THE LAW REFORM COMMISSION OF HONG KONG

PERIODICAL PAYMENTS FOR FUTURE PECUNIARY LOSS IN PERSONAL INJURY CASES SUB-COMMITTEE

CONSULTATION PAPER

PERIODICAL PAYMENTS FOR FUTURE PECUNIARY LOSS IN PERSONAL INJURY CASES

This consultation paper can be found on the Internet at:
<http://www.hkreform.gov.hk>

April 2018

This Consultation Paper has been prepared by the Periodical Payments for Future Pecuniary Loss in Personal Injury Cases Sub-committee of the Law Reform Commission. It does not represent the final views of either the Sub-committee or the Law Reform Commission, and is circulated for comment and discussion only.

The Sub-committee would be grateful for comments on this Consultation Paper by 24 August 2018. All correspondence should be addressed to:

The Secretary
Periodical Payments for Future Pecuniary
Loss in Personal Injury Cases Sub-committee
The Law Reform Commission
4th Floor, East Wing, Justice Place
18 Lower Albert Road
Central
Hong Kong

Telephone: (852) 3918 4097

Fax: (852) 3918 4096

E-mail: hklrc@hkreform.gov.hk

It may be helpful for the Commission and the Sub-committee, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Commission will assume that the response is not intended to be confidential.

It is the Commission's usual practice to acknowledge by name in the final report anyone who responds to a consultation paper. If you do not wish such an acknowledgment, please say so in your response.

THE LAW REFORM COMMISSION OF HONG KONG

PERIODICAL PAYMENTS FOR FUTURE PECUNIARY LOSS IN PERSONAL INJURY CASES SUB-COMMITTEE

CONSULTATION PAPER

PERIODICAL PAYMENTS FOR FUTURE PECUNIARY LOSS IN PERSONAL INJURY CASES

CONTENTS

Preface

Introduction

1. In Hong Kong, the court awards pecuniary damages in personal injury cases in a lump sum. Damages for future pecuniary losses may be awarded on the same basis as damages for past pecuniary losses, that is, *restitutio in integrum* or full compensation for the loss. The claimant's past and future losses are assessed and crystallised, once and for all into a lump sum payment[1] which is determined at the date of the hearing or agreement.

2. Assessing a "*once and for all*" lump sum award is a difficult task for courts as any assessment of damages for future pecuniary loss must consider what a plaintiff might have earned but for the injury, the earning capacity of the plaintiff after the injury and any additional expenses incurred following the injury. This lump sum must reflect the present value of the plaintiff's prospective loss, that is, the plaintiff's stream of future lost earnings and/or future expenses. This conventional approach to quantify future losses by using the multiplicand/multiplier model established by case law has been generally criticised as being imprecise and unscientific.

3. In a recent case, *Chan Pak Ting v Chan Chi Kuen & Anor,*[2] Bharwaney J pointed out the option of making periodical payments as an alternative to the conventional multiplier/multiplicand approach to assessing damages for future pecuniary loss. Bharwaney J noted that the system of lump sum compensation is problematic given "*that the future may unfold in a way that makes the lump sum award either too little or too much*".[3] He mentioned that section 2 of the Damages Act 1996 (the "1996 Act") in England empowered the courts to make periodical payments that lasted the actual life time of an injured plaintiff, and to vary such payments in accordance with the rise (or fall) of the retail price index.

Terms of reference

4. In early 2015, the Chief Justice and the Secretary for Justice asked the Law Reform Commission to review this subject. The terms of reference are:

> *"To review the relevant law relating to the assessment of damages for future pecuniary loss in personal injury cases, for*

---

1 Nicholas Bevan, Theodore Huckle, Sheralee Ellis, *Future Loss in Practice: Periodical Payments and Lump Sums*, para 2.06.

2 HCPI 235/2011, HCPI 671/2007 & HCPI 228/2010.

3 HCPI 235/2011, HCPI 671/2007 & HCPI 228/2010, at 5.

the purpose of considering whether reform is needed to allow periodical payments for future pecuniary loss to be awarded, and if so, to make recommendations for reform as appropriate including, if deemed necessary, the viability and desirability of a mechanism for fixing and reviewing the presumed rate of return on investment to be applied in assessment of damages in personal injury cases."

Membership of the Sub-committee

5. In March 2015, a sub-committee was appointed to review the subject. The members of the Sub-committee are:

Mr Raymond Leung, SC *(Chairman)*	Temple Chambers
The Hon Mr Justice Bharwaney	Judge of the High Court
Miss Kitty Cheng	Legal Counsel Hospital Authority
Mr Norman Hui	Senior Teaching Consultant Department of Professional Legal Education University of Hong Kong
Mr Ros K T Lam, JP (until September 2017)	Former Assistant Commissioner of Insurance (General Business) Office of the Commissioner of Insurance
Mr Simon Lam (from October 2017)	Executive Director (General Business) Insurance Authority
Ms Lucia Lau	Senior Legal Counsel Consumer Council
Mr Mark Reeves	Managing Partner Munros Solicitors & Notaries
Mr Peter C H Tam (until September 2017)	Chief Executive Hong Kong Federation of Insurers
Mr Steve Wong Yiu Fai	Assistant Principal Legal Aid Counsel/Civil Litigation(1) Legal Aid Department

6. Ms Kitty Fung, Senior Government Counsel in the Law Reform Commission Secretariat, is the secretary to the Sub-committee.

7. Since its formation, the Sub-Committee has met on a regular basis to discuss and consider the matters within the terms of reference. The questions in this paper are the result of those discussions. They represent the Sub-committee's preliminary views, presented for consideration by the community including the general public and stakeholders, such as insurers and those with an interest in this subject generally.

8. After conducting a study, including reviewing current Hong Kong law and practice and analysing the position in a number of overseas jurisdictions, the Sub-committee is issuing this consultation paper to seek the public's view and comments on whether reform is needed of the current position as to whether or not the court should be given the power to make periodical payment orders in respect of damages for future pecuniary loss in personal injury cases in Hong Kong and, if so, what kind of reform is appropriate. The consultation period will end on 24 August 2018. The Sub-committee welcomes any views, comments and suggestions on the issues presented in this paper. These will greatly assist the Sub-committee to reach its final conclusions in this important area.

9. The Sub-committee members wish to thank Mr David Liu, Senior Manager (General Business Division) of the Insurance Authority and all the individuals and organisations for their valuable assistance in providing information and advice during the preparation of this Consultation Paper.

Overview of Consultation Paper

10. This Consultation Paper has been prepared by the Sub-Committee for the purpose of soliciting public opinion on certain preliminary questions pertinent to the introduction of a new law allowing periodical payments to be awarded for future pecuniary loss in personal injury cases in lieu of lump sum damages.

11. The consultation process is directed at gauging public opinion in a qualitative way to assist in the decision as to whether it is desirable for the court to be given, by way of legislation, the power to impose a periodical payment order ("PPO") in respect of damages for future pecuniary loss in personal injury cases, and if so, what legislation would be appropriate.

12. This Consultation Paper consists of the following chapters:

(1) Chapter 1 is an introduction to the landscape of periodical payments for future pecuniary loss in personal injury cases.

(2) Chapter 2 sets out the conventional approach towards the assessment of pecuniary damages in personal injury cases and its legal framework in Hong Kong.

(3) Chapter 3 provides an overview of the UK legal framework and its experience in awarding periodical payment orders.

(4) Chapter 4 examines the current law in various overseas jurisdictions.

(5) Chapter 5 analyses the intertwined problems of indexation and setting of the discount rate.

(6) Chapter 6 examines the problems and prospects of introducing periodical payment orders in Hong Kong.

(7) Chapter 7 is a summary of five specific questions for consultation raised in the course of the paper.

13. With the current law and the court's approach in assessing damages for future pecuniary losses, the court is forced to take up the task of "*crystal ball gazing*". This approach brings the inevitable problem that the lump sum award for future pecuniary loss is either too little or too much, and has been generally criticised as being imprecise and unscientific.

14. As an alternative, Bharwaney J astutely observed in *Chan Pak Ting v Chan Chi Kuen & Anor*[4] the option of making a PPO for future pecuniary loss, except that there was, as yet, no legislation to permit the same. The Sub-committee has explored the experiences from UK and other jurisdictions when considering those statutory models as supplemented by further sub-legislation, practice directions and judicial decisions in cases brought before the courts in those jurisdictions. The Sub-committee's views on such overseas experiences provide guidance on the consideration as to the desirability and viability of introducing similar legislation for Hong Kong.

15. An important question relating to periodical payments is the setting of discount rates for the selection of multipliers in assessing damages in personal injury cases. This question, along with possible problems arising therefrom that may be encountered by various stakeholders, is also explored in this Consultation Paper.

16. In Hong Kong, a lump sum award is made at the time of trial to compensate for a continuing stream of income, which would otherwise have to be earned in the future if the injury had not been sustained, and to cover a continuing stream of expenditure to be incurred in the future as necessitated by the injury. The discount of the lump sum award is made in respect of income and expenditure that would only arise in the future. The measure of the discount is the presumed rate of return, which can reasonably be expected on that sum of damages if invested in such a way as to enable the plaintiff to meet the whole amount of the loss during the entire period.

---

[4] HCPI 235/2011 [2013] 1 HKLRD 634 at paras 5-6 and HCPI 235/2011 [2013] 2 HKLRD 1 at para 128.

17. Due to changes in the financial landscape, it is unrealistic to have a presumed rate of return of 4 to 5% as was held in *Chan Pak Ting*. Nonetheless, the setting of the discount rate would involve a very costly exercise, and is often unaffordable for plaintiffs to challenge the current discount rate. The Sub-committee invites the opinion of the public on whether there is a need for a mechanism to set the discount rate at appropriate periods inclusive of who or which authority should be empowered to set the discount rate. The Sub-committee would also consult the public whether or not the Chief Justice or any other person or body should be so empowered.

18. While a PPO regime would avert the risk of over-compensation or under-compensation in awarding damages, the Sub-committee noted some potential obstacles when implementing periodical payments in Hong Kong. The paying party, particularly insurers, may take a sceptical view towards PPOs because of the perceived risk of uncertainty in relation to index-linked payments, and there is also the concern of the windfall gains that may arise due to an early death of the plaintiff if a lump sum award is made. There are also questions on whether PPOs could or would be applied to all ranges of pecuniary damages or to "*catastrophic cases*" only, and the circumstances for reviewing or revising a PPO due to changes in circumstances of the injured person, who is a recipient of payments under the PPO.

19. The Sub-committee wishes to highlight these aspects of concern and to gauge the sentiment of the public and stakeholders by inviting comments and submissions on several open-ended questions. These questions, as set out in this Consultation Paper, are summarised as follows:

(i) Whether the court should be given, by way of legislation, the power to make PPOs in respect of damages for future pecuniary loss in personal injury cases?

(ii) What mechanism should be adopted for the formulation and promulgation of the discount rate?

(iii) What factors and limitations, if any, should be imposed on the court's power to award and review PPOs?

(iv) What are the circumstances for reviewing PPOs and related contingencies, and whether the current regime of awarding damages should co-exist with a PPO regime?

(v) Whether the court should take into account the security, funding options and suitability of a paying party before making a PPO?

20. Adopting an open approach, the Sub-committee would welcome views, comments and suggestions on any issues discussed in the Consultation Paper.

Chapter 1

An introduction – Periodical payments for future pecuniary loss in personal injury cases

Judicial intuition – forced "*crystal ball gazing*"

1.1 Over a century ago, Lord Blackburn in *Livingstone v Rawyards Coal Co*[1] defined the measure of damages as "*that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting compensation or reparation*". In the shorthand of lawyers, this is often referred to as the principle of "*restitutio in integrum*".[2]

1.2 Until the recent reform, damages in tort are almost invariably assessed and ordered by way of a lump sum. Despite the fact that such assessment would necessarily involve projection into the future, for instance, as to the presumed rate of return on investment and the life expectancy of the injured person concerned, which is attendant upon by a wide range of vicissitudes, and as to the effects of numerous imponderables, such as the rate of inflation affecting the price of goods and services, the court is accustomed to exercise judicial intuition.[3] In practical terms, this is not far from guesswork or *"crystal ball gazing"*.

1.3 It would appear that the court is forced to take up the unenviable task of arriving at a lump sum award by a tendency, amongst lawyers and the parties concerned, to take it for granted that only a one-off lump sum constitutes acceptable compensation or proper assessment of damages. This tendency was noted but rejected by the Royal Commission on Civil Liability and Compensation for Personal Injury (the "Pearson Commission Report").[4]

---

1 (1880) 5 App. Cas. 25 at 39.

2 See, for instance, Earl Jowitt in *British Transport Commission v Gourley* [1956] AC 185 at 197.

3 Litton VP in *Chan Pui Ki v Leung On* [1996] 2 HKLR 401 said *"We would unhesitatingly reaffirm the statement of principle above, and adopt what Mustill, LJ said in Cunningham v Camberwell Health Authority [1990] 2 Med LR 49, at 53:*
'What happens in practice is that the judge adopts an intuitive process buttressed by reference to previously decided cases. These cases partly operate as reference points whose features are compared with those of the case under consideration and partly form the basis of a general climate of opinion on the proper multiplier in a particular type of case with which a judge of long experience in the field will be entirely familiar. But it must be observed that these previous cases themselves must ultimately be intuitive in origin.'"

4 The Pearson Commission Report, Vol.1, p.47, at para 178. See also J Fleming, "Damages: Capital or Rent?" (1969) 19 U Toronto LJ 295; Donald Harris, Remedies in Contract and Tort (1988) pp. 275-277 discussed in The Law Commission (Law Com No. 224) "Structured Settlements and Interim and Provisional Damages" (September 1994), Cm 2646, at p.9 (n.4).

1.4 In giving directions for actuarial evidence to be adduced in the recent case of *Chan Pak Ting v Chan Chi Kuen* [2013] 1 HKLRD 634, Bharwaney J duly observed that:

> *"The desire for finality has produced a system of awarding damages which requires the trial judge to assess and award one lump sum representing the best estimation of these future losses and expenses. The problem with this approach is that the future may unfold in a way that makes the lump sum award either too little or too much: too little, if, for example, the award is exhausted by increased expenditure; and too much, if, for example, the plaintiff's actual life turns out to be much shorter than estimated at the time of trial. These weaknesses in the system of lump sum awards prompted the Pearson Commission to propose, by a majority, in 1978 that the court should in general make their awards in the form of periodical payments in respect of future pecuniary loss caused by serious and lasting injury and that the periodical payments should be subject to later revision when there was a material change in circumstances."*

A hard lesson learned from history

1.5 The lump sum award and its associated problems were outlined by Lord Scarman over 30 years ago in the case of *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] 1 AC 174 (at 182), when he stated:[5]

> *"The course of the litigation illustrates, with devastating clarity, the insuperable problems implicit in a system of compensation for personal injuries which (unless the parties agree otherwise) can yield only a lump sum assessed by the court at the time of judgment. . . The award, which covers past, present, and future injury and loss, must, under our law, be of a lump sum assessed at the conclusion of the legal process. The award is final; it is not susceptible to review as the future unfolds, substituting fact for estimate. Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering - in many cases the major part of the award - will almost surely be wrong. There is really only one certainty: the future will prove the award to be either too high or too low."* [emphasis added]

1.6 Robin De Wilde, writing in 2005 at the advent of the implementation of court ordered periodical payments by virtue of section 100 of the Courts Act 2003 (amending section 2 of the Damages Act 1996) referred to the observation of Master Lush of the Court of Protection and drew attention

---

[5] See Jennifer Stone, "Damages Awards: Lump Sums and Periodical Payments", Chapter 14, *Clinical Negligence*, edited by Dr Michael Powers QC & Dr Anthony Barton (5th Ed), at 14.10.

to the cruel facts arising from the *Lim Poh Choo* case, describing them in the following terms:

> *"At the time when Lim Poh Choo was decided (1980) it was regarded as the largest award of personal injury damages. It was settled for, in round terms, £250,000. Care at the time of settlement was provided for at the rate £8,000 per annum. According to the RPI that should now be £25,000 per annum. Her present actual Nursing Home costs are £65,000 per annum. She is now aged 69. She presently has £1.375 million under management. You will be astonished to know that what is left is not sufficient. Such results are far from encouraging. The law is only able to reflect the imperfections of life and the human condition. It cannot aspire to more than that."* [6]

1.7 Anecdotal as the story may be, it is a timely reminder of the problems and pitfalls embedded in a lump sum award.

The impetus for a change to periodical payments

1.8 In *Lim Poh Choo*, Lord Denning MR in the English Court of Appeal [7] was the fore-runner amongst the advocates for court ordered periodical payments under the then existing rules of the court, treating it as a form of interim payment.[8] In the House of Lords, reservation was expressed by Lord Scarman (at 182-183).

1.9 Regardless of the mechanism whereby an order for periodical payments may be made, there is no question that it would satisfy the requirement under the principle of *"restitutio in integrum"*. Just because the award is not by way of a lump sum and instead through a stream of regular payments, the injured person should not think that he is short-changed. Lord Steyn in *Wells v Wells* [1999] 1 AC 345 (at 384) said:

> *"The solution is relatively straightforward. The court ought to be given the power of its own motion to make an award for periodic payments rather than a lump sum in appropriate cases. Such a power is perfectly consistent with the principle of full compensation for pecuniary loss. Except perhaps for the distaste of personal injury lawyers for change to a familiar system, I can think of no substantial argument to the contrary. But the judges cannot make the change. Only Parliament can solve the problem."* [emphasis added]

---

6 Robin De Wilde "Periodical Payments – a journey into the unknown", JPIL (2005) 320.

7 [1979] QB 196 (at 216).

8 Similar sentiment was expressed by Lord Clarke in *Simon v Helmot* (supra) at para 88 c.f. Lord Dyson's contrary opinion in at para 105.

1.10 In recent years, the problems embedded in the inaccuracy or insufficiency of a lump sum award (arrived at by crystal-ball gazing) have been exposed or accentuated by the changing landscape in the financial market wherein injured persons and insurers alike found themselves.

1.11 The financial meltdown in 1998 brought to the forefront the validity of the presumed rate of return of 4 to 5% laid down in *Cookson v Knowles* [1979] AC 556 (based on investment in equities) or 3% in *Wells v Wells* [1999] 1 AC 345 (based on "*net*" return on Index-Linked Government Stocks "ILGS"). This has a direct impact on assessment of damages in personal injury cases since the presumed rate of return is the obverse side of the discount rate (the "Discount Rate") used to reduce the amount of future loss (an element in the lump sum award) on the assumption that the damages paid today would, when invested, attract a certain rate of return.

1.12 Despite the downward adjustment of the rate of return on investment (based on ILGS) to 2.5% by an Order of the Lord Chancellor promulgated on 25 June 2001,[9] the presumed rate of return (net of tax and inflation) was still far from being realistic. There was simply no reliable investment vehicle, which could bring in that sort of return. However, that was still the Discount Rate to be applied for assessment of damages in a lump sum.

1.13 Thereafter, the aftermaths of the financial *tsunami* in 2008 sounded another alarm bell for the need to overhaul the system of compensatory damages. Various governments with controlling interests in the global economy responded to the financial *tsunami* by increasing money supply (known as "*quantitative easing*") with the effect of driving interest rates down to almost zero.

1.14 The immediate effect was that the presumed 2.5% net return on ILGS (under the Lord Chancellor's 2001 Order) was simply unachievable. This was recognised by the Privy Council in *Simon v Helmot*[10] on appeal from the Royal Court of Guernsey. To put it bluntly, the 2001 Order has become a dead letter.

1.15 In Hong Kong, Bharwaney J in *Chan Pak Ting v Chan Chi Kuen* [2013] 2 HKLRD 1, with the assistance of actuarial and economic experts, also embarked on a critical analysis on the validity of the presumed rate of return of 4.5% adopted (from *Cookson v Knowles* [1979] AC 556) by the five-member bench of the Court of Appeal in *Chan Pui Ki v Leung On* [1996] 2 HKLR 401. Not surprisingly, the learned judge similarly found that 4.5% return was unrealistic and unachievable. Instead, a range of Discount Rates corresponding to the duration of future expenses to be incurred has been laid

---

9 The 2001 Order (dated 25 June 2001) issued in the exercise the Lord Chancellor's power under section1 of the Damages Act 1996, followed by an explanatory statement dated 27 July 2001 in the face of challenges from various quarters.

10 [2012] UKPC 5.

down by the learned judge[11] which was approved and adopted by the Court of Appeal in the subsequent case of *Chan Wai Ming v Leung Shing Wah* [2014] 4 HKLRD 669.

1.16 The revision of the Discount Rate in *Chan Pak Ting (supra)* has served to redress the imbalance in favour of defendants and their insurers, which had resulted in under-compensation. However, that is only one part of the equation. The selection of multiplier(s) in the assessment of future losses still has to be made amidst the imponderables surrounding the life expectancy of the injured person and vicissitudes attendant upon his personal circumstances.

1.17 Time and again, a disproportionate amount of time and legal costs are incurred to resolve complex issues arising in the assessment of damages, which strikes a discordant note with the principle of cost effectiveness and efficiency in the administration of justice as enunciated in the Civil Justice Reform introduced since April 2009.

1.18 It would appear that the obvious answer to this remaining part of the equation is to bestow upon the court a power to enquire into the suitability of and, where appropriate, to make award of damages, in whole or in part, by way of periodical payments.

1.19 The concept of periodical payment is not new. Under common law, a "*structured settlement*" voluntarily agreed upon by the parties can be made an order of the court. However, to avoid unnecessary jurisdictional argument, if a regime of periodical payments is to be introduced, it is better done by way of statutory intervention.[12]

1.20 In the United Kingdom, the regime of court ordered periodical payments has come into force since 1 April 2005.[13] Bharwaney J summarised the UK regime in the following terms:[14]

> *"... In the UK, the courts are empowered to make periodical payments that* ***last the actual life time*** *of the injured plaintiff; the payments can* ***vary in accordance with the rise (or fall) of retail price indices****; and, in the case of periodical payments to cover the costs of* ***future care****, the periodical payments can be* ***varied in accordance with earnings related inflation****, which may rise at a higher rate than price inflation and which can be ascertained by reference to earnings data such as that provided by the "Annual Survey of Hours and Earnings: Occupational Earnings for Care Assistants and Homecarers", commonly referred to as ASHE 6115. The court may not make a*

---

11 Minus 0.5% (up to 5 years), 1% (up to 10 years) and 2.5% (beyond 10 years).

12 Bharwaney J in *Chan Pak Ting v Chan Chi Kuen* [2013] 1 HKLRD 634, at para 6.

13 By virtue of section 100 of the Courts Act 2003 (refining section 2 of the Damages Act 1996).

14 See footnote 12 above.

periodical payment order unless it is satisfied that the continuity of payment is ***reasonably secure****."* [emphasis added]

1.21 In the main, the purpose of this Consultation Paper is to identify the problems of the current law and practices in assessing damages, in particular, future pecuniary losses in personal injury cases, arising from the uncertainties and imponderables attendant thereupon and to explore the prospects of introducing a regime whereby the Court is empowered to award damages, in whole or in part, by way of periodical payments so that the risks of under-compensation or over-compensation can be averted altogether. In this regard, assistance will be drawn from overseas experience.

1.22 As for Hong Kong, it is instructive to note that there has been no significant difference between price inflation and wage inflation at least over the last decade,[15] which may make indexation of periodical payments easier. Further, Hong Kong benefits from a simple system of taxation and there is no tax on damages. Medical services in the public sector are heavily subsidised and non-means-tested. Nor are social welfare benefits deductible from the award of damages.[16] All these are factors conducive to the implementation of a regime of periodical payments.

1.23 Naturally, a system of periodical payments can only work efficiently where a generally accepted Discount Rate can be swiftly applied for the purpose of selecting future multiplier(s) to arrive at a lump sum figure against which a proposed periodical payments order can be compared.

1.24 Furthermore, with changing economic and financial circumstances, it is essential to explore the feasibility and viability of a mechanism for reviewing the Discount Rate from time to time. It is both unreasonable and unrealistic to expect individual litigants to engage in the costly exercise of adducing economic evidence using their own resources in every case.

1.25 Against this background, the terms of reference of the Sub-committee have been extended to cover an exploration of the desirability and viability of a mechanism for periodical revision by a competent authority of the Discount Rate used for assessing damages for future losses in personal injury cases. This is a topic upon which judicial sentiments have been repeatedly expressed.[17]

1.26 Incidentally, considerations will also be given to the desirability of and, if deemed appropriate, the mechanics for allowing the dependants of a recipient of periodical payments to lodge a claim for "*loss of dependency*"

---

15 Only 0.43% in the period from 2001-2012, see Bharwaney J in *Chan Pak Ting v Chan Chi Kuen* [2013] 2 HKLRD 1 (at paras 34-39).

16 *Tang Kwong Chiu v Lee Fuk Yue* [1980] HKLR 588 and *Wong Kou-shee v Au Yeung Wing Keung* [1981] HKLR 249 and c.f provisions under the Social Security (Recovery of Benefits) Act 1997 (UK).

17 Cheung JA in *Chan Wai Ming v Leung Shing Wah* [2014] 4 HKLRD 669 (at para 8.1) and Bharwaney J in *Chan Pak Ting v Chan Chi Kuen* [2013] 2 HKLRD 1 (at paras 126-128) c.f. power of the Lord Chancellor under section 1 of Damages Act 1996.

where the recipient dies prematurely (i.e. during the remainder of the estimated working life which has been shortened by the injury in respect whereof the defendant is liable).

Question 1

We invite submissions as to:

Whether, as a matter of principle and notwithstanding the need for further exploration as to various aspects of operational feasibility, the court should be given, by way of legislation, the power to make periodical payment orders in respect of damages for future pecuniary loss in personal injury cases.

Chapter 2

Legal framework – Conventional approach towards assessment of damages

2.1 In this chapter, the conventional approach towards assessment of pecuniary damages in personal injury cases will be discussed so as to lay the foundation for exploration of the desirability and viability of "*periodical payments*" later in this Consultation Paper.

Current position under Hong Kong law

2.2 The law of Hong Kong, as it now stands, is that the court must assess damages once and for all in a lump sum save in those cases that qualify for an award of provisional damages.[1]

2.3 Damages for future pecuniary losses may be awarded on the same basis as damages for past pecuniary losses, that is, *restitutio in integrum* or full compensation for the loss. Two main categories of loss may be compensated:

> *"First, an award can be made for the plaintiff's future loss of salary, wages, profits and benefits from the date of trial until the date he could reasonably be expected to have ceased earning. Second, an award can be made for the extra financial expenses caused by the injury, from the date of the trial until the date it would reasonably be expected that such extra financial expenses will no longer be incurred."*[2]

2.4 This is a difficult task for the courts as any assessment of damages for future pecuniary loss must consider what a plaintiff might have earned but for the injury, the earning capacity of the plaintiff after the injury and any additional expenses incurred following the injury. The assessment of damages must also be done as a lump sum which "*is not susceptible to review as the future unfolds*".[3]

---

1 Bharwaney J in *Chan Pak Ting v Chan Chi Kuen* [2013] 1 HKLRD 634 (at Para. 6), section 56A of the High Court Ordinance (Cap 4) and Order 37, rr.8 to10 of the Rules of High Court discussed in Chapter 5 below.

2 *Hong Kong Personal Injury Service* (LexisNexis Butterworths) Vol 1, at 1555-1600.

3 *Lim Poh Choo v Camden & Islington Area Health Authority* [1980] AC 174 (HL).

