Guidance on Applications for Interim Payments

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In complex clinical negligence cases involving substantial damages and an uncertain prognosis, there is often an urgency on the part of claimants to access funds so as to procure immediate needs such as; treatment, care and suitable accommodation. There are two hurdles to that end goal, however: establishing liability, and the sheer length of time that it is now taking for matters to proceed through the courts to a final conclusion. Undoubtedly, the impact of the pandemic has not helped the latter obstacle, and indeed, has made it even more of a concern than it was before. In clinical negligence claims, cases are often case managed with elongated timetables to trial to allow for the gathering of expert opinion on both sides, joint statements etc.

As such, in cases where the damages sought are substantial, which appear strong on liability, but which face a long wait to a conclusion, an application for an interim payment offers a viable option to claimants for them to at least start the process of obtaining some form of compensation to meet their immediate needs. The difficulty then becomes how much to ask for. The Court expects more than a vague assertion of an amount, and instead requires detailed specifics as to how much, and how those figures are calculated. In the majority of cases, where liability is admitted, there has tended to be good opportunity to negotiate interim payments without making an application. However, whether it is amicable or contentious, the same approaches to quantifying the amount, need to be had.

The purpose of this piece is to give an overview of the issues in quantifying applications for interim payment in clinical negligence claims. Whilst it is geared more towards those cases where an application will be necessary, the points made ought also to be born in mind with an interim payment is being negotiated. To that end, we will not look at the requirements to be established prior to making the application under CPR 25.7(1), but suffice to say, that in clinical negligence claims where breach is not admitted, and remains in issue, obtaining interim payments is almost unheard of.

Quantifying Interim Payments Generally

A restriction is placed on the amount claimable within an application under CPR 25.7(4):

(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment. [Emphasis added.]

A useful starting point for a general discussion as to how quantifying an interim payment application ought to be approached, can be seen in the decision of Popplewell J in *Smith v Bailey* [2014] EWHC 2569 (QB), which built on the previous decision of the Court of Appeal in *Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 204. In *Smith*, the following points were set out at [19]:

(1) CPR r. 25.7(4) places a cap on the maximum amount which it is open to the Court to order by way of interim payment, being no more than a reasonable proportion of the likely amount of the final judgment (at [30]).

(2) In determining the likely amount of the final judgment, the Court should make its assessment on a conservative basis; having done so, the reasonable proportion awarded may be a high proportion of that figure (at [37], [43]).

(3) This reflects the objective of an award of an interim payment, which is to ensure that the claimant is not kept out of money to which he is entitled, whilst avoiding any risk of an overpayment (at [43]).

(4) The likely amount of a final judgment is that which will be awarded as a capital sum, not the capitalised value of a periodical payment order ("PPO") (at [31]).

(5) The Court must be careful not to fetter the discretion of the trial judge to deal with future losses by way of periodical payments rather than a capital award (at [32]).

(6) The Court must also be careful not to establish a status quo in the claimant's way of life which might have the effect of inhibiting the trial judge's freedom of decision, a danger described in Campbell v Mylchreest *as creating "an unlevel playing field" (at [4], [39]).*

(7) Accordingly the first stage is to make the assessment in relation to heads of loss which the trial judge is bound to award as a capital sum (at [36], [43]), leaving out of account heads of future loss which the trial judge might wish to deal with by a PPO. These are, strictly speaking (at [43]):

(a) general damages for pain, suffering and loss of amenity;

(b) past losses (taken at the predicted date of the trial rather than the interim payment hearing);

(c) interest on these sums.

(8) For this part of the process the Court need not normally have regard to what the claimant intends to do with the money. If he is of full age and capacity, he may spend it as he will; if not, expenditure will be controlled by the Court of Protection (at [44]). Nevertheless if the use to which the interim payment is to be put would or might have the effect of inhibiting the trial judge's freedom of decision by creating an unlevel playing field, that remains a relevant consideration (at [4]). It is not, however, a conclusive consideration: it is a factor in the discretion, and may be outweighed by the consideration that the Claimant is free to spend his damages awarded at trial as he wishes, and the amount here being considered is simply payment at the earliest reasonable opportunity of damages to which the Claimant is entitled: Campbell v Mylchreest *[1999] PIQR Q17.*

(9) The Court may in addition include elements of future loss in its assessment of the likely amount of the final judgment if but only if (a) it has a high degree of confidence that the trial judge will award them by way of a capital sum, and (b) there is a real need for the interim payment requested in advance of trial (para 38, 45).

(10) Accommodation costs are "usually" to be included within the assessment at stage one because it is "very common indeed" for accommodation costs to be awarded as a lump sum, even including those elements which relate to future running costs (at [36], [43]).

Factors (1) to (8) are often referred to as *Eeles 1* (derived from [43]-[44] of the judgment), and factors (9) and (10) as *Eeles 2*.

