

THE LAW REFORM COMMISSION
AN COIMISIUN UM ATHCHOIRIU AN DLI
(LRC 54-1996)

REPORT

ON

PERSONAL INJURIES:

PERIODIC PAYMENTS AND STRUCTURED SETTLEMENTS

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

© Copyright
First Published

The Law Reform Commission 1996
December 1996

ISSN 1393-3132

THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon. Anthony J. Hederman, former Judge of the Supreme Court, President;
John F. Buckley, Esq., Judge of the Circuit Court;
William R. Duncan, Esq., M.A., F.T.C.D., Barrister-at-Law, Professor of Law and Jurisprudence, University of Dublin, Trinity College;
Ms. Maureen Gaffney, B.A., M.A. (Univ. of Chicago), Senior Lecturer in Psychology, University of Dublin, Trinity College;
Simon P. O'Leary, Esq., B.A., Barrister-at-Law.

John Quirke is Secretary to the Commission.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General fifty three Reports containing proposals for the reform of the law. It has also published eleven Working Papers, ten Consultation Papers and Annual Reports. Details will be found on pp.178-183

The post of Research Counsellor to the Commission is vacant at present.

Ms. Deirdre Mulligan, LL.B., LL.M. (Edinburgh), Attorney-at-Law (State of New York), Ms. Lia O'Hegarty, B.C.L., LL.M. (Michigan), LL.M. (Harvard), Barrister-at-Law and Ms. Roisin Pillay, LL.B., LL.M (Cantab.) are Research Assistants.

Further information from:

The Secretary,
The Law Reform Commission,
Ardilaun Centre,
111 St. Stephen's Green,
Dublin 2.
Telephone: 671 5699.
Fax No: 671 5316

NOTE

This Report was submitted on 16 December 1996 to the Attorney General, Mr Dermot Gleeson, S.C., under section 4(2)(c) of the *Law Reform Commission Act, 1975*. It embodies the result of an examination of and research into the law of Personal Injuries, Periodic Payments and Structured Settlements which was carried out by the Commission at the request of former Attorney General, Mr John Rogers, S.C. together with proposals for reform which the Commission were requested to formulate.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public, in the form of this Report, so as to enable informed comments or suggestions to be made to the said relevant Government Departments by persons or bodies with special knowledge of the subject.

CONTENTS	PAGES
CHAPTER 1: INTRODUCTION	1- 3
The Reference	1
Approach Underlying This Report	1
 SECTION I: IRELAND 	
CHAPTER 2: PERSONAL INJURIES ACTIONS	4-20
The Action for Damages	4
Action In Tort	6
Assessment Of Compensation	7
Income Tax	12
The Appropriate Rate	13
Exception	14
Contract	18
Provisional and Interim Awards of Damages	20
 CHAPTER 3: FATAL ACCIDENT ACTION	 21-33
Introduction	21
The Wrongful Death Action	21
Parties Entitled To Avail Of The Remedy	22
The Basis Of Liability Under Part IV Of The 1961 Act	22
Recovery By Dependents For Pecuniary Loss	23
What Is The Basis Of Assessment Of Dependency?	24
 The Calculation Of Future Losses	 26
Period of loss	26
The discount rate	27
Allowance for taxation of interest from investment fund	27
Allowance for impact of inflation	28
 The Survival Action	 29
The Nature Of Damages Recoverable	30
The Relationship Between Survival Actions And Wrongful Death Actions	31

CONTENTS	PAGES
CHAPTER 4: EXISTING PROPOSALS FOR REFORM	34- 39
The O'Connor Report, 1972	34
The MacLiam Report, 1982	36
The Barrington Report, 1983	38
 SECTION II: THE UNITED KINGDOM 	
CHAPTER 5: PERSONAL INJURIES ACTIONS	40- 45
The Calculation Of The Award	40
The Payment Of The Award	43
 CHAPTER 6: FATAL ACCIDENT ACTIONS	 46- 49
Introduction	46
The Survival Action	46
The Wrongful Death Action	46
(i) Who can claim?	47
(ii) How are damages assessed?	47
 CHAPTER 7: STRUCTURED SETTLEMENTS AND OTHER REFORMS	 50- 70
Introduction	50
(i) The proposals of the Law Commission	50
(a) The 1973 Report	50
(b) The 1994 Report	52
(ii) The proposals of the Pearson Commission	53
 Interim Awards	 57
(a) Interim payments	57
(b) The split trial	57
 Provisional Damages	 57
Structured Settlements	61
(i) Mutual insurers	68
(ii) Medical negligence cases	69

CONTENTS

PAGES

SECTION III: THE UNITED STATES OF AMERICA

CHAPTER 8: PERSONAL INJURIES ACTIONS	71- 79
The Calculation Of The Award	71
Inflation	72
Taxation	76
Miscellaneous Other Factors	78
Conclusion	79
CHAPTER 9: FATAL ACCIDENT ACTIONS	80- 82
The Wrongful Death Action	81
Survival Actions	82
CHAPTER 10: STRUCTURED SETTLEMENTS AND OTHER REFORMS	83- 90
Structured Settlements	83
Periodic Payments	85
Constitutionality Of Legislation Providing For Periodic Payments	87

SECTION IV: CANADA

CHAPTER 11: THE PERSONAL INJURIES ACTION	91- 97
(i) Taxation	94
(ii) Inflation and interest	95
CHAPTER 12: FATAL ACCIDENT ACTIONS	98-102
The Survival Action	98
The Fatal Accident Action	100

CONTENTS	PAGES
CHAPTER 13: STRUCTURED SETTLEMENTS AND OTHER REFORMS	103-110
Structured Settlements	103
Ontario	105
Manitoba	106
British Columbia	109
 SECTION V: OTHER COMPARATIVE ASPECTS 	
CHAPTER 14: AUSTRALIA	111-117
Western Australia	111
South Australia	112
Victoria	114
Tasmania	114
Australian Federal System	116
 CHAPTER 15: NEW ZEALAND	 118-120
Basis Of Entitlement	118
Administration Of The Scheme	119
Financing Of The Scheme	120
Conclusions	120
 SECTION VI: CONCLUSIONS 	
CHAPTER 16: CONCLUSIONS AND RECOMMENDATIONS	121-144
Problems With The Lump Sum System	122
The Options For Reform And Recommendations	126
(i) Reviewable periodic payments	126
(ii) Interim awards and provisional damages	128
The Commission's Approach	137
 CHAPTER 17: SUMMARY OF RECOMMENDATIONS	 145-146

CONTENTS	PAGES
APPENDICES	147-175
APPENDIX 1: Law Commission Draft Bill	147-151
APPENDIX 2: Model Agreement for a Structured Settlement	152
APPENDIX 3: Rules of the Supreme Court of England and Wales	153-156
APPENDIX 4: Florida Statutes 1991	157-160
APPENDIX 5: New York Civil Practise Law and Rules 1992	161-163
APPENDIX 6: Californian Code of Civil Procedure	164-166
APPENDIX 7: Suggested Forms (California)	167
APPENDIX 8: Courts of Justice Act (Ontario)	168
APPENDIX 9: Periodic Payment of Damages Act (Manitoba)	169
APPENDIX 10: Report of the Justice Reform Committee of British Columbia, 1988	173
APPENDIX 11: List of Persons who furnished written submissions and List of Persons who attended the Commission's Seminar	174
LIST OF COMMISSION PUBLICATIONS	176-181

CHAPTER 1: INTRODUCTION

The Reference

1.1 Pursuant to section 4(2)(c) of the *Law Reform Commission Act, 1975*, the then Attorney General, Mr. John Rogers, S.C., referred a number of topics to the Commission, with the request that the Commission formulate proposals for their reform. One of these topics was the law relating to compensation for personal injuries. The Commission was asked to examine two aspects of this topic. The first was the application of the Statute of Limitations to cases of latent personal injuries. This was addressed in the Commission's Report on *The Statute of Limitations: Claims in respect of Latent Personal Injuries (LRC 21)*. The second aspect related to periodic payments and provisional awards of damages. This was first addressed in a Discussion Paper which the Commission circulated to persons and groups with a particular interest in the subject in August 1993. Having received the observations of these persons and groups the Commission held a meeting on the 9th December 1994 attended by experts in legal, insurance and administrative aspects of the topic. This Report contains our final recommendations.

The Commission is very grateful to those who furnished written submissions or attended the Commission's Seminar. It is particularly grateful to those who did both. Lists of those experts are to be found in Appendix II.

Approach Underlying This Report

1.2 This Report does not deal with the basis of liability in tort and the various rules of negligence but rather concerns itself with the way the tort system pays damages, irrespective of how that liability arises, and explores a number of different approaches that can be adopted in altering the common law practice of paying the plaintiff his or her damages in a once-off lump sum.

1.3 The practice of paying damages over a period of time has arisen, in the United States and in the United Kingdom, out of a method of settling cases which has made use of a special arrangement made with the revenue authorities. Legislation has been enacted which enables the courts to take a more active role in awarding structured settlements by putting these informal arrangements into statutory form.

1.4 It is necessary to include in this Report a brief discussion of how the courts calculate aspects of an award of damages for personal injuries, for two reasons.

1.5 Firstly, the Irish courts have adopted a different method of calculating damages awards for personal injuries, particularly with regard to that element of the award which represents future losses, from their English counterparts. In the context of introducing periodic payments it is the element of the award dealing with future losses that is relevant, since at the date of the trial the plaintiff is more likely to want to receive damages for pre-trial losses in a lump sum.¹ This approach is also more consistent with the aim of damages which is to put the plaintiff in the position he or she would have been in had the accident not occurred.

1.6 Secondly, if the courts are given a formal, statutory power to award structured settlements in certain circumstances, then the way in which they calculate certain aspects of the award could be determined by features of the legislation itself, e.g. provisions for inflation-proofing.

1.7 The principles and approach adopted by the Irish courts at present are very much conditioned by the fact that the plaintiff is only going to receive one lump sum payment. Consequently future losses must be reduced to present value by taking a complex variety of factors into account.² If provision is to be made for the awarding of a part of a personal injuries award in the form of a structured settlement then the extent to which this award is inflation-proofed and tax free may affect the way the courts will calculate that part of the award in the first place.

1.8 The arguments in favour of structured settlements³ can apply equally in fatal accident cases. In these cases, where the injured party dies, the nature of the future pecuniary loss to the estate or the dependents is often one of a periodic nature, i.e. the deceased's loss of future earnings. By the same token, similar policy objectives may ensure that the surviving dependants can avail of a guaranteed flow of periodic income such as is provided for by structured settlements. Consequently this Report also includes an outline of the provisions governing fatal accident cases.

1 It is worth noting that some States in America permit the court to structure any element of the damages award.
2 Including actuarial evidence and estimates as to future taxation and inflation.
3 Such as providing a guaranteed flow of inflation-proofed income for the lifetime of the plaintiff or the period of disability. These are discussed later in the Report.

1.9 We also propose to examine reforms that have been introduced in various other jurisdictions in this regard. This examination will focus on the way damages are paid in the common law personal injuries action.

SECTION I: IRELAND

CHAPTER 2: PERSONAL INJURIES ACTIONS

The Action For Damages

2.1 In many cases of accidental personal injury or death,¹ monetary compensation can be obtained if the injured party or estate can successfully bring a court action against a defendant who is either insured or who has the resources to be able to pay the compensation.²

2.2 An action can be brought in tort or contract or both depending on the circumstances of the accident. The vast majority of claims are made in tort. There is no reason, however, why an individual may not sue for damages for personal injuries suffered as a result of a breach of contract,³ although the extent of damages allowed will often be more limited.

2.3 An award of damages can only be made in the form of a lump sum.⁴ This contrasts with the payments made under the social welfare system for

1 Actions arising out of fatal accidents are dealt with in Chapter 3.
2 The Motor Insurance Bureau of Ireland has a scheme in place where awards of damages made against an uninsured driver will be paid. This is funded out of the premiums paid by insured drivers.
3 *Summers v Salford Corporation* [1943] AC 283.
4 *Fitter v Veal* (1701) 12 Mod Rep 542. See White, *Irish Law of Damages for Personal Injuries and Death*, (Dublin, 1989), at pp3-6.

workplace injuries⁵ and the various statutorily based compensation schemes for work or road accidents that exist in other countries, where some element of the compensation award is paid periodically. The fact that awards for damages for personal injury are made only in the form of a lump sum means that an assessment as to all losses both past and future, must be made at the trial. The plaintiff cannot recommence proceedings if his or her condition deteriorates or something occurs which was unforeseen at the time of the trial and yet drastically alters the position of the plaintiff. This is because the plaintiff's cause of action is merged in the initial judgment and therefore extinguished by it.

2.4 The purpose of the award of damages is to compensate the plaintiff for loss and injury suffered as a result of the negligent conduct of the defendant. Aggravated or exemplary damages may also be awarded in specific cases.⁶ However, the primary purpose of any award is to compensate the injured plaintiff.

2.5 While the injured party may have incurred many clearly ascertainable financial losses such as medical expenses and loss of earnings, calculating monetary compensation for the loss of a limb or mental impairment is less easy and involves the court in trying to estimate what monetary compensation is fair in all the circumstances of the case. Needless to say, that will frequently be decided by reference to previous, similar cases.

2.6 It should be stressed that the calculation of damages depends on the

5 The Department of Social Welfare is responsible for administering the occupational injuries benefits scheme. This scheme allows certain insured workers to claim a range of benefits if they are injured at work or they contract a disease from work. The scheme has its statutory basis in Chapter 5 of the *Social Welfare (Consolidation) Act, 1993*.

Since 1990 the scheme has been funded from the general Social Insurance Fund and employers pay a certain percentage of their PRSI bill to cover payments from this scheme. Prior to this there was a separate levy paid by employers into an Occupational Injuries Fund for the purpose of financing benefits under the scheme.

This latter scheme was set up by the *Social Welfare (Occupational Injuries) Act, 1966*, which replaced the *Workmen's Compensation Acts 1934-59*. This previous system was based on the direct liability of the employer for whom insurance against suit for injuries at work was optional. In introducing the 1966 Act the Minister for Social Welfare, Kevin Boland, stated in the Dáil (*Dáil Reports 23 Nov, 1965, Cols 114-116*) "Compensation for employment injury will henceforth be a social service rather than an obligation on an individual employer ... the present system allows too much scope for contention between the workman and the employer or his insurance company and rests in the last resort on the threat or practice of litigation. This tends to retard the workman's recovery and to prejudice good relations between him and his employer A system under which compensation would be payable as a social service with the employer not involved in the claim is obviously more desirable."

Consequently the underlying ethos behind Occupational Injuries benefits since 1966 has been one akin to that underpinning the more developed no-fault statutory schemes in other countries. The 1966 Act did not, however, replace the tort action, although damages would be reduced by any *collateral benefits* received under the statutory scheme. As a result, due to the relatively low funding of the statutory scheme, many tort actions for injuries at work are still brought.

6 Generally where the plaintiff's sense of injury resulting from the tort is justifiably heightened by the manner in which or the motive for which the defendant acted. See McMahon and Binchy, *Irish Law of Tort, 2nd Ed*, (Dublin, 1990), pp771-778. *McIntyre v. Lewis* [1991] I.R., 121, *Conway v. Irish Teachers Organisation* [1991] 2 I.R. 305.

plaintiff's condition and is independent of the basis of his or her claim. The emphasis is on the plaintiff's condition without regard to whether the injuries resulted from a car crash or a defective product.

2.7 Initially it is proposed to outline briefly the various circumstances in which a personal injuries or fatal accident action can be brought. Then it is proposed to examine in greater detail the method by which the compensation award is calculated, with particular reference to that part of the award which is for future losses.

Action In Tort

2.8 The law of torts operates to compensate an injured party for the losses suffered as a result of the wrongful conduct of another. In general the success of a claim depends on proving that damage was suffered and that this was caused by the tortious conduct of the defendant.

2.9 The tort that is most frequently met in the Irish Courts is that of negligence.

2.10 There is no all-encompassing test for establishing negligence, but in general, a plaintiff is required to prove that the defendant was in breach of a duty of care imposed on him or her by the law. Fault will be attributed where there has been a failure to take reasonable care in circumstances where the injuries were reasonably foreseeable. Lord Atkin, in *Donoghue v Stevenson*,⁷ stated the test thus:

"you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

2.11 The courts have applied this broad test to widely differing factual circumstances, including road accidents, medical treatment, accidents in the workplace, schools and on private premises.⁸

2.12 As well as negligence, a plaintiff may obtain compensation in tort for breach of statutory duty. Perhaps the most important context in which this operates in practice is in relation to accidents in factories, mines, quarries and other places of employment. Liability in this type of case is sometimes not

7 [1932] AC 562, at 580.

8 See our *Report on Occupiers Liability (LRC 46-1994)* and the Occupiers Liability Bill, 1994.

dependent on proof of carelessness by the defendant: a defendant entirely innocent of any fault may nonetheless be held strictly liable for the breach of the statutory provision if the court interprets it as encompassing a remedy in tort.⁹

2.13 Two other recent examples of strict liability without fault arise under the *Control of Dogs Act 1986* and the *Liability for Defective Products Act 1991*.

2.14 As can be seen, there are a number of different tests for deciding liability in cases of personal injury and the principles governing liability are still evolving as the courts seek to come to grips with the sometimes arbitrary results a strict application of the common law fault rules produces.¹⁰

Assessment Of Compensation

2.15 Once liability is established, the amount of compensation then depends on the various criteria applied by the courts in awarding damages. Perhaps the most important factor in determining the amount of compensation is the purpose of the award.

2.16 The purpose of an award of damages is to try to restore the plaintiff to the position he or she would have been in before the accident. Since a monetary award cannot restore a plaintiff to his or her prior position where severe personal injuries have been sustained, the courts will try to award compensation that is "fair" in the circumstances of the case, usually by reference to the awards given in previous, similar cases.

2.17 *Dr John White* in his book, *The Irish Law of Damages*¹¹, says about awards in personal injuries cases:

"An award of damages for personal injuries or for death is by way of a lump sum in respect of past and prospective losses resulting from such injuries or death. The assessment is made once and for all in respect of both past and prospective losses. Once the plaintiff recovers judgment for damages for personal injuries or death caused by a tort or breach of

9 See, for example *O'Sullivan v. Dwyer* [1971] I.R. 275, *Duly v. Avonmore Creameries* [1984] I.R. 131.
10 Critiques of the tort system in this respect can be found in a number of sources: Atiyah, *Accidents Compensation and the Law*, 4th Ed (1987); Calabresi, *The Costs of Accidents*, (1970); Stapleton, *Disease and the Compensation Debate* (Oxford, 1986); Harris and Others, *Compensation and Support for Illness and Injury*, (Oxford, 1984); Allen, Bourn and Holyoak (eds), *Accident Compensation After Pearson* (London, 1979); and speaking extra judicially Brian Walsh, foreword to McMahon & Binchy, *Irish Law of Torts*, 1st ed (Dublin, 1981), and Niall McCarthy, foreword to JPM White, *Irish Law of Damages for Personal Injuries and Death*, (Dublin, 1989).
11 *Irish Law of Damages for Personal Injuries and Death*, JPM White, (Dublin, 1989).

contract his cause of action is merged in such judgment and extinguished. He cannot bring a further action even in respect of those consequences of his injuries which were unforeseen at the trial and for which compensation was not allowed."¹²

2.18 The fixing of damages in proceedings in respect of personal injuries and wrongful death actions is now done in the High Court by the judge. The *Courts Act, 1988*, abolished juries in these actions in the High Court.

2.19 In rare cases aggravated or exemplary damages may be awarded in personal injuries cases, as for example where the plaintiff is the victim of a battery committed by the defendant, in particularly flagrant circumstances.

2.20 Compensatory damages are assessed under certain headings. The two most commonly referred to are general damages and special damages. Special damages usually refer to expenses incurred as a result of the tort up to the date of the trial. General damages cover the estimated cost of future medical and related expenses, as well as pain and suffering, prior to and subsequent to the making of the award and loss of amenities.

2.21 *White* characterises the assessment of damages by the courts by reference to the pecuniary and non-pecuniary losses of the plaintiff:

"Damages in respect of personal injuries are assessed with reference to the pecuniary and non-pecuniary losses sustained by the plaintiff. Pecuniary losses may be of two distinct types, namely loss of earning capacity and other pecuniary benefits, past and prospective; and expenses, past and prospective, occasioned by the injuries. These elements of loss constitute distinct items or 'heads' of damages. Similarly, with regard to non-pecuniary losses, where the plaintiff's damages are assessed having regard to his pain and suffering, past and prospective, his loss of amenities of life past and prospective, and his loss of expectation of life."¹³

2.22 In assessing prospective pecuniary losses, the court will attempt to award a lump sum amount that at the date of the trial represents the future loss of income or expenses incurred as a result of the tort. As Hamilton J stated in *Cooke v Walsh*¹⁴:

12 *ibid*, at p3.
13 *White, op cit*, at p107.
14 [1983] ILRM 429.

"This capital sum is frequently described as that sum of money which if invested will enable the plaintiff by recourse to interest and capital to replace his loss over his lifetime or working lifetime and is exhausted at the end of the period."

2.23 However, it may be said that there are no clear guidelines consistently adopted by the courts and quite often the methodology adopted by the courts in arriving at an award will differ from case to case.¹⁵

2.24 For example, the courts have changed their view several times on the subject of whether or not the final award of damages should be the total of all the composite figures for the various types of damages or whether the final figure should reflect the case as a whole and not be rigidly restricted by the amounts for each separate heading of damages.

2.25 *McMahon and Binchy* in discussing this problem identify a number of changes in the courts approach in this regard.¹⁶ In the 1950s the courts seemed to favour the overall assessment approach. O'Dalaigh J in *McMorrow v Knott*¹⁷ stated:

"Damages in a case of personal injuries are not to be assessed by pricing each element of damage separately and taking the total. A figure thus arrived at does not present a true picture. The several elements of damage instead of being totalled have to be fused, because the final assessment should be informed by a view of the case not seen in segregation but as a whole."

2.26 However, in the 1960s the view seemed to change to one more in favour of a separation of the total award of damages into its constituent heads. Kingsmill Moore J in *Sexton v O'Keefe*¹⁸ stated:

"The jury were not asked to segregate their award between special damages for expenses and monetary loss, on the one hand, and general damages for pain and suffering, disability and deprivation of enjoyment on the other. Such a separation and the award of damages under those two separate heads, in many cases of which this is one, would greatly facilitate the court in arriving at satisfactory conclusions in the event of an appeal."

15 *McMahon & Binchy, op cit*, pp783-811.

16 *Ibid*, at p784.

17 Unreported, Supreme Court, 21 December 1959, at p4.

18 [1966] IR 204, at 210.

2.27 The judge then added:

"I am of the opinion that [this separation of damages] is a practice which could with advantage be adopted in all cases where special damages are likely to form a considerable proportion of the award."¹⁹

2.28 The preference for the awarding of damages on the basis of totalling the amounts under the various headings of damages seems to have made the task of analysing a jury's decision easier for the appeal court. However, in the early 1980s in the case of *Reddy v Bates*,²⁰ the Supreme Court by a two to one majority, endorsed the approach of calculating the award by looking at the overall circumstances of the case. Griffin J stated:

"in a case such as this, where damages are to be assessed under several headings, where the jury has added the various sums awarded and arrived at a total for damages, they should then consider this total sum, as should this court on any appeal, for the purpose of ascertaining whether the total sum awarded is, in the circumstances of the case, fair compensation for the plaintiff for the injury suffered, or whether it is out of all proportion to such circumstances."²¹

2.29 As *McMahon & Binchy* point out, this "appears to defy the mathematical principle that the whole is neither greater nor smaller than the sum of its parts".²² However, it is interesting to note that the court felt that a valid consideration to be taken into account in determining the size of the award is the amount the award might yield if carefully and prudently invested. According to Griffin J in *Reddy v Bates* "the income which that capital sum would generate with reasonably careful and prudent investment is a factor which the jury, and this court on appeal, should take into consideration in arriving at a conclusion in this behalf".²³

2.30 This is arguably a very uncertain factor to be introducing into the calculation of a compensation award. McCarthy J in *Reddy v Bates* disagreed with the majority that this should be a factor. He stated that:

"The annual or other income which may, on its face, be realised by the whole or any part of a total award is irrelevant to any such review [of general damages]. I profess no competence to determine the relative effects of varying interest rates, the falling value of money, the hazards of even the most apparently solvent companies in which money may be

19 *Ibid.*

20 [1984] ILRM 197.

21 *Ibid.*, at 202.

22 *McMahon & Binchy*, at p785.

23 [1984] ILRM at p203.

invested for capital growth and the many other factors which exercise the minds of merchant bankers and the like, not always with success."²⁴

2.31 *White* says, regarding this factor (that the award will yield an income if prudently invested), that "it is difficult to understand what justifications may ever be suggested in its support".²⁵ While this approach may be, logically, an unsound way of calculating damages, since it may reduce damages for non-pecuniary losses by reference to the amount awarded for pecuniary losses, it nevertheless reflects a belief that, ultimately, the calculation of damages in a personal injury case is, to a degree, an impressionistic exercise. As *McMahon & Binchy* say, the "Supreme Court is opting for the supremacy of an intuitive resolution of the issue of compensation".²⁶ This is not as drastic an outcome as it may seem in that monetary compensation for physical and mental injuries is, by its very nature, an inexact science.

2.32 Another important aspect of the calculation of the damages is the consideration whether or not other compensating benefits received by a plaintiff will be deducted in calculating the award of damages.

2.33 In general, at common law, benefits which accrue to a plaintiff due to his or her own efforts (e.g. private insurance) are not deductible. Similarly, *ex gratia* or charitable payments (other than from the defendant himself or herself) will not be deducted.²⁷

2.34 Much of the common law position was given statutory force by s2 of the *Civil Liability (Amendment) Act, 1964*:

"In assessing damages in an action to recover damages in respect of a wrongful act (including a crime) resulting in personal injury not causing death, account shall not be taken of -

- (a) any sum payable in respect of the injury under any contract of insurance,
- (b) any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury."

2.35 Section 50 of the *Civil Liability Act, 1961*, makes similar provision as regards awards in wrongful death actions:

24 *Ibid* at p205.

25 *White*, at p273.

26 *McMahon & Binchy*, at p785.

27 *Redpath v Belfast and County Down Railway*, [1947] NI 187.

"In assessing damages under this Part (Fatal Injuries) account shall not be taken of -

- (a) any sum payable on the death of the deceased under any contract of insurance,
- (b) any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the death of the deceased."

2.36 These sections apply to any of the benefits referred to, irrespective of their source. So, in *Green v Russell*,²⁸ the court held that a benefit paid by the liable employer to the deceased employee's estate was not deductible under the similar provision in the *Fatal Accidents (Damages) Act, 1908*.

2.37 Payments made under social welfare legislation are generally regarded as not being deductible. However, following the introduction of s68 of the *Social Welfare (Consolidation) Act, 1981*, payments of injury benefit or disability benefit paid to a plaintiff, in consequence of the injuries for which he is suing in tort, will be deductible from the element of the damages which is for loss of earnings or profits, past and future. The deduction applies to benefit that "will probably" be payable for a period of 5 years from the time the cause of action accrued. So while these benefits are paid periodically, the deduction from the tort award will amount to a reduction in the lump sum.²⁹

2.38 Section 306A of the 1981 Act, inserted by s12 of the *Social Welfare Act, 1984*, extends the above exception to the general rule of non deductibility to disability benefit (including any amount payable therewith by way of pay-related benefit) and invalidity pension in cases where the action arises out of the use of a motor vehicle, in circumstances where liability for such injuries is required to be covered by insurance. The *Social Welfare Consolidation Act, 1993* incorporates these changes.

2.39 As regards other collateral benefits that may become available to the plaintiff, White argues that both benefits in kind, such as free health service and redundancy payments, are generally non-deductible.³⁰

Income Tax

2.40 The role taxation plays in the calculation of personal injury awards is

28 [1959] 2 QB 226.

29 For further detail on this area see *McMahon & Binchy*, pp23-27.

30 See *White* paras. 4.10.12 to 4.10.29.

also very important from the point of view of structured settlements or periodic payments.

2.41 For tax purposes compensation awards in personal injuries cases are treated as capital, rather than income, receipts. However, s24(1)(c) of the *Capital Gains Tax Act, 1975*, expressly excludes damages for loss of earnings recovered in a personal injury award from capital gains tax. Consequently the actual lump sum award itself is not taxed in the hands of the recipient.

2.42 However, the fact that the plaintiff's lost earnings would have been subject to income tax is taken into account when the court calculates that component of the award, thereby reducing the overall size of the award. This rule of calculation for personal injuries awards is called the *Gourley principle* after the case in which it was first used.³¹ The Supreme Court, in *Cooke v Walsh*³² in 1983, confirmed the application of this principle to Irish personal injury awards, namely that an amount should be deducted from that element of the award for loss of earnings which would have been payable to the Revenue as income tax if the earnings had been earned in the normal way. The principle applies equally to the amount the income would have been reduced by social insurance contributions and any other state levies that would have been payable by the plaintiff had he or she earned the income in the ordinary course of events. This principle of deduction also applies to other forms of lost income other than earnings, such as lost income from a pension.³³

The Appropriate Rate

2.43 The next problem that arises in calculating the deduction to be made according to the *Gourley* principle is to decide what income tax rate should be used in calculating the size of the deduction. This can be problematic as the income tax rate in the future may be different, thus affecting the amount of lost future net earnings. If the income tax rate increases in the future, then the plaintiff will be overcompensated for loss of future earnings if the deduction made is based on the tax rate at the date of trial. On the other hand, if the income tax rate decreases in the future, then the plaintiff will not have been accurately compensated for his loss of future earnings. Initially the courts were reluctant to engage in speculation as to future tax rates, the approach being that the income tax rate at the date of trial was to be used in making the deduction in the plaintiff's award for loss of future earnings. In *Gourley*, Lord Goddard said he would direct a jury as follows:

31 *British Transport Commission v Gourley* [1955] 3 All ER 796.

32 [1984] ILRM 208.

33 *In re Houghton Main Colliery Co. Ltd.* [1956] 1 WLR 1219.

"No one can foresee whether tax will go up or down, and I advise you not to speculate on the subject but to deal with it as matters are at present."³⁴

2.44 However, in more recent times the courts have shown a greater willingness to consider the realistic possibility that income tax may decrease in the future and that to base the *Gourley* deduction on present income tax levels would be unfair to the plaintiff. Kenny J in *Glover v BLN Ltd (No. 2)*³⁵ stated that:

"The estimate of the taxation which the plaintiff would have to pay on the earnings which he would have got if he had not been injured or if his contract had not been broken must necessarily be inaccurate but in a period of inflation and increasing taxation it will, in most cases, be less than the tax which would have been payable."

2.45 The position is not clear, however, and it seems that each case will depend on the circumstances, such as how far into the future the plaintiff will suffer a loss of earnings, the rate of taxation at the date of trial and whether a tax cut is proposed.³⁶ On this latter point, *White* states that "where there are firm government proposals for alterations in the rates of taxation, account should be taken of these."³⁷

2.46 While the position as regards estimating future income tax rates is still uncertain, the Supreme Court, in *Griffiths v Von Raaj*,³⁸ has stated more clearly the approach to be taken to estimating future tax rates on income from an investment of the plaintiff's lump sum in an investment fund.

Exception

2.47 As was pointed out above, the capital lump sum is not taxed in the hands of the plaintiff. However, if this lump sum is invested, then the income produced by it will be taxed according to normal income tax rates. There is one important exception to this position. Section 5 of the Finance Act, 1990, provides that where the plaintiff is "permanently and totally incapacitated by reason of mental

34 *Gourley*, at 808.

35 [1973] IR 432, pp441-442.

36 In the English case of *Daniels v Jones* [1981] 1 WLR 1103 (CA), at page 1116, Pearson LJ was prepared to consider impending budget proposals for a tax cut as a factor in calculating the *Gourley* deduction: "if one merely allows for a reasonable expectation in 1980 that there would before long be some alleviation of the very high surtax rates then prevailing, it is still an important factor and strikingly illustrated by the 1961 Budget proposals."

37 *White*, at p177.

38 [1985] ILRM 582.

or physical infirmity from maintaining himself" and the income from an investment of a lump sum for personal injuries is "the sole or main income" of the plaintiff, then the income will be exempt from income tax. According to *Byrne and Binchy*³⁹:

"This provision was introduced at Committee stage after public disquiet was expressed concerning the taxation of income from the settlement entered into in *Dunne v National Maternity Hospital*."

2.48 In any case where the requirements of section 5 are not met, the taxation of the income produced by an investment fund is important because, while the lump sum award is not taxed in the hands of the recipient, if the lump sum is invested by the recipient to produce a regular income, that income will be subject to income tax.

2.49 In *Griffiths v Von Raaj*, the Supreme Court acknowledged that the income tax that is payable on the income produced by an investment of the damages award should be taken into account when calculating the damages award and that therefore the size of this element of the award should be increased to compensate for this.⁴⁰ This is in line with the *Gourley* principle as regards future earnings. In terms of the tax rate to be used, however, Griffin J for the majority felt that it was excessive to award compensation on the basis of present tax levels since there was a high probability that this would not be continued, and therefore he reduced the overall amount. Griffin J stated:

"The calculations of the actuary, which are no doubt mathematically precise, assume, *inter alia*, that, for the lifetime of the plaintiff (something over 50 years) the current rates of taxation will be maintained for the entire period, that the bands of taxation will remain unaltered, that the return on capital will continue at present levels, and that although tax relief may now be claimed for the cost of care and medical expenses in some of the member states of the E.E.C. (including this country) there will not at any relevant time be any alteration in the position in the United Kingdom [where the plaintiff lived]."⁴¹

2.50 Griffin J therefore reduced the amount of the award saying that "[h]aving regard to the assumptions on which the multiplier used in this case is based, that multiplier is in my view too high, and the damages of £350,000 awarded under this heading are therefore excessive."⁴²

39 *Byrne & Binchy, Annual Review of Irish Law, 1990*, p458.
40 For a discussion of this case see *White*, pp182-187.
41 [1985] ILRM at p586.
42 *Ibid*, at p587.

2.51 Griffin J therefore reduced the damages for care and attention from £350,000 to £290,000 and the damages for loss of earnings from £125,000 to £85,000.

2.52 McCarthy J, while agreeing that income tax on income from an investment fund should be taken into account, dissented from this approach on the grounds that such a reduction, based on the future possibility of changes in the tax position on income from such an investment fund, was arbitrary in the absence of specific evidence. He stated:

"As to income tax, it is proper that it be taken into account and there is no means of assessment other than to take current tax rates. On the other hand, there is no evidence whatever to suggest that there will be any alteration in the United Kingdom in the right to set off charges such as are covered by this item. Whilst the sums seem large, I cannot estimate any other sum or point to any other means whereby it might be done. I cannot accept that there may be a reduction without explaining the basis of it - such would be entirely arbitrary."⁴³

2.53 *White* argues that McCarthy J's approach is preferable on the grounds that the reduction made to an award because the taxation rate on income from an investment fund is likely to be reduced should apply with equal force to the reduction made to damages for loss of future earnings on the grounds that income tax may be reduced:

"[I]f the approach of Griffin J, on the issue of the allowance to be made for the impact of income taxation on interest from the investment fund is applicable to the calculation of damages for loss of future earnings (as logically it must be so applied) then it follows as a necessary corollary (and in fairness to the plaintiff) that a similar allowance to take account of the possibilities of reduced income taxation in the future must be applied in the operation of the *Gourley* principle in relation to losses of future earnings with the result that the suggested allowance in the operation of the *Gourley* principle for possible decreases in future taxation must be made and must be of a very significant order indeed. The result will be to introduce wholly speculative allowances for the impact of income taxation *both* in the application of the *Gourley* principle and of the principle that allowance must be made for the impact of income taxation on interest from the investment fund."⁴⁴

2.54 The approach of the courts to the liability to tax on income from an investment of the lump sum award is very important in the context of the

43 *Ibid*, at p591.
44 *White*, at p186.

structured settlement debate. This is so because the income paid out periodically under a structured settlement arrangement in other jurisdictions is usually not taxed in the hands of the plaintiff. This raises the question whether if such an arrangement were arrived at in Ireland, the courts would simply reduce the lump sum amount on the grounds that the plaintiff would no longer be paying income tax on the income from the invested sum? This issue is one that clearly has to be addressed and resolved in any reform proposals.

2.55 Along with future taxation, inflation is also a very important factor in this context. Inflation and the devaluation of money were recognised as being valid factors to take into account when calculating damages for future losses by the Supreme Court in *Donnelly v Browne*.⁴⁵ The effect of taking inflation into account when calculating an award for future losses was clearly displayed in the case of *Cooke v Walsh*.⁴⁶

2.56 In that case Hamilton J in the High Court, in a judgment which was approved of by the Supreme Court, said that the real interest rate to be used for discounting the lump sum for loss of future earnings to present day values was to be calculated by reference to the current rate of inflation and the rate of interest from "safe easily realisable investments".⁴⁷ In this particular case an investment in 15% Exchequer Bonds was possible at the date of trial and the rate of inflation was 12.5%. Consequently the real interest rate used by the court to discount the lump sum award was 2.5%. Hamilton J stated:

"The rate of interest selected for valuation should have regard to the notional investment of the damages award by the plaintiff, and must therefore depend *inter alia* on the general investment climate at the date of the hearing. The decision as to the rate of interest selected for valuation will hinge on the assumption made as to the mode of investment and generally the test should be the yield obtainable from safe easily realisable investments at the time of receipt of the judgment damages. In determining the rate of interest to be selected for valuation, allowance must be made for devaluation in the value of money."⁴⁸

2.57 Griffin J in the Supreme Court upheld Hamilton J's approach and adoption of a discount rate of 2.5% stating:

"The learned trial judge was, in my opinion entitled to accept and adopt the rate of 2.5%, and this court is not entitled to interfere with that

45 Unreported, 15th May, 1972 (153-1989) (SC).

46 [1984] ILRM 208.

47 *Cooke v Walsh* [1983] ILRM 429, at 436.

48 *Ibid*, at 436.

finding made by him. It may very well be that in other cases, a different rate may be accepted on the evidence given in such cases."⁴⁹

2.58 The court did not take into account any tax payable on interest from the investment as, since the plaintiff was an infant, the High Court would determine the mode of investment of the fund for the plaintiff as a ward of court and a method was devised whereby the capital sum could be invested without attracting any income tax liability. This was done by investing the capital sum in short-dated securities, disposing of these before any dividend (income) became payable and re-investing the sum again in a similar security. This continuous re-investing of the capital profits as they arise avoids any liability to income tax until the plaintiff takes control of the funds. Presumably, if the scheme had attracted any income or capital gains tax, the court would have taken this into account and increased the award along the lines of the principles adopted in the *Griffiths v Van Raaj* case.

2.59 In conclusion, the Irish courts are willing to take future inflation rates into account in calculating what award to make. This can be a speculative process, particularly in times of fluctuating economic conditions.⁵⁰ It also contrasts with the approach of the English courts, who do not take inflation into account but effectively set off the interest on the investment of the lump sum against future inflation. Once again, if a structured settlement option were introduced the degree to which it would be inflation-proofed might impact on the way the courts calculate the lump sum in the first place. As the English courts do not consider inflation in determining the lump sum award, this is not a problem that has had to be addressed in England.

