There is no substitute for qualified experts

Stephen Ashcroft advises claimant lawyers to obtain financial analysis from experts to protect themselves against professional indemnity issues

IT IS HARD to believe that it is almost 20 years since the first structured settlement, *Kelly v Dawes*, was implemented, in 1989. The Premier League did not exist and few people had heard of Tony Blair. At the time, it was regarded as the biggest change to the court system for many years – the first time damages had been awarded on anything other than a lump sum basis.

Since then, there has been a raft of supportive legislation designed to encourage their usage, such as the Finance Acts 1995 and 1996, and the Damages Act 1996.

However, structured settlements remained very much in the minority, perhaps with the exception of clinical negligence awards. The National Health Service Litigation Agency was an enthusiastic proponent of structured settlements, but largely due to self-interest, such as cash-flow advantages, rather than altruism. There were various reasons given for the lack of take-up of structured settlements, but one obvious disadvantage was that the system was dependent on the consent of both parties.

In 2002, the Master of the Rolls set up a working party to look at the issue. This led to the Courts Act 2003, and the introduction of the current periodical payment regime. From 1 April 2005, s 100 and s 101 of the Courts Act gave the court the power to impose periodical payments, rather than award a lump sum, for all future losses. This was accompanied by the relevant Practice Direction, CPR41, which provided a detailed framework for the implementation of s 100 and s 101. However, in practice CPR41 was rarely complied with, and cases of judicial imposition were even rarer.

Logical sense

Viewed objectively, it is hard to argue against the logic of periodical payments to compensate for future losses. However, two other factors need to be taken into account: indexation of the payments and the claimant's attitude to risk. Both of these issues have been brought sharply into focus over the past 12 months or so by the cases of *Thompstone* and *A v B*.

The Court of Appeal judgment in the *Thompstone* cases was handed down on 17 January 2008, and, as widely expected, dismissed the appeals of the defendants against the first instance findings of periodical payment orders (PPOs) linked to ASHE 6115 rather than the retail price index (RPI). Just as with the concept of periodical payments, it is hard to argue against carers' wages being linked to an earnings-based index. Historically, earnings inflation has consistently outstripped price inflation, so it is not surprising that, as a sub-group, carers' earnings (as represented by ASHE 6115) have also increased at a faster rate than the RPI.

The effect of tying periodical payments awarded to meet a claimant's future care costs to the RPI would lead to a growing (and costly) disparity between the payments being made under the order and the actual cost of providing that care.

However, the issue is not purely one of cost. It is about providing an award that is "fair and reasonable" in the words of Swift J, in *Thompstone*. For a claimant, it is largely irrelevant whether ASHE 6115 outstrips the RPI, or vice versa. A claimant's concern is that the care they need, as a result of the negligence, is properly provided for by the defendant. A properly indexed PPO can largely be said to address that concern.

But how do a claimant and their advisers gauge whether a lump sum or periodical payments are more appropriate in any given case? How should the two be compared and on what criteria? What is the claimant's

attitude to risk? These are key elements in any decision, and will depend on reliable financial modelling, using realistic assumptions, to evaluate the options. Indeed, for the *Thompstone* cases, apart from the indexation issue, a vital element was which heads of damage should be taken as periodical payments, and which as a lump sum.

Just as with structured settlements, one of the imperatives is to strike the right balance between the two. While periodical payments may have significant advantages, they also have some disadvantages. The main one often cited is that they would cease on death, leaving no residual value to the estate. However, if the periodical payments relate solely to future care, by definition, that care will no longer be required following the demise of the claimant.

Inflexibility of periodical payments

The other main disadvantage with periodical payments is their inflexibility – the regime needs to be mapped out and set in stone at date of settlement. This is a much more valid reason, as a lump sum provides the claimant with an element of flexibility. One of the most important factors is trying to strike a balance between the two to provide the best of both worlds.

Such analysis can be provided only by a suitably qualified financial adviser, instructed as a Part 35 Expert in exactly the same way as the medical, care and all other experts. As far as costs are concerned, since the Courts Act, the court has an obligation to consider periodical payments, as set out in s 2(1) Damages Act (as amended).

- A court awarding damages for future pecuniary loss in respect of personal injury:
  (i) may order that the damages are wholly or partly to take the form of periodical payments; and
  (ii) shall consider whether to make that order.

Given the above, it would be difficult for a defendant to argue against obtaining such a report, although, if the scale of the fee is not agreed, it will be subject to detailed assessment in the usual way. This should be contrasted with the situation before the Courts Act, when, because of the consensual nature, defendants would often only agree to a structured settlement provided no further costs were incurred, with the costs often met by the claimant.

The above describes the position pre-settlement, with a report providing financial analysis – utilising generic financial modelling, rather than prescribing specific financial products. But other recent legislative changes have put the spotlight on post-settlement financial advice, particularly for claimants under a disability.

The Mental Capacity Act 2005 came fully into force on 1 October 2007. The primary purpose of the Act was to combine the personal welfare and healthcare jurisdiction formerly exercised by the family division of the High Court, with the property and financial decision-making jurisdiction of the Court of Protection.

However, the scope of the Act is much wider, and brings far-reaching changes across a broader spectrum. It has had, and will continue to have a significant impact on patients (now "protected parties") and their receivers (now "deputies"). These changes are more than just titular, and involve several administrative and more fundamental functions. They also apply to existing and new deputyships.

One significant change brought about by the Act is the disbanding of the investment division and the end of the panel brokers. Historically, particularly in large damages cases, in the absence of any investment recommendations from the claimant's own financial advisers (if any), the funds would be invested on behalf of the claimant by one of the courts' panel stockbrokers, and overseen by the investment division.

Any person who is authorised

Under the new regime, the court merely requires the deputy to take "proper advice" from a person who the deputy reasonably believes to be qualified to give it by his ability in, and practical experience of, other financial matters relating to the proposed investment.

The practical effect of this is that a deputy can instruct any person who is authorised by the Financial Services Authority. This covers not only independent financial advisers, but also "tied agents" – representatives of banks, building societies or insurance companies who can offer only their own products. This is in direct contrast to the Law Society rules, which, for obvious reasons, state that a solicitor can refer clients only through an independent financial adviser.

The logical consequence flowing from both *Thompstone* and the Mental Capacity Act is that the input of a suitably qualified expert is likely to become increasingly important, both before and after settlement. A solicitor would not dream of offering a medical prognosis for a claimant on the basis that he reads the *Lancet* every month, and should not proffer financial opinion on the basis that they have a PEP and an ISA, and never miss an episode of *The Money Programme*! Quite apart from their professional's reputation, it would not be looked upon too kindly by the firm's professional indemnity insurers.

Encouraging professionalism

Joking apart, the financial services industry, like the Law Society, has gone a long way towards encouraging professionalism and specialisation. Just as the legal marketplace has undergone significant change, particularly in the personal injury field, there are specialist IFA firms, albeit relatively few, that have the necessary expertise and experience to provide the legal profession with reports, analysis and advice which will assist their case.

Solicitors can also rest safe in the knowledge that, having secured a proper settlement for their client, the monies are appropriately invested to try to ensure, as far as possible, that the award is being used for the purpose for which it was intended.

While mindful of Mandy Rice-Davies's observation in the Profumo case ("He would say that, wouldn't he!"), with the advent of *Thompstone*, CPR41 is likely to be more rigorously applied.

Claimant lawyers would be advised 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.

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