OFFICIAL REPORT
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Economy, Energy and Fair Work Committee

Tuesday 22 January 2019

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ECONOMY, ENERGY AND FAIR WORK COMMITTEE

3rd Meeting 2019, Session 5

CONVENER

*Gordon Lindhurst (Lothian) (Con)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)
*Colin Beattie (Midlothian North and Musselburgh) (SNP)
*Angela Constance (Almond Valley) (SNP)
*Jamie Halcro Johnston (Highlands and Islands) (Con)
*Dean Lockhart (Mid Scotland and Fife) (Con)
*Gordon MacDonald (Edinburgh Pentlands) (SNP)
*Andy Wightman (Lothian) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ash Denham (Minister for Community Safety)
Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

CLERK TO THE COMMITTEE

Alison Walker

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Economy, Energy and Fair Work Committee

Tuesday 22 January 2019

[The Convener opened the meeting at 09:45]

Decision on Taking Business in Private

The Convener (Gordon Lindhurst): Good morning, and welcome to the third meeting in 2019 of the Economy, Energy and Fair Work Committee. I ask everyone in the public gallery to turn their phones off or to silent so that they do not interfere with the proceedings.

Agenda item 1 is to decide whether to take agenda items 4, 5 and 6 in private. Do members agree to do so?

Members *indicated agreement.*

Damages (Investment Returns and Periodical Payments) (Scotland) Bill: Stage 2

09:45

The Convener: Agenda item 2 is stage 2 of the Damages (Investment Returns and Periodical Payments) (Scotland) Bill. I welcome the Minister for Community Safety, Ash Denham, who has joined us with her team: Alex Gordon, Scott Matheson, Jill Clark and Frances MacQueen.

Sections 1 and 2 agreed to.

Schedule

The Convener: Amendment 1, in the name of the minister, is grouped with amendments 2 to 6.

The Minister for Community Safety (Ash Denham): Good morning to the committee.

Currently, there is no statutory requirement for the discount rate to be regularly reviewed, and it is clear that a lack of regular review is detrimental to all parties. In consultation, most consultees agreed that the rate should be reviewed regularly on occasions that are specified in legislation.

In taking account of the views of respondents, the Scottish Government decided that a review should be carried out every three years, with the possibility of a review being instigated earlier if circumstances were to point to that need. That would provide a significant degree of certainty, tempered with a proportionate degree of flexibility.

Stakeholders have suggested that, with the three-year review, the settlement of cases might be delayed if one or other party anticipated a more favourable rate coming into force. They argue that a five-year review period would go some way to addressing that issue, which is sometimes known as “gaming”.

I have always maintained that the Scottish Government’s imperative is that reviews are regular. As I outlined in my response to the stage 1 report during the stage 1 debate, I have listened carefully to those who have given evidence and to the committee’s conclusion that

“in the interests of finding that balance between flexibility and certainty ... five years would be preferable to three.”

The amendments alter the frequency of review from every three years to every five years, but the facility to call for an out-of-cycle review remains.

I move amendment 1.

Amendment 1 agreed to.

Amendments 2 to 6 moved—[Ash Denham]—and agreed to.

The Convener: Amendment 11, in the name of Jackie Baillie, is grouped with amendment 13.

Jackie Baillie (Dumbarton) (Lab): It was recognised by the minister that injured people are not necessarily ordinary investors—most would not invest in the stock market and those who do are likely to be quite risk averse. I recognise that the Scottish Government has tried to get the balance right. However, the committee needs to be sure that all the assumptions about deductions are accurate as any award will be for the rest of an individual's life.

Amendment 11 seeks to address an area in which the Government has underestimated the cost of taxation and investment advice. The committee took evidence from the Association of Personal Injury Lawyers at stage 1 and it highlighted its concerns that the adjustments in schedule B1 should reflect as closely as possible the costs that are incurred by the pursuer.

I have had the opportunity to reflect further since the stage 1 report and I will point to several pieces of evidence in support of the amendment. First, the analysis of the Government Actuary's Department showed that a reasonable allowance for expenses and tax might be anywhere between 0.5 and 2 per cent. I know that the Scottish Government preferred the lower end of that spectrum, but in its evidence to the committee the Government Actuary's Department stressed

"that a larger adjustment could be plausibly justified."

Secondly, Richard Cropper, from Personal Financial Planning, estimated the costs at 1.5 to 2 per cent and said that he believes that the Scottish Government figure is "materially under-estimated". Paul Rosson, an independent financial adviser, said that the smaller the award, the closer to 2 per cent the costs are likely to be. That is simply for independent advice, and does not include any tax. He recognises that, although in the case of a moderate award the cost would be 0.5 per cent across the industry, that does not include any tax. Finally, Graeme Lind, from Tilney Financial Planning, which is based in Edinburgh, said that the standard rate would be 1 per cent plus VAT but that taxation would take the figure

"north of 1.5 per cent per annum".

In arriving at a figure of 1.5 per cent, I have tried to recognise the broad range of factors. The general consensus, from the Government Actuary's Department to the range of financial advisers, indicates that 0.5 per cent is just a shade too low to cover both taxation and investment advice.

I pause at that point and invite the committee and the minister to agree with me.

I move amendment 11.

The Convener: I invite Dean Lockhart to speak to amendment 13.

