

# **PROPOSALS FOR A STRUCTURED JUDGMENTS ACT**

**Law Reform Commission of Saskatchewan Saskatoon, Saskatchewan**

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# I. STRUCTURED SETTLEMENTS AND JUDGMENTS IN CANADIAN LAW

## 1. INTRODUCTION

The structured settlement is rapidly becoming an accepted and even routine mechanism for settling personal injury claims. To many in the legal profession and insurance industry, it is an idea whose time has clearly arrived, welcomed as an innovation that produces benefits for both the injured plaintiff and the insurer who typically bears the cost of providing compensation.

The tort system has been subjected to increasing criticism in recent years, particularly as a mechanism for providing compensation to automobile accident victims. The cost of settling claims has escalated, driving up insurance premiums. Some plaintiffs are overcompensated, others are left with inadequate provision for long-term disability. Expanded no-fault automobile insurance coverage is currently under consideration in Saskatchewan as a means of coping with the perceived crisis in the automobile insurance industry. Structuring should not be seen as an alternative to fundamental reform of the compensation system. But it will be part of any major reform of the system that does not abolish tort compensation entirely. It can make a significant contribution to improving the system even if more controversial measures are not adopted. Structuring demonstrably reduces the cost of settling large claims while maximizing benefits to plaintiffs. On the other hand, the no-fault insurance program adopted in Ontario focuses on small to medium sized claims. No-fault coverage replaces compensation in tort except in cases of serious injury usually involving permanent disability. Structuring would complement such an approach.

The concept is straightforward. As Mr. Justice Vancise observed in the first case in which a structured settlement was reviewed by a Saskatchewan court, a structured settlement is "no more than an agreement to pay the plaintiff . . . by periodic payments rather than a lump sum payment."<sup>1</sup> The typical structured settlement in Canada is funded by a single-premium annuity purchased by a casualty insurer from a life insurance company. For tax reasons, the casualty insurer is the "annuitant" and "owner" of the annuity, but the annuity payments are made directly to the

<sup>1</sup>Fuchs et. al. v. Brears et. al.(1980) 44 Sask. R. 112.

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plaintiff rather than to the annuitant insurer.

Since much of the loss a settlement or damage award in a personal injury case is intended to compensate is spread over time in the form of lost income and periodic health-care expenses, periodic payment of compensation is both logical and appropriate. Calculation of periodic payments is, in principle, less difficult than determination of a lump sum payment sufficient to meet future needs as they arise. Moreover, the availability of a variety of annuities to fund structured settlements, and favourable tax treatment of such annuities, creates significant cost savings. The casualty insurance industry has embraced structuring because the cost of providing adequate compensation can be reduced. The plaintiff's bar was slower to be converted, but has come to realize that an annuity can produce a larger return over time for the injured party than a lump sum equal to the annuity cost. When, as is often the case, structuring makes it possible to obtain an adequate settlement within insurance policy limits, a structured settlement is particularly attractive to the plaintiff.

Lump sums are the traditional method both of awarding damages and settling personal injury claims out of court. Only twenty years ago, periodic payment of compensation in personal injury cases was virtually unknown. Today, structuring will at least be considered in almost every personal injury case in which potential damages exceed \$100,000. Although the structured settlement originated as a mode of settlement in personal injury cases, and is still largely confined to that sphere, there are some indications that it will spread to other types of claims, from wrongful dismissal actions to environmental damage cases. Some measure of the increasing use made of structured settlements is provided by the fact that all major life insurance companies now actively promote annuities designed to fund structured settlements among their products. ManuLife, which probably accounts for about half of the settlement market in Canada, has several full-time representatives in Saskatchewan who currently spend much of their time promoting structured settlements. Several other insurance companies, including London Life, also have experts in structured settlements on their staff in the province. Structured settlements have even spawned a new industry. Brokerage firms specialising in group benefit plans and pensions early saw an opportunity in the increasing popularity of structured settlements. The James E. Rogers Group Ltd., for example, entered the structured settlement field in 1980. The company assists in the preparation of proposals and acts as a broker for the purchase of an appropriate annuity to fund the settlement once it has been agreed upon. More recently, firms such as McKeller Structured Settlements Inc. that function strictly as

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structured settlement consultants have appeared on the national scene.

The courts in Saskatchewan and most other provinces lack jurisdiction to make awards on a periodic payment rather than lump sum basis. At present, Saskatchewan courts are prepared to approve orders based on structured settlements negotiated by the parties, but become actively involved in accessing structuring proposals only when required to approve settlements for infants. John P. Weir, author of the leading Canadian text on structured settlements suggests that structured judgments are the next logical step in the development of the new approach to damages pioneered in settlement negotiations.<sup>3</sup> In a recent English decision, Mr. Justice Rougier probably reflected a growing consensus on the bench when he expressed the opinion that "The sooner it is possible to award damages on this infinitely less hit and miss basis the better"<sup>4</sup>. Members of the Saskatchewan judiciary consulted by the Commission also favoured structured settlements legislation. Ontario has already conferred a limited jurisdiction on its courts to make structured awards in personal injury cases, and similar legislation has been proposed by the Manitoba Law Reform Commission and in draft legislation in British Columbia.<sup>5</sup> In the United States, the structured judgment is already a reality in the more than 17 states that have adopted the American Uniform Law Conference model *Periodic Payment of Judgments Act*.<sup>6</sup>

Although the concept of structured settlements and judgments is both simple and attractive, like almost any other innovations in the law, what was simple in theory has become more complex in practice. Even as it has solved many of the dilemmas associated with the traditional lump sum, structuring has introduced new problems and issues of policy.

For example, under the traditional lump sum regime, responsibility to insure that a damage award or settlement is invested to produce the income required by the beneficiary in the

<sup>2</sup>As for example, in Fuchs v. Beard.

<sup>3</sup>  
e.g. John P. Weir, Structured Settlements, Carswell. Legal Publications, 1984, p.<sup>9</sup>.

<sup>4</sup>HeeLy v. Britton, unreported, 1990. Quoted in The Law Commission consultation report (no. 125), Structured Settlements and Interim Provisional Damages, 1992.

<sup>5</sup>  
Structured judgments Legislation and proposals in other Canadian jurisdictions will be discussed below.

<sup>6</sup>See below.

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future is left to the beneficiary. While there is evidence to suggest that lump sums are often poorly invested or even wasted, any short fall in income that results is not a product of the terms of the settlement or award. On the other hand, if a structure stipulates purchase of an annuity that does not make adequate provision for inflation, generating a short fall in income, it is the award or settlement itself that is deficient. Worse still, if the annuity is purchased from an issuer who becomes insolvent, the invested funds could be lost. Again, responsibility lies with the terms of the award or settlement, not the beneficiary. A variety of strategies to protect structures from inflation have been developed. Similarly, to protect the investment of settlement funds, only annuities issued by the largest, most diversified financial institutions are usually considered appropriate for structuring. Whether current practices are entirely satisfactory is, however, a controversial question.

This report examines structured settlements in an effort to identify both the advantages and problems associated with them. From the point of view of law reform, the obvious question which follows such a review is whether structured settlements should be regulated by legislation. In addition, this report considers the case for adoption of structured judgment legislation that would confer jurisdiction on the courts to make structured awards. In the Commission's view, the two questions posed above are closely linked.

None of the problems in current law and practice identified by the Commission appear to be insoluble without legislative intervention. There is every reason to believe that the theory and practice of the structured settlement will continue to evolve if it is left as a matter between plaintiffs, defendants, and insurers. Some commentators who have examined the subject believe that legislative intervention would be desirable in some areas. Weir, for example, suggests that "surely a system which the courts, the parties, academics and the public have endorsed merits legislative attention."<sup>7</sup> But legislation may be premature, particularly if the courts are given an opportunity to provide guidance. In what is still the only reported Saskatchewan decision in which a court was required to approve a proposed structure, Mr. Justice Vancise set out criteria for assessing structures that addressed such matters as inflation protection and the solvency of annuity issuers.<sup>8</sup> Court

<sup>7</sup> see above, note 3.

<sup>8</sup> Fuchs v. Brears, above, note 1.

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approval of the proposed structure was required in that case only because it involved a settlement for an infant plaintiff. If the courts possessed a wider mandate to order structuring of awards, a context in which many of the perceived problems of structuring could be resolved would be created.

In the result, although this report addresses both structured settlements and structured judgments, the proposal it includes is confined to recommending a *Structured Judgments Act* that would permit the courts to make structured awards, and provide some guidance in the process. Both the rationale for this approach and the appropriate scope and content of the legislation will be fully discussed in the last chapter of the report.

### 2. THE LEGAL AND HISTORICAL BACKGROUND

#### (a) The current legal status of structured settlements and judgments

The notion that damages might be paid periodically is alien to the common law. An American court in 1970, after reviewing the authorities in both the United States and England, found no exception to the common law insistence on lump sums awards. It concluded flatly that: "The common law provides for simple lump sum judgments ...there can be no judgment for an indefinite amount, or a judgment payable in instalments.i~<sup>9</sup> In Canada, this principle has been clearly recognized at least since the 1927 Privy Council decision in *Fournier v. Canadian National Railway Co.*<sup>10</sup> Growing interest in structured settlements has recently been reflected in a reexamination of the issue. A 1988 British Columbia Court of Appeal decision confirmed that *Fournier* is still good law.<sup>11</sup> In a case that came before the Manitoba courts in the same year, *Watkins v. Cia fson*<sup>12</sup>, the Court of Appeal was prepared to regard the old rule as a mere anachronism rather than binding precedent. It would have permitted the court to adopt a structure proposed by one party, but rejected by another. On appeal, however, the Supreme

<sup>9</sup>*Frankle v. United States*, 312 F. Supp. 1331 (E.D. Pa. 1970).

10(1927) A.C. 167 (P.C.)

<sup>11</sup>*Scarff v. Wilson* (unreported, B.C. C.A., November 25, 1988, per Hinkson, J.)

