

Capacity.

[2020]JRC100

ROYAL COURT
(Samedi)

26 March 2021

Before : R. J. MacRae, Esq., Deputy Bailiff, and Jurats Ronge
and Dulake

Between Zac (A Minor) (by his delegate Advocate Zoe Blomfield) Plaintiff

And The Estate of A (deceased) Defendant

Advocate S. C. Thomas for the Plaintiff

Advocate L. A. Ingram for the Defendant

JUDGMENT

THE DEPUTY BAILIFF:

1. The Court has been asked to sit today in order to consider making a periodical payments order.
2. This is the first periodical payments order which the Court has been invited to make under the provisions of the Damages (Jersey) Law 2019 ("the Law").
3. As was noted by Commissioner Pamela Scriven QC in the judgment in the case of the X Children -v- Minister for Health and Social Services [2018] JRC 226, there were two particular areas upon which legislation in Jersey would bring clarity and certainty to the law, namely in respect of the Court's power to make periodical payment orders with or without the consent of the parties and the method by which the discount rate should be calculated in personal injury cases. The Law brings welcome clarity and certainty to these issues.
4. In respect of periodical payment orders, the relevant provisions of Article 4 are as follows:

“(2) A court awarding damages for future pecuniary loss in respect of personal injury may make an order that the damages must wholly or partly take the form of periodical payments.

(3) A court may not make a periodical payment order unless it is satisfied that the continuity of payment under the order is reasonably secure.

(4) For the purposes of paragraph (3), the continuity of payment under a periodical payment order is reasonably secure if –

(a) the order is enforceable against a Minister;

(b) it is protected by a scheme, statutory or otherwise, established under any jurisdiction, such scheme being one which the court is satisfied gives protection equivalent to the scheme established under section 213 of the Financial Services and Markets Act 2000 of the United Kingdom; or

(c) it is subject to a guarantee given under Article 5(2) by the Minister for Treasury and Resources in respect of that particular order.

(5) A periodical payment order may include provision for any of the following –

(a) requiring the party responsible for the payments to use a method (specified in the order or to be selected by the party) under which the continuity of payment is reasonably secure under paragraph (4);

(b) about how the payments are to be made;

(c) requiring the party responsible for the payments to take specified action to secure continuity of payment.

(6) Where a person has a right to receive payments under a periodical payment order, or where an arrangement is entered into in satisfaction of an order which gives a person a right to receive periodical payments, that

person's right under the order or arrangement may not be assigned or charged without the approval of the court which made the order and –

(a) the court must not approve an assignment or charge unless satisfied that it is necessary;

(b) a purported assignment or charge, or agreement to assign or charge, is void unless approved by the court.

(7) Any alteration of the method of payment under a periodical payment order is a breach of the order unless the alteration of method has been approved by the court.

(8) A person who has an interest in the making or receipt of a payment under a periodical payment order may apply to the court for a variation of the provisions of the order on the ground that there has been a material change of circumstances since the order was made.

(9) For the purposes of paragraph (8) a person may have such an interest if the person –

(a) is the recipient of the payment;

(b) is the person making the payment; or

(c) otherwise has an interest in the payment.

(10) For the purposes of paragraph (8), the States may, by Regulations, make provision for determining when there has been a material change of circumstances and when an application can be made under that paragraph, including, without prejudice to the generality of the foregoing, provision for –

(a) factors to be taken into account in determining whether there has been a material change of circumstances;

(b) any period of time that must elapse before an application or subsequent application is made, with reference to such factors as may be specified in the Regulations, including the nature of any change of circumstances or otherwise;

(c) when the leave of the Royal Court is required to make an application, whether in all circumstances or in such circumstances as may be specified in the Regulations;

(d) when the provisions of a periodical payment order may or must limit the circumstances in which an application under paragraph (8) may be made.”

5. The questions for the Court today are whether it should in its discretion make an order for periodical payments and whether or not the Court can be satisfied which, in this context, means sure, that the continuity of payment under such an order is reasonably secure.
6. It is not necessary to set out the tragic background to this case in detail.
7. The Plaintiff was almost 12 years old when over 10 years ago he suffered a car accident after which he was left with significant injuries to his limbs and a severe traumatic brain injury.
8. After treatment in Southampton and later in Jersey the Plaintiff was discharged to continue rehabilitation, approximately six months later. He is now 22 years of age. He lives independently, supported by a care package that includes regular visits from care workers. He continues to suffer from the consequences of the brain injury and will do for the rest of his life, which is predicted to be of near normal length. He has profound and permanent cognitive, executive and behavioural deficits which make him vulnerable and dependent on others and mean that he is unlikely to ever be capable of more than therapeutic employment.
9. In these proceedings he is represented by his delegate Advocate Zoe Blomfield who was appointed as such pursuant to the terms of the Capacity and Self-Determination (Jersey) Law 2016 in 2019.
10. The Defendant is the estate of A, although it has been the insurers who have conducted this litigation on behalf of that estate.
11. It is unnecessary to consider the details of the PPO insofar as it concerns the assessment of and steps to be taken to address the Plaintiff's future needs – including his care case management costs and the delegate fees. The reason that it is not necessary to do so is that these matters were considered as recently as 3rd March 2021 when the “Delegate Court” approved the decision of Advocate Blomfield to accept the offer of settlement made by and on behalf of the insurers in

