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Corporate Services Scrutiny Panel

Draft Damages Law Review Hearing

Witnesses: Jersey Primary Care Body and Hempsons Solicitors

Monday, 12th November 2018

Panel:

Senator K.L. Moore (Chairman)

Deputy J.H. Perchard of St. Saviour

Deputy S.M Ahier of St. Helier

Connétable R. Vibert of St. Peter

Connétable K. Shenton-Stone of St. Martin

Witnesses:

Consultant, Hempsons

Partner, Hempsons

Associate Solicitor, Hempsons

Chairman, Jersey Primary Care Body

[16:00]

Senator K.L. Moore (Chairman):

Good afternoon, and thank you for your attendance at today's Corporate Services Scrutiny Panel. As you know, we are scrutinising the draft Damages Law and we are most grateful for your attendance. The rules of engagement are very simple and we just remind everybody if you could maintain silence on your mobile phones and members of the public are aware of their duties and roles. The hearing will be streamed live and the recording will be published afterwards. We have been having some issues with the sound on those recordings so if you could speak clearly, which I

am sure for lawyers it will be extremely easy for you to do, and sit as comfortably close to your microphone as you can, that would assist us greatly. Also for the sake of the witnesses, could you confirm that you have had a chance to read and understand the witness statement that is in front of you?

Consultant, Hempsons:
We have.

Senator K.L. Moore:
Thank you. We will just start by introductions. I am Senator Kristina Moore, I am the Chairman of the Corporate Services Panel.

Deputy S.M. Ahier of St. Helier:
Steve Ahier, Vice-Chairman.

Scrutiny Officer:
Simon Spottiswoode, Scrutiny Officer.

Associate Solicitor, Hempsons:
Elizabeth Thomas, Hempsons

Chairman, Jersey Primary Care Body:
Nigel Minihane, G.P. (General Practitioner)

Consultant, Hempsons:
Bertie Leigh, Hempsons.

Partner, Hempsons:
Nadya Wolferstan, Hempsons.

Connétable R. Vibert of St. Peter:
Richard Vibert, member of the Corporate Services Scrutiny Panel.

Deputy J.H. Perchard of St. Saviour:
Deputy Jess Perchard, member of the Corporate Services Scrutiny Panel.

Connétable K. Shenton-Stone of St. Martin:
Karen Shenton-Stone, member of the Corporate Services Scrutiny Panel.

Senator K.L. Moore:

Thank you and we thank you very much for your submissions to the panel as well. We have all tried our best over the weekend to try to read and absorb them as best we can. So members of the public will also be able to read those themselves on our website. In your eyes, would you just like to explain how you feel that the draft Damages Law as it is being proposed in Jersey differs from other models in other jurisdictions.

Consultant, Hempsons:

Well, the draft law as the advisory paper makes clear intends to bring the law in Jersey into line with the law in England, broadly speaking. Our fundamental criticism of it as English lawyers is that everyone working with the English policy knows that this model is broken. That it is not sustainable. That is the advice that the N.H.S. (National Health Service) resolution has published to the Government in the form of its annual report in 2016-17, since when its liabilities have increased. The provision for its liabilities on the Treasury balance sheet has increased from 65 billion to 77 billion. The advice given by the Ministry of Justice makes it clear that they think that the … or the authors of the advice make it clear that they think that the time has come where we should depart from the rule given in Wells v Wells that we should have 100 per cent recovery based on the premise that the money will be invested in the least risky vehicle possible, namely government index linked gilt stocks. Because as the Treasury makes clear in its own advisory paper, the return on these is diminished by the fact that they are in very considerable demand and therefore they are overpriced as a result. That there are other vehicles which are more suitable and that the whole thing is artificial because as the Ministry of Justice points out in its paper, there is now ample evidence that even though money is awarded on that basis it is not invested in practice in that basis by claimants. That is not inconsistent with the decision in Wells v Wells given in 1998, 20 years ago. Then what Lord Hope said was that every payment of damages … every payment of interest embodies complaint. One is compensation for the use of the money and the other is compensation for the risk the money will not be repaid at the end of the term. It was said in Wells v Wells that that risk is taken by the claimant, the owner of the capital and therefore they should profit from any return for that risk. But the difficulty with that proposition is that it is artificial because what it ignores is the fact that every … you do not put a profoundly injured person in the position in which they were beforehand, which is what Lady Hale says in Helmot v Simon is the purpose of the law. You do not do that. When a child has all prospect of normal life destroyed at the moment of their birth when they become cerebrally palsy, profoundly brain damaged, they may be blind, they may be deaf, they are incapable of living autonomously, they are often tetraplegic, unable to help themselves, very often have to be tube fed. Now, there is no sum of money that can put that person in a position in which they were beforehand. They were able-bodied, they are now utterly disabled and you can make them rich and utterly disabled or you can make them very rich and utterly disabled. Doing the second does not do

