

LAW REFORM COMMISSION



MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT  
ON  
PERIODIC PAYMENT OF DAMAGES  
FOR PERSONAL INJURY AND DEATH

March 31, 1987

Report #68

The Manitoba Law Reform Commission was established by *The Law Reform Commission Act* in 1970 and began functioning in 1971.

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TABLE OF CONTENTS

	<u>Page #</u>
CHAPTER 1 - INTRODUCTION . . . . .	1
A. THE REFERENCE . . . . .	1
B. AN OVERVIEW . . . . .	2
CHAPTER 2 - CURRENT SYSTEM OF DAMAGES FOR PERSONAL AND FATAL INJURY . . . . .	3
A. INTRODUCTION . . . . .	3
B. LIABILITY FOR PERSONAL INJURY AND DEATH . . . . .	3
1. Cause of Action . . . . .	3
2. Personal Injury . . . . .	5
3. Survival of Actions . . . . .	5
4. <i>The Fatal Accidents Act</i> Action . . . . .	6
C. ASSESSMENT OF DAMAGE AWARDS . . . . .	7
1. General Principles . . . . .	7
(a) Introduction . . . . .	7
(b) Limitations on damages . . . . .	9
(i) mitigation of damages . . . . .	9
(ii) collateral benefits . . . . .	11
(c) Itemization of damages . . . . .	12
(i) special damages . . . . .	13
(ii) general damages . . . . .	13
(1) pecuniary loss . . . . .	13
(2) non-pecuniary loss . . . . .	17
(3) other losses . . . . .	18
2. Specific Principles . . . . .	20
(a) Personal injury actions . . . . .	20
(i) special damages . . . . .	20
(ii) general damages . . . . .	21
(1) future care costs . . . . .	21
(2) loss of future earnings or profit . . . . .	25
(3) non-pecuniary loss . . . . .	28

	<u>Page #</u>
(b) Survival of actions by estate where injured party dies . . . . .	30
(i) pecuniary loss . . . . .	30
(1) loss of earnings or profit . . . . .	30
(2) expenses . . . . .	30
(ii) non-pecuniary loss . . . . .	30
(iii) other losses . . . . .	31
(c) Fatal injury - <i>Fatal Accidents Act</i> actions . . . . .	31
(i) pecuniary loss . . . . .	31
(ii) non-pecuniary loss . . . . .	36
D. STRUCTURED SETTLEMENTS . . . . .	37
1. General Principles . . . . .	37
(a) Definition . . . . .	37
(b) Difference between structured settlement and court award . . . . .	38
(c) Historical evolution . . . . .	39
(d) Tax treatment . . . . .	40
(e) Advantages to structured settlements . . . . .	41
(f) Future trends . . . . .	43
2. Structured Settlements in Practice . . . . .	43
(a) Formulation of the structure . . . . .	43
(b) Funding for structured settlements . . . . .	44
CHAPTER 3 - THE NEED FOR REFORM . . . . .	46
A. PROBLEMS WITH THE PRESENT SYSTEM . . . . .	46
1. Accuracy . . . . .	46
(a) Loss of earnings or profit and loss of dependency . . . . .	47
(b) Future care expenses . . . . .	47
2. Size of Award . . . . .	49
3. Time Between Injury and Award . . . . .	50
4. Money Management . . . . .	54
5. Conclusion . . . . .	55
B. PERIODIC PAYMENT OF DAMAGE AWARDS . . . . .	56
1. Accuracy of Award . . . . .	56
2. Size of Award . . . . .	57

30	3.	Money Management . . . . .	59
30	4.	Conclusion . . . . .	60
30	C.	OTHER SYSTEMS . . . . .	63
30	1.	Review System . . . . .	63
31	2.	Bifurcated System . . . . .	66
31	3.	Provisional Damages . . . . .	67
36	4.	Interim Damages . . . . .	68
37	5.	Conclusion . . . . .	69
37		CHAPTER 4 - ISSUES RELATING TO IMPLEMENTATION OF A PERIODIC PAYMENT SYSTEM . . . . .	70
37		A. PRECONDITIONS TO PERIODIC PAYMENTS AWARDS . . . . .	70
38	1.	Nature of Injury . . . . .	70
39	2.	Size of Award . . . . .	72
40	3.	Cause of Action . . . . .	74
41	4.	Dissipation . . . . .	77
43	5.	Conclusion . . . . .	77
43	B.	HEADS OF DAMAGE WHICH MAY BE THE SUBJECT OF PERIODIC PAYMENTS	77
44	C.	AT WHOSE INSTANCE IS A PERIODIC PAYMENT AWARD AVAILABLE?	79
46	D.	GUIDELINES FOR THE EXERCISE OF THE COURT'S DISCRETION . .	83
46	E.	SECURITY . . . . .	85
46	F.	THE JUDGMENT . . . . .	90
47	1.	Itemization of Awards by Heads of Damage . . . . .	90
47	2.	Termination of Award . . . . .	93
49	(a)	Personal injury actions . . . . .	93
50	(i)	future care costs . . . . .	93
54			
55			
56			
56			
57			

	<u>Page #</u>
(ii) future loss of earnings . . . . .	94
(iii) non-pecuniary losses . . . . .	96
(b) <i>Fatal Accidents Act</i> actions . . . . .	97
(i) pecuniary damages . . . . .	97
(ii) non-pecuniary damages . . . . .	97
(c) Conclusion . . . . .	97
3. Other Matters Which Should Be Itemized in the Judgment	98
G. VARIATION OF AWARD FOR INFLATION . . . . .	99
H. COMMUTATION AFTER TRIAL . . . . .	106
I. ASSIGNMENT OF BENEFITS . . . . .	108
J. EXEMPTION FROM GARNISHMENT . . . . .	110
CHAPTER 5 - FURTHER RECOMMENDATIONS FOR REFORM . . . . .	113
A. METHOD OF IMPLEMENTATION OF PERIODIC PAYMENTS . . . . .	113
B. <i>INCOME TAX ACT</i> . . . . .	113
C. APPLICATION TO THE CROWN . . . . .	115
D. <i>THE JUDGMENT INTEREST AND DISCOUNT ACT</i> . . . . .	116
E. TRANSITIONAL PROVISION . . . . .	117
CHAPTER 6 - LIST OF RECOMMENDATIONS . . . . .	119
APPENDIX A - THE PERIODIC PAYMENT OF DAMAGES ACT . . . . .	122
APPENDIX B - LIST OF PERSONS WHO RESPONDED TO OUR WORKING PAPER OR WITH WHOM THE COMMISSION CONSULTED . . . . .	127

## CHAPTER 1

### INTRODUCTION

#### A. THE REFERENCE

This Report is in response to a reference from the Attorney-General of Manitoba. The reference directed our attention to the increasing popularity of structured settlements, whereby claims for personal injury or death are settled out of court and paid by means of annuities with periodic payments. We were asked to study this concept with a view to its use by the courts.

Accordingly, this Report considers the feasibility of authorizing courts to award damages for personal injury or death by periodic payments. That is, instead of a judgment invariably providing that a defendant pay the plaintiff the lump sum of \$X, should courts be empowered to order, in appropriate cases, that the defendant pay the plaintiff the sum of \$Y per month for a specified number of years (or for the remainder of the plaintiff's life)? At present, the courts lack this authority. They may award damages by lump sum only.

As is our custom in a topic of this nature, we sought the comments and opinions of a wide range of groups and individuals prior to the publication and delivery of this Report to the Attorney-General. A working paper was prepared and circulated. Responses to the working paper and other expressions of opinion concerning aspects of this project were received from interested groups and individuals from the bar of Manitoba and other provinces, the judiciary, insurance companies and regulators, injured persons' organizations and health care providers and funders. A list of those who responded to our working paper or with whom we spoke can be found in Appendix B to this Report. Without exception, we were impressed by the careful consideration that these groups and individuals gave to the issues raised in the working paper and the time that they devoted to discussing the matter with us. We have carefully considered the valuable comments which we received.

We wish to acknowledge the assistance of Professor Patricia Carlson of the University of Manitoba, Faculty of Law, who was engaged to undertake the initial research on this project and to prepare the working paper for the

Commission's review. Professor Carlson brought considerable scholarship and dedication to her work. We also wish to thank Prof. Charlotte K. Goldberg, Acting Professor of Law, Loyola Law School, Los Angeles, California, for assisting us in our research of the American legislation for the working paper.

## B. AN OVERVIEW

Our Report begins in Chapter 2 with a review and restatement of the basic principles of liability for personal injury and death and the basic principles by which damages for such losses are assessed by the courts in Canada. The Chapter concludes with a discussion of the history and modern use of structured settlements and of the very important effect of income tax on court-awarded damages and damages agreed upon in structured settlements.

Chapter 3 examines the criticisms which have been levied against the existing system of lump sum damages for personal injury and death and then considers the ability of a periodic payment system of damages to remedy these problems. A very brief discussion of other potential reforms to the existing system of assessment and payment of damages then follows; however, these alternatives are essentially outside the scope of this Report and are enumerated in order to highlight the benefits and shortcomings of the matter at hand, periodic payments.

We then consider the issues relating to the implementation of court-awarded periodic payments. The practical questions associated with authorizing courts to render such judgments are not inconsiderable. For example, what form should such judgments take? Must such judgments be secured in some fashion and, if so, how? At whose instance should an award of periodic payments be made? Chapters 4 and 5 set out our responses to these and other pragmatic issues.

Finally, we provide, in Appendix A, a proposed statute, with commentary, which was drafted internally by the Commission's staff. As always, we include the caveat that we do not have any formal training in legislative drafting. However, while technical improvement to our draft Act might certainly be possible, we believe that it accurately communicates the intent of our recommendations and, to that end, we recommend it.



## CHAPTER 2

### CURRENT SYSTEM OF DAMAGES FOR PERSONAL AND FATAL INJURY

#### A. INTRODUCTION

Injury or death may result from the tortious act of another person. Where this occurs, an interested party may obtain compensation for the injury or death by bringing an action against the tortfeasor. Where damages are sought for personal injury, an action may be brought by the injured person or someone on his behalf. However, where the injured person dies prior to commencing an action, the deceased's executor or administrator may bring an action for damages for personal injury for the benefit of the estate pursuant to *The Trustee Act*.<sup>1</sup> Where damages are sought for fatal injury, an action may be brought by and for the benefit of close relatives of a deceased person pursuant to *The Fatal Accidents Act*.<sup>2</sup>

In the discussion which follows, we will examine the principles of liability and assessment of damages which are applicable to these actions, in order to build the framework within which we may discuss the potential benefits of damages awarded by courts in the form of periodic payments. The principles which are common to all three actions will be studied initially, following which we will examine the principles applicable to each individual action. At the end of the chapter, we will discuss structured settlements, specifically where they are most useful and how they function in practice.

#### B. LIABILITY FOR PERSONAL INJURY AND DEATH

##### 1. Cause of Action

Most actions for damages for personal injury or death arising from a tortious act are based on the negligence of the tortfeasor. Negligence is

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<sup>1</sup>*The Trustee Act*, C.C.S.M. c. T160.

<sup>2</sup>*The Fatal Accidents Act*, C.C.S.M. c. F50.

established where a plaintiff shows: first, that the defendant owed him a duty of care; secondly, that injury or death arose from a failure by the defendant to take reasonable care, that is, the care that a reasonable person would have taken in the circumstances of the case; thirdly, that material injury resulted to the injured or deceased person from the defendant's failure to take care; and fourthly, that injury or death was a proximate consequence of the defendant's failure to take reasonable care.<sup>3</sup> Where a plaintiff is unable to establish each of these elements, he fails to discharge his onus of proof and is not entitled to damages. Where liability is established, an injured or deceased person's conduct is examined to determine whether the plaintiff can recover in full for the losses suffered. Contributory negligence by a plaintiff does not bar recovery of damages; rather, it reduces damages in proportion to the degree of the contributory negligence.<sup>4</sup> However, where an injured or deceased person voluntarily assumed the risk of injury or death, the plaintiff is not entitled to damages.<sup>5</sup> In addition, there are other defences which, if proven, may reduce or eliminate a plaintiff's entitlement to full recovery of damages.

Other tortious acts, though less common than negligence, may result in injury or death. For example, where a person intentionally frightens another person in a manner that seriously risks bodily harm and in the process harms him, or where a person intentionally applies offensive or harmful physical contact to another, the injured person can bring an action against the tortfeasor for battery. The plaintiff must prove that he was injured by the direct act of the defendant and, once proved, the defendant can escape liability only if he can establish the absence of both intention and negligence on his part or a defence such as self defence, consent or justification.<sup>6</sup>

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<sup>3</sup>For further discussion on the principles of a negligence action, see J.A. Fleming, *The Law of Torts* (6th ed. 1983) ch. 7-9; H. Luntz, A.D. Hambley and R. Hayes, *Torts: Cases and Commentary* (1980) ch. 2-5.

<sup>4</sup>*The Tortfeasors and Contributory Negligence Act*, C.C.S.M. c. T90, s. 4(1).

<sup>5</sup>E.g., *Cunningham v. Allen* (1986), 40 Man. R. (2d) 89 (Q.B.); *King v. Redlich* (1985), 24 D.L.R. (4th) 636 (B.C.C.A.).

<sup>6</sup>*Cook v. Lewis*, [1951] S.C.R. 830, app'd by *Dahlberg v. Naydiuk* (1969), 10 D.L.R. (3d) 319 (Man. C.A.), *Bettel v. Yim* (1978), 88 D.L.R.

(Footnote continued to page 5)

Additionally, actionable injury or death may be caused by nuisance by reason of dangerous premises, chattels or animals in the tortfeasor's control, trespass to person other than battery, or even breach of contract.

## 2. Personal Injury

The right to bring an action for damages for personal injury incurred by another person's tortious act exists at common law. Usually, the injured person himself is the plaintiff. However, where an injured person is an infant or mental incompetent, an action may be brought on his behalf by the person's next friend or committee, respectively.<sup>7</sup>

## 3. Survival of Actions

At common law, with some exceptions, the death of either party to an action extinguished an existing cause of action.<sup>8</sup> This principle was changed in Manitoba by the enactment of section 55 of *The Trustee Act*.<sup>9</sup> Section 55 provides that a cause of action for damages for personal injury survives the death of either an injured person or a tortfeasor. No new cause of action is created; the legislation simply extends the rights of an injured

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(Footnote continued from page 4)  
(3d) 543 (Ont. Co. Ct.); also see *Allan v. New Mount Sinai Hospital* (1980), 109 D.L.R. (3d) 634 (Ont. H.C.) rev'd on other grounds (1981), 125 D.L.R. (3d) 276 (Ont. C.A.).

<sup>7</sup>The Queen's Bench Rules, r. 74, 77 and 80.

<sup>8</sup>For the history of this common law rule, see P. H. Winfield, "Death as Affecting Liability in Tort" (1929), 29 *Columbia L. Rev.* 239; W.S. Holdsworth, "The Origin of the Rule in *Baker v. Bolton*" (1916), 32 *L.Q.R.* 431; and W.S. Holdsworth, 3 *History of English Law* (3rd ed. 1923) at 333-336, 576-585 and 676-677.

<sup>9</sup>*The Trustee Act*, C.C.S.M. c. T160, s. 55(1), which reads as follows:

All actions and causes of action in tort, whether to person or property, other than for defamation, malicious prosecution, false imprisonment, or false arrest, in or against any person dying continue in or against his personal representative as if the representative were the deceased in life  
.....

person to his estate, and the obligations of a tortfeasor to the deceased's estate. For a cause of action to survive, a right to sue must have vested in the injured person immediately prior to his death. The survival of the right to sue the tortfeasor pursuant to *The Trustee Act* does not derogate from rights which may accrue pursuant to *The Fatal Accidents Act*.<sup>10</sup>

#### 4. *The Fatal Accidents Act* Action

The common law principle that the death of a party extinguishes an existing cause of action was also changed by the enactment of *The Fatal Accidents Act*. Pursuant to the Act, close relatives of a deceased person can maintain an action, "[w]here the death of a person is caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the deceased to maintain an action and recover damages in respect thereof . . . ."<sup>11</sup>

The relatives who are entitled to institute an action include the surviving spouse, parent, child or sibling of the deceased.<sup>12</sup> The action must be brought by the executor or administrator on behalf of the relatives. However, if an action is not commenced by the executor or administrator within six months of the death, an action may be instituted by any or all of the relatives themselves.<sup>13</sup> Only one action may be brought, and it is deemed to be instituted for the benefit of all eligible beneficiaries who suffered compensable loss.<sup>14</sup>

Generally, damages are recoverable only where the deceased himself could have succeeded against the defendant had he not died. Thus, where the deceased voluntarily accepted the risk of death, damages are not recoverable.

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<sup>10</sup>*The Trustee Act*, C.C.S.M. c. T160, s. 55(4).

<sup>11</sup>*The Fatal Accidents Act*, C.C.S.M. c. F50, s. 3(1).

<sup>12</sup>*The Fatal Accidents Act*, C.C.S.M. c. F50, s. 4(1).

<sup>13</sup>*The Fatal Accidents Act*, C.C.S.M. c. F50, s. 6(1).

<sup>14</sup>*The Fatal Accidents Act*, C.C.S.M. c. F50, s. 8(1). See *Magill v. Township of Moore* (1919), 46 D.L.R. 562 (S.C.C.), aff'g (1918), 44 D.L.R. 489 (Ont. S.C., A.D.) for a case which dealt with a similar Ontario enactment.

Contributory negligence by the deceased does not bar recovery of damages, but reduces recovery in proportion to the deceased's contribution of negligence. However, the Act extends recovery of damages in two circumstances. First, where a settlement is made, a release is given or a judgment is recovered by the deceased against the tortfeasor within three months of the tortious act which caused the death, a fatal accident claim can be maintained by the beneficiaries; however, recovery pursuant to the settlement, release or judgment is taken into account in assessing damages.<sup>15</sup> Secondly, a *Fatal Accidents Act* claim can be instituted even where, at his death, the deceased could not have brought an action against the tortfeasor by reason of lapse of time or failure to comply with a statutory or contractual condition.<sup>16</sup>

### C. ASSESSMENT OF DAMAGE AWARDS

#### 1. General Principles

##### (a) Introduction

One of the fundamental principles of assessment of damages for personal or fatal injury is that a damage award should restore a plaintiff to the position which he would have occupied had the accident not occurred, insofar as money can accomplish this goal.<sup>17</sup> The principle is known as *restitutio in integrum*.

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<sup>15</sup>*The Fatal Accidents Act*, C.C.S.M. c. F50, s. 3(3). Where settlement was made, release given or judgment recovered by the deceased after three months from the tortious act, the beneficiaries are barred from recovery of damages in a *Fatal Accidents Act* claim (*The Fatal Accidents Act*, C.C.S.M. c. F50, s. 3(4)).

<sup>16</sup>*The Fatal Accidents Act*, C.C.S.M. c. F50, s. 8(3).

<sup>17</sup>This principle was originally enunciated by Lord Blackburn in *Livingstone v. The Rawyards Coal Company* (1880), 5 A.C. 25 (H.L.), and approved by the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) (hereinafter referred to as *Andrews*).

In the absence of legislation which authorizes courts to make awards which are subject to revision, a damage award must be made on a once-and-for-all basis. Thus, an award compensates for all past and future losses. A plaintiff cannot bring a separate action for different heads of damage, nor may he bring a subsequent action to increase the award where his future losses exceed the losses expected at trial. Similarly, a defendant cannot bring a subsequent action to decrease the award, where the plaintiff's future losses are less than expected at trial.<sup>18</sup> Once damages have been assessed and no further appeal is possible, an award cannot be altered.

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<sup>18</sup>In exceptional circumstances, an appellate court may allow fresh evidence to be adduced so that damages may be assessed at appeal on the basis of the additional evidence. This may, in effect, permit an appellate court to adjust the award to reflect changes in the plaintiff's condition between trial and appeal. Authority for the court to allow the fresh evidence must be set out in statute (e.g., *The Court of Appeal Act*, C.C.S.M. c. C240, s. 26(3)). Fresh evidence may be allowed where the applicant can show that "the evidence could not have been discovered by reasonable diligence before the conclusion of the hearing . . . [being appealed from] and . . . that the evidence, if accepted, would be practically conclusive." *Dormuth v. Untereiner* (1963), 43 D.L.R. (2d) 135 at 146-147 (S.C.C.); see also *Sabel v. Williamson* (1967), 61 D.L.R. (2d) 234 (S.C.C.); *Brown v. Gentleman* (1971), 18 D.L.R. (3d) 161 (S.C.C.); *Gilroy v. Portage Animal Hospital Ltd.* (1965), 53 D.L.R. (2d) 479 (Man. C.A.); and *Walker v. Manitoba Public Insurance Corporation* (1985), 35 Man. R. (2d) 308 (C.A.). The test for allowing fresh evidence on appeal has more recently been restated as follows:

- (1) the evidence will not be admitted if, by due diligence, it would have been adduced at trial (less stringent test for criminal cases);
- (2) the evidence must be relevant - that is, it must bear upon a decisive or potentially decisive issue in the trial;
- (3) the evidence must be credible - that is, reasonably capable of belief; and
- (4) the evidence, if believed, when taken with the other evidence adduced at trial, can be expected to affect the result.

See, *Palmer v. The Queen* (1979), 106 D.L.R. (3d) 212 (S.C.C.); *Mercer v. Sijan* (1976), 72 D.L.R. (3d) 464 (Ont. C.A.); *Maitland v. Drozda*, [1983] 3 W.W.R. 193 (Sask. Q.B.). However, where the requirements are met, a court will not automatically allow fresh evidence to be adduced. Two competing interests are weighed by a court: the public interest which demands finality to litigation and the once-and-for-all assessment of damages, and the affront to common sense which exists when a court shuts its eyes to a fact which

(Footnote continued to page 9)

Similarly, in the absence of legislation which enables an award to be ordered in the form of periodic payments, a court must order damages to be payable by a lump sum.<sup>19</sup>

In assessing a damage award, a court should not conjecture upon how a plaintiff will spend the award and whether he might dissipate it. The plaintiff may use the award as he wishes, and as such, has flexibility to plan his life.

(b) Limitations on damages

A plaintiff's recovery of damages may be limited by his duty to mitigate his damages and by his receipt of collateral benefits.

(i) mitigation of damages

An injury victim or fatal accident beneficiary is entitled to charge the defendant with the sum which he reasonably needs to make good his loss,<sup>20</sup> but he must take all reasonable steps to minimize his losses and cannot recover for a loss or part of a loss which he ought reasonably to have avoided.<sup>21</sup> This doctrine of mitigation of damages is applicable to all tort

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(Footnote continued from page 8)  
falsifies its assessment (see *Mercer v. Sijan*, above, where the Court adopted Lord Denning's comments in *McCann v. Sheppard*, [1973] 2 All E.R. 881 (C.A.), and *Maitland v. Drozda*, above).

<sup>19</sup>*Lewis v. Todd*, [1980] 2 S.C.R. 694. Also see, *Fournier v. Canadian National Railway Company*, [1927] A.C. 167 (P.C.) where the jury awarded damages in the form of an annuity which was to be paid annually for a certain period; on appeal, the Privy Council stated that the form of award was improper and illegal, and that the trial judge should have refused to accept the jury's verdict.

<sup>20</sup>*Martin v. Cantafio* (1971), 20 D.L.R. (3d) 725 (Man. C.A.).

<sup>21</sup>*Red Deer College v. Michaels* (1975), 57 D.L.R. (3d) 386 (S.C.C.); *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation*, [1979] 1 S.C.R. 633. For further discussion, see K.D. Cooper-Stephenson and I.B.

(Footnote continued to page 10)

actions for personal injury or death.<sup>22</sup> Accordingly, where a plaintiff's conscious or reckless conduct involves an unreasonable failure to reduce his loss, then he will not recover for that loss. The onus of proving that a plaintiff's conduct involves an unreasonable failure to mitigate rests on the defendant.<sup>23</sup>

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(Footnote continued from page 9)  
Saunders, *Personal Injury Damages in Canada* (1981) at 416-417 and 592-598. See also *Jones v. Fabbi* (1974), 49 D.L.R. (3d) 316 (B.C.S.C.) for its application to an intentional tort.

<sup>22</sup>*Janiak v. Ippolito*, [1985] 1 S.C.R. 146, where Wilson J. speaking on behalf of the court (which included Dickson J.) stated (at 166-167) that:

[T]he so-called 'duty to mitigate' derives from the general proposition that a plaintiff cannot recover from the defendant damages which he himself could have avoided by the taking of reasonable steps.

Wilson J. then quoted with approval (at 167) Pearson L.J. in *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 at 1075 (C.A.):

The plaintiff is not under any contractual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss.

These comments clarify the earlier statements of Dickson J. (as he then was) in *Andrews*, *supra* n. 17, at 461, where he expressed the view that the doctrine of mitigation of damages did not have a place in a personal injury claim. Apparently, Dickson J. did not intend to abolish the duty of a personal injury victim to mitigate his loss, but intended only to emphasize that an injury victim need not accept the cheapest form of compensation (such as, institutional care) and may be entitled to the more expensive compensation (such as, home care). See, K.D. Cooper-Stephenson and I.B. Saunders, *supra* n. 21, at 589-592 for further discussion.

<sup>23</sup>*Janiak v. Ippolito*, *supra* n. 22; *Red Deer College v. Michaels*,  
(Footnote continued to page 11)



(ii) collateral benefits

Collateral benefits are benefits other than court-awarded damages which contribute to a plaintiff's financial or physical well-being. They may be a sum of money, free medical care or other services. Most are received pursuant to statute or by contractual arrangement. Statutory benefits may include unemployment insurance benefits, social assistance, Canada Pension Plan benefits, workers' compensation, criminal injuries benefits, hospitalization and medical care and no-fault automobile accident insurance benefits. Contractual benefits may include private disability insurance, benefits received pursuant to an employment contract or collective agreement and life insurance benefits. An inheritance from a victim's estate is also a collateral benefit.

Receipt of such benefits obviously reduces the loss sustained by an injured person or fatal accident beneficiary. Nonetheless, a court does not usually deduct the value of such benefits from a damage award. However, a victim is not always permitted to cumulate his tort remedy with the collateral benefits which he receives. Where the conferrer of a collateral benefit has a right to recover the value of the benefit from the tortfeasor, a readjustment or reallocation of the loss may occur.<sup>24</sup>

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(Footnote continued from page 10)  
*supra* n. 21; *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation*, *supra* n. 21.

<sup>24</sup>The following are some of the circumstances where the rights of the conferrer of collateral benefits may be recognized:

1. where subrogation rights exist pursuant to a relevant statute or contract, a conferrer may be able to seek repayment from the tortfeasor: in personal injury actions, see *Guy v. Trizec Equities Ltd.* (1979), 99 D.L.R. (3d) 243 (S.C.C.); *Boarelli v. Flannigan* (1973), 36 D.L.R. (3d) 4 (Ont. C.A.); *Rawson v. Maher* (1982), 15 Man. R. (2d) 6 (C.A.); *McLeod v. Palardy* (1981), 10 Man. R. (2d) 181 (C.A.); *Watkins v. Olafson* (1986), 40 Man. R. (2d) 286 (Q.B.); *Rosenberger v. Cooke* (1982), 17 Man. R. (2d) 395 (Q.B.); in *Fatal Accidents Act* actions, see, *Vana v. Tosta* (1967), 66 D.L.R. (2d) 97 (S.C.C.); *Canadian Pacific Ltd. v. Gill* (1973), 37 D.L.R. (3d) 229 (S.C.C.).

(Footnote continued to page 12)

(c) Itemization of damages

The Supreme Court of Canada has directed lower courts to assess damage awards by an itemized consideration of the heads of damage that make up

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(Footnote continued from page 11)

2. where a court makes an award coupled with a direction that the plaintiff repay certain collateral benefits to the conferrer. Most cases involve nursing services rendered voluntarily, but the principle may be applied more broadly: *Arnold v. Teno* (1978), 83 D.L.R. (3d) 609 (S.C.C.) (hereinafter referred to as *Teno*); *Thornton v. Board of School Trustees of School District No. 57 (Prince George)* (1978), 83 D.L.R. (3d) 480 (S.C.C.) (hereinafter referred to as *Thornton*); *Coderre v. Ethier* (1978), 85 D.L.R. (3d) 621 (Ont. H.C.); *Neufeld v. Public Trustee of Manitoba* (1984), 28 Man. R. (2d) 164 (Q.B.); *Millett v. McDonald's Restaurants of Canada Limited* (1984), 29 Man. R. (2d) 83 (Q.B.); *McLeod v. Palardy*, above.
3. where a conferrer of benefits is entitled to institute an independent action against the tortfeasor for the value of the benefits provided to the plaintiff. E.g., the action *per quod servitium amisit* permits an employer to sue a tortfeasor who has deprived him of his employee's services by causing his employee bodily harm; he may recover wages and medical expenses which were paid to the injured employee: *R. v. Richardson*, [1948] 2 D.L.R. 305 (S.C.C.) foll'd by *Attorney-General of Canada v. Nykorak* (1962), 33 D.L.R. (2d) 373 (S.C.C.), *R. v. Murray* (1967), 60 D.L.R. (2d) 647 (S.C.C.), *R. v. Buchinsky* (1983), 145 D.L.R. (3d) 1 (S.C.C.), *Attorney-General of Canada v. Szaniszló* (1985), 25 D.L.R. (4th) 606 (B.C.S.C.). By the action *per quod consortium et servitium amisit*, a husband may sue a tortfeasor who has physically harmed, taken away or imprisoned his wife, and thereby deprived him of her society and service: *Stein v. Sobczak* (1981), 9 Man. R. (2d) 49 (C.A.); *Hill v. Danyluk* (1980), 5 Man R. (2d) 246 (Q.B.). Where a husband's claim for damages for loss of services and his wife's personal injury claim for damages for non-pecuniary loss overlap, a deduction of the sum that the husband recovers must be made from his wife's personal injury damages. See generally, *Salmond on Torts*, (17th ed. R.F.V. Heuston 1977) 349 *et seq.*; J. Irvine, "The Action Per Quod Servitium Amisit in Canada" (1980), 11 C.C.L.T. 241; and Law Reform Commission of British Columbia, *Report on The Action Per Quod Servitium Amisit*, (Report #89, 1986).

a final award.<sup>25</sup> The Supreme Court indicated that itemization permits meaningful review of an award on appeal, discloses the components of the award to the litigants and their advisors, assures them that all heads of damage have been considered, and affords reasonable guidance in future cases.<sup>26</sup> Itemization should be sufficiently detailed so as to enable a defendant to challenge the reasonableness of losses. Generally, damages are assessed according to special and general damages. General damages are further divided into those which compensate pecuniary and non-pecuniary losses. In the discussion which follows, principles of assessment of damages which are applicable to personal and fatal injury claims for these heads of damage are briefly discussed.

