

Periodical Payment Orders Claimant Lawyer's view

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Case Study 1: Jimmy

- Jimmy is aged 12. Hemiplegic after RTA.
- Residential school (5 days p/w) to 18 then home care (mother died in accident, father has heart condition)
- Life expectancy?
- Defendant - Big Insurer/Lloyds Syndicate/Govt Department/MIB uninsured
- Contributory fault (e.g. pedestrian)

Case Study 2: Kylie

- Kylie is aged 21. Work accident led to serious leg fracture requiring 3 operations. Worked as a driver - unable to return. Some residual earning capacity. Limited care claim.
- Defendant: Big Insurer with/without life arm. New insurer in the market.

Case Study 3: Beryl

- Beryl is 76. Fractured hip in a fall. Requires significant care and assistance.
- May have affected life expectancy, but not clear.
- Defendant - self insured supermarket chain.

Key issue 1: Choice



- Lump sum- pros
 - certain sum now
 - control of the claimant
 - no involvement with D
- Lump sum - cons
 - 'wrong' amount
 - fear it will run out
 - discount rate too high

Case Studies

- Jimmy
 - Judge will exercise choice on his behalf
- Kylie
 - May well want a lump sum for flexibility or a PPO for tax free supplemental income stream
 - How to determine whether reasonable?
- Beryl
 - Certainty of continuity of care
 - Family wishes

Key issue 2: Inflation

- Unless Court orders otherwise, PPOs linked to RPI
- Future loss of earnings
 - Average earnings index?
- Future care
 - Healthcare Costs index
 - Average earnings index?



Inflation - No different to current regime?



- RPI underlies the discount rate
- Sheppard v Stibbe: [2003] EWCA Civ 1370
- Court's discretion?
- Government approach is 'bottom up', but will damages still 'run out'?

Case Studies

- Jimmy
 - Long-term care regime with changes (inflexibility/inadequacy of PPO?)
- Kylie
 - Earnings likely to have increased by AEI
- Beryl
 - Will care costs exceed RPI?

Key issue 3: Life expectancy

- In cases where there is a real dispute between experts as to future life expectation then PPOs can 'bridge the gap'.
- But product availability?
- 'Impaired lives' has a different meaning in the life/annuity market than it does for personal injury lawyers and liability insurers.

Case Studies

- Jimmy
 - Potential for this to be a real issue here
- Beryl
 - Even if no disagreement about life expectancy, Beryl is likely to fear a lump sum might run out

Key issue 4: Contributory fault/litigation risk



- The government's approach is predicated on a 'bottom up' basis.
- But in many cases a full award is not made
- Contributory fault
- Litigation risk settlements

Case Studies

- Jimmy
 - Significant contributory fault would affect provision considerably
 - But would not a tax free income stream linked to RPI for life be a sensible part of an investment strategy?

Key issue 5: Payments to dependants



- Particularly important with regard to future loss of earnings
- A lump sum award is there for his family if the Claimant dies early
- The periodical payments award should not die with the Claimant

Key issue 6: Product availability and financial advice

- Court will consider the form of award preferred by the Claimant (but not conclusive)
- Taking into account 'the nature of any financial advice received'



Advising the claimant

- Personal injury lawyers will not usually be authorised by FSA to give financial advice
- Presumably must therefore obtain independent financial advice in every future loss claim?
- Product availability? Security?
- The judge effectively making investment decisions for an adult claimant of sound mind?

Case Studies

- Jimmy
 - long-term annuity required (beyond 2035 likely)
 - Security
- Kylie
 - long-term annuity
- Beryl
 - Security (self insured supermarket)

Key issue 7: Part 36 offers to settle/payments into court



- New complex provisions for all future loss claims.
- To be effective, must specify details of PPOs/lump sums
- Is the Part 36 'more advantageous than the award?'

Key issue 8: variability



- Considerable use of enquiry agent video evidence pre-trial.
- Will the claimant fear a variable PPO and looking over his shoulder forever?
- Impact on medical progress - effect of continuing litigation

Case studies

- Jimmy
 - ‘Steps’ in the PPO built in at Trial is not ‘variability’
 - Maybe foreseeable specific deterioration
- Kylie
 - Not likely to have a ‘provisional damages’ type change
- Beryl
 - Likely to be inappropriate?

Politics

- The Government (NHS) as a very significant payer of lump sums for future pecuniary loss
- Fear of the Claimant dissipating a lump sum and thrown back on the state



Conclusions



- Lump sum awards and discount rate imperfect
- PPOs linked to RPI will not deliver alone
- Serious practical difficulties
- But ... a first step towards a more rational approach?
