Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Damages (Return on Investment) Bill: Confederation of British Industry NI; Forum of Injury Lawyers

10 June 2021

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Ms Linda Dillon (Deputy Chairperson)
Ms Sinéad Bradley
Ms Jemma Dolan
Miss Rachel Woods

Witnesses:

Mr Stuart Anderson	Confederation of British Industry NI
Mr Kevin Shevlin	Forum of Injury Lawyers

The Chairperson (Mr Givan): I welcome Kevin Shevlin, Forum of Injury Lawyers (FOIL), and Stuart Anderson, the senior policy adviser for the Confederation of British Industry Northern Ireland (CBINI) to the meeting. Hansard will report the meeting and publish the transcript on the Committee web page in due course. I will hand over to Kevin and Stuart to give us a brief outline of the issues in the written submission, and we will then turn to members for questions. Thank you.

Mr Kevin Shevlin (Forum of Injury Lawyers): Thank you very much to the Chair and the Committee for giving us the opportunity to speak to you this morning. You have our response to the call for evidence, so we will not go through it in any great detail. We would like to give the Committee every opportunity to ask questions, which will, we think, be far more constructive. However, I have a few opening remarks, and Stuart will have a few more to add.

FOIL acknowledges that the proposed Bill, which is based on the Scottish framework, is infinitely preferable to the current model for setting the rate in Northern Ireland, which is still based on the Wells v Wells House of Lords decision. As you know, that was set on 31 May, by secondary legislation, at -1·75%. FOIL acknowledges that the steps being taken by the Department, and supported by the Committee, are very timely and very necessary, and we fully support the move to reform the outdated Wells v Wells model, which is not fit for purpose.

FOIL's response to the call for evidence accepted that the Wells model was not what we had sought. We, along with other representatives on what might be seen to be the defence or the insurers' side of the argument, had looked to the English model that was set up under the Civil Liability Act 2018. The statutory consultation offered two models — the Scottish and the English — and the Department went forward with a proposal based on the Scottish model but with a few slight changes, which we will deal with later. All that said, although it is not our preferred choice, FOIL is now fully behind the Department and the Justice Committee bringing that forward in a way that will deliver 100% compensation for claimants who have suffered injuries through no fault of their own.

Both sides of the debate fully support the 100% rule, which will ensure that plaintiffs injured through no fault of their own achieve what they deserve: essentially, they will be put back in the position that they were in before the accident, which means full compensation. It is important to understand — I am sure that the Committee understands this, given the conversations that we have had with members previously — the definition: it is to compensate the plaintiff in full for his losses throughout the period during which those losses will fall. However, it is no more or less than that. That is where we get into discussions about the risk of overcompensation and under-compensation, which have taken up so much time, but it is necessary, we think, to take that time.

The current rate carries with it a significant risk of overcompensation. What I mean by the "current rate" is the current rate of -1·75% that has just been announced. We will not spend very much time on that because this discussion is about the new model, which is the Scottish model, but it is important to understand that the current personal injury discount rate in Northern Ireland is -1·75%. At times, that has been referred to as an interim rate. FOIL would welcome that if it were a very short interim rate, but the reality is that, unless and until the reform Bill or something similar is on the statute book and the Government Actuary's Department (GAD) gives effect to it by striking a new rate, that rate would be better described as an "indefinite rate" rather than an "interim rate". Unless and until we know what is coming and when it is coming, we may have the -1·75% discount rate for a considerable period. That will cause significant difficulties.

We have other issues that we are happy to deal with in more depth with the Committee, and I have no doubt that there will be questions. I will hand over to Stuart.

Mr Stuart Anderson (Confederation of British Industry NI): Thanks, Kevin. Good morning, everyone. It is a pleasure to be with you. At the outset, I want to clarify that the CBI's submission is separate to that made by FOIL. Our submission is available on the website.

I offer my sincere congratulations to you, Chair, on your nomination. Best wishes for the coming weeks and months as you face the opportunities and challenges that will inevitably come with your new role. I also place on record our thanks to you for how you have navigated through this complex issue over the past year or so. I have no doubt that you will continue to be involved in the process.

