

Damages (Return on Investment) Bill

[AS INTRODUCED]

LEGISLATIVE COMPETENCE

At Introduction the Minister of Justice had made the following statement under section 9 of the Northern Ireland Act 1998:

“In my view the Damages (Return on Investment) Bill would be within the legislative competence of the Northern Ireland Assembly.”

Damages (Return on Investment) Bill

[AS INTRODUCED]

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Schedule Schedule C1 to the Damages Act 1996, as inserted

Damages (Return on Investment)

A

BILL

TO

Make provision in relation to the assumed rate of return on investment of particular damages awarded in personal injury cases.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:

Assumed return on investment

1.—(1) Before section 1 of the Damages Act 1996 insert—

“Assumed rate of return on damages invested: Northern Ireland

5 C1.—(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court must, subject to and in accordance with rules of court made for the purposes of this section, take into account the rate of return set by the official rate-assessor.

10 (2) Subsection (1) does not however prevent the court from taking a different rate of return into account if any party to the action shows that the different rate is more appropriate in the circumstances of the case.

(3) Schedule C1 (which makes provision about setting the rate of return for the purpose of subsection (1)) has effect.

15 (4) In subsection (1), the reference to the official rate-assessor is to—
(a) if no regulations under paragraph (b) are in force, the Government Actuary (but, when that office is vacant, the Deputy Government Actuary), or
(b) a person appointed in place of the Government Actuary (including the Deputy as referred to in paragraph (a)) by regulations made by
20 the Department of Justice in Northern Ireland.

(5) Regulations under subsection (4)(b) may provide for a person to deputise for the person appointed in place of the Government Actuary.

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(6) Before making regulations under subsection (4)(b), the Department of Justice in Northern Ireland must obtain the agreement of—

(a) as respects appointment in place of the Government Actuary, the person to be appointed,

5 (b) as respects deputising as mentioned in subsection (5), the person who is to deputise as provided for.

(7) The power to make regulations under subsection (4)(b) is exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979.

10 (8) Regulations under subsection (4)(b) may not be made unless a draft of the regulations has been laid before, and approved by a resolution of, the Assembly.”.

(2) Section 1 of the Damages Act 1996 is repealed.

Process for setting rate of return

15 **2.** Before Schedule 1 to the Damages Act 1996, insert Schedule C1 as set out in the Schedule to this Act.

Ancillary provision

20 **3.—**(1) The Department may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision that it considers appropriate for the purposes of, in connection with or for giving full effect to this Act.

(2) Regulations under subsection (1) may modify any statutory provision (including this Act).

(3) Regulations under subsection (1)—

25 (a) may not be made unless a draft of the regulations has been laid before, and approved by a resolution of, the Assembly, if they modify Northern Ireland legislation or an Act of Parliament;

(b) otherwise, are subject to negative resolution.

Interpretation

30 **4.** In this Act—

“the Department” means the Department of Justice;

“statutory provision” has the meaning given by section 1(f) of the Interpretation Act (Northern Ireland) 1954.

Commencement

35 **5.—**(1) Sections 3 to 6 come into operation on the day after this Act receives Royal Assent.

(2) The other provisions of this Act come into operation on such day or days as the Department may by order appoint.

40 (3) An order under subsection (2) may include transitional, transitory or saving provision.

Damages (Return on Investment)

Short title

6. This Act may be cited as the Damages (Return on Investment) Act (Northern Ireland) 2021.

SCHEDULE

Section 2.

SCHEDULE C1 TO THE DAMAGES ACT 1996, AS INSERTED

“SCHEDULE C1
SETTING THE RATE FOR SECTION C1(1): NORTHERN
IRELAND

Regular review of rates of return

1.—(1) The rate-assessor must review any original rate of return.

(2) A review under sub-paragraph (1) must be started by the rate-assessor on the appointed day.

(3) For the purposes of this paragraph, an original rate of return is—

- (a) a rate of return to which paragraph 27(1) applies, or
- (b) the position of there being no rate of return to which paragraph 27(1) applies.

2.—(1) The rate-assessor must review every subsequent rate of return.

(2) A review under sub-paragraph (1) must be started by the rate-assessor—

- (a) in relation to the first such review—
 - (i) on 1st July 2024, or
 - (ii) earlier as is required by the Department of Justice;
- (b) in relation to any subsequent review—
 - (i) on the day after the last day of the 5-year period, or
 - (ii) earlier within the 5-year period as is required by the Department of Justice.

