[2012] UKPC 5
Privy Council Appeal No 0064 of 2011

JUDGMENT

DYLAN SIMON
(Appellant)
v
MANUEL PAUL HELMOT
(By his next friends and guardians ROSEMARY HELMOT and KENNETH RAYMOND JORDAN)
(Respondent)

From the Court of Appeal of Guernsey

before

Lord Hope
Lady Hale
Lord Brown
Lord Clarke
Lord Dyson

JUDGMENT DELIVERED BY
LORD HOPE
ON

7 March 2012

Heard on 25 January 2012

Appellant	*Respondent*
Alistair Schaff QC	James Dingemans QC
Bernard Doherty	Gordon Dawes
(Instructed by Alan Taylor & Co)	(Instructed by Mourant Ozannes)

LORD HOPE:

1. The respondent in this appeal, Manuel Paul Helmot, sustained very serious injuries in November 1998 when he was struck by a car driven by the appellant while he was riding his bicycle. They were injuries of the kind that are normally classified as injuries of the maximum severity. Liability was admitted as soon as the respondent's claim for damages was notified to the insurers, and contributory negligence was not pursued against him. The issues between the parties related only to the quantum of damages.

2. As is common in such cases, these issues were complex and difficult. The appellant's insurer agreed to prescription of the respondent's claim being extended indefinitely, no doubt in the hope that it might be possible to achieve agreement as to the amount of the award. This proved not to be possible, so that the extended period was brought to an end in July 2008. Proceedings were issued in the Royal Court on 1 August 2008. Among the issues that the Court had to determine was the amount to be awarded for the losses that the respondent would incur in the future. They included his loss of earnings, but the most significant element was his claim for his future care and case management.

3. The respondent's injuries included severe brain damage resulting in psychiatric injury and cognitive impairment including severe short term memory loss. He also sustained partial loss of vision and loss of control of his right arm. He will never be able to work again, and he will require specially adapted accommodation and 24-hour care for the rest of his life. He was 28 years old at the time of the accident and 39 at the time of the judgment. His expectation of life has been reduced by 5 years from the normal figure for life expectancy for a man of his years of 45.9 years. Even with that reduction he has many years ahead of him during which the constant care and attention that he needs will require to be paid for.

4. The case proceeded to trial in October and November 2009 before Deputy Bailiff Collas and three Jurats. On 14 January 2010, after a hearing which lasted for six weeks, the Royal Court awarded the respondent damages in the sum of £9,337,852.27, with interest at the rate of 2% from 1 August 2008 until payment. The respondent had contended that two discount rates should be used for the calculation of his future recurring losses: 0.5% for non-earnings related losses and -1.5% for earnings related losses, including his own loss of earnings. The appellant's contention was that there should be single discount rate of 2.5%. The Royal Court applied a single discount rate of 1%.

5. On 12 February 2010 the respondent filed a notice of appeal in which he asked that the judgment of the Royal Court should be set aside to the extent that it

depended upon a discount rate of 1% and that it should be re-calculated based upon discount rates of -1.5% for earnings related losses and 0.5% for other losses. On 25 February 2010 the appellant filed a cross-appeal in which he contended that the judgment of the Royal Court should be set aside and that a single discount rate of 2.5% should be substituted. On 14 September 2010 the Court of Appeal (Sumption, Jones and Martin JJA) allowed the appeal and dismissed the cross-appeal. In place of the 1% discount rate that had been applied to all future losses by the Royal Court it substituted a discount rate of -1.5% for earnings related losses and 0.5% for other losses. These changes may seem small in percentage terms, but the effect of the Court of Appeal's judgment was to increase the total award of damages by about £4.5m. On 22 July 2011 the Court of Appeal granted leave to appeal to the Board.

6. As the Court of Appeal said at the outset of its judgment, the issues on this appeal can be understood only in the light of the developing law and practice of the courts in England and Wales: para 4. The English common law has persuasive force in Guernsey in areas not governed by Guernsey statutes or Guernsey customary law, in much the same way as it has in Scotland. In *Morton v Paint* (1996) 21 GLJ 61, which was a case about occupiers' liability, Southwell JA said that it was common ground that in relation to the law of torts it has been customary for the Guernsey courts to adopt English common law as it has been developed by the English courts. The law relating to the assessment of damages for personal injury is one of the areas in which there has been a large volume of litigation in England. Here too it is a source that may legitimately be referred to in the search for answers to problems that the bailiwick has not previously encountered.

7. This is not to say that the solutions that have been adopted in English law will be applied in Guernsey without an inquiry as to whether the underlying conditions in the respective jurisdictions are truly comparable. There is no reason why a discount rate calculated in accordance with English common law principles should not be adjusted in order to take account of differences between the two jurisdictions, as the Deputy-Bailiff accepted when delivering the judgment of the Royal Court, para 182. But before that stage is reached it is appropriate to focus on the English approach.

8. There is however one important difference which has to be noted at the outset. Section 2(1) of the Damages Act 1996 provides that a court awarding damages in an action for personal injury may, with the consent of the parties, make an order under which the damages are wholly or partly to take the form of periodical payments. It gave effect to a recommendation by the Law Commission in its report on Structured Settlements and Interim and Provisional Damages (1994) (Law Com No 224) (Cm 2646). Among its recommendations was that there should be no judicial power to impose a structured settlement on the parties: see paras 3.37-3.53. But a power to do this was introduced by section 100(1) of the

Courts Act 2003. In place of the requirement for consent it substituted a new section 2, which provides that the court may order that the damages are wholly or partly to take the form of periodical payments. Power to increase or reduce these payments was conferred by the Damages (Variation of Periodical Payments) Order 2005 (SI 2005/841). The new section 2 applies to England and Wales and Northern Ireland: see section 100(4) of the 2003 Act. It does not apply to Scotland, but in *D's Parent and Guardian v Greater Glasgow Health Board* [2011] CSOH 99, 2011 SLT 1137, para 52 Lord Stewart suggested that it would be helpful to have the same provision in Scotland too. Section 2 of the 1996 Act, as originally enacted, extended to the whole of the United Kingdom: see section 8(2) of that Act. But like the rest of the statute law of the United Kingdom it has no direct application in Guernsey.

9. There can be no objection in principle to the parties agreeing to structure the damages in such a way as to enable future costs to be met by a series of periodic payments which are adjusted by reference to an agreed index to take account of inflation. But what Guernsey lacks is the legislative framework which a court needs to make an order to that effect, or at least to order payment in terms of the agreement so that it can be enforced without further recourse to the courts. Experience of the operation of the amended section 2 of the 1996 Act in practice suggests that this is a reform that Guernsey too might usefully adopt for use in cases of this kind. For the time being however it is the way English law dealt with such cases before the 1996 Act was enacted that should be referred to for guidance. It is the closest one can come to the system that currently operates in Guernsey.

The assessment of future loss in English law

10. Leaving aside the changes introduced by statute, English law requires that an award of damages must take the form of a single lump sum. The award has to take account of all the elements of future loss as well as all the loss for the past. The inevitable delay in the provision of compensation for past losses can be made good by an award of interest at the appropriate rate on those parts of the lump sum that relate to the past. But the payment as part of the lump sum of an amount that is to compensate for losses to be incurred in the future gives rise to a different problem. Account must be taken of the fact that the money is being paid now for losses that will not arise until some date in the future. The adjustment that has to be made to the lump sum to account for this will affect the total amount to be paid by way of damages.

11. In the majority of cases this is unlikely to have a very large impact on the total award. But in cases where the injury is one of maximum severity the lump sum is already so large that it will make a very great difference to the result. It can

make all the difference between the adequacy and the inadequacy of the award to meet the losses which the injured party will sustain in the future. It can make all the difference too to the extent of the defendant's obligation to compensate the plaintiff for his injury. The object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position as he or she would have been in before the accident. They should not be left, at the end of the period during which the loss is to continue, in a better financial position that they would have been in apart from it: *Hodgson v Trapp* [1989] AC 807, 826 per Lord Oliver of Aylmerton. The aim is to award such a sum of money as will amount to no more, and at the same time no less, than the net loss: *Wells v Wells* [1999] 1 AC 345, 390.

12. It has to be recognised that it is not possible, when dealing with losses that will be incurred in the future, to achieve perfect accuracy. As Lord Steyn said in *Wells v Wells* at p 383, perfection in the assessment of future compensation is unattainable. But, just as there can be no good reason for a shortfall in the amount required to meet the outlays for nursing care in the future, there can be no reason for requiring the defendant to pay more than is needed to compensate the injured party for these outlays. It follows that the calculation should make the best use of such tools as are available.

13. The conventional approach, as Lord Oliver explained in *Hodgson v Trapp* at p 826, is to assess the amount that is notionally required to be laid out in the purchase of an annuity which will provide the annual amount that is needed for the whole period of the loss. The recurring annual amount has first to be determined. This is the multiplicand, to which a multiplier is then applied. It is the selection of the multiplier that lies at the heart of the dispute in this case. It has to take account of the period for which the loss can be expected to continue. If, as in this case, the injuries are of the maximum severity this will be the injured party's life expectancy. But one then has to determine the interest rate which represents the return which can reasonably be expected on the lump sum, assuming that it is invested in such a way as to enable the whole amount of the loss to be met during the entire period by the expenditure of income together with capital. This is the critical stage in the exercise. The higher the interest rate the lower the number of years' purchase that is required to calculate the capital value of the annuity.

14. It has been assumed until very recently that it will be possible to achieve a rate of return on capital which will more than offset the effects of inflation on the amount of the award. This has led to the assumption that the choice of interest rate will always take the form of a discount for the accelerated receipt of the lump sum. One of the issues in this case is whether the law allows the court to adjust the lump sum in the other direction if the evidence shows that the rate of inflation will outpace the rate of return on capital, as the Court of Appeal did in this case in regard to the losses that must keep pace with the rate of inflation for earnings in

Guernsey if the respondent is to be fully compensated. The effect of such an adjustment is to increase, rather than reduce, the number of years used as the multiplier. The use of the word "discount" is not an apt way of describing that exercise. But in principle there can be no objection to such an adjustment if the evidence shows that it is needed to ensure that the lump sum will continue to be large enough to meet losses to be incurred in the future. Otherwise the effects of accelerated receipt, which are inevitable where the award is by means of a lump sum, will not be properly recognised.

