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

FINANCIAL MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial Memorandum is published to accompany the Damages (Investment Returns and Periodical Payments) (Scotland) Bill, introduced in the Scottish Parliament on 14 June 2018.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 35–EN);
- a Policy Memorandum (SP Bill 35–PM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 35–LC).

3. This Financial Memorandum has been prepared by the Scottish Government to set out the costs associated with the measures introduced by the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

4. The main effects of this Bill will be to:

- Put in place a new statutory regime for calculating the discount rate which should be applied to future pecuniary losses for personal injury cases;
- Establish a timeframe for the review of the discount rate ;
- Provide that the task of reviewing and assessing the rate will fall to the Government Actuary;
- Give courts the powers to impose periodical payments orders for future pecuniary loss.

BACKGROUND – DISCOUNT RATE

5. Where damages for personal injury are awarded for future loss in the form of a lump sum, that award is adjusted to reflect the fact that the injured person is able to invest the money before the loss or expense for which it is awarded has actually occurred. That investment will generate a

return. The factor by which the award is adjusted is determined by the personal injury discount rate which represents the appropriate rate of return on investing the award.

CURRENT POSITION – DISCOUNT RATE

6. It is currently for the Scottish Ministers to set the discount rate for Scotland, under section 1 of the Damages Act 1996. The approach used is in line with the decision of the House of Lords in *Wells v Wells*[1] where the court considered that pursuers were to be deemed as very risk averse investors and that the discount rate should be based on an investment portfolio which protects against market risk and inflation. At that time, 100% investment in Index Linked Government Stock (ILGS) was regarded as the most suitable proxy.

7. The last rate change took place on 28 March 2017 when it moved to minus 0.75%. Prior to that it had changed to 2.5% in 2002. On both occasions the rate was set with reference to a three-year average of real gross redemption yields on ILGS.

8. In *Wells v Wells* the House of Lords decided that pursuers in personal injury cases were not in the same position as ordinary investors. The lump sum awarded to meet future pecuniary loss should: fully compensate the pursuer (neither more nor less); be sufficient to meet all the expected losses in full as they are expected to fall due without shortfall; be exhausted (along with the income assumed to be earned on the capital sum during the period of the award) at the end of the period for which the award is made; and be set on the basis that personal injury claimants are to be treated as very risk averse. Such pursuers, in the view of the House of Lords, could not leave the ability to pay for essential services to the risk of fluctuations of the investment market. The House of Lords was of the view that the discount rate should be the rate of interest expected where the investment is risk-free, so that when the investor needs the capital its value will not have been eroded by inflation. In their view 100% investment in ILGS was the most suitable proxy.

9. Whilst many of the characteristics of a pursuer as set out in *Wells v Wells* remain relevant and central to this issue there is a question mark over the continued applicability of assuming investment in ILGS only.

10. Throughout the consultation process[2] related to reforming the law in this area, some stakeholders have expressed concern that a rate linked to very low risk investments (ILGS) may result in some pursuers being over-compensated. It has recently been said that the current rate

[1] [1999] 1 A.C. 345

[2] *Damages Act 1996: The Discount Rate How Should It Be Set?* https://consult.justice.gov.uk/digital-communications/discount-rate/supporting_documents/discountratedamagesact1996consultation.pdf ; *Damages Act 1996: The Discount Rate - Review of the Legal Framework* in 2013 https://consult.justice.gov.uk/digital-communications/damages-act-1996-the-discount-rate-review-of-the/supporting_documents/damagesact1996discountrateconsultation.pdf *The Personal Injury Discount Rate: How it should be set in future;* https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/supporting_documents/discountrateconsultationpaper.pdf

consistently compensates for injury at more than the 100% required by law. Awards currently average 120% to 125% even after management costs and tax.[3]

New discount rate regime

11. In moving to a new methodology the intention is to properly balance any excesses of potential over-compensation with the chances of a pursuer being exposed to the risk of running out of compensation.

12. 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 the hypothetical investor who is described in the legislation.

13. In terms of characteristics, the hypothetical investor will have received a lump sum award of damages to meet future costs and any loss of future earnings which they will require because of the injury/incapacity they have suffered in order to put them in the position they would have been in but for the injury.

14. The hypothetical investor will be properly advised; there will be withdrawals from the fund to meet damages related needs from time to time over the duration of the award; and those withdrawals will exhaust the fund at the end of that period. The hypothetical investor's objective is to ensure that the award is capable of meeting the relevant losses in terms of both cash-flow and duration of the award. The hypothetical investor has no other funds or income and relies entirely on the lump sum to meet their injury-related needs.

