

Draft provisions to enable courts to impose a Periodical Payments Order in respect of damages for personal injury.

Background

1. When there is an award of damages in respect of a personal injury, it is generally paid as a lump sum. Particularly in cases where the losses being compensated relate to longer term future needs, payment by lump sum may carry the risk that it either underestimates or overestimates the actual requirements of the pursuer. This is because it can be very difficult to accurately predict a pursuer's life expectancy. In the case of an underestimation, the pursuer may suffer hardship if and when they run out of funds and they may then need to rely on the state. On the other hand where a lump sum exceeds the needs of a pursuer, the defender has been unfairly required to pay too much.

2. An alternate approach is the payment of those damages which represent future losses such as earnings or care, through periodical payments. This spreads the payments over a period (often the pursuer's life span) – usually via an annual payment. This approach has the advantage of mitigating the risks described in paragraph 1 above as they offer the scope to reflect more closely the pursuer's actual needs.

3. Currently, in Scotland, where damages for personal injury are payable the courts may make a periodical payments order but only where the parties consent. This position differs from that in England and Wales and Northern Ireland where the courts have the power to impose such an order.

4. There is little experience of parties agreeing periodical payments in Scotland. In 2011 however, in a case¹ where the parties did agree periodical payments as part of a structured settlement, the presiding judge offered some extensive comment as part of his opinion.

“It is for consideration whether statutory provision ought to be made in Scotland for the payment of damages by periodical payments similar to the provision that has been made in England and Wales and Northern Ireland. Parties were agreed that it would be helpful to have the same provision in Scotland.”

5. The opinion also supports the view that in catastrophic injury cases, a lump sum payment is limiting given the difficulties associated with forecasting life expectancy.

¹ D's Parent & Guardian v Greater Glasgow Health Board [2011] CSOH99

Consultation

6. As part of a wider consultation² on damages for personal injury carried out in the first quarter of 2013, the Scottish Government sought views on whether there would be merit in reviewing the existing approach to periodical payments in Scotland.

7. In addition, the Scottish Government asked the same question as part of a joint UK-wide consultation³ in relation to how the discount rate is set.

8. Those who responded to this question in both consultations were overwhelmingly in support of courts in Scotland having the necessary power to impose periodical payment orders. In particular there was support from the Senators, the Faculty of Advocates and the Law Society of Scotland. A further joint consultation on the discount rate⁴ closed on 11 May 2017. It sought views on a range of issues in relation to periodical payments and the responses to that consultation are currently under consideration, but a number of respondents have again expressed their support for Scotland being placed on an equivalent footing with the rest of the United Kingdom.

9. The support for change was on the basis that periodical payments can ameliorate some of the risks of either over or under compensating a claimant and offer scope to reflect pursuer's actual needs and losses more closely than is possible with lump sums.

Current legislative position

10. The existing approach to periodical payments is as currently set out at section 2 of the Damages Act 1996⁵ (replicated below) and provides that the courts in Scotland may make an order for periodical payments but only with the consent of the parties involved. Section 2, so far as relevant, provides as follows: -

Consent orders for periodical payments

2.—(A1) In cases where Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23rd October 2007 on rail passengers' rights and obligations applies, this section needs to be read in the light of Article 30

² Civil Law of Damages: Issues in Personal Injury A Consultation Paper, The Scottish Government, December 2012, <http://www.gov.scot/Publications/2012/12/5980>

³ The Damages Act 1996 – The Discount Rate – Review of Legal framework, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181750/damages-act1996-discount-rate-consultation.pdf

⁴ The Personal Injury Discount Rate: How it should be set in future 30 March 2017.

⁵ The Courts Act 2003 substituted new sections 2, 2A and 2B but only for England, Wales and Northern Ireland.

of the Uniform Rules concerning the contract for the international carriage of passengers and luggage by rail (damages to be awarded as annuity on request), as set out in Annex I to that Regulation.