It is important that the voice of business is heard in the debate and conversation about the reform of the discount rate. I am the senior policy adviser to the CBI in Northern Ireland. As an organisation, we represent 190,000 businesses across the UK. We are the largest business representative organisation in the UK. We represent some of our smallest start-ups and SMEs, right through to some of the UK's largest employers. We come at this from a uniquely holistic and industry-wide perspective. It is important to bring that voice to the debate.

The process for setting the new rate and the discussion around a new framework and, indeed, the interim rate, comes at a critical time for the Northern Ireland business community as we navigate through well-known issues: the implementation of the Northern Ireland protocol, the recovery from COVID-19 and the soaring costs of raw materials and commodity prices at this time. As a cross-sector business organisation, we want to ensure that a framework is developed that avoids imposing additional costs on local businesses, consumers and the public purse, which is a possible consequence of potentially legislating in a way that may veer towards overcompensation. In particular, we challenge the current rate under the methodology of Wells v Wells.

It is well known that getting this wrong could have an impact on every household. Historically, compared with the rest of the UK, Northern Ireland, for various reasons, has had to manage higher prices for retail insurance. I will put that in context: Northern Ireland households have half the discretionary income of the UK average. Therefore, as a society, we are not well placed to absorb additional costs. From a business perspective, we need to be clear that this issue is not in the hearts of the Northern Ireland business community at large. There is not a great awareness about this and the risk that it poses in additional costs or, indeed, additional risk. That is most clearly seen in the fact that there was not a wide range of responses received from wider industry to this consultation. We hope to elevate the debate through our submissions.

We fully support the Department's commitment to the overarching principle of 100% compensation for claimants. However, while the Scottish model proposed by the Department is not our preference, and we have been clear on that, the proposals are much better. Without question, they are fairer than the model presented under Wells v Wells, which currently results in the lowest discount rate anywhere in the world and is wholly inconsistent with any other part of the UK.

In representing the business community, I want to be clear about our priorities in this engagement. First, we want this issue to be approached with the appropriate degree of due diligence. Equally, we want urgency to be applied to finding a stable and predictable rate to replace the existing flawed methodology of Wells v Wells. We also want to ensure that the implications for the cost of business, the public purse and wider society are properly understood in the process of developing a new framework, and we would like to have seen a much more fulsome impact assessment.

I turn to the specifics of the Bill. In guarding against overcompensation, and assuming a strong presumption against overcompensation, we would like to see a clear evidence base for the notional investment portfolio that is put forward so that we can ensure that it is appropriate and fit for purpose. We would also like the additional adjustment of -0·5%, which the Scottish Government admit will inevitably lead to overcompensation, to be removed from the model.

I will leave it there to allow time for questions. Thank you, Chair.

The Chairperson (Mr Givan): Thank you, Kevin and Stuart, and thank you for your kind comments, Stuart.

Honing in on a couple of the key points as I see them at this stage, I think that the Bill will, in all likelihood, get support. However, there is the question of whether there are aspects of the Scottish model that we want to consider. For me, there are two key points in it. One is the decision-making process for who strikes the rate. Should it be a Minister, GAD or some notionally independent body? It is always difficult to get true independence.

There is also the inbuilt additional factor to ensure that there is never under-compensation. I think, Stuart, that you finished on the potential for overcompensation. Is that really where the two key issues lie, or is there an additional aspect to do with the way in which the investment model is calculated? In Scotland, it is 30 years, and this proposal is for 40 years or 42 years, is it? Anyway, it is significantly different.

Do you want to pick up on those three general points for me?

Mr Anderson: On the decision-making, our view is that this is a matter of public policy and is best placed in the hands of a Minister. We think that ministerial accountability should preside over that decision-making process.

I referred to the notional investment portfolio and the need to examine that. We have called on the Department to ensure that that is fit for purpose, because the Scottish Government's policy paper describes it as "cautious". Indeed, in a submission by the relevant Minister to the relevant Committee at the relevant time in the Scottish process, he describes it as being "very cautious".

