COSMETIC REFORM: PERIODIC PAYMENTS AND STRUCTURED SETTLEMENTS

by

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Ideally there would be no market for a book on personal injury damages in Canada. Accident victims or their dependants would be compensated through a first party social insurance plan, such as the scheme currently operating in New Zealand, or even better the one proposed for Canada by Professor Ison. The tort system for personal injury would then be consigned to its inevitable place as a mere chapter in legal history. As matters presently stand, however, the universal demise of civil liability in this sphere is still some way off politically.**

Introduction

Therein lies the sole justification for yet another essay on the topic of compensation for personal injury and wrongful death. There is no need here to rehash the arguments in favour of abolishing the tort system since these are well known as are the descriptions of the replacement model.[1] Equally this is not the forum to indulge in speculation on the political attractiveness or otherwise of expanded social insurance schemes to governments presently in power in our differing jurisdictions. Rather, this paper seeks more modestly to describe the departures from the lump sum mode of compensation and in particular to examine the arguments for and against the devices of periodic payments and struc-

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** K. Cooper-Stephenson and I. E. Saunders, *Personal Injury Damages in Canada* (1981), at p. iii.

1 T. G. Ison, *Rehabilitation and Compensation: The Future of Personal Injury Compensation,* (1979), at p. 87; 'Human Disability and Personal Income', *Studies in Canadian Tort Law* (1977, ed. Klar), at p. 427; 'The Politics of Reform in Personal Injury Compensation' (1977), 27 *U.T.L.J.* 385; H. Luntz, 'Proposals for a National Compensation Scheme' (1981) 55 *Law Inst. J.* 745.

tured settlements, both of which have received extensive comment of late.[2]

Since the principal topics of this paper consist of alternatives to the lump sum award, it is best to begin by examining the origins, justifications of and modifications to that traditional means of assessing tort damages. No matter which of the reports of *Fitter* v. *Veal*[3] one prefers, there is nothing to be found in the speeches of the curia which will support the idea of a second action for further compensation for consequential damage sustained by a party after the trial of the initial action. Indeed one report suggests that the judges were quite unsympathetic[4] in the face of the deceptively modern-sounding arguments against the once and for all assessment made by Sir Bertrand Shower.[5] That decision of the early eighteenth century reveals an emphasis on the notion of damages as *satisfaction* for wrong doing[6] which idea was the very basis of the somewhat recently litigated Celtic action of *assythment*[7] which underlines the difference of appreciation of the functions and purposes of judicial remedies over the centuries. Thus it would seem that the courts in earlier times were concerned to grant the

2 *Periodic Payments:* T. Elligett, 'The Periodic Payment of Judgments' (1979) 46 *Ins. Counsel J.* 130; L. Hindert, 'Periodic Payment of Personal Injury Damages' (1980) *F.I.C.Q.* 3; R. C. Henderson, 'Periodic Payments of Bodily Injury Awards' (1980) 66 *A.B.A.J.* 734; P. H. Corboy, 'Structured Injustice: Compulsory Periodic Payment of Judgments', (1980) 66 *A.B.A.J.* 1524; C. F. Krause, 'Structural Settlements for Tort Victims' (1980) 66 *A.B.A.J.* 1527; R. C. Henderson, 'Restoring the Tort Victim to Pre Injury Position' (1981) 67 *A.B.A.J.* 301; S. A. Rea, 'Lump Sum Versus Periodic Damage Awards' (1981) 10 *J. of Legal Studies* 131. C. G. Bale, 'A Tort Fund — Variable Periodic Damages Awards for Pecuniary Loss' (forthcoming, *New Studies in Canadian Tort Law,* ed. Steele 1982). *Royal Commission on Civil Liability and Compensation for Personal Injury* (Cmnd. 7054-I 1978) paras. 555-611.
Structured Settlements: D. A. Cave, 'Structured Settlements: An Alternative Resolution of Claims Including Death or Substantial Personal Injury', (1979) 27 *Chitty's L.J.* 234, (1979) 37 *The Advoc.* 329; L. McGlynn, 'Structured Settlements' (1981) *Can. Insur. Agent & Broker* 30; F. S. McKellar, 'Structured Settlements — A Current Review' (1981) 2 *Advoc. Q.* 389; *Yepremian et al.* v. *Scarborough Gen. Hosp. et al.* (1981) 15 C.C.L.T. 73 (Ont. H. Ct.); Fien Note (1981) 15 C.C.L.T. 79; H. W. Anderson, 'Structured Settlements — An Actuary's View' (1981) 16 C.C.L.T. 82; *Martin and Martin* v. *Bouchard* 1981) 32 N.B.R. (2d) 478 (Q.B.); T. V. Mangelsdofts, 'Structured Settlements in Review: The Fundamental Concept' (1981) 4 *Am. J. Trial Ad.* 459; F. G. Levin *et al.*, 'Structured Settlements in Review: A Case Study' (1981) 4 *Am. J. Trial Ad.* 579.

3 (1701) 12 Mod. 542, 88 E.R. 1506; *sub nom. Fetter* v. *Beale* (1701) 1 Ld. Raym 339, 91 E.R. 1122; Holt K.B. 13, 90 E.R. 905; 1 Salk. 117, 91 E.R. 11. The rule therein that the act, not the damage, gives rise to the cause of action illustrates the fallacy of relying on nuisance precedents to argue for tradition of 'periodic payments'. See S. A. Rea, 'Lump Sum Versus Periodic Damage Awards' (1981) 10 *J. of Legal Studies* 131.

4 'And it is the plaintiff's fault, for if he had not been so hasty, he might have been satisfied for the loss of his skull also', 91 E.R. 1122 at p. 1123.

5 His hardship argument was taken up by Lord Russell in *Gamell* v. *Wilson and Others* (1981) 1 All E.R. 579, 590 (H.L.) to support legislative reform of the single action tradition. See R. W. Hodgin, 'Damages for the "Lost Years" ' (1981) 32 *N.I.L.Q.* 106, at p. 114-116.

6 The first edition of *Mayne and McGregor on Damages* (1856) defined damages as 'pecuniary satisfaction obtainable by success in action'.

7 *McKendrick and Others* v. *Sinclair* 1970 S.L.T. 61, 1970 S.L.T. 234 and 1972 S.L.T. 110 (H.L.): See E. Veitch, 'Solatium — A Debt Repaid' (1972) 7 *Ir. Jur. (N.S.)* 77.

plaintiff a sum of money which would serve to offset the feelings of indignation and the desire for retribution as much as provide total compensation and encourage rehabilitation. Of course it is likely that the courts then wished to uphold a policy of finality of litigation and to protect the plaintiff through the lump sum against the risk that the wrongdoer might die or become insolvent. It is probable that the courts in that earlier period had no greater desire than today's judiciary[8] to add to the administrative burden of the courts the review of damage awards.

