

# THE LAW REFORM COMMISSION OF HONG KONG

## REPORT

### PERIODICAL PAYMENTS FOR FUTURE PECUNIARY LOSS IN PERSONAL INJURY CASES

#### EXECUTIVE SUMMARY

*(This executive summary is an outline of the Report. Copies of the full Report can be downloaded from the Commission's website at: <http://www.hkreform.gov.hk> or obtained from the Secretariat of the Law Reform Commission, 4th Floor, East Wing, Justice Place, 18 Lower Albert Road, Central, Hong Kong.)*

#### Consultation process

1. In April 2018, the Law Reform Commission's Periodical Payments for Future Pecuniary Loss in Personal Injury Cases Sub-committee ("**Sub-committee**") published the Consultation Paper on Periodical Payments for Future Pecuniary Loss in Personal Injury Cases ("**CP**"), pursuant to the following terms of reference:

*"To review the relevant law relating to the assessment of damages for future pecuniary loss in personal injury cases, 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 including, if deemed necessary, 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."*

2. Under the current law, 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<sup>1</sup> which is determined at the date of the hearing or agreement.

3. 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

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<sup>1</sup> Nicholas Bevan, Theodore Huckle and Sheralee Ellis, *Future Loss in Practice: Periodical Payments and Lump Sums* (Butterworths, 2007), at para 2.06.

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.

4. In a case, *Chan Pak Ting v Chan Chi Kuen & Anor*,<sup>2</sup> Bharwaney J pointed out the option of making periodical payments as an alternative to the conventional multiplier/multiplicand approach to assessing damages for future pecuniary loss.

5. The Sub-committee received 51<sup>3</sup> responses from members of the public during the consultation. We are most grateful to all those who have commented on the CP ("**Respondents**").

## Structure of the Report

6. The Report consists of 6 chapters dealing with 8 Final Recommendations:

- (a) Chapter 1 addresses the need to confer the power to the court to make Periodical Payment Orders ("**PPOs**") in respect of damages for future pecuniary loss in personal injury cases (Final Recommendation 1).
- (b) Chapter 2 deals with the setting up of a mechanism for the formulation and promulgation of the presumed net rate(s) of return on investment ("**Discount Rate**") (Final Recommendation 2).
- (c) Chapter 3 discusses various factors and limitations on the court's power to award PPOs (Final Recommendation 3).
- (d) Chapter 4 examines the circumstances for review by the court of PPOs and co-existence of a PPO regime with the current regime of provisional damages (Final Recommendations 4, 5 and 6).
- (e) Chapter 5 focuses on the need to ensure the security of payment under PPOs and the implementation of the PPO regime by way of legislation as soon as practicable. (Final Recommendations 7 and 8).
- (f) Chapter 6 sets out again, for quick reference, all of the Final Recommendations made in the previous chapters.

7. The list of Respondents to the consultation (**Annex 1**), the draft Personal Injuries (Miscellaneous Provisions) Bill (**Annex 2**) ("**Draft Bill**") and the Overview of existing compensation schemes in Hong Kong (**Annex 3**) can be found at the end of the Report.

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<sup>2</sup> [2013] 1 HKLRD 634, HCPI 235/2011, 671/2007 and 228/2010 (date of judgment: 18 Sep 2012).

<sup>3</sup> These responses came from academics, Government bureaux/departments, insurance companies, legal professional bodies, social services organisations, statutory bodies (relating to public health, insurance and consumers' rights) as well as members of the public.

## Chapter 1: Power of the court to make PPOs in respect of damages for future pecuniary loss in personal injury cases

8. In Question 1 of the CP, the Sub-committee invites comments on whether, as a matter of principle, 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.<sup>4</sup> The vast majority of the responses were supportive of the principle of bestowing upon the court a statutory power to order periodical payments for future pecuniary loss. How this question was approached depended to a large extent on the background of the relevant Respondents. The four opposing Respondents (out of the 24 responses to Question 1 received) have an insurance or quasi-insurance background and they may generally be regarded as the payers.

