Family / Personal injury

Making a break

How do you protect a client's PI damages prior to family proceedings, asks **Margaret Hatwood**

IN BRIEF

- Recently in divorce proceedings a wife received over half of a claimant's award of PI damages.
- How can you avoid this?

Are your client's personal injury (PI) awards at risk in the family courts? The short answer to this is yes and now more so than ever before. The fuzzy discretion of the family courts has now intruded into the PI lawyer's arena. Could a PI lawyer be negligent if he or she does not protect his client's damages? Quite possibly must be the answer to that.

Although the family courts have for many years regarded damages for personal injuries as part of the matrimonial pot available for division, historically, the awards made have been relatively small in terms of both amount and percentage. However, a recent case, *Mansfield v Mansfield* [2011] EWCA Civ 1056, [2011] All ER (D) 87 (Sep) has changed all that.

Division of financial assets

Under the Matrimonial Causes Act 1973 (MCA 1973) the family courts, in dealing with the division of assets, have to have regard to the factors contained in s 25. The court has a primary duty to consider the welfare of any minor children of the family. There is then a statutory checklist which requires the courts to consider factors such as the income and earning capacity, the needs, the obligations and responsibilities of the parties, the length of the marriage, the standard of living, any physical or mental disabilities, the parties' contributions and in exceptional cases only conduct and of course, all the circumstances of the case.

The courts pride themselves on creating a bespoke solution for each case. Since the case of *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, the court has had to check any award against a cross check of equality. In many cases the search for justice starts and ends with need. Complications arise in those cases where there is some surplus of assets available for distribution. Since the case of *Miller v Miller; McFarlane v McFarlane* 2006 UKHL 24, [2006] 3 All ER 1, to achieve fairness, the court has regard to "sharing", "compensation" and "need". In many cases the courts look at an equal division of family assets. However, in more modest cases the paramountcy of the welfare of the children may mean that the wife, if she is the primary carer receives substantially more than 50% of the available family assets.

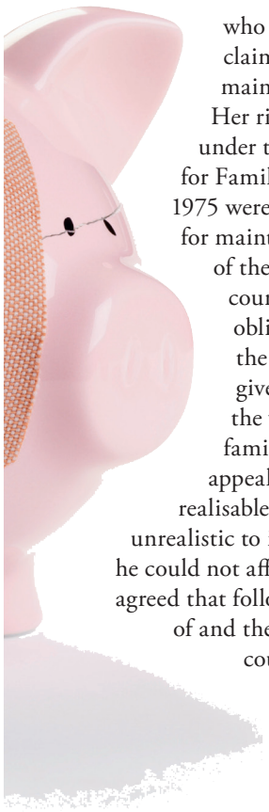
How have the family courts historically dealt with the division of PI awards?

Wagstaff

In *Wagstaff v Wagstaff* [1992] 1 All ER 275, five years into a nine year marriage, H had a serious accident and became paraplegic. W had two children from previous marriage which H had assumed responsibility for. His damages award was £418,000. By the time of their divorce £291,000 remained. W was awarded £32,000 and retained the former matrimonial home (FMH). H appealed saying that his disability should be the court's paramount consideration. On appeal, W's award reduced to nil. W then appealed herself seeking £64,000. the Court of Appeal reinstated the original award of £32,000. The court made it clear that the damages award was not "sacrosanct". Even compensation for pain and suffering and loss of amenity were part of a spouse's financial resources for the purposes of determining an application for financial relief. The size of the award and the circumstances in which it was made are relevant factors to take into account under s 25. In most cases these would temper or exclude the sharing of such capital with the other party. However, in this case to refuse an award to W would leave a disparity in the parties' financial circumstances. W would be left with no secure housing and to support the child alone. The court felt H could afford to make a capital payment to W without it adversely affecting his quality of life and £32,000 was a fair award. W received 13.48% of the husband's original damage award.

C v C

In *C v C* [1996] 1 FCR 283, H, W and the child of the family had been injured in a serious road traffic accident in 1986. H sustained the most serious injuries, with brain damage and impairment to his mobility and communication. An interim payment of £21,000 was made to H, paid to W as his next friend. Unfortunately the payment was not used for H's benefit. W commenced divorce proceedings in 1989. H's claim settled in 1991 for £5m with increasing annuities for life. H moved to Cyprus to live with his family



who were to care for him. W's claim for a lump sum and maintenance were dismissed. Her rights to make a claim under the Inheritance (Provision for Family and Dependant's) Act 1975 were also dismissed. An order for maintenance for the child of the family was made. The court said that the court's obligation was to balance the needs of the parties and give first consideration to the welfare of the child of the family. W appealed but her appeal was dismissed. H had no realisable capital and it would be unrealistic to impose obligations which he could not afford. While the court agreed that following *Wagstaff* the source of and the reason for the award could not be ignored having regard to H's extreme needs the court felt that the inequality in the award was justifiable? The award of maintenance for the child was left in place.The writer considers it is likely that the lack of award was influenced by the W's conduct in misusing an interim payment designed to meet H's needs.

Mansfield

Until recently, it appears that the courts have balanced the statutory criteria in MCA 1973 in a way which meant only relatively modest sums of capital from PI awards have been awarded to the spouse seeking an award by the family courts. However, this all changed radically in the recent case of *Mansfield*.

H received damages of £500,000 in 1998 before he met W. H and W married in September 2003 after cohabiting for 18 months. The total duration of their relationship was six years. Significantly, the couple had two children aged just four at the time of the Court of Appeal hearing. Under the guidelines in MCA 1973 the court had to give first consideration to the children's needs.