In the early part of this century, juries rather than judges tried to move away from the lump sum award. Firstly in Saskatchewan[9] and later in Québec[10] the lay assessors attempted to recompense, in the one case, a widow, and in the other, six children by means of annuities payable over fixed periods of time. This initiative was preremptorily rejected by appellate courts both inside Canada and without.[11] Later, however, one English judge expressed the opinion that, with the consent of the parties, the court had the inherent authority to substitute a secured pension for the once and for all award.[12] This penumbral jurisdiction of supreme court judges has been invoked in the Province of Ontario in relatively recent time to achieve a just and workable solution in a wrongful death action.[13] In the meantime some legislatures responded by the passage of provisions which permit split trials with interim payments[14] and others have gone as far as to sanction periodical payments.[15] In the former system the court is asked to assess fault in a declaratory order, to make an interim award (comprising usually of special damages, loss of income to trial and a lump sum for intangible losses) and to postpone the final assessment until the plaintiff's situation has stabilised. While this does attack some of the uncertainties in the once and

8 Committee on Tort Compensation (Mr Justice R. E. Holland, Osgoode Hall, Toronto, Ontario, August 1980).

9 *Waldron* v. *Elfros* (1922) 70 D.L.R. 726, [1923] 4 D.L.R. 1209 (Sask C.A.).

10 *Fournier* v. *C.N.R.* [1927] A.C. 167 (P.C.).

11 'The jury found that the Canadian National Railway Co. were by their servants guilty of the negligence charged, but most unfortunately shaped the damages they awarded in a form quite improper and illegal' *per* Lord Alkinson, [1927] A.C. 167, at p. 169.
This view was reasserted in the Supreme Court of Canada in *Andrews* v. *Grand and Toy Alta. Ltd.* (1978), 83 D.L.R. (3d) 452, at p. 458 (S.C.C.).

12 *Metcalfe* v. *L.P.T.B.* [1938] 2 All E.R. 352 at p. 355 (Q.B.):
'In such a case as this, a secured pension would seem to be the fairest way of compensating the plaintiff — fair to the employers and fair to the plaintiff — but the court has no power to make such an order except with the consent of the parties, and such consent is not given in this case. Accordingly, I must fix a lump sum, which, in the events that will happen, may be too much or may be too little. In view of the uncertainty of life, and the contingencies are beyond any calculation, no one can say what is fair and adequate compensation to the plaintiff . . .'

13 *Kolesar* v. *Jeffries* (1976) 59 D.L.R. (3d) 367 at pp. 377-380.

14 England: *Administration of Justice Act* 1969 (c. 58), s. 20: the relevant rule being R.S.C., 29, Pt. II.

15 Western Australia: *Motor Vehicle (Third Pty. Insur.) Act* (1943-1976) s. 16 (4).
South Australia: *Supreme Court Act* (1935-1980) s. 30 (b).

for all assessment it remains well short of the periodical payments option.

In the absence of root and branch legislative reform, it is clear from the law reports that the Australian High Court, the Supreme Court of Canada, the House of Lords together with the English Court of Appeal are growing increasingly restive with their roles as assessors of personal injury damage awards. This is so, despite the fact, that the judges do not in reality operate the system which is run on a daily basis by insurance adjusters, lawyers and expert advisors with the courts functioning most often only as a background threat to both sides to negotiate fairly.[16] Nevertheless, judicial statements of unhappiness with the state of the law and pleas for legislative intervention are becoming the rule rather than the exception.[17] The reasons for the judicial anguish are several: in the last quarter of the twentieth century it is now clear that most of the justifications for the lump sum award have been seriously eroded. That is to say, the risks of the defendant becoming insolvent when most are corporate insurers are now minimal. Also the last ten years have witnessed unchecked double-digit inflation with consequent rapid devaluation of money and this has emphasised the inadequacies of the single assessment.[18] Further, the courts have become more willing to consider the tax implications which render the lump sum problematic but which has given rise, in both Australia and Canada, to some judicial embarrassment by the necessary disruption of the customary respect for the rules of precedence in our highest tribunals.[19] All of this means that we have come a long way from satisfaction and finality as the policy bases for the judicial assessment of damages. It is clear that the courts are aiming for perfection of compensation[20] and are increasingly aware of the public interest in the avoidance of dissipation of

16 Cooper-Stephenson and Sanders *op. cit. supra,* at p. 7.

17 Australia: *Pennant Hills Restaurants Pty. Ltd.* v. *Barrell Ins. Pty. Ltd.* (1981) 55 A.L.J.R. 258 (H.C.).
Canada: *Andrews* v. *Grand and Toy Alta. Ltd.* (1978) 83 D.L.R. (3d) 452 (S.C.C.).
England: *Pickett* v. *British Rail Engineering Ltd.* [1978] 3 W.L.R. 955 (H.L.); *Croke* v. *Wiseman* [1982] 1 W.L.R. 71 (C.A.).

18 This is seen in the unseemly judicial scramble over discount rates: *Lewis* v. *Todd* (1980) 14 C.C.L.T. 294 (S.C.C.); *Todorovic* v. *Waller* (1981) 56 A.L.J.R. 59 H.C.). See J. L. R. Davis, 'Damages for Personal Injury and the Effect of Future Inflation' (1981) 56 *A.L.J.* 168.
In Canada this problem has been resolved in some Provinces by legislation, for example R.S.C. (Ont.), r. 267a: —
'The rate of interest to be used in determining the capitalised value of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is 2½% per annum.'

19 Australia: *Cullen* v. *Trappell* (1980) 54 A.L.J.R. 295 (H. Ct.) overruling *Atlas Tiles Ltd.* v. *Briers* (1978) 52 A.L.J.R. 707 (H. Ct.).
Canada: *Keizer v. Hanner* (1978) 82 D.L.R. (3d) 449 (S.C.C.); overruling *Gehrman* v. *Lavoie* [*1976*] 2 S.C.R. 561 (S.C.C.).
See Sher, Damages for Personal Injuries: Current Developments, Future Trends and Suggested Reforms (1981) 55 A.L.J. 458, at p. 464.

20 W. H. Charles, 'A New Handbook on the Assessment of Damages in Personal Injury Cases from the Supreme Court of Canada (1977-78)' 3 C.C.L.T. 344, drawing on the observations of Mr Justice Dickson in *Andrews* v. *Grand and Toy* (1978) 83 D.L.R. (3d) 452 (S.C.C.).

awards,[21] with resultant costs to the social welfare system. They are also concerned by the possible impact of large awards on general insurance rates.[22] The judges have been supported both by academic authors and by writers involved in the practice of law. Thus there have been published articles which expose the illogicality of the basic premises of certain portions of the lump sum award.[23] Other writers have lectured the courts on the economic facts of life[24] and some would prefer, absent total abolition, to remove the operation of the damages regime from the Courts and place it under the administrative control of the Workers Compensation organisation.[25] And, lastly, here a series of committees and commissions, usually headed up by members of the judiciary, have been generally in favour of schemes to replace the lump sum award with some form of variable periodical payments scheme.[26]

Thus, the judges are in favour of change, that academics support reform and government appointed investigators recommend that we abandon the lump sum award. There are precious few prepared to argue for the retention of the once and for all award[27] (covering past losses to trial and past trial losses made up of loss of earnings, medical expenses, costs of specialised services and intangible losses). Only the personal injury Bar seems to support the present method of capitalising losses by establishing the present value of past-trial losses using the life-span of the plaintiff and the costs of his care as bases with the *real* interest rate as a corrective. And some members of the Bar[28] believe

21 *Cullen* v. *Trappell* (1980) 54 A.L.J.R. 295 at p. 299 *per* Gibbs J.

