

ECONOMY, ENERGY AND FAIR WORK COMMITTEE**DAMAGES (INVESTMENT RETURNS AND PERIODICAL PAYMENTS)
(SCOTLAND) BILL****SUBMISSION FROM: Thompsons Solicitors****SUMMARY AND INTRODUCTION**

In the broadest sense we support the intention behind the Bill. That is to say, we support the extension of the rules in relation to Periodic Payment Orders (PPOs) and we support the creation of the statutory basis of taking investments returns into account in awards for future losses.

However, we disagree with the way that these objectives have been executed in the Bill. We have particular and significant concerns about the approach taken to investment rates. In our opinion the approach serves only to benefit the insurance industry. It disadvantages victims of accident, injury and disease. Perversely, it causes the most damage to the victims of the most serious injuries and diseases.

The insurance lobby have been extremely vocal on this subject and many others for a considerable period of time. The Scottish Parliament and successive Scottish Governments have shown themselves to be fairly immune to the lobbying activities of the insurance industry, unlike the Parliament at Westminster. Indeed, the Scottish Government have brought forward progressive legislation aimed at rebalancing the “asymmetric relationship” in personal injury litigation (for example with the introduction of QOCS via the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2017). It is with regret that I must suggest that the Bill as currently drafted runs contrary to the general policy approach of the Scottish Government and will make the asymmetrical relationship more asymmetrical.

It is noteworthy I think, that the same organisations tend to provide written evidence in relation to Bills such as the current one and the aforementioned Civil Litigation Bill. Personal injury litigation is particularly adversarial and the divide in the opinions between these organisations tend to reflect that adversarial approach in the evidence given. The evidence submitted in relation to this bill is slightly different in that evidence has been submitted by 3 neutral parties. They are Professor Victoria Wass, Personal Financial Planning Ltd and the Institute and Faculty of Actuaries. All 3 of those neutral contributors have significant concerns about the approach that the bill takes in relation to return on investment. All 3 express concerns about the fact that the hypothetical portfolio reflects the attitude of a cautious investor. All 3 express the view that the approach should be one of a risk free investor. I agree completely with that position and suggest that because the evidence is being given by entirely neutral parties a significant weight should be placed on those views.

A CAUTIOUS INVESTOR

The approach that the Bill takes effectively defines those who receive compensation from personal injury claims as investors and as financial risk takers. As I will explain below, it goes further than that. The Bill as currently drafted forces victims of a serious accident to become an investor and risk taker irrespective of their personal views on risk.

Thompsons Solicitors reject entirely that classification of victims and oppose fundamentally the consequence of the bill forcing all victims of serious personal injury to become investors.

Victims of personal injury are just that – victims. They have suffered injury as the result of negligence/breach of duty with another party. By law they are entitled to restitution; to receive a level of compensation that will put them back into the position that they would have been but for the accident. A victim of personal injury should not need to do anything to achieve restitution. Yet, as the Bill is currently drafted, a victim will not achieve restitution unless they invest the compensation that is awarded to them and they invest the money in a way that carries a risk. This is inherently wrong and in fact runs entirely contrary to the notion of restitution.

An injured party should receive a sum of money that provides restitution without the injured person having to take any risk whatsoever. Investment rates should of course be taken into account but it should be assumed that any investment would be a no risk investment because we, as society, should not ask victims to take any financial risk with their compensation. That is particularly the case when, as is the consequence of the Bill as currently drafted, the victim is only being asked to take a risk with their compensation to save insurance companies money. There is something quite morally bankrupt with that picture.

I would therefore strongly argue that the model should be based on the assumption that the victim of personal injury need only adopt a no risk approach to investment.

The fact that some victims may take a different approach to risk and secure a higher return is irrelevant. Indeed, even if it was true to say that the vast majority of victims would take such an approach is irrelevant. The insurance lobby and the policy memorandum seem to suggest that such circumstances results in “over compensation”. Such a view is simply incorrect. It actually discriminates against victims of serious injury as compared to individuals who are working and earning an income through employment. Employees have a guaranteed wage. They choose how to spend that income. Some choose to invest a portion of their income and indeed those who invest are commended for doing so by politicians. However, there is no requirement for employees to invest their money and accordingly to take any risk with their money. It is a matter entirely for them. However, as the Bill is drafted, the choice that is open to employees to invest or not is no longer open to victims. Unless they invest their money in a cautious portfolio they will be at a financial disadvantage.

