# SECURING THE FUTURE

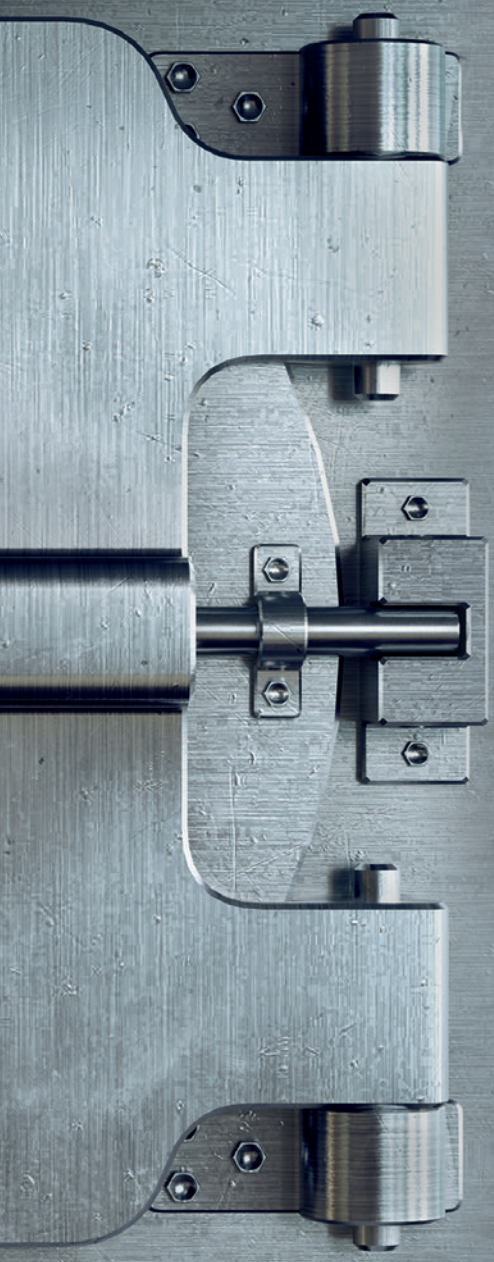
**GERARD MCDERMOTT KC AND MATTHEW SNARR ON WHEN TO USE FINANCIAL EXPERT EVIDENCE TO SECURE PERIODICAL PAYMENTS**

Periodical payments have been available in substantial personal injury claims since the Damages Act 1996. In the early years, they could only be made where both parties consented. The fact that the court could not impose them was noted by Lord Steyn in *Wells v Wells* [1999] 1 AC 345, where he observed that the court ought to be given the power to make such an award. He plainly felt that there was no real argument to the contrary.

But it was only after the Courts Act 2003 (which revised the 1996 Act) was implemented that the Courts gained the power to order periodical payments.

While periodical payments should probably be used more often, in the authors' experience, motor insurers (in particular) are reluctant to embrace them. This is presumably because of the need to reserve for the payment and escalation of periodical payments at a significantly lower discount rate than the current -0.25% rate.

Periodical payments orders (PPOs) are, however, much more common in clinical negligence cases against the NHS. The MIB is also more open to them, since it presumably spreads the need to collect money from the individual insurers who belong to the MIB over a longer period. Further, an organisation like the MIB is likely to have a large number of PPOs, which may enable it to manage the risks inherent in periodical payments more readily than many insurers.



## Expert evidence

One of the issues that arises is whether expert evidence should be required in these cases. In particular, whether it is required not only for the claimant, but also the defendant.

CPR 41.6 provides:

'The Court shall consider and indicate to the parties as soon as practicable whether periodical payments or a lump sum is likely to be the more appropriate form for all or part of an award of damages.'

In practice, the provisions of CPR 41.6 rarely take effect, and it is left to the parties to negotiate whether or not provision should be made by way of periodical payments for significant future damages, especially in the fields of care and case management. Claimants in particular are aware that the only way to compel a defendant insurer to pay damages by way of periodical payments is to go to trial.

There are a number of clear advantages to periodical payments for a badly injured claimant:

(a) the payments will be secure and are backed by the Financial Services Compensation Scheme;

(b) they are index-linked to the appropriate index – in the case of payments for care and case management, this will generally be ASHE 6115. This will provide a hedge against the increases in carers' wages that a claimant may have to meet (an issue that has become the more relevant since the return of double-digit inflation);

(c) they are tax-free;

(d) they last for the claimant's lifetime.

Financial advice will always be more crucial for the claimant than the defendant. Defendant insurers may have all the advice that they need, in reality, to reserve these claims and to work out the impact of any such orders on them.

For claimants, however, it is important to understand the differential advantages and disadvantages between lump sum and periodical payments orders. The question of the claimant's life expectancy will be material; as will the various opportunities that a claimant may have to invest money.

Likewise, in cases where there is a short life expectancy, although the attraction of periodical payments may be that a claimant will know that their care needs (especially) are met for life, whether that be long or short, it may mean that there is less available by way of lump sum to deal with issues such as accommodation.

It is in this area that the advice of an independent financial adviser (IFA) may become important.

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## What is the Court required to do?

CPR 41.7 provides that:

'When considering –

(i) Its indication as to whether periodical payments or a lump sum is likely to be the more appropriate form for all or part of an award of damages under Rule 41.6; or

(ii) Whether to make an order under s.2(1)(a) of the 1996 Act,

'the Court shall have regard to all the circumstances of the case and in particular the form of award which best meets the claimant's needs having regard to the factors set out in Practice Direction 41B.'

