BCRLAW

BRIGHT. COMMERCIAL. RESPONSIVE.

THE DAMAGES (JERSEY) LAW

Jeremy Heywood
Partner
+44 (0) 1534 760 851
jeremy.heywood@bcrlawjersey.com

Alexandra Baker
English Solicitor
+44 (0) 1534 760 878
alexandra.baker@bcrlawjersey.com

The **Damages (Jersey) Law** (the "**Law**") will place on a statutory footing aspects of the calculation of damages in personal injury cases.

The two key aspects are:

- A statutory 'discount rate' and the mechanism of setting it; and
- Statutory provisions for 'Periodic Payment Order' (a "**PPO**") Including an ability for the Court to impose a PPO against the wishes of the parties.

The Law was, at least in part, prompted by the case of **X Plaintiffs v. Minister of Health & Social Services** (in which BCR acted for the plaintiffs).

Calculation of Damages

The overriding principle of compensation is that a plaintiff must be awarded a sum of money that, insofar as money is able, puts them back in the position they would have been had the negligent act not occurred. Traditionally, damages have always been awarded in a single 'lump sum' payment.

Damages are usually split into two categories: (1) General Damages, for the actual injuries suffered; and (2) Special Damages, for losses suffered as a consequence of the injuries (such as loss of earnings). Special Damages are further divided into 'Past Losses' and 'Future Losses'.

Difficulties with Future Loss Calculations

Lump sum awards for future losses are calculated by establishing the annual loss (the 'multiplicand') and multiplying that by a number based on the anticipated period of the loss (the 'multiplier'). The most difficult part of the calculation is working out what the appropriate 'multiplier' is. Central to the calculation of the appropriate 'multiplier' is the 'discount rate'.

What is the Discount Rate?

The discount rate is an element of the calculation which is designed to factor-in the anticipated real return which might be achieved on a lump sum award. The 'real return' is the return which might be achieved after taking into account inflation, which erodes the value of money over time and other costs. The higher the assumed real return which a plaintiff is expected to achieve, the higher the discount rate and the lower the lump sum award.

Since the House of Lords decision in **Wells v. Wells**, the common law calculation of the discount rate assumed that a plaintiff would invest in the safest possible investments which, because they were linked to inflation, were thought to be ILGS (index-linked, UK government securities). In the **X Plaintiffs** case, the expert evidence suggested a discount rate of somewhere between -1.50% and -3.50% ought to be applied, given the real returns then available on ILGS, or other low risk portfolios.

What are PPO's?

An alternative method of awarding damages for future loss is to establish the annual loss, tie it to an appropriate inflation index and order that the defendant make an annual payment, to rise in value in accordance with that inflation index. **X v. Estate of Y and another** (in which BCR Law appeared), established that the Jersey Court can make an order for a PPO if both parties consent. A central issue in the **X Plaintiffs** case was whether the Court could impose a PPO without the consent of the parties.

A PPO must be secure (i.e. the defendant must be able to make the payment, now and many years into the future) other factors to be considered are the circumstances in which any payment might end, or be suspended, and the circumstances in which the annual sum might be revisited.

The Damages (Jersey) Law

The Law introduces a statutory discount rate. This is set at +0.50% for losses expected to last for less than 20 years and +1.80% for losses expected to last longer than 20 years. The Law allows for the discount rate to be altered by the Chief Minister with the approval of the Bailiff.

The Law allows the Courts to impose a PPO upon the parties without consent, provided that certain conditions are met. The Law establishes that the PPO is deemed to be reasonably secure if the defendant is a Minister, or is protected by certain government schemes, or guaranteed by the Treasury Minister.

BCRLAW

BRIGHT. COMMERCIAL. RESPONSIVE.

THE DAMAGES (JERSEY) LAW

Why the Change?

In the UK the discount rate was first set by the Lord Chancellor at +2.50%. In 2012, on appeal from the Court of Appeal in Guernsey, the Privy Council determined that Guernsey was not bound by the UK rate because the UK legislation did not apply to Guernsey. The Privy Council looked at the common law position (under **Wells v. Wells**) and arrived at a discount rate of -1.50% for earnings-related future losses. Since that decision, the Lord Chancellor has changed the rate in the UK to -0.75%.

In Jersey, the **X Plaintiffs** case was the first to get to trial in which the issue of the discount rate was fully argued. Using the principles applied by the House of Lords in **Wells v. Wells**, the plaintiffs' experts considered that the earnings-related discount rate ought to be c. -3.50%. The defendant thought it was -1.50%. The discount rate has a huge impact on the value of a claim. Assume an annual loss of £10,000.00 suffered by a 20 year old female plaintiff, for life, with a normal life expectancy:

- +2.50% = 32.97 multiplier = £329,700 award;
- 0.00% = 70.96 multiplier = £709,600 award;
- -0.75% = 94.99 multiplier = £949,900 award;
- -1.50% = 131.20 multiplier = £1,312,000 award; and
- -3.50% = 365.10 multiplier = £3,651,000 award.

The Government of Jersey wished to protect itself against significant lump sum awards in future cases and so brought forward the legislation, before judgment in the **X Plaintiffs** case had been delivered. Members of the medical profession in Jersey had also been agitating for a change because of the impact that lower discount rates have had on their insurance premiums.

Are the changes good or bad?

It depends on who you think should bear the investment risk. If the discount rate is too high, plaintiffs will have to assume greater investment risk to ensure that they receive the income they need. If it is too low, plaintiffs will be over-compensated and insurance premiums are likely to rise. Equally, if the discount rate is too high, insurers will be reluctant to agree to settlements by PPO, and if it is too low, plaintiffs will be equally reluctant to settle on the basis of a PPO.

The Chief Minister has asserted that the statutory discount rate will remain true to the principle of full compensation but the reality is that the Law moves away from the assumption that a plaintiff will invest only in the safest possible investments (ILGS) and assumes, instead, investment in an assumed portfolio of investments. This means that a plaintiff is now required to take more investment risk than previously in order to ensure that the award will meet their needs into the future. It is likely plaintiffs will now also seek investment management costs as part of their claim as these costs are likely to increase significantly now plaintiffs are required to invest their damages in portfolios.

Ultimately this is a balancing exercise and it is perfectly proper for the Government to undertake that balancing exercise. It remains to be seen whether the Government have struck the right balance with the current rates.

Contact:

This briefing is only intended to give a brief summary of the subject matter. It does not constitute legal advice. If you would like legal advice or further information, please contact us using the contact details below.

Jeremy Heywood
Partner
+44 (0) 1534 760 851
jeremy.heywood@bcrlawjersey.com

Alexandra Baker
English Solicitor
+44 (0) 1534 760 878
alexandra.baker@bcrlawjersey.com