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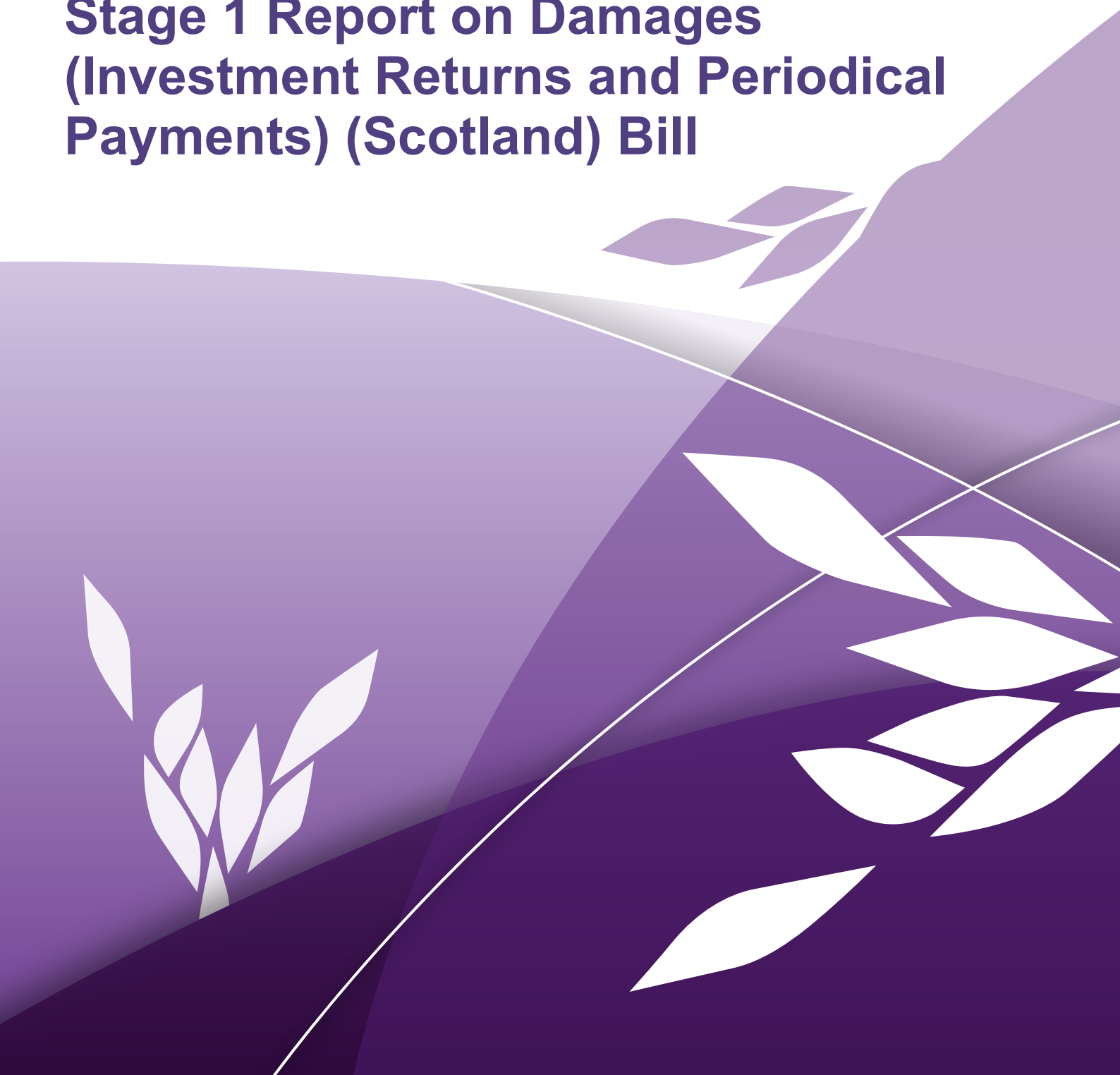
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Economy, Energy and Fair Work Committee Comataidh Eaconamaidh, Lùth is Obair Chothromach

Stage 1 Report on Damages (Investment Returns and Periodical Payments) (Scotland) Bill



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Economy, Energy and Fair Work Committee

Remit: To consider and report on economy and fair work matters falling within the responsibilities of the Cabinet Secretary for Finance, Economy and Fair Work; matters relating to the digital economy within the responsibilities of the Minister for Public Finance and Digital Economy, and matters relating to energy falling within the responsibilities of the Minister for Energy, Connectivity and the Islands.

(As agreed by resolution of Parliament on 6 September 2018)



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/economy-committee.aspx>



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Introduction

1. The [Damages \(Investment Returns and Periodical Payments\) \(Scotland\) Bill](#) ("the Bill") was introduced in the Scottish Parliament on 14 June 2018. It is a Scottish Government Bill.

2. The Policy Memorandum accompanying the Bill states—

” The overall policy of Part 1 of the Bill in reforming the law on the setting of the personal injury discount rate is to make provision for a method and process which is clear, certain, fair, regular, transparent and credible.

Part 2 of the Bill will give courts the powers to impose periodical payment orders (PPO) for future pecuniary loss. ¹

Background to the Bill

How personal injury claims work

3. 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 that a financial award can - as close to the position they were in before they were injured as possible.

The legal framework for personal injury cases

4. The law requires that, where a person or body has acted wrongfully, they are liable to compensate anyone who suffers loss as a direct result.

5. Further information on the background to the Bill can be found in the [SPICe briefing](#).

Overview of the Bill

6. The Bill is split into three parts.

7. Part 1 of the Bill makes provision for a new statutory regime for calculating the personal injury discount rate which should be applied to future pecuniary losses in personal injury cases. Section 1 requires a court to take account of the rate of return which is to be set by the official rate assessor. Section 2 and the schedule to the Bill set out the detail of how the rate is to be reviewed and set by the rate assessor.

8. Part 2 of the Bill contains provisions which give courts the power to impose periodical payment orders for future pecuniary loss in personal injury actions. It also contains provisions for the variation and suspension of periodical payment orders and similar agreements reached by parties.

9. Part 3 of the Bill contains general and ancillary provisions.

Consideration by other Committees

10. The Finance and Constitution Committee issued a call for evidence on the Financial Memorandum for the Bill, with a closing date of 31 August 2018. [Four responses](#) were received, following which it agreed that it would give no further consideration to the Financial Memorandum.
11. The Bill contains a number of delegated powers provisions. The Delegated Powers and Law Reform (DPLR) Committee published its [report](#) on the [Delegated Powers Memorandum](#) on the Bill on 24 October 2018. In that report, the DPLR Committee concluded that it was content with the delegated powers provisions contained in the Bill .


