

# The Concept of Maintenance and Compensation

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Section 23 (1) of the Matrimonial Causes Act 1973 provided the Courts with a power in the divorce case to make an order that either party to the marriage shall make to the other such periodical payments for such term as they may specify. The criteria as to how that should be judged was set out in Section 25. It directed the judge to have regard to:

- a) the income earning capacity property and other financial resources which each of the party to the marriage has or is likely to have in the foreseeable future
- b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future
- c) the standard of living enjoyed by the family before the breakdown of the marriage
- d) the age of each party to the marriage and the duration of the marriage
- e) any physical or mental disability of either of the parties to the marriage

f) the contributions made by each of the parties to the welfare of the family including any contributions made by looking after the home or caring for the family  
g) the value to either of the parties to the marriage of any benefit which by reason of the dissolution or annulment of that of the marriage that party will lose the chance of requiring.

The court in exercising the powers was to attempt to place the parties so far as was practical in having regard to their conduct just to do.

Until recently the courts interpreted this as affording maintenance payments to a spouse in order to meet her reasonable needs. Those reasonable needs were determined primarily in accordance with the previous standard of living that the parties had enjoyed.

In simplistic terms you would calculate what the living costs of one party were, deduct from those living costs the income that that party had, and the shortfall would be met by way of maintenance payment. Whilst the Act is



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gender neutral, the remainder of this article will proceed on the basis of a husband being responsible for payment of maintenance to a wife which governs the majority of cases.

In 2006 the House of Lords simultaneously heard two cases of *Miller and Miller* and *McFarlane and McFarlane* (Number session 2005 to 2006 UK HL24. In the *McFarlane* judgment Mrs *McFarlane* was awarded a compensatory award. This alone was out of a “relationship generated disadvantage” as described by Baroness Hale.

### Facts of *McFarlane*

The parties married on 1 September 1984. They had lived for 2 years together prior to marriage. There were 3 children of the marriage aged 16, 15 and 9. The children were educated at private schools. The parties separated in December 2000. It was effectively a 16 year marriage. Both parties were aged 46.

By the time the parties married they had both qualified professionally, the wife as a solicitor and the husband as a chartered accountant. They had each trained with leading city firms. After the birth of the first child the wife returned to work and later, in 1989, moved to Freshfields where she worked a 4 day week. In 1990 the husband became a partner in Touche Ross. Until this time, the wife had earned as much as the husband. For a while she had earned more than him. In 1991, before the birth of the second child, the parties agreed the wife should abandon her career and bring up the children on a day by day basis. They agreed to concentrate on the husband’s career. Subsequently the wife did not return to work as a solicitor. The husband became very successful. The husband had a gross partnership income of £455,000 in 1998 to 1999 rising to £972,000 in 2000 to 2001 the year of separation and then to £1.6 million in 2002 to 2003 that would produce a net salary of £753,000. The parties’ standard of living rose as the husband’s earnings increased. The wife’s evidence was that the living costs increased from £66,000 in 1995 to £148,000 in 2000.

Before the District Judge, an award was made in favour of the wife in the sum of £250,000 a year together with £60,000 per annum maintenance for the children. On appeal by the husband to the Circuit Judge, the amount was reduced to £180,000 on the basis that the wife did not need £250,000. The wife appealed to the Court of Appeal.

The Court of Appeal restored the periodical payments order to £250,000 holding that in exceptional cases periodical payments orders could be used as a means to enable the payee to accumulate capital. It did however reduce the order from a joint lives maintenance order to a 5 year term order.

On appeal to the House of Lords they left the £250,000 per annum award in place finding that periodical payment orders could be made for the purpose of affording compensation to the other party as well as to meeting financial needs. The wife had suffered a double loss; a diminution in her income capacity and the loss of a share in the husband’s enhanced income. The Matrimonial Causes Act was intended to be flexible in its application.

It will be noted that this principle of compensation can only apply in “big money cases”.

