STRUCTURED SETTLEMENTS AND INTERIM AND PROVISIONAL DAMAGES

LAW COMMISSION

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The Law Commission

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STRUCTURED SETTLEMENTS AND INTERIM AND PROVISIONAL DAMAGES

Item 11 of the Fifth Programme of Law Reform: Damages

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LAW COMMISSION

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To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain

PART I
INTRODUCTION AND SUMMARY OF PRINCIPAL RECOMMENDATIONS

1.1 In June 1991 you announced the Law Commission's Fifth Programme of Law Reform which included two new items relating to common law. One of these was the remedy of damages.[1] We considered that the time had come for us to carry out:

> "...an examination of the principles governing and the effectiveness of the present remedy of damages for monetary and non-monetary loss, with particular regard to personal injury litigation. Certain matters to which specific consideration is to be given include
>
> (i) the use of structured settlements as an alternative to, or in conjunction with, lump sum awards;..."

We noted that:

> "We shall pay particular attention to personal injury litigation.... The newer developments which have drawn our attention include the increasing use here and in other common law jurisdictions of structured settlements in personal injury litigation...."

1.2 In 1992 we published a Consultation Paper.[2] In the paper we asked whether the current arrangements for structured settlements needed to be rationalised, monitored or extended, and whether courts should be given power to impose structured settlements. We also considered lump sum damages and asked whether reform of the interim and provisional damages regimes was desirable, since these topics appeared to us to be interconnected with structured settlements and to form the background against which they operate. We sought views and information on all these issues, on some of which we had reached provisional conclusions.

[1] Fifth Programme of Law Reform (1991) Law Com No 200, Item 11.

[2] Structured Settlements and Interim and Provisional Damages (1992) Consultation Paper No 125 (hereafter Consultation Paper No 125).

1.3 There was a large response to the consultation paper and we are grateful for the time and effort spent by consultees, both in compiling their thoughtful responses and, in the case of some, by meeting us for further discussion. Because this is very much a developing area of the law, the practical experience of those involved in structuring (lawyers, the judiciary, investment advisers and intermediaries, insurance companies and some government departments), has been invaluable, while the overview provided by academic lawyers has also been of great assistance. A list of the respondents appears in Appendix B.

1.4 We considered a range of possible reforms, from those which raised broad issues of principle to more technical adjustments. For this reason this Report does not centre on a single proposal or reform. While the bulk of the consultation paper was concerned with structured settlements, we did not believe that these could be properly considered without also considering the methods of assessing lump sums, and interim and provisional damages.

1.5 The consultation paper stimulated much interest at conferences and in professional legal and insurance literature.[3] As structuring is very much a developing area of the law, new information flowed in throughout the consultation process. At the time when we were reviewing the law, structured settlements were a comparatively new development, and many practitioners were feeling their way in this field. While we were compiling the paper, the Law Society issued guidance on aspects of structuring, and since the consultation paper was published, two books devoted entirely to the subject of structured settlements have been published.[4] One of these books referred to our consultation paper throughout, and also to our consultation exercise, with the final chapter being almost entirely devoted to our provisional recommendations for reform.[5]

1.6 In general, the views of those we consulted supported our own provisional conclusions on the main issues we raised in the consultation paper. The one exception was the question whether there should be a judicial power to impose structured settlements. 53% of respondents favoured a power of imposition while

[3] Eg: "The Law Commission Proposals on the Reform of Damages" (21 January 1993) 1/93 Special Issue, Quantum; "Structured Settlements" (11 January 1994) The Lawyer, Focus issue 14; Katie Hay and Brian Capstick, "Structured Settlements: Future Gains and Future Losses" [1993] 8 Int ILR 247; R Lewis, "Structured Settlements; An Emergent Study" (1993) 13 CJQ 18, "Structured Settlements of Damages Awards in Britain and Canada" (1993) 42 ICLQ 780, "Problems faced by life insurers in offering annuities for structured settlements" (1993) Vol 3 No 2 Ins Law & Practice 30, "What discount is available for a structured settlement?" (1993) 143 NLJ 772, "A structure for the future" (1993) 90/27 Law Soc Gaz 17; R Lewis and C Roberts, "Structured Settlements of Personal Injury Damages: the Canadian Comparison" (1993) 12 Lit 65.

[4] See Richard Lewis, *Structured Settlements: The Law and Practice* (1993); and Iain Goldrein and Margaret de Haas (eds), *Structured Settlements: A Practical Guide* (1993). We are very grateful to Mr Lewis for making available to us the proofs of his book prior to publication.

[5] Richard Lewis's book, above.

44% did not.[6] Some of those who did not favour a power of imposition thought that there was as yet insufficient experience of structuring to justify creating such a power. The small majority in favour of imposition was made up of a mixed group, with some insurance and defendant representation, although it would be fair to say that probably most of these respondents had the plaintiff's interests at heart. In view of this response, we gave extensive further consideration to the question of the creation of a judicial power to impose structured settlements. However, we still have serious doubts about the wisdom of introducing such a power at this stage of the development of structuring. It would also be fair to say that the group of consultees who favoured a power of imposition either had not considered the mechanics of implementation or had very differing views on how such a power might operate in practice. In this Report, therefore, we recommend that no judicial power of imposition should be created at this stage, and that reform should be by way of rationalising and building on the voluntary system which already exists.

1.7 At the same time as our consultation exercise was taking place, the Commission was carrying out empirical research on damages. Social and Community Planning Research, an independent non-profitmaking institute specialising in social surveys, carried out a linked programme of quantitative and qualitative research for us, while Professor Hazel Genn, of Queen Mary and Westfield College, London, coordinated the project on our behalf. She is now preparing a report which we hope to publish later this year. We commissioned an in-depth survey of a nation-wide representative sample of 761 people who had received awards of damages for personal injury. The study had three specific aims, which were to explore what levels and what sorts of damages people receive for personal injuries, how people use their compensation payments and why they used the funds in the way reported, and to explore recipients' feelings about the adequacy of the settlement in meeting their needs, both at the time the award was made and at the time of interview. Interviews were conducted with people who had received damages at any time from two years ago up to ten years ago (the accidents occurred between 1967 and 1991), and we stratified the claims into four size bands according to the amount of damages received: Band 1 being settlements between £5,000 and £19,999, Band 2 being settlements between £20,000 and £49,999, Band 3 being settlements between £50,000 and £99,999, and Band 4 being settlements of £100,000 or more. Most of the interviews were held in the spring of 1993.

1.8 The fieldwork has produced some specific information which is relevant to the policy recommendations in this Report and to which we will refer in due course.[7] The qualitative research, which involved further in-depth interviews with 52 of the original sample, included nine respondents who had received structured settlements, ranging between £95,000 and £1,000,000. These people had generally sustained

[6] 3% were unclear on the matter.

[7] See paras 2.23, 2.29-2.30, and 3.16-3.19 below.

very severe injuries, and in many cases were being cared for by partners and parents. We were able to obtain valuable information about the experience of structured settlements in operation. This experience is quite new since structured settlements have really only been in existence in the United Kingdom for approximately five years. In addition to this specific material, we will also refer to such of the general initial results of the survey as we consider are relevant to our examination of structured settlements. The survey also included questions relating to provisional and interim damages to which we will refer in the relevant sections of this Report.[8]

1.9 We hope that information from our fieldwork and the analysis in the report which is based on it will assist in the consideration and formulation of policy on compensation for personal injury. It should certainly be a valuable addition to the limited amount of information of this sort now available in this country. Although we will be expressing gratitude to participants when we publish our report on the survey, as we are now publishing some of its results we would like at this stage to express our thanks to those who willingly gave up their time to discuss in detail what was in many cases, still a distressing subject. We also wish to thank the Association of British Insurers (ABI), the Medical Protection Society, the Medical Defence Union, the Law Society and the individual solicitors who voluntarily gave valuable assistance in the project.

1.10 The Disability Management Research Group at the University of Edinburgh completed a smaller empirical exercise[9] in 1993. This was funded by the ABI and while it did not specifically relate to structured settlements, it did contain some interesting results, including the finding that there was no evidence that victims of personal injury were being profligate with their awards: instead, they were concerned to preserve capital in order to cover future health care costs and care assistance, at least during the period up to ten years after injury. The risk of dissipation has often been argued as one reason for regarding structuring as desirable, especially in cases of serious injury where damages will be high. The initial results of our own survey tend to support the Edinburgh study result, and we examine the implications of this finding for structured settlements in Part III below.

1.11 During this project we were aware of the interest it was stimulating in the financial advice and insurance sectors. Intermediaries[10] kept in touch with us throughout, and they provided us with valuable information and interesting advice. We were also aware that members of the insurance industry had reacted to some of the provisional

[8] See paras 3.79, 3.81, 4.6 and 5.22 below.

[9] Paul Cornes, *Coping with Catastrophic Injury - A follow-up survey of personal injury claimants who received awards of £150,000 or more in 1987 and 1988* (January 1993), published in June 1993 (hereafter "the Edinburgh study").

[10] Such as Frenkel Topping Structured Settlements, the Structured Settlements Company Ltd, and Structured Compensation.

recommendations made in the consultation paper. For example, one insurance broker[11] assembled a structured settlement pool of European underwriters, called the Refus Annuity Pool, in the belief that the changes we might recommend could create demand for more than £300 million worth of a new class of cover.[12] The pool was formed with major reassurers to support general insurers and Lloyd's syndicates with annuities. Since the reassurers are not based in the United Kingdom they can avoid the current tax and administrative difficulties inherent in structuring.

1.12 Our main recommendations are:-

Lump sum damages

(a) That the actuarial tables published by the Government Actuary's Department (known as the Ogden Tables) should be admissible evidence in any proceedings for damages for personal injury (including proceedings under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934) where it is desired to establish the capital value of the sum to be awarded as general damages for future pecuniary loss;

(Paragraphs 2.9 to 2.23 and Recommendation 1).

(b) That there should be legislative provision:

(i) requiring courts, when determining the return to be expected from the investment of the sum awarded, to take account of the net return upon an index-linked government security (ILGS), and

(ii) permitting departure from the rates where it can be shown that a different rate would be better in the individual case, and

(iii) for the prescription of an alternative best indicator of real rates of return by statutory instrument where it appears to the Lord Chancellor that no index-linked government security exists to which reference can be made.

(Paragraphs 2.24 to 2.36 and Recommendations 2 to 6).

Structured settlements

(a) That there should be no judicial power to impose structured settlements. Reform should be by way of rationalising and building on the voluntary system. To this end the arrangements for structured settlements should be rationalised to enable life offices to be able to make payments under annuities bought by defendants with

[11] Steel Burrill Jones.

[12] 'Broker to form injury pool', *The Sunday Telegraph*, 16 May 1993.

personal injury damages free of tax direct to the plaintiff.

(Paragraphs 3.37 to 3.57 and Recommendations 7 to 8).

(b) That there should be provision for statutory structured settlements, with the following features:

(i) There must exist an agreement between a plaintiff and the defendant (or the defendant's insurer) settling any damages claim for personal injury, including any claim under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934;

(ii) The plaintiff and the defendant (or the defendant's insurer) must agree that the damages (so far as not consisting of a lump sum) are to consist of periodic payments to the plaintiff for a fixed term, or for life, or both (with or without provision for indexation);

(iii) The defendant (or the defendant's insurer) must agree to purchase for the plaintiff an annuity or annuities producing for the annuitant sums which as to amount and time of payment amount to the periodic payments specified in the agreement;

(iv) The annuity payments received by the plaintiff will be free of income tax just as instalments of damages received by the plaintiff from the defendant (or the defendant's insurer) under a voluntary structured settlement are free of income tax at present.

(Paragraphs 3.58 to 3.60 and Recommendation 9(i) to 9(iv)).

(v) The legislation will make it clear that:

(a) as a policyholder for the purposes of the Policyholders Protection Act 1975, the person for whom, pursuant to a structured settlement, an annuity has been purchased, shall have protection under that Act, but to the full extent of any liability, benefit or value

(Paragraphs 3.63 to 3.70 and Recommendation 9(v)); and

(b) the scheme for annuities purchased pursuant to a structured settlement shall apply to annuities purchased from an insurance company or companies authorised to carry on insurance business in the United Kingdom whether authorised under domestic or under European law given effect in the United

Kingdom

(Paragraphs 3.71 to 3.76 and Recommendations 9(vi) and 9(vii)); and

(c) the courts are to have jurisdiction to make an order by consent that the parties may settle the action by way of a structured settlement agreement that satisfies the statutory criteria. Such an order shall be capable of applying to both interim and provisional damages as well as to ordinary lump sum damages

(Paragraphs 3.77 to 3.84 and Recommendations 9(viii) to 9(x)); and

(d) where the Motor Insurers' Bureau has undertaken to pay damages in satisfaction of a claim or judgment against an uninsured driver, and purchases an annuity pursuant to a structured settlement which satisfies the requirements of the legislation, the provisions as to tax exemption and policyholders protection shall apply to that annuity

(Paragraphs 3.86 to 3.95 and Recommendation 9(xi)).

Provisional damages

(e) That Order 37, rule 10(6) of the Rules of the Supreme Court should be amended to provide that one application for further damages may be made in respect of each disease or type of deterioration specified in the order for the award of provisional damages, but that more than one application may be made where the disease or deterioration so specified occurs in more than one position on the body of the plaintiff. The possible positions should be specified at the time of making the order, to provide some limits to the reform

(Paragraphs 5.21 to 5.23 and Recommendation 11).

(f) Section 1 of the Fatal Accidents Act 1976 should be amended to include provision that where a person who has been awarded provisional damages subsequently dies due to the negligence which gave rise to that award the award of provisional damages shall not bar an action under the Fatal Accidents Act 1976; but any part of the provisional damages which were intended to compensate for pecuniary loss over a period which occurs after death can be taken into account by a court in assessing the amount of any loss of support claimed by dependants under the Fatal Accidents Act 1976 where it is just to do so

(Paragraphs 5.24 to 5.38 and Recommendation 12).

Arrangement of the rest of the Report

1.13 The rest of the paper is set out as follows. Part II deals with the calculation of lump sum damages, setting out the present law, summarising the case for reform and outlining the Commission's policy and recommendations.

Part III, which is the bulk of the Report, deals with structured settlements. The present law is summarised together with an outline of the advantages and disadvantages of structured settlements before the Commission's policy and recommendations for reform are presented. This Part concludes with recommendations on subsidiary issues, including two points relating to the administration and management of structured settlements.

Parts IV and V deal with interim and provisional damages.

Part VI contains a summary of recommendations.

Appendix A contains the draft Bill with explanatory notes.

Appendix B contains a list of those who responded to the consultation paper.

PART II
LUMP SUM DAMAGES

Summary of the present law

2.1 The principles governing the award of damages have in the main been worked out by the courts and are not based on statute. Damages in a tort action almost invariably take the form of a lump sum made up of special damages (for past pecuniary loss) and general damages (for future pecuniary loss including loss of earning capacity and the cost of future care, and non-pecuniary loss whenever occurring, such as pain and suffering and loss of amenity).[1] The commonly espoused purpose of these damages is restitutio in integrum; that the plaintiff shall be restored, as far as is possible in money terms, to the position occupied prior to the accident.[2] This is done by a 'lump sum', that is, a once-and-for-all assessment paid in the form of a single sum.[3] The tendency to take it for granted that only a one-off lump sum constitutes acceptable compensation was noted but rejected by the Royal Commission on Civil Liability and Compensation for Personal Injury.[4] Increasing acknowledgment of the deficiencies of the lump sum award and the growth in size of claims have combined to change the focus in a number of cases to alternative forms of payment of damages.

2.2 The most forceful criticism of the lump sum is that even where the loss to the plaintiff is capable of being expressed in pecuniary terms the award does not in fact accurately replace what has been lost. The tort system offers the full compensation implicit in restitutio in integrum. Apart from symbolically compensating pain and lost pleasures in money terms, this also means that lost earnings, out of pocket expenses, and possible ill-effects of the injury, such as medical complications and loss of marriage or employment prospects, will all be recoverable.[5] Reasonable future medical and nursing expenses are also recoverable. The difficulty with a lump sum for general damages is that "all future contingencies must be crudely

[1] See *Atiyah's Accidents, Compensation and the Law* (5th ed 1993), (ed Cane), p 108 and p 121; Report of the Royal Commission on Civil Liability and Compensation for Personal Injury [Chairman Lord Pearson] (1978) (hereafter "The Pearson Commission Report"), Cmnd 7054, vol 1, p 121.

[2] The Pearson Commission Report, vol 1, p 362, para 1717.

[3] See Damages for Personal Injury (1991), Law Reform Commissioner of Tasmania, Report No 67, p 11.

[4] The Pearson Commission Report, vol 1, p 47, para 178. See also J Fleming, "Damages: Capital or Rent?" (1969) 19 U Toronto LJ 295; Donald Harris, *Remedies in Contract and Tort* (1988) pp 275-277.

[5] *Atiyah's Accidents, Compensation and the Law* (5th ed 1993), (ed Cane), p 121.

translated into a present value"[6] despite a general awareness that uncertainty as to the future may mean that the present value is seriously inaccurate. The consultation paper examined this criticism of lump sums, as well as other disadvantages related to tax and inflation.

The multiplier/multiplicand method of assessment

2.3 One dimension of the 'present value' problem is the need for the court in estimating pecuniary loss to make 'guesstimates' of both the future general financial situation and the plaintiff's future. The judicial approach to the quantification of loss entails, broadly speaking, an identification of the net annual loss (the multiplicand), and the number of years for which the loss will last (the multiplier). The multiplicand is adjusted for any prospect of increased earnings whilst the multiplier is scaled down to reflect the contingencies of life and the fact that the money will be available to the plaintiff sooner under a lump sum award than it would otherwise have been, thereby allowing the plaintiff to invest the money to produce a positive real return during the years of the loss. It is the choice of multiplier which is generally the more difficult part of the calculation. The court often has to make judgments about the likelihood of different contingencies occurring when it is deciding whether to downrate the multiplier. It also has to take a view on the size of the discount to be made because the lump sum is receivable in advance. An alternative approach, considered below, is an actuarial one, using combined annuity and life expectation tables.

2.4 A number of criticisms have been made of the way in which the multiplier system operates in practice. In some cases the multiplier is lowered to take account of the risk of early death even when this has already been fully discounted in the determination of the number of years the loss is expected to endure.[7] The size of the discount made for contingencies may also be somewhat arbitrary at times. More importantly, the assumption which is implicit in the present approach of the courts in calculating multipliers is that the real rate of return on investment after tax is around 4 to 5%.[8] For this reason courts will usually apply a discount of this amount to the multiplier.

The actuarial approach

2.5 Much of the controversy surrounding the multiplier has centred on its relationship with actuarial evidence. In making allowance for the chances and contingencies of life, it is appropriate to adjust the multiplier for the possibility that the loss may not

[6] D Harris, *Remedies in Contract and Tort* (1988) p 276. See also *Jenkins v Richard Thomas and Baldwins Ltd* [1966] 1 WLR 476, 480; *Heeley v Briton*, 19 December 1990 (Unreported) 14 and *Worman v Tunbridge Wells Health Authority*, 8 October 1993 (Unreported) 5.

[7] See eg, *Mitchell v Mulholland (No 2)* [1972] 1 QB 65, 85-6, *per* Sir Gordon Willmer; followed in *Auty v NCB* [1985] 1 WLR 784,798, *per* Waller LJ.

[8] *Cookson v Knowles* [1979] AC 566, 571, *per* Lord Diplock (in times of stable currency).

continue over the projected time horizon because the plaintiff may die in the meantime. Death is not the only contingency to consider but it is usually the most important. One way of incorporating the contingency of death into the calculation is to use a table giving survival probabilities. These probabilities are age and sex specific. In the consultation paper we used the example of a male worker dying at the age of 37 who might have expected to work for 28 years until the age of 65. The multiplier has to be revised to take account of the prospects of his dying in any event before he reached that age. When the award of damages is being made, the expected loss in any future year is calculated as the annual loss multiplied by a factor reflecting the probability that the man will still be alive in that year. The probability of survival will decrease through time and thus in later years an ever smaller sum will fall to be discounted. Actuarial tables of multipliers are prepared with these contingencies incorporated. There are different tables for men and women to reflect variations in retirement age and mortality rates between the sexes.

2.6 Actuaries have developed expertise in calculating survival probabilities for classes of individuals with particular characteristics. The courts have often argued that such an approach is conjectural, that they are dealing with a single individual rather than a class of individuals and that they are very experienced in estimating the contingencies relevant to a particular person.

2.7 Following this Commission's recommendation in 1973,[9] the Government Actuary's Department published the *Actuarial Tables with Explanatory Notes for use in Personal Injury and Fatal Accident Cases*, often (and hereafter) referred to as "the Ogden Tables". In the Scottish case of *O'Brien's Curator Bonis v British Steel plc*[10] the First Division held that there was no reason why judicial notice should not be taken of the Ogden Tables, including the report of the working party which prepared the Tables, and that it could be assumed that the calculations which they reflect are arithmetically accurate. In England and Wales, however, in the absence of any statutory reform, an actuary has to be called to prove the Ogden Tables if they are to be used in evidence because technically they are hearsay evidence.[11]

Results of consultation and recommendations for reform

2.8 In this section we summarise what consultees said about the difficulties associated with lump sum damages which we set out in our consultation paper and we make recommendations for reform.

[9] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, p 63, para 230.

[10] 1991 SLT 477. Cf *Hunt v Severs* [1994] 2 WLR 602, para 2.16 below, for a more cautious approach to the Tables.

[11] However, in many cases, the Tables are allowed in by agreement between the parties, and no actuary is actually called.

The use of the Ogden Tables in making assessment

2.9 In the consultation paper, we provisionally concluded that actuarial methods should be given greater prominence in the awarding of lump sums.[12] We noted the advent of Index-Linked Government Securities (ILGS) and the fact that financial markets now appear able to put an accurate present price on a loss extending over a future period by offering these riskless, inflation-proof securities. The Ogden Tables accommodate the issue of inflation by assuming that the plaintiff will invest the damages award in ILGS as the best risk-free investments. The advent of these securities strengthens the case for making greater use of actuarial evidence. We also argued in the consultation paper that criticism of the actuarial approach as being too general was unfair since the Ogden Tables deal with contingencies which are common to all and there is nothing to prevent a more detailed analysis of an individual's particular position where appropriate. Finally, most European countries make use of actuarial tables for future loss claims and calculations, and the favoured approach in England and Wales is now out of line with the approach adopted in Scotland. We therefore suggested that the general use of the Ogden Tables should be formalised and encouraged by legislation, in order to remove the existing requirement for the Tables to be proved in each individual case.

2.10 The response on consultation showed that this is an idea whose time has come. Two thirds of those who responded on this issue supported our suggestion. The commonly held view was that actuarial evidence is relevant to the assessment of lump sum damages, and that it should be possible to put it before the court in a manner which is both simple and practical. The consultation revealed significant evidence of de facto use of the Tables in any event,[13] and the suggested reform will bring England and Wales into line with Scotland.

2.11 Some consultees suggested that the judiciary should **have** to take notice of the tables if they are used in evidence. We did not suggest this in the consultation paper and we consider there was insufficient support for the suggestion on consultation. Nor do we believe that there is any need to force the judiciary to take notice of actuarial tables if used in evidence. The purpose of the reform would be to facilitate and regularise, but not to compel, the use of the Tables.

2.12 Our recent Report on the Hearsay Rule in Civil Proceedings is relevant in this context,[14] since the only present impediment to the reception of the Tables in evidence, unless they are proved by an actuary, is that technically they are hearsay

[12] See Consultation Paper No 125, paras 2.21-2.22.

[13] The general view was that plaintiffs' representatives refer to the Tables regularly for the purpose of negotiation, and that claims managers in insurance companies refuse to use them. The judiciary also use the Tables, some, it was suggested by one judge, surreptitiously.

[14] (1993) Law Com No 216; Cmnd 2321.

evidence. In our Report we recommended that the rule excluding hearsay evidence should be abolished in civil proceedings, but that those intending to rely on hearsay evidence should be under a duty to give notice of this fact and that there should be statutory guidelines as to the weight to be given to hearsay evidence.[15] Our Report has been accepted by the Government[16] and, when implemented, would in any event remove the bar to the admissibility of the Ogden Tables.

2.13 For a number of reasons, however, we do not believe this step would be adequate in itself. First, it is unclear when our Report will be implemented. Secondly, it would not be desirable to encumber the presentation of actuarial evidence with the notice and guideline provisions. Actuarial tables are not hearsay in the true sense, and the intention of our proposed reform is to simplify the procedure rather than to complicate it further. The nature of the Ogden Tables is such that they are readily available to all parties, and their use should not surprise a party unfairly if notice is not given.[17] Therefore notice provisions are inappropriate. In our Hearsay Report we recognised that notice and the other safeguards are not always necessary. Our policy was to preserve the existing statutory provisions by which specified classes of documentary hearsay are already admitted without subjecting them to the new safeguards.

2.14 The position of the Ogden Tables is in fact similar to that of published works dealing with matters of a public nature admissible under section 9(2)(b) of the Civil Evidence Act 1968 and clause 7(2) of the draft Bill annexed to our Hearsay Report, and under neither of these provisions is such evidence subject to notice requirements. Finally, the present difficulties with the Tables do not only arise from the fact that they are hearsay. As we observe below, judicial suspicion and judicial reluctance to use them are also significant factors. In the light of this, a specific legislative provision simply providing that the Tables be admissible would have the dual purpose of removing the present technical difficulties, and a symbolic function designed to encourage their use.

2.15 The Ogden Tables are a sophisticated aid to both counsel and the judiciary in establishing future loss. They present technical information in a useful way, but are not currently being used with any consistency. The use of actuarial tables does not preclude the individual characteristics of particular cases from being taken into account, but does ensure that information which is relevant to most cases is taken into account. The facilitation of the use of the Ogden Tables should encourage

[15] *Ibid*, p 44.

[16] Written Answer, *Hansard* (HL) 25 January 1994, vol 551, col 69.

[17] We hope that with the new "cards on the table" approach to the conduct of civil litigation it would only be in the most unusual case that notice of intention to use the Ogden Tables was not in practice given in the evidence served before trial (RSC, O 25, r 8(1)(b)) or in the statement and any counter-statement of the special damages claimed (O 18, r 12(1A)). See also para 2.20 below.

consistency. It should also reduce delay and take some of the guesswork out of the present process. We therefore **recommend that:**

(1) Where, in any proceedings for damages for personal injury (including proceedings under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934) it is desired to establish the capital value of any future pecuniary loss to which the claim relates, actuarial tables published by the Government Actuary's Department should be admissible as evidence (Draft Bill, Clauses 6(1) and 6(2)).

2.16 There was some resistance on consultation to any increase in the use of actuarial tables. The basis of judicial reluctance to refer to the Tables is well known. It is generally expressed as fear of a loss of flexibility to deal with individual cases.[18] However, consultation gave us valuable insight into other historical reasons for the attitude of judges. Until the mid sixties, juries might still very occasionally deal with personal injury cases and up to that time judges therefore avoided complicated mathematical calculations by experts. The bulk of the cases heard by High Court judges in the 1950s and 1960s and argued by members of the Bar who were later to become judges, were concerned with personal injuries. A typical list at assizes until 1972[19] would contain 90% personal injury cases.[20] Judges and lawyers did personal injury work day in and day out without expert help and with considerable speed - the system had no experience of expert advice, and perceived no need for it. Hearsay evidence was not admitted until 1968.

2.17 Inflation also had no impact on assessment until the mid sixties. Moreover, breaking down an award into its composite parts is a comparatively new practice,[21] as is the practice of referring to other authorities and to *Kemp & Kemp*, the leading collection of up-to-date case law on the assessment of damages.[22] The ability of the medical profession to prolong life and to determine life expectancy was comparatively primitive and it still continues to be refined. For these reasons figures for the worst

[18] The view was summed up by the House of Lords recently in *Hunt v Severs* [1994] 2 WLR 602, 613 E-F, where Lord Bridge said: "The assessment of damages is not and never can be an exact science. There are too many imponderables. For this reason, the courts have been traditionally mistrustful of reliance on actuarial tables as the primary basis of calculation, approving their use only as a check on assessments arrived at by the familiar conventional methods...".

[19] The date of *Mitchell v Mulholland (No 2)* [1972] 1 QB 65, the principal decision reflecting the judiciary's negative attitude to actuarial evidence.

[20] Response from the Hon Mr Justice Popplewell.

[21] The former practice was set out by the Court of Appeal in *Watson v Powles* [1968] 1 QB 596. Section 22 of the Administration of Justice Act 1969 then introduced interest provisions requiring itemisation: see *Jefford v Gee* [1970] 2 QB 130. In practice, future pecuniary loss is now also sub-itemised even though this is not required.

[22] Kemp & Kemp, *The Quantum of Damages* (hereafter, "*Kemp & Kemp*").

injuries were comparatively low[23] and affected lesser claims. The pool of expert and experienced witnesses was much smaller. Costs in using such experts as were available were not seen as justified for the smaller damages being generally awarded. Finally, there was, and probably still is, a judicial drive for uniformity and this caused actuarial evidence which suggested that an average award would be wrong in a particular case to be viewed with suspicion.

2.18 This general picture has now been radically altered. Itemisation has led to increased awards, and the value of money has fallen in any event. Life expectancies, especially of those with serious injuries, are now at levels which would have been inconceivable twenty years ago. A pool of expertise has become available to assist the parties and the judge in assessing matters like life expectancy, needs and loss expressed in real terms. The Ogden Tables assist even further. Actuarial evidence allows a precise calculation for contingencies which are common to all and we do not envisage that it be used in any other way. Further, the Tables are becoming more sophisticated in the information they contain. New Ogden Tables have been prepared which give guidance on contingencies other than mortality, such as employment and illness. The Tables have also been revised in line with altered life expectancy figures and will be published by HMSO in 1994.[24]

2.19 We consider that judicial ignorance and suspicion of the Tables are no longer justified, if indeed they ever were. We therefore hope that if our recommendation concerning the Ogden Tables is implemented the Judicial Studies Board may be provided with the necessary resources to enable it to include mandatory study of the purpose and use of the Ogden Tables as part of judicial training for all judges who are appointed to hear personal injury cases.[25]

2.20 Some members of the judiciary, and certain insurance interests, argued that regular use of actuarial evidence would lead to delay in negotiation and settlement, and therefore in the hearing of cases, with attendant increases in cost. We do not agree with this view. We must make the preliminary point that our recommendation is confined to facilitating the use of the Ogden Tables. It is not intended in any way to make the general use of actuarial evidence mandatory. But in any event we do not accept that increased use of actuarial evidence would in fact cause delays. This does not appear to happen in Scotland. As one judge pointed out on consultation, as long as the basis of a party's actuarial evidence is disclosed and the other side can

[23] See *Lim Poh Choo v Camden Health Authority* [1979] QB 196, 214-221 (CA), where the dissenting judgment of Lord Denning MR is a good example of the prevailing judicial ethos during much of the 1970s.

[24] At the time of completion of this Report (July 1994), we are advised that the reference for the new Tables is ISB No 0117015814 and they will be available from HMSO at a price of £5.95 shortly.