Committee consideration

12. The Economy, Energy and Fair Work Committee was designated as lead committee for Stage 1 consideration of the Bill on 19 June 2018. The Committee issued a [call for evidence](#) on 22 June, with a closing date of 7 September 2018. The Committee received 24 responses to its call for evidence, as well as eight further written submissions during the course of its Stage 1 scrutiny of the Bill. Responses are published on the Committee's [webpage](#).
13. The Committee took formal evidence on the Bill at three meetings (see Annex A):
 - on 23 October 2018, the Committee heard from representatives of the Association of Personal Injury Lawyers; Thompsons Solicitors; Faculty of Advocates, and Professor Victoria Wass, Professor of Human Resource Management, Cardiff Business School;
 - following the session on 23 October the Committee wrote to Personal Financial Planning Ltd and Pannells Financial Planning Ltd to determine whether the portfolio meets the needs of the hypothetical investor.
 - on 30 October 2018, the Committee heard from representatives of the Forum of Scottish Claims Managers; the Forum of Insurance Lawyers; NHS National Services Scotland, and the Association of British Insurers;
 - on 6 November 2018, the Committee heard from the Minister for Community Safety, Ash Denham.
14. The Committee is grateful to all those who provided evidence which helped to inform our scrutiny of the Bill.

Discount rate

How the Discount Rate should be calculated

15. The Bill would define a “hypothetical investor”. This is someone who is investing an award of compensation for future loss. The Bill would require the discount rate to be calculated on the basis that the hypothetical investor will be investing over a 30-year period.
16. The Bill features a “notional portfolio” made up of investments in various classes of assets. The Scottish Government states that this is designed to meet the needs of the hypothetical investor.
17. The Bill requires a series of set adjustments to be made to the rate calculated on the basis of the hypothetical investor investing in the notional portfolio. These are—
 - the impact of inflation (with reference to the Retail Prices Index);
 - a deduction of 0.5% to represent the costs of tax and investment advice;
 - a further deduction of 0.5% as a “further margin” to reduce the risk of under-compensation.
18. The Scottish Government would be able to alter the adjustments and the make-up of the notional portfolio via secondary legislation.
19. James Dalton of the Association of British Insurers (ABI) felt that the current framework that sets the discount rate is broken as it is not connected to how pursuers actually behave; it assumes all compensation is invested in index-linked securities.

 We are therefore very supportive of this legislation, which changes the framework for setting the rate to one that bears much more relation to what happens in reality. It is also much more modern.

Source: Economy, Energy and Fair Work Committee 30 October 2018 [Draft], James Dalton (Association of British Insurers), contrib. 3²
20. Alan Rogerson of the Forum of Scottish Claims Managers (FSCM) agreed and saw the need for flexibility to allow the injured party to make decisions, such as leaving something behind for their dependents. Norma Shippin of NHS Scotland cautioned about changes to the discount rate, as changing it “can have a major effect on lump sums” ¹.
21. The Scottish Government’s approach is for a cautious but low risk portfolio—

” The Scottish Government now accepts that it is appropriate to move away from the index-linked gilts approach that was taken in *Wells v Wells* and towards a very cautious but low-risk portfolio. We recognise that the hypothetical investor will need to take professional advice that is tailored to them, but we are making further adjustments to reduce the risk to the investor. *Wells v Wells* did not force pursuers to invest in a particular way, and nor does the new legislation. As will have come out in some of the earlier evidence to the committee, what pursuers actually do is irrelevant. The method is intended to provide a standardised approach that will apply across a broad range of cases.

Source: Economy, Energy and Fair Work Committee 06 November 2018 [Draft], Ash Denham, contrib. 13³

Hypothetical Investor

22. Pursuers' representatives suggested that further advice from financial experts was necessary to determine if the portfolio really did meet the needs of the hypothetical investor. Personal Financial Planning Ltd highlighted that the hypothetical investor does not resemble the situation that the pursuer will find themselves in. Pannells Financial Planning Ltd felt that the proposed portfolio would reflect investments that would be made. However, they questioned the balance between fixed investments and company shares.

” The portfolio is in the real world, whereas the hypothetical pursuer is not. Therefore, there is a fundamental mismatch between the assumed portfolio and pursuers in the real world. To align the two, it would be necessary to make adjustments for systemic factors which undercompensate personal injury victims, notably discounts applied for litigation risk (most cases settle out of court), the inadequacy of the law in relation to claims for the capital cost of accommodation (which require the claimant to bear some or all of the cost), the inability to allow for real growth in earnings-based costs (above price inflation) and the risk of survival beyond an assumed date of death. ⁴

” We view the notional investment portfolio included in the Bill to be well diversified and believe that this would largely reflect the type of portfolio that would be adopted by a hypothetical investor as put forward in the Bill, albeit we would consider this portfolio to be overweight in Fixed Interest investments and underweight in Equities. In our experience the range of investment strategies and associated asset allocations used in practice by discretionary fund managers or financial advisers do differ considerably from one investment manager to another, although the notional investment portfolio is similar to the investment strategy used in reality for a cautious investor but when investing over a shorter investment horizon, ⁵

30-Year Period

23. The Bill assumes that the hypothetical investor will hold their assets for a 30-year period. The length of period the assets are held for will affect the likely returns a pursuer can generate. A longer period will increase the likely returns. The UK Government Actuary's Department (GAD) has carried out analysis around the

discount rate for both the Scottish and UK Governments. A 30-year period has been used for both pieces of work.

24. In supplementary written evidence, ABI gathered data on “average life expectancy following a serious personal injury claim with damages over £250,000” and found that figure to be 46 years.⁶
25. Alan Rogerson (FSCM) pointed out that, based on average life expectancies, anyone under the age of 56 (for men) and 59 (for women) was likely to live beyond 30 years. In the evidence session with the Scottish Government, the Minister was asked about the 30-year period, in her response she pointed out that it was to account for a broad range of cases:

” The investor damage profile is 30 years. There is no authority on which to base that figure; it was chosen merely as a useful duration that was neither too short nor too long. We should remember that it is meant to cover a broad range of cases. As there will be cases at either end of the scale, a 30-year period was taken as correct for the damage profile.

Source: Economy, Energy and Fair Work Committee 06 November 2018 [Draft], Ash Denham, contrib. 25⁷

26. Jill Clark of the Scottish Government noted that they asked the [UK Government Actuary's Department \(GAD\)](#) to look at investment periods of between five and 50 years, taking 30 years as the average, ahead of each review GAD will carry out similar work. The Bill is also drafted so that more than one rate can be applied.

” We asked GAD to model over a 30-year period on the basis that it was an average, but it also looked at periods of 15 years and 50 years, and its report contains a graph showing the difference between the shorter and longer durations. Ahead of each review, GAD will do the same work and offer advice. If the differential gets too big, it might point to a more sensible option of having more than one rate—one for a shorter duration and one for longer—but the evidence does not currently point in that direction. That said, the bill leaves it open for more than one rate to be applied in the future, should the analysis indicate that it would be better, and fairer, to do so.