2.5 This lump sum must reflect the present value of the plaintiff's prospective loss, that is, the plaintiff's stream of future loss of earnings and/or future expenses. Addressing this difficult question, the courts of England developed a method which has been followed in Hong Kong. Litton VP in the leading case of *Chan Pui Ki (an infant) v Leung On & The Kowloon Motor Bus Co (1933) Ltd*[4] *("Chan Pui Ki")* described this as the "*conventional method of assessing the appropriate lump sum to compensate for loss of future earnings*."[5] The method utilised is the multiplier/multiplicand model which has been summarised by Lord Fraser, speaking for the Privy Council in *Lai Wee Lian v Singapore Bus Service (1978) Ltd*[6] as follows:

> *"The appropriate award for loss of present and future earning capacity falls to be assessed by taking a suitable multiplicand (representing the periodical amount which, but for the accident, the plaintiff might have been expected to earn) and applying to it a suitable multiplier (representing the number of years during which she might have been expected to continue earning, subject to the discounts to be referred to hereafter)."*[7]

2.6 Determining damages for future pecuniary loss using the multiplicand/multiplier model has been generally criticised as being imprecise and unscientific. Nonetheless, Litton VP in *Chan Pui Ki* justified the use of the method as follows:

> *"Crude though the method might be, it is nevertheless a realistic acknowledgement of the inherent limitations of the whole exercise. It is based upon the applied wisdom of the courts over many years. In selecting a particular multiplier the court would be able to make comparisons with multipliers used in similar cases … It would be wise to bear in mind that the assessment of damages for future pecuniary loss can never be a mere matter of mathematics. Whilst the assessment may become more sophisticated as the years go by, and calculations are made in an attempt to achieve greater precision, they may give a false appearance of accuracy."*[8]

2.7 The multiplicand/multiplier model seeks to calculate compensation for future pecuniary losses which generally consist of loss of future income and benefits and future expenses due to the plaintiff's injury. These may manifest in a few ways, depending on the plaintiff's circumstances. In most cases a single assessment is made for the plaintiff's future loss of income and benefits. In some cases, a separate assessment may need to be made to account for a plaintiff's loss of future income after the cessation of employment, such as pension, superannuation etc. Furthermore, if the injury

---

4 [1996] 2 HKLR 401.
5 At 411B-C.
6 [1984] 3 WLR 63 (PC).
7 *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] 3 WLR 63 (PC), at 69.
8 Same as above, at 411C.

has shortened a living plaintiff's life expectancy and therefore earning capacity, a plaintiff may claim as damages the income and benefits that might have been earned in those "*lost years*".[9]

2.8 In each of these periods, the assessment of both the multiplicand and multiplier follows the same basic procedure. The objective of the method is to assess at trial a lump sum compensation which the plaintiff is expected to invest at an assumed real rate of return of 4-5%.[10] The total sum awarded should be exhausted (by the plaintiff's drawing down on both the capital invested and the income from the investment) by the end of the period contemplated by the court, usually the plaintiff's retirement date or, as the case may be, the end of the period during which medical or other expenses needed to be incurred by reason of the injury.[11]

A. Damages for future pecuniary losses (earnings and expenses)

2.9 Turning first to a plaintiff's future loss of earnings, the courts in Hong Kong have generally followed the law in England in determining the multiplicand and multiplier to assess this loss.

2.10 This method involving the use of a multiplicand and a multiplier is also applicable for assessment of other heads of future pecuniary losses such as medical expenses and nursing care.

The multiplicand

2.11 The multiplicand comprises the income and benefits that the plaintiff would have earned but for the injury. Where a plaintiff was employed at the date of injury, this assessment is a relatively straightforward question of fact and follows the same process as determining a plaintiff's pre-trial loss of income from the date of injury.

2.12 The starting point is to determine a plaintiff's monthly income and benefits at the date of injury. Income includes wages, salary, profits, tips, bonuses and other extra pay. The possibility of income and benefit increases in the future may also be considered provided that evidence is adduced to show a reasonable likelihood of such future increases.[12]

---

9 *Hong Kong Personal Injury Service* (LexisNexis Butterworths) Vol 1, at 1701.

10 See generally *Cookson v Knowles* [1979] AC 556 (HL) as adopted in *Chan Pui Ki v Leung On* [1996] 2 HKLR 401 (now superseded by the range of Discount Rates from -0.5% to 2.5% as laid down in *Chan Pak Ting v Chan Chi Kuen* [2013] 2 HKLRD 1 and endorsed by the Court of Appeal in *Chan Wai Ming v Leung Shing Wah* [2014] 4 HKLRD 669).

11 *Hong Kong Personal Injury Service* (LexisNexis Butterworths) Vol 1, at 1701.

12 Same as above, at 1703.

2.13 Where a plaintiff is not employed at the date of injury, determining a multiplicand can be more difficult. The appropriate considerations will differ according to whether a plaintiff is temporarily unemployed, too young to be employed or is not employed for some other reasons.[13]

The multiplier

2.14 The multiplier is intended to convert the multiplicand, the current annual loss of a plaintiff, into a lump sum compensation which represents the present value of the plaintiff's prospective loss. This function is set out in detail by Hobhouse J in *Willett v North Bedfordshire Health Authority*:[14]

> *"The function of the multiplier of an annual sum is first to convert one or more annual sums, that is, items of expenditure, into a single capital sum. It is, secondly, to allow for the advancement of the payment or payments that are being made. It is, thirdly, to allow for contingencies and other adjusting factors that have to be taken into account."*[15]

2.15 In Hong Kong, the Court of Appeal in *Chan Pui Ki* has made it clear that the "*conventional*" approach to selecting a multiplier should be followed[16] and that the "*actuarial method*" of using actuarial tables and statistical and economic data which has found favour in Australia and Canada is not to be used.

2.16 Since the decision of *Chan Pui Ki*, the economic situation and the state of the financial markets characterised by ultra-low interest rate (and hence low return on investment) were such that they prompted Bharwaney J to direct the admission of economic evidence in *Chan Pak Ting v Chan Chi Kuen*[17] to examine the validity of the net rate of return of 4 to 5% derived from *Cookson v Knowles* [1979] AC 556 and adopted in *Chan Pui Ki*.

2.17 The presumed net rate of return of 4 to 5% has since been superseded by the series of Discount Rates from -0.5% (for loss up to 5 years),

---

13 If a plaintiff is temporarily unemployed, the courts should consider the plaintiff's chances of obtaining employment in the future and the likely income and benefits that would result. If a plaintiff is too young to be employed, the court must make the best possible estimate on what career the child would have pursued and use that estimate to calculate future earnings. This is the case even for a very young child, as demonstrated in the Privy Council case of *Jamil bin Harun v Yang Kamsiah* [1984] A.C. 529.

14 [1993] PIQR Q166.

15 [1993] PIQR Q166, at Q167.

16 *Hong Kong Personal Injury Service* (LexisNexis Butterworths) Vol 1, at 1701.

17 In *Chan Pak Ting v Chan Chi Kuen* [2013] 1 HKLRD 634, Bharwaney J made the following direction in view of the evidence that the economic conditions of Hong Kong may have changed since the 1996 Court of Appeal decision in *Chan Pui Ki*. *"(1) There be a trial of the following preliminary issue in the captioned cases: Whether, having regard to economic developments from 1995 up to the present time, the Cookson v Knowles assumption of a net rate of 4.5% remains valid in Hong Kong and, if not, what is the net rate of return based upon which multipliers ought to be assessed and awarded …*"

1% (for loss up to 10 years) and 2.5% (for loss over 10 years) as laid down by Bharwaney J in *Chan Pak Ting v Chan Chi Kuen* [2013] 2 HKLRD 1 and endorsed by the Court of Appeal in *Chan Wai Ming v Leung Shing Wah* [2014] 4 HKLRD 669.

2.18 It is instructive to note that this is a very costly exercise and it is unreasonable and unrealistic to expect individual litigants to have the resources to adduce economic evidence in every case. Hence, the desirability and viability of a mechanism for reviewing from time to time the presumed rate of return (hence Discount Rate in selecting the multiplier for future losses) amidst changing economic and financial circumstances need to be explored.[18]

2.19 The conventional approach, which takes into account multipliers used by courts in similar cases together with the plaintiff's circumstances, requires a multiplier to be selected with respect to a plaintiff's future prospects and discounted for future contingencies and the increased value of a lump sum payment for future losses.[19] An award by way of a lump sum equivalent to the product of the multiplier and the multiplicand is supposed, when invested at the assumed net rate of return, to provide an income stream, to replace the loss of future earnings.

2.20 When selecting a multiplier, the first consideration is the period over which future loss of income and benefits will occur.[20] Where a plaintiff was earning income at the time of the injury, the only date to be determined is the date at which the plaintiff would stop earning, the date of retirement.

2.21 For young plaintiffs or those not yet employed, a determination of when earning would commence is also necessary. A court may take into account evidence of a plaintiff's likely career path, the nature of a career which may entail earlier or later retirement, pre-existing health conditions which may shorten expected working life and other relevant factors.

2.22 It used to be the practice of judges that the relevant period for fixing the multiplier (whether assessing future loss of earnings or future expenses) was to be discounted to reflect two major factors, as described by Lord Fraser in *Lai Wee Lian v Singapore Bus Service (1978) Ltd:*[21]

> *"First, there are the inevitable contingencies and uncertainties of human life and working capacity. Quite apart from this action, the appellant might have died or have been incapacitated by some other accident or by illness at any time during the 28 years. The chance of any of these things happening is entirely unpredictable in any individual case. The second factor is more susceptible of measurement; it is that the earnings which the*

---

18 See Chapter 5.

19 *Hong Kong Personal Injury Service* (LexisNexis Butterworths) Vol 1, at 1753.

20 Same as above, at 1754.

21 [1984] 3 WLR 63 (HL).

appellant is assumed to have lost would have been spread over her whole future working life whereas any award of damages will be paid to her as a lump sum now. Some discount is required in respect of this early payment. The practice in England is to allow for both these factors (contingencies and advance payment) together by reducing the figure for the multiplier substantially below the number of years during which earning capacity is assumed to have been diminished, and applying the reduced figure as a direct multiplier …. They consider that 15 years is appropriate as the multiplier to be directly applied according to English practice, to allow for discounting the initial figure of 28 in respect both of future contingencies and advance payment."[22]

2.23 However, it has to be borne firmly in mind that there is a factual presumption that the injured person has an average life expectancy and it is for the defendant to prove to the contrary (see *Rowley v London and North Western Railway* (1873) LR 8 Ex 221). Invariably, reference will be made to *Hong Kong Life Tables*[23] which would have already taken into account the general mortality risk amongst the population.

2.24 To rebut the presumption, expert medical evidence is normally required (see *Rawlinson v Cooper* [2002] EWCA Civ 392). Such expert evidence would have taken into account the specific mortality risks attendant upon the injured person.

2.25 Once the life expectancy of the injured person or the remainder of his working life or the future period for which expenses have to be incurred, as the case may be, has been agreed by the experts or found by the Court, there is no longer any room for "*judicial discounting*" contrary to the previous practice which has prevailed for some decades (see Lord Lloyd in *Wells v Wells*).[24]

2.26 In both England and Hong Kong the selection of the multiplier used to be an exercise based on judicial experience and intuition as guided by reference to multipliers adopted in comparable cases. The Hong Kong Court of Appeal in *Chan Pui Ki* described the process of the selection of a multiplier as follows:

"What happens in practice is that the judge adopts an intuitive process buttressed by reference to previously decided cases. These cases partly operate as reference points whose features are compared with those of the case under consideration and partly form the basis of a general climate of opinion on the proper multiplier in a particular type of case with which a judge of long experience in the field will be entirely familiar."[25]

---

22 [1984] A.C. 729.

23 Published by the Census and Statistics Department of the HKSAR Government.

24 *Wells v Wells* [1999] 1 AC 345, at 378C.

25 [1996] 2 HKLR 401.

2.27 In UK, with the advent of the Ogden Tables, which is admissible under section 10(1) of the Civil Evidence Act 1995, the selection of a multiplier is essentially a matter of reading from the relevant tables. In short, the Ogden Tables have become the starting point for selecting a multiplier. In *Wells v Well*s (supra), Lord Lloyd said:

> *"I do not suggest that the judge should be a slave to the tables. There may well be special factors in particular cases. But the tables should now be regarded as the starting-point, rather than a check. A judge should be slow to depart from the relevant actuarial multiplier on impressionistic grounds, or by reference to 'a spread of multipliers in comparable cases' especially when the multipliers were fixed before actuarial tables were widely used."*[26] [emphasis added]

2.28 In reality, prior to the decision of Bharwaney J in *Chan Pak Ting v Chan Chi Kuen (supra)*, Hong Kong courts did not select the multiplier on any scientific or mathematical basis.[27] They took into account a plaintiff's age, gender and expected working life, and made reference to previously decided cases. It is, however, impossible to determine from decided cases how these factors influenced the decision.[28]

2.29 Although there is no equivalent of section 10 of the Civil Evidence Act 1995 under Hong Kong Law, the equivalent of the Odgen Tables have been developed and refined over the last 20 years. The latest edition of such tables (known as the Chan's Tables)[29] has been widely accepted and applied by the Court and practitioners alike and treated as the first port of call in selecting a multiplier.[30]

2.30 Once a multiplier is selected, all that remains is for it to be combined with the multiplicand to reach a final lump sum award.

B. Loss of post-trial income and benefits in the "*lost years*"

2.31 "*Lost years*" claims arise where an injury shortens a plaintiff's life expectancy. Damages are claimed for income and benefits that would have been earned in the period of the plaintiff's working life that was aborted. In

---

26 [1999] 1 AC 345 at 379F-G. This was adopted by Bharwaney J in *Chan Pak Ting v Chan Chi Kuen* [2013] 1 HKLRD 634.

27 *Hong Kong Personal Injury Service* (LexisNexis Butterworths) Vol 1, at 1755.

28 Same as above, at 1755.

29 Dr Wai-Sum Chan, Dr Felix W.H. Chan & Dr Johnny S.H. Li., "Personal Injury Tables – Hong Kong 2016, Tables for the Calculation of Damages (2016)", Neville Sarony QC, SC edited, Sweet & Maxwell, (2016 ed).

30 Bharwaney J in *Chan Pak Ting v Chan Chi Chuen* [2013] 1 HKLRD 634 (paras 26 to 34).

Hong Kong, "*lost years*" claims may only be brought by living plaintiffs, not on the behalf of the estate of deceased plaintiffs.[31]

2.32 The starting point for determining the multiplier is to identify the length of the "*lost years*". This period is the difference between a plaintiff's pre-accident life expectancy (as normally determined by reference to Life Tables for a person of the plaintiff's age, health and habits) and his post-accident life expectancy (as determined with the aid of medical evidence). Within these years it must also be determined how many of these a plaintiff would have spent working.

2.33 A mathematical multiplier can then be read from Table 28 of the Chan's Tables.[32] Theoretically, the loss of income during the "*lost years*" would not commence until after the expiry of the projected life expectancy of the plaintiff. There will be an element of accelerated receipt (i.e. in terms of years from trial date to the expiry of life expectancy as agreed or found by the Court). Hence a discounting factor (as may be read from Table 27) will have to be applied to the mathematical multiplier (as obtained from Table 28) to arrive at the actual multiplier to be applied.[33]

2.34 For "*lost years*" claim, the estimated personal expenses of the plaintiff, which will be saved, will be deducted.[34] In appropriate cases, it may be advisable to issue proceedings and keep the action alive until the death of the plaintiff so that a loss of dependency claim under the Fatal Accident Ordinance (Cap 22) can be added.[35]

---

31 "*Lost years*" in fatal cases abolished and replaced by the claim for "*Loss of Accumulation of Wealth*" under section 20(2)(b)(iii) of LARCO (Cap 23).

32 Table 28, Multipliers for Pecuniary Loss for Term Certain.

33 Table 27, Discounting Factors for Term Certain.

34 *White v London Transport Executive* [1982] QB 489.

35 See Chapter 3, at para 3.45 post.

Chapter 3

Legal framework of periodical payments – experience from the United Kingdom

A. A Historical perspective

3.1 The problems and pitfalls embedded in a lump sum award need not be repeated. As early as 1978, the Pearson Commission Report in UK recommended, *inter alia*, as follows:

(a) PPOs should be confined to cases of death or serious and lasting injury such that would affect earning capacity or otherwise cause substantial pecuniary loss.

(b) The courts should be obliged to award damages for future pecuniary loss in the form of a PPO unless satisfied on application by the plaintiff that lump sums are more appropriate.

(c) Parties should be free to negotiate a settlement in any form they choose.[1]

3.2 Meanwhile, the fear of the money running out amidst the uncertainties facing the recipient has given rise to the practice of "*structured settlement*" which is the precursor to "*periodical payments*" in 1980s.

3.3 The first structured settlement in UK was implemented in 1989 in the case of *Kelly v Dawes*.[2] Through an evolutionary process, the regime of periodical payments has emerged. A review of the historical development will provide insight to the mischiefs which the regime seeks to redress.[3]

3.4 In October 1992, the Law Commission in UK published a Consultation Paper (No. 125) entitled *"Structured Settlements and Interim and Provisional Damages".* Having received wide-ranging responses, a number of changes to the system of "*structured settlement*" were recommended in Paper No. 224 published in September 1994. However, the Law Commission stopped short of recommending a power to be bestowed upon the Courts to impose structured settlements on the parties concerned.

---

1 Pearson Commission, *Report*, Volume One (1978), at paras 574 to 591.

2 (1990) Times 27 September [1990] CLY 1724.

3 A good summary of the historical development of "*Periodical Payments*" regime in UK can be found in Jennifer Stone, "Damages awards: lump sum and periodical payments", *Clinical Negligence* (5th Ed), Powers & Barton edited, Bloomsbury Professional, Chapter 14.

3.5 Paper No. 224 provided the impetus for a series of legislative changes. First came the Finance Act 1995 introducing provisions in the Income and Corporation Taxes Act 1988 to secure the tax-free nature of structured settlements. It enabled defendant insurers to purchase annuities on behalf of claimants in fulfilment of the terms under a structured settlement. The annuity providers, normally Life Offices, made tax-free payments direct to the claimant. Thereafter, further consequential provisions were made in the Finance Act 1996.

3.6 Next came the Damages Act 1996, which was intended to establish structured settlements firmly in the legislation as the safest form of 'investment' in the UK. Correspondingly, provision for 100% protection of structured settlement payments was made under the then Policyholders Protection Act.

3.7 By a combination of the Finance Acts 1995 and 1996 together with the Damages Act 1996, the implementation of structured settlements in suitable cases was greatly simplified, and the security of payment was guaranteed in the event that the annuity provider failed.

3.8 However, take-up rate of structure settlement remained surprisingly low. It was perceived that such low take-up rate was attributable to the fact that structured settlement could only be implemented with the consent of the parties concerned. Besides, both claimant and defendant practitioners often viewed structure settlements with suspicion. It might also be the case that the parties did not or did not properly consider the option of structured settlement, even in eminently suitable cases, for want of proper advice as to its benefits.

3.9 In 1999, the need for a statutory regime to enable the Court to order periodical payments was foreshadowed by Lord Steyn in *Wells v Wells.*[4]

3.10 In March 2000, the Lord Chancellor published the consultation paper entitled *"Damages: The Discount Rate and Alternatives to Lump Sum Payments"*. This was followed by other initiatives including "*Structured Settlements: Report of the Master of the Rolls' Working Party*" published in August 2002.

3.11 The purpose of the Working Party was to provide comprehensive, balanced and informed views. It was chaired by Brian Langstaff QC (as he then was), and comprised representatives from the relevant sectors. The Working Party's view on lump sums was as follows:[5]

---

4 [1999] AC 345, at 384.

5 Jennifer Stone, "Damages awards: lump sum and periodical payments", *Clinical Negligence* (5th Ed), Powers & Barton edited, Bloomsbury Professional, Chapter 14, at para. 14.19.

> *"The one thing that is certain about a once and for all lump sum award in respect of future loss is that it will inevitably either over-compensate or under-compensate. This will happen particularly where the claimant survives beyond the life expectancy estimated at the date of trial, or alternatively dies earlier. It will frequently be the case in practice that there is over-compensation in six figure sums, or, correspondingly, that a combination of increased life expectancy, the cost of care, and (it may be) the cost of new but necessary medical treatments is such that the sum needed exceeds anything that might have been awarded at the date of trial."*

They went on to state:

> *"Further, the method of compensation on a once and for all basis is most frequently made by the multiplication of the annual loss, assessed at the time of the award, by a multiplier which is derived from assumptions as to investment performance (as we have pointed out above), which may be vulnerable to future movements in interest rates and which assumes that the cost of provision of services and the specialised needs that the seriously injured may require will rise in accordance with the RPI rather than the National Average Earnings Index, or at some other rate."*

They concluded:

> *"Accordingly, we prefer a system that is better able to meet future needs as and when they arise. Such a system may also have its defects - as we shall go on to point out but we believe the advantages outweigh them."*

3.12 As a result of the recommendation of the Working Party, Civil Procedure Rules (CPR) Practice Direction 40C was introduced whereby cases with future losses in excess of £500,000[6] required consideration as to whether a lump sum or structured settlement was a more appropriate form of award and required the parties in prescribed cases to obtain proper advice.[7]

3.13 However, the Practice Direction related only to minors or patients (now protected parties/beneficiaries), and was subject to the Damages Act 1996. Hence, the consensual basis was maintained. That said, it was considered a sensible step in the right direction.[8]

3.14 Shortly thereafter in 2002, the Lord Chancellor's Department published another consultation paper entitled "*Consultation Paper Damages*

---

6 Civil Procedure Rules (2004), Practice Direction 40CPD.2, which was repealed in 2005 upon implementation of PPO.

7 As cited above.

8 As cited above.

for Future Loss: Giving the Courts the Power to Order Periodical Payments for Future Loss and Care Costs in Personal Injury Cases" wherein it was concluded:

> *"That in most circumstances periodical payments are, in principle, the more appropriate means for paying compensation for significant future financial loss. Periodical Payments better reflect the purpose of compensation, which is to restore the claimant's prior position. They also place the risks associated with life expectancy and investment on defendants rather than claimants."*

3.15 The idea of bestowing upon the Courts a power to order periodical payments received support from various stakeholders including, inter alia, the Association of Personal Injury Lawyers,[9] the Faculty and Institute of Actuaries and the Association of Consulting Actuaries.[10] Understandably, reservations were also expressed by these supporting stakeholders as to the detailed mechanics of the proposed system and how the court would be exercising the newly created power.

3.16 The outcome of this consultation was the Courts Act 2003, sections 100-101 (amending s.2 of the Damages Act 1996), which provides the courts with the power to impose periodical payments on the parties. The tax-free nature of periodical payments, whether met by a self-funding body or a provider of annuities, is enshrined in the Income Tax (Trading and Other Income) Act 2005, sections 731-733.[11]

3.17 It should also be noted that there is a working party established by the Institute and Faculty of Actuaries which investigates periodical payment orders and their effects on the UK insurance and reinsurance industry since they feature significantly on insurers' and reinsurers' balance sheets which also has an impact on pricing and capital modelling efforts of actuaries. This working party has been issuing relevant papers and surveys since on or about 2010.[12] The most recent workshop on 12 April 2016 dealt with issues such as the actuarial methodology in dealing with PPOs, PPOs in Ireland,[13] reinsurance and risk transfer and investment issues.[14]

---

9 See "A Response by the Association of Personal Injury Lawyers" (dated May 2002).

10 See "Joint Response by the Faculty and Institute of Actuaries and the Association of Consulting Actuaries" (dated 7 June 2002).

11 Jennifer Stone, "Damages awards: lump sum and periodical payments", *Clinical Negligence* (5th Ed), Powers & Barton edited, Bloomsbury Professional, Chapter 14, at para 14.22.

12 See https://www.actuaries.org.uk/practice-areas/general-insurance/research-working-parties/periodical-payment-orders-ppos.

13 On 27 May 2015, the Minister for Justice and Equality, Frances Fitzgerald TD, published the general scheme of the Civil Liability (Amendment) Bill 2015 which provides a statutory basis for the award of PPOs. The most relevant and recent case considering PPOs was *Russell (a minor) v Health Service Executive* [2015] IECA 236 (5 November 2015), with prior cases including (Northern Ireland) *Gilliland v McManus & Anor* [2013] NIQB 127 (6 December 2013); (Northern Ireland) *KD (a minor) by his Mother and Next Friend v Belfast Social Health and Care Trust* NIQB 143.

14 See 2016 CIGI - PPO Workshop 10042016 (1).

B. Courts Act 2003 (amending section 2 of the Damages Act 1996)

3.18 The Damages Act 1996 (as amended by sections 100-101 of the Courts Act 2003) came into force on 1 April 2005. A "*Guidance on Periodical Payment*s" was published by the Department of Constitutional Affairs.

3.19 The relevant texts of sections 2 and 4 of the Damages Act 1996 (as amended)[15] are set out in full hereinafter.

> **" 2. Periodical payments**
>
> (1) A court awarding damages for **future pecuniary loss** in respect of personal injury—
>
> (a) **may order** that the damages are wholly or partly to take the form of periodical payments, and
> (b) shall consider whether to make that order.
>
> (2) A court awarding **other damages** in respect of personal injury may, **if the parties consent**, order that the damages are wholly or partly to take the form of periodical payments.
>
> (3) A court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is **reasonably secure**.
>
> (4) For the purpose of subsection (3) the continuity of payment under an order is reasonably secure if—
>
> (a) it is protected **by a guarantee** given under section 6 of or the Schedule to this Act,
> (b) it is protected by a scheme under section 213 of the **Financial Services and Markets Act 2000 (**compensation) (whether or not as modified by section 4 of this Act), or
> (c) the source of payment is a **government or health service body**.
>
> (5) An order for periodical payments may include provision—
>
> (a) **requiring the party responsible** for the payments **to use a method** (selected or to be selected by him) under which

[15] *Robert Dean Harries v Dr Alan David Stevenson* [2012] EWHC 3447 (QB) where the claimant unsuccessfully attempted to argue that the Court should hold that this case came within section 1(2) of the Damages Act 1996 so that a Discount Rate different from the rate prescribed by the Lord Chancellor should be adopted. But this was rejected since the case put forward by the claimant was a direct attack on the prescribed rate and such an attack was not permitted, in particular, not at an interlocutory stage.

the **continuity of payment** is reasonably secure by virtue of subsection (4);

(b) about how the payments are to be made, if not by a method under which the continuity of payment is reasonably secure by virtue of subsection (4);

(c) requiring the party responsible for the payments to take specified action to secure continuity of payment, where continuity is not reasonably secure by virtue of subsection (4);

(d) enabling a party to apply for a variation of provision included under paragraph (a), (b) or (c).

(6) Where a person has a right to receive payments under an order for periodical payments, or where an arrangement is entered into in satisfaction of an order which gives a person a right to receive periodical payments, that person's right under the order or arrangement **may not be assigned or charged** without the approval of the court which made the order; and—

(a) a court shall not approve an assignment or charge unless satisfied that special circumstances make it necessary, and

(b) a purported assignment or charge, or agreement to assign or charge, is void unless approved by the court.

(7) Where an order is made for periodical payments, an alteration of the method by which the payments are made shall be treated as a breach of the order (whether or not the method was specified under subsection (5)(b)) unless—

(a) the court which made the order declares its satisfaction that the continuity of payment under the new method is reasonably secure,

(b) the new method is protected by a guarantee given under section 6 of or the Schedule to this Act,

(c) the new method is protected by a scheme under section 213 of the Financial Services and Markets Act 2000 (compensation) (whether or not as modified by section 4 of this Act), or

(d) the source of payment under the new method is a government or health service body.

(8) An order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the **retail prices index** (within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988) at such times, and in such a manner, as may be determined by or in accordance with Civil Procedure Rules.

(9) But an order for periodical payments may include provision—

(a) **disapplying** subsection (8), or

(b) **modifying** the effect of subsection (8).

2A. Periodical payments: supplementary

(1) Civil Procedure Rules may require a court to take specified matters into account in considering—

(a) whether to order periodical payments;
(b) the security of the continuity of payment;
(c) whether to approve an assignment or charge.

(2) For the purposes of section 2(4)(c) and (7)(d) '*government or health service body*' means a body designated as a government body or a health service body by order made by the Lord Chancellor.

(3) An order under subsection (2)—

(a) shall be made by statutory instrument, and
(b) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(4) Section 2(6) is without prejudice to a person's power to assign a right to the scheme manager established under section 212 of the Financial Services and Markets Act 2000...

2B. Variation of orders and settlements

(1) The Lord Chancellor may by order enable a court which has made an order for periodical payments to vary the order in specified circumstances (otherwise than in accordance with section 2(5)(d)).

(2) The Lord Chancellor may by order enable a court in specified circumstances to vary the terms on which a claim or action for damages for personal injury is settled by agreement between the parties if the agreement—

(a) provides for periodical payments, and
(b) expressly permits a party to apply to a court for variation in those circumstances.

(3) An order under this section may make provision—

(a) which operates wholly or partly by reference to a condition or other term of the court's order or of the agreement;
(b) about the nature of an order which may be made by a court on a variation;
(c) about the matters to be taken into account on considering variation;
(d) of a kind that could be made by Civil Procedure Rules...

(4) An order under this section may apply (with or without modification) or amend an enactment about provisional or further damages.

…

(7) In subsection (4)—

'*provisional damages*' means damages awarded by virtue of subsection (2)(a) of section 32A of the Supreme Court Act 1981 or section 51 of the County Courts Act 1984..., and

'*further damages*' means damages awarded by virtue of subsection (2)(b) of either of those sections...

...

4. Enhanced protection for periodical payments

(1) Subsection (2) applies where—
(a) a person has a right to receive periodical payments, and
(b) his right is protected by a scheme under section 213 of the Financial Services and Markets Act 2000 (compensation), but only as to part of the payments.