Dean Lockhart (Mid Scotland and Fife) (Con): Amendment 13 seeks to change the further margin adjustment from 0.5 per cent to 0.25 per cent. In its policy memorandum, the Government made clear that the further margin adjustment is to reduce the risk of undercompensation in certain cases. However, the policy memorandum also states that, as a result of the new further margin adjustment,

"there will inevitably be a probability of over-compensation".

Many stakeholders see that as a departure from the principle of 100 per cent compensation. The underlying principle is that damages have the purpose of placing the injured person, as far as possible, in the position that they would have been save for the injury incurred, and the courts are very careful at the outset in setting the level of compensation where it is likely to meet future financial losses and care costs.

The bill is not designed to revisit the basic principles of restitution but is aimed at ensuring that the level of compensation as set by the court is adjusted to reflect how the damages may be invested over the longer term. Based on stakeholder feedback, there is legitimate concern that, with the 0.5 per cent further margin adjustment, the bill will change those underlying principles of fair, 100 per cent compensation, which will come at a cost to the NHS and other public bodies and, potentially, lead to higher insurance premiums.

Although we want to avoid cases of undercompensation, this is a matter of public policy: it is widely recognised that if the further margin adjustment is set at 0.5 per cent, it will probably result in overcompensation, which comes at a cost. We must recognise that.

The Convener: Did the member wish to say anything about amendment 11 in the name of Jackie Baillie, or has he covered it? I should have invited him to speak on that as well.

Dean Lockhart: Very briefly, the underlying concern is the same. If we have a 1.5 per cent adjustment in addition to 100 per cent compensation, there is a risk that, over the longer term, that will result in overcompensation. There is wide recognition that the notional investment portfolio is cautious and would largely be made up of passive funds and debt fixed-asset investments. Those types of investments do not require active management, so such investment portfolios usually result in a lower management fee being incurred. My concern about amendment 11 is that we would end up revisiting the underlying principle of 100 per cent compensation if we changed the

tax and investment charge adjustment to 1.5 per cent.

John Mason (Glasgow Shettleston) (SNP): We received evidence on the issue that amendment 11 addresses during stage 1 and even since then we have had further briefings that go in opposite directions. The Association of British Insurers wants to go one way and the Association of Personal Injury Lawyers wants to go a different way.

There is a real issue here and we have considered it. However, I am not convinced by amendment 11. If we were to amend the bill in this regard, we would need to be a lot more sophisticated. For example, we had evidence that, at the beginning, people might have greater investment costs because they would need to take advice from scratch, whereas they would not need so much advice on an on-going basis, especially with a passive investment. That could be considered, but amendment 11 does not cover the issue. Another factor is the size of the settlement. With a very large settlement, a smaller percentage of it will go on investment advice and, with a small investment, the percentage will tend to be larger.

Therefore, we would not improve the bill a lot by making the adjustment 1.5 per cent instead of 0.5 per cent. I am persuaded by the argument that, although most investors will probably take the passive approach, if someone goes for an active approach and so spends a bit more in fees, over the long term, they should make more of a gain, which will match the extra costs.

I am not convinced by amendment 13 either. We took a lot of evidence and I think that we are all committed to the principle that people should be properly compensated. The evidence was that, inevitably, some people will be overcompensated and some will be undercompensated. That will always be the case, and we can never get round it, unless, I suppose, we have a different discount rate for every single person. It seems to me that the figure of 0.5 per cent is pretty reasonable. We could go higher or lower but, on the evidence that we heard during stage 1, I am convinced that we should stick to 0.5 per cent.

Angela Constance (Almond Valley) (SNP): Like Mr Mason, I would be concerned that amendment 13 might lead to pursuers being undercompensated. Of course, the minister will have her own views on that.

On amendment 11, I accept that, during stage 1 evidence, some pursuer representatives felt that the adjustment may not be enough and the committee tested the minister on that when she was at the committee previously. I wonder whether, in her closing remarks, the minister could give us any thoughts about whether 1.5 per cent is too high and whether she would consider, prior to stage 3, a move to 0.75 per cent or 1 per cent, given that there are concerns.

The Convener: Does any other member wish to speak? If not, the minister may respond.

10:00

Ash Denham: I am grateful to Jackie Baillie and Dean Lockhart for setting out the reasoning behind their respective amendments, although, in fact, they do opposing things. One would significantly increase the level of damages that are awarded to a pursuer and the other would decrease it. However, it makes sense for me to address both amendments at the same time.

The approach that we have taken in the bill on how the discount rate should be calculated is based on a portfolio that meets the needs of the hypothetical investor as described in the bill. The asset classes and percentage holdings that are contained in the notional portfolio have been balanced in such a way as to support an approach to investment choices that is capable of limiting volatility and also uncertainty. That is the starting point. Thereafter, the bill introduces two standard adjustments that the rate assessor must deduct from the rate of return that they have arrived at. The first is intended to take account of investment advice, management costs and taxation. The adjustment is set out in the bill, with regulation-making powers for the Scottish ministers to change the adjustment, if required.

The Scottish Government accepts that there will be a need to take investment advice and, indeed, one of the characteristics of the hypothetical investor is that they are properly advised. The Scottish ministers sought views from the Government Actuary's Department on the appropriate level for the adjustment for tax and passive investment management costs—I think that Jackie Baillie raised that in her comments. Although GAD considered that the reasonable allowance for expenses and tax might fall into the range of 0.5 per cent to 2 per cent, it was also of the view that allowance at the lower end was likely to be more appropriate for a number of reasons. It is reasonable to assume that pursuers will shop around to get the most competitive fees, and it is reasonable to assume that pursuers will directly invest in passive funds. In the current environment, income yields, particularly on bonds, are low, which eases the possible pressure of higher tax charges, and there are further prudence deductions included elsewhere in the discount rate.