(3) Where a review under sub-paragraph (1) is started earlier by virtue of sub-paragraph (2)(a)(ii) or (2)(b)(ii), it is to be treated as an extra review that does not affect the starting date for the first review of 1st July 2024 or the running of the 5-year period in relation to the previous review (and no 5-year period runs under sub-paragraph (2) in relation to the extra review).

(4) For the purposes of this paragraph—

- (a) a subsequent rate of return is a rate of return that is set—
 - (i) for the time being (including by reason of an extra review as mentioned in sub-paragraph (3)), and
 - (ii) subsequently to an original rate of return as described in paragraph 1(3)(a) (including as a result of a review under sub-paragraph (1) conducted from time to time by virtue of the continuing operation of sub-paragraph (2)(a) and (b)),
- (b) the 5-year period is the period of 5 years beginning with the day on which the previous review of a rate of return must be started (ignoring an extra review as mentioned in sub-paragraph (3)).

3.—(1) A review of a rate of return under paragraph 1(1) or 2(1) must be concluded by the rate-assessor within the 90-day period.

(2) For the purposes of this paragraph, the 90-day period is the period of 90 days beginning with the day on which the review must be started by the rate-assessor.

Overview as to rate-setting

4.—(1) The conduct by the rate-assessor of a review of a rate of return under paragraph 1(1) or 2(1) is governed by—

- (a) paragraphs 5 to 7,
- (b) paragraphs 9 and 10,
- (c) paragraphs 12 and 13,
- (d) paragraphs 19 to 21.

(2) A rate of return is to be set as a result of a review under paragraph 1(1) or 2(1) accordingly (plus see paragraph 23 as to reporting afterwards on the conduct of such a review).

5. In a review under paragraph 1(1) or 2(1), the rate-assessor must determine whether a rate of return to be set is to be—

- (a) different from the rate of return with which the review is concerned, or
- (b) the same as the rate of return with which the review is concerned.

6. In a review under paragraph 1(1) or 2(1), the rate-assessor must have regard to views—

- (a) of any person whom the rate-assessor chooses to consult, and
- (b) of any person whose advice the rate-assessor chooses to seek,

where received by the rate-assessor within a reasonable time in connection with the review.

Returns-based assessment

7.—(1) The basis on which the rate-assessor is to make a rate determination in a review under paragraph 1(1) or 2(1) is as set out in subparagraph (2).

(2) A rate of return should reflect the return that could reasonably be expected to be achieved by a person who invests—

- (a) in the notional portfolio, and
- (b) for a period of 43 years.

(3) This is without prejudice to paragraphs 10 and 20 (with paragraph 10 to be met before paragraph 20 is met).

(4) The notional portfolio is shown in the table in paragraph 12(3).

8. The Department of Justice may by regulations modify a period mentioned in paragraph 7(2).

9.—(1) Allowance must be made by the rate-assessor for the impact of inflation on the value of the return or investment to which paragraph 7(2) relates.

(2) The impact of inflation is to be allowed for by reference to, whether

- (a) the retail prices index, or
- (b) some published information relating to costs, earnings or other monetary factors as is, for use instead of the retail prices index, prescribed in regulations made by the Department of Justice.

(3) In sub-paragraph (2), “the retail prices index” means the general index (for all items) published by the Statistics Board or, if that index is not published for a relevant month, any substituted index or index figures published by that Board.

Standard adjustments

10.—(1) The standard adjustments must be made by the rate-assessor to a rate of return that would be arrived at but for this paragraph.

(2) The standard adjustments are the deduction of—

- (a) 0.75 of a percentage point, to represent—
 - (i) the impact of taxation, and
 - (ii) the costs of investment advice and management, and
- (b) 0.5 of a percentage point, as the further margin involved in relation to the rate of return.

11.—(1) The Department of Justice may by regulations modify a figure appearing in paragraph 10(2)(a) or (b).

(2) A figure as so modified—

- (a) may be zero or a positive number,
- (b) if not a whole number (including zero), may comprise or incorporate a decimal fraction.

Notional investment portfolio

12.—(1) As for the basis on which the rate-assessor is to proceed by virtue of paragraph 7(1), the notional portfolio is a combination of various types of things for investment in.