9. It is discernible from overseas experience that the insurance industry perceived itself to be adversely affected by the introduction of periodical payments in the sense that the overall costs for settlement of the claims would be higher and the negative reaction of the insurance industry is generally precipitated by such sentiment.

10. We acknowledge that jurisprudential and public policy issues are frequently intertwined. However, in the realm of the topic under consultation, the jurisprudential concept lies at the heart of what we are addressing. For instance, a court imposed PPO is seemingly at odds with another concept often repeated by Respondents in relation to plaintiff's "*exercise of their free will*" to decide whether to accept a lump sum or PPO and how to invest and spend the money received by way of damages. However, it has to be recognised that the assessment of damages in personal injury cases is often not dependent upon the plaintiffs' "*free will*", although the preference of the plaintiffs, in particular, as to the care regime will be taken into account as a relevant factor. In our legal system, the basis of the award of damages for personal injuries is jurisprudential and it is *restitutio in integrum*. Lump sum awards are less able to achieve this aim.

11. In many cases, lump sum awards are more costly to evaluate, requiring more expert evidence, for instance, on life expectancy. In essence, the lump sum awards put the future risk of under-compensation on the plaintiff and the future risk of over-compensation on the tortfeasor as lump sum awards are unable to reflect future changes in economic, financial and personal circumstances.

12. In our view, periodical payments would remove the future risk arising from uncertain life expectancy and economic conditions. Further, we are of the view that PPOs can avoid the possible dissipation of assets by family members and subsequent reliance on social welfare.

13. We agree with the Sub-committee's view that a PPO can afford protection to the recipient by providing a steady income stream that can be

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<sup>4</sup> See CP, at paras 1.1 to 1.26.

index-linked to reflect inflation. It would serve to remove the need for the plaintiff to address the potentially stressful issue of life expectancy in his claim. In addition, the plaintiff does not have to bear the investment costs and investment and inflation risk of a lump sum.

14. Having analysed the arguments for and against Question 1, we are persuaded that the concerns as to the vesting of the power of making PPOs to the court can be sufficiently addressed. More importantly, considerations as to the desirability of vesting a power in the court to make PPOs is primarily a legal question, albeit with a social dimension, pertinent to the need to realise and give effect to the principle of *restitutio in integrum*. Hence, it is not a matter of public policy as such as might have been perceived at some quarters. Rationally, the risk of under-compensation now faced by plaintiffs can be managed by the use of a PPO, which is a vehicle to properly and fully compensate plaintiffs for their loss.

15. We recommend that 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. For the avoidance of doubt, this 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. Detailed mechanism of the proposed PPO regime is set out in Parts 2 and 3 of the Draft Bill.

16. Our **Final Recommendation 1** is thus as follows:

*"We recommend that 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. For the avoidance of doubt, this 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."*

## **Chapter 2: Mechanism for the formulation and promulgation of the Discount Rate**

17. Question 2 in the CP invites submission on:

- "(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.*<sup>5</sup>

### **Question 2(1)**

18. In general, the vast majority were supportive of the idea of empowering an authority to conduct periodical review of the Discount Rate ("**Authority**"). Amongst those in support were various leading insurance companies. The support for establishing an Authority for fixing and reviewing the Discount Rate is unequivocal and overwhelming.

### **Question 2(2)**

19. The majority were in support of the Chief Justice assuming the role of the Authority.

20. However, noting the concerns raised by some Respondents, for example, in view of the experience in England and Wales and the risk of legal challenges that may be brought against the Authority by way of judicial review, we find it undesirable for the holder of the office of the Chief Justice, who is not expected to be in possession of the expertise and knowledge in economics and finance, to be placed in a position with exposure to threats of litigation over a subject of potential controversies.

