

LORD CHANCELLOR'S DEPARTMENT

**DAMAGES FOR FUTURE LOSS: GIVING THE COURTS THE POWER TO
ORDER PERIODICAL PAYMENTS FOR FUTURE LOSS AND CARE
COSTS IN PERSONAL INJURY CASES**

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

MAY 2002

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5300 members in the UK and abroad. Membership comprises barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

David Marshall	Vice-President, APIL
Allan Gore	Treasurer, APIL
Frances Swaine	Executive Committee Member, APIL
John Pickering	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

DAMAGES FOR FUTURE LOSS :
GIVING THE COURTS THE POWER TO ORDER PERIODICAL
PAYMENTS FOR FUTURE LOSS AND CARE COSTS IN PERSONAL
INJURY CASES

1. APIL welcomes this opportunity to respond to the LCD's consultation paper on giving the courts the power to order periodical payments for future loss and care costs in personal injury cases. In summary, APIL provisionally agrees that the courts should have a power to impose periodical payments where they are appropriate and that those payments should be open to review in limited circumstances. APIL's agreement on both points is, however, subject to the parameters outlined in this response.

Q1: Do you agree that the courts should have the power to order that damages for future losses in personal injury cases should be paid in the form of periodical payments?

2. APIL provisionally agrees that the courts should have the power to order that damages for future losses in personal injury cases should be paid in the form of periodical payments. This agreement is subject to the parameters in which it is proposed such a power should be exercised, as to which, please refer to our response to question 3 below.
3. Periodical payments have both advantages and disadvantages for claimants. Claimants would not have to fear running out of compensation as they would if damages were awarded as a lump sum. On the other hand, periodical payments create a lifetime relationship between the claimant and defendant that the claimant may find extremely difficult. For this reason, the merits of imposing periodical payments must be assessed on an individual case-by-case basis. The appropriateness of periodical payments will depend on several

factors including, most importantly, the claimant's wishes and future plans and also the basis on which the claim is concluded as compared with its full value. We agree, therefore, that it would be helpful to issue a Practice Direction, setting out the considerations a court should take into account when deciding between a lump sum, periodical payments or a mixture of the two. Such a Practice Direction should be developed following wide consultation with the appropriate bodies.

Q2: Should the legislation include a presumption that for larger cases periodical payments will be the preferred form of payment unless there is a good reason not to?

4. APIL does not believe that the legislation should include a presumption that for larger cases periodical payments will be the preferred form of payment. The above question immediately poses further questions such as how 'larger cases' would be defined. In addition, in looking into whether there was 'good reason not to' impose a periodical payment, the court would be required to analyse the case closely, in which case the presumption would be redundant except in the most obvious of cases. As noted above, we believe that the merits of periodical payments should be assessed on a case-by-case basis with the assistance of a Practice Direction, which, as noted above, should be developed following consultation with the appropriate bodies.

Q3: In what circumstances might a lump sum be more appropriate for all or part of the future losses?

5. It is impossible to predict all of the circumstances in which a lump sum would be more appropriate than periodical payments for all or some of the future losses. For example, it is predictable that a lump sum would be more appropriate where there are concerns about the future financial security of the defendant and/or his insurer or where the claimant does not want a life-long

connection with the defendant. Other circumstances, however, are less predictable as they relate to the particular wishes or future plans of the claimant. Claimants, for example, often wish to use their damages for future loss of earnings to purchase and/or adapt suitable accommodation. In addition, as noted by the CDF, a businessman may, quite reasonably, want to take future earning loss in the form of capital to invest or a young breadwinner might want to take a lump sum big enough to get a house in the countryside and start a bed and breakfast near to a good primary school. Alternatively, the claimant may not know at the time of settlement of other conclusion what he is going to do with his life following the accident, how he is going to spend his damages or how he will prioritise that spending. The law to date has always recognised the claimant's freedom of choice in spending his damages and should continue to do so.

6. For the above reasons we believe that courts should assess the merits of lump sums and/or periodical payments for future loss on a case-by-case basis with the assistance of a Practice Direction. Such a Practice Direction should at the very least require a court to consider the following:
 - The claimant's wishes;
 - The claimant's future plans;
 - The financial security of the defendant and/or his insurer;
 - The effect of any compromise to reflect, for example, contributory negligence or litigation risk;
 - The nature and extent of future uncertainties.

