



www.ashleymurraychambers.co.uk

Mansfield v Mansfield [2011] EWHC Civ 1056 – Issue 27 Damages Awards and the Sharing Principle

The Facts:

1. The parties' relationship (cohab/marriage) had lasted 6 ½ years and there were twin children (aged 4). Before the cohabitation began in 2002, the Husband had received in 1998 a damages award for a personal injuries claim of £0.5m. He had invested this award in the provision of his adapted home, which was to become the parties' marital home and a rental investment property from which he derived a modest income. The Wife had also put in the proceeds of sale of her own former home (equity £30k). On divorce, the Husband remained at the marital home and the Wife lived in rented accommodation with the twins.

The Central Issue and Parties' Stances:

2. The degree to which the judge in ancillary relief proceedings should reflect the origin of the family assets where the same have substantially resulted from a damages award on the settlement of a personal injuries claim.

3. The Wife sought capital for a home for her and the children, whereas the Husband argued for a more limited lump sum or, if rehousing capital was provided to her, then a Mesher order in his favour upon the same up to the children's independence.

The Lower Courts:

4. The District Judge had assessed the accommodation needs of the Wife and children as requiring a lump sum of £285k (assuming her mortgage capacity at £42k) and considered that this would leave c £320k of asset worth left to the Husband. The order made provision for a sale of the marital home in default to secure the payment.

5. The Circuit Judge considered that, actually, such an award would leave the Husband with £290k in value overall, but refused to interfere and rejected the Husband's appeal.

The Court of Appeal:

6. Upon the second appeal to the Court of Appeal, the Court upon earlier giving leave to appeal had identified the fact that the lower courts in both recorded judgments had given reference only to an abridged version of the citation from the leading judgment of Butler-Sloss LJ in **Wagstaff [1992] 1FLR 333**. The result of this was that, whilst emphasising that such a damages award formed part of the resources to be taken into account under the **section 25** exercise, the lower courts had omitted to give emphasis to that part of Her Ladyship's judgment which qualified the approach to be taken, namely that each case would be fact sensitive and, in many cases, 'the sharing principle' would be tempered by the needs of the damages award recipient and the nature of the award itself, being compensation for personal injury. It was seen as important to repeat the full quotation:-

"I do not understand Scarman LJ [in Daubney] as saying that no part of damages awarded under the head of pain, suffering and loss of amenity should be charged by the other spouse but, if he did, then I respectfully disagree. The reasons for the availability of the capital in the hands of one spouse, together with the size of the award, are relevant factors in all the circumstances of s 25. But the capital sum awarded is not sacrosanct, nor any part of it secured against the application of the other spouse. There may be instances where the sum awarded was small, and was specifically for pain and suffering, in which it would be unsuitable to order any of it to be paid to the other spouse. In some cases, the needs of the disabled spouse may absorb all the available capital, such as the requirement of residential accommodation. [Counsel] conceded that any calculations made in respect of the capital of the parties should reflect a substantial discount for the fact that the money was received as damages. In general, the reasons for the availability of the capital by way of damages must temper the extent of, and in some instances may exclude the sharing of, such capital with the other spouse. It is important to stress yet again that each case must be considered on its own facts."

7. The Court of Appeal considered that this misdirection as to the law enabled them to exercise their own discretion afresh, even by a second appeal.

8. However, having not heard the oral evidence presented before the lower court, the Court of Appeal, whilst considering the Wife had been fortunate to recover as much as £285k,

declined to tinker or interfere with the level of award, which the District Judge had regarded as meeting the Wife's 'needs' in the circumstances.

9. Instead, the Court of Appeal, considered that the lower courts had altogether failed to '*give special reflection to the origin of the family capital and the special purposes for which it was provided*' as highlighted by Butler-Sloss LJ in **Wagstaff**. This could most appropriately be done by the making of a Mesher order in the circumstances of the case. The reasoning for such an approach was that, as the Wife was the primary carer of the children in their dependency at present, she had the immediate 'need' for a share of the capital resources to provide a home during that period. However, thereafter, the 'needs' of a home for the children would give way to the rising 'needs' of the disabled Husband, particularly, as he grew older and the workings of a maturing Mesher order would suitably augment the resources then available to him. Accordingly, he was to have a charge under the Mesher order terms for one third of the equity upon sale of the property acquired by the Wife from the £285k lump sum.

Commentary:

10. **Daubney**[\[1976\] Fam 267](#) CA, **Davies** [1986] 1 FLR 497, **Wagstaff** [1992] 1 FLR 333 CA, **C v C (financial provision: personal damages)** [1995] 2 FLR 171, **H v H (financial provision: conduct)** [1994] 2 FLR 801, **A v A (financial provision: conduct)** [1995] 1 FLR 345 and **Wakefield v Secretary of State for Social Security** [2000] 1 FLR 510, 514G, CA, **per Wilson J** are all cases well known to this area of the law. The present case, however, is the first reported Court of Appeal decision, since **Mcfarlane/Miller** [2006] gave guidance as to the current approach to financial distribution upon divorce, which has considered to what extent 'the sharing principle' is to be adjusted to deal with the introduction of pre-acquired damages for personal injuries.

11. The lower court decisions had treated the same correctly as part of the overall resources of the parties under s 25. However, upon analysis the earlier judgments had over prioritised the 'needs' of the Wife and children for alternative accommodation without striking the appropriate balance of also addressing the 'needs' of the damages recipient and duly



acknowledging the fact that most of the resources being distributed had originated from the damages award itself.

12. The use of the Mesher order to permit the use by one spouse with primary child care to have sufficient funding for housing during the children's dependency and then to leave her probably with just sufficient to obtain single occupancy housing upon their independence whilst returning the surfeit funds back to the disabled spouse, is a novel revival of a form of order, which has had a chequered career over the years.

Ashley Murray
Ashley Murray Chambers
Liverpool