THE COURT OF APPEAL

Appeal No. 2015/49

Ryan P.
Finlay Geoghegan J.
Irvine J.

GILL RUSSELL (A MINOR) SUING BY HIS MOTHER AND NEXT FRIEND KAREN RUSSELL

PLAINTIFF/RESPONDENT

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT/APPELLANT

JUDGMENT of the Court delivered by Ms Justice Irvine on the 5th day of November 2015

1. The issues to be decided on this appeal concern the approach and conclusions reached by the High Court, (Cross J.), when assessing the damages due to the plaintiff, Gill Russell, ("Gill") who sustained catastrophic injuries at the time of his birth on 12th July, 2006, due to the admitted negligence on the part of the defendants. Gill suffers from Dyskinetic Cerebral Palsy affecting all four of his limbs. He suffers from respiratory issues and epileptic seizures. He is also doubly incontinent, and it is not in dispute that he will require 24 hour care for the rest of his life.

2. The defendant's appeal challenges firstly the findings of the High Court judge as to the annual sum, often referred to as the multiplicand, which Gill is likely to require throughout his lifetime in order to meet his ongoing care and other ancillary needs. Secondly, it challenges the legal and factual conclusions underpinning his finding that the appropriate multiplier to be used to assess the lump sum of damages, to which Gill is entitled in respect of all of his future pecuniary loss, is one which is based on him obtaining a real rate of return, (that being the nominal rate less the rate of inflation), of 1.5% per annum on the investment of his award. The parties are agreed that the hearing of the appeal on the first of these issues should await the Court's determination on the latter.

3. Before moving to consider the issues raised for the Court's consideration on this appeal, it is apposite to state that there is a major structural flaw in the present system which requires the court to assess, on a once off basis, the sum of money required to compensate a plaintiff with catastrophic/life long injuries for all of their future pecuniary loss. It is highly regrettable that, regardless of the outcome of this appeal, it is absolutely certain that whatever award is made will visit an injustice on one or other party. The only issue will be extent of that injustice.

4. While it is helpful that for the purposes of this litigation that the plaintiff's life expectancy has been agreed *i.e.* to the age of 45 years, it is inevitable that the parties' prediction in this regard will be wrong. The system will prove itself enormously wasteful should Gill not achieve his anticipated life expectancy as in such circumstances he will have been over compensated. Regrettably, the converse scenario will also produce an injustice in that, if he outlives the agreed life expectancy, he will run out of money in the course of his lifetime, assuming that the annual sum awarded in respect of his care is spent each year. The greater the inaccuracy of the agreed predicted life expectancy, the greater the potential injustice.

5. To state that the current law in this jurisdiction, which requires the court to award a lump sum intended to compensate a plaintiff for all past and future losses, and in particular future pecuniary loss, is inherently fallible and unjust cannot be disputed. It is also grossly outdated by reference to the approach now adopted by the courts in other Common Law and Civil Law jurisdictions. The reasons why this approach to the assessment of damages should be abandoned have been advanced and discussed in many reports published in this jurisdiction and elsewhere, going back many decades. Likewise, there is a substantial body of case law lamenting incorrect mortality and other predictions which result, at times, in either excessively generous awards to plaintiffs with the corresponding short changing of defendant or the opposite.

6. The report of the Working Group on Medical Negligence and Periodic Payments ("the Working Group") chaired by Mr. Justice John Quirke, published on 29th October, 2010, is one which explores in significant detail the difficulties of achieving the objective of compensation within our law, having regard to matters such as the degree of uncertainty affecting the estimation of life expectancy, the future fluctuation in inflation levels likely to effect the accurate calculation of future pecuniary loss and the risks to which the investment of lump sums may be exposed.

7. The Working Group unanimously urged the government to legislate so as to enable the courts to move away from the assessment of damages by way of a once off lump sum and instead award damages by way of Periodic Payment Orders ("PPOs"), whether consensual or otherwise, in catastrophic injury cases where long term permanent care would be required.

8. As far back as 1972, the Committee of Inquiry into the Insurance Industry, in its interim report, observed the injustice meted out to a plaintiff who lives longer than expected under the present system. The shortcomings of the system also attracted the attention of the Law Reform Commission. In its report on *Personal Injuries' Periodical Payments and Structured Settlements* (LRC 54-1996), it referred to an additional concern, namely the ability of certain plaintiffs to deal with large sums of money in a manner that would ensure that their fund was not dissipated quicker than intended.

9. Nicolas Bevan, in *The New Periodical Payments Regime* [2005] 2 Civil Court News 36, summarised the position extremely well when he stated as follows:-

> "The inherent fallibility of the 'snapshot' approach to valuing a plaintiff's future loss has been widely considered. It is generally accepted that the multiplier/multiplicand approach is almost guaranteed to miss the mark of fair and just compensation; it is usually Providence and not Science that decides whether the lump sum leaves a plaintiff unjustly enriched or under compensated."

10. The Working Group went on to conclude that the English system of compensation by periodic payment order represented the most modern and effective model for the payment of ongoing care and associated costs in personal injuries actions, a conclusion consistent with the views expressed repeatedly in the reports of successive committees and commissions established by governments within this jurisdiction and elsewhere over the last forty years. This system has been in place in the UK since 2003 and was deemed by the Working Group to be the most appropriate comparator against which to measure any proposed change required within this jurisdiction to address the problems identified in the lump sum award system.

11. It is noted that, in May last, a general scheme of a Civil Liability (Amendment) Bill 2015 was finally published by the Minister for Justice, Equality and Law Reform, the expressed intent of which is to provide for damages to be awarded in the form of periodic payments to persons suffering catastrophic injuries, and that the draft measure is at present undergoing pre-legislative scrutiny by the Oireachtas Joint Committee on Justice, Defence and Equality.

12. The sad fact of the matter is that the parties to this litigation would not likely be in the position in which they find themselves today if that legislation were on the statute books. Particularly given that in October, 2012, the proceedings were adjourned for 2 years on the basis of an agreed interim payment in the hope that the relevant legislation would be forthcoming. Regrettably, it is not and the High Court had no option but to proceed to finalise this claim by making a lump sum award of damages to cover all aspects of the plaintiff's loss. The PPO regime would have removed all of the risks central to these proceedings including those which relate to life expectancy predictions and the likely return on various types of investments in international markets over the next several decades.

13. While mindful of the doctrine of the separation of powers, this Court is nonetheless satisfied that it would be remiss of it, in the context of this appeal, not to express its concern with the manner in which it is obliged to approach its current task. Accordingly, it would urge the Oireachtas to bring to an end, by legislative reform, the potentially unjust manner in which the court is presently required to assess damages for future pecuniary loss in catastrophic injury cases.

14. It should perhaps also be observed that, by reason of the provisions of s. 24 of the Civil Liability and Courts Act 2004, it is open to the Minister by regulation to prescribe the discount rate that will apply for the purposes of the assessment of damages in respect of future financial loss. However, it should also be noted that the section provides that the court, even in circumstances where the rate has been fixed by the Minister, has jurisdiction to apply a rate different to that prescribed if satisfied that injustice would result. Accordingly, any such regulations would not entirely remove the uncertainty in relation to the return on lump sum investments such as that central to this appeal.

Real Rate of Return on Investment Income

15. Since the decision of Finnegan P. in *Boyne v. Dublin Bus* [2003] 4 I.R. 47, the courts in this jurisdiction have assumed that an injured plaintiff will obtain a real rate of return of 3% on the investment of any sum awarded to them in respect of future pecuniary loss.

16. In *Boyne*, the plaintiff, a twenty eight year old man was run over having alighted from the defendant's bus. He was left with a virtually useless leg and it was accepted that he would never work again. The parties were agreed as to his net weekly loss of earnings. Thus, the decision of the Court centred upon the real rate of return which the plaintiff would need to obtain on the investment of his loss of earnings lump sum so as to provide him with the stream of income he would have had but for his injuries.

17. Finnegan P., when considering the manner in which the damages awarded in respect of future loss of earnings might be calculated, referred to the decisions of the English Court of Appeal and the House of Lords in *Wells v. Wells* [1999] 1 A.C. 345 where, in the House of Lords, it was unanimously decided that the plaintiff was entitled to have his lump sum calculated based upon the real rate of return he would likely achieve if his award was invested in Index-Linked Government Stock (ILGS) which were then attracting a rate of 2.5% as opposed to the rate of 4% to 5% potentially achievable on what it considered to be the more risk laden strategy of investing in a mixed portfolio of equities and gilts.

18. It should be stated that the decision in *Wells* is one which governs three cases that were heard together because they involved the same issue. The first was the *Wells* case itself, in which a part-time nurse of 57 years of age was severely injured in a traffic accident. As a result, she suffered brain damage, was unable to work and would require care for the rest of her life. The second was that of *Thomas v. Brighton Health Authority* [1996] P.I.Q.R. Q44 which concerned a six-year-old boy damaged before birth by the maladministration of a drug intended to induce labour. He suffered from cerebral palsy, was severely physically handicapped and would require lifetime care. The third was that of *Page v. Sheerness Steel Company Ltd* [1996] P.I.Q.R. Q26, wherein the plaintiff, a 24-year-old steel mill worker, was struck on the head by a steel bar which penetrated his brain and left him requiring care for the rest of his life.

19. In determining that the appropriate real rate of return to be assumed when calculating the lump sum was 3%, Finnegan P. proceeded upon the assumption that the same would likely be invested in a mixed portfolio of equities and gilts. In particular he noted that there were no securities available within this jurisdiction equivalent to the UK ILGS which had been central to the decision of the House of Lords in *Wells*. Thus, following the guidance of the Court of Appeal in the same cases, he decided that a prudent investor would invest 70% of their award in equities and the remaining 30% in gilts, a split which he stated might not be appropriate in every case, given that the amount in equities would be determined by the duration of the fund.

20. It is perhaps unnecessary to state that there are obvious and easily recognisable problems with the application of the same multiplier in every case of future pecuniary loss. To do so assumes that, regardless of the amount invested or its likely duration, the investor will receive the same annual real rate of return, a clearly unsustainable proposition. Obviously, the greater the sum available for investment and the longer the period of the intended investment, the greater ought to be the annual real rate of return achieved, even if precisely the same investment policy is pursued. For example, a plaintiff who is awarded a sum of €200,000 in respect of five years net loss of earnings cannot expect that by placing that sum on deposit he will likely obtain the same real rate of return on his investment as a catastrophically injured plaintiff who may have €5 million to deposit, albeit subject to a need to drawdown a sum annually, over a forty year period.

21. Of some relevance to this appeal is the slightly earlier decision of O'Sullivan J. in *McEneaney v. County Council of the County of Monaghan and Coillte Teoranta*, a judgment of the High Court delivered on the 26th July, 2001. There, the plaintiff sustained catastrophic injuries in a road traffic accident when he was 22 years of age. As a result, he required ongoing care for the rest of his life. The plaintiff challenged the assumed 4% real rate of return which was at that time being used by actuaries to compute future pecuniary loss, submitting that it was excessively optimistic and should in fact be reduced to 2%. He also argued that, given that specific costs of future medical care and appliances had historically outstripped general inflation by 3% per annum, a discount rate closer to 0% should be considered.

22. In canvassing for a change in the discount rate, the plaintiff relied upon the reasoning of the House of Lords in *Wells*. This the High Court judge accepted, stating that he found the speeches of the law lords to the effect that the plaintiff should not be obliged to accept "non-negligible risk" compelling.

