Special Focus on Brain Injury Claims

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Managing Damages for Brain Injured Claimants

Andrew Sands and Nick Leech, specialist financial advisers and directors of Nestor, discuss what is involved in setting an investment strategy, aimed at ensuring awards of damages last as intended. It is not entirely straightforward, but proper financial planning should commence pre-settlement and include consideration of personal injury trusts, where appropriate; and of course, periodical payments.

PERIODICAL PAYMENTS

We have written extensively over the years, explaining why, from a financial perspective, periodical payments make sense for personal injury claimants, particularly those in the catastrophic/brain injury category. Such individuals through their deputies or trustees, are burdened with the very significant and lifelong risks, related to investment and mortality in respect of lump sum awards. Periodical payments simply eliminate those risks. Linkage to earnings related inflation, when combined with tax freedom, makes consideration of periodical payments essential in all brain injury claims. Unfortunately, not all such claimants can benefit from that form of compensation, as the court can only order periodical payments if it is satisfied of the reasonable security of continuity of payment. Periodical payments more or less look after themselves from an investment perspective, so we are left with managing the cases that settle on a lump sum basis, and of course, the lesser lump sum amounts that accompany periodical awards.

RISK – A CRUCIAL FACTOR

As regards the longer term investments (aside from some cash holdings), once the claimant’s capital and income needs have been ascertained, the remaining balance must be managed on a sustainable basis. One of the principal factors is establishing the attitude to investment risk of the claimant’s deputy, assuming the claimant falls under the jurisdiction of the Court of Protection. Given the nature of the award, a cautious approach to investment is the most usual outcome. Caution in the investment context, is aimed at limiting potential volatility in a client’s portfolio, but at the same time may restrict possible gains. Perhaps this is a suitable point to consider what investment returns driven by a cautious approach might mean in relation to the discount rate. The recent Lord Chancellor’s review process accepts that a 2.5% real return is not possible on the theory, which is based on returns from Index Linked Government Stock (ILGS). Hence the need for claimants to accept a level of risk which is unavoidable to achieve real returns – this is in spite of Wells, where the Lords recognised that claimants are not ordinary investors and should not, be exposed to risk in order to obtain a real return on their awards. Real return of course, means a return net of tax, price inflation and the costs of investment advice. Presently, that all adds up to a required gross return which is not at all easy to achieve, and difficult to reconcile with a cautious approach to investment risk.

Compare that with periodical payments – secure, lifelong, guaranteed, tax free and appropriately indexed income, and no costs related to investment. Good value indeed, which no doubt would prove remarkably popular if available to the wider public.

OVERALL STRATEGY

The following factors are key to meeting a claimant’s needs on a sustainable basis, and should always be considered as part of the advice process;

- Security and continuity of income - where the claimant’s needs are concerned, investments should be sought that have a greater degree of protection than those that are available to ordinary investors. Unnecessary levels of investment risk should be avoided.
- Flexibility - the claimant’s situation will undoubtedly change over the course of a lifetime, and finances should look to accommodate changing income needs.
- Tax efficiency - Income Tax and Capital Gains Tax mayler have a detrimental effect on the claimant’s financial situation, depending on the tax regime throughout the course of a possibly lengthy lifetime.

Cash holdings will provide flexibility, in other words catering for contingent events, which in real terms generate extra cost. The longer term investments, often meant to remain undisturbed for 3 to 5 years, is where the risk profile drives the make-up of the investments. Client portfolios based on caution will usually include a limited amount of riskier assets such as equities (stocks and shares). The larger part of the portfolio would usually be made up of fixed interest, a cover all term which includes income producing government and good quality corporate...
In addition to proper advice getting the claimant off on the front foot, maximising state benefits is particularly important in cases which have settled at a reduction. Mortality risk are lifelong, the latter clearly by definition, and represent many years of concern for claimants and their representatives.

The availability in particular of state funded care can be crucial in bridging the gap between what was recovered, and the actual cost of a client’s needs. The luxury of investing at higher risk, in the hope that time will bring higher returns, is not usually on the agenda.

SUMMARY
Managing lump sum awards of damages is a complex affair, and requires a different approach than other types of financial advice. Claimants require access to award to meet needs from day one post settlement. The availability in particular of state funded care can be crucial in bridging the gap between what was recovered, and the actual cost of a client’s needs. The input of an experienced specialist financial adviser is key to setting a financial strategy based on sustainability. An appropriate structure to a client’s award, based on keeping things as simple as possible provides peace of mind, as the immediate post settlement period can be just as stressful for clients as the litigation.