(2) The protection provided by the scheme shall extend by virtue of this section to the whole of the payments." [emphasis added]

3.20 In brief, under section 2 of the 1996 Act, a court awarding damages for future pecuniary loss in respect of personal injury may order that the damages are wholly or partly to take the form of periodical payments, and the court is obliged to consider whether to make that order. In other words, a Periodical Payments Order ("PPO") can be made in conjunction with a lump sum award. The courts may impose periodical payments with or without the consent of the parties.

3.21 Under section 2(3), a court may not make an order for periodical payments unless satisfied that the continuity of periodical payment is reasonably secure as set out in section 2(4).

3.22 Under section 2(5), the courts may in the order include specific provisions to ensure that the continuity of periodical payment is reasonably secure. To ensure the security of the continuity of periodical payment and to relieve the financial burden, defendants tend to rely on insurance and annuities.[16]

3.23 Under section 2(8), an order for periodical payments is treated as providing for the amount of payments to vary by reference to the **retail prices index**[17] at such times, and in such a manner, as may be determined under the

[16] Robin De Wilde, "Periodical payments - a journey into the unknown" [2005] JPILaw 320, at 323.
[17] Within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988.

Civil Procedure Rules. However, the Court is given the discretion under section 2(9) to order indexation of the periodical payments by reference to other index, such as wage data, where it can be demonstrated that indexation with RPI is insufficient to compensate the injured person.

3.24 PPOs, being intended to more accurately compensate for future pecuniary loss, are adaptable to the changing circumstances of plaintiffs. Payment schemes can be tailor-made in respect of payment method, as well as its duration and amount. Where it is known that the recipient's needs will increase or decrease at certain stage down the line, provisions can be made in the PPO for the payment amounts to be adjusted at specific times (ie stepped payments).[18]

3.25 The courts have generally wide discretion when making PPOs. Practice Direction 41.7[19] states that a court shall take into account all circumstances of the case, in particular the form of award which best meets the plaintiff's needs and the factors set out in Practice Direction 41B, these being scale of annual payments taking into account any deduction for contributory negligence, form of award preferred by the plaintiff and the defendant (including reasons for their preference).[20]

3.26 By anecdotal evidence and by the obviousness of some practical difficulties, cases where PPOs are conventionally avoided are those where the future needs are too variable and difficult to predict, where liability has been apportioned[21] (hence the inability to fully finance a PPO for future care without taking from other heads of claim but improvements in a plaintiff's condition might reduce the overall costs of care), or simply because there is too little money at stake and in cases where the related increased costs of creating and operating such administrative overhead might outweigh the benefits.

C. Damages (Variation of Periodical Payments) Order 2005

3.27 For better compensating a plaintiff, PPOs should be able to provide for changes in circumstances. Section 2B(1) and (2) of the 1996 Act empowers the Lord Chancellor by order to enable the courts in specified circumstances to vary a court order of, or agreement on, periodical payment.

3.28 Accordingly, the Lord Chancellor promulgated the "Damages (Variation of Periodical Payments) Order 2005" (the "2005 Order"). The court's power to vary a PPO is limited to the circumstances as prescribed thereunder.

---

18 The "*stepped payment*" is different to variation of payment made under the Damages (Variation of Periodical Payments) Order 2005, see paras 3.28 to 3.36 below.

19 Available at: http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part41

20 Practice Direction 41B (1), available at: http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_part41b.

21 *Gilliland v McManus* [2013] NIQB 127.

3.29 For ease of reference, relevant provisions under the 2005 Order are set out below:

"***Power to make variable orders***

2. If there is proved or admitted to be a chance that at some definite or indefinite time in the future the claimant will —

(a) 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, or

(b) enjoy some significant improvement in his physical or mental condition, where that condition had been adversely affected as a result of that act or omission,

the court may, on the application of a party, with the agreement of all the parties, or of its own initiative, provide in an order for periodical payments that it may be varied.

...

Award of provisional damages

4. The court may make a variable order in addition to an order for an award of provisional damages made by virtue of section 32A of the Supreme Court Act 1981 or section 51 of the County Courts Act 1984.

...

Applications to extend period for applying for permission to vary

6. Where a period is specified under Article 5(c) or (d) —

(a) a party may make more than one application to extend the period, and such an application is not to be treated as an application to vary a variable order for the purposes of Article 7;

(b) a party may not make an application for the variable order to be varied after the end of the period specified or such period as extended by the court.

Limit on number of applications to vary

7. A party may make only one application to vary a variable order in respect of each specified disease or type of deterioration or improvement.

...

Variable agreements

9. (1) If there is agreed to be a chance that at some definite or

indefinite time in the future the claimant will —

*(a) 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**, or*

*(b) enjoy some **significant improvement** in his physical or mental condition, where that condition had been adversely affected as a result of that act or omission,*

the parties to an agreement may agree that a party to it may apply to the court subsequently for its terms to be varied.

(2) Where the parties agree to permit an application to vary the terms of an agreement, the agreement —

(a) must expressly state that a party to it may apply to the court for its terms to be varied;

(b) must specify the disease or type of deterioration or improvement;

(c) may specify a period within which an application for it to be varied may be made;

(d) may specify more than one disease or type of deterioration or improvement and may, in respect of each, specify a different period within which an application for it to be varied may be made.

(3) A party who is permitted by an agreement to apply for its terms to be varied must obtain the court's permission to apply for it to be varied."
[emphasis added]

3.30 In essence, Articles 2 and 9 of the 2005 Order restrict the circumstances in which variation is permissible to those where **there is a chance that a plaintiff will develop some serious disease or suffer some serious deterioration, or enjoy some significant improvement**, in his physical or mental condition. In such cases, the court may, on the application of a party, with the agreement of all the parties, or of its own initiative, provide in an order for periodical payments that it may be varied (Article 2).

3.31 Article 10 requires the person applying for permission to apply to vary an order or agreement to show that the specified disease, deterioration or improvement has occurred and that it has caused or is likely to cause an increase or decrease in the plaintiff's financial loss. The application for permission is to be dealt with without a hearing. On a successful application for the variation of an order or agreement, the court may order that the amount of the annual payments to the plaintiff is to be varied (Article 13).

3.32 It is noteworthy that the power of the court to award provisional damages under section 32A of the Supreme Court Act 1981[22] is preserved by Article 4.

3.33 By way of background, an award of provisional damages may be made where the injured person is at risk of developing a disease or suffering a deterioration within a specific period of time as identified with the assistance of medical experts.

3.34 Where an application for provisional damages is pleaded, the court may award provisional damages on the assumption that the injured person will not develop such disease or suffer such deterioration. In that case, the injured person will be entitled to seek further damages should the risk materialises before expiry of the period specified in the order, which may however be extended more than one time upon application to the court.[23]

3.35 Similar to Article 7 above in respect of PPO, only one application may be made for further damages under an award of provisional damages.[24]

3.36 A major difference between a variation order under the PPO regime and an order for provisional damages is that the former is applicable to both "*serious deterioration*" and "*significant improvement*" whereas the latter is only applicable to "*serious deterioration*".

D. Security and continuity of payments

3.37 Where the periodical payments are to be provided by an insurer or Life Office under a scheme within the meaning of section 213 of the Financial Services and Markets Act 2000, the protection afforded to the recipient is 100% (see section 4 of Damages Act 1996).

3.38 For the purpose of section 2A of the Damages Act 1996, the Lord Chancellor promulgated the Damages (Government and Health Service Bodies) Order 2005 setting out the designated government bodies and designated health services bodies, which are deemed capable of making secured periodical payments.

3.39 Notably, the Motor Insurers' Bureau (MIB) and protection societies for doctors, such as the Medical Defence Union (MDU) and Medical Protection Society (MPS) are not included in the list of secured payers. However, MIB is generally regarded as a reasonably secured payer and MPS, through the setting up of a trust held under a separate subsidiary, has been able to satisfy the Court that payments therefrom are secured for the purpose of PPOs. MDU has not sought to set up a similar scheme.

---

22 Equivalent to section 56A of the High Court Ordinance, Cap 4 and see also Rules of High Court O.37, rr 7 to 10 c.f. Civil Procedure Rules (UK), Part 41.1.

23 See Rules of High Court O.37, r 8(3) c.f. 2005 Order, Article 6(a).

24 See Civil Procedure Rules (UK), Part 41.3(2) c.f. RHC O.37, r 10(6).

E. Indexation

3.40 In *Flora (Tarlochan Singh) v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103[25], the court considered indexation with Average Earning Index (AEI) and it made clear that *"affordability"* to the defendant was irrelevant. It considered that wage inflation was the primary reason for increasing care costs and therefore AEI was fair and appropriate.[26]

3.41 Similarly, in *Thompstone v Glossop Acute Services NHS Trust* [2006] EWHC 2904 (QB), indexation was made to earnings data provided by the "*Annual Survey of Hours and Earnings: Occupational Earnings for Care Assistants and Homecarers*", commonly referred to as ASHE 6115.

3.42 There is however no readily available annuity which provides payment indexed to ASHE 6115. An argument based on *"distributive justice"* was advanced by NHS in *Thompstone (supra).* Mrs. Justice Swift took the view that *"distributive justice"* was just *"affordability"* by another name and duly rejected it. The decision was upheld on appeal.[27]

F. PPO in practice[28]

3.43 The implementation of PPO is enhanced by corresponding provisions in the CPR Part 41.2 and Practice Direction 41B. The detailed procedures laid down thereunder, which dovetail with the provisions under the Damages Act 1996, are self-explanatory.

3.44 It is however instructive to note that under CPR 41.8, it is provided that:

> "***The Award***
>
> *41.8 - (1) Where the court awards damages in the form of periodical payments, the order must specify –*
>
> *(a) the annual amount awarded, how each payment is to be made during the year and at what intervals[29];*

---

25 *Robert Dean Harries v Dr Alan David Stevenson* [2012] EWHC 3447 (QB) also considered the principles laid down in *Flora*, supra.

26 Jennifer Stone, "Damages awards: lump sum and periodical payments" , *Clinical Negligence* (5th Ed), Powers & Barton edited, Bloomsbury Professional, Chapter 14, at paras 14.74 to 14.79

27 Same as above, at paras 14.81 to 14.94.

28 Via searches on, inter alia, the British and Irish Legal Information Institute, available at www.bailii.org.

29 In *AA v (1) CC (2) MIB* [2013] EWHC 3679 (QB), Mrs Justice Swift rejected the submission that the Court had power to make a variable PPO since the word "*intervals*" referred to the interval of years or intervals between changes in the amount of the payments to be made. Instead the court could approve a Tomlin Order as being in the interests of the claimant.

(b) the amount awarded for future –

(i) loss of earnings and other income; and

(ii) care and medical costs and other recurring or capital costs;

(c) that the claimant's annual future pecuniary losses, as assessed by the court, are to be paid for the duration of the claimant's life, or such other period as the court orders; and

*(d) that the amount of the payments shall vary annually by reference to the **retail prices index**, unless the court orders otherwise under section 2(9) of the 1996 Act.*

*(2) Where the court orders that any part of the award shall continue after the claimant's death, **for the benefit of the claimant's dependants**, the order must also specify the relevant amount and duration of the payments and how each payment is to be made during the year and at what intervals.*[30]

*(3) Where an amount awarded under paragraph (1)(b) is to **increase or decrease***[31] *on a certain date, the order must also specify –*

(a) the date on which the increase or decrease will take effect; and

(b) the amount of the increase or decrease at current value.

(4) Where damages for substantial capital purchases are awarded under paragraph (1)(b)(ii), the order must also specify –

(a) the amount of the payments at current value;

(b) when the payments are to be made; and

(c) that the amount of the payments shall be adjusted by reference to the retail prices index, unless the

---

30 It would appear that a "*lost years*" head of damage (that a plaintiff is expected to die early as a result of the negligence of the defendant) would also fall into this category.

31 See *AA v (1) CC (2) MIB [2013]* EWHC 3679 (QB), in which Mrs Justice Swift explained the potential difficulties in this regard (which was overcome by the use of a Tomlin Order). Civil Procedure Rules, Practice Direction 41.2 although dealing with provisional damages provides guidance on when an increase or decrease may occur, namely:

"(2) An order for an award of provisional damages –

(a) must specify the disease or type of deterioration in respect of which an application may be made at a future date;

(b) must specify the period within which such an application may be made; and

(c) may be made in respect of more than one disease or type of deterioration and may, in respect of each disease or type of deterioration, specify a different period within which a subsequent application may be made."

court orders otherwise under section 2(9) of the 1996 Act." [emphasis added]

3.45 It is particularly noteworthy that under CPR 48.2(2), an award under a PPO may provide for continuation of periodical payments to the dependants upon the death of the claimant. This has the effect of dispensing with the need for the dependants to take out further proceedings to claim for Loss of Dependency under the Fatal Accidents Act 1976.[32]

3.46 However, there seems no enabling provision in the Damages Act 1996 itself, which illustrates a legislative intent to allow continuing payment after death of the recipient. In practical terms, it is doubtful whether continuing payment is allowable where the PPO only covers future medical expenses and costs of care.

3.47 It should also be noted that where a claimant lacks capacity and will not regain it, a PPO for the annual deputy costs is acceptable since the cost is annual, stable and lifelong with the PPO securing a deputy's fees which avoids any dispute arising between the deputy and the family in respect of such costs. In a case where the capacity of a claimant is in doubt, an insurer may not be prepared to contemplate a PPO but if (some of) the experts opine there is a prospect of capacity being regained in the future, an insurer may disagree with a PPO and/or may insist on a provision that the PPO be terminable on the restoration of capacity. The difficulty can be avoided by using a Tomlin Order attached as a schedule to the order and can be agreed to and made acceptable to the Court.[33]

3.48 In a research funded by the Ministry of Justice "*Personal Injury Discount Rate Research*" (October 2013), it is shown that:

(a) in general, both claimants' lawyers and insurers are leaning towards a lump sum award;

(b) where the Discount Rate is high, insurers would even be prepared to top-up the lump sum to buy off the claim instead of bearing the long term burden and risk;

(c) claimants would consider PPO more in catastrophic cases and when the Discount Rate is high, entailing high investment risks.

3.49 Despite the initial skepticism harboured by stakeholders at different quarters, it would appear that PPO is now the norm for settling, at least, future costs of care in very substantial personal injury claims. In a submission made by the Personal Injury Bar Association (PIBA) of the General

---

32 c.f. Fatal Accidents Ordinance (Cap. 22).

33 See also footnote 31.

Council of the Bar of England and Wales (dated May 2013),[34] it was categorically stated that:

> *"The advent of the [PPO] regime has seen a transformation in the way in which very high value claims are settled. It is now standard for future care and case management (future care) claims to be settled by way of a PPO rather than on a lump sum basis... it is our experience that it is extremely rare for any future head of loss other than care to be resolved by way of a PPO."*

3.50 Further, in the said Research Paper 2013 (at p.13), it is documented that the National Health Service Litigation Authority (NHSLA) reported that there were 13,068 claims in 2010/11 of which about 66% was clinical related (i.e. about 8,712 cases). In 2011/12, the total number of claims was 13,549 of which 66% (i.e. about 9,032) were clinical related.

3.51 Correspondingly, it was documented in the Consultation Paper entitled "*Damages Act 1996: The Discount Rate, Review of the Legal Framework*" published by the Ministry of Justice on 12 February 2013 (the "2013 Consultation Paper") that during the relevant periods, the NHSLA was party to 930 (2010/11) and 1,116 (2011/12) PPOs. This is about 10 to 12% of all the clinical related cases.

3.52 The Compensation Recovery Units (CRU) under the then Secretary of State for Social Security (now Secretary of State for Work and Pensions) are responsible for clearing personal injury cases of all types for settlement and ensuring that social benefits paid to injured persons are recouped from the relevant wrongdoers. It is shown that between 2009 and 2012, only 10% of the claims (i.e. 70,000 per year) involved future losses requiring the use of Discount Rate for computation of damages.

3.53 On a rough-and-ready approach, assuming also that about 10% of the NHSLA cases involved future losses, that would suggest that most of such cases were settled by PPOs.

3.54 Where there is a fundamental disagreement on the amount or timing of a PPO, the case will need to proceed to judgment. However, if there is a substantively agreed model order, the Court is empowered to overcome disagreements. Examples would be where an insurer is entitled to require the claimant to undergo medical examination at its request upon reasonable notice being given to the claimant at any time during the claimant's life time, where the examination is limited to obtaining a medical opinion on the claimant's general health in order to obtain a quotation for the purchase cost of an annuity to fund the periodical payment and/or for the purposes of reviewing its reserve.

---

[34] Bar Council response to the "Damages Act 1996: the Discount Rate – review of the legal framework" Consultation Paper published by the Ministry of Justice (May 2013).

The insurer is entitled to receive written confirmation that a claimant is still alive on the date of annual payment[35] for a periodical payment to be made.[36]

3.55 There has been some notable activity in PPO-related litigation, in relation to interim payments. Interim payments are payments on account of damages which a party may be held liable to pay to another if a final judgment is given in their favour which enables a court to award to a claimant at an earlier point in time part of what will become due to it at judgment. Interim payments are to relieve the claimant of undue hardship while awaiting the final outcome of the action. It should be noted that the cases where interim payments have been made in PPOs cases are extremely fact sensitive. There are many such cases.[37]

3.56 In the case of *Cobham Hire Services Ltd v Eeles* [2009] EWCA Civ 204 (13 March 2009) ("*Eeles*") a two stage approach was set out.

3.57 Under the first stage, dealt with by Smith LJ at paragraph 43 of *Eeles*, the judge must assess the likely amount of the final judgment leaving out of account the heads of future loss which the trial judge might wish to deal with by way of PPO. As such, the allowable heads of loss may comprise general damages for pain suffering and loss of amenity, special damages to date, interest on those heads, capitalised accommodation costs, including future running costs. The assessment should be carried out on a conservative basis. Provided that is done, a reasonable proportion may be awarded. Proportions being as high as 90% have been awarded in the past.

3.58 Where, however, the interim payment requested exceeds a reasonable proportion of the likely award thus assessed, recourse may be had to the second stage of *Eeles*. Under this stage, the judge may include in the assessment of the likely amount of a final judgment the capitalised amounts of future losses. However, the Court can only do this if it *"can confidently predict*

---

35 For NHS cases, it is now standard practice that a claimant will receive their periodical payment in advance on 15 December of each year since this is 4 to 6 weeks after ASHE data is published, alternatively, in early January. This matter touched upon in *Sadler v Motor Insurers Bureau* [2012] EWHC B28 (QB).

36 Differing approaches were taken in *Sadler v Motor Insurers Bureau* [2012] EWHC B28 (QB) at first instance and in *Wallace v Follett* [2013] EWCA CIV 146 by the Court of Appeal.

37 Including but not limited to the cases considered, namely:
LAT v East Somerset NHS Trust (Now Yeovil District Hospital NHS Foundation Trust) [2016] EWHC 1610 (QB) (8 July 2016); *KLM v EUI Ltd* [2016] EWHC 1497 (QB) (24 June 2016); *AC (A Minor) v St Georges Healthcare NHS Trust* [2015] EWHC 3644 (QB) (15 December 2015); *Grainger v Cooper* [2015] EWHC 1132 (QB) (23 April 2015); *Smith v Bailey* [2014] EWHC 2569 (QB) (28 July 2014); *Haynes v Kingston Hospital NHS Trust* [2014] EWHC 2321 (QB) (11 July 2014); *Oxborrow (A Minor) v West Suffolk Hospitals NHS Trust* [2012] EWHC 1010 (QB) (20 April 2012); *Robert Dean Harries v Dr Alan David Stevenson* [2012] EWHC 3447 (QB); *PZC (A Child, By Her Mother and Litigation Friend, JZC) v Gloucestershire Hospital NHS Trust* [2011] EWHC 1775 (QB) (26 May 2011); *Mabiriizi v HSBC Insurance (UK) Ltd* [2011] EWHC 1280 (QB) (20 May 2011); *Crispin v Webster* [2011] EWHC 3871; *Kirby v Ashford and St Peter's Hospital NHS Trust (No 2)* [2011] EWHC 624 (QB); *Best v Smyth* [2010] EWHC 1541 (QB) (25 June 2010); *Brown (A Minor) v Emery* [2010] EWHC 388 (QB) (4 March 2010); *Christie & Anor v Rogers* [2010] EWHC 249 (QB) (28 January 2010); *Preston v City Electrical Factors Ltd & Anor* [2009] EWHC 2907 (QB); *Brewis v Heatherwood & Wrexham Park Hospitals NHS Trust* [2008] EWHC 2526 (QB) (20 October 2008).

that the trial judge will wish to award a larger capital sum than that covered by" the items falling within the first stage of *Eeles* as in paragraph 45 of the judgment of Smith LJ. Furthermore, the judge must be satisfied by evidence that there is a real need for the interim payment requested. As Smith LJ pointed out (see paragraph 45):

> *"For example, where the request is for money to buy a house, he must be satisfied that there is a real need for accommodation now as opposed to after the trial and that the amount of money requested is reasonable. He does not need to decide whether the particular house proposed is suitable, that is a matter for the Court of Protection, but the judge must not make an interim payment order without first deciding whether the expenditure of approximately the amount of money he proposes to award is reasonably necessary. If the judge is satisfied of that to a high degree of confidence then he will be justified in predicting that the trial judge would take that course and he will be justified in assessing the likely amount of the final award at such a level as will permit the making of the necessary interim award".*

3.59 A study undertaken by the International Underwriting Association Casualty Treaty Group (IUA) in 2010/2011 states that the numbers of PPOs funded by insurers (overwhelmingly through Motor Insurers' Bureau) are not very far behind the NHSLA's. This would suggest that about 200 to 250 periodical payment orders are being made annually (see 2013 Consultation Paper, at p.28).

3.60 There seems no reason why PPO should not work in the same way in Hong Kong. In *Chan Pak Ting*[38], Bharwaney J observed:

> *"128. The UK Damages Act 1996 goes beyond providing a mechanism for the Lord Chancellor to review and reset the discount rate. By the Act, the courts are also empowered to make periodical payment orders, which overcome the dual uncertainties of predicting of future inflation and predicting life expectancy, particularly in cases, such as the captioned cases, involving infants suffering from cerebral palsy."*

3.61 Along the same vein, in *Chan Wai Ming,*[39] Cheung JA said:

> *"9.2 Pending legislative change, Lord Clarke in Simon v. Helmot suggested that the parties should resort more to structured settlements by way of periodical payment orders. This will ensure different net rate of returns to be taken into account at different times. He observed that structured settlements in fact were commonly used in the United Kingdom before the Damages Act*

38 As cited above.
39 As cited above.

1996. In my view this is a matter worth looking into by personal injury practitioners."

3.62 On the foregoing observations, the issue as to whether it is desirable and feasible to implement a system of PPO in Hong Kong deserves serious consideration.

3.63 A global reinsurance intermediary in or about August 2016 reported,[40] based on claims data representing 75% of the total market, and after examining more than 550 Periodic Payment Orders (PPOs) and over 8,000 large claims, that the number of PPOs granted by UK courts in 2015 was similar to that of 2014, but substantially lower than the 2011 peak. The data showed that in 2016 monetary terms, an average 15% of an insurer's motor claims above £1 million would reach a PPO settlement. It was also reported that the average time taken to settle a PPO claim was six years, culminating in an average lump sum award of £2.1 million, and an average annual award of £90,000. The mean life expectancy of the injured party at the point of the PPO settlement was shown to be 42 years.

[40] See https://www.financedigest.com/volume-of-periodic-payment-orders-remains-low-according-to-aon-uk-motor-insurance-study.html.

Chapter 4

Overview of the position in overseas jurisdictions

4.1 This chapter sets out the current position in relation to periodical payments for future pecuniary loss in personal injury cases in a number of overseas jurisdictions, including Australia, Canada, Germany, Ireland, Netherlands, New Zealand, Scotland, Sweden, Singapore and United States.

4.2 The compensation system adopted in some of the jurisdictions, such as Germany and New Zealand differs to a large degree from the system in Hong Kong. The recent reform in the relevant law in Ireland serves as a useful reference for the Sub-committee in view of the similarity between the two legal systems and circumstances and we have therefore set it out in greater length and detail.

Australia

4.3 In Australia, provisions on damages for future pecuniary loss are different in each of the States and Territories. Generally speaking, the amount recoverable by a plaintiff is limited with respect to their earning capacity, often to three times average weekly earnings.[1] This is then combined with an assessment of a plaintiff's pre-accident and post-accident life expectancy.

4.4 The Civil Liability Act 2002 of New South Wales is an example of the legislation governing damages for personal injury. Section 12 of the Act limits a plaintiff's recovery of damages for future economic loss due to the deprivation or impairment of earning capacity to at most three times the amount of average weekly earnings at the date of award. The amount of average weekly earnings at the date of award is determined under section 12(3) of the Act by the Australian Statistician. Section 13 of the Act requires a court to adjust the award by the percentage possibility that the events would have occurred but for the injury. Under section 14 of the Act, if an award of damages is to include any component, assessed as a lump sum, for future economic loss, the present value of that future economic loss is to be determined by adopting a Discount Rate prescribed by governing regulations, or if no percentage is so prescribed, a Discount Rate of 5%.

[1] Barnett and Harder, *Remedies in Australian Private Law* (CUP 2014), at 174.

4.5 Awards for damages in Australia must be assessed once and for all in a lump sum.[2] At common law, courts may not make a periodic payment order without the consent of the parties. Nonetheless, legislation allows parties to negotiate a structured settlement to provide for payments at periodic intervals. Structured settlements are governed by different legislations in each of the States and Territories.

4.6 For example, Part 2 Division 7 of the Civil Liability Act 2002 in New South Wales regulates structured settlements. Section 23 enables the court to give the parties a reasonable opportunity to negotiate a structured settlement. A court that decides to make an award of damages in respect of future loss exceeding $100,000 must first notify all the parties of the terms of the award it proposes to make (section 23(2)). Under section 22, a "structured settlement" is an agreement that provides for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means. Under section 24, the court may, on the application of the parties, make an order approving of or in the terms of a structured settlement even though the payment of damages is not in the form of a lump sum award of damages.

4.7 Periodic payments would most often be deemed appropriate in circumstances of catastrophic injury, when life expectancy is uncertain and the plaintiff is in need of permanent institutional care or where the plaintiff is unable to manage the investment of a lump sum.[3]

Canada

4.8 In Canada, loss of earning capacity may be calculated by conventional assessment or by the use of actuarial information.[4] An assessment of damages is normally based on the number of working years until age 65 multiplied by the plaintiff's estimated annual lost income.[5] In estimating the annual lost income, the court may take into account the plaintiff's annual income in the year prior to the accident or that of a comparable employee.

4.9 In Saskatchewan, the Queen's Bench Rules provide for the calculation of the present value of the plaintiff's future income stream in absence of expert evidence on inflation and Discount Rates. Thus, calculating future damages using the prescribed life expectancy and Discount Rates are admissible in evidence without requiring expert testimony.[6] There is a similar provision in Ontario.[7] Where there is no legislated standard, the yield on *"gilt-edged securities for an equivalent term provide the best evidence*

---

2 Same as above, at 39.
3 Same as above.
4 Canadian Encyclopedic Digest (Carswell), *Damages*, at para 329.
5 Same as above.
6 Same as above, at para 330.
7 Canadian Encyclopedic Digest (Carswell) (n 71), at para 330; Rules of Civil Procedure, R.R.O. 1990, Reg 194, R 53.09.

of the appropriate discount rate."[8] The courts should take into account positive and negative contingencies, such as the likelihood of promotion, unemployment, sickness, early retirement and accidents.[9] Besides, the courts must consider gender-specific contingencies including typical male versus female work patterns.[10]

4.10 Canadian courts cannot order structured settlements or make periodic payment orders unless enabled by legislation or with the parties' consent. There is no overall regime of periodic payments. Provinces have their own periodic payment regimes.

4.11 For example, the Judicature Act RSA 2000 in Alberta provides for periodic payment orders when claiming damages, for personal injuries or for the death of a person, or provided for under the Fatal Accidents Act (section 19.1). On application by any party to a proceeding, the Court may order that damages awarded be paid in whole or in part by periodic payments, and where no party has made such an application, the Court may, at the Court's discretion and on the terms that the Court thinks just, order that an award for damages be paid by periodic payments if the Court considers it to be in the best interests of the plaintiff (section 19.1(2)).[11]

4.12 Under section 19.1(2.1), however, the court will not make such an order if:

(a) all the parties agree otherwise;

(b) one or more of the parties in respect of whom the order would be made satisfies the Court that the parties do not have sufficient means to fund the order; or

(c) the Court, on considering all the circumstances (including but not limited to considering whether an order for periodic payments would have the effect of preventing the plaintiff or another person from obtaining full recovery for damages awarded), is satisfied that such an order would not be in the best interests of the plaintiff.

