Court of Appeal

*Flora *v* Wakom (Heathrow) Ltd

[2006] EWCA Civ 1103

2006 July 11, 12; 28 Sir Mark Potter P, Brooke and Moore-Bick LJJ

Damages — Personal injuries — Future loss and expenses — Assessment — Variation of periodical payments — Whether to be calculated by reference to retail prices index or other index — Whether other index to be used only in exceptional circumstances — Damages Act 1996 (c 48), s 2(8)(9) (as substituted by Courts Act 2003 (c 39), s 100(1))

The claimant had been severely injured and claimed damages from the defendant for, inter alia, loss of earnings and the costs of his future care. The defendant admitted liability. In his statement of case the claimant contended that if the court made an order under section 2(1) of the Damages Act 1996[1] that the damages take the form of periodical payments, it should make an order, under section 2(9) of that Act, disapplying or modifying the effect of section 2(8) by providing for the amount of such payments to vary by reference to a wage-related index rather than by reference to the retail prices index. The claimant also sought permission to adduce expert evidence in support of his contention that a wage-related index would be more suitable than the retail prices index as the mechanism for varying the sums payable under any periodical payments order. The judge dismissed the defendant's application to strike out the relevant parts of the statement of case and to exclude the evidence of the expert.

On the defendant's appeal—

Held, dismissing the appeal, that section 2(8) of the 1996 Act prescribed that if a periodical payments order did not identify on its face the manner in which the amount of the payments was to vary in order to maintain their real value then it was to be treated as providing for the payments to vary by reference to the retail prices index unless the order contained provision of a type identified in section 2(9) disapplying or modifying the effect of section 2(8); that there was nothing in the language of those subsections to suggest that the power to make provision such as identified in section 2(9) might only be triggered in an exceptional case, nor was there any indication in section 2 of the 1996 Act that Parliament intended to depart from the principle that a victim of a tort was entitled to be compensated as nearly as possible in full for all pecuniary losses; and that, accordingly, the claimant should be allowed to advance his statement of case and to adduce the expert evidence at trial, and it would be for the trial judge to make such order for index-linking the periodical payments as he considered appropriate and fair in all the circumstances (post, paras 10, 19, 28–29, 37–40).

Wells v Wells [1999] 1 AC 345, HL(E) considered.

Decision of Sir Michael Turner [2005] EWHC 2822 (QB) affirmed.

The following cases are referred to in the judgment of Brooke LJ:

Cooke v United Bristol Healthcare NHS Trust [2003] EWCA Civ 1370; [2004] 1 WLR 251; [2004] 1 All ER 797, CA

Cookson v Knowles [1979] AC 556; [1978] 2 WLR 978; [1978] 2 All ER 604, HL(E)

Harding v Wealands [2006] UKHL 32; [2006] 3 WLR 83; [2006] 4 All ER 1, HL(E)

Heil v Rankin [2001] QB 272; [2000] 2 WLR 1173; [2000] 3 All ER 138, CA

Lim Poh Choo v Camden and Islington Area Health Authority [1980] AC 174; [1979] 3 WLR 44; [1979] 2 All ER 910, HL(E)

[1] Damages Act 1996, s 2(8)(9), as substituted: see post, para 4.

Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, HL(Sc)
Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42, HL(E)
R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349; [2001] 2 WLR 15; [2001] 1 All ER 195, HL(E)
R (Quintavalle) v Secretary of State for Health [2003] UKHL 13; [2003] 2 AC 687; [2003] 2 WLR 692; [2003] 2 All ER 113, HL(E)
R (S) v Chief Constable of the South Yorkshire Police [2004] UKHL 39; [2004] 1 WLR 2196; [2004] 4 All ER 193, HL(E)
R (Westminster City Council) v National Asylum Support Service [2002] UKHL 38; [2002] 1 WLR 2956; [2002] 4 All ER 654, HL(E)
Robinson v Secretary of State for Northern Ireland [2002] UKHL 32; [2002] NI 390, HL(NI)
Warren v Northern General Hospital NHS Trust (No 2) [2000] 1 WLR 1404, CA
Warriner v Warriner [2002] EWCA Civ 81; [2002] 1 WLR 1703; [2003] 3 All ER 447, CA
Wells v Wells [1999] 1 AC 345; [1998] 3 WLR 329; [1998] 3 All ER 481, HL(E)

