



Corporate Services Scrutiny Panel

Damages Law

Witness: The Chief Minister

Monday, 5th November 2018

Panel:

Senator K.L. Moore (Chairman)

Deputy S.M. Ahier of St. Helier (Vice-Chairman)

Deputy J.H. Perchard of St. Saviour

Connétable K. Shenton-Stone of St. Martin

Connétable R. Vibert of St. Peter

Witnesses:

The Chief Minister

Director General, Department for Strategic Policy, Performance and Population

Director of Social Policy, Department for Strategic Policy, Performance and Population

[13:45]

Senator K.L. Moore (Chairman):

Welcome back, Chief Minister, and welcome to his 2 officers. We are now going to concentrate for the next 15 minutes on the Damages Law. Hopefully we will be able to squeeze all of our questions into that. Firstly, just for the record, could we go around the room and introduce ourselves. I am Senator Kristina Moore and the Chairman of the Corporate Services Panel.

Deputy J.H. Perchard of St. Saviour:

Deputy Jess Perchard, member of the Corporate Services Scrutiny Panel.

Connétable K. Shenton-Stone of St. Martin:

Constable Karen Shenton-Stone, member of the Corporate Services Scrutiny Panel.

Director of Social Policy, Department for Strategic Policy, Performance and Population:

Ruth Johnson, Director of Social Policy.

The Chief Minister:

Senator John Le Fondré, Chief Minister.

Director General, Department for Strategic Policy, Performance and Population:

Tom Walker, Director General for Strategic Policy and Performance.

Scrutiny Officer:

Simon Spottiswoode, Scrutiny Officer.

Connétable R. Vibert of St. Peter:

Constable Richard Vibert, member of the Corporate Services Scrutiny Panel.

Deputy S.M. Ahier of St. Helier (Vice-Chairman):

Deputy Steve Ahier.

Senator K.L. Moore:

Thank you. Chief Minister, can you outline for us first the reasons for bringing forward the Draft Damages (Jersey) Law?

The Chief Minister:

That is very simple. Essentially probably week one of me being in this role we were given a briefing which basically said that there was a rather large law case coming down the line, which at that point I think was £238 million, which kind of focused the attention. Secondly, that potentially there were other potential liabilities ahead and that there was something that could be done to address this. In essence, the problem is that at present when damages are assessed we have an open liability, as it were, because of not having a discount rate under law in Jersey and that discount rate impacts quite significantly on the amount of money that can be awarded in damages. I will say that I was less than impressed with the fact that it had not been addressed previously. I understand that was purely an issue around timing but anyway. The most important thing was to address it moving forward and therefore that was the top priority and top instruction given at that briefing and now where we are is that the law is in front of us. I think the point that I would say is it obviously breaks into several parts but the key part is getting a discount rate into the legislation. Obviously that discount rate can then be changed and there will obviously, no doubt, be some discussions as to what is an appropriate discount rate and it is a balance between making sure that the insurance

company ultimately does not pay out very much money, which obviously protects professionals, it will protect the States, versus the member of the public or the claimant who is bringing a case and making sure they receive, shall we say, justice in achieving an appropriate level of damages. I think that is the summary.

The Connétable of St. Martin:

Thank you. We are aware that doctors have raised concerns about the costs of medical insurance premiums and that the Jersey Primary Care Body commissioned a report from Hempsons Solicitors. What engagement have you had with Hempsons and the Primary Care Body during the law drafting phase?

The Chief Minister:

Speaking personally I have not had any engagement but I do not know at the officer level if there has been any.

Director General, Department for Strategic Policy, Performance and Population:

Yes. We have met with the body on at least one occasion and we have exchanged messages and correspondence during the process in order to make sure that we had properly understood the points that they were making in the paper commissioned from Hempsons and so that they knew what to expect from us and when. We now expect that they would respond to the consultation with their views on what is being proposed.

Deputy J.H. Perchard:

Thank you. Chief Minister, how have you taken into consideration the needs of the recipients of damages awards when drafting the law?

The Chief Minister:

This is the balance between the people, if you like, the insured and the people bringing the claim against who are seeking damages. The level that has been brought through ... and I am sure Ruth can probably add some more ... is at 0.5 per cent and 1.8 per cent. It was assessed in part by the investment team I think in Treasury, if I recall correctly, who deemed that this was about achieving the right balance. However, I do gather there is a discussion obviously continuing at the moment and that, for example, the medical professionals think that the rate should be stronger or higher and that will be a decision we have to make. What I will just emphasise is the crucial thing is to get the law in place which gets a rate in place and obviously if there is a discussion that says that rate needs to be refined in the future that can be done very easily.

