



# Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019

## 2019 asp 4

**The Bill for this Act of the Scottish Parliament was passed by the Parliament on 19th March 2019 and received Royal Assent on 24th April 2019**

An Act of the Scottish Parliament to make provision in relation to the assumed rate of return on investment of particular damages awarded in personal injury cases; and to make provision in relation to periodical payments of various damages awarded in personal injury cases.

### PART 1

#### RETURNS ON INVESTMENT OF DAMAGES

#### **1 Assumed return on investment**

(1) Before section 1 of the Damages Act 1996 there is inserted—

##### **“B1 Assumed rate of return on damages invested: Scotland**

- (1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury, a court must take into account the rate of return set by the official rate-assessor.
- (2) However—
  - (a) the court is to do so subject to and in accordance with rules of court (if any) made for the purpose of subsection (1),
  - (b) the court may take a different rate of return into account if a party to the action shows that the different rate is more appropriate in the circumstances of the case.
- (3) Schedule B1 contains provision about setting the rate of return for the purpose of subsection (1).
- (4) In subsection (1), the reference to the official rate-assessor is to—

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- (a) if no regulations under paragraph (b) are in force, the Government Actuary (but, when that office is vacant, the Deputy Government Actuary), or
  - (b) a person appointed in place of the Government Actuary (including the Deputy as referred to in paragraph (a)) by regulations made by the Scottish Ministers.
- (5) Regulations under subsection (4)(b) may provide for a person to deputise for the person appointed in place of the Government Actuary.
- (6) Before making regulations under subsection (4)(b), the Scottish Ministers must obtain the agreement of—
- (a) as respects appointment in place of the Government Actuary, the person to be appointed,
  - (b) as respects deputising as mentioned in subsection (5), the person who is to deputise as provided for.
- (7) Regulations under subsection (4)(b) are subject to the affirmative procedure.”.
- (2) Section 1 of the Damages Act 1996 is repealed.

## 2      **Process for setting rate of return**

- (1) The schedule contains Schedule B1 for insertion into the Damages Act 1996.
- (2) Schedule B1 is to be inserted into the Damages Act 1996 before Schedule 1.

## **PART 2**

### PERIODICAL PAYMENTS OF DAMAGES

## 3      **Award, continuity and index-linking**

- (1) In section 2 of the Damages Act 1996—
  - (a) after subsection (A1) there is inserted—
    - “(A2) A court awarding damages for future pecuniary loss in respect of personal injury—
      - (a) must—
        - (i) consider whether to make an order under which those damages wholly or partly take the form of periodical payments, and
        - (ii) have special regard to the pursuer’s needs and preferences when doing so, and
      - (b) may make such an order with or without the consent of the parties.”,
  - (b) in subsection (1), for the words “in an action for personal injury” there is substituted “in respect of personal injury (other than damages for future pecuniary loss)”,
  - (c) after subsection (1) there is inserted—

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“(1A) A court may not make an order for periodical payments unless it is satisfied that the continuity of payment under the order is reasonably secure.

(1B) When a court makes an order for periodical payments, it must state why it is satisfied that the continuity of payment under the order is reasonably secure.”,

and the title of the section becomes “Periodical payment orders”.

(2) After section 2B of the Damages Act 1996 there is inserted—

**“2C Secure continuity of periodical payments**

- (1) For the purpose of section 2(1A), a court is to assume that the continuity of payment under an order is reasonably secure if—
  - (a) the right to receive the payments would be protected by—
    - (i) a guarantee under section 6 or Schedule 1, or
    - (ii) a scheme under section 213 of the Financial Services and Markets Act 2000 (whether or not as modified by section 4 of this Act), or
  - (b) the source of payment would be a recognised body or office-holder listed in subsection (6).
- (2) In an order for periodical payments, a court may include provision—
  - (a) specifying the method by which the payments are to be made,
  - (b) requiring the person responsible for making the payments to take specified action to secure the continuity of payment, where the continuity of payment is not considered by the court to be reasonably secure by virtue of subsection (1),
  - (c) enabling an application to be made to the court for variation of provision included in the order under paragraph (a) or (b).
- (3) Despite inclusion in an order for periodical payments of provision of the kind mentioned in subsection (2)(a), the payments may be made by a different method if under the different method—
  - (a) the right to receive the payments is protected in one of the ways mentioned in subsection (1)(a), or
  - (b) the source of payment is a recognised body or office-holder listed in subsection (6).
- (4) The court may vary the order in respect of provision of the kind mentioned in subsection (2)(a) or (b) but only if—
  - (a) an application is made to the court in accordance with provision included in the order under subsection (2)(c), and
  - (b) the court is satisfied that the continuity of payment under the order is still reasonably secure (with subsection (1) to be used for this too).
- (5) As regards cases involving future pecuniary loss, subsection (4)(a) does not prevent variation of the order under section 2F(2)(a)(v) (which is about method of payment).

