THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

DRAFT DAMAGES (VARIATION OF PERIODICAL PAYMENTS) ORDER 2004

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

(APIL06/04)

MARCH 2004

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5,300 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

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VARIATION OF PERIODICAL PAYMENTS

Introduction

1. APIL welcomes the opportunity to put forward its views regarding the draft Damages (Variation of Periodical Payments) Order 2004, as proposed by the Department for Constitutional Affairs (DCA). In summary, APIL feels that the draft Order represents a missed opportunity. Due to its restrictive drafting, the Order completely fails to provide a wide enough series of circumstances in which injured claimants can be granted a review of their periodical payment awards. For example, we are disappointed that the previously suggested *'exceptional change in circumstances'* clause – from the DCA consultation 'Damages for Future Loss'[1] – has not been included in the current draft Order.

2. APIL is also concerned that the suggestion concerning the review of periodical payments in the event that there is a change in care, has not been included. This provision was originally included in the *"medical deterioration or improvement"* clause, but again has not been carried over from the DCA consultation to the draft Order.

3. Finally, we believe that article 8 (2) of the draft Order – *case file* – does not allow for the retention of the full range of necessary documents needed in granting an order for periodical payments.

Variation of periodical payments

4. The Government, specifically the Department for Constitutional Affairs (DCA), originally consulted on proposals for the application and review of periodical payments in its document 'Damages for future loss'[2].

[1] A Lord Chancellor's Department (now the Department for Constitutional Affairs) Consultation Paper – 'Damages for Future Loss: Giving the Courts the power to order periodical payments for future loss and care costs in personal injury cases' published in March 2002.
[2] Ibid

5. The consultation paper detailed various proposals relating to periodical payments, one of which was the ability to review and vary periodical payments. The DCA proposal was for a limited right to review but only :

   - for medical deterioration or improvement, and for changes in care, where they can be foreseen at the time of the original order and the possibility of review is provided for in that order; and
   - in exceptional life-changing circumstances, on the application of either party.

6. In APIL's response[3] to this DCA consultation, both of these propositions were strongly supported. In addition, the Law Society stated that review of periodical payments should *"be based on fundamental need"* and that the criteria outlined above provided *"a balance between flexibility for the claimant and protection for the defendant"*[4]. The findings of the consultation were subsequently discussed in the House of Lords during the Courts Bill debate which focused on periodical payments. Baroness Scotland stated that:

   "[t]he majority of respondents were in favour of some form of variation, with a significant number wanting something much wider that that which we are now proposing. However, … we have adopted a cautious approach to variation."[5]

7. APIL is particularly disappointed to see that the views of a *"significant number"* of respondents, ourselves included, were ignored when the current Order was drafted. We feel strongly that the remit for the variation of periodical payments should be widened so that it includes

[3] See Appendix A: APIL's response to Lord Chancellor's Department consultation paper – *"Damages for Future Loss: Giving the Courts the power to order periodical payments for future loss and care costs in personal injury cases"* (May 2002)
[4] Damages for Future Loss - Response of the Law Society to the Lord Chancellor's Department Consultation Paper on Damages for Future Loss: Giving the Courts the Power to Order Periodic Payments for Future Loss and Care Costs in Personal Injury Cases (June 2002). (See http://www.lawsoc.org.uk/ for full response)
[5] Baroness Scotland of Asthal (27 March 2003) Column 1006

review for exceptional circumstances and where there has been a change of care.

Review due to life changing circumstances

8. APIL believes that reviews should be possible where there has been an exceptional change in a claimant's circumstances, other than his physical or mental condition. We adopt the Clinical Dispute Forum's (CDF) examples of such life changing circumstances as follows:

    - Major changes in family support, resulting from (for example) the death or incapacity of a family carer, the breakdown of a marriage or partnership in a claimant's household, abandonment of a claimant by his family;
    - A child claimant attaining majority or ceasing full-time education;
    - Closure of a hostel, residential community or other protective environment in which a claimant has been living;
    - Emigration by a claimant's family.

9. All the above examples will significantly affect a claimant's well being, both mentally and physically. We believe that the residual right for either party to seek permission from the court to apply for a review in exceptional circumstances should be provided within the draft Order.

Review due to change in care

10. In addition to a review where there has been an exceptional change in a claimant's circumstances, APIL believes that reviews should be possible where there has been a change in the care regime of the injured claimant. For example, a review would be needed when:

    - New medical technology offers a more appropriate means of care

- Alternative medical treatment is found to be effective, subsequent to the awarding of periodical payments
- New drugs may become available which ease the condition of the claimant, or aid in his recovery.