On the other hand, amendment 13 alters the second standard adjustment—the further margin adjustment—by reducing it to 0.25 per cent from

0.5 per cent. The intention of the further margin is to recognise that any investment, however cautious, carries some risk, and a proxy cannot take account of an individual's particular circumstances.

As set out in the GAD report, the inclusion of the further adjustment is to improve the chances of the pursuer having sufficient funds to meet their damages. The composition of the portfolio and the level of adjustment, which are set out in the bill, have been carefully arrived at. They are the result of actuarial advice and an analysis of all the available evidence. I welcome the conclusion of the committee, as set out in its stage 1 report, that it was satisfied with that approach.

Altering either of the standard adjustments will alter the final discount rate and, in the case of Jackie Baillie's amendment, the impact of increasing the level of adjustment for tax, investment advice and management costs to 1.5 per cent would be significant. For the illustrative examples that were included in the financial memorandum, it would increase the claim worth £3.6 million to £5.9 million, the claim worth £1.4 million to £2 million and the claim worth £0.77 million to £0.92 million. The balance would be tipped too far in favour of pursuers and their chances of being overcompensated would increase significantly. It is defenders who would have to fund those increases, be they private sector businesses or public sector services such as the national health service. I cannot imagine that we would want to place an unwarranted burden on businesses and our public services, any more than we would want to reduce the chances of a pursuer being properly compensated for their injury, which is what Dean Lockhart's amendment would do.

It is worth stressing that, when we talk about overcompensation and undercompensation, we are talking about the likelihood or the probability of it happening; it is not an absolute. There is an element of risk involved for the pursuer, no matter what the award basis is. However, the analysis around the distribution of returns that are generated by the investment portfolio in the bill shows that, if the return were not to be adjusted, it would result in a 50 per cent chance of the pursuer being undercompensated, and a 50 per cent chance of a pursuer being overcompensated.

In my view, a 50 per cent chance of undercompensation is not acceptable, which is why a further adjustment is needed to reduce the chance of undercompensation. Altering the level of further margin downwards would alter the balance of risk faced by the pursuer to their detriment, such that the chance of being undercompensated would increase to an unacceptable level. I hope that it is of some reassurance that the Scottish ministers will review the portfolio, and these adjustments, ahead of each regular review. We take advice on these matters so that any changes will be the result of professional and expert advice and of sound analysis. I maintain that that is the appropriate approach to take. Both these amendments undermine the considered and balanced approach that has been adopted in the bill, and I urge Jackie Baillie and Dean Lockhart not to press their amendments.

The Convener: I ask Jackie Baillie for her closing comments and an indication of whether she wishes to press or withdraw amendment 11.

Jackie Baillie: The purpose of amendment 11, which was specifically based on expert advice and professional opinion and on the Government actuary's own words, was to increase damages to cover taxation and investment advice, based on the practical experience of practitioners. I remind the minister that the Government actuary stressed

"that a larger adjustment could be plausibly justified."

Although I understand that she put the adjustment at 0.5 per cent, the Government Actuary's Department said that it could be substantially higher.

I would like to pick up on two members' contributions. I am sad to say that Dean Lockhart is entirely wrong. Amendment 11 is about reflecting the real cost of tax and advice, based on evidence and on experts and practitioners with knowledge of what they are doing. The day of experts has not gone. They have been extremely helpful in providing advice to the committee, and not only at stage 1. Further information has been provided to committee members, hence the amendments that are lodged today.

The review of the portfolio ahead of each regular review that the minister talked about is welcome. I would be interested to know, perhaps at a later stage, as she will not have an opportunity to respond, who is going to be involved, and whether that review is going to be set out in statute. I would be minded to consider withdrawing the amendment if the minister were to agree to a discussion on the issue before stage 3. I am also struck by John Mason's comments signalling that he would perhaps support a more sophisticated amendment that would reflect a variation in costs, and I am happy to consider that with him. Therefore, if the minister is willing to agree to a discussion, I will be happy to withdraw amendment 11. I encourage the committee not to support amendment 13.

The Convener: Minister, do you wish to respond to Jackie Baillie's offer at this stage?

Ash Denham: Yes, I am happy to take Jackie Baillie up on her offer. I would be glad to meet her

to discuss that if she is willing to withdraw amendment 11 at this stage.

Jackie Baillie: I am happy to do so.

Amendment 11, by agreement, withdrawn.

The Convener: Amendment 13, in the name of Dean Lockhart, has already been debated with amendment 11. I ask Dean Lockhart to wind up and indicate whether he wishes to move the amendment.

Dean Lockhart: John Mason was right when he said that we had received briefings on both sides of the argument, both for and against the further margin adjustment and how it might operate in practice. That reflects the fact that each adjustment cannot be viewed in isolation. They both operate in the same way to adjust the original damages award.

The bill sets out total adjustments of 0.5 per cent for tax and investment charges, and 0.5 per cent for further margin, making a total of 1 per cent. The amendments lodged by Jackie Baillie—

The Convener: We are looking for a brief winding up, as opposed to a general recap of the arguments at this stage, and for an indication of whether you wish to move the amendment.

