

# Damages (Investment Returns & Periodical Payments) (Scotland) Bill

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## Key terms

### What are periodical payments?

Currently claimants pursuing personal injury compensation claims in Scotland receive 'lump sum' compensation for losses and expenses that they will incur in the future, i.e. a sum of money that they will invest and then spend as and when they need to. Periodical Payment Orders ("PPOs") are an alternative form of compensation, whereby claimants will receive a much smaller lump sum that is then supplemented by annual payments to cover specific expenses, such as the cost of carers, such annual payment being index linked to allow for inflation.<sup>1</sup>

### What is the Discount Rate?

Where claimants are compensated for future losses on a lump sum basis, the discount rate is a mechanism for adjusting the award to offset interest earned through the investment of such awards, as well as the cost of investment and also inflation. Such adjustment ensures that claimants receive the precise amount that they need to meet such losses and expenses, no more and no less.<sup>2</sup>

## Overview & key issues

- The discount rate in Scotland was varied from 2.5% to -0.75% in March 2017, mirroring the change made in the rest of the UK one month earlier. The cost of this change has been estimated at several billion pounds per annum to compensators across the UK.
- The discount rate in Scotland is currently set by the Scottish Government and, in line with the rest of the UK, is set by reference to Index Linked Government Stocks ("ILGS").
- Recognising the need to develop a more appropriate method for calculating the discount rate and thereby avoiding over-compensation to injured parties, the UK and Scottish Governments launched a joint consultation in March 2017 to consider this issue in detail ("the Consultation").
- As a result of the Consultation, proposed changes to the system for the rest of the UK have already been published and form part of the Civil Liability Bill which is currently before the House of Commons at Westminster. This Bill was the subject of a Weightmans' update in June 2018.
- The Scottish Government has now published its own draft Bill to address the calculation of the discount rate in Scotland – the Damages (Investment Returns and Periodical Payments) (Scotland) Bill ("the Scottish Bill").
- While there are many similarities between the two Bills, there are some interesting differences which could result in a scenario where there are different discount rates north and south of the border.

## Legislative mechanism

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

## Key stakeholder/markets/clients

The Scottish Bill will directly impact all those commercial entities and government bodies responsible for meeting personal injury claims in Scotland, which will include:

- Insurance companies who write motor, public liability and/or employer liability policies, negatively impacted through greater claims spend and increased re-insurance premiums.
- Commercial companies that self-insure (whether fully self-insured through captives or part self insured through having large deductibles).
- Government departments.

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<sup>1</sup> Claimants can actually receive compensation by PPO currently but only where both parties agree.

<sup>2</sup> This is commonly referred to as the '100% principle' extolled in *Wells v. Wells* (1999).

- Local Authorities and other government bodies who habitually have large deductibles as a part of their insurance arrangements.

The discount rate then indirectly affects insurance premium payers, whether companies or individuals, due to insurers having to pass on the cost through increases in insurance premiums. It further impacts the wider public as a whole through affected Government departments and local authorities having less money to spend on public services.

## Timeline of events to date

**1996** – The Damages Act 1996 is enacted, obliging Scottish Ministers to prescribe the discount rate.

**2001** – Lord Irwin sets the discount rate for England & Wales at 2.5%.

**2002** – Under the Damages (Personal Injury) (Scotland) Order SSI 2002/46 the Scottish discount rate is set at 2.5%.

**November 2010** – The Minister for Community Safety announces a review of the discount rate in Scotland.

**2011** – Association of Personal Injury Lawyers (“APIL”)<sup>3</sup> run a campaign seeking a review of the rate on account of it not having kept pace with changing investment trends.

**October 2011** – The same Minister advises that the Scottish Government will run a public consultation around the methodology for the calculation of the discount rate in Scotland.

**1 August 2012** – The Scottish Government, in conjunction with the Ministry of Justice in England & Wales, plus the Northern Ireland Department of Justice, run the above mentioned consultation.

**27 February 2017** – Liz Truss (the then Lord Chancellor) announces a change in the discount rate for England & Wales from 2.5% to -0.75%, simultaneously indicating that the Government will consult over how it should be calculated.

**27 March 2017** – Scottish Ministers make an Order changing the discount rate for Scotland to -0.75%, with that rate coming into effect the following day.

**30 March 2017** – A further consultation around the methodology for the calculation of the discount rate is launched.

**14 June 2018** – Cabinet Secretary for Justice, Michael Matheson MSP, introduces the Scottish Bill, lead by the Economy, Jobs & Fair Work Committee.

## Summary of the current position

### The Discount Rate

#### Rate Assessor

Going by the Scottish Bill in its current form, in contrast to the rest of the UK, the rate in Scotland will be assessed by the ‘Rate Assessor’, rather than the Lord Chancellor. This person will be appointed by the Scottish Government, failing which the position will be filled by a UK Government Actuary.

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<sup>3</sup> Association of Personal Injury Lawyers (Claimant lobby group).

The Rate Assessor will not need to set up and have regard to an independent expert panel when undertaking each review. It will be left to the Rate Assessor to determine who they might wish to consult. That is in contrast to the Civil Liability Bill, governing the discount rate in England & Wales, which provides for the Lord Chancellor to compile and consult with an expert panel in connection with all but the first review of the rate in England & Wales.

The decision in relation to the Scottish discount rate is the Rate Assessor's alone, which arguably removes the issue of political influence, depending on who is appointed to the role.

### Assessment of rate/Notional portfolio of investments

The Scottish Bill moves away from the 'no risk' ILGS approach to the calculation of the discount rate and towards calculation by reference to a 'notional portfolio' of investments, which the injured party will hypothetically invest his/her damages in. The claimant will be assumed to be a cautious investor.