11. APIL would also interpret the lack of appropriate funds for future medical treatment as being applicable within this provision. There is a particular need for such a clause as there is a potential problem in the way future care costs are calculated[6]. Currently damages for care costs and future losses are routinely calculated on the basis of the retail price index (RPI). There is real concern that the cost of future care for the claimant, and the claimant's loss of earnings will, over a long period of time, increase by considerably more than the retail prices index. This means that the compensation which is intended to provide for these needs will be insufficient. In particular, the money paid periodically to cover the costs of care will quickly become inadequate to pay for a care regime which the court has said is necessary. For example, "medical" inflation has been estimated at an average of 3.9% per annum in the period 1997-2002 compared to RPI at 2.3%, and is predicted to be over double RPI in the next two years[7]. If increases in periodical payments orders are also linked to RPI, these problems will continue.

12. We believe that the right for either party to seek permission from the court to apply for a review in relation to changes in care should be provided within the draft Order.

Applicable cases

13. APIL considers that the utility of the draft Order is further compromised by the small number of cases to which the Order will be applicable.

[6] See Appendix B: Periodical Payments – An assessment of concerns and solutions by APIL (March 2004)
[7] "Medical" inflation refers to Hospital and Community Health Service ("HCHS") inflation (see Department of Health consultation paper 2002: Recovery of the Cost of NHS hospital treatment following road accidents)

Without the ability to review and vary periodical payments due to a change in care or life-changing circumstances, the only eventuality in which a review will take place is where it *"is proved or admitted to be a chance that at some definite or indefinite time in the future the claimant will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration, or enjoy some significant improvement, in his physical or mental condition"*[8]. In considering the above parameters, APIL can think of few, if any, examples where this would be applicable to injured claimants. Most injured claimants are unlikely to develop a subsequent ailment which was unforeseeable at the time of the original award of damages. If there is a chance that a claimant's condition will worsen, this fact is often accepted during the original calculation of damages, and reflected in the final amount awarded.

14. This narrow approach within the draft Order is directly reflective of section 32A of the Supreme Court Act 1981[9] relating to provisional damage awards in actions for personal injuries. Provisional damages can be awarded where:

"there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition."

[8] Draft Damages (Variation of Periodical Payments) Order 2004, article 2
[9] Inserted by the Administration of Justice Act 1982, section 6 (1). See also clause 41.2 (2) (a) of Statutory Instruments 1998 No. 3132 (L.17) – The Civil Procedure Rules.

15. It is obvious that the current Order has been drafted using the above definition as a template. Baroness Scotland confirmed this by stating, in reference to the variation of periodical payments, that:

"the order will, as far as practicable, adopt the mechanism currently applying to claims for provisional damages."[10]

16. APIL is concerned by the application of this provisional damages mechanism to periodical payments due to its restrictive nature. To illustrate the lack of provisional damage orders granted, rough figures from the Compensation Recovery Unit (CRU)[11] for 2001/02 showed that out of nearly 780,000 settlements recorded, only 182 were provisional damage awards: that is only 0.02% of all compensation claims settled for 2001/02. This illustrates the limited applicability of provisional damages and, by implication, the limited nature of the proposed draft Order for periodical payments.

Limitations of the draft Order

17. APIL believes the current draft Order fails to properly fulfil many of the stated objectives of periodical payments, potentially leaving the injured claimant in a worse position. The Government's stated purpose for the introduction of periodical payments was that they *"should help ensure that injured people receive the compensation to which they are entitled for so long as it is needed, without the worry of the award running out if*

[10] Baroness Scotland of Asthal (27 March 2003) Column 1006

[11] CRU operates the recovery scheme introduced by the Social Security (Recovery of Benefits) Act 1997. Where personal injury compensation is agreed on or after 6 October 1997, CRU recovers from the 'compensator', i.e. the defendant or the insurer, amounts equivalent to social security benefits paid as a result of an accident, injury or disease.
In ensuring that all due sums are recovered, compensators are obliged to notify CRU of all personal injury claims, details of which are entered onto the CRU's database. Compensators are, however, also obliged to notify CRU of the outcomes of personal injury claims. In completing form CRU102 for each claim, compensators must indicate, amongst other things, whether compensation has been paid or not. The analysis of the resulting data held by CRU reveals the number of claims for different types of personal injury.
The rate of compliance with the obligation to provide this data and the relative youth of the recovery scheme may affect the extent to which the data is representative. Accuracy in completing the CRU102 form may also be an issue. Whilst there may be scope for error in the recording of detail, however, there seems little scope for error in entering details of whether compensation has been paid or not. In the whole, CRU's data is both independent and should include details of most personal injury claims made in England, Scotland and Wales.

they happen to live longer than was expected"[12]*.* In addition, the ability to review periodical payments was accepted by the Government because it considered there was *"some merit in the argument that there should be some scope for review in exceptional circumstances if periodical payments are to achieve their aim of meeting the claimant's needs more accurately and less rigidly than a lump sum"*[13]*.* The proposed periodical payments system appears to meet neither of these intentions due to the non-inclusion of clauses taking account of life-changing circumstances and adjustments in care costs. Instead, the system seems rigid and inflexible.

