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TRUSTS FOR INJURY PAYMENTS –
PROTECTIONS, DISREGARDS AND KEY
CONSIDERATIONS

What is a PI Trust?

- Not a distinct trust type
- Constituted by what it holds and for whom
- Not available for fatality related awards
- But what it holds can extend beyond settlement or damages
- Rarely tax oriented
- But tax remains a trap for the unwary

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What does it do?

- The injured party should not be prejudiced
- A “disregarded location”
- Means-tested benefits
- Care (residential and non-residential)
- A management structure (for the incapax alone?)
- and what of 52-weeks?

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PI Trusts from the POV of the injured...

“advice must be given in all cases... irrespective of the size of the payment made. That is, unless the value of the award is miniscule in proportion to the client’s other resources, but even then, care is required. Circumstances can change.”

- Who is your client?
- What does the family look like?
 - The financial position?
 - Is there risk?
 - What matters to them?

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When does this need to be considered?

- Immediacy of advice – getting together early
- Looking a little further down the road
- Dealing with the other agencies – DWP, local authorities and care providers, the Office of the Public Guardian
- Remains an under-developed area of practice in Scotland
- Getting handle on the cost implications re heads of claim

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A question of desirability v necessity

- The injured party may feel that a trust is necessary
- Objectively, a trust may be beneficial
- A trust may be in place prior to Proof or negotiation
- But what makes it necessary?

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Necessity

- *Good v Lanarkshire Health Board* [2015] CSOH 75
- and... *Celine Martin v Salford Royal NHS Foundation Trust* [2022] EWHC 532 (QB)
- Proposition that costs of PIT might routinely be awarded where injury has caused incapacity
- ... but what do these cases tell us?
 - *Martin* and reliance on the Bare Trust and care profile
 - Not necessary in the case of *Good*... but why not?

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The Good Case

- “The requirements for recovering the cost of setting up and administering... are not met... for the reasons given in the submission for the defenders [edit: at para 16].” [para 17]
- “... required that the person was no longer able to manage his own affairs” [para 16]
- “The test... was appropriateness rather than reasonableness: a significant loss of intellectual function, a material inability to communicate or a very substantial physical incapacity was required (A v Powys Local Health Board [2007] EWHC 2996 at paragraphs 155-161)” [para 16]
- Context: no need for the means-tested benefits disregard [para 16]
- What of the care disregards?

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The Martin Case

- *“A bare trust offers little (if any) protection against the claimant's vulnerability.”*
[para 81 a]
- *“The care package is itself to be funded by way of variable periodical payments.”*
[para 81 b]

How does this rationale relate to the Scottish position?

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Where does that take us?

- Necessity for the trust lawyer?
 - Means-tested benefits
 - Residential care and (local authority dependent) social care
 - Management structure: Certainly incapacity but not exclusively
- Necessity for the Court?
 - Means-tested benefits? (funding non-means tested in Good and Martin)
 - But what of care?
 - (Otherwise?) Incapacity necessary
- In Scotland there is no alternative to the PI Trust for disregards
- Guardianship may run parallel but funds held by Guardian are assessed
- COSLA and social or non-residential care

And what of capacity?

- Expert reports and capacity – tread carefully
- Fluctuating and Mixed Capacity
- Task Specific
- Principles of Intervention
- Presumption of Capacity v Guardianship Order

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Expert Reports and Witness

- What a report will ordinarily cover:-
 - Necessary or unnecessary in the circumstances?
 - Cost of formation, including reporting and compliance
 - Cost of ongoing administration
 - Including tax and accounting in line with trustees duties at law
 - Reference to ancillary legal services required or likely to be required by the trustees (importantly – parallel incapacity costs)
- What the reporter will need:-
 - Clarity on requirements – what will be needed and when
 - Background – client and the injury
 - Prognosis – care, benefits
 - Capacity
 - Key people, family, trustees, intervenors, “persons of interest/risk”
 - **Perhaps lastly:** An indication of quantum (or range)

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QUESTIONS?

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