The Association of British Insurers (ABI), which is in front of you later, commissioned independent advice on this matter, and the view was that it veered too far from the target of a low-risk investment. So, while we are not experts on that, we call on the Department to ensure that that is correct and that it is upheld in an appropriate way.

We are fully behind the investment period, although I think that it is 43 years, rather than 40 or 42. That position was based on evidence, whereas the Scottish position of 30 years seems like an arbitrary figure to us.

You are correct: those are the three main issues that we picked up.

The Chairperson (Mr Givan): I am happy with those responses, unless, Kevin, you want to pick up on that as well.

Mr Shevlin: Yes. There are a few things in that. The issue of who should have the decision-making power is a matter that the Committee and the Executive will need to decide. The issue is that the two models have somehow been portrayed as binary choices. I am not so sure that they are. In a superficial way, it looks as though the Scottish model presents a purely actuarial exercise. The way in which the notional portfolio is framed in the Bill sets it out in terms of the type of investments and percentage holdings. Then, it looks as though, because that is what is in the Bill, it is over to the

Government Actuary to be the rate assessor, essentially, in a non-partisan, objective way. That has a certain attraction.

The difficulty is that, when you look at it, you see that there are two issues. First, is it correct that there should be no political oversight of it? At what point should there be political oversight? It seems as though, with the Scottish model that is proposed, that is happening now. Essentially, those issues have been debated, which is why it is now important that the Assembly and Committee have the chance to scrutinise the composition of that notional portfolio, because its composition will, in fact, dictate, to a large extent, the outcome: what the rate turns out to be. As Stuart said, the notional portfolio that is used in Scotland — the Bill copies it word for word — is very cautiously constructed. It is certainly not one that an adviser would advise for an injured claimant. It is important to understand that, by picking the construction of the portfolio, you are influencing the outcome. Therefore, essentially, although the decisions that you make now will not decide the outcome, because it will still be for the Government Actuary to strike the rate, you are inputting the information that he will use. That is an important point.

Secondly, on the notion that, somehow, the Scottish model is preferable because the Government Actuary carries out a purely arithmetical exercise, it is important to understand that that may be a little divorced from what actually happens. Even under the Scottish model, the Government Actuary's Department would accept and acknowledge that it has to make judgement calls and exercise a degree of discretion, even with the prescription within that notional model. Therefore, if there is an attraction to the Scottish model because it takes the political heat out of the discussion and passes it over to the actuaries — in this case, the Government Actuary — I am not sure that, in reality, that is what happens. The Government Actuary still needs to use a large degree of professional discretion and expertise, and will call on outside expertise as well.

Chair, you mentioned the difference between the 43-year duration of the notional portfolio in England and Wales and the 30-year duration in Scotland. As Stuart, quite rightly, points out, the English model of 43 years was based on actual evidence. The ABI, in particular, put forward statistical evidence at the time of the consultation, two years ago, in England and Wales, which was that the average life expectancy of a person who had suffered an injury that gave rise to an award of greater than £250,000 was 46 years. Therefore, the decision in England and Wales to go for 43 years is, at least, related to that. The decision in Scotland to go with 30 years is, from what I can see — I do not think that we have had any argument or debate on it — not based on any evidence at all.

Finally, the two standard adjustments, which is when the gross rate of return is then struck. The Government Actuary, or whoever, strikes the rate, and that is then adjusted down by two adjustments: first, 0·75% for the cost of taxation and investment, and a further margin, which, in Scotland, is called the "further margin" of prudence. One might question whether it is prudence, because you have a combined adjustment of 1·25%, which is very large. You are driving down the gross rate of return so that the net rate is considerably lower than it would otherwise have been. There is consistency between what happens in England and Wales and what happens in Scotland. The two jurisdictions, under two different models, are applying the same adjustments: the cost of investment advice, 0·75%; and the further margin, 0·5%. The important distinction, however, is that, in the Scottish model, that is prescribed, so it can be changed only by a rule change or regulation change. In the English model, that is entirely at the discretion of the Lord Chancellor. In Northern Ireland parlance, the equivalent of the Lord Chancellor is the Minister of Justice. I hope that that answer is of assistance.