Source: Economy, Energy and Fair Work Committee 06 November 2018 [Draft], Jill Clark, contrib. 28⁸

27. On 22 November 2018, the Scottish Government clarified the role of the 30-year period.

” It is important not to conflate the damages profile assumption with the actual length of awards. The Minister explained that damages awarded to pursuers will still reflect the pursuer's life expectancy (where that is relevant) – the 30-year period is only being used to set the discount rate and not limit award sizes. So, a young adult with a life expectancy of 50 years will still receive much more money than the 56 year old with a life expectancy of 30 years. As the Minister pointed out it is also worth noting that not all damages are rest of life – for example some might be paid in respect of lost earnings up to retirement age or others for fixed periods.⁹

“Further margin” adjustment

28. Defender representatives have expressed particular concern that the “further margin” adjustment to reduce the risk of under-compensation is unfair. They argue that a cautious portfolio with a shorter timescale than they would like was already likely to produce over-compensation, so it did not need a further adjustment for under-compensation.
29. In the Policy Memorandum ², the Scottish Government makes clear that this adjustment is to reduce the risk of under-compensation. However, it states that, as a result “there will inevitably be a probability of over-compensation”. Defenders see this as a clear departure from the principle of 100% compensation.
- ” In the case of a pursuer, investment is likely to be a necessity as opposed to a preference or choice. Damages have the purpose of placing the pursuer back in the position they would have been in save for the personal injury and with the sorts of damages that attract the discount rate this is most likely to be to meet future pecuniary losses and care costs. Damages are not surplus funds which can be speculatively invested. Any losses are likely to be material to a pursuer’s ability to meet their needs. For all of these reasons, the Scottish Government considers that a further adjustment is needed to reduce the likelihood of under-compensation. The corollary is that there will inevitably be a probability of over-compensation but it will be less than if the rate were set by reference to ILGS [Index-Linked Government Stock]. A further adjustment is, therefore, set out in the legislation which will be deducted from the rate of return. The further adjustment is in recognition of the fact that any investment, however carefully advised and invested may fail to meet their needs. The Scottish Ministers will have power to change that adjustment by regulations. ¹⁰
30. James Dalton (ABI) noted that setting the discount rate to 0.5 per cent was a “blunt instrument” that will over-compensate. He referred to the ABI’s written submission which proposed an alternative.
- ” Whilst we do not accept that any adjustment is required from the result produced by applying the other assumptions, there is an obvious and more equitable alternative if it is considered essential to err on the side of caution. Currently under paragraph 20 of Schedule B1 the rate assessor is required to round their result up or down to the nearest 0.25%. That could be amended so that the rounding is only ever to the nearest 0.25% downwards. In that way, the rounding exercise would only ever work in favour of pursuers’ interests but to a limited degree, consistent with the overall purpose of the setting of the discount rate and delivering an outcome that, as close as possible adheres to the 100% compensation principle. ¹¹
31. The Minister acknowledged the likelihood of under-compensation or over-compensation and explained the methodology used—

” For a range of reasons, there will always be to some degree the probability of undercompensation or overcompensation, and that is why the adjustments are there. The particular adjustment that we are discussing recognises that an investment, however cautious, will always carry some sort of risk. The methodology that we use acts as a proxy and is therefore unable to take account of individuals’ needs, because factors can vary.

Source: Economy, Energy and Fair Work Committee 06 November 2018 [Draft], Ash Denham, contrib. 18¹²

32. Not directly related to costs arising from the Bill, but in the context of the relationship between large value claims and customer insurance premiums, AVIVA wrote to the Economy, Energy and Fair Work Committee on 23 November 2018 with supplementary evidence stating that large injury claims currently account for 30-40% of the overall cost of all injury claims. ³

Assumed Period of Investment

33. The Bill assumes that the hypothetical investor will hold their assets for a 30-year period. The length of period the assets are held for will affect the likely returns a pursuer can generate. A longer period will increase the likely returns.
34. It is not obvious why a period of 30 years should be chosen. The GAD analysis suggests that it was used in a similar exercise carried out for the UK Government's Ministry of Justice.
35. Defender representatives have suggested that catastrophically injured pursuers are likely to be investing over a longer period.

” According to our analysis, the average life expectancy of a settled claim is around 40 to 45 years, which means that a 30-year period is very short.

In that context, having a portfolio that is underweight on equities means that a person is not hedging their inflation risks sufficiently. If they were to increase the size of the portfolio of equities within the overall portfolio, they would be better able to manage the inflation risk, and if they were to combine that with an extension of the portfolio's life expectancy from 30 to 40 years, for example, they would get a less conservative but still low-risk portfolio.

Source: Economy, Energy and Fair Work Committee 30 October 2018 [Draft], James Dalton, contrib. 16¹³

36. In supplementary written evidence, ABI gathered data on “average life expectancy following a serious personal injury claim with damages over £250,000” and found that figure to be 46. ⁴
37. Thompsons Solicitors noted that some pursuers had a much shorter life-span, and would be adversely affected by the assumptions in the Bill. ⁵
38. It would be possible to set more than one discount rate. This would better reflect the circumstances of pursuers dealing with short and long awards. This option was

explored in the 2017 Scottish Government/Ministry of Justice consultation, although most respondents preferred one rate for simplicity.⁶

39. The Bill makes provision for Scottish Ministers to use regulation-making powers to set more than one rate. However, it is not clear how this would operate in practice. For example, it is not clear that Scottish Ministers have the power to create more than one notional portfolio.

Notional Portfolio

40. The notional portfolio will comprise of low risk investments to meet the needs of the injured person. A number of respondents to the Committee's [call for evidence](#) questioned how decisions on the make-up of the notional portfolio were reached.
41. The Scottish Government commissioned work from the UK Government Actuary's Department¹⁴ (GAD) to inform their approach to this and other aspects of the Bill. The portfolio recommended by GAD has been used in the Bill.
42. GAD selected 20 funds on the basis of their being categorised as “low risk” by a respected “third-party investment research firm”. It describes its methodology thus—

” The asset allocation that was proposed for the notional portfolio and has been included in the Bill [...] has been informed by broad consideration of the different allocations across the 20 funds and the assets held by the 20 sample funds under each asset class.¹⁵

43. The Medical Defence Union argued that the portfolio in the Bill is more cautious than either of those used in the [Scottish Government/Ministry of Justice consultation exercise in 2017](#). The Association of British Insurers believed that the portfolio is “over-cautious”⁷.
44. Defender representatives argued that the notional portfolio is too cautious. The ABI (via solicitors DAC Beachcroft) commissioned an opinion from financial advisers Pannells Financial Planning Ltd. This concluded that the notional portfolio was too focussed on fixed assets at the expense of equities (company shares). Equities would deliver a higher rate of return over the 30-year period.
45. Defender representatives also argued that the Scottish Government would need to update the notional portfolio regularly via secondary legislation to keep up with market changes. It was suggested that financial advisers would do this at least once a year, so the Scottish Government would need to consider the issue at least at every three-year review. Defender representatives questioned whether the role of monitoring the appropriateness of the portfolio would fall to the Scottish Government or the UK Government Actuary's Department.
46. The Scottish Parliament Information Centre has provided more detail on the breakdown of the Notional Investment Portfolio—

SPICe Briefing Damages (Investment Returns and Periodical Payments) (Scotland) Bill—Investments: setting rate of return

Asset class	Percentage of portfolio
Cash or equivalents	10%
Non-index-linked gilts	15%
Index-linked gilts	10%
UK company shares	7.5%
Overseas company shares	12.5%
High-yield bonds (bonds with a higher risk of default, and consequent higher interest rate)	5%
Investment-grade bonds (bonds with a lower risk of default, and consequent lower interest rate)	30%
Property (land, buildings or moveable property)	5%
Other assets	5%

47. The Forum of Scottish Claims Managers also highlights that people receiving financial advice will re-balance their portfolio regularly to take account of market conditions. This would also allow for greater returns.
48. The Minister outlined the methodology that is used to create the notional portfolio—
- ” The portfolio is designed to meet the very specific needs of the hypothetical investor, and it was arrived at on the basis of professional advice and expertise. The Government Actuary’s Department carried out detailed analysis of a number of funds that were categorised as low risk by a firm called Morningstar, which is a third-party investment research firm that is widely recognised across the industry. The notional portfolio was built with reference to those funds. The Scottish Government believes that the portfolio would, therefore, meet the needs of an individual who is in the circumstances that we are describing.