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- (6) This is the list of who is a recognised body or office-holder as referred to in subsections (1)(b) and (3)(b)—
  - (a) a part of the Scottish Administration,
  - (b) each of—
    - (i) a Minister of the Crown,
    - (ii) a department of the Government of the United Kingdom.
- (7) The Scottish Ministers may by regulations—
  - (a) add an entry to the list in subsection (6) so as to include a particular, or category of—
    - (i) health service body,
    - (ii) non-government body,
  - (b) provide for an exception to an entry originally contained in the list in subsection (6) (or remove or modify such an exception provided for in the list).
- (8) Regulations under subsection (7)—
  - (a) may remove an entry added to the list,
  - (b) may not remove an entry originally contained in the list.
- (9) Regulations under subsection (7) are subject to the negative procedure.

## **2D Index-linking of amount of periodical payments**

- (1) Deemed to be incorporated in an order for periodical payments is provision that the amount of the payments is to alter—
  - (a) at such times and in such manner as set by or determined under rules of court, and
  - (b) on the statutory basis applying in the case.
- (2) Subsection (1) does not apply in relation to an order made before the day on which section 3 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 comes into force.
- (3) Provision deemed by subsection (1)(a) and (b) to be incorporated in an order may be modified by the court which makes the order.
- (4) Provision deemed by subsection (1)(b) to be incorporated in an order may be replaced by the court which makes the order, by including provision in the order—
  - (a) for the alternative basis of alteration that is to apply in the case, or
  - (b) for there to be no alteration in the case.
- (5) Provision of the kind mentioned in subsection (4)(a) may specify different bases for different circumstances.
- (6) The statutory basis of alteration as mentioned in subsection (1)(b) is alteration by reference to, whether indicating an upward or downward trend—
  - (a) the retail prices index within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988, or

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- (b) some published information relating to costs, earnings or other monetary factors as is, for use instead of the retail prices index, prescribed in regulations made by the Scottish Ministers.

(7) Regulations under subsection (6)(b)—

- (a) may make different provision for different circumstances,
- (b) are subject to the affirmative procedure.”.

#### **4 Variation or suspension of settlement**

After section 2D of the Damages Act 1996 (see section 3 of this Act) there is inserted—

##### **“2E Variation or suspension of future pecuniary loss award**

- (1) In an order under which damages for future pecuniary loss are wholly or partly to take the form of periodical payments, a court may include provision enabling an application to be made to the court for (either or both)—
  - (a) variation of the order in accordance with section 2F, or
  - (b) suspension of the right to receive payments under the order in accordance with section 2G.
- (2) A court may include provision of the kind described in subsection (1) in an order only if it is satisfied that—
  - (a) there is a chance of a change in the pursuer’s physical or mental condition occurring at some definite or indefinite point in the future, and
  - (b) should the change occur, the pursuer would be significantly over- or under-compensated by the damages being awarded for future pecuniary loss.
- (3) In an order including provision of the kind described in subsection (1), a court—
  - (a) must specify the sort of change in the pursuer’s physical or mental condition which must occur before an application may be made for—
    - (i) variation of the order, or
    - (ii) suspension of the right to receive payments under the order, and
  - (b) may specify a period within which any such application must be made (either generally or in respect of a specified sort of change in the pursuer’s condition).

##### **2F Variation of court-ordered periodical payments**

- (1) A court which has made an order under which damages for future pecuniary loss are wholly or partly to take the form of periodical payments may vary the order.
- (2) In varying the order, the court may—
  - (a) alter the terms on which periodical payments in respect of future pecuniary loss are to be paid, in particular—
    - (i) the amount that is to be paid as a periodical payment,

