Judgment 31/2010 **Helmot v Simon – Court of Appeal (Civil Appeal 414) - 14th September 2010**

Personal injuries claim – discount rate to be applied to the award – plaintiff's appeal from rate adopted by the Royal Court – the decision of the House of Lords in Wells v Wells (1999) and the position at common law in England prior to the determination by the Lord Chancellor in 2001 under s.1 of the Damages Act 1996 – important legal and factual differences between England and Guernsey in the domain of damages for personal injury – held that the Lord Chancellor's rate has no legal or evidential value in Guernsey in 2010 – the Royal Court should have taken account of the current return on index linked gilts and the difference between earnings inflation and price inflation – finding by the Jurats set aside and discount rate reduced from 1% to minus 1.5% for earnings-related losses and 0.5% for non earnings-related future losses. (see Judgment 4/2010).

Approved Text
15.09.10

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

CIVIL DIVISION

Between:

MANUEL PAUL HELMOT

Plaintiff/Appellant

V

DYLAN SIMON

Defendant/Respondent

Before:

Jonathan Philip Chadwick Sumption OBE QC
Michael Scott Jones QC
John Vandeleur Martin QC

JUDGES OF APPEAL

Hearing date: 13 September 2010
Judgment handed down: 14 September 2010

Counsel for the Plaintiff/Appellant: **Advocate G S K Dawes**
Counsel for the Defendant/Respondent: **Advocate A J Ayres**

JUDGMENT

SUMPTION J.A.

1. This appeal raises important questions about the assessment of long-term future damages in personal injury actions, a subject which has been much litigated in England but on which there is no

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authority in Guernsey.

2. The Appellant, Manuel Paul Helmot was cycling on a road in St. Sampson's on 18 November 1998, when he was struck head-on by a car driven by the Respondent. The consequences for Mr. Helmot have been tragic. He was 28 years-old at the time of the accident and 39 at the time of judgment. He has suffered severe brain damage, personality change, and partial loss of vision and limb movement. It is common ground that his expectation of life has been reduced by five years, from a 'normal' figure at his age of 45.9 years, and that he will require specially adapted accommodation and 24-hour care for as long as he lives.

3. The Respondent admitted liability, and the action proceeded to trial in the Royal Court on damages alone before Deputy Bailiff Collas and three Jurats. After a hearing of some six weeks, in which it heard extensive factual and expert evidence, on 14 January 2010 the Court awarded damages of £9,337,852.27 plus interest. Part of this sum comprised damages for pain and suffering, past losses and expenses and non-recurring future losses. These heads are not in issue on the appeal. The rest of the award comprised future recurring losses, principally representing loss of earnings and care costs. The sums awarded under these heads are challenged on appeal by both sides, on the ground that the Court applied the wrong multiplier when calculating the capital sum that would be required to make good the future annual income lost and to fund the future cost of care.

Assessment of recurrent future losses in English law

4. The issues on the appeal can be understood only in the light of the developing law and practice of the English courts.

5. The starting point, which no one challenges, is that in England, as in Guernsey, the Plaintiff is entitled to a sum by way of damages that will put him in a position financially equivalent, so far as may be, to that which he would have been in if he had not been injured.

6. At common law, damages could be awarded only as a single lump sum assessed at the time of the award. This meant that the Court had to find what was the recurring annual figure that represented the Plaintiff's future losses (known as 'the multiplicand'). It then applied a 'multiplier' to that figure, so as to calculate the capital sum that would produce a return sufficient to replace the lost income and fund the cost of care over the expected duration of the Plaintiff's life. The multiplier was determined by a combination of the Plaintiff's life expectancy and a discount for accelerated receipt which reflected the assumed rate of return on the capital. The object was to arrive at an amount which would generate the necessary annual amounts, allowing for future inflation, on the assumption that the Plaintiff drew on the whole of the income and a sufficient proportion of the capital to exhaust it at the expected time of the Plaintiff's death. The higher the assumed rate of return, the lower the multiplier and the lower the capital sum.

7. The problems associated with lump sum awards are well-known, and have been much

discussed. The validity of the assessment depends on the actual duration of the Plaintiff's life, and on the accuracy of the Court's predictions of what over that period will be (i) the development of the Plaintiff's clinical condition and care needs, (ii) the rate of inflation of incomes and care costs, (iii) the gross rate of return on any lump sum awarded, and (iv) the incidence of income tax. These matters are inherently uncertain at the time of the assessment, but there is no procedure, once a lump sum award has been made, for revising it in the light of future events as they occur. This means that while an assessment can be made which is correct on the balance of probabilities when the award is made, it is almost certain to be wrong in the event, possibly by a considerable amount.

