

## PERIODICAL PAYMENTS AND TERMINAL DISEASE

### *Introduction*

1. The litigation of cases involving those with terminal or potentially terminal disease presents numerous forensic difficulties to the litigator. Breach of duty and causation are challenging enough but even once these essential elements are established, the difficulties are not over. Substantial difficulties arise from;
  - i. uncertainty over the likely course of the disease;
  - ii. uncertainty over life expectancy;
  - iii. differences between the jurisprudential approaches to living as opposed to fatal accident claims.
2. Periodical payments orders are now routine in catastrophic injury cases. They are attractive because they provide a stream of payments to meet a continuous need. Periodical payments for lifetime care are paid right up until but not after death, because in those cases the death causes the need for care to expire. What characterises most of such catastrophic cases is the fact that the loss for which the periodical payments are ordered can appropriately be considered as ending with the death of the Claimant. But what of the situation where the impact of the injury will endure (inevitably in some altered way) after the death of the injured person? What, for example, where the injured person has historically provided regular financial or other support and would have been expected to do so beyond his/her now diminished life expectation? Is there any possibility that periodical payments might assist in this situation.
3. Asbestos induced mesothelioma and lung cancer are the two cancers most commonly encountered in personal injury litigation. With mesothelioma, the survival from diagnosis is usually around 15 months but it can be up to four years or more. With lung cancer, the course is less predictable and survival may be much longer. The experience of the Claimants' lawyers is that their clients and their clients' families often prefer for the litigation to be finalised where possible before death. This is rendered possible by 'fast track' procedures adopted in Liverpool, London, Manchester, and elsewhere. Often the period from commencement of proceedings to final award is four months or less. But although the common preference is for finality and for compensation to be finally resolved during lifetime, this can lead to undercompensation and inaccurate awards, problems that have to be explained to and understood by claimants who have enough to worry about already.
4. Typically, although Defendants may be persuadable otherwise, Claimants have to forego the bereavement award and any services claim continuing after death. A careful calculation has to be made weighing the value of the lost years income claim against the value of the lost dependency claim. The only certainty about the outcome is that the Claimant will be left confused and that the damages award in relation to post death losses will be inaccurate by a large margin.
5. Clinical negligence claims present similar, perhaps greater, difficulties. Whereas no-one survives mesothelioma or lung cancer, litigation in clinical negligence involves a wider range of cancers with a wide-ranging spectrum of possible outcomes, including long term disabled survival. How easily can a lump sum award – even when combined where possible with a provisional damages award – achieve the desired objective of full compensation?

Similarly, what of the severely brain injured adult with 20 years likely survival followed by 20 years loss of dependency for his/her spouse?

6. The answer may be that we need to look towards periodical payments in such cases so that the needs of living Claimants and their dependents are appropriately tailored to their needs.

### *Periodical Payments*

7. Although the relevant provisions are rarely in the limelight, their wording leaves no doubt that they are intended to allow both Claimants and their dependants to claim – amongst other things - for loss of dependency on a living but injured Claimant whose life expectancy has been impaired by the Defendant's breach of duty.

8. Section 2(1) of the 1996 Damages Act (introduced on the 1<sup>st</sup> April 2005) 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 the order.'

9. Thus, in every case where a court awards damages for future pecuniary loss in respect of personal injury, the Court is obliged to consider whether to make the compensation award in part payable by way of periodical payments.

10. Part 41.8(1) of the Civil Procedure Rules provides that any periodical payments order made must specify that the claimant's annual future pecuniary losses, as assessed by the court, are to be paid for the duration of the claimant's life, *or such other period as the court orders*.

11. That it is contemplated that such orders may continue after the Claimant's death is made beyond doubt by Part 41.8(2) which provides;

'where the court orders that any part of the award shall continue after the claimant's death, for the benefit of the claimant's dependants, the order must also specify the relevant amount and duration of the payments and how each payment is to be made during the year and at what intervals.'

