



Informing Progress - Shaping the Future

A Response by the Forum of Insurance Lawyers to
the Corporate Services Scrutiny Panel's review of
the Draft Damages (Jersey) Law.

November 2018



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FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

The consultation was drafted following consultation with members, including those who have responsibility for defending claims within the jurisdiction.

Any enquiries in respect of this response should be addressed initially to:

Shirley Denyer

Shirley Denyer LLP

FOIL Technical Director

info@foil.org.uk

FOIL

1 Esher Close

Basingstoke

Hampshire

RG22 6JP

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Introduction

FOIL members have very considerable experience in handling claims for damages for serious injury across England and Wales, Scotland and Northern Ireland, and in the Channel Islands. FOIL has followed carefully the long-running process of reform in England and Wales, and more recently in Scotland, to put in place new methodologies for setting the discount rate.

In addition to reviewing the papers regarding the Draft Damages (Jersey) Law FOIL has had the opportunity over several years to consider in detail the consultation papers and evidence put forward by the governments in Westminster and in Holyrood, including the evidence from the UK Government Actuary's Department analysed by the Treasurer of the States and the Chief Economist as part of the consultation on a change in the legal framework for setting the discount rate in Jersey. In November 2017, FOIL give evidence before the Justice Select Committee on the draft discount rate legislation in England and Wales.

FOIL supports fully the English common law principle, adopted in Jersey, that seriously injured plaintiffs should receive 100% compensation. To achieve 100% compensation, no more and no less, FOIL agrees with the finding in the report from the Treasurer of the States and the Chief Economist, that *"in personal injury cases, the PIDR should be a fair assessment of the rate of return that can realistically be expected from the investment of a lump sum award; and evidence of returns from such investments is relevant to the process. Furthermore, the basis for setting the rate should not follow an unrealistic 'no risk' approach, e.g. through investment solely in ILG"*.

FOIL supports the approach of a discount rate set under statute, creating political accountability for the rate based on appropriate independent information and advice.

The approach adopted under the draft law will align the assumptions made in the setting of the rate with those to be adopted in England and Wales and in Scotland, based on the principle that plaintiffs are lower risk investors who will use a diversified portfolio to invest their damages award. This alignment with the UK jurisdiction accords with the current position under case law in Jersey, set out in the judgment in *Saint v Feuvre* in 2014 that, without further determination by the Royal Court, the appropriate discount rate in Jersey is the same as that in England and Wales.

How do claimants/plaintiffs invest their damages?

As FOIL members act for defendants they have no direct experience of how claimants are advised to invest their lump sum awards. However, the evidence that is available with regard to England and Wales indicates that claimants do not in reality invest in 'no risk' IGL portfolios:

- As the Lord Chancellor, Lord Irving of Lairg, noted in the statement he made when setting the discount rate in England and Wales at 2.5% in 2011,

"I consider it likely that real claimants with a large award of compensation, who sought investment advice and instructed their advisors as to the particular investment objectives which they need to fulfil (as they could reasonably be expected to do) would not be advised to invest solely or even primarily in Index-Linked Government Securities, but rather in a mixed portfolio, in which any investment risk would be managed so as to be very low. This view is supported by the experience of the Court of Protection as to the independent financial advice they receive. It is also supported by the responses of the expert financial analysts whom I have consulted. No-one responding to the consultation identified a single case in which the claimant had invested solely in Index-Linked Government Securities and doubts were expressed as to whether there was such a case."

There is no evidence that claimant behaviour has changed since then.

- The Ministry of Justice's consultation paper on the setting of the rate published in February 2013, quoted on of the leading academic works, McGregor on Damages, on the point:

*"Full compensation for victims of personal injury is a principle which should be vigorously adhered to, but it is thought the application of the new discount rate leads to overcompensation. Probably not fully compensated in the past, the injured victim, certainly the very severely injured one, is to be overcompensated in the future. For the new thinking ignores the hard fact that claimants, like the Court of Protection for their patient claimants, are not in reality going to invest in ILGS and, as the Court of Appeal in effect recognised in *Warriner v Warriner*, do better with their money elsewhere."*

- Research conducted by Ipsos MORI in 2013, as part of the Ministry of Justice's review and consultation on the setting of the rate, gave no indication that claimants invest wholly in ILGS.
- Reports from wealth managers and investment strategists obtained by the ABI as part of its response to the Ministry for Justice consultation, indicated that claimants use mixed portfolios including a proportion of ILG and fixed interest instruments; some cash; and a significant proportion of UK and international equities, to achieve a return at low risk.

- The evidence-based report from the Government Actuary's Department published in July 2017 made it clear that claimants do not, in reality, invest in government stocks.

FOIL notes that the recommendations in the report, adopted in the draft law, are based on an average return over two representative portfolios identified by the GAD, both representative of the low risk portfolios typically used by personal injury claimants. FOIL believes this represents a realistic and appropriate approach to setting the rate. The provision within the draft law which will prevent the rate being set at a negative figure also reflects reality: no properly advised plaintiff would make investments resulting in a negative return.

It is important to note that the report from the Government Actuary's Department published in July 2017, indicated that under the rate of minus 0.75%, based on the use of IGL, over 95% of claimants are overcompensated by an average of 35%.

A dual rate

FOIL believes that there may be merit in considering a staged discount rate, recognising that better returns are available for longer-term investments. Dual rates can provide for a closer alignment to the reality of investment. Such a system operates in Ontario, with different discount rates either side of a 15 year threshold. FOIL understands that the long term rate is set by legislation and has been 2.5% since 1981. A similar system operates in Hong Kong, also with a longer term rate of 2.5%. Taking a longer term view, with a threshold at 20 years, as proposed, has the potential to introduce more stability in the process.

A power allowing dual rates to be set is a feature of the new discount regimes to be put in place in both England and Wales and in Scotland. However, the Ministry of Justice has recognised that introducing a dual rate could lead to a certain amount of gaming of the system. The detail of a dual rate regime needs careful consideration to ensure that the system treats both claimants and defendants fairly.

PPOs

For a very risk averse plaintiff, a periodical payment order removes any need to depend upon investments, providing the lowest risk option. The plaintiff can be assured that his or her needs will be met through regular payments. The availability of PPOs provides an important alternative to a lump sum, with no risk of the compensation award becoming exhausted before the expected term of the award. FOIL's experience of PPO awards suggests that this category of very low risk claimant is very small, with fairly take-up of PPOs in England and Wales.

A court power to make PPOs will give plaintiffs in Jersey the same flexibility in structuring their awards that claimants in England and Wales already have, and which will be shortly be available to pursuers in Scotland.

FOIL supports proposals to allow periodical payments to be varied but believes that the likelihood of a variation being required should be identified at the outset, with express provision for change included in the PPO. This is an important safeguard, minimising the risk of significant under or over-compensation. It also ensures that the chance of a significant change in the plaintiff's condition is ignored in assessing the initial award, avoiding double compensation.

In addition, on the circumstances permitting variation, FOIL would suggest that the wording used in Article 4(8), allowing variation on the basis of a "*material change of circumstance*", be changed to refer to significant improvement or serious deterioration in the plaintiff's physical or mental condition, reflecting the test in England and Wales under the Damages (Variation of Periodical Payments) Order 2005.