Provisional Damages in 2010:  
A Dead Duck?  
Julian Benson, Guildhall Chambers

The basis of the claim

1. The power to order PDs is found in s32A of Supreme Court Act 1981, and may arise where there is 
a chance that at some definite or indefinite time in the future the injured person will [...] develop some serious disease or suffer some serious deterioration in his physical or mental condition

The three stage test

2. The application of the section has lead to 3 questions being adopted:
   
   (a) Is the chance “measurable” rather than “fanciful”?  
   (b) What amounts to “serious disease” or “serious deterioration”?  
   (c) If measurable and serious, should the Court exercise its discretion to order PDs?

Curi v Colina [29th July 1988] C/A Unrep’d, Roch LJ

Judicial reluctance in making PD orders

3. The first hurdle for the Claimant is to prove the level of chance and the serious deterioration.  
4. The chances can be very small (0.01% in one case).  
5. There must generally be a clear cut event which ‘triggers’ the application for further damages: Wilson v MOD [1991] 1 All E R 638 (644h) Scott Baker LJ.  
6. “The section envisages a clear and severable risk rather than a continuing deterioration, as is the typical osteoarthritic picture” (Wilson).  
7. The Courts have often been loathe to exercise the discretion even after measurability and deterioration are proved. In Curi, Roch LJ endorsed earlier dicta that the Court should not be “very enthusiastic [to exercise its power] save in the clearest case.”  
8. Scott Baker J, in Wilson, also referred to dicta of Simon Brown J (now Lord Simon Brown) in Patterson v MOD [1987] CLY 1194: 
   
   [It is] desirable to limit the employment of this valuable new statutory power to cases where the adverse prospect is reasonably clear cut and where there would be little room for later dispute whether or not the contemplated deterioration had actually occurred.”  
9. Therefore, PDs have been chiefly been confined to disease cases: 
   
   (a) lung cancer/mesothelioma: Ward v Newalls [1998] PIQR Q41; 
   (b) cancer/radiotherapy complications: Thurman v Wilts HA [1998] PIQR Q115;  
   (c) blindness: Cronin v Redbridge (19th May 1987) Unrep’d (1/1,000 risk of developing a condition with 70% chance of causing blindness).  
10. A PD award is widely regarded as applicable as regards the risk of developing epilepsy after a head injury. But there may be cases, even protected party cases, in which PDs are not made (see below).
Recent decisions – is there a pattern?

PD awarded…

H (a protected party) v Thomson Holidays [2007] QB EWHC 850 Cox J

11. A highly complex case of renal failure in a 4 year old (12 at trial), with four different types of risks in the future:

(a) Complications if the Claimant could not have a kidney transplant (risk described by both experts as “more than fanciful”);

(b) Unsuccessful transplant (risk 5% - 10%)

(c) End stage kidney failure.

[each of these eventualities would have had devastating consequences – including the risk of 30-35 years on dialysis]

(d) The development of several (up to 8) associated conditions:

(i) Heart failure;
(ii) Diabetes;
(iii) Depression;
(iv) Cancer (several strains)
(v) Osteoporosis and avascular necrosis.

12. There is no record of the Order, but it will have been highly complex, and had to make provision, independently, for each eventuality.

Chewings v Williams [2009] EWHC 2490 (QB); [2010] PIQR Q1 (Slade J)

13. Mr Chewings suffered an exceptionally serious and rare injury to his ankle. He has a serious risk of requiring a fusion operation in the future triggered by increased pain in the joint. The decision about fusion would be difficult when it arose (the Defendant suggested that it “beggared belief” he would opt for surgery).

14. The risk was a “real risk” of infection if he underwent fusion, and a 2% risk of amputation. The Claimant did not have to prove that he would opt for surgery when the deterioration occurred.