The following additional cases were cited in argument:

Taylor v O'Connor [1971] AC 115; [1970] 2 WLR 472; [1970] 1 All ER 365, HL(E)
Wilson v First County Trust Ltd (No 2) [2003] UKHL 40; [2004] 1 AC 816; [2003] 3 WLR 568; [2003] 4 All ER 97, HL(E)

The following additional cases, although not cited, were referred to in the skeleton arguments:

Hunt v Severs [1994] 2 AC 350; [1994] 2 WLR 602; [1994] 2 All ER 385, HL(E)
Roberts v Johnstone [1989] QB 878; [1988] 3 WLR 1247, CA

INTERLOCUTORY APPEAL from Sir Michael Turner sitting as a judge of the Queen's Bench Division

By a claim form the claimant, Tarlochan Singh Flora, brought a claim against the defendant, Wakom (Heathrow) Ltd, for damages for personal injuries. The defendant applied to strike out those parts of the claimant's statement of case which related to the application of section 2(9) of the Damages Act 1996 to any periodical payments order that might be made in the claimant's favour and to exclude the evidence of Dr Victoria Wass which the claimant wished to adduce dealing with what would be the appropriate index to be applied to any periodical payments order made. On 7 December 2005 Sir Michael Turner refused the application.

By a notice of appeal dated 21 December 2005 and pursuant to permission granted by the Court of Appeal (May and Latham LJJ) on 6 February 2006 the defendant appealed. The grounds of the appeal were, inter alia, that the judge had failed to recognise that the language of section 2(8) of the Damages Act 1996, when read together with section 2(9) of the Act, CPR r 41.8(1) and parliamentary intention, clearly established that in unexceptional cases the retail prices index was the index to which periodical payments were to be linked.

By a respondent's notice dated 17 February 2006 the claimant sought to uphold the judge's order on the grounds that the defendant's proposed interpretation of section 2(8)(9) of the 1996 Act was inconsistent with the full compensation principle as articulated in *Wells v Wells* [1999] 1 AC 345 and that, since Parliament had intended the courts to have an unfettered discretion to choose whichever index accurately achieved the object of full compensation, section 2(8) was a deeming or default provision so that the

periodical payments award would only be linked to the retail prices index in the absence of a specified link to any other index. A

The facts are stated in the judgment of Brooke LJ.

Michael Pooles QC and *Oliver Ticciati* for the defendant.
Robert Glancy QC and *Robert Weir* for the claimant.

Cur adv vult B

28 July. The following judgments were handed down.

BROOKE LJ

1 This is an appeal by the defendant from an order of Sir Michael Turner, sitting as a judge of the Queen's Bench Division, on 7 December 2005, whereby he dismissed its application to strike out 11 paragraphs of the claimant's statement of case and to exclude the evidence of a particular expert witness. The appeal raises an important point on the construction of section 2(8)(9) of the Damages Act 1996. C

2 These two subsections, together with sections 2A and 2B, were substituted for section 2 of the original Act with effect from 1 April 2005 by section 100 of the Courts Act 2003 and the Courts Act 2003 (Commencement No 10) Order 2005 (SI 2005/910). The section as originally enacted gave the court power to make an order for periodical payments in a personal injuries case provided that the parties consented to the making of such an order. Section 2(1), as substituted, provides: D

> "A court awarding damages for future pecuniary loss in respect of personal injury—(a) may order that the damages are wholly or partly to take the form of periodical payments, and (b) shall consider whether to make that order." E

3 In other words, the court is obliged in every personal injury case involving a claim for damages for future pecuniary loss to consider whether to make such an order. This is why the present appeal has an importance transcending the significance of the dispute between the present parties, which is concerned with the consequences of a very serious workplace accident. On 13 May 2002 the 50-year-old claimant fell 35 feet from a ramp. His annual loss of earnings has been calculated at just under £12,000 and his annual need for care has been valued at between £18,000 and £27,000. Liability has been admitted, and only the amount of compensation, and the form of the order for compensation, is in issue. F G

4 The dispute centres round the interpretation of section 2(8)(9) of the 1996 Act, which provide:

> "(8) An order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the retail prices index (within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988) at such times, and in such a manner, as may be determined by or in accordance with Civil Procedure Rules. H
>
> "(9) But an order for periodical payments may include provision—(a) disapplying subsection (8), or (b) modifying the effect of subsection (8)."