8. In England, one area of uncertainty has been considerably eased as a result of developments in the practice for issuing United Kingdom government debt. The English Courts originally dealt with the uncertainty of future inflation by adopting the theory on which life offices and pension funds had operated since the 1950s, namely that any lump sum would, if invested in a balanced portfolio of equities and gilts, yield a positive real return over the medium or longer term sufficient to beat the rate of inflation and generate an income which would retain its value. The discount rate applied was generally between 4 and 5 per cent, which represented the assumed rate of return (net of taxation) on such a portfolio. This of course presupposed a comparatively risk-tolerant investment strategy. And the assumed return was grossly insufficient during periods of high inflation, such as the late 1970s and early 1980s. However, in 1981 the United Kingdom government began to issue index-linked gilts. These yielded a much lower nominal real rate of return than the traditional mixed portfolio of equities and gilts but completely protected the holder against price inflation at UK rates. In 1984, the Government Actuary's Department published the first edition of the 'Ogden Tables', named after Michael Ogden QC, the chairman of the working party which designed them. The Ogden tables enabled a multiplier to be derived for any given life expectancy and rate of return.

9. In *Wells v. Wells* [1999] 1 AC 345, the House of Lords approved the practice which had been adopted by some trial judges of using a discount rate arrived at on that assumption. The House applied a discount rate of 3 per cent. This represented the gross redemption yield of about 3.5 per cent on index-linked gilts in 1995, when the cases before them had originally been decided, reduced by 15 per cent to allow for income tax on a gross return at that level. The calculation was recognised to be imprecise. But it was adopted in preference to more elaborate tables allowing for a wider range of variables, in the interest of simplicity and ease of application: see Lord Lloyd, at page 375B. The result was to reduce the 'traditional' discount rate of about 4.5 per cent by about a third, and correspondingly to increase the size of the lump sum.

10. Section 1 of the Damages Act 1996 empowered the Lord Chancellor to fix a rate of return deemed to be made on any lump sum award. The Court was required to take account of that rate, unless one or other party could show that a different rate was more appropriate. The Act was in force at the time when *Wells v. Wells* was decided, but the power to fix a rate of return was not exercised until three years later. In June 2001, the Lord Chancellor fixed a standard rate of return of 2.5%, after extensive consultation with experts and those representing interested parties. It was explained in a statement of his reasons, which accompanied the draft statutory instrument. In summary, although the statute empowered him to fix 'different rates of return for different classes of case', the Lord Chancellor decided upon a single rate to cover all cases, because he considered that this would be easier to apply and more durable. He adopted the principle derived from *Wells v. Wells* that the

assumed rate of return should be based on the yield of index-linked gilts, and found that their current gross redemption yield at an assumed rate of inflation of 3 per cent was 2.46 per cent. This resulted in a rate of return net of income tax of 2.09%. He decided that this should be rounded to a multiple of 0.5 per cent, which was the rounding multiple used in the Ogden Tables. But rather than round to the nearest multiple of 0.5 per cent, he rounded up to 2.5 per cent. His only explanation for this was that he had '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.'

11. The Lord Chancellor's determination was widely criticised at the time as being too high, and as such too favourable to Defendants. Additional substance has been given to these criticisms in recent years as a result of the general decline of yields on gilts. At the time of the Royal Court's judgment in this case, the year-average gross redemption yield on index-linked gilts was 1.28 per cent, approximately half of the figure determined by the Lord Chancellor in 2001. However, no fresh determination has since been made in England under Section 1 of the Damages Act and no attempt has been made, so far as is known, to challenge either the original determination or the Lord Chancellor's failure to revise it. The Statutory Instrument of June 2001 remains in force in England. English law has thus achieved a high degree of certainty, at the expense perhaps of strict accuracy, by the device of a deemed statutory discount factor applicable irrespective of the economic circumstances.

12. The Lord Chancellor's determination of the deemed rate of return does not of course resolve the uncertainties associated with possible changes in the Plaintiff's clinical condition or needs after the judgment, nor those arising from the inevitable inaccuracy of predictions of the Plaintiff's expectation of life, nor those associated with variations in real rates of return. However, other statutory provisions have mitigated these problems. The High Court in England has had power since 1982 to make a provisional award in cases where there is reason to believe that the Plaintiff's condition may deteriorate in the future, and County Courts have had a similar power since 1984. More significantly, Section 2 of the Damages Act 1996 empowered the English courts to award damages by way of periodical payments instead of as lump sums in cases where both parties consented. As a result of an amendment effected by Section 100 of the Courts Act 2003 the English Courts have since 2005 had power to do so of their own motion. Sections 2(8) and (9) of the Damages Act 1996 (as amended) require periodical payments to be indexed to the Retail Price Index or in some other appropriate way.

<u>The corresponding position in Guernsey</u>

13. In Guernsey, the English common law has persuasive authority in areas not governed by Guernsey statutes or Guernsey customary law. How persuasive it is will depend on whether there are local considerations, social or legal, which point in a different direction. However, Guernsey is not, in legal terms, an island. It is fair to say that with comparatively minor exceptions the law of tort and the law of damages have for many years been built up on the model of the English common law, and English authorities have generally been applied. The use of English authority on issues where the underlying conditions in the two jurisdictions are broadly comparable is highly desirable in the

interests of legal certainty. The immense volume of civil and criminal litigation in England is bound to provide more nuanced answers to a wider range of legal problems than the rather smaller corpus of decisions generated within the bailiwick.

