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Indexation Ruling from the Court of Appeal - *Thompstone*

The Court of Appeal handed down its Judgment on 17th January 2008 in the four appeals of *Thompstone, De Haas, Corbett and RH*. The appeals related to the index or measure that should be applied to calculate the annual increase in the Respondent Claimants' periodical payments. The Court rejected the Appellants' arguments and gave a robust and unanimous affirmation of the Respondent Claimants' previous triumphs.

The Respondent Claimants in the four appeals suffer from severe cerebral palsy as a result of negligence at or around the time of their birth. All four claimants have very high lifelong care requirements. The issue in question was whether periodical payments should be varied by reference to the RPI in accordance with Section 2(8) of the Damages Act 1996 (as amended), or whether that sub-section should be modified, pursuant to Section 2(9) of the Act, which allows the Court to *disapply* or modify the effect of section 2(8).

The Appellants argued the following:-

(a) using an earnings related measure would lead to differences in compensation between the lump sum system and periodical payments;

(b) ASHE 6115 was not an appropriate measure and lacked proximity to the claimants' carers earnings;

(c) that the only form of modification permitted by s2(9) of the 1996 Act is modification of the RPI itself; and

(d) the principle of *"Distributive Justice"* should be applied, as account should be taken of the significant costs of an earnings related measure to the NHS.

The Court of Appeal dismissed all four appeals on all issues and upheld the trial judges' decisions. The Court also made it clear that ASHE 6115 is an appropriate measure:

> *We hope that as a result of these proceedings the National Health Service, and other defendants in proceedings that involve catastrophic injury, will now accept that the appropriateness of indexation on the basis of ASHE 6115 has been established after an exhaustive review of all the possible objections to its use, both in itself and as applied to the recovery of costs of care and case management.*
> *It will not be appropriate to reopen that issue in any further proceedings unless the defendant can produce evidence and arguments significantly different from, and more persuasive than, that which has been deployed in the present cases. Judges should not hesitate to strike out any defences that do not meet that requirement.*

(cont.)

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The Court of Appeal grasped the opportunity to consider the correct approach to the exercise of this power to impose periodical payments against the wishes of the parties.

The two facets of S.2(1) namely allocation of future losses between lump sum and periodical payments and how to index any periodical payment are inextricably linked and should be considered together. The Court provided guidance on how CPR 41.7 should be complied with, confirming a wide interpretation of a Claimant's needs, not restricted to those claimed. Claimants' needs do not have to be *'foreseeable necessities'.*

The Court recognised that in a substantial case the Claimant is likely to instruct and call an Independent Financial Adviser (IFA). If the Claimant is advised by an *experienced and responsible expert it is likely that great weight will be given to what that expert advises*. It will also be a rare case where the Defendant would need to call an expert to demonstrate that the form of order preferred by the Claimant will not best meet their needs. Both parties preferences should be given equal weight by a Judge but any decision should be based upon an objective assessment of what the Claimant needs and not what they or the Defendant wants.

The Future....

Following this ruling it is clear that a well thought out financial package provided by a suitably qualified expert is likely to be approved. The amount of future losses to be allocated to lump sum or periodical payments (allocation) and which index or measure is appropriate for calculation of the uplift in the periodical payments (indexation) need to be considered in unison.

Defendants need to assume that the courts will use ASHE 6115 as the measure to calculate annual increases of any periodical payment involving a significant future care claim.

The annuity market, based on current regulations, does not and is unlikely ever to cater for annuities linked in payment to ASHE 6115. Those defendants deemed 'reasonably secure' for self-funding purposes will need to make appropriate arrangements for funding ASHE 6115 linked periodical payments.

We hope you find this a useful summary; a more detailed analysis will be provided in our Spring 2008 newsletter.

If you wish to receive an electronic version of the full Court of Appeal judgment, please email your request to jenny.stone@nestorpartnership.co.uk.

Expert Independent Financial Advice in high value cases such as these is inherently complex. For an experienced, impartial view, whether acting for claimant or defendant, please telephone any one of the following Partners on 0161 763 4800 for a no-obligation discussion:-

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