18. APIL understands, and is concerned, that periodical payments will be encouraged and promoted by the Government and judiciary for the majority of damage awards, regardless of the amount of compensation. At the moment any potential rigidity of periodical payments can be offset by the fact that the court has full discretion to award damages in whichever form is appropriate i.e. periodical payments, structured settlements or lump sums. With the promotion of periodical payments, this type of discretion is less likely to be used. Injured claimants will subsequently have to accept periodical payments damage awards without the flexibility such an award requires.

19. In addition, it has been recognised that a certain level of award is more applicable to periodical payments. Indeed a damages figure of £250,000 has been suggested as being the limit under which "*periodical payments are unlikely to be a worthwhile option"*[14]. Due to this relatively high threshold, only a few cases will fall into this category. By extending periodical payments, however, to all levels of awards, the flexibility by the court in deciding the correct type of award will be eroded.

[12] Lord Irvine of Lairg (Lord Chancellor) - Introduction to LCD consultation – Damages for Future Loss (March 2002)
[13] Paragraph 59 of LCD consultation – Damages for Future Loss (March 2002)
[14] *"At present, the NHSLA automatically considers a structured settlement for all cases worth more than £250,000."* LCD consultation – Damages for Future Loss (March 2002): Annex A – Partial Regulatory Impact Assessment (paragraph 13)

20. APIL is concerned that the wider use of periodical payments, in their proposed form, for all types of damages will leave an injured claimant, in some instances, in a weaker position than if he had been awarded a lump sum payment. For example, an injured claimant who is awarded periodical payments would not have the flexibility to alter how the damages are invested – the insurer handles all investments, and pays a yearly sum to the claimant. The claimant also has no flexibility to have his periodical payments reviewed and/or varied due to a change in circumstances or care. In comparison, while an injured claimant who has been awarded a lump sum will have no means to have his award altered or varied, he does have the flexibility of individual investment of the damages award.

Retention of the case file

21. APIL believes the list of case documents to be retained for the purposes of reviewing a periodical payment award needs to be expanded. Article 8 within the draft Order details the case file documents which *"must be preserved in the court office where the proceedings took place"* until such time as they are no longer needed to be referenced by the court. Missing from the list of documents detailed at article 8 (2) are :

- Schedule of damages
- Counsel advice
- Financial advisers report

22. APIL believes it would be extremely difficult for the court to make a truly informed decision concerning varying a periodical payments award if these documents have not been retained from the original proceedings. APIL proposes that a more appropriate solution to ensure all relevant documentation is retained would be to amend article 8 (2) (f), so that it reads "any subsequent orders*, or reports pertinent to the*

heads of damages to be change". This will allow for the proper retention of all relevant documentation that the court might need in any review.

Conclusion

23. In conclusion, APIL feels that the draft Damages (Variation for Periodical Payments) Order 2004 fails to protect the interests of the injured claimant when awarded damages in the form of periodical payments. We believe that the Government had a real opportunity prior to the draft Order to deliver to claimants the ability to have their awards reviewed and varied dependent on life-altering circumstances and changes to their care regime. Yet any flexibility within the Order has been removed in the subsequent drafting, and the Order is now so narrow as to make it applicable to only a select few injured claimants; the Government has allowed the birth of variability, simply to smother it at the first opportunity.

24. In order to place the injured claimant back at the heart of periodical payments, and variability, it will be necessary to make the following changes:

- Allow for the review of periodical payments where there has been a change in care,
- And allow for the review of periodical payments in exceptional life-changing circumstances by inserting the following at article 2:

"2. The court may –

(a) on the application of a party,

(b) with the agreement of all the parties, or

(c) of its own initiative,

provide in an order for periodical payments that it may be varied,

(i) for medical deterioration or improvement, and for changes in care, where they can be foreseen at the time of the original order and the possibility of review is provided for in that order; and

(ii) in exceptional life-changing circumstances, on the application of either party."

- Alter article 8 so that all the necessary documents that relate to the original awarding of damages are retained. So article 8(2)(j) should read:

  "any subsequent orders, *or reports pertinent to the heads of damages to be change*".

Appendix A

APIL's response to Lord Chancellor's Department consultation:

'Damages for Future Loss': Giving the courts the power to order periodical payments for future loss and care costs in personal injury cases

May 2002

LORD CHANCELLOR'S DEPARTMENT

DAMAGES FOR FUTURE LOSS: GIVING THE COURTS THE POWER TO ORDER PERIODICAL PAYMENTS FOR FUTURE LOSS AND CARE COSTS IN PERSONAL INJURY CASES

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

MAY 2002

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5300 members in the UK and abroad. Membership comprises barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

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DAMAGES FOR FUTURE LOSS :
GIVING THE COURTS THE POWER TO ORDER PERIODICAL PAYMENTS FOR FUTURE LOSS AND CARE COSTS IN PERSONAL INJURY CASES

1. APIL welcomes this opportunity to respond to the LCD's consultation paper on giving the courts the power to order periodical payments for future loss and care costs in personal injury cases. In summary, APIL provisionally agrees that the courts should have a power to impose periodical payments where they are appropriate and that those payments should be open to review in limited circumstances. APIL's agreement on both points is, however, subject to the parameters outlined in this response.

