Periodical Payments for Future Pecuniary Losses

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Section 100 of the Courts Act 2003 came into effect on 1 April 2005 (yes, April Fool’s Day). The guidance reads: “The power for the Courts to order periodical payments will apply in all cases where orders or settlements have not been made before 1 April. The power to order variable payments will apply only to proceedings which are issued on or after 1 April.”

It is apparently the government’s hope that periodical payments will become the norm in personal injury cases. Superficially, the idea of compensating a claimant for the actual period he requires care or cannot work, rather than an calculated estimate that is bound to be either too high or too low, is attractive provided the payments are secure and appropriately increased to take account of inflation.

Despite significant evidence that suggests that wages have for many years consistently outstripped the retail prices index (RPI), it is the RPI that is applied when calculating a lump sum (and the 2.5% discount) and structured settlements which attract a tax concession on annual payments. It is notable that structured settlements were, even at the height of their popularity, usually confined to large claims; the fall of the stock market and poor annuity returns and loss of public confidence has meant they are considered less attractive than formerly. If there is underestimation of the inflation of wages by pinning the calculations to the RPI, the claimant’s lost future earnings and the wages of his or her care-givers may fall increasingly short of true compensation. Unlike a lump sum award, when compensation is paid out annually with insufficient uplift to update pecuniary losses in real terms, there is no opportunity for prudent investment to make up the shortfall. However, provided the funding of long term periodical payments into the future are secure, the claimant and his or her family will not risk the award becoming exhausted before the claimant dies.

However, many claimants’ lawyers are concerned that periodical payments regimes are beset with problems (in particular, the limited annuities market – see more below – and security of future payments) which may make such awards less appealing to both sides than hoped for by government, though the enjoyment of assured annual payments (especially when free of income tax) certainly has its attractions.

The new provisions and the issues and concerns they provoke are thoughtfully considered by Philip Norris QC along with his views on current and likely future guidance and government responses and judicial attitudes.¹

The Provisions in Brief

Section 100 of the Courts Act 2003 is substituted for s 2 of the Damages Act 1996 and inter alia requires the court to consider whether periodical payments are suitable in any case where future pecuniary losses are claimed – the size of the award is not to be determinative. Section 2(2) further allows periodical payments to be made in respect of past losses or compensation for non-pecuniary losses if the parties consent. It states that the key factor is the claimant’s needs and not...
the defendant’s wishes – but it also states that regard must be had to the form of the award preferred by both the claimant and the defendant and the reasons for this.

Section 100(8) provides that periodical payments shall be varied by reference to the Retail Price Index, (RPI) but allows an Order to disapply or modify the effect of (8). Further, the Lord Chancellor may by order enable a court to vary the terms of an Order it has already made for periodical payments. Similar provisions apply also to agreements made for periodical payments. Notwithstanding, the likelihood is that the RPI will be applied without uplift as the routine basis for awarding periodical payments. There are very few annuity providers as it is and it is at present impractical to offer a permissible index-linked annuity on any other basis. There are no suitable close-matching assets that can be held against alternative indices such as AEI (Annual Earnings Index) or NES (New Earnings Survey) which establish general trends in labour costs for the economy as a whole. In Cooke v United Bristol Healthcare [2003] EWCA Civ 1370 it was argued for the claimant that compensation for loss of earnings or care-givers’ wages should be assumed to be 2% above the RPI as demonstrated by generalised earnings surveys. This was flatly rejected along with a call for a lower discount rate than the current 2.5%.

As matters stand, a permissible index-linked annuity (one approved by the Financial Services Authority) is available because there are index-linked government stocks (ILGS) that match them- but these are only available until 2035. Obviously, the government may wish to issue fresh stocks in due course.

The Practice Direction to CPR 41 (PD 41B) sets out examples of circumstances that might induce a court to order an increase or decrease under Rule 41.8(3). How and when this might be applied is, to say the least, problematic.

CPR 41.6 requires the court, as soon as practicable (presumably at the first or second CMC), to indicate to the parties whether it is likely to favour periodical payments or a lump sum. As the parties will need to be in a position to set out their reasons in support of their preferences (provided for by Rule 41.5) they should have by this early stage have taken appropriate financial or other advice. However, it is likely that they will both be keen to take the opportunity to ask for and to provide further and better particulars of both their reasons and the advice on which these are based.

Notes