15. Prior to the decision of the House of Lords in *Wells v Wells* it was thought that it was not too difficult to find a sufficiently reliable guide to the rate of return that could be expected to be obtained on the lump sum if it were to be invested sensibly in a mixed basket of gilts and equities. This was reflected in the conventional assumption that a discount rate of 4 to 5% would be appropriate. In times of high inflation the rate of interest that can be earned by the prudent investor tends to be higher too, as interest rates have to provide for inflation as well as the return that the investor or depositor requires for foregoing the use of his money. But in *Mallett v McMonagle* [1970] AC 166, 176 Lord Diplock said that the courts should leave out of account the fear of inflation on the one hand and the high interest rates which reflect the fear of it and the capital appreciation which is the consequence of it, on the other. In *Cookson v Knowles* [1979] AC 556, 571-572 he adhered to this approach and at pp 576-577 Lord Fraser of Tullybelton endorsed it. Lord Diplock said that inflation was taken care of in a rough and ready way by the higher rates of interest obtainable as one of the consequences of it, and that no other practical basis of calculation had been suggested that was capable of dealing with so conjectural a factor with greater precision.

16. The opportunity for greater accuracy in the selection of the discount rate was provided by the introduction in 1981 of index-linked government securities ("ILGS"). This made it possible to match the receipts from the investment of a lump sum almost precisely to the sum needed to compensate by way of a lump sum for costs to be incurred in the future that were of the same kind as those to which the rise in value of ILGS was linked by the index. In 1984 the first edition of the Ogden Tables (entitled "Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases"), which had been prepared by the Government actuaries' department and compiled by a working party chaired by Michael Ogden QC, was published. It contained an invitation to practitioners to cease using the traditional multipliers which assumed a discount rate of 4 to 5% and use instead multipliers based on the assumption that funds would be invested in ILGS discounted at a rate of between 2.5 and 3.5%. In *O'Brien's Curator Bonis v British Steel plc* 1991 SC 315 an attempt was made to persuade the Court of Session to adopt those rates in the choice of multiplier for the calculation of the award to be made to a pursuer who had been so severely injured that he required care for the rest of his life. By the date of the hearing of the appeal interest rates

that could be obtained on ILGS had risen to about 4%, so it was conceded that the argument that a lower discount rate should be adopted was not sustainable.

17. In each of the three cases which were before the House of Lords in *Wells v Wells* [1999] 1 AC 345 the Court of Appeal had applied a discount rate of 4.5% in calculating the lump sum. The House held that the lump sum should be calculated on the basis of the return available on ILGS. As Lord Lloyd of Berwick explained at pp 375-376, he took the average of the gross redemption yield over a period of 12 months and allowed for the incidence of tax on the income element in the investment. This resulted in a figure of 3%, which he regarded as the appropriate rate of return for the cases that were currently before the House. He noted that section 1 of the Damages Act 1996 had given power to the Lord Chancellor to prescribe the rate of return that was to be expected from the investment of a lump sum award, but that no rate had yet been prescribed. Acknowledging that it was for the House to set guidelines to replace the old 4 to 5% bracket until the Lord Chancellor specified a new rate under that section, he proposed that 3% should be adopted as the rate for general use until he did so.

18. There was a difference of view as to whether the average should be derived from the average over a period of 12 months, as Lord Lloyd preferred, or three years as the other members of the Appellate Committee thought was more appropriate. The result was the same, on the figures that were then available. But it was acknowledged that the figure of 3% should not be regarded as immutable. Lord Steyn said at p 388 that only a marked change in economic circumstances should entitle any party to re-open the debate in advance of a decision by the Lord Chancellor, as did Lord Hutton at p 404. I said at p 393 that adjustments might have to be made to that rate in the light of significant changes in the yield on ILGS in the future, but that these changes should be left to the Lord Chancellor: see also Lord Clyde at p 397. In *Warren v Northern General Hospital NHS Trust (No 2)* [2000] 1 WLR 1404 it was noted that the gross return had dropped from 3.53% at the time of *Wells* to 2.84%, but the Court of Appeal refused to depart from the guideline of 3%. Stuart-Smith LJ said at p 1408 that the need for certainty to facilitate settlements coupled with the undesirability of extensive evidence from accountants, actuaries or economists with a view to persuading courts to change the discount rate militated strongly against any court seeking to do so before the Lord Chancellor had acted under the statute.

Developments since Wells v Wells

19. On 28 June 2001 by the Damages (Personal Injury) Order 2001 (SI 2001/2301) the Lord Chancellor, Lord Irvine of Lairg, fixed the rate of return for England and Wales and Northern Ireland at 2.5%. By the Damages (Personal Injury) (Scotland) Order 2002 (SI 2002/46) the Scottish Ministers fixed the same

rate for use in Scotland. On 27 July 2001, in the light of criticisms that he had relied on inaccurate figures as to the yield on ILGS, the Lord Chancellor issued a fresh decision which again set the rate at 2.5%.

20. The Lord Chancellor said, in a statement of his reasons for that decision, that in determining the discount rate he had applied the appropriate legal principle as to the object of the award of damages laid down in *Wells v Wells*. Although the statute empowered him to fix different rates of return for different classes of case, he had decided upon a single rate to promote certainty and because it would be easy to apply in practice. It was not his intention to make frequent changes to take account of every shift in market conditions. He had regard to the principle laid down in *Wells v Wells* that the assumed rate of return should be based on the yield of ILGS. He found that the average of the gross redemption yields of ILGS over a period of three years at an assumed rate of inflation of 3% was 2.46%. Discounting for tax payable in the hands of a UK taxpayer reduced this figure to 2.09%. Noting that the intervals used in the Ogden Tables for the calculation of the multiplier was 0.5%, he chose not to round his figure down to the nearest multiple which was 2% but to round it up to 2.5%. As the Court of Appeal noted in para 10 of its judgment, his only explanation for that decision was that he had taken account of matters which he considered were relevant to the setting of a discount rate which was just as between claimants as a group and defendants as a group.

21. He made it clear in his statement that he did not accept that the rate of return on ILGS was a pure and undistorted measure of the real rate of return that markets would afford in relation to investments with minimal risk. He had had regard to the fact that the Court of Protection had continued, even in the light of *Wells v Wells*, to invest in multi-asset portfolios including an equity element although the House of Lords in *Wells v Wells* had chosen not to be guided by its practice. This indicated that there were sensible, low-yield investment strategies available to claimants which would enable them to achieve a rate of return at 2.5% or above without being unduly exposed to risk in the equity markets. He also said that he had taken account of the fact that it was likely that claimants would not be advised to invest solely in ILGS but rather in a mixed portfolio in which any risk would be managed so as to be very low. This view was supported by the experience of the Court of Protection and the response of the expert financial analysts whom he had consulted.

22. The Lord Chancellor's determination was criticised at the time as being too favourable to defendants. Section 1(2) of the Damages Act 1996 provides that the fixing of a rate by the Lord Chancellor shall not prevent the court taking a different rate of return if any party to the proceedings shows that it is more appropriate in the case in question. But attempts to persuade the courts to take a fresh look at the issue did not meet with success. In *Warriner v Warriner* [2002] EWCA Civ 81,

[2002] 1 WLR 1703 the Court of Appeal held that this would only be appropriate if the case came into a category that the Lord Chancellor had not considered or had special features or circumstances and that, as there was nothing in the facts of the case of that character, the claimant should not be permitted to adduce expert evidence as to the appropriate multiplier. In *Cooke v United Bristol Heathcare NHS Trust* [2003] EWCA Civ 1370, [2004] 1 WLR 251 the Court of Appeal held that evidence that the effect of inflation on future care costs would be grossly underestimated if the effect of inflation were only built into the multiplier by means of the Lord Chancellor's discount rate amounted to an illegitimate assault on that rate and on the efficacy of the 1996 Act and should not be admitted. Laws LJ said in para 29 that it was a premise of the Lord Chancellor's order that the effects of inflation in claims for future loss were to be catered for solely by use of the multiplier which was conditioned by the discount rate.

23. No fresh determination has been made under section 1(1) of the 1996 Act since the Orders of 2001 and 2002. But section 100(1) of the Courts Act 2003 gave power to the courts in England and Wales to award damages by way of periodical payments of their own motion in cases where the parties had not been able to agree to this. There are now several examples of the way this provision is being applied in practice. In *Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103, [2007] 1 WLR 482 the Court of Appeal held that the claimant should be allowed to lead the evidence of an expert that the index to be applied to any periodical payments order that might be made should be a wage-related index to avoid a shortfall that would result if the periodic payments were linked to the retail prices index which historically wage inflation had outstripped.

24. In *Sarwar v Ali* [2007] EWCA 1255 (QB) Lloyd Jones J, applying the principle of full compensation, sometimes known as the 100% principle, described in *Wells v Wells* [1999] 1 AC 345, 390, held that the annual sum which he awarded under a periodical payments order was to be indexed each year by reference to the index known as ASHE 6115 for care assistants and care workers. That is not an index as such, but an annual survey of hours and earnings for that occupational classification which can be used to track care and case management costs. A challenge to this approach in *Thompstone v Tameside and Glossop Acute Services NHS Trust* [2008] EWCA Civ 5, [2008] 1 WLR 2207 was rejected. It should be noted however, as Waller LJ explained in para 61, that when the court is making a periodic payment order under section 2 of the 1996 Act, there is neither a multiplicand nor a multiplier. There is an annual sum which is to be indexed each year under section 2(8) by reference either to the retail prices index or as modified under section 2(9) for so long as the claimant lives or reaches a particular age. The annual figure forms the base of a periodical payment which is infinitely variable to keep pace with the effects of inflation.

25. In *D's Parent and Guardian v Greater Glasgow Health Board* 2011 SLT 1137 Lord Stewart pronounced decree in terms of an agreed settlement which included periodical payments for the child's lifetime. He did not have power to award damages by way of a periodical payments order as he was sitting in Scotland, but he took the opportunity to explain the details of the structured settlement to which he was asked to give effect. Following recent precedents in England which had been reported in the Association of Personal Injuries newsletter, the periodical payments were split into two parts. One, which amounted to roughly 90% of the total, related to the care costs accounted for by care staff. Those costs were to be index linked to ASHE 6115. The other part related to the part of care costs accounted for by nursing staff. They were to be index linked to ASHE 3211: see paras 34 and 49. It is worth noting Lord Stewart's comments in paras 26-31 on the question whether a system of periodical payments is suitable for use in all cases. He suggested that claimants might continue to opt for a lump sum in cases where there is a deduction for contributory negligence. But it should be appreciated that this may operate to their disadvantage if they are tied to the discount rate fixed under the statute.

The position in Guernsey

26. Statutes of the United Kingdom Parliament may relate to the bailiwick, either because they are expressed to apply there directly or upon the making of a subsequent Order in Council or ministerial order: *Jersey Fishermen's Association Ltd v States* [2007] UKPC 30, [2007] GLR 36, para 1. But the Damages Act 1996 is not one of them, and it has no equivalent in the laws of Guernsey. Guernsey law and English law both accept that the injured party is entitled to be provided with a sum of money which will put him in the same position as if he had not sustained the wrong for which he is to be compensated. But there is no provision in Guernsey for the award of damages for personal injury other than by way of a lump sum. And there is no statutory discount rate. Regard may be had to the common law of England for guidance as to how to adjust the present value of a lump sum to allow for the fact that it is to be paid now to cover losses that will be incurred in the future. The common law which is relevant is that which was analysed and developed in *Wells v Wells.* Significant changes in the yields on ILGS would justify adopting a different rate from that which was adopted in that case. But decisions about the effect of the 1996 Act or its application have no bearing on the way the lump sum is to be calculated according to Guernsey law.

