

Working Group
on
Medical Negligence and Periodic Payments

Report (Module 1)



AN ARD CHÚIRT
BAILE ÁTHA CLIATH 7



THE HIGH COURT
DUBLIN 7

MR. JUSTICE JOHN QUIRKE

29th October 2010

The Hon. Mr. Justice Nicholas Kearns
President of the High Court
Four Courts
Dublin 7

Dear President,

Re: Working Group on Medical Negligence and Periodic Payments

I am pleased to present to you the Report of the Working Group on Medical Negligence and Periodic Payments in respect of the first Module of its deliberations.

The Report concerns Periodic Payment Orders and the Group is hopeful that it will be of assistance to you.

Yours sincerely,

Handwritten signature of John Quirke in blue ink.

John Quirke

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29th October 2010

Chapter 1: Introduction

Establishment and terms of reference of the Working Group

On the 18th February 2010, the President of the High Court established a Working Group on Medical Negligence Litigation and Periodic Payments, with the following terms of reference:

1. To examine the present system within the courts for the management of claims for damages arising out of alleged medical negligence and to identify any shortcomings within that system.
2. To make such recommendations to the President as may be necessary in order to improve the system and eliminate the shortcomings.
3. To consider whether certain categories of damages for catastrophic injuries can or should be awarded by way of Periodic Payments Orders and to make such recommendations to the President as may be necessary.
4. To provide the President with such draft Legislation, Regulations, and Rules of Court as may be necessary to give effect to the Working Group's recommendations.

The President appointed Mr. Justice John Quirke, Judge of the High Court, as chairperson of the Working Group (referred to henceforth in this report as "the Group").

The other members of the Group, in alphabetical order, are as follows:

Mr. Michael Boylan, Partner, Augustus Cullen Law Solicitors
Mr. Ciaran Breen, Director, State Claims Agency
Mr. John Casey, CEO, Motor Insurance Bureau of Ireland
Mr. Patrick Hanratty, Senior Counsel
Ms. Justice Mary Irvine, Judge of the High Court
Mr. James Kehoe, Fellow, Society of Actuaries in Ireland
Mr. Mike Kemp, CEO, Irish Insurance Federation
Mr. John Kenny, Department of Justice
Mr. Justice Vivian Lavan, Judge of the High Court
Mr. Denis McCullough, Senior Counsel
Mr. Ciaran O'Cuinn, Special Adviser, Minister for Justice and Law Reform
Ms. Gráinne O'Loughlen, Registrar, Personal Injuries, Courts Service
Ms. Eunice O'Raw, Head of Litigation, Health Service Executive
Mr. Ciaran O'Rorke, Partner, Hayes solicitors
Mr. James Reilly, Patient Focus
Ms. Máire Reidy B.L., Judicial Fellow
Mr. Noel Rubotham, Courts Service
Mr. Brendan Savage B.L., Special Assistant

Ms. Marie Coady is Secretary to the Group.

Working method

The Group has met on nine occasions.

At an early stage in its meetings the Group decided to adopt a modular approach to its Terms of Reference and to give immediate attention to and produce a first report to the President on periodic payments (Module 1), before proceeding to consider and produce a second report on the management of medical negligence litigation, (Module 2).

Consultations

In embarking on its consideration of Module 1, the Group engaged in a consultation exercise with persons and bodies with particular interests in claims for personal injuries. That process was intended to reflect and include the respective perspectives of plaintiffs, defendants and those who provide care and treatment to the injured persons.

The following persons and bodies were amongst those who provided the Group with detailed and helpful written submissions:

The Health Service Executive

The National Rehabilitation Hospital

The Medical Protection Society

Irish Hospital Consultants Association

Acquired Brain Injury Ireland

The Independent Hospital Association of Ireland

The Irish Wheelchair Association

Mr. Noel Doherty, former Registrar, Wards of Court

The Personal Injuries Assessment Board

Ms. Dorothea Dowling, Chairperson, Motor Insurance Advisory Board

Mr. Colm McCarthy, Lecturer, UCD School of Economics

The Irish Insurance Federation

The Self-Insured Taskforce

Irish Public Bodies Mutual Insurances Ltd.

The Law Society of Ireland

The Bar Council

The Central Statistics Office

Investigation

The Group examined personal injury compensation systems within the European Union and looked with particular interest at systems within common law countries worldwide including Australia, the U.S.A. and Canada.

It noted that many of the questions which the Group is required to consider have very recently been addressed by the relevant authorities in England, where new, innovative measures have been adopted to deal with difficulties which are virtually identical to those identified by the Group. Those measures have now been successfully implemented in the U.K. by legislative and other means.

The “U.K. experience”

The Group, therefore, decided to pay particular attention to and seek to learn from the “U.K. experience”¹ while seeking not to lose sight of and to correspondingly learn from similar experiences in other jurisdictions.

The Group sought and obtained wide-ranging information and received considerable assistance through consultation and videoconferencing with persons and bodies concerned with personal injuries litigation within the U.K..

The Group is indebted to a number of persons, including experienced senior legal and other officers within the U.K. health sector and members of the U.K. legal profession who assisted the Group in ascertaining and understanding their considerable experience of the operation of U.K. legislation on periodical payments orders², both from plaintiffs’ and defendants’ perspectives.

The Group expresses its grateful appreciation in particular to the following persons from the U.K. for the commitment of time and effort which they gave in assisting the Group and for the detailed personal presentations and supporting documentation which the Group received from them:

1. Ms. Lisa Jordan, a partner in the firm of Irwin Mitchell Solicitors (and head of that firm’s Medical Law and Patients Rights team), who described the periodical payments orders regime in that jurisdiction from a plaintiff’s perspective;
2. Mr. Matthew McGrath, a partner in Beachcrofts Solicitors, who specialises in claims involving catastrophic injury healthcare and clinical risk;
3. Mr. Steven Walker, Chief Executive of the U.K.’s National Health Service Litigation Authority (NHSLA) who presented views, from a defendant’s perspective, on periodical payments orders, including the U.K funding arrangements for periodical payments;
4. Mr. Paul Ryman-Tubb A.C.I.I., Claims Technical Manager, U.K. Motor Insurer’s Bureau.

Structure of the report

Chapter 2 of the report contains an Executive Summary of the Group’s recommendations for Module 1.

Chapter 3 examines in detail the current form of the damages award and its deficiencies, considers, with reference to experience in this jurisdiction and elsewhere, the merits of an alternative approach, (in particular the concept of periodic payments orders), and sets out the significant conclusions of the Group arising from its deliberations.

Chapter 4 considers in detail the legislative and other measures which will be required in order to enable periodic payments orders to become available within this jurisdiction.

Chapter 5 considers the merits of providing for interim and provisional awards of damages.

The Appendix contains a proposal for a scheme of Bill which would give effect to the detailed recommendations of the Group.

¹ References to “the UK” in the Report are intended to refer to the jurisdictions in the United Kingdom to which the Damages Act 1996, as amended, applies, Scotland not being subject to that legislation.

² The Group prefers the term “periodic payments” to “periodical payments”. For the sake of consistency, and unless citing the English legislation in which the latter term appears, the former term is employed throughout this report, to include instances where reference is being made to the English regime.

Chapter 2: Executive Summary

1. The Group believes that the present method of awarding damages for future pecuniary loss in this jurisdiction - the single lump sum award - is inadequate and inappropriate in cases where a plaintiff has been catastrophically incapacitated in the long term or permanently and will require ongoing care and medical treatment in the future.

The Group believes that seriously injured plaintiffs should not be deprived of a right to claim within the courts that damages which are intended to pay for the cost of their future care (and their future treatment and medical and assistive aids and appliances) should be paid periodically and not by way of a single lump sum.

The Group also believes that defendants, facing such substantial claims should be entitled to claim within the courts that damages which are intended to pay for the cost of future care, treatment and medical equipment should, in the interests of justice, be paid periodically at the approximate time when the care, treatment and equipment is actually required.

The Group also believes that a statutory right to make such claims would not interfere in any way with the existing rights of capacitated³ adults to reach agreement and to settle claims for damages in such manner as they may deem appropriate.

2. The Group's principal recommendations are as follows:

(i) Legislation should be enacted to empower the courts, as an alternative to lump sum awards of damages, to make consensual and non-consensual periodic payments orders to compensate injured victims in cases of catastrophic injury where long term permanent care will be required, for the costs of (a) future treatment (b) future care and (c) the future provision of medical and assistive aids and appliances;

The orders should apply to the whole or part of an award in any case where, having regard to -

- (a) the nature of the injuries in respect of which the award is being made and
- (b) the circumstances of the person to whom the award is being made,

the court considers it appropriate in the best interests of that person that such an order should be made, provided that the parties have been given an opportunity by the court to make submissions and be heard in full on the relevant issues;

(ii) The courts should be empowered to make periodic payments orders to compensate for future loss of earnings only with the consent of all of the parties to the relevant claim;

(iii) Periodic payments orders may only be made in circumstances where the court is satisfied that continuity of payment under the periodic payments order is reasonably secure;

(iv) The State, through the agency of the NTMA, should be empowered to provide injured victims with the necessary security for periodic payments either by the provision of annuities to insurers and others or in such other manner as may be appropriate;

³ i.e. without intellectual impairment

Alternatively, consideration should be given to the introduction of a statutory scheme whereby payments made under periodic payments orders will be statutorily protected and fully guaranteed;

(v) Provision within the legislation must be made for adequate and appropriate indexation of periodic payments as an essential prerequisite for their introduction as an appropriate form of compensation.

In particular, the Group recommends the introduction of earnings and costs-related indices which will allow periodic payments to be index-linked to the levels of earnings of treatment and care personnel and to changes in costs of medical and assistive aids and appliances. This will ensure that plaintiffs will be able to afford the cost of treatment and care into the future.

The Group further believes that the competence and independent status of the Central Statistics Office uniquely qualify it to compile and maintain the indices required;

(vi) Variation of periodic payments orders should be permitted where it has been determined that the plaintiff's condition will seriously deteriorate or significantly improve and where this future contingency has been factored into the original periodic payments order. It should also be permissible, at the time of making a periodic payments order only, to provide in that order for "stepped payments", viz. the adjustment, on the attainment by a plaintiff of a particular age or ages, of the periodic payments, as indexed, to reflect an increase or decrease in living or care expenses;

(vii) A person entitled to receive periodic payments under a court order should not be entitled to assign or charge that right without the approval of the court which made the order. Such approval should not be grantable unless the court is satisfied that special circumstances make the giving of the charge or assignment necessary;

(viii) Periodic payments orders made to compensate for the costs of a plaintiff's care, treatment and medical and assistive aids and appliances should not extend to dependants of a plaintiff after the plaintiff's death. This should not preclude the parties from reaching agreement to make ongoing payments to dependants for specified periods after a plaintiff's death;

(ix) Legislation providing full and comprehensive exemption from income tax for such payments should also be enacted in order to give effect to the proper and equitable operation of periodic payments orders;

(x) For the purpose of determining liability for costs, in cases where a periodic payments order is made, the operation of the lodgment and tender arrangements and of section 17 of the Civil Liability and Courts Act 2004 should be restricted to those heads of loss not covered by the periodic payments order. Insofar as heads of loss covered by the periodic payments order are concerned, the court should, when determining the issue of liability for costs, be required to take into account all open offers (i.e. offers not qualified as being made without prejudice) and "Calderbank" offers⁴ made on behalf of the parties, after commencement of the proceedings, to effect a compromise of the proceedings;

(xi) Provision should be made, by way of amendment to the Bankruptcy Act 1988, expressly precluding the Official Assignee or trustee in bankruptcy from seeking payments under a periodic payments order for the benefit of the creditors if the person entitled to receive such payments becomes bankrupt;

⁴ For an explanation of a "Calderbank-type offer" see footnote on page 39.

(xii) Provision should be made in primary legislation confirming and clarifying the availability within this jurisdiction of interim and provisional awards of damages.

(xiii) The Department of Health and Children should take any steps necessary to avoid double recovery by beneficiaries of the medical card, long term illness schemes and any other similar benefits or allowances which might otherwise arise from the introduction of periodic payments orders.

Chapter 3: The form of the damages award in personal injuries actions: deficiencies and solutions

The current approach to awarding damages

Damages awarded to compensate for personal injuries are intended to “ put the party who has been injured... in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation...”.⁵

The application of this principle - called *restitutio in integrum* - can present practical difficulties.

At present damages in each case are assessed at a certain point in time and a lump sum is awarded which is intended to compensate for all past and future losses. Those losses include pecuniary loss (called “special damages”) and non-pecuniary loss (called “general damages”).

Special damages include loss of earnings and other material loss like the cost of care, medication, treatment, and medical and assistive aids and appliances. By their nature, past losses are generally verifiable by production of vouchers, statements and other documentary evidence.

Future special damages are compensated by lump sum awards intended to represent the capital value of the future loss.

General damages are intended to compensate for pain, suffering, distress and loss of amenity of life.⁶ Their assessment can give rise to particular difficulties. In one case, in which the plaintiff had suffered injuries causing paralysis, O’Higgins CJ described the task of assessing general damages for pain and suffering as “assaying the impossible”.⁷

In principle, the assessment of future special damages (“future pecuniary loss”) should be more feasible because, *prima facie*, the capital value of a future loss should be capable of calculation. In practice, however, the courts, when assessing future special damages, make particular assumptions in relation to some relevant factors and contingencies including:

- the likely life expectancy of the plaintiff
- the prospect of a further deterioration in the plaintiff’s condition
- the cost over time of medical care and treatment and of medical and assistive aids and appliances
- loss of earnings
- tax rates on income⁸
- inflation rates, and
- rates of return on the compensation for the category of loss concerned when invested.

