

THOMPSTONE - A PRACTITIONER'S GUIDE

By Stephen Ashcroft, Frenkel Topping

The recent Court of Appeal decision in the Thompstone cases upheld the first instance decisions regarding indexation of Periodical Payments, and confirms that, as regards Periodical Payments related to future care, the basis for indexation should be by reference to an earning-based index, i.e. ASHE 6115, rather than RPI. The decision was largely expected, and it is hard to argue against the logic of the decision. But what does it mean for Practitioners? Are they likely to have to review their practices in relation to high value personal injury and clinical negligence cases?

Since 1 April 2005, Courts have had the power to impose Periodical Payments rather than award a lump sum in respect of future losses. CPR41, introduced alongside the changes in the Courts Act, decreed that Periodical Payments should be considered in every case. However, in practice, this was rarely complied with, and the vast majority of cases settled on a lump sum basis. The lump sum culture is heavily ingrained within the damages system, and linkage of Periodical Payments to RPI was seen as a relatively straightforward reason for rebutting PPO's in favour of a lump sum. Following Thompstone, however, this is no longer the case.

The main thrust of the Thompstone cases focussed on indexation for future care. Section 2(8) Damages Act provides for indexation by reference to RPI, whereas Section 2(9) gives the Court the power to modify or disapply Section 2(8). Damages for future care are used predominantly to pay carers' wages, and wages have in general historically risen faster than RPI. Carers' wages are no exception, and the Court held that indexation by reference to ASHE 6115, a sub-set of the Annual Survey of Hours and Earnings, which specifically relates to carers.

Looking at ASHE 6115, wages have risen roughly at an average of 1.5% above the corresponding figure for RPI. In theory, therefore, it can be argued that PPO's linked to ASHE 6115 represent a premium over a lump sum settlement, but that is not the issue. The issue was, as stated by Smith J in Thompstone, that the Claimant received compensation that is "fair and reasonable", and designed to meet the Claimant's needs. It is largely irrelevant whether RPI or ASHE 6115 is higher or lower – the Claimant's needs are being better met by an appropriate earnings-based index rather than RPI.

It is no surprise that all the Thompstone cases were substantial claims, all against the NHS, and all with relatively young Claimants with a long expectation of life. In these types of case, future care is usually the largest single head of claim and the cause of most concern for Claimants and their family. All four of the cases pleaded (and obtained) PPO's for future care linked to ASHE 6115, with two of the cases also including case management by PPO. All other heads of future loss were awarded by way of a lump sum, which, together with past losses and general damages gave the Claimant a substantial lump sum award in addition to the Periodical Payments. Periodical Payments have many advantages, but they also have some drawbacks, and it is vital that a proper balance is maintained between the sums awarded by way of Periodical Payments and lump sums.

The fundamental principle of Periodical Payments is that they transfer the risk of provision of future care from the Claimant on to the Defendant. The Payments are guaranteed for the life of the Claimant, which removes the mortality risk. The payments are tax-free, and remove the risk of adverse taxation policies. Payments linked to ASHE 6115 remove (or at the very least, alleviate) the risk of wage inflation. The guaranteed nature of the payments removes any investment risk. When looked at objectively, it is hard to argue against Periodical Payments. Are they now likely, as the DCA hoped, to become the norm rather than the exception for the awards of future losses? What heads of damage should be considered, and at what levels?

The main downside of Periodical Payments is that they cease on death. This should not be an issue if they are for future care, as by definition, if the Claimant is dead, the care is no longer needed. That is not necessarily the case in respect of loss of earnings. Whilst damages are not designed for the remaindermen, earnings would be used to pay the mortgage, food, bills, holidays, etc, in the same way as if the Claimant had not been injured, and was bringing home wages every month. In these circumstances, we would normally advocate that future loss of earnings be paid by way of a lump sum, particularly where the Claimant has dependents.

Other heads of damage, e.g. therapies, transport, tend to be on a more ad-hoc basis, and better suited to the flexibility inherent in a lump sum award. Flexibility is also an issue where care needs are difficult to define and may fluctuate dependent upon the Claimant's circumstances. In one particular head injury

case, the Claimant's care requirements were directly related to his medication regime – if he was taking his medication, he was fine, but if he wasn't, he would require short high cost interventions to stabilise his condition. Such a case, although high value, was not particularly suited to a PPO, for obvious reasons.

Contributory negligence is another factor to be taken into account. If the Claimant does not make a full recovery, it should not automatically preclude Periodical Payments, although as a rule of thumb, the higher the element of contributory negligence, the less feasible a PPO becomes. However, it should be noted that in the case of *Sarwar –v– Ali*, the Court awarded Periodical Payments both for future care and for loss of earnings, where the Claimant had made only a 75% recovery. Each case will need to be looked at on its merits.

There are other ancillary matters, for instance the introduction of the Mental Capacity Act. The fundamental principle of the Act is that any decision should be made “in the best interests of the Protected Party” which is a shift in emphasis. In addition, since the MCA, the Court of Protection no longer retains the function of pre-approval of large settlements, particularly those involving Periodical Payments, therefore it is essential

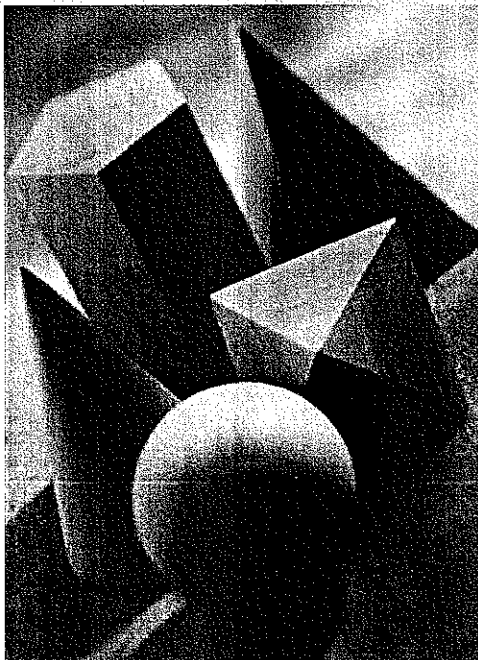
that, when dealing with Protected Parties, all options have been covered by the Litigation Friend and Advisors before the case comes for final approval in the High Court.

Like them or loathe them, the Thompstone Judgment has raised the bar in relation to Periodical Payments. Whilst I understand that the Defendants have petitioned the House of Lords directly in relation to an appeal, in the meantime it is vitally important that Claimants obtain proper financial analysis as to the merits or otherwise of accepting part of their award by way of Periodical Payments.

Periodical Payments, like Structured Settlements (which incidentally, are still available to Claimants) are not a panacea. But they are a legitimate and often beneficial option for Claimants, an option that requires a proper analysis, and in plenty of time before settlement. With the advent of Thompstone, the Claimant advisers will need to obtain financial analysis from a suitably qualified expert, not only to discharge their professional duty to their clients and the Court, but also to protect themselves against any potential professional indemnity issues in the future.

Stephen Ashcroft is a Director of Frenkel Topping Limited, financial advisors specialising in the investment of personal injury awards

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