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Damages (Investment Returns and Periodical Payments) (Scotland) Bill - Stage 3

Abigail Bremner

The Damages Bill would reform the way compensation is awarded for personal injury. The key theme has been balancing the interests of those pursuing personal injury claims with those defending them.

PERSONAL INJURY

LAW

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About this briefing

This briefing looks at parliamentary consideration of the Damages (Investment Returns and Periodical Payments) (Scotland) Bill prior to Stage 3.

The Bill would change the way compensation for [future losses](#) and expenses - such as care costs - is calculated. It would also encourage payment in instalments, rather than as a lump sum, in high value cases.

The main issues going into Stage 3 are:

- whether adjustments need to be made to the formula for calculating the [discount rate](#) to account for the risk of under- or over-compensation;
- how to ensure the voice of the pursuer is heard in court decisions to require periodical payments; and
- how to balance flexibility and certainty when making provision for periodical payments to be varied.

About the Bill

Key dates and documents

The Damages (Investment Returns and Periodical Payments) (Scotland) Bill is a Scottish Government bill. It was introduced in the Scottish Parliament on 14 June 2018.

The [Bill and related documents](#) are available from the relevant Bill page on the Scottish Parliament's website.

The [SPICe bill briefing](#) ¹ provides more detailed information on the Bill's provisions and the process for claiming compensation for personal injuries in Scotland.

The Economy, Energy and Fair Work Committee led in [conducting parliamentary scrutiny of the Bill](#).

What the Bill does

The Bill would:

- **reform the way the “discount rate” is calculated** – the discount rate is the adjustment made to a compensation award covering future losses (such as future care costs) to reflect the fact the injured party receives the compensation before the loss occurs.
- **give the courts the power to require payment of compensation via periodical payment orders** – this allows payment of compensation in regular instalments rather than a lump sum.

Terminology

Claims management company - businesses which handle legal claims from individuals, usually on the basis of charging a percentage of the compensation awarded if the case is won. Claims management companies can only negotiate on behalf of their clients. They cannot represent them in court. Thus, if court action is needed, the case will be passed to a solicitor (perhaps for the payment of a referral fee).

Damages - the legal term for compensation awarded by a court.

Defender - the party defending court action. The English legal term in this situation is the defendant. The party bringing court action is the pursuer.

Future loss – losses which occur in the future – such as the costs of future care or compensation for future loss of earnings. The discount rate and periodical payment orders are only relevant for this type of loss.

Gilts - the informal name for UK Government bonds. Index-linked gilts (or “index linked government stock – ILGS”) link returns to inflation, making them a safe way of guaranteeing a future cashflow. They are the benchmark currently used to calculate the discount rate.

Index-linked government stock - see "gilts" above.

Pursuer - the party bringing court action. The party defending court action is known as the defender. The term "claimant" is used in low value cases. Claimant is also the term used in English court procedure.

Qualified One-Way Costs Shifting (QOCS) – pronounced kwoks – where the pursuer is protected from liability for the defender’s legal expenses if they lose, but they can still claim their legal expenses from the defender if they win. This has been legislated for in personal injury cases in Scotland, but is yet to be brought into force.

Personal injury claims in Scotland

The role of compensation

A person can claim compensation if they are injured through the wrongful behaviour of another person or organisation. The role of compensation is to put the person - to the extent a financial award can - as close as possible to the position they were in before they were injured.

Most compensation claims are dealt with via negotiation rather than through the courts

Around a tenth of the court cases raised in Scotland's civil courts relate to personal injuries. However, the vast majority of personal injury cases do not end up in court. Instead, they are settled via negotiation between the parties.

The main stakeholders

Pursuers will usually be represented by a **solicitor** or a **claims management company** . Note that claims management companies cannot represent their clients in court. If court action is necessary, they will refer the case to a solicitor.

Defenders will usually be **insurance companies** (defending cases on behalf of customers with insurance to cover their liability) or **public sector bodies**. It is possible for individuals or organisations to have to defend actions themselves (usually via a solicitor) if they do not have insurance which covers the loss.