⁵ Lord Blackburn in *Livingstone v Rawyards Coal Co.* (1880) 5 App. Cas. 25 at 39.

⁶ McGregor on *Damages* 18th Ed. (2009) Sweet and Maxwell, at para. 1-021; White, *Irish Law of Damages for Personal Injuries and Death* (1989), Butterworths, Volume 1, at para 4.1.01.

⁷ *Sinnott v Quinnsworth* [1984] IRLM 523, at p. 532.

⁸ See Law Reform Commission report *Periodic payments and Structured Settlements* (LRC 54-1996), at paras. 2.40 – 2.54.

The capital value of future care is calculated by multiplying the annual net cost of future care (called “the multiplicand”) by a figure known as “the multiplier” which is actuarially calculated based upon life expectancy. The resultant capital sum is awarded to the plaintiff as damages to enable him/her to pay for a lifetime of future care.

The capital value of future loss of earnings is calculated as:

- (a) the annual loss of net earnings resulting from the injury (again, “the multiplicand”) adjusted to take account of
- (b) contingencies such as career advancement and periodic unemployment, multiplied by
- (c) the number of years over which that loss is expected to endure (again, “the multiplier”) adjusted by a discount rate to reflect the real annual rate of return from a “safe easily realisable investment”⁹ which the court estimates the lump sum will generate when inflation is taken into account.¹⁰ Thus, the higher the capital return projected for the period concerned, the less will be the lump sum awarded.

Findings and calculations made by the courts on these issues are based upon medical, socio-medical, actuarial, economic, financial and other expert evidence.

While the standard of proof of an existing fact will be whether it exists on the balance of probabilities, the standard of proof as to the occurrence of a particular event in the future is whether there is, on the balance of probabilities, a *chance* of that event happening, an approach which has been described as the “chance evaluation enquiry”.¹¹

Criticism of the lump sum award approach

The effectiveness of the current method of assessing damages for future loss can be seriously undermined by uncertainties affecting assumptions made as to (a) the plaintiff’s future personal circumstances and (b) future investment returns and inflation rates.

The system encourages a conflict of evidence with both parties seeking the best possible outcome. The court is required to determine the level of future damages by seeking to resolve conflicting expert medical and other evidence. This presents the court with the almost impossible task of providing “fair and just compensation” where life expectancy is uncertain or disputed.

Expert actuarial evidence, similarly, is not free from imperfection. In *Cooke (an Infant) v Walsh*¹², Hamilton J, while affirming the value of such evidence stated that it “must be approached with caution in any particular case” adding:

⁹ *Cooke v Walsh* [1983] ILRM 429 at p. 436, per Hamilton J. Griffin J in *Reddy v Bates* [1984] ILRM 197 referred (at p. 203) to a “reasonably careful and prudent investment”.

¹⁰ Section 24 of the Civil Liability and Courts Act 2004 provides for the prescribing by the Minister of a discount rate that shall apply for the purposes of the assessment of damages in respect of future financial loss, and different rates for different classes of financial loss or different periods of time. The court would be entitled to apply a rate other than the rate prescribed if it considered that the application of the rate prescribed would result in injustice being done. In any event, no rate has been prescribed to date.

¹¹ White, *op. cit.*, at paras. 1.3.01 and 4.2.01, citing Kemp & Kemp, *The Quantum of Damages*, Rev. Ed. Sweet & Maxwell, at para. 1.01.

¹² [1983] ILRM 429.

“... such evidence is based on calculations based on averages, and in the words of Diplock LJ, ‘do not allow for all the chances and changes of this mortal life’, (*Fletcher v Auto and Transporters Ltd* [1968] 2QB 322 at 346), whereas the assessment of damages in any particular case must be based on the facts of the individual case and must allow in the light of those facts for a wide range of further contingencies which might have affected the amount and duration of the loss to be valued.”¹³

The “lump sum” approach dictates that there is no recourse for a plaintiff who exhausts his fund by exceeding his projected life expectancy. Ongoing advances in medical science are likely to further skew (adversely for the injured victim) a system for predicting life expectancy which is already radically flawed. The one virtual certainty about a lump sum award to pay for future care is that the wrong amount will be awarded. That is inescapable.

Catastrophically injured persons who are intellectually capacitated are entitled to manage their own resources after a lump sum award of damages. Some may be youthful or inexperienced or both. Many invest unsuccessfully notwithstanding professional advice. Recent economic events illustrate the difficulties facing investors who need specific long term return on investments.

Many catastrophically injured persons have spent their final years (sometimes decades) without the means to pay for their care because the damages awarded have proved inadequate. The shortfall often occurs when family support is fragile or unavailable due to parental infirmity or decease.

Similarly, a defendant has no recourse if a large lump sum is paid to a plaintiff who succumbs to his injuries earlier than expected. The next of kin of some deceased plaintiffs have received unintended multi-million euro windfalls. Ironically, some have been those whose negligence originally caused or contributed to the catastrophic injury.

One commentator has summarised the position as follows:

“The inherent fallibility of the ‘snapshot’ approach to valuing a plaintiff’s future loss has been widely considered. It is generally accepted that the multiplier / multiplicand approach is almost guaranteed to miss the mark of fair and just compensation; it is usually Providence and not Science that decides whether the lump sum leaves a plaintiff unjustly enriched or under compensated.”¹⁴

Limiting awards of damages to single lump sum payments visits risks both on plaintiffs and defendants. The burden of risk upon the plaintiff has been described¹⁵ as comprising:

- (a) investment risk - the vehicle for investment of the lump sum may not maintain its capital value over the years;
- (b) mortality risk - the projected life expectancy of the plaintiff may fall short of his/her actual lifetime; and
- (c) inflation risk - actual inflation over the period of the plaintiff’s life may outpace the rates calculated for the purpose of the assessment.

¹³ At p. 433. Section 23 of the Civil Liability and Courts Act 2004 provides for the prescribing by the Minister of actuarial tables to which a court would require to refer when assessing damages in personal injuries actions in respect of future financial loss. No tables have been prescribed to date.

¹⁴ Bevan, Nicholas, *The New Periodical Payments Regime* [2005] 2 *Civil Court News* 36.s

¹⁵ *Periodic Payments and the Courts Act*, Paper of the Damages Working party of the Institute and Faculty of Actuaries, U.K., 2005.

The risk to the defendant, as indicated, is that the plaintiff will succumb to his or her injuries earlier than expected with the resultant windfall to the plaintiff's estate.

Lump sum awards also create a risk for the State because, if the return on investment is insufficient to meet the needs of the plaintiff, the State will probably be required to fund provision for those needs.

In 1972, the Committee of Inquiry into the Insurance Industry in its Interim Report, observed:

“The claim payment takes the form of a lump sum. In cases involving death or personal injury where the damages suffered are of an ongoing nature, such as loss of income flow, or recurring medical costs, this can be a serious defect... Where compensation is based on an injured person's life expectancy, once the payment has been made the case is closed and from the insurer's point of view the actual duration of life is irrelevant. If, however, the injured person lives longer than expected, he loses out financially. Conversely, if he dies prematurely, a benefit passes to persons not involved in the accident.”¹⁶

The Report of Enquiry into the Cost and Method of Providing Motor Insurance of 1982 (the MacLiam Report) identified similar deficiencies in the lump sum award approach.

In its report *Personal Injuries: Periodic Payments and Structured Settlements of 1996*¹⁷, the Law Reform Commission, in noting the shortcomings of a lump sum award, pointed to the uncertainties - already mentioned - attaching to assessment of the lump sum and to the possibility that plaintiffs may, due to inexperience in dealing with large sums, see their lump sum dissipate quicker than intended. However, it cautioned that the evidence of dissipation of awards was inconclusive.¹⁸

The inadequacy of lump sum awards has also attracted criticism from within the judiciary. In his foreword to a leading textbook on the subject,¹⁹ the late Mr. Justice Niall McCarthy commented:

“[T]here seems nothing to recommend the payment of large sums of money which, in a number of instances may either be too much or not enough. The plaintiff, in short, lives for a much lesser period than anticipated or lives for a much longer period. Years of practice at the Bar certainly showed instances in which both circumstances applied.”

In other common law jurisdictions, dissatisfaction with the restriction of awards for personal injuries to lump sums is of some longevity. In the 1920s, a Canadian jury declined to make a lump sum award in a fatal injuries action, awarding an annuity instead. The award was described as “illegal” by the Judicial Committee of the Privy Council, which also rejected the presiding judge's attempt to capitalise the annuity.²⁰

In the UK, the Law Commission, in its 1971 Working Paper *Personal Injury Litigation: Assessment of Damages*,²¹ expressed the view that compensating for future loss by a lump sum payment was at odds with the principle of restitution,²² and noted that “[t]he award of a lump sum may and sometimes must

¹⁶ Committee of Inquiry into the Insurance Industry, Interim Report on Motor Insurance, (Dublin, 1972), at p. 69.

¹⁷ (LRC 54-1996).

¹⁸ Paras. 16.5 to 16.17 of the Commission's report.

¹⁹ White, *op. cit.*

²⁰ *Fournier v Canadian National Railway Company* [1927] AC 167, at p. 169.

²¹ Working Paper No. 41.

²² Para. 250.

result in injustice”, pointing to the various types of uncertainty which render such awards imprecise, and the injustice to the parties of erroneous forecasting.²³

The majority of the Royal Commission on Civil Liability and Compensation for Personal Injury (“the Pearson Commission”) of 1978 considered that the lump sum was “not the most natural form of compensation” for claims for future pecuniary loss, being “inevitably inexact”.²⁴

The Law Commission, in its report *Structured Settlements and Interim and Provisional Damages* of 1994, observed:

“The difficulty with a lump sum for general damages is that ‘all future contingencies must be crudely translated into a present value’²⁵ despite a general awareness that uncertainty as to the future may mean that the present value is seriously inaccurate.”²⁶

In the leading case of *Wells v Wells*,²⁷ decided by the House of Lords before the English courts were empowered to make periodic payments orders notwithstanding the absence of consent by the parties, Lord Steyn stated:

“..there is a major structural flaw in the present system. It is the inflexibility of the lump sum system which requires an assessment of damages once and for all of future pecuniary losses. In the case of the great majority of relatively minor injuries the plaintiff will have recovered before his damages are assessed and the lump sum system works satisfactorily. But the lump sum system causes acute problems in cases of serious injuries with consequences enduring after the assessment of damages. In such cases the judge must often resort to guesswork about the future. Inevitably, judges will strain to ensure that a seriously injured plaintiff is properly cared for whatever the future may have in store for him. It is a wasteful system since the courts are sometimes compelled to award large sums that turn out not to be needed.”²⁸

The arguments in favour of lump sum awards

Lump sum awards, undoubtedly, have the advantages for the parties of conclusiveness and certainty in the resolution of a claim. They enable an insurer to “close the book” on the claim and facilitate the operation of standard reinsurance arrangements. For a plaintiff, they offer greater autonomy in allowing him or her to decide how to dispose of the total of the award: a plaintiff might, for example wish to invest the award in establishing a business. This argument, however, loses its force in the case of a plaintiff who is facing serious and long term or permanent incapacity.

It has also been argued that periodic payments tend to destroy initiative and operate as a disincentive to rehabilitation and that the onus should rest on the party seeking to restrict the full payment of compensation by way of a lump sum award to establish why the plaintiff should be deprived of his or her freedom of choice to dispose of the full capital value of the compensation as he or she wishes.

²³ Paras. 223 and 242.

²⁴ *Royal Commission on Civil Liability and Compensation for Personal Injury* 1978, (HMSO, Cmnd 7054), paras. 556 -557.

²⁵ Harris, *Remedies in Contract and Tort*, (1998) Weidenfeld and Nicolson.

²⁶ Para. 2.2.

²⁷ [1999] 1 AC 345.

²⁸ At page 384.

Alternatives to lump sum awards: the experience in other jurisdictions

Civil law jurisdictions²⁹

Germany:

The German Civil Code³⁰ stipulates that a person who, deliberately, negligently or unlawfully injures the life, body, health, freedom or property, or any other right of another person, shall be bound to compensate that other person for the damage arising from such an act. A plaintiff is entitled to expect “reasonable compensation”³¹ and as such, there is no express right to full compensation. Thus, a distinction can be drawn between the principle of *restitutio in integrum* applicable under Irish law (and the law of most other EU members) and the German compensation regime. In its decision of the 6th July 1955,³² the Federal Court of Justice stated:

“The main purpose of damages for pain and suffering is to provide reasonable compensation for the loss or damage, for any impairment of life, which is not of a pecuniary nature.”

