



Association of Personal Injury Lawyers

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

Stage 2 Amendment Briefing, January 2019

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for almost 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 200 members in Scotland who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with advocates, legal executives, paralegals and some academics.

Amendment 11:

In the schedule, page 14, line 12, leave out <0.5 of a percentage point> and insert <1.5 percentage points>

Briefing:

We agree with this amendment.

People who are seriously injured through no fault of their own are often no longer able to work, feed or care for themselves. When they are awarded a lump sum in compensation, the money is designed to replace lost earnings and pay for the care they may need for the rest of their lives.

Injured people are not ordinary investors, who play the market to make a profit. They are naturally averse to taking risks with their compensation because their future security, quite literally, depends on that money lasting for the rest of their lives.

They are also obliged to dip into the compensation fund when there are changes in their condition or other unforeseen circumstances, regardless of markets conditions, which is yet another risk factor for them.

The Damages (Investment Returns and Periodical Payments) (Scotland) Bill increases the risks injured people need to take when investing their compensation to ensure it lasts for the rest of their lives. Having done that, it must be beholden on the Government to minimise any further risk which the injured person has to take. That is why the adjustments on the face of the Bill in schedule B1, clause 10 are so important in principle, and why the level of adjustment must reflect as closely as possible the costs incurred by the injured person when investing the lump sum. They must also reflect the new, additional, market risks to which the injured person is to be exposed.

Last September, the Government Actuary's Department published its analysis of the personal injury discount rate. In relation to the adjustments, the report said:

Based on an initial assessment of possible tax liability for illustrative pursuer profiles and based on publically available data on fund expenses and charges, we believe that the reasonable allowance for expenses and tax might be in the region 0.5-2.0% pa. However, subject to Scottish Government's policy preferences, we believe that it likely to be more appropriate to choose an allowance towards the lower end of this range, for instance 0.5-1.0% pa....

Although we believe that a deduction towards the lower end of the range is likely to be appropriate, we would stress that a larger adjustment could be plausibly justified.¹

When compiling APIL's response to the call for evidence from the Economy, Energy and Fair Work Committee, we raised concerns that the 0.5 per cent allowance for the impact of taxation and cost of investment advice and management is too low.

¹ Government Actuary's Department/Scottish Government/Personal Injury Discount Rate Analysis; page 3; pars 1.12 and 1.13

We consulted independent financial adviser Richard Cropper, from Personal Financial Planning Ltd, who said:

“Suitable independent advice and investment management will incur a charge of between 1.5 per cent and 2 per cent per annum. As a result, the impact of advice costs has been materially under-estimated.” 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 also consulted independent financial adviser Paul Rosson, who also questioned the figures. “0.5% for tax/investment advice is not nearly enough,” he said. “If an individual were simply to invest their award via an online broker/platform without receiving any independent advice he would most likely be charged an average of around 1%. If that same individual were to use an independent financial adviser on a ‘moderately large’ portfolio (around £2m) he would pay the adviser about 0.5% of the portfolio on top of investment costs. For investors of smaller awards, the costs would be greater and would, in my opinion, be closer to 2%”.

Graeme Lind, financial planner at Tilney Financial Planning in Edinburgh, told us:

“Depending on the rate provided by GAD I believe the discount rate and the methodology behind it should put the pursuer in a better position than has been the case historically, certainly as far as the 2.5% discount rate goes. It is still the case, however, that the award could under compensate the pursuer and by definition funds will require to be invested with all the relevant risks attached to this. It is to be welcomed, therefore, that an additional 0.5% is being proposed as an adjustment in this regard although there can be no guarantee this will be sufficient.

The further 0.5% adjustment for investment management and tax is, in my opinion, much too low. A competitive investment management fee of 1% plus VAT per annum plus the impact of taxation will take the annual figure north of 1.5% per annum and as explained above, this could be considerably higher.”

This range of opinions has informed our proposed amendment that the standard deduction to represent the impact of taxation and the costs of investment advice and management should be 1.5 per cent.

The standard deduction of 0.5 per cent as a further margin involved in relation to the rate of return should be enough to help protect injured people from the market risk inherent in this legislation. It should, however, remain under review.

Amendment 13

In the schedule, page 14, line 15, leave out <0.5> and insert <0.25>

Briefing

We do not agree with this amendment.

The Scottish Government has made a policy decision that an adjustment of 0.5 per cent is a necessary contingency to ensure that an injured person is not under-compensated. This is particularly important given that the injured person will be expected to take certain risks when investing his compensation, under the terms of this legislation.

In its policy memorandum to the Bill the Government rightly points out that “damages are not surplus funds which can be speculatively invested.” It also says that “the further adjustment is in recognition of the fact that any investment, however, carefully advised and invested may fail to meet their needs.”

Amendment 15

In section 4, page 5, line 39 leave out <, or in addition to,>

Briefing

We disagree fundamentally with this amendment.

The legislation allows for damages for future pecuniary loss to be paid as a combination of lump sum and periodical payment orders (PPOs). This is so that a lump sum is available for substantial purchases (eg if the injured person needs to buy a new house, or make adaptations to his existing property) while PPOs deal with other losses, such as income and the cost of care.

This dual need does not necessarily change if a variation of the PPO arrangement is required later in the injured person's life. His condition may have deteriorated to the extent that a lump is required for new adaptations to his home, while he still needs a PPO to deal with other losses.

Amendment 16

In section 4, page 6, line 7, at end insert-

<() the change is attributable to the injuries for which the court has awarded damages for future pecuniary loss, and>

Briefing

We do not agree with this amendment.

Under the terms of the legislation, the court is required to specify, at the outset, the kind of change in an injured person's condition which would allow a variation of the original periodical payment order (PPO).

It is possible in cases of extreme seriousness and complexity that a future change could be foreseen which is asymptomatic at the time the court is required to make its decision. In such circumstances, compensation will obviously not be paid to reflect a condition which has not yet manifested itself.

This amendment would mean that if the condition (which had been foreseen but not compensated) manifests itself later in the injured person's life, it would not be possible to provide compensation for it. To allow this amendment would render the principle of 100 per cent compensation meaningless.

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