Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Damages (Return on Investment) Bill: Committee Consideration

23 September 2021

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Mervyn Storey (Chairperson)
Ms Sinéad Ennis (Deputy Chairperson)
Mr Doug Beattie
Ms Sinéad Bradley
Ms Jemma Dolan
Mr Robin Newton
Mr Peter Weir
Miss Rachel Woods

Witnesses:
Mr Martin Moore Department of Justice

The Chairperson (Mr Storey): Martin has joined us on StarLeaf. Martin, thank you for being with us. Hopefully, your services will not be needed too much during our deliberations. Thank you for being with us this afternoon.

Mr Martin Moore (Department of Justice): You are welcome.

The Chairperson (Mr Storey): If the Committee is minded to make an amendment to any clause, the purpose and desired outcome of the amendment needs to be clarified. The Committee may then wish to write to the Minister of Justice asking whether she accepts the proposed change and will table an amendment. Alternatively or at the same time, the Committee can ask for a draft amendment to be prepared by the Bill Clerk for its consideration. The Bill Clerk is listening to the Committee's deliberations, and, if the Committee indicates that it wants any draft amendments to be prepared, she can join the meeting to provide advice and seek clarification on the purpose of the proposed amendment if that is necessary. Given that advice from the Bill Clerk to a Committee takes place in closed session, that will happen at the end of the deliberations, rather than during the time, in case there is more than one proposed amendment to be discussed.

We will now work our way through the Bill. The Committee Clerk's paper setting out the purpose of the session and the process is at pages 41 to 43 of the meeting pack, and a paper setting out the key issues that the Committee may wish to consider during the deliberations was emailed to members yesterday and can be found at pages 3 to 9 of the tabled pack. If there are no questions or queries in the light of all the introductory remarks, we will move to clause 1.

Clause 1 provides that the rate assessor is the Government Actuary; provides that a court must take into account the rate that is set by the rate assessor; preserves the ability of a court to take into account a different rate; and introduces new schedule C1, which is inserted in the Damages Act 1996.

The key issues that were raised about the clause in the evidence to date include whether responsibility for setting the personal injury discount rate (PIDR) should sit with the Government Actuary in accordance with the framework that is set out in the Bill, remain with the Minister of Justice or sit with the Executive collectively; and, if responsibility for setting the rate is to remain with the Minister, who, at a minimum, the Minister should be required to consult before reaching a decision. The other issues that were raised were whether the Department should be required to publish an impact assessment before a rate review is due, setting out the potential impacts of different rates on Departments and businesses, and whether clause C1(2) is required or should be removed.

The aim is to seek members' views on clause 1, the issues that have been raised and the evidence that has been received; whether we are content with the clause, wish to amend it or require further information; or whether we wish to discuss rejecting it or to highlight any views or comments for inclusion in the Committee's report.

I want to raise the requirement to publish an impact assessment before a rate review is due, setting out the potential impacts of different rates on Departments and businesses. That would be useful. Am I right in thinking, Committee Clerk, that that can be done in the report?

The Committee Clerk: Yes. If the Committee supports that recommendation, we can put it in the report. I do not think that it is required to go into the Bill, but we can put in the report as a recommendation to the Department.

The Chairperson (Mr Storey): Are members content that that be the case?

Ms Ennis: Sorry, Chair. Could you repeat that, please?

The Chairperson (Mr Storey): We could, in our report on the Bill, recommend that the Department be required to publish an impact assessment before a rate review is due, setting out the potential impacts of different rates on Departments. It might give us some sense of where all that is likely to go. Are you content?

Members indicated assent.

The Chairperson (Mr Storey): Are there any other comments on clause 1? I welcome Robin. Thank you for attending. I also welcome Doug, who has now joined us. Apologies, Doug.

Mr Beattie: Apologies for being late, Chair.

The Chairperson (Mr Storey): Not at all. If we are content, we will work our way through the key issues as we have done. Nobody seems to be indicating that they wish to amend the clause or to clarify the purpose or desired outcome of an amendment or any of that. The Committee Clerk has put a note here to say that, if the Committee were to decide that it did not wish to support clause 1, which provides for the Government Actuary to be the rate assessor, the Bill Clerk would need to attend at this stage. However, nobody is indicating. Sorry, Rachel. You have put your hand up.