Germany

4.13 Under section 823(1) of the German Civil Code,

"A person who, intentionally or negligently, unlawfully injures the

---

8 Canadian Encyclopedic Digest (Carswell) (n 71), at para 330.

9 Same as above, at para 331.

10 Same as above, at para 332.

11 Under section 19.1(2)(b), the Court will order that an award for damages be paid by periodic payments if the plaintiff requests that an amount be included in the award to compensate for income tax payable on income from investment of the award.

life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this."

4.14 As stipulated in section 253(2),

"*If damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss.*"

4.15 A claimant is therefore entitled to expect a reasonable compensation instead of an express right to full compensation.[12] This method of compensation differs from the existing law in Hong Kong and England and Wales and Northern Ireland where the principle of *restitutio in integrum* applies.

4.16 Periodic payments were introduced in Germany in the late nineteenth century as the appropriate means of providing compensation for pecuniary loss.[13] It is provided in section 843 of the German Civil Code that where an injured person whose earning capacity is eliminated or reduced as a result of an injury to body or health or if his needs are increased, he would be given damages by way of an annuity payment.[14] Whether or not the person liable to pay damages must provide security and the kind and amount of security is determined by the circumstances.[15] The injured person may only demand a lump sum settlement in lieu of annuity if there is a compelling reason for doing so.[16]

4.17 An interim payment may be awarded to the plaintiff until the case is finally determined in the circumstances where permanent sequelae cannot be assessed.[17]

Ireland

4.18 Prior to recent reform to the law relating to personal injuries compensation, damages in Ireland were assessed and awarded by way of a lump sum to compensate for all past and future losses, including both pecuniary and non-pecuniary loss. Future pecuniary loss, which includes loss of earnings and other material loss, such as the costs of care, medication,

---

12 High Court of Dublin, Ireland, *Report of the Working Group on Medical Negligence and Periodic Payments (Module 1)*, at 16.

13 Same as above.

14 German Civil Code, section 843.

15 German Civil Code, section 843(2).

16 German Civil Code, section 843(3).

17 High Court of Dublin, Ireland, *Report of the Working Group on Medical Negligence and Periodic Payments (Module 1),* at 16.

treatment, and medical and assistive aids and appliances, were compensated by lump sum awards to represent the capital value of the future loss.[18]

4.19 In February 2010, the President of the High Court established a Working Group on Medical Negligence and Periodic Payment ('the WGMNPP') to examine the system within the courts for the management of claims for damages arising from alleged medical negligence and to make recommendations. It also considered whether certain categories of damages for catastrophic injuries can or should be awarded by way of periodic payments orders and to make such recommendations to the President of the High Court as may be necessary. A report was published in October 2010 by the WGMNPP which recommended legislation closely along the lines of legislation in England and Wales and Northern Ireland.

Category of personal injuries case in which periodic payments order should be available

4.20 Firstly, the WGMNPP considered the category of personal injuries case in which a PPO should be available. It came to the conclusion that difficulties may arise if the courts were required to confine the facility to particular categories of injury or particular degrees of severity of injury. It was thought that for practical purposes, it was not possible equitably to define such categories or degrees of gravity of injury. The WGMNPP considered that the imposition of an express minimum monetary threshold would be too inflexible. Additional difficulty was created arising from the erosion in the real value of any monetary thresholds over time and the need for regular review.[19]

4.21 The WGMNPP recommended in its report that legislation should be enacted to provide that:

> "*periodic payments orders may be made in respect of the whole or part of an award in any case where, having regard to -*
>
> *(a) the nature of the injuries in respect of which the award is being made and*
>
> *(b) the circumstances of the person to whom the award is being made,*
>
> *(c) the court considers it appropriate in the best interests of that person that such an order be made.*"[20]

---

18 Same as above, at 11.
19 Same as above, at 25.
20 Same as above, at 26.

4.22 However, the WGMNPP considered that mandatory periodic payments orders should be restricted to compensating a particular category of loss.[21]

Nature of the loss in respect of which damages in the form of periodic payment should be payable

4.23 The WGMNPP considered the nature of the loss in respect of which damages in the form of periodic payments should be payable. Since it was considered that the most pressing difficulties and inequities were related to long term care and treatment costs and permanent incapacity cases, the WGMNPP recommended that the courts should be empowered:

> "*To make consensual and non-consensual periodic payments orders in respect of (a) future treatment, (b) future care and (c) the future provision of medical and assistive aids and appliances.*"[22]

4.24 The WGMNPP thought that with the lack of a pressing case for applying mandatory periodic payments orders to compensation for future loss of earnings, it recommended that the court should be empowered to make periodic payments orders to compensate for future loss of earnings only with the consent of all the parties to the relevant claim.[23]

Periodic payment orders to supplement a lump sum award

4.25 The WGMNPP considered a similar approach should be adopted as England and Wales and Northern Ireland that the court should be empowered to award damages wholly or partly in the form of periodic payments for future pecuniary loss in respect of personal injury. The reason was to allow flexibility for both the plaintiff and the defendant. Where there may be consensus in a particular case that periodic payments are only necessary in respect of a particular category of future pecuniary loss, it may be appropriate for the court to permit the other type of future pecuniary loss to be compensated in the form of a lump sum.[24]

Provision for non-consensual payments order

4.26 The WGMNPP recommended that:

> "*save in the case of compensation for future loss of earnings, the courts should be empowered to make periodic payments orders with or without the consent of the litigating parties but only after*

---

21 Same as above.
22 Same as above.
23 Same as above, at 26 and 27.
24 Same as above, at 27.

those parties have been given an opportunity by the court to make submissions and be heard in full on the relevant issues."[25]

Mandatory consideration of the appropriateness of periodic payment orders or only upon request by the parties

4.27 The WGMNPP recommended that the courts should not be expressly required to consider awarding compensation by periodic payments order in every personal injury case.[26]

Securing periodic payments

4.28 As regards the security of periodic payments, the WGMNPP considered that periodic payments orders should only be made in circumstances where the court was satisfied that continuity of payment under the periodic payments order was "reasonably secure". It was believed that it was fundamental to the operation of any periodic payment regime that funds were available to satisfy periodic payments orders.[27]

4.29 However it was also noted by the WGMNPP that there was no annuity available to satisfy the need to provide reasonable security for periodic payment. There was also no guarantee scheme in Ireland similar to the Financial Services Compensation Scheme in England and Wales and Northern Ireland.

4.30 As the WGMNPP suggested, the state should bear the ultimate responsibility for the final care for all its citizens, especially for the disadvantaged. As for injured victims without resources in catastrophic cases, it recommended that :

"*the State, through the agency of the National Treasury Management Agency (NTMA) should be empowered to provide injured victims with the necessary security for periodic payments either by the provision of annuities to insurers and others or in such other manner as may be appropriate. Alternatively, consideration should be given to the introduction of a statutory scheme whereby payments made under periodic payments orders will be statutorily protected and fully guaranteed. In the absence of such a scheme, it is likely that only State defendants will be able to demonstrate, to the satisfaction of the court, that the continuity of payment of a periodic payments order can be reasonably secure*."[28]

---

25 Same as above.
26 Same as above, at 28.
27 Same as above.
28 Same as above, at 31.

Indexation of periodic payments

4.31 In terms of indexation of periodic payments, the WGMNPP recommended that a dedicated index should be applied to periodic payments and such index should be provided on a statutory basis.[29] It was believed that adequate and appropriate indexation of periodic payment was an indispensable and prerequisite requirement for any periodic payment scheme in Ireland.

Variation of periodic payments orders

4.32 The WGMNPP recommended that:

> "*provision should be made for the variation of periodic payments orders in certain limited circumstances and it should only be permitted where it had been determined that the plaintiff's condition would seriously deteriorate or significantly improve and where this future contingency had been factored into the original periodic payments order.*"[30]

4.33 The WGMNPP considered that variation of the periodic payments orders would be necessary and appropriate for the benefit of a defendant in cases such as where an injured plaintiff recovered his/her capacity leading to a reduction in care or treatment costs or resumption of earning potential. Yet, it was noted by the WGMNPP that that would undermine the finality in litigation. The WGMNPP was, therefore, of the view that provision should be made for the variation of periodic payment awards, in particular identified exceptional circumstances.[31] The provisions for variation of periodic payment orders in England and Wales and Northern Ireland pursuant to the Damages Act 1996 should be followed and adopted in Ireland. The WGMNPP had also considered whether periodic payments order should be allowed to provide for adjustment at the outset, such as reaching a certain age by a plaintiff or having the periodic payments to reflect the changes in living or care expenses by way of a "*stepped payments*" arrangement, such as the reaching of adulthood of the plaintiff. The WGMNPP recommended that provision should be made for periodic payments, as indexed, to be further adjusted for this purpose.[32]

---

29 Same as above.
30 Same as above, at 33.
31 Same as above, at 35.
32 Same as above.

Other issues

4.34 The WGMNPP considered that the recipient of a periodic payments order should be restricted from assigning his or her interest in the order or to charge the order or encumber it in any other manner.[33]

4.35 In terms of provision for dependants, the WGMNPP did not foresee any particular circumstances arising where the court should make periodic payments orders which would endure for dependants of injured plaintiffs after death where such orders were made to compensate for the costs of the plaintiff's care, treatment and medical and assistive aids and appliances.[34] However, the WGMNPP was against the view that litigation parties should be precluded from reaching agreement to make ongoing payments to dependants for specified periods after the death of an injured plaintiff.[35]

4.36 The WGMNPP considered that for the sake of clarity, legislation should provide for the exclusion of the right to receive periodic payments from the ambit of the Irish Bankruptcy Act in order to protect the continuity of the periodic payments.[36]

4.37 The WGMNPP had considered whether, in conjunction with a regime for periodic payments, provision should be made for interim payments of damages and for provisional damages awards. It recommended that:

> "*the availability of that remedy should be conditional on either an admission of liability by the defendant or the obtaining of judgment by the plaintiff for damages to be assessed.*"[37]

4.38 It also considered that a provision along the lines of section 3 of the Damages Act 1996 in England and Wales and Northern Ireland[38] for the making of interim and provisional awards of damages should be introduced in Ireland.[39]

---

33 Same as above, at 35 and 36.

34 Same as above, at 36.

35 Same as above.

36 Same as above, at 40.

37 Same as above, at 41.

38 Section 3 of the Damages Act 1996, further provides inter alia that:

- the award of the provisional damages shall not operate as a bar to an action for fatal injuries
- such part (if any) of the provisional damages and any further damages awarded to the person in question before his/her death as was intended to compensate him/her for pecuniary loss in a period which in the event falls after his/her death shall be taken into account in assessing the amount of any loss of support suffered by the person or persons for whose benefit the fatal injuries action is brought, and
- no award of further damages made in respect of that person after his death shall include any amount for loss of income in respect of any period after his death.

39 High Court of Dublin, Ireland, *Report of the Working Group on Medical Negligence and Periodic Payments (Module 1)*, at 42.

Legislation on periodic payment orders

4.39 The Irish Government examined the issues in response to the WGMNPP and decided in January 2013 on the enactment of legislation to provide for periodic payments in cases of catastrophic injury involving state defendants. The question of extending periodic payment orders to cases involving non-State defendants was to be examined by the Department of Justice and Equality in cooperation with the Department of Finance[40] which subsequently requested the State Claims Agency to commission research into the technical aspects of the issue, particularly the need to develop mechanisms that would provide for the financial security of payments on a long-term basis. The State Claims Agency commissioned a professional services company to undertake a study on the feasibility of introducing periodic payment orders in Ireland.[41]

4.40 Following the completion of the study, the Department of Justice and Equality established an inter-departmental working group ("the Working Group") to examine the technical aspects of this issue and to look at the implications of the professional findings for the proposed legislation on periodic payments.[42] The Working Group studied the issues raised in the professional study and undertook a consultation process with the insurance industry and other relevant stakeholders. A questionnaire was developed and circulated to stakeholders seeking their views on key aspects of the legislation.[43]

4.41 The Department of Justice and Equality sought the views of the insurance industry on the content of the proposed legislation on 23 July 2014. Organisations including the Medical Protection Society, the Medical Defence Union, the Personal Injury Assessment Board and those from the insurance industry were requested to complete a questionnaire and to provide any further information that it considered useful.

4.42 A Report was issued on 22 April 2015 and it consists of 9 chapters and a Civil Liability (Amendment) Bill 2015. The Report covers the following areas:

(1) Scope of the periodic payment order legislation

The Working Group considered that periodic payment order should be limited to case of catastrophic injury since it considered that catastrophic injury was likely to be the type of injury in which long-term costs would occur for the claimant. The Working Group also considered that periodic payment orders should be targeted at those requiring long-term care and the legislation should ensure that claimants with long-term care

---

40 Inter-Departmental Working Group on Legislation on Periodic Payment Orders, *Report of the Working Group on Legislation on Periodic Payment Orders,* 22 April 2015, at 3.

41 Same as above.

42 Same as above, at 4.

43 Same as above, at 5.

costs would have sufficient financing on a long-term basis to cover such costs. It considered that the legislation should focus on the definition of catastrophic injury and that it was not appropriate to set the size of the award as the potential criterion for awarding or not awarding periodic payment orders in view of the possibility of an increase in the overall size of awards over time.[44]

(2) Mandatory or discretionary periodic payment orders

A range of views were considered by the Working Group as to whether periodic payment orders should be mandatory or discretionary and whether or not the court should have discretion to award a periodic payment order and whether either party would have the possibility to oppose such an order.[45] Consideration was also given to the implications for the State should the claimant's money and supports run out. That would also need to be a factor in the decision as to when a periodic payment order should be awarded.[46] The Working Group considered that it would be prudent to include a provision in the General Scheme whereby the court would have discretion to award a mandatory periodic payment order but that its decision on this matter would be made having taken account of the views of the parties.[47]

(3) Variable and stepped periodic payment orders

Despite the recommendation of the WGMNPP, the Working Group considered that provisions for variation of periodic payment orders would introduce uncertainty to the State and to the insurance industry with regards to their respective liabilities. While recognising that claimants might need periodic payment orders to be adjusted to accommodate changes in their circumstances or their medical condition, the Working Group did not consider variation to be the best way to respond to the needs of claimants by reason of the resulting uncertainty and unpredictability. There was also the implication of financial cost increases for the State and for the insurance industry.[48]

The Working Group noted that 'stepped' payments would provide greater certainty for the State and for non-State defendants/insurers. The Working Group however acknowledged that this option would not accommodate any unanticipated changes in the circumstances of the claimant such

44 Same as above, at 7.
45 Same as above, at 9.
46 Same as above.
47 Same as above, at 10.
48 Same as above, at 11.

as the loss of the primary carer and the consequent reliance on paid care.[49] These circumstances might warrant the need for extra expenditure. The Working Group considered that:

> "*provision should be made in legislation for the court to consider whether to include one or more 'stepped' payments in a periodic payment order to cater for specific milestones in the claimant's life. Such milestones could include, inter alia, anticipated changes in care needs or entry into full-time education.* The Working Group *recommends that, in the interests of certainty, these milestones would be identified at the time of the award to enable the defendants to plan with regard to potential changes to their financial liabilities.*"[50]

(4) Security of periodic payment orders

The Working Group sought to balance the objective of ensuring that the award received by a catastrophically injured person under a periodic payment order would be secure in the event of insurer insolvency, and at the same time tried to ensure that the State would not be exposed to undue risks and costs. In particular the Working Group sought to avoid the state having to absorb the insurance risks of the private sector. The options explored include the following:[51]

(i) **State sponsored scheme.** This involved the establishment of a scheme whereby insurance companies could buy out their liabilities for periodic payment orders by providing the National Treasury Management Agency ("NTMA") with a lump sum. Such a scheme could be established within the NTMA and allowing it to manage the assets and liabilities of the scheme and administer periodic payment order payments. Ultimately the scheme would require a State guarantee.

(ii) **Reinsurance Pool.** Insurers would pay an annual premium to a pool for periodic payment order reinsurance. This premium would be calculated annually depending on the level of risk of the individual insurer. When a periodic payment order was awarded against an insurer, the reinsurance pool would take over the payments. Under this approach, the State would have to provide an ultimate back-stop for the reinsurance pool and, the State would

---

49 Same as above, at 12.
50 Same as above, at 13.
51 Same as above, at 14.

be expected to provide large advances due to the uncertain costs involved in periodic payment orders. However, if there are repeated calls on the guarantee, then the Government would have to assume the full debt of the pool.[52]

(iii) **Expansion of the Insurance Compensation Fund.** The Insurance Compensation Fund ("ICF") was primarily designed to facilitate payments to policyholders in relation to risks in the State where an Irish authorised or an EEA authorised non-life insurer went into liquidation and the approval of the High Court had been obtained for such payments. The Fund placed a maximum value of 65% or €825,000 (whichever is the lesser) on all payments from the fund in the event of a liquidation of an insurer. In order for the ICF to satisfactorily guarantee security of payment of periodic payment orders, it would be necessary to remove the payment limits in the case of periodic payment orders. In the case of repeated calls on the guarantee, the Government might need to eventually assume the full debt of the fund.[53]

The Working Group also considered the issue of long term, amortising bonds which would be linked to the index chosen for periodic payment orders. While these bonds would be useful for insurers to manage their liabilities, it was at the same time noted that they would unlikely be able to deal with the solvency risk to the satisfaction of the judiciary.[54]

The Working Group considered that the NTMA bond option would need to be combined with another mechanism for the purpose of safeguarding the periodic payment order in the event of the insolvency of insurance companies. It requested the NTMA and the Department of Finance to explore the feasibility of such a bond. The Working Group supported the proposal of the Department of Finance to amend the limits that apply under the Insurance Compensation Fund in order to allow for the full payment of periodic payment order liabilities in the event of insurer insolvency.[55]

(5) Indexation of periodic payment orders

In recognising that indexation was a key issue, the Working Group considered that a specific index should be chosen and included in the legislation. The Working Group did not favour

52 Same as above, at 15.
53 Same as above, at 16.
54 Same as above, at 17.
55 Same as above, at 18.

leaving the choice of index to the discretion of the court as it was thought that it would introduce a high degree of uncertainty of potential financial liabilities for both the State and for the insurance industry. The Working Group viewed that the index chosen which would be published at the same time each year should provide as much certainty as possible for defendants in terms of projected increases in their financial liabilities. This would enable accurate recording of changes to costs annually.[56] It proposed the adoption of the Irish Harmonised Index of Consumer Prices ("HICP"), which measured a broad-based basket of goods and services, including health, so that increases in costs would be in line with general increases in prices in the Irish economy. The Working Group also considered the question of providing for an additional uplift for additional wage growth and of determining the percentage of such uplift to be reviewed at 5 yearly intervals.[57]

Latest development in Ireland

4.43 A Civil Liability (Amendment) Bill was introduced into the Irish House of Oireachtas on 8 February 2017 ("the Bill").[58] The purpose of the Bill is to empower the courts to award damages by way of PPOs in catastrophic cases. The Bill was based on the Report issued by the WGMNPP established by the High Court ("the Report").[59]

4.44 It was mentioned in the Second Stage Speech made by the Tánaiste and Minister for Justice and Equality that the courts have made more than 50 interim PPOs since the publication of the Report and these PPOs were subject to review by the courts on returnable dates. The courts however did not favour settlement of these orders with the absence of legislation.

4.45 The Bill not only provides the court with the power to award damages by way of PPOs where appropriate, having regard to the best interests of the plaintiff and all the circumstances of the case, it contains provisions regarding the security and indexation of periodic payment orders. The Bill also provides that PPOs will not be subject to income tax and that such payments will not be taken into account in the event of bankruptcy.

Periodic payment orders

4.46 Section 2 of the Bill inserts a new part, namely Part IVB into the Civil Liability Act 1961. This new part inserts new sections 51H to 51O into the 1961 Act. The new section 51I of the Bill provides that the court has the

---

56 Same as above, at 19.

57 Same as above, at 22-24.

58 The Civil Liability (Amendment) Act was enacted in November 2017.

59 Please refer to para 4.19 above.

power to order the whole or part of the damage for personal injuries to a plaintiff who has suffered a catastrophic injury by way of periodical payments. Such damages related to:

> "*(a) the future medical treatment of the plaintiff,*
>
> *(b) the future care of the plaintiff,*
>
> *(c) the provision of assistive technology or other aids and appliances associated with the medical treatment and care of the plaintiff, and*
>
> *(d) where the parties consent in writing, damages in respect of future loss of earnings.*"

4.47 The definition of "*catastrophic injury*" is provided in the new section 51H:

> "*'catastrophic injury' means, in relation to a person, a personal injury which is of such severity that it results in a permanent disability to the person requiring the person to receive life-long care and assistance in all activities of daily living or a substantial part thereof.*"

4.48 As provided in the new section 51I(2), in deciding whether or not to make such an order, the court is required to have regard to:

> "*(a) the best interests of the plaintiff, and*
>
> *(b) the circumstances of the case, including:*
>
> *(i) the nature of the injuries suffered by the plaintiff; and*
>
> *(ii) the form of award that would, in the court's view, best meet the needs of the plaintiff having regard to—*
>
> *(I) the amount of any payments proposed to be made to the plaintiff,*
>
> *(II) the form of award preferred by the plaintiff and the reasons for that preference,*
>
> *(III) any financial advice received by the plaintiff in respect of the form of the award, and*
>
> *(IV) the form of award preferred by the defendant and the reasons for that preference.*"

4.49 In the case where the parties to such an action agree to the payment of damages by way of periodic payments, they may apply to the court. The court may make a PPO in accordance with the terms agreed, refuse the

application, or refuse the application and make a PPO under the new section 51I(1).[60]

4.50 The Bill provides for the award of a stepped payment. Under the new section 51I:

> "*(4) Where it is anticipated that there will be changes in a plaintiff's circumstances during his or her life which are likely to have an effect on his or her needs, a court may make provision in a periodic payments order that a payment under the order shall, from a specified date, increase or decrease by a specified amount (in this Part referred to as a 'stepped payment').*
>
> *(5) The changes in circumstances which may form the basis of a stepped payment include:*
>
> *(a) a plaintiff reaching 18 years of age;*
>
> *(b) a plaintiff entering primary or secondary school;*
>
> *(c) a plaintiff entering third level education; and*
>
> *(d) anticipated changes in the care needs of a plaintiff, including a requirement that the plaintiff move into residential care.*
>
> *(6) Where a court makes a periodic payments order under this section, the order shall specify—*
>
> *(a) the annual amount awarded to the plaintiff,*
>
> *(b) the frequency of the payments that are to be made to the plaintiff from the annual amount by the paying party,*
>
> *(c) the amount awarded for damages in respect of the matters referred to in paragraphs (a), (b) and (c) of subsection (1),*
>
> *(d) where, further to subsection (1)(d), the periodic payments order includes damages in respect of future loss of earnings by the plaintiff, the amount awarded for such loss of earnings,*
>
> *(e) the method by which payments are to be made by the paying party to the plaintiff,*
>
> *(f) that the payments under the order are to be made to the plaintiff during his or her lifetime,*

[60] The new section 51I(3) of the Bill.

(g) that the annual amount awarded to the plaintiff will be adjusted in accordance with the Harmonised Index of Consumer Prices as published by the Central Statistics Office or such other index as may be specified by the Minister under section 51L,

(h) where a stepped payment is provided for—

(i) the change in circumstances on which an increase or decrease in the amount of a payment (referred to subsequently in this paragraph as 'the relevant increase or decrease') is based,

(ii) the date on which the relevant increase or decrease shall take effect,

(iii) the amount of the relevant increase or decrease at current value, and

(iv) that the amount of the relevant increase or decrease shall, on the date that it takes effect, be applied to the annual amount awarded to the plaintiff as adjusted in accordance with the Harmonised Index of Consumer Prices as published by the Central Statistics Office or such other index as may be specified by the Minister under section 51L,

and

(i) any other matter that the court considers appropriate.

(7) Where –

(a) a court provides in a periodic payments order for a stepped payment, and

(b) prior to the date that the stepped payment is due to take effect, it is evident to the plaintiff that the anticipated change in the plaintiff's circumstances on which that stepped payment was based will not arise,

the plaintiff shall, as soon as practicable and not later than 10 working days before the date on which the stepped payment is due to take effect, notify the court that made the periodic payments order and the paying party in writing that the anticipated change in the plaintiff's circumstances which formed the basis for the stepped payment concerned will not arise.

(8) Where a court receives a notification under subsection (7) from a plaintiff in relation to a stepped payment specified in a periodic payments order, the court shall amend the

periodic payments order concerned by making such adjustments to the order as it considers appropriate.

(9) Where a periodic payments order is amended under subsection (8), the court shall cause a copy of the order as amended to be sent to the plaintiff and the paying party."

Security of PPOs

4.51 The new section 51J of the Bill provides for the security of PPOs and reads as follows:

"*51J. (1) A court may make a periodic payments order where it is satisfied that continuity of the payments under the order is reasonably secure.*

(2) In considering whether continuity of the payments under a periodic payments order is reasonably secure, a court shall have regard to the following matters:

(a) whether the payments under the order are guaranteed under the Clinical Indemnity Scheme[61] or the General Indemnity Scheme;[62]

(b) whether the payments under the order are eligible for payment from the Insurance Compensation Fund;[63]

(c) whether continuity of the payments under the order can be guaranteed by other means.

(3) In considering whether other means for guaranteeing payments referred to in subsection (2)(c) are such that continuity of the payments under a periodic payments order would be reasonably secure, a court shall have regard to whether the proposed means for guaranteeing payments under the order—

---

61 The new section 51H of the Bill provides:
"*Clinical Indemnity Scheme*" means the scheme established by the State under which the State Claims Agency manages clinical negligence claims taken against certain State Authorities and other parties indemnified by the scheme.

62 The new section 51H of the Bill provides:
"*General Indemnity Scheme*" means the scheme established by the State under which the State Claims Agency manages negligence claims, other than clinical negligence claims to which the Clinical Indemnity Scheme applies, taken against certain State Authorities.

63 The new section 51H of the Bill provides:
"*Insurance Compensation Fund*" means the fund established under section 2 of the Insurance Act 1964.

(a) are such as to be capable of making the proposed payments to a plaintiff during his or her lifetime, and

(b) are capable of being adjusted in accordance with the Harmonised Index of Consumer Prices as published by the Central Statistics Office or such other index as may be specified by the Minister[64] under section 51L."

Indexation of periodic payments

4.52 Payment under a PPO would be adjusted annually with reference to the Harmonised Index of Consumer Prices published by the Central Statistics Office or such other index as specified under the new section 51L of the Bill.[65]

4.53 The application of the index will be reviewed not less than 5 years after commencement of the Part IVB of the Bill to determine the suitability of application of the index, and thereafter will be reviewed every 5 years.

Consequential amendments to other Acts

4.54 The Bill provides for the amendment to section 3 of the Insurance Act 1964 so that the limitation that applies to section 3(4) will not be applicable to a sum required to meet the liability of the insured under a PPO. Section 3(4) deals with the maximum amounts that may be paid from the Fund in the event of a liquidation of an insurance company. It provides that the total amount that may be paid out of the Insurance Compensation Fund under subsection (1) in respect of any sum due to a person under a policy shall not exceed (whether as one payment or as the total of a series of payments) 65 per cent of that sum, or €825,000, whichever is the less.

4.55 The Bankruptcy Act 1988 is also amended for the protection of a claimant's periodic payment award in the event of the claimant's bankruptcy so that a claimant will continue to have the possibility of receiving the resources needed to cover necessary long-term care and medical attention and that such resources would not be available for distribution to creditors by the Official Assignee.

4.56 The Taxes Consolidation Act 1997 is amended by adding a new section to provide exemption from income tax in respect of payments made to

---

64 The new section 51H of the Bill provides – "*Minister*" means the Minister for Justice and Equality.

65 The new section 51L of the Bill.

persons under a PPO. In this way, PPOs will have the same tax exempt status as exists for payments for damages under a lump sum arrangement.

Netherlands

4.57 The Dutch Civil Code sets out some general rules on the recoverable damages in personal injury cases. The aim of the law is to provide full compensation for damage suffered. Effectively, all pecuniary loss is to be compensated, including the cost of medical treatment, reasonable cost of supplementary care, increased expenses due to physical impairment, actual loss of income, loss of future increase in income (for example, if the injuries adversely affect possible career prospects) and other future damages.[66] According to the Civil Code, the courts are allowed to award future damages either as a lump sum or as a periodic allowance.[67]

> "*Article 6:105 Estimation of damage that has not yet revealed itself :-*[68]
>
> *The estimation of damage which has not yet revealed itself may be postponed entirely or partially by the court or may be calculated in advance after assessment of all beneficial and unfavourable possibilities. In this last situation the court may order the debtor either to pay the calculated total sum at once through a lump-sum payment or to pay it periodically in split quantities (instalments), whether or not under the obligation to provide security; such a judgment can be given under additional conditions.*
>
> *As far as the court has ordered the debtor to pay the calculated sum periodically in split quantities (instalments), it may rule in the same judgment that this obligation can be modified at the request of each of the parties, to be lodged with the court which at first instance has given a judgment on the legal claim (right of action) for a compensation of damage, but only if afterwards new circumstances have come to light which are important for determining the extent of the compensation, but which were not taken into account as a beneficial or unfavourable possibility at the estimation of the chargeable sum.*"

In personal injury legal practice, both injurer and injured party generally prefer payment of a lump sum (partly for purposes of avoiding income tax).