Periodic payments were introduced in Germany in the late nineteenth century as the appropriate means of compensating for pecuniary loss. The German Civil Code provides for compensation to be paid to an injured party by payment of an annuity where, in consequence of injury to that party’s body or health, their earning capacity is destroyed or impaired, or there is an increase in their needs. A lump sum may be payable as an alternative “if a serious reason exists”.³³

The annuity payment may be paid monthly. Where the recovery process is uncertain, where there is no prognosis possible or indeed where there is a likelihood of further deterioration of the plaintiff’s medical condition, the plaintiff is entitled to make a claim for performance (the payment of a capital amount) and may also bring proceedings for a declaratory judgment, seeking a declaration that the person who caused the accident will be liable for future damage which cannot currently be assessed. In such circumstances, the court may award a monthly annuity in addition to a capital amount.³⁴ The plaintiff may apply for a variation of the amount payable on a monthly basis to account for an increase in inflation.³⁵

In circumstances where permanent sequelae cannot be assessed, an interim payment may be awarded to the plaintiff which seeks to compensate the plaintiff until such time as the case is finally determined.

Belgium:

The Civil Code contains basic provisions governing the law of damages for personal injuries and requires any person who, because of his conduct or negligence is responsible for causing harm to another person, to compensate that person for the damage caused. Articles 1382 to 1386 of the Civil Code impose an obligation on the defendant to make full compensation for the damage caused and injuries suffered.

²⁹ The Group has relied in particular on *Personal Injury Compensation in Europe*, edited by Marco Bona and Philip Mead, Kluwer (2000), in addition to its own research, in gaining an understanding of the approach in the civil law jurisdictions.

³⁰ German Civil Code (*Bürgerliches Gesetzbuch*), §823(1).

³¹ *Ibid.*, §253(2).

³² *Bundesgerichtshof (Großer Zivilsenat)* 1/55, NJW 1955, 1675.

³³ *Ibid.*, §843.

³⁴ *Ibid.*, §287.

³⁵ *Ibid.*, §323.

The Supreme Court of Belgium has consistently recognised the role of trial judges in determining the existence of loss and in calculating the quantum of the damages. As such, the Belgian courts enjoy wide discretionary powers with regard to the assessment and award of damages for personal injuries.

Damages for future loss may be awarded as a lump sum or by way of periodic payment and the court has discretion to decide the method of compensation to be employed. If damages are awarded by way of periodic payment, the court may order that an index-linked annuity is to be purchased to provide for the payments into the future. Parties to a personal injuries claim are also entitled to compromise an action on the basis of periodic payments.

Italy:

While Italian personal injury law is not regulated by a single and organised statutory code, the general rules governing liability, compensation and damages are contained in the Civil Code.

Further, the courts have developed principles giving rise to a plaintiff's entitlement to seek full compensation and new and innovative categories of damages. As such, the law governing Italian personal injury compensation is derived, primarily, from case law.

Article 2057 of the Civil Code provides that, if a personal injury has caused permanent damage, and in consideration of the financial status of the parties and the nature of the injuries, the court may award a life annuity ("rendita vitalizia"). The application of Article 2057 is usually limited to cases involving future loss of earnings and/or where the plaintiff is a minor.

While Article 2057 does not recognise a plaintiff's entitlement to vary or review the life annuity, it is established that a plaintiff may commence a new claim in order to obtain a review of the amount of the periodic payments on the grounds of the existence of new evidence which concerns further deterioration of the injury. In relation to interim payments, in the course of civil proceedings, a plaintiff may apply for an order directing the payment of sums not contested or only partially contested by the defendant.

Sweden:

The law applicable to personal injuries claims is governed by the Damages Act 1972. In practice, cases concerning compensation claims for personal injuries are rarely heard by the courts in Sweden due to the existence of specialised insurance boards. While these insurance boards do not replace the role of the courts, and while plaintiffs are not barred from commencing legal proceedings before the courts, the reality is that the majority of personal injuries claims are determined by the national insurance compensation boards. The principle of full compensation is recognised by Swedish tort law.

Section 3 of the Damages Act 1972 provides that where compensation is of "essential importance to the plaintiff's support", it must be paid in the form of periodic payments, save in exceptional circumstances. While the Damages Act recognised that plaintiffs should in certain cases, be entitled to decide between periodic payments and lump sum payments, a leading commentator on the Swedish regime has observed: "Periodical payments are still the norm in cases involving serious loss of earnings. Lump-sum payments are provided in respect of smaller earnings losses. This is also the case in respect of past earnings losses, costs and for non-pecuniary losses."³⁶

³⁶ Dufwa, in Bona and Mead, *op. cit.*

Common law Jurisdictions

Australia:

In the common law world, Australia pioneered the introduction of periodic payments as a form of final award in the 1960s.³⁷ In New South Wales, a Lifetime Care and Support Scheme was established by statute in 2006.³⁸ The Scheme - which is funded by a levy collected through compulsory third party insurance and administered by the Lifetime Care and Support Authority - provides lifelong treatment, rehabilitation and attendant care for persons who have suffered spinal cord injury, moderate to severe brain injury, multiple amputations, serious burns or blindness from a motor accident. The Scheme covers treatment, rehabilitation and care services that are “reasonable and necessary”. Treatment, rehabilitation and care services may include-

- medical treatment (including acute inpatient treatment and therapy)
- rehabilitation
- respite care
- attendant care services (personal assistance, home nursing, domestic assistance, community access, gardening and home maintenance, childcare, and educational and vocational support)
- aids and appliances and
- home and vehicle modification.

U.S. and Canada:

In the U.S., structured settlements were given recognition in Federal law in 1982 with the introduction of favourable tax treatment for payments from annuities funding structured settlements. Orders for periodic payments may be made in a number of U.S. States³⁹ and are also available in certain provinces in Canada.⁴⁰

United Kingdom:

Developments in the U.K. merit detailed consideration because they are the product of an accumulation of detailed studies over decades of the form of damages awarded in personal injuries actions and have resulted in what is arguably the most comprehensive and modern alternative to lump sum awards.

The Law Commission in its 1971 Working Paper considered that “the arguments in favour of a system of periodic payments are strong”.⁴¹ The Pearson Commission stated:

“periodic payments seem to us to offer important advantages in serious cases, although we recognise that it would not be practicable to eliminate all the uncertainties of awards of damages for future pecuniary loss”.⁴²

³⁷ The Motor Vehicle (Third Party Insurance) Act Amendment Act 1966 (Western Australia); section 30b, Supreme Court Act 1935-80 (South Australia)

³⁸ Motor Accidents (Lifetime Care and Support) Act 2006.

³⁹ See list of States in Law Reform Commission report *Periodic payments and Structured Settlements*, at para. 10.12.

⁴⁰ e.g., Section 129, Courts of Justice Act 1984 (Ontario), as amended.

⁴¹ Para. 250 of the report.

Pearson considered that periodic payments should be more effective in restoring plaintiffs to their original position if coupled with a review mechanism. They would then enable actual rather than forecast changes to be taken into account post-trial.

If treated as earned income periodic payments would also offer a means of avoiding the high investment income surcharge then applying in the U.K.

It was also believed that other compensation received by a plaintiff could more accurately be offset from periodic payments than lump sum damages.

Finally, Pearson accepted the view given in evidence to it that the prospect that periodic payments would prolong incapacity was outweighed by their benefits in reducing financial anxiety.⁴³

In the absence of legislative action structured settlements were introduced in the U.K. These settlements permitted defendant insurers to meet claims in whole or in part by payment in instalments funded by annuities purchased for the purpose. The settlements were facilitated by an agreement between the Inland Revenue and the Association of British Insurers in 1987. That agreement provided that certain types of structured settlements, formulated with Revenue approval for the making of serial payments, were not to be treated as income for tax purposes.

Structured settlements received judicial approval in 1989,⁴⁴ but their significance has been eclipsed by the introduction by statute in 1996 of a facility whereby damages may be awarded by means of a “periodical payments order”. Under the Damages Act of that year, the courts were empowered, where the parties consented, to order damages awarded for personal injuries to be paid wholly or partly by periodic payments. However, the requirement of the parties’ consent was enough to render the new power, in the words of Lord Steyn in *Wells v Wells*, “a dead letter”.⁴⁵

In its report, *Structured Settlements*, of 2002, the Master of the Rolls’ Working Party summarised the disadvantages of a conventional lump sum award as follows:

“The one thing which is certain about a once and for all lump sum award in respect of future loss is that it will inevitably either over-compensate or under-compensate. This will happen particularly where the plaintiff survives beyond the life expectancy estimated at the time of trial, or alternatively dies earlier. It will frequently be the case in practice that there is over-compensation in six figure sums, or, correspondingly, that a combination of increased life expectancy, the cost of care, and (it may be) the cost of new but necessary medical treatments is such that the sum needed exceeds anything that might have been awarded at the date of trial.”⁴⁶

The Working Party concluded:

“... of the features we have identified, that of accuracy is the most important. We are concerned that a consequence of a system of once and for all lump sum awards is that there will be under or over-compensation (in some cases considerable) and particularly concerned that a proportion of plaintiffs whose life expectancy is uncertain, and who need significant continuing care, might be left with significant uncompensated need. It adds to our concern that this is likely to occur later in

⁴² *Royal Commission on Civil Liability and Compensation for Personal Injury* 1978, (HMSO, Cmnd 7054), para. 566.

⁴³ *Ibid.*, paras. 567 – 571.

⁴⁴ *Kelly v Dawes*, (*The Times*, 27th September 1990 (QBD)).

⁴⁵ [1999] 1 AC 345 at 384.

⁴⁶ At para. 12 of the Working Group’s report.

life when the consequences will be particularly hard to manage... Accordingly, we prefer a system that is better able to meet future needs as and when they arise. Such a system may also have its defects – as we shall go on to point out – but we believe the advantages outweigh them.”⁴⁷

A Consultation Paper, *Damages for Future Loss: Giving Courts the Power to Order Periodical Payments for Future Loss and Care Costs in Personal Injuries Cases*, published by the Department of Constitutional Affairs in March 2002, prepared the way for a consultation exercise, which demonstrated “widespread support” for the introduction of periodic payments on a non-consensual basis.

Following swiftly upon this, the Courts Act 2003 amended the Damages Act 1996 to enable a court, in awarding damages for future pecuniary loss, to order that the damages take the form of periodic payments, and required the court to consider whether it should make such an order.⁴⁸ The provisions of the 2003 Act concerned apply to England and Wales and to Northern Ireland.⁴⁹

The Pearson Commission recommended that periodic payments should be revalued annually in line with the movement of average earnings, preferring this yardstick to that of the movement of retail prices.⁵⁰

Provision for indexation was not made for consensual periodic payments in the Damages Act 1996. The Courts Act 2003 empowered the courts to make compulsory periodic payments orders and provided for indexation of such payments in accordance with the retail prices index (RPI) or otherwise as directed in the periodic payments order.⁵¹

In the leading case of *Thompstone v Thameside and Glossop Acute Services NHS Trust*⁵² the Court of Appeal held that the official annual earnings survey applicable to care assistants and home carers (known as ASHE SOC 6115⁵³), should replace the RPI as the indexation measure in catastrophic injury cases, largely because the wage costs of such assistants or carers formed the main component of future care.

A second key reform of the 2003 Act was that enabling the Lord Chancellor by order to empower the courts to vary periodic payments orders in specified circumstances.⁵⁴ This was put into effect in the Damages (Variation of Periodical Payments) Order 2005, which provided for variation in cases where the court has ordered, or the parties have agreed, that the order or agreement is to be capable of variation and there is a possibility that the plaintiff will develop some serious disease or suffer some serious deterioration, or enjoy some significant improvement, in his/her physical or mental condition.⁵⁵

Periodic payments orders have by now, in the words of a leading authority on quantum of damages, become “the compensation method of choice” in England.⁵⁶ From the Group’s discussion with

⁴⁷ At para. 21.

⁴⁸ Section 2(1), Damages Act 1996, substituted by section 100, Courts Act 2003.

⁴⁹ For the sake of brevity, in mentioning the 2003 Act regime in this report, reference is made to England only.

⁵⁰ Paras. 598 to 600 of the Commission’s report.

⁵¹ Section 2(8), Damages Act 1996, inserted by section 100, Courts Act 2003.

⁵² [2008] 2 All ER 537.

⁵³ ASHE is the Annual Survey of Hours and Earnings prepared by the Office for National Statistics. SOC (Standard Occupational Classification) 6115 refers to the statistical grouping for care assistants and home carers.

⁵⁴ Section 2(7), Damages Act 1996, inserted by section 100, Courts Act 2003.

⁵⁵ Articles 2 and 9 of the Order.

⁵⁶ De Wilde (Gen. Ed.) *Facts & Figures 2008/09: Tables for the Calculation of Damages*, Sweet & Maxwell, quoted by Lewis, *Indexation of Periodical Payment Damages in Tort: The Future Assured?* (January 29 2010), available at SSRN: <http://ssrn.com/abstract=1544298>

practitioners in England, it would appear that the *Thompstone* decision has been instrumental in persuading plaintiffs and their advisors of the benefits of such orders.

