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Corporate Services Scrutiny Panel

Draft Damages Law

Witness: BCR Law

Monday, 17th December 2018

Panel:

Senator K.L. Moore (Chairman)

Deputy S.M. Ahier of St. Helier:

Deputy J.H. Perchard of St. Saviour:

Connétable K. Shenton-Stone of St. Martin

Witnesses:

Advocate D. Benest, Managing Partner, BCR Law

Mrs. A. Baker, English Solicitor, BCR Law

[14:32]

Senator K.L. Moore (Chairman):

Good afternoon, and thank you very much for joining us this afternoon, giving up your time, to speak to the Corporate Services Scrutiny Panel about the Draft Damages Law. We are grateful for your input. Can I first check that you have seen the witness statement and are happy with the ... I think it has been sent to you in advance?

Managing Partner, BCR Law:

Yes, absolutely happy with that.

Senator K.L. Moore:

We will start with our introductions, if we could. Just for the record, I am Senator Kristina Moore. I am the chairman of the Corporate Services Panel.

Deputy S.M. Ahier of St. Helier (Vice-Chairman):

Steve Ahier, vice-chair.

Connétable K. Shenton-Stone of St. Martin:

Karen Shenton-Stone, member of the Corporate Services Panel.

Deputy J.H. Perchard of St. Saviour:

Deputy Jess Perchard, member of the panel.

Managing Partner, BCR Law:

I am Advocate David Benest. I am an advocate and managing partner at BCR Law in Jersey.

English Solicitor, BCR Law:

I am Alexandra Baker. I am an English solicitor employed by BCR Law in Jersey.

Senator K.L. Moore:

Thank you. You very kindly sent us a very full submission but you state in those submissions that despite the fact that it is a very full and wide-ranging submission that there is much more that you would like to say. Can we just kick off by asking you what areas you felt that you wanted to add to your submission?

Managing Partner, BCR Law:

Certainly. I understand and, as you say, we have given a very full submission. I think it is probably a lever arch file of submission and the documents under it. I do not intend in any way, you will be very pleased to hear, to repeat those things because I am sure you have those and have the things that are raised in them, in mind. This is a very important topic. You will understand therefore that there are things that one would like to supplement in relation to it, but also, and it seems to me the most important thing, is to deal with any questions and issues which the panel, now having had an opportunity to consider representations both from us but also, I am sure, from others, any issues which the panel itself would like clarification on and matters, whether a policy or law or those things which fall between the 2, where you would like that clarification. I should first of all say that I think that the proposed legislation in terms of its principle is a very good idea. I think that bringing certainty and clarity in relation to the 2 areas of law, which the draft legislation proposes, is very sensible. There has been a lot of litigation over a number of years in Jersey since the *Helmot* v *Simon* decision in Guernsey, where the discount rate has been an issue. That has led to uncertainty for insurers, those acting for defendants and also for plaintiffs, and it has added to the expense of litigation because of that. It has required the instruction of a myriad cast of experts, which has had the effect of increasing the length of litigation. When you increase the length of litigation unfortunately you

also increase the cost of it. Therefore, having a discount rate set, which effectively takes that whole argument away, is something which is only beneficial. The same I think is true in relation to periodical payment orders where there has been clarity in relation to that where the court can give those orders by consent but not by order. Certainly that is an issue which remains live. The recent litigation case which gave rise effectively, as we saw in the Chief Minister's evidence to this panel, was potentially to determine that, but the case has been settled, which means that the court will not give a decision in relation to whether there is a common law power to impose. Absent that, the idea that the court can have a power in appropriate circumstances to do what it sees is justice between the parties, again, I think can only be seen as something which is advantageous. So certainly the evidence which I give is not intended in any way to detract from the sensibleness of the idea of government entering into these areas and clarifying the law in them. I think therefore streamlining litigation. The concerns I have I think are more around the detail and certainly around in terms of the proposed discount rate, the manner in which it is intended to come to that, because I think it is entirely wrong. The starting point that I come to, and I should say please do interrupt me at any point. The one thing you will understand from a lawyer is if you set them off one can talk for any length of time without interruption. So please do interrupt me if you would like clarification on anything. In terms of, first of all, the discount rates and the approach which is taken to that, I have acted over the years for defendants and for plaintiffs. In fact my case load probably before the recent piece of litigation, which appears to have given rise to this, has been principally for defendants. I have acted for a number of insurers. I have acted indeed for the Minister for Health in relation to clinical and agents' cases. I have acted for the Medical Defence Union, Medical Protection Society, so I am well aware of the arguments and concerns, which insurers have in relation to matters. But what one must have as a starting point in setting the discount rates is to have in mind the requirement to provide appropriate compensation. That is appropriate compensation, full compensation, no more no less. The issue is trying with a lump sum award to get that answer right. It is, one might say, virtually impossible to do that. You will have, by definition, over or under compensation however you try to do it because there are uncertainties about life expectancy. You cannot get it exactly right. What a court ultimately is involved in as an exercise and what the legislature should be involved in as an exercise, is to try and do the best it can to meet a balance between what defendants need, in terms of not overpayment, but importantly what plaintiffs need in terms of having appropriate compensation. Cases are principally concerned in terms of future loss with care and loss of earnings. Most important, in a sense of those being, particularly for those who are catastrophically injured, care. The recent case, which gave rise to a lot of publicity and, it would appear, the trigger for this litigation is one which is involved in long-term care. Now the good thing is that ultimately it is settled on a periodical payment order, which will mean that the plaintiffs are appropriately compensated for life and it is affordable in a way which, on the face of it, the lump sum award might not have been. But striking that balance, as I say, is not entirely straightforward. I am sure you understand exactly what the discount rate is there to do but

