The ABI's response to the Draft Damages Law – Call for Stakeholder Views

About the ABI:
The Association of British Insurers is the leading trade association for insurers and providers of long term savings. Our 250 members include most household names and specialist providers who contribute £12billion in taxes and manage investments of £1.8trillion.

Response:

1. The ABI is supportive of the reforms to the framework for setting the discount rate in the Civil Liability Bill in England & Wales, the Damages (Investment Returns and Periodical Payments) (Scotland) Bill and in turn supports the Draft Damages (Jersey) Law. The Terms of Reference for the Corporate Services Scrutiny Panel have been considered and comments on each are laid out below:

    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?**

2. The insurance industry fully supports the principle that seriously injured claimants should receive 100% compensation. The principle of full compensation requires a system that neither over nor under compensates claimants. However, this is best achieved using a methodology for setting the rate which reflects a real-world approach to investment, rather than a purely theoretical approach to how claimants invest their damages as the current framework allows for.

3. The current discount rate in England, Wales and Scotland of minus 0.75% reflects the application of a purely theoretical approach investment approach. The then Lord Chancellor in England & Wales took the view that the decision in *Wells v Wells* bound her to accept that the discount rate should be calculated as if based on claimants investing solely in Index Linked Government Securities (ILGS). That decision was followed in Scotland.

4. Such an approach to setting the Discount Rate does not deliver a rate that reflects reality. No properly advised claimant would ever invest in ILGS alone, nor any single asset that would deliver a negative return for the long term. All the evidence points to claimants investing in a mixed portfolio of assets, which is what they would be advised to do.

5. The court in deciding *Wells* made it very clear that the courts were not best placed to consider the detailed evidence required to decide on an appropriate discount rate and encouraged the Lord Chancellor to exercise the power to set the rate under the Damages Act 1996. He did so in 2001. In doing so the then Lord Chancellor took a wide view noting in his statement at the time *"I have taken account of matters which I consider are relevant to the setting of a discount rate which is just as between claimants as a group*

and defendants as a group"[1].

6. A statutory basis for setting the discount rate going forward is more appropriate. The Government rather than the courts are best placed to consider the appropriate evidence and make a decision that balances the interests of all parties – further details of the current position in the courts are given in response to question 3. Claimants must be fully compensated but that should be balanced by a public policy decision to take account of defendants as a group, especially the public sector, to the extent that defendants should not be required to over compensate claimants. Such a requirement has wider consequences for the cost of public provision and for the premium paying public.

7. As such, the ABI supports the proposal in the draft Law that the discount rate should never be set at below 0%. This underpins real world investment decisions and is supported by the Senior Economist's advice. No properly advised claimant would choose to invest in assets that guarantee a negative return. The ABI also supports the policy reasoning for this decision noting that it would not be appropriate for damages awards to be "recession proof" when all other areas of public provision and private services are not. These are awards that 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?

8. The ABI has only limited information available as to the effect on healthcare provision and the problems for doctors in obtaining indemnity, as the majority of such cover is not provided by ABI members. However, the ABI understands that the current approach of the courts in Jersey has often led to claims at levels which would exceed the likely limit of indemnity of any cover held or available in this market. Such circumstances would have an inevitable impact on the availability of affordable cover and on the risk to the Minister as the defendant of last resort.

9. The arguments which claimants began to raise in Jersey (and Guernsey) claims in around 2009 were born in part out the desire of claimant firms in mainland UK to highlight the growing gap between the discount rate set by the Lord Chancellor in 2001 and the approach said to have been taken in *Wells v Wells*. In large measure, those arguments relied on the diminishing returns from UK ILGS to justify an application of a negative discount rate to represent a suitable form of risk-free investment.

[1] Discount rate: statement laid by Lord Irvine of Lairg in the libraries of both Houses of Parliament on 27 July 2001

10. However, the returns from ILGS had even by 2009 been distorted downwards by a series of factors, including primarily the effect of Quantitative Easing instigated by the Bank of England. As well as distorting returns, those factors also meant that holding a portfolio entirely of ILGS could no longer be considered a risk-free strategy for any prudent claimant. Indeed prudent advice would always be for a claimant to hold a diversified portfolio, not to invest solely in a single asset class.

11. Claimant firms therefore provided evidence to the courts in Jersey as to the theoretical effect of applying their version of the *ratio* in *Wells v Wells*: that only the returns on ILGS could demonstrate the basis on which to calculate the return on risk-free investment. Such evidence obviously came at considerable expense and had often to be countered by similar evidence on the part of defendants.