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- (ii) the basis (if any) on which the amount of the payments is to adjust to reflect inflation,
  - (iii) the frequency of the payments,
  - (iv) the period during which the payments are to be made,
  - (v) the method by which the payments are to be made,
  - (b) award a lump sum instead of, or in addition to, any future periodical payments in respect of future pecuniary loss.
- (3) The court may vary the order only if—
- (a) the order includes provision under section 2E(1) enabling an application to be made for its variation, and
  - (b) it is satisfied that—
    - (i) since the order was made, a change has occurred in the physical or mental condition of the injured person which is of a sort specified in the order in accordance with section 2E(3)(a), and
    - (ii) as a result of the change, the damages awarded for future pecuniary loss will significantly over- or under-compensate the injured person unless the order is varied.
- (4) The court may vary the order only if it is satisfied that the continuity of payment under the order is still reasonably secure (with section 2C(1) to be used for this too).
- (5) Ordinarily, the court may not vary the order—
- (a) where a period within which an application for variation may be made is specified in the order, on an application made outwith that period,
  - (b) more than once in respect of each sort of change specified in the order in accordance with section 2E(3)(a).
- (6) But the court may—
- (a) allow a late application on cause shown by reference to delay in information becoming known to the applicant if it is satisfied that the delay is not attributable to something which the applicant unreasonably failed to do,
  - (b) vary the order despite subsection (5)(a) or (b) if it is satisfied that there are exceptional circumstances justifying doing so.
- (7) A reference in this section to the injured person is to the person who suffered the injury in respect of which the order has been made.

## **2G Suspension of court-ordered periodical payments**

- (1) A court which has made an order under which damages for future pecuniary loss are wholly or partly to take the form of periodical payments may suspend the right to receive payments under the order.
- (2) The court may suspend the right to receive the payments only if—
- (a) the order includes provision under section 2E(1) enabling an application to be made for suspension of the right to receive the payments, and
  - (b) it is satisfied that—

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- (i) since the order was made, a change has occurred in the physical or mental condition of the injured person which is of a sort specified in the order in accordance with section 2E(3)(a), and
  - (ii) as a result of the change, the damages awarded for future pecuniary loss will significantly over-compensate the injured person unless the right to receive the payments is suspended.
- (3) Where a period within which an application for suspension may be made is specified in the order, ordinarily the court may not suspend the right to receive the payments on an application made outwith that period.
- (4) But the court may—
  - (a) allow a late application on cause shown by reference to delay in information becoming known to the applicant if it is satisfied that the delay is not attributable to something which the applicant unreasonably failed to do,
  - (b) suspend the right to receive the payments despite subsection (3) if it is satisfied that there are exceptional circumstances justifying doing so.
- (5) A reference in this section to the injured person is to the person who suffered the injury in respect of which the order has been made.

## **2H Variation or suspension of agreed periodical payments**

- (1) A court may vary an agreement to which subsection (2) applies, or suspend a right to receive periodical payments under such an agreement, in accordance with—
  - (a) this section, and
  - (b) any restrictions on the court's power to do so specified in the agreement.
- (2) This subsection applies to an agreement which—
  - (a) has been made to settle a claim or action for damages in respect of personal injury, and
  - (b) provides—
    - (i) for the agreed damages attributed to future pecuniary loss to take wholly or partly the form of periodical payments, and
    - (ii) that an application may be made to the court under this subsection in the event that at some definite or indefinite point in the future a change of a sort specified in the agreement occurs in the physical or mental condition of the injured person.
- (3) If the court is satisfied that the test in subsection (5) is met, it may—
  - (a) vary the agreement by altering the terms relating to payments for future pecuniary loss, or
  - (b) suspend the right to receive payments for future pecuniary loss under the agreement.
- (4) In varying the agreement under subsection (3)(a), the court may—
  - (a) alter the terms on which periodical payments for future pecuniary loss are to be paid, in particular—

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- (i) the amount that is to be paid as a periodical payment,
  - (ii) the basis (if any) on which the amount of the payments is to adjust to reflect inflation,
  - (iii) the frequency of the payments,
  - (iv) the period during which the payments are to be made,
  - (v) the method by which the payments are to be made,
  - (b) award a lump sum instead of, or in addition to, any future periodical payments in respect of future pecuniary loss.
- (5) The test for the purpose of subsection (3) is that—
- (a) since the agreement was made, a change has occurred in the physical or mental condition of the injured person which is of a sort specified in the agreement as envisaged by subsection (2)(b)(ii), and
  - (b) as a result of the change, the damages agreed for future pecuniary loss will significantly over- or under-compensate the injured person unless—
    - (i) the agreement is varied, or
    - (ii) the right to receive payments for future pecuniary loss under the agreement is suspended.
- (6) A reference in this section to the injured person is to the person who suffered the injury in respect of which the agreement has been made.

