STATUTORY FUNDING AND PERIODICAL PAYMENTS:

…….. the final instalments

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STATUTORY FUNDING

Introduction

1. The vexed issue of the role of statutory funding in the assessment of damages surfaced in very limited form in February 2000, in the case of *Firth v George Ackroyd Junior Limited* [2000] Lloyds LR 312. But the first case in which the total of the damages to be awarded to the claimant actually depended on the outcome was *Bell v Todd* [2002] Lloyds Rep Med 12, decided in June 2001. Stanley Burnton J started his judgment as follows: "This case raises questions of general importance for local authorities and insurance companies...". This was certainly correct; his decision led to countless debates, countless legal submissions and numerous reported cases during the eight years that have since elapsed.

2. In the "sister" case of *Ryan v Liverpool Health Authority* [2002] Lloyds Rep Med 23, decided just three months later in September 2001, Munby J commented that the relevant legislation was "what I think I can properly describe as some of the worst, if indeed not the worst, drafted and most confusing subordinate legislation it has ever been my misfortune to encounter." This comment was also surely correct and most of the judgments in the subsequent reported cases contain a paragraph with the same comment couched in varying forms.

3. The debates, the legal submissions and the decided cases have been taken up with the proper construction of the most obscure Regulations and/or Guidance, most particularly on the topic of the extent of the statutory duty of a local authority under section 29 of the National Assistance Act 1948.

4. Permission to appeal was given in both *Bell v Todd* and *Ryan v Liverpool Health Authority*, but in the event no appeals were pursued. In *Sowden v Lodge* [2005] 1WLR 2129, it was expressly noted[1] that the correctness of these two decisions was not challenged on behalf of the claimants Louise Sowden and Philip Crookdake, but the Court of Appeal seems to have proceeded on the basis of their correctness, without further demur. Likewise in the further Court of Appeal decision in *Crofton v National Health Service Litigation Authority* [2007] 1WLR 923.

5. The Court of Appeal decision in *Peters v East Midlands SHA & Others* [2009] EWCA Civ 145 now tells us that the whole process has effectively been based on a false premise: a claimant is not obliged in the first place to give credit for potential statutory funding. A petition for permission to appeal has been lodged with the House of Lords and the outcome of that petition is awaited.

[1] Pill LJ at [55].

6. Meanwhile, the situation falls to be assessed on the basis of the Court of Appeal decision. This decision merits consideration, not only by way of study of an episode which may soon be regarded as a historical curiosity, but also in order to understand the position which has now been reached and to determine what, if any, role the issue of statutory funding will play in future cases.

Discussion

7. The facts in *Bell v Todd* should be noted. The claimant suffered catastrophic injuries when very young. There was no dispute as to the liability of the first defendant. By the time of trial, the claimant was aged 19 years and was in residential accommodation funded by the second defendant local authority. It was fully anticipated that he would remain in that accommodation or its equivalent throughout his life. The relevant issue was summarised in the judgment as follows:

> "[11] It is not, and could not be, disputed that if the claimant will be liable to pay [the second defendant] for the cost of his specialist care and accommodation, that cost properly forms part of his damages claim against the first defendant, and must be taken into account in any settlement."

The converse proposition was neither stated nor considered as an issue – very significantly, as can now be seen. That is, if the claimant was not liable to pay the second defendant for the cost of his care and accommodation, then he could not claim that cost or any part thereof as part of his damages claim against the first defendant. Rather, this converse proposition was taken for granted, on the basis that in those circumstances the claimant had suffered no loss which he could recover. Neither in *Bell v Todd* nor in *Ryan v Liverpool Health Authority* did the claimant make any active claim against the tortfeasor for care costs; in each case, the only relief sought was a declaration against the local authority to the effect that the claimant's damages would be disregarded for the purposes of assessing any liability to make payment to the local authority.