14. There are, however, important legal and factual differences between England and Guernsey in the domain of damages for personal injury. Legally, the most important difference is that there is no equivalent in Guernsey of the Damages Act 1996. It follows that there is no provision for the award of damages otherwise than by way of lump sum assessed at the time of judgment, and there is no statutory discount rate. Factually, there is a number of further differences. First, it is common ground that the rate of inflation within the bailiwick has been fairly consistently about 0.5 per cent higher than the UK RPI tracked by index-linked gilts, and that this state of affairs can be expected to continue. Second, income tax rates are lower in Guernsey, with the result that the net yield of index-linked gilts to a Guernsey resident will be different from that of the same securities held by a person taxable in the United Kingdom. Third, the statistical information available for prices and incomes is more limited for Guernsey than it is for the United Kingdom and in some cases less reliable.

The issues on the appeal

15. In the Royal Court, the Jurats fixed a discount rate of 1 per cent for future recurring losses. They arrived at this figure as follows. They found that in the interests of certainty and consistency, they should start with the rate of return of 2.5% set by the Lord Chancellor for index-linked gilts and then adjust it for changes in the net return that had occurred since 2001. They found that the gross return on index-linked gilts had fallen to 1.28 per cent. After allowing for income tax at the average rate applied in Guernsey, this equated to a net return of 1.13%. The Jurats noted that this was 1.05 per cent less than the net return of 2.18% which would have been achieved by applying Guernsey tax rates in force in 2001 to the gross yield of 2.46 per cent assessed in that year by the Lord Chancellor. They therefore deducted from the Lord Chancellor's rate of 2.5 per cent, 1.05 per cent for the decline of net yields on index-linked gilts since 2001 and 0.5 per cent representing the amount by which Guernsey RPI exceeded United Kingdom RPI. This produced a net real rate of return to a Guernsey resident of 0.95 per cent. They rounded this figure up to 1 per cent (the nearest multiple of 0.5 per cent), and from there arrived at a multiplier by reference to the current edition of the Ogden Tables.

16. The use of a discount rate of 1 per cent is challenged by both sides.

17. It is challenged by the Respondent (Defendant) on the ground that the Royal Court should have treated the Lord Chancellor's discount rate not just as a starting point but as fixing the appropriate rate in Guernsey. In support of this contention, Advocate Ayres relied not only on the desirability of certainty and consistency but on what he alleged to have been the practice in the legal profession in Guernsey in settling such claims.

18. The Appellant (Plaintiff), who appears by Advocate Dawes, challenges the 1 per cent as being too high. He makes two criticisms of the process by which the Jurats arrived at it:

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(1) He contends that the Lord Chancellor's rate is irrelevant in Guernsey and should not have been treated as the starting point of the Jurats' calculation. Instead of calculating the difference (at Guernsey rates of tax) between the net return on index-linked gilts found by the Lord Chancellor in 2001 and the net return of 1.13 per cent found by the Jurats in 2010, and then deducting that difference from the Lord Chancellor's 2.5 per cent, the Jurats should have ignored the Lord Chancellor's 2.5 per cent and simply adopted the current Guernsey net return of 1.13 per cent. Reducing that by 0.5 per cent for the higher rate of inflation in Guernsey, they would have arrived at a net real return of 0.63 per cent, which would have rounded down to 0.5 per cent.

(2) Advocate Dawes' second criticism of the Royal Court is that it should, in his submission, then have reduced the 0.5 per cent by a further 2 per cent, representing the amount by which, on the expert evidence, the rate of earnings inflation exceeds the rate of price inflation reflected in the UK RPI which is tracked by index-linked gilts. His case is that the rate of earnings inflation is a better indicator of the Appellant's loss of earnings, and also of the Appellant's future cost of care since by far the largest component of that cost is the earnings of care staff. The further adjustment proposed by Advocate Dawes would produce a negative net real return of minus 1.5 per cent, which he submits should have been applied to calculate the multiplier.

The combined effect of Advocate Dawes two points, if they are accepted, is by his calculation to increase the amount of the award by more than £4 million.

The relevance of the Lord Chancellor's rate of return

19. Although this point is technically raised by the Respondent by way of cross-appeal, it is convenient to deal with it first.

20. In my judgment, the statutory rate of return fixed by the Lord Chancellor under the Damages Act 1996 is irrelevant in Guernsey. The statute law of the United Kingdom has no direct application in this bailiwick and no persuasive force in a case where there is no corresponding local statute. In the absence of a statutory obligation to apply a particular rate of return, the question what return will be generated by any lump sum awarded is a question of fact to be decided on the evidence. The Lord Chancellor's rate applied in England may be evidence of the return which the lump sum invested in UK index-linked gilts could be in fact expected to yield. But it is certainly not conclusive evidence, and in this particular case it is not even good evidence, because of the dramatic decline since 2001 in yields on fixed interest securities issued by first class borrowers.

