



# Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019

## 2019 asp 4

**The Bill for this Act of the Scottish Parliament was passed by the Parliament on 19th March 2019 and received Royal Assent on 24th April 2019**

An Act of the Scottish Parliament to make provision in relation to the assumed rate of return on investment of particular damages awarded in personal injury cases; and to make provision in relation to periodical payments of various damages awarded in personal injury cases.

### PART 1

#### RETURNS ON INVESTMENT OF DAMAGES

#### **1 Assumed return on investment**

(1) Before section 1 of the Damages Act 1996 there is inserted—

**“B1 Assumed rate of return on damages invested: Scotland**

- (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, a court must take into account the rate of return set by the official rate-assessor.
- (2) However—
  - (a) the court is to do so subject to and in accordance with rules of court (if any) made for the purpose of subsection (1),
  - (b) the court may take a different rate of return into account if a party to the action shows that the different rate is more appropriate in the circumstances of the case.
- (3) Schedule B1 contains provision about setting the rate of return for the purpose of subsection (1).
- (4) In subsection (1), the reference to the official rate-assessor is to—

*Status: This version of this Act contains provisions that are prospective.*

*Changes to legislation: There are currently no known outstanding effects for the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019. (See end of Document for details)*

- (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 the Scottish Ministers.
- (5) Regulations under subsection (4)(b) may provide for a person to deputise for the person appointed in place of the Government Actuary.
- (6) Before making regulations under subsection (4)(b), the Scottish Ministers must obtain the agreement of—
- (a) as respects appointment in place of the Government Actuary, the person to be appointed,
  - (b) as respects deputising as mentioned in subsection (5), the person who is to deputise as provided for.
- (7) Regulations under subsection (4)(b) are subject to the affirmative procedure.”.
- (2) Section 1 of the Damages Act 1996 is repealed.

#### Commencement Information

**II** S. 1 in force at 1.7.2019 by S.S.I. 2019/197, reg. 2

## 2 Process for setting rate of return

- (1) The schedule contains Schedule B1 for insertion into the Damages Act 1996.
- (2) Schedule B1 is to be inserted into the Damages Act 1996 before Schedule 1.

#### Commencement Information

**I2** S. 2 in force at 1.7.2019 by S.S.I. 2019/197, reg. 2

PROSPECTIVE

## PART 2

### PERIODICAL PAYMENTS OF DAMAGES

## 3 Award, continuity and index-linking

- (1) In section 2 of the Damages Act 1996—
  - (a) after subsection (A1) there is inserted—
    - “(A2) A court awarding damages for future pecuniary loss in respect of personal injury—
      - (a) must—

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- (i) consider whether to make an order under which those damages wholly or partly take the form of periodical payments, and
      - (ii) have special regard to the pursuer's needs and preferences when doing so, and
    - (b) may make such an order with or without the consent of the parties.”,
  - (b) in subsection (1), for the words “in an action for personal injury” there is substituted “ in respect of personal injury (other than damages for future pecuniary loss) ”,
  - (c) after subsection (1) there is inserted—
    - “(1A) A court may not make an order for periodical payments unless it is satisfied that the continuity of payment under the order is reasonably secure.
    - (1B) When a court makes an order for periodical payments, it must state why it is satisfied that the continuity of payment under the order is reasonably secure.”,and the title of the section becomes “ Periodical payment orders ”.
- (2) After section 2B of the Damages Act 1996 there is inserted—

#### **“2C Secure continuity of periodical payments**

- (1) For the purpose of section 2(1A), a court is to assume that the continuity of payment under an order is reasonably secure if—
  - (a) the right to receive the payments would be protected by—
    - (i) a guarantee under section 6 or Schedule 1, or
    - (ii) a scheme under section 213 of the Financial Services and Markets Act 2000 (whether or not as modified by section 4 of this Act), or
  - (b) the source of payment would be a recognised body or office-holder listed in subsection (6).
- (2) In an order for periodical payments, a court may include provision—
  - (a) specifying the method by which the payments are to be made,
  - (b) requiring the person responsible for making the payments to take specified action to secure the continuity of payment, where the continuity of payment is not considered by the court to be reasonably secure by virtue of subsection (1),
  - (c) enabling an application to be made to the court for variation of provision included in the order under paragraph (a) or (b).
- (3) Despite inclusion in an order for periodical payments of provision of the kind mentioned in subsection (2)(a), the payments may be made by a different method if under the different method—
  - (a) the right to receive the payments is protected in one of the ways mentioned in subsection (1)(a), or
  - (b) the source of payment is a recognised body or office-holder listed in subsection (6).

