ECONOMY, ENERGY AND FAIR WORK COMMITTEE

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

SUBMISSION FROM: FOIL (The Forum of Insurance Lawyers) – Scottish Large Loss SFT

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

FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

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 FOIL is supportive of the Bill in principle subject to the observations made below:-

Review of the legislation in this area is welcomed and is indeed long overdue. The previous Discount Rate of 2.5% remained in place for 15 years and was clearly not reflective of the actual rate of return on investments. A review of the methodology in terms of how the rate should be set is also 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.

FOIL 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. Urgent review of the current rate is required as on the basis of a mixed portfolio the current discount rate is also leading to the overcompensation of pursuers.

The aim of the Bill is to ensure the law of how 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 aims one aspect which departs from the 100% principle is the “standard adjustment” which the Government itself acknowledges will result in the “probability of over-compensation”. This is neither fair nor credible as per the stated aims the Bill wishes to achieve.

The knock on impact of over compensation is not only in relation the damages awarded to pursuers but also the fees that pursuers’ agents can recover. As a result of an amendment, supported by Scottish Ministers, to the Civil Litigation (Expenses
and Group Proceedings) (Scotland) Act, any damages for future loss payable to a pursuer can be the subject of a deduction under a Damages Based Agreement to pay to their solicitors as fees.

The impact of over compensation impacts not just on insurers but on their policyholders in terms of the premiums they require to pay and it has a detrimental impact on the NHS in Scotland as well as other public bodies, all of which impacts on Scottish society as whole.

FOIL is pleased to see PPO’s coming across the border but has concerns that if a different discount rate is applied north and south of the border it may encourage practices such as forum shopping. There is no obvious reason why the discount rate should be different across the two jurisdictions.

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?**

FOIL agrees with the stated overall aims of the Bill “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”. The method and process suggested are clear, certain, regular and transparent however for the reasons given above the proposed “standard adjustment” is neither fair nor is it credible.

The objective is to provide 100% compensation. The Policy Memorandum states 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 and which the Scottish Government believes 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 for the hypothetical investor which mirrors an investor such as a pursuer who has received an award of damages 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.”

Whilst the Bill undertakes to set the rate taking into account a “notional portfolio” rather than ILGS by adopting the “standard adjustment” approach the same problem of over compensation occurs but simply by an alternative route.

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. The proposed standard adjustment does not achieve this balance.
Further information should be produced on the “notional portfolio” to allow an informed view to be taken on whether this approach meets the stated aims of being fair and credible.

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?**

FOIL’s position is that the fixing of the rate ought to remain a statutory one. The rate assessor needs to be politically accountable. Whilst input from the Government Actuary is welcomed the approach in England & Wales of having an independent panel has the added benefit of having wider input from experts with the necessary qualifications and experience to feed into the decision making process.

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?**

FOIL believes that identifying the correct discount rate is not something which can be achieved by the application an arithmetical formula alone. The rate setter should set the discount rate with reference to the behaviour of a reasonable pursuer. In doing so, there will inevitably be a requirement for the rate setter to exercise judgment. The rate setter should be politically accountable in the exercise of that judgement.

The proposal that the discount rate is fixed by the Government Actuary does not reflect the majority view of those responding to the 2017 consultation. The majority of respondents to that consultation supported a system whereby the rate was fixed by the Lord Chancellor and her Scottish counterparts.

The imposition of a prescriptive calculation methodology risks the discount rate being fixed at a figure which does not achieve the ultimate purpose of the discount rate; to ensure that pursuers are neither over nor under compensated.

While the aim that the discount rate is fixed in a manner which is clear, certain, fair, regular, transparent and credible, might be laudable; the proposed system does not reflect the reality of what is an incredibly difficult exercise. It is an exercise which cannot be achieved by the application of a scientific process and one which, FOIL believes, also requires the application of political judgment. For that reason, it is also one for which the rate setter should be politically accountable.
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?

FOIL is content that there should be a fixed period for review. However FOIL believes that a period of five or seven years would be more appropriate.