7. We stress that a court should only impose periodical payments upon a claimant who is capable of making his own decisions, and who does not want a lifetime relationship with the defendant, in exceptional circumstances. The claimants wishes and future plans should be the most important consideration of the court when deciding whether to order periodical payments, a lump sum or a mixture of the two. Having said that, there may be cases where it would be beneficial to a claimant for the court to decide that a lifetime relationship with

the defendant would be preferable. For example, this may be preferable for a claimant who will always be under a disability and who will have a lifetime of ongoing medical treatment and care, the cost of which rises above the RPI. It is these kinds of difficult and sensitive issues that should be addressed in further consultation on the development of a suitable Practice Direction.

Q4: Should (i) the power to order periodical payments, or (ii) any presumption in favour of periodical payments, apply to cases under the Fatal Accidents Act 1976?

8. In answer to question one, APIL highlighted that periodical payments create a life long relationship between a claimant and defendant. It is not difficult to see that many dependants claiming under the Fatal Accidents Act 1976 would not want such a relationship, but instead would prefer the ‘clean break’ available through a lump sum payment. In addition, calculating damages for dependency on the basis of loss of earnings is not usually complicated by issues of life expectancy. Periodical payments may not therefore, be as useful or as attractive in Fatal Accident Act cases. Having said that, however, there may be individual cases in which they may be appropriate and in which they are desired by the dependants. As noted by the CDF, the calculation of the dependency of an elderly widow of a younger millionaire could be problematic as the combination of a large multiplicand and difficulties in predicting life expectancy means that a lump sum could be wildly wrong. There should, therefore, be a power to order periodical payments to those claiming under the Fatal Accidents Act for those cases in which they are desired or in which they are suitable, again, subject to guidance in a Practice Direction.

Q5: Do you agree that insurers should have the option of self-funding, provided the court was satisfied about the security of the periodical payments?

9. APIL sees no reason why insurers should not be able to offer to self-fund periodical payments, provided the necessary amendments are made to the

Financial Services Compensation Scheme to ensure that all future payments to all claimants are protected at all times. It is also imperative that the FSCS can continue payments as they become due with little or no delay. Care regimes and medical treatments will be dependent on the cash flow generated by these future payments and it would be unacceptable if either were disrupted due to filling in the required FSCS forms and completing other bureaucratic procedures. This, again, may require some amendment of the scheme. As submitted by the CDF, defendants should provide proof of security and it would be for the claimant, if competent, to decide whether there was adequate security, and for the court to do so if the claimant was under a disability.

Q6: Are there other funding options that might offer adequate security?

10. APIL is unable to comment on this question as it does not fall within our members' expertise.

Q7: Do you agree that using Rule 44.3(4) is the best approach to dealing with offers to settle on the basis of periodical payments? If not, how should this issue be tackled?

11. APIL agrees that at this stage, using Rule 44.3(4) would be the best approach to dealing with offers to settle on the basis of periodical payments. We believe that the court should take into account the following factors identified by the

CDF:

- who opened negotiations;
- how early in the litigation that was done;
- how constructively negotiations were pursued;
- what reasons were put forward on either side for rejecting offers made.

We further believe that where the claimant has reasonably investigated the question of whether periodical payments would be suitable, the cost of that investigation, including any independent financial advice, should be recoverable by the claimant from the defendants regardless of whether the claimant opts for periodical payments or not. This will encourage claimants to obtain sensible advice at the appropriate stage in negotiations or proceedings.

Q8: Do you consider that any of the current relevant benefits regulations create inappropriate incentives or other anomalies and if so, what are they and how could they be remedied?

12. The CDF refers to an article by John Grace QC, which discusses the recent cases of Ryan and Bell. It notes that if Mr Grace is right, it would seem that those who lack capacity enjoy both a capital and income disregard, while competent claimants whose money is put in trust enjoy a capital disregard only of that income applied to special needs. These favourable circumstances, however, do not apply to payments under a ‘commercial’ structured settlement (Beattie v Secretary of State for Social Security [2001] Lloyds Rep Med 297). The reasoning in the Beattie case might also apply to self-funded structured settlements. The CDF explains that this would result in four classes of adult claimants as follows:

- Those receiving a lump sum, who are not under a disability and whose damages are not in trust. This class would not enjoy either a capital or income disregard for the purposes of means tested benefits.
- Those receiving a lump sum who are under a disability and whose damages are administered by the Court of Protection or under CPR Part 21 without there being a form of trust in existence. This class would enjoy both capital (so long as it is held by the Court) and income disregard.