Developments in Ireland

In Ireland, the Committee of Inquiry into the Insurance Industry, in its Interim Report on Motor Insurance of 1972, recommended that compensation for loss of income should be paid weekly or monthly, as appropriate, rather than in a lump sum.⁵⁷ The Report of Enquiry into the Cost and Methods of Providing Motor Insurance of 1982 was of the view that:

“a mechanism might be established whereby compensation could be awarded in the form of periodic payments and the motor insurance company concerned could transfer its obligation to a life insurance company in return for a single payment.”⁵⁸

The Law Reform Commission, in its report *Periodic Payments and Structured Settlements*, having examined in detail structured settlements and periodic payments orders provisions in other common law jurisdictions, was satisfied that a structured method of compensation “for future loss, pain and suffering, particularly in serious cases where awards are large” was appropriate, but, noting the view of the Law Commission in its report *Structured Settlements and Interim and Provisional Damages* of 1994 that:

“...it is too soon to legislate to give the courts power to impose a structure. Reform should be confined to rationalising and building on the voluntary system, for example, by providing that a life office could pay periodic payments directly and tax free to the plaintiff...”⁵⁹

recommended that the court should not have power to authorise a structured settlement against the wishes of any party to the litigation and that the position be reviewed after the expiry of five years from introduction of the consensual facility.⁶⁰

The Motor Insurance Advisory Board, in its report of 2002 recommended:

“That the system of lump sum compensation payments be reviewed on the basis that the long term needs of the seriously injured may be better served by guaranteed annual payments.”⁶¹

The Board saw this recommendation as addressing issues it had identified as “enhancement of justice and protection for victims” and “avoidance of need for victims to rely on the State”.

Arguments against periodic payments

A case against periodic payments was made in some detail in a Minority Opinion published with the Pearson Commission report. The minority was persuaded by evidence indicating that plaintiffs preferred lump sums to periodic payments, and was concerned that periodic payments would tend to destroy initiative and operate as a disincentive to rehabilitation.

It considered that a mechanism for review of periodic payments would prolong the adversarial process and cause uncertainty as to the ultimate extent of a defendant’s liability. Periodic payments, if made the

⁵⁷ At p. 69 of the Interim Report.

⁵⁸ At p. 47 of the Committee’s Report.

⁵⁹ Quoted at para.16.76 of the Law Reform Commission’s report.

⁶⁰ *Ibid.*, para. 16.82.

⁶¹ Recommendation 50 of the Board’s report.

norm, would, it was suggested, reduce the prospect which lump sum awards offered of early settlement of claims. It was also concerned about the additional cost of administering claims which would ensue, and by what it considered was the injustice of imposing a continuing liability on a defendant over many years, which would likely rise with inflation.

Undoubtedly, periodic payments deprive plaintiffs of the freedom of choice to dispose of the full capital value of their compensation in such manner as they may wish. However, as has been observed by a leading commentator on the subject, “it is hard to think of good reasons of principle or fairness to justify such freedom”.⁶² Clearly, the possibility that a periodic payments order might dissuade a plaintiff from resuming a productive life has no relevance in the case of a plaintiff who has suffered serious injury leading to long term or permanent incapacity.

Insofar as it might be argued that the imposition of a power to make a periodic payments order in disregard of a plaintiff’s desire for a lump sum payment would be an unconstitutional limitation of a plaintiff’s rights, the Law Reform Commission, in its 1996 report, observed:

“There is no absolute right under the Irish Constitution to have one’s damages paid in a lump sum. Assuming that the Irish courts would adopt, as a constitutional principle, the common law doctrine of *restitutio in integrum*..., the periodic payment of damages would fall comfortably within that principle. There can be no constitutional right to insist on a lump sum instead of a structured settlement once the settlement has a secure actuarial and medical basis.”⁶³

Submissions to the Group

Those who responded to the Group’s invitation to comment on the merits of introducing a facility for periodic payments of damages awards were generally supportive of the proposition.

One contributor expressed the view that there is “an unanswerable argument in favour of permitting such payments.”

Another suggested that such a facility would “provide a useful mechanism to address potential shortfalls that may arise where lump-sum awards are made in catastrophic injury cases, including shortfalls relating to long-term care costs”.

Another respondent⁶⁴ provided the following case history (with the permission of the injured victim):

“[X] is a male born in 1957 and who sustained a complete tetraplegic spinal cord injury secondary to a road traffic accident in 1976. He was aged 19 at the time and has now lived 34 years with his disability. He received a once off payment at that time.

Having spoken to him regarding Mr. Justice John Quirke’s request [X] strongly supports the notion of a periodic payment. In summary [X] states;

- Aging with a Spinal Cord Injury. Given his increased care needs at this time in his life he is not in a position to self-fund from his original award. [X] is currently unable to go home and is awaiting the outcome of local health services assessment of his needs.

⁶² Cane and Atiyah, *Accidents, Compensation and the Law*, 7th Ed. (2006) Cambridge, at p.140.

⁶³ At para.16.78 of the report. Emphasis as per the original.

⁶⁴ The National Rehabilitation Hospital

- [X] noted that lump sum awards put the individual under considerable stress to suitably invest their award, including managing the tasks of appointing accountants, dealing with investment managers etc.
- Lump sum awards draw ‘money hungry wolves’ who sometimes are family members or friends.
- At a young age of injury one can be ill-equipped to deal with the pressure. The socio-economic background of the person is a further consideration.”

Another contributor conditioned its support for the introduction of periodic payments on the parties consent to such an arrangement.

The importance of the need to index payments was acknowledged by most respondents.

Attention was also drawn to the desirability of affording tax exemption for such payments consistent with the current provision for exemption from income tax of income from the investment of lump sums paid in compensation for injury resulting in permanent or total incapacity.

Concerns were expressed on a number of aspects, notably -

- the additional cost of funding and administering periodic payments
- the manner in which such payments should be treated in the accounts of a party liable to pay them
- the possibility of a party liable becoming insolvent in the future
- the feasibility of a periodic payments order where a finding of contributory negligence has been made
- the difficulty presented by a finding of multiple liability on the part of co-defendants
- the need to distinguish between cases where the State is the defendant or insurer and those where a private insurer is involved, (having regard for the need for the continuing security of payments)
- the need for a specialised index separate from the Consumer Price Index in assessing long-term care costs.

Conclusions

The Group has concluded that the present method of awarding damages for future pecuniary loss in this jurisdiction - the single lump sum award - is inadequate and inappropriate in cases where a plaintiff has been catastrophically incapacitated in the long term or permanently.

The Group notes that this conclusion is consistent with the strong views expressed repeatedly in the reports of successive committees and commissions established by governments to investigate compensation for personal injuries within this jurisdiction and elsewhere during the past 40 years.

The Group believe that the courts should be empowered by legislation to make periodic payments orders, (whether consensual or otherwise), in catastrophic cases where long term permanent care will be required, subject to the courts’ satisfaction that the continuity of the periodic payments will be secured.

The Group is of the view that provision for indexation of periodic payments will be an essential prerequisite for compensation by way of periodic payments orders.

Legislation providing full and comprehensive tax exemption for such payments must also be enacted in order to give effect to the proper and equitable operation of periodic payments orders.

The Group is mindful of the entitlement of every capacitated adult to settle his or her claim by agreement on such terms as they may deem appropriate.

In reaching its conclusions the Group has had regard to the object of compensation within our law, the degree of uncertainty affecting estimation of life expectancy, future fluctuation in inflation levels likely to affect the accurate calculation of future pecuniary loss and the risks to which the investment of lump sums will be exposed.

Chapter 4: A new facility for periodic payments orders

This chapter examines the elements of a regime for the making of periodic payments orders under a series of headings. In doing so, the Group has regard to legislative approaches in other common law jurisdictions.

The Group has concluded that the English system of compensation by periodic payments orders represents the most modern and effective model for payment of ongoing care and associated costs in personal injuries actions. It has been in place since 2003, and is the most appropriate comparator against which to measure any proposed changes required within this jurisdiction to address the problems identified in Chapter 3.

It has been suggested that the English system may only be fully understood after an arduous examination of a relatively large collection of primary and secondary legislation, (including rules of court and practice directions, which have been described as “of immense detail and complexity”).⁶⁵ The Group is, therefore, concerned that provision for similar periodic payment orders in this jurisdiction should be relatively simple and accessible, and should rely on as limited a set of legislative sources, as is possible.

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

In the preceding chapter, the Group recommended that periodic payment orders should be available as a remedy in cases of very serious injury which renders the plaintiff significantly incapacitated in the long term or permanently.

Although in England the Damages Act 1996, as amended,⁶⁶ empowers the courts to make periodic payment orders in any personal injuries action, the Group understands that, in practice, such orders are made only in cases involving serious incapacity requiring long term care for the plaintiff.

Consideration has been given by the Group as to whether the making of a periodic payments order should be -

- expressly confined to catastrophic injuries cases
- made generally available in all personal injuries cases or
- expressly confined to awards of not less than a certain sum of money.

The Group believes that difficulties may arise if the courts are required to confine the facility to particular categories of injury or particular degrees of severity of injury. For practical purposes it is not possible equitably to define such categories or degrees of gravity of injury. The imposition of an express minimum monetary threshold may likewise prove inflexible. Monetary thresholds erode in real value over time and regular review creates additional difficulty.

In England, section 2A(1) of the 1996 Act provides that the Civil Procedure Rules may require a court to take specified matters into account in considering whether to order periodic payments.

Rule 41.7 requires the court, when informing litigating parties whether periodic payments or a lump sum is likely to be the more appropriate form for all or part of an award of damages or when considering

⁶⁵ McGregor (18th ed.:2009) *Damages* (Sweet & Maxwell) Ch. 35-010, at p. 1305.

⁶⁶ In this chapter, referred to as “the 1996 Act”.

whether to make a periodic payments order, to have regard to all the circumstances of the case and in particular the form of award which best meets the plaintiff's needs⁶⁷ (having regard also to the factors set out in Practice Direction 41B).

Those factors include:

- (1) the scale of the annual payments taking into account any deduction for contributory negligence;
- (2) the form of award preferred by the plaintiff including (a) the reasons for the plaintiff's preference; and (b) the nature of any financial advice received by the plaintiff when considering the form of award; and
- (3) the form of award preferred by the defendant including the reasons for the defendant's preference (it would seem clear from the English case-law to date that the court's view of the best interests of the plaintiff have precedence over the views of the parties).

Evidence from England suggests that the facility of periodic payments is, in practice, availed of only in cases of substantial awards for serious injury involving long term treatment or care, despite the fact that the relevant legislation does not confine it to such cases.

The Group recommends that, in this jurisdiction, legislation should be enacted which provides that periodic payments orders may be made in respect of the whole or part of an award in any case where, having regard to -

- (a) the nature of the injuries in respect of which the award is being made and
- (b) the circumstances of the person to whom the award is being made,

the court considers it appropriate in the best interests of that person that such an order be made.

However, the Group considers that mandatory periodic payments orders should only be made to compensate for a particular category of loss.

2. The nature of the loss in respect of which damages in the form of periodic payments should be payable

In England, section 2(1) of the 1996 Act confines such payments to damages for future pecuniary loss, as distinct from past pecuniary loss or non-pecuniary loss.

The Group is conscious that the power to make periodic payments orders will be a significant innovation in the law of damages within this jurisdiction. It does not consider that a pressing case has been made for the application of mandatory periodic payments orders to compensation for future loss of earnings. The Group recommends that periodic payments orders to compensate for future loss of earnings should be made by the courts only on a consensual basis.

The most pressing difficulties and inequities relate to long term care and treatment costs and permanent incapacity cases. The Group recommends that the courts be empowered -

- to make consensual and non-consensual periodic payments orders in respect of (a) future treatment, (b) future care and (c) the future provision of medical and assistive aids and appliances and

⁶⁷ Emphasis added.

- to make periodic payments orders to compensate for future loss of earnings only with the consent of all the parties to the relevant claim.

3. Periodic payments orders to supplement a lump sum award?

In England, section 2(1) of the 1996 Act empowers a court awarding damages for future pecuniary loss in respect of personal injury to order that the damages are wholly or partly to take the form of periodic payments.

It is suggested that such flexibility may suit both plaintiff and defendant: there may be a consensus in a particular case that periodic payments are only necessary in respect of a particular category of future pecuniary loss: in this event, it may be appropriate for the court to permit the other type of future pecuniary loss to be compensated in the form of a lump sum.

The Group considers that a similar approach should be adopted in this jurisdiction.

4. Provision for non-consensual periodic payments orders

Reference has already been made in Chapter 3 to the experience in England of a very low incidence of periodic payments orders when they were available on a consensual basis under the Damages Act 1996.

The Group believes that a similar experience is likely within this jurisdiction if consent becomes a necessary requirement to their availability.

The Group can see no reason why seriously injured plaintiffs should be deprived of a right to claim within the courts that damages intended to pay for the cost of their future care, treatment and medical and assistive aids and appliances should be paid periodically and not by way of a single lump sum.

The Group can see no reason either why defendants, facing such substantial claims should not be entitled to claim within the courts that the interests of justice require that damages which are intended to pay for the cost of future care, treatment and medical appliances should be paid periodically and at the approximate time when the care and treatment is actually required.

The Group believes that a statutory right to make such claims will not interfere in any way with the rights of capacitated adults to reach agreement and to settle claims for damages in such manner as they deem appropriate.

The Group recommends, therefore, that, save in the case of compensation for future loss of earnings, the courts should be empowered to make periodic payments orders with or without the consent of the litigating parties but only after those parties have been given an opportunity by the court to make submissions and be heard in full on the relevant issues.

5. Should the court be required in every case to consider the appropriateness of making a periodic payments order, or only required to do so where requested by the parties?