The committee should also note that a small majority of respondents to the 2017 consultation were of the view that the idea of a mixed portfolio of assets was the right way to go, as it balances flexibility with the best way of managing the risk. In addition, some respondents suggested that the approach most closely matches the actual behaviour of pursuers when they are investing. I hope that that answers your question.

Source: Economy, Energy and Fair Work Committee 06 November 2018 [Draft], Ash Denham, contrib.
g¹⁶

49. The Minister then went on to state that the Scottish Government's intention to review the portfolio ahead of every regular review which would allow the adjustments to be changed if it was felt that they were not meeting the needs of the hypothetical investor. She also highlighted that Scottish Ministers have the power to call for out-of-cycle reviews should economic conditions require it.

Recommendations

1. The number of people affected by personal injury cases where the discount rate applies may be small but the means of calculating their compensation is of vast importance to them and their families, as well as to pursuer and defender interests (the NHS included) and the insurance industry.

2. Like most of the respondents to our call for evidence, the Committee welcomes the additional clarity and transparency provided by having the method for calculating the discount rate set out in legislation. Opinion beyond that tends to divide into two camps. Defender representatives generally argue that any discount rate which does not reflect the returns of ordinary and prudent investment is unfair, leading to over-compensation. Those on the pursuer side highlight other risks – such as the costs of care and modifying accommodation – that could add to the investment risk and which the injured party would not have incurred had they not been wrongly injured. These are additional to the other risks a pursuer faces when instigating the compensation process and, they contend, could lead to under-compensation.

3. The Committee acknowledges that the process is not an exact science; the approach being that of the hypothetical investor with a notional portfolio investing over a period of 30 years. There appears to be little or no information on actual investor behaviour. Some witnesses saw a mismatch between the notional portfolio and the investment behaviour of pursuers in reality. Others pointed out that a longer time period might bring higher returns. However, as the Minister said, the point here is not what pursuers actually do but to provide a standardised approach that can work in the interests of fairness, regularity and credibility across a range of cases.

4. The 30-year assumed period of investment has been arrived at as a workable average to cover the damage profile for a broad range of cases. The Scottish Government has said it will keep the figure under review – with regular analysis and advice from the UK Government Actuary's Department – and where analysis showed a significant divergence in outcomes over 15, 30 and 50-year periods, consideration would be given to having more than one rate. The Committee seeks more detail from the Scottish Government on that commitment, including the degree of divergence that would suffice for it to introduce more than one interest rate.

Risk-free approach

Adjustments

50. The Bill would require a series of set adjustments to be made to the rate calculated on the basis of the hypothetical investor investing in the notional portfolio. These are—
- the impact of inflation (with reference to the Retail Prices Index);
 - a deduction of 0.5% to represent the costs of tax and investment advice;
 - a further deduction of 0.5% as a “further margin” to reduce the risk of under-performance.
51. Scottish Ministers would also be able to modify the extent of the adjustments, or change the measure of inflation, via regulations.
52. However, several respondents to the Committee's call for evidence argued that only a “risk-free” discount rate represented 100% compensation. Anything else required pursuers to take on investment risk in a way they would not have had to if they had not been injured. In her written submission to the Committee Professor Wass described the likely nature of a pursuer—
- ” The pursuer is not a hypothetical investor seeking the best returns. The pursuer is more like a hypothetical closed pension scheme meeting fixed liabilities from a fixed pot. ... The Pension Regulator does not permit a closed pension scheme to meet its future liabilities through a mixed portfolio. Rather a closed pension scheme is required to invest in ILGS or something very close to it. A mixed portfolio might provide flexibility to meet risk but at the very high cost of adding to the risks the pursuers already faces. ¹⁷
53. The Institute and Faculty of Actuaries noted that the regulatory regime which applies to insurers requires them to account for the liability to pay personal injury claims on a risk-free basis. It stated—
- ” Of particular concern is that an insurer would value the claim for solvency purposed by reference to a risk-free rate: it would seem to be unfair to ask an individual in these circumstances to take more risk than an insurer [...] ¹⁸
54. Professor Wass listed four sources of under-compensation that require pursuers to take risks when investing.

” The first shortfall that all claimants have to make up is that the personal injury discount rate since 2003 has always been above the actual risk-free rate on ILGS. They also have a risk of longevity; they do not know when they are going to die, so they always feel that they need to keep back some money so that they do not run out of their lump sum before their actual date of death rather than predicted date of death. That is another reason why they invest outside ILGS.

A lot of what the lump sum will cover is earnings-based losses. It might be loss of earnings, but principally it will be care. Care costs go up according to earnings inflation rather than price inflation and ILGS only protects against price inflation. Earnings inflation, up until the past 10 years, has always been more than price inflation. That is another shortfall that claimants have always been trying to make up.

The fourth shortfall is on accommodation. Because of the way in which the accommodation is compensated, people do not have enough to pay for adapted accommodation

Source: Economy, Energy and Fair Work Committee 23 October 2018 [Draft], Professor Wass, contrib. 85¹⁹

55. A number of defender respondents to the Committee’s call for evidence highlighted that PPOs can provide pursuers with a guaranteed payment for life. PPOs, where available, can remove both investment risk and the risk of living longer than an award provides for.

Tax and Financial Advice

56. Pursuer representatives have argued that a 0.5% adjustment may not be sufficient to cover the costs of tax and financial advice to the pursuer.
57. The GAD analysis suggested that something between 0.5% and 2.0% would be appropriate. It explains why a deduction at the lower end of the scale is likely to be appropriate.⁸ However, it notes that “a larger adjustment could be plausibly justified”⁹.
58. GAD’s detailed analysis suggests that “further evidence is gathered to confirm the appropriate adjustment”.¹⁰
59. In their submission to the Committee, Personal Financial Planning Ltd expressed concern regarding the assumption that portfolios would be invested passively.

” With regard to the adjustment for the costs of investment advice, there is an assumption in the GAD report that is often applied to investors generally: there is no point in paying for active investment management unless it delivers superior performance, i.e. the costs pay for themselves, if the performance is actually delivered. Therefore, on this basis, the assumption made is that the portfolio will be passively invested, not actively managed. However, this fundamentally misunderstands the nature of what pursuers require and must seek: that is not outperformance, but management of cash flows and risk. That management is an outright expense, and cannot end up delivering better than expected returns (only the market can do that). We would expect typical costs to fall in the range 1.5% to 2% in the real world, and for a portfolio of the size modelled by GAD the costs would be at the higher end of the range since it is only those with more capital who can generally expect to pay less in percentage terms for their advice.