The next point to make is in relation to the date of quantification – particularly in respect of past losses. In *Eeles*, the date of calculation of past losses was taken to be the date of trial. More recently though, in *PAL v Davison* [2021] EWHC 1108 (QB), Yip J calculated past losses at the date of the application, and held that it would be case dependent as to whether the calculation ought to be to the date of trial or the date of the application and will depend mostly on the degree of uncertainty of those losses accruing, and the degree to which making them part of the calculation could tie the hands of the future trial judge.

Finally, the court will have regard to any likely finding of contributory negligence. That is a specific requirement of CPR 25.7(5)(a), though the relevance of that in clinical negligence claims is less prevalent.

An Example in the Clinical Negligence Context

In *AC v St Georges Healthcare NHS Trust* [2015] EWHC 3644 (QB), the claimant claimed damages for the development of cerebral palsy sustained as a result of the negligence of the doctors and midwives, in the employ of the defendant, at the time of his birth. Liability had been admitted. The claimant sought an interim payment of just over £1.2m to purchase accommodation to suit his needs, and to further fund care and psychological support up to trial.

The issue was that, due to the claimant's young age, a large section of the future losses was likely to be funded by way of PPOs. In that instance, it was not in dispute that, as established at [31] of *Eeles* and listed as factor (7) from [19] in *Smith*, the PPO claims ought not to be capitalised for part of the interim payment assessment.

In *AC*, therefore, the starting point was to quantify those elements of the claim which will be capitalised into a final judgment at trial, and should only capitalise, at this stage, those future losses (excluding those likely to be subject to PPOs) on which there was a degree of certainty. It was not disputed, however, that the claimant needed better accommodation than he currently had. The main argument by the defendant had been that to allow this interim payment now, would remove the issue of accommodation from the trial judge – since it would already have been acquired by that stage. They argued, therefore, that the claimant ought to rent accommodation until trial. This suggestion was rejected by the Court. As such, Whipple J capitalised the accommodation claim as per *Eeles*, as part of the analysis of the likely final judgment, doing so on a *Roberts v Johnstone* basis with further quantification of removal and adaptation costs. This gave

a notional final judgment amount of £1.3m excluding PPOs, of which the court ordered 90% to be paid by way of interim payment.

Compiling Evidence in Clinical Negligence Claims

It falls then to consider what should be a part of an application for an interim payment in clinical negligence claims. In many respects, the first reference point ought to be the *Eeles*/*Smith* factors. It is important to use them as a guide and to have them at the forefront of your mind when preparing evidence, and, of course, in making a quantification assessment against which a 'reasonable proportion' can be assessed. That is so regardless of whether you are a claimant or a defendant.

Likewise, regardless of which side you are on, the following are pointers for preparing to make or meet an application for interim payment:

- Focused and detailed evidence is crucial. That includes both lay evidence and expert evidence. Plainly, the amount of evidence will depend on the extent to which the prognosis is uncertain and requires further input from experts in the future.

- In terms of explaining the reasons or motivations for seeking the payment, these do not need to be set out in masses of detail if the application is made under the *Eeles 1* factors, unless the cost of acquiring specific assets directly forms the bedrock of the quantum exercise i.e. the purchase of a property. That is because under the *Eeles 1* factors, the court is not making an award which legitimises or authorises the spending in a particular way, even in cases where the claimant does not have capacity. That aspect is a matter for the Court of Protection. However, if the application is made under an *Eeles 2* factor, then detail for the reasons for the funds needs to be set out as per factor (9) as set out in *Smith*. Of course, in respect of each claim advanced, the underlying need for the claimant to be compensated does still need to be established.

- In respect of expert reports, which underpin special damages claims i.e. care reports, it is important to have their quantification of care tied into specific periods in the trial timetable, including the date of the application, so that it is clear where the figures come from and run to.

- The other matter is for prognosis reports to also be broken down into similar periods. This may be far easier for experts in clinical negligence claims where a long-term prognosis is too uncertain and will depend on a variety of factors. If the prognosis period can be broken down into stages therefore, it will assist the shorter-term quantification exercise to be made for the purposes of the application.

- Finally, some form of schedule of loss ought to be outlined and completed so far as is possible prior to the application, and then at the time of the application, some form of overview document setting out both parties' positions on each loss claimed. A useful example can be seen in the decision in *Grainger v Cooper* [2015] EWHC 1132 (QB). In that case

the claimant used a ‘Valuation Table’ which set out the positions from the schedule and counter-schedule, had a ‘conservative valuation’ column and then had a commentary column outlining why that figure was arrived at.

- There then needs to be some argument as to ‘reasonable proportion’ and why the percentage contended for ought to be awarded.

- The final point is to be realistic and flexible:
  - First, there is no limit on the number of interim payment applications which can be made. As such, if there is a lot of uncertainty, consider a plan of making smaller applications over periods where there is more certainty, and retaining the option of reviewing the position and making a further application in the future.

  - Secondly, there needs to be some give and take in the quantification exercise which realistically considers the risk that a loss will not be awarded at all, or to the extent claimed, and takes a realistic view of the impact that the application will have on the decisions available to a judge at trial.

  - Thirdly, you can have interim payments set up in instalments over defined periods – see Practice Direction 25BPD.3. That may be a useful negotiating tool which both sides could live with until trial.