Member firms’ experience leading up to and following the change to the rate in March 2017 has been that speculation about the discount rate has impacted on the litigation progress and also negotiation tactics at settlement.

When the Civil Liability Bill was amended to allow for a period of five rather than three years it was observed by Lord Keen that the change, “could help reduce the effect of the litigation practice of trying to game the system”

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?

Member firms have no direct knowledge of the investment advice obtained by pursuers. However settlement discussions often imply that that such advice has been or will be obtained.

FOIL has no reason to believe that pursuers would be unable to access such expertise.

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?

We support Part 2 of the Bill whereby Scottish courts will be given the power to impose a PPO on parties without consent. It is entirely appropriate that the law in Scotland is brought into line with the existing provisions in England and Wales. PPOs provide an important alternative for pursuers who are more risk averse than the “hypothetical investor” identified in the Bill who would favour a lump sum payment. PPOs avoid the need for an individual to rely upon investment income and mean that there is no danger of a lump sum compensation award becoming exhausted before the end of the expected term of the award.

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?

We understand that there is a low uptake of PPOs in England and Wales on a year to year basis. With the number of higher value Scottish claims that might merit the consideration of a PPO amounting to only a fraction of the equivalent claims in England and Wales, we do not anticipate a significant number of PPOs in Scotland, albeit we would expect to see an increase from the current position. In addition, the proposals to change the approach to setting the discount rate as laid out in the Bill may yet lead to an increased appetite for PPOs. We do not anticipate any material impact arising from the requirement that continuity of payment under a PPO must be reasonably secure.

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?

We support the proposals to allow the Scottish courts to vary or suspend periodical payments where there is express provision in the PPO to do so. We consider that such proposals are a key element to achieve the fundamental objective of 100% compensation, minimising the risk of significant over or under-compensation. We would, however, suggest that the wording used in section 2E(2)(a) is revised to “a significant improvement or serious deterioration in the pursuer’s physical or mental condition…” instead of the current wording “a change in the pursuer’s physical or mental condition…”’. This suggested wording would be consistent with the current test applied by the Scottish courts in relation to awards of provisional personal injury damages under section 12 of the Administration of Justice Act 1982 and, as such, might assist in reducing the risk of satellite litigation arising from the interpretation of this part of the Bill. It would also be consistent with the intention that the system be clear, certain, fair, regular, transparent and credible.
Overall

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?

We are pleased to see that Scotland will have the same system as England and Wales in relation to the courts powers to impose PPOs. Where pursuers are risk averse or where there is a real uncertainty about life expectancy then access to PPOs is important. We need to ensure that the principle that pursuers should receive ‘100% compensation, no more, no less’, is closely adhered to, making it fairer for all. We believe the current discount rate of minus 0.75% has created a system where pursuers are over-compensated for their losses. The cost of over-compensation is one which is otherwise met by insurance customers and tax payers in Scotland. We support overall fairness and the concept of balance between members of society. The process for setting the discount rate must strike that balance and must not lead to over- or under-compensation.

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?

Subject to our concerns outlined in earlier answers, if this rate setting process is set alongside greater access to PPOs for those for whom a PPO would be most suitable, then the overall outcome is a system that is fairer for all. Subject to some concerns we are hopeful that the Bill should restore balance between the interests on both sides.

The need for regular reviews is supported by FOIL. FOIL believes that a period of five or seven years would be more appropriate.

Other comments

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

We are concerned that the Bill will produce a rate lower in Scotland than that produced by the process in England & Wales. This outcome is likely to leave Scotland with the lowest single discount rate, suggesting an ongoing lack of balance in the setting of the rate in Scotland.

As a result of an amendment, supported by Scottish Ministers, to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act, any damages for future loss payable to a pursuer can be the subject of a deduction under a Damages Based Agreement to pay to their solicitors as fees. One effect of setting the discount rate on an over-cautious basis would be that, just as the amount of damages for future loss would increase, so too would the amount which a solicitor could agree with a pursuer to deduct from those damages for their fees.