27. It is common ground that there are other factual differences too. They were listed by the Court of Appeal in para 14 of its judgment. First, the rate of inflation within the bailiwick has been fairly consistently about 0.5% higher than in the UK RPI which is tracked by ILGS. This state of affairs can be expected to continue. Second, income tax rates are lower in Guernsey than those that are payable by persons ordinarily resident in the UK. This means that the net yield of ILGS to a

Guernsey resident will be different from that which will be enjoyed by a person holding the same securities who is taxable in the UK. Third, the statistical information which is available to track the movement of prices and earnings is more limited for Guernsey than it is for the UK. For that reason at least, it is less reliable. These factual differences are all capable of being accommodated by adjustments to the calculation of the award that would be appropriate if this case was being decided in England. There is nevertheless a fundamental difference between the parties as to the rate of return that should be used to arrive at the discount rate which will determine the appropriate multiplier.

The evidence of the respondent's expert witnesses

28. The appellant’s case in the Royal Court was that Guernsey courts should follow and apply the single discount rate which had been set by the Lord Chancellor. The respondent’s case was that the Lord Chancellor’s rate was too low and that its adoption would result in his being undercompensated. In the absence of any Guernsey legislation establishing a discount rate for the Island and any judicial decisions in this jurisdiction, the Court should set an appropriate rate following the approach of the House of Lords in *Wells v Wells* which had regard to the current rate of return on ILGS, and it should employ two multipliers: one for earnings related losses and the other for costs that were not earnings related.

29. The respondent’s case was developed by the leading of evidence from three witnesses: Rowland Hogg, a chartered accountant; Roger Bootle, an economist; and Christopher Daykin, an actuary. Their credentials for giving evidence were, as the Court of Appeal observed in para 41 of its judgment, 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 damages in cases of this type. He has given evidence in several such cases in England, including two of those that were under appeal in *Wells v Wells*. Mr Bootle is a professional economist and the author of numerous publications on the subject, including the impact of inflation on investment strategy. Mr Daykin was the Government Actuary for the United Kingdom from 1989 to 2007. He was consulted in that capacity by the Lord Chancellor when he was fixing his discount rate in 2001 and was responsible for preparing the second to sixth editions of the Ogden Tables. He has also advised the Social Security Department of the States of Guernsey on the funding of long term benefits.

30. Mr Hogg’s conclusions as to the appropriate discount rate were summarised in para 3.8 of his Supplementary Report of 30 April 2009, in which he confirmed the views that he had expressed in his Report of 23 January 2009. Those conclusions were as follows:

> “i) The starting point in assessing the discount rate for Guernsey should be yields from ILGS and I consider that the appropriate yield before tax is 1.25% (January report para 5.16),
>
> ii) after allowing for Guernsey tax this would be reduced to 1% (para 5.19),
>
> iii) higher inflation in Guernsey than in the UK reduces this to 0.5% (para 5.24) which is my proposed basic discount rate (para 5.30),
>
> iv) for earnings-related losses there should be an additional allowance for the faster growth rate of earnings compared with prices. I propose a deduction of 2% to minus 1.5% (para 5.33) as the discount rate for such losses, which include future costs of care.”

31. Mr Bootle had been asked to answer two specific questions posed by Mr Hogg. These were

> “(i) What is the likelihood and extent of any divergence between the inflation rates in Guernsey and the United Kingdom;
>
> (ii) What is the extent of the likely future gap between the growth of Guernsey average earnings and Guernsey inflation.”

He summarised his overall conclusions in paras 33-34 of his report of 13 October 2006. They were as follows:

> “33. Based on general theoretical principles and observations over recent years, assuming that the monetary link with the UK is retained, I would regard ½ % p a on average as the best working assumption for the extent that Guernsey inflation might exceed UK inflation over periods of 15 years or more. But there will be considerable variation from year to year. It would be possible for the average gap to be zero, or even slightly negative. A gap as large as 1% would be possible, but not likely.
>
> 34. I would regard 2% on average as the best working assumption for the excess of Guernsey average earnings growth over Guernsey

> inflation over periods of 15 years or more. But again there will probably be considerable variation from year to year. The average figure could be as low as 1% or as high as 3%."

In an Addendum Report of 15 May 2009 he said that more recent published data from the UK and Guernsey had done little to alter the picture that he had painted in his report of October 2006, and that he stood by the general conclusions that he had reached then.

32. Mr Daykin referred in section 2 of his report of 6 May 2009 to the actuarial approach to the evaluation of loss of income and future costs, to which additional rigour had been introduced by the Ogden Tables. In para 2.3 he said that an actuary would approach the decision as to the appropriate discount rate by determining a risk-free rate of return, having regard to the yields available in the market on suitable very low-risk financial instruments which could produce cash flows similar to those which have to be valued and that the most appropriate securities would be UK ILGS. In para 2.8 he said that, taking the one-year average of ILGS with more than 15 years to maturity and allowing for an 11.4% deduction for tax as proposed by Mr Hogg, the resulting discount rate was 0.86% and that, before adjustment for the differential between Guernsey inflation and UK inflation, it should certainly not be more than 1% per annum. In para 2.9 he said that he agreed with Mr Hogg and Mr Bootle that a reasonable allowance to make for the future differential between Guernsey inflation and UK inflation was 0.5%, so the adjusted discount rate for determining the multipliers in Guernsey should be no more than 0.5% (ie 1.0% less 0.5%). In para 2.11 he said that in his reports to the Guernsey Social Security Department over a number of years he considered that an appropriate assumption for real earnings growth in Guernsey was 2% per annum and that he still believed this to be an appropriate assumption. In para 2.12 he said that heads of damages which were considered to be likely to go up in line with Guernsey price inflation should be valued using a multiplier based on a discount rate of no more than 0.5%. per annum. Heads of damages relating to cash-flows likely to go up in line with earnings in Guernsey, such as loss of earnings or costs of care, should be valued using a multiplier based on a discount rate of no more than -1.5%.

33. Mr Hogg, Mr Bootle and Mr Daykin all gave evidence. The scope for challenging their conclusions was limited. This was because the appellant's case was simply that the court should apply the discount rate fixed by the Lord Chancellor. His only expert witness was a forensic accountant, Mr Gregory. In para 3.1 of his report dated 2 September 2009 he said that he agreed with Mr Hogg on the following:

> "i. the yields that he has calculated on ILGS;

> ii. in the UK earnings inflation has been historically at a greater rate than price inflation;
>
> iii. the restricted statistical evidence available suggests historical earnings inflation in Guernsey is running at a greater than Guernsey price inflation;
>
> iv. the method followed by Mr Hogg in calculating the three year yields on ILGS is in accordance with the method set down in *Wells*."

In para 3.10 he said that Mr Hogg had correctly calculated the average yields on ILGS for one year and the three year averages. In para 3.11, as to the adjustment to be made for tax, he acknowledged that differences as to the adjustment that might be made to reflect Guernsey tax would, in all probability, not alter the 1% ILGS yield as calculated by Mr Hogg. In that situation, as those parts of Mr Hogg's reports that were the product of his own work were not in dispute, the answers that Mr Bootle and Mr Daykin gave to the questions that they had been asked to consider were critical to the choice of the discount rate.

34. Mr Bootle confirmed that although almost 5 months had elapsed since his addendum he had nothing to add to it. He said that he had placed no weight at all on the evidence from Guernsey average earnings in relation to Guernsey price inflation because of the very short runs of data available from Guernsey. A more robust judgment would be based on the broad base of calculations of international evidence confirmed over a long period of time, and that his best guess was 2% as a reasonable forecast figure. This was based on an interpretation of western economies as a whole. In cross-examination he agreed that the range of figures in his first report, which could be as low as 1% or as high as 3%, contained a high degree of variation. He agreed that it was possible that Guernsey inflation could be lower than UK inflation and that he did not base his figure at all on the Guernsey data. But in re-examination he said that his conclusion was much more robust than that, as it was based on the evidence of what happened to the developed countries' growth over a long period of time.

35. Mr Daykin said that his current estimate of the rate of return on ILGS, as a result of the Bank of England's quantitative easing policy, was 0.5%, which was less than the 1.0% that Mr Hogg had assumed. He confirmed that as an institution Guernsey itself assumed and adopted a 2% differential between wages and price inflation. In cross-examination he acknowledged that the Lord Chancellor did not accept his advice when he was fixing his discount rate, as he had taken into account other things such as political issues and the consequences for the Ministry of Defence and the National Health Service. He said that, although he did not have access any more to the information on which Guernsey assumed a growth of earnings over price inflation of 2% as he retired in 2006, it was a public figure which was in the reports. It was a very reasonable assumption to make, and he stood by it. He was not cross-examined on the conclusion that 0.5% was the best working assumption for the extent that Guernsey inflation might exceed UK inflation over periods of 15 years or more.

36. Mr Gregory also gave evidence. He agreed with Mr Hogg's calculations of the yields on ILGS, that UK earnings inflation was greater than price inflation and that such data as there were suggested that earnings inflation in Guernsey was greater than Guernsey price inflation. He said that it would not be appropriate to consider average earnings when considering the future rate of increases in the earnings of carers because top earners' earnings rise at a faster rate than lower earnings. But he did not present any calculations of his own. As the Court of Appeal said in para 43 of its judgment, he did not dissent from the approach or the conclusions of the respondent's witnesses, apart from emphasising the inherent variability of the possible outcomes.

The judgment of the Royal Court

37. The Jurats were directed by the Deputy-Bailiff to consider first whether it was appropriate to adopt the rate of 2.5% fixed by the Lord Chancellor: para 188. Having considered the matters that the Deputy-Bailiff said should be taken into consideration, they concluded that it would be appropriate to start with the discount rate set by the Lord Chancellor and then adjust it for specific Guernsey factors and for changes in the net return on ILGS that had occurred since he set the rate in 2001: para 192. They accepted the unchallenged evidence that yields had continued to decline since the rate was set. They also accepted Mr Hogg's evidence that the average over the last three years was 1.28% and that, after discounting for Guernsey tax at the rate proposed by Mr Hogg, the net return was 1.13%. As they saw it, the net return to the Guernsey investor had reduced as a result of these adjustments 1.05% per annum. They then considered the question whether to adjust for differences between earnings inflation and price inflation. They were directed by the Deputy-Bailiff that as a matter of law there could be no basis for adopting different discount rates for different types of loss in the absence of indices measuring the respective rates of inflation: para 197. But they were asked whether, if that direction was wrong in law, they would have adjusted the rate to take account of any difference in earnings inflation if they were directed to do so. Their answer was that it would be wrong to conclude that inflation in wages paid to carers in Guernsey simply followed the general economic theory and the general data analysed by the respondent's expert witnesses: para 198.