Trades unions also play an important role in supporting personal injury actions for members. Most trades unions will cover the costs of legal action for members who have suffered an injury in relation to their work.

The 100% compensation principle

It is a legal principle that a successful pursuer should receive 100% compensation - no more, and no less. This has led to a number of assumptions being made when calculating compensation awards.

The role of the personal injury discount rate

When compensation for **future loss** is awarded as a lump sum, it is argued that the pursuer receives an advantage by essentially being paid today for something that will happen in the future.

The pursuer can invest the money and so receive an additional return on the payment. This would result in over-compensation, in breach of the 100% compensation principle.

In order to address this, an adjustment is made to the initial lump sum, representing the notional rate of return if the money were invested. **This is the personal injury discount rate.**

The role of periodical payments

Despite what may be implied by the 100% compensation principle, the calculation of compensation is far from an exact science. Broad assumptions are made, for example, in relation to life expectancy and future economic conditions.

These assumptions expose pursuers to a number of risks which may result in under-compensation. For example, they may live longer than estimated, or the costs of care and equipment may increase beyond the measure of inflation used to calculate the award.

Periodical payment of compensation for future loss can reduce some of these risks. They will usually last for the lifetime of the pursuer and can be adjusted for different forms of inflation. They also remove the need for an investment strategy (and discount rate) as the money will be paid when it is due.

Note though that periodical payments will not always be available - for example, the defender may not be in a sufficiently secure financial position.

Controversy over the last change to the discount rate

Scottish Ministers first used their power to prescribe a discount rate in 2002, when it was set at 2.5%. The rate was next reconsidered in March 2017, when it was set at **minus** 0.75%. This means that the sum the court awards is increased (rather than decreased) through the application of the discount rate.

The rate change caused controversy because of its impact on defenders

The insurance industry argued that paying significantly larger compensation awards would have an impact on insurance premiums.

The change also has resource implications for public sector bodies. A number of such bodies pay compensation out of their own resources, rather than taking out insurance cover. The UK Government has set aside £1.2 billion per year to meet the additional costs to the public sector. ²

Consideration at Stage 1

The Economy Committee was responsible for Stage 1 scrutiny of the Bill. It held three oral evidence sessions:

- [23 October 2018](#)³ - with solicitors representing pursuers, the Faculty of Advocates and Professor Victoria Wass
- [30 October 2018](#)⁴ - with insurers, lawyers representing insurers and the NHS.
- [6 November 2018](#)⁵ - with the Minister for Community Safety.

It published its [Stage 1 Report](#)⁶ on 3 December 2018.

The Scottish Government [responded](#)⁷ on 13 December 2018.

The Delegated Powers and Law Reform Committee considered the delegated powers in the Bill and concluded that there was no need to draw the Scottish Parliament's attention to any of the Bill's provisions⁸.

The Stage 1 debate highlighted the competing interests to be balanced in the Bill

The Stage 1 debate took place on [18 December 2018](#)⁹. There was general support for the purpose of the Bill from across the chamber. However, Economy Committee members highlighted the balance that needed to be struck by the Bill.

There was a need to balance the interests of pursuers with those of defenders to achieve a fair result. There was also a need to balance the desire to ensure that individual pursuers received compensation which matched their circumstances with the requirement to cover a broad range of cases.

There was cross-party support for pursuers' wishes to play a bigger role in the decision to award periodical payments

Members highlighted several areas of the Bill as needing further consideration. There was cross-party support for adjustments to ensure that more weight was given to the pursuer's view on whether compensation should take the form of lump sum or periodical payments.

Consideration at Stage 2

The [Economy Committee debated Stage 2 amendments on 22 January 2019](#) ¹⁰.

This briefing does not attempt to deal with all of the amendments tabled. Instead, it discusses the main issues associated with the Bill, and how they have progressed through Stage 1 and Stage 2 consideration.

Those issues are discussed in the following sections:

- [whether the Bill's provisions would under- or over-compensate pursuers](#);
- [how provisions to review the discount rate would operate](#);
- [the role of periodical payment orders](#).