A 5 The claimant maintains that subsection (8) identifies the default position, and that a court may make the orders identified in subsection (9) whenever it appears just to do so. The defendant, on the other hand, maintains that subsection (8) provides for the order a court will ordinarily make, and subsection (9) may only be triggered in exceptional circumstances. It is common ground that so far as cases involving severe injuries are concerned there is nothing particularly exceptional about the B present case. The claimant's injuries have deprived him of the ability to work, and he has to rely on others to support his daily needs, but this is a common feature of many cases of this type.

6 The parts of the claimant's statement of case which the defendant wishes to strike out are concerned to identify the reasons why he contends that a wage-related index such as the average earnings index ("the AEI") C would be more suitable than the retail prices index ("the RPI") as the mechanism for varying the sums payable under the periodical payments order. In support of his case he wishes to rely on the expert, Dr Victoria Wass, whose evidence the defendant seeks to exclude. He wishes to argue that the latter index is not a reliable measure of wage inflation, and because the court will be largely concerned with assessing compensation for future loss of earnings (which are of necessity wage-related) and the D cost of future care (which is largely, if not entirely, wage-dependent), he would not receive full compensation through an order under section 2 of the 1996 Act linked to the RPI given that wage inflation has historically outstripped RPI inflation, and that it is legitimate, he says, to refer to the past as a guide to what the future may bring. It was conceded for the purposes of the defendant's application that Dr Wass's evidence was E capable of demonstrating that in future there would or might be a shortfall between the actual or likely cost of providing for his needs throughout his lifetime and the amount he would receive under a periodical payments order linked to the RPI.

7 On the present appeal it is not our job to express any views about the merits of his case in this respect. If this appeal is dismissed it will proceed to trial, and it will be for the trial judge to make appropriate findings on the F evidence before him or her. Sir Michael Turner, who has immense experience in this field of litigation, expressed the view when refusing permission to appeal that an appeal at this interlocutory stage would not enable this court to give the definitive guidance which was plainly required. Latham LJ however, with whom May LJ agreed, decided to grant permission to appeal after being told that the relationship between G section 2(8) and 2(9) of the 1996 Act was an issue of importance which was creating concern to courts all round the country. He considered that there was sufficient material already before the court to enable it to make an early determination on the issue of construction without having to await the consideration of detailed arguments based on the respective merits of the two indices in the present context.

H 8 The primary submission of Mr Pooles, who appeared for the defendant, was that the language of the two subsections was clear and that there was no need for us to look at Hansard as an aid to interpretation. If, contrary to this submission, we found any ambiguity in the words used by Parliament, we should consider the extracts from the debate in the House of Lords on the committee and report stages and on the third reading of the bill,

and these would help us to resolve any ambiguity in his client's favour. Mr Glancy, who appeared for the claimant, submitted that the language was quite clear—although in an opposite sense to that contended for by Mr Pooles—and that in those circumstances evidence from Hansard was inadmissible. We read the extracts to which Mr Pooles referred us without ruling one way or another in relation to the rival submissions.

9 The House of Lords has made it clear that reference to statements made in Parliament about the meaning or effect of a particular clause in a Bill is only permissible for the purpose of construing the equivalent section, when enacted, if three conditions are all satisfied. Those conditions were first identified by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, and are clearly set out by Lord Bingham of Cornhill in his speech in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 391–392. In that case he and other members of the House of Lords made it clear that these conditions should be strictly insisted upon: see pp 392D, 408C and 413G. The first of these conditions is that such reference was permissible only where legislation was ambiguous or obscure, or led to an absurdity.