In England, the courts are required to address the suitability of such an order when awarding damages in all personal injuries cases - see section 2(1)(b) of the 1996 Act.

Rule 41.5 of the Civil Procedure Rules provides that in a claim for damages for personal injury, each party in its statement of case may state whether it considers periodic payments or a lump sum is the more appropriate form for all or part of an award of damages and where such statement is given must provide

relevant particulars of the circumstances relied on. Where the statement is not provided, the court may order a party to do so, and may require it to be further particularised. The court is required to consider and indicate to the parties as soon as practicable whether periodic payments or a lump sum is likely to be the more appropriate form for all or part of an award of damages (Rule 41.6).

Having regard to the recommendations made at sections 1 and 2 above, the Group recommends that there should be no express requirement that the courts must, in every personal injury case, consider awarding compensation by periodic payments order.

6. Securing periodic payments

The Group recommends that periodic payments orders should only be made in circumstances where the court is satisfied that continuity of payment under the periodic payments order is reasonably secure. The availability of funds to satisfy periodic payments orders is fundamental to the operation of any periodic payment regime.

The Group recognises that different considerations may apply in respect of various categories of defendant. State defendants may be best placed to demonstrate, to the satisfaction of the courts, that continuity of payment is reasonably secure.

State defendants, such as the Health Service Executive, may decide to self-fund periodic payments, making relevant payments directly from their own resources as they fall due under the terms of the periodic payments order.

Non-State and private defendants may face difficulties demonstrating that continuity of payment is reasonably secure.

In England, it was envisaged that non-State defendants would purchase annuity products on behalf of plaintiffs which would provide a continuous stream of income which, in turn, would meet the payments specified in the periodic payments order or structured settlement. However, the Group has learned there are very few suitable financial products available to defendants in England and that those available are index-linked to the retail price index and not to more appropriate indices. It is considered likely that non-State defendants within this jurisdiction will face similar obstacles in attempting to purchase suitable annuity products.

Accordingly, non-State defendants may be obliged to demonstrate continuity of payment by other means. Apparently most non-State defendants in England seek to self-fund periodic payments by making payments directly from their own resources. Crucially, payments made in this manner by general insurers are fully protected under the Financial Services Compensation Scheme (“the FSCS”) thereby allowing non-State defendants to demonstrate to the satisfaction of the court that continuity of payment is reasonably secure.

Having examined the FSCS and the related legislation the Group recommends that consideration be given to the introduction of a scheme whereby payments made under periodic payments orders are statutorily protected and fully guaranteed.

Section 2(3) of the 1996 Act provides that a court may not make an order for periodic payments unless satisfied that the continuity of payment under the order is reasonably secure. For that purpose, section 2(4) provides that the continuity of payment under an order is reasonably secure if -

- (a) it is protected by a guarantee given under section 6 of the Schedule to the 1996 Act,
- (b) it is protected by a scheme under section 213 of the Financial Services and Markets Act 2000 (compensation) (whether or not as modified by section 4 of the 1996 Act), or
- (c) the source of payment is a government or health service body.

Under section 2(5) of the 1996 Act, an order for periodic payments may:

- (a) require the party responsible for the payments to use a method (selected or to be selected by that party) under which the continuity of payment is reasonably secure by virtue of section 2(4);
- (b) provide for how the payments are to be made, if not by a method under which the continuity of payment is reasonably secure by virtue of sub-section (4);
- (c) require the party responsible for the payments to take specified action to secure continuity of payment, where continuity is not reasonably secure by virtue of section 2(4);
- (d) enable a party to apply for a variation of the form of provision mentioned in (a) to (c).

Rule 41.9(1) of the Civil Procedure Rules provides that an order for periodic payments shall specify that the payments must be funded in accordance with section 2(4) of the 1996 Act, unless the court orders an alternative method of funding. Before ordering an alternative method of funding, the court must be satisfied that:

- (a) the continuity of payment under the order is reasonably secure; and
- (b) the criteria set out in the Practice Direction are met.

Insofar as sub-paragraph (b) is concerned, paragraph 3 of Practice Direction 41B provides that, before ordering an alternative method of funding under rule 41.9(1), the court must be satisfied that:

- (1) a method of funding provided for under section 2(4) of the 1996 Act is not possible or there are good reasons to justify an alternative method of funding;
- (2) the proposed method of funding can be maintained for the duration of the award or for the proposed duration of the method of funding; and
- (3) the proposed method of funding will meet the level of payment ordered by the court.

A clear and detailed summary of the above English provisions is contained in the Department of Constitutional Affairs' *Guidance on Periodical Payments*,⁶⁸ and in particular, Annex C thereof.

Page 12 of that document sets out how periodic payments are funded and places a particular emphasis on annuity products and self-funded periodic payments. In the context of annuity products, the report provides as follows:

“The defendant or defendant’s liability insurer buys an annuity for the claimant in order to provide a stream of income to meet the level of payments specified in the court order or agreement. The annuity could be bought in the name of the claimant or held by the defendant who would then pass the relevant periodic payments to the claimant. Payments made in either of these ways are statutorily protected under the FSCS and are considered to be ‘reasonably secure’ for the purposes of section 2(3) of the 1996 Act.

⁶⁸ April 2005.

If the annuity will meet the required payments in full, the defendant (or insurer) thereby discharges their liability to the life insurer who has provided the annuity. However, in so far as the annuity does not meet the payments in full then a residual liability for the balance remains with the defendant (or insurer), who will need to use another method (e.g. self-funding) or a different annuity to fund that element.”

In relation to the manner in which these payments are statutorily protected, Annex C explains how the guarantee operates under the FSCS established pursuant to section 213 of the Financial Services and Markets Act 2003. The FSCS provides compensation to eligible policyholders if they are insured by authorised insurance firms under contracts of insurance issued in the UK.

Section 4 of the Damages Act 1996, as substituted by the Courts Act 2003, provides enhanced protection under the FSCS for periodic payments. This ensures that the continuity of periodic payments is fully protected under the Financial Services Compensation Scheme where self-funded by any insurer or funded by an annuity. In the event of the liability insurer becoming insolvent, the payments are guaranteed under statute. In terms of the practical aspects of self-funding options in the context of non-State defendants, the Department of Constitutional Affairs *Guidance* states:⁶⁹

“The defendant or defendant’s liability insurer makes the payments directly from their own resources (however internally invested) as they become due under the court order or agreement. In this funding scenario, the liability to make payments continues to rest with the defendant/ insurer. It should be noted that only self-funded payments from certain sources (government/ health service bodies and most liability insurers) are protected by statute and are therefore considered to be “reasonably secure” under the 1996 Act (see section on security of payments above). The Financial Services Authority has confirmed that self-funding by a general insurer would be permissible under its regulations.”

The Group understands that there may in fact be only one annuity provider in England willing to offer an annuity suited to a periodical payments order. However, that annuity is linked to the RPI, rather than ASHE SOC 6115, which, as has been noted in Chapter 3, is the index largely in use in England since the *Thompson* decision, and the Group understands that no product linked to ASHE SOC 6115 is available to date.

The Group knows of no annuity provider within this jurisdiction which is currently providing an annuity product linked to an index more specialised than that of the Consumer Price Index (CPI), and it remains to be seen whether annuity products linked to a more specialised index will be developed over time in either jurisdiction.

However, the Group notes the responsibility of the State for all of its citizens and in particular for those who are most disadvantaged. It notes also that the State is the final care provider for catastrophically injured victims without resources.

The Group further notes the multiple treasury functions on behalf of the State of the National Treasury Management Agency (NTMA) and recommends that the State, through the agency of the NTMA should be empowered to provide injured victims with the necessary security for periodic payments either by the provision of annuities to insurers and others or in such other manner as may be appropriate and effective.

⁶⁹ At page 13.

Alternatively, provision could be made by statute for a Minister of the Government, with the consent of the Minister of Finance, to be authorised to give a guarantee to a body in terms similar to those of s. 6 of the Damages Act 1996 (U.K.).

Section 6(3) of the 1996 Act provides that the bodies in relation to which a Minister may give such a guarantee shall, subject to subsection (4) of that section, be such bodies as are designated in relation to the relevant government department by guidelines agreed upon between that department and the Treasury.

Subsection (4) provides that a guarantee purporting to be given by a Minister under this section shall not be invalidated by any failure on his part to act in accordance with such guidelines as are mentioned in subsection (3).

Section 6(5) provides that a guarantee under that section shall be given on such terms as the Minister concerned may determine but those terms shall in every case require the body in question to reimburse the Minister, with interest, for any sums paid by him in fulfilment of the guarantee.

Section 6(6) provides that any sums required by a Minister for fulfilling a guarantee under that section shall be defrayed out of money provided by Parliament and any sums received by him by way of reimbursement or interest shall be paid into the Consolidated Fund.

Conclusion

The Group has considered the compensation schemes available to investors and purchasers of insurance products in this jurisdiction and has concluded that such schemes are inadequate for the purpose of ensuring continuity of payment of periodic payments orders.

Currently, no guarantee scheme similar to the FSCS scheme exists in this jurisdiction.

The Group recommends that the State, through the agency of the NTMA should be empowered to provide injured victims with the necessary security for periodic payments either by the provision of annuities to insurers and others or in such other manner as may be appropriate.

Alternatively, consideration should be given to the introduction of a statutory scheme whereby payments made under periodic payments orders will be statutorily protected and fully guaranteed.

In the absence of such a scheme, it is likely that only State defendants will be able to demonstrate, to the satisfaction of the court, that the continuity of payment of a periodic payments order can be reasonably secure.

7. Indexation of periodic payments

Adequate and appropriate indexation of periodic payments will, in the view of the Group, be an indispensable requirement and prerequisite for any periodic payment scheme within this jurisdiction. This is because the amounts ordered to be paid on an annual basis must keep pace with the increase over time in the cost of care and of services and items intended to be funded by periodic payments.

The Group recommends the introduction of a dedicated index to apply to periodic payments on a statutory basis. This recommendation is influenced by the experience of indexation in England, which merits some scrutiny.

Section 2(8) of the Damages Act 1996 provides that an order for periodic payments “shall be treated as providing for the amount of payments to vary by reference to the retail prices index at such times, and in such a manner, as may be determined by or in accordance with Civil Procedure Rules”.

However, section 2(9) empowers the court to disapply section 2(8) or modify its effect. Rule 41.8 of the Civil Procedure Rules, *inter alia*, requires the order to specify that the amount of the payments shall vary annually by reference to the retail prices index, unless the court orders otherwise under section 2(9).

As mentioned in Chapter 3, the Court of Appeal in England has decided “after an exhaustive review of all the possible objections to its use” that in catastrophic injury cases, the Annual Survey of Hours and Earnings: Occupational Earnings for Care Assistants and Home Carers (ASHE SOC 6115) is an appropriate yardstick for indexation purposes.⁷⁰

The Group is of the view that an earnings related index, similar to the ASHE SOC 6115 index applied in the UK, must be established in this jurisdiction to assist in quantifying changes over time in levels of care cost.

The Group believes that an earnings related index covering the nursing and care sectors within this jurisdiction should be created and maintained by an appropriate independent body within the State. The index should, if possible be based upon data collected from care categories such as nurses, care assistants, physiotherapists, occupational therapists, speech and language therapists and other relevant persons.

A costs related index of relevant (a) medical treatment and (b) mechanical and other aids and appliances should similarly be created and maintained.

The Group has been greatly assisted by helpful information on these matters received directly from from the Central Statistics Office (CSO). Discussions with the CSO indicate that it will be possible to create an earnings related index of the kind (or as close as is reasonably possible to the kind), which will be required.

The data collected by the CSO in its Earnings Hours and Employment Costs Survey (EHECS) can provide the basis for such an index. The EHECS data, required by EU regulation and collected by the CSO, is specifically designed to measure trends in earnings levels. Through its quarterly survey,⁷¹ the CSO collects data from each respondent employer on the total earnings, hours and number of employees and this information is used to estimate overall averages.

Advice received from the CSO indicates that the EHECS based index is a reliable source for tracking changes in average earnings of employees over time. The CSO also advises that the EHECS based index is also the most appropriate index in the context of accessibility, simplicity and consistency in application. The Group understands that the “human health and social work” classification would be the most relevant in the context of the calculating the cost of future care.

In addition, the CSO has indicated that it will be possible to create costs-related indices of (a) medical treatment and (b) mechanical and other aids and appliances without undue difficulty or expense. This can be achieved by refining the CPI and creating appropriate sub-indices.

⁷⁰ *Thompson v Thameside and Glossop Acute Services NHS Trust* [2008] 2 All ER 537.

⁷¹ The CSO advises that the EHECS data is published each quarter within approximately three months of the reference period.

The Group therefore believes that the data collected by the CSO in its EHECS may provide a basis for an appropriate index.

The provision of a sector-related earnings index should also enable consensual periodic payments orders for future loss of earnings to be modified in line with changes in earnings for the occupation or activity concerned.

Because it believes that indexation is central to the concept of periodic payments orders, the Group has given considerable thought to the question of how indexation which is fair, consistent and accurate over significant time periods can best be applied to the payments which are to be made. The Group has concluded that fairness, consistence and accuracy can best be achieved if a competent independent body is statutorily charged with the responsibility of creating and maintaining all of the relevant and appropriate indices based upon reliable, verifiable data.