15. To take account of the need to invest the funds, there will be an adjustment for investment costs and tax. As already noted, this is not an exact science and also because every pursuer's individual circumstances are different, in order to reduce the probability of under compensation a further deduction from the rate of return will be set in the legislation. This is intended to recognise that a seriously harmed pursuer is unlikely to be able to meet their needs if they are under compensated. The corollary is that there will inevitably be a probability of over compensation but it will be less than if the rate were set by reference to ILGS.

Frequency of review – discount rate

16. The Scottish Government recognises that the rate change in 2017 caused concern and impacted adversely on defenders and insurers. The severity of impact was attributable to the fact that the rate had remained unchanged for a significant length of time.

17. The Bill makes provision for the rate to be reviewed at regular three-yearly intervals and also enables the Scottish Ministers to instigate earlier reviews. This approach is intended to build in some flexibility to take account of dramatic shifts in the market which may occur during

[3] Lord Keen of Elie https://hansard.parliament.uk/Lords/2018-04-24/debates/9EE297D1-7EB7-481D-ADAF-70F88B5612F0/CivilLiabilityBill(HL)

the three-year period. Notwithstanding a market crash or significant market incident the rate will be reviewed every three years.

18. Placing reviews on a regular cycle should ensure that going forward changes in the rate will be expected, transparent and incremental. It should also ensure that the discount rate is reflective of current market conditions. The impact on defenders of any rate decrease should be capable of being managed. Pursuers should not be exposed to long periods of over or under compensation due to changes in market returns.

Rate-assessor – discount rate

19. The Bill sets out the investment needs of the 'hypothetical investor' and an initial portfolio which, when applied with the relevant adjustments, is intended to meet the needs of a pursuer. The Scottish Ministers will have powers to ensure that the data relating to the portfolio and adjustments is current and remains consistent with the needs of the 'hypothetical investor' ahead of each review.

20. Currently before setting the rate, the Scottish Ministers are required to consult with the Government Actuary's Department. A fee is currently paid for the advice offered by GAD. The Bill provides that it will no longer be the Scottish Ministers who set the rate; rather it will be for the Government Actuary to assess the discount rate in line with the new statutory regime.

21. The Bill therefore includes provision to enable the Scottish Ministers to pay the Government Actuary for their work in assessing the rate. As the Bill sets out that the rate should be reviewed at least every three years, it follows that there will be a fee payable at least every three years.

Possible impact of a change in the discount rate

22. It would be expected that, at any given time, a move to a method based on a mixed portfolio, albeit with adjustments to be deducted from the rate of return generated by the portfolio, would result in a higher rate of return and therefore a reduction in the cost of settlements compared to a rate of return generated by investment in 100% ILGS. What those comparative returns will be is of course dependent upon the level of returns generated at the time of the review. However, the Bill itself will not change the discount rate and in terms of the illustrative figures set out below, these are not direct costs or savings arising from the Bill.

23. The legal framework under the Bill assumes that a pursuer is able to bear a higher level of risk than currently assumed. As a result it might be expected that, at least initially, the rate will increase. However this may not necessarily be the case it will be dependent upon the outcome of the review. The rate change is likely to still be significantly lower than the rate in place from 2002 to 2017. Subsequent rate changes may go up or down in relation to the rate at the time of any review, depending upon the returns achievable from the investment strategy which forms part of the methodology.

24. It follows that the higher the rate, the less a defender will need to pay by way of a lump sum for future pecuniary loss. The shift in March 2017 where the rate was reduced by 3.25% therefore resulted in significant increases to the amount of damages which required to be paid.

The scale of the change in March 2017 is due mainly to the fact that the rate had remained unchanged for around 15 years and in that time, particularly after 2008, the market changed dramatically. By way of illustration the table below sets out three examples of the impact, on the future pecuniary loss part of the award, of the March 2017 rate change.

25. The figures demonstrate that the scale of the impact is influenced by the duration of the claim i.e. the longer the period over which the damages are to be paid the greater the expected increase. There is one view that an individual who invests in the long term and is able to 'sit out' peaks and troughs in the markets should get a better rate of return. However where a pursuer needs to withdraw funds for a regular income, they may not be able to recover from a trough in the market because their capital will have been diminished.