21. The English courts have always attached importance to certainty and consistency in the assessment of damages for personal injuries, and I certainly do not under-estimate the importance of

these factors. They facilitate the settlement of cases without resort to expensive expert evidence and contested litigation. But there is a natural tension between certainty and consistency on the one hand and perfect accuracy on the other. The English courts have never carried their emphasis on certainty and consistency beyond the point where it starts to work injustice to either side. Leaving aside cases in which the English courts have felt bound by the inherent rigidity of the statutory scheme for assessing lump sum damages, the furthest that they have gone is to discourage major litigation with a view to achieving relatively minor changes in the going discount rate, in circumstances where there had been no major change in the relevant economic conditions. None of these considerations can justify assessing damages in Guernsey on an assumption about the rate of return which is out of date, has no current evidential basis and is not required by any statute or rule of law

22. I can deal quite shortly with Advocate Ayres' submission that the use of a discount rate of 2.5% derived from the Lord Chancellor's determination of 2001 has become the 'custom and practice of the Guernsey courts and legal practitioners.' We have been referred to only one decision in which a Guernsey court applied the Lord Chancellor's rate, and that was *Buckley v. Ronez Ltd.* [2009] GLR 120, where its use was agreed. It is not disputed that a discount rate of 2.5 per cent has commonly been used by practitioners to calculate damages for settlement purposes, but there is a world of difference between the law and the practice of lawyers. There is no evidence of when lawyers in Guernsey settled their cases on the suggested basis or why. It is far from clear whether they were doing so against the background of the current, historically low rates of return or at an earlier stage when they were higher. There is no reason to believe that there is a practice of using it regardless of its appropriateness in current economic and financial circumstances. More fundamentally, a practitioner engaged in settling a dispute about damages is concerned to arrive at the best figure within a range of acceptable outcomes which he can negotiate, bearing in mind the risks and costs of litigation to both sides. It is too late for that now. We have to decide on the law and the evidence what is the right outcome and to give what guidance we can to the profession for the future.

23. For these reasons I reject Advocate Ayres' submission that the appropriate discount rate as a matter of law is 2.5%.

Calculation of the net real rate of return

24. If, as I have concluded, the Lord Chancellor's rate has no legal or evidential value in Guernsey in 2010, it must follow that Advocate Dawes is right in the first of the two criticisms which he makes of the Jurats' discount factor of 1 per cent. The Jurats' method of calculation involved treating the Lord Chancellor's rounded up rate of 2.5% as their starting point and then adjusting it to the extent that it had proved to be wrong as applied to the current, much lower rates of return. But if it was wrong as applied to current returns, it should not have been used at all. The Jurats should not have set about adjusting the Lord Chancellor's 2.5% for the decline in the return on index-linked gilts since 2001, but should simply have used the rate to which the net return had fallen in 2010, which they found to be 1.13 per cent. They should then have deducted the agreed difference between UK and Guernsey rates of inflation so as to arrive at real net rate of return for Guernsey of 0.63 per cent and rounded it down to 0.5 per cent.

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Use of an earnings rate of inflation

25. This is much the most difficult question which arises on this appeal, and the one which has the most significant financial implications for the parties.

26. The United Kingdom publishes detailed and comprehensive statistics for prices, broken down by categories of goods and services, and for earnings, broken down by trade or profession. As far as prices are concerned they include two differently composed indices, the Retail Price Index (RPI) and the Consumer Price Index. In the case of earnings, they include the Annual Earnings Index and the Annual Survey of Hours and Earnings, both of which publish measures of aggregate earnings inflation, and disaggregated statistics for particular callings, including care assistants and home carers.

27. The English Courts have recognised in recent years that earnings inflation tends to exceed price inflation, and that indices of earnings inflation may therefore provide a better guide to both future loss of earnings and the future cost of health care. These conclusions have been consistently borne out by the UK statistical material identified in the preceding paragraph. In *Tameside and Glossop Acute Services NHS Trust v. Thompstone* [2008] 1 WLR 2207, the Court of Appeal examined the available information in considerable detail, and considered the implications of the persistent excess of the rate of inflation for carers' earnings over the rate of price inflation. The occasion was the hearing of three appeals all of which related to the indexation of periodical payments by way of damages for future care costs. The Court of Appeal considered that the question what was the appropriate way of indexing periodical payments was a question of fact: paragraph [73]. They accepted the criteria of a suitable index which had been agreed between the experts in one of the cases before them. These were set out at paragraph [75] of the judgment of the Court:

(i) accuracy of match of the particular data series to the loss or expenditure being compensated; (ii) authority of the collector of the data; (iii) statistical reliability; (iv) accessibility; (v) consistency over time; (vi) reproducibility in the future; and (vii) simplicity and consistency in application.

The Court considered that these criteria were satisfied by the disaggregated data for care assistants and home carers derived from the relevant subset of the Annual Survey of Hours and Earnings, known as ASHE 6115. That data therefore provided a truer measure of real future cost of care than the RPI. The Court acknowledged that ASHE 6115 was not itself an index, but an annual survey of carers' earnings. However, by taking the current hourly rate earned by a Plaintiff's carers, identifying the corresponding percentile of carers earnings, and comparing the hourly rate corresponding to that percentile in later annual surveys, it was possible to derive an index from the data: paragraph [71]. This was the course which the Court of Appeal considered should be adopted generally: paragraph [100].

