



Damages (Investment Returns and Periodical Payments) Scotland Bill

Introduction

The Bill sets out proposals for a new formula in setting the discount rate in personal injury cases in Scotland to reflect similar changes being made in England and Wales. It also seeks to give courts the power to impose periodical payment orders (PPOs) for future loss. The Bill was introduced to Scottish Parliament on 14 June 2018.

Three core objectives of the Bill

- Put in place a new statutory regime for calculating the discount rate which should be applied to future pecuniary losses for personal injury cases.
- Establish a timeframe for the review of the discount rate.
- Provide that the task of reviewing and assessing the rate will fall to the Government Actuary.

Background

Following a review of the discount rate by the Lord Chancellor, Scottish Ministers lowered the rate from 2.5% to -0.75% with effect from 28 March 2017, reflecting the same changes in England and Wales.

The Lord Chancellor confirmed that legally she must follow the guidance set by the House of Lords in *Wells v Wells* [1999]: (i) the discount rate should be based on an investment portfolio which offers the least risk (ii) a single, fixed rate should be used in all cases and (iii) it should be easy to use.

By accepting the importance and exclusivity of investment in (low risk) Index Linked Government Stock (ILGS), the practical effect of the reduced rate is a substantial increase in the value of future loss claims. This has had a significant impact on compensators. The Bill contains a new methodology for calculating the discount rate based on how claimants actually invest their damages. The courts would also have the power to issue PPOs, which would serve to spread damages payments out over the period of time the award is designed to cover.

The Bill is in three parts:

- Part 1 covers returns on investment of damages
- Part 2 covers periodical payments of damages
- Part 3 covers ancillary and final matters

Key points

- Amend Section 1 of the Damages Act 1996 to put the process of setting the rate on a clearer statutory footing, with a requirement for the Government Actuary to set the rate and publish their reasoning.
- Preserve the 100% compensation principle. The compensation sum should represent the full loss, neither more nor less, and should be exhausted at the end of the period for which the award is made.
- Require the Actuary to have regard to the actual returns available to claimants and the availability of a PPO in respect of some or all of the loss.
- Establish a timeframe for the review of the discount rate. A review should be carried out within three years of the previous review. Scottish Ministers will have the ability to call for an earlier review if needed.
- Give courts the power to impose PPOs for future pecuniary losses.



Damages (Investment Returns and Periodical Payments) Scotland Bill

Personal injury discount rate measures

The Bill sets out a framework for setting the rate based on a “notional investment portfolio” for an investor who takes advice and invests in a “cautious” portfolio over a 30 year period. Standard adjustment figures are to be fixed at 0.5% for taxation, and advice costs, and to account for fluctuations in the rate of return.

Scottish Ministers estimate that if this formula was currently applied it would set a discount rate in Scotland of 0.0% and the current intention is to apply one universal rate.

The rate would be assessed by the Government Actuary, rather than an independent panel, who can choose to seek views from a range of experts before making their recommendation to Scottish Ministers.

The Bill proposes that the Government Actuary will review the rate on the day that the Act is in force and must be concluded within 90 days. Subsequent reviews will be every three years, with the option to review earlier if circumstances such as market volatility point to such a need.

Periodical payment orders

Currently, Scottish courts can only make a PPO when the parties consent. As a result, they have until now been extremely rare. The Bill introduces a duty for the courts to consider whether a PPO is appropriate when awarding damages without the consent of the parties - albeit this is limited to future losses in personal injury cases.

Any other PPOs which a court may consider appropriate (i.e. for past losses) can be made, but only with the agreement of the parties.

The court must be satisfied that continuity of payment will be “reasonably secure” and can require a compensator to take certain prescribed steps to ensure that security. PPOs will be deemed to be index linked, and the court will have the power to vary or suspend any PPO in the future, where there has been a change in physical or mental condition, and to prevent under or over compensation.

Legislative timeline and next steps

- The legislation was introduced to the Scottish Parliament on 14 June 2018. Over the coming months, parliament will consider the general principles of the Bill, and ask interested parties for their input. Parliament will then debate and reach a decision on those principles in the Chamber.
- Stage 1 is expected to conclude in autumn 2018.
- We may see the Bill progress through Stage 2 before the end of the year, but the start of 2019 is more likely to conclude all remaining elements.
- If the Bill is to be enacted, it is likely to pass into law by the end of spring 2019.

Stages	Timeframe	Overview
Stage 1	Varies but it often lasts several months.	Considering the general principles.
Stage 2	Varies. Two whole weeks is usually allowed between the end of Stage 1 and the start of Stage 2. It can be dealt with at one committee meeting, or may require more and be spread over a number of weeks.	Amending the Bill.
Stage 3	The date for Stage 3 is proposed in a business motion usually 2 weeks before the proceedings are due to take place.	Final consideration.
Legislatively competent	Four week period.	Challenge by Law Officers on parliament's power to make law.
Royal Assent	Varies.	If no challenge, the Presiding Officer submits the bill to the Queen.

Contacts

For further information on this subject, please contact



Deborah Newberry
Head of Corporate and Public Affairs
t +44 20 7667 9508
deborah.newberry@kennedyslaw.com



Clare Johnston
Corporate Affairs Lawyer
t +44 20 7667 9893
clare.johnston@kennedyslaw.com

For further details and for full team profiles please see our website: kennedyslaw.com