As set out in the *McFarlane* case, compensation relates to prospective financial disadvantage which one party faces as a result of the decisions which they took from the benefit of the family during the marriage. The relationship generated disadvantages is not “needs driven” but “loss driven”. Since the House of Lords decision there have been several cases which have explored the concept of compensation more fully.

*RPvR? 2 (2007) 1 ALE 2105*. It was indicated that the word ‘compensation’ which had been used during the whole of the hearing did not appear in the statute. He questioned whether the word could add anything to the concept of “financial needs obligations and responsibilities”. He further warned that it is neither possible nor desirable to break up artificially ancillary relief claims into separate heads of claim, as if they were actions for damages for personal injuries. In family law, there is only one pot of resources which has to be divided between two parties fairly by balancing their competing claims with reference to Section 25. That is a world away from a civil claim where the resources of the defendant are irrelevant to the calculation of the claim and which is made up by aggregating separate heads of damages. In family law every pound (£) or percentage point added to one side subtracts in equal measure from the other. The Section 25 balancing exercise is very sensitive and even the slight adjustment can produce an exaggerated discrepancy/result. The judge noticed that he was seeing several cases with a compensation culture creeping in, with a view to bringing



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a greater science to family applications and in their craving for certainty. The judge found that such a scientific approach was totally misconceived and likely lead to double accounting. It was a blind alley at the mouth of which a “no entry sign” should now be firmly placed.

### **Lauder v Lauder 3 2007(2FLR)**

The courts however still appear eager to compensate the financial disadvantages suffered by one party to the marriage and is not limited to the McFarlane type of case, where the wife has sacrificed her career. The facts W was aged 70 H 69. The parties married in 1961 and had three children the youngest of which was 36. The former matrimonial home in 1988 was worth around £350,000. A Decree Nisi was made in 1985 and later that year made Absolute. The parties continued to live together in the former matrimonial home.

At the date of the divorce the children were aged 20, 18 and 14. During the course of the marriage W suffered ill health. A Consent Order was made in 1988, which envisaged that W would receive two thirds of the value of the matrimonial home, together with periodical payments at the rate of £8,000 per annum. The parties agreed that the Order would be deferred so that the 3 children could live in the house until they reached independence.

During the 15 and a half years after the Consent Order, H had paid the outgoings on the property and a sum of £50 a week towards W’s maintenance. Despite her health problems, W had worked, earning a modest income, and H had continued to be involved in business ventures and the property market. When the property was sold, it had doubled in value, and H through his business activities was worth approximately £4,500,000. Aged 68 on separation, W commenced a claim against H for an increase of her periodical payments. W set her income needs at £35,000. At first instance, the court awarded her £40,000 per annum. On appeal, H argued that W had not suffered any relationship generated disadvantage.

The Court of Appeal upheld the judgment, allowing the element of compensation for the relationship related disadvantages suffered by W. *V B v J P* (2008 1FLR 742) - Sir Mark Potter indicated in respect of compensation claims:

- a) On reading the Miller and McFarlane decisions, there are clear statements of an underlying principle

calling for consideration in cases where it is clear that:

- i) The parties have arranged their affairs in a way that has greatly advantaged the husband in terms of his earning capacity, but left the wife considerably handicapped in the terms of her own earning capacity;
- ii) The husband is a high earner, with a substantial surplus of resources over what is required to meet both parties’ needs. However, as made clear by their Lordships, while to identify and emphasise the need for an approach which would not preclude a wife from relying on a clear relationship generated disadvantage in support of a claim for maintenance, it is no more than an aspect of fairness, important to be identified as a strand or step in the thinking of the court when exercising its powers under S.23 and S.25 of the 1973 Act.

Sir Mark Potter also highlighted the problems of quantification of the compensation. At paragraph 66 of his judgment, he stated, “having made the findings which I have in relation to the wife’s earning capacity, it is right for me to have regard to her undoubted relationship generated disadvantage, albeit difficult to quantify and to take into account any award. However, because of:

- 1 The general uncertainty of the extent of the disadvantage;
- 2 The realistic agreement of the parties that there is an indefinite continuing need for is not suggested to be possible or appropriate.

