THE BAR OF IRELAND

The Law Library

Submission by the Council of The Bar of Ireland to the Department of Justice & Equality on Setting the Discount Rate in Personal Injury Cases

5 August 2020

Contents

Introduction

The Council of The Bar of Ireland (**"the Council"**) is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,170 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

Scope of Submission

The Department of Justice and Equality (the "Department") is consulting with the public in relation to the issue of the personal injury discount rate, also known as the real rate of return, and how it should be set. This rate is used by the courts in cases involving catastrophic personal injuries to determine the size of an award necessary to compensate a person for damages for future loss.

In engaging in a public consultation on the issue, the Department's intention is not to change the fundamental principle that a claimant should be fully compensated but to ask a series of questions about what if anything needs to be done in order to update the current system of setting the discount rate. The series of questions are set out under Section 2 of the Consultation Document under the following headings:

- 2.1 General Questions
- 2.2 Legislative Questions
- 2.3 Periodic Payment Orders Questions
- 2.4 Recent UK Developments Relevancy to Irish Market Questions

The Council has limited itself to those areas of the consultation with which its members have experience, knowledge and expertise, namely sections 2.1 – 2.3.

In considering its response to the consultation questions, the Council is guided by the fundamental guiding principle recently restated by a senior member of the judiciary in the following terms:

> "It is … of vital importance to state, in no uncertain terms, that it is mandatory for the court to approach its calculation of future pecuniary loss on a 100% basis regardless of the economic consequences that the resultant award may have on the defendant, on the insurance industry or on the public finances. It is acknowledged that it is equally important that the sum awarded does not overcompensate the plaintiff and that the defendant is given every opportunity to contest each integral component of the final award. Public policy has no part to play in the assessment of damages of this nature. If large awards in respect of claims of this nature have an adverse effect on insurance premiums or place pressure on the pockets of State defendants, that is not something that the court can take into account and, as a result, in some way moderate or reduce its award. The damages so awarded are, after all, destined to do no more than restore a plaintiff in financial terms to as close a position as they would have enjoyed in terms of wealth and independence had they not been the unwitting victim of the defendant's wrongdoing."
>
> ***Russell (a minor) v. Health Service Executive***
>
> **Court of Appeal [2016] 3 IR 427** at para 66, p479 (per Irvine J, as she then was)

2.1 General Questions

1. ***In determining the discount rate, should it be left to the Judiciary to decide on the appropriate rate on a case by case basis, or should the existing section 24 of the Civil Liability and Courts Act 2004 be amended by introducing principles and policies to allow the Minister for Justice and Equality to determine the rate and review at intervals thereafter? Please provide an explanation for your preference.***

There is no particular reason why the option is binary as between the judiciary and a Minister. There are a number of reasons why, in the Council's view, the determination of discount rates should not be the sole function of the judiciary:

(a) For a judiciary to determine it, the issue must be litigated. Litigation challenging the discount rate requires significant additional cost than might otherwise ordinarily be incurred. That requires a Plaintiff (who in many cases will be without means) to finance an exercise in terms of briefing engaging expert witnesses and lawyers. This is not in the interests of justice. It would necessarily mean that certain Plaintiffs should litigate when a particular rate is objectively inappropriate but lack the means to prove that case in Court.

(b) If the judiciary determine it on a case by case basis, then insofar as underlying economic circumstances shift, it may be the case that the discount rate is changed incredibly often and thus, many Plaintiffs will be forced into trial planning at huge expense. This will create considerable uncertainty. Already in practice if it becomes apparent that the discount rate may be challenged in any given case, it has a chilling effect on other settlements and proceedings.

There are many disadvantages to permitting the Minister to determine the rate:-

(a) Experience has shown (see e.g. the delay in introduction of the Civil Liability (Amendment) Act 2017) that matters subject to political processes may take time. This may be particularly the case where a government changes and there may be (as experience shows) considerable time until a new government forms. In the interim, a Plaintiff may be forced *not* to proceed with a trial for compensation that is needed because a relevant change is anticipated to the discount rate but held up in the political process.

(b) The discount rate is, itself, based on legal principle and economic reality. Respectfully, a reasonable view could be taken that this not something which should in any way become politicised.

