

THE LAW REFORM COMMISSION OF HONG KONG
PERIODICAL PAYMENTS FOR FUTURE PECUNIARY LOSS IN PERSONAL
INJURY CASES SUB-COMMITTEE
CONSULTATION PAPER ON PERIODICAL PAYMENTS FOR FUTURE
PECUNIARY LOSS IN PERSONAL INJURY CASES
EXECUTIVE SUMMARY

(This executive summary is an outline of the consultation paper issued to elicit public response and comment on the Sub-committee's questions. Those wishing to comment should refer to the full text of the consultation paper which can be obtained from the Secretary, Law Reform Commission, 4th Floor, East Wing, Justice Place, 18 Lower Albert Road, Central, Hong Kong, or downloaded from the Commission's website at: <<http://www.hkreform.gov.hk>>.

Comments should be submitted to the Secretary by 24 August 2018. References in this executive summary to paragraph numbers are to paragraphs in the consultation paper.)

Terms of reference

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

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

Overview of the Consultation Paper

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

3. As an alternative, Bharwaney J astutely observed in *Chan Pak Ting v Chan Chi Kuen & Anor*¹ the option of making a periodical payment order ("PPO") for future pecuniary loss, except that there was, as yet, no legislation to permit the same. The Sub-committee has explored the experiences from UK and other jurisdictions when considering those statutory models as supplemented by further sub-legislation, practice

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

directions and judicial decisions in cases brought before the courts in those jurisdictions. The Sub-committee's views on such overseas experiences provide guidance on the consideration as to the desirability and viability of introducing similar legislation for Hong Kong.

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

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

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

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

8. The Sub-committee wishes to highlight these aspects of concern and to gauge the sentiment of the public and stakeholders by inviting comments and submissions on several open-ended questions.

Chapter 1 An introduction – Periodical payments for future pecuniary loss in personal injury cases

Judicial intuition – forced "*crystal ball gazing*"

9. Over a century ago, Lord Blackburn in *Livingstone v Rawyards Coal Co*² defined the measure of damages as "*that sum of money which will put the party who has*

² (1880) 5 App. Cas. 25 at 39.

been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting compensation or reparation". In the shorthand of lawyers, this is often referred to as the principle of "*restitutio in integrum*".³

10. Until the recent reform, damages in tort are almost invariably assessed and ordered by way of a lump sum. Despite the fact that such assessment would necessarily involve projection into the future, for instance, as to the presumed rate of return on investment and the life expectancy of the injured person concerned, which is attendant upon by a wide range of vicissitudes, and as to the effects of numerous imponderables, such as the rate of inflation affecting the price of goods and services, the court is accustomed to exercise judicial intuition.⁴ In practical terms, this is not far from guesswork or "*crystal ball gazing*".

11. It would appear that the court is forced to take up the unenviable task of arriving at a lump sum award by a tendency, amongst lawyers and the parties concerned, to take it for granted that only a one-off lump sum constitutes acceptable compensation or proper assessment of damages.

The impetus for a change to periodical payments

12. In Hong Kong, Bharwaney J in *Chan Pak Ting v Chan Chi Kuen* [2013] 2 HKLRD 1, with the assistance of actuarial and economic experts, also embarked on a critical analysis on the validity of the presumed rate of return of 4.5% adopted (from *Cookson v Knowles* [1979] AC 556) by the five-member bench of the Court of Appeal in *Chan Pui Ki v Leung On* [1996] 2 HKLR 401. Not surprisingly, the learned judge similarly found that 4.5% return was unrealistic and unachievable. Instead, a range of Discount Rates corresponding to the duration of future expenses to be incurred has been laid down by the learned judge⁵ which was approved and adopted by the Court of Appeal in the subsequent case of *Chan Wai Ming v Leung Shing Wah* [2014] 4 HKLRD 669.

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

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

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

³ See, for instance, Earl Jowitt in *British Transport Commission v Gourley* [1956] AC 185 at 197.

⁴ Litton VP in *Chan Pui Ki v Leung On* [1996] 2 HKLR 401 said "We would unhesitatingly reaffirm the statement of principle above, and adopt what Mustill, LJ said in *Cunningham v Camberwell Health Authority* [1990] 2 Med LR 49, at 53: 'What happens in practice is that the judge adopts an intuitive process buttressed by reference to previously decided cases. These cases partly operate as reference points whose features are compared with those of the case under consideration and partly form the basis of a general climate of opinion on the proper multiplier in a particular type of case with which a judge of long experience in the field will be entirely familiar. But it must be observed that these previous cases themselves must ultimately be intuitive in origin.'"

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

Question 1

We invite submissions as to:

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

Chapter 2 Legal framework – Conventional approach towards assessment of damages

Current position under Hong Kong law

16. The law of Hong Kong, as it now stands, is that the court must assess damages once and for all in a lump sum save in those cases that qualify for an award of provisional damages.⁶

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

*"First, an award can be made for the plaintiff's future loss of salary, wages, profits and benefits from the date of trial until the date he could reasonably be expected to have ceased earning. Second, an award can be made for the extra financial expenses caused by the injury, from the date of the trial until the date it would reasonably be expected that such extra financial expenses will no longer be incurred."*⁷

18. This is a difficult task for the courts as any assessment of damages for future pecuniary loss must consider what a plaintiff might have earned but for the injury, the earning capacity of the plaintiff after the injury and any additional expenses incurred following the injury. The assessment of damages must also be done as a lump sum which *"is not susceptible to review as the future unfolds"*.⁸

19. This lump sum must reflect the present value of the plaintiff's prospective loss, that is, the plaintiff's stream of future loss of earnings and/or future expenses. Addressing this difficult question, the courts of England developed a method which has been followed in Hong Kong. Litton VP in the leading case of *Chan Pui Ki (an infant) v Leung On & The Kowloon Motor Bus Co (1933) Ltd*⁹ ("*Chan Pui Ki*") described this as the *"conventional method of assessing the appropriate lump sum to compensate for loss of future earnings"*.¹⁰ The method utilised is the multiplier/multiplicand model which has been summarised by Lord Fraser, speaking for the Privy Council in *Lai Wee Lian v Singapore Bus Service (1978) Ltd*.¹¹

20. Determining damages for future pecuniary loss using the multiplicand/multiplier model has been generally criticised as being imprecise and unscientific. The multiplicand/multiplier model seeks to calculate compensation for future pecuniary losses

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

⁷ *Hong Kong Personal Injury Service* (LexisNexis Butterworths) Vol 1, at 1555-1600.

⁸ *Lim Poh Choo v Camden & Islington Area Health Authority* [1980] AC 174 (HL).

⁹ [1996] 2 HKLR 401.

¹⁰ At 411B-C.

¹¹ [1984] 3 WLR 63 (PC).

which generally consist of loss of future income and benefits and future expenses due to the plaintiff's injury. These may manifest in a few ways, depending on the plaintiff's circumstances. In most cases a single assessment is made for the plaintiff's future loss of income and benefits. In some cases, a separate assessment may need to be made to account for a plaintiff's loss of future income after the cessation of employment, such as pension, superannuation etc. Furthermore, if the injury has shortened a living plaintiff's life expectancy and therefore earning capacity, a plaintiff may claim as damages the income and benefits that might have been earned in those "*lost years*".¹²

21. In each of these periods, the assessment of both the multiplicand and multiplier follows the same basic procedure. The objective of the method is to assess at trial a lump sum compensation which the plaintiff is expected to invest at an assumed real rate of return of 4-5%.¹³ The total sum awarded should be exhausted (by the plaintiff's drawing down on both the capital invested and the income from the investment) by the end of the period contemplated by the court, usually the plaintiff's retirement date or, as the case may be, the end of the period during which medical or other expenses needed to be incurred by reason of the injury.¹⁴

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

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

The multiplicand

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

24. The starting point is to determine a plaintiff's monthly income and benefits at the date of injury. Income includes wages, salary, profits, tips, bonuses and other extra pay. The possibility of income and benefit increases in the future may also be considered provided that evidence is adduced to show a reasonable likelihood of such future increases.¹⁵

25. Where a plaintiff is not employed at the date of injury, determining a multiplicand can be more difficult. The appropriate considerations will differ according to whether a plaintiff is temporarily unemployed, too young to be employed or is not employed for some other reasons.¹⁶

¹² *Hong Kong Personal Injury Service* (LexisNexis Butterworths) Vol 1, at 1701.

¹³ See generally *Cookson v Knowles* [1979] AC 556 (HL) as adopted in *Chan Pui Ki v Leung On* [1996] 2 HKLR 401 (now superseded by the range of Discount Rates from -0.5% to 2.5% as laid down in *Chan Pak Ting v Chan Chi Kuen* [2013] 2 HKLRD 1 and endorsed by the Court of Appeal in *Chan Wai Ming v Leung Shing Wah* [2014] 4 HKLRD 669).