1248 Man. R. 81.

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Court of Canada concluded that the Manitoba courts had erred. Although the Supreme Court recognised the advantages of structuring, it could find no authority for ordering periodic payments in the absence of a statutory power authorizing departure from the established rule.<sup>13</sup>

Lump sum damage awards were probably a creation of necessity rather than logic. It has been suggested that they were adopted by the courts as the tort of negligence developed in the 19th century simply because they were "the only [method of awarding damages]

the courts could realistically administer. ~14 But nothing in the law appears to have prevented even Victorian lawyers from negotiating a settlement involving periodic payment of damages, and, in fact, such arrangements were not entirely unknown.<sup>15</sup> When structured settlements began to become popular in Canada in the 1980's, the courts were requested to approve consent orders incorporating structured settlements and to review structured settlements for infants. In *Yepremian v. Scarborough General Hospital*, perhaps the first Canadian case in which a structured settlement was reviewed, the jurisdiction of the court to adopt the settlement was not regarded as an issue,<sup>16</sup> nor has the jurisdictional issue been raised since. In Ontario, however, the *Courts of Justice Act* was amended in 1984 to expressly permit the courts to make consent orders providing for periodic payments.<sup>17</sup>

### (b) The rise of the structured settlement

Although periodic payment of damages was not unknown at an earlier date, the first documented example of a structured settlement in a personal injury case in North America arose out of the "Thalidomide babies" cases in 1968. The sheer magnitude of the potential litigation involved in these cases, and the intended publicity, encouraged the pursuit of unusual remedies. The manufacturer of Thalidomide, a multinational pharmaceutical

<sup>13</sup> (1990) 3 S.C.R. 259.

<sup>14</sup> Commissioners Preparatory Note, American Model Periodic Payment of Judgments Act, National Conference of Commissioners on Uniform State Laws.

<sup>15</sup>Weir, above, note 3.

<sup>16</sup> (1981) 15 C.C.L.T. 73.

<sup>17</sup>S.O. 1984, c. 11, s. 129

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company, may have been more concerned to mount "an all-out effort to stem the loss of public confidence in its other drug products" than to settle the claims according to traditional formulae.<sup>18</sup> In itself, this experiment with structured settlements was perhaps too unusual to usher in a new era. But, for reasons quite unconnected with the Thalidomide cases, interest was growing in the periodic payment concept at just the time when this high-visibility precedent was provided.

Structured settlements were likely not seriously considered by the legal profession until relatively recently simply because lawyers tend to negotiate settlements modeled on the awards that the courts might predictably make. The impetus to consider alternatives to the traditional lump sum did not initially come from the legal profession. The structured settlement rose to prominence because changing commercial realities, particularly within the casualty insurance industry, made the lump sum less attractive than periodic payments as a method of funding personal injury claims. The use of periodic payments in other insurance-funded compensation programs, such as workers' compensation, provided a workable model.<sup>19</sup>

Most important of the commercial realities that created interest in periodic payment of compensation was the escalating size of damage awards in the United States during the 1970s. As Robert F. McGlynn of McKeller Structured Settlements Inc. has written:

The casualty industry developed the structured settlement in response to increasing damage awards. Insurers were simply seeking a less expensive way of funding future losses, such as medical care, rehabilitation and future income loss.<sup>20</sup>

18

Weir, above, p. 9, note 3.

19 Ibid, p. 9. Weir notes that

Employers in most American jurisdictions.. have the option of providing workmen's compensation coverage for their employees privately through Licensed general insurance companies.. claims personnel associated with insurers having product lines in addition to workmens compensation recognize the favourable claims experience flowing from the then current use of structured judgments permitted by workmens compensation Legislation and started looking for other applications of this profitable concept.

20 Robert F. McGlynn, Structured Settlements, February, 1983 (A Paper Prepared for the Province of Ontario by McKeller Structured Settlements Inc.).

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Compensation by way of periodic payment was an attractive alternative for two reasons. First, because the structuring process places determination of future losses on a more transparent and rational foundation than the guess work often involved in calculating a lump sum, it was thought to be less subject to abuse by juries. Second, it was believed that periodic payment would provide benefits equivalent to lump sum awards at less cost in the long run.

It seems likely that casualty insurers initially believed that a significant part of the saving inherent in structured settlements would come from amortizing payments over the life of the settlement. As McGlynn writes, 'the original intention of the U.S. casualty industry was to retain the capital in their own hands, invest it, and pay out the investment proceeds as periodic payments to the plaintiff.' But, as he notes,

Difficulties with internally funded settlements arose when the plaintiff's bar became concerned with the long-term financial stability of casualty companies. As a result the annuity purchased by the casualty company from a life insurance company has come into usage ~21

It was soon discovered that favourable tax treatment of annuities purchased to fund settlements made them as attractive to the casualty insurance industry as self-funding.

Structured settlements evolved more slowly in Canada, perhaps in part because damage awards are not regarded as excessive in this country in comparison to the United States.<sup>22</sup> Nevertheless, the idea inevitably spread north of the border. By 1981, it was estimated that more than 100 structured settlements were being negotiated in Canada annually, and ManuLife reported \$17 million income from structured settlements.<sup>23</sup>

### 21

'Self—funding' of periodic payments is still sometimes negotiated, however. Despite its drawbacks, Weir (above, note 3) reported in 1984 that 'one Canadian insurer (Cooperators' Group) is actively promoting this form of structured settlement and has arranged numerous structures on this basis'. More recently, a variation on self—funding in which the casualty insurer provides an indemnity bond to guarantee payment has been adopted, with the approval of Revenue Canada, to fund settlements involving insurers without a Canadian domicile.

<sup>22</sup>For a comparison of the history of structured settlements in Canada and the United States, see David Allen, 'Structured Settlements', (1988) 104 LRQ 448.

<sup>23</sup>Weir, above, p. 12, note 3.

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Acceptance of the concept in Canada stemmed from several sources. It was spurred in part, no doubt, by marketing efforts of the life insurance industry.<sup>24</sup> Canadian casualty insurers were probably receptive to the structured settlement concept primarily because of favourable tax treatment. Mr. Justice Holland reflected this point of view in *Yepremian v. Scarborough General Hospital* when he expressed the opinion that 'the prime advantage of a structured settlement is that payments are received tax-free.'<sup>25</sup> But the structured settlement has been attractive for other reasons as well. Canada may have escaped the problem of excessive damage awards that has plagued the United States, but the difficulty inherent in calculating an appropriate lump sum has long been recognised. In *Andrews v. Grand & Toy*, decided in 1978 before structured settlements had become popular in Canada, the Supreme Court signalled a change in the way in which damage awards should be determined, placing emphasis on more precise calculation of future needs than had usually been attempted in the past. In the course of the judgment, Mr. Justice Dickson recognised the inherent difficulty in using lump sum awards to meet future needs:

The subject of damages for personal injuries is an area of the law which cries out for legislative reform .

When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once and for all award.<sup>26</sup>

As Derek Cone noted in a comment on the decision published in 1979, The approach to calculation of damages favoured by the court made structuring an attractive alternative.<sup>27</sup>

### (c) Advantages of structuring

Any legislative initiative designed to ameliorate problems currently associated with structured settlements will almost certainly encourage their use. Even more certainly, legislation mandating structured judgments will have a significant impact on

<sup>24</sup> See comments on the marketing efforts of life insurers in *The Financial Post*, March 1982.

<sup>25</sup>(1981) 15 C.C.L.T. 73. See also Mr. Justice Holland's comments on the tax advantage in "Structured Settlements in Injury and Wrongful Death Cases", (1987) 8 *Advocates Quarterly* 185.

<sup>26</sup>(1978) 2 SCR 229.

<sup>27</sup>Derek Cone, *Structured Settlements: An Alternative Resolution of Claims Involving Death and Substantial Personal Injury*, (1979) 37 *Advocate* 331.

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the way damages are awarded. Whatever the flaws of lump sum payment, it has long been accepted. Plaintiffs have come to expect to receive lump sums, which can be spent or invested as they see fit. A further departure from the traditional approach, particularly if the courts are permitted to impose periodic payment on a reluctant party, can only be justified if the advantages of structuring for both plaintiffs and defendants are substantial and clear.

More than a little self-promotion can be detected in much of the current literature of structuring. It should not be forgotten that structured settlements first gained popularity as a cost-saving measure favoured by the casualty insurance industry, and that their popularity has been increased by the sales efforts of life insurance companies marketing annuities to fund structures. In addition, the popularity of structuring creates the danger that it will be regarded as a panacea for the ills of the tort system of compensation for personal injuries. Structuring will be an important part of any reform of the system short of complete abolition. The Commission takes no position in the current debate about the desirability of replacing compensation in tort in whole or in part with expanded no-fault insurance programs. But it should be observed that structuring, on even the most optimistic assessment of its potential, is not an answer to the critics of the tort system.

Nevertheless, structuring has significant benefits that justify encouraging its use at least so long as fundamental reform is impractical. The remainder of this chapter attempts to set out these benefits as objectively as possible. Whether they are substantial enough to justify permitting, the courts to impose structures requires consideration of other factors as well, which will be discussed in Chapter III.

Perhaps the most convincing argument in favour of structuring rests on the proposition that periodic payment is a more rational method of assessing damages in personal injury cases than the traditional lump sum. Obviously, to the extent that a settlement or judgment is intended to provide compensation for living expenses, health care and other costs that are incurred over time, a regime in which these costs are met when they arise makes sense. A lump sum is intended to provide capital which can be invested to provide for future needs; if calculation of the appropriate lump sum for this purpose was a straight-forward task, there would be little reason in principle to favour periodic payment. Unfortunately, calculation of lump sums is often difficult and beset with uncertainty. Dickson's uncompromising criticism of the

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lump sum in *Andrews v. Grand and Toy* was motivated by that fact. He noted that in calculating the lump sum,

The court is faced with the task of determining the present value of the lump sum which, if invested, would provide payments of the appropriate size over a given number of years in the future. [But] ...after judgment new needs of the plaintiff arise and present needs are extinguished; yet our law of damages knows nothing of the periodic payment. .28

The difficulties in calculating the lump sum that troubled Dickson are primarily the problems of dealing with contingencies that may arise in the future. Allowing for contingencies requires the courts to make what the English Law Commission referred to as

"guesstimates" about the future.<sup>29</sup> Most contingencies are more manageable if the award is structured. Some of them disappear entirely.