any more to put them in the position in which they were beforehand. To say that this risk component of the money should go to the claimant is simply an artificial device to increase the sum of money and thus the return that they get when they invest it normally on the basis of skilled professional advice. As the advisory paper that you have got from your law officers tells you, the model for this was set in 1978 by Dr. Lim Poh Choo, who was awarded £229,000 by the House of Lords. At that time we had rampant inflation in England and the assumption on which her award was calculated was 4.5 per cent return. Despite the inflation, despite the fact that we had confiscatory tax rates, still she beat the odds and she left a fund that was 5 times as great at the time of her death as it had been when the award was made. So as the law officers' paper says Lim Poh Choo was over-compensated as we were able to see at the time of her death. That is one respect in which this law differs from what is being proposed in England. The second thing is in England we are able to continue to kick the can down the road for political reasons, because it is financed from the basis of a national debt. We are able to accumulate liabilities this year of an additional £12 billion to £77 billion at a time when our total budget for obstetric services is only £2.6 billion. We know that the one thing that would make a difference to the outcomes for these babies is the provision of one to one midwifery care with the woman in labour. We know that we are 3,000 midwives short and that a third of the profession is destined to retire over the next few years and that this is because the profession is so unattractive. You have the same problem on Jersey, you have about 1,400 clinical staff, doctors and nurses, and you have 335 vacancies, as I understand. In England we have the same difficulty in recruiting nurses. We have a third of our obstetric S.p.R. (Specialist Registrar) slots on gaps, rota gaps because we cannot recruit people into this profession. You are going to be faced with the same thing. Nigel is here because what you are doing is making medicine so unattractive that doctors are not going to be attracted to come to the Island to replace the 20 per cent of consultants who are due to retire over the course of the next few years. Now, other respects in which your law proposals differ from the English law, you have a proposal that if a periodic payment order is made the claimant should be able to return what one might call an Oliver Twist clause if their needs increase. There is also a proposal that the defendant should be able to return if the claimants needs diminish but, of course, that will never be exercised because the defendant does not know what is happening to the claimant. So you will never see a defendant, a hospital, going back to court to reduce the compensation. This means that you are ending the one virtue of the common law, which is that the tortfeasor and the victim are separated on the day of judgment. Any periodic payment order keeps them in touch to the extent of making the payment once a year but the idea that you should make it possible to return is something I have never seen in a periodic payments proposal and I would have thought it would be utterly unmarketable in the insurance market because no insurer would walk into an open-ended liability. So that is one novelty. The other novelty you have is under clause 2.2, it is proposed to have 2 different rates. It is 0.25 per cent for a period up to 20 years and 1.8 per cent for a period over 20 years. That means that you will get a higher compensation if your period to be provided for is 19 years than if it is 21 or 22 years.

I think that must be a mistake. I cannot suppose that that is intended but that is what the literal meaning of that is. There is another area of the law which is odd, which is that it is proposed that there should be transition if you are going to reduce the rate to cater for the Human Rights Convention. The Human Rights Convention makes it impossible for the state ever to reduce the level of damages. If that were right, the present English Damages Act, which is proposing to reduce the level from minus .75 per cent to 1 per cent presumed return - or that is what we think is going to be the proposal - that will be a breach of someone's human rights. But I have never heard it said before and if that were to be suggested I think it would mean in effect that you could not introduce any tax increase because it would interfere with someone's right to some property that they owned. I think that is based on a misunderstanding of the Zielinski decision, where the French Government was criticised by the Human Rights Court because it had interfered in a dispute between 2 parties about an employment issue in Alsace Lorraine, and the Human Rights Court said that that was quite wrong. So those are the novel features of this law but broadly speaking my criticism of this law, with the greatest respect, is it is trying to bring your law into line with ours at a time when we, I hope, have all woken up to the fact that our law is unsustainable.

Senator K.L. Moore:

Thank you for that. We will pick through the different elements part by part so that we can properly question you. But I would like to make it clear that we are not part of the Government who have written this law.

Consultant, Hempsons:

Indeed.

Senator K.L. Moore:

We are like one of your select committees who are tasked with …

Consultant, Hempsons:

I do understand that, yes.

Senator K.L. Moore:

In your submission you refer to the Australian model as being perhaps the beacon that we could look to. What are the main points in the Australian model that you think are, in your experience, preferable and might be of help and of use to Jersey?

Consultant, Hempsons:

I am going to Australia at the end of this month because they have a big conference on professional indemnity. This is a worldwide problem. You are not the only people and nor are we the only people

who have stumbled on the weakness of the common law approach to this problem. It is happening everywhere. What happened in Australia was that in 2001 one of the indemnifiers went bust and the other one withdrew from market precipitously. This triggered a crisis. They set up a thing called the Ip Committee, which came up with a variety of measures to reduce the liability of tortfeasors and personal injury circumstances.

[16:15]

Obviously your business today is only the discount rate and as far as the discount rate is concerned, what they said then was … what they decided was that it should be reduced. The presumed rate of return money should be increased and they have adopted different discount rates in different states for different purposes. Almost all the states, as opposed to the Commonwealth in Canberra, have introduced rates of either 5 per cent or 6 per cent, varying for different purposes. They find that that works reasonably. I have not suggested that you should go that far. I think you should go to 4.5 per cent because we know that works from our own experience and we know that that produced proper returns for victims of tort because we proved it to our own satisfaction between the late 70s when the 4.5 per cent table was introduced and 1998. Over those 20 years it worked. Before then we had relied on judicial judgment, which meant, generally speaking, lower damages. But the 4.5 per cent table seems to us to be sensible.

Senator K.L. Moore:
One mechanism that appears to happen in the Australian model is that the future average … the maximum future earnings are limited at 2 to 3 times the national average. What is the impact and the benefit of that?

Consultant, Hempsons:
The benefit of that is that it depends on what you are trying to do with tort law, if you are trying to compensate someone for what they have lost, that is perfectly reasonable. If you take a QC who is earning £1 million a year and you make it impossible for him to earn his living, you have taken away from him £1 million a year and if you believe in the purpose of tort law to put him in the position in which he would have been but for the tort, that makes perfect sense. But you then run into the conundrum of why is it moral, right or fair to expect poorer members of society to maintain him in the position in which he was beforehand because it is not the tortfeasor who is going to pay this money, as everyone knows, it is either the insurer or it is the public purse. In medical cases, by one means or another it is the public purse. Lord Sumption in his critique of this, which I referenced in our submission to you, puts forward a brilliant, utterly devastating critique of why that is simply not right or fair. It obviously does reduce damages but I doubt if it is going to be a fundamental part of your attack on this problem because very few newborn babies are going to get awards which are