[25] This also applies to the recommendations we make about the use of Index-Linked Government Security rates, at paras 2.28-2.36 below.

counter it, there is no distinction between this situation and the situation where the judge is assisted by a medical witness. A doctor does not have to explain the fundamentals of medical knowledge every time medical evidence is given. An actuary should not have to do so, and judicial training should ensure that judges do not feel that they need to ask for such evidence.

2.21 In fact, increased use of the Ogden Tables would, we believe, reduce negotiation and the length of hearings. As suggested by another judge, once the first few cases based on the use of the Ogden Tables had worked through the system, it should be even easier to agree the appropriate multipliers than it is at present. The Tables do not eliminate the need for actuarial evidence in absolutely all cases, but they could do so in many, particularly as they can be regularly updated and refined. We do not intend to suggest that further adjustments will not have to be made to account for contingencies not covered by the Tables, but such adjustments form part of the current process in any event.

2.22 The final objection on consultation by insurance interests to the use of the Ogden Tables was that it is feared that the result will be increased awards. We reject this as a valid ground of criticism. In a system in which the purpose of compensation is to ensure that sums awarded last out until the final earnings are lost and final expenses are paid, a plaintiff may stand to lose or gain where contingencies are not allowed for correctly. There was a clear view expressed by the majority of consultees that some plaintiffs, especially younger plaintiffs, are being under-compensated at the present time.

2.23 If the belief that the use of such evidence will result in higher awards[26] is correct, we take the view that compensation as currently assessed in cases where actuarial evidence is not referred to or accepted may produce a shortfall which is unjustified. Our recommendation as to the admissibility and judicial use of the Ogden Tables should redress this injustice to some extent. Our empirical survey revealed that nearly two in five recipients of damages thought that they did not receive sufficient damages to compensate all their losses. By far the most common reaction was that they were not fully compensated for their loss of earnings. Although only a minority of victims had had to borrow money or run up debts as a result of their accident, the likelihood of doing so increased with size of damages, from a quarter of those in Band 1 to two-fifths in Band 4.[27]

[26] See eg: John Pritchard, *Personal Injury Litigation* (6th ed 1989) p 181. *Kemp & Kemp*, vol 1, paras 7-018 - 7-021 cites a number of examples which tend to show that this assumption is correct, and concludes that current practice does not accord with the cardinal principle of full compensation, in that multipliers are unrealistically low. The Pearson Commission Report, pp 147 and 156, is also cited in support.

[27] See para 1.7 above.

Use of ILGS rates to discount lump sums

2.24 We also described in the consultation paper how, despite elaborate calculations concerning mortality, the assessment of future pecuniary loss could be falsified by application of an inappropriate discount rate to the multiplier.[28] The present interest rates and projections of future movements are both subject to continuous adjustment.[29] At present, however, the general presumption is that the court will always abide by its figure of a 4-5% return on investment as appropriate in determining the discount.[30] Insurance companies do not take decisions based on such simplistic assumptions. Annuities involve such companies in making a promise to make payments over a long period of time on the basis of much more sophisticated methods of predicting future interest rates and of hedging the risk of interest rate movements. We therefore suggested in the consultation paper that the need for actuarial methods to be given greater prominence goes hand in hand with the need for more thought to be given to the choice of the appropriate discount rate when selecting multipliers in individual cases.

2.25 The multiplier approach is very flexible in that it can incorporate virtually any assumption about 'contingencies and chances', and about interest rates. Its use, however, seemed to us to be inappropriate unless use is also made of the most up-to-date information. We suggested in the consultation paper that to make enlightened assumptions about mortality rates would not lead to much greater accuracy in the assessment of damages so long as very crude assumptions about interest rates were being made. Our provisional view was that courts should make more use of information from the financial markets in discounting lump sums to take account of the fact that they are paid today. One way of doing this would be to enable courts to refer to the rate of return on ILGS as a means of establishing an appropriate rate of discount.[31] The purpose of this would be to obtain the best reflection of market opinion as to what real interest rates will be in future. The question upon which we sought the views of consultees was whether it would be reasonable to use the return on ILGS as a guide to the appropriate discount.

2.26 Almost two-thirds of those who responded to this question supported the use of the ILGS rates to determine more accurate discounts. These consultees agreed that the assumption of a 4-5% rate of return over time is crude and inflexible and can lead to over- or under-compensation and hence to injustice. The General Council of the

[28] Consultation Paper No 125, para 2.21.

[29] Consultation Paper No 125 showed in Appendix A how real interest rates over the last twenty years were considerably higher in the 1980s compared to the 1970s when an inflationary climate was triggered by oil prices and monetary policy: see para 2.12 of the consultation paper.

[30] *Auty v NCB* [1985] 1 WLR 784. A rate of 4.5% was used and not disputed in *Hunt v Severs* [1994] 2 WLR 602.

[31] See *Kemp & Kemp*, vol 1, para 7-015.

Bar told us that National Savings index-linked savings certificates produced 3.25% compound between 1980 and 1990, and that the Family Division generally used a 5% discount rate, but because this was before the deduction of tax, such a discount amounted to 3-3.75% net of tax. A number of consultees argued that it was inconsistent to apply a 2% rate to plaintiffs for loss of interest on capital used for housing.[32] One QC noted that the real rate of return for top tax payers on building society savings has been consistently less than 2% since 1978 and for much of that period there has been a negative return.

2.27 Comments were made to the effect that the current discount rate is 'excessively favourable to defendants', that plaintiffs are 'consistently short-changed', and that 4-5% is 'wholly unrealistic', 'unfair' and 'no more than a judicial exercise in defendant-weighted approximation'. While a third of those who responded opposed our suggestion about ILGS rates, a quarter of these in fact favoured the use of other methods (such as a new and regularly reviewed fixed rate), thereby also recognising the arbitrary nature of the 4-5% rate assumption. Another concern of those who opposed the suggestion was that any new system would be more complex than the existing one, which had the attraction of simplicity and consistency. These responses suggested that if a new system is practical and does not significantly add to costs, it would be acceptable.

2.28 We share the views of the majority of those who responded to us, that a practice of discounting by reference to returns on ILGS would be preferable to the present arbitrary presumption. The 4-5% discount which emerged from the case law was established at a time when ILGS did not exist. ILGS now constitute the best evidence of the real return on any investment where the risk element is minimal, because they take account of inflation, rather than attempt to predict it as conventional investments do. Capital is redeemed under ILGS at par and index-linked to the change in the Retail Price Index (RPI) since issue. Income remains constant in real terms, rising with increases in the RPI. There is no premium available for risk because there is no risk.

2.29 While it cannot, of course, be said with certainty that plaintiffs would always invest lump sum damages in ILGS, it is reasonable to assume they are naturally risk-averse, and the evidence from the Edinburgh study confirms the reasonableness of this assumption.[33] Our own study[34] was particularly revealing on this point. Spending of the award was related not only to the amount of damages received but also to the period between settlement and interview by SCPR. The proportion of recipients with about half or more of their damages still to spend by the time of interview increased from 24% in Band 1 to 35% in Band 2, 53% in Band 3, with

[32] *Roberts v Johnstone* [1989] QB 878. Also noted in Consultation Paper No 125, p 7, n 19.

[33] See para 1.10 above.

[34] See para 1.7 above.

a very slight drop to 51% in Band 4. Only one in ten in Band 4 had spent all their damages. For settlements within 3 years prior to interview, 71% of those with the smallest awards had spent over half of their damages, and only a third of those with the largest awards had done so. The longer the time since settlement, the smaller the difference between Bands: for settlements over 4 years ago, 56% of Band 2 recipients had spent over half their award, but the figure for those in Band 4 was still less at 45%. We believe that these figures show that those with serious injuries, who receive larger awards, are most concerned to preserve their funds for the future, and this would naturally make them risk-averse.

2.30 Our study revealed more direct evidence of this tendency. The most common method of saving a compensation award was to use a building society account, followed by a bank account. In all Bands, recipients were more likely to save their money in bank or building society accounts or in savings certificates than to invest in stocks or securities. As the amount of the award increased, however, so did the likelihood of investing in stocks or securities. Only one in ten recipients in Band 1 invested some of their compensation money in stocks or securities compared with six in ten of those in Band 4. The likelihood of getting advice about investment also increased significantly by size of award, from 26% in Band 1 to 84% in Band 4. We consider this to be clear evidence that those who receive large awards, where the choice of multiplier, and hence the level at which it is discounted, is crucial, are most concerned to preserve the value of their damages and to make good investments. This lends considerable weight to our assumptions about ILGS.

2.31 We are also convinced that ILGS rates can be used in a practical way to achieve a discount rate which is more realistic. We believe that ILGS should always be looked at, but that the parties should have the opportunity to adduce evidence as to alternatives they consider more appropriate if they so wish. For example, it may in the future be arguable that returns on ILGS are unduly depressed compared to those on other investments, and it is therefore important to keep flexibility in the system. We therefore **recommend that there should be legislative provision:**

> **(2) Requiring courts, when determining the return to be expected from the investment of the sum awarded in any proceedings for damages for personal injury (including proceedings under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934), to take account of the net return to the plaintiff on an index-linked government security (Draft Bill, Clause 6(3)).**

2.32 The numbers who responded to the question whether the court should always use ILGS rates or whether they should also take account of other evidence were not high. However, we have concluded that, subject to allowing the parties to adduce evidence as to what might be a more appropriate rate in the particular case, the court should always refer to ILGS. If, as we and most of our consultees believe,

index-linked securities represent the best indicator of real rates of return on low-risk investment, it follows that ILGS should always be taken into account in the first instance. This is why we **recommend that:**

(3) The legislation should only permit departure from the ILGS rates where it can be shown that an alternative rate would be better in the individual case.

2.33 The use of ILGS rates must depend on their accessibility to both practitioners and the judiciary. We were informed during the consultation process that ILGS rates are to be published in the Law Society's "Guardian Gazette" and in *Kemp & Kemp*. A table showing information recorded in the *Financial Times* of the current gross return on ILGS has been included in *Kemp & Kemp* from its update Release number 50. This table covers the period from June 1990 to December 1993 and it has columns showing the date, the gross yield, and the yields after deducting both lower and higher tax rates.[35] We understand there would be no difficulties in reproducing the Tables in the Supreme Court and County Court Practices. If our proposals are implemented, it would obviously be desirable that appropriate ILGS rates be published in the Supreme Court and County Court Practices. Practitioners and judges would then be able to use any of these sources of information where appropriate. We therefore **recommend that:**

(4) ILGS rates should be published in the Supreme Court and County Court Practices and regularly updated.

2.34 The question then arises how parties can agree and judges should choose what rates to take account of. Some guidance is necessary. It is desirable to establish which ILGS rate is appropriate to use in the normal run of cases, to give some predictability and to force those who may, on a rare occasion, wish to argue otherwise, to make a good case. We recommend that the choice be the rate that is recommended in the Working Party Report attached to the revised edition of the Ogden Tables. We have been informed that the actuaries advising the Working Party consider that the most suitable approach is to ascertain from the *Financial Times* the current gross return on ILGS against the descriptions "Inflation Rate 5%" and "Over 5 years". The *Kemp & Kemp* tables also recommend this as the most suitable choice.

2.35 However, the parties should be able to adduce evidence supporting an alternative choice of stock, for example, stock with yields closest to the period of loss in question where there is only one type of loss and the amount and period of loss is not compromised by factors such as contributory negligence, and disagreements

[35] See *Kemp & Kemp*, para 8-029/9.

about life expectancy.[36] Although provision for this could be written into the legislation, we believe that it is preferable for the legislative provisions to be broad and simple, their operative part providing that ILGS rates should be used. Directions as to the stock to be looked at should be included in Rules of Court, so that if in the future it becomes fairer to refer to different ILGS, the Rules can easily be amended. We therefore **recommend that:**

(5) Rules of Court should be drafted in conjunction with the legislation whereby judges are directed, in carrying out their new duty of having regard to ILGS rates, to refer to the current gross return on ILGS having the description of "Inflation Rate 5%" and "Over 5 years".

2.36 If index-linked securities cease to exist, the legislative direction and any consequential rules could not have any effect. In recommending reform, therefore, we need to take account of this possibility and to ensure flexibility if the suggested new system gets into difficulty. Accordingly **we recommend that:**

(6) The legislation should contain a power for the Lord Chancellor, following consultation with the Government Actuary and the Treasury, to prescribe by statutory instrument an alternative indicator of real rates of return (Draft Bill, Clauses 6(4) and 6(5)).

Decoupling the court's role in identifying loss

2.37 In the consultation paper we suggested that there might be another and possibly simpler way of using the financial markets to assist in the determination of awards. For instance, the developments in the tax treatment of annuities and the availability of ILGS could be taken together as the basis for the assessment of damages generally. It appeared that it might be possible to decouple the court's role in identifying the loss from its role in commuting the loss into a single lump sum of damages. The financial markets have the capacity to translate a specified income replacement stream into a capital sum and vice versa. The increasing sophistication of financial markets and the wider range of products they are able to offer since the advent of ILGS is a substantial resource and one which could be much more effectively utilised by the courts. The use of such expertise offers a number of advantages and is immune from much of the criticism of the present multiplier system. It would simplify the calculations the court has to do and reduce the number and variety of factors which have to be loaded into the multiplier. The court would be able to focus its energies on identifying the extent of the annual loss and the time horizon over which such loss is expected to continue.

2.38 In the consultation paper we suggested that the court could reach a view as to the annual loss and the number of years over which the loss might be expected to

[36] This would be unusual.

continue. It would not, however, identify a multiplier as it does at present. Instead, having designated an income stream for replacement, it would require evidence to be adduced of the capital cost of an appropriate bundle of securities on which the return would provide the required income. This capital cost could then be expressed, if required, as a lump sum. It would remain possible for the plaintiff to opt for the lump sum in preference to the bundle of annuities identified by the court's adviser. We suggested that it would be possible to specify very precisely the nature of the income stream to be replaced. It might be a steadily escalating (or declining) annual sum; the sum might be fully indexed against the RPI; there might be a series of overlapping policies; and the policies might run for a fixed term or for the life of the plaintiff (or the beneficiary).

2.39 We did not express a view about the merits of this decoupling proposal but we invited comment on its desirability and practicality. One important question which we raised was how account might be taken of contingencies which could not be allowed for in the multiplicand, such as the possibility of redundancy and time off work for illness. At present, judges take account of these possibilities by reducing the multiplier, and this option would not be available if the court no longer identified a multiplier. One solution we put forward would be to allow the judge to adjust the final financial package, by reducing a particular income stream, or by rounding down the lump sum as expressed. We sought comment on this proposal, on the possible difficulties described and any other difficulties foreseen.

2.40 70% of those who responded on this issue did not favour the proposal. In general, it was seen as cumbersome, expensive, and likely to turn the process into an exclusively accounting exercise. It was suggested that insurers would find it difficult to make reserve provision to cover their liabilities since outcomes would be difficult to predict. There were few practical suggestions as to how the process might work, apart from some suggestions about how allowance could be made for contingencies. A table of ready-reckoners prepared by actuaries to take account of commonly encountered contingencies was one suggestion. Another was that the court might make a finding at the first stage as to what allowance should be made for specific contingencies. However, it was also observed that common contingencies will in any event eventually be taken account of in the Ogden Tables.

2.41 In the light of the response on consultation, and of the fact that our suggestions as to the use of the Ogden Tables and ILGS rates of return would appear to achieve the same results with more certainty for defendants, we have concluded that the proposal to allow courts to designate only an income stream for replacement, and to require evidence to be adduced of the capital cost of an appropriate bundle of securities on which the return would produce the required income, is not a viable one and should be abandoned.

Tax and the Gourley rule

2.42 In the consultation paper we observed that although the lump sum itself is not subject to tax,[37] any investment income derived from it is subject to tax in the normal way.[38] In *British Transport Commission v Gourley*[39] the House of Lords, overruling earlier cases, held that in calculating damages for loss of earnings, account must be taken of the tax which would have been payable upon those earnings. Such damages were awarded as compensation, and the amount must be determined by the application of reasonable common sense, taking into account all matters which might have affected the plaintiff's tax liability.

2.43 The effect of the *Gourley* rule is that all personal injury compensation for loss of earnings is paid net and is not taxed. Therefore, if the loss is calculated at £100,000, the sum payable by the defendant to a basic rate taxpayer (who has used her or his allowance against other income) will be £75,000. The principle of restitutio in integrum is preserved since the plaintiff has not been overcompensated. However, the state does not pursue the defendant for the £25,000 representing the tax which would have been paid had the plaintiff not been injured.

2.44 It has been argued that the *Gourley* rule has the effect of providing a fiscal subsidy to those who are negligent, since the burden of the loss of the tax which the plaintiff would have paid is borne by the general body of taxpayers. The deterrent effect of imposing tort liability is to that extent diminished. The Commission considered this criticism in 1973[40] but it recommended no change, emphasising that there was no reason why someone who has lost a net sum should receive a gross sum. On consultation there was little dissent from this view. It was also noted that such a change would entail the Commission recommending that damages for personal injuries should be subject to tax in the hands of the plaintiff although such damages have been expressly exempted from taxation by the legislature.[41] In the consultation paper we expressed the provisional view that the reasoning in the Commission's 1973 Report is still sound, but we sought consultees' views.

2.45 The consultation paper also described a situation referred to as "*Gourley* in reverse".[42] This occurs in cases where the lump sum or part of it is invested, so that

[37] Taxation of Chargeable Gains Act 1992, s 51(2): "It is hereby declared that sums obtained by way of compensation or damages for any wrong or injury suffered by an individual in his person or in his profession or vocation are not chargeable gains."

[38] Income and Corporation Taxes Act 1988, s 656.

[39] [1956] AC 185.

[40] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, p 14, paras 49-52.

[41] See R Kerridge, "The Taxation of Emoluments from Offices and Employments" (1992) 108 LQR 433, for a recent formulation of this argument.

[42] *Kemp & Kemp*, vol 1, para 9-031.

interest is earned on the income, but the interest itself attracts tax. In *Taylor v O'Connor*[43] Lord Reid noted that lump sums were intended to be prudently invested and to be used up gradually. Interest and damages together should be adequate to last out the period required.[44]

2.46 In some cases, for example where an annuity is purchased, although part of each annual payment will be a return on capital and not taxable, that part which is truly income will bear tax. The amount available to the plaintiff to spend in these cases would fall short by the amount of the tax paid, and in such cases it could be said the plaintiff has been taxed twice. To take account of the possible incidence of tax would justify an increase in the award, either by an increase in the multiplier, or in the figure representing the annual loss, the multiplicand. This practice was followed in the Court of Appeal in *Thomas v Wignall*,[45] but its decision in that case was overruled by the House of Lords in *Hodgson v Trapp*,[46] and the practice of allowing for tax restricted to very exceptional circumstances where there is positive evidence that justice requires it. Lord Oliver of Aylmerton there observed that "the incidence of taxation in the future should ordinarily be assumed to be satisfactorily taken care of in the conventional assumption of an interest rate applicable to a stable currency and the selection of a multiplier appropriate to that rate".[47]

2.47 Our examination of the conventional assumption referred to by Lord Oliver[48] made us re-examine the validity of this approach. We concluded that the suggestions we have made as to the use of actuarial methods and evidence from the financial markets would permit the incidence of taxation to be taken into account in establishing more accurate multipliers. 81% of those who responded on the tax issue agreed with our view. In the light of this response, we recommend no further change.[49]

[43] [1971] AC 115.

[44] *Ibid*, 128F-H.

[45] [1987] QB 1098.

[46] [1989] AC 807.

[47] *Ibid*, 835B.

[48] Consultation Paper No 125, paras 2.12, 2.13 and 2.21.

[49] The Law Reform Commission of British Columbia has recommended recently that in the case of a future income award, assessment should be based on the present value of the claimant's projected loss of earnings, net of income tax, plus an additional amount to adjust for the impact of taxation of income generated by that amount. Canadian law ignores the impact of taxation and the Commission noted that the effect of this was to overcompensate plaintiffs. The Commission also noted as one of its reasons for reform that the Canadian approach is out of step with that followed by the courts in England, which follow *Gourley*. See Report on Taxation and the Assessment of Income-Related Damage Awards (1994) Law Reform Commission of British Columbia, LRC 134, pp 7-10. See also Report on Standardized Assumptions for Calculating Income Tax Gross-up and Management Fees in Assessing Damages (1994) Law Reform Commission of British Columbia, LRC 133, which led to LRC 134.

Allowing for inflation

2.48 In the consultation paper we referred to the decision of the Court of Appeal in *Auty v NCB*[50] when it affirmed the rule that the incidence of inflation should not affect the assessment of compensation in personal injury cases. We also observed that under our provisional proposals account would necessarily be taken of inflation through the use of actuarial evidence and the assessment through the financial markets of the real rate of return on Index-Linked Government Securities. Although only a small number of consultees commented on this issue, 90% of these supported our provisional conclusion. We therefore recommend that no further change is necessary.

[50] [1985] 1 WLR 784.

PART III
STRUCTURED SETTLEMENTS

Summary of the present law

3.1 The structured settlement provides an alternative form of damages to the lump sum award. Structured settlements have developed in the United Kingdom without legislative assistance as a result of their tax status. They usually consist of an initial lump sum part payment followed by a series of further instalments of the damages for which the defendant is liable. The initial lump sum tends to represent compensation for past pain and suffering and costs and expenses already incurred. The defendant or the defendant's insurer[1] uses the balance of the sum due under the settlement to purchase an annuity or a series of annuities from a life insurance company. The payments made under the annuities are used to fund the periodic payments, which usually last for the life of the plaintiff or a specified term, whichever is the longer.[2] At present, in the United Kingdom, structures are agreed voluntarily between the parties.

3.2 The genesis for the development of structuring in this country was a decision by the Inland Revenue embodied in an agreement between the Inland Revenue and the Association of British Insurers (ABI) in mid-1987. Although lump sum payments are themselves capital and are not subject to tax, any interest earned from subsequent investment is.[3] Periodic payments were also regarded as taxable in the hands of the plaintiff. For this reason, there was no perceived tax advantage in structuring an award rather than investing a lump sum. However, in 1978-79 in the United States, and in 1980 in Canada, the revenue authorities conceded tax-free status to structured settlements. This process considerably boosted the use of such settlements in North America and was mirrored in the United Kingdom by the 1987 agreement between the Inland Revenue and the ABI.

3.3 The Revenue considered that under existing case law damages do not necessarily lose their quality as capital falling outside the charge to income tax if the liability is discharged by a series of payments to the plaintiff. The previously obscure 1936 decision in *Dott v Brown*[4] supported this conclusion even where the series of payments was to continue for the life of the payee. Provided that the agreement between the defendant or the defendant insurer and the plaintiff was drafted in

[1] Hereafter "the defendant insurer".

[2] The analogy has been made with pensions (see Richard Lewis, *Structured Settlements: The Law and Practice* (1993), ch 1), but it is not entirely appropriate and does not reflect the technical differences between structures and pensions, which are charged to tax under Schedule E of the Income and Corporation Taxes Act 1988, s 19(3).

[3] See para 2.42 above.

[4] [1936] 1 All ER 543 (CA). Also relevant are *IRC v Ramsay* [1935] All ER (Reprint) 847, and *IRC v Church Commissioners for England and Wales* [1975] 1 WLR 1383 and [1977] AC 329 (HL).

appropriate terms, the series of payments to which the plaintiff became entitled under an agreement for a structured settlement was not chargeable to income tax.

3.4 The Inland Revenue approved a model agreement, drafted by the ABI, which may incorporate any of four different types of periodic payment schedules. *Basic Terms* allow pre-set payments to run for a fixed period. *Indexed Terms* link the payments in a Basic Terms agreement to the RPI to make them inflation-proof. *Terms for Life* allow pre-set payments to continue until the plaintiff's death, and there may be a pre-set minimum number of payments. *Indexed Terms for Life* are inflation-proof terms for life. The Inland Revenue has given such agreements advance clearance in principle provided they are in the standard form. The four types of arrangements reflected in the schedules are not necessarily the only ones acceptable to the Revenue but any variations require individual clearance. We were advised by the Revenue during consultation that as legal and financial practitioners have become more experienced with structured settlements, the number of agreements on which it is asked to comment has decreased.

3.5 In theory, the scope of structured settlements could be very wide. The Revenue interpretation of the case law and the model agreements could be used to structure settlements other than those arising from personal injury claims. However, the Revenue reached agreement with the ABI based on a hypothetical personal injury case and is said to be "keen that the tax position be limited to cases involving debts arising as a result of personal injury actions; it does not wish to see structures extended to other forms of litigation or to debts arising in other circumstances".[5] We are not aware of any attempts to extend the use of the scheme beyond personal injury claims, although we noted in the Consultation Paper that suggestions had been made to this effect in the United States for funding of pollution clean-up.[6]

3.6 The agreement between the ABI and the Inland Revenue assumes that the defendant insurer will wish to fund its liability by purchasing a life annuity from a life insurer. In a typical case, the defendant insurer agrees to pay damages by instalments which last for the life of the plaintiff and are index-linked. The annuity from the life office runs back-to-back with this agreement and funds those payments. Under section 349 of the Income and Corporation Taxes Act 1988 (ICTA), the life office has to deduct tax from the payments it makes to the defendant insurer pursuant to the life policy. Its contract is with the defendant insurer, and the life office cannot make payments direct to the plaintiff without the plaintiff being taxed on the payments. This is because under the Revenue's interpretation of the case law, there must be discontinuity between the annuity contract and the structured settlement. If there is no such discontinuity the

[5] See Richard Lewis, *Structured Settlements: The Law and Practice* (1993) p 65.

[6] Consultation Paper No 125, p 63, n 100.

character of the payments to the plaintiff changes and they would be regarded by the Revenue as income rather than capital, and subject to tax.

3.7 The consequence of the requirement of discontinuity is that, to ensure the capital nature of the payments, the defendant insurer remains separately liable to the plaintiff, and it must gross-up the payments it makes to the plaintiff to cover the deduction previously made by the life office. The defendant insurer is able to offset the income tax deducted from the annuity against the corporation tax due on its profits. If that corporation tax is fully covered by other deductions, the surplus income tax is repaid. It must, however, carry this cost itself pending repayment. It also bears the costs of administering the scheme. This is different from the situation in North America where annuities which relate to personal injury or fatal accident cases can be paid directly by the life office as agent of the insurer to the plaintiff without deduction of tax, provided the annuity is non-transferable, non-commutable and non-assignable.[7]

3.8 The reason why structured settlements are attractive to insurance companies in the United Kingdom in spite of these drawbacks is that they are able to negotiate with the plaintiff for a discount to be made from the sum to be invested in the annuity. This discount will reflect uncertainties in the claim as well as the fact that the income from the annuities will not be taxable in the hands of the plaintiff. The structured settlement package, the discount, and the annuity are usually established by agreement between the parties, with the assistance of intermediaries who may have forensic accounting expertise and knowledge of the life insurance markets.

3.9 Whilst the model agreement applies to the whole of the United Kingdom, our analysis in the consultation paper of the underlying law concerning personal injury damages and our provisional recommendations for reform related only to England and Wales under the Law Commissions Act 1965 and our programme item. The recommendations for reform contained in this Report are therefore restricted to England and Wales. However, it is important that wherever possible tax legislation should apply on a uniform basis throughout the United Kingdom and we therefore consider that corresponding provision should be made for Northern Ireland and Scotland where appropriate.[8]

[7] Revenue Canada Taxation Bulletin No IT-365R2, 8 May 1987, s 5. It has been supplemented by advance rulings in individual cases since then, but has not been replaced overall. Advance Income Tax Ruling: 23 November 1989 in respect of *Kay v Coffin* provides that non-assignability now only relates to the plaintiff. Revenue Canada has agreed that the defendant insurer can conditionally assign its obligations and liabilities prior to purchase of an annuity to an eligible assignee with the plaintiff's written agreement. This is intended to remove perceived difficulties in structuring faced by self-insurers, non-resident foreign insurers and reinsurers, and insolvent insurers. A triple ruling of 25 September 1991 to McKellar Structured Settlements Inc, 649 Scottsdale Drive, Suite 100, Guelph, Ontario, Canada N1G 4T7, now allows absolute assignment.

[8] See, further, para 3.98 below.

The advantages and disadvantages of structured settlements

3.10 One of the advantages of structuring is said to be that it benefits both parties, thereby encouraging early settlement with attendant savings in cost and time. Parties that are far apart on a lump sum figure, perhaps because of differences over life expectancy, may be able to take a different approach which will eventually lead to an acceptable compromise.

3.11 However, the main advantage cited for plaintiffs is certainty. This consists of a number of elements. The plaintiff is relieved of the burden of managing a large sum of money and is protected from possible dissipation of the funds. There is the assurance of regular payments for life and of payments to dependants if the payments are guaranteed for a period longer than the plaintiff's life, together with the assurance that the payments will not decline in value if they are index-linked. These features make structured settlements particularly appropriate in cases where there are serious injuries and the conventional award would be large, and particularly where the plaintiff is a child and a long period of future care is envisaged. It is regarded as unlikely the state will ever have to step in to provide for the plaintiff where a settlement is structured.

3.12 Flexibility is seen as a further attractive feature of structuring for the plaintiff. The projected settlement can be tailored individually to the plaintiff's needs. Damages are linked to life expectancy without an absolute date having to be specified to provide a cut-off point. Cash flow is also based on projected future cash requirements. Provided these are considered carefully, the annuity package can be set up to provide at the appropriate time for education, changing nursing needs, asset accumulation, housing, marriage and children, and limited work or business prospects, if any. The damages will not be spent before these needs arise. The way to achieve these aims is to include the payment of periodic lump sums at key stages in the plaintiff's life. By this means structuring focuses on the plaintiff's needs, unlike the conventionally assessed lump sum, thereby in principle reducing the adversarial nature of the proceedings.

3.13 Finally, the tax advantages of structured settlements, which have already been outlined,[9] have been the real catalyst for the development of this form of award for both plaintiff and defendant. Tax savings to the plaintiff could in an extreme case and at current levels of tax approach 40% of the periodic payments.[10] It is argued strongly by advocates of structuring that the annuity purchased is able to provide greater benefits in the longer term than a traditional lump sum invested by the plaintiff. The plaintiff is also immunized against future increases in personal tax

[9] Para 3.3 above.

[10] The tax saving is quantified by comparing the periodic payments under the structured settlement agreement with an annuity purchased by a plaintiff out of a lump sum. In the latter only the element representing a return of purchase price would not be chargeable to tax.

rates. The tax saving is also a negotiating tool, since it can fund any discount requested by the defendant.

3.14 From a policy point of view the favourable tax treatment given to structured settlements and the consequent incentive to make such agreements seem to be justified for several reasons. Firstly, structured settlements developed as a result of dissatisfaction with lump sums, which fail to replace like with like, substitute capital sums for continuing future losses, and may be insufficient to meet the plaintiff's long term needs, being based on considerable guesswork. The state has moved to meet this dissatisfaction by facilitating structuring through the tax structure. Structuring diversifies the range of remedies available to victims of personal injury.[11] Secondly, the state has a significant interest in preventing recipients of damages from becoming unnecessarily dependent on welfare benefits. The public has in fact paid once to compensate the victim in the form of insurance premiums. If the victim later has to fall back on welfare benefits, the public is in effect being forced to pay twice over.

