

Indexation of Periodical Payments for Care

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*Damages (Investment Returns and Periodical Payments)
(Scotland) Bill Part 2—Periodical payments of damages*

2D (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

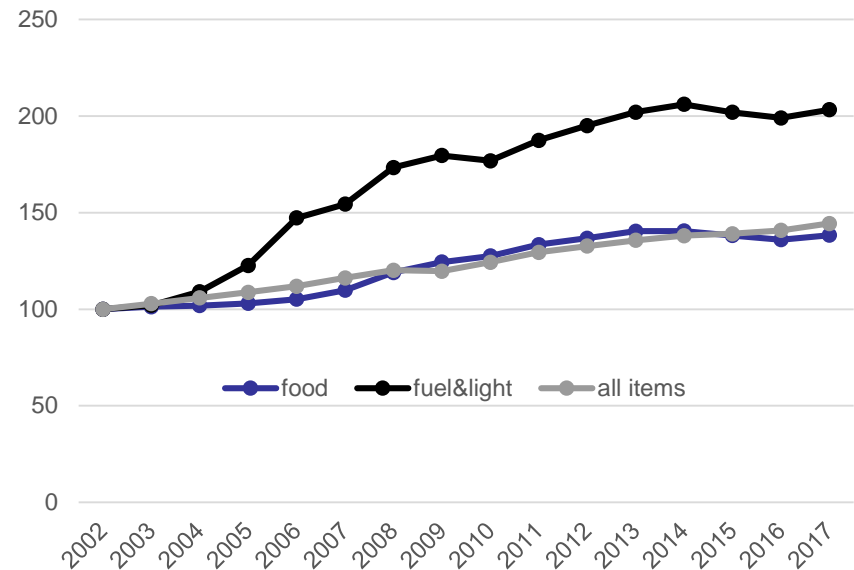
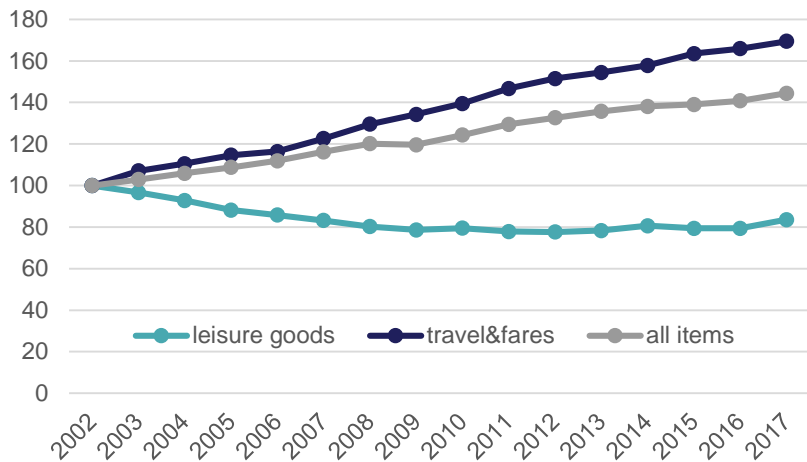
(b) some published information relating to costs, earnings or other monetary factors as is, for use instead of the retail prices index, prescribed in regulations made by the Scottish Ministers.

Indexation

1. Inflation-proofing is required in a PPO
2. Distribution of inflation rates
3. Match index to expenditure
4. Mis-match will lead to over- or under-compensation (accumulative and limited flexibility to accommodate)
5. Care costs largely comprise earnings
6. Historically earnings increase faster than prices

