

# PI Claims: Considerations when representing a Claimant who lives outside of the Jurisdiction

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In England and Wales, we have a very well-established compensation system designed to meet the financial needs of individuals who have suffered injury at the fault of another. Some of these well-established principles can be taken for granted when quantifying claims for individuals who live in England and Wales, but what happens when the claimant moves to reside in another jurisdiction?

This article is designed to raise some of the issues that need to be considered when representing a claimant who was injured in England and Wales, but no longer lives in this jurisdiction.

## Tax

It is established by statute (Section 51 (2) TCGA 1992) that compensation awarded as part of a PI claim isn't taxable in the hands of the individual. But this might not necessarily be the case in other jurisdictions, especially those with alternative compensation systems. Is your client potentially liable to pay tax on the lump sum award and / or any annual periodical payments that might be agreed upon settlement? If so, how can this potential tax liability be mitigated? This is an issue which requires expert evidence and should be considered before directions are set.

In a case concerning a child who resided in New Zealand, tax wasn't payable on the capital lump sum but might have been on any annual periodical payment (APP). Consideration therefore needed to be given as to how to best mitigate that risk. Considerations included, but were not limited to:

1. Would the Defendant agree to a tax indemnity?
2. Could you gross up the APPs?
3. Could you capitalise the APPs using a more advantageous discount rate to compensate the claimant for the risks associated with an uncertain life expectancy?
4. Is there a tax authority which could give a binding ruling on the issue in advance of any settlement / trial?

## Discount Rate

In England and Wales, we apply the England and Wales PI discount rate when quantifying all future losses in personal injury claims. This discount rate is set by the Lord Chancellor in a way that reflects the current economic climate and costs of investing in England and Wales.

If your claimant lives outside of England and Wales, could it be argued under Section 1A(2) of the Damages Act 1996 that it is '*more appropriate*' in the case in question to take a different rate of return into account?

This is an issue which requires expert evidence from actuarial and economics experts, who will have to grapple over what methodology to use in determining the '*more appropriate*' discount rate. Should you be going back to first principles of full compensation (*Wells v Wells*) and restitutionary damages? Or should you, and is it even possible to, attempt to follow the approach taken by the Lord Chancellor when setting the PI discount rate in England and Wales?

## Indexation of the PPO

In England and Wales, if a PI settlement is agreed by way of a lump sum, plus annual periodical payments for (usually) care and case management, those annual payments are linked to an index which ensures the payments increase over the years in line with inflation. In England and Wales cases, ASHE 6115 is usually the index to which the PPO is linked pursuant to Section 2(8) of the Damages Act 1996. Section 2(9) of the same Act however allows that to be disapplied.

If a claimant residing outside of the jurisdiction is paying for care and case management, then you should be considering whether an index which relates to price / wage increases in that country should apply. Again, this is an issue which requires expert evidence from an economist.

## Currency Issues and Exchange Rate Risk

With claimants residing outside of the jurisdiction, there are likely to be different currencies at play. It is important to consider whether there is an exchange risk associated with converting money from GBP to an alternative currency and determine ways to mitigate that risk. Do you need to plead your Schedule in the currency in which the losses have been and will continue to be incurred? Should your settlement agreement / Order be based on payment in the currency of the country where the money is designed to be spent? Will you need to plead your schedule in two or more different currencies and convert it all into one currency at settlement?

Should an exchange rate be agreed at the point of settlement?

CPR Rule 16 and its Practice Direction sets out the requirements where a claim is for a sum of money expressed in a foreign currency.

Issues could potentially arise when making and receiving Part 36 offers where a claim is in GBP but an award is in a foreign currency, in particular issues around whether the award is more or less advantageous than a previous offer.

## Managing Property and Finances when the Claimant Lacks Capacity

In England and Wales, when a claimant lacks capacity, or is likely to lack capacity at the age of 18, a Deputy is appointed by the Court of Protection to make decisions on their behalf and manage their property, finances and affairs. But if you have a claimant who resides outside of England and Wales, the question arises as to whether the Court of Protection in England and Wales has the jurisdiction to appoint a Deputy for the claimant.