28. *Thompstone* was not concerned with damages for loss of earnings. However, in *Sarwar v. Ali* [2007] LS Law Med. 376, Lloyd Jones J ordered periodical payments for care costs to be indexed by

reference to disaggregated data for carers in ASHE 6115 and periodical payments for loss of earnings to be indexed by reference to the aggregated ASHE earnings data for all full-time male employees. This decision, although it was made at about the same time as the three cases considered by the Court of Appeal in *Thompstone*, was not appealed alongside them. But it is tolerably clear that the Court of Appeal regarded it as turning on the same considerations: see paragraphs [8] and [75].

29. *Thompstone* was not a case about the assessment of an immediate lump sum award. In England the Court of Appeal has ruled out any attempt to adjust the discount rate used for a lump sum award so as to reflect the difference between price and earnings inflation. This was because it would be inconsistent with the statutory deemed rate of return determined by the Lord Chancellor under Section 1 of the Damages Act 1996: *Cooke v. United Bristol Healthcare NHS Trust* [2004] 1 WLR 251. As the Court of Appeal pointed out in *Thompstone*, the result has been an anomalous and unsatisfactory gap between the value of a periodical payment award and the value of a lump sum award, notwithstanding that both are designed to achieve 100 per cent compensation for the Plaintiff. This problem, however, does not arise in Guernsey where periodical payment orders are not available and there is no deemed statutory rate of return. It follows that an adjustment of the discount rate to reflect the higher rate of earnings inflation is not ruled out in Guernsey for the reasons which have led the Courts to rule it out in England. This is the step which Advocate Dawes invited the Royal Court to take and which, in the face of their refusal, he invites us to take.

30. The Royal Court rejected the invitation for two reasons, one of law and the other of fact. The essential problem, as they saw it, was that although an index of average prices in Guernsey has been published since 1964 on principles broadly comparable to those of the UK RPI, published statistics about the growth of average earnings are available only for the years 1989-2003, and then considerably in arrears and on a basis which has been found to contain some methodological flaws. Publication of the average earnings data is currently suspended pending the completion of a review of the methods used. There are no statistics available for particular callings such as health care. Accordingly, Advocate Dawes' submission was based mainly on the evidence of his expert witnesses, to the effect that the differential apparent from the published statistics for the United Kingdom between price inflation and earnings inflation reflected economic factors which could be expected to operate in the same way in Guernsey.

31. The Deputy Bailiff directed the Jurats (paragraph 198) that:

... it was fundamental to the Court of Appeal's decision in *Thompstone* that there was a suitable alternative index [to the RPI] available... In Guernsey, there is not even a current index of average earnings, let alone a specific index of the earnings of carers. As a matter of law there can be no basis for adopting different discount rates for different types of loss in the absence of indices measuring the respective rates of inflation.

That disposed of Advocate Dawes' submission as a matter of law. But the Jurats were asked, in case the direction was wrong, whether they would have adjusted the rate of return to take account of the difference between earnings inflation and the price inflation tracked by index-linked gilts, if they had

been directed that they were at liberty to do so. Their answer (paragraph 199) was as follows:

Their conclusion was that they would not do so in the absence of a suitable index. They consider that it would be wrong to conclude that inflation in wages paid to carers in Guernsey simply follows the general economic theory and general data analysed by the Plaintiff's experts on economics.

32. I shall deal first with the Deputy Bailiff's view that as a matter of law there had to be a suitable index of earnings before the discount factor could be adjusted to reflect the difference between price and earnings inflation. In my judgment this direction was wrong.

33. In the first place, it is not a question of law. The question whether the capital growth of an index-linked security tracking the RPI will match future increases in earnings or care costs is a question of fact. The question whether any particular adjustment to the discount rate will compensate for the difference if there is one, is also a question fact. If an adjustment to the discount rate can be made which is not based on an index but will serve to compensate the Plaintiff more exactly for his losses, there is no legal reason why it should not be made.

34. There is, however, a more fundamental reason why the Deputy Bailiff's direction was wrong, whether the question be classified one of as fact or law. It misunderstands the function of an index in the calculation of a lump sum. The publication at regular intervals of an index of prices or earnings, prepared on a consistent basis, may serve two distinct functions: as a source of historic data, and as a tool for adjusting future payments to match supervening changes in the level of prices or earnings. The Deputy Bailiff considered that it was fundamental to the decision in *Thompstone* that there was a suitable index of earnings available. Indeed it was. But that was because the Court of Appeal in *Thompstone* was dealing with the indexation of future periodical payments, which by definition required a suitable index. The Court of Appeal was examining the various alternative indices for the second of the two purposes identified above, namely for their value as a tool for adjusting future payments.