Q1: Do you agree that the courts should have the power to order that damages for future losses in personal injury cases should be paid in the form of periodical payments?

2. APIL provisionally agrees that the courts should have the power to order that damages for future losses in personal injury cases should be paid in the form of periodical payments. This agreement is subject to the parameters in which it is proposed such a power should be exercised, as to which, please refer to our response to question 3 below.

3. Periodical payments have both advantages and disadvantages for claimants. Claimants would not have to fear running out of compensation as they would if damages were awarded as a lump sum. On the other hand, periodical payments create a lifetime relationship between the claimant and defendant that the claimant may find extremely difficult. For this reason, the merits of imposing periodical payments must be assessed on an individual case-by-case basis. The appropriateness of periodical payments will depend on several factors including, most importantly, the claimant's wishes and future plans and

also the basis on which the claim is concluded as compared with its full value. We agree, therefore, that it would be helpful to issue a Practice Direction, setting out the considerations a court should take into account when deciding between a lump sum, periodical payments or a mixture of the two. Such a Practice Direction should be developed following wide consultation with the appropriate bodies.

Q2: Should the legislation include a presumption that for larger cases periodical payments will be the preferred form of payment unless there is a good reason not to?

4. APIL does not believe that the legislation should include a presumption that for larger cases periodical payments will be the preferred form of payment. The above question immediately poses further questions such as how 'larger cases' would be defined. In addition, in looking into whether there was 'good reason not to' impose a periodical payment, the court would be required to analyse the case closely, in which case the presumption would be redundant except in the most obvious of cases. As noted above, we believe that the merits of periodical payments should be assessed on a case-by-case basis with the assistance of a Practice Direction, which, as noted above, should be developed following consultation with the appropriate bodies.

Q3: In what circumstances might a lump sum be more appropriate for all or part of the future losses?

5. It is impossible to predict all of the circumstances in which a lump sum would be more appropriate than periodical payments for all or some of the future losses. For example, it is predictable that a lump sum would be more appropriate where there are concerns about the future financial security of the defendant and/or his insurer or where the claimant does not want a life-long connection with the defendant. Other circumstances, however, are less predictable as they relate to the particular wishes or future plans of the

claimant. Claimants, for example, often wish to use their damages for future loss of earnings to purchase and/or adapt suitable accommodation. In addition, as noted by the CDF, a businessman may, quite reasonably, want to take future earning loss in the form of capital to invest or a young breadwinner might want to take a lump sum big enough to get a house in the countryside and start a bed and breakfast near to a good primary school. Alternatively, the claimant may not know at the time of settlement of other conclusion what he is going to do with his life following the accident, how he is going to spend his damages or how he will prioritise that spending. The law to date has always recognised the claimant's freedom of choice in spending his damages and should continue to do so.

6. For the above reasons we believe that courts should assess the merits of lump sums and/or periodical payments for future loss on a case-by-case basis with the assistance of a Practice Direction. Such a Practice Direction should at the very least require a court to consider the following:

   - The claimant's wishes;
   - The claimant's future plans;
   - The financial security of the defendant and/or his insurer;
   - The effect of any compromise to reflect, for example, contributory negligence or litigation risk;
   - The nature and extent of future uncertainties.

7. We stress that a court should only impose periodical payments upon a claimant who is capable of making his own decisions, and who does not want a lifetime relationship with the defendant, in exceptional circumstances. The claimants wishes and future plans should be the most important consideration of the court when deciding whether to order periodical payments, a lump sum or a mixture of the two. Having said that, there may be cases where it would be beneficial to a claimant for the court to decide that a lifetime relationship with the defendant would be preferable. For example, this may be preferable for a claimant who will always be under a disability and who will have a

lifetime of ongoing medical treatment and care, the cost of which rises above the RPI. It is these kinds of difficult and sensitive issues that should be addressed in further consultation on the development of a suitable Practice Direction.

Q4: Should (i) the power to order periodical payments, or (ii) any presumption in favour of periodical payments, apply to cases under the Fatal Accidents Act 1976?

8. In answer to question one, APIL highlighted that periodical payments create a life long relationship between a claimant and defendant. It is not difficult to see that many dependants claiming under the Fatal Accidents Act 1976 would not want such a relationship, but instead would prefer the 'clean break' available through a lump sum payment. In addition, calculating damages for dependency on the basis of loss of earnings is not usually complicated by issues of life expectancy. Periodical payments may not therefore, be as useful or as attractive in Fatal Accident Act cases. Having said that, however, there may be individual cases in which they may be appropriate and in which they are desired by the dependants. As noted by the CDF, the calculation of the dependency of an elderly widow of a younger millionaire could be problematic as the combination of a large multiplicand and difficulties in predicting life expectancy means that a lump sum could be wildly wrong. There should, therefore, be a power to order periodical payments to those claiming under the Fatal Accidents Act for those cases in which they are desired or in which they are suitable, again, subject to guidance in a Practice Direction.