much more on the loss of earnings front than that. Nor are most of these awards made up of loss of earnings anyway. If you fix the discount at 4.5 per cent, you will be then discounting all loss of earnings for 20 years accelerated receipt which will, in effect, half them in any event. It is only then for the period of the impaired lifetime that you will be paying for loss of earnings anyway. But the real thrust of these awards is the one patient institutions, the cost of care claims. Now, what is wrong with that is that these are eye-watering. We are paying £300,000 a year to keep someone in a one patient institution and the difficulty with that is not only that it is unaffordable and unreasonable, if you have someone who needs turning once a night or once a week and they are very heavy, you need 2 carers to turn them. That means you have to pay for 8 carers and they are surrounding the one patient. If you had a group of patients in a small unit of 8 or 10 people then that resource would be spread and the cost would be reduced by 8 to 14 people, which is the optimal size of these units. There are other advantages, which is units of that size can be run properly and professionally. You do not have the same scope for abuse of the inmates. You do not have the same loss of professional training and professional progress that you get with people working for larger organisations. Nobody now thinks that it is proper for the very vulnerable people who are vulnerable to an increased risk of violence, sexual and emotional abuse to be isolated in one patient institutions. In no other context do we think that this is good professional care. It is because we are trying to reproduce the family and the big care packages are all for adults and a time when in the ordinary course of events they would have grown up and left home. The parents by then will have wanted to retire and we have to pay for a case manager to look after this whole team of people. That is the really expensive vehicle that we have to attack.

Chairman, Jersey Primary Care Body:

May I widen that issue? So from my perspective as a doctor, we are looking at an ethical perspective too. So we have talked about one patient institutions, why is it that it is ethical and right to spend this amount of money on one or 2 people to the detriment of the rest of the population? What is the difference between an individual who may have suffered a birth injury, which cannot necessarily be put back to negligence, it is not always possible to do that from a medical point of view, what is the difference between that and somebody who gets cancer and gets damaged and has to go through the main hospital system? If we are damaging our hospital system by these massive pay-outs, such that we cannot build our new hospital or we cannot sustain the services that we want to, we increase waiting lists … I see waiting lists of a year for some of the specialities I am referring to. How can that be right? So we need to look at it from that perspective and a wider society perspective. The other aspect is if we spend this degree of money can we maintain services? We spoke in our submissions about particular services, so obstetrics, neonatology, the orthopaedic service. So we know that there are large sums of money being paid at the moment for indemnity of obstetricians, we do not know exactly what they are because commercial interests were put forward as a reason

why I was not allowed to know, but we have been quoted a figure of £600,000 per annum, which is not out of kilter with what some of the obstetricians …

Partner, Hempsons:
That is per obstetrician.

Chairman, Jersey Primary Care Body:
We do not know if that is the case yet but we know there are high values. That is before these cases come to pass. So we know the 2 that are there, the 5 in the offing and before the me-toos that follow. So if those people get large awards disproportionately large awards, what is going to happen to our indemnity rates? Will we be able to indemnify our high risk specialities? The G.M.C. (General Medical Council) insists that people who work as doctors are indemnified. If they are not indemnified they cannot work here. If we cannot have antenatal care on the Island, how will that affect our J cats, our 1(1)(k), our general economy. The issue is already live, or has been live in Guernsey, Elizabeth works in Guernsey, there was an orthopaedic surgeon who was taken to task because of a mistake that occurred in an operation. He was not struck off or anything, it was not gross negligence, he made a mistake, we are human, he did. But he can no longer be indemnified in the Channel Islands because the insurers will not cover him in that area. He can work in the U.K. So we will looking at all sorts of problems in terms of recruitment. That recruitment will come to primary care, where I come from. We already pay twice what our colleagues pay in the U.K. where our G.P. colleagues are subsidised by the U.K. Government to the tune of £60 million per annum.

Partner, Hempsons:
They are going to entirely indemnified by the state, in due course.

Chairman, Jersey Primary Care Body:
So how will we attract G.P.s? We know that no one wants to be a G.P. at the moment, we want to make general practice and primary care the heart of our healthcare for the future with our demographic changes, how are we going to attract young people to come here and work in this environment unless we make it an environment that is enticing to them? Finally, there is the risk to the Island, which Bertie touched on. The economy. We know that in states such as Australia, or jurisdictions such as Australia, where they have introduced this general liability insurance, car insurance has gone down. We can go back to our medical insurers and says we have a much better controlled, regulated environment that works and it does not just work for the professionals, it also works for the claimants. One last thing about the claimants, even those … if we look at the sort of awards that we are talking about and bring them down to lower levels, what is right … you will notice that in the submissions from the law officers there was a very complicated actuarial report which I confess I did not understand, which looked at how many people were over-compensated or under-

compensated. At no point did it define what under-compensation or over-compensation was. So is £2 million over-compensation, is £200 million, a case at the moment, under-compensation? We really do not know. I think this is a case wholly for the people who represent us. You are a select committee, you are part of the Government of Jersey, part of the States of Jersey, this is a choice for you. This is not a choice for the judiciary. With due respect to my legal colleagues here, they are there to make the mechanism of law work so the law that is passed by the Government is enacted. You are there to make the law.

