



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Damages (Return on Investment) Bill:
Medical Protection Society

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The subject of the review is particularly relevant to us because membership of MPS provides members with a right to request indemnity for claims arising from professional practice. We manage claims for clinical negligence that are brought against GPs, private doctors, dentists and other healthcare professionals. One of the most terrifying things a member can face is a claim being brought against them, and our claims handling philosophy aims to provide an expert, supportive and efficient service to members who are faced with those claims. Where there is no defence, and it is clear that a claim will continue to be pursued, MPS tries to effect settlement on fair terms as early as possible. That is fair for claimants and fair for our members who do not want to go through lengthy court battles. Where there is a good defence to a claim, we will pursue that robustly. Many claims do not withstand detailed legal scrutiny and are successfully rebutted. At least 70% to 80% of our claims are successfully defended in the medical world.

Changes to the personal injury discount rate (PIDR) will have a profound consequence on the cost of clinical negligence, which, in turn, will have an impact on healthcare professionals. In the previous evidence session on the budget, you heard about the impact that a change in the PIDR could have on the amount going out of the budget. As a responsible and well-managed defence organisation, we have an obligation to reflect the costs of clinical negligence in membership subscription fees so that we can be in a position to defend members' interests in the future. Changes to the PIDR also lead to a change in the costs for the Department of Health via Health and Social Care (HSC).

It is important that there is reasonable compensation for patients who are harmed because of clinical negligence, but that has to be balanced by society's ability to pay and the impact of the changes on wider issues such as the provision of healthcare. That is why, for MPS, it is so important to strike the right balance in how the rate is set.

That is our initial statement. I am happy to take any questions on the submission or anything else that you would like to explore.

The Deputy Chairperson (Ms Dillon): Thank you, Tim. I appreciate that. I want to ask one quick question. You referred to the notional portfolio. Would the current notional portfolio be appropriate if it were based on a 30-year period, as it is in Scotland, rather than a 43-year period? What is your view on that?

Mr Jordan: I like the 43-year period because it is based on actual data. It is based on the average length of time for which a claimant invests their money. It makes more sense to use 43 years rather than an arbitrary 30 years. It also gives us the opportunity to invest in, perhaps, some longer-term assets that might perform slightly better for the claimant. On two grounds, therefore, it is a sensible period to use.

The Deputy Chairperson (Ms Dillon): OK. I appreciate that. I want to make a point. We have been told by the Department that we can look at the framework only. We cannot look at the rate, the impact that it will have on the health service or anything else. However, the next item on the agenda relates to a research paper that clearly shows that societal impact was taken into account in other jurisdictions. I am a bit concerned that the Department has been so hard and fast in directing the Committee not to take those factors into account. Last week, I had a meeting with the GP federation in my constituency, Mid Ulster, in which members outlined the difficulties and challenges that they are having. They did not talk specifically about the personal injury discount rate, but indemnity plays a part in whether a GP wants to be a partner because it has quite a large financial implication; it is anything up to £12,000 at the minute. That is concerning. Do you have a view on the Committee's very tight remit to look only at the framework and not at how the changes impact on wider society?

Mr Jordan: MPS's view is that the Committee should consider the wider impact. I think that the decision is political. When you are having impacts on GPs across Northern Ireland, it is not just a matter of a simple, actuarial, mathematical formula. The wider impact on and the additional costs that may be faced by HSC have to be taken into account, however we set the rate.

The Deputy Chairperson (Ms Dillon): Yes. I appreciate that. You said in your submission that the review period should be three years rather than five years. I understand why you say that, but I am a bit concerned that three years is such a short period and that, after a year, you might have people stopping settling and saying, "If we wait another year or so, we might have something of benefit". It affects both sides, defendants and plaintiffs. Do you have a view on that?

Mr Jordan: It is quite difficult, to be honest, to choose between five and three years. On balance, we prefer three, because you can see quite significant changes over a five-year period. That has been shown in the past. From our point of view, the benefits of having a more regularly updated rate outweigh the negatives of having the rate over five years. That is our position.

The Deputy Chairperson (Ms Dillon): OK. This is my final question, and then I will go to other members. Coming from an actuarial background, do you think that the Bill that we have been presented with, which copies the Scottish model of the Government Actuary deciding the rate, is the right model?

Mr Jordan: No. We believe that the responsibility for setting the rate should lie with the elected Minister in the Department of Justice. To our minds, it is a clear political decision, so the proposals of it being with the Government Actuary solely would not be our first choice. We think that the need to balance fair, just and reasonable compensation for claimants against the resources available to consumers and taxpayers is delicate, and we think that that decision should rest with an elected official who can properly weigh the broader societal balance that has to be considered in making these decisions.