this case. That judgment, although confidential, has been considered and read by all members of the Court today.

12. The Delegate Court also held that it was reasonable for Advocate Blomfield to conclude that the proposed periodical payments were reasonably secured but noted that it was the trial court, this Court, to be satisfied of the same prior to an order being made.
13. In view of the decision of the Delegate Court, it is not necessary for this Court to consider the quantum of the lump sum or the proposed order by way of periodical payments. It is not the task of this Court to approve the delegate's entry into the settlement agreement but, as we have said, to decide whether or not a periodical payment order should be made and, if it should, whether or not the proposed order is reasonably secure.
14. Most personal injury cases are compromised by way of a lump sum. This is convenient, cost effective and appropriate to both Plaintiff and Defendant.
15. As noted by Baroness Hale in Simon -v- Helmot [2012] UK PC 5, an appeal to the Privy Council from a decision of the Court of Appeal in Guernsey:

“60. The only principle of law is that the claimant should receive full compensation for the loss which he has suffered as a result of the defendant's tort, not a penny more but not a penny less.”

16. Plainly, in the case of a substantial injury with life long and possibly uncertain consequences, such an object is more likely to be achieved, in many cases, by the making of a periodical payments order as opposed to a lump sum order. As Commissioner Scriven noted in the X Children case at paragraph 13 of the judgment:

“13. ... It is a method that is fair to both the Plaintiffs and the Defendant, by ensuring that those care costs are met for the true length of time for which they are needed, neither a longer, nor shorter, period.”

17. Having regard to the circumstances of this case and the terms of the proposed periodical payments order (which is confidential between the parties but has been seen by the members of the Court) the Court has no doubt that such an order is appropriate, subject to the Court being satisfied that the proposed order is reasonably secure.

18. We reach this conclusion for four principal reasons. First, the parties are agreed that a periodical payments order is appropriate and have agreed to settle the proceedings (avoiding a four week quantum trial) on that basis. Secondly, the Plaintiff is young and has a long life expectancy. Thirdly, his needs may change over time. Fourthly, such a disposal is a method that is fair to both Plaintiff and Defendant for the reasons set out by Commissioner Scriven above.
19. As to the security of the proposed order, we have been assisted by the Plaintiff's submissions, the Defendant's submissions, a substantial body of evidence and the opinion of leading counsel on behalf of the Plaintiff.
20. In fact, there are four levels of security for the payment proposed. As to the first level of security, we have been provided with a statement of Mr Purkiss, the relevant insurance broker in Jersey. He confirms that the motor policy in this case was issued in March 2010 and the insurer was Syndicate 510 at Lloyds, which is managed by Tokio Marine Kiln (TMK).
21. TMK manages four syndicates at Lloyds including Syndicate 510 which underwrote the policy and the Jersey broker had binding authority to write motor risks on its behalf.
22. The financial security of Syndicate 510 is addressed in the evidence of Catherine Marshall, a manager in the compliance department at TMK. The premium income for the Defence Insurer was approximately £1 billion for both the years ended 31st December 2018 and 31st December 2019. Syndicate 510 is regulated by the Financial Conduct Authority and the Prudential Regulation Authority and must satisfy the regulatory requirements of Lloyds of London. Syndicate 510 is only permitted to continue to underwrite insurance because it has satisfied Lloyds of its capital requirements under Solvency II and also Lloyds' own capital criteria.
23. As to the second level of security, Catherine Marshall explains that all Lloyds members have to pay money into a trust known as "Funds at Lloyds" which is intended to provide cover in circumstances where the syndicate cannot meet its liabilities. This is considered by William O'Connor, a solicitor at Lloyds, in his evidence. He says that in the unlikely event of members of Syndicate 510 being unable to meet its liabilities from its own capital resources then Lloyds holds "*Funds at Lloyds*" in the name of each member as an additional layer of security for policy holders.
24. As to the third level of security in what Mr O'Connor says is the "*extremely unlikely event*" that it is called upon, the Central Fund of Lloyds could meet any payment on a discretionary basis. The default position would be that in the event of a default by a syndicate, the Central Fund would

respond if called upon. It currently holds in excess of £2.4 billion in assets which would plainly satisfy any sums that could fall due in this case. Accordingly, he concludes that irrespective of the “backstop” provided by the Financial Services Compensation Scheme (“FSCS”), the Court can be “satisfied that there is reasonable security in this matter”.