Dean Lockhart: I will not press my amendment for the time being, but I reserve the ability to revisit amendment 13, depending on the other amendments that are lodged at stage 3.

Amendment 13 not moved.

The Convener: Amendment 7, in the name of the minister, is grouped with amendment 9.

Ash Denham: We have taken the opportunity to lodge a stage 2 amendment in order to improve the readability of the text in paragraph 12 of the schedule, which introduces the notional investment portfolio. Amendment 7 will split subparagraph 1 into two subparagraphs, such that some of the text will be moved into a new subparagraph—1(A)—that will follow subparagraph 1, which comes ahead of the notional investment portfolio itself. The amendment makes connected adjustments to tidy up the narrative, including introducing the notional investment portfolio. It is merely a minor drafting amendment; the overall sense of the text will not be altered. The amendment will make no change whatever to the notional investment portfolio, which is set out in the table in subparagraph 2.

Amendment 9 will make a minor and separate adjustment in the provision for

"variation or suspension of agreed periodical payments."

A reference to "injured person" will replace the slightly more descriptive wording in proposed new section 2H(2)(b)(ii) of the Damages Act 1996, so that it relies on the nearby definition of "injured person". The result will be that the proposed new section will be unchanged, and the adjustment is consistent with the approach that is taken in various other provisions for periodical payments.

I move amendment 7.

Amendment 7 agreed to.

The Convener: Amendment 14, in the name of Dean Lockhart, is in a group on its own.

Dean Lockhart: Amendment 14 would require the Scottish Government to review the notional portfolio, as it is set out in the bill, before every review of the discount rate by the rate assessor, and to embed in the legislation the duty to consult stakeholders before doing so. The mix of investments in the notional portfolio is an important part of the framework for setting the discount rate. Given that investment markets are fast moving and that the nature of investments changes rapidly, it is important that the Scottish Government reviews the mix of investments before each review of the rate, and that it consults widely in doing so. A consultation approach would enable the Government to take account of the market conditions that exist between reviews, and of the change in investment practice that will inevitably happen between the five-yearly reviews.

I think that the Minister for Community Safety has accepted that, in practice, the Government will review the notional portfolio before each review of the discount rate, anyway. Our view is that it would be better to embed the review expressly in the legislation, and that the duty to consult should also be included. A formal duty to consult would have the advantage of making the position clear and the process more transparent.

I move amendment 14.

The Convener: If no member wishes to comment on amendment 14, I will give the minister the opportunity to respond.

Ash Denham: It is helpful to hear Dean Lockhart's explanation of the intention behind amendment 14. He is right to suggest that the bill currently provides that

"the Scottish Ministers must have regard to the need to ensure that the notional portfolio remains"

appropriate, but it might be helpful if I outline the intended process that will be followed ahead of each regular review.

The first review will be carried out on the basis of the portfolio and adjustment figures that are set out in the bill. Ahead of the second and subsequent regular reviews, Scottish ministers will engage with GAD to review whether the portfolio is still appropriate, through desk-based research of low-risk portfolios; whether the margins are still

appropriate; whether a dual rate is applicable, based on analysis from GAD and commenting on the extent to which investment returns differ over different time periods; whether the period over which the investment returns are to be assessed should be altered; and whether the retail prices index remains the appropriate measure of inflation.

10:15

Decisions on any change to the portfolio, the adjustments, the period over which expected returns are based and the inflation measures are for Scottish ministers. Any changes will be made by regulations to be laid under affirmative procedure before the review commences. It follows that Scottish ministers could not carry out such a review without consulting others and without taking appropriate professional and expert advice, nor could they lay the necessary regulations to make changes without demonstrating that proportionate and relevant consultation had taken place. That said, I understand that including express provision on the face of the bill would formalise the situation. For that reason, I am happy for Dean Lockhart to press amendment 14.

If amendment 14 is agreed to by the committee, the Government will need to consider whether any drafting adjustments are necessary at stage 3 to ensure that the provisions will work properly, given the possibility of interim rate reviews in addition to rate reviews in the regular review cycle. That would be in addition to the need for the Government to ensure that the overall wording and structure of the provisions will achieve the desired result in the best and clearest way possible.

The Convener: Does Dean Lockhart wish to press amendment 14?

Dean Lockhart: I press amendment 14.

Amendment 14 agreed to.

Schedule, as amended, agreed to.

Section 3—Award, continuity and index-linking

The Convener: Amendment 12, in the name of Jackie Baillie, is in a group on its own.

Jackie Baillie: The purpose of amendment 12 is straightforward; it is designed to give effect to the committee's recommendations in its stage 1 report. It would allow the pursuer's voice to be heard in respect of their preference for either a periodical payment order or a lump sum, and would give weight to that preference. When Parliament debated the matter and Angela Constance and myself raised the issue, the minister helpfully said that she would reflect further on it. The amendment is designed to tease out that reflection.

Periodical payment orders are helpful—especially in cases of personal injury, which tend to be catastrophic and involve conditions that will be lifelong for the pursuer. A continuing regular payment would protect payment of on-going costs. That said, there will be circumstances in which a pursuer does not want a periodical payment order but would prefer a lump sum—for instance, where they want to make a large up-front capital investment, perhaps for an adapted house.

I do not want to see a circumstance, and I do not believe that the committee wants to see it, in which the pursuer is forced to have a periodical payment order. Pursuers have often taken a long road to compensation, particularly when there have been catastrophic injuries. Getting a positive decision and an award at the end of that process can be empowering. I do not want to remove that and disempower the pursuer at the final stage because their views have not been listened to. This is about ensuring that the court gives due weight to their preference.