8. The perceived effect of these two decisions was followed in all the subsequent cases. In *Sowden v Lodge*, it was held that the claimant's needs were met by the local authority's provision of residential accommodation, subject only to the convoluted proposition that the defendant tortfeasor should pay for such top-up care as might reasonably be needed. In *Freeman v Lockett* [2006] PIQR P23, the predictable claimant argument came to the fore, namely that it would be unreasonable for to oblige the claimant to take up any provision for statutory care, given the practical difficulties arising and the uncertainties for the future. Unsurprisingly, this argument found judicial favour, not only in that particular case, but also in subsequent cases; not least, it allowed an outcome which accorded with the existing judicial unease at the prospect of the tortfeasor passing a very substantial proportion of his liability onto public funding.

9. But it was not until *Peters* that any attention was actually focussed on the basic premise that underlay all these decisions. Does a claimant have an obligation to take up available public funding? Does the availability of such funding mean that he has suffered "no loss"?

10. Notably, the facts in *Peters* were indistinguishable from the facts in *Bell v Todd.* The claimant suffered catastrophic injuries as a result of the negligent failure of the first defendant to ensure that her mother received a rubella vaccination before becoming pregnant. There was no dispute as to the liability of the first defendant. By the time of trial, the claimant was aged 21 years and was in residential accommodation funded 50:50 by the second defendant local authority and the relevant PCT. It was fully anticipated that she would remain in that accommodation for some time to come and equivalent accommodation thereafter.

11. At first instance, Butterfield J held that there was no obligation on the claimant to take up available public funding, albeit without recourse to legal authority actually cited in his judgment[2]:

> "[75] … in my judgment it is entirely reasonable for the claimant not to rely on the statutory obligation of the local authority to provide for her where the alternative of recovery from the defendants is available to her for all the reasons articulated in this judgment. Even if matters were otherwise equal as between relying on the local authority and recovering from the defendants – which they are not – the claimant would be fully entitled as a matter of law to choose to pursue the tortfeasors. The argument of the defendants is simply unsustainable. The loss of the claimant remains the same whoever foots the bill. I am quite satisfied that there is here no question that the claimant will recover for avoidable loss."

12. In reliance on *The Liverpool* and other cases, the Court of Appeal endorsed this conclusion of Butterfield J in clear terms. The point had not been argued in *Sowden v Lodge*; the decision in *Crofton* was predicated on the finding that the claimant would in fact receive direct payments from the local authority to enable him to pay for his care. At [53] of the judgment of the court:

> "[53] …. We can see no reason in policy or principle which requires us to hold that a claimant who wishes to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right. The claimant has suffered loss which has been caused by the wrongdoing of the defendants. She is entitled to have that loss made good, so far as this is possible, by the provision of accommodation and care. ……
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> "[56] In our judgment, therefore, provided that there was no real risk of double recovery, the judge was right to hold that there was no reason in principle why the claimant should give up her right to damages to meet her wish to pay for her care needs herself rather than to become dependent on the state. ……."

13. On the basis of this decision, the outcome of *Bell v Todd*, *Ryan v Liverpool Health Authority Sowden v Lodge* and all the other cases where deduction was made on account of statutory funding was wrong – because either the wrong issue was brought before the court or the correct argument was not raised.

14. Coincidentally, this decision also has the effect by judicial means of rendering local authority funding subject to precisely the same regime as created by statute in respect of PCT funding. In brief outline:

- Care provided by the NHS (via the relevant PCT) is free of charge, irrespective of means: NHS Act 2006 s.1

- But s.2(4) of the Law Reform (Personal Injuries) Act 1948 has always applied:
  > "In an action for damages for personal injuries … , there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of the facilities available [from the NHS]."

- This has left one remaining defence argument, namely that the claimant will in fact use NHS facilities/care - in which case due credit must be given. This is as confirmed by the House of Lords in *Lim Poh Choo* [1980] AC 174. The argument can still arise in certain limited circumstances.

[2] The case which became central to the Court of Appeal decision, namely *The Liverpool (No.2)* [1963] P 64, was cited to him in argument.

