Personal injury

Not so catastrophic?

Christopher Sharp QC reports on *Cobham Hire Services Ltd v Eeles*: a year on

IN BRIEF

- The need to allow a trial judge the opportunity to make periodical payments orders in catastrophic injury claims may limit the court's ability to order interim payments.
- Excessive and premature interim payments must be avoided to preserve flexibility, but arguments to be deployed by both sides are being developed.

Part 25 of the Civil Procedure Rules (CPR) makes provision for interim payments. This provision is frequently employed in personal injury claims, especially in claims for substantial damages arising out of catastrophic injuries, where immediate funding is required ahead of the final quantification of the claim for adapted housing, equipment, or expensive care regimes.

Frequently such provision is in the interests of both parties as early rehabilitation and the provision of appropriate housing, therapy and support will have a beneficial effect on the claimant's recovery and may reduce the long-term cost of care. This is the principle which underlies the Rehabilitation Code and it makes sense for insurers and for claimants alike.

However, by virtue of the Damages Act 1996 s 2, a court awarding damages for future pecuniary loss in respect of personal injury, not only "*may* order that the damages are wholly or partly to take the form of periodical payment" but also "*shall* consider whether to make that Order".

In almost all serious cases the overwhelming majority of the value of the claim lies in future pecuniary loss, and especially future care, therapy and equipment. Accordingly the court is obliged to consider whether these elements of the claim should be met by periodical payments. Under Pt 41.7 the court, in deciding whether to indicate to the parties whether periodical payments or a lump sum is likely to be the more appropriate form for all or part of the award of damages, or whether to make an order in the form of periodical payments, shall have regard to all the circumstances of the case and in particular the form of the award which best meets the claimant's needs (having regard to the factors set out in the practice direction at 41BPD.1).

Periodical Payments Orders (PPOs)

Since Thompstone v Tameside & Glossop Acute Services NHS Trust [2008] 2 All ER 553, when the Court of Appeal upheld the trial judges' decisions to to exercise the power under s 2(9) Damages Act to replace the retail prices index as the measure by which the amount of payments for future care could vary with an index derived from the annual survey of hours and earnings for care assistants and home carers, a PPO is usually regarded as best meeting the claimant's needs, at least in cases where the claimant is going to recover 100% of his loss, as it provides greater protection against the effects of wage inflation on care costs. In addition, of course, a PPO protects parties where there is a significant issue on life expectancy.

It is well recognised that as a consequence of the rule in *Roberts v Johnstone* [1989] QB 878 (whereby the future cost of accommodation is calculated not by the capital cost but the loss of use of the capital tied up in the accommodation plus the costs of adaptation) the accommodation element of a claim will rarely if ever meet the cost to the claimant of providing his accommodation needs. He will therefore have also to employ sums recovered under other heads of loss.

If the future pecuniary loss is met by a periodical payments order, however, the conventional capitalised value of a claim is hugely reduced, as one is only left with the past loss, the general damages and such future loss as may be met by a capitalised lump sum. The availability of funds to meet immediate costs, including accommodation, is accordingly reduced. A problem arises when the need to protect the ability of the court to make a periodical payments order collides with the need to fund immediate costs, against the backcloth of the provisions of CPR 25.7(4). This was the problem with which the Court of Appeal had to grapple in *Cobham Hire Services Ltd v Eeles* [2009] EWCA 204, [2009] All ER (D) 144 (Mar).

The case concerned an infant claimant whose condition was still developing so that the settlement of the claim was delayed. He had received interim payments of £450,000. His parents sought to purchase a property which would meet his (and his family's) needs and applied for an interim payment of £1.2m. The claimant valued the claim at around £5m but had previously offered to settle at £3.5m and the judge valued the claim on a conservative basis at that figure. The defendant argued that a further interim payment in this sum would tie the trial judge's hands since there would be insufficient value left in the claim

to make a periodical payments order for care, which would best meet the claimant's needs. The judge made the order and the defendant appealed, arguing, inter alia, that the interim payment exceeded a reasonable proportion of the capital sum likely to be awarded at trial. The appeal was allowed.

