

## INDEXATION OF PERIODICAL PAYMENTS AFTER THOMPSTONE

1. In THOMPSTONE v. TAMESIDE & GLOSSOP ACUTE SERVICES NHS TRUST 2006 EWHC 2904 (QB), Mrs. Justice Swift had to determine the following issue: whether an order for periodical payments should be varied by reference to the RPI pursuant to Section 2(8) of the Damages Act 1996, or whether there should be a provision modifying the effect of sub-section (8) by adopting an alternative measure of variation pursuant to Section 2(9) of the 1996 Act.
  
2. The parties had agreed and the Court had approved all heads of loss, save for damages for future care costs. The multiplicands for care had been agreed. Life expectancy was agreed to age 62. The Claimant expressed a preference for periodical payments if those payments were linked to an earnings index. If the Court ruled that the only index to which payments could be linked was RPI, then the Claimant's preference was for a lump sum.
  
3. The Defendant did not oppose an order for periodical payments, but contended that the only index to which such payments should be linked was RPI. In this case the Defendant did not advance an argument that the appropriate order was one for periodical payments rather than a lump sum [contrast the approach in A. v. B. HOSPITALS NHS TRUST 2006 EWHC 2833 (Admin)].

4. In the event, Swift J. rejected RPI as an appropriate index and determined that, in this case, an earnings index (ASHE 6115) was an appropriate measure for the indexation of periodical payments for future care costs. This paper considers the principles and evidence which led the Court to this conclusion. Various alternative measures for indexation were examined by the Court. The paper looks at their various strengths and weaknesses, with a view to the arguments that may be deployed in future cases.
  
5. Swift J. has granted permission to appeal. Whether **THOMPSTONE** will be the only case considered by the Court of Appeal on this issue remains to be seen. In **FLORA v. WAKOM (HEATHROW) LTD. 2006 EWCA Civ 1103** the Court of Appeal thought it likely there would be a number of trials at which the expert evidence was thoroughly tested. A group of appeals would then be heard together and definitive guidance given (Brooke L.J. paragraph 33). Subsequent to the handing down of the judgment in **THOMPSTONE**, Nelson J. in the case of **DE HAAS v. SOUTH WEST LONDON STRATEGIC HEALTH AUTHORITY** declined an application on behalf of the defendant to try the issue of indexation on expert evidence which, in most respects, replicated that adduced in **THOMPSTONE**. It was, again, an NHS case. Other cases on indexation are approaching trial.

#### **The Facts in THOMPSTONE**

6. Damages were claimed for major brain injury sustained at birth. The approved damages, excluding future care, amounted to £1,218,098. The agreed multiplicands for care were:

£43,000pa to age 11  
£57,400pa from age 11 to 19  
£91,000pa from age 19 for life

The care experts had agreed hourly rates for care at £8 for weekdays, and £9.75 at weekends. The Claimant's expert, Dr. Victoria Wass, calculated a weighted average rate of £8.50.

### **The Alternative Indices/Measures**

#### **7. RPI**

This index measures average growth of prices of a basket of goods and services intended to reflect typical consumer expenditure. The basket is updated every year to keep up with changing trends in consumer expenditure. The index is weighted to reflect the fact that people spend far more on some items than others. The cost of home carers does feature as one item of domestic services, which is a sub group of household services. The evidence in THOMPSTONE was that the weighting attached to home carers meant this cost represented 0.12% of the component parts of the RPI.

#### **8. AEI**

This index measures average growth in earnings. It is based on a survey of 8,400 employers covering 9 million employees. The earnings surveyed include bonuses and overtime. Average earnings are obtained by dividing the total amount paid by the total number of employees paid. Changes in the structure of a workforce can result in increases in average earnings. It is not designed to measure levels of earnings.

#### **9. ASHE Aggregate and Median**

The Annual Survey of Hours and Earnings (ASHE) replaced the New Earnings Survey (NES) in 2004. ASHE is now available as a consistent series from 1998. It is

not an index. It is a measure of levels of earnings. It is based upon a survey of 245,000 employees. The survey looks at actual earnings rather than wage rates. It includes overtime payments and bonuses. The point or interval estimates are published across the distribution. Levels of pay are published at 10 percentile intervals and at the quartiles. ASHE median represents the level of earnings at which the same number of individuals will earn more as will earn less than the median level. The ASHE median is lower than the ASHE mean (average). This results from the effect of high earners.

