

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

POLICY & RESOURCES COMMITTEE

INSURANCE – STATUTORY DISCOUNT RATE AND OTHER MATTERS

The States are asked to decide:-

Whether, after consideration of the policy letter entitled 'Insurance – Statutory Discount Rate and Other Matters' dated 8 February 2019 they are of the opinion:-

1. To approve the proposals set out in that Policy Letter for the preparation of the necessary Guernsey legislation to:
 - a. enable the introduction of a statutory discount rate with the setting of the rate to be by regulations of the Policy & Resources Committee;
 - b. create a power for the court to order the payment of damages for a personal injury claim by means of periodical payments;
 - c. create a power, by Ordinance, to introduce a scheme to recover costs which would otherwise fall to the States arising from a personal injury claim; and
 - d. create a power, by Ordinance, to introduce limitations to personal injury damages awards.
2. To direct the preparation of such legislation as may be necessary to give effect to the above proposition.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

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INSURANCE – STATUTORY DISCOUNT RATE AND OTHER MATTERS

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

8 February, 2019

Dear Sir

1. Executive Summary

- 1.1 This Policy Letter is recommending the introduction of legislation designed to remove elements of uncertainty pertaining to the value of personal injury claim settlements. This will remove some of the risk allowance which inevitably forms part of the pricing of insurance premiums which are paid by individuals, companies and government.
- 1.2 It is understood that the absence of this legislation is a factor in local insurance rates being proportionately higher than in the United Kingdom. This is particularly relevant to insurance for medical professionals and improvements in insurers' confidence in the local market will help mitigate rises to future premiums for clinicians which will inevitably be recovered, either from the States as part of the secondary health contract or through patient charges.

2. Statutory Discount Rate

- 2.1. In some personal injury cases, where the injury is permanent or long lasting, damages are awarded to cater for the cost of future lifetime care. This means that insurers have to pay as a lump sum the full amount that it is estimated it will cost to look after that person for the likely remainder of that person's life at the time of judgment together with compensation for loss of earnings (this can run into several millions of pounds).

- 2.2. In order to cater for the fact that the award is paid up front, a discount is often given to the defendant to offset the gain that can be made in investing the full amount at the time of judgment - rather than the injured person receiving the cost of their care on a periodic basis as the needs arise. In effect, receiving the full amount decades in advance can put the injured person in a better financial position than they would have been had they had to wait for periodic payments, although this may be offset by loss caused inflation over time. Therefore, the discount rate is intended to reflect the financial gain a plaintiff will make upon investment of a lump sum damages award, balanced against the effect of inflation upon the value of that investment. The investment approach adopted by or on behalf of the person receiving an award and the resulting returns will determine whether the income is higher or lower than that expected when the award is made.
- 2.3. In England, the rate is fixed by statute by the Lord Chancellor, pursuant to s.1 of the Damages Act 1996 and the Courts in England and Wales have not departed from the statutory rate. The discount rate is kept under review and is evaluated by actuarial assessment.
- 2.4. In Guernsey, the courts used to adopt the UK discount rate but in the case of *Helmut v Simon* in 2010 the Privy Council departed from the UK rate (then 2%) and determined that the applicable discount rate was negative, i.e. effectively an increase in the amount payable rather than a decrease (-1.5% for certain losses and -0.5% for others)¹. This judgment and the consequential uncertainty concerning the level of discount rate that the court will set has increased the cost of insurance in the Bailiwick, as it has increased the underwriting risk for insurers of such potential claims.
- 2.5. To avoid uncertainty, **it is proposed to legislate to introduce a statutory discount rate which would be set by regulations of the Policy & Resources Committee and regularly reviewed.** The Policy & Resources Committee would comprehensively research and consult extensively on the appropriate rate in Guernsey with interested parties including insurers; medical professionals; advocates, actuaries, etc. This means that the States will be able to balance the interests of insurers (and those of the public paying premiums) against the needs of potential claimants by setting an appropriate rate.

