

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

PROJET DE LOI

Entitled

**THE DAMAGES (ASSUMED RATE OF RETURN AND RELATED MATTERS)
(ENABLING PROVISIONS) (GUERNSEY AND ALDERNEY) LAW, 2020**

The States are asked to decide:-

Whether they are of the opinion to approve the draft Projet de Loi entitled "The Damages (Assumed Rate of Return and Related Matters) (Enabling Provisions) (Guernsey and Alderney) Law, 2020", and to authorise the Bailiff to present a most humble petition to Her Majesty praying for Her Royal Sanction thereto.

This proposition has been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

EXPLANATORY MEMORANDUM

This Law provides for the discount rate (relating to the assumed rate of return from the investment of a sum awarded as damages for future pecuniary loss in respect of personal injury) to be set by regulations made by the Policy & Resources Committee, and for further relevant provision (in relation to the recovery of healthcare costs by the States, and limits on the quantum of damages) to be made by Ordinance. The Law requires that there be consultation before regulations are made setting the discount rate, and allows for there to be different rates of return for different classes of case. It also provides for a court to be able to make periodic payment orders when awarding damages for future pecuniary loss in respect of personal injury.

PROJET DE LOI

ENTITLED

The Damages (Assumed Rate of Return and Related Matters) (Enabling Provisions) (Guernsey and Alderney) Law, 2020

THE STATES, in pursuance of their Resolution of the 27th March, 2019^a, have approved the following provisions which, subject to the Sanction of Her Most Excellent Majesty in Council, shall have force of law in the Islands of Guernsey, Alderney, Herm and Jethou.

Assumed rate of return on investment of damages.

1. (1) Subject to subsection (2), in determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in respect of personal injury a court shall, subject to and in accordance with regulations made by the Committee for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by such regulations.

(2) Subsection (1) shall not prevent a court taking a different rate of return into account if any party to the proceedings shows that it is more

^a Article IV of Billet d'État No. V of 2019.

appropriate in the case in question, if regulations under that subsection so provide.

(3) Subject to section 7(2), regulations under subsection (1) shall be made after consultation with such persons as appear to the Committee to be appropriate, and may prescribe different rates of return for different classes of case and may, without limitation, distinguish between classes of case by reference to -

- (a) the description of pecuniary loss involved,
- (b) the length of period during which future pecuniary loss is expected to occur, and
- (c) the time when future pecuniary loss is expected to occur.

(4) The Committee shall regularly, and at least every five years, review -

- (a) the prescribed rate of return in regulations made under subsection (1) and determine whether it should be -
 - (i) changed to a different rate, or
 - (ii) kept unchanged, or
- (b) if no rate of return is for the time being prescribed by regulations made under subsection (1), whether a rate should be so prescribed and, if so, what the rate should be,

but for the avoidance of doubt, a failure by the Committee so to do shall not invalidate any regulations made by the Committee for the purposes of this section.

Periodic Payment Orders.

2. (1) A court awarding damages for future pecuniary loss in respect of personal injury –

(a) may order that damages are wholly or partly to take the form of periodical payments, and

(b) shall consider whether to make that order.

(2) A court awarding other damages in respect of personal injury may, if the parties consent, order that the damages are wholly or partly to take the form of periodical payments.

(3) An order that damages are wholly or partly to take the form of periodical payments shall be referred to as a "**Periodic Payment Order**".

(4) A court may not make a Periodic Payment Order unless satisfied that the continuity of payment under the order is reasonably secure.

(5) A Periodic Payment Order may include provision –

(a) about how payments are to be made, and

(b) requiring the party responsible for the payments to take specified action to secure continuity of payment,

and the Order may contain such incidental, ancillary, consequential and supplementary provision, and may be made on such terms and conditions and subject to such penalty, as the court thinks proper.

(6) Where a person has a right to receive payments under a Periodic Payment Order, or where an arrangement is entered into in satisfaction of a Periodic Payment Order, that person's right under the order or arrangement may not be assigned or charged without the approval of the court which made the order; and-

- (a) a court shall not approve an assignment or charge unless satisfied that special circumstances make it necessary, and
- (b) a purported assignment or charge, or agreement to assign or charge, is void unless approved by the court.