(1) A court awarding damages in an action for personal injury may, with the consent of the parties, make an order under which the damages are wholly or partly to take the form of periodical payments.

(2) In this section “damages” includes an interim payment which the court, by virtue of rules of court in that behalf, order the defendant to make to the plaintiff (or, in the application of this section to Scotland, the defender to make to the pursuer).

(3) This section is without prejudice to any powers exercisable apart from this section.

11. As indicated the position in the rest of the United Kingdom is different: the courts have the power to impose periodical payment orders without the agreement of the parties involved. The relevant provisions for England and Wales and Northern Ireland were contained in the Courts Act 2003 (sections 100 and 101).

12. The Scottish Government is persuaded that placing the Scottish courts on an equivalent footing to those in the rest of the UK would be of benefit and we would therefore like to seek your views on some draft legislative provisions which are intended to give effect to the policy outlined above. **Annex A** contains the draft provisions which are intended to place Scotland on an equivalent footing in this regard with the rest of the United Kingdom. We are inviting comments of the draft provisions to ensure from a practitioner perspective they will achieve their intended effect set out below.

Commentary on the draft provisions

13. The intended effect of the provisions is set out below.

Section 1

- Section 1(1) of the provisions amends section 2 of the Damages Act 1996. It inserts a new subsection (A2) which requires courts to consider whether awarding damages by way of periodical payments is appropriate. It also gives the court the power to make an order for periodical payments without the consent of the parties. This duty to consider, and the power to make orders, will apply only where the court is awarding damages for future pecuniary loss. When awarding damages for other types of loss (e.g. solatium or past pecuniary loss) the court will still have the power to make periodical payment orders under subsection (1) with the consent of the parties. Subsection (A2) applies regardless of the type of proceedings in which the issue arises (i.e. whether it is an action, a petition or otherwise).
- Subsection (1) is amended to so that the court’s existing power is accordingly limited to awards for other types of damages, and also to clarify that it is available regardless of the type of proceedings.

- New subsection (1A) requires the court to be satisfied that the continuity of the payments is reasonably secure before it makes a periodical payments order. This applies whether the order is to be made under subsection (A2) or under subsection (1).
- New subsection (1B) allows the court to ensure that the real value of periodical payments is preserved over the whole period for which they are payable. Courts will be able to provide for the payments amounts to vary to take account of inflation. The provisions do not specify, even as a default position, which inflation index should be used by the courts. It will be a matter for the courts to determine on the basis of evidence and submissions put to them. Again, this applies to orders made under subsection (A1) and those made under subsection (1).
- New section 2C sets out further information on the continuity of periodical payments. Subsection (1) provides that continuity of payments is assumed to be reasonably secure if it is protected by a ministerial guarantee or the Financial Services Compensation Scheme or where the source of the payments is a government body or a health service body. Subsection (6) enables the Scottish Ministers to specify in regulations the bodies that will be government bodies or health service bodies for this purpose. The court will not be bound to follow that assumption where, for example, it is presented with evidence which suggests the payments would not, in fact, be reasonably secure.
- Subsection (2) enables the court to include in an order provision about the method of payment and any steps which the person responsible for paying (the defender/compensator) must make to secure continuity of payment. The court will not be able to make provision about such steps where the circumstances covered by subsection (1) apply (i.e. that the payment is assumed to be reasonably secure for a reason given there).
- Subsection (2)(c) allows the court to pave the way for the provisions on method of payment or required steps to be varied on a subsequent application to the court.
- Subsection (3) permits the use of a payment method other than that specified in the order, but only where the other method is backed by one of the protections or secure sources mentioned above.
- Subsection (4) allows an application to be made to the court for a variation of the order's provisions on how the payment is to be made and for the court to act upon such an application. This power to vary the order is separate from the power under section 2E (see below). Subsection (4) ensures that a court can only exercise this power of variation where the way for the application has been paved when the original order was made and that, after variation, the periodical payments will remain reasonably secure.

