



**LAW REFORM COMMISSION REPORT:
PERIODICAL PAYMENTS FOR FUTURE
PECUNIARY LOSS IN PERSONAL INJURY CASES**

SUBMISSIONS

1. On 25 April 2018, the Law Reform Commission’s Periodical Payments for Future Pecuniary Loss in Personal Injury Cases Sub-committee released a consultation paper (the “Consultation Paper”) to invite public views on whether the court should be given, by way of legislation, the power to make periodical payment orders in respect of damages for future pecuniary loss in personal injury cases.
2. The Law Society has studied the Consultation Paper, and provides the following submission.

Question 1

[LRC] invite submissions as to:

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

Law Society’s Responses:

3. In assessing damages in personal injuries claims, the principle of *restitutio in integrum* shall apply, which means that the party wrongfully injured is entitled to such a sum of money as will put him/them in as good a position as if the accident to him has not happened.

Lord Hope of Craighead in *Wells v Wells* [1999] 1 AC 34 said

*“...the object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position he or she would have been in but for the accident. The aim is to award such a sum of money as will amount to no more, and at the same time no less, than the net loss...”*¹

4. However, when the Court is to determine precisely what will provide full compensation for the injured claimants, in particular the damages for those future losses and future costs, the assessment have become difficult if not impossible, as the future is inherently uncertain.

5. In *Chan Pak Ting v Chan Chi Kuen (No.1)* HCPI 235/2011 the Hon Mr Justice Bharwaney said

“5. ... The desire for finality has produced a system of awarding damages which requires the trial judge to assess and award one lump sum representing the best estimation of these future losses and expenses. The problem with this approach is that the future may unfold in a way that makes the lump sum award either too little or too much: too little, if, for example, the award is exhausted by increased expenditure; and too much, if, for example, the plaintiff's actual life turns out to be much shorter than estimated at the time of trial.”

6. By way of illustration, prediction on future costs of accommodation of a particular claimant could no longer be benchmarked against Consumer Price Indices, as the property price in Hong Kong has skyrocketed in the past few years.

¹ [1999] 1 AC 34 (page 390A-B)

香港物業售價指數
PRICE INDICES FOR HONG KONG PROPERTY MARKET
(1999 = 100)