22 *Andrews* supra n. 20. Here there would appear to be a difference in judicial policy between the two jurisdictions. In the Supreme Court of Canada Mr Justice Dickson justified an arbitrary ceiling of $100,000 for awards for intangibles on the premise of the deleterious impact of growing awards on insurance rates. Conversely in *Pennant Hills Restaurants Pty. Ltd.* v. *Barrell Insur. Pty. Ltd.* (1981) 55 A.L.J.R. 258 (H.C.) Stephen J. was adamant that such extraneous considerations should not influence the High Court: 'It is not part of the judicial function to depress the level of awards on policy grounds: the Courts have no mandate to entertain any such policy.'
See now *Lindal* v. *Lindal* (1982) 129 D.L.R. (3d) (S.C.C.), and Osborne, Note (1982), 19 C.C.L.T. 3; and E. Veitch, Note, (1982) *McGill L.J.* (forthcoming).

23 J. G. Fleming, 'Damages: Capital or Rent' (1969) 19 *U.T.L.J.* 295; P. S. Atiyah, 'Loss of Earnings or Earning Capacity' (1971) 45 *A.L.J.* 228.

24 S. A. Rea, 'Inflation, Taxation and Damage Assessment' (1980) 58 *C.B.R.* 280; J. L. R. Davis, 'Damages for Personal Injury and the Effect of Future Inflation' (1981) 56 *A.L.J.*

25 C. G. Bale, 'A Tort Fund — Variable Periodic Damage Awards for Recurring Loss' (forthcoming in *New Studies in Canadian Tort Law* ed. Steele 1982).

26 Report of the Committee on Personal Injuries Litigation (Cmnd. 3691 1968); Royal Commission on Civil Liability and Compensation for Personal Injury (Cmnd. 7054 1978); Committee on Tort Compensation (Mr Justice R. E. Holland, Osgoode Hall, August 1980). The Law Lords in 1971 proclaimed their support for periodical payments in the debates on the *Law Reform (Misc. Provs.) Act* 1971, per Lord Gardiner 318 H.L. Debs., col. 1573 (14 May 1971). See E. Veitch, 'A Law Reform (Bereaved Spouses) Act (N.J.)?' (1971) 22 *N.I.L.Q.* 319, at pp. 326-327.

27 S. A. Rea, 'Lump Sum versus Periodic Damage Awards' (1981) 10 *Journal of Legal Studies* 131.

28 J. L. Sher, 'Damages for Personal Injuries: Current Developments, Future Trends and Suggested Reforms', (1981) 55 *A.L.J.* 458.

that any compulsory deviation from the lump sum award represents the denial of freedom of choice of the individual while one or two would argue in favour of an inalienable right to be profligate.[29]

Despite such last ditch attempts, it is obvious that the complexities involved in trying to assess the perfect lump sum are overwhelming both counsel and judges. There is a certain band-aid quality to such ideas as the 'gross-up' — that amount which should be added to a lump sum award to compensate the plaintiff for the income tax payable on the investment income.[30] Equally, the overlooking of the impact of the practice of 'rounding-down' — whereby the lump sum is brought down to two significant digits, in half-million dollar award, surely is embarrassing.[31] Moreover, the belated appreciation of real productivity gains[32] serves to reveal the crudity of very recent awards in Canada although the Australian judges have seen the light earlier.[33] And after all of the flurry over discount rates it appears that both logic and economics demand either an undiscounted assessment[34] or at the most a differential rate varying between ½% for the present value of lost future earnings and 2½% in assessing the present value of future health costs.[35] It is therefore not surprising that all are crying out for legislative intervention.[36]

There are other pressures for reform. The changes in attitudes of the judges to compensation of plaintiffs, that is, away from fairness between victim and wrongdoer to a goal of total compensation has without question driven up the levels of awards and settlements. Faced with pressure on their cash flow the insurers, who are today's routine defendants, have begun to explore alternatives to the lump sum award. At the same time astute counsel have found it prudent to advise clients to consider receiving their awards in other forms so to avoid the fierce impact of sharply rising tax rates on investment income, which problem has been exacerbated by the rising levels of awards and settlements. And lastly what little research which has been conducted on the uses to

29 P. H. Corboy, 'Structured Injustice: Compulsory Periodic Payment of Judgments' (1980) 66 *A.B.A.J.* 1524. S. A. Rea, 'Lump Sum Versus Periodic Damage Awards' (1981) 10 *Journal of Legal Studies* 131 at pp. 143 and 154.

30 *Teno* v. *Arnold* (1978) 3 C.C.L.T. 272 (S.C.C.).

31 R. D. Gibson, 'Repairing the Law of Damages', (1978) 8 *Man. L.J.* 637 at pp. 640-1.

32 *Malat* v. *Bjornson (No. 2)* (1979) 4 W.W.R. 673 at pp. 678-9 (B.C.S.C.); *Lewis* v. *Todd* (1980) 14 C.C.L.T. 294 at p. 313 (S.C.C.).

33 *Tsouvelis* v. *Victorian Rly. Comms.* [1968] V.R. 112 at pp. 135-6; *Forsberg* v. *Maslin* [1968] S.A.S.R. 432. See Cooper-Stephenson and Saunders *op. cit. supra* p. 204 *ff.*

34 *Pennant Hills Restaurants Pty. Ltd.* v. *Barrell Insur. Pty. Ltd.* (1981) 55 A.L.J.R. 258 (H.C.) per Stephenson J.

35 C. G. Bale, 'A Tort Fund — Variable Periodic Damage Awards for Pecuniary Loss' (forthcoming in *New Studies in Canadian Tort Law* (ed. Steele 1982).

36 Salmon L.J. in *Jenkins* v. *Richard Thomas & Baldwin Ltd.* [1966] 1 W.L.R. 476 at p. 480 (C.A.) was an early and eloquent proponent.

which plaintiffs put their lump sum awards suggests that the very manner of the giving of the compensation denies its basic purpose.[37]

Periodic Payments: Present and Future:

The current discussion of alternatives to the lump sum in Canada, England and the United States has been largely restricted to generalities and there has not been any serious attempt, outside of Australia, to examine the schemes presently in place in South and Western Australia.[38] Such analysis would require empirical study beyond the scope of this paper which in this regard must be restricted to examination of the reported cases.