(7) Rules of court enacted by Order of the Royal Court may require a court to take specified matters into account when considering –

- (a) whether to make a Periodic Payment Order,
- (b) the security of the continuity of payment, and
- (c) whether to approve an assignment or charge or agreement to assign or charge.

(8) Where a Periodic Payment Order is made, an alteration of the method by which the payments are made shall be treated as a breach of the order

(whether or not the method was specified under subsection (5)(a)) unless –

- (a) the court which made the order declares its satisfaction that the continuity of payment under the new method is reasonably secure, or
- (b) the source of payment under the new method is a committee of the States of Guernsey or the States of Alderney.

(9) In this section "**damages**" includes an interim payment which the court orders the defendant to make to the plaintiff.

Recovery of healthcare costs.

3. (1) The States may by Ordinance prescribe a scheme that applies where -

- (a) a person ("**the compensator**") has made or is to make payment (or is making payment under a Periodic Payment Order) of a sum awarded as damages, for or in respect of pecuniary loss in respect of personal injury suffered by another person ("**the victim**"), and
- (b) benefits have been paid to or for the victim in respect of the personal injury, or any other costs relating to healthcare arising from or in respect of the personal injury have been incurred by or in respect of the victim, by or on behalf of the States of Guernsey.

(2) A scheme prescribed by an Ordinance made under subsection (1) may also apply where a sum has been paid or is being paid by the compensator to the victim voluntarily or in pursuance of an agreement, and subsection (1)(a) shall be construed accordingly.

(3) A scheme prescribed by Ordinance made under subsection (1) shall have the purpose of enabling the States of Guernsey (where the scheme applies) to recover from the compensator as a civil debt the benefits paid and costs incurred.

(4) Without prejudice to the provisions of section 7 (general provisions as to subordinate legislation), an Ordinance under subsection (1) may make such provision that the States think fit for the purpose set out in subsection (3) including, without limitation –

- (a) provision in respect of different classes and sums of awards of damages and payments, including by reference to the distinguishing factors set out in section 1(3) and in respect of damages awarded by way of a Periodic Payment Order, and in respect of different benefits and costs, different classes of benefits and costs, and differing amounts of benefits and costs,
- (b) the creation of powers for the States of Guernsey to demand information in respect of the payment of benefits and the incurring of costs, including (without limitation) provision in respect of –

- (i) the information or class or description of information to be provided,
 - (ii) the form and manner in which the information must be provided,
 - (iii) the means by which the information must be provided,
 - (iv) the time within which the information must be provided, and
 - (v) the periods to which the information must relate,
- (c) provision that in prescribed circumstances, some or all of benefits paid and costs incurred may not be recovered,
- (d) provision in respect of reviews of, and appeals against, decisions to recover benefits paid and costs incurred, and
- (e) provision as to the creation and punishment of offences, but such provision may not –
- (i) provide for offences to be triable only on indictment,

- (ii) authorise the imposition, on summary conviction of an offence, of a term of imprisonment or a fine exceeding the limits of jurisdiction for the time being imposed on the Magistrate's Court by section 9 of the Magistrate's Court (Guernsey) Law, 2008^b,
- (iii) authorise the imposition, on conviction on indictment of any offence, of a term of imprisonment exceeding two years.

Courts to disregard benefits paid and costs incurred when assessing damages.

4. In assessing damages in respect of any personal injury a court shall disregard the amount of any benefits paid or likely to be paid, and of any other costs relating to healthcare incurred or likely to be incurred by the States of Guernsey, in respect of that personal injury.

Power by Ordinance to limit awards of damages.

5. (1) The States may by Ordinance prescribe limits in respect of the quantum of damages for losses in respect of personal injury that may be awarded by a court.

(2) Without prejudice to the provisions of section 7 (general provisions as to subordinate legislation), an Ordinance under this section may prescribe different limits to apply in different circumstances, and for different periods and different purposes, including by reference to the distinguishing factors

^b Order in Council No. XVIII of 2009; amended by Ordinance No. XXII of 2009; and No. IX of 2016.

set out in section 1(3) and in respect of damages awarded by way of a Periodic Payment Order.