15. The facts triggered the discretion, which the Judge exercised with alacrity: this was

“the very situation for which an award [PDs] is entirely appropriate. It is in the interests of the parties to reach a settlement, but there is a real chance that further extremely serious physical damage will be suffered…..” (paragraph 34) (PD, 3 years to revert to Court)

PDs not awarded

Garth v MIB [25.05.07] Hickinbotham HHJ (then sitting as s9 Judge) (QB)

16. A 29 stone “super morbidly obese” woman (BMI 50+), but not previously disabled by her weight, suffered an open book hip fracture – giving rise to a 7.5% risk of developing a sciatic nerve palsy, leading to drop foot and somewhat increased pain (which in turn had a 12.5% risk of infection and might need two further procedures).

17. The Defendant successfully argued that the risk that surgery would not improve the Claimant’s condition did not trigger the discretion – because the level of pain and drop foot did not amount to “a serious deterioration”.

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Syringomyelia – conflicting approaches

Mitchell v Royal Liverpool Hospital NHS Trust. Judge [17.07.06] QB (Beatson J)

18. The Claimant’s evidence (in this interlocutory appeal) was that he had a 0.15% chance of developing serious features which could lead him to become wheelchair-bound, incontinent and with serious upper body weakness. The Judge (on appeal from the DJ’s refusal) permitted the Claimant to amend to include a claim for PDs on the basis that the 0.15% risk was not fanciful – NB this was not a decision on the application of the rule – but it does assist in identifying the level of risk which could trigger the exercise of discretion).

Davies v Bradshaw and MIB [2008] EWHC 740 (QB)

19. The expert evidence (combining two opinions) was that there was up to an 8% risk that an expanding cyst in the spinal cord would lead to surgery. The risks of seriously increased neuro-deficit were 1% or 2-3%. In that case, surgery would be indicated (possibly more than once) and the risk that surgery would not succeed was 0.25%.

20. Wilkie J held that:

   “the development of a syrinx which is symptomatic and expanding which surgery is unsuccessful in dealing with is insufficiently distinct from the types of case referred to in Wilson” (paragraph 132).

21. Surely the better view is that of Cox J in Chewings, because the parties cannot provide any meaningful protection for the Claimant on a lump sum basis, and the consequences of deterioration were dire.

22. The conclusion is that these cases are fact - and Judge - sensitive.

Formal requirements of the CPR

23. A claim for PDs must be included in the Particulars of Claim (CPR 42.2(1)), and must state that there is a chance of a disease/deterioration, and specify what that disease/deterioration will be: CPR 16.4(1)(d)

24. The Order for PDs:

   (a) will specify the disease/type of deterioration;
   (b) will specify the period during which application may be made;
   (c) will specify different diseases/deteriorations and different periods for each;
   (d) will specify the documents which are to be preserved and provided on a further application for damages. The files to be preserved are termed the ‘Case File’ and is defined in paragraph 3 of the Practice Direction.

25. There is a draft form of Order annexed to the Practice direction.

26. The Claimant may apply to extend the specified period, but may only apply once for further damages in respect of each disease/deterioration: CPR 41.3(2).

27. The Claimant must notify the Defendant and (if s/he knows of one) the insurer, 28 days before he makes any application for further damages, and must then apply for directions within 21 days: CPR 41.3(3)-(4).

Practical advice on dealing with claims for PDs

28. It is important to spot the possibility early on, particularly because of the complication in making Part 36 offers, which afford good protection to the client.

29. Take early instructions, as some insurer clients may (rarely) prefer a PD Order, especially where
the risk is very small. Of course that depends upon:

(a) The length of time the Claimant has to return to Court, which could play havoc with reserves, etc;
(b) The potential cost if the deterioration occurs – which could play similar havoc!

30. Assuming the client is against PDs, these points militate against them:

(a) Deterioration is not “serious”;
(b) Risk is “fanciful”;
(c) In serious brain injury case:
   (i) the impact of the deterioration (e.g., epilepsy) may be very modest where 24 hour care is already provided;
   (ii) the epilepsy may be highly likely to be well controlled – weighing heavily in the ‘discretion’;
(d) Raise the possibility that the ‘deterioration’ might reduce the provisional award, e.g., because of reduced life expectancy; discussed but not resolved in Molinari v MOD [1994] PIQR Q33;
(e) In a case not involving a protected party, consider a modest lump sum to “buy off” the risk of PD.

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