¹⁴ *Hong Kong Personal Injury Service* (LexisNexis Butterworths) Vol 1, at 1701.

¹⁵ Same as above, at 1703.

¹⁶ If a plaintiff is temporarily unemployed, the courts should consider the plaintiff's chances of obtaining employment in the future and the likely income and benefits that would result. If a plaintiff is too young to be employed, the court must make the best possible estimate on what career the child would have pursued and use that estimate to calculate future earnings. This is the case even for a very young child, as demonstrated in the Privy Council case of *Jamil bin Harun v Yang Kamsiah* [1984] A.C. 529.

The multiplier

26. The multiplier is intended to convert the multiplicand, the current annual loss of a plaintiff, into a lump sum compensation which represents the present value of the plaintiff's prospective loss.

27. In Hong Kong, the Court of Appeal in *Chan Pui Ki* has made it clear that the "conventional" approach to selecting a multiplier should be followed¹⁷ and that the "actuarial method" of using actuarial tables and statistical and economic data which has found favour in Australia and Canada is not to be used.

28. Since the decision of *Chan Pui Ki*, the economic situation and the state of the financial markets characterised by ultra-low interest rate (and hence low return on investment) were such that they prompted Bharwaney J to direct the admission of economic evidence in *Chan Pak Ting v Chan Chi Kuen*¹⁸ to examine the validity of the net rate of return of 4 to 5% derived from *Cookson v Knowles* [1979] AC 556 and adopted in *Chan Pui Ki*.

29. The presumed net rate of return of 4 to 5% has since been superseded by the series of Discount Rates from -0.5% (for loss up to 5 years), 1% (for loss up to 10 years) and 2.5% (for loss over 10 years) as laid down by Bharwaney J in *Chan Pak Ting v Chan Chi Kuen* [2013] 2 HKLRD 1 and endorsed by the Court of Appeal in *Chan Wai Ming v Leung Shing Wah* [2014] 4 HKLRD 669.

30. It is instructive to note that this is a very costly exercise and it is unreasonable and unrealistic to expect individual litigants to have the resources to adduce economic evidence in every case. Hence, the desirability and viability of a mechanism for reviewing from time to time the presumed rate of return (hence Discount Rate in selecting the multiplier for future losses) amidst changing economic and financial circumstances need to be explored.¹⁹

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

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

33. In both England and Hong Kong the selection of the multiplier used to be an exercise based on judicial experience and intuition as guided by reference to multipliers adopted in comparable cases.

¹⁷ *Hong Kong Personal Injury Service* (LexisNexis Butterworths) Vol 1, at 1701.

¹⁸ In *Chan Pak Ting v Chan Chi Kuen* [2013] 1 HKLRD 634, Bharwaney J made the following direction in view of the evidence that the economic conditions of Hong Kong may have changed since the 1996 Court of Appeal decision in *Chan Pui Ki*. "(1) There be a trial of the following preliminary issue in the captioned cases: Whether, having regard to economic developments from 1995 up to the present time, the *Cookson v Knowles* assumption of a net rate of 4.5% remains valid in Hong Kong and, if not, what is the net rate of return based upon which multipliers ought to be assessed and awarded ..."

¹⁹ See Chapter 5 of the Consultation Paper.

²⁰ *Hong Kong Personal Injury Service* (LexisNexis Butterworths) Vol 1, at 1754.

34. In UK, with the advent of the Ogden Tables, which is admissible under section 10(1) of the Civil Evidence Act 1995, the selection of a multiplier is essentially a matter of reading from the relevant tables. In short, the Ogden Tables have become the starting point for selecting a multiplier. In *Wells v Wells* [1999] 1 AC 345, Lord Lloyd said:

*"I do not suggest that the judge should be a slave to the tables. There may well be special factors in particular cases. But the tables should now be regarded as the starting-point, rather than a check. A judge should be slow to depart from the relevant actuarial multiplier on impressionistic grounds, or by reference to 'a spread of multipliers in comparable cases' especially when the multipliers were fixed before actuarial tables were widely used."*²¹ [emphasis added]

35. Although there is no equivalent of section 10 of the Civil Evidence Act 1995 under Hong Kong Law, the equivalent of the Ogden Tables have been developed and refined over the last 20 years. The latest edition of such tables (known as the Chan's Tables)²² has been widely accepted and applied by the Court and practitioners alike and treated as the first port of call in selecting a multiplier.²³

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

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

37. "Lost years" claims arise where an injury shortens a plaintiff's life expectancy. Damages are claimed for income and benefits that would have been earned in the period of the plaintiff's working life that was aborted. In Hong Kong, "lost years" claims may only be brought by living plaintiffs, not on the behalf of the estate of deceased plaintiffs.²⁴

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

39. A mathematical multiplier can then be read from Table 28 of the Chan's Tables.²⁵ Theoretically, the loss of income during the "lost years" would not commence until after the expiry of the projected life expectancy of the plaintiff. There will be an element of accelerated receipt (i.e. in terms of years from trial date to the expiry of life expectancy as agreed or found by the Court). Hence a discounting factor (as may be read from Table 27) will have to be applied to the mathematical multiplier (as obtained from Table 28) to arrive at the actual multiplier to be applied.²⁶

40. For "lost years" claim, the estimated personal expenses of the plaintiff, which

²¹ [1999] 1 AC 345 at 379F-G. This was adopted by Bharwaney J in *Chan Pak Ting v Chan Chi Kuen* [2013] 1 HKLRD 634.

²² Dr Wai-Sum Chan, Dr Felix W.H. Chan & Dr Johnny S.H. Li., "Personal Injury Tables – Hong Kong 2016, Tables for the Calculation of Damages (2016)", Neville Saroni QC, SC edited, Sweet & Maxwell, (2016 ed).

²³ Bharwaney J in *Chan Pak Ting v Chan Chi Chuen* [2013] 1 HKLRD 634 (paras 26 to 34).

²⁴ "Lost years" in fatal cases abolished and replaced by the claim for "Loss of Accumulation of Wealth" under section 20(2)(b)(iii) of LARCO (Cap 23).

²⁵ Table 28, Multipliers for Pecuniary Loss for Term Certain.

²⁶ Table 27, Discounting Factors for Term Certain.

will be saved, will be deducted.²⁷ In appropriate cases, it may be advisable to issue proceedings and keep the action alive until the death of the plaintiff so that a loss of dependency claim under the Fatal Accident Ordinance (Cap 22) can be added.²⁸

Chapter 3 Legal framework of periodical payments – experience from the United Kingdom

A. A Historical perspective (see Chapter 3 of Consultation Paper)

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

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

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

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

44. Under section 2(5), the courts may in the order include specific provisions to ensure that the continuity of periodical payment is reasonably secure. To ensure the security of the continuity of periodical payment and to relieve the financial burden, defendants tend to rely on insurance and annuities.²⁹

45. Under section 2(8), an order for periodical payments is treated as providing for the amount of payments to vary by reference to the **retail prices index**³⁰ at such times, and in such a manner, as may be determined under the Civil Procedure Rules. However, the Court is given the discretion under section 2(9) to order indexation of the periodical payments by reference to other index, such as wage data, where it can be demonstrated that indexation with RPI is insufficient to compensate the injured person.

46. PPOs, being intended to more accurately compensate for future pecuniary loss, are adaptable to the changing circumstances of plaintiffs. Payment schemes can be tailor-made in respect of payment method, as well as its duration and amount. Where it is known that the recipient's needs will increase or decrease at certain stage down the line, provisions can be made in the PPO for the payment amounts to be adjusted at specific times (ie stepped payments).³¹

47. The courts have generally wide discretion when making PPOs. Practice Direction 41.7³² states that a court shall take into account all circumstances of the case, in particular the form of award which best meets the plaintiff's needs and the factors set out in

²⁷ *White v London Transport Executive* [1982] QB 489.

²⁸ See Chapter 3 of the Consultation Paper, at para 3.45.

²⁹ Robin De Wilde, "Periodical payments - a journey into the unknown" [2005] JPILaw 320, at 323.

³⁰ Within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988.

³¹ The "*stepped payment*" is different to variation of payment made under the Damages (Variation of Periodical Payments) Order 2005, see paras 3.28 to 3.36 of the Consultation Paper.

³² Available at: <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part41>

Practice Direction 41B, these being scale of annual payments taking into account any deduction for contributory negligence, form of award preferred by the plaintiff and the defendant (including reasons for their preference).³³

C. Damages (Variation of Periodical Payments) Order 2005

48. For better compensating a plaintiff, PPOs should be able to provide for changes in circumstances. Section 2B(1) and (2) of the 1996 Act empowers the Lord Chancellor by order to enable the courts in specified circumstances to vary a court order of, or agreement on, periodical payment. Accordingly, the Lord Chancellor promulgated the "Damages (Variation of Periodical Payments) Order 2005" (the "2005 Order").