38. The Court's conclusion was set out in the following paragraph:

> "199. In conclusion, the Court sets the discount rate in the current case by starting with the Lord Chancellor's rate of 2.5%, deducting 0.5% for the difference between UK RPI and Guernsey RPI and deducting a further 1.05% to allow for the reduction in the return on ILGS. Then, rounding to the nearest 0.5%, the Jurats arrive at a figure of 1% as the discount rate to assume in the present case."

The Court of Appeal

39. The judgment of the Court was delivered by Sumption JA. He dealt first with the relevance of the Lord Chancellor's rate of return. He said that in his judgment the statutory rate of return fixed by the Lord Chancellor under the Damages Act 1996 was irrelevant in Guernsey. It was certainly not conclusive evidence, and was not even good evidence because of the dramatic decline since 2001 in yields on fixed interest securities issued by first class borrowers. He also rejected the appellant's argument that there was a practice of using a discount rate of 2.5% derived from the Lord Chancellor's determination regardless of its appropriateness in current economic and financial circumstances: paras 20-22.

40. Sumption JA then considered the Deputy-Bailiff's view that there had, as a matter of law, to be a suitable index of earnings before the discount factor could be adjusted to reflect the difference between price and earnings inflation. He said that this was wrong. It was a question of fact, and if an adjustment could be made which would serve to compensate the respondent more exactly for his losses there was no legal reason why it should not be made: para 32-33. The Deputy-Bailiff's direction was also wrong because it was based on a misunderstanding of the function of an index in the calculation of a lump sum. The lump sum was awarded on the footing that investment in ILGS would achieve an automatic adjustment for future increases in the general level of prices. The question then was whether it was possible to adjust the discount rate to reflect the fact that, on the evidence, the rate of price inflation in Guernsey was not the same as the rate of increase of the UK RPI and that the rate of earnings inflation in Guernsey was even further from the rate of increase of the UK RPI: paras 34-37. He also disagreed with the Jurats that an index was necessary as a matter of fact to enable these adjustments to be made: para 39.

41. Having considered the evidence, Sumption JA said that it seemed to him to constitute strong unchallenged evidence of both the existence of a gap between price and earnings inflation in Guernsey of the order of 2%, and the likelihood that over time it would persist: para 44. The question then was whether the Appeal Court could and should intervene to correct the position. He concluded that it should, for three reasons. First, the Jurats' view that a current index of earnings was the only acceptable kind of evidence was based on a conceptual error which seemed likely to have influenced their thinking. Second, their reasons depended on the uncertainty of future trends for the earnings of carers in Guernsey as opposed to average earnings. But evidence from the United Kingdom suggested that, while the rate of increase was different, it was greater and that any difference would be likely to increase rather than reduce the award. Third, as far as the Jurats intended to discard economic theory, they were overlooking the fact that any analysis of the expected future behaviour of prices and earnings was bound to depend on economic theory, and they had also disregarded evidence which was

powerful, consistent and unchallenged on issues on which their own experience was unlikely to be of much assistance: para 46.

42. As for the question whether there should be more than one rate, this seemed to him to be correct in principle in a case where there was a significant difference between the elements representing loss of earnings and care costs: para 48. The correct discount rate to apply was -1.5% for earnings related losses comprising the respondent's own loss of earnings and the cost of employing his carers. The correct rate for the non-earnings related elements of the future loss was 0.5%: para 49.

Discussion

43. Mr Schaff QC for the appellant said that economic theory was all very well, but that nobody could tell whether what was predicted will or will not occur in the future. However disciplined the exercise, it could not be safe to assume 2% growth over the next 40 years. As much mischief would be caused by going down that road as not. Over-compensation was as much anathema, and as invidious, as a failure to give full compensation. The evidence that was critical was that of Mr Bootle. He took issue with Mr Bootle's analysis of the difference between UK and Guernsey RPI and the very limited basis for his conclusion that 2% was the best working assumption for the excess of Guernsey average earnings growth over Guernsey inflation. There was simply not enough information for a figure that had such a dramatic impact on the result in this case.

44. Mr Daykin had relied on figures used for future planning by government, but they were drawn from a different context. Moreover he had not had access to the relevant information at first hand since his retirement in 2006. The Jurats were not bound to accept such evidence. The lack of an index which could take account of any difference in earnings inflation was a very significant point which they were entitled to take into account. The Court of Appeal's criticism of their view that it would be wrong to conclude that inflation in relation in wages paid to carers simply followed the general economic theory and data analysed by the respondent's experts was unfair because that was the very issue that they had to consider and it was a view that was open to them on the evidence.

45. Mr Schaff did not attempt to support the appellant's original case that the Royal Court should adopt the rate fixed under the statute by the Lord Chancellor. He concentrated on his objections to the approach that was endorsed by the Court of Appeal. As he pointed out, the problems that must be addressed in the computation of a lump sum award have been under discussion for many years. He referred to dicta in two decisions of the High Court of Australia. In *Pennant Hills*

Restaurants Pty Ltd v Barrell Insurances Pty Ltd [1981] HCA 3, (1981) 145 CLR 625, 639 Gibbs J said that is was unreasonable to suppose that an economist will be able to predict with accuracy the nature and extent of changes in the purchasing power of money during a period extending for several decades ahead and that, while predictions as to the economic future in thirty years time might perhaps be made by a soothsayer, expert evidence could not rationally be given on such a subject. In that case there was a difference of opinion as to the discount rate to be applied in assessing damages for future loss or expenditure. Three members of the High Court favoured a zero discount to allow for inflation, three favoured a discount rate of 2% and the then Chief Justice, Barwick CJ, favoured a rate of 5%.

46. Each of the solutions suggested in the *Pennant Hills* case was the product of careful thought and analysis in the face of the acute problem, which had been the subject of much discussion in the authorities including *Mallett v McMonagle* [1970] AC 166 and *Cookson v Knowles* [1979] AC 556, of trying to predict what was likely to happen in the future with any kind of accuracy. The High Court returned to the question whether an allowance should be made for inflation in *Todorovic v Waller* [1981] HCA 72, (1981) 150 CLR 402. Gibbs CJ reiterated his concerns about the nature of the exercise: pp 419-420. But, having recognised at pp 420-421 that there was much to be said for adhering to the settled doctrine which required the court to reject evidence of inflation, he concurred in the view of the majority that a rate of 3% should be applied in the future.

47. But finding a solution today is not so dependent on surmise and speculation as it was when the issue was being discussed in those cases three decades ago. As Lord Steyn said in *Wells v Wells* [1999] 1 AC 329, 384, the landscape has changed. The investment scene has been radically altered. The breakthrough came with the introduction of ILGS and the appreciation that there was at last a tool that could be used to provide protection against inflation. It is tailor-made for investors who want a safe investment for the long term. In practical terms it is risk free. As nearly as possible, it guarantees the availability of the money to meet costs as and when it is required. It may not be perfect, as buying and selling gilts in the short term may result in a gain or loss of capital. But it is the best tool that is available. The question that the present case raises is how to use that tool, given that some adjustments are needed to fit the particular situation in which the respondent finds himself.

48. The Jurats took as their starting point the rate which was determined by the Lord Chancellor and then sought to adjust it for factors that were specific to Guernsey and for changes in the net return on ILGS since 2001: para 192. The consequences of their doing so were set out in para 199: see para 37, above. After rounding up to the nearest 0.5%, they arrived at a discount rate of 1.0%. They were right to reject the appellant's argument that they should simply adopt the discount rate of 2.5% fixed by the Lord Chancellor. As the Deputy-Bailiff told

them, that rate had not as a matter of law been adopted by legislation or by custom or practice in Guernsey: para 186. And the Jurats noted that the Lord Chancellor had taken account of information from various sources which meant that he was not merely performing the same exercise as the House of Lords did in *Wells v Wells*: para 191. But, given all these points, should they have had any regard to it at all?

49. Sumption JA said in the Court of Appeal that the Lord Chancellor's rate was irrelevant in Guernsey: para 20. He also said that it had no current evidential basis: para 21. I would prefer to adopt the second alternative. The Jurats were well aware that they were not required by any Guernsey statute to apply the rate fixed by the Lord Chancellor. That rate might have had something to offer if the Lord Chancellor had adopted the same approach as the House of Lords did in *Wells v Wells*. As it is, the evidential value of his determination was wholly undermined not just by the passage of time but also by the fact that, as the Jurats themselves appreciated, the Lord Chancellor took account of things that played no part in the analysis in *Wells v Wells* at all. He had consulted widely and he took account of the experience of the Court of Protection and, as Mr Daykin said in his evidence, of the consequences for the Ministry of Defence and the National Health Service. It is true that the courts in England and Wales have not given any encouragement to the idea that they might be willing to take a fresh look at the issue. But that is because of the statutory context in which the determination was made.

50. The proper course, in all the circumstances, would have been for the Jurats to disregard the Lord Chancellor's rate altogether. The effect of doing this would have been to start with the current Guernsey net return in ILGS of 1.13%, reduce it by 0.5% for the higher rate of inflation to 0.63% and then round it down to 0.5%. The Court of Appeal said that this was what they should have done, and that 0.5% was the figure that they should have arrived at for the non-earnings related elements of the respondent's loss. I agree with that conclusion, although I confess that I have more sympathy with the Jurats' reasoning in the face of the very complex issues that were before them than the Appeal Court's discussion of this issue might suggest.

Earnings related losses

51. The most difficult issue relates to the earnings related elements, and in financial terms it is undoubtedly the most important. Various points arise under this heading. Is it acceptable in principle for there to be different discount rates for different heads of loss? Is it acceptable in principle to apply a discount rate which is not a discount rate at all, but an adjustment of the lump sum in the reverse direction? And were the Jurats entitled, on the evidence that was before them, to

hold that an adjustment to the discount rate was not open to them in the absence of a suitable index and that the evidence before them was of too general a character to be acceptable?

52. The answer to the first two questions is to be found in the premise that the victim of a tort is entitled to be fully compensated. If the evidence shows that inflation will affect different heads of loss in different ways and that the differential is capable of being evaluated, the court should not close its mind to using different rates. To do that would risk giving the victim less than he is entitled to. The possibility of modifying the effect of tying future payments to the retail prices index was recognised by section 2(9) of the Damages Act 1996, as amended by section 100(1) of the Courts Act 2003. It was endorsed by the Court of Appeal in *Flora v Wakom (Heathrow) Ltd* [2007] 1 WLR 482, on the ground that there was no indication in that section that Parliament intended to depart from the principle that a victim of a tort was entitled to be compensated as nearly as possible in full for all pecuniary losses: para 29, per Brooke LJ.