Q5: Do you agree that insurers should have the option of self-funding, provided the court was satisfied about the security of the periodical payments?

9. APIL sees no reason why insurers should not be able to offer to self-fund periodical payments, provided the necessary amendments are made to the Financial Services Compensation Scheme to ensure that all future payments to

all claimants are protected at all times. It is also imperative that the FSCS can continue payments as they become due with little or no delay. Care regimes and medical treatments will be dependent on the cash flow generated by these future payments and it would be unacceptable if either were disrupted due to filling in the required FSCS forms and completing other bureaucratic procedures. This, again, may require some amendment of the scheme. As submitted by the CDF, defendants should provide proof of security and it would be for the claimant, if competent, to decide whether there was adequate security, and for the court to do so if the claimant was under a disability.

Q6: Are there other funding options that might offer adequate security?

10. APIL is unable to comment on this question as it does not fall within our members' expertise.

Q7: Do you agree that using Rule 44.3(4) is the best approach to dealing with offers to settle on the basis of periodical payments? If not, how should this issue be tackled?

11. APIL agrees that at this stage, using Rule 44.3(4) would be the best approach to dealing with offers to settle on the basis of periodical payments. We believe that the court should take into account the following factors identified by the CDF:

- who opened negotiations;
- how early in the litigation that was done;
- how constructively negotiations were pursued;
- what reasons were put forward on either side for rejecting offers made.

We further believe that where the claimant has reasonably investigated the question of whether periodical payments would be suitable, the cost of that

investigation, including any independent financial advice, should be recoverable by the claimant from the defendants regardless of whether the claimant opts for periodical payments or not. This will encourage claimants to obtain sensible advice at the appropriate stage in negotiations or proceedings.

Q8: Do you consider that any of the current relevant benefits regulations create inappropriate incentives or other anomalies and if so, what are they and how could they be remedied?

12. The CDF refers to an article by John Grace QC, which discusses the recent cases of Ryan and Bell. It notes that if Mr Grace is right, it would seem that those who lack capacity enjoy both a capital and income disregard, while competent claimants whose money is put in trust enjoy a capital disregard only of that income applied to special needs. These favourable circumstances, however, do not apply to payments under a 'commercial' structured settlement (Beattie v Secretary of State for Social Security [2001] Lloyds Rep Med 297). The reasoning in the Beattie case might also apply to self-funded structured settlements. The CDF explains that this would result in four classes of adult claimants as follows:

- Those receiving a lump sum, who are not under a disability and whose damages are not in trust. This class would not enjoy either a capital or income disregard for the purposes of means tested benefits.

- Those receiving a lump sum who are under a disability and whose damages are administered by the Court of Protection or under CPR Part 21 without there being a form of trust in existence. This class would enjoy both capital (so long as it is held by the Court) and income disregard.

- Those, whether under a disability or not, who receive a lump sum which is paid into a discretionary or (possibly) bare trust. This class would enjoy a disregard of capital within the trust, but only a limited income disregard.

- Any of the above who have entered into a structured settlement. For this class, the contingency sum would be disregarded but their annuity payments will be taken into account.

13. APIL believes that the current complications and contradictions highlighted above may be a major deterrent to the use of periodical payments and this needs to be resolved if a system of periodical payments is to be used successfully. The CDF suggests:

"[T]he tortfeasor [should] compensate[s] the claimant and repay[s] those who have provided or will provide for the consequences of his injury, whatever the claimant's age or legal status and whatever sort of trust provision has been devised. This approach would mean that neither capital nor income from any award should be disregarded in assessing eligibility for future means-tested benefits. The loss would lie on the wrongdoer where it belongs."

This would be an extension of the current system with the CRU prior to settlement.

Q9: Do you agree that it would be desirable to prevent or regulate the factoring of structured awards? If so, is the best approach to bar claimants from assigning periodical payments? If not, how should this issue be tackled?

14. APIL agrees that in order to protect claimants from major abuse it would be desirable to prevent the factoring of structured awards. We believe that this should be achieved by barring claimants from assigning periodical payments.

Q10: Do you agree that it should be possible to award provisional and further damages by way of periodical payments?

Q11: Do you agree that orders for periodical payments should be open to review only:

- **for medical deterioration or improvement, and for changes in care, where they can be foreseen at the time of the original order and the possibility of review is provided for in that order; and**
- **in exceptional, life-changing circumstances, on the application of either party; and if so, in what circumstances might a review be appropriate?**

If not, should there be more or less reviewability and in what circumstances?

Q12: Should there be a paper application for permission to review (except where the original order provides that permission is unnecessary), with the right to an oral hearing if either party objects to the decision on paper? If not, how should applications for review be dealt with?

