Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Damages (Return on Investment) Bill: Forum of Complex Injury Solicitors; Association of Personal 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
Mr Paul Frew
Miss Rachel Woods

The Chairperson (Mr Givan): Apologies to both witnesses for not having arranged this, but if they are content, I will bring Julian and Oonagh in simultaneously. Julian, do you want to make remarks initially, and then I will move to Oonagh? After that, I will go to members for questions.

Mr Julian Chamberlayne (Forum of Complex Injury Solicitors): Good afternoon. I am perfectly happy with the suggested format. Oonagh and I know each other well. Indeed, for the sake of transparency, Oonagh is also a member of the Forum of Complex Injury Solicitors (FOCIS). Today, however, as she will no doubt explain, she is giving evidence on behalf of the Association of Personal Injury Lawyers (APIL).

FOCIS is a group of 25 pre-eminent solicitors from England, Wales, Scotland and Northern Ireland. All our members have dedicated their careers to acting for seriously injured plaintiffs. We include amongst our members eight past presidents of the Association of Personal Injury Lawyers. Our aims include furthering understanding in the wider community of issues that arise for those who suffer serious injury caused by the wrongful acts or omissions of another. Just to explain the difference between FOCIS and APIL, FOCIS is a much more select group focusing solely on plaintiffs who have life-changing disabling injuries, whereas APIL is an organisation representing all personal injury lawyers, involving all claims, including those that are much more short-lived.

The first issue that I will address is how the discount rate should be set to ensure full compensation. FOCIS continues to view the Wells v Wells formula as the best and most appropriate way to achieve that. It is the only methodology that avoids plaintiffs being exposed to both investment and inflation risk. We have talked a lot about investment risk today but have hardly touched on inflation risk. However, if you look back historically to what concerned the courts in Wells v Wells, it was the impact of inflation, particularly over the long periods that have been mentioned. That was one of their main worries and why they favoured index-linked gilts (ILGs) as a proxy for the calculation. ILGs were only ever a proxy. They were not intended to represent how plaintiffs would invest their money. ILGs were meant to be a simple method for the courts to calculate the losses that would remove investment risk and speculation about investment risk or how plaintiffs might invest, and remove the inflation risk.

The debates about fixing the discount rate in England, Scotland and now Northern Ireland have tended to focus on the fear of overcompensation despite there being no credible evidence that that has ever been the case under the Wells v Wells regime. Even if you might be able to find a small proportion of plaintiffs who perhaps got very lucky with the timing and type of investments that they made, those individuals, of course, do not share their good luck with the plaintiffs whose money ran out. You can contrast that with the insurance model, which does exactly that. Insurers spread the risk of claims across a whole book and across insurance premiums for all policyholders. That is why insurers are so much better placed to carry investment risk than individual plaintiffs are. However, if the law were to change to force seriously injured plaintiffs to take the investment risk, the debate would need to look at the flip side of alleged overcompensation. We would need to ask ourselves this fundamental question: what proportion of plaintiffs do we consider it fair to, potentially, go under-compensated? Unfortunately, that issue has, often, been overlooked in these debates in all the UK jurisdictions.

The conceptual difficulty with attempts to seek coherent evidence on plaintiff investment behaviour is that any such evidence would be skewed by examples of the old and markedly unfair rate of 2·5%, which was left as it was for far too long. That rate, effectively, forced plaintiffs and their advisers to take more risk to ensure that their needs were met for life; cut back on expenditure — so some needs went unmet; or turn to the state to plug the gap. I will return to that theme. In any event, looking at past investment markets and related investor behaviour is a fundamentally flawed approach to predicting likely future investment climate and related plaintiff investment behaviour.

FOCIS considers the 2015 report on the discount rate, which was commissioned by the Ministry of Justice and conducted by a panel of four experts, to be the most credible evidence on what a notional investment portfolio might look like if you went down that route. The majority view of that panel, which included an economist, an actuary and investment advisers, was that any truly low-risk portfolio would require at least 75% of investments in index-linked gilts, with the remaining 25% invested between UK corporate bonds, global government inflation-linked bonds and global equities, and that any other asset classes posed unacceptable levels of risk. Conversely, where we have got to in Scotland and, now, as proposed in the Bill for Northern Ireland, is a notional portfolio that has only 10% invested in ILGs and a further 15% in nominal gilts.