12. Additional difficulties arose in that, for unknown reasons, some cases proceeded only on the basis of evidence presented by the claimant and without countering evidence. This included the lead case in Guernsey (*Simon v Helmot*), which ultimately went to the Privy Council and is now largely relied on in both Jersey and Guernsey.

13. The approach of presenting expert evidence has led to theoretical arguments claiming to support discount rates as low as minus 4%. Such arguments assume the need to perpetuate the notion of a risk-free investment strategy of investing solely in ILGS. Despite this approach being supported in *Wells* and to a degree in *Simon*, it is a strategy that no prudent financial advisor would propose adopting in practice.

14. There is also no evidence that since the discount rate in England and Wales was reduced to minus 0.75% in March 2017, any claimant has invested their lump sum award solely in ILGS. Indeed, the arguments now being advanced routinely before the Jersey courts have a flavour of trying to provide a theoretical justification for that reality.

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

15. 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 of actual returns on investment, rather than theoretical returns. A dual approach should ensure that those claimants with a shorter investment period, who cannot rely as easily on returns from investment in equities, are not under compensated. A higher long term rate is appropriate. There are numerous studies[2] demonstrating that the long term investment horizon is always significantly more stable than the short term (see below).

16. The draft Damages Law sets a statutory discount rate and also allows for the court to make Periodical Payment Orders (PPO) in specified circumstances. This allows the claimant a choice as to how to take their award of damages. This choice is essential for claimants. Only claimants and their legal and financial advisers can provide the reasons

[2] See for example: Barclays Equity Gilt Study - https://www.allocationblog.com/content/uploads/sites/3/2016/07/Equity-Gilt-Study-2016.compressed.pdf

why claimants choose to settle their claim on a particular basis. However, it appears that claimants take into account a number of factors when deciding what form of award to choose and that some of those factors are not financial. Those factors, and the weight given to them by the claimant, will vary from case to case depending on the circumstances of the individual claimant and their attitude or wishes.

17. The most obvious non-financial factor is the desire of the claimant to provide security for their family/dependents in the event that the claimant dies earlier than their predicted life expectancy. However, this runs directly contrary to the principle of full compensation, in which the parties and the court have to assume that the capital sum will be completely exhausted at the end of the relevant period (usually the claimant's life expectancy). That said, the principle that claimant choice should be the key factor is supported.

18. Having taken account of the claimant's choice, the court will assess damages. The application of the real world approach to meeting inflation will mean that those with a less than 20 year investment horizon will have a discount rate of 0.5% applied to their future losses and those with a greater than 20 year investment horizon 1.8%.

19. The ABI supports the principle of using some form of dual rate methodology, a concept already used in other jurisdictions and permitted within the draft legislation in England and Wales and in Scotland. There are variations 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.

20. A dual rate mechanism recognises the problem of using a “single” discount rate to determine lump sums that are often calculated as the present value equivalent of very long payment streams (typically 50 years plus). To assume that real yields will perpetually remain at the current depressed levels in effect ignores the longer term average returns that have been achieved historically, and that are likely to be achieved again in the future.

21. The dual rate overcomes this flaw, by setting rates that recognise that settlements covering shorter durations may require different assumptions from those covering longer durations.

22. The essence of a dual rate is therefore the recognition that better returns on investments can be gained over longer periods. Where investment is limited to a shorter period, and in that period there is also the need to draw down the capital, returns are likely to be lower.

23. So, a dual rate is usually split into a “long term” rate and a “short term” rate.

    Short term rate: It is broadly accepted by investment managers that for shorter terms of investment, it is appropriate to adopt an approach which may be lower risk and which will also generate lower returns. Opinions differ as to the period of years to be covered by such a strategy and this is reflected by the differing approaches in Ontario and Hong

Kong, but the consensus appears to be for at least 10-15 years. The draft Law's combined proposal of 20 years and a rate of + 0.5% represents a suitable compromise.

The draft Law does not detail the mechanism for future reviews of this rate. 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. 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.

Long-term rate: In Ontario, the long-term rate is set by statute and has remained at 2.5% since 1981. Any long term rate should be set by reference to the historic and predicted returns achieved when investing over a long period. The long-term stability of this approach benefits both claimants and compensators by creating more predictability, and reflecting the relative stability of investment returns over longer time.

The long term rate must be based on realistic returns that could be expected to be achieved for low risk long term investments (40-50 year period). By taking a long term view, any distortions from market cycles, whether upturn or downturn, would be smoothed out.