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

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

51. It is noteworthy that the power of the court to award provisional damages under section 32A of the Supreme Court Act 1981³⁴ is preserved by Article 4.

52. Similar to Article 7 in respect of PPO, only one application may be made for further damages under an award of provisional damages.³⁵

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

D. Security and continuity of payments

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

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

³³ Practice Direction 41B (1), available at: http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_part41b.
³⁴ Equivalent to section 56A of the High Court Ordinance, Cap 4 and see also Rules of High Court O.37, rr 7 to 10 c.f. Civil Procedure Rules (UK), Part 41.1.
³⁵ See Civil Procedure Rules (UK), Part 41.3(2) c.f. RHC O.37, r 10(6).

E. Indexation

56. In *Flora (Tarlochan Singh) v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103³⁶, the court considered indexation with Average Earning Index (AEI) and it made clear that "affordability" to the defendant was irrelevant. It considered that wage inflation was the primary reason for increasing care costs and therefore AEI was fair and appropriate.³⁷

57. Similarly, in *Thompstone v Glossop Acute Services NHS Trust* [2006] EWHC 2904 (QB), indexation was made to earnings data provided by the "Annual Survey of Hours and Earnings: Occupational Earnings for Care Assistants and Homecarers", commonly referred to as ASHE 6115. There is however no readily available annuity which provides payment indexed to ASHE 6115. An argument based on "distributive justice" was advanced by NHS in *Thompstone (supra)*. Mrs. Justice Swift took the view that "distributive justice" was just "affordability" by another name and duly rejected it. The decision was upheld on appeal.³⁸

F. PPO in practice³⁹

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

59. It is particularly noteworthy that under CPR 48.2(2), an award under a PPO may provide for continuation of periodical payments to the dependants upon the death of the claimant. This has the effect of dispensing with the need for the dependants to take out further proceedings to claim for Loss of Dependency under the Fatal Accidents Act 1976.⁴⁰

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

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

- (a) in general, both claimants' lawyers and insurers are leaning towards a lump sum award;
- (b) where the Discount Rate is high, insurers would even be prepared to top-up the lump sum to buy off the claim instead of bearing the long term burden and risk;
- (c) claimants would consider PPO more in catastrophic cases and when the Discount Rate is high, entailing high investment risks.

62. Despite the initial skepticism harboured by stakeholders at different quarters, it would appear that PPO is now the norm for settling, at least, future costs of care in very substantial personal injury claims.

³⁶ *Robert Dean Harries v Dr Alan David Stevenson* [2012] EWHC 3447 (QB) also considered the principles laid down in *Flora*, supra.

³⁷ Jennifer Stone, "Damages awards: lump sum and periodical payments", *Clinical Negligence* (5th Ed), Powers & Barton edited, Bloomsbury Professional, Chapter 14, at paras 14.74 to 14.79

³⁸ Same as above, at paras 14.81 to 14.94.

³⁹ Via searches on, inter alia, the British and Irish Legal Information Institute, available at www.bailii.org.

⁴⁰ c.f. Fatal Accidents Ordinance (Cap. 22).

Chapter 4 Overview of the position in overseas jurisdictions

63. The compensation system adopted in some of the jurisdictions, such as Germany and New Zealand differs to a large degree from the system in Hong Kong.

Australia

64. In Australia, provisions on damages for future pecuniary loss are different in each of the States and Territories. Generally speaking, the amount recoverable by a plaintiff is limited with respect to their earning capacity, often to three times average weekly earnings.⁴¹ This is then combined with an assessment of a plaintiff's pre-accident and post-accident life expectancy.

65. Awards for damages in Australia must be assessed once and for all in a lump sum.⁴² At common law, courts may not make a periodic payment order without the consent of the parties. Nonetheless, legislation allows parties to negotiate a structured settlement to provide for payments at periodic intervals. Structured settlements are governed by different legislations in each of the States and Territories.

66. Periodic payments would most often be deemed appropriate in circumstances of catastrophic injury, when life expectancy is uncertain and the plaintiff is in need of permanent institutional care or where the plaintiff is unable to manage the investment of a lump sum.⁴³

Canada

67. In Canada, loss of earning capacity may be calculated by conventional assessment or by the use of actuarial information.⁴⁴ An assessment of damages is normally based on the number of working years until age 65 multiplied by the plaintiff's estimated annual lost income.⁴⁵ In estimating the annual lost income, the court may take into account the plaintiff's annual income in the year prior to the accident or that of a comparable employee.

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

Germany

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

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

⁴¹ Barnett and Harder, *Remedies in Australian Private Law* (CUP 2014), at 174.

⁴² Same as above, at 39.

⁴³ Same as above.

⁴⁴ Canadian Encyclopedic Digest (Carswell), *Damages*, at para 329.

⁴⁵ Same as above.

70. Under section 253(2) of the German Civil Code, a claimant is entitled to expect a reasonable compensation instead of an express right to full compensation.⁴⁶ This method of compensation differs from the existing law in Hong Kong and England and Wales and Northern Ireland where the principle of *restitutio in integrum* applies.

71. It is provided in section 843 of the German Civil Code that where an injured person whose earning capacity is eliminated or reduced as a result of an injury to body or health or if his needs are increased, he would be given damages by way of an annuity payment.⁴⁷ Whether or not the person liable to pay damages must provide security and the kind and amount of security is determined by the circumstances.⁴⁸ The injured person may only demand a lump sum settlement in lieu of annuity if there is a compelling reason for doing so.⁴⁹

72. An interim payment may be awarded to the plaintiff until the case is finally determined in the circumstances where permanent sequelae cannot be assessed.⁵⁰

Ireland

73. Prior to recent reform to the law relating to personal injuries compensation, damages in Ireland were assessed and awarded by way of a lump sum to compensate for all past and future losses, including both pecuniary and non-pecuniary loss. Details of the reform are set out in the Consultation Paper.

Latest development in Ireland

74. A Civil Liability (Amendment) Bill was introduced into the Irish House of Oireachtas on 8 February 2017 ("the Bill").⁵¹ The purpose of the Bill (detail set out in the Consultation Paper) is to empower the courts to award damages by way of PPOs in catastrophic cases. The Bill was based on the Report issued by the Working Group on Medical Negligence and Periodic Payments established by the High Court.⁵²

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

Netherlands

76. The Dutch Civil Code sets out some general rules on the recoverable damages in personal injury cases. The aim of the law is to provide full compensation for damage suffered. Effectively, all pecuniary loss is to be compensated, including the cost of medical treatment, reasonable cost of supplementary care, increased expenses due to physical impairment, actual loss of income, loss of future increase in income (for example, if

⁴⁶ High Court of Dublin, Ireland, Report of the Working Group on Medical Negligence and Periodic Payments (Module 1), at 16.

⁴⁷ German Civil Code, section 843.

⁴⁸ German Civil Code, section 843(2).

⁴⁹ German Civil Code, section 843(3).

⁵⁰ High Court of Dublin, Ireland, Report of the Working Group on Medical Negligence and Periodic Payments (Module 1), at 16.

⁵¹ The Civil Liability (Amendment) Act was enacted in November 2017.

⁵² Please refer to para 4.19 of the Consultation Paper.

the injuries adversely affect possible career prospects) and other future damages.⁵³ According to the Civil Code, the courts are allowed to award future damages either as a lump sum or as a periodic allowance.⁵⁴ In personal injury legal practice, both injurer and injured party generally prefer payment of a lump sum (partly for purposes of avoiding income tax).

New Zealand

77. In 1972, tortious causes of action for personal injuries in New Zealand were abolished and a statutory scheme of benefits for accident victims without proof of fault was introduced by the Accident Compensation Act 1972. This Act came into effect in 1974 and was later being replaced by the Accident Compensation Act 2001 ("The AC Act 2001").

78. New Zealand's "*no fault*" accident compensation scheme differs from the common law system for compensating persons who had suffered personal injury as a result of the negligence of another person. Under the statutory scheme, anyone in New Zealand who suffers a "*personal injury by accident*" can file a claim for compensation for their losses with the Accident Compensation Corporation, i.e. a Crown organisation responsible for administering the country's no-fault accidental injury scheme by providing financial compensation and support to citizens, residents, and temporary visitors who have suffered personal injuries.⁵⁵

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

80. Lump sums were reintroduced by the AC Act 2001 in 2002, but in a limited form, dealing only with permanent impairments of 10% or more, and not with mere pain and suffering or loss of amenity.⁵⁶

Scotland

81. As provided in section 2 of the Damages Act 1996 where damages for personal injury are payable in Scotland, the courts may make an order for periodic payments, only with the consent of the parties involved. This position differs from England and Wales and Northern Ireland, where an amended version of section 2 of the Damages Act 1996 is in effect that empowers the courts to impose an order providing for periodic payments to the injured person without the consent of the parties.⁵⁷

82. In December 2013, the Scottish Government issued the *Civil Law of Damages: Issues in Personal Injury, Scottish Government Response to the Consultation*. It was proposed that Scottish courts should be empowered to impose a periodic payment order and

⁵³ Willem H. van Boom, "Compensation for Personal Injury in the Netherlands", Bernhard A. Koch, Helmut Koziol (eds.), *Compensation for Personal Injury in a Comparative Perspective, Tort and Insurance Law* Vol. 4, 2003, Springer Wien New York, paras 60 and 61.

