

*Draft Order laid before Parliament under section 2B(6)(c) of the Damages Act 1996 for approval by resolution of each House of Parliament.*

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DRAFT STATUTORY INSTRUMENTS

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**2004 No. [ ]**

**DAMAGES (ENGLAND AND WALES)**

**DAMAGES (NORTHERN IRELAND)**

**The Damages (Variation of Periodical Payments) Order 2004**

*Made* - - - - 2004  
*Coming into force* - - 2004

Whereas the Lord Chancellor, in accordance with section 2B(6)(b) of the Damages Act 1996(1), has consulted with such persons as appeared to him to be appropriate:

And whereas a draft of this Order has been laid before Parliament in accordance with section 2B(6)(c) of that Act:

Now, therefore, the Lord Chancellor, in exercise of the powers conferred upon him by section 2B(1), (2), (3) and (6) of the Act, hereby makes the following Order:

**Citation, commencement, interpretation and extent**

1.—(1) This Order may be cited as the Damages (Variation of Periodical Payments) Order 2004 and shall come into force on the fourteenth day after the day on which it is made.

(2) In this Order —

- (a) “the Act” means the Damages Act 1996;
- (b) “agreement” means an agreement by parties to a claim or action for damages which settles the claim or action and which provides for periodical payments;
- (c) “damages” means damages for future pecuniary loss in respect of personal injury;
- (d) “defence society” means the Medical Defence Union or the Medical Protection Society;
- (e) “variable agreement” means an agreement which contains a provision referred to in Article 9(1);
- (f) “variable order” means an order for periodical payments which contains a provision referred to in Article 2.

(3) In the application of this Order to Northern Ireland —

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(1) 1996 c. 48; section 2B was inserted by the Courts Act 2003 (c. 39), section 100.

- (a) “claimant” means plaintiff;
  - (b) “permission” means leave;
  - (c) “statements of case” means, in the High Court, the writ and pleadings and, in the county court, the civil bill and any notice of intention to defend, defence, notice for particulars, replies and counterclaim.
- (4) This Order extends to England and Wales and Northern Ireland.
- (5) This Order applies to proceedings begun on or after the date on which it comes into force.

### **Power to make variable orders**

2. If there is proved or admitted to be a chance that at some definite or indefinite time in the future the claimant will —

- (a) as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration, or
- (b) enjoy some significant improvement, in his physical or mental condition, where that condition had been adversely affected as a result of that act or omission,

the court may, on the application of a party, with the agreement of all the parties, or of its own initiative, provide in an order for periodical payments that it may be varied.

### **Defendant’s financial resources**

3. Unless —

- (a) the defendant is insured in respect of the claim,
- (b) the source of payment under the order for periodical payments is a government or health service body within the meaning of section 2A(2) of the Act,
- (c) the payment is guaranteed under section 6 of or the Schedule to the Act, or
- (d) the order is made by consent and the claimant is neither a child, nor a patient within the meaning of Part VII of the Mental Health Act 1983(2) or of Part VIII of the Mental Health (Northern Ireland) Order 1986(3),

the court will take into account the defendant’s likely future financial resources in considering whether to make a variable order.

### **Award of provisional damages**

4. The court may make a variable order in addition to an order for an award of provisional damages made by virtue of section 32A of the Supreme Court Act 1981(4) or section 51 of the County Courts Act 1984(5) or, in relation to Northern Ireland, paragraph 10(2)(a) of Schedule 6 to the Administration of Justice Act 1982(6).

### **Contents of variable order**

5. Where the court makes a variable order —

- (a) the damages must be assessed or agreed on the assumption that the disease, deterioration or improvement will not occur;

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(2) 1983 c. 20.

(3) S.I.1986/595 (N.I. 4).

(4) 1981 c. 54; section 32A was inserted by the Administration of Justice Act 1982 (c. 53), section 6.

(5) 1984 c. 28.

(6) 1982 c. 53.

- (b) the order must specify the disease or type of deterioration or improvement;
- (c) the order may specify a period within which an application for it to be varied may be made;
- (d) the order may specify more than one disease or type of deterioration or improvement and may, in respect of each, specify a different period within which an application for it to be varied may be made;
- (e) the order must provide that a party must obtain the court's permission to apply for it to be varied, unless the court otherwise orders.

#### **Applications to extend period for applying for permission to vary**

- 6. Where a period is specified under Article 5(c) or (d) —
  - (a) a party may make more than one application to extend the period, and such an application is not to be treated as an application to vary a variable order for the purposes of Article 7;
  - (b) a party may not make an application for the variable order to be varied after the end of the period specified or such period as extended by the court.

#### **Limit on number of applications to vary**

7. A party may make only one application to vary a variable order in respect of each specified disease or type of deterioration or improvement.

#### **Case file**

8.—(1) Where the court makes a variable order, the case file documents must be preserved by the court until the end of the period or periods specified under Article 5(c) or (d) or of any extension of them or, if no such period was specified, until the death of the claimant.

- (2) The case file documents are, unless the court otherwise orders —
  - (a) the judgment as entered;
  - (b) the statements of case;
  - (c) the schedule of expenses and losses;
  - (d) a transcript of the judge's oral judgment;
  - (e) all medical reports relied on;
  - (f) a transcript of any parts of the claimant's own evidence which the judge considers necessary;
  - (g) any subsequent orders.