Consultant, Hempsons:

Can I just take one point up that Nigel made? He was talking about the commercial policy. You, of course, as legislators are people who hold to account a government that buys this policy. We have been told the policy is commercially confidential and therefore the terms of it will not be made clear. I can understand why the price is commercially confidential, I cannot understand why the terms are, because any P.I. (Professional Indemnity) policy that I have ever read has an upper limit, and it is usually £10 million is the upper limit for any claim. Now, you have had a pair of claims of over £100 million and the difficulty with a commercial policy that provides £10 million when the claim may be over 100 is fairly obvious. But what you have to realise is that Jersey has some advantages and some disadvantages as a result of being an Island. One of the disadvantages is the atmosphere here or the view of this place that is taken by indemnifiers and insurers as a result of a combination of the Guernsey decision in Helmot v Simon, which proved to be a beacon for the common law we have followed and are now going to get out of through statutory law in England. The other is the claims that you have had this year. Every indemnifier will be thinking twice about doing business here. That is your disadvantage. Your great advantage is the agility of this legislative process that you have where you are able to change the law much more effectively than we are. You have seen the mountain of papers and the length of time that we have been cogitating on this problem over the 3 years in England. We have not yet got anything that looks like progress.

Senator K.L. Moore:

The point that was made to us last week on behalf of the Chief Minister and his officers was that they were seeking to provide the best possible care for people who find themselves in these positions. Often it is necessary, particularly in the cases in relation to children to send those children off Island, which is a very expensive model of care and something that has been increasing over the years. We will move on. We want to pick up on various different points so we will move on now to look at the discount rate. Of course it was mentioned earlier that the recommendation from your side is 4.5 per cent. Deputy Ahier.

Deputy S.M. Ahier:

The panel has received letters from G.P.s claiming that only a higher discount rate would suffice. Would you agree with this view and, if so, what discount rate would you like to see implemented? You have covered that slightly before.

Consultant, Hempsons:
I have suggested 4.5 per cent.

Partner, Hempsons:
Nigel on behalf of G.P.s?

Chairman, Jersey Primary Care Body:
As I said, it is striking that balance so the 4.5 per cent, as Bertie said, is something that has been in practice so we know it works. We could go higher according to the Australian rates but we are looking at a little bit of the unknown. We want to make sure that as a doctor we are caring for all of our society, it is not a matter of making a decision for those few unlucky individuals who are tragically affected at birth. There are many people in our society who have disabilities who are not covered by such large awards and it is a matter of making sure that we look at the big picture, not just individuals.

Consultant, Hempsons:
If you look at page 6 of the paper that we prepared for you, you will see that we took a hypothetical case, which was based very loosely on the Robshaw case, in the sense that …

Partner, Hempsons:
Which is a disabled child, cerebral palsy disabled child.

Consultant, Hempsons:
A birth injury, and our case got 14.184 on the 2.5 per cent table.

Partner, Hempsons:
That is 14 million.

[16:30]

Consultant, Hempsons:
We suggested using the 4.5 per cent table which would reduce the award, we thought, to about £10.3 million. If you had gone to the 5 per cent table that would have brought it just down below the £10 million figure. We thought that ought to be your target because it coincides with what the

commercial limit of these policies is. It is still a very large sum of money, £10 million, but there is inevitably a fallacy of the altered perspective. There is an assumption that we should be adhering to the present norms and it is harder to rein back expectations when people have been receiving sum that are unaffordable.

Deputy S.M. Ahier:
How much would that compensation claim have been at the current English rate of minus 0.75 per cent?

Consultant, Hempsons:
Can I …

Deputy S.M. Ahier:
Well, just an estimate.

Consultant, Hempsons:
Well, an estimate, that would be a multiplier of 65 as opposed to 20. So for the future payments, it will be 3 times as much and that would have added … it would have taken it up towards 30 million.

Deputy S.M. Ahier:
Thirty million. Then what is your view on the split discount rate proposed in the draft law?

Consultant, Hempsons:
Well, in the first place, I do not understand how it is proposed to work. I cannot suppose that it is really intended that someone with 19 years' loss should get more than someone with 21 or 22 years' loss. I think that must be an oversight.

Partner, Hempsons:
Do you understand that point in that the lower discount rate means that someone at 19 years only gets a discount rate of 0.5 per cent as opposed to someone at 22 years who will get 1.8?

Consultant, Hempsons:
So that the longer period gets less money even though they have a longer period of loss.

Partner, Hempsons:
Gets less money because they have a higher discount rate.

Consultant, Hempsons:

We think that must be a mistake.

Deputy S.M. Ahier:
Is this applicable anywhere else, in any other jurisdiction?

Partner, Hempsons:
No.

Consultant, Hempsons:
No.

Partner, Hempsons:
Certainly not in the U.K.

Consultant, Hempsons:
I do not understand it. If he had wanted that, if you did want to go down that route, I think you would graduate it and you would say it was 0.5 for all awards up to 20 years and if it was more than 20 years then it would be 2 awards, 0.5 for up to 20 and 1.8 for the period beyond that. But I think that that is so far adrift of what you ought to be because we worked out that on those figures it would be £16 million for this hypothetical award as opposed to a figure of £10 million, which is what we thought you ought to be aiming for if you were hoping to reassure the profession and the indemnifiers that what you are proposing is reasonable.

Chairman, Jersey Primary Care Body:
Could I give you a little bit of background around the £10 million as well? It was mentioned that there are various individuals, usually severely damaged, who end up in the U.K. in special institutions. The average cost, I am told, for that is around a quarter of a million, around £250,000, so even a £10 million pay-out invested prudently at, say, 5 per cent would be £500,000 a year. So there would still be an accrual of a quarter of a million pounds for that individual every year, over-compensation or under-compensation.

Consultant, Hempsons:
There are people who need packages that great if they are in an institution, but I say that that ought to be provided for by the National Health Service. It does not matter whether they are the victims of tort or not, you have a moral duty. These claimants in the present plaintiff 1 and plaintiff 2 cases, you have a moral duty to provide that care. What I say you do not have a moral duty to do is to impoverish the whole health service of the Island and to make an award of £200 million, which will

fall into their estate and to their family at their death. That I do not understand as being morally necessary or appropriate.

Deputy S.M. Ahier:
Especially when the family were the abusers and …

Partner, Hempsons:
Yes, indeed.