Director General, Department for Strategic Policy, Performance and Population:

It is perhaps worth adding, Chief Minister, that the law of course follows the principle that someone that has suffered life-changing consequences will need care for the remainder of their life in all likelihood should be neither under nor over-compensated. So they should not receive more than their need but neither should they receive any less.

Senator K.L. Moore:

How does one quantify the need, I think is what the question is trying to drive at, and how is that being set?

Director of Social Policy, Department for Strategic Policy, Performance and Population:

I think that the quantification of need is extremely difficult. It is something that the court struggles with at the moment and there are a myriad of examples where the courts have made determinations and over the passage of time it has proven that those determinations are not correct and individuals have been either over-compensation or under-compensated. That is part of the difficulty of the system and the need to forward project what a person's needs are. That is one of the reasons why we are bringing forward a statutory provision for periodic payment orders because those are a much more kind of finessed tool in terms of being able to reassess a person's need as their needs change, which they will do.

Senator K.L. Moore:

There is in this law a facility for unlimited appeals, as we have understood it, whereas in the U.K. (United Kingdom) law there is only an opportunity for one appeal. Why has that been done?

Director of Social Policy, Department for Strategic Policy, Performance and Population:

It has been done because obviously we want to improve on other jurisdictions. Research in response to the U.K. legislation has said that periodic payment orders are an incredibly helpful tool but that is a tool that is blunted in U.K. legislation by only allowing one change to periodic payment orders. We have allowed an unlimited number of changes to periodic payment orders providing they are justified changes because you may make a change 3 years on but then you may need to make another change 5 years on or 10 years on. There is not that facility in the U.K. law but there will be that facility in our law so it is a much better tool.

The Chief Minister:

I think the point about the periodic payments is again the law is just enabling a court to award them. I think the Attorney General had to make a submission to the court to request so this gives the court the ability to award such orders. Going back to the original thing about the damages side we are into a whole industry where forensic accountants and expert witnesses would then determine the

level of damages. There are actuarial tables that get involved; all that type of stuff. This is just focusing on the discount rate.

Senator K.L. Moore:

I would be grateful if the Director of Policy could share with us that background information that you just referred to in relation to periodic payment orders and also if you could just explain which body will determine whether there is justification in applying for changes?

Director of Social Policy, Department for Strategic Policy, Performance and Population:

I can certainly share the background information with you but with regard to who makes the determination as to whether there is justified grounds to alter or amend a period payment order that is the courts.

The Connétable of St. Peter:

Much of my original question has been answered but just one point. Has the U.K. also said a split discount rate for above and below 20 years?

Director of Social Policy, Department for Strategic Policy, Performance and Population:

I would have to clarify that and come back to you.

The Connétable of St. Peter:

Thank you.

The Chief Minister:

Yes, we will come back to you because I think I have seen something on that fairly recently.

Deputy A.M. Ahier:

Obviously this has been debated as well but can you explain the reason for introducing the periodic payment orders?

The Chief Minister:

I think the point we have made that, okay, in summary and I will definitely refer to my colleague and officers on either side. The issue is that when you get very large sums of money that can cause distortions essentially. It is about making sure the money ends up with the right person I believe and that those person's needs continue to be made. I think the periodic payments allow that if circumstances change those periodic payments can take account of that as I have understood it.

Director General, Department for Strategic Policy, Performance and Population:

There are 2 ways in which someone could be compensated. If you have got an individual who perhaps is quite young and is expected to live for another 30 or 40 years and it is not clear how their condition might change over those 30 or 40 years, as well as it not being absolutely clear how long they might live, then trying to accommodate all of that in a single lump sum payment right at the start of their life can be quite challenging for the courts to arrive at a global figure that they can be certain of. So a periodic payment order enables the court instead to reach a decision whereby that individual receives exactly in each year the amount that they need and then if their health condition improves then they can come back and say: "Well, it is improved. I do not need as much money." But equally if their health condition deteriorates and perhaps their health gets worse they can return to the court and have that adjusted. So rather than having to make a guess 30 years into the future on one day in court you can have a system whereby the amount that you need can be adjusted as your circumstances change over the next 30 years of your life.

The Chief Minister:

I think it is probably an insight in this is enabling the court to make, it is not obliging to, because it is in the hands of the court.

Deputy A.M. Ahier:

Is it possible that this would lead to lower amounts being received by recipients of awards by only receiving P.P.O.s (periodic payment orders)?