23. O'Sullivan J. accepted the appropriateness of a 2.5% real rate of return before making any allowance for medical inflation and did so by reference to a mixed portfolio containing 70% equities and 30% gilts. He concluded that this approach might prudently be pursued having regard to the plaintiff's long life expectancy, once he avoided investment in equities during the first and last five year periods of investment.

24. Accordingly, it can be stated that in *McEneaney* the Court accepted that, in calculating the real rate of return, it should take into account that a plaintiff is entitled to avoid "non-negligible risk". Insofar as O'Sullivan J. concluded that this could be achieved by reference to a mixed portfolio including a substantial percentage of equities, he did so against the backdrop of the non-availability of pan European ILGS and plaintiff's evidence as to how, in such circumstances, the real rate of return might be calculated.

25. Even though *Boyne* is not authority for the proposition that a 3% real rate of return should be assumed in every case of future pecuniary loss, a rather "one size fits all" approach has, since the date of that decision, been adopted by the courts for the purpose of determining the multiplier to be used when calculating all classes of future pecuniary loss. That situation pertained until the decision of the High Court in the present case where the judge calculated the damages in respect of future pecuniary loss by reference to a real rate of return of 1.5%.

26. Given the High Court judge's conclusion on this issue, it is necessary to refer briefly to the submissions made by the parties in the High Court and then to the legal and evidential basis which led the High Court judge to this conclusion.

The High Court hearing

27. The principal submission advanced on the plaintiff's behalf was that in order to achieve a 3% real rate of return on his lump sum award in respect of future pecuniary loss, it would be necessary for him to invest a substantial percentage of that award in equities. This was, according to the plaintiff, an excessively risky approach having regard to the use for which the funds invested would be required, namely his future care and ancillary needs. The Court was urged to follow the reasoning of the House of Lords in *Wells* where it was held that an injured plaintiff was not in the position of an ordinary prudent investor and was entitled to pursue an investment strategy which would afford greater security and certainty, and which would best be achieved by investment in ILGS.

28. In reliance upon the reasoning in *Wells*, the High Court was urged to favour a real rate of return based upon the most risk adverse type of investment available to the plaintiff to cater for his future care. While no ILGS are available in this jurisdiction, such as were available in the UK at the time of the decision in *Wells*, such securities can be purchased in the U.K and the United States. In particular, ILGS can be purchased in euros in Germany and France and can be bought in a manner such that they will provide the plaintiff with a virtually risk free stream of income capable of meeting his future needs. Given that yields from such bonds were at a historic low at the time of the High Court hearing, that being the time at which the initial investment would take place, the Court was urged to favour a real rate of return at 0%.

29. The plaintiff further argued that in fixing the real rate of return, the Court also had to have regard to the fact that the cost of wages for those who would likely care for the plaintiff would likely rise at a rate above the Consumer Price Index ("CPI"). That being so, the RRR had to be different to that which might apply in cases where the cost of care was not the principal component of the lump sum payment. A like argument was advanced in respect of medical costs, which, according to the plaintiff were also likely to run ahead of ordinary inflation.

30. In response, the defendant submitted that a 3% real rate of return was realistic, fair and proportionate. Such a return had been achieved by the Courts Service over several decades for those in Wardship. The high likelihood was that if the court approached the multiplier by reference to a real rate of return of 0% per annum the plaintiff, and indeed a substantial percentage of other plaintiffs, would end up being massively overcompensated for their losses as they would, as a matter of probability, not invest in ILGS but in a mixed portfolio which would likely yield a 3% real rate of return.

31. That this was so, according to the defendant, was because no prudent investor would adopt an investment strategy that did not involve diversification. Further, the securities proposed by the plaintiff (ILGS) were not, it submitted, risk averse. While the full amount of any ILGS would be repaid on the date of its maturity, together with a sum (in the case of French or German bonds) to reflect eurozone inflation over the period of the investment, the plaintiff could nonetheless end up being at a loss because of a potential difference between inflation in Ireland and that in the eurozone in general. Further, such an investment approach carried risks pertaining to sovereign default and eurozone break up in which case the relevant government might renege or default in whole, or in part, on the repayment of the ILGS. A further complication was that there were no bonds as yet available of the necessary duration to cover the period of investment required to meet the plaintiff's needs.

32. The arguments made by the parties were much more extensive and nuanced than those set out in the preceding paragraphs. However, hopefully that account is sufficient to allow for a proper consideration of the findings and conclusions of the High Court judge. These are contained the written judgment which he delivered on the 18th of December, 2014, following a lengthy hearing and having had the benefit of extensive oral and written submissions.

Decision of the High Court

33. The High Court judge concluded that, in quantifying the damages to which the plaintiff was entitled, he was required to put him in the same financial position as he would have enjoyed had he not been injured. That sum was to be calculated by making allowance, where appropriate, for a range of contingencies. However, once that calculation was done, there was no justification for imposing an artificial cap on the multiplier. There was, he stated, as was suggested by Lloyd L.J. in *Wells* at p.364,

> "... no room for a judicial scaling down. Current awards in most serious cases may seem high ... But there is no more reason to reduce the awards, if properly calculated, because they seem high than there is to increase awards because the injuries are very severe".

34. The overall legal approach of Cross J. was one which was consistent with that adopted by the House of Lords in *Wells*, a decision which he considered to be good law in this jurisdiction, given that it was not, in his view, in conflict with the decisions of O'Sullivan J. in *McEneaney* or that of Finnegan P. in *Boyne*.

35. Critical to his judgment was his conclusion that the plaintiff was not to be treated as an ordinary "prudent investor" when it came to determining the likely real rate of return which he might obtain on investment of his lump sum. What was prudent for this plaintiff

was different from what would be prudent for other investors and indeed certain other plaintiffs. This was because the funds to be invested were principally required for his essential future care rather than to meet any other type of future pecuniary loss. Prudence required that the real rate of return be determined having regard to the plaintiff's right to invest his award in the most risk averse manner possible and, in his view, that was in ILGS.

36. In relation to the submissions that the real rate of return on investment income ought to be calculated by reference to the likely yield from an investment in ILGS rather than in a mixed portfolio of equities and gilts, the High Court judge accepted, inter alia, the following:

> (i) That no ILGS were available issued by this jurisdiction but securities of this nature were available to be purchased from the UK and governments in other eurozone countries such as Germany and France.
>
> (ii) That while inflation rates might differ in eurozone countries, that divergence was likely to be insignificant in the long term.
>
> (iii) That the availability of suitable bonds was somewhat limited. This was because they did not mature at regular intervals and were, at the date of judgment, not available beyond a twenty year period. If that difficulty arose, he considered it might reasonably be overcome by the creation of a mixed portfolio of ILGS with some of the fund being kept in cash and some other percentage being put into bonds in countries other than France or Germany.
>
> (iv) That, in order for the plaintiff's potential investment in ILGS to be compromised, there would have to be a break up of the eurozone and the European Union as well as a sovereign default by either Germany or France, an overall risk that he considered to be fanciful.
>
> (v) That the risks to which the plaintiff's fund would be exposed if invested in ILGS would be significantly less than those to which it would be exposed if invested, as advocated by the defendant, in a mixed portfolio containing a significant percentage of equities.
>
> (vi) That, in order to produce a 3% real rate of return, the greater percentage of the plaintiff's fund would have to be invested in equities, and, in the portfolio advocated by one of the defendant's expert witnesses, these would have to achieve a 5% annual real rate of return. Such an investment strategy was unacceptable for this plaintiff.

37. The High Court judge also accepted that the Office of Wards of Court of the High Court had historically invested the damages awarded to plaintiffs such as Gill Russell in mixed portfolios containing a substantial percentage of equities and had achieved a 3% real rate of return on such investments. However, in his view it was too early to conclude that returns of this nature could be maintained in the future. He also stated that how the sum awarded to Gill, or indeed to any other plaintiff, would likely be invested was not, in his view, a matter to be taken into account in determining the real rate of return to be applied. Neither was it for the court itself to be prescriptive as to how any such award should be invested. What was important was that the lump sum awarded should fully meet the plaintiff's future care needs if invested in the most risk averse fashion. At para. 2.49 of his judgment, the High Court judge stated as follows:-

> "I find that a prudent investor on behalf of the plaintiff given the absolute necessity to ensure that his fund would not be dissipated would invest in a safest possible portfolio, whether of ILGS or in a mixed fund with substantially less equities to give greater security than an ordinary plaintiff who suffered a diminution in his earning capacity. Any plaintiff will also be more risk adverse than an ordinary prudent investor in the market place. It is impossible to imagine any individual more risk adverse than this plaintiff."

38. The fact that a plaintiff might ultimately elect to adopt a higher risk strategy than that considered by the court as the prudent when assessing the real rate of return was, the High Court judge stated, no reason for altering the basis upon which the damages calculation should be made. Prudence in this case required that damages be assessed on the assumption that the plaintiff was entitled to invest his award in the safest possible investment portfolio.

39. In favouring the ILGS approach for the purposes of determining the real rate of return, the High Court judge expressed himself influenced by the fact that the Bank of England pension fund was invested in ILGS. He stated that in his opinion the plaintiff's requirement for security was far greater than that of the staff of the Bank of England and that the defendant had failed to explain why, therefore, ILGS should be considered an excessively cautious or excessively expensive approach to securing his future essential care needs.

40. In relation to wage inflation, the High Court judge accepted the evidence of Prof. Brendan Walsh to the effect that within a period of five years wage inflation would outstrip general inflation by a minimum of 1%. That being so, he concluded that he should reduce the real rate of return by 0.5% to allow for wage inflation given that the majority of the plaintiff's claim for pecuniary loss concerned the cost of future care.

41. The plaintiff's arguments pertaining to medical inflation were rejected by the High Court judge and accordingly he found it unnecessary to make any further adjustment to the real rate of return by reference to his future medical costs.

42. In fixing the real rate of return by reference to his conclusion that ILGS provided the most suitable risk averse investment strategy for the plaintiff, the High Court judge concluded that a rate of 1.5% was appropriate and he did so on the basis that at the time of the trial the then yield on ILGS was 0.5%. Given that the plaintiff would be entering the ILGS market on several occasions during his life time, he concluded that a further 1% had to be added to take account of the evidence of Prof. Walsh to the effect that over the life time of the investment the value of such bonds might reasonably be anticipated to rise to 1% or 2%. From the 1.5% figure, he then made the 0.5% deduction in respect of wage inflation, thus concluding that the real rate of return to be used when calculating this plaintiff's claim for future care based upon an investment in ILGS should be 1%.

43. The High Court judge also concluded that if the plaintiff's financial advisors were not able to craft a portfolio of investments containing solely ILGS, then he considered that they might pursue investment in a portfolio beyond the remit of ILGS, but one which would have no more than half of the equity component proposed by the defendant. He concluded that it would be unjust to expect the plaintiff, who would be investing to cover the cost of his future care, to bear the type of risk which would stem from an investment in a mixed portfolio containing the high equity component (60%) as was proposed by one of the defendant's experts. The High Court judge reasoned that if 3% was the appropriate real rate of return for an ordinary prudent investor in such a mixed fund, then someone in the plaintiff's position should be expected to take no more than half of the risks of such an investor. He went on to

conclude that a mixed portfolio with a 30% equity component would also likely yield a real rate of return of 1.5%. Allowing for wage inflation of 0.5%, a real rate of return of 1% was appropriate regardless of whether the investment method adopted was ILGS or a "mixed portfolio".

