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Dear Sirs

RSA Response to Draft Damages Law – Call for Stakeholder Views

As one of the country's leading insurers, RSA is well placed to comment on the issues raised in this paper, and how they will impact the industry and consumers. We have worked closely on this issue with our UK trade body, the Association of British Insurers (ABI), and have had access to the reports commissioned for the purposes of the ABI's response to the consultation. We would be happy and indeed would welcome the opportunity to discuss any aspect of our response further.

RSA is a major provider of motor insurance, employers' liability insurance and public liability insurance. With respect to claims made under these types of policies, we make many payments to claimants who have suffered loss through personal injury as well as additional costs where such claimants have legal representation. In addition we also underwrite our own 'Before the Event' legal expenses insurance.

Executive Summary

RSA believe that the methodology and legal basis for the setting of the discount rate applicable to lump sum awards for future loss should result in fair compensation for claimants who have suffered serious injuries and losses as a result of an accident. We also believe it is important, in the interests of ensuring justice for both claimants and defendants, that whilst such compensation must be sufficient, it should also not over compensate them - defendants should not be required to pay more than the actual losses of the claimant.

In 2017, the Lord Chancellor in the UK took the view that she was bound by the decision of the House of Lords in Wells v Wells that claimants should be assumed to invest in Index Linked Government Stocks (ILGS), as a consequence of which, the discount rate for England and Wales was reduced to -0.75%. We took the view that this decision was misguided in law, timing and in technical basis. We support the reforms to the framework for setting the discount rate, as set out in the Civil Liability Bill in England and Wales, and the Damages (Investment Returns and Periodical Payments) (Scotland) Bill, and also broadly support the proposals set out in the Draft Damages (Jersey) Law.

We believe the following principles should be considered in setting the rate:

- **A methodology which reflects investment practice in reality**. There should be a move away from an ILGS-based methodology to one based on claimants taking a low risk approach to a mixed portfolio of investments. We believe this is a more viable and flexible solution and reflective of actual practice as recommended by IFAs.

- **Mechanism for setting the rate**. There is a need for a clear and systematic methodology for the mechanism by which a review of the rate is triggered and set. Review of the rate should be triggered by the movement of relevant investment returns or indices which could be identified by way of legislation, and not by specified dates. Once a review of the rate is triggered, the mechanism for reviewing the rate must be sufficiently flexible to adapt to changing economic circumstances, and should match the risk profile of the claimant as a low risk investor. It is not possible to determine that one particular mix of assets, however appropriate for now, will meet that risk profile which may in itself change in the future.

- **Availability of Periodical Payment Orders (PPOs) and the relationship of the lump sum award and PPOs.** PPOs represent the most secure and safe mechanism of settlement and their availability strengthens the argument for lump sum settlements to take into account returns from a 'low risk' investment approach, In opting for a lump sum a claimant is, by definition, opting to take some investment and mortality risk in exchange for flexibility and the opportunity to make higher investment returns. To suffer a serious injury can remove from a claimant many choices and freedoms that they previously enjoyed and therefore, we believe the claimant should always have the choice of how they receive their compensation, whether that be lump sum settlement or PPO.

- **More than one discount rate.** There is merit in differentiating the discount rate either side of either a 15 or 20 year period reflecting the realistic rates of return which can be achieved on long term investments. However, such a model must require the claimant to choose between a lump sum or a lifetime PPO for each head of future loss at the time of settlement. We are opposed to a dual rate on any other basis.

- **Political accountability for setting the rate.** Ultimately political accountability is needed when setting the rate. As such the Government should set the rate so that a policy decision is taken for which it is accountable, rather any quasi-judicial process.

1. **What changes are being proposed to compensation payments in personal injury cases in Jersey?**
2. **Why are the changes contained in the draft Damages Law necessary?**

RSA believe that the methodology and legal basis for the setting of the discount rate applicable to lump sum awards for future loss should be on the basis of 100% compensation. We also believe it is important, in the interests of ensuring justice for both claimants and defendants, that whilst such compensation must be sufficient, it should also not over compensate them - defendants should not be required to pay more than the actual losses of the claimant.

Setting of the rate needs to be reflective of investment practice in reality. No claimant would be advised to invest in ILGS alone, and a methodology based solely on ILGS is fundamentally flawed because:

- Investment solely in ILGS cannot be viewed as a viable strategy for "risk free" claimants especially at the current time when it has a negative yield.
- The purchase of ILGS has not always been readily available for claimants (or at least in a form suitable whereby the maturity of such investments would meet the claimants' future requirements for care and case management).
- In practice ILGS are rarely recommended by Independent Financial Advisors (IFAs) other than in a mixed basket of investments, and IFAs do not recommend investment in a single asset class.
- Where available, Periodical Payment Orders (PPO) affords claimants the option of a largely risk free form of compensation, in the sense that it removes both mortality and investment risk. If claimants opt for a lump sum, they are by definition opting to take some investment and mortality risk in exchange for flexibility and the opportunity to make higher investment returns.
- It cannot be right that one investment choice was set for all time as the proxy of investment behaviour.