This case is not one where it is necessary to attempt to quantify the element of compensation separately from that of the wife’s needs generously assessed against the background of the standard of living during the marriage, the husband’s considerably increased income and the reduced availability to the wife of a substantial proportion of the child maintenance originally provided”.

In *S v S (Non-Matrimonial Property Conduct)* (2007 1FLR 1196) Mr Justice Burton referred to compensation, but he chose not to include any in his award. His reasoning being, “I am quite satisfied that she gave no sign of what might be the case in other circumstances, a thwarted ambition or irrevocably damaged career. I do not believe that this head of loss can be said to arise in every circumstance. It is not an unfamiliar situation, for example in employment tribunals, where it is said to be



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the consequence of an unfair dismissal that a Claimant can never recover satisfactory employment, although in that forum, there is the statutory cap to the compensation.

In this case, I am not persuaded at all that anything has been lost by the 1.5 year gap in the Applicant's employment or as a result of the mutual agreement between the parties that she would not work. Indeed, the understanding and her own desire, as was plainly in evidence, was that this arrangement of her not working would not be limited to the period when she might have to be a carer of the children, but would extend to their joint enjoyment of his retirement at Brundenell, where she would choose to spend her time in sailing and painting".

*A v A* (2007 1FLR 176) is another case where compensation was considered but not awarded. "In this case, I do not believe the wife has suffered any economic disadvantage at all. She met the husband when she was only 21 years old. She did not have any qualifications or a budding career or for substance. She made no economic sacrifices for this relationship, and as a result of the marriage she would be much better off than she would have been had she pursued her chosen career. However, she clearly has needs as a result of her dependency on the husband during the course of the marriage and the fact that she is going to care for the children until they reach adulthood".

### **C R v C R (2008 1FLR 323)**

Mr Justice Body took the following view regarding compensation: "compensation is a difficult concept which usually considers the position of the person who has suffered some detriment, regardless of the ability of the other person to pay; this was the antithesis of the exercise in ancillary relief, which involves striking a fair balance in the context of the finite kitty. There was no compensation factor in this instance; the wife had failed to demonstrate any significant lost career prospects. In any event, a wife with 'ordinary' career prospects which had been fortified following marriage to a husband who had become a financial high flyer was highly likely to have been adequately compensated for that forfeiture by the very fact of equal division of the family resources".

### **Summary**

- Generally speaking, compensation claims will be limited to big money cases;
- In big money cases where the matrimonial assets are sufficient for a clean break to be achieved, a wife with 'ordinary' career prospects is likely to have been compensated by an equal division of the assets and consideration of how the wife's career might have progressed is unnecessary and should be avoided. Where, however, that is not the case and the parties accept or the court decides that fairness can only be achieved by an award of continuing periodical payments in respect of a wife's maintenance, then the matter of compensation in respect of relationship generated disadvantage requires consideration; again as a strand or element of fairness;
- In cases other than big money cases, where a continuing award of periodical payments is necessary and the wife has plainly sacrificed her own earning capacity, compensation will rarely be amenable to consideration as a separate element in the sense of a premium susceptible of calculation with any precision, where it is necessary to provide ongoing periodical payments for the wife after the division of the capital assets insufficient to cover her future maintenance needs and any element of compensation is best dealt with by a 'generous assessment' of her continuing needs and restricted by purely budgetary considerations in the light of the contributions of the wife to the marriage and the broad effect of the sacrifice of her own capacity upon her ability to provide for her own needs following the end of the matrimonial partnership;
- The consideration of compensation arises at the exit of the marriage, and in relation to the division/redistribution of the family's assets. Compensation should be viewed as a feature of the concept of fairness, rather than a head of claim in its own right;
- At the end of the marriage, the partnership ends and the wife no longer has any right or expectation of sharing, unless and to the extent that consideration of her needs, or compensation for relationship disadvantage so requires. A clean break is to be encouraged wherever possible;
- The concept of compensation remains a difficult area to specify with any precision as to exactly what it means and how it can be quantified.