

STATES OF JERSEY



DRAFT DAMAGES (JERSEY) LAW 201- (P.131/2018): AMENDMENT

Lodged au Greffe on 14th January 2019
by the Chief Minister

STATES GREFFE

1 PAGE 59, ARTICLE 2 –

For paragraph (5)(d) and (e) substitute –

- “(d) circumstances, of whatever nature, to be taken into account in determining the discount rate, including circumstances relating to such matters as economic sustainability, affordability, and inflation, including wage inflation;
- (e) different circumstances to be taken into account in different types of case;
- (f) the making of rules of Court.”.

2 PAGE 60, ARTICLE 4 –

(a) Renumber paragraph (10) as paragraph (11).

(b) After paragraph (9) insert –

“(10) For the purposes of paragraph (8), the States may, by Regulations, make provision for determining when there has been a material change of circumstances and when an application can be made under that paragraph, including, without prejudice to the generality of the foregoing, provision for –

- (a) factors to be taken into account in determining whether there has been a material change of circumstances;
- (b) any period of time that must elapse before an application or subsequent application is made, with reference to such factors as may be specified in the Regulations, including the nature of any change of circumstances or otherwise;
- (c) when the leave of the Royal Court is required to make an application, whether in all circumstances or in such circumstances as may be specified in the Regulations;
- (d) when the provisions of a periodical payment order may or must limit the circumstances in which an application under paragraph (8) may be made.”.

CHIEF MINISTER

REPORT

Article 4: Periodic payment orders

Article 4 of the [Draft Damages \(Jersey\) Law 201-](#) (“the draft Law”) provides for a Court awarding damages in relation to a personal injury claim to order that those damages take the form of periodical payments, as distinct from a single lump sum payment. This is known as a periodic payment order (“PPO”).

PPOs have a number of significant advantages over lump sum payments. When making a PPO the Court does not have to –

- (i) attempt to estimate life expectancy – the payments made under a PPO stop at the point of death;
- (ii) consider whether the monies awarded will run out before the claimant dies – a concern that can result in over-compensation; or
- (iii) speculate over investment returns – if a return on an investment is greater than, or lower than anticipated, a claimant can be either over-compensated or under-compensated for their loss.

The draft Law provides that when a PPO has been made, a person who has an interest in the payments made under that PPO may apply to the Court for the PPO to be varied if there has been a ‘material change of circumstances’; for example, a change in the recipient’s care needs. In England and Wales, a party can only make one application for PPO to be varied in respect of each type of injury or disease. In England and Wales, applications to vary can only be made insofar as the original PPO permits them to be made, and cannot be made in response to a change in financial needs, unless there is also a change in relevant parts of the claimant’s condition. This has given rise to criticisms about their lack of flexibility – if the purpose of a PPO is to help ensure that an individual is neither over-compensated nor under-compensated for their loss, it is important that the terms of a PPO can be revisited when necessary. In light of these criticisms, the draft Law does not limit the number of times a PPO can be varied.

The draft Law, which was lodged on 24th October 2018, and is due to be debated on 29th January 2019, has been subject to a period of consultation. During the consultation, most stakeholders welcomed the ability of the Court to make PPOs. However, a number queried whether allowing a PPO to be varied in response to any ‘material change of circumstances’ (Article 4(8) of the draft Law) could result in overly frequent applications for variations. This could, in turn, create uncertainty and expense for all parties, including both recipients of the awards and insurers.

On the other hand, the words “material change of circumstances” are words that, generally speaking, one would anticipate that the Royal Court would have no difficulty in interpreting, and could be relied upon to produce a body of Jersey case-law which would determine what circumstances were “material”, and what were not.

Nonetheless, it may be of assistance in due course for the Assembly to provide, by way of Regulations, guidance in interpreting this term. Accordingly, an amendment to the draft Law has been prepared. This gives the States the power to prescribe by Regulations the conditions under which a PPO can be varied, i.e. to determine what amounts to a

material change in circumstances. As provided for in the new paragraph (10) to be inserted in Article 4 of the draft Law by this amendment, such Regulations might –

- define the factors to be taken into account when determining if there has been a material change of circumstance;
- restrict the time between applications, or restrict the types of applications;
- provide when the Court’s permission is required to apply for a variation to a PPO.

Financial and manpower implications

The Draft Damages (Jersey) Law 201- brings forward statutory provision for the setting of a discount rate and for Periodic Payment Orders. The draft Law upholds the principle that a claimant should be fully compensated, but not over-compensated, for their losses. For this reason, this amendment to the draft Law has no financial or resource implications for the States.