21. As one of the primary responsibilities of the Financial Secretary is to oversee the policy formulation and implementation of decisions on financial, monetary, economic as well as trade and development matters in Hong Kong, we consider that the Financial Secretary, to be assisted by his team of financial experts and advisors, would be well placed to be the Authority.<sup>6</sup>

### **Question 2(3)**

22. The general sentiment was that a review should be conducted at least once every three to five years. However, in view of the experience in the UK, a major review touching upon, for instance, the combination of a reasonable portfolio of investments upon which the rates of return are used for setting the Discount Rate, should only be undertaken every six years.<sup>7</sup> It is contemplated that a major review of this nature would entail a process of public consultation capturing a wide array of stakeholders. Hence, an interval slightly longer than five years is deemed appropriate.

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<sup>5</sup> Same as above, at paras 5.81 to 5.96.

<sup>6</sup> See clause 3 of the Draft Bill.

<sup>7</sup> Same as above, see clause 4(3).

23. There was a general consensus that expert input is required before any decision is made on the Discount Rate. It seems sensible that an "expert panel" of the intended Authority should be kept to an optimum size consisting of no more than, say, seven members to be chosen from any of the following organisations:

- (a) Actuarial Society of Hong Kong;
- (b) Hong Kong Monetary Authority;
- (c) Investor and Financial Education Council;
- (d) Mandatory Provident Fund Schemes Authority;
- (e) CFA Society Hong Kong;
- (f) Judge of the High Court in charge of the Personal Injuries List;
- (g) The Treasury; and
- (h) University academics specialising in consumer and actuarial matters.

24. Details of the proposed mechanism and composition of the Authority for periodic review of the Discount Rate are set out in Part 2 of the Draft Bill.

25. For the above reasons, our **Final Recommendation 2** is as follows:

*"We recommend that the Financial Secretary should be the Authority empowered to formulate and promulgate the Discount Rate.*

*We also recommend that the Financial Secretary 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."*

### **Chapter 3: Factors and limitations on the court's power to award and review PPOs**

26. Question 3 of the CP has three parts, namely:

- "(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.*"<sup>8</sup>

27. The three sub-questions posed under Question 3 look at who should be the ultimate decision maker on whether a PPO is made, the court or the parties, and the breadth of coverage of any PPOs made.

### **Question 3(1)**

28. The majority of Respondents felt that the consent of the parties should be paramount. This is a debate which has taken place in other jurisdictions where periodical payments have been established. In essence it is a conceptual issue as to whether the court, a neutral arbiter, is better placed to protect the interests of the claimant and to reflect a more appropriate application of the law than the individual parties or whether personal wishes of the parties should prevail.

29. It can be said that a court mandated decision may better ensure the application of the concept of *restitutio in integrum* as it is likely to be a dispassionate decision focused on the plaintiffs' objectively assessed best needs. Where the decision is mandated by consent, then "best needs" are not necessarily the overriding concern. It needs to be emphasised that in jurisdictions where the court is the final arbiter, the parties' views are always an important element in its decision making.

### **Question 3(2)**

30. A majority of the Respondents felt that the ultimate flexibility as to what a PPO should cover should lie with the court. It is important to note that it was generally felt by all Respondents that PPOs are more appropriate for the larger value claims involving long-term care or accommodation issues or claims referred to as catastrophic and, in particular, where the plaintiff was under a disability. This tallies with the experience from the UK.<sup>9</sup>

31. It was also generally agreed by the Respondents that where the claims are smaller, where past income losses or expenses already incurred are involved or where the administration costs of running a PPO are

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<sup>8</sup> See CP, at paras 6.24 to 6.41.

<sup>9</sup> In the Institute and Faculty of Actuaries of the United Kingdom ("IFoA")'s report entitled *Periodical Payment Orders Working Party Update – Industry Survey* (July 2020) ("IFoA 2020 Report"), it is documented that the majority of the PPOs involved claimants with catastrophic level injuries requiring full time or prolonged personal care (See IFoA 2020 Report, at 8 (figure 1), 8 (figure 2), 37 (figure 30) and 38 (figure 31)). Generally, the propensity for PPOs would increase with the size of the claim (See IFoA 2020 Report, at 17 (figure 10)).

disproportionately high (perhaps for older plaintiffs), then PPOs would not be appropriate.