(c) Further, poor legislative outcomes from the political process necessarily encourage challenge. For example, if one has regard to the indexation provisions applying to PPOs under the Civil Liability (Amendment) Act 2017 (the **"2017 Act"**), its deficiencies have been a reason cited by the High Court in opting *not* to apply it (*Hegarty v HSE* [2019] IEHC 788 **("*Hegarty*")**)

Such deficiencies include:

(i) the application of an improvident indexation to the annual amount stipulated in PPOs such as to undermine the entire purpose of the PPO regime with the result that it has been described, in *Hegarty*, as a '*dead letter*';

(ii) the restriction of the power to review the adequacy of the index to the Executive and;

(iii) the requirement that the Minister, in carrying out that review, takes into consideration matters that have nothing to do with *restitutio in integrum* or the legitimate purpose of any compensation regime.

The result is to leave catastrophically injured claimants with only one option, namely a lump sum. Should the power to set the discount rate also be restricted to the Executive, this consolidates too much power in the Executive. It also consolidates this power in a manner that could well lead to a departure from the principles the courts have established and applied in setting the discount rate, to date. The Minister for Justice, Equality and Law Reform and the Minister for Finance may have policy and fiscal considerations that could lead to conflict with the clearly mandated purpose and function of compensation.

Put simply, the litigation process, whilst guaranteeing the application of proper principles, is costly; the political process may be wholly inappropriate and inimical to the vindication of litigants' rights.

Therefore, the Council recommends that consideration be given to establishing an independent body with responsibility for setting the discount rate by applying the principles already established by the courts. The objectives are to provide claimants full recovery for probable future financial loss including loss of earnings, cost of aids and appliances and the cost of future care and not any fiscal

and policy considerations as were deprecated in *Russell (a minor) -v- the Health Service Executive* [2016] 3 IR 27 and in *Hegarty.*

The best option would appear to be a statutory body, independent of the Executive, charged with the quasi-judicial task of setting the discount rate on a periodic basis, applying the principles long established by the courts and assisted by a panel of experts. There are many examples of comparable powers in Irish public life given to various regulators. The agency proposed, here, would have greater independence from the Executive than that of the office of the Lord Chancellor in the United Kingdom.

A further option would be for a sub-committee of the Judicial Council to be given the statutory power to set a discount rate, with access to the assistance of experts as discussed below in the context of an independent statutory body.

2. ***If you favour updating existing legislation, and introducing principles and policies, can you please provide a view on what you think the investment strategy underpinning the discount rate should be? Options include:***

    (i) Maintaining the existing risk averse approach as set out in the Gill Russell v HSE case (low risk investments), or;

    (ii) Adopting the approach recently introduced in the UK of determining the rate by reference to expected rates of return on low risk diversified portfolio of investments.

Unless the law is changed, the applicable legal principle is that established by the Court of Appeal in *Russell* which is, in summary, that the investment approach should meet the Plaintiff's particular needs. A prudent investor investing monies for the life-time benefit of a catastrophically injured child who depends on the income for the care which, to be blunt, keeps him or her alive, will not adopt a strategy that a different Plaintiff may adopt.

It is difficult, it is submitted, to say anything other than the prudence of investment reflects the object of investment which itself will vary from case to case. It is very difficult to put forward any reasonable argument as to why a prudent investor would adopt anything other than a low risk investment for a catastrophically injured Plaintiff.

The purpose of special damages is to pay for matters the Plaintiff has proven to *need* (in terms of care, aids and appliances, services), therefore, it is very difficult to see why prudence would tolerate risk in investment. Arguably a different view could be taken for loss of earnings insofar other heads of special damage would cover the "needs" of a Plaintiff and, in such an example, compensation for lost earnings does not really cover such needs.

It is respectfully submitted that the guiding principle is what prudence dictates for a given situation. This necessarily suggests different discount rates for different types of injury which may be very difficult to work out in practice. If that is not desirable, then it would seem reasonable that if one rate is taken to govern all cases it should be a rate that does not undercompensate anyone who needs it most which would, in principle, favour the low risk approach.

3. ***Please outline any other options that you think would be feasible for calculating the discount rate explaining why you think these would be appropriate.***

We believe actual methodologies for the calculation of the discount rate is more appropriately a matter for other areas of expertise.