Contract⁵¹

2.60 In the vast majority of cases persons who are injured in an accident have no contractual relationship with the person they believe caused the accident. If they do, however, and if the accident may have been caused by a breach of contract, then damages may be obtainable by suing in contract.⁵² This may arise, for example, when a chauffeur drives in breach of the terms of his contract and injures his employer.

2.61 If damages are to be awarded for personal injuries (including mental

49 [1984] ILRM 208, at 216.

50 Second guessing future economic trends proved a hazardous process for the American courts in the late 1960s in this regard.

51 See generally *Chitty on Contracts, General Principles*, 25th ed para 1704-06, and *Halsbury's Laws of England*, 4th ed vol 12, para 1174.

52 *Summers v Salford Corporation* [1943] AC 283.

distress) under a contract, the test applied by the courts is whether or not the occurrence of the injuries as a result of the breach was within the contemplation of the parties at the time the contract was made.⁵³

2.62 Damages for mental distress caused by a breach of contract were allowed in *Jarvis v Swan Tours Ltd*⁵⁴ where Denning MR stated:

"In a proper case damages for mental distress can be recovered in contract just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and the frustration caused by the breach."

2.63 In *Harte v Sheehy*⁵⁵ Costello J refused to extend this to distress caused by the failure to complete a contract for the sale of land.⁵⁶

2.64 In *McAuliffe v Moloney*,⁵⁷ where a child was injured while playing on a gate, the Supreme Court was prepared to consider awarding damages for breach of a repairing covenant against the landlord in respect of the personal injuries suffered.⁵⁸

2.65 In *Siney v Dublin Corporation*⁵⁹ the Supreme Court allowed the plaintiff to recover damages for "physical inconvenience and discomfort" suffered as a result of the defendant's breach of contract in providing housing under the *Housing Act, 1966*, which was "unfit for human habitation".

2.66 In view of the potential development of a practice of awarding damages for personal injuries suffered as a result of a breach of contract, this category of claim has to be included in any reform proposal. This will not, perhaps have as significant an impact as at first might be believed. *The Civil Liability Act, 1961*, which introduced radical changes in regard to aspects of civil liability, defines "wrong" as including a breach of contract. The change does not appear to have occasioned much judicial controversy or any real difficulty in practice.

53 *Hutchinson v Harris* (1978) 10 Build LR 19, and *Konfos v C Czarnikow Ltd* [1967] 3 AER 686.

54 [1973] 1 QB 213.

55 Unreported, 14 March 1988 (HC).

56 See generally *White*, pp257-8.

57 [1971] IR 200.

58 On the facts they held that the repairing covenant in the lease did not apply to this gate.

59 [1980] IR 400.

Provisional and Interim Awards of Damages

2.67 There is no precedent in Irish law or practice for provisional awards of damages. While there is no provision in any Irish statute or rule of court for interim awards of damages, such awards are sometimes made in practice. For example, from time to time when a court has awarded damages to a plaintiff and the defendant appeals against the quantum of damages only, a court will order the defendant to pay out a substantial amount of the award for damages, which order may be appealed to the Supreme Court by the defendant before payment is made on foot of the award.

2.68 Provisional and interim awards will be examined in greater detail in Chapter 7 in the context of the law in the United Kingdom.

CHAPTER 3: FATAL ACCIDENT ACTIONS

Introduction

3.1 The issue of periodic payments can be a relevant one even in cases where the injured party dies either as a result of the accident or from some other cause, before any action arising out of the accident is completed. This is so because he or she may leave behind members of his or her family who may have been financially dependent on him or her.

3.2 Two types of action can arise after a wrongful death. The first is a wrongful death action; the second, a survival action.

3.3 The causes of action for personal injuries which survive death are of *two distinct types*. *First, there are causes of action for personal injuries which are unrelated to the death*. For example, the defendant negligently injures the deceased during the latter's lifetime but, before the deceased has prosecuted his or her cause of action for negligence to judgment, he or she dies from an independent cause. Here the cause of action survives for the benefit of the deceased's estate, but it has nothing to do with wrongful death. *Secondly, there are causes of action for personal injuries in respect of the very torts which occasion death*. Here again the cause of action survives but the survival action derives from the wrongful death.

The Wrongful Death Action

3.4 The House of Lords in 1808 in the case of *Baker v Bolton*¹ decided that the English common law did not contain such a rule. That position was remedied by legislation; a statutory wrongful death action in Ireland is currently governed by the *Civil Liability Act, 1961*.²

3.5 The first statutory remedy was provided in 1846 by the *Fatal Accidents Act, 1846*, commonly known as Lord Campbell's Act, which applied to both England and Ireland. This Act afforded a remedy to a limited class of family members by way of wrongful death action. This statute was repealed and replaced in this jurisdiction by the *Fatal Injuries Act, 1956*, which in turn has been

1 (1808) 1 Camp 483.

2 The question as to whether or not there is a separate common law right and the nature and extent of such right has yet to be decided. See White, at pp285-309.

repealed and replaced by the fatal injuries provisions of Part IV of the *Civil Liability Act, 1961*, which provides the modern statutory remedy of a wrongful death action.³

Parties Entitled To Avail Of The Remedy

3.6 The remedy under Part IV of the *1961 Act* is, by section 48(1), given to the "dependants" of the deceased. By section 47(1), "dependant" is defined as meaning "any member of the family of the deceased who suffers injury or mental distress" while "member of the family" is defined as meaning the spouse, parent, grandparent, stepparent, child, grandchild, stepchild, brother, sister, half-brother or half-sister of the deceased. Section 47(2) provided that, in deducing any relationship for the purpose of establishing title to sue for wrongful death, a person adopted under the *Adoption Act, 1952*, should be considered the legitimate offspring of the adopter or adopters and, subject to that provision, that an illegitimate person should be considered the legitimate offspring of his mother and reputed father. It also provides that in deducing such title to sue, "a person *in loco parentis* to another shall be considered the parent of that other".⁴

3.7 *The Status of Children Act 1987*, which introduced a general principle of equality as between children, regardless of the marital status of their parents, encourages the removal of language referring to children whose parents are not married as "illegitimate". It does not appear to have affected the substance of Section 47 of the 1961 Act.

The Basis Of Liability Under Part IV Of The 1961 Act

3.8 The basis of liability is covered by section 48 of the Act. Section 48(1) of the Act of 1961 gives the remedy for wrongful death. It provides:

"When the death of a person is caused by the wrongful act of another such as would have entitled the party injured, but for his death, to maintain an action and recover damages in respect thereof, the person who would have been so liable shall be liable to an action for damages for the benefit of the dependants of the deceased."

3.9 Section 2(1) of the *1961 Act* defines "act" to include "default or other

3 In England, the Fatal Accidents Act, 1846, has been repealed and replaced by the *Fatal Accidents Act, 1976*, as amended by section 3(1) of the *Administration of Justice Act, 1982*. See Chapter 4.

4 See *Hollywood v. Cork Harbour Commissioner* [1992] 2 IR 457 where O'Hanlon J. held that the crucial test was whether the deceased has assumed "the moral responsibility, not binding in law to provide for the material needs of another."

omission"; and "wrong" is defined to mean "a tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible, and whether or not the act is also a crime, and whether or not the wrong is intentional".

3.10 The condition precedent to liability under Part IV of the Act of 1961 is that the fatal injuries must have been caused by the wrongful act, default or other omission of the defendant so that the deceased could notionally have successfully sued the defendant or his estate in respect thereof at the time when he sustained the injuries. This requirement of an actionable wrong to the deceased as the basis of liability clearly follows from the wording of the statute. As *White*⁵ points out, there is scope for controversy concerning whether, given an actionable wrong to the deceased at the time when the fatal injuries were sustained, the wrong must also have been actionable at the suit of the deceased at the time of his death. There appears to be no reported Irish decision where the point in issue has been considered.

Recovery By Dependents For Pecuniary Loss

3.11 Section 49(1)(a)(i) of the *Civil Liability Act, 1961*, as amended by section 4 of the *Courts Act, 1988*, provides that the damages recoverable for wrongful death under Part IV of the *1961 Act* shall include:

"the total of such amounts (if any) as the judge shall consider proportioned to the injury resulting from the death to each of the dependants, respectively, for whom or on whose behalf the action is brought"

3.12 Recovery may be had in respect of the loss of money or services⁶ even though the deceased may not have been under any legal obligation to support the claimants.⁷ Even if the deceased did not contribute to the support of the claimants at the date of death, or make any contributions to the claimants prior to his death, the claimants can still recover provided they can show a *reasonable expectation of pecuniary benefit* from the continued existence of the deceased.⁸

5 See *White* p318.

6 Recovery may be allowed for loss of services: e.g., *Franklin v The South Eastern Ry. Co.* (1858) 3 H & N 211; *Condon v The Great Southern & Western Ry. Co.* (1865) 16 ICLR 415; *Wolfe v The Great Northern Ry. Co.* (1890) 26 LR Ir 548; *Hull v The Great Northern Ry. Co.* (1890) 26 LR Ir 289; and for loss of gifts of goods: see, e.g., *Dalton v The South Eastern Ry. Co.* (1858) 4 CB (NS) 296, where recovery was allowed in respect of loss of the value of 'presents of tea, coffee, sugar, meat, & c., which with occasional donations of money averaged about £20 a year'.

7 *Franklin v The South Eastern Ry. Co.* (1858) 3 H & N 211; *Dalton v The South Eastern Ry. Co.* (1858) 4 CB (NS) 296.

8 *Horgan v Buckley* (No. 1) [1938] IR 115 (SC) and *Taff Vale Ry. Co. v Jenkins* [1913] AC 1 (HL (E)).

3.13 The dependants cannot claim for pecuniary gains which are deemed at law to have accrued to them in consequence of the death of the deceased unless the statute otherwise specifically provides. In other words, recovery is allowed in respect of the balance of pecuniary losses over gains resulting from the death.⁹

3.14 Consequently the burden of proof is upon the plaintiff to show that the dependants have sustained a net pecuniary loss.¹⁰

What Is The Basis Of Assessment Of Dependency?

3.15 The occurrence of future happenings, such as the continuation of a life or the prospect of promotion, cannot be determined on the balance of probabilities as facts. With regard to the occurrence of future events, all that can be done is for the court to assess the chance of such events occurring on the basis of the evidence available, i.e. on the basis of facts proved on the balance of probabilities.¹¹

3.16 This issue was analysed in the former leading case of *Horgan v Buckley (No. 1)*,¹² a decision of the former Supreme Court. In this case Meredith J, discussing the nature of the chance valuation enquiry involved in those cases where the issue of the claimants' having sustained pecuniary loss depends on what he described as "double contingencies" (i.e. what the deceased would have earned in the future and would have contributed to the support of the claimants had he survived) stated:

"The next question, however, [which arose in the interpretation of section 2 of the *Fatal Accidents Act, 1846*] was one of no little difficulty, and from the nature of the case involved complications. Were the words "resulting from such deaths" to be understood to mean that damages

9 The position was clearly stated by Kingsmill Moore J in *Murphy v Cronin* [1966] IR 699, at 708 who said:
"What has to be ascertained as accurately as possible is the net pecuniary loss incurred by the dependants in consequence of the death of the deceased. In arriving at the sum the loss of a 'reasonable expectation of pecuniary benefit ... from the continuance of the life' must be taken into account as well as the pecuniary benefit which can be demonstrated to have been lost: *Franklin v South Eastern Railway Co.*; *Dalton v South Eastern Railway*, *Pym v Great Northern Railway Company*. But 'the damages ... must take into account any pecuniary benefit accruing to that dependant in consequence of the death of the deceased. It is the net loss on balance which constitutes the measure of damages' - *Davis v Powell Duffryn Associated Collieries Ltd.* A reasonable possibility of benefit accruing from the death must also be taken into account in reduction of damage. *Byrne v Houllhan*."

10 *Hull v The Great Northern Ry. Co. of Ireland* (1880) 26 LR Ir 289; *Appelbe v West Cork Board of Health* [1929] IR 107 (SC); *Gallagher v Electricity Supply Board* [1933] IR 558 (SC). See also *Gallagher v Electricity Supply Board* [1933] IR 558 (SC). See *White* at p327.

11 See *White* at p328.

12 [1938] IR 115 (SC).

could only be recovered in respect of injury shown to have actually eventuated or "materialised" as the result of the death, or was it admissible for the jury to take into account loss that for one reason or another, might in fact never be incurred, that is to say, prospective loss? It is now definitely settled that such prospective loss may be taken into account: *Taff Vale Railway Co v Jenkins*¹³ ...

Once it was decided that prospective loss might be taken into account a difficulty arose *as to the basis of fact upon which the jury might proceed to estimate that loss*. Might they make their estimate on the basis of a double possibility or multiple contingency? In other words, *might the prospective loss be only loss that might reasonably be expected to result from circumstances that were themselves not actual but only reasonably to be expected?* The view that there must be some existing fact from which the probability of loss could be immediately inferred, that is, as a direct result, was a view that made a very strong appeal to the legal mind - though if the jury are to be entitled to take prospective loss into account, and if the matter is then to be left to what "they may think" proportionate, there does not seem to be any very apparent basis for the distinction in the words of the statute, seeing that in each case, whether the possibility is single or double, the making of the estimate must set out from an existing basis of fact as initial basis. Also, from a logical or mathematical point of view, the distinction between a single and double contingency is of no material significance, since the product of the chances in the latter case may show a higher degree of probability than in the case of a single more remote contingency".¹⁴

3.17 In *Horgan's* case, in finding that there was evidence from which a jury could properly find that the claimants had a reasonable expectation of pecuniary benefit from the deceased, had he lived, Sullivan CJ observed that the man had at an earlier time shown himself to be industrious, that the uncontradicted evidence was that he had been looking for a farm and that the inference could be drawn that he was preserving the deposit for the purpose of buying a farm which would have enabled him to support his wife and children.

3.18 Cases involving claims by parents in respect of the deaths of young children will frequently raise the further contingency, namely, whether the parents would at some time in the future be in need of support as a result of a deterioration in their financial position so that the issue becomes one of the valuation of the chances that the deceased would have earned and would have contributed in the event of the parents being in need. Indeed, in modern times this is the most likely basis of the parents' dependency - the loss of the element of security which is provided by having an adult son or daughter upon whom they

13 [1913] AC 1 (HL (E)).

14 [1938] IR 115, at 132-134, emphasis added.

can rely for assistance in the event of their needing it in their old age. The loss of this element of security is a proper subject of recovery notwithstanding that it depends on multiple contingencies for, as Meredith J observed in *Horgan's* case, "the product of the chances in the latter case may show a higher degree of probability than in the case of a single more remote contingency".¹⁵

The Calculation Of Future Losses

3.19 For the purposes of periodic payments the important element of the damages award is that part which represents future losses. In a wrongful death action, future (i.e. post-trial) losses are determined by ascertaining the weekly or annual value of the dependency of the claimants and the post-trial period during which the dependency would have continued to exist, from which may be deduced the gross financial loss of the dependants in respect of this period.

3.20 As with future losses in a personal injuries action, the calculation of the actuarial multiplier to be used to calculate what sum to pay the dependants at the date of trial is all important. The calculation of this multiplier depends principally on four factors, namely, the anticipated period of post-trial loss, the appropriate discount rate in respect of interest which will be earned by the capital investment fund of damages during that period, the adjustment to that discount rate to offset the impact of future taxation on such interest and the impact of future cost inflation.

Period of loss

3.21 The period of loss is determined by ascertaining the number of years during which it is likely that the deceased would have contributed to the dependants' support. The life expectation not only of the deceased but also of the dependants is relevant to this enquiry. The expectation of life of the dependants is determined as of the date of death for there is no guarantee that, but for the wrongfully occasioned death, the deceased would have survived to the date of trial. From the ascertained total period of anticipated loss is deducted the period between the date of death and date of trial, which will have been included in the calculation of pre-trial losses. The balance of years of lost support, if any, forms the basis of the actuarial multiplier. Where the loss has been determined to be likely to continue to a given age of the deceased and a dependant, allowance will be made for the contingency of an earlier than average death by the actuary in the multiplier which he or she proposes. Likewise, where the loss has been determined to be likely to continue for the life of the deceased

¹⁵ [1938] IR 115, at 134.

(had he or she not been tortiously killed) or the life of a dependant, the actuarial multiplier proposed by the actuary will allow for the chance of departure, either way, from the average represented by the period of the expectation of the relevant life or lives derived from mortality tables. In other words, the probability of survival of the deceased and the dependants to a given age is built into the actuarial multiplier.

The discount rate

3.22 The question of the appropriate discount rate to be applied to effect a reduction to present value is no longer determined solely by the relevant market interest rates available for investments. It also depends upon the anticipated impact of income taxation on the interest from such fund and the impact of future cost inflation upon the value of interest from the investment fund. What is relevant is the *net rate of return* which is capable of being obtained when the capital fund is invested in the relevant mode, i.e. from safe, easily realisable investments at the date of the judgment.¹⁶ We have seen earlier that the Irish Courts have taken the view that where future income taxation is required to be taken into account, the proper course is first to reduce the available market interest rate obtainable on investment of the damages in the relevant mode to take account of such future taxation and then to reduce the resultant rate of interest by the relevant inflation rate to give the *net real rate of return*, which gives the final discount rate to be adopted in the calculation.

Allowance for taxation of interest from investment fund

3.23 Allowance for the impact of taxation upon the deceased's earnings will reduce his or her assessed disposable income and consequently the dependants' damages awards for pecuniary loss. This allowance must necessarily be made, for what is relevant is the deceased's contribution to the dependants from his income. If, however, no further allowance is made for the impact of taxation on income from an investment fund, then the result will be that the dependants will not enjoy the full value of the assessed damages for loss of dependency. This is because the interest from such damages when invested will be subject to income tax. The damages must therefore be increased to allow for the impact of such taxation on interest from the capital fund.

3.24 On this point, Lord Reid in the House of Lords in *Taylor v O'Connor*¹⁷ stated that:

¹⁶ See *per* Hamilton J in *Cooke v Walsh* [1983] ILRM 429, at 436 (HC).
¹⁷ [1971] AC 115 at p129.

"This case is in a sense *British Transport Commission v Gourley* [1956] AC 185 in reverse, for that case instructs us that we must see what the plaintiff really lost taking account of taxation. There damages had to be reduced if taxation was taken into account. Here they have to be increased".

3.25 In *Griffiths v Van Raaj*¹⁸ the Supreme Court recognised the propriety of making allowance for the impact of taxation on interest from the investment fund in the assessment of damages for pecuniary loss in personal injury actions - although the extent of the allowance sanctioned by the Court in that case may be criticised as inadequate - and there is no doubt but that the same principle applies in the context of the assessment of pecuniary loss in wrongful death actions. Expert evidence must be adduced to deal with the projected impact of taxation on interest from the capital fund. Allowance for this factor is properly made in the calculation by an adjustment of the discount rate employed for reduction to present value with consequent adjustment of the actuarial multiplier.

Allowance for impact of inflation

3.26 The Irish courts, unlike their English counterparts,¹⁹ make a direct allowance in the calculation of damages for future pecuniary loss for the future impact of cost inflation.²⁰ The matter has been considered in the context of the assessment of future pecuniary loss in personal injury actions, but the same principle applies to the assessment of such loss in wrongful death actions. The established approach in personal injury actions, which is of equal application in wrongful death actions, is to seek to protect the damages award when invested from the impact of such future inflation. This is done by adjusting the discount rate employed in reducing the lump sum award to present value. The market interest rates available at the date of judgment for safe, easily reliable investments, after having first been reduced to allow for the impact of income taxation on interest from the investment fund, are further reduced to allow for the future rate of inflation. The resulting interest rate, representing the *net real rate of return* is employed in discounting the award for future pecuniary loss to present value. If legislation introducing periodic payments or structured settlements were introduced and this contained provisions for these payments to be treated in a special way for tax purposes, then this might affect the way the courts calculate the damages in the first place.

18 [1985] ILRM 582 (SC).

19 See *Cookson v Knowles* [1979] AC 556 (HL(E)); and *Taylor v O'Connor* [1971] AC 115 (HL (E)).

20 Described as the projected general rise in the level of prices for goods and services in *Cooke v Walsh* [1984] ILRM 208 (SC).

The Survival Action

3.27 At common law the rule was that a cause of action in tort which was vested in a deceased person before his death abated with his death. The rule applied to prevent the *estate* of a deceased tort victim from pursuing to judgment both a cause of action vested in the deceased before his death in respect of a tort which resulted in his death and also a cause of action vested in the deceased before his death in respect of a tort which arose independently of the circumstances which occasioned his death. Where the tort resulted in the deceased's death, his *dependants* were, until the enactment of the *Fatal Accidents Act, 1846*, likewise without a remedy because of the complementary rule of the English common law,²¹ which has also been assumed to form part of Irish Law,²² that the death of a human being was not something which could be complained of in a civil court.

3.28 Part II of the *Civil Liability Act, 1961*, abolished the general rule in this jurisdiction (as did the *Law Reform (Miscellaneous Provisions) Act, 1934*, in England) and provided, subject to certain exceptions, for the survival of causes of action for the benefit of, or against, a deceased's estate. The effect of this is that a cause of action for personal injuries, which is vested in the deceased before death, survives the death of the deceased for the benefit of the estate, and may be prosecuted by the personal representative on behalf of the estate in what is called a *survival action*. However, claims for damages for non-pecuniary loss which are competent in a personal injury action when maintained by the injured person are not competent where the action is maintained for the benefit of the estate after the death of the deceased. Where, therefore, a wrongful death action on behalf of the deceased's dependants under Part IV of the *1961 Act* is competent, a survival action in respect of the tort which occasioned the death may also be maintained on behalf of the deceased's estate, if the deceased suffered damage of a kind which is compensatable in such a survival action, or if the estate incurred funeral expenses in respect of the death of the deceased. If such losses have been sustained, then a survival action will be competent and may be maintained in addition to any wrongful death action which may be competent under Part IV of the *1961 Act*. Sometimes, however, because of the scope of the statutory wrongful death action²³ and its interrelationship with the survival action, no advantage will be gained from also bringing such a survival action.

21 *Baker v Bolton* (1808) 1 Camp 483, discussed earlier in this Chapter.

22 We have already noted White's discussion of the arguments either way on this question.

23 For example, expenses incurred by the deceased by reason of the tort (such as medical expenses) and funeral expenses which are recoverable in a survival action are alternatively recoverable in a wrongful death action under Part IV of the Act of 1961 where such recovery will enure for the benefit of the dependants: see section 49(2) of the Act of 1961. These elements of loss may, therefore, be recovered in the wrongful death action without the necessity of bringing a survival action.

3.29 There can be circumstances where both actions should be brought, such as where the deceased has suffered a loss of earnings occasioned by the tort in the period between the accident and his or her death. The family cannot recover for such a loss of earnings in an action under Part IV of the Act of 1961, which compensates only for loss of dependency *consequent on death*. Therefore, if the family are to recover in respect of this loss, they can only do so by participation in the deceased's estate as increased by recovery in a survival action in respect of such lost earnings.

3.30 Section 7(1) of the *1961 Act* abolishes the general common law rule that a cause of action for tort vested in a person before the death does not survive that person's death. Section 7(1) provides that:

"On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) vested in him shall survive for the benefit of his estate".

3.31 The effect of this provision is that a cause of action for personal injuries which is vested in a person before death is, on death, transmitted to the estate and may be prosecuted by the personal representative on behalf of the estate.²⁴

The Nature Of Damages Recoverable

3.32 The cause of action transmitted to the estate is the same as that which the victim would have had, had he or she survived. Recovery is not allowed in a survival action, however, in respect of all of the elements of damages which are recoverable in a personal injury action. Section 7(2) of the *1961 Act* precludes recovery by the estate in a survival action of damages in respect of *non-pecuniary loss*, i.e., for pain and suffering, loss of amenities of life and loss of expectation of life. Nor can *exemplary damages* be recovered.

3.33 Recovery is, therefore, limited in a survival action to: (i) funeral expenses which are expressly made recoverable by section 7(3) where the tort which is the subject of the action has occasioned the death (and would not otherwise be recoverable since the deceased could not have maintained a claim in respect of the same during his or her lifetime except on the basis of the loss represented by the acceleration of the incidence of such expenses by reason of anticipated premature death); and (ii) the deceased's pecuniary loss resulting from the tort which includes: (a) expenses incurred by the deceased before

²⁴ The excepted causes of action defined in section 6 of the Act of 1961 (as amended by the *Family Law Act, 1981*) include one for a claim for compensation under the *Workmen's Compensation Act, 1934* (now the *Occupational Injuries Act, 1986*).

death as a result of the tort; (b) the deceased's loss of earnings and other pecuniary benefits between the date of the accident and the date of death; and, it is submitted, (c) the deceased's loss of earnings and other pecuniary benefits which would have accrued to him or her during the last years, i.e., the years after the date of death during which he or she would have been alive and earning and in receipt of such other pecuniary benefits were it not for the tort. The issue of recovery under this latter head requires further consideration and is dealt with below.

3.34 Any losses or gains to the estate which occur due to the death are irrelevant to the damages recoverable under the survival action. This is because of section 7(3) which provides that, in a survival action brought on behalf of the estate of a deceased person in respect of a *wrong which has occasioned the death of the deceased*, losses and gains to the estate consequent on the death cannot be taken into account in the damages calculation.

3.35 Damages for loss of earnings and other pecuniary benefits in the lost years are calculated in the same fashion as those in a wrongful death action.

The Relationship Between Survival Actions And Wrongful Death Actions

3.36 The action on behalf of the estate under section 7(1) of the *Civil Liability Act, 1961*, is completely unaffected by recovery of damages in a wrongful death action brought by the dependants under Part IV of the *1961 Act*. Section 7(4) of the Act expressly provides that:

"The rights conferred by this section for the benefit of the estate of a deceased person are in addition to the rights conferred on the dependants of deceased persons by Part III of the Act of 1936 and Part IV of the Act".

3.37 However, wrongful death damages may be affected by a survival award. This is so because where there is a claim made in a wrongful death action under Part IV of the *1961 Act* by the dependants and a claim made in a survival action by the estate, a defendant has an interest in the allocation among the various dependants of the total sum assessed in respect of the dependants' dependencies in the wrongful death action. The amount adjudged due to a particular dependant may be reduced or extinguished by that dependant's succession to the whole or part of the victim's estate with consequent reduction in the sum payable by the defendant in the wrongful death action, and if the apportionment of damages in the wrongful death action among the dependants differs from the distribution of the estate among the dependants under the rules of testate or intestate succession, there will be an increased liability imposed upon the

defendant.

3.38 *White* argues that there are four important limitations on the rule of deduction from wrongful death damages.²⁵

3.39 First, no deduction ought to be made in respect of that part of the damages awarded in a survival action and subsequently received by the dependants, which is referable to the victim's loss of earnings between the date of the accident and the date of death, and which would have been expended by the victim on the maintenance of the dependants had the victim not been tortiously injured.

3.40 Secondly, no deduction ought to be made in respect of that part of the damages recovered by the estate and subsequently received by a dependant which is referable to funeral or medical or other expenses of the deceased which that dependant has paid or is liable to pay.

3.41 Thirdly, *White* argues, any sum recovered by the dependants in respect of mental distress resulting from the death in an action under Part IV of the *1961 Act* cannot be affected by any amount received by the dependants as a result of the estate's action. Like can only be set off against like. The justification for reducing or eliminating the dependants' wrongful death award in respect of their financial loss is that the dependants have suffered less or no financial loss as a result of the death because of their succession to the deceased's estate as increased by the amount recovered in the survival action. The dependants' mental distress consequent on the death cannot, however, be in any way affected by the reduction of their financial loss as a result of their succession to the deceased's estate and, therefore, the damages for mental distress should not be affected by any amount received by the dependants from the estate of the deceased either as a result of the survival action or otherwise.

3.42 Finally, *White* argues that where a deduction falls to be made from the wrongful death damages for loss of financial dependency, such deduction is only properly made in respect of the *net* pecuniary benefit to the dependants from the award made in the survival claim.

3.43 One final point worth noting is that a judgment in either a survival action or wrongful death action is not a bar to bringing a subsequent action in the other. This can occasionally cause problems as *White* points out:

25 See *White* pp452-3.

"This can lead to practical difficulty in assessing damages in a wrongful death action where the survival action (if competent) has not been prosecuted to judgment before, or at the same time as, the wrongful death action, for the court will have to assess in the wrongful death action, where damages for loss of financial dependency are claimed therein, the chance of a subsequent survival action being brought and the net pecuniary benefit likely to accrue to the respective dependants from such an action which must be set off against their respective claims for loss of financial dependency in the wrongful death action".²⁶

CHAPTER 4: EXISTING PROPOSALS FOR REFORM

4.1 A number of different reform options have been floated from time to time in Ireland. In this section it is proposed to look at some of them.

The O'Connor Report, 1972

4.2 In 1972, a Committee under the chairmanship of John O'Connor produced a Report on Motor Insurance¹ having investigated the insurance industry in Ireland.

4.3 The report examined the motor insurance industry in Ireland in some detail. The legal environment in which the motor insurance industry operates was also examined. In this context the Committee looked at the many different proposals and reforms that had been made to the legal environment for motor insurance and road accident compensation in other countries.² Eleven proposals were examined in detail and a further nine proposals given a brief examination.

4.4 The Committee noted that all twenty proposals had a recurring theme which was that problems with motor insurance systems stemmed from "the dependence of the motor insurance system on the law of tort for providing compensation in respect of the damages caused by traffic accidents, in particular the proof of negligence or fault on the part of the wrong-doer".³

4.5 The Committee, therefore, decided to examine the merits and demerits of the fault principle. They took the view that:

"[E]ach man ought to be compensated in accordance with his loss and punished in accordance with his fault. His compensation should reflect his loss and not his innocence while his punishment should reflect his guilt and not the damage he has done."⁴

4.6 While the Committee felt that there were serious anomalies in the fault system, they were agreed that they did not want to see it eliminated completely in the context of traffic accident compensation.

1 Committee of Inquiry into the Insurance Industry, Interim Report on Motor Insurance, (Dublin, 1972).

2 These are described in Chapter 4.

3 Interim Report on Motor Insurance, *supra* n.1 at p59.

4 *Ibid*, at p63.

4.7 They made a number of recommendations which were designed to reduce the role of negligence in the determination of compensation for personal injuries and damage in road accident cases.⁵ There was unanimous agreement among the members of the Committee on the recommendations. A minority of the members, however, felt that these recommendations did not go far enough, and they made further recommendations in an addendum to the Report.⁶ The unanimously accepted recommendations include:

- (i) An assumption of equal proportionate negligence in the case of two car or multiple collisions up to the District Court limit, subject to the exception that any driver/owner involved in an accident be allowed to prove that he or she was completely blameless in the accident, in which case they would be entitled to claim full compensation.
- (ii) Subject to (i) for smaller claims by driver/owners, the concept of strict liability should apply to all claims for damages including personal injury and property damage up to the Circuit Court limit. This would remove from a driver involved in a road accident certain defences⁷ which would normally be open to him or her.
- (iii) In cases for actions for hearing in court, there should be a presumption of negligence on the part of the driver/owner which he or she would be entitled to disprove.
- (iv) A system of interim payments of claims, which could include the payment of scheduled benefits, should be introduced for both Circuit and High Court cases.

4.8 Apart from recommendation (iv) above, the Committee did not make any specific recommendation on the way compensation should be paid. However, making comment on lump sums earlier in the Report they state:

"The claim payment takes the form of a lump sum. In cases involving death or personal injury where the damages suffered are of an ongoing nature, such as loss of income flow, or recurring medical costs, this can be a serious defect. Compensation for loss of income should be payable weekly or monthly, as appropriate, rather than in the form of a lump sum. Where compensation is based on an injured person's life expectancy, once the payment has been made the case is closed and

5 These are set out in Chapter 8.

6 Interim Report on Motor Insurance, *supra* n.1 at p82.

7 Among the defences which the Committee considered should be removed were: unknown and/or unascertainable physical defect in the driver, unknown and/or unascertainable defect in the vehicle, that the injured party volunteered to join the driver/owner in the adventure and an Act of God.

from the insurer's viewpoint the actual duration of life is then irrelevant. If, however, the injured person lives longer than expected, he loses out financially and conversely, if he dies prematurely, a benefit passes to persons not involved in the accident. Such problems would not arise in the case of regular payments tied to actual rather than expected duration of life."⁸

4.9 The report does not, however, go into any further detail about how a system of *regular payments* might be set up.

4.10 The minority recommended that, in addition to the unanimously accepted recommendations of the Committee, a form of no-fault compensation system be set up. The benefits under this scheme would be paid periodically. The minority state:

"We favour a system for the payment of scheduled benefits in cases of death or personal injury to victims of road accidents. These benefits would apply up to stated limits and, save for some possible exceptions ... would be paid regardless of fault. Such a system of scheduled benefits could operate alongside the existing system in that payments for personal injuries beyond the scheduled limits as well as payments for property damage could be dealt with as at present though, naturally, account would have to be taken of the scheduled benefits received by a claimant before fixing the total of any further payments due."⁹

4.11 This proposal was intended to be supplementary to, rather than replacement of, the recommendations in the main report. It is also clear that a plaintiff could still sue in tort for damages, but these would be reduced by the amount of scheduled benefits the plaintiff would receive under the new scheme.

The MacLiam Report, 1982

4.12 The MacLiam Report was the product of an enquiry into the costs and methods of providing motor insurance and was concluded in 1982.¹⁰ In this report the Committee's main concern was with the costs of the motor insurance industry and the concern over rapidly rising motor insurance premiums.

4.13 The costs of claims for compensation were examined and the Committee

8 *Ibid*, at p69.

9 *Ibid*, at p92.

10 Report of Enquiry into the Cost and Methods of Providing Motor Insurance, (Dublin, 1982).

looked into the option of having awards paid periodically. In this context the Committee discussed several problems that the payment of compensation in a lump sum award can create. The Medical Director of the National Medical Rehabilitation Centre gave evidence that the making of large lump sum awards in cases of very serious personal injury could often be very unsuitable. The report describes his evidence:

"He gave two examples to illustrate alternative possibilities. In one, a patient of his had been awarded a sum thought sufficient to maintain him at a certain level of comfort and special care which the Court had considered he should receive, but the money had run out many years before the patient had died and the intention of the award had not been realised. In the other, a young child had suffered serious injuries in a car driven by her father and, the father having been adjudged to have been negligent, the child had been awarded a very large lump sum which was paid of course by the father's insurance company. Not long afterwards the child died, and the compensation money became the property of the father who thus profited from his own wrong-doing. In the former case the money ... paid in compensation was considerably less, and in the second case vastly more, than was necessary to achieve its intended purpose."

4.14 The Committee acknowledged that a system which allowed the compensation award to be paid periodically would help solve this problem. However they felt that in the context of their own report there was no evidence to suggest that such a scheme would alter the cost of motor insurance. They state that a problem with such a scheme would be that the nature of the motor insurance business "is incompatible with the acceptance of such long-term obligations".¹¹ However they also state:

"One possibility that deserves examination is that a mechanism might be established whereby compensation could be awarded in the form of periodic payments and the motor insurance company concerned could transfer its obligation to a life insurance company in return for a single payment."¹²

4.15 The Committee recommended that the relevant government departments discuss the possibility of setting up such an arrangement with the insurance industry. The Committee then concluded that while such a system would allow compensation to be more finely tuned to suit the purpose for which it was intended "there is no reason at present to suppose that it would prove particularly more or less costly to insurers than the present system".¹³

11 *Ibid*, at p47.
12 *Ibid*, at p47.
13 *Ibid*.

The Barrington Report, 1983

4.16 The Barrington Report was the product of a Commission of Inquiry's research into the area of "Safety, Health and Welfare at Work". The Report examines the area of compensation for accidents at work in the context of the contribution the compensation schemes make to accident prevention.¹⁴

4.17 In this context the Commission of Inquiry stated seven reasons why they believed the tort system of compensation, despite being based on fault, was counter productive to the work of accident and disease prevention:¹⁵

- (i) Investigations carried out to determine the causes of accidents are often seriously hampered by witnesses who may be reluctant to give evidence in case it prejudices the civil claim of an injured co-worker.
- (ii) The tort system is by its nature concerned with establishing fault and awarding compensation and not with the prevention of accidents and diseases *per se*.
- (iii) The tort system focuses on the particular cause of an event rather than on the underlying root causes of the whole pattern of circumstances.
- (iv) The tort system is expensive to administer and this money may be better spent on prevention. The Social Welfare Occupational Injuries Scheme costs considerably less to administer than the tort system.
- (v) The tort system only deals with the post accident situation and no organised strategy to feed the results of the tort system back to any policy or programme of preventative activities is discernible.
- (vi) The existence of the tort system and reasonable premiums for employers' liability insurance may actually inhibit the development of better preventative mechanisms at the workplace.
- (vii) The tort system and attendant delays in settling cases may lead to malingering, compensation neurosis and provide an opportunity for employers and workers to "milk the system".

¹⁴ Report of the Commission of Inquiry on Safety, Health and Welfare at Work, (Dublin, 1983) at Ch 21.
¹⁵ *Ibid*, at pp164-165.

4.18 The Commission then acknowledged that there were some advantages to the tort system of compensation. A tort action can draw attention to defects in safety in the place of work. There was also an argument that the concept of individual responsibility operated more strongly within the tort system than it would in a no-fault system.

4.19 The Commission then briefly considered the option of a no-fault system in the context of accident prevention. They acknowledged that there were certain advantages to a no-fault system. For example, since fault is not an issue, the job of investigation is not impeded and accident prevention is thus enhanced.

4.20 Compensation in a no-fault system also tended to be less of a lottery with the injured worker being virtually guaranteed compensation. On the other hand they recognised that there might be certain disadvantages in a no-fault system. A no-fault system could be counter-productive as far as accident prevention is concerned in that, since compensation is automatic, there might be less of an incentive for employers to take care in providing a safe place of work.

4.21 In the end, however, the Commission felt that the issue demanded a lot more analysis that went beyond the scope of their reference. They concluded that, while a no-fault system had advantages and disadvantages for accident prevention, "we find it difficult to come to a reasoned conclusion on whether such a fundamental change in the present system would be justified on that basis alone."¹⁶

4.22 They stated further that "whether a no-fault system is better than that of tort, turns on considerations of costs, benefits, equity and effectiveness of alternative systems, considerations which were beyond our mandate and resources."¹⁷ The Commission then concluded: "Our uneasiness about the present system prompts us to recommend that such a major inquiry should be carried out as early as possible."¹⁸ The Commission however did not examine the merits or demerits of the way the tort system pays its compensation awards in lump sum amounts.

16 *Ibid*, at p166.

17 *Ibid*, at p168.

18 *Ibid*, at p169.

SECTION II: THE UNITED KINGDOM

CHAPTER 5: PERSONAL INJURIES ACTIONS

5.1 The basic principles of tort which are the basis for compensation for personal injuries in the United Kingdom are similar to those applied in Ireland. However, there are a number of interesting and significant differences in the way damages are calculated and paid that merit examination.

