[J-40A-D-2010]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MARK L. HELPIN	:	Nos. 36 & 37 EAP 2009
	:	
v.	:	Appeal from the Order of the Superior
	:	Court entered on 4/1/09 at 125 EDA 2008
TRUSTEES OF THE UNIVERSITY OF	:	and 307 EDA 2008, affirming the order of
PENNSYLVANIA, MARJORIE	:	the Court of Common Pleas, Philadelphia
JEFFCOAT, THOMAS FREITAG, AND	:	County, entered on 12/13/07 at 0702
LAWRENCE M. LEVIN	:	September Term, 2005.
	:	
APPEAL OF: TRUSTEES OF THE	:	
UNIVERSITY OF PENNSYLVANIA	:	
	:	
	:	
MARK L. HELPIN,	:	
	:	Nos. 48 & 49 EAP 2009
Appellant	:	
	:	Appeal from the Order of the Superior
TRUSTEES OF THE UNIVERSITY OF	:	Court entered on 4/1/09 at 125 EDA 2008
PENNSYLVANIA, MARJORIE	:	and 307 EDA 2008, affirming the order of
JEFFCOAT, THOMAS FREITAG, AND	:	the Court of Common Pleas, Philadelphia
LAWRENCE M. LEVIN,	:	County, entered on 12/13/07 at 0702
	:	September Term, 2005.
Appellees	:	

ARGUED: May 12, 2010

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: December 21, 2010**

I respectfully dissent, as I would hold that lump-sum awards based on lost future income should be discounted to present value.

As the majority observes, this Court in Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980), developed the total-offset approach on the theory that "the effect of

the future inflation rate will completely offset the interest rate, thereby eliminating any need to discount the award to its present value." Majority Opinion, slip op. at 8 (quoting Kaczkowski, 491 Pa. at 579, 421 A.2d at 1036). On its face, this pronouncement appears to say that conservative lenders will not expect any real growth for their holdings, but will only lend at an interest rate capable of keeping pace with inflation. However, the assumption that low-risk investments will always yield a real growth rate of zero seems unrealistic, and it has not been adopted by other jurisdictions. For example, the United States Supreme Court has referred to a "real interest rate" of approximately two percent. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 542 n.25, 103 S. Ct. 2541, 2553 n.25 (1983). Other courts likewise recognize the existence of growth in safe investments even after inflation has been factored out.[1]

[1] See, e.g., Feldman v. Allegheny Airlines, Inc., 524 F.2d 384, 387-88 (2d Cir. 1975) (accepting a real growth rate, and hence a discount rate, of one-and-one-half percent); Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 39 n.10 (2d Cir. 1980) (noting a general agreement among economists that, when inflation rates are relatively stable, the real yield of money is approximately two percent); O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1199 (7th Cir. 1982) (Posner, J.) ("In periods when no inflation is anticipated, the risk-free interest rate is between one and three percent."); id. at 1200 (indicating that one-half percent is "lower than most economists believe [the real rate of interest on safe investments] to be for any substantial period of time"); Feldman v. Allegheny Airlines, Inc., 382 F. Supp. 1271, 1293-94 (D. Conn. 1974) (explaining that: an inflation-adjusted discount rate should be used; the rate should be about two percent during stable periods of low inflation; and it should be approximately one and one-half percent when inflation is high and/or unpredictable); see also Pfeifer, 462 U.S. at 548-49, 103 S. Ct. at 2556 (holding that a trial court using a real growth rate of between one and three percent will not be reversed if it explains its choice); Culver v. Slater Boat Co., 722 F.2d 114, 122 (5th Cir. 1983) (same); cf. Schnebly v. Baker, 217 N.W.2d 708, 728 (Iowa 1974) (permitting use of a zero real growth rate, but only where the evidence adduced at trial demonstrated that inflation and nominal interest were equal), abrogated in part on other grounds, Franke v. Junko, 366 N.W.2d 536 (Iowa 1985).