The adjustment to protect against volatility is directly related to the point made above about the costs of investment advice, since reducing volatility is one of the purposes of the advice. Therefore, if the allowance for investment costs is adequate no further adjustment should be necessary.²⁰

60. Pannells Financial Planning Ltd added that the charges noted on the Bill do not account for the initial cost of advice and that the pursuer would not have the experience to choose a package without such advice.

” The approach to charges noted on the face of the Bill does not take any account of initial advice costs, these can typically range from 1%-3% of the amount invested. In respect of the second point noted, it is worth pointing out that it is unlikely that the pursuer would have the requisite knowledge or skill to choose a suitable asset allocation or appropriate investments to hold themselves without some advice, regardless of whether these are “passive” or “active” managed funds. It could therefore be argued that some account should be made for initial advice charges within the deduction to the discount rate.²¹

61. It was put to the Minister that the 0.5 per cent adjustment for tax and investment might not be enough. The Minister responded that they had consulted with GAD that took the view that 0.5 per cent was appropriate—

” Although GAD considered that a reasonable allowance would be somewhere between the 0.5 per cent that you have mentioned and 2 per cent, it took the view that the lower end of that range would be more appropriate. It gave a number of reasons for that, one of which was that it thought that investors would typically shop around to get the best possible rate. In its report, GAD suggested that the Scottish Government should seek further advice on the level of the adjustment, and work is being undertaken on that.

Source: Economy, Energy and Fair Work Committee 06 November 2018 [Draft], Ash Denham, contrib.
15²²

62. Jill Clark of the Scottish Government stated that the likelihood was that portfolios would be full of passive funds that would not require a lot of management; the current shape of the market suggests that there is no pressure regarding higher tax

charges. She assured the Committee that the Scottish Government would be looking at the matter further ¹¹ .

Conclusions

5. We heard evidence that the pursuer already takes on a number of risks in the process of achieving compensation for personal injury, for example, in relation to living longer than provided for in their award, or dealing with inflation costs which were higher than covered by their award. An investment risk, it was argued, added to the likelihood of under-compensation; and a risk-free approach to the discount rate was seen as the only way to achieve the 100% compensation principle. The contrary view was that investors' portfolios were likely to be adjusted on an on-going basis to include higher-performing assets that increase returns.

6. Any investment comes with a degree of risk and the Scottish Government accepts that there is always a possibility of under- or over-compensation. It considers that a 50% chance of under-compensation – as UK Government Actuary's Department analysis suggested is currently the case – is not acceptable. The Minister believes the adjustments – to cover inflation, the costs of tax and investment advice, and a “further margin” adjustment to reduce the risk of under-performance – will reduce that probability. On balance, the Committee is satisfied with that approach.

Political Accountability

UK Government Actuary

63. The Bill would require the UK Government Actuary to review the discount rate every three years, starting from the date the legislation comes into force. There is also provision for additional, out-of-cycle reviews, should Scottish Ministers request them.

64. Asked about political accountability, the Minister said—

” The Scottish Government’s view is that the determination of the rate is purely an actuarial exercise; there is no need to exercise political judgment. ... GAD will publish its reasoning along with the rate, which will allow complete transparency in the process.

Source: Economy, Energy and Fair Work Committee 06 November 2018 [Draft], Ash Denham, contrib. 47²³

65. Jill Clark of the Scottish Government described the “grounding part of the bill”. She said—

” The powers to change the portfolio and the adjustments are simply intended as a way to keep them up to date and relevant as investment markets change. The constant is the description of the hypothetical investor, which will have been agreed by the Parliament.

Source: Economy, Energy and Fair Work Committee 06 November 2018 [Draft], Jill Clark, contrib. 51²⁴

66. Scott Matheson of the Scottish Government added—

” the Government actuary’s role is one of decision making within a very narrow range of parameters that are set out in the legislation. GAD is not acting as an adviser to ministers ... it will be determining the rate and producing a report. It will be the rate as set out in that report that the courts will take into account, subject to the discretion that was referred to

Source: Economy, Energy and Fair Work Committee 06 November 2018 [Draft], Scott Matheson, contrib. 70²⁵

Review Period

67. The Scottish Government suggests ¹² that a three-year period balances the requirements of flexibility and certainty.

68. 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.

” Although personal injury cases are managed on a timetable by the court, the more complicated cases take longer and you might be waiting a year or even two years for a court hearing. That time can be used by the parties to negotiate a settlement, but if one party perceives that there would be a benefit in waiting a year, there is not really anything to stop them doing that if they think that they will get more or have to pay less if they wait. It has a material effect on our ability to settle cases.

Source: Economy, Energy and Fair Work Committee 30 October 2018 [Draft], Kate Donachie, contrib. 41²⁶

69. Thompsons Solicitors has suggested that, to prevent gaming, the discount rate should be calculated on the basis of when the claim was raised, rather than when it was settled.

” I would suggest that the solution here is for the new rate only to apply to court actions raised after the investment rate changes. In other words, the rates to be used when a case is being settled or an award handed down by a judge should be the rate at the time that the case was litigated irrespective of whether or not the rate subsequently changed during the course of the litigation. ²⁷

70. Alan Rogerson (FSCM) supported a five-year review period as it would be more stable—

” I would certainly advocate a five-year review period. Three years, in my experience, is a little too short. That is because, in the run-up to a review, either side may see an advantage in holding off and not settling the case—there is a perceived advantage in waiting and perhaps getting more advantageous terms after a review period. A five-year cycle would allow a more stable period in between times. Allied to that are the questions about how an injured person chooses to invest their damages and what sort of advice they get—you would expect a managed portfolio to be reviewed annually. However, I strongly suggest that a five-year review period is the way to go, to stop people taking advantage of the system and of the uncertainty of the review period to delay settlement.

Source: Economy, Energy and Fair Work Committee 30 October 2018 [Draft], Alan Rogerson, contrib. 40²⁸

71. Westminster legislation has been amended to extend the review period for the discount rate there to five years. When it was suggested that a five or even seven year review period the Minister noted that the Government were open to suggestions.

” In general, the bill is meant to ensure that we avoid the previous situation, in which there were very long periods between reviews. It was considered that the three-year period would be a suitable compromise. The Government is certainly open to considering alternative periods, including a five-year period if that would be more acceptable. I would be interested to read the committee's views on the matter in its stage 1 report if it is considering such a proposal.

Source: Economy, Energy and Fair Work Committee 06 November 2018 [Draft], Ash Denham, contrib. 80²⁹

Conclusions

7. The intention behind the UK Government Actuary being responsible for setting the rate is that it becomes a technical rather than political exercise. A contrasting approach is being taken in England and Wales. There is an argument that this ought to remain a decision for which there is political accountability, given the financial implications for public bodies such as the NHS. The Scottish Government's view is that the setting of the rate is an actuarial exercise, with political accountability being provided by setting the framework in primary legislation. It is also worth noting that the Scottish Government would be able to alter the adjustments and make-up of the notional portfolio via secondary legislation and therefore does have an ongoing input to the process. The Committee is, on balance, content with the approach outlined.