10 In my judgment this condition is not satisfied in the present case. If a periodical payments order does not identify on its face the manner in which the amount of the payments is to vary (in order to maintain their real value) then section 2(8) of the 1996 Act prescribes that it is to be treated as providing for what is set out in that subsection unless the order contains provision of a type identified in section 2(9). There is nothing in the language of these subsections to suggest that the power to make provision such as identified in section 2(9) may only be triggered in an exceptional case (whatever may be the meaning of that phrase). Incidentally, it is interesting to see that the same neutrality is apparent in CPR r 41.8(1)(d), which simply provides:

> "Where the court awards damages in the form of periodical payments, the order must specify . . . (d) that the amount of the payments shall vary annually by reference to the retail prices index, unless the court orders otherwise under section 2(9) of the 1996 Act."

11 Mr Pooles referred us to a passage in the speech of Lord Carswell in *Harding v Wealands* [2006] 3 WLR 83, para 81, but there is nothing in that speech, or in the speeches of the other members of the House of Lords in that case, to suggest that the strict conditions laid down in *Pepper v Hart* and the *Spath Holme* case have been relaxed. Lord Carswell perceived "sufficient possible ambiguity" in *Harding's* case, para 83 to justify resort to Hansard as a confirmatory aid, a perception not shared by the other members of the House of Lords.

12 My belief that it is illegitimate in this case to rely on what was said by a minister at an advanced stage of the progress of the Bill through the House of Lords is fortified by a passage in the speech of Lord Hoffmann in *Robinson v Secretary of State for Northern Ireland* [2002] NI 390, para 40:

> "I am not sure that it is sufficiently understood that it will be very rare indeed for an Act of Parliament to be construed by the courts as meaning something different from what it would be understood to mean by a

A member of the public who was aware of all the material forming the background to its enactment but who was not privy to what had been said by individual members (including ministers) during the debates in one or other House of Parliament. And if such a situation should arise, the House may have to consider the conceptual and constitutional difficulties which are discussed by my noble and learned friend Lord Steyn in his B Hart Lecture: '*Pepper v Hart*; A Re-examination' (2001) 21 Oxford Journal of Legal Studies 59 and were not in my view fully answered in *Pepper v Hart*."

Lord Hoffmann no doubt had in mind, among other things, the passage in that lecture in which Lord Steyn said, at p 65:

"Parliament can legislate only through the combined action of both C Houses . . . Although the legislative powers of Parliament are exercised by human beings, Parliament as an abstraction cannot have a state of mind like an individual. Parliament legislates by the use of general words. It would be strange use of language to say even of an individual legislator that he intended something in regard to the meaning of a Bill which was never present in his mind. To ascribe to all, or a plurality of legislators, an D intention in respect of the meaning of a clause in a complex Bill and how it interacts with a ministerial explanation is difficult. The ministerial explanation in *Pepper v Hart* was made in the House of Commons only. What is said in one House in debates is not formally or in reality known to the members of the other House. How can it then be said that the minister's statement represents the intention of Parliament, i e both Houses."

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13 The remainder of this long paragraph need not be cited here, but it provides a powerful reminder of the problems inherent in access to Hansard unless Lord Browne-Wilkinson's three conditions are all met. In *Robinson's* case [2002] NI 390 Lord Hobhouse of Woodborough spoke powerfully to similar effect, at para 65, and Lord Millett, at para 76, expressed himself fully in agreement with Lord Hoffmann.

F **14** We were also referred to the explanatory notes to the Courts Act 2003, which by section 100 effected the change in the law with which we are concerned on this appeal. Para 354 of these notes forms part of the explanation of the new provisions as to periodical payments. It states:

"To ensure that the real value of periodical payments is preserved over the whole period for which they are payable, new section 2 provides that G periodical payments orders will be treated as linking the payments to the retail prices index ('RPI'). The timing and manner of adjustments to take account of inflation will be determined by, or in accordance with, the Civil Procedure Rules. It is expected that, as now, periodical payments will be linked to RPI in the great majority of cases. However subsection (9) preserves the court's power to make different provision H where circumstances make it appropriate."

Mr Pooles argued that the expectation that periodical payments would be linked to the RPI in the great majority of cases would be belied if we were to interpret the two subsections at the heart of this appeal in the way favoured by Mr Glancy. The reason for this is that it is common ground on this appeal

that the greater part of the awards for future pecuniary loss is wage-related: see para 6 above.