24. It is axiomatic that the long-term rate should rarely change, since it should not be affected by short-term or even medium-term factors. Whilst the long-term rate should be considered as part of any review process, change would only be needed if there is evidence of a permanent shift in the returns expected *over the longer-term*. We would expect that to be highly unusual given the past performance and evidence that returns remain steady and well above inflation over very significant periods of time.

25. The long-term rate is based on analysis by the GAD in 2017. In one important respect, that analysis was pessimistic in a way that would have a significant effect on the long term rate. The GAD assumed that the average period of years for which a lump sum would need to last was 30 years. Their reasons for this assumption appear to be to strike a balance between longer periods and shorter periods. With the model proposed in Jersey, the shorter periods are already catered for by the short term rate. The long term rate should therefore be sufficient to cater for the range of periods for all cases lasting beyond 20 years.

26. ABI data shows that for claims with a value exceeding £1 million, the average life expectancy of the claimant is 46 years. The value threshold used is likely to mean that all cases involving significant losses for more than 20 years are captured in this average. The market studies show that the longer the time horizon, the more likely it is that higher returns will be generated. We believe those studies would show that on the approach used, the long term rate should be higher than 1.8% and around the 2.5% net rate applied in Ontario since 1981.

27. **Impact:** The rates proposed in the draft Law will reduce the sums of money received by the claimant, as against current awards but it is highly likely that current awards significantly over compensate claimants. The claimant will now have more choice as to the form of the award and level of risk that they are prepared to take – because PPOs will be available. For those claimants that prefer a lump sum award, the sum recoverable will be discounted appropriately, reflecting a real world approach to accounting for inflation based on the length of the investment horizon.

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?

28. The current rate in Jersey is set according to the common law, unlike England & Wales, Scotland, Northern Ireland, most Australian states, most Canadian states and Spain, among others, who already have statutory discount rates.

29. Political accountability is needed and important when setting the rate. As such, the power to set the rate should rest with the appropriate Minister so that a policy decision is taken for which the decision maker is politically accountable rather than the judiciary attempting to consider evidence on the issue.

30. The decision on the discount rate if based in statute does not impact on the common law framework, it is a statutory decision that merely applies a rate to be adopted within that common law framework. The decision has been a judicial one to date, but the draft Damages Law proposes to change that position. This will bring Jersey into line with mainland UK where the setting of the discount rate is already statutory.

31. The decision requires consideration of inflation forecasts, a policy decision as to the level of the risk that a claimant should be required to take (there is no such thing as a risk fee investment), detailed consideration of the appropriate mix of assets for a portfolio to meet the level of risk as determined and a policy decision as to the appropriate allowance for tax and charges. These are all decisions that more appropriately rest with the Minister rather than be left to the courts to consider, based on expert evidence as presented by the interested parties.

32. Article 3 (6) refers to a "lower risk diversified portfolio of investments". It is not clear what is meant by "lower" risk. The Senior Economist refers throughout his report to "low risk" portfolios referring to evidence from research and the recent UK consultation which shows that claimants generally invest in low risk diversified portfolios. The use of "lower risk" in Article 3 begs the question lower than what? If the intention is that the risk is "low risk" Article 3 should be revised to make that clearer. The term "low risk" is one readily understood by financial advisers and investment managers and may need no further definition. England and Wales has chosen to adopt a range, defining the ends of that range rather than the precise level of risk within the range. Scotland has used the term

"cautious" (synonymous with low risk) in its covering Policy Memorandum but not in the Bill itself.

33. It is noted that no allowance has been made for investment management charges as part of the rate setting exercise. It is appropriate not to make an allowance for the following reasons:
    - Claimants purchasing such services will tend to keep the cost to a minimum;
    - a low risk portfolio involves less active management, meaning lower management fees;
    - a portfolio requiring more active management should be predicted to generate higher returns.

34. Any decision to make allowance for investment management fees ought therefore to reflect the likelihood of higher returns and be based on a higher starting point than 0.5%/1.8%.

35. Ultimately the discount rate is a decision of public policy. The claimant must receive full compensation, but the interests of defendants (including state-funded bodies) must also be accounted for in that decision. If those interests are not accounted for, then there are implications for the cost of healthcare and insurance costs. The courts cannot be expected to take such policy matters into consideration.

36. As the report of the Senior Economist highlights, the process of deciding such issues via the courts requires the involvement of expensive expert evidence on a case by case basis: this approach was approved by the decision of the Privy Council in *Simon v Helmot*[3], although the decision in that case largely turned on the lack of evidence from the defendant to counter the evidence of the claimant. This is an uncertain and costly means of determining the discount rate and the decision to set the rate via statute is welcomed.