3.15 Thirdly, the victim's future needs may be better met by regular payments which are more likely to be spent upon the purposes for which damages are awarded. The result is an award of damages which is as close to real compensation as is possible. Finally, the victim has the real certainty of regular income. In fact, a victim will have more certainty than prior to the accident, in the sense that the risk of unemployment no longer forms part of the equation. The certainty of a future income stream is seen to be better than the prospect presented by the receipt of a lump sum which then has to be invested and managed by the victim. For the victim who has suffered particularly serious personal injuries, and who faces a life of dependancy stretching into some unknown future, the certainty of regular income is a prime concern.

3.16 Our empirical study also appears to lend support to this reasoning. While it must be said that a majority of the recipients in each Band thought that being paid a lump sum was the best method of payment, the proportion who took this view grows steadily smaller, from 77% in Band 2, to 65% in Band 4 where large damages were awarded. We think that the overall result reflects the dominance of a 'lump-sum culture'. When recipients were asked if they would have preferred a mixture of lump sum and instalments, those in Bands 1, 2 and 3 were 15%, 13% and 17% in favour, while those in Band 4 were 31% in favour. This again indicates that where large awards are involved, structured settlements are seen as more attractive.

[11] Although other sorts of awards could, in theory, be structured, victims of defamation, conversion or breach of contract are less likely to become dependent on the state because the wrong to them has terminated or severely reduced their future employment prospects and are less likely to have continuing long term future care needs. We have therefore confined our recommendations for reform to actions for personal injury, which is the natural context in which structuring has arisen. See para 3.5 above.

3.17 Our qualitative survey revealed that although those who had received structured settlements were generally offered them by the other side as opposed to specifically requesting them, and although some felt pressured, for the same reasons as with lump sum offers (such as 'It's either this or they go to court', or a desire to return to normality and reduce stress), into accepting the structure, respondents generally held very positive views about the structured settlement they had received. Indeed, there was a general agreement from those who had actual experience of structures that this form of compensation was preferable to lump sum only payments. To them the structure was seen as providing lifelong security and peace of mind, allowing the individual to plan, financially, for the future, while the income is sorted out for the present and for the future and keeps in line with inflation through index-linking: moreover the individual does not carry the responsibility for investment, and this removes the temptation to 'blow the lot in one go', particularly when the recipient comes of age.

3.18 Furthermore, although both our larger survey and the Edinburgh study[12] revealed that the anecdotal evidence of dissipation of damages awards is clearly exaggerated,[13] we do not believe these studies furnish clear evidence that no risk of dissipation exists or that this risk is unreal. It is apparent that people are not simply going out and 'blowing' all of their damages in one go, particularly where the award is large. On the other hand, recipients are clearly worried that their large awards will not last, and they may well be living frugally with that fear in mind.[14] It could be said that the fear is not one of dissipation through profligacy but of gradual dissipation due to inflation, unexpected needs and the fact that the award was inadequate in the first place. This means that where larger awards are involved, recipients have both a physical and psychological need for their funds to be secure and certain for the future. This is borne out by the tendency of recipients of large awards to put part or all of their award towards purchasing a home - 43% in Band 4 used the damages for this purpose compared to 24% in Band 3. The desire for a home reflects a desire for security and it is satisfied by the purchase of a roof over one's head which at the same time increases its value as a capital asset.

3.19 Our study also revealed valuable information indicating that the state has a clear interest in preventing injury victims becoming dependent on its assistance. It is apparent that there is a high risk of this happening to those who suffer serious

[12] See para 1.10 above.

[13] In the consultation paper, we referred to an empirical study carried out for the American life insurance industry in the late 1970s (which we were unable to trace) stating that 25% of award recipients had nothing left of their award at the end of two months, 50% had nothing left at the end of one year, 70% had nothing left after the second year and 90% had nothing left after five years: Consultation Paper No 125, p 16, para 2.32. See also paras 2.29-2.30 above.

[14] This view has also been argued by Stephen Ashcroft in "Super Structure" (1993) 90/41 Law Soc Gaz 33.

injuries and receive large awards. 74% of those in Band 4 never returned to the job they had at the time of the accident compared to 26% of those in Band 1. Band 4 recipients were five times more likely to be permanently disabled and incapable of ever returning to work. The likelihood of receiving state benefits increased by Band, as did the mean number of benefits received (from 1.6 in Band 1 to 3.7 in Band 4). In all, two in five of those in Band 1 and two in three in Bands 2-4 were getting at least one state benefit at the time of the interview. These results indicate that if damages run out, the state would have to be the provider in the majority of cases where serious injuries are involved. It seems that the Band 4 recipients would clearly benefit from the advantages of structuring.

3.20 Structured settlements do, however, have a number of disadvantages. They do not avoid the need for forecasting. In fact they may place an undesirable emphasis on forward planning which is avoided where lump sums are used. Whereas with the latter the plaintiff has to deal with anticipated future needs by managing the lump sum and making payments to meet the needs as required, a structured settlement requires experts and advisers to prepare a complex advance budget for life. Once determined, structured settlements cannot be changed - they only possess initial flexibility. The pressure to 'get it right' at that initial stage is therefore extreme. Payments from annuities may come on stream at the wrong time or not be needed at all. Prognoses may yet prove to be incorrect, affecting decisions previously made about lifestyle. The problem is ameliorated to a degree by building a contingency fund into the structure, but the size of this fund varies a great deal.[15]

3.21 Moreover, structured settlements do not completely remove the risk that the monies provided under them will not in fact be adequate to meet the plaintiff's needs. The plaintiff, unless subject to supervision by the Court of Protection, will still in fact be able to squander any monies received even if they are intended for specific purposes.[16] Another aspect of the risk is that although structures are linked to the RPI via the index-linked annuity, this cannot guarantee that costs of future care will always be met.[17] Historically, the cost of care has risen faster than the RPI. To this extent, the shortfall has to be made up from the contingency fund. Structures are by no means perfect.

3.22 Finally, a structured settlement, although apparently benefiting a plaintiff in every way, may simply be undesired by the individual plaintiff. For example, a severely

[15] It is also currently argued that returns on structured settlements are not advantageous because interest rates have dropped. We deal with this at para 3.29 below.

[16] This seemed unlikely in the cases of the nine structured settlement recipients interviewed for our qualitative survey, who were mainly being cared for by partners or parents due to the seriousness of their injuries. Those partners and parents clearly took the matter of spending and looking after funds very seriously.

[17] This was noted as a disadvantage by the structured settlement recipients interviewed for our qualitative survey.

injured plaintiff may wish to take a large lump sum in order to move to another country for family reasons or to take advantage of educational or business opportunities there.

Background issues

Guarantees

3.23 A guarantee can be built into a structure whereby periodic payments are made for the lifetime of the plaintiff or for a guarantee period, whichever is longer. Four consultees made specific mention of this feature. One of them observed that in the majority of the cases where a guarantee is 'required' it is not for the benefit of dependants but is based on a view of structuring as an alternative method of compensation for full loss, in order to safeguard the lump sum damages that otherwise would have been received (in other words, the conventionally assessed lump sum). The motivation is therefore to prevent insurance companies from gaining by the early death of the plaintiff at a time before the cumulative periodic payments add up to anything approaching the lump sum which might have been paid. The effect of a guarantee, however, may be to ensure that benefits beyond those to which they are legally entitled accrue to dependants. Some consultees regarded this as unacceptable and suggested that we should address the situation. One insurance company, unsurprisingly, saw no need for guarantee periods and a practitioner thought that guarantees should only be allowed to cover compensation for earnings where dependants would have relied on those earnings for a certain period.

3.24 In contrast, the ABI persuasively argued, using a freedom of contract argument, that a guarantee is given for the benefit of dependants and that this is usually achievable at a small cost to the victim which the victim chooses to accept or reject. We agree. The guarantee is a part of the complex and still developing negotiation process, which the informed plaintiff can choose to have or to do without, as the case may be. There appears to be no reason why plaintiffs should not be able to protect an amount equal to the lump sum they may have received in any event. Such a view supports the conventional adversarial approach to negotiation, which how the majority of structures are agreed at present in this country. Dependants can be provided for to some degree where the plaintiff chooses to accept the terms available, and we see this as a useful flexibility which should not be destroyed. There was no general support for any suggestion that guarantee periods should be banned or discouraged. There is in our view no clear justification for this and we therefore recommend no change.

'Bottom-up' or 'top-down' structures

3.25 Some consultees commented on the form that structures should take. In the consultation paper we concluded that there appeared to be no consistent approach

to the starting point in negotiating a structure.[18] However, consultation has convinced us that the general approach to structuring is that it is simply a different way of paying out the lump sum; parties consider that the conventional lump sum must always be offered and agreed and then structured. These are called 'top-down' structures. There is less usually a 'bottom-up' or needs-based approach, whereby the focus is shifted to the plaintiff's future needs, a suitable annuity is priced to meet those needs, and the defendant agrees to pay the purchase price of the annuity. In such cases, a conventional sum may never be agreed at all. Seven consultees favoured this approach, one arguing that the conventional approach is in fact an aberration.[19]

3.26 However, in his response, Richard Lewis thought that too much significance is attached to differences in the two approaches, as they should both lead to the same result. He pointed out that a plaintiff's lawyer should not ignore non-pecuniary losses or loss of earnings even when taking the needs-based approach, and that the conventional approach uses a multiplicand - a yearly based assessment - to arrive at the final figure, for example, when assessing cost of care. Again, we believe that neither approach should be made compulsory. This is an evolving facet of the negotiation process. Both approaches are possible in this country, but the 'top-down' approach currently appears to predominate, with plaintiff's counsel insisting on working from a conventional sum. In this way the question whether not to do so would satisfy counsel's professional duty simply does not arise.

3.27 We have concluded that the flexibility which now exists should not be reduced. It is unsurprising that a defendant-oriented intermediary would prefer the 'needs-based' approach, since such an approach provides opportunities for a defendant insurer to purchase an annuity at a price which might be cheaper than a conventional lump sum. Although some consultees preferred the 'needs-based' approach and expressed the view that it should be used more often, this intermediary was the only one to consider the conventional approach to be an 'aberration'.

3.28 The development of the 'needs-based' approach is possible within the existing system, and a change in culture, not legislation, would be better suited to take this forward. We consider that there is evidence that this is already happening. In a recent article,[20] Bill Braithwaite QC described a case where the only difference

[18] Consultation Paper No 125, para 3.17.

[19] This was the United States-based Structured Settlements Company, which only acts for defendants. It argued that true structured settlements come about through needs-based negotiations, with benefits arising for both parties, neither party having an absolute advantage. The conventional approach used in the United Kingdom is seen by the company as no more than an effort to avoid tax on part of an otherwise conventional damage settlement, and therefore legally and morally questionable.

[20] "Bottom up - settling the unsettleable" (1994) 144 NLJ 638.

between the parties was in relation to life expectancy: the plaintiff's medical advisers set it at age 50 while the defendants' doctors thought it was no more than eight years from trial. The valuations of the claim were therefore almost a million pounds apart, which seemed an impossible gap to bridge using a conventional approach. The parties agreed instead to take a 'bottom-up' approach focusing on the plaintiff's needs, and the result was that the major item of future care claimed at £35,000 a year was settled by the defendants offering a total of £32,000 a year linked to the RPI and guaranteed for five years. We agree with Mr Braithwaite's conclusion that this is an excellent example of the benefits of structured settlements, and we add that it is an excellent example of how useful the 'needs-based' approach can be.

Returns from structured settlements versus returns on invested conventional lump sums

3.29 Although the consultation paper did not specifically ask about relative returns from structuring and lump sums, approximately 12% of consultees commented on this issue. Half of those who addressed the matter seriously questioned the received wisdom that the returns on structured settlements are better than those from an invested conventional award. They pointed out that the returns on ILGS have dropped considerably as interest rates have dropped and they questioned the assumptions (such as what form of investment would be used for the lump sum, what rate of future inflation is assumed, and that tax bands will not alter in the future) which are used by intermediaries to compare investment in the conventional manner with returns under a structure.

3.30 An article written by one consultee forensic accountant,[21] summarised these concerns and was seen by intermediaries to have a serious 'dampening' effect on how plaintiffs, defendant insurers, and practitioners currently view structuring. However, a member of the leading firm of intermediaries argued strongly in a rebutting article[22] that the assumptions they had used as the intermediaries in most of the structures arranged in England to date, when they compared how well lump sums would do if invested, as against the returns in a structure, had been developed over time with the agreement of the Court of Protection and its investment advisers, and had been scrutinised by other accountants who agreed with their approach. For its part, the Court of Protection told us that the comparisons between conventional investments and structured settlements which are put before courts do not always give an accurate picture and tend to over-favour structures. However, Frenkel Topping also pointed out that returns were not the only consideration which ought to determine whether a structure should be entered into and that security and certainty were particularly important. In any event, the ordinary investment of a lump sum involves risk, and is at present generating low returns as well.

[21] Carol Ellison, "Unsafe Structures?" (1993) 90/32 Law Soc Gaz 2.

[22] Stephen Ashcroft, "Super Structure" (1993) 90/41 Law Soc Gaz 33.

3.31 It is apparent that since the publication of the consultation paper there has been a marked contraction in the structured settlement market, arising from the lower interest rates obtainable on ILGS. The plaintiff has to devote more settlement monies to purchase annuities which used to go further. Insurers have had to accept smaller discounts for entering into a structure, while the costs of the administrative difficulties they face have not decreased. This has been picked up by the media to the extent that when personal injury cases are reported in the press there have been a number of references to a view that structures are not viable any more.

3.32 In these circumstances, we have reexamined the question we raised and dismissed very briefly in the consultation paper - whether structured settlements should be available at all.[23] We consider that our original conclusion that the availability of structured settlements as a remedy in personal injury cases in England and Wales should not now seriously be questioned remains sound. Our researches and the evidence provided by the studies undertaken by both us and the Edinburgh Rehabilitation Studies Unit[24] have convinced us that structured settlements are a useful alternative form of arranging an award of damages which should remain available to allow plaintiffs a choice as to how to plan their future.

3.33 Structured settlements seem to us to offer, at the very least, the certainty of regular payments for at least the life of the plaintiff. A specific type of personal injury victim desires that certainty. Structured settlements must be attractive in particular to a plaintiff who is very young and to any plaintiff who has suffered very serious injuries. These may be cases where large sums of damages are at stake. For obvious reasons structures cannot always out-perform other forms of investment, but plaintiffs should be in the position of being able to make a fully-informed choice as to whether the certainty of regular payments is worth the risk of a slightly lower return than what a lump sum conventionally invested might bring.

3.34 Structuring also offers a means of settling difficult cases where the parties appear far apart and a conventional approach has reached an impasse.[25] Finally, there was no suggestion in any of the responses on consultation that structuring should be prohibited or discouraged. Instead, people's concerns centred on a view that structures should not become the norm or be automatically regarded as the 'best thing' for the plaintiff, and that plaintiffs should get the best advice and should be fully informed of the options open to them, at no extra cost. With this in mind, we still consider that structuring will, in appropriate cases, be the best choice for a significant group of plaintiffs. For this reason also, we consider that artificial administrative barriers should be removed from the process. We go on to consider this point in detail in paragraph 3.54 below.

[23] Consultation Paper No 125, para 3.22.

[24] See paras 3.16-3.19 above.

[25] See para 3.28 above.

Thin nature of the life markets

3.35 Two intermediary consultees expressed concern at the 'thin nature' of the life annuity market supporting structuring. The life companies face problems having to quote for impaired lives because there is very little statistical evidence as yet upon which to base predictions about life expectancy. Consequently, it is difficult for the companies to hold minimum reserves to back such quotes, and to find reinsurance for the risks they take on in so quoting. Apart from the development of the Refus syndicate,[26] it appears that the situation which was outlined to us at the time the consultation paper was written remains the same. There are only three or four companies consistently in the market, although other entrants enter and leave it on a regular basis. A further factor affecting the market is that, as one intermediary noted, the annuities are linked to ILGS, and the longest dated gilt will be redeemed in July 2030. In respect of periods after 2030 the life companies only quote a fixed percentage or the RPI, whichever is lower.

3.36 Intermediaries also told us that there are inconsistencies within life companies as to whether suitable annuities will be offered or not, with different offices of the same company taking contrary positions at the same time. It was felt that a greater level of expertise, or willingness to supply the expertise, was needed, as quoting involves the necessity for complicated medical records to be perused and assessed before a decision to underwrite the special risk can be made. We do not consider that this background situation is one on which we can make any useful recommendations. The market is a commercial one which must reach its own equilibrium and its make-up cannot be a damages law reform issue. We are aware that a group of intermediaries has established a structured settlements association which will have a code of ethics, a set of rules and a constitution and will also aim to maintain standards.[27] Another important aim of the association is to examine how to extend the number of life companies participating in the structuring market.

Results of consultation and recommendations for reform

Judicial power to impose structuring

3.37 The consultation paper raised the very significant question whether the voluntary nature of structured settlements should be supplemented by either a general power or a specific power in the court, in certain circumstances, to require that an award should be made by way of a structure.[28] We prefaced our remarks by observing that damages are not a discretionary remedy. If the liability of the defendant is

[26] See para 1.11 above.

[27] The Commission was invited to observe the second meeting of the association, held at the Guild House, Fenchurch Street, London, on 26 April 1994.

[28] Structures have already received indirect legislative recognition in the Court of Protection (Amendment) Rules, referred to in para 3.159 below, and in the Social Security Administration Act 1992, s 88 - the recoupment provisions referred to in para 4.9 and n 11 below. See also para 3.100 below.

established or admitted, the court must award damages as sought.[29] The question whether or not courts should have the power to impose structured settlements is therefore a question about the method or form of payment. We considered the principle of imposition, the effect on the settlement process and practical questions about the form of any power of imposition.

3.38 It has been argued that if the court were able to impose a structured settlement against the wishes of the plaintiff, this would breach the established principle that plaintiffs should be able to spend their damages awards as they wish. The corollary of this liberal principle is that plaintiffs should be able to insist on receiving their award in the form of an immediate lump sum payment. Imposition of a different form of award has been seen as interference with freedom of contract.[30] It is also argued by some that it is wrong to introduce paternalism into personal injury awards when awards of damages in other areas of the law continue to leave plaintiffs in receipt of lump sums which they are free to spend as they wish.

3.39 We considered that such arguments are not strong, because it is assumed that the natural process of settlement can only involve lump sums and that this should prima facie not be tampered with. But, as we have already noted,[31] the lump sum is by no means self-evidently the ideal and only form of damages. The court, in awarding damages for personal injuries, has a duty to compensate for the loss suffered. While that duty may create a right in the plaintiff to such compensation, it does not extend to the creation of a right to demand how the compensation should be paid. As to paternalism, it seemed to us to be inconsistent to reject imposition as paternalistic whilst wishing to enhance structuring in every other way for what are essentially paternalistic reasons. The aims of establishing a life-long, inflation-proof "pension" for the plaintiff and preventing dissipation are based on a benevolent desire to give security of payment to the plaintiff throughout the anticipated period of the loss. Finally, we shared the view of the Pearson Commission that the freedom of choice which is offered by the lump sum is something which plaintiffs would not have enjoyed if they had not been injured and it is not therefore an essential part of a system based on restitutio in integrum.[32]

3.40 We also considered some other important reasons, unconnected with paternalism, which may justify giving a court power to impose structures. The court has a duty to award compensation which will put the plaintiff back into the position she or he

[29] See *McGregor on Damages* (15th ed 1988) p 3, para 1: "Damages are the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or breach of contract...."

[30] By the act of interfering with settlements. See *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) (ed Cane), p 119.

[31] See para 2.1 above.

[32] The Pearson Commission Report, vol 1, p 123, para 565. See para 2.1 above.

would have been in had the accident not occurred. It is arguable that the replacement of a lost stream of income by periodic payments and the provision of funds to meet medical and other needs created by the injury as those needs arise achieves this more effectively than the provision of a lump sum. Moreover, there is an inconsistency in a plaintiff arguing that a particular need exists, such as the need for an adapted house, and then using the money for something completely different. Even in contract law, where a plaintiff is prima facie entitled to the cost of curing a defect in the defendant's performance, damages will not be assessed on that basis if there is no undertaking or proposal to undertake the cure, or at least circumstances which indicate sufficient firmness of intention to spend the damages on the cure.[33] If the money is not to be spent on the "need", then the "need" cannot be real. The state can also be said to have an additional and valid interest in courts being able to make compensatory awards in a form which may prevent plaintiffs becoming a burden on social security and hence on the taxpayer. The attraction of structures is that they go further than lump sums to facilitate the meeting of specific needs as they arise and, in doing so, replicate, so far as is possible, the compensatory basis on which awards are made.

3.41 We concluded that, in the context of structures it was reasonable *in principle* to contemplate giving courts power to make orders that would result in compensation being awarded in the form that replicates as far as is possible the basis upon which the award is made. The question we raised, however, was whether allowing the courts to impose structured settlements would in fact achieve this purpose successfully. Quite apart from any concerns of principle, we thought that to invest the courts with power to impose structured settlements would have profound effects on both the court system and the process of making out of court settlements. We therefore considered a number of important and complex practical issues, the first being the effect this would have on bargaining positions. Our examination of the effects of imposition on bargaining positions which we set out in the consultation paper did not rule out, and indeed supported, the option of granting courts the power to impose structured settlements on the motion of either party to an action for personal injury damages.

3.42 We then examined the kind of questions which would need to be asked to establish the bounds of a power of imposition, the first question being what form such a power would take, and whether there should be mandatory limits on the power, monetary limits, or limits related to life expectancy or incapacity. A further important difficulty we raised for consideration was the matter of the discount. We observed that under the present voluntary regime, defendants generally secure a discount on what is to be paid for the annuity or annuities as part of the negotiation.

[33] G H Treitel, *The Law of Contract* (8th ed 1991) p 838; Megarry VC in *Tito v Waddell (No 2)* [1977] Ch 106, 332C-D, 333.

3.43 There appeared to be four methods of quantifying the discount.[34] The parties may calculate the total tax saving and then allocate it between themselves in negotiated portions. Alternatively, plaintiffs may concentrate on simply achieving a structured settlement to meet their needs. Some defendants on the other hand may state what payments they are prepared to offer, without specifying any discount, and leaving the plaintiff to decide whether to accept. Finally, the standard approach is that of calculating what the conventional lump sum damages would have been and negotiating the discount from that point. This method is also subject to variations. The general trend appeared to be towards adopting a discount of 10 - 15% of the money used to purchase the periodic payments,[35] although this may have decreased now that returns on structures are lower.[36] Larger discounts may reflect difficulties in the plaintiff's case and the desire to settle. The discount is the price of a commodity which the plaintiff and the defendant can only bargain for with each other. Insurers use their bargaining power to strike a discount. We were very concerned about what might happen to the discount if a judicial power to impose structuring was created.

3.44 We also raised questions about how court-imposed structures could be made secure and to what extent the court would have a duty to ensure such security, what effect a power of imposition would have on intermediaries and costs, and whether court-ordered structures or any aspect of them should be reviewable. In addition, we asked whether a judicial discretion or power to impose structuring, if granted, should be confined to personal injury cases. On that question, we reached the firm conclusion that preferential treatment for the victims of personal injury is justified to a degree because there is a strong public interest in specific needs that would otherwise necessarily be met by the welfare system or public institutions such as the health service being met out of the award over a long period of time.[37]

3.45 Finally, we wondered whether creating a judicial power to impose might be premature since the process of structuring is comparatively new to the United Kingdom, and we asked if it should be given time to stabilise both in form and operation. We also wondered if the highly technical nature of structuring would be reflected adequately by a simple power of imposition. We suggested that there might in any event be advantages in deferring legislation which empowers the imposition of structuring, so that any inherent bias within the system towards the lump sum

[34] See Iain Goldrein & Margaret de Haas (eds), *Structured Settlements: A Practical Guide* (1993) pp 60-61.

[35] There is some confusion as to whether this should be based on the total sum or the annuity. See Richard Lewis, *Structured Settlements: The Law and Practice* (1993) ch 9, and paras 3.125-3.129 below.

[36] Rodney Nelson-Jones, "No Damage Done" (1994) 91/12 Law Soc Gaz 20, 24, states that the average discount seems to have fallen in 1993 from 10% to 7.5%.

[37] See para 3.14 and n 11 above.

award will be tempered by experience of the process of structuring awards. The general aim of promoting structured settlements could in the meantime be met by proposals to improve the existing voluntary regime by rationalising the tax requirements. We believed that such improvements would ensure that structured settlements are used when they should be and when they would best serve the interests of the parties, and our proposals as to improvements to methods of calculating loss would also strengthen the system within which structuring is developing.

3.46 We did not express any provisional view as to whether or not there should be a judicial power to impose structured settlements when we sought views on consultation. We said that we did not regard the arguments against the imposition of structuring based on freedom of choice and hostility to paternalism as convincing, but we also recognised a clear need for non-anecdotal evidence on whether there is a general tendency to dissipation of awards of damages in the United Kingdom. As we have already said, the Edinburgh study[38] found no examples of fiscal improvidence or profligacy. In fact, there were many indications of prudent, future-oriented financial planning. Relevant preliminary figures in our own empirical study appear to confirm this finding.[39]

3.47 When we added the responses which opposed a power of imposition to those which thought it is too early to contemplate creating such a power, there were 39 responses (53%) in favour and 32 responses (44%) against a power of imposition. Some insurance and defendant representatives actually favoured a power of imposition but most of the consultees who did were plaintiff's interest groups and counsel. It is probably for this reason that approximately one quarter of those in favour of a power of imposition clearly wanted structures to be imposed against the defendant's will, while fewer were clear that they wanted the power to be exercised against plaintiffs. The General Council of the Bar was one of the group of consultees who opposed the proposal, and saw creation of a power of imposition now as likely to lead to confusion, disenchantment and expense. The Law Society favoured a delay of 10 years before any such reform is considered.

3.48 In our opinion it is too soon to legislate to give the courts the power to impose structured settlements. Consultation did not reveal any call for it based on existing injustice. The proposal was generally seen as being simply 'desirable' or 'undesirable', or 'undesirable at this stage'. In fact there was such a variety of responses in favour of a power of imposition that the most that could be extracted from them was that:

[38] Paul Cornes, *Coping with Catastrophic Injury - A follow-up survey of personal injury claimants who received awards of £150,000 or more in 1987 and 1988* (January 1993), pp 57 and 89. See para 1.10 above.

[39] See paras 3.29-2.30 above.

- more favoured imposition against the will of defendants than against the will of plaintiffs;
- there was a recognition that rationalisation of the tax regime would make imposition less onerous to defendants;
- where imposition against the plaintiff's will was favoured, a significant number contemplated this only being exercised where the plaintiff is not *sui juris*;
- monetary thresholds were generally not favoured;
- there was a desire to keep any power simple and a belief that this is possible;
- a broad judicial discretion was favoured;
- there was some support for the idea that imposed structuring should only apply to future losses;
- it was seen as necessary to consider the effect of any proposed power on the legal aid regime and on payments into court.

3.49 In view of the result of consultation, before we reached a conclusion on this issue, we sought to develop a draft legislative scheme giving the courts a power of imposition which took account of the considerations set out above. When we then considered each facet of the power, we reached the conclusion that although some of the perceived difficulties could be overcome, significant problems remained. The two most important of these were a right of appeal and discounts.[40] In most final orders by trial courts there is a right of appeal and where an order to structure has been made we consider either party should have a right to appeal. The grounds of appeal would have to be similar to those which currently apply to lump sums. There would be a right of appeal on quantum, against the amount which was to be put into the structure, and it would also be necessary to provide an appeal against a decision to order a structure rather than a lump sum. The parties might argue that either the court failed to take the required considerations into account, or, having done so, had made the wrong decision about them.

3.50 This is where a judicial power to impose appeared to us to fall apart badly. Unless a power of appeal is severely restricted, it would be possible for the party who did not want the structure imposed to appeal the judgment as a matter of course. Because the structure to be approved comprises annuity offers which must be taken up within a limited time, lodging an appeal would effectively sabotage the offer. Either party could then argue that, rather than appeal, the whole process must begin again, or substantial injustice could occur. This would be time-consuming and costly, and would clog up the court system. A draconian power to allow the court to refuse the right of appeal where it was being misused in this way would

[40] The others were that judges would have to be given a broad discretion to order the parties to negotiate a structure, with the court approving the final package. Although guidelines as to what the court should take into account could be included, these would also have to be general. Such 'umbrella' legislation encourages inconsistency in decision making and is difficult for the judiciary to apply. Further, negotiation would have to be completed within a specified time, implying the necessity for enforcement mechanisms, which would possibly involve unjustified delay and expense.

reduce the difficulties, but there would be evidential problems which would add further to cost and delay. We could not see how such problems could be easily overcome.

3.51 However we considered that the main problem in creating a judicial power to impose a structure is that structured settlements are creatures of negotiation and are born of agreement between the parties. Cases proceed to judgment because of **disagreement** between the parties. It is difficult to see how a judicial power could retain the flexibility of the existing regime and it would be important to achieve this as far as possible. One element in this flexibility is the discount.[41] In a voluntary system the discount reflects the bargaining power of the parties, a recognition that the defendant is entitled to share in the tax savings, a desire to settle the matter quickly, any element of contributory negligence by the plaintiff, an element to cover the administration costs incurred by the insurance company, and any other uncertainties attached to liability.

3.52 It is impossible to prescribe a power of imposition without considering the discount. If the existing administrative and cash flow costs of structuring are removed,[42] it becomes difficult to see any rationale for a discount in a non-voluntary system since the court would resolve issues of liability, contributory negligence and mitigation. A non-voluntary system is likely to involve the court in the merits of the bargain offered to an undesirable (and possibly impractical) extent and may also be unjust. If it is the plaintiff who does not want a structure but seeks a lump sum, it does not seem right in principle for the court both to order that the award should be paid in the form of a structure and also that a percentage of the money funding the award should be discounted and kept by the defendant insurers. If it is the defendant who does not want a structure and a settlement has not been reached because of this, it does not seem right to reward the defendant for not settling and forcing the case to court by giving him a discount. While discounting cannot be justified when coercive powers are used, we believe it is justified in a voluntary system, as will be seen from paragraphs 3.125 to 3.129 below.

3.53 We have concluded that structuring is still developing, and that the recommendations we make below[43] for rationalisation of the existing regime will meet the most significant deficiencies of voluntary structuring, and make structuring more attractive to defendants. Those defendants will become more likely to offer structures whether plaintiffs request them or not. Our proposed reforms should be given time to 'settle in'. The views of the General Council of the Bar and the Law Society, in recommending caution, are also significant. They indicate that practitioners would appreciate more time to develop expertise in negotiating

[41] See paras 3.125-3.129 below.

[42] See paras 3.54-3.58 below.