In Western Australia in 1966 the power to award periodical payments and to review the payments was granted to the Third Party Claims Tribunal[39] whose powers were retained by the District Court on the abolition of the Tribunal in 1972.[40] In the intervening years it would appear that the powers granted under the enabling provisions have not been used very often and informed opinion holds that there is no great enthusiasm for the device with the Bar or with insurers. In the most recent case, *Pringle* v. *Mackay*,[41] Heenan D.C.J. speculated that the lack of popularity was caused by the possibility of no end to litigation and by the fear, particularly in an inflationary era, of endless applications for review. In addition the learned judge explored the difficulty posed by the characterising of the victims' pecuniary loss as lost capacity or the loss of a capital asset. In such an analysis the damage is not limited to future economic loss, so that if periodic payments are assessed then if these are brought to an end by the plaintiff's death there must be a denial of fair compensation for the loss of a capital asset. There is an answer to this charge and that is to rethink the basis of the pecuniary

37 C. F. Krause, 'Structured Settlements for Tort Victims' (1980) 66 *A.B.A.J.* 1527, 1528; Committee on Tort Compensation (Mr Justice R. E. Holland, Osgoode Hall August 1980); D. A. Cave, Structured Settlements: An Alternative Resolution of Claims Involving Death or Substantial Personal Injury [1979] 37 *The Advoc.* 329.

38 This neglect is odd particularly since Professor Luntz's *Assessment of Damages* (1974), at pp. 22-26, drew attention to the legislation.
There are partial schemes in place in the United States but these have not escaped constitutional challenge: T. Elligett, 'The Periodic Payment of Judgments' (1979) 46 *Ins. Counsel J.* 130.

39 *Motor Vehicle (Third Party Insurance) Act* 1943-1966 s. 16E (5).

40 *Motor Vehicle (Third Party Insurance) Act* 1943-1976 s. 16 (4):
'(4) On the hearing and determination of any action or proceedings a Court shall, without in any way limiting its usual powers in relation thereto, have the following further powers—
(a) to award by way of general damages either a lump sum or periodical payments or a lump sum and periodical payments, such periodical payments to be for such period and upon such terms as the Court determines; and
(b) at any time either of its own motion or on the application of any party to the action or proceedings—
(i) to review any periodical payment and either continue, vary, reduce, increase, suspend, or determine it, or on the review to order payment to the claimant of a further lump sum; or
(ii) to order that any such periodical payments be redeemed by payment of a lump sum.'

41 Port Hedland Action No. 10 of 1980 (Decision 17 July 1981).

loss. 'It is submitted that it is invalid to regard the tort victim as an income-generating machine with the tortious conduct impairing the machine's capacity to generate income.'[42] Thus the justification for periodical payments therefore lies in the fact that it actually replaces that which has been lost — a future flow of earnings. The recently recognised intangible content of the workplace[43] must fall under the intangible heading and be coped with by a lump sum payment.

In the instant case, Heenan J. concluded that a periodical award was not appropriate in respect of the plaintiff's claim for loss of earnings. He did however make an award of periodical payments to meet the cost of domestic help and nursing assistance on the basis that the calculation required no speculation, it was amenable to rationale variation and would ensure that the money was applied for the purpose intended.[44]

In South Australia, where there is in place a more elaborate legislative scheme,[45] there has been a greater number of reported cases.[46] The provisions permit the court to offer a declaratory judgment of fault, adjourn final assessment and assess and order payment of special damages along with an award for pain and suffering.[47] Despite *dicta* as to the problems of the specific wording of the subsections the judges have been able to carry out the policy of the legislation which permits the deteriorating victim to return to the Court for re-evaluation, to give the victim his compensation in the value of the dollars at the time of his loss, and to permit the defendant the use of his money in the meantime. However it has not saved the Court the agonies of guessing as to in-

42 Bale, *op. cit. supra.*

43 Cooper-Stephenson and Saunders *op. cit. supra* at p. 204 *ff.*

44 The Court assessed these costs on the basis of institutional care leaving it open to the plaintiff to apply for variation in the event that he chose life at home to life in a rehabilitation hospital. C.f. *Andrews* v. *Grand and Toy Alta. Ltd.* (1978) 82 D.L.R. (3d) 452 (S.C.C.).

45 *Supreme Court Act,* (1935-1980) (S.A.) s. 306.

46 *Nathan and James* v. *Vos* (1970) S.A.S.R. 455; *Ikonomos* v. *Lesiuk and Ikonomos* (1973) 6 S.A.S.R. 111; *Horwell* v. *Jones* (1975) 11 S.A.S.R. 502; *Cirjak* v. *Todd* (1977) 17 S.A.S.R. 316; *Grabkowski* v. *Majchrowski and Vass* (1978) 19 S.A.S.R. 290; *Walker* v. *Tugend* (1981) 28 S.A.S.R. 194.

47 The particular wording of the subsection has required some liberal construction by the judges to achieve the desired flexibility. Thus, it is provided by s. 30 (b) (2) 'Provided, however, that where the declaratory judgment has been entered in an action for damages for personal injury, such payment or payments shall not include an allowance for pain or suffering or for bodily or mental harm (as distinct from pecuniary loss resulting therefrom) except where serious and continuing illness or disability results from the injury or except that, where the party entitled to recover damages is incapacitated or partially incapacitated for employment and being in part responsible for his injury is not entitled to recover the full amount of his present or continuing loss of earnings, or of any hospital, medical or other expenses resulting from his injury, the court may order payment or payments not to exceed such loss of earnings and expenses and such payment or payments may be derived either wholly or in part from any damages to which the party entitled to recover damages has, but for the operation of this proviso, established a present and immediate right or except where the judge is of opinion that there are special circumstances by reason of which this proviso should not apply.'
See particularly *Cirjack* v. *Todd supra.* 46.

flation, interest rates, and contingencies of various kinds as the most recent decision shows.[48]

On the positive side, the judges have been happy to apply the benefits of periodical payments whenever there is evidence of present disability which is of uncertain duration and impact as well as in situations where the plaintiff's present disability is less than that forecast for the future.[49] From a reading of these few reported cases one has the impression that the system operates effectively only to a limited extent. That is to say, the main charges against the tort system are: delay, inexactitude of assessment and cost. If any reform, no matter how cosmetic, is to justify its adoption then it must respond at least partially to the attacks on the system. Yet the reports make it obvious that delay is sill a major problem in these cases with the elapse of time between accident and hearing ranging between two and ten years, while the problems of assessment facing Legoe J. in *Walker* v. *Tugend*[50] encompassed the old favourites of cash for loss of amenities for an unaware plaintiff[51] and the application of conventional sums for loss of expectation of life.[52]

If one tests this scheme against the guidelines above then it must fail on all three. There can be little doubt that there is no reduction in costs to the parties and indeed with a minimum of two hearings attached to the initial costly delays then the overall price of the scheme must be higher than that of the lump sum award system. It is true that the parties derive a benefit from the reduction of the guesswork in the assessment but it is also true that the plaintiff is not protected against inflation. That is, the periodical payments are not indexed to either a price or wage index so that the plaintiff's sole avenue is an application for variation which is cumbersome to say the least. There is also the possibility of the defendant attempting to reduce his obligation by monitoring the victim which raises the issue of intrusion upon privacy.