Ms Dillon: Than you, Kevin and Stuart, for the presentations and for your answers to the questions so far. Most of my questions were answered in your responses to the Chair's questions, particularly on the 30 years versus 43 years. It is my reading that the 43-year period is evidenced and that the 30-year period is not, so I accept that there could be some argument around that.

I asked others who came before the Committee about periodic payment orders (PPOs), and this may be a less appropriate question to ask you. The periodic payment orders are probably better suited where the Government or public services are responsible for paying out the money. I would be a wee bit nervous about putting one in place where a business or an insurance company was involved. They could go to the wall at any time and leave the claimant with nothing. What is your view of the periodic payment orders?

Mr Shevlin: It is more of a legal question. PPOs have been about since April 2005, so they are not new. There has not been as great a take-up as you might have expected. You are absolutely right: it is about choosing a PPO over a lump sum approach to paying future losses. In a personal injury case, you have general damages for pain and suffering, but we are talking about future losses, which are primarily related to a loss of earnings and the costs of care and case management. In more recent times, the PPOs have dealt mainly with the care costs and the case management costs.

The important question, which has been raised before — I think that this is your question — is this: how secure are funds that are dealt with by way of a PPO? The difference with a lump sum payment is that the defendant makes the payment now so that, at the time of the settlement or award, the money is either there or it is not. If it is not, there is an insurer behind it, so the money is there and is paid out. It is then a matter for the claimant and his or her advisers to manage it. The difference with a PPO is that there are periodic payments, usually annually but not always, and they usually cover the annual costs of, for example, hiring care workers and case management.

The issue of what happens when an insurer goes bust has been covered off. The periodic payment provisions came from the 1996 Damages Act, which is a UK-wide Act. An amendment made to the 1996 Act by the 2003 Courts Act, which is also a UK-wide Act, gives further protections. Essentially, that means that any PPOs that are funded by a general insurer that is compulsorily insured — in employer's liability cases or motor accident cases — are secure. They are protected under the financial services compensation scheme (FSCS). That is guaranteed and protected. Compulsorily insured matters that give rise to injuries, such as a catastrophic road traffic accident, are covered. We all know that drivers must have motor insurance and that, in the absence of motor insurance, the Motor Insurance Bureau (MIB) picks up the tab. That is compulsory insurance in relation to road traffic accident cases, and the FSCS takes care of that.

Employer cases might involve an accident at work, such as someone getting a hand or limb trapped or falling from a height and suffering a serious injury that means that they have to go off work to receive care and attention. Those claims are also covered under the FSCS. There is no doubt at all about that.

Ms Dillon: That is very helpful. That is a concern that I had about putting in *[Inaudible owing to poor sound quality]* periodic payment orders. You are the first person who has been able to enlighten me about that, and I appreciate it.

Mr Shevlin: If you want to come back on any issues, I am quite happy for you to submit a further question. You can ask me a question, and I will respond. The forum will be quite happy if you want to set that out. I am sure that the witnesses who follow and I will be quite happy to give you some detail on that, but that is the position.

Ms Dillon: That is helpful. We had an informal session with the ABI. I will be upfront: everybody has a vested interest, whether that is the injured person or those who pay out. Everything has to be balanced against both positions, and that is what I am trying to do. I accept that everybody has to try to protect their interests, and I accept that business must have a voice in this. I have been very vociferous about this up to this point. The Minister told us that we could not take into account anything to do with the impact on business or the impact on the health service. Last week, information from a research paper showed that other jurisdictions had not taken that approach. We are probably more open-minded this week. Let me put it this way: you are lucky that you are here this week and not two weeks ago. *[Laughter.]* I appreciate your answers. Thank you. That is all that I have for now. My other questions were answered by responses to the Chair's questions.

Ms S Bradley: Thank you, Stuart and Kevin. I will take a minute to apologise. I was in the meeting earlier, but I did not get an opportunity to wish Gordon Dunne well. I put on record that I am thinking of Gordon and his family, and I wish him a speedy recovery.

Your submission is quite detailed, Stuart and Kevin. The conversation so far has reached into areas that I wanted to consider. Rightly, Linda brought up the PPOs, and our thoughts on those are, I suppose, still maturing, particularly in relation to public bodies.

