

Draft Damages (Jersey) Law 20-

Analysis and Comments by BCR Law for

The Corporate Services Panel – Scrutiny Review

BCR Law

BCR Law, of 12 Hill Street, St. Helier, Jersey, JE2 4UA, is a Jersey law firm ("**BCR Law**"). The firm has considerable experience in claims for damages for personal injuries and clinical negligence. The firm acts for both plaintiffs and defendants (including States' Ministers and insurers). Approximately 40% of the firm's work in these areas is for plaintiffs, with approximately 60% of its work being for defendants.

BCR Law has acted for numerous plaintiffs and defendants in cases in which the issues of the appropriate approach to the calculation of lump sum damages, and the availability and proper approach to a periodic payment order ("**PPO**") have been considered. These are issues which have been at the forefront of practice in this area since the decision of the Royal Court of Guernsey in **Helmut v. Simon**, in January 2010.

BCR Law are currently instructed to represent two plaintiffs (the "**X Plaintiffs**") in proceedings against the Minister for Health & Social Services (the "**Minister for Health**"). That case, which has received considerable publicity, has involved the detailed consideration of many issues relevant to this consultation. In particular, there was detailed evidence heard from leading experts in the field of economics, actuarial science, investment management and modelling, and accountancy. Further, the Royal Court heard detailed submissions on the legal principles to be applied to the determination and assessment of damages in such cases.

BCR Law are keen to assist the Corporate Services Panel (the "Panel") in their Scrutiny Review of the proposed Draft Damages (Jersey) Law 20- (the "Draft Law"). It should be stated at the outset, that the request for the provision of comments was received on 26th October 2018, setting a deadline for comment of 9th November 2018. This is an extremely tight timeframe, particularly given the firm's other professional commitments. It has not been possible in that timeframe to set out our comments in as much detail, and with as much clarity, as we would have liked. Advocate David Benest and Advocate Jeremy Heywood are both willing, if a convenient date can be found, to attend upon the Panel in person to provide further comment or to answer any further questions which the Panel may have.

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INTRODUCTION

1. The two key proposals of the Draft Law are:
 - a. To place the setting of the 'discount rate' on a statutory footing; and
 - b. To make statutory provision for the awarding of damages by way of 'periodic payment orders', including an ability for the Royal Court to impose such an order against the wishes of the parties.
2. There is merit to the proposal to establish a statutory system by which the discount rate is set. The implementation of a properly researched, regularly reviewed, statutory discount rate will bring greater certainty to both plaintiffs and defendant in the assessment of the value of claims. It will reduce the costs involved in litigating those claims, as there will not be a need to adduce expert evidence (often conflicting expert evidence) as to the appropriate discount rate to be applied.
3. There is, equally, merit to the establishment of a statutory system for awarding damages by way of a periodic payment order ("PPO"). Such an order, if properly calculated and secure, if made subject to proper terms, is sometimes the best and fairest way to ensure a plaintiff receives the compensation to which he is entitled. Such an order, if tied to a proper rate of inflation, can negate the investment risk a plaintiff might be required to run to hedge against inflation. Such an order negates the risk to a plaintiff of under-compensation, should he exceed his statistical life expectancy, and negates the risk to a defendant of over-compensation, should the plaintiff die before his statistical life-expectancy.
4. The Draft Law asserts that it does not seek to move away from the principle of 'full compensation'. That statement can be described, at best, and with a considerable degree of charity, as misleading. The Draft Law, as it is currently drafted, runs the risk of deeply disadvantaging plaintiffs (often amongst the most vulnerable in society) by almost guaranteeing that plaintiffs will be undercompensated. It is a deeply flawed piece of legislation which has clearly been prepared in haste without proper research or analysis.

PRINCIPLES OF COMPENSATION

5. The conventional approach to the quantification of damages for personal injury claims is long established. The objective of a court in determining damages for personal injuries is to arrive at a lump sum which represents as nearly as possible full compensation for the injury which the plaintiff has suffered [Wells v. Wells [1999] 1 AC 345, at 363].

General Principles of Loss and Damage

6. In a claim for personal injuries, a plaintiff can usually claim:
 - a. 'General Damages', which in the context of personal injury claims are usually stated to be for non-pecuniary loss and damage, such as for pain, suffering, or loss of amenity; and
 - b. 'Special Damages', which are usually related to pecuniary losses suffered as a consequence of the injuries sustained (such as, for example, damage to clothing, or loss of earnings, or the costs of care).
7. 'Special Damages' can further be divided into 'Past Loss' and 'Future Loss'. Obviously, past losses relate to those losses already suffered and sustained at the time of the assessment of damages, whereas future losses relate to losses which have not yet been suffered but which it is anticipated will be suffered. To give an example, if a plaintiff was injured in an accident and could not work for two years by the time his case came to trial, his past losses would include a claim for two years of lost earnings. If it was anticipated that he would not be able to return to work for a further two years, his future losses would include a claim for his future loss of earnings.
8. The assessment of loss and damage suffered by a plaintiff in a personal injury claim is not an easy task. The simplest element, currently, is the assessment of general damages. These are usually calculated by reference to the English Judicial College Guidelines. Those set out a host of physical and psychological injuries which might be suffered and a range of damages which might be awarded as general damages. These are simply guidelines, but provide a helpful indication as to the likely level of an award that a court might make.

9. Assessment of past losses is usually relatively straightforward as well. As long as the losses suffered were caused by the injuries sustained, and were not too remote as to have been unforeseeable, then it is likely that a plaintiff will be able to prove such losses with a degree of clarity. In the example of a plaintiff who has not been able to work for a period of two years, he will likely be able to demonstrate what his pay was, what annual pay increase and bonus, if any, he was likely to receive, and thus prove his loss. He is compensated for having been kept out of his money by an award of interest.
10. The assessment of future losses can be extremely complicated. Such an assessment is, by its very nature, an exercise which employs the judicial crystal ball, based on the facts and best evidence available at the time of the assessment, and the assumptions which might properly be drawn from such facts and assumptions. It is almost inevitable that the lump sum awarded in respect of future losses will ultimately prove to be either too little or too much [*Wells v. Wells*, at 363]. By way of an example, a plaintiff may receive a lump sum award calculated on the basis of an assumed life expectancy of 10 years. It is highly likely that plaintiff will either 'out-perform' or 'under-perform' his statistical life expectancy – the plaintiff may live a further 15 years (and so have been under-compensated) or may die the day after the award was made (and so have been over-compensated). It is accepted by all that it is not a perfect system. It appears, however, that it is the best system which has yet been adopted.

General Principles for the Calculation of Future Losses

11. The general principles can be very simply stated. The plaintiff must show that he is likely to suffer an ongoing loss, what that loss is, and how long he is likely to suffer it for. The annualised value of the loss (the 'multiplicand') is then multiplied by a multiplier to arrive at the lump sum value of the plaintiff's claim for that head of loss. The equation is, therefore, $\text{multiplicand} \times \text{multiplier} = \text{lump sum value}$. The difficulties come in determining what the multiplicand is and what the multiplier should be.
12. The most difficult aspect of the calculation is working out what the multiplier should be. By way of example, assuming an annual cost of care of £10,000, and a life expectancy of 10 years, the calculation is not simply $10 \times £10,000$. The £10,000 needed to purchase the care in the tenth year would have been in the plaintiff's hands for nine years, and so would have earned interest, or a return, over that period. The objective of the lump sum award is to arrive at a figure which, by drawing down both interest and capital, will provide exactly the annual loss, and no more [*Wells v. Wells*, at 364]. The higher the assumed rate of return that the plaintiff will achieve on the lump sum, the lower the

initial lump sum needs to be. Conversely, the lower the assumed rate of return, the higher the initial lump sum would need to be. Taking this to a logical conclusion, if the assumed rate of return is negative, then the initial lump sum would need to be greater still.