10. ASHE 6115

In addition to ASHE Aggregate which covers a wide range of occupations, there is also an occupational earnings series. This series measures changes in the levels of earnings of particular occupational groups. 6115 consists of care assistants and home carers. The classifications do change from time to time. The measures of occupational pay reflect the impact on earnings of changes in labour market conditions that are specific to a particular occupational group or groups. Examples would be a labour shortage or surplus or the result of statutory regulation.

**The Relevant Principles**

11. The judgment of Swift J. is informed by certain principles which underlie the decision and can be summarised as follows:

- (1) The principle of 100%/full compensation has not been abandoned or diluted by the introduction of the power to impose periodical payments.

- (2) Indexation of periodical payments should ensure, as far as possible, that the real value of the annual payments is retained over the whole period over which payments will be made.
- (3) The Court of Appeal had determined in FLORA that the Court, in applying Section 2(8) and 2 (9) of the 1996 Act, should decide which index/measure was appropriate, fair and reasonable in the light of the evidence.

### **The Evidence in THOMPSTONE**

12. The Claimant relied on Dr. Victoria Wass to adduce evidence as to:

- (1) the available indices/measures of prices and wages;
- (2) the extent to which changes in future care costs would be a reflection of movements in earnings or prices;
- (3) historical trends in the movement of prices and wages;
- (4) whether changes in home carer costs were likely to reflect general increases in wages;
- (5) the implications if the care costs were linked to RPI rather than an earnings index.

The last matter was also supported by evidence from Richard Cropper, a financial expert.

13. The evidence established to the satisfaction of the Judge that:

- (1) Whichever earnings measure was considered and whichever periods were looked at during the past 40 years earnings had increased at a faster rate than prices. This was a trend that was likely to continue in the future.

- (2) The future care costs which would be incurred by the Claimant were overwhelmingly determined by earnings rather than prices. The proportion of the care costs reflected by the RPI was no more than 4-5% of the total up to age 19 and 2-3% thereafter.
- (3) Whilst there was no measure which was specific to the cost of a home care package in Greater Manchester, there was no reason to think that the increase in the earnings of the home carers which the Claimant would have to employ would be any different to increases in earnings of home carers in general. Further, there was no basis for suggesting that home carers' earnings had not increased at a rate significantly higher than prices.
- (4) The result of linking the Claimant's periodical payments to RPI would lead, over a period of years, to a substantial shortfall between the periodical payments and the real cost of care.

### **The Potential Disadvantages Of The Earnings Measures**

#### AEI

14. This index does not provide a level of earnings to compare with the level of carers' pay in the present case. Dr. Wass adopted the ASHE mean as a good indication of the level of earnings reflected by the AEI. In 2005 the ASHE mean was £12.50 per hour. This rate has to be contrasted with the weighted average rate for the carers in **THOMPSTONE** of £8.50. Dr. Wass's evidence was that higher earnings tend to increase at a faster rate than lower earnings. Average earnings were therefore likely to increase faster than carers' earnings, which were significantly below average. This would introduce the potential for systematic imprecision (bias) and over-

compensation. In addition, using average earnings would not reflect changes to the earnings of carers as an occupational group.

#### ASHE Median

15. The level of the ASHE median in 2005 was £9.56. This is much closer to the weighted average for carers in THOMPSTONE, but would still introduce some bias and the potential for over-compensation. Again, ASHE median is a broad-brush approach which would not reflect changes to carers' earnings. Dr. Wass suggested that if the Court was attracted to ASHE median as the measure for care costs, this measure could be adopted in other cases. In her view the ASHE median reflected average carers' earnings. The weighted average in THOMPSTONE was somewhat below average carers' costs in other cases.
16. The linking of increases in periodical payments to a particular percentile point in the distribution, whether it be ASHE median or some other point such as ASHE 40, assumes that the earnings of carers will remain at that percentile point, rather than move to a different point in the earnings distribution. The evidence of Dr. Wass was to the effect that the earnings of different occupational groups do tend to maintain their position in the distribution or league table of earnings. The Court accepted this as generally the position, although there may be exceptions. (The example relied on by the Defendant was bus drivers, relative to train drivers and police officers.)
17. The ASHE data is published annually, whereas RPI and AEI figures are published monthly. For ASHE, provisional figures are published in the October of each year which are based on data obtained in the April. Final figures are published in the

following October. This means there is an 18 month delay from the obtaining of data to the publication of final figures. Occasionally there has been revision of the final figures, although such revision has only amounted to a change of one or two pence.