37. As highlighted above, the approach of presenting expert evidence in court cases has led to theoretical arguments claiming to supporting discount rates as low as minus 4%. Such arguments assume the need to perpetuate the notion of a risk-free investment strategy of investing solely in ILGS. Despite this approach being supported in *Wells* and to a degree in *Simon*, it is a strategy that no prudent financial advisor would adopt in practice.

38. **Impact on existing cases**: At Article 6, the draft Law proposes that the new regime shall apply to an existing case prior to any court judgment, unless it appears to the court that to do so would contravene the right to a fair trial under Article 6 of ECHR. The ABI agrees that the new rate should always apply to existing cases: this is always how the common law has operated in the past. The rationale is that the application of a discount rate in an individual case is always a prospective exercise, looking at the likelihood of future returns – even if it gives the appearance of increasing or reducing the lump sum award.

[3] *Dylan Simon v Manuel Paul Helmot (By his next friends and guardians Rosemary Helmot and Kenneth Raymond Jordan)* [2012] UKPC 5

39. The States may want to consider whether the proviso in respect of Article 6 ECHR is strictly necessary. In its current form, the draft Law may encourage claimants to seek to raise such arguments in every case where the setting of the new rate has an impact, when the rationale set out above should mean that such arguments would never properly arise.

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

40. The Impact will be to bring Jersey into line with England & Wales and Scotland. PPOs allow risk averse claimants a lower risk option as to how their damages are awarded.

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

42. The concept of periodical payments is one of just two significant exceptions permitted to that rule. It allows payments to be made over time (usually the claimant's lifetime), but within a framework which is still fixed at the time of the initial award. In that way the uncertainty is limited to the time period over which the defendant will have to make payments.

43. The other significant exception to the single award rule lies in the framework for the award of provisional damages. In carefully defined circumstances, a claimant facing a chance of a serious medical condition occurring in the future is entitled to an initial (provisional) award of damages ignoring that chance, coupled with the right to return to the court for a further award of damages if that condition does materialise. Again the parameters for the right to return are set at the time of the initial award, so the only remaining uncertainty is over whether the condition will materialise.

44. The variable PPO concept as introduced in England and Wales is an attempt to bring the two exceptions together and in effect to allow provisional periodical payments. That is a sensible and workable concept, but only if it retains the key element of its use and parameters being controlled at the point of settlement. That involves three specific controls:

    1. the requirement that the variation be limited to the chance of specific circumstances, defined in advance at the time of settlement, occurring;

    2. the restriction of such circumstances to the chance of a serious medical condition: any other anticipated future changes (such as the likelihood of care needs increasing when the claimant gets older) can usually be dealt with in the initial award itself;

    3. the assessment of the initial award having to ignore that chance in valuing the claim.

45. The wording of Article 4(8) to 4(10) of the draft Law lacks the necessary clarity to control the use of variable orders and introduces an unwelcome element of uncertainty by reference to just a material change of circumstances. The detail of what is intended should be set out in the draft Law, rather than being left to Rules of Court made by the Superior Number of the Royal Court.

46. The parameters within which variable orders operate could technically be contained in Rules of Court, but they derive from policy considerations which would be matters for the States to consider. A comparison with how this was dealt with in England and Wales and is currently being addressed in Scotland may be helpful.

47. The original legislation in England and Wales was section 2D of the Damages Act 1996, inserted by the Courts Act 2003. That section allows the Lord Chancellor to cover the detail in a statutory instrument, but it still sets out the basic requirements including that variation will be allowed only in specified circumstances, by reference to a term in the original court order. It also specifically includes the power for the Lord Chancellor to make provision of a kind that could be made by court rules.

48. The statutory instrument is the Damages (Variation of Periodical Payments) Order 2005 (see **Annex A)**. This contains all the control mechanisms expected: the requirement for a defined chance of a serious medical change, the assumption that this is ignored in the original award and the way in which the original court order will define and limit the right to return.

49. The draft Damages (Investment Returns and Periodical Payments) (Scotland) Bill, currently before the Scottish Parliament, deals with matters in a similar way but includes all the necessary provisions in the Bill itself at clause 4 (see **Annex B**). This is to be expected, as the wording of the 2005 Order in England and Wales has not changed in 13 years and the inclusion of its provisions in the Bill itself avoids the need for any further Order.