NO RISK INVESTMENT

I firmly believe that the victims of personal injury should only be required to adopt a no risk approach to investment. There seems to be some controversy around ILGS. That issue is however in many ways a red herring. The issue of paramount importance is a political one: whether or not the victims should be expected to a cautious or no risk approach to investment.

If there is a problem with ILGS providing a sufficiently stable rate of return for the purpose of basing the discount rate then a solution must be found to this problem rather than abandoning the concept that lies at the heart of Wells –v- Wells. The current approach in the Bill throws the baby out with the bath water.

If the concern according to paragraph 14 of the policy memorandum is that victims may be under compensated using rates based on ILGS then two solutions may present themselves. Firstly, an alternative no risk model must be found. The financial markets may have moved on but it simply cannot be correct to say that financial advisers are not offering no risk investment models. Further research on this issue is required. Secondly if the problem is under compensation then this can simply be reflected in the discount rate. The calculation for the award of damages should be based on ILGS minus an additional percentage to reflect this risk. Such a calculation cannot be beyond the wit of governmental actuaries.

We have various other concerns with the drafting of the bill all of which will fly away if the no risk approach I and others have advanced is adopted. For completeness I should set out those concerns here as an alternative argument.

THIRTY YEAR INVESTMENT PERIOD

I am unsure why that figure is considered the appropriate one and the impact it may (in over and under compensation) for victims of fatal diseases with short lifespans, such as mesothelioma victims, or young children who suffer significant catastrophic injury, where the financial loss for a period significantly longer than 30 years.

THREE YEARLY REVIEW AND THE IMPACT UPON LITIGATION CONDUCT

I share this concern. I would suggest that the solution here is for the new rate only to apply to court actions raised after the investment rate changes. In other words, the rates to be used when a case is being settled or an award handed down by a judge should be the rate at the time that the case was litigated irrespective of whether or not the rate subsequently changed during the course of the litigation.

0.5% ADJUSTMENT FOR INVESTMENT AND MANAGEMENT FEES

In my experience this is lower than the market rate. More evidence is required on this subject and the adjustment needs to be increased.

UK GOVERNMENT ACTUARY

I am extremely surprised with the current position in the Bill. It runs contrary to the majority of the consultation responses. The reality is that the setting of the discount rate is a quasi-political decision and, in the context of the governmental actuary, by someone fulfilling a quasi-governmental role. Given the very different views that the Scottish Government and Scottish Parliament have taken to Westminster in respect of important issues surrounding civil justice I simply cannot understand the current position. At the very least, I think that a full explanation should be given for the decision. I would, however, like the vast majority of the consultation responses, suggest that the Scottish Government should appoint its own expert or expert panel.

We finally have two comments in relation to PPOs that are freestanding from all of the comments above about the investment rate of return.

COMPULSORY PPOs

I have acted for Scottish people who have suffered catastrophic injury in circumstances where they have had to pursue claims in England. From that experience I know that for victims of serious injury it can be extremely distressing to have a PPO forced upon them without their consent. Securing compensation in a case of catastrophic injury is normally a very long and arduous process. Victims of catastrophic injury feel empowered by their compensation. Being told that a significant proportion of their compensation must be converted into a PPO can destroy that sense of empowerment. It can create the sense that the wrongdoer has "had a win" at the very last moment. The entirely understandable view that some victims hold is that a PPO results in the insurer "keeping their compensation" which the insurer adds to its enormous investment fund. Consequently the victims see their damages as being used to "make the insurance company" far more money from than the victim would have been able to achieve and in fact more than the victim will receive by way of PPO payments.

I fully recognise that PPOs are a good thing but not in all circumstances. For the reasons set out in the preceding paragraph I would submit that they should only be used where the pursuer consents.

REVIEW OF PPO WHEN CIRCUMSTANCES CHANGE

I have no concerns with the general principle here. I however think that it is important to recognise that this will involve the claimant going through additional court processes for which they will require legal representation. The principles of Qualified One Way Cost Shifting that are now enshrined in the 2017 Act should apply to PPO reviews such that the pursuer will not be exposed to the risk of defenders' costs if they fail to prevent an attempt to reduce the PPO or fail in an attempt of their own to increase a PPO unless their conduct amounts to an abuse of process.