Submissions of the parties

Submissions of the appellant
44. Mr. McCullough S.C., on the appellant's behalf, submits that it is open to this Court to substitute its own conclusions for those of the High Court judge insofar as the inferences which he drew from the evidence did not involve him in making decisions as to the truth of the evidence given by different witnesses. He relies upon the fact that the High Court judge stated that he was satisfied that all of the witnesses were telling the truth and that the difference in their evidence was due to the fallibility of economists' forecasts of future events. Thus, no mischief would be created if this Court were to decide to substitute its own conclusions for those of the High Court judge notwithstanding the fact that it did not hear the evidence of the witnesses' viva voce.

45. The appellant maintains that the High Court judge erred in law in deciding upon the appropriate multiplier to be used when calculating the plaintiff's future pecuniary loss without reference to its interests qua defendant. It submits that he was obliged to carry out a balancing exercise between the parties in the course of which he ought to have had regard to its interests, constitutional and otherwise. He was also obliged, according to the appellant, to have regard to the proportionality of his intended award and to the duty of the plaintiff to mitigate his loss as *per* the decision of Finnegan P. in *Boyne*, matters which he was said to have incorrectly excluded from his consideration

46. The appellant submits that the Court erred in law in disregarding how, on the balance of probabilities, the plaintiff was likely to invest his award in respect of pecuniary loss and how that investment would likely perform. The appellant argues that there is no principled reason why Irish law should "draw down the shutters" in this regard given that, in assessing damages, the court adopts a methodology whereby it prefers one scenario to another, on the balance of probabilities. It decides issues such as life expectancy and the future needs of a plaintiff on this basis, both being decisions which involve a certain degree of uncertainty. That being so, there is no reason why the court should not, in determining the appropriate multiplier, take into account the manner in which the plaintiff's award is likely to be invested. The fact that the yield on that investment cannot be determined with absolute certainty is no reason why such an assessment should be excluded. In failing to consider how the award will likely be invested and what it will yield, on the balance of probabilities, the court opens up the possibility that, at the end of the period of loss, a plaintiff may be left in a better financial position than what he would have been in had he not been injured.

47. The appellant submits that the High Court judge erred in law and in fact in failing to find that the plaintiff's funds were likely to remain under the control of the Office of Wards of Court on attaining his majority and in his failure to have regard to the real rate of return that would likely be achieved on the investment of his award in such a scenario. Further, regardless of whether or not the Court was satisfied that the plaintiff's funds would likely continue to be managed by the Office of Wards of Court on his attaining his majority, it erred in failing to have regard to the fact that a 3% real rate of return was historically achieved on the investment of awards for catastrophically injured plaintiffs. The appellant relied upon the decision in *Boyne* as authority for the proposition that the court ought to have regard to the investment policy of the Office of Wards of Court when determining the appropriate multiplier.

48. The appellant submits that the High Court judge erred in determining the likely real rate of return on investment income in this case by reference to an investment policy (an exclusively ILGS model) when there was no evidence before him of the plaintiff's intention or willingness to follow such an approach. Further, it maintains that the High Court judge misinterpreted the decision in *Boyne*, which it contends is authority in support of its contention that ILGS are not an appropriate investment for the prudent Irish investor as ILGS bought outside the jurisdiction carry with them both an exchange and inflation risk that is unacceptable. It submits that the High Court judge should have followed the investment approach approved of by Finnegan P. in *Boyne*, when determining the real rate of return in that case, which was based on his conclusion that the prudent investor would invest in a mixed portfolio of equities and gilts.

49. The appellant submits that it is superficial to seek to distinguish *Boyne* from the present case on the grounds that, in *Boyne*, the court was assessing the plaintiff's claim for pecuniary loss arising from his loss of future earnings as opposed to a claim for pecuniary loss arising in respect of future care costs, as is the fact in the present case. There should be no difference to the approach of the court when determining the likely real rate of return on the investment required to meet either head of claim.

50. The appellant submits that the High Court judge erred in fact in concluding that an investment restricted to ILGS provided the Plaintiff with the most risk adverse method of investment to meet his future care needs. Such an investment strategy does not have the requisite flexibility to do so. It instanced the possibility that the plaintiff might live beyond his agreed life expectancy in which case the income from his ILGS would simply run out whereas investment in a mixed portfolio provided him with the possibility that he might have income available should he live longer than expected.

51. The appellant also relied upon the potential loss of investment income to the plaintiff if for any reason a bond might have to be sold before its maturity date. Further, ILGS exposed the plaintiff's income stream to the risk of sovereign default and the risk of a eurozone breakup, risks which it submitted were not fanciful, as was found by the High Court judge. Also, ILGS, while intended to protect against inflation, did not achieve that objective in the present case given that such bonds were not available in this jurisdiction and would therefore be subject to a serious risk of inflation divergence on the date of maturity. The appellant complained that no evidence had been put before the Court to demonstrate that there was a range of bonds available in the eurozone maturing in a manner likely to fit the investment required by the plaintiff. Further, while accepting that an ILGS model could not work without the inclusion of non-eurozone ILGS investments the High Court judge did not address their potential unsuitability due to the additional risk arising in such circumstances from a currency differential.

52. In urging the Court to conclude that the High Court was in error in following the decision of the House of Lords in *Wells*, the appellant relied upon the fact that *Wells* was decided not only on facts that do not apply in this case but also on the grounds that it was decided against the backdrop of considerations that equally do not apply here. The first was the Court's belief that the Lord Chancellor would otherwise himself move to set a discount rate as he was entitled to do under s. 1 of the Damages Act 1996. The second, that for public policy reasons the court considered it necessary to fix a rate in order to facilitate the settlement of proceedings, thus saving litigants the expense of callings expert witnesses to prove the appropriate discount rate at trial, even though the rate fixed was one which might not do justice to the parties in every case.

The Respondents submissions:
53. Mr. Gleeson S.C., on behalf of the respondent, submits that the High Court judge's conclusions were not all based on inferences drawn from the facts and that in any event no grounds have been advanced to explain why this Court should draw different

inferences to those drawn by the High Court judge. It is not, he contends, open to the Court to jettison the restrictions imposed upon an appellate court as per the decision in *Hay v. O'Grady* [1992] 1 I.R. 210.

54. Counsel further argues that in respect of a number of propositions advanced by the appellant on this appeal, no evidence was adduced in the High Court. Thus, it is not open to the appellant to ask this Court, for example, to have regard to public policy issues such as the potentially burdensome effect of an alternation in the real rate of return on the State's resources or the effect that the same might have on insurance premiums. Not only was there no evidence led concerning these issues, these issues were never pleaded.

55. While the appellant complains that the High Court judge failed to have regard to its interests in reaching his conclusions, counsel submits that it has failed to identify precisely what matters he allegedly disregarded and which now render his conclusions unsustainable in law. Insofar as the appellant argues that the High Court judge impermissibly failed to have regard to its property rights, the Court was advised that so such argument was advanced in the High Court and should not be entertained on this appeal. In any event, counsel submits that the appellant has failed to explain how, accepting as it does that the Court must award compensation on a 100% basis, the judge wrongfully interfered with its property rights.

56. The respondent submits that the High Court judge was correct in concluding that he was obliged to award the plaintiff full compensation regardless of how burdensome such an award might be on the defendant. Counsel reminded the Court that the appellant has not appealed the High Court judge's findings that the plaintiff should not be obliged to invest in any product that carries any risk. What it has appealed is the High Court judge's finding that a prudent investor would invest in ILGS and/or in a mixed portfolio including a small percentage of equities which would only provide a real rate of return of 1.5% and there was ample evidence to support such a finding.

57. Counsel submits that the High Court judge was entitled to prefer the respondent's expert testimony to the effect that a plaintiff's potential investment in ILGS would be more risk adverse than an investment of the type advocated by the defendant comprising mixed portfolio with a significant percentage of equities. In circumstances where the defendant has not appealed the finding that the plaintiff should not have to bear any risk in considering how to invest his award, the appellant was nonetheless seeking impermissibly to urge the adoption by this Court of a mode of investment which would expose him to risks which could be avoided by the ILGS approach. It was clear from the evidence that the risks associated with investment in equities could be bought out by investment in ILGS. Accordingly, the judge had correctly concluded that the risk that an investment in equities might leave someone like the plaintiff short of funds for any period of his predicted life expectancy was one for which it was unreasonable to expect him to bear. The High Court judge had heard evidence to the effect that it was important that the plaintiff's lump sum would not suffer from volatility in terms of it's value and that the risk of this happening was one which was most likely to arise through an investment strategy involving equities.

58. The respondent submits that the High Court judge was correct in concluding that, as a seriously injured child, the plaintiff should not be equated with an ordinary investor for the purposes of determining what should be considered to be a prudent investment. Plaintiffs do not choose to invest. Rather, it is the tort and its consequences that compel them to do so. The ordinary investor, counsel submits, may be prepared to take a calculated risk in the hope of improving his or her financial position and may invest in equities to that end. On the other hand, a plaintiff in the position of Gill Russell requires the return on the investment of their award to provide them with the necessities of life. In this regard, the High Court judge was correct to conclude that prudence required his compensation to be calculated based on either total investment in ILGS or investment in a mixed portfolio configured in such a manner as to amount to a risk free investment and which would produce a real rate of return of 1%, having taken into account the likely effects of wage inflation.

59. Counsel for the respondent submits that the High Court judge was correct in concluding that ILGS were the most risk adverse investment by which to calculate the plaintiff's entitlement to pecuniary loss. However, while ILGS were inflation proof with respect to general inflation, they were not inflation proof in the context of potential wage inflation, and hence the High Court judge was correct, on the evidence, in making a further adjustment to the likely real rate of return based on future wage inflation.

60. As to the appellant's submission that the High Court judge failed to take account of his obligations to mitigate his loss, counsel submits that the respondent is not obliged to mitigate the amount of damages payable by the defendant by taking risks as to the manner in which he might invest his award. That obligation arises at an early stage in the process when the trial judge assesses what the damage suffered by the plaintiff has been and whether the plaintiff could reasonably have reduced the extent of his damage. Once the judge has ascertained the damage, his duty is to award full compensation.

Judgment

61. While this module of the appeal principally concerns the defendant's complaint as to the allegedly impermissible approach taken by the High Court judge in fixing the multiplier to be used to calculate the lump sum payable to the plaintiff in respect of his future pecuniary loss, given that no appellate court has in recent times considered the proper approach to be adopted by a court of first instance when faced with such a task, this Court will now consider in general terms the relevant principles which it considers ought to be applied in such circumstances. In doing so, the Court will deal with specific issues arising for its consideration on this appeal.

Proper assessment of pecuniary loss

100% compensation Rule

62. In making an award of damages for pecuniary loss, the court must pursue the objective of providing a plaintiff with full 100% compensation for all of his or her probable future financial loss. In catastrophic injury cases, such as the present one, that part of the plaintiff's claim will inevitably include a claim for loss of earnings, the cost of aids and appliances and the cost of future care.

63. The appellant does not seek to dispute the plaintiff's entitlement as a matter of law to 100% compensation, and indeed the terms of the interim settlement agreed between the parties in 2012 specifically provided that the plaintiff would be compensated on that basis. However, notwithstanding this fact, the appellant makes a range of submissions that are consistent only with an assertion that the court, when determining the amount of compensation payable, should have regard to the likely effect that the award may have not only on the defendant but also on society at large. The headlines to these submissions include reference to the likely effect of increased awards on public policy, the insurance industry, the State's finances, the defendant's constitutional rights to private property and the principle of proportionality.

64. It is thus 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 over compensate 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.