¹ This was a combination of the difference between Guernsey and UK Inflation; lower income tax rates in Guernsey and limited statistical information available to track the movement of prices and earnings in Guernsey.

3. Periodic Payments

- 3.1 In cases of damages awarded for catastrophic injury, often rendering the claimant unable to support themselves financially and requiring lifelong care, the damages awarded are designed to provide funding to cover for the rest of the claimant's life. However, it is impossible to predict with accuracy how long the claimant will live; care requirements may alter from those anticipated at the time of the settlement; the cost of providing care may change; or investments returns may be above or below those assumed by the prevailing discount rate. Therefore, a lump sum award payment could result in the claimant not having sufficient funding to meet their needs during the last years of their life or receiving more funding than is necessary which cannot be recovered by the insurer.
- 3.2 The Damages Act 1996 also permits personal injury awards to be made by way of periodic payments. This is not presently possible in Guernsey, where only lump sum payments can be made. It would be sensible to have a similar provision in Guernsey to allow flexibility as to how personal injury awards can be paid.
- 3.3 Therefore, **it is proposed that legislation is introduced that enables the court to order the payment of damages by means of periodical payments.** This could be instead of, or additional to, the payment of lump sums. A claimant would receive regular damages designed to cover the financial costs and losses which arise over time. A Periodic Payment Order could be subject to regular review or on application and thus can take account of changes in circumstances.

4. Recovery of healthcare costs falling to the States

- 4.1 The United Kingdom has a Compensation Recovery Unit which '*works with insurance companies, solicitors and Department for Work and Pensions customers, to recover:*
- *amounts of social security benefits paid as a result of an accident, injury or disease, if a compensation payment has been made (the Compensation Recovery Scheme)*
 - *costs incurred by NHS hospitals and Ambulance Trusts for treatment from injuries from road traffic accidents and personal injury claims (Recovery of NHS Charges)'*
- 4.2 It is **proposed that legislation is introduced which would enable a scheme to recover costs which would otherwise fall to the States be introduced by subordinate legislation.** There would need to be States approval to introduce this subordinate legislation and a Policy Letter would be submitted following consultation with interested parties.

5. Statutory limitation to damages awards

- 5.1 The cost of personal injury awards continues to rise with consequential increases in insurance premiums. Whilst there is the principle that a claimant should be fully compensated for the losses he has incurred, there are options in how the necessary care is provided. This includes requiring claimants to make use of the services provided by the States where appropriate instead of receiving private care.
- 5.2 It is **proposed that legislation is introduced which would enable the introduction by subordinate legislation of a statutory limitation to damages awards**. There would need to be States approval to introduce this subordinate legislation and a Policy Letter would be submitted following consultation with interested parties.

6. Next Steps

- 6.1 The proposals set out in this Policy Letter are for the preparation of enabling legislation to introduce: a statutory discount rate; a scheme to recover costs which would otherwise fall to the States; and a statutory limitation to damages awards. The Policy & Resources Committee will extensively consult with interested parties prior to enacting a regulation to set a statutory discount rate and, if appropriate, submitting Policy Letters for a scheme to recover costs which would otherwise fall to the States and a statutory limitation to damages awards. The timing of the introduction of new measures will be dependent on the enactment of the enabling legislation but it is intended that the consultation exercise will commence in the second quarter of 2019.

7. Compliance with Rule 4

- 7.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.
- 7.2 In accordance with Rule 4(1), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications. She has advised that there is no reason in law why the Propositions should not to be put into effect.
- 7.3 In accordance with Rule 4(3), the Propositions are not requesting the States to approve funding.
- 7.4 In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions above have the unanimous support of the Committee.

7.5 In accordance with Rule 4(5), the Propositions relate to the duties of the Committee to examine issues which expressly do not fall within the mandates of other committees.

Yours faithfully

G A St Pier, President

L S Trott, Vice-President

A H Brouard

J P Le Tocq

T J Stephens