

## **PERIODICAL PAYMENTS - The new trail to trial**

### **1. Overview**

- 1.1 Since the 1<sup>st</sup> April 2005 s.100 of the Courts Act 2003 has come into force, which amends the old S.2 of the Damages Act 1996. The court can now impose a periodical payments order onto a Claimant and Defendant (instead of or partly instead of a lump sum order) without their consent.
- 1.2 There are now new Civil Procedure Rules to assist with the delivery of such Orders. The court is now required to consider a periodical payment order in every case where there is a claim for damages for future pecuniary loss in a personal injury context.
- 1.3 By the new S.2(1) of the Damages Act 1996 it is only "damages for future pecuniary loss in respect of personal injury" in respect of which the court can make a periodical payments order without the consent of both parties (but it can go further if both parties consent, under S.2(2)).
- 1.4 The damages can be "wholly or partly" by way of a PP order (S.2 (1) (a)).
- 1.5 What is not covered by S.2 (1)? All past losses, including interest, and PSLA. In relation to future losses, Loss of Congenital Employment must be general damages, but will damages for Disadvantage on the Open Labour Market be considered as "pecuniary loss" ?
- 1.6 The court must now consider whether to make a periodical payments order in respect of such loss in every case (S.2(1)(b)).
- 1.7 Under the new Part 41.7 both when considering what indication to give the parties, and when considering whether to make a PP order the court is required to consider "all the circumstances", and "the form of award which best meets the claimant's needs, having regard to the factors set out in the practice direction."
- 1.8 The Practice Direction does expressly refer to the claimant's "preference". Also to the "scale of the annual payments taking into account any deduction for contributory negligence" and "any financial advice received" (41BPD.1 (1), (2) and (3)).
- 1.9 As the DCA Guidance states, "The Rules allow a wide discretion to take into account all the circumstances of an individual case ..."
- 1.10 What of the claimant who wishes to spend his money frivolously? Can he now be stopped? Cf Ruxley Electronics Ltd v Forsyth [1995] 3 WLR 188 @ p126 HL.

1.11 If the claimant pursues a PP order there are likely to be differences in approach (see also "Evidence" below):

- In care claims we will move away from "valuation" of the care claim and seek to discover the likely "cost". That is to say, for example, national rates may not be applicable to local conditions.
- How will we evaluate the loss of the chance of future earnings?

1.12 In a PP claim the effect of deduction for Contributory Negligence and/or "Litigation Risk" will be cemented.

1.13 How will Defendant assess their Reserve?

## 2. The Claim

### Pre-action

- 2.1 There are practical reasons for a claimant to make an early decision as to whether to claim periodical payments:
- 2.2 Pre-action protocol - primarily designed for claims up to £15,000, but used more extensively. Currently no requirement to indicate if intending to claim periodical payments. But what about early settlement?
- 2.3 Financial Advice - how can you advise a client whether a lump sum or a periodical payment will be of greater financial advantage to him? How will you ascertain his "needs" (rather than his requirements)?
- 2.4 Financial advice probably should be from an IFA (solicitors may be authorised, see Financial Services and Markets Act 2000, but are you sufficiently well equipped?).
- 2.5 Tax benefits of periodical payments (exempt from income tax – S.100 (2) of the Courts Act 2003; but only for the claimant, see S.329AA (2) of the Income and Corporation Taxes Act 1988, so NOT for widow/widower). Consider the Pension Claim.
- 2.6 Receipt of PP will be automatically disregarded for the purposes of assessment of means tested benefits (without the need for a Special Needs Trust).
- 2.7 S.4 also provides some protection against Insolvency. PP for care and medical costs should be protected, otherwise past and future PP can form part of the estate.

## After Issue

### Pleading

- 2.8 Part 41.5 permits pleading that a claim for PP "is the more appropriate form of award" in the statement of case.
- Part 41.5 (1) is discretionary;
  - However, the court can direct you to state your position anyway under Part 41.5 (2) or to provide further particulars, Part 41.5 (3);
  - NB you should also plead the circumstances relied upon.
- 2.9 Surely important to obtain the court's indication under Part 41.6, because it will effect the presentation of your case, see paragraph 2.13 below and also "Evidence".
- 2.10 For Minors and Patients (Part 21) probably better to seek the indication anyway. These considerations will be bound to form part of the approval hearing.
- 2.11 Important to have regard to the "Factors" set out in Part 41.7 and the Practice Direction, 41BPD.1.
- All the circumstances of the case;
  - The claimant's needs;
  - The scale of annual payments;
  - Contributory negligence;
  - C's preference and his reasons;
  - Nature of financial advice if received.
- 2.12 For Defendants:
- D's preference and its reasons
- 2.13 Drafting considerations not restricted to the statement of case – how will the Schedule of Loss be drafted? See "Evidence" below. Consideration must be given to "stepping" in any proposed Order; e.g. significant promotions in a loss of future earnings claim; in care claims how to deal with the likely loss of a gratuitous carer, or a recognised future change in claimant's care needs.
- 2.14 For how long will the Order for periodical payments last, see Part 41.8(1) (c)? It will probably be different in care claims from earnings claims.
- 2.15 On the face of it C could seek to amend at a future date, to include such a claim, but is that necessary?