The experience of our members when advising plaintiffs with significant injuries is that most will leave far in excess of the 10% that is assumed in the notional portfolio simply in the bank or building society, especially in early years. They also, typically, have to use significant sums to carry out adaptations to make their accommodation disability accessible before they can even start to think about investing the remainder. The ultimate amount that is invested is less than the amount of damages, and many of the investments are delayed for numerous years. Therefore, actually generating an investment return is on a smaller scale and for a shorter period.

One of the main points that I want to make is that requiring an injured person to gamble with their compensation award by investing in high-risk assets places an unacceptable burden on them, and, perversely, removes a key aspect of the responsibility for providing adequate compensation from the wrongdoer.

I want to pick up on a few points that were made, notably, by the Forum of Injury Lawyers (FOIL) this morning. While the proposed 0·5% adjustment to moderate under-compensation is welcome, it does not go far enough. The Government Actuary, when advising the Lord Chancellor in the report that you were referred to, immediately prior to setting the rate in England and Wales, suggested that the Lord Chancellor consider a margin adjustment of between 0·25% and 0·75% to mitigate the incidence of under-compensation, accepting that to have 50% of people actually see their compensation run out was not consistent with the full compensation principle. The Lord Chancellor, unsurprisingly, simply picked the midpoint; 0·5%. In that same report, the Government Actuary provided a helpful graph that showed that, even with that 0·5% adjustment, about one third of plaintiffs would still run out of their compensation before the end of their lifetime, and a worrying 22% would suffer a shortfall of 10% or more. In serious-injury claims, that could leave them unable to fund their care and equipment needs for many years. Does that really sound like full compensation for those individuals?

I strongly disagree with the suggestion from FOIL this morning that the composition of the portfolio already avoids under-compensation for individual plaintiffs. If the wrongdoer does not compensate adequately, the responsibility shifts, initially, to the injured person but, ultimately, it probably falls back on the state to make up their shortfall. Insurers are in a much better position than any individual plaintiff to aggregate their funds, hedge their investment risks and deal with fluctuations in the investment market.

Turning to the cost of investment advice and taxation, FOCIS views the proposed adjustment of 0·75% as far too low and likely to compound under-compensation. We were one of the only organisations to submit data on this, initially to the Ministry of Justice (MOJ) in 2019 for the debate in England and Wales. We have resubmitted that data to this Assembly. We obtained from our members and the professional deputies and trustees of personal injury trusts data concerning the investment charges actually incurred by their clients in recent years. We commissioned Ian Gunn, a personal financial planner who had been a member of the MOJ's expert panel in 2015, to analyse the charges on those client portfolios.

Our members produced the data sheet that we have submitted. It is based on 389 clients, nine different firms and a very wide range of settlement amounts from £67,000 right up to £7·45 million. The result was an average of the total investment charges of 1·58%, which is very significantly above the 0·75%. What was, perhaps, more telling was that less than 5% of those portfolios had charges of 1% or less, which was more than counterbalanced by the 6% of portfolios that had charges of more than 2%. The overwhelming majority fell into the range of 1% to 2% and tended to cluster around 1·5%. Those are just the investment management charges. We must not forget the additional impact of tax. Once that is factored in, there is a compelling case that the adjustment should be 1·5% to 2%, not 0·75%.

I noted that FOIL and the Confederation of British Industry NI (CBINI) indicated this morning that they had chosen not to produce evidence on that point. However, with respect, given the resources they have applied to this issue in all of the UK jurisdictions, you can safely conclude that if they had been able to find reliable data of lower investment management charges for plaintiffs, they would have submitted it.