In addition, the Scottish Bill states that the rate should reflect the return based on a 30-year investment period and certain specified 'standard adjustments' must be taken into account, namely deductions of 0.5% for the impact of taxation and cost of investment advice/management and 0.5% as a further margin involved in relation to the rate of return. These provisions are specific to the Scottish Bill and do not appear in the Civil Liability Bill and more prescriptive than the Civil Liability Bill.

Significantly, the Scottish Government has stated that using the proposed methodology would currently produce a discount rate of **0%**.

While it is recognised that a different outcome may be produced when the actual review is carried out (which is likely to be in 2019), David Lidington's prediction on 07 September 2017 was that the rate for England & Wales would be somewhere in between 0% and 1%. According to figures produced by the Association of British Insurers ("ABI"), such a rate differential could create a disparity of between £8 million to £20 million when it comes to the cost of Scottish catastrophic injury claims.

### Single rate

A single rate will apply to all cases unless specific regulations are passed by the Scottish Government, whereas there is provision in the Civil Liability Bill for more than one rate to be set at the Lord Chancellor's discretion.

### Timing

The first review of the discount rate must be started on the day that the Scottish Bill receives Royal Assent. The review must then be concluded within 90 days of that date. Thereafter, the Scottish Government must present the Rate Assessor's report to Holyrood 'as soon as practicable' with the recommended rate taking effect the following day.

Those provisions differ in some respects to the Civil Liability Bill, although the Civil Liability Bill was amended during its passage through the House of Lords so that the review for England & Wales too must be started on the day that it receives Royal Assent (assuming that that amendment is accepted by MPs in the House of Commons). With the Scottish Bill scheduled to come into force next year, it is not inconceivable that Scotland will have a new discount rate some months before the rest of the UK.

The rate must then be reviewed at least every 3 years, in line with the original draft of the Civil Liability Bill, but with that period having again been changed during its passage through the House of Lords, the rate in England & Wales will now be reviewed every 5 years (assuming that that amendment is accepted by MPs in the House of Commons).

### Stand-alone legislation

Unlike the Civil Liability Bill, the Scottish Bill is not tied to the wide-ranging whiplash reforms. As such, the Scottish Bill will be regarded as less controversial and arguably stands better prospects of getting through.

## Periodical Payments

- The proposed methodology for assessing the discount rate is the headline-grabber but the Scottish Bill also makes provision for the introduction of PPOs in Scotland. As indicated above, to date PPOs have only been available in Scotland where both parties consent to the making of such an order.
- The Scottish Bill will enable the Scottish courts to impose a PPO on parties in relation to future pecuniary losses.
- The rules to be followed, and the safeguards provided, are very much in line with the existing system used by the rest of the UK, including the need to make specific provision in the PPO to allow for any potential variation in the future (i.e. that there is the potential for some specified change in the injured party's medical condition).
- One difference worth highlighting is the proposed ability of the court to suspend a PPO where there is evidence that the injured party will be significantly over-compensated if the payments are not stopped. Again, the original PPO must contain specific provision to allow for suspension but, as matters currently stand, there is no equivalent provision available south of the border.

## Next steps & anticipated timelines

We estimate a timetable as follows but emphasise that this is just an estimate at this stage and that review of the Scottish Bill should be measured over time:

**July 2018** – Call for evidence.

**August** – Deadline for submission of evidence.

**September** – Stage 1 Committee stage commences.

**June 2019** – Estimated date for the Scottish Bill to be passed by Holyrood and Royal Assent granted.

**July** – Rate review commences.

**September** – Rate review concludes.

**October** – New discount rate announced.

Recent amendments to the Civil Liability Bill to exclude the composition of an expert panel and consultation with that panel when it comes to the first review of the discount rate in England & Wales could see the introduction of a new rate in England & Wales significantly expedited beyond our original time estimate of late 2019. Thus there may well end up being a period when different discount rates apply in Scotland and in England & Wales, even if the discount rates ultimately end up being consistent.

## Best and worst case outcomes

The best indicator of the likely outcome is the recent reference to a **0% discount rate**. However, trends in investment returns over the interim period need to be monitored and will be the best indicator as to whether that bracket will remain valid.

The best case outcome for compensators is the passing of the Scottish Bill into law and a review outcome consistent with the above, in or around June 2019. The worst case outcome would be the Scottish Bill failing to become law, whether through being voted down or because of a further general election taking place. However, the former scenario would seem unlikely.

In the meantime, it looks very much as though PPOs will now become a more common feature of compensation claims in Scotland following the passing of the Scottish Bill. Admittedly uptake of PPOs in England & Wales has been limited to date.

However, the Government is seeking that the Civil Justice Council look at ways to better promote PPO uptake and there seems an appetite in Government at least for PPOs to become more common throughout the UK.

### Practical steps to take now

The insurance industry and other affected bodies need to continue to lobby in favour of the Scottish Bill. In the meantime, compensators would be well advised to continue to attempt to negotiate by reference to more favourable discount rates than -0.75%, in anticipation of a new more favourable rate being set. The credibility of that argument will increase the closer we get to the anticipated date on which a new rate will be announced and the further individual cases are from reaching trial.

Scottish legal services providers will in the meantime need to gear themselves up towards advising on PPOs as a standard approach to high value compensation claims in the future.

### Core sources of information

- The draft Damages (Investment Returns and Periodical Payments) (Scotland) Bill can be found [here](#).
- You can monitor the Scottish Bill's progress [here](#).
- s.1 Damages Act 1996 is available [here](#).

### Can we help?

We will continue to liaise with Government over further developments and as the Civil Liability Bill continues its progress through Parliament, and more detail emerges, we will provide updates with a view to assisting compensators in their preparation for these reforms.

In the meantime, should you wish to discuss this in more detail, or would like assistance with any other matter, please do not hesitate to get in touch.



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