50. In both England and Wales and Scotland it is clear that these provisions could have been made by way of procedural rules. However, in each case the necessary decisions of policy have been made by the Government and contained in legislation. The contents of either the 2005 Order in England and Wales or clause 4 of the draft Bill in Scotland set out succinctly the matters that should be addressed in the draft Law.

51. The power to order a variable PPO allows defendants to make an application, as with the existing provisions in England and Wales and those planned in Scotland. If such orders are readily available to defendants, the ability of defendants to apply to vary a PPO because of any change in circumstance will encourage compensators to require claimants to provide detailed information as to their health and wider circumstances, on a regular basis and long after settlement, in order to allow the defendants to judge whether any application should be made. That would be intrusive and could deter claimants from seeking an otherwise sensible PPO option. The controls proposed above would therefore be as much for the benefit of claimants as that of compensators.

52. The ABI would also encourage the addition of the Motor Insurers Bureau (MIB) to the list of those where continuity of payment is considered to be reasonably secure. The MIB has satisfied the courts in England & Wales that the payments it makes are reasonably secure because it is funded by the insurance industry and also because the UK government is currently required by EU Directives to establish a compensation scheme for such victims.

Association of British Insurers
November 2018

This Statutory Instrument has been printed in substitution of the S.I. of the same number and is being issued free of charge to all known recipients of that Statutory Instrument.

STATUTORY INSTRUMENTS

2005 No. 841

DAMAGES, ENGLAND AND WALES

DAMAGES, NORTHERN IRELAND

The Damages (Variation of Periodical Payments) Order 2005

Made - - - - 18th March 2005

Coming into force in accordance with Article 1(1)

Whereas the Lord Chancellor, in accordance with section 2B(6)(b) of the Damages Act 1996(**a**), has consulted with such persons as appeared to him to be appropriate:

And whereas a draft of this Order has been laid before and approved by resolution of each House of Parliament in accordance with section 2B(6)(c) of that Act:

Now, therefore, the Lord Chancellor, in exercise of the powers conferred upon him by section 2B(1), (2), (3) and (6) of the Act, hereby makes the following Order:

Citation, commencement, interpretation and extent

1.—(1) This Order may be cited as the Damages (Variation of Periodical Payments) Order 2005 and shall come into force on the fourteenth day after the day on which it is made.

(2) In this Order —

(a) "the Act" means the Damages Act 1996;

(b) "agreement" means an agreement by parties to a claim or action for damages which settles the claim or action and which provides for periodical payments;

(c) "damages" means damages for future pecuniary loss in respect of personal injury;

(d) "defence society" means the Medical Defence Union or the Medical Protection Society;

(e) "variable agreement" means an agreement which contains a provision referred to in Article 9(1);

(f) "variable order" means an order for periodical payments which contains a provision referred to in Article 2.

(3) In the application of this Order to Northern Ireland –

(a) "claimant" means plaintiff;

(**a**) 1996 c. 48; section 2B was inserted by the Courts Act 2003 (c. 39), section 100.

(b) "permission" means leave;

(c) "statements of case" means, in the High Court, the writ and pleadings and, in the county court, the civil bill and any notice of intention to defend, defence, notice for particulars, replies and counterclaim.

(4) This Order extends to England and Wales and Northern Ireland.

(5) This Order applies to proceedings begun on or after the date on which it comes into force.

Power to make variable orders

2. If there is proved or admitted to be a chance that at some definite or indefinite time in the future the claimant will —

(a) as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration, or

(b) enjoy some significant improvement in his physical or mental condition, where that condition had been adversely affected as a result of that act or omission,

the court may, on the application of a party, with the agreement of all the parties, or of its own initiative, provide in an order for periodical payments that it may be varied.

Defendant's financial resources

3. Unless —

(a) the defendant is insured in respect of the claim,

(b) the source of payment under the order for periodical payments is a government or health service body within the meaning of section 2A(2) of the Act,

(c) the payment is guaranteed under section 6 of or the Schedule to the Act, or

(d) the order is made by consent and the claimant is neither a child nor a patient within the meaning of Part VII of the Mental Health Act 1983(**a**) or of Part VIII of the Mental Health (Northern Ireland) Order 1986(**b**),

the court will take into account the defendant's likely future financial resources in considering whether to make a variable order.

Award of provisional damages

4. The court may make a variable order in addition to an order for an award of provisional damages made by virtue of section 32A of the Supreme Court Act 1981(**c**) or section 51 of the County Courts Act 1984(**d**)or, in relation to Northern Ireland, paragraph 10(2)(a) of Schedule 6 to the Administration of Justice Act 1982(**e**).