Director General, Department for Strategic Policy, Performance and Population:

It should not do because of the principle that the court is working to, which is that someone should not be over or under-compensated. They should receive exactly the right amount and that is the advantage of allowing an individual to go back again and make the case that their circumstances have changed and that the payment order should be adjusted. So if at the outset the payment orders prove to be insufficient because their health has deteriorated say over 10 years at the end of those 10 years they could go back and say: "Well, my health condition has got worse I need the order to be increased" and they can go back to the court and the court can consider the evidence and make that change if it is appropriate. It should not ever lead to anyone being under-compensated.

Deputy A.M. Ahier:

Will the court also be able to apply a periodic payment order and an initial lump sum for costs that may be incurred like buying an adapted flat prior to getting the P.P.O.?

Director General, Department for Strategic Policy, Performance and Population:

I think normally, and Ruth might know, they would go down one route or the other but I think that there are circumstances in which the court can exercise some discretion around upfront costs.

Deputy A.M. Ahier:

Because obviously if somebody needed to buy a property which was adapted for their disability that had been incurred surely they would need to have that paid for straightaway rather than ...

Director of Social Policy, Department for Strategic Policy, Performance and Population:

Even if there was a periodic payment order it would not preclude that periodic payment order being frontloaded for one-off costs.

Senator K.L. Moore:

I would imagine that the cost of appealing to the court would have some impact upon their budget and savings also as well as time and perhaps stress as well. Has that been taken into account?

Director of Social Policy, Department for Strategic Policy, Performance and Population:

You mean that if a claimant felt that their periodic payment order needed to be reviewed. They would indeed need to revert to that court for that. One would hope though that they would be properly advised by their lawyers as to the likelihood of that periodic payment order being ... in most cases it will be being uplifted and that will be on a basic provision of evidence; is there sufficient evidence to demonstrate that there is going to be an increase in costs? Those increases in costs could be about a deterioration of condition but also one of the other things it could be about is about access to new and evolving medical techniques as well, which would be of benefit to that individual.

The Chief Minister:

It is always that balance because the alternative is that they have the stress that the lump sum they had was insufficient if it is that way round. There is a trade-off.

Director General, Department for Strategic Policy, Performance and Population:

Also you do find cases where it is not necessarily an adversarial experience. If someone's condition significantly improves and they are in danger of being over compensated you do find cases where the individual and the insurer go jointly to make an adjustment because the individual does not want to have money that they not entitled to and the insurer does not need to pay out money that is no longer needed by the individual. It is not always an adversarial experience then.

Senator K.L. Moore:

This is rather a technical piece of legislation and of course it has got the 6-week minimum lodging period. Do you anticipate, Chief Minister, bringing forward any amendments to this law?

[14:00]

The Chief Minister:

Not at this stage. I think we are probably in your hands to an extent. As I said, if, for example, it focuses around what level the discount rate should be ... that might be a discussion to have at the time ... my impression would be that from the point of view of speed of getting the legislation in place and then do the discount rate separately by order. Obviously in other words you would have an undertaking to change but it depends what the outcome of your work is there. Were you anticipating any changes at this stage or not?

Senator K.L. Moore:

We would perhaps suggest that a small deferral was made, particularly due to the amount of business on 4th December.

The Chief Minister:

I think we are waiting for some confirmation on that because one of the problems we have had ... and I am putting measures in place, or trying to put measures in place, to ensure this hopefully does not occur again ... but I was expecting to see this a little bit earlier. I think the issue on the deferral is just making sure we make the Privy Council date after the debate in sufficient good time to make sure that the legislation is on the books, if possible, on a timely basis. I think we are just waiting for some feedback on that to see if we can defer or not because in the ideal world ...

Director of Social Policy, Department for Strategic Policy, Performance and Population:

The U.K. has not released Privy Council dates for 2019 yet.

Senator K.L. Moore:

If you would be good enough to share those with us. That information would be gratefully received.

The Chief Minister:

That message has been emphasised already. Do not worry.

Deputy A.M. Ahier:

Will solicitors' fees in pursuing a personal injury claim on the claimant's behalf be set by the court?

The Chief Minister:

That I genuinely do not know. That is definitely well beyond my knowledge. I am looking at Tom or Ruth. I do not think it is covered under this law to be honest.

Director of Social Policy, Department for Strategic Policy, Performance and Population:

It is not a matter for this piece of legislation.

Senator K.L. Moore:

Okay then. I think that brings our brief hearing to a close. I know, Chief Minister, you have a very important meeting so I close the hearing.

[14:03]