

**WORKING PARTY ON STRUCTURED SETTLEMENTS
(CHAIR: BRIAN LANGSTAFF QC)**

METHODS OF AWARDING COMPENSATION

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

MARCH 2002

The executive committee would like to acknowledge the assistance of the following people for assisting with the preparation of this response:

Frances McCarthy President, APIL

Patrick Allen Vice-President, APIL

Mark Harvey Secretary, APIL

David Marshall Treasurer, APIL

Allan Gore Executive Committee Member, APIL

Any enquiries in respect of this response should be addressed, in the first instance, to:

Annette Morris
Policy Research Officer
APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585

Fax: 0115 958 0885

E-mail: Annette@apil.com

METHODS OF AWARDING COMPENSATION

1. The Association of Personal Injury Lawyers (APIL) was formed as a membership organisation in 1990 by claimant lawyers committed to providing the victims of personal injury with a stronger voice in litigation and in the marketplace generally. We now have around 5,000 members across the UK and abroad, and membership comprises solicitors, barristers, academics and legal executives.
2. The way in which damages are awarded to injured victims affects the extent to which those damages provide victims with the full compensation they are entitled to at common law. Damages are usually awarded in a lump sum but can also be awarded through a structured settlement. In addition, there is currently renewed interest in allowing victims to receive damages through periodic payments following a review of their circumstances.
3. In summary, APIL believes that all these methods of awarding compensation have their own advantages and disadvantages outlined below. For these reasons it is imperative that all victims should be able to choose the way in which their compensation is awarded to them. It is vital that neither the courts nor defendants should be able to force a claimant to receive his damages in a certain way. We further believe that this right to choose should be enshrined in legislation. The system would then operate in the same way as the current procedure for provisional damages. This allows a claimant with an unclear prognosis to receive damages on the assumption that their condition will not deteriorate, but return for further damages in the future if it does. The claimant is the only party entitled to seek provisional damages.

Lump Sum Damages

4. Compensation is usually awarded in a lump sum and on a once and for all basis. The traditional justification for doing this is that it allows finality of litigation – claimants can move on and look to the future and defendants are certain of their liabilities. Hazel Genn, in her research for the Law Commission¹, found that there was a strong preference for being paid in a lump sum, except amongst respondents who had received settlements of £100,000 or more². The reasons provided for this were as follows³:

- Personal control over money
- For the benefits of investments / savings
- Greater purchasing power
- End of claim process
- Better able to plan for the future
- Settlement too small for instalments
- Easier to manage
- Financial security.

The problem with awarding damages in a lump sum and on a once and for all basis, however, is that the award will, in many cases, either be too low or too high, as so many predictions relating to prognosis and life patterns must be made at the time of settlement or other conclusion. In addition, delays can occur in concluding the claim because compensation cannot be calculated until prognosis is clear, which can take some time.

¹ Personal Injury Compensation: How Much is Enough? A study of the compensation experiences of victims of personal injury, Law Comm. No. 225 (1994)

² Ibid, page 181

³ Ibid, table 1008

Periodic Payments Following Review

5. Hazel Genn found that among the small number of respondents who said that they would have preferred instalment payments, the chief reasons given were either that respondents valued the security of having regular payments coming in or because they felt the money would last longer since they would not be able to spend it all at once or whenever they felt like it⁴. There are, however, some disadvantages to awarding compensation periodically following review. Awarding compensation in this way would result in a lifetime relationship between the victim and the defendant that the victim may not want. It is important, therefore, that periodic payments following a review of the claimant's circumstances should not be imposed on a victim at either the request of the victim or order of the court.

6. APIL accepts that awarding compensation in a series of periodic payments following a review of the victim's circumstances would allow damages awarded to meet the needs of victims more accurately. A victim would not have to fear running out of money as if, following review, it appeared that he was in fact entitled to more compensation, he would be able to recover it. Compensators would not pay too much in damages.

7. The logic of these arguments, however, ignores the fact that many cases either settle or are determined on a compromise basis, either as to liability or indeed also as to quantum. A claimant may be found to have been contributorily negligent to the extent of 33%, or settle for 33% less in damages because of litigation risk. In those situations, a claimant loses that proportion of his damages and must prioritise how he spends the balance. APIL submits that he should be entitled to chose, for example, to forego what he might have been awarded for his transport needs in order to fund his care needs. Simply because he then spends little or nothing to satisfy his transport needs by comparison with what was assumed at the time of an award, does not mean that he no longer has those needs. It is right in principle, therefore, that a

⁴ Ibid, page 183

review of damages should not interfere with a claimant's continuing entitlement to damages on the basis of need.

8. In other words, what concerns APIL is the extent to which a review of damages either impinges upon, or indeed conflicts with, the principle that it is no business of either the compensator or the court⁵ how a claimant spends his damages. Care needs to be taken with any proposals to ensure that this right is preserved. Moreover, where should the lines of review be drawn? Do they extend to reviewing loss of earnings awards if either the average earnings index runs so far ahead of retail prices as to under-compensate for future loss of earnings, or to reviewing loss of earnings in the face of a claimant who has managed to achieve residual earnings higher than was originally contemplated? Can a claimant who was thought to have a residual earning capacity but who has never managed to get a job return to recalculate his award? Will general damages be reviewable if prognosis agreed at trial turns out to have been over-optimistic? Or is review to be limited to needs-based heads of claim like care? Is there any logical basis for drawing lines differently in answer to these questions? APIL fears that the superficial attractiveness of the arguments in paragraph 6 above ignores these difficult issues. APIL submits that it may be better for these issues to be decided by Parliament.

Structured Settlement

9. The structured settlement also provides an alternative to lump sum damages that allows claimants to receive regular payments for life. This, again, lessens the burden of financial management on the claimant and reduces argument on issues such as life expectancy. A distinction must be drawn, however, between "top down" structures and "bottom up" structures. With top down structures damages are calculated in a lump sum in the usual way and an annuity purchased to provide annual payments. The advantage of top down

⁵ re-affirmed in Wells v Wells [1998] 3 W.L.R. 329

structures generally depends, therefore, on the financial market at the time of settlement. Bottom up structures do not involve the calculation of a lump sum but instead involve the defendant replacing recurrent losses and/or expenses with periodic payments. The annuity rate is, therefore, irrelevant making this method of settlement much more attractive. Both methods, however, are inflexible in that they are incapable of changing to reflect the actual needs of a claimant once settlement or other conclusion of the claim has been achieved.

Conclusion

10. As outlined above, the various ways of awarding compensation have both advantages and disadvantages for injured victims and the most suitable method will depend on the victim's individual circumstances. APIL could only support a system involving periodic payments with review, however, if claimants were free to choose their way in which they received their damages and if that freedom was enshrined in legislation.