I move amendment 12.

John Mason: Speaking on my own behalf and not necessarily on behalf of my colleagues, I agree with Jackie Baillie's argument for amendment 12. Periodical payments are inherently good because they take away some of the risk that the committee has been debating for the past half an hour, and give people a constant income that they can live on. When vulnerable people are involved, that has to be a good thing.

However, there are some exceptions. As Jackie Baillie has already said, people may want a large capital sum up front, and I understand that the courts can split awards. There are also situations in which a pursuer wants a clean break from the defender and does not want an on-going relationship, even if it is purely legal.

The idea that the court could "impose" a PPO gets some of our backs up. We know that the courts will listen to both sides, but it would be good to require specifically that they do so. Amendment 12 would not give a veto to the pursuer, but re-emphasises that the pursuer's desires and fears should be taken into account seriously by the court. If amendment 12 is pressed, I will be happy to support it.

Angela Constance: I am on the record as being sympathetic to what Ms Baillie is trying to achieve with amendment 12. We should be looking for extra efforts or assurances in the bill to ensure that meaningful consideration is given to the views of the pursuer, and that the court process does not add to the sense of

powerlessness that people who have suffered a catastrophic injury might well feel. I suppose that I am less prescriptive about how that might be achieved. I just want to see it done in the bill in the best way, so that we are not reliant purely on the judiciary. It is important that the provision be in the legislation.

The minister gave a very clear commitment during the stage 1 debate, which she followed up in correspondence, that she would give the matter consideration prior to stage 3. I suppose that what I would like to hear today is the minister fleshing out how she will consider the issue. What is the scope of her considerations? How will she work with members across the political divide?

Dean Lockhart: I understand the sympathy and concerns that have been expressed by Jackie Baillie and others, but I have some concern about the wording of amendment 12 and the fact that it would cut across the court's discretion to decide the form of payment that would be in the best interests of the injured party. Perhaps, instead of the provision being embedded in the bill, it could be covered by the rules of court.

I have concerns about proposed new section 2(A3)(b) of the 1996 act, because the statutory presumption would work

"unless the court considers that there are compelling reasons not to do so".

"Compelling reasons" is a very high legal threshold to meet, so I think that, rather than there being a presumption in favour of PPOs, that would almost automatically result in PPOs, unless "compelling reasons" showed otherwise. I have concerns about the wording of amendment 12.

Ash Denham: I am grateful to Jackie Baillie for lodging amendment 12. During the stage 1 evidence sessions, I listened to people who had great concerns that the bill does not provide that the court, when considering whether to impose a PPO, should give precedence to the views of the pursuer. In my response to the stage 1 report, I explained that I was not keen to fetter the ability of the court to make the best decision according to the facts and circumstances at hand. I went on to say that I would, because of the strong support that had been expressed for an amendment providing that the court should have regard to the pursuer's preference, give the matter further consideration.

I appreciate from what I heard at stage 1 that not giving effect to the views of the pursuer can be disempowering to those individuals. Having reflected further, particularly on the position of pursuers in such cases and the importance of not adding additional distress in an already very distressing situation, I am pleased to support the principle that underlies amendment 12. However, we need to think very carefully about how the provision could best balance the rights of the pursuers and defenders when aiming to give preference to the pursuer's position. With that in mind, I offer to work with Jackie Baillie ahead of stage 3 to settle with her the precise approach to be adopted in order to address the matter appropriately.

I am sure that a revised version of amendment 12, in workable terms on which we can all agree, could be devised for lodging at stage 3. Accordingly, I ask Jackie Baillie not to press amendment 12.

The Convener: I ask Jackie Baillie to wind up, and to press or seek to withdraw her amendment.

Jackie Baillie: Angela Constance summed it up best for me when she said that the provision needs to be in the bill, so that it is absolutely clear. I think, therefore, that—I say it with due respect—Dean Lockhart is wrong to say that we could simply put it in guidance or in court rules.

I understand that what the minister is offering is to put the provision in the bill. On that basis, I will happily seek to withdraw amendment 12, and will work with the minister and other members to ensure that we get it right for stage 3.

Amendment 12, by agreement, withdrawn.

The Convener: Amendment 8, in the name of Stewart Stevenson, is in a group on its own.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I spoke in the stage 1 debate on this important bill and have identified a relatively small but important issue in relation to periodical payments. The bill provides for a more subtle and varied way of setting periodical payments—in the case of future pecuniary loss, for example, with or without the consent of the parties. There are, therefore, some important duties that the court must undertake.

The court could also be re-engaged in the issue of periodical payments under proposed new section 2C(2)(a) of the Damages Act 1996, because it might come back to the subject of periodical payments in varying previous orders. It is important that the whole issue of periodical payments be considered.

There is also provision under proposed new section 2C(4) of the 1996 act for a scheme under section 213 of the Financial Services and Markets Act 2000. Of course, ownership of schemes might well change over the period in which periodical payments are to be made, which might be 60 or 70 years.

A wide range of things place a significant duty on the court, when it decides that "continuity of payment" is "reasonably secure", to explain why it

has come to that conclusion. Courts might frequently simply point to the relevant part of the act. However, given that there are private sector ways of securing periodical payments, it would be proper that the person who is likely to be in receipt of a periodical payment is able to understand why the court concluded that payment will be reasonably secure, and that they could, in extremis, if they felt it necessary, challenge that decision outwith the legislation, by other means. That would also allow the person's representatives to challenge the decision during the court process, if they had doubts about the security of a periodical payment.