Contents of variable order

5. Where the court makes a variable order —

(a) the damages must be assessed or agreed on the assumption that the disease, deterioration or improvement will not occur;

(b) the order must specify the disease or type of deterioration or improvement;

(c) the order may specify a period within which an application for it to be varied may be made;

(**a**) 1983 c. 20.
(**b**) S.I. 1986/595 (N.I. 4).
(**c**) 1981 c. 54; section 32A was inserted by the Administration of Justice Act 1982 (c. 53), section 6.
(**d**) 1984 c. 28.
(**e**) 1982 c. 53.

(d) the order may specify more than one disease or type of deterioration or improvement and may, in respect of each, specify a different period within which an application for it to be varied may be made;

(e) the order must provide that a party must obtain the court's permission to apply for it to be varied, unless the court otherwise orders.

Applications to extend period for applying for permission to vary

6. Where a period is specified under Article 5(c) or (d) —

(a) a party may make more than one application to extend the period, and such an application is not to be treated as an application to vary a variable order for the purposes of Article 7;

(b) a party may not make an application for the variable order to be varied after the end of the period specified or such period as extended by the court.

Limit on number of applications to vary

7. A party may make only one application to vary a variable order in respect of each specified disease or type of deterioration or improvement.

Case file

8.—(1) Where the court makes a variable order, the case file documents must be preserved by the court until the end of the period or periods specified under Article 5(c) or (d) or of any extension of them or, if no such period was specified, until the death of the claimant.

(2) The case file documents are, unless the court otherwise orders —

(a) the judgment as entered;

(b) the statements of case;

(c) the schedule of expenses and losses;

(d) a transcript of the judge's oral judgment;

(e) all medical reports relied on;

(f) a transcript of any parts of the claimant's own evidence which the judge considers necessary;

(g) any subsequent orders.

(3) A court officer must ensure that the case file documents are provided by the parties where necessary and filed on the court file.

(4) Where a variable order has been made, the legal representatives of the parties and, if the parties are insured, their insurers, must also preserve their own case file until the end of the period or periods specified under Article 5(c) or (d) or of any extension of them or, if no such period was specified, until the death of the claimant.

Variable agreements

9.—(1) If there is agreed to be a chance that at some definite or indefinite time in the future the claimant will —

(a) as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration, or

(b) enjoy some significant improvement in his physical or mental condition, where that condition had been adversely affected as a result of that act or omission,

the parties to an agreement may agree that a party to it may apply to the court subsequently for its terms to be varied.

(2) Where the parties agree to permit an application to vary the terms of an agreement, the agreement —

(a) must expressly state that a party to it may apply to the court for its terms to be varied;

(b) must specify the disease or type of deterioration or improvement;

(c) may specify a period within which an application for it to be varied may be made;

(d) may specify more than one disease or type of deterioration or improvement and may, in respect of each, specify a different period within which an application for it to be varied may be made.

(3) A party who is permitted by an agreement to apply for its terms to be varied must obtain the court's permission to apply for it to be varied.

Application for permission

10.—(1) An application for permission to apply for a variable order or a variable agreement to be varied must be accompanied by evidence —

(a) that the disease, deterioration or improvement specified in the order or agreement has occurred, and

(b) that it has caused or is likely to cause an increase or decrease in the pecuniary loss suffered by the claimant.

(2) Where the applicant is the claimant and he knows that the defendant is insured in respect of the claim and the identity of the defendant's insurers, he must serve the application notice on the insurers as well as on the defendant.

(3) Where the applicant is the claimant and he knows that the defendant is a member of a defence society and the identity of the defence society, he must serve the application notice on the defence society as well as on the defendant.

(4) The respondent to the application may, within 28 days after service of the application, serve written representations on the applicant and, if he does, must file them with the court.

(5) The court will deal with the application without a hearing.

Refusal of permission

11.—(1) Where permission is refused, the applicant may, within 14 days after service of the order, request the decision to be reconsidered at a hearing.

(2) No appeal lies from an order refusing permission after reconsideration.

Grant of permission

12.—(1) Where permission is granted, the court will also give directions as to the application for the variation of the variable order or the variable agreement.

(2) Directions must include directions as to —

(a) the date by which the application for variation must be served and filed;

(b) the service and filing of evidence.

(3) No appeal lies from an order granting permission.