(2) In the table—

- (a) the first column shows the types of things that the portfolio is composed of,
- (b) the second column shows the percentage that each of the types of things is of the portfolio.

(3) The table is as follows—

Cash or equivalents	10%
Nominal gilts	15%
Index-linked gilts	10%
UK equities	7.5%

Overseas equities	12.5%
High-yield bonds	5%
Investment-grade-credit	30%
Property (heritable or moveable)	5%
Other types (see the examples)	5%

(4) Examples of other types as mentioned in the first column of the table are infrastructure, commodities, hedge funds and absolute return funds.

13. So far as necessary, if—

(a) an entry in the first column of the table is not ascribed meaning by regulations under paragraph 14,

(b) any associated examples are not ascribed meaning by regulations under paragraph 14,

the entry is or (as the case may be) examples are to be interpreted by the rate-assessor as appropriate by bringing to bear professional knowledge of what the relevant terminology is commonly understood to mean in investment contexts.

Details within portfolio

14. The Department of Justice may by regulations ascribe meaning to—

(a) an entry in the first column of the table in paragraph 12(3),

(b) any associated examples.

15.—(1) The Department of Justice may by regulations—

(a) as respects the first column of the table in paragraph 12(3), add, remove or modify an entry or any associated examples,

(b) as respects the second column of the table—

(i) add or remove a figure,

(ii) modify a figure.

(2) A figure so added, or as so modified—

(a) may be zero or a positive number,

(b) if not a whole number (including zero), may comprise or incorporate a decimal fraction.

Hypothetical investor

16.—(1) Before a review under paragraph 2(1) is due to start, the Department of Justice must consider whether regulations under paragraph 14 or 15 are necessary for ensuring that the notional portfolio remains suitable for investment in by a hypothetical investor.

(2) In considering the matter, the Department of Justice must consult such persons as it considers appropriate.

(3) No consideration of the matter is required ahead of an extra review as mentioned in paragraph 2(3).

17.—(1) A hypothetical investor is a person who falls within each of sub-paragraphs (2) to (4).

(2) A person falls within this sub-paragraph if the person—

- (a) is a recipient of damages, and
- (b) will—
 - (i) invest the damages, and
 - (ii) do so as properly advised.

- 5 (3) A person falls within this sub-paragraph if the person—
- (a) has no financial resources, apart from the damages, that can be used to meet the losses and expenses for which the damages are awarded, and
 - (b) will make withdrawals from the investment fund deriving from investment of the damages.
- 10
- (4) A person falls within this sub-paragraph if the person is someone whose objectives are of securing that the damages will—
- (a) meet the losses and expenses for which the damages are awarded, and
 - (b) be exhausted at the end of the period for which the damages are awarded.
- 15

18. For the purpose of paragraphs 16 and 17—

- (a) a reference to damages is to damages of the kind mentioned in section C1(1), and
 - (b) the damages are to be assumed to be received in a lump sum (rather than by way of periodical payments).
- 20

Expression of rates set

19.—(1) A rate of return is to be set by the rate-assessor as a percentage figure.

- 25 (2) The figure may be—
- (a) zero, or
 - (b) a negative or positive number.
- (3) If the figure is not a whole number (including zero), the number is to comprise or incorporate a decimal fraction of 0.25, 0.5 or 0.75.

30 20.—(1) A rate of return that would be arrived at but for this paragraph is to be rounded up or down by the rate-assessor to the nearest figure permitted, if necessary so as to come to—

- (a) a whole number (including zero), or
 - (b) a number comprising or incorporating a decimal fraction of 0.25, 0.5 or 0.75.
- 35

(2) If two permitted figures are equally near when rounding under sub-paragraph (1) arises, rounding is to be to whichever of the figures is reached—

- (a) from the positive side of zero, by going towards (or to) zero, or
 - (b) from the negative side of zero, by going further below zero.
- 40

Single or multiple rates

21.—(1) Except where the Department of Justice by regulations requires more than one rate of return to be set by the rate-assessor, a rate of return is to be set so as to have effect for all cases.

5 (2) Where more than one rate of return is set for the time being by virtue of regulations under sub-paragraph (1), a review under paragraph 1(1) or 2(1) is to be conducted separately in relation to each rate of return (and a reference in paragraph 2(4)(b) to the previous review is to be read as necessary for this).