- Subsection (5) ensures that subsection (4)(a) does not prevent payments being made in accordance with an order as varied under section 2E. (Subsection (3)(b) would not prevent that anyway because it is mirrored in section 2E(4)).
- The new section 2C is said to be inserted after section 2B, despite there being no existing sections 2A and 2B in the Scottish text of the Damages Act 1996. However, this reflects the existence of sections 2A and 2B as part of the law of England and Wales and Northern Ireland (see the Courts Act 2003, section 100).

Section 2

- Section 2(1) of the provisions inserts a series of sections (2D to 2I) into the Damages Act 1996 to deal with variation and suspension of orders and agreements which deal with periodical payments for future pecuniary loss. These provisions do not apply to orders which only include provision for lump sums, or to orders which make provision for periodical payments in respect of other types of loss (i.e. those made under section 2(1) of the 1996 Act with the consent of the parties).
- New section 2D describes the circumstances in which a court may make an order for periodical payments capable of being varied or suspended by the court in the future. (For shorthand, such an order is referred to here as a “variable order”.) To do this it must include provision in the original order which paves the way for a subsequent application to be made to the court for the variation and/or suspension of the order or rights to payments under it. Without such a paving provision it will not be possible for an application to be made to the court under the following provisions inserted into the 1996 Act. (This is separate to the provisions of section 2C concerning applications for variation of the method of payment.)
- Subsection (2) provides that a court may only include such a facility if it is satisfied that there is a significant deterioration or improvement in the claimant's medical condition which can be foreseen at the time of the original order and that as a consequence of that change the pursuer would end up being either significantly over- or under- compensated.
- Subsection (3) sets out what the court must specify in a variable order including details about the type of change in condition which would trigger any application to vary and the period within which an application must be made.
- New section 2E goes on to describe what the court may do to vary an order which includes: altering the amount of payment, its indexation, the frequency of payment, the method of payment and period of payment as well as providing for a lump sum instead of or in addition to periodical payments. Whilst in general the court may not vary an order more than once in respect of any specified change, or outside the application period specified in the original order, it may do so where there are exceptional circumstances. This is

intended to provide the courts with the necessary flexibility to take account of a range of circumstances. The court will not be able to vary the order unless the continuity of payment remains reasonably secure.

- New section 2F enables the court to suspend periodical payments. This provision reflects the judgement in *AA v CC [2013] EWHC 3679 (QB)* that the Damages Act 1996 and the Civil Procedure Rules in relation to England and Wales did not provide courts with the power to make an order for “periodical payments which are expected to stop at some uncertain time and to re-start again at some uncertain time later” and recognises that suspension goes further than variation. There is no limit to the number of occasions payments may be suspended under this section. The criteria which must be met before a court decides to suspend payments are otherwise the same as those for variation.
- New section 2G extends the court’s power to vary and suspend to agreements made between parties which settle personal injury claims or actions and which make provision for periodical payment in respect of future pecuniary loss. Section 2G does not limit the number of occasions on which a right to a payment under an agreement can be suspended. Otherwise, and subject to the terms of the agreement restricting this, the court will have the same power to vary an agreement, or suspend the right to receive payments under one, as it would to vary an order, or suspend a right, under section 2E or 2F.
- Section 2H sets out the circumstances in which a suspension under either section 2F or 2G may be lifted. The court must be satisfied that the injured person’s physical and/or mental condition has altered since the time of the suspension and that they would be significantly under-compensated should the suspension continue.
- Decisions made in relation to variation or suspension are to be subject to a bespoke review process but are otherwise not subject to review (including normal avenues of appeal against judicial decisions). Section 2I provides for this. Any person aggrieved by a decision (whether that is the pursuer or the defender) may apply, within 21 days, for the decision to be reviewed. If the original decision was made by a sheriff, the review would be carried out by another sheriff and if the original decision was by a Lord Ordinary in the Outer House of the Court of Session, the review would be carried out by another Lord Ordinary in the Outer House of the Court of Session. Subsection (3) sets out that a review may be disposed of either upholding the original decision or making any decision that could have been made by the court which made the original decision. The decision on the review is final (i.e. not subject to onward appeal). It is intended that this should be a low-intensity review of the original decision and question 2 below seeks views on what would be appropriate for this purpose.
- Section 2(2) of the provisions inserts an interpretation provision into the Damages Act 1996.