8. The Scottish Government wishes to strike a balance with the regularity of the review period between the requirements of flexibility and certainty. Some witnesses were worried at those who might "game" the system, pushing or holding back proceedings to suit the timing of the next review. One suggestion was that such a scenario could be prevented by factoring in when the claim was raised rather than when it was settled. The Committee believes that there is merit in this suggestion and invites the Scottish Government to set out how this might be achieved and whether it can be done through the Bill or otherwise.

9. The Minister told us the intention was to review the portfolio ahead of every regular review, with a further failsafe being the provision for Scottish Ministers having the power to call for an out-of-cycle review. Acknowledging this rigorous approach, the Committee believes – in the interests of finding that balance between flexibility and certainty – that five years would be preferable to three.

Periodical Payment Orders (PPOs)

Use of PPOs

72. PPOs are currently available in the Scottish courts, but only if both parties agree. The Bill would change the law to allow the courts to impose a PPO, even if there was not agreement between the parties. Generally witnesses representing pursuers saw the benefits of PPOs.

” The faculty has no real problem with the proposals on PPOs, which look reasonably sensible and strike the necessary balance to allow for people to come back under very limited circumstances. They also deal with the issue of security and the rest. From my perspective, the provisions look quite sensible.

Source: Economy, Energy and Fair Work Committee 23 October 2018 [Draft], Simon Di Rollo, contrib. 147³⁰

73. However, it was suggested by Professor Wass that private insurers would not want to use them and currently should a case go to court they would not be used. Gordon Dalyell (Association of Personal Injury Lawyers) expanded on this, envisaging a scenario involving a young pursuer and the impact on insurance cover.

” One of the main areas of concern relates to cases that involve employers’ liability insurance and public liability insurance. Such policies generally have an indemnity limit of £10 million. That is sufficient for most lump-sum cases, but in a case that involved a young pursuer, in particular, a PPO might create difficulties for the future. The issue would need to be looked at carefully and would require reassessment of the obligations on employers and public bodies in relation to their levels of insurance cover.

Source: Economy, Energy and Fair Work Committee 23 October 2018 [Draft], Gordon Dalyell, contrib. 138³¹

74. This was challenged by Alan Rogerson (FSCM), who found it hard to imagine a situation where a court would not be sympathetic to an injured person seeking a PPO. James Dalton (ABI) assured the Committee that there were no issues regarding the expense the regulatory regime would have for insurers.

” To answer your question directly, there is no problem with that regime. Insurers comply with that across Europe in valuing those long-term liabilities; they put money on their balance sheets to account for that and to ensure that they are solvent and their capital position is robust. There is no problem with the regulatory regime.

Source: Economy, Energy and Fair Work Committee 30 October 2018 [Draft], James Dalton, contrib. 86³²

75. Patrick McGuire (Thompsons) expressed concern about a PPO being forced on an injured person as there is a merit to receiving a lump sum—

” However, my concern is that the bill creates a situation in which a PPO could be forced on a victim. I have personal experience of acting at the Scottish end of litigations in which the claim has been raised in England for jurisdiction reasons and a Scottish person has had a PPO forced on them. That occurrence—when a person does not want a PPO and wants the choice of a lump sum but the court makes the decision for them—can be very difficult for somebody at the end of what is often an extremely long road to compensation, as catastrophic injury cases inevitably are. The process of finally getting compensation is ultimately empowering and a decision that is forced on a person in many ways disempowers them. I caution against creating a situation whereby the decision can be forced on a victim. That is not necessarily the case for insurers, but if a victim wants a PPO, they ought to be able to argue for that and a court can make a decision irrespective of an insurer’s view.

Source: Economy, Energy and Fair Work Committee 23 October 2018 [Draft], Patrick McGuire, contrib. 157³³

76. However, PPOs are only used in the most serious of personal injury cases, where compensation for future loss makes up a significant part of the award. There are only a few such cases per year in Scotland. As a result, many have not had any experience dealing with PPOs. Kate Donachie of Forum of Insurance Lawyers said—

” My experience is the same as Alan Rogerson’s. I have dealt for a long time with claims for serious injuries and I have never been asked for a periodical payment order, nor has it ever been raised, even as an option, or floated at any settlement discussion.

Source: Economy, Energy and Fair Work Committee 30 October 2018 [Draft], Kate Donachie, contrib. 33³⁴

77. There are circumstances where PPOs will not be appropriate – for example, in most cases where there is contributory negligence or where the compensator is not considered to be reasonably secure.
78. The courts in England and Wales have been able to impose PPOs for a number of years. Respondents to the Committee’s call for evidence commented on the use of PPOs in England. In its written submission Allianz Insurance Plc outlined the process.

” A critical part of the use of a PPO in England and Wales is the requirement that any settlement before or after court proceedings have been started, requires the approval of the court to represent a valid discharge of the claim. This is more than a "rubber-stamp" exercise and will, in practice, involve written and oral submissions to the court as to the adequacy of the settlement. In high value cases where a PPO would be contemplated, it would also involve the pursuer disclosing financial advice to the court alone to evidence the form of award which best meets their needs. ³⁵

” Although the courts have the power to impose PPOs in England & Wales, we are unaware of a case in which the court has done so. We would anticipate that even with the power to impose PPOs, the Scottish Courts would use the power sparingly, if the pursuer has a strong preference for a lump sum settlement.

In our experience most claimants prefer to receive the loss of earnings element of their compensation payment as a lump sum to maximise the flexibility that a lump sum payment can give them, for example to fund the purchase of accommodation.³⁶

79. It appeared that public sector bodies are at the forefront of using PPOs in England. It was suggested that this was because their budget process worked well with ongoing liabilities.

80. Several respondents suggested that insurance companies were reluctant to offer PPOs. This was thought to be because the way insurance companies have to account for this liability was expensive for them. It was suggested that insurance companies have to reserve for future payments on a “risk-free” basis. Professor Wass observed—

” My view is that poor uptake of PPOs is largely confined to non-government defenders and is driven by the reluctance of the general insurance sector to take on the very risks that are so difficult and costly for pursuers to manage.³⁷

81. Respondents representing insurers, however, suggested that there would be no problem making PPOs available. But several suggested that pursuers prefer lump sums.

82. The Minister anticipated that there would be a small number of PPOs initially and acknowledged that PPOs were not for everybody.

” The number of cases in which a PPO could be used is quite small to begin with, so we are not anticipating a large increase in take-up. We simply hope that providing courts with the option to encourage people to use PPOs where that is appropriate might lead to a slight increase in numbers. In addition, there might be some influence in cases that do not go to court but are settled by agreement—even though people would not be forced by a court order to use a PPO, they might consider using one anyway.

We know that PPOs are not suitable for all pursuers or in every case. For a variety of factors, some pursuers might prefer to have a clean break, so they will not want to enter into such an arrangement. In addition, not all defenders will be sufficiently financially secure to use a PPO. Nevertheless, we hope that greater use will be made of PPOs.