35. Adjusting the discount factor used to calculate a lump sum award is a completely different exercise. There are no future payments. The lump sum is an immediate award representing all future losses and costs for which the Plaintiff is entitled to be compensated. It reflects the court's present prediction of the future, but once it is made it applies irrespective of what the future may turn out to hold. It follows that the fact that there is an index of earnings which for years ahead will vary according to changes in the level of earnings as they occur is completely irrelevant to the calculation of a lump sum award.

36. The reason for calculating a lump sum award on the footing that the lump sum will be invested in index-linked gilts is that it achieves an automatic adjustment for future increases in the general level of prices. On the assumption that the lost earnings or costs which are being compensated increase in line with the UK RPI, the assumed portfolio will automatically grow at the same rate as the losses which it supposed to replace and the costs which it is supposed to fund. To the extent that

the losses and costs have their own trajectory, independent of the RPI, the whole basis for assuming an investment of the lump sum in index-linked gilts is undermined.

37. On the evidence, the rate of price inflation in Guernsey, where Mr. Helmot's losses and costs will be incurred, is not the same as the rate of increase of the UK RPI, and the rate of earnings inflation in Guernsey is even further from the rate of increase of the UK RPI. Against that background, the question arises whether it is possible to adjust the discount rate used in Guernsey to reflect these differences. In my judgment, it is in principle possible to do so if it is proved that the rate of earnings inflation is likely, taking one year with another, to bear a reasonably constant relationship (say plus 2 per cent) to the RPI over the expected duration of the Plaintiff's life. This would be achieved by adjusting the discount rate by the amount of the average difference. The factual basis on which you would be doing this is that there is a presently observable propensity for earnings inflation to exceed RPI by a constant margin of 2 per cent, which is likely to persist.

38. To prove that there is such a propensity does not require the existence of an index which will track future changes. What it will normally require is expert economic evidence tending to show that the propensity exists and can be expected to persist. In principle, the exercise is no different from the adjustment of the discount rate by 0.5 per cent to reflect the difference between UK and Guernsey RPI, which was agreed between the parties to be appropriate and endorsed by the Royal Court. The only value in this context of an index of earnings and prices is that it is a source of historic data. Even then its value is essentially secondary. One would expect any expert economic analysis of the relationship between price and earnings inflation to be tested by reference to historic data. Indices tracking past changes in both are likely to assist in that process. If the historic data bears out the theory, then the theory is more likely to be accepted. But there is no principle, and certainly no rule of law, that precludes a court from accepting sufficiently persuasive theoretical evidence of the relevant relationship, even in the absence of reliable historic data. Nor, if historic data is deployed, does it necessarily have to take the form of indices.

39. Approaching the matter on the (in my view correct) footing that the point was open to them in law, the Jurats found that an index was necessary as a matter of fact. Or so I read their observation that they would not adjust the discount rate in the absence of a suitable one. I disagree with this also, for the same reason. An index of historic data is helpful, but it is no more than one kind of evidence. It is not indispensable if there is persuasive evidence of another kind.

40. However, the Jurats did not stop there. They went on to find that it would be 'wrong to conclude that inflation in wages paid to carers in Guernsey simply follows the general economic theory and general data analysed by the Plaintiff's experts on economics.' I take this to be a finding that the expert evidence did not prove that there was in fact a propensity which was likely to persist for the inflation of carers' earnings to exceed price inflation by 2 per cent or, possibly, at all.

41. I therefore turn to examine the evidence on this point which was before the Jurats. It consisted of the expert evidence of Mr. Rowland Hogg, Mr. Roger Bootle and Mr. Christopher Daykin. Their credentials for giving this evidence were as impressive as they could possibly have been. Mr. Hogg is a forensic accountant, who has made a special study of the problems associated with the assessment of

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long-term future damages for personal injury and has given advice and/or evidence in many of the English cases on the subject. Mr. Bootle is a professional economist and the author of a number of publications on the impact of inflation on investment strategy. Mr. Daykin was the UK Government Actuary from 1989 to 2007. In that capacity, he was responsible for preparing all but the first edition of the Ogden Tables and for advising the Lord Chancellor on the setting of the statutory rate in 2001. He has also advised the Social Security Department of the States of Guernsey on the funding of long-term benefits under the bailiwick's social security laws. The evidence of these witnesses, both oral and written, was given in appropriately moderate terms which took full account of the variations which are possible when seeking to predict long-term future returns and rates of inflation.

42. That evidence may be summarised as follows:

(1) It is normal for progressive increases in productivity to result in average earnings increasing faster than average prices. In the long-term public finance report published by HM Treasury in March 2008, productivity in the United Kingdom is projected to grow at a rate between 1.75 per cent and 2.25 per cent, with a baseline projection of 2 per cent to 2057. Historically, gross domestic product per head in Guernsey has tended to increase faster than in the United Kingdom. The ratio varies between 0.95 and 1.32, with a rising trend up to 2001 and a falling trend thereafter. But since 2006, the UK economy has grown faster than the Guernsey economy.