I mentioned inflation, and I want to come back to that briefly. Some plaintiffs will have been, effectively, forced to take investment risks because the costs of meeting their needs increased beyond the basis on which their claim was settled. One of the main reasons that that happens is the effect of real earnings growth and inflation on disability-related items, which due to the specialist nature of those products, do not necessarily increase consistently with the RPI or even the CPI.

Our members' experience is that, in the most serious injury claims, damages for care and case management account for 50% or more of the plaintiff's damages. Once you also factor in the loss of earnings claims and medical and therapeutic costs, which tend to be heavily earnings-related, the weighting goes to 70% or more. It has been well established by the UK courts and the periodical payments regime, through the case of Thompstone v Tameside and the cases that preceded it and the decision of the Privy Council in the Guernsey case of Helmot v Simon, that earnings inflation rises in the long term at an average of at least 1·5% per annum more than price inflation. If that is compounded over decades, it has an enormous effect. Therefore, we contend that the proposed RPI provision for Northern Ireland is the minimum acceptable inflationary adjustment and that, if the alternative of the CPI were ever contemplated, that would require an adjustment of at least 1% to rebalance the position.

I will briefly mention the longevity risk, which is another issue that has not featured large in this debate. All investment advisers and, indeed, their plaintiff clients have to plan for the very real possibility that they might exceed their life expectancy, and they have to invest accordingly. There are readily available, highly credible statistics concerning longevity prepared by the Office of National Statistics (ONS). We contend that GAD ought to have factored those statistics into its analysis and modelling. To illustrate that point, if you look at the ONS stats for a 20-year-old man in England or Wales, you see that they have a predicted life expectancy of 86. If you look further at those stats, you see that there is a 25% chance that they will live a further 10 years to be 96. Something needs to be done about that. That is a risk that plaintiffs take. If it is not modelled into the calculations and adjusted for, there ought to be a further contingency adjustment of, say, 0·5% to allow for that real risk. I will mention that again when we talk about periodical payments. To be clear, that is an additional risk over and above the 0·5% investment portfolio under-compensation margin.

There has been some debate about the advantages and disadvantages of transferring the responsibility for setting rates to the Government Actuary. The view of FOCIS is that the method of calculating the discount rate ought to be depoliticised. The discount rate has been set at inappropriate levels for many years, but it is clear that a discount rate adjustment has been contemplated on every occasion, whether in Northern Ireland, Scotland or England and Wales, and the relevant Minister has been largely reliant on the Government Actuary to calculate what that rate ought to be. Having a formula that is predetermined by the legislation, and that empowers the Government Actuary to review and implement the revised rate, creates transparency, which will be important for all plaintiffs in Northern Ireland. That has been recognised by the Scottish legislation.

I will pick up on a point that I heard this morning. If I am reading paragraphs 8, 15 and 16 of the schedule to the Bill correctly, DOJ, rather than the Government Actuary, has the power to pass regulations to amend the notional portfolio or the assumed 43-year period. Therefore, I do not feel that the Bill would give too much power to the Government Actuary. I actually contend that, before contemplating amending any of those regulations, there ought to be a requirement for the appointment of an expert panel, similar to the one that was appointed by the MOJ in 2015, which should include at least an economist, an investment adviser and an actuary.

I have a few concluding thoughts. Any of the models for fixing the discount rate are simply proxies for calculating compensation. They were never intended to match investment behaviour, which will obviously vary considerably from plaintiff to plaintiff. The Scottish model is preferable to the English model, but both represent a significant departure from no-risk full compensation. With the current 0·5% under-compensation adjustment, the new discount rate in Northern Ireland will be less negative than the current discount rate based on Wells v Wells. Therefore, compensation and the cost to compensators will go down, not up. It is likely that that would still be the case even if you accepted the submissions that we have made today that there ought to be a larger under-compensation adjustment and/or a more realistic adjustment for investment management charges and tax. It seems to me that, whichever way you go with this, unless you leave it as it is with Wells v Wells, compensators will save money, not spend more.

