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

Stage 1 evidence

Introduction

The Association of Personal Injury Lawyers (APIL) is a not-for-profit campaign organisation formed by pursuers' lawyers to represent the interests of people who are injured through no fault of their own. The organisation has almost 30 years' history of working to help injured people gain the access to justice they need, and currently has around 3,300 members, 136 of whom are in Scotland. Membership comprises solicitors, advocates, legal executives and academics whose interest in personal injury work is predominantly on behalf of pursuers.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members

Any enquiries in respect of this evidence should be addressed, in the first instance, to:
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General comments – periodical payment orders

APIL has always supported the use of periodical payment orders (PPOs) because in many cases they are the best way of providing for an injured person's needs for the whole of his life. There are occasions, however, when PPOs are not the best solution for injured people, such as when a lump sum is needed for adaptions to the home, or to buy a new house. In those circumstances, when a lump sum compensation payment is the most appropriate option, injured people and their families should not be expected to take risks when investing the money which is supposed to last for the rest of their lives.

While our comments are confined primarily to part one of the Bill, and the schedule, we would caution that care should be taken to ensure that the pursuer is protected from paying the costs in the event of any future applications to vary or suspend PPOs due to a change of circumstances.

General comments – returns on investment of damages

We recognise that the purpose of this legislation is to change the way the discount rate is set, moving away from a calculation which is based on Index-Linked Government Stock. We do not accept, however, that the use of ILGS can "lead to the chance of significant levels of over-compensation" as stated in the policy memorandum. This conclusion is based on arguments, typically made by compensators, that injured people have in the past been prepared to take some risks when investing their compensation. As the policy memorandum itself points out, there are difficulties in relying on past evidence because much of it will have been based on a discount rate of 2.5 per cent, which was too high. This created a climate in which "pursuers may have been forced into taking more investment risk than they were comfortable with in order to generate the necessary return." This supports the evidence of our own members who report that the vast majority of injured people are risk-averse.

Once compensation has been awarded, responsibility for helping the injured person usually passes from the solicitor to an independent financial adviser (IFA). Since discussion about this Bill will inevitably focus on the notional investment portfolio and standard adjustments, we strongly recommend that evidence is sought from IFAs who have experience of dealing with this type of investment. On that basis, we will restrict our comments primarily to general points of principle.

The role of the Government Actuary and the setting of the rate

We agree entirely with the Scottish Government's approach of removing the possibility of political influence over the setting of the rate. There is no legitimate reason or necessity for political involvement. Setting the discount rate should be an actuarial task, not a political one.

We also welcome the Scottish Government's decision not to rely on the investment behaviour of injured people in setting the rate, although past behaviour has clearly influenced the decision to move away from calculating the rate on the basis of ILGS, as discussed above.

The combination of using the Government Actuary to set the rate and setting out the formula by which the calculation should be made on the face of the Bill will certainly foster transparency, and this is important to pursuers. It is critical, however, that the portfolio generates as low a risk as possible for injured people. More detail is required about how the portfolio meets the needs of a 'cautious' investor, so that this can be examined by IFAs.

Review period

The furore generated when the latest discount rate was set in 2017 was caused by the fact that the rate had not been reviewed for 15 years, and was far too high for most of that time. The reduction was, as a result, dramatic. All stakeholders should be able to agree that the sensible way forward is a review every three years, with the option of intermittent reviews inbetween.

Standard adjustments

We welcome the inclusion of standard adjustments on the face of the Bill. Again, the need for transparency should be something about which all stakeholders ought to be able to agree.

Following our discussions with IFAs, however, we are concerned that the 0.5 per cent allowance for the impact of taxation and cost of investment advice and management is too low. We also suggest that the 0.5 per cent suggested as a general margin requires further examination if the risk of under-compensation is to be minimised.

We recognise, as the financial memorandum to the Bill asserts, that calculation of investment costs and (especially) tax is not an exact science. According to Richard Cropper, an IFA at Personal Financial Planning Ltd:

“With regard to investment costs, financial advice…is made up of financial planning advice, and investment management. Suitable independent advice and investment management will incur a charge of between 1.5% and 2% per annum. As a result, the impact of advice costs has been materially under-estimated.”

In an independent briefing for APIL, Mr Cropper goes on to say that the impact of taxation is impossible to estimate accurately in advance as it depends on many factors, all of which change over time, and some of which change day by day. On that basis, he says the allowance for investment advice and tax is “almost certainly bound to be too little.”

We recognise, of course, that the three year review period presents an opportunity to change the way the standard adjustments will be calculated. Our concern is that three years can be a long time if those figures are not accurate. Even in this notional portfolio where the majority of investment is relatively low risks, the impact of inflation can be considerable and risk negating many of the benefits of the portfolio. For example, in certain categories (or ‘heads’) of damage, such as the cost of future care, and calculation of loss of future earnings, the rate of inflation is higher than the normal rate. If, as the financial memorandum states, the purpose of the adjustments is to reduce the probability of undercompensation, the figures need to be accurate and, we suggest that further investigation is advisable.

Ends

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