---

66 Willem H. van Boom, "Compensation for Personal Injury in the Netherlands", Bernhard A. Koch, Helmut Koziol (eds.), *Compensation for Personal Injury in a Comparative Perspective*, *Tort and Insurance Law* Vol. 4, 2003, Springer Wien New York, paras 60 and 61.

67 The new Civil Code, *Nieuw Burgerlijk Wetboek*, hence: BW; Same as above, at para 62.

68 Excerpt from an unofficial website: http://www.dutchcivillaw.com/civilcodebook066.htm.

New Zealand

4.58 New Zealand's compensation system arose not in response to concerns over medical malpractice but through workers' compensation reforms. The Royal Commission established in 1967 considered that accident victims would need a secure source of financial support for the period when they were being deprived of their capacities to work. The Commission had doubt on whether a liability-based system may provide the necessary financial support and hence recommended a no-fault compensation scheme for personal injury.

4.59 In 1972, tortious causes of action for personal injuries in New Zealand 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 and was later being replaced by the Accident Compensation Act 2001 ("The AC Act 2001").

4.60 The AC Act 2001 was enacted for the purpose of:

> "*providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs)*".[69]

New Zealand's "*no fault*" accident compensation scheme differs from the common law system for compensating persons who had suffered personal injury as a result of the negligence of another person. Under the statutory 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 Corporation ("ACC"), i.e. a Crown organisation responsible for administering the country's no-fault accidental injury scheme by providing financial compensation and support to citizens, residents, and temporary visitors who have suffered personal injuries.[70]

4.61 One of the major objectives of the AC Act 2001 is to establish the ACC to facilitate "*the promotion of measures to reduce the incidence and severity of personal injury*". The work of the Corporation primarily focuses on:

> *"rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation..."*[71]

---

69 New Zealand Accident Compensation Act 2001, section 3.

70 http://www.acc.co.nz/about-acc/overview-of-acc/introduction-to-acc/index.htm.

71 New Zealand Accident Compensation Act 2001, section 3.

4.62 Further, the ACC should ensure that:

> *"…during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment…*"[72]

4.63 Under section 48 of the AC Act 2001, a person who wants to make a claim for his or her personal injury must be lodged with the ACC, who will investigate the claim at its own expense and then make its decision on the claim within the prescribed time.

4.64 Prior to the enactment of the AC Act 2001, the Accident Rehabilitation and Compensation Insurance Act 1992 abolished lump sum payments for loss of faculty and pain and suffering, replacing it with a periodic "*independence allowance*" paid in a more restrictive set of circumstances, i.e. for residual disability only but not mere pain, suffering or loss of amenity.

4.65 Lump sums were reintroduced by the AC Act 2001 in 2002, but in a limited form, dealing only with permanent impairments of 10% or more, and not with mere pain and suffering or loss of amenity.[73]

4.66 Under section 69(1) of the AC Act 2001, a claimant who suffered a personal injury is entitled to one or more entitlements.[74] These entitlements include:

(a) rehabilitation, comprising treatment, social rehabilitation, and vocational rehabilitation:

(b) first week compensation:

(c) weekly compensation:

(d) lump sum compensation for permanent impairment:

(e) funeral grants, survivors' grants, weekly compensation for the spouse or partner, children and other dependants of a deceased claimant, and child care payments.

Scotland

4.67 In Scotland, an award of damages in respect of a personal injury claim is generally paid as a lump sum. In December 2012, the Civil Law Reform Unit of the Scottish Government issued a consultation paper on *Civil Law of Damages: Issues in Personal Injury*. The underlying principle of the

---

72 Same as above.

73 New Zealand Accident Compensation Act 2001, section 69.

74 New Zealand Accident Compensation Act 2001, section 67.

consultation was to enable key aspect of damages from personal injury to be modernised and simplified. A range of issues were canvassed in the consultation, including those in relation to periodic payments and Discount Rate. It was noted in the consultation paper that when the claimant's long-term future losses and need were estimated, they could rarely be known with certainty. There was also the risk of an under estimation which resulted in hardship suffered by the claimant as well as the possibility of an overestimation of the amount which would cause unfairness to the defendant. It was said that greater use of periodic payments would offer scope to reflect the actual needs and losses of a claimant more closely than is possible with lump sums.

4.68 At present, as provided in section 2 of the Damages Act 1996 where damages for personal injury are payable in Scotland, the courts may make an order for periodic payments, only with the consent of the parties involved. This position differs from England and Wales and Northern Ireland, where an amended version of section 2 of the Damages Act 1996 is in effect that empowers the courts to impose an order providing for periodic payments to the injured person without the consent of the parties.[75]

4.69 In the case of *D's Parent and Guardian (AP) v Greater Glasgow Health Board*,[76] Lord Stewart offered extensive comment on the settlement and guidance on the use of periodic payments in Scotland. He observed that it was for consideration whether statutory provision ought to be made in Scotland for the payment of damages by periodic payments similar to the provision that had been made for England and Wales and Northern Ireland.[77] Against this background, the Scottish Government sought the views of the public as to whether "*there would be merit in reviewing the existing approach to periodic payments, as currently set out in Scottish version of section 2 of the 1996 Act?*"

4.70 In December 2013, the Scottish Government issued the *Civil Law of Damages: Issues in Personal Injury, Scottish Government Response to the Consultation*, which states that:

> *"periodic payments can ameliorate some of the risks of either over or under compensating a successful claimant and offer scope in the future to reflect the pursuer's actual needs and losses more closely than is possible with a lump sum payment at the conclusion of the case*."[78]

It was therefore proposed that Scottish courts should be empowered to impose a periodic payment order and to vary such orders in the future.[79] At the end of the formal consultation period, the Scottish Government commissioned

---

75 Scottish Government, *The Civil Law of Damages: Issues in Personal Injury, Scottish Government Response to the Consultation*, Dec 2013, at 15.

76 [2011] CSOH 99.

77 Same as above, at 15.

78 Same as above.

79 Same as above.

independent, external analysis of all the responses received and published an independent analysis report. The Damages Bill was announced in September 2013 by the Scottish Government.[80]

Singapore

4.71 Under the Supreme Court of Judicature Act 1993 (Cap 322, 2007 Ed), the High Court of Singapore is empowered to order damages assessed in any action for personal injuries to be paid in periodic instalments rather than as a lump sum.[81] Yet, awards of periodic payments are deemed exceedingly rare in practice by the court.[82] In the case *Lai Wai Keong Eugene v Loo Wei Yen* [2013] SGHC 123 ("*Lai Wai Keong"*),[83] the Singaporean court seemed to adopt the approach that if neither party sought damages by way of periodic payments, it must award lump sum damages. Vinodh Coomaraswamy J stated in the judgement:

> *"It appears that both plaintiffs and defendants – or more often the latter's insurers – invariably prefer lump sum awards. In the case before me, neither party sought damages by way of periodic payments. So it is a lump sum which I must award."*

Sweden

4.72 The law in Sweden relating to liability and compensation is governed by the Tort Liability Act (Skadeståndslagen).[84] In Sweden, full compensation to the victim is generally guaranteed. One characteristic of the Swedish system is that claims are frequently settled out of court and few cases would go to court. Most personal injury cases are settled voluntarily according to the opinions given by advisory boards, such as the Traffic Accident Board and the Liability Insurance Personal Injury Board. These boards would set the standards of personal injury compensation and the Supreme Court would develop the legal practice in more important key issues.[85]

---

80 See also paras 5.22 and 5.23 below.

81 Singapore Supreme Court of Judicature Act 1993 (Cap 322), First Schedule, para 17. Under paragraph 17 of the First Schedule of the Supreme Court of Judicature Act 1993 (Cap. 322, 2007 Ed), the High Court of Singapore is empowered to order damages assessed in any action for personal injuries to be paid in periodic instalments rather than as a lump sum.

82 *Lai Wai Keong Eugene v Loo Wei Yen* [2013] SGHC 123 (Vinodh Coomaraswamy J), para 26.

83 *Lai Wai Keong Eugene v Loo Wei Yen* [2013] SGHC 123, para 26. It can be inferred that a possible reason that the court rarely ordered periodic payment was that it was not asked by the parties to do so. Although paragraph 17 of the First Schedule of the Supreme Court of Judicature Act 1993 (Cap. 322, 2007 Ed) does not require parties' consent before ordering periodic payment, *Lai Wai Keong* seems to suggest that the court would take such factor into account.

84 Law No 1972:207, amended 1975:404 and 1995:1190; Erland Strömbäck, "Personal Injury Compensation in Sweden Today", Stockholm Institute for Scandinavian Law 1957-2009, at 431.

85 Erland Strömbäck, "Personal Injury Compensation in Sweden Today", Stockholm Institute for Scandinavian Law 1957-2009, at 432.

4.73 Compensation for loss of earnings takes the form of an annuity or a lump sum depending on the circumstances. Traditionally, payment of annuities has been the norm and is thought to be the preferable method of payment of compensation due to social reasons.[86] Another reason behind the preference for annuities is the favourable indexing of the compensation.[87]

4.74 As society develops, the establishment of other compensation schemes, such as social insurance, has resulted in damages losing much of its significance in maintaining the injured person and his family. In most cases, injured persons in tortious claims treat damages as a supplementary form of compensation. Yet, the law still treats annuities as the main form of compensation in cases where they are of major importance in providing continuous maintenance to the injured person.[88]

4.75 A lump sum payment is an alternative kind of compensation in other cases and it is possible to combine annuity with a lump sum. An annuity can be wholly or partially converted into a lump sum.[89]

4.76 In relation to indexing of the annuities for tortious liabilities, it is protected against inflation within a frame of 5% per annum. If the inflation of one year does not reach 5%, there is no index addition. It is also possible to take the percentage of the actual inflation into account for the coming year so that it is possible to reach the necessary level of 5% that year or even exceed it.[90]

United States

4.77 Many states in the United States have no-fault statutory schemes for road accidents and injuries to workers. Except in cases of injuries at work, these states do not preclude the taking of a tort claim. The existence of statutory schemes will affect how often a tort claim will be taken out.[91]

4.78 Structured settlements have become more popular and widely used in the United States,[92] but many states enacted legislation that allows or even requires periodic payments of damages. The Uniform Laws Commissioners in the United States prepared a Model Periodic Payment of Judgments Act in 1980, which had provided a model for many states to introduce their own periodic payments laws. Since 1990, this earlier act had

---

86 Same as above, at 442.

87 Same as above, at 443, note 18.

88 Same as above, at 442.

89 Same as above, at 443.

90 At the time when the law of indexing annuities was written (1974), the inflation rate was normally much higher. It is possible to 'save' the percentage of inflation what is over the 5-percent-level to the next year. Same as above, at 443.

91 The Irish Law Reform Commission, *Report on Personal Injuries: Periodic Payments and Structured Settlements*, December 1996, para 8.1.

92 Same as above, para 10.1.

been replaced by a considerably updated Uniform Periodic Payment of Judgments Act (UPPJA).

4.79 A number of US states now have legislation that empowers the court to award periodic payment of damages in the context of medical malpractice, including Alabama, Alaska, California, Delaware, Florida, Illinois, Kansas, Louisiana, Maryland, New Mexico, New York, Oregon, South Dakota, Utah, Washington and Wisconsin. In South Dakota and Washington, periodic payment of damages has been made available in all actions for personal injury and totally disabling personal injury, respectively.[93]

4.80 Most states in the US require future losses to be reduced to their present value so that damages can be awarded in the form of a lump sum. Factors relating to future taxation and inflation rates will need to be taken into account. Damages awarded will be adjusted by taking into account the amount of interest that an investment of the lump sum itself will earn over time. It is approached on the basis that a figure which, when placed in safe investments at the date of judgment, will earn interest equal to the projected loss of wages.[94]

4.81 Under the UPPJA, either party to a tort action involving bodily injury may elect to have the award of future damages for economic loss to be in periodic form if the damages will potentially exceed US$100,000.00.[95] The other party may contest such an election by showing that the time period for periodic payment is too short or the amount of damages too small to make periodic payment an advantage over a lump sum award, or by showing that a periodic payment judgment cannot be properly and securely funded.

93 Same as above, at para 10.12.
94 Same as above, at para 8.8.
95 The United States Uniform Periodic Payment Judgments Act, section 2(c)(1).

Chapter 5

The intertwined problem of indexation and setting of the Discount Rate

---

A. Why is a Discount Rate needed?

5.1 It is trite that the damages awarded in a personal injury case is to *"fully compensate"* the plaintiff for the loss caused by the injuries inflicted upon him by the wrongdoer. The Court will strive to achieve this aim in so far as the loss is capable of being quantified. In the words of Lord Hope in *Wells v Wells* [1999] 1 AC 345:[1]

> *"Nevertheless the object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position as he or she would have been in but for the accident. The aim is to award such a sum of money as will amount to no more, and at the same time no less, than the net loss. As Lord Oliver of Aylmerton said in Hodgson v Trapp [1989] A.C. 807, 826:*
>
> > *'Essentially what the court has to do is to calculate as best it can the sum of money which will on the one hand be adequate, by its* ***capital and income****, to provide annually for the injured person a sum equal to his estimated annual loss over the whole of the period during which that loss is likely to continue, but which, on the other hand, will not, at the end of that period, leave him in a better financial position than he would have been apart from the accident. Hence* ***the conventional approach is to assess the amount notionally required to be laid out in the purchase of an annuity*** *which will provide the annual amount needed for the whole period of loss.'"*
> > [Emphasis added]

5.2 Conventionally, damages are awarded by way of a lump sum and **by reason of accelerated receipts**, the plaintiff may be **overcompensated if the lump sum is not discounted** on the ground that the bulk of money in his

---

[1] At 390A-B.

hand can be invested to produce income. Lord Hope in *Wells v Wells*[2] further explained that:

> ***"The measure of the discount is the rate of return which can reasonably be expected on that sum [of damages] if invested in such a way as to enable the plaintiff to meet the whole amount of the loss during the entire period*** *which has been assumed for it by the expenditure of income with capital... The assumptions to be made at the stage of selecting the Discount Rate are simply these. First, it is to be assumed that the lump sum will be invested in such a way as to enable the plaintiff to meet the whole amount of the losses or costs as they arise during the entire period while protecting the award against inflation, which can thus be left out of account. Secondly, it is to be assumed that that investment will produce a return which represents the market's view of the reward to be given for foregoing the use of the money in the meantime. This is the rate of interest to be expected where the investment is without risk, there being no question about the availability of the money when the investor requires repayment of the capital and there being no question of loss due to inflation."*** [Emphasis added]

5.3 In practice, the Discount Rate will dictate the selection of multipliers used in the calculation of damages. The multiplier is just another representation of the Discount Rate, which can be read from actuarial tables for PI Cases (such as Ogden Tables in UK and the Chan's Tables in Hong Kong).

5.4 Once the period of loss (or future needs) has been determined, the selection of multiplier at a given Discount Rate is a mathematical exercise and there is no more room for judicial tinkering on the ground of "*contingencies of life*" (see *Lord Lloyd in Wells v Wells* [1999] 1 AC 345 at 378C).

5.5 The setting of Discount Rate is of paramount importance since it will affect the amount of damages to be awarded if made in a lump sum. By way of illustration, assuming that compensation of £50k per year is awarded (in real terms) for a male claimant for life and the compensation is taken as a lump sum, the variation in the award is shown at the chart below (Figure 1) extracted from the 2013 Consultation Paper.

5.6 For instance, if the claimant is at the age of 10, the award would be £1.7m if the Discount Rate were 2.5% compared to £3.2m if the Discount Rate were 0.5%; and a plaintiff aged 60 at the time of injury would be awarded about £0.9m under a Discount Rate of 2.5% and £1.2m at a Discount Rate of 0.5% (see Figure 1 below).

---

[2] At 390G-391C.

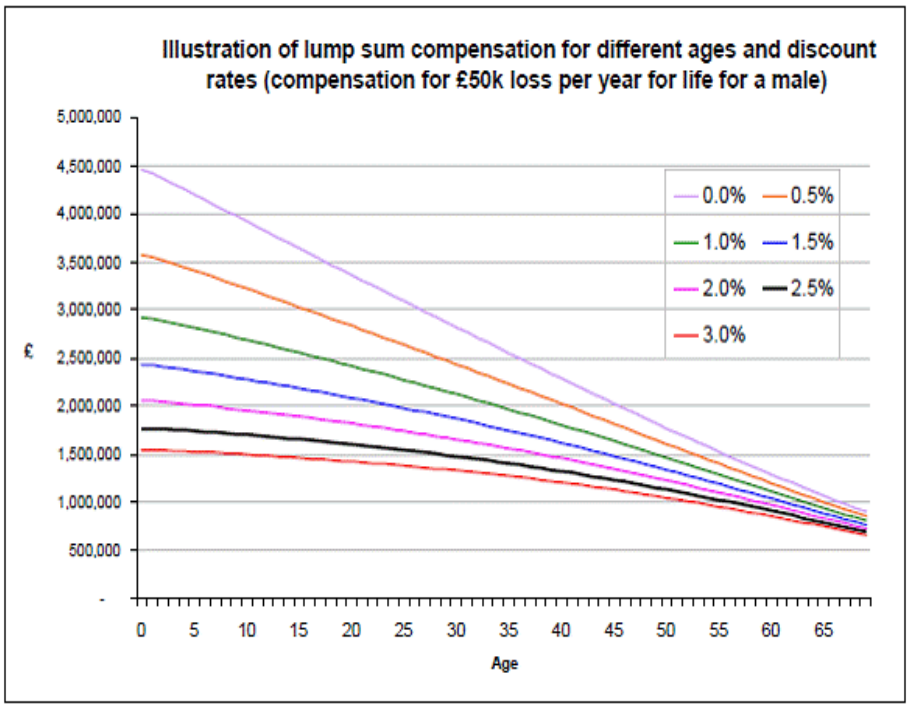

Figure 1

B. A historical survey

From "Cookson v Knowles" to "Wells v Wells"

5.7 For decades, the assumed rate of return on investment in personal injury cases was taken as 4% to 5% (or 4.5%), net of tax and inflation, on the strength of the decision of the House of Lords in *Cookson v Knowles* [1979] AC 556.

5.8 An unsuccessful attempt was made in *Chan Pui Ki v Leung On* [1996] 2 HKLR 401 to assault the underlying assumptions adopted in *Cookson v Knowles* in light of changing economic and social conditions.

5.9 In rejecting the plaintiff's argument for a lower Discount Rate on the strength of actuarial evidence, the five-member bench of the Court of Appeal embraced the rough-and-ready approach of the *Cookson v Knowles* (supra) and held that it had not shown to be inapplicable or erroneous in Hong Kong. Litton JA (as he then was) explained:

> *"54. Cookson v Knowles was a fatal injuries case, but the principles for compensating future pecuniary loss are the same for non-fatal cases. There, the deceased was aged 49... the House of Lords held that the application of a multiplier of 8½ years purchase to the figure of dependency at the date of trial was the correct approach... upon the assumption that the lump sum award would provide a 'real' return of 4% - 5% for the duration of the period intended to be covered by the award:*

At the date of the trial in Cookson v Knowles, it was possible to obtain interest at a rate of approximately 14% in gilt edged securities, with inflation running at approximately 10% (see Lord Fraser at 577D).

55. As Lord Fraser said at 576G:

'The measure of the proper award to a widow ... is a sum which, prudently invested, would provide her with an annuity equal in amount to the support that she has probably lost through the death of her husband, during the period that she would probably have been supported by him. The assumed annuity will be made up partly of income on the principal sum awarded, and partly of capital obtained by gradual encroachment on the principal. The income element will be at its largest at the beginning of the period and will tend to decline, while the capital element will tend to increase until the principal is exhausted. The multipliers which are generally adopted in practice are based on the assumption (rarely mentioned and perhaps rarely appreciated) that the principal sum of damages will earn interest at about 4 or 5%, which are raised (sic) [rates] that would be appropriate in time of stable currency ... But in time of rapid inflation the rate of interest that can be earned by prudent investment in fixed interest securities tends to be high, as investors seek to protect their capital and also to obtain a positive rate of interest.'"

5.10 In short, the underlying assumption of *Cookson v Knowles* is that the widow would be able to achieve a real rate of return of 4 to 5% (net of tax and inflation) by establishing a portfolio of assets producing an annual income which, together with a portion of the capital, would be sufficient to fully compensate the widow for loss of dependency. In modern parlance, the thinking behind *Cookson v Knowles* is that:

"if the claimant were to put the damages awarded into gilts or another form of investment generating fixed interest, the high rate of interest the claimant would obtain in inflationary times should be in advance of inflation, hopefully by about 4.5%: if the claimant invested in equities, while dividends might not exceed 4.5%, the capital growth should keep up with inflation. The fixed interest on the one would be matched by the total return on the other, leaving a real rate of return in each case in the region of 4.5%."[3]

[3] Ministry of Justice, the Scottish Government and the Department of Justice, Northern Ireland, "Damages Act 1996: The Discount Rate – Review of the Legal Framework" Consultation Paper (CP 3/2013) at 11, note 10.

5.11 It is unfortunate that *Chan Pui Ki v Leung On* (supra) was decided ahead of the decision of the House of Lord in *Wells v Wells* (supra) where the assumptions in *Cookson v Knowles* were challenged and disapplied.

5.12 Primarily, it was accepted in *Wells v Wells* (supra) that the injured person should not be forced to take unnecessary risks such as that attendant upon investment in equities in order to achieve a higher rate of return resulting in a higher Discount Rate and a lower multiplier (hence, a lower award) which would benefit the wrongdoer. Further, due regard was given for the fact that:

(a) injured persons have little control over, for instance, when the expenses for care are to be incurred, which means a fair degree of liquidity is required;

(b) investment vehicles with long and inflexible maturity period will not be suitable; and

(c) injured persons, who normally have no other means of subsistence, are not well-placed to absorb the risk of investment loss, particularly, where they may be forced to absorb such loss by depleting the capital.

5.13 In *Wells v Wells* (supra), the House of Lords was convinced that the Discount Rate should be fixed on the basis of the returns from Index-Linked Government Securities (ILGS). On the evidence, the Discount Rate based on ILGS was fixed at 3% (net of tax and inflation) on the assumption that:

(a) A hypothetical claimant would invest only in ILGS and would hold them until maturity;

(b) The return was assessed on the 3-year average of all ILGS[4];

(c) ILGS with maturity not exceeding 5 years were excluded; and

(d) Inflation was estimated at 5% and Standard Tax Rate of 25% was taken into account.

The post-Wells v Wells era

5.14 In fact, before the decision of *Wells v Wells* (supra), the Damages Act 1996 had been passed, which provides that:

"1.(1) In determining the return to be expected from the investment of a sum awarded as damages for future

[4] c.f. Lord Lloyd (at 376B) preferring to use an average of 12 months.

pecuniary loss in an action for personal injury the court shall, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.

(2) Subsection (1) above shall not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.

(3) An order under subsection (1) above may prescribe different rates of return for different classes of case.

(4) Before making an order under subsection (1) above the Lord Chancellor shall consult the Government Actuary and the Treasury; and any order under that subsection shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament."

5.15 In the exercise of his power under section 1 of the Damages Act 1996, Lord Irvine of Lairg (Lord Chancellor) made the Damages (Personal Injury) Order 2001 on 25 June 2001 setting the Discount Rate at 2.5% (net of tax, inflation, management fee).

5.16 The Discount Rate of 2.5% under the 2001 Order engendered criticisms from some quarters, which resulted in the publication of a statement on 27th July 2001 in which Lord Irvine explained the reasoning of his decision and maintained his decision (see Appendix A.1 to Ministry of Justice Consultation Paper *Damages Act 1996 – The Discount Rate – How should it be set?*[5] (the "2012 Consultation Paper").

5.17 In this statement, Lord Irvine made clear he has taken full consideration of the guidelines laid down in *Wells v Wells* (supra) and he intended:

(a) a single Discount Rate for the sake of simplicity and certainty;

(b) the Discount Rate to be rounded to the nearest half percent to coincide with the Ogden Tables; and

(c) the Discount Rate as set would continue to be used unless "*there is a significant and established change in the relevant real rates*".

5.18 In setting the 2.5% Discount Rate, the minor deviation from *Wells v Wells* (supra) is that Lord Irvine found it appropriate to include ILGS with less

[5] 1 August 2012 (CP12/2012).

than 5 years to maturity since there are claimants whose need are not more than 5 years. In obtaining the 3-year average of all ILGS, he used the real yield (as opposed gross redemption yield) for ILGS which were very close to maturity date. The inflation was estimated to be no more than 3% (instead of 5%).

5.19 The fixing of the Discount Rate under the 2001 Order has done away with the need to pay for extra investment advice. The procedure for investing in ILGS is simple enough and the management fee has been factored into the Discount Rate. Hence, claims for investment advice thereafter have been disallowed.[6]

5.20 Not until recently, there had been no change to the 2.5% Discount Rate since the 2001 Order. This has caused disquiet amongst claimants. Owing to drastic changes in the financial markets since the financial "*tsunami*" in 2008 with the use of "*quantitative easing*" in many money markets, the return on ILGS had fallen to 0.2% by the end of 2012 (see Figure 2 below extracted from the 2012 Consultation Paper at p. 25).

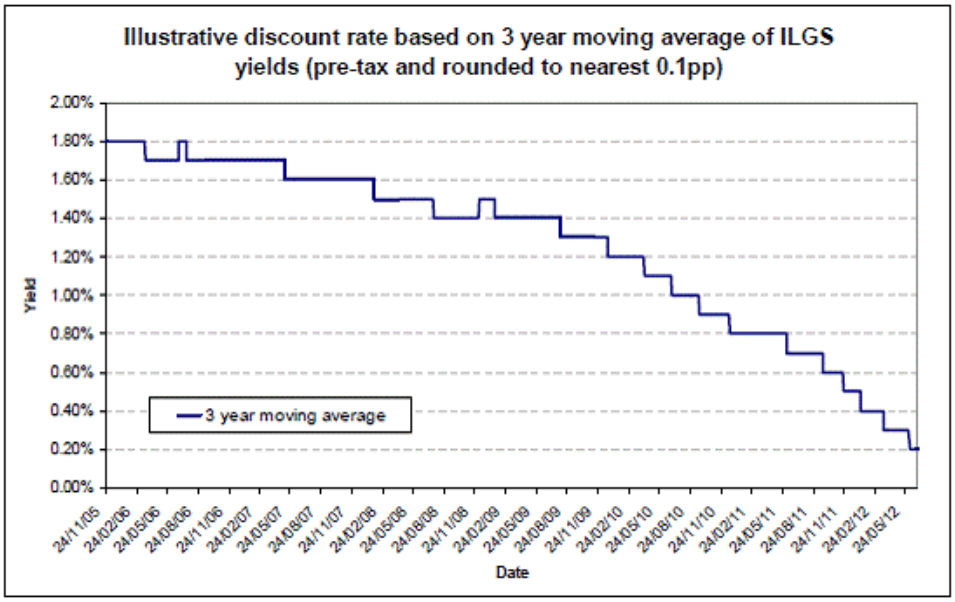

Figure 2

5.21 The assumptions in *Wells v Wells (supra)* were subject to critical analysis by the Privy Council in *Simon v Helmot* (on appeal from Court of Appeal of Guernsey) [2012] UKPC 5. In short, the Privy Council upheld the decisions of the Court of Appeal that:

(a) it is no longer realistic to follow the 2.5% Discount Rate under the 2001 Order;

(b) on the evidence, the starting position is that the gross return is only about 1%; and

[6] See *Page v Plymouth Hospital NHS Trust* [2004] PIQR Q6.

(c) due to the higher rate of inflation of wages, a Discount Rate of minus 1.5% should be applied for earning-based losses and 0.5% for non-earning-based losses.

Latest development on Discount Rate in UK

5.22 The Lord Chancellor announced on 27 February 2017 a reduction of the Discount Rate to minus 0.75% and this change came into force on 20 March 2017. The Scottish Minister had laid an Order on 27 March 2017 to change the Discount Rate in Scotland to minus 0.75% and such change came into force on 28 March 2017. Further to this development, a consultation exercise "*The Personal Injury Discount Rate, How it should be set in future*" was conducted by the UK Ministry of Justice and Scottish Government from 30 March to 11 May 2017.