32. The view of the majority not to restrict PPOs to artificially defined "*catastrophic*" cases is understandable. Time and again, arguments were unnecessarily canvassed as to which category of disability a particular claimant should fall. Categorising PPOs, for instance, to only catastrophic injury cases is likely to lead to endless argument as to what constitutes catastrophic injury, and fixing an arbitrary threshold below which a PPO should not be made would sidetrack from the real issue, being how claimants for future loss can be fully compensated.

33. Having considered the views of the respondents, and taking into account that most of the cases giving rise to the need for making PPOs (to avoid the uncertainty of life expectancy and future economic situations) are catastrophic cases which require constant medical care, we are inclined to adopt the Irish model by specifying that PPOs should be limited to catastrophic cases properly understood. In this connection, it is noteworthy that what may be regarded as falling within a statutory definition of "catastrophic cases" can be discerned from the "*gross disability*" and "*disaster*" categories of injuries (as a guide to the assessment of damages for pain, suffering and loss of amenities), which are well recognised by legal practitioners in Hong Kong.

### **Question 3(3)**

34. In the CP, the Sub-committee pointed out that there is an option to have court determined PPOs in respect of only certain heads of claim such as future accommodation and care. Distilling the responses, we have the following observations:

- Some Respondents felt that PPOs should only cover future loss claims but at the discretion of the court.
- Some however felt that there should be a limit to certain heads of loss where the court's discretion is exercised and that for heads of damages covering non-pecuniary loss, these could only be subject to a PPO if the parties consented.
- Some Respondents felt that the court should have a general unlimited discretion to award PPOs for all heads of loss.

35. We recommend that 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;<sup>10</sup> and
  - (c) without prejudice to (a) above, cover all heads of future pecuniary loss subject to the consent of the parties to the proceedings.<sup>11</sup>
36. The recommendations herein are reflected in clause 11 of the Draft Bill.
37. Our **Final Recommendation 3** is as follows:
- "We recommend that 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."*

#### **Chapter 4: Circumstances for review by the court of PPOs and co-existence of a PPO regime with the current regime**

38. Question 4 of the CP is sub-divided into four constituent parts, which are:
- "(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;*

<sup>10</sup> See clause 2 of the Draft Bill.

<sup>11</sup> In particular, it is proposed that where a PPO includes an element of "future loss of earnings", the amount and duration of payment should be explicitly set out in the original order (see clause 11(3)(d) of the Draft Bill).

- (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.*<sup>12</sup>

#### **Question 4(1)**

39. We readily acknowledge the need to limit the power to vary PPOs, even where a PPO is warranted in the first place.<sup>13</sup> In this connection, we take the view that the Damages (Variation of Periodical Payments) Order 2005 ("**2005 Order**") in the UK<sup>14</sup> would be a good reference point as the basis for any legislation to be enacted in Hong Kong. The principle of fairness to all parties finds expression in the procedure. Notably, an application to vary may be made by the plaintiff or the defendant on account of "*serious deterioration*" or "*significant improvement*", as the case may be.

40. To start with, a PPO would set out clearly the terms of payments. It should also be remembered that in granting a PPO, the court will also have the ancillary power to allow a defendant to call for regular medical examination(s) of a plaintiff and thus to provide a structured check-up of the plaintiff.<sup>15</sup> Similar provisions have been adopted in clause 11 of the Draft Bill.

41. Further, where a "*variable order*" is made under a PPO, the stringent criteria to be fulfilled and the timeframe for an application for leave to

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<sup>12</sup> See CP, at paras 6.42 to 6.57.

<sup>13</sup> Same as above, at paras 6.50 to 6.51.

<sup>14</sup> Same as above, at paras 3.29 to 3.30, see also Articles 2 and 9 of the 2005 Order.