15 The use that courts may make of explanatory notes as an aid to construction was explained by Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956, paras 2–6; see also *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, para 4. As Lord Steyn says in the *National Asylum Support Service* case, explanatory notes accompany a Bill on introduction and are updated in the light of changes to the Bill made in the parliamentary process. They are prepared by the government department responsible for the legislation. They do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. They are intended to be neutral in political tone; they aim to explain the effect of the text and not to justify it.

16 The text of an Act does not have to be ambiguous before a court may be permitted to take into account explanatory notes in order to understand the contextual scene in which the Act is set: see the *National Asylum Support Service* case, para 5. In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction. Lord Steyn, however, ended his exposition of the value of explanatory notes as an aid to construction by saying [2002] 1 WLR 2956, para 6:

> "What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in explanatory notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."

17 The value of para 354 of the explanatory notes as an aid to construction in the present appeal is that it identifies the contextual scene as containing a determination "To ensure that the real value of periodical payments is preserved over the whole period for which they are payable". That is all. If, however, it is impossible to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament, it is in my judgment equally impossible to treat the Government's expectations as reflecting the will of Parliament. We are all too familiar with statutes having a contrary result to that which the Government expected through no fault of the courts which interpreted them.

18 The explanatory note to the Courts Act 2003 is helpful in that it confirms that the principal purpose of these provisions is to achieve the aim identified by the Lord Chancellor when he gave his reasons for setting the discount rate mentioned in section 1 of the 1996 Act at 2·5% in a statement on 27 July 2001. He quoted this passage from the speech of Lord Hope of Craighead in *Wells v Wells* [1999] 1 AC 345, 390:

> "the object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position he or she would have been in but for the accident. The aim is to award such a sum of money as will amount to no more, and at the same time no less, than the net loss."

A **19** This is merely an updated restatement of what Lord Blackburn said in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39, when he spoke of the

> "general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the
B party who has been injured . . . in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation . . ."

There is no indication in section 2 of the 1996 Act, as substituted, that Parliament intended to depart from this well known principle, unless we were to adopt the interpretation of section 2(8) favoured by the defendant's
C insurers.

20 Mr Pooles also urged us to take into account the contents of the regulatory impact assessment ("RIA") which accompanied this part of the Courts Bill when it was presented to Parliament. This, too, reflects the Government's expectation of the effect of the Act. Whatever may be the merits of such a document in a different context, it is in my judgment of no
D value at all when the provision with which we are concerned was introduced by amendment at a late stage of the Bill's passage through the House of Lords, and when no reference at all was made to indexation either in the RIA or in the departmental consultation paper that preceded the introduction of the Bill.

21 We were also encouraged to take into account recent history surrounding the identification of the appropriate discount rate for the
E purpose of calculating lump sum awards in personal injury cases and the July 2001 statement by the Lord Chancellor, at para 18 above. Carnwath LJ's judgment in *Cooke v United Bristol Healthcare NHS Trust* [2004] 1 WLR 251, paras 48–56 provides a valuable summary of the history that led up to the enactment of the 1996 Act. In short, the view of the House of Lords in *Cookson v Knowles* [1979] AC 556 and *Lim Poh Choo v*
F *Camden and Islington Area Health Authority* [1980] AC 174, namely that inflation was best left to be dealt with by investment policy, was succeeded by the view of the Law Commission's Report on Structured Settlements and Interim and Provisional Damages (1994) (Law Com No 224) (Cm 2646) that courts should be obliged to take into account the net return on an index-linked government stock ("ILGS") when determining the rate to be expected
G from the investment of a sum awarded as damages for future pecuniary loss. This in turn was superseded by the decision of Parliament that the rate of return prescribed by an order made by the Lord Chancellor should be definitive for this purpose (section 1(1) of the 1996 Act, subject to the exception provided for in section 1(2) which we were told is for all intents and purposes treated as a dead letter today).