(i) special damages

Special damages compensate for pecuniary losses such as out-of-pocket expenses as well as loss of earnings or profit (in personal injury actions) which were incurred between the accident and trial. As they have already been incurred, special damages are capable of more exact calculation, and therefore the losses which they compensate must be specified by the plaintiff in his pleadings and proven strictly.

(ii) general damages

General damages compensate for all losses other than those which are compensated by special damages. The losses may be either pecuniary or non-pecuniary losses.

(1) pecuniary loss

Pecuniary losses may include future loss of earnings or profit and future care costs in personal injury actions and loss of dependency in *Fatal Accidents Act* actions. Each type of pecuniary loss is assessed separately.

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<sup>25</sup>*Andrews, supra* n. 17; *Guy v. Trizec Equities Ltd.*, *supra* n. 24. See also, *Fenn v. City of Peterborough* (1979), 104 D.L.R. (3d) 174 (Ont. C.A.); *Kiddell v. Kulczycki*, [1977] 3 W.W.R. 216 (Man. Q.B.).

<sup>26</sup>*Andrews, supra* n. 17.

The fundamental principle of compensation for pecuniary loss is *restitutio in integrum*. That is, compensation is to be "full" for all pecuniary losses.<sup>27</sup>

In assessing damages for pecuniary loss, a court should not be influenced by the defendant's financial position, sympathy for either party, or the social costs of high damage awards.<sup>28</sup> Rather, a court should consider the level and duration of loss, and contingencies which could affect the loss, in order to calculate a self-extinguishing capital sum which will generate sufficient income to meet the future pecuniary losses of the plaintiff as they accrue.

In assessing the level of loss, a court predicts the future care costs and lost wages or profit of a victim in a personal injury action and the dependency loss of a beneficiary in a *Fatal Accidents Act* case. Even where a court encounters great difficulty in ascertaining future losses, it is justified in awarding substantial damages.<sup>29</sup> A plaintiff need not prove that a future loss will occur, and need only prove that there is a reasonable chance that the loss will occur.<sup>30</sup> Speculative and fanciful possibilities of future losses, unsupported by expert or other cogent evidence, should be ignored in assessing future pecuniary damages.<sup>31</sup>

Accounting for contingencies has been criticized for being a largely speculative practice which ensures that an award either over- or under-compensates a plaintiff, depending on whether the contingency occurs. Nonetheless, in assessing future losses, a court will recognize and give effect to contingencies which are reasonably foreseeable,<sup>32</sup> provided that

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<sup>27</sup>*Andrews, supra n. 17*, at 461-462.

<sup>28</sup>*Lindal v. Lindal* (1981), 129 D.L.R. (3d) 263 (S.C.C.).

<sup>29</sup>*Penvidic Contracting Co. Ltd. v. International Nickel Co. of Canada Ltd.* (1975), 53 D.L.R. (3d) 748 (S.C.C.).

<sup>30</sup>*Conklin v. Smith* (1978), 88 D.L.R. (3d) 317 (S.C.C.).

<sup>31</sup>*Schrump v. Koot* (1977), 82 D.L.R. (3d) 553 (Ont. C.A.).

<sup>32</sup>*Lewis v. Todd, supra n. 19*.

supporting evidence is adduced at trial.<sup>33</sup> Where warranted, a deduction for contingencies is made. However, as contingencies may be both positive and negative, in many cases a contingency deduction is not justified.<sup>34</sup>

In calculating compensation for future losses a court applies a discount factor to account for the income which will be generated from the investment of the lump sum (bearing in mind the effect of long term inflation). The reduced damage award should theoretically provide the sum which, when invested, will compensate the plaintiff for his future pecuniary losses and self-extinguish at the end of the period of loss.<sup>35</sup> In Manitoba, a 3 per cent discount factor has been mandated by legislation since September 1986.<sup>36</sup> Where a discount factor is not legislated, it is determined according to evidence presented in court.<sup>37</sup>

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<sup>33</sup>*Lewis v. Todd*, *supra* n. 19; *Andrews*, *supra* n. 17; *Thornton*, *supra* n. 24; *Fenn v. City of Peterborough*, *supra* n. 25; *McLeod v. Palardy*, *supra* n. 24. Usually actuarial evidence is used to establish the probability of a recognized contingency: *Lewis v. Todd*, *supra* n. 19.

<sup>34</sup>*Fenn v. City of Peterborough*, *supra* n. 25.

<sup>35</sup>*Andrews*, *supra* n. 17; *Keizer v. Hanna* (1978), 82 D.L.R. (3d) 449 (S.C.C.); *Lewis v. Todd*, *supra* n. 19.

<sup>36</sup>*The Judgment Interest and Discount Act*, C.C.S.M. c. J8, s. 9. Ontario, Nova Scotia and British Columbia have legislated or permitted courts to make rules to establish a discount rate: *Courts of Justice Act*, 1984, S.O. 1984, c. 11, s. 90(1)(q), Rules of Civil Procedure, O. Reg. 560/84, R. 53.09 - 2½%; *Judicature Act*, S.N.S. 1972, c. 2, s. 42 (fa) en. S.N.S. 1980, c. 54, s. 4 - 2½%; *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 51, en. S.B.C. 1981, c. 10, s. 30, B.C. Reg. 352/81 - 2½% ("future difference between the investment rate of interest and the rate of increase of earnings due to inflation and general increases in productivity") and 3½% ("future difference between the investment rate of interest and the rate of general price inflation").

<sup>37</sup>*Andrews*, *supra* n. 17; *Lewis v. Todd*, *supra* n. 19. Actuarial evidence is normally adduced. The discount factor is calculated by subtracting the rate of long-term inflation from the rate of return on long-term investments. There is a lack of uniformity in jurisdictions without legislated discount factors, with factors ranging from 2½ to 7%. In  
(Footnote continued to page 16)

Where a large sum is awarded to compensate losses over a significant period, sometimes a sum of money, referred to as a management fee, is awarded to enable a plaintiff to acquire professional assistance for the investment and utilization of the award. It is infrequently awarded in even the most serious cases, but may be awarded where management is complex,<sup>38</sup> where the size of the award is large,<sup>39</sup> or where a plaintiff is incapable of managing his affairs.<sup>40</sup> However, even in these cases, where a close relative is

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(Footnote continued from page 15)  
the following cases, a discount factor of 7% was calculated: *Andrews*, *supra* n. 17; *Thornton*, *supra* n. 24; *Teno*, *supra* n. 24; (the *Andrews*, *Thornton* and *Teno* cases collectively are referred to as 'the trilogy'); *Keizer v. Hanna*, *supra* n. 35. In Manitoba, prior to September 1986, the discount factor ranged from 2% to 6%; see, *Lawrence's Estate v. Good* (1984), 26 Man. R. (2d) 115 (Q.B.); - 2%; *Simpson v. Felicioni* (1985), 36 Man. R. (2d) 6 (C.A.) - 3%; *Watkins v. Olafson*, *supra* n. 24 - 3%; *MacDonald v. Alderson* (1981), 8 Man. R. (2d) 202 at 228 (Q.B.), var'd at (1982), 15 Man. R. (2d) 35 (C.A.) - 3%; *Ring Estate v. Fullerton* (1983), 25 Man. R. (2d) 241 (Q.B.) - 3%; *Rose Estate v. Belanger* (1985), 32 Man. R. (2d) 282 (C.A.) - 3%; *McLeod v. Palardy*, *supra* n. 24, - 4%; *Kernsted v. Desorcy*, [1979] 1 W.W.R. 512 (Man. C.A.) - 6%. Productivity factor may also be "an appropriate component of a damage award in a proper case": *Lewis v. Todd*, *supra* n. 19, at 270; *Malat v. Bjornson* (No. 2), [1979] 4 W.W.R. 673 (B.C.S.C.); *Julian v. Northern & Central Gas Corp. Ltd.* (1979 and 1980), 31 O.R. (2d) 388 (C.A.). And see, *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 51, en. S.B.C. 1981, c. 10, s. 30, which provides that the discount rate to be used in calculating loss of earnings must take general increases in productivity into account.

<sup>38</sup>*Holian v. United Grain Growers Ltd.* (1980), 2 Man. R. (2d) 374 and 4 Man. R. (2d) 264 (Q.B.), var'd. on other grounds 4 Man. R. (2d) 253 (C.A.), leave to appeal to the Supreme Court of Canada refused, *sub nom. United Grain Growers Ltd. v. Holian*, 6 Man. R. 170 (S.C.C.).

<sup>39</sup>*Teno*, *supra* n. 24. Also see, *McLeod v. Palardy*, *supra* n. 24, where no fee was awarded due to the small award.

<sup>40</sup>*Teno*, *supra* n. 24. Compare with *Lan v. Wu*, [1981] 1 W.W.R. 64 (B.C.C.A.), leave to appeal to S.C.C. denied (1980), 14 C.C.L.T. 282n. (S.C.C.). See also, *Mandzuk v. Vieira* (1986), 28 D.L.R. (4th) 677 (B.C.C.A.), where the court defines the capability to manage one's own affairs as normal day to day affairs, not the investment of hundreds of thousands of dollars to provide income over a long period of time and to self-extinguish at the end of that period.

capable of assisting the plaintiff in management of the lump sum, a court may decline to award a management fee.<sup>41</sup> The quantum of the management fee awarded depends upon the value of the overall award and the period over which the funds must be managed.<sup>42</sup> Awards have ranged from \$20,000 to \$75,000.<sup>43</sup>

(2) non-pecuniary loss

Non-pecuniary damages compensate in personal injury actions for loss of expectation of life, pain and suffering, and loss of amenities and in *Fatal Accidents Act* actions for loss of guidance, care and companionship.<sup>44</sup>

*Restitutio in integrum*, the basic compensation principle for pecuniary loss, has limited application in the assessment of damages for non-pecuniary loss. In the personal injury context, a plaintiff who is gravely and permanently impaired can never be fully restored to the position which he would have occupied but for the tort with respect to his loss of expectation of life and loss of amenities.<sup>45</sup> Similarly, in the fatal injury context, a surviving spouse or child cannot be compensated fully for their loss of care, companionship and guidance.<sup>46</sup> Thus, in personal injury actions, a court awards compensation for non-pecuniary losses to provide a victim with reasonable solace for his misfortune.<sup>47</sup> The size of an award depends upon the seriousness of the injury and the ability of the award to ameliorate the victim's condition. In *Fatal Accidents Act* actions, an award

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<sup>41</sup>*Tomlinson v. Wurtz* (1982), 16 Man. R. (2d) 145 at 161 (Q.B.); *Ring Estate v. Fullerton*, *supra* n. 37.

<sup>42</sup>*McLeod v. Palardy*, *supra* n. 24.

<sup>43</sup>*MacDonald v. Alderson*, *supra* n. 37, \$20,000; *Fenn v. City of Peterborough*, *supra* n. 25, \$25,000; *Teno*, *supra* n. 24, \$35,000; *Mandzuk v. Vieira*, *supra* n. 40, \$40,000; *Giannone v. Weinberg* (1986), 37 C.C.L.T. 52 (Ont. S.C.), \$75,000.

<sup>44</sup>*The Fatal Accidents Act*, C.C.S.M. c. F50, s. 4(4).

<sup>45</sup>*Andrews*, *supra* n. 17.

<sup>46</sup>*Nielsen v. Kaufmann* (1986), 26 D.L.R. (4th) 21 (Ont. C.A.).

<sup>47</sup>*Andrews*, *supra* n. 17.

for non-pecuniary losses represents a compassionate allowance unrelated to pecuniary measure.<sup>48</sup>

In both personal injury and *Fatal Accidents Act* actions, usually only one figure is calculated for all non-pecuniary losses due to the overlap which exists between various losses.<sup>49</sup>

Pecuniary damages cannot be precisely calculated due to the necessity to forecast future events, as discussed above. However, the imprecision in assessing non-pecuniary losses is even more apparent, because they do not lend themselves to mathematical calculation.<sup>50</sup> As non-pecuniary loss cannot be objectively translated into monetary terms, this area of compensation is one where the social burden of large awards has relevance and moderation in the size of an award is justified.<sup>51</sup> To meet the social pressure to moderate awards and to achieve uniformity, courts have established monetary guidelines for non-pecuniary awards.<sup>52</sup> Notwithstanding these guidelines, inevitable differences between cases and changing economic conditions are recognized. Non-pecuniary losses must be proved on a balance of probabilities; an award cannot be based on purely conjectural evidence.<sup>53</sup>

### (3) other losses

Where a person suffers distress as a result of the character of the defendant's act, he may be awarded aggravated damages.<sup>54</sup> Typically, aggravated damages are awarded in cases of intentional wrongdoing or where an

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<sup>48</sup>*Rose Estate v. Belanger*, *supra* n. 37.

<sup>49</sup>*Sonsie v. McIntyre* (1980), 6 Man. R. (2d) 277 (C.A.).

<sup>50</sup>*Andrews*, *supra* n. 17.

<sup>51</sup>*Larney Estate v. Friesen* (1986), 41 Man. R. (2d) 169 (C.A.).

<sup>52</sup>See *infra*, at 28-29 and 36-37.

<sup>53</sup>*Sonsie v. McIntyre*, *supra* n. 49, foll'd by *Larocque Estate v. Belhumeur* (1983), 22 Man. R. (2d) 81 (Q.B.); *Duong Estate v. Au* (1984), 29 Man. R. (2d) 206 (Q.B.).

<sup>54</sup>*Rookes v. Barnard*, [1964] 1 All E.R. 367 (H.L.).



injured person's emotions are heightened by the defendant's extreme recklessness.<sup>55</sup> Although they could be subsumed as an aspect of pain and suffering, they are usually dealt with as a distinct subhead of non-pecuniary damages. Aggravated damages are not intended to punish a defendant.

Where a defendant's conduct is blameworthy or merits condemnation by the court, a plaintiff may be awarded exemplary damages. They are awarded where damages will satisfy the need to punish, deter or prevent unjust enrichment.<sup>56</sup> They are most commonly awarded in personal injury actions in suits of trespass to person. Rarely are they awarded in negligence cases, because the conduct of a defendant apart from his lack of care is usually not blameworthy or meriting condemnation by a court.<sup>57</sup> Whether they are permissible in *Fatal Accidents Act* actions is questionable.<sup>58</sup> Assuming punishable behaviour, a plaintiff can recover exemplary damages only where he himself is the victim of the behaviour.<sup>59</sup> In assessing exemplary damages, a court exercises moderation and fairness. Factors which a court considers are (1) the conduct of the parties, (2) the size of the compensatory award, (3) the means of the defendant, (4) analogous criminal fines, (5) prior criminal proceedings, and (6) undue profit by the plaintiff with respect to the award.<sup>60</sup>

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<sup>55</sup>E.g., *Dalsin v. T. Eaton Co. Canada Ltd.* (1975), 63 D.L.R. (3d) 565 (Alta. Dist. Ct.); *Delta Hotels Ltd. v. Magrum* (1975), 59 D.L.R. (3d) 126 (B.C.S.C.); *Storrie v. Newman (No. 2)* (1982), 139 D.L.R. (3d) 482 (B.C.S.C.).

<sup>56</sup>*Phillips v. Soloway* (1956), 6 D.L.R. (2d) 570 (Man. Q.B.); *Fraser v. Wilson* (1969), 6 D.L.R. (3d) 531 (Man. Q.B.); *DiMarco v. Mordue* (1983), 20 Man. R. (2d) 214 (Q.B.); *Breitkreutz Estate v. Hummel Estate* (1978), 11 A.R. 228 (S.C.T.D.).

<sup>57</sup>*Robitaille v. Vancouver Hockey Club Ltd.* (1981), 124 D.L.R. (3d) 228 (B.C.C.A.).

<sup>58</sup>*Blacquiere's Estate v. Canadian Motor Sales Corp. Ltd.* (1975), 10 Nfld. & P.E.I.R. 178 (P.E.I.S.C.) suggests that exemplary damages are recoverable in *Fatal Accidents Act* actions.

<sup>59</sup>*Rookes v. Barnard*, *supra* n. 54; *Kenmuir v. Huetzelmann* (1977), 3 C.C.L.T. 153 (B.C. Co. Ct.).

<sup>60</sup>For a full discussion of these factors, see K.D. Cooper-Stephenson and I.B. Saunders, *supra* n. 21, at 701-704.

Where a plaintiff establishes a cause of action but fails to prove an entitlement to compensatory damages, nominal damages may be awarded. For example, they may be awarded where a plaintiff's injury is worthless, provocation by a plaintiff negates substantial damages, or a court believes that an action should not have been instituted. A nominal award may serve two practical purposes. It establishes legal rights and assists a court in awarding costs. A nominal award is usually a trivial amount.<sup>61</sup>

## 2. Specific Principles

In this section, we will discuss the principles of assessment of damages as they specifically apply to personal injury actions (whether brought by the injured person or his estate), and to *Fatal Accidents Act* cases.

### (a) Personal injury actions

In assessing damages for personal injuries, a court's primary concern is to ensure that a victim is provided with an award which will enable him to maintain himself reasonably over the period of his disability. In making its assessment, a court considers damages under two main heads: special damages and general damages.

#### (i) special damages

As previously indicated, special damages compensate for pre-trial loss of earnings or profit and pre-trial expenses.

An award for pre-trial loss of earnings compensates a plaintiff for income he would have earned prior to trial had there been no accident.<sup>62</sup> Contingencies such as uncertainty in the plaintiff's employment prospects and pre-existing medical conditions which could have resulted in early retirement are taken into account.<sup>63</sup> However, a deduction is not made where negative

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<sup>61</sup>For further discussion on nominal damages in the personal injury and fatal accident context, see K.D. Cooper-Stephenson and I.B. Saunders, *supra* n. 21, at 65-69.

<sup>62</sup>*Watkins v. Olafson*, *supra* n. 24.

<sup>63</sup>*Holian v. United Grain Growers Limited*, *supra* n. 38 (C.A.).

contingencies are offset by positive contingencies such as wage increases which the plaintiff might have enjoyed during the pre-trial period. Where a plaintiff was self-employed, damages for loss of profits can be claimed as an element of special damages. However, a claim for loss of profits may be more difficult to prove than one for loss of earnings. Special income losses, that is, losses which are attributable to missed pecuniary advantage of a special nature, may also be claimed.

Pre-trial expenses which may be recovered include: hospitalization and medical expenses, such as the actual cost of hospitalization, medical advice, surgical operations, nursing care, special appliances and equipment, medication and other prescriptions and reasonable cost of travel for treatment, household and living expenses, such as the cost of adjustments to the home which are necessary for the provision of food, cost of added wear and tear on clothing, and purchase of a specially equipped vehicle, where not claimed under cost of future care, and voluntary services provided by third parties.

(ii) general damages

General damages include damages for future pecuniary loss, that is, future care costs and loss of future earnings or profit, and non-pecuniary loss. Compensation for each of these heads of damage is calculated separately.

(1) future care costs

Future care costs may include both expenses which are directly attributable to the injury, such as hospitalization and medical expenses, as well as expenses which a plaintiff would have incurred had he not been injured, such as household and other living expenses.<sup>64</sup>

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<sup>64</sup>Andrews, *supra* n. 17, Thornton, *supra* n. 24, foll'd by Cunningham v. Allen, *supra* n. 5.

In assessing damages for future care expenses, a court awards sufficient damages so that a plaintiff can maintain himself reasonably over the duration of his injuries. The correct focus is upon the plaintiff's injuries and upon providing him with a reasonable standard of care, rather than upon the defendant's burden or the social burden of the expense, particularly where such an emphasis would result in a failure to properly compensate a plaintiff. The two latter factors are relevant only in choosing between acceptable alternatives. This does not imply that a defendant's interests do not deserve protection. His interests are protected by the court ensuring that the plaintiff's claims are legitimate and justifiable.<sup>65</sup>

The physical and mental capabilities of a plaintiff dictate what is proper compensation. A proper environment for someone who is mobile and in full control of his mental faculties is a home, rather than an institutional setting. Such a plaintiff would therefore be entitled to all reasonable costs of a home environment.<sup>66</sup> On the other hand, a person with severe mental impairment and/or physical immobility might be unsuited to a home environment and proper compensation might therefore exclude the additional costs of home care.

Each care expense item is considered and the reasonableness of each decided at trial as a question of fact.<sup>67</sup> An estimate is then determined of the compensation that the plaintiff requires on a periodic basis to maintain a reasonable standard of care.

The period over which the expenses will likely be incurred is then considered. In cases of temporary disability, the recovery period is estimated. In cases of permanent disability, actuarial evidence regarding the plaintiff's post-accident life expectancy is adduced. Where certain expenses are expected to be incurred over only a portion of the total period of loss, this factor must be considered in the calculation of damages.<sup>68</sup>

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<sup>65</sup>*Andrews, supra* n. 17.

<sup>66</sup>*Andrews, supra* n. 17.

<sup>67</sup>*Andrews, supra* n. 17.

<sup>68</sup>*Fenn v. City of Peterborough* (1976), 73 D.L.R. (3d) 177 (Ont. H.C.) *var'd supra* n. 25.

Contingencies are considered, and a deduction made where the evidence warrants. The germane contingencies differ from those which are relevant to future loss of earnings, necessitating a separate calculation. Commonly, a deduction of 20 per cent to account for contingencies is made in calculating the future care award.<sup>69</sup>

Following the initial calculation of the plaintiff's periodic ongoing needs, a lump sum is then calculated which, when prudently invested, will generate the income required to meet the estimated future care expenses and extinguish itself at the end of the period of loss. In calculating the lump sum, the court applies a discount rate of 3 per cent.<sup>70</sup>

Finally, an amount may be awarded to compensate the plaintiff for his future income tax liability on the investment income earned on the lump sum for future care costs. Such a sum is commonly known as a gross-up. In 1978, the Supreme Court of Canada declined to award a gross-up for future taxation in the trilogy of personal injury cases which came before the Court.<sup>71</sup> The Court provided two reasons. First, it indicated that the impact of taxation on income generated from a lump sum for future care costs is mitigated by several provisions of the *Income Tax Act (Canada)*<sup>72</sup> which permit a taxpayer, in computing his taxable income for the year, to deduct an amount equal to that portion of medical expenses which exceeds 3 per cent of his income. Medical expenses which may be deducted include the cost of a full-time attendant or full-time care in a nursing home for the taxpayer, his spouse or a dependant who, in a 12 month period ending in the tax year, was

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<sup>69</sup>*Andrews, supra* n. 17, *Thornton, supra* n. 24, *Teno, supra*, n. 24.

<sup>70</sup>See *supra*, at 15.

<sup>71</sup>*Andrews, supra* n. 17, *Thornton, supra* n. 24, *Teno, supra* n. 24. Also see *Tomlinson v. Wurtz, supra* n. 41, and *MacDonald v. Alderson, supra* n. 37.

<sup>72</sup>*Income Tax Act*, S.C. 1970-71-72, c. 63, s. 110(1)(c) as am. See *Andrews, supra* n. 17, at 475.

confined for a substantial period of time each day by reason of illness, injury or affliction to a bed or wheelchair, or remuneration of one full-time attendant upon the taxpayer, in a self-contained domestic establishment in which persons who are cared for live, if the person cared for is likely to be dependent on others for personal needs for a long period of indefinite duration. For an infant, the tax consequences are further mitigated by other provisions of the *Income Tax Act*,<sup>73</sup> which provide that income generated from property that was acquired by a person as an award for damages to compensate for personal physical or mental injuries, and capital gains earned from the disposition of such property are exempt from tax, where the income was earned or capital gains generated before the end of the tax year in which the taxpayer attains the age of twenty-one.<sup>74</sup> The Court's second reason for not awarding a gross-up in the trilogy cases was its view that the exact future tax burden is extremely difficult, if not impossible, to predict as the rate of tax and exemptions change over time.

However, more recently, courts in Manitoba and Ontario have grossed-up awards to compensate a plaintiff for his future tax liability for investment income generated from the future care portion of the damage award.<sup>75</sup> The comment has also been made by the Ontario Court of Appeal that

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<sup>73</sup>*Income Tax Act*, S.C. 1970-71-72, c. 63, ss. 81(1)(g.1), (g.2), as am. S.C. 1973-74, c. 14, s. 23(2), S.C. 1974-75-76, c. 26, s. 44(2), S.C. 1985, c. 45, s. 39(1).

<sup>74</sup>*Teno*, *supra* n. 24, at 633.

<sup>75</sup>See *Tiessen v. Her Majesty the Queen in the Right of Ontario*, Ont. S.C. unreported, May 13, 1980; *Schmidt v. Sharpe* (1983), 27 C.C.L.T. 1 (Ont. S.C.); *Davies Estate v. Robertson* (1984), 5 O.A.C. 393 (Ont. C.A.); *Riosa v. Marko*, Ont. H.C. unreported, Nov. 17, 1984; *De Champlain v. Etobicoke General Hospital* (1985), 34 C.C.L.T. 89 (Ont. S.C.); *McErlean v. Sarel* (1985), 32 C.C.L.T. 199 (Ont. S.C.); *Kiddell v. Kulczycki*, *supra* n. 25; *Cunningham v. Allen*, *supra* n. 5; *Watkins v. Olafson*, *supra* n. 24. Also see *Simpson v. Felicioni*, *supra* n. 37, where the Manitoba Court of Appeal indicated a readiness to consider the tax issue but was unable to do so because evidence as to the plaintiff's present personal income tax rate and future income tax liability was not presented; in *Penn v. City of Peterborough*, *supra* n. 25, a gross-up was not awarded due to insufficient

(Footnote continued to page 25)

the claims for gross-ups to meet future tax liability on investment income earned on the future care portion of the awards failed in the Supreme Court cases merely for lack of adequate proof.<sup>76</sup>

When a gross-up is awarded for future tax liability, the quantum varies according to the size of the future care portion of the award, amongst other factors. Gross-ups have ranged from \$230,000 to \$3,000,000.<sup>77</sup>

(2) loss of future earnings or profit

This portion of the general damages portion of the award compensates a plaintiff for the loss of the capacity to earn an income in the future, not his actual loss of earnings.<sup>78</sup>

In calculating damages for loss of future earnings or profit, a court estimates the average weekly, monthly or annual income that the plaintiff would have earned had he not been injured. For an adult plaintiff, a reasonable estimate may be a figure between the plaintiff's pre-accident

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(Footnote continued from page 24)  
evidence, but the court made no reduction for contingencies, partially to offset the possibility of tax on future income generated from the care portion of the award.

However, courts in British Columbia do not gross-up the award for future care. E.g., *Waterhouse v. Fedor*, B.C.S.C., unreported, December 22, 1986, Vancouver, No. C844976, Legg J.; *Scarff v. Wilson*, B.C.S.C., unreported, December 5, 1986, Vancouver, No. C827458, Cumming J.; *Malat v. Bjornson* (No. 2), [1980] 4 W.W.R. 446 (B.C.S.C.); *Leischner v. West Kootenay Power & Light Co. Ltd.* (1986), 24 D.L.R. (4th) 641 (B.C.C.A.); *Mandzuk v. Vieira* (1983), 43 B.C.L.R. 347 (S.C.); *Milina v. Bartsch*, B.C.S.C., unreported, January 24, 1986, Vancouver, No. C823424, McLachlin J.).

<sup>76</sup>*Fenn v. City of Peterborough*, *supra* n. 25.

<sup>77</sup>*Watkins v. Olafson*, *supra* n. 24; *McErlean v. City of Brampton*, Ont. S.C. unreported, 1986. And see K. Lockhart and A. Johnson, "More millions awarded by Fitzpatrick, J. - with explanations", September 1986, *Canadian Lawyer* 30; also see *Giannone v. Weinberg*, *supra* n. 43.

<sup>78</sup>*R. v. Jennings* (1966), 57 D.L.R. (2d) 644 (S.C.C.).

wage and the maximum for that work.<sup>79</sup> In estimating, a court accounts for any increase in earnings that the plaintiff might reasonably have anticipated during his working life.<sup>80</sup> Lost employment fringe benefits are taken into account,<sup>81</sup> as well as secondary income sources.<sup>82</sup> Non-income producing spare-time activities for which there is pecuniary loss, as well as the loss of future pension benefits resulting from early retirement, are also considered.<sup>83</sup> Where a plaintiff expects to earn income after his injury, an estimate is made of the future income that he may earn. His prospective loss of earnings equals the difference between what he would have earned had the accident not occurred and his earnings following the accident.<sup>84</sup> Factors which are relevant to determining a plaintiff's reduced future income are similar to those appropriate to assessing loss of earning capacity in cases of total incapacity. Despite the greater difficulty in assessing loss of future earnings where the plaintiff is a child, the courts do so.<sup>85</sup> The accuracy in predicting future earnings loss increases with the child's age at the time of injury. For a young child, a court must make assumptions based on the child's pre-accident intelligence, motivation, physical health, and parental background.<sup>86</sup> For an older child, a court often has some evidence with which to choose a particular salary scale.<sup>87</sup> Where a child is only temporarily disabled, he can claim for the loss or delay of an educational opportunity.<sup>88</sup>

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<sup>79</sup>*Andrews, supra* n. 17.

<sup>80</sup>*Thornton, supra* n. 24.

<sup>81</sup>*MacDonald v. Alderson, supra* n. 37.

<sup>82</sup>*Gehrmann v. Lavoie* (1975), 59 D.L.R. (3d) 634 (S.C.C.).

<sup>83</sup>*Holian v. United Grain Growers Limited, supra* n. 38.

<sup>84</sup>*Trizec Equities Ltd. v. Guy* (1978), 85 D.L.R. (3d) 634 (N.S.S.C., A.D.) rev'd in part, *supra* n. 24.

<sup>85</sup>*Tomlinson v. Wurtz, supra* n. 41.

<sup>86</sup>*Teno, supra* n. 24.

<sup>87</sup>*Conklin v. Smith, supra* n. 30.

<sup>88</sup>*Deziel v. Deziel*, [1953] 1 D.L.R. 651 (Ont. H.C.); *Gruden v. McLean* (1971), 24 D.L.R. (3d) 404 (Ont. C.A.).