Consider, for example, the problem of life expectancy. The number of years a permanently disabled plaintiff can be expected to require income is a major factor in calculating a lump sum. Actuarial tables will provide the court with a figure for the average life expectancy of a person of the plaintiff's age and sex. Medical evidence may make it possible to adjust this figure, taking into account the plaintiff's present state of health and the prognosis of his or her injuries. But a prediction based on these considerations is no more than an informed guess. Actuarial tables provide the mean life expectancy for an entire age and sex group. Even a prognosis based on medical examination of the patient has only statistical significance. The courts have no option but to use these statistical estimates, though they are rarely accepted without qualification. Since an underestimate will deprive the plaintiff of needed income in the future, uncertainty is usually resolved by grossing up the award.

Just how difficult dealing with life expectancy (and some other contingencies) can be when a lump sum is calculated is

· illustrated by a 1980 English case, *Lim v. Camden Health*

<sup>28</sup>see above, note 26.

<sup>29</sup>The Law Commission, *Structured Settlements and Interim Provisional Damages: A consultation Paper*, 1992, p.<sup>6</sup>.

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*Authority.*<sup>30</sup> Lord Scarman applied what the English courts refer to as "the multiplier approach" to adjust actuarial life expectancy to account for other factors and make allowance for income earned on investment of the award. He proceeded in this manner:

Her expectation of life, according to the tables, will be in the order of a further 37 years. In this case I must make substantial discount because of acceleration of payment [investment earnings], some reduction for the contingency that she will not reach the average age [as a result of her injuries], some reduction to allow for the purely domestic element, and some increase for prospective inflation. Balancing these elements as best I can, I find the appropriate multiplier for the period of future care in England to be 11.

After factoring in some further considerations, he revised his initial estimate to 12, and concluded that there was not sufficient reason to overturn the trial judge's decision to set the multiplier at 14 years.

The consequences of underestimating life expectancy can be catastrophic for the plaintiff. Conversely, an estimate that is too high may significantly overcompensate. If, for example, the court finds that the plaintiff will require \$20,000 semiannually and fixes life expectancy at 15 years, a lump sum of \$345,840 invested at 8% per annum will be required. If life expectancy is set instead at 20 years, the lump sum required will be \$395,856. If life expectancy is set at 25 years, \$429,644 will be required. An award based on a 15 year life expectancy will fall \$83,804 short if the plaintiff lives 25 years. On the other hand, if the plaintiff lives only 10 years, \$271,806 would have been required, and if the plaintiff survives 5 years, only \$162,218 would have been necessary. In the latter case, the plaintiff is over compensated by 113%.

A structure avoids this forensic lottery. The plaintiff will be fully protected from the consequences of underestimating life expectancy by purchase of an annuity that will provide \$20,000 semiannually for life. The cost of the annuity will be based on an adjusted actuarial estimate of life expectancy, but since the annuity issuer is spreading the risk over a large pool of clients, the actuarial approach is entirely appropriate. Cost to the casualty insurer will not be much different from the cost of paying

<sup>30</sup> [1980 A.C. 174. See the discussion in David Kemp, "The Assessment of Damages for Future Pecuniary Loss in Personal Injury Claims", (1984) 3 C.J.Q. p.120.

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a lump sum based strictly on an actuarial estimate of life expectancy and medical evidence. But since the consequences of underestimating life expectancy will not deprive the plaintiff of income, there is no need to gross up the award. In addition, the structure can be tailored to meet specific needs. For example, if a death benefit for a spouse is deemed appropriate, an annuity providing one can be purchased. Attempting to achieve the same result in a lump sum award would introduce yet other contingencies, making the calculation still more uncertain.

Structuring does not make all the contingencies that bedevil calculation of a lump sum disappear. This is particularly true in regard to uncertainty about the future needs of the plaintiff. Some structures have included a contingency fund to meet medical expenses that cannot be accurately estimated when the award is made; others have provided for escalation of payments during the period when additional expenses are most likely. While this is at least a modest improvement over lump sum guess work, a real solution to this problem would require reviewable awards of periodic payments. Some commentators regard reviewable structures as a logical development.<sup>31</sup> It is difficult, however, to envision this development within the framework of structures funded by purchase of annuities.

But even when structuring does not wholly eliminate contingencies, it may create a context in which contingencies are more effectively addressed than in calculation of a lump sum. For example, an inflation factor can be built into the periodic payment scheme by purchase of an annuity with a variable rate of return that reflects inflation. There is no guarantee that inflation will be adequately accounted for in a structure, but there are workable options available to address the problem.<sup>32</sup> Annuity issuers have responded to the perceived need to make realistic provision for inflation by developing new types of annuity. For example, annuities with a rate of return tied to the interest rate on Treasury Bills have recently become a popular form of inflation protection. Interest on Treasury Bills usually correlates at least roughly with inflation rates. While this may not be an entirely satisfactory method of dealing with inflation, it is a significant improvement over anything the courts have been able to do in the lump sum context to provide protection against inflation. Moreover, it can be expected that pressure from the plaintiff's bar will

<sup>31</sup>See Weir, above, note 3, for example.

<sup>32</sup>Inflation protection in structured settlements, and the problems associated with dealing with this contingency, are discussed in more detail in Chapter II.

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encourage annuity issuers to continue expanding the range of options.

Perhaps the greatest advantage created by the context of structuring is more effective use of actuarial and financial planning expertise. When a lump sum is awarded, the award is calculated by amortizing the sums required in the future, and determining the lump sum necessary to generate the required future income. Life insurance companies are in the business of making just the calculations described above, and do so as part of their business of selling annuities. By structuring, the parties, guided by the advice of structured settlement consultants, can make effective use of the expertise of the life insurance industry. While the same result could perhaps be achieved by greater use of experts in calculating lump sums, introduction of expertise as part of a structuring process is more cost effective, if for no other reason than that much of the expertise has gone into the development of appropriate annuities. There is no need to reinvent the wheel in every compensation case when proven annuity vehicles are available "off the shelf". Similarly, purchase of an annuity relieves the plaintiff of the burden of making investment decisions in the future. One Saskatchewan judge consulted by the Commission expressed the opinion that the saving in financial consultants' and brokers' fees made possible by structuring is a major reason for preferring it.

Advocates of the structured settlement also suggest that lump sums are unsatisfactory because they provide no assurance that an award will be properly invested to meet the needs they are intended to provide for. There is evidence that damage awards are all too often squandered. A study for the American life insurance industry found that

Within two months of settlement (award, lotteries, sweepstakes, insurance, inheritances, etc.), twenty-five percent of recipients had nothing left. By the end of the first year, fifty percent had nothing left. By the end of the first two years, seventy percent had nothing left and within five years of settlement ninety percent had nothing left.<sup>33</sup>

Even though this study was perhaps somewhat biased by the inclusion of lotteries and inheritances in the same category as damage awards and insurance monies, there can be little doubt that award of a

<sup>33</sup>R. Somers, "The Structured Settlement - A Better Way", The Journal of Insurance, March/April, 1979.

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lump sum is no guarantee that the capital will be invested wisely. An accident victim who fails to preserve the capital awarded is likely to require public assistance. On broad social policy grounds, therefore, structured settlements are attractive.

The logic of awarding periodic payments to fund future need that is itself periodic generates a net saving to the compensation system. But at least one of the most important cost savings that structuring creates has less to do with the underlying rationality of the system than with historical accident. The tax treatment of annuity-funded structures is much more favourable than the tax treatment of lump sums. While an award is non-taxable whether it is structured or not, the income from investment of a lump sum attracts tax. If the annuity funding a structure is owned by the casualty insurer, payments made to the beneficiary are all regarded as part of the award, and nontaxable.<sup>34</sup> The tax savings are considerable.

Consider, for example, an award to a single woman, age 31, with no other source of income, who has been disabled by an accident. A lump sum award of \$400,000 invested at 10.5% would produce an annual income for the plaintiff of \$42,000. This would amount to an after-tax income of \$26,704. A structured settlement funded by a \$375,000 single premium annuity guaranteed for forty years, would, on the other hand, produce a non-taxable income of \$38,254 for the plaintiff. From the point of view of the defendant's insurer, the advantage in adopting a structured settlement is obvious. The defendant himself may also find an advantage in negotiating a structured settlement, since the likelihood of settling within insurance policy limits is greater. From the plaintiff's point of view, there is also an advantage. When the money available to settle a claim can buy a greater benefit, astute negotiation may produce a greater total benefit for the plaintiff than would otherwise be the case.

The non-taxable status of structured settlements also eliminates tax consequences as a contingency. When a lump sum is calculated, it is usual to gross up the award to take future tax liability into account. Like other contingencies, this one involves considerable guess work. Tax liability will be affected by income from other sources, and, of course, will change if tax rates change.

<sup>34</sup>Taxation of structured settlements will be discussed more fully in Chapter II.

The example was provided by RazMoghal of ManuLife, and is based on a British Columbia case. Tax was calculated on the basis of 1988 B.C. rates.

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While tax treatment of structured settlements could change, there is every reason to believe that the present, favourable, regime will remain intact for the foreseeable future. Revenue Canada has facilitated the use of structuring, and recent tax interpretation bulletins have clarified and expanded the scope of the tax advantage. No doubt, the fact that structuring is supported by the life insurance industry, the casualty insurance industry, and the bar will do much to protect the present regimen. Moreover, structuring has received similarly favourable tax treatment in the United States and Britain.<sup>36</sup> The growing number of structured settlements involving insurers from outside Canada makes change in the domestic regime increasingly less likely.

<sup>36</sup>The British case indicates the influence of the pro—structuring lobby. Inland revenue initially ruled that income from annuities used in structured settlements is taxable. However, in 1987, an agreement was reached between Inland Revenue and The Association of British Insurers to adopt an interpretation of the tax laws favourable to structuring. (see The Law Commission, above, p.27, note 29).