The Calculation Of The Award

5.2 The rules for calculating the compensation award in a personal injuries action in England are somewhat different to those in Ireland. In terms of the way damages are calculated in England the major differences are:

- (i) Actuaries are not involved in assessing awards.
- (ii) The sum awarded for future loss of earnings does not specifically incorporate an allowance for inflation¹ or an allowance for the risk that an injured party will not be employed for their entire life.²
- (iii) The rules for awards of compensation for a death are different - one of the main differences being that, if the deceased is over 18 without any dependents, then the estate will not receive any compensatory award except funeral expenses, and parents and other relations will not be entitled to damages for bereavement or other damages.³

1 The English position on inflation was stated by Lord Scarman in *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, at page 193 where he gave three reasons for not calculating a plaintiff's damages by reference to inflation:

"First it is pure speculation whether inflation will continue at present, or higher, rates, or even disappear. The only sure comment one can make upon any inflation prediction is that it is as likely to be falsified as borne out by the event. Secondly, as Lord Pearson said in *Taylor v O'Connor*, at p143, inflation is best left to be dealt with by investment policy. It is not unrealistic in modern social conditions, nor is it unjust, to assume that the recipient of a large capital sum by way of damages will take advice as to its investment and use. Thirdly, it is inherent in a system of compensation by way of a lump sum immediately payable, and, I would think, just, that the sum be calculated at current money values, leaving the recipient in the same position as others, who have to rely on capital for their support to face the future."

2 This is discussed in greater detail below.

3 Compensation in fatal accident cases is discussed in detail in Chapter 6.

- (iv) Prior to 1990, UK legislation⁴ provided that there would only be a 50% deduction from a compensation award of certain social security benefits (namely sickness benefit, invalidity benefit, non-contributory invalidity pension, injury benefit, disablement benefit). However, as from 3 September, 1990 any payment of compensation for an injury occurring on or after 1 January, 1989 will have these benefits deducted in full from the award and used to reimburse fully the Department of Social Security.

5.3 As in Ireland the lump sum must be calculated to represent the present value of any future loss.⁵ By and large this is done by the use of two figures, a multiplier and a multiplicand. The multiplicand is an annual sum that represents the plaintiff's loss of earnings or expenses at the date of trial. This figure is then multiplied by the multiplier, a figure based not on actuarial evidence,⁶ as in Ireland, but one calculated by reference to previous cases and which reflects what the court believes is a balanced assessment of the plaintiff's loss. All contingencies have to be taken into account. In the case of future loss of earnings, these include mortality, sickness, unemployment, promotion and all other factors that would have affected the plaintiff's earnings if he had not been injured; in the case of future expenses, these include mortality and the prospect that in the future more expensive arrangements may have to be made for the plaintiff's care.

5.4 In this regard there are four important differences in the approach adopted by the English courts as compared to those in Ireland:

- (i) Inflation is not be taken into account - *Cookson v Knowles*.⁷
- (ii) There is be no increase in the size of the award to cater for a higher rate of tax and no allowance for future changes in tax - *Hodgson v Trapp*.⁸
- (iii) An annual rate of loss existing at the date of trial is capitalised by applying a multiplier representing the number of years

4 *Law Reform (Personal Injuries) Act, 1948, s2(1), as amended by the Social Security (Consequential Provisions) Act, 1975.*

5 Whether the assessment is of damages for future expenses or for future loss of earnings, the court's task is to award a sum that is "the present value of prospective loss" (per Lord Reid in *British Transport Commission v Gourley* [1956] AC 185 at p212).

6 In practice actuaries are not used by the courts in England in calculating personal injuries awards although the courts do use recognised tables of multipliers. However, the use of actuaries would seem to be a matter for each individual judge to decide depending on the circumstances of each case. In *Sullivan v West Yorkshire Passenger Transport Executive*, *The Times*, 26 June, 1980, Lord Justice Stephenson said that it was for the parties to decide what evidence to call and for the judge to rule whether it was admissible. There was no authority to the effect that judges should not have regard to actuarial evidence.

7 [1978] AC 556.

8 [1988] 3 All ER 870.

purchase required to purchase an annuity at a rate of interest between 4% and 5% - *Cookson v Knowles*.

- (iv) The multiplier is reduced from that produced by a 4.5% table to take account of contingencies, e.g. sickness, unemployment or premature death.

5.5 As the issue of future inflation is an important one in the debate over periodic payments, it is proposed briefly to look at the rationale behind the difference in the English approach in this regard.

5.6 The English courts have adopted the approach to inflation advocated by Lord Diplock in *Mallet v McMonagle*⁹:

"In my view the only practicable course ... is to leave out of account the risk of further inflation, on the one hand, and the high interest rates which reflect the fear of it, on the other hand ... money should be treated as retaining its value of the date of judgment, and in calculating the present value of annual payments which would have been received in future years, interest rates appropriate to times of stable currency such as 4 per cent should be adopted".

5.7 It also appears that, in cases where tax on income from an investment of the award will reduce the income from the assumed 4% or 5% rate, the courts will take this into account in the discounting process.¹⁰ In practice, therefore, depending on the factors affecting the particular plaintiff's tax liability, the effective discounting rate can be between 2% and 3%. Lord Scarman describes the approach in *Lim Poh Choo v Camden and Islington Health Authority*:¹¹

"The law appears to me to be now settled that only in exceptional cases, where justice can be shown to require it, will the risk of future inflation be brought into account in the assessment of damages for future loss ... It is perhaps incorrect to call this a rule of law. It is better described as a sensible rule of practice, a matter of common sense. Lump sum compensation cannot be a perfect compensation for the future. An attempt to build into it a protection against future inflation is seeking after a perfection which is beyond the inherent limitations of the system. While there is wisdom in Lord Reid's comment (*Taylor v O'Connor* [1971] AC 115, at p130) that it would be unrealistic to refuse to take inflation into account at all, the better course in the great majority of

9 [1970] AC 166, at p176.

10 Authority for this proposition can be found in the speeches delivered by members of the House of Lords in *Taylor v O'Connor* [1971] AC 115 *per* Lord Reid at p129, *per* Lord Morris of Borth-y-Gest at pp133-134, *per* Viscount Dilhorne at p139, and *per* Lord Pearson at p143).

11 [1980] AC 174.

cases is to disregard it ... The correct approach should be therefore, in the first place to assess damages without regard to the risk of future inflation. If it can be demonstrated that, upon the particular facts of a case, such an assessment would not result in a fair compensation (bearing in mind the investment opportunities that a lump sum award offers), some increase is permissible."¹²

5.8 As with the calculation of lump sum awards in Ireland, this system of calculation may lead to inappropriate compensation. This is because before applying the rules for calculating compensation for future loss, a judge has to make findings on the evidence before him or her of certain facts such as the plaintiff's life expectancy, the timing and extent of any deterioration in the disability, the likelihood and timing of future surgery, and the necessity for professional care or residential care. Inevitably, there will often be conflicts in the evidence presented to the court over these issues increasing the likelihood of a wrong choice, which will result inevitably in either under or over-compensation.

The Payment Of The Award

5.9 Prior to 1981 and the introduction of provisional damages and interim awards, the way damages were paid in the United Kingdom was broadly similar to that in Ireland. Damages could only be awarded in the form of a once-off lump sum, although, as we have seen, the criteria for calculating that lump sum were different in certain respects.

5.10 The reason why only a lump sum could be awarded is because, at common law, judgments awarding damages for personal injuries extinguished the plaintiff's cause of action. Thus, if the plaintiff, after judgment, suffered a serious deterioration in health, or developed a serious disease caused by the defendant's fault, he or she was bound by the judgment. There could be no second action for further damages, no matter how serious the later complications, nor how modest the original injury.¹³

5.11 These common law principles still apply unless a claim for provisional damages is made.¹⁴

5.12 The once-off lump sum approach contains a risk of injustice. For example, where a plaintiff, who was said at trial to be at risk of future epilepsy,

12 *Ibid.*, at p183.

13 *Fitter v Veal* (1701) 12 Mod 542.

14 Provisional damages are discussed in Chapter 7.

was compensated in proportion to the degree of risk and eventually suffered the onset of grand mal epilepsy, he could not claim further damages.

5.13 The financial consequences could be very significant. A standard authority on the range of damages in epilepsy cases in England is *Jones v Griffith*.¹⁵ The Court of Appeal, in 1968, suggested a range of £10,000-£11,000 for damages for pain, suffering and loss of amenity for *grand mal* epilepsy. The updated value of that award is £55,000-£60,000.

5.14 *Herbert v GLC*¹⁶ provides an example of a specific award to reflect the risk of epilepsy. A 10-20% risk for a 63 year old plaintiff led to an award of £4,000 which was upheld in the Court of Appeal. If the plaintiff did not go on to develop epilepsy, he was enriched by £4,000; if he did, he was under-compensated by something in the region of £50,000.

5.15 Brennan in his book on provisional damages¹⁷ gives an example of how the previous law operated in practice in an epilepsy case:

- "1. Plaintiff - 25 years old - fractured skull - one post-accident convulsion; - by trial apparently fully recovered.
2. Medical evidence of 5% + future risk of grand mal epilepsy.
3. Within the total award for general damages the judge awards for epilepsy risk, say £3,000 (approximately 5% + of updated value of the award in *Jones v Griffith*).
4. At age 35 grand mal epilepsy occurs and persists. Plaintiff's personal life radically affected - employment prospects severely diminished - all justifying a notional further award of say £100,000.
5. Plaintiff receives no further compensation.
6. At best plaintiff may have invested the £3,000 in fact awarded, but over the 10 years from 25 to 35 this may have grown to only £4,650 at 4½% being the suggested investment rate for calculating the multiplier - see Lord Diplock in *Mallet v McMonagle*).¹⁸

15 [1969] 1 WLR 795.

16 (1981) Kemp Vol 2, 3-221.

17 *Provisional Damages, A Guide to the New Procedures*, (London, 1988).

18 Brennan, at p18 (footnotes omitted).

5.16 Brennan then comments:

"The result of this example is a serious injustice to the plaintiff and a major saving for the defendant's insurers. Alternatively, if the plaintiff never becomes epileptic, the £3,000 award would be a windfall to him at the insurer's cost. The balance of justice must surely require a system of compensation for the plaintiff who does in fact suffer the later catastrophe."¹⁹

¹⁹ *Brennan*, at p18 (footnotes omitted).

CHAPTER 6: FATAL ACCIDENT ACTIONS

Introduction

6.1 In the United Kingdom, as in Ireland, there are two separate actions that may be brought if the victim of an accident dies. The first is the survival action under the *Law Reform (Miscellaneous Provisions) Act, 1934* and the second is a wrongful death action under the *Fatal Accidents Act, 1976*.

The Survival Action

6.2 In the case of causes of action accruing after 1 January 1983 the damages recoverable in fatal cases are limited to financial loss suffered before death, to damages for pain and suffering sustained by the deceased before death and to funeral expenses. In the many cases where death is instantaneous or almost instantaneous there will of course be no award for pain and suffering.¹

The Wrongful Death Action

6.3 The second, and more important, cause of action that English law now allows on death is the independent cause of action given to the near relatives of the deceased who have been deprived of support or services. This is the remedy provided by the *Fatal Accidents Act, 1976*.

6.4 At common law the relatives had no cause of action when they suffered loss in consequence of a tortiously inflicted death. Such a cause of action was first introduced by the 1846 Act. The present provisions are contained in the *Fatal Accidents Act, 1976*.

6.5 Section 1(1) provides that if death is caused by any wrongful act, neglect or default such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damages, the person who would have been liable if death had not ensued is liable to an action for damages, notwithstanding the death of the person injured.

¹ The *Law Reform (Miscellaneous Provisions) Act, 1934* had provided for the survival of *all* causes of action subsisting in the deceased, including a right to damages for loss of expectation of life. This was abolished by s1 of the *Administration of Justice Act, 1982*.

6.6 It is to be noted that the right of action created by the *Fatal Accidents Act, 1976*, is for damages suffered, not by the deceased, but by the deceased's family after his or her death. It is, of course, a pre-condition under the Act that the deceased would have been entitled to maintain an action on his or her own behalf and recover damages if he or she had survived. Furthermore, damages recoverable by dependants are reduced if the deceased contributed to the accident by his or her own negligence (section 5).

(i) Who can claim?

6.7 This is dealt with by section 1 of the Act. Section 1(2) provides that every such action shall be for the benefit of the dependants of the deceased. Section 1(3) defines "dependant" as (a) the wife or husband of the deceased; (b) any person who is a parent or grandparent of the deceased; (c) any person who is a child or grandchild of the deceased; (d) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

6.8 In practice, most claims under the *Fatal Accidents Act, 1976*, are brought by a widow or widower on behalf of herself or himself and their children, or sometimes by the parents of an unmarried son or daughter who is contributing to their support. It goes without saying that even if a person falls within the definition of "dependant" provided in the Act, he or she will still have to prove loss arising from the death of the deceased, and in practice many relatives have no claim at all.

(ii) How are damages assessed?

6.9 Section 3(1) of the *Fatal Accidents Act, 1976*, deals with the assessment of damages and consolidates the *Fatal Accidents Acts*. It provides that such damages can be awarded as are proportioned to the injury resulting from the death to the dependants respectively. This is in similar, but not identical, terms to section 2 of the 1846 Act.

6.10 The effect of section 3 is that there is no statutory limitation on the damages to be awarded. The law developed in practice over the years, and it became settled that damages were awarded for financial loss only. Save as provided by section 3 of the *Administration of Justice Act, 1982*, in the case of causes of action accruing after 1 January 1983, no sum can be awarded to relatives under the Act for their own mental distress or for the loss of society of the deceased.

6.11 The purpose of the award of damages in a wrongful death action and the mode of assessing damages in these cases were set out by Lord Diplock in *Mallet v McMonagle*²:

"The purpose of an award of damages under the Fatal Accidents Act is to provide the widow and other dependants of the deceased with a capital sum, which with prudent management, will be sufficient to supply them with material benefits of the same standards and duration as would have been provided for them out of the earnings of the deceased had he not been killed by the tortious act of the defendant, credit being given for the value of any material benefits which will accrue to them (otherwise than as the fruits of insurance) as a result of his death.

To assess the damages it is necessary to form a view upon three matters each of which is in greater or lesser degree one of speculation: (1) the value of the material benefits for his dependants which the deceased would have provided out of his earnings for each year in the future during which he would have provided for them had he not been killed: (2) the value of any material benefits which the dependants will be able to obtain in each such year from sources (other than insurance) which would not have been available to them had the deceased lived but which will become available to them as a result of his death: (3) the amount of the capital sum which with prudent management will produce annual amounts equal to the difference between (1) and (2) (that is 'the dependency') for each of the years during which the deceased would have provided material benefits for the dependants, had he not been killed."³

6.12 The purpose of the award is not to give the dependants such sums as would give them an annual income equal to the dependency. This would clearly be unfair on the defendant because at the end of the period of the dependency the whole of the capital sum would remain. Lord Pearson expressed the way in which the courts approach this aspect very clearly in *Taylor v O'Connor*⁴ when he said:

"The fund of damages is not expected to be preserved intact. It is expected to be used up gradually over the relevant period - 15 or 18 years in this case - so as to be exhausted by the end of the period. Therefore, what the widow receives annually - £3,750 in this case - is made up partly of income and partly of capital. As the fund is used up, the income becomes less and less and the amounts withdrawn from the capital of the fund become greater and greater, because the total sum to be provided in such year - the £3,750 - is assumed ... to remain

2 [1970] AC 166.

3 At pp174-175.

4 [1971] AC 115.

constant throughout the relevant period."⁵

6.13 On the question of what multiplier to use in calculating the damages, Thomas Gaunt states:

"No-one pretends that the calculation of the multiplier is a scientific operation and no hard-and-fast rule can be laid down for calculating it. All that can be done is to point to the factors that the courts commonly take into account when calculating the multiplier. In effect, the question of calculating the multiplier is left to the discretion and experience of the judges. The best that a practitioner can do is to have regard to the sort of multiplier which has in the past been adopted by judges in similar circumstances to those with which he is concerned."⁶

6.14 The most important factor to take into account when considering which multiplier to apply is, of course, the age and probable working life of the deceased and the expectation of life of the dependants. If the deceased has good prospects, the multiplier will be higher.

6.15 There must also be a discount for the uncertainties of life: the fact that the deceased might have been run over by a bus on the following day or that he or she was involved in a particularly hazardous occupation. Discount must also be made for the fact that the dependants will receive an accelerated benefit in the form of a lump sum down rather than smaller benefits over a number of years. Because of these uncertainties the appropriate time for selecting the multiplier is at the time of death, and the number of pre-trial years for which special damages are awarded should then be deducted from the multiplier.⁷

5 At p143.

6 Kemp & Kemp, *Damages for Personal Injury and Death*, 2nd ed, at p46.

7 See House of Lords decision in *Graham v Dodds* [1983] 1 WLR 808.

CHAPTER 7 : STRUCTURED SETTLEMENTS AND OTHER REFORMS

7.1 The various problems with the once-off lump sum system were addressed in two studies carried out in the 1970s in England, by the Law Commission in 1973 and Pearson Commission in 1978.¹ The problem has again been addressed by the Law Commission in their recent Report on Structured Settlements and Interim and Provisional Damages.²

(i) The proposals of the Law Commission

(a) *The 1973 Report*

7.2 The Law Commission recommended legislation to institute a right to seek provisional damages and thereafter additional damages if the plaintiff developed a serious disease or suffered some serious deterioration in his or her physical or mental condition.

7.3 Clause 6 of their draft Bill set out their proposals (pp.108-111 of the Report).³ The essential contents of Clause 6(1) were embodied in Section 32A(1) of the *Supreme Court Act, 1981*, as enacted by Section 6 of the *Administration of Justice Act, 1982*.

7.4 The Law Commission also made recommendations on the calculation of awards of damages for future losses. The Commission considered the speeches of the House of Lords in *Taylor v O'Connor*.⁴ In the light of this case and that of *Mitchell v Mulholland (No 2)*⁵ they concluded that the view of the courts was that:

"(a) The use of the multiplier has been, remains and should continue to remain, the ordinary, the best and the most satisfactory method of assessing the value of a number of future annual sums both in regard to claims for lost dependency under the

1 The Law Commission *Report on Personal Injury Litigation - Assessment of Damages* (Law Com No 56, 1973) and the *Royal Commission on Civil Liability and Compensation for Personal Injury* (the Pearson Commission) reported in 1978 (HMSO, Cmnd 7054).

2 Law Com. No. 224 (1994).

3 The Law Commission's *Draft Bill on Personal Injuries, 1973*, appears in Appendix 1.

4 [1971] AC 115.

5 [1972] 1 QB 65.

Fatal Accidents Acts and claims for future loss of earnings or future expenses.

- (b) The actuarial method of calculation, whether from expert evidence or from tables, continues to be technically admissible and technically relevant but its usefulness is confined, except perhaps in very unusual cases, to an ancillary means of checking a computation already made by the multiplier method".

7.5 The Law Commission considered that this position was unsatisfactory and recommended that legislation should be introduced to allow parties in these cases to rely on actuarial evidence and that the courts should be allowed refer to actuarial tables.⁶

7.6 Following the Law Commission's recommendation, the Government Actuary's Department published the *Actuarial Tables with Explanatory Notes for use in Personal Injury and Fatal Accident Cases*, often referred to as "the Ogden Tables". In the absence of any statutory reform or of agreement between the

6 They recommended a legislative provision along the following lines:

- '(1) Where
- (a) in an action under the Fatal Accidents Acts damages are claimed in respect of future pecuniary loss; or
- (b) in an action for damages for personal injuries damages are claimed in respect of future pecuniary loss (including future pecuniary loss consisting of the reasonable value of any services to which section 5(1) of this Act applies, being services that would probably have been rendered after judgment),
- then, subject to any relevant rules of court and without prejudice to any power or discretion of the court as to the costs of or incidental to any proceedings, subsection (2) below shall apply in relation to that claim.
- (2) For the purposes of establishing the capital value, as at the date of judgment, of any future pecuniary loss to which the claim relates, or the capital sum which at that date represents the reasonable value of any services to which the claim relates, any party to the action shall be entitled to adduce and rely on any admissible actuarial evidence; and where any such evidence is relied on for that purpose, the court shall have due regard to it in assessing the damages claimed.
- (3) The Lord Chancellor may, after consultation with such persons or bodies of persons as appear to him requisite, by order approve for the purposes of this section any actuarial table or set of actuarial tables which in his opinion merit such approval; and any such table or set of such tables that is for the time being so approved shall, as regards any claim in relation to which subsection (2) above applies, be admissible in evidence for the purpose mentioned in that sub-section in so far as it is relevant for that purpose.
- For the purposes of this sub-section any notes or other explanatory material issued in conjunction with any actuarial table or set of actuarial tables shall be treated as part of that table or set.
- (4) The power of the Lord Chancellor to make orders under sub-section (3) above shall include power to revoke a previous order and shall be exercisable by statutory instrument.'

parties, an actuary has, in fact, to be called to prove the Ogden Tables if they are to be used in evidence as they constitute hearsay evidence.

7.7 The Law Commission also considered the option of giving the courts the power to order periodic payments of awards but decided against such a proposal. They felt that the experience in the jurisdictions they examined, Western Australia and Germany, showed that periodic payments were by and large not popular with either plaintiffs or defendants.⁷ They concluded, however, that the only worthwhile system of periodic payments would be one "devised to apply as widely and comprehensively as possible" and which "would be used by a significant number of litigants".⁸ These criteria meant that they considered only a reviewable system of periodic payments, i.e. one in which the periodic payment could be altered in the light of changed circumstances. This proposal was floated in the working paper⁹ and met with almost universal opposition. In their final report they noted that "the introduction of a system of periodic payments would meet with vehement opposition from almost every person or organisation actually concerned with personal injury litigation".¹⁰ They therefore decided not to recommend any system of periodic payments.

(b) The 1994 Report

7.8 Twenty one years after their 1973 *Report on the Assessment of Damages in Personal Injury Cases* referred to above, the Law Commission reported again on the topic in the context of their examination of damages as a remedy. The Report was preceded by a Consultation Paper which noted the deficiencies of lump sum damages and considered whether the development of voluntary structured settlements and the existing provisions for interim and provisional payments usefully corrected such deficiencies.

7.9 Noting that their recommendation on the admissibility of actuarial evidence in the 1973 Report had not been implemented, the Commission in 1994 recommended, *inter alia*:

"Where, in any proceedings for damages for personal injury (including proceedings under the *Fatal Accidents Act, 1976* and the *Law Reform (Miscellaneous Provisions), Act 1934*) it is desired to establish the capital value of any future pecuniary loss to which the claim relates, actuarial tables published by the government Actuary's Department should be admissible as evidence"

7 Law Commission Working Paper No. 41, (1971), at pp114-130.

8 *Ibid*, at p129.

9 Law Commission, Consultation Paper No. 125, paras. 3.39-3.46.

10 See note 1, above.

We will refer to other conclusions of the Law Commission as they arise later in this Report.

(ii) The proposals of the Pearson Commission

7.10 In 1973 the British Government set up a Royal Commission on Civil Liability and Compensation for Personal Injury to be chaired by Lord Pearson. The Commission's terms of reference were broad¹¹ and included examining the question of whether or not the tort system was an appropriate mechanism for awarding compensation to accident victims.

7.11 The Commission was in favour of retaining tort as a basis for compensation. However, it examined the question of whether or not damages should be paid in a once-off lump sum.

7.12 The Commission commented on the problems of the traditional method of calculating the damages for future losses:

"The traditional method of calculating lump sum damages for future pecuniary loss has been to multiply the plaintiff's net annual loss by an appropriate factor representing a number of 'years' purchase'. This factor, known as the 'multiplier', has always been less than the number of years for which compensation is to be provided, since it is scaled down to take account of the fact that the plaintiff receives his compensation in advance as a lump sum. A reduction is also made for future contingencies, such as the chance that the plaintiff would have died for a reason unconnected with the injury. The method in theory

11 The Commission notes at p3, Vol 1, of its Report:

"We were appointed on 19th March 1973:

'to consider to what extent, in what circumstances and by what means compensation should be payable in respect of death or personal injury (including ante-natal injury) suffered by any person -

- a. in the course of employment;
- b. through the use of a motor vehicle or other means of transport;
- c. through the manufacture, supply or use of goods or services;
- d. on premises belonging to or occupied by another or
- e. otherwise through the act or omission of another where compensation under the present law is recoverable only on proof of fault or under the rules of strict liability,

having regard to the cost and other implications of the arrangements for the recovery of compensation, whether by way of compulsory insurance or otherwise.'

provides a lump sum sufficient, when invested for this purpose, to produce an income equal to the lost income over the relevant period, when the interest is supplemented by withdrawals of capital."¹²

7.13 The Commission felt that this method of calculating and awarding damages involved many potential inaccuracies with the result that the compensation awards often proved inadequate. Consequently, the majority decided that the courts should be given the power to award periodic payments of the damages for future loss, and that, in cases of serious injury, the courts should be obliged to so award the damages unless the plaintiff could show that a lump sum would be more appropriate in the circumstances of his or her case.¹³

7.14 On the subject of periodic payments the majority's recommendations can be summarised as follows:

- (i) That in cases of serious and lasting injury or death, plaintiffs should receive from the court an award in the form of a lump sum, except for compensation for future pecuniary loss which should be by award of periodic payments unless the plaintiff has satisfied the court a lump sum award would be more appropriate.
- (ii) That the parties in such cases should remain free to settle the claim for a lump sum for all heads of damage prior to the action coming to trial.
- (iii) That the court should have a discretion to award periodic payments for future pecuniary loss for injuries which are not lasting and serious.
- (iv) That the plaintiff (but not the defendant) should have power to apply to commute a periodic payment award for a lump sum on showing good grounds to the court.
- (v) That either party should have the right to apply to the court for a review of a periodic payments award limited to those cases where there has been a change in the plaintiff's pecuniary loss brought about by changes in his or her medical condition.
- (vi) That the death of a plaintiff holding an award for periodic payments would give his or her dependants a fresh right of action against the defendant for lost dependency in respect of the years when, but for his or her injury, he or she would still have been alive.
- (vii) That payment of the award by the defendant or his or her insurers

¹² *Pearson Report*, Vol 1, at p139.

¹³ *Pearson Commission Report*, Vol 1, at paras 573 and 576.

should be made at intervals no less than monthly, and the award itself should be indexed against inflation.

- (viii) That an uninsured defendant might be required to deposit a lump sum with an insurance company to provide income for the periodic payments.

7.15 The minority did not favour the introduction of such a system of periodic payments. Their reasons can be summarised as follows:

- (i) They felt plaintiffs preferred lump sums.
- (ii) Periodic payments may reduce initiative and hinder rehabilitation.
- (iii) The necessary review procedure which would accompany a system of periodic payments would be an undesirable continuation of the adversarial process which is not in the plaintiff's best interest.
- (iv) The new system would hinder the early settlement of claims.
- (v) Since more actions would proceed to trial and judgment, there would be a consequent increase in costs and delays.
- (vi) The need for one party to obtain continuing fresh medical evidence periodically in order to monitor changes in physical condition will further add to the costs of the compensation process.
- (vii) The effect of inflation on once-off lump sum awards could be more effectively combatted by adopting differing multiplier methods in calculating that part of the award for future losses.
- (viii) A plaintiff has a right to a lump sum award, and it is unfair to impose on a defendant a continuing liability for periodic payments of damages.
- (ix) It is unfair to a defendant to give the dependants of a deceased plaintiff a fresh cause of action.

7.16 The majority's recommendations on periodic payments were not implemented.

7.17 The following is a constructive critique of the Pearson Commission's proposals by J H Preveett:¹⁴

"The replacement of lump sums by periodic payments would largely remove the need for actuarial assistance in the assessment of damages. There is nevertheless, in the author's opinion, a strong case on general grounds for the payment of damages as a periodic income rather than a capital sum. If such payments were subject to regular review, adjustments could be made to allow for changes in the circumstances of the injured party, changes in taxation and changes in the level of wages or cost of living. Periodic payments would also overcome the problem that since neither judges nor actuaries have crystal balls, the calculation of lump sum damages would always be wrong. At present, the plaintiff who lives too long suffers from the inadequacy of his award, while the plaintiff who dies too young is over-compensated.

The "modified multipliers" recommended by the majority in Chapter 15 of the Pearson Report represent a significant advance in that they attempt to take proper account of the factors of both inflation and taxation. It seems to the author, however, that what has emerged from the Pearson report, if it ever were enshrined in legislation, is still very complicated. There is a danger that actuaries might in future find themselves more heavily involved, not in giving opinions on assessment of damages but in actually doing the arithmetic because many legal practitioners would feel unable to cope with it.

There is nothing in the text of the Pearson report or in its recommendations that changes the author's view that there would always remain a need for actuarial assistance in the assessment of damages in large and complicated cases."¹⁵

7.18 While the Commission's recommendations on periodic payments were never specifically implemented, their findings did influence the debate on the topic.

7.19 Reform in one area finally came in 1981 with the introduction of a procedure for obtaining interim awards. Ultimately, three major alterations to the way damages are awarded for personal injuries have been made to the tort system in England which differentiate it, in terms of specific statutory provisions, from the system in Ireland. As well as interim awards, provision for provisional damages was introduced in 1982 (although the provisions only came into effect in 1985),¹⁶ and then in 1987 the Inland Revenue and the Association of British Insurers came to an agreement which made structured settlements possible.¹⁷

15 *Ibid.*, at pp104-105.

16 See Appendix 3 for the Rules of the Superior Courts which introduced the provisions.

17 See Appendix 2 for a copy of this agreement.

Interim Awards

7.20 Two procedural devices have enabled the final award to be delayed until the medical prognosis is clear:

(a) **Interim payments**¹⁸

Under s32 of the *Supreme Court Act, 1981*, and the *Rules of the Supreme Court*, order 29, rr9-17, the court has power to order an *interim* payment of damages if liability is admitted or otherwise clear *and* the defendant is a public authority or is covered by insurance or has other sufficient resources.¹⁹

7.21 Munkman says that this procedure "is suitable where the injuries are serious and it will take time to assess the ultimate damages but in the meantime expenses have to be met. In such cases the mere existence of the procedure is likely to result in an agreement".²⁰

(b) **The split trial**²¹

7.22 This approach separates the resolution of liability from the assessment of damages. An order for the interim payment of damages can be made after a finding of liability.

Provisional Damages

7.23 One of the problems with the interim awards procedure was the difficulty in assessing the quantum where there was a risk of some serious disability supervening at a later stage, though the chance of this was quite small and would not justify a large award if assessed immediately.

7.24 Section 6 of the *Administration of Justice Act, 1982*, was introduced to

18 RSC Order 29 pt 11 means that interim payments are available if the plaintiff will succeed at trial - see *Breeze v McKennon Ltd*, *The Times*, 23rd November, 1985.

19 Ord 29, r12(1) provides that an interim award may be made if the applicant can show 'that if the action were to proceed to trial the plaintiff would succeed in the action on the question of liability without any substantial reduction of the damages for fault on his part or on the part of any person in respect of whose injury or death the plaintiff's claim arises and would obtain judgment for damages against the respondent (or where there are two or more defendants, against any of them)'.
Damages for Personal Injuries and Death, 7th Edn, at p164.

20 *Damages for Personal Injuries and Death*, 7th Edn, at p164.

21 RSC Order 33 rr3, 4A.

deal with this problem.²² It introduced a new power (put into operation by rules of court) to allow damages to be assessed in two stages if:

"there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition."²³

7.25 Munkman describes the operation of the section as being that "the stated risk will be ignored when damages are assessed in the first place (they will be assessed "on the assumption" that the disease or deterioration will not occur) but if eventually it does occur, further damages will be assessed".²⁴ The typical case where this power could be used is epilepsy, which may appear for the first time several years after a head injury takes place.

7.26 While neither the word "chance" nor "serious" was defined or qualified by the legislation, the reasoning behind the legislation was that the provisional damages procedure should only be used in exceptional cases.

7.27 This was certainly the intention of the English Law Commission when they prepared their draft Bill on the subject. Whilst clause 6 of their draft Bill did not define the word "chance" or otherwise limit the scope of an award for provisional damages, they clearly intended that the provisional damages claim should be exceptional.

22 The section implements with certain variations recommendations of the English Law Commission and the Pearson Commission, though their recommendation that provisional awards should be made only where the defendant was a public authority or was insured in respect of the plaintiff's claim was not adopted.

The Lord Chancellor, when introducing the Bill in the House of Lords (*Hansard*, HL Vol 428, cols 28-29) stated, regarding this procedure, that "it will not be involved unless the plaintiff wants it and the court is satisfied that this procedure will not cause serious prejudice to the defendant".

23 S32A(1) of the *Supreme Court Act, 1981*, (inserted by s6 of the *Administration of Justice Act, 1982*) provides in sub-sections (1) and (2):

(1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.

(2) Subject to subsection (4) below, as regards any action for damages to which this section applies in which a judgment is given in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to award the injured person -

(a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and

(b) further damages at a future date if he develops the disease or suffers the deterioration."

24 *Supra*, note 20, at 165.

7.27 Note 2 to clause 2 of the draft Bill emphasises this:

"The provisions in this clause are aimed at enabling the court to do justice *in a strictly limited type* of case, namely that in which the Plaintiff can prove that there is a chance, *but no more than a chance*, that as a result of his injuries *serious consequences* may occur in the future."

7.28 Further, by note 7 to clause 6 of the draft Bill the Commission underlined the power of the court's "full discretion to grant or refuse" an application for provisional damages.

7.29 It was the Commission's "expectation" that provisional damages awards would only be made in the sort of case they describe in paragraph 232 of their report. Such cases were those with a risk of future "catastrophe such as epilepsy, cancer or total blindness", where "medical prognosis cannot say whether the catastrophe will or will not occur."

7.30 The Law Commission concluded that provisional damages should be restricted to those cases where the onset of some future catastrophic condition was foreseen. However, section 32A of the draft Bill uses the adjective "serious" to describe the future condition - which arguably has in contemplation something less than catastrophic.

7.31 The provisional damages rules were introduced by the *Rules of the Supreme Court (Amendment No. 2), 1985*, paragraphs 2, 3 and 4 - amending order 18 r8(3) and adding rr7-10 to order 37.²⁵ They came into force on 1 July, 1985. These rules provide that a claim for a provisional damages award can only be made by the plaintiff.²⁶ Consequently a defendant has no right to seek such an award. An award of provisional damages can only be made by the court. There is no provision for such an award by private settlement - settlements *must* lead to a court order.

7.33 An award for provisional damages can be made against an uninsured person despite the Law Commission's recommendation that it be restricted to actions against public authorities, insured persons and persons covered by the requirements of Part VI and section 143 of the *Road Traffic Act, 1972* ("the insurer concerned").

7.34 There are three important rules which cover the making of a provisional

²⁵ See Appendix 3.
²⁶ Order 37 r8(1).

damages award. They are order 37 r8(1), r8(2) and r8(4).²⁷ A number of consequences flow from these three provisions. First, the Court has a discretion. Both provisions state that the court *may* make an award. According to Brennan²⁸ the relevant factors in exercising that discretion are:

- "- the degree of risk of the chance occurring;
- the seriousness of the condition and amount of damages likely if it does occur; and
- any prejudice to the defendant if the period in which a condition may occur is indefinite or very prolonged, and/or difficulty in future valuation making reserve assessment and/or investment protection and/or re-insurance unduly onerous."²⁹

7.36 Secondly, they mean that the court can only make an award if the plaintiff has pleaded a provisional damages claim and if the court is satisfied that it is a section 32A case (i.e. that it is a chance case and that the chance condition is serious).

7.37 Thirdly, the court may make an award in respect of one or more chance conditions and, if appropriate, for a different period in respect of different conditions.

7.38 Fourthly, the terms of an award may be such as the court thinks just. As Brennan points out this can be an area of contention. He states:

"The defendant may wish terms designed to protect his interests during the specified period. Conversely, the plaintiff may seek to avoid terms that involve him in expense he may not recover if the chance condition does not occur. The court may be anxious to impose terms that ensure any future trial of further damages is not beset by the absence of, or

27 Order 37 r8(1) provides that:

"The court may on such terms as it thinks just and subject to the provisions of this rule make an award of provisional damages if:

- (a) the plaintiff has pleaded a claim for provisional damages, and
- (b) the court is satisfied that the action is one to which Section 32A applies."

Order 37 r8(2) provides that:

"An order for an award of provisional damages shall specify the disease or type of deterioration in respect of which an application may be made at a future date, and shall also, unless the court otherwise determines, specify the period within which such application may be made."

While Order 37 r8(4) provides that:

"An order for an award of provisional damages may be made in respect of more than one disease or type of deterioration and may in respect of each disease or deterioration specify a different period within which an application may be made at a future date."

28 *Provisional Damages - A guide to the new procedures*, (London, 1986).

29 *Ibid*, at p52.

vagueness of, medical or employment details that could be assembled and preserved during the specified period.³⁰

7.39 Finally the order must be precise. This is so because of order 37 r8(2) which requires the court to "specify" the disease or type of deterioration in respect of which further damages can be claimed and to specify the time period within which a further damages application can be made "unless the court otherwise determines". There may of course be different specified periods for different chance conditions.

Structured Settlements

7.40 Despite these reforms, many of the problems that had been identified with the once-off lump sum awards still remained. It was against this background of dissatisfaction that the Inland Revenue in Britain and the Association of British Insurers, the ABI, came to an agreement to allow the use of structured settlements.³¹

7.41 Awarding a structured settlement in a case means that, instead of the traditional lump sum payment made to plaintiffs, they receive a guaranteed income or pension derived from an annuity bought by the insurer and held for the benefit of the injured person. In contrast to the lump sum award the income payments can be varied and "structured" over a period of time. Structured settlements are now used in a number of countries.³²

7.42 The agreement between the Inland Revenue and the ABI provided that plaintiffs could receive guaranteed periodic payments of their compensation award, tax free, by means of the purchase, by the defendant's insurers, of an annuity. These "structured" settlements were only possible if both parties agreed out of court to the arrangement. The financial arrangements had to satisfy one of the model agreements drawn up in the agreement.

7.43 The case of *Dott v Brown*,³³ which decided that deferred payments of a debt could be treated as capital and not income, provided the legal basis for the Inland Revenue allowing the periodic payments of the award in the form of an annuity not to be taxable in the hands of the plaintiff.

30 *Ibid*, at p53.

31 This agreement is reproduced in Appendix 2.

32 In Chapters 10 and 13 the use of structured settlements in the United States and Canada respectively will be examined.

33 (1936) 14 *Law Times* 484.

7.44 The concept of structured settlements allows plaintiffs to receive whatever proportion of their damages they wish in the form of a series of future annual payments, linked to the life and projected future cash requirements of the plaintiff. The balance of the damages is paid in the manner of the traditional lump sum.

7.45 The general philosophy behind the structure is that once a plaintiff in a large personal injury or fatal accident case has been provided with his or her set-up costs, e.g. home, equipment and car, and also has a reasonable contingency cash fund, the balance of the lump sum is normally used as a means to provide an annual income.

7.46 What happens in practice is that the amount of money that is used to fund the settlement is used by the defendant's insurer to purchase an annuity in order to fund the regular payments that it has to make to the plaintiff as damages by instalments. Effectively the arrangements are back-to-back. The important point from a tax point of view is that there are two very distinct contractual relationships involved. Thus, first, the insurer has an obligation to pay damages by instalments to the plaintiff and secondly, by the purchase of an annuity, the insurer has a right to receive a series of future payments which are linked to the life of the plaintiff.

7.47 While there is a good deal of flexibility in the way the annuity can be established in the beginning,³⁴ once the structure is established it cannot be varied. Hence the need for an adequate contingency cash fund.³⁵

7.48 The mechanics are that the general insurer will pay out to the plaintiffs damages by instalments which may be index-linked and last for the life of the plaintiff or for a specified number of years, if longer. In turn, the general insurer purchases an annuity from a life office in order to fund the series of payments as determined above. Under present UK tax legislation the life office will pay to the general insurer the required annuity after deduction of income tax. The general insurer has to pay to the plaintiff the gross equivalent of the annuity, but he can write this amount off against his corporation tax liability. There will thus be a loss in cash-flow to the general insurer, but overall the whole arrangement is fiscally neutral.