We would also recommend that the Minister gets input from experts, at a minimum, consisting of the Government Actuary, economists, investment advisers and, possibly, wider stakeholders as well.

The Deputy Chairperson (Ms Dillon): My concern about wider stakeholders is that everybody will have their own view of it, and that will make things pretty complicated, but I understand where you are coming from. Having looked at the research paper today, my concern is that other jurisdictions looked at the societal impact, and we have been directed very clearly that that is not the position of the Minister. I appreciate your answers to those questions.

I am not sure whether Rachel or Sinéad put their hand up first. I will bring in Rachel first and then Sinéad. Apologies if I have that the wrong way round.

Miss Woods: I will not take very long. Apologies, Sinéad, if you want to ask the same questions. Tim, thank you very much. Your briefing was very good and easy to understand. I have a number of questions on the same theme as Linda's. I will just pick up on one of the points about taking other considerations into account. We have been told very clearly what we should and should not consider, and I have been looking at the research paper and reading about other jurisdictions that have done so. I think that I caught you right in saying in your introduction that you have an interest or knowledge of rates being set elsewhere, in other countries. Maybe I misheard you on that. If I did, sorry about that. Do you have any thoughts about that? Is that something that you would see quite a bit across other countries and jurisdictions where wider societal impacts are taken into consideration or is it a bit of both?

Mr Jordan: The British Institute of International and Comparative Law (BIICL) produced a paper that looked at countries around the world that set personal injury discount rates. In some countries around the world, the personal injury discount rate is quite positive. It can be as high as +6% or +3-5% in other countries. I cannot speculate as to the motives for setting those higher discount rates, but you can infer that the impact on society is one of the things that may be taken into account by some countries when setting discount rates.

Miss Woods: Thank you very much. The general support for a review of the rate every five years has been touched on, and you said that you would support a three-year review. You have elaborated on why you believe that that would be more beneficial. Do you see three-year reviews elsewhere? Is that commonplace rather than a five-year review, or is it a bit of both?

Mr Jordan: To be honest, I think that three years is at the shorter end of what you would see globally. We are being asked what we think would be the perfect scenario. There may be a balance in there of perfection against the operational challenges of doing something more frequently. So, we would recommend three years, but I recognise that, in practice, many countries use something a bit longer than that, probably more for operational reasons than anything else.

Miss Woods: I appreciate your answer. Finally, do you think that the framework that is proposed in the Bill would provide the stability and certainty that is needed, or is there something that we need to look at to change fundamentally?

Mr Jordan: I am straying into the actuarial world. There are so many uncertainties when you are setting compensation for a lump sum. It is not just the use of the rate that you set; it is around how much care the claimant needs and their life expectancy, so perfection is impossible. We need to work out what is fairest on average.

On the portfolio, the work that I have seen by Parnell Financial Management and the Association of British Insurers (ABI) suggests that they may be a little more cautious than what you might see actual claimants invest their money in, although MPS does not have any sort of insight into how claimants invest their money. That is not our role, but the work that I have seen from ABI and Parnell suggests something a bit different.

Miss Woods: Thank you, Tim.

Ms S Bradley: Chair, I do not know whether it was my hand or Rachel's that was up first.

Thanks, Tim, for that. I appreciate that you reflected on 43 years versus 30 years in your presentation. I was always of the view that, if you can invest for longer, you could expect to see a larger return. You have pointed out that you can perhaps go for equity investment as an example of where you might be able to take a risk. The Department did come back to us, and it, almost, negated that argument by saying that the difference would be incidental. Given the large sums that we are talking about, I do not expect that it would be so incidental, so I cannot be as dismissive of that point as the Department has recommended we should be.

Fundamentally, your submission and your presentation today highlight to me the huge conflict that there is on this issue, whereby we as a Committee are being instructed to hit the target of 100%, even though we all know that there is no exact science. You used the word "perfection". There is no perfection. It is all about notional portfolios and notional investments, and timelines vary. I recognise that there is no perfection here. Everybody is saying that we all agree on hitting the 100%, but where I do not understand the logic is that the Government Actuary's Department, which, essentially, switches off all the noise from stakeholders and all the noise from those who may have a vested interest in it landing in a certain place, is charged with trying to hit that 100%, which we know is very debatable. However, your suggestion is that it is not just about 100%. It cannot just be purely about that. You should have a Minister in the equation.