⁵⁴ The new Civil Code, *Nieuw Burgerlijk Wetboek*, hence: BW; Same as above, at para 62.

⁵⁵ <http://www.acc.co.nz/about-acc/overview-of-acc/introduction-to-acc/index.htm>.

⁵⁶ New Zealand Accident Compensation Act 2001, section 69.

⁵⁷ Scottish Government, *The Civil Law of Damages: Issues in Personal Injury, Scottish Government Response to the Consultation*, Dec 2013, at 15.

to vary such orders in the future.⁵⁸ At the end of the formal consultation period, the Scottish Government commissioned independent, external analysis of all the responses received and published an independent analysis report. The Damages Bill was announced in September 2013 by the Scottish Government.⁵⁹

Singapore

83. Under the Supreme Court of Judicature Act 1993 (Cap 322, 2007 Ed), the High Court of Singapore is empowered to order damages assessed in any action for personal injuries to be paid in periodic instalments rather than as a lump sum.⁶⁰ Yet, awards of periodic payments are deemed exceedingly rare in practice by the court.⁶¹ In the case *Lai Wai Keong Eugene v Loo Wei Yen* [2013] SGHC 123 ("*Lai Wai Keong*"),⁶² the Singaporean court seemed to adopt the approach that if neither party sought damages by way of periodic payments, it must award lump sum damages.

Sweden

84. In Sweden, full compensation to the victim is generally guaranteed. One characteristic of the Swedish system is that claims are frequently settled out of court and few cases would go to court. Most personal injury cases are settled voluntarily according to the opinions given by advisory boards, such as the Traffic Accident Board and the Liability Insurance Personal Injury Board. These boards would set the standards of personal injury compensation and the Supreme Court would develop the legal practice in more important key issues.⁶³

85. Compensation for loss of earnings takes the form of an annuity or a lump sum depending on the circumstances. Traditionally, payment of annuities has been the norm and is thought to be the preferable method of payment of compensation due to social reasons.⁶⁴ Another reason behind the preference for annuities is the favourable indexing of the compensation.⁶⁵

86. A lump sum payment is an alternative kind of compensation in other cases and it is possible to combine annuity with a lump sum. An annuity can be wholly or partially converted into a lump sum.⁶⁶

⁵⁸ Same as above.

⁵⁹ See also paras 5.22 and 5.23 of the Consultation Paper.

⁶⁰ Singapore Supreme Court of Judicature Act 1993 (Cap 322), First Schedule, para 17. Under paragraph 17 of the First Schedule of the Supreme Court of Judicature Act 1993 (Cap. 322, 2007 Ed), the High Court of Singapore is empowered to order damages assessed in any action for personal injuries to be paid in periodic instalments rather than as a lump sum.

⁶¹ *Lai Wai Keong Eugene v Loo Wei Yen* [2013] SGHC 123 (Vinodh Coomaraswamy J), para 26.

⁶² *Lai Wai Keong Eugene v Loo Wei Yen* [2013] SGHC 123, para 26. It can be inferred that a possible reason that the court rarely ordered periodic payment was that it was not asked by the parties to do so. Although paragraph 17 of the First Schedule of the Supreme Court of Judicature Act 1993 (Cap. 322, 2007 Ed) does not require parties' consent before ordering periodic payment, *Lai Wai Keong* seems to suggest that the court would take such factor into account.

⁶³ Erland Strömbäck, "Personal Injury Compensation in Sweden Today", Stockholm Institute for Scandinavian Law 1957-2009, at 432.

⁶⁴ Same as above, at 442.

⁶⁵ Same as above, at 443, note 18.

⁶⁶ Same as above, at 443.

United States

87. Many states in the United States have no-fault statutory schemes for road accidents and injuries to workers. Except in cases of injuries at work, these states do not preclude the taking of a tort claim. The existence of statutory schemes will affect how often a tort claim will be taken out.⁶⁷

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

89. A number of US states now have legislation that empowers the court to award periodic payment of damages in the context of medical malpractice.

90. Most states in the US require future losses to be reduced to their present value so that damages can be awarded in the form of a lump sum. Factors relating to future taxation and inflation rates will need to be taken into account. Damages awarded will be adjusted by taking into account the amount of interest that an investment of the lump sum itself will earn over time. It is approached on the basis that a figure which, when placed in safe investments at the date of judgment, will earn interest equal to the projected loss of wages.⁶⁸

Chapter 5 The intertwined problem of indexation and setting of the Discount Rate

A. Why is a Discount Rate needed?

91. Conventionally, damages are awarded by way of a lump sum and **by reason of accelerated receipts**, the plaintiff may be **overcompensated if the lump sum is not discounted** on the ground that the bulk of money in his hand can be invested to produce income.

92. In practice, the Discount Rate will dictate the selection of multipliers used in the calculation of damages. The multiplier is just another representation of the Discount Rate, which can be read from actuarial tables for PI Cases (such as Ogden Tables in UK and the Chan's Tables in Hong Kong). Once the period of loss (or future needs) has been determined, the selection of multiplier at a given Discount Rate is a mathematical exercise and there is no more room for judicial tinkering on the ground of "*contingencies of life*" (see Lord Lloyd in *Wells v Wells* [1999] 1 AC 345 at 378C).

93. The setting of Discount Rate is of paramount importance since it will affect the amount of damages to be awarded if made in a lump sum.

⁶⁷ The Irish Law Reform Commission, *Report on Personal Injuries: Periodic Payments and Structured Settlements*, December 1996, para 8.1.

⁶⁸ Same as above, at para 8.8.

B. A historical survey

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

94. A historical survey is set out in greater detail in the Consultation Paper.

95. For decades, the assumed rate of return on investment in personal injury cases was taken as 4% to 5% (or 4.5%), net of tax and inflation, on the strength of the decision of the House of Lords in *Cookson v Knowles* [1979] AC 556. In short, the underlying assumption of *Cookson v Knowles* is that the widow would be able to achieve a real rate of return of 4 to 5% (net of tax and inflation) by establishing a portfolio of assets producing an annual income which, together with a portion of the capital, would be sufficient to fully compensate the widow for loss of dependency.

96. Primarily, it was accepted in *Wells v Wells* [1999] 1 AC 345 that the injured person should not be forced to take unnecessary risks such as that attendant upon investment in equities in order to achieve a higher rate of return resulting in a higher Discount Rate and a lower multiplier (hence, a lower award) which would benefit the wrongdoer. In *Wells v Wells* (supra), the House of Lords was convinced that the Discount Rate should be fixed on the basis of the returns from Index-Linked Government Securities (ILGS). On the evidence, the Discount Rate based on ILGS was fixed at 3% (net of tax and inflation) on the assumption that:

- (a) A hypothetical claimant would invest only in ILGS and would hold them until maturity;
- (b) The return was assessed on the 3-year average of all ILGS⁶⁹;
- (c) ILGS with maturity not exceeding 5 years were excluded; and
- (d) Inflation was estimated at 5% and Standard Tax Rate of 25% was taken into account.

The post-Wells v Wells era

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

- "1. (1) *In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court shall, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.*
- (2) *Subsection (1) above shall not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.*
- (3) *An order under subsection (1) above may prescribe different rates of return for different classes of case.*
- (4) *Before making an order under subsection (1) above the Lord Chancellor shall consult the Government Actuary and the Treasury; and any order*

⁶⁹

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

under that subsection shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament."

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

99. In setting the 2.5% Discount Rate, the minor deviation from *Wells v Wells* (supra) is that Lord Irvine found it appropriate to include ILGS with less than 5 years to maturity since there are claimants whose need are not more than 5 years. In obtaining the 3-year average of all ILGS, he used the real yield (as opposed gross redemption yield) for ILGS which were very close to maturity date. The inflation was estimated to be no more than 3% (instead of 5%).

100. The fixing of the Discount Rate under the 2001 Order has done away with the need to pay for extra investment advice. The procedure for investing in ILGS is simple enough and the management fee has been factored into the Discount Rate. Hence, claims for investment advice thereafter have been disallowed.⁷⁰

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

- (a) it is no longer realistic to follow the 2.5% Discount Rate under the 2001 Order;
- (b) on the evidence, the starting position is that the gross return is only about 1%; and
- (c) due to the higher rate of inflation of wages, a Discount Rate of minus 1.5% should be applied for earning-based losses and 0.5% for non-earning-based losses.