15. APIL accepts that there are circumstances in which it would be appropriate to allow periodical payments to be reviewed. We believe, however, that such reviews should only be allowed in very limited circumstances, as outlined below, to ensure that claimants are protected from, for example, continued or repeated surveillance. We believe that it would be unacceptable to have either an unrestricted right of review or regular reviews timetabled as a matter of course, for example, every five years.

16. Subject to what is stated below, APIL believes that periodical payments should be open to review **only**:

    - For medical deterioration or improvement, and for changes in the provision of care, **where they can be foreseen at the time of the original order and the grounds for review are provided for in that order**; and

- In **exceptional** life changing circumstances (other than a change in a claimant's physical or mental condition) where those changes were foreseeable or not.

17. We have noted above that reviews should be allowed in the event of foreseeable medical deterioration or improvement, although to protect the claimant, it is imperative that reviews in such circumstances are only allowed where the relevant improvement or deterioration was foreseeable at the time of the original order and the grounds for review were provided for in the order. We agree that significant but unforeseen medical deterioration (or improvement) should not provide grounds for review. This would introduce an unacceptably high level of uncertainty and in most cases would raise extremely difficult questions of causation. Moreover, it might encourage continued or repeated surveillance of claimants, which is to be deprecated.

18. Reviews should be also possible where there has been an exceptional change in a claimants' circumstances, other than his physical or mental condition, whether those changes have been foreseeable or not. We adopt the CDF examples of such life changing circumstances as follows:

- Major changes in family support, resulting from (for example) the death or incapacity of a family carer, the breakdown of a marriage or partnership in a claimant's household, abandonment of a claimant by his family;
- A child claimant attaining majority or ceasing full-time education;
- Closure of a hostel, residential community or other protective environment in which a claimant has been living;
- Emigration by a claimant's family.

Some of the above events are foreseeable whilst others are not but all could affect a claimant's well being significantly. We believe a residual right should be provided for either party to seek permission from the court to apply for a review in exceptional circumstances as outlined above.

19. As provisional damages already provide for a form of review where there is a foreseeable chance of serious deterioration in a claimant's physical or mental condition, we can see no reason why it should not be possible to award provisional damages by way of periodical payments.

20. Applications to review should initially be made on paper. We can see the need to place limitations on such applications, which should be made within twelve months of the occurrence or discovery of the events said to justify the application.

Appendix B

APIL document:

Periodical Payments – An assessment of concerns and solutions

March 2002

PERIODICAL PAYMENTS

AN ASSESSMENT OF CONCERNS AND SOLUTIONS

A DOCUMENT BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5,300 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

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PERIODICAL PAYMENTS

Summary

APIL is concerned that by linking increases in periodical payments to the retail prices index (RPI) numerous injured claimants will not receive full and just compensation. In order to combat under-compensation for the negligently injured person, APIL proposes the following solutions:

- Promoting and encouraging the powers that the courts themselves have to alter the method of funding and the index used for calculation of the damages award.
- A widening of the insurance products available to the courts via an expansion of the compensation annuity market. This could be achieved by –
    - Promotion by Government agencies of the non-RPI annuity market.
    - A special release of Government gilts in order to draw more insurers into the marketplace.
- An additional contingency fund to be awarded with all periodical payments. This fund would only be called upon in the event of the periodical payments being insufficient due to the elevated inflation costs of medical care.
- When periodical payments are awarded, the amount could be calculated on an RPI basis plus an additional percentage - for example, RPI plus 2%.
- An amendment to the proposed practice direction for periodical payments which would recognise the under-compensation of future care cost damages as a change in circumstances, and as such allow for an increase in the amount of the award.
- Use by the Lord Chancellor of his power to set different discount rates for different heads of loss, in particular by altering the discount rate in respect of the cost of future care from the present 2.5 per cent to a more appropriate lower rate, or even possibly to a nil rate.

Background

The object of an award of damages for personal injury is to put the claimant in the same position, financially, as he would have been in if he had not been injured. In most cases the claimant will have suffered several different kinds of loss. Traditionally he will usually receive a lump sum, which is calculated by adding together the monetary values for each type of loss.

Naturally some losses can be more readily expressed in terms of money than others. For example medical and other bills which the claimant has already paid, and earnings which he has already lost through being unable to work. In cases of serious injury, damages for future losses - such as loss of earning capacity and the cost of continuing medical and other care - are likely to be by far the largest element in the lump sum award.

Lump-sum awards for future loss are assessed by calculating the annual loss of earnings or the cost of future care (the multiplicand) multiplied by the number of years for which the losses are likely to continue (the multiplier). The multiplier is very often the expected life-span of the claimant. This total sum for future loss is then discounted to reflect the investment benefit that the claimant can receive as a result of being awarded all the money in a lump sum.

There are, however, disadvantages with lump-sum awards. For insurance companies or NHS trusts it is very difficult to budget for a single lump sum which can sometimes be millions of pounds. Such huge sums being paid out unexpectedly, without being budgeted for, can dramatically affect the cash-flow. So far as a claimant is concerned, if he lives longer than average or if a lump sum is poorly invested there is the possibility that the necessary funds for future care will run-out before his death.