There should be a move away from an ILGS-based methodology to one based on claimants taking a low risk approach to a mixed portfolio of investments. We believe this is a more viable and flexible solution and reflective of actual practice as recommended by IFAs.

We support the proposal in the draft Law that the discount rate should not fall below 0% on the basis it reflect real world investment decisions and proper investment advice not to invest in assets that guarantee a negative return. Also, awards cover long term future losses and should reflect the predicted outcome for the full period of loss, not a limited period of recession.

3. What problems (potential and actual) are there for doctors in obtaining medical indemnity insurance in Jersey (and Guernsey)?

a). What is the wider context that any such problems are set against?

b). What would be the impact on members of the public accessing healthcare in Jersey and Guernsey if concerns around doctors' indemnity insurance are not resolved?

c). Will the draft Damages Law resolve the problems identified, either partly or fully?

RSA does not have information available as to the effect on healthcare provision and the problems for doctors in obtaining indemnity. However, we do have experience of claims that have significantly exceeded the limit of indemnity of any cover held or available in this market. This could impact on the availability of affordable cover and on the risk to the Minister as the defendant of last resort.

Approximately a decade ago, claimants in Jersey (and Guernsey) relied on the argument of diminishing returns from UK ILGS to justify an application of negative a discount rate to represent a suitable form of risk-free investment. ILGS returns over that period have been artificially distorted downwards mainly by the effect of Quantitative Easing combined with other factors. As we indicated in our previous answer, investment solely in ILGS could no longer be considered either a risk-free or realistic strategy for any prudent claimant.

Some cases proceeded only on the basis of evidence presented by the claimant and without countering evidence culminating in the lead case of Simon v Helmot in Guernsey which is now largely relied on. Expert evidence has led to theoretical arguments claiming to support discount rates as low as minus 4%, all the while perpetuating the assumption of a risk-free investment strategy of investing solely in ILGS, even though no prudent financial advisor would propose such a strategy.

4. What impact will the draft Damages Law have on recipients of damages awards in Jersey in the future?

The draft Damages Law aims to deliver against the 100% compensation principle. The rates set out in the draft Law have been assessed taking account actual returns on investment, rather than theoretical returns. There are always difficult and complex considerations in deciding the categories which should be created if different rates should be set. However an approach which involves more than one rate, whilst adding a layer of complexity to the process, could provide some flexibility in aligning the investment return required to meet the specific elements of a claimant's award, and is a mechanism which is more likely to support and achieve the 100% compensation principle.

A dual approach should ensure that those claimants with a shorter investment period, who are unable to rely on returns from investment in equities to match their needs are not under compensated, whilst for the longer term investment, a higher rate is appropriate. In our view, investment on a long term basis is usually a period of over 15 years - opinions differ as to the period of years to be covered by a long term investment strategy but the consensus appears to be for at least 10-15 years. The rate of return for the longer term period is not volatile or vulnerable to short or medium term economic fluctuations which could be anticipated to occur throughout an economic or business cycle. As such it would not require or be subject to regular review.

RSA supports a dual rate methodology which is now permitted within the draft legislation in England and Wales and in Scotland, and variations of it are used particularly in the State of Ontario in Canada and Hong Kong: these two models are themselves different. Ontario has a "stepped rate", applying two rates in a single case. Hong Kong's model applies a different single rate to the entire future losses in cases with different investment horizons.

The essence of a dual rate is therefore the recognition that better returns on investments can be gained over longer periods which in our view is 15 years or longer. We accept that returns on investments for a shorter period are likely to be lower. The advantages are that it is fair, relatively predictable and aligns the calculation of damages to the likely and achievable investment returns which can be achieved over the duration of future losses.

In Ontario, the long-term rate is set by statue at 2.5% since 1981. We recommend that any long term rate should be set by reference to the historic and predicted returns achieved when investing over a long period. It is inherent in a long-term rate that it should rarely change, and such change should only be needed if there is evidence of a permanent shift in the returns expected over the longer-term. However given the past performance and evidence that returns remain steady and well above inflation over very significant periods of time, this is unlikely.

However, we are concerned that the method by which it is being proposed a dual rate will be applied under the Damages Act i.e. different rates depending on the length of the multiplier, will introduce an artificial boundary between shorter and longer multipliers which could distort the negotiation process, especially negotiation around the level of multipliers for specific heads of damage. It could delay settlements between past and future losses so that heads of damage can be settled where the multipliers especially for loss of earnings may fall within the 20 year period rather than a longer period where the higher discount rate would be applied to the whole duration of the loss. It could also potentially drive front loading of care costs for example.

The advantage of the Ontario model over what is being proposed here is that it removes any unintended additional behavioural consequences around negotiation of multipliers and multiplicands that might exist with other split discount rate models.