53. The working out of this approach in practice can be seen in *Thompstone v Tameside and Glossop Acute Services NHS Trust* [2008] 1 WLR 2207, and although the order that was made in *D's Parent and Guardian v Greater Glasgow Health Board* 2011 SLT 1137 gave effect to an agreed structured settlement it too demonstrates the strength of the argument that different rates should be used where this can be shown to be justified by the evidence. Over-elaboration in the carrying out of this exercise is to be avoided, and it may be that this is what the Deputy-Bailiff had in mind when he directed the Jurats that it was not open to them, as a matter of law, to adopt different discount rates for different types of loss. But, for the reasons I have already explained, the law is to the contrary. The decision of the House of Lords in *Wells v Wells* should not be seen as an indication that a single discount rate must always be adopted. It would be wrong to do that if the evidence shows that, if that were to be done, a given head of loss would not be fully compensated.

54. As for the question whether it is open to the court to apply a discount rate which is not a discount rate at all, the answer to this question too is to be found in the principle that the victim should, so far as it is possible to do so, be fully compensated. The effect of the adjustment that the respondent contends for is to increase, rather than reduce, the number of years used as the multiplier. At first sight this is counter-intuitive. It is an increase, not a reduction. But, as I suggested earlier (see para 14, above), the use of the word "discount" is not an apt way of describing the exercise. It is, in essence, simply a process of adjustment. And in principle there can be no objection to its operating in the reverse direction if the evidence shows that an adjustment which increases the multiplier is needed to ensure that the lump sum will continue to be large enough to meet losses to be incurred in the future. Otherwise the effects of accelerated receipt, which are

inevitable where the award is by means of a lump sum, will not be properly recognised.

55. The third question is the most troublesome. The problem is that the effects of the likely future gap between the growth of Guernsey average earnings and Guernsey inflation cannot be eliminated by linking the adjustment to yields from securities that are determined by the application of an index in the same way as ILGS. Nor it is possible, where the award has to take the form of a lump sum, to update the amounts awarded after a given period by applying indices that measure movements in costs such as ASHE 6115. The problem is not that the amount to be built into this part of the award cannot be protected against inflation. It can. But it cannot be protected to a sufficient degree to close the gap which the respondent's expert witnesses identified. The underlying premise requires that the victim be fully compensated. So the gap should be closed if this can be done without his being over-compensated which, as Mr Schaff was at pains to emphasise, is just as objectionable.

56. In the end of the day this must depend on the extent and quality of the evidence. The Jurats were not prepared to make the adjustment in the absence of a suitable index, and because they thought that it would be wrong to conclude that the extent of the gap could be identified by the general economic theory and general data that the respondent's experts had analysed. It was general, in the sense that it was not specific to the earnings of carers in Guernsey because, as Mr Bootle explained, of the very short runs of data available from Guernsey. But, as Lord Dyson says in para 113, the law has never demanded precision in the assessment of future loss. Use of the periodic payments system will go a long way to achieving this, which is why that system has so much to commend it. Here, however, it was the lump sum approach that was being adopted. This was bound to include matters which, by their very nature, could not be ascertained precisely. Mr Bootle's analysis was the best evidence that was available, and his conclusions and those of Mr Daykin were largely unchallenged except on the ground, as Mr Schaff submitted, that it was not enough in view of the dramatic effect their conclusions had on the result. Had Mr Daykin's evidence stood alone, I would have thought that there was some force in this objection. But, as Mr Schaff accepted, it was Mr Bootle's evidence that was critical and it was based on a thorough examination of information drawn from many countries over a long period. There was no contrary evidence.

57. I would hold that the Court of Appeal was right to intervene and to substitute for the Jurats' single figure of 1.0% overall a rate of 0.5% for the future losses that are not earnings related and a rate of -1.5% for the earnings related elements of the respondent's future losses, on the ground that these figures had been established by the evidence. While I would endorse the Court of Appeal's observations in paras 50-52 of its judgment as to how cases of this kind should be

handled in the future, I should also like to express the hope that legislation might be introduced in Guernsey to enable the court to order the payment of damages by means of periodical payments in line with the systems that are now available in the United Kingdom. I share Lord Clarke's admiration for the ability of the common law to develop new remedies. But it is one thing to approve a structured settlement which the parties have agreed to, as Lord Stewart did in *D's Parent and Guardian v Greater Glasgow Health Board* 2011 SLT 1137. To impose such a settlement on parties who were unwilling or unable to reach such an agreement is another. Like Lord Dyson, I think that a change of that nature is best left to the legislative process.

Conclusion

58. The advice which I would humbly give to Her Majesty is that the appeal should be dismissed. But, like the Court of Appeal, I would pay tribute to the quality of the judgment of the Royal Court. As Sumption JA said, it is a model of careful analysis and presentation. For the most part the conclusions that were reached by the Deputy-Bailiff and the Jurats were accepted by the parties. The issues before the Board were much the most difficult, and the way they dealt with them has proved to be of considerable assistance in the resolution of this appeal.

LADY HALE:

59. I agree that this appeal should be dismissed, for the reasons given by Lord Hope, to which what follows is only a footnote.

60. The only principle of law is that the claimant should receive full compensation for the loss which he has suffered as a result of the defendant's tort, not a penny more but not a penny less. Allied to this is the principle, which no-one in this case has sought to attack, that damages must be expressed as a lump sum, payable now. So how to arrive at a lump sum which will provide "full compensation" in the face of an uncertain future?

61. The principal issue in this case is whether, and if so how, a lump sum award of damages for future financial loss in a personal injury case can take account of future inflation. In the past, the rough and ready solution was that there was no need to do so. The assumed return on the capital sum awarded at today's values would more than cater for the future. Indeed, it would generate a profit, for which a discount had therefore to be made. That solution is clearly not good enough to provide full compensation these days.

62. The decision of the House of Lords in *Wells v Wells* [1999] 1 AC 345 showed that the rough and ready solution was not a principle of law, but merely a pragmatic response to the problems of prediction. Once a way could be found of catering for future price inflation in the award, by assuming that the lump sum would be invested in the purchase of Index Linked Government Securities, their Lordships were happy to adopt it. There is glancing reference in counsel's argument to the fact that wage inflation has historically outstripped price inflation, but that was not the point in the case. But if real incomes will rise over time, then catering only for retail price inflation will lead to under-compensation for those elements in the loss which relate to future earnings – whether of the claimant himself or of the people looking after him. There can be nothing wrong in principle in trying also to cater for the effect of future wage inflation.

63. The problem is how to do it. After all, as Mr Dingemans pointed out, our estimates of life expectancy, from which the multipliers are derived, are predictions of the future. So there is nothing wrong in incorporating predictions into the calculation. But actuaries have been predicting life expectancy for many years and have a sound statistical base, derived from population studies, from which to do so. Can it be said that predictions of future earnings are as reliable?

64. We have all lived through a period of almost continuous growth in real earnings. It is difficult for our generation to imagine anything else. But our parents lived through the 1930s, and indeed World War II, when life was very different. How confident can anyone be that economic growth will continue for the next 45 years, the expected life span of the claimant in this case? The recent turmoil in the markets and economies of the western world might suggest that predictions of future economic growth are rather less reliable than predictions of future life expectancy. A prolonged recession may be more likely than the return of the plague.

65. What was the evidence in this case? The evidence of the economist, Mr Bootle, was the most significant. His report was dated as long ago as October 2006. The earnings data from Guernsey were too limited for him to base his predictions upon them. He based his conclusions on two things: first, the general theory of economic growth; and second, the data collected over a substantial period from a substantial number of similar western economies. From these he concluded that the "best working assumption" was an average growth of earnings over prices in Guernsey over 15 years of 2% p a, although there would be considerable fluctuation from year to year. And he stood by that in his addendum report in May 2009 and in his oral evidence at the end of 2009. The intervening cataclysms had not caused him to alter his long term view.

66. Mr Daykin, the former Government actuary, had for many years up until 2006 advised the Guernsey Government of the assumptions they should make when costing certain pensions and social security schemes. He had consistently advised that they should assume a 2% per annum growth in real earnings. As an actuary, he may well have relied upon other expert advice to arrive at that view. But like any other independent professional adviser, he will have taken a view on the reliability of that prediction. His consistent advice to Government is therefore some support for Mr Bootle's opinion.

67. This is formidable evidence which the defendant was not in a position to contradict. It is not correct as a matter of law that there has to be a specific index measuring the relevant earnings in order to make this sort of prediction. The point in *Thompstone v Tameside and Glossop Acute Services NHS Trust* [2008] 1 WLR 2207, relied on in the Royal Court, was quite different. There, the court had power to make a periodical payments order to cater for the future costs of care. Such orders are automatically index-linked to the retail price index unless the court considers a different index more suitable. There is a more suitable index, the ASHE 6115 index of carers' earnings, and so that index could be chosen to provide the necessary index-linking. This tells us nothing about the evidence necessary to support a prediction of future growth in real earnings for the purpose of calculating a lump sum.

68. This business of predicting the future for the purpose of capitalising periodical payments is not new. In the Court of Appeal in *Wells v Wells* [1997] 1 WLR 652, at 686, Thorpe LJ commented that "There does not seem to be a distinction of fundamental principle between providing for the future needs of plaintiffs in personal injury litigation and applicants in proceedings under the Matrimonial Causes Act 1973 or the Inheritance (Provision for Family and Dependants) Act 1975". He commended the method of calculation devised and approved in 1984 in *Duxbury v Duxbury (Note)* [1992] Fam 62 as preferable to the conventional "multiplier/multiplicand" method used in personal injury cases. The *Duxbury* calculation is described thus in the Family Law Bar Association's annual publication *At A Glance* for 2011- 2012:

> "Duxbury calculators are based on an iterative computation, seeking the amount which if invested to achieve capital growth and income yield (both at assumed rates and after income tax on the yield and CGT on the realised gains) could theoretically be drawn down in equal inflation-proofed instalments over a period (usually, but not always, the estimated actuarial life expectancy of the recipient) but would be completely exhausted at the end of the period."

69. Thus it too is aiming to produce a capital sum which will be exhausted at the end of the assumed period of entitlement but will produce an index-linked income over that time. It has of course to make various assumptions. The three key financial predictions are currently an average income yield of 3% per annum, average capital growth of 3.75% per annum and average (price) inflation of 3% per annum, making a real rate of return of 3.75%. The authors acknowledge that "The past is an imperfect guide, indeed a very imperfect guide, but it is the least/most (un)reliable guide devised so far, and history tells us that average real returns of 3.75% p a are – over the long term – achievable even with a cautious investment strategy". In 2009, the Duxbury Working Party (consisting of forensic accountants, including Mr Tim Lawrence, the originator of the *Duxbury* calculator, a Government Actuary, a computer programmer and a leading family law practitioner, among others) reacted to the dramatic turndown in the economy by recommending a reduction in the assumed yield in the first year.