5.23 It is stated in the consultation paper that the core purpose of this consultation is:

> "• ***What principles should guide how the rate is set?***
>
> *Are the present principles still fit for purpose? What should the principles be?*
>
> *What investment returns should be taken into account in setting the rate?*
>
> *Should the possibility of a periodical payment order affect the decision as to the relevant investments?*
>
> • ***How often should the rate be set?***
>
> *Should this be left open, as now, or would a set pattern of review be better?*
>
> *Would an annual, three year or five year system be better?*
>
> *Should reviews be triggered by degrees of change in investment returns?*
>
> • ***Who should set the Discount Rate?***
>
> *Should the power to do so remain with the Lord Chancellor and her counterparts in Scotland, or would it be better for someone else, possibly an expert panel, to set the rate?*"[7]

5.24 The post-consultation report which includes a summary of the Government's (England and Wales) proposals for reform of the law and draft

[7] Ministry of Justice and the Scottish Government, *The Personal Injury Discount Rate, How it should be set in future*, March 2017.

provisions to give effect to the proposals, alongside with other relevant documents was released in September 2017.[8] The draft legislation was published with a view to invite comments from the public.

C. The position in Hong Kong

5.25 By reason of the decision in *Chan Pui Ki v Leung On* (supra), plaintiffs in Hong Kong were saddled with the presumed rate of return of 4.5% in selecting multipliers. Litton, VP (as he was) giving the judgment of the Court said (at 421):

> *"We would unhesitatingly reaffirm the statement of principle above, and adopt what Mustill, L.J. said in Cunningham v Camberwell Health Authority [1990] 2 Med LR 49, at p.53:*
>
> > *'What happens in practice is that the judge adopts an intuitive process buttressed by reference to previously decided cases. These cases partly operate as reference points whose features are compared with those of the case under consideration and partly form the basis of a general climate of opinion on the proper multiplier in a particular type of case with which a judge of long experience in the field will be entirely familiar. But it must be observed that these previous cases themselves must ultimately be intuitive in origin.'*
>
> *Practitioners should also bear in mind what Lord Diplock said in the Privy Council in Paul v Rendell 34 ALR 569:*
>
> > '*The assessment of damages in actions for personal injuries is not a science. A judgment as to what constitutes proper compensation in money terms for pain, suffering or deprivation of amenities of life, can only be intuitive, and the assessment of future economic loss involves a double exercise in the art of prophesying not only what the future holds for the injured Plaintiff but also what the future would have held for him if he had not been injured.'*[9]
> >
> > *'To undertake detailed mathematical calculations in which nearly every factor is so speculative or unreliable in order to assess the capital sum to*

---

8 Ministry of Justice, *Response to the Consultation, The Personal Injury Discount Rate – How it should be set in future*, September 2017; Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/642810/discount-rate-response-consultation-web.pdf.

9 At 571 lines 40-46.

> *represent what is only one of several components in a total award of compensation for personal injuries, is, in their Lordships' view, not only not worthwhile but, worse than this, it has a tendency to mislead. To have one's attention focused on the detailed differences between the rival calculations, as that of counsel and their Lordships' has been in the instant appeal, makes it only too easy to forget how far removed from all reality are most of the assumptions on which the calculations are based. One is in danger of becoming unable to see the wood for the trees.*"[10]

5.26 There is no equivalent of ILGS in Hong Kong although there have been recent issues of bonds (denominated in Hong Kong Dollar) by government or quasi-government organisations. Anyone living in Hong Kong for the last 10 years would know that there was no investment (let alone low-risk investments) which would give a net return anywhere near 4 to 5%. Although there is no tax on investment, the rate of inflation was substantial.

5.27 Over the years, there might have been sporadic attempts by plaintiffs to assault the underlying assumptions of *Cookson v Knowles* (supra) as entrenched by the decision in *Chan Pui Ki v Leung On* (supra). However, the path was only clear for a thorough re-visitation of the topic under the guidance of Bharwaney J in his management of a number of catastrophic cases, which culminated in his judgment in *Chan Pak Ting v Chan Chi Kuen (No.2)*.[11]

5.28 Several principles are clear from the exposition of the law made by Bharwaney J:

(a) How the plaintiff actually invested the damages is irrelevant;[12] and

(b) The fact that insurance premium will go up due to downward adjustment of the Discount Rate (resulting in higher multiplier) should not affect the plaintiff's entitlement to "*full compensation*".[13]

5.29 Based on the economic evidence adduced, Bharwaney J, looking at returns of the preceding 5 to 12 years,[14] devised Discount Rates (net of inflation and management fees) according to the duration of future needs as follows:

---

10 At 579 line 49 to 580 line 9.
11 [2013] 2 HKLRD 1.
12 At para 75 citing Lord Clyde in *Wells v Wells* (supra), at 394H–395B.
13 See para140 citing Lord Hutton in *Wells v Wells* (supra), at 4050-F.
14 5 to 7 years for bonds and EFNs and 12 years for equities.

Duration of Needs	Discount Rate	Investment Portfolio
Not Exceeding 5 years	- 0.5%	20% in 12 months time deposits, 80% in Hong Kong Exchange Fund Notes (EFN).
Not Exceeding 10 years	1%	15% in 12 months fixed deposits and 85% in EFNs and bonds of BBB+ or better.
Exceeding 10 years	2.5%	10% in 12 months fixed deposits, 70% in bonds of BBB+ or better and 20% in high quality blue chips that qualified as "*widows and orphans*" stock.

5.30 Importantly, after a close examination on the differential (less than 0.5%) between the rate of increase in wages and that of retail prices over a long period, Bharwaney J held that there is no justification for different Discount Rates to be applied to earning-based element of losses.

5.31 The appeal from the decision of Bharwaney J in *Chan Pak Ting (supra)* has since been abandoned. However, the approach and new Discount Rates has been fully endorsed by the Court of Appeal in *Chan Wai Ming v Leung Shing Wah*.[15]

D. Approaches of overseas jurisdictions towards fixing of the Discount Rate

5.32 In light of the ever-changing economic conditions and uncharted landscape in the financial market, the fixing of Discount Rates for assessing damages in personal injury cases is a perennial problem facing judges and administrators alike in various jurisdictions.

5.33 As illustrated by the survey summarised hereinafter, different jurisdictions tackle the problem differently and the strategies employed range from statutory intervention (see summary at "Annex A"), which is plagued by inflexibility when changes are clearly warranted, to avoidance of the problem altogether by introducing a no-fault based compensation scheme by way of periodical payments as in the case of New Zealand.

Scotland

5.34 In Scotland, by virtue of section 1 of the Damages Act 1996, in determining the size of that deduction on the issue of Discount Rate, the courts will generally be guided by the views of the Scottish Ministers as expressed in subordinate legislation (i.e. by the "*rate of return ... prescribed by an order*

[15] [2014] 4 HKLRD 669.

made by [the Scottish Ministers]"). This Discount Rate was 2.5%, having last been prescribed by the Scottish Ministers in 2002.[16] In setting the rate, Ministers took account both of the purpose established by the primary legislation and of the views of the House of Lords, expressed in the judgment in *Wells v Wells* (supra), as to the sort of considerations that were relevant in fulfilling that purpose.

5.35 At the time when the rate was prescribed by the Scottish Ministers in 2002, an undertaking was given that:

> *"The Executive will shortly consult interested bodies about various matters to do with damages for personal injuries, including questions about what mechanism Scottish Ministers should adopt in future changes to the rate".*

5.36 However, that consultation exercise did not materialise. Scottish Ministers, jointly with the UK Government and the Department of Justice, Northern Ireland, had been reviewing the current 2.5% rate within the framework established by the primary legislation and *Wells v Wells* (supra) in order to establish whether it remains appropriate for fulfilling the established purpose in today's changed economic climate, following a consultation process under the 2012 Consultation Paper, which closed on 23 October 2012.[17]

5.37 Thereafter, the 2013 Consultation Paper[18] was issued in February 2013. It sought the views on whether the legal parameters governing the way in which the Discount Rate prescribed under section 1 of the Damages Act 1996 should be changed and whether there was a case for encouraging the use of periodical payments. This second issue was primarily examined in the context of the law of England and Wales and Northern Ireland only.

5.38 On periodical payments in Scotland, consideration of this issue was limited to the extent that a PPO might be made but only with the consent of the parties involved. The consultation of this paper was closed.[19]

5.39 The updated position of the reviewing exercise as posted in the Scottish Government website was that the responses to that consultation were being analysed.[20]

---

16 The current rate is minus 0.75%: see para 5.22 above.

17 Consultation Paper entitled *Damages Act 1996 – The Discount Rate – How should it be set?* (1st August 2012) and Scottish Government, *Civil Law of Damages: Issues in Personal Injury – A Consultation Paper*, Dec 2012, at 45.

18 *Damages Act 1996: The Discount Rate - Review of the Legal Framework* (CP 3/2013).

19 http://www.gov.scot/Topics/Justice/law/damages/damagesetc.

20 Same as above; A consultation exercise *The Personal Injury Discount Rate, How it should be set in future* was conducted by the UK Ministry of Justice and Scottish Government from 30 March to 11 May 2017, see paras 5.22 and 5.23 above.

New Zealand

5.40 In the New Zealand system, injured patients would receive government-funded compensation through the Accident Compensation Corporation (ACC). In exchange, they give up the right to sue for damages arising out of any personal injury covered by the accident compensation legislation. This prohibition applies even when a person chooses not to lodge a claim or is not entitled to compensation. Whilst it remains possible for the victims to bring actions for exemplary damages, the courts have found that not even gross negligence warrants such damages unless there is some element of conscious or reckless conduct.

5.41 Under the existing scheme administered by the ACC, it seems that there is no "*Discount Rate*" concept since compensation under various categories[21] is provided and fixed under the Accident Compensation Act 2001 as contained in Part 4 of the Act.

Australia

5.42 In 1981, the High Court of Australia decided that the appropriate Discount Rate for personal injury and death claims was 3% (see *Todorovic v Waller*).[22] The Ipp Report[23] also recommended that the Discount Rate should be fixed at 3%, based on advice from the Australian Government Actuary that "*a realistic after-tax Discount Rate might be in the order of 2 to 4 per cent*" and also on the desirability of maintaining a stable Discount Rate for plaintiffs, defendants and insurers.[24]

5.43 The aforementioned default rate of 3% still applies across Australia today in the absence of any statutory provision to the contrary. In a number of states/territories, Discount Rates are established by statutes.[25]

Canada

5.44 As the Canadian legal system is of a common law origin, civil actions for damages for personal injury are based on similar principles of tort as those applied in Ireland and England and Wales and Northern Ireland. Eight provinces and two territories have legislation to mandate the Discount Rate used for the assessment of future pecuniary damages in civil litigation.[26]

---

21 Accident Compensation Act 2001, Schedule 1.

22 *Todorovic v Waller* (1981) 150 CLR 402, 424, 451, 460, 478.

23 The late David Andrew Ipp AO, QC was the Chairman of the Panel of Eminent Persons, which former Australian Prime Minister John Howard established in 2002 to reform tort laws. The Panel produced its final report known as the Ipp Report on 30 September 2002.

24 Negligence Review Panel, "Review of the Law of Negligence Final Report 2002", at 211.

25 See Annex A for the table on applicable statutory Discount Rates in different states/territories within Australia.

26 See Annex B for the table of summary of provincial and territorial legislation pertaining to Discount Rates for civil litigation in Canada.

Only Alberta, Newfoundland and Labrador, and the Yukon do not have a mandated Discount Rate.[27]

5.45 It is worth noting that in Ontario, whilst awards for future monetary damages are calculated using the Discount Rate set out in R 53.09(1) of the Rules of Civil Procedure and it was generally considered that the court had no discretion to depart from this method of calculation, the courts did depart from the Rules of Civil Procedure Discount Rate for calculating future pecuniary damages.

5.46 Two decisions of the Ontario Superior Court of Justice seem to suggest that it is more common for the court to award future health care costs using a Discount Rate that is more favourable to the plaintiff than the one set out in R 53.09(1),[28] and that in cases involving very significant amounts of care, it would be practical to attempt to recover damages for future care using a Discount Rate calculated by a health care economist and not the one set out in the Rules of Civil Procedure.[29]

5.47 Further, Canadian courts have affirmed the use of actuarial evidence in assessing personal injury damages in a number of landmark cases. In *Dobbin v Alexander Enterprises Ltd*, the Newfoundland Court of Appeal held that "*the actuarial method seems to be preferable to the conventional method for it lends itself to a greater degree of precision*".[30]

5.48 In *Andrews v Grand & Toy Alberta Ltd*., Dickson J acknowledged the use of actuarial calculations as "*the best available means of determining the appropriate award*".[31] Dickson J further explained that the trial judge had a degree of freedom in dealing with the expert evidence and he/she could make necessary adjustment in light of the specific evidence and circumstances regarding the claim.

United States

5.49 In the United States, assessment of damages is a matter for the jury.[32] A victim of personal injury is entitled to have an award for decreased earning capacity reduced to its present value. It has been established in a number of cases that expert evidence is admissible to show the plaintiff's probable life expectancy and the cost of an annuity which will compensate him for his loss.

---

27 http://www.mckeating-actuarial.com/ESW/Files/CBA-NB_paper_for_web2000063_site_-_April_2015.pdf.

28 *See Morrison v Greig* [2007] O.J. No. 225 (S.C.J.), at para 170-179.

29 *MacNeil (Litigation Guardian of) v Bryan* (2009), 74 CCLI (4th) 282, 81 CPC (6th) 116 (ON SCJ); Tomlinson and Olevson, "Paying for the Future; An Analysis of Large Award for Future Care Costs", available at http://clcnow.com/uploads/articles/41/paying-future.pdf?1399435529.

30 *Dobbin v Alexander Enterprises Limited* (1987), 63 Nfld. & P.E.I.R.1, (NL CA), at para 91.

31 *Andrews v Grand & Toy Alberta Ltd* [1978]2 S.C.R 229, at 237.

32 "Damages, VI Practice and Procedure", *American Jurisprudence,* 22 Am Jur 2d, at para 797.

5.50 The testimony of an actuary is also admissible on the question of the present value of the impairment sustained. The court can also consider the actuarial evidence in determining the appropriate Discount Rate.[33] However, as the members of the jury are laymen, they may encounter difficulty in understanding the actuarial evidence as to the present cash value of future earnings and costs of care.

5.51 The determination of the percentage rate to be used for discounting the damages is a matter of considerable controversy.[34] The courts in the US have different methods of evaluating the roles of Discount Rate and future inflation. One inflation rate approach is to regard:

> *"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."*[35]

5.52 In the leading case of *Jones & Laughlin Steel Corporation v Pfeifer*,[36] 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*

---

33 *Brown & Root, Inc. v De Sautell* (Tex Civ App Houston (1st Dist)) 554 SW2d 764 (16 June 1977), at para 10.

34 The Irish Law Reform Commission (n 79), at para 8.9.

35 Same as above, at para 8.12.

36 (1983) 462 US 523, 103 SC 2541, 76 L Ed 2d 768.

predicted price inflation. The resulting figure is the plaintiff's damages for lost wages.

(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 Pfeifer.

(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."[37]

5.53 While the method of assessment/ Discount Rate in some states is mandated either by statute, case law or jury instructions; in some other states, how the Discount Rate is selected is dictated by economic conditions, such as in California.[38] A table extracted from an article published by Fulcrum Inquiry, provides some examples which relate to personal injury claims (unless otherwise noted) is at Annex C.

Singapore

5.54 The Singapore Courts follow English authorities in choosing multipliers in personal injury litigation. The landmark decision of the Privy Council in *Lai Wee Lian v Singapore Bus Service*[39] ("*Lai Wee Lian*") followed the methods of old English authorities when choosing multipliers. Such approach was endorsed again by the Court of Appeal in *Tay Cheng Yan v Tock Hua Bin*[40] ("*Tay Cheng Yan*").

5.55 In the more recent case of *Lai Wai Keong Eugene v Loo Wei Yen*,[41] the Court of Appeal refused to depart from *Lai Wee Lian* and *Tay Cheng Yan* and continued to adopt 5% as the Discount Rate in calculating the multiplier. However, the Court of Appeal added that their decision would not

---

37 The Irish Law Reform Commission (n 79), at para 8.15.

38 Fulcrum Inquiry, "Selecting Discounts Rates for Personal Injury & Employment Damage Calculations", November 2012; Available at https://www.hg.org/article.asp?id=20491. See Annex C for table on Discount Rate method in different states in the United States.

39 Lai Wee Lian v Singapore Bus Service *(1978) Ltd* [1984] 1 MLJ 325.

40 *Tay Cheng Yan v Tock Hua Bin and another* [1992] 1 SLR(R) 779.

41 *Lai Wai Keong Eugene v Loo Wei Yen* [2014] SGCA 31.

preclude the courts from adopting a lower or higher Discount Rate if this was found to be appropriate on the facts of a particular case.

5.56 The Court of Appeal considered the main reasons for not following the English decision in *Wells v Wells*[42] were:

(a) Inflation-proof investment products like ILGS in UK (as relied on by the Court in *Wells v Wells* (supra)) were unavailable in Singapore.

(b) There was no guarantee that the present low rates of return e.g. 1% in Singapore would persist.

(c) Any drastic change to the Discount Rate for accelerated receipt can only be undertaken after a careful study, with input from experts and the various stakeholders involved. This is a matter that falls within the institutional competence of the legislature.

E. Whether a mechanism for adjustment of the Discount Rate is needed?

5.57 It is instructive to note that the approach and the presumed rate of return of 4 to 5% laid down in *Cookson v Knowles* (supra) are guidelines and not set in stone, although one would be slow to seek to change it without good reasons. Lord Salmon said (at 574B) that:

> *"There is one matter that I should like to emphasise, namely that in my view it is impossible to lay down any principles of law which will govern the assessment of damages for all time.* ***We can only lay down broad guidelines for assessing damages*** *in cases where the facts are similar to those of the instant case and where economic factors remain similar to those now prevailing."*[43] [Emphasis added]

5.58 Along the same vein, Lord Lloyd said in *Wells v Wells* (supra, at 372) that:

> *"Wright v British Railways Board is also important because of Lord Diplock's observation, at p.784, that guidelines as to the rate of interest for economic and non-economic loss should be simple to apply, and broad enough to allow for the special features of individual cases. Such guidelines are not to be regarded as rules of law or even rules of practice.* ***They set no binding precedent****, and can be altered as circumstances alter. It follows that a new approach to setting the appropriate Discount*

42 [1999] 1 AC 345.

43 See also Bharwaney J in *Chan Pak Ting v Chan Chi Kuen* [2013] 2 HKLRD 1 at para 77.

Rate, differing from that adopted in Mallett v McMonagle [1970] A.C. 166 and Cookson v Knowles, does not have to be justified under the Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234. Lord Salmon made the same point in Cookson v Knowles [1979] A.C. 556, 574." [Emphasis added]

5.59 Therefore, it is theoretically possible for individual plaintiffs to contend for a tailor-made Discount Rate in light of his unique circumstances. Notwithstanding the decision in *Wells v Wells (supra)*, the flexibility available to the Court to cater for individual circumstances was recognised in *Biesheuvel v Birrell.*[44]

5.60 In that case, Eady, J started with a multiplier arrived at by applying a 3% rate of return (as suggested in *Wells v Wells (supra)*) but provided for a substantial uplift on account of the incidence of tax in the Netherlands, where the plaintiff would stay. Eady, J said (at Q48):

"If it should be the case for a resident of the Netherlands that a fund is going to diminish more rapidly as a result of local taxation, it cannot be ignored by the court in its attempt to arrive at proper compensation (in the sense of providing reasonably for the plaintiff on a restitutio basis until the anticipated date of death). As Lord Oliver observed in Hodgson v Trapp at 826:

> *'Essentially what the court has to do is to calculate as best it can the sum of money which will on the one hand be adequate, by its capital and income. . . Hence the conventional approach is to assess the amount notionally required to be laid out in the purchase of an annuity which will provide the annual amount needed for the whole period of loss.'*

...

Where there is evidence that a plaintiff's right to that remedy is going to be frustrated, by some extraneous factor which conventional discount figures will be inadequate to counter, whether by unusually high rates of taxation or otherwise, then the court needs to have the flexibility to be able to resort to unusual multipliers to meet the problem. There is no good reason of law or policy to justify a short-fall in the amount required for future care or for the other outlays rendered necessary by the disability. Indeed, on the contrary, it was made quite clear by Lord Reid in Taylor v O'Connor [1971] AC 115, 128 that damages 'have to be increased' by an amount necessary to counteract any such shortfall."

---

44 [1999] PIQR Q40.

5.61 It is noteworthy that Eady, J decided the case on common law principles but in UK, the same power is provided for in section 1 of the Damages Act 1996,[45] which finds no parallel in Hong Kong.

5.62 There is no reason why the common law approach cannot be applied in Hong Kong. However, each case must be decided on its own facts and the incidence of the tax may be different depending on the size of the damages in question. In *Van Oudenhoven v Griffin Inns Ltd* [2000] 1 WLR 1413, Stuart-Smith, LJ warned against the pitfall of finding an exceptional case by the mere fact that the plaintiff would be subject to Dutch tax.[46]

5.63 In *Warriner v Warriner* [2002] PIQR Q87, Dyson, LJ explained that section 1(2) of the Damages Act 1996 should only be invoked in truly exceptional circumstances.

5.64 The Discount Rate is meant to be a simple means to ascertain the multiplier to be applied in all cases. It is devised based on the hypothetical plaintiff and is necessarily broad-brush. Hence, the occasions for individual plaintiffs contending for a special Discount Rate would be very few and far between. As a matter of fact, *Chan Pak Ting (supra)* came 17 years after the decision in *Chan Pui Ki (supra)*.

5.65 The determination of Discount Rate in light of new economic situation amidst the change of landscape in the financial market calls for assistance from experts from the different disciplines such as actuarial, accounting and economics. It is a very costly and time-consuming exercise and normally beyond the financial capability of individual plaintiffs. In any event, if a challenge is successful, the costs will have to be borne by the defendant at the end of the day.

5.66 In the circumstances, it is eminently sensible for a mechanism to be put in place for reviewing the Discount Rate as and when required. Needless to say, it is counter-productive if the review is done too frequently.

5.67 In *Chan Pak Ting (supra)*, Bharwaney, J observed:

> *"127. A review could be initiated by the judge in charge of the Personal Injuries List who could select appropriate cases to re-test the validity of the prevailing Discount Rate. The suggestion by Professor Chan of a Working Party chaired by the Chief Justice and consisting of judges, lawyers, actuaries and economists to review the issue periodically also merits attention. It is a workable suggestion if interested parties, such as liability insurers, the Motor Insurers Bureau, the Secretary for Justice, and the Hospital Authority, to name a few, agree that courts assessing damages for personal injuries should adopt*

---

45 See para 5.14 above.

46 At 1419.

appropriate multipliers by reference to the Discount Rate set by the Working Party. Unless this rate was higher than the rate set by court, plaintiffs are likely to agree as well. The bigger question is whether or not legislation similar to the Section 1 of the Damages Act 1996 should be enacted empowering the Chief Justice to prescribe the Discount Rate after consulting the Monetary Authority. The benefit of such a course is that it avoids the burden of costs on the losing party or parties, in any case where the Discount Rate is being reviewed."[47]

5.68 Likewise, in *Chan Wai Ming,*[48] Cheung JA observed that:

"9.1 Hong Kong does not have ILGS upon which the return rate may be more easily identified. In the long term, the only solution to the problem now faced by this Court which is bound to resurface time and again, is to introduce legislation similar to the United Kingdom Damages Act 1996 which allows the authority to prescribe a rate of return from time to time in order to meet changes in the economic condition. This is a call urged upon Guernsey by the Privy Council and I will repeat a similar call that the legislation should be introduced in Hong Kong without further delay."

5.69 For one reason or another, the Lord Chancellor had not revised the 2.5% Discount Rate since the 2001 Order despite the drastic and fundamental changes in the financial market and economic situation. The issue came to a head in 2012 after the decision of the Privy Council in *Simon v Helmot (supra).*

5.70 The response of the Ministry of Justice was to issue the 2012 Consultation Paper. The consultation thereunder ended on 23rd October 2012.

5.71 In the 2012 Consultation Paper, the difficulties and shortcomings in setting a Discount Rate based only on ILGS were highlighted. For instance, investing in ILGS is not 100% risk free since there may be mismatches in that (a) the money may not be there as and when needed; and (b) there may be time lag between the inflation index and the determination of return from ILGS.

5.72 The question of whether there should be a single Discount Rate was also floated. Two options were raised for discussion. Option 1 entails a refinement of the ILGS-based assessment. Option 2 involves assessment by reference to a portfolio of investment assets selected from "*Mixed Investment 0%-35% Shares*", "*Sterling Fixed Interest*" and "*Money Market*" (see 2012 Consultation Paper, at p.36).

---

47 As illustrated by the subsequent abandonment of the appeals from the decision.

48 [2014] 4 HKLRD 669.

5.73 It seems extraordinary that the Lord Chancellor did not proceed straightaway with the review of the Discount Rate in the exercise of his power under section 1 of the Damages Act 1996 and instead issued the 2012 Consultation Paper. This may have been done in recognition of the fact that any change to the Discount Rate should be generally accepted by the public for it to work.

5.74 Whichever way one looks at it, a periodical review mechanism is desirable and necessary. It may take many forms and different jurisdictions may approach it differently. In Australia, it is done by way of statutory provisions.

5.75 In Ireland, it has also been proposed that along with the implementation of the regime for PPO, the Discount Rate will be reviewed every 5 years in accordance with the Harmonised Index of Consumer Prices.[49]

5.76 Regardless of how it is fixed (i.e. whether by the Court in a case brought by a litigant or by a review mechanism), a Discount Rate is necessary for the calculation of the amount of damages in order to avoid over-compensation or under-compensation. It is just a question of what procedure to adopt.

5.77 Importantly, litigants in individual cases normally do not (and may not reasonably be expected to) have the resources to adduce actuarial and economic evidence in order to canvass arguments on the need to adjust the applicable Discount Rate. Further, to have the court resolving a dispute of such nature for the benefit of the whole society at a cost to be borne by one or a few litigants is unjust and not in tune with the principles of effective and efficient administration of justice enunciated in the Civil Justice Reform implemented since April 2009.

5.78 It seems that a workable model is to introduce legislation akin to section 1 of the Damages Act 1996 authorising the Chief Justice to review the Discount Rate in consultation with relevant government departments (such as the Treasury, Hong Kong Monetary Authority, the Census & Statistics Department) and other stakeholders (such as the Insurance Industry, Hospital Authority and Motor Insurers' Bureau).

5.79 Since there is no equivalent of ILGS in Hong Kong, the past performance of a mixed portfolio of assets composing of fixed deposits, EFN and high quality stocks as mapped out in *Chan Pak Ting* (supra) would be a good basis to use to fix the Discount Rate. Only broad statutory power akin to section 1 of the Damages Act 1996 is advisable so as not to hamstring the relevant authority in its revision of the Discount Rate.

5.80 The announcement of the new Discount Rate can be made by way of gazette or other suitable means. By way of analogy, the Chief Justice

[49] Section 51L of Part IVB of the Civil Liability Act 1961, inserted by the Civil Liability (Amendment) Act 2017 enacted in Nov 2017; see also para 4.46 above.

has been announcing the "*Interest Rate on Judgment Debt*" from time to time without any difficulty.

F. Interface of the Discount Rate with PPO

5.81 First and foremost, it is emphasised that the Discount Rate (which fixes the net rate of return after having regard to the rate of inflation) is not to be confused with indexation of PPOs with the Retail Price Index (RPI) in the case of UK or Consumer Price Index (CPI) in Hong Kong.

5.82 In fixing the Discount Rate, due regard has to be given to the rate of inflation (as reflected in CPI) in order to arrive at a net rate of return on investment. A simple and easy to apply Discount Rate is important in producing a rough-and-ready lump sum figure so that both plaintiffs and insurers can make an informed decision as to whether a PPO is to be preferred.

5.83 In Hong Kong, four series of Consumer Price Indices (CPIs) are compiled to reflect the impact of consumer price changes on households in different expenditure ranges. The CPI(A), CPI(B) and CPI(C) are compiled based on the expenditure patterns of households in the relatively low, medium and relatively high expenditure ranges.

5.84 The CPI(A), CPI(B) and CPI(C) respectively cover some 50%, 30% and 10% of households in Hong Kong. The average monthly household expenditure (in HK$) of these groups during the base period (i.e. October 2014 – September 2015) was $5,500-$24,499, $24,500-$44,499 and $44,500-$89,999 respectively and that of the Composite CPI was $5,500-$89,999.