In assessing damages for loss of earnings, no deduction is made for the tax liability which would have been attracted had the award been earned over the working life of the plaintiff. The rationale is that loss of a capital asset, namely, earning capacity, is being compensated<sup>89</sup> and not lost earnings *per se*. For the same reason, a gross-up is not awarded for the future tax liability on the income generated from the investment of the lump sum attributable to earnings loss.<sup>90</sup>

The period of loss of earnings or profit of the plaintiff must be estimated. Where a plaintiff is temporarily incapacitated, predictions must be made as to the period of recovery and whether recovery will be complete. Where a plaintiff is permanently incapacitated, his pre-accident work-life is the usual period of loss.<sup>91</sup> Actuarial evidence is adduced to determine pre-accident work-life expectancy, as well as evidence which demonstrates that the plaintiff's work-life would vary from that of the average Canadian. In the absence of other evidence, it is presumed that a plaintiff would have retired at age sixty-five. Where a plaintiff is an infant, courts tend to assume that he would have worked from age twenty until age sixty-five.<sup>92</sup> The period of loss may have to be segmented where different levels of earning pertain to different periods.<sup>93</sup>

Contingencies which may affect future earnings or profit, such as unemployment, illness, accident, business depression, and mental and emotional stress at work or home, are taken into account in calculating damages for loss

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<sup>89</sup>*R. v. Jennings, supra n. 78; Guy v. Trizec Equities Ltd., supra n. 24; Watkins v. Olafson, supra n. 24.*

<sup>90</sup>*Andrews, supra n. 17. For a more recent case, see Leischner v. West Kootenay Power & Light Co. Ltd., supra n. 75.*

<sup>91</sup>*Andrews, supra n. 17; R. v. Jennings, supra n. 78.*

<sup>92</sup>*Teno, supra n. 24.*

<sup>93</sup>*Holian v. United Grain Growers Limited, supra n. 38 (2 Man. R. (2d) 374 (Q.B.)).*

of prospective earnings.<sup>94</sup> The contingency deduction depends on the facts of a case, particularly on the nature of the plaintiff's former occupation. As some contingencies are accounted for in calculating average earnings, and not all contingencies are adverse, logically the deduction should be small. However, there is considerable support for a significant contingency deduction.<sup>95</sup>

Finally, a lump sum is calculated equal to the amount which, when invested, will generate the lost earnings or profit. As with other future pecuniary losses, a 3 per cent discount factor is then applied. In addition, a court may account for future industrial and national productivity.<sup>96</sup>

### (3) non-pecuniary loss

The principle of *restitutio in integrum*, which applies to pecuniary losses, has only limited application in determining damages for non-pecuniary losses because these losses cannot be valued in monetary terms nor can money compensate fully for these losses. Instead, the Supreme Court of Canada adopted a "functional" approach to the problem of the determination of damages for non-pecuniary losses. Rather than setting a value on lost happiness, this approach attempts to assess the compensation which is required to provide the injured person with reasonable solace for his misfortune. Money is awarded because it can function to substitute enjoyment and pleasures for those which have been lost.<sup>97</sup> Generally, the quantum of an award depends on the seriousness of the injury and ability of the award to ameliorate the condition of the particular victim. However, damages for loss

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<sup>94</sup>*Chase v. Mehta* (1985), 35 Man. R. (2d) 161 (C.A.).

<sup>95</sup>*Andrews, supra* n. 17 - 20%; *Teno, supra* n. 24 - 20%; *Thornton, supra* n. 24 - 10%; *Holian v. United Grain Growers Limited, supra* n. 38 - 20% (C.A.); *Chase v. Mehta, supra* n. 94 - 33 1/3%; *Simpson v. Felicioni, supra* n. 37 - 20%.

<sup>96</sup>See *supra*, at 15.

<sup>97</sup>*Andrews, supra* n. 17, foll'd by *Lindal v. Lindal, supra* n. 28.

of amenities of life are not necessarily reduced where a plaintiff is unconscious and unaware of his condition.<sup>98</sup>

To achieve uniformity in these awards which are particularly difficult to quantify accurately, and to satisfy the social pressure against large awards, the Supreme Court of Canada set an upper limit of \$100,000 for non-pecuniary awards in personal injury actions.<sup>99</sup> This limit applies save in exceptional circumstances.<sup>100</sup> The limit has been exceeded in one instance where the plaintiff suffered prolonged excruciating pain and serious disability.<sup>101</sup> However, the figure of \$100,000 is to be considered with some flexibility to account for the erosion in the value of money since the trilogy cases were decided; it is subject to increase upon proof or agreement as to the effect of inflation since the trilogy decisions.<sup>102</sup>

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<sup>98</sup>*R. v. Jennings*, *supra* n. 78.

<sup>99</sup>*Andrews*, *supra* n. 17; *Thornton*, *supra* n. 24; *Teno*, *supra* n. 24; *appl'd by Lindal v. Lindal*, *supra* n. 28.

<sup>100</sup>*Andrews*, *supra* n. 17; *Stein v. Sobczak*, *supra* n. 24. See *Dhalla v. Jodrey* (1985), 16 D.L.R. (4th) 732 (N.S.S.C., A.D.), *McKee v. Gergely*, B.C.C.A. unreported, September 30, 1986, Vancouver, No. 003316, and *Reynard v. Carr*, B.C.C.A. unreported (according to J. Thompson, "B.C. high court cuts award that topped limit set in 'trilogy'", *National*, February 1987, Vol. 14, No. 2, at 4, jury awards of \$200,000 and \$300,000 respectively were reduced, indicating that, based on the trilogy cases, the awards were wholly erroneous).

<sup>101</sup>*Fenn v. City of Peterborough*, *supra* n. 25 where the court awarded non-pecuniary damages of \$125,000. But see, *Lindal v. Lindal*, *supra* n. 28, where the court indicated that more severe injuries than those in the trilogy cases do not necessarily justify an award greater than \$100,000 and that the circumstances in which the limit should be exceeded will be very rare.

<sup>102</sup>*Lindal v. Lindal*, *supra* n. 28, where court held that in 4 month period since trilogy cases, inflation was not a significant factor, and thus, \$100,000 for non-pecuniary losses was appropriate. See also, the following cases in which the quantum of non-pecuniary damages exceeded \$100,000 in response to the change in economic conditions since the 'trilogy' cases: *Fenn v. City of Peterborough*, *supra* n. 25 - \$125,000; *MacDonald v. Alderson*, *supra* n. 37 - \$130,000; *Tomlinson v. Wurtz*, *supra* n. 41 - \$130,000; *Watkins v. Olafson*, *supra* n. 24 - \$180,000; *Baumeister v. Drake* (1986), 38 C.C.L.T. 1 (B.C.S.C.) - \$181,983; *Reekie v. Messervey* (1986), 4 B.C.L.R. (2d) 194 (B.C.S.C.) - \$180,000; *Mandzuk v. Vieira*, *supra* n. 40 - \$160,000; *Busche v. Connors*, B.C.S.C., unreported, May 20, 1986, Vancouver, No. B841452 - \$183,757; *Jacobs v. McLaughlin*, (1986), 43 M.V.R. 12 (Alta. Q.B.) - \$135,000 (on basis of \$177,000 as upper limit); *Joubert v. Rosetown (Town)*, (1986), 50 Sask. R. 41 (Q.B.) - \$115,000 (on basis of \$184,000 as upper limit).

(b) Survival of actions by estate where injured party dies

In general, an estate can recover damages for the personal injury losses for which a deceased person could have recovered had he survived, subject only to the effect of death on the measure of those losses.<sup>103</sup> In most cases, damages which are recoverable by the estate are less than the victim himself could have recovered had he survived.

(i) pecuniary loss

(1) loss of earnings or profit

Damages for lost earnings or profit which accrued before death are recoverable by the estate. Damages for earnings or profit attributable to the period after the death are not recoverable.

(2) expenses

Generally, expenses which would have been incurred but for the death<sup>104</sup> and expenses of the estate<sup>105</sup> are not recoverable. An exception to this is that funeral expenses are recoverable<sup>106</sup> where death was caused by the defendant and the expenditures were reasonable.<sup>107</sup>

(ii) non-pecuniary loss

While damages for pain and suffering and loss of amenities are

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<sup>103</sup>*The Trustee Act*, C.C.S.M. c. T160, s. 55(1).

<sup>104</sup>*The Trustee Act*, C.C.S.M. c. T160, s. 55(1).

<sup>105</sup>*Katz v. Little* (1963), 38 D.L.R. (2d) 515 (Man. Q.B.), and see *The Trustee Act*, C.C.S.M. c. T160, s. 55(1): ". . . damages recoverable for the benefit of his estate . . . shall be calculated without reference to any loss or gain to his estate consequent on his death . . . ."

<sup>106</sup>*The Trustee Act*, C.C.S.M. c. T160, s. 55(1): ". . . a sum in respect of funeral expenses may be included."

<sup>107</sup>*Katz v. Little*, *supra* n. 105.

recoverable,<sup>108</sup> recovery for loss of expectation of life is expressly prohibited by the legislation.<sup>109</sup> Recovery for non-pecuniary losses has been criticized as inappropriate as they are personal to the deceased, and thus create a windfall for the estate.

(iii) other losses

*The Trustee Act* expressly prohibits the recovery of exemplary damages by the estate.<sup>110</sup>

(c) Fatal injury - Fatal Accidents Act actions

Damages in a *Fatal Accidents Act* action are assessed on the basis of a plaintiff's loss, as distinct from his needs.

(i) pecuniary loss

Damages for pecuniary loss under *The Fatal Accidents Act* compensate the deceased's dependants for the pecuniary benefits which the dependants might have reasonably expected to receive had the deceased lived.<sup>111</sup> Losses may include loss of income, valuable services, accumulated wealth or a combination of these. Damages are calculated in a manner similar to the calculation of damages for pecuniary loss in cases of serious personal injury.<sup>112</sup>

Damages for loss of income compensate for the portion of the deceased's income which would have been available to the beneficiaries over

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<sup>108</sup>*Hartman v. Fissette* (1976), 66 D.L.R. (3d) 516 (S.C.C.); *Kuales v. Svenson* (1957), 24 W.W.R. 24 (Man. Q.B.).

<sup>109</sup>*The Trustee Act*, C.C.S.M. c. T160, s. 55(1).

<sup>110</sup>*The Trustee Act*, C.C.S.M. c. T160, s. 55(1).

<sup>111</sup>*Roberts v. Semchyshyn* (1956), 6 D.L.R. (2d) 266 (Man. C.A.); *Kernsted v. Desorcy*, *supra* n. 37; *Keizer v. Hanna*, *supra* n. 35.

<sup>112</sup>*Keizer v. Hanna*, *supra* n. 35. Actuarial evidence is necessary: *Duong Estate v. Au*, *supra* n. 53.

the period of dependency.<sup>113</sup> They are calculated in a four-step process. First, the average periodic gross income which the deceased would have earned but for his death is estimated.<sup>114</sup> Prospective increases in income and secondary sources of earnings are taken into account.<sup>115</sup> Secondly, the deceased's projected net earnings are calculated by deducting, where applicable, his costs of earning an income,<sup>116</sup> his contributions to fringe benefit plans such as unemployment insurance, Canada Pension Plan, private superannuation funds, and life insurance, if dependants claim the benefits as part of their loss of pecuniary benefits,<sup>117</sup> and the tax payable on the income.<sup>118</sup> Thirdly, the deceased's disposable income is calculated by deducting from his net average earnings his annual savings and the value of his basic necessities and amenities. The value of basic necessities and amenities equals the amount which the deceased would have spent on himself and persons other than the claiming beneficiaries. Income of the surviving spouse is taken into account.<sup>119</sup> Fourthly, each dependant's entitlement to a portion of the deceased's disposable income is calculated.<sup>120</sup>

Damages for loss of valuable services of the deceased, even though not directly income-producing, may be recoverable by the dependants. Losses may include loss of a full-time homemaker as well as loss to children of

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<sup>113</sup>*Lewis v. Todd*, *supra* n. 19; *Clement v. Leslies Storage Ltd.*, [1979] 2 W.W.R. 577 (Man. C.A.).

<sup>114</sup>This estimate is particularly difficult where the deceased operated a business or farm: *Sonsie v. McIntyre*, *supra* n. 49; *Johnson Estate v. Sjolander* (1985), 34 Man. R. (2d) 203 (Q.B.).

<sup>115</sup>*Keizer v. Hanna*, *supra* n. 35.

<sup>116</sup>*Julian v. Northern & Central Gas Corp. Ltd.*, *supra* n. 37.

<sup>117</sup>*Kernsted v. Desorcy*, *supra* n. 37; *Keizer v. Hanna*, *supra* n. 35.

<sup>118</sup>*Keizer v. Hanna*, *supra* n. 35; *Lewis v. Todd*, *supra* n. 19; *Rose Estate v. Belanger*, *supra* n. 37.

<sup>119</sup>*Rose Estate v. Belanger*, *supra* n. 37.

<sup>120</sup>*Lawrence's Estate v. Good*, *supra* n. 37.

parental care, education, training and guidance.<sup>121</sup> Damages for loss of valuable services are not awarded for grief, mental distress or sentimental reasons, and must be capable of pecuniary estimate.

A dependant may also recover damages for the loss of that portion of the savings which the deceased would have accumulated but for his premature death, and which the dependant would have inherited.<sup>122</sup> The wealth which likely would have accumulated had the deceased survived is calculated. Then, the value of other persons' and the claimant's actual inheritance, if any, is deducted. On occasion, a court simply concludes that the loss of wealth is offset by the dependant's accelerated inheritance.

Reductions in an award under *The Fatal Accidents Act* may be made to account for certain financial advantages arising prior to trial, collateral benefits received by the claimant and contingencies. Remarriage of the surviving spouse,<sup>123</sup> and legal<sup>124</sup> or *de facto*<sup>125</sup> adoption of a dependent child after the death of the parent and before trial will decrease the quantum of a damage award where the defendant satisfies the court of the financial advantage obtained by the remarriage<sup>126</sup> or adoption. However, this will not necessarily eliminate the award, as contingencies respecting the continuation of the financial advantage are taken into account.<sup>127</sup>

Although collateral benefits may reduce an award, they are largely

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<sup>121</sup>*Vana v. Tosta*, *supra* n. 24. Replacement cost is used as a measure of the value of lost services: *Franco v. Woolfe* (1976), 69 D.L.R. (3d) 501 (Ont. C.A.).

<sup>122</sup>Recovery does not depend on the size of loss: *Vana v. Tosta*, *supra* n. 24; *Kwong v. The Queen*, [1979] 2 W.W.R. 1 (Alta. S.C., A.D.).

<sup>123</sup>*Fleming v. Markovich*, [1942] 4 D.L.R. 287 (Ont. C.A.).

<sup>124</sup>*Fawns v. Green*, [1972] 1 W.W.R. 272 (B.C.S.C.).

<sup>125</sup>*Lefebvre v. Dowdall* (1964), 46 D.L.R. (2d) 426 (Ont. H.C.).

<sup>126</sup>*Ball v. Kraft* (1966), 60 D.L.R. (2d) 35 (B.C.S.C.).

<sup>127</sup>*Fleming v. Markovich*, *supra* n. 123.

ignored due to section 7 of *The Fatal Accidents Act*.<sup>128</sup> This section states that the following benefits are not to be taken into account in assessing damages: (1) a sum paid or payable under a contract of insurance or assurance, (2) a benefit or right to benefit payable because of the death, under *The Workers' Compensation Act*, *The Social Allowances Act*, *The Child Welfare Act*, or any other similar provincial, federal or other legislation, (3) a pension, annuity or other periodical allowance payable by reason of the death of the deceased, and (4) an amount recoverable under any statutory provision conferring a special right to bring an action for the benefit of persons for whose benefit an action may be brought under *The Fatal Accidents Act*.

Finally, an award may be reduced for contingencies. Contingencies which are relevant to the determination of damages for loss of dependency are strikes, unemployment, sickness, accidents, no further accumulation of wealth, disinheritance of dependants, family separation by marriage breakdown or a child leaving the family unit,<sup>129</sup> remarriage of the surviving spouse,<sup>130</sup> and legal or *de facto* adoption. Contingency reductions have ranged from 10 per cent to 25 per cent.<sup>131</sup> Although contingencies are fully considered, a court must in the end ensure that the award is fair and adequate.<sup>132</sup>

The period of loss is determined separately for each dependant. Usual periods of loss are: for a surviving spouse, joint life expectancy; for an infant child, until the age of majority; and for parents of a deceased child, a period less than the joint life expectancy of the parents and deceased child. Actuarial evidence as to the appropriate period is normally adduced, as well as additional evidence which may justify a deviation from the

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<sup>128</sup>*The Fatal Accidents Act*, C.C.S.M. c. F50, s. 7.

<sup>129</sup>*Kernsted v. Desorcy*, *supra* n. 37, *Keizer v. Hanna*, *supra* n. 35; *Ring Estate v. Fullerton*, *supra* n. 37.

<sup>130</sup>*Dormuth v. Untereiner*, *supra* n. 18; *May v. Municipality of Metropolitan Toronto* (1968), 2 D.L.R. (3d) 659 (Ont. H.C.).

<sup>131</sup>*Lewis v. Todd*, *supra* n. 19 - 10%; *Rose Estate v. Belanger*, *supra* n. 37 - 20%; *Lawrence's Estate v. Good*, *supra* n. 37 - 25%; *Ring Estate v. Fullerton*, *supra* n. 37 - 30%.

<sup>132</sup>*Keizer v. Hanna*, *supra* n. 35.



actuarial statistics. As all losses may not be attributable to the entire period of dependency, in calculating losses it may be necessary to segment the total period into the following periods: (1) pre-trial,<sup>133</sup> (2) trial to the end of the youngest child's dependency, (3) end of the youngest child's dependency to the deceased's expected retirement date, and (4) deceased's expected retirement date to the end of the joint life expectancy of deceased and surviving spouse.<sup>134</sup>

Again, the award is capitalized into a lump sum and the discount rate of 3 per cent is applied<sup>135</sup> to damages for post-trial loss.<sup>136</sup>

In addition, the award is grossed-up for the income tax for which a beneficiary will be liable on the interest earned on the award for loss of dependency.<sup>137</sup>

Finally, in assessing damages for loss of dependency, the court must consider the apportionment of collective losses. These are benefits which are shared among all dependants. The value of all collective losses is the difference between the deceased's disposable income, services and wealth, and the value of all individual losses. The value of collective losses is apportioned amongst individual beneficiaries in light of their particular circumstances.

In addition to loss of dependency, a few expenses are also compensated. Subsection 4(3) of *The Fatal Accidents Act*<sup>138</sup> authorizes a

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<sup>133</sup>But see, *Ring Estate v. Fullerton*, *supra* n. 37, where the court used a date other than the trial date to calculate pre-trial losses.

<sup>134</sup>*Kernsted v. Desorcy*, *supra* n. 37.

<sup>135</sup>*The Judgment Interest and Discount Act*, C.C.S.M. c. J8, s. 9.

<sup>136</sup>*Duong v. Au*, *supra* n. 53.

<sup>137</sup>*Keizer v. Hanna*, *supra* n. 35; *Lewis v. Todd*, *supra* n. 19; *Rose Estate v. Belanger*, *supra* n. 37; *Lawrence's Estate v. Good*, *supra* n. 37; *Julian v. Northern & Central Gas Corp. Ltd.*, *supra* n. 37; *Ring Estate v. Fullerton*, *supra* n. 37.

<sup>138</sup>*The Fatal Accidents Act*, C.C.S.M. c. F50, s. 4(3).

court to award damages for the reasonable expenses of a funeral and disposal of the deceased's body, where the expense claimed was incurred by a person for whose benefit the action is brought. Some administrative expenses may also be compensable.<sup>139</sup> Expenses not authorized by statute are not recoverable.

(ii) non-pecuniary loss

A single category of non-pecuniary loss may be awarded under *The Fatal Accidents Act*. Subsection 4(4) of the Act provides that damages can be awarded to compensate for loss of guidance, care and companionship that the deceased, if he had lived, might reasonably be expected to have given a beneficiary.<sup>140</sup> The subsection, in effect, authorizes a compassionate allowance for loss of guidance, care and companionship which is compensable without pecuniary loss.<sup>141</sup>

In assessing damages for non-pecuniary loss, courts have held that a moderate award is appropriate.<sup>142</sup> For this reason, moderate conventional awards have been established by Manitoba courts. For a surviving spouse, where the claim relates almost entirely to loss of companionship of the spouse, the conventional award is approximately \$10,000,<sup>143</sup> although this award may be reduced where the lost period of care and companionship is

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<sup>139</sup>*Johnson Estate v. Sjolander*, supra n. 114.

<sup>140</sup>*The Fatal Accidents Act*, C.C.S.M. c. F50, s. 4(4), en. S.M. 1980, c. 5, s. 1. Prior to 1980, a claim for loss of care and guidance could be advanced under *The Fatal Accidents Act* only when that claim involved pecuniary loss: *Vana v. Tosta*, supra n. 24; *Clement v. Leslies Storage Ltd.*, supra n. 113.

<sup>141</sup>*Rose Estate v. Belanger*, supra n. 37; *Lawrence's Estate v. Good*, supra n. 37; *Farley v. Buchanan*, (1982), 17 Man. R. (2d) 426 (Q.B.); *Charbonneau v. Huff* (1984), 29 Man. R. (2d) 290 (Q.B.), aff'd (1985), 34 Man. R. (2d) 278 (C.A.); *Johnson Estate v. Sjolander*, supra n. 114; *Duong Estate v. Au*, supra n. 53; *Larney Estate v. Friesen*, supra n. 51.

<sup>142</sup>*Lawrence's Estate v. Good*, supra n. 37.

<sup>143</sup>*Rose Estate v. Belanger*, supra n. 37; *Larney Estate v. Friesen* supra n. 51; *Lawrence's Estate v. Good*, supra n. 37.

relatively short.<sup>144</sup> For a dependent child who has lost the companionship, care and guidance of a parent, an award ranging from \$0 to \$10,000 is appropriate.<sup>145</sup> For an older child who is no longer dependent, damages for loss of guidance of his parent should be a nominal sum.<sup>146</sup> Manitoba awards cannot be compared with similar awards in Ontario, as conventional awards are not established there.<sup>147</sup>

#### D. STRUCTURED SETTLEMENTS

##### 1. General Principles

###### (a) Definition

Not all claims for damages for personal injury or death arising from tortious conduct are actually adjudged by the courts. In fact, most of these claims are settled before trial or even before an action is commenced. Increasingly, some of the cases are being settled between the parties by means of structured settlements. A structured settlement is a "means whereby all or part of the damages are paid to a claimant by means of periodic payments

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<sup>144</sup>*Johnson Estate v. Sjolander, supra* n. 114.

<sup>145</sup>*Rose Estate v. Belanger, supra* n. 37 - \$10,000; *Duong Estate v. Au, supra* n. 53 - \$0 to \$10,000; *Larney Estate v. Friesen, supra* n. 51 - \$10,000, \$2,500 each to brother and sister.

<sup>146</sup>*Johnson Estate v. Sjolander, supra* n. 114.

<sup>147</sup>Awards in Ontario for loss of guidance, care and companionship are made pursuant to the *Family Law Act, 1986*, S.O. 1986, c. 4, s. 61(2)(e) (formerly the *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 60(2)(d)), are not conventional and are often higher than awards in Manitoba: *Gervais v. Richard* (1984), 12 D.L.R. (4th) 738 (Ont. H.C.) - \$43,000 for loss of 16 year old son; *Reidy v. McLeod Estate* (1986), 36 C.C.L.T. 307 (Ont. C.A.) - loss of son in first family, \$20,000 to mother, \$15,000 to father, \$5,000 to sister, \$10,000 to brother, and for loss of son in second family, \$35,000 to mother; *Nielsen v. Kaufmann, supra* n. 46 - loss of wife and mother, \$40,000 to husband, \$20,000 to first son, \$30,000 to second son.

rather than by means of a lump sum."<sup>148</sup> They are used in both personal injury<sup>149</sup> and fatal injury cases.<sup>150</sup> The precise terms and conditions of the payment of damages are determined by the parties to the settlement. The payment plan can range from a simple plan involving two payments separated by an interval, to a complex plan involving an initial lump sum followed by periodic payments which vary in size and in interval between payments, paid by means of an annuity, with inflation protection and productivity increases. Most settlements are determined with finality when the original payment scheme is formulated. Thus, they are fixed and unresponsive to any material change in the claimant's needs or circumstances.<sup>151</sup>

(b) Difference between structured settlement and court award

In the absence of enabling legislation or the consent of both parties, there is no power in Canadian courts to grant an award of damages in the form of a structured settlement.<sup>152</sup> Where both parties provide their

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<sup>148</sup>*Yeapremian v. Scarborough General Hospital (No. 2)* (1981), 31 O.R. (2d) 384 at 387 (H.C.).

<sup>149</sup>*Ibid.*

<sup>150</sup>*Kolesar v. Jeffries* (1974), 59 D.L.R. (3d) 367 (Ont. H.C.).

<sup>151</sup>See, *Steeves v. Fitzsimmons* (1975), 66 D.L.R. (3d) 203 (Ont. H.C.) for an example of a settlement which provided that an application to vary the amount of the settlement could be made on behalf of the injured infant up to and including her seventh birthday.

<sup>152</sup>*Andrews, supra* n. 17, at 458-459, where Dickson J. (as he then was) stated on behalf of the court:

In spite of these severe difficulties with the present law of personal injury compensation, the positive administrative machinery required for a system of reviewable periodic payments, and the need to hear all interested parties in order to fashion a more enlightened system, both dictate that the appropriate body to act must be the Legislature, rather than the Courts. Until such time as the Legislature acts, the Courts must proceed on established principles to award damages which compensate accident victims with justice and humanity for the losses they may suffer.

consent, a court can make an award of periodic payments. However, a consent judgment thus rendered is not really a judgment directed by the court, rather it is a consensual settlement determined by the parties.

(c) Historical evolution

The impetus for the widespread acceptance of structured settlements was provided by several factors. Among these factors was the increase in the incidence of large damage awards in the 1960's and 1970's. As indicated by one textwriter:

During that period [late 1960's and early 1970's] American juries, for the first time, began granting million and multi-million dollar verdicts. Records indicate that these relatively enormous awards propelled from a single million dollar verdict during all of 1964 to a point where, by 1977, American juries were routinely handing down awards of one million dollars or more on the average of once per week. . . . These awards, whose frequency and magnitude are still continuing to grow in geometric proportion, now appear to constitute the rule rather than the exception.<sup>153</sup>

As a result of these high awards, the cost of insurance premiums has escalated, forcing some individuals to operate without insurance coverage due to its expense and some insurers to cease to do business.<sup>154</sup> In Canada, damage awards are not as high as those found in the United States. The judiciary controls the size of awards, particularly in respect of non-pecuniary damages, where the courts have established upper limits of damages. However, notwithstanding these measures, damage awards continue to escalate and, as in the United States, the cost of insurance premiums has risen drastically. Economic factors have also been responsible for the increase in the popularity of structured settlements. The concern that a court-ordered award would not adequately match future inflation has convinced

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<sup>153</sup>J.P. Weir, *Structured Settlements*, (1984) 6. It also has been postulated that litigation concerning thalidomide victims in the late 1960's encouraged the use of structured settlements: J.P. Weir, at 11, citing K. Keene, R. Ross, *Business Insurance*, April 28, 1980, at 25.

<sup>154</sup>T. Elligett, "The Periodic Payment of Judgments" (1979), 46 *Ins. Counsel J.* 130; N. Roth, "The Medical Malpractice Insurance Crisis: Its Causes, the Effects and Proposed Solutions" (1977), 44 *Ins. Counsel J.* 469.

many claimants to enter into structured settlements so that they could negotiate safeguards for future inflation. In addition, tax laws and administrative practice in the United States and Canada have given damages payable on a periodic basis pursuant to a structured settlement an advantage over damages payable by lump sum. These same factors also stimulated the introduction of legislation in the United States, which authorizes courts to award damages payable on a periodic basis.

(d) Tax treatment

As mentioned previously, periodic payments received pursuant to a properly arranged structured settlement (or, indeed, pursuant to a court's judgment, if that were permitted) may be eligible for favourable tax treatment. The settlement must be funded by an annuity which is established by someone other than the claimant (the plaintiff) and cannot be funded via a trust. In addition, the annuity policy should not name the beneficiary of the claimant who is to receive benefits on the claimant's death, and should provide that payments are neither assignable nor commutable. If the claimant desires that the policy contain an irrevocable direction to the insurance company to pay proceeds to himself, then he should obtain an advance ruling from Revenue Canada to ensure that the annuity is not treated as a trust. Similarly, if the claimant desires a deferral of the commencement of the periodic payments, then he should obtain an advance ruling to ensure that he is not accused of tax evasion.<sup>155</sup>

Assuming these formalities are met, damages paid on a periodic basis pursuant to a structured settlement may be received tax-free by the claimant.<sup>156</sup> This means that interest which is earned on the principal of the annuity by its issuer is accumulated and paid to the claimant tax-free.

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<sup>155</sup>For the commencement of periodic payments to be deferred, there must be good medical reasons for doing so: J.P. Weir, *supra* n. 153, at 112, fn. 74 citing address by B. Dath, Senior Ruling Officer Revenue Canada, CFIC Conference, Toronto, June, 1982.

<sup>156</sup>Revenue Canada Interpretation Bulletin IT-365R, "Damages, Settlements, and Similar Receipts" (1981). The Department's position was reaffirmed in "Revenue Canada Round Table", [1984] Can. Tax Found. 783 at 799. Otherwise, the interest income portion of the annuities are taxed pursuant to *Income Tax Act*, S.C. 1970-71-72, c. 63, s. 56(1)(d), 60(a) and *Income Tax Regulations*, C.R.C., c. 945, s. 300.

If, instead, the claimant had received the same amount of principal in a lump sum, the interest earned by him on that principal would have been taxable.

However, it must be noted that the tax advantage conferred upon structured settlements arises from an administrative decision of Revenue Canada. It is embodied in an Interpretation Bulletin and not in the *Income Tax Act*; accordingly, the tax treatment of structured settlements is subject to change by Revenue Canada at any time. In addition, it is not necessarily a certainty, even where the requirements of Revenue Canada's administrative policy are met, that the favourable tax treatment will apply to a particular case. To determine whether payments to be made pursuant to a structured settlement will receive favourable treatment, an advance tax ruling must be obtained from Revenue Canada for that case. The ruling is binding only in respect to the particular case for which it was obtained; that is, the binding effect of a specific ruling does not extend to third parties. Therefore, even where the facts of two cases are very similar, a claimant must obtain a separate ruling to ensure that Revenue Canada's administrative policy applies. However, even a tax ruling does not provide absolute certainty of treatment. Where the law upon which an advance ruling was based changes, that ruling ceases to be valid from the effective date of the change in the law.<sup>157</sup>

(e) Advantages to structured settlements

The major advantage of structured settlements is their favoured tax status. Since interest earned on a lump sum settlement is taxable to the claimant, and interest earned within an annuity funding a structured settlement is not, a structured settlement providing benefits identical to a lump sum settlement is less expensive to the tortfeasor (the defendant).<sup>158</sup> Simply put, a claimant investing a lump sum of \$1,000,000 at 10 per cent per annum might expect to receive interest income of \$50,000 per year (assuming a tax rate of 50 per cent); however, because of its tax-free status, an

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<sup>157</sup>Revenue Canada Information Circular No. 70-6R, (1978), para. 12.