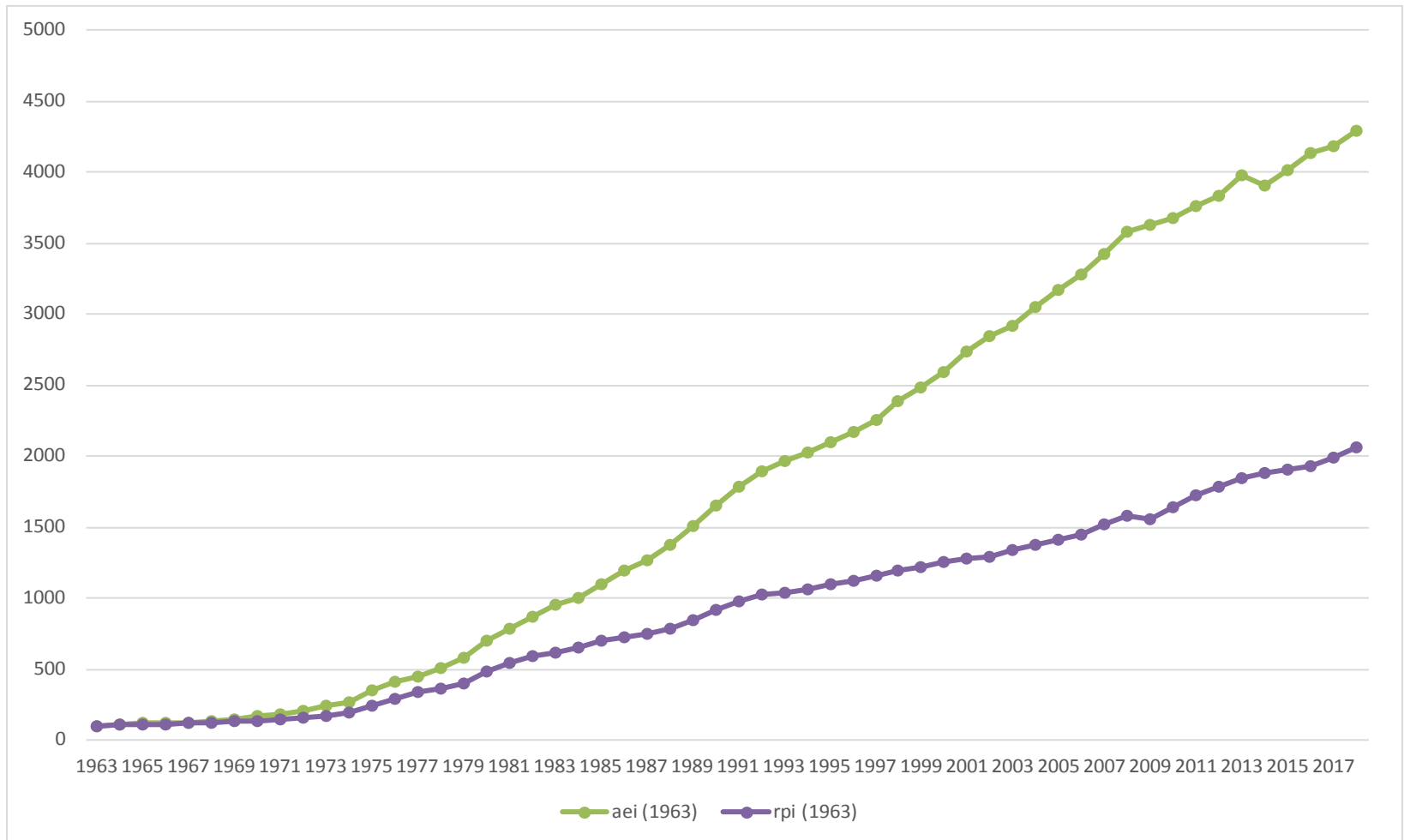
Cropper and Wass (2009) Periodical Payment Awards and the Transfer for Risk in Ward J and Thornton R (eds.) *Personal Injury and Wrongful Death Damages calculations: Transatlantic Dialogue* Emerald Books

Differences in inflation rates



Note on RPI: Discredited as an index in 2016. It no longer has the 'National Statistic' quality mark. Due to the way it is calculated, it overstates price inflation. It has been replaced by the CPI as a measure of domestic inflation. The wedge between RPI and CPI is roughly 1 percentage point. ILGS remain linked to RPI.

Average earnings and RPI (1963-2018)



Mismatch between index and expenditure and the cumulative shortfall

- An annual payment of £1,000 in 1963 indexed to RPI would have risen to £20,615 in 2018.
- An annual expenditure of £1,000 in 1963 which increases by average earnings would have risen to £42,963 in 2018.
- The annual payment linked to RPI meets only 48 per cent of an earnings-linked expenditure in 2018.

Mackay J's seven criteria

- I. Precisions – accuracy of match to type of expenditure
- II. Authority of the collector
- III. Statistical reliability
- IV. Accessibility
- V. Consistency over time past
- VI. Reproducibility into the future
- VII. Simplicity and workability in application

Corbett v South Yorkshire SHA March 28 2007
RH v United Bristol Healthcare NHS Trust EWHC 1441
Court of Appeal Thompstone para 71

What is the expenditure and how can we measure it?