## **II. STRUCTURED SETTLEMENTS: ISSUES AND PROBLEMS**

### **1. INTRODUCTION**

Despite the attractiveness of the structured settlement, like any significant innovation, it brings its own set of problems in its wake. In the discussion which follows, the most significant of these will be identified. Some of them will be seen to be serious enough to warrant concern. In the Commission's opinion, however, none of them requires legislation regulating structured settlements if the supervisory role of the courts is expanded by mandating structured judgments. Structured judgments legislation should be informed by the background considerations discussed in this chapter, and, where appropriate, include mechanisms to bring judicial attention to bear on the problems identified.

It should also be noted that some of the issues identified relate to matters such as income taxation and insolvency that are within federal jurisdiction. They nevertheless merit discussion. Structured judgments legislation must be compatible with the relevant federal law, and avoid compounding problems created by factors outside its control.

### **2. THE MODE OF FUNDING AND SECURITY OF PAYMENTS**

Structured settlements are typically funded by a single-premium annuity purchased by the casualty insurer from a life insurance company or other annuity issuer. For tax reasons (which will be explained below), the casualty insurer is the "annuitant" and "owner" of the annuity, but the annuity payments are made directly to the plaintiff rather than to the annuitant insurer. The use of annuities to fund structured settlements is attractive because this method both ensures full funding of benefits, and provides reasonable security for the plaintiff.<sup>37</sup>

Two other methods of funding structured settlements are also occasionally used. "Self funding" by a casualty insurer, now a very rare practise, has been mentioned briefly above. In the United States, structured settlements are sometimes set up as trust funds. If, for example, the trust funds are in an (insured) deposit with a trust company which administers the trust, security is provided. In Canada, however, the trust income will attract taxation and is therefore not as desirable as an annuity arrangement. In addition, the trustee may find that the most convenient way to insure that monies are available for periodic payments is to purchase an annuity, thus duplicating costs. Nevertheless, some commentators have argued that trusts could be more extensively used in structuring: See Steven Blair, "An Alternative to Structured Settlements", (1987) 8 *Advocates Quarterly* 467. Trust funds are occasionally used for structured settlements involving infants because of the more favourable tax treatment afforded to infants' trust funds. The Public Trustee will play a

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This arrangement is not perfect, however. Since the casualty insurer is the "owner" of the annuity, there is a danger that annuity payments will be subject to claims made by its creditors in the event that it becomes insolvent. This problem is very real. Several casualty insurers have failed in Canada in recent years; the much-discussed "crisis" in the casualty insurance industry was one of the factors contributing to the popularity of the structured settlement.

A standard method of attempting to achieve this end has become inclusion in the settlement of an irrevocable direction from the casualty insurer to the annuity issuer to pay the policy proceeds to the plaintiff. In order to insure tax-free status for the structured settlement, such an irrevocable direction must be given by the casualty insurer.<sup>38</sup> Some structured settlement consultants are satisfied that the irrevocable direction is adequate protection. Robert McGlynn of McKellar Structured Settlements Inc. has written that:

Since under a properly drawn annuity contract, the rights and privileges of the owner (the casualty company) are subject to the rights of the irrevocably designated payee and those payments are irrevocably directed to the payee, the money payable under the contract is not property to which the casualty company is entitled. Insurance companies are not covered by the *Bankruptcy Act* of Canada but the *Winding-Up Act* R.S.C. 1970, c. W-10. The liquidators would not have any control over proceeds of the annuity since the monies being paid by the annuity contract would not come within the definition of property, effects or choses in action to which the casualty company would be entitled.<sup>39</sup>

But this opinion may overlook the effect on the tax-free status of the settlement of a finding that the casualty insurer has no proprietary interest in the proceeds, creating a "catch-22"

significant role in the administration of an infant's affairs in any event, and might logically be constituted as trustee of the settlement funds. In what may well have been the earliest structured settlement in Canada (one of the Thalidomide cases), an annuity was purchased, but deposited with the official guardian in Ontario for administration (V.T. Rachlin, "Pensions or Damages", In the Future of Personal Injury Compensation, Ed. I.B. Saunders, Butterworth's, 1975, pp. 55—56).

<sup>38</sup> Interpretation Bulletin IT—365R 25 (c)(ii). The annuity must also be "non—assignable, non— commutable, non— transferable".

See McG Lynn, footnote 8 above.

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situation. Weir suggests that the benefits of the irrevocable direction may be "illusory":

The irrevocable direction to pay, if challenged by a creditor, may be ruled by a court to be either of no force or effect at law, and hence, revokable in any event, or, if not found to be revokable, to constitute either a trust or an assignment. In either of the latter two situations, although the principal amount is effectively secure, any finding of trust or assignment necessarily constitutes receipt by the claimant, constructive or otherwise, and eliminates the tax-free status of the structure.

He concludes that "the issue remains unresolved, in many cases unrecognized, though of great importance"  
40

The security of a structured settlement could also be jeopardized by insolvency of the annuity issuer. In Canada, life annuities, the form of annuity most often used to structure awards, can only be issued by life insurance companies. Life insurance companies are less vulnerable than casualty insurers. Until recently, the solvency of Canadian life insurers appeared to be beyond question. Over extension in the real estate market during the mid-eighties has, however, created difficulties during the current recession for several companies, and two have been forced out of business. In both cases, neither policy nor annuity holders suffered any loss. The insurance industry is committed to maintaining its reputation. It has announced plans to establish an industry-funded policy guarantee system.

Annuities for a fixed term are issued by trust companies as well as life insurers. This type of annuity is occasionally used in structuring. Failures of trust companies have been common enough in Canada to create concern about the security that can be provided by them. It should be noted that deposit insurance does not cover annuities issued by trust companies.

Prudent planning dictates that the annuity purchased to fund a settlement be obtained from an annuity issuer that is financially sound. Because the financial track record of trust companies is not as good as that of life insurance companies, the practice is to avoid such issuers. In *Fuchs et al v. Brears et al*, Mr. Justice Vancise stipulated that:

40 Weir, above, note 3, p. 111.

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The court must be extremely careful in approving settlements [for infants] to insure that the insurer is financially stable. In my opinion the best way to do that is to insist that the annuity be provided by a Canadian life insurance company. Life insurance companies are regulated under the *Canadian and British Insurance Companies Act* and their activities are carefully scrutinized by the superintendent of insurance. They must maintain minimum reserves to insure that the annuities issued by them will be paid.

Even before the current problems of the life insurance industry emerged, most authorities also suggested that care should be exercised even in the choice of a life insurance company as annuity issuer. Weir notes that:

Some judges approving annuity policy settlements for minors and mental incompetents have expressed reluctance to allow annuities to be placed with life insurers having assets of less than three billion dollars. Often overlooked by some casualty insurers and counsel is that everything is subject to negotiation, even the choice of annuity issuer.<sup>41</sup>

In order to provide the fullest possible protection, the terms of a structured settlement should clearly set out the remedies upon default. Revenue Canada requires that the terms of the settlement provide that the casualty insurer "remain liable to make the payments as required by the settlement agreement"<sup>42</sup>, but it would appear that most settlements include little more. Weir writes that:

It is incomprehensible that reference to the claimants remedies in the event of default of payment are consistently absent from Canadian structured settlement negotiations, settlement agreements or judgments. Most often the structured settlement involves financial obligations five or six times those of a typical mortgage yet the claimant, because of tax considerations, will

<sup>41</sup> There are approximately ten Canadian life insurance companies with assets in excess of three billion dollars.

<sup>42</sup> Interpretation Bulletin IT—365R2 5(c)(iii).

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have no security interest in the principal amount, or annuity policy, generating the periodic payments.<sup>43</sup>

A plaintiff's solicitor has an obvious responsibility to take all reasonable steps to insure that any structured settlement she negotiates will be financially sound. A court called upon to approve a structure should also satisfy itself that adequate security is provided. The problems in doing so should not be over emphasised, however. The annuities used to fund structures under current practices are among the soundest investments available. It is unlikely that a plaintiff investing a lump sum would do better. Since there is no control on the way in which a lump sum may be invested, many plaintiffs will do considerably worse.

### 3. INFLATION PROTECTION

An obvious advantage of the structured settlement is the opportunity it offers to incorporate an inflation adjustment mechanism. Grossing up a lump sum to counter inflation is inevitably a much more speculative matter. But the structured settlement format does not guarantee inflation protection, or even provide a simple method to provide it. Structuring changes the context in which this difficult problem can be attacked, but as the Holland Committee noted:

It is said that periodic payments provide a better protection than lump sum awards against inflation. [But] this depends on what system of costs of living indexing is employed for a periodic payment system.<sup>44</sup>

Unfortunately, the right system is not always chosen. In fact, there is considerable evidence that adequate attention has only recently been directed to provision of effective inflation protection in structured settlements.

Several mechanisms for accounting for inflation are in use in structured settlements. The most common in Canada has been a "fixed formula adjustment", and it is still a recommended option in the literature published by structured settlement consultants.<sup>45</sup>

Weir, above, note 3, p. 135.

Committee on Tort Compensation [Holland] Report, Toronto, 1980, p. 9.

See McGlynn, footnote 8 above (McKellar Structured Settlements Inc.) and Jim Rogers, "Structured Settlements—What? Why?" (James E. Rogers Group Ltd.).

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Under the fixed formula method, the periodic payments are increased by a fixed percentage each year. Because the court in *Yepremian v. Scarborough General Hospital*<sup>46</sup> approved an infant's settlement with a 3% formula, that level of adjustment has become a precedent. A 3% formula was incorporated in the settlement approved by the Saskatchewan Court of Queen's Bench in *Fuchs et al v. Brears et al.*

Unfortunately, this form of inflation protection is far from satisfactory. If the chosen adjustment rate underestimates the inflation rate by even 0.5%, a 20% short fall in real dollar terms will be generated by the fortieth year. If inflation adjustment is provided for at 3%, and inflation returns to 10%, by the fortieth year of the structure the periodic payments will fall short by 92%. The success rate of economists in predicting future inflationary trends is notoriously low. Reliance on the fixed formula adjustment is little or no improvement over traditional attempts to account for inflation by grossing up lump-sum awards.