13. The calculation is further complicated by the need to take into account inflation and the true value of money. Prior to the case of Wells v. Wells, the English courts had assumed that a plaintiff could manage the impact of future inflation by investing the lump sum awarded in a mixed portfolio of equities and gilts with a sensible overall risk profile. The House of Lords in Wells v. Wells considered that the advent of index-linked government stock ("ILGS") provided a surer guide to the calculation of the lump sum as the return of income and capital on ILGS is protected against inflation [Wells v. Wells, at 364-365]. It should be noted, however, that the return on ILGS is based on the percentage increase in the retail price index between the date of issue and the date of maturity, so it does not protect against all measures of inflation.
14. The position at common law, in England and Wales, was therefore that future losses must be awarded on the basis of a lump sum, calculated by reference to an annualised loss (the multiplicand) multiplied by the appropriate multiplier. The multiplier to be applied is calculated on the basis of the assumed period of the loss, adjusted by the appropriate discount rate. The discount rate is to be calculated on the basis of the assumed rate of return if the plaintiff invested exclusively in ILGS. Ultimately, in Wells v. Wells, the House of Lords concluded that the appropriate discount rate to be applied was +3.0%.
15. It is important to note that the House of Lords [Wells v. Wells, at 365] was clear that how the plaintiff would, in fact, invest his damages was of no relevance to the calculation. It would be perfectly open to a plaintiff to take his lump sum award and stick it all under his mattress, not spending a penny of it. Equally, he would be free to head to Las Vegas and stake it all on the roulette table. What a plaintiff does with his damages is a very different and separate question to what damages a plaintiff is entitled to as a consequence of the wrongs he has suffered.

THE ENGLISH POSITION

The Damages Act 1996

16. The decision in Wells v. Wells was given after the Damages Act 1996 had been passed, but before all of its provisions had come into force. Under section 1 of the Damages Act 1996, power had been given to the Lord Chancellor to set a statutory discount rate. It is important to note that the Damages Act 1996 provided that a court must take into account the statutory discount rate set by the Lord Chancellor, but that a court could depart from adopting the statutory discount rate if it was established by any party to proceedings that a different discount rate was more appropriate.
17. On 28th June 2001, by the Damages (Personal Injury) Order 2001, the then Lord Chancellor fixed the discount rate for England & Wales at +2.50%. As noted by the Privy Council in Simon v. Helmot [2012] UKPC 5, the Lord Chancellor gave a statement at the time, in which he set out his reasons for arriving at that rate [Simon v. Helmot, at para. 20]. In summary, these were:
- a. The Lord Chancellor had applied the appropriate legal principles as to the object of an award of damages as had been laid down in Wells v. Wells.
 - b. Lord Irvine decided to impose a single rate for all classes of loss (whether earnings-related or not) in order to promote certainty.
 - c. He was not going to make frequent changes to the Discount Rate to take into account every shift in the underlying market conditions.
 - d. The Lord Chancellor had had regard to the principle in Wells v. Wells that the assumed rate of return should be based on the yield of ILGS.
 - e. He had taken the average gross redemption yields of ILGS over a three year period with an assumed rate of inflation of +3%, resulting in a yield of +2.46%.
 - f. Discounting for UK tax payable in the hands of a UK taxpayer, this reduced the figure to +2.09%, which the Lord Chancellor had chosen to round up to +2.5%. No real explanation was provided as to why the Lord Chancellor had chosen to round up, rather than down.

18. The Lord Chancellor's decision in 2001 was criticised as being too favourable to defendants. There was a suspicion that the Lord Chancellor had taken into account political concerns, as to the impact on the NHS and the Ministry of Defence, should the discount rate be set at too low a level. In any event, the discount rate remained unchanged until 20th March 2017.

19. On 27th February 2017, the then Lord Chancellor made a statement in which she confirmed that she would lay a Statutory Instrument to change the discount rate from +2.50% to -0.75%. The Lord Chancellor, in her statement, gave her reasons as follows:

- a. Plaintiffs must be treated as risk-averse investors, as they may well be dependent on the lump sum, and the income it generates, for long periods of time.
- b. The Lord Chancellor was satisfied that the discount rate should be based on the three year average of real returns on ILGS. As such, the discount rate would be set to -0.75%.
- c. The Lord Chancellor expressly recognised the significant impact that the change to the discount rate would have on the financial position of the NHS, General Practitioners, and medical defence organisations. The impact on the insurance industry was also expressly recognised, and the Lord Chancellor confirmed that the Chancellor of the Exchequer would meet with representatives of the insurance industry *"to discuss the situation"*.
- d. The Lord Chancellor promised a complete review of how the discount rate should be determined:

"The government will review the framework under which I have set the rate today to ensure that it remains fit for purpose in the future. I will bring forward a consultation before Easter that will consider options for reform including: whether the rate should in future be set by an independent body; whether more frequent reviews would improve predictability and certainty for all parties; and whether the methodology – which in effect assumes that claimants would invest only in index-linked gilts – is appropriate for the future. Following the consultation, which will consider whether there is a better or fairer framework for claimants and defendants, the government will bring forward any necessary legislation at an early stage." Emphasis added.

2017 Consultations

20. On 28th February 2017, the Chancellor of the Exchequer met with the Director General of the Association of British Insurers. Following that meeting, a joint statement was issued in the following terms:

"Claimants must get the money they're entitled to following an injury in order to support their future needs.

It is important that going forward, personal injury discount rates are set at a level that is fair to both claimants and consumers.

The government will progress urgently with a consultation on the framework for setting future rates, and bring forward any necessary legislation at an early stage.

The industry will contribute fully to the upcoming consultation, and the government will carefully consider all evidence and arguments submitted."

21. The UK government initiated a consultation on how to approach the issue of the Discount Rate in future. The consultation, ran by the Ministry of Justice, ran from 30th March 2017 to 11th May 2017. It was as part of this consultation that the Ministry of Justice instructed the Government Actuary Department to produce the GAD Report.
22. A General Election intervened, and the feedback from the consultation is, apparently, still being analysed. The statutory discount rate remains at -0.75%.
23. Interestingly, and perhaps an indication of how the UK government is approaching matters, in a speech given to the Association of British Insurers on 27th June 2017, Stephen Barclay MP, Economic Secretary to the Treasury, said the following:

"Many of these consumers, as well as many of the companies represented in this room, will have been affected by the change in the personal injury discount rate. That concerns me, and I know it will concern many of colleagues in Parliament. That is why the government has been consulting on how the rate can be set in future in England and Wales. Scotland and Northern Ireland set their rate separately, which has an impact on the parliamentary arithmetic. We are currently considering the responses to the consultation we've received and I would like to thank the industry for the

constructive engagement on this issue. We want to make sure that the way the rate is set is put on the firmest possible footing in future, so that we have a better and fairer system for claimants and defendants. In doing so, we will keep true to the 100% principle: that a claimant is paid no less than they should be, and no more. In short, we have been consulting on moving away from a mechanism that has grown outdated and, with negative returns on interest-linked gilts, lost its connection with the way people invest in the real world." Emphasis added.

