

LRC issues report on "Periodical Payments for Future Pecuniary Loss in Personal Injury Cases"

The Law Reform Commission of Hong Kong (LRC) today (January 19) published a report on "Periodical Payments for Future Pecuniary Loss in Personal Injury Cases", recommending that the court should be given, by way of legislation, the power to make, in suitable cases, periodical payment orders (PPOs) in respect of damages for future pecuniary loss in personal injury cases.

The report follows a study by the LRC's Periodical Payments for Future Pecuniary Loss in Personal Injury Cases Sub-committee chaired by Mr Raymond Leung, SC, which issued a consultation paper in April 2018. The Sub-committee has studied the current law and relevant practices in assessing damages for future pecuniary loss in personal injury cases in Hong Kong, and compared them with the experience of other jurisdictions, such as the United Kingdom, Ireland, other European countries, the United States and Singapore.

Under the current law in Hong Kong, the court awards pecuniary damages in personal injury cases in a lump sum. 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. The claimant's past and future losses are assessed and crystallised, once and for all, into a lump sum payment which is determined at the date of the hearing or agreement. Assessing a "once and for all" lump sum award is a difficult task for 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. This conventional approach to quantify future losses by using the multiplier/multiplicand model established by case law has been generally criticised as being imprecise and unscientific. In a Court of First Instance case, the judge pointed out the option of making periodical payments as an alternative to the conventional multiplier/multiplicand approach to assessing damages for future pecuniary loss.

The responses to the consultation paper have been taken into account in formulating the final recommendations in the report. Some of the main final recommendations contained in the report are:

- (1) 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. The new power vested in the court is not intended to affect the free will and power of a non-mentally incapacitated person to attain amicable settlement with the tortfeasor or relevant paying party.
- (2) The Financial Secretary (FS) should be the authority empowered to formulate and promulgate the presumed net rate(s) of return on investment (Discount Rate). The FS should consult an expert panel for each review of the Discount Rate. The Discount Rate should be subject to periodic review once every six years.
- (3) The power of the court to award periodical payments should,
 - (a) irrespective of the consent of the parties to the proceedings in respect of future pecuniary loss, be referable to costs of care and accommodation;
 - (b) be limited to catastrophic cases; and
 - (c) without prejudice to (a) above, cover all heads of future pecuniary loss subject to the consent of the parties to the proceedings.
- (4) The original PPOs should be open to review by the court under the following limited circumstances:
 - (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; and

- (b) the review should be restricted to only one application subject to extension of time for the application as the court may allow in appropriate circumstances.
- (5) The court should have a discretion to make a PPO after taking into account the security of the periodical payments to ensure the continuity of payments and satisfying itself that a PPO is able to secure the full scope of the plaintiff's award.
- (6) PPOs ought to be introduced by way of legislation as soon as practicable and further refinement can be made along the way after implementation for stakeholders to build readiness for PPOs.

The report and its 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 4/F, East Wing, Justice Place, 18 Lower Albert Road, Central, Hong Kong.

Ends

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