Example	**Value of claim at 2.5%**	**Value of claim at -0.75%**
A catastrophic brain injury of a male baby at birth where future pecuniary losses have been calculated at £40,000 a year for life.	£1,416,400	£5,149,200
A 19 year old male following a severe road traffic accident where future pecuniary losses have been calculated at £20,000 a year for life.	£646,200	£1,816,000
A 58 year old woman severely injured as the result of a workplace accident where future pecuniary losses have been calculated at £25,000 a year for life.	£519,000	£879,250

26. The portfolio and adjustments in the Bill would currently produce a discount rate of 0.0%. When the initial review is carried out by the rate-assessor next year, it may produce a different rate depending on any movement in investment returns. As an illustration only, based on the figure of 0.0% this would reduce the estimated value of a claim but not to the extent of pre March 2017 claims. Using the same examples as outlined above the table below illustrates what a move from the current rate to the illustrative rate would mean in terms of the value of these claims.

Example	**Value of claim at -0.75%**	**Value of claim at 0.00%**
A catastrophic brain injury of a male baby at birth where future pecuniary losses have been calculated at £40,000 a year for life.	£5,149,200	£3,558,400
A 19 year old male following a severe road traffic accident where future pecuniary losses have been calculated at £20,000 a year for life.	£1,816,000	£1,366,200
A 58 year old woman severely injured as the result of a workplace accident where future pecuniary losses have been calculated at £25,000 a year for life.	£879,250	£768,500

PERIODICAL PAYMENT ORDERS

27. As an alternate to settling a personal injury case on a solely lump sum basis, where both parties agree, it may be settled using a Periodical Payments Order (PPO). A PPO is method of settlement whereby usually the future pecuniary losses (as opposed to past losses or any damages payable for solatium[4] etc.) are paid on an annual basis in line with an agreed inflationary factor either for a set duration or until the pursuer's death. There is therefore no need for a discount rate to be applied to the future pecuniary losses as payment of these is guaranteed via the PPO and the uprating of the annual payment to reflect the agreed inflationary factor is for the defender to absorb. In this way the pursuer is not required to carry the inevitable risk of investing a lump sum or of their compensation running out because they live longer than expected. Although they do take on some small additional risks such as the default risk of the body responsible for making the payment (often an insurer). In the main however the risk remains with the defender/insurer. Conversely there is no risk to the defender of over-payment or a windfall payment to beneficiaries because the pursuer dies earlier than assumed.

28. PPOs are most likely to be used in the most catastrophic of injury cases, especially where the pursuer is very young and there is a great deal of uncertainty. At the moment the use of a PPO is subject to the agreement of the parties. This Bill however provides courts with the powers to impose a PPO even where one or both parties disagree.

29. The Bill will for the first time enable Scottish courts to impose a periodical payment order where the damages payable include future pecuniary loss and where they are satisfied that the continuity of payment under such an order is reasonably secure.

30. The courts will not be involved in all damages settlements. Very often, these are simply agreed between the parties, but where the court is involved in the award, under the Bill they must consider whether some or all of the damages should be paid via a PPO.

31. There are no definitive figures on how many cases are settled in Scotland on a PPO basis. The Institute and Faculty of Actuaries PPO Working Party has however produced some UK-wide data in relation to PPOs.[5] It shows that the use of PPOs has generally been in decline since 2010 and in 2015 there were around 45 settled PPOs compared to around 180 large claims which settled as a lump sum. This covers what it estimates to be around 90% of PPO settlements for motor and liability insurance claims, which if factored up would give a figure of around 50. The figure for Scotland on a 10% basis could therefore be estimated at five. However there is not necessarily a consistent rate of claim across the United Kingdom.

32. In addition the Clinical Negligence and Other Risks Indemnity Scheme (CNORIS) which was established to provide claims management arrangements for Scotland's NHS settles around two to three cases by PPO per annum. This makes an estimated total of seven or eight PPO settlements in Scotland every year. The numbers are therefore relatively small although the

[4] Solatium is the element of a damages award which is intended to compensate for injury to feelings or reputation or (more relevantly for personal injury cases) pain and suffering and loss of expectation of life arising from an injury as distinct from compensation for pecuniary loss.
[5] https://www.actuaries.org.uk/search/site/%2522ppo%2522

sums involved may be large and will generally be over £1m per claim. In the case of the PPO Working Group figures, more than half of the claims were between £1m and £2m with the remainder being over £2m.