24. The reference to the position in Scotland is also interesting. It does not appear that those who have prepared the Draft Law have looked at the legislative regime in Scotland or any of the Scottish consultations. That is an unfortunate failing.

THE SCOTTISH POSITION

25. Scotland is not bound by the English approach to the discount rate. The **Damages Act 1996** provided that the Scottish Government could, by Order, set a statutory discount rate. The statutory discount rate in Scotland is set separately from the statutory discount rate in England & Wales (and, indeed, from Northern Ireland).
26. The Scottish statutory discount rate was first set at +2.50% by the **Damages (Personal Injury) (Scotland) Order 2002**. That was, of course, the same rate as that set by the Lord Chancellor in England & Wales. In March 2017 the Scottish discount rate was changed to -0.75% (again, the same rate as that set by the Lord Chancellor).
27. Following the change to -0.75% the Scottish Government launched a consultation process in which it sought to reconsider the basis upon which the statutory discount rate is set. The Scottish Government noted that ILGS yields had declined significantly, particularly since the financial crisis. This, it was considered by some, had led to a situation in which many plaintiffs (known in Scotland as 'pursuers') were over-compensated. Equally, the Scottish Government noted that it is difficult for plaintiffs to construct a portfolio of ILGS which meet their expected income needs. Finally, it was considered that reliance on ILGS also ran the risk of under-compensation, because ILGS only rise in line with RPI, not any other measure of inflation (such as wage inflation).

Damages (Investment Returns and Periodical Payments) (Scotland) Bill

28. The result of the Scottish Government's consultation was the production of the Draft **Damages (Investment Returns and Periodical Payments) (Scotland) Bill** (the "**Scottish Bill**"). The Scottish Bill was split into two parts: the first sought to make the setting of the statutory discount rate "*clear, certain, fair, regular, transparent and credible*"; the second provided the Scottish courts with the power to impose PPO's for future pecuniary losses. The Panel are encouraged to read the entirety of the Scottish Bill, which BCR Law have provided a copy of. It does not appear that those proposing the Draft Law have read the Scottish Bill or considered any of its proposals.

Full Compensation

29. The Scottish Bill sets out a new framework for setting a statutory discount rate in Scotland, which will be inserted into the **Damages Act 1996**. Importantly, the Scottish

Bill clearly reasserts the commitment to the 100% compensation principle, whilst recognising that it is a difficult goal to achieve:

"... the Scottish Government recognises that the assessment of a lump sum award of damages, particularly for future loss, can never be an exact science and that there will inevitably be levels of under- and over-compensation because of a range of factors.

...

The system is therefore inevitably imperfect but, without the benefit of foresight, it can never be anything other than an approach intended to provide the best possible assessment for the broadest range of cases. The Scottish Government remains of the view that the principle of full compensation should be maintained but the realities of trying to achieve it need to be recognised."

Setting the Rate

30. The proposal in the Scottish Bill is that the statutory discount rate would be set by the Government Actuary. Importantly, the Scottish Bill retains the power in the Scottish courts to apply a different discount rate if appropriate in the case before it. This mirrors similar provision in the **Damages Act 1996** as it applies to England & Wales. The Draft Law does not afford the Royal Court any such discretion, leaving the Royal Court powerless to achieve justice in cases coming before it where it would unjust to apply the proposed statutory discount rates.
31. The Scottish Bill proposes that the legislation would provide a framework by which the statutory discount rate should be set, but that the mechanics of determining the actual rate should be determined not by politicians, but by independent, expert, professionals. The objective of requiring the statutory discount rate to be set by the Government Actuary would be to remove the determination of the rate from the political arena. It is thought by the Scottish Government that such a system ensures that the focus of setting the statutory discount rate remains focused on achieving full compensation for those who have suffered loss.

Review of the Statutory Discount Rate

32. The Scottish Bill noted the absence of a statutory requirement to review the statutory discount rate regularly. This led to a gap of 15 years in Scotland during which the

statutory discount rate was not reviewed. The absence of a requirement to regularly review the statutory discount rate is likely to lead to long periods when either plaintiffs are over-compensated (and defendants unfairly penalised) or plaintiffs are under-compensated and left without the monies required to meet their needs.

33. The consultation process revealed a consensus on the need for regular review and a range of views on the appropriate review period, from annually to every ten years. After considering matters, the proposal of the Scottish Government was that the statutory discount rate should be reviewed within three years of the previous review, with the ability to instigate an earlier review if circumstances required it. Once a review is instigated, the Government Actuary would have 90 days to complete the review and revise (if appropriate) the statutory discount rate.
34. It was thought that this proposal balanced the need for certainty with the need for flexibility. We agree. If reviews are fixed, there is the potential (on the part of both plaintiffs and defendants) for claims to be either pushed forward to benefit from the prevailing rate, or to be delayed in the anticipation of the setting of a more favourable rate. Further, if reviews are fixed they cannot react to a significant change in available returns, such as the impact of a major financial crisis. Equally, were rates change too frequently, settlement of disputes would become more difficult as the appropriate quantum of claims would change with changes to the rate.
35. The Draft Law has ignored these considerations and concerns. It provides a power for the Chief Minister to change the rate by Order. It requires only that the Chief Minister consult with the Learned Bailiff. It stipulates that the Chief Minister cannot change the statutory discount rate to one which is below 0.00%. It does not stipulate the frequency of review. These proposals are deeply unsatisfactory. The absence of any provisions requiring review is particularly concerning in the Draft Law as it strips the Royal Court of any ability to mitigate an unfairly high, or low, statutory discount rate in individual cases before it. The Scottish Bill provides for proper review and provides the Scottish courts with a discretion to depart from the statutory discount rate where it would be unjust to apply it.

The Framework

36. The Scottish Government, following consideration of the results of the consultation, accepted that it was appropriate to move away from setting the statutory discount rate by reference to returns on ILGS alone. The Scottish Bill sets out a 'notional

investment portfolio' which is designed to meet the objectives and characteristics of a 'hypothetical investor'. Both the 'notional investment portfolio' and the 'hypothetical investor' are defined in the Scottish Bill.

37. The 'hypothetical investor' is defined as being recipient of a lump sum award of damages to replace any future loss of earnings, and to meet future costs, caused by the injury/incapacity they have suffered in order to put them into the position they would have been in but for the injury. The assumed objectives and characteristics of the 'hypothetical investor' are defined also:

- a. The hypothetical investor will be properly advised.
- b. The hypothetical investor's objective will be to secure that the investment of their lump sum award of damages will cover the losses and expenses for which the award was made.
- c. There will be withdrawals of income and capital from the investment fund to meet those losses and expenses.
- d. The withdrawals from the investment fund will exhaust the investment fund at the end of the period for which the lump sum damages were awarded.
- e. The hypothetical investor has no other funds or income and relies entirely on the lump sum to meet their injury-related needs and so will take an approach in terms of investment choices which is capable of limiting volatility and uncertainty.