I still find the process that we are following here a little jarring. I accept what the Minister said about the target being 100%. None of us should be influenced by any noise around that. You either hit the 100% or you do not. As we have come to learn, however, this is not an exact science. We have talked about notional portfolios and all that comes with those.

If my reading of your submission is correct, you have concerns about the role of the Government Actuary's Department. I appreciate that there may not be the same level of expertise in the Northern Ireland Civil Service, so the Government Actuary's Department seems to be a healthy place to offer a service to which we would not otherwise have access. However, whilst you referenced that expertise, you made the point that decisions within the process may mean that it is not an exact science and that, arguably, there could be some political considerations. Chair, something that we could explore more is what exactly the Government Actuary's Department is being tasked to do. Can you give me an example of what you think GAD might have to consider that could, arguably, be framed as politically sensitive?

Mr Shevlin: That is a very good question. I am not an actuary and, thankfully, I am not an accountant either, but there are issues there. For example, at the heart of this, you have a notional portfolio. The purpose is that you have an injured claimant, notionally, who has a very significant injury, lifelong care needs, for example, and is not able to work. Therefore, you have to look at how you award him a lump sum and, if you award him a lump sum, take account of the accelerated receipt of that. That is where the discount rate comes from. What you are trying to figure out is, by giving him all the money now, even money that he might need in, say, 20 or 30 years, he can invest that and earn quite a lot of money on it, or not. Those are the risks. The debate is then whether an injured plaintiff should be expected to take that risk. That is where all this comes from. In that context, where you are notionally having to theorise about what level of risk that person takes, there are political decisions. The level of risk that a person should be expected to take is an argument that needs to be out there. We cannot pretend that that is not there.

There is also the acceptance of the risk, whether it is low risk or no risk. For example, you might say that Wells v Wells was very close to no risk, and that is why it was flawed. It was flawed from the very start. It was not really flawed from what happened 10 or 15 years ago. We are now in a position that either the Government have, in framing the legislation, or GAD has, in applying what the Government give it, to make judgement calls and look at notional portfolios. I am not a stocks-and-shares person, but the portfolio as it is comprises government gilts, which are fairly low-risk fixed bonds — again, fairly low risk — but there are then equities at various levels of risk. With the equities, you have a heightened level of risk, but you have a greater rate of return. Therefore, by balancing that, what you get is a mixed risk in your portfolio. I am quite sure that, if you set GAD the task of coming up with a set of mixed-risk portfolios, it could come up with 50, 60, 100 or 150 of them. I honestly do not know, but there is not just one that will fit it. There will be a myriad of probably hundreds and thousands of those. For example, in selecting the length of the investment period, the type of investment and the percentage holding of the investment, you influence the results. Those are all decisions, and they are not necessarily policy decisions. I and the forum would not suggest that GAD is not the correct body to go to. It certainly is, and it has the benefit of being a UK-wide service. The same individuals have been advising the Lord Chancellor in England and Wales on the English rate and the Scottish Parliament on its rate, and will do the same for ours. It is not a different entity. Those individuals are all in the same UK-wide office and will be carrying out similar exercises.

Interestingly, if you look at the model that GAD put forward — or, rather, GAD advised and produced models that the Lord Chancellor in England and Wales accepted and which framed the English rate, which then became -0.25% — an argument could be made that the risk portfolio within it was not more adventurous but prepared to take more risk than the Scottish one. GAD will simply give a range of advices, and that is when the Scottish Minister in Scotland or the Lord Chancellor in England need to make strategic decisions and policy decisions.

I am not sure whether that helps or confuses you, but these are very detailed issues. GAD is certainly the correct entity to do this. My initial remarks were simply to make the Committee aware that there is a very easy and trite argument to say, "If you go with the Scottish model, you can take the political heat out of it. Simply set up the model, hand it over to GAD, and it feeds it all into some sort of computer system and out sprouts a rate". That is not how it happens: it is about the choices and decisions that are made. GAD will be doing that within its general discretion. How much of that is overseen by what you might describe as the Executive or Government? I honestly do not know. You might need to ask the Department of Justice or the Department of Finance about that.