(3) A court officer must ensure that the case file documents are provided by the parties where necessary and filed on the court file.

(4) Where a variable order has been made, the legal representatives of the parties and, if the parties are insured, their insurers, must also preserve their own case file until the end of the period or periods specified under Article 5(c) or (d) or of any extension of them or, if no such period was specified, until the death of the claimant.

#### **Variable agreements**

9.—(1) If there is agreed to be a chance that at some definite or indefinite time in the future the claimant will —

- (a) as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration, or

- (b) enjoy some significant improvement, in his physical or mental condition, where that condition had been adversely affected as a result of that act or omission,

the parties to an agreement may agree that a party to it may apply to the court subsequently for its terms to be varied.

(2) Where the parties agree to permit an application to vary the terms of an agreement, the agreement —

- (a) must expressly state that a party to it may apply to the court for its terms to be varied;
- (b) must specify the disease or type of deterioration or improvement;
- (c) may specify a period within which an application for it to be varied may be made;
- (d) may specify more than one disease or type of deterioration or improvement and may, in respect of each, specify a different period within which an application for it to be varied may be made.

(3) A party who is permitted by an agreement to apply for its terms to be varied must obtain the court's permission to apply for it to be varied.

### **Application for permission**

**10.**—(1) An application for permission to apply for a variable order or a variable agreement to be varied must be accompanied by evidence —

- (a) that the disease, deterioration or improvement specified in the order or agreement has occurred, and
- (b) that it has caused or is likely to cause an increase or decrease in the pecuniary loss suffered by the claimant.

(2) Where the applicant is the claimant and he knows that the defendant is insured in respect of the claim and the identity of the defendant's insurers, he must serve the application notice on the insurers as well as on the defendant.

(3) Where the applicant is the claimant and he knows that the defendant is a member of a defence society and the identity of the defence society, he must serve the application notice on the defence society as well as on the defendant.

(4) The respondent to the application may, within 28 days after service of the application, serve written representations on the applicant and, if he does, must file them with the court.

(5) The court will deal with the application without a hearing.

### **Refusal of permission**

**11.**—(1) Where permission is refused, the applicant may, within 14 days after service of the order, request the decision to be reconsidered at a hearing.

(2) No appeal lies from an order refusing permission after reconsideration.

### **Grant of permission**

**12.**—(1) Where permission is granted, the court will also give directions as to the application for the variation of the variable order or the variable agreement.

(2) Directions must include directions as to —

- (a) the date by which the application for variation must be served and filed;
- (b) the service and filing of evidence.

(3) No appeal lies from an order granting permission.

### **Order for variation**

13.—(1) On an application for the variation of a variable order or a variable agreement, if the court is satisfied —

- (a) that the disease, deterioration or improvement specified in the order or agreement has occurred, and
- (b) that it has caused or is likely to cause an increase or decrease in the pecuniary loss suffered by the claimant,

it may order —

- (i) the amount of annual payments to be varied, either from the date of the application for permission or from the date of the application to vary if the order did not require the permission of the court for an application to vary, or from such later date as it may specify in the order;
- (ii) how each payment is to be made during the year and at what intervals;
- (iii) a lump sum to be paid in addition to the existing periodical payments.

(2) Section 2(3) to (9) of the Act applies to orders under this Order as it applies to orders for periodical payments.

### **Application of rules of court**

14. In England and Wales, the Civil Procedure Rules 1998(7) and in Northern Ireland, rules of court apply to applications under this Order, except where this Order makes provision inconsistent with Civil Procedure Rules or rules of court.

Date

Parliamentary Under Secretary of State  
Department

## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order enables courts to vary orders and agreements in personal injury cases under which all or part of the damages take the form of periodical payments. Articles 2 and 9 restrict the circumstances in which variation is permissible to those where there is a chance that the claimant will develop some serious disease or suffer some serious deterioration, or enjoy some significant improvement, in his physical or mental condition, and the court has ordered, or the parties have agreed, that the order or agreement is to be capable of variation.

The decision that an order may be varied in the future may be made on the application of a party, or with the consent of the parties or of the court's own initiative (Article 2). In the case of an order, the court's permission for an application to vary the order is required, unless the court decides otherwise (Article 5); in the case of an agreement, the court's permission is always required (Article 9).

Article 10 requires the person applying for permission to apply to vary an order or agreement to show that the specified disease, deterioration or improvement has occurred and that it has caused or is likely to cause an increase or decrease in the claimant's financial loss. The application for permission is to be dealt with on the papers. If permission is refused the claimant may ask the court to reconsider the matter at a hearing (Article 11). No appeal from the grant of permission or the refusal of permission on a reconsideration is possible (Article 12).

On a successful application for the variation of an order or agreement, the court may order that the amount of the annual payments to the claimant is to be varied (Article 13). It may also order that a lump sum be paid in addition to the periodical payments. Article 13 further provides that, as with the original order, the court must be satisfied that the continuity of payment as varied is reasonably secure, under section 2(3) of the Damages Act 1996.