



A note on damages in Personal Injury Cases

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A note on Damages in Personal Injury Cases

In personal injury cases, damages are usually assessed on a once and for all basis. This means that a case cannot be re-opened for any reason once it has been settled. It is therefore important that all aspects of the case are taken into account in the settlement of the claim.

Damages comprise of two main elements; **solatium** and **patrimonial loss** (special damages).

Solatium

Solatium is compensation for pain and suffering, loss of faculty, loss of the amenities of life, or shortened expectation of life.

Solatium represents the amount which a judge or jury believes is appropriate compensation for the victim, with regard to the particular injuries and the general range of previous awards in similar cases. Although previous awards are not authorities, they are taken into consideration along with a series of other guidelines.

Solatium covers both past and future losses. Past loss should be shown on the normal balance of probabilities i.e. that something is more likely than not to be the case (a better than 50:50 likelihood that something occurred). *Future* medical problems do not require proof on the balance of probabilities.

What is needed for a claim of solatium?

All claims require a **medical report** by a suitably qualified practitioner which details the injuries, medical treatment and prognosis. This will be instructed by a Solicitor at a time and location convenient to the client.

It may also be necessary to instruct a **psychiatric report** by a suitably qualified practitioner to assess any mental illnesses suffered as a result of the incident in question. Again, this will be instructed by the Solicitor at a time and location convenient to the client.

Patrimonial Loss (special damages)

This head of damage relates to particular financial losses, expenditure and outlays. There are several headings that fall into this category; below are brief descriptions of these. It should be noted that it is of benefit to the claim if receipts/proof of payment can be produced; any documentation that shows exact outlays and expenditure is only going to strengthen a claim for patrimonial loss.

Past wage loss

Past wage loss should be proved by establishing the net pre-accident wages details; calculating the wage loss caused by absence, and then subtracting any sick pay to obtain the net loss.

Future wage loss

Future wage loss, as it sounds, relates to the loss of future earnings. Awards of future wage loss will depend on the court's assessment of the victim's employment prospects. There is a distinction made between permanent and temporary incapacity to work.

Where there is **permanent** injury and incapacity with no prospects of return to work, the approach is to establish a multiplicand, which is the likely net wage at the date of the proof. This can be obtained by reference to wages details of a comparative employee. This is then multiplied by the multiplier; this is the number of years' required to create a lump sum for compensation of the future loss.

Alternatively, in cases where incapacity to work is not permanent, the court may award a lump sum for loss of employability or for the disadvantage experienced on the labour market. This approach will almost invariably be less than the multiplicand approach. The relevant factors taken into account are:

- the severity of injury;
- the pursuer's age and work history;
- eligibility for other kinds of employment;
- wage earning capacity; and
- the security of the present employment.

Where there is a permanent incapacity which restricts but does not rule out any further employment, the courts have frequently awarded a lump sum based on two to three years loss of earnings.

A loss of employability award can be made where the pursuer is in employment at the date of proof, but the injury would put the pursuer at a disadvantage if he or she had to apply for work on the open labour market.

Pension loss

Where the injured person loses pensionable employment, there is a loss under the head of "pension loss".

Pension loss must be calculated as a lump-sum award, and is based on the actuarial valuation on the future loss of the employer's contribution to the fund, and other associated benefits. Actuarial evidence will be required to calculate a reduced future lump sum or annual pension payment losses.

The proper approach to the evaluation of a loss of retirement pension is to look at the periods before and after normal retirement age. The period *before* retirement age represents a claim for *loss of earnings*, and pension benefits received during that period should not be set off against this head of claim. The period *after* normal retirement age represents a claim for *loss of pension*, and pension benefits received after that date should be taken into account.

Claims for services

Where necessary services have been provided by a relative, the responsible person has to pay to the injured person reasonable remuneration for the relative, in the absence of an express agreement by the relative that no payment should be made in respect of those services. The claim relates to past and future services.

Relatives are defined broadly and include former spouses, cohabitees and in-laws.

Services typically will mean hospital visits, assistance with washing, dressing and other domestic tasks.

Where the services were provided over a brief recovery period, the court will typically make a modest lump sum award.

Where substantial or continuing help is provided, the court will expect evidence to be led on the weekly time spent by the relative, together with details of similar charges for such services on the open market, e.g. the local authority "home help" rates.