<sup>15</sup> See CP, at para 6.46.

vary a PPO will be expressly set out in the original order (see clauses 16 and 19 of the Draft Bill).

42. It is noteworthy that Article 10 of the 2005 Order<sup>16</sup> provides that a person applying for permission to apply to vary an order or agreement bears the burden to show that the specified disease, deterioration or improvement has occurred and that it has caused or is likely to cause as of a particular date an increase or decrease in the plaintiff's financial loss. It is envisaged that similar rules of procedure will be made if the recommendations for PPO herein are accepted and implemented.

43. Further, we would lay down a marker that legal aid should be made available for such applications (see clause 25 of the Draft Bill). Details of the intended mechanism for an application to vary a PPO have been set out in clauses 16 and 19 to 23 of the Draft Bill.

44. In respect of the concerns regarding the increased complications and burden to the insurers and reinsurers in reserving funds for payments, the principle of *restitutio in integrum* should be at the forefront of the considerations.<sup>17</sup> Further, the UK experience suggests that the insurers are more than capable of adjusting their strategy in reserving their funds. Although jurisprudence consideration lies at the heart of our consideration, we note that the (re)insurance sector will need to build readiness to address these new challenges with the support of the actuarial community before they will be ready for PPOs.

### **Question 4(2)(a)**

45. Having considered the responses, we set out in clause 12 of the Draft Bill concerning "stepped" payment, which is to be distinguished from a "variable order" provided under clause 16 thereof. In essence, a "stepped" payment is a definitive term of the PPO directing that the periodical payment is to be adjusted (increase or decrease, as the case may be) at certain point of

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<sup>16</sup> Application for permission

- "10. (1) An application for permission to apply for a variable order or a variable agreement to be varied must be accompanied by evidence –
- (a) that the disease, deterioration or improvement specified in the order or agreement has occurred, and
  - (b) that it has caused or is likely to cause an increase or decrease in the pecuniary loss suffered by the claimant.
- (2) Where the applicant is the claimant and he knows that the defendant is insured in respect of the claim and the identity of the defendant's insurers, he must serve the application notice on the insurers as well as on the defendant.
- (3) Where the applicant is the claimant and he knows that the defendant is a member of a defence society and the identity of the defence society, he must serve the application notice on the defence society as well as on the defendant.
- (4) The respondent to the application may, within 28 days after service of the application, serve written representations on the applicant and, if he does, must file them with the court.
- (5) The court will deal with the application without a hearing." (emphasis added)

<sup>17</sup> See CP, at paras 1.9, 2.3, 6.2 to 6.10 and 6.19 to 6.21.

time as stipulated in the original order on account of the defined change in the stage(s) of life or circumstances of the plaintiff. It will operate by the force of the original order and no further application needs to be made.

46. A "*variation order*" in the proper sense is one addressed in Question 4(2)(a) which would be governed by the provisions such as those proposed in clauses 16 and 19 to 23 of the Draft Bill. Under this regime, the court may make a "*variable order*" specifying the qualifying event and criteria for an application to vary a PPO, though the same can also be provided for by agreement of the parties.

#### **Question 4(2)(b)**

47. In light of the provision for "*stepped*" payment and the availability of a mechanism empowering the court to make a "*variable order*", we accept that there is probably no need for another procedure to allow for adjustment due to "*life-changing circumstances*" which are not amenable to exhaustive definition.

#### **Question 4(2)(c)**

48. We take the view, after striking a balance between protection for the recipient under a PPO and needs for finality, that the number of applications to vary a PPO should be limited to one.

#### **Question 4(3)**

49. We would emphasise that the "*last opportunity*" claim by the dependants of a recipient under a PPO referred to in Question 4(3) would only apply to cases where the PPO includes, by consent of the parties (see Recommendation 3) an element of "*future loss of earnings*" (as opposed to future costs of care and accommodation). In this scenario, in the event of the premature death of the recipient under a PPO, it does appear that his dependants would suffer a loss by way of the financial benefits to be derived from the portion of payments representing the deceased's "*future loss of earnings*".