Miss Woods: Sorry, Chair. I do not know whether you can hear me.

The Chairperson (Mr Storey): Yes, we can, Rachel.

Miss Woods: I just have a question on clause C1(2). I know that it was brought up before, by the International Underwriting Association of London (IUA), as not being necessary. We may need to put something in the report about that. The Department has indicated that it is already in the Damages Act, and there is case law. However, if it were to be made specific, even with a change to the explanatory and financial memorandum, that could be of assistance.

The Chairperson (Mr Storey): It would be useful to include that in the report. Are we agreed?

Members indicated assent.

The Chairperson (Mr Storey): OK. Thank you, members. If there are no other issues in relation to clause 1, we will move to clause 2.

Clause 2 inserts new schedule C1 into the 1996 Act, which sets out the detail about how the Government Actuary is to approach the task of reviewing and setting the discount rate. No issues were raised in the evidence in relation to the clause. The issues raised relate to the specifics of the schedule. I want to seek your views on clause 2 and ask whether you are content with the clause. If no one has indicated, I will take it that we are content.

Paragraphs 1 to 6 of new schedule C1 provide that the first review carried out by the Government Actuary is to be a review of the current rate; deal with the timing of subsequent reviews; require a review to take place on 1 July 2024 and thereafter establish a five-year cycle of regular reviews; require any review of the rate to be concluded within 90 days; and provide that the Government Actuary can consult or seek advice from any person and must have regard to their views if received within a reasonable time.

Most of the responses are supportive of the timing of the reviews and the proposed five-year cycle. However, one organisation recommended that the review period be three years rather than five years. Martin, can you give us a sense of what would be the advantages as well as the challenges and difficulties if it were three as opposed to five years?

Mr Moore: The advantage would be that the rate would be reviewed sooner, so, if circumstances changed in the interim, the rate would be reviewed and corrected, so to speak. That said, there is a provision that allows an extra review to be done, so, if economic circumstances or whatever arose that caused the rate to be deemed out of kilter with what it should be, that could happen in any case. The disadvantage of setting it at three years is that it is a short enough period that it might encourage parties to game the system by delaying settlements. If a case arose 18 months or a year before the review was due, that might be sufficient time for delays in the negotiations and so on, if one of the parties felt that a review was coming that might change the rate in their favour. The idea is that five years is the optimum period, because it reduces the opportunity for gaming. Moreover, five years is still a fairly regular period for the rate to be reviewed.

The Chairperson (Mr Storey): OK. Any comments from members? Are we content with that?

Members indicated assent.

The Chairperson (Mr Storey): Paragraphs 7 and 8 of new schedule C1 provide that the rate should reflect the rate of return for the notional portfolio over a 43-year period and give the Department a power by regulations, subject to draft affirmative procedure, to change the period of 43 years to another period. Apologies for there being a lot of reading, but I want to give you a sense of the key issues raised about the paragraphs in the evidence that was received. The issues include whether a 43-year investment period, as opposed to a 30-year period, for the setting of the discount rate is appropriate; whether the Government Actuary's Department (GAD) should factor longevity, based on available statistics, into any future analysis and modelling as proposed by the Forum of Complex Injury Solicitors (FOCIS); whether, if the 43-year period is used, a further margin of adjustment of the 0·5%, in addition to the adjustments provided at paragraph 10 of the schedule, should be included to mitigate the broader risk of under-compensation as proposed by FOCIS but which is opposed by other organisations; and whether the Department should be encouraged to gather data on the average investment period for claimants in Northern Ireland to inform any future consideration of whether to change the assumed period of the investment.

Ms S Bradley: Thank you, Chair. I appreciate you raising that point because it is worth noting. We have taken a model and tailored it without any full explanation of the timeline. Could we get some response or rebuttal to the points that have been raised against paragraphs 9 and 10 of the schedule, one of which is about measuring it against RPI? I believe that the Government are planning to move from that position. Does the Bill allow for an easy step in to correct it, if that is what happens? I appreciate that different parties have different agendas on this, but we are being told that the further adjustment is unnecessary or can result in overcompensation. I am interested to hear what the Department says about that.

The Chairperson (Mr Storey): We will come to those two points, Sinéad. We are not at them yet. We are just dealing with clause 2. If you hold those, we will deal with them when we come to them in a moment or two. That is for our own sanity in trying to work our way through this.