[43] See paras 3.54-3.58.

structures. This approach preserves the possibility of a power of imposition being considered in the future if necessary but we have serious doubts about the introduction of a power of imposition at this stage and we **recommend therefore that:**

(7) Reform of structured settlements should be confined to rationalising and building on the voluntary system.

Rationalisation of the existing voluntary regime

3.54 The different regime applicable to mutual insurers for the calculation of their profits chargeable to corporation tax has discouraged mutual insurers and the medical defence organisations from offering structured settlements. Mutual insurers do not pay corporation tax in respect of their trading operations. They are taxed on their investment income, however, and most of the money arising from the annuity is treated as investment income, but the payments to the plaintiff which must be made by mutuals are considered to be part of the mutual activity and cannot be offset against their investment income. Any structure by a mutual would involve it having to write off the tax suffered on the investment income, and would therefore be much less attractive than it would be for a proprietary company. It would usually be uneconomic for this reason. The tax situation of the medical defence organisations is similar to the mutual companies, and they are also discouraged from offering structures. However, since the introduction of NHS indemnity in 1990,[44] District Health Authorities have assumed responsibility for both new and existing claims against medical staff. This means that the medical defence societies are no longer directly involved in medical negligence claims unless the claim arises against a general practitioner or a doctor in private practice. For this reason the extent to which the medical defence unions are likely to be involved in structuring has been reduced.

3.55 Because of their genesis within the existing tax framework, fine distinctions have to be made to achieve a structured settlement which qualifies for the favourable tax treatment. Structuring under the present tax regime causes expense to the defendant insurer in two respects. First, the insurer suffers a loss in cash flow as it can only claim the difference between the net sums which it receives from the life office and the gross sums which it pays the plaintiff at the end of each year. The benefit of the offset will only be enjoyed some months after the claim is made. Second, an additional administrative burden is placed on the insurer in having to act as a 'letter-box' passing the sums onto the plaintiff. In the consultation paper we asked whether these burdens were a real disincentive to the defendant insurer offering a structure, and we said that we felt the problem may be overstated. However, we also observed that since structuring may confer a benefit on the state

[44] Under the National Health Service and Community Care Act 1990. See also paras 3.106-3.110 below.

in helping to prevent the plaintiff becoming dependent on state benefits, it is arguably inequitable that the defendant insurer should have to bear the loss in cash flow and the administrative burden.

3.56 Over two-thirds of those who considered these aspects thought that the administrative costs to insurers were relatively small and bearable. However, the remaining third thought that the costs were significant. There was general recognition that these costs, whether small or not, caused some insurers to dislike structuring. All of those who considered loss of cashflow thought that it was inequitable for insurers to bear the loss.

3.57 Under existing arrangements the tax benefits of structured settlements depend on the preservation of the capital nature of the payments although the money is received as a series of payments rather than a single lump sum. In the consultation paper we proposed that this artificiality should be removed and that the system should be rationalised by allowing the life office which sells an annuity to a defendant insurer in fulfilment of a structuring arrangement, to pay the periodic payments tax-free and direct to the plaintiff. This would eliminate the need for the insurer to gross up payments and claim the tax back at a later stage. There was a large response to this proposal and without exception those who responded were in favour of the suggestion. Some saw the system as one which begins with a deduction of a non-existent tax liability and therefore not altogether rational. In general, our proposal was seen to solve the administrative and cash-flow problems and to allow insurers or defendants who can at present only structure with a tax loss, such as mutuals and the medical defence unions, to enter the field. We therefore **recommend that:**

(8) A life office should be able to make payment free of tax direct to the plaintiff as the annuitant under an annuity bought for her or him from the office by the defendant (or defendant insurer) who will apply for this purpose a part of the damages which would be payable by the defendant to the plaintiff.

3.58 We consider that this recommendation can be implemented by a stand-alone structured settlements scheme, in which, for the first time, structured settlements will be defined and put on a statutory basis. It will be necessary to put the concept of structured settlements as developed under the existing law and reflected in the agreement between the ABI and the Revenue (that is, the interpretation of the case law and the model agreement and schedules), into legislative form, with such modifications as are considered necessary to remove the disadvantages identified above.[45] We **recommend that:**

[45] See paras 3.54-3.55.

(9) The principal components of such a reform would be:

(i) There must exist an agreement between a plaintiff and the defendant (or the defendant insurer) settling any damages claim for personal injury, including any claim under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934;

(ii) The plaintiff and the defendant (or the defendant insurer) must agree that the damages (so far as not consisting of a lump sum) are to consist of periodic payments to the plaintiff for a fixed term, or for life, or both (with or without provision for indexation);

(iii) The defendant (or the defendant insurer) must agree to purchase for the plaintiff an annuity or annuities producing for the annuitant sums which as to amount and time of payment amount to the periodic payments specified in the agreement;

(iv) The annuity payments received by the plaintiff will be free of income tax just as instalments of damages received by the plaintiff from the defendant (or the defendant insurer) under a voluntary structured settlement are free of income tax at present (Draft Bill, Clauses 1 and 2).

3.59 As far as scope is concerned, we observed above[46] that in theory structuring could now extend to actions beyond personal injury. However, we are not aware of any attempts to achieve this. It is clear that structuring is currently available for all personal injury claims. Our rationalisation proposals seek to reflect this position and to capture the standard definition of personal injury. The scheme also preserves flexibility in that it does not specify mandatory forms for the agreements, but prescribes the principles upon which they must be based. Any agreement which satisfied the principles in the legislation would therefore produce periodic payments free of income tax, as now, but would also be able to take advantage of direct payment and a simplified procedure. In doubtful cases it may be desirable for the agreement to be approved by the Revenue.

3.60 The Revenue wishes to withdraw from the approval process as much as possible. However, it would be necessary for the proposed flexibility to be built in to prevent parties having to pursue expensive court actions where questions of interpretation arise. The legislation would remove the need for the Revenue to examine as many agreements as it does at present. Plaintiffs and their counsel should be able to use the legislation in much the same way as they currently use the model agreement. It is only in the borderline cases that the Revenue should have to become involved,

[46] See para 3.5.

and this is as it should be.

Assignment

3.61 A significant proportion of defendants or defendant insurer interests wanted defendant insurers to be able to close their books completely on the claim by assigning liability to the life office and they suggested this should be combined with allowing the life office to pay periodic sums to the plaintiff directly. This group also emphasised that such an approach would have security advantages for the plaintiff, which we consider below. In Canada, initially conditional and now absolute assignment is possible with the consent of the plaintiff. The assignee must be an affiliate of the issuer of the annuity contract or another assignee approved by the court, and if the assignee fails to perform, the defendant insurer's liability revives. The defendant insurer pays the amount of the premium plus a nominal fee to the assignee and the assignee purchases a single premium, non-assignable, non-commutable and non-transferable annuity from a life office. The defendant insurer irrevocably directs the life office to make payments direct to the plaintiff.[47] However, the intended assignees are not necessarily the life office itself. It may be a third party. This is because such assignment was intended to open structuring to non-Canadian insurers or reinsurers, self-insurers and general insurers which became insolvent. These conditions have been imposed by the Revenue in Canada to maintain the fiscal neutrality of the arrangement.

3.62 The comprehensive scheme we have recommended, on the other hand, would not be dependent on preservation of the fiscal neutrality requirement embodied in case law in England and Wales. It therefore simply avoids any necessity for assignment of liability because the tax free annuities are to be bought at the outset for the plaintiff pursuant to the structured agreement, and the defendant then drops out of the picture completely.

Security

3.63 We considered the security issue in our consultation paper[48] because the plaintiff must be concerned with the long term position of both the defendant insurer and the life company, by virtue of the fact that periodic payments have to continue to be made, sometimes for many years into the future. We suggested in the consultation paper that the possible collapse of the life company may not give rise to difficulties since, under the Policyholders Protection Act 1975 (hereafter "the PPA"), the general insurer will receive 90% of the policy's worth[49] and will thus

[47] See Robert G Watkin, "The New Method of Structuring Settlement Agreements" (1992) 71 Can BR 27. Also advance triple Ruling from Revenue Canada of 25 September 1991 to McKellar Structured Settlements Inc.

[48] At paras 3.61-3.64.

[49] Section 10(2). The PPA protects policy holders from the consequences of authorised insurance companies failing to meet their liabilities and finances that protection by levies on the insurance industry. See generally Merkin (ed), *Colinvaux's Law of Insurance* (6th ed

have the means to meet most of its obligation to the plaintiff. If, however, the general insurer goes into liquidation, the PPA has no application since the plaintiff is not a policyholder of that company and, it seems, must simply join the list of creditors.

3.64 Those who favoured the defendant insurer being able to assign its liability to the life office completely argued that the main benefit to the plaintiff is in terms of security. Complete assignment to the life office would appear to allow the plaintiff to benefit directly from the protection provided by the PPA because, following assignment, the plaintiff would become a policyholder in terms of the Act. We were advised by the Department of Trade and Industry (DTI) during consultation that a review of some aspects of the PPA was being conducted by a joint DTI/ABI working party. A consultation paper was issued in July 1994 which, among other things, recommended that periodic payment beneficiaries under structured settlements should be unequivocally covered as third party claimants under the PPA, whether the general insurer or the life office becomes insolvent.[50] The paper also recommends that the liability of the failed insurance company in respect of structured settlement payments should be 100% rather than 90%. This indicates that the insurance industry supports the possibility of making structured settlements more secure than at present. Any doubts about whether or not a plaintiff who is receiving periodic payments under a structured settlement is a 'policyholder' in terms of the PPA should therefore be removed.

3.65 In the consultation paper we considered that the question whether security is a real problem ultimately depends on the strength of the insurance industry and of the regulatory scheme imposed by the Insurance Companies Act 1982. This scheme provides for margins of solvency and for intervention by the Secretary of State where this is desirable to protect policyholders.[51] We provisionally concluded that a law reform issue did not arise since it is not possible to insure so as to avoid totally the possibility that business failure will destroy the benefits of a particular policy. That would require a line of guarantees stretching to infinity. We therefore inclined to the view that the desirability of contingency insurance (and the question who should bear its cost) should be a matter of judgment for plaintiffs and their advisers in each individual case. This would also apply to the individual negotiation of special clauses in the annuity policy protecting the plaintiff in the event of the liquidation of the defendant insurer. Moreover, we thought that an alternative of granting special insolvency status to structured settlement creditors was not justified on current evidence as to general security of insurance contracts.

1990), ch 22.

[50] A review of the Policyholders Protection Act 1975: a consultative document (1994) Department of Trade and Industry, pp 16-17.

[51] Insurance Companies Act 1982, ss 32-48, 83-86.

3.66 It must be remembered that, when the agreement between the ABI and the Revenue was made, the ABI pointed out that security might be an issue.[52] It was acknowledged that the arrangement prevented the plaintiff from enjoying the protection of the PPA, because of the voluntary nature of structured settlements, and plaintiffs were enjoined to consider the advisability of obtaining a financial guarantee from another insurer when negotiating the settlement. We invited comment on whether the problem of security of structured settlements was seen as a real one and if so, whether any, and if so, which, of the solutions proposed are viable.

3.67 Consultation revealed a real concern about security from a large and varied group of consultees. 75% of those who considered the issue thought that it was important. Richard Lewis summarised the concerns of most of these consultees as arising from doubts about the adequacy of regulation of the insurance industry by the Department of Trade and Industry, and the increasing indications in recent years that the insurance industry is in difficulty.[53] This is a state of affairs which did not exist when the 1987 agreement between the Inland Revenue and the ABI was made. Currently, it appears more likely that a defendant insurer could become insolvent than a life office but risk exists for both. Plaintiffs who accept a structure find their fortunes 'locked in' with those of the insurance companies involved. It might be said that a plaintiff with a lump sum to invest also faces uncertainties about where to put the funds. However, the difference between a victim with a lump sum to invest and a victim who takes a structure backed by annuities is that although the former also faces and accepts a certain risk in choosing where to place funds, she or he has more control over the funds in that they can be withdrawn if questions arise about the quality of the investment. The victim committed to a structure is committed, in a sense, from the outset, to the fortunes of the life and general insurance companies involved, because the funds cannot be removed.

3.68 In the light of this situation, which may be deterring some plaintiff's legal advisers from accepting a structure (because we consider that our empirical survey revealed real concern about security from recipients of damages, and because rationalisation of structuring could be said to amount to state endorsement of the process), we have concluded that there appears to be some obligation to ensure that structures are as secure as possible. This will also prevent plaintiffs having to fall back on the state should insolvencies occur.

3.69 Consultees differed widely as to how this problem might be dealt with. Two of them favoured insurers obtaining contingency insurance, but the ABI pointed out that it is not possible to get credit insurance which will cover the length of time involved

[52] Association of British Insurers, Note describing the general background, Ref C/156/001, 9 July 1987, cl 4.

[53] Richard Lewis, *Structured Settlements: The Law and Practice* (1993) ch 15.

in most structures. Four consultees, including the Court of Protection and the General Council of the Bar, took the approach originally envisaged, that the parties must satisfy themselves as to the security of the product. However, two fifths of consultees wanted protection to be built into the system in some way. Three favoured creating a special class of creditor to deal with the insolvency of the defendant insurer and two opposed it.

3.70 We believe that creating such a special class of creditor by changing the insolvency rules would be difficult to justify and it would also be a more complicated approach given that the scheme we have outlined above is primarily a rationalisation of existing arrangements, that is, a simpler way of allowing defendant insurers to pass their liability onto the life office and ensure that the plaintiff becomes entitled to the protection provided for in the PPA. The plaintiff would become the annuitant under the annuity purchased pursuant to a structured settlement agreement and accordingly would become the policyholder for the purposes of the PPA. All that is required is that statutory structured settlements become entitled to enhanced policyholders protection. We therefore **recommend that:**

9(v) In terms of the Policyholders Protection Act 1975, the plaintiff who becomes an annuitant pursuant to a structured settlement agreement shall be entitled to protection to the full amount of the liability, benefit or value attributed to the policy (Draft Bill, Clause 3).

The implications of EC law

3.71 On 1 July 1994 the European Commission's third life assurance Directive came into force in the United Kingdom.[54] The Directive provides for the harmonization of the laws relating to life assurance and implements the concept of the "single passport" for insurance authorisation, whereby insurance companies authorised to conduct business by any Member State of the European Union can lawfully carry on insurance business in any of the other States. Where a life assurance company wishes to open a branch or supply life assurance services in a Member State which is not its home state, it is required to supply information to competent authorities in its home state and to meet certain conditions. The authorities in the home Member State are responsible for and attest to minimum solvency margins of the company calculated in accordance with requirements set out in Articles 19 and 20 of the Directive. They pass the information to the Member State where the company intends to carry on business. That Member State may also impose conditions under which, in the interest of the domestic general good, the business may be carried on there. In the case of the provision of services, the company has

[54] Directive 92/96/EEC. Also relevant are Directives 79/267/EEC and 90/619/EEC. The Regulations which comply with the Directive are the Insurance Companies (Third Insurance Directives) Regulations 1994 (SI 1994 No 1696), the Insurance Companies (Accounts and Statements) (Amendment) Regulations 1994 (SI 1994 No 1515) and the Insurance Companies Regulations 1994 (SI 1994 No 1516).

to be certified after it has met the requirements. If an assurance undertaking is to be wound up, commitments contracted through a branch or freedom to provide services are to be met in the same way as any other insurance contracts of the undertaking, without distinction as to nationality as far as the lives assured and the beneficiaries are concerned.

3.72 It appears that it would therefore be unlawful and contrary to the United Kingdom's treaty obligations for the rationalisation scheme we recommend above[55] to apply only to annuities purchased from companies authorised to carry on business in the United Kingdom under our domestic law and thus to discriminate against annuities purchased from insurance companies authorised under the laws of another member of the EC. We therefore **recommend that:**

> **9(vi) The scheme for annuities purchased pursuant to a structured settlement shall apply to annuities purchased from an insurance company or companies authorised to carry on insurance business in the United Kingdom whether authorised under domestic or under European law as given effect in the United Kingdom (Draft Bill, Clause 1(4)).**

3.73 We do not, however, consider that we can recommend that full policyholders protection for structures should also extend to all EC insurance companies authorised to carry on insurance business in the United Kingdom under the EC Third Directive. Section 5 of Schedule 8 of the Insurance Companies (Third Insurance Directives) Regulations 1994[56] amends section 3(2) of the Policyholders Protection Act 1975 so that the reference to being authorised under section 3 or 4 of the Insurance Companies Act 1982 to carry on insurance business of any class in the United Kingdom includes a reference to being an EC company which is lawfully carrying on insurance business of any class in the United Kingdom. A new subsection 2A is also added to section 21 to the effect that the Policyholders Protection Board may waive any levy imposed on an EC company if it is considered appropriate to do so.

3.74 We are advised by the DTI that the effect of this is to maintain the status quo, whereby EC companies which have branches in the United Kingdom can come under the umbrella of the PPA, but those which offer services do not. In the event of a non-United Kingdom company becoming insolvent, the policyholder is to look first to the protection scheme in the country concerned where a branch is operated in the United Kingdom, or where services are offered. Obviously, in the latter case, the scheme in the non-United Kingdom Member State is the last resort. The DTI envisages that the power of waiver of levy will be used where the EC Member State

[55] See paras 3.57-3.58.

[56] SI 1994 No 1696.

has a protection scheme which is as good as or better than our own, and where authority to operate a branch is involved.

3.75 We face a difficulty in making recommendations in this area because although harmonisation of insurance law in the Member States is well-advanced, the harmonisation of policyholders protection is not. These issues have also been put out to consultation by the DTI,[57] but until agreement has been reached, the status quo, which has been criticised as distorting the market, will remain. It may be that eventually only UK consumers will be protected under the PPA, or that the status quo is extended, possibly by allowing inward service providers to join the UK scheme voluntarily, or that an EC-wide compensation fund is established.

3.76 At present, however, under the Third Directive, the single market is based on recognition of home state supervision. The harmonisation provisions throw the responsibility back on the plaintiff contemplating buying an annuity for a structure from a company authorised to operate a branch in the United Kingdom or supplying services under EC law, because information as to insolvency provision in the home Member State of the company will be available. It will be incumbent on such a plaintiff to be absolutely satisfied as to the security of the structure, in particular where the EC company does not have a branch in the United Kingdom and is only offering services. In these changing circumstances, our recommendations for reform of the law relating to EC companies and security of structured settlements must not go beyond what is currently provided in the PPA as amended. We therefore **recommend that:**

9(vii) Full policyholders protection for annuitants under structured settlements shall apply to annuities purchased from insurance companies which are authorised insurance companies within the meaning of the Policyholders Protection Act 1975 (Draft Bill, Clause 3).

Consent orders

3.77 We referred to difficulties with structuring after a court order, even a consent order, in paragraphs 3.37 and 3.38 of the consultation paper. If the defendant has already discharged the debt before entering into the structured settlement, the starting point is a capital lump sum, and any arrangement that simply uses that capital lump sum to purchase an annuity will result in a series of capital payments, and those annuity

[57] See: A review of the Policyholders Protection Act 1975: a consultative document (1994) Department of Trade and Industry, pp 11-16. The important question of geographical coverage is one issue. The effect of the House of Lords decision *Scher v PPB* [1994] 2 WLR 593; [1993] 2 WLR 479, is that services business written by an authorised company from the UK will be covered by the PPA irrespective of the residence of the policyholder or the location of the risk. This decision means that, for example, American structured settlements funded by annuities purchased in the UK will be covered. The insurance industry is pressing for an amendment to the PPA to remove such outward business from its scope.

payments can no longer be free from income tax. A formal court order would probably have the effect of so discharging the debt, even if the parties consented to the order.[58] On the question whether this problem is significant, as Richard Lewis points out,[59] the number of personal injury cases which actually proceed to court is not great. It is also possible to adjourn proceedings and ensure a structured settlement is put in place before the court issues a formal order awarding the plaintiff a lump sum. In some cases, however, this is not easy to achieve,[60] and it will be in the more serious cases that a court appearance is likely to be necessary. In order to facilitate these few, but important, cases where extreme care is needed, and to clear up any doubts about whether an order could attract the tax benefits once validly made, we **recommend that:**

9(viii) The legislation should include a provision that the tax regime should apply to a structured settlement agreement incorporated in a court order made with the consent of both parties which otherwise qualifies (Draft Bill, Clause 4).

Power to make a consent order

3.78 The recommendation we have just made assumes that the court has power to make such a consent order. In the consultation paper we observed that there is some uncertainty in this regard, even though there is case law supporting such a power.[61] 92% of consultees thought that this should be put beyond doubt and David Foskett QC argued strongly that legislation is necessary because the courts have no power to award periodic payments and the consent of the parties would make no difference where no such jurisdiction exists. We therefore **recommend that:**

9(ix) The legislation should contain a clause confirming that the courts have jurisdiction to make an order by consent that the parties may settle the action by way of an agreement that satisfies the statutory criteria (Draft Bill, Clause 4).

[58] The Inland Revenue has apparently never been presented with a draft consent order, and therefore has not had to form a view as to whether the constraints of the existing law would prevent the adoption of a form of words such as to achieve the tax effect desired by the plaintiff. We understand that the Revenue has not taken the position that it is *impossible* for a court order to be drawn in terms which provide for the payment of a series of capital payments to the plaintiff over a period of time or for the plaintiff's lifetime. As with the structured settlement agreement, the taxation consequences would be determined by the exact wording of the order, and would depend on whether liability was crystallised by the order.

[59] Richard Lewis, *Structured Settlements: The Law and Practice* (1993) p 74.

[60] For example, where an insurer has to satisfy a judgment obtained against the defendant for liability in respect of a road accident, under s 151 of the Road Traffic Act 1988, the liability arising 7 days after the date of the judgment.

[61] *Burke v Tower Hamlets, The Times* 10 August 1989 (Drake J).

Structuring interim and provisional damages

3.79 Interim payments in respect of damages are provided for in Part II of Order 29, rule 11 of the Rules of the Supreme Court.[62] Where the court is satisfied that the defendant has admitted liability, or that there is an order for damages to be assessed, or that if the action proceeded to trial the plaintiff would obtain substantial damages against the defendant or any of them, if more than one, it may make an order for an interim payment to be made in such amount as it thinks fit, not exceeding a reasonable proportion of likely damages after taking into account any contributory negligence, set-off, crossclaim or counterclaim. The defendant must be an insured person, a public authority or a person with the means to make the payment. Our empirical survey revealed that about one in four of those in Band 1 were aware of the availability of interim damages, and that knowledge increased with the size of the damages award so that two-thirds of those in Band 4 knew about interim payments. The likelihood of seeking such an award and receiving one unsurprisingly increased with size of the award - only 12% of Band 1 respondents asked for and received an interim payment while nearly two-thirds of Band 4 respondents did so. Nearly all of those who said they asked for an interim payment were given one, and the number of interim payments received also increased according to the size of the award.

3.80 Provisional damages, which are intended to deal with cases in which the plaintiff can prove there is a possibility, but no more than a possibility, that a disease will develop or that a deterioration will occur in her or his condition, are provided for by section 6 of the Administration of Justice Act 1982, whereby section 32A was inserted into the Supreme Court Act 1981.[63] Only the plaintiff can claim that a provisional damages award be made and an award is final as to immediate damages. The plaintiff can only claim further damages in relation to the occurrence of any 'feared event' specified by the court making the award of provisional damages. It follows that personal injury claims cannot be pursued indefinitely on the basis of an unsure prognosis, and the provisional damages award (immediate damages and interest) cannot be re-opened at a later stage to claim extra damages.

3.81 The courts have therefore been given the power to compensate certain categories of plaintiffs whose condition deteriorates. It was not envisaged that the provisional damages procedure would be used very often. Our survey findings supported this prediction. Only 4% of respondents in Bands 2-4 said that they claimed provisional damages, and only 1% said that they received an award. Plaintiffs must establish the existence of a "chance" which may arise at any time in the future that their condition will decline. The disease or deterioration in the plaintiff's physical or mental condition which develops must, however, be "serious". The Practice Direction of 1 July 1985 requires the judge to specify the disease or type of

[62] See para 4.1 below.

[63] See para 5.2 below.

deterioration it has been assumed will not occur for the purposes of the immediate award which will entitle the plaintiff to further damages.[64] Normally, the judge is also required to specify in the judgment the period within which the application for further damages must be made. The tendency, however, appears to be not to set a limit at all. RSC, Ord 37, r 8(3) also allows the plaintiff to apply, within the specified period, for extension of that period. The plaintiff may make more than one such application.

3.82 We observed in the consultation paper[65] that provisional awards of damages cannot at present be structured, since they result from a court judgment and therefore do not attract the tax concessions. Interim damages cannot be structured for the same reason. Because we considered that some limited form of reviewability is desirable and practicable, we also considered that it ought to be possible to structure provisional awards where both parties consent. Similarly, there is value in allowing interim damages to be structured if the parties desire it. The statutory schemes provide reasonable limits to reviewability which protect both plaintiffs and defendants. Because interim payments may be substantial, the opportunity to structure them would be useful. Throughout the consultation, it has been made clear to us that early rehabilitation is essential for the larger cases, and that interim payments are invaluable for this purpose. Structuring an interim payment may provide the best means of allowing a rehabilitation scheme to be set up.

3.83 Because provisional damages can also be substantial and in fact may be the only award that the plaintiff receives, the case for structuring them is even stronger than for interim damages. The defendant will be able to use the initial provisional damages award to purchase the appropriate annuities and there will be no suggestion that those annuities will be cancelled or altered in the future. The happening of the 'chance event' creates further loss and future needs for the plaintiff and it may be that the plaintiff will for this reason also wish to structure the final provisional award, or not, as the case may be. But this should not affect any existing structure.

3.84 90% of those consultees who looked at this issue agreed with our proposal. We have therefore decided that both interim and provisional damages should be capable of being structured, but only where both parties consent, since the nature of structuring is such that the terms and arrangements require the cooperation of both parties. We therefore **recommend that:**

9(x) It should be possible to structure interim and provisional damages where both parties consent and the court should be able to make appropriate orders (Draft Bill, Clause 4).

[64] [1985] 1 WLR 961.

[65] Consultation Paper No 125, p 84, para 5.21.

Judicial power of review

3.85 In the consultation paper we asked if the court should be able to impose restructuring on a voluntary structured settlement by allowing one or both of the parties to apply to the court for review. We did not think it would be consistent to recommend that courts should be given power to impose conditions of review on structures which have been reached by consent if the courts have no initial power to impose structured settlements. On consultation a majority of consultees opposed review generally. Because we do not recommend a judicial power to impose structured settlements, and also for the reasons set out in paragraphs 3.146 to 3.154 below, we adhere to our original view that a judicial power to review voluntary structured settlements should form no part of the new regime. However, we have recommended that provisional and interim damages be capable of being structured,[66] and some of the flexibility which is favoured by those advocating a power of review can be achieved by structuring provisional and interim damages in appropriate cases.

Motor Insurers' Bureau (MIB)

3.86 The MIB is a non-statutory body - it is a guarantee fund set up by all motor insurers in order to compensate the victims of uninsured and untraced motorists who cause injury negligently. In cases where the defendant is an uninsured driver the MIB has agreed[67] to satisfy a judgment if that judgment is not met in full by the judgment debtor within seven days. The Bureau is required to meet the damages awarded for personal injury, damage to property (subject to an excess of £175), costs and interest. It is irrelevant to the MIB's obligations why the judgment debtor has failed to meet the judgment. In the consultation paper we noted that because payments are effectively ex gratia, they cannot be structured at present. The victim is not a party to the agreement which establishes the liability of the MIB and has no direct right of action against the Bureau itself.

3.87 Under the "Untraced Drivers" Agreement[68] the MIB has agreed to pay compensation to applicants who are victims of negligent untraced motorists. The consideration of an application under this agreement is a non-adversarial process. Full investigation is made by the Bureau and there is a right of appeal to an independent arbitrator if the applicant is dissatisfied. Compensation is paid for personal injury alone. A limited contribution is made to costs. The applicant cannot bring proceedings since there is no known defendant and the applicant does not have any right of action against the Bureau. In the consultation paper we noted that

[66] See para 3.84 above.

[67] By an agreement concluded on 21 December 1988 between the MIB and the Secretary of State for the Environment. The agreement and the other agreements which establish the liabilities of the MIB may be determined at any time by the Secretary of State or by the MIB by 12 months notice in writing.

[68] 22 November 1972 and supplementary agreement of 7 December 1977.

uncertainty about the Bureau's tax status is at present preventing structuring in these cases - it pays only minimal corporation tax and would be unable to reclaim the tax which is deducted at source by the life office. In any event, payments are again ex gratia.

3.88 The MIB also deals with cases where the defendant was driving outside the terms of an insurance policy. These cases are dealt with in accordance with the terms of the "Uninsured Drivers" Agreement, but are handled by insurers who have issued a policy covering the risk but whose policy is not applicable to the specific accident. These obligations are paid by the individual insurers from their own funds. In the consultation paper we noted that the Inland Revenue has advised that structuring is possible in these cases. The Revenue opinion was not specific and the MIB is not aware of any case in this category which has been successfully structured.

3.89 The Bureau also has obligations with regard to motorists visiting the United Kingdom and in respect of United Kingdom motorists travelling overseas. Where a foreign motorist is involved in an accident in the United Kingdom, the victim may submit a claim to the MIB which will deal with it directly or through an agent. Funds for settlement come from the foreign motorist's insurers overseas or, where uninsured, from the MIB, which is later reimbursed by its equivalent in the foreign country concerned. We did not consider this category in the consultation paper. The MIB regards it as another category of cases in which victims cannot have claims satisfied using a structured settlement under the existing regime, because where the necessary funds originate overseas, there are complex taxation problems, notwithstanding the fact that the initial obligations fall on the MIB. If the foreign insurer must pay tax on the annuity under its domestic law, it will be unable to reclaim the amount by which it grosses-up the payments to the plaintiff. If there is a double tax treaty with Britain, the annuity may be paid gross to the plaintiff, thus saving the foreign insurer the need to reclaim the amounts.

3.90 In the consultation paper we expressed the provisional view that the MIB should be able to structure.[69] 99% of those who considered these difficulties agreed. It is inequitable that a particular class of plaintiff is unable to structure simply because she or he has the misfortune of being injured by a defendant who is not insured. In the consultation paper we suggested that if rationalisation of the tax regime was adopted, and the MIB was then able to enter into structured settlements in the form of a suitable model agreement, in our provisional view the tax advantages should be available.

3.91 In the event, however, we can only recommend a very limited reform. The MIB occupies a unique position as a "fund of last resort", and it therefore argued that it was never intended nor were there any expectations that compensation would be

[69] Consultation Paper No 125, para 3.36.

paid on "exactly" the same basis as ordinary common law damages. However, the MIB's response on consultation did acknowledge that it is inequitable that accident victims should be denied the benefits of a structured settlement simply because they had the misfortune to suffer injury at the hands of a person who has failed to comply with the legal obligation to insure. The MIB therefore, has been and continues to be working to investigate the feasibility of structured settlements.