Whilst conscious of the many arduous demands upon the time and resources of the CSO, the Group believes that the competence and independent status of the CSO uniquely qualify it to undertake the requisite responsibility.

The Group is aware that the imposition of a statutory duty on the CSO to establish and maintain the indices concerned would necessitate some modification of the statutory regime - the Statistics Act 1993 - which gives the CSO its remit and independence. In particular, s. 13 of the 1993 Act confers on the Director General of the CSO exclusive responsibility for and independence in deciding the methodology and professional standards used by the CSO, the content of statistics published by it, and the timing and methods of dissemination of statistics compiled by it. The National Statistics Board has responsibility, with the agreement of the Taoiseach, *inter alia*, for setting priorities for the compilation and development of official statistics and assessing the resources to be employed in their compilation.⁷²

However, the Group is respectfully of the view that due primarily to the fact that the EHECS data is already collected by the CSO on a regular and consistent basis, the assumption by the CSO of any additional statutory duty recommended by the Group should not, given the amount of relevant data currently available, require significant, if any, additional resources, nor should it encroach on the independence of the CSO as a body. If anything, it is that independence which marks the CSO out for the role envisaged for it by the Group.

As an alternative, the competent Minister could be statutorily required to create and maintain the appropriate indices to be applied to relevant periodic payments orders, or to designate another person or body to discharge these tasks. Provision is made for this second option in the proposed Scheme of Bill appended to this report. However, it is difficult to see what body or person other than the CSO would have the expertise and resources commensurate to the tasks concerned, and the Group recommends the first option as the most appropriate and realistic solution.

8. Variation

The Group recommends that provision be made for the variation of periodic payments orders in certain limited circumstances. Variation should only be permitted where it has been determined that the plaintiff's condition will seriously deteriorate or significantly improve and where this future contingency has been factored into the original periodic payments order.

⁷² Section 19(1) of the 1993 Act.

The Group has considered the legislative regime in the UK in this context and notes as follows:

Section 2B(1) of the Damages Act 1996 empowers the Lord Chancellor, by order, to enable a court which has made an order for periodic payments, to vary that order in particular circumstances, (to be specified in the order), other than upon the application of a litigating party.

Section 2B(2) empowers the Lord Chancellor, by order, to enable a court, in specified circumstances, to vary the terms upon which a claim or action for damages for personal injury has been settled between parties by way of periodic payments, if the agreement provides for and expressly permits a party to apply to a court for a variation of the agreement and the payments.

The Damages (Variation of Periodical Payments) Order 2005 makes further provision for circumstances in which variation of periodic payments will be permitted.

Articles 2 and 9 restrict the variation to cases where there is a possibility that the plaintiff will develop some serious disease or suffer some serious deterioration, or enjoy some significant improvement, in his/her physical or mental condition, and the court has ordered, or the parties have agreed, that the order or agreement is to be capable of variation.

The decision that an order may be varied in the future (known as a “variable order”) may be made on the application of a party, or with the consent of the parties or of the court's own initiative (Article 2 of the Order). Where the court makes such an order, the court's permission for an application to vary the order is required, unless the court decides otherwise (paragraph (e) of Article 5); in the case of an agreement, the court's permission is always required (Article 9(3)).

The person applying for permission to apply to vary an order or agreement must show that the specified disease, deterioration or improvement has occurred and that it has caused or is likely to cause an increase or decrease in the plaintiff's financial loss (Article 10(1)). The application for permission is dealt with by the court on the submitted papers, and without a hearing. If permission is refused the plaintiff may ask the court to reconsider the matter at a hearing (Article 11(1)).

No appeal from the grant of permission or the refusal of permission on a reconsideration is possible (Article 12(3), Article 11(2)).

The court may, where authorising a variation, order that -

- the amount of the annual payments to the plaintiff is to be varied and/or
- the regularity of payments is to be altered and/or
- a lump sum is to be paid in addition to the periodic payments.⁷³

The court must reconsider the varied order and be satisfied that the continuity of payment, as varied, is reasonably secure, under section 2(3) of the 1996 Act.

Section 2(7) of the 1996 Act provides that an alteration of the method by which the payments are made under a periodic payments order shall be treated as a breach of the order unless -

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

⁷³ Article 13(1).

(b) the new method is protected by a guarantee given by a Minister in respect of a public sector liability as permitted by the Act,

(c) the new method is protected by the Financial Services Compensation Scheme, or

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

In addition to facilitating provision for variation of the amount of the periodic payments, the 1996 Damages Act also enables the court in England, when making an order for periodic payments, to permit a litigating party to apply for a variation of the method whereby continuity of payment is secured.⁷⁴

Whilst the Group is conscious that the provision of a facility for variation of periodic payments may tend to undermine finality in litigation, it recognises that, in particular circumstances, variation may be required so as to ensure that injured plaintiffs will be adequately compensated for costs and expenses which they have incurred and will incur as a direct result of the injuries which they have suffered.

Variation may also be necessary and appropriate for the benefit of a defendant where, for example, an injured plaintiff recovers capacity leading to reduction in care or treatment costs or resumption of earning potential.

The Group is, therefore, of the view that provision should be made for the variation of periodic payment awards, in particular identified exceptional circumstances.

The Group considers that the provisions for the variation of periodical payment orders in England pursuant to the Damages Act 1996, as amended, as described above would serve as a useful model and should be followed and adopted within this jurisdiction.

The Group has also considered whether it should be permissible to provide in a periodic payments order at the outset for the adjustment, on the attainment by a plaintiff of a particular age, or ages, of the periodic payments to reflect an increase or decrease in living or care expenses, e.g. when a plaintiff reaches adulthood – an arrangement known as “stepped payments”. The Group is of the view that provision should be made for periodic payments, as indexed, to be further adjusted for this purpose.

9. Assignment or charging of periodic payments

The Group has considered the question of whether the recipient of a periodic payments order should be entitled to assign his or her interest in the order or to charge the order or encumber it in any other manner.

In England, a person entitled to receive periodic payments under a court order may not assign or charge that right without the approval of the court which made the order. The court may not approve an assignment or charge unless satisfied that special circumstances make that necessary.⁷⁵ Any purported assignment or charge, or agreement to assign or charge which is not approved by the court is deemed void. Rule 41.10 of the Civil Procedure Rules provides that, where the court is satisfied that special circumstances make an assignment or charge necessary, it shall, in deciding whether or not to approve the assignment or charge, also have regard to the factors set out in the practice direction, viz.:

- whether the capitalised value of the assignment or charge represents value for money;

⁷⁴ Para. (d) of section 2(5).

⁷⁵ Section 2(6) of the 1996 Act.

- whether the assignment or charge is in the plaintiff's best interests, taking into account whether these interests can be met in some other way; and
- how the plaintiff will be financially supported following the assignment or charge.

Section 2A(4) of the 1996 Damages Act excludes from the prohibition on assignment a case where the right is assigned to the scheme manager under section 212 of the Financial Services and Markets Act 2000, i.e. where the right of recovery is assigned in return for being compensated by a compensation scheme.

The Group considers that such restrictions are appropriate and fully justifiable given the object of periodic payments orders, and should apply to periodic payments orders in this jurisdiction.

10. Provision for dependants

In England, Rule 41.1(c) of the Civil Procedure Rules provides that an order for periodic payments shall provide that the plaintiff's annual future pecuniary losses, as assessed by the court, must be paid for the duration of the plaintiff's life, "or such other period as the court orders".

Rule 41.2 provides that where the court orders that any part of the award shall continue after the plaintiff's death, for the benefit of the plaintiff's dependants, the order must also specify the relevant amount and duration of the payments and how each payment is to be made during the year and at what intervals.

The Practice Direction provides that an order may be made under rule 41.8(2) where a dependant would have had a claim under section 1 of the Fatal Accidents Act 1976 if the plaintiff had died at the time of the accident.

The Group has considered whether, in particular circumstances, the courts should be empowered to make periodic payments orders which would endure for dependants of injured plaintiffs after death. The Group does not foresee such circumstances arising where periodic payments orders are made to compensate for the costs of the plaintiff's care, treatment and medical and assistive aids and appliances.

The Group can see no reason why the litigating parties should be precluded from reaching agreement to make ongoing payments to dependants for specified periods after the death of an injured plaintiff.

11. Tax liability

Section 189 of the Taxes Consolidation Act 1997 already affords tax relief in respect of income from the investment of lump sums awarded or paid in settlement following the institution of proceedings to an individual who is permanently and totally incapacitated by reason of mental or physical infirmity from maintaining himself or herself.

The legislation in England provides that periodic payments - whether under a court order or a settlement agreed by the parties - shall not for the purposes of income tax be regarded as the income of a plaintiff and trustees, and shall be paid without deduction.

The Group considers that, to enable periodic payments orders to operate effectively and equitably, provision should be made – most appropriately, it is suggested, in a Finance Bill - for periodic payments to be exempt from income tax.

12. Costs

The rules of court allow a defendant in a personal injuries action, on notice to the plaintiff, to lodge in court an amount to satisfy the claim of the plaintiff⁷⁶ (or, where the defendant falls within various categories of public body or office-holder or insurer,⁷⁷ to make an offer of payment in satisfaction in lieu of lodgment⁷⁸).

The defendant may make a lodgment (or offer) once, at the time of delivering the defence or, on a notice of trial being served, within four months of service of the notice of trial, unless the court otherwise permits. Provision is also made for the lodgment or offer to be increased, unless this would be unfair or prejudicial to the plaintiff.⁷⁹ The fact or amount of the lodgment are not generally disclosable to the court.⁸⁰

Where the plaintiff does not accept the lodgment or offer and subsequently is awarded an amount in damages which fails to exceed the lodgment or offer, the plaintiff becomes entitled to the costs of the action up to the date of the lodgment or offer only, and the defendant becomes entitled to the costs of the action from the date of the lodgment or offer.

Section 17 of the Civil Liability and Courts Act 2004 provides that the parties to an action for personal injuries must, after the date of service of the personal injuries summons on the defendant⁸¹ exchange formal offers to settle the action (the defendant having an option of serving a notice stating that he or she is not prepared to pay any amount to settle the action).

When considering the awarding of costs, the court must have regard to the terms of a formal offer, and the reasonableness of the conduct of the parties in making their formal offers.

Section 17 operates in addition to, and not in substitution for, the lodgment and tender provisions of the rules of court.

The lodgment and tender rules and formal offers under section 17 are designed to encourage a plaintiff to settle his or her claim and avoid a trial where a defendant is willing and able to make a satisfactory offer of settlement. An issue arises as to whether those provisions are capable in practical terms of accommodating the concept of a damages award in the form of periodic payments.

In England, the Civil Procedure Rules regulating the making of an offer of settlement by a plaintiff or defendant (known as a “Part 36 offer”) now contain special provisions for offers to settle claims which might result in a periodic payments order. Such an offer may contain an offer to pay or accept -

- the whole or part of the damages for future pecuniary loss in the form of (i) a lump sum; or (ii) periodical payments; or (iii) both a lump sum and periodical payments
- the whole or part of any other damages in the form of a lump sum.

⁷⁶ Order 22 rules 1 to 13, Rules of the Superior Courts.

⁷⁷ Viz.: a Minister of Government; the Attorney General; the Government; the State; any party in respect of whom the State is providing an indemnity; an indemnifier of any party and authorised to carry on business in the State as an insurance undertaking pursuant to the law for the time being in force; the Motor Insurers Bureau; or the Visiting Motor Insurers Bureau.

⁷⁸ Order 22, rule 14, Rules of the Superior Courts.

⁷⁹ Delany and McGrath, *Civil Procedure in the Superior Courts*, 2nd Ed. (2005), Round Hall.

⁸⁰ Order 22, rule 1(8), Rules of the Superior Courts.

⁸¹ Par. 3, the Civil Liability and Courts Act 2004 (Section 17) Order 2005 (SI No. 169 of 2005).

A Part 36 offer must state the amount of any offer to pay the whole or part of any damages in the form of a lump sum and *may* state what part of the lump sum, if any, relates to damages for future pecuniary loss and what part relates to other damages to be accepted in the form of a lump sum.

The offer *must* state what part of the offer relates to damages for future pecuniary loss to be paid or accepted in the form of periodical payments and must specify -

- the amount and duration of the periodical payments
- the amount of any payments for substantial capital purchases and when they are to be made, and
- that each amount is to vary by reference to the retail prices index (or to some other named index, or that it is not to vary by reference to any index), and

the offer *must* state either that any damages which take the form of periodical payments will be funded in a way which ensures that the continuity of payment is reasonably secure in accordance with section 2(4) of the Damages Act 1996 or how such damages are to be paid and how the continuity of their payment is to be secured.

Where a Part 36 offer is made to pay or to accept damages in the form of both a lump sum and periodical payments, the offeree may only give notice of acceptance of the offer as a whole.

Where a plaintiff fails to obtain a judgment more advantageous than a defendant's Part 36 offer, the plaintiff will be exposed to an order for the defendant's costs unless the court considers it unjust so to order.

Where judgment against the defendant is at least as advantageous to the plaintiff as the proposals contained in the plaintiff's offer, the defendant will be similarly exposed to liability for the plaintiff's costs.

