

Do PI lawyers need to protect a client's damages? YES!

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Introduction to Family Law

In determining financial proceedings the family courts have regard to the S25 Matrimonial Causes Act 1973 (S 25 factors)

- The primary consideration is the welfare of any children of the family
- The statutory checklist
- Needs, obligations, responsibilities, length of the marriage, standard of living, any physical or mental disabilities, the parties' contributions and in exceptional cases only conduct
- Bespoke solutions



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Judicial Gloss

- White v White 2001 AC 596 Cross check against yardstick of equality
- Post Miller v Miller; McFarlane v McFarlane 2006 UKHL 124 the court considers “sharing and compensation”
- Consideration of whether assets are matrimonial, or non matrimonial
- Needs come first
- Court now looks at length of relationship cohabitation moving seamlessly into marriage



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How have the courts dealt with PI Awards in divorce proceedings?

Daubney v Daubney 1976 All ER 453

- 1964 RTA
- H and W both injured awarded £4000 and £3625 respectively
- H lost all his award in business venture. W used a flat.
- 1967 W and later the children left H.
- First hearing fmh worth £8250 transferred to H chargeback 7/12 in favour of W exercisable when his new child 18.
- First appeal W's chargeback reduced to 30%
- Second appeal reduced to 15%



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Pritchard v Cobden 1988 Fam 22

- H seriously injured received damages of £434,126
- £53,000 of which damages for financial losses arising out of divorce!
- PI and divorce case heard together
- Contrary to public policy to allow damages for financial losses arising from divorce
- £53,000 award disallowed and damages for PSLA reduced by £10k, carer's allowance reduced by 50%



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Wagstaff v Wagstaff 1992 1 All ER 275

- 1976 marriage
- 1981 H seriously injured paraplegic
- 1983 parties separated
- H awarded £418,000
- In divorce H ordered to pay W £32,000
- H appealed first appeal no award for W
- Second appeal original order upheld.
- At divorce H had £219,000 W only 10% approx



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C v C 1 FCR 283

- 1986 H, W and C all injured in RTA. H seriously. C had thalassaemia.
- Interim payment £21,000 not used for H's benefit.
- 1991 H's claim £5m and increasing annuities
- H had moved to Cyprus and would be cared for by his family



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C v C part 2

- W's claims for a lump sum of £31,000 and PPs of £13,000 rejected at first hearing full clean break
- PPs made for child
- W appealed seeking a lump sum nominal maintenance and restoration of claims under Inheritance Provision for Family and Dependents Act
- Court refused appeal. Harsh decision. C with mother



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Mansfield v Mansfield 2011 EWCA 1056

- H award of £500,000 for PI damages in 1988
- H and W married in 2003 separated in 2008
- Twins aged 4 at time of appeal hearing
- H had invested his assets in 2 properties one fmh Orchards and the other flat let out
- Post separation H lived in Orchards (specially adapted for him)



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Mansfield 2

- At the first hearing before DJ W received £285,000 to be paid within 3 months. In default sale of the Orchards W to receive 63%
- H appealed to circuit judge appeal dismissed
- Court of Appeal said DJ had erred in law had overlooked the principle that the general sharing rule had to be tempered to reflect the needs of the recipient and the nature of the acquisition of the damages
- Court of Appeal reluctant to interfere with the finding that



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Mansfield 3

W needed a minimum of £285,000 for her needs or the children of the family

- DJ thought H's needs could be met by the £320,000 that remained to him
- Court of Appeal granted H's application for a chargeback which would be 33% of the capital awarded to W
- To be payable when the twins achieved maturity



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Summary

Daubney W received 64% assets ultimately

Pritchard W received 29% assets

Wagstaff W received 14.38% assets

C v C W received nothing unless you count £21,000 she snaffled

Mansfield W initially received 47% assets

Reduced to 30% when the chargeback exercised



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Protection of PI damages

- Structuring award where appropriate – initial lump sum followed by periodical payments
- Compensation protection trust not watertight the family courts have the power to take into account trust assets and vary nuptial settlements
- Marital Agreements – pre nuptial, pre civil partnership, post nuptial agreements
- Cohabitation agreements if the parties not married



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Why pre nups are necessary!

McCartney v. Mills McCartney [2008] EWHC 404

- Four-year marriage, four-year-old child
- W's ambitious list of expenditure included holidays of almost £500,000 per annum, £39,000 for wine, £125,000 for clothes
- Need for seven fully staffed properties - total wish list £3.25m per annum
- Needs assessed at £600,000pa. which was then capitalised
- Award £14m, £24.3 m with what she already owned.



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So when can a pre-nup be binding?

Green Paper 1998 Supporting Families

- Full mutual financial disclosure
- Both parties have independent legal advice
- Agreement made 21 days minimum prior to marriage
- Where enforcement would cause injustice not binding
- Where there are no children or to be reviewed if there are children
- If enforceable under law of contract



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Crossley v. Crossley 2008 1

FLR 1467

- Not a first marriage both wealthy - H more so
- No financial claims pre nup
- Marriage broke down after a year
- H issued application to show cause why pre-nup should not be adhered to, H successful. Mrs Crossley appealed unsuccessfully.