## **2I Lifting of suspension of periodical payments**

- (1) A court which has suspended a person's right to receive periodical payments under section 2G or 2H may lift the suspension if it is satisfied that—
- (a) there has been a change in the physical or mental condition of the injured person since the right to receive the payments was suspended, and
  - (b) the injured person will be significantly under-compensated unless the suspension is lifted.
- (2) A reference in this section to the injured person is to the person who suffered the injury in respect of which the order or (as the case be) the agreement in question has been made.”.

## **5 Liability for bearing expenses in case**

After section 2I of the Damages Act 1996 (see section 4 of this Act) there is inserted—

### **“2J Liability for bearing certain expenses**

- (1) No court may make an award of expenses against the injured person in respect of any expenses which relate to—
- (a) qualifying proceedings, or
  - (b) appeal proceedings.
- (2) The exception to this is where the injured person conducts the qualifying or (as the case may be) appeal proceedings otherwise than in an appropriate manner.
- (3) Qualifying proceedings are proceedings—



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- (a) by virtue of section 2C(4), as to variation of an order,
  - (b) by virtue of section 2F, as to variation of an order,
  - (c) by virtue of section 2G, as to suspension of a right in relation to an order,
  - (d) by virtue of section 2H as to variation of an agreement or as to suspension of a right in relation to an agreement, or
  - (e) by virtue of section 2I—
    - (i) as to lifting of a suspension of a right under section 2G in relation to an order, or
    - (ii) as to lifting of a suspension of a right under section 2H in relation to an agreement.
- (4) Appeal proceedings are proceedings in an appeal arising from qualifying proceedings.
- (5) In the case of qualifying proceedings or appeal proceedings concerning something sought in relation to an agreement, the rule and the exception in this section about an award of expenses are subject to any wholly or partly different provision in the agreement that governs the matter of who is to bear any expenses of the kind covered by this section.
- (6) In the case of qualifying proceedings or appeal proceedings concerning something sought in relation to an order, the rule in this section about an award of expenses is subject to any further exceptions specified in an act of sederunt as mentioned in section 8(6) of the Civil Litigation Act.
- (7) The issue of whether the injured person conducts qualifying proceedings or appeal proceedings in an appropriate manner is to be determined in accordance with section 8(4) and (5) of the Civil Litigation Act (with the references there to the claim or proceedings to be read in connection with this section as if to the qualifying or (as the case may be) appeal proceedings).
- (8) This section is without prejudice to section 8(1) to (3) of, together with section 8(4) to (7) of, the Civil Litigation Act.
- (9) In this section—
- (a) a reference to the injured person—
    - (i) is to the person who suffered the injury in respect of which the order or (as the case be) the agreement in question has been made, but
    - (ii) includes someone representing or responsible for the interests of the injured person where the injured person is not a party in the qualifying or (as the case may be) appeal proceedings in the injured person’s own name,
  - (b) “the Civil Litigation Act” means the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.”.

## **6 Restriction on assignation by recipient**

After section 4 of the Damages Act 1996 there is inserted—

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**“4A Periodical payments: restriction on assignation**

- (1) An assignation of a qualifying right to receive the portion of periodical payments which falls within the description in subsection (2) is of no effect unless the assignation is approved by the relevant court.
- (2) The portion with respect to subsection (1) is the portion of periodical payments which is identified, in the order or agreement under which the periodical payments in total are made, as relating wholly to expenditure likely to be incurred by or for the person as a result of the personal injury concerned.
- (3) Approval may be given by the relevant court in connection with subsection (1) only if it is satisfied that special circumstances make the assignation necessary.
- (4) Subsection (1) does not prevent a right to receive periodical payments from being assigned, without the relevant court’s approval, to the scheme manager established under section 212 of the Financial Services and Markets Act 2000.
- (5) Subsection (1) does not apply if the order or agreement in question was made before the day on which section 6 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 comes into force.
- (6) For the purposes of this section, a qualifying right to receive periodical payments is a right to receive payments of that type which arises from (including as varied)—
  - (a) an order made under section 2,
  - (b) an agreement made pursuant to such an order, or
  - (c) an agreement—
    - (i) made to settle a claim or action for damages in respect of personal injury, and
    - (ii) providing for the agreed damages attributed to future pecuniary loss to take wholly or partly the form of periodical payments.
- (7) The references in this section to the relevant court are—
  - (a) in relation to an order under section 2, to the court which made the order,
  - (b) in relation to an agreement mentioned in subsection (6)(b), to the court which made the order to which the agreement is pursuant,
  - (c) in relation to an agreement mentioned in subsection (6)(c), to a court which could have heard the claim or action for the damages in respect of which the agreement was made.”.