<sup>158</sup>R.F. McGlynn, "Structured Settlements", May 1981, Canadian Insurance Agent & Broker, 30 at 31.

annuity-funded structured settlement can provide the same benefit to the claimant at a cost to the tortfeasor of only \$500,000. As a further consequence, periodic payments may allow settlement of claims within insurance policy limits,<sup>159</sup> where one-time lump sum payments would exceed the tortfeasor's third party liability insurance coverage.<sup>160</sup>

Structured settlements are more advantageous for certain claimants than for others. They are particularly appropriate where (1) the claimant is a minor, elderly, mentally incompetent or uneducated person or a person who has demonstrated a propensity to dissipate a lump sum damage award,<sup>161</sup> (2) the claimant's injury is severe, permanent or is likely to progressively deteriorate, (3) the claimant's anxiety about his future and financial well-being may be alleviated by an early settlement in the form of an annuity policy issued by a secure life insurance company, (4) the claimant is already in a high tax bracket or might go into a higher tax bracket by a lump sum payment and wishes to avoid costly tax consequences, and (5) the claimant is an infant for whom it would be advantageous to defer payment of an award in order to create a larger sum from which he can obtain tax-free periodic payments as an adult.<sup>162</sup> It is not appropriate to structure a settlement where a need for immediate capital expenditures depletes the award so that the remaining sum is insufficient for an adequate annuity.

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<sup>159</sup>F. Luchak, "Structured Damage Settlements" (Dept. Cont. Ed., Law Society of Upper Canada, 1981) 11.

<sup>160</sup>See *Pelky v. Hudson Bay Insurance Co.* (1981) 35 O.R. (2d) 97 (Ont. H.C.), where the court, in considering and discussing insurer's duty to settle claims in good faith, implied that it would be unreasonable for an insurer, in any claim which would be in excess of policy limits if awarded as a lump sum, to omit to propose or to reject arbitrarily a structured settlement offer.

<sup>161</sup>R.F. McGlynn, *supra* n. 158 and F. Luchak, *supra* n. 159. And see, for example, *Brousseau v. Donnelly* (1984), 29 Man. R. (2d) 194 (Q.B.) in which the court approved a structured settlement for an injured minor.

<sup>162</sup>R.F. McGlynn, *supra* n. 158 and F. Luchak, *supra* n. 159.



(f) Future trends

Two trends for the future appear likely. First, the use of structured settlements will likely continue to expand, with growth reaching its maximum when taxation issues are secure in legislation. Secondly, the use of structured settlements will likely also expand to settlements which involve smaller sums of money.<sup>163</sup>

2. Structured Settlements in Practice

(a) Formulation of the structure

A structured settlement is formulated in one of two ways.<sup>164</sup> First, it may be formulated in the same manner as is presently utilized in the courts for a conventional lump sum. The amount calculated may then be adjusted to reflect the resulting tax savings. A portion of the total award is set aside for an immediate lump sum, if any, and the balance forms the basis for the annuity which funds the future periodic payments and future lump sums. Secondly, a settlement may be determined according to the physical and psychological needs of the claimant, and actual resources which are available, taking into account collateral benefits, and the upper limit of the tortfeasor's insurance policy or amount to which the insurer will contribute.

Most settlements contain one or more of the following items: (1) an immediate lump sum to cover legal fees, necessary capital expenditures and expenses already incurred, (2) periodic installment payments to be received by the claimant over a fixed number of years or his lifetime, (3) a mechanism to safeguard against inflation, (4) supplemental lump sums to coincide with future anticipated major expenditures, (5) contingency funds to provide for uncertain expenses, and (6) term insurance on the life of the person providing care to the claimant.

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<sup>163</sup>J.P. Weir, *supra* n. 153, at 13, where he indicates that early settlements averaged several hundred thousand dollars, while at present the average is approximately one hundred thousand dollars with structures as small as \$1,400 in the U.S. and \$8,800 in Canada being reported.

<sup>164</sup>J.P. Weir, *supra* n. 153, at 28 *et seq.*

(b) Funding for structured settlements

Financing of any structured settlement scheme is derived from the tortfeasor or his casualty insurer. The funding schemes which are commonly used are: self-funding, trusts and annuities.

In a self-funding scheme, periodic payments are made by the tortfeasor or his casualty company directly to the claimant without the involvement of a third party. Although this method is administratively simple, it is not extensively used as it does not provide adequate security to the claimant.

A trust is a legal relationship in which a trustee holds property for the benefit of a specified beneficiary and deals with the property of the trust according to its terms and objects. Trusts are not widely used in Canada to fund structured settlements except for specific purposes such as medical or educational contingencies. Its lack of use is attributable to (1) the unfavourable tax treatment for payments made from a trust, (2) the difficulty in involving a qualified institution, such as a trust company or bank to act as trustee for trusts valued at less than \$100,000,<sup>165</sup> (3) the inability to guarantee the generation of the necessary income throughout the claimant's lifetime, and (4) the power of a mentally competent adult beneficiary to wind up the trust and dissipate the fund.<sup>166</sup>

An annuity is a contract between a life insurance company and a liability insurer for the payment of periodic amounts to a specified individual during the lifetime of a particular person or for a fixed

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<sup>165</sup>J. P. Weir, *supra* n. 153, at 39.

<sup>166</sup>In Manitoba, unless the terms of the trust provide otherwise, court approval is required to terminate prematurely or vary a trust: *The Trustee Act*, C.C.S.M. c. T160, s. 61(2), en. S.M. 1982-83-84, c. 38, s. 4, as am. by S.M. 1984-85, c. 17, s. 32(2). For further discussion, see R.B. Cantlie, "A Case of Mistaken Identity: The Rule in *Saunders v. Vautier* and Section 61 of *The Trustee Act of Manitoba*" (1986), 15 Man. L.J. 135; and Manitoba Law Reform Commission, *Report on the Rule in Saunders v. Vautier* (Report #18, 1975).

period.<sup>167</sup> An annuity is the usual method of funding a structured settlement. Its popularity is attributable to the following: (1) an annuity is flexible enough to meet the needs of any claimant, (2) where properly structured, periodic payments are received on a tax-free basis, and (3) generally, only an insurance company has the resources and expertise to undertake to guarantee a regular income stream.<sup>168</sup> The income stream can be protected against inflation by the use of one or more compensatory devices: (1) periodic lump sums, (2) a larger initial periodic payment, (3) periodic payments which vary at a constant increasing or decreasing rate or (4) periodic payments which increase or decrease according to a floating rate, adjustable at least annually in accordance with one of a number of economic factors. A constantly increasing rate, adjusted annually and calculated either as a fixed percentage or in absolute amounts, is most frequently used in Canadian structured settlements.<sup>169</sup>

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<sup>167</sup>J. P. Weir, *supra* n. 153, at 40, citing D. Norwood, *The Uniform Life Insurance Law of Canada* (Life Insurance Institute of Canada 1974) 18.

<sup>168</sup>J. P. Weir, *supra* n. 153.

<sup>169</sup>J. P. Weir, *supra* n. 153.

## CHAPTER 3

### THE NEED FOR REFORM

In this Chapter, we examine the criticisms which have been levied against the existing system of lump sum damages for personal injury and death and consider whether these criticisms can be addressed by the introduction of damages by periodic payments.

#### A. PROBLEMS WITH THE PRESENT SYSTEM

Four major criticisms have been made of the existing systems of lump sum damages. First, it is argued that lump sum damages are inherently inaccurate. Secondly, it is said that the system of lump sum damages results in excessively large awards; this has the added effect of placing upward pressure on premiums for liability insurance. Thirdly, the lump sum award system may result in delays in resolving claims. Finally, lump sum awards are liable to dissipation by claimants inexperienced in the handling of large sums of money.

##### 1. Accuracy

No matter how scientific the evidence, how educated the experts and how judicious and fair the trier of fact, a lump sum award cannot mirror a plaintiff's actual future losses. The court must make assumptions concerning events which might have occurred but for the injury or death, forecast the future needs of the plaintiff, and predict what events may arise in the future to change those needs. The court makes its decision based on the evidence placed before it at trial and seeks the aid of experts in carrying out its task, but the clairvoyance of these experts is surely only marginally greater than that of the courts. In the opinion of O'Sullivan, J.A.:

Fortune tellers are not allowed to come to court to predict the future because there is no rational basis for their predictions. I do not mean to downgrade the science of economics but I know of no scientific or rational basis for accepting their predictions of the future.<sup>1</sup>

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<sup>1</sup>*MacDonald v. Alderson* (1982), 15 Man. R. (2d) 35 at 51 (C.A.).

However, in the absence of enabling legislation providing otherwise, a trial judge must grant a once-and-for-all lump sum award to compensate for all losses including those that may or may not be incurred in the future. Accurately forecasting these unknowns is an impossible task which results in inaccurate awards, especially in personal injury cases involving serious permanent disability. The plaintiff will inevitably either be overcompensated or undercompensated.

The problem is most acute in the assessment of damages for loss of earnings or profit, loss of dependency and future care expenses.

(a) Loss of earnings or profit and loss of dependency

The assessment of damages for loss of earnings or profit in a personal injury action or for loss of dependency in a *Fatal Accidents Act* action requires considerable prognostication. A court must predict the occupation which a personal injury or fatal accident victim would have pursued and his earnings level in that occupation had the accident not occurred; for a partially incapacitated victim, the work which he is and will be capable of undertaking and his probable earnings in that work must be predicted. To calculate earnings or profit, the injured or deceased person's work-life expectancy (had the accident not occurred) and economic factors such as salary increases, inflation rates, productivity rates, unemployment rates and taxation rates must be predicted.

No system of assessment of damages, including the present lump sum system, permits an accurate prediction of the employment, business, promotions or gains that a victim would have achieved had the accident not occurred. However, several factors, such as the rate of inflation and the actual post-accident earnings of a personal injury victim, might be more accurately accounted for in another system of assessment.

(b) Future care expenses

The assessment of damages for future care expenses in a personal injury action is no less difficult. A trial judge must make predictions as to

the extent of a victim's needs, the compensation required to meet those needs, and the period over which compensation is necessary. Inaccuracy in an award will result, for example, where an injured person dies either before or after the predicted period of loss. Where death occurs prior to the estimated period of loss, the victim is overcompensated with respect to compensation for future care costs. Where the victim survives beyond the forecast period, he is undercompensated for his care costs.

In addition, a trial judge must consider whether, as a consequence of the injury, the plaintiff may suffer further injury or impairment, such as epilepsy, arthritis or amputation, in the future. Damages are assessed according to the chance of a disease or impairment occurring. Where compensation is awarded on the basis of a chance that further injury or impairment will occur, and it does not occur, the plaintiff is overcompensated by the value of the additional damages awarded. Where the disease or impairment occurs, the plaintiff is undercompensated, as the award is less than would have been awarded had the disease or impairment been considered a certainty.

Further inaccuracy in the future care portion of an award results when an organization which has a right of subrogation in respect of future health care expenses, fails to subrogate. For example, *The Health Services Insurance Act* requires an individual who brings a lawsuit because of a wrongdoer's tortious act to include in his claim the amount of benefits which he has received and may receive under the provincial health care plan. The Manitoba Health Services Commission (M.H.S.C.) can subrogate for both past and future health care expenses.<sup>2</sup> However, M.H.S.C. will not always seek recovery of future health care costs where, (1) the defendant is underinsured or uninsured, and M.H.S.C. has at most a limited hope of recovering its claim, (2) Manitoba Public Insurance Corporation is the insurer, and subrogation

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<sup>2</sup>*The Health Services Insurance Act*, C.C.S.M. c. H35, ss. 121, 122, & 126. If the injured person does not include the amount of these medical benefits in his claim, he must notify the Health Services Commission so that the Commission can bring its own action for these expenses: *The Health Services Insurance Act*, C.C.S.M. c. H35, s. 130.

would thus result in one government agency merely transferring funds to another government agency and (3) forecasting a future medical expense is very difficult and uncertain. In addition, even where M.H.S.C. pursues its rights, it usually does so only with respect to some expenses.<sup>3</sup> Assuming the defendant is adequately insured or otherwise able to pay the judgment, failure to subrogate fully may result in a substantial windfall to an injury victim.<sup>4</sup>

A further windfall to a victim may also result in situations where a court awards damages for at-home health care services. If the victim's condition subsequently deteriorates so that he must be hospitalized or institutionalized, these costs will be borne by M.H.S.C.; nonetheless, the victim is entitled to keep the damages for services which are no longer needed or appropriate.

## 2. Size of Award

Courts used to be concerned that damage awards undercompensated personal injury victims or fatal accident beneficiaries.<sup>5</sup> Today, the reverse is true. The concern now appears to be that damage awards overcompensate plaintiffs at the expense of defendants, and society in general. Defendants must pay expensive damage awards,<sup>6</sup> which may or may not fall within the policy limits of their liability insurance. Society finds that premiums for liability insurance are rising: it is alleged that large court awards are a cause.

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<sup>3</sup>Third party recovery for the years ending March 31, 1985 and March 31, 1986 respectively were \$4,314,000 and \$3,856,000: see Manitoba Health Services Commission, *Annual Report 1985-1986*, at 61.

<sup>4</sup>p. Osborne, "Accident Compensation in Manitoba: Reflections After a Decade of No-Fault in New Zealand", 1985 (unpublished paper in University of Manitoba Library) at 10.

<sup>5</sup>*R. v. Jennings* (1966), 57 D.L.R. (2d) 644 (S.C.C.).

<sup>6</sup>*Lindal v. Lindal* (1981), 129 D.L.R. (3d) 263 (S.C.C.); *Lewis v. Todd*, [1980] 2 S.C.R. 694; *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) (hereinafter referred to as *Andrews*); *MacDonald v. Alderson*, *supra* n. 1.

The size of damage awards have been limited by the Supreme Court of Canada by its imposition of a ceiling on non-pecuniary damages in personal injury actions<sup>7</sup> and direction that trial judges ignore actuarial evidence which does not accurately reflect an injury victim's loss and results in unfairness to a defendant.<sup>8</sup> Similarly, the Manitoba Court of Appeal has imposed moderate conventional sums for non-pecuniary loss in *Fatal Accidents Act* actions.<sup>9</sup> However, the concern respecting large awards remains.

It is not our purpose here to enter into an investigation of the reasons for larger damage awards. However, it is certainly true that the large size of awards is attributable in part to the lump sum award system itself. The awarding of a management fee where the court believes the plaintiff to be incapable of managing a large award obviously increases the size of the final award. Furthermore, damages for loss of dependency in *Fatal Accidents Act* cases and the future care portion of personal injury awards are grossed-up to provide a plaintiff with a sum of money to cover his future tax liability on interest to be earned from investment of the lump sum award.

### 3. Time Between Injury and Award

The present once-and-for-all lump sum award system often involves lengthy delays between accidents and awards. Delay is attributable primarily to a need to await stabilization of a personal injury plaintiff's medical condition so that the most accurate medical prognosis can be obtained for a

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<sup>7</sup>*Andrews, ibid.*; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)* (1978), 83 D.L.R. (3d) 480 (S.C.C.) (hereinafter referred to as *Thornton*); *Arnold v. Teno* (1978), 83 D.L.R. (3d) 609 (S.C.C.) (hereinafter referred to as *Teno*).

<sup>8</sup>*Andrews, supra n. 6*; *Thornton, ibid.*; *Teno, ibid.*

<sup>9</sup>*Rose Estate v. Belanger* (1985), 32 Man. R. (2d) 282 (C.A.); *Lawrence's Estate v. Good* (1984), 26 Man. R. (2d) 115 (Q.B.); *Larney Estate v. Priesen* (1986), 41 Man. R. (2d) 169 (C.A.).



court to assess damage for future loss. The time-consuming legal process involved in pleadings, discovery and, to a lesser extent, acquisition of pre-trial and trial court dates, is also a factor as are the advantages which accrue to a defendant from delay.<sup>10</sup>

Delay produces two negative effects. First, it may slow or impede the recovery and rehabilitation of the accident victim; he may develop post-traumatic stress disorder,<sup>11</sup> a condition characterized by a prolongation of symptoms and a genuine unshakeable belief that the disability or injuries caused by the accident have failed to improve or have worsened. Although it was originally theorized that this syndrome was caused, albeit subconsciously, by the desire for or expectation of compensation,<sup>12</sup> this has been largely debunked.<sup>13</sup> The etiology of post-traumatic stress disorder is

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<sup>10</sup>One advantage of delay has been eliminated through the enactment of legislation providing for prejudgment interest: *The Judgment Interest and Discount Act*, C.C.S.M. c. J8.

<sup>11</sup>This is the term used by the American Psychiatric Association: "Post-Traumatic Stress Disorder", [1985] 1 *Lancet* 562, at 562. It has also been known variously as compensation neurosis, accident neurosis, litigation neurosis, post-traumatic syndrome, traumatic syndrome, traumatic neurosis and post-traumatic disorder. For a discussion of this disorder with respect to whiplash victims, see A.B. Bass, M. Wright and T. Hogan, "An Objective Study of the Whiplash Victim and the Compensation Syndrome" (1974-75), 6 *Man. L.J.* 333.

<sup>12</sup>The syndrome has been defined as "'a state of mind, born out of fear, kept alive by avarice, stimulated by lawyers, and cured by verdict.'": A.D. Pokorny and F.J. Moore, "Neuroses and Compensation" (1953), 8 *Arch. Industr. Hyg.* 547 at 552, referring to F. Kennedy, "Mind of Injured Worker: Its Effect on Disability Periods" (1946), 1 *Compens. Med.* 19. See also H. Miller, "Accident Neurosis" (pts. 1 and 2), [1961] *Brit. Med. J.* 919, 992.

<sup>13</sup>E.g., G. Mendelson, "'Compensation Neurosis': An Invalid Diagnosis" (1985), 142 *Med. J. Aust.* 561 at 563:

The concept of 'compensation neurosis' as defined by Foster Kennedy and Henry Miller - as a condition motivated by pecuniary gain and cured by the conclusion of litigation - is not supported by any of the criteria customarily applied to the validation of disease entities . . . .

(Footnote continued to page 52)

considerably more complex, involving aspects such as pre- and post-traumatic personality, monetary gain, attention-seeking, freedom from unwelcome work or tasks and dependency gratification.<sup>14</sup> However, it seems well accepted in the medical literature that the delays and stress inherent in the litigation process are an important factor in the perpetuation of the disorder; according to one study,

[i]t is thought that immediate or very early settlement of legal proceedings would at least remove one factor which may be responsible for the production of the symptoms. To expedite the proceedings would, therefore, seem to be of considerable importance.<sup>15</sup>

Even if a clinical diagnosis of post-traumatic stress disorder cannot be made, it is only natural that the uncertainty of the outcome of litigation would cause a cautious victim to postpone any major purchase. It is understandable too that many plaintiffs dwell on the court proceedings and disability

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(Footnote continued from page 51)

See also N. Parker, "Accident Litigants with Neurotic Symptoms", [1977] 2 Med. J. Aust. 318; R. Kelly and N. Smith, "Post-traumatic Syndrome: Another Myth Discredited" (1981), 74 J. Roy. Soc. Med. 275; M.J. Tarsh and C. Royston, "A Follow-Up Study of Accident Neurosis" (1985), 146 Br. J. Psych. 18.

<sup>14</sup>See generally, L. Keiser, *The Traumatic Neurosis* (1968); M.J. Tarsh and C. Royston, *supra* n. 13; N. Gotten, "Survey of One Hundred Cases of Whiplash Injury after Settlement of Litigation" (1956), J. Am. Med. Assoc. 865.

<sup>15</sup>J.I. Balla and S. Moraitis, "Knights in Armour: A Follow-Up Study of Injuries After Legal Settlement", [1970] 2 Med. J. Aust. 355 at 361. See also L. Keiser, *supra* n. 14, at 87 who states that "prolonged exposure to this atmosphere of combat [the adversarial system] is detrimental to the patient." For a blunter assessment, see E.M. Krusen and D.E. Ford, "Compensation Factor in Low Back Injuries" (1958), 166 J. Am. Med. Assoc. 1128 at 1133: "Litigation should be avoided if at all possible, since the engaging of a lawyer often seriously retards the patient's recovery. The physician should encourage an early settlement."

But see, M. Galanter, "The Day After The Litigation Explosion" (1986), 46 Md. L. Rev. 3 at 10, fn. 29 quoting from G. Gleser, B. Green and C. Winget, *Prolonged Psychosocial Effects of Disaster: A Study of Buffalo Creek* (1981) 140, a follow-up study of litigants; it indicated that "litigation was not prolonging their suffering . . . [compared to] a small group of nonlitigants. This comparison indicated that nonlitigants, if anything, were suffering more symptomatology than litigants. Certainly there was no evidence to suggest that the lawsuit was causing a prolongation of the psychic distress experienced by the survivors."

instead of dealing with the accident in a physically and mentally productive manner, because the outcome of the once-and-for-all court proceeding affects their long term finances and standard of living. Unfortunately, the delay in recovery may result in a higher award when finally litigated.

Secondly, delay may force some injury victims or *Fatal Accidents Act* beneficiaries to settle out of court prematurely.<sup>16</sup> This may arise because of impatience with the process or because the plaintiff has pressing financial needs which cannot await final adjudication and collection of the judgment. This delay before trial may be advantageous to a defendant in settlement negotiations. However, it is difficult to say how severe a problem this is in Manitoba, given the availability of promptly provided benefits from the Manitoba Public Insurance Corporation,<sup>17</sup> Unemployment Insurance Commission,<sup>18</sup> Manitoba Health Services Commission<sup>19</sup> and, in some cases, Canada Pension Plan<sup>20</sup> and disability insurance policies. The requirement for financial assistance pending settlement or trial may also be offset by a casualty insurer, who may make interim payments in good faith where liability is certain and a good relationship exists between the insurer and the plaintiff's lawyer.

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<sup>16</sup>Representatives of the Canadian Paraplegic Association have indicated in personal interviews that they do not believe premature settling of claims to be of widespread concern as it would likely occur only where a personal injury victim has a large family and large debts.

<sup>17</sup>A Regulation Respecting Coverage Under *The Manitoba Public Insurance Corporation Act*, M.R. 333/74, as am., Part II.

<sup>18</sup>*Unemployment Insurance Act*, S.C. 1970-71-72, c. 48, as am.

<sup>19</sup>*The Health Services Insurance Act*, C.C.S.M. c. H35, A Regulation Under *The Health Services Insurance Act*, M.R. 115/85 as am. and A Regulation Under *The Health Services Insurance Act* Designating the Benefits Payable in respect of the Cost of Insured Medical Services, M.R. 127/85.

<sup>20</sup>*Canada Pension Plan*, R.S.C. 1970, c. C-5 as am.

#### 4. Money Management

At present, the responsibility for investing or otherwise dealing with an award rests with the plaintiff and the court assumes that the award will be invested by the plaintiff in a prudent manner. The assumption is also made that the invested award will generate interest income for the plaintiff, which, with the lump sum, will provide the plaintiff with the necessary resources to finance his future expenses as they arise. However, in a significant number of cases these assumptions have been proven to be incorrect. Often, a plaintiff does not invest the award wisely, or at all, and the income earned on the lump sum together with the capital amount is inadequate to maintain himself.<sup>21</sup> The victim may then become destitute and

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<sup>21</sup>Several studies have shown dissipation to be a major problem. One study by the American life insurance industry, reported that 25% of award recipients had nothing left of their award at the end of two months, 50% had nothing left at the end of one year, 70% had nothing left after the second year and 90% had nothing left after 5 years. (R. Somers, "The Structured Settlement - A Better Way", *The Journal of Insurance*, March/April 1979). The same statistics were reported by D.A. Cave, "Structured Settlements: An Alternative Resolution of Claims Involving Death or Substantial Personal Injury" (1979), 37 *Advocate* 331. A study done for the Automobile Accident Compensation Committee in British Columbia interviewed 17 personal injury award recipients; it reported that the majority believed that misallocation of the compensation award was fairly common, and that it is difficult for most recipients to make the most out of a large sum of money, as the average person is not capable of establishing an investment portfolio that can ensure an adequate regular income spread over many years (British Columbia, Automobile Accident Compensation Committee, *Report* (1983) 76). The Pearson Commission conducted a personal injury survey and found that recipients of tort compensation most commonly spent their award on current living expenses, or a holiday or other luxuries. More than one-third of those who responded used part or all of the money in these ways, 13% banked a portion of their award, while only 5% invested any of it. Most of the awards in the survey were small (England, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (1978) 123) (hereinafter referred to as the *Pearson Commission Report*). Finally, a study of 322 assorted compensation cases prior to 1936 concluded "that lump-sum settlement often leads to distressing situations, the money being spent foolishly, leaving the patient still disabled and needing more money". (A. D. Pokorny and F. J. Moore, "Neuroses and Compensation" (1953), 8 *Arch. Industr. Hyg.* 547 at 553-554, referring to study by C. Norcross, *Vocational Rehabilitation and Workmen's Compensation* (1936)).

be compelled to resort to social assistance. The courts have recognized the inability of some individuals to manage a lump sum by awarding a management fee to enable them to hire professionals to assist in the management of their awards. However, even where a management fee is awarded, a plaintiff is not obliged to hire a professional and may not do so.

Even the best intentioned plaintiff may find he has dissipated his award. An injury victim or fatal accident beneficiary is usually familiar with the periodic acquisition and management of relatively small amounts of income, not with the acquisition or management of a large lump sum of money. Compounding this are factors arising from the accident itself: the disabilities caused by the accident, together with the accompanying emotional upheaval, do not assist in the prudent and dispassionate planning of finances. Finally, some injury victims or fatal accident beneficiaries may simply squander their award; we do not, however, know the extent of this problem.<sup>22</sup>

#### 5. Conclusion

The above discussion outlines the major problems associated with the present lump sum system. Awards are inaccurate, especially where a large portion of an award represents compensation for future losses. High awards are partially attributable to the necessity to award a management fee and gross-up for future taxation, sums which are only necessary in a lump-sum award system. Lengthy delays between accidents and awards, which may cause stress for the plaintiff and may cause him to settle his case prematurely, are also a part of the current system of lump sum damage awards. Finally, plaintiffs who are inexperienced in the management of a large sum of money may mismanage a lump sum award, dissipate it, and find themselves in need. In the section which follows, we consider whether a system of damages by periodic

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<sup>22</sup>The majority of the British Columbia committee held the opinion that while squandering of an award was possible, it did not seem to be a common occurrence based on the survey of 17 victims of catastrophic injury. The minority view was that the potential squandering of lump sum payments might be a widespread problem (British Columbia, Automobile Accident Compensation Committee, *supra* n. 21, at 75-78).

payments is the solution to these problems and, if it is not the solution, whether it is a partial solution.

## B. PERIODIC PAYMENT OF DAMAGE AWARDS

If the problems of the lump sum award system could be solved by a system whereby a damage award is payable on a periodic basis, then implementation of such a system would be justified. In our view, the periodic payment of damages would indeed alleviate some, though not all, of these problems.

### 1. Accuracy of Award

Perhaps the greatest problem faced by the existing system of damages assessment is its inherent inaccuracy. However, it is apparent to us that the inaccuracy does not stem primarily from the requirement for lump-sum awards. Rather, it stems from the requirement that damages be assessed on a once-and-for-all basis, forcing courts to predict the future. Greater accuracy in predicting the occupation in which an injured or deceased person would have been employed and the earnings and promotions which he would have received had he not been injured or killed cannot be achieved by a system of periodic payment of damage awards. The pre-trial and post-trial loss of earnings or profit of an injury victim, and the loss of dependency on income of a fatal accident beneficiary would still have to be predicted under a system of periodic payment awards. Nonetheless, some small improvements in the accuracy of awards could be achieved through the implementation of a system of periodic payment awards.

The elimination of the calculation of a gross-up for future tax liability on the interest earned on a lump sum judgment would be a step towards greater accuracy. The calculation of the gross-up involves predictions of future returns on investment and future rates of taxation, which courts have until recently considered to be more speculative than other estimations of future events. Assuming that Revenue Canada would extend the favourable tax treatment which it presently may afford to periodic payments made pursuant to a structured settlement to a damage award payable by periodic payments, then a tax gross-up would be unnecessary.

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The elimination of the need to discount judgments for future losses would also result in greater accuracy. A discount rate is applied because the plaintiff is receiving monies now for losses that he will not incur until some point in the future. Though the implementation of a legislated discount rate<sup>23</sup> results in consistency from case to case, the rate is nonetheless based on predictions of the long-term rate of return on investments and the long-term rate of inflation and may or may not be an accurate rate for the future. The application of a discount rate would be unnecessary in a system of damages by periodic payment, although consideration of future inflation would continue to be necessary.

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Finally, if periodic payments were to terminate upon the death of a plaintiff, the impossible task of accurately predicting life expectancies and the resultant overcompensation or undercompensation when the court's prediction does not match the plaintiff's actual date of death would be eliminated.

## 2. Size of Award

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The periodic payment of damage awards would make a significant contribution to the reduction of the size of awards because two elements of lump sum awards would be eliminated.

When periodic payments are awarded, there is no need for a management fee. When awarded, a management fee can be a significant sum. Similarly, a gross-up for future taxation can be significant. Assuming that Revenue Canada would extend the favourable tax treatment presently afforded to some structured settlements to damage awards payable on a periodic basis, then a properly structured periodic payment award would not be taxable to the plaintiff<sup>24</sup> and a gross-up for future taxation would therefore not be needed. As Montgomery J. stated:

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<sup>23</sup>*The Judgment Interest and Discount Act*, C.C.S.M. c. J8, s. 9.

<sup>24</sup>Revenue Canada Interpretation Bulletin IT-365R, "Damages, Settlements, and Similar Receipts" (1981).

The elimination of gross up in some cases will cut the size of the award by up to 50 percent with no loss to the plaintiff. This can be accomplished in two ways: either by amendment to the Income Tax Act to make the income in future care costs non-taxable, or by giving the courts jurisdiction to structure payments in a judgment rather than being restricted to lump sum awards.<sup>25</sup>

A tax-free periodic payment award would also mean that damages for lost earnings could be awarded on a net after-tax basis, better approximating the plaintiff's pre-accident position and effecting a further saving. These reductions in the size of awards would result in cost savings to defendants, without affecting the financial position of plaintiffs. However, the reduction in the size of awards goes far beyond these savings. As we have previously indicated,<sup>26</sup> the cost of an annuity purchased by a defendant which periodically pays out a certain sum of principal and interest to a plaintiff is significantly less than the lump sum which a plaintiff would have to invest in order to receive the same periodic payments of principal and interest; this is because under current tax practice interest earned under the annuity is received tax-free while the interest earned by the plaintiff on the lump sum is taxed. The results are vividly demonstrated in the following excerpt from a newspaper account of the settlement by periodic payments of a seriously injured boy's claim:

An eight-year-old Winnipeg boy could receive \$37 million during his lifetime under terms of an accident claim settlement approved by a Manitoba court.

To do that, he'll have to live to be 100, but that is a possibility the negotiators of the settlement considered . . . .

. . . .

If he lives to be 70, the payout would be about \$9 million . . .

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<sup>25</sup>Fair Action in Insurance Reform, *A Report in Response to the Ontario Task Force on Insurance*, Appendix III, Montgomery J., "Paper at Canadian Bar Association Meeting, June 26, 1986", at 3.

<sup>26</sup>*Supra*, at 41-42.



However, a lawyer for the Manitoba Public Insurance Corporation, which insured the defendant . . . said the settlement will cost the Crown corporation less than \$600,000.

. . . [He] said that under terms of the structured settlement, MPIC purchased an annuity from another insurance company for between \$400,000 and \$500,000.