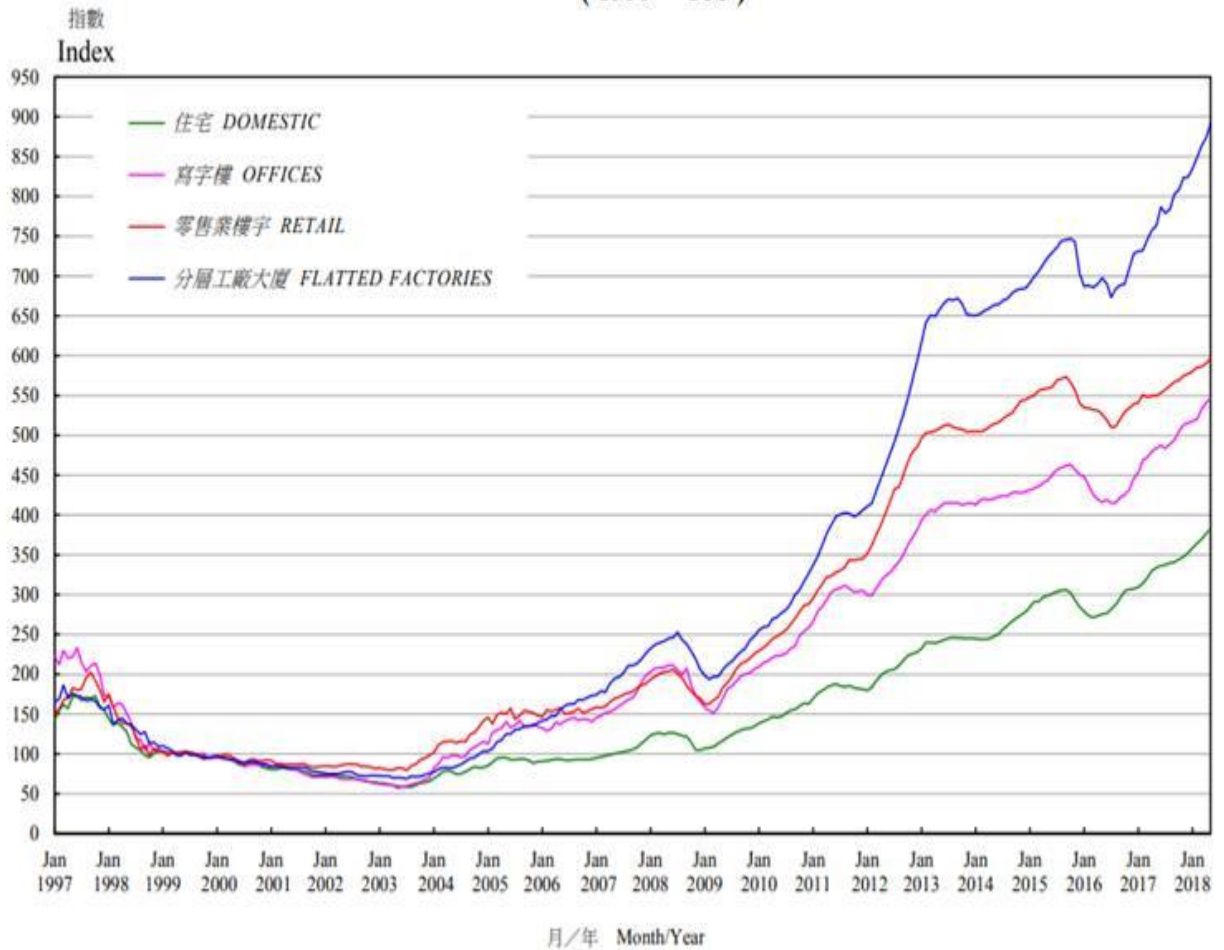


Figure - Price Indices by Property Type from Jan 1997 to Jan 2018

(Source: Hong Kong Property Review Monthly Supplement (as at July 2018), Rating and Valuation Department)

7. *From a policy consideration of the principle of restitutio in integrum, we agree that the Court should have the power to make periodical payment orders in awarding damages in personal injuries claims.*

A PROPOSAL

8. Before we are to provide answers to other consultation questions, we set out below our further observations.
9. It is quite obvious that, from both parties' points of view, periodical payment orders could remove much if not all of the risk associated with the uncertainty of the length of payment for future financial needs, ensuring that the payments are made in full, on time and will stop when the need is no longer required. However, from the insurers' perspectives, there are concerns and potential difficulties.

(a) Challenges for Making Reserves

Since the cessation of periodical payments cannot be known at the time of the order, insurers have difficulties in making reserves for personal injury claims. The difficulties are compounded by Hong Kong's ageing population. This, together with the highly unpredictable politics on socio-economic issues such as minimum wage, renders it both complicated and costly to assess the right level of reserving for periodical payment orders.

(b) Uncertainties

Periodical payment orders give rise to uncertainties, as

- (i) subject to further consultation, periodical payment orders could be opened to reviews by claimants,
- (ii) it is difficult to accurately price annuities for periodical payment orders, when there is little or nil robust evidence or data in Hong Kong on impaired life mortality.

These uncertainties present a major challenge for the management of insurers and their actuaries and will bring significantly increased costs. The effects could even be more acute for reinsurers as, in the experience in the UK, the effects are not diluted with small claims.

(c) Significant Financial / Administrative burden to Insurers

There will also be more administrative work for the insurers; the costs of administering such 'long-tail' claims are not insignificant. These administrative costs could be passed onto policyholders and third parties, such as consumers, business and taxpayers.

(d) No Finality

There is no finality to the matter notwithstanding settlement. This is undesirable to most, if not all, liability insurers / reinsurers which seek certainty when reaching a resolution of a claim.

(e) Requirement of Experts

In the UK, when it comes to the making of the periodical payment orders, the Court would usually appoint a Part 35 Expert to advise on the financial needs of the claimant and make recommendations on those issues pertinent to periodical payment orders. We are not sure if similar practice would be adopted in Hong Kong, but if that is the case, that could be costly and time-consuming for both parties.

(f) Insurers' abilities to undertake long term commitments

In fact, whether the concerned insurer can undertake payment for an unknown period is doubtful. Liability insurers may not be licensed or financially equipped to fulfill payments for an unknown period. This would place the claimants at risk of loss. Also from the perspective of the claimant, he/she would want to be certain that the periodical payment order can be fulfilled to its full term.