- Earnings of a particular type of carer in the direct employment of a private household
- No direct measure
- Alternative proxy measures
- Do the proxy measures provide a better match than the RPI?

Retail Prices Index (RPI)

- Measures of prices growth based upon the cost of a basket of goods and services consumed by a typical household
- Contents of basket and weights are revised annually
- Published as a monthly, quarterly and annual index by ONS
- Home care accounts for 0.1 per cent of the RPI basket

=> RPI basket is a poor match for care head of loss

Two earnings series (AEI and ASHE)

1. Average earnings Index (AEI) (1963-2010)
Average weekly earnings AWE (2000-2018)
2. Annual Survey of Hours and Earnings (ASHE)
(1997-2017)

Average Earnings Index (AEI)/ AWE

- Aggregate earnings growth
- Average (mean) weekly earnings
- Includes overtime, bonuses, no disaggregation
- Based upon a salary survey of 8,400 employers (9 million employees)
- Employment weights are revised annually
- Published as a monthly level and as a monthly index
- Firms of less than 20 employees are excluded (excludes carers directly employed by the claimant)
- Average level of weekly earnings in 2018 was £516. This higher than the average for carers (£291) and for highly paid carers in claimant care plans (£403).
- Mean provides a distorted view of the centre of a distribution which is non-symmetrical

Annual Survey of Hours and Earnings (ASHE)

- 1 per cent random sample of all PAYE employees (includes carers directly employed by the claimant) undertaken by ONS
- Collected annually for first full week in April
- Provisional statistics published in October/November/December with and final statistics the following year
- Mean and deciles (10th to 90th)
- Detailed earnings data – annual, weekly, hourly, base pay, incentive pay, overtime pay
- Disaggregation by occupation, industry, age, place of work, level of earnings, sex and part-time/full-time (but not all together)

ASHE 6115 (6145 and 6146)

Core tasks for care workers and home carers

- assists and enables service users to dress, undress, wash, use the toilet and bathe;
- serves meals to service users at table or in bed and assists with feeding if required;
- generally assists with service users' overall comfort and well being;
- provides interest and activities to stimulate and engage the service user;
- helps with daily activities such as letter writing, paying bills, collecting benefits;
- undertakes light cleaning and domestic duties including meal preparation as required;
- monitors service users' conditions by taking temperature, pulse, respiration and weight, and contributes to record keeping;
- liaises with professional staff in carrying out care plans etc.

Capture impacts on pay which are occupation-specific

1. Regulations -Care Standards, Manual Handling Regulations, European Working Time Directive
2. Labour market shortage/surplus
3. Change in skill mix
4. Professionalisation/de-professionalisation of care
5. Digital platforms, robotics, artificial intelligence
6. Demographic time bomb (ageing population)
7. Change in immigration

Defendants' arguments against ASHE 6115

1. Imprecision -includes distortionary factors (carers other than those in private sector, directly-employed in claimant's home, with complex needs and in the exact geographical location)
2. Pay drift is a distortionary factor

