

## Periodical Payments: A look at the new Rules

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## Compensation

- Compensation in tort aims to put the victim in the position he would have been but for the tort
- Does giving a lump sum to replace an income stream or regular outgoings achieve this?



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## So why are structured settlements not used more?

- Consent
  - Only if both sides agree
- Ignorance/fear
- Top down approach
  - Work out what the lump sum would be and then purchase an annuity
- Annuity rates

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## Damages Act 1996 amended by ss. 100 & 101 Courts Act 2003



- Incongruously included in the Courts Act 2003 which otherwise deals with criminal law reform
- Damages Act 1996 as amended remains the key statute

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## Powers of the Court

- The Court shall consider making orders for periodical payments for future pecuniary loss
- Court may order periodical payments instead of a lump sum for future pecuniary loss without the consent of the parties
- Court may order periodical payments in respect of any other head of loss with the consent of the parties

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## Tax treatment



- All periodical payments
  - by Court Order
  - by agreement
- Exempt for income tax
- 329AA of the ICTA 1988

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### [Draft] CPR Rule 41

- Formerly 'Provisional Damages' now entitled 'Damages'
- Rules 41.1 to 41.3 remain unamended to deal with Provisional Damages
- A new Part II (Rules 41.4 onwards) deal with Periodical Payments
- Practice Direction 41B – Periodical Payments under the Damages Act 1996

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### [Draft] CPR 41.6: the court's indication



"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."

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### [Draft] CPR 41.7: Factors to be taken into account

"When considering (a) its indication ... under rule 41.6; or (b) whether to make an order under section 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 the practice direction."

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**[Draft] Practice Direction 41B****Factors to be taken into account**

- The scale of the annual payments taking into account any deduction for contrib neg
- the form of award preferred by the claimant
  - (a) the reasons [for it] ; and
  - (b) the nature of any financial advice received
- the form of award preferred by the defendant including the reasons for the defendant's preference.

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**[Draft] CPR 41.8: increases and decreases in awards**

- (3) Where an amount awarded under paragraph (1)(b) is to increase or decrease on a certain date, the order must also specify—
  - (a) the date on which the increase or decrease will take effect; and
  - (b) the amount of the increase or decrease at current value.

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**[Draft] Practice Direction 2.2:  
examples of increases or decreases**

- (1) condition will change leading to [change] in ... care ... costs
- (2) gratuitous carers will no longer continue
- (3) educational circumstances will change;
- (4) the claimant would have received a promotional increase in pay;
- (5) the claimant will cease earning.

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### [Draft] Practice Direction 6: Court Approval

- “Where a claim for damages for personal injury is made by or on behalf of a child or patient and is settled prior to the start of proceedings or before trial, the provisions of the Practice Direction which supplements Part 21 must be complied with”.
- Old PD 21 6.4 (£500,000 awards) is “substituted” so no longer applies

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### [Draft] PD 21 6.9



- The court must be supplied with-
  - (1)an opinion on the merits of the settlement or compromise given by counsel or solicitor acting for the child or patient, except in very clear cases; and
  - (2)a copy or record of any financial advice.”

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### Security: Damages Act s2(3)

- (3) A court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is reasonably secure.
- (4) Secure if:
- ministerial guarantee
  - FSCS protection
  - government or health service body

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### Security: Damages Act s2(3)

- So if FSCS applies or it is from a governmental body or protected by ministerial guarantee, it's deemed to be secure
- Otherwise the Court can still order Periodical Payments, but must be satisfied
  - why not possible to satisfy s 2(4)
  - pay out at required level for the duration is reasonably secure

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### Extension of Financial Services Compensation Scheme (FSCS)

- **Previously**
  - only life annuities expressly protected
  - only 90%
- **Now**
  - insurers may fund directly without an annuity
  - insurer may purchase annuity and pass on payments

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### Protection: Courts Act 2003

Explanatory Note 364

“At present, the FSCS would not operate effectively to protect the claimant's right to continue to receive the payments in the event of the failure of the underlying insurer [because the defendant is the policy holder not the claimant].”

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### Damages Act section 6: Ministerial Guarantee

If it appears to a Minister of the Crown that the payments are to be made by a body in relation to which he has ... power to do so, he may guarantee the payments to be made under the agreement or order.

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### Protection: Courts Act 2003 Explanatory Note 365

- "Section 4 (3) and (4) provide for recipients of periodical payments to have a direct claim under the FSCS, and for that claim to cover 100% of the payments, when any arrangement is put in place to fund periodical payments that attracts the protection of the FSCS - that is where it is underpinned by an annuity or a relevant general insurance contract [NB not all]"

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### Damages Act s2(6)

- (a) a court shall not approve an assignment or charge unless satisfied that special circumstances make it necessary, and
- (b) a purported assignment or charge, or agreement to assign or charge, is void unless approved by the court.

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### Variation: Courts Act 2003 Explanatory Note 357

“The new section 2B gives the Lord Chancellor an order-making power to enable the court to vary periodical payments under specified circumstances. A range of provisions which may be contained in such an order are set out in subsection (3). An order made under this power is subject to prior consultation by the Lord Chancellor and the affirmative resolution procedure.”

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### Variation: Courts Act 2003 Explanatory Note 357

“Following the recent consultation it is intended that the first order will enable variation of periodical payments orders only where there is a significant medical deterioration or improvement in the claimant's condition which can be foreseen at the time of the original order and where the court provides for the possibility of variation in that order”.

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### Speculative concerns

- What Guidance for the judiciary?
- Will general insurers be allowed to “self fund”
- Will the mandatory requirement to index periodical payments to RPI prevent FSA regulated life insurers from providing products extending beyond 2035?
- Will the government change its mind and issue new ILGS?

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### Product concerns

- Will providers return to the market with products?
- Is the flexible annuity a solution?
- Are there any other types of product?
- Is any of this safe for any claimant until products have a tried and tested track record?
- Should lawyers be required to warrant financial advice they give to their clients?

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### When?!

- To come into force on 1 April 2005
- Periodical Payment Orders - all cases with settlements/judgement after that date
- Variable Orders - all proceedings issued after that date



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