65. The defendant did not did not enlarge upon what it meant by stating that the Court was obliged to be "fair to the defendant" in the context of its acceptance of the principle of 100% compensation. Further, while it maintains that the High Court in reaching the decision which it did excluded its interests, it did not explain adequately how its property rights under the constitution, for example, would entitle the Court to take any different approach to the assessment of damages than that which it did adopt. It is also factually incorrect, as was submitted, that the High Court judge disregarded the defendant's interests following what it described as a finding of guilt on its part. This is a case in which liability was admitted. The High Court heard and considered evidence put forward by the defendant in respect of each and every head of claim advanced by the plaintiff such that its interests might be fully considered before the multiplicand was determined. Further, when it came to a consideration of the multiplier to be applied, the defendant called evidence and made submissions in support of what it maintained was the proper approach to be adopted by the court when conducting that exercise. In such circumstances it is difficult to find any merit in the submission that in some way its interests were not considered.

66. The principle of 100% compensation and the resultant consequences are well described in the judgment of Stephen J. in the High Court of Australia in *Pennant Hills Restaurants Pty. Ltd. v. Barrell Insurances Pty. Ltd.* [1981] H.C.A. 3, where at para. 51 he stated:-

> "51. This undiscounted approach will result in a substantial increase in the amount of damages to be awarded in individual cases, but if its result is not to over-compensate the plaintiff, this is in itself no objection to its adoption. It is no part of the judicial function to depress the level of awards on policy grounds; the courts have no mandate to entertain any such policy. If proper compensation is productive of what are seen as socially undesirable consequences, as by unduly increasing insurance premiums, this may be doing no more than redistributing the financial burden of road traumas and industrial accidents from the victims and the community at large to road users and industry. If such redistribution is unacceptable, overseas models exist for legislative remedies in the shape of schemes of compensation which do not entail lump sum payments. So long as the question of compensation is left to the common law and to its remedy of a once and for all lump sum award, the aim of such awards must remain fair compensation, leaving it to the legislature, if it sees fit, to intervene on public policy grounds."

67. The defendant's resources can never be relevant to anything other than the plaintiff's ability to enforce their award. A number of observations of their lordships in *Wells* are of assistance in this regard. Lloyd L.J., concerning future pecuniary loss, stated at p. 373:

> "I cannot for my part see anything unjust in requiring the defendant to compensate the plaintiff in full, however burdensome that may prove."

At p. 364 he advised:

> "The purpose of the award is to put the plaintiff in the same position, financially, as if he had not been injured. The sum should be calculated as accurately as possible, making just allowance, where this is appropriate, for contingencies. But once the calculation is done, there is no justification for imposing an artificial cap on the multiplier. There is no room for a judicial scaling down. Current awards in the most serious cases may seem high. The present appeals may be taken as examples. But there is no more reason to reduce the awards, if properly calculated, because they seem high than there is to increase the awards because the injuries are very severe."

68. Likewise, Scarman L.J. stated in *Lim Poo Choo v. Camden and Islington Area Health Authority* [1980] Appeal Cases 174, advised:-

> "There is no room here for considering the consequences of a high award upon the wrongdoer or those who finance him. And if there were room for any such consideration, upon what principle or other criterion is the judge to determine the extent to which he is to diminish upon this ground the compensation payable"?

69. It is undoubtedly the case that any modification of the discount rate in the present case, if applied across the board, will result in a general increase in the size of awards for future pecuniary loss. However, to leave in place an unrealistically high real rate of return would be to disregard the principle of 100% compensation, given that the same would result in the under compensation of plaintiffs with claims of that nature.

70. Accordingly, the role of the trial judge must centre upon ensuring that each of the several and distinct elements of the claim which make up the overall total award in respect of pecuniary loss is calculated as accurately as possible. When that has been done, the trial judge has no entitlement to increase or modify that figure on account of his or her own subjective assessment that the intended award seems unduly large. If the judge is uncomfortable or uncertain about the appropriateness of the total award, he or she should do what was advised by Clyde L.J. at p. 395 of his judgment in *Wells*, where he stated as follows:-

> "If at the conclusion of the exercise the judge is uneasy at the total result he should not seek to make any overall adjustment in either direction to the total award to meet his unease; he should return to reconsider each element in the calculation and secure that there is no need for revision at that level."

The objective of the assessment of Pecuniary Loss

71. The objective which the Court seeks to achieve when estimating future pecuniary loss is well-stated by Oliver L.J. in *Hodgson v. Trapp* [1989] A.C. 807, at p. 826:

> "Essentially, what the Court has to do is to calculate as best it can the sum of money which will, on the one hand, be adequate, by its capital and income, to provide annually for the injured person a sum equal to his estimated annual loss over the whole of the period during which that loss is likely to continue, but which, on the other hand, will not at the end of that period, leave him in a better financial position than he would have been apart from the accident. Hence, the conventional approach is to assess the amount notionally required to be laid out in the purchase of an annuity which will provide the annual amount needed for the whole period of loss."

72. Once each of the elements of the lump sum has been computed as accurately as is possible, the total award should be sufficient to fund the notional annual sum required by a plaintiff to meet their financial loss or tortuously induced financial needs over the specific period to which those losses relate.

73. In other words, the trial judge must compute the lump sum which when invested will provide the plaintiff with an annual sum equivalent to all of his future loss, be that loss one which arises in respect of earnings or be it one required to cover his future medical care.

The Multiplicand and Multiplier

74. The first element in the lump sum calculation is the multiplicand. In the present case this sum includes the cost of the aids, appliances and nursing care that the plaintiff will require in any given year for the remainder of his agreed life expectancy. In many cases a plaintiff's need for care may increase or decrease as the years go by, and in such cases it is necessary for the court to take different multiplicands for different periods to be covered by the award. Regrettably, the calculation of the multiplicand is not an exact science, but the court will, having considered the evidence from both parties, end up making an informed decision as to what it considers the plaintiff's future needs are likely to be.

75. It is at the time when the court is calculating the multiplicand that a defendant is entitled to challenge the validity or extent of any aspect of the claim being advanced by a plaintiff on grounds that they have failed to mitigate their loss. For example, in a catastrophic injury claim, a defendant might contend that the claim advanced for future care is excessive in that the plaintiff claims the cost of employing two carers to meet their future needs. Such a claim may be predicated on the assertion that two carers are necessary to allow the plaintiff make a range of transfers, such as from bed to chair, with efficiency and dignity. However, the defendant may claim that the plaintiff in such circumstances is failing to mitigate their loss and may contend that if they were to use a hoist for the purpose of making such transfers that only one carer would be required thus significantly reducing the claim. Or, in the case of a plaintiff claiming for full loss of earning to retirement age, the defendant might contend that the plaintiff had failed to mitigate their loss by refusing to engage with part time employment which would have the effect of reducing the annual sum claimed. These are but two examples of how a defendant may raise the obligation of plaintiffs to mitigate their financial loss in litigation of this nature.

76. However, this Court rejects the submissions advanced on the appellant's behalf in the present case that a plaintiffs obligation to mitigate their loss arises for the court's consideration, not in advance of determining the multiplicand but when fixing the multiplier. As already stated earlier in this judgment, the appellant argues, notwithstanding its agreement that the plaintiff must receive 100% compensation, that he has an obligation to mitigate his loss by investing his award once made in a manner such as would reduce the its obligations in terms of the size of the award. That precise argument was advanced in the House of Lords in *Wells* and was rejected out of hand by all five law lords. Each stated that a plaintiff's obligation to mitigate their loss arose for consideration when the court was seeking to determine the annual sum he would require to meet his future financial needs. Once that exercise was complete, his obligations in this respect were at an end. As was stated by Clyde L.J. at p. 396, concerning the plaintiff's duty to mitigate loss:-

> "That duty relates to the nature and extent of the items which he or she may claim as arising from the injury. It does not extend to the way in which he or she may dispose of the award."

77. Of further assistance is the following extract from the decision of Hutton L.J., at p.404, when rejecting the arguments advanced by the defendants that the plaintiffs' duty to mitigate their losses obliged them to invest their damages in what the defendants considered to be a prudent investment, namely a mixed basket of equities and gilts.

> "I have already given my reasons for not accepting the submission that it is imprudent for a gravely injured plaintiff to invest in ILGS to ensure the payment of future nursing care. I further consider that the concept of mitigation of damages does not apply to the investment of the damages after they have been awarded by the court. The duty to mitigate applies at an earlier stage in the process when the trial judge assesses what the damage suffered by the plaintiff has been and whether the plaintiff could reasonably have reduced the extent of his damage. But once the judge has assessed the damage his duty is to award full compensation. In the present cases there is nothing that the plaintiffs could do to reduce the extent of the nursing care that they will require in the future or to reduce the amount of the loss they will suffer from the extinction of their future earning capacity"

78. This Court adopts, as an entirely correct statement of the law, the aforementioned extracts from the judgments of Lords Hutton and Clyde. Thus, we reject, as relevant to the calculation of the multiplier, any argument concerning an obligation on the part of the plaintiff to mitigate his loss on the basis that he is obliged to pursue any particular type of investment policy. It follows that we consider that Finnegan P. in *Boyne* was incorrect in law when he concluded that relevant to the consideration of the appropriate multiplier was the plaintiff's obligation to mitigate his loss by reference to the manner in which he, as a prudent investor, might invest the award. The Court will later return to his treatment of the plaintiff as a "prudent investor" for the purpose of determining the appropriate real rate of return.

79. Having selected the correct multiplicand for each head of claim, the court must then make a further range of assumptions to calculate the correct multiplier so as to ensure that the calculation can be applied to the precise period of the loss for which the plaintiff is to be compensated. This involves the court choosing the interest rate which represents the discount for the payment now of a lump sum to compensate for the loss to be sustained by the plaintiff over a period of years in the future.

80. The interest rate selected is critical in that the objective of the exercise is to decide upon a lump sum which, when invested, will be sufficient to allow the plaintiff, by drawing down both interest and capital, to have exactly what has been determined by the court will be required to meet his needs for the period of his agreed life expectancy, but no more. The purpose, therefore, of fixing the discount to which the defendant is entitled by reason of the upfront lump sum payment is to eliminate the possibility that the plaintiff might be overcompensated.

81. How the multiplier is determined is succinctly described in *Wells* by Lord Hutton in the following passage from p. 399 of the report:

> "The multiplier which the courts apply to the annual cost of nursing care and the annual loss of earning capacity to produce the lump sum of compensation is determined by reference to the respective periods in the future from which the cost will be incurred and the loss will be sustained, but discounted to allow for the immediate receipt of the lump sum rather than the receipt of periodical payments over a number of years. The discount is assessed by reference to the assumed rate of return on the lump sum but invested so that the higher the rate of interest assumed the smaller the multiplier."

82. The consequence of the choice of discount rate is well described in the following passage from the judgment of Lord Hope at p. 389 in *Wells*:

> "A discount must be given for the fact that money is being paid now for a loss that will not arise until some date in the future. The rate to be applied in calculating that discount will affect the amount of the total sum to be paid as damages. In the majority of cases a difference of a point or two in the rate of discount will not have a very large impact on the total award. But in cases where the injury is one of maximum severity and in any other case where the element of future loss forms a major part of the award, a difference of a point or two in the rate of discount will make a very great difference to the result. It may make all the difference between the adequacy and inadequacy of the award as compensation for the losses which the plaintiff will sustain".

It is the defendant's concern as to the effect that the downward shift in the discount rate has had on the size of the lump sum award of the High Court judge that has undoubtedly stimulated this appeal.

The Plaintiff as an investor
83. Critical to the assessment of the rate of interest that a plaintiff might reasonably be expected to receive on the investment of their lump sum is the type of investment which the court considers would be prudent in circumstances where the sums to be drawn down annually are needed to replace lost earnings and/or to meet the costs of a plaintiffs future medical or nursing needs.