I am not disagreeing with it, but I am just trying to follow the logic of this. You are saying that that noise is not incidental and is worth hearing and that we do need to know about the balance and social value. I suppose that that is particularly true if it affects a Department and there is an effect on budgets and whatnot. Is it true to say that, when you make that proposal to move to a Minister-led or Department-led policy or one led by an elected representative, you are unapologetically deviating from the very precise piece of work that the Government Actuary's Department does in trying to hit the 100%? Is that what you are saying to us, Tim?

Mr Jordan: Yes, because it has wider societal impacts, as you have said. Moving to -1.75% will cost an extra £16 million this year in the budget. Clearly, the choice of any PIDR will have a financial impact. Also, it would have an impact, potentially, on the provision of general practice in Northern Ireland if we were to set a rate significantly lower than that in the rest of the world. I think that the provision of healthcare has to be taken into account.

Ms S Bradley: Tim, that is a very good point. I appreciate your raising it because, ultimately, we as a Committee, as the Chair will appreciate, have been tasked with a job. The parameters of what we have been asked to do have been firmly set. We are receiving submissions not just from you but from others who are saying that, before we start, the parameters are wrong. They are saying that, before we get into the detail of how we do the framework, the parameters of our task are incorrect. That is a big piece of information for us, as a Committee, to reflect on and take on board. I hear your arguments as to why that is the case, and they are good, including the societal and market implications and being able to sustain this in the longer term to ensure that insurance is affordable. What you have said very firmly reiterates what others have said and puts the question back to us, "Are the parameters inside which we are working the correct ones?" I appreciate your paper and your presentation, Tim. Thank you.

The Deputy Chairperson (Ms Dillon): Nobody else has indicated that they want to ask a question. However, I know that Paul Frew does not have the ability to put his hand up on screen. Paul, if you want to ask any questions before we move on, go ahead.

Mr Frew: I will use my proper hand — the one attached to my body — to wave at you. *[Laughter.]* Tim, thank you very much. I take a slightly different view in that we are a Committee in our own right and while we are scrutinising legislation, we should not be held back or restricted in any way by the parameters within which we examine it. I am quite bullish on that. What we look at should be our decision. One thing that strikes me about your submission, Tim, is that you talk about:

"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."

That is one way of looking at it. However, during evidence that we heard last week, it was suggested that the rate that was in place at the time of the accident is what people should strive for. That would stop a build-up of cases or people holding back or trying go headlong before the rate changes. What is your view on that?

Mr Jordan: I politely disagree with the piece of evidence that was given last week. One of the challenges is that there can be a huge delay between an incident occurring and a claim being brought. If a child is injured, there can be more than 18 to 20 years between an incident occurring and a claim being brought. It is right that the legislation that is used to set the compensation is based on the money that a claimant would currently need to pay for their care, however you choose to calculate that, rather than going back in time to when the claimant was injured, which would not make sense from a fairness or claimant point of view.

Mr Frew: So, you are very clear that it should not be the date of the incident or the date of the issue of proceedings; it should be the date of the final decision, the date of the resolution of a court case or the settlement date.

Mr Jordan: That is the most accurate view that we have at the time on the cost of providing compensation, so it would be the right date to use.

Mr Frew: If you go for reviews every five years, or three years, as you suggested, will you still have a build-up of cases that do not settle? What is the best outcome? Five years or three years? Would a review every three years mean that the rate would not change as drastically as it would with a review every five years, or do you see a correlation in that?

Mr Jordan: The longer the period, the greater the chance of dislocation between the current market and the rate that is set. That points you towards having a shorter period to remove some of that risk. Equally, I recognise that the period between reviews can become too short and the reviews can be too regular. It can sometimes take more than three years to work through a case — certainly more than a year — and you would want some certainty. For us, three years is optimal, but I have some sympathy with five years. With anything shorter, you are getting into the realms of making it hard to manage a case to settlement, and, if it is any longer, you would get that huge risk of dislocation between the current market environment and what the existing PIDR is.

Mr Frew: OK. That is all I have for you. Thank you very much for your time today.

The Deputy Chairperson (Ms Dillon): Nobody else has indicated that they want to ask a question. Thank you, Tim, for your presentation and for responding to our questions. It has certainly been very helpful, and we will reflect on what Sinéad and Paul have said about the parameters that we have been set. The next item on the agenda is on the research paper, and I have some concerns. I have to say that I was very forceful on this, as those were the parameters within which we were being set the task, and the discussion was almost not even allowed to go beyond that. I certainly have had my mind opened up by the research paper and the presentation. Thank you again for your presentation, Tim. We appreciate it.

Mr Jordan: Thank you very much.