ASHE 6115

18. Dr. Wass devised a spline function, the purpose of which was to identify a range of earnings around each of the percentile points from 10% to 90%. This would mean that whatever the weighted average hourly rate, it would fall within a range of hourly rates. The weighted average in THOMPSTONE of £8.50 fell within the range at the 80<sup>th</sup> percentile which was from £8.43 to £9.51. This approach was rejected in favour of the parties agreeing or the Court determining the published percentile point closest to the weighted average rate in the particular case. The published level at the 75<sup>th</sup> percentile was £8.47, which the Judge selected as the appropriate measure.
  
19. The Defendant argued, that although the cost of carers for the Claimant might presently be reflected by the 75<sup>th</sup> or 80<sup>th</sup> percentile of 6115, this may not remain the position. The examples given were, firstly, that carers might, as a profession, become better qualified and so better paid. For the purposes of the Defendant's argument it was assumed that the Claimant's carers would be unaffected by such developments and so might no longer be at the 75<sup>th</sup> or 80<sup>th</sup> percentile but may have dropped to the 60<sup>th</sup> percentile. If increases in payments were linked to the 80<sup>th</sup> percentile, this might overcompensate the Claimant. Alternatively, it was argued that the arrival of substantial numbers of foreign care workers prepared to work for low wages might mean that the Claimant's carers were now at the 90<sup>th</sup> percentile. If increases were linked to the 75<sup>th</sup> or 80<sup>th</sup> percentile, there might be under-compensation. The answer

to these arguments is that the Claimant's care package would not be isolated from such developments. Various factors might influence the cost of care in the future, but the earnings of the Claimant's carers were likely to maintain their position in the distribution i.e. at the 75<sup>th</sup> or 80<sup>th</sup> percentile.

20. The Defendant stressed that the composition of the occupational group might change in the future, causing difficulty and uncertainty in tracking increases of a particular percentile point. The experts were agreed that home carers were likely to increase in number and so it was improbable that home carers would drop out of the classification. Dr. Wass suggested that home carers might constitute a separate classification rather than being combined with care assistants. If home carers did form a new occupational group or become part of a new group, this would not pose a great problem. The hourly rate at the 75<sup>th</sup> percentile will have been tracked up to the date of reclassification. The appropriate percentile point for that hourly rate can be identified within the new classification. It may no longer be at the 75<sup>th</sup> percentile, but the payments will now be linked to the percentile within the new occupational group which most closely reflects the rates which the Claimant has to pay for care.

### **Contentions Of The Defendant**

21. The Defendant argued that:
- (1) a claimant should be put to his election as to which single measure he advanced as an alternative to RPI;
  - (2) the burden of proof was upon a claimant to establish that there was some measure other than RPI which should be adopted;

- (3) a Court should consider the appropriateness of an alternative measure in isolation rather than comparing its merits with RPI;
  - (4) the Court should rely on principles of distributive justice to deny an alternative measure to the claimant;
  - (5) the Court should recognise that there was over-compensation in respect of other heads of damage, in particular accommodation, and should take this into account. Further, that the Claimant had obtained lump sum awards in respect of other heads of loss and so had the opportunity to invest these sums and obtain a better return than 2.5%.
22. The Court rejected each of these arguments, holding:
- (1) A claimant was not limited to arguing for a single alternative measure.
  - (2) There was an evidential burden on a claimant to adduce evidence as to an alternative appropriate index but, having adduced such evidence, it was then for the Court to determine the appropriate index/measure.
  - (3) In making a determination as to the appropriate measure, the Court had to consider the merits and flaws of each measure advanced, including RPI.
  - (4) It was not open to the Court to consider and rule upon the policy issues raised by the Defendant's arguments as to distributive justice. This was precluded by authority and in any event the Court was in no position to rule upon such matters.
  - (5) There was no basis for a finding of over-compensation in respect of the award for accommodation – the formula in ROBERTS v. JOHNSTONE was in accordance with the 100% principle. Further, the Court could not infer there

would be any surplus from investing other funds which could be used to meet a shortfall in care costs.