10. Periodical payment orders can only be made when the payer is considered sufficiently secure.
11. In this regard, Hong Kong is different from the UK. In the UK, when periodical payment orders are made against regulated insurance companies, the payments are guaranteed by its Financial Services Compensation Scheme. There is almost no risk of non-payment under periodical payment orders. In Hong Kong, however, there is no guarantee of financial sustainability of insurance companies which, like other private companies, are not immune to ups and downs in the market or any crippling financial crisis.
12. The spirit behind periodical payment orders is to ensure *restitutio in integrum* to the claimant, and avoid over payment by the defendant. They are more accurate in fixing compensation to the claimant and for the insurers/defendants.

The Establishment of Centralized Fund

13. In summary, while periodical payment orders are more desirable than lump sum orders as a matter of principle, there are concerns for both parties in a personal injuries litigations viz.:-
- (a) the claimant --- the defendant/insurer may not be able to make payment up to the end of his/her needs;
 - (b) the insurers ---- there is not finality and they cannot close the case. Some insurers may not able to fullfill long and uncertain terms of commitment.

In order to address the above, we propose that before Hong Kong is to have the periodical payment orders regime, there should be a system whereby the damages for future needs could be *capitalized* into a fund (the “Fund”), to be managed by an independent third party.

14. In our Proposal :-
- (a) damages for future needs shall be assessed by the Court as one lump sum, using the appropriate discount rate and the expected term for the claimant’s need (as is currently the case). This will be the subject matter of the periodical payment order;
 - (b) the insurance company will therefore only have to pay this lump sum without being concerned with periodical payments;
 - (c) this sum shall be paid by the insurance company into the Fund. After full payment, the insurance company would be discharged from any or further liabilities of the matter.
 - (d) the Fund would then pay out periodical payments to the claimant as provided for in the periodical payment order;
 - (e) if the claimant’s need stops earlier than assessed by the Court, the surplus will be kept by the Fund (see below);
 - (f) if the need become longer than assessed by the Court, the Fund will continue to pay the claimant from its own “reserve”.

15. We envisage that if this Fund manages all periodical payment orders, the sum will become very sizeable. Inevitably, some payment will be shorter than assessed and some longer. The surplus from the “*short-paid*” orders will go to support the “*long-paid*” cases.
16. Also, this Fund should be managed by qualified financial advisors who will invest and try to achieve growth, hopefully equal to or better than the discount rate used in the Judgment. The returns could also be used to support the Fund (e.g. the costs in the administration of the Fund), and to support the long-paid cases.
17. The Fund could be maintained by an independent third party, like Motor Insurance Bureau, a special branch of the Registrar, or a newly established authority.
18. While the actual operation of the Fund would need to be further discussed, capitalisation of damages for future needs in the above Proposal should be beneficial to both claimants and the insurance companies.
19. With our Proposal, we are to respond to the rest of the consultation questions in the following.

Question 2

Subject to Question 1 above, [LRC] invite submissions as to:

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

Law Society's Responses:

20. If Hong Kong is to have a periodical payment orders regime, then
- (1) yes, there should be an authority empowered to fix and to review the presumed net rate(s) of return on investment for personal injury Claims. These reviews should be periodical.
 - (2) The Chief Justice should be the above-mentioned authority.
 - (3) The legal profession, the accounting and the actuarial professions, the insurance industry as well as the relevant Government Departments (i.e. the Department of Justice, the Legal Aid Department, the Census and Statistics Department and the Office of the Government Economist) should be consulted. The review should take place at least once every three years. The discount rate could be promulgated by announcement by the Judiciary – in the same manner as the Judiciary has been making announcements from time to time on interest rates on judgment debts. The discount rate could also be posted on the Judiciary's website and be made available to the general public.

Question 3

Subject to Question 1 above, [LRC] invite submissions as to:

- (1) Whether the power of the court to award periodical payment should be irrespective of the consent of the parties to the proceedings.
- (2) Whether the power to award periodical payment should be generally vested in the court to be exercised in circumstances as it deems just and fair or whether such power should be limited to cover a specific class of personal injury cases, and, if so, how the class of cases is to be defined.
- (3) Whether a periodical payment order made by the court may cover all or only some heads of future pecuniary loss, in whole or in part, irrespective of the consent of the parties to the proceedings; and in the latter case, whether a periodical payment may cover all other heads of damages to such extent as the parties may agree.