Ms S Bradley: Sorry, Chair. I understood that that was coming under part of this early clause.

The Chairperson (Mr Storey): No, not your first part. We are looking at the question of whether the period is 43 years or 30 years. Martin, do you want to comment on that? Do you want to deal with the issues that Sinéad raised?

Mr Moore: Sorry, do you want me to talk about the 43 years?

The Chairperson (Mr Storey): Yes.

Mr Moore: The 43 years is really the only period for which, as far as we are aware, there is any evidence. As part of the call for evidence from the Ministry of Justice when it was setting its rate, evidence was provided that the average investment period for a claimant was between 40 and 45 years, so 43 years is the midpoint of that estimate. The Lord Chancellor subsequently chose to assume that period in 2019, and our Department's view is that it is better to use that evidence-based period rather than the 30 years, which is essentially an arbitrary figure that was used in Scotland.

Ms S Bradley: May I come back on that? Maybe I am not making my point clearly. I cannot help but feel that these are interlinked, because we have taken the Scottish model and made a determination separate from the Scottish model by extending the years. Given that, surely we have to look at the ramifications of that in the context of the other pieces that I referred to. They are all interlinked. If we are moving to 43 years, which is a fair argument if it is a more representative number of years, we also have to be cognisant of the fact that that could extend the potential return on investment. Therefore, we have to visit the other pieces that sit there that are the levers for overcompensation or under-compensation. I find it difficult to look at these individually without acknowledging the knock-on effect that it could potentially have on other parts of the Bill.

The Chairperson (Mr Storey): Martin, do you want to comment?

Mr Moore: Our perspective is that these are all estimates. As we keep saying and as everybody knows, it is not an exact science. We are using our best judgement to estimate parameters within a framework that will best deliver 100% compensation in the round, so our perspective is, "What assumed investment period is most likely to deliver that 100% principle?". There is no particular rationale for the 30-year period that is used in Scotland. There is some evidence to support the 43-year period, and, on that basis, we think that that is the most reasonable period that should be assumed. It is not a case of an outcome in terms of 43 years providing more compensation than 30 years; it is about what the appropriate assumed period is, and we think that it is 43 years.

Ms S Bradley: I accept that as a stand-alone argument, but I see how it is interwoven with the later part of the Bill. Are we ultimately declaring that the Scottish model is wrong? Is it not attaining 100%? Where is the redress in that Act? I am struggling not to connect this with later parts of the Bill. I accept the argument, and it is probably right, but there are knock-on consequences that do not seem to be filtering through at this stage.

The Chairperson (Mr Storey): Martin, on that correlation — the point that Sinéad is making about the knock-on effect — between this part and the other part of the Bill that we will come on to, paragraph 9 of the schedule to the Bill, about RPI, what is the Department's view of the effectiveness of the Scottish model?

Mr Moore: I am not entirely confident that I can remember the exact timeline, but I think that the evidence for the 40- to 45-year period was perhaps not available to the Scottish Parliament at the time that the legislation was being passed. The evidence came to light in a later exercise conducted by the Lord Chancellor, and that may explain why, without the benefit of that evidence, the legislators went for the 30 years. If I have got that wrong, I can clarify it after the meeting, but I think that that is correct.

The Chairperson (Mr Storey): OK. Sinéad?

Ms S Bradley: I will not labour that at this point. Thank you. I appreciate that.

The Chairperson (Mr Storey): It is important that members have the opportunity, because that is the purpose of this process. We are not minded to make any amendment to this, but it will be important to reflect, in the report, the concerns raised by Sinéad. To be clear, we are not saying that we want to amend it — we are content with clause 2.

Members indicated assent.

The Chairperson (Mr Storey): Thank you for your help with that, Martin. That brings us to schedule C1, paragraph 9, to which Sinéad made reference. It requires an adjustment to the rate to take account of inflation, as measured by RPI or other such measure of inflation as may be prescribed by regulation by the Department, subject to the draft affirmative procedure. The key issues raised in relation to the paragraph, in the evidence received by the Committee, included general support for the use of RPI and the recommendation that, if CPI is used, it should be adjusted by +1% as it was in England and Wales. Sinéad, do you want to comment on this part?