15. The possibility that this last defence argument remains available also in the field of local authority funding arises from two further passages in *Peters.* First, the court was concerned to avoid the risk of double recovery by the claimant. For cases where a deputy is involved on behalf of the claimant[3], it devised at [63-65] the means of limiting the deputy's authority, such that no application for state funding can be made without further authority obtained from the Court of Protection. Second, whilst it held the actual decision to have no application to the facts of *Peters*, the court did not question the correctness of the decision in *Crofton*. So if a claimant will in fact receive state funding, due credit must continue to be given in reduction of his damages.

The consequences

16. On the basis of the Court of Appeal decision, it cannot be denied that, the scope for the defence argument as to statutory funding is now greatly diminished. Certainly in cases where the claimant is to recover damages on the basis of 100% liability, it is difficult to envisage any circumstances where the argument can be continued. The deputy is unlikely voluntarily to forgo the claim against the defendant tortfeasor; and there are few if any care requirements that are incapable of being set up and paid for on a private basis (at the defence insurer's expense). Moreover, he is likely to be content to accept the restriction on his powers suggested by the Court of Appeal; if circumstances do change in the future, he can seek the necessary further authority from the Court of Protection.

17. However, the position when the claimant is to recover damages subject to a significant deduction for contributory negligence may yet be different. The deputy now has a gap to fill, in order to meet the claimant's care needs on an annual basis. And this gap may be all the more real if a periodical payments order is made; there is likely to be a deficiency in each and every year. The deputy may therefore retain a strong wish to pursue state funding, in order to make good that gap. And if he is to do that, he must avoid any restriction of his authority, of the type envisaged by *Peters*. At the same time, if he expresses an unwillingness to accept such restriction, the inference surely follows that his intention is indeed to seek state funding. In order to accommodate these difficulties, the deputy may well have to acknowledge the fact that he does intend to seek state funding. Applying *Crofton,* the consequence is that state funding in these circumstances does still fall to be taken into account[4].

[3] As invariably the case where public funding issues arise. If there is no deputy, then the damages themselves will not be disregarded by the local authority when assessing the claimant's liability to pay.

[4] The effect of sections 1(1) & 1(2) of the Law Reform (Contributory Negligence Act 1945 will be that this is done on a pro rata basis.

PERIODICAL PAYMENTS

The "model" schedule

1. The defendants' appeal to the HL in *Thompstone* was withdrawn in June 2008. The parties in each of the three cases were left to complete their respective orders and put them to the court for approval. Their existing drafts varied. Sensibly, it was decided to start afresh in each case, such that the three orders presented for approval would be in like form.

2. An approval hearing duly came before Mackay J, with two judgments being given by him: [2008] EWHC 2423 (QB), 31 July 2008; [2008] EWHC 2424 (QB), 31 July 2008. In the second of these judgments, he approved the orders as then before the court and the relevant schedule (divided into three parts) is annexed: However, subsequent comment led to a desire to make further alterations and this led to a further hearing, this time before Sir Christopher Holland. By this time, two further NHSLA cases had been added, making five in total. The judgment on this occasion is at [2008] EWHC 2948 (QB); 2 December 2008. A model schedule is again annexed, this time in its final form, as approved for use in all five cases.

3. In the 2424 judgment, Mackay J said as follows:

> "[6] ….. the model [schedule] is in a form which can be freely circulated and publicised in such practitioner works as Facts and Figures or Kemp and Kemp and will therefore be known to all who work in this field.
>
> "[7] I cannot and do not attempt to dictate future decisions by my brother and sister judges on settlement of such cases, but I can, I think, make this statement, designed to ensure that litigation involving the NHSLA is conducted in a just and economical way. If in future cases claimants' advisers wish to ignore the model and devise their own forms of order, they will necessarily incur expense in so doing, both in re-writing the order and, probably, having available at court the advisor who assisted them to explain it to the court and to justify preferring it to the model. While all matters of costs are entirely for the judges who hear applications, it seems to me that they are likely, if they do that, to do so at their client's risk as to costs should the court conclude that the expense was unnecessarily incurred."