50. If Hong Kong is to adopt the UK approach by the court ordering continuation of the award after the plaintiff's premature death, there would be no need for a subsequent claim for loss of dependency. However, we take the view that it is not entirely satisfactory to deal with this element of the claim or payments under a PPO by way of a rule of court (such as Rule 41.8(2) of the Civil Procedure Rules in England and Wales). Hence, the claim ought to be preserved by way of an explicit statutory provision such as that proposed in clause 15 of the Draft Bill. We take the view that there is neither conceptual nor logistical impairment to this approach.

51. The court is accustomed to determine the eligibility of a person for a loss of dependency claim within the remit of the Fatal Accidents Ordinance (Cap 22). If the cause of death is related to the original injury, there is unlikely to be any issue of causation since the computation of the element of PPO on account of "*future loss of earnings*" of the injured person (ie the recipient under a PPO who dies prematurely) would have already been assessed by the parties at the inception of the PPO and spelt out in the original order (see clause 11(3)(d) of the Draft Bill). If the cause of death is unrelated to the original injury, then the dependants have no basis to make any claim against the party ordered to make the PPO, for example, if the claimant died as a result of an accidental fire.

52. By the same token, the fact that a recipient under a PPO could have provided for the risk of premature death by procuring life insurance is not relevant. As a matter of law, a tortfeasor is required to compensate the injured person for wrongful act on the principle of *restitutio in integrum*. It is precisely for this reason that the court will not take into account any compensation received by the injured person from his own insurer to reduce the damages payable by a tortfeasor.<sup>18</sup>

#### **Question 4(4)**

53. We observe that Article 4 of the 2005 Order<sup>19</sup> allows for the court to make a "*variable order*" in addition to existing provisional damages<sup>20</sup> (thus allowing co-existence of the two regimes as the basis for the two regimes are different). Importantly, a major difference between a "*variation order*" under the PPO regime and an order for provisional damages is that the former is applicable to both "*serious deterioration*" and "*significant improvement*" whereas the latter is only applicable to "*serious deterioration*".<sup>21</sup>

54. Furthermore, we agree that the present regime for provisional damages serves a different purpose and it would not be in conflict with a PPO, even in the scenario of a premature death.<sup>22</sup> It would not result in any duplication of damages.

55. Theoretically, there is no reason why the court cannot order a scheme of payment of provisional damages, akin to a PPO. However, it is advisable to separate the two for the sake of conceptual discipline.

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<sup>18</sup> *Parry v Cleaver* [1970] AC 1, [1969] UKHL 2.

<sup>19</sup> See CP, at para 3.29; Article 4 of the 2005 Order:

"The court may make a variable order in addition to an order for an award of provisional damages made by virtue of section 32A of the Supreme Court Act 1981 or section 51 of the County Courts Act 1984."

<sup>20</sup> See CP, at paras 3.32 to 3.34, with paras 3.33 to 3.34 defining the features of a provisional damages award and thus differentiating the provisional damages award with a PPO which is summarily defined at paras 3.20 and 3.24 to 3.25.

<sup>21</sup> Same as above, at para 3.36.

<sup>22</sup> Same as above, at para 6.55.

56. Upon careful consideration of the responses and taking into account the development and experience from the UK since the implementation of PPOs as discussed in the CP,<sup>23</sup> we have sought to crystallise our recommendations in respect of this question by way of Part 3 of the Draft Bill.

57. Our **Final Recommendations 4 to 6** are as follows:

#### **Final Recommendation 4**

*"We recommend that 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."*

#### **Final Recommendation 5**

*"We recommend that upon the cessation of periodical payment occasioned by premature death of a recipient of periodical payments, 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 dependants from the periodical payments he received but for his premature death and in respect of which the dependants have not received any compensation or damages from the paying party or any person who was or may be liable to him."*

#### **Final Recommendation 6**

*"We recommend that the current mechanism for provisional damages should be preserved."*

## **Chapter 5: Security of the periodical payments**

58. This Chapter deals with Question 5 of the CP which has three parts, namely:

*"(1) Whether the court should take into account the security of*

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<sup>23</sup>

Same as above, at paras 3.43 to 3.63.