Latest development on Discount Rate in UK

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

103. The post-consultation report which includes a summary of the Government's (England and Wales) proposals for reform of the law and draft provisions to give effect to the proposals, alongside with other relevant documents was released in September 2017.⁷¹ The draft legislation was published with a view to invite comments from the public.

⁷⁰ See *Page v Plymouth Hospital NHS Trust* [2004] PIQR Q6.

⁷¹ Ministry of Justice, *Response to the Consultation, The Personal Injury Discount Rate – How it should be set in future*, September 2017; Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/642810/discount-rate-response-consultation-web.pdf.

C. The position in Hong Kong

104. By reason of the decision in *Chan Pui Ki v Leung On* [1996] 2 HKLR 401, plaintiffs in Hong Kong were saddled with the presumed rate of return of 4.5% in selecting multipliers.

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

106. Over the years, there might have been sporadic attempts by plaintiffs to assault the underlying assumptions of *Cookson v Knowles* (supra) as entrenched by the decision in *Chan Pui Ki v Leung On* (supra). However, the path was only clear for a thorough re-visitation of the topic under the guidance of Bharwaney J in his management of a number of catastrophic cases, which culminated in his judgment in *Chan Pak Ting v Chan Chi Kuen* (No.2).⁷²

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

- (a) How the plaintiff actually invested the damages is irrelevant;⁷³ and
- (b) The fact that insurance premium will go up due to downward adjustment of the Discount Rate (resulting in higher multiplier) should not affect the plaintiff's entitlement to "full compensation".⁷⁴

108. Based on the economic evidence adduced, Bharwaney J, looking at returns of the preceding 5 to 12 years,⁷⁵ devised Discount Rates (net of inflation and management fees) according to the duration of future needs as follows:

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

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

⁷² [2013] 2 HKLRD 1.

⁷³ At para 75 citing Lord Clyde in *Wells v Wells* (supra), at 394H–395B.

⁷⁴ See para 140 citing Lord Hutton in *Wells v Wells* (supra), at 4050-F.

⁷⁵ 5 to 7 years for bonds and EFNs and 12 years for equities.

110. The appeal from the decision of Bharwaney J in *Chan Pak Ting (supra)* has since been abandoned. However, the approach and new Discount Rates has been fully endorsed by the Court of Appeal in *Chan Wai Ming v Leung Shing Wah*.⁷⁶

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

Scotland

111. In Scotland, by virtue of section 1 of the Damages Act 1996, in determining the size of that deduction on the issue of Discount Rate, the courts will generally be guided by the views of the Scottish Ministers as expressed in subordinate legislation (i.e. by the "*rate of return ... prescribed by an order made by [the Scottish Ministers]*"). This Discount Rate was 2.5%, having last been prescribed by the Scottish Ministers in 2002.⁷⁷ In setting the rate, Ministers took account both of the purpose established by the primary legislation and of the views of the House of Lords, expressed in the judgment in *Wells v Wells* (supra), as to the sort of considerations that were relevant in fulfilling that purpose.

112. Scottish Ministers, jointly with the UK Government and the Department of Justice, Northern Ireland, had been reviewing the current 2.5% rate within the framework established by the primary legislation and *Wells v Wells* (supra) in order to establish whether it remains appropriate for fulfilling the established purpose in today's changed economic climate, following a consultation process under the Ministry of Justice Consultation Paper *Damages Act 1996 – The Discount Rate – How should it be set?*⁷⁸ (the "2012 Consultation Paper"), which closed on 23 October 2012.⁷⁹

113. Thereafter, the 2013 Consultation Paper⁸⁰ was issued in February 2013. It sought the views on whether the legal parameters governing the way in which the Discount Rate prescribed under section 1 of the Damages Act 1996 should be changed and whether there was a case for encouraging the use of periodical payments. This second issue was primarily examined in the context of the law of England and Wales and Northern Ireland only.

114. On periodical payments in Scotland, consideration of this issue was limited to the extent that a PPO might be made but only with the consent of the parties involved. The consultation of this paper was closed.⁸¹

New Zealand

115. Under the existing scheme administered by the Accident Compensation Corporation, it seems that there is no "*Discount Rate*" concept since compensation under various categories⁸² is provided and fixed under the Accident Compensation Act 2001 as contained in part 4 of the Act.

⁷⁶ [2014] 4 HKLRD 669.

⁷⁷ The current rate is minus 0.75%: see para 5.22 of the Consultation Paper.

⁷⁸ 1 August 2012 (CP12/2012).

⁷⁹ Consultation Paper entitled *Damages Act 1996 – The Discount Rate – How should it be set?* (1st August 2012) and Scottish Government, *Civil Law of Damages: Issues in Personal Injury – A Consultation Paper*, Dec 2012, at 45.

⁸⁰ *Damages Act 1996: The Discount Rate - Review of the Legal Framework* (CP 3/2013).

⁸¹ <http://www.gov.scot/Topics/Justice/law/damages/damagesetc>.

⁸² Accident Compensation Act 2001, Schedule 1.

Australia

116. In 1981, the High Court of Australia decided that the appropriate Discount Rate for personal injury and death claims was 3% (see *Todorovic v Waller*).⁸³ The Ipp Report⁸⁴ also recommended that the Discount Rate should be fixed at 3%, based on advice from the Australian Government Actuary that "*a realistic after-tax Discount Rate might be in the order of 2 to 4 per cent*" and also on the desirability of maintaining a stable Discount Rate for plaintiffs, defendants and insurers.⁸⁵

117. The aforementioned default rate of 3% still applies across Australia today in the absence of any statutory provision to the contrary. In a number of states/territories, Discount Rates are established by statutes.⁸⁶

Canada

118. As the Canadian legal system is of a common law origin, civil actions for damages for personal injury are based on similar principles of tort as those applied in Ireland and England and Wales and Northern Ireland. Eight provinces and two territories have legislation to mandate the Discount Rate used for the assessment of future pecuniary damages in civil litigation.⁸⁷ Only Alberta, Newfoundland and Labrador, and the Yukon do not have a mandated Discount Rate.⁸⁸

United States

119. In the United States, assessment of damages is a matter for the jury.⁸⁹ A victim of personal injury is entitled to have an award for decreased earning capacity reduced to its present value. It has been established in a number of cases that expert evidence is admissible to show the plaintiff's probable life expectancy and the cost of an annuity which will compensate him for his loss.

120. While the method of assessment/Discount Rate in some states is mandated either by statute, case law or jury instructions; in some other states, how the Discount Rate is selected is dictated by economic conditions, such as in California.⁹⁰

Singapore

121. The Singapore Courts follow English authorities in choosing multipliers in personal injury litigation. The landmark decision of the Privy Council in *Lai Wee Lian v Singapore Bus Service*⁹¹ ("*Lai Wee Lian*") followed the methods of old English authorities

⁸³ *Todorovic v Waller* (1981) 150 CLR 402, 424, 451, 460, 478.

⁸⁴ The late David Andrew Ipp AO, QC was the Chairman of the Panel of Eminent Persons, which former Australian Prime Minister John Howard established in 2002 to reform tort laws. The Panel produced its final report known as the Ipp Report on 30 September 2002.

⁸⁵ Negligence Review Panel, "Review of the Law of Negligence Final Report 2002", at 211.

⁸⁶ See Annex A in the Consultation Paper for the table on applicable statutory Discount Rates in different states/territories within Australia.

⁸⁷ See Annex B in the Consultation Paper for the table of summary of provincial and territorial legislation pertaining to Discount Rates for civil litigation in Canada.

⁸⁸ http://www.mckeating-actuarial.com/ESW/Files/CBA-NB_paper_for_web2000063_site_-_April_2015.pdf.

⁸⁹ "Damages, VI Practice and Procedure", *American Jurisprudence*, 22 Am Jur 2d, at para 797.

⁹⁰ Fulcrum Inquiry, "Selecting Discounts Rates for Personal Injury & Employment Damage Calculations", November 2012; Available at <https://www.hg.org/article.asp?id=20491>. See Annex C for table on Discount Rate method in different states in the United States.

⁹¹ *Lai Wee Lian v Singapore Bus Service* (1978) Ltd [1984] 1 MLJ 325.

when choosing multipliers. Such approach was endorsed again by the Court of Appeal in *Tay Cheng Yan v Tock Hua Bin*⁹² ("*Tay Cheng Yan*").

122. In the more recent case of *Lai Wai Keong Eugene v Loo Wei Yen*,⁹³ the Court of Appeal refused to depart from *Lai Wee Lian* and *Tay Cheng Yan* and continued to adopt 5% as the Discount Rate in calculating the multiplier. However, the Court of Appeal added that their decision would not preclude the courts from adopting a lower or higher Discount Rate if this was found to be appropriate on the facts of a particular case.

