HEALTHCARE
LITIGATION AND DISPUTE RESOLUTION

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Group Briefing
December 2015

The Russell Decision: the "Real Rate of Return" case

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The Court of Appeal recently upheld the decision of the High Court in *Gill Russell (a minor) v HSE*, to reduce the real rate of return from the traditional 3% (the "*Reddy v Bates deduction*") to a rate of return of between 1% and 1.5%.

The real rate of return is the annual percentage return realised on an investment, which is adjusted for changes in prices due to inflation or other external effects. The lower the rate of return applied to a lump sum award, the higher the award will be.

This important decision means that lump sum awards in favour of persons with catastrophic or long-term injuries will be significantly higher in the future.

THE GILL RUSSELL CASE

Gill Russell, a minor, suffered catastrophic injuries at birth and requires 24-hour medical care for the rest of his life.

In assessing the level of damages, the Court of Appeal agreed with Mr Justice Cross in the High Court that the real rate of return should be set on the assumption that Mr Russell is entitled to invest his award in as risk free an investment strategy as is available. The Court also agreed with Mr Justice Cross that Mr Russell should not be treated as an investor who has income and surplus money to invest. The Court noted that Mr Russell has, and never will have, any other income. It also noted that he is entirely dependent on the lump sum award, and the interest he can earn from investing it, to meet his medical needs and that he cannot afford to lose any part of the award.

The Court acknowledged that plaintiffs are "*entitled to take their award to Las Vegas or place it on a horse in the Grand National in the hope that they may enhance it*". However, it said that it is not the function of the Court to enquire into a plaintiff's intentions with regard to the award. If the Court did this, the amount of compensation payable to two plaintiffs with the exact same claim, "*one wise and one foolhardy*", might be different.

WHAT DISCOUNT RATE NOW APPLIES?

The Court set the real rate for calculating Mr Russell's claims for future pecuniary loss (i.e. aids and appliances etc.) at 1.5%, and the real rate to be applied to his claim for future care (i.e. nursing and other wage-related care) at 1%. The difference in the two rates was due to concerns regarding wage inflation.

The Court concluded that the reduction of the rate was necessary to enable Mr Russell meet his future needs without him having to take unnecessary risks to achieve that end. To expect and indeed oblige him to take such risks would, in the Court's view, be both unjust and unacceptable.

IMPACT OF DECISION

It is difficult to imagine how the "prudent investor" profile could not be extended to all plaintiffs and therefore the impact of the Russell decision may well be felt beyond catastrophic injury medical negligence cases. In this regard, the comments of the Court of Appeal in relation to a future loss of earnings claim are interesting. It did not accept the comments of Mr Justice Cross that a plaintiff with a claim for future loss of earnings might be treated as less risk averse than a plaintiff with a claim for future care. The Court stated that while there may be a "*rare case*" where a particular plaintiff does not need their earnings to survive on a day to day basis, most plaintiffs will not fall into this category. The implication of this is that the rate of return applicable to future loss of earnings may be 1.5%.

POTENTIAL REFORMS

The decision in this case lends further weight to calls on the Government to introduce periodic payment awards (PPOs). Ms Justice Irvine in her judgment in the Court of Appeal specifically referred to the "*frailty and injustice of the lump sum system of compensation*". The introduction of PPOs would obviate the need for judges to speculate on the investment risks which injured persons are willing to assume. Read our article on PPOs here.

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