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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **6/12/13**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

JANINE ANN GILLILAND (A PERSON UNDER A DISABILITY)
BY ROBERT GEORGE GILLILAND NEXT FRIEND

Plaintiff;

-and-

JEMMA McMANUS & ANOR

Defendants.

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GILLEN J

Introduction

[1] In this matter the plaintiff sustained a catastrophic injury as the result of a road traffic accident on 31 January 2006. Primary liability was accepted save that contributory negligence arose because of the plaintiff's failure to wear a seatbelt at the time of the accident. The flow of authority suggested that a deduction in the range of 20/25% would be necessary in this instance as a result of such failure.

[2] The plaintiff suffered a severe traumatic brain injury with a fracture of the pelvis. She will have permanent neurocognitive deficits that will prevent her from ever realising her premorbid potential. Processing auditory information is not completely reliable and she is prone to faulty decision-making. Such neurocognitive deficits will put her at increased risk if she does not continue to receive an adequate level of supervision and support. Her current care package allows a carer to accompany her to all activities. She also has a carer stay with her at home when her parents are at work.

[3] Calculation of damages in such cases always involves complex calculations of substantial sums of money. As Leveson LJ recently said in Wallace v Follett [2013] EWCA Civ 146 at [1]:

> "The court inevitably relies on experienced counsel, familiar not only with the calculation of damages in personal injury cases but also with the financial structures that can be put in place to ensure that the needs of the injured person are met while, at the same time, providing a measure of assurance for insurers that uncovenanted windfalls do not result should the estimates at trial have proved to be over-optimistic from the plaintiff's perspective."

[4] A fundamental departure from the concept of lump sum compensation has been introduced by the Courts Act 2003 (amending the Damages Act 1996). The Damages (Variation of Periodical Payments) Order 2005 and the accompanying rules are in place in Northern Ireland. In short, in cases where damages for future pecuniary loss in respect of personal injury or death are to be awarded, the courts are now not only empowered but are positively *required* to consider whether to make an order that the damages are to take the form of a periodical payments order (PPO).

[5] It is imperative, therefore, that this new concept be considered by the court in every such case where future pecuniary loss arises irrespective of whether counsel raises the matter or not. Thus the court can impose a PPO on the parties without the consent of the parties themselves. However it is required to go through an exercise to satisfy itself that it is right to do so. I pause to observe that it does not appear to me that such a power can be exercised by the court when the parties are of full age, have legal capacity and have *consented* to a settlement. In such a case they can agree any order they wish and such consent order is beyond the jurisdiction of the court to consider save for the enforcement of its terms. However in all cases where the court *makes an award,* including where a court has to approve settlements and compromises made in respect of infants and patients, the requirement arises.

The Statutory and Regulatory context

[6] Section 2 of the Damages Act 1996 provides:

> "**Periodical payments**
>
> A court awarding damages for a future pecuniary loss in respect of personal injury –
>
> (a) may order that the damages are wholly or partly to take the form of periodical payments and

(b) shall consider whether to make that order."

[7] The Rules of the Court of Judicature (Northern Ireland) 1980 were amended by the Rules of the Supreme Court (Northern Ireland) (Amendment No.3) 2006, and where relevant, provide as follows in Order 37:

"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;(sic) 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 paragraphs (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)."

Those factors are then listed as follows:

"(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 reason 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."

[8] It may be of assistance in future cases involving PPOs if I venture to address some issues arising from these rules.

[9] Rule 12 is a pleading point that is often overlooked by counsel in statements of claim and it is a matter of which the profession should take note. In this case counsel had met that pleading obligation in the amended statement

of claim indicating that "for all on going future loss the plaintiff considers the award of periodical payments to be the most appropriate form for an award of damages" albeit there had not been provided relevant particulars of the circumstances which are relied on in support of the statement.

[10] The nature of any financial or actuarial advice received by the plaintiff when considering the form of an award will assist a party who is drafting the statement of claim or defence to state whether a PPO or lump sum is the more appropriate form of award for all or part of an award of damages. Where such statements are given, relevant particulars of the circumstances which are relied on should be provided. It follows that every plaintiff in such cases may well need to have addressed the relevant advantages of a PPO based on financial advice at a very early stage. A plaintiff's legal adviser may find that he will need a very good reason, probably backed by expert financial advice, for not having discussed in detail or commended such a provision to his client in clear terms. Solicitors or barristers should incline to caution and carefully consider obtaining such financial or actuarial advice, since they are neither permitted nor (usually) qualified to give such advice themselves.

[11] Rule 13 requires the court and the parties to consider and indicate as soon as practicable whether PPOs are likely to be appropriate in any case where there are "damages for future pecuniary loss". This is not merely a dust jacket endorsement of a general principle. The law requires reassuring clarity and so this issue must take its place among the elements of case preparation and be considered by the court in accordance with this rule. The benefit of this rule may lie in how it is read rather than how it is written. In practice, at the very early review stage a court may well merely ask the parties if they have considered a PPO but require more positive consideration thereafter.