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

123. It is instructive to note that the approach and the presumed rate of return of 4 to 5% laid down in *Cookson v Knowles* (supra) are guidelines and not set in stone, although one would be slow to seek to change it without good reasons. It is theoretically possible for individual plaintiffs to contend for a tailor-made Discount Rate in light of his unique circumstances. Notwithstanding the decision in *Wells v Wells* (supra), the flexibility available to the Court to cater for individual circumstances was recognised in *Biesheuvel v Birrell*.⁹⁴

124. There is no reason why the common law approach cannot be applied in Hong Kong. However, each case must be decided on its own facts and the incidence of the tax may be different depending on the size of the damages in question.

125. The Discount Rate is meant to be a simple means to ascertain the multiplier to be applied in all cases. It is devised based on the hypothetical plaintiff and is necessarily broad-brush. Hence, the occasions for individual plaintiffs contending for a special Discount Rate would be very few and far between.

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

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

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

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

⁹² *Tay Cheng Yan v Tock Hua Bin and another* [1992] 1 SLR(R) 779.

⁹³ *Lai Wai Keong Eugene v Loo Wei Yen* [2014] SGCA 31.

⁹⁴ [1999] PIQR Q40.

effective and efficient administration of justice enunciated in the Civil Justice Reform implemented since April 2009.

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

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

132. The announcement of the new Discount Rate can be made by way of gazette or other suitable means. By way of analogy, the Chief Justice has been announcing the "*Interest Rate on Judgment Debt*" from time to time without any difficulty.

F. Interface of the Discount Rate with PPO

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

134. In Hong Kong, four series of Consumer Price Indices (CPIs) are compiled to reflect the impact of consumer price changes on households in different expenditure ranges. The CPI(A), CPI(B) and CPI(C) are compiled based on the expenditure patterns of households in the relatively low, medium and relatively high expenditure ranges. By aggregating the expenditure patterns of all households covered by the above three indices, a Composite CPI is also compiled to reflect the impact of consumer price changes on the household sectors as a whole. The year-on-year rate of change in this index is generally taken to reflect overall price inflation.⁹⁵

135. There is no substantial difference between price inflation and wage inflation in Hong Kong as found by Bharwaney J in *Chan Pak Ting v Chan Chi Kuen*.⁹⁶ Hence, if PPO is implemented in Hong Kong, a uniformed indexation with Composite CPI seems reasonable and workable. That said, it is necessary to maintain a degree of vigilance and a mechanism, which can be invoked for timely review of the Discount Rate in response to changing economic and financial scenes, seem essential.

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

⁹⁵ Consumer Price Index Section of Census and Statistics Department of HKSAR website.

⁹⁶ [2013] 2 HKLRD 1 at paras 32 to 38.

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

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

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

Question 2

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

- (1) Whether an authority should be empowered to fix and to conduct periodical revision of the presumed net rate(s) of return on investment (the Discount Rate(s)) to be applied in the assessment of damages in all personal injury cases, in particular, in the selection of multiplier(s) for assessing future pecuniary loss for different periods of future loss and expenses to be incurred.
- (2) Whether the Chief Justice or any other person or body should be such empowered authority.
- (3) The identification of the stakeholders whom such empowered authority should consult in fixing the Discount Rate(s), the frequency of review and the mode of promulgation of the Discount Rate(s) so fixed.

Chapter 6 Problems & prospects of introducing PPO in HK (with reference to UK & Ireland) – identifying issues for consultation

Disadvantages of lump sum awards

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

141. Specifically they cannot accurately take account of future events as they actually transpire.⁹⁷ These events could be personal to the plaintiff, such as the actual duration of a plaintiff's life and the deterioration or improvement in the plaintiff's condition or, general to the economy, such as the actual return on investments available in the market or impact of inflation on the plaintiff's cost of care and medical expenses.

⁹⁷ *Chan Pak Ting v Chan Chi Kuen & Anor* [2013] 1 HKLRD 634, at para 5.

142. Lump sum awards also put the burden of risk and responsibility on the plaintiff rather than the tortfeasor. The plaintiff has the responsibility for investment. He takes the risk and stress arising from his investments. His lump sum may run out before his death due to overspending or underinvesting.⁹⁸

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

Advantages of periodical payments

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

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

146. PPOs provide a secure steady income stream for the life of the plaintiff, with the added peace of mind this brings.⁹⁹

147. Provided they are index linked, PPOs provide a close match between the award of damages and actual expenditure needed to meet expenses as they are calculated by a bottom up process¹⁰⁰ and thus better meet the goal of *restitutio in integrum*.

148. PPOs remove the risks from the plaintiff with respect to investment returns, fluctuations in prices and accuracy of the Discount Rate. Most plaintiffs are not experienced money managers whereas insurers or other bodies against whom PPOs are made will have access to greater financial expertise.¹⁰¹ This is both practically and morally preferable as it is the defendant who caused the loss.

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

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

151. In the event of a plaintiff's untimely death, there is no windfall to his estate.¹⁰²

⁹⁸ Harvey McGregor, *McGregor on Damages* (18thed), *The Common Law Library*, Sweet & Maxwell, Thomson Reuters, 35-003.

⁹⁹ Kemp & Kemp, "The Law of Personal Injury Damages", *The Quantum of Damages*, Thomson, Sweet & Maxwell, Vol 1, Ch 23.

¹⁰⁰ First, the heads of damages to be incorporated into a PPO such as loss of earnings or costs of care are calculated to estimate the Plaintiff's actual needs. The order then provides for the plaintiff to be paid the appropriate amounts for the duration of his needs, or the expiry date of his natural working life.

¹⁰¹ See the survey of local residents' financial management habits that was conducted by the Public Opinion Programme, The University of Hong Kong in 2015. According to the survey, which interviewed 1,001 Hong Kong residents aged between 18 and 65, only 40% of respondents had a habit of saving while 59.9% did not. A majority in Hong Kong do not therefore save and invest.

¹⁰² However, counter to this argument, see comments of Master Denzil Lush of Court of Protection of England and Wales in his article "Damages for personal injury: why some claimants prefer a conventional lump sum to periodical payments" (2005), *L.L.R.* 2005, 1(2), at 187-203:

"The argument about a potential windfall for underserving beneficiaries tends to be overstated. In most cases, one or both of the claimant's parents have given up work to care for their child and may be the primary carers for many years. They become dependent on the damages award and the child indirectly assumes responsibility for

152. In practice, PPOs have enabled faster resolution of claims for plaintiffs with a shortened life expectancy.¹⁰³

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

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

Limits to periodical payments

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

Disadvantages of periodical payments

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

157. A lump sum allows the plaintiffs the benefit of a large capital sum and autonomy to dispose of that according to their personal needs or preference. They could, for instance, choose to apply it in setting up a business, though this is unlikely to apply to a plaintiff with catastrophic injuries. More practically, from a Hong Kong perspective with inflating property prices and the relatively high down payment requirement, a plaintiff may prefer the lump sum award to be invested in property, a common life goal in Chinese culture.

158. It is desirable in any award for damages for future loss to have a capital sum to be set aside to provide for unforeseen contingencies. Awards for periodical payments limit the size of such capital sum and provide for a basis for rejection of PPO's by plaintiffs.¹⁰⁴

159. Cost of care and medical inflation are difficult to predict or hedge against. Further, they impose extra administrative costs over the lifetime of the PPO. As a result, UK experience has shown that PPOs will increase the overall costs of insurance owing to more conservative reserving and additional operation expenses. However, following the principle of *restitutio in integrum*, this is not a concern of the courts in making awards with

their maintenance. There is often little prospect of their returning to the labour market if the child dies prematurely and they could face hardship when the periodical payments ceases on the claimant's death and their income stream vanishes instantaneously."

¹⁰³ Denzil Lush, "Damages for personal injury: why some claimants prefer a conventional lump sum to periodical payments" (2005), L.L.R. 2005, 1(2), 187-203.

¹⁰⁴ Denzil Lush, "Damages for personal injury: why some claimants prefer a conventional lump sum to periodical payments" (2005), L.L.R. 2005, 1(2), 187-203.

respect to future pecuniary loss, see judgment in *Wells v Wells*¹⁰⁵ as followed by Bharwaney J in *Chan Pak Ting v Chan Chi Kuen No.2*.¹⁰⁶

Periodical payments preferable

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

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

Appropriateness having regard to the size of the claim

162. PPOs are not appropriate for all heads of claim such as past income loss and expenses already incurred. By virtue of their administrative costs, PPOs are not appropriate for small claims. In UK, when debating the Damages Act 1996, Parliament considered whether to limit PPOs to a certain size of claim and decided not to. The UK Parliament took the view that they are in principle suitable for all future loss claims of a significant amount or duration, provided the payments are not so small as to make their use disproportionate.¹⁰⁷

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

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

165. The Sub-committee recognises that in practice it is only higher value claims, where the deficiencies of lump sum awards are significant enough, that will warrant PPOs. The UK Practice Direction 41B, which lists factors to be taken into account by the court in assessing the appropriateness of a court order for periodical payments, includes the scale of the annual payments taking into account any deduction for contributory negligence. If the annual payments are not sufficiently high, no order will be made.¹⁰⁸ A similar system could be adopted in Hong Kong.