The interest that will accrue on the annuity . . . over the remainder of . . . [the plaintiff's] life, will be enough to cover the bulk of the payments he will receive, the lawyer said.<sup>27</sup>

Furthermore, if the size of some awards can thus be reduced, then a claim which may have fallen outside a defendant's liability insurance policy limit had payment been ordered on a lump sum basis may fall within policy limits where payment is ordered on a periodic basis. Thus, a plaintiff may actually recover a larger portion of the award by periodic payments than he would have by a lump sum award. Finally, although we may be overly optimistic, a reduction in the size of damage awards may influence insurers to reduce liability insurance premiums or at least to restrain escalation in those premiums.

### 3. Money Management

As discussed in the preceding section, lump sum awards are subject to mismanagement and dissipation. By placing in the hands of plaintiffs smaller amounts of money at times coinciding with their needs, a system of periodic payment of damage awards could greatly reduce this problem. We do recognize that not all problems of dissipation would be eliminated, as those plaintiffs who are inclined to do so could still mismanage individual payments in a periodic payment system; worse still, unless restrained, the plaintiff could also assign his right to receive payments in exchange for a lump sum capable of dissipation.

The ability of a periodic payments scheme to restrain dissipation of damage awards for personal injury or death raises the more fundamental issue

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<sup>27</sup>*Winnipeg Free Press*, March 7, 1987, at 1 and 4.

of personal autonomy. Arguably, a damage award belongs to a plaintiff and should be available to him to utilize as he wishes, in the same way as other members of society can deal with their personal property. Accordingly, he should be able to obtain his award as a lump sum, should he so desire. Society should not paternalistically mandate the periodic payment of damages to protect a plaintiff from himself. On the other hand, society has a legitimate interest in preventing dissipation, as it is expected to provide publicly funded social assistance where a plaintiff dissipates his award.

While the Commission accepts that some damage awards are dissipated by the recipients, we are not convinced that it is a problem meriting special action. The prevention of dissipation alone does not justify the implementation of a system of periodic payments; it does, however, add weight to the other advantages of the system.

#### 4. Conclusion

The availability of damages by periodic payments will not solve all of the problems of the present system of damages assessment; it will however solve some. Periodic awards can make very important contributions to the reduction of the size of damage awards; hopefully, the reduction of liability insurance premiums would be a side effect. Modest improvements in the accuracy of damage awards should also result. Finally, the danger of mismanagement and dissipation of awards would be reduced.

The benefits of a system of periodic payments have been recognized by others before us. Numerous studies including the Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia, the Royal Commission on Civil Liability and Compensation for Personal Injury in England, the Report of the Ontario Supreme Court Committee on Tort Compensation, and the Report of the Board of Inquiry into Motor Vehicle Accident Compensation in Victoria<sup>28</sup> have recommended periodic payments of

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<sup>28</sup>Australia, National Committee of Inquiry, *Compensation and Rehabilitation in Australia*, (1974) vol. 1 (hereinafter referred to as the *Woodhouse*)  
(Footnote continued to page 61)

damage awards. Similar views have often been expressed in the medical literature.<sup>29</sup> Legislation authorizing courts and tribunals to award damages on a periodic basis has been enacted in Western Australia<sup>30</sup> and Ontario<sup>31</sup> (though we note that the power has been rarely used in these jurisdictions)<sup>32</sup>. Numerous American states have also enacted such legislation.<sup>33</sup> Indeed, periodically-paid compensation is already well

(Footnote continued from page 60)

*Report*); *Pearson Commission Report*, *supra* n. 21, in which the majority recommended periodic payment of damages for future pecuniary loss caused by death or serious and lasting injury, where losses equalled an annual value of 5 percent or more of average annual earnings and were likely to last at least 4 or 5 years from the date of the award; Ontario, Supreme Court, Committee on Tort Compensation, *Report*, (1980) for cases of wrongful death or personal injury, with consent of all parties; Victoria, Board of Inquiry into Motor Vehicle Accident Compensation in Victoria, *Report*, (1978) for motor vehicle accident victims. In addition to recommending that courts have the authorization to award damages payable on a periodic basis, each of these reports also recommended that the payments be eligible for review in certain circumstances.

<sup>29</sup>E.g., A.D. Pokorny and F.J. Moore, *supra* n. 12, at 553-554, referring to a study by C. Norcross, *Vocational Rehabilitation and Workmen's Compensation* (1936); M.J. Tarsh and C. Royston, *supra* n. 13; L. Keiser, *supra* n. 14. See also, T.G. Ison, "The Therapeutic Significance of Compensation Structures" (1986), 64 Can. Bar Rev. 605.

<sup>30</sup>*Motor Vehicle (Third Party) Insurance Act 1943-1972*, s. 16 E(5)(a) (W. Aust.) pertains to cases of personal injury or death caused by or arising out of the use of a motor vehicle.

<sup>31</sup>*Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 129.

<sup>32</sup>See *Musca v. Colombini*, [1970] W.A.R. 33 (W. Aust. S.C. F.C.) as an example of an award of periodic payments in Western Australia. Since its enactment in 1984, no periodic awards have been made pursuant to the Ontario legislation.

<sup>33</sup>The following U.S. states have legislation which permits court awarded periodic payment of damages awards in the context of medical malpractice: Alabama, Alaska, California, Delaware, Florida, Illinois, Kansas, Louisiana,

(Footnote continued to page 62)

accepted in Manitoba in the context of workers' compensation and automobile insurance.<sup>34</sup>

The periodic payment of damages is not a panacea. However, we are convinced that granting Manitoba courts the power to award damages on a periodic basis will improve the existing system by which damages for personal injury and death are calculated and paid. We therefore recommend:

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(Footnote continued from page 61)

Maryland, New Hampshire, New Mexico, New York, Oregon, South Dakota (effective July 1, 1987), Utah, Washington and Wisconsin. South Dakota (effective July 1, 1987) and Washington make periodic payment of damages available in all actions for personal injury and totally-disabling personal injury, respectively. See: Ala. Code §6-5-486 (1975); Alaska Stat. §09.55.548 (1983); Cal. Civ. Proc. Code §667.7 (West 1980); Del. Code Ann. tit. 18, §6864 (Supp. 1984); Fla. Stat. Ann. §768.51 (West 1986); Ill. Ann. Stat. ch. 110, para. 2-1701 to 2-1719 (Smith-Hurd Supp. 1986); Kan. Stat. Ann. §60-2609 (1983); La. Rev. Stat. Ann. §40:1299.39 and 40:1299.43 (West Supp. 1986); Md. Cts. & Jud. Proc. Code Ann. §3-2A-08(b) (1984); N.H. Rev. Stat. Ann. §507-C:7 (1983); N.M. Stat. Ann. §41-5-7 (1978); N.Y. Civ. Prac. L. & R. §5031 to 5039 (McKinney Supp. 1986); Or. Rev. Stat. §752.070 (1985); S. D. Codified Laws Ann. §21-3A-5 to 21-3A-13 (Supp. 1986); Utah Code Ann. §78-14-9.5 (Supp. 1986); Wash. Rev. Code Ann. §4.56.240 (Supp. 1983); Wis. Stat. Ann. §655.015 (West. Supp. 1985).

<sup>34</sup>*The Workers Compensation Act*, C.C.S.M. c. W200; A Regulation Respecting Coverage under *The Manitoba Public Insurance Corporation Act*, Man. Reg. A180-M.R. 333/74, as am. Many U.S. states also have legislation which provides for periodic payments in the context of criminal injuries compensation or personal injuries from automobile accidents, generally in a no-fault insurance context, including Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Texas, and Utah. See: Ark. Stat. Ann. §66-4014 (1980); Colo. Rev. Stat. §10-4-706 (1973); Conn. Gen. Stat. Ann. §38-333 (West Supp. 1986); Fla. Stat. Ann. §627.736 (West 1984); Ga. Code Ann. §56-3406b (Harrison 1977); Haw. Rev. Stat. §294-4(2) (Supp. 1984); Kan. Stat. Ann. §40-3110 (1981); Ky. Rev. Stat. Ann. §304.39-210 (Michie/Bobbs-Merrill 1981); Md. Ann. Code art. 48A, §544 (1979); Mass. Gen. Laws Ann. ch. 90, §34 M (West Supp. 1986); Mich. Comp. Laws Ann. §500.3142 (West 1981); Minn. Stat. Ann. §658.54 (West Supp. 1986); N.J. Stat. Ann. §39: 6A-4 (West Supp. 1986); N.Y. Ins. Law §5106 (McKinney 1984); N.D. Cent. Code §26.1-41-09 (Supp. 1985); Or. Rev. Stat. §743.805 (1985); Pa. Stat. Ann. tit. 71, §180-7.10 (Purdon Supp. 1986); Tex. Rev. Civ. Stat. Ann. art. 5.06-3(d) (Vernon 1981); Utah Code Ann. §31A-22-307 (1986).

RECOMMENDATION 1

*That legislation be enacted to authorize the courts to award damages for personal injury or death by way of periodic payments.*

C. OTHER SYSTEMS

Notwithstanding the foregoing recommendation, we recognize that a system of periodic payments does not remedy all of the problems of the existing system of damage awards.

A major element of inaccuracy will remain in a system of periodic payments. A once-and-for-all lump sum award accounts for future events at trial. The award cannot be altered after the trial to account for actual occurrences. As such, a once-and-for-all award, whether paid by lump sum or periodic payments, is inaccurate to the extent that future eventualities are not properly taken into account at trial. Similarly, delays will continue to be a feature of a once-and-for-all system of lump sum or periodic damages. Delay is primarily attributable to the time required for a plaintiff's medical condition to stabilize so that the most accurate medical prognosis can be obtained for the court's assessment of damages for future loss. A periodic payment system in which damages are still assessed on a once-and-for-all basis would not alleviate these delays.

Other systems have been suggested to deal with the above problems of delay and inaccuracy. Although a full examination of these other systems is beyond the scope of this Report, it is useful to digress briefly to review them.

1. Review System

A system in which an award can be reviewed and varied to account for changes in circumstances offers greater flexibility than a once-and-for-all lump sum system. A review system could reduce delay and the problems associated with it. Since the parties could return to court whenever circumstances changed after the original trial, it would be unnecessary to await stabilization of a plaintiff's medical condition prior to the original

adjudication. The ability to increase or decrease awards at any time in the future to fit altered circumstances, coupled with the concomitant elimination of the need to predict the distant future, would also result in substantial improvements in the accuracy of awards.

Support for reviewable periodic payment of damage awards can be found in Western Australia, Ontario, as well as some U.S. legislation<sup>35</sup> although, at least in the Commonwealth jurisdictions, there are only a few instances in which the power has been exercised.<sup>36</sup> Numerous studies which have examined reform of the once-and-for-all lump sum damage system have also supported the implementation of a review system.<sup>37</sup>

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<sup>35</sup>*Motor Vehicle (Third Party) Insurance Act 1943-1972*, s. 16E(5)(b) (W. Aust.); *Courts of Justice Act 1984*, S.O. 1984, c. 11, s. 129; Kan. Stat. Ann. 60-2609 (1983) (Kansas); La. Rev. Stat. Ann. §40:1299.39, §40:1299.43 (West Supp. 1986) (Louisiana); N.M. Stat. Ann. §41-5-9 (1978) (New Mexico).

<sup>36</sup>For cases in which the system of review was considered or utilized, see *Hall v. Fare*, [1973] W.A.R. 156 at 160 (W. Aust. S.C.), where Jackson C.J. inquired of counsel as to whether it would not be sensible and in the best interests of both parties to award damages partly in a lump sum and partly by periodic payments which could be reviewed and adjusted as the need arose. This suggestion was rejected by both parties and a reviewable award was not made against their wishes; *Scutt v. Bailey (No. 1)*, [1964] W.A.R. 74 (W. Aust. S.C.) and *Scutt v. Bailey (No. 2)*, [1964] W.A.R. 81 (W. Aust. S.C.) where the court reserved to the plaintiff liberty to apply for additional benefits with respect to hospital care costs should the injured person be liable for that expense in future; *Musca v. Columbini*, [1970] W.A.R. 33 (W. Aust. S.C. F.C.) where the court ordered that either party could apply for an increase in the periodic payment amount.

<sup>37</sup>*Woodhouse Report*, *supra* n. 28, recommended that a beneficiary should be entitled to review to obtain an increase should changed circumstances justify it but that an award should not be decreased because of attempts by the plaintiff to overcome his physical handicap; New Zealand, Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (1967), which also recommended that payments should be reviewable but should not be reduced because of the plaintiff's efforts on his own behalf; *Pearson Commission Report*, *supra* n. 21, which recommended that periodic payments should be

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However, a review system has a number of serious drawbacks. First, a review system would result in loss of the finality present in a once-and-for-all lump sum system. This loss might result in severe psychological problems for a plaintiff if periodic payments were susceptible to reduction on review. In such a case, a plaintiff might lack the incentive to rehabilitate himself, as he would realize that, upon a return to health, the defendant could apply to court to reduce or eliminate the periodic payments. If applications by defendants for downward review were permitted, defendants would have an incentive to investigate the lives of plaintiffs, infringing upon their privacy.<sup>38</sup> A defendant would never know the potential extent of his liability, making it difficult for him to get on with his life.

Secondly, a review system would require additional pre-trial procedures, such as examinations for discovery, and court appearances for variation hearings, together with appeals from these decisions. The additional hearings would increase the burden on the court system and would increase overall legal costs to both parties. Over the lifetime of a seriously injured plaintiff, the increase in costs to all parties, as well as the court system, could be substantial.

Indeed, the increased burden would not stop at the parties to the action, but would be felt by society as a whole. The possibility of review would make estimating the full extent of liability and calculating appropriate

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subject to review, for changes in a plaintiff's pecuniary loss brought about by changes in his medical condition and cases for which a declaration of liability was made, with damages to be awarded at a future date; Ontario, Supreme Court, Committee on Tort Compensation, *supra* n. 28, which recommended that an order for payment of damages on a periodic basis should be open to review by the court on application by the plaintiff.

<sup>38</sup>Of course, periodic payments exist under other compensation schemes, such as worker's compensation, and these factors have apparently not proven unmanageable. *E.g.*, *The Workers Compensation Act*, C.C.S.M. c. W200, s. 21(1).

premiums and reserves extremely difficult. Inevitably, insurers' costs would rise and liability insurance premiums would increase.

## 2. Bifurcated System

At present, liability and quantum of damages are assessed at one trial. As we have seen, a trial must be delayed until a plaintiff's medical condition stabilizes in order for a court to assess damages accurately, even though the evidence respecting liability is usually available without delay. In the meantime, the memories of witnesses to the accident fade.

A bifurcated system is one in which liability and damages are adjudicated separately. A trial on the issue of liability is held immediately, while the memories of witnesses are clear;<sup>39</sup> a further trial on the issue of damages is held later. In some cases, interim damages, representing a portion of the damages which it is anticipated will be assessed ultimately, are awarded at the original hearing. These might include damages for losses already incurred and damages for pain and suffering.

There is some legislative support for a bifurcated system<sup>40</sup> and case law pursuant to that legislation.<sup>41</sup> As well, the *Pearson Commission*

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<sup>39</sup>*Ikonomos v. Lesiuk* (1973), 6 S.A.S.R. 111 (S.C.); *Nathan v. Vos*, [1970] S.A.S.R. 455 (S.C.).

<sup>40</sup>Germany, France and South Australia have legislation which permits liability and assessment of damages to be adjudicated separately. See, A. Samuels, "Damages in Personal Injuries Cases: A Comparative Law Colloquium Report" (1968), 17 Int. & Comp. L.Q. 443; *Supreme Court Act, 1935-1975*, s. 30(b) (S. Aust.).

<sup>41</sup>*Cirjak v. Todd* (1977), 17 S.A.S.R. 316 (S.C.); *Todd v. Lane* (1975), 11 S.A.S.R. 13 (S.C.); *Horwell v. Jones* (1975), 11 S.A.S.R. 502 (S.C.); *Cooper v. Bech No. 2* (1975), 12 S.A.S.R. 151 (S.C.); *Polidori v. Stoker* (1973), 6 S.A.S.R. 273 (S.C.); *Revesz v. Orchard*, [1969] S.A.S.R. 336 (S.C.); *Grabkowski v. Majchrowski* (1978), 19 S.A.S.R. 290 (S.C.); *Nathan v. Vos*, *supra* n. 39; *Walker v. Tugend* (1981), 28 S.A.S.R. 194 (S.C.). In each of these cases, the court made a declaratory order with respect to liability and granted damages for losses to trial while in some damage payments were awarded on account of the damages which would later be assessed.



*Report* supported a bifurcated system for cases where a plaintiff suffers serious and lasting injury but no pecuniary loss at trial.<sup>42</sup> In Manitoba, a bifurcated system could be readily implemented as the Queen's Bench Rules already permit a separate trial on different questions or issues of fact.<sup>43</sup>

However, there are several drawbacks to such a system. First, extra procedural steps, such as separate examinations for discovery for liability and quantum, would be required, resulting in higher costs. Secondly, a two hearing process would probably result in an increase in the overall court time required per case; this would in turn likely increase the burden on the court system. Thirdly, if liability is determined immediately after an accident and the final damage assessment is delayed until a later date, a plaintiff who has succeeded in proving the defendant's liability in the first trial may have little or no incentive to mitigate his losses and rehabilitate himself.<sup>44</sup>

### 3. Provisional Damages

A scheme of provisional damages was recommended by The Law Commission<sup>45</sup> in England, and has since been implemented there.<sup>46</sup>

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<sup>42</sup>*Pearson Commission Report*, supra n. 21, where it was recommended that a court be authorized to make a judgment as to the relevant injury and proportion if any of contributory negligence. Should the injury later cause the plaintiff pecuniary loss, it would be open to him to apply to court for a review of his award.

<sup>43</sup>Queen's Bench Rules, r. 211(1).

<sup>44</sup>S. Rea, "Lump-Sum Versus Periodic Damage Awards" (1981), 10 J. of Legal Stud. 131.

<sup>45</sup>The Law Commission (England), *Report on Personal Injury Litigation - Assessment of Damages* (Report #56, 1973), but only for defendants who are a public authority, insured, or a person whose means and resources enable him to make interim payments.

<sup>46</sup>*Supreme Court Act 1981*, c. 54, s. 32A, en. *Administration of Justice Act 1982*, c. 53, s. 6 (U.K.) provides that where an injured person can prove that there is a possibility of further serious disease or deterioration in his condition, the court can make a provisional award of damages for the injuries which exist at the time, and can make another award at a later stage if and when the further disease or deterioration actually occurs.

Under this system, liability is determined and damages are assessed in the present manner, with one exception. Where a court accepts that there is a possibility that some specific event may occur in the future (such as, the onset of arthritis attributable to the accident), the court makes no award of damages for that possible event. Instead, it authorizes the plaintiff to return to court for a further assessment of damages if and when that named possible event actually occurs.

Some greater accuracy should result. The system grants the benefits of review to plaintiffs, yet protects them from the possibility of downward review. Unfortunately, the lack of finality remains for the defendant and his insurer. Furthermore, the plaintiff may return to court where a condition specified in the judgment occurs; accordingly, the plaintiff has an incentive to delay trial until he can predict all possible future complications.

#### 4. Interim Damages

Where a trial is delayed, a plaintiff who desperately requires financial assistance may be forced into a premature settlement which is not necessarily in his best interests. It has been suggested that this problem could be alleviated by permitting plaintiffs to apply to court for interim damages prior to a final adjudication of liability and assessment of damages. There is support for this type of system in law reform commission reports<sup>47</sup>

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<sup>47</sup>Woodhouse Report, *supra* n. 28, for exceptional cases of a serious nature; Law Reform Commission of Hong Kong, *Report on Damages for Personal Injury and Death* (1984); Law Reform Commission of Tasmania, *Compensation for Personal Injuries Arising Out of Tort* (Working Paper, 1980), in cases of serious or lasting injury or disability; Western Australia Law Reform Commission, *Interim Damages in Personal Injury Claims* (Project No. 5, 1969), for all personal injury cases once liability is agreed upon or decided by the court; Winn Committee, "Working Paper No. 2 - Helping Hardship - Interim Payments" in "The Winn Committee on Personal Injuries Litigation" (1967), 111 Solic. J. 68, where hardship occurs in actions for damages for personal injury or a claim under *The Fatal Accidents Act*.

as well as in legislation;<sup>48</sup> interim damages have also received support in medical journals.<sup>49</sup>

However, this system shares the problem of added time and cost without addressing the issue of accuracy. The concept of a plaintiff being entitled to receive damages before the defendant has even been adjudged liable is also difficult to accept.

## 5. Conclusion

The search for a perfect system for the assessment of damages for personal injury and death clearly does not stop with the implementation of damages by periodic payment. However, the Commission believes that further study is necessary before it could recommend any of these other systems.

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<sup>48</sup>Supreme Court Act 1981, c. 54, s. 32 (U.K.); see also, *Law Reform (Miscellaneous Provisions) (No. 2) Act 1977*, No. 52 of 1977 (Bermuda); *Supreme Court Act, 1935-1975*, s. 30b (S. Aust.).

<sup>49</sup>*E.g.*, M.J. Tarsh and C. Royston, *supra* n. 13, at 25.

## CHAPTER 4

### ISSUES RELATING TO IMPLEMENTATION OF A PERIODIC PAYMENT SYSTEM

In the previous Chapter, we recommended that legislation be enacted authorizing courts to award periodic payments of damages. In this Chapter, we will discuss the issues associated with the implementation of this recommendation and consider methods of resolving them.

#### A. PRECONDITIONS TO PERIODIC PAYMENTS AWARDS

Experience in the field of structured settlements has shown that periodic payments are usually utilized in personal injury cases where it appears that victims are likely to suffer long term disability and require large awards. Similarly, in fatal accident cases, periodic payments are utilized most frequently in structured settlements where large future losses extend over many years.

With this in mind, the Commission considered whether periodic payments should be available in all awards of damages for personal injury or death, or whether it would be appropriate to limit the availability of periodic payments according to one or more of the following factors: (1) the nature of a victim's injuries in personal injury actions, (2) the size of the award, (3) the cause of action which gave rise to the claim, and (4) the possibility that the plaintiff might dissipate the award. In the discussion which follows, we consider this question.

#### 1. Nature of Injury

As mentioned above, experience in structured settlement cases has shown that periodic payments are often used in cases of long term disability. In this type of case, the size of a settlement would usually be large, and the period over which the victim would require support would be lengthy, perhaps his entire lifetime. It is commonly accepted that in these sorts of cases the problems of lump sum awards are most apparent and the periodic payment of

damages is most beneficial. Consequently, if there is to be a limitation on the availability of periodic payment awards, a limitation based on the nature of the injury would seem to be the most reasonable choice. However, the difficulty in such a limitation is in arriving at a definition of the injuries which will qualify. The definition should encompass only those injuries which are of a severity which signifies that a periodic payment award is justified. However, the impact of an accident on a particular plaintiff and the compensation which is appropriate is largely reflective of a victim's pre-accident lifestyle, employment and age. For example, the loss of the use of an arm may be a serious and lasting injury to a professional baseball pitcher while not nearly as serious to a lawyer. Similarly, where a 20 year old and a 50 year old both become paraplegics in an accident, each will have individual needs which may or may not justify a periodic damage award. Obviously, the range of possible injuries and their effect on particular plaintiffs is limitless.

There is in fact little legislative support for the limitation of periodic payments to certain types of injury. The state of Washington limits periodic payments to cases where injuries totally and permanently disable a plaintiff,<sup>1</sup> while South Dakota allows periodic payments for any case involving an action for bodily injury.<sup>2</sup> A more limited approach has also been supported by the Pearson Commission which recommended that periodic payment awards be limited to situations of death or serious and lasting injury.<sup>3</sup> The Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand recommended that minor permanent partial disability should be compensated by lump sum.<sup>4</sup>

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<sup>1</sup>Wash. Rev. Code Ann. §4.56.240 (Supp. 1983) (Washington).

<sup>2</sup>S.D. Codified Laws Ann. §21-3A-2 (Supp. 1986) (South Dakota) - effective July 1, 1987. Bodily injury is defined in the legislation as any bodily harm, sickness, disease or death; see also, *Model Periodic Payment of Judgments Act*, §§2(1) and 3(a) (U.S.A. 1980).

<sup>3</sup>England, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (1978) (hereinafter referred to as the *Pearson Commission Report*), vol. 1 at 126.

<sup>4</sup>New Zealand, Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (1967).

In view of the limitless range of possibilities of injuries and the effect of those injuries on the individual plaintiffs, the Commission is of the view that it is not possible or desirable to formulate a definition which would be appropriate.

## 2. Size of Award

The availability of a periodic award could also be governed by the dollar value of the award; this approach has been adopted by a number of American states. The dollar value could be based on (a) the amount claimed by the plaintiff in his prayer for relief, (b) the actual award of future losses which are granted, (c) the amount of future medical expenses, (d) the total amount of the lump sum award which would otherwise be awarded, or (e) the amount by which the total award exceeds any payments which are advanced prior to the final adjudication. Most jurisdictions which have enacted legislation limiting the use of periodic payments on the basis of size of award rely on the size of the award for future damages.<sup>5</sup> However, legislative precedent also exists for periodic payments to be based on the size of the total award<sup>6</sup> or the size of the total award in excess of any advance payments.<sup>7</sup>

Similar variations exist in the threshold amount chosen by the

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<sup>5</sup>Cal. Civ. Proc. Code §667.7(a) (West 1980) (California); N. H. Rev. Stat. Ann. §507-C:7 IV (1983) (New Hampshire); Utah Code Ann. §78-14-9.5(2) (Supp. 1986); S.D. Codified Laws Ann. §21-3A-5(3) (Supp. 1986) (South Dakota) effective July 1, 1987; N. Y. Civ. Prac. L. & R. §5031 (e) (McKinney Supp. 1986) (New York); Fla. Stat. Ann. §768.51(1) (West 1986) (Florida); La. Rev. Stat. Ann. §40:1299.39B and H(4) and 40:1299.43 (West Supp. 1986) (Louisiana); Wis. Stat. Ann. §655.015 (West Supp. 1985) (Wisconsin) previously called for awards for future medical expenses in excess of \$25,000 to be paid periodically; however, pursuant to 1983 Wis. Laws 158 §5 (effective March 20, 1984), the statute no longer specifies that payments need be periodic.

<sup>6</sup>Ala. Code §6-5-486 (1975) (Alabama); Or. Rev. Stat. §§752.060 and 752.070 (1985) (Oregon).

<sup>7</sup>Md. Cts. & Jud. Proc. Code Ann. §3-2A-08 (b) (1984) (Maryland).

American states. The thresholds range from \$50,000 to \$500,000.<sup>8</sup> Experience in the field of structured settlements suggests that periodic payments are most beneficial where an award for future losses is at least \$100,000.<sup>9</sup> Other suggestions are that damage awards up to \$10,000,<sup>10</sup> or damages for annual losses of less than 5% of annual earnings which are likely to last less than 4 or 5 years from the date of the award<sup>11</sup> should be awarded on a lump sum basis.

However, we believe that it is impossible to calculate the precise point at which a periodic payment award would begin to produce an advantage to the plaintiff or a saving to the defendant or society. This difficulty in predicting a threshold figure is compounded by the extent to which a finding of contributory negligence affects the sum actually recoverable. As well, there is no convincing evidence that periodic payments of damages would only be appropriate for larger awards. As such, the Commission holds the view that it is not advisable to pre-judge the size of the award for which periodic payments would be desirable.

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<sup>8</sup>Cal. Civ. Proc. Code §667.7 (a) (West 1980) (California) - \$50,000; N. H. Rev. Stat. Ann. §507-C: 7 IV(1983) (New Hampshire) - \$50,000; Ala. Code §6-5-486 (1975) (Alabama) - \$100,000; Or. Rev. Stat. §752.060 (1985) (Oregon) - \$100,000; Utah Code Ann. §78-14-9.5(2) (Supp. 1986) - \$100,000; S.D. Codified Laws Ann. §21-3A-5(3) (Supp. 1986) (South Dakota) - \$100,000 (effective July 1, 1987); N. Y. Civ. Prac. L. & R. §5031(e) (McKinney Supp. 1986) (New York) - \$250,000; Fla. Stat. Ann. §768.51(1) (West 1986) (Florida) - \$500,000; La. Rev. Stat. Ann. §40:1299.39B and H(4) and 40:1299.43 (West Supp. 1986) - \$500,000; and see Wis. Stat. Ann. §655.015 (West Supp. 1985) (Wisconsin) - \$25,000 (but pursuant to 1983 Wis. Laws 158 §5, effective March 20, 1984, payments no longer had to be "periodic").

<sup>9</sup>J.P. Weir, *Structured Settlements* (1984) 17.

<sup>10</sup>Australia, National Committee of Inquiry, *Compensation and Rehabilitation in Australia*, (1974) vol. 1 (hereinafter referred to as the *Woodhouse Report*).

<sup>11</sup>*Pearson Commission Report*, *supra* n. 3.

### 3. Cause of Action

The availability of periodic payment awards could also be limited to a particular cause of action. Most American legislation adopts this approach. Many states provide that periodic payments are available where damages for medical malpractice are obtained against a physician, dentist, medical institution or health care provider.<sup>12</sup> Other American legislation provides for periodic payments to be awarded for personal injuries incurred in automobile accidents, generally in a no-fault insurance context.<sup>13</sup> In Western Australia, a court can award periodic payments where personal injury or death is incurred in an accident involving a motor vehicle<sup>14</sup> and the Report of the British Columbia Automobile Accident Compensation Committee recommended the use of periodic payments in "an action for damages arising out of the bodily injury to or the death of a person caused by the ownership, use or operation of a motor vehicle . . . ."<sup>15</sup> On the other hand, Ontario legislation authorizing a court to order periodic awards does not restrict awards to specific types of cases, but allows periodic awards for any personal injury or fatal accident action.<sup>16</sup>

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<sup>12</sup>Ala. Code §6-5-486 (1975) (Alabama); Alaska Stat. §09.55.548(a) (1983); Cal. Civ. Proc. Code §667.7(a) (West 1980) (California); Del. Code Ann. tit. 18, §6864(a) (Supp. 1984) (Delaware); Fla. Stat. Ann. §768.51(1) (West 1986) (Florida); Ill. Ann. Stat. ch. 110, para 2-1701 (Smith-Hurd Supp. 1986) (Illinois); Kan. Stat. Ann. §60-2609 (1983) (Kansas); La. Rev. Stat. Ann. §40:1299.39 and 40:1299.43 (West Supp. 1986) (Louisiana); Md. Cts. & Jud. Proc. Code Ann. §3-2A-08(b) (1984) (Maryland); N. H. Rev. Stat. Ann. §507-C:1 & 2 (1983) (New Hampshire); N. M. Stat. Ann. §41-5-7 (1978) (New Mexico); N. Y. Civ. Prac. L. & R. §5031 (McKinney Supp. 1986) (New York); Or. Rev. Stat. §752.060 (1985) (Oregon); Utah Code Ann. §78-14-9.5 (Supp. 1986); Wis. Stat. Ann. §655.015 (West Supp. 1985) (Wisconsin).

