

# A Claimant's Right To Apply for Further Damages Under a PDO Passes, on Death, to Their Estate and May Be Advanced by the Executor

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On Friday 22 July 2022, Johnson J handed down judgment in *Power v Bernard Hastie & Company Ltd & others* [2022] EWHC 1927 (QB) in respect of an application for an order for substitution made by the executor of the deceased's estate. The judgment provides High Court authority for the proposition that a claimant's right to seek further damages under a PDO passes, on their death, to their estate, a finding previously made by HHJ Roberts in his judgment in *Guilfoyle v North Middlesex University Hospitals NHS Trust* (County Court at Central London, 4 April 2018).

## Background

This is an asbestosis claim in which, in 1993, Kay J made a provisional damages order ['PDO'] that the five defendants pay the claimant, Mr Hammacott, damages of £5,000 for the asymptomatic pleural plaques and early asbestosis he had developed as a result of being exposed to asbestos whilst working for them, on the assumption that he would not (as a result of the acts and omissions giving rise to his claim against the defendants) develop certain conditions or diseases identified in the schedule to the PDO ['the schedule'].

Mr Hammacott died in 2017 as a result (the applicant contended) of developing condition(s) and/or disease(s) identified in the schedule. The executor of Mr Hammacott's estate, his nephew, Mr Power ['the applicant'], applied for an order that he be substituted as the claimant - in his capacity of executor of the estate - so that he could apply for further damages under the terms of the PDO (on the basis Mr Hammacott had developed the condition(s) and/or disease(s) identified in the schedule) ['the application'].

## Application / Submissions

The defendants opposed the application. The principal submissions advanced on their behalf were:

1. The statutory framework and/or the PDO itself limited the right to claim further damages under the PDO to the Claimant only;
2. By reason of the doctrine of merger (under which the claim merged into the judgment) Mr Hammacott's original cause of action was determined by the order of Kay J. It had no independent vitality thereafter. Accordingly, there was no cause of action to pass onto Mr Hammacott's estate on his death.

## Judgment

1. Does the statutory framework limit the right to claim further damages under a PDO to the Claimant only?

Johnson J acknowledged that both section 32A of the Senior Courts Act 1981 (the Act which gives the power to make provisional damages orders) and CPR 41.1(2)(c)(ii) provide that, where a provisional damages award is made, "*the injured person*" is entitled to apply for further damages under it. However, he found that there was nothing in either the Act or the rules that prevented the injured person's right to apply for further damages under a PDO from being transferred to his estate.

Therefore, he found, contrary to the defendants' submissions, the statutory framework did not limit the right to claim further damages under a PDO to the Claimant personally. In support of this finding he relied upon the concession by counsel for the defendants that had Mr Hammacott made an application for further damages under the PDO but died before that application had been heard, his estate could have taken over the application.

2. Did the terms of the PDO in this case limit the right to claim further damages under it to the Claimant personally?

The defendants argued that the statement that any application for further damages under the PDO must be made “*within the Plaintiff’s lifetime*”, which was contained within the ‘statement of agreed facts’ that accompanied the PDO, demonstrated that the parties intended that the right to claim such further damages was personal to the claimant and not to be passed on to his estate. Johnson J rejected that submission, finding that, had the intention been to limit the right to claim further damages under the PDO to the Claimant personally, “*different words would have been used in both the order and the statement of facts*”.

3. Did the relevant cause of action pass to the applicant?

Johnson J noted it was common ground between the applicant and the defendants that the only way in which the applicant might have acquired the right to pursue an application for further damages under the PDO is by operation of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 [‘the 1934 Act’], which provides (subject to specified exceptions) that causes of action vested in Mr Hammacott survived his death for the benefit of his estate.

The judge accepted “*in principle*” counsel for the defendants’ submission that, by reason of the doctrine of merger, once judgment had been given by Kay J, Mr Hammacott’s original cause of action had no continuing vitality “*... beyond that prescribed by the order of Kay J and rules of court. Mr Hammacott did not have a general continuing right to litigate his original cause of action, and no such right passed to his estate.*”

However, he found that, “*Once judgment was given for provisional damages, Mr Hammacott had a continuing residual right to seek further damages in accordance with the PDO and rules of court. That right existed where the conditions set out in the order of Kay J were satisfied. That is a right that vested in Mr Hammacott. It was therefore transferred to the applicant by operation of section 1 of the 1934 Act*” (emphasis added).

Accordingly, Johnson J found that, contrary to the defendants’ submissions, the doctrine of merger did not prevent the “*residual right*” to seek further damages under the PDO, in accordance with the terms of the PDO, which was a right that vested in Mr Hammacott, from being transferred to his estate pursuant to s. 1 of the 1934 Act and that it: “*... follows that a relevant cause of action (the right to claim further damages under the PDO) passed to the applicant.*”

Having found that there were no issues as to limitation as the PDO provided that an application for further damages under the PDO may be made “*without time limit*”, Johnson J considered that, in the above circumstances, the requirements of CPR 19.2 (4)(a) and (b) applied and were satisfied. Therefore, he acceded to the application for an order that the applicant be substituted as the claimant in the proceedings for the purposes of making an application for further damages under the PDO.

## Comment

This judgment provides High Court authority for the proposition that, generally, a claimant’s right to seek further damages under a PDO passes, on their death, to their estate, a finding previously made by HHJ Roberts in his judgment in *Guilfoyle v North Middlesex University Hospitals NHS Trust* (County Court at Central London, 4 April 2018).

However, in the writer’s opinion, Johnson J’s findings in respect of (a) the defendants’ submissions as to the terms of the order itself limiting the right to claim further damages to the claimant personally and (b) limitation, suggest that this judgment would not prevent defendants from either:

1. Seeking to draft a PDO (for agreement with a claimant) which included wording that clearly and specifically limited the right to claim further damages under a PDO:

- a) to the Claimant personally (and not his estate); and/or
- b) within a particular time;

2. Seeking to rely on such a clearly worded PDO, in an appropriate case, to oppose a similar application to that which was made in this case

Given the prevalence of PDOs in asbestosis claims, the 'take-away' from this judgment is that when drafting, agreeing or considering the wording of such orders, one should not be too hasty (Hastie)!

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