(2) In the short run, earnings growth can vary widely in relation to inflation, but over a number of years it is bound to be closely related to labour costs. This is because these are a large proportion of the cost of production, and prices determine the real wage implied by any given level of nominal wages. In the long run, the gap between the rates of increase of average earnings and consumer prices will be closely related to the rate of productivity growth, reflected in the growth of gross domestic product per head.

(3) While high rates of growth are commonly recorded in emerging economies, in a mature economy such as Guernsey one would expect an average rate of growth of about 2-3 per cent. This is characteristic of most major European economies. In the United Kingdom, average earnings have increased on average about 1.8 per cent faster than prices since the Average Earnings Index was introduced in 1963. However, the average difference between the two rates of increase conceal wide variations in individual years, and in recent years the rate of earnings inflation has tended to decrease.

(4) Given Guernsey's state of economic development, and its close economic relationship and monetary union with the United Kingdom, a broadly comparable relationship between price and earnings inflation in the bailiwick is to be expected there. Mr. Bootle's estimate was that the average gap over periods of fifteen years or more could reasonably be expected to lie between 1 per cent and 3 per cent, with 2 per cent being the 'best working assumption'. He based his assessment primarily on his analysis of Guernsey's economy, but pointed out that

the published statistics for the fifteen years for which earnings data are available shows that the differential between price and earnings inflation is higher, about 2.7 per cent on average over the whole period. However, there are large variations from year to year and the shortness of the run of statistics makes the average highly sensitive to outlying values in a small number of abnormal years.

(5) A differential of about 2 per cent between the rates of price and earnings inflation has been assumed by public bodies for a variety of purposes requiring long-term forecasts. For example, the UK Government Actuary (at the time, Mr. Daykin) made alternative assumptions of a differential of 1.5 per cent and 2 per cent for the period to 2060/61 in the 2003 Quinquennial Review of the National Insurance Fund. Mr. Daykin's evidence was that on his advice as UK Government Actuary, the Social Security Department of the States of Guernsey makes its own funding projections on the assumption of a 2 per cent long-term rate of real earnings growth.

(6) In the United Kingdom, the earnings of health carers, as tracked by ASHE 6115, have tended to increase faster than average earnings. There is no data on the relative position of health carers in Guernsey.

43. In cross-examination, Advocate Ayres suggested that these points constituted an indirect attack on the use of a discount rate at all, but he did not challenge any of the points themselves. His one expert witness, a forensic accountant, did not dissent from either the approach or the conclusions of the Plaintiffs' witnesses, apart from emphasising the inherent variability of the possible outcomes.

44. This evidence, as it seems to me, constituted strong, indeed unchallenged evidence of both the existence of a gap between price and earnings inflation in Guernsey of the order of 2%, and of the likelihood that over the long term it would persist.

45. In 1967, in the early days of this Court, it was held in *Guille v. Mackay* [Court of Appeal, 14.6.67] that in principle the Court of Appeal would not interfere with the findings of fact made by Jurats in a civil case provided that there was some basis on which they could reasonably or lawfully have arrived at them. This decision must, however, be viewed against the background of the practice of the Royal Court at the time it was made. This was for the Bailiff or Deputy Bailiff to put a series of factual questions to the Jurats, to which they returned unreasoned Yes or No answers. The current practice, which has existed for some two years, is for the Court to give a reasoned judgment summarising however briefly the Jurats' reasons for arriving at their findings. The change does not warrant a departure from the decision in *Guille v. Mackay*, but it does make it a great deal easier to satisfy the conditions laid down in that case for reviewing findings of fact. If reasons are given which cannot be supported on the evidence, or which suggest that the Jurats misunderstood it, this Court can and should intervene to correct the position.

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46. There are in my view three reasons for departing from the finding of the Jurats in this case. The first is that their expressed view that a current index of earnings was the only acceptable kind of evidence is based on a conceptual error (which I have pointed out) and seems likely to have influenced their whole approach to the facts. Second, their reasons overtly depended on the uncertainty of future trends for the earnings of carers in Guernsey, as opposed to average earnings. However, the evidence from the United Kingdom suggests that so far as the rate of increase of carers' earnings has differed from the rate of increase of average earnings, it has been greater. It was not suggested at the trial that it was smaller. Any difference would therefore be likely to increase rather than reduce the award. I would have regarded the Jurats' observation about the uncertain future course of carers' earnings in Guernsey as entitled to some weight if Advocate Dawes was claiming an increase in his client's award on the basis of the difference in the rates of inflation for carers' and average earnings. But his case, and his evidence, both in the Royal Court and before us, was based on the rate of inflation of average earnings. He was not asking for more than that. Third, so far as the Jurats intended to discard more generally the 'economic theory' advanced by the Plaintiff's experts, they were I think overlooking the fact that any analysis of the expected future behaviour of prices and earnings and the relationship between them is bound to depend on economic theory. They were also disregarding evidence which was powerful, consistent and unchallenged, on issues on which their own experience of Guernsey society was unlikely to be of much assistance.