Ms S Bradley: Yes. You made the point well, Chair. It is about that adjustment piece and whether we have provision for making the alteration easily. The only other issue that I have to raise at this point is on paragraph 10.

The Chairperson (Mr Storey): We are content with paragraph 9, and we will move to schedule C1, paragraphs 10 and 11. Paragraph 10 requires standard adjustments to be made to the rate arrived at on the basis of a deduction of 0·75 of a percentage point to take account of the impact of taxation and the cost of investment advice and management and a deduction of 0·5 of a percentage point as a further margin that recognises that there is risk inherent in any investment. Paragraph 11 provides that the amount of the standard adjustments may be changed by the Department by regulations subject to the draft affirmative procedure.

Among the key issues raised in relation to the deduction of 0·75 of a percentage point was whether the standard adjustment of 0·75 is appropriate; whether it is too low, as suggested by the Association of Personal Injury Lawyers (APIL) and FOCIS and should be amended to 1·5 to avoid under-compensation of claimants; or whether the standard adjustment for the taxation and investment advice should be removed from the Bill and defendants be allowed to consider paying for the reasonable cost of future financial advice as a separate head of claim through negotiation or award at the time of settlement, as proposed by AXA. That issue has been raised a number of times, and members have slightly different views. It is a judgement call. We must ensure that we give it due consideration. It will be a judgement call on our part.

Ms S Bradley: I would like clarification. I am not opposed to it being in the Bill. There are costs associated with management and advice. Even though it is a notional portfolio, the expectation is that the claimant will be in receipt of money, and we should be encouraging good behaviour, for want of a better expression, with that money. Therefore, even if they do not go down the notional portfolio route of investment, they should be securing and taking good financial advice. It is important that that is in the Bill.

Paragraph 10(2)(b) of schedule C1 refers to the 0·5 of a percentage point as the "further margin". I am still not clear about what that is. It has been suggested to us that it may not have to be there. I am not comfortable with it being there without understanding what it represents. Any clarity on that would be helpful.

The Chairperson (Mr Storey): Martin, do you want to comment on the necessity of paragraph 10(2)(b) of schedule C1?

Mr Moore: A margin similar to the further margin in the Bill was applied in England and Wales by the Lord Chancellor. He called it a "margin of prudence", which is a good way of describing it. It is a recognition — I emphasise it, again — that this is an exercise in judgement, albeit an informed judgement, and that there is risk inherent in it. There is risk in any investment. Everything in the Bill for the notional portfolio is based on informed assessments and estimates of how things might happen in the future and how investments might perform, albeit on the basis of expert advice. Nonetheless, there is risk. The further margin is a position to say, "Rather than having a 50:50 risk of overcompensation and under-compensation, we would, as a measure of prudence, rather that the risk was slightly in favour of the claimant than the defendant". Generally, the defendant is a large corporate organisation, backed by large financial resources and in a much better position to bear the risk than an individual claimant who is probably a person on their own. Expert advice tells us that, without the margin, the risk is 50:50 between overcompensation and under-compensation. Adding the margin tips the balance of risk slightly in favour of the claimant. The probability is roughly 65% for overcompensation and 35% for under-compensation.

The Chairperson (Mr Storey): Apologies, Sinéad. I cannot see the screen. I will come back to you in a minute.

Ms Ennis: Based on the briefing, my understanding is that there could be some overcompensation. However, individual claimants will not be left out of pocket when they acquire the things that they need, such as modifications to their home, or incur expenses. Will the margin ensure that claimants are compensated and have money for the things that they need?

Mr Moore: The risk that a claimant will be under-compensated cannot be eliminated. There will always be that risk. There is always the possibility that the initial calculation wrongly calculates the claimant's needs, inflation increases more than was projected, the investments do not perform as expected or the person lives longer than expected. Any of those factors can lead to a situation of under-compensation or overcompensation. We are trying to minimise that risk. The further margin accepts that the risk exists and recognises that the defendant is in a better position to bear slightly more of the risk than the claimant. It shifts the risk slightly towards a risk of overcompensation and away from a risk of under-compensation. There is no formula that can remove the risk altogether.

Ms Ennis: Yes, it is not an exact science. Basically, we are hedging our bets.

Mr Moore: Yes.