In the 2948 judgment, Sir Christopher Holland went further:

> "[4] The same three cases have now come before me (sitting as a Deputy High Court Judge) in the following circumstances. There is an urgent requirement for a 'model' order to serve as a foundation for the final orders necessary to give effect to the many cases held in partial abeyance pending the conclusion of the appellate process – and to serve as a like foundation for similar orders to be made in future cases. …. The overall concerns are for me two-fold: approval with respect to the cases now before me and prospective approval with respect to the many cases now waiting for such and with respect to the cases that will, alas, inevitably arise in the years to come.
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> "[14] This judgment with its appendices, seeks to supply an introduction to the expeditious disposal of the formidable outstanding concern: approval of the many still embryo orders. …… "

4. It might therefore be thought that the model schedule approved for these cases is now supposed to be used in each and every case. But this is not so and (it is suggested) it is important that defendant advisers should not allow such an expectation to take hold. The importance of this point arises from two specific provisions included in the model schedules, which were agreed, if not actually stipulated by the NHSLA in each case:

- That the payments in each case should be made annually in advance, on 15 December in each year; and
- That the annual indexation exercise should be performed on the same date in each case, namely 15 December.

These provisions were sought by the NHSLA for "reasons of orderly administration and economy", given the large number of cases it was already handling, with large increases in those numbers obviously to follow. The administrative ease of handling those large numbers of cases on just one date in each year could be questioned. The substantial cost implications are beyond question – as set out below. It is the cost implications that should cause defence advisers to seek alternative provisions.

5. Mackay J surely had these very points in mind when further stating in the 2424 judgment:

> "[5] …. The [model] order is specific to the NHSLA in this particular respect: for understandable and, in my judgment, legitimate reasons of orderly administration and economy, given the number of claims of this nature with which it has to deal, the NHSLA wishes to make all its adjustments in PPOs, of which there will soon be very many, at the same time of year. This is fixed in the model as 15th December, which gives time for assimilation of the initial ASHE figures in October/November. So important is that feature of the model to them that it has conceded terms which are positively advantageous to claimants relating to the timing of payments. It will almost always be the case their birthdays do not coincide with the payment date and, thus, the steps in their multiplicands do not either and they will therefore enjoy accelerated receipt of the increased figure.
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> "[8] As to the wider picture, there are, of course, other insurers and indemnifiers, including such as the Motor Insurance Bureau, for whom the model will not provide an immediate or exact fit, but it would surely make sense for them to combine, and to devise a single model suitable for their use in which connection there are large parts of this schedule that could usefully be adopted. Should that exercise result in agreement, consideration should then, in my view, be given to an approach to the Rules Committee to add a new Practice Direction prescribing a model to be used in such cases similar to, for example, CPR Part 25, Practice Direction 13 in relation to interim injunctions, to achieve the aims I have set out above."

He thereby expressly envisaged that there will be some variation in non-NHSLA cases. And a similar comment is also to be found at paragraph 8 in the 2948 judgment of Sir Christopher Holland.

The order proposed for non-NHSLA cases

6. It is not thought that a Practice Direction model has yet been achieved. In those circumstances a standard form of order has yet to be evolved for non-NHSLA cases and this paper is designed towards that goal. The suggested variations arise for the following reasons:

- Administrative provisions remain essential, as to the method of payment; provision for notices; etc. By inference, the orders approved in the Mackay/Holland judgments contained these administrative provisions within the body of the order; the model schedule contains no mention of them. It is suggested that it is more convenient to set them out in a separate Part 1 of the Schedule – with the other Parts to be re-numbered. This Part 1 can remain in very similar form to the Schedule which gained a degree of acceptance in respect of RPI-linked periodical payments, following publication in Kemp News, Issue 5/2005.

