

Personal Injury and Medical Law Teams Case Note

Flora v Wakom [2005] EWHC 2822 (QB); [2005] All ER (D) 117 (Dec), (Sir Michael Turner); [2006] EWCA 1103 [Brooke, Moore-Bick and Potter LJJ] (28th July 06)

Facts: This was a serious personal injury with substantial claims for future loss of earnings and future care. The sole issue before the court was whether the indexation of future periodical payments could/should be varied from the RPI to the AEI to reflect that actual likely annual increase in these costs, In relation to the discount rate in the conventional assessment of future loss claims it is “settled law” that the discount rate fixed by the Lord Chancellor should prevail unless particular or exceptional circumstances arise as provided for by s.1(2) Damages Act 1996. S 2(8) of that Act and CPR 41.8(4)(c) now enables courts to order periodical payments but s2(9) also allows the court to fix the variation in those payments otherwise than “by reference to the retail prices index”. The Master ordered each side to prepare a statement of case in relation to the appropriate indexation but only C complied; D issued an application notice for strike out under CPR 3.2(2)(a) on the basis that as a matter of law the court would or could not order periodical payments to be made other than in accordance with the s2(8) of the Act.

The Submissions before Sir Michael Turner

The Claimant submitted that:

- 1) The inclusion of this exception in Statute following the unsuccessful attempts in Warriner v Warriner [2002] 1 WLR and Cooke v United Bristol Health Care & Ors [2004] 1 WLR 251 to vary the discount rate set by s1 Damages Act 1996, was indicative of legislative intention to permit such variation in respect of periodical payments;
- 2) This was not a proper case for the court to have recourse to the debates in Parliament as an aid to construction of the section since the language of s.2 was not so obscure that resort should be had to extraneous material. Reliance was placed upon the speech of Lord Nicholls in Wilson v First County Trust (No. 2) [2004] 1 AC 86 where reference was made to Pepper v Hart [1993] AC 593.
- 3) Limitations imposed by the courts and the Lord Chancellor in the computation of lump sum payments for future loss should not be brought into the new legislative regime
- 4) Although the discount rate does assume some increase due to inflation there is no equivalence in orders for periodical payments and there is no opportunity for a claimant to take investment decisions to obviate the worst effects of inflation. As such the decisions in Warriner and Cooke have no bearing on the point and the court was not bound by them

- 5) The index by which periodical payments should be varied was the Average Earnings Index which like loss of earnings and care is wage related and where wage inflation has historically outstripped RPI inflation with the inevitable result that a claim would not receive full compensation if the variation permitted by s2(8) was restricted to that reflected in RPI; this still leaves the court free to apply the RPI to computation of equipment, transport, holidays, accommodation, medical supplies etc.

The Defendant argued that :

- 1) As a matter of history, policy and assumptions underlying the 1996 Act, RPI was the accepted measure;
- 2) The desirability of achieving reasonable certainty in lump sum cases was equally apt in the case of periodical payments, relying heavily upon the debates on the Damages Bill and the judgments of Dyson LJ in Warriner and Laws LJ in Cooke; in the latter Laws LJ stated that *"as long as the rate [the Lord Chancellor] has set is extant, the courts cannot in the adjudication of personal injury claims subvert or undermine it"* (paragraph 32)
- 3) There were likely to be practical difficulties posed for general insurers by such variation

Turner J reviewed the history of the computation of a future income stream (loss of earnings) or future expenses (future loss of care) including the trilogy of cases in Wells v Wells etc. [1999] 1 AC 345 where the House of Lords was concerned to arrive at a method of computation of the lump sum which would provide for the reasonable protection of the seriously ill claimant against the impact of inflation on the future streams of compensation, the recognition at that time being (see Lord Steyn) that periodical payments might provide a more workable solution. Turner J's judgment made reference to the Lord Chancellor's reasoning when determining the discount rate under s1 Damages Act 1996. In the Damages Order the Lord Chancellor acknowledged that it remained open to the courts *"to adopt a different rate in any particular case if there are exceptional circumstances which justify doing so"* and s1 provides that a different rate of return, as fixed, may be taken if it is shown *"that it is more appropriate in the case in question"*.