That is the basis on which I have lodged amendment 8. I hope that colleagues around the table are prepared to support it, as I have no vote in the matter.

I move amendment 8.

The Convener: Although I do not disagree in principle with what Mr Stevenson said, there are a couple of matters on which I would appreciate clarification. First, if a pursuer makes a periodical payment order application on a certain basis, would not the assumption be that the pursuer is satisfied about security of payment?

The second issue is more to do with the wording of amendment 8 and how it fits with the other provisions in section 3 of the bill. Mr Stevenson alluded to the fact that, under proposed new section 2C of the Damages Act 1996, the court will be required to make an assumption that continuity of payment is reasonably secure. If the act requires the court to make that assumption, I am not sure how the court can be required to give reasons for that assumption. I take on board the point that the court might make an order relating to a scheme that is not covered by the various bodies or, for example, the guarantee under proposed new section 2C(1)(a)(i) of the 1996 act, but I wonder whether the wording is right. Perhaps Mr Stevenson can come back on those two points.

If no other member wishes to comment, I invite the minister to respond.

10:30

Ash Denham: Thank you, convener. I am grateful to Stewart Stevenson for lodging amendment 8.

Courts issue opinions or notes as a matter of course to give the reasons for their decisions. That is a long-standing practice and is part of the right to a fair trial that is guaranteed by article 6 of the European convention on human rights.

In cases that fall within those provisions, it is likely that the reasoning will be that the party that is funding the PPO will fall within the sources that are identified in the legislation as being reasonably secure, and there will have been no evidence to contradict that position. Nevertheless, there might be others whom the court is satisfied are reasonably secure, so it will be important to expose the reasoning.

I am happy for Stewart Stevenson to press amendment 8, while reserving the possibility of lodging Government amendments at stage 3 to make any necessary technical changes to ensure that his provision dovetails with existing provisions.

Stewart Stevenson: The minister has mentioned some specific issues. The important thing is that, even when the pursuer is applying to the court for a periodical payment order, the court is in control of the outcome. In particular, what it is proposed be inserted at new section 2C(2)(a) of the Damages Act 1996 means that the court will be

"specifying the method by which the payments are to be made".

The court therefore clearly will have control over the way in which periodical payments will be made.

Proposed new section 2C can, of course, enable an application to be made to the court for variation of provision, but it does not require that that be done. It is therefore important that there is clarity at the outset about the court's decision making, in this regard.

The minister helpfully pointed out that it is not—shall we say?—particularly novel to require the court to explain its workings. On that basis, I am certainly happy to watch what the Government might do by way of further modification of the provision at stage 3, if that is required, but I would like to press amendment 8.

Amendment 8 agreed to.

Section 3, as amended, agreed to.

Section 4—Variation or suspension of settlement

The Convener: Amendment 15, in the name of Dean Lockhart, is grouped with amendment 16.

Dean Lockhart: Amendment 15 is a probing amendment to ascertain the intended operation of the section. It seeks to clarify that the court may not award a further, or additional, lump sum when considering an application to vary the PPO. In other words, the court may not increase the size of the overall original settlement. That would avoid the risk of the court being asked to reopen the original settlement when considering how to vary the PPO award in future.

Amendment 15 is not intended to prevent the court from being able to award a lump sum instead of a periodical payment that might be required, depending on the individual's circumstances. Instead, it seeks to clarify that the court cannot award a new lump sum over and above the quantum of the original award.

That is important because, otherwise, the benefits of finality and certainty of damages would be undermined. The single award concept is crucial for reasons of finality and certainty for the pursuer and the defender, and the provision in the bill would create uncertainty and the potential for awards to be reopened in particular circumstances.

There might be another way of addressing the issue by retaining the words "in addition to", while adding clarification at the end of the subsection to say that any payment of an additional lump sum will not increase the quantum of the original compensation awarded. I am happy to work with the minister to clarify the operation of that section.

I move amendment 15.

Ash Denham: Once again, I thank Dean Lockhart for providing a bit more detail on his amendments.

On amendment 15, it might be helpful if I first summarise how awards of damages for personal injury may be made. The methods of award—that is, either a lump sum or periodical payment—are not mutually exclusive, and a pursuer who receives their award by way of an order or agreement for periodical payments will rarely receive their entire award in that way. At the point at which a settlement figure is agreed or ordered, the pursuer might already have experienced losses—for example, their past salary or past care or treatment—and their settlement might therefore include a capital sum to allow them to purchase a piece of equipment to assist them. Such payments would be made in a lump sum, and only future pecuniary losses could be made in the form of periodical payments. Indeed, the award or settlement might provide for those future losses to be addressed through a mix of lump sum and periodical payments.

That flexibility for the courts is maintained in the bill's provisions relating to the variation of periodical payments, and if we were to restrict or hamper that flexibility, it would mean that, if a court were presented with evidence that a pursuer's losses had increased due to a change in their condition, it would no longer be open to the court to award a lump sum in addition to the periodical payments as originally awarded. It would be restricted to a choice between varying the level of the periodical payments or replacing the whole of the periodical payments with a lump sum when increasing the level of compensation.