25. The fourth level of security only arises in the unlikely event that Lloyds could not satisfy any liability under the periodical payments order.
26. We have been supplied with a letter from a solicitor writing on behalf of the FSCS who explains that the FSCS would satisfy any liability in this case, in the remote scenario where it is called upon, to the level of 90% of the sums due.
27. The contract of insurance in this case was a protected contract of insurance as defined in the Compensation Rules in that it was issued by a “relevant person” through an establishment in the UK, or, *inter alia*, the Channel Islands.
28. In the comprehensive correspondence from the FSCS it is explained that the Plaintiff in this case would be eligible to make such a claim pursuant to a periodical payments order made in Jersey in the event of the syndicate’s default and the amounts available from the Central Fund at Lloyds being insufficient.
29. As to the balance of 10% (and indeed the whole 100% if for any reason the FSCS did not fund payments) then, pursuant to the agreement made between the then Home Affairs Committee and the Motor Insurers Bureau (“MIB”) dated 7th September 2000 (“the MIB Agreement”), the MIB will be liable to honour the payments in this case assuming that various pre-conditions are met. It is agreed between the parties in this case that all pre-conditions prior to the MIB indemnifying the Plaintiff in respect of his claims have been complied with in this case. The MIB Agreement was entered into by the Home Affairs Committee, as we have said. It appears to us that with the transition to Ministerial Government, the functions of the Home Affairs Committee and its rights and liabilities under any contract were transferred to the Minister for Home Affairs pursuant to the States of Jersey (Transfer of Functions from Committees to Ministers) (Jersey) Regulations 2005. Article 4 of those Regulations makes it clear that for construction purposes the MIB Agreement should be read as referring to the Minister for Home Affairs as receiving minister. The functions of the Minister for Home Affairs in respect of the Jersey motor vehicles legislation were then transferred to the Minister for Transport and Technical Services pursuant to the States of Jersey (Transfer of Functions No. 1) (Home Affairs to Transport and Technical Services) (Jersey) Regulations 2006, so we conclude that the reference in the MIB Agreement ought to now be read

as to the Minister for Infrastructure as successor of the Minister for Transport and Technical Services.

30. Unsurprisingly Mr Rosson, an independent financial adviser, has reviewed all the material and expresses the view that there is reasonable security in this case for the payment, subject to the opinion of the Court.

31. Accordingly, there are four layers of security in this case:
 - (i) The financial resources and solvency of TMK of which the Defence Insurer forms part;

 - (ii) The resources of the “Funds at Lloyds”;

 - (iii) The Lloyds Central Fund which holds assets of £2.4 billion;

 - (iv) The Financial Services Compensation Scheme and/or the Motor Insurers Bureau.

Accordingly, the members of the Court were satisfied as to the security of payment in this case.

32. We considered with care the draft consent order in this case. We note that the Plaintiff, the Defendant and the Defence Insurer have permission to apply to the Court for the purposes of both enforcing the settlement agreement and applying to vary the periodical payment order contained therein pursuant to Article 4(8) of the Law.

33. We note that the equivalent legislation in England and Wales restricts the grounds upon which a variation may be ordered to “*only one application*” (see the Damages (Variation of Periodical Payments) Order 2005 in respect of “*each specified disease or type of deterioration or improvement*”).

34. The terms of Article 4(8) of the Law give the Court a much wider discretion, providing for variation on the grounds of any material change in circumstance, which could extend to both economic as well as medical changes so far as they are “material” which, in our view, means significant. It has been observed that these provisions provide a much fairer mechanism to ensure that a Plaintiff’s compensation could, if necessary, be varied so that it was no more and no less than that which was required to meet their needs.

35. Although the States has yet to make regulations under Article 4(10) of the Law for the provision of determining whether there has been a material change of circumstance, the Court should not, in principle, have any difficulty in determining whether or not there has been a material change of circumstance even in the absence of such regulations being made. Accordingly, the absence of regulations under Article 4(10) is no impediment to the Court making periodical payments orders, if necessary, varying them on the application of interested parties.
36. Accordingly, we make the order, as amended by the Court during the course of the hearing.

Authorities

Damages (Jersey) Law 2019.

[X Children -v- Minister for Health and Social Services](#) [2018] JRC 226.

Capacity and Self-Determination (Jersey) Law 2016.

[Simon -v- Helmot](#) [2012] UK PC 5.