Consultant, Hempsons:
Yes.

Deputy S.M. Ahier:
Does the draft law risk over-compensating or under-compensating particular claimants?

Consultant, Hempsons:
Any award is going to over-compensate or under-compensate and, as we saw with Dr. Lim Poh Choo, I think that all you can say is that we have to balance society's interests and the claimant's interest and make an award which seems to be fair knowing that whether or not it will prove to be too much or too little will depend upon how long the claimant lives, whether their condition deteriorates, whether the stock market does very well and proves beneficial. Those are all things above the pay grade of you, even you, the legislature. You cannot do that. All you can do is reach an award which seems to you to be fair and reasonable.

Chairman, Jersey Primary Care Body:
We do have a degree of a safety net in Jersey in that we have had the foresight to put in place the long-term care charge, which amounts at full cost to around £50,000 a year. So we do have a leeway within the system already.

The Connétable of St. Peter:
You have successfully answered a number of parts of my question, but what impact do you see the damages law having on members of the public in Jersey? You have already said that it could impact our ability to recruit healthcare specialists, G.P.s, et cetera. I suppose as a result of that do you consider if we do not get this correct that Islanders may need to seek treatment off-Island?

Chairman, Jersey Primary Care Body:
Who will pay for that?

The Connétable of St. Peter:

Well, exactly. We would end up paying out of the social security system, but if we do not get this right, will we see that you are unable to indemnify doctors so people will have to travel away from the Island for treatment?

Consultant, Hempsons:

A lot of people do already have to travel away from the Island for treatment and it is right that they should do so. The question is whether that treatment will always be available for them. We have made such a mess in England of our indemnity market that the M.D.U. (Medical Defence Union), the biggest provider of indemnity care, has now refused to indemnify spinal surgeons altogether. It has withdrawn from the market at any price because it thinks that the law is so capricious and compensation is … presumably; I do not know. I cannot speak for them, but they have withdrawn from the market. But it is right that if I need the most complex cardiac or neurosurgery electively I should go off Island, that you should not try to provide that level of subspecialist sophistication for a population of 100,000 people because there are conditions that you can only provide on that basis. The difficulty is with general practice, with emergency care and with obstetric practice, which you cannot go off Island for, you have to provide them where the population lives. If you are of child-bearing age and the obstetric care on the Island is not appropriate, you will probably go and live somewhere else. If you are an obstetrician of ability and mobility, you will probably choose to go and practise somewhere else if you think that you are going to risk bankruptcy every time you go to work.

Chairman, Jersey Primary Care Body:

Or may be forced to go elsewhere because they cannot get indemnity …

Partner, Hempsons:

They cannot get insurance.

The Connétable of St. Peter:

The costs of insurance, how has that changed perhaps over the last decade or so, or particularly in the last few years?

Consultant, Hempsons:

It is very difficult; how long is a piece of string? As I quoted in the paper, when Lim Poh Choo was in the Court of Appeal, Lord Denning said that you had to balance this reasonability and they scoffed at him and the claimant's counsel in his skeleton argument before the House of Lords said every doctor can get unlimited indemnity from the M.D.U. for £100 a year, or the M.P.S. (Medical Protection

Society) or the M.D.D.U.S. (Medical and Dental Defence Union of Scotland). They all charge the same, £100 a year for anyone. Now we …

Partner, Hempsons:
That was in the 1970s.

Consultant, Hempsons:
That was in 1976, and now you cannot say what the limit of cover is. General practice in England is now recognised as being unaffordable on the M.D.U. policy, which is why we know that from next year it is going to be taken over by N.H.S. resolution on behalf of the state. Obstetricians, I think the average obstetrician is paying about £4,000 or £5,000 per delivery but they are only able to …

Partner, Hempsons:
That is £4,000 to £5,000 on insurance per baby.

Partner, Hempsons:
Per baby, so your fee for having a private baby, you have to pay the hospital, which is about £10,000, you have to pay the doctor, which is about £8,000, and you have to pay £4,000 for the doctor's indemnifier. I think, but that depends very much on the practice profile of the individual. I have heard of one individual who is paying more than £600,000 a year for indemnity cover just for the obstetrician. He has quite a substantial practice, as you can work out from those sums, but anyway, what it costs is a piece of string.

Senator K.L. Moore:
Dr. Minihane, perhaps as representative of the primary care body locally, you could tell us where G.P.s go. Do they use the M.D.U. currently to …?

Chairman, Jersey Primary Care Body:
At the moment they can use what is called the M.D.O.s, the mutual defence organisations. There are 3 of those: the M.D.U., the M.D.D.U.S. and the M.P.S. They are all of a similar nature but, as Bertie was saying, the limited indemnity is about £10 million. Anything above that is discretionary, so we do not know where we will be. The new information for me today, which I had not been aware of, was that the indemnity situation will be taken care of by the Government in the U.K. If that does not happen here how will we attract new people to the Island? Again, if we are going to try and maintain what we have already, we do need to look at that discount rate because we may be in a position whereby we can claim that our insurances for doctors could be at a lower level than they are at the moment and then retain. The other aspect, as I said, was the wider economy where - and

this has happened in Australia - there are other bits of insurance that have been reduced and have made the economy more vibrant than it was before.

Partner, Hempsons:

Nigel, my understanding, though, is one of the reasons when you explored this with the medical defence organisations as to why you are paying more for your insurance it is because of Helmot v Simon. It is jurisdiction specific in terms of the fact you are practising on the Channel Islands means you pay more.

Chairman, Jersey Primary Care Body:

There are a couple of other factors which they cited as well, which is that our lawyers are more expensive here, that there is an increasing number of claims and they cite this, and now they have a few more in the offing, and the gradual increase in the awards, which we have seen mount over the years.