<sup>13</sup>*Supra*, at 62, fn. 34.

<sup>14</sup>*Motor Vehicle (Third Party Insurance) Act 1943-1972*, s. 16E(5)(a) (W. Aust.).

<sup>15</sup>British Columbia, Automobile Accident Compensation Committee, *Report* (1983) 207 (Appendix C, Proposed Amendment to the Insurance (Motor Vehicle) Act, s. 241 A(1)).

<sup>16</sup>*Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 129.



The Commission has considered whether to limit recovery of periodic payment awards to medical malpractice, automobile accident or other claims. There seems to be no logical reason for limiting recovery in this manner. In fact, one must consider whether a statute which provides for recovery of periodic payment awards for certain causes of action and not others would be constitutionally valid given the protections in the *Canadian Charter of Rights and Freedoms*.<sup>17</sup> Several American statutes which restrict periodic payment of damages to cases involving medical malpractice have been challenged on the ground that they violate constitutional guarantees of "due process of law" and "equal protection of the laws". These challenges have been based primarily on section 14 of the U.S. Constitution.<sup>18</sup> In *Carson v. Maurer*,<sup>19</sup> legislation authorizing periodic payments in actions for medical malpractice was held to be unconstitutional because it unreasonably discriminated in favour of health care defendants and unduly burdened seriously injured malpractice plaintiffs. The court viewed the legislation as discriminatory because a malpractice plaintiff could not obtain a lump sum judgment and could not accumulate interest on the unpaid portion of an award. In addition, the court objected to the fact that, although the money represented by the judgment became the plaintiff's property when he obtained judgment, he was denied the right to dispose of that property, as and when he pleased. The court concluded that the statute, which singled out seriously injured malpractice victims whose future damages exceeded \$50,000, required them to shoulder the burden inherent in a periodic payment scheme for which the general public benefits. It therefore offended basic notions of fairness and justice and, accordingly, was an unreasonable exercise of the

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<sup>17</sup>*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*.

<sup>18</sup>U.S. Const. amend. XIV, §1 provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

<sup>19</sup>*Carson v. Maurer*, 424 A.2d 825 (N.H.S.C. 1980) is the only case in which the periodic payment of damages *per se* was one of the reasons that the court made a finding of unconstitutionality.

legislature's policy power and violated equal protection guarantees. Other American courts though have disagreed and held provisions authorizing periodic payment of damage awards for medical malpractice actions to be constitutional.<sup>20</sup> In *American Bank and Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc.*,<sup>21</sup> the court indicated that, while a periodic payment of damages scheme could reasonably be applied across the entire tort spectrum, the equal protection guarantee does not prohibit a legislature from implementing a reform measure one step at a time. The court also rejected an argument that the legislation was void for uncertainty because it did not clearly specify the methodology by which a court is to structure a periodic payment schedule. The *American Bank* case was followed in California by *Craven v. Crout*<sup>22</sup> and *Fein v. Permanente Medical Group*.<sup>23</sup> Similarly, the constitutionality of legislation which limits the availability of periodic payments to certain causes of action has been upheld in several other American cases.<sup>24</sup>

These American cases are instructive in predicting the constitutional validity of periodic payment legislation in Canada since the *Canadian Charter of Rights and Freedoms* contains a clause similar to section 14 of the U.S. Constitution.<sup>25</sup> In addition to the other reasons militating

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<sup>20</sup>Some cases have made a finding of unconstitutionality, but for reasons unrelated to the matters at issue in this Report.

<sup>21</sup>*American Bank and Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc.*, 204 Cal. Rptr. 671 (Cal. S.C. 1984).

<sup>22</sup>*Craven v. Crout*, 209 Cal. Rptr. 649 (Cal. App. 1 Dist. 1985).

<sup>23</sup>*Fein v. Permanente Medical Group*, 211 Cal. Reprtr. 368 (Cal. S.C. 1985).

<sup>24</sup>*Florida Patient's Compensation Fund v. Von Stetina*, 474 So. 2d. 783 (Fla. S.C. 1985), *State ex rel. Strykowski v. Wilkie*, 261 N.W. 2d. 434 (Wis. S.C. 1978).

<sup>25</sup>Section 15(1) of the *Canadian Charter of Rights and Freedoms* provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

against it, legislation which limits recovery of periodic payment awards to certain causes of action such as medical malpractice or automobile accident cases will undoubtedly attract strong and perhaps successful attack on constitutional grounds.

In conclusion, the Commission sees no acceptable basis for limiting the availability of a periodic payment of damage award according to the cause of action which gave rise to the personal injury or death.

#### 4. Dissipation

An award of periodic payments might also be limited to cases where it is demonstrated that a plaintiff would dissipate a lump sum award. There is no legislative precedent which supports this option. While the prospect of dissipation may incline a court to award damages in periodic payments, there will surely be many situations without this prospect where periodic payments might be successfully employed. Therefore, the Commission holds the opinion that such an option is not justifiable.

#### 5. Conclusion

There are numerous options for limiting the availability of periodic payments. The difficulty in choosing any option lies in formulating limits which are neither too broad nor too narrow. Given the wide variety of situations for which periodic payments may be beneficial, the Commission believes that it is best not to pre-judge the type of case in which a periodic payment award would be desirable and thus to permit courts a wide discretion. Therefore, we recommend:

##### *RECOMMENDATION 2*

*That there be no restrictions on the types of cases in which courts are permitted to grant damages by periodic payments for personal injury or death.*

#### B. HEADS OF DAMAGE WHICH MAY BE THE SUBJECT OF PERIODIC PAYMENTS

In Chapter 2, we detailed the various heads under which damages may be awarded in personal injury actions, *Fatal Accidents Act* actions, and

survival of action for personal injury cases. We now consider whether periodic payment of awards should be permitted for all of these various heads of damage or only for certain of them.

It is certainly true that some heads of damage lend themselves more readily to a periodic payment award than do others. Periodic payments would probably be most beneficial in cases involving large future pecuniary losses accruing over many years, particularly where it is apparent that a plaintiff cannot manage a large sum of money by himself. Indeed, while a significant number of American states permit periodic payments to be awarded for any head of damage,<sup>26</sup> most states permit periodic awards for future losses only.<sup>27</sup> Furthermore, the experience gained in structured settlements has demonstrated that often a portion of the total compensation is arranged by periodic payments, with the remainder being arranged by lump sum. Frequently, future pecuniary losses or all future losses including non-pecuniary losses are compensated by periodic payments, while past losses and sometimes future non-pecuniary losses are compensated by lump sum payment. Expenses and losses which are incurred on a regular on-going basis tend to be compensated on a periodic basis to ensure that the necessary funds are received by the plaintiff as the corresponding on-going expenses and losses are incurred. Conversely, infrequent or once-only expenses and losses or those incurred prior to trial tend to be compensated on a lump sum basis; this allows a plaintiff, for example, to repay loans or credit which were incurred or extended prior to trial.

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<sup>26</sup>Ala. Code §6-5-486 (1975) (Alabama) (all heads excluding attorneys' fees and out-of-pocket expenses); Kan. Stat. Ann. 60-2609(a) (Kansas); Md. Cts. & Jud. Proc. Code Ann. §3-2A-08(b) (1984) (Maryland); Or. Rev. Stat. §752.070(2) (1985) (Oregon); Wash. Rev. Code Ann. §4.56.240 (Supp. 1983) (Washington).

<sup>27</sup>Alaska Stat. §09.55.548(a) (1983); Cal. Civ. Proc. Code §667.7(a) (West 1980) (California); Del. Code Ann. tit. 18, §6864(a) (Supp. 1984) (Delaware); Fla. Stat. Ann §768.51(1) (West 1986) (Florida); Ill. Ann. Stat. ch.110, para. 2-1708 (Smith-Hurd Supp. 1986) (Illinois); La. Rev. Stat. Ann. §40:1299.39B, 40:1299.43 (West Supp. 1986) (Louisiana); N.H. Rev. Stat. Ann. §507-C:7 IV(1983) (New Hampshire); N.M. Stat. Ann §41-5-7 (1978) (New Mexico); N.Y. Civ. Prac. L. & R. §5031(e) (McKinney Supp. 1986) (New York); S.D. Codified Laws Ann. §21-3A-5 (Supp. 1986) (South Dakota) - effective July 1, 1987; Utah Code Ann. §78-14-9.5(2) (Supp. 1986); Wis. Stat. Ann. §655.015 (West Supp. 1985) (Wisconsin).

However, we are wary of such inflexibility; the Commission believes that the diversity of situations which may present themselves to a court will not lend themselves to such pat solutions. The circumstances of any particular case could indicate that any or all heads of damage (excluding nominal damages) should be awarded either by lump sum or periodic payments, or both. We prefer that courts have discretion to select the appropriate method of payment for each head of damage. This solution would achieve the greatest flexibility.

Therefore, we recommend:

**RECOMMENDATION 3**

*That periodic payments be permitted for any and all heads of damage for personal injury or death.*

**RECOMMENDATION 4**

*That the courts be permitted to make an award for each head of damage payable entirely by lump sum, entirely by periodic payments or in part by periodic payments and in part by lump sum.*

**C. AT WHOSE INSTANCE IS A PERIODIC PAYMENT AWARD AVAILABLE?**

A crucial question to be asked in implementing a system of periodic payment of damages is: at whose instance should a periodic payment award be available? The answer will have a major impact on the extent to which the system will be used. There are several options.

The first option is that the payment of a damage award by periodic payments should be compulsory without any discretion on the part of the court or the parties to the action. Three American states provide for compulsory periodic payments,<sup>28</sup> although in one of those states, periodic payments may

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<sup>28</sup>Louisiana, New Mexico and New York: La. Rev. Stat. Ann. §40:1299.39B, 40:1299.43 (West Supp. 1986); N. M. Stat. Ann. §41-5-7 (1978); N. Y. Civ. Prac. L. & R. §5031(e) (McKinney Supp. 1986).

not be awarded where all parties agree to opt out.<sup>29</sup> In addition, several studies have recommended compulsory periodic payments. In the United Kingdom, the Pearson Commission recommended that courts be required to award periodic payments for future pecuniary loss in all cases of serious or fatal injury, unless a plaintiff could show that, in the circumstances of his case, a lump sum would be more appropriate.<sup>30</sup> The Law Reform Commission of Tasmania recommended mandatory periodic payment for damages for future economic and non-economic loss, stating that indications from jurisdictions with voluntary systems did not inspire confidence that a voluntary system would be utilized.<sup>31</sup> Mandatory periodic payments would certainly overcome any reluctance by the public, the legal profession or the judiciary to use such a system. Obviously though, this option would be appropriate only if periodic payments should be awarded in every case.

However, notwithstanding the support elsewhere for compulsory awards, the inflexibility of such a system makes it unacceptable to us. There will be cases where periodic payments are more appropriate than a lump sum award. Depending on the circumstances, there will also be cases where a lump sum award is more appropriate than periodic payments. As a result, compulsory periodic payments are not justifiable; their use should be discretionary. At issue is whose discretion should be controlling.

A number of variants exist in other jurisdictions and we enumerate these options below. Many grant the court no discretion at all:

- (1) The court must award periodic payments if they are chosen by the plaintiff;<sup>32</sup>
- (2) The court must award periodic payments if either plaintiff or

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<sup>29</sup>N. Y. Civ. Prac. L. & R. §5031 (f) (McKinney Supp. 1986) (New York).

<sup>30</sup>*Pearson Commission Report*, *supra* n. 3.

<sup>31</sup>Law Reform Commission of Tasmania, Discussion Paper, Inquiry into Compensation for Victims of Motor Vehicle Accidents, July, 1986.

<sup>32</sup>Md. Cts. & Jud. Proc. Code Ann. §3-2A-08(b)(1984) (Maryland).

defendant so request<sup>33</sup> (we note that the Canadian Bar Association has expressed opposition to any system permitting an award of periodic payments against the wishes of the plaintiff<sup>34</sup>);

- (3) The court must award periodic payments if both plaintiff and defendant so elect; or, if one party so elects and the other does not file a timely objection; or, if one party so elects and the other party objects and the electing party is either a plaintiff who demonstrates that future damages will exceed an amount specified in the legislation or a defendant who is responding to a claim for future damages exceeding a specified amount and demonstrates that appropriate security for the claim can be provided.<sup>35</sup>

Others grant the court limited discretion:

- (1) The court may award periodic payments if either plaintiff or defendant so elect;<sup>36</sup>

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<sup>33</sup>Cal. Civ. Proc. Code §667.7(a) (West 1980) (California); Fla. Stat. Ann. §768.51(1)(b) (West 1986) (Florida) although the court has a limited discretion not to award periodic payments where it determines that manifest injustice would result to a party; Utah Code Ann. §78-14-9.5(2)(Supp. 1986).

<sup>34</sup>"Report of The Canadian Bar Association Resource Committee on Recommendations of The Automobile Accident Compensation Committee, September 24th, 1983" (1984), 42 Advocate 145.

<sup>35</sup>Ill. Ann. Stat. ch. 110, para. 2-1705(c) and (d) (Smith-Hurd Supp. 1986) (Illinois); S.D. Codified Laws Ann. §21-3A-2 (Supp. 1986) (South Dakota) - effective July 1, 1987 (Illinois has the additional requirement that future damages must be likely to accrue for more than one year). The court has a limited discretion not to award periodic payments if the purposes of the statute would not be served. In South Dakota, if the amount of future damages is less than the threshold amount, the plaintiff may, assuming compliance with the other conditions set out above, nonetheless require the court to award periodic payments.

<sup>36</sup>N. H. Rev. Stat. Ann. §507-C:7 IV (1983) (New Hampshire). A number of important provisions of this chapter have been found to be unconstitutional, and it is uncertain whether the remaining provisions would have been enacted without the rest; thus these provisions may be unconstitutional as well: *Carson v. Maurer*, *supra* n. 19.

- (2) The court may award periodic payments if both plaintiff and defendant so elect<sup>37</sup> (we note that the Canadian Bar Association has indicated support for this option<sup>38</sup>).

Finally, some American and Australian jurisdictions permit courts to award periodic payments in their sole discretion.<sup>39</sup> This option clearly permits the maximum degree of flexibility, allowing courts to make a decision based upon the facts of each individual case. Indeed, courts could choose to award damages in periodic payments even where the parties to the action did not wish this. While we recognize that this is unlikely,<sup>40</sup> we believe that, in appropriate circumstances, courts should have this option. A system where the court has an unfettered discretion to award damages in periodic payments is most consistent with our confidence in the courts to do justice according to the facts of each case and, indeed, with the expressed views of some members of the judiciary.<sup>41</sup>

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<sup>37</sup>*Courts of Justice Act 1984*, S.O. 1984, c. 11, s. 129.

<sup>38</sup>*Supra* n. 34.

<sup>39</sup>Ala. Code §6-5-486 (1975) (Alabama); Alaska Stat. §09.55.548(a) (1983); Del. Code Ann. tit. 18, §6864(a) (Supp. 1984) (Delaware); Kan. Stat. Ann. §60-2609(a) (1983) (Kansas); Or. Rev. Stat. §752.070 (1985) (Oregon); Wash. Rev. Code Ann. §4.56.240 (Supp. 1983) (Washington); *Motor Vehicle (Third Party Insurance) Act 1943-1972*, s. 16E (5)(a) (W. Aust.).

<sup>40</sup>*Hall v. Fare*, [1973] W.A.R. 156 (W. Aust. S.C.) where suggestion of judge that it would be in the interests of both parties for the award to be partly a lump sum and partly in periodic payments was rejected by parties; judge therefore chose not to make a periodic payment award against the wishes of both parties. See also similar view of court in *Barr v. Foot*, Nov. 22, 1972, unreported, (W. Aust. S.C.).

<sup>41</sup>*Andrews v. Grand and Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) (hereinafter referred to as *Andrews*); *MacDonald v. Alderson* (1982), 15 Man. R. (2d) 35 (C.A.). Also see two recent Ontario cases in which the judge expressed a desire to have this authority, without the requirement for the parties' consent: *de Champlain v. de Champlain*, FULL TEXT 607-034 per Montgomery, J. (Ont. S.C.); K. Lockhart and A. Johnson, "More millions awarded by Fitzpatrick, J. with explanations", *Can. Lawyer*, Sept. 1986, 3.



In considering these options the Commission has kept in mind that in trying to remedy the pitfalls of the present system care must be taken not to legislate new ones. Enactment of legislation which is very detailed, specific and complex may unintentionally legislate inequities. Furthermore, any new system should be designed to encourage, not hinder, its use. Therefore, we believe that a new system, untried in our courts, coupled with the potential for very different circumstances from case to case, ought to be left as flexible as possible, at least at the outset. As such, we recommend that the decision to make periodic payment awards should be left entirely to a court's discretion, with no additional requirement that one or both parties elect to have the court order a periodic award. It is hoped that making periodic payments available with the fewest requirements and restrictions will result in the greatest benefit of periodic payments being achieved for the largest number of cases. It is also anticipated that this will not add delay to court proceedings or substantially alter the way in which trials are conducted or the evidence which must be adduced. We recommend:

*RECOMMENDATION 5*

*That the decision to order a periodic payment of damage award be in the discretion of the court.*

D. GUIDELINES FOR THE EXERCISE OF THE COURT'S DISCRETION

Having recommended that the decision to award damages by periodic payments should be left to the discretion of the courts, we now consider whether courts should be provided with guidance as to how to exercise this discretion and what guidance could be provided.

Guidance within the legislation could take one of two forms. A general preamble could be included in the legislation authorizing the awarding of damages by periodic payments; such a preamble could provide assistance to the court in the exercise of its jurisdiction by stating the purpose and intent of the scheme. Alternatively, the legislation could, within its body, provide a list of factors or guidelines which a court should consider in exercising its discretion. We would consider the following factors to be relevant:

- (1) the need to protect a plaintiff against the risk of poor money management and improvident investments,
- (2) the extent to which greater accuracy would be achieved by a periodic payment award,
- (3) the extent to which periodic payments would reduce the size of an award by eliminating the need for a management fee,
- (4) the income tax implications of a periodic payment award including
  - (i) the elimination of a gross-up on the future care portion of a personal injury award and on the dependency claim in *Fatal Accidents Act* cases, and the consequent reduction in the overall size of an award,
  - (ii) the plaintiff's present tax status and whether he would be placed in a higher marginal tax bracket as a result of interest earned on a lump sum award, and
  - (iii) the ability to award damages for lost earnings on a net after-tax basis,
- (5) whether the damages which would be paid by a periodic award are of a sufficient amount to justify payments over a period of years,
- (6) the extent to which a plaintiff would require one or more lump sums for the purchase of capital equipment or the payment of debts,
- (7) the wishes of the plaintiff and defendant,
- (8) the extent to which a court is satisfied that a periodic payment can be adequately secured,
- (9) the seriousness of the injury in a personal injury case, and
- (10) the anticipated period of loss.

Guidance provided through the inclusion of a preamble or the listing of specific guidelines would indeed provide a court with some assistance in exercising its discretion pursuant to this new scheme. However, we do not believe that the assistance so provided would ultimately be particularly valuable and might in fact come to be stultifying. Given the varied circumstances for which we anticipate that the legislation should be utilized, an exhaustive list of guidelines or a meaningful preamble is not possible. The guidelines or a preamble may be interpreted as comprehensive of the matters which should be considered. Of course, we might attempt to avoid this

possibility by adding the further consideration of "such other factors as the court may in the circumstances consider appropriate", but we fear that this answers the search for specifics with more generalities and ultimately renders the exercise of legislating guidelines meaningless. In order to avoid a court taking a narrow interpretation of when it should exercise its discretion to award periodic payments, the Commission holds the view that it would be better that the legislation neither specify guidelines nor contain a preamble as to its purpose. While we hope that the courts will, at least initially, pay some regard to the factors which have motivated us to recommend the authorization of damages by periodic payments, we are confident that the courts will, in time, develop their own criteria respecting the awarding of periodic damage awards, based upon the circumstances of the cases brought before them. We recommend therefore:

*RECOMMENDATION 6*

*That the legislation authorizing the awarding of damages by periodic payments contain neither guidelines for the exercise of the court's discretion nor a preamble as to the legislation's purpose.*

E. SECURITY

We consider the question of securing an award of periodic payments to be the single most important issue associated with the implementation of such a scheme.

Every lump sum judgment is insecure to some extent. Every successful plaintiff must hope that the defendant has sufficient insurance or other resources to satisfy the judgment and where necessary must attempt to enforce his judgment against the defendant. However, a plaintiff who receives a periodic payment award which is not secured is in an even more precarious position than is a plaintiff who receives a lump sum award. The latter can expect to receive payment in full shortly after obtaining final judgment, failing which he may take enforcement proceedings for the full amount of the lump sum judgment. The former has only a right to receive each periodic payment as it becomes due; if a payment is missed, he may take enforcement proceedings to collect that one missed instalment, but is powerless to take any action respecting future instalments. In our view, this result is unacceptable.

A possible solution would be to provide that, where one instalment of periodic payments is not paid, all future instalments are accelerated and become immediately due and payable, and therefore subject to immediate enforcement. While this would alleviate part of the problem referred to above, it falls short; the recipient of a judgment payable on a periodic basis would still have to live with the fear of a future default throughout the term of the payments.

In our view, it is usually essential that a judgment for damages by periodic payments be adequately secured for the protection of the plaintiff. We note that a number of American jurisdictions with legislation authorizing damages by periodic payments have reached the same conclusion.<sup>42</sup> Of course, we do recognize that a court may determine in a minority of cases that it is appropriate to waive the posting of security; for example, where the Government of Manitoba is the judgment creditor, security should not be necessary.<sup>43</sup> The Commission therefore recommends:

*RECOMMENDATION 7*

*That, unless the court determines otherwise, no award of damages by periodic payments be effective unless adequate security for the award is posted by or on behalf of the defendant.*

What then is acceptable security for periodic payments? The experience gained in structured settlements provides assistance in answering

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<sup>42</sup>Alaska Stat. §09.55.548(a) (1983); Cal. Civ. Proc. Code §667.7(a) (West 1980) (California); Fla. Stat. Ann. §768.51(3) (West 1986) (Florida); Ill. Ann. Stat. ch. 110, para. 2-1710, 2-1711 (Smith-Hurd Supp. 1986) (Illinois); N.H. Rev. Stat. Ann. §507-C:7 IV (1983) (New Hampshire); N.Y. Civ. Prac. L. & R. §5031(a), 5032, 5033 (New York); S.D. Codified Laws Ann. §21-3A-7 and 21-3A-8 (Supp. 1986) (South Dakota) - effective July 1, 1987; Utah Code Ann. §78-14-9.5(3) (Supp. 1986). See also *Model Periodic Payment of Judgments Act*, §7 and 8 (U.S.A. 1980).

<sup>43</sup>Subsection 19(4) of *The Proceedings Against the Crown Act*, C.C.S.M. c. P140, provides that:

19(4) If the order provides for the payment of money by way of damages or otherwise, or of costs, the certificate shall state the amount so payable; and the Minister of Finance shall, subject as hereinafter provided, pay out of the Consolidated Fund without further legislative authority than this subsection to the person entitled, or to his order, the amount appearing by the certificate to be due together with the interest, if any, lawfully due thereon.

this question. Structured settlements are commonly funded by annuities, though in the United States they are, on occasion, funded directly by casualty insurers, or by trusts or surety bonds. Annuities are favoured in Canada because of the favourable tax treatment which presently may be accorded to the monies received by the claimant. To achieve this favourable treatment, an annuity must be purchased by the defendant's casualty insurer from a life insurance company and the defendant's casualty insurer, not the claimant, must own the annuity. The claimant is the beneficiary of the annuity and may be the measuring life for the determination of the period over which payments are to be made.

We expect that annuities would be the primary, if not the exclusive, form of security used for awards by courts of damages by periodic payments. However, we recognize that other forms of security may be appropriate in some circumstances. A court could permit a defendant to create a trust of a specified sum out of which the periodic payments would be paid;<sup>44</sup> the trustee could be a trust company or perhaps a government agency such as the Public Trustee. While the claimant would thus be protected from the insolvency of the holder of the funds, he would presently be precluded from the favourable tax treatment that is the major attraction of periodic payments. The defendant might also file a surety bond with the court, as security for his failure to honour any future instalment of the periodic payments<sup>45</sup>. However, such security exposes the plaintiff to the risk of the financial failure of the issuer of the bond; it also fails to fulfil the present criteria of Revenue Canada for its advantageous tax treatment.

In our view, an annuity contract from a life insurance company is presently the best security for an award of damages by periodic payment. However, while we recognize that their disadvantages will result in limited use at this time, we would not exclude the use of trusts or surety bonds; they may well be appropriate in certain circumstances. Indeed, we would give the courts a wide discretion to consider alternative suggestions from counsel.

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<sup>44</sup>Maryland authorizes the creation of a trust to assure periodic payments: Md. Cts. & Jud. Proc. Code Ann. §3-2A-08(b) (1984).

<sup>45</sup>Alabama authorizes the periodic payment of a damage award to be secured by a surety bond: Ala. Code §6-5-486(4) (1975).

Even the use of annuities carries a risk to plaintiffs though. The fact that the defendant's casualty insurer is the owner of the annuity should pose no risk to the claimant where the annuity policy contains an irrevocable direction in favour of the claimant; the beneficiary will have the assurance that he will continue to be designated as the payee of the annuity payments, since the direction can neither be altered nor revoked without the consent of the beneficiary. The annuity funds would not be subject to the control of the defendant's casualty insurer or of the creditors of the casualty insurer and would not form part of the casualty insurer's estate in the event of a bankruptcy.<sup>46</sup>

However, the claimant has much to fear from the bankruptcy or insolvency of the life insurer which has issued the annuity contract.<sup>47</sup> If the life insurer fails, it would obviously not be in a position to make any further payments to the claimant; the claimant would be unable to look again to the defendant or his casualty insurer to continue the payments, since they presumably discharged their obligation with the original purchase of the annuity.

We have considered a number of possible responses to this problem. We might, of course, attempt to reconcile the life insurance industry to our proposed scheme of periodic payments. Life insurance companies might be required to hold monies received for the purchase of such annuities in trust, separate from the rest of their assets. Unfortunately, we anticipate that

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<sup>46</sup>*The Insurance Act*, C.C.S.M. c. I40, ss. 168(1) and 173(1). See also the *Bankruptcy Act*, R.S.C. 1970, c. B-3, s. 47(b).

<sup>47</sup>Although unlike casualty insurers, no federally licenced life insurer has ever become insolvent in Canada, there is certainly a risk of insolvency: J.P. Weir, *supra* n. 9, at 135, indicates that within an 18 month period several years ago, 4 of Canada's 260 federally registered and monitored casualty insurers became insolvent, while at 138, he indicates that at least one Canadian life insurance company has been reported to be in difficulty and failures of U.S. life insurance companies are not uncommon. According to R.F. McGlynn, "Structured Settlements", 1983 (unpublished paper in University of Manitoba Law Library) 2: "A number of [Ontario] High Court Judges have taken the position that they will not approve settlements involving the use of an annuity unless the issuing life insurer has a minimum of \$3 billion in assets."

this would raise the cost of these annuities to an unacceptable level by increasing the cost of administration and decreasing the scope for remunerative investment. Indeed, it might prompt life insurance companies to decline to write such annuity contracts.

The state of New York employs a solution which seeks to restrict the issuers of the annuities to the largest and most secure life insurance companies. Its periodic payments legislation requires its state Superintendent of Insurance to "establish rules and procedures for determining which insurers . . . are financially qualified to provide the security required under this article and to be designated as qualified insurers".<sup>48</sup> Security must be "in the form of an annuity contract, executed by a qualified insurer and approved by the superintendent of insurance . . . and approved by the court."<sup>49</sup> Manitoba's Superintendent of Insurance,<sup>50</sup> whose duties include the inspection and supervision of provincially incorporated life insurers, could presumably perform this role in this province or could seek to delegate it to the federal Superintendent of Insurance.<sup>51</sup>

Discussions have been held on this issue with Manitoba's Superintendent of Insurance who has, in turn, discussed it with his federal counterpart. They have advised us that they are seriously concerned about their ability to undertake this task. Their foremost concern is the difficulty of selecting appropriate criteria to predict the future stability of an insurance company. A company which is strong at the date of inspection

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<sup>48</sup>N. Y. Civ. Prac. L. & R. §5039 (McKinney Supp. 1986) (New York).

<sup>49</sup>N.Y. Civ. Prac. L. & R. §5032 (McKinney Supp. 1986) (New York).

<sup>50</sup>*The Insurance Act*, C.C.S.M. c. I40, s. 3(1).

<sup>51</sup>*The Insurance Act*, C.C.S.M. c. I40, s. 4(1), provides that,

. . . the Lieutenant Governor in Council may enter into an agreement or agreements with the Government of Canada under which, upon the terms and conditions therein contained, the Superintendent of Insurance (Canada) shall perform the duties imposed upon the superintendent under the sections of this Act dealing with the financial inspection and supervision of insurers.

may not be so in the future when, for example, its management changes. A secondary concern is the implied guarantee which might accompany the inclusion of a company's name on a list of qualified insurers and the possible negative connotation of the exclusion of a company's name. Finally, they are concerned about the resources which would have to be expended in order to establish criteria specifically for this purpose and to determine on an on-going basis the satisfaction of the criteria by each licensed life insurance company.

We remain convinced of the importance of ensuring that the issuer of an annuity securing a judgment ordering periodic payments is financially sound. However, in deference to the concerns of the provincial and federal Superintendents of Insurance, we propose that the decision of whether an annuity written by a given life insurance company provides the necessary security should be left to the discretion of the court. We recommend:

*RECOMMENDATION 8*

*That security be in the form of an annuity contract issued by a life insurer satisfactory to the court or in any other form of security satisfactory to the court.*

The Commission holds the opinion that the provision of security which is satisfactory to the court is crucial and that, should satisfactory security not be posted or be approved by the court, the court should vacate its award of periodic payments and substitute for that award a lump sum damage award. We recommend:

*RECOMMENDATION 9*

*That, if security is not posted or if the security posted is not satisfactory to the court, the court vacate those portions of the judgment in which periodic payments were awarded and substitute therefor a lump sum damage award.*

F. THE JUDGMENT

1. Itemization of Awards by Heads of Damage

The Supreme Court of Canada has directed that lower courts should itemize their awards, identifying the quantum of damages which is awarded for



each particular head of damage.<sup>52</sup> Itemized awards are considered preferable because they are more accurate than global awards and because they facilitate appellate review.<sup>53</sup> In addition, itemization of damage awards is necessary for the awarding of prejudgment interest, as interest is awarded for certain heads of damage and not others, and for the discounting of future damages.<sup>54</sup>

Itemized awards are even more important in a system where damages may be awarded by periodic payments. We consider it unlikely that periodic payments will be ordered for all damages in a particular case. It is more probable that damages for some heads (such as for loss of earnings to the date of the trial) will be awarded in a lump sum, while damages for other heads (such as for loss of earnings after the trial) will be awarded by periodic payments. Even where all damages are awarded by periodic payments, the payments for some heads may terminate on a future specified event or date, while the payments for other heads may continue for the duration of the plaintiff's life or to his estate. Some heads of damages would also be subject to the addition of prejudgment interest, while others would not.