if I can just summarise in my mind, its purpose. That is to look at and translate, in a way, the annual cost. So we have an annual cost of care; nursing or whatever it may be, or indeed an annual loss of earnings case. If you had a loss for the next 70 years and you just times that annual loss by 70 you would get to a figure. So if my loss of earnings is £10,000 and I times that by 70, I have £700,000. The argument is that by getting all the money upfront, I will have too much money. I will be overcompensated because I am able to use that money for that 70 years. I can invest £700,000 and what one hopes that will give me is more than the £10,000 a year and the maths is intended to be that I will put pop my clogs on the 70th year. Now, the assumption that I will make a positive return on having all the money upfront on my investment is not a safe assumption, and that is the problem. Because there are a number of things which interact with that investment. So if we assume for the moment that we have £700,000 in the bank, and ... first of all, if you put it in the bank, which is the safest place probably to put it, you will be getting a very low interest rate. So you will not be getting anything like ... you will be lucky if you get the 1.8 per cent that is suggested is the long-term discount rate under the legislation. It simply will not at the moment. So you are required then to do something else with it. Now, that means taking risk. The big decision which the legislature needs to make in terms of setting a discount rate, or the mechanism for setting a discount rate, is the level of risk which a plaintiff should be required to take. The approach which the English courts have taken thus far in a case called *Wells* and in subsequent cases which have been seen in other parts of the world, including cases in Hong Kong, have been that the plaintiff is not an ordinary investor. They should not be assumed to be in a position of an ordinary investor and they should be assumed to have a very low risk appetite.

[14:45]

Because if it goes wrong for them, if I put my £700,000 in an investment portfolio and it loses money, I am for ever going to be trying to catch up and I am not going to have the money to pay myself the £10,000 every year.

Senator K.L. Moore:
Can I just break in there for a second? So the 2 points there really, so in the draft law we have, there is an option for an infinite amount of appeals to be taken back to the court.

Managing Partner, BCR Law:
This is the review mechanism.

Senator K.L. Moore:
Yes.

Managing Partner, BCR Law:

This is in relation to the periodical payment orders, I think, there is a review.

Senator K.L. Moore:

In your view, is that a necessary or even an adequate method for a claimant to go back and have their case revisited?

Managing Partner, BCR Law:

The first thing is that that is not dealing, as I understand with the legislation, with the discount rate part. That is dealing with the review of a periodical payment order. So say the court says: "We are not going to deal with this by way of a lump sum because we think that it is more appropriate because of the nature of care or the nature of loss of earnings to deal with this by way of a periodical payment order." So an annual payment which is inflated by an appropriate measure of inflation. We can then review that. In England, I think you can review it once if there is a step-change. But what is proposed here is that there should be, I think, an infinite number of reviews. Now, in a way, you might think that is a very positive thing because you can keep coming back if your care changes or there is a requirement ... a material change which requires a review. For my own part, I think that is not a good idea. I think review is but an infinite number of reviews is not because you just simply have never-ending litigation potentially with all of its associated costs, experts and so forth. I think that the flexibility, which is suggested by reviews, is helpful, but that it needs to be carefully structured so that it needs to be much clearer as to what would trigger the ability to come back for a review and it might be sensible to cap the number of reviews overall because otherwise, as I say, you could just have a revolving door to the court. Principal review is a good idea, the number of reviews, the infinite nature of reviews just by legislation is not. I would welcome clarity around the factors to be taken into account in triggering a review and potentially a cap on the number of reviews.

Senator K.L. Moore:

That is very helpful, thank you. You were also talking about how one calculates the amount over a particular period of time. So in other jurisdictions that have adopted different models, for example, the Australian model, have taken a very specific view and quite different to the view that is being proposed in this draft law.

Managing Partner, BCR Law:

I did have some comments about Australia. If I deal with those first. There is a huge danger in simply jurisdiction shopping until you find something which looks like it either suits one interest group or another. What Jersey has always been in a position to do and has been one of the strengths, I think, of the way in which Jersey has approached its legislative programme, is to go out and look at what is best, not what simply meets an immediate need of a particular interest group or lobby group,

but to look for so-called best in class. I would immediately say, just in preface to the comments from Australia, that the current draft legislation is by no means best in class. I think it is a knee-jerk reaction designed to deal with a particular case, rushed, badly drafted, and ill-thought through because it does not take a holistic view of matters. It was designed and reading of the explanatory note and certainly the introduction to the law, suggested it was drafted by a defendant in trouble looking for a way out rather than a legislature trying to do its best in measuring what is right from both sides of an argument. Very much designed to meet a £238 million claim. What one should never do as a legislature is draft legislation which is designed to meet the immediate moment. What you need to do is draft legislation which meets years hence and is a well-balanced piece of legislation, which does its best to find an appropriate ground between different interest groups. This does not. Certainly it would not, if it sought to adopt the discount rate, which I think is 4.5 per cent, in Australia. The first thing is that the Australian model of damages is different. They have a no-fault compensation system in relation to certain elements of their claims. But also what one needs to understand in setting the discount rate are the economic arguments and the actuarial arguments which underlie calculation. You cannot just say: "Australia has a discount rate of 4.5 per cent and therefore that is a good idea. We should have that because that looks like it will save insurers a lot of money and at the same time obviously if it is good enough for Australia, it must be compensating plaintiffs." Well, it might be but what I do not know, and what you would have to know in order to determine that, is exactly what inflation was in Australia, what interest rates were in Australia, what investment returns were in Australia, what the cost of investment was in Australia to translate that into a Jersey situation.