70. The *Duxbury* calculation was first devised when it was thought that the purpose of financial awards in matrimonial cases was to cater for the "reasonable requirements" of the dependent party. Now that the "sharing principle" has been adopted, the calculation is mainly used as a guide to capitalising an existing periodical payments order or to check whether the sum produced by the sharing principle will be enough to meet the applicant's needs. But the point is the same: how can we most accurately calculate a capital sum which will cater for the future needs of the recipient?

71. In *Wells v Wells*, Thorpe LJ made a powerful plea, echoing the evidence given by the Bar Council in response to the Law Commission's Consultation Paper No 125, that the assessment of damages for personal injuries in complex cases should also adopt the *Duxbury* method instead of the traditional multiplier/multiplicand method. My purpose in mentioning it is not to repeat that plea, for the assumptions underlying the *Duxbury* calculation are not uncontroversial in family law circles (see Phillpotts and Bruce, "An Alternative View of *Duxbury*" [2010] 40 *Family Law* 161 and Marks, "An alternative view of *Duxbury:* A Reply" [2010] 40 *Family Law* 614). There are probably more imponderables in a family law context than in a personal injuries context: will she marry another rich man? Will his business fail? What to do about retirement? My purpose is simply to point out that there is nothing wrong in principle in making assumptions about future inflation in order to calculate a capital sum which will compensate for future financial losses. Lawyers acting for both husbands and wives have been prepared to accept that *Duxbury* calculations are fair, and I do not think that that is simply the product of indolence.

72. However, *Duxbury* calculations do suffer from the uncertainties of prediction. Nothing will in fact turn out exactly as it is predicted to turn out, whether in family law or in personal injuries law. A far safer way of catering for

future financial losses is by way of a structured settlement involving capital payments for some needs and periodical payments for future needs, which can be adjusted year on year for inflation in accordance with the most suitable index available. For a while during the hearing of this case, I was attracted by the notion that it might be open to the common law of Guernsey to develop such a system for itself, especially now that the practical issues have been addressed in the Damages Act as amended in England and Wales, but that possibility was not explored in the argument before us. There is of course absolutely nothing to prevent the parties' agreeing such a settlement should they so wish and it is something of a mystery why this has not been explored in this case, which is the most serious ever encountered in the Bailiwick. Even after our decision, it might be of benefit to both sides to do so. In common with Lord Clarke, I would not rule out the possibility of developing the common law of Guernsey to allow the court to impose such a solution in a future case, although it is interesting that the possibility was not seriously considered by the Law Commission of which I was a member when Consultation Paper No 125 on "Structured Settlements and Interim and Provisional Damages" was published. I hope, of course, that there is never another case of such catastrophic injuries on the Island, but it might be prudent for the States of Guernsey (and the other Islands) to legislate for the possibility before the next case arises.

73. For these and the reasons given by Lord Hope, therefore, I would dismiss this appeal.

LORD BROWN:

74. I too agree that this appeal should be dismissed and, although really there is nothing that I can usefully add to the reasons given by Lord Hope, Lady Hale, Lord Clarke and Lord Dyson, I shall nevertheless succumb to the temptation of including this brief addendum.

75. The core considerations in the case are surely these. First, the great bulk of the claimant's recoverable damage consists of the cost of having to meet his future care needs (and, although this amounts to far less, his own future loss of earnings). Secondly, generally speaking, countries like Guernsey (and the United Kingdom) grow richer over the years. Certainly that has been the consistent long-term trend over many decades. Real earnings grow faster than the cost of living ie earnings inflation exceeds price inflation (RPI). Accordingly, thirdly, if this claimant is compensated for future loss only on the basis of projected RPI inflation, his award (intended to compensate him for his future losses over the period of his predicted further life span of forty years) will almost certainly prove inadequate to meet his long-term future care needs.

76. The real question in the appeal must therefore be this: which approach is preferable: one which ignores the established trend showing an increase in real earnings and so produces an award almost certainly less than will be sufficient to meet the claimant's likely future care costs, or one which uses the best available evidence to predict the future relationship between earnings and living costs and attempts, therefore, to arrive at an award which satisfies the claimant's undoubted entitlement to full compensation for his injuries?

77. The answer must therefore be obvious. Only if we were unwise enough to introduce into Guernsey compensation law a new principle to the effect that economic theory is just too imprecise a tool by which to seek to gauge likely future trends (and were therefore to bar, or simply ignore, evidence substantially based upon it) could the Jurats' approach in this case properly be upheld.

LORD CLARKE:

78. I agree that this appeal should be dismissed. I wish to add only a very few words of my own.

79. Much is common ground. There is no relevant statute or customary law in Guernsey. The issue between the parties has been treated as governed by the English common law, subject to appropriate adjustments on the facts to reflect the difference in conditions between Guernsey and England. The parties have proceeded on the basis that the common law position can be taken from the decision of the House of Lords in *Wells v Wells* [1999] 1 AC 345 and that at common law the relevant damages must be assessed as a lump sum.

80. There are no more recent cases which discuss the common law position for two reasons. The first is that in England and Wales the assessment of damages is no longer governed entirely by the common law. By section 1(1) of the Damages Act 1996 ("the 1996 Act") the court must to take into account such rate of return (if any) as may be prescribed by order of the Lord Chancellor. Before making such an order the Lord Chancellor is obliged by section 1(4) to consult the Government Actuary and the Treasury. As Lord Hope explains at para 19, in 2001 he set the discount rate at 2.5%. By section 1(2) the court is not prevented from taking a different rate from that set by the Lord Chancellor if any party shows that it is more appropriate in the case in question. In fact, in the cases referred to by Lord Hope the Court of Appeal has construed that subsection somewhat narrowly and shown a marked disinclination to fix a different rate. The result is that in practice the set rate has been taken.

81. The second reason is that by section 2(1) of the 1996 Act the court was given power, with the consent of the parties, to make an order under which the damages were wholly or partly to take the form of periodical payments. Subsequently, by section 100(1) of the Courts Act 2003, that section was substituted by a new section 2, which makes detailed provisions for such an order ("a PPO") even in the absence of consent. As a result, PPOs are now common. In paras 23 and 24 Lord Hope describes the way in which the courts have approached such orders in England and Wales.

82. The approach identified in one of the cases to which Lord Hope refers seems to me to be of particular significance. In *Sarwar v Ali* [2007] EWHC 1255 (QB) Lloyd Jones J accepted what he described (at para 143) as a consensus between the experts that the RPI is not an appropriate index for periodical payments in respect of future loss of earnings and that an appropriate index for periodical payments in respect of future loss of earnings should be applied instead of ILGS: see paras 144 to 152. He equally accepted that the same was true of the future cost of care and case management: see paras 153 to 158, cf paras 159 to 164. Thus he concluded at para 177 that an earnings based index or measure was likely to reflect future increases in the cost of care and case management with considerably greater accuracy than the RPI.

83. It was just such considerations that led the respondent to rely upon the expert evidence as to earnings inflation in the instant case. It was necessary to rely upon expert evidence because there was no relevant index and no investment such as ILGS which would reflect earnings inflation. It is common ground that ILGS only reflects price inflation. It followed that some further and different evidence was required in order to satisfy the underlying principle that the respondent was entitled, so far as possible, to be compensated in full. I can see no reason why expert evidence should not be relied upon in this regard, provided that it is sufficiently compelling.

84. I agree with Lord Hope, Lady Hale and Lord Dyson that the evidence was sufficiently compelling. For my part, I was impressed, not only by the evidence of the economist Mr Bootle, but also by the evidence of the actuary, Mr Daykin, who had considerable experience of the economic conditions in Guernsey, albeit some time earlier. I agree with the conclusion of Sumption JA, giving the sole judgment in the Court of Appeal, at para 44, that their evidence constituted strong, indeed unchallenged, evidence of both the existence of the gap between price and earnings inflation in Guernsey of the order of 2% and of the likelihood over the long term that it would persist. The appellant did not rely upon evidence of more recent economic conditions as new evidence upon which he was entitled to rely but rather upon such material as an indication of the unreliability of prediction. Of course all predictions involve the risk that they may turn out to be wrong but the witnesses were relying upon long term trends and, as the Court of Appeal

observed, their evidence was not contradicted by any evidence called on behalf of the appellant.

85. I agree that the conclusions of the Jurats on the facts were flawed because, as Sumption JA pointed out at para 46, they were not entitled to reject the evidence of the experts merely because they relied upon economic theory and because their view involved disregarding evidence that was powerful, consistent and unchallenged on which their own experience of Guernsey society was unlikely to be of much assistance.

86. Finally I would like to add three points about the future. First, I agree with other members of the Board that it would be desirable for legislation to be introduced expressly to authorise the making of PPOs in Guernsey. Secondly, the decision in this appeal does not mean that the figure of 2% will be set in stone. Although uniformity of approach is plainly desirable and frequent changes are equally undesirable, I agree with Sumption JA that, if there were convincing evidence to support substantially different figures, the relevant percentages in the future would indeed be different.

87. Thirdly, a consideration of the development of the approach to the measure of damages in this class of case vividly demonstrates the flexibility of the common law. Lord Hope has traced that development by reference to the approach of the House of Lords up to and including *Wells v Wells* [1999] 1 AC 345. Lord Dyson too has set out the history at paras 99 to 101. In particular, at para 13 Lord Hope sets out what he calls the conventional approach explained by Lord Oliver in *Hodgson v Trapp* [1989] AC 807 at 826 and at para 15 he describes the approach to inflation in *Mallett v McMonagle* [1970] AC 166 per Lord Diplock at 176, which was endorsed in *Cookson v Knowles* [1979] AC 556, at pp 571-572 per Lord Diplock and at pp 576-577 per Lord Fraser of Tullybelton. As Lord Hope points out at paras 17 to 18, that approach was discarded by the House of Lords in *Wells v Wells*. In particular the House abandoned the approach which had previously been adopted of taking a discount rate of 4.5-5% based upon what a plaintiff could be expected to earn on a lump sum if it were invested sensibly in a mixed basket of gilts and equities. That approach was abandoned in *Wells v Wells.* Indeed it was rejected as unsound: see eg per Lord Lloyd at p 371.

88. It was not suggested in the course of argument in *Wells v Wells* or in this case that it would be open to the courts to develop the correct approach to the assessment of damages in this class of case by permitting the making of a PPO in an appropriate case. However, it appears to me that, if perchance Guernsey should not legislate as suggested above, it might be open to the courts to permit such a step, by way of development of the common law. As Lady Hale puts it at para 60, the only principle of law is that the claimant should receive full compensation for

the loss which he has suffered as a result of the defendant's tort, not a penny more but not a penny less. She adds that, allied to that is the principle that damages must be expressed as a lump sum, payable now. That is indeed the approach which has been adopted to date, and, as she says, the question in this case (as in previous cases) has been accepted to be how to arrive at a lump sum which will provide "full compensation" in the face of an uncertain future.

