

Not knowing the amount of compensation award (EXB (a protected party by his mother and litigation friend) v FDZ and others)

01/02/2019

Personal Injury analysis: What happens when a claimant, and protected party, is best off not knowing the amount of their compensation award? Emily Formby, barrister at 39 Essex Chambers, considers the case of EXB (a protected party by his mother and litigation friend) v FDZ and others concerning the overlap in jurisdiction between the civil courts and the Court of Protection (CoP). Despite the overlap being commonplace in daily practice, reported cases giving guidance on how to navigate issues thrown up by the different procedures are rarer than one might think.

EXB (a protected party by his mother and litigation friend) v FDZ and others [2018] EWHC 3456 (QB)

What are the practical implications of this case?

The overlap in jurisdiction between the civil courts and the CoP is commonplace in daily practice. However, reported cases giving guidance on how to navigate issues thrown up by the different procedures are rarer than one might think. In *EXB (a protected party by his mother and litigation friend) v FDZ and others*, the court tackles the issue of what to do when a claimant, and protected party, is best off not knowing the amount of their compensation award. It gives immediate guidance on a form of order to achieve an approval of an award without the protected party knowing the size of that award. In doing so, it gives guidance on how to carry out the assessment of best interests. A draft order is contained with the reported judgment.

The case also provides general guidance on how to tackle a best interest decision when the very process of evaluating best interests inevitably requires a pre-determination of the issue. Here the particular question is how do you consider whether a protected party should know the size of his award? This must be done by best interest assessment, but that assessment can only be achieved by not actually mentioning the size of the award. This inevitably leads to a pre-determination of the decision—a classic catch 22. Foskett J provides a path through this particular thorny thicket.

What was the background?

The court gave a dual judgment with the judge sitting both as a judge of the Queen's Bench and the CoP (all High Court judges are judges of the CoP by virtue of their office). However, the judge noted that as a judge of the CoP, he rarely found himself administering the jurisdiction of that court. That is why this judgment is of some interest. To assist in giving guidance as to the correct jurisdictional approach, the court was assisted by an amicus curiae (friend of the court).

The road traffic accident that forms the subject for this action occurred in October 2013. The claimant suffered severe injuries—orthopaedic and a head injury. Aged only 26 at the time, despite being a backseat passenger in the car, liability was resolved with a 25% reduction from full damages for orthopaedic injuries and a 5% reduction for head and brain injuries. The long-term severe brain injury left the claimant with permanent difficulties in executive functioning and in aspects of his behaviour.

The contributory negligence reductions led to a common problem with the administration of injury awards—while the quantum is calculated on the basis of precise need (however that is defined and evaluated by the parties and the court) at the conclusion of the quantum evaluation, the final sum is subject to the overarching percentage reduction determined by the liability issues. Therefore, any damages sum calculated in compensation will have to be carefully managed in expenditure so as to meet the reasonable needs of the claimant's lifetime, post claim resolution.

The Future of Law. Since 1818.

This is a common problem in situations where the way damages are calculated is at odds with the practical way they are managed. In the present case, the reduction of damages, particularly on heads of loss such as care, meant that careful husbandry and investment of damages was required to ensure sufficient funds for the rest of the claimant's life.

As is often the case with a protected party, the claimant's damages were managed by a deputy—there was a deputy for the litigation but also a property and affairs deputy to manage the investment and spend of the damages sum in the future.

However, in accordance with the 'best interest' requirement of the CoP rules, 'wherever possible the person who lacks capacity to make a decision should still be involved in the decision-making process'.

While the claimant lacked capacity entirely to manage his affairs, he was not incapable and lived a relatively independent life without daily involvement of either the deputy or the support team. 'Spending money' was organised on the basis of the claimant receiving a 'not insignificant' sum of money on Thursday to last until the weekend and a top-up at the beginning of the week. Even with this system in place and the amounts strictly limited the claimant struggled and was unable to control his impulses—for example, while receiving a sum to buy presents for his daughter he had 'blown it' on other things. He was also felt to be relatively vulnerable and open to the suggestions of others. His 'associates' would tend to exploit him and he often spoke of owing people money in situations where the deputy and support workers were unable to verify whether he had in fact borrowed money or was required to repay it.

Accordingly, in order to respect the 'best interests' doctrine, the claimant ought to be involved in the decision as to whether he should know the amount of his damages or not. But to tell him the amount as part of the decision-making process was clearly impossible.

Therefore, there was a wide consultation on the claimant's attitude toward money as a whole. Views were taken from a wide cohort—the deputy, claimant's family, medical team, carers and the claimant himself as to his attitude towards money. The clear conclusion was that it was not in the claimant's best interests to know the amount of the award—it was overwhelmingly felt this would open him up to vulnerable exploitation and the money would literally 'burn a hole' in his pocket. Accordingly, a declaration as to incapacity in relation to the decision of managing his money and knowing the amount of the award was justified.

What did the court decide?

Having reached this conclusion, the court then continued to decide how best to frame an order to give effect in the least restrictive way to the decision. Was an order required under the CoP jurisdiction at all? As a general decision within the ambit of management of the claimant's property and affairs, it was arguably a decision that fell within the deputyship order already, with no need for further order.

However, the present deputy argued that his role in managing the claimant, and his perpetual 'push' for money, would be made easier if he was able to say: 'I have an order of the court which does not allow me to tell you the amount of the award'. Hence, an order was made since it was in the best interests of the claimant to have it so clearly formulated.

What this case reminds us is that the overarching framework of the CoP jurisdiction is imported into the Queen's Bench Division whenever required and can be exercised by any High Court judge. There is no need to institute separate proceedings. It is, however, important to ensure the ambit of the CoP decision is known and properly presented to the judge.

In making a declaratory order, the ambit must be carefully considered. In this instance (and the wording of the order is attached to the judgment), the deputy is told not to inform the claimant of the sum and, since he is likely to know or have knowledge of anyone else dealing with the damages, the deputy has provision to make an urgent 'without notice' application to prevent disclosure of this size of settlement by anyone else if this seems a likely future problem.

As to costs, the reminder again is the distinction between civil and CoP jurisdiction. In this instance, the costs were borne by the tortfeasor since the need for the issue to be resolved arose from the accident and its associated incapacity. However, following the CoP procedure, the costs of financial matters would ordinarily be paid by the

protected party's estate, whereas in welfare cases the costs would be borne by each party. Costs considerations may need to be borne in mind in such instances.

Emily Formby is well known for her extensive personal injury and clinical negligence practice. Within these specialisations she has wide experience acting for both claimant and defendant in all types of claims, both public and private and in related areas such as inquests, court of protection, cost disputes, insurance related issues, fatal accidents and product liability claims. Formby has been recommended as a leading junior in personal injury law and clinical negligence within the Legal 500, Chambers and Partners and Legal Experts directories for many years. She is a CEDR qualified mediator and a Recorder appointed to sit in the Crown Court.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.



FREE TRIAL

The Future of Law. Since 1818.