I found the points made about PPOs this morning highly surprising. I will leave it to Oonagh to relate that more directly to the Northern Ireland experience. However, the overwhelming experience of FOCIS members is that most insurers are really reluctant to offer PPOs and that trying to get them to do so is like pulling teeth. They will often take plaintiffs right to the door of the court before they are willing to switch from a lump-sum offer to a PPO. I said "most", and there are exceptions to that. I acknowledge that there are some more forward-thinking insurers who occasionally offer PPOs more readily and earlier. The reason that the majority do not do that, however, is that they know that the long-term cost of taking the investment, inflation and longevity risk is greater than the cost of any of the discount rates that we have talked about. We also should not forget that, when PPOs are offered, they tend to relate only to one of the many heads of loss, typically care and case management. PPOs are no excuse for setting the discount rate at a level that will result in under-compensation for a third or more of the plaintiffs, which, as I mentioned, would be the result even with the 0·5% under-compensation margin adjustment.

Finally, we should all be thankful that the incidence of lifelong disabling injuries that result in calculations that significantly engage the discount rate is excruciatingly low. The vast majority of claims relate to injuries that have only a short to medium-term impact and so do not have a significant future loss claim. The impact of a fair discount rate on insurance premiums would be spread across all policyholders, and, whether they are consumers or businesses, they would hardly notice the difference. Conversely, if the discount rate is set too low, the adverse impact on those who have wrongly sustained life-changing injuries is profound. There will be impacts on their families, and, as I mentioned, in all likelihood, it will fall back on the state to prop them up and hence will fall back on the taxpayers.

Thank you very much for giving me the time to make those points.

The Chairperson (Mr Givan): Thank you, Julian. That was comprehensive, and you have, helpfully, addressed some of the points raised in the previous session that I wanted to ask you about.

I will bring in Oonagh at this stage. Oonagh, you are very welcome to the meeting. If you speak to your submission briefly, we will then move to questions. Thanks, Oonagh.

Ms Oonagh McClure (Association of Personal Injury Lawyers): Chair and members of the Committee, thank you for inviting us to speak to you today.

APIL is a not-for-profit organisation that campaigns on behalf of injured people. It lobbies for changes in the law relating to personal injury, and it campaigns for fair and full compensation for all injured people. Whilst I appreciate that the Committee is discussing the draft legislation before it — I note the Chair's comments about that — APIL remains of the view that the best way of calculating the discount rate is by using the method as set out in Wells v Wells and that moving away from that methodology risks leaving people under-compensated for injuries that were caused by someone else's fault. I appreciate that the Committee has heard a lot of discussion about this today, but, under the current methodology, the injured person is assumed to be risk-averse or very low risk. APIL believes that that is the best way of ensuring that a person receives 100% full compensation.

Injured people, by their very nature, are not canny investors. They should not be hedging risks, as was referred to this morning. As Julian said, they are not investing to make a gain. They are investing to make sure that their compensation lasts for the period that it is supposed to last and puts them, as much as possible, in the financial position that they would have been in had the accident not occurred. People who receive compensation do so because their injuries have been caused by someone else through no fault of their own. In moving away from the principle of Wells v Wells, the Department is assuming that injured people are now not just risk-averse or very low risk but low-risk investors. If the Department stays with the Wells v Wells methodology, this legislation would be unnecessary. The Department now has set an interim rate under the Wells v Wells calculation, and that could have been the position without the necessity for this legislation and this discussion.

APIL wants to make the following points on the draft legislation. If the legislation is introduced, we support the adoption of the Scottish model. We believe that removing the possibility of political interference is the preferable situation for Northern Ireland, and it ensures that the rate is not influenced by any certain political agenda. Having the transparency of the notional portfolio in the legislation is welcome. The proposed legislation, unlike the England and Wales model, does not require the investment behaviour of injured people to be considered, and, legally, that should be a good thing. As Julian pointed out, there is still political accountability, and the Department retains the responsibility for setting the methodology. We believe that that is appropriate.