Ms S Bradley: Chair, I appreciate that the answer to that question is on record. As you will be aware, the Committee has been charged to focus on the 100%, and that is for good reason. I have every sympathy with the explanation given, and I have no problem in declaring that I am on the side of the unfortunate claimant in those cases. If we have to tilt the scales in any direction, that is where I want it to go. It is critical to connect this point with the earlier one. If we are leaning towards the possibility of overcompensation to the claimant, we need to be at least aware of every point in the Bill where we may do that. We could be leaning quite heavily towards that. I am very mindful of trying to connect all those points and taking a whole view of whether we are as near to 100% compensation as we can get. Thank you, Chair. I appreciate that.

The Chairperson (Mr Storey): I remind members that we have correspondence on this issue from the Association of British Insurers (ABI). Sinéad, in a sense, you rehearsed some of those concerns earlier. The ABI believes that including the adjustment exceeds the aim and principle of 100% compensation. As set out in the paper, it states that it should be removed from the Bill by the deletion of paragraph 10.

The point that you made is on record and will be reflected in the report. The Committee has to make a judgement call in trying to ensure that the onus does not fall on the claimant. The Deputy Chair also made that point. It is important for the Committee to record that point.

Is the Committee content that the Bill stays as it is? Do members wish to consider an amendment, such as the deletion of an element of the clause? Is the Committee content, at the moment, with the Bill as it is?

Members indicated assent.

The Chairperson (Mr Storey): Members may want to come back to that.

That brings us paragraphs 12 to 15 of new schedule C1, which set out the notional portfolio with the types of investments and percentage holdings of each. The interpretation of the types of investment provides for the Department to make regulations to define any of the types of investment included in the notional portfolio and provides for the Department to have a power by regulations, subject to the draft affirmative procedure, to change the list of investments and percentage holdings in the notional portfolio.

The key issues that were raised about that were whether the notional portfolio provided for in the Bill is appropriate, particularly when considered in conjunction with the proposed further margin of adjustment of the 0·5 of a percentage point to achieve, as we have previously discussed, as close to 100% compensation as possible; whether the notional portfolio is overcautious, as claimed by a number of organisations, and that the proportion of equity investment should be increased within the overall portfolio to avoid overcompensation; or whether the notional portfolio should reflect the Wells v

Wells assumption of investment solely in index-linked gilts to ensure that under-compensation does not occur.

It is for us to determine whether we are content with paragraphs 12 to 15 or whether we think that anything else should be done to reflect some of those concerns or issues that were raised during consideration. Is the Committee content?

Members indicated assent.

The Chairperson (Mr Storey): I will move on. If someone on StarLeaf wants to get my attention, just speak. I cannot see you putting up your hand, so apologies for that. Sinéad, do you want to comment on that?

Ms S Bradley: If at one part of the Bill we are trying to reflect what a normal period of time is for an investment, it is also reasonable to take a real-world view of what an investment looks like, as opposed to going down the gilt route. I think that that is a more consistent approach.

The Chairperson (Mr Storey): Paragraph 16 of new schedule C1 provides that, before a review of the rate is due to start, the Department must consider whether the notional portfolio remains appropriate with reference to the characteristics and objectives of the hypothetical claimant investing an award of damages, as described in paragraph 16. No real issues were raised about that. Is the Committee content?

Members indicated assent.

The Chairperson (Mr Storey): That brings us on to paragraphs 17 and 18 of new schedule C1, which describe the characteristics and objectives of the hypothetical claimant investing an award of damages and clarifies that the type of damages in question is a lump sum award of damages for future financial loss.

Some issues that were raised about that are whether the description of the hypothetical investor is accurate; and whether there should be a duty on the Department of Justice to gather evidence and commission research of actual claimant investment behaviour, as proposed by a number of organisations, and, if not, a legislative duty. The Committee may wish to consider recommending in the Bill report that the Department gather the evidence and commission some report or research. I know that it is a task to try to get that information, but it might be useful so that there would be some sense of the investment behaviour in a number of organisations. Are members content to do that and reflect it in the report?

Members indicated assent.

The Chairperson (Mr Storey): Martin, have you any comment on that? This was raised before and officials said that it might be difficult to garner that information. Do you think that it would be possible?

