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6 October 2021

Dear Christine,

### **Damages (Return on Investment) Bill**

Thank you for your letter of 29 September about periodical payments orders (PPOs).

Officials have reviewed the Hansard of the discussion on 23 September and, in terms of the current process relating to PPOs, the Committee may find it helpful to note the following provisions in the Damages Act 1996 and court rules.

As well as enabling the court to make a PPO without the consent of the parties, the 1996 Act (in section 2(1)(b)) requires the court to consider whether or not to make a PPO. Under court rules, claimants must state in the documents used to initiate legal proceedings, whether they consider a PPO or a lump sum to be the most appropriate form of award, which means that claimants are required to actively consider the option of a PPO and their legal representative will advise them in this regard. Similarly, defendants who admit liability, must state in their written defence which form of award they consider to be appropriate. Both parties are also required to provide information to the court to explain their preferred form of award. If a party omits to state their preferred form of award, or to provide sufficient explanation as to the reasons for their preference, then the court can require them to provide this.

One of the matters discussed on 23 September was whether or not the use of PPOs ought to be promoted by the Department. The Department considers that, in an individual case, it is properly a matter for the parties, based on legal and financial advice in regard to their specific circumstances, to assess whether or not a PPO is preferable to a lump sum, and ultimately, where a case proceeds to a hearing, this is a matter for the court. In reaching its decision, the court will have regard to all the circumstances of the case and decide what form of award best meets the needs of the claimant. Any settlement in respect of a child will also be subject to court approval on the same basis.

As noted in my correspondence dated 4 September, however, court rules (appended below) require the court to take into account certain factors when considering whether or not to make a PPO. The relevant court rules are made by the Court of Judicature Rules Committee with the Department's approval and the Committee is chaired by the Lady Chief Justice. The Committee may wish to consider writing to the Rules Committee to recommend that it considers adding to those factors to include, for example, consideration of the inherent risk that a lump sum award may not best deliver full compensation consistent with the 100% principle, or other factors that could help to increase uptake.

The Committee may also wish to consider if it would be helpful for it to invite the Lady Chief Justice to consider a judicial studies training event, perhaps jointly with the Bar and Law Society, around PPOs and the challenges with securing 100% compensation on investing a lump sum.

I hope the Committee finds this information helpful.

**CLAIRE McCORMICK DALO**

**Rules of the Court of Judicature**

**Order 37 rr.11-17**

III. DAMAGES ACT 1996 – PERIODICAL PAYMENTS

*Interpretation*

11. In this Part—

"the 1996 Act" means the Damages Act 1996;

"damages" means damages for future pecuniary loss; and

"periodical payments" means periodical payments under section 2(1) of the 1996 Act.

*Statement of claim*

12. —(1) This rule applies to proceedings for damages for personal injury.

(2) The plaintiff in his statement of claim shall state whether he considers periodical payments or a lump sum to be the more appropriate form for all or part of an award of damages.

(3) Where the defendant admits to the whole of any cause, he shall, in his defence, state whether he considers periodical payments or a lump sum to be the more appropriate form for all or part of an award of damages.

(4) Where a statement is given under paragraphs (2) or (3), a party must provide relevant particulars of the circumstances which are relied on in support of the statement.

(5) Where a statement under paragraph (2) or (3) is not given, the court may order a party to make such a statement.

(6) Where the court considers that the statement of claim contains insufficient particulars under paragraph (2) and (3), the court may order a party to provide such further particulars as it considers appropriate.

*Court's indication to parties*

13. The court shall consider and indicate to the parties as soon as is practicable whether periodical payments or a lump sum is likely to be the more appropriate form for all or part of an award of damages.

*Factors to be taken into account*

14. —(1) When considering

- (a) its indication as to whether periodical payments or a lump sum is likely to be the more appropriate form for all or part of an award of damages under rule 3; or
  - (b) whether to make an order under section 2(1)(a) of the 1996 Act, the court shall have regard to all the circumstances of the cases and in particular the form of award which best meets the plaintiff's needs, having regard to the factors set out in paragraph (2).
- (2) The factors referred to in paragraph (1) are:
- (a) the scale of the annual payments taking into account any deduction for contributory negligence;
  - (b) the form of award preferred by the plaintiff including:–
    - (i) the reasons for his preference; and
    - (ii) the nature of any financial advice he received when considering the form of the award;
  - (c) the form of award preferred by the defendant including the reasons for the defendant's preference.

*The award*

15. –(1) Where the court awards damages in the form of periodical payments, the order must specify:–
- (a) the annual amount awarded, how each payment is to be made during the year and at what intervals;
  - (b) the amount awarded for the future— (i) loss of earnings and other income; and (ii) care and medical costs and other recurring or capital costs;
  - (c) that the plaintiff's annual future pecuniary losses, as assessed by the court, are to be paid for the duration of the plaintiff's life, or for such other period as the court orders; and
  - (d) that the amount of the payments shall vary annually by reference to the retail prices index, unless the court orders otherwise under section 2(9) of the 1996 Act.
- (2) Where the court orders that any part of the award shall continue after the plaintiff's death, for the benefit of the plaintiff's dependants, the order must also specify the relevant amount and duration of the payments and how each payment is to be made during the year and at what intervals.
- (3) Where the court makes an order under paragraph (2), the order must also specify the relevant amount and duration of the payments and how each payment is to be made during the year and at what intervals.

- (4) Where an amount awarded under paragraph (1)(b) is to increase or decrease on a certain date, the order must also specify—
- (a) the date on which the increase or decrease will take effect; and
  - (b) the amount of the increase or decrease at current value.
- (5) Where the damages for substantial capital purchases are awarded under paragraph (1)(b)(ii), the order must also specify—
- (a) the amount of the payments at current value;
  - (b) when the payments are to be made; and
  - (c) that the amount of the payments shall be adjusted by reference to the retail prices index, unless the court orders otherwise under section 2(9) of the 1996 Act.

#### *Continuity of payment*

16. —(1) An order for periodical payments shall specify that the payments must be funded in accordance with section 2(4) of the 1996 Act, unless the court orders an alternative method of funding.
- (2) Before ordering an alternative method of funding, the court must satisfy itself that:— (a) the continuity of payment under the order is reasonably secure;
- (b) a method of funding provided for under section 2(4) of the 1996 Act is not possible or there are good reasons to justify an alternative method of funding;
  - (c) that the proposed method of funding can be maintained for the duration of the award or for the proposed duration of the method of funding; and
  - (d) that the proposed method of funding will meet the level of payment ordered by the court.
- (3) An order under paragraph (2) must specify the alternative method of funding.

#### *Assignment or charge*

17. Where the court under section 2(6)(a) of the 1996 Act is satisfied that special circumstances makes an assignment or charge of periodical payments necessary, it shall in deciding whether or not to approve the assignment or charge, also have regard to;
- (a) whether the capitalised value of the assignment or charge represents value for money;
  - (b) whether the assignment or charge is in the claimant's best interests, taking into account whether these interests can be met in some other way; and
  - (c) how the claimant will be financially supported following the assignment of the charge.