84. Quite correctly, in the view of this Court, Cross J. determined that the assessment of the real rate of return is to be made on the assumption that the plaintiff should be entitled to invest his award in as risk free an investment strategy as is available and which will likely meet his future care needs. In particular, we agree with his conclusion that the plaintiff is not to be treated as an ordinary prudent investor for the purposes of calculating the likely return on the investment of his lump sum. In adopting this approach, the High Court judge appropriately adopted the reasoning of the House of Lords in *Wells*, thus rejecting the approach earlier taken by the Court of Appeal in the same cases and which approach appears to have informed, to some extent, the decision of Finnegan P. in *Boyne*. The Court of Appeal in *Wells* and Finnegan P. in *Boyne* had concluded that in calculating the plaintiff's lump sum award for future pecuniary loss the court was entitled to proceed on the presumption that the plaintiff would invest his award as an ordinary prudent investor.

85. Having considered the authorities on this issue and in particular the decision of the House of Lords in *Wells*, this Court is satisfied that it would be fundamentally flawed reasoning for a court to assume that the same investment policy would be prudent for all investors. The catastrophically injured plaintiff who needs to replace their lost income or to provide for their future care is simply not in the same position as the ordinary investor who has an income and has surplus funds to invest. The latter is clearly in a position to absorb greater risk. They are not dependant on such monies to meet their basic day to day requirements and indeed may not need to access these surplus funds for many years. Accordingly, they might prudently be in a position to invest in equities given their ability, should the market fall, to hold onto their investment and wait until the market recovers before selling. Even if they end up loosing on their investment the outcome is not catastrophic. However, most injured plaintiffs enjoy no such comfort. Almost inevitably they are dependant upon their award of damages to meet their needs as they arise on a day to day basis. Accordingly, this Court is satisfied that the High Court judge was correct when he concluded that the plaintiff was entitled to have his damages calculated on the basis that he should be entitled to pursue the most risk averse investment reasonably available to meet his needs.

86. In *Wells*, the Court of Appeal held that the damages to which each of the plaintiffs was entitled should be assessed on the conventional basis that they, as prudent investors, would go into the market and obtain a 4% to 5% annual return on their awards by investing in a mixture of equities and gilts. The House of Lords unanimously rejected that approach on the basis that it was unreasonable to expect the plaintiffs to gamble their compensation on the equities market. They concluded that plaintiffs were not to be considered equivalent to the ordinary prudent investor. As was stated by Lord Steyn at p. 386, when contrasting the plaintiffs in those cases to the ordinary investor:-

> "On the other hand, the typical plaintiff requires the return from an award of damages to provide the necessities of life. For such a plaintiff it is not possible to cut back on medical and nursing care as well as other essential services. His objective must be to ensure that the damages awarded do not run out. It is money that he cannot afford to lose. The ordinary investor does not have the same concerns. It is therefore unrealistic to treat such a plaintiff as an ordinary investor. It seems to me entirely reasonable for such a plaintiff to be cautious and conservative. He does not have the freedom of choice available to the ordinary investor. If a comparison is to be made – and in this field all comparisons are inexact – the position of the plaintiffs is much closer to that of elderly, retired individuals who have limited savings which they want to invest safely to provide for their declining years. Such individuals would generally not invest in equities. But for plaintiffs the need for safety may often be more compelling."

87. It is perhaps not unsurprising therefore that the appellant in the present proceedings does not dispute or contest the conclusion of the High Court judge that for the purposes of calculating the multiplier the plaintiff is not to be considered as a ordinary prudent investor and that he is entitled to have his lump sum award calculated on the basis that he is entitled to a lump sum that is sufficient to enable him to participate in as risk free an investment as is available to meet the totality of his future losses over his remaining life expectancy.

88. For the same reasons, this Court rejects the defendant's criticism of the High Court judge for his failure to adopt the approach of Finnegan P. in *Boyne* when he concluded that, in determining the multiplier, the court was entitled to assume that the plaintiff would invest his award in the same manner as an ordinary prudent investor. While he was correct that, in calculating the lump sum, a court is entitled to assume that the plaintiff will invest prudently, he was wrong to approach the selection of the multiplier on the basis that the plaintiff would likely adopt an investment strategy akin to that appropriate for an ordinary prudent investor rather than that which would be considered prudent for a plaintiff dependent upon their annuity to sustain their future welfare. However, it should also be stated that, while disagreeing with the approach of Finnegan J. in *Boyne*, the Court is slow to criticise this aspect of his decision as, while it is clear that some aspects of the decision of the House of Lords in *Wells* were considered, it is not obvious from the text of the judgment that it was argued that for the purposes of assessing the real rate of return the plaintiff should be treated in any way different from an ordinary prudent investor.

89. For the purposes of clarity it is perhaps of importance for this court to state that we do not accept the albeit obiter view expressed by the High Court judge in the present case insofar as he indicated that a plaintiff with a claim for future pecuniary loss confined to loss of earnings might possibly be treated as less risk averse than a plaintiff who has a claim for the cost of future care. There appear to be a number of arguments against such a proposition. It would seem to admit of the adoption of a potentially higher real rate of return in the loss of earnings claim on the assumption that the plaintiff can necessarily absorb a greater risk when investing their award to secure their future income. While of course there may be the rare case where a particular plaintiff may not

need their earnings to survive on a day-to-day basis and might thus be in a position to take risks in terms of the investment of their award, most plaintiffs do not fall into that category. A plaintiff who will never be in a position to work again and is dependant upon the investment of his lump sum for their own support and that of his family may be entitled be treated similarly in terms of the investment risk he should have to absorb to the plaintiff who needs to cover the cost of their future nursing care on an annual basis. As this did not arise on the facts herein we consider that a decision on this issue should be left over to an appeal where it does so arise.

Relevance of how the plaintiff will probably invest

90. In the course of this appeal, the appellant maintained that as a matter of law the High Court judge erred in determining the likely real rate of return without having regard to how, on the balance of probabilities, the plaintiff was likely to invest his award. While of course it is correct to state that, as a matter of law, the court must determine a wide range of issues by reference to future probabilities, there is simply no authority to support the proposition that the court should decide upon the level of the award of damages by reference to what the plaintiff may do with that award in terms of investment or expenditure. Damages for pecuniary loss do no more than seek to replace what the plaintiff would have had were it not for the defendant's wrongdoing. It is open to any plaintiff in charge of their own affairs to do what they like with the lump sum awarded in respect of future pecuniary loss. Of course, many plaintiffs who recover large awards of damages take professional advice and invest accordingly. However, a plaintiff is equally entitled to take their award to Las Vegas or place it on a horse in the Grand National in the hope that they may enhance it. But it is no function of the court to conduct an enquiry as to what the plaintiff is likely to do with their award for the purpose of deciding the level of the award. If it were to do so, the amount of compensation payable to two plaintiffs (one wise and one foolhardy) with precisely the same claim for financial loss would be different.

91. This very issue was pursued by the defendants and rejected by the House of Lords in *Wells*. Clyde L.J., at p. 394, stated as follows:-

> "One clear principle is that what the successful plaintiff will in the event actually do with the award is irrelevant. As Lord Fraser of Tullybelton observed in *Cookson v. Knowles [*1979] A.C.556, 577p it is for the plaintiff just to decide how the award is to be applied. Whether he is proposing to investors or spend it, or, more particularly, exactly how he is proposing to invest it or spend it, does not affect the calculation of the award. No distinction is recognised here between misers and spendthrifts. While it may be evident that there are certain ways in which he could prudently invest the award and other ways in which he could be imperilling his own future comfort by his employment of the award, the quantification of the sum to which is entitled in compensation takes no account of the course which he may in the event choose to adopt."

92. Steyn L.J. at p. 386, when addressing the same issue was critical of the Court of Appeal for falling into error when it took into account, for the purpose of assessing the appropriate real rate of return, the fact that seriously injured plaintiffs had in the past usually invested in a portfolio which included equities. There, he stated as follows:

> "More importantly, the court cannot be expected to investigate what plaintiffs, who are not a homogenous group, will or will not do with their damages. The correct approach is to concentrate on the objective question, namely what is the type of investment that plaintiffs can reasonably be expected to make."

93. For these reasons, it is irrelevant that no evidence was tendered on the plaintiff's behalf to demonstrate what investment strategy would likely be pursued on his behalf, assuming that the award would come under his control on attaining his majority. Accordingly, this Court rejects the appellant's submission that the High Court judge erred in determining the multiplier by reference to a type of investment, namely ILGS, without evidence that this was the approach that would likely be pursued on his behalf. All that the plaintiff is required to establish is that the scheme of investment which he proposes will, as was stated by Steyn L.J. in *Wells*, "enable him participate in as risk free an investment as is available to meet the totality of his future losses over his remaining life expectancy.

The relevance of Wardship

94. This Court also rejects the appellant's contention that the High Court judge was required to have regard to the fact that, as a matter of probability, the plaintiff would remain in wardship and that his funds would thus remain under the control of the Court's Investment Service, which had historically achieved a 3% real rate of return by investing the awards of those under its care and who were in a similar position to the plaintiff in mixed portfolios of assets which included a high percentage of equities.

95. First, on the evidence the High Court judge did not reach any conclusion as to what would happen to the plaintiff on attaining his majority and neither did the defendant seek to establish that fact as a matter of medical probability. Indeed, Dr. Jacinta McElligott, a consultant in rehabilitation medicine who was called on the defendant's behalf, confirmed that the plaintiff's cognitive function was relatively well preserved and that this boded well for his capacity to have independence in his future life. Second, while Mr Brian O'Loughlin, based on his examination of the published reports of the Accountant of the Courts of Justice for the years ended 30th September 2010 to 2013 inclusive (he being the person responsible for the management of funds under the control of the Courts), gave evidence that a real rate of return of 3.2% was achieved on such funds as were invested in a mixed portfolio including a substantial percentage of equities, the High Court judge took the view, as he was entitled to do on the evidence, that just because equities had performed in a certain manner over a limited number of years in the past it did not necessarily follow that similar results would be achieved in the future. Third, unlike in *Wells*, no witness was called to explain the policy of the Court's Investment Service when deciding how to invest the funds of different categories of plaintiff. Thus, the plaintiff had no opportunity to investigate whether the historic real rates of return achieved on its mixed fund was likely to carry through in future decades. Neither did he have the opportunity to explore whether some awards were invested entirely in gilts and others in mixed portfolios, and whether this meant that more risk was being absorbed by one category of plaintiff than another, very relevant questions in circumstances where it is accepted that the Plaintiff is entitled to have his damages calculated by reference to the least risk averse investment suitable to his future needs.

96. Another concern arising from the absence of oral evidence on the matter was the fact that, without it, there was no way of knowing whether the investment strategy likely to be adopted on his behalf would be one driven by the real rate of return used by the court when calculating its award rather than based on that which it considered the most prudent and risk averse investment, having regard to his future care and like requirements. To quote the respondent's submissions, there was no way of knowing whether the policy of the Office of Wards of Court was anything more than a case of the "tail wagging the dog".

97. In *Wells* the same argument was advanced on behalf of the defendants with the court being invited to take into account, when fixing the multiplier, the manner in which the Court of Protection commonly invested the awards of those under its care. The House of Lords did not favour such an approach and in its judgment at p.387 Mr. Bruce Denman, who was responsible for the Court of

Protection's investment policy, is recorded as having stated:

> "If you are looking to have no risk, then the advice to the court would have to be to use index-linked gilts because they are the only vehicle of that nature that will guarantee you a return over and before whatever inflation is."

