

April 2021

Committee Stage - Damages (Return on Investment) Bill

Opening remarks

The Medical Protection Society (MPS) welcomes the opportunity to submit evidence to the Northern Ireland Assembly on the Damages Bill. Our ambition is that the legislation leads to a fairer and more predictable framework for setting the discount rate.

Summary of our response

MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals with more than 300,000 members around the world, more than 8,000 of which are in Northern Ireland.

As a responsible non-for-profit organisation, owned by members, this call for evidence is particularly relevant to us since membership to MPS provides members with the right to request indemnity for claims arising from professional practice. We manage claims for clinical negligence brought against GPs, private doctors and dentists.

Changes to the PIDR have profound consequences on the cost of clinical negligence and this in turn has a significant impact on healthcare professionals. As a responsible and well-managed defence organisation, we have an obligation to reflect the rising costs of clinical negligence in membership subscription fees so we can be in a position to defend members' interests long into the future. Changes to the PIDR also lead to significant changes in the costs for the Department of Health in terms of the cost of claims against HSC.

Our claims handling philosophy aims to provide an expert, supportive and efficient claims handling service to members who are faced with claims. Where there is no defence and it is clear that a claim will be pursued, MPS will try to effect settlement on fair terms as early as possible. Where there is a good defence to a claim, MPS is robust in pursuing it. Many claims do not withstand detailed legal scrutiny and are successfully rebutted, and MPS successfully defends a significant proportion of claims.

It is important that there is reasonable compensation for patients who are harmed due to clinical negligence, but this must be balanced against society's ability to pay. We have long highlighted that if the cost of claims rises too high then the balance could tip too far, and the cost will become significantly greater for the Department of Health, for healthcare professionals and for society.

We believe that our proposals strike a good balance between ensuring reasonable compensation is available to patients harmed due to clinical negligence whilst also ensuring the compensation awarded is fair and also that the wider costs are affordable.

Questions

Question 1: Is the new statutory methodology to calculate the personal injury discount rate the most appropriate to achieve as close to 100% compensation as possible?

As a Medical Defence Organisation, MPS does not represent claimants or hold data on claimant investment behaviour. We are however aware that research compiled for the UK Ministry of Justice in 2013 found that claimants who sought independent financial advice following settlement would typically invest in a mixed portfolio (including fixed-interest accounts, property, equities, commodities, hedge funds, gilts, and notional savings) rather than investing solely in ILGS.

The current PIDR methodology in Northern Ireland assumes that a claimant would invest the entirety of their damages pay-out in Index Linked Government Securities (ILGS). However, the ABI provided evidence to the 2017 Ministry of Justice and Scottish Government consultation¹ that this unlikely to be the case therefore this could possibly lead to overcompensation for the claimant. A move to using the Scottish methodology whereby a notional investment portfolio is used moves the assumption closer to reality but there could possibly be an element of caution within that portfolio leading to possible over compensation for the claimant. The ABI has obtained information from Pannells Financial Planning, a firm of independent financial advisers, and the notional portfolio is not deemed to be accurate as there is a larger proportion of fixed investments and a lower proportion in equity investments. The assumed investment period is 43 years and over this period of time equity investments are of lower risk.

¹ <https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/>

Question 2: Has the new methodology the potential to veer towards over compensation and if so how can this be rectified?

As mentioned in our response to question 1 there is the potential for over compensation due to the notional portfolio being of lower risk than that which a claimant is typically likely to be recommended by a financial planning professional.

Question 3: Has the new methodology the potential to veer towards under compensation and if so how can this be rectified?

It is highly unlikely that the new methodology would lead to under compensation as the current assumptions which are being used are in line with the investment of an extremely cautious investment portfolio.

Question 4: Does the new statutory methodology reflect how a claimant would be advised to invest their award?

Yes, MPS believes that the new statutory methodology which assumes lump sums would be invested in a low risk way more closely reflects how a claimant would be advised to invest their award. However, the notional portfolio may be too cautious following thoughts of Pannells. We believe claimants are reported to maintain an overall low level of risk, they are not in practice following a very low risk investment approach as we think this is the most appropriate assumption given the research compiled for the UK Ministry of Justice in 2013².

This research 2013 found that claimants who sought independent financial advice following settlement would typically invest in a mixed portfolio (including fixed-interest accounts, property, equities, commodities, hedge funds, gilts, and notional savings) rather than investing solely in ILGS , Therefore, whilst claimants are reported to maintain an overall low level of risk, it seems they are not in practice following a very low risk investment approach.

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/254856/personal-injury-discount-rate-research.pdf

Question 5: What are the likely effects of using an investment period of 43 years rather than 30 years in the model and do you agree with this approach?

Using a longer investment period gives the possibility for claimants being able to invest in areas which would be deemed too risky in the shorter term and offer a higher rate of return in the longer term, for example equity investments. This would mean the possibility of a higher return being achieved on the portfolio. If anything, a longer investment period should result in a higher PIDR, reflecting the ability to hold a wider range of assets that contain illiquidity and volatility premia.

Question 6: What are the advantages or disadvantages of transferring responsibility for setting the rate from the Department of Justice to the Government Actuary and is there an appropriate level of accountability in the new statutory methodology?

MPS believes that a model where the decision lays within the elected minister in the Department of Justice would also be effective in Northern Ireland and this is the position we took when responding to the consultation by the Ministry of Justice in August 2020, therefore the Government Actuary solely being responsible for setting the rate is not our first choice.

The need to balance fair, just and reasonable compensation for claimants against the resources available to consumers and taxpayers is a delicate exercise and we believe that the decision should rest with an elected official, who can properly weigh the broader societal balance which has to be considered.

We would recommend that the minister gets input from experts, at a minimum consisting of the Government actuary, an economist and an investment advisor.

Additional comments

MPS believes that it would be better for the review of the discount rate to take place every three years, rather than five years as expressed in the Bill in order to ensure that any rate changes would be relatively minor each time. There should be a regular and predictable point at which the rate is reviewed in order to avoid sudden and dramatic changes.

For consistency and fairness, we would also recommend that the legislation is drafted to ensure that any new discount rate set as a result of the review, applies to all settlements, regardless of incident date or date of issue of proceedings, to avoid arguments on the appropriate discount rate to be applied based on retrospectivity.

Finally, MPS would like to draw the attention of the Assembly to the consequences which changes to the PIDR have on the cost of clinical negligence and in turn the impact it has on the cost of professional indemnity for healthcare professionals. The new methodology as it stands could lead towards over compensation, and MPS will have to price responsibly for the future which could translate into higher subscription rates for our members; healthcare professionals in Northern Ireland.

We believe that the above proposals strike a good balance that could help to ensure reasonable compensation is available whilst ensuring the compensation awarded is fair and affordable.

About MPS

MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals. We protect and support the professional interests of more than 300,000 members around the world. Membership provides access to expert advice and support together with the right to request indemnity for complaints or claims arising from professional practice.

Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This can include clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

MPS is not an insurance company. We are a mutual non-for-profit organisation and the benefits of membership of MPS are discretionary as set out in the Memorandum of Articles of Association.

Contact

Should you require further information about any aspects of our response to this consultation, please do not hesitate to contact us.

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