Accordingly, it is scarcely surprising that those interested in the operation of the scheme have concluded that it has not found favour with the legal profession, the bench or litigants. In South Australia where both the initiative and the discretion to award periodic payments lie with the court it must be admitted that it has been used only sparingly over the lifetime of the legislation. Of course litigants can avoid the courts by proceeding straight to negotiated settlement and if that is so then one must assume that faced with a choice they and their counsel prefer the once and for all cash award.

More recently there have been fresh initiatives. Professor Gordon

48 *Walker* v. *Tugend* (1981) 28 S.A.S.R. 194. The Court was able to give a precis of the reported history of the legislation in one paragraph.

49 *Nathan and James* v. *Vos* supra n. 46. The Courts are aware of the need to be cautious at the time of the interim assessment so as to avoid being embarrassed by the 'malingering' plaintiff — *Gradkowski* v. *Majchrowski and Vass* supra.

50 (1981) 28 S.A.S.R. 194.

51 Applying *Lim Poh Choo* v. *Camden and Islington Area Health Authority* [1980] A.C. 174.

52 Applying *Skelton* v. *Collins* (1966) 115 C.L.R. 94.

Bale of Queen's University, Kingston, Ontario has proposed an interim scheme which would serve to deal with some of the problems. He suggests[53] that there should be established a fund to be administered by the Worker's Compensation Boards of the Canadian Provinces, which tort fund should be used for the benefit of tort victims. This fund would receive all lump sum awards for pecuniary losses and health costs, with an opting-in provision for the beneficiaries of settlements. This structure would apply to all seriously injured victims whose earning capacity had been reduced by ten per cent or more and who would receive monthly payments from the fund. These payments-out would be indexed to the levels of industrial wages.

The obvious benefit of this scheme is that it attacks the problems of inflation and it reduces the overall administrative costs by placing the burden of the administration on an organisation which has both the resources and expertise as well as a proven record for efficiency of operation.[54] It also has the advantage of eliminating the tortfeasor following the once and for all assessment so that insurance corporations as defendants would not have the resistance to this proposal which they presumably have to the Australian schemes which prohibit the closing of files and inhibit the calculation of potential liabilities. And lastly, since Bale recommends that variations be dealt with by the Workers Boards rather than by the Courts as is the Australian system, it is likely that the costs of review will be lower due to the nature of operation of the Boards.

Those stated strengths of Bale's initiative serve to underline the perceived weaknesses of the statutory schemes either in place in the United States of America[55] or presently proposed.[56] These have been attacked also on the basis of their intrusion on freedom of choice and similarly on the ground of paternalism.[57] It must be true that where the plaintiff is forced by statute to accept periodic payments against his wishes then he may be pressured into settling for a reduced lump sum in

53 See also S. A. Rea, 'Lump Sum Versus Periodic Damage Awards (1981) 20 *Journal of Legal Studies* 131, at p. 140.

54 Sir Owen Woodhouse was much impressed by the Ontario Workers Compensation Board's record, *Royal Commission of Inquiry, Compensation for Personal Injury in New Zealand,* (1967).

55 Ala. Code 6-5-486 (1975); Alaska Civ. Proc. Code 09.55.548; Cal. Civ. Proc. Code 667.7 (and 647.7); Del. Code Ann. tit 18, 6864; Fla. Stat. 768.48, 768.51; Kan. Civ. Proc. Stat. Ann. 60-2609; Md. Ann. Code 3-2A08 (1974); N.H. Rev. Stat. Ann. 507-C: 7; N.M. Stat. Ann. 58-33-7, 58-33-9, 58-33-10; N.D. Cent. Code 26-40. 1-16 (1977 Supp.); Or. Rev. Stat. 752.070; Wash. Rev. Code 4.56; Wis. Stat. 655.015. See S. A. Rea, 'Lump Sum Versus Periodic Damage Awards' (1982) 11 *Journal of Legal Studies* 131, at pp. 147-150.

56 *Uniform Law Commissioners' Model Periodic Payment of Judgments Act* (approved and recommended for enactment in all the States, August 1980).

57 There is no uniformity here: Seven of the thirteen states give the court the discretion (Ala., Al., Del., Kan., N.D., Ore., and Wash.); in one the court must make a periodic award if one party so requests (Cal.); in two the court acquires the discretion if one party requests periodic payments (Fla. and N.H.); in another the plaintiff has the right to choose but the court retains the power of final decision (Mld.); and in two others periodic payments are mandatory for future medical expenses (N. Mex. and Wisc.).

order to avoid the statute. But this is but one weakness of schemes which had only two narrow goals: the coping with the uncertainties of future losses and the forestalling of dissipation of awards. Accordingly the majority of these schemes seeks to make payments on an instalment basis over the life expectancy of the victim.[58] Others aim to avoid over-payment to the estate in the event of the plaintiff's premature death[59] and in so doing serve to deprive the survivors of that portion of the damages payable to the victim for non-pecuniary losses. Of all of these in place only the Alaskan provisions attempt to cope with inflation by indexing the periodic payments to the cost of living of the victim's community.

In short, the schemes presently on the statute books in the United States can be put to one side as over-restricted in purpose and flawed in implementation and so on both grounds are not useful as models. However there has been a recent revival of interest and debate over periodic payment schemes in North America. In Canada, Mr Justice Richard Holland's Committee[60] listed the advantages of periodic payments and another writer in a recent article[61] listed for us the disadvantages. For economy of space it may be beneficial to present these arguments in calculus form:

For	*Against*
1. Ability to reassess.	1. Lack of finality.
2. Encourage rehabilitation.	2. Loss of incentive to rehabilitation.
3. Reduction of compensation neurosis.	3. Encouragement of snooping on plaintiff.
4. Reduction on pressure on plaintiff to settle.	4. Medicare expenses require a lump sum payment.
5. Reduction in plaintiff-caused delays.	5. Insurers must keep files open indefinitely.
6. Avoidance of dissipation of awards.	6. Plaintiff deprived of his choice.
7. Protection against inflation.	7. Plaintiff requires a capital sum to replace lost earning capacity.
8. Earlier payments to the plaintiff.	8. Lump sum possible by settlement.
9. Tax advantages of periodic payment.	9. Burden on the uninsured defendant.
10. Simplification of tax calculations in fatal cases.	10. How to secure financial security periodic payments.
11. Consistency of policy with other statutory schemes (*e.g.* No-fault sections of the provincial Insurance Acts).	11. Requirement of procedural changes in the legal system to cope with only a small percentage of the personal injury problem.