Notably, Kaczkowski effectively conceded this point, indicating that interest rates depend only "in part" on expectations of future inflation. Kaczkowski, 491 Pa. at 581, 421 A.2d at 1037. Nevertheless, Kaczkowski then stated that, since nominal interest rates tend to "rise and fall with inflation, we shall exploit this natural adjustment by offsetting the two factors in computing lost future earning capacity." Id. at 581, 421 A.2d at 1037-38. This statement appears to be a non sequitur: simply because the two rates "rise and fall" together, it does not follow that they are numerically identical. Thus, the Court assigned no legal significance to the potentially substantial numerical difference between the inflation rate and the nominal interest rate, stating only that to the degree there is a variance between the two, it will benefit "the innocent victim and not the tortfeasor who caused the loss." Id. at 582, 421 A.2d at 1038. Accordingly, not only did the Kaczkowski Court fail to establish a persuasive basis for total-offset, but it appeared content to introduce unnecessary, systemic imprecision in the law of remedies.[2] It also failed to give any attention to whether a one-size-fits-all approach is realistic, given that different industries have different wage-growth patterns. See Michael I. Krauss & Robert A. Levy, Calculating Tort Damages for Lost Future Earnings: The Puzzles of Tax, Inflation, and Risk, 31 GONZ. L. REV. 325, 344 (1995-96) (hereinafter, "Calculating Tort Damages") ("Even if wage growth and inflation were roughly equal for the nation as a whole, they might be vastly different for certain industries."); id. at 344 n.87 (pointing

[2] I am not convinced that systematically over-penalizing civil defendants is appropriate, not only because it runs counter to basic notions of corrective justice, but because civil liability is decided on a preponderance of the evidence, which subsumes a risk that civil defendants will wrongly be found liable. See generally Commonwealth v. Maldonado, 576 Pa. 101, 109, 838 A.2d 710, 715 (2003) (observing that the preponderance standard stems from a belief that the plaintiff and defendant should equally share the risk of an erroneous verdict). Thus, as we already accept that a significant number of liability verdicts may be incorrect, it does not seem equitable to incorporate a structural inaccuracy inflating the amount of damages.

out that, during the period 1975 through 1988, the annual increase in an employee's hourly value to his employer (which correlates with wage growth) ranged from 11.8 percent in the semiconductor manufacturing industry, to negative 1.4 percent in the laundry business).

Since Kaczkowski was decided, moreover, the General Assembly has provided some guidance, at least with regard to lost earnings resulting from medical negligence. In particular, the Medical Care Availability and Reduction of Error (MCARE) Act provides:

> Future damages for loss of earnings or earning capacity in a medical professional liability action shall be reduced to present value based upon the return that the claimant can earn on a reasonably secure fixed income investment. These damages shall be presented with competent evidence of the effect of productivity and inflation over time. The trier of fact shall determine the applicable discount rate based upon competent evidence.

40 P.S. §1303.510. This shows the Legislature's recognition that inflation and interest rates will not always be equal, and that competent evidence is necessary to determine the appropriate discount rate as a factual matter. Accord Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 342, 108 S. Ct. 1837, 1846 (1988); Culver, 722 F.2d at 122; 22 AM. JUR. 2D Damages §154 & n.4 (2010) (collecting cases).

This is not the only theoretical shortcoming appearing on the face of the Kaczkowski decision. The second one, related to the first, has to do with the Court's apparent misunderstanding of the role of expected future salary raises occasioned by industry-wide productivity enhancements and the employee's rising skill and experience level. In particular, the Kaczkowski rule was developed by reference to the federal district court's Feldman decision and two cases from the Alaska Supreme Court, Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967), and State v. Guinn, 555 P.2d 530 (Alaska 1976). Kaczkowski observed that, in Feldman, a detailed evidentiary