3.92 The MIB would be reluctant to take on the administrative burdens imposed by the present complicated process of structuring. These would be eliminated to a large degree by our proposals as to rationalisation. The MIB also raises difficulties with the current 'topping up' tax requirements which would require it to review its Articles of Association, its system of levy and its general financial structure. However, removal of the requirement to 'top up' should avoid that difficulty. In fact, the MIB acknowledges that if the life office were to pay instalments directly to the plaintiff, most of its problems would be overcome so far as victims who submit claims under the terms of the "Uninsured Drivers" Agreement are concerned. Although this would be a limited reform, it would include the majority of the victims who come into contact with the MIB.

3.93 The MIB has said, however, that other 'practical and complex' problems would remain. One of these is that it would not be able to intervene in an action prior to judgment since it has no legal standing. There is nothing, however, to exclude the acceptance of compensation by the plaintiff of a settlement of the claim which is negotiated between the plaintiff and the defendant or the Bureau. The Bureau enters into negotiations with the agreement of the uninsured motorist, and it seeks to do this as often as possible to avoid the cost of a full trial. If an uninsured driver refuses to co-operate with the Bureau, it may not be able to be involved in negotiations, since to do so would conceivably prejudice the defence, and in the event of a settlement, the defendant's right to contest that the Bureau has the right to recover from her or him. The MIB observed on consultation that lack of cooperation by the uninsured motorist used to occur more often in the early days of the scheme than it does now. In most cases, therefore, the MIB deals with its voluntary liability by negotiation and settlement out of court.

3.94 The MIB did not specify what the other 'practical and complex' problems might be. Its preferred solution to all the difficulties was that tax-free status should be given to all annuities bought by defendants in actions for personal injury. We deal with and reject that proposal at paragraphs 3.116 to 3.123 below. However, we have concluded that because consultees expressed a strong desire for the MIB to be able to offer structuring if appropriate, our recommendations for reform by rationalisation of the existing regime should take account of this if possible. Because the liabilities of the MIB are voluntary and extra-statutory, and because it is established by Articles of Association and Regulations, we cannot usefully do more than take account of its position in making recommendations. Our intention is to

facilitate the use of structuring by the MIB as far as possible. It lies with the MIB, however, to adapt its own regime to overcome any remaining practical problems. Since the MIB expressed agreement with our provisional view in the consultation paper that it should be able to offer structures, we hope that this will in due course be done. But if the MIB does not manage to overcome the remaining practical difficulties, we consider that our recommendations should have the effect that at least in only a minority of cases involving the MIB would structuring remain impracticable.

3.95 However, we would not wish the MIB to possess greater powers than those exercised by a court. The MIB has observed that if it could offer a structured settlement under the "Untraced Drivers" Agreement, it would also be in a position to impose one. While the MIB does not in fact see this as a problem, because it regards itself as having acquired substantial experience in acting in the interests of plaintiffs and using a non-adversarial process, we do not consider it desirable that the MIB should be able to exercise powers in relation to a structure which are greater than those of a court, or which would allow imposition while negotiated structures operate on a voluntary basis. Since we have not recommended a judicial power of imposition, and since allowing the MIB to structure claims it has agreed to meet under the "Uninsured Drivers" Agreement would deal with most of the cases dealt with by the Bureau, we consider that these are the natural limits to desirable reform. We therefore **recommend that:**

9(xi) The draft legislation should include the MIB where it has purchased an annuity on structured terms as defined in the legislation, and where it has undertaken to pay damages in satisfaction of a claim or judgment against an uninsured driver (Draft Bill, Clause 5).

3.96 The MIB also raised difficulties relating to EC law which we refer to above,[70] which it could foresee arising where overseas insurers from the EC are trading on the basis of 'freedom of services'. It observed that whilst the market in this respect is at present limited, expansion can be anticipated once the regime is expanded to 'Mass Risks' (effectively the private motorist). Whilst services insurers will be required to appoint a claims agent in the country where they are providing services and that claims agent must be capable of representing the insurer before a court, the funding arrangements for claims settlements will emanate from overseas as in the Green Card System. We consider that our recommendation for a statutory tax free status for annuities purchased from insurance companies in EC Member States authorised to carry on business in the United Kingdom, which are used to fund structured settlements, will meet most of the difficulties envisaged by the MIB, subject to the limitations on policyholders protection.

[70] See paras 3.71-3.76 above.

The scope of the Bill

3.97 We envisage that our recommendations should have the effect of splitting structuring into two parts, resulting in a dual structured settlements regime made up of common law structures and statutory structures. Common law structuring will continue as at present, with the parties complying with the requirements of the ABI/Revenue agreement, and submitting documentation to the Revenue for approval where a case appears unusual where doubts exist. Self-funded structures should make up the bulk of this class. We would expect structures funded by the purchase of annuities to follow the statutory scheme, which, while built around periodic payments which are free of income tax in exactly the same way and to exactly the same extent as under the existing common law scheme, will differ in that the administration of such structures will have been significantly rationalised and simplified. As such, we would expect this form of structuring to be much more attractive to defendants and defendant insurers in appropriate cases. In theory, the scope of the common law structured settlements regime could be wider,[71] but in practice it applies to all forms of negligently caused personal injury. The scope of both schemes is therefore effectively the same - they are, in fact, both aimed at the same class of plaintiff.

3.98 We also reiterate the point we made earlier[72] about the scope of the draft Bill presented with this Report for implementation. We have deliberately left the extent clause in the Bill open.[73] The Law Commissions Act 1965 and our programme item prevent us from making recommendations for Northern Ireland and Scotland. Revenue law and EC law, however, extend into both these jurisdictions, and we therefore consider it essential that a co-ordinated approach should be taken to implementation of our recommendations on structured settlements.[74] The Scottish Law Commission and the Law Reform Advisory Committee for Northern Ireland have advised us that such provision is likely to be welcomed in Scotland and Northern Ireland.

The shape of the Bill

3.99 We recognise that the draft Bill in its current form is somewhat artificial, because drafting rules require that clauses with any Revenue implications must become part of a Finance Bill in order to be passed. This means that the text of the draft Bill will have to be divided in order for it to be implemented. We therefore envisage that all of the clauses which provide that structured settlement payments should continue to be free of income tax should be inserted in a Finance Bill, leaving the balance to

[71] See paras 3.5 and 3.59 above.

[72] See para 3.9 above.

[73] Draft Bill, Clause 9(6).

[74] The same must apply, where relevant to the other jurisdictions, to our recommendations for reform relating to actuarial evidence (see paras 2.15-2.36 above) and provisional damages (see paras 5.23 and 5.37 below).

be contained in a Damages Bill.

Existing legislation referring to structured settlements

3.100 We have examined the existing primary and secondary legislation referring to structured settlements. Section 88 of the Social Security Administration Act 1992 exempts the periodic payments in a structure from the recoupment scheme by which the Department of Social Security recovers state benefits paid to a plaintiff as a result of an accident.[75] The section is headed "structured settlements" and in effect it ensures that there is full recoupment of all the benefit received up to the date of entering into the structured settlement agreement, no matter how small the initial lump sum (the threshold above which the recoupment scheme generally operates is £2,500). We have examined section 88 and we do not consider that it requires amendment to take account of the provisions in our draft Bill since its definition sections appear compatible with those we propose. Similarly, the Court of Protection (Amendment) Rules 1992, which contain a new Rule 82A referring to structured payment of damages, appear to be compatible with the statutory scheme we recommend. No consequential amendments are required.

Criminal Injuries Compensation

3.101 In the consultation paper we referred to the question of whether payments made by the Criminal Injuries Compensation Board (CICB) may be the subject of a structured settlement. It was not clear whether the CICB was able to purchase annuities and administer structured settlements because of the status of the Board itself. The Board was set up under the prerogative but legislation (never brought into force) had been passed to put it onto a purely statutory basis.[76] The payments it made to victims of criminal injury under the scheme it administered were "ex gratia" and they therefore did not comply with the requirement that there must exist an antecedent debt if annuity payments are to be treated as payments of capital and not subject to tax. The ex gratia nature of the payments was in reality a fiction since the Board was instructed and compelled to make payments to all who satisfied the requirements of the scheme, refusal to do so being susceptible to control by judicial review.

3.102 We provisionally concluded in the Consultation Paper that it seemed desirable for the CICB to be able to offer structures when making awards.[77] We observed, however, that the Criminal Injuries Compensation Scheme might itself require amendment. Paragraph 12 of that scheme provided that compensation was normally

[75] See para 4.9 and n 11 below.

[76] Sections 108-117 of the Criminal Justice Act 1988 established the scheme, but under s 171(1) they were to come into effect on a day to be appointed. A revised 1990 scheme, (Written Answer *Hansard* (HL) 8 December 1989, vol 163, cols 410-417, copies also available from the Board), came into force on 1 February 1990.

[77] Consultation Paper No 125, para 3.36.

to take the form of a lump sum. However, this was subject to paragraph 9, which granted a general discretion to the Board to make special arrangements for the administration of an award. This provision, combined with the fact that applicants did not have a 'right' to compensation under the scheme, and that decisions of the Board were final, with no right to appeal, meant that, if the CICB was in a position to structure any award it made, it would have the power to impose such an award against the wishes of the plaintiff.

3.103 Since the consultation paper was published, the Government has replaced the Criminal Injuries Compensation Scheme with a new, tariff based scheme on 1 April 1994. A White Paper setting out the proposed scheme in detail was published in December 1993.[78] Under the new scheme, compensation is no longer assessed on the basis of common law damages, and injuries of comparable severity are grouped or banded together in a tariff of awards, each band attracting a single lump sum payment. Tariff levels range from £1,000 to £250,000, there is no separate payment for loss of earnings or medical expenses, and the basic rules of eligibility remain largely as before. Appeals will be considered first by the Criminal Injuries Compensation Authority (an internal review), and then by an independent appeals panel, consisting of members drawn from the medical and legal professions, the business and commercial world and other professional or responsible groups appointed by the Secretary of State. The new scheme is to be non-statutory at first and payments will continue to be made on an ex gratia basis.[79] It is currently the subject of an application for judicial review.[80]

3.104 99% of those who considered the difficulties mentioned in paragraph 3.101 above agreed that it would be desirable to remove any uncertainties which may surround the ability of the CICB to offer structured settlements. In principle, it could be argued in relation to the new criminal injuries compensation scheme that because the new tariff levels may still produce awards of up to £250,000, structuring would

[78] Compensating Victims of Violent Crime: Changes to the Criminal Injuries Compensation Scheme (1993) Home Office and Scottish Home Office and Health Department, Cm 2434.

[79] See CICA outline of the new scheme, Issue Number One, (3/94), and Guidelines, available from the Criminal Injuries Compensation Authority, Tay House, 300 Bath Street, Glasgow G2 4JR.

[80] *R v Secretary of State for the Home Department, Ex parte the Fire Brigades Union and others, The Independent* 24 May 1994. A consortium of 11 trade unions, backed by the Law Society, made the application arguing that s 17(1) of the Criminal Justice Act 1988 imposes an obligation on the Home Secretary to bring into force the old statutory scheme and the Home Secretary has acted improperly in deciding to bring in another different scheme. Staughton LJ held that the Home Secretary was not obliged to bring the statutory provisions into force, and that therefore there was nothing irrational or improper in his deciding not to do so, or in bringing in the new scheme under the common law. The application was therefore dismissed. Leave to appeal to the Court of Appeal was granted. No awards under the new scheme can be finalised although applications are being processed. There is a backlog of cases under the old scheme of nine months for first decision casework and two years for appeals.

still be of real benefit in some cases where such awards are made. It could still be argued that victims of personal injury who happen to come under the terms of the new criminal injuries compensation scheme would be disadvantaged as a class compared with others if structuring is not possible. Although our rationalisation reforms should remove many of the administrative difficulties, the new CICB scheme would still require amendment because payments under the new scheme are still ex gratia. Nevertheless, we consider that it would be undesirable for the new Authority to have greater powers than ordinary courts in relation to structured settlements. For this reason, in our view, any powers eventually vested in the Authority to grant structured settlements should not include a power of imposition.

3.105 Principle aside, it is apparent that there are significant practical restraints on what this Commission can recommend in the way of reform. We are aware that prior to the development of the proposed new scheme, active consideration was being given to the question whether it would be practical or appropriate to introduce a concept of structured criminal injuries compensation awards.[81] All such work ceased, however, in preparation for the new scheme and none is currently being carried out while the new scheme is being 'settled in' and its legality is being tested in the courts.[82] We understand that the new Authority supports the idea of structuring in principle and that it hopes to take the matter forward at some time in the future but cannot say when. In the light of this background we do not consider that the CICB can at present realistically be part of the legislative structured settlements scheme we have recommended. The strong response on consultation reinforces our view, however, that it ought to be possible to offer structures within the context of any criminal injuries compensation scheme, and we consider that, assuming the new scheme is upheld by the courts, there is a need for those administering the new scheme to deal with this issue as soon as practicable. Alternatively, should the old scheme prevail, the matter of structuring criminal injuries compensation awards should be reconsidered.

Government departments

3.106 We observed in the consultation paper that a number of awards in medical negligence cases had been structured by the National Health Service (NHS). In these cases, an 'Options Appraisal' report is prepared for approval by the Department of Health. If an annuity is to be purchased by the NHS, the options appraisal must show it as the most favoured option **and** it must meet Treasury guidelines for the cost to the Exchequer as a whole. The discount to the Health Authority, and the fact that the plaintiff is less likely to run out of funds and to have to revert to relying on NHS care, are weighed against the loss of tax which would have accrued to the state from the tax on the income of a conventional award.

[81] Letter from the Home Office to the Law Commission, 14 July 1992.

[82] Telephone advice from Home Office representative on 13 May 1994. See also *The Independent on Sunday* 8 May 1994, p 10.

Initially, a number of Health Authority structures were annuity-based and annuity backing was preferred by plaintiffs' representatives because they had reservations about entering into a long term financial commitment with a Health Authority. Crown agencies usually self-insure, and in 1992, the Department of Health and the Treasury began to examine ways to facilitate structures by Health Authorities self-funding structures. Self-funding means that Health Authorities could simply make periodic payments as and when they were due from their own resources. The self-funding of structures was seen as financially attractive: there should be cash-flow savings to the Authority, and Health Authorities could become like 'miniature life offices', because plaintiffs who die prematurely would fund those who live into old age.

3.107 On 21 August 1992, a case involving a 10 year old girl became the first medical accident case to be settled by means of a self-funded structured settlement.[83] The negotiation of structured settlements on this basis is not straightforward. When faced with the possibility of the NHS self-funding structured settlements, some plaintiffs' solicitors indicated that they preferred annuities, but they would accept self-funding if the settlement was guaranteed in some way by the government. At the time the consultation paper was published the Department of Health was responding to this issue by looking into the possibility of the Secretary of State for Health guaranteeing self-funded structured settlement payments by Service Bodies (including NHS Trusts). We believed that such a development should be encouraged and indeed that consideration should be given to extending the approach to other Government departments which may be subject to personal injury suits. It seemed unfair that a plaintiff could be disadvantaged through having the misfortune to suffer injury at the hands of a particular type of defendant - in this case, a government employee - and for no other reason. We invited comment on this proposition.

3.108 92% of those who responded on this issue agreed with our view. There was some concern expressed about the complicated requirements of structuring a settlement with the NHS. This is because up to three bodies may fund the settlement: the District Health Authority, the Regional Health Authority and the Department of Health.[84] NHS bodies account for the vast majority (if not all) of such self-funded

[83] *O'Toole* (1992) 136 SJ 880.

[84] For a detailed discussion of the complexities, see Richard Lewis, *Structured Settlements: The Law and Practice* (1993) pp 253-256. In summary, the ultimate responsibility for funding a structure depends on the overall size of the settlement and the date liability arose. The District will normally be responsible for the first £30,000, the Region for the next £270,000 and, for claims prior to April 1991, any further amount is divided with the Region responsible for 20 per cent and the Department of Health for 80 per cent. Cases relating to later years are the full responsibility of the Authorities and trust hospitals which must make arrangements to bear the full costs involved. Eventually structured settlements will be made in the name of the trusts, as they will be predominantly responsible for providing health care and for employing staff.

structured settlements entered into by Government departments. Individual departments are left to determine their own approval processes, with reference to the Treasury where relevant, although we are not aware of any other departments entering into self-funded structured settlements as yet.[85] In the case of the Department of Health the defendant Health Authority is required to forward the case for a structured settlement in an options appraisal report, supported by case documents, to qualify for assistance with funding.

3.109 Assurance about the security of payments from a Health Authority, if not a guarantee, is provided by a letter from NHS representatives at present, not the Secretary of State, which is acceptable to most plaintiffs' representatives and the judiciary. The bottleneck of cases awaiting Treasury approval and guarantee letters which existed at the time the consultation paper was published, has now disappeared. Structures are being offered by the NHS, and the general approach now being followed in these cases, while not ideal, does appear to be working satisfactorily. Because of this we make no further recommendation for change. We understand, however, that the Department is still seeking legislation that would allow the Secretary of State to provide an appropriate Crown guarantee. We support this process. The legal effect of a letter of guarantee is untried in court and restrained by the legal processes. It would be preferable to have statutory powers to give a guarantee, in particular because NHS trusts are likely to investigate self-funded structuring in substantial cases in the near future. Claims must be met out of the trust's own resources, and because of this, letters of guarantee may appear less attractive to plaintiffs and their advisors. We therefore support legislation giving the Secretary of State the power to provide an appropriate Crown guarantee. However, we are advised by the NHS that such a guarantee is probably limited to catastrophic scenarios such as the dissolution of a Health Authority, because the NHS, while guaranteeing the funds, cannot force a Health Authority to spend them on a structure, although they are earmarked for that purpose. A plaintiff would have to resort to the courts to enforce the agreement in such a case, but that seems to us to be entirely appropriate as long as she or he was made fully aware of this possibility at the outset. The possible dissolution of NHS bodies has been a concern of plaintiffs' representatives, and we therefore consider that a legislative guarantee such as that proposed would be valuable additional protection for plaintiffs accepting self-funded structures from such bodies.

3.110 A general solution applicable to all departments should be the longer term aim. Other departments may wish to offer self-funded structures. The Criminal Injuries Compensation Authority has expressed an interest in a coordinated approach by Government departments in relation to structuring and especially the revenue implications of self-funding for the state. We would strongly support such a development.

[85] The MOD is considering it. See (1994) 91/22 Law Soc Gaz 6.

Self-funded structured settlements generally

3.111 Our proposals for rationalisation do not extend to self-funded settlements, which mainly involve the Department of Health. It is however, conceivable that a large self-insured corporation might also consider providing periodic payments if its tax position allowed and if the plaintiff was prepared to accept that the arrangement was secure. We propose no reforms in relation to self-funding, which is a manifestation of structuring following its own line of development and upon which we received no representations or proposals for reform. If our rationalisation proposals are enacted, the existing law on what constitutes "capital" and the present arrangements as to tax would not be affected and would enable self-funded settlements to continue to exist in tandem with those backed by annuities. Statutory structured settlements would comprise the bulk of structures, and common law structured settlements would make up the balance.

Periodic payments

3.112 In the consultation paper we left aside the larger question of whether the judiciary should have power to grant awards of damages in the form of periodic payments. This was because the focus of the paper was to look at the enhancement and effectiveness of existing techniques for awarding damages other than by way of lump sum. We commented, however, that at some stage in the future, this question might be the subject of a specific review. Only three consultees commented on this issue and two of these were of the opinion that since structuring has only recently been developed, it was too early to consider a general power to make awards of damages in the form of periodic payments.

3.113 In the light of this almost non-existent response, and in the light of the reforms we propose for structured settlements, we do not have any recommendations to make on this issue. Structured settlements appear to be a market response to the difficulties which prevented the implementation of the recommendations of the majority of the Pearson Commission as to periodic payments.[86] They recommended a scheme of periodic payments confined to cases of death or serious or lasting injury. Under this scheme, courts would be obliged to order such payments unless the plaintiff could show that a lump sum award would be more appropriate, but parties would be free to settle claims by lump sum **or** periodic payment. A plaintiff could apply for the commutation of a periodic payment order to a lump sum, and the court would have a discretionary power to make such an order. Periodic payments would be subject to review on the application of either party but only if there were changes in the plaintiff's pecuniary loss as a result of changes to her or his medical condition. Periodic payments would be administered by insurers at least monthly. The payments would be revalued annually in line with the movement in average earnings.

[86] The Pearson Commission Report (1978), vol 1, paras 555-614. See para 2.1 above.

3.114 These recommendations were seen by a minority of the Pearson Commission as too far reaching and complicated for a number of reasons.[87] The review procedure would be an undesirable continuation of the adversarial process and the continuing uncertainty as to the defendant's liability was regarded as unacceptable, with the plaintiff becoming the pensioner of the defendant. They felt that more actions would proceed to trial, causing substantial and unnecessary costs. The costs of administering claims would increase as periodically fresh medical evidence and review hearings would be required. Finally, they felt that plaintiffs preferred lump sums and that they should not have their bargaining position weakened by a judicial power to impose periodic payments.

3.115 The majority of the Pearson Commission rejected a suggestion that the Government should make available index linked bonds, in which insurers could invest in order to cover their inflation proofed liabilities - they did not feel able to recommend such a substantial innovation for the limited purpose of financing their recommended periodic payments scheme.[88] ILGS have now been issued in any event, and the structures market, providing a voluntary and flexible form of periodic payment, has developed because of the existence of ILGS. The purpose of our Report is to address difficulties in the structured settlements regime and for that reason, and because structuring is in itself a form of periodic payment, periodic payments of the type envisaged by the majority of the Pearson Commission do not raise law reform issues at this time.

All annuities bought with personal injury damages to be tax free

3.116 We have recommended that the tax regime should be altered to allow life offices to pay instalments of damages direct to plaintiffs, and that the annuities bought by defendants or defendant insurers to fund structured settlements in personal injury actions should be free of tax at the outset.[89] We also raised for consideration in the consultation paper the possibility of legislation extending tax free status to the proceeds of all annuities bought with personal injuries damages, whether by defendants or plaintiffs. This would require a major change to the tax regime.

3.117 We identified a number of advantages in such a change. Payments would be secured under the PPA[90] over the period of the loss for the plaintiff who has suffered personal injury, and there would be no need for the state, and hence the taxpayer, to act as a backstop. We accepted these advantages as desirable in recommending the rationalisation of the structured settlements regime. This wider proposal would

[87] *Ibid*, the minority opinion, paras 615-630.

[88] *Ibid*, para 603.

[89] See paras 3.53-3.58 above.

[90] See para 3.63 above.

also remove the problems associated with the discount,[91] since the plaintiff could go into the market and directly purchase a similar package without foregoing tax advantages. The administrative costs and difficulties which are now deterring or preventing some insurers or other bodies from offering structures would disappear. The plaintiff would be able to rely on the provisions of the PPA if the life office collapsed. We also saw the proposal as eliminating the problems which the courts are now facing in assessing loss when attempting to take account of the incidence of future taxation.

3.118 We also considered the disadvantages of such a reform. Such a move could be described as further favouring the small percentage of successful tort plaintiffs who suffer future financial loss,[92] because such plaintiffs represent a fraction of all disabled people, although we did acknowledge that it is these cases which involve very large sums which should be better preserved if possible. Secondly, it was questionable whether allowing plaintiffs to purchase annuities to fund their own tax-free periodic payments would make best use of the large funds involved in the way structuring does at present. This is because there would be no guarantee that the plaintiff would seek out and receive adequate advice, either on future needs or on the best annuity to meet those needs. In fact, the plaintiff would be in the same difficult position as she or he would be in having to deal with the investment of a lump sum. It is apparent that part of the attraction of structuring is the forward planning which goes into determining the sort of annuities that might be purchased - the change as outlined might detract from the focus on need which we see as a definite advantage of structuring.

3.119 A further disadvantage we foresaw was a possible return to negotiation and achievement of a settlement figure in the conventional manner, with a consequential loss of negotiation tools where the parties seem to be very far apart, and a consequential loss of savings in time and expense. It was unclear to us what would happen to the process of negotiation generally. Defendants might prolong negotiations by holding out for discounts which would allow them to share in the proposed tax savings, even though they could not legitimately claim some portion of these savings to cover non-existent administration and cash-flow costs. It seemed unlikely that structuring in its present form would simply co-exist with the wider proposal for reform.

3.120 We also considered that such a new regime would require strict policing by the Revenue to ensure that it was not misused for tax avoidance purposes. We thought it would be desirable that the annuities which would now be tax-free should be limited to those which were bought on the plaintiff's life, and that they should be

[91] See paras 3.125-3.129 below.

[92] Identified as 7.5% of all claims in the Pearson Commission Report, vol 2, p 14, para 44. See para 2.1 above.

payable only to the plaintiff, and non-assignable and non-commutable by the plaintiff. While careful drafting of key definitions such as 'personal injury', and the development of appropriate forms would certainly be possible, the attendant costs might be too high to justify the benefits sought. We sought views and comments on the desirability of this proposal.

3.121 There was a surprising and significant response in favour of this suggested reform. 84% of the 44 consultees who considered this proposal supported it. It is significant that in this group there was a high representation of those with plaintiffs' interests as their concern. Most of them did not seem concerned about how such a system would affect structuring generally. The Law Society reported mixed views and reserved its position. The General Council of the Bar was in favour. Those in favour recognised the need for safeguards, such as those we suggested in the consultation paper[93] and additionally:

- the purchase of an annuity within a specified period;
- prior court or Revenue permission to use the funds in this way;
- prior investment advice must be sought.

A small number of consultees wanted to extend the proposal to cover other sorts of investment of personal injury damages.

3.122 We do not think the time is right for such a reform. The reasons given for supporting the proposal included the wish to avoid all the current disadvantages of structuring and the risk of failure of the general insurer. These problems will be corrected by our proposals as to direct payment by the life office and as to amendment of the PPA to provide full security for structures.[94] The only significant additional reason is that this proposal preserves choice for the plaintiff as to what use a damages award may be put to. The majority of those who supported the proposal still wanted to hedge it around with some controls, thus negating choice to a degree, and supporting a paternalistic approach to how awards of damages might be spent.

3.123 Consultation revealed that the non-adversarial nature of structuring was seen as very beneficial, and there was a real fear that this benefit would be lost on a return to conventional methods of negotiation which focus only on the lump sum, which the plaintiff would then be able to structure if desired. Consultees who favoured this proposal also gave us little guidance as to what they thought might happen to the existing structuring regime. For these reasons, we do not consider a reform of this nature desirable at this stage and we prefer to rely on the rationalisation recommendations we have already made. Such a radical reform could always come

[93] See para 3.97 of Consultation Paper No 125.

[94] See paras 3.54-3.70 above.

later, after rationalisation has taken hold, if there is still a perceived need for it. Accordingly, we do not recommend that all annuities bought with the proceeds of personal injury damages should be made tax-free.

Annuities bought with proceeds of first party insurance to be tax free

3.124 One consultee suggested that monies from first party insurance[95] used to structure should also attract the tax exemption if structured. We do not recommend this. If this proposal was accepted, it could then be argued that people with general health insurance should be able to structure in the same way and that premiums for all first party insurance should be tax deductible. The line would be hard to draw. This reform would also have the effect of offering tax incentives to those well enough off to afford health and accident insurance, whilst ignoring those forced to rely on the state.

Monitoring the negotiation process

The discount

3.125 In the consultation paper we described how an insurer will often try to take full account of the entire cost of a structured settlement by seeking a discount on the amount structured. The average discount at that time was about 10% of the purchase price of the annuity.[96] We gave some examples in the consultation paper[97] which tended to show that the discounts being requested by insurers were more than a plaintiff would have to pay in tax on the income generated by an ordinary annuity. In other words, a plaintiff who purchased an ordinary annuity with money from a lump sum award would in fact be paying less tax on that annuity than she or he would be conceding to the defendant insurer as a discount when agreeing to a structured settlement.

3.126 We observed in the consultation paper that in these circumstances, the advantages to the plaintiff of a structured settlement appeared not to be fiscal, but that the concession of a discount might take account of other elements such as the strength of the case, the desire to settle it and the desire to achieve certainty of future payments. Consultation has now convinced us that our examples, though technically correct, were not realistic, because they were based on the purchase of level annuities. It would be very unlikely for a structured settlement annuity not to be an increasing one since otherwise there would be no allowance for inflation. The ABI presented us with actuarial calculations which tended to show that increasing annuities would produce much higher tax savings for the plaintiff with a structured

[95] Where the plaintiff only is covered against the risk of personal injury or death in a number of circumstances. This may also include any injury which occurs while travelling in a vehicle which is also covered by the insurance.

[96] "Structured Settlements - A Practitioner's Viewpoint", a paper prepared for the Commission by Frenkel Topping Structured Settlements, May 1992, p 7. But see para 3.43 above. Average discounts currently appear to be 7.5%.

[97] At paras 3.28-3.29.

settlement, the implication of this being that average discounts at 10% of the purchase price of the annuity do not in fact absorb all of the tax savings made. There does therefore appear to be some element of fiscal incentive to a plaintiff in accepting a structure, in spite of having to agree to a discount.

3.127 In the consultation paper we asked what elements go into the determination of the discount. Insurers have always argued that a discount is required to offset the additional costs of a structured settlement, in setting up systems to administer payments and pass them on to the plaintiff, and in carrying the cash flow loss identified in paragraph 3.7 above. We asked in the consultation paper about the size of these costs. The majority of those who responded to the question thought that the costs are relatively small. Estimates ranged from 2 - 4% of the purchase price of the annuity. There was a general view that although the costs might be small, they **do** put insurers off structuring even though discounts are available. The lower annuity rates at present leave plaintiffs with less incentive to agree discounts at 10% but even with the new average of 7.5% it seems that discounts can be 3.5% - 5.5% greater than the administrative costs alone. This balance must therefore comprise elements relating to other facets of the negotiation. Consultees acknowledged that structures encouraged settlement and that the discounts reflect the strength of the case and, perhaps, contributory negligence, and the plaintiff's desire for certainty. Some consultees, including the Law Society, argued strongly that it is quite legitimate for defendants to share in the tax benefits, for these reasons. Conversely, 63% of those responding on this issue argued that discounts are not justified at all, either because the defendant should not benefit from the tax incentives, or because there is no reason why the plaintiff should pay for the administrative costs.

3.128 We agree with the view expressed by Richard Lewis, that the approach to discounts should remain flexible, since they are only part of a complex negotiation process.[98] A plaintiff may concede a higher discount if able to obtain a favourable rate of interest on the monies outstanding, or an insurer may accept a lower discount if the plaintiff has agreed to the intermediary being paid by commission, and thereby indirectly by the plaintiff, or if, as is the case at present, rates of return on annuities are low. Our recommendations for rationalisation[99] should remove the administrative difficulties and costs. These would amount to between 2-4% of the total cost of the annuity and we would therefore expect that plaintiffs should be in a position to insist on further reductions in the discounts. The ABI and the Law Society confirmed this view in their responses.

3.129 As structuring becomes more common and better understood, there will also be less need for an incentive element to be reflected in the discount. We do not think that levels of discount should be controlled: good negotiation rests on flexibility which

[98] Richard Lewis, *Structured Settlements: The Law and Practice* (1993) ch 9, pp 132-137.