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NG v. KR (pre-nuptial contract)

[2008] EWHC 1532 (Radmacher round one)

- Eight-year marriage, two children. W £100m. H a banker on £120k+
- W wanted pre nup. Prepared by W's notary in Germany.
- H awarded £5.56m £2.56m for housing + capitalised maintenance £2.335m for him. Plus £500k for German house.
- Judge said H not bound by pre nup, H no independent legal advice, no disclosure by W, no negotiations, no proper translation



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Radmacher v. Granantino [2009]

EWCA Civ 649

W appealed to Court of Appeal:

Appeal granted:

- Housing fund £2.5m reverted to W after H's parenting years
- Capitalised maintenance award £2.35m set aside and to be revisited
- Agreement governed by German law where such agreements binding, that an important factor
- H bright and chose not to get advice. H knew W wealthy.
- H appealed to Supreme Court



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Radmacher v. Granatino [2010] UKSC

42



- By a majority the Court of Appeal judgment was upheld with a dissenting judgment from Lady Hale
- Lady Hale was the only family law judge sitting



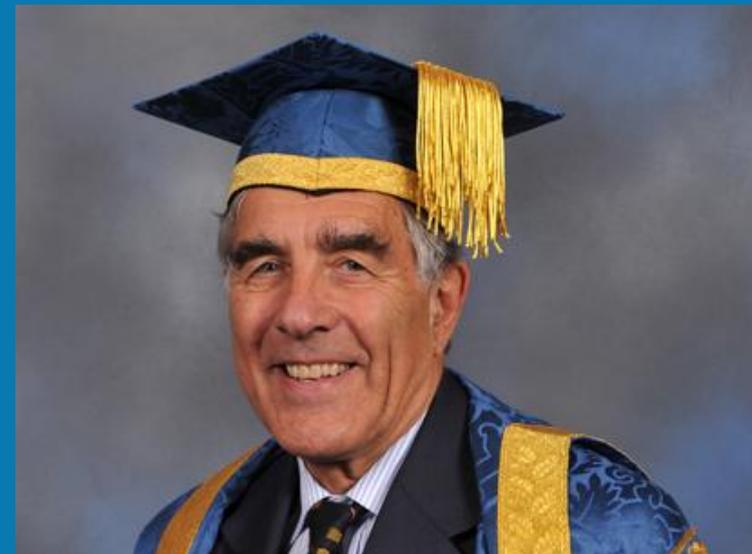
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Lord Philips

- “The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement”



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The questions for a court post Radmacher

- Were there circumstances attending the making of the agreement that detracted from the weight to be given to it?
- Free will, no undue influence and be advised of implications
- Were there circumstances which enhanced weight e.g. foreign element (historically the courts had given more weight where there was a foreign element)



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The factors the Law Commission considered important in Radmacher

- The rule of public policy that pre nuptial agreements are void because they anticipate a future separation is obsolete
- No distinction between the treatment of pre nuptial and post nuptial agreements
- Nuptial agreements can't exclude the jurisdiction of the court in financial cases



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Law Commission Report 198

Marital Property Agreements

- Signed and in writing
- Financial disclosure – not enforceable unless
- Requirement for legal advice
- Timing no 21 day time limit –transfers deadline
- Should there be an automatic sunset clause?



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Post Radmacher?

Z v Z 2011 EWHC 2878 (FAM)

Assets £15m W asked for equal division

3 children

Separation de biens – does not cover
maintenance

Hybrid approach W given 40 % assets



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Post nups equally valid?

- NA v. MA [2006] EWHC 2900- what the butler saw case!
- W not held to post nup signed under duress.
- In *MacLeod* [2008] UKPC 64, pre nup on eve of marriage (valid in Florida where marriage took place).
- Post nup after 8 years of marriage.
- PC said more weight for post nup than pre nup (this approach overruled in *Radmacher* Supreme Court).
- Post nup agreement declared valid.



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Cohabitation agreements

- More couples cohabit than ever before
- 1.8m 1998; 2.7m 2008
- No such thing as 'common law spouse'
- Cox v. Jones [2004] EWHC 1486
- Agreements can now be valid
- Once void for public policy - Sutton v. Mischon de Reya and Gawor & Co [2003] EWHC 3166.



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What about gay couples?

- Registered civil partners
- Broadly speaking divorce laws apply to CPs
- But only if they intend to enter into a registered CP
- If they don't, treated as cohabittees



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Collaborative approach

- What is collaborative law
- How can it be used
- On breakdown of relationship
- For pre nup agreements



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Conclusion

- Marital agreements are worthwhile
- Advice to unmarried PI claimants get a pre nup
- Advice to married PI claimants post nup
- Cohabitees have a cohabitation agreement



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