Failure to give adequate consideration to the effects of inflation is, in part, a reflection of the inexperience of the plaintiff's bar with structured settlements. But the problem was compounded by a paucity of available annuity options at the time when structured settlements first became popular. Until recently, most insurers would not quote on an annuity with a percentage increase of more than 4%. There is still reluctance in the insurance industry to provide annuities with an indexed adjustment linked to the cost of living. Weir reports that "such a parameter is not sufficiently crystallized to permit life insurance actuaries to calculate pay-outs for reserves or make investment assumptions."<sup>47</sup>

However, the life insurance industry has responded to pressure from the plaintiff's bar to develop an annuity vehicle with adequate inflation protection. Many annuity issuers will now provide annuities with "linked adjustments" that relate payments to the rates of return on selected investments. For example, Sun Life provides an escalating annuity with an annual increase equal to the past year's average yield on treasury bills minus 3%. The U.S. *Model Periodic Payment of Judgments Act* similarly attempts to account for inflation by relating payments to interest rates on one year Government Bonds. While this approach to inflation adjustment

<sup>46</sup>(1981) 31 O.R. (2nd) 494.

<sup>47</sup> Weir, above, note 3, p. 83

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is not perfect, it represents a major improvement over the fixed formula approach.<sup>48</sup>

It is vitally important that more attention be given to inflation adjustment than in the past. A decade ago, The Holland Report noted that:

If periodic payments are inadequately indexed, the plaintiff would be better off with a lump sum that could, at least in theory, be invested to give protection against the decline in the value of money.<sup>49</sup>

It is unfortunate that this advice is still not heeded by all solicitors, judges, and consultants. But the fact remains that satisfactory mechanisms for providing inflation protection in structured settlements are available today that were not available a decade ago, and that are still not available when a lump sum is calculated. Structuring has provided a context in which the problem of inflation can be effectively addressed.

#### 4. CONFLICT OF INTEREST

Because the structured settlement is a novel concept, there is danger that legal counsel involved in negotiating a settlement will not be fully aware of the implications of a proposed structure. Even as the legal profession becomes more sophisticated in its approach to structured settlements, it will be necessary for most lawyers to rely on the advice of advisors from the insurance industry. The advantages of a structured settlement will be realised only if it is carefully "tailored" to the needs of the injured party, and if available annuities have been thoroughly canvassed: These are matters that require expertise other than that of the legal profession.<sup>50</sup> Reliance on annuity brokers and structured settlement consultants creates some novel problems, however.

<sup>48</sup> Leroy J. Grossman and Paul D. Roman, "The Model Periodic Payment of Judgments Act: An Economic

Analysis", *trial (ALTA)*, May 1982, questions the assumption that there is good linkage between interest rates on one year Government Bonds and inflation rates. They demonstrate that, historically, linkage with interest rates would underestimate the impact of inflation. Nevertheless, unless annuity issuers become willing to issue policies linked to the cost of living index or the gross national expenditure implicit price index, linkage to treasury bills is probably the only practical alternative.

<sup>49</sup> see above, note 44.

<sup>50</sup> See the comments by two practitioners, Leon Lewis, "Tailoring the Structure" and Kenneth Howie, "The Plaintiff's Perspective" in Law Society of Upper Canada Continuing Legal Education Materials, April 1983.

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At present, it is usually the casualty insurer who proposes the settlement and introduces a structured settlement consultant "who purports or is held out by the casualty insurer to be acting objectively and in the best interests of both parties simultaneously."<sup>51</sup> It is usually assumed that the consultant acts objectively, but a potential conflict of interest may nevertheless arise.

In the first place, it is the casualty insurer who retains the consultant, and his remuneration comes from the casualty insurer either in the form of a fee for services or as a commission on the annuity policy purchased by the casualty insurer. Second, the casualty insurer establishes the parameters for the consultant by confidentially providing information to him as to policy limits and funds reserved for settlement. As Weir notes, the "reserves are set in the first instance in a partisan and adversarial manner. The consultant's mandate in practice is to propose a structure within the limits of the reserve. If that fact is lost sight of by plaintiff's counsel, he may inadequately protect his client's interests.

It is generally recognized that the plaintiff's counsel should endeavour to look beyond the advice of the structured settlement consultant introduced by the defendant. Thus, for example, a leading member of the plaintiff's bar in Ontario recommends that "a solicitor should insure that his annuity broker has shopped the market and should test the structure with an independent actuary", but as Weir notes, "an actuary may be able to provide an opinion as to the structure of the proposed settlement, but not as to the adequacy of the available funds."<sup>52</sup>

In Saskatchewan, the practice would appear to be to consult an independent source to obtain quotes from a number of insurance companies, but to otherwise rely upon the experts introduced by the defendant. Similarly, Mr. Justice Vancise recognized the need for truly independent advice in *Fuchs et al v. Brears et al*, but was satisfied with giving the following direction:

To insure that the best value for the infant has been obtained, the defendant should obtain a quotation from at least four Canadian life insurance companies to provide the guaranteed annuity to the defendant. An independent person knowledgeable in the area such as a chartered

<sup>51</sup> Weir, above, note 3, p. 133.

<sup>52</sup> Weir, above, note 3, p. 134, quoting Kenneth Howie.

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accountant or an actuary should provide a cost benefit analysis of each proposal. That will insure that the best coverage available at the time was purchased.

To some extent, the potential problem of conflict of interest outlined above is mitigated at present if plaintiff's counsel compares the proposed structure with the lump sum that might be conventionally awarded. If the after-tax income that would be generated by the lump sum is equalled or exceeded by the periodic payments provided by the structure, the question of whether the structure was predicated on a confidential reserve for settlement is perhaps of only secondary interest. In *Fuchs et al v. Brears et al*, Mr. Justice Vancise stated that:

It is essential that counsel file with the court a brief setting out an estimate of what a conventional lump sum award would have been . . . . It is desirable to have information from an independent person knowledgeable in this field comparing the value of a proposed structured settlement with the estimated lump-sum value which sets out what the lump sum in the plaintiff's hands would produce. .

This is probably adequate to prevent serious detriment to plaintiffs, though it may be only a short-term fix. One of the reasons why the structured settlement is attractive is because the assumptions involved in calculating the lump sum are questionable. To link acceptance of a structured settlement to a lump sum equivalent is artificial, and unlikely to remain standard practice as experience with structured settlements grows. Nevertheless, the problem of conflict of interest is one that can be adequately addressed without legislation. The courts have suggested a solution that is workable. at present, and can be expected to provide further guidance as it is needed in the future.

### 5. TAX CONSIDERATIONS

Although damages for personal injury are not subject to income tax, the interest earned on the award when it is invested is taxable. Similarly, annuity payments are ordinarily subject to tax under Canadian law. It might appear, therefore, that the periodic payments generated by structured settlements will be subject to tax in the hands of the plaintiff. In fact, that would appear to have been the position of Revenue Canada, asset out in Interpretation Bulletin IT-365 (March 1977), when structured settlements were first introduced in Canada. The Department's position changed,

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however, in a series of advance rulings in 1979 and 1980. In March 1981 the Interpretation Bulletin was revised (IT-365R1), but it did not conform in all respects with the opinions rendered in the advance rulings. Finally, in May 1984 a revision that made it clear that periodic payments paid pursuant to a properly conceived structured settlement will not be taxable in the claimant's hands was issued (IT-365R2). The Interpretation Bulletin currently in effect (IT-365R3) was issued in May 1987. It introduced no change in substance.<sup>53</sup>

The history of the Revenue Department's changing approach to structured settlements has been recounted here primarily to underscore the fact that the tax treatment of structured settlements has not been, and cannot yet be said to be, entirely settled. The tax-free status presently recognized is contingent upon the continued favourable attitude of the Department of Revenue. There are no definitive court decisions interpreting the application of the *Income Tax Act* to structured settlements. Thus, as was suggested in commentary on IT-365R2:

It is to be noted however, that this policy position is capable of revocation by a court which could conceivably conclude that the tax-free nature of personal injury awards was varied by statute in the case of periodic payments representing income and capital amounts.<sup>54</sup>

A change in tax policy could make structuring much less attractive. Nevertheless, as noted in the first chapter of this report, there is every reason to believe that favourable tax treatment will continue to be extended to structured settlements.

A more practical problem for solicitors negotiating structured settlements is created by the language of IT-365R3. Despite revisions, the Interpretation Bulletin remains vague enough to cast doubt on the tax—free status of some arrangements. To avoid potential problems, most commentators suggest that an advance ruling be obtained in regard to a proposed structured settlement in all cases.<sup>55</sup> In *Fuchs et al v. Brears et al*, Mr. Justice Vancise

<sup>53</sup> On the tax implications of structured settlements, see generally Martin L. O'Brien, "Litigation Structured Settlements" in *Income Tax for the General Practitioner*, Law Society of Upper Canada Continuing Legal Education, 1986.

<sup>54</sup> T.A.R. 36.

<sup>55</sup> E.g. Weir, above, note 3, p. 114; T.A.R 36 (Commentary on IT-365R2).

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made the obtaining of an advance ruling a condition precedent to approval of a structured settlement for an infant.

It should also be noted that the conditions required by the Revenue Department to qualify for tax-free status place some limitations on the form which a structured settlement may take. In particular, to qualify for tax-free status the structured settlement must be funded by an annuity purchased by the casualty insurer. The casualty insurer must be the "owner" and "annuitant". The annuity payments are notionally income (or mixed interest income and return of capital) in the hands of the casualty insurer, and the payments made from that income source by the casualty insurer or under the casualty insurer's direction to the claimant are thus to be characterized simply as part payments of a damage settlement. It is this fiction that establishes the tax-free status of the payments in the hands of the claimant.<sup>56</sup>

### 6. OTHER MATTERS

#### (a) Compulsion to negotiate

Rule 184 (b) of the *Rules of the Court of Queen's Bench* provides that "where a defendant makes an offer to settle, which has not been revoked and the plaintiff...fails to obtain a judgment more favourable than the terms of the offer to settle", cost consequences will be visited upon the plaintiff. It is unclear whether this rule would have application in a case in which a structured settlement is proposed. It may be difficult to determine whether the proposed structured settlement is "more favourable" than the lump sum judgment eventually obtained. In addition, the fact that the offer was cast in the form of a structured settlement may be seen as precluding application of the rule. The plaintiff may argue that he should not be compelled to accept a structured settlement since there is no provision permitting such a judgment to be made at trial.