Additionally, the court can vary an order or agreement only where there is actual change in the pursuer's condition and the change itself results in significant over or undercompensation. Proposed section 2F of the 1996 act, which is inserted by section 4 and relates to orders, and proposed section 2H, which relates to agreements, do not permit the court to reopen the original award altogether. Therefore, what is set out in amendment 15 would not be the right approach.

On amendment 16, the bill already includes a causation link to the original injury on two fronts: the original court order must include provision enabling an application to be varied in the future, and any change in condition has to result in significant over or undercompensation. The bill does not change the underlying principles in Scots law that require a causal connection between the injury and the loss for which the pursuer is to be compensated. Therefore, if the original order awarding periodical payments includes no provision for variation to be made in the future, the court might not even entertain an application from either party to vary. Where the court enables future variation in this way, it must specify the sort of change in the pursuer's condition that must occur before an application can be made. In so doing, the original court order will be acting in the light of and subject to the essential rule in law of a causal connection between the injury and the loss.

As a result, there is already a clear and necessary link between the original injury and the circumstances that might result in variation. The reference in proposed section 2F(3)(b)(ii) to "the injured person" being "significantly over- or under-" compensated also links the variation to the original injury and makes it clear that what we are talking about is a significant, not trivial, change to the pursuer's condition. In addition, amendment 16 refers to a change being "attributable" to the injury, but it is not clear how that would work where the change is actually an improvement, as that would not be "attributable" to the injury. Put simply, the bill needs say nothing more to achieve what amendment 16 seems to be designed to achieve and in my view, therefore, it is not needed.

For the reasons that I have given, I urge the member not to press amendment 15 and not to move amendment 16. If he does so, I ask the committee to reject the amendments.

Dean Lockhart: On amendment 15, I thank the minister for clarifying how the provisions in this section are intended to work. I am concerned about the drafting of the subsection in question, but I am happy not to press amendment 15 if I can

work with the minister on wording that might address my concerns before stage 3.

Ash Denham: I am happy to do that.

Dean Lockhart: Thank you very much.

The minister slightly pre-empted my arguments in favour of amendment 16, but she is completely right to say that causation is an inherent underlying principle of Scots law and that there needs to be a link between the original injury and the change in medical condition. Amendment 16 was designed to add to the provisions in proposed new section 2F, which already set out how and when a court can review a PPO. During the committee's evidence session on the bill, we heard—from BTO Solicitors LLP, in particular—that an explicit reference to the requirement for the change in condition being the cause of the additional compensation is missing from proposed new section 2F. I am happy not to move amendment 16 if I can work with the minister to clarify that the underlying principle of causation will be embedded in the bill at stage 3.

Ash Denham: We have been quite clear that amendment 16 is not needed, because what it seeks to do is already covered in the bill.

The Convener: Jackie Baillie wishes to say something.

Jackie Baillie: I am pre-empting your next question, convener, when you will ask whether members are content for Dean Lockhart to withdraw amendment 15. I will wait for your question.

The Convener: Indeed. The procedure has got slightly out of sync. Are members content for Dean Lockhart to withdraw amendment 15?

Jackie Baillie: No, I am not content. I seek to press amendment 15. I am entirely happy with the minister's response so, in pressing amendment 15, I am inviting the committee to vote it down.

The Convener: The question is, that amendment 15 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Halcro Johnston, Jamie (North East Scotland) (Con)
Lindhurst, Gordon (Lothian) (Con)
Lockhart, Dean (Mid Scotland and Fife) (Con)

Against

Baillie, Jackie (Dumbarton) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Constance, Angela (Almond Valley) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Wightman, Andy (Lothian) (Green)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 15 disagreed to.

The Convener: I invite Dean Lockhart to move or not move amendment 16.

Dean Lockhart: I will not move amendment 16.

The Convener: Do any members object to amendment 16 not being moved at this stage?

Jackie Baillie: Yes—I am going for a clean sweep. I wish to move amendment 16 on the basis that I am entirely content with the minister's response. I therefore encourage the committee to vote against it.

I move amendment 16.

The Convener: The question is, that amendment 16 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Halcro Johnston, Jamie (North East Scotland) (Con)
Lindhurst, Gordon (Lothian) (Con)
Lockhart, Dean (Mid Scotland and Fife) (Con)

Against

Baillie, Jackie (Dumbarton) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Constance, Angela (Almond Valley) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Wightman, Andy (Lothian) (Green)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 16 disagreed to.

Amendment 9 moved—[Ash Denham]—and agreed to.

Section 4, as amended, agreed to.

After section 4

The Convener: Amendment 10, in the name of the minister, is in a group on its own.

Ash Denham: I listened to those who raised concerns during stage 1 evidence sessions about the costs involved should a pursuer return to the courts to have an order for periodical payments varied due to a change in their physical or mental condition that would result in their being significantly overcompensated or undercompensated by the damages being awarded for future pecuniary loss.

When I attended the committee to give evidence at stage 1, I was asked to consider whether I could commit to ensuring that such costs fall on defenders, as that was regarded as a fairer approach. I undertook to look at how the Civil

Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 would interact with the bill. Although the matter did not feature as a conclusion or a recommendation in the committee's stage 1 report, it was raised again during the stage 1 debate.