Senator K.L. Moore:

I was also asking, I think in Australia they also take the view that no person can be compensated for loss of earnings that is more than 2½ times the average salary, which I am just putting it out there as ...

Managing Partner, BCR Law:

Again, I can see that. As I say, it is a different approach to damages in Australia because it is based on a no-fault compensation system, which is largely state funded. So that is very different. Placing an overall cap on damages is not something which this legislation proposes and I would certainly argue very much against that. We have in Jersey an insurance-based system and in relation to, for instance, motor policy, so motor claims are unlimited in the amount of the indemnity. *Helmot* v *Simon* has been there in Guernsey. There is no suggestion that insurers are not willing to insure motor claims in Guernsey. No suggestion indeed that there has been an inability to get motor claims in Jersey. We are a considerable number of years on now from *Helmot* v *Simon.* It would be wrong, in my view, if you were to say to somebody, and we have ... the average earnings in Jersey are relatively high but we also have a lot of people in Jersey because of the nature of the Island, which

we have. An Island full of lawyers, bankers and accountants and trusts professionals, who do earn considerably more than that. It would be wrong, in my view, if they were not to be properly compensated, their families were not to be properly compensated, if they were catastrophically injured.

Senator K.L. Moore:

Thank you. You have put your case very clearly that in your view this law is unfit for purpose, despite the idea of ...

Managing Partner, BCR Law:

The principle is a great idea. The execution is not.

Senator K.L. Moore:

In your view, is it possible to amend the law sufficiently to make it fit for purpose or is it something that needs a complete rewrite to make it adequate?

Managing Partner, BCR Law:

If you ask any draftsman, in a sense, whether they would like to ... if you were carrying on from something you would rather start somewhere else, they will probably say yes. The legislation as currently drafted I think is such a bad piece of drafting that it is not a starting point that I would use. I think there are much better pieces of draft legislation there. We have suggested that Scotland has a very sensible model, which is dealing with both of these aspects and seeks to draw, I think, a fair balance between the needs of the person paying and the needs of the person receiving compensation. The danger, I think, in adopting things in the way which the draft legislation does, is that what it has said is ... this has all been thought through in England, look at the Government Actuary Department report. That is fixed on a discount rate, recommendations, lots of people have already crawled over this. We do not need to think about it, we simply need to adopt that. There are all sorts of things wrong with that. The first is, most importantly, that that is not what the Government Actuary Department report was intended to do at all. It was not looking at fixing an interest rate. It was looking at giving a factor, which the Lord Chancellor would take into account in fixing the discount rate. The other thing, and it needs, and I would urge you, to look at the detail of the report and to understand the purposes for which it was written and also the assumptions which it made. For instance, once of the assumptions which it made was that ... and this is on page 2 of the report itself, in terms of the damage profile it says: “We have only analysed outcomes for a claimant that has to meet damages of £10,000 per annum for 30 years.” That is a very small pool of people. If one is looking at catastrophic injuries one is looking at care, which will be in the hundreds of thousands of pounds a year, which needs a very different view taken in relation to it. It also did not look at outcomes which had itself decided. It was given by the Ministry of Justice a

number of potential discount rates and had to do its maths, and it ignored mortality and it ignored inflation. If you ignore inflation in setting the discount rate you have gone horribly wrong because the one thing that eats into your return is inflation. So we come back to my example, just very briefly, it shows you why this is not ... you cannot set a discount rate using G.A.D (Government Actuary Department. I have my £700,000 pots to meet my ... I will use the same figure in fact, the £10,000 in terms of loss of earning. I cannot get any decent return by just leaving it in the bank so I have to take some level of risk, so I have to go to investment manager and put my money in the portfolio and I say: "I want you to give me a return for this. I need £10,000 a year cast iron going forward as a mixture of capital and income." They say: "I can get you a good 4 per cent return by you not taking much risk" and you think that sounds a good idea. That sounds fine. That would be a good low risk rate of return. But it is not a real rate of return at all because we know from the last inflation figures in Jersey that inflation is running at 4.3 per cent. So if I am getting a return of 4 per cent, I am losing 0.3 per cent. So that is not a return at all. It certainly is not a positive return of 1.8. The other things I need to take into account is I am also going to have to pay investment fees on that, and the evidence was in the trial that I recently dealt with, that one might be looking at investment charges of between 0.6 per cent and 1 per cent.

[15:00]

So you need to take that off your ... we are now at minus 1.3. If you take into account the instance of tax, and one of the things that was encouraging in the draft legislation was - certainly for those living in Jersey - income on investments of a personal injury award might not be taxable. That would be an answer to that. But the evidence again, in relation to this ... if you looked at the instance of tax you would take off another 0.5 per cent, so we are at minus 1.8, if my maths is right, rather than positive 1.8. Because it is not enough to look at the rate of return, which is here in G.A.D., you have to add in those other things, which affect the way in which you should properly calculate the discount rate to give you a real rate rather than a nominal rate of return. So you have to take off, as I say, inflation. You have to take off investment costs and you have to take off tax. It was very clear in G.A.D., page 4 of their report in the introduction, that: "The returns and analysis outlined above ignore investment fees, management charges, adviser fees and tax, and that the claimant would be required to meet those. If explicit allowance is not included in the discount rate for these factors and the rate is set directly with reference to the analysis above then the claimant will be at greater risk of under-compensation. The appropriate allowance for expenses and tax is likely to depend on a number of factors" and they allowed 0.5 per cent for fees and tax together, but the evidence in the recent trial was that would be an insufficient factor.

Deputy J.H. Perchard:

Without going into too much detail, we have been told more than once by the Government that this is an urgent piece of legislation, but there are upcoming cases that ...