[12] None of the factors set out in rule 14 is prescriptive. The fact of the matter is that the smaller the award (allowing for contributory negligence) the less persuasive the case for a PPO. A steady stream of guidance on the factors has begun to seep out in the authorities and is well set out, for example, in *McGregor on Damages* 18th Edition at [45-025] *et seq*. There is no easy answer to determining how large or how small future loss should be before invoking a PPO. An empirical rather than a metaphysical approach is preferable. For example, it might be thought that there is no need for a periodical payments order for a sum of less than £30,000 in total in respect of "future losses", but there is no authority for such a proposition. It will depend on the circumstances of each case. Thus an aged plaintiff, with even limited "future loss" may be better off with such an order, if the actual life lived was to be some two to three years in excess of that which was anticipated. There may be a plausible argument to be made that PPOs are better for uncertain "short losses periods", rather than "long losses periods". Context is everything.

[13] What is clear however is that the test for the court is an objective one. In Thompstone v Tameside and Glossop Acute Services NHS Trust (2008) 1 WLR 2207 at paragraph 108 Waller LJ said:

> "The parties have also agreed that the test which the judge must apply is an objective one. Of course, he must have regard to the wishes and preferences of the parties and to all the circumstances of the case but, in the end, it is for the judge to decide what order best meets the plaintiff's needs. The judge's mind should be focused not on what the claimant prefers but on what best meets the claimant's needs. The two are not necessarily the same."

[14] Rule 15 specifies what must be included in the order. The practice has been, both in England and in this jurisdiction, for the parties to draw up the order of the court which will make provision for all aspects of the settlement including payment of the lump sum, the form and content of the periodical payments and any terms necessary in respect of indemnities or reverse indemnities in respect of public funding. The terms to be included can be complicated and experience has shown that the drafting of the order can be a lengthy process.

The Issue in the instant case

[15] The issue before me in this case is whether or not this is an appropriate case for a lump sum or a PPO. I turn to the headings in rule 14.

The form of award preferred by the plaintiff including the reason for his preference

[16] Mr McNulty QC, who appeared on behalf of the plaintiff with Mr Hamill, addressed me on the reasoning of the plaintiff's father and next friend for wishing there to be a lump sum payment. The plaintiff's next friend has indicated through counsel a preference for a lump sum because he is satisfied that as a controller the benefit of the flexibility of a lump sum would allow him to achieve a better growth in income to meet the plaintiff's needs.

[17] In this context I pause to observe that counsel drew my attention to the recent case of Wallace v Follett [2013] EWCA Civ 146 where the Court of Appeal in England in a catastrophic road traffic injury claim included an order which provided that the claimant be required to attend regular medical examinations by the insurers medical experts for the rest of his life to help insurers fine-tweak their reserves by updating their medical assessment of the victim's life expectancy. The plaintiff's father wished to avoid that in this instance. I consider that Follett was a case on its own facts and does not necessarily set a

precedent for future cases. Compensating insurers will always be required to justify such a step as that which occurred in Wallace's case since it does provide a departure from the clean-break principle. I have not taken that into account as a factor in this case and in any event I note that it was not raised before me as a condition by the current insurers.

The scale of the annual payments, taking into account any deduction for contributory negligence.

[18] Mr McNulty informed me that in negotiations between the parties such were the catastrophic injuries to this plaintiff that figures in the range of £4m/£5m were discussed as representing the appropriate lump sum compensation. Having read the medical reports in this case this seemed a reasonable approach in terms of quantum. Of that figure, it was clear that care costs would require expenditure of something in the range of £2m over the lifetime of the plaintiff.

[19] As already indicated it was common case that a deduction in the range of 20/25% would be necessary in this instance due to the failure to wear a seat belt.

[20] Whatever the concerns, however, it must be right to say that a claimant may well ordinarily stand to gain a great deal more than he risks losing by entering into a PPO unless there is any significant element of contributory negligence. In that case, he may need to spend more than he would be entitled to receive annually if the order was made for life and therefore prefer a lump sum. But he may also be extremely keen to enjoy the long-term benefits (and security) afforded by periodical payments.

The nature of any financial advice when considering the form of the award

[21] I have had the benefit of a note prepared by Goldblatt McGuigan, forensic accountants acting on behalf of the plaintiff. Whilst this distinguished firm of forensic accountants are neither actuaries nor financial advisors (and usually actuarial evidence is preferable in a case of this kind) the circumstances of the contributory negligence are such in this case that I was prepared to accept and indeed to benefit from the comments made by Goldblatt McGuigan. Having set out the advantages and disadvantages of a PPO (most of which are embraced in my comments above), Goldblatt McGuigan presented the arguments in favour of a lump sum by making the following points:

- A significant figure is being deducted for contributory negligence.
- Of necessity the controller is going to have to give significant consideration to changes in the proposed care structure, the application and use of past losses and restriction to expenditure on all future heads of claim as a result of this.