Mr Anderson: If I may, Sinéad, I will add something about the application of the Scottish model that is important to get across this morning. From a policy perspective under the Scottish model, there is a clear understanding and acceptance that it will inevitably lead to overcompensation. As a result of that, a financial memorandum was produced as the Bill was going through that clearly sets out the estimate of the cost to the public purse and the NHS in Scotland. We do not have that here, and it is important to bring that forward by way of an impact assessment through this Bill. It is a really important related point to note when looking particularly at the Scottish model.

Ms S Bradley: Thank you both. Stuart, you are right. The fact that the memorandum was created is, in my mind, an acceptance that this is not a pure exercise and that we have to be cognisant of the other effects. As legislators, our immediate thoughts go to the Government, but it will, no doubt, have an effect on the markets as well. I accept that it is all notional and that there are risks and all of that. Let us be honest; I see little safeguarding about whether the person is vulnerable or is able to manage their money, and advocates and all of that. We need a better understanding because, ultimately, the person could go out and put it on black or red, or whatever their choice is. There are significant problems if the person is vulnerable and needs access to the NHS. The effect could widen from the initial assessment if the money was not managed properly and there was no safeguarding.

There are issues beyond the actuary part that have a public effect. I am trying to pare back what is a procedural piece and what is a political piece. Where are the political decisions and nuances? You are right, Kevin: we have to respect the role of GAD and what it is able to do, but we have to assure ourselves that it is not an overreach and GAD is not constrained to make it fit the time that it has. Thank you both. That has been really helpful.

Miss Woods: Thank you, Kevin and Stuart. Your answers have cleared up quite a lot of the questions that I had. It has been good to listen to your very detailed responses. I will pick up on something that is probably quite technical that I am just trying to get my head around. You will appreciate that what we are looking at is very complicated, and it seems to get more complicated every week. The FOIL response stated:

> *"Apart from the composition of the notional portfolio as set out in the new methodology, which in the view of the joint signatories is cautious and light in equities, the one part of the Bill that could be re-considered and either removed or amended, is the 'further margin' prescribed at 0.5%."*

It goes on to talk about the further margin. Can you explain that a bit more? What do you recommend that the Committee should look at?

Mr Shevlin: Yes. There are probably a number of issues. The Committee asked whether there were tendencies in the Scottish Bill proposals that would lead to overcompensation, which is one of the things here. Certainly, one of the things that would lead to that is the further margin. However, it is not, by any means, the only one. If I wanted to list those, the first would be the construction of the notional investment portfolio itself, which is too cautious. It needs to be a little bit more equity than low-risk gilt. The Department has already acknowledged that by going with the English model of 43 years rather than 30 years. That will partly rebalance it.

Later on today, you will hear from the Association of Personal Injury Lawyers (APIL) and the Forum of Complex Injury Solicitors (FOCIS), who may well make arguments in relation to the very same points. They may well put forward arguments that those should be maintained or, maybe, raised; I honestly do not know. The important thing between 43 years and 30 years is that the actual difference that that makes to the effect on the rate is quite small. Work was done on this the last time around, and I think that the consensus was that the difference was between 0·1% and 0·2% — the effect of having either a 43-year notional duration or a 30-year duration on what the ultimate rate of return would be was 0·1% or 0·2%. Given that the discount rate is rounded up or down to a quarter of a per cent — 0·25% — that means that the actual effect will either be zero or 0·25%. In terms of the bigger picture here, FOIL, the British Insurance Brokers' Association (BIBA) and, no doubt, the ABI and the CBI would say that, if the Committee and the Assembly are looking to rejig some of the proposed Scottish-based model, that is one thing. That has already been conceded, though, so we have that already. We have 43 years rather than 30 years.