Managing Partner, BCR Law:
I am aware of at least 2.

Deputy J.H. Perchard:
... may make it particularly urgent. Obviously while I tend to agree that we should not be passing legislation that is not fit for purpose, the argument we have been presented with in response to that is: "We can change it later." What would your response be to that?

Managing Partner, BCR Law:
There are so many things wrong with that, I do not know where to start. The first of those, as I say, it is this principle of a knee-jerk reaction to legislating because you are trying to meet an immediate concern. Whenever one rushes anything, it is never going to be the same as if you take your time over it, scrutinise it and come to a proper and measured view in relation to it and look for best in class. That is the first thing. The second is that there is something slightly distasteful, in my view, about legislating when you are the defendant, when you are taking away from the court the ability to provide appropriate compensation by using the back door when there is an existing claim. I appreciate that there are transitional provisions in relation to this and I do not think those are adequate at all either. I will come on to those in a second, but there is something, I think, which is reprehensible in seeking to legislate your way out of extant claims. It is different, I think, if one is legislating prospectively, but what we have here is legislation which is seeking to impose it on an existing set of circumstances and that is unfair. The transitional provisions I do not think are adequate either, because what they talk about is - a rather odd use of the word, in my view - it being disproportionate not to apply what would then be the current legislation. It would seem to me the better word - if that is what one is going to use - would be that it would be unreasonable to apply the discount rate as set by legislation rather than a different discount rate.

Senator K.L. Moore:
In fairness though, in this situation, is it likely that the Government will ever be in situation where they are not facing some claims against them, therefore that moment where they are not a defendant could never come?

Managing Partner, BCR Law:
I would accept that to some extent, but I think that one deals with that first of all by fairness in relation to the transitional provisions. I question whether it is reasonable rather than disproportionate. It is the wrong word in terms of drafting, but also that provided the discount rate itself is set in a fair way,

and what is proposed is, frankly, plucking a figure out of the air, based on inadequate evidence. It is based on a misreading, first of all, of the G.A.D.'s report. Do you have that, by any chance? It is part of the draft legislation.

Senator K.L. Moore:
Yes.

Managing Partner, BCR Law:
Could I ask you to turn to page 15 of the report? This is a section within the report which deals with real returns on investment, so something after inflation. The figure of 1.8 is the figure for U.K. (United Kingdom) equities at 20 years. The figure which the Government has proposed in the legislation assumes that you will invest all of your compensation, 100 per cent, in U.K. equities. First of all, it is not a very low risk, it is not a low risk and it is a very high-risk strategy. If in order to get my 1.8 per cent after inflation I have to put all of my eggs in one basket - and in a pretty precarious basket at that - we know, for instance, even looking at matters at the moment ... and this is an example of why you cannot set a discount rate in this way.

The Connétable of St. Martin:
Sorry, I just wanted to ask if you had a recommendation on what percentage the discount adjustment should be at.

Managing Partner, BCR Law:
Yes, I promise I will come to that. I have 2 things to show you, but I think it is a method of calculation rather than a rate that is important. Let us assume we do as the Government suggests and we have all of our money invested in U.K. equities. What we would have seen over the last 6 months, in looking at the F.T.S.E. (Financial Times Stock Exchange), is that the F.T.S.E. I think has dropped from somewhere around 7,500 to somewhere around 6,500. I may not have those figures exactly right, but by a considerable percentage, let us say. Let us assume just for the moment that it is 10 per cent. If I put all of my money, my compensation that I have received, into simply a tracker fund, which is basically what that suggests I do to get my 1.8, I have lost 10 per cent of it, so £70,000 of my £700,000 has gone. That is, on a simple equation, 7 years of my £10,000, that is gone. I have got to make my money now - what is left, my £630,000 - work even harder in order to get back to where I started in getting my return. That is why this is just unfair, or certainly it is unfairly skewed, against plaintiffs, because one is simply looking at a high risk. Now, what G.A.D. was doing was not just doing that and plucking any old figure. If we turn on to page 17, what had happened in G.A.D. - it is very important to understand this - is that G.A.D. was asked to assume 2 different portfolios of investments. The portfolios, we do not need to look at them, but they are set out within their report at page 29. We will have a look at those in a sec, but those were 2 portfolios, the first of

which was considered to be a low-risk portfolio, moving away from the very low risk, which was the investment only in index-linked government stocks, so government bonds which were inflation-proofed, and portfolio B, which was the portfolio which was the highest-risk portfolio that the sample, who had given evidence and had been asked to provide evidence to the G.A.D., had invested in. If we look at portfolio A, which is the nearest one might get to a low-risk portfolio, we see the returns in fact are 1.2 per cent over 20 years, not 1.8 per cent. If one was looking at some sort of balanced portfolio - sorry, this is on page 17 - the 20-year figure is 1.2, not 1.8, so if one is trying to find something which is low risk and a real rate of return, 1.2. Up to 5 years, which is the other thing, it is zero rather than 0.5 per cent. Those are fairer figures. They are not my suggestion, those figures, but they are fairer figures, because at least if one looks at portfolio A on page 29, you can see that it is a better balance, because there is 13 per cent in U.K. equities, you have got diversification in looking at overseas equities, you have got some interest in fixed-interest gilts and index-linked gilts and certain bonds. Anyone who knows anything, frankly, about any sort of modern portfolio theory will know that you do not put all your eggs in one basket. It is one of the things we are always told to do and you know that if you are investing, you want a balance between equities and bonds, because normally when the equity market is declining, the bond market is doing the opposite. That is why you need at least something. Now, it is important to understand the limitations even of that within G.A.D., and that is because the sample which G.A.D. used were of plaintiffs who had invested. The argument was: "We should set our discount rate by what the plaintiffs do." There is a slight falsehood in it because these were all investment portfolios which were invested at a time when the discount rate in England was plus 2.5, so in order to get the assumption, get a return anywhere near what the court assumed you were getting as a return, you obviously had to take some risks, you had to invest in higher-risk strategies because otherwise you would not have got anywhere near. So it was not as it should have been, looking at things as, in a sense, a blank canvas and saying: "What is the risk a plaintiff should take and what is the type of portfolio that we think meets that risk and how are we going to do it?" It was, in a sense, working backwards from what plaintiffs had done in a totally different environment. It is mentioned in our submissions. You will note in the bundle of material some commentary by a chap called Richard Cropper and a professor of macroeconomics called Victoria Wass. They were both giving evidence to your equivalent in the U.K. and the criticisms which they make are even more validly made here, I think, because we are trying to do things at one remove and we are not even picking the 1.2 per cent rate. Now, you asked me what I would suggest as a way forward.