- The logical starting point is the initial years where the parents will in all likelihood have to restrict the extent of outsourced care and possibly defer expenditure and living costs.
- Regular reviews of the lump sum balance will have to be conducted to determine the longevity of the fund against projected expenditure taking account of increased external care needs as the parents get older.
- Management of the fund is likely to be best achieved by considering all needs against a single lump sum, as opposed to managing a periodical payment which in the initial period may or may not be applied to care while at the same time also having to manage the remaining fund to potentially meet future care needs.
- The certainty of payment at 75% of the agreed care need (which is less than the care need recommended for the plaintiff) will likely require top-up in any event in later years. As such the whole settlement requires management in order to provide for future care and living expenses in a manner other than that claimed.
- This is a pragmatic issue as opposed to a mathematical one in relation to the maximisation of quantum which may be best met by way of a lump sum. Periodic reviews of the longevity of the fund will have to be conducted against expected remaining life to determine the breakeven level of expenditure against which actual expenditure should be monitored. That will require the services of an independent financial agent or actuary.

The form of award preferred by the defendant and including the reasons for the defendant's preference

[22] The defendant has expressed no preference in this instance and remains neutral.

Preliminary Comments

[23] I commence by making some general comments about the nature of periodical payments and lump sum payments

Advantages of a Periodical Payments Order

[24] The PPO would provide a stream of income to the plaintiff. How it is funded by the defendant would not be the plaintiff's problem but a matter on which the court and the defendant must satisfy themselves. The guaranteed payment by way of periodical order would be dependent on the actual life of the plaintiff rather than some estimate provided by a doctor or relying on a general estimate of the population at large drawn from life tables. Also it is tax free in the hands of the recipient. It is predictable and gives secure payments. It does not interfere with the plaintiff's receipt of State income, housing and other

benefits. The possibility of inheritance of a financial estate from the plaintiff by his or her family is avoided. The occasional situation of a plaintiff dying prematurely, despite the medical experts' views to the contrary is avoided. It prevents or minimises the windfall effect. It avoids the costs and expenses of investment advice needed to manage the capital fund in a "lump sum" award. Thus, the difficulties inherent for an individual in creating an investment portfolio to provide taxed income for an uncertain future are removed.

Disadvantages of Periodical Payments Order

[25] Potentially it denies the plaintiff the chance to achieve a better rate of return to protect against a higher actual rate of earnings of carers and other providers of personal services in the future because of wage cost inflation. The difficulty arises in considering whether PPOs can ever provide the protection which a soundly invested portfolio could do through providing enough money to cope with the increasing rate in the costs of future care services.

[26] There is also a requirement to predict the possibility of the need for a variation. There is an inability to vary to meet unforeseen changes of circumstances unless there is also provision for a capital fund. That capital fund can be provided for out of "past damages" and the "general damages award" for pain, suffering and loss of amenity. It may well be that any financial adviser will not recommend a PPO unless the plaintiff retains a reasonably significant contingency fund to cover future capital purchases and unexpected expenditure. This can leave things extremely tight if the claimant hopes to fund future care, case management, therapies and equipment by way of periodical payments. In Thompstone's case Waller LJ observed at paragraph 107:

> "Many claimants are advised that, due to the uncertainties inherent in a long life in a disabled condition, they should seek a substantial capital sum for contingencies in addition to that required for their immediate and foreseeable needs; this will provide for a degree of flexibility in the future .The claimant may also wish to purchase some facility for which damages have not been awarded at all or for which partial damages have been agreed on a compromise basis. Such a facility may not be a 'need' in the sense of being an absolute necessity (if it were it would have been covered by damages) but it may none the less be taken into account by the judge when assessing what order best meets the claimant's needs….. The decision as to what form the order should take will be a balancing exercise of the various factors likely to affect the claimant's future life"

[27] Where there is any significant element of contributory negligence a plaintiff may need to spend more than he *would* be entitled to receive annually if the order was made for life and therefore will prefer a lump sum.

Conclusion

[28] My primary concern about a PPO in this matter is that once contributory negligence of a substantial nature, as in this instance, has been built into the liability finding, full compensation can never be achieved by the plaintiff. The only conceivable way that this can occur is if the "past loss and the "general damages" award (pain, suffering and loss of amenity) can be put into the pot for the "damages for the future pecuniary loss" and make up the shortfall caused by the reduction for contributory negligence. In this case I think such an attempt would be complex and unwieldy.

[29] In short, where there has been a deduction for contributory negligence of 20%/25%, under a PPO the plaintiff's controller would lose the required flexibility to decide how to spend her damages and manage the investment in the hope of achieving better growth in income to meet the shortfall arising from the deduction.

[30] Therefore I have come to the conclusion in this case that the arguments which I have set out above in favour of a lump sum and the helpful note provided by Goldblatt McGuigan are such that this is not an appropriate case for a PPO and that a lump sum is more likely to be in the interests of this plaintiff.