10 22. Regulations under paragraph 21(1) must—

- (a) specify the circumstances to which each rate of return is to relate,
- (b) require the rate-assessor's report under paragraph 23 to cover each rate of return separately.

Reporting and effective date

15 23.—(1) After a review under paragraph 1(1) or 2(1) is concluded, the rate-assessor must send to the Department of Justice a report on the conduct of the review.

(2) The report is to be sent to the Department of Justice without undue delay (and no later than on the last day of the 90-day period described in paragraph 3(2)).

20 (3) The report is to—

- (a) include—
 - (i) a rate determination made in the review,
 - (ii) a summary of the calculation of the rate of return (which may be accompanied by explanatory or supporting material),
- (b) state the day on which the report is sent to the Department of Justice (and the day on which the review is concluded).

25 24.—(1) The Department of Justice must lay the report before the Northern Ireland Assembly as soon as practicable after the day on which the Department receives the report from the rate-assessor.

(2) The rate-assessor must publish the report on the same day as the report is laid before the Northern Ireland Assembly by the Department of Justice.

30 25. A rate determination comes into effect at the beginning of the day after the day on which the report including the determination is laid before the Northern Ireland Assembly by the Department of Justice.

Reimbursement of costs

35 26. The Department of Justice must adequately reimburse the rate-assessor for costs, including as to staff and outlays, incurred by the rate-assessor in exercising the rate-assessor's functions with respect to a review under paragraph 1(1) or 2(1).

Transitional arrangements

27.—(1) This sub-paragraph applies to a rate of return—

(a) prescribed by an order under section 1(1) of the Damages Act 1996, and

5 (b) having effect—

(i) in relation to Northern Ireland, and

(ii) immediately before the appointed day.

(2) A rate of return to which sub-paragraph (1) applies is to be treated from the appointed day as if it were set for the purpose of section C1(1).

10 28.—(1) A review under paragraph 1(1) of the position of there being no rate of return cannot cause the maintaining of that position, so in conducting such a review in relation to that position—

(a) paragraphs 5(a) and 33(5)(a) are to be read as if referring to a rate of return of some sort, and

15 (b) paragraphs 5(b) and 33(5)(b) are to be ignored.

(2) On the question of a review under paragraph 1(1) of the position of there being no rate of return, see paragraph 1(3)(b).

29. Paragraph 6 extends to views received, in advance of the appointed day, in anticipation of the starting of a review under paragraph 1(1).

20 30. Paragraph 26 extends to costs incurred, in advance of the appointed day, in anticipation of the starting of a review under paragraph 1(1).

Procedure for regulations

31.—(1) Regulations under this Schedule may—

(a) make provision to apply in all cases, or

25 (b) make different provision for different circumstances.

(2) The power to make regulations under this Schedule is exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979.

30 (3) Regulations under this Schedule may not be made unless a draft of the regulations has been laid before, and approved by a resolution of, the Northern Ireland Assembly.

Interpretation of Schedule

32. In this Schedule, a reference to the rate-assessor is to the official rate-assessor as mentioned in section C1(1).

35 33.—(1) Sub-paragraphs (2) to (5) apply for the interpretation of this Schedule.

(2) A rate of return is a rate of return for the purpose of section C1(1).

40 (3) A rate of return is set as a result of a review under paragraph 1(1) or 2(1) and on the coming into effect of a rate determination made by the rate-assessor in that review.

(4) A review of a rate of return under paragraph 1(1) or 2(1) is concluded when the rate-assessor makes a rate determination in the review.

(5) A rate determination is a determination by the rate-assessor that is to be made in a review under paragraph 1(1) or 2(1) of what the new rate of return is, either—

- (a) different from the rate of return under review, or
- (b) the same as the rate of return under review.

34. In this Schedule—

“the appointed day” means the day on which the Schedule to the Damages (Return on Investment) Act (Northern Ireland) 2021 comes into operation;

“the Department of Justice” means the Department of Justice in Northern Ireland.”.

Damages (Return on Investment) Bill

[AS INTRODUCED]

A Bill to make provision in relation to the assumed rate of return on investment of particular damages awarded in personal injury cases.

Introduced by: Mrs Naomi Long, Minister of Justice

On: 1 March 2021

Bill Type: Executive Bill

ACCOMPANYING DOCUMENTS

**An Explanatory and Financial Memorandum is printed separately as
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