[99] See paras 3.57-3.58 above.

is prejudiced by mandatory levels. We do, however, consider it important for information about discounts to be readily available. We have recommended that courts be allowed to make consent orders for structures,[100] so that an opportunity for judicial observations as to reasonable levels of discounts will be created. Further guidance could be given by the Law Society which has already published guidelines on structuring and it could update these regularly. The guidance could include information on discount levels based on information received from practitioners. It would also be important to give guidance as to the base against which such discounts should be measured. There has been some confusion about the size of discounts. It should be made clear that the base must always be the amount that goes into the purchase of periodical payments, not the total of all sums which make up the settlement figure, including any non-periodical elements, because the plaintiff will still receive these elements as a lump sum even if there is a structure. We therefore consider it is desirable that guidelines on average discount levels and what they represent should be prepared and maintained by the Law Society.

Intermediaries

3.130 In view of concerns expressed to us about the position of the intermediaries providing professional accountancy advice to parties wishing to structure, and about the ways in which they are paid, we examined in our consultation paper questions relating to conflict of interest, the persons to whom duties of care are owed and methods of remuneration. Often the same firm of accountants will advise both parties while holding itself out as independent. Where a defendant instructs an intermediary who then purports to act for both parties,[101] although the intermediary acts on the instructions of the defendant, its charges are indirectly paid by the plaintiff through payment of commission on the annuity.

3.131 In the consultation paper we provisionally concluded that the mere fact that an intermediary has acted for both parties may not be unacceptable where, having been made fully aware of the advantages and disadvantages, both parties consent, and provided they are both protected against breaches of duty by the intermediary. We sought the views of consultees as to precisely what is happening in practice and whether a real problem is seen to exist. The role of the intermediary in structuring has been said to be more interventionist than in other contexts since intermediaries are given responsibility for converting the plaintiff's expressed future needs into a financial package. We asked:

(a) should intermediaries be able to act for both parties and, where they do, do they in fact act for one or both,

(b) what views are held as to the extent of their duties,

[100] See para 3.77 above.

[101] See, for example, *Beck v Plastizers Ltd (Readicut International plc)* (1992) 8(6) PMILL 41.

(c) whether adequate protection is provided by the plaintiff's legal advisers who should supervise the settlement,

(d) whether, where the intermediary has acted without due care, the law of negligence provides adequate protection for the parties affected,

(e) what views are held on payment by commission, and

(f) whether the position of the intermediary in structuring raises special problems not adequately addressed by the law of fiduciary duties and professional negligence, which should accordingly be dealt with in the context of a reform of structured settlements or whether its position in structuring is simply an aspect of wider issues concerning intermediaries and professional advisers.

3.132 We considered that where an intermediary who purports to act for one or both parties gives negligent advice which the plaintiff relies on by accepting the structure, it will be liable for the economic loss caused.[102] Whether there has, in fact, been a want of due care will depend on whether reasonable practice, which a body of professional opinion would have supported (in this context the Institute of Chartered Accountants), has been followed.[103] As far as fiduciary duties are concerned, intermediaries who have been empowered to act in a situation of potential conflict will, as fiduciaries, nevertheless owe duties of good faith and they must not perform their duties so as to prejudice beneficiaries.[104]

3.133 Our small survey of structured settlement recipients revealed that there is an awareness of the difficulties posed by the position of intermediaries.[105] Responses on consultation varied but approximately half of those who responded were concerned about the conflict of interest where intermediaries are acting for both parties. Significantly, over half of those who expressed concerns were lawyers or their representative bodies. The Law Society considered that solicitors should consider each case to establish whether there is in fact a *real* conflict of interest. The Law Society and the Court of Protection, among others, thought that independent advice should always be obtained by the plaintiff's solicitor and that

[102] See *Caparo Industries plc v Dickman* [1990] 2 AC 605 (liability for economic loss due to negligent misstatement is confined to cases where the statement or advice has been given to a *known recipient for a specific purpose* of which the maker was aware and upon which the recipient has detrimentally relied).

[103] *Lloyd Cheyham & Co Ltd v Littlejohn & Co* [1987] BCLC 303, 313.

[104] Eg *Movitex v Bulfield* [1988] BCLC 104, 120-121; *Kelly v Cooper* [1993] AC 205 (PC). See generally P Finn, *Fiduciary Obligations* (1977).

[105] 'It was a real problem to me to know what to do because I knew that [the] people [who] wanted me to take a structured settlement were going to get back-handers [commission]'. (Female, 35; daughter disabled in car crash; £350,000 structured settlement).

joint instructions should always be used.[106] The Institute of Accountants and individual accountants who acted as intermediaries argued that general accountancy ethics provided adequate protection where both parties had been made aware of the advantages and disadvantages of this way of proceeding. The law of professional negligence was seen as adequate to control the behaviour of the professionals.

3.134 In summary, while there was concern expressed about intermediaries acting for both parties, we have not been persuaded by the consultation that the problem requires or is capable of a legislative solution. A number of safeguards were suggested which could be embodied in guidance by the relevant professional bodies. The favoured safeguards were: (a) joint instructions, (b) full information as to the risks of joint instructions and the basis of charging, (c) independent advice to be sought by the plaintiff's solicitor on the intermediary's report, and (d) costs to follow the event so that the plaintiff is not penalised in any way as she or he would be if the costs were paid out of the award. We therefore **recommend that:**

(10) The relevant professional bodies consider whether they need to amend their rules in the light of the concerns about intermediaries acting for both parties in structuring awards of damages.

3.135 We also consider that such difficulties as exist in connection with the form of intermediaries' remuneration cannot be addressed by legislation. At present some intermediaries are paid by way of commission on the annuity purchase price[107] and others by way of fees on a time basis for the work involved. It is the payment by commission that is controversial. The consultation paper considered a number of criticisms:

(a) payment by commission might lead to the recommendation of an annuity which is not the best on offer at the relevant time, or which is not, in fact, in the best interests of the plaintiff,[108]

(b) commission charges can be unduly high for the amount of work involved,[109]

[106] The consultation paper suggested that an independent financial adviser could be instructed to double-check a structure proposal but noted that as lawyers gained experience with structures they would also be able to judge more readily whether further independent advice is required. We did not consider that in the context of structures lawyers' professional duty to advise their clients in the circumstances of each case could be defined by rigid rules.

[107] Frenkel Topping, the largest intermediary, charges 3% in all cases in which a structured settlement is created. There is no fee if no structure results.

[108] The market from which annuities are sought by intermediaries remunerated by commission would clearly be restricted by that very fact and there would be a disincentive to competition because any commission would have to be shared.

[109] In the consultation paper we noted that some accountants felt this.

(c) charging by commission could discourage good practice and might encourage charlatans and incompetents to enter the market, and

(d) solicitors, who are obliged to disclose commission to clients and can only retain such monies if the client consents, are at a competitive disadvantage.[110]

3.136 The main argument put by those favouring commission is that no fee at all is charged if the parties are unable to reach agreement. It is also said that payment by commission is satisfactory if the parties (and, where appropriate, the court) consent, if the plaintiff is made fully aware of the way the proposed intermediary will charge and the alternative methods of charging, and if all fiduciary duties are satisfied.

3.137 56% of those who addressed this issue opposed payment by commission but most of these were lawyers and plaintiffs' support groups. These consultees believed that charging on a time basis would enhance savings and compromise. However, 32% of those who considered this issue, including the Law Society and the General Council of the Bar, were not opposed to payment by commission and saw it as part of the process of flexible negotiation which is still evolving. They therefore tended to favour market regulation of this practice. We agree with this view. The life market in structures is so small that the intermediaries have little choice in obtaining quotations and the opportunities to promote special arrangements are limited. The markets are also highly volatile and offers remain valid for a very short time. In the past, because the largest intermediary charges commission and has brokered the majority of structures, most payment has been by commission. We observed in the consultation paper that some larger firms of solicitors now have a policy of not using intermediaries who charge by commission, and rely on their own acquired expertise. We would expect this trend to continue where individual solicitors considered that the payment of commission in an individual case was too expensive. We therefore make no recommendation for reform in this area.

Disclosure of the purchase price

3.138 We asked in the consultation paper whether defendants should always disclose to the plaintiff the purchase price of the proposed annuity. It was argued that disclosure is required to enable the plaintiff to assess whether what is proposed in terms of the annual income will meet her or his needs, and whether it is fair and reasonable compared with what could be achieved using the conventional lump sum method. Our provisional view was that it is not essential to know the purchase price in every case.[111] The plaintiff's solicitor has a duty to try to achieve restitutio in

[110] The introduction of disclosure requirements for financial services intermediaries will substantially lessen, if not entirely meet, this point: see the Financial Services (Conduct of Business) (Product and Commission Disclosure) Rules 1994, made by the Securities Investment Board and the Lautro (Product and Commission Disclosure) Rules 1994.

[111] We believe, however, that voluntary disclosure of the price may facilitate acceptance by a plaintiff and may therefore be advantageous to a defendant.

integrum. If the plaintiff's future needs will be met by the award the plaintiff will be returned to a position as close as possible to that occupied prior to the accident. In any event, the plaintiff's advisers should be able to ascertain how the market price of such an annuity compares with a lump sum ascertained in the conventional way. Not knowing the actual price simply prevents the plaintiff's adviser from discovering the extent of the saving, if any, made by the defendant on the conventional figure. To the argument that the benefit of any saving made by the defendant should be shared, we pointed out that the possibility of the saving acts as an incentive for the defendant to seek to settle the matter, and the plaintiff does benefit from that process.

3.139 In reaching our provisional conclusions we took account of *Braybrooke v Parker,*[112] where Morland J had to decide whether the defendants should be ordered to disclose to the plaintiff and to the court the cost of the annuity to the defendant insurer prior to the joint application by the plaintiff and the defendants for court approval to a structure. Counsel for the plaintiff argued that because a proposed structured settlement is a bargain and one of the parties (the insurer) is in a strong bargaining position, fairness demanded that the annuity price be disclosed. Morland J noted that in all the reported cases the purchase cost of the annuity had apparently been disclosed. He held, however, that the one question which had to be answered where approval to a structure was sought was this: is the proposed settlement - in this particular case, a structured settlement - in the best interests of this particular plaintiff? In his judgment, it was not necessary for the judge to know the actual cost of the annuity in order to answer that question.

3.140 The focus of the inquiry was on the overall interests of the disabled plaintiff, not on any advantages or otherwise to the defendant. He held that the requirements for information to be provided to the court when approval of a structured settlement is sought[113] did not support any need for disclosure of the cost of the annuity. He also noted that in this case there was a substantial issue on quantum - the parties were not agreed on the likely settlement figure: he held, however, that as a matter of principle this made no difference. It would be for the judge in such a case to take this issue into account when deciding whether it would be to the plaintiff's advantage to accept the offer of the structured settlement proposed. He also thought it was unrealistic to suggest that the plaintiff's accountant advisers would find it difficult to obtain a figure (albeit in general terms) for the cost of the annuity proposed. Finally, he considered that if insurers were able to obtain annuities to satisfy properly approved structured settlements at an economic rate, this was in the general public interest, because it would presumably have the effect of keeping premiums down.

[112] *The Guardian* 2 November 1991.

[113] *Kelly v Dawes, The Times* 27 September 1990; *Kemp & Kemp,* vol 1, para 6A-110.

3.141 Response on consultation was almost evenly split on this issue. 42% of those who responded on this issue (with a high representation of solicitors and barristers) thought the price of the annuity should always be disclosed. Richard Lewis thought that although there may be no legal duty on the defendant to disclose, the plaintiff's solicitor's duty of care might require her or him to discover the market price of the annuity. This approach was based on a view of structured settlements as offering an alternative method of payment, thereby creating a choice for the plaintiff. A decision between the alternatives could not be properly made unless the alternatives can be compared. However, 50% of the consultees who responded on this issue (including the Law Society) thought that plaintiffs had no reason to be concerned with the cost of the annuity, so long as their needs would be met. Both groups envisaged delay and expense if the defendant refuses to disclose. The General Council of the Bar reported mixed views on the issue.

3.142 In the consultation paper we asked whether the defendant should be forced to disclose the purchase price of the annuity. Like many of those who responded, we did not make a clear distinction between issues relating to disclosure by the defendant and the question whether or not the plaintiff's solicitor should always discover the market price of the annuity in order to comply with her or his professional duty.

3.143 We still do not believe that anything could be usefully achieved by heavy-handed interference in the negotiation process to compel the defendant to disclose the purchase price. In almost all cases, the price is in fact disclosed, and the plaintiff's solicitor can exercise the sanction of refusing to consider a structure until such disclosure is made. This should only be necessary if the plaintiff's advisers are unable to make use of the financial information available in the market to calculate the reasonable cost of such an annuity. This might cause some delay, but a mandatory duty to disclose would have to be supported by a sanction for breach, and the process of enforcing that duty where there was resistance would occasion delay and expense to the plaintiff. Any system involving a mandatory duty would have to provide reasonable time limits for compliance, and would require application to be made for enforcement together with evidence of non-compliance, and an opportunity for a defence to be put forward would also have to be built in. No doubt, if a defendant wanted to delay, such a process could be 'milked' to the utmost, time limits permitting, without actual non-compliance. We cannot see that such a system would actually improve what already exists, even if the real extent of any problem justified any such intervention.

3.144 The issue relating to the extent of the professional duty of the plaintiff's legal advisers remained unresolved on consultation. In the consultation paper we expressed the view that the extent of the duty was to do what was reasonable to achieve restitutio in integrum. This appeared to be met if the plaintiff's future needs were reasonably met by the structured settlement package, no matter what the

purchase price of the annuity happened to be. This view could be said to flow from a view of structuring as 'needs-based'.

3.145 Because our recommendations so far have been concerned to preserve the flexibility of approaches to structuring, we would not want to insist that the practitioner's professional duty is dependent on the 'needs-based' approach in every case. It must surely depend on the particular approach taken by the practitioner in each individual case. Therefore, the practitioner who takes an approach to negotiations focusing on a conventional sum which is then structured should, in principle, discover the market price of the offer, in order to determine whether that amount would generate greater returns than the structure if invested conventionally. If, unusually, in such a case the market price cannot be discovered, and the defendant refuses to disclose the purchase price, it would be unwise for the plaintiff's advisers to recommend that the structure should be accepted. While this cautious strategy seems desirable, again, we do not think we can usefully recommend any legislative reform to make it mandatory.

Reviewability

3.146 In paragraph 3.19 of the consultation paper we commented both on the initial flexibility of structured settlements and on the fact that once entered into they cannot be changed. Parties entering into a structured settlement will usually seek to provide by means of a contingency fund for unanticipated needs which may result from the injury to the plaintiff. For example, when the plaintiff's condition deteriorates, further expenditure may be needed. We invited comment on the adequacy of the contingency fund approach as a means of meeting needs not provided for by other benefits in the structured settlement. We suggested that if the contingency fund approach is not seen as adequate, the question arises whether structured settlements should be reviewable. Reviewability could take one of two forms - first, new money, additional to that put into the original settlement, could be provided. Second, the unexpended benefits from the original settlement could be restructured in a way that better met the needs of the plaintiff.

3.147 The possibility of reviewability to provide new money for plaintiffs has been considered by both this Commission and by the Pearson Commission. In 1971 this Commission considered the possibility that damages might be awarded in the form of variable periodic payments which the court was either obliged or had a discretion to order instead of the conventional lump sum.[114] Variability was seen as essential to ameliorate the injustice caused by inaccurate forecasting.[115] No other system was considered. The Commission expressed support for upwards-only reviews, because if awards could be reviewed downwards the possibility of intentional malingering

[114] Personal Injury Litigation - Assessment of Damages (1971) Law Com Working Paper No 41, paras 226-252.

[115] *Ibid*, para 227.

might lead insurance companies into undertaking secret surveillance of the plaintiff.[116]

3.148 In its working paper the Commission also expressed a strong preference for a discretionary rather than an obligatory system, but it reached no conclusion on whether such a system ought to be introduced.[117] The suggestion of variable periodic payments met with strong disapproval on consultation and was not recommended in the final report.[118] Five years later, on receiving substantial evidence in favour of periodic payments, the Pearson Commission recommended the introduction of a pension system as a remedy available to the court in cases of serious injury or death.[119] The pension was to be reviewable by the court to the extent that it might take account of inflation and any unforeseeable deterioration in the plaintiff's medical condition, provided that the latter led to financial loss. More comprehensive review was seen as too complicated, at least at first. Like this Commission, the Pearson Commission saw reviewability as essential to achieve the advantage of a flexible system of periodic payments which could take account of actual changes following trial. These recommendations were not implemented.

3.149 We suggested in the consultation paper that if the contingency fund is not an adequate means of providing for unexpected needs resulting from the plaintiff's injury, the reviewability of the structured settlement in order to meet those needs is in principle desirable so as to achieve restitutio in integrum. We also felt that reviewability should be triggered by any unforeseeable deterioration in the plaintiff's medical condition arising out of the original injury, provided that it has caused further financial loss. For the reasons given in our 1971 Working Paper,[120] however, we did not think that an unforeseeable improvement in the plaintiff's condition should enable a review to take place or that the effect of inflation should make structures reviewable, because most structures are based on annuities which are index-linked where appropriate. We observed that parties are free at present to agree reviewable structured settlements, but in practice they appear never to do so.

3.150 Within the present consensual system, the primary **legal** obstacle to parties agreeing a structured settlement which allows for reviewability in the form of the provision of new money is that it would not appear to attract the tax benefits now afforded to annuities which repay a fixed pre-existing debt. The tax legislation would have to be amended if periodic payments under a reviewable structure were to be tax-free

[116] *Ibid*, paras 243-4.

[117] *Ibid*, para 240.

[118] (1973) Law Com No 56, paras 26-30.

[119] The Pearson Commission Report, vol 1, paras 555-573. See paras 2.1 and 3.112-3.115 above.

[120] Personal Injury Litigation - Assessment of Damages (1971) Law Com Working Paper No 41, para 243.

in the hands of the plaintiff. But quite apart from any legal obstacles, we doubted whether defendants would in fact agree to such reviewability. The possibility of a reviewable settlement would allow the defendant to negotiate to reduce the size of the lump sum paid in addition to the amount structured, since reviewability would largely remove the need for a contingency fund. It would also give the defendant the option of agreeing to defer payment of part of the award upon a contingency that may never arise. However, defendant insurers would not be able to close their books because of the further open-ended liability they would be undertaking. We thought it also far from clear that the life insurance industry would be able or prepared to offer annuities which accommodated reviewability. The exercise would be costly because insurers would have to purchase a new package of assets to back the new policies.

3.151 In the consultation paper we observed that structured settlements which provide for reviewability in the form of a restructuring of the original agreement would not have any tax disadvantages: they do not carry the implication that there is a reviewable debt. Because of this, no changes to the tax legislation would be needed. Reviewability in this form has the considerable merit for defendants that no new money need be provided. We also considered that as matters now stand, parties are free to agree at any time in the life of a structure that it should be rearranged even if rearrangement is not a term of the original agreement. This might be seen as not creating a reviewable debt, but renegotiating how it is to be paid.

3.152 In principle such an approach may be undesirable because knowledge that the structure is reviewable if predictions prove to be incorrect might encourage less care being taken at the initial stage. It might also encourage plaintiffs to seek review for reasons of dissatisfaction rather than need, the genuineness of that dissatisfaction cancelling out any caution which might arise from being at risk as to costs. Additionally, it seemed to us that in practice only in rare circumstances would it be practical to have such a review. The need for a review, we assumed, would usually be caused by a new or unforeseen additional need, but no new money would be provided. There would also be costs in rearranging the structure and they would no doubt have to be borne by the plaintiff.

3.153 Just over half of those who responded on this issue (with a strong insurance representation, but including the Law Society and the General Council of the Bar), were opposed to reviewable structures where these would constitute a reopening of the case to take into account a deterioration the risk of which was not considered at the time of settlement. All the disadvantages referred to in paragraph 3.152 above were confirmed. These consultees could not see how the practical difficulties could be overcome. 20% of consultees favoured reviewable structuring, but most did not favour it beyond the extent provided by the existing provisional damages regime.[121]

[121] See paras 3.79-3.84 above.

20% favoured simple restructuring without the provision of new money, but the Law Society thought that this should only be possible with the consent of all interested parties, as well as the Revenue. A small number supported reviewability for both unforeseen deterioration or improvement in medical condition, where this led to new financial loss. It was suggested that insurers could insure for such possibilities, seen to be comparatively rare.

3.154 In the consultation paper we provisionally concluded that because simple restructuring is already possible, an amendment to the tax legislation to allow for new money to be provided would be unlikely to lead to the greater use of voluntary reviewable settlements, because of the resistance of insurance companies. Consultation has confirmed this view. Additionally, the minority who favoured review had few ideas as to how the practical problems should be overcome, and generally took a very idealistic approach. We do not think that it is practical to pursue extending the tax benefits to a review of a structure in which additional money is provided. Further, we note that restructuring in the sense of rearrangement of existing annuities is possible now and it will continue to be possible if the tax situation is rationalised,[122] but we do not think it appropriate or practical for either party to force defendants to accept this form of restructuring. We therefore make no recommendations relating to reviewability of structures.[123]

Administration and management

Granting of approval

3.155 Some dissatisfaction had been expressed to us about the administrative procedures which are involved in structuring an award. At present it may be necessary to obtain the approval of the Revenue, the Treasury, a judge and the Court of Protection. A High Court Practice Note aimed at expediting court approval of structured settlements in personal injury cases was issued in 1992.[124] One suggestion put to us was that if the requirements specified by the High Court are met, the court should be empowered to give a general approval which would bind the other bodies involved. We did not, however, believe the approval of the court should bind the other bodies. Since the Practice Note was issued the process should now have become less cumbersome, and parties have also become more experienced in setting up structures. It should also be noted that a number of the requirements set out by each body duplicate those of other bodies and preparation for identical requirements will only have to be carried out once. We also regarded it as desirable that each body effectively preserves its unique jurisdiction in relation to each case. The approach of each will vary, if only subtly in some instances, because the particular interests being protected simply may not overlap. In this context, we saw

[122] See paras 3.54-3.96 above.

[123] But note our recommendations as to structuring interim and provisional damages in paras 3.84 above.

[124] [1992] 1 WLR 328.

adherence to a strict form, determined as adequate by one body, as an inappropriate test of general approval.

3.156 Consultation revealed a general concern to preserve each body's jurisdiction. 62% of those who responded agreed with our view. There was no real suggestion that multiple approvals are holding up the process too much. We therefore make no recommendations for reform in this area.

Court of Protection fees

3.157 Although it was no part of this exercise to examine the general principles upon which the Court of Protection charges fees, some concern had been expressed to us on the way in which the Court treats payments under structured settlements when calculating its fees. The Court supervises certain structured settlements pursuant to its special jurisdiction.[125] In some respects regular payments under such settlements have the characteristics of income, and as such, fees would be levied under the Court of Protection Rules.[126] Nevertheless, there appeared to be some inconsistency, since the Revenue treats the periodic payments made pursuant to structures as capital. If the payments were treated as capital for fee purposes the Court could charge nothing at all in relation to the payments. However, the Court and the Public Trust Office would still have carried out work in approving the settlement and supervising the use of the payments. This would create an anomaly compared to the treatment of conventional lump sum awards where regular payments of interest received on the lump sum would be liable to a fee.

3.158 The Court of Protection was concerned to receive a fair fee to cover the costs of administration in these cases. The result of consultation carried out by the Public Trust Office in 1991 was that most respondents favoured setting the percentage of the annual payments made under structured settlements or similar specified financial arrangements to be taken into account as income for fee purposes at 50%. At current fee levels, this means that about 2 - 3% of a payment will be paid as a Court fee if the Court is involved.

3.159 The Rules were therefore changed.[127] In the consultation paper we considered that the rule change had resolved the uncertainty and had recognised the special nature of payments under structured settlements. Although the work of the Court and the

[125] The Court of Protection administers settlements as part of the legal framework set out for it in the Mental Health Act 1983 (as amended by the Public Trustee and Administration of Funds Act 1986) and the Court of Protection Rules 1984, SI 1984 No 2035. The Court of Protection and the Public Trust Office manage and administer the property and affairs of patients, people who are incapable, by reason of mental disorder, of doing so themselves. The Commission will be publishing its Report on Mentally Incapacitated Adults and Decision-Making, which will include a review of this jurisdiction, in the near future.

[126] SI 1984 No 2035.

[127] Court of Protection (Amendment) Rules, SI 1992 No 1899.

Public Trust Office is likely to be at a lower level where a settlement is structured, there is some work or administration involved. 43% of those who commented on this issue agreed. However, 48% thought that the fees were still too high, and felt the formula penalises larger structures, deters the use of balloon payments,[128] despite it being hard to characterise them as anything other than capital, and does not favour annuities of short duration where a substantial portion of the payments are likely to assume the character of capital rather than income. Practitioners were concerned whether the fees are justified by the level of work involved. We concluded that as the fees have only recently been altered, and the responses on consultation were almost evenly split, we should ourselves make no recommendation as to change at this stage.

3.160 We have been advised by the Public Trustee that Court of Protection fees have recently been reviewed and it is hoped that new fee rules will be included in the Court of Protection Rules which should come into effect in September 1994. No change is to be made at this stage to the treatment of structured settlements in relation to the administrative fee. The 1992 amendment will be preserved in the 1994 Rules. The Public Trustee intends to review the fee rules annually and structured settlement fees will be included in these reviews. Those who have continuing concerns about the level of the fees will therefore be able to make their views known to the Public Trustee.

[128] Capital payments occurring at predetermined intervals.

PART IV
INTERIM DAMAGES

Summary of the present law

4.1 Interim payments in respect of damages are provided for in Part II of Order 29, rule 11 of the Rules of the Supreme Court, which provides:

> "11. - (1) If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied -
>
> (a) that the defendant against whom the order is sought (in this paragraph referred to as "the respondent") has admitted liability for the plaintiff's damages, or
>
> (b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or
>
> (c) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them,
>
> the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amounts as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, crossclaim or counterclaim on which the respondent may be entitled to rely.
>
> (2) No order shall be made under paragraph (1), in an action for personal injuries if it appears to the Court that the defendant is not a person falling within one of the following categories, namely -
>
> (a) a person who is insured in respect of the plaintiff's claim;
>
> (b) a public authority; or
>
> (c) a person whose means and resources are such as to enable him to make the interim payment."[1]

Ord 13, r 12 of the County Court Rules incorporates the provisions of RSC, Ord 29, Part II, with minor modifications. There was some concern expressed to us that interim damages are not sought in some cases in which they ought to be. We examined these concerns on consultation.

Results of consultation and recommendations for reform

The need requirement

4.2 One major explanation for the possible under-utilisation of the interim damages procedure is that, although the Rules themselves do not require that the plaintiff must show a need for the interim payment, it has become customary in personal

[1] See also para 3.79 above.

injury actions for such payments to be limited to sums for which need is shown. However, RSC, Ord 29 contains no restriction, express or implied, to the effect that an interim payment depends on need. Further, the amount of an interim payment is assessed against the plaintiff's pecuniary losses such as earnings or the cost of special treatment rather than as a payment on account of general damages. These requirements have no application to interim payments in other classes of litigation.

4.3 In *Schott Kem Ltd v Bentley and Others*[2] Neill LJ regarded the practice of requiring need to be shown in personal injury cases as sensible, because large interim payments in such cases might lead to difficulties if an order for repayment (necessary where, by mischance, the final damages are less than the interim award) was subsequently made under Ord 29, r 17. He recognised the special position of the plaintiff in personal injury cases. In such cases the disability caused by the injury may mean that a plaintiff who has lost her or his earning capacity and has spent the interim award would find it impossible to make repayment. Further, Ord 29, r 11(1) requires the Court not to risk over-paying the plaintiff, and this creates a need for caution, particularly if there is uncertainty over quantum.[3] It is a relatively simple matter for the Court to exercise the requisite caution by ordering payment of sufficient amounts to compensate the plaintiff for lost wages or other financial hardship up to the anticipated date of trial, and of sums needed for special treatment or equipment.

4.4 The *Schott Kem* case[4] was not a personal injury case, and it involved the defendant's counsel arguing that the practice of showing need extended beyond such cases. This was rejected by Neill LJ, who noted that the Rules do not in fact prevent an interim payment order being made in the absence of need or prejudice.[5] This must apply to any type of case. The court has discretion whether to order an interim payment at all. In the consultation paper we thought it would be unwise to replace this flexibility with a hard and fast rule unless it was generally felt the discretion is exercised ungenerously. Our provisional view was that the present position should not be disturbed.

4.5 Very few consultees considered that the overall discretion to grant an interim order is exercised ungenerously. However, 52% of those who considered these aspects, including the Law Society, the General Council of the Bar and the Association of Personal Injury Lawyers (APIL), were opposed to the practice of requiring a plaintiff to show need for an interim payment even though the Rules do not specify this. These consultees felt the Rules should be interpreted literally, as they

[2] [1991] 1 QB 61, 74B.

[3] *The Supreme Court Practice* (1993), vol 1, Part 1, p 541.

[4] *Schott Kem Ltd v Bentley* [1991] 1 QB 61.

[5] *Ibid*, 74C-D.

presuppose that the plaintiff will substantially succeed on liability. They felt that the court's discretion is adequate to control any excesses.

4.6 We were told that a broader approach had been taken in Scotland and that this had not resulted in over-compensation or repayment orders. Early interim payments were seen as invaluable to the rehabilitation process. On the other hand, 40% found the need requirement acceptable. Nearly half of this group were insurance companies and they considered that interim payments were often used to continue funding the claim. Our empirical survey revealed that 54% of damages recipients in Band 1 and 73% in Band 4 said that the interim payment they received was made to enable them to pay for something in particular. All but a handful (97% in Bands 2-4) said they used the money in the manner intended.

4.7 Just over half of those who responded to the consultation paper objected to the need requirement. It could be said that the de facto requirement of "need" operates as a fetter on the full use of the interim payment regime as originally intended by the Winn Committee which recommended the introduction of interim damages.[6] Further, split trials appear to be increasing in popularity,[7] and when an interim order is made following a judgment on liability, liability is no longer an issue. There is no reason why a plaintiff should not then receive the sums which she or he is bound to receive after a trial as to quantum, and need should not come into it. One solution would be to recommend that Ord 29, r 11 should be amended to make it clear that need should not be a determining factor in the granting of such an award, though it may be a factor.

4.8 We do not think such a reform should be adopted, and instead reiterate our provisional view that the present position need not be disturbed. In a recent decision the Court of Appeal said that in a personal injury case the Rules should be interpreted literally. In *Stringman v McArdle*[8] Stuart-Smith LJ summarised the view of the court by stating:

> "It should be noted that the plaintiff does not have to demonstrate any particular need over and above the general need that a plaintiff has to be paid his or her damages as soon as may reasonably be done. It will generally be appropriate and just to make an order where there will be some delay until the final disposal of the case. Therefore what the court is concerned with in fixing the quantum is

[6] Report of the Committee on Personal Injuries Litigation (1968) Cmnd 3691, p 38.