Because some plaintiffs and their counsel are still inclined to reject the concept of the structured settlement out of hand, the policy goal Rule 184(b) pursues may be jeopardized if structured settlements become more common and the rule is held to have no

<sup>56</sup> The tax consequences for the casualty insurer are still far from clear. It would appear, however, that at present the interest portion of the annuity income attributed to the casualty insurer is taxable, but that deductions from income can be made with respect to the cost of the annuity as a claims expense. See Weir, *supra*, pp. 121—124. In any event, the perceived tax liabilities of casualty insurers has not discouraged them from entering into structured settlements.

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application to offers to settle in this fashion. Weir suggests that "this is a matter that will require consideration in any future law reform accommodating structures, whether implemented in settlements or judgments."<sup>57</sup>

It is also unclear whether the fact that a structured settlement may make it possible to settle a claim within policy limits which could not be so settled on a lump sum basis creates any obligation to consider a structured settlement during negotiation. In *Pelky and Fort as v. Hudson Bay Insurance Company*<sup>58</sup>, the Ontario Supreme Court held that an insurer might be liable to the insured if it refuses a settlement offer within the policy limit, and damages in excess of the limit are awarded.

### **(b) Structured settlements and smaller claims.**

Weir notes that

Notwithstanding that the rationale for utilizing structured settlements is in theory applicable to all claims, only claims in excess of one hundred thousand dollars have received consideration for such treatment in the past.<sup>59</sup>

Larger claims generate greater tax savings, and therefore make structured settlements more attractive. It has also been suggested that structured settlement consultants are reluctant to become involved with smaller claims, perhaps because their remuneration is usually in the form of a fixed commission rate. Kenneth Howie, an experienced plaintiff's counsel, has expressed the opinion that the added overhead costs and time in structuring a settlement make them unattractive if the lump-sum equivalent is less than about \$50,000 .

Weir suggests that attitudes may change over time in this respect. He speculates that "the casualty insurance industry, which

<sup>57</sup> Weir, above, note 3, p. 132.

<sup>58</sup> [1982] I.L.R. 1—1493.

<sup>59</sup> Weir, above, note 3, p. 17.

<sup>60</sup> Howie, above, note 52.

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is reported to be experiencing severe financial difficulties, may be unable to resist structuring smaller claims", and Howie has noted some cases in which structuring of relatively small claims made sense because of the special needs of the plaintiff. A London Life representative told the Commission that his company has recently been involved in a structure for a teen-aged plaintiff in which a single payment annuity, payable when the beneficiary reached the age of majority, was utilized, even though the settlement involved only \$25,000.

### (c) Legal fees and structured settlements

Contingency fee arrangements may create some novel problems in a structured settlement context. Solicitor and client must agree as to whether the fee is to be based on the total value of the payments to be made under the annuity, on the cost of the annuity (which is the cost of the settlement to the casualty insurer), or upon the lump sum equivalent to the structure. Since contingency fees are subject to review by the court, some guidance as to which method of calculation is most reasonable can be expected as structured settlements become more common. Calculation of the fee on the basis of the lump sum equivalent would, of course, approximate the traditional fee level. A fee calculated in that manner would usually be less than a fee calculated on the basis of the pay-out under the annuity, and more than the fee calculated on the basis of the cost of the annuity.

If the fee is calculated on the basis of the cost of the annuity, counsel for the plaintiff may be forced to rely on the casualty insurer to indicate that the fee is appropriate, since (for obvious reasons related to the negotiations) the casualty insurer may not wish to disclose the cost of the annuity. As Weir notes, this problem may "lead to the abandonment of the structure", or impel plaintiff's counsel to negotiate with respect to the fee on some other basis. If in the result, counsel insists on a fee calculated on the basis of the pay-out under the annuity, he may be over compensated. Alternatively, the parties may be driven to an arrangement under which a third party passes on the appropriateness of the fee. Once again, some guidance from the courts would be valuable.

### III. STRUCTURED JUDGMENTS

#### 1. STRUCTURED JUDGMENTS IN CANADA AND OTHER JURISDICTIONS

Structured judgments have been discussed since the earliest experiments with structured settlements. As Derek Cave noted in a 1979 case comment, the Supreme Court at least impliedly called for law reform to mandate periodic payment in *Andrews v. Grand & Toy*.<sup>61</sup> Until the Court reluctantly concluded in *Watkins v. Olafson*<sup>62</sup> that there is no inherent jurisdiction to award periodic payments, it seemed possible that the judiciary might take the lead itself. From the beginning, however, most commentators proposed creating jurisdiction to make structured judgments by legislation. In 1980, The *Holland Report*, prepared by a select committee of the Ontario bench and bar, proposed enabling legislation to permit structuring on consent of the parties. In 1984, the committee's recommendation was adopted in the Ontario *Courts of Justice Act*.<sup>63</sup>

The Ontario legislation represented only a modest extension of judicial authority beyond the jurisdiction recognized in other provinces to approve structured settlements. Although it remained the only Canadian legislation permitting structured judgments until 1990, proposals for structured judgments legislation were made in other jurisdictions. Most of them recommended more comprehensive legislative initiatives, including authorization to structure even when all parties do not consent to the exercise. The Manitoba Law Reform Commission recommended a broad discretion to structure damage awards in a 1987 report.<sup>64</sup> In British Columbia, a *Structured Compensation Act* based on similar principles was introduced in the legislature for discussion in 1989. Plans to enact the legislation in the following year were postponed by a provincial election. In 1987, the Ontario Law Reform Commission (subject to a strong dissent by the Chairman) rejected structuring without consent of all parties.<sup>65</sup> Nevertheless, legislation was adopted in the province in 1990 to permit a structured judgment on the motion of

<sup>61</sup>See above, note 26.

<sup>62</sup>  
see above, note 13.

<sup>63</sup>so 1984, c.11, s.129.

<sup>64</sup>Manitoba Law Reform Commission, Periodic Payment of Damages for Personal Injury and Death, 1987.

<sup>65</sup>Ontario Law Reform Commission, Report on Compensation for Personal Injuries and Death, 1987.

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the defendant without the plaintiff's consent if the plaintiff requested gross up of lump sum award to compensate for tax consequences that would be avoided by structuring.<sup>66</sup>

Structured judgments legislation has been adopted more quickly in the United States than in Canada. The *Model Periodic Payment of Judgments Act* drafted by the National Conference of Commissioners on Uniform State Laws has been adopted by at least 17 states. Like the Manitoba and British Columbia proposals, the model act creates a discretion to structure awards on the motion of any party. 19 other states have structured judgments legislation of more limited scope, typically applying only to automobile accidents and criminal injuries compensation. At the other extreme of legislative initiatives, 3 states provide for reviewable periodic payments.

### 2. SHOULD JUDGMENTS BE STRUCTURED?

The basic argument in favour of recognition of structured judgments is straight forward: If periodic payment is a more rational and cost-effective way of providing compensation than the lump sum, the court should not be precluded from making such awards. This is particularly true if structured settlements become increasingly common. It would be anomalous if the courts lacked the power to make an award on the same basis as a settlement can be negotiated between the parties.

From the point of view of law reform, there is an even more cogent argument in favour of structured judgments. At present, only some five percent of personal injury cases reach the courts. Yet, what the courts do in that five percent of cases is of crucial importance to the entire tort compensation system casualty insurance industry. It is the awards made by the courts that provide the bench-marks that guide negotiation in the 95 percent of cases that never reach the courts. In effect, the courts provide guidance and regulation of the entire system of negotiation and settlement. One commentator has described the personal injury action as:

- An administrative process designed to compensate accident victims, in which a right of "appeal" is given to the courts of law. The right of "appeal" to the courts

<sup>66</sup>The Courts of Justice Act, R.S.O. 1990, c.43, s.116.

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[is]... used as a weapon whereby the administrators may be induced to behave reasonably

The problems that have inevitably been generated by the increasing popularity of the structured settlement would become more manageable if the courts were in the business of making structured judgments. At present, the courts review structures only when called upon to approve an infant's settlement. It is indicative of the value of court review and the desirability of expanding the ambit of court review that there is to date only a single Saskatchewan judgment in which a structured settlement was considered, but that judgment provides cogent guidance to counsel involved in structured settlement negotiations.

In the Commission's opinion, enactment of structured judgments legislation would be the most effective way to provide regulation of structured settlements as the theory and practice of structuring continues to evolve. All of the major problems outlined in the last chapter of this report have been addressed by the courts. In some cases, such as ensuring adequate security for structures, the judicial lead has already provided satisfactory direction. In others, such as potential conflicts of interest between plaintiffs and structured settlement consultants, final solutions have not yet been formulated, but experience to date suggests that the courts are better equipped to find them than legislatures. Even in cases in which judicial initiatives can be criticized, as in regard to ensuring adequate inflation protection, minimal legislative guidance to the courts is probably the most satisfactory approach. Structuring is still in its infancy, and is evolving rapidly. Legislation that attempted to impose solutions to perceived problems would risk straight-jacketing further development. Judicial supervision through structured judgments would provide a more flexible regulatory mechanism than structured settlements legislation.

### 3. SHOULD STRUCTURED JUDGMENTS BE IMPOSED?

There has been no significant opposition to the proposition that the courts should be empowered to make structured judgments. Debate has focused instead on the issue of whether or not the courts should be mandated to impose a structure without the consent of all parties. The Manitoba Law Reform Commission would give the courts a open-ended discretion to make structured awards. The

67 P.S. Atiyah, *Accidents, Compensation and the Law*, (1975), p. 279.

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American model act permits structuring of claims in excess of \$100,000 in the discretion of the court on the motion of either party. The Ontario Law Reform Commission, on the other hand, has opposed creating a discretion to structure without the consent of all parties.