[15:15]

The Scottish model - and I think again this was provided to you as part of our submissions - the model they have adopted is a very sensible one. Talking about looking at the way in which the legislature might deal with matters over here, I think it could sensibly look to the draft Bill, the

Damages (Investment Returns and Periodical Payments) (Scotland) Bill, which is a very well-reasoned piece of legislation and has within it the detail that is needed. The other criticism overall that I would make in relation to what we have in front of us is that it has not thought everything through. That is the danger of a knee-jerk reaction piece of legislation, that you do not look at all the factors that you should take into account in dealing with matters. The Scottish approach is, in my view, fair, because what it basically says is that: "We will set down a mechanism for setting the discount rate in a neutral way" so not by the person who happens to be the defendant in a piece of litigation, but by something which Parliament will have laid down as a formula. I will just read very briefly - this is from the policy memorandum which accompanies the draft legislation, so their project - they say: "The Scottish Government accepts that it is appropriate to move away from the approach of setting the rate by reference to returns on I.L.G.S. (index-linked government stock) because it is clear that this can lead to the chance of significant levels of over-compensation. The Bill will provide a new methodology. The Bill sets out a portfolio with asset classes and percentage holdings which is designed to match the objectives and characteristics of the hypothetical investor, also identified in the legislation. In terms of characteristics, the hypothetical investor will have received a lump sum award of damages to replace any loss of future earnings or to meet future earnings or to meet future care costs caused by the injury or incapacity they have suffered in order to put them in the position they would have been but for the injury. The hypothetical investor will be properly advised. The investor's objective will be securing the investment of the damages, covering the losses and expenses for which the award was made, that there will be withdrawals from the fund to meet those losses and expenses and that those withdrawals will exhaust the fund at the end of the period for which damages were awarded. 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. In changing the methodology away from the rate based on I.L.G.S., the Scottish Government has made provision for a portfolio constructed on the basis of portfolios described as 'cautious' and which the Scottish Government believes would meet the needs of an individual in the position of the hypothetical investor who is described in the legislation. This is a different approach to that consulted on, which asked about how awards were actually invested. There are difficulties arising from attempting to set a rate on how pursuers/plaintiffs 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 per cent discount rate, which prevailed from 2002 until early 2017, and which is therefore arguably not reliable." That is precisely the point in relation to G.A.D., so what Scotland have said is: "G.A.D., that is no help to us, because it is historic, it is unreliable. We would be idiots if we based our legislation on something unreliable and outdated. We look forward." "Given that level of discount rate, pursuers may be 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 some responses to the consultation,

that investing in a mixed portfolio of assets provides flexibility and is the best way of managing risk. The rate assessor is required to calculate the rate of return based on the projected return to the portfolio over a 30-year period, taking account of inflation." I would have thought this would be based on the Retail Prices Index, but the Scottish Ministers will have to specify another basis, so they have a rate assessor, an independent third party, as it could be I suppose over here, like the Auditor General or somebody like that, someone who is outside of direct involvement in Government: "The Scottish Government accepts that there will be a need to take investment advice, and indeed one of the characteristics of the hypothetical investor is that they are properly advised. In light of this, an adjustment will have to be made to the rate of return to take account of investment advice, management costs and tax. The adjustment is set out on the face of the Bill with regulation-making powers to change the adjustment. In the case of a pursuer, investment is likely to be necessary, as opposed to a preference. Damages have the purpose of placing the pursuer back in the position they would have been in save for the personal injury, and with the sorts of damages that attract the discount rate, this is most likely to meet future pecuniary loss and care. Damages are not surplus funds which can be speculatively invested. Any losses are likely to be material to the 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 than if the rates were set by I.L.G.S. A further adjustment is therefore set out in the legislation, which will be deducted from the rate of return. Further adjustment is in recognition of the fact that any investment, however carefully advised and invested, may fail. The Scottish Ministers will have power to change that adjustment by regulation." Then in the Bill itself is set out first of all those adjustments, which are taken from the rate. Standard adjustments are the deduction of 0.5 per cent for tax and investment advice and management and 0.5 per cent as a margin. Then at Article 12 they then set out a notional investment portfolio, which is made up of 10 per cent cash, 15 per cent nominal gilts, 10 per cent index-linked gilts, 20 per cent of equities and overseas equities, 5 per cent of high-yield bonds, 30 per cent investment grade credit, which are again bonds, 5 per cent in property and 5 per cent in other weird and wonderful. That then sets out the basis upon which, looking at a portfolio, you can then calculate the rate of return. It is a much more scientific approach looking forward, rather than the - in my view - very unscientific approach which is taken by looking at G.A.D., which is outdated, as Scotland has suggested it is outdated and for the reasons which Scotland has suggested. What I would propose - I am sure Scotland does not mind us borrowing its Bill ...