The table describes in a nutshell the debate which has taken and is

58 Ala.; Kan.; Mld.; Ore.; Wash.
59 Cal.; Del.; Fla.; N.H.; Wisc.
60 Committee on Tort Compensation (Osgoode Hall, August 1980).
61 H. W. Anderson, 'Structured Settlements — An Actuary's View' (1981) 16 C.C.L.T. 82, at p. 84.

taking place in Canada at present and which is largely academic. The controversy in the United States has had higher profile with the profession due to the existence of a recommended model statute proposed by the Uniform Commissioners. The Model *Periodic Payment of Judgments Act* of 1980 replaces the lump sum award at the election of one of the parties to an action with the final decision remaining with the Court. It incorporates the favourable tax treatment of payments over time and places the risks and costs of management of money with the insurer-defendant. Moreover, as the Court is asked to assess the lump-sum in the dollars of the day it obviates the guesswork involved in the discounting to present value. There is, in addition, a built-in indexing factor for inflation or deflation.

Since the legislative provisions are given below in an appendix it is only necessary here to provide an outline of the Act and to assess in which manner it meets the usual criticisms of the tort system — delay, uncertainty, and cost. Section one establishes the purpose as being — the reduction of guesswork over future losses, the achieving of greater precision in awards and the avoidance of dissipation. Thus the Act takes aim at uncertainty in awards and the potential cost to society of unwise use of awards by plaintiffs. The third section sets up the procedures for invoking the Act. This can be done by both parties agreeing or by one party so electing with power in the Court to approve over the objection of the other. The suggested threshold damage figure for invoking the Act is $100,000.00 and sets the policy that periodic payments should be utilised only for medium to large awards. The Court is empowered to assess all future damages in current values, by s. 5, while the method for adjusting the payments to cope with variations in the value of the currency, in s. 7, is both objective and national in character. The draftsmen admit to experimentation with a number of indices before settling on a factor comprising fifty-two week United States treasury bills. The Act adopts a discount rate of three per cent for rendering of present value where necessary (s. 10). S. 11 deals with the death of the recipient and decrees termination of the benefits to avoid windfall.

The Model Act has been vigorously attacked by some members of the personal injury Bar and by some insurers. Principally, they have argued that the underlying paternalism of this Act is repugnant and that any system must permit victims to use or invest their funds like everyone else in society. The indexing system has been described as curious and as insufficient as a security factor against inflation, principally since interest rates always lie behind price increases. Further it has been suggested that the real interest rate is challengable and it must be said that the draftsmen themselves state — 'The suggested figure of 3% in the Act is probably the highest figure that should be adopted, and there is substantial evidence that it should be lower'. Some have asked the question whether it is a rational choice in present fiscal circumstances to forego present dollars for augmented, but devalued, future dollars. And most are opposed to the one-sided termination of payments on death,

especially where there is no reciprocal provision for the claimant to reopen in the event of a worsening of his condition. The draftsmen originally did include a reopening or variation section but this was dropped in 1978 following opposition based upon the problems of such for the insurance industry, perceptions of delayed rehabilitation, and the difficulties of causation inherent in the changes in tort victims.

If we apply some of the positive criteria listed in the calculus earlier to this proposal, it must be asked whether this proposal passes ? Does it permit reassessment ? No, Will it encourage rehabilitation ? Unanswerable, Will it reduce compensation neurosis ? Unlikely, Will it reduce the pressure on the plaintiff to settle ? Probably not, Will it reduce plaintiff-caused delays ? No, Will it deter dissipation ? Yes, Will it protect against inflation ? Not effectively, Will it provide earlier payments to the plaintiff ? No, Are there tax advantages to the plaintiff? Yes, Will it simplify tax calculations ? Yes, Will it reduce the costs to the plaintiff ? Almost certainly not.

Clearly the Act does not do too well and indeed that is inevitable when its aims were limited, as said before, to reducing guesswork in assessments and deterrence of dissipation.

In conclusion, when one reviews the case-law of South and Western Australia, examines the experience in the United States and reads the views of the Canadian committee of inquiry along with the minority report of the United Kingdom Pearson Royal Commission it is hard to convince oneself that periodic schemes, as tried so far, deal efficiently with the problems posed by the lump sum method. It is only with Gordon Bale's modifications that a scheme would be worth adopting, which scheme of course would not be too far away from total reform itself.

Faced with the shortcomings of the extant scheme of periodic payments, some have argued that most of these problems together with the difficulties of the lump sum award can be overcome by well-drawn structured settlements to which we now turn.

Structured Settlements

The word 'structured' is used here in the sense of the making up from a number of linked parts a definite pattern put together to ensure full compensation. Thus we have a means of paying compensation to a victim which can be assembled to cope with the situation of each and every claimant. It is possible to vary the payments-out each year, to defer payments-out, to permit lump sums to be payable from time to time and to provide for increases in the payments-out to cope with the changing needs of the payee or to respond to inflation and devaluation of the currency. In other words, the flexibility of the instrument is limited only by the imagination of the designer of the scheme. Settlement means what it says — the voluntary acceptance of a scheme of

instalment payments which are supported by an annuity purchased from a life company by a one-time premium furnished by the defendant.

The increasing attraction of this regime lies in its amenability to all of the parties involved in the resolution of a personal injury problem: the victim, the tortfeasor, legal counsel, the insurer(s) and the trial bench. This characteristic of being all things to all interested parties that it is not limited in its purpose simply to avoid dissipation or restricted to cases involving the fiscally incompetent, the grossly impaired or the very young. Additionally, a structured settlement is much more than a routine annuity settlement since most structured settlements will combine regular payments-out with irregular lump sum payments for specified purposes.

It is now conventional wisdom in Canada that this device should be utilised in cases where the claim is likely to be in excess of $50,000.00, where the victim is a minor. It should be used in all fatal accidents or where there is severe bodily injury which impairs earning capacity, where there is mental impairment, where the claim is likely to be in excess of the limits of the tortfeasor's liability insurance, where there is a likelihood of dissipation or where the victim is in a high marginal tax bracket.

Since this scheme involves a settlement following negotiation it is vital that the victim be given *all* of the relevant information. This means that he should have an estimate of the lump sum value of his rights to compensation which, under present Canadian practice, includes compensation for future tax incidence and claims for fees for the management of the fund. Therefore when counsel begins the process he must first obtain an actuarial report of the present value of the client's losses. This will be followed by negotiation with the other side both on the issues of liability and on quantum, after which the matter of periodic payments will arise by way of offer and counter-offer. The decision on the ultimate structured settlement will be determined to a considerable extent by the original lump sum evaluation. If a settlement is the preferred mode of compensation then an annuity is purchased by the tortfeasor, for an undeclared sum, from a life insurance company. This reduces the administrative costs of arrangements to the plaintiff and lowers the outlay of the defendant without in any way lowering the benefits to the plaintiff.

