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BRIEFING NOTE

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Court accepts a lesser management fee is warranted following reduction of the discount rate in the *Law and Equity Act*

***Best v Thomas* 2014 BCSC 2487 (CanLII)**

In British Columbia, regulations under the *Law and Equity Act* set out the discount rate to be applied to damages set to manifest in the future, in order to determine their present value. On April 30, 2014, these rates were amended down (to either 1.5% per annum, or 2% per annum, depending on the nature of the future loss). The effect of this was to increase the present value of future damages[1].

However another issue arose; if there is a lowering of the target rate of return to ensure future value is not eroded, ought that not result in lower management fees being awarded? The theory behind this was that a plaintiff is entitled to what is "*reasonably necessary*" for such fees to ensure the target rate is achieved; and the lower rate can be achieved with a primarily self-directed series of investments, rather than active management of a portfolio. This question was addressed by the trial judge in ***Best v Thomas***, where the amendment to the *Law & Equity Act* occurred after trial and before the parties had resolved all costs issues.

Mr. Best was injured when his motorcycle was struck by a van. He was successful at trial and awarded approximately $2.6 million for future damages (split approximately 55/45 between future care and lost future income). He sought management fees of approximately $250,000. It appears to have been conceded that his fund did not require aggressive management (for example in equity stocks) given the reduced discount rate. Rather, the judgment records that the submission for management fees was "*based on the need to secure advice to structure the investments in safer vehicles, such as bonds*."

The reasonableness of the amount for the level of services provided was not disputed. At issue was the level of services that were reasonably required, in order to ensure a rate of return that at least matched the discount rate applied under the *Law & Equity Act* to arrive at the present value.

The third party, ICBC (given the underlying facts, it seems likely the defendant driver & owner of the vehicle were denied coverage), argued that with the lowering of the discount rate, the average individual investing his or her money in government of Canada bonds will, over the long run, avoid the erosion of inflation. It then argued that such individual does not require comprehensive portfolio management services to do so.

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[1] See our May 2014 Briefing Note on the amendment

The court accepted this argument, even though the current rate is insufficient; accepting ICBC's expert's evidence that by 2019, government bond rates will be better than 2%.

The court also accepted the expert evidence that such investments can be set up with little or no management cost, holding; "*in the long run the plaintiff can invest his money safely through free advice by his financial institution*". However that "*... there must be a modest award for financial advice to bridge the gap between now and when the projections indicate the bond rates will go up. Otherwise the plaintiff will be exposed to approximately five years of uncertainty...*". She awarded $25,000 in management fees (10% of what the plaintiff had sought) accordingly.

It is important to note that the Judge agreed that the plaintiff was "*a mature adult and I find no reason he cannot make rational decisions about his financial future*." Clearly, in cases where a plaintiff is unable to manage his or her own financial affairs, different considerations will come into play in assessing the need for, and level of fund management required. However, outside the scheme set up by the Public Guardian and Trustee Fees Regulation, there is merit to an argument that a lowered rate of return ought to require less active management of a fund (and therefore lower fees) than that which was required prior to May, 2014.

As regards the level of knowledge required of a plaintiff to manage their own affairs, it appears that those of average intelligence will suffice; there is no need for any special training or experience. In the present case, Mr. Best had left high school in grade 11 (although obtained his GED, 2 or 3 years later), and appears to have held relatively unskilled, labouring type employment.

Finally, we commented in our earlier Briefing Note that it would be interesting to see if structured settlements see a rise in popularity, given that the rates of return are now more in line with the discount rates. There are generally advantages to these for defendants as well as plaintiffs, however outside of the motor vehicle context, there is no obligation on a plaintiff to structure their future damage awards. We await case comment on this.

As of the writing of this briefing note, ***Best v Thomas*** has not been cited by another court. Whether another trial Judge will take the same view remains to be seen (much will depend upon the evidence as to government bond rates and the plaintiffs acumen, with which they are presented). However this is a helpful development for insurers, in lowering what can be a significant head of damages.

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