Order for variation

13.—(1) On an application for the variation of a variable order or a variable agreement, if the court is satisfied —

(a) that the disease, deterioration or improvement specified in the order or agreement has occurred, and

(b) that it has caused or is likely to cause an increase or decrease in the pecuniary loss suffered by the claimant,

it may order —

(i) the amount of annual payments to be varied, either from the date of the application for permission or from the date of the application to vary if the order did not require the permission of the court for an application to vary, or from such later date as it may specify in the order;

(ii) how each payment is to be made during the year and at what intervals;

(iii) a lump sum to be paid in addition to the existing periodical payments.

(2) Section 2(3) to (9) of the Act applies to orders under this Order as it applies to orders for periodical payments.

Application of rules of court

14. In England and Wales, the Civil Procedure Rules 1998(**a**) and in Northern Ireland, rules of court apply to applications under this Order, except where this Order makes provision inconsistent with Civil Procedure Rules or rules of court.

Signed by authority of the Lord Chancellor

David Lammy
Parliamentary Under Secretary of State
Department for Constitutional Affairs

18th March 2005

(**a**) S.I. 1998/3132.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order enables courts to vary orders and agreements in personal injury cases under which all or part of the damages take the form of periodical payments. Articles 2 and 9 restrict the circumstances in which variation is permissible to those where there is a chance that the claimant will develop some serious disease or suffer some serious deterioration, or enjoy some significant improvement, in his physical or mental condition, and the court has ordered, or the parties have agreed, that the order or agreement is to be capable of variation.

The decision that an order may be varied in the future may be made on the application of a party, or with the consent of the parties or of the court's own initiative (Article 2). In the case of an order, the court's permission for an application to vary the order is required, unless the court decides otherwise (Article 5); in the case of an agreement, the court's permission is always required (Article 9).

Article 10 requires the person applying for permission to apply to vary an order or agreement to show that the specified disease, deterioration or improvement has occurred and that it has caused or is likely to cause an increase or decrease in the claimant's financial loss. The application for permission is to be dealt with on the papers. If permission is refused the claimant may ask the court to reconsider the matter at a hearing (Article 11). No appeal from the grant of permission or the refusal of permission on a reconsideration is possible (Article 12).

On a successful application for the variation of an order or agreement, the court may order that the amount of the annual payments to the claimant is to be varied (Article 13). It may also order that a lump sum be paid in addition to the periodical payments. Article 13 further provides that, as with the original order, the court must be satisfied that the continuity of payment as varied is reasonably secure, under section 2(3) of the Damages Act 1996.

This Statutory Instrument has been printed in substitution of the S.I. of the same number and is being issued free of charge to all known recipients of that Statutory Instrument.

STATUTORY INSTRUMENTS

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4 Variation or suspension of settlement

After section 2D of the Damages Act 1996 (see section 3 of this Act) there is inserted—

"**2E Variation or suspension of future pecuniary loss award**

(1) In an order under which damages for future pecuniary loss are wholly or partly to take the form of periodical payments, a court may include provision *5* enabling an application to be made to the court for (either or both)—

(a) variation of the order in accordance with section 2F, or

(b) suspension of the right to receive payments under the order in accordance with section 2G.

(2) A court may include provision of the kind described in subsection (1) in an *10* order only if it is satisfied that—

(a) there is a chance of a change in the pursuer's physical or mental condition occurring at some definite or indefinite point in the future, and

(b) should the change occur, the pursuer would be significantly over- or under-compensated by the damages being awarded for future pecuniary loss.

(3) In an order including provision of the kind described in subsection (1), a court—

(a) must specify the sort of change in the pursuer's physical or mental condition which must occur before an application may be made for—

(i) variation of the order, or

(ii) suspension of the right to receive payments under the order, and

(b) may specify a period within which any such application must be made (either generally or in respect of a specified sort of change in the pursuer's condition).

2F Variation of court-ordered periodical payments

(1) A court which has made an order under which damages for future pecuniary loss are wholly or partly to take the form of periodical payments may vary the order.

(2) In varying the order, the court may—

(a) alter the terms on which periodical payments in respect of future pecuniary loss are to be paid, in particular—

(i) the amount that is to be paid as a periodical payment,

(ii) the basis (if any) on which the amount of the payments is to adjust to reflect inflation,

(iii) the frequency of the payments,

(iv) the period during which the payments are to be made,

(v) the method by which the payments are to be made,

(b) award a lump sum instead of, or in addition to, any future periodical payments in respect of future pecuniary loss.