Source: Economy, Energy and Fair Work Committee 06 November 2018 [Draft], Ash Denham, contrib.
85³⁸

Variation of PPOs

83. The Bill would allow for a PPO to be varied in certain, specified circumstances. This is a departure from current legal practice. Generally, court action is a once-and-for-all opportunity to reach a settlement.
84. Currently, the risk that a condition may deteriorate (or improve) can be factored into the award the court gives. However, there is an ongoing risk that things do not turn out as expected falls on the parties.
85. The Bill would allow the parties to come back to court to adjust a PPO where—
- the original agreement had made provision for variation and identified the particular change which would need to occur;
 - that changed had actually occurred; and
 - there would be “significant” over- or under-compensation as a result.
86. When reconsidering an award, the court would have wide ranging powers to vary a periodical payment. This includes, for example, the power to suspend payments, change the way inflation is accounted for, or convert the payment to a lump sum.
87. Some defender representatives were concerned that the courts' power 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. Causation is a necessary element in establishing a claim for negligence. In their submission to the Committee, BTO Solicitors LLP said—
- ” The proposals in the Bill would allow the courts to revisit a compensation award in limited circumstances. This is important to allow the principle of 100% compensation to be achieved. It is not clear from the prop—osed wording in the Bill that causation of the change to the pursuer’s physical or mental condition, arising from the original accident under which a PPO was granted, must be established for a variation or suspension. It may appear to be stating the obvious to stipulate that causation is established but it would do no harm to expressly say so for the avoidance of any doubt and to avoid satellite litigation.
- 39
88. Pursuer representatives noted that pursuers would have additional expenses in bringing a case back to court for a variation. The Association of Personal Injury Lawyers (APIL) called for these to fall to the defender. Thompsons suggested they should be covered by the principle of Qualified One-Way Costs shifting (QOCS).

- ” In addition, the provisions also potentially convey a wider discretion than in the rest of the UK to award a (further) lump sum 'instead of, or in addition to, any future periodical payments in respect of future pecuniary loss'. The use of the words “or in addition to” might be thought to permit further damages to be awarded in addition to the variation of the PPO for other heads of loss which are not covered by periodical payments. This provision makes the potential for reopening the award too wide. There are other statutory provisions which permit the court to rule that a lump sum award can be reopened in defined circumstances. The words “or in addition to” should be deleted. ¹¹
- ” The principles of Qualified One Way Cost Shifting that are now enshrined in the 2017 Act should apply to PPO reviews such that the pursuer will not be exposed to the risk of defenders’ costs if they fail to prevent an attempt to reduce the PPO or fail in an attempt of their own to increase a PPO unless their conduct amounts to an abuse of process. ²⁷

89. Qualified One-Way Costs Shifting (QOCS) will be introduced for personal injury claims in Scotland when the relevant provisions of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 are brought into force. It alters the general legal rule that the loser in court action pays the winner's legal expenses (such as expert evidence and engaging a solicitor). QOCS provides that a pursuer is protected from liability for a defender's legal expenses if they lose, but they can still claim their legal expenses from the defender if they win.
90. Most personal injury cases are settled by negotiation between the parties rather than going to court. The Bill would make provision for such negotiated settlements to provide for variation (although the court would have to consider the issue if variation was actually requested).

Conclusions

10. The Committee welcomes the provision for a court power to impose a periodical payment order, as did almost all of those respondents to our call for views. PPOs are currently available to Scottish courts but only in cases where both parties agree. We invite the Scottish Government to bring forward amendments to give more weight to the pursuer's views when a court is asked to decide on a PPO. This might be by example providing for a statutory presumption in favour of the pursuer on this point. In England and Wales, where PPOs are already available to the courts, they tend to be favoured by public bodies, the NHS included. It is anticipated this may also prove to be the case in Scotland. However, in the interests of wider application and pursuer choice, the Committee asks the Scottish Government to outline how it will promote the use of PPOs beyond the public sector. We also welcome the provisions to vary PPOs in the circumstances set out in the Bill, including the scenario whereby significant over or under compensation is likely.

11. The absence of the Motor Insurer's Bureau (MIB) from the list of reasonably secure bodies was raised during the Committee's scrutiny. The Scottish Government said it would consider adding the MIB to the list once uncertainties about its position created by

Brexit were resolved. The Committee asks the Scottish Government to report back to us in 12 months from now with the outcome of its considerations.

General principles of the Bill

12. The Committee welcomes the introduction of the Bill. Although the number of personal injury cases where the discount rate applies is small, the importance of the process to the individuals and families concerned is considerable; and – while not underplaying the differences of opinion between the defender and pursuer sides on the detail – we welcome the additional clarity and transparency provided by having the method for calculating the discount rate set out in legislation. The Committee is content that the provisions in the Bill have been framed in the interests of achieving fairness, regularity and credibility across a range of cases and for both sides.

13. We draw particular attention to those paragraphs where we have sought more information (conclusion 4), asked the Scottish Government to outline a solution (conclusion 8), recommended a change (conclusion 9), invited amendments (conclusion 10) and asked for more detail (also conclusion 10) and requested an update (conclusion 11).

14. The Committee supports the general principles of the Bill and recommends to the Parliament that they be agreed to.

Annex A - Extracts from the minutes

Extracts from the minutes of the Economy, Energy and Fair Work Committee and associated written and supplementary evidence

28th Meeting, Tuesday 23 October 2018

3. Damages (Investment Returns and Periodical Payments) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

- Gordon Dalyell, Vice President, Association of Personal Injury Lawyers;
- Patrick McGuire, Solicitor Advocate, Thompsons Solicitors;
- Simon Di Rollo QC, Faculty of Advocates;
- Professor Victoria Wass, Professor of HRM, Cardiff Business School.

Gordon Lindhurst declared that he was a member of the Faculty of Advocates.

5. Damages (Investment Returns and Periodical Payments) (Scotland) Bill: The Committee considered the evidence heard at today's meeting.

29th Meeting, Tuesday 30 October 2018

2. Damages (Investment Returns and Periodical Payments) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

- Alan Rogerson, Forum of Scottish Claims Managers;
- Kate Donachie, Forum of Insurance Lawyers;
- Norma Shippin, Director and Legal Advisor, and Joy Atterbury, Head of Litigation, NHS National Services Scotland;
- James Dalton, Director of General Insurance Policy, Association of British Insurers.

4. Damages (Investment Returns and Periodical Payments) (Scotland) Bill: The Committee considered the evidence heard at today's meeting.

30th Meeting, Tuesday 06 November 2018

3. Damages (Investment Returns and Periodical Payments) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Ash Denham, Minister for Community Safety, Jill Clark, Civil Law and Legal System Division, Scott Matheson, Legal Directorate, and Alex Gordon, Parliamentary Counsel Office, Scottish Government.

5. Damages (Investment Returns and Periodical Payments) (Scotland) Bill: The Committee considered the evidence heard at today's meeting.