33. Views were sought from stakeholders on the draft PPO provisions. There was a clear view that take-up of PPOs was influenced by the discount rate. The higher the rate the more likely a pursuer would opt for a PPO. Some respondents considered that the current rate was a disincentive to opting for a PPO.

34. There was a cautious view amongst respondents that the courts power to impose could result in more PPOs but generally respondents found this difficult to predict and indicated that in any case the numbers would inevitably be very small. There was also a view that there would be no real difference in the numbers of cases settling out of court but that it may place a different slant on negotiations if one or other party wanted to avoid the imposition of a PPO. If the courts were to begin imposing PPOs against the wishes of both parties that may encourage settlement. Inevitably there would be a bedding down period and the courts and the judiciary would need to undertake a degree of training.

35. All respondents nevertheless considered that it was important that the courts in Scotland are placed on an equal footing with their counterparts in the rest of the United Kingdom and that they brought many benefits to pursuers where settlement by PPO was appropriate.

36. For NHS clinical negligence claims, the new power in the Bill for the courts to impose a PPO has been welcomed. In addition to the benefits to a pursuer, settlement by PPO enables the impact of changes in the discount rate to be ameliorated to an extent as it allows costs to be spread and managed over a longer period of time.

COSTS ON THE SCOTTISH ADMINISTRATION

37. The Scottish Government will pay for the work carried out by the Government Actuary's Department in respect of setting the discount rate. In the past, because the rate has been changed infrequently the Scottish Government has only paid for work in 2002 and in 2017. Costs for that advice were in the region of £10,000 on each occasion.

38. The requirement placed on the Government Actuary to review the rate no less than every three years will mean that a fee for that work will be paid on that basis. The Scottish Government estimates that fee will be in the region of £50,000. This fee is as advised by GAD and is based on the anticipated time likely to be needed to complete the review and report, multiplied by the hourly charge for the staff likely to be involved in the review, including the Government Actuary. An out of cycle review would of course generate an equivalent additional fee.

39. Where the Scottish Government is a defender in an action for damages involving future pecuniary losses, they may have to pay more or less in damages in line with changes to the rate relative to the previous rate. The amount of damages they will have to pay, regardless of the rate, is what is required to fully compensate the pursuer. Enquiries were made with the firm of solicitors which handles Scottish Government personal injury claims as to how many personal injury claims have been settled by the Scottish Government which have been impacted by the

change in the discount rate, since the summer of 2016, and there have been none. This covers not only the Scottish Government and its Agencies but also Non-Departmental Public Bodies and other organisations such as the Scottish Fire and Rescue Service, the Scottish Police Authority as well as the Forestry Commission. It is anticipated that the future impact would be minimal and that the number of such cases will continue to be negligible. This reflects the fact that the personal injury cases being dealt with do not involve injuries of sufficient severity that damages are awarded for future losses. It is not therefore anticipated that any consequential change in the rate would affect these claims.

40. Ultimately the Scottish Government meets the costs of NHS clinical negligence claims. As set out in the Scottish Government's consolidated accounts for 2016-17, the total provision made by NHS boards in respect of claims for clinical and medical negligence amounted to £612 million. It is important to note that this amount is a provision which covers costs anticipated over a number of years. The average time from intimation of a claim to settlement is just under ten years. This is because these types of cases are regularly intimated shortly after a child is born but then sisted by the pursuer for several years as the claim cannot be brought to completion until the child is old enough for future care needs to be properly assessed.

41. When the rate changed in March 2017 from 2.5% to -0.75% the provision made by NHS boards was increased by £160 million. Again it should be noted that this additional provision covers a number of years. Funding to meet the additional costs was provided by HM Treasury. The expectation is that funding will continue to be provided by HM Treasury on the basis of the actual cost of the extant discount rate until equivalent legislation in England and Wales comes into effect. The net funding implications of the policy proposals in Scotland will therefore be the difference between the expected costs of what the Scottish Government is proposing in Scotland against the Barnett share of the budget that flows to equivalent UK departments under the forthcoming legislative arrangements for England and Wales.

42. If the review in England and Wales produces an equivalent or lower rate than here in Scotland any rate change here will continue to be fully funded, a higher rate in England and Wales would mean that there is a shortfall. This is not capable of quantification until the rates both north and south of the border have been reviewed and would of course be dependent upon the levels of claims and settlement in England and Wales relative to Scotland. An impact assessment will be completed at the time of a review, including the first review.