*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 organisation and institutions, whether created by statute or otherwise, which are considered to be financially secure as paying parties for court ordered periodical payments.*<sup>24</sup>

59. The responses for Question 5(1) were unanimously in favour of the need for the court to take into account the security of the periodical payments before making the order to ensure continuity of the payments. For Questions 5(2) and 5(3), an overriding majority of the responses were also in favour.

60. In order for PPOs to work, payments have to be secured against all potential adverse consequences so that the recipients will not be affected. The details of such protective mechanism will have to be mapped out for the implementation of a PPO regime. The responses received in relation to the proposed protective mechanism or funding options that should be in place include the following:

(a) self-funding by insurers (ie insurance, including annuity);

(b) self-funding by Government or statutory bodies of substantial means such as the Hospital Authority, Employees Compensation Assistance Fund Board ("**ECAFB**"), Motor Insurers' Bureau of Hong Kong ("**MIB**")<sup>25</sup> and the Employees Compensation Insurer Insolvency Bureau ("**ECIIB**")<sup>26</sup>

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<sup>24</sup> Same as above, at paras 6.58 to 6.81.

<sup>25</sup> MIB's mandate is to cater for motor accidents where either at the time of the accident giving rise to liability there is not in force a policy or such policy is ineffective; and where any final claim is not paid in full by the relevant insurer because of its insolvency.

<sup>26</sup> ECIIB assumes responsibility for the liabilities of insurers engaging in employees' compensation business that become insolvent. It is the trustee of the insolvency fund set up under the

- (c) statutory scheme of protection/legislation, such as:
  - (i) to follow the approach of the UK by establishing a Financial Services Compensation Scheme that provides enhanced protection to fully secure the continuity of periodical payments; and
  - (ii) to set up a policy holders' protection scheme ("**PPS**") in Hong Kong as a source of security in case of insurance company insolvency; and
- (d) centralised fund proposed by the Law Society.

61. The Respondents considered that financial security can be provided by:

- (a) bodies that are considered secure which include:
  - (i) the Government;
  - (ii) companies fully owned by the Government, eg the HKMC Annuity Limited (wholly owned by the Hong Kong Mortgage Corporation Limited which in turn is wholly owned by the Government through the Exchange Fund);
  - (iii) statutory bodies;
  - (iv) the Hospital Authority;
  - (v) MIB;
- (b) guarantees from the Government; and
- (c) funding of PPOs through the use of "*trust*".

62. It is safe to conclude that the Government, a Government guarantee, statutory bodies and a statutory scheme of protection were considered by the majority of Respondents to be the best security for the continuity of PPO payments.

63. Under the current bodily injury landscape and compensation schemes in Hong Kong and with the absence of a suitable annuity market as well as the lack of readiness expressed by the insurance sector, the award of a PPO would likely be restricted to certain classes of defendants (such as those funded by the Government or quasi-Government institutions or statutory bodies)

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Employees Compensation Assistance (Amendment) Ordinance 2002 to cater for claims arising from insurer insolvency.

which are able to provide security or guarantee of the long-term periodical payments.

64. PPOs can potentially leverage the existing compensation schemes of MIB, the Employees' Compensation Assistance Scheme ("**ECAS**") and ECIIB. However, this is not what these schemes were set out to achieve, and consequential amendments would be required to the relevant legislation and agreements among the Government, MIB or ECIIB and insurers, as well as the mandates and *modus operandi* of these bodies before they are ready for PPO. It is also important to ascertain how fund size, funding mechanism and levies to be paid by the policy holders will be affected. The foregoing needs to be satisfactorily addressed to prepare for the readiness for PPO.