In order to tackle some of these issues in regard to lump-sum payments, the idea of using periodical payments was proposed. Periodical payments involve the awarded damages being paid to the claimant on a yearly basis, rather in a single lump-sum.

The Pearson Commission, in 1978, recommended that reviewable periodic payments should become the main remedy in cases of serious or lasting personal injury and death, but their recommendation was not implemented. The Damages Act 1995, however, gave courts the power to order structured settlements, if both parties agreed, and periodical payments were introduced via the Courts Act 2003, which received Royal Assent on 20 November 2003.

The debate surrounding the introduction of periodical payments has highlighted problems relating to the fact that damages for care costs and future losses are routinely calculated on the basis of the retail price index (RPI). There is real concern that the cost of future care for the claimant, and the claimant's loss of earnings will, over a long period of time, increase by considerably more than the retail prices index, which will mean that the compensation which is intended to provide for these needs will be insufficient. In particular, the money paid periodically to cover the costs of care will quickly become inadequate to pay for a care regime which the court has said is necessary. For example, "medical" inflation has been estimated at an average of 3.9% per annum in the period 1997-2002 compared to RPI at 2.3%, and is predicted to be over double RPI in the next two years[15]. If increases in periodical payments orders are also linked to RPI, these problems will continue.

APIL strongly believes that the following suggestions offer many positive and attainable actions which could help to resolve the issue of under-compensation.

Alteration of the discount rate by the Lord Chancellor / Secretary of State for Constitutional Affairs

Large awards for damages are subject to an adjustment (the 'discount') to take account of the income a claimant can earn when the lump sum awarded is invested.

[15] "Medical" inflation refers to Hospital and Community Health Service ("HCHS") inflation (see Department of Health consultation paper 2002: Recovery of the Cost of NHS hospital treatment following road accidents)

Until 1998, the discount rate was 4.5% (i.e. it was assumed that this was the average interest over time that the claimant could expect to earn on the invested lump sum). In 1998 the discount rate was reduced to 3% following a House of Lords judgement in the case of *Wells v Wells*[16]. Under the Damages Act 1996, the Lord Chancellor has the power to set a new discount rate at his discretion. The last discount rate change was in June 2001, when it was reduced to 2.5%.

APIL firmly believes that inadequacies in the amount of damages awarded from a calculation based on the RPI could be offset by a further reduction of the discount rate. The Lord Chancellor should use his power to establish a differential discount rate for the various heads of damages, including cost of future care. In order to properly reflect the inflation increase, there would need to be a reduction in the discount rate to zero per cent, or as near as possible. This reduction would ensure the value of payments to victims in some cases for many years ahead.

The discretion of the court

The courts currently have a certain level of discretion in awarding damages. This discretion, however, appears not to be widely used.

For example, Section 1 (2) of the Damages Act 1996 gives the court the opportunity to take *"a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question".*

In addition the draft rule for periodical payments states that in relation to continuity of payment:

"40.26 – (1) An order for periodical payments shall specify that the payments must be funded in accordance with section 2(4) of the 1996 [Damages] *Act, unless the court orders an alternative method of funding."*

[16] [1999] 1A.C. 345

The draft rules also allow for judicial discretion in relation to the award itself:

"40.28 – (1) When damages are awarded by the court in the form of periodical payments, the order must specify –

> *(c) that the amount of the payments shall vary annually by reference to the retail prices index, unless the court orders otherwise under section 2(9) of the 1996* [Damages] *Act."*

An explanatory note to the Courts Act 2003 reiterates the above point, stating:

"It is expected that, as now, periodical payments will be linked to RPI in the great majority of cases. However subsection (9) preserves the court's power to make different provision where circumstances make it appropriate."

APIL would like to see the wider endorsement, by both the Government and the judiciary, for the use of court discretion in relation to the calculation of damages awards. We believe that possible, and sometimes inevitable, under-compensation is contrary to the intentions of awarding for future care. We believe that this under-compensation represents a 'circumstance' in which it would be necessary to use a different method of calculation.

The ability to decide the method of calculation would enable the court to apply more appropriate indices, ideally for the separate heads of damage. For example RPI could be used to calculate past losses, while NAE would be used to assess future losses. More importantly this would mean that HCHS inflation could be applied to calculate costs of future care. This would mean the funds needed for the ongoing care of negligently injured claimants would be properly sustainable.

The insurance market

In March 2000, the Lord Chancellor's Department (LCD) – now the Department for Constitutional Affairs (DCA) - issued a consultation paper entitled *"The Discount Rate and Alternatives to Lump Sum Payments".* In this consultation paper, the LCD sought views on the inflation provisions periodic

payments might attract. In summarising the responses to this consultation paper, the LCD noted:

"There was agreement that inflation proofing was necessary but disagreement over the appropriate index. A number of responses took the view that the traditional link to the RPI was not appropriate for loss of earnings or costs of care as both could be shown to increase at a higher level. But there was no consensus on the appropriate index for each. Among those in favour of maintaining the link with the RPI, it was suggested that the use of different indices would be too complicated. It was pointed out that the Court of Appeal made its decision on general damages in Heil v Rankin by reference to the RPI. It was also pointed out that payments from annuities were linked to the RPI because matching requirements mean that Life Companies have to secure the payments with investment in index-linked gilts."