Services to injured person's relative

A claim arises where the injured person is unable to carry out these services. A reasonable sum is payable by way of damages. Typical examples relate to gardening, DIY home decorating and maintenance. There should be some evidence of comparable tradesmen rates, remembering that only the labour element and not the materials (which would have been used in any event) can be claimed.

Services claims in serious injury cases

Services will typically be provided by a relative, or a professional carer, or both.

A specialist cost of care report will be required; this should address and quantify the care provided to date and should set out a care plan for the future. The cost of professional care should be assessed in comparison to charges for such services on the open market, e.g. the local authority "home help" rates (*as above*). In addition an inventory of special aids and equipment required by the injured person should be provided. [This should project replacement schedules and costs]

In claims for future care costs there is usually only one contingency, namely the expected mortality of the injured person.

Recovery of benefits

Essentially, any benefits you received as a result of your accident can be recovered post-settlement. This is to prevent unjustified enrichment occurring.

What can be recovered?

Recoupment of benefits takes effect only on damages for loss of earnings, care costs, and loss of mobility. Damages for pain and suffering are effectively exempt from any clawback.

Like-for-like deductions

Only like-for-like deductions will be allowed, e.g. attendance allowance cannot be deducted from wage loss, but only from a cost of care award.

There is to be no adjustment to the benefits position to reflect any finding of contributory negligence. The same principles apply to extra-judicial settlements.

Below is a table that indicates which benefits are recoverable under which heads of compensation.

Like for Like Deductions Sch.2 SS(RB)A 1997

Head of Compensation	Benefit
1. Compensation for earnings lost during the relevant period	Disability working allowance Disablement pension payable under s.103 of the 1992 Act Incapacity Benefit Income support Invalidity pension and allowance Jobseeker's allowance Reduced earnings allowance Severe disablement allowance

	Sickness benefit Statutory sick pay Unemployability supplement Unemployment benefit
2. Compensation for cost of care incurred during the relevant period	Attendance allowance Care component of disability living allowance Disablement pension increase payable under s.104 or s.105 of the 1992 Act
3. Compensation for loss of mobility during the relevant period	Mobility allowance Mobility component of disability living allowance

Provisional damages

The availability of provisional damages forms an exception to the rule that litigation is final, with damages to be assessed on a once-and-for-all basis. In certain cases the courts may make an award of provisional damages, leaving the pursuer an opportunity to return to court for further damages in the future.

When may provisional damages be awarded?

There are a series of quite detailed requirements in order for an award of provisional damages to be awarded. The rules are interpreted restrictively, and in practice the courts award provisional damages only where the deterioration will cause a major impact on the injured person's life.

The defender or responsible person at the time of the act or omission must be a public authority, a public corporation or insured or otherwise indemnified in respect of the claim, and it must be proved or admitted that there is a risk that the injured person will develop some serious disease or suffer some serious deterioration in physical and mental condition.

How does an award of provisional damages work?

Where a claim for provisional damages applies, the claim is valued on the basis that deterioration will not develop, but the pursuer is allowed to return to the court in the event that it does. What this means inevitably is that any award of provisional damages will be less than a once-and-for-all award. If provisional damages are to be obtained, it is critical to obtain a medical report which specifically addresses the nature of the anticipated deterioration, the risks expressed as a percentage if possible, the timescale, and the impact of the deterioration on the victim's everyday life and employment.

Structured settlements

Where large sums of money are recovered in damages, representatives should consider a structured settlement, particularly where damages are to cover long-term future care costs.

A structure is an agreement between the pursuer and the insurer for the defender that all or part of the lump sum damages should be put to the purchase of an allowance.

Provided that the agreement is in the format agreed by the Inland Revenue and the Association of British Insurers, the annuity will produce tax-free periodical payments during the lifetime of the pursuer.

The disadvantages of the structure are:

- (a) it lasts only for the lifetime of the pursuer (although there may be a guaranteed minimum period by agreement), and no sums will accrue to the victim's estate on death;
- (b) the insurers may seek a discount on the lump sum allocated to purchase the annuity, when compared to a conventional damages award;
- (c) current annuity rates are considered to be low, and financial advice may be that prudent investment on the open market will produce a better rate of return.

Structured settlements are available only by agreement and must be put in place before any final decree. In appropriate cases agents should seek independent financial advice.