38. The 'notional investment portfolio' is made up of a mix of assets including cash, UK and overseas equities, property and gilts. The 'notional investment portfolio' has been constructed on the basis of evidence as to the make-up of portfolios described as 'cautious'. Scottish Ministers may, via regulations, add, remove or modify the examples within the notional portfolio or the percentages of a type of assets within the portfolio. The Scottish Bill expressly moves away from any reliance on 'evidence' as to how plaintiffs have actually invested their damages awards in the past (the approach which is sought to be adopted by the Draft Law):

"There are difficulties arising from attempting to set a rate on how pursuers have actually been investing. On this, data is not generally available and what is available is

historical, some of it based on the 2.5% discount rate which prevailed from 2002 until early 2017 and which is, therefore, arguably not reliable. Given that level of discount rate, pursuers may have been forced into taking more investment risk than they were comfortable with in order to generate the necessary return. Also pursuers' circumstances are varied and the individual's particular circumstances will dictate the level of risk they are prepared to take. The portfolio does reflect responses to the consultation that investing in a mixed portfolio of assets provides flexibility and is the best way of managing risk."

39. In addition, the Scottish Bill has made express statutory provision for two further adjustments which must be made to the statutory discount rate which would otherwise have been arrived at by the Government Actuary. These are proposed to be:

- a. A deduction of 0.50% to account for the impact of taxation and the costs of investment management and advice; and
- b. A further deduction of 0.50% to mitigate the risk of under-compensation. The Scottish Bill explains the rationale for this further adjustment as follows:

"In the case of a pursuer, investment is likely to be a necessity as opposed to a preference or choice... Damages are not surplus funds which can be speculatively invested. Any losses are likely to be material to a pursuer's ability to meet their needs. For all these reasons, the Scottish Government considers that a further adjustment is needed to reduce the likelihood of under-compensation. The corollary is that there will inevitably be a probability of over-compensation but it will be less if the rate were set by reference to ILGS."

40. The Draft Law has taken no account at all of the many dangers of adopting the MOJ Portfolios which formed the basis of the GAD Report. It takes no account of the fact that if it expects plaintiffs to invest plaintiffs will need to pay for investment management and advice. It takes no account of the special nature of plaintiffs as investors. Those proposing the Draft Law have simply accepted the MOJ Portfolios without analysis and the GAD Report without question. Such an approach is extraordinarily ill-considered and risks severe injustice to some of the most vulnerable members of our society.

Periodical Payments

41. Prior to the Scottish Bill, Scottish courts could only make a periodical payment order (PPO) when the parties both consented. The Scottish Bill introduces a duty for the courts to consider whether a PPO is appropriate when awarding damages, and also provides the power to the court to make a PPO without the consent of the parties – albeit this is limited to future losses in personal injury cases.

THE GUERNSEY POSITION

42. The issue of the correct discount rate to be applied to the calculation of damages for personal injuries was considered by the Privy Council, on appeal from the Court of Appeal of Guernsey, in the case of **Simon v. Helmot** [2012] UKPC 5.

43. The important principles to be drawn from that case can be summarised as follows:

- a. The **Damages Act 1996** does not extend to Guernsey, nor does any Statutory Instrument made under the **Damages Act 1996**. As such, the statutory discount rate set by the Lord Chancellor in England & Wales is not binding in Guernsey. Decisions about the effect of the **Damages Act 1996**, or its application, have no bearing on the way a lump sum award is to be calculated in Guernsey [**Simon v. Helmot**, at para. 26].
- b. There are other factual differences between Guernsey and the UK which have an impact on the appropriate discount rate to be applied in Guernsey (it should be noted that the Draft Law takes no account of these factual differences). These include:
 - i. The rate of inflation in Guernsey, which had been fairly consistently +0.50% higher than the rate of RPI inflation in the UK (which is the inflation rate tracked by ILGS).
 - ii. Income tax rates in Guernsey are considerably lower than those that are payable by persons ordinarily resident in the UK. This means that the net yield of ILGS to a Guernsey resident will be different to that enjoyed by a person holding the same securities who is taxable in the UK.
 - iii. The statistical information available as to the movements in prices and earnings, in relation to inflation and otherwise, was much more limited in Guernsey than in the UK.
- c. Their Lordships considered that the statutory discount rate as set by the Lord Chancellor (which was then still +2.50%) had no evidential basis to support it, such having been undermined by the passage of time and the nature and extent of the UK-specific factors which the Lord Chancellor took into account [**Simon v. Helmot**, at para. 49]. The proper approach to the calculation of the

discount rate in Guernsey was to disregard the UK statutory discount rate figure, which would, on the basis of the evidence presented, result in a discount rate for 'goods'-based future losses of +0.50% [Simon v. Helmot, at para. 50].

d. 'Services'-based future losses were more difficult to calculate, but undoubtedly the most important. The Privy Council considered in detail the decision of the House of Lords in Wells v. Wells, which had been accepted by all parties as being the common law position in England and Wales, and made the following determinations:

- i. There is no reason in principle why a separate discount rate should not be set for different types of future loss.
- ii. If the evidence was that a discount rate should be applied which, in fact, was no discount at all but, rather, increased the size of the lump sum award in order to take into account the effect of earnings inflation, there can, in principle, be no objection to that approach [Simon v. Helmot, at para. 54].
- iii. The evidence, such as it was, suggested that earnings inflation in Guernsey was approximately +2.00% higher than RPI inflation. As such, the imposition of a discount rate of -1.50% for 'services'-based future losses was appropriate [Simon v. Helmot, at para. 57].

44. It should be noted that the decision of the Privy Council was handed down in 2012, over six years ago. Guernsey has not brought forward legislation to set a statutory discount rate. There has been no indication that Guernsey-based medical practitioners cannot find appropriate insurance. There has been no indication that motorists have been unable to find appropriate insurance. Anecdotaly, BCR Law is aware that insurance premiums for medical practitioners in Jersey did rise after the Privy Council's decision, but it does not appear as though the medical profession has had any difficulty securing the necessary insurance for the last six years.

THE JERSEY POSITION

45. In the area of personal injury law, including in relation to the approach to damages, Jersey has traditionally followed the position as it exists in England & Wales. Prior to the decision of the Royal Court of Guernsey in Helmot v. Simon [GJ 4 2010], claims for damages for personal injuries invariably proceeded on the assumption that the discount rate was the same as that set in England & Wales [Saint v. Le Feuvre [2014 JRC 142D], at para. 89].
46. Saint v. Le Feuvre is the only Jersey judgment which has, to date, dealt at all with the issue of the discount rate following the Privy Council's decision in Simon v. Helmot. The recent case in which BCR Law have been involved is the first case since Simon v. Helmot to have fully ventilated the issue before the Royal Court. Considerable research and analysis was undertaken in the preparation of submissions on this issue. Included with these comments are some of those documents looked at. It does not appear that those who propose the Draft Law have looked at anything other than the GAD Report.
47. It is plain that the arguments made in Helmot v. Simon, in relation to the applicability of the Damages Act 1996, and any Statutory Instruments made under it, apply with equal force to Jersey as the Privy Council found them to apply to Guernsey. As the Royal Court of Jersey made clear, in Saint v. Le Feuvre, it is (currently) entirely open to a plaintiff in Jersey to argue for a the application of a different discount rate, but any such argument must be supported by expert evidence [Saint v. Le Feuvre, at para. 89,].
48. The position in Jersey is, therefore, currently unclear. The statutory discount rate set by the Lord Chancellor in England & Wales, currently -0.75%, clearly does not automatically apply. The decision of the Privy Council in Simon v. Helmot, whilst of the very highest persuasive authority, is not binding.

THE DISCOUNT RATE

49. The 'discount rate' is probably a misnomer. It would probably be better termed an 'adjustment rate'. It is one element in the calculation of the appropriate multiplier to be applied to the appropriate multiplicands (albeit an important element).