Annex B - Written evidence

Written Submissions to the [Call for Views](#)

List of other Written Evidence

- [The Medical Defence Union](#)
- [Faculty of Advocates](#)
- [AXA Insurance](#)
- [Aviva](#)
- [Professor Victoria Wass](#)
- [Clyde & Co LLP](#)
- [BLM](#)
- [Personal Financial Planning Ltd](#)
- [Stagecoach Group plc](#)
- [Association of Personal Injury Lawyers \(APIL\)](#)
- [Allianz](#)
- [Medical Protection Society](#)
- [DAC Beachcroft Scotland LLP](#)
- [BTO Solicitors LLP](#)
- [Forum of Scottish Claims Managers](#)
- [Transportation Claims Ltd \(First Group plc\)](#)
- [LV=](#)
- [Law Society of Scotland](#)
- [MDDUS](#)
- [Institute and Faculty of Actuaries](#)
- [Association of British Insurers \(ABI\)](#)
- [Association of British Insurers \(ABI\)-Discount_Rate](#)
- [Forum of Insurance Lawyers](#)
- [Enterprise Holdings](#)
- [Thompsons Solicitors](#)

Supplementary Evidence

- [Professor Victoria Wass - Summary](#)
- [Association of British Insurers](#)
- [Professor Victoria Wass](#)
- [NHS Settlement Payments 2010-18](#)
- [NHS - Claims settled by Lump Sum and PPO](#)
- [Association of British Insurers: Comments On The Government Actuary's Department Personal Injury Discount Rate Analysis](#)
- [Association of British Insurers](#)
- [Forum of Scottish Claims Managers](#)

Correspondence

On 24 October 2018, the Committee wrote to Personal Financial Planning Ltd and Pannells Financial Planning Ltd to request further information on the aspects of the Bill that dealt with financial investment and advice.

- [Personal Financial Planning Ltd](#)
- [Pannells Financial Planning Ltd](#)

Annex C - Glossary

100% compensation principle	The idea that an injured person should receive exactly the right amount of compensation, no more, and no less.
Act of sederunt	A form of secondary legislation made by the Court of Session to regulate civil court procedure.
Additional fee	An increase in the amount which can be claimed as judicial expenses from the losing party, on the basis that the case was unusually complex or time-consuming.
After the event insurance	Insurance to cover against the risk of having to pay the opposing party's judicial expenses in a court action, where the insurance policy is taken out after the event giving rise to court proceedings.
Auditor	An officer of the court responsible for independently reviewing the fees charged by a solicitor for legal work.
Before the event insurance	Insurance that was in place before the occurrence of the event giving rise to the court proceedings. The insurance covers the legal fees of the insured and may also cover an opponent's expenses (in the event of the insured being ordered to pay their opponent's judicial expenses).
Claims management companies	Companies 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 do not employ solicitors and must pass a claim on (sometimes for a referral fee) to a solicitor if representation in court is needed.
Contributory negligence	Where the pursuer is considered by the court to be partly responsible for their own injury. In these cases, compensation is reduced in line with the responsibility the pursuer bears. For example, if a pursuer was to be considered half responsible for their accident, compensation would be reduced by 50%.
Damages	The legal term for compensation awarded by a court.
Damages-based agreements	A form of no win, no fee agreement where a lawyer gets a percentage share of the damages awarded if the case is successful.
Defender	The party defending court action. The party bringing court action is the pursuer. The English legal term in this situation is the defendant.
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 stocks – 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.
Judicial expenses	Judicial expenses are paid by the losing side to the winning side in civil court action (although the court has discretion to alter this rule). They cover costs such as lawyers' fees and commissioning expert evidence. The sums which can be claimed in solicitors' fees are set out in regulation.
Ogden Tables	These are statistical tables used to calculate an appropriate lump sum in personal injury cases. They provide various "multipliers" which can be used to turn an annual loss into an appropriate future award.
Outlays	These cover various expenses, such as the costs of expert reports and witnesses and the costs of engaging an advocate. These are usually paid by the solicitor, who can then bill these costs to the client (although there may be a delay between the solicitor paying the outlay and getting reimbursed).
Patrimonial loss	Economic loss, such as loss of earnings, as opposed to loss associated with pain and suffering.
Pro bono	The phrase used to describe when a lawyer provides their services for free.
Pursuer	The party bringing a court action.
Qualified, one way costs shifting (QOCS)	A departure from the normal rule that the loser pays the winner's judicial expenses. Under QOCS, a pursuer is not liable for the defender's judicial expenses if they lose, but can still claim their expenses from the defender if they win. It is qualified in certain circumstances, such as where the pursuer acts unreasonably.
Referral fees	Solicitors may be referred cases by a variety of bodies including employer and trade organisations, trade unions, Citizens Advice Bureaux, and claims management companies. The arrangement will sometimes involve the payment of a fee by the solicitor, known as a referral fee.
Satellite litigation	This term refers to a situation where one legal claim spawns further legal claims to settle related legal issues.
Senior courts	The phrase refers to the Court of Session in a Scottish context and may also be used to include the UK Supreme Court.

Solatium	The part of a compensation award that deals with pain and suffering, including loss of enjoyment of life.
Speculative fee agreement	Another form of no win, no fee agreement, where the lawyer will be paid an uplift on their fees if the case is won.
Success fee agreement	A term used in the Bill to cover all types of agreements to pay a lawyer based on the outcome of the action. It covers damages-based agreements and speculative fee agreements. Such agreements are commonly referred to as no win, no fee agreements.
Success fee	The additional sum the client pays under a no win, no fee agreement where the case is successful. The success fee can be looked on as the premium paid to the lawyer for taking on the risk that the case could be unsuccessful.
Taxation	The process for independently reviewing the fees charged by a solicitor. Judicial taxation deals with the expenses to be paid by the losing party in litigation to the winning party. Taxation is carried out by an auditor of court.

- [1] Scottish Government. (2018, June 14). Policy Memorandum. Retrieved from [http://www.parliament.scot/S5_Bills/Damages%20\(Investment%20Returns%20and%20Periodical%20Payments\)%20\(Scotland\)%20Bill/SPBill35PMS052018.pdf](http://www.parliament.scot/S5_Bills/Damages%20(Investment%20Returns%20and%20Periodical%20Payments)%20(Scotland)%20Bill/SPBill35PMS052018.pdf)
- [2] Economy, Energy and Fair Work Committee 30 October 2018 [Draft], James Dalton (Association of British Insurers), contrib. 3, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=11744&c=2122138>
- [3] Economy, Energy and Fair Work Committee 06 November 2018 [Draft], Ash Denham, contrib. 13, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=11768&c=2126033>
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- [13] Economy, Energy and Fair Work Committee 30 October 2018 [Draft], James Dalton, contrib. 16, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=11744&c=2122151>

- [14] Government Actuary's Department. (2018) Scottish Government - Personal Injury Discount Rate Analysis.. (2018, September 5). Retrieved from <https://www2.gov.scot/Topics/Justice/law/damages/damagesetc/GAD-discount-rate-analysis-05-09-2018>
- [15] The Government Actuary's Department. (2018, September 5). "Personal Injury Discount Rate Analysis" for the Scottish Government. Retrieved from <https://www2.gov.scot/Resource/0054/00540068.pdf>
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