The other point that we mentioned in our submission is that we believe that the rate of 0·75% for taxation and investment advice is on the low side. Having spoken to a number of independent financial advisers (IFAs), we believe that the appropriate rate would be 1·5%. We are informed by IFAs that, apparently, the lower the sum, the higher the cost of the investment.

If the Committee would like to ask anything, I am happy to take questions.

The Chairperson (Mr Givan): Oonagh, thank you very much for that. Again, you have outlined very clearly the position of your organisation.

Will you both pick up on one point that I want to address, namely the argument on the accountability of the systems in the Scottish approach against the English and Welsh approach, where the decision on the rate that is struck is a political one? Why do you view reaching a decision on the rate as a more actuarial task than one that should have a political input?

Ms McClure: It is quite a complex calculation. The point is that, once the methodology has been set out, there is no reason for politics to become involved. As has been pointed out, the Department retains the power to alter that methodology, the notional portfolio or the additional rates that have been mentioned, if it feels that it is necessary to do so, and that will remain the case. Calculating it is really a matter for actuaries, who look at the returns on investment as they are at that time.

The Chairperson (Mr Givan): OK. Thanks, Oonagh.

Ms Dillon: Thank you both for your presentations. In relation to PPOs, I cannot quite figure out who is for them and who is pushing back on them. I would have thought that the insurers would be keen on them, because they are a way of getting 100% compensation and are less risky for them, but I accept that there are administration costs that come with them. From the perspective of the injured person, I was concerned that their fears about PPOs would be on what would happen if something happened to the person, company or organisation that was paying out to them. However, we have been assured this morning that the payment is protected. Is that your understanding? Is it your understanding that there are more plaintiffs who are keen to get PPOs but that insurance companies are not responding positively to those requests?

Ms McClure: In the majority of cases, the Financial Services Compensation Scheme (FSCS) will step in and protect the payment, but there will be the odd case where that does not happen and that person may be left without compensation.

The use of PPOs is very rare. They are very rarely offered, and, as Julian pointed out, the reason seems to be that the insurers like to have the risk managed and off the books as opposed to having an ongoing situation. To be honest, from dealing with injured people every day, I know that they find the whole court process emotionally draining, exhausting and very stressful. When they get to the end of it, they almost like to cut the tie: they do not really want to have their lives managed or to have a connection with something that they found very difficult. They would rather take a lump sum and move on. In reality, PPOs are rarely offered.

Ms Dillon: I understand them wanting to take the lump sum and move on. People do not like the court process, and I totally get that, because it can be very long and drawn out. However, where is the safeguarding? To be fair, that is something that Sinéad Bradley has raised previously and may well want to raise again. Where is the safeguarding for somebody who is potentially vulnerable and open to having their finances abused if they get a lump sum?

Mr Chamberlayne: If anything, periodical payments add a safeguard for the vulnerable. The truly vulnerable, if they lack mental capacity, will likely have their awards managed by the Court of Protection, so they will have a professional deputy. The next class down of inexperienced investors — most of our clients have no investment experience — if they are being asked to invest very large lump sums, are at risk of getting bad advice or of people trying to take advantage of them. That is a serious risk that goes with the regime. Periodical payments are one way of moderating that, but they usually apply only to one head of claim and are not suitable for all claims.

I am very pro PPO. I have concluded a number of claims for clients on a periodical payment basis, but, as I indicated, I have had numerous other clients for whom we sought PPOs but insurers refused to offer them, or, certainly, we at least had multiple rounds of negotiation and hung on, on our client's behalf, to fight that corner to achieve them.

You asked about why insurers do not offer them more readily. It is because they cost them more. It is a numbers game for the insurers. They know that the cost of hedging their exposure to providing periodical payments for the rest of the life of that plaintiff will cost more for absolutely the same reasons that we are debating why the discount rate needs to be set at a low level and not involve significant investment risk, inflationary risk etc: those risks compound over time and cost a lot of money over time. As I said, it is quite telling that, even when contrasted with the Wells v Wells discount rate, most insurers would prefer to offer our clients a lump sum than a periodical payment.

Ms Dillon: OK. That is helpful. Thank you very much.