Risk Appetite to be Assumed

50. The key factor in determining the discount rate is the assumed rate of return that a plaintiff is expected to achieve by investment. Clearly, the higher the assumed rate of return, the more positive the discount rate will be, and the lower the resulting multiplier, which would lead to the final lump sum award being lower. Conversely, if the plaintiff is assumed to achieve a low, or negative, return, then the discount rate will need to be lower, or even negative, resulting in a higher multiplier and, ultimately, a higher lump sum award.
51. Generally speaking, if one wishes for higher potential returns, then one needs to take greater risk with one's investments. The House of Lords, in Wells v. Wells, was clear that a plaintiff is not an ordinary investor and cannot be assumed to be capable of accepting the greater risks that a private investor might be willing to accept. The essence of their lordships' reasoning was that a plaintiff requires the returns from his lump sum to meet his needs. If he does not achieve those returns he may be very severely prejudiced. To take an example, assume a plaintiff has projected annual care needs amounting to £100,000.00 and is dependent on his lump sum to provide for those. If in one year the plaintiff only realises £75,000.00 in returns, he is faced with either only paying for nine months of care (which he is unlikely to be able to do) or he has to draw down a greater amount of capital to cover the shortfall. This means that his capital pot is lower, meaning that the next year he has to take greater investment risks in the hope of recouping his shortfall. It is for this reason that the House of Lords considered that a plaintiff must be assumed to be willing only to take a very low risk approach to investments. In the opinion of the House of Lords, the lowest risk investment available was ILGS.
52. It is important not to misunderstand the reason for using ILGS as the calculative basis for the discount rate. The question is whether (as per Wells) ILGS should be used as a pricing mechanism to ensure that a plaintiff obtains a risk-free rate of return (or as near as possible to a risk-free rate of return). ILGS as a class are taken to be a proxy for the risk-free rate of return. They are not to be taken as a specific set of ILGS which would closely match the

cash-flows in any particular case. The use of ILGS as a pricing tool is of universal application.

53. ILGS therefore should be seen as a group of investments which provide a precise hedge against RPI inflation and have a negligible default risk. They also provide a means of putting a value on cash-flows assumed broadly to go up in line with RPI inflation, regardless of whether a precise portfolio can be created which exactly generates the required cash-flows for any particular plaintiff. They are not an investment policy. This established approach provides certainty for litigants and a firm foundation for a similar approach to be adopted in each and every case.
54. As soon as one departs from ILGS one enters a world where a plaintiff is expected, in fact required, to take a degree of investment risk in order to hedge against the risks of the lump sum award being insufficient to provide for the plaintiff's needs. It does not solve the problem of over-compensation or under-compensation, it simply increases the risk of under-compensation and reduces the risk of over-compensation.
55. Cutting across all the above considerations is one question: is there a statistically acceptable level of risk? This can perhaps be reduced to the question "how many plaintiffs out of 100 can be forecast to run out of money before a portfolio can be deemed unacceptable?". And who should bear the uncertainty risk in that regard - the tortfeasor/insurers or the victim? The balance of risk must involve a consideration of who can best bear the risk - the defendant (who can cross-insure with the many lives on its books) or the plaintiff, for whom such a revenue failure would be catastrophic. If this approach is adopted, the States will have to decide what percentage of plaintiffs suffering a shortfall it is prepared to countenance.

CRITICISM OF THE GAD REPORT

56. The Draft Law seeks to impose a minimum expected level of risk appetite on a plaintiff. The proposal is that plaintiffs should be assumed to have a 'low' risk appetite, rather than a 'very low' risk appetite. The Draft Law considers that the GAD Report demonstrates:

- a. How plaintiffs in reality invest damages awards; and
- b. The returns that can be anticipated by investing in 'low risk' portfolios.

57. The fundamental problem with the "low risk" portfolio approach is that it is undefinable in practice and can mean entirely different things to different people at different times. Any definition would have to recognise "low risk" in the context of a plaintiff who is entirely dependent on their monetary award to keep a roof over his head and is therefore a vulnerable and not an ordinary investor.

58. The GAD Report is fundamentally flawed for a number of reasons, and the reliance placed upon the GAD Report shows an extraordinary lack of analysis and care on the part of those who propose the Draft Law. The GAD Report has been the subject of severe criticism, including (but certainly not limited to) the former Government Actuary of the United Kingdom (and head of the Government Actuary Department), Mr. Chris Daykin.

59. Some of the more serious issues with the GAD Report are that:

- a. The modelling reflected only investment modelling assumptions laid down by the Ministry of Justice - rather than independent actuarial advice. The "**MOJ Portfolios**" were not selected by GAD.
- b. The GAD Report did not comment on whether the MOJ Portfolios assumed would meet any new criterion of "low risk". The very clearly expressed view of Mr. Daykin is that, with the high percentage of equities and property, not to mention the asset allocation implied investment in hedge funds, the MOJ Portfolios could not be honestly described as anything like 'low risk'.
- c. The returns set out in the GAD Report do not make any allowance for investment advice/management fees, or for the impact of taxation. The

impact of taking those figures into account is a significant reduction in the assumed return.

- d. The GAD Report gives no consideration the fact that different elements of a plaintiff's future losses might be impacted by different rates of inflation. For example, there is no recognition that services-based losses (which are costs which are predominantly affected by earnings-related inflation) could increase costs by c. an extra 2% per year.
- e. The GAD Report artificially obtains a better return via making a high assumption in equity holdings and does not consider how any given plaintiff would combat the risk of prolonged cyclical downturns. This was one of the points considered by the House of Lords in Wells when they determined that ILGS provided the 'best tool' by which to benchmark the real returns available to a plaintiff at the lowest possible risk. The problem of expecting plaintiffs to invest in the equities market is that, as we are all warned, investments can go up as well as down. As Lord Lloyd stated at [p366]

"[Plaintiffs] are not "ordinary investors" in the sense that they can wait for long-term recovery, remembering that it was not until 1989 that equity prices regained their old pre-1972 level in real terms. For they need the income, and a portion of their capital, every year to meet their current cost of care. A plaintiff who invested the whole of his award in equities in 1972 would have found that their real value had fallen by 41 per cent. in 1973 and by a further 62 per cent. in 1974. The real value of the income on his equities had also fallen."

60. Further, had those proposing the Draft Law paused for a moment to examine the MOJ Portfolios, they would have recognised the inherent fallacy in placing reliance on those figures. This is that it was based on how plaintiffs were reportedly investing their awards in reality. There are two problems with this:

- a. The House of Lords has expressly stated that how a plaintiff spends or invests his damages is irrelevant to the calculation of what those damages should be; and, more importantly
- b. It ignores the fact that plaintiffs were being forced to take higher risks in order to ensure that their lump sums generated sufficient returns because the discount

rate had been set for political reasons at too high a level. In other words, the MOJ simply looked at the level of risk being taken without analysing the cause of that level of risk being taken. Had the discount rate been set at +5.00%, the MOJ Portfolios would have looked at how plaintiffs were actually investing their damages and would have noted that plaintiffs were in reality taking much greater risks with their investments and thus concluded that the discount rate should be set even higher.

61. It was that latter point which was considered by the Justice Select Committee of the House of Commons, when considering proposed legislative changes in England & Wales in 2017. As the Committee reported at Paragraph 38:

"Professor Victoria Wass suggested that the discount rate could not be based upon investment behaviour because the discount rate itself affects investment choices:

"In temporal space, the discount rate comes before the investment choices. During the period between 2001 and March 2017, claimants were forced into risk-bearing assets in order to more closely match the return of 2.5% on which their lump sums were based."

