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

2019 asp 4

PROSPECTIVE

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—

"(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.

Status: *This version of this part contains provisions that are prospective.*
Changes to legislation: *There are currently no known outstanding effects for the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019, PART 2. (See end of Document for details)*

(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).

(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

(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.”.

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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,
    (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—

(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.

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(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—

(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—

(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,

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(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—

"**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.

(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).

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Changes to legislation: *There are currently no known outstanding effects for the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019, PART 2. (See end of Document for details)*

(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.”.

Status:
This version of this part contains provisions that are prospective.

Changes to legislation:
There are currently no known outstanding effects for the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019, PART 2.