We therefore consider it essential that damage awards be itemized in all judgments in which one or more heads of damage are compensated by periodic payments. In light of the direction by the Supreme Court of Canada, it may be unnecessary to embody such a requirement in legislation. However, since the Supreme Court's direction, trial courts have, on occasion, made global awards in personal injury cases as well as in *Fatal Accident Act* cases<sup>55</sup> and have

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<sup>52</sup>*Supra*, at 12 *et seq.*

<sup>53</sup>On the other hand, it has been argued that itemization of awards results in higher awards because of overlap between certain heads of damage. However, vigilance from the courts should eliminate this danger. It has also been argued that the evidence adduced at trials does not typically support with accuracy such specific categorization of damages. However, assessment of damages, whether itemized or global, always involves predictions of uncertain events and therefore always involves a measure of inaccuracy.

<sup>54</sup>*The Judgment Interest and Discount Act*, C.C.S.M., c. J8, ss. 4, 5 and 9.

<sup>55</sup>*Christensen v. Holohan* (1982), 17 Man. R. (2d) 443 (C.A.) where the court indicated that although separate assessment for pecuniary and  
(Footnote continued to page 92)

not been criticized by appellate courts for having done so. The Commission has therefore concluded that the legislation which authorizes courts to make awards of damages by periodic payments should also require that a court, in making such an award, must itemize each head of damage for which an award is to be made, the quantum of damages attributable to each head, and whether a lump sum, periodic payment, or both is awarded for each head of damage so identified. This type of requirement can be found in legislation in several American states.<sup>56</sup> We recommend:

*RECOMMENDATION 10*

*That, where a court orders that one or more heads of damage be paid by periodic payments, the judgment identify each head of damage for which an award is made and indicate whether the award is made in the form of a lump sum, periodic payment or both.*

We have earlier in this Report described in some detail the various heads of damage under which damages for personal injury and death are presently assessed. We have considered adding specificity to our recommendation that judgments itemize heads of damage by incorporating those heads into legislative form. However, to require the courts to itemize awards according to these heads of damage might hamper the continuing development of the common law. Thus, while the Commission holds the view that the legislation should require itemization of awards, it does not believe that the legislation should codify the specific heads for which the courts must itemize damages. Rather, the Commission believes that, in the interests of flexibility, the courts should be permitted to choose the categories in which to itemize damages according to the circumstances of each case. We recommend:

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(Footnote continued from page 91)  
non-pecuniary losses allows for meaningful review, it does not mean that global awards are to be avoided in all circumstances; *Johnston Estate v. Sjolander* (1985), 34 Man. R. (2d) 203 (Q.B.), where global approach was used to assess pecuniary loss.

<sup>56</sup>Alaska Stat. §09.55.548(a) (1983); Fla. Stat. Ann. §768.48(1) (West 1986) (Florida); N.H. Rev. Stat. §507-C:7 III (1983) (New Hampshire); Ill. Ann. Stat. ch. 110, para. 2-1706(a) (Smith-Hurd Supp. 1986) (Illinois); N.Y. Civ. Prac. L. & R. §5031 (McKinney Supp. 1986) (New York); S.D. Codified Laws Ann. §21-3A-3 (Supp. 1986) (South Dakota); Del. Code Ann. tit. 18, §6864 (Supp. 1984) (Delaware). Also see the *Model Periodic Payment of Judgments Act*, §4 (U.S.A. 1980).

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*RECOMMENDATION 11*

*That the legislation authorizing damages by periodic payments not specify the heads of damage under which a court must itemize damages.*

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2. Termination of Award

The ultimate termination of periodic payments at some point in the future is inherent in their award. The Commission has considered whether the choice of termination date or event should be left to be specified by the court in its judgment or whether the legislation authorizing the periodic payment of damage awards should specify that the awards for certain heads of damage terminate on the death of the recipient or some other specific date. The Commission has addressed its attention to whether such a measure would compensate a plaintiff more accurately by providing him with compensation over the duration of his loss while providing a greater degree of fairness to a defendant by ensuring that the plaintiff's next-of-kin will not inherit a windfall. In the discussion which follows, the heads of damage which pertain to personal injury and *Fatal Accidents Act* actions are examined separately to determine whether it would be advantageous for any or all of them to terminate at a fixed, specific date.

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(a) Personal injury actions

(i) future care costs

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The period over which a plaintiff requires compensation for future care costs depends on the seriousness and permanence of his injury. Where a plaintiff has suffered a permanent, serious injury, the period over which he will require compensation will likely be his post-accident lifetime. Where a plaintiff has suffered a temporary injury, he will likely require compensation over a period which is shorter than his entire post-accident lifetime. The infinite variety of injuries and the ways in which they can impact on a plaintiff mean that in any given case it is impossible to predict the exact duration over which compensation will be needed. However, in all cases, when

a plaintiff dies, his care costs end. Therefore, it is appropriate that damages which compensate for these costs terminate not later than at the plaintiff's death. A plaintiff's estate would not be short-changed should compensation for care costs terminate on the plaintiff's death because care expenses also end on his death. Legislation in several American states indicates support for this approach.<sup>57</sup>

(ii) future loss of earnings

Damages which compensate for loss of future earnings or profit under our current lump sum system are calculated on the basis of the plaintiff's pre-accident work-life expectancy. If the plaintiff had not been injured and worked over his predicted work-life, his dependants would have benefitted during the entire pre-accident work-life period. Indeed, if the victim died as a result of the defendant's actions, his dependants could bring an action for damages pursuant to *The Fatal Accidents Act*<sup>58</sup> for their loss of dependency, based on his pre-accident work-life expectancy. If, instead, damages for loss of future earnings were assessed on the basis of a reduced post-accident life expectancy, the plaintiff's dependants would be short-changed and barred from recovering damages to compensate for their loss of dependency for the period between the deceased's actual date of death and his pre-accident work-life expectancy.<sup>59</sup> Consistency with recovery under *The Fatal Accidents Act* and restoration of plaintiffs and their dependants to the positions they would have occupied but for the accident requires that the calculation of damages for future loss of earnings in a personal injury

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<sup>57</sup>N. H. Rev. Stat. Ann. §507-C:7 IV (1983) (New Hampshire); N. Y. Civ. Prac. L. & R. §5035 (McKinney Supp. 1986) (New York); S.D. Codified Laws Ann. §21-3A-10 (Supp. 1986) (South Dakota) - effective July 1, 1987; Del. Code Ann. tit. 18, §6864(b) and (c) (Supp. 1984) (Delaware); Utah Code Ann. §78-14-9.5(6) (Supp. 1986). See also *Model Periodic Payment of Judgments Act*, §11 (U.S.A. 1980). However, payments continue or are commuted and paid to the plaintiff's estate or beneficiaries in Alabama and Florida: Ala. Code §6-5-486(3) (1975); Fla. Stat. Ann. §768.51(2) (West 1986).

<sup>58</sup>*The Fatal Accidents Act*, C.C.S.M. c. F50.

<sup>59</sup>*The Fatal Accidents Act*, C.C.S.M. c. F50, s. 3(4), except in the circumstances set out in s. 3(3) of the Act.

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action be based on the plaintiff's pre-accident work-life expectancy, and that where a plaintiff's early death is a result of the accident caused by the defendant, damages attributable to the loss of earnings should not terminate at the death but should continue to the plaintiff's estate.<sup>60</sup>

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Should a distinction be made between cases in which a plaintiff's early death results from the accident and cases in which the plaintiff's early death results from an unrelated cause? Arguably, periodic payments which compensate for loss of earnings should terminate on the plaintiff's actual death where the death is unrelated to the accident. In this way, a plaintiff and his dependants would be most closely restored to their pre-accident positions; neither the deceased's estate nor his dependants would have benefitted by his earnings to the end of his predicted pre-accident work-life where he died prematurely from a cause unrelated to the accident. Thus, if damages for loss of earnings were to continue to the plaintiff's estate notwithstanding that death was unrelated to the defendant's actions, then his estate would be overcompensated and the defendant would be prejudiced to the same extent.

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American legislation often provides that periodic payments for heads of certain damages terminate on the plaintiff's death; however, none distinguishes between deaths caused by the defendant's actions and those unrelated to his actions. Similarly, while the Pearson Commission recommended that periodic payments which compensate for earnings loss terminate at the plaintiff's death, it did not recommend a differentiation between cases involving death caused by the defendant's actions and others.<sup>61</sup>

<sup>60</sup>The following American states take this approach: Ala. Code §6-5-486(3) (1975) (Alabama); N. H. Rev. Stat. Ann. §507-C:7 IV (1983) (New Hampshire); Del. Code Ann. tit. 18, §6864(b) & (c) (Supp. 1984) (Delaware); Fla. Stat. Ann. §768.51(2) (West 1986) (Florida); Cal. Civ. Proc. Code §667.7 (c) (West 1980) (California); Utah Code Ann. §78-14-9.5 (6) (Supp. 1986); N. Y. Civ. Prac. L. & R. §5035 (McKinney Supp. 1986) (New York); S.D. Codified Laws Ann. §21-3A-10 (Supp. 1986) (South Dakota) - effective July 1, 1987; Ill. Ann. Stat. ch. 110, para. 2-1713 (Smith-Hurd Supp. 1986) (Illinois).

<sup>61</sup>*Pearson Commission Report*, *supra* n. 3, at 129. The report recommended that a plaintiff's dependants should be permitted to bring an action similar to a *Fatal Accidents Act* action to recover damages for the plaintiff's

(Footnote continued to page 96)

Furthermore, although consideration of the cause of a plaintiff's death might be consistent with compensation principles, it would require a second court hearing to determine the cause of death. Although the extent of such a hearing would likely be limited, nevertheless, even such a limited review would involve extra time and expense in litigation. Indeed, it might be seen as unnecessarily cruel to the victim's family. As discussed previously, we cannot support such a review.

Rather than favour defendants by providing that periodic payments which compensate for loss of earnings terminate on the death of the plaintiff, on balance, we believe that the equities should lie with plaintiffs. It is preferable that damages which compensate for earnings loss continue after the plaintiff's death to his estate for the balance of his pre-accident work-life expectancy, without regard to the cause of death.

(iii) non-pecuniary losses

If damages for non-pecuniary losses were to be paid periodically, it would be most appropriate that they be payable over the period of the loss. As with care costs, the period of loss over which non-pecuniary losses are incurred varies significantly, being dependent upon the injury sustained and plaintiff involved. For a permanent, serious injury, the period of loss would most likely be the post-accident lifetime of the victim. For a less serious injury, the period of loss might be shorter. In any event, non-pecuniary losses end on a plaintiff's death. Therefore, it is appropriate that damages for non-pecuniary losses terminate not later than at the plaintiff's death. A plaintiff's estate would not be shortchanged because non-pecuniary losses are not losses of the estate.

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(Footnote continued from page 95)  
earnings attributable to the years which the deceased, but for his injury and subsequent death, would have worked. Their recommendation represents a radical departure from the usual rule that only one action can be brought for the same injury and, if implemented, would result in additional costs, court backlog, and a lack of finality. See also British Columbia, Automobile Accident Compensation Committee, *supra* n. 15.

(b) Fatal Accidents Act actions

(i) pecuniary damages

Where pecuniary damages are awarded on a periodic basis, it is appropriate that they are awarded to the dependants over the period during which they would have received dependency benefits, had the accident not occurred. Where the dependant is the surviving spouse, this period would likely extend until the end of the spouses' pre-accident joint life expectancy. Where the dependant is a minor dependent child, the period of dependency would likely extend until he reached the age of majority, or perhaps longer.

If a dependant dies prior to his expected period of dependency, should the periodic payments which are attributable to that person's loss of dependency cease? Consistency with the principle of restoring the plaintiff to the position he would have occupied but for the tort means that the plaintiff should be compensated over the entire period of dependency but that payments to that dependant should cease on that person's death.

(ii) non-pecuniary damages

Where damages for non-pecuniary losses are awarded on a periodic basis, it will usually be appropriate that payment be made over the period of loss. Where the beneficiary is a surviving spouse, this period would likely be the period of the spouses' joint life expectancy. Where the beneficiary is a minor, this period would usually extend to the age of majority, but may extend beyond. Where a beneficiary is a child who is beyond the age of majority, the period of loss would likely be short and difficult to predict. The variations in the appropriate periods of payment do not indicate a common date at which payments should terminate.

(c) Conclusion

Although the foregoing is a useful guide, the period of loss and therefore the period over which damages should be payable will differ for each

head of damage and each individual case. While it is appropriate in some cases that the payment of damages for certain heads of damage cease on the death of the plaintiff, in other cases this may not be so. We do not recommend that the legislation mandate either that periodic payments are to continue to the plaintiff's estate or are to cease on the plaintiff's death. Such decisions should be left to the court and should be addressed in each judgment, by setting out the period over which the periodic payments for each head of damage are to be payable. Depending upon the head of damage and the particular facts of the case, a judgment may call for payments to end after a fixed number of years, upon the death of the plaintiff, upon the later of a fixed number of years and the death of the plaintiff, or some other formula appropriate to the situation. We recommend:

*RECOMMENDATION 12*

*That a judgment which awards damages for one or more heads of damages by periodic payments specify the period over which the payments for each such head of damage is to be made.*

*RECOMMENDATION 13*

*That, where a plaintiff dies prior to the termination date specified by a court for a head of damage in a judgment, the remaining periodic payments continue to be paid to the estate of the plaintiff until the applicable termination date.*

3. Other Matters Which Should Be Itemized in the Judgment

Obviously, where a court makes a periodic payment of damage award, some further itemization in the judgment is necessary. Clarity as to the manner of payment of the award requires that the court specify other matters, such as the amount of each periodic payment, the interval between each payment, the amount of any future lump sums ordered for each head of damage, the date of payment of those lump sums, and the recipient of each periodic payment and lump sum. A requirement for such specificity can be found in some American legislation.<sup>62</sup>

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<sup>62</sup>Cal. Civ. Proc. Code §667.7(b)(1) (West 1980) (California), Fla. Stat. Ann. §768.51(5) (West 1986) (Florida), Kan. Stat. Ann. §60-2609(a) (1983) (Kansas), and Utah Code Ann. §78-14-9.5(4) (Supp. 1986) all require the judgment to specify the dollar amount of the periodic payments, the interval between payments, and the number of payments or the period of time over which the

(Footnote continued to page 99)



The Commission believes that the above-mentioned specificity is necessary in every judgment awarding periodic payments. The Commission recommends:

*RECOMMENDATION 14*

*That, where a court orders that one or more heads of damage be paid by periodic payments, the judgment shall, in respect of each head of damage for which periodic payments are awarded, state:*

- (a) the amount of each periodic payment;*
- (b) the interval between each periodic payment; and*
- (c) the recipient or recipients of each periodic payment.*

*RECOMMENDATION 15*

*That, where the court orders that one or more lump sums be paid in the future, the court specify the head of damage in respect of which each lump sum is awarded, the amount of each lump sum, and the date upon which each lump sum is to be paid.*

G. VARIATION OF AWARD FOR INFLATION

Should damages which are payable on a periodic basis be increased over time by a rate which takes inflation into account?

In awarding lump sum damages, the courts account for inflation in assessing their awards. The courts acknowledge that, if inflation is not taken into account, the financial position of plaintiffs would become progressively worse due to the erosion of the purchasing power of the award. As stated in the *Andrews* case:

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(Footnote continued from page 98)  
payments are to be made. In New York, the annuity contract is to provide for payment of annual payments, and unless otherwise stated, the annual sum is to be paid in equal monthly installments: N.Y. Civ. Prac. L. & R. §5031(e) (McKinney Supp. 1986) (New York).

One thing is abundantly clear: present . . . rates should not be used with no allowance for future inflation. To do so would be patently unfair to the plaintiff . . . . [I]nflation . . . may . . . be predicted to operate over the lifetime of the plaintiff to increase the cost of care for him at the level accepted by the Court, and to erode the value of the sum provided . . . .<sup>63</sup>

Fairness to plaintiffs and consistency with the lump sum damage award system dictates that inflation also be considered in assessing periodic awards.

Having so concluded, we must consider the manner in which an inflation rate is to be determined. There are two options.

First, the courts could be given the task of determining an inflation rate based on the evidence presented at trial, on a case-by-case basis. This approach is taken by two American states which have legislation providing that periodic payments increase by a rate to be fixed by the court.<sup>64</sup> Although, logically, predictions of long-term inflation should remain fairly constant over short periods of time, the evidence adduced in different cases by different economists undoubtedly would result in different predictions of inflation from case to case. This option would also result in a considerable amount of time being taken in trials to hear evidence from economists on current and future inflation levels. As Deniset, J. stated:

This means that during a trial of an action for damages involving very serious injuries, much time is now taken with economists and

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<sup>63</sup>*Andrews, supra* n. 41, at 255. We recognize that there are several reasons for ignoring inflation. First, the increased cost of accounting for inflation would result in a benefit to plaintiffs at a potentially unmanageable financial burden to defendants; the plaintiff's financial position would be protected against future inflation, while the defendant's financial position would progressively deteriorate as his obligations to make larger payments became increasingly onerous. Secondly, full protection of plaintiffs against inflation places them in a better position than other members of society; while plaintiffs would be protected against future inflation, other individuals in society would continue to face the financial insecurities which accompany changes in the cost of living.

<sup>64</sup>Del. Code Ann. tit. 18, §6864(b) (Supp. 1984) (Delaware) (the increase is said to be in respect of interest on the unpaid balance); Utah Code Ann. §78-14-9.5(3) (Supp. 1986).

actuaries offered by both sides. I do not think the courts are well equipped to assess their evidence and the time and expense of such trials has been enormously increased.<sup>65</sup>

A desire to eliminate the need to introduce such evidence was a key consideration in the introduction of a legislated discount rate for future lump sum damages in Manitoba.

The alternative is to have the legislation which authorizes the periodic payment of damages specify an inflation rate to be used in calculating periodic payment awards. This would eliminate the time and expense associated with adducing evidence respecting inflation. In addition, a legislated rate would result in uniformity between periodic awards, as the same inflation rate would be used to assess all periodic payment damage awards. Furthermore, such legislation would introduce consistency between awards payable on a periodic basis and lump sum awards: for both, the inflation rate would be legislated.

On balance, the Commission is of the view that it is more appropriate that the legislation which implements the periodic payment scheme also provide for an inflation rate to be used in calculating periodic payment awards. We recommend:

*RECOMMENDATION 16*

*That all judgments awarding damages by periodic payments provide that the amount of the periodic payments shall increase over time in recognition of inflation at a rate specified in the legislation.*

We must consider next whether the legislated rate should be a fixed rate or a floating rate. Floating rates, while providing the best protection against inflation for a plaintiff by mirroring inflation on a continual basis, have been criticized by the insurance industry as unfeasible: annuities in such circumstances would be too expensive and monthly payments too low to be useful.<sup>66</sup> The additional expense of such annuities arises because insurers

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<sup>65</sup>*Tomlinson v. Wurtz* (1982), 16 Man. R. (2d) 145 at 164 (Q.B.).

<sup>66</sup>*Pearson Commission Report, supra n. 3, at 130.*

cannot accurately predict increases in inflation and therefore would have to charge larger premiums to cover their increased risks. Indeed, it has been suggested that the risks involved in providing an annuity which is closely indexed to inflation is so substantial as to make it prohibitive for insurers to meet the uncertain costs without government assistance.<sup>67</sup> While the greater year-to-year accuracy of a floating index may be desirable, the practical problems associated with such a rate appear insurmountable.

While a fixed rate would not provide the year-to-year accuracy of a floating rate, it could nonetheless provide long-term accuracy. Although we have become conditioned to the high and volatile rates of inflation prevalent from the mid 1970s to the early 1980s, it must be remembered that these were aberrations. Inflation over the last 25 or 50 years has, in fact, averaged in the range of 3 per cent to 6 per cent. The use of a rate reflective of long-term inflation should produce fair results over time to the recipients of periodic payments. In addition, greater certainty would be achieved for defendants and their insurers: their liability would be certain from the date of judgment, as the rate of increase of the periodic payments would be known when judgment is rendered and would not vary over the currency of the judgment. Thus, insurers could accurately calculate future increases in periodic payments and the premiums necessary to cover their risks. New York and Sweden each has legislation pursuant to which periodic payments increase according to a fixed rate.<sup>68</sup> We recommend:

*RECOMMENDATION 17*

*That the rate of inflation specified in the legislation reflect the long-term rate of inflation in Canada and not be varied on account of short-term changes in inflation.*

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<sup>67</sup>See *Pearson Commission Report, ibid.*; G. Bale, "Encouraging the Hearse Horse Not to Snicker: A Tort Fund Providing Variable Periodic Payments for Pecuniary Losses" (1983) *Issues Tort L.* 91.

<sup>68</sup>N.Y. Civ. Prac. L. & R. §5031 (e) (McKinney Supp. 1986) (New York), where the legislation specifies that there is to be a 4% added payment based upon that portion of the damages remaining unpaid; in Sweden, adjustments to periodic payments are made annually and may not exceed 5% per annum: J.G. Fleming, "The Impact of Inflation on Tort Compensation" (1978), 26 *Am. J. Comp. Law* 51.

This leaves us with the final question of how the legislated long-term inflation rate should be determined. There are several indices upon which we may draw. The first, the Consumer Price Index, is a well-known index of price change in the Canadian economy; it is a "measure of the percentage change in the cost of purchasing a constant 'basket' of goods and services, representative of the purchases made by a particular population group in a specified time period."<sup>69</sup> Although not a true measure of the overall rate of inflation, nevertheless, this index has been extensively used as a measure of economic change throughout the Canadian economy. For example, changes in the Consumer Price Index have been used to adjust wage rates in many labour contracts, old age security pensions, unemployment insurance benefits, many contractual or regulatory arrangements such as insurance coverages and alimony and child support payments, and, since 1973, it has been used to adjust the personal income tax exemption levels. The index is published by Statistics Canada on a monthly basis, has specific release dates and is final on publication.<sup>70</sup> Although it has been criticized by some as far from perfect for the enormous variety of purposes for which it is used,<sup>71</sup> it has also been described as "probably the best inflation index in the world."<sup>72</sup> The use of similar indices for the determination of increases in periodic payments has been recommended by several Commonwealth studies<sup>73</sup> and by

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<sup>69</sup>Statistics Canada, *Your guide to the Consumer Price Index*, at 2.

<sup>70</sup>The Consumer Price Index is reported by Statistics Canada monthly in *The Consumer Price Index* (publication 62-001).

<sup>71</sup>See P. Myers, "Finding flaws in the CPI as the 'right' measure" (1980), vol. 22, No. 10, Exec. 44 and L.A. Kelly and P. Kumar, *Recent Price Trends in Canada and Their Implications* (1973) 2, citing R.N.A. Loyns, *CPI and IPI as Measures of Recent Price Change* (1972).

<sup>72</sup>J.C. Francis, *Investments: Analysis and Management* (1981) at 226.

<sup>73</sup>*Woodhouse Report*, *supra* n. 10, which recommended that periodic benefits be geared on an automatic basis to quarterly changes in the consumer price index and 1% increase per year for general increases in living standard. Also see New Zealand, Royal Commission of Inquiry, *supra* n. 4, (Footnote continued to page 104)

legislation in Alaska.<sup>74</sup>

A second option, the Implicit Price Index, Gross National Expenditure, is a measure of changes in the prices of all final goods and services produced in the economy or imported into the country. It is based on the Gross National Product.<sup>75</sup> Recently, Statistics Canada replaced this index with a similar measure of economic change called the Implicit Price Index, Gross Domestic Product.<sup>76</sup> The index is published on a quarterly basis by Statistics Canada and is subject to revision after publication.<sup>77</sup> While each of these indices provides a more comprehensive measure of price changes than does the Consumer Price Index, they are viewed as less relevant in measuring changes in the cost of living of individuals, since the additional factors which are measured, including price trends in the government and business sectors of the

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(Footnote continued from page 103)  
and British Columbia, Automobile Accident Compensation Committee, *supra* n. 15 (Proposed Amendment to the Insurance (Motor Vehicle) Act, s. 241A(4)), which recommended that periodic payments be adjusted for inflation based on the Consumer Price Index for the previous 12 months.

<sup>74</sup>Alaska Stat. §09.55.548(a)(1983) provides that the amount of the periodic payments shall be adjusted annually in accordance with the consumer price index in the community where the plaintiff lives.

<sup>75</sup>The Gross National Product measures income received (from production) by resident factors of production and is calculated by excluding interest and other types of investment income paid abroad and by including similar income flows received from abroad.

<sup>76</sup>This index is based on the Gross Domestic Product which measures production taking place within Canada; it is considered to be a more appropriate measure of economic development taking place within the country than the Gross National Product.

<sup>77</sup>The Implicit Price Index, Gross Domestic Product is reported quarterly by Statistics Canada in *National Income and Expenditure Accounts* (publication 13-001).

economy<sup>78</sup> and "export and wholesale prices", have little direct application to the average Canadian.<sup>79</sup>

The Average Weekly Earnings Industrial Composite figure is a third measure of economic change. This figure reflects changes in average weekly earnings of all sectors of employment except agriculture, government, defence, hospitals, schools, religion, household services, fishing, hunting and trapping. The Industrial Composite classification was changed in 1983 to the Average Weekly Earnings Industrial Aggregate Index, which provides a fuller coverage of the economy, both by industry and size of employer.<sup>80</sup> The Pearson Commission recommended a similar index as the basis for increases in periodic damage awards.<sup>81</sup>

Changes in government bond interest rates could also be used as a measure of economic change.<sup>82</sup> The British Insurance Association and the American Model Periodic Payment of Judgments Act recommended this option.<sup>83</sup>

It is true that no price or economic index provides a complete picture of the overall rate of inflation. As such, an analysis of inflation by necessity must involve an analysis of the trends of a number of indices.

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<sup>78</sup>L.A. Kelly and P. Kumar, *supra* n. 71, at 3.

<sup>79</sup>p. Myers, *supra* n. 71, at 48.

<sup>80</sup>The Industrial Aggregate figures are reported by Statistics Canada monthly in *Employment, Earnings, and Hours* (publication 72-002).

<sup>81</sup>*Pearson Commission Report*, *supra* n. 3, which recommended that periodic payments be revalued annually in line with movement of average earnings.

<sup>82</sup>The Bank of Canada publishes detailed statistics respecting government bonds and Treasury bills monthly in *Bank of Canada Review*.

<sup>83</sup>*Pearson Commission Report*, *supra* n. 3; *Model Periodic Payment of Judgments Act*, §7 (U.S.A. 1980), provides for periodic payments to be adjusted on a yearly basis according to the rate of discount per year for the last issue of one year U.S. treasury bills in the year immediately preceding the year of adjustment.

However, given these limitations, we are persuaded by the widespread use of the Consumer Price Index throughout many facets of the Canadian economy that it is likely the best single available indicator of inflation in Canada. As such, we recommend its use in determining a legislated rate for use in assessing periodic damage awards. There are several forms of Consumer Price Index: some measure consumer price change over time within a particular city, while others relate to individual items or groupings of items which might serve particular needs. In addition, seasonally adjusted data provide information for certain analytical purposes. We favour the broadest form of the Consumer Price Index, called the *Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)*, as this index ensures the widest application to all parties, notwithstanding differences in residence, spending patterns or seasonal factors. The legislated rate should be based upon the long-term trend of the Consumer Price Index and should not be sensitive to short-term swings. However, we hesitate to suggest a specific figure and would prefer that the legislated number be arrived at in consultation with the insurance industry. The legislated inflation factor must do justice to plaintiffs, but it must also be commercially acceptable to the issuers of annuities.

Accordingly, we recommend:

*RECOMMENDATION 18*

*That the specified rate of inflation be set in consultation with the life insurance industry based upon the long-term trend of the Consumer Price Index of Canada, All-items (Not Seasonally Adjusted).*

H. COMMUTATION AFTER TRIAL

The Commission considered whether a party who receives a periodic payment award at trial should be allowed thereafter to seek to have those periodic payments commuted into a lump sum, either at his own initiative or at the discretion of the court. A plaintiff may wish to do this, for example, where he believes that the security for the payments is at risk or where he has a business opportunity which requires a lump sum investment. Commutation might also be desirable where actual inflation rates exceed the legislated indexing rate and the plaintiff feels that a lump sum would provide him with an investment opportunity which would better safeguard his future real



income. The availability of commutation has been recommended by several law reform studies,<sup>84</sup> and is permitted in limited circumstances in one American state.<sup>85</sup> However, while there are instances such as these where commutation seems beneficial to a particular plaintiff, there are several reasons why commutation may be detrimental.

First, the commuted value of an annuity will likely be considerably less than a lump sum award would have been. An uninformed claimant may seriously impair his long-term financial position through a improvident commutation.

Secondly, if commutation required an application to court, it would effectively result in a type of review, as it would be necessary for a court to hear evidence to determine whether commutation should be allowed in a given situation. As previously indicated, the Commission is not prepared to recommend any form of review at this time.

Thirdly, if a court makes an award of damages payable by periodic payments and the legislation allows for commutation to a lump sum at a future time, the casualty insurer would want or be required to purchase a commutable annuity. Given the increased flexibility, such an annuity would be more costly; the same premium would buy a smaller annuity or, at the time of commutation, a principal-reducing penalty would be charged.

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<sup>84</sup>*Woodhouse Report*, *supra* n. 10, which recommended that some commutation should be allowed when clearly in the best interests of the plaintiff; *Pearson Commission Report*, *supra* n. 3, which recommended that a damage award recipient should be entitled to apply to court for commutation and the court should have discretionary power to grant or refuse an application, using the same criteria that it would have used at trial in deciding on whether to award a lump sum or periodic payments; New Zealand, Royal Commission of Inquiry, *supra* n. 4, which recommended that a court should have the discretion to commute all or part of periodic payments to a capital sum where the interests or needs of the recipient warrant it.

<sup>85</sup>N.Y. Civ. Prac. L. & R. §5036 (McKinney Supp. 1986) (New York), which allows a judgment creditor to apply to have an award for damages commuted by establishing that continued payment of periodic payments will impose a hardship; the court must find that (1) unanticipated and substantial medical or other needs arose which warrant a lump sum, (2) a lump sum would not impose an unreasonable financial burden on the judgment debtor or debtors, (3) a lump sum will accommodate further medical and other needs of the judgment creditor, and (4) a lump sum would further the interests of justice.