Senator K.L. Moore:

We often do.

Managing Partner, BCR Law:

... that is a well-thought through piece of draft legislation which is considering all of the things that we are being asked to consider. It is not so that Jersey should not come to its own view in relation to matters. In many things it should, but what it should do is make sure that in doing that it is coming to a best-in-class solution. In my view, the best in class at the moment in terms of the legislative approach is the draft Scotland Bill, because I think it is better than the English legislation, which gives the discount rate being set to the Lord Chancellor and it is not something that is reviewed very regularly. This allows for more regular review and therefore a fairness in relation to matters. It does it by means of a proper mechanism rather than by something which could be entirely arbitrary. It is tied back to something which means it has an overall fairness to it, rather than being driven in another way by pure political motives and would allow for something which could be adopted quite quickly, which would be the answer to the concern which there might be, provided there are appropriate transitional provisions, as I say. But I think part of the answer to that is if the discount rate is fixed in a fair and not arbitrary way, then there cannot be much complaint on the part on a plaintiff if it is looking forward rather than looking backwards.

Deputy S.M. Ahier:

Sorry, a quick clarification on the discount rate in Scotland, which was 2.5 per cent in 2002 and then changed in 2017 ...

Managing Partner, BCR Law:

The discount rate, as I understand it in Scotland, has tracked what it is in England.

Deputy S.M. Ahier:

That is what I was going to say. Is that not what the Lord Chancellor decided?

Managing Partner, BCR Law:

Yes, which is why they are moving away now on the part of their ability to do so.

Deputy S.M. Ahier:

But they have not changed it as yet?

Managing Partner, BCR Law:

No. This is a piece of draft legislation, which came out in the middle of the ...

Deputy S.M. Ahier:

That was after 2017.

Managing Partner, BCR Law:

... trial. This is the current draft. I do not know.

Deputy S.M. Ahier:

All right, thanks. It is just so we know.

Managing Partner, BCR Law:

You might even be able to get their law in before they do. I am not sure whether it has in fact yet been passed. This was draft legislation which was published, I think, sometime in June of this year. It may now be in force, but prior to that the discount rate was the 2.5 per cent, which it had been set by the Lord Chancellor and that it had been for ever until 2017, when it was reduced to minus 0.75.

Deputy J.H. Perchard:

Where has the proposed split rate come from?

Managing Partner, BCR Law:

I think it is this, and if we go back and look at the G.A.D. report, you will see that the suggested returns for a shorter period are less, I think the argument there being that if I have my money for a longer term, I can take greater risk with it because I do not need it for another 20 years, whereas if I have only 5 years, I need to have much more in safer investments, because I am going to use it more quickly. For instance, probably one or 2 years of expenditure you would simply have to keep in cash, so you would get no return, and in fact a negative return, because inflation would be eating into that, whereas the money that I am going to spend in 20 years or 30 years I can invest in slightly riskier investments because I have got the chance of recovering it. You still have to take a view as to how risky that investment can be, because if you have this, like we have just seen in the F.T.S.E. now, a substantial percentage drop, I then have that catch-up that I have got to do over a number of years just to get back to where I started.

Deputy J.H. Perchard:

It does seem very sudden though to go something up to 20 years with 0.5 and then a sudden jump in that 20th year. It seems ...

Managing Partner, BCR Law:

But I think that is the basis of the legislation. My preferred route would simply be to a have a single discount rate for that rather than have a split rate for the 2 years. If you set the discount rate appropriately, then that should not matter, because it is rather arbitrary, I agree.

Deputy J.H. Perchard:

It feels it, yes. Thank you.

Senator K.L. Moore:

I am rather conscious of the time.

Managing Partner, BCR Law:

No, not at all. As I say, we have not really talked about periodical payment orders.

Senator K.L. Moore:

We have not yet, no, which is where we could go next if you think you have the ability to stay with us for a little bit longer.

Managing Partner, BCR Law:

Yes, I am happy to do that. If you are happy with me, I am happy to stay.

Senator K.L. Moore:

We have covered quite a lot of ground, so we will try not to keep you too long.

Managing Partner, BCR Law:

I think I can take periodical payment orders in a sense much more shortly, because as I said at the beginning in my introduction, very supportive of the idea of them. The argument in fact in the case which has in a sense ... put it this way, it appears from the Chief Minister's evidence to the panel that that was the catalyst for certainly the immediacy in bringing this legislation. To that extent, in a way it is the elephant in the room. The panel may or may not be aware that it has now fully settled and it settled on terms which are obviously confidential to the States, but I am sure if you wish to, you would be able to find them out.

[15:30]

But certainly from my part, they are confidential to my client, so I cannot tell you the detail of it, but I can tell you this much: they have settled on the basis of a periodical payment order in relation to each plaintiff and together with a lump sum award, which covered certain other heads of damage, not the care element, and which will also provide a buffer in relation to the periodical payment order. One of the arguments there at trial was the need, if you have a periodical payment order, to have a sufficiency of a cushion or contingency in case there is a step change, because at the moment we do not have this ability to review here, so if you have a step change, you have to be able to provide for that in your own way.

Deputy S.M. Ahier:

Will this in any way affect our ability to acquire insurance cover if we are opposing having a periodical payment like this?