In considering whether it would be unjust to make such orders, the court will take into account all the circumstances of the case including: the terms of the offer concerned, the stage in the proceedings when it was made, including in particular how long before the trial started the offer was made; the information available to the parties at the time when the offer was made; and the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated.

The English procedural rules are, in the view of the Group, a necessarily imperfect attempt at a solution. They reflect the difficulty in evaluating the adequacy of an offer comprised of periodic payments and lump sum components, and are silent as to how a court is to determine whether a particular offer is more or less disadvantageous than the award made in the case.

The Group is of the view that the present lodgment and tender arrangements cannot be expected to operate justly for the parties in the case of a claim for damages which is to be met wholly or partly in the form of periodic payments. The making of an offer by a defendant to settle a claim for future pecuniary loss in the form of periodic payments - and its evaluation in turn by the plaintiff - will involve complex considerations, including an estimate of the capital value of the payments, a calculation of life expectancy and a consideration of the likely effects of indexation on the payments. That exercise could be further complicated by the need to combine any lump sum component with the periodic payments component of the offer.

The same considerations may hamper the parties' compliance with the requirement to make or evaluate a formal offer under section 17 of the 2004 Act.

The Group is of the view that the most practicable solution to the problem lies in restricting the operation of the lodgment and tender arrangements and of section 17 of the 2004 Act, in cases where a periodic payment order is made, to those heads of loss not covered by the periodic payment order. Insofar as heads of loss covered by the periodic payment order are concerned, the court should, when determining the issue of liability for costs, be required to take into account all open offers (i.e. offers not qualified as being made without prejudice) and "Calderbank" offers⁸² made on behalf of the parties, after commencement of the proceedings, to effect a compromise of the proceedings.

This would entail amending Order 22 to require a defendant making a lodgment or offer in satisfaction of an action for damages for personal injuries to specify how much of the lodgment or offer is attributable to future pecuniary loss and to break down the amount attributable to such loss between (a) future medical treatment; (b) future care; (c) provision for mechanical or other appliances associated with such care or treatment; and (d) future loss of earnings. The same consideration would apply to formal offers under section 17 of the 2004 Act.

The combined effect of (i) confining the lodgment and tender procedure and section 17 of the 2004 Act to the lump sum portion of an award and (ii) allowing the court to consider open or "Calderbank" offers for the portion covered by a periodic payments order should serve to provide clarity of outcome on liability for costs for the parties. Where a plaintiff succeeds at trial in "beating" the defendant's offer by way of lump sum but the periodic payments order made by the court is less favourable than the offer of periodic payments made by the defendant, the court would be entitled – as the rules of court currently permit it to do in its discretion where requested to do so⁸³ – to set off the liabilities for the costs of litigating the separate heads of loss between the parties.

Provision should be made in primary legislation that, in the event of the making of a periodic payments order, s. 17 of the 2004 Act should not apply in respect of the heads of loss covered by the order, and the court should take into account open offers and "Calderbank" offers made post-action in determining liability for the costs of the litigation related to those heads of loss. Such provision would need to be accompanied by an amendment of Order 22 of the Rules of the Superior Courts to the effect mentioned above.

The above recommendations would require that, for the purposes of taxing or agreeing costs, bills of costs be itemised as to the work involved in claiming or, as the case may be, disputing the various heads of loss aforementioned.

13. Protection of periodic payments in the event of bankruptcy

The legislation in England excludes the right to receive periodic payments or any property or arrangement designed to protect continuity of the periodic payments, from a bankrupt's estate for the purposes of realisation, or the making of an income payments order, for the benefit of the creditors.

⁸² A "Calderbank offer" is an offer expressed to be 'without prejudice except (*or save*) as to costs'. It is intended to have all the features of a pure "without prejudice" offer, but enables reference to be made to it in the proceedings concerned, if it is not accepted, in seeking to visit liability for costs on the party who has declined the offer. It gained widespread recognition in England following a Family Division case (*Calderbank v. Calderbank* [1976] Fam. Law 93). The "Calderbank offer" has received recognition in this jurisdiction in the case of actions in respect of claims or counterclaims for which a lodgment or tender offer in lieu of lodgment may not be made - Order 99 rule 1A(1) (b) , Rules of the Superior Courts (S.I. No. 12 of 2008).

⁸³ Order 99 rule 4, Rules of the Superior Courts.

Since a right of action arising from a tort causing personal injuries to a debtor does not vest in the assignee in bankruptcy in the event of the debtor's adjudication as a bankrupt, it might be argued that no express provision needs to be made in a head of Bill excluding payments under a periodic payments order.

However, s. 65(1) of the Bankruptcy Act 1988 provides:

“(1) Notwithstanding any provision to the contrary in any other enactment, whenever a bankrupt is in receipt of or is entitled to receive any salary, income, emolument or pension, the Court may, from time to time, on the application of the Official Assignee, make such order directed to the bankrupt and any person from whom the bankrupt is entitled to receive any such salary, income, emolument or pension for the payment to the Official Assignee of all or part of such salary, income, emolument or pension, subject to such conditions as to payment as the Court may specify in the order having regard to the family responsibilities and personal situation of the bankrupt.”

In light of s. 65(1), it would seem prudent, for the sake of clarity to make provision expressly excluding payments under a periodic payments order from the ambit of that sub-section, and the Group so recommends.

14. Medical card or long term illness card entitlements

The Group is conscious that the introduction of periodic payments to cover treatment and care expenses could lead to double recovery by beneficiaries of the medical card or long term illness schemes or any other similar schemes under which benefits or allowances are available. The Group considers that the Department of Health and Children should take the necessary steps to ensure that any such anomaly would be avoided.

Chapter 5: Interim payments in respect of damages and provisional awards of damages

The Group has considered whether, in conjunction with a regime for periodic payments, provision should be made for interim payments of damages and for provisional damages awards.

These subjects were considered by the Law Reform Commission in its 1996 report.

Interim payments of damages

The Law Reform Commission noted that interim awards of damages are not made in Ireland except where the court, having awarded damages to the plaintiff, declines to stay execution in respect of a portion of the award of the damages pending an appeal by the Defendant against quantum.

The Commission recommended that such awards should be adopted and should be grounded in a statute or in a rule of court. The Commission considered the English rule of court which empowers the courts to order interim payments of damages if liability is admitted or is otherwise clear and where the defendant is a public authority, is covered by insurance or has other sufficient resources.

In England, interim awards may also be made where judgment for damages has been obtained by the plaintiff or where the court is satisfied that, if the claim went to trial, the plaintiff would obtain judgment for a substantial sum from the defendant concerned.

The Law Reform Commission recommended that rules of court in this jurisdiction should make provision for interim awards of damages and that:

- (a) such awards should not be based on need;
- (b) the defendant's resources should not be relevant;
- (c) they should apply to all defendants;
- (d) they should be conditional on an admission of liability; and
- (e) they should not be made when an appeal has been lodged against liability, (but the court should have discretion to make an interim award where liability appears clear, even though contested on appeal).⁸⁴

The Group respectfully shares the view of the Law Reform Commission, both as to the merit of making provision for the remedy of an interim award of damages, and recommends that the availability of that remedy should be conditional on either an admission of liability by the defendant or the obtaining of judgment by the plaintiff for damages to be assessed.

Provisional damages

The Group has considered the question whether the courts should be specifically empowered to make provisional awards of damages in personal injuries actions where there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.

⁸⁴ Paras. 16.27 - 16.35 of the Commission's report.

In its 1996 report the Law Reform Commission, considered this question and concluded:

“Our own consultations revealed that there was universal support for provisional awards, again, based on a chance of serious deterioration and never based on non-medical contingencies. Such awards could be structured, if this proved desirable. A procedure of this sort would help alleviate the inaccuracy in some awards in very serious personal injuries cases and might also lead to earlier settlements and reduced delays. Furthermore, assuming that the probabilities used to calculate the size of damages for these disabilities are reasonably accurate, then insurance companies could plan future liabilities with some confidence on the basis of a number of cases. Therefore, *we would recommend the introduction of a facility for provisional awards in cases where a chance of serious deterioration in the plaintiff's health exists as a result of the wrong.*”⁸⁵

The Group shares the view of the Law Reform Commission that provision for the making of interim and provisional awards of damages should be introduced in this jurisdiction.

While rules of court could be considered as the legal basis for such remedies, it may be more appropriate that they be provided for in primary legislation.

In England, provisional damages are awarded based on an assessment which assumes that the injured person will not develop the disease or suffer the deterioration in his condition, and further damages may be awarded at a future date if he develops the disease or suffers the deterioration.⁸⁶

Section 3 of the Damages Act 1996, further provides *inter alia* that -

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

That legislative provision appears to address adequately the possibility that a person awarded provisional damages may subsequently die as a result of the act or omission which gave rise to the cause of action for which the damages were awarded.

Were such provision to be enacted within this jurisdiction - and the Group so recommends - it is suggested that this would require the insertion of a new section in Part IV (Fatal Injuries) of the Civil Liability Act 1961.

⁸⁵ Para. 16.42 of the Commission's report. Emphasis as per the original.

⁸⁶ S.32A, Supreme Court Act 1981.

Appendix

Draft Scheme of Civil Liability (Damages) Bill

ARRANGEMENT OF SECTIONS

1.	Short title
2.	Commencement
3.	Interpretation
4.	Power to award damages by periodic payments
5.	Security of periodic payments
6.	Guarantees of future periodic payments
7.	Indexation of periodic payments
8.	Variation of periodic payments order
9.	Prohibition on assignment or charge of right to periodic payments without court approval
10.	Criteria for variation or authorisation of an assignment or charge
11.	Costs
12.	Provisional and supplemental damages
13.	Interim payments of damages
14.	Amendment of Bankruptcy Act 1988

BILL

entitled

AN ACT TO MAKE PROVISION FOR THE MAKING OF PERIODIC PAYMENTS ORDERS AND GRANTING OF OTHER RELIEFS IN RESPECT OF ACTIONS FOR DAMAGES FOR PERSONAL INJURY AND TO PROVIDE FOR RELATED MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Short title	1. — This Act may be cited as the Civil Liability (Damages) Act 20??.
Commencement	2. — The Minister may, by order or orders, appoint such day or days on which this Act shall come into operation, and different days may be so appointed for different purposes and for different provisions.
Interpretation	3. — In this Act, unless the context otherwise requires— “Act of 1961” means the <i>Civil Liability Act 1961</i> ; “Act of 1993” means the <i>Statistics Act 1993</i> ; “Act of 2000” means the <i>National Treasury Management Agency (Amendment) Act 2000</i> ; “Central Statistics Office” means the office established by section 8 of the Act of

	<p>1993;</p> <p>“court” means the Supreme Court, the High Court or the Circuit Court;</p> <p>“Director General” means the Director General of the Central Statistics Office;</p> <p>“interim payment of damages” means, in relation to proceedings in which a claim is made for damages for any personal injury, a payment on account of any damages, debt or other sum (excluding any costs) which a party to those proceedings may be held liable to pay to or for the benefit of another party to the proceedings if a final judgment or order of the court in the proceedings is given or made in favour of that other party;</p> <p>“Minister” means the Minister for Justice and Law Reform;</p> <p>“paying party” includes any defendant in proceedings against whom a periodic payments order is made and any person who has undertaken on behalf of such a defendant the obligation to make payments under such order to the person to whom they are or will become due;</p> <p>“periodic payments order” means an order made under <i>section 4</i>;</p> <p>“personal injury” has the same meaning as in <i>section 2</i> of the Act of 1961;</p> <p>“plaintiff” means any plaintiff in proceedings in whose favour and for whose benefit a periodic payments order is made;</p> <p>“State authority” has the same meaning as in <i>section 7</i> of the Act of 2000.</p>
<p>Power to award damages by periodic payments</p>	<p>4. — (1) Subject to the other subsections of this section and <i>section 5</i>, a court when awarding damages for personal injuries, may, having regard to:</p> <ul style="list-style-type: none"> (a) the nature of the injuries in respect of which an award of damages in respect of personal injury is being made and (b) the circumstances of the plaintiff, <p>where it considers it appropriate in the best interests of the plaintiff, order that the whole or part of such of those damages as relate to</p> <ul style="list-style-type: none"> (i) the future medical treatment of that person, (ii) the future care of that person, (iii) provision for mechanical or other appliances associated with such care or treatment, and (iv) future loss of earnings by that person, <p>be paid in periodic payments in such amount or amounts and for such period, or periods, not exceeding the remaining lifetime of the plaintiff, as the Court shall in that order provide.</p> <p>(2) A periodic payments order may only be made in respect of damages relating to a matter referred to in paragraph (iv) in <i>subsection (1)</i> where the parties consent.</p> <p>(3) A periodic payments order may be made by consent of the parties.</p> <p>(4) Save where the parties have consented to the making of a periodic payments order, the court shall not make a periodic payments order unless it has heard the parties on the issue of whether such an order should be made.</p>
<p>Security of periodic payments</p>	<p>5. — (1) A court may not make a periodic payments order unless it is satisfied that the continuity of payment under the order is reasonably secure.</p> <p>(2) For the purpose of <i>subsection (1)</i> the continuity of payment under a periodic payments order is deemed to be reasonably secure where—</p> <ul style="list-style-type: none"> [(a) the payments under the periodic payments order are protected by a guarantee given under <i>section 6</i>, or