43. By way of a high level illustration of what that differential may be, dependent upon what rate is set in Scotland and what rate may be set in England and Wales, it is estimated that a 0.25% differential could add around £2m to £5m per year to claims. This estimate is based on an actuarial assessment carried out after the rate change in March 2017 which estimated that the impact of the 3.25% reduction in the discount rate would be result in an increase of £30m to £60m per annum. Again these figures must be treated with caution, they are intended only to provide a broad indication, they cannot reflect the specifics of each case, such as the level of potential future costs of care; the individual life expectancy of the pursuer, and estimated settlement dates in any year. On the basis of a 0% rate here and a rate of 1% for England and Wales the maximum exposure on the basis of the modelled figures would be £8-£20m. Whilst this is intended as an estimate of what the maximum exposure could be, actual exposure could of course be much less in line with the impact of an estimated 0.25% differential as set out above.

44. The impact of the discount rate can of course be mitigated by the use of periodical payment orders. The provisions in the Bill which will enable the Courts in Scotland to, for the first time, impose a periodical payment order will be helpful to bodies such as the NHS who would be deemed a secure funder for the purposes of the provisions relating to periodical payment orders.

Scottish Courts and Tribunal Service

45. Any increase in PPOs which proceed to the court could have an impact on the Scottish Courts and Tribunals Service (SCTS).

46. It is expected that the majority of cases will be raised in the Court of Session and the complexity of a PPO will likely require the court to hear evidence from accountants increasing the amount of court time required to dispose of a case**.** It is difficult to estimate with any accuracy the volume of PPOs, and subsequent applications for variation which may arise. However, given that the overall estimate of PPO settlements will be small and despite some significant additional court time being required in each case, it is nonetheless expected that any potential increase in costs should be capable of being managed from within existing resources on the basis that the numbers are very small. The average cost for a sitting day in the Court of Session for 2016-17 based on the number of sitting days is £3,767.

47. The courts will also apply the discount rate, which again is something that they already do. Save for what is said in respect of PPOs above it is assumed that there will be no change in the number of personal injury actions raised or in those which proceed to the court. By way of example there were 8,766 personal injury cases initiated in the Scottish courts in 2015-16, which represents a decrease of 5% on the previous year’s figures. In England and Wales 133,882 personal injury claims were issued in the county and magistrates courts in 2016. Only a small proportion of personal injury claims will attract the discount rate.

COSTS ON LOCAL AUTHORITIES

48. There are no specific costs which fall to local authorities. As above, where a local authority is a defender in an action for damages where the discount rate will apply, it may have to pay more or less in damages in line with changes to the rate relative to the previous rate. The amount of damages it will have to pay, regardless of the rate, is what is required to fully compensate the pursuer.

49. It is not anticipated that more personal injury cases will be raised as a result of this Bill or that the level of awards of damages i.e. the value of the claim before the discount rate is applied, will increase or decrease.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

50. Those most likely to be affected by the Bill will be pursuers in personal injury cases and defenders in personal injury cases including public sector bodies such as the NHS, other businesses and insurers.

51. The new statutory regime for setting the rate contained in the Bill means that pursuers will no longer be deemed to be very risk averse individuals. In turn this means that their risk exposure will increase as will their risk of exhausting their damages award sooner than expected. However, the provisions also make adjustments to the rate to allow for the cost of taxation, investment advice and investment management, along with an adjustment for a margin for prudence which will reduce the presumed rate of return generated by the investment portfolio.

52. For defenders and insurers, a higher discount rate will mean a corresponding reduction in the lump sum payments they make. Insurers should be able to pass on savings in the form of reduced insurance premiums to the benefit of wider society.

53. Solicitors - whether they are representing pursuers or defenders - are unlikely to be affected. It is not anticipated that the volume of cases handled by solicitors will change under the provisions in the Bill.

SUMMARY

54. The only direct costs relating from this Bill will be the payment for the Government Actuary's role in determining the rate. These costs are not new as the Scottish Ministers currently pay to carry out the necessary statutory consultation with them under the existing law. Given the changes to the frequency of review, the payments will be more regular. They reflect the fact that the Government Actuary's Department funding model is such that it operates on a cost recovery basis for its professional services.

Direct costs arising from the legislation		
Description	Amount	Note
Fee payable to the rate-assessor to carry out the review and report.	£50,000 per review	Reviews will normally take place every three years but out of cycle reviews are possible in exceptional circumstances.

This document relates to the Damages (Investment Returns and Periodical Payments) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 14 June 2018

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

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