5.85 By aggregating the expenditure patterns of all households covered by the above three indices, a Composite CPI is also compiled to reflect the impact of consumer price changes on the household sectors as a whole. The year-on-year rate of change in this index is generally taken to reflect overall price inflation.[50]

5.86 In *Simon v Helmot* [51] both the Guernsey and the Privy Council accepted the expert evidence that there was a significant differential between wage inflation and price inflation. In gist, wage inflation was 2% higher and it justified the application of a separate (lower) Discount Rate to the quantification of earning-related losses (i.e. including loss of earnings and costs of nursing care, etc).

5.87 In contrast, there is no substantial difference between price inflation and wage inflation in Hong Kong as found by Bharwaney J in *Chan*

---

50 Consumer Price Index Section of Census and Statistics Department of HKSAR website.

51 Same citation as above.

Pak Ting v Chan Chi Kuen.[52] Having considered the statistics from 2001 to 2012, showing an average differential of only 0.43% *per annum*, the learned judge concluded that:

> *"39. In my judgment, the difference of **0.43% is not significant enough for me to set two Discount Rates**. I find, having regard to current economic conditions, that the current small difference is likely to persist, at least in the near term. **However, this issue must be revisited if changes in the economy produce a difference between wage inflation and price inflation that approaches or exceeds 1%**."*
> [Emphasis added]

5.88 Hence, if PPO is implemented in Hong Kong, a uniformed indexation with Composite CPI seems reasonable and workable. That said, it is necessary to maintain a degree of vigilance and a mechanism, which can be invoked for timely review of the Discount Rate in response to changing economic and financial scenes, seem essential.

5.89 In the long run, the review of the Discount Rate is not something that can properly be left to the devices of individual litigants by resorting to court proceedings. The prohibitive legal costs and expert fees aside, the inevitable lead time from the inception of a case to judgment would mean that timely adjustments cannot be made in many other pending cases, which would not be fair either to the plaintiffs or defendants who await and depend on the ultimate ruling.

5.90 In the 2013 Consultation Paper,[53] the Ministry of Justice basically asked for opinion on two broad questions, namely:

(a) Whether the legal parameters governing the way in which the Discount Rate is currently calculated produce a rate that is as "*right*" as it ought reasonably to be so that the person injured is fully compensated (i.e. whether instead of ILGS only, other investments of higher return should be used in fixing the Discount Rate)?

(b) Whether there is a case for encouraging the use of periodical payment?

5.91 The benefit of PPO is that the risk of discounting needs not be addressed since the adverse consequences attendant upon the realisation of any investment risks are borne by the defendant (eg the plaintiff living longer than life expectancy or fluctuation in the actual rate of return on investment).

---

52 [2013] 2 HKLRD 1 at paras 32 to 38.

53 In the Executive Summary of "Damages Act 1996: The Discount Rate – Review of the Legal Framework" Consultation Paper (May 2013).

5.92 However, a research funded by the Ministry of Justice (Personal Injury Discount Rate Research, October 2013) shows that:

(a) in general, both claimants' lawyers and insurers are leaning towards a lump sum award;

(b) where the Discount Rate is high, insurers would even be prepared to top-up the lump sum to buy off the claim instead of bearing the long term burden and risk; and

(c) claimants would consider PPO more in catastrophic cases and when the Discount Rate is high, entailing high investment risks.

5.93 Incidentally, in the 2013 Consultation Paper, it was also suggested that since PPOs were available, a refusal by a claimant to accept it would necessarily mean that he thought that he would be able to find an investment with a better return than ILGS and he was therefore expected to take higher risks (i.e. justifying a higher Discount Rate in a case where a lump sum award was preferred by the claimant and was to be made by the Court).[54] This suggestion was flatly rejected by the PIBA representing the General Council of the Bar in its submission (May 2013) as being unfair.[55]

5.94 The PIBA would embrace and maintain the *Wells v Wells* (supra) approach in setting a Discount Rate with reference to the returns from ILGS only. This is shared by many claimants' lawyers whereas the defendants and insurers advocate for a change to using a mixed portfolio of investments[56] which would result in higher Discount Rate.

5.95 In general, the elimination of uncertainties would be conducive to settlement of personal injury cases. The tracking of inflation by Composite CPI is well established and the scheme of PPOs will go a long way towards elimination of dual uncertainties arising from inflation and life expectancy. Naturally, the implementation of any PPO scheme will be further enhanced by a reliable mechanism for periodical review of the Discount Rate (to be applied across-the-board) so that the parties would know exactly where they stand in quantifying claims.

5.96 There are commonalities between indexation of PPO and the fixing of the Discount Rate since both require consideration of the changes in inflation. Regardless of the divergence of opinion as to the mechanism for review, it would appear that a generally accepted scheme for fixing and announcing the prevailing Discount Rate will be conducive to settlement of claims.

---

54 2013 Consultation Paper at paras 41 and 42.

55 Bar Council response to the "Damages Act 1996: The Discount Rate – review of the legal framework" Consultation Paper published by the Ministry of Justice (May 2013).

56 As happened in *Chan Pak Ting*.

Question 2

Subject to Question 1 above, we invite submissions as to:

(1) Whether an authority should be empowered to fix and to conduct periodical revision of the presumed net rate(s) of return on investment (the Discount Rate(s)) to be applied in the assessment of damages in all personal injury cases, in particular, in the selection of multiplier(s) for assessing future pecuniary loss for different periods of future loss and expenses to be incurred.

(2) Whether the Chief Justice or any other person or body should be such empowered authority.

(3) The identification of the stakeholders whom such empowered authority should consult in fixing the Discount Rate(s), the frequency of review and the mode of promulgation of the Discount Rate(s) so fixed.

Chapter 6

Problems & prospects of introducing PPO in HK (with reference to UK & Ireland) – identifying issues for consultation

6.1 In this chapter, we briefly outline the prospect of having PPOs and the various problems and challenges involved.

Disadvantages of lump sum awards

6.2 As discussed in earlier chapters, the uncertainties inherent in assessing the future loss components of a lump sum award inevitably mean that such awards prove in the course of events to be inaccurate in being either too high or too low and thus fail to meet the goal of *restitutio in integrum*.

6.3 Specifically they cannot accurately take account of future events as they actually transpire.[1] These events could be personal to the plaintiff, such as the actual duration of a plaintiff's life and the deterioration or improvement in the plaintiff's condition or, general to the economy, such as the actual return on investments available in the market or impact of inflation on the plaintiff's cost of care and medical expenses.

6.4 Lump sum awards also put the burden of risk and responsibility on the plaintiff rather than the tortfeasor. The plaintiff has the responsibility for investment. He takes the risk and stress arising from his investments. His lump sum may run out before his death due to overspending or underinvesting.[2]

6.5 With respect to administration of justice, lump sum awards give rise to more costly litigation on a regular basis through the need of expert evidence, often conflicting, to predict life expectancy or, less regularly, to determine the Discount Rate.

---

1 *Chan Pak Ting v Chan Chi Kuen & Anor* [2013] 1 HKLRD 634, at para 5.

2 Harvey McGregor, *McGregor on Damages* (18th ed), *The Common Law Library*, Sweet & Maxwell, Thomson Reuters, 35-003.

Advantages of periodical payments

6.6 PPOs provide a potential solution to many problems faced with lump sum payments.

6.7 PPOs remove from the courts the need to ascertain imponderables such as life expectancy and deterioration or improvement of condition and simplify litigation arguments involving these contentious issues.

6.8 PPOs provide a secure steady income stream for the life of the plaintiff, with the added peace of mind this brings.[3]

6.9 Provided they are index linked, PPOs provide a close match between the award of damages and actual expenditure needed to meet expenses as they are calculated by a bottom up process[4] and thus better meet the goal of *restitutio in integrum*.

6.10 PPOs remove the risks from the plaintiff with respect to investment returns, fluctuations in prices and accuracy of the Discount Rate. Most plaintiffs are not experienced money managers whereas insurers or other bodies against whom PPOs are made will have access to greater financial expertise.[5] This is both practically and morally preferable as it is the defendant who caused the loss.

6.11 PPOs limit the plaintiff's investment advisor costs as he will not have to engage a fund manager to manage such a large lump sum.

6.12 Periodical payments can be index linked to take into account of inflation and variable to take into account significant deterioration or improvement in the Plaintiff's condition.

6.13 In the event of a plaintiff's untimely death, there is no windfall to his estate.[6]

---

3 Kemp & Kemp, "The Law of Personal Injury Damages", *The Quantum of Damages*, Thomson, Sweet & Maxwell, Vol 1, Ch 23.

4 First, the heads of damages to be incorporated into a PPO such as loss of earnings or costs of care are calculated to estimate the Plaintiff's actual needs. The order then provides for the plaintiff to be paid the appropriate amounts for the duration of his needs, or the expiry date of his natural working life.

5 See the survey of local residents' financial management habits that was conducted by the Public Opinion Programme, The University of Hong Kong in 2015. According to the survey, which interviewed 1,001 Hong Kong residents aged between 18 and 65, only 40% of respondents had a habit of saving while 59.9% did not. A majority in Hong Kong do not therefore save and invest.

6 However, counter to this argument, see comments of Master Denzil Lush of Court of Protection of England and Wales in his article "Damages for personal injury: why some claimants prefer a conventional lump sum to periodical payments" (2005), L.L.R. 2005, 1(2), at 187-203:
"*The argument about a potential windfall for underserving beneficiaries tends to be overstated. In most cases, one or both of the claimant's parents have given up work to care for their child and may be the primary carers for many years. They become dependent on the damages award and the child indirectly assumes responsibility for their maintenance. There is often little prospect of their returning to the labour market if the child dies prematurely and they could face*

6.14 In practice, PPOs have enabled faster resolution of claims for plaintiffs with a shortened life expectancy.[7]

6.15 PPOs limit the risk of dissipation of the award by family members.

6.16 A plaintiff with some mental incapacity may be capable of managing his own affairs but less capable of managing a lump sum. It is preferable that a plaintiff manages his own affairs rather than rely on others.

Limits to periodical payments

6.17 Although PPOs will temper the effect of changes in circumstance such as inflation, estimates of changes in future needs will still have to be made, such as for young plaintiffs whose needs will change as they become adults. PPOs cannot provide for unforeseen capital expenditure needs and could in some case end up being a financial straitjacket if there is an under estimate made. Conventional lump sums have more flexibility in that the income drawn can be adjusted with actual changing needs. In practice, in most cases not all future losses will be paid in the form of periodical payments. For instance, there may be a preference for a lump sum with respect to future accommodation needs and future loss of earnings. Evidence will still be required in such cases.

Disadvantages of periodical payments

6.18 It may be said that with a PPO, a plaintiff is 'forever reliant' on the defendant for the remainder of his natural life. Although this impacts on defendants more, there may remain in the mind of some plaintiffs a feeling of an unwanted continued reliance on the defendant rather than the independence that a lump sum award brings. A lump sum brings finality to proceedings which a PPO does not.

6.19 A lump sum allows the plaintiffs the benefit of a large capital sum and autonomy to dispose of that according to their personal needs or preference. They could, for instance, choose to apply it in setting up a business, though this is unlikely to apply to a plaintiff with catastrophic injuries. More practically, from a Hong Kong perspective with inflating property prices and the relatively high down payment requirement, a plaintiff may prefer the lump sum award to be invested in property, a common life goal in Chinese culture. Some plaintiffs and advisors believe that a carefully invested lump sum will outperform periodical payments and cite *Lim Poh Choo v Camden*

---

hardship when the periodical payments ceases on the claimant's death and their income stream vanishes instantaneously."

[7] Denzil Lush, "Damages for personal injury: why some claimants prefer a conventional lump sum to periodical payments" (2005), L.L.R. 2005, 1(2), 187-203.

and Islington Area Health Authority as an example.[8] However, this loses sight of the intent of the award of damages in tort, *restitutio in integrum*.

6.20 It is desirable in any award for damages for future loss to have a capital sum to be set aside to provide for unforeseen contingencies. Awards for periodical payments limit the size of such capital sum and provide for a basis for rejection of PPO's by plaintiffs.[9]

6.21 Cost of care and medical inflation are difficult to predict or hedge against. Further, they impose extra administrative costs over the lifetime of the PPO. As a result, UK experience has shown that PPOs will increase the overall costs of insurance owing to more conservative reserving and additional operation expenses. However, following the principle of *restitutio in integrum*, this is not a concern of the courts in making awards with respect to future pecuniary loss, see judgment in *Wells v Wells*[10] as followed by Bharwaney J in *Chan Pak Ting v Chan Chi Kuen No.2*.[11]

Periodical payments preferable

6.22 Nevertheless, we believe periodical payments are in principle a more appropriate means of payment of damages for significant future financial loss. They better reflect the purpose of an award to restore the plaintiff to the position he would have been in, had the injury not occurred, and they place the future risks on the tortfeaser. As for the plaintiff, whilst he has a right to compensation, he does not have a right to require it only be in the form of a lump sum.

6.23 Finally, it is socially desirable that plaintiffs in catastrophic or severe injury cases should have a guaranteed income to cover their daily and medical needs for the duration of their lives, and that they should not have to fall back onto the Government for support, which they would have to do if the money runs out.

Appropriateness having regard to the size of the claim

6.24 PPOs are not appropriate for all heads of claim such as past income loss and expenses already incurred. By virtue of their administrative costs, PPOs are not appropriate for small claims. In UK, when debating the Damages Act 1996, Parliament considered whether to limit PPOs to a certain size of claim and decided not to. The UK Parliament took the view that they are in principle suitable for all future loss claims of a significant amount or

---

8 [1979] 1QB 196 varied [1980] AC 174.

9 Denzil Lush, "Damages for personal injury: why some claimants prefer a conventional lump sum to periodical payments" (2005), L.L.R. 2005, 1(2), 187-203.

10 [1999] 1 AC 345 at p.388 D-E.

11 [2013] 2 HKLDR 1, at para. 14.

duration, provided the payments are not so small as to make their use disproportionate.[12]

6.25 In Ireland however PPOs have been limited to only catastrophic injuries. The Sub-committee is concerned that if the Irish model is followed, substantial argument will arise as to what amounts to a catastrophic injury and inconsistences in application are likely to arise. Further, the focus will be not on the plaintiff's needs but on an interpretation of his condition.

6.26 It is undesirable to limit PPOs to a specific amount as this would then require periodic review. A flexible system where there is no specific limit placed on the size or nature of award applicable and where the principal determinant is the award that best meets the plaintiff's needs is, in the Sub-committee's view, more preferable.

6.27 The Sub-committee recognises that in practice it is only higher value claims, where the deficiencies of lump sum awards are significant enough, that will warrant PPOs. The UK Practice Direction 41B, which lists factors to be taken into account by the court in assessing the appropriateness of a court order for periodical payments, includes the scale of the annual payments taking into account any deduction for contributory negligence. If the annual payments are not sufficiently high, no order will be made.[13] A similar system could be adopted in Hong Kong.

Appropriateness having regard to the nature of the claim

6.28 Arguments have been raised to limit the heads of damage to be covered by PPOs to future medical costs and care. To do so, however, would be to restrict the extent to which they can cure deficiencies in the present lump sum system.

6.29 As the focus in PPOs is future loss, they will inevitably be awarded in conjunction with a lump sum award for other heads of damage. If no limit is imposed on the heads it is applied to, then in practice the court will consider each head of future loss separately to decide whether it is appropriate to make a PPO in respect of it. PPOs are particularly appropriate for future care and medical needs. In UK, it is also now not uncommon for future loss of earnings and future deputyship fees also to be treated as PPOs.[14] In Hong Kong, future accommodation costs will also be a potentially important element.

---

12 Kemp & Kemp, "Medico-legal material calculation and awards tables source materials", *The Quantum of Damages*, Thomson, Sweet & Maxwell, Vol 2, Ch 41, 41-002.

13 Hence in *Rowe v Dolman* [2007] EWHC 2799 QB, the Court acceded to the plaintiff's request that he be given a lump sum rather than a periodical payments order as this would enable him to live a substantial part of his life as he wished to live it.

14 Harvey McGregor, *McGregor on Damages* (18th ed), *The Common Law Library*, Sweet & Maxwell, Thomson Reuters, 50-034. Examples of UK case law granting PPOs are *Harries (a child by his mother and litigation friend) v Stevenson* [2012] EWHC 3447 (QB), *Cobham Hire Services Ltd v Eeles (by his mother and litigation friend Eeles)* [2009] EWCA Civ 204, *TUV v Great Ormond Street Hospital NHS Foundation Trust* [2015] EWHC 2829 (QB), *Thompstone v Tameside and*

6.30 PPOs will rarely be used in fatal accident claims. One of the compelling reasons for periodical payments in cases involving living plaintiffs is that their life expectancy is uncertain and a lump sum award may under or over compensate them. This does not apply to fatal accidents. For a deceased, the life expectancy or working life is determined by reference to the evidence of retirement age and the life tables and thus there is no such uncertainty.

6.31 However where a dependant's life expectancy is uncertain, periodical payments may be useful.[15] They may also be useful for child dependants whose length of study is uncertain.

Court driven

6.32 It is also necessary to determine whether there should be a court driven PPO regime as in UK or a more discretionary less mandatory regime where the wishes of the parties are given greater recognition. In UK, section 2 of the 1996 Damages Act gives the decision making power on whether to award a PPO for future pecuniary loss to the court and makes it mandatory that the court **shall** consider whether to make that order.

6.33 The court is the ultimate arbiter and is not bound to follow the wishes of the parties and even if they both agree on a PPO the Court may decline to make the order.[16]

6.34 The views of the parties are a factor to be taken into account and under rule 41.5 of the Civil Procedure Rules, the parties in their statement of case have to state whether periodical payments or a lump sum are the more appropriate form of order sought.

6.35 The court then gives its view under rule 41.6. In doing so, it takes into account all the circumstances of the case to see what best meets the claimant's needs under rule 41.7, having regard to the factors set out in Practice Direction 41B. It is the claimants' needs as objectively determined by the court that are paramount here. Practice Direction 41B provides that the factors which the court shall have regard to under rule 41.7 include:

(1) the scale of the annual payments taking into account any deduction for contributory negligence;

Glossop Acute Services NHS Trust [2008] EWCA Civ 5 and *Leo Whiten v St George's Healthcare NHS Trust* [2011] EWH C2066 (QB).

15 In *Sloan (Widow & Executrix of the Estate of D J Sloan, Deceased) v Halsen Insulation & Engineering Company Ltd.*, periodical payments were made to a widow of the deceased for her future care, the deceased having provided care to her prior to his death in the accident.

16 Hence in *Morton v Portal Ltd* [2010] EWHC 1804 QB where the claimant was guilty of contributory negligent to the extent of 25% and this thus reduced his annual payments, he still sought a PPO. However, the court declined to make an order. The court itself had to decide if a PPO was in the claimant's best interests and decided that it was not.

(2) the form of award preferred by the claimant including –

(a) the reasons for the claimant's preference; and

(b) the nature of any financial advice received by the claimant when considering the form of award; and

(3) the form of award preferred by the defendant including the reasons for the defendant's preference.

6.36 In *Thompstone v Tameside & Glossop Acute Services NHS Trust*,[17] the Court of Appeal issued definitive guidance on the operation of the factors as follows:

> *"The parties have also agreed that the test which the judge must apply is an objective one. Of course, he must have regard to the wishes and preferences of the parties and to all the circumstances of the case but, in the end, it is for the judge to decide what order best meets the claimant's needs. The judge's mind should be focused not on what the claimant prefers but on what best meets the claimant's needs; the two are not necessarily the same."*

6.37 Anecdotal reports from UK indicate that there is far more voluntary use of periodical payments by defendants, as opposed to the precursor structured settlements which were little used, because if a defendant does not agree to a voluntary payment, he knows the court may impose one on him in any event.[18]

6.38 Even under a system when the courts are empowered to impose PPOs on the parties, in practice PPOs will also be voluntarily agreed between the parties as well as ordered by the court. Where the court in arriving at its decision follows a set of yardsticks such as those set out in Practice Direction 41B, one can expect parties when voluntarily entering into PPOs to apply those same yardsticks.

6.39 The alternative to a court mandated PPO scheme is one where the parties themselves can be the ultimate arbiters and where the court cannot make a PPO without their consent. The risk of such a scheme is that there will be little take up as defendants will be concerned about the costs of funding PPOs and many plaintiffs will have an inclination to take a lump sum.

6.40 There is also the option to make PPOs court determined only for certain heads of claim such as future accommodation and care, and consensual for other heads such as future loss of earnings.

---

17 2008 EWCA Civ 5.

18 Tim Kevan and Maria Kwiatkowska, "Periodical payments in personal injury claims", *Personal Injury Practitioners' Library*, no.9, St. Albans, UK:Xpl Pub., c2006.

6.41 The Sub-committee feels it premature to express a view on this point at this stage as it would be matter that would need to be vented fully as and when any legislation is drafted.

Question 3

Subject to Question 1 above, we invite submissions as to:

(1) Whether the power of the court to award periodical payment should be irrespective of the consent of the parties to the proceedings.

(2) Whether the power to award periodical payment should be generally vested in the court to be exercised in circumstances as it deems just and fair or whether such power should be limited to cover a specific class of personal injury cases, and, if so, how the class of cases is to be defined.

(3) Whether a periodical payment order made by the court may cover all or only some heads of future pecuniary loss, in whole or in part, irrespective of the consent of the parties to the proceedings; and in the latter case, whether a periodical payment may cover all other heads of damages to such extent as the parties may agree.

Indexation

6.42 Guarding against inflation is crucial to making PPOs effective. A claimant who is awarded a periodical payments order has a fixed future income which is intended to meet his ascertained needs, and must be protected against future inflation in the costs of meeting those needs, otherwise the primary objective of periodical payments, securely meeting the needs of the claimant, will not be met. Therefore, for periodical payments to be effective, they must be index linked.

6.43 In UK, section 2(8) of the Damages Act provides that a PPO is index linked to the Retail Price Index (RPI) but under section 2(9) this may be modified. Experience in UK has shown that inflation in the costs of care has on occasion exceeded the inflation in the RPI although in recent years in fact inflation in the cost of care has lagged behind the RPI.[19] Section 2(9) of the Damages Act thus empowers the court to specify a rate of indexation that is different from RPI. So in *Thompstone v Tameside and Glossop Acute*

[19] Harvey McGregor, *McGregor on Damages* (18th ed), *The Common Law Library*, Sweet & Maxwell, Thomson Reuters, 50:033.

Services NHS Trust[20] the Court of Appeal confirmed the application of a cost of care index higher than the RPI to that part of the PPO order covering costs of care and case management.[21]

6.44 Historically in Hong Kong, there has not been a substantial variation between wage inflation and general price inflation particularly in recent years[22] and the ability to adopt varied indices may not be of much significance in a Hong Kong context although the flexibility to provide a different figure may be desirable in case exceptional circumstances arise.

6.45 In UK, the courts and the Lord Chancellor exercising his authority under the Damages Act 1996 have fixed a Discount Rate having regard to the average gross redemption yield under index linked government securities. This follows the judgment of the House of Lords in *Wells v Wells*[23] which held that the injured plaintiff was not in the same position as an ordinary prudent investor and was entitled to the greater security and certainty achieved by investment in indexed linked government securities. In Hong Kong, we have no equivalent of index linked government securities as a guideline to ascertain the annual return. As a result, when the courts do come to reassess the Discount Rate, it is a laborious and expensive process requiring expensive expert testimony on economic conditions as occurred in *Chan Pak Ting*. It is also highly contentious with plaintiffs' looking for a Discount Rate which reflects a secure low risk investment portfolio and defendants urging a Discount Rate based on a more mixed higher return portfolio. To obviate this and provide a long term solution to the problem which is bound to resurface time and again, the Court of Appeal in *Chan Wai Ming v Leung Shing Wah*[24] recommended the introduction to Hong Kong of legislation similar to the Damages Act 1996 to prescribe a rate of return from time to time in order to meet changes in the economic condition.

Variable payment orders

6.46 In UK, under the Damages (Variation of Periodical Payments) Order 2005 made pursuant to section 2B of the Damages Act, the court can vary an existing periodical payment order if the claimant suffers a serious deterioration or significant improvement in his condition. Standard periodical

---

20 [2008] EWCA Civ 5.

21 Another example of indexation is *Leo Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 (QB).

22 *Chan Pak Ting v Chan Chi Kuen* [2013] 2 HKLDR 1, at para 30. The figure in *Chan Pak Ting* went up to 2012. They showed a 0.78% differential between 1995 and 2012 and a 0.43% differential between 2001 and 2012. Nominal Wage increases as compared with composite CPI changes based on Census and Statistics Department figures since 2012 are as follows:

	Composite CPI	Nominal Wage Figures	Differential
2013	4.3%	4.1%	-0.2
2014	4.4%	4.2%	-0.2
2015	3.0%	4.2%	1.2
Nov 2016	1.2%	3.7%	2.5

23 [1999] 1 AC 345.

24 [2014] 4 HKLRD 669.

payment orders in UK thus give a right to a defendant to call for regular medical examination of a claimant.[25]

6.47 The concept of varying a PPO is controversial. For defendants, it provides added burden, in particular, from an insurance reserving prospect, as it may be very difficult to reserve.

6.48 Concerns have been expressed, when addressing the possibility of variable PPOs in other jurisdictions, that this would encourage satellite litigation on matters such as quantum and causation, for example, the question of whether a change in medical condition is a result of the original breach or merely a result of a disease process.[26]

6.49 In UK, variable orders can only be given in very restricted circumstances. The power to vary a periodical payments order must relate to events specified in the original order or agreement. In other words, the power is limited to addressing only those contingencies that can be foreseen at the time of the trial or settlement. If variable payment orders are to be adopted in Hong Kong, it is suggested that they have similar restrictions.

6.50 Before the 2005 Order was introduced, some stakeholders[27] had suggested widening the power to vary PPOs to an exceptional change in the circumstances surrounding the claimant in addition to a significant change in the claimant's condition. This would cover such events as:

- major changes in family support, resulting from (for example) the death or incapacity of a family carer, the breakdown of a marriage or partnership in a claimant's household, abandonment of a claimant by his family;
- a child claimant attaining majority or ceasing full-time education;
- closure of a hostel, residential community or other protective environment in which a claimant has been living; and
- emigration by a claimant's family.

6.51 To broaden the scope this wide, however, would impose even higher indiscernible burdens on defendants and their insurers and increase even further the complexity of any attempt to reserve for such risk. The Sub-committee believes limiting the power to vary to contingencies foreseen at the time of trial or settlement is preferable.

---

25 For an example of a variable PPO in practice, see *Jack Farrugia v Steven Burtenshaw the Motor Insurers Bureau Quinn Insurance Limited* [2014] EWHC 1036 (QB). Here there was a 2% risk of developing uncontrolled epilepsy in which case the claimant's needs would increase significantly. See also *Kotula v EDF & others* [2011] EWHC 1546 which involved a paraplegic who faced a 1% risk of developing syrinx (pseudocyst collection of cerebrospinal fluid) which would result in significant clinical features.

26 *Report of the Working Group on Legislation on Periodic Payment Orders* (Ireland) published on 22 April 2015, at 56-59.

27 Association of Personal Injury Lawyers (APIL) response to Draft Damages (Variation of Periodical Payments) Order 2004.

6.52 Payments under PPOs normally cease upon the death of the injured person with the potential result that the dependants would be under-compensated due to the premature death of the injured person. Therefore, the dependants should be given a chance to seek remedies pursuant to a loss of dependency claim so as to avoid any injustice. In UK, the Civil Procedure Rules 41.8(2) provides that:

> "*Where the court orders that any part of the award shall continue after the claimant's death, for the benefit of the claimant's dependants, the order must also specify the relevant amount and duration of the payments and how each payment is to be made during the year and at what intervals.*"

6.53 If the courts of Hong Kong were to have the same or similar powers to continue the award after the plaintiff's pre-mature death due to his injuries, the dependants would not need to pursue a claim for loss of dependency in the circumstance and any such damages would be accounted for without any concern for duplication of damages.

6.54 Where a claimant's condition is likely to deteriorate it would be unfair on the claimant if the court is to make an award based on his current condition which can leave him under-compensated if his health is worsened. At the same time, it would be unjust on the defendant to make a lump sum award on a future condition, which may never develop.