- With due caution, some alterations can be made to the NHSLA model, for the sake of simplification.
- Assuming that the two specific provisions identified above are to be varied for non-NHSLA cases, corresponding adjustments to the order are needed.

The two specific provisions: frequency of payment

7. Payments made annually in advance will obviously cost the defence insurer (and thus all policyholders) more than payment by instalments during the year

8. The Damages Act 1996 contains no stipulations on the point. Section 2(1) simply provides:

> "A court awarding damages for future pecuniary loss in respect of personal injury – (a) may order that the damages are wholly or partly to take the form of periodical payments; and (b) shall consider whether to make that order."

Frequency of payment is therefore left (along with other such details) to the inherent jurisdiction that the court must surely possess as to such matters. Pt.41.8(1)(a) expressly requires that the order must specify the annual amount awarded, how each payment is to be made during the year *and at what intervals* (italics added). When giving the judgment of the court in *Thompstone*, Waller LJ said at [107]; " … in deciding whether to make an order under section 2(1), the judge's overall aim must be to make whatever order best meets the claimant's needs." .

9. The claimant is obviously entitled to some form of advance payment, such that he can meet his outgoing bills as and when due for payment. But (it is submitted) there is no cause for the court create a reserve fund beyond that purpose and thereby give a windfall gain to the claimant. After all, the claimant is entitled to "such a sum of money as will amount to no more, and at the same time no less than [his] net loss": *Wells v Wells* [1999] AC 345, per Lord Hope at p.390B.

10. The defence argument is simply that the claimant does not need annual advance payments. Monthly payments may cut matters too fine, as to both fluctuating needs and due dates for payment. But quarterly payments should represent a fair balance between the claimant's need to be in funds and the defendant's legitimate desire to avoid overcompensation[5].

11. The sums involved are significant in the individual case and very substantial indeed if accumulated over a number of cases. Figures produced by an IFA on behalf of a claimant have asserted a "loss" to the claimant of 2.0 - 2.3% of the total annual sum if payments are made quarterly rather than annually. The defence argument is that this "loss" to the claimant comprises the loss of a windfall; the true loss is that of the defence insurer.

The two specific provisions: the date for the annual indexation exercise

12. The significance of the 15 December date is that the ASHE figures are published annually in October/November. 15 December is the earliest date for indexation that can realistically be achieved after that publication, given the calculations that have to be performed. For obvious reasons, this date becomes the date of choice for claimants.

13. The point arising is easily demonstrated by considering an order for periodical payments made in (say) October. Whether made by consent or following judgment, the figures included in that

[5] And quarterly payments are being agreed without problem in many cases.

order have been computed on the basis of the costs as at that time. To uprate those figures by say 5% just two months later, on 15 December, would be to give a substantial windfall to the claimant in that year and again in each following year – at substantial cost to the defence insurer.

14. What is the correct date for indexation? Given that the figures included in the order have been computed on the basis of costs as at that time, *prima facie* indexation should take place on each anniversary date thereafter. But this should yield to individual facts, in particular as to the date each year when the claimant himself or herself faces an annual increase. For example, an agency that is already being used may increase its rates on 1 January each year; directly employed carers may already have an annual review date established. Alternatively, expert care reports nowadays often apply increased care rates with effect from 1 April each year[6]; if such a date is used in the reports, that may constitute some evidence of the appropriate date, in the absence of other more specific evidence.

The two specific provisions: the consequent variations

15. In *Muteliso v Muduma*, 15 January 2009 (HHJ Grenfell, Leeds Combined Court), both the above issues were argued. The judge appears to have accepted the concept of financial detriment suffered by the defence insurer, but then went on to impose a solution of his own devising. He directed that payments should be made annually in advance, on 15 December, but continued to say that any significant detriment shown to have been suffered by the defence insurer as a consequence should be corrected by reduction of the multiplicand – presumably by estimated calculation at the outset[7]. By later clarification of his judgment, he directed that no such adjustment should actually be made in the particular case. Permission to appeal has been requested. It may be that neither side would welcome this approach in future cases.