34 The court in the case of *Kelly v Dawes*, *Times*, 27 September, 1990, set down guidelines to be followed by the parties in agreeing a structured settlement. These guidelines are discussed below.

35 This is stipulated in the *Kelly v Dawes* guidelines.

7.49 The fiscal consequences of these transactions are as follows:

- (i) The purchase of the annuity can be treated as a re-insurance premium.
- (ii) The receipt of the regular annuity is wholly taxable in the hands of the general insurer.
- (iii) The payment of the gross amount of the debt to the plaintiff can be fully written off as a tax deductible item by the general insurer.
- (iv) The general insurer can obtain relief for the withholding tax that it has effectively had to fund until its normal due date for corporation tax.
- (v) The regular receipts by the plaintiff are not subject to taxation as they are effectively capital receipts by instalments. Provided all of the regulations are adhered to and the model agreement is the overriding agreement which gives the discharge from the plaintiff to the defendant, then the regular receipts by the plaintiff do not need to be included on the plaintiff's income tax return.

7.50 Under existing tax legislation, the annuity purchased by the general insurer must be received after deduction of tax. The general insurer has to pay the equivalent of the gross amount to the plaintiff. This makes the concept of structures less attractive to the insurance industry because of the loss in cash-flow and the requirement to maintain an administrative record of the payments.

7.51 However, while the insurers will have to meet a cost in the loss of cash flow and some administration, this is to be set against the advantages of a reduced cost to the insurer in the overall settlement of the case. There is a reduced cost to the insurer because the plaintiff does not have to pay any tax on the annual instalments.

7.52 The Inland Revenue and the ABI have drafted and agreed model agreements.³⁶ The Revenue has advised that if an agreement is made between the parties which complies with one of the model agreements, then the receipt by the plaintiff of the regular monies will be tax free.

³⁶ A copy of the Model Agreement for such a structured settlement is set out in Appendix 2.

7.53 While the courts in England have no powers to order a structured settlement award, they have set down guidelines to be adopted in cases where the parties agree to use the mechanism. The guidelines were set out by Potter J in *Kelly v Dawes*³⁷, the first case where a structured settlement was used.

7.54 Potter J set out a six point plan to be followed in cases where it is proposed to arrange a structured settlement:

- (i) The starting point will be to assess the value of the claim and its constituent elements from a conventional basis. It will be necessary to have some idea of the appropriate lump sum figure or at least the bracket for settlement from that perspective. If need be, a barrister's opinion will be sought. Care should be taken to ensure that adequate medical evidence is available to deal with the important matter of the plaintiff's life expectancy.
- (ii) It is necessary to obtain appropriate independent expert advice from accountants or other financial experts on the fiscal and investment advantages to the plaintiff of the proposed structured settlement. Again this involves an analysis of the life expectancy position and likely future implications, particularly with regard to such matters as the costs of care.
- (iii) The draft form of agreement proposed must conform with the Inland Revenue procedure. In other words, it must be in the form of a model agreement or at least have confirmation from the Inland Revenue that the agreement falls within the scope of any revenue provisions or practice upon which the value and approach to the structured settlement depends.
- (iv) In cases where the plaintiff is a person under a disability, confirmation of the approved terms of the agreement will be required from the Court of Protection (obviously conditional upon the approval of the settlement by the Court). For example, in one case, whilst the Receiver had not actually been appointed by the time of the settlement (and thus strictly the Court of Protection had no jurisdiction), nevertheless express approval from the Court of Protection to the suggested scheme was obtained.³⁸
- (v) Material should be provided to satisfy the Court that there are sufficient funds available outside the structure provisions to meet any foreseeable capital needs of the plaintiff whether by means of a lump sum element in the settlement or by reason of

37
38

Supra, n. 34.
Grimsley v Grimsley and Meade, 28 January 1991, unreported, McCullough J.

other resources available to the plaintiff, i.e. the Court will want to know whether there is an adequate contingency fund.

- (vi) Material must be available to satisfy the Court that the agreement involves secure arrangements by responsible insurers, whether one of the well known "tariff" companies or one of the syndicates operating under the rules and protection of the Lloyd's Market.

7.55 On the 12 February 1992, the High Court in England issued a Practice Note on the obtaining of court approval for structured settlements.³⁹ This practice note is primarily based on Potter J's guidelines.

7.56 In practice there are four different types of annuity available to a plaintiff. They are:

- (i) An annuity which is index-linked or increases at a fixed compound rate.
- (ii) An annuity which is guaranteed for a minimum number of years or for the duration of the plaintiff's life, whichever is longer.
- (iii) An annuity which also allows for streamed lump sum payments in the future, in addition to the regular sums, to cater for the changing needs of the plaintiff.
- (iv) An annuity with deferred annual payments starting some years after the settlement.

7.57 Some degree of flexibility is allowed and the Inland Revenue have indicated that a number of variations on the type or types of annuity provided are allowed so long as certain minimum requirements are met. John Frenkel refers to three in particular:⁴⁰

- "(a) The annuity purchased by the insurer must fully equate to the damages by instalments paid to the plaintiff. This enables the insurer to treat the purchase of the annuity as a reinsurance premium and not as an investment;
- (b) We have looked into the possibility of the defendant offering a

39 Structured Settlements: Court's Approval [1992] 1 W.L.R. 328.
40 Frenkel, *Structured Settlements - Practical Examples of Actual Cases Implemented*, a paper delivered at a seminar in Sheffield, July 1991, at p9, reproduced in *Structured Settlements - A practical guide to using structured settlements in personal injury cases*, produced by Frenkel Topping Structured Settlements, 1991.

different guarantee to the plaintiff than that which it is actually buying. This would have offered the prospect of some surplus monies to the insurer if the plaintiff were to die after the guarantee period given to the plaintiff but before the expiry of the guarantee bought by the insurer. The Revenue were not happy with such an arrangement as it offered the prospect of an investment return to the insurer and therefore coloured the payment used to buy the annuity in the first place such that it might no longer be treated as a reinsurance premium and therefore not allowable as a trading expense;

- (c) The income stream structured does bear a recognisable relationship to the losses as suffered."

7.58 Unlike the position in some states of the United States,⁴¹ the courts in England have not been given any power to impose a structured settlement on the parties. So far, there has been only one attempt to persuade a Court that it has power to impose an order for periodic payments upon a defendant. In *Burke v Tower Hamlets Health Authority*,⁴² Mr Justice Drake refused to make an order that the cost of future care for the plaintiff should be paid directly by the defendants for the rest of the plaintiff's life. The judge took the view that defendants were entitled to close their files; that continuing payments were an oppressive lingering financial burden; and that it was in the public interest that litigation should come to an end.

7.59 A solicitor with experience in the field, Keith Popperwell, has commented:

"The view of Mr Justice Drake is likely to prevail. The difficulties involved in varying an order for periodic payments or resolving disputes and the desire that litigation should have a speedy and definite conclusion, all militate against the compulsory award of damages by periodic payments."⁴³

7.60 While structured settlements have yet to be used in England in fatal accident cases (as they have been in North America), commentators have expressed the view that they will have a useful role to play.

7.61 Pickering, commenting on the potential use of structured settlements in fatal accident cases says:

41 The position with respect to structured settlements in the US is dealt with in Chapter 10.

42 *Times Law Reports*, 10 August 1989.

43 *Ibid*, at p3.

"These are not dissimilar in principle from cases involving future care elements for there is a need to analyse future dependency requirements. At present we have a system which assesses the level of dependency and again makes payment by the lump sum approach. There is no tax benefit to the plaintiffs who are subject to tax on the investment of any such sum. Hence the use of a structure may be of obvious benefit if the prime requirement in a fatal case is to ensure that there is available for the dependants a regular source of money/income rather than an immediate lump sum. The facility to prepare a structured settlement and gain the benefit of the tax saving is something which is worthy of consideration."⁴⁴

7.62 It is also worth noting that structured settlements can provide added security for dependents of surviving plaintiffs. This is because the annuity can be guaranteed for a minimum number of years. If the plaintiff dies before this period of time has elapsed then the payments will go to the beneficiaries of his or her estate. However, because the contractual nexus is broken, they must pay tax. The general insurer can therefore direct payments to be made direct by the life company to the beneficiaries as nothing is lost. The guarantee period does not therefore affect the general insurer.

7.63 Initially the opportunity to structure large awards in this way was not often used; there was only one such settlement agreed in the first two years since the agreement. However, while statistics are not available, it does appear that "structured" settlements are being more frequently agreed in some of the more serious cases.⁴⁵

7.64 Editorial comment in the *New Law Journal* in January, 1990⁴⁶ noted that the advantages of the structured settlement arrangement had been perfectly demonstrated by the *Kelly* case where a structured settlement was approved, and that the increased use of the facility was probably dependant on practitioners getting used to the idea:

"The solution lies almost entirely in the hands of the legal and insurance professions. The commitment shown in the *Kelly* case must be followed if structured settlements are to become an accepted method of paying compensation. If it isn't then it will be an opportunity badly missed to the detriment of all."⁴⁷

44 *Ibid.*, at pp12-13.

45 In *Field v Hertfordshire Health Authority* reported in the *Irish Independent*, 1 November 1991, the plaintiff was awarded £1,042,413 and the defendant agreed to "structure" the settlement. This is believed to be the first structured award agreed by a public body. Similarly, in *Tombs v Merton and Sutton Health Authority* (reported in the *London Independent*, 1 December, 1991), the High Court approved in principle an award of £1.65 million, which, the report suggests, may also be invested under a structured settlement.

46 (1990) 140 *New Law Journal* 88.

47 *Ibid.*

7.65 Richard Lewis states that the new system has advantages:

"A structured settlement enables an insurer to pay out less money than before, while at the same time allowing a plaintiff to draw a high income from the damages obtained. The gains are made at the taxpayer's expense. From the perspective of the accident victim, structured settlements offer at least two new advantages over the lump sum: first, the income generated can be guaranteed against erosion by inflation; second, it is paid free of tax in the plaintiff's hands."⁴⁸

7.66 Lewis then points out that there are two limits to this system. First, judges have no power to order the structuring of their award of damages - it is up to the parties to arrange this. However, he points out that this is not too much of a problem since only a tiny percentage of cases proceed to judgment. Secondly, it can only apply when there is going to be significant financial loss in the future. Lewis, relying on statistics derived from the Pearson Commission Report, points out that only 7½% of tort cases involve any future financial loss.⁴⁹

7.67 There have also been some teething problems with the use of structured settlements. The incentive for the defendant insurer is that, by being able to write off the payments they make to the plaintiff, they can reduce their tax liability. This created a problem where the defendant insurer was a non-trading insurer and consequently had no investment income in respect of which to make use of the write-off.⁵⁰ This problem initially applied to two types of insurers, namely mutual insurers and health authorities.

(i) **Mutual insurers**

7.68 Such insurance companies do not pay tax on any of the trading profits that they make because trading effectively takes place with their own members and in tax terms it is not possible to make a profit on dealing with oneself. Thus, the insurance company would have to pay tax on the annuity that it receives from the life office as it is treated as investment income. However, it would not get the corresponding write-off for the payments that it makes to the plaintiff as this could *not* be set against the investment income of the company. This means that the insurer would have to bear the cost of the taxation and therefore would need to appraise a structured settlement differently as compared to a normal trading (i.e. Schedule D, Case I) insurer.

48 *Structured Settlements - a new way of paying damages*, (1988) 138 *New Law Journal*, at p860.

49 *Ibid.*

50 See Frances Gibb, *Accident awards held up by dispute over who pays*, *Times*, 28 July 1992.

7.69 The Law Commission in their Consultation Paper conclude, provisionally, that a mutual insurer should be able to pay instalments of damages direct to the plaintiff, and that this solution should go hand in hand with an extension of the tax status currently given to settlements which conform to the model agreements.⁵¹

(ii) **Medical negligence cases**

7.70 The initial understanding regarding structured settlement claims for medical negligence was that they could not be implemented as effectively as for a normal trading insurance company. However, in January 1990, the Crown Indemnity rules were changed to make the Department of Health ultimately responsible for paying damages in these cases.

7.71 The future for structured settlements in medical negligence cases now looks more promising. John Frenkel has commented:

"My firm have had a number of discussions with various Government bodies and there does appear to be real interest in further consideration of Structured Settlements as a means of settling Medical Negligence cases. This offers the opportunity of real savings to the National Health Service as well as offering a more advantageous settlement with greater certainty for the plaintiff than a comparable lump-sum only award could ever do. We now have a medical negligence case which we are piloting, where the damages have been agreed between the parties at £950,000 on the basis of a Structured Settlement, subject only to the approval of the Department of Health and the Treasury. Our discussions with them on the case indicate their willingness to support the concept in view of the huge potential savings. The plaintiff's original claim was for over £1,800,000 in conventional terms, and by my reckoning the defendants will have saved in the order of £250,000. They paid into Court £950,000 and while this figure was not accepted as a conventional lump sum it was accepted as a Structured Settlement. Furthermore, a scheduled one week hearing was averted, with the consequent savings on costs."⁵²

7.72 Further advantages and disadvantages of structured settlements will be discussed in Chapter 16. However, what seems clear at this stage is that their use, which only occurs with the agreement of both parties, is on the increase as more plaintiffs and practitioners become aware of their advantages. One way of facilitating a wider use of this arrangement could be to allow the courts to *award*

51 Law Commission Consultation Paper No. 125, at paras 3.32-3.33.
52 Frenkel, *op. cit.* at p26.

payment of compensation in the form of a structured settlement, thereby encouraging precedents of their use to become a regular feature of the system more quickly than under the present situation whereby the courts can only *approve* settlements devised by the parties which they do not have the power to award themselves. The question then arises as to whether and in what circumstances the courts might be given the power to award compensation under a structured settlement in the absence of full agreement between both parties. This subject is discussed further in Chapter 16.

SECTION III: THE UNITED STATES OF AMERICA

CHAPTER 8: PERSONAL INJURIES ACTIONS

8.1 The legal systems in the United States have several different methods of awarding compensation for personal injuries. Many states have no-fault statutory schemes for road accidents and injuries to workers. These states do not however preclude the taking of a tort claim except in the case of injuries at work, although the existence of the statutory scheme will affect how often a tort claim will be made.¹

8.2 The principles of tort have been altered by legislation in many states with regard to cases of personal injury. Special rules for products liability, medical malpractice and occupiers' liability are common in many states.

8.3 Our concern, however, is with the way the award is calculated and how it is paid as opposed to when and in what circumstances liability will be held to attach.

8.4 In this context, it is therefore proposed to look at the approach United States courts take to calculating damages, in particular for future losses, and the account taken of inflation and taxation. This will be done in the context of fatal accident cases² as well as personal injury actions. Then it is proposed to look at the practice of structuring awards and at the various laws enacted in different states to allow courts to order periodic payments of certain elements of personal injury awards.³

The Calculation Of The Award

8.5 As in Ireland and the United Kingdom, the rules for calculating damages for personal injury are independent of the basis of the claim. The emphasis is upon the plaintiff's condition without regard to whether the injuries resulted from a car crash or a defective product.

1 This is because damages received under the statutory scheme will generally be set off against any award of damages made in a tort action.
2 This will be discussed in Chapter 9.
3 This will be discussed in Chapter 10.

8.6 For the purpose of assessing the merits or demerits of a system of periodic payments it is helpful to distinguish between past (pre-trial) losses and future losses, if any. In the United States most states, as in Ireland and the United Kingdom, require future losses to be reduced to their present value so that the damages can be awarded in the form of a once-off lump sum.

8.7 As before, the critical factors that need to be taken into account are those related to future taxation and inflation rates.

8.8 An adjustment to the damages awarded is necessary to take into consideration the amount of interest that an investment of the lump sum itself will earn over time. The trier of fact has to fix a figure which, when placed in safe investments at the date of judgment, will earn interest equal to the projected loss of wages. Certain factors should be taken into account in fixing the final figure for damages.

8.9 The determination of the percentage rate to be used for discounting the damages has evoked considerable controversy among courts, commentators, and experts. A high discount rate works to the defendant's advantage by lowering the total liability; conversely, the plaintiff benefits from applying the lowest possible percentage rate.

8.10 No consensus has developed as to whether, and to what extent, the impact of inflation should be looked at when calculating the projected earning scheme. Proponents of its inclusion as an adjustment factor contend that, unless the damages award reflects estimated future inflationary trends, a plaintiff will be undercompensated because inflation will erode the purchasing power of the substituted wages. Critics of adjusting damages for inflation argue that predicting future inflation is akin to crystal ball gazing; it is too speculative and unreliable to be fairly applied. Moreover, forecasting such trends is too complex for accurate assessment by jurors, even with the aid of expert testimony.

Inflation

8.11 The inflation factor must be distinguished from other factors which may affect the computation of damages. For example, apart from inflation, estimated wage increases may be entirely attributable to projected job promotions or industry growth.

8.12 Courts have employed numerous methods to evaluate the respective roles of the discount rate and future inflation rate. One approach acknowledges that

both the discount and inflation factors are relevant, yet not susceptible of being accurately predicted. Therefore, both factors are simply offset and cancel each other out. Another method allows the introduction of expert testimony with respect to each factor, leaving the trier of fact to evaluate the evidence and make any adjustments as deemed appropriate. Other courts have disregarded inflation, but have adjusted the damages award downward by some discount rate. Many courts are now following the lead of the United States Supreme Court with a varied offset approach. Under this method courts discount the damages award only by the "real" rate of interest. This method considers that market interest rates include two components: an estimate of anticipated inflation and the desired real return on investment. The first element concerning inflation is offset against projected future inflation. The real interest rate, which essentially remains constant over time (between 1 and 3%), is then applied to reduce the damages award into present value.

8.13 Some courts have taken a "real interest rate" approach which has been adopted in Australia.⁴ They have endorsed the economic theory suggesting that market interest rates include two components - an estimate of anticipated inflation, and a desired "real" rate of return on investment - and that the latter component is essentially constant over time. They have concluded that the inflationary increase in the estimated lost stream of future earnings will therefore be perfectly "offset" by all but the "real" component of the market interest rate.

8.14 Still other courts have preferred to continue relying on market interest rates. To avoid undercompensation, they have shown at least tentative willingness to permit evidence of predicted future price inflation in estimating the lost stream of future income.

8.15 In the leading case of *Jones & Laughlin Steel Corporation v Pfeiffer*⁵ the US Supreme Court noted three different methods that various courts have used to adjust damages to take account of wage and price inflation:

- (i) In the "case-by-case" method, the fact-finder first predicts all of the wage increases a plaintiff would have received during each future year of work lost by the injury. These wage increases include expected adjustments for future inflation. These predictions allow calculation of the future income stream the plaintiff has lost. The fact-finder then discounts that income stream to present value using the market interest rate, which reflects future predicted price inflation. The resulting figure is the plaintiff's damages for lost wages.

4 The Australian authorities are referred to in the case of *Jones & Laughlin Steel Corporation v. Pfeiffer* (1983) 462 US 523.

5 (1983) 462 US 523, 103 SC 541, 78 L Ed 2d 768.

- (ii) Another approach is the "real interest rate" method, also called the below-market-discount method. The fact-finder predicts wage increases attributed to merit or industry productivity, but does not attempt to predict the wage increases that might result from inflationary pressures on wages. Then the resulting income stream is discounted by a below-market discount rate between 1% and 3%. The "real interest rate" subtracts the amount attributable to future price inflation. This is the method used in *Pfeiffer*.
- (iii) Another method is based on the "total-offset" theory. In this approach future wage increases, including the effects of future inflation, are presumed to offset exactly the interest a plaintiff would earn by investing the lump-sum damage award. A court thus awards a plaintiff the amount of estimated lost wages. The fact-finder neither discounts the award nor adjusts it for inflation.

8.16 The difficulties in this area were clearly outlined by Justice Stevens in the US Supreme Court in *Pfeiffer*. Stevens stated:

"Unfortunately for triers of fact, ours is not an inflation-free economy. Inflation has been a permanent fixture in our economy for many decades, and there can be no doubt that it ideally should affect both stages of the calculation described in the previous section.

The first stage of the calculation required an estimate of the shape of the lost stream of future income. For many workers, including respondent, a contractual "cost-of-living adjustment" automatically increases wages each year by the percentage change during the previous year in the consumer price index calculated by the Bureau of Labor Statistics. Such a contract provides a basis for taking into account an additional societal factor - price inflation - in estimating the worker's lost future earnings.

The second stage of the calculation requires the selection of an appropriate discount rate. Price inflation - or more precisely, anticipated price inflation - certainly affects market rates of return. If a lender knows that his loan is to be repaid a year later with dollars that are less valuable than those he has advanced, he will charge an interest rate that is high enough both to compensate him for the temporary use of the loan proceeds and also to make up for their shrinkage in value.

In this country, some courts have ... endorsed the economic theory suggesting that market rates include two components - an estimate of anticipated inflation, and a desired "real" rate of return on investment - and that the latter component is essentially constant over time. They

have concluded that the inflationary increase in the estimated lost stream of future earnings will therefore be perfectly "offset" by all but the "real" component of the market interest rate.

Still other courts have preferred to continue relying on market interest rates. To avoid undercompensation, they have shown at least tentative willingness to permit evidence of what future price inflation will be in estimating the lost stream of future income.

Within the past year, two Federal Courts of Appeals have decided to allow litigants a choice of methods. Sitting en banc, the Court of Appeals for the Fifth Circuit has ... held it is acceptable either to exclude evidence of future price inflation and discount by a "real" interest rate, or to attempt to predict the effects of future price inflation on future wages and then discount by the market interest rate. A panel of the Court of Appeals for the Seventh Circuit has taken a substantially similar position.

Finally, some courts have applied a number of techniques that have loosely been termed "total offset" methods. What these methods have in common is that they presume that the ideal discount rate - the after-tax market interest rate on a safe investment - is (to a legally tolerable degree of precision) completely offset by certain elements in the ideal computation of the estimated lost stream of future income. They all assume that the effects of future price inflation on wages are part of what offsets the market interest rate. The methods differ, however, in their assumptions regarding which if any other elements in the first stage of the damages calculation contribute to the offset.

The Pennsylvania Supreme Court [taking a third approach concluded] that the plaintiff could introduce all manner of evidence bearing on likely sources - both individual and societal - of future wage growth, except for predictions of price inflation. However, it rejected those courts' conclusion that the resulting estimated lost stream of future income should be discounted by a "real interest rate". Rather, it deemed the market interest rate to be offset by future price inflation."

8.17 The Supreme Court concluded that it should not establish one method as the exclusive federal rule for use in federal causes of action in federal courts. The Court observed that there are two stages in calculating damages (estimation of the lost stream of income and selection of an appropriate discount rate), and found that inflation should be included in both stages.

8.18 It noted that, in the early 1980s, two Federal Courts of Appeals decided to allow litigants a choice of methods. The Court of Appeals for the Fifth

Circuit in *Culver v Slater Boat Co*⁶ overruled its prior decision in *Johnson v Penrod Drilling Co*,⁷ and held it acceptable either to exclude evidence of future price inflation and discount by a "real" interest rate, or to attempt to predict the effects of future price inflation on future wages and then discount by the market interest rate. A panel of the Court of Appeals for the Seventh Circuit took a substantially similar position in *O'Shea v Riverway Towing Co*.⁸

8.19 These decisions were noted by the court in *Pfeiffer*, but it declined to establish any one method as the federal rule, although it did note the attractiveness of the total offset method.

8.20 Finally, some courts have applied a number of techniques that have loosely been termed "total offset" methods. What these methods have in common is that they presume that the ideal discount rate - the after-tax market interest rate on a safe investment - is, to a legally tolerable degree of precision, completely offset by certain elements in the ideal computation of the estimated lost stream of future income. They all assume that the effects of future price inflation on wages are part of what offsets the market interest rate.

Taxation⁹

8.21 With respect to tax rates, the United States Supreme Court held in *Norfolk & Western R Co v Liepelt*¹⁰, decided prior to *Pfeiffer*, that the lost stream of income in a *Federal Employers' Liability Act* (FELA) case should be estimated in after-tax dollars and that the discount rate should also represent the after-tax rate of return to the injured worker.

8.22 The position as regards federal income tax is that the plaintiff's award for personal injuries is not subject to the federal income tax. Under §104(a)(2) of the Internal Revenue Code of 1986, a tort victim can exclude from gross income the amount of compensatory or punitive damages he or she received on account of personal injuries. Punitive damages in libel and slander suits, however, are considered income. In most states, the rule regarding compensatory and punitive damages is usually the same. It seems clear that the single fact that

6 (1982) 688 F.2d 280, at pp308-310.

7 (1975) 510 F.2d 234.

8 (1982) 677 F.2d 1194, at p1200.

9 See generally Yorio, *The Taxation of Damages: Tax and Non-Tax Policy Considerations*, (1977) 62 *Cornell L Rev* 701; (1982) 16 *ALR* 4th 589 and supplements; Annot, (1980) 47 *ALR Fed* 735; *Lost Wages Portion of Injury Settlement Is Not Taxable* (1985) 63 *J Tax'n* 341; Richmond, *Taxation of Personal Injury Awards: An Update* (1984) 3 *Trial Advocate Q* 148; Dolin and Slessnick, *Taxes and Their Effect on Compensatory Awards* (1983) 33 *Fed Ins Couns Q* 397; Franz, *Should Income Taxes Be Excluded When Calculating Lost Earnings?* (1982) 18 *Trial* [No 10] 53.

10 (1980) 444 US 490, 100 SC 755, 62 L Ed 2d 689.

a tort award is or is not subject to income tax should not in itself be sufficient to affect the amount of the award. A problem arises when the award, or a part of it, is to compensate for the loss of benefits that would have been subject to the tax if they had been received. The primary instance is compensation for lost wages. If no reduction is made in the award, the injured plaintiff receives more for wages than if he or she had not been injured. For this reason, some courts have held that the absence of income taxes must be taken into account in setting the amount of the award.¹¹

8.23 Most courts have been concerned about the speculative character of the amount of a potential deduction, at least insofar as it applies to future earnings. There is no way of telling what the tax rates will be in the future, nor what exemptions, deductions and other income the plaintiff would have, so as to determine what tax bracket he or she would have been in; and the whole matter is affected by possible future inflation. For these reasons, the federal courts and most state courts have been inclined toward the position that, in the case of the average taxpayer, no deduction should be made, but that the other imponderables in the calculation would take care of the problem.

8.24 A separate problem is that of what should be said to the jury. Trial courts often find the whole matter frustrating and say nothing about it; and appellate courts usually find this within the discretion of the trial court. Other courts say that the jury should be told only that the award is not subject to income tax. The Supreme Court in *Norfolk & Western Ry Co v Liepelt*¹² ruled that, in cases brought under the *Federal Employers' Liability Act*, evidence may be offered to show the effect of income taxes on the deceased's estimated future earnings, and the court may instruct juries that awards are tax-exempt and jurors should not consider such taxes in fixing the amount of the award. The Court found reasonable cause for concern that tax-conscious juries would not be aware of the special statutory exception for personal injury awards contained in the Internal Revenue Code.¹³

11 *Floyd v Fruit Indus* (1957) 144 Conn. 659, 136 A.2d 918; *Maus v New York C & St LR Co* 165 Ohio 281, 135 N.E.2d 253 (1956), "to deduct the anticipated tax saving from the recovery would nullify the tax benefit conferred by Congress": *Dixie Feed & Seed Co v Byrd* (1964) 52 Tenn. App. 619, 376 S.W.2d 745; Note (1956) 69 *Harv L Rev* 1495.

12 (1980) 444 US 490.

13 See also *Blanchfield v Dennis* (1982) 292 Md. 319, 438 A.2d 1330. The Seventh Circuit, however, found the *Norfolk & Western* holding to be "procedural," and proceeded to apply state law to arrive at a somewhat different conclusion. In the case of *In re Air Crash Disaster Near Chicago* (1983) 701 F.2d 1190 (7th Cir), *cert. denied*, (1983) 464 US 866, the court held that although an Illinois court would admit tax evidence to arrive at a measure of damages, under current Illinois practice, it was proper to refuse to instruct the jury that the damage award would not be subject to income taxes.

Miscellaneous Other Factors

8.25 Three other factors are commonly acknowledged in the United States as being relevant to the adjustment of damages for future losses. They are:

- (i) *Merit Increases in Wages:* An individual worker may receive "real" wage increases, beyond inflationary adjustments. Such increases are usually reflected in "seniority" or "experience" raises, "merit" raises, or promotions. It is difficult to prove whether a particular injured worker might have received such increases, or when they might have occurred. Some types of employment lend themselves to such proof more easily than others. There has been little dispute that such adjustments should be included in the stream if they can be established with reasonable certainty.¹⁴
- (ii) *Societal Factors:* A plaintiff's wages may change for societal reasons unrelated to price inflation or the individual worker's advancement on merit. The wages of workers in the plaintiff's class may increase or decrease over time. Changes in society bring about such adjustments. New technology, growth in industrial productivity, and successful collective bargaining are all factors that can contribute to changes in wages. Some cases have allowed evidence of the probable effect of such societal factors.¹⁵
- (iii) *Future Price Inflation:* Persistently high inflation rates during a period of recent history convinced many courts that plaintiffs were being seriously undercompensated. Judicial refusal to acknowledge price inflation left many personal injury victims and wrongful death dependents with reduced purchasing power. The problem was that courts refused to allow evidence of future inflation to compute lost future income, yet allowed discounting with current interest rates that reflected anticipated future price inflation.

8.26 Judge Posner explained this problem in *O'Shea v Riverway Towing Co:*

"[I]f there is inflation it will affect wages as well as prices. Therefore to give Mrs O'Shea \$2318 today because that is the present value of \$7200 10 years hence, computed at a discount rate -12 per cent - that consists mainly of an allowance for anticipated inflation, is in fact to give her less than she would have been earning if she was earning \$7200 on the date

14
15

See *State v Gulnn*, (1976) 555 P.2d 530.
See *Kaczowski v Bolubasz*, (1980) 491 Pa. 561, 421 A.2d 1027.

of the accident, even if the only wage increases she would have received would have been those necessary to keep pace with inflation."¹⁶

Conclusion

8.27 The uncertainties surrounding this area have led to some suggestions that these damage adjustment issues would be better resolved by the legislature rather than the courts or, alternatively, that this element of the damages award would be better paid by means of periodic payments.¹⁷

8.28 In the final analysis, predicting future inflationary trends, future market interest rates, and future industrial trends is an inexact science. The final lump sum damages award almost certainly will, in hindsight, turn out to be either overcompensation or undercompensation. Consequently, there is a growing interest in periodic payment of damages in a series of instalments rather than in a lump sum. The various reforms that have been introduced in some states of the United States are discussed in Chapter 10.

¹⁶ (1982) 677 F.2d 1194, at 1199 (7th Cir).

¹⁷ For additional information concerning the roles of inflation and discount rate as adjustments to damages see the following commentary: Mutatis & Widious, *Toward Just Compensation: A Statistical Comparison of the Total Offset Method of Valuing Lost Future Earnings* (1986); Landsea & Roberts, *Inflation and the Present Value of Future Economic Damages* (1982) 37 *U Miami L Rev* 93; Note, *Inflation, Productivity, and the Total Offset Method of Calculating Damages for Lost Future Earnings* (1982) 49 *U Chi L Rev* 1003; Sherman, *Projection of Economic Loss: Inflation v Present Value* (1981) 14 *Creighton L Rev* 723; Kolbach, *Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards* (1978) 64 *Iowa LJ* 138; Formuzis & O'Donnell, *Inflation and the Valuation of Future Economic Losses* (1977) 38 *Mont L Rev* 297; Note, *Future Inflation, Prospective Damages, and the Circuit Courts* (1977) 63 *Va L Rev* 105; Henderson, *The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value* (1975) 20 *SDL Rev* 307; Lawless, *Computation of Future Damages: A View of the Bench* (1968) 54 *Geo L J* 1131; Leasure, *How to Prove Reduction to Present Worth* (1960) 21 *Ohio St LJ* 204; Immel, *Actuarial Tables and Damage Awards* (1958) 19 *Ohio St LJ* 240.

CHAPTER 9: FATAL ACCIDENT ACTIONS

9.1 Wrongful death and survival actions are almost exclusively statutory actions with limited damages. There is little agreement among jurisdictions on appropriate damages when a tortfeasor's conduct results in death rather than personal injury short of death.

9.2 The same common law rules that led to the legislation in Ireland and the United Kingdom also explain the present state of the law in the United States.¹ First, the death of a person was not considered an actionable injury. Second, personal tort actions died with the plaintiff. The result of these rules was harsh for dependants who consequently had no claim for the tortious death of a family member. In the United States these rules have been changed, usually by statute. The odd patchwork of the current law is attributable to this history.

9.3 Most state legislatures now have provided *Survival Acts* that allow the deceased's estate to bring at least some tort actions. Many jurisdictions allow the victim's personal injury claims to survive under these Acts. The orientation of these actions is upon the deceased's losses rather than upon the family's losses. The estate recovers the damages and distribution is by will or intestacy.

9.4 Many state and federal statutes provide for wrongful death actions in addition to, or as an alternative to, the survival of personal injury claims. A typical wrongful death statute names specific beneficiaries with some relationship to the deceased who may sue and limits the types of recoverable damages, such as to "pecuniary" losses sustained by the statutory beneficiaries. Jurisdictions with both a *Survival Act* and a *Wrongful Death Act* allow both actions and use rules such as collateral estoppel to avoid double recovery by family members.

9.5 Damages in the survival or wrongful death actions vary by jurisdiction. Some or all of the following elements may be permitted: loss of future income, loss of child's services in minority and support of parents in their elderly years, the child's pain and suffering before death, medical expenses, funeral expenses, loss of society with the child, and parents' grief.

¹ See Chapters 3 and 6 respectively.

The Wrongful Death Action

9.6 The damages provisions in *Wrongful Death Acts* are generally one of three types: (1) the all-inclusive type lists particular elements of damages; (2) the pecuniary loss type restricts recoveries to economic losses; and (3) the general loss type provides for damages in a vague way, e.g. such "damages as are just".

9.7 Commentators have harshly criticised the jurisdictions that limit recoveries to pecuniary loss.²

9.8 In wrongful death actions, the beneficiaries can recover the value of the deceased's support and services in the home. Evidence of the deceased's work history, if any, and contribution to the household is relevant. Such contributions can include wages from work outside the home, performance of routine household tasks, and advice, counsel, or guidance for other family members, especially children. The amount that would have been spent from earnings toward the personal support of the deceased is deducted.³

9.9 The "pecuniary loss" or "actual loss" limitation in many *Wrongful Death Acts* has posed a problem in claims of mental anguish and grief by surviving family members. Such limitations create particular problems with the death of a child, because the value of a child's services and support to family is usually low. Although solace damages, often called solatium, are allowed in many civil law countries, the influence of *Lord Campbell's Act* made such recovery rare in common law jurisdictions. The modern trend has been to reconsider this exclusion, as the principal case reflects.

9.10 Mental suffering is distinguished from loss of society in many jurisdictions following the modern trend. Reform by statute or judicial interpretation has liberalized recovery for intangible losses, but mental anguish and grief is often excluded as an element of damages. Some jurisdictions that allow recovery for loss of society, comfort and affection nonetheless prohibit grief damages as likely to produce unjustifiably high awards. Other jurisdictions allow the mental element because it is no less intangible than other non-economic

2 See for example Strong & Jacobson, *Such Damages as are Just: A Proposal for More Realistic Compensation in Wrongful Death Cases* (1982) 43 *Mont L Rev* 55; Belfance, *The Inadequacy of Pecuniary Loss as a Measure of Damages in Actions for the Wrongful Death of Children* (1979) 8 *Ohio Northern UL Rev* 543; Speiser & Malawer, *An American Tragedy: Damages for Mental Anguish of Bereaved Relatives in Wrongful Death Actions* 51 *Tulane L Rev* 1; *Death of Children: A Nonparametric Statistical Analysis of Compensation for Anguish* (1974) 74 *Colum L Rev* 884.

3 See for example *Wentling v Medical Anaesthesia Services, PA* (1985) 237 Kan. 503, 701 P.2d 839 (assistance in spouse's work and care of handicapped child); and (1967) *Henneman v McCalla* 260 Iowa 60, 148 N.W.2d 447 (housework, care of minor child, assistance to husband in farm work, income outside home as nurse's aide).

losses.⁴

9.11 The orientation of the death statute toward the survivors or the deceased also affects intangible losses. For example, New Hampshire refused to allow parents to recover for loss of society with an injured or deceased child. The court in *Sicilano v Capital City Shows, Inc*⁵ reasoned that the state's wrongful death statute is not based on loss to survivors but focuses on losses suffered by the deceased. The court further invoked public policy reasons: (1) the emotional nature of intangible, nonpecuniary losses could lead to disproportionate awards; (2) multiple claims hinder settlements; and (3) consortium claims increase expenses ultimately to be borne by the public through increased insurance premiums.

Survival Actions

9.12 Some jurisdictions allow damages for the deceased's pain and suffering in survival actions. The usual requirement is that the victim be conscious and in pain before death.⁶

9.13 One noteworthy case involving pre-death mental and physical suffering is *Delong v Erie County*.⁷ A woman who heard a prowler outside called the police 911 emergency number, but the operator negligently dispatched the nearby patrol car to the wrong address. She died of multiple knife wounds in a savage attack. The court upheld a \$200,000 pain and suffering award.

9.14 In terms of the deceased's loss of the pleasure of life as an element in survival actions equivalent to such elements in personal injury actions, a few jurisdictions have recognized these damages which are sometimes called *hedonic damages*. For example in *Sherrod v Berry*⁸ the court awarded \$850,000 for the loss of the pleasure of life supported by an expert witness who testified on the measurable value of life apart from the \$300,000 in lost earnings. In *Katsetos v Nolan*⁹ the court awarded \$400,000 for loss of ability to enjoy life's activities, pain and suffering, and lost future earnings.

4 See for example *Wilson v Lund* (1971) 80 Wash.2d 91, 491 P.2d 1287 (statute permits recovery for loss of love; mental anguish damages allowed if established by expert testimony); *Dawson v Hill & Hill Truck Lines* (1983) 208 Mont. 325, 671 P.2d (grief damages allowed under statute providing for "just" damages); *Smith v Hub Manufacturing, Inc* (1981) 634 F.Supp 1505 (NDNY) (no grief damages under New York pecuniary loss statute); and *Pagitt v Keokuk* (1973) 208 N.W.2d 700 (Iowa) (allowing mental suffering under pecuniary loss statute).
5 (1984) 124 NH 719, 475 A.2d.
6 See for example *Murphy v Martin Oil Co* (1974) 58 Ill.2d 423, 308 N.E.2d 583; and *Schlichte v Franklin Troy Trucks* (1978) 285 N.W.2d 725 (Iowa).
7 (1982) 89 A.D.2d 376, 455 N.Y.S.2d 887.
8 (1987) 827 F.2d 195 (7th Cir.).
9 (1976) 170 Conn. 637, 388 A.2d 172.

CHAPTER 10: **STRUCTURED SETTLEMENTS AND OTHER REFORMS**

10.1 Structured settlements akin to those used in the United Kingdom began to be used in the United States in the early 1970s. Various states have introduced legislation giving various powers to the courts to order periodic payments of awards in certain circumstances.