98. Similarly, at pp. 369-370 Lloyd L.J. noted that the Court of Protection "may feel obliged to invest in equities so long as the sums available for investment are calculated on the basis of a 4.5 per cent return." Further, he noted that

> "In a letter written since the decision of the Court of Appeal, Mr. Denman records the advice given by the Lord Chancellor's Honorary Investment Advisory Committee to the Master of the Court of Protection in the event of awards being calculated by reference to the return on I.L.G.S. The advice is given in guarded terms. He should "seriously consider" a minimum-risk, index-linked portfolio. The master has accepted this advice. It is at least clear, therefore, that the present policy is not set in stone."

99. While the reports of the Accountant of the Courts of Justice were referred to in evidence, given that neither he nor anyone else responsible for the investment policy was called to give evidence, such reports were of little evidential weight and certainly did not provide an evidential basis sufficient to permit the defendant contend that the High Court judge erred in failing to factor such reports into his decision. The evidence was not only limited but it was evidence which the plaintiff was given no opportunity to explore or challenge.

100. Further, if the Court is correct in its view that when calculating the multiplier it is not entitled to look to what investment a non-wardship plaintiff is likely to pursue, surely it must adopt a similar position in respect of plaintiffs who are likely to remain in wardship? If it was otherwise, the court could conceivably find itself adopting a different discount rate for two plaintiffs with the same 30/40 year claim for pecuniary loss where one such plaintiff was brain damaged and the other not. In the case of the brain damaged plaintiff, the court would be asked to calculate its award based on a real rate of return of 3% on the basis that he would remain in wardship and his award would be invested in a mixed portfolio of equities and gilts, regardless of any risk involved. In the case of the other plaintiff, the court would be asked to fix the rate of return by reference to the most risk adverse investment strategy and to calculate the same based on ILGS or perhaps even a mixed portfolio with a very modest percentage of equities. The result would be that the first plaintiff would not only have to bear greater investment risk but would also receive a substantially smaller award.

Did the High Court judge err in holding that investment in eurozone ILGS by a plaintiff in the position of Gill Russell was more risk averse than investment in a mixed portfolio containing a substantial equity component of the nature advised by the defendant?

101. This is a question which must of course be answered in the light of the High Court judge's conclusion that the plaintiff, when investing his award, should not be obliged to take any avoidable risk and should be entitled to invest in the "safest possible portfolio, whether of ILGS or in a mixed fund with substantially less equities".

102. In order to decide whether the High Court judge was entitled to conclude on the evidence that ILGS, rather than a mixed portfolio of the nature proposed by the defendant, presented the more prudent investment risk for the plaintiff, it is necessary to briefly consider the more significant aspects of the evidence concerning the different types of risks faced by a plaintiff seeking to invest their award in order to guarantee their future care or other financial needs.

103. Prof. Kay, an economist who recently carried out a review of equity markets and long-term decision-making on behalf of the British government, gave evidence on the plaintiff's behalf and advised that the greatest risks to which he would be exposed in terms of investment would relate to future inflation and the unpredictability of future investment returns. That being so, he was satisfied that the most risk averse strategy for the plaintiff to adopt was to invest in ILGS.

104. The defendant however argued that there were many additional risks attached to investment in ILGS such that the court should conclude that investment in a mixed portfolio of gilts and equities posed a lesser risk to the plaintiff and that prudence would drive any risk averse plaintiff to adopt such an approach. In particular, it stressed that unlike the position in *Wells*, Government backed ILGS were not available in this jurisdiction. Hence, the plaintiff would be exposed to inflationary risks. Other risks posed by investment in ILGS include those which might stem from a failure to diversify as well as those risks as may arise by virtue of currency exchange rates, the possible breakup of the eurozone, the present unavailability of bonds of sufficient maturity to correspond with the plaintiff's life expectancy as well as sovereign default.

105. The High Court judge having heard the evidence concerning the risks pertaining to investment in ILGS and those that would arise on an investment in a mixed portfolio preferred the plaintiff's expert evidence and concluded that ILGS presented a significantly lesser risk and was one which the prudent plaintiff might reasonably pursue.

106. The Court will now briefly examine some aspects of the evidence concerning the risks arising for a plaintiff considering the option of investing in ILGS or in a mixed portfolio containing a containing a percentage of equities of 55 % or 60% as advocated by the defendant.

Inflation

107. Any court considering a claim for future pecuniary loss must be concerned to ensure that a plaintiff will be able to invest their lump sum in a manner that will provide them with the money they would have had but for the defendants negligence or as in the present case the cost of meeting their tortuously inflicted future needs despite the likely impact of inflation on their award over the period of the loss, because if they are not so protected they will not receive full compensation.

108. Up to the time of the decision of the High Court in this case, Irish judges did not take any special steps to seek to inflation proof, so to speak, awards of damages for pecuniary loss. In *Boyne*, for example, Finnegan P. addressed the issue of inflation only fleetingly and did so, at p. 55, in the following terms:-

> "The courts have taken the approach that inflation can be taken into account by the assumption that a plaintiff can invest the lump sum award and more particularly that the same can be invested partly in equities and partly in gilts resulting in both a hedge against inflation and a reasonable degree of security."

109. He went on to report that this approach to dealing with inflation and indeed the calculation of the discount rate had been abandoned by the House of Lords in *Wells* due to the availability in the UK, since 1981, of ILGS which, in addition to providing an income, also guaranteed a plaintiff that their capital sum would be preserved in terms of its real value given that ILGS were linked to the retail price index.

110. As already stated, what is not clear from the judgment in *Boyne* is whether the plaintiff made the case for having his award determined by reference to the likely yield from ILGS on the grounds that they might provide a better hedge against inflation than an investment in a mixed portfolio or indeed for any other reason. From the text of the judgment, the real argument appears to have centred upon whether the real rate of return on a mixed portfolio containing 70% equities would be 2.9%, as proposed by the plaintiff, or 4%, as submitted by the defendant. What is however clear is that Finnegan P. in basing his calculation on the likely return on a mixed portfolio did so on what this Court considers to have been an incorrect premise, namely that he should treat the plaintiff as an ordinary investor, thus drawing him away from the need to consider any other more risk averse alternative.

111. In his judgment, Cross J. considered the likely impact of inflation on the plaintiff's award should he invest in ILGS and expressed himself satisfied that ILGS exposed him to no more than minimal risk. He concluded that while inflation rates might differ in eurozone countries, that divergence was unlikely to be significant in the long run. His conclusion in this regard was supported by the evidence Dr. Shane Whelan, a fellow of the Society of Actuaries in Ireland, who stated that the key risk for the plaintiff in investing in ILGS was how inflation across Europe might differ from that in Ireland but that this rarely happened in regions with the same currency, an opinion with which the defendant's investment manager and financial adviser, Mr. O'Loughlin, agreed. Dr. Whelan was convinced that ILGS, of all the possible strategies, was the one which minimised the risk to the plaintiff's cash flow by virtue of inflation over several decades. His opinion in this regard was strongly echoed by Professor Brendan Walsh, former professor of economics at UCD, who advised that ILGS were specifically designed to deal with the potential effects of inflation on investments and would thus provide the best protection for the plaintiff's income stream, regardless of the fact that they could not be purchased in this jurisdiction.

112. Mr. O'Loughlin also considered inflation to be the biggest risk to the plaintiff's award in the long term and agreed that index-linked bonds all but eliminate this risk. While his statement to this effect may not have been intended to cover a situation where an Irish plaintiff would invest in ILGS purchased in another country, if one accepts that the divergence in inflation rates in eurozone countries is unlikely to be anything other insignificant, as was not seriously contested, his evidence clearly supports investment in eurozone ILGS as an inflation proof strategy.

Currency Risk
113. The High Court heard evidence from Dr. Whelan to the effect that there would be a currency risk including that associated with potential devaluation should the plaintiff invest in ILGS. However, he stated that ILGS suited to the plaintiffs requirements could be bought in France or Germany with the best available being "OAT€i" a French product. Hence, the risk that the yield on any particular ILGS might be diminished due to a difference in exchange rates or as a result of the devaluation of the relevant currency at the date of its maturity was not one of significance given these risks, as slight as they were, would only arise if the plaintiff was purchasing ILGS outside of the eurozone, and there was no evidence to suggest that any significant part of the plaintiff's award would be invested in that manner. Further, Prof. Walsh advised that for governments of advanced economies risks of this nature were not significant.

114. In addition, and perhaps of some importance, was the evidence that equivalent currency risks would arise on the defendant's proposed investment strategy in that an equity portfolio with a strong international component on the international market exposed the plaintiff to similar risks at the time of sale.

Unavailability of longer dated securities and the risk of having to sell before maturity.
115. Prof. Walsh accepted that in eurozone countries that issue ILGS there are none currently available with the maturity range needed to match the plaintiff's loss, which at the date of trial was 37 years, a problem also considered and rejected as a meaningful risk by the House of Lords in *Wells*. There, the law lords formed the view that, having regard to the demand for such securities, their future availability would be secured. Indeed, in this regard, the High Court heard evidence that one of the reasons that the yields from ILGS were so low at the moment was because of the ever-increasing demand for these products due to what was described as the "flight to safety" of investors in light of recent economic uncertainty and the demand for these products by a wide range of pension funds.

116. Prof. Walsh, who advised that the longest dated ILGS with a maturity date to 2040 were those issued by the French government, was satisfied that new ILGS would come on stream in the future, a fact that was not contested by the defendant. Further, he saw no difficulty in constructing a portfolio of ILGS with varying maturity dates such that the plaintiff's income stream would be protected and available to meet his needs as required. He was also satisfied that the Court should have no real concern that some ILGS might have to be sold before their respective maturity dates and that the plaintiff's need for ongoing funding could be overcome by the manner in which they were purchased. This evidence was mirrored by that of Prof. Kay, who stated that a selection of fixed interest securities of varying maturities could readily be used to achieve a high degree of correspondence between the plaintiff's assets and his ongoing annual financial needs, thereby minimising his investment risk.

117. Having regard to the risks just described, it is important to note that the trial judge in his judgment clearly had regard to the possibility that a portfolio of ILGS for this plaintiff might at some stage include non eurozone ILGS. This he concluded might happen if bonds with the required maturity dates were not available in the favoured eurozone countries, thus increasing the risk to the plaintiff's fund from inflationary factors and differing currency exchange rates. However, it may reasonably be inferred from his decision that this possibility was of insufficient import, having regard to the evidence of Prof Walsh and Prof. Kay as to the nature, extent and likely occurrence of such risks, to cause him to conclude that a portfolio including a substantial equity component posed a lesser investment risk for the plaintiff.

Risk of Sovereign Default /Breakup of The Eurozone
118. Prof. Kay agreed that recent economic and political events had cast doubt on the assumption that government securities in developed countries could be considered entirely free of credit risk. However, in his opinion only heavily indebted countries or those with non-stable governments might be tempted to default, and, given that most of the plaintiff's ILGS would be purchased in France and Germany, it meant that a risk to the plaintiff's investment on this basis was very remote, an opinion shared by the defendant's experts. Prof. Walsh advised that the Governments of the US and Western Europe were regarded as trustworthy, financially secure and unlikely to default. Of some relevance also is the fact that a relatively similar credit risk would apply to many equity investments that the plaintiff might decide to purchase if he were to pursue a mixed portfolio of equities and gilts.

Lack of Diversification
119. Prof. Ahearne, Professor and Head of Economics at the National University of Ireland, who gave evidence on behalf of the defendant, advised the Court that to invest by reference to one asset class alone violated what many analysts considered the first rule of investment. Spreading a portfolio across different asset classes helps to alleviate investment risk. To reduce the risk further, the portfolio should be globally diversified so that investment returns are not overly exposed to developments in one part of the world. However, his principal reason against investment in ILGS was that they were unattractive because of the nominal yields which were, at the time of the hearing, very low.