**7 Protection on occurrence of insolvency**

- (1) After section 4A of the Damages Act 1996 (see section 6 of this Act) there is inserted—

**“4B Periodical payments for future pecuniary loss: insolvency**

- (1) A trust deed which provides for the transfer to the trustee of a right to receive relevant periodical payments as described in subsection (4) cannot have protected status by virtue of section 163(1) of the Bankruptcy Act.

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- (2) Under a protected trust deed as mentioned in section 163(1) of the Bankruptcy Act, a person cannot be required to pay to the trustee by way of a contribution from income the portion of periodical payments which falls within the description in subsection (5).
  - (3) Where the estate of a person who has a right to receive periodical payments is sequestrated—
    - (a) in the operation of the Bankruptcy Act—
      - (i) relevant periodical payments as described in subsection (4) are to be treated as income,
      - (ii) neither the right to receive relevant periodical payments as described in subsection (4), nor any property or arrangement designed to protect their continuity, is to be regarded as forming part of the person's estate,
    - (b) a debtor contribution order under section 90(1) of the Bankruptcy Act may not require the portion of periodical payments which falls within the description in subsection (5) to be paid to the trustee.
  - (4) The references in subsections (1) and (3)(a) to relevant periodical payments are to periodical payments awarded or agreed, or to periodical payments in so far as awarded or agreed, as damages for future pecuniary loss.
  - (5) The portion with respect to subsections (2) and (3)(b) is the portion of periodical payments which is identified, in the order or agreement under which the periodical payments in total are made, as relating wholly to expenditure likely to be incurred by or for the person as a result of the personal injury concerned.
  - (6) Subsections (1) to (3) do not apply if—
    - (a) the right to receive the periodical payments has been assigned since the order or agreement giving rise to the right was made, and
    - (b) the person who has the right to receive the periodical payments is not spending them for the benefit of the person who suffered the injury in respect of which that order or agreement was made.
  - (7) Subsections (1) to (3) do not apply if the order or agreement in question was made before the day on which section 7 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 comes into force.
  - (8) For the purposes of this section, periodical payments are payments of that type made, or to be made, by virtue of (including as varied)—
    - (a) an order made under section 2,
    - (b) an agreement made pursuant to such an order, or
    - (c) an agreement made to settle a claim or action for damages in respect of personal injury.
  - (9) In this section, “the Bankruptcy Act” means the Bankruptcy (Scotland) Act 2016.”.
- (2) In section 78 of the Bankruptcy (Scotland) Act 2016, in subsection (2)—
- (a) the words “section 88” become paragraph (a),
  - (b) after that paragraph (as so numbered) there is inserted “, and
  - (b) section 4B(3)(a) of the Damages Act 1996.”.

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### **PART 3**

#### **ANCILLARY AND FINAL MATTERS**

#### **8 Ancillary provision**

- (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.
- (2) Regulations under subsection (1) may—
  - (a) modify any enactment (including this Act),
  - (b) make different provision for different purposes.
- (3) Regulations under subsection (1)—
  - (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act,
  - (b) otherwise, are subject to the negative procedure.

#### **9 Commencement**

- (1) These provisions come into force on the day after Royal Assent—
  - (a) section 8,
  - (b) this section and section 10.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
- (3) Regulations under subsection (2) bringing into force any provisions containing any text referring to the day on which the provisions come into force may amend the text so that the text specifies the date on which the provisions actually come into force.
- (4) Regulations under subsection (2) may—
  - (a) include transitional, transitory or saving provision,
  - (b) make different provision for different purposes.

#### **10 Short title**

The short title of this Act is the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019.