Mr Moore: I think that it would be difficult. It is hard to conceive of how the Department would be able to find out who the claimants were, in the first place, and how they have invested their damages. It is hard to see how you could place an obligation on anyone to provide that information, even if we were able to track them down and ask them.

The evidence that has been available to date has been provided by financial advisers, so it is really second-hand evidence as to how they believe that advisers advised people to invest, rather than what they have done once they got the money, which is really their private business.

The Chairperson (Mr Storey): However, having it reflected in the report means that it can be assessed. Might the Department be able to give us a response on that? We have tabled it out as well as we possibly can.

Have you any comment on the other point, Martin — whether the description of the hypothetical investor is accurate?

Mr Moore: This is the part of the Bill that ensures that the notional portfolio will seek to achieve 100% compensation, because it specifies that it is an investor who needs to invest money to receive the

money that they need and that will be exhausted at the end of the period that they need it for. In other words, they get everything required to meet their needs — no more or no less. Every time there is a review, the Department is required to make sure that the notional portfolio meets those criteria: in other words, that it still meets the 100% compensation principle.

The Chairperson (Mr Storey): Yes. OK. Members, if there are no amendments or further comment, we will move on to paragraphs 19 to 34 of new schedule C1. They provide for the rate to be set as a percentage figure and rounded to the nearest whole number or quarter percentage point; provide for there to be a single rate that will apply to all cases unless the Department, by regulations, requires more than one rate to be set; provide for the Government Actuary to send a report of his review to the Department and set out the information that the report must include; require the Department to lay the report before the Assembly as soon as is practicable and, after it is received from the Government Actuary, to publish the report on the same day; provide that the rate as determined by the Government Actuary will come into effect on the day after the report is laid; and provide for reimbursement by the Department of the Government Actuary's costs. The paragraphs contain transitional provisions that set out the procedure for regulations made by the Department and include an interpretation of the provision.

One organisation proposed that the rate should apply only to compensation awards relating to incidents that took place after the change in the rate, rather than at the time the damages are awarded, as the legislation currently provides for.

Is there any comment about that issue, or are we content with paragraphs 19 to 34 of the schedule?

Members indicated assent.

The Chairperson (Mr Storey): Thank you. That concludes schedule C1.

We now move to clauses 3, 4, 5 and 6. Clause 3 makes ancillary provision. Clause 4 is an interpretation provision. Clause 5 deals with the commencement, and clause 6 sets out the short title of the Bill. No issues were raised in relation to those. Are we content with them?

Members indicated assent.

The Chairperson (Mr Storey): In conclusion, a number of other issues were raised in the evidence that was received on the Bill. I will summarise a few of those issues so that they are recorded and that we can have them before us again: the consequences of changes to the PIDR on the health service and on healthcare professionals, particularly GP indemnity costs, should be borne in mind and considered when setting the rate; the need for a state-backed indemnity scheme for GPs, similar to that which was introduced in England and Wales when the framework for setting the rate changed in those jurisdictions; the need to promote the use of periodical payments orders (PPOs), particularly in cases against the health service, so that as many cases as possible are settled by PPOs, removing the responsibility on the claimant to manage very large sums of money and providing the assurance that they will receive a continuous annual income every year for the remainder of their life; and the potential impact on insurance premiums and the implications of that on car insurance, businesses and so on, which should be considered and taken into account when setting the rate. The information on that last point should be published when the rate is being reviewed or changed to ensure that businesses are aware of the potential costs. Finally, the legislation needs to be progressed as soon as possible to enable the new rate. Over the last period of time, a lot of concerns have been driven by the need to progress this legislation so that the new rate is set to minimise the potential impact of the –1·75% rate that was recently set by the Department under the Wells v Wells methodology. That is a summary of some of the other issues.

Martin, may I raise the issue of the need to promote the use of periodical payments orders? Has the Department taken any proactive steps to address that problem? That issue seems to have been left out there, and there does not to seem to be much to give us a sense of confidence that it is being used in the way that was intended.

Mr Moore: Nothing has been done to promote the use of PPOs. The provision is there. At the minute, our understanding is that it is not used particularly often. That is because either one or other party, or both, simply prefers to take the lump sum.

The Chairperson (Mr Storey): OK. You have your hand up, Robin, and then it is Sinéad.

