

Periodical Payments: the new era?

Note

This talk was originally projected to cover recent developments in the fields of both periodical payments and public funding. In the event, it will focus almost exclusively on periodical payments, with just a few comments on public funding added at the end.

1. The history of periodical payments

1.1. Damages Act 1996 s.2:

- Periodical payments by consent

1.2. Lord Steyn in *Wells v Wells* [1999] AC 345 at p.384 (July 1998):

*“... there is a major structural flaw in the present system. It is the inflexibility of the lump sum system which requires an assessment of damages once and for all of future pecuniary losses. ... It is a wasteful system since the courts are sometimes compelled to award large sums that turn out not to be needed. It is true, of course, that there is statutory provision for periodic payments: see section 2 of the Damages Act 1996. But the court only has this power if both parties agree. Such agreement is never, or virtually never, forthcoming. **The present power to order periodic payments is a dead letter. The solution is relatively straightforward. The court ought to be given the power of its own motion to make an award for periodic payments rather than a lump sum in appropriate cases.** Such a power is perfectly consistent with the principle of full compensation for pecuniary loss. Except perhaps for the distaste of personal injury lawyers for change to a familiar system, I can think of no substantial argument to the contrary. But the judges cannot make the change. Only Parliament can solve the problem.”*

1.3. Courts Act 2003 ss.100-101:

- Section 2 of 1996 Act replaced by new provisions, empowering court to order periodical payments.
- But introducing the indexation debate:

“2(8) An order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the retail prices index

*2(9) But an order for periodical payments may include provision -
(a) disapplying subsection (8),
(b) modifying the effect of subsection (8)”*

1.4. Commencement: 1 April 2005

- Dribble of RPI orders
- Now on the verge of resolving the indexation issue, in C's favour.

1.5. The position with the House of Lords:

- Defendants' petition for permission to appeal lodged 12 February 2008;
- [decision awaited]

2. Thompstone – “The remaining issues”

2.1. The overall task of the court:

“... the judge’s overall aim must be to make whatever order best meets the claimant’s needs” [107] & [108].

2.2. Expert evidence:

- C will invariably have expert evidence:

“It is clear that, in a substantial case, the claimant will usually instruct and call an [IFA] to report on the form of order which he or she considers will best meets the claimant’s needs. Even if the parties agree on all issues, such a report is likely to be of assistance to the judge who is asked to approve the form of order. The practice direction anticipates that the claimant will usually have such evidence” [109]

- If the issue between the parties is whether or not there should be periodical payments (or the heads of damage that should be subject to such an award), then the process remains adversarial; cf, the approval process, which is inquisitorial. C’s expert evidence must therefore be disclosed to D; it cannot simply be shown to the court. [123]

- As to expert evidence in behalf of D:

“... However, the practice direction does not anticipate that the defendant will instruct its own financial adviser.” [109]

Then:

- (1) It is unnecessary for D to adduce expert evidence if he wishes merely to say that D (or more precisely D’s insurer) would prefer lump sum/periodical payments (as the case may be) e.g. because it would be better for D’s cashflow; because D should not unfairly have to pay more than is warranted by C’s actual lifespan: [109-110]
- (2) *“The fact is, however, [that] his counter-proposal is unlikely to carry any weight with the judge”* [123]
- (3) D does need expert evidence if he wishes to take particular point, e.g. that it is impossible to make financial provision for security, consistent with regulatory requirements. [110]
- (4) It will rarely be appropriate for D to adduce expert evidence or to argue that he has a proposal for C’s damages that is better for C than C’s own proposals. If D seeks to adduce expert evidence of this kind, the judge *“should require demonstration that the point clearly arises”* before giving permission. [112]
- (5) *“... we think it will only be in a rare case that [defence expert evidence] should be called.”* [124]

2.3. The court’s power to override both parties

- The court does have such a power. [102]
- However, it will be in evidential difficulties if it seeks to do so. [Ditto]
- *“[Rarely], the judge could be dissatisfied with the proposals of both parties and the information provided by them. We think that, in those circumstances, it would be open of the judge to appoint an assessor and call for a report.”* [129]

2.4. Two outstanding issues (not identified in *Thompstone*):

There are two particular heads of claim that potentially still need to be addressed and resolved:

- Case management; and
- Care provided by an agency (at agency rates).

What classification/indexation is going to be appropriate here? What expert evidence is going to be needed?

An illustrative table shows the potential significance of these matters (and any other similar matters, e.g. loss of earnings). Assume a present multiplicand of £10,000:

	Indexed at 5%	Indexed at 4.5%	Difference
After 30 yrs	£43,200 pa	£37,500 pa	£5,700 pa
After 40 yrs	£70,400 pa	£58,200 pa	£12,200 pa

3. The order

3.1. *“The Defendant makes the point that ... the Order and Schedule resulting from the proceedings should be comprehensible to the Claimant’s family and to his advisers”.* Swift J at [149]

3.2. The “conventional” RPI formula:

$$NPP = OPP \times \frac{NIF}{OIF}$$

3.3. The ASHE indexation exercise is not quite so simple, because of the liability for each figure to change:

- In October/November of each year, the provisional figures for the year to the end of the pay period encompassing 6 April last are published.
- At the same time, the final figures for the preceding year are published, in substitution for the provisional figures published a year earlier.
- Further corrections can be made to the final figures, from time to time.
- Methodology can change somewhat and, with it, the figures (although presumably the likelihood of further changes will decline with time)
- Reclassification of the “SOC’s” is projected every 10 years.

3.4. Accordingly:

- Whenever performing an indexation calculation, it is necessary to incorporate the up to date figures for each element of the equation.
- (It is also advisable to print off a hard copy of the figures being used)

3.5. Use of the ASHE Tables:

- At any one time, the current figures are contained in the one table for each year.
- We are concerned with “Hourly Pay – Gross”, which is Table 14.5a for each year.
- Note the various classifications of potential relevance: 3221 – 3229; 5113.
- Determining the percentile: the weighted average hourly rate.

3.6. The formula for use in the Schedule to the order:

“In March each year thereafter (starting in March 2010), each figure in paragraph 2 above shall be recalculated for the year starting on April next in accordance with the following formula:

$$NPP = OPP \times \frac{[NSPF + (NSFF - PSPF)]}{A}$$

Where:

NPP =	the new periodical payment figure to be paid with effect from 18 April next.
OPP =	the original periodical payment figure as set out in paragraph ... above.
NSPF =	the Series provisional figure for the most recent year, as published by the Office for National Statistics ("ONS") on the date when the calculation is being carried out.
NSFF =	the Series final figure for the preceding year, as published by the ONS on the same date when the calculation is being carried out.
PSPF =	the figure used as the NSPF in the preceding year's calculation.
A =	the Series figure for the year to April ... [<i>start year</i>], as published by the ONS on the date when the calculation is being carried out.
Series =	the United Kingdom Annual Survey of Hours and Earnings Occupational Group 6115, hourly pay – gross (currently being Table 14.5a), 90 th percentile, published by the ONS."

Plus specific provisions for (a) recalculation in the event of revision of a final series figure and (b) re-basing in the event of series reclassification.

- 3.7. The annual uprating exercise is going to be an intricate exercise, which (it is suggested) will cry out for standardisation; the development of some computer software; and central handling. At the least, each insurer should have a specific team/unit for the task. Will there even be scope for a centralized handling unit acting on behalf of a number of insurers?

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