The big issue, then, is the two adjustments. It is not just the further margin at 0·5%; before you get into that, the first adjustment that you have is 0·75%, which is for the notional cost of taxation on the investment and for taking investment advice, which means annual charges. That is already 0·75%. That is evidence-based to a degree, and I have no doubts that APIL and others will make arguments that that figure is not sufficient. Equally, FOIL and the ABI could have made arguments that it should be less or, in fact, it should not be there at all. However, we are not seeking to make that argument. What we are saying is that the further margin that you are touching on at 0·5% is totally unnecessary and is too much. In a way, given what I have said before — that there were already tendencies in the Scottish Bill that will overcompensate — by bringing in the further margin, you are essentially double-counting. You have already provided for the risk of overcompensation by, for example, the composition of the portfolio, which is, we think, too low-risk or risk-averse. You have done that already.

You have already balanced up the equation, which is the balancing act between overcompensation and under-compensation, but to add on the further margin at 0·5%, we say, is totally unnecessary.

Just on that point, if there is a political or a policy point to pick up in the Scottish Bill, it is the further margin. The Scottish Executive, the Scottish Minister and, as Stuart mentioned, the financial memorandum that accompanied the Scottish statute in 2019, on which our Bill is very largely based, made no bones about it. They did not try to disguise it or bury it; they came out and said that they accepted that, by bringing forward a further margin of 0·5%, there was a significant risk of overcompensation. It is there on the record; they did not try to disguise it. So if you are looking for a policy — whether you call it political or whether you call it policy — FOIL, BIBA and, no doubt, the CBI and the ABI would ask that the Committee consider whether it needs to be there at all, because it has already been taken account of by the other issues that I have already mentioned, particularly the composition of the notional portfolio.

Does that assist?

Miss Woods: Brilliant. Thank you very much, Kevin. It is good to have that explained.

Mr Anderson: I want to add to that. To be really clear, the Scottish policy paper — this demonstrates the detail that we have gone into on this — says at paragraph 71 that it will "inevitably" lead to overcompensation. It is as clear as that. That is the issue that we are grappling with. I am here on behalf of business because of the concern about that. We want to get in that strong presumption against overcompensation, and we want to be clear that the Scottish Government accept that it is inevitable.

Miss Woods: Thank you, Stuart. I do not think that you could be any clearer. I appreciate your comments.

Ms Dillon: I have a quick question on that last point. The Scottish Government have been very upfront about it, but, at the beginning of the session, you said that in the English and Welsh model, whilst it is not in the Bill, they have adopted the same approach. Is that correct?

Mr Shevlin: Yes, they have. They have come at it from a slightly different angle, but the net effect of it is that they have.

Ms Dillon: It is the same?

Mr Shevlin: There was, in fact, a very interesting statement that the Lord Chancellor made when they were striking the rule in England and Wales, and they were reducing the Wells v Wells-based -0·75% to -0·25%. Again, we can send on details, but he said that if he had simply accepted the GAD advice, which took into account the adjustment for the cost of taxation and investment advice, the rate in England and Wales at that time would have been a positive rate. It would have been 0·25%. It became -0·25% because they went ahead and the Lord Chancellor asked GAD to do further projections. I cannot quite remember what it was, but it was a very interesting piece in which the Lord Chancellor also made a not dissimilar comment to that which was made in Scotland. They were saying, "Yes, it carries a risk of overcompensation". I think that what they had in mind was trying to balance the risk of overcompensation and under-compensation. They were comparing it and almost saying, "OK, there is a risk of overcompensation, but whatever the defendant lobby sees resulting from this will not be as bad as what it would have been if we had stayed with Wells v Wells". To me, that was not a very fair way of interpreting it. Hopefully, I have interpreted the Lord Chancellor's point correctly. No doubt, someone will argue with me on that. Again, if that is a point of interest for you, FOIL is happy to write to the Committee and set that out for you.

Ms Dillon: Yes, that would be helpful. I appreciate that. I am cognisant that they felt that they needed to do the same thing, even though it was not in the Bill, so it could potentially happen here even if was not in the Bill. I think that it would be helpful to have that information if you can send that to us; I would appreciate that. Thank you.

The Chairperson (Mr Givan): I thank you both for coming, Kevin and Stuart. I appreciate the time that you have spent at the meeting. If there is anything that we need to follow up on, we will do so. On behalf of the Committee, thank you.