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## SCHEDULE

*(introduced by section 2(1))*

### INVESTMENTS: SETTING RATE OF RETURN

This is Schedule B1 for insertion into the Damages Act 1996—

#### “SCHEDULE B1

*(introduced by section B1(3))*

#### SETTING THE RATE FOR SECTION B1(1): SCOTLAND

##### **Regular review of rates of return**

- 1 (1) The rate-assessor must review any original rate of return.
  - (2) A review under sub-paragraph (1) must be started by the rate-assessor on the appointed day.
  - (3) For the purpose of this paragraph—
    - (a) an original rate of return is—
      - (i) a rate of return to which paragraph 27(1) applies, or
      - (ii) the position of there being no rate of return to which paragraph 27(1) applies,
    - (b) the appointed day is the day on which the schedule of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 comes into force.
- 2 (1) The rate-assessor must review every subsequent rate of return.
  - (2) A review under sub-paragraph (1) must be started by the rate-assessor—
    - (a) on the day after the last day of the 5-year period, or
    - (b) earlier within the 5-year period as is required by the Scottish Ministers.
  - (3) Where a review under sub-paragraph (1) is started earlier by virtue of sub-paragraph (2)(b), it is to be treated as an extra review that does not affect the running of the 5-year period in relation to the previous review (and no 5-year period runs under sub-paragraph (2)(a) in relation to the extra review).
  - (4) For the purpose of this paragraph—
    - (a) a subsequent rate of return is a rate of return that is set—
      - (i) for the time being (including by reason of an extra review as mentioned in sub-paragraph (3)), and
      - (ii) subsequently to an original rate of return as described in paragraph 1(3)(a) (including as a result of a review under sub-paragraph (1) conducted from time to time by virtue of the continuing operation of sub-paragraph (2)(a) and (b)),
    - (b) the 5-year period is the period of 5 years beginning with the day on which the previous review of a rate of return must be started (ignoring an extra review as mentioned in sub-paragraph (3)).
- 3 (1) A review of a rate of return under paragraph 1(1) or 2(1) must be concluded by the rate-assessor within the 90-day period.

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- (2) For the purpose of this paragraph, the 90-day period is the period of 90 days beginning with the day on which the review must be started by the rate-assessor.

### **Overview as to rate-setting**

- 4 (1) The conduct by the rate-assessor of a review of a rate of return under paragraph 1(1) or 2(1) is governed by—
- (a) paragraphs 5 to 7,
  - (b) paragraphs 9 and 10,
  - (c) paragraphs 12 and 13,
  - (d) paragraphs 19 to 21.
- (2) A rate of return is to be set as a result of a review under paragraph 1(1) or 2(1) accordingly (plus see paragraph 23 as to reporting afterwards on the conduct of such a review).
- 5 In a review under paragraph 1(1) or 2(1), the rate-assessor must determine whether a rate of return to be set is to be—
- (a) different from the rate of return with which the review is concerned, or
  - (b) the same as the rate of return with which the review is concerned.
- 6 In a review under paragraph 1(1) or 2(1), the rate-assessor must have regard to views—
- (a) of any person whom the rate-assessor chooses to consult, and
  - (b) of any person whose advice the rate-assessor chooses to seek,
- where received by the rate-assessor timeously in connection with the review.

### **Returns-based assessment**

- 7 (1) The basis on which the rate-assessor is to make a rate determination in a review under paragraph 1(1) or 2(1) is as narrated in sub-paragraph (2).
- (2) A rate of return should reflect the return that could reasonably be expected to be achieved by a person who invests—
- (a) in the notional portfolio, and
  - (b) for a period of 30 years.
- (3) This is without prejudice to paragraphs 10 and 20 (with paragraph 10 to be met before paragraph 20 is met).
- (4) For the notional portfolio, see the table in paragraph 12(3).
- 8 The Scottish Ministers may by regulations modify a period mentioned in paragraph 7(2).
- 9 (1) Allowance must be made by the rate-assessor for the impact of inflation on the value of the return or investment to which paragraph 7(2) relates.
- (2) The impact of inflation is to be allowed for by reference to, whether indicating an upward or downward trend—
- (a) the retail prices index within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988, or

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- (b) some published information relating to costs, earnings or other monetary factors as is, for use instead of the retail prices index, prescribed in regulations made by the Scottish Ministers.

### Standard adjustments

- 10 (1) The standard adjustments must be made by the rate-assessor to a rate of return that would be arrived at but for this paragraph.
- (2) The standard adjustments are the deduction of—
  - (a) 0.75 of a percentage point, to represent—
    - (i) the impact of taxation, and
    - (ii) the costs of investment advice and management, and
  - (b) 0.5 of a percentage point, as the further margin involved in relation to the rate of return.
- 11 (1) The Scottish Ministers may by regulations modify a figure appearing in paragraph 10(2)(a) or (b) (and update the adjacent text so that percentage points are referred to correctly in the singular or plural).
- (2) A figure as so modified—
  - (a) may be zero or a positive number,
  - (b) if not a whole number (including zero), may comprise or incorporate a decimal fraction.