(3) The court may vary the order only if—

(a) the order includes provision under section 2E(1) enabling an application to be made for its variation, and

(b) it is satisfied that—

(i) since the order was made, a change has occurred in the physical or *5* mental condition of the injured person which is of a sort specified in the order in accordance with section 2E(3)(a), and

(ii) as a result of the change, the damages awarded for future pecuniary loss will significantly over- or under-compensate the injured person unless the order is varied. 1

(4) The court may vary the order only if it is satisfied that the continuity of payment under the order would still be reasonably secure (with section 2C(1) to be used for this too).

(5) Ordinarily, the court may not vary the order—

(a) where a period within which an application for variation may be made is specified in the order, on an application made outwith that period,

(b) more than once in respect of each sort of change specified in the order in accordance with section 2E(3)(a).

(6) But the court may—

(a) allow a late application on cause shown by reference to delay in information becoming known to the applicant if it is satisfied that the delay is not attributable to something which the applicant unreasonably failed to do,

(b) vary the order despite subsection (5)(a) or (b) if it is satisfied that there are exceptional circumstances justifying doing so.

(7) A reference in this section to the injured person is to the person who suffered the injury in respect of which the order has been made.

2G Suspension of court-ordered periodical payments

(1) A court which has made an order under which damages for future pecuniary loss are wholly or partly to take the form of periodical payments may suspend the right to receive payments under the order.

(2) The court may suspend the right to receive the payments only if—

(a) the order includes provision under section 2E(1) enabling an application to be made for suspension of the right to receive the payments, and

(b) it is satisfied that—

(i) since the order was made, a change has occurred in the physical or mental condition of the injured person which is of a sort specified in the order in accordance with section 2E(3)(a), and

(ii) as a result of the change, the damages awarded for future pecuniary loss will significantly over-compensate the injured person unless the right to receive the payments is suspended.

(3) Where a period within which an application for suspension may be made is specified in the order, ordinarily the court may not suspend the right to receive the payments on an application made outwith that period.

(4) But the court may—

(a) allow a late application on cause shown by reference to delay in information becoming known to the applicant if it is satisfied that the delay is not attributable to something which the applicant unreasonably failed to do,

(b) suspend the right to receive the payments despite subsection (3) if it is satisfied that there are exceptional circumstances justifying doing so.

(5) A reference in this section to the injured person is to the person who suffered the injury in respect of which the order has been made.

2H Variation or suspension of agreed periodical payments

(1) A court may vary an agreement to which subsection (2) applies, or suspend a right to receive periodical payments under such an agreement, in accordance with—

(a) this section, and

(b) any restrictions on the court's power to do so specified in the agreement.

(2) This subsection applies to an agreement which—

(a) has been made to settle a claim or action for damages in respect of personal injury, and

(b) provides—

(i) for the agreed damages attributed to future pecuniary loss to take wholly or partly the form of periodical payments, and

(ii) that an application may be made to the court under this subsection in the event that at some definite or indefinite point in the future a change of a sort specified in the agreement occurs in the physical or mental condition of the person who suffered the injury.

(3) If the court is satisfied that the test in subsection (5) is met, it may—

(a) vary the agreement by altering the terms relating to payments for future pecuniary loss, or

(b) suspend the right to receive payments for future pecuniary loss under the agreement.

(4) In varying the agreement under subsection (3)(a), the court may—

(a) alter the terms on which periodical payments for future pecuniary loss are to be paid, in particular—

(i) the amount that is to be paid as a periodical payment,

(ii) the basis (if any) on which the amount of the payments is to adjust to reflect inflation,

(iii) the frequency of the payments,

(iv) the period during which the payments are to be made,

(v) the method by which the payments are to be made,

(b) award a lump sum instead of, or in addition to, any future periodical payments in respect of future pecuniary loss.

(5) The test for the purpose of subsection (3) is that—

(a) since the agreement was made, a change has occurred in the physical or mental condition of the injured person which is of a sort specified in the agreement as envisaged by subsection (2)(b)(ii), and

(b) as a result of the change, the damages agreed for future pecuniary loss will significantly over- or under-compensate the injured person unless—

(i) the agreement is varied, or

(ii) the right to receive payments for future pecuniary loss under the agreement is suspended.

(6) A reference in this section to the injured person is to the person who suffered the injury in respect of which the agreement has been made.

2I Lifting of suspension of periodical payments 15

(1) A court which has suspended a person's right to receive periodical payments under section 2G or 2H may lift the suspension if it is satisfied that—

(a) there has been a change in the physical or mental condition of the injured person since the right to receive the payments was suspended, and

(b) the injured person will be significantly under-compensated unless the suspension is lifted.

(2) A reference in this section to the injured person is to the person who suffered the injury in respect of which the order or (as the case be) the agreement in question has been made."