

Insight 216

from Horwich Farrelly's Large & Complex Injury Group



WELCOME TO INSIGHT

In this week's edition of Insight, we return to the case of *Celine Martin V Salford Royal NHS Foundation Trust* which we first considered in Insight Issue 210 when the court considered the issue of whether when statutory funding was in place for care it was appropriate to separate the physical care and make private provision for it. The court also considered mental capacity and the weight to be attached to neuropsychological testing to determine that issue.

In the earlier decision, the court concluded it was appropriate to separate the mental care which was deemed adequate and the physical care which was not. The court also concluded the claimant although vulnerable to suggestion by others did not lack capacity.

The claimant was also given leave to amend the proceedings to claim the cost of a personal injury trust.

The issues remaining were:

- Whether the damages were to be paid by a lump sum order or by a periodical payments order (PPO)?
- Whether the PPO should be variable?
- Whether the claimant should receive damages to reflect the set-up and running costs of a personal injury trust (PIT)?

The hearing was before His Honour Judge Bird sitting as a high court judge.

The judgment is available at [\[2022\] EWHC 532](#).

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Celine Martin V Salford Royal NHS Foundation Trust

Background

The claimant was 47 years old. She had an extensive psychiatric history which began before the defendant's negligence. The claimant was diagnosed with Emotionally Unstable Personality Disorder (EUPD), paranoid schizophrenia and had a history of substance abuse. In the past the claimant had attempted suicide and had been detained at mental health facilities for long periods.

Injuries as a result of the defendant's negligence

As a consequence of the defendant's negligence in 2010 the claimant had become dependent on others for all aspects of her daily life. The claimant uses a wheelchair to get around and relies upon carers. A hoist was required to move her from her chair. She has restricted movement in all limbs, poor sitting balance, her left leg was shortened and she has foot drop. The claimant also suffered a brain injury resulting in severe neurological impairment.

The issues

(1) Whether the damages were to be paid by a lump sum order or by a PPO?

When considering this issue CPR 47.1 required the court to have regard to all the circumstances of the case and,

in particular, to consider what form of order best met the claimant's needs having regard to the following factors:

- (a) the scale of the annual payments, taking into account any deduction for contributory negligence.
- (b) the form of award preferred by the claimant including (i) the reasons for the claimant's preference; (ii) the nature of any financial advice received by the claimant when considering the form of the award; and (iii) the form of award preferred by the defendant, including the reasons for the defendant's preference.

The claimant had received financial advice from R who had prepared three reports and given oral evidence. His evidence was that, given the size of annual payments, the claimant's needs would be best met by a PPO. In his reports R expressed concern that uncertainty in the performance of future investments meant that there was a real risk that returns anticipated by the discount rate would not be achieved. R's view was that the risk of underperformance should not be borne by the claimant.

The claimant had accepted R's advice. Further in her witness statement the claimant stated she had discussed the issue with her father and stated her preference was to have damages awarded in respect of future care and case management paid by way of periodical payments.





Taking all the factors into account the court concluded that it should order that the claimant’s damages for future pecuniary loss should take the form of a PPO.

(2) Whether the PPO should be variable?

The defendant requested a variable PPO.

Article 2 of the Damages (Variation of Periodical Payments) Order 2005 allows the court to include as part of the order provision that periodical payments can be varied.

If such an order is made it must specify the relevant disease or type of deterioration or improvement and must provide that a party must obtain the court’s permission to apply for it to be varied unless the court orders otherwise.

The requirement to specify the relevant disease or type of deterioration or improvement was central.

The need to apply for permission was an essential gate-keeping step in the process.

Before the power to vary an order arose there first had to be proved or admitted a chance that the claimant would develop some serious disease or suffer some serious deterioration to her physical or mental condition.

The “chance” had to be something that was measurable rather than fanciful.

The defendant had satisfied the court that there was a chance that at some time in the future the claimant would suffer a serious deterioration in her condition. Therefore, the power to make a variable PPO arose.