12. The practice direction to Part 41 confirms;

'An order may be made under rule 41.8(2) where a dependant would have had a claim under section 1 of the Fatal Accidents Act 1976 if the claimant had died at the time of the accident' Rule 41.8(2) deals with circumstances where the court considers that any part of the award should continue after the claimant's death for the benefit of his or her dependants, and requires the order to specify the relevant amount and duration of the payments and how each payment is to be made during the year and at what intervals'.

13. The DCA Guidance on Periodical Payments (issued in 2005) explained how such an Order might work.

'In relation to duration, for example, the court might order that damages of £x for care costs should last for the lifetime of the claimant, but that all or part of

the damages for loss of earnings (£y) should last beyond the death of the claimant until his child has reached the age of 18. In deciding how much £y will be, the court will wish to take into account that periodical payments paid other than to the claimant are no longer tax exempt following the claimant's death (see section on tax treatment below). Paragraph 2.1 of the Practice Direction explains that this applies in situations where a dependant would have had a claim under section 1 of the Fatal Accidents Act 1976 if the claimant had died at the time of the accident (for example, the court may consider that compensation for loss of earnings should cover the duration of the dependency)<sup>1</sup>.

#### *The Potential Benefits*

14. The three highlighted attractions of pursuing a periodical payments claim in this context are then freedom from taxation, better apportionments in lost years financial dependency and recoverability of lost years services damages
15. So far as taxation is concerned, the question is whether periodical payments in respect of, say, a loss of financial dependency provided by a dying spouse, would be exempt from tax. Without that taxation benefit, of course, the periodical payments would be far less attractive to the Claimant.
16. The DCA Guidance issued in 2005 suggested that there would be problems. It stated that the predecessor to the current legislation, Section 329AA(2) (a) Income and Corporation Taxes Act provided that the tax exemption applied only to the person entitled to the damages under the agreement or order (i.e. the claimant) so that if the periodical payments were to carry on after the death of the claimant for the benefit of the claimant's dependants, they would lose their tax free status and would be liable for income tax. Sections 329AA and 329AB of ICTA (as amended by the Courts Act 2003) have been rewritten as sections 731 to 734 of the Income Tax (Trading and Other Income) Act (ITTOIA) and in the main, ITTOIA does not change the effect of the law and the Guidance suggested that income that was taxable under the existing legislation would remain taxable under ITTOIA.
17. However, in a case one which the writer was recently involved, HMRC provided a more favourable response. It was said that the answer depends on the terms of the order made by the Court. So, if the Court were to make an order in exercise of its power under section 2 of the Damages Act 1996, directing periodical payments to and for the benefit of the widow as a result of the husband's personal injury, it is likely that the wife is 'the person entitled to the damages under the order'. If the wife is the person entitled to the damages under the order, s.733(a) of the Income Tax (Trading and Other Income) Act 2005 ('ITTOIA') specifically provides that she will be entitled to tax exemption from the periodical payments under s.731(2)(a) ITTOIA 2005. In other words, if damages are recoverable for loss of financial dependency and the Court makes an Order for periodical payments in favour of the widow, then the periodical payments will be exempt from tax.
18. In **PHIPPS v BROOKS DRY CLEANING SERVICES LTD**<sup>1</sup>, the CA determined that the lost years earnings recovery should be subject to a different (higher) discount for living expenses than that which applies in fatal dependency claims. In the usual case, the discount is one half as opposed to one third (or one quarter where there are children). Where, however, the claim is formulated and awarded by way of periodical payments, there is no reason why the claim should be reduced in this way (because what is being

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<sup>1</sup> (1996)CA (Civ Div) ([Stuart-Smith LJ](#), [Waite LJ](#), [Swinton Thomas LJ](#)) 11/7/96

compensated is loss of dependency – see above). Although any Order would have to reflect the change from lifetime loss of earnings to dependency post-death, the Damages (Variation of Periodical Payments) Order 2005 provides the structural mechanism exists whereby this can be done. Of course, it may be argued that the group of dependents and the extent of their dependency is so variable that periodical payments are inappropriate. That may be so in some cases and so a lump sum award might be preferred.