Mr Newton: It was only to ask permission to leave the meeting for a short time, if that is OK.

The Chairperson (Mr Storey): Permission granted, Robin.

Mr Newton: Thank you. I appreciate it.

The Chairperson (Mr Storey): Sinéad is next.

Ms S Bradley: This is on the matter of PPOs. I am aware that, in the Bill, we are saying that, when a settlement is made, the discount rate at that moment in time will apply because it is assumed that the claimant is in receipt of a lump sum. In the Bill as it stands, even if that agreement is set up by the parties through the PPO, the anchor will be that the discount rate will have been calculated at that moment in time and that, therefore, the payment over the trajectory of the time remaining will not be subject to any levers of review, and any dramatic changes to the discount rate will not be taken into account. Is that wise? Is this an opportunity for us to reinforce the strength of PPOs? When I think of PPOs, I am particularly mindful of those claimants who may have safeguarding issues and be reliant on the goodwill of others to protect their long-term investments. I am putting that out there because I wonder whether the Bill is an opportunity to make a PPO a more realistic and safer option for a claimant to consider.

The Chairperson (Mr Storey): Can we hold that for one minute and bring in the Deputy Chair. Sinéad?

Ms Ennis: My point is about the indemnity scheme. Given that we learned at the start of the meeting that there will be no Barnett consequential, it would be useful for the Committee to understand and to get information from the Health Minister about whether he is actively pursuing an indemnity scheme with the British Treasury. Obviously, we do not want the burden to be passed to the health service or GPs.

The Chairperson (Mr Storey): We can clarify that. Are members content?

Members indicated assent.

The Chairperson (Mr Storey): Martin, Sinéad Bradley raised the point about using the Bill as an opportunity to do something in relation to periodical payments orders. What would including that in the Bill look like? How do you see that as being of value? Obviously, Sinéad has set out how she sees its inclusion as being of help. From the Department's point of view, how do you see that as being achievable?

Mr Moore: We would probably need to consider whether that is within the scope of the Bill. The Bill is about the discount rate and not about periodical payments orders. We struggle to see how you could legislatively increase the use of PPOs. It is already possible for a court to order a PPO, even without the consent of the parties. Naturally, a court is probably unlikely to want to do that. I understand that the guidance or rules that judges have to consider include a consideration of what both parties want to do and allow both parties to argue for or against a PPO.

The Chairperson (Mr Storey): Who has the responsibility of having the adequate information available in relation to the promotion of PPOs? Ultimately, the use of PPOs may be slightly different, because that may be in the hands of the court. Does the responsibility to promote the use of PPOs not lie within the confines of the Department? If the Department is not the best vehicle for that — we may not yet have concluded whether it is — what is the Department's view about what it could do about that to ensure that the use of PPOs is promoted?

Mr Moore: This is probably a disappointing answer, but I do not think that the Department has considered whether or how it would be its responsibility to promote PPOs. I cannot really answer that on the spot.

Miss Woods: I have some sympathy with that in relation to whether promotion is the Department's responsibility. I wonder about the courts. If there are rules on how PPOs are decided on between both parties and on how both parties are considered, are people aware of that? At Committee, we have

discussed the importance of training, information sharing and guidance in relation to many Bills. It seems that the courts already have the power, and there are options for PPOs. Are PPOs being put forward as an option? We do not really know. I understand the point, but that is why I have some difficulty with the idea of promoting something that is already an option. Maybe people do not know about it. I was thinking about the legislation and other things that the Committee is working on.

If the Department were to promote PPOs, to whom would it promote them? Would it be the courts? The Department cannot do that, because the courts are independent. Is it something that the Courts and Tribunals Service should be doing? Can we recommend that, maybe? I am not too sure, because, again, we do not have all the details on how it works in practice in the court system between the two parties.

The Chairperson (Mr Storey): Could you clarify that for us, Martin? What is the current state of practice with PPOs? If it is like a secret drawer in a cabinet, who was responsible for putting the drawer there in the first place? Whether people use it or not, that is another issue. If you can give us some sense of that, it might help us to determine — we can certainly get further clarification — whether an amendment would be within the scope of the Bill. We can make progress on the issue in Committee. Can you get us more clarity on where PPOs currently stand in relation to the available suite of information and tools, so that we can satisfy our minds that we have not missed an opportunity to do something of value about their promotion?