However, we would point out, again, that there is a reasonable argument, to the effect insofar as prudence dictates policy, that one single discount rate may tend to do injustice. It may overcompensate some and undercompensate others.

4. ***In setting out your favoured option can you please provide supporting evidence of how claimants actually invest their compensation and their reasons for doing so?***

Members of The Bar of Ireland do not give financial or investment advice to their clients and any knowledge of the manner in which various clients invest compensation is a product of the confidential lawyer-client relationship. As such, we do not believe it appropriate to make any observation in this regard.

2.2 Legislative Questions

If you consider that the discount rate should be the subject of legislation please indicate:

1. ***Whether the Minister for Justice and Equality should retain the existing power under section 24 of the 2004 Act to set the discount rate.***

Please see above. The Council sees considerable merit in the creation of a body, independent of Government, with statutory powers to periodically review and determine discount rates. We do not believe the judiciary should be required to determine, nor Plaintiffs required to argue for, a new discount rate on an *ad hoc* basis. For the reasons outlined above, the Minister for Justice and Equality (and indeed any other member of the Executive) ought not have the power to determine the discount rate and section 24 of the 2004 Act should be repealed.

2. ***If so, should a panel of experts be established to advise the Minister with regard to the setting of the discount rate?***

Should the Minister retain a power to set the discount rate, a panel of experts should be established to advise her. The panel should be constituted in such a way to ensure that it has a sufficient range of expertise to advise the Minister even where the panel does not have the full complement of members. This will help to avoid any unnecessary delay caused by the filling of casual vacancies.

Two further points require expression:

(i) First, a panel of experts should be established to advise any independent statutory body in the setting of a discount rate;

(ii) Second, the panel of experts will not, itself, be sufficient. Legislation must enshrine the principles already established by the courts and require those principles to be applied with the assistance of expert opinion from the expert panel.

3. ***In the alternative, should a panel of experts be established to set the discount rate?***

This is a reasonable option, but we would submit it would have to follow a clearly defined, accountable and transparent system which is best achieved through an independent body which is required to engage in public consultation on the matter. That body would, it is assumed, retain appropriately

selected and qualified experts to advise and that advice should be subject to public scrutiny and submission. Again, the expertise of the panel should be used to apply the guiding principles already clearly established by the courts.

4. ***What principles or policies would you like to see included in the amended legislation?***

We recommend that any legislation, from the outset, must refer and adhere to the guiding principle that the calculation of future pecuniary loss is intended to secure 100% recovery.

Assuming that a discount rate is set (and thus investment is required), the overriding principle should be that a Plaintiff for whose benefit compensation has been given should be required to take the lowest risk that a prudent investor would think is reasonably possible in investing an award to achieve future outcomes.

Further, a key point should be made as follows. If you give a prudent investor €100,000.00 and tell them that they must obtain €10,000.00 a year, they will adopt a strategy to do this. This may involve considerable risk. If, on other hand, you tell such a person that they are required to generate €10,000.00 a year and ask them how they will achieve that, if they have an appetite for risk, they may ask for a capital sum of €100,000.00. If they have less appetite they may say a capital sum of €200,000.00 is required.

The point being made above is that it can be artificial to talk about risk abstract from the fact that compensation can be calculated to avoid risk. An investor, for example, may be able to make a given return. However, that investor may well believe there are less risky ways to achieve the return which could be achieved with a greater capital sum. Hence, the risk a prudent investor *might* take is necessarily variable if there is variation on the capital sum in the first place. For this reason, simply observing that any given investor can achieve any given return on the market is not likely to be satisfying as a comparator to setting a discount rate for the present purposes.

5. ***Should the principles and policies underpinning revised legislation assume the profile of the claimant to be:***

    (i) very risk averse – as is currently the case;

(ii) low risk – a mixed portfolio of balancing low risk investments – as in the UK;

(iii) an ordinary prudent investor;

(iv) another type of investor.

We believe the question does not address the correct point. The appropriate investor is the prudent investor investing for the given client. For some types of Plaintiffs this may not mean low risk in terms of lost earnings as other special damages may cover needs. For other Plaintiffs, where earnings is the only claim, this may mean low risk.

