From: The Rt Hon Sir Declan Morgan

Royal Courts of Justice
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Damages (Return on Investment) Bill

Many thanks for your letter, dated 26th March 2021, seeking my view on the content of the Damages (Return on Investment) Bill which proposes changes to the framework for setting the personal injury discount rate in Northern Ireland. I note that similar requests were addressed to the Chair of the shadow Civil Justice Council, the Association of District Judges, Council of County Court Judges, Council of District Judges (Magistrates' Court) and Northern Ireland Lay Magistrates Association. This is a composite response encompassing the views expressed by the judiciary.

As the Justice Committee members will be aware, it is not the function of the judiciary to comment on policy matters, other than the operational aspects of the proposals and their impact on the work of the courts. In that respect our comments cannot address the specific questions posed but are offered by way of assistance to the Committee.

You will know that the review of the personal injury discount rate is overdue. It is our view that the continued uncertainty has had a negative impact on case progression of personal injury claims at both the High Court and County Court tiers as it is delaying the award of damages for personal injuries, which may be life-changing in many instances, to those who need access to these funds to cover the losses flowing from the injury - for future loss or expense including compensation for loss of earnings, care costs, case management costs and medical expenses. These future losses and expenses may in some cases run for many years into the future.

As the Departmental officials have advised, the overall aim is that the award will neither under-compensate nor over-compensate the injured party, and the discount rate forms a vital part of a calculation which converts an assumed future stream of income into a present lump sum. As Lord Hope of Craighead stated in Wells v Wells [19991 1 AC 34 at page 390A-B:

> "...the object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position he or she would have been in but for the accident. The aim is to award such a sum of money as will amount to no more, and at the same time no less, than the net loss.. .".

The prescribed rate must be taken into account in all cases in which the Court has to determine the return to be expected from the investment of a sum awarded as damages for future financial loss in a personal injury action on or after that date, irrespective of when the injury occurred, the cause of action arose or the proceedings began.

Members have been briefed that the personal injury rate of plus 2.5% has applied in this jurisdiction since it was set in 2001 by the Lord Chancellor prior to devolution of justice. Until the subsequent review, which resulted in the rate of minus 0.75% coming into effect in the other UK jurisdictions in March 2017, the Department of Justice in Northern Ireland largely followed the changes made by the Lord Chancellor, but this change was not applied at that time in the absence of an Assembly to enact the required secondary legislation. Following further review in 2019, in England and Wales the rate was set at minus 0.25% for all claims settled on or after 5th August 2019, while Scotland subsequently confirmed their rate as minus 0.75% on 1st October 2019.

The continuing hiatus which has persisted for the last 4 years in this jurisdiction means that Plaintiffs in high value personal injury actions involving large future special damage claims are prima facie only entitled to sums which in any other part of the UK would be regarded as inadequate and not representing proper and full compensation. The difference in capital requirement is particularly pronounced in times of low interest rates. The courts in Northern Ireland should not be expected to approve settlements of such actions in which the future damages lump sum award would be regarded as substantially inadequate for the plaintiff in any other UK jurisdiction. Neither should they be expected to approve settlements which place an undue burden on the tax-payer who ultimately bear the cost of over-compensation if awarded against the Departments defending such actions.

The difference in the discount rate between Scotland and England & Wales appears to relate largely to a different composition of the investment portfolio, the assumed duration of loss and the date at which the economic modelling was run in each instance. The different approaches to inflation appear a little confusing, but ultimately arrive in broad terms at a 1% return after inflation. The England & Wales discount rate was based on conditions prevailing in December 2018 alone, whereas the Scottish rate has been arrived at by looking at modelling not just from that date but also from June 2019. It is striking how much the economic conditions had deteriorated, with a difference on the Scottish modelling of almost 0.38% over just that six-month period. The fact that the rate can change that much in only six months rather exposes the uncertainties that claimants face in managing their investment over many decades.

It is not acceptable that a citizen may sustain a life-changing injury in Northern Ireland where we still have a plus 2.5% discount rate, causing massive under-compensation, or a continued avoidable delay in receiving the due compensation to allow them to achieve the best quality of life for as long as is possible. That position urgently needs to change. It is disappointing that a substantive legislative remedy could not be accelerated the setting of

an interim rate of minus 1.75% is anticipated to result in defendants avoiding settlements pending the new rate being set.

The Committee will no doubt have been referred to the documents published by the Ministry of Justice (MOT) when they considered these matters. You may also be aware of the research report commissioned from The British Institute of International and Comparative Law (BIICL) in 2017 to examine the issue of the discount rate applying to quantum in personal injury cases from a comparative law perspective. It focused on the jurisdictions of: Australian States, Canadian Provinces, France, Germany, Hong Kong, Ireland, Spain and South Africa. The BIICL research shows that there are a wide variety of rates and approaches to its setting in the jurisdictions considered, but all give effect to the principle of full compensation and, where relevant, give the claimant the benefit of a defensive investment strategy. BIICL noted a broad range of rates (at that time) from 6% in the Australian State of Victoria for motor vehicle and workplace accident victims, to 3.5% in Spain. No jurisdiction with a single discount rate had a negative rate as is currently the case in the UK.

I hope members find these observations helpful to your considerations, and on behalf of the judiciary I would ask for an expedited legislative remedy to restore the balance between the interests of plaintiffs and defendants, with regular time-bound reviews mandated, as soon as possible.

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Lord Chief Justice of Northern Ireland

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