Fourthly, commutability would presently have a negative effect on the tax treatment of a periodic payment award. According to Revenue Canada's current administrative practice, structured settlements which are payable on a periodic basis, not by way of a lump sum, are afforded favourable tax treatment. Currently, most existing structured settlements contain a non-commutability clause. In the Commission's opinion it appears that the existence of such a clause has likely had a persuasive influence on Revenue Canada's current treatment of periodic payments made pursuant to a structured settlement. If an award or settlement could be commuted subsequent to trial, we fear that Revenue Canada could interpret the ownership of such an award or settlement to be in the plaintiff and, as a result, that it would likely not extend its favourable tax treatment to a commutable damage award; this would make the interest portion of periodic payments taxable in the plaintiff's hands and eliminate one of the major benefits of periodic payments.

Finally, if a plaintiff were permitted to assign a portion of his periodic payments, then he would be in as good or better a position as a person who is not a tort victim; he could borrow a lump sum for investment purposes on the security of the periodic payment award. Therefore, should assignment of payments be allowed, it would not be necessary for a plaintiff to be able to commute his award in order to obtain a lump sum.

On consideration of the advantages and disadvantages of commutation, the Commission believes that a plaintiff should not be allowed to commute periodic payments to a lump sum subsequent to trial. Therefore, we recommend:

*RECOMMENDATION 19*

*That the commutation of periodic payments to a lump sum not be permitted.*

I. ASSIGNMENT OF BENEFITS

The Commission considered whether a plaintiff ought to have the right to assign periodic payments, using the guaranteed stream of payments as security on which to borrow a lump sum.

The question is not answered easily. On the one hand, a right to assign periodic payments may jeopardize one of the benefits likely intended by a court when ordering that damages be paid in that form: the elimination or reduction of the danger of squandering or mismanagement of a lump sum award. This benefit is lost if the plaintiff can effectively convert his guaranteed income stream into a lump sum by assigning it. On the other hand, it seems appropriate that accident victims and fatal accident beneficiaries should be no more restricted in the way in which they handle their money than are other members of society.

Two American states permit the assignment of damages received in periodic payments where the assignment is to secure the payment of alimony, maintenance or child support, to pay for the costs of products, services or accommodations provided or to be provided by the assignee for medical or other health care, or to pay legal fees incurred in securing the judgment.<sup>86</sup> The Ontario Supreme Court Committee on Tort Compensation also preferred limited assignability.<sup>87</sup>

On balance, the Commission is of the view that, while we should strive to have the position of plaintiffs approximate that of the rest of society to the extent possible, the ability of plaintiffs to assign periodic benefits should be limited in two ways. First, with respect to damages for loss of earnings, a plaintiff should be subject to the same rights and restrictions as is a wage earner with respect to the assignment of his right to receive wages.<sup>88</sup> Secondly, the Commission holds the opinion that a

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<sup>86</sup>Ill. Ann. Stat. ch. 110, para. 2-1715 (Smith-Hurd Supp. 1986) (Illinois) and N.Y. Civ. Prac. L & R. §5038 (McKinney Supp. 1986) (New York). Delaware and New Mexico prohibit the assignment of a "claim for compensation"; Del. Code Ann. tit. 18, §6863 (Supp. 1984); N.M. Stat. Ann. §41-5-12 (1978). See also *Model Periodic Payment of Judgments Act*, §13 (U.S.A. 1980).

<sup>87</sup>Ontario, Supreme Court Committee on Tort Compensation, *Report* (1980) opposed assignment, except for the provision of health care and limited other purposes, such as the payment of legal fees.

<sup>88</sup>Restrictions to a person's right to assign his right to receive wages are set out in *The Law of Property Act*, C.C.S.M. c. L90, s. 32, and include the  
(Footnote continued to page 110)

plaintiff should be restricted from assigning damages for future care costs except where the assignment is made to the providers of such care to the plaintiff, whether the care involves the provision of products, services or accommodation. In this way, the Commission believes that a plaintiff would be restored to a position similar to that which he would have occupied but for the accident. At the same time a plaintiff would be prevented from dissipating that portion of his award which, if depleted, would be most likely to result in him becoming destitute and dependent on the public purse for support. Therefore, we recommend:

*RECOMMENDATION 20*

*That an assignment or agreement to assign a plaintiff's right to periodic payments for future care costs be void, except as security for the cost of products, services or accommodation provided or to be provided by the assignee for the plaintiff's care.*

*RECOMMENDATION 21*

*That The Law of Property Act be amended so that the restrictions therein which pertain to assignments of wages are also made applicable to periodic payments for loss of wages or earnings.*

J. EXEMPTION FROM GARNISHMENT

Section 5 of *The Garnishment Act*<sup>89</sup> provides that service of garnishment process on a garnishee binds any debt due or accruing due, other than wages, at the time of service, from the garnishee to the defendant or judgment debtor, and binds all wages that become due or payable from the

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(Footnote continued from page 109)  
following: (1) except for an assignment to secure past or future indebtedness for necessities, an assignment of wages to be earned in the future is invalid against the employer of the person making it, unless accepted in writing by the employer; (2) an assignment by a cohabiting spouse of future wages to be earned by that spouse is invalid without the written consent of the other spouse; (3) an assignment of future wages is valid only where the money lent, advanced or paid in exchange exceeds 95% of the wages assigned; (4) an assignment of a greater portion of wages than is liable for seizure or attachment under *The Garnishment Act* is invalid and of no effect insofar as the amount of the exemption allowed under *The Garnishment Act*.

<sup>89</sup>*The Garnishment Act*, C.C.S.M. c. G20, s. 5.

garnishee to the judgment debtor within 1 month, commencing on the day after service. Sections 6 to 9 of the Act then set out limitations respecting the extent to which wages may be garnished.<sup>90</sup>

Where a damage award is payable on a periodic basis, each future payment would be a debt which would be due to a plaintiff; therefore, it could be garnished by a party to whom the plaintiff owes a debt. Since we anticipate that often damages to compensate for loss of wages will be awarded in the form of periodic payments, the Commission felt it necessary to consider the appropriateness of limiting the extent to which periodic payments which compensate for these losses may be garnished. Upon consideration, the Commission has concluded that a plaintiff would be more closely restored to the position which he would have occupied but for the accident if attachment or seizure of that portion of periodic awards which are attributable to compensation for loss of wages were limited in the same manner as are attachment and seizure of wages pursuant to *The Garnishment Act*. This approach is taken in one American state as well as by the American Model Periodic Payment of Judgments Act.<sup>91</sup>

The Commission therefore recommends:

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<sup>90</sup>*The Garnishment Act*, C.C.S.M. c. G20, ss. 6-9, limits the garnishment of wages. Seventy per cent of wages due or accruing due by an employer to any employee is exempt from seizure or attachment under a garnishing order issued out of any court; the amount of the exemption is to be not less than \$250 per month for a person without dependants and \$350 for a person with one or more dependants; a judge may order that no exemption be allowed where a debt is contracted for board or room or both, and in the opinion of the court, the exemption is not necessary for the support and maintenance of the debtor, or his family or dependants; the exemption is to be \$250 per month where the wages of a person are seized or attached by virtue of a court order for alimony or maintenance, a duly executed separation agreement or *The Family Maintenance Act* or *The Wives' and Children's Maintenance Act*. Creditors and debtors may apply to increase or decrease the exemptions.

<sup>91</sup>Ill. Ann. Stat. ch. 110, para. 2-1716 (Smith-Hurd Supp. 1986) (Illinois); the statute then goes on and exempts all future damages except to the extent that they may be assigned; *Model Periodic Payment of Judgments Act*, §14 (U.S.A. 1980).

*RECOMMENDATION 22*

*That periodic payments for loss of wages or earnings be exempt from seizure or attachment under a garnishing order to the extent that wages are exempt under any applicable law.*

## CHAPTER 5

### FURTHER RECOMMENDATIONS FOR REFORM

In this Chapter, we consider other issues and legislative amendments involved in the implementation of court-awarded periodic payments.

#### A. METHOD OF IMPLEMENTATION OF PERIODIC PAYMENTS

Having recommended the enactment of legislation authorizing the Manitoba courts to award damages payable on a periodic basis, and having made recommendations concerning the details of such a system, it becomes necessary to consider the manner in which our recommendations should be implemented.

There are three options: implementation within *The Queen's Bench Act*, within *The Queen's Bench Rules* or by a separate statute. We favour implementation in a separate statute, as our proposals involve not simply amendments but substantive changes to the common law. We recommend:

#### *RECOMMENDATION 23*

*That the recommendations for the authorization of judgments awarding periodic payments be implemented by way of a separate statute, similar to that set out in Appendix A.*

#### B. INCOME TAX ACT

One of the major advantages that we see in structured settlements and in court-awarded periodic payments arises from their tax treatment. A plaintiff who receives a lump sum damage award is liable for income tax on the interest earned on the invested lump sum and only certain portions of the award are grossed-up to provide a plaintiff with the necessary funds to cover this future tax liability. However, damages which are received in a periodic form pursuant to structured settlements and, presumably, pursuant to damages which are awarded by a court in a periodic form are treated more favourably. When the requirements of Revenue Canada are met, a plaintiff is not liable for tax with respect to the periodic payments (including the portion of those

payments representing the interest earned on the lump sum premium by the life insurance company issuing the annuity). Unfortunately, this favourable tax treatment rests upon a precarious foundation. The *Income Tax Act* of Canada does not prescribe this tax treatment. Rather, it is available only by Revenue Canada's present administrative policy.

That this policy could change at any time is a matter of very real concern to us. We therefore recommend as an important measure in the implementation of a periodic payment of damages system:

*RECOMMENDATION 24*

*That the Government of Manitoba request the federal government to amend the Income Tax Act so that the favourable tax treatment presently afforded to periodic payments is entrenched in the Income Tax Act.*

Although we make no recommendations on the matter, amendment to the *Income Tax Act* to give effect to the foregoing may also be an apt time to consider suggestions that the taxation of interest earned on lump sum damage awards be reviewed. In the *Andrews* case, Dickson, J. said:

The exact tax burden is extremely difficult to predict, as the rate and coverage of taxes swing with the political winds . . . . The Legislature might well consider a more generous income tax treatment of cases where a fund is established by judicial decision and the sole purpose of the fund is to provide treatment or care of an accident victim.<sup>1</sup>

Tax reform was also suggested by an Ontario organization in response to the Ontario Task Force on Insurance. Their report stated:

The income tax laws should be amended to remove the taxation of investment income on lump sum payments for future care and treatment

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<sup>1</sup>*Andrews v. Grand and Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 at 475 (S.C.C.). In addition, see K. Lockhart and A. Johnson, "More millions awarded by Fitzpatrick, J. - with explanations", *Can. Lawyer*, Sept. 1986, 30 at 32, quoting Fitzpatrick J. of the Ontario Supreme Court: "We need relief from income tax in the work-outs [of personal injury awards]. What's involved from Revenue Canada's point of view is peanuts anyway."



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and thus make such awards consistent with structured settlements. We agree with the Task Force that the present taxation of investment income on such lump sums is "nonsensical". Given federal responsibility for the *Income Tax Act*, we appreciate that implementation may be difficult but we urge the Government of Ontario to advocate such reform to their federal colleagues.<sup>2</sup>

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C. APPLICATION TO THE CROWN

Should the scheme authorizing courts to award damages payable on a periodic basis be applicable to the provincial Crown? In addressing this question, we need only consider whether the scheme should apply to the Crown as defendant; the instance of the Crown as a plaintiff does not arise as, *ipso facto*, it cannot sustain personal or fatal injury.<sup>3</sup>

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The provincial Crown is liable in tort for personal injury or death both directly<sup>4</sup> and vicariously<sup>5</sup> for the acts and omissions of its officers and agents. This liability is limited by various common law and statutory exemptions. The rationale for exemptions and other special privileges which are extended to the Crown are primarily historical but also include modern

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<sup>2</sup>Fair Action in Insurance Reform, *A Report in Response to the Ontario Task Force on Insurance*, at 29.

<sup>3</sup>Personal or fatal injury may result to an officer or servant of the Crown in the context of his employment with the government. In this instance, the employee could collect damages through the workers' compensation scheme or by electing to proceed directly against the tortfeasor. But, in either event, the claim is not made in the capacity of the Crown. The Crown's claim in a case where personal injury or death is sustained by an employee is limited to an *action per quod servitium amisit* for loss of services; no Crown claim for injury or death arises.

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<sup>4</sup>*The Proceedings Against the Crown Act*, C.C.S.M. c. P140, s. 5(1)(b)-(d): the Crown is directly liable in tort, as if it were a person, for breaches in its capacity as an employer, for breaches attaching to its ownership of property, and under any statute, regulation or by-law.

<sup>5</sup>*The Proceedings Against the Crown Act*, C.C.S.M. c. P140, s. 5(1)(a).

needs and values or "public policy". As examples, the effective operation of the public administration and the greater public good have been cited as reasons for limitations on Crown liability.<sup>6</sup>

In determining whether the Crown should be bound by periodic payment legislation, we have considered both the legal reasons and the policy concerns which govern the exemption of the Crown from tortious liability and which otherwise afford special status to the Crown. We have concluded that there are no compelling reasons of public purpose to exclude the Crown from the application of periodic payment legislation. In fact, a periodic payment scheme would offer to the Crown the same benefits it would offer to a private defendant. Accordingly, we are of the view that the legislation which authorizes courts to award damages by periodic payments should be made applicable to the Crown. Given section 15 of *The Interpretation Act*,<sup>7</sup> a specific provision should be included in the legislation expressly binding the provincial Crown.

We recommend:

*RECOMMENDATION 25*

*That the legislation which authorizes courts to award damages by way of periodic payment contain an express provision making the legislation applicable to the provincial Crown.*

D. THE JUDGMENT INTEREST AND DISCOUNT ACT

Section 9 of *The Judgment Interest and Discount Act* provides that, where a portion of a judgment represents compensation for future damages, the

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<sup>6</sup>John M. Law, "Part I: Where's The Tort? Municipal Liability from an *Ultra Vires* Aspect", *The Manitoba Bar Newsletter: Headnotes and Footnotes*, October, 1986, Volume XVII, No. 8, 5.

<sup>7</sup>*The Interpretation Act*, C.C.S.M. c. I80, s. 15 reads:

No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner unless it is expressly stated therein that Her Majesty is bound thereby.

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value of the future damages is to be discounted by 3 per cent.<sup>8</sup> The 3 per cent is deemed to be "the percentage difference between the long-term rate of return on safe, but productive, investments and the long-term rate of general price inflation."

The section was enacted in September 1986 and, of course, assumes that all damage awards which compensate for future damages will be lump sum awards. However, the implementation of legislation authorizing courts to make periodic payment of damage awards would change this. Although section 9 is appropriate for lump sum awards which compensate for future losses or the portion of an award which is a lump sum and which compensates future losses, it is inappropriate for those portions of awards which are payable by way of periodic payments and which compensate for future losses. For these portions of an award, it is appropriate that damages be indexed to account for future inflation rather than discounted.

Therefore, implementation of a scheme of periodic payment of damage awards necessitates an amendment to section 9 of *The Judgment Interest and Discount Act* so that periodic payments of damages which compensate future losses will not be discounted. We recommend:

*RECOMMENDATION 26*

*That section 9 of The Judgment Interest and Discount Act be amended to ensure that only damages for future losses payable on a lump sum basis are discounted, and that section 9 not apply to damages for future losses payable on a periodic basis.*

E. TRANSITIONAL PROVISION

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A final matter which we must consider is the necessity of a transition provision respecting implementation of an Act authorizing periodic payment of damages for personal injury and fatal injury. In our view, it would be unreasonable to alter the rights and obligations of litigants once their actions have commenced. We therefore recommend:

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<sup>8</sup>*The Judgment Interest and Discount Act*, C.C.S.M. c. J8, s. 9.

*RECOMMENDATION 27*

*That the legislation authorizing the courts to award damages payable on a periodic basis apply to all actions for personal injury or death which are commenced following its proclamation.*

Section 10 of *The Interpretation Act* states: "The provisions of an enactment do not affect litigation pending at the time of its enactment unless it is so expressly stated therein."<sup>9</sup> It is our opinion that section 10 is adequate and that there is no necessity to enact further transition provisions.

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<sup>9</sup>*The Interpretation Act*, C.C.S.M. 180, s. 10.

## CHAPTER 6

### LIST OF RECOMMENDATIONS

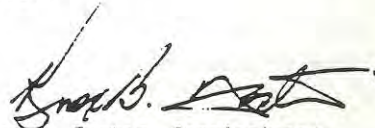
The recommendations of the Commission in this Report are as follows:

1. That legislation be enacted to authorize the courts to award damages for personal injury or death by way of periodic payments. (p. 63)
2. That there be no restrictions on the types of cases in which courts are permitted to grant damages by periodic payments for personal injury or death. (p. 77)
3. That periodic payments be permitted for any and all heads of damage for personal injury or death. (p. 79)
4. That the courts be permitted to make an award for each head of damage payable entirely by lump sum, entirely by periodic payments or in part by periodic payments and in part by lump sum. (p. 79)
5. That the decision to order a periodic payment of damage award be in the discretion of the court. (p. 83)
6. That the legislation authorizing the awarding of damages by periodic payments contain neither guidelines for the exercise of the court's discretion nor a preamble as to the legislation's purpose. (p. 85)
7. That, unless the court determines otherwise, no award of damages by periodic payments be effective unless adequate security for the award is posted by or on behalf of the defendant. (p. 86)
8. That security be in the form of an annuity contract issued by a life insurer satisfactory to the court or in any other form of security satisfactory to the court. (p. 90)
9. That, if security is not posted or if the security posted is not satisfactory to the court, the court vacate those portions of the judgment in which periodic payments were awarded and substitute therefor a lump sum damage award (p. 90)
10. That, where a court orders that one or more heads of damage be paid by periodic payments, the judgment identify each head of damage for which an award is made and indicate whether the award is made in the form of a lump sum, periodic payment or both. (p. 92)

11. That the legislation authorizing damages by periodic payments not specify the heads of damage under which a court must itemize damages. (p. 93)
12. That a judgment which awards damages for one or more heads of damages by periodic payments specify the period over which the payments for each such head of damage is to be made. (p. 98)
13. That, where a plaintiff dies prior to the termination date specified by a court for a head of damage in a judgment, the remaining periodic payments continue to be paid to the estate of the plaintiff until the applicable termination date. (p. 98)
14. That, where a court orders that one or more heads of damage be paid by periodic payments, the judgment shall, in respect of each head of damage for which periodic payments are awarded, state:
  - (a) the amount of each periodic payment;
  - (b) the interval between each periodic payment; and
  - (c) the recipient or recipients of each periodic payment. (p. 99)
15. That, where the court orders that one or more lump sums be paid in the future, the court specify the head of damage in respect of which each lump sum is awarded, the amount of each lump sum, and the date upon which each lump sum is to be paid. (p. 99)
16. That all judgments awarding damages by periodic payments provide that the amount of the periodic payments shall increase over time in recognition of inflation at a rate specified in the legislation. (p. 101)
17. That the rate of inflation specified in the legislation reflect the long-term rate of inflation in Canada and not be varied on account of short-term changes in inflation. (p. 102)
18. That the specified rate of inflation be set in consultation with the life insurance industry based upon the long-term trend of the *Consumer Price Index of Canada, All-items (Not Seasonally Adjusted)*. (p. 106)
19. That the commutation of periodic payments to a lump sum not be permitted. (p. 108)
20. That an assignment or agreement to assign a plaintiff's right to periodic payments for future care costs be void, except as security for the cost of products, services or accommodation provided or to be provided by the assignee for the plaintiff's care. (p. 110)
21. That *The Law of Property Act* be amended so that the restrictions therein which pertain to assignments of wages are also made applicable to periodic payments for loss of wages or earnings. (p. 110)

22. That periodic payments for loss of wages or earnings be exempt from seizure or attachment under a garnishing order to the extent that wages are exempt under any applicable law. (p. 112)
23. That the recommendations for the authorization of judgments awarding periodic payments be implemented by way of a separate statute, similar to that set out in Appendix A. (p. 113)
24. That the Government of Manitoba request the federal government to amend the *Income Tax Act* so that the favourable tax treatment presently afforded to periodic payments is entrenched in the *Income Tax Act*. (p. 114)
25. That the legislation which authorizes courts to award damages by way of periodic payment contain an express provision making the legislation applicable to the provincial Crown. (116)
26. That section 9 of *The Judgment Interest and Discount Act* be amended to ensure that only damages for future losses payable on a lump sum basis are discounted, and that section 9 not apply to damages for future losses payable on a periodic basis. (p. 117)
27. That the legislation authorizing the courts to award damages payable on a periodic basis apply to all actions for personal injury or death which are commenced following its proclamation. (p. 118)

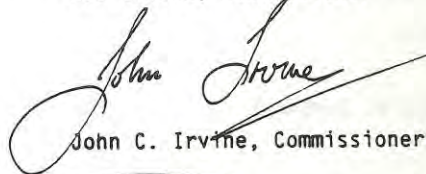
This is a Report pursuant to section 5(3) of *The Law Reform Commission Act*, signed this 31st day of March 1987.



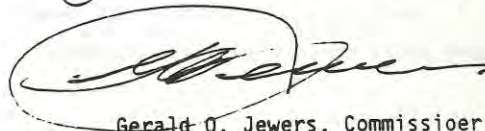
Knox B. Foster, Commissioner



Lee Gibson, Commissioner



John C. Irvine, Commissioner



Gerald O. Jewers, Commissioer

APPENDIX A

THE PERIODIC PAYMENT OF DAMAGES ACT

Her Majesty, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions

1 In this Act

"judgment creditor" means the person who is entitled to receive payment of, or to enforce, a judgment;

"judgment debtor" means the person obligated to make payment under any judgment or against whom the same may be enforced;

"periodic payments" means the payment of money to a judgment creditor at such intervals and in such equal or unequal amounts as are ordered by the court, and includes lump sum amounts ordered by the court to be paid at a time or times in the future.

Periodic payments permitted

2 In a proceeding where damages are claimed for personal injuries, for the death of a person, or pursuant to The Fatal Accidents Act, the court may, in its discretion, order that damages be paid in whole or in part by periodic payments.

Contents of judgment

3 Where a court orders that damages be paid by periodic payments, the judgment shall conform with the following:



COMMENTARY

Section 1 defines terms which are used frequently throughout the draft Act.

The definitions of "judgment creditor" and "judgment debtor" are modelled on the definition of those terms in section 4 of The Queen's Bench Rules.

The definition of "periodic payments" includes payments which might otherwise be thought of as lump sums. For example, a court might award a "lump sum" of \$10,000 to be paid every 5 years for the purpose of purchasing a new vehicle for the judgment creditor. Although the interval between payments is greater than the monthly interval which we expect will be most common, they are nonetheless periodic payments.

Section 2 implements Recommendation 1 and authorizes courts to award damages on a periodic basis. In accordance with Recommendations 2 to 6, the decision whether to award damages in that fashion is in the discretion of the court; no pre-conditions or limitations are specified.

- (a) the judgment shall identify each head of damage for which an award is to be made and shall state whether a lump sum or periodic payment is awarded for each head of damage so identified;
- (b) the judgment shall, in respect of each head of damage for which a lump sum is awarded, state the amount of such lump sum;
- (c) the judgment shall, in respect of each head of damage for which periodic payments are awarded, state:
  - (i) the amount of each periodic payment;
  - (ii) the intervals between each periodic payment;
  - (iii) the date or the event upon which the periodic payments are to cease; and
  - (iv) the recipient or recipients of each periodic payment.

#### Security required

4(1) Unless the court orders otherwise, every judgment which orders that damages be paid by periodic payments is conditional upon the judgment debtor filing with the court, within 30 days of the judgment being rendered or such other time fixed by the court, security to assure the payment of the full amount of the judgment satisfactory to the court.

#### Form of security

4(2) Such security shall be in the form of an annuity contract issued by a life insurer satisfactory to the court or in any other form of security satisfactory to the court.

#### Effect of posting security

5(1) Upon security being posted and approved in accordance with section 4, the judgment is satisfied and the judgment debtor by whom or on whose behalf the security is posted is discharged.

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Section 3 identifies specific matters with which a judgment containing an award of damages by periodic payments must deal. All heads of damage for which an award is made must be itemized (Recommendations 10 and 11). Where a lump sum is awarded for a head of damage so itemized, the amount of the lump sum must be stated. Where periodic payments are awarded for a head of damage so itemized, the judgment must name the recipient of those payments (which should usually be the plaintiff), the amount of each payment and the frequency of the payments (Recommendations 14 and 15). The date or event upon which the periodic payments for the particular head of damage terminate must also be specified (Recommendation 12). This is of particular significance in light of section 6 of the draft Act.

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Subsection 4(1) implements Recommendation 7. It is anticipated that the courts may wish to make rules respecting the procedure to be followed in the hearing on the adequacy of the security offered by the judgment debtor.

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Subsection 4(2) implements Recommendations 8.

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Section 5 deals with the consequences of posting or failing to post adequate security. The judgment debtor discharges his obligation to the judgment creditor by posting security approved by the court; the judgment creditor thereafter looks to the issuer of the security. However, if adequate security is not posted, the court must replace the periodic payments portion of the judgment with a lump sum award (Recommendation 9).

#### Effect of not posting security

5(2) Where security is not posted and approved in accordance with section 4, the court shall, upon the request of any party, vacate those portions of the judgment in which periodic payments were awarded and substitute therefor a lump sum award or awards.

#### Effect of death

6 Where a judgment creditor dies prior to the termination date specified for a head of damage in a judgment in accordance with clause 3(c)(iii), the remaining periodic payments for the head of damage shall continue to be paid to the estate of the judgment creditor until the applicable termination date.

#### Provision for inflation

7 A court which delivers a judgment providing for the periodic payment of damages shall, in calculating the amount of the periodic payments, make provision for the annual increase of such payments by \_\_\_ per cent, which is hereby deemed to be the rate of long-term general price inflation.

#### Commutation prohibited

8 Except as provided in subsection 5(2), no award for periodic payment of damages shall be commuted into lump sum.

#### Garnishment limited

9 Periodic payments for damages for loss of future earnings are exempt from garnishment, attachment, execution and any other process or claim to the extent that wages or earnings are exempt under any applicable law.

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Pursuant to subsection 3(c) of the draft Act, the court must specify the date or event upon which the periodic payments for a given head of damages terminates. If the judgment creditor dies prior to the specified date or event, the periodic payments continue in accordance with the judgment to the estate of the judgment creditor (Recommendation 13). Thus, if a court orders that payments of damages for a head of damage (such as, loss of future earnings) be made for 10 years and the judgment creditor dies after 8 years, the payments will continue to his estate for a further 2 years. If, on the other hand, a court orders that payments of damages for a head of damage (such as, future care costs) be made for the life of the judgment creditor, those payments will cease on his death.

Section 7 implements Recommendations 16 and 17. In accordance with Recommendation 18, we have not specified the rate of inflation to be employed. We prefer that this be determined following consultation with the life insurance industry.

Section 8 implements Recommendation 19.

Section 9 implements Recommendation 22.

#### Assignment of periodic payments

10 Any assignment of or agreement to assign any right to periodic payments identified in a judgment as being in respect of future care costs is void and unenforceable except as to amounts assigned to a provider of care for the cost of products, services or accommodations provided or to be provided by the assignee for such care.

#### Crown bound

11 The Crown is bound by this Act.

#### Reference in Continuing Consolidation

12 This Act may be referred to as chapter P32.3 of the Continuing Consolidation of the Statutes of Manitoba.

#### Commencement of Act

13 This Act comes into force on a day fixed by proclamation.

Section 10 implements Recommendation 20.

Section 11 implements Recommendation 25.

Note: The following statutes also require consequential amendment:

**Law of Property Act Amended**

1 Subsection 32(6) of The Law of Property Act, being chapter L90 of the Revised Statutes is amended by adding thereto immediately after the word "salary" the following words:

and includes periodic payments in respect of loss of future income or loss of earning capacity ordered or adjudged payable under The Periodic Payment of Damages Act.

**Judgment Interest and Discount Act Amended**

1 The Judgment Interest and Discount Act, being chapter J8 of the Continuing Consolidation of the Statutes of Manitoba, is amended by adding immediately after section 9 the following section:

9.1 Section 9 does not apply to compensation for future damages awarded as periodic payments pursuant to The Periodic Payment of Damages Act.



Certain other statutes must also be amended in order to give effect to some recommendations. The suggested amendment to *The Law of Property Act* implements Recommendation 21. The suggested amendment to *The Judgment Interest and Discount Act* implements Recommendation 26.

APPENDIX B

LIST OF PERSONS WHO RESPONDED TO OUR WORKING PAPER OR  
WITH WHOM THE COMMISSION CONSULTED

Ms. J. Bartley-Reynes, Rehabilitation Counsellor, Manitoba Division of the Canadian Paraplegics Association

Mr. W. Bedard, Assistant Bodily Injury Claims Manager, Manitoba Public Insurance Corporation

Mr. J.J. Camp, Lawyer (Vancouver, British Columbia)

Mr. D. Campbell, Manulife Insurance Co. and associate of Baxter Structured Settlements

Mr. B. Carlson, Claims Supervisor, Manitoba Public Insurance Corporation

Dr. R. Cooke, Compensation Committee, Manitoba Health Services Commission

Mr. T.G. Hague, Compensation Committee, Manitoba Health Services Commission

Ms. C. Hall, Lawyer (Winnipeg, Manitoba)

Hon. Mr. Justice A.C. Hamilton, Court of Queen's Bench

Mr. R.H. Harvey, Compensation Committee, Manitoba Health Services Commission

Mr. B. Heindl, Administrative Assistant, Manitoba Division of the Canadian Paraplegics Association

Mrs. S.D. Jackson, Supervisor, Ancillary Programmes, Manitoba Health Services Commission

Mr. J. Lane, Executive Director, Manitoba Division of the Canadian Paraplegics Association

Mr. M. Lloyd, Compensation Committee, Manitoba Health Services Commission

Mr. E. McGill, Superintendent of Insurance, Province of Manitoba

Mr. Wm. McMillan, Great West Life Assurance Company

Mr. R. McNicol, Lawyer (Winnipeg, Manitoba)

Hon. Mr. Justice P.S. Morse, Court of Queen's Bench

Mr. O. Olson, Rehabilitation Counsellor, Manitoba Division of the Canadian Paraplegics Association

Mr. D. Poapst, Actuary, Great West Life Assurance Co.

Mr. W. Saranchuk, Senior Legal Counsel, Manitoba Public Insurance Corporation

Mr. A. Schryvers, Rehabilitation Counsellor, Manitoba Division of the Canadian Paraplegics Association

Mr. N. Scott, Vice-President, Canadian Indemnity Company

Mr. M.R. Silvester, Compensation Committee, Manitoba Health Services Commission

Prof. F. Steel, Faculty of Law, University of Manitoba

Ms. V. Thompson, Supervisor of Services, Manitoba Division of the Canadian Paraplegics Association

Mr. B. Wasicuna, Rehabilitation Counsellor, Manitoba Division of the Canadian Paraplegics Association

Mr. E. Wilkie, Claims Manager, Canadian Indemnity Company

Mr. S. Winfield, Senior Counsel, Insurance Corporation of British Columbia