Structured judgments legislation requiring the consent of both plaintiff and defendant would, no doubt, be easier to frame and less controversial than legislation permitting the courts to impose structured judgments. The 1984 Ontario provision permitting structuring on consent was less than one hundred words long. But the consent requirement would deprive the legislation of much of its utility. Since the courts have had no difficulty in Saskatchewan or elsewhere in finding inherent jurisdiction to incorporate structured settlements in consent orders, legislation that permitted structuring only on consent would not much expand the present judicial role, and would do nothing at all to ensure that structuring is seriously considered in all cases in which it would be beneficial. Because the concept of structuring is new, there is still hesitation to embrace or even explore it on the part of some parties and their counsel. If it is accepted that periodic payment of damages is a desirable solution in a broad range of cases, one of the parties should not be able to unilaterally deny the benefits of this new legal technology for unexplained and perhaps unreasonable reasons.

Despite the logic of permitting the courts to impose structured judgments, arguments on the other side of the question cannot be lightly dismissed. The core of the argument against imposed structures rests on a question of principle. Imposing a structure compromises the right presently enjoyed by a successful plaintiff to invest or otherwise dispose of an award as he sees fit. It is argued that disturbing a common law right sanctioned by more than a century of authority and practice would only be justified if there is a clear and unequivocal advantage to plaintiffs in altering their rights. Much of the impetus behind the current interest in structured settlements and judgments has come from the insurance industry. The benefits of structuring for defendants and their insurers are substantial. The critics do not deny that structuring can also benefit plaintiffs, but doubt that the net benefit is clear and substantial enough to justify overturning the common law. Thus, for example, the Ontario Law Reform Commission focuses on the problems of providing adequate security and inflation protection in structures as reasons for preserving the right to insist on a lump sum award. An astute plaintiff, the Commission argues, may do better on both counts than

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the court, and should be left with the option to attempt to do so

The cogency of the argument presented by the Ontario Law Reform Commission depends in part on the assessment made of the advantages and disadvantages for plaintiffs of structuring. This report has reviewed the issues involved in making such an assessment. In the Saskatchewan Commission's opinion, the Ontario Commission has over-emphasised the problems associated with structuring. Consider first the problem of security. It may not be possible for the court to guarantee the security of a structure, but as was noted in chapter 2, purchase of annuity from an annuity issuer that would be approved under the guidelines the courts have already developed is as secure an investment as it is possible to make in the current market. Even an astute plaintiff cannot be expected to do better, and for many plaintiffs, the annuity investment would increase the likelihood that income will be available when it is needed in the future.

The Ontario Commission is particularly critical of the Manitoba Law Reform Commission's proposal to mandate a fixed percentage inflation factor in structured judgments legislation. No doubt, the criticism is valid. This report has also suggested that the fixed percentage adjustment provides inadequate inflation protection. But other approaches to inflation protection are available that deal with inflation more successfully than the guess-work involved in grossing up a lump sum to take inflation into account. In fact, the lump sum calculation usually involves no more than applying a notional fixed percentage formula to the lump sum. In one respect, however, the Ontario Commission's critique of the Manitoba Commission's approach to inflation does include a useful lesson. If structured judgments are to be imposed on plaintiffs, the legislation should do everything possible to ensure that plaintiffs' interests will be protected. Therefore, the legislation should include direction to the court concerning such matters as security and inflation protection.

The opposition to imposed structuring does not, rest entirely on a cost-benefit analysis. Lurking behind the essentially pragmatic argument of the Ontario Law Reform Commission is a more basic concern about abridging plaintiffs' rights. The right to dispose of an award without fetter is regarded by the critics as

<sup>68</sup>See above, note 65.

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more than a contingent procedural right. At least impliedly, it is associated with fundamental property rights. But as the English Law Commission observed, such a point of view is untenable on close analysis:

We consider that such arguments are not strong. These arguments assume that the natural process of settlement can only involve lump sums and that this should prima facie not be tampered with. But... the lump sum is by no means self-evidently the ideal and only form of damages. The court, in awarding tort damages, has a duty to compensate for the loss suffered. That duty creates a right in the plaintiff to demand that she or he be compensated, but in no sense extends to the creation of a right to demand how the compensation be paid. ... Finally, we share the view of the Pearson Commission that the freedom of choice offered by the lump sum is something which the plaintiff would not have enjoyed if she or he had not been injured and is therefore not an essential part of a system based on *restitutio in integrum* <sup>69</sup>

It was noted in the introduction to this report that lump sum awards are a product of history and necessity, not a choice based on principle. Now that the modern annuity is available to facilitate periodic payment of damages, there is no sound reason for not taking advantage of the opportunity to place damage awards on a firmer, more equitable foundation.

The Commission favours legislation permitting the courts to impose structured judgments without the consent of all parties. It should be clear, however, that this conclusion is acceptable only because the evidence suggests that the benefits of structuring to plaintiffs as well as defendants usually outweigh the disadvantages. In order to ensure that the goals of the legislation are met, the court should retain a discretion to make lump sum awards, even when the claim is substantial and one of the parties has requested structuring. Procedures should be adopted that will permit all parties to be heard on the issue before a decision to structure is rendered.

<sup>69</sup>See above, note 29.

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### 4. THE SCOPE OF LEGISLATION: AN OVERVIEW

The basic requirements of structured settlements legislation are obvious. A workable mechanism to determine whether a structured settlement is appropriate in disputed cases is a necessary cornerstone of structured settlements legislation.

Equally important are mechanisms to permit the court to participate in the formulation of the structure, receive expert advice, and ensure that the structure finally evolved will protect the interests of the plaintiff who will rely upon it to meet continuing needs.

Structured judgments legislation will present the courts with a substantial, and in some respects novel, burden. Structuring is perhaps better suited to negotiation than litigation. The "tailoring" that is critical to a successful structure is no doubt best achieved by a process of negotiation, sharing of information, and close consultation with experts. Mr. Justice Griffiths of the Ontario High Court has suggested that the court's role when a structured settlement is under consideration by the parties is primarily that of a facilitator. He writes that:

My purpose in confessing at the outset that our judges are far from expert in this field, is simply to emphasize that it is the responsibility of counsel for the plaintiff to carry out the investigation, to acquire the expertise and to determine whether or not the proposed structure represents a better deal for his client.

Ordinarily, a court in a case in which a structure has been ordered should adopt the same philosophy. Legislation should encourage this approach. The court must be prepared to resolve conflicts the parties themselves can not resolve, but its role should primarily be one of approving or modifying a structure proposed to it by one or both of the parties. The court should be empowered to make rulings as to the quantum of damages, the heads of damages that should be structured, and other matters required to facilitate the structuring process. In addition, the Commission is of the opinion that the open-ended discretion to direct structuring recommended by the Manitoba Law Reform Commission should be avoided. The approach of the American model act, which permits the court to order structuring only on the motion of a party, will ensure that at

70 "Structured Settlements—The Judicial Perspective", Law Society of Upper Canada Continuing Legal Education, April 1983.

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least one party is committed to structuring and prepared to take the lead by presenting a concrete proposal.

The issues and problems identified in the last chapter will be replicated in the context of structured judgments. It would not be desirable to attempt legislation of definitive solutions to these problems. Legislation should be limited to establishing basic guidelines in which the law can be developed by the courts. On the other hand, if the legislature permits the courts to impose structured settlements, it must be satisfied that adequate protection of the parties' interests will be provided. Guidelines in the legislation should address issues such as security and inflation protection. The guidelines must, however, be flexible enough to respond to experience and changing realities.

Some of the problems outlined in the last chapter cannot in any event be directly addressed by structured judgments legislation. The most serious of the problems in this category relate to matters outside provincial jurisdiction. In particular, it would be desirable to enshrine the tax status of structured settlements in the *Income Tax Act*, and amend federal bankruptcy legislation to provide protection for the claimants under structured settlements against the insolvency of the annuity issuer or the casualty insurer who purchases and "owns" the annuity.

Finally, it should be noted that some reforms to accommodate structured settlements and judgments might be appropriately made outside of structured judgments legislation. For example, the Rules of Court could be amended to clarify the costs consequences of rejection of an offered structured settlement, and either *The Legal Profession Act* or the Rules of the Law Society could usefully address the question of appropriate fees in cases involving structured settlements.

## IV. PROPOSALS FOR STRUCTURED JUDGMENTS LEGISLATION

The basic requirements for structured judgments legislation were set out in the last chapter. Here, more concrete proposals will be formulated. A draft *Structured Judgments Act* based on these proposals is contained in the appendix.

### 1. GROUNDS FOR STRUCTURING

Structured settlements have been found to be most useful in personal injury cases in which the award is intended to provide for future needs of the injured party. For that reason, the primary focus of structured judgments legislation has been personal injury actions. Thus, the American *Model Periodic Payment of Judgments Act* applies only to actions "for bodily injury", and the Manitoba Law Reform Commission has recommended legislation applying only to "personal injury and death". Both these acts permit the courts to impose structured judgments without consent of all the parties to the action. The Commission agrees that jurisdiction to impose a structured judgment should be confined to personal injuries, the class of claims which have produced the most experience with structuring, and for which the benefits of structuring have been most clearly established. It is, however, likely that structuring will become attractive in other types of actions. It would be appropriate to anticipate future developments to the extent of recognizing a jurisdiction to structure damages in actions other than personal injury claims on consent of the parties.

**PROPOSAL #1: The court should have jurisdiction to impose structured judgments in claims for personal injury or death, and to make a structured judgment on consent of all parties in other damage actions.**

As a practical matter, structuring may be proposed by the court at a pre-trial conference, but is most likely to be initially proposed by a party. Legislation should reflect this reality. The jurisdiction of the court to impose a structure should be exercised when one party has suggested a structured settlement, but the other has rejected the option. Legislation should provide guidelines for determining when a structure should be imposed, and a summary procedure giving the parties an opportunity before trial to make submissions on the issue. In this respect, the Commission has adopted the basic approach of the *Model Act*, which similarly requires a timely motion to structure from one of the parties.

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Since experience with structured settlements has indicated that structuring is rarely practical when smaller claims are involved, jurisdiction to impose structuring should be confined to cases in which the claim, or portion of the claim which might be structured, is apparently above \$100,000. The \$100,000 limit has been recognised in Canada as a reasonable cut-off when a structured settlement is considered. It is also the limit contained in the *Model Act*. Since pleadings are not always a reliable guide to the damages which can reasonably be expected to be awarded, the question of whether the claim is in fact large enough to structure should be one of the matters to be determined by the court when a motion to structure is made.