89. It appears to me that in every case of this kind the true question is how, in all the circumstances of the case, to arrive at full compensation. In my opinion, if full compensation can be better achieved by a different approach, there is no reason in principle why the common law should not adopt it. It would simply be a different (and perhaps better) way of achieving the same end. It is surely a question of fact, and therefore evidence, what is the better way of doing so in the circumstances of a particular case. PPOs have been introduced for the very good reason that they are perceived to produce a more just result, at any rate in many cases. If that is so, the principle of full compensation would support the conclusion that a PPO should be made and not a lump sum award.

90. In *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 the House of Lords declined to permit an interim award of damages for these reasons given by Lord Scarman at p 183:

> "Lord Denning appeared, however, to think - or at least to hope - that there exists machinery in the Rules of the Supreme Court which may be adapted to enable an award of damages in a case such as this to be 'regarded as an interim award' [1979] QB 196, 220. It is an attractive, ingenious suggestion - but, in my judgment, unsound. For so radical a reform can be made neither by judges nor by modification of rules of court. It raises issues of social, economic and financial policy not amenable to judicial reform, which will almost certainly prove to be controversial and can be resolved by the legislature only after full consideration of factors which cannot be brought into clear focus, or be weighed and assessed, in the course of the forensic process. The judge—however wise, creative, and imaginative he may be - is 'cabin'd, cribb'd, confin'd, bound in' not, as was Macbeth, to his 'saucy doubts and fears', but by the evidence and arguments of the litigants. It is this limitation, inherent in the forensic process. It is this limitation, inherent in the forensic process, which sets bounds to the scope of judicial law reform."

91. Lord Dyson makes what is I think a very similar point in para 105, where he notes that periodical payments are obviously the most accurate (and therefore the fairest) way of taking inflation into account in the assessment of damages but he

adds that it would be a step too far to say that such an innovation should be made by the courts in the exercise of their inherent power to develop the common law. In my opinion that is to take too pessimistic a view. I agree with him that the introduction of such a power and the regulation of its exercise are better done through the legislative process (after proper consultation of interested parties) than, as he puts it, by court diktat.

92. However, historically the courts have been willing to develop new remedies to meet the requirements of justice in particular cases. Take, for example, the equitable remedies of rescission, rectification, lien and specific performance, all of which were judicial creations. More recently, freezing and search orders were introduced in order to deliver justice in circumstances where existing remedies would have been inadequate. As J H Baker says in *An Introduction to English Legal History*, 4th ed (2007), at p 204,

> "both … were new procedures devised by judicial discretion, without precedent, to make the regular law function more effectively … and they have both now been subsumed in procedural legislation."

93. To my mind there is no reason of principle that prevents the Guernsey courts from introducing PPOs at common law in an appropriate case. This would not herald a dramatic change in the law or involve the creation of a new species of remedy. It would simply involve the courts adapting an existing remedy, namely the award of damages by way of a lump sum, by making an award of damages by way of a PPO in an appropriate case. As Lord Dyson says, such an order is the most accurate (and therefore the fairest) way of taking inflation into account in the assessment of damages. It seems to me to follow, if that is so, that the principle of full compensation would be best met in many cases by the making of such an order.

94. For my part I would not regard that as any greater development of the common law than the change made by the House of Lords in *Wells v Wells.* This is not to say that legislation would not be better. But, as the Law Commission noted in para 3.1 of its 1992 Consultation Paper No 125 on "Structured Settlements and Interim and Provisional Damages", "structured settlements have developed in the United Kingdom without legislative assistance". Para 3.22 included this:

> "We believe that the availability of structured settlements as a remedy in personal injury cases in the United Kingdom should not now be seriously questioned. Though it has been said that their development has been somewhat 'in the shadow of the law', we

> believe that the advantages clearly outweigh any disadvantages, and that the availability of structuring is a useful option which can benefit plaintiffs, particularly given the high incidence of cases that are settled."

95. Thus, as I understand it, parties regularly reached structured settlements in cases of this kind before the passing of the 1996 Act. Such settlements provided an initial lump sum for past pain and suffering and costs already incurred and an annuity or series of annuities from a life insurance company for the future. The settlements were agreed without the benefit of detailed rules of court; so I do not regard the absence of such rules as an impediment. Moreover, given the introduction of PPOs in England, it does not seem to me that the absence of further consultation in Guernsey is a good reason for the courts to refuse to countenance such a development.

96. The above views are expressed without the benefit of argument and, would of course be open to revision in the light of submissions in a particular case. In the meantime they represent my current views, for what they may be worth. However that may be, I agree that the appeal should be dismissed for the reasons given by Lord Hope, Lady Hale and Lord Dyson.

LORD DYSON:

97. In November 1998, Mr Helmot sustained grave injuries in a road accident. He was 28 years of age at the time. As a result of his injuries, he will need constant care for the rest of his life. It was common ground that his life expectancy was reduced to 40.9 years. Negligence was admitted. On any view, Mr Helmot is entitled to a substantial award of damages, the principal elements of which are in respect of (i) future loss of earnings and (ii) the cost of his care (the largest part of which comprises the cost of his carers). I shall refer to these compendiously as "the earnings related losses". On 14 January 2010, the Royal Court made a lump sum award of approximately £9.33m by applying a single discount rate of 1%. On 14 September 2010, the Court of Appeal increased the award by approximately £4.5m. They set aside the 1% discount rate and substituted a rate of -1.5% for the earnings related losses and a rate of 0.5% for the other losses.

98. I consider that the appeal should be dismissed for the reasons given by Lord Hope. I do not wish to add anything to what he has said in relation to the 0.5% rate issue. But in view of the difficulty of the issues relating to the earnings related losses and in deference to the quality of the submissions of Mr Schaff QC (which,

ultimately, I have not felt able to accept), I wish to add some words of my own on this aspect of the appeal.

99. The full compensation principle has been asserted many times and is not in doubt. But its application to claims for future losses has given rise to much difficulty. Before the advent of Index-Linked Government Securities ("ILGS") and the ground-breaking decision in *Wells v Wells* [1999] 1 AC 345, the effect of future inflation was for practical purposes ignored. It was assumed that a lump sum award of damages would be prudently invested and that the return from such investment would take care of the effects of inflation. On that footing, a discount rate of 4 to 5% was generally adopted. In this way, inflation was taken care of in a "rough and ready way": see, for example, per Lord Diplock in *Cookson v Knowles* [1979] AC 556 at p 571H. The position was summarised by Lord Scarman in *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 at p 193D as follows:

> "The law appears to me to be now settled that only in exceptional cases, where justice can be shown to require it, will the risk of future inflation be brought into account in the assessment of damages for future loss…..It is perhaps incorrect to call this rule a rule of law. It is better described as a sensible rule of practice, a matter of common sense. Lump sum compensation cannot be a perfect compensation for the future. An attempt to build into it a protection against future inflation is seeking after a perfection which is beyond the inherent limitations of the system. While there is wisdom in Lord Reid's comment (*Taylor v O'Connor*, at p 130) that it would be unrealistic to refuse to take inflation into account at all, the better course in the great majority of cases is to disregard it. And this for several reasons. First, it is pure speculation whether inflation will continue at present, or higher, rates, or even disappear. The only sure comment one can make upon any inflation prediction is that it is as likely to be falsified as to be borne out by the event. Secondly, as Lord Pearson said in *Taylor v O'Connor*, at p 143, inflation is best left to be dealt with by investment policy…."

100. It was well understood that accurate quantification was impossible. The courts were unwilling to admit expert evidence as to future costs based on attempts to predict the economic or social future of the nation. The objections to such evidence were stated, for example, by Lord Oliver in *Hodgson v Trapp* [1989] AC 807, 833C where he drew attention to the "inherently unscientific" nature of the exercise, saying memorably that "to assess the probabilities of future political, economic and fiscal policies requires not the services of an actuary or an accountant but those of a prophet." No doubt, he would have excluded economists as well.

101. As Lord Hope has said, this problem has also been considered by the High Court of Australia. In *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625, Gibbs J said at p 639 that, generally speaking, the courts should adhere to the rule that no allowance should be made for inflation in assessing damages in personal injury cases. He gave two reasons. First, it was unreasonable to suppose that any economist will be able to predict with accuracy the nature and extent of changes in the purchasing power of money during a period extending for several decades ahead: "[P]redictions as to the economic future in thirty years time may perhaps be made by a soothsayer but expert evidence cannot rationally be given on such a subject". Secondly, testimony as to the rate of inflation at times many years in the future would prolong trials and render more difficult the assessment of damages without providing any real assistance to the court. The same reasoning was adopted by Stephen J. At p 656, he identified as "serious defects" the reliance, "case by case, upon expert evidence regarding an inherently uncertain fact, the economic future. This has given rise to the familiar and substantial objection not only to the speculative nature of such evidence but also to the added complexities which the introduction of such evidence will bring to trials". At pp 656-657, he referred to the formidable task of predicting an average rate of inflation for the relevant period in the future and made the point that the failure correctly to predict the distribution of swings in inflation over a long period (in that case 30 years) could lead to gross error in the amount awarded. Similar reasoning was expressed by the High Court of Australia in *Todorovic v Waller* (1981) 150 CLR 402.

102. This rough and ready way of dealing with the problem of inflation (ie ignoring it) was a pragmatic solution to a difficult problem. It was believed to be the best that could be devised. It was thought to work reasonably well in times of stable currency and it had the advantage of certainty. In the United Kingdom, the arrival of ILGS and the ability to assess damages on the basis of a discount rate determined by reference to the return on ILGS enabled the courts to deal with future inflation in a more precise way. The House of Lords in *Wells* determined a net discount rate of 3% (to reflect the incidence of taxation) which was based on a gross return of 3.5%. But even with the advent of ILGS, the House recognised that precision was impossible. As Lord Lloyd said at p 373C, investment in ILGS was "the most accurate" way of calculating the present value of the loss which plaintiffs will actually suffer in real terms. He added at p 373G that it was desirable to have a single rate applying across the board "in order to facilitate settlements and to save the expense of expert evidence at the trial." Lord Steyn (p 388D-F) said that it was essential that there should be a "firm and workable principle" to enable settlement negotiations and litigation to be conducted with the benefit of a reasonable degree of predictability. He acknowledged that there was an element of "arbitrariness" in any figure, but was content to adopt 3% as the best present net figure. It should not be regarded as immutable, but only a "marked change in economic circumstances" should entitle a party to reopen the debate in advance of a decision by the Lord Chancellor to prescribe a rate under the

Damages Act 1996 ("the 1996 Act"). The effect of the decision should be to eliminate the need in future to call experts in such cases. Lord Hutton too said at p 404H that the net rate of 3% should be applied until the Lord Chancellor prescribed a different rate pursuant to his power under 1996 Act "or unless there is a very considerable change in economic circumstances".