presentation was made at trial concerning the decedent's likely career path, including her growth in productivity and concomitant salary increases that would have exceeded raises based only on seniority. Feldman thus allowed for a large lost-earnings estimate, but reduced it to present value using a partially-offset discount rate of one-and-one-half percent -- representing the nominal interest rate on government securities reduced by the expected rate of inflation. On the other hand, the Alaska cases adopted a total-offset rule, but limited its application to estimates of lost earnings that only folded in seniority-based raises. See Guinn, 555 P.2d at 545-46. This Court dismissed such limitation as tantamount to a partial reversion to the old rule of discounting based on the nominal interest rate, see Kaczkowski, 491 Pa. at 580, 421 A.2d at 1037 ("[I]t appears that the Alaska court's conception that merit based increases are 'speculative' is a throwback to the previously rejected traditional approach."), and instead opted for a combination of the two methods, permitting enhanced lost-earnings estimates that include expected gains from experience, skill, and industry-wide productivity improvements, while prohibiting any discounting of that larger estimate. See id. at 579, 421 A.2d at 1036.

What Kaczkowski failed to realize is that, because safe investments tend to offer a real interest rate that, while low, is above zero, the prospect of having a lump-sum award grow in real terms would approximately compensate for the victim's lost opportunity to benefit from these other factors -- i.e., his increasing value to his employer due to skill and experience, as well as industry-wide productivity gains, presumably due to improved technology and business methods. Accord Pfeifer, 462 U.S. at 549, 103 S. Ct. at 2557 (recognizing a "sound economic argument" for the total-offset rule as applied to estimates that exclude these latter factors, while only including "individual seniority and promotion gains"). Thus, from a theoretical standpoint, the

Alaska court's limitation is economically sensible, and Kaczkowski's self-described "eclectic method" is overly compensatory. Kaczkowski, 491 Pa. at 579, 421 A.2d at 1036. See generally Michael T. Brody, Inflation, Productivity, and the Total Offset Method of Calculating Damages for Lost Future Earnings, 49 U. CHI. L. REV. 1003, 1022 (1982) ("The Kaczkowski variant of the total offset method suffers from the opposite problem: because it increases the [basic lost earnings] prediction by expected productivity gains and then fails to discount by the real interest rate, it is overcompensatory."); Calculating Tort Damages, 31 GONZ. L. REV. at 344 n.85 ("[T]he Pennsylvania approach is the equivalent of a negative discount rate, i.e., wages are accelerated for inflation plus productivity and then discounted for inflation alone."). Further, Pennsylvania is apparently the only jurisdiction that requires application of this method. See Thomas R. Ireland, Total Offsets in Forensic Economics: Legal Requirements, Data Comparisons, and Jury Comprehension, 9-Fall J. LEGAL ECON. 9, 15 (1999); 22 AM. JUR. 2D Damages §132 n.1 (2010).[3]

Even to the degree Kaczkowski is entitled to deference under stare decisis, for several reasons, I believe it would be best not to extend its approach to other scenarios, such as the present breach-of-contract action involving, inter alia, lost profits and/or bonuses. First, as explained above, the Kaczkowski Court's decision to apply the total-offset rule to damage estimates that include projected raises above and beyond predictable seniority-based increases stems from an analytical error, and ultimately results in overcompensation. Thus, it would be best, in my view, not to expand that error into other types of civil cases. See generally Kaczkowski, 491 Pa. at 579 n.21,

[3] Intermediate appellate courts in at least two other jurisdictions allow the use of total-offset, but do not require it, leaving the question to the discretion of the trial court. See Wal-Mart Stores, Inc. v. Coleman, 745 So. 2d 423, 424 (Fla. Dist. Ct. App. 1999); Paducah Pub. Library v. Terry, 655 S.W.2d 19, 25 (Ky. Ct. App. 1983).

421 A.2d at 1036 n.21 ("We do not wish to disturb [the requirement of discounting] in calculating future damages in other contexts. We refrain from attempting to fashion broad general rules as a panacea." (internal quotation marks omitted)).

