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A defendant's application for a variable PPO; and who bears the cost of a personal injury trust?

Martin v Salford Royal NHS Foundation Trust (2022) EWHC 532 (QB)

This recent decision (reported briefly in the FOIL Voice) is creating great interest in defendant circles.

Following the assessment of damages at an earlier hearing, the court determined three further issues: how the damages were to be paid, i.e., by a lump sum order or by a periodical payments order; if periodical payments were appropriate whether that order should be variable; and whether the claimant (whom the judge had found to have capacity) should receive damages to reflect the set up and running costs of a personal injury trust (PIT).

On the basis of the claimant's expert evidence, it was agreed between the parties, and the judge accepted, that it was appropriate to order that the claimant's damages for future pecuniary loss should take the form of periodical payments.

The application for a variable order was made by the defendant because the serious deterioration for which it contended would lead to a decrease in the cost of the claimant's day-to-day care. The relevant deterioration identified by the defendant fell under two heads, the first identified by the claimant's own orthopaedic expert and the second from the jointly instructed neurorehabilitation expert.

IN BRIEF

A High Court Judge allowed a defendant's application for a variable periodical payments order. The defendant would be able to apply for the PPO to be varied if a serious deterioration occurred in the claimant's condition, leading to a reduction in the cost of his day-to-day care.

The judge refused to award the claimant (who had mental capacity) the costs of a personal injury

The defendant's position was that there was a sufficient "chance" that the claimant would in the future (when she was in her 60s) suffer a deterioration in her physical condition as a result of its negligence which (either alone or as a result of her pre-existing mental health condition) would result in a need to move her to an institutional care environment. Such a deterioration would be serious because it would mean that the claimant's home-based care regime, no matter how comprehensive, would not be sufficient to meet her care needs.

The Deputy High Court Judge held that the defendant had established on the evidence that there was a more than fanciful prospect (a chance) that at some time in the future, the claimant would, as a result of the act or omission which gave rise to the cause of action, suffer a serious deterioration in her condition. The power to make variable periodical payments order therefore arose and ought to be exercised in the defendant's favour. Such orders were not everyday orders, but this ruling simply permitted an application for a variation to be made in due course. Whether one was permitted would be a matter for the court at that time.

On the third issue, the claimant submitted that there was a reasonable need for an award of damages to cover the costs of the PIT so as to restore the claimant to the position she would have been in had the defendant not been negligent. The claimant relied on her vulnerability to justify such an order

The judge regarded as instructive 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. Save where children and protected parties or protected beneficiaries were involved, the court did not generally adopt a protective role. This was illustrated by the established principle that the court was not concerned with how a claimant dealt with damages after they are awarded. A person who was of full capacity was entitled to take his or her own view of things. There would be no separate award in respect of the cost of investment advice and a successful claimant would be free to invest, gamble or otherwise squander his damages.

The judge accepted that although there was no claim based on Article 2 (the right to life) it was appropriate to consider if the court came under an operational duty to take steps to counter the risk of the Claimant committing suicide. He was also prepared to proceed on the basis that the claimant's risk of suicide was both real and immediate. However, it was plain from Rabone (2012) that the presence of a real and immediate risk to life was not sufficient for the operational duty to arise. She was not under the direct supervision of the state (or the defendant) or the court. She was not an in-patient and she was not a protected party. Although the claimant was vulnerable to exploitation and that vulnerability had been "amplified" by her injuries and by the award of damages she had received, she had support from her father and took his advice. Her position was improving, and her continued stability would be assisted by the care package and accommodation that will be put in place.

The risk of the claimant committing suicide was, on the evidence, not a high risk.

These factors, combined with the award of damages designed to address her physical needs for the rest of her life (which would have a "beneficial effect" on her mental health, were all pointers to a low risk.

As to the nature of the risk, it arose from a number of factors including substance abuse and relationship breakdowns and feelings of desperation arising out of her injuries, all of which were

exacerbated by pre-existing mental health issues. It was relevant that the suicide risk had not been created solely by the defendant's negligence.

Accordingly, the operational duty did not arise.

If the judge was wrong and the duty did arise, he concluded that the duty had been discharged and there were no reasonable and proportionate steps the court (or the defendant) should be required to take to deal with the risk.

In the absence of a protective jurisdiction over her affairs, it was not open to this court to award damages in respect of a PIT. The overriding principle was that the court was not concerned with the future management of the compensatory fund.

It added nothing to the claimant's argument that the defendant took her as it found her. Taking the claimant as a vulnerable person was the starting point. The real issue was what steps should be taken to deal with the vulnerability. Where the court lacked a protective jurisdiction (as explained above) the answer was that the court had no power to protect the claimant.

The full judgment is available at: [Martin v Salford Royal NHS Foundation Trust \(Payment of Damages\) \[2022\] EWHC 532 \(QB\) \(11 March 2022\) \(bailii.org\)](#)

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