Power by Ordinance to amend sections 3 and 4 in respect of the States of Alderney.

6. The States may by Ordinance amend section 3 (recovery of healthcare costs) and section 4 (courts to disregard benefits paid and costs incurred when assessing damages) for the purpose of inserting provision in those sections (including, in the case of section 3, in one or more subsections thereof) in respect of the States of Alderney that is equivalent to the provision therein in respect of the States of Guernsey.

General provisions as to subordinate legislation.

7. (1) Regulations under this Law shall be laid before a meeting of the States as soon as possible and shall, if at that or the next meeting the States resolve to annul them, cease to have effect, but without prejudice to anything done under them or to the making of new regulations.

(2) A power to make an Ordinance or regulations under this Law shall, where it is exercised in respect of Alderney, be exercised following consultation with the Policy and Finance Committee of the States of Alderney, but a failure to comply with this subsection shall not invalidate any Ordinance or regulations made under this Law.

Interpretation.

8. (1) In this Law -

"**Committee**" means the Policy & Resources Committee of the States of Guernsey,

"**personal injury**" includes any disease and any impairment of a person's physical or mental condition, and

"**Periodic Payment Order**" has the meaning given in section 2.

(2) In this Law, "**benefits**" means any payments made, or care, treatment or other services provided, by or on behalf of the States of Guernsey to an individual in respect of the costs of or associated with healthcare received by that individual, including but not limited to benefits payable and care, treatment or other services supplied whether under the Health Service (Benefit) (Guernsey) Law, 1990^c and the Social Insurance (Guernsey) Law, 1978^d and any Ordinance or subordinate legislation made thereunder or otherwise; and for the purposes of this definition, making payments includes but is not limited to providing benefits in kind, and

^c Ordres en Conseil Vol. XXXII, p. 192; amended by Order in Council No. IX of 2003; No. II of 2011; No. IV of 2018; Recueil d'Ordonnances Tome XXVI, pp. 177 and 483; Ordinance Nos. XXII and XXVII of 2002; No. XXI and XXXIII of 2003; No. XLII of 2006; No. XLIII of 2007; No. XXII of 2015; Ordinance Nos. IX and XLIV of 2016; and No. XLIV of 2016; the Law is applied with modifications to Alderney by Recueil d'Ordonnances Tome XXV, p. 204.

^d Ordres en Conseil Vol. XXVI, p. 292; amended by Ordres en Conseil Vol. XXVII, pp. 238, 307 and 392; Vol. XXIX, pp. 24, 148 and 422; Vol XXXI, p. 278; Vol. XXXII, p. 59; Vol. XXXIV, p. 510; Vol. XXXV(1), p. 164; Vol. XXXVI, pp. 123 and 343; Vol. XXXVIII, p. 59; Vol. XXXIX, p. 107; Order in Council No. X of 2000; No. IX of 2001; No. XXIII of 2002; No. XXIV of 2003; No. XI of 2004; No. XVIII of 2007; No. V of 2012; No. IV of 2014; No. III of 2016 and No. IV of 2018; Recueil d'Ordonnances Tome XXV, p. 148; Tome XXVI, p. 177; Ordinance No. XXXIII of 2003; No. XLIV of 2007; Nos. VII and XLII of 2009; No. XVII of 2011; No. XXXVIII of 2012; No. XXX of 2013; Nos. IX and XXX of 2016; Nos. XIII, XXIII and XXXIV of 2017; Nos. XXVII and XXXVI of 2018; and Alderney Ordinance No. VIII of 2018.

providing through statutory or administrative arrangements for the reduction or elimination of a sum that would otherwise be payable in respect of such costs.

(3) The States may by Ordinance amend the definition of "benefits" at subsection (2); and for the avoidance of doubt, such amendment may include (but is not limited to) the insertion of provision in respect of the States of Alderney that is equivalent to the provision made in that definition in respect of the States of Guernsey.

Citation.

9. This Law may be cited as the Damages (Assumed Rate of Return and Related Matters) (Enabling Provisions) (Guernsey and Alderney) Law, 2020.

Commencement.

10. This Law shall come into force on the day appointed by Ordinance of the States; and different dates may be appointed for different provisions and for different purposes.