

Clerk for Committee of Justice
[Room 242 Parliament Buildings](#)
[Ballymiscaw](#)
[Stormont](#)
[Belfast](#)
[BT4 3XX](#)

Committee.justice@niassembly.gov.uk

Dear Christine

Re: Damages (Return on Investment) Bill

I refer to your letter of 6th July. Following on from the evidence session, I am delighted to assist the Committee. The statement to which I referred was by the Lord Chancellor the Right Honourable David Gauke MP on the 15th July 2019 in a Statement of Reasons. I would refer to paragraphs 15, 16 & 17 and in particular to paragraph 20. I have attached for completeness a copy of the Statement of Reasons so the Committee may read the totality of the document.

The Government Actuary's advice suggested that for a representative Plaintiff, the combined expected nett return that could be reasonably expected, would be +0.25%. Setting the rate at that level would, based on the Government Actuary's advice, result in an even, that is a 50/50 risk of Plaintiffs being under or over compensated. He described it as "a neutral estimate without bias.."and represented a rate after deductions for tax, expenses and damages inflation

The Lord Chancellor however noted that this was not the conclusion of the process but rather, the starting point for his determination of the rate. The Lord Chancellor then from paragraph 17 onward of the Statement of Reasons considered alternative modelling carried out by GAD as set out in GAD's advice dated 25th June 2019. He concluded that setting the rate at +0.25% would run in his opinion too high a risk of under-compensating Plaintiffs. The Lord Chancellor referred to GAD's analysis which included looking at the uncertainties and sensitivities within GAD's modelling assumptions. The Government Actuary at Chapter 9 ("Setting the Personal Injury Discount Rate" 25th June 2019) discussed how its modelling and the assumptions made within it, would give rise to risks of both over and under compensation.

In paragraph 20 of the Statement of Reasons, the Lord Chancellor noted by reference to the Government Actuary's modelling and analysis, that by setting the rate at -0.25% (rather than leaving it at +0.25%), a Plaintiff would be "...approximately twice as likely to be over compensated as under compensated and ... approximately four times as likely to receive at least 90% compensation as they are to be under compensated by more than 10%. I consider that this leaves a reasonable additional margin of prudence which reflects the sensitivities of the rate to the baseline assumptions".

In my evidence to the Committee, the reference then to the thoughts expressed by the Lord Chancellor in July 2019, was a reference to this particular section of the Statement of Reasons which is clear in its terms.

Interestingly, in the next paragraph (21) the Lord Chancellor went on to consider how setting the rate at -0.5% would influence the balance between over and under compensation. The Government Actuary's modelling indicated that a representative Plaintiff would have approximately a 70% chance of the award not being exhausted at the end of the term and approximately 20% chance of having more than 10% of the award remaining at the end of the term of the award. He concluded that the median expectation using a -0.5% rate was of over-compensation of almost 20%.

Similar sentiments were clearly expressed in the Scottish Government's Policy Memorandum which accompanied the draft Damages (Investment Returns and Periodical Payments) (Scotland) Bill in June 2008 when it considered similar policy-related adjustments around a further margin. Paragraph 71 of the Policy Memorandum reads;

“...Damages are not surplus funds which can be speculatively invested. Any losses are likely to be material to the Pursuer's ability to meet their needs. For all of these reasons the Scottish Government considered 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” (interest linked Government stock).

It went on to state that;

“...the further adjustment is in recognition of the fact that any investment, however carefully advised and invested may fail to meet their needs...”.

It is important to have a clear understanding of the uncertainties that will inevitably accompany any modelling or methodology set out to determine the appropriate discount rate. It is not the role of the Government Actuary to advise on what is or is not an appropriate level for risk of either under or over-compensation. GAD readily acknowledge that its role is to provide illustrative personal injury discount rates at various levels of risk. In looking at the uncertainties and sensitivities which are part of GAD's modelling assumptions, the Government Actuary's role and expertise is to consider outcomes for injured Plaintiffs resulting from its modelling.

GAD have repeatedly made clear each time it provides advice to what might be loosely described as the Executive or Government in whichever jurisdiction, that its analysis and advice is not to be relied upon as a means of calibrating to a precise level or risk of the plaintiffs' compensation. GAD's purpose is that its analysis be used, “...as an illustration and overall indication of the potential investment risks that claimants might face, to help the Lord Chancellor's judgement in determining an appropriate PI discount Rate” (para 2.13 page 21 of Government Actuary advice to the Lord Chancellor : Setting the Personal Injury Discount Rate) dated 25th June 2019.

By way of further reminder, in the same vein, later on in GAD's Advice to the Lord Chancellor he again cautions that his analysis and advice is intended to provide “...a guide in setting the rate not a formula for it, and I would warn of the risk of over-fitting to the results of my analysis on setting the rate”.

In the discussions around the 100% compensation principle, there has been a very necessary focus on the need to fairly balance the risk of under - and over-compensation. The

methodology proposed under this Damages bill , based largely on the Scottish model is not entirely the formulaic alternative portrayed in contrast to the seemingly more flexible English model . There are policy positions already front loaded within the Damages Bill which are express and clearly on the record. The low risk investor profile moves away from the risk averse or very low risk approach under Wells v Wells which has produced our current PIDR of -1.75% but is still a profile more cautious than that chosen by the Lord Chancellor in England and Wales . The use of a longer 43 year investment period , as in the English model ,rather than 30 years as in Scotland potentially allows for marginally greater returns . The decision to follow the prescription of standard adjustments for tax, investment advice/expenses and the like and the most clearly policy-orientated device of a *further margin* was expressly created to address the risks of under compensation. By adding this further margin of prudence , the creators of both the English and Scottish models , acknowledge they have in the process increased the probability of over- compensation .

The balancing act required to give effect to the 100% compensation principle is that sufficient monies- no more and no less - are available to an injured plaintiff to meet future needs as and when they are expected to fall. That is the goal. While it is necessary to guard against the risks that an injured plaintiff's compensation might not be sufficient , it is important as well to ensure that in doing so, the risk of over- compensation is not put to one side to the extent that over- compensation becomes a probability.

The lower risk composition of the prescribed notional portfolio within the Damages Bill (compared to the English model) is already a factor which mitigates against under-compensation . The addition of the further margin to the standard adjustment for taxation/investment advice ,FOIL would argue , goes too far in addressing the risk of under-compensation . It is unnecessary as sufficient mitigation factors have by policy choices already made by the Department of Justice in framing the Public Consultation and by modelling carried out by GAD , been reflected within the Damages Bill before the Committee and Assembly.

FOIL NI would again take this opportunity to thank the Committee for providing an opportunity to join this conversation and assist the Committee in the very significant task before it.

Kind regards,

Kevin Shevlin.
Chair of FOIL NI.

Sent from my iPad