

What to do when you've suffered injury

Relationship between personal injury compensation and financial planning



ABOUT THE AUTHOR

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In general, professionals involved in personal or criminal injury litigation are now aware that significant benefits can accrue to clients if any award arising from such litigation is settled into a trust. For many years, the Social Security authorities accepted the general principle that money arising from compensation for injury should be excluded when assessing means-tested benefits, but it was not until 1987 (Income Support (General) Regulations 1987 Schedule 10, Para 12) that this was enshrined in statute.

To the surprise of many, there is no such thing in law as a personal injury trust; it is simply a trust – be it bare, discretionary, or whatever – that is settled with funds arising as a result of a personal injury. But if the beneficiary of such a trust is also the claimant in the case, the Benefits Agency must disregard any entitlement to receive money from the trust from their calculations when assessing such an individual for means-tested benefits.

Some will argue that anyone who receives a claim can afford to simply ignore benefits, and this may be the case in some of the larger payouts. However, anyone familiar with such cases will be very aware that entitlement to Income Support sets in train a host of other benefits. The Income Support payment is not a particularly large sum, but usually there comes with it the entitlement to Housing Benefit,

free prescriptions, help with school meals and uniforms, and so on; ancillary benefits which can often be more valuable than the actual weekly emolument, and which may be very useful to those who have received a rather smaller claim. In any case, discounting benefits overlooks the principle and the legislation noted above – that receipt of compensation should not disqualify the claimant from benefits; otherwise the claim money has to be used for day-to-day living and the government (because they are not having to pay benefits) becomes the main beneficiary of the compensation, and not the claimant.

Sooner or later

Solicitors and barristers sometimes argue in favour of waiting until the case is settled before addressing trust issues, thus separating the legal and financial issues, but there are compelling reasons for settling the trust, and involving a financial planner, sooner rather than later.

I suspect most solicitors dealing with any volume of personal injury cases, of any size, will have witnessed the claimant experiencing marital breakdown, contributed to by the stress of the injury and the litigation. Any self-respecting matrimonial lawyer will claim a share of the settlement in ancillary relief proceedings. Likewise, if the proceeds of litigation are paid personally to a bankrupt claimant, they will almost certainly become the property of the Trustee in Bankruptcy. Also, if the claimant loses his or her legal capacity before the case is settled, (or never had capacity in the first place, as invariably happens in cases of medical negligence at birth, for example) the property will become subject to

the Court of Protection, which is convoluted in administration and consequently costly. Other potential problem situations will no doubt occur to the reader.

Early settlement of a trust is not a silver bullet in all such cases, but it can only help. Courts, matrimonial ones in particular, may seek to ignore a trust and make an award regardless, but the longer the time between settling a trust, and any divorce or bankruptcy, the less risk there is of a successful argument that the main purpose of the trust was to deprive others of a share of the funds.

Arranging a trust without the claim being settled is accomplished by the simple expedient of a loan from the settlor to the trustees, repayable when the case is settled so as not to contaminate the trust with funds not related to the injury.

At the other extreme, if, for some reason, a trust was not settled at the time of the award, it can be done later without detriment to the effectiveness of the trust. The writer has advised a client where four years has elapsed since the award before the client settled the proceeds into trust and successfully resubmitted a claim for Income Support. The crucial point is that the award must be separately identifiable, perhaps in a distinct investment or a different bank account. Once the claim is lumped into the client's general funds, it is too late; Humpty Dumpty cannot be put together again.

Getting the most out of it

Working with the recipients of personal injury compensation can be extraordinarily rewarding for all concerned. Obviously, the financial arrangements are necessarily of great



benefit to the injured parties, but consider that the legal team involved have the satisfaction of seeing the fruition of their labours put to good use, and the financial planner has the opportunity, perhaps more so than in any other type of case, to see his or her skills employed to make a real difference.

Sudden flows of wealth can cause emotional difficulties, particularly with clients who are already vulnerable because of serious injury or disability. Many such clients have never had access to, or control of, more than a few thousand pounds at any one time. Often the time between injury and settlement is one of financial hardship. The easing of the pressure of having no money is replaced by an entirely new set of problems.

A financial planner has the task of showing clients how the compensation can be a tool to help them achieve everything that is important to them during the rest of their lives, and to work with them to ensure that possibilities become realities.

If ever there was a tailor-made situation for a lifetime cashflow model, large personal injury cases qualify. Clients are paid a one-off, fixed amount of money, to which they are extremely unlikely ever to add. What are they going to do with it? Often, claimants and their families have existed without anything other than the bare necessities for a long time, often six or seven years or more, and the amount of money now at their disposal can be incomprehensible to them. The urge to splash out is understandably very strong, and a good financial planner will be honest and very firm and tell the clients the truth about this money – it is all they will ever have, and it must not be wasted; it must only

be spent on things that are very important to them. To do this properly requires that their costed objectives are fed into a cashflow model covering the rest of their lives, using this to create a budget for them to run on. But what is really important to them?

Like to have, need to have

Values-based financial planning is an incredibly powerful tool for discovering what a client really wants. Instead of simply asking what the clients wants to do with the money, the planner delves deep into the clients' innermost psyche, to discover what really matters to them. This can be very difficult, but the rewards are high for all concerned. For the client, they achieve a much better understanding of what is important to them, and by hanging their objectives for the trust fund on hooks defined by these values, they become much more engaged. Do clients get excited about budgeting GBP10,000 a year for additional living costs? Not in my experience. Would (for example) a paraplegic client become engaged with a financial plan that provided the financial wherewithal to make him less dependent on his wife and allow her a couple of hours more a day to herself? He would, if that was what was important to him.

For the trustees (and the financial planner) an engaged client, once he understands that the financial plan is in place to help him achieve the objectives that are really important to him, is much less likely to change his mind about what he wants to do, and much more likely to accept the advice of the planner and the trustees about what needs to be done on an ongoing basis.

Focusing on needs, what really are needs, not immediate whims, saves clients from allowing funds to be diverted to less important matters. Anyone that has dealt with these cases will know that very soon after news gets out, all sorts of people: friends, relatives, sundry hangers-on, seem to think they have a claim on some of the money. By having the funds in trust, the clients can legitimately say that they have no control of the money, and, because they know what it is they really need the money for, they will not want it to be diverted anyway.

Finally, the same plan can be used as the basis for trustees' investment decisions. The best benchmark for investment returns must surely be the growth rate needed to deliver the client's objectives, rather than any arbitrary industry index. Clients are not interested in technical benchmarks; they want to be certain that they will be financially secure. A good financial plan makes the trustees' job easier by defining the return needed, which can be matched to an asset allocation model, and checked against the risk profile of the client (and possibly the trustees).

Lawyers, trustees and financial planners working together with aligned interests? What a good idea! And it makes for very satisfied clients, too. ■

1. Personal injury trusts must not be confused with 'disabled trusts' introduced by *Finance Act 2006* to allow provision for vulnerable persons by way of trust without triggering an immediate charge to IHT. A personal injury trust can also be a 'disabled trust' but is not necessarily so.