



Response by the Faculty of Advocates to

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

General

1. What are your views on the Bill overall? Is legislation in this area required? How far do you think the Bill will achieve what it sets out to do?

We agree that legislation in this area is required. We consider that the current process for setting the rate of return is in need of reform. We agree that a statutory methodology for calculating the discount rate is necessary. We also agree that establishing a timeframe for regular review of the discount rate is essential. We find it difficult to comment upon some of the specific provisions such as the standard adjustments and the composition of the notional investment portfolio. We would defer to expert professional opinion. The key point is that someone who has been catastrophically injured and who is in need of permanent round the clock care should not be required to take any significant risk with investment to meet those anticipated needs.

We have no doubt that it is necessary to provide Scottish courts with the power to order damages to be paid by way of periodical payments orders. We think that the draft provisions provide a reasonable basis to allow this long overdue reform to be made.

Part 1

2. Part 1 of the Bill aims *“to reform the law on the setting of the personal injury discount rate in order to make provision for a method and process which is clear, certain, fair, regular, transparent and credible”*. Is it an aim with which you agree? And to what extent do you believe the reform will achieve all these things – a clear, certain, fair, regular, transparent and credible method and process?

We agree with the stated aim or rather stated aims of the legislation. We find it difficult, without the benefit of expert professional opinion, to comment on

whether all of these aims will be achieved. We are uncertain whether the types of investment or relative percentages contained in the proposed investment portfolio are appropriate. We are also uncertain whether the stated percentages in the standard adjustments are fair. Plainly, the departure from ILGS means that investment advice will be required. We would defer to expert opinion as to whether 0.5 of a percentage point is adequate to cover the cost of investment advice as well as anticipated taxation.

3. In terms of who sets the rate, the Scottish Government proposes to have the rate reviewed by the Government Actuary rather than Scottish ministers (as is the current situation). It believes that this will remove the setting of the rate from the political sphere “where there is the potential for pressure from external interests to attempt to influence the outcome” and “should provide fairness to all parties involved”. What are your views?

We agree that it is right to seek to remove the setting of the rate from the political sphere. We understand that the Government Actuary will be able to deliver what is sought.

4. The Scottish Government has chosen to lay down in detail how the rate should be calculated in legislation. Do you support this proposal over the approach taken in England and Wales of leaving much more to the discretion of the Lord Chancellor and an expert panel?

Yes. In principle providing the detail in advance in legislation is welcome. It helps to meet the aim of clarity and the aim of certainty. As to the technical detail of the investment we require to defer to expert professional opinion as to whether aspects of the provisions meet the aims of fairness and credibility.

5. With no statutory requirement for the discount rate to be reviewed regularly, currently there can be a 15 year gap between reviews in Scotland. The Government Actuary will start a review of the rate on the date on which the relevant provisions of the Bill are brought into force. Thereafter they will be required to start a regular review every three years and the Scottish Ministers may decide on an additional, out-of-cycle review, but which would not disrupt three-yearly reviews. Do you have any views?

We agree that regular review is essential. One of the major drawbacks with the current regime is the gap between reviews of the rate. Sharp variation in the discount rate before and after any change produces a lack of consistency in awards and creates a sense of injustice. The provisions seem to us to address this problem.

6. In changing the methodology to move away from a rate based on Index-Linked Government Stock (ILGS), the Bill makes provision “on the basis of portfolios described as cautious and which we believe would meet the needs of an individual in the position of the hypothetical investor who is described in the legislation”. The

Scottish Government also states: “The portfolio does reflect responses to the consultation that investing in a mixed portfolio of assets provides flexibility and is the best way of managing risk”. Do you think the Scottish Government is justified in assuming that injured people have access to the necessary expertise to achieve this?

We think that in cases where large sums of money are awarded injured persons should be able to access expertise. Such expertise requires to be funded throughout the period of the loss. We would defer to expert professional opinion as to whether the proposals in the Bill make adequate provision in this regard.

Part 2

7. Where damages for personal injury are payable, the Scottish courts may make a periodical payments order but only where both parties consent. This differs from England and Wales, where the courts have the power to impose such an order. Part 2 of the Bill will give courts the powers to impose periodical payments orders (PPO) for compensation for future financial loss. Respondents to recent consultations overwhelmingly supported courts in Scotland having the power to impose periodical payment orders, seeing this as a way of reducing uncertainty as well as the risk of over-/under-compensating pursuers. What is your position?

We agree.

8. How well used do you think the provisions would be in practice? What impact do you think the requirement on the court to ensure the “continuity of payment under such an order would be reasonably secure” would have

We think that particularly where there is a significant dispute between the parties relative to life expectancy the ability to make a periodical payments order will be attractive and will be used.

The requirement on the court to ensure the “continuity of payment under such an order would be reasonably secure” is, of course, essential. It will be necessary for parties to satisfy themselves that the security requirements in clause 3 (2) [new 2C of the 1996 Act as amended] will be met. This may require expert opinion because the corporate structure of the legal person providing payment may not always be obvious. The provisions of the Bill seem to be in accordance with existing practice in England and Wales. Hitherto, the courts in Scotland have not taken any protective role in damages awards so it will be necessary to develop experience and expertise in this area.

9. The proposals in the Bill would allow the courts to revisit a compensation award where there has been a change of circumstances (although only where this has been identified in advance). This would represent a change to the current law. Do you have any comments?

We think that it is necessary to allow for variation in very limited specified circumstances. For good reason courts tend to be very circumspect when it comes to allowing variations of orders. We think that the provisions in clause 4 [new 2E - 2I of the 1996 Act] strike an appropriate balance.

Overall

10. The Bill overall is intended to support the Scottish Government's national outcome that: "We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others". Do you have any comment?

We have no comment.

11. In previous consultations in this area, views have tended to be polarised between pursuer and defender interests. Does the Bill, in your view, manage to balance these interests?

The Faculty of Advocates is an independent body. Our members regularly give independent advice to claimants and to defenders. In so doing it is our aim to retain our independence at all times. Our response to this consultation and our responses to previous consultations in this area have always been intended to be independent.

Our general impression is that, subject to the matters to which we would defer to expert professional opinion, the Bill balances the interests of parties.

Other comments

12. Are there any other aspects of the Bill you wish to comment on?

We have no further comment.