KENT CARTY SOLICITORS

KENT CARTY UPDATE

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A. The Supreme Court clarifies principles for financial losses in professional negligence claims

The recent Supreme Court decision in *Rosbeg v LK Shields* provides professionals and their insurers with much needed clarity around valuing financial losses in professional negligence claims where these arise in a volatile market.

Background

The Plaintiff alleged that LK Shields, while acting as the Plaintiff's conveyancing solicitor, failed to complete the registration of a parcel of land. In September 2007 the Plaintiff sought to sell the land for €10 million but could not complete the sale because of the conveyancing defect. LK Shields rectified the error in October 2008 but by then property values had fallen and the potential purchaser reduced his offer to €6 million. What was the correct quantum of damages to cover the financial loss?

First Decisions

At first instance, Peart J found the Defendant liable for the losses rejecting their defence that there was no substantive agreement by the Plaintiff to sell the property. He found, on the evidence, that a sale would have occurred in 2007 if there had not been a problem with the title. Moving on to calculate the value of the loss, he concluded that the correct amount was the difference in value of the property between the date of agreement to sell in 2007 and the date of the Trial. To this must be added damages for accumulated interest on a bank loan and an additional amount for increased Capital Gains Tax. In total, LK Shields were held liable for €11.5 million.

Court of Appeal

The defendant appealed both as to liability and to quantum, but the appeal was unsuccessful. The Court if Appeal held that they were constrained by the principles in *Hay v Grady* and could not overturn the Trial Judge's findings based on the evidence before him.

Supreme Court Decision

The Supreme Court firstly found unanimously that the Trial Judge had not erred on liability – there was sufficient evidence for his inference that the Plaintiff would have sold the property in 2007 for €10 million. It remained to decide whether the assessment of the amount of loss was justified.
Giving the majority judgment, O'Donnell J ruled that the correct measure of damages should be based on the difference in the property's value between at the date the error had been rectified and the date which the negligence was cured. He held that LK Shields were no longer liable for any additional loss that the Plaintiff had suffered after the title issue had been rectified by in October 2008.

The financial loss was thus the difference between the original €10 million offer and the subsequent offer of €6 million, adjusted appropriately for interest and CGT. Thus, the Supreme Court held that the correct measure of damages was a total of €5.25 million, being the €4 million difference as adjusted.

Key Points to Note

- Where the negligence arises because a professional fails to perform a duty, which can yet be performed, the correct measure of damages to a Defendant was the cost of the substitute performance and, any foreseeable loss in value caused by the delay in doing so".
- The professional is only liable for losses which flow from the negligent act and is not automatically liable for every loss which follows the negligent act.
- Contributory negligence and other factors, such as a volatile property market and the plaintiff's own actions may also be considered in quantifying the financial loss.
- In a static or rising market, no financial loss may arise.
- Where a plaintiff lost a special purchaser that may be accounted for.

B. Periodic Payment Orders – The Outlook

Background

After much judicial prompting, the Civil Liability (Amendment) Act 2017 was finally signed into law in November 2017. When it is granted a commencement date, this will permit Courts to make awards which contain Periodic Payment Orders as opposed to the current regime which only allows lump sum awards to be made for damages.
The objective of PPO's is to provide an award for catastrophic injury claimants which recognizes the uncertainty of their potential life span. An award can be made of an annual sum which increases with inflation which will provide for the Plaintiff's ongoing needs – particularly the cost of long term medical care.
The first thing to note is that despite promises the legislation has not yet commenced, it is understood that this may well not occur until 2019.

Traditional Damages Awards

Traditionally damages are compensated by means of a single lump sum payment but for catastrophic claims it is evident that the calculation of this lump sum involves considerable guesswork by the Court and can lead to serious injustice, either to a Plaintiff whose lump sum is ultimately found wanting or else to a Defendant who may pay a very large lump sum to a Plaintiff who dies shortly thereafter. It is argued by its proponents that replacing a lump sum by a PPO will correct this problem. Irvine J commenting *obiter* in *Gill Russell v HSE* [2015] said that PPOs will resolve this "fundamentally flawed and unjust system".

Issues with PPO Awards

There are several possible problems with PPOs:

a) They are potentially more expensive and certainly riskier for Defendants' insurers
b) The inflation risk is difficult to manage as there is no suitable inflationary index to model increase in medical care costs available in Ireland – Plaintiffs could run out of money.
c) Plaintiffs and their advisers often prefer the "certainty" of Lump sum awards. Will they refuse PPOs?

a) Insurance companies faced with the need to fund PPOs are presented with a number of technical challenges. However, these are perfectly commonplace in the wider insurance domain with Life Assurance and particularly index-linked Pensions and there are no intractable problems here. The issue for insurance companies is that the final cost of PPOs may well prove to be larger than an equivalent lump sum. This is due to the fact that Judges assessing lump sum awards and calculating a "multiplier" have frequently been slow to recognize the need to reduce the underlying interest rate in low interest-earning investment markets. Undoubtedly, PPOs carry more uncertainty for insurers

who will have to carry more capital to support their outstanding PPOs but there are many ways using reinsurance or portfolio diversification to remove this risk from their balance sheets. This is grist to the actuarial mill.