### Notional investment portfolio

- 12 (1) As for the basis on which the rate-assessor is to proceed by virtue of paragraph 7(1), the notional portfolio is a combination of various types of things for investment in.
- (2) In the table—
  - (a) the first column shows the types of things that the portfolio is composed of,
  - (b) the second column shows the percentage that each of the types of things is of the portfolio.
- (3) Here is the table—

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cash or equivalents	10%
nominal gilts	15%
index-linked gilts	10%
UK equities	7.5%
overseas equities	12.5%
high-yield bonds	5%
investment-grade credit	30%
property (heritable or moveable)	5%
other types (see the examples)	5%

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- (4) Examples of other types as mentioned at the bottom of the first column of the table are infrastructure, commodities, hedge funds and absolute return funds.

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- 13 So far as necessary, if—
- (a) an entry in the first column of the table is not ascribed meaning by regulations under paragraph 14, or
  - (b) any associated examples are not ascribed meaning by regulations under paragraph 14,
- the entry is or (as the case may be) examples are to be interpreted by the rate-assessor as appropriate by bringing to bear professional knowledge of what the relevant terminology is commonly understood to mean in investment contexts.

#### **Details within portfolio**

- 14 The Scottish Ministers may by regulations ascribe meaning to—
- (a) an entry in the first column of the table in paragraph 12(3),
  - (b) any associated examples.
- 15 (1) The Scottish Ministers may by regulations—
- (a) as respects the first column of the table in paragraph 12(3), add, remove or modify an entry or any associated examples,
  - (b) as respects the second column of the table—
    - (i) add or remove a figure,
    - (ii) modify a figure.
- (2) A figure so added, or as so modified—
- (a) may be zero or a positive number,
  - (b) if not a whole number (including zero), may comprise or incorporate a decimal fraction.

#### **Hypothetical investor**

- 16 (1) Before a review under paragraph 2(1) is due to start, the Scottish Ministers must consider whether regulations under paragraph 14 or 15 are necessary for ensuring that the notional portfolio remains suitable for investment in by a hypothetical investor.
- In considering the matter, the Scottish Ministers must consult such persons as they consider appropriate.
- (2) In considering the matter, the Scottish Ministers must consult such persons as they consider appropriate.
- (3) No consideration of the matter is required ahead of an extra review as mentioned in paragraph 2(3).
- (4) For who is a hypothetical investor, see paragraph 17(1).
- 17 (1) A hypothetical investor is someone who falls within each of sub-paragraphs (2) to (4).
- (2) That is, someone who—
- (a) is a recipient of damages, and
  - (b) will—
    - (i) invest the damages, and
    - (ii) do so as properly advised.



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- (3) That is, someone who—
    - (a) has no financial resources, apart from the damages, that can be used to meet the losses and expenses for which the damages are awarded, and
    - (b) will make withdrawals from the investment fund deriving from investment of the damages.
  - (4) That is, someone whose objectives are of securing that the damages will—
    - (a) meet the losses and expenses for which the damages are awarded, and
    - (b) be exhausted at the end of the period for which the damages are awarded.
- 18 For the purpose of paragraphs 16 and 17—
- (a) a reference to damages is to damages of the kind mentioned in section B1(1), and
  - (b) the damages are to be assumed to be received in a lump sum (rather than by way of periodical payments).

### **Expression of rates set**

- 19 (1) A rate of return is to be set by the rate-assessor as a percentage figure.
- (2) The figure may be—
- (a) zero, or
  - (b) a negative or positive number.
- (3) If the figure is not a whole number (including zero), the number is to comprise or incorporate a decimal fraction of 0.25, 0.5 or 0.75.
- 20 (1) A rate of return that would be arrived at but for this paragraph is to be rounded up or down by the rate-assessor to the nearest figure permitted, if necessary so as to come to—
- (a) a whole number (including zero), or
  - (b) a number comprising or incorporating a decimal fraction of 0.25, 0.5 or 0.75.
- (2) If two permitted figures are equally near when rounding under sub-paragraph (1) arises, rounding is to be to whichever of the figures is reached—
- (a) from the positive side of zero, by going towards (or to) zero, or
  - (b) from the negative side of zero, by going further below zero.