¹⁰⁵ [1999] 1 AC 345 at p.388 D-E.

¹⁰⁶ [2013] 2 HKLDR 1, at para. 14.

¹⁰⁷ Kemp & Kemp, "Medico-legal material calculation and awards tables source materials", *The Quantum of Damages*, Thomson, Sweet & Maxwell, Vol 2, Ch 41, 41-002.

¹⁰⁸ Hence in *Rowe v Dolman* [2007] EWHC 2799 QB, the Court acceded to the plaintiff's request that he be given a lump sum rather than a periodical payments order as this would enable him to live a substantial part of his life as he wished to live it.

Appropriateness having regard to the nature of the claim

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

167. As the focus in PPOs is future loss, they will inevitably be awarded in conjunction with a lump sum award for other heads of damage. If no limit is imposed on the heads it is applied to, then in practice the court will consider each head of future loss separately to decide whether it is appropriate to make a PPO in respect of it. PPOs are particularly appropriate for future care and medical needs. In UK, it is also now not uncommon for future loss of earnings and future deputyship fees also to be treated as PPOs.¹⁰⁹ In Hong Kong, future accommodation costs will also be a potentially important element.

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

169. However where a dependant's life expectancy is uncertain, periodical payments may be useful.¹¹⁰ They may also be useful for child dependants whose length of study is uncertain.

Court driven

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

171. The court is the ultimate arbiter and is not bound to follow the wishes of the parties and even if they both agree on a PPO the Court may decline to make the order.¹¹¹ The views of the parties are a factor to be taken into account and under rule 41.5 of the Civil Procedure Rules, the parties in their statement of case have to state whether periodical payments or a lump sum are the more appropriate form of order sought.

¹⁰⁹ Harvey McGregor, *McGregor on Damages* (18th ed), *The Common Law Library*, Sweet & Maxwell, Thomson Reuters, 50-034. Examples of UK case law granting PPOs are *Harries (a child by his mother and litigation friend) v Stevenson* [2012] EWHC 3447 (QB), *Cobham Hire Services Ltd v Eeles (by his mother and litigation friend Eeles)* [2009] EWCA Civ 204, *TUV v Great Ormond Street Hospital NHS Foundation Trust* [2015] EWHC 2829 (QB), *Thompstone v Tameside and Glossop Acute Services NHS Trust* [2008] EWCA Civ 5 and *Leo Whiten v St George's Healthcare NHS Trust* [2011] EWH C2066 (QB).

¹¹⁰ In *Sloan (Widow & Executrix of the Estate of D J Sloan, Deceased) v Halsen Insulation & Engineering Company Ltd.*, periodical payments were made to a widow of the deceased for her future care, the deceased having provided care to her prior to his death in the accident.

¹¹¹ Hence in *Morton v Portal Ltd* [2010] EWHC 1804 QB where the claimant was guilty of contributory negligent to the extent of 25% and this thus reduced his annual payments, he still sought a PPO. However, the court declined to make an order. The court itself had to decide if a PPO was in the claimant's best interests and decided that it was not.

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

- (1) the scale of the annual payments taking into account any deduction for contributory negligence;
- (2) the form of award preferred by the claimant including –
 - (a) the reasons for the claimant's preference; and
 - (b) the nature of any financial advice received by the claimant when considering the form of award; and
- (3) the form of award preferred by the defendant including the reasons for the defendant's preference.

173. In *Thompstone v Tameside & Glossop Acute Services NHS Trust*,¹¹² the Court of Appeal issued definitive guidance on the operation of the factors as follows:

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

174. Even under a system when the courts are empowered to impose PPOs on the parties, in practice PPOs will also be voluntarily agreed between the parties as well as ordered by the court.

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

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

Question 3

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

- (1) Whether the power of the court to award periodical payment should be irrespective of the consent of the parties to the proceedings.
- (2) Whether the power to award periodical payment should be generally vested in the court to be exercised in circumstances as it deems just and fair or whether

¹¹² 2008 EWCA Civ 5.

such power should be limited to cover a specific class of personal injury cases, and, if so, how the class of cases is to be defined.

- (3) Whether a periodical payment order made by the court may cover all or only some heads of future pecuniary loss, in whole or in part, irrespective of the consent of the parties to the proceedings; and in the latter case, whether a periodical payment may cover all other heads of damages to such extent as the parties may agree.

Indexation

177. Guarding against inflation is crucial to making PPOs effective. A claimant who is awarded a periodical payments order has a fixed future income which is intended to meet his ascertained needs, and must be protected against future inflation in the costs of meeting those needs, otherwise the primary objective of periodical payments, securely meeting the needs of the claimant, will not be met. Therefore, for periodical payments to be effective, they must be index linked.

178. In UK, the courts and the Lord Chancellor exercising his authority under the Damages Act 1996 have fixed a Discount Rate having regard to the average gross redemption yield under index linked government securities. This follows the judgment of the House of Lords in *Wells v Wells*¹¹³ which held that the injured plaintiff was not in the same position as an ordinary prudent investor and was entitled to the greater security and certainty achieved by investment in indexed linked government securities.

179. In Hong Kong, we have no equivalent of index linked government securities as a guideline to ascertain the annual return. As a result, when the courts do come to reassess the Discount Rate, it is a laborious and expensive process requiring expensive expert testimony on economic conditions as occurred in *Chan Pak Ting*. It is also highly contentious with plaintiffs' looking for a Discount Rate which reflects a secure low risk investment portfolio and defendants urging a Discount Rate based on a more mixed higher return portfolio. To obviate this and provide a long term solution to the problem which is bound to resurface time and again, the Court of Appeal in *Chan Wai Ming v Leung Shing Wah*¹¹⁴ recommended the introduction to Hong Kong of legislation similar to the Damages Act 1996 to prescribe a rate of return from time to time in order to meet changes in the economic condition.

Variable payment orders

180. In UK, under the Damages (Variation of Periodical Payments) Order 2005 made pursuant to section 2B of the Damages Act, the court can vary an existing periodical payment order if the claimant suffers a serious deterioration or significant improvement in his condition. Standard periodical payment orders in UK thus give a right to a defendant to call for regular medical examination of a claimant.¹¹⁵

¹¹³ [1999] 1 AC 345.

¹¹⁴ [2014] 4 HKLRD 669.

¹¹⁵ For an example of a variable PPO in practice, see *Jack Farrugia v Steven Burtenshaw the Motor Insurers Bureau Quinn Insurance Limited* [2014] EWHC 1036 (QB). Here there was a 2% risk of developing uncontrolled epilepsy in which case the claimant's needs would increase significantly. See also *Kotula v EDF & others* [2011] EWHC 1546 which involved a paraplegic who faced a 1% risk of developing syringomyelia (pseudocyst collection of cerebrospinal fluid) which would result in significant clinical features.

181. The concept of varying a PPO is controversial. For defendants, it provides added burden, in particular, from an insurance reserving prospect, as it may be very difficult to reserve.

182. Concerns have been expressed, when addressing the possibility of variable PPOs in other jurisdictions, that this would encourage satellite litigation on matters such as quantum and causation, for example, the question of whether a change in medical condition is a result of the original breach or merely a result of a disease process.¹¹⁶

183. In the UK, variable orders can only be given in very restricted circumstances. The power to vary a periodical payments order must relate to events specified in the original order or agreement. In other words, the power is limited to addressing only those contingencies that can be foreseen at the time of the trial or settlement. If variable payment orders are to be adopted in Hong Kong, it is suggested that they have similar restrictions.

184. Payments under PPOs normally cease upon the death of the injured person with the potential result that the dependants would be under-compensated due to the premature death of the injured person. Therefore, the dependants should be given a chance to seek remedies pursuant to a loss of dependency claim so as to avoid any injustice.

185. If the courts of Hong Kong were to have the same or similar powers to continue the award after the plaintiff's pre-mature death due to his injuries, the dependants would not need to pursue a claim for loss of dependency in the circumstance and any such damages would be accounted for without any concern for duplication of damages.

186. Where a claimant's condition is likely to deteriorate it would be unfair on the claimant if the court is to make an award based on his current condition which can leave him under-compensated if his health is worsened. At the same time, it would be unjust on the defendant to make a lump sum award on a future condition, which may never develop.

187. Under the current law, the court has the power to award "*provisional*" damages (under Rules of the High Court O.37, r.10) in cases where there is a chance that the claimant will develop a specific serious condition or suffer a deterioration in their mental or physical condition as specified in the order awarding provisional damages.¹¹⁷ If the claimant suffers this condition or his condition deteriorates, an award of further damages may be made. In fact, a dependant or beneficiary can make an application to the court where a claimant was awarded provisional damages and subsequently dies.¹¹⁸

188. An award of provisional damages must be made by the court and not by a mere agreement between the parties.

¹¹⁶ *Report of the Working Group on Legislation on Periodic Payment Orders* (Ireland) published on 22 April 2015, at 56-59.