Section 3

- Section 3 of the Bill deals with the protection of periodical payments and inserts new section 4A into the Damages Act 1996.
- The purpose of this amendment is to ensure that the pursuer cannot assign the periodical payments (whether outright or in security for some other obligation) without the approval of the court. This offers some added protection to what may be a vulnerable pursuer in difficult circumstances. In circumstances where the court has made an order for periodical payments (whether with or without the consent of the parties, and whether for future pecuniary loss or not), section 4A(1) prevents the assignation of the right to receive periodical payments unless the court approves the assignation. By virtue of subsection (2) the court must be satisfied that there are special circumstances that make it necessary. In reality this is a high standard of test and it is anticipated that courts, in considering whether or not to give approval, will want to be satisfied that the assignation represents value for money; that it is in the best interests of the individual; and how the individual will be financially supported following the assignation. The provision does not restrict the ability of the pursuer to enter into an agreement to assign the right to a periodical payment, only the granting of an assignation itself. This does not affect the claimant's ability to borrow money using the fact of their entitlement to periodical payments in future as evidence of their financial status and credit worthiness. However, it will prevent loans being secured on the future income stream under the periodical payments unless this is approved by the court. Subsection (3) makes the assignation of periodical payments to the scheme manager of the Financial Services Compensation Scheme an exception to the requirement for the court's approval.

Section 4

- Section 4 of the Bill deals with the treatment of periodical payments in the event of the recipient's insolvency and inserts section 4B into the Damages Act 1996.
- The purpose of this amendment is to protect that part of the periodical payment for future pecuniary loss which relates wholly to expenditure likely to be incurred for the person as a result of the personal injury to which it relates. That portion of the periodical payment cannot be required to be paid to a trustee of a protected trust deed under section 16(3) of the Bankruptcy (Scotland) Act 2016 where the estate of the recipient of the periodical payment order is sequestrated. That portion of the periodical payment order will not be payable to the trustee under a debtor contribution order under section 90 of the Bankruptcy (Scotland) Act 2016. The protection does not apply where the right to receive the periodical payments has been assigned after the order was made and the person to whom the right has been assigned is not using the periodical payments for the benefit of the person who suffered the injury to which the periodical payments relate.

Questions

1. Do you agree that these provisions meet their intended aim as set out in the paragraph 13.
2. New section 2C(3) permits the use of a payment method other than that specified in the order in certain circumstances. What is your view on whether the court should be able to pre-empt the possibility of reliance being placed on this section and narrow down (either completely or partially) the method(s) of payment for all defenders?
3. We propose that decisions made in relation to variation or suspension are to be subject to a bespoke review process. Do you have views on what level of review would be appropriate and on how that might best be achieved in practice?
4. In your view will the bankruptcy provisions work in the context of the wider bankruptcy legal framework?
5. Do you wish to highlight any particular issues in relation to the draft provisions?

Impact Assessment

14. Periodical payments can ameliorate some of the risks of either over or under compensating a successful pursuer by ensuring that the award of damages will last for the appropriate period (often the pursuer's lifetime), so there is no risk that the award will be exhausted. A pursuer is also benefited as there is no investment risk as there is with a lump sum. PPOs can also bring security and peace of mind for the injured party and their family and their use could also minimise arguments over life expectancy.