As noted above, the growth of this device in Canada derives from its advantages to all parties and these are examined below. In *Yepremian*[62] in 1981 Holland J. spoke to the advantages to the plaintiff of the tax subsidy which have been formally accorded by Revenue Canada to

62 *Yepremian* v. *Scarborough Gen. Hosp.* (1981) 31 O.R. (2d) 384 (Ont. H.C.).

the structured settlement.[63] Whereas the interest earned by a lump sum is taxable, the interest earnings within periodic payments are considered non-taxable income so long as the annuity is not *owned* by the victim/recipient. Thus, the defendant must be the purchaser/owner of the annuity. Also counsel must avoid any hint of constructive receipt of the lump sum into the hands of the victim, though giving the victim the *choice* of receiving the lump sum or the annuity it could produce. And lastly here, where the victim is already in a high tax bracket the value of the tax free periodic payments to that individual may be twice the same amounts from other sources coming to the victim. In addition to the tax advantage, the plaintiff is relieved of both the costs and risks of investment of a lump sum award. Thus there is no need for the plaintiff to concern himself with decisions on how to maximise his income from an invested award and the payment of management fees recognised in the trilogy of 1978 is so rendered redundant. A further

63 See *Tax Bulletin* (IT-365R) s. 56 (1) (d), *Income Tax Act* (Can. 1970-71-72, c. 63) : RECEIPTS IN RESPECT OF PERSONAL INJURIES

5. Amounts in respect of personal injuries or death may be received on account of any or all of the following:

(a) Special damages — examples are compensation for
  (i) out-of-pocket expenses such as medical and hospital expenses, and
  (ii) accrued or future loss of earnings;

(b) General damages — examples are compensation for
  (i) pain and suffering
  (ii) the loss of amenities of life,
  (iii) the loss of earning capacity, and
  (iv) the shortened expectation of life;

(c) Amounts as compensation for loss of support may be paid to the dependents of the deceased.

All amounts in (a), (b) and (c) above will be treated as non-taxable receipts provided that they can reasonably be considered as compensation in respect of personal injuries and not income from employment or a termination payment. (See IT-202R Workmen's Compensation Payments; Injury Leave Pay or Similar Payments). An amount of such a compensation is non-taxable even though the quantum of the compensation is determined with reference to accrued loss of earnings to the date of award or settlement or to future loss of earnings.

6. The method of payment (periodic or lump sum) is not an important factor in determining the taxability of an award or settlement for personal injuries or death. However, where an amount that has been determined to be non-taxable is paid on a periodic basis, see 13 below for taxing of interest element, if any.

INTEREST ELEMENT IN AWARDS FOR PERSONAL DAMAGES

13. Where payments for damages that have been awarded by a Court or resolved in an out-of-court settlement, in respect of personal injuries or death, are paid on a periodic basis, the payments will not be considered to be annuity payments for the purposes of paragraph 56 (1) and 60 (a). Accordingly, no part of such payments will be treated as interest income. However, where an award for damages has been used by the taxpayer or his representative to purchase an annuity, the amounts received will be considered as annuity payments under paragraphs 56 (1) and 60 (a) and Regulation 300.

Likewise in the United States of America s. 104 (a) (2), Internal Revenue Code Rev. Ruling 79-220:

> 'An insurance company purchased and retained exclusive ownership in a single premium annuity contract to fund monthly payments stipulated in settlement of a damage suit. The recipient may exclude the full amount of the payments from gross income under section 104 (a) (2) of the Code rather than the discounted present value. Payments made to the estate after the recipient's death are also fully excludable.'

benefit to the plaintiff of this type of settlement lies in its flexibility. Arrangements can be made for lump sums to be paid out to cover such large host items as replacement of vehicles, purchase of medical aids or the costs of children's education. However, all of these elections must be incorporated in the scheme at the outset, there being no means for later change in the annuity structure. Where the victim is a minor the structured settlement has the advantages of earning greater interest than the present court administered schemes[63a] and gives the recipient-minor a lifetime tax exempt status going beyond the twenty-one year age limit of present legislation. And, of course, the settlement precludes the probabilities of dissipation of an award in the hands of an eighteen year old which is always a possibility under our existing lump sum schemes.

It is worth observing that in a case such as *Yepremian* the savings to the defendant of a structured settlement saved to save the plaintiff therein the costs of a final appeal to the Supreme Court of Canada and the risk of losing all in that forum on the liability issue. Holland J. wrote:

> He is better looked after, in my view, under the terms of the settlement than he would have been under my judgment at trial or even under the increased award of the Court of Appeal.[64]

There is one other practical benefit of this device for the plaintiff where his lump sum claim exceeds the limits of the defendant's liability policy. Awards in Canada have risen rapidly in the last five years, with the consequence that $1M awards and settlements are not noteworthy, but most Canadians have not got accustomed to buying that degree of coverage. The consequent gap results in the excess-limits problem. In such cases both parties stand to lose. The funds available may not match the plaintiff's claim and the defendant's personal assets are placed in jeopardy due to the deficiencies of his coverage. In this situation a compromise can be managed through the structured settlement. In this way the plaintiff derives a guaranteed, indexed pay-out, the defendant protects his assets and even the insurer may save a little if the annuity premium is below the limits of the liability policy.[65]

Along with the above advantages, the defendant, where a corporate entity and possibly self-insured, does not have to pay out a huge cash settlement nor does such a party have to carry forward its potential liabilities year after year until a trial determines liability and/or quantum. Since the personal injury Bar in both the United States and the states of Australia have not taken to periodic payment schemes it is interesting that in both Canada and the United States they have em-

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63a Only 10% per annum is paid out on awards of minors.

64 (1981) 15 C.C.L.T. 73 at p. 78 (Ont. H. Ct.).

65 See L. McGlynn, 'Structured Settlements' (1981) *Canadian Income Agent and Broker* 30 at p. 31.

Lump Sum	Age	Sex	Life Expec.	Value of Claim	Invest %
Policy Limit $400,000	31	Female	45	$450,000	15
Structured Settlement	31	Female	45	$45,225/yr	

Lump sum income = *$67,500,* after tax *$43,000*
Therefore all three win.

braced the idea of structured settlements. One could speculate as to the reasons for their seemingly erratic choices. However one can state as a fact that structured settlements favour the interests of counsel. That is, as the typical settlement is made up of 'front monies' paid as a lump sum and regular payments over time the lawyer not only always gets paid first but also can enjoy deferred payment. Of course, the ethical counsel will ensure that his fee, if a contingency calculation, will not bankrupt the client out of his lump sum and will base his fee on the lump sum evaluation of the claim and *not* on the sum of the payments-out over the client's life-time. The elimination of the client's lump sum can be avoided if counsel is prepared to accept his fee as a percentage of the monthly payments over a fixed number of years. By this means the burden on the client is deferred and the lawyer can benefit tax-wise from the averaging of his income over time. Here it is appropriate to point out that there is some difference between Canadian and American practice in the use of contingency fees. While these are acceptable in most of the Canadian provinces they are not used to the same extent nor for such large fee recovery as in the United States, there being a considerable distance between Canadian and American billing traditions.[66]

The Canadian insurance industry, like the legal profession, seems enthusiastic about this device, even to the extent of some competition, through the cutting of rates for annuities in the life side of the industry. One report[67] suggests that the liability insurer typically saves twenty to forty per cent as against the lump sum, avoids lengthy and expensive litigation and avoids the adverse publicity attendant on large scale litigation.