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- (4) The court may vary the order in respect of provision of the kind mentioned in subsection (2)(a) or (b) but only if—
- (a) an application is made to the court in accordance with provision included in the order under subsection (2)(c), and
  - (b) the court is satisfied that the continuity of payment under the order is still reasonably secure (with subsection (1) to be used for this too).
- (5) As regards cases involving future pecuniary loss, subsection (4)(a) does not prevent variation of the order under section 2F(2)(a)(v) (which is about method of payment).
- (6) This is the list of who is a recognised body or office-holder as referred to in subsections (1)(b) and (3)(b)—
- (a) a part of the Scottish Administration,
  - (b) each of—
    - (i) a Minister of the Crown,
    - (ii) a department of the Government of the United Kingdom.
- (7) The Scottish Ministers may by regulations—
- (a) add an entry to the list in subsection (6) so as to include a particular, or category of—
    - (i) health service body,
    - (ii) non-government body,
  - (b) provide for an exception to an entry originally contained in the list in subsection (6) (or remove or modify such an exception provided for in the list).
- (8) Regulations under subsection (7)—
- (a) may remove an entry added to the list,
  - (b) may not remove an entry originally contained in the list.
- (9) Regulations under subsection (7) are subject to the negative procedure.

## **2D Index-linking of amount of periodical payments**

- (1) Deemed to be incorporated in an order for periodical payments is provision that the amount of the payments is to alter—
- (a) at such times and in such manner as set by or determined under rules of court, and
  - (b) on the statutory basis applying in the case.
- (2) Subsection (1) does not apply in relation to an order made before the day on which section 3 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 comes into force.
- (3) Provision deemed by subsection (1)(a) and (b) to be incorporated in an order may be modified by the court which makes the order.
- (4) Provision deemed by subsection (1)(b) to be incorporated in an order may be replaced by the court which makes the order, by including provision in the order—
- (a) for the alternative basis of alteration that is to apply in the case, or

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(b) for there to be no alteration in the case.

- (5) Provision of the kind mentioned in subsection (4)(a) may specify different bases for different circumstances.
- (6) The statutory basis of alteration as mentioned in subsection (1)(b) is alteration by reference to, whether indicating an upward or downward trend—
- (a) the retail prices index within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988, 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 Scottish Ministers.
- (7) Regulations under subsection (6)(b)—
- (a) may make different provision for different circumstances,
  - (b) are subject to the affirmative procedure.”.

#### **4 Variation or suspension of settlement**

After section 2D of the Damages Act 1996 (see section 3 of this Act) there is inserted—

##### **“2E Variation or suspension of future pecuniary loss award**

- (1) In an order under which damages for future pecuniary loss are wholly or partly to take the form of periodical payments, a court may include provision enabling an application to be made to the court for (either or both)—
- (a) variation of the order in accordance with section 2F, or
  - (b) suspension of the right to receive payments under the order in accordance with section 2G.
- (2) A court may include provision of the kind described in subsection (1) in an order only if it is satisfied that—
- (a) there is a chance of a change in the pursuer's physical or mental condition occurring at some definite or indefinite point in the future, and
  - (b) should the change occur, the pursuer would be significantly over- or under-compensated by the damages being awarded for future pecuniary loss.
- (3) In an order including provision of the kind described in subsection (1), a court—
- (a) must specify the sort of change in the pursuer's physical or mental condition which must occur before an application may be made for—
    - (i) variation of the order, or
    - (ii) suspension of the right to receive payments under the order, and
  - (b) may specify a period within which any such application must be made (either generally or in respect of a specified sort of change in the pursuer's condition).