15. In England and Wales and Northern Ireland the courts must be satisfied that that the defender is sufficiently secure before they impose a PPO. (This is also reflected in the draft provisions in Annex A). In England and Wales UK regulated insurers are regarded as secure as are the NHS Litigation Authority and the Motor Insurers Bureau. The use of PPOs is however dominated by the latter 2 organisations.⁶

16. Where the defender is the State, a particular advantage is better control of cash flow. For other defenders there may be service and administration costs which make them less attractive.

17. There will also be cases where a PPO is not appropriate. For example where there is contributory negligence or where a defender's policy limit prevents them purchasing an annuity to fund a PPO. It would of course be for the court to reach a view on whether a PPO was appropriate before it made the necessary order. The provisions enable an order to be varied or suspended in specific circumstances. Our

⁶ The Personal Injury Discount rate, how it should be set in future. Ministry of Justice and the Scottish Government. 30 March 2017.

view therefore is that the introduction of a power enabling the courts to impose periodical payments should not have any adverse impact on either the pursuer or the defender and indeed for some there should be benefits to both as outlined above. We would however welcome views on: -

- 6. In general, what do you think the impact of implementing these provisions would be?**
- 7. Is it likely that more or fewer actions will be settled out of court?**
- 8. Do you think the order making power would impact on how settlement negotiations are conducted? In what way?**
- 9. Can you quantify the benefits for pursuers?**
- 10. Can you quantify the benefits for defenders and compensators?**
- 11. Can you quantify the drawbacks for pursuers?**
- 12. Can you quantify the drawbacks for defenders and compensators?**
- 13. Can you quantify the impact on the Scottish Courts and Tribunals Service?**

Please explain and, where possible, provide evidence for your answers

- 14. Detailed views on the impact of any specific elements of the proposals would also be welcome.**

DRAFT PROVISIONS*Periodical payments***1 Award and continuity**

- (1) In section 2 of the Damages Act 1996—
- (a) after subsection (A1) there is inserted—
- “(A2) A court awarding damages for future pecuniary loss in respect of personal injury—
- (a) must consider whether to make an order under which those damages wholly or partly take the form of periodical payments, and
- (b) may make such an order with or without the consent of the parties.”,
- (b) in subsection (1), for the words “in an action for personal injury” there is substituted “in respect of personal injury (other than damages for future pecuniary loss)”,
- (c) after subsection (1) there is inserted—
- “(1A) A court may not make an order for periodical payments unless it is satisfied that the continuity of payment under such an order would be reasonably secure.
- (1B) A court may provide in an order for periodical payments that the amount of the payments is to vary to reflect inflation on such basis as the court specifies in the order.”,

and the section title becomes “Periodical payment orders”.

- (2) After section 2B of the Damages Act 1996 there is inserted—

“2C Continuity of periodical payments

- (1) For the purpose of section 2(1A), a court is to assume that the continuity of payment under an order is reasonably secure if—
- (a) the right to receive the payments would be protected by—
- (i) a guarantee under section 6 or the Schedule, or
- (ii) a scheme under section 213 of the Financial Services and Markets Act 2000 (whether or not as modified by section 4 of this Act), or
- (b) the source of payment would be a government body or a health service body.
- (2) In an order for periodical payments, a court may include provision—
- (a) specifying the method by which the payments are to be made,
- (b) requiring the person responsible for making the payments to take specified action to secure the continuity of payment, where the continuity of payment is not considered by the court to be reasonably secure by virtue of subsection (1),

- (c) enabling an application to be made to the court for variation of provision included in the order under paragraph (a) or (b).
- (3) Despite inclusion in an order for periodical payments of provision of the kind mentioned in subsection (2)(a), the payments may be made by a different method if under the different method—
 - (a) the right to receive the payments is protected in one of the ways mentioned in subsection (1)(a), or
 - (b) the source of payment is a government body or a health service body.
- (4) The court may vary the order in respect of provision of the kind mentioned in subsection (2)(a) or (b) but only if—
 - (a) an application is made to the court in accordance with provision included in the order under subsection (2)(c), and
 - (b) the court is satisfied that the continuity of payment under the order would still be reasonably secure (with subsection (1) remaining in use for this).
- (5) As regards cases involving future pecuniary loss, subsection (4)(a) does not prevent variation of the order under section 2E(2)(a)(v) (which is about method of payment).
- (6) In subsections (1)(b) and (3)(b), the references to a government body or a health service body are to a body designated as such in regulations made by the Scottish Ministers.
- (7) Regulations under subsection (6) are subject to the negative procedure.”.