22 *Wells v Wells* [1999] 1 AC 345 was decided before the Lord
H Chancellor exercised his new statutory power for the first time. In *Warriner v Warriner* [2002] 1 WLR 1703, paras 28–30, Dyson LJ summarised the main effect of that decision and cited passages from three of the speeches in the House of Lords. The flavour of what he said can be derived from para 28 of his judgment:

"In *Wells v Wells* [1999] 1 AC 345 the House of Lords laid down a guideline discount rate of 3% that was to be applied generally until the Lord Chancellor prescribed a rate pursuant to section 1(1) of the 1996 Act. Their Lordships recognised that a single rate was a somewhat rough and ready instrument, but they embraced it on policy grounds. These grounds were that the certainty of such a rate was desirable, would facilitate settlements, and result in saving the expense of expert evidence at trial . . ."

23 The need for some fairer system for awarding damages for future pecuniary loss was signalled by Lord Steyn in his speech in *Wells v Wells* [1999] 1 AC 345, 384:

"there is a major structural flaw in the present system. It is the inflexibility of the lump sum system which requires an assessment of damages once and for all of future pecuniary losses. In the case of the great majority of relatively minor injuries the plaintiff will have recovered before his damages are assessed and the lump sum system works satisfactorily. But the lump sum system causes acute problems in cases of serious injuries with consequences enduring after the assessment of damages. In such cases the judge must often resort to guesswork about the future. Inevitably, judges will strain to ensure that a seriously injured plaintiff is properly cared for whatever the future may have in store for him. It is a wasteful system since the courts are sometimes compelled to award large sums that turn out not to be needed. It is true, of course, that there is statutory provision for periodic payments: see section 2 of the Damages Act 1996. But the court only has this power if both parties agree. Such agreement is never, or virtually never, forthcoming. The present power to order periodic payments is a dead letter. The solution is relatively straightforward. The court ought to be given the power of its own motion to make an award for periodic payments rather than a lump sum in appropriate cases. Such a power is perfectly consistent with the principle of full compensation for pecuniary loss. Except perhaps for the distaste of personal injury lawyers for change to a familiar system, I can think of no substantial argument to the contrary. But the judges cannot make the change. Only Parliament can solve the problem."

24 The passages from the Lord Chancellor's statement of 27 July 2001 that were quoted by Laws LJ in *Cooke v United Bristol Healthcare NHS Trust* [2004] 1 WLR 251, para 19 show that the Lord Chancellor decided to seek to set a discount rate which would satisfy the legal principle already laid down authoritatively by the courts, particularly in *Wells v Wells* [1999] 1 AC 345. He was keen to set a single fixed rate which was easy for everyone to apply in practice. Because experience showed that it was probable that nobody in fact invested their award solely in ILGS, and because claimants' advisers were unlikely to advise their clients to invest primarily in those securities, the Lord Chancellor considered that it was reasonable to postulate claimants investing in a mixed portfolio in which investment risks would be managed so as to be very low.

25 When rejecting an attempt to adduce expert evidence to the effect that future care costs would be grossly underestimated if the effect of inflation were only built into the multiplier by means of the Lord

A Chancellor's discount rate and the multiplicand was based on current costs at the date of trial, Laws LJ spoke in *Cooke's* case [2004] 1 WLR 251, para 29, of

> "the fact, plain in my judgment beyond the possibility of sensible argument, that it is a *premise* of the Lord Chancellor's order that the effects of inflation in claims for future loss are to be catered for solely by
B means of the multiplier, conditioned as it is by the discount rate. Accordingly the multiplicand was necessarily treated as based on current costs at the date of trial."

26 At para 31 Laws LJ reported that if a single discount rate was taken across the board, as had been done by the Lord Chancellor's order, the full compensation principle would only be achieved in a rough and ready way,
C since actual rates of inflation would differ between different sectors. At para 32 he said that even if the present claimants stood to suffer very substantial shortfalls, this could not amount to a proper basis for allowing their appeals to prosper, because the court was obliged by ordinary constitutional principles to act conformably with the discount rate set by the Lord Chancellor.

D **27** This brief summary of the recent history of the discount rate used for the purpose of calculating lump sum awards for future pecuniary loss is sufficient to show that an award of a lump sum is entirely different in character from an award of periodical payments as a mechanism for compensating for such loss. When setting the appropriate discount rate in the context of a lump sum award the House of Lords or the Lord Chancellor had to guess the future and to hope that prudent investment policy would
E enable a seriously injured claimant to benefit fully from the award for the whole of the period for which it was designed to provide him/her with appropriate compensation.