120. In contradistinction, the plaintiff's experts took the view that lack of diversification was not a concern for the plaintiff who would be investing in government backed securities in countries which were trustworthy, financially secure and unlikely to default and that, if there were concerns about a greater concentration of ILGS being purchased in France or Germany, a small amount of bonds in countries outside the eurozone could be purchased to spread any such perceived risk.

Volatility in the Equity Market

121. The plaintiff's experts placed particular emphasis on the risk to the plaintiff investor of investing in a mixed portfolio containing a significant percentage of equities. They were in agreement with the defendant's experts that a better return might be achieved by the investor who invests in such a portfolio over a period such as 30 or 40 years; however, in their view, the potential for the value of the equity component to rise and fall was extremely unpredictable as to timing, and this created problems for a plaintiff such as Gill Russell. As Prof. Walsh stated, if your timing was good you could do well in the market, but regrettably no investor could escape its fluctuations.

122. One of the problems with equities, as advised by Prof. Walsh, is that the plaintiff needs access to funds on an ongoing basis. His expenses are recurrent and are not capable of being deferred or postponed. This means that his lump sum has to be run down in a predictable fashion. On the defendant's proposals, it was not possible to avoid the risk of having to sell equities when their price was depressed. The plaintiff would be exposed to this risk regardless of whether he pursued the investment strategy proposed by Prof. Ahearne or that of Mr. O'Loughlin.

123. Prof. Ahearne proposed that the plaintiff would purchase both gilts and equities with his award. The equities would be allowed to grow for 20 years and the gilts would be cashed in each year to provide him with his annual income over that period. In the remaining 17 years, the equities would be sold to meet the income stream required. As Prof. Walsh pointed out, if the market were to collapse during that period, like it did in 1966, 1972, or 2008, the equities would end up being sold at a great undervalue and the plaintiff would run out of money. He would have no ability during that period to "sit out the dips" in the manner in which might be possible for the ordinary investor. On Mr. O'Loughlin's proposal, the equities would all be sold within the first 30 years; that being so, a point would come when the plaintiff would be required to sell his equities regardless of their market price.

124. Another troubling matter in terms of the risks attached to investment in equities, is that a plaintiff cannot choose, not only when to exit the market but when to enter it. Both Prof. Ahearne and Mr. O'Loughlin had proposed substantial investment in equities from the outset. If the equity market was low at the outset, then a plaintiff would stand to make significant gain. On the other hand, as was advised by Prof. Walsh, if the market was high at the time of the initial investment, i.e. in or around the time of the award, then the plaintiff's future finances were put at substantial risk.

125. The Court also heard evidence from the plaintiff's experts to the effect that the proposals advanced as prudent by Prof. Ahearne and Mr. O'Loughlin both assumed that the value of the plaintiff's equities would not decline in the early life of the award. Regrettably, the fact of the matter was that this was a significant risk and, if they did, the value of the plaintiff's fund would never recover and would be permanently impaired with the effect that he would not be able to meet his more distant care needs. In this regard, Prof. Walsh produced a table to show how a negative return in the equity component of a mixed portfolio might result in its premature exhaustion.

126. In addition to these concerns, the High Court heard evidence from Prof. Kay that, in his opinion, you couldn't make assumptions that equities were volatile only in the short run and not in the long run. It was also advised that, on Mr. O' Loughlin's proposal, the plaintiff would have to achieve an average return of 4.8% per annum on the equity component of his investment over the first 10 years and a 5.5% real rate of return over the remaining 27 year period, in default of which he would run short of funds. Prof. Kay advised that this was an unrealistic expectation, and Mr. O'Loughlin himself had to concede that there had been periods of 20 continuous years when the stock market had produced less than 3% growth.

127. Another interesting fact to note, regarding Mr. O'Loughlin's proposal, is that in his report he describes the investment over the first 30 year period, which involves a mix of 55% equities, 35% bonds and 10% cash, as a "medium risk asset mix" as against the lower risk asset mix, a mix of 50% gilts and 50% cash over the final seven years of the investment. From this, it can be inferred that it is the equity component of the portfolio that moves the risk from low to medium. This being so it is difficult to see how the defendant can argue that the investment of the plaintiff's funds on such a basis would not expose him to unnecessary risk given that it is one which is described as carrying a "medium risk" over the first thirty year period.

128. Two factual matters that were not in dispute are, firstly, that investment in equities is riskier than gilts, hence the potentially greater return on equities; and, secondly, that gilts or index-linked stocks would be the preferred prudent investment for any plaintiff seeking protection against inflation over the short period. In this regard, it is perhaps worth noting that Mr. Denman, in *Wells*, is reported as having advised that the Court of Protection would exclude equities altogether for short-term investment as it would be too risky an approach, the prudence of which advice none of the experts in the present case sought to contest. It appears not to have been in dispute in this case that a similar approach is adopted by the Office of Wards of Court when dealing with short-term investments. That being so, it is hard to see any justification for asking a catastrophically injured plaintiff who must invest to meet their nursing care needs for perhaps a period of 30 or more years to take any greater risk with the investment of their award. What is risk free or prudent for the plaintiff with short term financial needs must surely be the same for the plaintiff facing a longer term financial need.

129. This brings the Court to consider one final argument made by the defendant as to the type of investment it maintains the court should consider prudent for someone in the plaintiff's position. The defendant argues that by investing in ILGS the plaintiff would be ruling out the possibility that his investment might protect him against the risk of out living the life expectancy agreed or determined by the court and that it would be imprudent. This, it has to be said, is a rather clever if somewhat self serving submission for the defendant to advance given that, if it were accepted, it would potentially reduce very significantly the level of the plaintiff's award. Indeed, a similar argument was advanced in *Wells* without success.

130. As already stated, it is for the court to determine the lump sum that the plaintiff will require to enable him to participate in as risk free an investment as he may demonstrate is available and which is suitable to meet the totality of his future needs. Thereafter, it is for the plaintiff to decide how he will invest that sum. He can at that stage, or indeed at any later time in his life, decide to alter his investment strategy with a view to trying to achieve a financial return that might support him for some additional period beyond his agreed or anticipated life expectancy. However, those are not risks that should be imposed upon him by the court in the manner in which it selects the discount rate because, by so investing, he runs the risk of running short on the money which the court has determined that he needs on an annual basis. Such an approach would also run contrary to the premise underlying the calculation of future pecuniary loss, which is that, as of the date of the agreed or determined life expectancy, the plaintiff's fund will have been wound down to zero.

131. At p. 392 in *Wells*, Hope L.J. dealt succinctly with the argument in the following passage from his judgment:

> "……the whole exercise is carried out upon the assumption that the period of the loss and the amount of it throughout that period has already been ascertained by the court. The only question is the rate of the discount for paying that amount in the form of a lump sum. It may be that in practice the plaintiff will decide to invest part of the award in equities to meet the risk of a shortfall in the long term, but that is a matter for the plaintiff, not for the court."

132. In the light of the evidence which was before the High Court, this Court is satisfied that the High Court judge's conclusion that a prudent investor in the plaintiff's position seeking the most risk averse investment strategy to protect his award over the relevant period of his loss would best achieve that objective by investing in ILGS with varying dates of maturity, is well supported by the evidence.

133. While it is clear that the decision of the High Court judge in this regard was based upon inferences which he drew from the facts, thus leaving open to this Court the right to draw its own inferences from the facts proved, as per the decision of McCarthy J. in *Hay v. O'Grady* [1992] IR 210, it has long been accepted that an Appellate court should be slow to substitute its own inferences for those drawn by the trial judge, without good reason, given that, unlike the trial judge, it does not enjoy the benefit of seeing the witnesses give their testimony under close scrutiny and cross-examination. Regardless of any such reservation, having considered the evidence and the submissions of the parties, this Court can find no good reason to interfere with any of the inferences drawn by the trial judge.

Support for an ILGS approach.

134. This Court has found the decision of the House of Lords in *Wells* to be a highly persuasive authority as to the appropriate legal principles to be applied by a court when assessing damages in respect of future pecuniary loss and also as to the appropriateness of assessing the real rate of return by reference to ILGS rather than a mixed portfolio, regardless of the non-availability of ILGS issued by the state. The concerns voiced in those proceedings as to the risks stemming from the volatility of equities as part of the investment strategy for catastrophically injured plaintiffs are precisely those which were advanced by the plaintiff's experts in this case.

135. While we cannot say that eurozone ILGS for this plaintiff are as tailor made as UK ILGS were for the plaintiffs in *Wells*, because they will be bought outside of this jurisdiction and therefore may not necessarily match inflationary trends here; nonetheless, we agree with the High Court judge that on the evidence before him they represented the most risk free investment available to meet his future financial needs.

136. The use of ILGS as the basis for computing compensation in respect of future financial loss has received widespread support, as was submitted on the plaintiff's behalf in the course of the appeal before this Court. Again, it has to be said that this support comes in the context of the calculation being carried out for a plaintiff in the country in which the ILGS may be purchased. Nonetheless, it is perhaps of some value to note that the approach adopted in *Wells* coincides with the recommendations of the working party chaired by Sir Michael Ogden Q.C. (1984 and 1994) which recommended that the discount rate should be based on the presumed investment by a plaintiff in index-linked government stock. Further, The Law Commission Report on Structural Settlements and Interim and Provisional Damages in the UK (Law Com No. 224, 1994) advised as follows: –

> "We share the views of the majority of those who responded to us, that a practice of discounting by reference to returns on ILGS would be preferable to the present arbitrary presumption. The 4-5% discount which emerged from the case law was established at a time when I LGS did not exist. ILGS now constitute the best evidence of the real return on any investment where the risk element is minimal, because they take account of inflation, rather than attempts to predict it as conventional investments do. Capital is redeemed under ILGS at par and index-linked to the change in the Retail Price Index (RPI) since issue. Income remains constant in real terms, rising with increases in the RPI. There is no premium available for risk because there is no risk."

137. Both of these reports were drawn to the courts attention in the course of the appeal. Further, it is perhaps also relevant to note that these views emerged long in advance of the financial collapse of 2007 which brought into such sharp focus the risks pertaining to investment in equities for those who cannot ride out a decade or more of a downturn in such market.

Was there evidence to support the High Court judge's calculation of 1.5% real rate of return based upon investment in ILGS?

138. It is without doubt that the evidence as to the likely real rate of return on ILGS over the period of the plaintiff's future pecuniary loss was not entirely consistent, even amongst the plaintiff's own witnesses. Nonetheless, each expressed their own professional view as to the appropriate rate which the Court should adopt and why.

139. The appellant is correct in its submission that the defendant's economist, Mr. McArdle, was the witness who had prepared the most detailed analysis of yields on ILGS in international markets, in that in section 2 of his report he had offered his opinion based on the bond yields in sixteen countries. He stated that the approach of the Court to the discount rate should be guided by reference to historic averages, an approach criticised by each of the plaintiff's witnesses on the basis already outlined. Using that approach, a real rate of return of 3% would be appropriate.

140. However, the High Court judge was not obliged to accept his conclusion in circumstances where he heard extensive evidence on the issue from a wide range of experts, all of whom had the relevant expertise to advise on the matter.

141. Prof. Kay advised that, looking at ILGS issued by governments of strong credit quality such as the UK, US, Germany and France, he considered that the rate should be fixed at 0% but certainly not higher than 1% before adjustment for any wage inflation. His opinion was based on current yields and prices, even though he accepted that current interest rates were usually low. He reminded the Court that the plaintiff would have to buy into the market at the date of his award and he would not be able to benefit from rates historically available which were undoubtedly higher. Accordingly, his view was that current yields should be used as the basis for the calculation.