Senator K.L. Moore:

One G.P. in a submission to us suggested that they had seen their payments increase by about 10 per cent year on year over the last 10 years. Would you concur with that?

Chairman, Jersey Primary Care Body:

Well, if I remember rightly, I was paying about £5,000 per annum around 2012. It doubled after Helmot v Simon to around £10,000 and now the average is around £16,000.

Consultant, Hempsons:

I am staggered that it is so low, frankly, and I would be astonished if it did not go up very considerably as a result of the 2 claims presently before the courts. I think he is being under-priced and he is very lucky.

Senator K.L. Moore:

That liability is a maximum of £10 million?

Consultant, Hempsons:

No, it is not. It is discretionary but it is unlimited. So all cover from a medical defence organisation is discretionary. There is no limit on it. The £10 million limit is the commercial policy and that is fixed in most cases. There is a limit but it is fixed, but if they pick you up they will pay.

Partner, Hempsons:

Whatever.

Consultant, Hempsons:
Whether or not they will pay more than £10 million …

Chairman, Jersey Primary Care Body:
That is right, yes.

Consultant, Hempsons:
… we will have to see.

Partner, Hempsons:
Most of the doctors on the Island I understand are members of medical defence organisations. Your obstetricians I think do have commercial insurance purchased by the States. That is my …

Chairman, Jersey Primary Care Body:
Because the M.D.O.s would no longer indemnify.

Partner, Hempsons:
The M.D.O.s will not insure.

Associate Solicitor, Hempsons:
The terms of that insurance metric we do not know. So whether it has a cap on how many claims that can be brought in a year, what the upper limit is, whether it is £10 million, the reporting arrangements between your obstetricians and the States as to claims in the pipeline, we do not know any of that information.

Consultant, Hempsons:
I have handled claims where commercial insurance has been rejected because the doctor was deemed not to have declared an event of which they knew before the beginning of the year. So it is claims made policy and you have to disclose any occurrence of which you are aware.

Chairman, Jersey Primary Care Body:
Those claims can be made later.

Consultant, Hempsons:
Up to 20 years, 30 years later.

Chairman, Jersey Primary Care Body:

We would expect, if we are looking at the commonest claim, we would be looking at cerebral palsy cases, and I think we have not stipulated so far that on average with 1,000 births a year occurring in Jersey we would expect one every year and every other year.

Partner, Hempsons:
You normally wait until the child is 5 or 6 years old because that is when damage is properly … you know the extent of the damage. So you are not getting them the moment that they are born. They will appear 5 or 6 years after the birth, these claims.

The Connétable of St. Martin:
I am conscious of the time so this question is in 2 parts. Do you believe that you have had a satisfactory level of engagement with the States of Jersey from the drafting of this law and, if not, which aspects of the law do you feel have been overlooked during its drafting?

Chairman, Jersey Primary Care Body:
Shall I start and then …? **[Laughter]**

The Connétable of St. Martin:
Yes, quite long.

[16:45]

Chairman, Jersey Primary Care Body:
I approached Kristina back in 2015-16 and she very correctly put me in touch with the law officers, and Philippa Venn, a colleague of mine, and I went to the law officers. We were told in no uncertain terms that there were more pressing cases of law that were more pertinent to the Island's economy than this and, moreover, that we should seek advice; not that the States would seek advice on this pressing issue but we should go and seek advice. So that is what we have been doing. General practitioners and the Jersey Medical Society have been paying partly for this advice with colleagues in Guernsey who are equally worried about this situation because it affects the whole of the Channel Islands. Since that time we did have a conversation with the law officers and I think perhaps we will not go on the incriminatory aspects but they were engaging for that hour and I think they learnt a lot from my colleagues here about how they might approach the situation.

Partner, Hempsons:
Yes. The paper that I know you have a copy of was commissioned jointly by the Jersey Medical Society and B.M.A. (British Medical Association) and that was as a result of concerns and an attempt to lobby the States even further by getting expert advice from lawyers who practise in this area in

the U.K. to try and draw attention to it. I understand that it was circulated among members of the States Assembly and the law officers in February. Obviously, that was quite late on, but we first started having discussions about this … I am a Jersey resident and Nigel approached me in September 2016 about why the insurance levels were so disparate. We have been working on it pan-Island ever since, involving law firms as well as legal officers, because it is something that we saw coming down the pipeline.

Consultant, Hempsons:
In fairness to everybody, none of us foresaw 2 claims of £100 million and we wrote our paper on 28th February to try and bring home to everybody how dangerous we thought the situation was, but we did not foresee the cases of plaintiff 1 and plaintiff 2. We have not seen anything like that in England. The biggest claim I have seen is £64 million in England and I have not seen that on paper myself, it has only been described to me by a colleague. The biggest claim I have seen is about £40 million. So these claims are black swans and I do not think you can criticise anybody for not foreseeing those.

Partner, Hempsons:
We did think something was coming down the pipeline but not that large.

Associate Solicitor, Hempsons:
I think the average for a cerebral palsy case now is £20 million, so it is that sort of figure, and that is for the U.K. If you consider whether … I do not know, whether the net worth of individuals in Jersey is different, whether the dynamics of the situation …

Partner, Hempsons:
The cost of care certainly is more.

Associate Solicitor, Hempsons:
Yes, exactly, so that is just purely England based, £20 million.

Senator K.L. Moore:
Thank you. I note you looking at the clock. Are you …?

Consultant, Hempsons:
We have plenty more for you.

Senator K.L. Moore:
We are aware of that. Can we fit it into 10 minutes or would you be able to run over if needs be?

Consultant, Hempsons:

Oh, we can stay all night. **[Laughter]**

Senator K.L. Moore:

I thought perhaps you might have a plane to catch.

Partner, Hempsons:

No, they are here this evening.