Held:

- 1) This is a "developing area of jurisprudence" (see the notes to Civil Procedure Vol 1 in relation to CPR 3.4(2)(a)) with the arguments proceeding on a far broader basis that the principles on which the court will strike out a statement of case. How best to treat future inflation in a regime where the court now has power to order periodical payments is a "novel exercise" where some principle should be identified with which to guide the courts (paragraph 55) and does not just depend on past jurisprudence (paragraph 58).
- 2) One of the main purposes underlying the Damages Act 1996 is to promote and provide a system which will facilitate the computation of damages on lines which are clear and consistent to parties and their advisers "(in) order to promote and facilitate settlements and to simplify the assessment of damages in actions which come on for trial" (*per* Lord Hutton in Wells [p404]). The principle of certainty and ease of assessment has equal relevance to orders for

periodical payments. However, although the search for some other, and more representative, index than RPI might introduce uncertainty and difficulty, *“the ability of the common law to adapt to the new regime will lead to the development of a jurisprudence and will yield that species of certainty which finally evolved by the decision in Wells”*

- 3) S2(8) is the earliest point in the section which gives recognition to the fact that inflation is likely to affect the value of periodical payments over time. The subsection could be read as a default provision to apply in the absence of evidence to demonstrate that the RPI is not the appropriate measure; another is that an onus is equivalent to that which has been held to exist in s.1 (Cooke and Warriner) and requires something in the nature of exceptional circumstances will be required to justify the court exercising the s.2(9) powers.
- 4) As a matter of conventional statutory construction it is impermissible to read into the sub-sections not only words which are not there but words which could so easily have been inserted similar to s.1(1)
- 5) There is every reason to be optimistic that the Court of Appeal will be able to provide guidelines in such cases thereby providing innovative solutions to problems either where no statute is available to regulate the problem or, as here, only providing partial regulation.
- 6) It is *“eminently arguable that the courts should consider whether or not variation by reference to RPI is not merely the default option but is, in practical terms, the only option which should be allowed”* although should this be the result *“the legislative attempt to meet the long-felt need for a system of compensation for future losses and expenses may prove to be as dead in the water as the earlier attempt to do so consensually. It is hard to envisage circumstances in which the court would in effect, intentionally, deprive the current legislative attempt of practical effect”* (paragraph 63)
- 7) The court is required to award compensation to the claimant and is not directly concerned with how a defendant meets or funds its liability although Turner J accepted that insofar as claims against private sector defendants were concerned *“there may be real difficulties in defendants and their insurers being able to satisfy the court that the continuity of such payments is reasonably secure”*

On the narrow procedural basis the application was dismissed as being “procedurally misconceived” there being no relevant jurisprudence by reference to which it could be said that the statement of case is bound to fail.

On appeal to the Court of Appeal:

Issue: The issue before the court was the interpretation of s.2(8) and s.2(9) Damages Act 1996. C submitted that s.2(8) sets out the default position and that s.2(9) allows the Court to modify the effect of s.2(8) where it appears just to do so. D maintained the provisions of s.2(9) could only be triggered in exceptional circumstances and it was common ground that there is nothing particularly exceptional about the present case. For the purposes of the appeal the expert's hypothesis of an actual or potential shortfall was accepted. The CA was concerned at this stage with an early determination on the issue of construction of the two sections without having to await the consideration of detailed arguments based on the respective merits of the two indices.

D [appellant] submitted that the language of the 2 sections was clear but that otherwise the CA should have reference to Hansard on the committee and report stages of the Bill as well as the Explanatory Notes to the 1996 Act and the Courts Act 2003; the Regulatory Impact Assessment ("RIA"); the recent history surrounding the identification of the appropriate discount rate in the case law; and the Law Commission 1994 report concerning ILGS [index-linked government gilts].

C [respondent] also submitted that the language was clear but that accordingly evidence from Hansard was inadmissible.

Held: **Brooker LJ [V-P]**

- 1) In accordance with Lord Browne-Wilkinson's speech in *Pepper v Hart* [1993] AC 594, and Lord Bingham in *R v Secretary of State for Transport, the Environment and the Regions ex p Spath Holme Ltd* [2001] 2 AC 349, 391, reference to statements made in Parliament is only permissible for construing the equivalent section if three conditions are all satisfied of which the first is that the legislation must have been ambiguous or obscure, or led to an absurdity. These conditions should be strictly insisted upon.
- 2) The first condition is not satisfied as "*there is nothing in the language of these sub-sections to suggest that the power to make provision such as identified in s.2(9) may only be triggered in an exceptional case*" [paragraph 10]. Harding v Wealands [2006] UKHL 32 does not suggest that the strict conditions laid down in Pepper v Hart have been relaxed and Lord Carswell's perception that "*sufficient possible ambiguity*" justified resort to Hansard as a confirmatory aid, was not a perception shared by other members of the House. Brooke LJ quoted Lord Hoffman in Robinson v Secretary of State for Northern Ireland [2002] UKHL 32 (paragraph 40):

