

LRC releases consultation paper on Periodical Payments for Future Pecuniary Loss in Personal Injury Cases

A sub-committee of the Law Reform Commission (LRC) released a consultation paper today (April 25) to invite public views on whether the court should be given, by way of legislation, the power to make periodical payment orders (PPOs) in respect of damages for future pecuniary loss in personal injury cases.

The Chairman of the Periodical Payments for Future Pecuniary Loss in Personal Injury Cases Sub-committee, Mr Raymond Leung, SC, said in a press conference that the purpose of the consultation paper is to identify the problems of the current law and practices in assessing damages, in particular future pecuniary losses in personal injury cases.

"This is for the purpose of considering whether reform is needed to allow periodical payments for future pecuniary loss to be awarded, and if so, to make recommendations for reform as appropriate," Mr Leung said.

He said that the Sub-committee has studied the experiences of other jurisdictions, such as the United Kingdom, Ireland, other European countries, the United States and Singapore to provide guidance on the consideration as to the desirability and viability of introducing relevant legislation for Hong Kong.

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

In the consultation paper, the Sub-committee invites the opinion of the public as to whether there is a need for a mechanism to set the discount rate at appropriate periods inclusive of who or which authority should be empowered to set the discount rate. Public views

on whether the Chief Justice or any other person or body should be empowered to fix this discount rate and to conduct periodic revision of such rate are also sought.

Under current law in Hong Kong, a lump sum award is made at the time of trial to compensate for a continuing stream of income, which would otherwise have to be earned in the future if the injury had not been sustained, and to cover a continuing stream of expenditure to be incurred in the future as necessitated by the injury.

The court must assess damages once and for all in a lump sum, save in those cases that qualify for an award of provisional damages. Damages for future pecuniary losses may be awarded on the same basis as damages for past pecuniary losses, that is, *restitutio in integrum* or full compensation for the loss.

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

He added that this conventional approach brings the inevitable problem that the lump sum award for future pecuniary loss is either too little or too much, and has been generally criticised as being imprecise and unscientific.

Another important question relating to periodical payments is the viability and desirability of a mechanism for fixing and reviewing the presumed rate of return on investment to be applied in assessment of damages in personal injury cases. The discount of the lump sum award is made in respect of income and expenditure that would only arise in the future. The measure of the discount is the presumed rate of return, which can reasonably be expected on that sum of damages if invested in such a way as to enable the plaintiff to meet the whole amount of the loss during the entire period.

In addition, the Sub-committee has considered the desirability of having a mechanism for allowing the dependants of a recipient of periodical payments to lodge a claim for "loss of dependency" where the recipient dies prematurely (i.e. during the remainder of the estimated working life which has been shortened by the injury in respect whereof the defendant is liable).

The major question to be consulted is 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.

Subject to the above question, the Sub-committee invites submissions on some key issues including:

(i) Whether the court should be given, by way of legislation, the power to make PPOs in respect of damages for future pecuniary loss in personal injury cases?

(ii) What mechanism should be adopted for the formulation and promulgation of the discount rate?

(iii) What factors and limitations, if any, should be imposed on the court's power to award and review PPOs?

(iv) What are the circumstances for reviewing PPOs and related contingencies, and whether the current regime of awarding damages should co-exist with a PPO regime?

(v) Whether the court should take into account the security, funding options and suitability of a paying party before making a PPO?

All views should be submitted on or before August 24, 2018 to:
The Secretary, Periodical Payments for Future Pecuniary Loss in
Personal Injury Cases Sub-committee, LRC (4/F, Justice Place, East
Wing, 18 Lower Albert Road, Central, Hong Kong) by mail, by fax

(3918 4096) or by e-mail (hklrc@hkreform.gov.hk).

The consultation paper and the executive summary can be accessed on the website of the LRC at www.hkreform.gov.hk. Hard copies are also available on request from the Secretariat of the LRC at the above address.