[7] By O 33, r 4(2A) for the High Court, and by CCR, O 13, r 2(2)(c) for the County Court, liability can be tried separately from quantum of damages. See Consultation Paper No 125, p 68, n 4.

[8] [1994] PIQR 230.

that it does not exceed a reasonable proportion of the damages which in the opinion of the court are likely to be recovered."[9]

We therefore recommend no change, but we consider that it is desirable that *Stringman* be noted in the Supreme Court Practice and the County Court Practice so that practitioners are made aware of its effect.[10]

Recoupment of DSS benefits

4.9 There is a complex statutory regime for the recoupment of DSS benefits from tortfeasors which has recently been altered.[11] It was pointed out to us that the operation of the new provisions can swallow up interim payments, particularly where the latter are small. One solution we tentatively suggested in the consultation paper was to give the courts a power to order the exclusion of the operation of the new regime in cases where an interim award has been granted for a specific capital expense, for example, the purchase of a specially designed and adapted car, or disability aids. An alternative and more far-reaching solution we also suggested was to exclude recoupment in all cases of interim awards. The reason and justification for this was that the principle of recoupment would not be subverted in either case since once a final award has been determined, recoupment would apply to the totality, although the time at which repayment is made to the DSS would of course be deferred.

4.10 A further solution we put forward was to require the defendant insurer to repay to the DSS, as part of any interim payment, any benefit paid up to the time of the interim payment as well as the sum needed for the particular capital item. However, we were concerned that such a proposal would be unattractive to defendants, and would reduce the use of the interim regime. We did not form any provisional views on these suggestions, and we sought information on how often this

[9] *Ibid*, 233-234.

[10] Copies of this Report will be forwarded to the editors of both publications.

[11] Section 2 of the Law Reform (Personal Injuries) Act 1948 ("the old regime"), and Part IV, ss 81-104 of the Social Security Administration Act 1992 ("the Compensation Recovery Scheme"), are attempts to deal with the problem of double compensation. They are based on the view that it is not acceptable for a person to receive both state benefits and compensation. The old regime allowed the compensator to deduct from the compensation half of some benefits (for example, Sickness Benefit) which the injured or ill person received, or would have received, for five years after the injury or illness occurred. The amount deducted by the compensator was not paid to the DSS. The Compensation Recovery Scheme (in force September 1990) means that a defendant paying damages of over £2,500 in respect of an accident that occurred, or a disease that was diagnosed, on or after 1 January 1989, has to pay the amount that the plaintiff has received in "relevant benefits" from the DSS directly to the DSS. The period of deduction runs from the date of claiming benefit to settlement, or five years, whichever comes first. The benefits are deducted in full from the compensation payment and the provisions of the old regime now only apply where the payment is less than £2,500. The Compensation Recovery Scheme applies regardless of whether a claim is settled or litigated and to damages awarded at trial. Periodic payments under a structured settlement are exempt (Social Security Administration Act 1992, s 88).

problem arises in practice, whether it in fact discourages applications for interim awards, and whether any, and if so, which, of the proposed solutions would be effective.

4.11 There was a clear majority (75%) opinion of those who responded opposing the application of the current regime to interim awards and expressing concern about its effect. Most, either specifically or by implication, wanted DSS payments to be recouped when the final payment is made, although the Law Society wished the amount due to the DSS to be taken into account when the interim payment is assessed if possible, making the interim award larger. The DSS also thought that any problem could be alleviated by a court ensuring that the amount of an interim payment is sufficient to cover both the amount of benefits to be repaid and the specific capital expense. The Compensation Recovery Unit would be happy to supply details of all benefit payments. The DSS was clearly opposed to giving power to the courts to override the recoupment provisions. The DSS also thought that any such move would also increase the risk of interim payments being sought to avoid recoupment, leaving the Department to seek recovery from the plaintiff's own assets, rather than receiving it from the defendant.

4.12 Item 11 of our Fifth Programme,[12] which set out the scope of the damages review, specifically excludes the recovery provisions of the Social Security Acts 1989 and 1990. We considered this matter in the consultation paper because it had been raised with us so often prior to publication of the consultation paper. We are unable to make any recommendation but we report these results because consultation revealed real dissatisfaction with the situation.

Interim payments and the MIB

4.13 *Powney v Coxage*[13] established that where the Motor Insurers' Bureau is joined as a defendant in a personal injury action, the court has no jurisdiction to order the Bureau to make an interim payment. Where the defendant is an uninsured driver the Bureau has agreed to pay damages due to the plaintiff if judgment is not satisfied in full by the judgment debtor within seven days, subject to certain conditions, one of which is that any such judgment should have been assigned to it. In *Powney* the agreement was judged to give rise only to a potential, not an actual, liability to pay damages. The result in this case was that the plaintiff was unable to obtain an order for an interim payment from either the first defendant or the Bureau. The anomaly, which in this case forced the court to dismiss the appeal with some regret, caused us to invite comment on whether the Rules of Court should be amended specifically to permit orders for interim payment against the MIB. Our provisional view was that this should be done.

[12] See para 1.1 above.

[13] *The Times* 8 March 1988 (QBD); (1988) 4(5) PMILL 35.

4.14 97% of those who responded to this question agreed with our provisional view. The MIB considered such a reform to be unnecessary as it informed us that it makes interim payments voluntarily. It regarded the case of *Powney* as unusual in that the member insurance company which the MIB had appointed to act as its representative in that case had formed the view that the plaintiff was not entitled to an interim payment even under the MIB internal guidelines. The MIB advised us that it is highly unlikely such a case would arise again since it now requires representatives to refer any issues of this nature to its Secretariat before any question of litigation arises.

4.15 While the MIB points out that there is an 'understanding' between it and the Department of Transport that the Bureau will voluntarily make interim payments in relation to claims on the "Uninsured Drivers" Agreement and applications under the "Untraced Drivers" Agreement, and that they therefore think there is no immediate need for change, it is apparent from consultation that there is an understanding amongst practitioners and others that such an order cannot be made against the MIB. This may be deterring applications for interim payments in some cases. At present, it is the MIB's internal guidelines that govern the question whether or not a plaintiff may obtain an interim payment, since the Rules do not allow it. In *Powney* the MIB's representative had decided that the plaintiff was not entitled to an interim payment even in terms of the guidelines, although the requirements of the Rules appeared to be met. We are concerned that, although the MIB wishes to make interim payments, plaintiffs have to satisfy both the requirements of the Rules, **and** internal MIB guidelines of which they have no notice. The latter may alter at any time and they are unable to challenge them.

4.16 However, we have concluded that a change to the Rules to formalise the existing 'understanding', and to encourage applications against the MIB would be ineffective, because the MIB has voluntarily entered into the Agreements it has made with the Government to satisfy judgments obtained by the victims of uninsured drivers and negligent untraced motorists. It cannot be compelled to make interim payments at a stage when by definition, no judgment has been entered against the uninsured or untraced driver. It is not, therefore, possible for the existing practice of the MIB making voluntary interim payments to be formalised without the MIB agreeing to amend its agreement with the Government,[14] and making its internal guidelines public so that plaintiffs may know whether they can meet the additional requirements.

[14] The Supreme Court Procedure Committee considered this matter in 1993 and reached the same conclusion. See Supreme Court Procedure Committee Annual Report (1993), para 3.5, pp 13-14.

4.17 We suggest that, as for the approach to the need test referred to above,[15] reference to the MIB's practice of making voluntary payments, and the relevant requirements of its internal guidelines, should be included in the Supreme Court Practice and the County Court Practice so that practitioners and parties may know what the situation is. The MIB has advised us that it has no objection to this. It has summarised its current practice as follows:

> "The question of interim payments must be approached on a fair and reasonable basis.
>
> The plaintiff's legal advisers are expected to provide information along the lines of that which would be required in an affidavit under the Rules. That information would include documentary evidence including medical reports, details of special damages past and present and an explanation as to why the plaintiff needs an interim payment advising of any special needs and hardship (we refer here to Supreme Court Practice 1993, Page 541, Note (f)).
>
> MIB will then consider the matter in the light of Practice Note 1 on Page 543 of the Supreme Court Practice 1993 which suggests that in the event that the plaintiff would obtain judgment for a substantial sum of money, the court would readily order payment of sufficient to compensate the plaintiff for lost wages or other financial hardship up to the anticipated date of trial and sums needed for special treatment or equipment. If, however, the plaintiff wished for a large sum on account for the general damages then good reason should be given."

We have no difficulty with this approach provided that it is interpreted in the light of *Stringman v McArdle*.[16]

Use of the interim damages regime

4.18 Although only eleven consultees considered the overall use of the interim damages regime, all of them thought that appropriate use was being made of the facility. Two insurance companies thought that there was a considerable amount of informal use. Twenty one consultees thought that the procedure was not onerous. Five out of seven who addressed the issue felt that awards were not ungenerous, while two felt that interim damages had been awarded ungenerously but not in all cases. It was suggested that perhaps High Court judges were more generous than Masters and District Court judges. In general, there was no significant criticism of the regime. We therefore suggest no changes to procedure. However, one consultee with much

[15] See para 4.8.

[16] [1994] PIQR 230.

experience of personal injury litigation,[17] thought that in general delays where interlocutory applications are made are excessive.

Joint defendants - O 29, r 11 (1)(c)

4.19 Two judges[18] noted difficulties where there is more than one defendant, and it is clear that the plaintiff will succeed against one or other defendant but cannot tell which before trial. We considered this matter carefully although it was not raised in the consultation paper. A literal reading of O 29, r 11 (1)(c) would not require the identification of the defendant because all that the Rule states where there are two or more defendants is that the court must be satisfied that the plaintiff would obtain judgment against "any of them". However, the Court of Appeal decisions in *Breeze v McKennon*[19] and *Ricci Burns v Toole*[20] prevent an interim award being made in such circumstances. It was held that O 29, r 11 (1)(c)[21] requires the plaintiff to show not only that one of several defendants must be liable, but also which one of the defendants is so liable.

4.20 In *Breeze* Croom-Johnson LJ said that the Rule is not happily drafted, but saw interpretation as requiring a common sense approach.[22] He reasoned that the starting point for interpreting the Rule was for the court to find what damages are likely to be recovered by the plaintiff, after allowing (where appropriate) for contributory negligence. It then had to take into account any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely. He decided that this could only mean a set-off available to the defendant against whom the order is being made, and took this as reinforcing the meaning he had given to r 11(1)(c), that the plaintiff must establish that she or he will at trial recover damages from the respondent against whom the order is made.

4.21 Popplewell J stated in his response to the consultation paper that where an innocent defendant is able to recover his share of the interim payment against the other defendant after judgment it seems unreasonable that the plaintiff should be deprived of the opportunity of an interim payment just because he is unable to identify the party from whom he is going to recover damages when applying for the interim payment.

[17] The firms of Robin Thompson & Partners and Brian Thompson & Partners, who made a single joint response to Consultation Paper No 125.

[18] Alliott and Popplewell JJ.

[19] (1985) 32 Build LR 41.

[20] [1989] 1 WLR 993.

[21] See para 4.1 above.

[22] *Breeze v McKennon* (1985) 32 Build LR 41, 49.

4.22 This suggestion has already been the subject of a recent consultation carried out by the Lord Chancellor's Department in 1993 at the request of the Supreme Court Procedure Committee.[23] That consultation revealed a majority view that the proposal for reform was unfair, mainly because it does not seem right that a defendant should be forced to make an interim payment just because the other defendant, who is ultimately found to be liable, was not prepared to admit liability. Consultees were also concerned that plaintiffs would be encouraged to join as many rich defendants as possible in the action not because liability can clearly be proved against them, but because they may be prepared to pay out a large sum to avoid continuing litigation.

4.23 There were also doubts about the practicalities of the changes to the Rules which would be needed in order to allow a non-liable defendant to recover the payment at the end of the day. If recovery was allowed against the plaintiff, difficulties were foreseen because the plaintiff would naturally have spent the interim payment and may be reluctant or unable to repay. If, as would be more practicable, recovery from the liable defendant by the non-liable defendant before final payment to the plaintiff was made was facilitated, doubts about the solvency of the liable defendant were raised, since rich defendants might have been joined for the very reason that the plaintiff was concerned about the solvency of the defendant against whom there was the strongest case on liability. In the light of the negative response to its consultation, the Lord Chancellor's Department decided not to make any alteration to the Rules. We have also considered the responses, and have concluded that the arguments against any change are compelling. Accordingly, we also make no recommendation for reform.

[23] Supreme Court Procedure Committee Annual Report (1993), para 3.5, pp 13-15.

PART V
PROVISIONAL DAMAGES

Summary of the present law

5.1 In the consultation paper we noted that in its 1973 report, this Commission recommended legislation aimed principally at the sort of case we had called 'chance' cases.[1] It was envisaged that such legislation would provide a procedure to deal with cases in which the plaintiff can prove there is a possibility, but no more than a possibility, that a disease will develop or a deterioration will occur in her or his condition. In such cases the plaintiff can be awarded nothing in respect of the disease or deterioration unless it occurs. The Commission, however, was concerned about the uncertainty that would be created as to the extent of the defendant's liability by the introduction of provisional awards that permitted a further claim should the disease in fact develop or the deterioration in fact occur. It therefore also recommended that such awards should only be made against certain types of defendants. These were public authorities, defendants insured in respect of the claim, and those not required to have third party vehicle insurance.[2]

5.2 The Pearson Commission Report endorsed these recommendations in general terms[3] and by section 6 of the Administration of Justice Act 1982, section 32A was inserted into the Supreme Court Act 1981 and provides:

> "32A. Orders for provisional damages for personal injuries.
>
> (1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.
>
> (2) Subject to subsection (4) below, as regards any action for damages to which this section applies in which a judgment is given in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to award the injured person -

[1] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, p 66, para 239.

[2] *Ibid*, p 66, para 240. This last class was exempt from the requirements of s 143 of the Road Traffic Act 1972 by reason of making a deposit with the Accountant General of the Supreme Court or otherwise.

[3] The Pearson Commission Report, vol 1, p 127, paras 584-585. See para 2.1, n 1 above.

(a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and

(b) further damages at a future date if he develops the disease or suffers the deterioration.

(3) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the rule-making authority may consider necessary or expedient.

(4) Nothing in this section shall be construed -

(a) as affecting the exercise of any power relating to costs, including any power to make rules of court relating to costs; or

(b) as prejudicing any duty of the court under any enactment or rule of law to reduce or limit the total damages which would have been recoverable apart from any such duty."[4]

5.3 The system came into operation on 1 July 1985, but it applies in all cases, including actions commenced before that date. The power to award such damages is not confined to the limited class of defendants we had recommended and they can be awarded against an uninsured person. Only the plaintiff can claim that a provisional damages award should be made, and an award is final as to immediate damages. The plaintiff can only claim further damages in relation to the occurrence of any 'feared event' specified by the court making the award of provisional damages. Thus, personal injury claims cannot be pursued indefinitely on the basis of an uncertain prognosis, and a provisional damages award (immediate damages and interest) cannot be re-opened at a later stage by a claim for extra damages.

5.4 The courts were therefore given the power to compensate certain categories of plaintiffs whose condition deteriorates after trial. Plaintiffs must establish the existence of a 'chance' which may arise at any time in the future that their condition will decline. But the disease which has developed or the deterioration in the plaintiff's physical or mental condition must be 'serious'. The Practice Direction of 1 July 1985 requires the judge to specify the disease or type of deterioration it has been assumed will not occur for the purposes of the immediate award which will entitle the plaintiff to further damages if it occurs at a future date.[5] The judge will also normally specify the period within which the application for further damages

[4] The relevant Rules of the Supreme Court are O 37, rr 7-10 *Supreme Court Practice* (1993) vol 1, pp 634-637. There is also an important Practice Direction (Practice Direction [1985] 1 WLR 961). The regime also has effect in relation to County Courts (County Courts Act, s 51; County Courts Rules O 6, r 1B; O 22, r 6).

[5] [1985] 1 WLR 961.

must be made, and this will be set out in the judgment.[6] The tendency appears to be not to set a limit at all. However, if a period is specified, RSC, O 37, r 8(3) also allows the plaintiff to apply, within the specified period, for extension of that period. The plaintiff may make more than one such application.

5.5 The legislation does not define or qualify the words 'chance' and 'serious', although the way this section will in practice operate will depend on how they are interpreted. This, combined with the comparative rarity of applications for provisional damages, explains why Scott Baker J said in 1990 that "the courts have not yet worked out the precise circumstances in which awards for provisional damages will be made."[7] He held that three questions were to be considered:

- whether it is proved that there is a chance;
- whether it is proved that there is a chance of some serious deterioration in the plaintiff's physical condition; and
- whether the court should exercise its discretion in favour of the plaintiff in the circumstances of the case.

The judge held that to qualify as a 'chance', the possibility must be measurable rather than fanciful. Therefore, a chance may be slim, but still measurable.[8] As to 'serious deterioration', the judge stated that something beyond ordinary deterioration was required. Seriousness in any particular case is a question of fact depending on the circumstances of the case. Scott Baker J held that the section envisaged a clear and severable risk rather than a continuing deterioration. There had to be some clear-cut event, which, if it occurs, triggers entitlement to further compensation.[9] Thus, a threshold test was created. As to the exercise of the discretion, the judge held that this involved weighing up the possibility of doing justice by a once-and-for-all assessment against the possibility of doing better justice by reserving the plaintiff's right to return. Although there was no discussion of deterioration in mental condition, it is probable that the same approach will be applied.

Results of consultation and recommendations for reform

Gradual deterioration

5.6 The legislation, as interpreted by the case law, had been criticised by APIL before the publication of the consultation paper as excluding many cases which involve a gradual deterioration of the plaintiff's condition. It was suggested that provision should be made to permit an award for provisional damages where the trigger

[6] And in the associate's certificate, *ibid.*

[7] In *Willson v Ministry of Defence* [1991] 1 All ER 638, 641j-642a, a case involving deterioration in the plaintiff's physical condition.

[8] *Ibid*, 642 a-d.

[9] *Ibid* 644, e-j.

mechanism does not involve a specific one-off event, and also in cases of natural progression with potentially serious consequences. Our provisional view was that the approach of Scott Baker J in *Willson v Ministry of Defence*[10] was in keeping with the original recommendations of the Law Commission on which the statutory scheme was based. Our earlier report had referred to the possibility of some event occurring as the distinguishing feature of 'chance' cases.[11] The idea of an 'event' does not stretch easily to include natural progression. We suggested that it would require a clear policy reason, such as repeated injustice, to extend the ambit of the section.

5.7 One third of consultees considered this suggestion. 60% of these did not favour an extension of the regime to include gradual deterioration. Over half of that 60% comprised defendant interests. Among the reasons they gave were that it would be impossible to establish legal criteria for judges to use, that gradual deterioration can already be taken into account, and that the administrative costs of the tort system would increase. 40% of those responding favoured extending the regime, particularly where employment is likely to be put at risk. This group included significant numbers of plaintiff's representatives or their interest groups.

5.8 The composition of the opposing views expressed on consultation is unsurprising. However, the fact that only 40% of the total favoured any extension of the regime has convinced us that the extent of any continuing injustice, if it exists at all, is not such that the original concept of a chance case should be altered. We also consider that the practical problems of defining gradual deterioration are significant. We therefore recommend no change.

Recovery of the plaintiff

5.9 On consultation we raised the question whether the provisional damages regime should be extended to include instances where the medical uncertainty concerns the extent to which the plaintiff will **recover** from an already existing condition. Typical of these would be psychological or neurological cases where it might be possible to apply the provisional damages regime by assessing the immediate payment by reference to the most favourable medical prognosis, and giving the plaintiff the right to seek a further award (perhaps before a certain date) if at the end of a specified period the condition had not improved as predicted by that prognosis.

5.10 Although not mentioned in our 1973 recommendations, uncertainty about recovery could in a sense be said to be a 'chance' case. If assessment is made on orthodox lump-sum principles, the chance of recovery from the condition will be taken into account by a suitable percentage reduction in the award. Therefore, if the recovery

[10] [1991] 1 All ER 638.

[11] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, p 66, para 239.

does not occur at all or if it occurs earlier or later than originally expected, the plaintiff has been under- or over-compensated, and she or he cannot make up any under-compensation in any way by pursuing a further damages award. The introduction of a new type of provisional award regime could correct the difficulty.

5.11 However, we argued in the consultation paper that such an approach is not desirable. The present regime allows an initial payment to be based only on the existing situation, and is therefore as certain a remedy as is possible. Uncertainty surrounding deterioration is then ameliorated by being dealt with in the future if and when that uncertainty is resolved to the plaintiff's detriment. Turning this process on its head so that the initial payment would be based on the most favourable medical prognosis, with a right to return for more if that prognosis proves to be incorrect, would restore uncertainty to the first award, and would possibly encourage malingering in order to found a further application.

5.12 It might also be much more difficult for experts to make predictions relevant to the new procedure. Predicting recovery is quite different from predicting deterioration, especially where psychological and neurological conditions are involved. Further, lapses in recovery are common in such instances. Finally, a defendant may feel hard done by when recovery occurs earlier than predicted, and be justified in requesting some sort of refund. Yet in most cases it would be highly undesirable to allow such recovery, as the plaintiff may be in no position to repay. 96% of those who responded to this suggestion supported our provisional view. In the light of this lack of enthusiasm for change we do not recommend any reform.

Death of the plaintiff

5.13 In *Molinari v Ministry of Defence*[12] the plaintiff had developed leukaemia due to exposure to radiation at his workplace. Liability was admitted by his employers. He had endured intensive treatment which resulted in both long term and short term side effects. It was agreed that his suffering had been tremendous and the plaintiff had become a changed man. He was unlikely to return to a job he enjoyed, had suffered chronic anxiety and his prognosis was pessimistic. There was a 12-20% chance that he would relapse, and this would require further unpleasant and costly treatment and would inevitably lead to death. It was held that because there was a chance that the plaintiff would suffer some serious deterioration in his physical condition, the court had a discretion to award provisional damages.

5.14 Mr W Crowther QC, sitting as a deputy High Court judge, also thought that the case raised a complication which did not appear to have been envisaged when section 32A of the Supreme Court Act 1981 was drafted. In this case the deterioration in the plaintiff's condition could actually result in a decrease rather than an increase in the global damages recoverable. The judge used the example of

[12] [1994] PIQR Q33.

a young man with no dependants who spends every penny he earns on himself. He contracts a disease which severely and permanently disables him, and there is a 50/50 chance he will suffer a relapse and die after a short and painful illness. Traditionally assessed damages would take account of the chance of the relapse and death and be significantly reduced. General damages would be reduced substantially overall. Damages for future loss would also be reduced because there would be a 50/50 chance that all the plaintiff was entitled to was damages for the lost years, and in such a case these would be modest.

5.15 However, if provisional damages were awarded, they would be assessed on the assumption that deterioration and death would not occur. The plaintiff would therefore recover full loss of earnings and if the deterioration occurred, could come back for further damages, in spite of the fact that his imminent death invalidated the basis of the original award. This would result in injustice to the defendant because the plaintiff would have been over-compensated. The judge pointed out that the original provisional award cannot be reopened, nor can the over-compensation be set against the further award. He therefore held that in an extreme case it would be proper for the court to refuse to award provisional damages on the grounds that the potential injustice to the defendants of such an award far outweighed the potential injustice to the plaintiff of a traditional award. However, in the present case he could not see that there was likely to be any or irredeemable prejudice to the defendants in awarding provisional damages, and therefore an award was made.

5.16 We have considered whether this issue, which was not put out to consultation, necessitates reform. We have concluded that it does not. The provisional damages regime was developed as a palliative to the problems of reopening and reviewing cases, which we discussed in detail when considering questions of reviewability.[13] In any event, we consider that the regime allows a valuable flexibility of approach, which the judge in this case used entirely appropriately. Where clear injustice to a defendant would result from a provisional award, and the plaintiff would suffer less injustice from a traditionally assessed lump sum, the traditional approach should be taken. We therefore make no recommendations for reform.

Flexibility on time limits

5.17 We also examined the argument that the time limits within which an application for additional damages might be made were unnecessary since it should be anticipated that the court will be asked to extend the time limit if the specified period is due to expire and no application has been made. This suggestion is based on the view that the court may well grant the request. We did not accept this argument. As a matter of principle, it could prejudice the defendant in some cases to leave the period

[13] See paras 3.146-3.154 above.

indefinite, and we considered this point to be important when we made our original recommendations in 1973.[14]

5.18 In addition, there are practical reasons for preferring a specified period, and this may in fact be advantageous to both parties. There will be few cases where the medical experts will not be prepared to name a date by which the event leading to deterioration is likely to occur. If that date passes without deterioration, it is likely that the risk of occurrence will have diminished, and new medical reports will be able to establish a new period with reasonable clarity. The risk may even have fallen so much that it will be appropriate for the court to exercise its discretion **not** to grant an extension of the original period. It cannot therefore be assumed that the plaintiff will automatically seek an extension, or that the court will grant it as a matter of course.

5.19 If the extension is granted, but the risk is shown to be reduced at the time of the granting of the extension, the defendant will be able to re-assess the extent of insurance cover which needs to be renewed. Further, both parties, and especially the plaintiff, and the plaintiff's solicitor, have a particular date to work to for monitoring of the plaintiff's medical condition, and for keeping of records. The court, which merely has a record-keeping duty, is also obliged to maintain a file which is reasonably up-to-date. It is less likely where extensions have to be granted that the claim will be forgotten by any party or the court. This is especially important where the 'chance' event takes years to happen. Finally, RSC, O 37, r 8(2) is a flexible provision in any event, allowing the judge not to specify a time limit where this is seen to be appropriate. We could see no reason to replace this flexibility with a rigid rule. 92% of those who responded to this suggestion supported the stance we took. We therefore make no recommendation for reform.

The overriding discretion of the court

5.20 The second relevant feature of the regime concerns the court's overriding discretion to grant a provisional damages order. In the consultation paper we asked if this discretion is too wide. RSC, O 37, r 8(1) provides that the court "may" make an award of provisional damages, and this is the discretion referred to by Scott Baker J in the *Willson* case[15] as the third step once the plaintiff has overcome the hurdles of 'chance' and 'serious deterioration'. We wondered whether leaving the discretion with the court simply creates a further uncertainty in an already difficult area of the law. However, we decided on balance that the discretion ensures flexibility and is therefore the most appropriate machinery for dealing with existing uncertainties. Further, we considered that the court should be allowed to take prejudice to the defendant into account. 84% of those who considered this issue endorsed our view,

[14] Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, p 66.

[15] *Willson v Ministry of Defence* [1991] 1 All ER 638.

though there was some suggestion that discretion created a 'lottery' situation. However, we do not think that any 'lottery' situation is other than an ordinary consequence of the litigation process. For these reasons we do not propose any change.

More than one application

5.21 Under RSC, O 37, r 10(6), a plaintiff is only entitled to make one application for further damages in respect of each disease or type of deterioration specified in the order for the award of provisional damages. It appears that this could create injustice where, for example, two limbs are injured in an accident, leaving a risk that both will develop arthritis at a later stage. Since it is the disease which must be specified, and not the susceptible body parts, if arthritis developed in a leg first but in an arm later, a plaintiff who claims for the former cannot claim further damages for the latter. This possible effect of r 10(6) seems to go against the general wording of section 32A(1) of the Supreme Court Act 1981. The logic of protecting the defendant which is embodied in r 10(6) is apparent. However, in the circumstances outlined it seems unduly harsh. We suggested a number of solutions. One solution would be to give the court more discretion by empowering it, when approving the original provisional award, to allow for additional applications for further damages. Another would be to allow the court to regard a second application arising from the same injury, though based on the same deterioration, to be deemed to be part of the first application. Alternatively the court could have power in hearing the further application to permit another application, again, based on the same deterioration. It is to be expected that such powers would be exercised very rarely. We inclined to the view that such a provision would more fully reflect the spirit of the legislation, and invited general comment on it.

5.22 85% of consultees who raised this issue agreed that more than one application for further damages arising out of the same injury should be allowed. We agree. We believe the likely number of cases would be small. No statistics are collected to enable the Lord Chancellor's Department to produce annual figures showing the number of applications made for provisional damages. Our empirical survey showed that only 4% of respondents in Bands 2-4 said they claimed provisional damages. Any very small increase in the use of the court system would not, we think, create difficulties, let alone overstretch the system. It would be necessary to ensure that the conditions under which more than one application could be made would be clear and within defined limits. One way of doing this would be to require that the possible positions on the body where further deterioration might be anticipated should be specified at the time of the first application. This requirement was suggested by the General Council of the Bar and others, and it would necessitate consequential amendments to rr 8(2) and 8(4).

5.23 We acknowledge that it might not be possible to identify at the time of the first application all of the relevant possible positions on the body. We believe this

establishes the natural limits to such a reform. Our recommendation will improve the lot of the plaintiff in most cases while maintaining some certainty for the defendant. Judges will have to monitor the process carefully, to ensure that applications genuinely and realistically identify other possible areas on the body which may deteriorate, and not allow a multiplicity of positions to be specified so that in fact the whole body is covered. The amendments required by our recommendation will probably also justify the issuing of a Practice Note to explain the effect of the amended rules. We therefore **recommend that:**

(11) RSC, Order 37, rule 10(6) be amended to provide that one application for further damages may be made in respect of each disease or type of deterioration specified in the order for the award of provisional damages, but that more than one application may be made where the disease or deterioration so specified occurs in more than one position on the body of the plaintiff provided that the possible positions are specified at the time of making the order.

The interaction with the Fatal Accidents Act 1976

5.24 A significant question which arose during our review concerned the effect of the provisional damages regime on actions by dependants under the Fatal Accidents Act 1976 and actions by the estates of deceased persons under the Law Reform (Miscellaneous Provisions) Act 1934. Where a living plaintiff in a personal injury action obtains an award of provisional damages and has the right to apply to the court for further damages if she or he should develop some specified disease or diseases or deterioration in health, but the plaintiff then dies as a result of such specified disease or deterioration before a claim can be brought for further damages or before it can be pursued to judgment, it is not clear whether a claim by the dependants under the Fatal Accidents Act 1976 is precluded by reason of the provisional award, even though no further award has ever been made. The matter has not been determined by the Court of Appeal or the House of Lords, although it has been considered by the former in *Middleton v Elliott Turbomachinery Ltd.*[16]

5.25 In our consultation paper we mentioned the fact that an award to dependants under the Fatal Accidents Act 1976 can include as much of the deceased's potential earnings in the lost years as would have gone to support the dependants. The courts have held that the right to bring a Fatal Accidents Act claim is lost if the deceased made a claim in respect of the same injury during her or his lifetime where the claim has been settled or gone to judgment.[17] We thought this conclusion entirely correct.

[16] *The Times* 29 October 1990; (1990) 6(8) PMILL 58-59; (1991) 7(1) PMILL 4-5.

[17] *Read v The Great Eastern Railway Co* (1868) LR 3 QB 555. Section 1(1) of the Fatal Accidents Act 1976 provides:-

> "If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and

The problem concerns the meaning of 'settled or gone to judgment'. If a provisional award (the immediate payment) is seen as a final determination of the rights of one party against the other, it seems possible that a claim for any part of the lost years' earnings could disappear altogether, because it cannot be saved by the Law Reform (Miscellaneous Provisions) Act 1934.