28 A periodical payments order is quite different. This risk is taken away from the claimant. The award will provide him or her year by year with appropriate compensation, and the use of an appropriate index will protect him/her from the effects of future inflation. If he or she dies early the
F defendant will benefit because payments will then cease. It is unnecessary in the context of this statutory scheme to make the kind of guesses that were needed in the context of setting a discount rate. The fact that these two quite different mechanisms now sit side by side in the same Act of Parliament does not in my judgment mean that the problems that infected the operation of the one should be allowed to infect the operation of the other. There is
G nothing in the statute to indicate that in implementing section 2 of the 1996 Act (as substituted) Parliament intended the courts to depart from what Lord Steyn described in *Wells v Wells* [1999] 1 AC 345, 382–383 as the "100% principle", namely that a victim of a tort was entitled to be compensated as nearly as possible in full for all pecuniary losses: see also paras 18–19 above.

H **29** For this reason I reject the argument that in enacting section 2(8)(9) of the 1996 Act Parliament must be taken to have intended to provide compensation lower than that which would be awarded through adherence to the 100% principle if a periodical payments order was to be made. For the same reason I reject the argument that the courts should consider questions of affordability when determining what order to make because, as Lord

Steyn said in *Wells v Wells* [1999] 1 AC 345, 383B–384A, policy arguments based on affordability are a matter for Parliament and not for the courts. It is true that in *Heil v Rankin* [2001] QB 272, para 95, this court took into account questions of affordability when determining what amount for general damages, for pain, suffering and loss of amenity the public would perceive as fair, reasonable and just. There is no material, however, on which a court could safely rely in deciding whether the public would perceive it to be fair, reasonable and just for compensation for future pecuniary losses to be reduced simply on affordability grounds. It would have been easy for Parliament to decree that this should be so (and to be willing to incur the accompanying political odium for doing so) but there is no evidence in the language of section 2 of the 1996 Act that this was Parliament's intention.

30 Mr Pooles also pointed out that under the law as it now stands an annuity provider is bound to hold close-matching securities, of which ILGS are the most obvious example. This is why representatives of claimants have traditionally favoured RPI or RPI plus a fixed percentage because ILGS are linked to RPI. It appears to me that arguments of this kind are best left to a trial at which a judge can hear evidence from both sides before deciding what order it would be fair and appropriate to make. The regulations now made under the Insurance Companies Act 1982 and the Financial Services and Markets Act 2000 may change as new AEI-related instruments are devised, and in my judgment it would be quite wrong to interpret the Damages Act 1996 as being immune to future changes of this kind. In any event it appears that the defendant's insurance company, like a government agency, carries out a self-funding policy in relation to periodical payments orders. So long as the court is satisfied that the continuity of payment under the order is reasonably secure, whether by one of the means identified in section 2(4) of the 1996 Act or otherwise, the order may lawfully be made. In contrast, if the court is not so satisfied, the order may not be made: see section 2(3).

31 In the same way, arguments that a simple application of the AEI may over-compensate workers in the lowest quartile of average earnings and may under-compensate workers in the highest quartile are more appropriately left to a trial at which a judge can consider all the evidence before deciding what order it is fair and reasonable to make.

32 Mr Pooles expressed forensic concern about the prospect of trials at which a host of expensive expert witnesses would have to be called on each side while the court was exploring the merits, if any, of using an index other than RPI. He reminded us of what Stuart-Smith LJ said in *Warren v Northern General Hospital NHS Trust (No 2)* [2000] 1 WLR 1404, para 13 about the undesirability of extensive evidence from accountants, actuaries or economists. This judicial comment was made, however, in a quite different context, in the period after *Wells v Wells* [1999] 1 AC 345 when people were waiting for the Lord Chancellor to use his statutory power to fix a discount rate for the calculation of lump sum awards.