Whether the Bill's provisions would under- or over-compensate pursuers

Currently, the discount rate is calculated with reference to a form of UK Government bond known as [index-linked government stock](#) (ILGS). Because this form of investment grows with inflation, it was considered to be risk-free. However, demand for ILGS has made them expensive to acquire, pushing the discount rate down to its current rate of **minus 0.75%**.

The hypothetical investor will take a cautious approach to investment

The Bill therefore proposes to base the discount rate on a notional portfolio of investments which are designed to meet the need of a "hypothetical investor". This hypothetical investor must rely on their investments to meet all the losses and expenses for which compensation was awarded. They will therefore take a cautious approach to investment which is "capable of limiting volatility and uncertainty" (Policy Memorandum, paragraph 67).

Pursuers representatives believe this approach places additional risks on pursuers

Pursuers' representatives stressed that pursuers have to claim compensation through no fault of their own. They are already likely to have settled their claim for less than its true value, and take on a number of risks (such as the risk that they will live longer than estimated) which tend towards under-compensation.

In their view, it was unfair to expect pursuers to take on the further risk of being required to invest their money to create a return.

Defender representatives believe this approach results in over-compensation

Defender representatives argued that pursuers in fact invest as ordinary, prudent investors. They are therefore able to generate a higher return for their investment than the discount rate accounts for. In addition, they believed that several of the assumptions in the Bill exacerbated this perceived tendency towards over-compensation.

They took particular issue with what was referred to as the "**further margin adjustment**", provided for in the Bill. This was a downwards adjustment to the discount rate of 0.5% to reduce the risk of under-compensation. In their view, this breached the [100% compensation principle](#), because it increased the chance of over-compensation.

Stage 1 considerations

The Economy Committee's Stage 1 Report noted that it was, on balance, satisfied with the approach.

Stage 2 amendments

Purpose of amendment	Result
<p>Amendment 11 in the name of Jackie Ballie sought to increase the deduction made to the discount rate to cover the costs of tax and advice - from 0.5% to 1.5%.</p> <p>The Committee had heard evidence that 0.5% may not be enough to cover these costs.</p>	<p>It was argued that this change may upset the balance between the interests of pursuers and defenders in the way the discount rate was calculated.</p> <p>The amendment was withdrawn on the basis that the Minister agreed to meet with Ms Baillie to discuss the issue in advance of Stage 3.</p>
<p>Amendment 13 in the name of Dean Lockhart sought to reduce the further margin adjustment from 0.5% to 0.25%.</p> <p>He argued that this would reduce the risk of over-compensation and therefore bring the Bill's proposals closer to the 100% compensation principle.</p>	<p>It was argued that this amendment would also upset the balance between pursuer and defender interests.</p> <p>Amendment 13 was not moved.</p>

How provisions to review the discount rate would operate

Large gaps between reviews of the discount rate previously were thought to contribute to [the negative impact of changes](#). The Bill therefore proposed regular reviews every three years, as well as the possibility for Scottish Ministers to institute an out-of-cycle review if circumstances (such as an economic crash) justified it.

The role of the UK Government Actuary's Department

One of the stated aims of the Bill was to take the setting of the discount rate out of the political arena. Instead, the provisions in the Bill would create a framework which would make the setting of the rate a technical exercise. The UK Government Actuary's Department (GAD) would calculate the rate (after considering changes to the notional portfolio and standard adjustments) at each review.

Gaming the system

Defender representatives raised concerns that either party may try to "game" the system if the review period is not extended to at least five years. Gaming refers to a potential practice of trying to delay or speed up the settlement of claims depending on whether an upcoming rate review is likely to be advantageous.

Changes to the flow of cases has resource implications for the courts and insurers.

The Stage 1 Report

The Economy Committee concluded that, on balance, it was content with the roles of GAD and the Scottish Government in the rate setting process.

It recommended that the Scottish Government give consideration to applying the discount rate which was in place at the time a claim was raised - rather than when it was settled. This could avoid gaming.

It also recommended that the gap between reviews was increased from three to five years in order to strike the right balance between flexibility and certainty.