Law Society's Responses:

21. The answers to the above questions are as follows:

- (1) Under our Proposal, after the defendants or the insurance companies have paid the damages in full to the Fund, they close off their liabilities. The making of the periodical payment orders would therefore be a matter for the Court and the claimants.

Culturally, local Chinese people are inclined to buy properties if they could have a lump sum of money. This could exhaust the damages, and may not be to the advantages of the claimants in all cases. As such, we agree that the Court should have power to sanction payments out and to award periodical payments, irrespective of the consent of the claimant.

We also propose that when the Court is to make periodical payment orders, it shall take into account all the circumstances of the case.

As for the circumstances that the Court could look into, we propose that reference could be made to the Civil Liability (Amendment) Act 2017 in Ireland². The bill to this Act was referred to and relied upon in the Consultation Paper (but has not been passed at the time when the Consultation Paper was released). The LRC considered that, in view of the similarity between the legal systems and circumstances of Hong Kong and Ireland, the reform in the relevant law in Ireland could serve as a useful reference in this law reform (paragraph 4.2).

Section 51I(2) of the above Act, as passed, provides the following:

“In deciding whether or not to make a periodic payments order, a court shall have regard to—

(a) the best interests of the plaintiff, and

(b) the circumstances of the case, including:

(i) the nature of the injuries suffered by the plaintiff; and

(ii) the form of award that would, in the court’s view, best meet the needs of the plaintiff having regard to—

(I) the amount of any payments proposed to be made to the plaintiff,

(II) whether the court has made an order in the proceedings

² See <https://data.oireachtas.ie/ie/oireachtas/act/2017/30/eng/enacted/a3017.pdf>
The Act was passed on 20 November 2017

concerned expressed to be one of an interim nature with respect to the payment of damages to the plaintiff, and where such an order has been made, the amount of such damages,

- (III) the form of award preferred by the plaintiff and the reasons for that preference,*
- (IV) any financial advice received by the plaintiff in respect of the form of the award, and*
- (V) the form of award preferred by the defendant and the reasons for that preference.”*

The above basket of factors should be of referential values.

- (2) We have considered limiting periodical payment orders to only catastrophic injuries but agree with the LRC that in that case, substantial argument could arise as to what amounts to “catastrophic injuries” and inconsistencies in application are likely to arise. Further, the focus will not be on the plaintiff’s needs but on an interpretation of his condition (paragraph 6.25).

We believe that periodical payment orders would be suitable for high value seriously injured personal injury cases (with a significant portion of damages for future losses and future costs) and also where the victim does not have capacity to manage his or her own financial affairs.

Without specifying a particular type(s) of cases for periodical payment orders to be applied, we propose that periodical payment orders should by default be considered in cases where a committee under Mental Health Ordinance Cap 136 is to be set up. In these types of cases, we consider that proper sanction by the Court³, greater protection required for mentally incapacitated persons and the interplay between Mental Health Court and the Personal Injury Court, warrant a periodical payment orders regime.

- (3) We take the view that in the making of periodical payment orders, it is not preferable for the Court to make distinction of different heads of claims for the purpose of payments.

³ See the comments by the PI Judge in *Fong Yau Hei v Gammon Construction Ltd* HCPI 1222/2003

Question 4

Subject to Question 1 above, [LRC] invite submissions as to:

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

Law Society's Responses:

22. Our answers are as follows:

- (1) Yes, periodical payment orders should be open to review by the Court upon application by the claimant.

Under our Proposal, after full payment of the damages as assessed to the Fund, the defendant or the insurance company have a clean break from the matter.

- (2) We agree that those matters set out in the above box would be relevant in the review of the periodical payment orders.
- (3) No, we do not agree that upon premature death of the claimant, his or her estate should still have the opportunity to lodge claims against the defendant. Under our Proposal, after the defendant or the insurance company have paid the full sum of damages into the Fund, they should not have any further liabilities arising from the matter.
- (4) We agree that the current mechanism for provisional damages should be preserved but we do not agree that periodical payment orders should be applicable to cover provisional damages although their co-existence is technically possible.

Question 5

Subject to Question 1 above, [LRC] invite submissions as to:

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

Law Society's Responses:

23. For the answers to the three questions, please see our Proposal.

The Law Society of Hong Kong

21 August 2018