"I am not sure that it is sufficiently understood that it will be very rare indeed for an Act of Parliament to be construed by the courts as meaning something different from what it would be understood to mean by a member of the public who was aware of all the material forming the background to its enactment but who was not privy to what had been said by individual members (including Ministers) during the debates in one or other House of Parliament. And if such a situation should arise, the House may have to consider the conceptual and constitutional difficulties which are discussed by my noble and learned friend Lord Steyn in his Hart Lecture ((2002) 21 Oxford

Journal of Legal Studies 59) and were not in my view fully answered in *Pepper v Hart*."

in which lecture Lord Steyn referred to the problems posed by a "plurality of legislators".

- 3) The Explanatory Notes to the Courts Act (s.100 of which effected the change in the law the subject of the appeal) assume that PPOs will be linked to the RPI "*in the majority of cases*". D argued that on C's case the expectation of RPI would be belied as the great majority of awards for future pecuniary loss are wage-related. However such a Note being intended to be neutral, explain rather than justifies the Government's intention and insofar as it casts light on the objective setting or contextual scene of the statute, and the mischief to which it is directed, they it is always an admissible aid to construction. However, such a Note cannot be treated as reflecting the will of Parliament: Lord Steyn in R (Westminster City Council) v NASS [2002] 1 WLR 2956, para. 5 [paragraphs 15 to 17]
- 4) The common purpose of the two sections under consideration is that quoted by the Lord Chancellor from Wells v Wells [1999] 1 AC 345 at 390A-B when setting the discount rate in s.1 1996 Damages Act at 2.5%, namely "*to place the injured party as nearly as possible in the same financial position as he or she would have been but for the accident ...*".

"There is no indication from s.2 of the 1996 Act that Parliament intended to depart from this well-known principle, unless we were to adopt the interpretation of s.2(8) favoured by the Defendant's insurers"
[paragraph 19]

- 5) Cases concerning the discount rate for the purpose of calculating lump sum awards for future pecuniary loss, include Wells v Wells, Cooke v United Bristol Healthcare NHS Trust [2004] 1 WLR 251 and Warriner v Warriner [2005] 1 WLR 81 In these cases the need for a fairer system for awarding damages for future pecuniary loss was signaled:

"[T]here is a major structural flaw in the present system. It is the inflexibility of the lump sum system which requires an assessment of damages once and for all of future pecuniary losses .. [and] ... causes acute problems in cases of serious injuries .. [where] ... the judge must often resort to guesswork about the future"

per Lord Steyn in Wells v Wells at p384 A-E

- 6) The history was sufficient to show that an award of a lump sum is entirely different in character from an award of periodical payments as a mechanism for compensating future pecuniary loss. In the context of a lump sum award the Lord Chancellor had to guess the future and hope that prudent investment policy would enable a seriously injured claimant to benefit fully from the award for the whole of the period for which it was designed to provide appropriate compensation [paragraph 27]. A periodical payments order is quite different. The risk is taken away from the claimant:

“The award will provide him or her year by year with appropriate compensation, and the use of an appropriate index will protect him/her from the effects of future inflation. If he or she dies early the defendants will benefit because payments will then cease. It is unnecessary in the context of this statutory scheme to make the kind of guesses that were needed in the context of setting a discount rate”

[paragraph 28]

- 7) The fact that these two quite different mechanisms now sit side by side in the same Act of Parliament does not mean that the problems that infected the operation of the one should be allowed to infect the operation of the other:

“There is nothing in the statute to indicate that in implementing s 2 of the 1996 Act (as substituted) Parliament intended the courts to depart from what Lord Steyn described in *Wells v Wells* at pp 382H-383 B as the “100% principle”, namely that a victim of a tort was entitled to be compensated as nearly as possible in full for all pecuniary losses (see also paras 18-19 above)”.

