



Periodical payments:
UPDATE 2009
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Damages Act s.2:


"A court awarding damages for future pecuniary loss in respect of personal injury(b) shall consider whether to make [a periodical payments] order"



CPR Pt.41.7:

"When considering [whether to make a periodical payments order], the court shall have regard to all the circumstances of the case including in particular the form of order which best meets the claimant's needs,"

Reiterated in *Thompson* at [107-108]



Recognising the appropriate case:

- Future pecuniary loss:
 - Future care etc;
 - Future earnings
- Substantial, predictable and stable
- C's wishes



The CPR preliminary steps:

- Pt.41.5: Statement of case
- Pt.41.6: Indication to parties



Periodical payments v Lump sum

The advantages:

- Certainty of level of income & ASHE indexation
- Certainty of duration of income
- The "depressed" lump sum:
 - Continuing assumption of real net return of 2.5%
 - Gilts versus equities
 - Tax rates 40%, rising to 60/50%
- Contrast level of p.p.'s & purchased life annuities



Periodical payments v Lump sum

The disadvantages:

- The effect of contributory negligence. Note:
 - The order made in Sarwar;
 - The knock-on effect as to public funding.
- Inflexibility
- C attracted to lump sum/ C not actually going to engage care regime as claimed
- The chance of higher rates of return on investment of lump sum



Expert financial evidence

On behalf of C:

- "... in a substantial case, C will usually instruct ... an IFA to report on the form of order. The Practice Direction anticipates that C will usually have such evidence." Thompstone [109]
- C of full capacity: case settling. Do you obtain IFA report?

On behalf of D:

"... we think it will only be in a rare case that [defence expert evidence] should be called." Thompstone [124]



Expert financial evidence

C's expert evidence:

- Timing
- Disclosure of report to D: Thompstone [129]



Consent orders: Pt.40.6

- Damages Act s.2(1): “ ... *shall consider whether to make [a periodical payments] order*”
- Damages Act s.2(3): “A court *may not make an order fro periodical payments unless satisfied [as to continuity of payment]*”
- Do these provisions mean that court approval is needed in every case?



The court’s power to overrule

- The court does have such a power: *Thompstone* [102]
- However, it will be in evidential difficulties if it seeks to do so. [Ditto]
- Note:
 - *Sarwar v Ali* [2007] EWHC 1255 (QB)
 - *Burton v Kingsbury* [2007] EWHC 2091 (QB)



The form of the order

Following the withdrawal of the *Thompstone* appeal to the HL, three judgments were given as to the proper form of the periodical payments orders:

- [2008] EWHC 2423 (QB) Mackay J; 31 July 2008
- [2008] EWHC 2424 (QB) Mackay J; 31 July 2008
- [2009] PIQR P153 Sir Christopher Holland; 2 December 2008



The form of the order

- Note the comments to the effect that these orders should be used as models for all orders hereafter – especially Sir Christopher Holland at [4].
- But note Mackay J in [2008] EWHC 2424 at [3], [5] & [8]: he expressly observed that these orders were specific to the NHSLA and that other insurers may seek to produce other versions.



The form of the order

Important as to:

- Frequency of payment – annual; quarterly; monthly.
- Date of indexation – 15 December; anniversary date; other specific date.



The form of the order

For the result, go to:

http://www.guildhallchambers.co.uk/practice_areas/pi.cfm?s=369