19. In **PHIPPS**, the dying Claimant sought compensation for loss of gardening and DIY services during the lost years. There was conflicting first instance authority on the point but the Court of Appeal decided that no claim lay. The basis for the decision (which does not seem to be grounded in any clear principle) can be summarized as follows; while the Court accepted that **PICKETT**<sup>2</sup> had decided that compensation should be available to a living Claimant where what was suffered was the destruction or diminution of something having a monetary equivalent, and that it did not matter whether – in the case of loss of earnings or earning capacity – such damage or destruction related to a period during which the capacity might have been destroyed or diminished because the tort cut short his expected span of life;
- i. a Claimant did not lose anything of value when he lost the capacity to do DIY work which would save him expense that he would never incur;
  - ii. just because, in a case where the Claimant performed gardening or DIY for reward, he would be able to recover lost earnings, that does to justify awarding it on some other unspecified basis.
12. Many will argue that the case is outmoded and certainly does not apply to personal services, such as personal care. Before mentioning in this context the new periodical payments regime, it is helpful to hark back to the dictum of Lord Wilberforce, in **PICKETT**, to see whether the decision in **PHIPPS** is sound in principle. In response to the argument that the Claimant loses nothing because he would not be alive to enjoy the monies, the response of Lord Wilberforce was; ‘yes they are (of value): what is of value to me is not only my opportunity to spend them (my earnings) enjoyably but to use such part of them as I do not need for my dependants or for other persons or causes which I wish to support. If I cannot do this, I have been deprived of something on which a value – a present value – can be placed.’ It is submitted that gardening and DIY (the Claimant was 51 and had recently married) met Lord Wilberforce’s criteria although the fact that the Court of Appeal may have held otherwise presents an obvious problem. However, the reasoning should not necessarily extend to other services and, in particular, it certainly should not apply to services provided for a disabled, frail or infirm spouse. In **LOWE v GUISE**<sup>3</sup>, the 31 year old Claimant was injured in a road traffic accident that rendered him unable to look after his badly disabled brother as extensively as he had prior to the accident. The question was whether he was entitled to compensation for that loss. The Defendant argued that there was no such entitlement. However, the Court of Appeal decided that there was; ‘... an injured Claimant who works albeit gratuitously for his family, a fortiori, or at any rate within the nucleus of a family home, does suffer loss, the loss of being able to contribute the value of his service to the needs of his family ...’ (per Rix LJ.) Tying this dictum in with that of Lord Wilberforce, it is submitted that the Courts should be looking closely at the formulation of these claims to see whether, in fact, the decision in **PHIPPS** is not ripe for review or – at the very least – should not be limited to its own special circumstances.
13. It seems, therefore, that lost years services claims may well now be recoverable in periodical payments form. The damages landscape has changed dramatically

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<sup>2</sup> 1980 AC 136

<sup>3</sup> 26<sup>th</sup> February 2002

since the introduction of periodical payments and the common law should be well equipped to adapt so as to keep pace. Such payments would be specified to end when the dependency would have ended. Thus a double benefit for claimants is involved; the loss is recoverable and it is recoverable tax free.

*Conclusions*

14. It remains to be seen what use will be made of these new potentially wide ranging powers. Overall they offer significant potential benefits to Claimants. There will be issues as to indexation and – probably also – as to the information needed to assess dependency. There will be arguments about the juridical distinction between living claims and fatal claims. There will be many cases where only a lump sum award is attractive. However, in all cases where there is a substantial loss of services claim, it would seem very sensible – unless and until **PHIPPS** is reversed or distinguished – to claim periodical payments for this head of loss. Difficult decisions will still have to be taken about whether cases should be settled/fought by the Claimant during his lifetime or by his widow after his death. It seems likely that the involvement of an IFA to advise the Claimant on the financial implications of any award is going to become increasingly the norm.

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