## Indication

- 2.16 When is the “indication” likely to be given? Part 41.6 refers to “as soon as possible”.
- 2.17 At the CMC? PTR before “Trial Judge”? How reliable will this indication be – and will it matter, given that the ultimate decision will always be by the Trial Judge?
- 2.18 Considerations for Defendant – how important will the Defendant’s say be? What is likely to influence the Judge?
- Small annual payments for a relatively short time might involve significant administration burdens.
  - Lack of Security beyond 2035 (but listen to Ralph Chatfield).
  - D’s difficulties in obtaining correct product.
  - Needs best met by lump sum. E.g. that one cannot be certain of the correct indexation over a long period into the future; or that the uncertainties of the loss of earnings claim dictate a lump sum approach.

## Interim Payments

- 2.19 There will be an affect on the jurisprudence of making an interim award under Part 25.6 & 25.7, E.g:
- By what criteria can C satisfy the “substantial amount of money” test (Part 25.7 (1) (c))
  - In that consideration will any PP element be in or out?
- 2.20 How will Campbell v Mylchreest [1998] PIQR P20 be reconciled with the new regime (C can spend his money on what he likes)? Is it only the part not likely to be made subject to PP that C can spend as he likes?
- 2.21 Note also the new S.2 (5) of the Damages Act 1996. “damages” includes an interim payment.

### 3. Evidence

#### Care Claims

- 3.1 A periodical payments order will for a fixed annual amount. Reports need to address local cost to this C.
- 3.2 Ordinarily a periodical payments order will be increased annually by reference to the Retail Price Index (see the new S.2 (8), and Part 41.8 (1) (d)) – “unless the court orders otherwise” pursuant to new S.2 (9).
- 3.3 If you seek another index, you will need to prove your case for it. Consideration must be given to the evidence required to obtain a different index or “RPI +”. What has happened locally, and nationally, and is there any evidence of imminent local increases?
- 3.4 Historical evidence is reasonably clear that earnings of carers have increased beyond RPI – but will that continue, and if so how will you secure C's position?
  - What will govern the rise of wages for carers?
  - Will Defendants begin to provide competitive services?
  - Can the Rowland Hogg argument (RPI +2%) be circumnavigated by D suggesting that Parliament intended that “exceptional circumstances” would be required to go outside RPI (i.e. similar to Cooke v UBHT)?
- 3.5 Even if outside the scope of a provisional award, and a Variation of Order and Settlements (S. 2B), nonetheless it may be a case where there is a need for an increase or decrease in the periodical payments order in the future. E.g. change of accommodation; improvement post a successful operation; change from gratuitous to commercial carer. This is commonly referred to as “stepping”.
- 3.6 These steps will need to be identified with as much precision as possible:
  - The court must specify the date of change, see Part 41.8 (3);
  - There is no power to vary a final order (otherwise than under S.2B)
  - The Defendant will be setting up a “scheme” to ensure that this scheme of periodical payments is met, whether by self-funding, or by the purchase of an annuity.

- 3.7 Will the setting of these dates be done on the balance of probabilities, even given it will be a future event<sup>1</sup>?
- 3.8 Will the traditional approach to loss of earnings fit with PP claims?
- Ascertain the Normal Retirement Age;
  - Ascertain any likely promotions (by reference to which test?);
  - Mortality can be ignored, but how to cater for “other contingencies”;
  - If the law is that the evaluation of loss of future earnings is the loss of the chance of obtaining those earnings, then where will this be taken into account?
- 3.9 Any Pension loss can be catered for in a continuing PP order for the benefit of the widow, but it will not be tax free in her hands – will she be better off with a lump sum invested now?

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<sup>1</sup> But in assessing damages which depend on its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards.”  
[Per Lord Diplock in *Mallett v McMonagle* [1969 2 All ER 171, @191]

#### 4. The Part 36 Offer

- 4.1 Both parties will want to engage this provision for two purposes,
  - to promote a settlement;
  - and/or to provide an interest advantage to a Claimant, or a costs protection for a Defendant.
- 4.2 There is a new Rule: Part 36.2A.
- 4.3 Consider the wording of Part 36.20 (1) (c), and Part 36.21 (1). Part 44.3 (4) still applies.
- 4.4 The courts will continue to apply the dual test of "D is liable for more" or "more advantageous to C". This will be easier to determine if the case is issue-based (i.e. how much will the annual care regime cost, what amount of lump sum should be awarded?), than if it is a question of what type of order should be made (i.e. PP versus lump sum).
- 4.5 Consider the information to be provided under Part 36.2A (5)
  - Must state the amount of the offer to pay part or whole by lump sum
  - May state part relating to future pecuniary loss by way of lump sum
  - May state amount of other damages
  - Must state what element of future pecuniary loss will be by PP, and amounts, duration, part relating to future capital payment (and when to be paid), and the index to be applied
  - Must state that the PP will be reasonably secured (which presumably relates to D).
- 4.6 The other party can make use of the "clarification" rule, Part 36.9.

## **Post Trial / Settlement**

### **5. Approval**

- 5.1 Part 21 applies. The Practice Directions show that the court must be satisfied that PP has been considered (E.g. 21PD.6).
- 5.2 The Order will require meticulous drafting.

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