Second, a contract breach does not ordinarily result in physical injury or death to the victim. This is relevant because, even if one assumes the validity of the Kaczkowski approach as to tortious conduct, within a contract-breach framework the victim can reasonably expect to continue to "progress[] in his chosen occupation in terms of skill, experience and value to the employer." Id. at 579, 421 A.2d at 1036 (internal quotation marks omitted). This, in turn, means that the theoretical foundation supporting the total-offset rule, at least in the terms explicated by Kaczkowski, is substantially undermined for purposes of contract-based actions. Here, it is not disputed that Dr. Helpin was able to continue to work and progress in his field of dentistry notwithstanding the contract breach. It seems equally likely that, if better technology, more efficient business methods, or other factors eventually result in enhanced productivity throughout Dr. Helpin's field as a whole, he will benefit financially from those improvements.

There are other features specific to this case, moreover, that counsel against a blind application of the total-offset method. First, Dr. Helpin's damages expert, Edwin Rosenthol, C.P.A., may have already folded an expectation of price inflation into his estimate, not only with regard to lost profits or bonuses, but relative to Dr. Helpin's base academic salary. In particular, Mr. Rosenthol assumed that Dr. Helpin would receive a yearly two-and-one-half percent structural salary increase in accordance with departmental policy. See N.T., June 8, 2007 (a.m.), at 106. It seems reasonable that some of that annual increase represents a cost-of-living adjustment intended to compensate for the effects of general price inflation; if so, at least some discounting would be necessary to avoid a double recovery. See generally Pfeifer, 462 U.S. at 538,

103 S. Ct. at 2551; O'Shea, 677 F.2d at 1200 ("[B]uilding inflation into the estimate of future lost earnings and then discounting using [only] the real rate of interest would systematically overcompensate."); Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 933 (Alaska 1977) (same as to lost retirement benefits).

Just as significantly, Mr. Rosenthol factored in projected increases in clinic-based bonuses and/or profits occasioned by a number of items, such as: the addition of new operating rooms and other treatment facilities at the clinic; the hiring of additional medical staff; enhanced efficiencies with regard to the procedures used to schedule patients for treatment; and the inclusion of subsidies from the hospital in the amount of $116,000 per year -- subsidies that were not certain to continue. See N.T., June 8, 2007 (a.m.), at 107-113; N.T., June 8, 2007 (p.m.), at 12. See generally id. at 7, 9 (reflecting Mr. Rosenthol's testimony on cross-examination that his calculation was based entirely on "what Dr. Helpin felt the clinic would do under his leadership, not what it would do under someone else's leadership"). All of these factors go well beyond the predictable, yearly, seniority-based increases that comprised the foundation for the total-offset rule utilized in Beaulieu, or even the expected merit-based raises that underpinned the rule in Kaczkowski. Therefore, applying total-offset in the present situation represents a significant expansion of the method that does not appear warranted by precedent or the facts of this case. See City of Whittier v. Whittier Fuel & Marine Corp., 577 P.2d 216, 226 (Alaska 1978) (refusing to extend Beaulieu to contract cases involving lost future profits), overruled in part on other grounds, Native Alaskan Reclamation & Pest Control, Inc. v. United Bank Alaska, 685 P.2d 1211 (Alaska 1984).[4]

[4] I note, as well that the Beaulieu line of decisions has been overridden by a statute, see Alaska Stat. §09.17.040(b) (1986), the purpose of which "was to bring Alaska in line with other states which reduce future economic awards to present value[.]" Beck v. State, 837 P.2d 105, 117 (Alaska 1992); see Brief for Appellant at 12-13. According to (continued . . .)

Accordingly, I respectfully dissent from the majority's decision to expand the rule of Kaczkowski to encompass future lost earnings in the present case.

Mr. Chief Justice Castille and Madame Justice Orie Melvin join this dissenting opinion.

(. . . continued)
the Alaska court, this legislative measure "was a response to a liability insurance crisis and was intended to increase the availability and affordability of liability insurance." Beck, 837 P.2d at 117 (internal quotation marks omitted). As a policy matter, the present majority's reasoning could apply equally to all awards of future damages, and its effect will likely be to decrease the affordability of liability insurance.