5.26 The latter was amended by section 4(2) of the Administration of Justice Act 1982,[18] to provide that a surviving cause of action vested in a deceased person's estate now excludes any lost years element. The amendment was motivated by a desire to prevent non-dependant heirs receiving a windfall,[19] but it could have the consequences outlined above if the nature of provisional damages awards is not clearly defined. A plaintiff, in deciding whether to seek an award of provisional damages together with the specification of a feared event which might lead to her or his death, is faced with the possibility that she or he may later have to make an urgent and distressing application although then in a terminal condition, in order to preserve the claim to compensation for the lost years. In contrast, if the plaintiff does not seek provisional damages, she or he would be able to receive compensation in some degree in the award of lump sum damages for the possibility of the occurrence of the feared event.

5.27 This was exactly the factual situation in *Middleton v Elliott Turbomachinery Ltd.*[20] The trial judge made an immediate award, and, under RSC, O 37, r 10, declared that if the plaintiff developed any of the specified conditions he would be entitled to

> recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

Read interpreted the extent of the new action permitted by the equivalent section in the Fatal Accidents Act 1846 (which, for all intents and purposes, contained almost identical wording).

[18] The amendment is now s 1(2)(a)(ii) of the Law Reform (Miscellaneous Provisions) Act 1934. Sections 1(1) and 1(2)(a)(ii) provide:-

> "(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of, his estate ...
>
> (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:-
>
> (a) shall not include -
>
> ... (ii) any damages for loss of income in respect of any period after that person's death."

[19] See *Hansard* (HL) 8 March 1982, vol 428, col 28, speech of Lord Hailsham LC, introducing what is now the Administration of Justice Act 1982, in the House of Lords.

[20] *The Times* 29 October 1990.

apply for further damages. He also declared that the part of the judgment which gave the plaintiff a conditional right to apply for further damages at a future date was not a judgment or satisfaction as precludes such a claim by his surviving dependants under the Fatal Accidents Act 1976 for damages corresponding with such further damages. However, the Court of Appeal did not think such a declaration could be made.

5.28 Mustill LJ said that it was no part of an appellate court's function to act as a purveyor of advice by expressing opinions on events which, if they happened at all, would happen in the future, and were more likely not to happen than to happen. Further, if a claim did arise from the happening of that event, it would be brought by persons not party to the present actions and whose identity could not accurately be predicted now. Therefore there was no ground for the court below to intervene by granting the declaration. It was seen as significant by the Court of Appeal that the plaintiff had had a choice: to opt for an immediate but small award in relation to the risk that serious consequences would ensue, or an immediate award of provisional damages with a right to return should he become ill. The court declined to express a view on the substantive issue.

5.29 The plaintiff had also sought a further declaration that on his death any right to an award of further damages under the judgment would devolve upon his estate and that the limitation imposed by section 1(2)(a)(ii) of the Law Reform (Miscellaneous Provisions) Act 1934 was not to apply to such an award for further damages. But although that further declaration was not pursued before the judge at first instance, the point which was the subject of the proposed declaration was before the Court of Appeal. The Court of Appeal expressed the tentative view that the position was not different from any other judgment for damages to be assessed and that consequently in assessing those damages the court would be able to take account of any loss of earnings attributable to the shortening of the plaintiff's life due to the occurrence of the 'feared event' referred to in the provisional award. That view was expressed obiter and, as we understand the position, the point had not been argued. Some doubt must remain whether this tentative view accurately states the law.

5.30 The questions which remain unanswered therefore were:

(a) Is the award of provisional damages a "final determination" so that no further claim can be brought by dependants under the Fatal Accidents Acts where otherwise appropriate?

(b) Is a claim by the estate for earnings in the lost years barred by section 1(2)(a)(ii) of the Law Reform (Miscellaneous Provisions) Act 1934?

5.31 As to (a), we merely commented that we did not see a provisional damages award as final and conclusive of the parties' rights. The further damages stage is not

merely a matter of assessing damages already agreed to be paid at the initial stage. There are strict notice requirements in the rules[21] to allow the defendant to meet the claim. The defendant may wish to challenge the plaintiff's contention that the chance condition has occurred and is the result of the defendant's negligence. It could be said that the medical condition is still in dispute between the parties. Or the defendant may wish to raise a suggestion of duplication between the provisional damages and the further damages claim, or of disability unrelated to the cause of action. Most importantly, RSC, O 37, r 8(3) gives an overall discretion to the court to grant extensions of time periods within which applications for further awards must be made. Because prejudice to the defendant will be one of the matters to which the court will attend in the exercise of this discretion, it cannot be said that the immediate award of provisional damages determines the rights of the parties once and for all.

5.32 Therefore, in the consultation paper we said that a provisional damages award does not fall foul of the rule in *Read v Great Eastern Railway Co Ltd.*[22] To view the matter otherwise would be to defeat the purpose of the provisional damages scheme, and create inconsistency. A terminal condition, if it advances quickly enough, could prevent dependants of a deceased person from pursuing compensation. Conversely, a serious deterioration would allow the victim to pursue further damages by completing the claim begun in a provisional damages action. Rights and liabilities should not fall to be determined by capricious acts of fate. However, in the absence of a determination by the courts, uncertainty exists which it was intended the provisional damages regime would remove.

5.33 As to (b), we agreed with the obiter view of the Court of Appeal in the *Middleton* case that section 1(2)(a)(ii) of the Law Reform (Miscellaneous Provisions) Act 1934 does not prevent a claim by the estate for earnings in the lost years. Until this matter is the subject of a direct decision of the court, however, uncertainty prevails.

5.34 Our provisional view was that this uncertainty was not something which either plaintiffs or defendants should have to live with until there is a judicial decision in a suitable case. It seemed distasteful that a plaintiff with a terminal condition might have to pursue a last-minute action on her or his deathbed to determine the matter. In numerous cases plaintiffs will have to decide whether or not provisional damages are appropriate for them, although the risk of a terminal condition developing may be many years off. In such circumstances, it will be very difficult at present for legal advisers to give clearcut advice. One result of this might be the under-utilisation of the provisional damages regime. All these effects are undesirable. We suggested that the solution would lie in making it clear in legislation that dependants can pursue further damages actions connected to provisional damages awarded to a

[21] See paras 2.13 and 2.20 above.

[22] (1868) LR 3 QB 555.

plaintiff before a reserved terminal condition manifested itself and prevented the plaintiff pursuing the further award because of earlier death. This would remove the provisional damages regime from the ambit of section 1 of the Fatal Accidents Act 1976.

5.35 97% of those who considered these difficulties supported our provisional view. However, there was concern that double recovery should not be revived. One of the few consultees to consider this matter in detail suggested that because a provisional award is a form of hybrid judgment - complete as to the damage occurring to date, but incomplete as to the chance event - it could not have been contemplated in the judgment in *Read*.[23] Therefore, it was argued, a deceased plaintiff could in such circumstances maintain an action and recover damages under section 1 of the Fatal Accidents Act 1976.

5.36 Further, this respondent argued that the hybrid nature of a provisional judgment meant that causation remains in issue in relation to further damages. This means that the position is different from the situation when other judgments are entered for damages to be assessed and therefore in attempting to avoid the effect of section 1(2)(a)(ii) of the Law Reform (Miscellaneous Provisions) Act 1934, the court would not be able to take account of any loss of earnings attributable to the shortening of the plaintiff's life due to the occurrence of the 'feared event' referred to in the provisional award. In other words, this respondent disagreed with the obiter reasoning of the Court of Appeal summarised at paragraph 5.29 above. However, if this view of the effect of the Fatal Accidents Act 1976 is correct, there would be no need to attempt to avoid the effect of the Law Reform (Miscellaneous Provisions) Act 1934 at all, since earnings for the lost years would be recoverable under the Fatal Accidents Act 1976.

5.37 In spite of this argument we think that there is still uncertainty about the legal position, and we consider that a straightforward clarification of the Fatal Accidents Act 1976 should remove it.[24] We consider, however, that flexibility should be

[23] Beachcroft Stanleys, Solicitors.

[24] The Scottish Law Commission raised the issue in Scotland when Consultation Paper No 125 was published. As a result, Scottish law was changed by amendment to s 1 of the Damages (Scotland) Act 1976, introduced by s 1(3) of the Damages (Scotland) Act 1993, c 5, which provides:

> "...Where a deceased has been awarded a provisional award of damages under section 12(2) of the Administration of Justice Act 1982, the making of that award does not prevent liability from arising under this section but in assessing for the purposes of this section the amount of any loss of support suffered by a relative of the deceased the court shall take into account such part of the provisional award relating to future patrimonial loss as was intended to compensate the deceased for a period beyond the date on which he died."

preserved to prevent double recovery where possible. We therefore **recommend that:**

> **(12) Where a person who has been awarded provisional damages later dies because of the act which caused the injury for which damages were awarded, the damages awarded shall not bar an action relating to the death under the Fatal Accidents Act 1976; but any of the damages intended to compensate for future pecuniary loss shall be taken into account by the court when assessing any loss in relation to any dependancy claim brought under the Fatal Accidents Act, where it is just to do so (Draft Bill, Clause 7).**

5.38 The reform only applies where the plaintiff has died as a result of the original injury, since this was the specific issue we put out to consultation. In any event, we consider that to take account of situations where the plaintiff has died due to negligence after receiving provisional damages for a previous negligent act of a different defendant would be too wide a reform and would be unnecessary. Further, the court should have a discretion to take damages already awarded into account. In some cases, the dependants may not have benefited from the provisional award at all, for example where a plaintiff spends the total award on personal consumables prior to death. Therefore, the damages should be taken into account 'if and so far as the court thinks just'.

Procedure

5.39 One pair of consultees[25] thought that the procedure where application is made for a further award is too skeletal at present. It was suggested that Rules of Court should require a statement of case from the plaintiff, a defence to case from the defendant, and that automatic directions should apply thereafter. The difficulty they perceived at present was that directions are needed in practice and that individual summonses have to be formulated and prepared. Since we did not consult on this matter, we merely recommend that this point be considered by the Supreme Court Procedure Committee and we hereby bring it to the Committee's attention.

[25] Robin Thompson & Partners and Brian Thompson & Partners, Solicitors, in a joint response.

PART VI
SUMMARY OF RECOMMENDATIONS

Lump sum damages

6.1 The actuarial tables published by the Government Actuary's Department (known as the Ogden Tables) should be admissible evidence in any proceedings for damages for personal injury (including proceedings under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934) where it is desired to establish the capital value of the sum to be awarded as general damages for future pecuniary loss.

(Paragraphs 2.9 to 2.23; clause 6).[1]

6.2 There should be legislative provision requiring courts, when determining the return to be expected from the investment of the sum awarded, to take account of the net return upon an index-linked government security (ILGS), permitting departure from the rates where it can be shown that a different rate would be better in the individual case, and for the prescription of an alternative best indicator of real rates of return by statutory instrument where it appears to the Lord Chancellor that no index-linked government security exists to which reference can be made.

(Paragraphs 2.24 to 2.32, 2.36; clause 6).

6.3 ILGS rates should be published in the Supreme Court and County Court Practices and regularly updated.

(Paragraph 2.33).

6.4 Rules of Court should be drafted in conjunction with the legislation directing judges in carrying out their new duty of having regard to ILGS rates to refer to the current gross return on ILGS having the description of "Inflation rate 5%" and "Over 5 years".

(Paragraph 2.35).

Structured settlements

6.5 There should be no judicial power to impose structured settlements. Reform should be by way of rationalising and simplifying the voluntary system. To this end the arrangements for structured settlements should be rationalised to enable life offices to be able to make payments under annuities bought by defendants with personal injury damages free of tax direct to the plaintiff.

(Paragraphs 3.53 to 3.57).

6.6 There should be provision for statutory structured settlements, with the following features:

[1] These references are to clauses in the draft Bill contained in Appendix A below.

(i) There must exist an agreement between a plaintiff and the defendant (or the defendant's insurer) settling any damages claim for personal injury, including any claim under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934;

(ii) The plaintiff and the defendant (or the defendant's insurer) must agree that the damages (so far as not consisting of a lump sum) are to consist of periodic payments to the plaintiff for a fixed term, or for life, or both (with or without provision for indexation);

(iii) The defendant (or the defendant's insurer) must agree to purchase for the plaintiff an annuity or annuities producing for the annuitant sums which as to amount and time of payment amount to the periodic payments specified in the agreement;

(iv) The annuity payments received by the plaintiff shall be free of income tax just as instalments of damages received by the plaintiff from the defendant (or the defendant's insurer) under a voluntary structured settlement are free of income tax at present.

(Paragraphs 3.58 to 3.59; clauses 1 and 2).

(v) The legislation should make it clear that:

(a) As a policyholder for the purposes of the Policyholders Protection Act 1975, the person for whom, pursuant to a structured settlement, an annuity has been purchased, shall have protection under that Act, but to the full extent of any liability, benefit or value, and full policyholders protection shall apply to annuities purchased from insurance companies which are authorised insurance companies within the meaning of the Policyholders Protection Act 1975,

(Paragraphs 3.67 to 3.70 and 3.76; clause 3)

and;

(b) The courts are to have jurisdiction to make an order by consent that the parties settle the action by way of a structured settlement agreement that satisfies the statutory criteria. Such an order shall be capable of applying to both interim and provisional damages as well as to ordinary lump sum damages,

(Paragraphs 3.77 to 3.84; clause 4)

and;

(c) The scheme for annuities purchased pursuant to a structured settlement shall apply to annuities purchased from an insurance company or companies authorised to carry on insurance business in the United Kingdom whether

authorised under domestic or under European law as given effect in the United Kingdom,

(Paragraphs 3.71 to 3.72; clause 1(4))

and;

(d) Where the Motor Insurers' Bureau has undertaken to pay damages in satisfaction of a claim or judgment against an uninsured driver, and purchases an annuity pursuant to a structured settlement which satisfies the requirements of the legislation, the provisions as to the periodic payments being free of tax and policyholders protection shall apply to that annuity.

(Paragraphs 3.86 to 3.95; clause 5).

6.7 The relevant professional bodies should consider whether they need to amend their rules in the light of the concerns outlined in this Report relating to intermediaries acting for both parties.

(Paragraphs 3.130 to 3.134).

Provisional damages

6.8 Order 37, rule 10(6) of the Rules of the Supreme Court should be amended to provide that one application for further damages may be made in respect of each disease or type of deterioration specified in the order for the award of provisional damages, but more than one application may be made where the disease or deterioration so specified occurs in more than one position on the body of the plaintiff. The possible positions should be specified at the time of making the order, to provide some limits to the reform.

(Paragraphs 5.22 to 5.23).

6.9 There should be legislative provision that where a person who has been awarded provisional damages subsequently dies due to the negligence which gave rise to that award, the provisional damages shall not bar an action under the Fatal Accidents Act 1976; but any part of the provisional damages which were intended to compensate for pecuniary loss over a period which occurs after death can be taken into account by a court in assessing the amount of any loss of support claimed by dependants under the Fatal Accidents Act 1976, where it is just to do so.

(Paragraphs 5.24 to 5.37; clause 7).

(Signed) HENRY BROOKE, *Chairman*
JACK BEATSON
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*
19 July 1994

APPENDIX A

Draft
Damages Bill

ARRANGEMENT OF CLAUSES

PART I
STRUCTURED SETTLEMENTS

PART II
ASSESSMENT OF DAMAGES AND EFFECT OF PROVISIONAL AWARD

PART III
SUPPLEMENTARY

A

B I L L

TO

To make new provision in relation to the payment and assessment of damages for personal injury and with respect to the effect of an award of provisional damages on subsequent fatal accident claims. A.D. 1994.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

STRUCTURED SETTLEMENTS

Structured settlements.

1.—(1) In this Part of this Act a "structured settlement" means an agreement settling a claim or action for damages for personal injury on terms whereby—

(a) the damages are to consist partly of periodical payments; and

(b) the person to whom the payments are to be made is to receive them as the annuitant under one or more annuities purchased for him by the person against whom the claim or action is brought or, if he is insured against the claim, by his insurer.

(2) The periodical payments may be for the life of the claimant, for a specified period or of a specified number or minimum number or include payments of more than one of those descriptions.

(3) The amounts of the periodical payments (which need not be at a uniform rate or payable at uniform intervals) may be—

(a) specified in the agreement, with or without provision for increases of specified amounts or percentages; or

(b) subject to adjustment in a specified manner so as to preserve their real value; or

(c) partly specified as mentioned in paragraph (a) and partly subject to adjustment as mentioned in paragraph (b) above.

EXPLANATORY NOTES

PART I: STRUCTURED SETTLEMENTS

Clause 1 implements Recommendations 7, 8 and 9(i) - 9(iii) and 9(vi) (Report, paragraphs 3.53, 3.57, 3.58 and 3.72) on structured settlements. It defines statutory structured settlements.

Subsection (1) confines structuring to damages for personal injury, and outlines the requirement for payments to be partly periodical, and the requirement that the defendant or the defendant's insurer purchase one or more annuities for the plaintiff.

Subsection (2) provides that the periodical payments may be for the life of the plaintiff, for a fixed term, or for a fixed or minimum number of payments, or a combination of all of these. The description is intended to encompass the types of annuities currently used to fund structuring, and to take account of the use of guarantee periods whereby payments are made for a minimum number of years or until death, whichever is later.

Subsection (3) describes the periodical payments in further detail. The amounts of the payments may increase by specified amounts or percentages (allowing for fixed pre-determined increases at intervals), be adjusted to preserve their real value (allowing for increases or decreases tied to the Retail Price Index), or be a combination of both.

PART I

(4) The annuity or annuities must be purchased from an insurance company authorised to carry on business of the relevant kind in the United Kingdom—

1982 c.50

(a) under section 3 or 4 of the Insurance Companies Act 1982; or

S.I. 1994/1696

(b) by virtue of the Insurance Companies (Third Insurance Directives) Regulations 1994,

and be such as to provide the annuitant with sums which as to amount and time of payment correspond to the periodical payments described in the agreement.

Income tax.

2. Sums which a person receives or is entitled to receive as, or on behalf of, the annuitant under an annuity purchased for him or, as the case may be, for the person on whose behalf they are received, pursuant to a structured settlement shall not be regarded as his income for any purposes of income tax and accordingly shall be paid without any deduction under

1988 c.1

section 349(1) of the Income and Corporation Taxes Act 1988.

Enhanced policyholders protection.

1975 c.75

3. In relation to an annuity purchased for a person pursuant to a structured settlement from an authorised insurance company within the meaning of the Policyholders Protection Act 1975 (and in respect of which that person as annuitant is accordingly the policyholder for the purposes of that Act) sections 10 and 11 of that Act (protection in the event of liquidation of insurer) shall have effect as if any reference to ninety per cent. of the amount of the liability, of any future benefit or of the value attributed to the policy were a reference to the full amount of the liability, benefit or value.

Consent orders.

4.—(1) A court awarding damages in an action for personal injury may, with the consent of the parties, make an order—

(a) incorporating structured terms; or

(b) requiring the parties to enter into an agreement on structured terms,

in respect of the damages awarded by the court; and, where such an order is made, sections 2 and 3 above shall have effect in relation to an annuity purchased pursuant to those terms as they have effect in relation to an annuity purchased pursuant to a structured settlement.

(2) In this section "structured terms" means terms corresponding to those described in section 1 above in relation to an agreement settling a claim or action for damages.

(3) In this section "damages" includes an interim payment which the court, by virtue of rules of court in that behalf, orders the defendant in an action for personal injury to make to the plaintiff.

Claims against uninsured drivers.

5. Sections 2 and 3 above shall have effect in relation to an annuity purchased by the Motor Insurers' Bureau as they have effect in relation to an annuity purchased pursuant to a structured settlement if the annuity is purchased pursuant to an agreement made by the Bureau—

(a) in respect of damages which it undertakes to pay in satisfaction of a claim or judgment against an uninsured driver; and

EXPLANATORY NOTES

Subsection (4) describes the type of company from which a relevant annuity may be bought to back a structure. Such companies must be authorised to carry on business in the United Kingdom under sections 3 or 4 of the Insurance Companies Act 1982 or be an EC company authorised to carry on business (from a branch or simply offering services) authorised under measures designed to give effect to EC Directives intended to achieve the harmonisation of the European insurance market. The subsection also prescribes that the sums payable under the annuity or annuities to the plaintiff must correspond in amount and timing to the periodical payments described in the structuring agreement.

Clause 2 implements Recommendation 9(iv) (Report, paragraph 3.58) and provides that the sums received by a plaintiff or on the plaintiff's behalf from the annuity purchased under a structured settlement agreement continue to be free of income tax as are such payments under existing common law structured settlements.

Clause 3 implements Recommendations 9(v) and 9(vii) (Report, paragraphs 3.70 and 3.76) and makes provision for annuitants under structured settlements to be able to make full recovery of any sums due under an annuity in the event of the liquidation of the life company providing the policy under the Policyholders Protection Act 1975.

Clause 4 implements Recommendations 9(viii) - 9(x) (Report, paragraphs 3.77, 3.78, and 3.84) and gives courts jurisdiction to make consent orders for structuring of damages for personal injury, including provisional and interim damages.

Subsection (1) gives jurisdiction to courts awarding damages in personal injury actions to make an order, where the parties consent, incorporating structured terms or requiring an agreement on structured terms to be entered into, and provides that the provisions of sections 2 and 3 of the Bill will apply to such structures.

Subsection (2) defines 'structured terms' as terms corresponding to those described in section 1.

Subsection (3) defines 'damages' to include interim payments of damages. It is unnecessary to include provisional damages in the definition as they are damages in any event and must be taken to be so included.

Clause 5 implements Recommendation 9(xi) (Report, paragraph 3.95) and extends the structured settlements regime to allow the Motor Insurers' Bureau to structure damages it has undertaken to pay in satisfaction of a claim or judgment against an uninsured driver. Sections 2 and 3 have effect in relation to any annuity purchased by the MIB pursuant to a structured settlement on terms corresponding to those described in section 1.

(b) on structured terms as defined in section 4(2) above. PART I

PART II

ASSESSMENT OF DAMAGES AND EFFECT OF PROVISIONAL AWARD

Assessment of damages for future pecuniary loss.

6.—(1) This section has effect in relation to the assessment, in an action for personal injury, of the sum to be awarded as general damages for future pecuniary loss.

(2) Actuarial tables for use in personal injury and fatal accident cases prepared by the Government Actuary's Department shall be admissible as evidence of the matters which they contain and may be proved by the production of a copy published by Her Majesty's Stationery Office.

(3) In determining the return to be expected from the investment of the sum awarded, the court shall, subject to and in accordance with rules of court made for the purposes of this provision, take into account the net return on an index-linked government security but it shall be open to any party to show that a different rate of return is more appropriate in the case in question.

(4) If at any time it appears to the Lord Chancellor that no index-linked government security exists to which reference can be made under subsection (3) above he may by order prescribe an alternative indicator of real rates of return and that subsection shall have effect accordingly.

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

Effect of provisional award on fatal accident claim.

7.—(1) Where a person who has been awarded provisional damages subsequently dies as a result of the act or omission which gave rise to the cause of action for which the damages were awarded—

(a) the award of those damages shall not operate as a bar to an action in respect of his death under the Fatal Accidents Act 1976; but 1976 c.30

(b) such part (if any) of the damages as was intended to compensate him for pecuniary loss in a period which in the event falls after his death shall, if and so far as the court thinks just, be taken into account in assessing the amount of any loss of support suffered by the person or persons for whose benefit the action is brought.

(2) In this section "provisional damages" means damages awarded by virtue of section 32A(2)(a) of the Supreme Court Act 1981 or section 51(2)(a) of the County Courts Act 1984. 1981 c.54 1984 c.28

EXPLANATORY NOTES

PART II: ASSESSMENT OF DAMAGES AND EFFECT OF PROVISIONAL DAMAGES

Clause 6 implements Recommendations 1, 2, 3 and 6 (Report, paragraphs 2.15, 2.31, 2.32 and 2.36) on lump sum damages and makes provision for the method of assessment of damages for future pecuniary loss.

Subsection (1) confines the operation of the section to the assessment of general damages for future pecuniary loss in personal injury actions.

Subsection (2) makes provision for actuarial tables prepared by the Government Actuary's Department to be admissible as evidence in personal injury cases.

Subsection (3) directs courts to take into account the net return on an index-linked government security when determining the return expected on investment of damages, but leaves it open for any party to show in the individual case that a different rate of return is more appropriate. Rules of Court will identify the appropriate index-linked government security to be considered.

Subsection (4) makes provision for the Lord Chancellor to prescribe by order an alternative indicator of real rates of return if no appropriate index-linked government security exists.

Subsection (5) provides that any order under subsection 4 must be made by statutory instrument subject to annulment pursuant to a resolution by either House of Parliament and cannot be made unless the Lord Chancellor has consulted the Government Actuary and the Treasury beforehand.

Clause 7 implements Recommendation 12 (Report, paragraph 5.37) on provisional damages and prevents an award of provisional damages to a person who subsequently dies from the injuries for which the provisional damages were awarded from barring an action for the death under the Fatal Accidents Act 1976, but also allows the court to take into account the fact that dependants might have benefited from a relevant part of the provisional damages when it makes an award under the Fatal Accidents Act 1976.

Subsection (1) provides that where a person has been awarded provisional damages and then dies as a result of the injuries, the provisional damages award does not prevent an action being brought for the benefit of dependants under the Fatal Accidents Act 1976. However, in assessing loss of support for dependants, the court is to take into account any part of the provisional damages intended to provide for pecuniary loss incurred after the time of death, if this is just.

Subsection (2) defines provisional damages as being the regime applicable to both the Supreme Court and the County Courts.

PART III

SUPPLEMENTARY

Interpretation.

8. In this Act "personal injury" includes any disease and any impairment of a person's physical or mental condition and references to a claim or action for personal injury include references to such a claim or action brought by virtue of the Law Reform (Miscellaneous Provisions) Act 1934 and to a claim or action brought by virtue of the Fatal Accidents Act 1976.

1934 c.41
1976 c.30

Short title, commencement and extent.

9.—(1) This Act may be cited as the Damages Act 1994.

(2) This Act comes into force on such day as the Lord Chancellor may appoint by an order made by statutory instrument and different days may be appointed for different provisions.

(3) Part I does not apply to any agreement made before the coming into force of that Part.

(4) Section 6 does not apply to an action commenced before the coming into force of that section.

(5) Section 7 does not apply where provisional damages are awarded before the coming into force of that section.

(6) [Extent].

EXPLANATORY NOTES

PART III: SUPPLEMENTARY

Clause 8 defines "personal injury". Claims for personal injury are to include claims or actions brought under the Law Reform (Miscellaneous Provisions) Act 1934 or under the Fatal Accidents Act 1976 (Report, paragraph 3.59).

Clause 9 contains the short title, commencement and extent.

Subsection (1) provides that the short title is the Damages Act 1994.

Subsection (2) makes provision for the Lord Chancellor to bring the Act or appropriate parts of it into force on different days, if appropriate, by statutory instrument.

Subsection (3) provides that the structured settlement provisions shall not apply to any agreement entered into before those provisions take effect.

Subsection (4) provides that section 6, relating to assessment of future pecuniary loss, does not apply to any action commenced before section 6 comes into effect.

Subsection (5) provides that section 7, relating to provisional damages, does not apply to any provisional damages awarded before section 7 comes into effect.

Subsection (6) makes no provision for extent because the Law Commission cannot make recommendations for Northern Ireland and Scotland, but it will be necessary for a co-ordinated approach to be taken to structured settlements because these depend on a tax regime which extends beyond England and Wales. The other jurisdictions will also have to consider the applicability of the provisions which do not relate to structured settlements (Report, paragraphs 3.9 and 3.98).

APPENDIX B

List of persons and organisations who commented on Consultation Paper No 125

Mr David Allen
Allen French & Co, Financial Advisers
The Honourable Mr Justice Alliott
Peter Andrews QC
Piers Ashworth QC
Association of British Insurers
Association of Community Health Councils
The Association of Consulting Actuaries
Association of Disabled Professionals
Association of Personal Injury Lawyers
The Automobile Association
AXA Insurance Company Limited
Beachcroft Stanleys, Solicitors
Blake Lapthorn, Solicitors
Mr Roger Bowles
Boyes Turner & Burrows, Solicitors
Michael Brent QC
Brian Thompson & Partners and Robin Thompson & Partners
British Coal Corporation
British Insurance and Investment Brokers' Association
British Medical Association
British Society of Rehabilitation Medicine
The Builders' Accident Insurance, Limited
Mr Andrew Burrows
Mr Peter Cane
Capsticks, Solicitors
Chase De Vere
CIGNA Services UK Limited
Professor Laurence Copeland
Cornhill Insurance
Council of Circuit Judges
Council of Industrial Tribunal Chairmen
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Disabled Living and Design
Disaster Action
Professor Tony Dugdale and Julia Burgess
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Frenkel Topping Structured Settlements
GAN Minster Insurance Company Limited
The General Council of the Bar
Edwin Glasgow QC, Colin MacKay QC and Mr Michael Tillett
Godwins Limited, Financial Advisers
His Honour Judge S P Grenfell
Caroline Harmer
Healthcare Financial Management Association
Mr F J Holding
The Hon Mr Justice Holland
Home Office
The Hon Mr Justice Hutchison
Ince & Co, Solicitors
The Institute of Chartered Accountants
The Institute of Legal Executives
Iron Trades Insurance Group
Irwin Mitchell, Solicitors
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Mr Roger Kerridge
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The Law Society of Northern Ireland
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Legal Aid Head Office
The Rt Hon Lord Justice Leggatt
Lord Chancellor's Department
Mr Richard Lewis
Lloyd's of London
London Insurance and Reinsurance Market Association
Mrs A B Macfarlane, Master of the Court of Protection
Colin McEachran QC
Harvey McGregor QC
Henry McHale and John V Davies, Barristers
The Medical Defence Union Ltd
The Medical Protection Society
The Midlands Centre for Spinal Injuries
Motor Insurers' Bureau

Munich Reinsurance Company
National Development Team for People with Learning Disabilities
The Rt Hon Lord Justice Neill
NFU Mutual
NIG Skandia
Nottinghamshire Law Society
Sir Michael Ogden QC and John Crowley QC
Osborne Morris & Morgan, Solicitors
Pannone & Partners, Solicitors
Personal Injury Compensation Claims Service
Police Federation of England and Wales
The Hon Mr Justice Popplewell
Public Trust Office
Mr William Pusey
Revell Ward, Chartered Accountants
Rivermead Rehabilitation Centre
Robson Rhodes, Chartered Accountants
Robson Rhodes, Chartered Accountants
The Hon Mr Justice Rougier
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The Structured Settlements Company Ltd
CJM Sutherland QC
Touche Ross & Co
Trades Union Congress
The Hon Mr Justice Tucker
The Hon Mr Justice Turner
Victim Support
Mr Terence Walker, Barrister
R Watson & Sons, Consulting Actuaries
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