

DAMAGES (INVESTMENT RETURNS AND PERIODICAL PAYMENTS) (SCOTLAND) ACT 2019

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

The structure of the Act

Part two – Periodical payments of damages

Section 3 – Award, continuity and index-linking

28. [Section 3\(1\)](#) of the Act amends section 2 of the 1996 Act. It inserts a new subsection (A2) which requires a court awarding damages for future pecuniary loss to consider whether to make an order under which the whole or part of those damages would take the form of periodical payments (a “periodical payment order”). In doing so courts must have special regard to the pursuer’s needs and preferences. The new subsection also gives courts the power to make such a periodical payment order without the consent of the parties. When awarding damages for losses other than future pecuniary loss (e.g. damages for pain and suffering and loss of expectation of life (known as *solatium*) or past pecuniary loss) the court will still have the power to make periodical payment orders under subsection (1) but only with the consent of the parties.
29. Section 2 of the 1996 Act is also amended by the insertion of new subsections (1A) and (1B). Subsection (1A) requires the court to be satisfied that the continuity of the payments is reasonably secure before it makes a periodical payments order. The court must also set out its reasons for being satisfied that the continuity of payment would be reasonably secure (subsection (1B)). These requirements apply whether the order is to be made under subsection (A2) or under subsection (1).
30. [Section 3\(2\)](#) of the Act inserts a new section 2C in the 1996 Act which makes further provision concerning the continuity of periodical payments. Paragraphs 31 to 37 below describe the effects of the particular provisions in the inserted section 2C. The new section 2C is stated to be inserted after section 2B, despite there being no existing sections 2A and 2B in the Scottish text of the 1996 Act. This acknowledges the existence of sections 2A and 2B as part of the law of England and Wales and Northern Ireland (see the Courts Act 2003, section 100).
31. Subsection (1) provides that continuity of payments is assumed to be reasonably secure if it is protected by either a ministerial guarantee or the Financial Services Compensation Scheme, or where the source of the payments is a recognised body or office-holder (on which see the notes on subsections (6) and (7) below). The court will not be bound to follow that assumption where, for example, it is presented with evidence which suggests the payments would not, in fact, be reasonably secure.

*These notes relate to the Damages (Investment Returns and Periodical Payments)
(Scotland) Act 2019 (asp 4) which received Royal Assent on 24 April 2019*

32. Subsection (2) enables the court to include in a periodical payment order provision about the method of payment and any steps which the person responsible for paying (the defender/compensator) must take to secure continuity of payment. The court will not be able to make provision about such steps where the circumstances covered by subsection (1) apply (i.e. where the payment is assumed to be reasonably secure for a reason given there).
33. Subsection (2)(c) allows the court to pave the way for the provisions on method of payment or required steps to be varied on a subsequent application to the court. If no such provision is included it will not be possible for the court to vary the order under subsection (4) (see paragraph 35 below).
34. Subsection (3) permits the use of a payment method other than that specified in the order, but only where the other method is backed by one of the protections or secure sources mentioned at paragraph 31 above.
35. Subsection (4) allows an application to be made to the court for a variation of the order's provisions on how the payment is to be made. This power to vary the order is distinct from the power under section 2F (see below). Subsection (4) ensures that a court can only exercise this power of variation where the way for the application has been paved when the original order was made and where, after variation, the continuity of periodical payments will remain reasonably secure.
36. Subsection (5) ensures that the provisions of subsection (4)(a) do not prevent the method of payment being altered under section 2F(2)(a)(v) where a periodical payment order relating to damages for future pecuniary loss is varied.
37. Subsection (6) lists the bodies and office-holders that are recognised for the purposes of subsections (1)(b) and (3)(b). The list comprises the core central government departments, bodies and ministers (both UK Government and Scottish Government), but subsections (7) and (8) allow the Scottish Ministers to make regulations (subject to the negative procedure) changing the list. This will permit bodies within the National Health Service or outside government to be added where the Scottish Ministers consider it appropriate that the assumption in subsection (1) should apply to those bodies. Similarly, it will allow additions to the list to be removed where the Scottish Ministers no longer consider it appropriate for the assumption to apply.
38. [Section 3\(2\)](#) of the Act also inserts a new section 2D into the 1996 Act. Subsection (1), read with subsection (6) deems there to be included in any periodical payment order a requirement for the amount of payments to be altered at intervals. This allows the real value of periodical payments to be preserved over the whole period for which they are payable. In the absence of provision to the contrary the amount of payments is to be altered by reference to the retail prices index, with rules of court prescribing the timing, frequency and manner of alterations.
39. Subsections (3), (4) and (5) provide for courts to have the power to modify the deemed requirement, including the power to substitute an alternative basis of alteration or to order that there should be no alteration. Subsection (6)(b) also gives the Scottish Ministers the power to prescribe an alternative to the retail prices index as the default basis of alteration.
40. These provisions on index linking apply to orders made under section 2(A2) of the 1996 Act (inserted by section 3(1)(a)) and to those made under section 2(1). They will not apply to orders made before the commencement of section 3 of the Act (subsection (2)).