2 Variation and suspension

- (1) After section 2C of the Damages Act 1996 (see section 1 of this Act) there is inserted—
 - “**2D Variation or suspension of future pecuniary loss award**
 - (1) In an order under which damages for future pecuniary loss are wholly or partly to take the form of periodical payments, a court may include provision enabling an application to be made to the court for (either or both)—
 - (a) variation of the order in accordance with section 2E, or
 - (b) suspension of the right to receive payments under the order in accordance with section 2F.
 - (2) A court may include provision of the type described in subsection (1) in an order only if it is satisfied that—
 - (a) there is a chance of a change in the pursuer’s physical or mental condition occurring at some definite or indefinite point in the future, and
 - (b) should the change occur, the pursuer would be significantly over- or under-compensated by the damages being awarded for future pecuniary loss.
 - (3) In an order including provision of the type described in subsection (1), a court—

- (a) must specify the sort of change in the pursuer's physical or mental condition which must occur before an application may be made for—
 - (i) variation of the order, or
 - (ii) suspension of the right to receive payments under the order, and
- (b) may specify a period within which any such application must be made (either generally or in respect of a specified sort of change in the pursuer's condition).

2E Variation of court-ordered periodical payments

- (1) A court which has made an order under which damages for future pecuniary loss are wholly or partly to take the form of periodical payments may vary the order.
- (2) In varying the order, the court may—
 - (a) alter the terms on which periodical payments in respect of future pecuniary loss are to be paid, in particular—
 - (i) the amount that is to be paid as a periodical payment,
 - (ii) the basis (if any) on which the amount of the payments is to vary to reflect inflation,
 - (iii) the frequency of the payments,
 - (iv) the period during which the payments are to be made,
 - (v) the method by which the payments are to be made,
 - (b) award a lump sum instead of, or in addition to, any future periodical payments in respect of future pecuniary loss.
- (3) The court may vary the order only if—
 - (a) the order includes provision under section 2D(1) enabling an application to be made for its variation, and
 - (b) it is satisfied that—
 - (i) since the order was made, a change has occurred in the physical or mental condition of the injured person which is of a type specified in the order in accordance with section 2D(3)(a), and
 - (ii) as a result of the change, the damages awarded for future pecuniary loss will significantly over- or under-compensate the injured person unless the order is varied.
- (4) The court may vary the order only if it is satisfied that the continuity of payment under the order would still be reasonably secure (with section 2C(1) remaining in use for this).
- (5) Ordinarily, the court may not vary the order—
 - (a) where a period within which an application for variation may be made is specified in the order, on an application made outwith that period,
 - (b) more than once in respect of each type of change specified in the order in accordance with section 2D(3)(a).

- (6) But the court may vary the order despite subsection (5)(a) or (b) if it is satisfied that there are exceptional circumstances justifying its doing so.

2F Suspension of court-ordered periodical payments

- (1) A court which has made an order under which damages for future pecuniary loss are wholly or partly to take the form of periodical payments may suspend the right to receive the payments.
- (2) The court may suspend the right to receive the payments only if—
 - (a) the order includes provision under section 2D(1) enabling an application to be made for suspension of the right to receive the payments, and
 - (b) it is satisfied that—
 - (i) since the order was made, a change has occurred in the physical or mental condition of the injured person which is of a type specified in the order in accordance with section 2D(3)(a), and
 - (ii) as a result of the change, the damages awarded for future pecuniary loss will significantly over-compensate the injured person unless the right to receive the payments is suspended.
- (3) Where a period within which an application for suspension may be made is specified in the order, ordinarily the court may not suspend the right to receive the payments on an application made outwith that period.
- (4) But the court may suspend the right to receive the payments despite subsection (3) if it is satisfied that there are exceptional circumstances justifying its doing so.

