

T: 0300 244 4000
E: scottish.ministers@gov.scot

Gordon Lindhurst MSP
Convener
Economy, Energy and Fair Work Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

12 December 2018

DAMAGES (INVESTMENT RETURNS AND PERIODICAL PAYMENTS) (SCOTLAND) BILL STAGE ONE REPORT

I would like to thank the Committee for their very thorough and considered Stage One Report on the Damages (Investment Returns and Periodical Payments) (Scotland) Bill. In particular I am pleased to note the Committee's recommendation that the general principles of the Bill be agreed to and the positive nature of the Report.

I note that the Committee have made a number of recommendations which would require action on the part of the Scottish Government. I thought it would be helpful, ahead of the Stage One Debate to confirm that the Scottish Government is reflecting on the views of the Committee in these areas and I have set out some more detail below.

Recommendation 4

The Committee seeks more detail from the Scottish Government on the commitment to keep the 30-year assumed period of investment under review, including the degree of divergence that would suffice for it to introduce more than one interest rate.

Ahead of each review the Government Actuary's Department (GAD) will check the returns on the portfolio over different time periods, probably at 10/15 years and 50 years. If the outcome of that exercise demonstrates a significant divergence in returns, that will point to the use of more than one rate for different lengths of award being more appropriate in the pursuit of the goal of 100% compensation.

For both the choice of assumed investment period and the potential use of split rates, GAD have cautioned against setting out an approach that is too formulaic (e.g. a split rate will be used if there is a difference of x%), as this would be spurious accuracy. Whilst their report

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

contains assumed/simulated investment returns over different time horizons, there is a large degree of uncertainty in these. The interpretation of the tables will therefore require the use of judgement rather than the application of a formula.

Recommendation 8

I note that the Committee believes that there is merit in applying the personal injury discount rate which was in force at the time the claim was raised rather the discount rate at the time the claim is settled. In this way the Committee would hope to avoid the deliberate delaying of a settlement on either the part of a pursuer or defender, when a change to the rate is anticipated in order to obtain a more advantageous outcome. This is commonly know as 'gaming'. The Committee invites the Scottish Government to set out how this might be achieved and whether it can be done through the Bill or otherwise.

Our initial thoughts are that to peg the personal injury discount rate in this way, may prove detrimental to pursuers. The very obvious illustration of this would be the obverse of what happened when the rate changed from 2.5% to -0.75% in 2017. At that time, defender interests made much of the impact on the value of individual claims and indeed the Committee heard about this first hand. In the Financial Memorandum, which accompanied the Bill, we set out in a table at paragraph 25 examples of claims that had increased dramatically as a result of the change in rate. Whilst much of that impact was due to the lengthy time between reviews, if a claim value before a rate change was for example £4m and after the rate change is £6m, we would have a concern that this approach would effectively under-compensate a pursuer by £2m.

We know also that in the case of catastrophic injuries that occur at birth, settlement is delayed for many years. This is usually in order to ascertain the extent of the injuries, particularly if they are brain related. Again in these types of cases, we would be concerned that applying the discount rate at the time the action is raised may be significantly detrimental to either the pursuer or the defender, depending on the different rate applicable at the point of settlement.

It would seem to be make little sense for damages to be calculated by reference to the rate of return that applied at any point in time other than the point in time at which damages are calculated. The role of the court is to select an appropriate multiplier for the anticipated period of future loss reckoned from the date of the award. Using the most up to date rate of return to calculate the multiplier will maximise the chances of the multiplier being accurate. Using an out of date rate of return does not seem appropriate and seems to prioritise the control of 'gaming' over getting the award right. I think this recommendation needs some further careful consideration and I will of course revert once we have done that.

Recommendation 9

I note that the Committee believes reviews every five years would be preferable to every three years.

We have listened carefully here to those who gave evidence and to the conclusion of the Committee that in the 'interests of finding the balance between flexibility and certainty, that five years would be preferable to three'. We have also borne in mind that in England and Wales, the equivalent legislation there was amended to move from a three year review period to one of five years. Bearing all of this in mind we agree with the conclusion of the

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

Committee and will bring forward an amendment at Stage Two to alter the frequency of review from every three years to every five. The facility to call for an out-of-cycle review will of course remain.

Recommendation 10

I note that the Committee would like the Scottish Government to bring forward amendments to bring more weight to the pursuer's views when a court is asked to decide on a PPO. The Committee helpfully suggested that this might be achieved by way of providing for a statutory presumption in favour of the pursuer.

The policy here is of course to provide for the first time, the courts with the necessary powers to make an order for periodical payments without the consent of the parties. But not only that, the courts are required to always consider whether awarding damages by way of periodical payments is appropriate. In fulfilling this duty the courts will inevitably weigh up the views of both the defender and the pursuer in arriving at a decision on whether or not to impose an order.

We would be keen not to undermine or limit the courts' ability to make the best decision given all the facts and circumstances of a particular case but will reflect further on this matter.

Recommendation 10

I also note that the Committee asks the Scottish Government to outline how it will promote the use of PPOs beyond the public sector. As the Committee recognises, the numbers involved are not large and are unlikely to ever become significant. Experience in England and Wales bears this out. Increasing the use of PPO's beyond public sector cases is not solely within the gift of the Scottish Government. There are other factors in play, a defender must be reasonably secure but pursuers too are reported as having many reasons for wishing to opt for a lump sum over a PPO.

I think the best way forward therefore would be to liaise with the courts on how the use of PPO's could be encouraged in appropriate cases and I will arrange for my officials to do that. This is likely to be when we discuss the need for Rules of Court to support the Bill's provisions. Having said that the fact that the Bill obliges courts to consider PPOs in every relevant case is in itself a significant encouragement. I know that the Ministry of Justice is also investigating whether or not there are ways in which any obstacles to the use of PPO's can be removed and take up improved and I will ensure that we liaise with them in order to benefit from any lessons learned.

Recommendation 11

In terms of undertaking to report back to the Committee in 12 months on the outcome of our consideration of whether the Motor Insurers Bureau can be designated as a reasonably secure body, I would be happy to do so.

I hope this information is helpful to the Committee and I look forward to the Stage One Debate on the Bill.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

ASH DENHAM

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

St Andrew's House, Regent Road, Edinburgh EH1 3DG
www.gov.scot