**The Court's Conclusions In THOMPSTONE**

23. The essential findings made by the Court were as follows:

- (1) RPI has not been an accurate or reliable indicator of growth in earnings in the past, nor is it likely to be so in the future.
- (2) Past data establishes that RPI has not kept pace with growth in average carers' earnings.
- (3) The strong probability is that the earnings levels of the types of carers employed by the Claimant will grow at a significantly faster rate than RPI.
- (4) If payment for future care costs is linked to RPI, then the purpose of indexation, which is to ensure that the real value of the payments is retained, will not be met.
- (5) Indexation of payments for care costs to RPI will not meet the Claimant's needs and therefore cannot be described as fair, reasonable or appropriate.
- (6) Indexation to AEI is likely to result in systematic over-compensation. Although such over-compensation is likely to be considerably less than under-compensation resulting from a link to RPI, it would still be significant.
- (7) The earnings data in AEI includes payments which would not be received by home carers and it is not a measure that would be sensitive to changes in the carers' labour market.
- (8) AEI would not necessarily be a reliable and accurate indicator of growth in carers' earnings and is therefore not a suitable alternative to RPI.

- (9) ASHE median suffers from the same faults as AEI and so would not be an appropriate alternative to RPI.
- (10) ASHE 6115 is sufficiently sensitive to reflect changes affecting the earnings of carers. It would provide a reasonable and accurate indicator of the growth of earnings of the type of carer to be employed by the Claimant. It would therefore fulfil the purpose of indexation – to maintain the real value of the payments.
- (11) It is reasonable to use the weighted average hourly rate to match the carers' earnings to the appropriate ASHE 6115 percentile.
- (12) The use of ASHE 6115 will not lead to any significant over-compensation.
- (13) The use of ASHE 6115 does not lead to undue complexity.
- (14) The Court was therefore satisfied that it was appropriate, fair and reasonable under Section 2(9) to modify the effect of Section 2(8) by providing for the amount of payments to vary by reference to the 75<sup>th</sup> percentile of ASHE 6115.

### **The Future**

24. In **THOMPSTONE**, five and a half days of Court time was devoted to the issue of indexation of periodical payments. The Court heard evidence from six experts. As Swift J. makes clear, it is a decision on the particular facts in the light of the evidence that was led. The Judge was not invited to decide generic issues. However, her decision was informed by a number of rulings on principle. It remains to be seen whether other judges reach different conclusions on the points of principle, or reach different conclusions on different evidence.

25. Factual differences which may arise in the future include a care package which is much more complex, perhaps involving nurses and carers at very different hourly rates. Would a Court link part of the care costs to 6115 and part to 6111 which covers nursing auxiliaries and assistants? Alternatively, the weighted average care costs may be much higher than in THOMPSTONE. In such a case, linking to 6115 may lead to under-compensation. (The earnings at the 90<sup>th</sup> percentile for 6115 in 2005 were £10.30). If the Court was satisfied that ASHE median or AEI would not lead to over-compensation, might the Court be persuaded that either measure would be appropriate, fair and reasonable?
26. The Court in THOMPSTONE dealt with indexation in the context of the future care costs. There was no consideration of indexation of periodical payments for future loss of earnings.
27. The approach of the NHSLA in two recent cases has been to argue in favour of periodical payments as against a lump sum. Such arguments have not been successful when opposed by claimants, but it may be a point the NHSLA will pursue on appeal.
28. A problem remains in the case of a defendant who cannot self-fund periodical payments. The Court has power under Section 2(5) of the 1996 Act to require the purchase of a structured settlement annuity from a life insurer. A limited market exists for RPI-linked annuities but there are no earnings linked annuities. At present a Court would not be able to order periodical payments linked to an earnings index against certain defendants.

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