2G Variation or suspension of agreed periodical payments

- (1) A court may vary an agreement to which subsection (2) applies, or suspend a right to receive periodical payments under such an agreement, in accordance with—
 - (a) this section, and
 - (b) any restrictions on the court's power to do so specified in the agreement.
- (2) This subsection applies to an agreement which—
 - (a) was made to settle a claim or action for damages in respect of personal injury, and
 - (b) provides—
 - (i) for the agreed damages attributed to future pecuniary loss to take wholly or partly the form of periodical payments, and
 - (ii) that an application may be made to the court under this section in the event that at some definite or indefinite point in the future a change of a type specified in the agreement occurs in the physical or mental condition of the person who suffered the injury.
- (3) If the court is satisfied that the test in subsection (5) is met, it may—

- (a) vary the agreement by altering the terms relating to payments for future pecuniary loss, or
 - (b) suspend the right to receive payments for future pecuniary loss under the agreement.
- (4) In varying the agreement under subsection (3)(a), the court may—
- (a) alter the terms on which periodical payments for future pecuniary loss are to be paid, in particular—
 - (i) the amount that is to be paid as a periodical payment,
 - (ii) the basis (if any) on which the amount of the payments is to vary to reflect inflation,
 - (iii) the frequency of the payments,
 - (iv) the period during which the payments are to be made,
 - (v) the method by which the payments are to be made,
 - (b) award a lump sum instead of, or in addition to, any future periodical payments in respect of future pecuniary loss.
- (5) The test for the purpose of subsection (3) is that—
- (a) since the agreement was made, a change has occurred in the physical or mental condition of the injured person which is of a type specified in the agreement as envisaged by subsection (2)(b)(ii), and
 - (b) as a result of the change, the damages agreed for future pecuniary loss will significantly over- or under-compensate the injured person unless—
 - (i) the agreement is varied, or
 - (ii) the right to receive payments for future pecuniary loss under the agreement is suspended.

2H Lifting of suspension of periodical payments

A court which has suspended a person's right to receive periodical payments under section 2F or 2G may lift the suspension if it is satisfied that—

- (a) there has been a change in the physical or mental condition of the injured person since the right to receive the payments was suspended, and
- (b) the injured person will be significantly under-compensated unless the suspension is lifted.

2I Review of decisions under sections 2E to 2H

- (1) Subsection (2) applies when a court has made a decision—
- (a) under section 2C(4), varying or declining to vary an order,
 - (b) under section 2E, varying or declining to vary an order,
 - (c) under section 2F, suspending or declining to suspend a right to receive periodical payments,

- (d) under section 2G—
 - (i) varying or declining to vary an agreement, or
 - (ii) suspending or declining to suspend the right to receive periodical payments under an agreement, or
 - (e) under section 2H, lifting or declining to lift a suspension of a right to receive periodical payments.
- (2) A person aggrieved by the decision may apply for it to be reviewed by—
 - (a) a sheriff, if the decision was made by a sheriff, or
 - (b) a Lord Ordinary, if the decision was made by a Lord Ordinary.
 - (3) The court which carries out a review under this section may dispose of it by—
 - (a) upholding the decision being reviewed, or
 - (b) making any decision that could have been made by the court which made the decision being reviewed.
 - (4) A decision of a type mentioned in subsection (1) may not be reviewed otherwise than under this section.
 - (5) In relation to a review under this section—
 - (a) an application must be made before the expiry of the period of 21 days beginning with the day the decision in question is pronounced,
 - (b) the court’s determination in disposing of the review is final.”.
- (2) In section 7 of the Damages Act 1996, in subsection (2)—
 - (a) the words from “personal injury” to the end become paragraph (a),
 - (b) after that paragraph (as so numbered) there is inserted—
 - “(b) in sections 2E to 2H, the references to the injured person are to the person who suffered the injury in respect of which the order or agreement in question was made.”.