Senator K.L. Moore:

Right, okay, but we will try to push on and get through everything as best we can.

Consultant, Hempsons:

Can I talk about P.P.O.s (periodic payment orders) because there is quite …?

Senator K.L. Moore:

We do have some questions. If you would like, we can move on to that section right away.

Partner, Hempsons:

No, why do you not continue if we are going to move on to P.P.O.s?

Senator K.L. Moore:

I think we were just going to move on to the model here being a privately insured model as opposed to the U.K. National Health Service. Therefore, do you believe that the draft law will resolve the concerns of G.P.s and other doctors regarding indemnity insurance? I think we have all agreed that that is a no or we have heard that from you today. What impact do you see on the fees? We have covered that. A different discount rate, could that resolve any problems identified?

Chairman, Jersey Primary Care Body:

Well, the only thing we have not touched upon in terms of fees is, of course, the difference here is general practitioners charge the public. We are concerned about accessibility issues and those are separately being discussed, but this will have a great effect on those when we are trying to make sure that people have basic healthcare.

Senator K.L. Moore:

Has this issue been taken into account during those discussions about primary care and …?

Chairman, Jersey Primary Care Body:

It has been mooted but it was met with the same sort of response as the law officers: well, you know, it is not really something that is of great concern; we would rather look at how primary care is structured. Yes, that is true, primary care needs to be structured appropriately but it also needs to be accessible and there are issues there that, as I said, are being aired but need more thought and more engagement separately.

The Connétable of St. Martin:

Your submission points to a wider overhaul of the Island's indemnity arrangements and approach to clinical negligence as being necessary to avoid risking long-term damage to the Island's healthcare. Can you explain this?

Consultant, Hempsons:

Well, we have done in the sense that we see you have a problem with a … the basic problem is not yours, it is not peculiar to the Island of Jersey. We have a world problem that the common law concept of 100 per cent payment of damages is unaffordable and does not strike an appropriate balance. Everyone knows that we now have to compromise and produce a sensible, fair, reasonable award for people who are victims of tort, and that is what is happening in Australia. That is what our Damages Act does in England. We are not intending in England to allow the actuaries and the accountants free rein to tell us what the market price of money is. We are tempering their advice with statutory power to reduce. That is why we are going from minus 0.75 per cent apparently to 1 per cent. They will not tell us what the figure is in England because, frankly, it is a bit like the terms of Brexit: they cannot make up their minds themselves. That is the difficulty that we are faced with. Now, everyone knows you have to strike a compromise. At one extreme you have Lord Sumption in his lecture where he very elegantly and persuasively says that the whole notion of tort compensation should go. You have the Australian model where you reduce the discount rate and you have various devices to reduce it. You have to strike a fair and sensible balance. Even the authors of this law are saying that when they say that you should have a floor of nought per cent return. It is said on page 12 of the briefing paper that any return of less than nought would be unaffordable by this Island, so that implicitly recognises that there has to be a compromise between what is affordable and what the actuaries say is the true price of money or the true return according to some abstract calculus. It is the question of where you strike that balance and what you think would be fair and reasonable in the circumstances. If you create a compromise which is unfair and unreasonable, in the case of a self-employed general practitioner like the gentleman on my right who has to pay his own indemnity payments, you will ultimately chase him away. Long before you chase him away you will interfere with your ability to attract his successors and you will see what we have seen where we have made professions professionally unattractive, as with midwives in England, and you get people disproportionately not joining that profession or going to work

elsewhere or retiring prematurely. They waste away and that is what is going to happen to general practice. That impacts on the broader body politic because people now regard modern healthcare as essential. We now think that we cannot go and live and work on an island where the primary care we may need in emergency is not available, not if we have any choice about it. So that will impact on your ability to attract people of child-bearing age and other people who are mobile and can choose to live elsewhere.

Senator K.L. Moore:

We are going to move on now to talk about periodic payments. We were rather confused, I think, about your suggestion that periodic payments were not acceptable and that was particularly in light of the comment you made earlier, Bertie, about the proposed law being unmarketable to insurers, whereas in our submissions it has to be said that the only submissions that have been positive about the draft law are from insurance companies. So we were a little puzzled about that and it was our understanding as laypeople that it was perhaps the periodic payments that was attractive to the insurers.

Consultant, Hempsons:

Well, first, periodic payments, as far as the medical defence organisations are concerned, they cannot do periodic payments at all. They are not reasonably secure. There are 2 reasons for that. The first is that the medical defence organisations are not insurance companies. They won an action in 1978, M.D.U. v Department of Trade, where it was accepted that because of their high moral standing and professionalism they should be exempted from the requirements of insurance fraud. That is why they are able to retain their discretion and they do not have to produce the deposits that insurance companies have to produce. The second, more technically, is that in fact P.P.O.s are a tax dodge. They are an agreement between the Treasury and some enterprising accountants in the 1990s at the time of the Lord Wolff reforms that any payment of damages is exempt from tax. Therefore, serial payments of damages, which is what periodic payments are, should be treated as exempt from tax . By contrast, if they are paid by the insurance company, the insurance company has to invest the money and they have to pay tax on the money before they pay it on to the claimant. Therefore, the tax exemption that is enjoyed by P.P.O.s in England disappears. Interestingly, the proposed law here does have one other novel feature, which I did not mention earlier, which is that it proposes that income earned by the victim of tort, once they have the money and they have then invested it, that their interest on their earnings should be exempt from tax. I am not sure whether that is just income tax or whether it is going to be capital gains tax as well because, of course …

Partner, Hempsons:

We do not really have a capital gains tax in Jersey.

Consultant, Hempsons:

Okay, but they may change that in the future. **[Laughter]**

Partner, Hempsons:

I think that is unlikely so that deals with that issue.