As I indicated in my recent letter to the committee, I agree that the right approach is to ensure that, where such proceedings are raised, the pursuer should continue to receive the protection of qualified one-way costs shifting, or QOCS. That is in the spirit of the 2018 legislation as it relates to personal injury actions. Therefore, amendment 10 will replicate the protection of QOCS as provided for in the 2018 act but it will be adapted for applications that relate to the variation or suspension of an order for periodical payments. Therefore, regardless of who raises such proceedings—be it the defender or the pursuer—the pursuer will not be required to meet those expenses.

10:45

Where parties have agreed periodical payments without recourse to the courts, or where they have settled an action through an agreement and a subsequent action that relates to variation or suspension arises, the same default position will apply, which is that the pursuer will be protected by QOCS unless the agreement provides differently. In that way, the amendments will not interfere with what has already been agreed between the parties. The protection will extend to proceedings where the injured person is represented by someone such as a guardian or judicial factor or someone who is acting under power of attorney. In those cases, the proceedings may not be in the injured person's name.

I move amendment 10.

The Convener: Before other members come in, I will raise a point about drafting and the form that the amendment takes. I will put to one side the principle of the amendment, which, as the minister correctly says, brings periodical payment orders in line with the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. It may be for members of the minister's team to explain the basis for the approach, but why has it not been done as a simple amendment to the 2018 act, where all the other expenses rules relating to QOCS in the area are contained, rather than by an amendment to the Damages Act 1996, which, after 20 years of amendments and use, is becoming a rather clumsy beast?

Perhaps the minister can come back in on that, because I am not persuaded that that is the best way to do it. Perhaps I should clarify that it might be easier to deal with the issue by simply putting into section 8(2) of the 2018 act a subparagraph (c), which would include any application for a variation of a periodical payment order or the suspension of a right in relation to such an order, or an appeal in relation to any such order. That would put the provision in the 2018 act, rather than reproducing lengthy provisions about the issue in a completely different act.

I am happy for the minister to intervene to clarify that.

Ash Denham: I thank the convener for raising that. It is perhaps important that I put a few notes on the record about why it has been done in that way. The Government gave careful consideration to how best to deal with QOCS in a new section—2J—as contained in amendment 10. Although I accept that section 2J is quite long, that is necessary to cover the details that are required in the context of the other provisions for periodical payments. However, the main rule is captured succinctly in subsections (1) and (2). My view is that it is worth stating that there, for reading alongside the other provisions on periodical payments, and that that allows the provisions on periodical payments—including the way that QOCS operates in connection with them—to stand as a complete set or as one package.

The remaining details are narrated in subsections (3) to (9), partly by free-standing propositions and partly by referring to the civil litigation legislation, where it is appropriate. There is no neat way of shortening that—at least, not without compromising on the absolute clarity that is needed in the context of the provisions for periodical payments. No matter how it is done, the essence of subsections (3) to (9) is essential for everything to work as intended. For example, we need to set out the precise proceedings that are to be covered by the rule in subsections (1) and (2), what the rule is subject to in two different situations and how properly to tie in the provisions with the civil litigation legislation, where that is required.

Critically, the rules that are stated up front in subsections (1) and (2) cannot be missed. Moreover, I suggest that those key subsections are pretty simple in their own terms for the reader to follow.

I hope that that answers your question, convener.

The Convener: I am not sure that it does, because, if one looks at the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, one sees fairly detailed provisions in section 8. I am not persuaded that the drafting set out in amendment 10 is necessary.

Jackie Baillie: I am not going to argue about the drafting; I will stick to the principle of

amendment 10 in the name of the minister, which I very much welcome and support. I raised the issue during the stage 1 debate and she promised to reflect on it. I am delighted that she has done so and I agree with the approach that has been taken, so I will support amendment 10.

The Convener: As no other member wishes to speak, I ask the minister to wind up.

Ash Denham: To reiterate, the approach that the convener set out is not one that we want to take; we want to do it specifically in the way that is set out in amendment 10. I hope that that answers the convener's question.

The Convener: Very well—thank you. The question is, that amendment 10 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baillie, Jackie (Dumbarton) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Constance, Angela (Almond Valley) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Wightman, Andy (Lothian) (Green)

Abstentions

Halcro Johnston, Jamie (North East Scotland) (Con)
Lindhurst, Gordon (Lothian) (Con)
Lockhart, Dean (Mid Scotland and Fife) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 3.

Amendment 10 agreed to.

Sections 5 to 9 agreed to.

Long title agreed to.

The Convener: That ends our consideration of the bill at stage 2. I thank the minister and her team.

Before we move on to the next agenda item, I suspend the meeting briefly to allow the minister and her officials to leave.

10:52

Meeting suspended.

10:53

On resuming—

European Union (Withdrawal) Act 2018

Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 [Draft]

The Convener: Agenda item 3 is on the European Union (Withdrawal) Act 2018. We are considering the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019, which are made under the powers conferred by that act on the devolved authorities.

Under the protocol between the Scottish Parliament and the Scottish Government, the committee is required to consider whether the procedure that is attached to the Scottish statutory instrument is appropriate or should be changed. The instrument is subject to the affirmative procedure, which reflects previous practice for instruments in the area of cross-border insolvency that make changes to primary legislation.

Is the committee content that the affirmative procedure is appropriate for scrutinising the instrument?

John Mason: My understanding is that, today, we are looking purely at whether the procedure should be affirmative and not at the content, which will be dealt with later. If that is so, I am happy to support such an approach.

The Convener: Yes—this is purely about the procedure.

As the committee has confirmed that it is content, we will now move into private session.

10:54

Meeting continued in private until 12:51.

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