Are there also benefits to society as a whole? Does this scheme decrease the social costs of the tort regime?[68] In recent years the insurance industry has taken large losses on its liability business due to fast rising awards and settlements in personal injury cases. The companies have passed on their problem to the consumer in the form of higher premiums so that if this device slows down the rate of increase or indeed could reverse the trend there would be immeasurable savings to all persons purchasing liability insurance. There may also be indirect savings to the tax payer if it can be shown that the structured settlement eliminates dissipation. Some informal surveys[69] suggest that within two months of an award one quarter of the recipients have

66 This point is well illustrated by the settlement outlined by F. G. Levin *et al*, 'Structured Settlements in Review: A Case Study' (1981) 4 *Am. J. Trial Ad.* 459. Therein the U.S. Law firm received *$830,000* on day one, a further *$830,000* in each of the years 1981, 1982, 1983, 1984 and 1985 with a final *$2M* in the 31st year of the pay-out which totalled $20M approximately. In Canada, in the *Mesie* v. *McConnell* settlement, (Toronto, Ontario No. 12488/77 Nov. 25, 1980 H. Ct. Ont.) the solicitor's fee was *$35,000* on a pay-out of just over $12M.

67 *Financial Post*, 6 March 1982, at p. 24, col. 1.

68 In *Lindall* v. *Lindall* (1982) 129 D.L.R. (2d) 263, at pp. 270-273, Dickson J. highlights the place of costs to society in the assessment of awards.

69 Cane *op. cit.* Bale *op. cit.*

nothing left, after one year the figure is one half, with seventy per cent being broke after two years and ninety per cent out of cash after five years. If these bankrupt recipients of lump sum awards are persons whose earning capacity is totally or seriously impaired then they must rely on the tax supported social welfare and medicare systems. The structured settlement, properly drawn, as a mirror of the lost earning capacity of the victims considerably lowers the risk of welfare reliance. However there is a debit side to the tax consideration in that the structured settlement which protects the recipient totally against tax exacerbates the present illogical tax treatment of the injury victim. In Canada we assess the compensation on the pre-tax income, exempt the award itself from tax but tax the investment income of the award.[70] By this rationale the plaintiff is overcompensated, the defendant pays for the loss he has caused but Revenue Canada and Canadians at large are deprived of legitimate tax revenue.

In Australia and the United Kingdom[71] the award is calculated on the base of the post-tax income of the plaintiff, the award is exempt and the investment income is subject to tax. By this mode the victim is fully compensated for his loss but the defendant does not pay for all of the losses he has caused while the Internal Revenue and the British taxpayer are deprived of legitimate revenue. The logical position[72] would be to base the compensation on the pre-tax income of the victim and subject the award and the investment income, if any, to tax. In this way the victim is compensated effectively, the defendant pays for the losses he causes while the Revenue and the community are not subsidising either defendants or accident victims. The structured settlement is a total denial of that logic.

This is not the only shortcoming of this device. In the process of arriving at a structured settlement there are two occasions in which decisions have to be made which entail future guessing. When the lump sum evaluation of the claim is made then it is necessary to use a discount rate which recognises the investment potential of the award over its projected lifetime. The errors of the past have been sharply exposed by Mr Davis.[73] And while there have been enacted practice guidelines[74] for court approved awards there is still room for settlement variations from seven per cent down to zero — there being some judicial support for an undiscounted approach.[75]

When the structured settlement is being negotiated at some point there must be agreement on the index rate whose purpose is to ensure that the future payments-out will serve their purpose of replacing the

70 *R.* v. *Jennings* (1966), 57 D.L.R. (2d) 664 (S.C.C.).
71 *Cullen* v. *Trappell* (1980) 29 A.L.R. 1; *B.T.C.* v. *Gourley* [1956] A.C. 185.
72 Most recently articulated by Bale *op. cit.*
73 J. L. R. Davis, 'Damages for Personal Injury on the Effect of Future Inflation' (1982) *A.L.J.* 168.
74 Canada: *Judicature Amendment Act* (1979) (Ont.) c. 65 s. 6 (5); *Judicature Amendment Act* (1980) (N.S.) c. 56, s. 4 setting a rate of 2½%. Australia: Common Law Practice, etc., *Acts Amendment Act* 1981 s. 5.
75 *Todorovic* v. *Waller* (1981) 56 A.L.J.R. 59 (H. Ct.).

losses of the victim. Some earlier settlements were defective in that they carried index factors as low as 4% and many have been drawn using a 6% to 8% factor although the leading Canadian life company in this field[76] will offer an index factor of 12%. The burden therefore lies on counsel to shop around to ensure that his client is not inadequately compensated nor taken in by the deceptively attractive total of the pay-outs over time.

It is vital for counsel to interpret the schedules of payments accurately for the client to avoid the misunderstanding of the client that a several million dollars settlement renders him a millionaire. Indeed, in many cases where the pay-out is extended over thirty or more years the recipient may not be doing very well at all where the rate of inflation considerably exceeds the index factor of the settlement. The client must be efficiently advised of the estimated future purchasing power of the projected income and at this time be advised of other devices possibly more suitable to their peculiar situation — for example a diversified, income-oriented trust which may hold greater flexibility and produce a higher yield in inflationary situations. In other words, there are occasions in which the structured settlement is not the appropriate device, which decision can only be made after due consideration of the client's tax position, his present liabilities, the projected rate of inflation and the client's age. In regard to the last, to avoid a shortfall whereby the client outlives the settlement the structure obviously should be drawn over the lifetime of the victim, particularly where the disability is permanent. The converse, the early death of the victim, can be effectively dealt with by a reversion clause coupled with a minimum guarantee payment to the dependants.

As must now be clear the structured settlement is not *the* answer but is a most useful device particularly in severe personal injury cases of grossly diminished earning capacity where the settlement can be married with a partial lump sum. That sum can be used to pay off such large liabilities as mortgages and the settlement can then perform as the mechanism producing income replacement for the lifetime of the victim.

Conclusion

This article lends itself to a very brief summing up. All of us are aware of the problems posed by the lump sum award. Absent total abrogation we must seek out devices which will perform more efficiently. The periodic payments device is not popular with the interested parties in Australia, it is opposed by Bar and insurance industry in the United States and has been rejected in Canada's largest provincial jurisdiction, Ontario, as being administratively too expensive. We have a new proposal in Canada from Professor Bale which requires our attention.

76 Manufacturer's Life Ins. Co. in 1981 wrote over one hundred and fifty settlements at a premium income of in excess of $17M. *Financial Post*, 6 March, 1982 at p. 24, col. 1.

A newer idea, the structured settlement has the support of all involved in the personal injury industry in Canada. Since 1979 it has grown very quickly in popularity and has already spawned two specialist corporations.[77] The device meets some of the more telling attacks on the lump sum payment but it is not always appropriate and should not be viewed as the omnicompetent solvent.

77 *McKellar Structured Settlements Inc.* Guelph Ontario and *The Structured Settlements Company,* Burlington, Ontario are presently advertising their services in the pages of the Ontario Reports series.