Consultant, Hempsons:

Well, that would explain that. But anyway, that is a novel feature which will diminish further the attraction of periodic payments because that tax exemption disappears. When most insurance companies buy P.P.O.s, what they do is they match the stream of payments that they have to make with an annuity and they go into the annuity market. The life offices who sell annuities by and large do not gamble. They simply match these and they sell annuities, which are nowadays index-linked annuities, which is what we are talking about although it is not made clear in the proposed law that these are going to be index-linked P.P.O.s but that is what we have in England. They are running at minus 1.5 per cent, so these P.P.O.s are very expensive. I am surprised that insurers think that these are attractive. In our worked hypothetical where we said that the award on the basis of the 1.8 per cent table is £16 million, 2.5 per cent table would be 14 and we suggested on 4.5 it should come down to 10, we costed a P.P.O. as coming out at about £34 million …

Partner, Hempsons:

To purchase.

Consultant, Hempsons:

… to purchase because that is what it will cost at minus 1.5 per cent. So I am surprised. A P.P.O. does make a lot of sense if it is paid for by the state for political reasons because it enables the state to add it to the national debt. If you believe in financing the decommissioning of your nuclear power stations, as we do, by putting it on our grandchildren, then it does make sense to have P.P.O.s financed in this way because anything which happens after the next election is obviously of much less political significance than anything that happens before the next election. If you do not have a national debt, because by and large you do not except for specific preordained purposes, it does not seem to me to have the same attraction.

Partner, Hempsons:

I think it would be worth asking your insurers about how much such a product would cost because that may explain some of the enthusiasm for the product.

[17:00]

I have not seen any … in the U.K. it is pretty much state-funded P.P.O.s because of the medical defence organisations not having the ability to do it and the rest is done through the Treasury. So I would be very interested in sort of a 50 or 60-year claim how much they would be selling that to you for.

Consultant, Hempsons:
As I read the category of people who were going to be able to do P.P.O.s under the draft law, it did not seem to me to be including insurance companies, but I may be wrong.

Associate Solicitor, Hempsons:
It is also the point Bertie made about being able to go back and change the periodic payment order to say we need more money every year, that adds … it is an important … I mean, I would again be interested to know that the insurers were quite happy with that …

Consultant, Hempsons:
The Oliver Twist clause.

Associate Solicitor, Hempsons:
… how they find that structure of a P.P.O. attractive.

Partner, Hempsons:
How they begin to quantify …

Consultant, Hempsons:
Because every indemnifier has to balance their books. But as I say, I do not think that it applies to insurance companies.

Partner, Hempsons:
But the States buy the insurance for those bodies. I think that is what the suggestion would be.

Chairman, Jersey Primary Care Body:
It is also thought of as a deferment but it depends on the number of claims being made. We are talking about one or 2. We know there are another 5 of similar magnitude in the background, we are told, and that is before the me-toos. So if these large payments are made, if we have every other year a damaged child, will they not suddenly say: “Where are we on the spectrum here and why should we not be having these large awards?” in contrast to perhaps other people, as I said at the beginning, who through no fault of their own also have disabilities but do not get that sort of tort law applied to them.

Associate Solicitor, Hempsons:

The tort law is obviously based on the balance of probabilities so it is where you sit either side of a 50 per cent line as to whether you have £300,000 a year in care costs or you are on the States. So it is not a …

Chairman, Jersey Primary Care Body:

Which could be diminished if we do not make the right decision. There is another aspect about making the right decision that I would like to bring forward as well, if I may. That is I think there is provision within the new law to change the rate in the future. We feel - and I will defer to my legal colleagues to explain more about it - that with judicial review in the background that would be unlikely, so the decision is something that has to be made at an appropriate level now, not necessarily in the future.

Consultant, Hempsons:

Absolutely. I think it would be cruising for a bruising to suggest that the law officers should have the power to vary the discount rate. It is suggested that they should consult the Bailiff. Well, on what basis is the Bailiff supposed to advise them? "The Chief Minister may after consultation by the Bailiff amend the discount." On what basis is …?

Partner, Hempsons:

We think that is supposed to replicate the Lord Chancellor in the U.K. Of course, he was a political appointee. He is a member of the Government. The Bailiff is not that, so that raises an issue which we as English lawyers are not going to expand upon but we flag it up.

Consultant, Hempsons:

Then the regulations make provisions for the process for determining and the consultation. On what basis are they to consult? The creation of bodies who must be consulted? You are going to create a body to consult? On what basis are they going to advise you? Are they going to simply give you actuarial advice about the price of money? If so, you are going to be back where you were with your £200 million award. Then different discount rates and different types … on what basis is this to happen? All of these are fertile questions for lawyers to take you off to judicial review. The factors to be taken into account in determining the discount rate, so regulations are going to determine the factors you are to take into account. There be dragons. I would keep away if I were you. It is much simpler for the primary legislature to say: "The law is thus."

Chairman, Jersey Primary Care Body:

Or to coin a phrase: "Do not provide fertile ground for lawyers." **[Laughter]**

Consultant, Hempsons:

Fertile ground for lawyers is never wasted.

Senator K.L. Moore:

Okay. Do you have any further questions? No. Okay. Well, we have reached the end of our questions to you and I thank you all for making what is quite a complex, technical matter very easily digestible. You have clearly drawn and illustrated the elements that you feel are of importance to the Island.

Partner, Hempsons:

It is a political decision ultimately: what can you afford?

Consultant, Hempsons:

If there are any further matters we can assist you with, please do come back to us and ask us. We would be delighted to help.

Senator K.L. Moore:

Thank you very much.

Partner, Hempsons:

No, we really are; if there is a clarification point, please.

Senator K.L. Moore:

Thank you. We thank you most kindly and we will close the meeting.

[17:05]