



Eight things you need to know: Personal Injury damages in divorce cases

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The “pre-acquired” or “non-matrimonial” argument is one which has taken up much commentary in family law circles over recent years. However, the conundrum can be even more challenging when considering personal injury damages that one party may have received in order to meet their specific needs arising from an accident or injury. When dealing with a case when some or all of the assets are sourced from PI damages, it is important to consider the following:

1. **Do not assume that damages are protected** - The analysis as to what constitutes financial resources available for distribution following a divorce is widely defined and can and does include damages paid out from claims for personal injury, which are not “*sacrosanct*” or protected from the claims of the other spouse. (*Wagstaff v Wagstaff* [1992] 1 WLR 320).
2. **The Court’s powers are broad** - The Courts are obliged to have regard to all the factors contained in Section 25 of Matrimonial Causes Act 1973, with no one factor outweighing the other. That said, in balancing the factors, the bias will often be made in favour of the person who has suffered, especially if those injuries or disabilities are ongoing. In other words, the source of and rationale for the funds should not be ignored (*C v C (Financial Provision: Personal Damages)* [1995] 2 FLR 171)

3. **Timing** - Whilst the Courts are required to give first regard to the welfare of any child of the family under the age of 18, this is only whilst the child is a minor. Once the child is independent it is likely that the injured party's needs will be prioritised. The Court may therefore consider a structure that provides for the return of any sums at a future point, or for a form of *Mesher* order, for example terminating on the maturity of the child (*Mansfield v Mansfield [2011] EWCA Civ 1056*).
4. **Keep it clean** - As with other "non-matrimonial" property, personal injury damages may be less easy to protect if they have been intermingled with matrimonial property over a significant period of time or if they are used to fund or improve the family home. So, if affordable, try and keep receipts from personal injury damages separate from other family resources.
5. **Needs, needs, needs** – Personal injury damages can be clearly distinguished from assets which have amassed as a result of parties' joint endeavours during a marriage, regardless of when awarded or when the injuries occurred. In these circumstances, this must at least temper the extent of any realistic claim from the other spouse for compensation from or sharing of those funds. Consider also that needs may include medical needs when formulating a budget and capital requirements.
6. **Watch out for** – Damages payments are often utilised in adapting a property to provide for an injured person's needs. Despite this, there is still an assumption that the former matrimonial home should be shared between the parties.
7. **Keep up with paperwork** – Make sure you obtain and read paperwork associated with the claim in advance. The family Courts may treat the various heads of claim differently when it comes to future division between spouses. For example, an award for loss of earnings is often treated by the Court as being capable of division in the same way an ongoing earned income would be, especially if the other spouse's needs could not otherwise be met without relying on the state.
8. **Prevention is better than cure** - With pre and post nuptial agreements now being afforded increasing weight by the Courts, considering ring-fencing assets that are received as a result of a personal injury damages claim by agreeing and enshrining in a formal document how they should be treated in the event of separation. It may also be possible for it to be agreed that parties should treat any damages in the same way as they would for a schedule 1 case, thus only providing for a child and their primary carer during the child's minority. Alternatively, consider whether it would be appropriate to place any lump sum received in trust for the ongoing needs of the injured party (subject to appropriate tax advice).

The Family Court has very broad powers, any personal injury damages received by either spouse will be taken into account as an asset available to them and any outcome will be fact specific and hard to predict. Steps should be taken at the earliest possible stage to future proof damage awards.

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