- 8) Accordingly the argument is rejected that in enacting s 2(8) and 2(9) of the 1996 Act Parliament must be taken to have intended to provide compensation lower than that which would be awarded through adherence to the 100% principle if a periodical payments order was to be made [paragraph 28] and there was force in C’s argument that to adopt a contrary approach would create a very real danger that the new statutory scheme would not have the beneficial effect identified by Lord Steyn in *Wells* “but would be rendered to a great extent a dead letter” [paragraph 34]:

“If it is ordered that the whole of the damages for future pecuniary loss are to take the form of periodical payments, then the claimant will lose the facility of an investment policy that may extinguish the baneful effect of a discount rate that ultimately derives from calculations based on RPI ... [and] the claimant’s inability to invest a significant part of his award will lead him to be seriously under-compensated as the years wear on”.

[paragraph 34]

... In enacting s 2 of the 1998 Act ... it cannot have been Parliament’s purpose to create a scheme which no properly advised claimant would ever wish to use.”

[paragraph 36]

- 9) For similar reasons the arguments is rejected that the courts should consider questions of affordability when determining what order to make because, as Lord Steyn said in *Wells v Wells* at pp 383B – 384A, policy arguments based on affordability are a matter for Parliament and not for the courts. Whilst in *Heil v Rankin* [2001] QB 272 the Court of Appeal took into account questions of affordability when determining what amount for general damages, for pain, suffering and loss of the public would perceive as fair, reasonable and just:

“There is no material ... on which a court could safely rely in deciding whether the public would perceive it to be fair, reasonable and just for compensation for future pecuniary losses to be reduced simply on affordability grounds. (willing to incur the accompanying political odium for doing so) but there is no evidence in the language of s 2 of the 1996 Act that this was Parliament’s intention.”

[paragraph 29]

It would be entirely wrong to interpret the 1996 Act as being immune to future changes but arguments on the appropriate index are best left to the trial judge [paragraphs 30 and 31]

- 10) Turner J was therefore entirely correct in his “powerfully expressed passage” (quoted at paragraph 36) in holding that the indexation point was eminently arguable even if the result may be real difficulties for defendants and their insurers in being able to satisfy the court that the continuity of such payments is reasonably secure. The C should be allowed to advance his statement of case and adduce the expert evidence on indexation at the trial of the action:

“It will then be for the trial judge to decide whether it is appropriate to use the powers given to him by Parliament in s 2(9) and to make such order for index-linking the periodical payments (if a periodical payments order is in fact made) as he considers appropriate and fair in all the circumstances, without being obliged to detect exceptional circumstances before he is at liberty to depart from the RPI”.
[paragraph 37]

Comment: This is a robust and arguably landmark decision in which Brooke LJ makes no secret of his disdain for the attempts of the Government of the day to impose its wishes rather than the intention of Parliament upon the courts:

“We are all too familiar with statutes having a contrary result to that which the Government expected through no fault of the courts which interpreted them.”

[paragraph 17]

If there was political and financial expediency in the drafting of s.2(8) and s.2(9) then the Court of Appeal was not prepared to countenance this as is made clear in the re-affirmation of the 100% principle stated by Lord Steyn in the cited passage in Wells v Wells. Yet in so many large claims – in particular those involving public bodies, such as the NHS, there has been continuous and relentless pressure to reduce the value of claims (see the **NHS Redress Bill** and the **Compensation Act**). It is to be hoped therefore that Brooke LJ’s words at the end of paragraph 36 (quoted at 8) above) are not expressed more in hope than expectation.

This will be encouraging news for claimants but a cause for significant concern for defendants, insurers and reinsurers who have already anticipated considerable problems with reserving cases where there is likely to be a PPO stretching out for undefined period. Certainly in the private sector, there are likely to be considerable logistical difficulties in being able to satisfy the courts as to the “reasonable security” of the periodical payments as required under s.2(3) Damages Act 1996. Turner J however considered that the long history of the insurance industry “demonstrates that it is capable of devising innovative strategies to cope with changing demands” (quoted at paragraph 36)

For the present claimants should be very cautious about settling cases involving significant future pecuniary loss claims and should only enter into settlements having made it clear that they have taken full account of the possibility that in the future some, if not all, PPOs will be based upon AEI indexation. Any decent forensic accountant will be under an

obligation to consider this development in any report to the court as required under (Rule 41.7(2) (b)¹

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Please note that this Case Note is intended to provide a summary and comment of the subject matter covered. It is not intended to be comprehensive or to provide legal or other professional advice.

¹ this requires consideration of *"the nature of any financial advice received by the claimant"*. This could create problems with confidentiality as this would allow the defendant to have access to the claimant's investment advice: this is something that will need to be worked out by the courts and there is no guidance on this

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