The Scottish Government response

The Scottish Government was concerned that proposals to apply the discount rate at the time the claim was made would be too detrimental to pursuers. It noted that claims for catastrophic injuries can take many years to conclude - so that economic circumstances may have changed considerably.

The Scottish Government agreed to extend the review period to five years.

Stage 2 amendments

Purpose of amendment	Result
<p>Scottish Government amendments 1 to 5 would extend the period between discount rate reviews from three to five years.</p>	<p>The amendments were agreed to without division.</p>
<p>Amendment 14 in the name of Dean Lockhart would require the Scottish Government to review the make-up of the notional investment portfolio in the Bill before every rate review, in consultation with stakeholders. This was intended to ensure the investment mix remained up-to-date.</p>	<p>The minister noted that the Scottish Government, with GAD, would be conducting such a review anyway. She did not object to the requirement being set in legislation.</p> <p>The amendment was agreed to without division.</p>

The role of periodical payment orders

Forcing periodical payments onto a pursuer

Patrick McGuire from Thompsons Solicitors noted that some pursuers had fought a long and hard battle to receive compensation. They may not wish to have any ongoing relationship with the defender.

He raised concerns that forcing a reluctant pursuer to accept periodical payments rather than a lump sum may leave them feeling disempowered. He suggested the Bill's provisions would allow the court, rather than the pursuer, to make the final decision.

Revisiting the level of compensation awarded via a Periodical Payment Order

The Bill would allow for a Periodical Payment Order (PPO) to be varied in the future in certain, specified circumstances. Variation would only be possible where:

- the parties agreed to it;
- the specific change(s) identified in the agreement had occurred; and

- significant over- or under-compensation would otherwise result.

Some defender representatives were concerned that the court’s powers to vary an award were too wide. Some defenders also raised concerns that the Bill did not make sufficient provision for a causal link to be established between the original event and the change in condition.

Paying for a return to court

Pursuer representatives noted that pursuers would have additional expenses in bringing a case back to court for a variation. They suggested such court action should be covered by the principle of [Qualified One-Way Costs Shifting](#) (QOCS).

Stage 1 scrutiny

The **Economy Committee** welcomed the provisions on periodical payment orders. It also welcomed the fact that the court would have the ability to vary payments where significant over- or under-compensation was likely.

It called on the Scottish Government to bring forward amendments which would give more weight to the pursuer’s view when the court was considering imposing a PPO.

The **Scottish Government** was not keen to limit the discretion of the courts in this area by setting requirements for what it must consider. However, the Minister agreed to reflect further on the issue of pursuers being forced to accept PPOs.

Stage 2 amendments

Purpose of amendment	Result
<p>Amendment 12 in the name of Jackie Baillie would enable the parties to court action to make representations to the court about whether to require a PPO. The court would be obliged to follow the views of the pursuer unless there were "compelling reasons" for not doing so.</p>	<p>The Minister accepted that there had been a strong view from MSPs that an amendment of this nature was needed. However, she remained concerned about the wording of Ms Baillie’s proposal.</p> <p>The amendment was withdrawn following a ministerial commitment to work with Ms Baillie in advance of Stage 3.</p>
<p>Amendment 15 in the name of Dean Lockhart sought to make it clear that the court could not award an additional lump sum when reconsidering a PPO.</p>	<p>The Minister argued that the proposal would limit the court’s flexibility to award a further lump sum where a change in the pursuer’s condition justified it. She agreed to work with Mr Lockhart on the wording of this section.</p> <p>The amendment was disagreed to by division.</p>
<p>Amendment 16 in the name of Dean Lockhart sought to create a requirement for the court to consider whether the original injury had caused the change in question before a PPO could be varied.</p>	<p>The Minister argued that causation was already dealt with in the original decision to award compensation, and the requirement for a specific change before variation could be considered.</p> <p>The amendment was disagreed to by division.</p>
<p>Scottish Government amendment 10 would apply QOCS to proceedings to vary a PPO, although the parties could choose to make different provision in an agreement.</p>	<p>The amendment was agreed to by division.</p>

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