Pay Drift

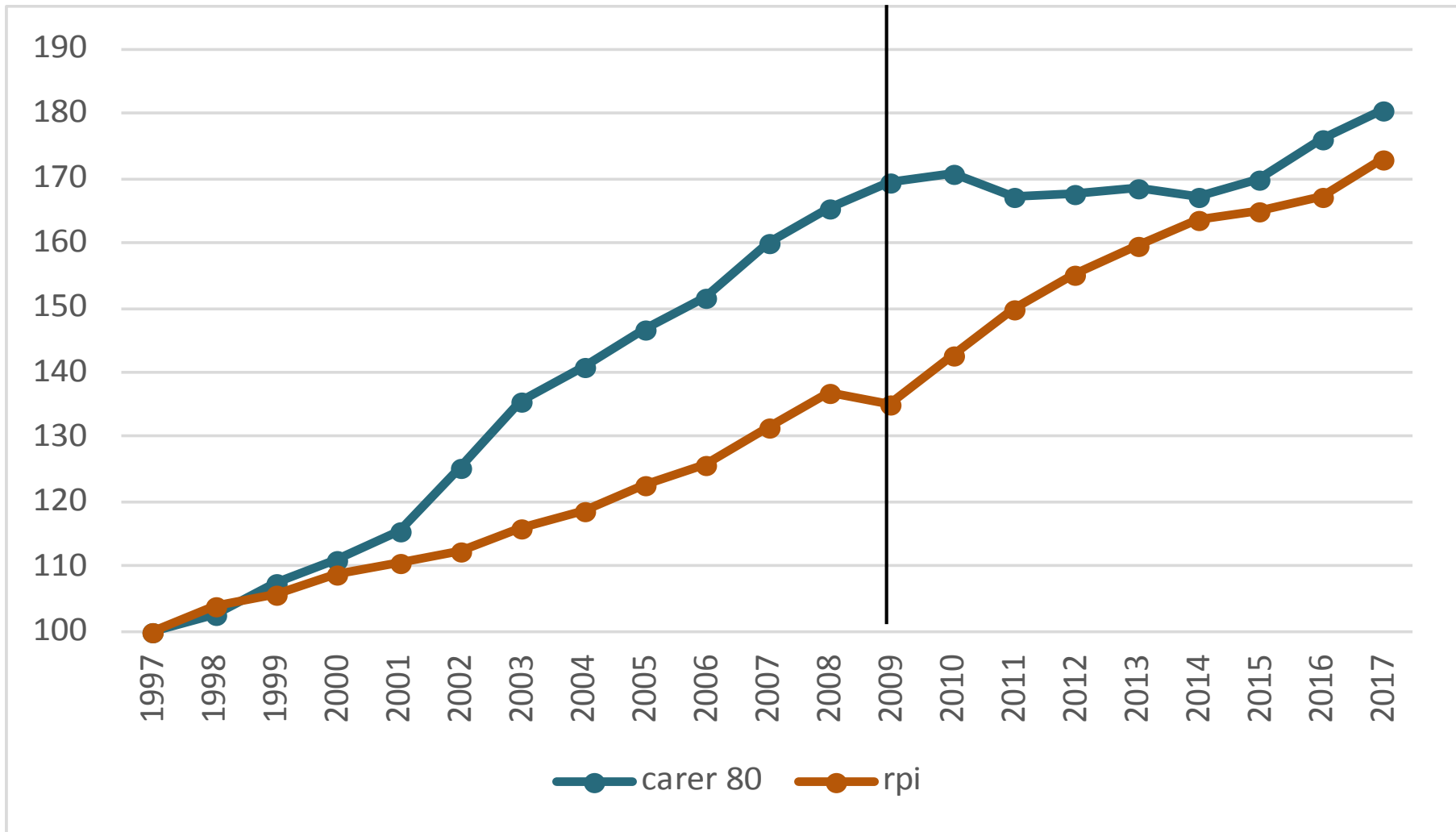
- Extent to which a measure of earnings growth exceeds a measure of wage settlement growth (cost of living increase)
- Service-based increments, promotion-based increments, increases which reflect labour shortage, productivity/merit based increments and changes in the skill or qualification mix (compositional change)