Eeles conclusions

Some principles may be derived from *Eeles*:

- The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment: CPR 25.7(4). Although the court has a discretion whether to make an order for interim payments and if so how much, it is not an unfettered discretion.
- A reasonable proportion may be a high proportion provided the assessment of the value of the claim has been conservative.
- If a PPO is made the capital sum ordered at the final hearing will obviously be much less than the capitalised full value of the claim.
- In a case in which a PPO is likely to be made the amount of the final judgment for the purposes of the interim payment application does not include the notional capitalised value of the PPO (or PPOs).
- If the judge makes too large an interim payment that sum is lost for all time for the purposes of founding a PPO.
- The capital value of the final judgment will exclude the heads of future loss which the trial judge might wish to deal with by PPO and prima facie it will be limited to special damages to date; general damages for PSLA; and interest (if any); but conventionally may also include the accommodation costs (but see *Brown v Emery* below).
- The judge on the interim payment application must not speculate about how the final trial judge will allocate damages (between a lump sum and PPOs). Before the judge on the application encroaches on the trial judge's freedom to allocate he should have "a very high degree of confidence that such a course is appropriate and that the trial judge will endorse the capitalisation undertaken".
- Before taking such a course (at all) the judge must first be satisfied that there is a real need for the interim payment requested (now, as opposed to after final trial), and that the amount of the money requested is reasonable and reasonably necessary.
- The judge must exercise care that any award he makes, whether in respect of care or accommodation, does not establish an inappropriate status quo so as to render the playing field uneven.
- The objective is not to keep the claimant out of his money but to avoid any risk of over-payment.

The problem that arises in such cases is evident. Where a substantial sum is needed immediately it is very likely to compromise the ability of the trial judge to award a PPO, especially where substantial interim payments have already been made and the claimant seeks an additional sum (the *Eeles* "trap", the incidence of which may reduce as claimants realise the danger of seeking too much by way of interim payments too early).

The Court of Appeal therefore allowed for an exception (applying *Braithwaite v Homerton University Hospitals NHS Foundation Trust* [2008] EWHC 353, for those cases in which the judge at the interim payment stage is able confidently to predict that the trial judge will capitalise additional elements of the future loss so as to produce a greater lump sum award. In such a case, a larger interim payment can be justified. Those will be cases in which the claimant can clearly demonstrate a need for an immediate capital sum, probably to fund the purchase of accommodation. As was recognised in *Braithwaite* this might mean there would have to be some discount or postponement of periodical payments, but unless such an exceptional course were possible, the claimant's needs simply could not be met, and so the judge was bound so to order.

This exception has been seized on by judges in several cases over the last few years:

- *Kirby v Ashford & St Peters Hospital* [2008] EWHC 1320 (QB): a child with spastic quadriplegia required a further interim to fund the acquisition of accommodation and establish a care regime. The interim award would exceed a reasonable proportion of the final capital award so the application would fail under the first limb of *Eeles* but there was reasonable need for the property and it would not be reasonable for him to remain in inadequate unadapted property until trial.
- *Johnson v Chesterfield & Derbyshire Royal Hospital NHS Trust* (Sheffield DR: 22.5.09): a severely disabled child due to recover only 70% of her claim had already received £700,000 to buy a property but needed more to adapt and fund care. She was in a desperate situation (exacerbated by the less than full recovery) and the exception was established.
- *FP v Taunton & Somerset NHS Trust* [2009] EWHC 1965 (QB), [2009] All ER (D) 57 (Aug): C sought additional interim payments for accommodation and care. The capital value of the claim assessed so as to include the two years of care which would, by the time of trial, represent a past loss, was (just) sufficient to cover the sum sought.
- *Christie v Rodgers* [2010] EWHC 249 (QB): interim payments already advanced had funded the purchase of a property which D argued was excessive. C had to have further interim monies to fund care. The award was reduced to reflect C's ability to access the equity in the property and her own savings.
- *Preston v City Electrical Factors Ltd* [2009] EWHC 2907, [2009] All ER (D) 177 (Nov): *Eeles* distinguished. C would only recover 50% and on D's figures the PPO would be too low to justify the administrative costs; a PPO would be too rigid to meet the potentially variable care needs of C; C did not want a PPO. Court concluded a PPO would not be in C's best interest and the trial judge would not wish to make one, so *Eeles* did not apply.

A further aspect is illustrated by *Brown v Emery* [2010] EWHC 388: while an applicant for an interim payment does not have to prove a specific need for the payment unless he is seeking a sum greater than a reasonable proportion of specials, generals and accommodation costs, where there was a real issue to be tried as to C's need for accommodation as a result of the severity of her injuries, it could not be assumed that such costs would form part of the final judgment. To award a sum for the disputed accommodation claim would be to provide an unlevel playing field (*Campbell v Mylchreest* [1999] PIQR 17). In the circumstances the interim payment was limited to a proportion of generals, specials and future earnings (agreed as likely to be capitalised, C being a child) less interim payments already paid. NLJ

Christopher Sharp QC, St John's Chambers, Bristol. E-mail: *Christopher.SharpQC@stjohnschambers.co.uk*