65. PPS theoretically can be used as a platform to secure PPO payments for non-motor and non-employees' compensation claims. However, this is not what the PPS is set out to achieve.

66. In relation to PPOs for medical malpractice claims, it is important to address the "*un-insured*" or "*un-indemnified*" doctors in clinical negligence awards as in the case of MIB, ECAS and ECIIB for motor and employees' compensation claimants.

67. The operational feasibility and sustainability of any scheme for PPOs is of the utmost importance if it is to be successfully implemented. Sustainability is predicated on security in funding and the other side of the coin of funding is cost. The cost of PPOs is driven by the new uncertainties arising from the nature of PPOs versus lump sum awards. A PPO payer needs to be able to address these uncertainties in estimating the fund size and devising a robust funding mechanism with the support of the relevant stakeholders. This underscores the direction in which a PPO payer would need to take to attain the required level of readiness for PPOs. Although jurisprudence consideration lies at the heart of our deliberation, we note that the stakeholders will need to build readiness to address these new challenges before they will be ready for PPOs.

68. To take Question 5 forward, we have considered two options which warrant further detailed evaluation:

(a) Option A

- (i) Set up a new independent statutory body with Government guarantee to administer solely PPOs.
- (ii) Need to align the existing compensation schemes through requisite amendments in the relevant legislation as well as agreements between the Government, and MIB or ECIIB.
- (iii) Need to assess financial implication on fund size and levy required.

- (iv) Pros:
    - Government guarantee and hence fully secure.
    - Full transparency on cost of PPOs to society.
  - (v) Cons:
    - Cost-efficiency likely to be low given the anticipated low number of PPO cases against the fixed cost of a standalone statutory body.
    - Funding takes time to build.
    - Additional levy would most likely be required.
- (b) Option B
- (i) Harmonise the existing compensation schemes for motor and employees' compensation claims and the impending PPS (legislative intent permitting) to cover PPOs.
  - (ii) Need to align the existing compensation schemes through requisite amendments in the relevant legislation and agreements among the Government, and MIB or ECIIB, and insurers, as well as the mandates and *modus operandi* of these bodies.
  - (iii) Need to assess financial implication on fund size, funding mechanism and levy required.
  - (iv) Pros:
    - Leverage existing funds of MIB, ECAS and ECIIB.
    - Leverage administrative mechanisms of existing schemes and cost-efficiency are likely to be higher.
  - (v) Cons:
    - Although in theory this can be done, it will involve a significant exercise to harmonise the existing compensation schemes, mechanisms and the concomitant legislative amendments.
    - Additional levy would most likely be required due to the additional cost involved.
    - Lack of full transparency on cost of PPOs to society.

69. Taking into account of the above, we consider that the funding options that should be available to ensure adequate security for periodical payments 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 the Government or a statutory scheme of protection; and

- (c) procurement of annuities or similar investment products to provide a secured stream of income.

70. Apart from Government departments, other organisations and institutions, whether created by statute or otherwise, may provide adequate financial security to the satisfaction of the court as paying parties for court ordered periodical payments. It would be open to a defendant to procure annuities or similar investment products to provide a secured stream of income in order to discharge its payment obligation under a PPO despite the potential difficulties anticipated by insurance companies.

71. Given the wide coverage of the majority of personal injury cases under motor insurance (including MIB), employees' compensation insurance (including ECAFB and ECIB), professional indemnity protection in respect of medical malpractice (covered by the Hospital Authority or medical protection insurance or schemes), we consider that PPOs ought to be introduced by way of legislation as soon as practicable starting off with payers with funding and guarantee from the Government, statutory bodies, and for scheme of protection deemed secured by the court. Further refinement can be made along the way to include other stakeholders, in particular, payers with insurance and quasi-insurance background after they have addressed their concerns, to build readiness for PPOs.

72. For the above reasons, our **Final Recommendations 7 and 8** are as follows:

#### **Final Recommendation 7**

*"We recommend that 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."*

#### **Final Recommendation 8**

*"We recommend that 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."*