious deterioration in the pursuer’s physical or mental condition...”.

10. The Bill overall is intended to support the Scottish Government’s national outcome that: “We have strong, resilient and supportive communities where people take

responsibility for their own actions and how they affect others". Do you have any comment?

No

11. In previous consultations in this area, views have tended to be polarised between pursuer and defender interests. Does the Bill, in your view, manage to balance these interests?

The Bill is mainly relevant to people who have been in the unfortunate situation of experiencing personal injury as a result of the fault of another in the circumstances where those injuries will have a significant impact on their future capabilities. The Bill will allow such injured people and the compensators to have some comfort in the knowledge that the Scottish Government has taken significant strides towards considering the methods and principles of fairly quantifying such claims. The aim of the Bill is to ensure that injured people are neither significantly under or over compensated and that the procedures for compensators are structured, fair and transparent.

As stated at the outset, whilst the Bill is a welcome step forward, there are some aspects which merit further consideration to ensure a true balance is achieved between the interests of pursuers and the impacts on society in terms of increased insurance premiums and increased costs on the public purse including, but not limited to, the NHS.

Other comments

12. Are there any other aspects of the Bill you wish to comment on?

We refer to the answers above.