3 Restriction on transfers or securities

After section 4 of the Damages Act 1996 there is inserted—

“4A Periodical payments: restriction on transfers or securities

- (1) An assignation of a qualifying right to receive periodical payments is of no effect unless the assignation is approved by the court which made the order giving rise to the right.
- (2) Approval may be given by the court in connection with subsection (1) only if it is satisfied that special circumstances make the assignation necessary.
- (3) Subsection (1) does not prevent a right to receive periodical payments from being assigned, without the court’s approval, to the scheme manager established under section 212 of the Financial Services and Markets Act 2000.
- (4) For the purposes of this section, a qualifying right to receive periodical payments is a right to receive periodical payments which arises from an order that is made (both)—

- (a) under section 2, and
- (b) on or after the day on which section 3 of the [Damages [...] (Scotland) Act 2018] comes into force.”.

4 Protection on occurrence of insolvency

- (1) After section 4A of the Damages Act 1996 (see section 3 of this Act) there is inserted—

“4B Periodical payments for future pecuniary loss: insolvency

- (1) A trust deed which provides for the transfer to the trustee of a right to receive relevant periodical payments as described in subsection (4) cannot have protected status by virtue of section 163(1) of the Bankruptcy Act.
- (2) Under a protected trust deed as mentioned in section 163(1) of the Bankruptcy Act, a person cannot be required to pay to the trustee by way of a contribution from income the portion of a periodical payment which falls within the description in subsection (5).
- (3) Where the estate of a person who has a right to receive periodical payments is sequestrated—
 - (a) in the operation of the Bankruptcy Act—
 - (i) relevant periodical payments as described in subsection (4) are to be treated as income,
 - (ii) neither the right to receive relevant periodical payments as described in subsection (4), nor any property or arrangement designed to protect their continuity, are to be regarded as forming part of the person’s estate,
 - (b) a debtor contribution order under section 90(1) of the Bankruptcy Act may not require the portion of a periodical payment which falls within the description in subsection (5) to be paid to the trustee.
- (4) The references in subsections (1) and (3)(a) to relevant periodical payments are to periodical payments awarded or agreed, or to periodical payments in so far as awarded or agreed, as damages for future pecuniary loss.
- (5) The portion with respect to subsections (2) and (3)(b) is the part of a periodical payment which is identified, in the order or agreement under which the periodical payments in total are made, as relating wholly to expenditure likely to be incurred by or for the person as a result of the personal injury concerned.
- (6) Subsections (1) to (5) do not apply if—
 - (a) the right to receive the periodical payments in question has been assigned since the order or agreement giving rise to the right was made, and
 - (b) the person who has the right to receive those periodical payments is not spending them for the benefit of the person who suffered the injury in respect of which that order or agreement was made.
- (7) Subsections (1) to (5) do not apply if the order or agreement giving rise to the right to receive the periodical payments in question was made before the day on which section 4 of the [Damages [...] (Scotland) Act 2018] comes into force.

- (8) For the purposes of this section, periodical payments are payments of that kind made, or to be made, pursuant to—
 - (a) an order made under section 2, or
 - (b) an agreement made to settle a claim or action for damages in respect of personal injury.
 - (9) In this section, “the Bankruptcy Act” means the Bankruptcy (Scotland) Act 2016.”.
- (2) In section 78 of the Bankruptcy (Scotland) Act 2016, in subsection (2)—
- (a) the words “section 88” become paragraph (a),
 - (b) after that paragraph (as so numbered) there is inserted “, and
 - (b) section 4B(3)(a) of the Damages Act 1996.”.