Practice Direction 41B in turn provides:

'Factors to be taken into account (Rule 41.7) -

'The factors which the Court shall have regard to under Rule 41.7 include -

(i) The scale of the annual payments taking into account any deduction for contributory negligence;

(ii) The form of award preferred by the claimant including –

(a) the reasons for the claimant's preference; and

(b) the nature of any financial advice received by the claimant when considering the form of award; and

(iii) The form of award preferred by the defendant including the reasons for the defendant's preference.'

It is well established that, particularly in the case of claims for future care, the Court will readily depart from the idea that periodical payments should be linked to RPI, and typically (universally in our experience) such awards are linked to the index ASHE 6115 published by the ONS.

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## Who needs expert evidence?

Two issues that are increasingly arising are:

(a) Whether any advice sought by the claimant should be disclosed; and

(b) Whether the defendant requires expert advice as well.

The answer to some of these questions can be found in one of the leading cases on periodical payments, *Tameside and Glossop Acute Services NHS Trust v Thompstone* [2008] PIQR Q2.

The Court of Appeal's decision in *Thompstone* reaffirmed the decision of Mrs Justice Swift that it was appropriate that payments for care should be linked to ASHE 6115. However, there are some useful observations from the Court of Appeal (Waller LJ) that are still good today. He observed as follows:

(a) That the claimant will usually instruct and call an independent financial adviser to report on the form of order which they consider would best meet the claimant's needs.

(b) The Practice Direction anticipates that the claimant will usually have such evidence. But the Practice Direction does not anticipate that the defendant will instruct their own financial adviser.

(c) Even if the parties agree on all issues, such a report is likely to be helpful to the judge who is asked to approve the form of order.

(d) It is undesirable that cases concerning whether to order periodical payments should be unnecessarily burdened with evidence on satellite issues. The defendant's general preferences did not need evidence to support them.

(e) Some evidence might be required if a more specific point is to be made where a defendant wishes to avoid a PPO, and wants to argue that it would be impossible for it to make suitable financial provision. In reality this will rarely arise, certainly in road traffic collision claims, but where the indemnity provided by an insurance policy is limited (as will almost always be the case in the fields of employer's liability or public liability), the need for payments to be secure may be more difficult to deal with; particularly in cases of long life expectancy and significant future payments.

(f) The Court indicated that 'It will rarely be appropriate for a defendant to argue that its proposals will meet the claimant's needs better than the proposals being advanced on the claimant's behalf'.

(g) Some of the earlier cases on periodical payments recognise this too – see *RH v United Bristol Healthcare NHS Trust* [2007] EWHC 1441 (QB) and *Godbold v Mahmood* [2006] PIQR Q5.

## Issues to consider

In the first instance, practitioners (particularly those acting for claimants) in this field will want to consider the basis on which they are instructing an IFA. Is the claimant merely seeking advice as to which is the best mode of damages order relating to specific heads of loss, or does the claimant wish to rely on a report from an IFA expert witness to put before the Court?

In many of the more substantial claims, the desirability of a PPO, particularly for care and case management, may be obvious to experienced practitioners; though of course lawyers are not financial advisers, and it will be advisable in every case to obtain an appropriate report from an IFA - if only to validate the view reached by the practitioner.

In a case where approval is required, the Court is likely to want to see such a report to support the choice made, whether for periodical payments or a lump sum. In cases where there is a liability or contributory negligence aspect, the issue may become more nuanced; and the Court will want to see the basis on which a settlement has been achieved.

For instance, if there is a complete denial of liability, but a compromise has been reached which amounts to a markedly reduced sum as against the full liability value of the claim, it may well be appropriate not to order periodical payments. Likewise, as many IFAs observe, periodical payments are simply one part of the consideration in compromising a very significant claim. If an appropriate settlement can be achieved beyond that which might be achieved at trial, then the fact that periodical payments are not available will be only one consideration.

## What should the Court be ordering?

It is easy to be drawn into the idea that there should be equality of arms in this area. However, where there is no real dispute as to whether a PPO could be appropriate (and often there will not be), it is difficult to see the purpose in a defendant obtaining an IFA report.

Likewise, if a party is not a protected party, the purpose of an IFA report may be to inform the party's views, and also those of their professional advisers, as to what the appropriate award should be. This should generally be regarded, it seems to us, as internal advice which need not be disclosed to the defendant. All that a Defendant has to consider is whether or not they are prepared to submit to such an order.

The issue, as noted above, is somewhat different where there is a protected party, where a Court will want to see why periodical payments have or have not been agreed, and the rationale behind that decision.

We are aware of a number of instances where a Court has simply ordered that both parties should be able to obtain expert financial advice (to consider the desirability of a PPO), and that such expert evidence should be exchanged either simultaneously or sequentially. We suggest that this should not be the norm. It will depend on the purpose for which a report is obtained.

Even in the case of a minor or protected party, there may be an interest in not showing the defendant what the report says - although it will of course need to be disclosed to the Court, as part of the confidential advice proffered to the Court in approving such a settlement.

As to the costs of obtaining an IFA's report, it seems to us that they will generally (if not always) be recoverable. One reason for directing that expert evidence be obtained by a claimant (but not disclosed) is to put beyond argument the question of whether or not the cost of obtaining such an advice should be recoverable.

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