*Structured Settlements*¹

10.2 Structured settlements were first utilised in the United States about twenty five years ago. Initially only very substantial claims were structured. Today virtually any claim can be structured depending on the needs of the parties.

10.3 Structured settlements are legal in all states and under federal law. Juries, however, are not empowered to structure their awards. They have been utilised for many types of damages awards, including cases of personal injury, property damage, workers' compensation, toxic waste clean-up and first party property claims.

10.4 They are tailored to meet the specific needs of the claimant and take the form of a financial package providing the claimant with periodic payments, either for a fixed term of years or, more usually, for the life of the claimant. In most cases the claimant will also receive a capital sum in respect of special damages.

10.5 US income tax legislation generally exempts the proceeds of structured settlements from tax liability as long as the beneficiary is not the owner of the annuity. In other words, payments from most settlements are tax free provided the carrier (i.e. the defendant's insurance company) retains ownership of the policy.

10.6 As with structured settlements in the United Kingdom, there are several

¹ See Hindert, *Periodic Payment of Personal Injury Damages* (1980) 31 *Fed Ins Couns Q* 3; Krause, *Structured Settlements for Tort Victims* (1980) 88 *ABAJ* 1527; Stone, *Explaining Structured Settlements* (1985) 21 *Trial* 96; Winslow, *Tax and Economic Considerations in Structured Settlements* (1984) 35 *Fed Ins Counsel Q* 56; Vaughan, *Tax Issues of Personal Injury and Wrongful Death Awards* (1984) 19 *Tulsa LJ* 702; Staller, *The Periodic Payment Settlement Act of 1982* (1983) 29 *Prac Law* [No 3] 25; Wells, *Tax Consequences of Damages* (1983) 12 *Colo Law* 53; Leland, *Periodic Payments* (1983) 3 *Cal Law* 32; Harrison, *The Ethics of Structuring Settlements* (1985) 34 *Drake L Rev* 1045; Sweeney, *Structured Settlements: Plaintiffs' Attorneys' Fees* (1982) *Tr Law Guide* 335.

practical advantages to the plaintiff. First, the plaintiff does not have the responsibility of arranging investment to insure that the income will last for the required time. Secondly, there is a tax advantage to the plaintiff because under a conventional award, although he or she would not have to pay income tax on the lump-sum amount, he or she would have to pay the tax on income from the investment of that lump sum. This contrasts with periodic payments under a structured settlement which are not taxed on receipt by the plaintiff. In *Processes of Dispute Resolution*,² the authors comment:

"[C]ertain tax and financial advantages may increase the expected value of the structured settlement considerably above present value. Each year's payment is fully non-taxable to the recipient, thus providing tax shelter benefits for the period of the annuity. If the plaintiff received the present value in a lump sum payment and invested it, the income would, of course, be taxable. See Winslow, *The Seven Most Common Questions About Structured Settlements*, 1986 Trial Lawyer's Guide 14; Rev Rule 79-220, 1979 - 2, CB 74. Moreover, the structured settlement assures the party of the agreed-upon amount each year, regardless of fluctuations in market interest rates or the stock market. This financial stability may be especially desirable when investment returns are fluctuating widely. Finally, depending on individual circumstances, *not* receiving a large lump sum payment can be personally advantageous - the recipient avoids both the risk of receiving bad financial advice from well-intentioned family members or friends, and the risk of giving in to the temptation to purchase unnecessary luxuries because the amount received *seems* so inexhaustible."³

10.7 These savings to the plaintiff can lead to a settlement which is also attractive to the defendant, and sometimes also to the plaintiff's lawyer, because of the way lawyers are paid in personal injury actions (i.e. generally receiving between 25-35% of the damages award). The lawyer negotiating the structured settlement may be able to structure his or her fee over some or all of the payment period, thereby avoiding the tax consequences of a large increase in income in any one year.⁴

10.8 Several commentators in the United States have noted how the growing use of structured settlements has increased the opportunity for parties to reach settlements in circumstances where negotiations over a conventional lump sum have failed to produce an agreement.⁵

2 Murray, Rau and Sherman, *Processes of Dispute Resolution - The Role of Lawyers*, (New York, 1988).

3 *Ibid.*, at pp149-150.

4 A lawyer trying to postpone income in this way, however, must be careful to avoid 'constructive receipt' treatment.

5 See Danninger, Johnson & Lestl, *Negotiating a Structured Settlement* (1984) 70 ABAJ 67.

10.9 An excellent example of the way structured settlements operate in practice and of how their mutual advantages can lead to a settlement of a cause of action is described as follows:⁶

"For example, assume facts similar to *Sorenson Chevrolet*, with the plaintiff requesting over \$360,000 and the defendant wanting to pay less than \$280,000. If the \$360,000 were structured, with \$60,000 paid immediately and the remainder in ten annual instalments of \$30,000, the present value of the settlement, assuming an 8% discount rate compounded annually, would be roughly \$261,300.

The advantages of a structured settlement can be significant. In the example, the plaintiff receives over time what he sees as the value of his claim, and the defendant insurance company has to pay less than it sees as its liability. And a settlement, which otherwise would be outside of reach, looks doable. The defendant resolves an outstanding liability at a substantially lower cost - the company would probably pay present value for an annuity, which is almost \$100,000 (28%) below the agreed value because of possible waiver of commissions in the purchase of the annuity, cost savings in intercompany transfers, and other variables available to an insurance company."⁷

10.10 However, once a structure is "bought", it cannot be varied, and unless it has a built-in contingency fund,⁸ a structured settlement may not be appropriate for an injured plaintiff whose health is unpredictable or whose needs are highly variable. The advantages and disadvantages of structured settlements are discussed further in chapter 16.

*Periodic Payments*⁹

10.11 As structured settlements became more popular and widely used, many states began to enact legislation to permit, or in some instances require, periodic payment of damages.¹⁰ The Uniform Laws Commissioners in the United States prepared a model *Periodic Payment of Judgments Act* in 1981.¹¹ This provided a model for many states introducing their own periodic payments laws.

6 Murray, Rau and Sherman, *Processes of Dispute Resolution - The Role of Lawyers*, (New York, 1988).

7 *Ibid*, at pp149-150.

8 One of the requirements laid down in *Kelly v Dawes*, in England. See Chapter 7.

9 For further discussion, see Corboy, *Structured Injustice: Compulsory Periodic Payment of Judgments* (1980) 66 ABAJ 1524; Henderson, *Restoring the Tort Victim to Pre-Injury Position: A Goal on Which All Can Agree* (1980) 67 ABAJ 301; Elligett, *The Periodic Payment of Judgments* (1979) 46 *Ins Cours J* 130; Grossman & Roman, *The Model Periodic Payment of Judgments Act: An Economic Analysis* (1982) 18 *Trial [No 5]* 62. See generally Hindert, Dehner & Hindert, *Structured Settlements and Periodic Payment Judgments* (1986).

10 See e.g., Florida, Ch 86-160 of 1986; Michigan, Public Act of 178 of 1986; New York, Ch 682 of Acts of 1986.

11 14 Uniform Laws Ann 2 (West Supp 1981). The Act is discussed by the Reporter of the Act in Henderson, *Periodic Payments of Bodily Injury Awards* (1980) 66 ABAJ 734.

10.12 The following US states have legislation which permits court-awarded periodic payment of damages awards in the context of medical malpractice: Alabama, Alaska, California¹², Delaware, Florida,¹³ Illinois, Kansas, Louisiana, Maryland, New Mexico, New York,¹⁴ Oregon, South Dakota, Utah, Washington and Wisconsin. South Dakota and Washington make periodic payment of damages available in all actions for personal injury and totally disabling personal injury, respectively.¹⁵

10.13 In 1986, the State of New York introduced legislation to allow for periodic payments to be ordered by the courts in cases of medical malpractice. Explaining the reasoning behind the legislation, the legislature stated:

"The legislature hereby finds and declares that a comprehensive reform of the medical and dental malpractice adjudication system is necessary in order to ensure the continued availability and affordability of quality health services in New York State. Escalating malpractice insurance premiums discourage physicians and dentists from initiating or continuing their practice in New York and contribute to the rising cost of health care as premium costs are passed along to the health care consumer. The legislature finds, therefore, that steps must be taken to reduce the cost of malpractice insurance and to restrain associated health care costs, while assuring the availability of compensation for persons injured as a result of malpractice. By expediting case resolution, discouraging frivolous claims and defenses, moderating attorney contingency fees, limiting the opportunity for double recoveries, and requiring the periodic payment of large future awards, the legislature intends to reduce the escalating cost of malpractice insurance and to improve the adjudication of malpractice claims. The legislature further finds that hospitals must enhance their efforts to reduce medical and dental malpractice through the establishment of medical and dental malpractice prevention programs and through greater scrutiny of physicians and dentists prior to granting hospital privileges and that increased resources should be devoted to the investigation and prosecution of professional misconduct. The legislature finds that the public interest further requires that premium levels for physicians and dentists must be restrained to the extent feasible in order to maintain high quality medical services for New York and to explore alternative

12 Relevant provisions from the *California Civil Code* appear in Appendix 6.

13 Relevant provisions from the *Florida Statutes* appear in Appendix 4.

14 Relevant provisions from the *New York CLS* appear in Appendix 5.

15 See Ala. Code 6-5-486 (1975); Alaska Stat 09.55.548 (1983); Cal Civ Proc Code 667.7 (West 1980); Del Code Ann 18, 6864 (supp 1984) Fla Stat Ann 768.51 (West 1986); Ill Ann Stat ch 110, paras 2-1701 to 2-1719 (Smith-Hurd Supp 1986); Kan Stat Ann 60-2809 (1983); La Rev Stat Ann 40:1299.39 and 40:1299.43 (West Supp 1986); Md Cts & Jud Proc Code Ann 3-2A08(b) (1974); NH Rev Stat Ann 507-C:7 (1983); NM Stat Ann 41-5-7 (1978); NY Civ Prac L & R 5031 to 5039 (McKinney Supp 1986) Or Rev Stat 752.070 (1985); S D Codified Laws Ann 31-3A-5 to 21-3A-13 (Supp 1986); Utah Code Ann 78-14-9.5 (Supp 1986); Wash Rev Code Ann 4 56 240 (Supp 1983); Wis Stat Ann 655 015 (West Supp 1985).

long-term approaches to the malpractice issue."¹⁶

Constitutionality Of Legislation Providing For Periodic Payments

10.14 The constitutionality of legislation providing for periodic payments has been tested in many state courts. For example, the California legislation providing for periodic payments in medical malpractice actions¹⁷ was challenged for breaching the *due process* and *equal protection* principles in the United States Constitution. The courts have consistently held its provisions to be constitutional.

10.15 During the 1970s, a number of states enacted statutes providing special procedures and rules for recovery in medical malpractice actions. One such special rule adopted in some jurisdictions provided for the periodic payment of future damages in such actions. In determining the constitutional validity of these provisions, the courts have dealt with issues of whether state or federal constitutional provisions for due process of law, equal protection of the laws, or the right to trial by jury were violated thereby. The leading case in this regard is *American Bank & Trust Co v Community Hospital*.¹⁸

10.16 In this case it was held that a state statute providing for periodic payment of future damages in medical malpractice actions was constitutionally valid in that it did not deny "due process of law", "equal protection of the law", or "trial by jury", as alleged by opponents of such statutes.

10.17 The Court rejected attacks on the constitutional validity, under both federal and state constitutions, of a statutory provision for the periodic payment of future damages in medical malpractice actions.¹⁹ Rejecting the claim that the statute violated due process by reducing the rights of a class - victims of medical malpractice - without a corresponding *quid pro quo*, the Court observed that a plaintiff has no vested property right in a particular measure of damages, and that the legislature has broad authority to modify the scope and nature of such damages.

10.18 As to the plaintiff's argument that the legislation was not "rationally related" to the ends sought - reducing "skyrocketing" medical malpractice premiums which increased health care costs, as well as assuring the availability of funds to the victim of malpractice when they were needed - the Court declared

¹⁶ Laws 1985, Ch 294, S 1 legislative findings and declaration.

¹⁷ See Appendix 6.

¹⁸ (1984) 36 Cal.3d 359, 683 P.2d 670, 204 Cal. Rptr 671.

¹⁹ Cal Code Civil Procedure, s887.7. Reproduced in Appendix 6.

that although reasonable persons might disagree as to the wisdom of the legislative approach to the problem, it was clearly not irrational.

10.19 The Court pointed out that the argument that the statute's failure to contain malpractice insurance costs was based on unsubstantiated doubts, and thus had never been given a fair trial in practice. In any event, the Court said, "rationality" is not determined by success. Responding to an argument that the statute violated equal protection of the laws, the Court declared that equal protection was not violated by the statute through the creation of a privileged class of tort defendants. The statute was a reform measure and the equal protection clause does not prohibit the legislature from implementing reform "one step at a time". The Court noted the existence of sentiment to the effect that all future tort damage should eventually become subject to the "periodic payments" formula.

10.20 Finding the statute ambiguous on the issue whether the amount of future damages so to be paid was a matter for judge or jury, the Court declared that, in any event, the provision for the Court to determine the actual amount of each periodic payment was not an unconstitutional interference with the right to jury trial, such right being protected so long as there is no impairment of the substantial features of a jury trial by improper interference with the jury's decision.

10.21 The Court concluded by finding the statute not to be vague, and therefore not unconstitutional, notwithstanding its leaving unsolved the problem of actual formulation of such periodic payments. Trial courts would deal with such issues as they had in time-honoured fashion, and appellate courts would remain available to aid in the familiar task of filling in statutory gaps.

10.22 A statutory provision in Wisconsin for payment into a "future medical expenses fund" of medical malpractice awards exceeding \$25,000, such amounts to be disbursed in periodic payments for such expenses until the amount was exhausted or the patient should die, was held by the Court in *State ex rel Strykowski v Wilkie*²⁰ to be a valid legislative enactment which could not be said to be unreasonable or to deny equal protection of the law. Refusing to apply a strict scrutiny to the statute, which in its view involved no suspect classifications and affected no "fundamental" rights, the Court declared that the procedure in question was obviously intended for the benefit of a claimant with substantial injuries requiring long-term treatment. The Court would not concern itself with the wisdom or correctness of the legislative determination, but only with whether there was a reasonable basis upon which the legislature might have acted.

20 (1978) 81 Wis.2d 491, 281 N.W.2d 434.

10.23 In North Dakota, the Court in *Ameson v Olson*²¹, although holding invalid as a whole a medical malpractice statute on the basis of state constitutional inadequacies (irrelevant to this particular issue), obliquely considered the issue of a provision for periodic payment of future damages, declaring that it found no constitutional objection to the last sentence of the section providing for such payments, whereby a judgment so entered might be subject to modification or termination on the basis of specified contingencies. The Court construed the modification provision as relating only to periodic rather than lump-sum payments, and the contingencies in question to be those stated in advance in the original judgment itself. By considering and declaring constitutional a particular aspect of the periodic payments provision, it might be argued, the Court may have indicated that it would give favourable consideration to the provision itself were it to come before the Court as part of a statute otherwise constitutional.

10.24 However, not all state legislation has succeeded in avoiding some element of unconstitutionality in its provisions. For example, the Court in *Carson v Maure*²² held that statutory provisions for periodic payment of future damages in medical malpractice actions were unconstitutional as violating "equal protection" provisions.

10.25 The Court held that the right to recover for medical malpractice fell within an "equal protection" evaluation category lying somewhere between those matters requiring fulfilment of a "compelling state interest" for validity and those requiring only a "rational basis". The Court held invalid under the test adopted - "a fair and substantial relation to the object of the legislation" - a statute providing, *inter alia*, for periodic payment of future damages exceeding \$50,000 in medical malpractice actions. The Court noted that the purpose of the provision relating to periodic payments in such instances was to reduce medical reparations system costs by eliminating a bonus element, consisting of the payment of portions of the award no longer required to compensate a malpractice victim who dies before the expiration of his or her actuarial life expectancy.

10.26 The Court declared that, regardless of whether the provision substantially furthered that purpose, it unreasonably discriminated in favour of health care defendants, while unduly burdening seriously injured malpractice plaintiffs. Noting further that this provision was apparently designed to insure that the claimant with substantial injuries requiring long-term treatment would have money available to pay for future medical care, the Court found this a questionable benefit, particularly the denial of a plaintiff's right to dispose of the property obtained in a judgment as and when he or she pleased. The Court

21 (1978) 270 N.W.2d 125.

22 (1980) 120 NH (New Hampshire State Supreme Court) 925, 424 A.2d 825, 12 ALR 4th i.

pointed out that, although the statute prevented the injured party's distributees from gaining a windfall through the victim's premature death, by the same token it created a windfall in such event for the tortfeasor's insurer. Finally, the Court said, a statute singling out seriously injured malpractice victims with over \$50,000 in future damages offended basic notions of fairness and justice by requiring one class to shoulder the burden inherent in a periodic payment scheme from which the general public benefited, so that the statute in question constituted an unreasonable exercise of the legislature's police power violating the state's equal protection guarantee.²³

²³ For further commentary on these Acts see Henderson: *Periodic Payments of Bodily Injury Awards*, (1980) 66 *American Bar Association Journal* 734; and Grossman and Roman, *The Model Periodic Payment of Judgments Act: An Economic Analysis* (1982) 18 *Trail Magazine* 62.

SECTION IV: CANADA

CHAPTER 11: THE PERSONAL INJURIES ACTION

11.1 As the Canadian legal system is a common law system, the civil action for damages for personal injury is based on similar principles of tort to those applied in Ireland and England. In examining the application of these principles in Canada, it must be remembered that all the provinces in Canada have enacted some form of statutory no-fault compensation schemes for work and road injuries.¹

11.2 As in Ireland and England, damages in a civil action can only be awarded in the form of a lump sum which must include a final estimate of losses incurred before the trial and future losses. The Canadian courts have no power to order periodic payments. This was the express finding of the Canadian Supreme Court in *Watkins v Olafson*² where it was held that, in the absence of legislation, the Court had no power to award the periodic payment of damages. McLachlin J explained the Court's reasoning:

"The change in the law which we are asked to endorse in this case would constitute a major revision of the long-standing principles governing the assessment of damages for personal injury - in particular, the principle that judgment is to be rendered once and for all at the conclusion of a trial, and the correlative entitlement of the plaintiff to immediate execution on the entire award. Permitting courts to award periodic damages for personal injuries does not involve the extension of an existing rule, but the adoption of a new principle. We are not concerned with the right of a court to award the periodic payment of a judgment which has been finally delivered. Rules governing execution in several provinces permit this to be done. We are concerned rather with the proposal that the plaintiff lose his or her right to a final, once-and-for-all award, to be replaced by a scheme under which the amount he or she receives may depend upon the ruling of the court on applications far in the future. The change is, moreover, fraught with complex ramifications extending beyond the rights and obligations of the parties at bar."³

11.3 As to the question whether to assess damages for personal injury in

1 See *Pearson*, Vol 3.
2 [1989] 2 SCR 750, 61 DLR (4th) 577.
3 61 DLR (4th) 577 at 584.

terms of a global sum or to allocate amounts to the separate heads of damages, the Canadian courts have only recently come down in favour of the latter approach.⁴

11.4 The significance of the courts' choice of approach is that if legislation introducing a power to award periodic payments is enacted but this power is restricted to certain "heads" of damages (e.g. only future losses, as in many US states), then the impact that the new legislation will have will be easier to assess, and the legislation will be less complex, if the courts are in the habit of assessing personal injuries damages awards under separate headings.

11.5 In the *Andrews*⁵ case Dickson J stated:

"The method of assessing general damages in separate amounts ... in my opinion, is a sound one. It is the only way in which any meaningful review of the award is possible on appeal and the only way of affording reasonable guidance in future cases. Equally important, it discloses to the litigants and their advisers the components of the overall award, assuring them thereby that each of the various heads of damage going to make up the claim has been given thoughtful consideration."

11.6 In *Arnold v Teno*,⁶ Spence J approved the following *dictum* of Zuber J in the court below:⁷

"While in the end result, a global figure must be arrived at and while this figure is not capable of precise or scientific ascertainment, it is nevertheless desirable in cases of large assessments that some basic calculations be done to more specifically explain the total and to act as a check or guide respecting the ultimate figure."

11.7 The fourfold classification of damages awards approved by the Supreme Court involves a division of the heads as follows:

- (i) Special Damages (pre-trial pecuniary loss);
- (ii) Prospective Loss of Earnings and Profits (pecuniary loss);
- (iii) Cost of Future Care and Other Expenses (pecuniary loss);

4 In the cases of *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452 and *Arnold v Teno* (1978) 83 DLR (3d) 609.
5 (1978) 83 DLR (3d) 452.
6 (1978) 83 DLR (3d) 609 at 627 (SCC).
7 (1976) 67 DLR (3d) 9, at 24 (Ontario CA).

(iv) Non-Pecuniary Loss.

11.8 So far as the three heads of pecuniary loss are concerned, the arithmetical approach to assessment will require further itemization, and may thus involve sub-categorisation within those heads. However, despite a well-recognised subdivision of the head of non-pecuniary loss,⁸ it was the view of the Supreme Court that damages under that head should be awarded globally, because of the clear overlap between its subdivisions. Dickson J in the *Andrews* case explained this view as follows:

"It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is a sound practice. Although these elements are analytically distinct, they overlap and merge at the edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the lost period, and to cause mental pain and suffering in the contemplation of this prospect. These problems, as well as the fact that these losses have the common trait of irreplaceability, favour a composite award for all non-pecuniary losses."⁹

11.9 As to whether or not these cases were intended to set down an approach to be adopted by courts in all personal injury actions, Cooper-Stephenson and Saunders¹⁰ comment that:

"It is possible to interpret the *dicta* from the Supreme Court in favour of subdivision into four primary categories as mere expressions of opinion as to what is desirable - leaving it up to lower courts to decide whether to award damages under separate headings or according to the global approach. However, flexibility was not the position taken by the Ontario Court of Appeal in *Reibl v Hughes*.¹¹ In that case, the trial judge had awarded a global sum encompassing all the heads of damage. Brooke JA, on appeal, stated that: "An assessment of damages by way of a global award in the circumstances is not in accord with the principles enunciated by the Supreme Court of Canada ...",¹² and a new trial on the issue of damages was ordered. It therefore seems likely, especially in cases where large sums are involved, that courts will be required to specify the amounts awarded under the separate heads."¹³

It is not clear, however, whether the new approach was intended to

8 *Phillips v South Western Railway* (1878) 4 QBD 406.
9 (1978) 83 DLR (3d) 452 at 478.

10 *Personal Injury Damages in Canada* (Toronto, 1981).
11 (1978) 89 DLR (3d) 112.

12 *Ibid.*, at 128.

13 Cooper-Stephenson and Saunders then note that "[t]his practice is now being followed in almost all personal injury cases".

encompass all awards, both small and large. It is suggested here that it should. Provided that care is taken to avoid overlap between the separate heads, no injustice can result from the greater accuracy achieved by specification. And the knowledge of litigants that their claim has been given detailed consideration is an important goal in all cases, even those involving relatively small amounts."¹⁴

11.10 In terms of the legislative reforms that have been introduced in Canada with respect to periodic payments, it is interesting to note the approach the Canadian courts have taken to the effect that (i) taxation and (ii) inflation and interest should have on the assessment of a damages award.

(i) Taxation

11.11 The position adopted by the Canadian courts in relation to what effect future income tax rates should have on the calculation of an award for loss of future earnings is different to that adopted in Ireland and the United Kingdom.

11.12 Dickson J, in the *Andrews*¹⁵ case, summarised the position as follows:

"In *The Queen v Jennings*, this Court held that an award for prospective income should be calculated with no deduction for tax which might have been attracted had it been earned over the working life of the plaintiff. This results from the fact that it is earning capacity and not lost earnings which is the subject of compensation. For the same reason, no consideration should be taken of the amount by which the income from the award will be reduced by payment of taxes on the interest, dividends, or capital gain. A capital sum is appropriate to replace the lost capital asset of earning capacity. Tax on income is irrelevant either to decrease the sum for taxes the victim would have paid on income from his job, or to increase it for taxes he will now have to pay on income from the award."¹⁶

11.13 This approach has been criticised as tending to over-compensate the accident victim.¹⁷ It also, interestingly, contrasts with the position in fatal accident cases.¹⁸ Explaining the reasoning behind this difference, Dickson J stated:

14 Cooper-Stephenson and Saunders, *supra* n. 10 at p49.
15 (1978) 83 DLR (3d) 452.
16 *Ibid.* at 474-75 (SCC).
17 See Cooper-Stephenson and Saunders, *supra* n. 10 at pp185-89.
18 This will be covered later on in this Chapter.

"In contrast with the situation in personal injury cases, awards under the Fatal Accident Act, RSA 1970 c138, should reflect tax considerations, since they are to compensate dependants for the loss of support payments made by the deceased. These support payments could only come out of take-home pay, and the payments from the awards will only be received net of taxes: see the contemporaneous decision of this court in *Keizer v Hanna*."

(ii) **Inflation and interest**

11.14 In this regard, the approach of the Canadian courts has more in common with the approach in Ireland than with that adopted in the United Kingdom. As has been seen,¹⁹ the English courts decided, effectively, to ignore both considerations of inflation and interest rates on the grounds that these factors generally tended to cancel each other out and were in any event too speculative. While fluctuating economic conditions tend to lend support to the latter argument, the Canadian courts have chosen to include the variables of inflation and interest rates when calculating the lump sum amount to a plaintiff for future losses.

11.15 Once again, the position was definitively stated in the *Andrews* case, where Dickson J stated:

"The approach at trial was to take as a rate of return the rental value of money which might exist during periods of economic stability, and consequently to ignore inflation. This approach is widely referred to as the Lord Diplock approach, as he lent it his support in *Mallet v McMonagle*, [1970] AC 166. Although this method of proceeding has found favour in several jurisdictions in this country and elsewhere, it has an air of unreality. Stable, non-inflationary economic conditions do not exist at present, nor did they exist in the recent past, nor are they to be expected in the foreseeable future. In my opinion it would be better to proceed from what known factors are available rather than to ignore economic reality. Analytically, the alternative approach to assuming a stable economy is to use existing interest rates and then make an allowance for the long-term expected rate of inflation

One thing is abundantly clear: present interest rates should not be used with no allowance for future inflation. To do so would be patently unfair to the plaintiff. It is not, however, the level of inflation in the short term for which allowance must be made, but that predicted over the long term. It is this expectation which is built into present interest

19 See Chapter 5.

rates for long-term investments. It is also this level of inflation which may at present be predicted to operate over the lifetime of the plaintiff to increase the cost of care for him at the level accepted by the Court, and to erode the value of the sum provided for lost earning capacity."²⁰

11.16 According to Cooper-Stephenson and Saunders "[t]here is little doubt that emphasis on the average expected differential between inflation and interest rates will do greater justice to personal injury victims".²¹ They then refer to research carried out by Gibson²² who looked at inflation and interest rate figures for Canada for the period 1965-77.

11.17 Gibson observed:

"This data seems to establish that until the abnormal period of the last few years the relationship between inflation and interest rates was a relatively stable one, upon which a court might well be justified in basing an assumption as to the long-term real earning power of investments. However, the difference between the two rates has been nowhere near the 7 per cent figure adopted by the Supreme Court for the future. The average real interest rate over the 13 year period surveyed was only 1.79 per cent. This figure is distorted, of course, by the extraordinary fact that inflation soared above investment income during two of the years surveyed. But even if we ignore recent abnormalities, and consider only the years 1965-1972, the average spread between interest and inflation was only 3.01 per cent. The highest differential in the entire 13 year period was only 4.22 per cent.

If the past has anything to tell the future in these matters, therefore, it would appear that even the assumption of the trial judge in the *Andrews* case that the damage award could be expected to run at 5 per cent annually in real terms was an over-estimate. The Supreme Court's conclusion that the plaintiffs could count on earning 7 per cent will leave those plaintiffs seriously undercompensated unless they encounter extraordinary good luck in their investment experiences."²³

11.18 Interestingly, Cooper-Stephenson and Saunders in their conclusions argue for an approach, and a discount rate, which would produce very similar results to those achieved in Ireland in the *Griffiths v Von Raaj* case (where the discount rate settled on was 2.5%).²⁴ They state:

20 (1978) 83 DLR (3d) 452 at 471-2.

21 *Supra* n.10 at p267.

22 D Gibson, *Repairing the Law of Damages* (1978) 8 *Man LJ* 637.

23 *Ibid.*, at pp851-2.

24 See Chapter 2.

"It is now established that the effect of anticipated inflation and of investment interest on the lump sum be considered together by determining an appropriate discount factor. The determination must take account of known factors, rather than ignore economic reality. Each case is to be decided on its own facts, and expert evidence may be used to assist determination. Though the Supreme Court of Canada in *Andrews v Grand & Toy Alberta Ltd* used current long-term investment interest rates in conjunction with evidence of long-term inflation, producing a 7% discount rate, it is strongly arguable that focus should be on the estimated average differential between the inflation and interest rates over the period of loss. Such a focus, which will likely indicate a differential of approximately 2%, should be considered together with other circumstances, which may indicate a "normal" discount rate of approximately 3%. If however the factor of productivity is built into the award, as it should be, then it may well be that evidence will reveal that there should be no discount of the damages for loss of earnings at all."²⁵

11.19 As to how the problems presented by these uncertainties could be resolved, they comment:

"though the assessment under this head of damage is extremely mathematical, it is also an exercise which involves prediction of uncertainties, and the evaluation of social and economic issues of great importance. It hardly needs saying that many of the difficulties arise because of the lump sum system of awards - a system very much under attack at the present day. However, it is not true to say that an alternative system of periodic payments would resolve all the problems, unless that system moved away from the theory of compensation, and instead awarded damages on some kind of fixed scale."²⁶

25 *ibid*, at p274.
26 *ibid*, at p151.

CHAPTER 12: FATAL ACCIDENT ACTIONS

12.1 As in Ireland there are two types of action possible in Canada where the victim in an accident dies. They are a survival action and a fatal accident claim.

The Survival Action

12.2 With one exception, actions for personal injury everywhere in Canada survive for the benefit of the injured party's estate, regardless of whether death was due to the conduct of the defendant or independently caused. The lone exception is Saskatchewan, where actions are preserved only in the case of injuries "not resulting in death". However, as a general proposition, the modern law does not create a new cause of action based on the death; it merely extends to the personal representative the existing rights of the injured party. As Furlong CJ stated in *Anthony v Fleming*.¹

"The *Survival of Actions Act* is quite different [from the *Fatal Accidents Act*] in that it creates no new cause of action but simply extends the rights of an injured person to his estate. It sweeps away the old maxim *actio personalis moritur cum persona*, and permits the survival of rights of action which had vested in the deceased in his lifetime."

12.3 It should be noted that survival actions are in addition to and not in derogation of any rights under the *Fatal Accidents Acts*, though damages received by way of a survival action may be taken into account in a fatal accident claim.²

12.4 In terms of the measure of damages recoverable in a survival action, the injured party's estate is restricted by the fact that only such rights as were vested in the deceased immediately before he or she died are preserved.

12.5 Consequently, the general rule is that an estate can recover in respect of all the losses for which the injured party would have been compensated had he or she survived to pursue the claim, subject only to the effect of the death on the substance of those losses. However, most jurisdictions have legislatively modified the rule, in one or both of two ways: (a) by excluding some damages normally allowed, e.g. damages for non-pecuniary loss, and (b) by allowing some damages normally excluded, e.g. funeral expenses. In the result, the measure of damages in a survival action is the above-stated general rule as amended, if at all,

¹ (1982) 37 DLR (2d) 93.
² *Ibid.*, at p94.

by the statute in question.

12.6 In terms of damages specifically for loss of future earnings, most Canadian provinces exclude any damages for future earnings or profit.³ Cooper-Stephenson and Saunders comment that:

"So far as is known, there is no reported case allowing prospective loss nor even a case where such a claim was made. In their report to the Conference of Commissioners on Uniformity of Legislation(1961), at p110, the Alberta Commissioners declared that statutory exclusion of prospective loss "is unnecessary because these items are not included in the first place". Nonetheless, the draft *Act* provided in s6(1): "No damages are recoverable for the benefit of an estate for ... (f) loss of expectancy of earnings subsequent to death".⁴

12.7 Most statutes expressly prohibit recovery under this head. Most explicit of all is the British Columbia legislation, which precludes "damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died". Less explicit, though equally effective it seems, are those Acts which limit compensation to "*actual* financial loss". As for the remaining legislation, however, the denial of prospective pecuniary loss is difficult to justify on the wording. This includes the Manitoba statute, even though it provides that "damages shall be calculated without reference to any loss or gain to the estate consequent on his death".

12.8 Derived from an English statute,⁵ this oddly-phrased provision⁶ was at first thought to bar recovery of future loss,⁷ but the predominant view now⁸ is that it excludes only those items which in the nature of things the deceased could never have gained or lost while alive.⁹ Insurance money due on death is an example of such a gain, while funeral expenses and annuities ceasing on death are examples of such a loss.¹⁰ So, in Manitoba, the Northwest Territories, Ontario and the Yukon, damages for future loss seem in practice to be refused when in law they are arguably recoverable, on the ground that they are not statutorily prohibited. At the same time, to deny lost earnings or profits may well achieve the preferable result, which, as one commentator has pointed out,¹¹

3 This was the position favoured by the English Law Commission in its *Report on Personal Injury Litigation - Assessment of Damages* (1973), at pp28-9.

4 *Ibid*, at p380.

5 *Law Reform (Miscellaneous Provisions) Act, 1834*, s1(2)(c).

6 H McGregor, *Damages* (1972), at p380.

7 *Slater v Spreag* [1936] 1 KB 83 at 87-88, *per* McKinnon J *obiter*. In Canada, the point was left open in *Stebbe v Laird* [1938] 1 DLR 240 at 245 (Man. KB).

8 First explained by Lord Wright in *Rose v Ford* [1937] AC 828 at 842.

9 H Street, *Principles of the Law of Damages* (1962), p146. See also H McGregor, *Damages* (1972), p380.

10 Examples given by Lord Wright in *Rose v Ford*. And see N Hutton, *Mechanics of Law Reform* (1961) 24 *MLR* 18, at p25; *Whitten v Poltronetti* (1974) 44 DLR (3d) 120 at 128 (Man. QB).

11 *J A Jolowicz*, [1980] *Camb LJ* 180, at p163.

would not be the first time that a mistaken view of the law has provided the correct solution.

The Fatal Accident Action

12.9 Every province in Canada has now enacted, in some form or other, legislation to allow family members and dependents to bring fatal accident claims.¹² Fatal accident claims are separate from survival actions, though damages received by way of a survival action may be taken into account in a fatal accident claim.

12.10 For the most part only relatives are protected. These typically include the wife, husband, parents, children, grandparents, grandchildren, step-parents and step-children. Brothers and sisters are sometimes included, while certain statutes also accord rights of suit as a result of so-called "illegitimate" and adoptive relationships, including *de facto* adoptive relationships. By far the longest list of beneficiaries can be found in the recent law of Prince Edward Island. There, protection is expressly furnished, to a child *en ventre sa mere*, "a spouse of a child, grandchild or parent of the deceased", and, in prescribed circumstances, a divorced spouse and the surviving partner of unmarried cohabitation, the latter having gained some standing also in Ontario. Prince Edward Island even affords rights to "any other person who for a period of at least three years immediately prior to the death of the deceased was dependent upon the deceased for maintenance and support".

12.11 The limitation period for a fatal accident suit is usually either one or two years, with time commencing to run from death. Only one action lies and, regardless of the nominal plaintiff, every action is deemed to be for the benefit of all dependants who have suffered actionable loss. The claim should be brought by the executor or administrator of the deceased's estate, not however as representative of the deceased but as fiduciary for the beneficiaries. Where there is no executor or administrator, or no action is brought by him or her within a designated time, any or all of the beneficiaries can commence proceedings themselves. And should it happen that the wrongdoer dies before

12 Current statutes, not including amendments, are: The Fatal Accidents Act, RSA 1970, c138; Family Compensation Act, RSBC 1979, c120; The Fatal Accidents Act, RSM 1970, cF50; Fatal Accidents Act, RSNB 1973, cF-7; The Fatal Accidents Act, RS Nfld 1970 c126; Fatal Accidents Ordinance, RONWT 1974, cF-3; Fatal Injuries Act, RSNS 1967, c100; Family Law Reform Act, 1978 (Ont), c2, ss60-64; Fatal Accidents Act, PEI 1978 c7; The Fatal Accidents Act, RSS 1978, cF-11; Fatal Accidents Ordinance, YT 1980, c9. And note the fatal accidents provisions in the Canada Shipping Act, RSC 1970, cS-9, ss718-726; *LeVae v SS Giovanni Amendola* [1959] Ex CR 24, affirmed as to damages [1960] Ex CR 492. Also the Carriage by Air Act, RSC 1970, cC-14; *Frederick v Ottawa Aero Services Ltd* (1964) 42 DLR (2d) 12, affirmed (1964) 48 DLR (2d) 702n (SCC). Further on the new Ontario legislation, which is very poorly drafted, see I Eilyn, *Damages for the Injured Plaintiff: Can the Value of Non-Contracted Services be Recovered under Ontario Law?* (1979-80) 2 *Advocates' Q* 47; M Smith, *Part V of the Family Law Reform Act, 1978* (1977-78) 1 *Advocates' Q* 367; T Sage, *The Family Law Reform Act, 1978: Changes in Procedure in Personal Injury Litigation* (1979-80) 2 *Advocates' Q* 478.

the victim, the latter's dependants can still sue.

12.12 The effect of taxation on the assessment of damages in fatal accident cases is different to that in personal injuries actions. The Supreme Court in *R v Jennings*¹³ had set out the position in relation to personal injuries actions, namely, that damages for loss of future earnings were to replace a "lost capital asset of earning capacity" and therefore were not to be reduced by taking future income tax on those earnings into account.

12.13 Initially, the courts were in doubt as to whether the decision in *Jennings* applied to fatal accident cases. For, traditionally, the value of lost dependency has been calculated on the basis of a proportion of the deceased's earnings after tax. The courts, in general, took the view that fatal accident cases were distinguishable on the theoretical basis that the value of a dependency necessarily required that the deceased's after-tax income be considered, and that lost dependency could not be constructed as the loss of a capital asset. However, in *Gehrmann v Lavoie*,¹⁴ the Supreme Court of Canada decided to bring fatal accident cases into line with cases for personal injuries, and applied the *Jennings* case to an action under the British Columbia Families' Compensation Act.¹⁵ Compensation for lost dependency was to be based on the deceased's gross earnings. Then, in 1978, the Supreme Court reversed itself in *Keizer v Hanna*,¹⁶ a decision of the full Court. The leading judgment of de Grandpre J made reference to the general attitude of the legal profession over the years¹⁷ to the number of fatal accident cases based on the deceased's net earnings,¹⁸ to the views of various writers¹⁹ and to the "fundamental" theoretical distinction between a claim for lost dependency and a claim for loss of earning capacity by a personal injury victim.²⁰

12.14 There was also initial uncertainty in Canada as regards the allowance to be made for interest rates and inflation. The position was clarified in the case of *Lavis v Todd*²¹ where Dickson J explained:

"In the case of a fatal accident the Court is endeavouring to compensate the dependents of the deceased for loss of a future stream of income which the dependents might have expected to receive but for the death of the deceased. As it is not open to a Court, in the absence of enabling

13 (1966) 57 DLR (2d) 644 (SCC).