103. The inflation-proofing of ILGS was based on movements in the retail price index ("RPI"). It was well understood in *Wells* that "it may be true" that nursing costs had, historically, risen faster than RPI (p 367H). That was not, however, a point taken by the plaintiffs and its significance was not the subject of discussion in the speeches. But it lies at the heart of the present case.

104. In the United Kingdom, there have been important statutory developments since *Wells.* First, the Lord Chancellor fixed the rate of return at 2.5% in 2001 (for England and Wales) pursuant to his power under the 1996 Act. Secondly, section 2(1) of the 1996 Act (as amended by section 100(1) of the Courts Act 2003) gave power to the courts in England and Wales to award damages by way of periodical payments.

105. But the Lord Chancellor's rate does not apply in Guernsey and there is no statutory power to order periodical payments in Guernsey either. The assessment of damages for future losses is determined in Guernsey by the application of common law principles. It has not been submitted that there is power at common law to make orders for periodical payments. In my view, periodical payments are obviously the most accurate (and therefore the fairest) way of taking future inflation into account in the assessment of damages. But I think that it would be a step too far to say that such an innovation should be made by the courts in the exercise of its inherent power to develop the common law. The introduction of the power to make orders for periodical payments in England and Wales without the consent of the parties was accompanied by detailed procedural rules (CPR 41.4 to 41.10 and PD41B). These govern the way in which the court should exercise its discretion to make such orders. The introduction of such a power and the regulation of its exercise are better done through the legislative process (after proper consultation of interested parties) than by court diktat.

106. It is important not to lose sight of the fundamental principle that a claimant is entitled to full compensation and that the duty on the court is to do its best, using all tools that are available to it, to achieve that end. Before the advent of the ILGS, the courts were unwilling to take account of expert evidence about future economic trends because (i) it was too uncertain, (ii) it would be likely to involve the use of contentious expert evidence which itself was undesirable, and (iii) inflation was sufficiently taken care of by assuming that lump sums would be prudently invested. The arrival of ILGS gave the courts a better and more precise

way of taking inflation into account and the result was *Wells.* But as I have said, the solution propounded in *Wells* was not set in stone pending a decision by the Lord Chancellor. It would require a "marked change in economic circumstances" before the debate could be reopened. The only way in which such a change in circumstances could be proved to a court would be by expert evidence, almost certainly from an economist. In other words, the House of Lords recognised that it might be possible to persuade a court that the principle of full compensation would be better satisfied by adopting a different discount rate from that adopted in *Wells.*

107. That is precisely what was sought to be done in the present case. The claimants attempted to persuade the court that there has been a marked change in economic circumstances and that, if the calculation of the earnings related losses was based on a discount rate derived from the return on ILGS, substantial under-compensation would result. To that end, expert evidence was adduced on behalf of Mr Helmot. It seems that no objection was taken to the admission of this evidence. Indeed, the defendant instructed an accountant, an actuary and an economist, but only called the accountant (Mr Gregory). The crucial evidence was that given by two witnesses, Mr Bootle and Mr Daykin. It was not challenged. Lord Hope has already referred to some of it at paras 31 to 35 above. It led the Court of Appeal to assess it as "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" (para 44 of the judgment of Sumption JA).

108. In his oral evidence, Mr Bootle explained that the common experience of Western economies supports a gap between price and earnings inflation of between 1% and 3%. The stronger the growth of an economy, the greater the gap. In times of economic stagnation, there should be no gap at all; and in times of prolonged economic crisis, the gap can be negative. Indeed, material was placed before the Board which shows that in the year to November 2011, RPI inflation in the UK was 5.2%, whereas pay inflation was only 2%. Mr Bootle said (p 671 of the record) that his figure of 2% over a period in excess of 15 years for Guernsey was based on "the broad base of calculations of international evidence, very well based, very well founded, confirmed over a long period of time and 2% is my best guess as a reasonable forecast figure". And a little later (p 678) he said that there was so much evidence from so many countries for such a long period of time that "robust" statements could be made about the gap. It was "highly unlikely" that a country like Guernsey would experience no gap at all between average earnings' growth and inflation. There was a lot of data and 2% was a "reasonable" number.

109. In addition to the opinion of Mr Bootle, there was also the important evidence of Mr Daykin that in his reports to the Guernsey Social Security Department over a number of years he considered that an appropriate assumption

for real earnings growth in Guernsey was 2% per annum and he still believed this to be an appropriate assumption.

110. I agree that, for the reasons given by Sumption JA and Lord Hope, the Deputy-Bailiff was wrong to direct the Jurats that, as a matter of law, there could be no basis for adopting different discount rates for different types of loss in the absence of indices measuring the respective rates of inflation. But the Jurats were also asked by the Deputy-Bailiff whether, if that direction was wrong in law, they would have adjusted the rate to take account of any difference in earnings inflation if they were directed to do so. They said that they would not do so in the absence of a suitable index because "it would be 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" (para 198). They gave no further elaboration.

111. Sumption JA gave three reasons for rejecting this finding. First, the erroneous expressed view of the Jurats that a current index of earnings was the only acceptable kind of evidence "seems likely to have influenced their whole approach to the facts". I see no basis for holding that the Jurats did not conscientiously decide the issue on the alternative hypothesis as they had been directed to do. Secondly, the Jurats' reasons "overtly depended on the uncertainty of future trends for the earnings of carers in Guernsey, as opposed to average earnings". I accept that this is a possible reading of the Jurats' reasoning, since they expressly referred to earnings in Guernsey. But I am inclined to think that this is not a sufficient reason for concluding that they did not have regard to the entirety of the expert evidence and in particular the evidence of Mr Bootle about the gap between average growth in earnings and price inflation in western economies (of which Guernsey was one). The reference to Guernsey earnings is readily explicable by the fact that this was a Guernsey case. In other words, the Jurats were simply saying that they were unwilling to accept the expert evidence because it was based on general economic theory and general data.

112. The third reason given by Sumption JA was that:

> "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."

113. In my view, the second part of this criticism of the Jurats' reasoning is justified. The crucial question is whether they were entitled to disregard the evidence of Mr Bootle and Mr Daykin which, as Sumption JA said, was "powerful, consistent and unchallenged". In my view, the only basis for doing so would have been that it was speculative and inherently uncertain and that, for the reasons mentioned in the authorities to some of which I have referred at paras 99 to 101 above, the Jurats were entitled to disregard it. But that is not how the Jurats put it. They said that they disregarded the evidence because it followed *general* economic theory and *general* data. This suggests that they were of the view that, unless the expert evidence was *specific* and *precise*, they would not accept it. But the law has never demanded precision in the assessment of future loss. By its very nature, it cannot be an exact science. The court must do its best on the available evidence. If the evidence is pure speculation and without any foundation in fact, the court will reject it. But if evidence as to likely future economic trends is firmly based on convincing historical data, the court may be able to make findings as to the future in which it has confidence to the appropriate standard of proof. In relation to evidence that is based on an assessment of future economic trends, the court will be especially cautious for all the reasons that have been expressed in previous authorities. But there is no reason in principle why such evidence cannot be accepted. Suppose that each year during the past 20 years, earnings have risen between 2% and 3% faster than prices and that the court is asked to assess future care costs of someone with a short life expectancy. There can be no justification for holding that, on these admittedly bare and rather crude facts, damages should be assessed using a discount rate based on RPI inflation. Such an assessment would be bound to lead to under-compensation. Ultimately, however, it is a question of assessing the quality of the evidence in any particular case.

114. Mr Bootle was firm in his evidence, which was based on a great deal of material, that over a long period it was reasonable to assume that there would be an average gap of 2% between growth in earnings and price inflation. If this evidence was accepted, it would demonstrate that a discount rate based on the ILGS would lead to a massive under-compensation of Mr Helmot's claim for earnings related losses. The unchallenged evidence of Mr Bootle and Mr Daykin was so strong that there could be no basis for rejecting it unless such evidence could never be accepted in any case, whatever the circumstances. But as I have said, the authorities have never gone that far and such an extreme position cannot be justified in principle. It is certainly not compelled by any rule of law.

115. The fact that earnings have tended to increase significantly faster than prices (as measured by the RPI) has been recognised in English case law on periodical payments. In *Sarwar v Ali* [2007] EWHC 1255 (QB), Lloyd-Jones J made a periodical payments order under the 1996 Act in respect of future care costs indexed by reference to an index drawn from data specific to carers' earnings, namely ASHE 6115, rather than by reference to RPI. He accepted that

RPI was an inappropriate basis for indexation of future care costs. It was common ground between the four experts instructed in that case that, historically, average earnings had increased at a faster rate than prices (para 160). The average rates of increase over periods of 20 and 40 years were variously put at between 1.5% and 2%. This evidence is consistent with that of Mr Bootle and Mr Daykin.

116. In my judgment, there was no good reason to disregard the undisputed expert evidence in this case. Since there was no challenge to the figure of 2%, it seems to me that the Jurats had no real alternative but to accept it. No other figure was suggested.

117. I should refer to two other points made by Mr Schaff. First, he submits that it is wrong in principle to apply more than a single discount rate in assessing damages for future losses: the court should adopt the simple approach prescribed in *Wells.* He submits that different discount rates for different heads of loss can only be justified on the basis of expert evidence and such evidence should not be admitted for the policy reasons to which I have already referred. He also asks rhetorically: why as a matter of principle should the exercise be limited to two discount rates if impressive cohorts of experts can demonstrate that different heads of loss (eg housing costs, transport costs and fuel costs) may all be subject to inflation at different rates? I regard this *in terrorem* argument as fanciful. In view of the cautious approach that the courts have consistently taken to the admission of expert evidence in this area of the law, it is unrealistic to suppose that arguments of this kind would be accepted. The Court of Appeal was (rightly) alive to the dangers of opening the floodgates to expert evidence and all the uncertainty that this would engender. I agree with what Sumption JA said at paras 51 and 52 of his judgment.

118. Secondly, Mr Schaff submits that there is no precedent for assessing damages on the basis of a minus discount rate and that the concept of a minus discount is counter-intuitive. On this issue, I agree with what Lord Hope says at para 14. The principle that the lump sum should be adjusted so as to reflect the predicted rate of inflation is clearly correct. Until recently, the rate of return on ILGS has exceeded inflation, so that a discount has been required for the accelerated receipt of the money. But if inflation outpaces the rate of return, then the lump sum needs to be increased to reflect that fact. That is done by increasing the number of years used as the multiplier. The term “negative discount” may be somewhat odd, but the concept is logical and it reflects a correct principle.

119. For these reasons, as well as those given by Lord Hope, I would advise Her Majesty that the appeal should be dismissed.