Managing Partner, BCR Law:

I do not think so, although as was suggested in evidence at the trial, periodical payment orders are not a panacea. They are not a silver bullet which means that a claim is not suddenly worth an awful lot of money, because the approach which insurers take to reserving means that they apply a discount rate which will be much less than the 1.8 suggested in the legislation. The evidence - I think it is in the papers - in some of the documents which you have there, is that insurers reserve at minus 2 often, so on their balance sheet they will be okay. If they are responsible for a periodical payment order, they will be reserving it minus 2 as the discount rate, so it will not necessarily mean at all that rates of premium will be less, but of course that is what they are doing in England. There is I suppose an answer here - or a question, rather, here - as to whether Jersey is trying in some way to legislate differently so that it is in a different position from an insured party's position, a perhaps more advantageous position than would be the case in England and Wales. Periodical payments and the approach towards those will be the same in the rest of England and Wales, in Scotland and here. If one adopted that and looked at a discount rate set in the Scottish model, you would be in no different position really from the rest of the British Isles, remembering at the moment that the discount rate in England and Wales is minus 0.75. What you would not have is insurers saying: "Jersey is all a bit weird and we need, because it is Jersey, to inflate insurance costs" which I think is part of the argument now. What one needs to look at is whether it is the peculiarities of Jersey which are pushing rates up or simply the fact that we are in a much more litigious world than we have been and that rates of return generally are lower, meaning that damages claims are higher and therefore insurance premiums are higher.

Deputy S.M. Ahier:

Will the damages law impact how the Island recruits healthcare specialists, such as G.P.s (general practitioners) because of the increased cost of insurance?

Managing Partner, BCR Law:

My own view is that the recruitment of G.P.s has nothing to do with a much wider question than simply insurance premiums. The first reason I say that is because Jersey has its own peculiarities in terms of recruitment, whether you are looking at a G.P. or you are looking at a lawyer or a teacher or any other professional person. Jersey is not an easy place to recruit because it is an expensive place to live, it has an expensive property market, and all of those other factors, which means it is not a straightforward place to recruit. In terms of claims, as I say, I have acted for many years, for over 20 years, for medical defence organisations and I am not aware of any substantial claim which has settled in Jersey of anything like this nature. I would safely say that I am not aware of any

settlement of a clinical negligence claim which has been in excess of £1 million. That is not to say there is not one out there, but it is unlikely to be a G.P. claim. The risks for G.P.s are very much lower than, for instance, the hospital, because we are lucky in Jersey in that we have a medical system which is within easy reach, so one sees very ready referrals from G.P.s to the hospital, because the expert is there and, frankly, pretty accessible in comparison to the U.K. Our waiting lists are lower; our ability to access healthcare is better. That means that if a G.P. is worried about anything, they readily refer things. In my experience, as I say, and I acted for - I still do - the M.D.U. (Medical Defence Union) for over 20 years. The number of G.P. claims I have had is less than I can count on one hand. I think it is, frankly, scaremongering on that part and there may be other reasons why G.P.s are seeing a rise in their insurance costs, but I would be surprised if it is just down to this. I think the Minister's costs and the ability to obtain insurance for obstetrics is a different matter, but it is a matter which is a worldwide problem in relation to getting insurance for those types of claims, because if something goes wrong at birth and you have a cerebral palsy case, then the costs of lifetime care are considerable. Giving birth, I am afraid, is a risky business, so the ability to insure there I think is relatively difficult, but it is not a Jersey problem, it is a much wider problem than that. The other, I think, is in relation to spinal types of surgery. I do not believe that we do much direct spinal surgery here. We would tend to refer that to the U.K.

Deputy S.M. Ahier:

In regards to the eligibility for plaintiffs to apply for social security or other benefits, would the draft law alter a claimant's eligibility in contrast to under the current damages law?

Managing Partner, BCR Law:

This is very interesting, and I have always thought this is an area which does require some attention. The present position under the Social Security (Jersey) Law, Article 40, is that any benefits which are paid by the States are not treated as deductible against damages. If I receive a benefit - a disability benefit or something of that nature - as a direct result of my injury, I do not have to account to that to the defendant, so I have had my benefit and I still get my full loss of earnings claim or care claim from the defendant. There is, frankly, an element there of double recovery. Now, that is something which it seems to me does seem odd and one might look at altering that to ensure that there is not that element of double recovery. It is dealt with in England by the Compensation Recovery Unit, which is part of the Department of Work and Pensions, which effectively recovers from a defendant the benefits which are being paid out, which the defendant repays effectively to the Government, but deducts from what is due to the plaintiff. That seems to me to be entirely fair, that you are compensated, but you do not get to keep your benefits on top, which is what the position is. I think that could usefully be addressed, whether in this legislation or other legislation.

Deputy S.M. Ahier:

Are you able to comment on how the draft law will affect the taxation for P.P.O. (periodical payment order) payments?

Managing Partner, BCR Law:

This is one piece of the draft law which I think is helpful, which is that it at least hints at dealing with tax of both periodical payments and of, more importantly, income from damages awards and the 2 are obviously different. If I have a lump sum award which I invest, there is some suggestion that perhaps in order to ameliorate the problem in relation to the discount rate, I would not be taxed on the income from that. That causes some difficulties, because when does something cease to be your capital from your damages award? Unless you can entirely ring-fence it, that might cause some logistical problems. In my view, it would be better to take it into account in setting the discount rate. Also, frankly, the States would still get its tax take in relation to that and defendant insurers would be paying rather than the taxpayer in relation to that. That is one thing. Periodical payments I think are different. The current position in relation to periodical payments in Jersey is that they are not taxed. That is not something which is statutory, but it is something which is under the tax guidance and which in the 2 cases that there have been periodical payments, both of which I have been involved in, there has been a special dispensation confirmed by the Comptroller, that the income on those periodical payments ... well, first of all the lump sum, but also the payment of the periodical payment itself then will not be taxed. I think that is absolutely fair.