14 (1978) 59 DLR (3d) 634 (SCC).

15 RSBC 1960, c138.

16 (1978) 82 DLR (3d) 449 (SCC).

17 *Ibid*, at p485.

18 *Ibid*, at pp485-7.

19 *Ibid*, at pp486-87; *McGregor on Damages*, 13th ed (1972), para 407; Stevenson and Orr, *The Tax Element in Damages* (1956) *British Tax Review* 8; H Street, the *Law of Torts* 6th ed (1978); JG Fleming, *The Law of Torts*, 4th ed (1971); *Income Tax and Damages in Delict* (1950) 67 *South African LJ* 296.

20 *Ibid*, at pp486-88.

21 (1980) 14 CCLT 284.

legislation, to order periodic payments adjusted to future needs, the dependents receive immediately a capital sum roughly approximating the present value of the income they would have received had the deceased survived. They are able to invest this capital sum and earn interest thereon. A proportion of the interest received may be offset by the effect of inflation. To the extent that the interest payments exceed the rate of inflation, there is conferred on the dependents, through payment today of a stream of future income, a benefit which can be expressed as the "real rate of return". There would clearly be enrichment of the plaintiff at the expense of the defendant if the court did not take this benefit into account in making an award. Accordingly, the court applies a so-called "discount factor", i.e., the real rate of return which the plaintiff can expect to receive on the damage award."²²

12.15 This is much the same approach as that adopted in personal injuries actions. Once again it draws some criticism from Cooper-Stephenson and Saunders, who argue:

"the proposal to compute the discount figure by reference to "present rates of return" is highly questionable. For as previously pointed out, this tends to ignore the fact that interest rates fluctuate with inflation rates. Our own suggestion here is the same as that put forward in the context of personal injury, and for the same reasons: the discount rate should be based on the estimated average long-term differential between inflation and investment rates over the relevant period of loss. Even if the courts were to continue to predict inflation and interest independently, the focus should still be on the expected average interest rate, rather than on the contemporary figure".²³

12.16 Once again the experience in Canada has been that the obligation to award plaintiffs their compensation for future losses in a lump sum value at present day values is a complicated and inexact science.

22 *Ibid*, at 309-310.

23 *Personal Injury Damages in Canada*, (Toronto, 1981) at 455-6.

CHAPTER 13: **STRUCTURED SETTLEMENTS AND OTHER REFORMS**

13.1 As in the United States, there was a growing dissatisfaction in Canada with the once-off, lump sum award. In the early 1980s, structured settlements began to be used to combat some of the uncertainties with the lump sum award. The tone was set in 1978 in the *Andrews v Grand & Toy Alberta Ltd*¹ case, where Dickson J commented:

"The subject of damages for personal injury is an area of law that cries out for legislative reform When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once and for all award.

The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation of investment, income from it is subject to tax ... yet our law of damages knows nothing of periodic payment."²

Structured Settlements

13.2 The structured settlement market has been in existence in Canada for over ten years and according to Frenkel:³

"The market for structures in Canada is estimated at about Canadian \$150 million per annum."⁴

13.3 Frenkel also comments that, unlike in the United States, "the structured settlement market ... is principally Plaintiff driven."⁵

13.4 In Canada, the advantages to the structured settlements are similar to those in the United Kingdom and the United States. First, periodic payments received pursuant to a structured settlement are generally totally tax-free in the hands of the plaintiff. To gain this benefit, however, the structured settlement must be properly arranged. The following are essential characteristics:

1 (1978) 2 SCR 229.

2 *Ibid*, at 236.

3 In his paper delivered at a Seminar in Sheffield, July 1991, and reproduced in *Structured Settlements - A practical guide to using structured settlements in personal injury cases*.

4 *Ibid*, at p3.

5 *Ibid*.

- (i) The settlement must be funded by an annuity (not a trust). The annuity will usually be purchased by the defendant's liability insurer (not the plaintiff) who must own the annuity.
- (ii) The annuity policy should not name the beneficiary of the plaintiff who is to receive benefits on his or her death.
- (iii) The annuity should provide that payments are neither assignable nor commutable. However, if the plaintiff wishes the policy to contain an irrevocable direction from the liability insurer to the life insurer to make annuity payments direct to the plaintiff, then he or she should obtain an advance ruling from Revenue Canada to ensure that the annuity is not treated as a trust.

13.5 The situation that gave rise to structured settlements being used in Canada was very similar to that in the United Kingdom. The Canadian revenue authority, Revenue Canada, conferred a tax advantage on structured settlements complying with these criteria by ruling that interest earned on the lump sum premium by the life insurance company which issues the annuity is accumulated and paid to the plaintiff tax-free. By contrast, if the plaintiff had received the same amount of principal as a lump sum, he or she would be liable for tax upon the interest income earned on investment of that lump sum.

13.6 As with the agreement in the United Kingdom between the ABI and the Inland Revenue,⁶ this favourable tax treatment results only from an administrative decision of Revenue Canada.⁷ There is no legislation which guarantees the tax advantage; and advance tax rulings are obtained from Revenue Canada for each case in which an annuity-funded structured settlement is being considered.

13.7 Thus, with a tax-free status, a structured settlement/award providing benefits identical to a lump sum settlement is less expensive to the defendant, and therefore has advantages for both liability insurers and life insurers. The Manitoba Law Reform Commission cites the following example:⁸

"A claimant investing a lump sum of \$1 million at 10% per annum might expect to receive interest income in \$50,000 per year (assuming a tax rate of 50%); however, because of its tax-free status, an annuity-funded structured settlement can provide the same benefit to the claimant at a cost to the tortfeasor of only \$50,000. As a further consequence, periodic payments may allow settlement of claims within insurance policy

⁶ See Chapter 7. The agreement is reproduced in Appendix 3.

⁷ The decision is recorded in Revenue Canada's *Interpretation Bulletin*, IT 365R of 1981.

⁸ Manitoba LRC, *Report on Periodic Payment of Damages for Personal Injury and Death*, No. 68, 1987.

limits, where one-time lump sum payments would exceed the tortfeasor's third party liability insurance coverage."⁹

13.8 In 1987, Revenue Canada restricted the tax-free status of annuity payments by a revision of its earlier 1981 ruling. The new ruling¹⁰ states that the "casualty insurer is the owner of, and annuitant (beneficiary) under, the annuity contract and *must report as income the interest element inherent in the annuity contract* while the payments received by the claimant represent, in the Department's view, non-taxable payments for damages." (emphasis added). However, the insurer is entitled to set off against its liability the annuity payments made to the claimant as claims expenses, and thereby put itself in a tax-neutral position. This is the same arrangement that exists in the United Kingdom, where the general (defendant) insurer has to pay tax on the annuity payments received from the life insurer but can write these off against other taxable income.¹¹

13.9 Under a personal injury annuity contract, the defendant (or his liability insurer) pays a single lump sum (capital premium) to a life insurer ("the issuer") in return for which the issuer agrees to pay periodic amounts to the plaintiff. Those amounts are made up of two blended components:

- (i) part refund of the capital premium; and
- (ii) part return of interest earned from investment of the lump sum.

Ontario

13.10 The Ontario Law Reform Commission carried out a study of this area in 1987 which appears in their Report on Compensation for Personal Injuries and Death.¹²

13.11 In that Report, the subject of periodic payments is examined,¹³ in particular the issue as to whether the Court should be allowed order periodic payments and whether they should be reviewable.

13.12 The majority decided not to recommend any change in the existing law either to allow for periodic payments to be awarded contrary to the wishes of

9 *Ibid*, at p41.

10 Recorded in *Interpretation Bulletin*, IT 365R2, 1987.

11 This is further outlined in Chapter 7.

12 Ontario LRC, *Report on Compensation for Personal Injuries and Death*, 1987.

13 See Chapter 5 of the Report.

either party or to make these payments reviewable.¹⁴

13.13 The Vice Chairman, H Allan Leal, DC, QC, dissented and argued in favour of the approach adopted by the Manitoba Law Reform Commission, where it was recommended that the court be given the power to order periodic payments in its own discretion.¹⁵

13.14 Despite these recommendations against giving the court power to order periodic payments, the Ontario legislature has since taken the lead in enacting statutory provisions giving the court the power to order them.

13.15 Section 129 of the *Courts of Justice Act, 1984*, SO 1984, c11, provided that, in a proceeding in which damages are claimed for personal injuries, or in a proceeding brought under Part V of the *Family Law Reform Act, 1986*, where all the affected parties consent, the court may order the defendant to pay all or part of the award of damages periodically. *The Courts of Justice Act, 1984*, was amended by SO 1989, c67, to make structured settlements mandatory where the plaintiff requests a gross up for income tax, unless the parties agree that such an order should not be made or the court determines that it would not be in the best interests of the plaintiff to make such an order.¹⁶

13.16 Frenkel comments that "as this is the lead province in relation to legal matters it is anticipated that this will come to be the norm nationwide".¹⁷

Manitoba

13.17 The Law Reform Commission of Manitoba produced a Report on this topic in 1987¹⁸ and proposed that legislation be adopted to allow for the courts to order periodic payments of damages in personal injury cases. The Commission drafted an Act¹⁹ in the matter, and features of particular interest in this Act are the proposal that the decision to order periodic payments be in the sole discretion of the court and that the courts be permitted to make an order for the periodic payment of any aspect or "head" of damages as part of the award.

14 *Ibid*, at p178.

15 *Ibid*, at pp175-178.

16 A copy of the current provision now contained in section 116 of the *Courts of Justice Act*, RSO 1990, is reproduced in Appendix 8.

17 *Ibid*, at p3.

18 Manitoba LRC, *Report on Periodic Payment of Damages for Personal Injury and Death*, No. 68, 1987.

19 See Appendix 9 for a copy of the proposed Act.

13.18 In general, the view of the Manitoba LRC was that the ambit and circumstances of any order or award of damages to be paid periodically should be left to the court unfettered by legislative guidelines.

13.19 The basic recommendation in the Report is that "legislation be enacted to authorize the courts to award damages for personal injury or death by way of periodic payments".²⁰ In making this proposal, the Manitoba LRC sought to address three problems: the inherent inaccuracy of lump sum awards; the large size of damages awards; and "money management", that is, concern over the possibility that plaintiffs may dissipate lump sum damages awards.

13.20 They did not recommend that periodic payments be made subject to review. The Commission rejected a system of reviewable payments because of the loss of finality, the additional burden and expense that would be placed on the courts and the parties, and the difficulties that would be faced by insurers, the last of which, it suggested, would necessarily lead to increased cost that would be reflected in higher liability insurance premiums.²¹ The Commission was of the view that further study would be necessary before it could propose a reviewable system.²² The Commission did acknowledge, however, that merely providing for periodic payments would preserve a "major element of inaccuracy"²³ and would not alleviate the problem of delay.

13.21 The Manitoba Law Reform Commission made more than twenty recommendations dealing with various aspects of periodic payments. The most significant of them are referred to below.

13.22 The Commission recommended that no restriction should be placed either on the types of case in which courts may grant damages in the form of periodic payments or on the heads of damage in respect of which periodic payments may be ordered.²⁴ The Commission further recommended that the decision to order periodic payments should rest entirely in the discretion of the court, and expressly rejected systems under which the jurisdiction to do so depends on the preference of either party, or both of them.²⁵

20 *Ibid*, at p63.

21 *Ibid*, at pp85-86.

22 The Manitoba Law Reform Commission also considered a scheme of provisional damages, such as that recommended by the English Law Commission (see Law Commission Report, *supra*, note 8), and later enacted by the *Administration of Justice Act, 1982*, s6, as well as the possibility of interim damages: see Manitoba Report, at pp67-68. As with reviewable periodic payments, its view was that further study was necessary before either of these alternatives could be endorsed.

23 *Ibid*, at p63.

24 *Ibid*, at pp74-79.

25 *Ibid*, at pp79-83. It was further recommended that "the legislation authorizing the awarding of damages by periodic payments contain neither guidelines for the exercise of the court's discretion nor a preamble as to the legislation's purpose": *ibid*, at p85.

13.23 With respect to the important question of securing future payments, the Commission made several proposals. The basic recommendation was that adequate security for an award of periodic payments should be posted by or on behalf of the defendant, unless the court determined otherwise. The Report proposed further that "security be in the form of an annuity contract issued by a life insurer satisfactory to the court or in any other form of security satisfactory to the court".²⁶

13.24 With respect to the impact of inflation, the Commission recommended that, rather than allow courts to determine the inflation rate on a case-by-case basis, "all judgments awarding damages by periodic payments provide that the amount of the periodic payments shall increase over time in recognition of inflation at a rate specified in the legislation".²⁷ The specified rate of inflation, it was proposed, should reflect the long-term rate of inflation in Canada, and should not be varied to take account of short-term changes in inflation. The Commission further recommended that the specified rate of inflation, to be established in consultation with the life insurance industry, should be based on the long term trend of the *Consumer Price Index of Canada, All Items (Not Seasonally Adjusted)*.²⁸

13.25 In addition to the foregoing matters, the Commission considered:

- (a) whether a plaintiff who receives periodic payments should be allowed to convert or commute them into a lump sum;
- (b) whether the right to periodic payments should be assignable; and
- (c) the form that a judgment should take.²⁹

13.26 They decided

- (a) that commutation should not be allowed;³⁰
- (b) that assignment should not be allowed;³¹ and
- (c) that the form a judgment which orders periodic payments should take is to specify which heads of damages are covered by periodic payments and the period over which the payments

26 *Ibid.*, at p90.

27 *Ibid.*, at p101.

28 *Ibid.*, at pp101-06.

29 *Ibid.*, at pp90-99 and pp106-10.

30 Recommendation 19, at p108.

31 Recommendation 20, at p110.

for each such head are to be made.³²

13.27 The Manitoba Report and its recommendations have yet to be implemented. In commenting on the Manitoba Report, the Law Reform Commission of Tasmania noted that:³³

"The Report has not yet been implemented, although advice provided in April 1990 indicated that the Minister of Justice for Manitoba was giving the matter favourable consideration with a view to introducing legislation in the near future."³⁴

British Columbia

13.28 In the province of British Columbia, the Justice Reform Committee produced a Report in 1988, which also recommended that legislation be introduced to allow the courts to order awards of damages by way of structured settlements.³⁵ The intent behind this recommendation was to clear up any uncertainty over whether or not the courts had the authority to order the payment of an award by way of structured settlement.³⁶

13.29 Legislation was introduced to the Parliament in British Columbia in May 1990, and the *Structured Compensation Act (Bill No 29)* has been referred to a Standing Committee of the legislature for its inquiry and recommendations.

13.30 This *Structured Compensation Bill* aims at providing for periodic compensation under any or all heads of damages by requiring the defendants' insurer to purchase a single premium annuity contract which must be non-assignable, non-commutable and non-transferable. Payments under the annuity contract must be made directly to the plaintiff. The court may only make a structured compensation order if the defendant is backed by an insurer; and may seek the recommendations of experts as to the provisions to be contained in the annuity contract, the cost thereof, and the choice of the appropriate life insurer or financial institution proposed to issue the annuity contract. Most importantly, the court may override a plaintiff's wish to receive a lump sum award for future loss, and may order that such compensation be by way of periodic payments where it considers that the best interests of the parties would be served by structuring the compensation in the manner contemplated by the Act.

32 Recommendations 11 and 12.

33 Law Reform Commission of Tasmania, Report No.67, *Damages for Personal Injury*.

34 *Ibid*, at p41.

35 *Access to Justice: The Report of Justice Reform Committee*, BC, 1988.

36 The Committee's Report (which was only 1 page) appears in full in Appendix 10.

13.31 According to the Law Reform Commission of British Columbia, this Bill is still under consideration by the legislature.

SECTION V: OTHER COMPARATIVE ASPECTS

CHAPTER 14: AUSTRALIA

14.1 Compensation for personal injury in Australia is based primarily on the common law action of tort. Legislation providing for periodic payments has been enacted in three Australian states. In 1966, with the enactment of the *Motor Vehicle (Third Party Insurance) Amendment Act, 1966*,¹ Western Australia became the first jurisdiction in the common law world to depart from the lump sum award of damages.² The following year, the *Supreme Court Acts, 1935-1966*, were amended in South Australia to confer authority on the courts to order periodic payments.³ New South Wales introduced a power for the courts to award periodic payments in serious road accident cases with the enactment of the *Transport Accidents Compensation Act, 1987*.

Western Australia

14.2 Under the Western Australia *Motor Vehicle (Third Party Insurance) Act, 1943*, as amended in 1966 and 1972,⁴ the court has power to order payment of damages by way of lump sum or periodic payments, or both, in claims for death or bodily injury caused by, or arising out of, the use of a motor vehicle.⁵ Periodic payments may be ordered for whatever period the court determines. At any time, the court, either acting on its own motion or on an application by a party, may review the payments and order them to be varied or terminated. Apparently, periodic payments have been ordered rarely under the legislation.⁶ In the first 15 years of the Act's operation, only 33 orders for reviewable periodic payments were made.⁷

1 No. 95 of 1966, s15.

2 In non-common law jurisdictions, damages by way of periodic payments are more common: see, generally, Fleming, *Damages: Capital or Rent?* (1969) 19 *U Toronto LJ* 295.

3 *Supreme Court Act Amendment Act (No. 2), 1966-1967*, No. 21 of 1967, s4.

4 No. 32 of 1943, s16(4), as amended by No. 95 of 1966, s15 and No. 42 of 1972, s6.

5 Originally, in 1966, the power to order periodic payments had been given to a special motor claims tribunal, known as the Third Party Tribunal. In 1972, on its abolition, the power was conferred on the court: see *Motor Vehicle (Third Party Insurance) Amendment Act, 1972*, No. 42 of 1972.

6 New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales*, LRC No. 43 (1984) (hereinafter referred to as "New South Wales Report"), Vol 1, para 4.8, at p82.

7 See Luntz, *Damages for Personal Injury: Rhetoric, Reality and Reform from an Australian Perspective* (1985), 38 *Current Legal Probs* 29, at p34.

South Australia

14.3 The power to order periodic payments was first introduced in Southern Australia in 1967.⁸ Pursuant to section 30b of the South Australia *Supreme Court Act, 1935-80*, in an action for damages, the court may make a declaratory order on the issue of liability and postpone the determination of damages. Where such an order is made, the court may order interim payments on account of damages. In addition to, or instead of, an order for interim payment, the court may order periodic payments for a fixed period or until a further order. Periodic payments may be varied or terminated by the court on the application of any party.

14.4 Where the court has postponed the determination of damages, any party may apply for a final assessment of damages. In an action for personal injury, where such an application has been made, the judge must undertake a final assessment where the plaintiff's medical condition has stabilised, or where a period of four years has elapsed since the original declaratory judgment. However, even where these conditions are met, a final assessment may be refused if the judge is of the view that there are special circumstances that justify continuing postponement of that assessment.⁹

14.5 Unlike the Western Australia legislation, the availability of periodic payments is not confined to compensation for motor vehicle accidents, but extends to all actions that may be brought in the Supreme Court. There is, however, a limitation as to the heads of damage. Interim payment in respect of non-pecuniary loss is not permitted, except in certain, specified cases.¹⁰

14.6 As in Western Australia, the power to order periodic payments has been exercised only rarely.¹¹ In neither Western Australia nor South Australia has there been any study of the reasons why there has been so little recourse to periodic payments.¹² Professor Veitch¹³ suggests that the South Australia changes have "not found favour with the legal profession, the bench or litigants", because they fail to affect significantly three key problems of the tort system - delay, inexactitude of assessment and cost.¹⁴

14.7 In 1984, the Law Reform Commission of New South Wales produced a

8 By No. 21 of 1967 which amended the Southern Australian *Supreme Court Acts*.

9 See *Supreme Court Act, 1935-80*, s30b(6), as enacted by No. 21 of 1967, s4.

10 *Ibid*, s30b(2).

11 *New South Wales Report*, see note 6, para 4.7, at p83.

12 *Ibid*.

13 See Veitch, *Cosmetic Reform: Periodic Payments and Structured Settlements* (1981-83) 7 *U Tasm L Rev* 136.

14 *Ibid*, at p144.

report on accident compensation for transport accidents.¹⁵ In broad terms, the Report advocated the introduction of a scheme which would provide for no-fault compensation for people injured, or the families of people killed in transport accidents. The Report led to the enactment in New South Wales of the *Transport Accidents Compensation Act, 1987*.

14.8 Section 81 of the *Motor Accidents Act, 1988 (NSW)*, introduced the mechanism for courts to impose structured judgments by way of periodic payments for future economic loss for New South Wales plaintiffs who have suffered severe permanent or long-term disability as a result of a motor vehicle accident. The defendant must be compulsorily insured.

14.9 However, only months after its commencement, the Act was amended: the express requirement that the plaintiff be severely disabled was removed; and separate provision was made for future care damages on the one hand, and loss of future earning capacity on the other. The court may order that payment be made in accordance with such arrangements as it determines or approves, but only if the plaintiff and the defendant's insurer also agree.

14.10 The Act also now lists the factors to be taken into account in making the order, which include:

- (i) the plaintiff's ability to manage and invest a lump sum;
- (ii) the need to ensure that payment is made only for such expenses that the plaintiff is truly entitled to; and
- (iii) the views of the insurer.

In respect of loss of earning capacity, the court may order the purchase of an annuity, with periodic payments to be paid at intervals no greater than 12 months. Any party to the arrangements may apply for their variation or termination.

14.11 In November 1990, the *Personal Injuries Damages Bill, 1990 (NSW)* was introduced into Parliament. This Bill would empower the court to impose structured judgments so that payments for future economic loss could be made on a periodic basis (as an alternative to "lump sum" payments) in all awards of damages for death or personal injury not actionable under the *Motor Accidents Act, 1988 (NSW)*, the *Workers Compensation Act, 1987 (NSW)*, or the *Dust Diseases Tribunal Act, 1989 (NSW)*. The Bill would require the court to

¹⁵ New South Wales Law Reform Commission Report No. 43, *Accident Compensation: A Transport Accidents Scheme for New South Wales* (1984).

determine separately the amount of damages for non-economic loss, past economic loss and future economic loss before empowering the court to order periodic payments for the last-mentioned head of damage. The Bill suggests (but does not require) the purchase of an annuity.

14.12 Victoria and Tasmania, which do not have schemes providing for periodic payment of damages within the context of the common law personal injuries action, do have statutory no-fault compensation schemes for injured victims of road accidents.¹⁶

Victoria

14.13 The scheme in Victoria was established under the *Motor Accidents Act, 1973*. It followed from the recommendations of a special committee set up by the state government to seek ways of reducing the time taken to settle claims and provides for the provision of benefits to road accident victims during an initial period of 104 weeks, without regard to negligence. A claim under the Act must be made within three years of the accident.

Tasmania

14.14 The scheme in Tasmania was established under the *Motor Accidents (Liabilities and Compensation) Act, 1973*. It followed from proposals made in 1972 by the Law Reform Commission of Tasmania for a no-fault road accident insurance scheme. Common law rights are retained, but benefits are provided on a no-fault basis for a maximum period of 208 weeks.

14.15 Since then there have been further proposals for altering the common law approach of only awarding damages in lump sums. In a Working Paper prepared by Mr R W Baker, QC, in 1981 for the Law Reform Commission of Tasmania, entitled *Compensation for Personal Injuries Arising out of Tort*, a tentative recommendation was made to empower the Supreme Court to make a preliminary damages award and an order for periodic payments in cases of serious or lasting injury or disability. It was proposed that both pecuniary and non-pecuniary losses would be so payable. Variations in payments according to the rate of inflation were envisaged by an annual revaluation in line with the movement of average earnings.

¹⁶ See *Pearson*, Vol 3 for greater details of these schemes.

14.16 With narrower terms of reference, the Law Reform Commission of Tasmania published its Report on *Compensation for Victims of Motor Vehicle Accidents* (No. 52) in 1987, in which it recommended, by a majority, that the Supreme Court should be required to order reviewable periodic payments for future pecuniary losses related to earning capacity, and medical care costs in excess of \$5,000. The Commission recommended that lump sum awards should continue to be made for past pecuniary loss; pain, suffering and loss of amenities; and fatal accident claims. The Report refers to widespread support for periodic payments within Tasmania, though its recommendations have not been implemented.

14.17 In 1990, the issue of compensation for personal injury was again referred to the Tasmanian Law Reform Commission, and they produced a Report which recommended that the court be given the power to award damages in the form of periodic payments.¹⁷

The Commission recommended that:

- (i) Legislation be enacted to authorise courts to award all or any damages for personal injury or death by way of structured judgments, including periodic payments, as an alternative to lump sum awards, provided that such structured judgments are assessed once-and-for-all and are not reviewable. Juries should be authorised to assess damages in a lump sum or in amounts to be paid periodically. The form of the final order should, however, be reserved to the trial judge.
- (ii) No restriction be placed upon the courts' discretion to make awards involving periodic payments.
- (iii) The court be empowered, in all cases where damages are claimed for personal injury or death, to order that the defendant's insurer be made a party to the proceedings.
- (iv) The court be empowered, in cases where the court deems it appropriate, to arrange the annuity and require the defendant's insurer to reimburse the court for the costs thereof and any expenses associated therewith, including a share of the overheads.
- (vi) Legislation be enacted to provide that a commutation or assignment of a plaintiff's right to periodic payments, made without the approval of the court, be void.

17 Report No. 67, *Damages for Personal Injury* (1990).

14.18 As yet the Tasmanian Report has not been implemented.

Australian Federal System

14.19 The viability of no-fault schemes for the whole of Australia was examined in 1973 when the Australian Federal Government set up a Committee under the chairmanship of Mr Justice Woodhouse, called the National Committee of Inquiry on Compensation and Rehabilitation in Australia. The Committee reported in 1974.¹⁸

14.20 The Committee of Inquiry drew attention in its Report in July 1974, first, to what it regarded as a lack of moral basis for the fault theory in that such factors as momentary inattention, fatigue, attitude, age and capacity are ignored; and then, to the plight of those injured persons who, though entirely innocent themselves, frequently receive nothing. The Committee went on to outline what it described as the capricious and selective results of the existing system; the delays and anxieties that lead up to trial and possible appeal; the nature of common law damages, in particular, the finality of awards and such imponderables as future loss of earnings; the effect of the system on rehabilitation; and its costs.

14.21 The Committee recommended that a scheme should cover all incapacities, regardless of cause and irrespective of fault. It took the view that once the principle of community responsibility for the injured is accepted, that same responsibility cannot be withheld from the sick. All persons injured in Australia should be covered, whether their usual place of residence was in Australia or not, but only residents of Australia should be covered for sickness. Injuries received by those convicted of committing serious crimes of violence, such as murder, hijacking and grievous bodily harm wilfully caused, should be excluded.

14.22 The Committee took the view that the scheme should replace any common law actions available. In general the state governments were opposed to the scheme. According to Pearson:¹⁹

"They feared the adverse effect of the proposals on both public and private finances at state level. In Victoria, for example, over one-half of the funds of the state Government Insurance office were invested with public or semi-public bodies. Furthermore, if private insurers were to

¹⁸ The Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia, 1974.
¹⁹ *Pearson Report*, Vol 3, at p180.

lose workers' compensation and third party motor insurance, they would face severe liquidity and unemployment problems."²⁰

14.23 The Labour Government who had commissioned the Report began drafting a Bill to implement the Scheme but, with a change of Government in November 1975, the Bill was dropped. Since then the only action that has taken place has been at state level, as outlined earlier in this chapter.

20 *Ibid*, para 183.

CHAPTER 15: NEW ZEALAND

15.1 In terms of the scope of this Report, which considers the introduction of some form of periodic payments *within* the confines of the tort system, New Zealand is in a category all its own. This is because, in 1972, tortious causes of action for personal injuries were abolished, and a statutory scheme of benefits for accident victims without proof of fault was introduced by the *Accident Compensation Act, 1972*. This Act came into effect in 1974. Under the Act, compensation payments are paid periodically.¹

15.2 There are three aspects to the no-fault compensation scheme. They are (i) the basis of entitlement, (ii) the administration of the scheme, and (iii) the financing of the scheme. In terms of this Report, some of the features of the scheme may have relevance, namely, the types of loss for which periodic compensation is available.

Basis Of Entitlement

15.3 Under the scheme, anyone in New Zealand who suffers a "personal injury by accident" can file a claim for compensation for their losses with the Accident Compensation Commission ("ACC"), the statutory body charged with administering the scheme.

15.4 The provisional heads under which claims may be brought include loss of earnings (in the case of earners) or potential loss of earnings (in the case of non-earners), the cost of medical treatment, expenses generally incurred in consequence of the accident, the cost of necessary attendance on the accident victim, assistance to him or her by others and lump sums for permanent disability, for pain and suffering, disfigurement and loss of enjoyment of life. In cases where the victim dies, dependants are able to claim earnings-related compensation, as well as reasonable funeral expenses. Earnings lost during the first week after an accident are paid in full by the employer if the accident was at work, or by the ACC if not. After this the ACC pays compensation at 80% of the victim's usual earnings; this goes up to 90% in the case of the low paid. If the victim can still work, but his or her earning capacity is diminished, then compensation is paid at 80% of the amount by which his or her earning capacity is lessened. Interim payments may be made while the relevant calculations regarding entitlement are made. There are statutory upper limits on all awards that may be made.

¹ See generally the *Pearson Commission Report*, Vol 3, Chapter 10.

15.5 One of the most important features of the scheme is that it has unified the approach to all kinds of accidental injury. As Holyoak points out:

"the basic tenet, adhered to with commendable consistency, is that a broken leg merits the same amount of compensation whether it is suffered through a work accident, a car crash or a domestic mishap in the house."²

15.6 In terms of the principles relied upon in awarding compensation, the ACC does not rely on the old common law principles. The ACC, in a way similar to the Employment Appeals Tribunal in Ireland, is not bound by its own decisions, but has developed a relatively coherent approach to interpreting the key phrase in the legislation "personal injury by accident". Cases are dealt with on a case by case basis.

15.7 Section 114 of the Act allows the ACC to make a final assessment of the degree of impairment which a permanently injured victim has suffered, when his or her condition has stabilised. In practice, the process of handling such complaints is slow. Another feature of this procedure is that the earnings-related element of compensation can be increased if the victim's condition worsens but it cannot, by law, be decreased if his or her condition improves. This feature of the scheme has been criticised as being overly generous to some claimants.

Administration Of The Scheme

15.8 The scheme is administered by the ACC. The ACC has twelve centres in the country and 40 smaller centres administered by state insurance offices or private insurance companies who act as agents of the ACC. To file a claim an individual fills in a form at an ACC office or a post office. Since only the ACC can reject or accept claims, all prospective claims are then sent to the ACC's head office in Wellington. The procedure for dealing with claims is straightforward. An ACC officer will examine the claim. If he or she refuses it, then his or her superior must check it. If both agree that the claim is not merited, then a "pre-decision" letter is sent to the claimant explaining that the claim may not be sustainable and inviting the claimant to provide further relevant information. Only after 21 days does the ACC proceed to make a formal decision to reject a claim. If the claimant is dissatisfied with the decision, he or she can then request the Commission to review the decision. This formal review can consider any evidence, which evidence will be made available to the applicant. The procedure is quite informal and will normally be conducted by an

² David K Allen, *Alternative Accident Compensation Strategies* in Allen, Bourn and Holyoak (eds), *Accident Compensation After Pearson*, (1979, London), at p185.

ACC official with the claimant present. According to the Pearson Commission, claimants were only assisted by lawyers in 25% of the cases.³ If the claimant is still dissatisfied, an appeal may be made to the Accident Compensation Appeal Authority (which normally consists of a single judge, though possibly with an expert assessor), which sits in public and reconsiders all the evidence. There can be a further appeal to the Supreme Court on a point of law of public importance, and a further appeal in the usual way to the New Zealand Court of Appeal and, where appropriate, to the Privy Council.

Financing Of The Scheme

15.9 The scheme is financed from three separate funds. First, there is the earner's scheme which covers all injuries suffered by the employed or self-employed. This scheme is financed by a levy on employers as a percentage of wages, the percentage varying with the degree of risk in the employment generally. Secondly, a separate scheme exists for the compensation of persons injured in road accidents. This is financed by a levy on vehicles dependant upon the class of vehicle. Thirdly, there is a catch-all scheme financed from national funds for anyone else injured or killed by an accident in New Zealand. One of the problems in financing the scheme has been to know at what rate to set the various levies to meet the outgoings of the ACC. This is a particular problem with section 114 cases, relating to permanent injury, where a final assessment has yet to be made.

Conclusions

15.10 The scheme has recently come under considerable criticism in New Zealand. This criticism has been directed, not at the no-fault aspect of the scheme, but rather at the way it is funded. In July 1991 the Minister for Labour, Bill Birch, outlined a number of reforms his Government intended to introduce.⁴ The document's principal commitment is to relieve the employers from having to fund non-workplace injuries, something they had been doing to an increasing degree. The document also contains a continuing commitment to the abolition of the common law action.

3 *Pearson*, Vol 3, Chapter 10.

4 W. Birch, *Accident Compensation, A Fairer Scheme*, (1991).

SECTION VI: CONCLUSIONS

CHAPTER 16: CONCLUSIONS AND RECOMMENDATIONS

16.1 The once-off lump sum award is the traditional form of compensation payment for personal injuries actions. The insurance and legal professions are trained and accustomed to appraise the settlement of tort claims on a lump sum basis. There are clearly certain advantages to the once off, lump sum award. It allows the injured plaintiff the benefit of a large capital sum and the freedom to dispose of that as he or she sees fit. The advantage for the insurance companies is that, in paying a lump sum, they can close their books on a case. This allows them to plan for their future liabilities with more certainty. However, as has been discussed at various previous stages in this paper, this system has certain major disadvantages.

16.2 A lump sum is obviously appropriate to cover accrued losses. Whether it is appropriate for future losses has regularly been questioned.¹ As well as the many specially commissioned reports that have criticised lump sums, many common law judges have also been critical. For example Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.* thought it "highly irrational to be tied to a lump sum system and a once-and-for-all award".² McLachlin J., in his judgment in the Canadian Supreme Court in *Watkins v. Olafson*, set out some of the shortcomings of the traditional, once-off lump sum when he stated:

"The imperfections of a lump-sum, once-and-for-all, as a means of providing for a plaintiff's cost of future care, has often been noted. Where the injury is serious and the period of time for which care must be made lengthy, a large number of variables enter into the calculation. Should the plaintiff live longer than projected, or earn less on his capital than expected, he will run out of funds for his care. On the other hand, should chronic illness force him to live in an institution rather than his own home, or should he die earlier than forecast, the funds provided may turn out to be excessive, resulting in a windfall for him or his heirs at the defendant's expense.

Considerations such as these support the conclusion that in cases where care must be provided for a long period in the future, periodic payments are more consistent than the lump-sum rule with the fundamental principles upon which the assessment of damages for personal injury are

1 For a discussion of the issue, see J.G. Fleming, *op cit.* Also the panel on *Pensions or Damages? In The Failure of Personal Injury Compensation*, at pp35-71 (1979).

2 (1978) 83 DLR (3d) 452, at 456 (SCC).

founded -the basic concepts of *restitution in integrum* and full but fair compensation. The whole basis of the claim advanced by the appellant is that in order to provide adequately for his future care he requires a monthly stream of income indexed for inflation for the rest of his life. Periodically paid sums capable of adjustment in the event of changed circumstances best ensure that this need will be met, given the impossibility of predicting the future with any real accuracy. At the same time, it is urged, the result would be fair to Defendants, ensuring they pay only what is actually required".³

16.3 The Canadian writers, Cooper-Stephenson and Saunders,⁴ comment that "[s]uch strong partiality towards the lump sum is striking. Civil law systems often allow periodical damages. Even within the common law world, periodical payments are typically the norm under workers' compensation schemes, not to mention no-fault insurance provisions, welfare plans, and the maintenance laws".⁵

16.4 Large lump-sum awards, however, are on the increase. Severe injuries require long term treatment and rehabilitation. Combined with loss of earnings, this leads to large lump sum awards being made. The purpose of these awards is to compensate the victim for his loss, but it must do so on the basis of evidence available at the trial and based on an expectation that the money will serve its compensatory purpose.

Problems With The Lump Sum System

16.5 An award of damages can be very difficult to assess at the date of trial when there may be several uncertainties, such as the future medical prognosis of the injured party. Since damages will be assessed once and for all at the trial, this uncertainty can often contribute to delays in a case coming to trial. These delays can occasionally lead to plaintiffs settling their cases prematurely and provide a disincentive to rehabilitation.⁶

16.6 A second problem which has been identified in both the United Kingdom and North America is that many plaintiffs may, due to inexperience in dealing with large sums, see their lump sums dissipate quicker than intended. It would be wrong to exaggerate this problem, however. Studies recently conducted by the Law Commission and the Disability Management Research Group at the University of Edinburgh have shown that the risk of dissipation is less than was

3 *Ibid.* at 580.

4 *Personal Injury Damages in Canada* (Toronto, 1981).

5 *Ibid.*, at p9. For a comment on the implications of periodic payments for Canada see J G Fleming, *Damages: Capital or Rent?* (1989) 19 *UTLJ* 295.

6 Both these problems were referred to in the McLiam Report and the Barrington Commission Report, which are discussed in Chapter 3.

widely believed and that those awarded very high damages are least likely to fritter away their compensation.

16.7 It is worth referring to some of the evidence on the issue. In America, a survey in *Business Insurance*⁷ noted that "90 per cent of all major windfalls - be they in the form of sweepstakes, lotteries or court settlements - have been squandered within five years". An article in the *English Law Society Gazette*⁸ notes "[t]hat there has long been concern that many awards are either squandered on extravagant expenditure or not used to their full effect". The same article refers to a Canadian insurance industry study of the disbursement of large cash awards which found that "50 per cent of the recipients had nothing left after one year; 70 per cent of the recipients had nothing left after two years and 90 per cent of the recipients had nothing left after five years".

16.8 In 1983, a study was carried out in New South Wales in Australia to see what happened to large lump sums. *Colin Bass Human Resources* conducted a study for the Law Reform Commission of New South Wales of 263 accident victims who received lump sums as compensation in 1976. The survey covered motor vehicle compensation claims, workers' compensation redemption and common law industrial injury claims. The sample of people was generated from records maintained by three major insurance companies and the Workers' Compensation Commission. It included approximately 70 per cent of all traffic accident victims who had received high amounts of compensation (\$100,000 or more), and a representative sample of traffic accident victims who had received medium range awards (\$20,000-\$35,000).

16.9 The major findings of the Lump Sum Survey in relation to all categories of respondent, and to traffic accident victims in particular, as to their economic circumstances after 7 years were as follows:

- Nearly one half (47 per cent) of all accident victims were in a financially vulnerable position 7 years later. For recipients of medium and high range awards in the traffic accident category, the percentages in a financially vulnerable position were 34 per cent and 50 per cent respectively.
- More than one half of all respondents either received social security benefits or reported incomes under \$100 per week. Of those who had received medium range awards for traffic accidents, 30 per cent received social security benefits and had incomes of less than \$100; and of those who had received high awards, 19 per cent received social security benefits and 35 per cent overall had incomes of less than \$100 per week.

7
8

April 28, 1980.
No. 11, 21 March, 1990, at p27.