If the Court of Protection in England and Wales doesn't have jurisdiction, it becomes necessary to explore the closest equivalent mechanisms available in the country in which the claimant resides. It turns out that in New Zealand, this was in the form of a Professional Trustee (a bit like a PI Trust in England and Wales) or a Property Manager.

This is an issue which requires specialist expert evidence, and the Court will have to approve any mechanism identified to manage the claimant's funds on an interim and final basis.

## Experts Outside of the Jurisdiction

When representing a claimant who resides outside of the jurisdiction, expert evidence from foreign experts is likely to be required. It will then be necessary to ensure that any reports obtained are compliant with CPR Part 35 and that the expert understands the litigation process in England and Wales. This can be taken for granted when using experienced experts in England and Wales.

A further consideration relates to the rules around summoning experts in alternative jurisdictions. Any attempt to serve a witness summons outside England and Wales will not be binding. Instead, a process set out under CPR Rule 34 must be followed which involves the Court sending a Letter of Request, which is a request made by a judicial authority of one contracting state to the Hague Convention to the competent authority of another contracting state either to obtain evidence or to perform some other judicial act. The contents of the Letter of Request are set out in Article 3 of the Hague Convention.

The RCJ have a foreign process department who can advise on summoning witnesses outside of the jurisdiction and the Foreign Commonwealth Office can advise on what restrictions / requirements there are for witnesses giving evidence via video link in a Court in England and Wales, from other jurisdictions.

If your case does end up going to trial, do you need to apply for and arrange for witnesses to give expert evidence via video link?

## Losses in other Countries

If the financial losses of the claimant are to be incurred in another country, it is important that your experts provide an opinion of the likely costs of meeting the claimant's needs in that country. Your experts are going to have to do their research on local accommodation and adaptation costs, care rates, the cost of aids and equipment, any local VAT equivalent taxes and additional employer costs.

## Case Managers

It is well established that in cases in England and Wales concerning severe injury that Case Managers are usually appointed to advocate for the claimant and to help organise and facilitate the necessary rehabilitation package. Case Managers exist in England and Wales because of our PI compensation system, but this might not necessarily be the case in other countries.

In a case concerning a child in New Zealand, it became apparent that Case Managers didn't really exist due to their No-Fault Compensation System. As such, a Case Manager based in England, who happened to be from New Zealand, was appointed on an outreach basis.

## Life Expectancy

Does your life expectancy expert need to consider any adjustments to their life expectancy estimations based on the county in which the claimant lives?

## Practical Considerations

In addition to the legal and procedural considerations set out above, there are also practical issues to consider:

1. Is there a language barrier? Do you need to work with a translator and have key documents translated? Any witness whose first language is not English will have to give their evidence in their first language and the CPR requirements in this area will have to be followed closely. These issues will cause substantial increases in costs and will have to be budgeted for in full. Consideration also needs to be given to whether this means your client / witness is classed as vulnerable for the purposes of proceedings.
2. Should you be seeking out Leading Counsel / Counsel who has experience in the issues which arise in these sorts of cases?
3. Are there other legal advisors from whom you can seek advice on issues which fall outside of your area of expertise? Court of Protection Lawyers? International Personal Injury lawyers? Trust lawyers?
4. Do you or anyone in the firm have connections in other countries, which you could use to get recommendations for experts or a steer on where to look?
5. Is there a time difference you have to work with? For New Zealand, it meant early morning or late evening conferences, and a Joint Settlement Meeting across different time slots first thing in the morning and in the evening / into the night.

The list of considerations above is not designed to be exhaustive and there may well be other issues that have arisen in your cases where claimants have resided in other jurisdictions. I would be interested to hear from you if that has been the case. I hope at least that this article has provided food for thought on some of the things to consider when your client says to you: *'I'm thinking about moving to Australia'*.