¹¹⁷ A claim for provisional damages must be included in the claimant's statement of case. If the court believes that a provisional damages award is appropriate, it will (UK PD41A 2.1):

- (a) assess damages on the basis of the claimant's current prognosis disregarding the future risk;
- (b) identify the potential future risk in the order;
- (c) stipulate a timeframe within which the claimant may return to court if the claimant's health deteriorates as a result of this risk; and
- (d) order that the relevant documents are kept by the court.

The courts of Hong Kong have very similar duties, powers and procedure as per Rules of the High Court O.37, rr.7-10.

¹¹⁸ This is not provided for under Rules of the High Court.

189. Theoretically, even if PPO is implemented, the regime of "*provisional*" damages can be left intact to co-exist with the PPO regime. Practically, if a PPO is made after an award for provisional damages, the court could vary the amount of payments when there is a substantial change in a claimant's physical or medical condition by way of a variation order under the PPO regime. The net effect is that if the court is equipped with the power to vary PPOs, the regime of "*provisional*" damages and the power to award further damages thereunder would be of secondary importance.

Question 4

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

- (1) Whether the original periodical payment order should be open to review by the court upon the application of either party to the proceedings.
- (2) If yes, what should be the circumstances for reviewing periodical payment orders, including but not limited to the following:
 - (a) changes in the need for and level of future care as a result of significant medical deterioration or improvement, which is foreseen at the time of the original order, with specific criteria pertinent to the nature of deterioration or improvement, as well as the duration during which a review can be applied for, being stipulated in that order;
 - (b) exceptional life-changing circumstances, and if so, what are these circumstances; and
 - (c) restriction on the number of applications for review and limit on extension of time for review that may be allowed.
- (3) Whether, upon the cessation of periodical payment occasioned by premature death of a recipient of periodical payment, the dependants of such recipient should be afforded one last opportunity to pursue a claim against the paying party for loss of dependency, or being the amount which the deceased recipient would have contributed to his dependant from the periodical payment he received but for his premature death and in respect of which the dependant has not received any compensation or damages from the paying party or any person who was or may be liable to him.
- (4) Whether the current mechanism for provisional damages should be preserved and whether periodical payment orders should be applicable to cover provisional damages although their co-existence is technically possible.

Problems in implementing PPOs in Hong Kong

190. Before anything else can be considered in assessing whether it is appropriate for a court to order periodical payments or for the parties to agree on periodical payments, there must be an assurance that the continuity of the periodical payment is secure. This is the first step that the court must take under section 2(3) of the Damages Act 1996.

191. PPOs are possible in UK as there is a well-established annuities market and because of the financial guarantees provided by the Financial Services and Markets Act 2000, neither of which exists in Hong Kong.

192. Section 2(4) of the Damages Act provides for situations where the continuity of a periodical payment can be automatically considered to be reasonably secure¹¹⁹ and situations where there is no such automatic consideration, such as payments self-funded by the Motor Insurers Bureau, medical defence organisations, offshore insurers and private defendants. Courts will only order periodical payments against such bodies where for instance they buy an annuity from a life office for the benefit of the claimant¹²⁰ which gives them the protection of the Financial Services Compensation Scheme.

193. Whilst the Government may give a similar guarantee to a government department or the Hospital Authority may be regarded as financially secure such as to warrant automatic approval, it will be difficult for liability insurers in Hong Kong to provide the assurance required through an annuity as we have no local annuities market.

194. Even in UK, problems have arisen for insurers on occasion in finding appropriate annuities. Further, notwithstanding the mature annuities market operating in UK, defendants' insurers and bodies such as the Medical Protection Society (MPS) have found it difficult to purchase annuities. This has led to insurers to self-fund PPOs and the MPS to set up a trust specifically to cover them.

195. For insurers, the level of extra reserving is usually decided at the board level of individual insurers, hence the regulator has a key role in monitoring and ensuring adequate provision of reserving, a task that would have to be taken on by Hong Kong's Insurance Authority.

196. Nevertheless, although initially, in UK, insurers were reluctant to use PPOs in view of the uncertainties and long-tail liabilities involved, with more experience, however, they have become more confident to initiate and use PPOs for settling claims.

Factors that would facilitate the introduction of a PPO regime

197. First of all, a mature annuity market, able and ready to assume the risks involved, is fundamental to an effective PPO regime. If annuity payments are adopted in Hong Kong, the tail can easily be extended from the current one to 40 years or beyond.

198. Secondly, development of a common benchmark for assessing and determining the cost of care will enhance the effectiveness of a PPO regime, since the change in care costs can be referenced for calculating and determining the amount of annual payment to be made under a PPO.

199. Lastly, following the example in UK, a guarantee arrangement introduced to deal with situations of insurers becoming insolvent that is in line with the framework of existing levies and safety nets in Hong Kong is equally important to the development of a PPO regime.¹²¹

¹¹⁹ This is when (a) it is protected by a Ministerial guarantee under section 6 of the 1996 Act; (b) it is protected by a scheme under section 213 of the Financial Services and Markets Act 2000; and (c) the sources of the payments is a government or health service body.

¹²⁰ Kemp & Kemp, "Medico-legal material calculation and awards tables source materials", *The Quantum of Damages*, Thomson, Sweet & Maxwell, Vol 2, Ch 41, 41-010.

¹²¹ This was specifically addressed in practice in *Jack Farrugia v Steven Burtenshaw the Motor Insurers Bureau Quinn Insurance Limited* [2014] EWHC 1036 (QB). Here the 3rd defendant, an insurer, was likely to go into liquidation and as the Financial Services Compensation Scheme would meet its ongoing liability to satisfy a PPO, the judge was satisfied the continuity of payment was reasonably secure.

Challenges of introducing PPOs in Hong Kong from the insurers' perspective

200. We note that there will be the following challenges from the perspective of the insurance industry if PPOs are to be introduced in Hong Kong:

- (a) Similar to the situation in UK, a lack of evidence and data on impaired life mortality in Hong Kong will render it difficult to accurately price annuities for PPOs.
- (b) Guarantee arrangements are only available in respect of employees' compensation and motor insurance.
- (c) It is fairly impossible to estimate the proportion of future claims that would be settled as PPOs since PPO propensity for liability claims may vary due to different factors.
- (d) It is hard to predict care costs in view of the ageing population and the politics surrounding minimum wage, hence rendering it more difficult to make the right level of reserving for PPO.

Establishing a Discount Rate mechanism¹²² is a huge challenge to both insurers and reinsurers, and it will involve a long process of consultation.

201. The Sub-committee is cognisant of the following sentiments expressed by the insurance industry:

- (a) that an independent PPO impact study be carried out before any decision is taken and that the study be properly scoped to cover all major stakeholders; and
- (b) that the subject of discount rate be taken forward as a separate and independent exercise with involvement of the newly established Insurance Authority, where appropriate.

202. Government bodies and institutions such as the Hospital Authority and the MIB might consider, where appropriate, a voluntary form of PPO as was done in Scotland where the Damages Act 1996 does not apply.¹²³

Security of payment - absence of protection similar to Financial Services Compensation Scheme

203. In order for PPO to work, the payments have to be secured against all potential adverse consequences so that recipients will not be affected. By way of example, in UK, payments under PPOs will be 100% guaranteed by the Financial Services Compensation Scheme. Hence, if a financial institution fails to meet its obligation to make payment under a PPO, the recipient can look to the scheme for payment. A similar mechanism for protection of recipients will be needed if PPO is to be introduced in Hong Kong. The details of such protective mechanism will have to be mapped out if the implementation of PPO is deemed desirable. This may take the form of a "*bail out*" scheme established on the strength of levies imposed on paying parties under PPOs. It is also necessary to provide for other eventualities such as merger and acquisition of insurers and other financial institutions with liabilities under PPOs as it appears to a growing global trend.

¹²² "Discount Rate" is the assumed net rate of return on investment which insurers are entitled to take into account when funding an award. Generally, a reduction in Discount Rate will bring the economic value of lump sums and PPOs closer together, while an increase will pull them further apart.

¹²³ *D's Parent and Guardian v Greater Glasgow Health Board* [2011] SLT 1137.

Question 5

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

- (1) Whether the court should take into account the security of the periodical payments before making the order.
- (2) The funding options that should be available to ensure adequate security for periodical payments. These options may include, but are not limited to:
 - (a) self-funding provided by, as the case may be, insurers, the government, or statutory bodies of substantial means;
 - (b) self-funding backed by guarantees from government or a statutory scheme of protection; and
 - (c) procurement of annuities or similar investment products to provide a secured stream of income.
- (3) Whether, apart from government departments, there are other organisations and institutions, whether created by statute or otherwise, which are considered to be financially secure as paying parties for court ordered periodical payments.