A dual rate methodology also potentially solves a number of wider issues which has undermined the setting of the rate for a number of years: it should substantially reduce the risk of judicial review action because it offers a flexible solution which appropriately accommodates short term economic factors. Furthermore, such a model provides certainty and addresses the challenge of timing of reviews so that for the period of 15 years or less the rate would be reviewed where there is a material change in investments (the parameters for such material change being set out in the legislation) and for the period over 15 years review would occur only where there was an exceptional and fundamental change which led experts to revise established orthodox thinking on long term investment strategy.

One potential concern with any dual rate structure is that an individual claimant could seek to maximise benefit by opting for a lump sum for the period covered by the short-term rate and then seek a PPO for the remainder of the future loss period. The effect of this approach if permitted would be to distort the overall risk profile applied by the dual rate.

Our recommendation if this model were to be adopted is that the dual rate option can only be applied to each individual head of future loss as a whole, i.e. to cover the entire period of any future loss. The effect of this would be that in respect of any head of future pecuniary loss, the court must award either a lump sum or a PPO but not both. It would still permit a claimant to have a PPO for one head of future loss (such as care and case management) and a lump sum for other heads of future loss, as often happens now.

The draft Law does not detail the mechanism for future reviews of this rate. The Civil Liability Bill in England and Wales currently proposes a 5 year frequency to reflect this, with the option of an earlier review in the event of significant changes. The short term rate is more likely to be susceptible to external factors and may therefore require more frequent review, although we would caution against the risk of such reviews affecting the ability of the parties to settle claims – if the rate is reviewed frequently, one or other party will always want to influence the timing of settlement to their advantage.

It is likely that the rates proposed in the draft Law will reduce compensation received by a claimant but at the present, it is highly likely that a claimant is being overcompensated. The claimant will now have more choice because PPOs are available as an alternative both as to the form of the award and level of risk that they are prepared to take. For those claimants prepared to take a commensurate risk by taking a lump sum award, the sum recoverable will be discounted appropriately reflecting the rate or return achieved by investment practice reflecting reality.

5. What will be the impact of introducing a statutory discount rate for damages awards?
a) What discount rates have been set with regards to damages awards up until now?

The current discount rate in Jersey is set according to the common law, unlike most other jurisdictions. England & Wales, Scotland, Northern Ireland, most Australian states, most Canadian states and Spain, among others, all have statutory discount rates. The existence of a statutory discount rate does not affect the common law framework in which claims are managed, which would continue to operate as it does now.

Political accountability is needed when setting the rate. As such the Government should set the rate so that a policy decision is taken for which it is accountable, rather than the decision being made through a quasi-judicial process.

The decision on the rate also requires consideration of wider factors such as inflation forecasts, the level of investment risk and detailed consideration of the appropriate mix of assets for a mixed portfolio to meet the level of risk as determined and appropriate allowances for taxation and other charges. These should be political decisions based on expert evidence presented by the relevant parties.

We question what is meant by a "lower risk diversified portfolio of investments". In Article 3 (6). This is not consistent with the phrase used by the Senior Economist throughout his report which shows that claimants generally invest in "low risk" diversified portfolios. What does the use of "lower risk" in Article 3 then imply? If the intention is "low risk", then Article 3 should be revised to say so.

We support no allowance to be made for investment management charges as part of the rate setting exercise.

Ultimately setting of the discount rate is a decision of public policy. Setting of the rate should be done in a way that balances the interests of policyholders and defendants including state-funded bodies, with the need to provide seriously injured claimants with full compensation. The courts would not and could not be expected to take such matters in to consideration.

RSA agrees that the new rate should always apply to existing cases: the application of a discount rate in an individual case is always a prospective exercise, looking at the likelihood of future returns.

6. What will be the impact of putting into statute the power of the court to make periodic payment orders for damages awards?

The impact will be to bring Jersey into line with England & Wales and Scotland. PPOs provide risk averse claimants with a lower risk option for their award of damages.

The basic principle of the law of damages for personal injury in England and Wales and in Jersey is that, for reasons of finality and certainty for both sides, the claimant is entitled to a single final award, either by agreement or by judgment of the court.

The concept of periodical payments is one of two significant exceptions permitted to that rule. It allows payments to be made on a regular basis, usually for the duration of the claimant's life, but the payments are determined at the time of the initial award. This means the only two elements that are not fixed at the time of settlement are the duration of payments and the extent to which the payments will increase in line with the appropriate inflation index.

The other significant exception to the single award rule lies in the framework for the award of provisional damages. In limited circumstances, where there is a material prospect of the claimant suffering a serious deterioration in their medical condition directly related to the original injury, they may seek a provisional award of damages based on the known injury, coupled with the right to return to the court for a further award of damages if the deterioration specified at the time of the original award materializes. Therefore, in the same way as PPOs, the only uncertainty is whether the deterioration materializes.

The variable PPO concept as introduced in England and Wales brings those two exceptions together and in effect allows for provisional periodical payments. A variation to a PPO must be limited to specific circumstances, defined in advance at the time of settlement.

The wording of Article 4(8) to 4(10) of the draft Law refers only to a material change of circumstances and in that sense introduces a significant element of uncertainty. The specific detail of what is intended should be set out in the draft Law, rather than being left to Rules of Court.

Yours faithfully

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