Mr Moore: There is no reason to believe that people are not aware of PPOs. Any solicitor will know that a PPO is an option and ought to be advising his or her client whether they should go for a lump sum or a PPO or advising them that they have the option of a PPO if they do not want to take a lump sum. That is the business between a solicitor and a client. Most of these cases do not end up before a court; they are usually settled before they get to court. If they go to court, again, there is no reason to believe that a judge will not be aware that a PPO is an option.

The Chairperson (Mr Storey): There is probably something there that we will want to come back to. Are members content that we give some further consideration to that issue?

Members indicated assent.

Ms S Bradley: May I make one last point? It is not about promoting PPOs. A PPO may be the appropriate vehicle for one claimant and not another. I am thinking particularly of a very young person whose periodical payments may peter out over a lifetime. You have to be mindful of that. Where the Bill sets the discount rate, we are dropping an anchor at the point at which that claimant is negotiating the settlement. At that point in time, we are saying that that is the discount rate that applies to the claimant. Even if the claimant takes the PPO route, that discount rate will apply to them for the remainder of their settlement. Should the Bill address the possibility of a PPO being tracked? Should there be a massive differential between the time at which the settlement was agreed and, say, 30 years later, when the claimant is still in receipt of a PPO? Should the Bill be cognisant of that as opposed to making the assumption that it is one lump sum payment? That is what I am trying to get at.

Mr Moore: May I clarify something there? If there is a PPO, the discount rate is not applied. The discount rate is applied only if there is a lump sum. It is only if there is a lump sum that there is money to invest. The PPO is paid out regularly, so the money is used in real time, if you like. The money is not invested and the returns on the investment are then used to meet a claimant's needs.

Ms S Bradley: I appreciate that. We are making the assumption that it is a lump sum during that settlement period. The Bill states that it is assumed to be a lump sum. Under the heading "Hypothetical investor" of schedule C1, at paragraph 18(b):

> *"the damages are to be assumed to be received in a lump sum (rather than by way of periodical payments)."*

That is where I have a bit of an issue.

Mr Moore: That clarifies that the discount rate applies only when a lump sum is awarded and, therefore, the claimant has a large sum of money to invest. If the claimant opts for a periodical payments order, they will get the money paid to them regularly — I do not know whether it is every year or every six months — for the rest of their life. That amount is then adjusted, as I understand, for

inflation as well, so the question of the claimant having to invest the money does not arise, so the discount rate does not come into it. The Bill relates only to the application of a discount rate when a lump sum is awarded.

Ms S Bradley: OK, I appreciate that. You are saying that the settlement before the periodical payments are set up is the settlement and might not be part of that. Would the discount not be factored in to that?

Mr Moore: The parties will negotiate how much money is needed to meet that person's needs as a result of the personal injury. If the person then opts for a periodical payments order, there is no need to consider how to take into account the returns on the investment of that because the person will not be investing at all, so the discount rate does not come into it at all in that situation. If the person decides that they want to receive a lump sum, the discount rate would be applied at that point.

At clause 1, new paragraph C1(1) sets out the purpose of what we are talking about, which is that a rate of return is to assist the court:

> *"In determining the return to be expected from the investment of a sum awarded as damages".*

The whole purpose of this is in relation to a lump sum and not to a PPO.

Ms S Bradley: My takeaway from that is that, if a claimant goes down the periodical payment route, they would have a zero discount. It would not be applicable.

Mr Moore: Yes, that is right.

Ms S Bradley: I appreciate that. Thank you.

The Chairperson (Mr Storey): Members, that concludes our consideration of the Damages (Return on Investment) Bill. Clerk, do you want to summarise the issues to which we may want to return?

The Committee Clerk: Yes. Members indicated that they may want to return to the 0·5 of a percentage point further margin, although, at this stage, they are not minded to make changes. The second issue was the periodical payments order and whether members have enough information to clarify the position and are happy, whether they want to consider anything further or whether they want to come back to that issue.

The Chairperson (Mr Storey): OK. The formal clause-by-clause consideration will be on 7 October. I thank Martin for being with us. As always, we appreciate his time and involvement. I also thank the Bill Clerk, who listened in. Thank you very much for your time.