



DEPARTMENT OF CONSTITUTIONAL AFFAIRS

**PROPOSED RULES AND PRACTICE DIRECTION ON PERIODICAL
PAYMENTS**

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

OCTOBER 2003

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 4,900 members in the UK and abroad. Membership comprises solicitors, 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:

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PROPOSED RULES AND PRACTICE DIRECTION ON PERIODICAL PAYMENTS

1. APIL welcomes the opportunity to comment on the draft proposed draft rule and practice directions in relation to periodical payments. Our comments, however, are based on the provisions of the Courts Bill being enacted and amending section two of the Damages Act 1996.

The Statement of Case

2. APIL is concerned that rule 40.22 concerning the initial statement of case provides that “*full particulars of the relevant factors*” are to be given. This provision creates a need for additional and unnecessary time to be spent, and adds cost at an inappropriate stage in the litigation. The initial statement of the case is only supposed to be a summary of the claimant’s case. An initial summary avoids the front loading of costs involved in the calculation of life expectancy and quantum at such an early stage in proceedings especially important when, as is often the case, liability issues have not yet been concluded. It would seem that this rule would increase legal expenses, thus acting contra to the overriding objective of the CPR in general.
3. APIL feels a more appropriate wording for rule 40.22 would be to replace “*full particulars*” with “provisional view”. This should require the information that can be given (without incurring the additional expense of detailed investigation and consideration) would be detailed in the schedule. The subsequent issues would be dealt with in the case management conference (CMC). The need for directions on this aspect would be flagged via a rule requiring a simple declaration at the issue stage in terms of likely value of the case. This declaration should specify that quantum might exceed £500,000 and therefore that consideration of an award of periodic payments is required. This is similar to the requirement that High Court jurisdiction is decided when a Claimant declares that damages will exceed £50,000. Thus the

requirement should be that “if it is anticipated that the full liability value of the claimant’s claim might exceed £500,000, that it be declared/specified in the Statement of Case”. The other details currently required under rule 40.22 and 40.24, and its sub-ordinate practice directions, would be dealt with in the CMC

4. In respect of the “*relevant factors which the court must have regard to under rule 40.24*” these factors are “*set out in the practice direction*”. APIL has concerns over several of these ‘factors’:

- PD 1 (3) – The issue of contributory negligence is unlikely to be known at the date of service of the Statement of Case, unless there has been some form of compromise concerning liability in the initial stages. Further, and in any event, cases can and will be compromised for less than the full liability value for reasons other than contributory negligence, globally described as litigation risks. This is unlikely to have occurred before issue, which is one of the reasons why APIL is concerned that to deal with the periodic payments aspects at this stage is premature and potentially wasteful, as for example where a discount for litigation risk subsequently agreed both militates against an award of periodic payments, and reduces the full value below £500,000 such that the need for and expense of consideration could have been avoided.
- PD 1 (4) – This practice direction concerns the form of award preferred by the claimant. APIL has continually asserted that the form of award should be dictated by the claimant in respect of their needs and wishes. APIL feels that there should be a provision that the claimant needs will only be disregarded in exceptional circumstances, and that these circumstances will be detailed by the Practice Direction or the court. APIL considers part (b) of the practice direction superfluous as it would hinder rather than aid a claimant’s decision to insist on a particular form of award. Finally, in reference to the need to make a decision so early on in proceedings, the claimant is unlikely to have full

knowledge of his possible options particularly when it is not yet clear whether he will recover the full value of his claim or only a proportion thereof.

- PD 1 (5) – APIL is strongly against any provision that would undermine the proper and fair compensation due to an injured claimant. Thus we are concerned that the provision allowing the defendant to express preference as to the type of award may mean that it is the defendant’s concerns, or those of his insurer, which may be purely financial in scope, that will be given equal weight as those of the injured claimant.

Potential ways of dealing with future loss

5. APIL feels that there is undue expectancy placed on the claimant to consider potential ways of dealing with future loss within rule 40.22. We feel this responsibility should rest upon both parties. Tackling the problem in this manner should encourage constructive dialogue as to how best to compensate future loss, and will also highlight issues that may arise from either party concerning method of payment. APIL asserts, however, that it is the wishes and well-being of the claimant that should be of primary concern in any such discussions. As detailed previously, views expressed by either party at the Statement of Case stage should only be provisional.

Calculation

6. Rule 40.25 deals with the calculation of future periodical payments. APIL feels that the use of the word “*annual*” is an unnecessary restriction to the rule as it may often be more pertinent to calculate the future losses on a wider and more general basis.

The Award

7. APIL would like the inclusion of the words “and other recurring costs” after “*care and medical costs*” in rule (1) (b) (ii). The addition of this wording will allow for costs not traditionally covered by ‘care and medical costs’. For example, the cost of equipment, transport, and additional living expenses does not naturally fit in with the concept of ‘care’.

Conclusion

8. APIL feels that the wishes and needs of the injured claimant should be paramount when considering the awarding of compensation. As such the current draft of the rules and practice directions on periodical payments place an undue emphasis on the claimant to provide potential ways of dealing with future loss. Yet in respect of the factors to be taken into account via rule 40.22 and 40.24, the needs of the claimant are marginalised. APIL strongly supports the insertion of a separate practice direction highlighting the needs of the claimant and requesting that any deviation from the wishes of the claimant by the court be fully explained and detailed.