Senator K.L. Moore:

Staying with P.P.O.s, if we could, in your helpful submissions you mention the imposition of P.P.O.s and I think you suggest that an imposition would be unlawful.

Managing Partner, BCR Law:

As the law presently stands, yes. That is the position taken, but obviously if legislation does it, it is not. My position was that in relation to at common law, so the law before the passing of any legislation, it was not possible to impose a P.P.O. and that could only be done by consent. That was one of the arguments we had in front of the Royal Court and we will never know the answer to, because we settled between the end of the argument and the delivery of a judgment. My view, having heard the arguments - and giving some of them - remains that it would not have been possible. Part of that reason is because if one looks at the way in which every other legislature has dealt with it, from Scotland to England to Hong Kong, all of those who are looking at it see it as the proper basis for doing it, to be legislative change. Part of the reason I think for that is that there needs a regime around it. If one looks at the *X* v *Y* case, which is the first case in Jersey which allowed a P.P.O. to be made by consent, it did that by looking to the legislation in the U.K. as useful guidance as to how it should be done and the protections around it, reasonable security, for instance. There is no point in having a P.P.O. if the person from whom you are getting it is not good for the

money going forward. In that case, *X* v *Y,* the ultimate insurer was AXA and what the court said there was: “That is not good enough.” Because we did not have the same protections as England under the F.S.A. (Financial Services Authority) scheme which would, in the event of a failure of an insurance company, pay out - that does not extend to Jersey - they would say: “Bigger trees have fallen in the financial forest” and therefore it was not possible simply to deal with it in that way. You need to have all of those protections around it.

[15:45]

In terms of reasonable security, that is one of the things that the draft legislation seeks to deal with, for instance, if it is a Minister of the States or the guarantee is given by the Minister for Treasury and Resources, then those are things which the court can assume without greater investigation are reasonably secure, but there are other factors which should be taken into account as well in terms of the suitability of a P.P.O. I think, again, what the English legislation has done, and I think the Scottish legislation seeks to do, is to look at those factors. It is under Practice Direction 41B in relation to P.P.O.s under the Damages Act of 1996. When the court considers whether a P.P.O. should be made, it looks at the scale of the annual payments, the form preferred by the plaintiff or the claimant and the reasons for that and the advice which the plaintiff might have taken in relation to it and suitability and the form which the defendant wishes, and again, the reasons for that. I think those need to be more clearly stated in our draft legislation so that the court, when it is exercising a power to impose, does so for the right reasons.

The Connétable of St. Martin:
Do you believe that the imposition of the transitional provisions outlined in the draft law will have a disruptive impact on both pre-existing and future claimant cases?

Managing Partner, BCR Law:
I think the importance in transitional provisions is that they are fair and that they seek to do justice to the plaintiffs in any litigation, who will have been proceeding on a particular basis, and will have received advice against the background of the existing law, but equally in a sense treat the paying party fairly as well against the background of what would then be the discount rate. That is a decision which in my view is one best left to a court. I do not think the transitional provisions, as they are presently drafted, meet that balance of fairness because the test which they suggest is a test I do not understand because I do not understand what is meant by it being disproportionate. I think that a better test is either one which says simply it is not fair but the legal word that is always used when one wants to say it is not fair is that it is not reasonable in all the circumstances. That is a test which the court is well used to applying. I would welcome, therefore, transitional provisions which said: “In all the circumstances we would apply the statutory discount rate, save in circumstances where it

was unreasonable to do so." That I hope would strike an appropriate balance. It depends. If a claim has been going on for 5 years on one particular basis, it would seem to me particularly unfair to a claimant or plaintiff to suddenly change the whole landscape. If something has just been issued then that is an entirely different matter.

The Connétable of St. Martin:

In your submissions you suggest that the draft law could be contrary to the principles of the European Court of Human Rights.

Managing Partner, BCR Law:

I think it could. Notwithstanding that it purports to have a certificate of compliance with it because I do not think it seeks to strike that balance of fairness between the plaintiffs and defendants, as the transitional provisions are drafted. It brings me back to this concern that ... and I can see a very ready argument being made that it is not compliant in circumstances where it has inadequate transitional provisions and is designed to meet circumstances where the States is the defendant because what you are doing is saying: "Well, we cannot win on the current landscape so we will change the rules." That seems to me to be entirely wrong, that you can simply say: "We are perceived as losing, as it currently stands, and therefore we are going to change the rule book." That is, I think, a dangerous road to tread down in circumstances where you are a defendant and seeking to pass legislation, particularly in circumstances where the Chief Minister has said before this panel that that is precisely what this legislation is designed to do. That should not be what legislation is designed to do. Not change the landscape because you do not like the current one, in terms, when you are a defendant. It should be aimed not with any particular piece of litigation in mind. It should be framed to meet what society thinks is a just outcome balancing the needs of plaintiffs who are a vulnerable group and who, as all the case law suggests, should be treated not as ordinary investors but as a special group of investors who have particular needs. Balancing their requirements against the need, quite properly, to ensure that doctors, but everyone, employers ... I think there is more risk for employers potentially in terms of indemnity levels than there are doctors, or certainly equal issues. But balancing claimants' needs and the needs of insurance and the ability to get insurance. I think that balance can be quite properly struck by adopting something which is akin to the Scottish model, which does seek deliberately to draw that balance and not to prefer the needs of one special interest group, frankly, against another.

Senator K.L. Moore:

Thank you.

Managing Partner, BCR Law:

Thank you very much for your time.

Senator K.L. Moore:

You have been very helpful in giving your time and we are very grateful. I close the hearing.

[15:52]