- Fifty three per cent of all respondents were initially satisfied with the amount of compensation received. However, by the time of the survey, three of four respondents were dissatisfied. Of those in the medium range traffic accident category, 48 per cent were initially satisfied with the compensation payment, but this figure had fallen to 22 per cent at the time of the survey. In the high range traffic accident category, some 70 per cent were initially satisfied with the amount of compensation received. However, only 15 per cent were satisfied at the time of the survey.⁹

16.10 A small-scale study carried out in Edinburgh in 1993 found no evidence that the victims of personal injury surveyed were being profligate.¹⁰

16.11 The English Law Commission undertook some research of its own into a sample of 761 people who had received awards of damages for personal injury within two to ten years of the survey. The recipients were classified into four size bands according to the amount of damages received:

Award

Band 1	£ 500	- £19,999
Band 2	£ 20,000	- £49,999
Band 3	£ 50,000	- £99,999
Band 4	£100,000	- or greater

16.12 It found that:

"Spending of the award was related not only to the amount of damages received but also to the period between settlement and interview The proportion of recipients with about half or more of their damages still to spend by the time of interview increased from 24% in Band 1 to 35% in Band 2, 53% in Band 3, with a very slight drop to 51% in Band 4. Only one in ten in Band 4 had spent all their damages. For settlements within 3 years prior to interview, 71% of those with the smallest awards had spent over half of their damages, and one a third of those with the largest awards had done so. The longer the time since settlement, the smaller the difference between Bands: for settlements over 4 years ago,

⁹ A paper on the survey, entitled *Lump Sum Accident Compensation*, was published by the Commission in September 1983.

¹⁰ Paul Comes, *Coping with Catastrophic Injury - A follow-up survey of personal injury claimants who received awards of £150,000 or more in 1987 and 1988* (January 1993), published in June 1993.

56% of Band 2 recipients had spent over half their award, but the figure for those in Band 4 was still less at 45%. We believe that these figures show that those with serious injuries, who receive larger awards, are most concerned to preserve their funds for the future, and this would naturally make them risk-averse.

Our study revealed more direct evidence of this tendency. The most common method of saving a compensation award was to use a building society account, followed by a bank account. In all Bands, recipients were more likely to save their money in bank or building society accounts or in saving certificates than to invest in stocks or securities. As the amount of the award increased, however, so did the likelihood of investing in stocks or securities. Only one in ten recipients in Band 1 invested some of the compensation money in stocks or securities compared with six in ten of those in Band 4. The likelihood of getting advice about investment also increased significantly by size of award, from 26% in Band 1 to 84% in Band 4. We consider this to be clear evidence that those who receive large awards, where the choice of multiplier, and hence the level at which it is discounted, is crucial, are most concerned to preserve the value of their damages and to make good investments".¹¹

16.13 There is little hard evidence of what happens to large awards in Ireland. The McLiam Report into the cost of motor insurance¹² heard evidence of this problem from the Medical Director of the National Medical Rehabilitation Centre, and the Report noted that "[p]eople suddenly finding themselves in possession of large sums of compensation money are sometimes tempted to spend it imprudently on purposes other than those for which it was intended, leaving themselves later unprovided for".¹³

16.14 There is a third problem. The fact that the award assessed at the date of trial is both once-off and final can militate against the accuracy of the award in its aim of compensating the victim. Since awards are made as lump sums assessed at the date of the trial, they must, in most serious cases, be based on predictions as to the future progress of the plaintiff's medical condition. There are also other uncertainties which will affect the calculation of the award, such as the economic factors upon which the calculation of damages for future loss are based (such as inflation and income tax rates).

16.15 As a result, an award will be calculated on the percentage probability of,

11 Report on Structured Settlements and Interim and Provisional Damages: Law Com. No. 224, paras 2.29, 2.30. See also para 3.28.

12 Report of Enquiry into the Cost and Methods of Providing Motor Insurance, 1982.

13 *Ibid*, at p46.

for example, an injured plaintiff developing epilepsy. If the plaintiff goes on to develop epilepsy, he loses out; if he does not, he has been unjustly enriched. This problem was alluded to by the late Mr. Justice Niall McCarthy, of the Supreme Court, who stated, extra-judicially:

"[T]here seems nothing to recommend the payment of large sums of money which, in a number of instances must be either too much or not enough. The plaintiff, in short, lives for a much lesser period than anticipated or lives for a much longer period. Years of practice at the Bar certainly showed instances in which both circumstances applied".¹⁴

16.16 Commenting on the same problem, Fleming says "[t]he shortcomings of the process are lamentable beyond imagination".¹⁵

16.17 Furthermore, with improving medical care, the plaintiff's life may exceed his or her life expectancy at the date of trial, leaving him or her short-changed.

The Options For Reform And Recommendations

16.18 There are a number of possible reform options that could be introduced to tackle these problems.

(i) **Reviewable periodic payments**

16.19 The most elaborate proposal would be a system of reviewable periodic payments, whereby one of the parties could return to court at a later date to apply for the amount of damages being paid periodically to be altered in light of a change in the condition of the plaintiff. Kansas, Louisiana and New Mexico all have legislation providing for reviewable period payments.¹⁶ Both the Wodehouse and Pearson Reports¹⁷ recommended some form of reviewable periodic payment system, the argument supporting such a proposal being that only such a system can fully tackle the problem of *inaccuracy* in compensation awards.

16.20 The arguments against such a proposal are, however, very strong. If the payments are reviewable downwards this would operate as a serious disincentive

14 In his foreword to J P M White, *Irish Law of Damages for Personal Injuries and Death*.

15 *Ibid.*

16 Kan Stat Ann 60-2609 (1983), La Rev Stat Ann s40:1299.39, s40:1299.43 (West Supp. 1988) and NM Stat Ann s41-5-9 (1978) respectively.

17 See Chapters 14 and 7 respectively.

to the rehabilitation of the plaintiff. Similarly the mere possibility of a review (either upwards and/or downwards) would contribute to great uncertainty in the context of insurers estimating the full extent of liability and therefore the value at which to set their premiums. The possibility of a further return to court in uncertain and possibly contentious circumstances would also add greatly to the costs of administering a scheme.

16.21 The English Law Commission rejected the option in 1973¹⁸ and the specific proposals of the Pearson and Wodehouse Reports on this point were never implemented.

16.22 Now that structured settlements are a fact, the English Law Commission, reconsidering the matter in their Consultation Paper, provisionally concluded that reviewability was desirable in principle to the extent that it takes into account any deterioration in the plaintiff's medical condition connected with the original injury, provided it has caused further financial loss. Review should not be triggered by improvement in the plaintiff's condition or by inflation. Review could involve the provision of new money or the restructuring of the original agreement but the Law Commission doubted that, because of expense, defendants would agree to review even if tax law was amended. Restructuring was also considered undesirable in principle.¹⁹

16.23 On consultation, a majority of the English Law Commission's consultees opposed review and the Commission, ultimately, in their Report did not recommend giving a power of review to the Courts, suggesting that the flexibility sought by those in favour of review could be achieved by structuring provisional and interim awards.²⁰

16.24 The Manitoba and Ontario Law Reform Commissions also rejected the idea.²¹ McLachlin J, commenting on this proposal, stated:

"One such difficulty is the review process presupposed by the Court of Appeal's award of periodic damages. The main purpose of the periodic award is to permit adjustment from time to time so that compensation may be more precisely tailored to need. But how is this tailoring to take place? Presumably further court hearings would be required, with the concomitant expense and worry entailed by documents, discovery, hearings and appearances.

18 See Chapter 7.

19 Law Commission, *op cit.* paras 3.39 to 3.46, 6.15 to 6.18.

20 Report para 3.85.

21 See Chapter 13.

Yet another factor meriting examination is the lack of finality of periodic payments and the effect this might have on the lives of plaintiff and defendant. Unlike persons who join voluntarily in marriage or contract - areas where the law recognises periodic payments - the tortfeasor and his or her victim are brought together by a momentary lapse of attention. A scheme of reviewable periodic payments would bind them in an uneasy and unterminated relationship for as long as the plaintiff lives.

The result would be an increased burden on the parties and on the court system. Rules governing the review process would also be required, rules which might be better fashioned by non-judicial bodies".²²

16.25 Furthermore the problems with inaccuracy can be tackled by other reform proposals, such as provisional awards. For the above reasons therefore, *we would not recommend that a system of reviewable periodic payments be introduced.*

(ii) **Interim awards and provisional damages**²³

16.26 The next question is whether provisions for interim awards and provisional damages should be introduced. There are provisions for both these measures in the United Kingdom.

(a) ***Interim awards***

16.27 A provision for interim awards allows an immediate payment of certain elements of a damages award in personal injuries cases, such as medical expenses, where liability is either not contested or is clear. Such a reform could be introduced by amending the Rules of Court, and the Court could be given a discretion as to when to make such awards. Commentary on the equivalent provision in the United Kingdom suggests that the mere existence of the procedure tends to produce an agreement as to an interim payment in many cases.

16.28 However, concern was expressed to the English Law Commission that interim damages were not sought in some cases in which they ought to be and they examined these concerns on consultation.

22
23

ibid., at p584.
For a detailed description of how these features operate in the United Kingdom see Chapter 7.

The "need" requirement

16.29 The English Law Commission found that although RSC Order 29 contained no need-based restriction on making an interim award, it had become customary in personal injury actions for such payments to be limited to sums for which need was shown.

16.30 They referred to the case of *Schott Kem Ltd. v. Bentley and Others*²⁴ in which Neill LJ regarded the practice of requiring need to be shown in these cases as sensible

"...because large interim payments in such cases might lead to difficulties if an order for repayment (necessary where, by mischance, the final damages are less than the interim award) was subsequently made under Ord 29, r 17. They recognised the special position of the plaintiff in personal injury cases. In such cases the disability caused by the injury may mean that a plaintiff who has lost her or his earning capacity and has spent the interim award would find it impossible to make repayment. Further, Ord 29, r 11(1) requires the Court not to risk over-paying the plaintiff, and this creates a need for caution, particularly if there is uncertainty over quantum. It is a relatively simple matter for the Court to exercise the requisite caution by ordering payment of sufficient amounts to compensate the plaintiff for lost wages or other financial hardship up to the anticipated date of trial, and of sums needed for special treatment or equipment".²⁵

16.31 Very few of those consulted by the English Law Commission considered that the overall discretion to grant an interim order was exercised ungenerously, notwithstanding the practice of requiring need to be shown, nonetheless, a majority were opposed to the practice. The Commission shared this view.

16.32 Noting the increase in popularity of split trials, where liability and damages are assessed separately, the Law Commission observed that when the question of liability had been settled:

"There is no reason why a plaintiff should not receive the sums which she or he is bound to receive after a trial as to quantum, and need should not come into it".²⁶

24 [1991] 1 QB 61, 74B.
25 Report *op cit.* para 4.3.
26 *Ibid* para 4.7.

16.33 They quoted with approval from the judgment in *Stringham v. McArdle*.²⁷

"It should be noted that the plaintiff does not have to demonstrate any particular need over and above the general need that a plaintiff has to be paid his or her damages as soon as may reasonably be done. It will generally be appropriate and just to make an order where there will be some delay until the final disposal of the case. Therefore what the Court is concerned with in fixing the quantum is that it does not exceed a reasonable proportion of the damages which in the opinion of the court are likely to be recovered".

16.34 As we saw in para. 2.67 above, interim awards of damages are not made in Ireland except where the court, having awarded damages to the plaintiff, refuses a stay on a portion of the damages pending an appeal by the Defendant against quantum. It is highly desirable that this practice be grounded in a statute or in a rule of court. In para. 7.20 above, we noted the English Rule of Court which gives the court power to order an interim payment of damages if liability is admitted or otherwise clear and the defendant is a public authority, is covered by insurance or has other sufficient resources. The Commission is satisfied that a provision on those lines would put the existing practice into a proper framework.

16.35 *Accordingly, we recommend that there should be provision in law in the Rules of Court for the interim award of damages and that:-*

- (a) *such an award should not be based on need;*
- (b) *the Defendant's resources should not be relevant;*
- (c) *it should apply to all defendants;*
- (d) *it should be conditional on an admission of liability;*
- (e) *it should not be made when an appeal has been lodged against liability. However, the court should have discretion to make an interim award where liability appears clear, even though contested on appeal.*

(b) Provisional awards

16.36 An award of damages could be provisional and permit a supplemental award, at least in the case of loss which was unforeseeable during the original assessment. However, the common law for centuries has required not only that damages be assessed in a lump sum, but also that they be assessed once-and-for all.²⁸ Again, there is the notion of a "split" trial, in which the ultimate calculation of damages is postponed until the victim's physical condition has stabilised. There would be a provisional award covering both past and estimated future losses, pending a final medical report.

16.37 A provision for provisional damages would, if invoked at the request of a plaintiff, allow the court to award damages in a case for all existing losses and injuries and for future losses based on these existing injuries, but not for diseases or disabilities that only *might* arise in the future, such as epilepsy. Such an award would specify the particular disability in question, and if this disability did subsequently arise, the plaintiff could apply for the relevant damages. Again it is thought that the existence of this procedure would in most cases lead to the payment being made by agreement.

16.38 In Chapter 7 above we examined the English legislation on provisional awards. The interpretation and development of these provisions have been very helpfully analysed in 1991 by Scott Baker J in *Willson v. Minister of Defence*.²⁹ Having referred to S.32A of the *Supreme Court Act 1981*, which applies to an action for damages for personal injuries in which there is proved or admitted to be a chance, in the future, that the plaintiff will develop a serious illness or deteriorate seriously, as a result of the wrong, he said that there are three questions to be answered:

"One is whether it is proved that there is a chance, the second is whether it is proved that there is a chance of some serious deterioration in the plaintiff's physical condition, and the third is, if the plaintiff succeeds in passing over both those hurdles, whether the court should exercise its discretion in his favour in the circumstances of the case

A chance, it will be appreciated, is not defined in s.32A. This has been considered in a number of previous cases. It seems to me that the legislature has used a wide word here and used it deliberately

The second question turns on the words 'serious deterioration in his physical condition'. There is a question of how 'serious' should be

28 *Fitter v. Veal* (1702) 91 ER 1122; 1 Ld Raym 336.
29 [1991] 1 All ER 636.

interpreted in the light of this section. On one view, 'serious' could cover a wide range of circumstances from something not far beyond the trivial at the bottom end of the scale to something approaching the catastrophic at the top end of the scale.

In my judgment, what is envisaged here is something beyond ordinary deterioration. Whether deterioration is serious in any particular case seems to me to be a question of fact depending on the circumstances of that case, including the effect of the deterioration upon the plaintiff. For example, where a plaintiff suffers a hand injury and there is a deterioration it may be a matter of great gravity for a concert pianist but a matter of rather less importance for somebody else. Insofar as it is material ... I favour the wider interpretation of 'serious deterioration' as advanced on the plaintiff's behalf.

... Osteoarthritis is a progressive condition. It is very common in cases where damage is suffered to an articular surface. I am not satisfied that it is established that deterioration to the point of surgery being required falls within the definition of serious deterioration in the circumstances of this case. It seems to me to be simply an aspect of a progression of this particular disease".³⁰

16.39 Scott Baker J adopted with approval observations on the relevant law in other judgements, notably those of Simon Brown J in *Patterson v. Minister of Defence*:

"Of course, one great advantage of a provisional damage award is that it is unnecessary to resolve differences such as arise here between the specialists, as to the precise extent of the risk to which the plaintiff is now exposed. Justice can and will be done whichever view is correct

[G]enerally speaking, it appears to me desirable to limit the employment of this valuable new statutory power to cases where the adverse prospect is reasonably clear-cut and where there would be little room for later dispute whether or not the contemplated deterioration had actually occurred".³¹

Scott Baker J also approved of the statement of Michael Davies J in *Allott v. Central Electricity Generating Board*, to the effect that:

"If provisional damages were to be generally awarded in cases where there is some orthopaedic injury and a possibility of traumatic arthritis supervening, then there would be an award of provisional damages in

30 *ibid*, at 841-842.
31 [1987] CLY 1194.

almost every case, which (in my view) would be absurd".³²

16.40 Having quoted these authorities Scott Baker J concluded:

"The general rule in English law is that damages are assessed on a once-and-for-all basis. Section 32A of the 1981 Act creates a valuable statutory exception. In my judgment, the section envisages a clear and severable risk rather than a continuing deterioration, as is the typical osteoarthritic picture.

In my judgment, many disabilities follow a developing pattern in which the precise results cannot be foreseen. Within a general band this or that may or may not occur. Such are not the cases for provisional damages. The courts have to do their best to make an award in the light of a broad medical prognosis

In my judgment, there should be some clear-cut event which, if it occurs, triggers an entitlement to further compensation".

The provisional view of the English Law Commission in their Consultation paper was that the judgment in *Willson* was in keeping with the Commission's original recommendation and that the law should not be changed.³³ The Commission had referred to the possibility of an "event" occurring as the distinguishing feature of "chance" cases.³⁴ The idea of an "event" did not encompass natural progression. They suggested that it would require a clear policy reason such as repeated injustice, to change the law.

16.41 In their Report, the Commission found with respect to this suggestion that:

"One third of consultees considered this suggestion. 60% of these did not favour an extension of the regime to include gradual deterioration. Over half of that 60% comprised defendant interests. Among the reasons they gave were that it would be impossible to establish legal criteria for judges to use, that gradual deterioration can already be taken into account, and that the administrative costs of the tort system would increase. 40% of those responding favoured extending the regime, particularly where employment is likely to be put at risk. This group included significant numbers of plaintiff's representatives or their interest groups.

The composition of the opposing views expressed on consultation is

32 Unreported, 19 December 1988.

33 Law Commission, *op cit*, paras 5.6, 6.41.

34 (1973) Law Com. No. 56, p88, para 238.

unsurprising. However, the fact that only 40% of the total favoured any extension of the regime has convinced us that the extent of any continuing injustice, if it exists at all, is not such that the original concept of a chance case should be altered. We also consider that the practical problems of defining gradual deterioration are significant. We therefore recommend no change".³⁵

16.42 Our own consultations revealed that there was universal support for provisional awards, again, based on a chance of serious deterioration and never based on non-medical contingencies. Such awards could be structured, if this proved desirable. A procedure of this sort would help alleviate the inaccuracy in some awards in very serious personal injuries cases and might also lead to earlier settlements and reduced delays. Furthermore, assuming that the probabilities used to calculate the size of damages for these disabilities are reasonably accurate, then insurance companies could plan future liabilities with some confidence on the basis of a number of cases. Therefore, *we would recommend the introduction of a facility for provisional awards in cases where a chance of serious deterioration in the plaintiff's health exists as a result of the wrong.*

(c) Structured Settlements

16.43 Earlier in this Report we have described how structured settlements operate in practice. We now address the crucial question. Should provision be made for structured settlements of awards, at all events where both parties consent to the arrangement?

16.44 Such a proposal could be implemented in a number of ways. For example, the initial practice of using structured settlements in North America, and the current practise in the United Kingdom, were based on a non-statutory based agreement between the respective Revenue and Insurance authorities. In North America, legislation putting the practice on a statutory footing was eventually introduced. This legislation simply guaranteed the tax free status of the periodic payments and allowed the Life Office to pay the payments directly to the plaintiff, thus simplifying the practice. The use of structured settlements has become more and more frequent in both these jurisdictions.

16.45 In many respects the adoption of structured settlements does not represent a radical alteration of the present tort based system of compensation. The rules regarding liability are not affected and the method of calculating the award is only slightly altered to accommodate changes made to tax legislation to allow for the use of structured settlements. Change is found only in the way compensation for losses (usually just future losses) in cases of serious personal injury is paid.

35 Report *op cit.* paras 5.7, 5.8.

(i) *Advantages of Structured Settlements*

16.46 A structured settlement guarantees an inflation-proofed tax free income to the plaintiff for the rest of his or her life and/or for a minimum period of years. The management and responsibility for the investment is also catered for. In this, albeit somewhat limited respect, structured settlements provide a solution to many of the problems of the once-off lump sum award.

16.47 It is often considered socially desirable that plaintiffs in severe personal injury cases should have a guaranteed income for the duration of their lives. Indeed, this strikes at the very heart of the rationale of the annual loss and multiplier approach to the traditional assessment of damages whereby the lump sum is intended to be fully exhausted at the end of the plaintiff's life. As there are so many uncertainties and difficulties for plaintiffs to face, there will either be too much damages over at the end of the plaintiff's life, which might mean that as a result of being excessively prudent the plaintiff has gone without certain care. Alternatively, the damages will be extinguished before the plaintiff has died, in which case the plaintiff will become a burden to the family and more likely to the social services system. Both of these scenarios are far from ideal. The advantage of an income secured for life is of particular benefit in impaired life cases where the projected life expectancy is uncertain. Consequently, structured settlements can have a wide application for most types of personal injury and fatal accident cases.

16.48 Plaintiffs are protected from any temptation to dissipate the lump sum and are spared some of the financial pressure that can arise with the management of large sums of money.

16.49 There can be significant savings in the costs of administration of the fund, not all of which can be recovered in the action but which would nevertheless have to be borne by the plaintiff.

16.50 Apart the tangible and intangible savings and benefits accruing to the plaintiff, the defendant can see substantial cash savings in the payment of damages arising as a result of savings in taxation on the income and in the costs of administering the fund that would otherwise have been generated by the lump sum.

(ii) *Disadvantages*

16.51 There is a potential loss of flexibility for the plaintiff once the structure is established. This problem can be overcome by the careful planning of the plaintiff's changing requirements at an early stage and also in allowing for an appropriate contingency fund at the outset. Indeed, it could be argued that prior to the accident the plaintiff probably had very little flexibility in the way he or she conducted his or her lifestyle in that he or she would have had to work to pay for regular outgoings and would not have had the opportunities available to people with capital.

16.52 We noted that structured settlements in Britain must be organised by the life office which pays the general insurer who then pays the plaintiff. This is so because, to avail itself of the taxation agreement, the life office cannot pay the plaintiff directly. Rather the funds must be channelled through the defendant insurer who will then pay the plaintiff a gross sum.

16.53 This is not the position in North America where, under current legislation in Canada and the United States, there is provision for annuities which relate to personal injury or fatal accident cases to be paid directly by the life office as agent of the insurer to the claimant without deduction of tax, on the condition that such an annuity is non-transferable, non-commutable and non-assignable.

16.54 This arrangement in Britain places the burden on the defendant insurer. As Frenkel comments:

"In the UK such a method of payment is not possible under existing tax legislation and, until it is, it is expected that a high degree of co-operation is going to be required by the general insurer in order to facilitate the administration required".

16.55 On the same point Keith Popperwell argues that:

"Political pressure is needed to streamline the method of payment and to avoid any potential loss of investment income to the General Insurer. Payment should be made direct to the plaintiff by the Life Insurer without threatening the loss of tax benefits. A relatively simple amendment by way of a Finance Act to fall in line with American and Canadian statutes is not an unattainable aim".

16.56 When a settlement is structured under the UK system, a file will remain open for the plaintiff's lifetime. The administration problems are not too

complex as payments are made by standing order, but the payments made by the life company to the general insurer are subject to deduction of tax at the standard rate. The general insurer has contracted with the plaintiff for the gross amount of the annuity and therefore has to gross up the monthly payments. However, as has been explained before, the whole transaction is tax neutral as these payments can be set off against general income tax liability.

16.57 Another potential problem is that of security. Again, McLachlin J. in *Watkins v. Olafson* in the Canadian Supreme Court comments:

"Another difficulty involves security. In the case at bar, security appears not to have been an issue, one of the respondents ordered to pay being provincial government".

Even so, concerns arise; could the plaintiff be certain that the government would not, at some future date, curtail his right to damages? Even with an apparently solvent defendant, it is unfair and unacceptable to place the plaintiff in the uncertain position of not being sure the money he needs to meet his or her needs will be forthcoming in the future. Most of those who have studied periodic payment schemes concur that they are unworkable unless sufficient security is posted. But, assuming security is necessary, how can a judge ensure compliance with an order that a reluctant defendant post security? What adverse consequences could be brought to bear on a defendant who refused or professed to be unable to post the necessary security?"

16.58 However, problems as to security can be met by the purchasing of a life policy from a registered life office and in practice this does not seem to have presented much of a problem in the United Kingdom.

16.59 One of the initial problems in the United Kingdom was the irregular use of these settlements, with only one taking place in the first two years. However, as publicity grew and more professionals became aware of the technique involved and the benefits of structured settlements, the frequency of their use increased greatly.

16.60 On the basis of experience in North America and the United Kingdom, where structured settlements have become increasingly popular on a consensual basis, *we recommend that provision be made for the use of structured settlements.*

The Commission's Approach

16.61 The Commission is satisfied that a structured settlement is a highly

appropriate way of compensating plaintiffs for future loss, pain and suffering, particularly in serious cases where awards are large. We are also satisfied that plaintiffs should be encouraged to the greatest possible extent to enter into structured settlements in these cases. The most important question to be considered is whether or not a court should have power to *compel* either or both parties to an action to enter into such an arrangement. But before we decide on that question, we will explore ways to encourage the periodic payment of damages without having resort to compulsion by the Courts.

16.62 We will first examine what can be done by way of adjustment of the tax regime.

16.63 There are two main pillars in the State's approach to tax and structured settlements:

- (1) *The Gourley Principle*³⁶ which ordains that awards take account of the deduction of tax from future earnings.
- (2) *Section 5 of the Finance Act, 1990* which provides that the income from the investment of a lump sum in total incapacity cases should be tax free.

16.64 The Commission is not going to recommend a change in the Gourley principle itself. The lump sum might be taxed as a capital gain but as tax is already deducted under the Gourley principle this would amount to double taxation and would be unfair.

16.65 It follows that the only way the tax system might encourage the use of structured settlements would be "to use the carrot rather than the stick". An attractive option would be to extend the availability of tax relief under Section 5 of the *Finance Act, 1990* to all cases in which an award or part of an award of damages for personal injuries is structured. *We recommend that tax relief be so extended.*

16.66 Furthermore, in view of the problems encountered in England outlined in paras. 16.50 to 16.53 above, *we recommend that provision be made to allow the life office pay awards directly to plaintiffs as tax free income, in their hands, that interest being unassignable.*

36

Discussed above at para 2.45 *et seq.*

16.67 Given that the present approach of the Commission is to encourage the use of structured settlements in appropriate cases rather than to have them imposed, the Commission notes the similarity between this approach and the approach to the encouragement of reconciliation or mediation in the context of judicial separation. We note in particular the obligation placed on a solicitor, by Section 5 of the *Judicial Separation Act, 1989*, to *discuss* the possibility of reconciliation or mediation with an applicant for judicial separation. *We recommend that a similar obligation to discuss a structured settlement be placed on the plaintiff's solicitor in appropriate cases.*

16.68 We considered whether or not provisions should be introduced to regulate the way damages are calculated by the courts, particularly in terms of damages for future losses. Clearly new tax provisions regarding income from structured settlements could affect the way a court calculated the size of the award, if the court knew that both parties were consenting to a structured settlement. However, to legislate for these calculations could unduly restrict the courts and create confusion amongst practitioners as to the basis upon which settlements would be negotiated.

16.69 It is best for the courts to adapt their approach to the facts of each case. So at this stage such legislation may not be necessary. Therefore, in terms of whether or not provisions should be introduced to regulate the way damages are calculated, particularly in terms of damages for future losses, *we would not recommend that provisions be introduced to alter the way the courts calculate damages awards.*

The Imposition of Structured Settlements

16.70 The most important question to be addressed is whether the court should have power to authorise a structured settlement *against the wishes* of any party to the litigation. It is useful to examine how the English Law Commission approached this question.

16.71 The English Law Commission was not impressed with arguments against structured settlements based on paternalism. In its Report, it noted that:

- (a) A right to compensation does not extend to the creation of a right in the plaintiff to demand how the compensation should be paid.
- (b) It is inconsistent to reject imposition as paternalistic whilst wishing to enhance structuring in every other way for what are essentially paternalistic reasons, the benevolent desire to give security of compensation through the period of loss.

- (c) Such freedom of choice would not have existed had the plaintiff not been injured.

16.72 In favour of structuring, the English Law Commission suggested that:

- (a) Periodic payments best replace a lost "stream" of income.
- (b) A plaintiff should not be able to claim money for a specified purpose and then not apply it to that purpose.
- (c) The State has an interest in ensuring that plaintiffs do not become dependent on social welfare, having squandered their damages.

16.73 Having rejected arguments based on principle, the English Law Commission turned to practical considerations. Noting the discount secured by the defendant in purchasing an annuity, it was very concerned as to what might happen to it if a judicial power to impose structuring were created. Structured settlements "are creatures of negotiation" born of agreement. Cases proceed to judgment because of disagreement. The Law Commission question how a judicial power could retain the flexibility of the existing regime, one element in this flexibility being the discount, which reflects the bargaining power of the parties.

"If it is the plaintiff who does not want a structure but seeks a lump sum, it does not seem right in principle for the court both to order that the award should be paid in the form of a structure and also that a percentage of the money funding the award should be discounted and kept by the defendant insurers. If it is the defendant who does not want a structure and a settlement has not been reached because of this, it does not seem right to reward the defendant for not settling and forcing the case to court by giving him a discount. While discounting cannot be justified when coercive powers are used, we believe it is justified in a voluntary system ...".³⁷

16.74 In addition to the problems relating to the discount, the English Law Commission saw problems arising from the right to appeal on imposed structuring. It suggested that this could sabotage an offer of an annuity which would have to be taken up in a limited time.

16.75 The English Law Commission's consultations on the imposition of structuring disclosed that:

37 Report *op cit.* para 3.52.

- more favoured imposition against the will of defendants than against the will of plaintiffs;
- there was a recognition that rationalisation of the tax regime would make imposition less onerous to defendants;
- where imposition against the plaintiff's will was favoured, a significant number contemplated this only being exercised where the plaintiff is not *sui juris*;
- monetary thresholds were generally not favoured;
- there was a desire to keep any power simple and a belief that this is possible;
- a broad judicial discretion was favoured;
- there was some support for the idea that imposed structuring should only apply to future losses;
- it was seen as necessary to consider the effect of any proposed power on the legal aid regime and on payments into court.³⁸

Conclusion of the English Law Commission

16.76 A recurring and important theme in their Report is that the law on structuring is still developing and that the statutory reform should help it "settle in". The Commission was satisfied that it was too soon to legislate to give the courts power to impose a structure. Reform should be confined to rationalising and building on the voluntary system, for example, by providing that a life office could pay periodic payments directly and tax free to the plaintiff.

Our Conclusions

16.77 Similar considerations informed our deliberations as informed those of the English Law Commission. Some of us were more impressed than others by their arguments in favour of court-imposed structured settlements.

16.78 There is no absolute right under the Irish Constitution to have one's damages paid in a lump sum. Assuming that the Irish Courts would adopt, as

³⁸ Report *op cit.* para 3.48.

a constitutional principle, the common law doctrine of *restitutio in integrum* i.e. of putting the plaintiff (to the extent that damages can do so) back in his pre-injury situation, the periodic payment of damages would fall comfortably within that principle. There can be no constitutional right to insist on a lump sum *instead of* a structured settlement once the settlement has a secure actuarial and medical basis.

16.79 The State would have a legitimate interest *inter alia* as the paymaster of Social Welfare, in "delimiting", under Article 43, any 'right' to squander damages or in ensuring that compensation was not squandered by the family of a helpless plaintiff. The exigencies of the common good would include the objective that the availability of compensation for future suffering or loss would endure.

16.80 Despite these considerations the Commission is, nonetheless, reluctant to rush headlong into a paternalistic recommendation which could interfere with a person's right to do as he wishes with his own property - a person's right to do wrong. While we can envisage a right to impose a structured settlement, we find it extremely difficult to set out criteria which a Court, having discretion to insist on a structured settlement, might follow. Unless a decision could be based on some obvious condition such as alcoholism or mental incapacity, it would be difficult to avoid basing such a power on educational or social criteria. Such criteria would be questionable, to say the least.

16.81 Our own consultations disclosed a majority in favour of court-imposed structuring of awards for future loss of earnings and for future care with a division of opinion on whether the part of an award for future pain and suffering should be structured. However, among those in favour of structuring, Mr. Justice Keane and Patrick Connelly S.C. were also of the opinion that a structured settlement ought to be reviewable, in a manner akin to the review procedures which used to arise under the Workman's Compensation Code. This view was opposed, strongly, by Dr. Gregg of the National Rehabilitation Board, who suggested that it constituted "an incentive to deteriorate".

16.82 The Commission is of the view that, whatever the theoretical arguments in favour of a court imposed structured settlement may be, it would be preferable to take matters one step at a time and to move to a system of structured settlements without this controversial element. Once the system has been operating successfully for a time, there may be merit in reconsideration of this issue. *Accordingly, the Commission recommends that the court should not have power to authorise a structured settlement against the wishes of any party to the litigation. This decision should be reviewed by the Commission in five years time. To enable such a review to be grounded on relevant data the Commission recommends that it be given responsibility to develop an appropriate research programme.*

16.83 The next question to be considered is whether the entitlement to have resort to the structured settlement scheme should be limited to plaintiffs with particular kinds of injuries, such as paraplegia, for example. We think that it would not be wise to introduce any such specific limitation. The strong likelihood is that the structured settlement scheme will appeal to plaintiffs who have sustained certain kinds of injury which are usually associated with high awards but it seems to us that there is no need to exclude other, possibly rare, kinds of injuries. Nothing in particular would be gained by doing so. *Accordingly, we recommend that the possibility of resort to the structured settlement scheme should not be limited to plaintiffs with particular categories of injury.*

16.84 As to fatal accident claims, we see no reason why they should be excluded and accordingly *we recommend that the structured settlement scheme should extend to fatal accident litigation.*

16.85 It is also necessary to consider whether it should be permissible for a structured settlement scheme to operate in cases where provisional damages can be awarded. We consider that there is no reason in principle why it should not, although we concede that this factor of uncertainty complicates the calculations. If the parties can agree on how the settlement is to take account of this factor, we do not see why they should be denied access to the structured settlement scheme. *Accordingly we recommend that it should be permissible for a structured settlement scheme to operate in cases where provisional damages can be awarded.*

16.86 We see no reason in principle why the possibility of a structured settlement should be excluded in cases involving self-insurers or the Motor Insurers Bureau of Ireland scheme. Again, the detail of this arrangement is a matter for discussion between the Minister and other interested parties rather than for legislative prescription. *We therefore recommend that consideration be given to extending the structured settlement scheme to (a) self-insurers and (b) cases involving the Motor Insurers Bureau of Ireland.*

16.87 The next question is whether the plaintiff should be permitted to commute his or her pension into a lump sum if the court gives its approval. Undoubtedly, such a possibility would be attractive to plaintiffs contemplating entering into structured settlement schemes. We can see no fundamental objection. The courts' role would ensure that this entitlement would not operate oppressively. *Accordingly we recommend that the plaintiff should be permitted to commute his or her pension into a lump sum if the court gives its approval.*

16.88 Where a plaintiff dies shortly after a structured settlement has come into operation it is difficult to prescribe any solution that will do full justice to the

parties' expectations as well as to the *desideratum* of finality. Any solution may be criticised for failing to deal effectively with all possible outcomes. After much thought and discussion, *we have concluded, and so recommend, that, where the plaintiff dies in these circumstances, provision should be made for the payment of one year's annuity to the next-of-kin.*

16.89 A plaintiff who obtains an award of damages for injury, pain and suffering and economic loss to date should be entitled to receive that sum immediately, rather than have it made part of a structured settlement. In our view, the structured settlement process should apply only to *future* injury and loss. A plaintiff who has suffered, say, £100,000 worth of injury and loss up to the time of the award and who is estimated as being likely to suffer a further £200,000 of injury and loss in the future should be entitled to receive £100,000 immediately. It is always possible that he or she could die in six months' time. If the £100,000 were made part of the structured settlement, there is a concern that the plaintiff and his or her estate would receive under-payment in the event of such early death. Moreover, as a matter of principle, it is hard to justify not giving to the plaintiff at the time of the judgment full compensation for what he or she has already lost. *Accordingly, we recommend that the structured settlement process should apply only to future injury and loss.*

CHAPTER 17: SUMMARY OF RECOMMENDATIONS

1. **Provision should be made for the interim award of damages:**
 - (a) such an award should not be based on need,
 - (b) the defendant's resources should not be relevant,
 - (c) it should apply to all defendants,
 - (d) it should be conditional on an admission of liability,
 - (e) it should not be made when an appeal has been lodged against liability. However, the court should have discretion to make an interim award where liability appears clear, even though contested on appeal. (Para. 16.35)
2. It should be possible to make provisional awards of damages in cases where a chance of serious deterioration in the plaintiff's health exists as a result of the wrong. (Para. 16.42)
3. Provision should be made for the use of structured settlements. (Para. 16.60)
4. Tax relief under Section 5 of the *Finance Act, 1990* should be extended to all structured settlements. (Para. 16.65)
5. It should be made possible for life assurance offices to pay awards under structured settlements directly to plaintiffs. (Para. 16.66)
6. Where an award appropriate for structuring is made to a plaintiff, that plaintiff's solicitor should be obliged to discuss the advisability of structuring the settlement with the plaintiff. (Para. 16.67)
7. We recommend no change in the way awards of damages are calculated by the courts. (Para. 16.69)
8. The court should not have power to authorise a structured settlement against the wishes of any party to the litigation. This decision should be reviewed by the Commission in five years time. To enable such a review to be grounded on relevant data, the Commission recommends that it be given responsibility to develop an appropriate research programme. (Para. 16.82)
9. Resort to a structured settlement should not be limited to plaintiffs with particular categories of injury. (Para. 16.83)

10. The structured settlement scheme should be available in fatal accident litigation. (Para. 16.84)
11. It should be permissible for a structured settlement scheme to operate in cases where provisional damages can be awarded. (Para. 16.85)
12. Consideration should be given to extending the structured settlement scheme to (a) self-insurers and (b) cases involving the Motor Insurers Bureau of Ireland. (Para. 16.85)
13. A plaintiff should be permitted to commute his or her pension into a lump sum if the court gives its approval. (Para. 16.87)
14. Where a plaintiff dies shortly after a structured settlement has come into operation, provision should be made for the payment of one year's annuity to the next-of-kin. (Para. 16.88)
15. The structured settlement process should apply only to future injury and loss. (Para. 16.89)

APPENDIX 1

Law Commission Report Draft Bill (pages 108-111)

Law Reform (Personal Injuries etc) Bill

6 - (1) If, in an action for damages for personal injuries in which judgment is given in the High Court, there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gives rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition, the following provisions of this section shall have effect in relation to the action.

(2) In the following provisions of this section -

- (a) 'the relevant event' means the event of which there is proved or admitted to be a chance as mentioned in subsection (1) above; and
- (b) 'provisional damages' means damages assessed on the assumption that the relevant event will not occur.

(3) Subject to subsection (5) below, the court on the application of the plaintiff may, if it thinks fit, award the injured person provisional damages in respect of matters falling within any of such one or more of paragraphs 7 to 12 of Schedule 1 to this Act as may be specified in the application.

(4) If the relevant event occurs at any time after an award of provisional damages has been made in respect of any such matters, the court may on the application of the plaintiff award the injured person such additional damages in respect of those matters as are appropriate in all the circumstances:

Provided that if in giving judgment for the provisional damages (with or without any other damages) the court has fixed a period running from the date of that judgment within which any application under this subsection must be made, such an application shall not, without the permission of the court, be made after the end of that period.