I take on board your point about 30 years versus 43 years. However, probably one of the only things that we have evidence for is the 43 years. To be honest with you, everything else is notional and subject to interpretation from 50 different angles. As a member mentioned earlier — I think that it was Rachel — the more we read into this and the more presentations we get, the more complex it becomes. The 43 years is based on evidence, so why would there be pushback on that? That question is to Julian or Oonagh.

Ms McClure: The legislation takes the Scottish legislation *[Inaudible owing to poor sound quality]* on that point and has gone to the 43 years, which was lifted from England. As I think that Kevin from FOIL said earlier, that figure is based on the average life expectancy. That is an average, and, again, it is not accurate for everybody. It is an average, so some people live for more and others for fewer years than that. They struck an average at 43 years. That seems like a long time — you could see that for a birth-injury case. For people with serious catastrophic injuries, whose injuries will develop into additional complications, some of which are unforeseen, that seems like quite a significant period.

I am not clear why Scotland adopted the 30 years. It may have been that they assumed that that was the lowest rate of survival, as opposed to an average, as it were. Most people surviving for more than 30 years might be how they came to that figure. However, again, 43 years is an average. It is not guaranteed.

Mr Chamberlayne: I am sceptical about the evidence about the 43 years. I know that you said that you have evidence, but it is certainly out of kilter with the experience of our members, especially on the claims involving the most serious injuries. It may be that that data is skewed by people with more moderate injuries who have a lesser impact on the discount rate. Cutting through it, when you look at GAD's modelling, it does not make that much difference, and I think that that point was made earlier. I do not think that it is a make-or-break provision. It is nowhere near as important as the other points that we have discussed. The composition of the portfolio, the under-compensation adjustments and inflation are all more important. The difference between 30 and 43 years does not materially change the discount rate that you will end up with.

Ms Dillon: OK. That is fair enough. Thank you very much, Julian and Oonagh. Those are all my questions for now.

Ms S Bradley: Thanks to Julian and Oonagh. I am interested in what you said, Julian, about our assumptions. The piece that we are looking at is the discount rate. Am I right to have made the assumption that a judgement has already been made, in the case of the individual plaintiff, taking account of their age, their potential earnings and the requirements of degenerative health conditions? You talked about longevity and their anticipated lifespan. Is it fair to assume that a lot of that has already been determined in the reaching of the settlement? What we are looking at, then, is the discount rate in meeting that. Obviously, I take your point that the claimant should not have to carry the risk of becoming an investor overnight, after such a trauma. However, it speaks to the fact that, once you hold a significant amount of money, there will be a return on it. It is about trying to rebalance the books. Is it fair to make the assumption that the inflation piece that you talk about has been considered at that point?

Mr Chamberlayne: The awards, which are made by the court or agreed between the parties by way of settlement, assume current day values. If someone's loss of earnings at that point in time is £25,000, that is what we call the "multiplicand", to which we will then apply the multiplier, for whatever their working lifetime would have been, to calculate their loss of earnings. The same would apply for a lifetime loss. Let us say that someone had a care package that cost them £50,000 a year, and they were aged 20, and they had a predicted life expectancy of 50 years. The multiplier is derived using the discount rate. The discount rate is a very significant component in working out what that multiplier will be. The multiplier is the combination of the period of loss, coupled with the assumed investment return, net of inflation and net of investment charges and tax. So, we need to take into account inflation and investment charges and tax when we set the discount rate. That is really important. That is why it may seem odd that we have negative discount rates. You said in your question that you assumed that people make a positive return on their lump sum, but, actually, if you are talking about low-risk investments and you look at the figures that we have ended up with in England and Scotland, once you adjust for inflation, investment management charges and tax, even on what I would say were rather insurer-friendly adjustments, you still get to a negative figure. The value of the money goes down in time, not up.

Ms S Bradley: You are talking about the inflation piece alongside the impact of taxation. In the Bill, they are two separate pieces. To my mind, the Department holds more of a lever over the taxation piece and the cost of investment and management than the inflation piece.