Include pay drift in an occupational measure

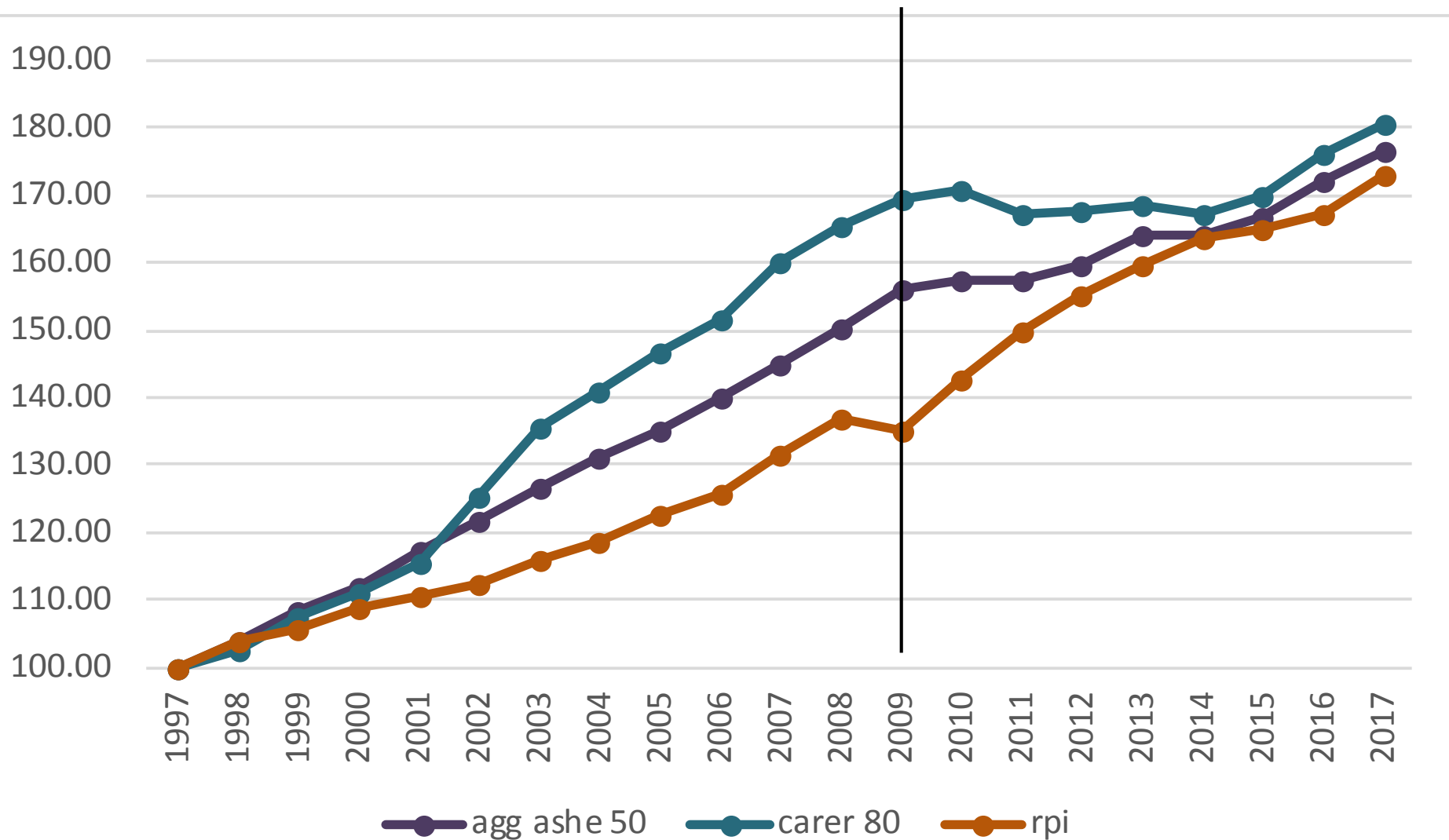
The question for the court is whether the claimant's compensation should be linked to the cost of a package of care fixed at the time of settlement or linked to an appropriate part of a constantly evolving care market?

Remember there have been dramatic changes in society's expectations about the delivery of care in the last 20 years, let alone the last 50 years.

ASHE 6115 and RPI 1997-2017



ASHE 6115, aggregate ASHE and RPI 1997-2017



Annualised average growth rates ASHE and RPI

% pa	ASHE 6115	Agg ASHE	RPI
1997-2017	3.0	2.9	2.8
1997-2009	4.5	3.7	2.6
2009-2017	1.1	2.1	4.2

What is the future for carers' wages?

Escalators

- Immigration controls for unskilled workers (Brexit)
- Labour and skills shortages
- Ageing population
- Re-professionalisation
- Regulation
- Minimum wage
- Artificial intelligence
- Robotics

Depressors

- Wage subsidies (Universal and tax credits)
- Deregulation of labour market
- Digital platforms
- Gig economy

What about PPOs for loss of future earnings?

Less compelling

- Care is about meeting a direct need where the cost of meeting that need is an earnings-based cost.
- The majority of personal income is spent on the RPI basket. No increase in living standards

More complicated

- The occupational group is uncertain
- There are employment risks to consider, these are age-related
- There is occupational mobility to consider (within or between occupations)
- There are age-related earnings effects to consider (levels and growth rates)
- There are changing tax, national insurance or pension arrangements to consider

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