142. Dr. Whelan considered 0.5% gross, or 0.25% allowing for management fees, to be the appropriate rate. He too recognised that historic norms had produced rates in the range of 2 % to 4% before management costs, but like Prof. Kay he took the view that the Court should not factor into its calculation historic yields as the plaintiff had to invest in the conditions prevailing at the time of his award.

143. Professor Walsh explained the nature of the market to be faced by the plaintiff following his award by reference to the OAT €i,

which was then being offered with a 0% real rate of return as opposed to the rate of 3.15% which had been offered in 2001 when it was first auctioned. Similarly, the ILGS initially offered in the UK in 1981 at 2.5% above inflation were, as of the date of trial, yielding negative returns for shorter dated securities. Prof. Walsh apprised the Court as to the view of the IMF that present levels of real interest rates were abnormally low but as to the defendant's evidence that recovery to earlier norms was to be anticipated in the short term, it was his considered opinion that any such recovery would be slow rather than fast. In this regard, he once again relied upon the opinion of the IMF to the effect that recovery was most likely to occur in the medium term. Further, he himself was convinced that there would be no return to the high real rates last seen in the 1990s.

144. It was not disputed that the real rate of return on ILGS at the date of trial was abnormally low, with the result that yields were then at 0% or negative and that it was going to take some period, short or long, for those yields to improve. Accordingly, there was evidence from which the High Court judge was entitled to conclude that the plaintiff, when revisiting the market in future years, would likely be able to purchase ILGS with a slightly better yield than that currently available such that he should fix the real rate of return by reference to that likely uplift.

145. While Prof. Ahearne's evidence was that if real returns were to recover to long term sustainable rates of 2% in the advanced economies of the world then real yields on ILGS might be expected to increase to 3%, he did not explain how the Court might factor this into its decision when determining the overall rate to be fixed in the context of the uncontested evidence as to the current low yields available to the plaintiff entering into the market for the first time following his award.

146. These references to the evidence hopefully serve to demonstrate that there was more than sufficient evidence to support the finding of the High Court judge that the then current yield from ILGS was 0.5% and his conclusion that, over the plaintiff's lifetime, the yield available would rise to 1% or 2%, thus justifying him taking an overall figure of 1.5% to cover the entirety of the period of investment.

1½% real rate of return on mixed portfolio with 30% equities?

147. In light of the finding of the High Court judge that ILGS were to be preferred over equities as the most risk averse investment for this plaintiff, it is unnecessary to deal to any great extent with his conclusion that if for some reason those in charge of his investment strategy were unable to conveniently invest his entire fund in ILGS, he might nonetheless be expected to achieve a real rate of return of 1.5% on his fund by taking 50% of the risk that might be taken by the ordinary investor and by investing in a more conservative mixed portfolio.

148. In relation to this conclusion the Court will do no more than note the following three matters. Firstly, the trial judge accepted the evidence of the plaintiff's experts that a plaintiff such as Gill Russell should not be obliged to have his lump sum calculated on the basis that he would invest any portion of his award in equities because to do so would involve him taking unnecessary investment risks. That being so it is difficult to see a valid basis for this alternative approach to assessing the discount rate. Secondly, there was no evidence as to the expected real rate of return from a mixed portfolio containing a 30% equity component over the plaintiff's lifetime. Thirdly, it does not logically follow that the real rate of return would reduce from the 3% likely to be achieved with a 60% equity component to 1 ½% with a 30% component given that the portfolio would also contain other asset classes such as cash or bonds likely yield different returns.

Wage Inflation

149. In calculating the plaintiff's claim for future pecuniary loss, allowance has to be made for any inflation in excess of ordinary inflation that will likely affect any particular expense to which he may be exposed over the period of the loss. In this case, the cost of his care over future years is what is at issue. As the real rate of return is calculated by adjusting nominal yields for inflation, customarily measured against the Consumer Price Index (CPI) or its European equivalent, the Harmonised Index of Consumer Prices (HICP), if wage inflation in the care sector is likely to exceed ordinary inflation, then an adjustment in the real rate of return is required to meet that extra cost. Hence, it was necessary for the High Court judge to decide as a matter of probability what would likely happen to the plaintiff's care costs into the future. In this instance he concluded that the wages of carers are likely to outstrip the inflation protection afforded by ILGS over the period of the plaintiff's loss and thus an adjustment in the real rate of return of 0.5% was warranted. The question for this Court is whether there was evidence to support that finding.

150. It has to be said that it is unfortunate that there is no tailor made index in this country to deal with the likely cost of future care, unlike in the UK where the ASHE 6115 is used. That is the Annual Survey of Hours and Earnings: Occupational Earnings for Care Assistants and Home Carers. However, the parties in the High Court adduced a significant amount of evidence on the issue as to whether or not wages in the care sector are likely to outstrip ordinary inflation over the lifetime of the plaintiff.

151. Prof. Ahearne, on the defendant's behalf, advised the Court that the cost of care in the relevant sector had declined between 2009 and 2013. This was, in his opinion, due to the fact that wages in the sector were related to the rates paid by the HSE for home help. He believed that there was no need to make any adjustment for potential wage inflation due to the fact that downward pressure would continue to be exerted on earnings within the public sector in an effort to reduce government borrowing, and this would have a dampening effect on the rates paid to carers in the private sector. Mr. McArdle, in his evidence, accepted that wages in general might increase above inflation by something in the region of 0.2% to 1.5%. However, neither witness considered it necessary for the Court to make any adjustment in the discount rate to provide for wages in the care sector running ahead of CPI.

152. The contrary view was expressed by Dr. Whelan who advised that wages had constantly risen faster than inflation over the last century, and he referred to a particular study of the carpenter's profession to demonstrate that wage increases, on average, had run at between one and two percentage points above inflation over the long run. This study, he stated, was in accordance with the broad trend that wages in the same occupation tend to increase by an average of 1% to 2% per annum over long periods. While he did not provide any specific evidence concerning the historic rates of pay for care workers, he saw no reason for distinguishing workers in that sector from other classes of workers and expressed himself satisfied that the Court should assume that their wages would rise by 1.5% per annum higher than inflation over the long term.

153. Prof. Kay anticipated that Ireland, as a country at the technological frontier, might expect productivity growth of 2% in the long run. As a result, he predicted that earnings in general, including those in the care sector, would likely outstrip inflation by an average of 2%. As for The Society of Actuaries in Ireland, the Court was advised that it recommended that an allowance of 1.5% be made in respect of wage inflation generally.

154. While Prof. Walsh accepted that wages, including those in the care sector, had been holding steady in many countries since 2010, he was satisfied that over the medium-term and long run real wages would resume their former trend and would outstrip both CPI and HICP. In time, he was satisfied that there would be a restoration of rates of pay within the public sector such that the wages of carers would start to rise again in line with general wage inflation. This is what he said:

> "My best view is that the carers and providers, the people for whom this is their income, will in the medium and long term enjoy increases in their standard of living. This would imply that they will see their earnings, their wages and salaries, increase somewhat faster than the consumer price index"

155. Accordingly, notwithstanding the defendant's submissions on the issue, having considered the evidence before the High Court, this Court is satisfied that the High Court judge's downward adjustment of the real rate of return by 0.5% to take account of future wage inflation, for the purpose of the calculation of the plaintiff's claim for future care, was appropriate. He was clearly entitled to conclude that wage inflation in general would, over the period of loss, exceed CPI at a minimum of 1% and that if no adjustment was made, the plaintiff would not receive full compensation. Further, given that he accepted that wage inflation in the care sector would not fall into line with general wage inflation for a period of approximately five years, that being the opinion of Prof. Walsh's, he was entitled to reduce the adjustment required in the real rate of return to 0.5% to take this factor into account.

156. The court notes that the trial judge, having concluded that a real rate of return based upon investment in a portfolio of ILGS should be set at 1.5%, reduced that rate to 1% to take account of future wage inflation, a factor only relevant to the computation of the cost of future care. However, from his judgment and order it appears that he then proceeded to use the 1% rate for the purpose of calculating certain categories of pecuniary loss of a non care nature. No submissions were addressed to this issue. Given that a rate of 1% was considered appropriate solely by reason of the potential impact of wage inflation, the use of 1% rather than 1.5% to calculate any category of pecuniary loss other than future care would appear inappropriate.

Conclusion

157. In calculating damages for future pecuniary loss, the court must pursue the policy of providing the plaintiff with compensation on a 100% basis. It is no part of the court's function, when carrying out that task, to consider the effect that any such award may have on matters such as the finances of the defendant, on insurance premiums or on the State's resources. Policy matters are for the Oireachtas. Neither is the defendant's likely capacity to meet any such award relevant to the court's consideration of the sum to be awarded.

158. Of particular importance is the fact that the court's calculation of the discount rate be made on the basis of the assumed entitlement of a plaintiff to invest their award in as risk free an investment as is available and suitable to meet their future needs. How such a plaintiff may intend to use or invest their award is not a matter that the court is entitled to investigate or act upon when deciding upon the discount rate to be applied. Thus, the real rate of return should be computed absent a consideration of whether or not the plaintiff's fund will be managed by the Court's Investment Service.

159. On the facts of this case the Court is satisfied that the trial judge was entitled to conclude that the appropriate discount rate to be used for the purposes of calculating all of the plaintiff's outstanding claims for future pecuniary loss is 1.5%, with the exception of his claim for future care where the rate should be reduced by 0.5% to 1% to take account of the extent to which wage inflation is likely to exceed CPI over the course of his lifetime.

160. It follows that we are satisfied that his conclusion that the plaintiff's lump sum should be calculated by reference to ILGS, was well founded on the evidence as was his conclusion that wage inflation in the health care sector is likely to outstrip general inflation in early course and is likely to continue in that vein over his lifetime.

161. This Court acknowledges that the award to which the plaintiff will be entitled as a result of the adjustment in the real rate of return will undoubtedly appear high in comparison to what it would have been if calculated by reference to the rate of 3% which has been used for a long number of years. However, it must be stressed that the discount rate only applies to claims for future pecuniary loss. It does not herald any change in the approach of the courts to compensation for the pain and suffering caused by the injury the subject matter of any claim. The alteration of the rate is, we believe, necessary to enable the plaintiff meet his future needs without him having to take unnecessary risks with the fund provided to achieve that end. To expect and indeed oblige a plaintiff, by the manner in which the Court approaches the calculation of their lump sum, to take such risks is, in the unanimous view of this court, both unjust and unacceptable.

162. It would be inappropriate to conclude this judgment without emphasising once again the frailty and injustice of the lump sum system of compensation regardless of whatever real rate of return is used in its calculation. The reality is that the award is calculated to meet a plaintiff's needs up to a presumed date of death. If the plaintiff outlives that date, he or she will run out of money for their future care. Should that happen in the present case, the plaintiff's life will be imperilled due to the catastrophic nature of his injuries. However, if he should for any reason die prematurely, a significant injustice will have been inflicted upon the defendant in that it will have paid for the cost of care and aids and appliances which the plaintiff will not have needed by reason of his untimely death. It is surely time to catch up with those jurisdictions who have addressed this fundamentally flawed and unjust system by the introduction of legislation to permit awards be made by way of periodic payment order.

Outstanding Issues on Appeal

163. The Court will hear Counsel prior to giving directions in relation to a hearing on outstanding issues in relation to the multiplicand which it was agreed to be left over until after this judgment.