A key factor for Insurers is the likely number of PPOs which they will have to bear. The legislation has gone some way to minimize the number of such claims. It is likely that insurers outside the realm of medical negligence will see only a handful of PPO awards over the next several years. The initial impact is therefore likely to be small and allows a period of assessment to take place.

b) The problem of inflation affects both lump sum awards and PPOs but is more directly visible in relation to a PPO. With rising health care costs, an annual sum from a PPO will soon become insufficient unless it is increased regularly. In the UK a dedicated inflationary index has been developed to model increasing health care costs. Such index is not available in Ireland; the CPI will be used instead which is clearly inadequate. It will be interesting to see how the Courts face up to this problem and whether they will allow regular upward reviews of PPOs during their life.

c) A problem that has not been well articulated concerns Plaintiff choice. In the early years of the PPO system in the UK, agreement was required between the two parties to select a PPO rather than a lump sum. Not surprisingly Insurers opposed PPOs but more surprisingly so also did Plaintiffs and their barristers. Even after the legislation was relaxed, it took a number of years for Plaintiffs to see the benefits of PPOs and to opt for them rather than the immediate lump sum.

The Irish legislation allows Courts to impose a PPO on both sides, but the Court must explicitly have regard to the two sides' views on the matter. It is unclear how often a Court will actually impose a PPO in circumstances where the Plaintiff, or his advisers, opposed such an award. This is ground yet to be trodden and is a further inhibitor to significant numbers of PPOs in the near term.

Conclusion

Although, the introduction of PPO's has been widely welcomed, it is too early to say whether they will have a significant impact on Irish claims, outside the sphere of medical negligence. The number of catastrophic claims in Ireland in other areas such as motor insurance or public liability is quite small. A key question will be how widely the Courts interpret the term "catastrophic" – in the initial legislation it has a much narrower application than for example in the UK. The whole area of these periodic awards is something that is likely to develop slowly, and we should expect the Court's practice and indeed the legislation to evolve gradually as time passes.

C. Court of Appeal cuts awards for general damages

Insurers have welcomed recent developments in the Court of Appeal where in a number of cases general damages have been cut by up to 50%. The key principles for determining the quantum of damages were set out in *Fogarty v Cox* [2017]:

(i) Was the incident traumatic and how much distress was caused?
(ii) Did the plaintiff require hospitalisation, and if so, for how long?
(iii) What did the plaintiff suffer in terms of pain and discomfort or lack of dignity?
(iv) What surgical interventions or other treatments did they require?
(v) Did the plaintiff need to attend rehabilitation, and if so, for how long?
(vi) While recovering in their home, was the plaintiff capable of independent living?
(vii) If the plaintiff was dependent, why was this so and what was the extent?
(viii) What limitations were imposed on their leisure activities?
(ix) For how long was the plaintiff out of work?
(x) To what extent was their relationship with their family interfered with?
(xi) Finally, what was the nature any treatment, therapy or medication required?

Application of the Fogarty Principles

The CoA applied similar principles in *Payne v Nugent* [2016], Irvine J held that "she was not satisfied that the general damages award was just, proportionate or fair having regard to the injuries sustained". She held that the Trial Judge had erred grossly in calculating the general damages component of the award and the total award reduced from €121,000 to €69,000.
A similar approach was applied in *Nolan v Wirenski* [2016], where damages for pain and suffering were reduced were reduced from €120,000 to €65,000 because the Plaintiff only suffered modest injuries.

However, at a recent conference, Irvine J observed that the CoA does not wish to reduce general damages awards dramatically. The Court is of the view that small cases should obtain small awards, modest cases obtain modest awards, and extreme/catastrophic cases obtain large awards.

Controversy continues at the level of damages assessed in some areas of personal injury awards – particularly whiplash claims, which were highlighted in a recent report of the Personal Injuries Commission chaired by former High Court President, Nicholas Kearns. It points to the claim by the Injuries Board that 80% of personal injuries claims have a whiplash component and that these receive a level of general damages which are multiples of those obtained in other European jurisdictions. A key element towards the objective of reducing insurance premiums is to lower the cost of these whiplash awards. The Commission has recommended that the government should introduce legislation to limit such awards.
However, it must be recognised that these proposals have surfaced repeatedly over the last thirty years. Usually any legislative changes have foundered due to the constitutional independence of the judiciary. It will be interesting to see how this problem can be solved this time round.

Conclusion

The Court of Appeals adoption of a consistent and common-sense approach to assessing general damages awards must be welcomed by all parties involved in personal injuries claims. It has championed a clear message that general damages awards by Trial Judges must be reasonable and proportionate with respect to the severity of the Plaintiff's injuries. Insurance companies should be ready to appeal awards where they depart from the *Fogarty* principles.

For further information in relation to any of the above issues, please contact Gavan Carty at Kent Carty Solicitors.

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