- Those, whether under a disability or not, who receive a lump sum which is paid into a discretionary or (possibly) bare trust. This class would enjoy a disregard of capital within the trust, but only a limited income disregard.
- Any of the above who have entered into a structured settlement. For this class, the contingency sum would be disregarded but their annuity payments will be taken into account.

13. APIL believes that the current complications and contradictions highlighted above may be a major deterrent to the use of periodical payments and this needs to be resolved if a system of periodical payments is to be used successfully. The CDF suggests:

“[T]he tortfeasor [should] compensate[s] the claimant and repay[s] those who have provided or will provide for the consequences of his injury, whatever the claimant’s age or legal status and whatever sort of trust provision has been devised. This approach would mean that neither capital nor income from any award should be disregarded in assessing eligibility for future means-tested benefits. The loss would lie on the wrongdoer where it belongs.”

This would be an extension of the current system with the CRU prior to settlement.

Q9: Do you agree that it would be desirable to prevent or regulate the factoring of structured awards? If so, is the best approach to bar claimants from assigning periodical payments? If not, how should this issue be tackled?

14. APIL agrees that in order to protect claimants from major abuse it would be desirable to prevent the factoring of structured awards. We believe that this should be achieved by barring claimants from assigning periodical payments.

Q10: Do you agree that it should be possible to award provisional and further damages by way of periodical payments?

Q11: Do you agree that orders for periodical payments should be open to review only:

- **for medical deterioration or improvement, and for changes in care, where they can be foreseen at the time of the original order and the possibility of review is provided for in that order; and**
- **in exceptional, life-changing circumstances, on the application of either party; and if so, in what circumstances might a review be appropriate?**

If not, should there be more or less reviewability and in what circumstances?

Q12: Should there be a paper application for permission to review (except where the original order provides that permission is unnecessary), with the right to an oral hearing if either party objects to the decision on paper? If not, how should applications for review be dealt with?

15. APIL accepts that there are circumstances in which it would be appropriate to allow periodical payments to be reviewed. We believe, however, that such reviews should only be allowed in very limited circumstances, as outlined below, to ensure that claimants are protected from, for example, continued or repeated surveillance. We believe that it would be unacceptable to have either an unrestricted right of review or regular reviews timetabled as a matter of course, for example, every five years.

16. Subject to what is stated below, APIL believes that periodical payments should be open to review **only**:

- For medical deterioration or improvement, and for changes in the provision of care, **where they can be foreseen at the time of the original order and the grounds for review are provided for in that order; and**

- In **exceptional** life changing circumstances (other than a change in a claimant's physical or mental condition) where those changes were foreseeable or not.

17. We have noted above that reviews should be allowed in the event of foreseeable medical deterioration or improvement, although to protect the claimant, it is imperative that reviews in such circumstances are only allowed where the relevant improvement or deterioration was foreseeable at the time of the original order and the grounds for review were provided for in the order. We agree that significant but unforeseen medical deterioration (or improvement) should not provide grounds for review. This would introduce an unacceptably high level of uncertainty and in most cases would raise extremely difficult questions of causation. Moreover, it might encourage continued or repeated surveillance of claimants, which is to be deprecated.

18. Reviews should be also possible where there has been an exceptional change in a claimants' circumstances, other than his physical or mental condition, whether those changes have been foreseeable or not. We adopt the CDF examples of such life changing circumstances as follows:

- Major changes in family support, resulting from (for example) the death or incapacity of a family carer, the breakdown of a marriage or partnership in a claimant's household, abandonment of a claimant by his family;
- A child claimant attaining majority or ceasing full-time education;
- Closure of a hostel, residential community or other protective environment in which a claimant has been living;
- Emigration by a claimant's family.

Some of the above events are foreseeable whilst others are not but all could affect a claimant's well being significantly. We believe a residual right should be provided for either party to seek permission from the court to apply for a review in exceptional circumstances as outlined above.

19. As provisional damages already provide for a form of review where there is a foreseeable chance of serious deterioration in a claimant's physical or mental condition, we can see no reason why it should not be possible to award provisional damages by way of periodical payments.

20. Applications to review should initially be made on paper. We can see the need to place limitations on such applications, which should be made within twelve months of the occurrence or discovery of the events said to justify the application.