

## Compensation Claims in Family Law Property Settlement Proceedings

Given the significant number of personal injury compensation claims currently being processed, it is important to consider how these monetary contributions affect matrimonial and de facto property settlement proceedings in the unfortunate event of separation. This paper outlines how the Courts have dealt with finalised or pending compensation claims in family law property settlement matters.

Depending on the nature of the claim, an award of damages may or may not be assignable to another party. For example, claims for personal injury are not assignable. In *Zorbas v Zorbas* (1990), the Court held that a pending damages claim for personal injuries was not considered 'property' for the purposes of section 79 of the *Family Law Act 1975* ("the Act"). This means that the amount to be claimed was not included in the property pool of the parties and therefore could not be split.

"There are some circumstances where an award of damages in a personal injury claim will be considered as 'property', and the claim would be deemed a significant contribution to the property pool by the spouse who received the claim," warns Mr Antonious Abdelshahied, Lawyer, **Michael Sing Lawyers Pty Ltd**.

In the event a party receives a personal injury compensation payout and contributes the payout towards the joint assets of the parties, the Courts have considered whether the other spouse can claim a contribution to the damages award. In *James v James* (1984), the wife argued that her contributions to household expenses and earnings allowed the husband to continue with his compensation claim. This argument was rejected by the Court.

However, a broader approach was adopted in *Aleksovski v Aleksovski* (1996). The Courts said, "in most cases, a damages verdict arising from a personal injury claim, whenever received, is a contribution by the party that suffered the injury. It should not be considered in isolation, for the reason that each and every contribution, which each of the parties makes to the relationship, must be weighed and considered at the same time."

This means that although a claim may be considered 'property' in property settlement proceedings, before the Court determines how much each party receives, the Court must determine the contributions made to the payout, for example, did the spouse assist the injured spouse with care and day-to-day activities while they were unable to care for themselves.

In some situations, a spouse may become injured immediately prior to, or immediately after, the separation with such injury giving rise to a compensation payment. In those circumstances, there is a capacity to argue for the compensation payment to be "quarantined" and excluded from the property pool available for distribution between the parties. Mr Abdelshahied warns that, "there is no one size fits all approach to personal injury compensation payments. It is imperative you obtain legal advice about your specific circumstances to ensure that you are fully aware of the effect a compensation payment may have on your property settlement and how to tailor your negotiations to obtain the optimal result."

In *Kostov v Kuslev* (2008), His Honour Brewster FM said, "the first thing to be observed is that the husband's damages award is a contribution made by the husband and the husband alone ... if a person in the position of the husband suffers injury, and is unable to care for himself, and if a person in the position of the wife provides care for him, then the husband would be entitled

to recover damages referable to the gratuitous care provided by the wife. This is called a *Griffiths v Kerkemeyer* award after the High Court case which definitively established this principle."

It seems that when a party receives a compensation payout for personal injury and is able to look after him/herself, an argument for a contribution based entitlement would fail.

In cases where there is no property other than the pending claim, difficult questions can arise. In *Pleym v Pleym* (1986), the court refused to adjourn the family law property settlement proceedings until after the outcome of the damages claim, resulting in the wife failing in the proceedings. Further, the Court held that a property settlement order can only be made where there is property available for distribution. However, there are cases, such as *Tems v Tems* (1990) and *Hamilton v Hamilton* (1984), where the Courts have relied on the power to adjourn property proceedings, pursuant to section 79(5) of the Act. Section 79(5) gives the Court the power to adjourn property settlement proceedings until a financial resource vests as property.

In *Tems v Tems* (1990), the issue in contention revolved around the husband's Defence Force Pension and not a personal injury claim. His Honour Barry J said that, "the fact that there is no property presently in existence is not a basis, in my view, for striking out a property settlement application. Such a course would give no meaning or effect to the intention of the legislature as expressed in s79(5)."

In *Hamilton v Hamilton* (1984), His Honour Nygh J adopted a different approach. In that case whether any property existed depended on the outcome of a complex legal argument regarding a personal injury claim in the Supreme Court of Victoria's equity division. His Honour adjourned the wife's property settlement application, which was filed 'out of time', until the outcome of the Supreme Court determination was known. His Honour concluded that, "as the Court could not say the parties had no assets; it would not refuse the wife's application".

"An application seeking an adjournment pending a personal injury claim would, in most cases, only be granted if there is no other property available for distribution," says Mr Abdelshahied.

"Separated parties who have a pending compensation claim, either in the negotiation phase or in the State Courts, should obtain legal advice regarding the nature and effect of the award on family law property settlement proceedings," warned Mr Abdelshahied.

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If you have an issue involving family law, please contact the Michael Sing Lawyers Pty Ltd family law team in Brisbane on (07) 3229 6099 or the Gold Coast on (07) 5597 8888 to arrange a consultation.



**Gold Coast Office**

9 Ouyan Street  
Bundall QLD 4217  
PO Box 9073 GCMC QLD 9726  
T +61 7 5597 8888  
F +61 7 5597 8899

**Brisbane Office**

Level 10, 410 Queen Street  
Brisbane QLD 4000  
PO Box 3246 Brisbane QLD 4001  
T +61 7 3229 6099  
F +61 7 3226 9001

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