6.55 Under the current law, the court has the power to award "*provisional*" damages (under Rules of the High Court O.37, r.10) in cases where there is a chance that the claimant will develop a specific serious condition or suffer a deterioration in their mental or physical condition as specified in the order awarding provisional damages. [28] If the claimant suffers this condition or his condition deteriorates, an award of further damages may be made. In fact, a dependant or beneficiary can make an application to the court where a claimant was awarded provisional damages and subsequently dies.[29]

6.56 An award of provisional damages must be made by the court and not by a mere agreement between the parties.

---

[28] A claim for provisional damages must be included in the claimant's statement of case. If the court believes that a provisional damages award is appropriate, it will (UK PD41A 2.1):

(a) assess damages on the basis of the claimant's current prognosis disregarding the future risk;

(b) identify the potential future risk in the order;

(c) stipulate a timeframe within which the claimant may return to court if the claimant's health deteriorates as a result of this risk; and

(d) order that the relevant documents are kept by the court.

The courts of Hong Kong have very similar duties, powers and procedure as per Rules of the High Court O.37, rr.7-10.

[29] This is not provided for under Rules of the High Court.

6.57 Theoretically, even if PPO is implemented, the regime of "*provisional*" damages can be left intact to co-exist with the PPO regime. Practically, if a PPO is made after an award for provisional damages, the court could vary the amount of payments when there is a substantial change in a claimant's physical or medical condition by way of a variation order under the PPO regime. The net effect is that if the court is equipped with the power to vary PPOs, the regime of "*provisional*" damages and the power to award further damages thereunder would be of secondary importance.

Question 4

Subject to Question 1 above, we invite submissions as to:

(1) Whether the original periodical payment order should be open to review by the court upon the application of either party to the proceedings.

(2) If yes, what should be the circumstances for reviewing periodical payment orders, including but not limited to the following:

(a) changes in the need for and level of future care as a result of significant medical deterioration or improvement, which is foreseen at the time of the original order, with specific criteria pertinent to the nature of deterioration or improvement, as well as the duration during which a review can be applied for, being stipulated in that order;

(b) exceptional life-changing circumstances, and if so, what are these circumstances; and

(c) restriction on the number of applications for review and limit on extension of time for review that may be allowed.

(3) Whether, upon the cessation of periodical payment occasioned by premature death of a recipient of periodical payment, the dependants of such recipient should be afforded one last opportunity to pursue a claim against the paying party for loss of dependency, or being the amount which the deceased recipient would have contributed to his dependant from the periodical payment he received but for his premature death and in respect of which the dependant has not received any compensation or damages from the paying party or any person who was or may be liable to him.

(4) Whether the current mechanism for provisional damages should be preserved and whether periodical payment orders should be applicable to cover provisional damages although their co-existence is technically possible.

Problems in implementing PPOs in Hong Kong

6.58 Before anything else can be considered in assessing whether it is appropriate for a court to order periodical payments or for the parties to agree on periodical payments, there must be an assurance that the continuity of the periodical payment is secure. This is the first step that the court must take under section 2(3) of the Damages Act 1996.

6.59 PPOs are possible in UK as there is a well-established annuities market and because of the financial guarantees provided by the Financial Services and Markets Act 2000, neither of which exist in Hong Kong.

6.60 Section 2(4) of the Damages Act provides for situations where the continuity of a periodical payment can be automatically considered to be reasonably secure[30] and situations where there is no such automatic consideration, such as payments self-funded by the Motor Insurers Bureau, medical defence organisations, offshore insurers and private defendants. Courts will only order periodical payments against such bodies where for instance they buy an annuity from a life office for the benefit of the claimant[31] which gives them the protection of the Financial Services Compensation Scheme.

6.61 Whilst the Government may give a similar guarantee to a government department or the Hospital Authority may be regarded as financially secure such as to warrant automatic approval, it will be difficult for liability insurers in Hong Kong to provide the assurance required through an annuity as we have no local annuities market.

6.62 Even in UK, problems have arisen for insurers on occasion in finding appropriate annuities. Annuities available are linked to the Retail Price Index. There is therefore no substantive annuity market that an insurer can use to fully transfer the risk of funding if a higher index is used such as for the cost of care assistants (ASHE 6115). Defendants have used this to argue against periodical payment orders on grounds of affordability but such arguments have been rejected by the courts. As the Damages Act specifically

---

30 This is when (a) it is protected by a Ministerial guarantee under section 6 of the 1996 Act; (b) it is protected by a scheme under section 213 of the Financial Services and Markets Act 2000; and (c) the sources of the payments is a government or health service body.

31 Kemp & Kemp, "Medico-legal material calculation and awards tables source materials", *The Quantum of Damages*, Thomson, Sweet & Maxwell, Vol 2, Ch 41, 41-010.

gave the court the power to order a different index than the RPI, if it felt this best met the claimants needs, there was no room for such arguments.[32] This problem has been got around, on occasion, by courts ordering or claimants accepting periodical payments tied to the lower inflation indices in the RPI.[33]

6.63 Further, notwithstanding the mature annuities market operating in UK, defendants' insurers and bodies such as the Medical Protection Society have found it difficult to purchase annuities. This has led to insurers' to self-fund PPOs and the MPS setting up a trust specifically to cover them.

6.64 For insurers, the level of extra reserving is usually decided at the board level of individual insurers, hence the regulator has a key role in monitoring and ensuring adequate provision of reserving, a task that would have to be taken on by Hong Kong's Insurance Authority.

6.65 Nevertheless, although initially, in UK, insurers were reluctant to use PPOs in view of the uncertainties and long-tail liabilities involved, with more experience, however, they have become more confident to initiate and use PPOs for settling claims.

Factors that would facilitate the introduction of a PPO regime

6.66 First of all, a mature annuity market, able and ready to assume the risks involved, is fundamental to an effective PPO regime. If annuity payments are adopted in Hong Kong, the tail can easily be extended from the current one to 40 years or beyond.

6.67 Secondly, development of a common benchmark for assessing and determining the cost of care will enhance the effectiveness of a PPO regime, since the change in care costs can be referenced for calculating and determining the amount of annual payment to be made under a PPO.

6.68 Lastly, following the example in UK, a guarantee arrangement introduced to deal with situations of insurers becoming insolvent that is in line

---

[32] In *Flora v Wakom (Heathrow) Ltd* [2006] EWAC Civ 1103 and *Thompstone v Tameside & Glossop Acute Services NHS Trust* [2006] EWHC 2904, the court rejected such arguments saying that the legislation left no room for them; and if it was an issue to be addressed then it was a matter of public policy and had parliament intended it be taken into account it would have provided for it.

[33] In *Thompstone v Tameside & Glossop Acute Services NHS Trust* [2006] EWHC 2904, the Court acknowledged that to make an award it had to be sure under section 2(4)(b) of the Damages Act 1996 that periodical payments were secure. It said that if there was no annuity available at the higher rate needed for this then the court could order payments indexed to a lower inflationary index, say, the RPI plus 1% or 1.5%. In practice, the parties will therefore have to be innovative in their solutions to deal with the lack of appropriate annuity products. This happened in *Okeowo v Norton*, a case settled out of court in 2008 and noted by *A Plears* in (2008) 158 New LJ 1247. Here the liability insurer was a Lloyd's syndicate and thus was not "*reasonably secure*" within the meaning of the Damages Act 1996, section 2(4)(b). However, the claimant accepted an annuity, bought from a secure life office, even though it was linked only to the RPI, because it was also accompanied by £1 million lump sum to compensate for the lack of earnings indexation.

with the framework of existing levies and safety nets in Hong Kong is equally important to the development of a PPO regime.[34]

Challenges of introducing PPOs in Hong Kong from the insurers' perspective

6.69 We note that there will be the following challenges from the perspective of the insurance industry if PPOs are to be introduced in Hong Kong:

(a) Similar to the situation in UK, a lack of evidence and data on impaired life mortality in Hong Kong will render it difficult to accurately price annuities for PPOs.

(b) Guarantee arrangements are only available in respect of employees' compensation and motor insurance.

(c) It is fairly impossible to estimate the proportion of future claims that would be settled as PPOs since PPO propensity for liability claims may vary due to different factors.

(d) It is hard to predict care costs in view of the ageing population and the politics surrounding minimum wage, hence rendering it more difficult to make the right level of reserving for PPO.

Establishing a Discount Rate mechanism[35] is a huge challenge to both insurers and reinsurers, and it will involve a long process of consultation.

6.70 The Sub-committee is cognisant of the following sentiments expressed by the insurance industry:

(a) that an independent PPO impact study be carried out before any decision is taken and that the study be properly scoped to cover all major stakeholders; and

(b) that the subject of discount rate be taken forward as a separate and independent exercise with involvement of the newly established Insurance Authority, where appropriate.

---

34 This was specifically addressed in practice in *Jack Farrugia v Steven Burtenshaw the Motor Insurers Bureau Quinn Insurance Limited* [2014] EWHC 1036 (QB). Here the 3rd defendant, an insurer, was likely to go into liquidation and as the Financial Services Compensation Scheme would meet its ongoing liability to satisfy a PPO, the judge was satisfied the continuity of payment was reasonably secure.

35 "*Discount Rate*" is the assumed net rate of return on investment which insurers are entitled to take into account when funding an award. Generally, a reduction in Discount Rate will bring the economic value of lump sums and PPOs closer together, while an increase will pull them further apart.

6.71 Government bodies and institutions such as the Hospital Authority and the MIB might consider, where appropriate, a voluntary form of PPO as was done in Scotland where the Damages Act 1996 does not apply.[36]

Security of payment - absence of protection similar to Financial Services Compensation Scheme

6.72 In order for PPO to work, the payments have to be secured against all potential adverse consequences so that recipients will not be affected. By way of example, in UK, payments under PPOs will be 100% guaranteed by the Financial Services Compensation Scheme. Hence, if a financial institution fails to meet its obligation to make payment under a PPO, the recipient can look to the scheme for payment. A similar mechanism for protection of recipients will be needed if PPO is to be introduced in Hong Kong. The details of such protective mechanism will have to be mapped out if the implementation of PPO is deemed desirable. This may take the form of a "bail out" scheme established on the strength of levies imposed on paying parties under PPOs. It is also necessary to provide for other eventualities such as merger and acquisition of insurers and other financial institutions with liabilities under PPOs as it appears to a growing global trend.

Other considerations

6.73 There are minor complications arising from incidence of tax and means-tested benefits.

Taxation

6.74 In UK, express provisions have been made to exempt periodical payments for income tax.[37]

6.75 This is not an issue in Hong Kong. Hong Kong has a simple tax system. An individual's income is chargeable to profits tax or salaries tax only if it arises or is derived from his/her trade, profession, business, office, employment or pension in Hong Kong. There is no capital gains tax and no dividend tax imposed on income generated by investment, e.g. stocks, funds, annuities. Compensation awarded in a personal injury case, be it a lump sum award or periodical payment order, as well as income generated from the invested compensation will be tax free. It is, therefore, unnecessary for the Court or the parties to consider the impact of taxation in making or seeking a compensation award one way or the other.

---

36 *D's Parent and Guardian v Greater Glasgow Health Board* [2011] SLT 1137.

37 Section 329AA of the Income and Corporation Taxes Act 1988.

6.76 However, in assessing the overall amount of damages a plaintiff is entitled to, the Court will deduct from the claim of damages for loss of earnings, an amount which would have been payable to the Inland Revenue Department as income tax if the earnings had been earned in the normal way as if the plaintiff had not been injured. This principle will be applied no matter whether a lump sum award or a periodical payment order is to be granted.

Social welfare payments

6.77 Initially in UK, recipient of periodical payments were penalised in their eligibility to receive social security and other benefits, as compared to a claimant who received only a lump sum payment, and amendments were made to the law to remedy this.[38]

6.78 In Hong Kong, the key social security scheme is the Comprehensive Social Security Assistance ("CSSA") which is means-tested. Apart from a residence requirement, an applicant must pass both the income and asset tests in order to be eligible to receive financial assistance which include standard rates payable on a monthly basis, supplements on annual or monthly basis and special grant for specific household or medical needs. A lump sum or periodical payments award will affect entitlement to claim CSSA. However, as it is to provide an income stream for life, this is only right and proper.

6.79 So far as injured plaintiffs are concerned, there are also some non-means-tested schemes, namely, Social Security Allowance ("SSA") Scheme and Traffic Accident Victims Assistance ("TAVA") Scheme.

6.80 The objective of the SSA Scheme is to provide a monthly allowance to residents who are severely disabled, or who are 65 years of age or above, to meet special needs arising from disability or old age. The scheme includes, among other allowances, normal disability allowance and higher disability allowance which are non-means-tested. As this scheme is not means-tested, entitlement to it will not be affected by a PPO.

6.81 TAVA Scheme aims to provide speedy financial assistance to road traffic accident victims (or to their dependants in cases of death). It is non-means tested, and does not take into account the element of fault leading to the occurrence of the accident. Payments are made for personal injuries, while loss of or damage to property is not covered. The scheme, however, provides for repayment of any payment made under it from damages received. If a PPO is made, the Court will then have to ensure there is a sufficient lump sum payment with it to discharge the TAVA payment received.

---

[38] The Social Security Amendment (Personal Injury Payments) Regulations 2002 and National Assistance (Assessment of Resources) (Amendment) (No.2) (England) Regulations 2002.

Question 5

Subject to Question 1 above, we invite submissions as to:

(1) Whether the court should take into account the security of the periodical payments before making the order.

(2) The funding options that should be available to ensure adequate security for periodical payments. These options may include, but are not limited to:

(a) self-funding provided by, as the case may be, insurers, the government, or statutory bodies of substantial means;

(b) self-funding backed by guarantees from government or a statutory scheme of protection; and

(c) procurement of annuities or similar investment products to provide a secured stream of income.

(3) Whether, apart from government departments, there are other organisations and institutions, whether created by statute or otherwise, which are considered to be financially secure as paying parties for court ordered periodical payments.

Chapter 7

Summary of questions for consultation

Question 1

We invite submissions as to:

Whether, as a matter of principle and notwithstanding the need for further exploration as to various aspects of operational feasibility, the court should be given, by way of legislation, the power to make periodical payment orders in respect of damages for future pecuniary loss in personal injury cases. (Paras 1.1 to 1.30)

Question 2

Subject to Question 1 above, we invite submissions as to:

(1) Whether an authority should be empowered to fix and to conduct periodical revision of the presumed net rate(s) of return on investment (the Discount Rate(s)) to be applied in the assessment of damages in all personal injury cases, in particular, in the selection of multiplier(s) for assessing future pecuniary loss for different periods of future loss and expenses to be incurred.

(2) Whether the Chief Justice or any other person or body should be such empowered authority.

(3) The identification of the stakeholders whom such empowered authority should consult in fixing the Discount Rate(s), the frequency of review and the mode of promulgation of the Discount Rate(s) so fixed. (Paras 5.81 to 5.96)

Question 3

Subject to Question 1 above, we invite submissions as to:

(1) Whether the power of the court to award periodical payment should be irrespective of the consent of the parties to the proceedings.

(2) Whether the power to award periodical payment should be generally vested in the court to be exercised in circumstances as it deems just and fair or whether such power should be limited to cover a specific

class of personal injury cases, and, if so, how the class of cases is to be defined.

(3) Whether a periodical payment order made by the court may cover all or only some heads of future pecuniary loss, in whole or in part, irrespective of the consent of the parties to the proceedings; and in the latter case, whether a periodical payment may cover all other heads of damages to such extent as the parties may agree. (Paras 6.24 to 6.41)

Question 4

Subject to Question 1 above, we invite submissions as to:

(1) Whether the original periodical payment order should be open to review by the court upon the application of either party to the proceedings.

(2) If yes, what should be the circumstances for reviewing periodical payment orders, including but not limited to the following:

(a) changes in the need for and level of future care as a result of significant medical deterioration or improvement, which is foreseen at the time of the original order, with specific criteria pertinent to the nature of deterioration or improvement, as well as the duration during which a review can be applied for, being stipulated in that order;

(b) exceptional life-changing circumstances, and if so, what are these circumstances; and

(c) restriction on the number of applications for review and limit on extension of time for review that may be allowed.

(3) Whether, upon the cessation of periodical payment occasioned by premature death of a recipient of periodical payment, the dependants of such recipient should be afforded one last opportunity to pursue a claim against the paying party for loss of dependency, or being the amount which the deceased recipient would have contributed to his dependant from the periodical payment he received but for his premature death and in respect of which the dependant has not received any compensation or damages from the paying party or any person who was or may be liable to him.

(4) Whether the current mechanism for provisional damages should be preserved and whether periodical payment orders should be applicable to cover provisional damages although their co-existence is technically possible. (Paras 6.42 to 6.57)

Question 5

Subject to Question 1 above, we invite submissions as to:

(1) Whether the court should take into account the security of the periodical payments before making the order.

(2) The funding options that should be available to ensure adequate security for periodical payments. These options may include, but are not limited to:

  (a) self-funding provided by, as the case may be, insurers, the government, or statutory bodies of substantial means;

  (b) self-funding backed by guarantees from government or a statutory scheme of protection; and

  (c) procurement of annuities or similar investment products to provide a secured stream of income.

(3) Whether, apart from government departments, there are other organisations and institutions, whether created by statute or otherwise, which are considered to be financially secure as paying parties for court ordered periodical payments. (Paras 6.58 to 6.81)

Annex A

Table on applicable statutory Discount Rates in different states/territories in Australia

State/Territory	Name of Statute	Discount Rate
NSW	Civil Liability Act 2002 (NSW)	5% [section 14(2)(b)][1]
	Motor Accidents Compensation Act 1999 (NSW)	5% [section 127][2]
Victoria	Wrongs and other Acts (Public Liability Insurance Reform) Act 2002 (Vic)	5% [section 28I(2)][3]
	Transport Accident Act 1986 (Vic)	6% [section 93(13)][4]
Queensland	Personal Injuries Proceedings Act 2002 (Qld)	5% [section 52(2)][5]
Western Australia	Law Reform (Miscellaneous Provisions) Act 1941 (WA)	6% [section 5][6]
South Australia	Civil Liability Act 1936	5% [section 3 (prescribed Discount Rate)][7]
Tasmania	Common Law (Miscellaneous Actions) Act 1986 (Tas)	7% or such other % fixed by the Governor [section 4(1)(e)&(f)][8]
Australian Capital Territory	Default rate	3%

1 http://www.austlii.edu.au/au/legis/nsw/consol_act/cla2002161/s14.html.
2 http://www.austlii.edu.au/au/legis/nsw/consol_act/maca1999298/s127.html.
3 http://www.ocpc.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f93b66241ecf1b7ca256e92000e23be/183cc296b1938c8dca256e5b00214033/$FILE/02-049a.pdf.
4 http://www.austlii.edu.au/au/legis/vic/consol_act/taa1986204/s93.html.
5 https://www.legislation.qld.gov.au/LEGISLTN/ACTS/2002/02AC024.pdf.
6 http://www5.austlii.edu.au/au/legis/wa/consol_act/lrpa1941404/s5.html.
7 https://www.legislation.sa.gov.au/LZ/C/A/CIVIL%20LIABILITY%20ACT%201936/CURRENT/1936.2267.UN.PDF.
8 http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc_id=114++1986+AT@EN+20040818140000.

State/Territory	Name of Statute	Discount Rate
Northern Territory	Personal Injuries (Liabilities and Damages) Bill 2002 (NT)	5% [section 22(2)(b) (prescribed Discount Rate)][9]
	Motor Accident (Compensation) Act 1979 (NT)	6% [section 4 (prescribed Discount Rate)][10]

9 http://www5.austlii.edu.au/au/legis/nt/consol_act/piada365/s22.html.
10 http://www.austlii.edu.au/au/legis/nt/consol_act/maa298/s4.html.

Annex B

Summary of provincial and territorial legislation pertaining to Discount Rates for civil litigation in Canada

Province	Mandated rates as of 2015	Date of most recent change	Reference / Background
Alberta	No mandated rate	n.a.	n.a.
British Columbia	Loss of earnings: 1.50% Future Care/Other Damages: 2.00%	2014 Note: Prior to April 30, 2014, the mandated rates were: Loss of earnings: 2.50% Future Care/Other Damages: 3.50%	Law and Equity Act, R.S.B.C. 1996, c. 253, section 56 Law and Equity Regulation, BC Reg. 352/81
Manitoba	3.00%	1993	Court of Queen's Bench Act, S.M. 1988-89, c. 4 (C.C.S.M. c. C280), section 83(2) S.M. 1993, c. 19, section 5
New Brunswick	2.50% is the default rate, but evidence can be led that another rate is more appropriate.	2014 Note: Prior to October 1, 2014, 2.5% had been the required rate since at least 1986.	New Brunswick Rules of Court, N.B. Reg. 82-73, Rule 54.10(2)
Newfoundland and Labrador	No mandated rate	n.a.	n.a.
Nova Scotia	NOT a motor vehicle accident (non-MVA): 2.50% MVA: 3.50%. However the regulation provides that, effective January 1, 2005, the Discount Rate for each calendar year may be based on the	Non-MVA: 1980 MVA: 2003 Notes: Prior to November 2003, the mandated rate for MVAs was 2.50%.	Civil Procedure Rules r. 70.06(1) Insurance Act section113C Automobile Insurance Tort Recovery Limitation Regulations O.I.C. 2003-457, N.S. Reg. 182/2003, section 113c

<table>
<tr><th>Province</th><th>Mandated rates as of 2015</th><th>Date of most recent change</th><th>Reference / Background</th></tr>
<tr><td></td><td>difference between the rate set for Government of Canada bonds and the consumer price index for the previous 12 months.</td><td>The MVA mandated rate rule is currently under review.</td><td></td></tr>
<tr><td>Northwest Territories</td><td>2.50%</td><td>Could not confirm.</td><td>Judicature Act, R.S.N.W.T. 1988, c. J-1, section 57(1)</td></tr>
<tr><td>Nunavut</td><td>2.50%</td><td>1998</td><td>Judicature Act, SNWT (Nu) 1998, c 34 s 1, section 57(1)</td></tr>
<tr><td>Ontario</td><td>For Trials Commencing After January 1 of:
<table><tr><th>Year</th><th>Select (1)</th><th>Ultimate (2)</th></tr><tr><td>2000</td><td>3.00%</td><td>2.50%</td></tr><tr><td>2001</td><td>2.75%</td><td>2.50%</td></tr><tr><td>2002</td><td>2.50%</td><td>2.50%</td></tr><tr><td>2003</td><td>2.50%</td><td>2.50%</td></tr><tr><td>2004</td><td>2.25%</td><td>2.50%</td></tr><tr><td>2005</td><td>1.50%</td><td>2.50%</td></tr><tr><td>2006</td><td>1.00%</td><td>2.50%</td></tr><tr><td>2007</td><td>0.75%</td><td>2.50%</td></tr><tr><td>2008</td><td>0.75%</td><td>2.50%</td></tr><tr><td>2009</td><td>0.75%</td><td>2.50%</td></tr><tr><td>2010</td><td>1.25%</td><td>2.50%</td></tr><tr><td>2011</td><td>0.50%</td><td>2.50%</td></tr><tr><td>2012</td><td>0%</td><td>2.50%</td></tr><tr><td>2013</td><td>-0.50%</td><td>2.50%</td></tr><tr><td>2014</td><td>0.30%</td><td>2.50%</td></tr><tr><td>2015</td><td>0.30%</td><td>2.50%</td></tr><tr><td>2016</td><td>0%</td><td>2.50%</td></tr><tr><td>2017</td><td>0%</td><td>2.50%</td></tr></table></td><td>Annual review.
Current rule was introduced beginning with 2014 trials.
From 2000 to 2013, a different rule for automatic annual reset was in place.
Between 1980 and 1999, the mandated rate was 2.5% for all periods.</td><td>Rules of Civil Procedure, R.R.O. 1990, Reg. 194 r. 53.09(1)(b)
Ontario also mandates inflation rates for income tax gross-up calculations as follows:
For Trials Commencing After January 1 of:
<table><tr><th>Year</th><th>Select (1)</th><th>Ultimate (2)</th></tr><tr><td>2000</td><td>2.25%</td><td>2.75%</td></tr><tr><td>2001</td><td>3.00%</td><td>3.50%</td></tr><tr><td>2002</td><td>3.25%</td><td>3.25%</td></tr><tr><td>2003</td><td>3.00%</td><td>3.25%</td></tr><tr><td>2004</td><td>3.00%</td><td>2.75%</td></tr><tr><td>2005</td><td>3.50%</td><td>2.50%</td></tr><tr><td>2006</td><td>3.50%</td><td>2.00%</td></tr><tr><td>2007</td><td>3.75%</td><td>1.75%</td></tr><tr><td>2008</td><td>3.50%</td><td>1.75%</td></tr><tr><td>2009</td><td>3.25%</td><td>1.50%</td></tr><tr><td>2010</td><td>2.75%</td><td>1.25%</td></tr><tr><td>2011</td><td>3.25%</td><td>1.25%</td></tr><tr><td>2012</td><td>3.25%</td><td>1.00%</td></tr></table></td></tr>
</table>

Province	Mandated rates as of 2015	Date of most recent change	Reference / Background
	(1) Select Rate applies for the 15-year period from the start of the trial (2) Ultimate Rate applies thereafter		2013 3.00% 0.00% 2014 2.30% 0.10% 2015 2.40% 0.20% 2016 2.10% -0.40% 2017 1.70% -0.70% (1) Select Rate applies for the 15-year period from the start of the trial (2) Ultimate Rate applies thereafter
Prince Edward Island	2.50%	Not since 1994 PEI adopted the Ontario Rules of Civil Procedure in 1990 but does not seem to have harmonized subsequent to Ontario's 1999 changes.	Prince Edward Island Rules of Civil Procedure, r. 53.09(1)
Québec	Loss of earnings: 2.00% Future Care (Goods): 3.25% Future Care (Services): 2.00%	Act: 1991 Regulation: 1997	Civil Code of Québec (S.Q., 1991, c. 64) Regulation under article 1614 of the Civil Code respecting the discounting of damages for bodily injury, RRQ, c. CCQ, r. 1
Saskatchewan	3.00%	Could not confirm.	Saskatchewan Queen's Bench Rules, r. 284B(1)(b)
Yukon	No mandated rate	n.a.	n.a.

Annex C

Table on Discount Rate for some states in the United States[1]

State	Statute, Case Law, or Jury Instruction	Discount Rate / Discount Method
Alabama	Case law – Personal injury/wrongful death cases if filed in AL state court under provision of Jones Act	In personal injury and wrongful death cases filed in Alabama state court under the provisions of the Jones Act, case precedent (*J.F.P. Offshore, Inc. v. Diamond* (1992)) requires the Court to instruct the jury on the below-market discount rate method, limiting the economic damages expert's choice of methods/rates. (Note: If not filed under AL state court under provisions of Jones Act, no current AL statutes or case law exist.)
Alaska	Statute and case law	Earnings calculations must consider both wage growth and discounting unless a total offset method is stipulated. Additionally, future losses must be reduce[d] to present value using a risk-free, long term interest rate.
Georgia	Statute and case law	According to O.C.G.A. § 51-12-13, 2002, "*it shall be lawful for the trier of fact, in determining the present value of any future earnings, annuity, or amounts, to reduce the same to the present value upon the basis of interest calculated at 5 percent per annum*." This statute was upheld in the Court of Appeals, who concluded that the phrase, "*shall be lawful*" is not ambiguous, the economist has no choice; 5% is required.

[1] Extracted from Fulcrum Inquiry, "The Appropriate Discount Rate in a Lost Earning Claim", September 2016; Available at http://www.fulcrum.com/lost-earnings/.

State	Statute, Case Law, or Jury Instruction	Discount Rate / Discount Method
Michigan	Statute	According to Michigan Compiled Laws (MCL)§ 600.6306(1), "…*All future economic damages…reduced to gross present value…'gross present value' means the total amount of future damages reduced to present value at a rate of 5% per year for each year in which damages accrue…"* (Note: The statute excludes this provision for plaintiffs 60 years old or older at the time of judgment.) Michigan Supreme Court further ruled that the statutory 5% rate is simple, not compounded. According to (MCL)§ 600.6306(2), "…*the court shall determine the ratio of total past damages to total future damages and shall allocate the amounts to be deducted proportionately between past and future damages"*.
New Jersey	Statute	According to New Jersey Stat. Ann. §2A: 16-64 (2011), "*'Discounted present value' means the present value of future payments determined by discounting those payments to the present using the most recently published applicable federal rate for determining the present value of annuity, as issued by the United States [Internal] Revenue Service."* This statue is applicable used unless a total offset method is stipulated.
New York	Statute	No discounting to present value is permitted under civil court rules. Any discounting occurs by the court after trial in a post-verdict but pre-judgement hearing. No specific discount rate is mandated.

State	Statute, Case Law, or Jury Instruction	Discount Rate / Discount Method
Pennsylvania	PA Supreme Court	Lost future earnings (other than medical malpractice) discounted at a 0% real discount rate (i.e., "*long term inflation rate and interest rate will completely offset each other*".) Note: Although an economic damages expert may not provide his/her expert opinion on the offset approach, he/she may opine to any future real wage increases.