"This point was also put forward by APIL: "While the discount rate was artificially high at 2.5%, however, claimants were often forced into the invidious position of having either to take chances with their compensation by putting it into higher risk investments, or struggling to make ends meet"."

62. In addition to the above, the very basis of the MOJ assumptions was flawed, as was made clear by the evidence of Mr. Cropper to the Justice Select Committee and the comments made by the Scottish Government in the Scottish Bill. The MOJ assumptions are most seriously flawed in the following respects:

- a. The MOJ based the composition of the MOJ Portfolios on responses received from only four firms.
- b. The parameters put forward by the MOJ to the GAD (i.e. that an assumption should be made of income needs of £10,000 per annum linked to RPI for 30 years) did not mirror any of the portfolios put forward by the four firms who did respond to the MOJ.

- c. GAD was asked to provide statistical analysis on portfolios A & B, but the MOJ did not ask GAD to provide any standard deviation data on the expected mean returns. There is no objective measure of their risk. In other words, the modelling does not allow for any assessment on the size and extent of any economic downturns or investment class fluctuation.
- d. The MOJ's requirement that income needs be assumed to be £10,000 per annum leads to a complete misrepresentation of the impact of taxation on plaintiffs receiving larger awards because of higher income needs. In effect, the assumption of £10,000 per annum income meant that there was no tax payable on the income. In a case where the plaintiff's income needs were £100,000 per annum, the impact of taxation would result in a net income figure of c. £66,000 per annum in the UK, leaving an annual shortfall, as a consequence of tax alone, of £34,000 as against the plaintiff's needs.
- e. The entire approach of the MOJ has been to look at average under-compensation or over-compensation. This ignores the fact that it is of no comfort to an under-compensated plaintiff that a certain portion of plaintiffs are in the same boat and a certain portion have fared better. As was said in the context of unemployment "for the unemployed man the unemployment rate is 100%".

AN ALTERNATIVE APPROACH TO 'LOW RISK'

63. An objective definition of "low risk" that is capable of generating some consensus is provided in the Report to the Ministry of Justice of October 2015. This report was prepared by Messrs Cox, Cropper, Gunn and Pollock. It is yet another report that those proposing the Draft Law do not appear to have read.

64. This is a significant report for a number of reasons:

- a. It was specifically commissioned by the MOJ to provide guidance on the issue of the discount rate and alternatives to the use of ILGS.
- b. It is a thoroughly well researched and detailed document. It is immeasurably better researched and better reasoned than the GAD Report.
- c. It was entirely independent and not predicated on any desired outcome.
- d. Its majority recommended retention of the existing system.
- e. Its unanimous conclusion in the event of a decision that ILGS were not retained was its chosen 'low risk' portfolio which is of direct relevance to these proceedings:

"The panel is in complete agreement that, if forced to accept some investment risk, then the second portfolio (three quarters ILGS and one-quarter in an optimal mix of risky investments) is potentially appropriate for a very low level risk, but not a "risk free", investor and the 100% rule."

- f. The Cox/Cropper/Pollock Portfolio was endorsed by Her Majesty's Treasury as their preferred model in a letter to the MOJ dated 12th January 2017. It does not appear that such an endorsement has been given to other portfolios.
65. The portfolio mix was explained in detail in Appendix 2 of the Report but summarised on p49 of the document. It included an allowance for fees and tax of 1.5% (bonds) and 1.25% (equities), although it is admitted that this deduction is a "broad brush" (p46, paragraph 4.19). Of the 25% in other holdings, 12.5% are corporate bonds, 7.5% overseas developed government inflation linked bonds and 5% equities. Each one of the asset classes is subject to a detailed technical analysis in Appendix 2 of the Report

(p64ff). The Panel is encouraged to read this Report in detail as it gives an excellent overview of many of the issues in play with the Draft Law.

66. A further point of interest is that the portfolio put forward in the report was put to the experts in the recent trial of **X Plaintiffs v. Minister**. None of the experts criticised it. Most expressed a positive opinion.

PERIODIC PAYMENT ORDERS

67. In certain circumstances, an award of damages made on the basis of periodic (usually annual) payments, can be a better way of ensuring that a plaintiff is fully compensated and is not exposed to unnecessary risks. The Royal Court has held that it has a power to make an order for payment of damages by way of a PPO where:

- a. The parties consent to such an order being made;
- b. The Court is satisfied of the conditions precedent to making such an order as would have been required in England & Wales; and
- c. The parties submit to directions made by the Court of the kind contemplated by **Damages Act 1996** and rules of court made thereunder when ordering future payments of sums due (an essential provision in order to permit the court not just to make the order in the first place but also to police it during the plaintiff's lifetime).

68. There is currently no statutory basis upon which the Royal Court can make an order for a PPO, whether by consent or otherwise. Whether the Royal Court can impose a PPO absent the consent of the parties was an issue in the recent case of **X Plaintiffs v. Minister**. Submissions were made by the Plaintiffs, the Minister and Her Majesty's Attorney General. Judgment on that issue has been reserved.

69. The advent of a statutory regime is broadly to be welcomed. The concern is that, as with the rest of the Draft Law, the proposals put forward are incomplete and ill-considered. English courts were given the power to impose PPO's by the **Courts Act 2003** (ss.100-101), which amended the **Damages Act 1996** to give courts the power to impose periodic payments on the parties. There is a significant and complex statutory framework which exists in England underpinning that power. With the exception of provisions relating to the security of periodic payments, there is little detail as to the proposed legislative framework to support a PPO regime (for example, as regards the tax treatment of a PPO).

English Position

70. As stated, the statutory framework which has been put in place in England and Wales as a result of the **2003 Act** is complex. It is worth summarising these provisions, as they

identify the various areas of difficulty which a PPO regime has to grapple with, and they point up the need for a comprehensive legislative scheme if PPO's are to be introduced in a manner which is fair to all stakeholders. Consideration of the English system demonstrates that a satisfactory procedural and substantive framework, with suitable safeguards for plaintiffs and defendants, is required. It is not clear whether careful (or any) consideration has been given to the ramifications of simply creating a legislative basis upon which the Court can impose a PPO.

71. Under s.2(3) of the **1996 Act**, the court can only make a PPO if satisfied that continuity of payment under the order is "reasonably secure". This provision was directed at the obvious concern that a plaintiff subject to a PPO has to rely on the fact that a defendant will be able to meet the payments ordered long into the future. Continuity of payment is automatically considered to be reasonably secure where it is protected by a ministerial guarantee or by the Financial Services Compensation Scheme, or where the source of the payment is a government or health service body. The **1996 Act** extended protection for periodical payments under the FSCS to cover 100% of the payments (rather than 90%). Practice Direction 41B sets out the criteria under which any alternative method of funding is to be considered reasonably secure. Commentators consider that the criteria are likely to be interpreted restrictively.
72. CPR r.41.7 prescribes the circumstances which a court must take into account when deciding whether or not to make a PPO. The court must make the form of order which "best meets the claimant's needs", and must take into account (i) the scale of the annual payments (taking into account any deduction for contributory negligence), (ii) the form of award preferred by the plaintiff (including the reasons for the plaintiff's preference and the nature of any financial advice received by the plaintiff), and (iii) the form of award preferred by the defendant including the reasons for the defendant's preference (PD 41B). In draft form, the Practice Direction had required the court to see the financial advice obtained by the plaintiff, but in the event it was decided not to require this.
73. CPR r.41.8 requires a PPO to specify the annual amount awarded (divided into (i) loss of earnings and other income, and (ii) care and medical costs and other recurring or capital costs), how each payment is to be made during the year and at what intervals, and the period over which the payments will be made. The default index to be applied to the payments is the RPI unless the court orders otherwise.