You said that a third of plaintiffs run out of compensation. I did not quite catch that, Julian. You rightly said that these are small numbers of people, thankfully. However, we are flying blind here as regards a lot of the data. There is no monitoring. We certainly have not been privy to any set of data that shows us the realities of what people go off to do with their settlements and whether the money reaches the end of life, as has been anticipated. Can you elaborate on your point that one third of plaintiffs run out of compensation, please?

Mr Chamberlayne: Yes, I can. I will take your first point first. I did not mean to conflate inflation with investment management charges and tax. Investment management charges and tax go together, and that is currently the 0·75% adjustment, which I said should be more like 1·5% or even 2%.Separately, there are the inflation provisions in the draft Bill. I agree that they should be separate. The point that I was flagging there is that a debate is raging separately about discontinuing the RPI. Were that to happen and we were to switch to the CPI, we would need to make an adjustment, which relates to earnings inflation. The losses that personal injury plaintiffs sustain are not your typical shopping basket. They are heavily weighted around paying for care, medical treatment and disability aids and equipment etc.

Ms S Bradley: While you are on that point, I will say that you were revealing about the PPOs. You shone a bit of light on that situation, which we otherwise were not overly aware of, so I appreciate that.

Mr Chamberlayne: My reference to a third being under-compensated, even with the 0·5% under-compensation margin adjustment, which the Lord Chancellor applied in England and then was used in Scotland and features in the Northern Ireland draft Bill, was based on a graph from the Government Actuary's Department in the report that immediately preceded setting the rate for England. There was a similar graph in the Government Actuary's earlier report to the MOJ right at the start of the latest discount rate adjustment process, which illustrated the same point. I will gladly send you that report and highlight where the graph is.

That graph was tied into the Government Actuary saying to the Lord Chancellor that you could just say that 50% of plaintiffs seeing their compensation last their lifetime is full compensation. Actually, however, lots of people would say, "Hang on, what about the other 50%?". They are inherently under-compensated. To provide full compensation, it is not really acceptable for 50% of those people, all of whom are individuals, so they do not pool their funds, to go on being under-compensated. We need to do better than that.

The impact of that on the modelling that had been done for the investment portfolio in England, either taking a 0·25% adjustment or a 0·75% adjustment, was that the Lord Chancellor split the difference and went for a mid-figure of 0·5%. When you look at that on the graph, what I am saying to you is that, with that adjustment, at least it meant that it was no longer 50% of people who were under-compensated but a third of them were still under-compensated. That begs this question: is that full compensation?

I took one of those cases to the Court of Appeal in Bermuda. It is a common-law regime, which is based on Wells v Wells. In that case, the Court of Appeal judges accepted that anything much more than 5% of under-compensation would not, in their view, be a full-compensation system. That was more Wells v Wells-style thinking. I accept that this is, probably, the political question: what level of people being under-compensated are you willing to tolerate and still claim to maintain a full-compensation system? I say that it should be nowhere near 50%; in fact, I would say that even a third is too high. It should really be quite a small number, if any, but there it is. I will happily send you that graph.

Ms S Bradley: I would appreciate having the graph, as well as the underlying data. Was that a sample of cases that were taken, and what was the sample size? I want to understand more thoroughly how that was arrived at.

Mr Chamberlayne: I will send it to you. It is part of the Government Actuary's Department's main report. It is based on the modelling that it did with modelling software that runs thousands of different permutations, but it is all hypothetical; none of it is based on real data.

Ms S Bradley: Yes, that is the difficulty in this, Julian. Although we are, thankfully, talking about a small number, there does not seem to be any data capture on the reality. Everything is notional, hypothetical and plotted out. I suppose that we are flying blind in a lot of ways. Thank you.

The Chairperson (Mr Givan): Thank you, Julian and Oonagh, for agreeing to my request to do the presentation together, which was helpful to us logistically. I am sure that, if there are other issues that we want to come back to, we will follow those up with you in due course. Thank you both for talking to the Committee today.