

PERSONAL INJURY DAMAGES AND ANCILLARY RELIEF

John Bolch, March 2009

I recently had cause to consider this issue in connection with one of my cases, the question, of course, being: should an award of damages for personal injury be regarded as a financial resource¹, and therefore be included as one of the assets available for distribution between the parties?

The leading case in this area remains *Wagstaff v Wagstaff*². The facts in that case were as follows: The parties were judicially separated. The husband had received substantial damages, totalling £418,000, following a road accident in which he sustained head and other injuries, rendering him paraplegic and confined to a wheelchair. The wife applied for ancillary relief and, at first instance, was awarded a lump sum of £32,000, on the basis of a clean break, with the wife retaining the former matrimonial home, which she had purchased from the local authority, at a discount, after the separation. In calculating the lump sum, the deputy registrar took into account the award of damages, but allowing a large discount for the fact that the husband's capital was derived from damages for personal injuries. The husband appealed.

Before the appeal was heard the wife sold the former matrimonial home and invested almost all of the proceeds, her only capital, in a new property which she purchased jointly with a work colleague for £65,000 with a £40,000 mortgage. She and her colleague paid the mortgage jointly, and it was agreed that on sale of the property she would receive the first £30,000, plus half of the balance of the equity. The wife did work, but only had a modest income.

The husband's circumstances were that he had purchased another property of his own, which had been adapted to his special needs. He lived there with a female friend and her children. She did not work, but cared for him. His income was derived from state benefits and interest on his savings. He had invested a sizeable part of his damages award in a business enterprise, which was not yet in profit. The appeal judge calculated that the value of his remaining capital, including the equity in his house, was some £291,000.

The appeal judge considered the s 25 criteria and held that the disability of the husband must be the paramount consideration. Counsel for the wife had conceded to the judge that, in order to pay a lump sum, the husband would have to sell either his house or his business. The judge found that the lump sum award therefore adversely affected the husband "to an

¹ Under s 25(2)(a) Matrimonial Causes Act 1973

² [1992] 1 FLR 333

unreasonable degree", whereas the wife had no immediate need for capital. Accordingly, he decided that the wife was not entitled to a lump sum.

The wife appealed to the Court of Appeal. Lady Justice Butler-Sloss, as she then was, considered that the damages could be included as one of the assets available for distribution:

"The reasons for the availability of the capital in the hands of one spouse, together with the size of the award, are relevant factors in all the circumstances of s 25. But the capital sum awarded is not sacrosanct, nor any part of it secured against the application of the other spouse. There may be instances where the sum awarded was small, and was specifically for pain and suffering, in which it would be unsuitable to order any of it to be paid to the other spouse. In some cases, the needs of the disabled spouse may absorb all the available capital, such as the requirement of residential accommodation."

She disagreed with the appeal judge's finding that the husband's disability was the paramount consideration: *"The judge's understandable sympathy for the husband led him, in my view, to give a prominence to the fact of his disability, which caused him seriously to underestimate the wife's position"*. The wife was left to support herself and the child of the family, she lacked complete security, as her existing capital would be inadequate to house herself suitably if the present arrangement broke down. She therefore found that the judge had *"erred in carrying out the balancing exercise and his decision not to order any lump sum payment to the wife was plainly wrong and cannot stand"*. Accordingly, she allowed the wife's appeal and restored the order of the deputy registrar.

The decision in *Wagstaff* was followed by Mr Justice Singer in *C v C (Financial Provision: Personal Damages)*³, who said that it and the earlier case of *Daubney v Daubney*⁴ *"establish the general proposition that damages for personal injuries are not excluded from consideration when a court conducts the s 25 exercise, but that the source of and rationale for the funds should not be ignored"*. However, in that case it was found that, notwithstanding the fact that the husband had received a very substantial sum of damages, his needs were such that there was virtually no readily available capital which might be transferred to the wife. More recently, the decision in *Wagstaff* was followed in the 2006 Northern Ireland High Court case of *McA v McA*⁵.

In conclusion, the exercise seems to be:

³ [1995] 2 FLR 171

⁴ [1976] Fam 267

⁵ (Master 39) Master Redpath June 2006

1. Damages for personal injury fall to become part of the pot to be dealt with on the ancillary relief application.
2. However, the reasons for the damages award are highly relevant to the outcome of the ancillary relief application. In particular, the needs of the party that received the award will, of course, be a major factor to take into account, alongside consideration of all of the other s.25 factors.
3. If the needs of the receiving party do not use up all of the damages then the other party may be entitled to a share of those monies, subject to the s.25 factors.

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