### **Single or multiple rates**

- 21 (1) Except where the Scottish Ministers by regulations require more than one rate of return to be set by the rate-assessor, a rate of return is to be set so as to have effect for all cases.
- (2) Where more than one rate of return is set for the time being by virtue of regulations under sub-paragraph (1), a review under paragraph 1(1) or 2(1) is to be conducted separately in relation to each rate of return (and a reference in paragraph 2(4)(b) to the previous review is to be read as necessary for this).
- 22 Regulations under paragraph 21(1) must—
- (a) specify the circumstances to which each rate of return is to relate,

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- (b) require the rate-assessor's report under paragraph 23 to cover each rate of return separately.

### **Reporting and effective date**

- 23 (1) After a review under paragraph 1(1) or 2(1) is concluded, the rate-assessor must send to the Scottish Ministers a report on the conduct of the review.
- (2) The report is to be sent to the Scottish Ministers without undue delay (and no later than on the last day of the 90-day period described in paragraph 3(2)).
- (3) The report is to—
- (a) include—
- (i) a rate determination made in the review,
- (ii) a summary of the calculation of the rate of return (which may be accompanied by explanatory or supporting material),
- (b) state the day on which the report is sent to the Scottish Ministers (and the day on which the review is concluded).
- 24 (1) The Scottish Ministers must lay the report before the Scottish Parliament as soon as practicable after the day on which they receive the report from the rate-assessor.
- (2) The rate-assessor must publish the report on the same day as the report is laid before the Scottish Parliament by the Scottish Ministers.
- 25 A rate determination comes into effect at the beginning of the day after the day on which the report including the determination is laid before the Scottish Parliament by the Scottish Ministers.

### **Reimbursement of costs**

- 26 (1) The Scottish Ministers must adequately reimburse the rate-assessor for costs, including as to staff and outlays, incurred by the rate-assessor in exercising the rate-assessor's functions with respect to a review under paragraph 1(1) or 2(1).
- (2) No reimbursement is owed under sub-paragraph (1) if the rate-assessor is part of the Scottish Administration.

### **Transitional arrangements**

- 27 (1) This sub-paragraph applies to a rate of return—
- (a) prescribed by an order made under section 1(1) of the Damages Act 1996, and
- (b) having effect—
- (i) in relation to Scotland, and
- (ii) immediately before the appointed day.
- (2) A rate of return to which sub-paragraph (1) applies is to be treated from the appointed day as if it were set for the purpose of section B1(1).
- (3) For the purpose of this paragraph, the appointed day is the day on which the schedule of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 comes into force.

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- 28 (1) A review under paragraph 1(1) of the position of there being no rate of return cannot cause the maintaining of that position, so in conducting such a review in relation to that position—
- (a) paragraphs 5(a) and 33(5)(a) are to be read as if referring to a rate of return of some sort, and
  - (b) paragraphs 5(b) and 33(5)(b) are to be ignored.
- (2) On the question of a review under paragraph 1(1) of the position of there being no rate of return, see paragraph 1(3)(a)(ii).
- 29 (1) Paragraph 6 extends to views received, in advance of the appointed day, in anticipation of the starting of a review under paragraph 1(1).
- (2) For the purpose of this paragraph, the appointed day is the day on which the schedule of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 comes into force.
- 30 (1) Paragraph 26 extends to costs incurred, in advance of the appointed day, in anticipation of the starting of a review under paragraph 1(1).
- (2) For the purpose of this paragraph, the appointed day is the day on which the schedule of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 comes into force.

### **Procedure for regulations**

- 31 (1) Regulations under this schedule may—
- (a) make provision to apply in all cases, or
  - (b) make different provision for different circumstances.
- (2) Regulations under this schedule are subject to the affirmative procedure.

### **Interpretation of schedule**

- 32 In this schedule, a reference to the rate-assessor is to the official rate-assessor as mentioned in section B1(1).
- 33 (1) Sub-paragraphs (2) to (5) are also for construing this schedule.
- (2) A rate of return is a rate of return for the purpose of section B1(1).
- (3) A rate of return is set as a result of a review under paragraph 1(1) or 2(1) on the making in the review of a rate determination by the rate-assessor.
- (4) A review of a rate of return under paragraph 1(1) or 2(1) is concluded when the rate-assessor makes a rate determination in the review.
- (5) A rate determination is a determination by the rate-assessor that is to be made in a review under paragraph 1(1) or 2(1) of what the new rate of return is, either—
- (a) different from the rate of return under review, or
  - (b) the same as the rate of return under review.”.