(5) An award of provisional damages shall not be made under this section unless the defendant or, if judgment has been or is to be given against two or more defendants, at least one of those defendants falls within at least one of the following descriptions, namely -

- (a) a public authority;
- (b) a person who is insured in respect of the plaintiff's claim for damages for personal injuries (whether or not the injuries are of the kind mentioned in paragraph (c) below);
- (c) if the injuries are injuries caused by, or arising out of, the use of a motor vehicle on a road, a person whose liability to the plaintiff in respect of the injuries either -
 - (i) is covered by a security in respect of third-party risks complying with the requirements of Part VI of the *Road Traffic Act, 1972*; or
 - (ii) would have been required by section 143 of that Act to be covered by a policy of insurance or security in respect of such risks complying with the requirements of the said Part VI but for the fact that a sum had been deposited by him with the Accountant General of the Supreme Court under section 144 of that Act.

Law Reform (Personal Injuries etc) Bill

In this subsection 'motor vehicle' and 'road' have the same meanings as in the *Road Traffic Act, 1972*, and 'public authority' includes the Crown.

(6) If in the action there is proved or admitted to be a chance that two or more such events as are mentioned in subsection (1) above will occur, subsections (2) to (5) above shall apply with such modifications as may be necessary to enable the court, on the application of the plaintiff, to award the injured person provisional damages assessed on the assumption that such one or more of those events as may be specified in the application will not occur and to enable the plaintiff, where more than one of those events is so specified, to make separate applications under subsection (4) above in respect of different events so specified (with power for the court to fix different periods under subsection (4) in relation to different events).

(7) The foregoing provisions of this section shall not prejudice any duty of the court under any enactment or rule of law or arising from any contract to reduce or limit the total damages which would have been recoverable apart from any such duty; and where judgment is given for damages consisting of or including provisional damages under this section, or consisting of additional damages under subsection (4) above, any such duty of the court to reduce the damages recoverable shall apply notwithstanding that the damages recoverable on that occasion may not be or are not the only damages recoverable in the action.

Clause 6

1. This clause implements the recommendations with regard to provisional awards in paragraphs 239-243 of the Report.
2. The provisions in this clause are aimed at enabling the court to do justice in a strictly limited type of case, namely that in which the plaintiff can prove that there is a chance, but no more than a chance, that as a result of his injuries serious consequences may occur in the future.
3. In such a case the clause provides that the plaintiff may receive an award in respect of all heads of damage, proved or admitted, but not in respect of the chance of the serious consequences and the award will be assessed on the assumption that the chance will not materialise. The clause goes on to provide that if and when the serious consequences manifest themselves the plaintiff may then return to court and claim additional damages for this further loss.
4. In order to restrict the powers conferred by the clause to those cases where their use will be appropriate the clause provides that:
 - (a) an award of 'provisional damages' (i.e. damages assessed on the assumption that the serious consequences of which there is only a chance will not occur) can only be made if the plaintiff claims relief in this form; and
 - (b) even where the plaintiff does apply for 'provisional damages', the court has complete discretion whether to make an award in this form.
5. Subsection (1) lays down the basic condition which must obtain if there is to be any award of 'provisional damages' namely that there must be a chance that at some time in the future the injured person will, as a result of the act or omission giving rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.
6. Subsection (2) labels the event of which there is thus a chance 'the relevant event', and defines 'provisional damages' as damages assessed on the assumption that this event will not occur. Thus an award of 'provisional damages' will always be smaller than an award of full damages, since the latter would include something for the possibility that the relevant event might one day occur.

7. Subsection (3) further restricts the circumstances in which 'provisional damages' can be awarded by providing that such an award may only be made on the application of the plaintiff, and goes on to give the court full discretion to grant or refuse such an application - the expectation being that the courts will award provisional damages only in cases of the sort described in paragraph 232 as 'chance' cases.

8. The reference in subsection (3) to such one or more of paragraphs 7 to 12 of Schedule 1 as may be specified in the application means that a plaintiff applying for an award of 'provisional damages' can choose whether to apply for them in respect of non-pecuniary loss and all heads of future pecuniary loss, or only in respect of some of those heads. Thus a plaintiff may wish to take his full damages for loss of earnings but may wish his damages for pain and suffering and future expenses to be assessed in the first instance on the assumption that his condition will not seriously deteriorate later on, with the possibility of coming back for an additional award in respect of these heads (but not for loss of earnings) if the relevant event occurs.

9. Subsection (4) enables a plaintiff who has been awarded 'provisional damages' on the assumption that the 'relevant event' in question will not occur to come back to the court for additional damages if that event does in fact occur. Any additional damages awarded will be limited to those heads of damages in respect of which provisional (as opposed to full) damages were awarded in the first instance, and will be assessed at whatever amount is appropriate in all the circumstances.

10. As stated in paragraph 240 of the Report, only defendants who are insured or who can properly be treated as if they were insured should have an uncertain liability hanging over them indefinitely and accordingly subsection (5) provides that an award of 'provisional damages' cannot be made unless

- (a) the defendant is a public authority or
- (b) the defendant is insured or
- (c) in road accident cases, the defendant has deposited money in the Supreme Court and is thus exempt from the insurance or other requirements of section 143 of the *Road Traffic Act, 1972*.

11. Subsection (6) makes the procedure for obtaining an award of 'provisional damages' available in cases where there is a chance of more than one relevant event occurring in the future.

12. Subsection (7) contains a saving similar to the saving in clause 2(3) - see the note on that subsection. Subsection (7) additionally makes it clear that where, for example, the plaintiff's damages are liable to reduction because of his contributory negligence, this reduction must be applied both to the award of 'provisional damages' and to any subsequent award of additional damages.

APPENDIX 2

INLAND REVENUE AND ABI

**Structured Settlement
Model Agreement**

PARTIES: (1) ("the Claimant")
(2) ("the Insurer")

WHEREAS:

- (1) The Claimant has made a claim against ("the Insured") arising out of the ("the Claim").
- (2) It is agreed that the claim shall be settled for £.....

AGREED:

- 1 The Insurer shall be substituted for the Insured to the extent that any liability of the Insured to the Claimant in respect of the claim shall attach to and be the sole responsibility of the Insurer and that the Insured shall be discharged from any such liability.
- 2 By way of settlement of the claim the Insurer shall pay or procure to be paid to the Claimant the sum of £..... and the Claimant shall accept such sum in full and final settlement of the claim, which is discharged.
- 3 Subject to the Claimant complying with Clause 4 to the satisfaction of the Insurer, the debt of £..... arising under Clause 2 shall be discharged by payments by the Insurer to the Claimant in accordance with the Schedule.
- 4.1 The Claimant shall forthwith take all necessary steps to discontinue any proceedings which have been begun or threatened against the Insurer or the Insured in connection with the Claim.
- 4.2 The Claimant shall not institute any proceedings against the Insurer or the Insured in connection with the claim.

DATED: _____ SIGNED: (1) _____ (the Claimant)
(2) _____ (for the Insurer)

APPENDIX 3

The New Rules of the Supreme Court relating to Provisional Damages

1985 No. 846 (L8)

SUPREME COURT OF ENGLAND AND WALES

The Rules of the Supreme Court (Amendment No. 2) 1985

2. The Arrangement of Orders at the beginning of the rules of the Supreme Court 1965 shall be amended by substituting for the title to Order 37 the words 'Damages: assessment after judgment and orders for provisional damages'.
3. Order 18 rule 8(3) shall be amended by inserting, after the words 'claim for exemplary damages', the words 'or for provisional damages'.
4. Order 37 shall be amended as follows:-
 - (1) there shall be substituted, for the title, the words
'DAMAGES: ASSESSMENT AFTER JUDGMENT AND
ORDERS FOR PROVISIONAL DAMAGES';
 - (2) immediately before rule 1 there shall be inserted the words
'I. ASSESSMENT OF DAMAGES AFTER JUDGMENT';
 - (3) after rule 6 there shall be added the following Part:-
'II. ORDERS FOR PROVISIONAL DAMAGES FOR
PERSONAL INJURIES'.

Application and interpretation

7.
 - (1) This part of this Order applies to actions to which Section 32A of the Act (in this Part of this Order referred to as 'section 32A') applies.
 - (2) In this Part of this Order 'award of provisional damages' means

an award of damages for personal injuries under which -

- (a) damages are assessed on the assumption that the injured person will not develop the disease or suffer the deterioration referred to in section 32A³⁹; and
- (b) the injured person is entitled to apply for further damages at a future date if he develops the disease or suffers the deterioration.

Order for provisional damages

8. (1) The Court may on such terms as it thinks just and subject to the provisions of this rule make an award of provisional damages if -
- (a) the plaintiff has pleaded a claim for provisional damages, and
 - (b) the Court is satisfied that the action is one to which Section 32A applies.
- (2) An order for an award of provisional damages shall specify the disease or type of deterioration in respect of which an application may be made at a future date, and shall also, unless the Court otherwise determines, specify the period within which such application may be made.
- (3) The Court may, on the application of the plaintiff made within the period, if any, specified in paragraph (2), by order extend that period if it thinks it just to do so, and the plaintiff may make more than one such application.
- (4) An order for an award of provisional damages may be made in respect of more than one disease or type of deterioration and may in respect of each disease or deterioration specify a different period within which an application may be made at a future date.
- (5) Orders 13 and 19 shall not apply in relation to an action in which the plaintiff claims provisional damages.

Offer to submit an award

9. (1) Where an application is made for an award of provisional damages, any defendant may at any time (whether or not he makes a payment into court) make a written offer to the plaintiff -
 - (a) to tender a sum of money (which may include an amount, to be specified, in respect of interest) in satisfaction of the plaintiff's claim for damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration referred to in section 32A; and
 - (b) to agree to the making of an award of provisional damages.
- (2) Any offer made under paragraph (1) shall not be brought to the attention of the Court until after the Court has determined the claim for an award of provisional damages.
- (3) Where an offer is made under paragraph (1), the plaintiff may, within 21 days after receipt of the offer, give written notice to the defendant of his acceptance of the offer, and shall on such acceptance make an application to the Court for an order in accordance with the provisions of rule 8(2).

Application for award of further damages

10. (1) This rule applies where the plaintiff, pursuant to an award of provisional damages, claims further damages.
- (2) No application for further damages may be made after the expiration of the period, if any, specified under rule 8(2), or of such period as extended under rule 8(3).
- (3) The plaintiff shall give not less than three months' written notice to the defendant of his intention to apply for further damages and, if the defendant is to the plaintiff's knowledge insured in respect of the plaintiff's claim, to the insurers.
- (4) The plaintiff must take out a summons for directions as to the future conduct of the action within 21 days after the expiry of the period of notice referred to in paragraph (3).
- (5) On the hearing of the summons for directions the Court shall

give such directions as may be appropriate for the future conduct of the action, including, but not limited to, the disclosure of medical reports and the place, mode and date of the hearing of the application for further damages.

- (6) Only one application for further damages may be made in respect of each disease or type of deterioration specified in the order for the award of provisional damages.
- (7) The provisions of Order 29 with regard to the making of interim payments shall, with the necessary modifications, apply where an application is made under this rule.
- (8) The Court may include in an award of further damages simple interest at such rate as it thinks fit on all or any part thereof for all or any part of the period between the date of notification of the plaintiff's intention to apply for further damages and the date of the award.

APPENDIX 4

**Florida Statutes 1991
Title XLV Torts
Chapter 768 Negligence
Part II Damages**

S.768.78 Alternative methods of payment of damage awards

(1)(a) In any action to which this part applies in which the trier of fact makes an award to compensate the claimant for future economic losses which exceed \$250,000, payment of amounts intended to compensate the claimant for these losses shall be made by one of the following means, unless an alternative method of payment of damages is provided in this section:

1. The defendant may make a lump-sum payment for all damages so assessed, with future economic losses and expenses reduced to present value; or
2. Subject to the provisions of this subsection, the court shall, at the request of either party, unless the court determines that manifest injustice would result to any party, enter a judgment ordering future economic damages, as itemised pursuant to s768.77(1)(a), in excess of \$250,000 to be paid in whole or in part by periodic payments rather than by a lump-sum payment.

(b) In entering a judgment ordering the payment of such future damages by periodic payments, the court shall make a specific finding of the dollar amount of periodic payments which will compensate the judgment creditor for these future damages after offset for collateral sources. The total dollar amount of the periodic payments shall equal the dollar amount of all such future damages before any reduction to present value, less any attorney's fees payable from future damages in accordance with paragraph (f). The period of time over which the periodic payments shall be made is the period of years determined by the trier of fact in arriving at its itemised verdict and shall not be extended if the plaintiff lives beyond the determined period. If the claimant has been awarded damages to be discharged by periodic payments and the claimant dies prior to the termination of the period of years during which periodic payments are to be made, the remaining liability of the defendant, reduced to present value, shall be paid into the estate of the claimant in a lump sum. The court may order that the payments be equal or vary in amount, depending upon the need of the claimant.

- (c) As a condition to authorising periodic payments of future

damages, the court shall require the defendant to post a bond or security or otherwise to assure full payment of these damages awarded by the judgment. A bond is not adequate unless it is written by a company authorised to do business in this state and is rated A + by Best's. If the defendant is unable to adequately assure full payment of the damages, the court shall order that all damages be paid to the claimant in a lump sum pursuant to the verdict. No bond may be cancelled or be subject to cancellation unless at least 60 days' advance written notice is filed with the court and the judgment creditor. Upon termination of periodic payments the court shall order the return of the security, or so much as remains, to the judgment debtor.

(d)(1) In the event that the court finds that the judgment debtor has exhibited a continuing pattern of failing to timely make the required periodic payments the court shall:

a. Order that all remaining amounts of the award be paid by lump sum within 30 days after entry of the order;

b. Order that, in addition to the required periodic payments, the judgment debtor pay the claimant all damages caused by the failure to timely make periodic payments, including court costs and attorney's fees; or

c. Enter other orders or sanctions as appropriate to protect the judgment creditor.

(2) If it appears that the judgment debtor may be insolvent or that there is a substantial risk that the judgment debtor may not have the financial responsibility to pay all amounts due and owing the judgment creditor, the court may:

a. Order additional security;

b. Order that the balance of payments due be placed in trust for the benefit of the claimant;

c. Order that all remaining amounts of the award be paid by lump sum within 30 days after entry of the order; or

d. Order such other protection as may be necessary to assure the payment of the remaining balance of the judgment.

e. The judgment providing for payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amounts of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Periodic payments shall be subject to modification only as specified in this subsection.

f. Claimant's attorney's fee, if payable from the judgment, shall be based upon the total judgment, adding all amounts awarded for past and future damages. The attorney's fee shall be paid from past and future damages in the same proportion. If a claimant has agreed to pay his attorney's fees on a contingency fee basis, the claimant shall be responsible for paying the agreed percentage calculated solely on the basis of that portion of the award not subject to periodic payments. The remaining unpaid portion of the attorney's fees shall be paid in a lump sum by the defendant, who shall receive credit against future payments for this amount. However, the credit against each future payment is limited to an amount equal to the contingency fee percentage of each periodic payment. Any provision of this paragraph may be modified by the agreement of all interested parties.

g. Nothing in this subsection shall preclude any other method of payment of awards, if such method is consented to by the parties.

(2)(a) In any action for damages based on personal injury or wrongful death arising out of medical malpractice, whether in tort or contract, in which the trier of fact makes an award to compensate the claimant for future economic losses, payment of amounts intended to compensate the claimant for these losses shall be made by one of the following means:

1. The defendant may make a lump-sum payment for all damages so assessed, with future economic losses and expenses reduced to present value; or

2. The court shall, at the request of either party, enter a judgment ordering future economic damages, as itemised pursuant to s768.77, to be paid by periodic payments rather than lump sum.

(b) For purposes of this subsection, "periodic payment" means provision for the spreading of future economic damage payments, in whole or in part, over a period of time, as follows:

1. A specific finding of the dollar amount of periodic payments which will compensate for these future damages after offset for collateral sources shall be made. The total dollar amount of the periodic payments shall equal the dollar amount of all such future damages before any reduction to present value.

2. The defendant shall be required to post a bond or security or otherwise to assure full payment of these damages awarded. A bond is not adequate unless it is written by a company authorised to do business in this state and is rated A + by Best's. If the defendant is unable to adequately assure full payment of the damages, all damages, reduced to present value, shall be paid to the claimant in a lump sum. No bond may be cancelled or be subject to cancellation unless at least 60 days' advance written notice is filed with the court and the claimant. Upon termination of periodic payments, the security, or so

much as remains, shall be returned to the defendant.

3. The provision for payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amounts of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made.

APPENDIX 5

New York Consolidated Laws Service (1992) Civil Practise Law and Rules

Article 50-B. Periodic Payment of Judgments in Personal Injury, Injury to Property and Wrongful Death Actions

S.5041 (e) With respect to awards of future damages in excess of two hundred fifty thousand dollars in an action to recover damages for personal injury, injury to property or wrongful death, the court shall enter judgment as follows:

After making any adjustment prescribed by subdivisions (b), (c) and (d) of this section, the court shall enter a judgment for the amount of the present value of an annuity contract that will provide for the payment of the remaining amounts of future damages in periodic instalments. The present value of such contract shall be determined in accordance with generally accepted actuarial practices by applying the discount rate in effect at the time of the award of the full amount of the remaining future damages, as calculated pursuant to this subdivision. The period of time over which such periodic payments shall be made and the period of time used to calculate the present value of the annuity contract shall be the period of years determined by the trier of fact in arriving at the itemised verdict; provided, however, that the period of time over which such periodic payments shall be made and the period of time used to calculate the present value for damages attributable to pain and suffering shall be ten years or the period of time determined by the trier of fact, whichever is less. The court, as part of its judgment, shall direct that the defendants and their insurance carriers shall be required to offer and to guarantee the purchase and payment of such an annuity contract. Such annuity contract shall provide for the payment of the annual payments of such remaining future damages over the period of time determined pursuant to this subdivision. The annual payment for the first year shall be calculated by dividing the remaining amount of future damages by the number of years over which such payments shall be made and the payment due in each succeeding year shall be computed by adding four per cent to the previous year's payment. Where payment of a portion of the future damages terminates in accordance with the provisions of this article, the four per cent added payment shall be based only upon that portion of the damages that remains subject to continued payment. Unless otherwise agreed, the annual sum arrived at shall be paid in equal monthly instalments and in advance.

(f) With the consent of the claimant and any party liable, in whole

or in part, for the judgment, the court shall enter judgment for the amount found for future damages attributable to said party as such are determinable without regard to the provisions of this article.

S.5045 Effect of death of judgment creditor

(a) Unless otherwise agreed between the parties at the time security is posted pursuant to section five thousand forty-three of this article, in all cases covered by this article in which future damages are payable in periodic instalments, the liability for payment of any instalments for medical, dental or other costs of health care or non-economic loss not yet due at the death of the judgment creditor terminates upon the death of the judgment creditor.

(b) The portion of any periodic payment allocable to loss of future earnings shall not be reduced or terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support immediately prior to his death to the extent that such duty of support exists under applicable law at the time of the death of the judgment creditor. Such payments to such persons shall continue for the remainder of the period as originally found by the jury or until such duty of support ceases to exist, whichever occurs first. In such cases, the court which rendered the original judgment may, upon petition of any party in interest, modify the judgment to award and apportion the future payments of such unpaid future damages in accordance with this subdivision which apportioned amounts shall be payable in the future as provided for in this article. In the event that the judgment creditor does not owe a duty of support to any person at the time of the death of the judgment creditor or such duty ceases to exist, the remaining payments shall be considered part of the estate of the judgment creditor. In such cases, the court which rendered the original judgment may, upon petition of any party in interest, convert those portions of such periodic payments allocable to the loss of future earnings to a lump sum by calculating the present value of such payments in order to assist in the settlement of the estate of the judgment creditor.

S.5046 Adjustment of payments

(a) If, at any time after entry of judgment, a judgment creditor or successor in interest can establish that the continued payment of the judgment in periodic instalments will impose a hardship, the court may, in its discretion, order that the remaining payments or a portion thereof shall be made to the judgment creditor in a lump sum. The court shall, before entering such an order, find that: (i) unanticipated and substantial medical, dental or other health needs have arisen that warrant the payment of the remaining payments, or a portion thereof, in a lump sum; (ii) ordering such a lump sum payment would not impose an unreasonable financial burden on the judgment debtor or debtors; (iii) ordering such a lump sum payment will accommodate the future medical, dental

and other health needs of the judgment creditor; and (iv) ordering such a lump sum payment would further the interests of justice.

(b) If a lump sum payment is ordered by the court, such lump sum shall be calculated on the basis of the present value of remaining periodic payments, or portions thereof, that are converted into a lump sum payment. Unless specifically waived by all parties, the annuity contract executed pursuant to section five thousand forty-two of this article shall contain a provision authorising such a lump sum payment if such payment is approved pursuant to this section. The remaining future periodic payments, if any, shall be reduced accordingly. For the purposes of this section, present value shall be calculated based on the interest rate and mortality assumptions at the time such a lump sum payment is made as determined by the insurer who has provided the annuity contract, in accordance with regulations issued by the superintendent of insurance.

S.5047 Settlements

Nothing in this article shall be construed to limit the right of a plaintiff, defendant or defendants and any insurer to settle property damage, personal injury or wrongful death claims as they consider appropriate and in their complete discretion.

APPENDIX 6

Deering's California Codes Annotated

The Code of Civil Procedure

Part 2. Civil Actions

Title 8. Trial and Judgment in Civil Actions

Chapter 8. Manner of Giving and Entering Judgment

Cal. Code Civ. Proc

S.667.7 (1992) Medical Negligence Actions

(a) In any action for injury or damages against a provider of health care services, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds fifty thousand dollars (\$50,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.

(b)(1) The judgment ordering the payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Such payments shall only be subject to modification in the event of the death of the judgment creditor.

(2) In the event that the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments, as specified in paragraph (1), the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including court costs and attorney's fees.

(c) However, money damages awarded for loss of future earnings

shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death. In such cases the court which rendered the original judgment, may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this subdivision.

(d) Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments shall cease and any security given, pursuant to subdivision (a) shall revert to the judgment debtor.

(e) As used in this section:

(1) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(2) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

(3) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(4) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

(f) It is the intent of the Legislature in enacting this section to authorise the entry of judgments in malpractice actions against health care providers which provide for the payment of future damages through periodic payments rather than lump-sum payments. By authorising periodic payment judgments, it is the further intent of the Legislature that the courts will utilise such judgments to provide compensation sufficient to meet the needs of an injured plaintiff and those persons who are dependent on the plaintiff for whatever recovery which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended. It is also the intent of the Legislature that all

elements of the periodic payment program be specified with certainty in the judgment ordering such payments and that the judgment not be subject to modification at some future time which might alter the specifications of the original judgment.

APPENDIX 7

Cal Code Civ Proc S. 666.7 (1992)

SUGGESTED FORMS

JUDGMENT AUTHORISING PERIODIC PAYMENTS OF PROSPECTIVE DAMAGES IN MEDICAL MALPRACTICE ACTION

[Title of Court and Cause]

The above-entitled cause came on for hearing before this court on _____, 19____ [with a jury]. _____ appeared as attorney for _____, and _____ appeared as attorney for _____. Oral and documentary evidence was duly presented and the jury was properly instructed following arguments by counsel.

The jury awarded judgment in favour of the plaintiff and against defendant as hereinafter set forth:

_____ [Specify damages to date of trial].

_____ [Specify prospective damages].

A request was made by _____ [plaintiff or defendant] that the award of prospective damages be made in the form of periodic payments of \$ ____ per ____ [month or as the case may be] until such judgment is satisfied.

It is therefore ordered that the judgment for prospective damages in the sum total of \$ ____ be made to _____ in ____ [number] instalments of \$ ____, on the ____ of each ____ [month or as the case may be], ____ [beginning on ____, 19__], or within thirty (30) days after the judgment becomes final].

_____[Set forth further provisions pertaining to the posting of security by defendant and the return of any surplus to defendant once judgment is satisfied].

_____[Set forth further provisions pertaining to assessments for failure of defendant to comply with periodic payment schedule].

Dated _____, 19__.

[Signature]

APPENDIX 8

Canada/Ontario

Courts of Justice Act, R.S.O. 1990, C.43

116.-(1) In a proceeding where damages are claimed for personal injuries or under Part V of the Family Law Act for loss resulting from the injury to or death of a person, the court,

- (a) if all affected parties consent, may order the defendant to pay all or part of the award for damages periodically on such terms as the court considers just; and
- (b) if the plaintiff requests that an amount be included in the award to compensate for income tax payable on the award, shall order the defendant to pay all or part of the award periodically on such terms as the court considers just.

(2) An order under clause (1)(b) shall not be made if the parties otherwise consent or if the court is of the opinion that the order would not be in the best interests of the plaintiff, having regard to all the circumstances of the case.

(3) In considering the best interests of the plaintiff, the court shall take into account,

- (a) whether the defendant has sufficient means to fund an adequate scheme of periodic payments;
- (b) whether the plaintiff has a plan or a method of payment that is better able to meet the interests of the plaintiff than periodic payments by the defendant; and
- (c) whether a scheme of periodic payments is practicable having regard to all the circumstances of the case.

(4) In an order made under this section, the court may, with the consent of all the affected parties, order that the award be subject to future review and revision in such circumstances and on such terms as the court considers just.

(5) If the court does not make an order for periodic payment under subsection (1), it shall make an award for damages that shall include an amount to offset liability for income tax on income for investment of the award. 1989, c.67, s.3.

APPENDIX 9

THE PERIODIC PAYMENT OF DAMAGES ACT

Her Majesty, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions

1. *In this Act*

"judgement creditor" means the person who is entitled to receive payment of, or to enforce, a judgement;

"judgment debtor" means the person obligated to make payment under any judgment or against whom the same may be enforced;

"periodic payments" means the payment of money to a judgment creditor at such intervals and in such equal or unequal amounts as are ordered by the court, and includes lump sum amounts ordered by the court to be paid at a time or times in the future.

Periodic payments permitted

2. In a proceeding where damages are claimed for personal injuries, for the death of a person, or pursuant to The Fatal Accidents Act, the court may, in its discretion, order that damages be paid in whole or in part by periodic payments.

Contents of judgment

3. Where a court orders that damages be paid by periodic payments, the judgment shall conform with the following:
- (a) the judgment shall identify each head of damage for which an award is to be made and shall state whether a lump sum or periodic payment is awarded for each head of damage so

identified;

- (b) the judgment shall, in respect of each head of damage for which a lump sum is awarded, state the amount of such lump sum;
- (c) the judgment shall, in respect of each head of damage for which periodic payments are awarded, state:
 - (i) the amount of each periodic payment;
 - (ii) the intervals between each periodic payment;
 - (iii) the date or the event upon which the periodic payments are to cease; and
 - (iv) the recipient or recipients of each periodic payment.

Security required

- 4(1) Unless the court orders otherwise, every judgment which orders that damages be paid by periodic payments is conditional upon the judgment debtor filing with the court, within 30 days of the judgment being rendered or such other time fixed by the court, security to assure the payment of the full amount of the judgment satisfactory to the court.

Form of security

- 4(2) Such security shall be in the form of an annuity contract issued by a life insurer satisfactory to the court or in any other form of security satisfactory to the court.

Effect of posting security

- 5(1) Where security is not posted and approved in accordance with section 4, the court shall, upon the request of any party, vacate those portions of the judgment in which periodic payments were awarded and substitute therefore a lump sum award or awards.

Effect of death

- 6 Where a judgment creditor dies prior to the termination date specified for a head of damage in a judgment in accordance with clause 3(c)(iii),

the remaining periodic payments for the head of damage shall continue to be paid to the estate of the judgment creditor until the applicable termination date.

Provision for inflation

- 7 A court which delivers a judgment providing for the periodic payment of damages shall, in calculating the amount of the periodic payments, make provision for the annual increase of such payments by _ per cent, which is hereby deemed to be the rate of long-term general price inflation.

Commutation prohibited

- 8 Except as provided in subsection 5(2), no award for periodic payment of damages shall be commuted into lump sum.

Garnishment limited

- 9 Periodic payments for damages for loss of future earnings are exempt from garnishment, attachment, execution and any other process or claim to the extent that wages or earnings are exempt under any applicable law.

Assignment of periodic payments

- 10 Any assignment of or agreement to assign any right to periodic payments identified in a judgment as being in respect of future care cost is void and unenforceable except as to amounts assigned to a provider of care for the cost of products, services or accommodations provided or to be provided by the assignee for such care.

Crown bound

- 11 The Crown is bound by this Act.

Reference in Continuing Consolidation

12 This Act may be referred to as chapter p32.3 of the Continuing Consolidation of the Statutes of Manitoba.

Commencement of Act

13 This Act comes into force on a day fixed by proclamation.

APPENDIX 10

REPORT OF THE JUSTICE REFORM COMMITTEE OF BRITISH COLUMBIA, 1988

Supreme Court Act

When a court awards damages in an action, normally the damages are payable in a lump sum. In some cases, however, that is not considered appropriate. For example, if a person has suffered catastrophic injuries in a car accident, possibly including brain damage, he or she will have special needs for a very long time. In those cases it may be more appropriate for the money to be used to buy an annuity. This will provide income and guarantee security for the injured person.

This type of arrangement is known as a 'structured settlement' and it is being used more and more often, usually by agreement. Some judges feel that they do not now have the authority to order payment of an award by way of structured settlement.

Recommendations 180

The Supreme Court Act, s42, should be amended to clearly give a judge the authority to order an award of damages to be satisfied by way of a structured settlement.

APPENDIX 11

List of Persons who furnished written submissions

Mr J. Comerford, Registrar of the Supreme Court
Mr Colm Condon, Senior Counsel
Mr Patrick Connolly, Senior Counsel
Mr John Daly, Department of Enterprise and Employment
Mr J.C. Delahunty, Chief Registrar of the High Court
Mr Dermot Gleeson, Senior Counsel
Mr Justice Ronan Keane, Judge of the High Court
Mr Frank Mullen, Revenue Commissioners
Mr James Nugent, Senior Counsel
Mr Pies Seagrave-Daly, Actuary

List of Persons who attended the Commission's Seminar

Mr Patrick Connolly, Senior Counsel
Mr John Dalton, Registrar of Wards of Court
Mr John A. Daly, Insurance Reform Unit - Dept. of Enterprise and Employment
Mr John Delahunty, Chief Registrar, High Court
Mr Thomas M. Gregg, Consultant, National Rehabilitation Board
Mr Henry Hickey, Senior Counsel
Mr Marcel Jacques, Office of the Revenue Commissioners
Mr Justice Ronan Keane, High Court
Ms Nuala McLoughlin, Assistant Registrar of Wards of Court
Mr Eamonn O'Dea, Office of the Revenue Commissioners

Mr Eugene O'Sullivan, Family Law Committee, Law Society

Mr Noel T. Smith, Solicitor

THE LAW REFORM COMMISSION
Ardilaun Centre
111 St Stephen's Green
Dublin 2

Telephone: 671 5699
Fax No.: 671 5316

LIST OF LAW REFORM COMMISSION'S PUBLICATIONS

- First Programme for Examination of Certain Branches of the Law with a View to their Reform (Dec 1976) (Prl. 5984) [out of print] [10p Net]
- Working Paper No. 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977) [£ 1.50 Net]
- Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (Nov 1977) [£ 1.00 Net]
- Working Paper No. 3-1977, Civil Liability for Animals (Nov 1977) [£ 2.50 Net]
- First (Annual) Report (1977) (Prl. 6961) [40p Net]
- Working Paper No. 4-1978, The Law Relating to Breach of Promise of Marriage (Nov 1978) [£ 1.00 Net]
- Working Paper No. 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (Dec 1978) [£ 1.00 Net]
- Working Paper No. 6-1979, The Law Relating to Seduction and the Enticement and Harboursing of a Child (Feb 1979) [£ 1.50 Net]
- Working Paper No. 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979) [£ 1.00 Net]
- Working Paper No. 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (Dec 1979) [£ 1.50 Net]
- Second (Annual) Report (1978/79) (Prl. 8855) [75p Net]
- Working Paper No. 9-1980, The Rule Against Hearsay (April 1980) [£ 2.00 Net]
- Third (Annual) Report (1980) (Prl. 9733) [75p Net]
- First Report on Family Law - Criminal Conversation, Enticement and Harboursing of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981) [£ 2.00 Net]

Working Paper No. 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (Sep 1981)	[£ 1.75 Net]
Fourth (<u>Annual</u>) Report (1981) (Pl. 742)	[75p Net]
Report on Civil Liability for Animals (LRC 2-1982) (May 1982)	[£ 1.00 Net]
Report on Defective Premises (LRC 3-1982) (May 1982)	[£ 1.00 Net]
Report on Illegitimacy (LRC 4-1982) (Sep 1982)	[£ 3.50 Net]
Fifth (<u>Annual</u>) Report (1982) (Pl. 1795)	[75p Net]
Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	[£ 1.50 Net]
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (Nov 1983)	[£ 1.00 Net]
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (Dec 1983)	[£ 1.50 Net]
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (Dec 1983)	[£ 3.00 Net]
Sixth (<u>Annual</u>) Report (1983) (Pl. 2622)	[£ 1.00 Net]
Report on Nullity of Marriage (LRC 9-1984 (Oct 1984)	[£ 3.50 Net]
Working Paper No. 11-1984, Recognition of Foreign Divorces and Legal Separations (Oct 1984)	[£ 2.00 Net]
Seventh (<u>Annual</u>) Report (1984) (Pl. 3313)	[£ 1.00 Net]
Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	[£ 1.00 Net]
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	[£ 3.00 Net]
Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985)	[£ 2.00 Net]
Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985) (July 1985)	[£ 2.50 Net]
Report on Offences Under the Dublin Police Acts and Related Offences (LRC 14-1985) (July 1985)	[£ 2.50 Net]

Report on Minors' Contracts (LRC 15-1985) (August 1985)	[£ 3.50 Net]
Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985) (August 1985)	[£ 2.00 Net]
Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (LRC 17-1985) (Sep 1985)	[£ 3.00 Net]
Report on the Liability in Tort of Mentally Disabled Persons (LRC 18-1985) (Sep 1985)	[£ 2.00 Net]
Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19-1985) (Oct 1985)	[£ 3.50 Net]
Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985) (Oct 1985)	[£ 2.00 Net]
Eighth (<u>Annual</u>) Report (1985) (Pl. 4281)	[£ 1.00 Net]
Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21-1987) (Sep 1987)	[£ 4.50 Net]
Consultation Paper on Rape (Dec 1987)	[£ 6.00 Net]
Report on the Service of Documents Abroad re Civil Proceedings - the Hague Convention (LRC 22-1987) (Dec 1987)	[£ 2.00 Net]
Report on Receiving Stolen Property (LRC 23-1987) (Dec 1987)	[£ 7.00 Net]
Ninth (<u>Annual</u>) Report (1986-1987) (Pl 5625)	[£ 1.50 Net]
Report on Rape and Allied Offences (LRC 24-1988) (May 1988)	[£ 3.00 Net]
Report on the Rule Against Hearsay in Civil Cases (LRC 25-1988) (Sep 1988)	[£ 3.00 Net]
Report on Malicious Damage (LRC 26-1988) (Sep 1988)	[£ 4.00 Net]
Report on Debt Collection: (1) The Law Relating to Sheriffs (LRC 27-1988) (Oct 1988)	[£ 5.00 Net]
Tenth (<u>Annual</u>) Report (1988) (Pl 6542)	[£ 1.50 Net]
Report on Debt Collection: (2) Retention of Title (LRC 28-1989) (April 1989)	[£ 4.00 Net]

Report on the Recognition of Foreign Adoption Decrees (LRC 29-1989) (June 1989)	[£ 5.00 Net]
Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989) (June 1989)	[£ 5.00 Net]
Consultation Paper on Child Sexual Abuse (August 1989)	[£10.00 Net]
Report on Land Law and Conveyancing Law: (2) Enduring Powers of Attorney (LRC 31-1989)(Oct 1989)	[£ 4.00 Net]
Eleventh (<u>Annual</u>) Report (1989) (PI 7448)	[£ 1.50 Net]
Report on Child Sexual Abuse (September 1990) (LRC 32-1990) [out of print]	[£ 7.00 Net]
Report on Sexual Offences Against the Mentally Handicapped (September 1990) (LRC 33-1990)	[£ 4.00 Net]
Report on Oaths and Affirmations (LRC 34-1990) (December 1990)	[£ 5.00 Net]
Report on Confiscation of the Proceeds of Crime (LRC 35-1991) (January 1991)	[£ 6.00 Net]
Consultation Paper on the Civil Law of Defamation (March 1991)	[£20.00 Net]
Report on the Hague Convention on Succession to the Estates of Deceased Persons (LRC 36-1991) (May 1991)	[£ 7.00 Net]
Twelfth (<u>Annual</u>) Report (1990) (PI 8292)	[£ 1.50 Net]
Consultation Paper on Contempt of Court (July 1991)	[£20.00 Net]
Consultation Paper on the Crime of Libel (August 1991)	[£11.00 Net]
Report on The Indexation of Fines (LRC 37-1991) (October 1991)	[£ 6.50 Net]
Report on The Civil Law of Defamation (LRC 38-1991) (December 1991)	[£ 7.00 Net]
Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser (LRC 39-1991) (December 1991); (4) Service of Completion Notices (LRC 40-1991) (December 1991)	[£ 6.00 Net]
Report on The Crime of Libel (LRC 41-1991) (December 1991)	[£ 4.00 Net]
Report on United Nations (Vienna) Convention on Contracts for the	

International Sale of Goods 1980 (LRC 42-1992) (May 1992)	[£ 8.00 Net]
Thirteenth (<u>Annual</u>) Report (1991) (PI 9214)	[£ 2.00 Net]
Report on The Law Relating to Dishonesty (LRC 43-1992) (September 1992)	[£20.00 Net]
Land Law and Conveyancing Law: (5) Further General Proposals (LRC 44-1992) (October 1992) [out of print]	[£ 6.00 Net]
Consultation Paper on Sentencing (March 1993)	[£20.00 Net]
Consultation Paper on Occupiers' Liability (June 1993) [out of print]	[£10.00 Net]
Fourteenth (<u>Annual</u>) Report (1992) (PN.0051)	[£ 2.00 Net]
Report on Non-Fatal Offences Against The Person (LRC 45-1994) (February 1994)	[£20.00 Net]
Consultation Paper on Family Courts (March 1994)	[£10.00 Net]
Report on Occupiers' Liability (LRC 46-1994) (April 1994)	[£ 6.00 Net]
Report on Contempt of Court (LRC 47-1994) (September 1994)	[£10.00 Net]
Fifteenth (<u>Annual</u>) Report (1993) (PN.1122)	[£ 2.00 Net]
Report on The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (LRC 48-1995) (February 1995)	[£10.00 Net]
Consultation Paper on Intoxication as a Defence to a Criminal Offence (February 1995)	[£10.00 Net]
Report on Interests of Vendor and Purchaser in Land during period between Contract and Completion (LRC 49-1995) (April 1995)	[£ 8.00 Net]
Sixteenth (<u>Annual</u>) Report (1994) (PN. 1919)	[2.00 Net]
Report on An Examination of The Law of Bail (LRC 50-1995) (August 1995)	[£10.00 Net]
Report on Intoxication (LRC 51-1995) (November 1995)	[£ 2.00 Net]
Report on Family Courts (LRC 52-1996) (March 1996)	[£10.00 Net]
Seventeenth (<u>Annual</u>) Report (1995) (P.N. 2960)	[£ 2.50 Net]

Report on Sentencing (LRC 53-1996) (August 1996) [£ 8.00 Net]

Consultation Paper on Privacy: Surveillance and the Interception of
Communications (September 1996) [£20.00 Net]