In essence, the investor profile is the profile of the investor actually investing for the given Plaintiff and we believe it is not unreasonable to say that different discount rates be adopted for different purposes. Again, it is also accepted that this may create litigation over which rate is appropriate in any given case. If the cost of that litigation in social and economic terms is too great, then the advantage of a unitary rate can be seen, but that can only be adopted insofar as it is designed not to create the very type of injustice for the most needy Plaintiffs that compensation is intended to avoid.

If, therefore, it must be one profile, we believe justice is best achieved by the profile of a very risk averse investor.

It must be remembered that these monies are not invested for gain over and above capital. They are being invested *to achieve a target capital*. In this respect, it is very difficult to see how anything other than a very risk averse profile is suitable to same.

6. ***Should the courts retain the power to apply a different rate than the rate provided for in legislation?***

This is a difficult question. One argument could be made that setting such a rate is an interference with the judicial power. By the same token, one could counter that by contending that whereas this was a power enjoyed by the Courts, the State does have the legislative power to remove such a function and vest it elsewhere.

It has to be recognised, of course, that the judiciary have to date determined the discount rate. It is also the case that section 24 of the 2004 Act leaves open a residual judicial power for the Courts to continue to do so.

Whereas a full discourse of constitutional principle is outside the scope of this submission, it has to be recognised that constitutional issues arise in relation to whether matters – traditionally viewed as being within the remit of the "judicial power" – can be divested from the judiciary and allocated to non-judicial bodies. Clearly, the jurisprudence on point in cases such as *McDonald v Bord na gCon* [1965] IR 217 and its progeny have to be taken seriously and questions would arise as to whether the setting of a discount rate is a "limited" function or not. Equally, there is difficulty in applying jurisprudence others have criticised as "hopelessly circular" (as it is) in that it appears to work by describing what the Courts have done and necessarily saying the Courts can only do that.[1]

Serious questions have to be asked as to whether the historic circular approach is to be viewed as a strait jacket to prevent what appears to be sensible reform. Indeed, insofar as the operations of any such body would be clearly subject to judicial review, it remains difficult in abstract to see what core constitutional principle is served by saying the legislature cannot vest power to set a discount rate in another body to the exclusion of the Court. This, of course, is largely for the constitutional advices that the State must take.

This submission is simply observing that the cost of leaving the discount rate to party based litigation is extreme. It is inappropriate to expect a catastrophically injured child to, in essence, pay for this or indeed, to expect the charity of experts to assist. If that idea is taken seriously and the moral imperative behind it seems as worthy of pursuit, the question would then arise as to whether the corpus of constitutional jurisprudence on the "judicial power" is really such that would prevent the setting of a rate by an independent body. Finally, we would observe that it would appear possible that all of this could be avoided by the provision of a residual power in the Court which, it is hoped, would not be required to be invoked if, in fact, a just and sensible discount rate was set.

By the same token, however, it would likely mean that if economic circumstances began to outstrip any given set discount rate and if the relevant authority did not adjust it, the scenario would again arise where Plaintiffs would be forced to bear the expense of arguing for the discount rate. Whilst the

[1] See Eoin Carolan, "Separation of Powers and Administrative Governance" in Eoin Carolan and Oran Doyle eds., The Irish Constitution: Governance and Values (Thomson Roundhall, Dublin, 2008), p. 195, at p. 220

latter scenario does recreate a situation in which plaintiffs would be forced to bear the risks associated with arguing for a different discount rate, we feel that such an option is still a more appropriate last resort scenario than one where the economic circumstances began to outstrip the discount rate set by the statutory body, where that body does not adjust the rate and where the court *does not* have the residual power to use a different discount rate to reflect the economic reality at any given time. A residual discretion would therefore allow for adherence to the guiding principle at all material times.

7. ***Should the Minister (or expert panel) be empowered to set different rates for different classes of case?***

Subject to our disapproval of the power being given to the Minister, yes. As outlined above, we believe this to be the most appropriate outcome.

It will necessarily mean that parties "outside" one rate may wish to argue they should be "inside" it and this may lead to litigation, but in principle and in logic it does appear to us that a prudent investor may adopt a different strategy depending on what its ultimate target is and in principle, there may be a difference in terms of achieving, for example, a partial life time of lost earnings as against achieving a required monthly income to pay for a PEG tube to be properly maintained or life-saving care.