In considering whether to exercise its discretion in favour of the defendant the court took into account:

(i) The claimant had expressed a desire for certainty going forward.

(ii) The claimant did not want to worry about further applications to court.

(iii) The claimant did not trust the defendant.

(iv) The making of a variable order should not be a run of the mill occurrence.

(v) The general principle was that damages should be assessed on a once and for all basis.

(vi) If the order was made and variation activated there would be a benefit to the public purse as the defendant would pay a reduced annual bill.

The judge concluded the court ought to exercise the discretion in the defendant’s favour and make a variable order. Whilst this may disappoint the claimant the court was simply permitting an application in the future. Whether that application would be successful would be a matter for the court at a future date.

The claimant suggested that any order should prevent any application prior to the claimant’s 60th birthday. Although the evidence suggested that it was probable that any deterioration may occur once the claimant was in her 60’s it did not exclude the chance it would occur earlier.

For that reason, the judge made an order that the application to vary the order could be made at any time during the claimant’s lifetime.

(3) Whether the claimant should receive damages to reflect the set up and running of a PIT

The claimant submitted that there was a reasonable need for an award of damages to include the cost of setting up and running a PIT. The claimant relied upon her vulnerability to justify an order and argued the court had a positive duty to protect the vulnerable which required it to award PIT costs.

The judge noted that awards which compensated a claimant for managing a compensation fund were routinely made when a claimant lacked capacity but where a claimant had capacity awards had not been made. In the absence of any reported decision where the court had decided to award the costs of managing an award to a claimant of full capacity the claimant's submissions centred on invoking the court's protective jurisdiction.

In deciding whether the court had a protective function the judge noted:

- The court's protective jurisdiction arises most obviously where a party lacks capacity.
- The court has a general jurisdiction in relation to children.
- Save where children or protected parties are involved the court does not generally adopt a protective approach.
- The established principle is that the court is not concerned with how a claimant deals with damages after they are awarded. A person of full capacity is entitled to take his or her own view of things. A successful claimant is free to invest, gamble or otherwise squander his damages.
- It was accepted the claimant was vulnerable to exploitation, but she had support from her father and takes advice. Her position was improving and was assisted by the care package and accommodation put in place.
- The risk of suicide was low on the evidence before the court.



Taking into account the above factors the judge concluded no protective jurisdiction arose.

The judge concluded:

“In the absence of a protective jurisdiction over her affairs in my view it is not open to me to award damages in respect of a PIT. This is consistent with the absence of any reported case where damages to fund a PIT have been awarded to a claimant with capacity. The overriding principle is that the court is not concerned with the future management of the compensatory fund”

The judge concluded by considering that even were he wrong in his conclusions and it was open to him to make an award he would still decline to do so as:

- (a) A PIT offers little (if any) protection against the claimant's vulnerability.
- (b) Whilst the claimant is vulnerable her future care regime is likely to lead to a better mental health outcome funded by way of periodical payments. Therefore, her vulnerability will not become worse as time moves on.
- (c) Although the experts agreed that PIT damages are reasonably necessary to manage the claimant's award the principle of whether to award damages is a question for the judge and not for experts.

On that basis no award was made for the costs of setting up and running the PIT.

Commentary

The real issues in this latest hearing related to the claimant's contention that a variable PPO should not be made and the claimant's attempted extension to the court's protective jurisdiction to include vulnerable claimants. The claimant lost on both counts.

The decision in respect of the variable PPO was unsurprising. The evidence before the court was that there would be a deterioration in the claimant's condition at some future point and it was correct to allow the defendant the opportunity to return to court to seek variation in that event.

The attempt to extend the court's jurisdiction was always going to be a difficult if not insurmountable hurdle given that the claimant was unable to point to any previous decision where the court had awarded damages for the costs of a PIT where the claimant had capacity. Once the claimant had lost the capacity argument at the earlier hearing the chances of persuading a court to order damages for the setting up of the PIT were always going to be remote.



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