The Financial Services Authority says that 'close-matching regulations' mean that periodical payments have to be linked to the RPI as this is the only index on which annuities are purchased. This conclusion appears to be further supported by Brain Langstaff QC, who noted:

"No annuity product offers express protection against wages inflation (NAE, National Average Earnings) still less against Hospital and Community Health Service (HCHS) inflation. There are no assets which are linked to the NAE index- so close matching is impossible. It is thus impossible at present for periodical payments under an insurance based structure to rise at a rate which accurately reflects the rise in labour costs, even though one of the main purposes of entering a structure may be to provide for the cost of future nursing care, which is largely labour related. However, with profit policies may provide a return which is beyond the RPI and hence nearer to (or perhaps in excess of) the NAE."[17]

[17] Master of the Rolls' working party on structured settlements (November 2002)

APIL believes that it was anticipated by the Government that with the courts having the ability to award periodical payments, the small annuity market which serviced such awards would grow to take advantage of the increased numbers. With this increase in the number of providers, it was further anticipated that the range of products available would multiply and broaden. What has happened, however, is that insurers have been reluctant to enter the market. According to Glenn Smyth, an independent financial adviser, this reluctance by the insurers to enter the market may be due to ever increasing average longevity, low interest rates and a shortage in the supply of Government gilts[18] (though this will change as and when Government borrowing escalates).

APIL feels that in order for products to become available which will allow the investment of damage awards in annuities which track indices other than the RPI, there must be an expansion of the annuity market. We believe that this can be achieved in a number of ways. Firstly, the Government needs to become more actively involved in developing and encouraging insurers into the non-RPI indexed annuity market. To this end, we understand there are ongoing discussions between the DCA and the Department for Trade and Industry (DTI) into how to expand the market. These discussions, however, need to be made a higher priority so as to ensure that injured claimants are not left wanting.

Another possible solution to attracting insurers into the market would be to make more Government gilts available. This could be achieved by the Government having a special issue of gilts. APIL is conscious of the fact that the market for annuities for compensation damages is relatively small and it may not be practicable to have a special issue of gilts solely for this market. It may, however, be possible to include a special gilt issue for compensation awards within a larger issue for another organisational sector. Indeed pension companies are currently campaigning to have a special gilt issue by the Government. While they may not justify such an issue on their own, the

[18] Risk-free bonds issued by the British government. They are also known as Index-Linked Government Securities (ILGS). They are the equivalent of U.S. Treasury securities.

combined demands of both the pension companies and the compensation insurance industry together may justify a special Government gilt issue. Such an issue would ideally strengthen the annuity market and provide for alternative insurance products to become available.

Awarding of periodical payments by the court

An alternative solution to the problem of under-compensation because of RPI is to compensate for the discrepancy between it and care costs by increasing the amount of damages awarded. For example, when awarding compensation the court could establish a periodical payment plan backed by a contingency fund. What this would entail is a court awarding periodical payment damages, with a lump sum paid to an independent third party (i.e. trustee, the court, etc.). This lump-sum amount would then be available so that in the event of under-compensation during the latter years of the claimant's life their award could be 'topped-up' by this contingency fund.

Another possibility is to establish the idea of 'RPI +' (plus) for certain heads of damages; the award would be based on the normal RPI inflation figure but there would an additional fixed percentage added (i.e. RPI plus 2%). This would ensure that claimants receive the additional inflation increase that would be necessary in order for the award to accurately reflect future care costs.

In some respects it would be ideal for the court to be able to award additional damages in instances where there is likely to be under-compensation. This discretion would allow for there to be full and fair compensation, and would also combat any over-compensation which may occur. Indeed the draft rule and practice direction for periodical payments indicate that the court can increase the amount of damages awarded. This alteration of the amount of damages appears to be contingent on the claimant having a big change in circumstances. Draft rule 40.25 deals with the calculation of periodical payments and states that:

"the court shall assess the claimant's annual future losses and needs and have regard to the factors set out in the practice direction".

The practice direction, in turn, says the court should consider:

"2.1 (2) whether the award should increase or decrease on a certain date"

Examples of dates[19] where an increase may take place, however, concern the change in the claimant's circumstances, such as physical deterioration, and do not include the possibility of future care costs being insufficient. APIL believes that lack of funds is a significant change in a claimant's circumstances, and as such should be reflected in the examples of dates given in the draft practice direction.

[19] Part 40 – Draft Practice Direction Amendments (29.09.03) – Calculation (rule 40.25) 2.2