47. The main ground on which Advocate Ayres sought to defend the Royal Court's conclusion on this point was not, in fact, one which the court itself gave. He submitted that to allow the difference between price and earnings inflation to affect the amount of the award would involve applying different rates to different parts of the award. Thus future non-recurring items, such as the cost of equipment purchases or of adaptations of the Plaintiff's home would in principle fall to be discounted by reference to the rate of price inflation; and, subject to the availability of the necessary data, different rates might have to be applied to the loss of the Plaintiff's own future earnings and the cost of paying his carers. He argues that this was contrary to principle, and inconsistent with the reasoning of the House of Lords in *Wells v. Wells*.

48. I do not wish to encourage the use of a large number of different rates, especially when the difference is not great. But Advocate Ayres is plainly right to say the use of a rate of earnings inflation for loss of earnings and care costs will usually involve assessing the lump sum by reference to at least two rates of inflation. This is because parts of the award will represent future costs which are more likely to increase in line with price inflation. I am not dismayed by this prospect. I do not accept that a single rate was required, either explicitly or implicitly, by the reasoning of the House of Lords in *Wells v. Wells*. In that case it was pointed out by the Defendant that gilt-edged securities indexed to the RPI would not compensate the Plaintiff for the higher rate of earnings inflation, but since the Plaintiff did not take the point that his award should be increased on that account, the House of Lords was not directly concerned with its implications: see Lord Lloyd of Berwick at pages 367-8. Lord Lloyd's observation at page 373G that there should be a 'single rate applying across the board' was addressed to the argument that the rate of return used might differ according to the Plaintiff's actual investment intentions, not to the argument which Advocate Ayres has advanced before us. The decision of Lloyd Jones J., in making a periodical payments order in *Sarwar v. Ali* [2007] LS Law Med. 376, to apply different rates to the element representing loss of earning and the element representing care costs seems to me to be correct in principle in a case where there is a significant

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difference between them, and equally applicable to the assessment of a lump sum award.

Conclusion

49. I consider that the correct discount rate to apply in the present case is minus 1.5 per cent for earnings-related losses, i.e. Mr. Helmot's own lost earnings and the cost of employing his carers. It will be 0.5 per cent for the non-earnings-related elements of his future losses. I propose that Counsel should be invited to agree a calculation of the correct award on that footing.

50. In future the courts of Guernsey, when assessing recurring future losses of earnings and care costs, should take as their starting point the assumption endorsed by the House of Lords in *Wells v. Wells* that the Plaintiff will invest any lump sum awarded in UK index-linked gilts, whether or not he actually intends to do so. In the case of a Guernsey resident who will suffer his loss of earnings and incur his care costs in Guernsey, the court should determine the gross redemption yield on UK index-linked gilts. Since the assumption is that the Plaintiff goes out into market to invest the lump sum on the day of the judgment, the appropriate course will be to take the average gross redemption yield over a period of one year up the time of trial, of index-linked gilts which remain unredeemed at that time. They should adjust that yield for (i) taxation at Guernsey rates, and (ii) the difference between UK and Guernsey rates of price inflation, so as to produce a net real rate of return in Guernsey. They should then adjust the result to ensure that in relation to the earnings-related element of the damages (generally comprising the Plaintiff's lost earnings and the cost of paying his carers), the Plaintiff is compensated for the excess of the rate of inflation of average earnings over the rate of price inflation.

51. Although the issues with which we have been concerned are almost entirely issues of fact, given the range, quality and objectivity of the expert evidence adduced in this case, it is undesirable that the same questions should be relitigated in future cases where the result is likely to be the same or only marginally different. In the absence of convincing evidence to support substantially different figures, I would expect the courts and the parties in future to assume that the rate of price inflation in Guernsey can be expected to exceed the UK RPI by 0.5 per cent, and that the Guernsey rate of average earnings inflation can be expected to exceed the Guernsey rate of price inflation by 2 per cent.

52. Rather different considerations apply to the gross redemption yield on UK index-linked gilts. In *Wells v. Wells* the House of Lords expressed the hope that 3 per cent would be treated as the relevant net rate of return until the Lord Chancellor exercised his power to fix a rate of return under Section 1 of the Damages Act 1996: see Lord Lloyd at pages 375-6, Lord Steyn at page 388 D/E and Lord Clyde at pages 397F/G. That assumed a reasonably stable gross redemption yield of 3.5 per cent. I am not, however, prepared to make a similar assumption about the gross redemption yield of 1.28 per cent which the Royal Court has found in this case. It reflects the historically low returns which are presently available on low-risk fixed-interest securities, after three years of exceptional turbulence in the bond markets. When conditions stabilise, it seems unlikely to be at current levels of interest. Until that happens it may well be appropriate to re-examine case by case the current gross redemption yield available on UK index-linked gilts. At least that figure should ordinarily be readily ascertainable and

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beyond serious challenge.

53. I would not wish to leave this case without paying tribute to Counsel for their meticulous and helpful submissions and to the Deputy Bailiff and Jurats whose judgment is a model of careful analysis and presentation. On most points their decision has been accepted by the parties and is not the subject of this appeal. The fact that we have reached a different conclusion on the points which are still in issue simply reflects their inherent difficulty and novelty.

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