H invested his damages in two properties: a bungalow called The Orchard and a two-bedroom flat which was let out. The primary property had been adapted for someone with his needs. Lord Justice Thorpe commented: "No doubt that was a thoroughly sensible investment since the primary property provided a suitable home for a man with his disabilities including a prosthesis, and the investment property provided a rent." In 2008, W left taking the children with her. W had invested £30,000 in the improvement of The Orchards which she had contributed to from the proceeds of sale of a flat which had been her pre-marital home. W was awarded £285,000 by the district judge. The district judge gave H three months to raise the lump sum and in default ordered the sale of The Orchards. Moreover, the district judge had refused H's request for a chargeback in his favour.

An appeal to the circuit judge failed. However, to a degree, the Court of Appeal looked at matters afresh. W was represented by leading counsel and a junior. H acted in person. The Court of Appeal considered they had two questions to consider: first whether the sum of £285,000 was the correct figure; and second whether there should be a chargeback.

The Court of Appeal decided that the district judge did consider the wife's needs carefully and had considered it was likely that The Orchards, a property specially adapted for the husband's needs, would have to be sold and they did not interfere with the capital award. Although they commented that the award was on the high side. However, they did decide to convert the award into a Mesher order (a postponement of the exercise of the trust for sale until a specified event occurs).

> **"Post-nuptial agreements are used in cases where there is a sudden change in financial circumstances"**

The court said the rationale for this was that for the immediate future the wife's and children's needs had priority and she needed a substantial share of the family assets. The court felt that W's need to provide a primary home for the children would terminate on their majority or the conclusion of the twins' tertiary education.

Thorpe LJ, who gave the leading judgment, said: "So it seems to me that the exceptional factor in this case, namely the origin of the family capital or the vast majority of the family capital, makes it particularly suitable for the application of a Mesher order. Accordingly, I would quantify the extent of the husband's reversionary interest or residual interest, at one third of the capital awarded to the wife."

The decision was unanimous.

An unhappy compromise

The decision is an unhappy compromise. It is particularly unfortunate that H would almost certainly be forced to sell his specially adapted home. W could have received the two-bedroom flat which would have at least provided a sizeable deposit for a property for her and the twins, if not a home. If the twins were of the same sex (and there is no mention of whether they were) the flat might have been a suitable home for H and children. Although, of course, that solution would have deprived H of a source of income.

It is also salient to note that in financial terms most of the family capital had been provided by H's PI award of £500,000. W's contribution seems to have been limited to £30,000. It should also be noted that the award was made notwithstanding H's damages award was prior to the parties meeting *and* notwithstanding the fact that a civil court had assessed H's needs at £500,000 for the purposes of the PI award. The district judge made a finding that H's needs could be met by his retention of the remaining £320,000. However, it is difficult to see how the district judge arrived at that figure and indeed the circuit judge expressed some doubt about it. He thought the remaining figure might be £270,000, or maybe £290,000. H had proposed an award of £130,000. W had a mortgage capacity of £42,000.

Impact of the decision

The impact of this decision cannot be underestimated. This appears to be the first reported decision in which a significant proportion of a PI award has been transferred to the spouse of a person sustaining serious personal injuries.

Therefore prudent PI lawyers should now advise their clients to take advice about how best they can protect their award. There are a variety of mechanisms that can be employed.

PI awards structuring

A detailed examination of this area is outside the scope of this article. However many substantial awards are structured as a lump sum following by periodical payments, this may be preferable. A

compensation protection trust may not suffice. For the purposes of financial remedies in divorce a trust of any kind is not watertight. The court has powers to take into account trust assets.

Marital agreements

These are now given a considerable amount of weight by the family courts. They are especially helpful in the case of short marriages, second marriages and where there are no children. They are often used to ring-fence non-matrimonial assets, eg inherited wealth, SO there is no reason why a PI award could not be ring-fenced. In the 1998 Government Green Paper *Supporting Families* it was said that such an agreement would be likely to be given effect by the courts if:

(i) there was a mutual disclosure of the parties' circumstances;
(ii) both parties obtain independent legal advice;
(iii) the agreement is signed not less than 21 days before the marriage;
(iv) it would not be unfair to hold the parties to the agreement;
(v) there are no children, or the agreement is reviewed if children arrive.

In the Supreme Court case of *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 All ER 373, a pre-nuptial agreement, whereby a husband agreed not to make any financial claims against a very wealthy wife worth £100m, was largely upheld and the husband was only allowed to make limited financial claims on behalf of the children despite the fact when the husband entered into the agreement there had been no mutual disclosure, he had had no independent advice, indeed he probably could not understand the agreement as it was in German and no translation was provided. Nonetheless, he did realise the broad content of what he signed. By the time of the divorce financial proceedings the husband was no longer a high earning banker but was an academic researcher on a very modest income.

The court said: "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." If the award of damages occurs before the marriage then a pre-nuptial agreement ring-fencing the assets can be drawn up. However, if the damages award is during the marriage is it too late to act?

Family lawyers are increasingly finding that post-nuptial agreements are used in cases where there is a sudden change in financial circumstances, or where a marriage is in difficulties as in the case of *NA v MA* [2006] EWHC 2900 (Fam), [2007] All ER (D) 41 (Jan) where a husband insisted his wife sign a post-nup when he discovered her affair.

It is now clear, after *Radmacher* that pre- and post-nuptial agreements are given the same weight by the court. The status of any marital agreement in English family law is that the agreement is regarded as one of the circumstances of the case.

Prudent PI lawyers who obtain a significant damages award will now need to turn to their family department colleagues for advice how best to preserve their client's damages. NLJ

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