	<p>(b)] the source of the payments under the periodic payments order is -</p> <p>(i) a State authority within the meaning of the Act of 2000 or</p> <p>(ii) any person or body, or class of persons or body, other than one referred to at paragraph (i), designated by order of the Minister for Finance.</p> <p>(3) A periodic payments order may include provision—</p> <p>(a) requiring the paying party to make the periodic payments concerned by a method which the court is satisfied would ensure that continuity of payment is reasonably secure;</p> <p>(b) requiring the paying party to take specified action to secure continuity of payment;</p> <p>(c) enabling a party to the proceedings or a paying party to apply for a variation of any provision included in a periodic payments order by virtue of <i>paragraphs (a) or (b)</i>.</p> <p>(4) Where a periodic payments order is made, the method by which the payments are made may not be altered without the prior approval of the court unless <i>subsection (2)[(a) or (b)]</i> applies to the new method.</p>
Guarantees of future periodic payments	<p>[6. — <i>See comments at page 31 of the Report as to the option of providing by statute for a Minister of the Government, with the consent of the Minister of Finance, to be authorised to give a guarantee to a body in terms similar to those of section 6, Damages Act 1996 (England, Wales and Northern Ireland).</i>]</p>
Indexation of periodic payments	<p>[Option 1:</p> <p>7. — (1) Notwithstanding anything contained in the Act of 1993, the Central Statistics Office shall compile and publish annually indices, each in an itemised manner, indicating –</p> <p>(a) the estimated respective average hourly earnings in the preceding year in the occupations of nurse, physiotherapist, occupational therapist, speech therapist, care assistant, and in such other occupations associated with the treatment or care of persons who are injured or are physically or mentally incapacitated as the Director General may specify,</p> <p>(b) the estimated respective average costs in the preceding year of such types of medical procedure or service for the treatment of the persons referred to in paragraph (a) as the Director General shall specify,</p> <p>(c) the estimated respective average costs in the preceding year of mechanical and other aids or appliances for the support or assistance of such persons.</p> <p>(2) Where a court makes a periodic payments order, unless the court in that order otherwise orders, such order shall -</p> <p>(a) indicate the proportion or amount, if any, of the periodic payments required by that order to be made which is attributable to each item in the indices respectively referred to in subsection (1),</p> <p>(b) provide for the proportion or amount concerned to be adjusted annually to the extent of the increase or decrease, if any, indicated in the index concerned for the preceding year in respect of the item to which it has been so attributed and</p> <p>(c) indicate the date on or by which such adjustment is to be made.</p> <p>(3) The first of each of the indices referred to in subsection (1) shall be published not later than [six] months after the coming into operation of this section.</p> <p>(4) <i>Section 26 of the Debtors (Ireland) Act 1840</i> does not apply to any future payment becoming due under a periodic payments order until the date on which</p>

	<p>the payment in question has become due and remains unpaid.</p> <p>(5) This section applies notwithstanding <i>section 22(2)(e) of the Courts Act 1981.</i></p> <p>[Option 2:</p> <p>7. — (1) There shall be compiled and published annually, by</p> <p style="padding-left: 20px;">(a) the Minister or</p> <p style="padding-left: 20px;">(b) where the Minister so determines, by such other person or such body as the Minister shall by order specify,</p> <p>indices, each in an itemised manner, indicating –</p> <p style="padding-left: 20px;">(i) the estimated respective average hourly earnings in the preceding year in the occupations of nurse, physiotherapist, occupational therapist, speech therapist, care assistant, and in such other occupations associated with the treatment or care of persons who are injured or are physically or mentally incapacitated as the Minister may by regulations, specify,</p> <p style="padding-left: 20px;">(ii) the estimated respective average costs in the preceding year of such types of medical procedure or service for the treatment of the persons referred to in paragraph (i) as the Minister shall in such regulations specify,</p> <p style="padding-left: 20px;">(iii) the estimated respective average costs in the preceding year of mechanical and other aids or appliances for the support or assistance of such persons.</p> <p>(2) Where a court makes a periodic payments order, unless the court in that order otherwise orders, such order shall -</p> <p style="padding-left: 20px;">(a) indicate the proportion or amount, if any, of the periodic payments required by that order to be made which is attributable to each item in the indices respectively referred to in subsection (1),</p> <p style="padding-left: 20px;">(b) provide for the proportion or amount concerned to be adjusted annually to the extent of the increase or decrease, if any, indicated in the index concerned for the preceding year in respect of the item to which it has been so attributed and</p> <p style="padding-left: 20px;">(c) indicate the date on or by which such adjustment is to be made.</p> <p>(3) Notwithstanding anything contained in the Act of 1993, the Central Statistics Office may be specified by the Minister by regulations under subsection (1) as a body which shall compile and publish the indices referred to in that subsection.</p> <p>(4) The first of each of the indices referred to in subsection (1) shall be published not later than [six] months after the coming into operation of this section</p> <p>(5) <i>Section 26 of the Debtors (Ireland) Act 1840</i> does not apply to any future payment becoming due under a periodic payments order until the date on which the payment in question has become due and remains unpaid.</p> <p>(6) This section applies notwithstanding <i>section 22(2)(e) of the Courts Act 1981.</i></p>
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<p>Variation of periodic payments order</p>	<p>8. — (1) A court may make provision in a periodic payments order that it may be varied only if, at the time of making of that order, there is proved or admitted to be a chance that at some definite or indefinite time in the future the plaintiff will</p> <ul style="list-style-type: none"> (a) as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration, or (b) enjoy some significant improvement in his or her physical or mental condition, where that condition had been adversely affected as a result of that act or omission. <p>(2) Where the court makes provision in accordance with <i>subsection (1)</i>,</p> <ul style="list-style-type: none"> (a) it shall assess damages on the assumption that the disease, deterioration or improvement will not occur; (b) the periodic payments order must specify the disease or type of deterioration or improvement; (c) the periodic payments order may specify a period within which an application for it to be varied may be made; (d) the periodic payments order may specify more than one disease, or type of deterioration or improvement and may, in respect of each, specify a different period within which an application for it to be varied may be made. <p>(3) Where the court makes provision in accordance with <i>subsection (1)</i>, the court may vary the order ,</p> <ul style="list-style-type: none"> (a) where on the application of the plaintiff it is satisfied that an event referred to in paragraph (a) in <i>subsection (1)</i> has occurred; (b) where on the application of the defendant it is satisfied that an event referred to in paragraph (b) in <i>subsection (1)</i> has occurred. <p>(4) The power to vary a periodic payments order under this section shall, in circumstances to which paragraph (b) in <i>subsection (1)</i> refers, include power to discharge that order.</p>
<p>Prohibition on assignment or charge of right to periodic payments without court approval</p>	<p>9. — (1) A plaintiff's right to receive payments under a periodic payments order may not be assigned or charged without the prior approval of the court which made the periodic payments order; and—</p> <ul style="list-style-type: none"> (a) the court shall not approve an assignment or charge unless it is satisfied that special circumstances make it necessary, and (b) subject to <i>subsection (2)</i>, a purported assignment or charge, or agreement to assign or charge right mentioned in this section, is void unless it has been approved by the court. <p>(2) <i>Subsection (1)</i> does not apply where a plaintiff assigns a right mentioned in <i>subsection (1)</i> to a person who has compensated the plaintiff in full for the loss of the value of the right, in accordance with an enactment or with a scheme operated under an enactment.</p>
<p>Criteria for variation or authorisation of an assignment or charge</p>	<p>10. — In considering —</p> <ul style="list-style-type: none"> (a) whether to vary a periodic payments order on the application of a plaintiff in accordance with <i>section 8</i>, (b) whether to authorise an assignment or charge in accordance with <i>section 9</i>, <p>a court shall, in addition to any other required matter, have regard to:</p> <ul style="list-style-type: none"> (i) the arrangement which would be appropriate in the best interests of the plaintiff and (ii) where relevant, the likely future security of the periodic payments.

<p>Costs</p>	<p>11. (1) An offer of terms of settlement made under section 17 of the <i>Civil Liability and Courts Act 2004</i> shall specify</p> <ul style="list-style-type: none"> (a) what amount of the offer is attributable to future pecuniary loss and (b) what portions of that amount are attributable, respectively, to <ul style="list-style-type: none"> (i) future medical treatment; (ii) future care; (iii) provision for mechanical or other appliances associated with such care or treatment; and (iv) future loss of earnings. <p>(2) Where the court makes a periodic payments order -</p> <ul style="list-style-type: none"> (a) section 17 of the <i>Civil Liability and Courts Act 2004</i> shall not apply to that part of the costs of the proceedings which is attributable to any head of loss the subject of the periodic payments order, and (b) the court shall, when determining liability for the part of the costs of the proceedings referred to in paragraph (a) as between the parties, take into account <ul style="list-style-type: none"> (i) all offers, if any, not qualified as being made without prejudice and (ii) all offers, if any, made without prejudice save as to the issue of costs <p>made by or on behalf of a party to the proceedings, after their commencement, to effect a compromise of the proceedings.</p>
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Provisional and supplemental damages	<p>12. — [(1) In any proceedings in which a claim is made for damages for personal injury, where the court is satisfied, or it is admitted, that there is a chance that at some definite or indefinite time in the future the plaintiff will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition, the court may make an order awarding the plaintiff—</p> <p>(a) damages assessed on the assumption that the plaintiff will not develop the disease or suffer the deterioration in his or her condition (in this section, a “provisional damages order”), and</p> <p>(b) further damages at a future date if he or she develops the disease or suffers the deterioration (in this section, a “supplemental damages order”).]</p> <p>OR</p> <p>[(1) In any proceedings in which a claim is made for damages for personal injury, where the court is satisfied, or it is admitted, that there is a possibility, but no more than a possibility, that the plaintiff will, as a result of the act or omission which gave rise to the cause of action, suffer particular serious consequences in the future, the court may –</p> <p>(a) make an order (in this section, a “provisional damages order”) awarding the plaintiff damages assessed on the assumption that such serious consequences will not occur, identifying those consequences and specifying a period within which the plaintiff may re-apply to the court for an award of further damages in accordance with the terms of the provisional damages order in the event of such consequences occurring, and</p> <p>(b) where an application is made in accordance with <i>paragraph (a)</i>, make an order (in this section, a “supplemental damages order”) awarding the plaintiff further damages in accordance with the terms of the provisional damages order where the court is satisfied that the consequences referred to have occurred.]</p> <p>(2) Nothing in the <i>Statutes of Limitations</i> prevents the making of an application for a supplemental damages order in any case in which a provisional damages order has been made.</p>
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<p>Interim payments of damages</p>	<p>13. — (1) The court may, where either of the conditions listed in <i>subsection (2)</i> is met, make an order requiring a party to proceedings in which a claim is made for damages for personal injury to make an interim payment of damages, of such amount as may be specified in the order, to a person claiming damages in the proceedings, or into court for the benefit of that person.</p> <p>(2) The conditions referred to in <i>subsection (1)</i> are:</p> <p>(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the plaintiff;</p> <p>(b) the plaintiff has obtained judgment against that defendant for damages to be assessed.</p> <p>(3) The court shall not order an interim payment of damages in an amount greater than that which it considers to be</p> <p>(a) reasonably necessary having regard to the plaintiff's circumstances and</p> <p>(b) a reasonable proportion of the likely amount of the final judgment.</p> <p>(4) The court shall, when considering whether to make an interim payment of damages, take into account –</p> <p>(a) contributory negligence; and</p> <p>(b) any relevant set-off or counterclaim.</p> <p>(5) Nothing in this section affects the exercise of any power relating to costs.</p>
<p>Amendment of Bankruptcy Act 1988</p>	<p>14. — The <i>Bankruptcy Act 1988</i> is amended by:</p> <p>(a) the substitution of the following subsection for <i>subsection (4)</i> of <i>section 44</i>:</p> <p>“(4) The property to which <i>subsection (1)</i> applies does not include—</p> <p>(a) property held by the bankrupt in trust for any other person, or</p> <p>(b) any sum which vests in the Official Assignee under <i>section 7(1)(a)</i> of the <i>Auctioneers and House Agents Act 1967</i>, or <i>paragraph (i)</i> of <i>section 30</i> of the <i>Central Bank Act 1971</i>, or</p> <p>(c) any right to receive payments under a periodic payments order within the meaning of <i>section 3</i> of the <i>Civil Liability (Damages) Act 20??</i>.”</p> <p>(b) the insertion of the following subsection immediately following <i>subsection (2)</i> of <i>section 65</i>:</p> <p>“(3) An order made under this section shall not affect payments made to a bankrupt under a periodic payments order within the meaning of <i>section 3</i> of the <i>Civil Liability (Damages) Act 20??</i>.”</p> <p>(c) the substitution of the following section for <i>section 71</i>:</p> <p>“71. — The Court may make to the bankrupt out of his estate such allowances as the Court thinks proper in the special circumstances of the case, provided that where the bankrupt enjoys a right to receive periodic payments under or by virtue of a periodic payments order made under <i>section 4</i> of the <i>Civil Liability (Damages) Act 20??</i>, no such allowance shall be made out of the estate in respect of any expenditure (or any part of any expenditure) likely to be incurred by or for the bankrupt as a result of the personal injury to which the order relates where the periodic payments order relates to or includes payment of or in respect of that expenditure (or such part of that expenditure).”</p>