74. CPR r.41.8(2) specifies that a court can order that a PPO is to continue after the plaintiff's death, for the benefit of the plaintiff's dependants. However, in these circumstances, the order must specify the relevant amount and duration of the payments to be made after death.
75. CPR r.41.8(3) provided that a court can order a "stepped" PPO, i.e. a PPO where the level of payments changes at certain specified dates in the future. However, such a PPO must specify the date on which the change will take place (rather than identifying an event with an unknown date) and the changed level of payments which will be made (rather than there being any mechanism for assessing the changed costs at the date when the change is made). This provision is not to be confused with the variation of a PPO, where payments can be changed in the light of events taking place after judgment (as to which see below).
76. CPR r.41.8(4) provides that if a PPO provides for a future substantial capital cost, then the order must specify the amount of the payment to be made at current value, the date of the future payment, and that the amount of the payment will be adjusted by reference to the RPI (or another index specified by the court).
77. Under CPR r.41.5 the court was given the power to order parties to plead their case as to whether periodic payments would be appropriate in their statements of case. R.41.6 compels the court to consider and indicate to the parties "as soon as practicable" whether periodic payments or a lump sum award would be more appropriate. These provisions recognise the importance of the parties and the court considering the implications of periodic payments as early as possible in the litigation process, rather than turning to the issue only at trial (or, as here, over half way through trial).
78. One of the most controversial aspects of the new statutory regime was whether it might be possible to vary the payments made under a PPO as a result of changed circumstances following judgment. The competing considerations weighed by UK policy-makers included (i) the desirability of having an accurate award which met the claimant's actual needs, and (ii) the need for finality, certainty and efficiency (particularly from the perspective of defendants) when disposing of claims. These issues were extensively debated in the UK Parliament (see Department of Constitutional Affairs Guidance on Periodical Payments).

79. In the event, it was decided tightly to restrict the right to vary PPO's. Under the

Damages (Variation of Periodical Payments) Order 2005:

- a. A PPO may provide that an application can be made to the court to vary the level of payments. This variation can only be the result of either (i) the plaintiff developing a serious disease or suffering some serious deterioration, or (ii) the plaintiff enjoying some significant improvement in his mental or physical condition. Thus variations are limited to serious changes in the plaintiff's medical condition, rather than other changes in circumstances which may vary the plaintiff's needs or the costs which he is incurring;
- b. The PPO must specify the disease or type of deterioration or improvement, and may specify more than one. It may limit the period within which an application to vary must be made;
- c. Only one application to vary can be made in respect of each specified disease or type of deterioration or improvement;
- d. There is no power to order unrestricted variation, e.g. because the payments under the original PPO have proved insufficient or any contingency was too small, or because care costs have escalated over time.

80. The restrictive nature of these provisions has been subject to criticism by some commentators, who suggest that any change in circumstances should be permitted to result in a variation, that this change should include those which are not foreseen as well as those which can be anticipated at the time of judgment, and that more than one application should be permitted. The proposals put forward in the Draft Law (that anyone who has an interest in a PPO can apply to the Royal Court for a variation of the PPO where there has been a material change of circumstances) are an improvement on the position in England and are to be welcomed.

81. S.2(6)(a) of the **1996 Act** provides that a plaintiff cannot assign his or her right to receive periodical payments to another without the approval of the court which made the relevant PPO, with such approval only being given in "special circumstances" (as further defined in Practice Direction 41B). This provision is intended to prevent a plaintiff from bypassing the power to impose a PPO by simply assigning their right to receive payments in return for a lump sum. This is, sensibly, mirrored in the Draft Law.

82. Receipt of personal injury compensation in the UK can affect eligibility for social security and other benefits. As a result of the **Social Security Amendment (Personal Injury Payments) Regulations 2002** and the **National Assistance (Assessment of Resources) (Amendment) (No. 2) (England) Regulations 2002**, periodical payments are largely disregarded for the purposes of assessing eligibility for means tested benefits and for assessing liability to contribute towards local authority assistance. The treatment of PPO's in Jersey in this regard is unclear.
83. In summary, the statutory scheme in place in the UK represents a carefully considered compromise after lengthy consultation with the relevant stake-holders. Arguably, it does not succeed in arriving at a wholly satisfactory system, and certainly it differs in various respects from the solutions which legislatures in other common law jurisdictions have arrived at.

Imposition of a PPO

84. The Draft Law creates a power for the Royal Court to impose a PPO without the consent of the parties. That is not necessarily a bad thing, but the Draft Law gives no guidance as to how the Royal Court should approach such a course. This is unsatisfactory.
85. The English statutory scheme provides that the wishes of the parties must be taken into account when deciding whether or not to impose a PPO, and that the paramount consideration is the form of order which "best meets the claimant's needs". When choosing the form of order in England, therefore, the parties' interests are not to be given equivalent weight: the future requirements of the plaintiff should be given primacy over the interests of the defendant and over any reason which the defendant may have for preferring a PPO.
86. As one would expect, there have been very few cases in which a PPO has been imposed on a claimant in England against his or her wishes in the 13 years or so since the power to do so was introduced by statute.
87. The Master of the Court of Protection of England and Wales has stated that the practice of the Court of Protection is generally not to impose a PPO against the wishes of a claimant:

"For the Court of Protection to impose an order for periodical payments against the wishes of the claimant would be a hostile step and the court is only likely to do so in exceptional circumstances. These are where the claimant's friends or family are not acting in his or her best interests, and if there is a serious risk that they will seek to dissipate a conventional lump sum award.

...

"If the court is satisfied that claimants and their families wish to settle on a conventional basis having received competent and impartial advice and having carefully weighed the pros and cons, it will not seek to interfere with their decision. There will of course always be a small number of cases where the court has good reason to believe that a family is not acting in the claimant's best interests and in those cases it would reserve the right to impose a periodical payments order against the claimant's will."

OTHER ISSUES

Taxation/Benefits

88. As discussed above, the treatment of awards of damages (whether by way of lump sum and/or PPO) for taxation purposes, and in terms of eligibility for benefits, has been the subject of detailed and extensive primary and secondary legislation in the UK (and other jurisdictions). There is no clarity at all in the Draft Law as to how these matters will be treated in Jersey.

- a. There is nothing at all which deals with the position of plaintiffs as regards benefits.
- b. The only reference to the impact of taxation is the proposed amendment to the **Income Tax (Jersey) Law 1961**. The reality is that the proposed amendment does not give any clue as to what the position will be, as it simply permits the States, by Regulation, to make provision for the taxation of investment returns from the investment of lump sum awards of damages (including the potential to exempt such returns from taxation).
- c. There is nothing in the Draft Law to explain how PPO's will be treated for the purposes of taxation.

Transitional Provisions

89. The transitional provisions are extraordinary. If enacted, they would create a power to retrospectively impose the new statutory discount rates on existing cases prior to judgment and, even more extraordinarily, even on appeal. Further, they would create a power to retrospectively impose PPO's on existing cases, even on appeal.