In addition, the court should retain a general discretion to determine whether structuring is appropriate in a disputed case.

**PROPOSAL #2: The court should have jurisdiction, on application of a party, to direct that the judgment in the case will be structured if**

- (a) the amount of future damages that may be awarded appears to exceed \$100,000; and
- (b) the court is of the opinion that structuring is appropriate;

**or where both parties consent to structuring of the judgment.**

### 2. FORMULATION OF THE STRUCTURE

Having determined that a structured judgment is appropriate, the court should attempt to facilitate the formulation of a structure, rather than take an activist role in designing it. In most cases, it should be left to one or preferably both of the parties to investigate structuring of the judgment, to make concrete proposals to the court for approval, and to provide the court with evidence to access the proposed structure.

To facilitate this process, the court should be empowered to make rulings on matters which the parties may find it difficult to resolve themselves. The American model Act and the draft legislation proposed by the Manitoba Law Reform Commission require the court to make findings as to such matters as the portion of the damages that should be structured. In the Saskatchewan Commission's

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view, the court should make such rulings only if the parties seek assistance. The degree of guidance the parties require will vary from case to case; in many cases, the parties will be appropriately left to settle the particulars of the structure as if they were negotiating a settlement out of court. It is also unnecessary to legislate the form which the structured judgment will take. That is a matter best left to the courts to develop with experience.

**PROPOSAL #3: The court should be empowered to:**

- (a) **make a separate ruling as to the quantum of future damages;**
- (b) **determine the appropriate term for which periodic payments will continue;**
- (c) **determine the frequency of periodic payments; and**
- (d) **settle other matters which may arise in regard to the structure.**

While both parties can be expected to engage the assistance of structured settlements consultants and other experts, and to make their expertise available to the court, the court should be empowered to retain its own experts to assist in assessing a proposed structure. Use of an expert by the court will be necessary in cases in which the court is forced to take an active role in assisting the parties to develop a structure, and may be necessary if the court perceives a conflict of interest on the part of an expert introduced by one of the parties.

**PROPOSAL #4: The court should be authorized to retain the assistance of experts to assist it in formulating or accessing a structure.**

### 3. APPROVAL OF PROPOSED STRUCTURES

The most important function of the court in most cases is to satisfy itself that the structure evolved prior to judgment is acceptable. This is a role the court must already undertake when approval of a structured settlement for the benefit of an infant is required. In some respects, the task of the court will be more difficult when it undertakes to impose a judgment that is not satisfactory from both parties' point of view. But it is this role

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that will contribute most to the evolution of both structured settlements and judgments.

Legislation should identify the most significant problems that experience with structured settlements has revealed. In particular, tax considerations, security of payment, and adequate inflation protection should be addressed.

Because there is evidence that it is not always adequately addressed at present, Inflation protection is a particularly acute problem. In particular, the "fixed adjustment" remains popular, despite serious inadequacies. The American model Act requires funding of structures with securities tied to the return on short-term government bonds. While a similar approach may be desirable in Canada, the Commission is of the opinion that it would not be desirable to limit the options that may become available as new forms of annuity are developed to fund structures. Therefore, the "tied-adjustment" approach could be introduced into the legislation as a bench-mark, but should not be required.

Annuities purchased from financially-sound life insurance companies have become a standard method of structuring settlements, and are ordinarily required to realise tax savings. The use of trust funds and other mechanisms should not, however, be ruled out by the legislation. Once again, the conventional approach should be a bench-mark.

**PROPOSAL #5: In formulating or approving a structure, the court must satisfy itself that**

- 1(a) tax consequences have been adequately taken into consideration;**
  - (b) provision for security of payment over the life of the structure is adequate; and**
  - (c) adequate provision for inflation has been incorporated into the structure.**
- 2. Security should be in the form of an annuity issued by a life insurer satisfactory to the court, or in any other form that the court is satisfied will provide equivalent security of payment.**
  - 3. Provision for inflation should be provided by investment of funds at an interest rate tied to Government of Canada**

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**Treasury Bills, or in such manner that the court is satisfied will provide equivalent provision for inflation.**

### 4. ASSIGNMENT AND GARNISHMENT

The American Model Act limits the right of the plaintiff to assign periodic payments to ensure that they are not dissipated. In Saskatchewan, the right to assign wages is limited. Since periodic payments are usually intended to provide future income, the Commission is of the opinion that assignment of periodic payments should be circumscribed. In some cases, however, assignment is appropriate. In particular, assignment to provide for health care may be reasonable, particularly if the plaintiff requires care in an institution.

The Manitoba Law Reform Commission recommends that periodic payment to subject to garnishment only to the extent that wages are subject to garnishment. Since periodic payments are intended to provide income or necessary care, the Saskatchewan Commission is of the opinion that such a provision is appropriate.

#### **PROPOSAL #6:**

- 1. An assignment of any right to periodic payment should not be enforceable except an assignment for the purpose of providing for health or residential care.**
- 2. Periodic payments are exempt from garnishment to the extent that wages are exempt from garnishment.**

### 5. FAILURE TO PROVIDE SECURITY AND DISCHARGE

Since most personal injury claims involve casualty insurers, there is usually little difficulty in ensuring that the terms of a judgment will be carried out. Nevertheless, provision should be made for the eventuality that the defendant will fail to carry the judgment into effect by purchasing an annuity or providing the security otherwise required. In such a case, the court should substitute a lump sum for the periodic payments originally awarded in order to permit the plaintiff to pursue ordinary enforcement remedies. The draft Manitoba Act and American Model Act make similar provision.

When security is provided as required by the judgment, the judgment debtor should be discharged. The Commission does not

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recommend making provision for review of periodic payments at the present time. Providing for discharge when the security is in place conforms to the practice in Saskatchewan and elsewhere when a structured settlements is negotiated and incorporated in a court order.

**PROPOSAL #7:**

- 1. When a structured settlement is funded by an annuity in accordance or other security as required by the judgment has been given, the judgment is satisfied and the judgment debtor is discharged.**
- 2. When a structured settlement is not funded or secured as required by the judgment, the court should be empowered, on the motion of a party, to substitute a lump sum award.**

# APPENDIX

## DRAFT STRUCTURED JUDGMENTS ACT

This Act may be cited as *The Structured Judgments Act*.

2. In this Act:
  - (a) "future damages" means damages which accrue after damage findings are made by the court;
  - (b) "structured judgment" means an award of future damages made payable in periodic instalments, in whole or in part, as the court may direct, but also includes any other award of damages that may be made in addition to such periodic payments.
3. This Act applies to:
  - (a) any action for damages resulting from personal injury in which future damages may be awarded;
  - (b) with consent of all parties to the action, any other action in which future damages may be awarded.
- 4.(1) Where a party in an action to which this act applies serves notice on all other parties to the action, and files the notice not less than thirty days prior to commencement of trial, requesting that the court structure any award of damages that may be made, and
  - (a) all parties of the action consent to the request; or
  - (b) the future damages that may be awarded appear to be in excess of \$100,000;the court shall, subject to Section 5, make a structured judgment if any future damages are awarded.
- (2) Upon application, the court may abridge the notice period required in sub-section (1) if it would not be unfair to any party to do so.
- 5.(1) Notwithstanding Section 4, the court may decline to structure a judgment if, in its opinion, it would not be equitable to ail parties to do so, or under the circumstances, the amount of future damages that may be awarded does not warrant structuring the judgment.
- (2) Any party may apply to the court before or after commencement of trial for a determination that
  - (a) the award should not be structured pursuant to sub-section 1; or
  - (b) the future damages do not appear to be in excess of \$100,000.

- 6.(1) In structuring a judgment, the court may take into consideration any proposal for structuring the damage award made by a party to the action, and may for the purpose of assessing any such proposal or to assist the court in structuring the judgment, engage the services of a qualified expert.
- (2) For the purpose of facilitating the structuring of a judgment, or preparation of proposals by the parties, the court, prior to structuring the judgment, may make separate findings as to
- (a) the future damages;
  - (b) the time at which future damage will accrue; and
  - (c) other damages;
- and in addition the court may specify
- (a) the term during which periodic payments are to be made under the judgment;
  - (b) the frequency of payments to be made under the judgment;
  - (c) whether payments are to continue for the lifetime of the claimant or otherwise, and any beneficiary in the event that the claimant dies before the term of the term of the payments has expired; and
  - (d) any other matter' which the court deems appropriate.
- (3) The court shall, in structuring a judgment satisfy itself that:
- (a) the tax consequences of structuring the settlement have been taken into account, and for that purpose may require an advance ruling from the Department of Revenue (Canada);
  - (b) the security for payment is adequate, and may for that purpose require the party against whom the damages are awarded or that party's liability insurer to purchase an annuity from a Canadian life insurance company with sufficient assets to ensure that its obligations will be met; and
  - (c) the judgment is within any applicable liability policy limits, or if it is not, the extent to which it exceeds the limits; and
  - (d) adequate provision has' been made for the effect of inflation on periodic payments made under the judgment, and for that purpose may require that the structure be funded by an annuity with a variable rate of return linked to the rate of return on Government of Canada Treasury Bills.
- (4) A structured judgment may make provision for payment of future damages, in whole or in part, in periodic payments, and where future damages are so structured, may also make provision for periodic payments in respect of
- (a) other damages, in whole or in part; and
  - (b) where all the parties to the' action consent, such legal fees as may be agreed upon by the parties.
7. Where a structured settlement is funded by an annuity in accordance with Section 6 (3) (b), or other security for payment acceptable to the court has been given, the judgment is satisfied and the judgment debtor is discharged:

8. Where, within 30 days of judgment, a judgment has not been funded by an annuity or such other security as the judgment requires has not been provided, the court may, on application of a party, vacate those portions of the judgment in which periodic payments were awarded and substitute a lump sum award.
9. Periodic payments awarded under this Act are exempt from garnishment to the extent that wages are exempt from garnishment.
10. No assignment of periodic payments awarded under this act is enforceable except an assignment for the purpose of procuring health or residential care.