16. Assuming instead that instalment payments are directed to be made quarterly and that the date of indexation is fixed for the date appropriate to the individual case, adaptations to the NHSLA model will be needed, starting with the basic adjustment to specify that each annual periodical payment shall be made by payment of four equal instalments. The following practical suggestions are made:

    16.1 Four quarterly dates for payment need to be set, with the first date sufficiently delayed from the date of the order to allow the due administrative arrangements to be set up. The intervening period to be covered by a pro rata sum to be added to the lump sum part of the award.

    16.2 In the NHSLA model, this provision for a pro rata payment appears at the end of Part 1 of the Schedule. It is suggested that it can fit more conveniently into the body of the order. Not least, this should ensure that the provision is not overlooked when the parties draw up the order.

    16.3 If stepped payments are to become payable in later years, the quarterly dates should be chosen such that one of them falls on the claimant's birthday; it is then straightforward for each higher level of payment to start on that date in the appropriate year. If no stepped payments are involved, the quarterly dates can be chosen without regard to the claimant's birthday.

    16.4 One of these quarterly dates needs to be selected as the appropriate date for the indexation exercise – dependant on the individual facts. (It may be that the "appropriate date" for indexation will drive the choice of the quarterly dates in the first place). In the case of stepped payments, it is not necessary to make the indexation date coincide with

[6] Being the date when NJC rates are set.

[7] Rather than re-calculation each year, dependent on the appropriate rate of return for the time being.

the claimant's birthday. All the stepped rates of payment are uprated annually from the outset, whether or not actually in payment. So the higher stepped payment automatically starts not only on the appropriate birthday, but also at the rate appropriate for the time being.

The resultant proposed order

17. The resultant order is inevitably long and complex. In her judgment at first instance in *Thompstone*, Swift J at [149] appears to have endorsed the concept that "… the Order and Schedule resulting from the proceedings should be comprehensible to the claimant's family and to his advisers". That hope is surely now lost. The full text of the order proposed by this paper can now be seen at www.guildhallchambers.co.uk/practice_areas/pi.cfm?s=369. It has satisfied both parties and has been granted court approval in a significant number of cases. It may help towards avoiding the re-designing of the wheel on each occasion[8].

18. In very broad outline, the contents of the order are as follows:

- The body of the order. Obviously this may require adaptation, to suit the individual circumstances of the case.
- Schedule Part 1: the administrative or "general" provisions
- Schedule Part 2: the RPI-linked periodical payments. Periodical payments of this type may still be ordered or agreed, in respect of certain heads of damage. Part 2 is included against this event. More usually, all periodical payments will be ASHE-linked, in which case Part 2 should be deleted
- Schedule Part 3: the ASHE 6115-linked periodical payments. The central formulae appear at paragraph 5 (for the first annual recalculation) and paragraph 6 (for subsequent annual recalculations, which incorporate the correction due following the publication of final figures to replace the initial release figures). Paragraphs 7 to 12 provide for recalculation in the event of reclassification of the SOC or a change in methodology.

19. One small point on another issue. Many periodical payments orders (reasonably) provide that the claimant should provide to the defence insurer evidence each year in the form of a letter from his GP, to confirm that he is still alive. In *Long v Norwich Union*, [2009] EWHC 715 (QB), the claimant sought an additional lump sum to cover the potential costs of complying with this requirement. Mackay J rejected this claim, on the basis that it was properly included within the Deputy's costs, for which due award had been made. (If necessary, it might alternatively be said that any modest cost incurred by the claimant of this or any other administrative type – e.g. postage - in connection with the periodical payments is covered by the modest return that he will generate on the payments to be received by him quarterly in advance and held by him pending payment out)

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[8] See Mackay J at paragraph 2 of the 2424 judgment.