The premise to this question should be altered to include the statutory body favoured in this submission.

8. ***How often should the discount rate be reviewed?***

Assuming an Independent body was established for this and assuming this to be its function, there is no reason why its full-time function would not be dedicated to this. We would suggest a formal determination be required every 2 years on a discount rate with continual rolling reviews. Should any seminal economic event occur, the ability of such a body to review the rate at any given time, would therefore be possible.

Clearly, many lessons could be learned from the past in terms of time-frames for public submission, clear structures and time frames for decision making etc., but assuming a full time dedication to the task, every two years is reasonable.

Legislation should provide for public consultation and should enumerate bodies including the Law Society and The Bar of Ireland to be notified of the commencement of a consultation process and invite submissions.

2.3 Periodic Payment Orders (PPO's) Questions

9. ***What impact would changes to the existing discount rate have on the use of periodic payment orders in catastrophic injury cases?***

A change to the existing discount rate is unlikely to have any impact on the use of periodic payment orders in catastrophic injury cases.

The reason for this is that the legislative PPO regime is, as described by Murphy J in *Hegarty*, a "*dead letter*". This, in turn, arises from the legislative choices referred to in the response to Q.1 of section 2.1 above, particularly those centring round the indexation of PPO annual amounts. Periodic payment orders are unlikely to be used until those choices are reversed. The regime does not achieve anything like full recovery for catastrophically injured claimants.

There is, however, a concern about the true objective of this query; it implies that the failure of the legislative PPO regime is linked to the existence of a more favourable lump sum option, made more favourable by the discount rate. By extension, it implies that making the discount rate less favourable could stimulate utilisation of PPOs. As we have stated, the guiding principle of full recovery is the essential result to be achieved. A change in the discount rate should be made for the purposes of achieving 100% recovery and *restitutio in integrum* and certainly not for the purposes of providing an incentive to litigants to use an improvident PPO regime.

If greater use of periodic payment orders is the desired objective, it should only be achieved by the enactment of legislation correcting the deficiencies in the 2017 Act and not by setting a discount rate for lump sum awards intended to drive litigants to use improvident periodic payment orders as the "*least worst*" option.

This exemplifies the problem with consolidation in the Executive of the power to set the PPO index and the power to set the lump sum award discount rate. These powers should be conferred on a statutory body, independent of the Executive, applying the principles and objectives (including 100%

recovery) already established in *Russell* and *Hegarty* with the benefit of advice from an expert panel and with a residual power conferred on the courts to apply a different rate and different index, respectively, in order to do justice in individual cases.

10. *Has the decision in Gill Russell vs. HSE made it more or less likely that claimants will utilise PPOs?*

Before addressing this question, it must first be acknowledged that the reason claimants will not "*utilise PPOs*" is the aforementioned deficiencies in the 2017 Act. This is not due to the discount rate for lump sum awards, set in *Russell*, creating a disincentive to use PPOs.

Logic dictates that a PPO with a provident index to reflect inflation specific to the cost of care, aids and equipment etc. would, in almost all cases, be preferable to a lump sum award with a discount rate set on the basis of a very risk averse investor. Put simply, the PPO regime most favourable to the claimant should trump the lump sum regime most favourable to the claimant.

It is, however, idle to address the question of whether *Russell* presents an incentive or disincentive to the use of PPOs where the legislative PPO regime fails to achieve the very purpose of such a regime. The interaction between lump sum awards and PPOs is distorted by the futility and ineffectiveness of the current PPO regime.

The non-utilisation by claimants, and courts, of PPOs should result in the improvement of the PPO legislation so that it achieves the purpose of full recovery and *restitutio in integrum*; it should not result in a discount rate that itself fails to achieve this purpose.

THE BAR
OF IRELAND

The Law Library

Distillery Building
145-151 Church Street
Dublin 7 D07 WDX8

Tel: +353 1 817 5000
Fax: +353 1 817 5150
Email: thebarofireland@lawlibrary.ie
Twitter: @TheBarofIreland
www.lawlibrary.ie