33 We are now dealing with a different statutory provision and, if the experience of the past is any useful guide, it is likely that there will be a number of trials at which the expert evidence on each side can be thoroughly tested. A group of appeals will then be brought to this court to enable it to give definitive guidance in the light of the findings of fact made by a number

A of trial judges. The armies of experts will then be able to strike their tents and return to the offices or academic groves from which they came.

34 There was, in my judgment, considerable force in Mr Glancy's submission that if the court were to adopt an approach to the interpretation of section 2(8)(9) which was different to that which he advanced there would be a very real danger that this new statutory scheme would not have the beneficial effect identified by Lord Steyn in *Wells v Wells* [1999] 1 AC 345 but would be rendered to a great extent a dead letter. If it is ordered that the whole of the damages for future pecuniary loss are to take the form of periodical payments, then the claimant will lose the facility of an investment policy that may extinguish the baneful effect of a discount rate that ultimately derives from calculations based on the RPI. While there was some evidence that courts were now making orders that represented a mix of a lump sum and periodical payments, the greater the periodical payment content of the award, the more likely it is, on the assumptions on which the court conducted this appeal, that the claimant's inability to invest a significant part of his award will lead him to be seriously under-compensated as the years wear on.

35 There is no evidence that this was Parliament's purpose, and we should not go down that interpretative path if there is any other that is reasonably open to us. (For the importance of purposive interpretation see *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, per Lord Bingham, at para 8, and Lord Steyn, at para 21.) The court must not, as Lord Bingham put it, frustrate the will of Parliament under the banner of loyalty to that will, and neglect the purpose which Parliament intended to achieve when it enacted the statute:

> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose."

In enacting section 2 of the 1996 Act, as substituted, it cannot have been Parliament's purpose to create a scheme which no properly advised claimant would ever wish to use.

36 Sir Michael Turner ended his judgment in these terms, at para 63:

> "On the narrow procedural basis, I would dismiss this application as being procedurally misconceived. At this juncture, there is no relevant jurisprudence by reference to which it could be said that the statement of case is bound to fail. In contrast there is a pressing necessity for the issues, which the claimant wishes to have judicially determined, to be the subject of such determination. It might be that following that process, the courts will deny significant content to section 2(9) of the Act. Doubting, as I do, that such will be the result, I regard it as eminently arguable that the courts should consider whether or not variation by reference to the RPI is not merely the default option but is, in practical terms, the only option which should be allowed. If the courts should take that line, it is my respectful opinion that the legislative attempt to meet the long-felt need for a system of compensation for future losses and expenses may prove to be as dead in the water as the earlier attempt to do so consensually. It is

hard to envisage circumstances in which the court would in effect, intentionally, deprive the current legislative attempt of practical effect. In so concluding I do not overlook the fact that in so far as claims against private sector defendants there may be real difficulties in defendants and their insurers in being able to satisfy the court that the continuity of such payments is reasonably secure, this being a condition precedent to the court exercising its powers to award damages by way of periodical payments. The long history of the insurance industry, however, demonstrates that it is capable of devising innovative strategies to cope with changing demands."

37 The members of this court do not have Sir Michael's unrivalled experience of personal injuries litigation. While I would be readier than he was to consider the defendant's application to be properly made (based as it was on the defendant's advisers' belief that the courts would interpret section 2(8) along the lines so forcefully advocated by Mr Pooles) there is very great force in what he said in the remainder of this powerfully expressed passage. At all events, I agree with him that the claimant should be allowed to advance his statement of case and adduce Dr Wass's evidence at the trial of this action. It will then be for the trial judge to decide whether it is appropriate to use the powers given to him by Parliament in section 2(9) and to make such order for index-linking the periodical payments (if a periodical payments order is in fact made) as he considers appropriate and fair in all the circumstances, without being obliged to detect exceptional circumstances before he is at liberty to depart from the RPI.

38 For all these reasons I would dismiss this appeal.

MOORE-BICK LJ

39 I agree.

SIR MARK POTTER P

40 I also agree.

Appeal dismissed.
Permission to appeal refused.

6 December. The Appeal Committee of the House of Lords (Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Mance) dismissed a petition by the defendant for leave to appeal.

Solicitors: Beachcroft Wansbroughs; Irwin Mitchell.

J C B