90. The Draft Law does at least, even if rather sheepishly, acknowledge the obvious Article 6 ECHR issues of the imposition of the new statutory discount rates to ongoing litigation. That is the purpose of the wording in the proposed Article 6(a) "*unless it appears to the court that to apply the rate would be contrary to the rights of a party to the action under Article 6 of the European Convention on Human Rights...*". Any attempt to impose such a new regime on current cases where evidence has been heard would almost certainly be unlawful – particularly where a Minister of the States is the defendant. Where cases have litigated already, but not yet reached trial, the Human

Rights issues are more complex, but it is certainly strongly arguable that the sort of peremptory imposition (without reasonable notice period) envisaged by the Draft Law is also contrary to ECHR principles.

91. There is assertion that the position with PPO's is different and that the power to impose PPO's can be exercised entirely retrospectively without there being any breach of ECHR principles. This is simply untrue. It is, frankly, unbelievable that those proposing the Draft Law genuinely consider that such a proposal is ECHR compliant. There is an established right at common law for a plaintiff to receive his damages by way of lump sum (there is considerable case law to this effect). That right would be infringed by this provision of the Draft Law.
92. To be blunt, it appears that the transitional provisions contained in the Draft Law have been designed and proposed as a direct result of the anticipated judgment (against the Minister for Health & Social Services) in the *X Plaintiffs v. Minister* case. The transitional provisions are extraordinary, suspect in motivation, and almost certainly unlawful.

Prohibition on Negative Discount Rate

93. The Draft Law asserts that it seeks to adhere to the principle of full compensation. This is an obvious fiction given the prohibition on setting a negative discount rate. There can be no logical reason why, if a plaintiff can only expect to achieve negative returns on investments (even if the plaintiff is assumed to invest in a 'low risk' rather than 'no risk' basket of investments), the discount rate should not reflect this.
94. The notes prepared by the Law Officers' Department expressly recognise that (1) the economic situation might be such that the appropriate discount rate should be negative; and (2) that in such circumstances a failure to set a negative discount rate would be a departure from the principle of full compensation. The justification provided for such a departure is that, in such a situation, the economic outlook for Jersey would be such that it would provide a compelling reason to depart from full compensation.
95. The analysis of the Law Officers' Department is flawed.

- a. For a start, the current statutory discount rate in England & Wales is a negative discount rate. There is no suggestion that the long-term economic prognosis for the UK is such that plaintiffs should be penalised by being under-compensated.
- b. The Law Officers' Department seems to consider that a poor economic outlook for the Island equates to an inability on the part of a defendant to fully compensate a plaintiff for the consequences of the defendant's negligence. This is revealing.
 - i. Most defendants will be insured. If they are not sufficiently insured, and cannot satisfy an award, they will simply be made bankrupt once their insurance and personal assets have been depleted. This leaves the plaintiff under-compensated, but is the position whatever the discount rate.
 - ii. What really seems to trouble the Law Officers' Department is the impact on the public finances should claims be brought against the States and the States not have sufficient insurance coverage. This, it is suspected, is precisely the situation which has arisen in **X Plaintiffs v. Minister**. In effect, the Draft Law seeks to ensure that States Departments are protected from the consequences of their own negligence (both in terms of the acts which give rise to the claim and in terms of a failure to have in place proper and sufficient insurance) at the expense of the most vulnerable members of society.

SUMMARY

96. The issue as to the potential for there to be a negative discount rate has been a live issue since the decision of the Royal Court of Guernsey in 2010. The benefits of legislation to enact a system by which awards of damages could, where appropriate, be made as a PPO, were set out in detail by the Privy Council in 2012.

97. It cannot be a coincidence that it is only after the recent trial in *X Plaintiffs v. Minister* (and before judgment) that the Chief Minister has brought forward the Draft Law. This legislative exercise is clearly a reactive measure which has all the appearance of administrative panic in response to *X Plaintiffs v. Minister*. It has quite clearly been drafted in haste, without proper research or consideration, and with unlawful transitional positions designed specifically to disadvantage the Plaintiffs in that case. The 'analysis' behind the change set out in the consultative documentation is little more than a legal *paella*. It is a jumble of limited (and unverified) financial data lifted from others, misunderstood and misapplied, combined with a topping of 'buzzwords'. It has virtually no academic merit and is a deeply cynical piece of legislation.

98. The Draft Law proposes to create and apply a statutory discount rate and afford the Royal Court the power to impose an award of damages by way of a PPO. There is considerable merit in both of those aims. In order to achieve these aims properly, however, much greater care and consideration needs to be taken. In our view:

- a. There should remain a true commitment to the principle of full compensation.
- b. If it is thought desirable to move away from the use of the real rate of return on ILGS as the benchmark by which to calculate returns, then:
 - i. The move should be to a genuinely cautious, or 'low risk' hypothetical portfolio, such as that constructed in the Scottish Bill.
 - ii. The hypothetical portfolio should be constructed on the basis of the objectives and characteristics of the 'hypothetical investor', including the following:
 1. The hypothetical investor will be properly advised.

2. The hypothetical investor's objective will be to secure that the investment of their lump sum award of damages will cover the losses and expenses for which the award was made.
 3. There will be withdrawals of income and capital from the investment fund to meet those losses and expenses.
 4. The withdrawals from the investment fund will exhaust the investment fund at the end of the period for which the lump sum damages were awarded.
 5. The hypothetical investor has no other funds or income and relies entirely on the lump sum to meet their injury-related needs and so will take an approach in terms of investment choices which is capable of limiting volatility and uncertainty.
- iii. There should be a proper framework for the setting of the statutory discount rate by an appropriate person or body.
 - iv. The statutory discount rate should be further adjusted to take proper account of the impact of taxation and the costs of investment advice and fees.
 - v. The statutory discount rate should be further discounted to mitigate the risk of under-compensation, as is proposed in the Scottish Bill.
- c. Whether or not the statutory discount rate is set by reference to the real yield on ILGS or a 'low risk' portfolio:
- i. The statutory discount rate should be obliged to be reviewed on a frequent basis, not simply be capable of review at the whim of the Chief Minister.
 - ii. The legislation should afford the Royal Court a discretion to depart from applying the statutory discount rate where it appears to the Royal Court that justice requires a different discount rate to be applied to the case before it.

- iii. There should be provision for different discount rates to be applied to different types of losses, as this will reflect the fact that inflation affects different losses to differing extents.
- d. The implementation of a statutory framework for the award of damages, where appropriate, by PPO is to be welcomed. The Draft Law, however, does not do enough to ensure the success of the system or to safeguard the interests of all involved. If a statutory framework is to be implemented, it needs to be complete and needs to include:
 - i. Provision that the Royal Court can only make a PPO if satisfied that continuity of payment under the order is "reasonably secure".
 - ii. The Royal Court must be obliged to make the form of order which "best meets the plaintiff's needs".
 - iii. There must be an ability to vary a PPO where there is a material change in circumstances.
 - iv. Clarity as to the impact receipt of a PPO will have on a plaintiff's eligibility for social security and other benefits.
 - v. Clarity as to the taxation treatment of PPO payments.

99. Given the tight timeframe within which to provide comments, this is not a complete and full analysis of the Draft Law. It is hoped that it is of some assistance to the Panel. Both Advocate David Benest and Advocate Jeremy Heywood would be happy to attend on the Panel to provide further assistance if this is considered desirable and a convenient time can be identified.

Dated this 9th day of November 2018



.....
Advocate Jeremy Heywood

BCR Law